DECISIONS OF THE FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION, OFFICE OF THE SECRETARY, 2024

Federal Maritime Commission

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June 10, 2024

Daniel B. Maffei, Chairman

Rebecca F. Dye, Commissioner

Louis E. Sola, Commissioner

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Max M. Vekich, Commissioner

Office of Administrative Law Judges

Erin M. Wirth, Chief Administrative Law Judge

Linda S. Harris Crovella, Administrative Law Judge

Alex M. Chintella, Administrative Law Judge

The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, 46 U.S.C. Chapters 401-413. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other Orders that may be significant or establish a new legal precedent.

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INFORMAL DOCKETS

FORMAL DOCKETS

CHARGE COMPLAINTS

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FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

RGC COFFEE INC., *Claimant*

v.

MEDITERRANEAN SHIPPING COMPANY, *Respondent*.

DOCKET NO. 1993(I)

Served: July 19, 2023

BEFORE: Theresa DIKE, *Small Claims Officer*.

ORDER APPROVING CONFIDENTIAL SETTLEMENT AND DISMISSING PROCEEDING

On May 17, 2023, the Secretary of the Federal Maritime Commission issued a Notice of Filing of Small Claims Complaint and Assignment ("Notice"), stating that Claimant RGC Coffee Inc. ("RGC") had filed an informal complaint against Mediterranean Shipping Company ("MSC"). Claimant alleges that MSC violated 46 U.S.C. § 41102(c) in connection with the transportation of its cargo from Cartagena, Colombia to Seattle, Washington.

The Secretary instructed MSC to file a response to the Claim by June 12, 2023, and to indicate whether it consents to the adjudication of the Claim under the informal procedures provided at Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-305). The Secretary also assigned the proceeding to the Chief Administrative Law Judge to designate a Small Claims Officer to adjudicate the proceeding.

Prior to the deadline to submit a response to the complaint, MSC requested and was granted additional time extending the deadline to submit its response to July 3, 2023. On June 22, 2023, the parties submitted Claimant's motion to dismiss, together with a copy of their settlement agreement. MSC has not yet filed a response to the complaint and did not object to the adjudication of this proceeding under the informal procedures. Accordingly, the Chief Administrative Law Judge assigned this proceeding to the undersigned for adjudication under the Commission's informal procedures on July 19, 2023.

Claimant asks that its complaint against MSC be dismissed with prejudice based on a settlement agreement between the parties resolving the issues in dispute. Pursuant to the Commission's Rule 72(a)(3):

> [A]n action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted

> with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

46 C.F.R. § 502.72(a)(3). Although Rule 72, governing dismissal of Commission proceedings, is not applicable to Subpart S proceedings, the undersigned used the rule as guidance for ruling on Claimant's request to dismiss the Claim.

The Commission's regulations allow settlements by litigating parties; however, the Commission requires that settlement agreements be submitted "for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." *Maher Terminals v. The Port Authority of N.Y. & N.J.*, 34 S.R.R. 322, 325 (FMC 2016). In reviewing settlement agreements, the Commission is guided by its "strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *Maher Terminals*, 34 S.R.R. at 326 (quoting *APM Terminals North America, Inc. v. Port Authority of N.Y. & N.J.,* 31 S.R.R. 623, 626 (FMC 2009)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1092 (ALJ 1978). However, if a "proffered settlement does not appear to violate any law or policy and is free of fraud duress, undue influence, mistake or other defect which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Id.* at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from the vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988).

The parties agree that "the amount or value of the consideration being exchanged pursuant to this Settlement Agreement is the result of negotiation based on the Parties' evaluation of the risks and costs associated with litigation and is accordingly deemed mutually just and appropriate by the Parties." Settlement Agreement at 3. Claimant represents that in entering into the settlement agreement it "has relied upon all necessary advice, including from its own legal counsel and that the terms of this Settlement Agreement have been completely read and explained to it by its advisors and/or attorneys, and that those terms are fully understood and voluntarily accepted by it." Settlement Agreement at 2.

A review of the settlement agreement, which is signed by all parties, does not show any indicia of fraud, duress, undue influence, or mistake, and appears to reflect an arm's-length resolution between the parties. The terms appear to be fair, reasonable, and adequate. Accordingly, the parties' settlement agreement is approved, and this proceeding dismissed with prejudice, as requested.

Although the parties did not explicitly request confidentiality, the Settlement Agreement is titled as a "Confidential Settlement Agreement and Release" and "[e]ach party acknowledges the confidential nature of the existence and terms and conditions of this Agreement" and hold each other responsible for any breach of the confidential information in the Settlement Agreement. Settlement Agreement at 2. It is thus presumed that the parties are seeking confidentiality for their agreement. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (internal citations omitted); *Marine Dynamics v. R.T.M Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *International Association of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). The parties' implied request to keep their settlement agreement terms confidential is reasonable and thus granted.

Upon consideration of the proposed settlement and Claimant's motion to dismiss its Claim, and for the reasons stated above, it is hereby

ORDERED that the settlement agreement be **APPROVED**. It is

FURTHER ORDERED that the request for confidentiality be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

ALIOUNE BADARA AND DORA MAE NDIAYE, *Complainants*

v.

FLEUR DE LIS WORLDWIDE, LLC, *Respondent*.

DOCKET NO. 1985(I)

Served: July 25, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Small Claims Officer's June 21, 2023, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

GLOBERUNNERS, INC., *Complainant*

v.

DOCKET NO. 22-27

HOYER GLOBAL (USA), INC., *Respondent.*

Served: July 31, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's June 28, 2023, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

FEDERAL MARITIME COMMISSION

RGC COFFEE INC., *Claimant*

v.

MEDITERRANEAN SHIPPING COMPANY, *Respondent*.

DOCKET NO. 1993(I)

Served: August 22, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Small Claims Officer's July 19, 2023, Order Approving Confidential Settlement and Dismissing Proceeding has expired. Accordingly, this decision has become administratively final.

Amy Strauss
Acting Secretary

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

TCW, INC., *Claimant*

v.

MEDITERRANEAN SHIPPING COMPANY, S.A.;
MEDITERRANEAN SHIPPING COMPANY (USA) INC.,
Respondents.

DOCKET NO. 1994(I)

Served: August 23, 2023

BEFORE: Theresa DIKE, *Small Claims Officer*.

ORDER APPROVING SETTLEMENT AND DISMISSING PROCEEDING

On May 23, 2023, the Secretary of the Federal Maritime Commission issued a Notice of Filing of Small Claims Complaint and Assignment ("Notice"), stating that Claimant TCW, Inc. ("TCW") had filed an informal complaint against Mediterranean Shipping Company, S.A. and Mediterranean Shipping Company (USA) Inc. (collectively "MSC"). Claimant alleges that MSC violated provisions of the Shipping Act of 1984 in connection with certain invoices they issued to Claimant.

The Secretary instructed Respondents to file a response to the Claim by June 19, 2023, and to indicate whether they consent to the adjudication of the Claim under the informal procedures provided at Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-305). The Secretary also assigned the proceeding to the Chief Administrative Law Judge to designate a Small Claims Officer to adjudicate the proceeding.

Respondents requested and were granted additional time extending the deadline for their response to the Claim to August 4, 2023, to allow them to negotiate a settlement with Claimant and to finalize the parties' settlement agreement. On August 3, 2023, Claimant submitted a motion to dismiss, indicating that the parties had agreed to resolve their dispute. On August 4, 2023, Respondents submitted a copy of a confidential settlement agreement between the parties.

Respondents have not yet filed a response to the Claim and did not object to the adjudication of this proceeding under the informal procedures. Accordingly, the Chief Administrative Law Judge assigned this proceeding to the undersigned for adjudication under the Commission's informal procedures on August 23, 2023.

Claimant asks that its complaint against MSC be dismissed based on a settlement agreement between the parties resolving the issues in dispute. Pursuant to the Commission's Rule 72(a)(3):

> [A]n action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

46 C.F.R. § 502.72(a)(3). Although Rule 72, governing dismissal of Commission proceedings, is not applicable to Subpart S proceedings, the undersigned used the rule as guidance for ruling on Claimant's request to dismiss the Claim.

The Commission's regulations allow settlements by litigating parties; however, the Commission requires that settlement agreements be submitted "for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." *Maher Terminals v. The Port Authority of N.Y. & N.J.*, 34 S.R.R. 322, 325 (FMC 2016). In reviewing settlement agreements, the Commission is guided by its "strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *Maher Terminals*, 34 S.R.R. at 326 (quoting *APM Terminals North America, Inc. v. Port Authority of N.Y. & N.J.,* 31 S.R.R. 623, 626 (FMC 2009)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1092 (ALJ 1978). However, if a "proffered settlement does not appear to violate any law or policy and is free of fraud duress, undue influence, mistake or other defect which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Id.* at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from the vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988).

Pursuant to the settlement agreement between the parties MSC will make a one-time payment in the amount of $3,330.00 to Claimant, and within 30 days of the filing of Claimant's motion to dismiss the proceeding and the parties' settlement agreement, MSC and TCW's representatives will meet "to discuss, in good faith, MSC billing practice issues that have been raised by TCW, including the use of the shutout under [the Uniform Interchange and Facilities Access Agreement] when valid billing disputes exist." Settlement Agreement at 2-3.

The parties state that they "are entering into this Settlement Agreement for the purpose of making a peaceful resolution between them," and agree that "any difference between the amount

of monetary damages sought by any party and the amount or value of the consideration being exchanged pursuant to this Settlement Agreement is the result of negotiation based on the Parties' evaluation of the risks and costs associated with litigation and is accordingly deemed mutually just and appropriate by the Parties." Settlement Agreement at 3. Claimant represents that in entering into the settlement agreement it "has relied upon all necessary advice, including from its own legal counsel and that the terms of this Settlement Agreement have been completely read and explained to it by its advisors and/or attorneys, and that those terms are fully understood and voluntarily accepted by it." Settlement Agreement at 2.

A review of the settlement agreement, which is signed by both parties, does not show any indicia of fraud, duress, undue influence, or mistake, and appears to reflect an arm's-length resolution between the parties. The terms appear to be fair, reasonable, and adequate. Accordingly, the parties' settlement agreement is approved, and this proceeding dismissed.

Upon consideration of the proposed settlement and Claimant's motion to dismiss its Claim, and for the reasons stated above, it is hereby

ORDERED that the settlement agreement be **APPROVED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED**.

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Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MSRF, INC., *Complainant*

v.

YANG MING TRANSPORT CO., *Respondent*.

DOCKET NO. 22-21

Served: September 7, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On August 24, 2023, Complainant MSRF, Inc. ("MSRF") and Respondent Yang Ming Transport Co. ("Yang Ming") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in

[1] This 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.

> contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties, "both sophisticated corporate entities," state that they "arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks." Motion at 3. The parties state:

> The Confidential Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the disputes between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation.

Id.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and the request for confidentiality in the settlement agreement is more extensive than traditional requests. The undersigned notes that the agreement is only binding on the parties, and nothing in the confidentiality provision should be construed as binding on the Commission. Accordingly, this confidential settlement agreement will be treated by the Commission in the same manner as other confidential settlement agreements, and the Commission will have the opportunity to review the settlement agreement prior to its approval becoming final. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require review of the parties' briefing and an initial decision would be subject to exceptions or appeals. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Complainant MSRF and Respondent Yang Ming be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. The settlement agreement should be maintained in the Secretary's confidential files. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

TCW, INC., *Claimant*

v.

MEDITERRANEAN SHIPPING COMPANY, S.A.;
MEDITERRANEAN SHIPPING COMPANY (USA) INC.,
Respondents.

DOCKET NO. 1994(I)

Served: September 25, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Small Claims Officer's August 23, 2023, Order Approving Settlement and Dismissing Proceeding has expired. Accordingly, this decision has become administratively final.

Amy Strauss
Acting Secretary

FEDERAL MARITIME COMMISSION

MEDITERRANEAN SHIPPING COMPANY – INVESTIGATION FOR COMPLIANCE WITH §§ 41104(a) AND 41102 OF DEMURRAGE OR DETENTION CHARGES UNDER THE CHARGE COMPLAINT PROCEDURES OF 46 U.S.C. § 41310

Docket No. CC-001

Served: September 29, 2023

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, and Carl W. BENTZEL, *Commissioners*. Louis E. SOLA, *Commissioner,* concurring. Max M. VEKICH, *Commissioner*, concurring in part and dissenting in part.

Order Dismissing Charge Complaint and Discontinuing Order to Show Cause

This is a charge complaint proceeding under the Shipping Act, 46 U.S.C. § 41310. On February 3, 2023, upon charge complaint information submitted, the Federal Maritime Commission (Commission) issued an Order to Show Cause (OSC) directing Mediterranean Shipping Company, S.A. (MSC) to show cause why it should not be ordered to refund or waive charges assessed or paid for failure to comply with the Shipping Act.

For the reasons discussed below, the Commission dismisses the Charge Complaint against MSC and discontinues the OSC proceeding.

I. BACKGROUND

Under the Shipping Act's charge complaint provision at 46 U.S.C. § 41310, a person may submit to the Commission information concerning complaints about charges assessed by a common carrier. 46 U.S.C. § 41310(a). Once the Commission receives such a submission, the agency will promptly investigate whether the charge in question is in compliance with section 41104(a) and 41102 of the Shipping Act. 46 U.S.C. § 41310(b).

If the Commission determines that a charge does not comply with the Shipping Act, the Commission will promptly order the refund of charges paid (or waiver of charges assessed but not yet paid). 46 U.S.C. § 41310(c). The Commission may also assess a civil penalty under section 41107, in addition to or in lieu of ordering a refund. 46 U.S.C. § 41310(d).

This proceeding was commenced pursuant to the Shipping Act's charge complaint provision at 46 U.S.C. § 41310 and the Commission's order to show cause rule at 46 C.F.R. § 502.91, based on information submitted by Complainant SOFi Paper Products (SOFi). The Commission received a complaint from SOFi, a party billed or assessed for certain charges by MSC. OSC at 3. MSC assessed a congestion surcharge in the amount of $1,000 to SOFi with respect to bill of lading No. MEDUI0745188 dated July 14, 2022. MSC claimed to have assessed the surcharge in accordance with its published tariff rule. As a billed party, SOFi requested justification for the charge, which MSC had not provided as of the time of the issuance of the OSC. *Id.*

Stating that MSC's failure to show the reasonableness of the surcharge or provide a justification for the surcharge demonstrates that the surcharge may constitute an unreasonable action or practice in violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14), the Commission issued the OSC on February 3, 2023, and directed MSC to show cause why the Commission should not order it to refund charges paid or waive charges assessed, and/or impose a civil penalty, under 46 U.S.C. §§ 41310(d) and 41107, for failure to comply with 46 U.S.C. § 41102(c) and 41104(a). *Id.* at 2-4. The Commission's Office of Enforcement (OOE) was named a party to the proceeding. *Id.* at 4.

II. DISCUSSION

A. Whether MSC is the proper party in this proceeding

MSC claimed that the Commission has issued the Order to Show Cause to the wrong party because "MSC did not bill SOFi for the congestion surcharge in the amount of $1,000," and MSC's customer was an NVOCC (which is not a party to this proceeding). MSC Response at 10. MSC stated that "while [the NVOCC] had the contractual obligation to pay certain rates to MSC, [the NVOCC] had its own discretion and contractual arrangement to charge its customers, including SOFi." *Id.* at 15. MSC further alleged that "[i]f there had been a problem with MSC's congestion surcharge, it would be [the NVOCC] as the 'shipper' to MSC who could have lodged the complaint had it believed the charge to be unreasonable; however, it has not done do." *Id.*

The Shipping Act's charge complaints provision provides as follows:

> If the common carrier assessing the charge is acting in the capacity of a non-vessel-operating common carrier, the Commission shall, while conducting an investigation under subsection (b), consider—
> (1) whether the non-vessel-operating common carrier is responsible for the noncompliant assessment of the charge, in whole or in part; and
> (2) whether another party is ultimately responsible in whole or in part and potentially subject to action under subsections (c) and (d).

46 U.S.C. § 41310(e).

MSC is claiming that it is the wrong party in this proceeding because its customer was an NVOCC. Under the Shipping Act's charge complaints provision, however, when the common carrier assessing a charge is an NVOCC, the Commission must consider whether another party, such as an ocean common carrier, is ultimately responsible. The facts demonstrate that MSC acted as the ocean common carrier with respect to SOFi's shipment. As the ocean common carrier with respect to the shipment in question, MSC is the proper party in this charge complaint proceeding.

B. MSC's petition to dismiss the charge complaint and OSC

On February 24, 2024, MSC filed a Petition to Dismiss the Charge Complaint and the Order to Show Cause (Petition to Dismiss). In its Petition to Dismiss, MSC stated that "[p]ursuant to 46 C.F.R. § 502.69, [MSC] hereby petitions for an order dismissing with prejudice the Charge Complaint No. 001 and the related Order Directing MSC to Show Cause . . . in its entirety." Petition to Dismiss at 1. The Commission, however, waived its rules of practice and procedure in 46 C.F.R Subparts A-E, I-L, P, and all other provisions not consistent with the OSC. OSC at 5. The Commission's rule at 46 C.F.R. § 502.69 is part of the Commission's rules of practice and procedure in Subpart E – Private Complaints and Commission Investigations. Therefore, the provision under which MSC filed its Petition to Dismiss was specifically waived by the Commission in this charge complaint and OSC proceeding.

In its response to MSC's Petition to Dismiss, OOE asserted that MSC's Petition to Dismiss is "improper under the procedural rules governing this proceeding, is inconsistent with the OSC, and should be summarily denied on those grounds." OOE Response to Petition at 2. OOE stated that "the Commission has expressly disabled Subpart A, including § 502.12 with regards to the applicability of the FRCP, as well as the Subpart E, which [MSC] relies upon as the basis for its request." *Id.* at 2-3. OOE further stated that "[t]his proceeding is instead governed by the Show Cause process pursuant to 46 C.F.R. § 502.91, found within Subpart F of the Commission's regulations," and "[i]nasmuch as the OSC supersedes the provisions of Subpart A-E, [MSC]'s Petition is improper and should be denied." *Id.* at 3.

OOE is correct. The Commission's OSC expressly waived 46 C.F.R. § 502.69, pursuant to which MSC filed its Petition to Dismiss. If a respondent is permitted to file disallowed substantive pleadings, it may hinder the Commission from "promptly investigat[ing] the charge with regard to compliance with section 41104(a) and section 41102" as required under the Shipping Act's charge complaints provisions at 46 U.S.C. § 41310. MSC's Petition to Dismiss is denied.

C. MSC's motion for confidential treatment for portions of its response

On February 28, 2023, MSC filed Motion for Confidential Treatment for Portions of its Response, and on March 3, 2023, MSC filed Amended Motion for Confidential Treatment for Portions of its

Response (Motion for Confidential Treatment). MSC stated that its Response to the OSC references its ocean agreement with a non-party, and the submitted ocean agreement includes an attached exhibit that is subject to a confidentiality provision that prevents the disclosure of its terms. Motion for Confidential Treatment at 1. MSC further stated that the contractually agreed upon rates that are enclosed to the ocean agreement were privately negotiated between MSC and the non-party and are thus confidential. *Id.* at 1-2. MSC alleged that "[d]isclosure of the Rates would damage the commercial interests and competitiveness of the parties to the Ocean Agreement." *Id.* at 2.

OOE stated that "[d]espite the Commission previously waiving the provisions [MSC] relies on to request [confidential] treatment, the matter of confidentiality must be addressed to protect trade secrets and minimize dangers to private entities." OOE Reply to Respondent's Answer to OSC (OOE Reply) at 2 (footnote and citation omitted). OOE further stated that "[t]he Commission's own regulations regarding service contracts filed with the Commission require confidentiality under 46 C.F.R. § 530.4." *Id.* OOE, therefore, "has no objection to [MSC]'s request that the information and materials indicated in its Motion for Confidential Treatment be kept confidential, nor does [OOE] object to [MSC] filing both public and confidential versions of its Response to Show Cause." *Id.*

Although MSC relied on waived provisions in filing its Motion for Confidential Treatment, protecting commercial entities' trade secrets and confidential rates information is an important consideration. Further, as OOE stated, service contracts are filed with the Commission confidentially under the Shipping Act and the Commission's regulations. *See* 46 U.S.C. § 40502(b)(1) and 46 C.F.R. § 530.4. In addition, granting MSC's Motion will not delay the Commission's prompt investigation of this charge complaint. MSC's Motion for Confidential Treatment for Portions of its Response is granted.

D. MSC's petition to file sur-reply

On April 13, 2023, MSC filed a Petition for Leave to File Sur-Reply (Petition for Leave) and its attached Sur-reply to the OSC. MSC stated that after carefully reviewing OOE's Reply to MSC's Answer to Order to Show Cause, MSC believes that "a brief response to the Reply is necessary to address certain points and matters contained in that filing, which could aid the Commission in its ruling." Petition for Leave at 1. MSC's counsel conferred with the OOE and understood that OOE is of the view that the regulations do

not give MSC a right to response to the OOE Reply. *Id.* MSC thus filed the Petition for Leave and requested leave to file its Sur-Reply. *Id.* at 2.

On April 19, 2023, OOE filed its Response to MSC's Petition to File Sur-Reply (OOE Response to Sur-Reply). OOE asserted that MSC's Petition for Leave and its enclosed Sur-Reply "is improper under the procedural rules governing this proceeding, is inconsistent with the OSC, and should be summarily denied by the Commission on those grounds." OOE Response to Sur-Reply at 2. OOE stated that the regulation at 46 C.F.R. §§ 502.61-502.75, under which MSC filed its Petition for Leave, has been expressly disabled by the Commission's OSC. *Id.* at 2. OOE alleged that "[p]olicy issues reintroduced in [MSC's Sur-Reply] that were previously raised by [MSC] in their earlier Petition and Answer[,] are already before the Commission." *Id.* OOE further stated that if any new policy issues introduced by MSC deserve attention by the Commission, "such review will have an opportunity to occur during the penalty phase of this proceeding, should the Commission refer this matter to the Administrative Law Judge for a hearing on the assessment of a civil penalty pursuant to 46 U.S.C. §§ 41107 and 41109." *Id.* OOE also asserted that MSC "[has] not shown good cause for the significant delay such a petition, if granted, would impose upon this proceeding" when MSC "had previous opportunity to submit the assertions and materials within [MSC's] sur-reply, as part of their Answer to the OSC." *Id.* at 2-3.

Again, OOE is correct. The Commission's OSC expressly waived 46 C.F.R. §§ 502.61-502.75, which is Subpart E of the Commission's rules of practice and procedure. The OSC stated that "pursuant to 46 C.F.R. § 502.10, the Commission hereby waives the provisions of Subparts A-E . . . of Part 520, and all other provisions of the Commission's Rules of Practice and Procedure except as consistent with this Order." OSC at 5. As with MSC's Petition to Dismiss, if a respondent in a charge complaint proceeding is permitted to file expressly disallowed substantive pleadings, it may hinder the Commission's prompt investigation of charges under the Shipping Act's charge complaints provisions at 46 U.S.C. § 41310. MSC's Petition for Leave is denied.

E. Whether MSC should be ordered to refund charges paid or waive charges assessed

The Commission ordered MSC to show cause why the Commission should not find that MSC's action in assessing a congestion surcharge with respect to bill of lading No.

MEDUI0745188 dated July 14, 2022, constitutes a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14). OSC at 3-4. The Commission further ordered MSC to show cause "why the Commission should not promptly order the refund of charges paid by SOFi Paper Products with respect to charges that do not comply with § 41102 and § 41104(a)(14), as provided under § 41310(c)." *Id.* at 4.

With respect to a refund, the charge complaints provision provides that "[u]pon receipt of submissions under subsection (a), if the Commission determines that a charge does not comply with section 41104(a) or 41102, the Commission shall promptly order the refund of charges paid." 46 C.F.R. § 41310(c). The Commission may order a waiver of charges assessed but not yet paid, in addition to ordering a refund of charges already paid.

In its Response to Order to Show Cause dated February 28, 2023 (MSC Response), MSC stated that the issue of a refund is moot because "MSC in fact did make a refund when it sent the check for the total amount in the Charge claim of $1,000 to SOFi's office in Florida on February 13, 2023, and that check was confirmed delivered to SOFi's office on the following day by FedEx." MSC Response at 25-27. MSC stated that it sent the refund check "prior to any decision by the FMC in respect to SOFi's complaint," and "MSC's voluntary action constitutes a full satisfaction of SOFi's rights under 46 U.S.C. § 41310 *et seq.* and no further demand can be made by SOFi to MSC pursuant to the facts of this case." *Id.* at 27.

On March 27, 2023, OOE submitted its Reply to Respondent's Answer to Order to Show Cause (OOE Reply). OOE acknowledged that "on February 13, 2023, after the OSC was served, MSC issued a check refunding the charges in question, in full, to SOFi at its legal business address." OOE Reply at 2. OOE further acknowledges that "[MSC] also submitted evidence that this check was cashed by SOFi on March 6, 2023." *Id.* at 2-3 (citation omitted). Stating "[t]he sole relief authorized to the Complainant under the Charge Complaint statutory provisions in 46 U.S.C. § 41310 is a refund or waiver" and that the full refund has already been remitted, OOE further stated that it does not propose that any further relief be ordered to the Complainant under the charge complaint. *Id.* at 3.

The Commission agrees with OOE. MSC fully refunded the surcharge in question to SOFi (the charge complainant) after the Commission initiated this Show Cause proceeding. Accordingly, the refund issue is now moot. In addition, as further discussed below, the Commission does not find that violations of the Shipping Act were

proven in this proceeding. Therefore, SOFi's charge complaint for refund is dismissed.

F. Whether MSC's surcharge to SOFi was a violation of the Shipping Act

1. Whether the Commission may assess a civil penalty in addition to or in lieu of a refund

After acknowledging that the refund issue is moot because MSC already refunded the surcharge in question to SOFi, OOE stated that "pursuant to the OSC, the Commission may still make a determination as to whether the charge was noncompliant and whether a civil penalty should therefore [be issued] pursuant to 46 U.S.C. §§ 41107 and 41109." OOE Reply at 3.

MSC claimed that "[a]ccording to the FMC's policies and procedures, as well as its Charge Complaint guidelines and related interim procedures, [MSC's] voluntary refund in full of the charge at issue prevents the Commission from taking any further action on this Charge Complaint including the imposition of a penalty." MSC Response at 31. MSC further stated that "[a] penalty is also not warranted in this matter because [MSC] negotiated in good faith with SOFi throughout this proceeding. Good faith that SOFi lacked when it breached the settlement by seeking to recover in excess of the full amount of its claim." *Id.* at 31-32. MSC is incorrect in asserting that a penalty under the Shipping Act charge complaints' penalty provision at 46 U.S.C. § 41310(d) may not be assessed once a refund or waiver of the charge is made.

The Shipping Act's charge complaints provision for penalties provides that "[i]n the event of a finding that a charge does not comply with section 41104(a) or 41102 after submission under subsection (a), a civil penalty under section 41107 shall be applied to the common carrier making such charge." 46 U.S.C. § 41310(d). The Shipping Act's penalty provision at section 41107 provides that "[a] person that violates this part or a regulation or order of the Federal Maritime Commission issued under this part is liable to the United States Government for a civil penalty or, in addition to or in lieu of a civil penalty, is liable for the refund of a charge." 46 U.S.C. § 41107(a) (emphasis added). The Shipping Act's penalty assessment provision at section 41109 also provides that the Commission may "assess a civil penalty" or "in addition to, or in lieu of, assessing a civil penalty . . . , order a refund of money." 46 U.S.C. § 41109(a).

The Commission agrees with OOE that even after a refund or waiver of the charge in question, the Commission may still assess a civil penalty in a charge complaint proceeding if it finds that the charge does not comply with sections 41104(a) or 41102 of the Shipping Act. Pursuant to sections 41310, 41107, and 41109 of the Act, 46 U.S.C. §§ 41310, 41107, 41109, the Commission may assess a civil penalty in addition to or in lieu of a refund in charge complaint proceedings under 46 U.S.C. § 41310. Otherwise, common carriers could nullify the charge complaint penalty provision at 46 U.S.C. § 41310(d) by simply refunding or waiving the charge in question, even when there might be violations of the Shipping Act. Whether or not to impose a penalty under the charge complaint proceeding must be determined by the Commission, not by a common carrier's litigation strategy. The Commission disagrees, however, with OOE that a violation has been proven in this case.

2. Whether the congestion surcharge is a violation of 46 C.F.R. § 545.5

OOE alleges that MSC's congestion surcharge to SOFi may constitute a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14). OOE Reply at 7. Section 41104(a)(14) of the Shipping Act provides that a common carrier shall not "assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including [46 U.S.C. § 41102(c)] or [46 C.F.R. part 545]." Read together with other Shipping Act provisions and OOE's analysis, 46 C.F.R. part 545 in this proceeding refers to the Commission's interpretive rule at 46 C.F.R. § 545.5 entitled *Interpretation of Shipping Act of 1984 - Unjust and unreasonable practices with respect to demurrage and detention*.

The interpretive rule explains that "[t]he purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) . . . in the context of demurrage and detention." 46 C.F.R. § 545.5. It further clarifies that "[t]his rule applies to practices and regulations relating to demurrage and detention for containerized cargo." 46 C.F.R. § 545.5(b). The interpretive rule is applicable only to demurrage and detention charges. The interpretive rule defines demurrage and detention charges as "any charges, including 'per diem,' assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ('regulated entities') related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges." *Id.* There is no indication that either SOFi or OOE claims that the congestion surcharge is a demurrage and detention charge. MSC claims that "the

surcharge herein at issue is not either demurrage or detention charge" and "[a]ccordingly, Part 545 is inapplicable." MSC Response at 22.

Demurrage and detention charges are generally assessed after the expiration of free time, which allows shippers and/or consignees to use terminal space or shipping containers free of charge for certain limited length of time. The amount of demurrage and detention charges, including "per diem," generally depends on the length of the use of space or containers after the free time. It does not appear, however, that the assessment of the congestion surcharge depended on the expiration of any free time. Nor does it appear that the amount of the congestion surcharge depended on any period of use. The congestion surcharge appears to be assessed equally to all customers regardless of free time and length of use of land or containers. Rather than specific use of land or containers, it appears that the congestion surcharge was assessed for each container with respect to the overall flow of transportation. The Commission believes the congestion surcharge was not a demurrage and detention charge, and thus not subject to the interpretive rule at 46 C.F.R. § 545.5. As the interpretive rule at 46 C.F.R. § 545.5 is not applicable to the congestion surcharge, the surcharge does not constitute a violation of that rule.

3. Whether the congestion surcharge is a violation of 46 U.S.C. § 41102(c)

The Commission now turns to the remaining issue of whether the congestion surcharge is a violation of the Shipping Act at 46 U.S.C. § 41102(c). Section 41102(c) states as follows:

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

46 U.S.C. § 41102(c).

OOE stated that the provision "applies to unreasonable charges or fees that common carriers, such as MSC, may levy against their customers." OOE Reply at 4. OOE alleged that "[a] lack of information regarding what circumstances may either trigger or extinguish such a charge is unreasonable and contrary to 46 U.S.C. § 41102(c)" and "[a]n absence of detail into the justification and the timeframe as to when a charge will be levied by a common carrier

similarly frustrates a party's ability to contest the charge, engage in any substantive decision-making regarding how to avoid it, or to compare rates between one carrier and another." *Id.* OOE averred that "[t]he Commission has held that a charge is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged." *Id.* at 5. OOE also alleged that pursuant to the Commission's regulation, "tariff terms must be clear and definite" and "[a] common carrier leaving the shipping public to guess as to when and how a surcharge will apply renders that charge neither clear nor definite." *Id.* at 5 (footnotes omitted).

OOE claimed that "notwithstanding the resolution of the refund to SOFi, the issue of MSC's congestion surcharge remains ongoing as further demonstrated by the update to its tariff effective February 21, 2023, regarding such charges in the inbound U.S. trades." *Id.* at 3 (footnote omitted). OOE provided its analysis "[g]iven the possibility that the surcharge may have been levied upon more of MSC's customers in addition to SOFi since the enactment of the Ocean Shipping Reform Act of 2022 (OSRA 2022)." *Id.* OOE averred that considering MSC's insistence on actively maintaining in its tariff the congestion surcharge that is at the heart of this proceeding, "the Commission is presented with an opportunity . . . to make a determination as to the reasonableness of MSC's congestion surcharge and whether it may constitute a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14)." *Id.* at 7. OOE further stated that "[s]uch an undertaking would arguably be to the benefit of all members of the Shipping public who may have been billed by MSC for this ambiguous surcharge subsequent to the enactment of OSRA 2022." *Id.*

MSC claims that "[w]hile the Commission has determined that demurrage and detention relate to 'receiving, handling, storing or delivering property[,]' . . . the charge at issue in this case is <u>not</u> demurrage nor detention." MSC Response at 19-20 (emphasis in the original). It also claimed that "the congestion surcharge herein does not relate to receiving, handling, storing or delivering property – it relates to the transportation of the property," and "[t]he congestion surcharge at issue relates to the water transportation of the cargo, and hence falls outside the scope of Section 41102(c)." *Id.* at 20. MSC alleged that "the Commission lacks the legal authority to challenge the amount of the charge," and "MSC is under no legal obligation to justify the congestion surcharge any more that [sic] it is required to justify other surcharges, such as fuel surcharges, bill of lading surcharges, hazardous goods charges, overweight cargo surcharges, or other charges." *Id.* at 20-21. MSC further alleged that "[a] tariff

rule imposing a congestion surcharge might potentially be subject of a legal challenge on the basis of clarity if the application of the charge turned on criteria specified in the tariff rule and those criteria were not clear," but "there is no requirement that tariff rules contain such criteria." *Id.* at 21. MSC further claimed that "there is no issue of clarity here – the charge applies on all cargo subject to the tariff in question, and there is nothing ambiguous or unclear in the application of the charge." *Id.* MSC also claimed that "if the charge had been styled as a peak season surcharge or general rate increase, it is highly unlikely that this proceeding would have been initiated," and "[b]y focusing on the name of the charge, rather than the clarity and application of the charge, the Commission is missing the point and elevating form above substance." *Id.*

The Commission need not address these arguments in this case. In charge complaint proceedings, the Commission determines whether there is a violation with respect to specific charges assessed or paid, rather than with respect to a common carrier's entire practice. *See* 46 U.S.C. § 41310(b) (upon receipt of a charge complaint with respect to a charge assessed by a common carrier, the Commission shall promptly investigate the charge with regard to compliance with section 41104(a) and section 41102), 46 U.S.C. § 41310(c) (if the Commission determines that a charge does not comply with section 41104(a) or 41102, the Commission shall promptly order the refund of charges paid), and 46 U.S.C. § 41310(d) (in the event of a finding that a charge does not comply with section 41104(a) or 41102, a civil penalty under section 41107 shall be applied to the common carrier making such charge). Here, the Commission finds that the record is insufficient to establish that a violation of section 41102(c) occurred in this charge complaint proceeding.

III. CONCLUSION

It is hereby **ORDERED** that:

(1) MSC's Petition to Dismiss is **DENIED**;

(2) MSC's Motion for Confidential Treatment for Portions of its Response is **GRANTED**, and the requested portions of MSC's Response are **CONFIDENTIAL**;

(3) MSC's Petition for Leave to File Sur-Reply is **DENIED**;

(4) SOFi's Charge Complaint against MSC is **DISMISSED**; and

(5) The Charge Complaint and Order to Show Cause proceeding against MSC is **DISCONTINUED**.

By the Commission.

Amy Strauss
Acting Secretary

Commissioner Louis E. SOLA, concurring:

Although I concur with this ruling, it is imperative to consider the multifaceted concerns regarding auxiliary charges across various industries. The growing frequency of auxiliary charges is an issue we must be prepared to address and set forth frameworks to ensure these fees serve the best interests of the shipping industry.

Commissioner Max M. VEKICH, concurring in part and dissenting in part:

I concur with the Majority's opinion with respect to parts A, B, C, D, E and F.1 and F.2. I disagree with the Majority's holding in F.3 and therefore dissent from the holding of the Majority.

On February 3, 2023, the Commission's Order to Show Cause directed MSC to show cause why the Commission should not impose a civil penalty, under §§ 41310(d) and 41107 upon such finding of noncompliance with § 41102 and § 41104(a)(14); and provided that, in such event, MSC shall have the opportunity for a hearing prior to assessment of a civil penalty, as provided under § 41109(a). Order to Show Cause at 4.

I disagree with the Majority that the record is insufficient to establish a violation of § 41102 (c). I would find MSC's congestion surcharge is in violation of 46 C.F.R. 520.7 (a)(1) since it is neither clear nor definite. In as much as the charge does not meet the requirements of part 520.7, it is a violation of § 41104 (14). Accordingly, I would find a violation of § 41102(c) since I believe it is an unreasonable practice to assess a charge pursuant to a tariff which does not satisfy tariff requirements and is therefore in violation of the Commission's rules.

The salient issue in this case is whether the tariff rule implemented and assessed by MSC was clear and definite. The record supports a finding that it is not. The Majority's focus on whether the record contained sufficient evidence of congestion in the port of unloading, or elsewhere, is misplaced. No matter the answer, under the tariff rule, the charge would still apply. I don't believe a tariff rule that allows implementation of a congestion charge without sufficiently identifying the degree of congestion warranting the charge is clear and definite, or, for that matter, reasonable. On its face, MSC's tariff rule requires assessment of the charge even for voyages that did not incur congestion and does not include any

indication of when the congestion charge would cease to be assessed.[1] If the charge is assessed in the absence of congestion, then I believe that that is an unreasonable practice. Further, there is no additional service provided to justify the charge; quite the opposite, the charge is assessed when the cargo cannot be delivered as scheduled. Under the facts as presented, I believe MSC committed a violation when it assessed its congestion charge pursuant to a tariff rule that was not clear and definite. Therefore, and consistent with the Order to Show Cause, I would initiate a separate penalty proceeding to be referred to the Commission's Administrative Law Judge for consideration of penalties.

I further disagree with the Majority that a charge complaint proceeding under § 41310(b) cannot determine whether there is a violation of "a common carrier's entire practice." Majority opinion at 12. The Majority cites to the language of 46 U.S.C. § 41310(b), which specifically contemplates the finding of a violation under § 41102. § 41102(c) is the prohibition against unreasonable or unjust common carrier practices. It is illogical that the Commission couldn't review a common carrier's 'entire practice' when § 41310(b) specifically contemplates investigating compliance with § 41102 (c).

[1] Although not controlling, I am mindful that MSC assessed the additional $1000 charge at a time when freight rates had been driven to historic and astronomical levels. MSC was not losing money and needing to recoup losses.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,
Complainant

v.

GATEWAY TERMINALS, LLC; CHARLESTON STEVEDORING CO., LLC; PORTS AMERICA FLORIDA, INC.; CERES MARINE TERMINALS, INC.; AND SSA ATLANTIC, LLC, *Respondents*.

DOCKET NO. 22-12

Served: September 29, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

This proceeding began on April 12, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant International Longshoremen's Association ("ILA") had filed a complaint against Respondents Gateway Terminals, LLC ("Gateway"), Charleston Stevedoring Company, LLC ("CSC"), Ports America Florida, Inc. ("PAF"), Ceres Marine Terminals, Inc. ("Ceres"), and SSA Atlantic, LLC ("SSA").

An amended complaint, filed on June 3, 2022, alleges that Respondents are preventing "true negotiation over the rates and fees for stevedoring and marine terminal operation services" at the Ports of Charleston and Savannah, in violation of the Shipping Act, by operating a joint venture under an agreement that violates § 41102(b); are imposing "undue or unreasonable prejudice or disadvantage" by eliminating competition in violation of § 41106(2); and are refusing to deal or negotiate "with any person," including with the ILA and its affiliated local unions, in violation of § 41106(3). Amended Complaint at 15-20. Respondents filed an answer denying the allegations and alleging affirmative defenses, including that the Amended Complaint fails to state a cause of action, the ILA has not suffered any damages for which the FMC can grant relief, the claims are barred in whole or in part by the doctrine of sovereign immunity, and the FMC "lacks subject matter jurisdiction over the claims." Answer at 12-13.

[1] This 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.

On January 23, 2023, Respondents moved to bifurcate this proceeding into a jurisdictional adjudication, followed by a proceeding on the merits if jurisdiction is established over at least one Respondent. Motion to Bifurcate at 1-3. This motion was granted on March 9, 2023 ("Bifurcation Order"), and it was directed that discovery be limited to jurisdictional inquiries only, followed by an initial decision as to whether there is jurisdiction to adjudicate the Amended Complaint. Bifurcation Order at 4. The Order explained that here, "convenience, along with expediting and economizing, are equally well served by requiring the parties to engage in limited discovery followed by briefing on the issue of jurisdiction before proceeding to the more expansive discovery likely to occur regarding the merits." Bifurcation Order at 4. Therefore, the present decision will solely address whether Respondents are marine terminal operators subject to the Commission's jurisdiction. Because the Commission examines an entity's MTO status based on the specific facility at issue in the dispute, jurisdiction here will be assessed based on whether any of Respondents are marine terminal operators specifically at the Port of Savannah and/or at the Port of Charleston.

As discussed more fully below, the evidence does not support a finding that any of Respondents are marine terminal operators at either of the relevant ports. None of Respondents have been shown to be engaged in "the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier" at the Port of Savannah or at the Port of Charleston. Respondents' activities at these ports also do not support MTO status based on Commission case law, including *Louis Dreyfus Corp. v. Plaquemines Port Harbor & Terminal Dist.*, Docket No. 79-45, 25 F.M.C. 59 (FMC July 30, 1982). While certain of Respondents may offer essential services at the relevant ports – consisting of container vessel stevedoring and gate services – Respondents have not been shown to control access to private facilities at the relevant ports to enforce their charges. Moreover, the overall level of control exhibited by Respondents at the relevant ports is not sufficient to constitute a "furnishing" of terminal facilities there, so as to confer jurisdiction over Respondents. Finally, there is no precedence for service providers being deemed to be marine terminal operators solely on the basis of their being awarded an exclusive services contract by the port authority/marine terminal operator decision-maker. Accordingly, the ILA has not met its burden of establishing that any of Respondents are marine terminal operators at the Port of Savannah or at the Port of Charleston. Because jurisdiction has not been established over Respondents, this case will not proceed to an adjudication on the merits.

B. Procedural History

On April 12, 2022, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On May 9, 2022, Respondents filed a motion to dismiss ILA's complaint. ILA moved for leave to file an amended complaint on June 3, 2022. This motion was granted on June 23, 2022, and Respondents' motion to dismiss was denied as moot.

On July 8, 2022, Respondents filed a motion to dismiss Counts 2, 3, and 4 of ILA's Amended Complaint and to strike ILA's prayer for reparations. On July 29, 2022, ILA filed an opposition to Respondents' motion to dismiss and on August 12, 2022, Respondents filed a reply to ILA's opposition.

On August 18, 2022, an order was issued requesting briefing on the issue of whether or not this proceeding or the requested relief implicate state sovereign immunity. Both ILA and Respondents filed the requested briefing on September 15, 2022. On September 22, 2022, an *amicus curiae* brief was submitted by Georgia Port Authority (GPA). ILA filed a response to Respondents' state sovereign immunity briefing on September 27, 2022, and Respondents filed a response on September 29, 2022. On September 26, 2022, this proceeding was reassigned to the undersigned.

On November 7, 2022, an order was issued denying Respondents' partial motion to dismiss, including their request to strike ILA's request for award of reparations ("Order on Partial MTD"). The Order also accepted GPA's *amicus* brief and directed Respondents to file an answer to the amended complaint by November 18, 2022. Order on Partial MTD at 2, 7.

On January 23, 2023, Respondents filed a motion to bifurcate the proceeding "into two separate litigations: the first proceeding solely on jurisdictional issues, and the second on the merits of the ILA's claims." Motion to Bifurcate at 2. A March 9, 2023, Order ("Bifurcation Order") granted Respondents motion "to bifurcate the issue of jurisdiction from the merits of the case," which allowed ILA discovery "limited to how the subject terminals operate at the two ports in question." Bifurcation Order at 4-5. The Order also stated: "even if only one of the named Respondents is demonstrated by the jurisdictional discovery to be an MTO, the case will proceed to discovery on the merits and the parties will be given an opportunity to submit briefs limited to the Shipping Act violations alleged to have occurred." Bifurcation Order at 4.

On March 17, 2023, an order on motion to amend schedule was issued. On May 10, 2023, an order on second motion to amend schedule was issued. A notice of extension of time was issued on March 29, 2023, extending the deadline for issuance of an Initial Decision from April 12, 2023, to December 12, 2023.

On May 15, 2023, ILA filed its jurisdictional brief, proposed findings of fact, and appendix (exhibits labeled as "CX"). On June 5, 2023, Respondents filed their opposition brief, proposed findings of fact, and appendix (exhibits labeled as "Resp. Appx.," referred to herein as "RX"). Respondents then moved for leave to supplement the record on June 13, 2023. A June 20, 2023, Order granted this motion, accepting a declaration provided by Mr. Joel Britt, Vice President of Terminal Operations for South Carolina State Ports Authority ("SCPA" or "SCSPA"), and extended ILA's time allowed to file its response brief by one week. On June 27, 2023, ILA filed its reply brief and supplemental appendix.

C. Arguments of the Parties

ILA argues that the Federal Maritime Commission has jurisdiction over Respondents insofar as they are, or at a relevant time were, marine terminal operators within the ports of Charleston and Savannah; they so qualify because Respondents control access to the port terminals and operate terminal facilities in Charleston and Savannah; and efforts to obtain evidence of day-to-day operations were hindered because Respondents have refused to provide necessary discovery. Brief at 1, 3-27; Reply at 1, 3-22.

Respondents assert that ILA has failed to carry its burden of proving by a preponderance of the evidence that any of the five Respondents is a marine terminal operator in either the Port of Charleston or the Port of Savannah; therefore, the Amended Complaint should be dismissed for lack of jurisdiction over each and every Respondent; and Respondents have complied with their jurisdictional discovery obligations. Opposition at 1, 13-27, 38.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are set forth in part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT ("FOF")

A. Entities

1. The International Longshoremen's Association ("ILA") is a labor organization representing longshore workers, clerks and checkers, maintenance and repair workers, and other workers employed in related crafts along the East and Gulf Coasts of the United States, including the Ports of Savannah, Georgia, and Charleston, South Carolina. Amended Complaint at ¶ 1; Answer at ¶ 1.

2. The ILA represents employees of Respondents Gateway, CSC, Ceres, and SSA at the Port of Savanna and the Port of Charleston. Amended Complaint at ¶ 7; Answer at ¶ 7.

3. Gateway is a Georgia limited liability company with its principal place of business in Garden City, Georgia. Amended Complaint at ¶ 2; Answer at ¶ 2. It is now a joint venture, owned by Southeast Stevedoring Holdings, LLC ("SSH"), which in turn is owned by Ceres, SSA, and Marine Terminals Corporation - East ("MTCE"). Answer at ¶ 2; RX 365 (Grimes Decl., Gateway VP of Finance).

4. At present, Gateway is the exclusive provider of container vessel stevedoring and gate services in the Port of Savannah, based on a license agreement with the Georgia Ports Authority ("Gateway-GPA Agreement"). CX 587; CX 586-624 (whole agreement).

5. Ceres, SSA, and MTCE combined their respective stevedoring businesses at the Port of Savannah in 2021, into the pre-existing Gateway entity in order to create the current Gateway joint venture. CX 11; CX 390 (Second Amended Gateway Operating Agreement); CX 440 (Ceres & Gateway 2021 Services Agreement); CX 478 (SSA & Gateway 2021 Services Agreement); CX 537 (MTCE & Gateway 2021 Services Agreement); RX 380.

6. As described in the Gateway-GPA Agreement, GPA "decided to consolidate the provision of container vessel stevedoring and gate services by a single entity in the belief that consolidation would yield positive benefits for the State of Georgia and Terminal users including . . . improvements related to safety, quality and efficiency of vessel stevedoring and gate services." CX 586.

7. Prior to reforming in 2021, Gateway provided gate services at Garden City Terminal and Ocean Terminal, but it did not offer stevedoring services at the Port of Savannah. CX 390; CX 459; RX 129.

8. Gateway's 2014 Operating Agreement with GPA states that GPA owns the Gate Interchange Facilities at the Port of Savannah and that Gateway had been organized to manage equipment interchange service at those facilities. CX 249.

9. CSC is a Delaware limited liability company with its principal place of business in Charleston, South Carolina. Amended Complaint at ¶ 3; Answer at ¶ 3.

10. CSC was formed as a joint venture in 2020 and is also owned by SSH, therefore it is ultimately owned by Ceres, SSA, and MTCE. CX 204; CX 206.

11. Ceres, SSA, and MTCE combined their pre-existing assets in the Port of Charleston as of May 4, 2020, in order to create the current CSC joint venture. *See, e.g.*, CX 225 (Transition Services Agreement between CSC and MTCE); RX 379-380.

12. At present, CSC is the exclusive provider of container vessel stevedoring at the Port of Charleston based on a License Agreement and Master Port Facility License Agreement with the South Carolina State Ports Authority. CX 212-223 (2020 CSC-SCPA License Agreement); CX 180-203 (2020 CSC-SCPA Master Port Facility License Agreement).

13. As described in the CSC-SCPA License Agreement, SCPA "has determined that it would be more efficient for the JV to provide Stevedore Services at the Port rather than having to transact with three stevedoring entities" and the SCPA desires for the JV to "provide adequate, competitive, consistent, efficient, optimized, and safe Stevedore Services at the Terminal in an effort to keep the Port competitive in the United States port market." CX 212.

14. Per the CSC-SCPA License Agreement, CSC is also authorized to "participate, as today, in the Charleston Gate Company ("CGC")" such that "CGC will bill the JV for its services" and "the JV shall negotiate tariff rates for Stevedore Services and CGC fees for gate services directly with the container lines." CX 221, Schedule A.

15. As of 2019, the Charleston Gate Company was the gate operator in the Port of Charleston and SSA, Ceres, and Container Maintenance Corporation ("CMC") each owned one-third of the company. CX 170; CX 173; *see also* RX 274 (Charleston Gate Amended Operating Agreement, signed October 1, 2015).

16. The 2011 Charleston Gate Operating Agreement indicates that Charleston Gate was formed for the purpose of hiring and managing labor to perform, at the Port of Charleston, "certain functions known as 'TIR Functions,' which primarily involve checking containers into and out of the Port and assigning temporary storage locations for each container." CX 1038.

17. Ceres Marine Terminals, Inc. ("Ceres") is a Maryland corporation with its principal place of business in Nashville, Tennessee. Answer at ¶ 6.

18. SSA Atlantic, LLC ("SSA") is a Delaware limited liability company with its principal place of business in Seattle, Washington. SSA also has a place of business located in Savannah, GA. Amended Complaint at ¶ 5; Answer at ¶ 5.

19. Ports America Florida, Inc. is a Florida corporation with its principal place of business in Tampa, Florida. Amended Complaint at ¶ 4; Answer at ¶ 4.

20. Prior to Gateway and CSC becoming the exclusive providers of container vessel stevedoring services at the Ports of Savannah and Charleston, Ceres and SSA provided container stevedoring services independently at both ports. RX 379 (Mygatt Decl., Ceres CEO); RX 387-388 (Lokey Decl., SSA Regional VP).

21. Ceres continues to provide stevedoring for cruise ships at the Port of Charleston. RX 383; CX 1129.

22. SSA continues to provide stevedoring for military and non-containerized cargo at the Port of Charleston. RX 387; Opposition at 16.

B. Port of Savannah Operations

23. On October 29, 2021, Gateway and the Georgia Ports Authority entered into the Gateway-GPA Agreement making Gateway the exclusive provider of stevedoring and gate services in the Port of Savannah, including Garden City Terminal and Ocean Terminal. CX 586-587. This agreement was to take effect on January 1, 2022, and remain in effect through December 31, 2031, by default. CX 587-588.

24. The Gateway-GPA Agreement states:

> GPA owns and operates deep-water marine terminal facilities known as Garden City Terminal ("GCT") located in Garden City, Georgia and Ocean Terminal ("OT") located in Savannah, Georgia. GCT and OT are collectively referred to as the "Terminal" . . . . [Per Georgia law] GPA is granted certain powers to (i) develop and improve seaports of the State of Georgia for the handling of waterborne commerce, domestic or foreign, (ii) investigate and handle matters pertaining to transportation rates and rate structures affecting freight and commerce through such ports, and (iii) to do any other things necessary or proper to foster and encourage the commerce of the State of Georgia; . . . in the exercise of its powers and regulatory authority described above, GPA is constantly seeking to improve Terminal operations and deliver services to Terminal users more efficiently and effectively; . . . in furtherance of the foregoing, GPA has decided to consolidate the provision of container vessel stevedoring and gate services by a single entity in the belief that the consolidation will yield positive benefits for the State of Georgia and Terminal users including . . . improvements related to safety, quality and efficiency of vessel stevedoring and gate services. . . . GPA and Gateway agree to cooperate in the provision of services in order to achieve certain goals as a result of the consolidation, including . . . cost savings and greater productivity.

CX 586.

25. Section 1 of the Gateway-GPA Agreement states:

> GPA designates Gateway as the exclusive provider of container vessel stevedoring and gate services at the Terminal, subject to the terms and conditions herein. As a result of designating a single provider of container vessel stevedoring and gate services (collectively, the "Services"), GPA intends to improve the level of service provided to Terminal users related to safety and efficiency. **Gateway acknowledges and agrees that GPA shall continue to be the marine terminal operator for the Terminal responsible for the operation of all cranes and container handling equipment** such as top lifts, and all container yards and intermodal container transfer facilities. GPA and Gateway shall coordinate as necessary to achieve the objectives of this agreement with respect to the services to be performed by each party. For the avoidance of doubt, the Parties acknowledge and agree that the exclusive right granted to Gateway herein to provide stevedoring services shall apply solely to container vessels and shall exclude stevedoring services for non-container vessels. GPA shall have the right to grant permission to any other third party to provide services for non-container vessels.

CX 587 (emphasis added).

26. Section 3 of the Gateway-GPA Agreement provides: "As a specific condition of this Agreement, **GPA and Gateway agree to adopt and incorporate by reference herein all rates, rules and regulations not specifically covered in this Agreement, as set forth in GPA's Marine Terminal Operator Schedule No. 5-A . . . together with all changes and revisions thereto issued in the future (the "MTO Schedule")**. Gateway acknowledges the inclusion of such rates, rules and regulations in this Agreement and agrees to be bound by, and comply in all materials respects with, the requirements set forth in the applicable provisions of the MTO Schedule." CX 588 (emphasis added).

27. The Gateway-GPA Agreement further states: "this Agreement and the relationship created hereby shall not be considered to be a partnership, joint venture, or employee/employer relationship . . . . **The relationship between Gateway and GPA shall be that of a third-party service provider and marine terminal operator**." CX 589 (emphasis added).

28. Section 8(a) of the Gateway-GPA Agreement provides:

> GPA and Gateway have agreed upon certain key performance indicators ("KPIs") related to safety, vessel operations (planning and execution) and gate operations, as set forth in Exhibits B, C, and D, that will be used by the Parties to measure and evaluate Gateway's safety record and performance of the Services. . . . In the event Gateway fails to achieve one or more of the Performance Targets, or Gateway's performance of the Services fails to meet GPA's goals for safety, productivity and/or efficiency based on the KPIs, GPA shall have the right to terminate this Agreement . . . .

CX 589.

29. The Gateway-GPA Agreement describes a new GPA department, the Marine Department, formed "for the purpose of coordinating vessel stevedoring work with Gateway management and GPA personnel from other departments including . . . Yard, Intermodal, Cranes, Ship Operations and Port Police. The Marine Department will work closely with Gateway to (i) review planning and execution of vessel stevedoring operations, (ii) analyze KPIs and Performance Targets, (iii) communicate concerns among GPA, Gateway and ocean carriers, (iv) ensure safety requirements are being followed, and (v) investigate opportunities to improve all aspects of vessel and Terminal Services." CX 590.

30. Section 9 of the Gateway-GPA Agreement requires Gateway "to adopt and utilize any and all information technology systems developed by, or on behalf of, GPA related to the Services" and requires Gateway "to utilize GPA's terminal operating system ("TOS") in the performance of the Services . . . ." CX 590.

31. Exhibit B ¶ 5(a) of the Gateway-GPA Agreement states: "GPA is a marine terminal operator with deep water facilities handling international cargo . . . . The Terminal contains 'Restricted Areas' . . . and access control requirements are enforced by GPA.

The Terminal property is a 'Restricted Area' requiring all entry to comply with GPA's Facility Security Plan" and "Gateway agrees" to "comply with GPA's Facility Security Plan, to the extent the Facility Security Plan, or any part thereof, is made known to Gateway." CX 609-610. Paragraph 5(c) states "In addition to the terminal security surcharge described in the MTO Schedule, GPA reserves the right to recover security expenses by way of assessment, if any, applied to all users of GPA's Terminal facilities." CX 610. Paragraph 5(d) states "Gateway agrees to immediately notify GPA's Port Police Department of any breach of security and/or transportation security incident." CX 610.

32. The Gateway-GPA Agreement specifies:

> All rates applicable to the Services are set forth in Exhibit A . . . . Gateway agrees to comply with all safety rules and requirements related to the Services, as set forth in Exhibit B . . . . Gateway agrees to perform vessel Services in accordance with the terms and conditions set forth in Exhibit C, and gate Services in accordance with the terms and conditions set forth in Exhibit D . . . .

CX 589.

33. Pursuant to Exhibit A of the Gateway-GPA Agreement, Gateway is authorized to "invoice ocean carriers for vessel stevedoring services based on rates negotiated and agreed upon between Gateway and the applicable ocean carrier" and to "invoice ocean carriers for gate services based on rates negotiated and agreed upon between Gateway and the applicable ocean carrier." Further, "Gateway agrees the rates, terms and conditions offered to ocean carriers for the Services shall be competitive with those offered to ocean carriers at the Terminal immediately prior to the Effective Date of this Agreement." CX 606, Ex. A ¶¶ 1-2, 4.

34. The Gateway-GPA Agreement also makes explicit that "GPA's regulatory role shall include reviewing whether Terminal users are being offered commercially reasonable rates for purposes of GPA and its Terminals for comparable services to those offered to ocean carriers at GPA's Terminals immediately prior to Effective Date of this Agreement." CX 606, Ex. A ¶ 4. To effect this "Gateway shall direct each of its members to provide GPA with their rate schedule(s) for the two (2) years prior to the Effective Date, applicable to vessel and gate services, so that GPA may compare previous rates to the new rates . . . proposed by Gateway as of the Effective Date of this Agreement." CX 606, Ex. A ¶ 4. The agreement further provides:

> In the event GPA concludes Gateway is not offering commercially reasonable rates for services provided at the Terminal on the Effective Date, Gateway agrees it will amend its rates as necessary to satisfy GPA's regulatory concerns. Gateway's failure to amend its rates as directed by GPA pursuant to the immediately preceding sentence, shall be deemed a material breach of this Agreement.

CX 606, Ex. A ¶ 4.

35. In addition, the contract provides:

> Being the exclusive provider of vessel stevedoring services on the Terminals, Gateway agrees to provide to GPA, on a quarterly basis its unaudited financial statements and on an annual basis, its audited financial statements . . . specific to its operations on the Terminals, and a schedule of rates for the Services provided at the Terminals. On an annual basis, Gateway shall provide GPA with its contracts with the ocean carriers that are applicable to GPA.

CX 606-607, Ex. A ¶ 6.

36. Gateway agrees "to apply an annual rate increase for the Services to be effective each October 1st" and to be calculated as provided in Exhibit A. Any "further rate increase . . . shall require the express written consent of GPA." For example, Gateway may "request to adjust its rates to recover costs incurred through unforeseen circumstances, such as a pandemic," provided that once the circumstances have passed, the adjusted rates must return to the rates in effect at the outset of the circumstances necessitating the adjustment. CX 606-607, Ex. A ¶ 6.

37. Exhibit C of the Gateway-GPA Agreement states that:

> GPA shall designate a certain amount of space near each berth for the purpose of storing equipment used by Gateway to provide vessel Services . . . . The size and location of the Storage Area shall be determined by GPA, after having received comments from Gateway regarding the location, size and condition of the proposed area. Except for the equipment being stored in the Storage Area, Gateway shall remove all other equipment, tools and personal property from the Terminal daily. . . .
>
> Gateway shall remove all containers and breakbulk cargo from the dock facilities at the Terminal prior to the earlier of the arrival of a new vessel at berth, or the end of the day. If Gateway is unable to remove breakbulk cargo from the dock as a result of any cause, condition or event which is beyond the reasonable control of Gateway, then Gateway shall promptly notify GPA of the reason therefor, and following receipt of such notice, GPA shall work with Gateway to remove the breakbulk cargo from the dock as soon as practicable.

CX 615, Ex. C ¶ 3(a)-(b).

38. Exhibit D of the Gateway-GPA Agreement states that:

> GPA owners certain real and personal properties, including . . . work booths, printers, computers, operating systems and other equipment at each gate located on Terminal. GPA grants permission to Gateway to utilize such facilities in the provision of gate services by recording (i) all transfers of equipment, meaning containers and chassis, entering or

> leaving the Terminal by rail or motor carrier, and (ii) the condition of the equipment during each interchange."

CX 623, Ex. D ¶ 3; *see also* CX 459-460 (Gateway's 2014 Operating Agreement stating that GPA owns Gate Interchange Facilities at Garden City Terminal and Ocean Terminal and that Gateway would utilize those facilities to "produce all Equipment Interchange Receipt and Trailer Interchange Receipt records," where "the EIR is a receipt issued by Gateway acknowledging the transfer of equipment into or out of the terminal by rail or truck.").

39. Per Exhibit D of the Gateway-GPA Agreement, the GPA sets access standards and gate hours, which Gateway is contractually obligated to enforce. CX 623. GPA also "reserves the right to change gate hours based on gate volumes or customer service expectations." CX 623. Gateway thus provides access to the terminals pursuant to GPA access instructions and validates required documentation needed to enter the terminal as determined by the GPA. CX 623-624; RX 364-367; RX 400; RX 404-405. In addition, Gateway must provide GPA with monthly reports on its gate performance, based on the KPIs set forth in the Gateway-GPA Agreement, and GPA may end the contract if specified KPIs are not met. CX 624 (KPIs for gate performance); CX 589; *see also* CX 612-613 (KPIs for safety performance); CX 616-619 (KPIs for vessel planning).

40. At the Port of Savannah, gate operations are separate from security services. GPA Police are responsible for terminal security and GPA controls who enters and exits their facility through GPA's security gates, including conducting the security Transportation Worker Identification Credential ("TWIC") access control biometric scan to allow access to the GPA terminals. Reply at 9 n.14; RX 367; RX 398; RX 405-407 (McCarthy Decl., GPA COO); *see also* CX 589; CX 610-611; CX 623.

41. Prior to an over-the-road ("OTR") truck driver arriving at GPA terminals, the trucking company's dispatcher accesses a GPA system that interfaces with the GPA Terminal TOS. The dispatcher creates a PIN for their OTR driver to deliver or receive containers. Gateway, in its gate services role, makes a determination of whether the assigned PIN matches the information in the GPA TOS. If there is an issue with the information that needs to be corrected, the driver is sent to Driver Assistance, operated by GPA, or is referred to the OTR driver's dispatcher. RX 404-405; *see also* CX 1140 ¶ 30.

42. Thus, it is the Port Authority who determines who will be admitted to the Port of Savannah in a security screening. Afterwards, contractually specified gate services are provided by Gateway, including inspecting inbound and outbound containers for compliance with regulatory requirements set by GPA, and inputting and verifying data about the container as required by GPA, with inconsistent information or problems also being managed by GPA. RX 364-365; RX 404-407; CX 623-624.

43. While containers are assessed a gate fee by Gateway, truckers and cargo owners are not charged upon arrival and departure. The fee is negotiated between Gateway and the ocean carrier and is billed to the ocean carrier on a weekly basis. CX 606 ("Gateway ***shall invoice*** ocean carriers for gate services . . . .") (emphasis added).

44. Gateway does not, and has no authority to, turn away trucks or cargo for nonpayment. RX 365; CX 623-624; CX 606; CX 586-622.

45. Gateway does not, and has no authority to, refuse entry to trucks or cargo on economic or commercial grounds. RX 365; CX 623-624; CX 606; CX 586-622.

46. Prior to its Second Amended and Restated Operating Agreement in 2021, Gateway's principal members were SSA, "MTC, d/b/a Ports America Group" and Ceres, although any qualified stevedoring company that was a new member of the Georgia Stevedore Association could join its organization. CX 459; CX 461; CX 459-473; CX 399 (SSA contributed 1/3 interest in Gateway).

C. Port of Charleston Operations

47. On April 8, 2020, the License Agreement between CSC and SCPA was signed ("CSC-SCPA License Agreement"), making CSC the exclusive stevedoring company at Wando Welch, North Charleston, and Hugh Leatherman Terminals at the Port of Charleston. CX 212; CX 219; CX 221. This agreement took effect as of May 4, 2020, and is set to terminate on December 31, 2029, if not extended. CX 213; RX 387.

48. The CSC-SCPA License Agreement uses as defined terms "Authority" (South Carolina State Ports Authority), "JV" (Charleston Stevedoring Company LLC), and "Port" (Port of Charleston). CX 212.

49. The CSC-SCPA License Agreement states that the SCPA "determined that it would be more efficient for the JV to provide Stevedore Services at the Port rather than having to transact with three stevedoring entities" taking into account factors including: (1) "recent consolidations in the shipping line industry that have created discontinuity between the three stevedoring entities and inefficiencies at the Port, (2) the larger volume of business required for three separate stevedoring entities to optimize efficiencies . . . (3) the fact that each of the three JV partners currently operates with the same workforce, (4) the inefficiencies for the Authority of working with three stevedoring entities that each have their own preferences and procedures which complicate marine terminal operations . . . (6) the duplication of administrative and backroom costs for each of the three stevedoring entities that further create inefficiencies at the Port, (7) the financial and logistical challenges currently facing the three stevedoring entities currently operating at the Port, and (8) the Authority's desire to utilize, and ensure that there is, a long-term viable stevedoring operation at the Port that would result in the most economical and efficient terminal operations[.]" CX 212.

50. Section 2 of the CSC-SCPA License Agreement provides that:

> Except as specifically stated herein, all arrangements, services, and charges between the parties and use of the Authority's facilities and terminals shall be governed by the rules, regulations, rates and terms of the Authority's then-current Terminal Tariff/Marine Terminal Operator Schedule . . . as may be amended from time-to-time ["MTOS"] . . . and the MTOS is incorporated by reference and made part of this Agreement.

> Discounted MTOS rates, services/rates not listed in MTOS, and other terms and conditions relating to provision of Stevedore Services are outlined in Schedule A attached hereto . . . .

CX 213.

51. The CSC-SCPA License Agreement states that "JV will provide Stevedore Services Directly to ocean carriers pursuant to contracts between JV and such ocean carriers" and that "JV shall be the sole provider of the Stevedore Services on the Terminal. . . . The terms and conditions set forth in Schedule A shall apply to such Stevedore Services." CX 214.

52. Section 6 of the CSC-SCPA License Agreement requires that CSC "shall fully comply with . . . all rules and regulations of the Authority, including those in the Authority's MTOS . . . ." CX 214.

53. The CSC-SCPA License Agreement states that the "parties shall not in any way or for any purpose be deemed to be or become partners, joint ventures, or agents with respect to each other by virtue of this Agreement" and that "[a]ny purported assignment of any rights or delegation of performance under this Agreement without the written consent of the Authority is null and void." CX 215; *see also* CX 214 ("The parties acknowledge and agree that neither party is an agent or representative of the other, and all employees or laborers employed by either party shall be employees of such party at all times and not of such other party.").

54. Section 18 of the CSC-SCPA License Agreement provides that the "rights and obligations set forth under this Agreement are consistent with, and in furtherance of, the Authority's purpose and powers of authority as articulated under applicable South Carolina laws, rules, and regulations, including . . . to improve harbors and seaports, and create long-range port development to maximize economic benefit to the State of South Carolina and increase water-borne commerce." CX 217.

55. Schedule A of the CSC-SCPA License Agreement details:

> JV shall have the exclusive right to perform Stevedore Services at the Authority and to participate, as today, in the Charleston Gate Company ("CGC") under mutually agreed terms with Container Maintenance Company ("CMC"). CGC will bill the JV for its services, and the current management of the CGC shall be maintained.
>
> JV shall negotiate tariff rates for Stevedore Services and CGC fees for gate services directly with the container shipping lines. JV acknowledges and agrees that rates for Stevedore Services and the Stevedore Services provided at the Authority shall be competitive and bear a reasonable relationship to accepted norms for cost and profit standards for similar services in the South Atlantic port market and will be related to productivity routinely achieved on container ships at the Port and other relevant costs at the Authority.

> The Authority and JV shall endeavor to consult with each other and, where applicable, develop guidelines and protocols for the safest, most efficient, and most competitive Stevedore Services in the South Atlantic port market . . . .
>
> The Authority will provide space as needed and agreed at its Terminals for JV equipment required for vessel operations.
>
> JV shall procure tractor and trailer equipment from current equipment providers . . . as long as cost is competitive, and quality is maintained. JV shall have the right to provide its own equipment if neither of these standards is met after due consultation with those providers.
>
> . . . .
>
> The Authority will provide access to its marine terminal operating system ("TOS") on an agreed basis and subject to procedures established between the parties. The TOS access fee for the initial 10-year term of this Agreement shall be One Dollar ($1.00) per container . . . .
>
> JV shall evaluate if the activities of the South Carolina Stevedores Association relevant to container terminal operations can be incorporated into its structure for the purposes of economic, administrative, and managerial efficiency, to allow for the provision of the most cost effective Stevedore Services. This evaluation must be conducted within 12 months of the effective date of this Agreement and a copy provided to the Authority.
>
> JV shall employ highly qualified local management with experience in vessel operations, terminal activities, and waterfront labor relations. JV local management shall not report to local management in a competing maritime port so as to avoid any competitive conflicts.
>
> JV and the Authority shall meet regularly to review the quality and results of Stevedore Services and define areas for improvement. . . .
>
> The JV may request office space from the Authority but maintains no obligation to provide such office space in its facilities unless it is feasible to do so in the Authority's sole discretion.
>
> Should the JV or any of its members own or operate, or agree to own or operate, a marine container terminal in the State of South Carolina outside of the Authority's jurisdiction, the Authority shall have the right to cancel this Agreement unilaterally with one hundred eighty (180) days' prior written notice.

CX 221-223.

56. The CSC-SCPA Master Port Facility License Agreement ("CSC-SCPA Facility Agreement") was signed on June 5, 2020. CX 198. It uses as defined terms "Ports Authority" (South Carolina State Ports Authority), "Licensee" (Charleston Stevedoring Company LLC), and "Port" (Port of Charleston). CX 180. The CSC-SCPA Facility Agreement term is five years by default, and the agreement "may be terminated by either party, for any reason or no reason at all" upon 90 days written notice to the other party. CX 182.

57. The CSC-SCPA Facility Agreement provides that "the duties of the Ports Authority include the duty to operate, develop, and improve the Port of Charleston . . . to stimulate commerce and foster the import, export and distribution of waterborne freight through the Port, from and to other ports in the United States and around the world; and . . . the Port Authority has determined that granting Licensee a license to use the Facility in order to provide stevedoring services at the Terminal necessary and useful to facilitate the handling and movement of cargo, to, from, and within the Terminal and Port in generating international waterborne commerce, upon the terms and conditions set forth in this Agreement, will enhance commerce through the Ports to the advantage of the citizens of the State of South Caroline." CX 180.

58. The CSC-SCPA Facility Agreement further provides:

> The Port Authority hereby grants to Licensee . . . a license for the use of certain land and improvements located at the Terminal [shown on] Schedule A [the "Facility"], together with a nonexclusive license to use other facilities at the Terminal, as set forth in Section 1.02 of this Agreement, for the purposes and upon the terms stated herein. . . . The parties agree that this Agreement is a license and not a lease and that no estate in real property or other interest in property is created by this Agreement. . . . [T]he Port Authority reserves the right in its sole discretion to relocate the entire Facility, or any portion of the Facility, within the Terminal or Port upon ninety (90) calendar days' prior written notice to Licensee.

CX 181.

59. Section 1.02 of the CSC-SCPA Facility Agreement states:

> Licensee may use, in common with other users of the Port, passageways between the Facility and highways and other public access to Terminal facilities, driveways and other facilities made available from time to time by the Ports Authority. The Ports Authority shall have the right to change the designated common facilities and to designate certain common facilities for the exclusive use of one or more users of the Port or Terminal so long as such activities do not impair Licensee's use of the Facility. Use of the common facilities shall be on a first-come, first-served basis, and subject to such rules and regulations as may be adopted from time to time by the Ports Authority, and subject to scheduling of the Ports Authority,

> which, in its sole discretion it deems necessary or useful for proper management of the other facilities on the Terminal and at the Port.

CX 181.

60. Section 3.02 of the CSC-SCPA Facility Agreement states:

> Except as specifically covered in this Agreement, the use of the Facility and Terminal and all matters, arrangements, services, and charges between the parties shall be governed by the rules, regulations, rates and terms of the Authority's then-current Marine Terminal Operator Schedule . . . as may be amended from time to time, or its successor ("MTOS").

CX 182.

61. The CSC-SCPA Facility Agreement provides that the "Facility shall be used and occupied by Licensee solely for providing stevedoring services at the Terminal necessary and useful to facilitate the handling and movement of cargo to, from, and within the Terminal and Port in generating international waterborne commerce . . . ." CX 183-184.

62. The CSC-SCPA Facility Agreement states that "Licensee and all Licensee's agents, employees and contractors shall fully comply with all applicable provisions of the Maritime Transportation Security Act ("the MTSA") and all applicable policies, procedures, and regulations of the Ports Authority and the Department of Homeland Security pertaining to security and operations at the Port and the Terminal." CX 184. The agreement provides as well that "Licensee shall fully comply with all rules and regulations of the Port Authority, including those in the Ports Authority's MTOS . . . ." CX 184.

63. Section 6.01(a) of the CSC-SCPA Facility Agreement states "Licensee shall, at Licensee's expense, be responsible for all maintenance and repairs of the Facility." CX 186. Section 6.02(a) of the agreement provides "Licensee shall not make any material alterations, renovations, improvements or other installations in, on or to the Facility or any part thereof (including, without limitation, any alterations of the entrance way(s) or signs, structural alterations, or any cutting or drilling into any part of the Facility or any securing of any fixture, apparatus, or equipment of any kind to any part of the Facility) . . . until Licensee . . . shall have obtained the Ports Authority's written approval thereof . . . ." CX 187. Section 6.02(c) states "All improvements and additions made by or for Licensee shall be deemed part of the Facility, shall remain at the Facility, and shall be surrendered to the Ports Authority at the expiration or earlier termination of this Agreement, unless the Ports Authority shall elect to have Licensee remove all or any portion of such alterations, additions, or improvements . . . ." CX 187.

64. The 2015 Charleston Gate Amended Operating Agreement provides:

> the Members have separately operated at the South Carolina State Port Authority . . . in their separate operations Members SSA and Ceres have each performed certain functions known as 'TIR Functions,' which

> primarily involve checking containers into and out of the Port and assigning temporary storage locations for each container; . . . these Members have each incurred substantially identical costs in performing such TIR Functions; . . . these Members compete for the overall business of customers at the Port, but do not compete simply for a customer's TIR Functions; . . . the Members have previously formed this [company] known as Charleston Gate, L.L.C. for the purpose of hiring and managing labor to perform the TIR Functions at the Port . . . . As the purpose of the Company is to hire and manage labor to perform the TIR functions at the Port, and these TIR functions primarily involve checking containers into and out of the Port and assigning temporary storage locations for each container, as well as inspecting and making necessary repairs to containers, the powers and duties of the Members shall be limited to those powers and duties necessary to accomplish this purpose.

RX 273-275.

65. Charleston Gate Company's gate services consist primarily of performing equipment interchange functions. In this role, Charleston Gate Company follows the interchange transaction guidelines issued by SCPA, including to provide documentation to the truck driver and to update SCPA's TOS. RX 377; *see also* Britt Decl. at 5 (filed June 13, 2023 and accepted into evidence by June 20, 2023, Order).

66. Prior to an over-the-road ("OTR") truck driver arriving at SCPA terminals, the trucking company's dispatcher accesses a SCPA system that interfaces with the SCPA TOS. The dispatcher creates a PIN for their OTR driver to deliver or receive containers. Charleston Gate makes a determination of whether the assigned PIN matches the information in the SCPA TOS. Britt Decl. at 8.

67. Charleston Gate Company invoices CSC for the equipment interchange services, and CSC in turn invoices those who receive the equipment interchange services. Britt Decl. at 5.

68. Specifically, CSC charges a gate fee per vessel throughput for gate services. These fees are set forth in CSC's negotiated rate sheets with carriers and are billed to carriers directly. RX 374 (Haigler Decl., CSC VP).

69. As a sample, a rate sheet between CSC and Hapag Lloyd, effective October 1, 2020 to September 30, 2021 specified: "Payment terms are 30 days from date of invoice. Any payment not received within thirty (30) days of receipt of the invoice shall accrue penalty and interest charges from the thirty first (31st) day at the rate of two percent (1.0%) [sic] per month, which will apply to any outstanding balance." CX 254.

70. Prior to CSC, SCPA charged customers directly for gate services. RX 374.

71. At the Port of Charleston, gate services are separate from security services. Screening of persons and vehicles arriving at the terminal is performed by port police at a SCPA

security gate at the terminal entrance. Reply at 9 n.14; RX 377. If granted access by SCPA, Charleston Gate Company afterwards provides contracted gate services. RX 377.

72. CSC does not, and has no authority to, turn away trucks or cargo for nonpayment. RX 377; CX 221-223; CX 212-220.

73. CSC also does not, and has no authority to, refuse entry to trucks or cargo on economic or commercial grounds. RX 377; CX 221-223; CX 212-220.

D. 2019 FMC Submission

74. In 2019, SSA, Ceres, and Ports America Florida ("2019 Parties") sought to establish a joint venture, which would serve as the exclusive vessel stevedoring provider across the Port of Charleston and the Port of Savannah. CX 1103.

75. The 2019 Parties filed their proposed agreement with the Commission in March 2019 ("2019 FMC Submission"). CX 1100. The agreement, titled "Georgia - South Carolina Marine Terminal Operator Cooperative Working Agreement" proposed the formation of a new entity, NEWCO, "to provide container marine terminal services and stevedoring in the ports of Savannah, Georgia and Charleston, South Carolina." CX 1103. NEWCO was to be owned in equal one-third shares by Ceres, SSA, and PAF. RX 117.

76. On April 2, 2019, the Commission acknowledged the submission, designating this proposal as FMC Agreement No. 201293. RX 111.

77. In their 2019 FMC Submission, the parties, SSA, Ceres, and Ports America Florida, indicated that they were marine terminal operators and that NEWCO would operate as a marine terminal operator in the Ports of Savannah and Charleston. CX 1103-1104.

78. The 2019 FMC Submission specified:

> 4.2 NEWCO shall provide marine terminal services and conduct container stevedoring, terminal, container freight station, and activities incidental thereto, at the Ports. Specifically, the Parties agree that, during the term of this Agreement, NEWCO will assume responsibility for providing those facilities and services currently provided by the Parties in their individual capacity in the Ports, including marine terminal gate operations and vessel loading and unloading operations, and the operation of equipment and technology related thereto.
>
> 4.3 NEWCO and the Parties expect to enter into long-term license agreements with each of the Ports for the use of facilities in those Ports. Such agreements will detail the services to be provided by NEWCO . . . (e.g., marine terminal gate and vessel loading and unloading operations) and those facilities and services which currently are, and will remain, under the control of the Ports (e.g., operation and manning of cranes and container yard areas) . . . .

CX 1104.

79. SCPA submitted comments in support of proposed FMC Agreement No. 201293, noting "Each of the partners has consistently expressed concerns to us over the long-term viability of their stevedoring operations in terms of both profitability and growth potential . . . .The ocean container carrier industry has consolidated from over 20 carriers to less than 10 in the last few years . . . . [W]e believe that a JV stevedoring company in Charleston is a logical and compelling response to overall container industry consolidation and fully support its establishment." RX 113-114.

80. SCPA noted among the benefits of the proposed joint venture the: "Reduction in overhead from the consolidation of fragmented and less efficient companies; Enhancement of the interface between terminal operations and the stevedoring operations through a common and consistent approach to such operations and utilization of a common system; More predictability in volumes leading to a more capable and effective organization; . . . . [and] Enhanced integration with Charleston Gate Co. LLC, a joint venture between the stevedores and Container Maintenance Corp to run our gate complex. In future, the stevedore JV will incorporate the gate company in its overall cost structure for invoicing to the lines." RX 114.

81. On May 9, 2019, the Commission issued a Request for Additional Information. RX 132.

82. The 2019 Parties provided an Initial Joint Response to Request for Additional Information on June 22, 2019. RX 155; RX 116-130. The response included the following questions and answers:

> 8- *Although the Parties' responses to staff's preliminary questions*
>
> *Savannah own and control much of the terminal infrastructure, the Parties assert that their activities are within the Commission's jurisdiction. Please explain in detail how each Party meets the definition of a "marine terminal operator" at each of the ports, specifically how each Party provides "wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier" at each port . . .*
>
> The parties qualify as marine terminal operators in the ports . . . because of their operational control and staffing of key terminal infrastructure (i.e., the terminal gates), their control over access to the terminal facilities, their provision of essential services (including checking, recognized by the Commission to be a marine terminal service, as well as yard planning and stevedoring), and their assessment and collection of gate fees.
>
> . . . .
>
> 9. *Is it the Parties' position that each Party's current activities at the Ports of Charleston and Savannah are subject to the Commission's jurisdiction and the relevant requirements and prohibitions applicable to*

marine terminal operators under the Shipping Act and the Commission's regulations? Please explain why or why not.

. . . [I]t is our position that the Parties are marine terminal operators in the Ports currently, and will continue to be MTOs going forward after the agreement takes effect. While there may be some uncertainty arising from a prior agreement filing submitted by the parties in 1998, we do not view the opaque disposition of that agreement to be controlling in this case.

In 1998, the Parties took the position that their operations, and particularly their joint control of gate operations, were subject to the Commission's jurisdiction. Accordingly, the Parties filed Agreement No. 201067, *Gateway Terminals, LLC*, which covered the establishment of the Savannah gate company. However, at that time a determination apparently was made at the Commission that the agreement was not subject to the Shipping Act. There appears to be no formal decision or other final agency action setting out the reasons for this jurisdictional determination. Accordingly, we continue to believe that, if the issue were to be fully adjudicated, the Parties' operations would be found to be within the Shipping Act's scope.

---

15. *How will NEWCO reduce operational inefficiencies, yard congestion, and vessel delays at the ports of Savannah and Charleston if the Agreement were to go into effect?*

Having multiple stevedores operating in the same facility inevitably introduces inefficiencies and disruption. The formation of NEWCO will enable the three constituent companies to standardize processes around best practices and leverage a single technology platform for the combined operations. . . .

19. *Do either the Georgia Ports Authority of the South Carolina Ports Authority currently have any oversight on rate setting for gate or stevedoring services at their facilities? If so, please describe.*

Rate setting for stevedoring services currently is performed by the Parties, independent of SCPA and GPA oversight. Similarly rates for gate services or TIR in Savannah are set by Parties, independent of GPA. In contrast, in Charleston, currently SCPA determines the rates for gates services or TIR in Charleston.

It is expected that NEWCO will establish gate rates for each port in the future, with input from each of the port authorities; however, agreements with the port authorities have not been finalized or adopted yet.

Carrier billing is performed by Parties for stevedoring and gate services in Savannah, with stevedoring billed by Parties and gate services billed by SCPA in Charleston. It is planned that NEWCO would perform both services (stevedoring

and gate services) in both locations, producing billing for both stevedoring and gate in Charleston and Savannah, although no formal agreements with the ports have been adopted to date.

. . . .

30. *Please identify any other U.S. ports in which any of the Parties provide stevedoring and/or gate services, and where another party operates the marine operator in these instances.*

Container Terminals	Stevedore	Gate Operator	Marine Terminal Operator
Charleston, SC	Ceres, Ports America, SSA	CHS Gate	Port Authority
. . .			
Savannah, GA	Ceres, Ports America, SSA	Gateway	Port Authority

. . . .

The role of the Parties in ports such as Savannah and Charleston, where the Parties control the gates, is significantly different from their role in ports where they have no control over gate operations (and therefore act solely as stevedores) such as Norfolk and Houston. In Norfolk and Houston, the Parties' role is to load and unload containers between the vessel and the point of rest. In contrast, in Savannah and Charleston, the Parties exercise control over access to the terminal itself, as well as playing a significant role in yard planning and moving cargo within the facility. This more expansive role requires closer cooperation with the port authority, and allows for more efficient and integrated gate/yard/vessel operations.

RX 119-130 (formatting in original).

83. The Commission's then-General Counsel Tyler Wood issued an opinion letter on August 6, 2019 ("Opinion Letter"), stating "It is the opinion of OGC that, based on the materials provided, the Parties to the agreement do not appear to be MTOs as defined by the Shipping Act of 1984, and that this agreement therefore falls outside of the Commission's jurisdiction. This opinion is that of OGC alone and is nonbinding on the Commission." RX 157.

84. The Opinion Letter reasoned:

> The Shipping Act, the Commission's regulations, and the Plaquemines case make clear that an entity must have some level of control over physical terminal assets in order to meet the MTO definition; performing services alone is insufficient. . . . [T]he fact that the Parties perform services at the Ports, including services defined in Commission regulations as "marine terminal services," is not enough to establish that they are MTOs under the Act.
>
> In this case, it appears that the Parties do not exercise sufficient "control" over any terminal facilities to render them MTOs under the Shipping Act at either Port. Their primary activities consist of stevedoring services provided to the carriers, and, as noted by the Parties, the Commission does not consider stevedores to be MTOs under the Act. See Final Rule: Exemption of Certain Marine Terminal Arrangements, 57 Fed. Reg. 4578, 4581 n.16 (Feb. 6, 1992) ("The Commission does not assert or claim jurisdiction over stevedoring activities."). And none of the other services listed by the Parties involve the exercise of control over terminal facilities. Although some of the services described are performed at the gates, which might be considered terminal facilities, the Parties' description indicates that the Ports own the gates, and the Gate Companies merely perform services at those locations (e.g., inspecting cargo, providing directions to truckers). In other words, it does not appear that the services provided by the Gate Companies are directly connected to the use of terminal facilities, akin to providing wharfage, dockage, or warehousing. . . . Additionally, nothing in the information provided by the Parties suggests that they have the ability, like the port authority in *Plaquemines*, to condition access to the gates or the terminals on payment of fees for their services.[3]
>
> For the foregoing reasons, it is the opinion of OGC that the parties to the Georgia - South Carolina MTO Cooperative Working Agreement do not appear to be MTOs under the Act at the Ports and, therefore, the Agreement is not subject to the Commission's jurisdiction. . . .
>
> n3. The parties assert that they "control access to the terminal," but this appears to refer to the mere fact that truck traffic must pass through the gates to enter the terminal.

RX 160-161.

85. The 2019 Parties elected not to appeal the letter and, instead, formally withdrew the proposed agreement from the Commission's consideration by letter to the General Counsel dated September 9, 2019. RX 163. The 2019 Parties then changed course, and NEWCO was not formed. Instead, separate port-specific JVs were formed at the Port of Savannah and the Port of Charleston, as detailed above. *See, e.g.*, FOF 4-6, 10-12.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Status of Ports America Florida

Respondents assert, regarding Ports America Florida, that it operates only in ports in Florida, and not in the terminals at issue in this case. Opposition at 13. ILA acknowledges that:

> Ports America Florida, Inc. was named as a respondent in this case because the publicly disclosed proposed joint venture agreement (Agreement 2011293) included that entity as a contracting party. Discovery has revealed, however, that another Ports America affiliate has been a marine terminal operator in the Ports for years and is currently the contracting party in the joint ventures as actually implemented. Regardless, this brief will show that all the contracting parties were marine terminal operators in the Ports at all relevant times before and after the joint venture. This brief will use the term "Ports America" to include the Ports America affiliate operating in Savannah and Charleston.

Brief at 1 n.1 (citation omitted).

This decision only addresses the parties named in the complaint. ILA could have amended its filing and added the correct entity. Further, ILA was on notice since at least May 9, 2022, that Ports America Florida was not operating at the ports at issue in this proceeding. Respondents' Motion to Dismiss at 3-4 (May 9, 2022). However, given the facts already developed and the outcome, it is unlikely that naming a different Ports America entity would have changed the outcome.

2. Discovery Issues

ILA asserts that Respondents have refused to provide necessary discovery; and that it has received no documents from Ports America Florida. Brief at 3-8; Reply at 18-23. Respondents contend they have complied with their jurisdictional discovery obligations. Opposition at 27-37.

Regarding PAF, as already discussed, ILA is aware that "another Ports America affiliate" – not Ports America Florida – "is currently the contracting party in the joint ventures as actually implemented." Brief at 1 n.1. Further, ILA was specifically allowed, and has received, discovery "limited to how the subject terminals operate at the two ports in question." *See* Bifurcation Order at 4. The evidence generated has been both appropriate and sufficient to resolving the jurisdictional question at issue here. No detrimental impact on the proceedings or on ILA has been shown. As noted earlier in this proceeding, the reason for addressing jurisdiction ahead of the merits was to avoid unnecessary discovery in the event that no jurisdiction was found. That has turned out to be the case.

3. Burden of Proof

ILA asserts that in cases such as this one, where jurisdiction is being decided based on affidavits and discovery material without holding an evidentiary oral hearing, the ILA has the

burden of making out a *prima facie* showing of personal jurisdiction over Respondents; and conflicts between the facts contained in the parties' affidavits must therefore be resolved in the ILA's favor. Brief at 8. Respondents contend that ILA must prove its case by a preponderance of the evidence; this case is not pending before the Presiding Officer on a motion to dismiss; and that nothing in the Commission's rules or precedent requires an evidentiary hearing to decide a contested question of jurisdiction. Opposition at 4-5.

It is well established that to prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

The bifurcation order did not raise the question of jurisdiction in the context of a motion to dismiss. As was stated in the Bifurcation Order:

> I am mindful that Complainant has the burden to prove that the Commission has jurisdiction, and as noted by Judge Wirth and the undersigned, such a determination would be clearer after discovery. Consequently, Complainant should be allowed discovery on that issue, and a scheduling order that allows for limited discovery on the jurisdictional issue, followed by briefing on that issue alone, will be helpful in determining whether the Commission has jurisdiction based on facts, rather than assertions alone.

Bifurcation Order at 3. ILA was therefore allowed discovery "limited to how the subject terminals operate at the two ports in question." Bifurcation Order at 4. The Order also stated: "even if only one of the named Respondents is demonstrated by the jurisdictional discovery to be an MTO, the case will proceed to discovery on the merits and the parties will be given an opportunity to submit briefs limited to the Shipping Act violations alleged to have occurred." Bifurcation Order at 4.

Commission Rules make explicit that for private party complaints, the "Presiding Officer will determine whether an oral hearing is necessary." 46 CFR § 502.62(a)(5). Here, the undersigned judge determined that an oral hearing was not necessary. ILA must prove its case by a preponderance of the evidence in order to prevail.

B. Legal Standard for Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant

to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 999, 2006 WL 2007808, at *11 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000).

ILA alleges violations of the Shipping Act by Respondents, which it asserts to be marine terminal operators. The Shipping Act makes clear that the Commission has jurisdiction over marine terminal operators. 46 U.S.C. § 41106 ("A marine terminal operator may not . . . ."); 46 U.S.C. § 41102(c) ("A common carrier, marine terminal operator, or ocean transportation intermediary may not . . . ."). The question to be resolved, therefore, is whether ILA has established that at least one of Respondents is a marine terminal operator such that FMC has jurisdiction over this proceeding.

The Shipping Act defines a marine terminal operator ("MTO") as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. § 40102(15); *see also* 46 C.F.R. § 525.1(c)(13). The Shipping Act does not define "terminal facilities," however the term is defined in Commission regulations as:

> [O]ne or more structures comprising a terminal unit, which include, but are not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage spaces, cold storage plants, cranes, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and ocean common carriers or between two ocean common carriers.

46 C.F.R. § 525.1(c)(18).[2]

The Commission examines an entity's MTO status based on the specific facility at issue in the dispute. *Auction Block Co. v. City of Homer*, Docket No. 12-03, 2014 WL 5316337, at *5 (FMC Aug. 12, 2014) (aff'd sub nom. *Auction Block v. FMC*, 606 Fed. Appx. 347 (9th Cir. 2015) (affirming the Commission's interpretation of the definition of 'marine terminal operator' as calling for a facility-specific analysis); *see also Puerto Rico Ports Auth. v. FMC*, 919 F.2d 799, 802-03 (1st Cir. 1990) ("[w]hile PRPA may furnish terminal facilities at San Juan and Mayaguez, the Commission properly did not base its jurisdiction on those activities.").

What constitutes a marine terminal operator was discussed in a series of cases involving harbor fees at Plaquemines Port in Louisiana. The issue was whether Plaquemines Port, which neither owned nor operated the port's marine terminal facilities, was nevertheless a marine

[2] The term "*Marine* terminal facilities" is also defined in Commission regulations, but in part 535 - Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984. This decision does not evaluate the propriety of an agreement under the Shipping Act. Rather, at issue is whether Respondents are marine terminal operators. Therefore, the definition at 46 C.F.R. § 525.1(c)(18) is the more relevant definition.

terminal operator. *Louis Dreyfus Corp. v. Plaquemines Port Harbor & Terminal Dist.*, Docket No. 79-45, 25 F.M.C. 73, 21 S.R.R. 219 (ALJ Nov. 17, 1981) ("*Plaquemines - ALJ*"). Key facts included that Plaquemines Port had administrative authority and control over the private wharves and terminal facilities as a function of Louisiana Law, and Plaquemines Port used this authority to assess fees covering such items as police, fire, and ambulance services. *Plaquemines - ALJ*, 25 F.M.C. at 85, 124, 126. Plaquemines Port had superimposed its tariff fees upon the charges (both contract and tariff) of the private terminal facilities located in the Port. *Plaquemines - ALJ*, 25 F.M.C. at 134. Plaquemines Port had also written explicit rules providing it with authority to deny entrance to entities who did not pay Plaquemines Port's tariffs. *Plaquemines - ALJ*, 25 F.M.C. at 96 (for example, Item 130, "Penalties for Violation" of the tariff provided: "It shall be unlawful for any person, firm, or corporation to utilize or make use of the Plaquemines Port, Harbor and Terminal District or any of its facilities without paying to the District the proper toll, charge or fee therefore as fixed and specified in this tariff . . . .").

The ALJ found Plaquemines Port to be a marine terminal operator, and subject to the Commission's jurisdiction, explaining: "***Plaquemines Port conditions the use of these private terminal facilities upon the payment to Plaquemines Port of its harbor fee and supplemental harbor fee. If these fees are not paid, Plaquemines Port will bar, or attempt to bar, the use of these private facilities to the shipping public***" adding that in "so conditioning the use of these private facilities, Plaquemines Port controls their use, and control is the key factor." *Plaquemines - ALJ*, 25 F.M.C. at 134 (emphasis added).

The Commission affirmed the ALJ's finding of jurisdiction over Plaquemines Port, similarly highlighting the extent of Plaquemines Port's control over terminal facilities:

> ***[I]t is the control of terminal rates and practices which constitutes 'furnishing' terminal facilities and confers Commission jurisdiction***. Conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects ***significant threshold control*** over terminal facilities. . . .
>
> The combination of the Port's exclusive ability to furnish such terminal services, its assessment of selective transfer cargo fees and its control of access to the private facilities results in ***fundamental control*** over the rates and practices of terminal facilities.

Louis Dreyfus Corp. v. Plaquemines Port Harbor & Terminal Dist., Docket No. 79-45, 25 F.M.C. 59, 66-67, 21 S.R.R. 1072, 1080 (FMC July 30, 1982) ("*Plaquemines - FMC*") (footnotes omitted; emphases added). In a subsequent case concerning Plaquemines Port, the Commission reaffirmed its finding of jurisdiction, stating:

> To reiterate those findings, the Port is a 'marine terminal operator' subject to the 1984 Act, because its exclusive ability to provide essential health, safety and security services to vessels and cargo interests in commercial cargo handling transactions, its assessment of selective cargo transfer fees, and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Further, the Port's practice of assessing, on the basis of cargo transactions, a fee for providing to vessels and cargo essential

> health, safety and security services constitutes the furnishing of 'other terminal facilities' within the meaning of the 1984 Act.

New Orleans Steamship Assoc. v. Plaquemines Port, Harbor & Terminal Dist., Docket No. 83-2, 1986 WL 170020, at *5 (FMC Sept. 16, 1986) ("*Plaquemines II - FMC*"). The DC Circuit concurred with the Commission, stating:

> Since the Port assessed a fee for its essential services ancillary to the facilities and ***conditioned access to the private facilities within its jurisdiction upon payment of that fee***, the FMC found a 'furnishing' of the facilities. . . .
>
> We agree with the FMC that the Port's combination of offering essential services and controlling access to the private facilities amounts to the furnishing of terminal facilities.

Plaquemines Port, Harbor & Terminal Dist. v. FMC, 838 F.2d 536, 543 (D.C. Cir. 1988) ("*Plaquemines II - DC Cir.*") The DC Circuit also explained: "The DOJ argues that upholding FMC jurisdiction over the Port could result in the FMC controlling the fire and emergency services of every waterside city in America. This argument is overstated. Waterside cities will not automatically or accidentally fall into FMC jurisdiction. Only if such ports begin to charge a fee for their services ***and to control access to private facilities to enforce their charges*** will today's decision bring them within the jurisdiction of the FMC." *Plaquemines II - DC Cir.*, 838 F.2d at 543 (footnote omitted).

The Commission considered and found marine terminal operator status to be present as well in *Petchem v. Canaveral Port Authority*, where the Canaveral Port Authority had denied a tug operator's application for a non-exclusive franchise. Docket No. 84-28, 1986 WL 170038 (FMC Mar. 28, 1986) (aff'd sub nom. *Petchem v. FMC*, 853 F.2d 958 (D.C. Cir 1988)).[3] The complainant in that case argued that the Port Authority's denial of its application for a non-exclusive franchise to provide commercial tug and towing services at Port Canaveral was an unreasonable practice violating the Shipping Act. *Petchem*, 1986 WL 170038, at *1. In *Petchem*, the Commission first looked at whether the respondent, Canaveral Port Authority, was a marine terminal operator, and found that it was. However, this status was ***not*** based on a "furnishing of terminal facilities." Rather, the Commission found marine terminal operator status based on Canaveral Port Authority's service of common carriers offering cruise transportation to passengers. *Petchem*, 1986 WL 170038, at *4. Having determined that the Port Authority was an MTO, the Commission ***then*** evaluated whether the activities in question amounted to the "furnishing of terminal facilities" for purposes of establishing subject matter jurisdiction. The Commission explained "our jurisdiction over Petchem's complaint ultimately must rest on findings that the Port Authority's control over tug services through its franchise system represented furnishing of 'terminal facilities,' and that such furnishing was in connection with common carrier service at the Port." *Petchem*, 1986 WL 170038, at *6 (adding that the "Port Authority's exclusive franchise system for tug operations extends the Port's furnishing of

terminal operations from the pier onto the waters of the harbor." *Petchem*, 1986 WL 170038, at *12).

The First Circuit subsequently addressed related questions of MTO status in *Puerto Rico Ports Authority ("PRPA")*, evaluating the status of the Puerto Rico Ports Authority, which had assessed certain harbor fees against vessels.[4] *Puerto Rico Ports Auth. v. FMC*, 919 F.2d 799, 802-03 (1st Cir. 1990). The First Circuit reached a different conclusion, however, holding that PRPA was not an MTO and had not subjected itself to the jurisdiction of the Commission, through the imposition of a harbor service fee at the Port of Ponce. *Puerto Rico Ports Auth.*, 919 F.2d at 802-03. The Court reasoned that, "[t]o support the exercise of Commission jurisdiction, it must be determined initially that the one providing the service is a marine terminal operator – in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier," emphasizing that "PRPA, under any plausible interpretation, is not in the 'business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier' at the Port of Ponce" where "PRPA's sole function at Ponce is to provide such general harbor services as law enforcement, radio communications, harbor cleaning, and port captain services."

The First Circuit also asserted that its decision did not conflict with the DC Circuit's *Plaquemines* decision, because *Puerto Rico Ports Auth.* was distinguished on a factual basis, stating:

> We believe that the Commission's reliance on *Plaquemines II* in the instant case is misplaced. The ***Port in Plaquemines II had complete control over the private terminals***, including the amount of fee the terminals charged. The Commission found that Plaquemines Port administered and controlled all privately owned docks and wharves within its geographical jurisdiction. The Port had ***complete control over the fees and charges levied by the owners of private terminal facilities***. Through its ***plenary control over the private terminal facilities, the Port became a de facto terminal operator***. . . .
>
> Since we conclude that PRPA did not exercise the type of plenary control over Ponce terminal facilities that the Port exercised over private terminal facilities in *Plaquemines II*, we need not consider the mode of statutory analysis employed by the Commission and the District of Columbia Court of Appeals.

919 F.2d at 806 (emphases added). In more recent reflections on *Plaquemines*, the Commission has emphasized the criticality of the relevant entity actually exercising control, stating: "An essential element in *Plaquemines* was that Plaquemines Port had ***actually exercised control*** by implementing a tariff rule that effectively denied access to private facilities as a consequence of non-payment." *Lake Charles Harbor and Terminal Dist. v. West Cameron Port, Harbor &*

Terminal Dist., Docket No. 06-02, 2007 WL 2468431, at *5-6 (FMC Aug. 2, 2007) (emphasis added) (and concluding that "unlike the situation in Plaquemines, it has not been shown that [West Cameron Port] is offering essential services and controlling access to private facilities through the enforcement of fees." 2007 WL 2468431, at *6).

Therefore, in this proceeding, to establish marine terminal operator status at a particular port, via a "furnishing of terminal facilities," two factors are considered: (1) does the entity offer essential services; and (2) control, including (a) whether the entity controls access to private facilities to enforce its charges and (b) whether the entity exerts significant control.

In addition, because the Commission examines an entity's MTO status based on the specific facility at issue, Respondents' MTO status will be assessed by considering activities at the specific facilities where they are alleged to have breached the Shipping Act. *Auction Block*, 2014 WL 5316337, at *5. Therefore, consideration of MTO status at the Port of Savannah will be based on activities at Garden City Terminal and South Terminal, and consideration of MTO status at the Port of Charleston will be based on activities at Wando, North Charleston, and Leatherman Terminals.

C. Parties' Arguments

ILA asserts that as the exclusive provider of stevedoring and checking services, Respondents can condition access to the terminals based on payment of their fees; Respondents can condition access to the terminals because of their control over the gates; Respondents operate terminal facilities in Charleston and Savannah; and Respondents jointly control the terminal facilities in Charleston and Savannah with the port authorities. Brief at 9-27; *see also* Reply at 6-18. ILA generally argues that Respondents should be found to be marine terminal operators based on *Plaquemines*, but also points to *Petchem* contending that Respondents' provision of exclusive services constitutes the furnishing of terminal services, providing the Commission with jurisdiction. *See, e.g.*, Brief at 11-12; Reply at 7.

Respondents assert that the Shipping Act's definition of marine terminal operator is narrow; the control theory of terminal jurisdiction is inapplicable here; the General Counsel correctly applied the relevant precedent; and each of PAF, SSA, Ceres, Gateway, and CSC is not a marine terminal operator in either the Port of Charleston or the Port of Savannah. Opposition at 5-27.

D. Analysis

First, the combination of Respondents' stevedoring and gate services will be considered to evaluate whether such activities establish personal jurisdiction under the control theory as applied in *Plaquemines* and subsequent cases. In particular, Gateway's activities will be discussed at the Port of Savannah, and CSC's activities will be discussed at the Port of Charleston. Because neither of these entities' activities are found to meet the threshold needed for personal jurisdiction, there is no need to discuss in depth the activities of Ceres, SSA, and Ports America Florida, since their activities at the relevant ports are less significant (or in the case of PAF, non-existent) and display yet far less control, as demonstrated in the findings of fact. Second, ILA's argument that Gateway and CSC's provision of exclusive stevedoring

confers jurisdiction will be addressed. Finally, ILA's allegations that individual Respondents operate terminal facilities via warehousing or otherwise will be addressed.

As a foundational point, both parties cite to documents regarding the 2019 proposed MTO agreement, which was submitted to the Commission, but then ultimately withdrawn after the general counsel's determination that parties to the proposed agreement did not appear to be MTOs. FOF 75, 83-85. As was stated in multiple earlier orders, that outcome is not determinative of the outcome here. June 23, 2022, Order at 3; Bifurcation Order at 2-4. Assertions made in 2019, that parties to the submission believed themselves to be marine terminal operators does not dispose of the issue. Neither does the general counsel's determination that the parties were not MTOs resolve this question, both because the precise agreement under review was never put into effect, and because, as the letter indicated, the opinion was that of the general counsel and not binding on the Commission. The general counsel's analysis did, however, highlight key factors, which will be freshly evaluated here in light of the facts now developed in the record, including the overall level of control exhibited by Respondents and whether Respondents condition access to the terminals based on payment of fees for their services.

As explained below, to the extent that Respondents exercise control, they only do so to the extent permitted by the port authorities, who ultimately own and control these facilities. The port authorities are not parties, and the ILA cannot undo the agreements between the port authorities and their service provider through this Shipping Act complaint, which only names the service providers. Indeed, to the extent that ILA members believe the market would be more competitive with multiple stevedores at these ports, the decision to consolidate was made by the port authorities, not these parties. Moreover, the public port authorities provided considered justifications for those decisions. FOF 24, 49.

1. Stevedoring & Gate Services

To assess whether any of Respondents can be considered MTOs under *Plaquemines*, at the Port of Savannah or the Port of Charleston, two factors are considered: (1) do Respondents offer essential services; and (2) control, including (a) whether Respondents control access to private facilities to enforce their charges and (b) whether Respondents exert significant control.

First, looking at Gateway's activities at the Port of Savannah, there is no dispute that Gateway provides exclusive vessel stevedoring and exclusive gate services pursuant to the GPA-Gateway Agreement. FOF 23. While the agreement assures Gateway the authority to negotiate stevedoring and gate services pricing with carriers, it otherwise consistently subjects Gateway to the authority of GPA. FOF 25-39. For example, Gateway agrees to adopt and incorporate GPA's Marine Terminal Operator Schedule, other than as specified in the agreement. FOF 26. Gateway's pricing authority is also circumscribed in numerous ways, including GPA's option at the effective date of the agreement to veto any prices it deems not to be competitive, and Gateway's subsequent requirement to "amend its rates as required to satisfy GPA's regulatory concerns" or be deemed in material breach of the agreement. FOF 34. Gateway is further bound by the price increase and decrease formulas detailed in the agreement, in addition to having to provide all carrier contracts to GPA annually, plus having to provide all rate sheets quarterly. FOF 35-36. As well, Gateway is under GPA's clear authority with regard to metrics. First,

Gateway must provide to GPA monthly a long list of metrics covering KPIs for safety, vessel operations, and gate services. FOF 28, 39. The GPA-Gateway Agreement then provides that if certain KPIs are not met, GPA may cancel the contract at any time. FOF 39. It is also clear that the gate services provided by Gateway are not the equivalent of security services. FOF 40. Gateway provides access to the terminals pursuant to GPA access instructions, at hours set by GPA, and validates required documentation as determined by GPA. FOF 39, 42. Meanwhile, security services are handled by GPA's police, who ultimately determine who may enter and leave the port's terminals. FOF 40. Importantly, while Gateway invoices carriers for stevedoring and gate services, Gateway has not been shown to have any kind of authority to exclude truckers or carriers for failure to pay fees. FOF 43-45. Neither has Gateway been shown to have so acted, in the absence of such authority. FOF 44-45. As the GPA-Gateway Agreement states clearly, no partnership, joint venture, or employee/employer relationship is created by virtue of the agreement. FOF 28. Rather, GPA is the marine terminal operator and Gateway is a third-party service provider. FOF 26, 28.

Next, looking at CSC's activities at the Port of Charleston, again there is no dispute that CSC provides exclusive vessel stevedoring pursuant to the CSC-SCPA License Agreement. FOF 51, 55. But unlike at the Port of Savannah, CSC has not also been made the exclusive provider of gate services. FOF 55, 64-65. Rather, the Charleston Gate Company continues to provide TIR services, consisting of checking containers into and out of the Port and assigning temporary storage locations for each container, while CSC's role allows it to negotiate gate services rates with carriers. FOF 55, 64-65. But here, too, the relevant agreements make clear that CSC is subject to the authority of SCPA. CSC agrees to adopt and incorporate SCPA's Marine Terminal Operator Schedule, other than as specified in the agreement. FOF 50, 60. CSC is also bound to follow all SCPA rules and regulations generally. FOF 60, 62. The agreements further make clear that SCPA decides what space CSC may use for vessel stevedoring and can change that at any time; and that SCPA owns the facilities, including the gates. FOF 58-59. CSC must also confer with SCPA in pursuit of achieving "the safest, most efficient, and most competitive" stevedore services in the South Atlantic port market. FOF 55. Also, at the Port of Charleston, there is a clear distinction between gate services and security services, the latter of which are handled by SCPA's police. FOF 71. The police perform the initial check at the security gates; afterwards, if admitted by SCPA police, Charleston Gate provides gate services. FOF 71. In addition, like Gateway at the Port of Savannah, CSC has not been shown to have any kind of authority to exclude truckers or carriers for failure to pay fees. FOF 72-73. Neither has CSC been shown to have so acted, in the absence of such authority. FOF 72-73. As the agreements further make clear, no agency, partnership, or joint venture is created between SCPA and CSC; rather SCPA is the marine terminal operator and CSC is a service provider. FOF 50, 52-53, 55.

a. Do Respondents Offer Essential Services?

Against this factual backdrop, the first question to be asked is whether Gateway and CSC offer essential services. As noted, there is no dispute that Gateway provides exclusive vessel stevedoring and exclusive gate services at the Port of Savannah and that CSC provides exclusive vessel stevedoring at the Port of Charleston. Neither offers an essential "health, safety, and security" service as was provided by Plaquemines Port. *See, e.g.*, *Plaquemines - FMC*, 1986 WL 170020, at *5 ("[T]he Port's practice of assessing . . . a fee for providing to vessels and cargo essential health, safety and security services constitutes the furnishing of 'other terminal

facilities' within the meaning of the 1984 Act.") Stevedoring (provided by CSC and Gateway) and gate services (provided by Gateway) are nevertheless arguably "essential." *See Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate Exclusive Tug Arrangements in Port Canaveral, Florida*, Docket Nos. 02-02 and 02-03, 2003 WL 21551810, at *6 (FMC July 8, 2003) ("*Canaveral Port Authority*") (where the Commission confirmed that the Canaveral Port Authority had offered "an essential service, tug and towing" in an application of *Plaquemines*).[5] This first question is therefore satisfied. The second question cannot be answered in the affirmative, however, as discussed below.

b. Control

The second factor, control, is the key factor to be assessed. *See, e.g.*, *Plaquemines - ALJ*, 25 F.M.C. at 134 (in "so conditioning the use of these private facilities, Plaquemines Port controls their use, and control is the key factor."); *Plaquemines - FMC,* 25 F.M.C. 59, 66-67 (An entity need not directly or physically provide terminal services to be deemed an 'other person' subject to the Act. . . . it is the control of terminal rates and practices which constitutes 'furnishing' terminal facilities and confers Commission jurisdiction.) Whether Respondents control access to private facilities to enforce their charges will be considered first, followed by whether Respondents exert significant control.

1. Do Respondents Control Access to Private Facilities to Enforce Their Charges?

Regarding question one, the evidence shows that neither Gateway nor CSC control access to private facilities to enforce their charges. Both Gateway and CSC have authority to "invoice," but not to exclude based on failure to pay such invoices. FOF 33, 43-45, 67, 69, 72-73. This is not akin to the situation in *Plaquemines*, where the presiding officer found that the tariff rules written and published by Plaquemines Port allowed the port to "impose civil sanctions, including the placing of vessels, owners, agents, and users of Plaquemines Port facilities on a delinquent list ***with consequent denial of further use of the Port or its facilities***" for failure to pay Plaquemines Port's tariffs. *Plaquemines - ALJ*, 25 F.M.C. at 98. Indeed, Plaquemines Port had even written into its tariff rules the possibility of criminal sanctions, such that a "failure to pay Plaquemines Port the proper toll, charge or fee for use of any facilities" could result in the person, firm, or corporation being guilty of a misdemeanor, punishable by a fine or imprisonment in the Parish jail, or both. *Plaquemines - ALJ*, 25 F.M.C. at 131; *see also Puerto Rico Ports Auth.*, 919 F.2d at 805 (1st Cir. 1990) (emphasizing that the Plaquemines Port tariff provided that any vessel failing to pay the fee would be denied "access to the Port ***and the private facilities*** within its jurisdiction.").

[5] This decision by the Commission granted a joint petition to approve a settlement and discontinue proceedings and also modified the analysis utilized to find jurisdiction over the Canaveral Port Authority. The Commission explained that upon "further consideration of the Commission's Order in Docket No. 02-02 and the ALJ's Initial Decision in Docket No. 02-03, we have realized that, while the findings of jurisdiction over CPA are correct, the analyses are unnecessarily restrictive." *Canaveral Port Authority*, 2003 WL 21551810, at *5.

By contrast, here, there has been no showing that any of Respondents have the ability or authority, or have even attempted, to control access to private facilities to enforce their charges. *See, e.g.*, CX 1140-1141 ¶¶ 29-35 (no assertions that Gateway denies entry based on failure to pay fees); CX 1127-1128 ¶¶ 27-28 (no assertions that CSC denies entry based on failure to pay fees). ILA contends, for example, that "now, in both ports, if a carrier fails to pay either CSC's or Gateway's gate fees, Respondents have the ability to deny that carrier access to the facility in order to transport its cargo on road trucks." However, ILA provides no valid support for this contention.

ILA notes in its Reply brief: "Respondents claim that the GPA and SCSPA police are generally responsible for terminal security, including who enters and exits the facility through terminal security gates. But the ILA never argued that Respondents have control over these security gates." Reply at 9 n.14. With agreement over the fact that the relevant port authorities control security, including who enters and exits the facility, all that is left pointing to Respondents' "control over access to facilities" is supposition. For example, ILA asserts: "Mr. Grimes states that the fact that carriers are billed weekly, rather than daily, for their services is somehow indicative that Gateway cannot deny access to carriers who refused to pay their fees. But of course Gateway would also be able to deny access to a carrier who does not make its weekly payments." Reply at 8 n.10. Such assertions do not carry ILA's burden here, and no other supportable proof has been referenced. Meanwhile, the GPA-Gateway Agreement takes care to describe the limits of Gateway's authority. *See, e.g.*, FOF 25-39. The CSC-SCPA Agreements likewise affirm SCPA's authority, and the requirement that CSC accede to SCPA rules and requirements. *See, e.g.*, FOF 50-55, 58-63.

2. Do Respondents Exert Significant Control?

Fundamentally, Gateway and CSC have not been shown to evidence the significant level of control required. *See, e.g.*, *Plaquemines – FMC*, 25 F.M.C. at 66-67 ("Conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects ***significant threshold control*** over terminal facilities" and the "combination of the Port's exclusive ability to furnish such terminal services, its assessment of selective transfer cargo fees and its control of access to the private facilities results in ***fundamental control*** over the rates and practices of terminal facilities") (emphases added); *see also Puerto Rico Ports Auth.*, 919 F.2d at 806 (stating that Plaquemines Port "had ***complete control*** over the fees and charges levied by the owners of private terminal facilities. Through its ***plenary control*** over the private terminal facilities, the Port became a ***de facto*** terminal operator" and concluding that "PRPA did not exercise the type of plenary control over Ponce terminal facilities that [Plaquemines] Port exercised over private terminal facilities") (emphases added). Instead, based on the facts developed, it is clear that GPA and SCPA remain in control as marine terminal operators, and that status is made evident by the agreements themselves. Gateway and CSC are granted sufficient authority to perform their designated stevedoring and gate services functions, but their authority is bounded. They have not been shown to have been provided with any authority of significance beyond that.

Certainly, Gateway and CSC's roles at the respective ports do not support a "*de facto* marine terminal operator status" for either. This is particularly the case because control needs to have been exercised. *Lake Charles Harbor*, 2007 WL 2468431, at *5 ("An essential element in

Plaquemines was that Plaquemines Port had ***actually exercised control*** by implementing a tariff rule that effectively denied access to private facilities as a consequence of non-payment." (emphasis added)). Gateway and CSC are authorized to provide services as designated in agreements with relevant port authorities, following rules and procedures established by port authorities. They must follow MTO tables, except as otherwise specified in agreements. *See, e.g.*, FOF 26, 31, 50, 52, 60, 62. GPA's control even includes the option to veto Gateway's pricing with carriers over vessel stevedoring and gate fees under certain conditions. FOF 34. SCPA, on the other hand, did not assure themselves an ability to veto CSC pricing. However, under the agreement, CSC is forced to commit to be market competitive and for its pricing to "bear a reasonable relationship to accepted norms for cost and profit standards for similar services in the South Atlantic port market" and to "be related to productivity routinely achieved on container ships at the Port." FOF 55.

In *Plaquemines*, the determination that Plaquemines Port was a marine terminal operator did not rest on an ability to set prices alone. The outcome hinged on the ability of Plaquemines Port to exclude entry to port facilities for nonpayment of tariffs. *See, e.g.*, *Plaquemines - FMC*, 25 FMC at 66 (Plaquemines Port "has imposed utilization of its services and payment of its fees as an unavoidable appurtenance of all private terminal facilities."). As discussed above, none of Respondents have any authority, ability, or history of being able to exclude entry to port facilities for nonpayment of their fees. Gateway and CSC stand as service providers, chosen by their respective port authorities, GPA and SCPA. These port authority decision-makers concluded that port operations would be improved by instituting an exclusive container vessel stevedoring provider for reasons of efficiency, sustainability, and other enumerated factors. *See, e.g.,* FOF 24, 49. That Gateway and CSC offer container vessel stevedoring at the behest of the port authorities does not establish a significant level of control by Gateway or by CSC. Neither does Gateway's selection as the exclusive gate services provider advance ILA's arguments where the actual gate services provided are limited, under control of GPA decisions, rules, and regulations, and where GPA police is the entity empowered to restrict terminal entrance. *See, e.g.*, FOF 24-45. ILA's arguments with respect to gate services are also contradicted by the facts, for example, ILA contends "Respondents cannot deny that Gateway and ***CSC*** have full operational control over gate facilities as the 'exclusive providers' of gate operation services in the Ports." Reply at 8 (emphasis added). Yet, as ILA acknowledges elsewhere in its briefing, "the Charleston Gate Company performs gate service at the Port of Charleston." Brief at 16; *see also* FOF 15, 55. In short, the evidence supports precisely what the contracts describe – that Gateway and CSC are third party service providers, serving at the discretion of the port authorities, which port authorities remain in control as the marine terminal operators. *See, e.g.*, FOF 23-45, 47-63.

It is noteworthy that the record contains no complaints from truckers or ocean carriers regarding stevedoring or gate fees, stevedoring or gate practices, or any lack of access to any facilities at the Port of Savannah or the Port of Charleston. In *River Parishes Co. v. Ormet Primary Aluminum Co.*, the Commission was evaluating whether the marine terminal operator's grant of an exclusive contract for assist tugboat services at Burnside Terminal violated the Shipping Act. Docket No. 96-06, 1999 WL 125991, at *1 (FMC Feb. 3, 1999). The Commission held that the complainant had failed to meet its burden of proof on the merits, also observing:

> [T]he vessels calling at Burnside do indeed require assist tug service, and they appear satisfied with the service they are receiving. While in *Gulf Container Lines*

> the complainant was a customer of the terminal, here the complainant is an erstwhile competitor with the terminal's service in question, and it is difficult at best to assess what the customers (of both tug and terminal) have to complain about the sole provider system if the cost to them is lower and the service the same. In *Gulf Container Lines*, the complainant argued that the services being forced upon it were unwanted, unneeded and of very poor quality. Here customers are not complaining about the service. It is therefore unnecessary for us to speculate about the concerns of vessel interests if they do not register any complaints."

1999 WL 125991, at *33 (citation omitted).

While the lack of trucker and ocean carrier complaints here is not dispositive, it reinforces the need for ILA to provide evidence supporting such claims as "if a carrier does not agree to gate fees in Savannah or Charleston it is then otherwise forced to select another port . . . to ship its cargo." Reply at 15; *see also* Brief at 12. Here, the evidence presented shows that none of Respondents have a level of control analogous to that expressed in *Plaquemines*; rather, what Respondents can provide is limited, while the port authorities' control is assured across the breadth of the relationship.

If it had been established that any of Respondents furnished terminal facilities, it would also have been necessary for ILA to establish that such relevant facilities were provided in connection with a common carrier, to perfect marine terminal operator status. *Lake Charles Harbor*, 2007 WL 2468431, at *7. However, since ILA has not carried its burden of persuasion regarding any of Respondents either furnishing or operating terminal facilities, the question of whether terminal facilities are provided in connection with a common carrier need not be addressed.

2. Exclusive Stevedoring

ILA advances as a separate argument that jurisdiction can be supported entirely based on the exclusive provision of stevedoring by Gateway and CSC at the Ports of Savannah and Charleston, respectively. Brief at 11-13. It points to *Petchem* and *Canaveral Port Authority*, asserting these cases support the proposition that "once a carrier is required to use a particular entity for a marine terminal service, access to the terminal becomes conditioned on that entity, and the entity is considered a marine terminal operator." Brief at 11. However, ILA's argument does not acknowledge key distinctions made by the Commission across these and similar cases.

In the Commission's assessment of jurisdiction over Canaveral Port Authority ("CPA"), the key question was not whether CPA itself was a marine terminal operator; "CPA had conceded it ***was*** a marine terminal operator." *Canaveral Port Authority*, 2003 WL 21551810, at *5 (emphasis added). Rather, CPA argued that the Commission did not have jurisdiction over CPA's specific activities in question – its towing operations. *Canaveral Port Authority - Possible Violations of Section 10(B)(10), Unreasonable Refusal to Deal or Negotiate*, Docket 02-02, slip-op at 2 (FMC Feb. 24, 2003). In the present case, by contrast, it is the initial question – whether any of Respondents are in fact marine terminal operators – that is at issue. As the First Circuit reasoned in *Puerto Rico Ports Authority*, "To support the exercise of Commission jurisdiction, it

must be determined initially that the one providing the service is a marine terminal operator – in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. Only then may a court turn to the second half of the jurisdictional inquiry under 10(d)(1) and determine whether certain activities are related to or connected with receiving, handling, storing, or delivering property." 919 F.2d 799, 803 ("Contrary to the parties' assertions, however, those activities alone are not sufficient to confer jurisdiction on the Commission.").

Further, the entity deemed to have "furnished" terminal facilities in *Petchem* and *Canaveral Port Authority* is not the analog to the Respondent joint ventures – Gateway and CSC – but rather is the analog to the Port Authorities – GPA and SCPA. In *Canaveral Port Authority*, the Commission found jurisdiction over the decisionmaker, CPA, who had "usurped the right of carriers to choose their tug operator" by ***deciding*** that Seabulk would have an exclusive franchise. 2003 WL 21551810, at *5-6. It was the Port Authority of Georgia and the Port Authority of South Carolina State that decided to institute an exclusive stevedore at their respective ports, not Gateway and CSC (the JVs selected ***as*** exclusive stevedores). *See also Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, Docket No. 11-11, 2013 WL 9808672, at *13 (ALJ Jan. 10, 2013) (denying complainant's claims, including its challenge of PAC's "exercise of its contractual right of exclusivity," explaining that the adoption of complainant's position "would call into question the enforceability of all 'quiet enjoyment' leases of space in marine terminals regulated by the Commission and would require that their exclusivity provisions be affirmatively justified by the parties to the leases[,]" concluding: "[s]uch an expansion of Commission precedent is unsupported by applicable law.") (admin. final March 20, 2013).

Finally, the Commission has been explicit in stating that it does not assert jurisdiction over stevedoring activities. Final Rule, Exemption of Certain Marine Terminal Arrangements, 57 Fed. Reg. 4578, 4581 n.16 (Feb 6, 1992) ("The Commission does not assert or claim jurisdiction over stevedoring activities"). Thus, it would be a particular stretch to deem Respondents here marine terminal operators (and thus subject to Commission jurisdiction) on the basis of their stevedoring activities.

3. Other Arguments

ILA makes a number of other assertions, seemingly intentioned to demonstrate Respondents' status as MTOs via a classic definition. For example, ILA contends "CSC and Gateway are so interconnected with the Ports Authorities and are so involved in the day-to-day operations of the Ports' terminal facilities (and the services connected therewith) that they share joint operational control with SCSPA and GPA over the Ports' terminal facilities." Reply at 11; *see also* Reply at 15-16 (asserting that "office space leased by Respondents, among the other extensive property leased or licensed to Respondent, further illustrates Respondents' extensive presence at the terminals and their involvement with the day-to-day operations of the terminal facilities"). However, coordination is not the equivalent of control. While the factual record supports that there is coordination and communication between the port authorities and Gateway/CSC, such coordination and communication does not change the fundamental power dynamic. As developed in the factual record, Gateway and CSC perform their designated and limited functions; they can otherwise make requests and recommendations, but ultimately the

port authorities decide matters pertaining to marine terminal operations. *See, e.g.*, FOF 24-41, 49-62.

ILA also points to evidence specific to Respondents other than Gateway and CSC, for example asserting that SSA operates an off-pier warehouse in Charleston; and claiming that Respondents "misunderstand what the office space, training areas, yard space, and other marine terminal facilities leased by Respondents on the terminals show." Reply at 13, 15; *see also* Reply at 6 n.6 (where ILA contends Respondents "lease or license large swaths of the terminal facilities in both Savannah and Charleston (including gate booths, yard space, office buildings, warehouses, training areas, and the use of dockage, wharfage, and other terminal areas as needed to perform their stevedoring and gate services).").

These and other examples ILA points to either are not sufficiently supported with facts or are not relevant to the outcome. For example, an entity having office space or space to store supplies used by the entity itself does not constitute that entity's furnishing of marine terminal facilities. As for ILA's off-pier warehouse argument, ILA has not provided the legal support necessary to establish that these activities are sufficient to find an entity to be a marine terminal operator under the Shipping Act. Further, without reliable evidence to support them, statements in declarations to the effect that an entity "maintains complete control over the marine terminal" or that it "completely controls the shipping and storage yards within the terminals, as well as all movements of cargo throughout the yard" are not proof of the same. *See, e.g.*, CX 1120-21; CX 1126; *see also* CX 1132; CX 1139.

ILA has not established by a preponderance of the evidence that any of the named Respondents herein are marine terminal operators, and accordingly, its claim is denied.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that ILA has not carried its burden of demonstrating by a preponderance of the evidence that any of Respondents are marine terminal operators, it is hereby

ORDERED that the claims against each of the Respondents be **DENIED**. It is

FURTHER ORDERED that ILA's Amended Complaint against each of Respondents be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED.**

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,
Complainant

v.

GATEWAY TERMINALS, LLC; CHARLESTON STEVEDORING CO., LLC; PORTS AMERICA FLORIDA, INC.; CERES MARINE TERMINALS, INC.; AND SSA ATLANTIC, LLC, *Respondents*.

DOCKET NO. 22-12

Served: October 3, 2023

NOTICE OF COMMISSION DETERMINATION TO REVIEW

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's September 29, 2023, Initial Decision in this proceeding.

Amy Strauss
Acting Secretary

FEDERAL MARITIME COMMISSION

MSRF, INC., *Complainant*

v.

YANG MING TRANSPORT CO., *Respondent*.

DOCKET NO. 22-21

Served: October 11, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 7, 2023, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

Amy Strauss
Acting Secretary

FEDERAL MARITIME COMMISSION

MARINE TRANSPORT LOGISTICS, INC., *Complainant*, CMA CGM, S.A., *Respondent.*	Docket No. 22-23

Served: October 30, 2023

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max VEKICH, *Commissioners*. *Commissioner* BENTZEL, concurring. *Commissioner* VEKICH, concurring.

Order Affirming Denial of Motion

This case is before the Commission on an appeal of an Order of the Administrative Law Judge (ALJ) denying a motion by Respondent CMA CGM, S.A. (CMA) for a Letter of Request to French authorities under the Hague Evidence Convention. CMA, a common carrier headquartered in Marseille, France, claims that French law bars it from providing any documents in response to the requests of Complainant Marine Transport Logistics, Inc. (MTL) under ordinary Federal Maritime Commission (FMC) procedures,

and it asserts that instead Hague Convention procedures must be used.

For the reasons set forth below, we deny the appeal and affirm the ALJ's Order. CMA has failed to show that the ALJ abused her discretion in rejecting CMA's unprecedented demand that it be permitted to provide no documents in response to MTL's discovery requests except through Hague Convention procedures, in a case that involves the shipment of containers from a U.S. port by CMA's U.S. subsidiary. CMA remains free to make objections as to specific requests or documents, on foreign law or other grounds.

I. BACKGROUND

On September 7, 2022, MTL, a Non-Vessel Operating Common Carrier (NVOCC), initiated this case with a Complaint alleging that CMA-CGM (America), L.L.C. (CCA), a Vessel-Operating Common Carrier, had violated 46 U.S.C. § 41102(c) of the Shipping Act of 1984 in connection with the handling of eight containers. Complaint; Order on Respondent's Motion for Letter of Request and Extension of Time, March 28, 2023 (Order) at 2-3. An Amended Complaint adding CCA's parent company, CMA, was filed on December 9, 2022, and on December 29 the ALJ issued an order, following a joint motion, permitting the amendment of the case caption to list only CMA as the Respondent. Order at 2. In the December 29 order, the ALJ noted that as part of the joint motion, CMA had agreed to be responsible for the actions of CCA "and to make available any discovery sought regarding actions by CCA." *Id*.

On March 9, 2023, CMA filed a Motion for Extension of Time and for Compliance with French Law and the Hague Convention. Order at 1. That Motion argued that CMA could not provide documents in response to MTL's pending document requests until CMA had obtained the approval of French authorities under French law. *Id*. at 1-2. With its motion CMA provided a letter from the French Ministry of Finance regarding the requirements of

French law, but CMA did not provide a copy of the document requests with which it was refusing to comply. *Id*. at 1, 3. On March 16, MTL filed a Response to CMA's motion that did not expressly oppose the Motion, but did raise objections. MTL emphasized that CMA had not produced any documents at all, not even basic "demurrage related documents," and that MTL had consented to the substitution of CMA for its U.S. subsidiary as respondent in the case in part based on CMA's assurance that that change would not affect compliance with discovery requests. Order at 1-2; MTL Motion Response at 1-2. In a March 16 Motion for Leave to Reply that the ALJ treated as a reply, CMA argued that the French legal requirements would apply even if its U.S. subsidiary was the only respondent in the case. Order at 2; CMA Motion Reply at 2.

The ALJ denied CMA's Motion in its March 28, 2023 Order. The ALJ concluded that CMA had failed to justify its refusal to produce documents in response to a request made under FMC procedures. Order at 3-4. The Order noted that although the parties had not provided the actual requests at issue, in light of the Complaint's allegations they likely related to container shipments from a U.S. port arranged by two U.S. companies, and that CMA had failed to show, as it had to, that use of the Hague Convention was actually necessary in this case. *Id*. at 3. The ALJ relied on the factors identified in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543-44 & n.28 (1987), particularly the interests of the United States, the importance of the discovery to the case, the connection of the materials at issue to the United States, and the apparent lack of such a connection to France. Order at 4.

CMA appealed the ALJ's Order on April 7, 2023, submitting its filing as an Appeal from Discovery Ruling Addressed to Persons and Documents Located in a Foreign Country under 46 C.F.R. § 502.150(d) (Appeal). On April 14, MTL filed a very short Response (Appeal Response), which incorporated by reference its short March 16 Response to CMA's initial Motion. Appeal Response at 1. The Appeal Response again raised objections to CMA's requested relief

but did not directly state that MTL opposed it. *Id*. MTL did note that its document requests were really directed at materials held by CMA's U.S. subsidiary, CCA. *Id*. The regulation under which interlocutory appeals are normally filed is section 502.221, as the ALJ noted in her July 27, 2023 Order staying the case pending this appeal, and that section requires a motion, which was not filed here. In any event, the ALJ appears to have permitted the appeal to proceed. The Appeal and Appeal Response were timely filed under section 502.150(d).

On appeal, CMA claims that because the ALJ's March 28 Order requires production of documents that are "owned and/or located in France," Appeal at 1, and that are "owned by CMA and reside on servers located in France," Order at 3, the Order is inconsistent with French law, and such materials must instead be produced through Hague Convention procedures. Appeal at 1-3, 6-8. CMA relies heavily on the Supreme Court's ruling in *Aerospatiale* and the factors that are evaluated in conducting the "comity analysis" described in that case. *Id*. at 14-19.

II. DISCUSSION

A. Standard of Review

The Commission reviews discovery orders under an abuse of discretion standard. The Commission's rules do not expressly address the standard of review in this context. *See Rana v. Franklin*, FMC No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022); *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. & N.J.*, FMC No. 11-12, 2014 WL 7328475, at *7-8, 2014 FMC LEXIS 35, at *18-19 (FMC Nov. 20, 2014). However, "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. "In reviewing district courts' orders on discovery, the United States Courts of Appeal apply an abuse of discretion standard because a 'narrowly circumscribed' scope of review is consistent with district courts'

'considerable discretion in managing discovery' and their 'broad discretion to impose sanctions for discovery violations under Rule 37.'" *Rana*, 2022 WL 1744905, at *4 (quoting *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015)) (additional citations omitted).

B. Ordering CMA to Respond to Document Discovery Through Ordinary Commission Procedures Was Not an Abuse of Discretion

In the March 28 Order, the ALJ acted well within her discretion in rejecting CMA's arguments as insufficient to justify blanket non-compliance with discovery requests in FMC proceedings. Order at 3-4. In her decision, the ALJ relied on cases establishing that the party seeking to avoid discovery under the Federal Rules of Civil Procedure in this context must show that Hague Convention procedures are necessary, *see Luminati Networks Ltd. v. Code200*, Civ. No. 19-396, 2021 WL 2819457, at *2, 2021 U.S. Dist. LEXIS 128634, at *10 (E.D. Tex. Feb. 1, 2021), because a foreign law "actually bars the production or testimony at issue," *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993). And, the ALJ noted, even where evidence is physically located in a foreign nation, the Hague Convention does not deprive federal courts of authority to order foreign entities before them to produce that evidence. *Aerospatiale*, 482 U.S. at 539-40. It is worth noting that CMA does not question the FMC's jurisdiction over it. In addition, the Supreme Court emphasized in *Aerospatiale* that Hague Convention procedures are not mandatory or exclusive, but an optional method to obtain evidence where a particular situation calls for it. *Id*. at 540-41.

The ALJ proceeded to evaluate CMA's request under the five factors identified in *Aerospatiale* and concluded that all of the factors weighed against the request. Order at 4. Specifically, the factors are: (1) the importance to the litigation of the information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent

to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. *See* 482 U.S. at 543-44 n.28. The ALJ did not address each factor individually, but emphasized that the discovery requested was important to the case, especially since no documents had been provided; that CMA's refusal to produce any material was overbroad; that there was no indication the requested documents originated in France or were created by French citizens; that CMA was a party to the case and an FMC-regulated entity that could produce the documents through its U.S. subsidiary; and that permitting CMA to refuse to produce any documents in response to MTL's request would "undermine important interests of the United States." Order at 4.

The ALJ's overall analysis of the precedent applicable to CMA's request is correct. In particular, CMA did not show that use of the Hague procedures is necessary. Despite CMA's assertions that the requested documents are "located in France," Order at 3, there is no specific claim here (much less persuasive evidence) that the documents are unavailable in the United States from CMA's U.S. subsidiary. And CMA has not shown that the mere presence of copies of documents in France would be sufficient to bar ordinary discovery here. The U.S. Complainant MTL states that it dealt with CMA's U.S. subsidiary with regard to the shipments at issue, which went from a U.S. port to nations other than France, and as the ALJ noted, there remains no indication that these shipments went to France or included involvement by French residents. *Id*. at 3. As the ALJ also noted, and CMA later confirmed, the documents sought include bills of lading, emails, and other common transport-related documents related to the shipments. *Id*.; Appeal at 16. CMA presented no reason to the ALJ that these materials would not be present in the United States.

The ALJ's overall evaluation of the *Aerospatiale* factors is also correct. Basic document discovery is obviously important to FMC litigation like this case (factor 1), and the conduct of litigation

regarding alleged violations of federal law clearly serves important interests of the United States, while it is difficult to see how reasonable discovery of the documents at issue here would impair important interests of France (factor 5). In addition, while it seems possible that some responsive documents did not originate in the United States, the ALJ was provided with no specific showing that most or even any of them did (factor 3). It seems clear that most or all responsive documents are available through the alternative means of CMA simply producing them, whether through its U.S. subsidiary or not, in the ordinary course (factor 4). The ALJ was unable to analyze the specificity of the document request (factor 2) because CMA failed to provide a copy of the request with its Motion. Although this failure would appear be a waiver of any CMA claim regarding factor 2, a review of the requests that CMA did belatedly provide with its Appeal indicates that five of the seven requests focus on the eight specific containers described in the Complaint, with only the last two requests seeking documents about similar complaints made to CMA and CMA revenue from demurrage- and detention-related charges. *See* Appeal Exhs. 4-5. CMA did not show that such requests had to be pursued using Hague Convention procedures.

CMA has pointed to no prior FMC proceeding in which the FMC or any court has denied all ordinary document discovery on the basis that CMA urges here. On the contrary, district courts are free to deny requests like the one CMA makes here. *See*, *e.g.*, *Luminati Networks*, 2021 WL 2819457 (denying a request for issuance of a Hague Convention letter where most of the five *Aerospatiale* factors weighed against the request). Moreover, the ALJ here cited a recent case in which a Florida district court had denied a stay that CMA's U.S. subsidiary had requested on a comparable basis. Order at 3, citing *De Fernandez v. CMA CGM S.A.*, Civ. No. 21-22778, 2022 WL 2713737 (S.D. Fla. July 12, 2022). That case involved claims by Cuban exiles under the Helms-Burton Act and the potential application of French and European Union "blocking statutes," so the context was somewhat different. But in evaluating a request by CMA's U.S. subsidiary to stay the

case on the grounds that the blocking statutes prevented CMA itself from participating, the court did undertake a comity analysis under *Aerospatiale*, finding that the balance of international interests weighed against the requested stay. *See* 2022 WL 2713737, at *9-11. And the court noted that U.S. courts have long been skeptical of claims that such blocking statutes present any real risk to French nationals, as they had been enacted to protect those nationals from overseas discovery and to give them "tactical weapons and bargaining chips in foreign courts." *Id*. at *6 (citations omitted).

In fact, the apparent role CMA has played in efforts to obtain discovery from its U.S. subsidiary in this case is a point supporting the ALJ's decision. As MTL notes, its discovery requests are directed at documents maintained by that subsidiary, Appeal Response at 1 – something CMA does not appear to dispute. It is true that CMA, the French parent, was substituted as the only Respondent here, with MTL's consent. But as the ALJ noted, the December 29, 2022 Order allowing that substitution makes clear that CMA had agreed to "make available any discovery sought regarding actions by" its subsidiary. Order at 2.

MTL also notes that CMA produced the same type of material sought here in response to MTL's complaint in FMC case 18-07, with no apparent reference to French authorities or prosecution as a result. Appeal Response at 1. The respondent in that case was CMA's U.S. subsidiary. The parties settled the case after an exchange of initial discovery. *See* FMC No. 18-07, Feb. 18, 2020 Initial Decision Approving Settlement. Here, CMA was put on notice of MTL's argument about FMC 18-07 by MTL's Response to CMA's Motion. *See* Motion Response at 2-4. Yet CMA has provided no specific explanation as to why the prior case was different, including in its Motion Reply. CMA has generally argued that it only became aware of more stringent French legal requirements earlier this year. Order at 2; Appeal at 3-4.

In any event, even without resort to Hague Convention procedures, CMA can still object to specific requests or documents

as beyond the reach of permissible discovery under FMC rules. As to discovery, the Shipping Act directs the FMC to follow the Federal Rules of Civil Procedure to the extent possible, 46 U.S.C. § 41303(a)(2), and the FMC has established extensive rules of practice and procedure at 46 C.F.R. § 502. In particular, section 502.141(e) provides the general standards for permissible discovery, as well as limitations on the frequency and extent of discovery. And section 502.141(j) provides for protective orders. In short, the FMC's existing procedures provide ample protection from impermissible discovery requests, and CMA remains free to invoke the relevant provisions, like any other party before the Commission.

C. CMA's Arguments on Appeal Do Not Show an Abuse of Discretion

In its Appeal of the ALJ's March 28 Order, CMA argues primarily that the use of Hague Convention procedures is required or at least advisable in this case. Appeal at 10-19. But as the ALJ correctly found, CMA has not established the need for such procedures here, Order at 3-4, and its arguments on appeal, though extensive, are unavailing. Once again, CMA cites no direct precedent for the determination it seeks foreclosing ordinary document discovery in an FMC proceeding, or indeed in any comparable federal agency proceeding. Nor does CMA provide evidence showing that all, or even any, of the specific documents MTL seeks are unavailable in the United States.

CMA asserts that the French law on which it relies applies even to documents "to be produced by" its U.S. subsidiary if those documents are "owned" or controlled by CMA, so its position is that French law would bar production under the FMC's ordinary procedures even if the U.S. subsidiary was the only respondent in this case. Appeal at 6-8. CMA does not specifically contend that the

law would bar even production of documents held in the United States about CMA's U.S. activities, although that view would appear to be a logical extension of its position. But CMA cites no U.S. authority applying the French law to completely bar such discovery under the Federal Rules of Civil Procedure or in proceedings before a federal agency. CMA also claims that criminal penalties are possible if production would cause substantial harm to essential French interests, yet it concedes that the materials sought here would be very unlikely to implicate that standard, and it provides no example of such a prosecution. Appeal at 6.

CMA does note that the court in the *De Fernandez* case, cited by the ALJ, later granted a request for use of a Hague procedure, Appeal at 8-9 & n.9, but the Order CMA cites expressly did not foreclose ordinary discovery of materials located in the United States. On the contrary, the Order stressed that use of the Hague procedure it permitted was for the "limited purpose" of getting documents or information "originating in and located in France" — a standard that CMA has not shown is met here as to any specific document, much less as to every document responsive to MTL's requests. *See* Appeal Exh. 8, Order Granting Defendants' Memorandum Supporting Request for International Assistance and Appointment of a Commissioner, *De Fernandez*, Civ. No. 21-22778 (S.D. Fla. Apr. 6, 2023) (Doc. 128) at 2. The *De Fernandez* court's Order also made clear that it did not relieve any party of its discovery obligations under the Federal Rules, "including production of documents and information within the possession, custody or control of Defendant CMA CGM (America) LLC and any agents or representatives of CMA CGM S.A. (France) located in the United States or any other jurisdiction not subject to the French Discovery laws or Blocking Statute." *Id*. at 4. CMA is subject to similar discovery obligations under the FMC's rules.

CMA argues broadly that the Commission lacks the power to forego use of Hague Convention procedures as described in the *Aerospatiale* case because the FMC is not a federal court, Appeal at 10-12, but CMA provides no authority actually saying that. Instead,

it only provides general statements making the obvious points that the agency is not a court and that its powers are defined by Congress. Moreover, as noted above, those powers do authorize the FMC to order discovery and direct it to follow the Federal Rules to the extent possible, 46 U.S.C. § 41303(a)(2) — as CMA admits, Appeal at 14 n.13 — and the FMC has established extensive rules of practice and procedure that protect parties appearing before it, at 46 C.F.R. § 502.

CMA also argues that the use of a procedure for consultation through the U.S. Department of State described in 46 U.S.C. § 41108(c)(2) is required here, Appeal at 12-14, but that claim is incorrect. As an initial matter, although CMA asserts that the procedure is required, it also says that the procedure is actually "unnecessary" if the agency simply follows a Hague procedure as CMA urges. Section 41108(c)(2) provides that if a common carrier resisting an FMC discovery order "alleges that information or documents located in a foreign country cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of the failure to comply and of the allegation relating to foreign laws." The statute then directs that the Secretary of State "shall promptly consult with the government of the nation within which the information or documents are alleged to be located" to help the FMC obtain the material. CMA cites no case precedent mandating use of the section 41108(c)(2) procedure.

In any event, CMA's claims are not clear and developed enough to require a consultation under 46 U.S.C. § 41108(c)(2) at this stage. In particular, CMA provides no clear showing that specific requested documents or categories of documents are "located" in France only, as section 41108(c)(2) would require so as not to permit parties to evade discovery simply by sending documents overseas, or that the documents are unavailable in the United States.

2. CMA Has Failed to Show That *Aerospatiale* Requires the Use of Hague Procedures Here

CMA argues that comity requires use of Hague Convention procedures in this case, relying on *Aerospatiale* and an analysis of the factors it identified. Appeal at 14-19. But a core feature of that case is that Hague procedures are not mandatory, 482 U.S. at 540-41, and as the ALJ found, the relevant factors actually weigh against the use of such procedures here, Order at 4.

In addressing the importance of the requested documents to the litigation (factor 1), CMA claims that MTL "already has most" of the documents it seeks. Appeal at 16. But CMA does not mention the demurrage-related documents MTL specifically mentioned needing, Motion Response at 3-4; Order at 2, nor the last two MTL requests, which seek certain information beyond the eight containers at issue, *see* Appeal Exhs. 4-5. In any event, vague claims that a litigant "already has most" of the documents it requests in discovery do not establish that the documents sought are unimportant to the litigation. CMA has not shown that the ALJ's determination that the documents are important, especially since CMA has produced none, Order at 4, was an abuse of discretion.

CMA argues that the ALJ mistakenly believed that the specificity factor (factor 2) referred to the CMA's own request for Hague procedures, but that the proper analysis, of the specificity of MTL's document requests, shows them to be "not at all specific" but "blunderbuss" and therefore appropriate for Hague procedures. Appeal at 16-17. First of all, the ALJ had no means of analyzing the specificity of MTL's requests in her March 28 Order, since CMA failed to provide them until its April 7 Appeal. Leaving aside CMA's potential waiver on this point, it is true that the ALJ's discussion of the *Aerospatiale* factors includes a statement that CMA's request to "block all discovery related to these containers is overbroad." It seems possible that this statement was related at least in part to factor 1 and was meant to emphasize that the need for

discovery is great in a situation where none has been provided. But in any event, a review of the actual MTL requests does not support CMA's claim that they are so broad as to call strongly for Hague procedures. Appeal Exhs. 4-5. As noted above, five of the seven requests focus closely on documents related to the eight specific shipments at issue, with only the last two seeking several years of documents regarding similar complaints made to CMA and CMA revenue from demurrage- and detention-related charges. In light of the above, and the weight of the other factors, any perceived error here would be harmless.

Turning to factor 3, where the information at issue originated, CMA asserts vaguely that "[s]ome of the requested documents most likely originated in the United States," while "[o]thers did not," but that this is irrelevant because all that matters under French law is that the documents are "owned by" CMA. Appeal at 18. However, as the ALJ noted, the record contains no indication that the requested materials originated in France. Order at 4. Nor does CMA claim that any of the requested documents are unavailable in the United States. And a claim that CMA can avoid producing materials that originated in or are maintained in the United States simply because copies may exist in France, or because a French company may be viewed as "owning" the documents, could easily undermine FMC and other federal discovery procedures. CMA provides no support in United States law for such a position, and in fact one of its own authorities, the *De Fernandez* Order, is to the contrary. *See* Appeal Exh. 8 at 2, 4.

With regard to factor 4, the availability of alternative means of securing the information, CMA argues that the Hague procedures provide a good alternative. Appeal at 18. However, the ALJ properly understood this factor to involve whether there is an alternative to the Hague procedures, and as she noted, "CMA is a party to this proceeding, is an FMC-regulated entity, and is the most appropriate entity to provide these documents, although its American subsidiary could also provide the documents." Order at 4. In other words, the available alternative is that CMA simply produces responsive

material under ordinary FMC discovery procedures.

Finally, with regard to the balance of interests of the United States and the "state where the information is located" (factor 5), CMA faults the ALJ for not fully explaining her conclusion, and it claims that in any case French interests prevail here, relying on precedent describing France's interests in protecting its citizens and controlling access to information within its borders. Appeal at 18-19. It is true that the ALJ did not provide a direct explanation of her determination that "noncompliance with the [document] request would undermine important interests of the United States." Order at 4. But those interests are easy to discern from the context. As the Order made clear, CMA is claiming the right to provide no documents whatsoever in response to a request by the complainant, in an adjudication at the federal agency charged with enforcing U.S. maritime law, using the ordinary discovery procedures detailed in that agency's regulatory structure, as mandated by Congress. In terms of the French interests at stake, it is difficult to see how any important French interests are implicated by the disclosure of materials related to eight containers shipped from the United States by U.S. companies to ports outside France. Indeed, CMA has not even shown that the materials are "located" outside the United States, much less in France.

CMA does point to one other FMC case, Docket No. 21-05, in which a Hague procedure was attempted, suggesting that shows Hague procedures are appropriate in FMC matters and do not impair U.S. interests. Appeal at 19-20 nn.16-17. However, the use of a Hague procedure in that pending case (in which a Swiss court denied a request for documents from the ALJ on the basis that the request was "outside the scope of the Convention," FMC 21-05, January 13, 2023 Initial Decision on Default at 1) was the result of a joint motion of the parties. It provides no support for CMA's position that such a course is mandatory in the current case.

Finally, CMA emphasizes what it considers to be the speed and ease of the Hague procedures. Appeal at 20. But even if the

Commission were to accept such assurances, that would not be a basis for CMA to avoid the FMC's own well-established discovery procedures.

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Respondent CMA's April 7, 2023 Appeal from Discovery Ruling Addressed to Persons and Documents Located in a Foreign Country; and

By the Commission.

Amy Strauss
Acting Secretary

Commissioner BENTZEL, concurring:

I concur with the sentiments and frustration expressed by Commissioner Vekich, and would further suggest that we explore the potential for process that would explicitly require regulated entities to consent with Commission process as a condition to operating in FMC regulated trades.

Commissioner VEKICH, concurring:

Although the ALJ did not impose sanctions against the Respondent, I believe doing so may have been warranted in this

proceeding. The Federal Rules of Civil Procedure are followed by the Commission to the extent that they are consistent with sound administrative practice. 46 C.F.R. § 502.12. Federal Rule 26(g) provides that where an attorney without adequate justification makes discovery responses or objections that are legally unwarranted or interposed for an improper purpose, such as needlessly causing delay or increasing costs, a court "must" impose an appropriate sanction, which "may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." Further, Federal Rule 37 provides for comparable sanctions for unjustified failures to cooperate with discovery in particular contexts, including motions to compel and failures to comply with court orders. Outside of the discovery context, Federal Rule 11 provides that a court may impose comparable sanctions on an attorney in the event of filings made for an improper purpose or that are legally unwarranted.

Litigants before the Commission are entitled to discovery to prove their allegations. Respondent's argument that the Hague Convention bars it from providing any document discovery in a civil proceeding before the Commission except through the Convention's procedures raises serious concern. Respondent caused substantial delay and additional litigation expense to the Complainant which, in my view, may have been based on frivolous arguments. I believe the Commission should consider whether the arguments advanced by the Respondent warrant sanctions.

FEDERAL MARITIME COMMISSION

RAHAL INTERNATIONAL INC., *Complainant*

v.

HAPAG-LLOYD AG, HAPAG-LLOYD (AMERICA), LLC, AND HAPAG-LLOYD USA, LLC, *Respondents*

AND

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA), LLC, *Third-Party Complainants*

v.

MAHER TERMINALS, LLC, GCT NEW YORK LP, AND GCT BAYONNE LP, *Third-Party Respondents*.

DOCKET NO. 23-05

Served: October 30, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 27, 2023, decision to grant Respondent Hapag-Lloyd USA, LLC's Motion for Summary Judgment and order that the complaint against Hapag-Lloyd USA, LLC be dismissed has expired. Accordingly, the corresponding portion of the Order on Motion for Summary Judgement and Motion to Dismiss has become administratively final.

Amy Strauss
Acting Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MSRF, INC., *Complainant*

v.

HMM CO. LTD., *Respondent*.

DOCKET NO. 22-20

Served: November 22, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

Complainant MSRF, Inc. ("MSRF") commenced this proceeding by filing a complaint alleging Respondent HMM Co. Ltd. ("HMM") had violated the Shipping Act of 1984, as amended ("Shipping Act"). MSRF alleges that HMM "refused to provide MSRF enough commitments in its advance service contracts, instead providing only a fraction of the space MSRF needed at substantially higher prices;" and "refused to provide MSRF more than approximately 9 of the promised 25 FEUs of . . . allotted space, forcing MSRF to make alternate transportation arrangements with other common carriers at substantially higher spot market prices;" meanwhile reselling "the capacity allotted to MSRF . . . to other shippers on the same spot marked at substantially higher rates than those to which it agreed in the service contract;" all in violation of 46 U.S.C. §§ 41102(c) and 41104(a)(2), (5), (9), and (10). Complaint at 5-7.

HMM filed an answer denying the allegations and raising affirmative defenses, including lack of jurisdiction; failure to state a claim under which relief may be granted; failure to allege essential elements under the various sections of the Shipping Act alleged; that the service contract at issue "contains Complainant's exclusive remedies;" the Federal Maritime Commission ("Commission" or "FMC") does not have "the authority to award damages for a breach of contract claim;" HMM's conduct was reasonable; third parties were responsible for any alleged damages; and "Complainant has failed to mitigate its damages." Answer at 8-9.

date of service. 46 C.F.R. § 502.227.

In its briefing, MSRF indicates that it is no longer pursuing Count III of the complaint, alleging that HMM violated 46 U.S.C. § 41104(a)(5). Brief at 1, n. 1.[2] It is less clear whether MSRF continues to pursue Count IV, where it alleges that HMM violated 46 U.S.C. § 41104(a)(9). Therefore, for sake of completeness, Count IV of the complaint will be discussed briefly below, after Count I, alleging a violation of § 41102(c); Count II, alleging a violation of § 41104(a)(2); and Count V, alleging a violation of § 41104(a)(10).[3]

MSRF filed the complaint after the June 16, 2022, changes to the Shipping Act alleging violations occurring prior to the modifications to the Shipping Act. In the Ocean Shipping Reform Act of 2022 ("OSRA 2022"), Congress modified section 41104(a)(10) prohibiting ocean common carriers from: "unreasonably refus[ing] to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." Pub. L. No. 117-146, §7, 136 Stat. 1272, 1274 (2022). This change does not apply to this proceeding and is not discussed. In addition, in September of 2022, the Commission issued a Notice of Proposed Rulemaking ("NPRM") regarding the definition of unreasonable refusal to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier. NPRM, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-25, 87 Fed Reg. 57674, 2022 WL 4356068 (September 21, 2022). As well, in June of 2023, the Commission issued a Supplemental Notice of Proposed Rulemaking ("SNPRM") on the same subject-matter. SNPRM, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-25, 88 Fed Reg. 38789-01, 2023 WL 3973368 (June 14, 2023). The proposed rules have not been adopted, and are therefore not applicable to this proceeding, although comments made by the Commission regarding historical context and cases is discussed to a limited extent in the analysis.

As elaborated more fully below, none of MSRF's claims are successful. MSRF entered into a service contract with HMM, which was amended 14 times, yet MSRF's claims primarily rely on the service contract as originally enacted, prior to the amendments. Many of the 14 amendments were at the initiation or for the benefit of MSRF, including the addition of shipping lanes and the continuation of 2021 prices during the contract extension. The duration of the service contract was extended by amendment, and through the end of the contract, HMM carried almost double the minimum quantity commitment of cargo ("MQC"). MSRF fails to acknowledge the ongoing communication and negotiation between parties that led to the amendments from which MSRF derived a substantial financial benefit. MSRF does not claim

(and the evidence also does not support) that any kind of collusion or undue pressure led it to agree to these amendments.

MSRF has not met its burden of establishing that HMM engaged in unjust or unreasonable conduct; provided service in the liner trade not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff or a service contract; refused to deal or negotiate; or gave undue or unreasonable preference or advantage to another. Because none of MSRF's claims are successful, it is unnecessary to evaluate MSRF's damages calculations.

B. Procedural History

On August 19, 2022, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On September 13, 2022, HMM filed an answer to the complaint. On September 26, 2022, the case was reassigned to the undersigned. On October 6, 2022, a scheduling order issued.

On November 29, 2022, MSRF filed a motion requesting an extension of time for the parties to complete the depositions of fact witnesses, to which HMM consented. On November 30, 2022, the extension of time was granted.

On December 15, 2022, the parties filed a joint motion for entry of a confidentiality stipulation and a proposed protective order ("Protective Order Motion"). On January 4, 2023, an order granting the confidentiality stipulation and protective order issued. On January 13, 2023, an amended scheduling order issued.

On April 21, 2023, MSRF filed a motion for summary decision, in addition to its proposed findings of fact, appendix, and a motion for confidential treatment.[4] On April 24, 2023, the undersigned issued an order *sua sponte*, accepting MSRF's motion for summary decision as its initial brief. On May 12, 2023, HMM filed its opposition brief, proposed findings of fact, response to MSRF's proposed findings of fact, appendix, and a motion for confidential treatment. On May 24, 2023, MSRF filed a reply brief, response to HMM's proposed findings of fact, and motion for confidential treatment.

On May 26, 2023, an order to correct filings issued due to both parties over-designating testimony and documents as confidential, as well as designating as confidential information that it had previously made public. The parties were ordered to resubmit confidential and public appendices, proposed findings of fact, missing table of contents and confidential request table, if not previously submitted, and supplemental motions for confidentiality.

On June 5, 2023, HMM filed a motion to strike portions of MSRF's reply brief, or alternatively, for leave to file a sur-reply, asserting that MSRF improperly raised both new facts

[4] The email to which these filings were attached indicated that a Motion for Summary Judgment was also attached, but it was not. The missing motion was then provided attached to an email dated April 24, 2023.

and new arguments in its reply brief. On June 9, 2023, MSRF filed an opposition to HMM's motion to strike, but assented to HMM filing a sur-reply.

On June 9, 2023, MSRF submitted the requested filings, including a corrected public and confidential version of its appendix (exhibits labeled as "CX"), a corrected response to HMM's proposed findings of fact, and a supplemental motion for confidential treatment. Also on June 9, 2023, HMM submitted the requesting filings, including a corrected public and confidential version of its appendix (exhibits labeled as "RX"), proposed findings of fact, a table of contents for its appendix, and a revised motion for confidential treatment.

On June 12, 2023, an order issued denying HMM's motion to strike and allowing HMM to file a sur-reply. On June 22, 2023, HMM filed a sur-reply.

C. Arguments of the Parties

MSRF asserts that from May to December 2021, HMM only provided MSRF with 9 of 25 containers agreed in the service contract and although "HMM claims it fulfilled its obligations by later providing the necessary containers after this time period, MSRF was damaged by HMM's failure to provide space when it needed it the most;" HMM violated 46 U.S.C. § 41102(c) because its refusal to provide MSRF with the agreed upon cargo space between May 2021 and April 2022 was not in accordance with standard shipping practices; HMM violated 46 U.S.C. § 41104(a)(2) because by refusing to provide MSRF with the agreed upon minimum quantity of cargo space from May 2021 to April of 2022, HMM failed to provide service that was in accordance with the classifications, rules, and practices contained in the Service Contract; HMM violated 46 U.S.C. § 41104(a)(10) because MSRF requested, during multiple occasions, cargo space to ship containers from certain ports in Asia into the United States, but in almost every single instance where MSRF attempted to deal or negotiate for space, HMM refused to provide the space requested; HMM waived its opportunity to exercise the arbitration clause in the service contract by actively participating in the present litigation without asserting their right to arbitrate; and an award should be entered in favor of MSRF and against HMM in the amount of $228,171.52. Reply Brief at 3-8, 11-12; Brief at 1-5.

HMM contends that MSRF fails to articulate cognizable claims under the Shipping Act; the record is devoid of evidence supporting any of MSRF's claims; MSRF's claims are no more than breach of contract claims; HMM did not breach the service contract and carried almost double the minimum quantity commitment; MSRF's claims should be denied because the parties agreed to arbitrate breach of contract claims; there was no violation of 46 U.S.C. §§ 41102(c), 41104(a)(2), 41104(a)(9), or 41104(a)(10); and MSRF has failed to support the alleged damages. Opposition at 8, 11-17; Sur-Reply at 3-4, 8, 11, 12.

D. Motions for Confidential Treatment

"take care to limit any such designation to specific material that qualifies for such protection" when designating material as protected under the confidentiality provision. *Id*. at 7. On January 4, 2023, an order entering confidentiality stipulation and protective order was issued. The following requests for confidential treatment were subsequently received: MSRF's motion for confidential treatment of certain materials filed April 21, 2023; HMM's motion for confidential treatment of certain materials filed May 12, 2023; MSRF's motion for confidential treatment of certain materials filed May 24, 2023; MSRF's supplemental motion for confidential treatment of certain materials filed June 9, 2023; and HMM's revised motion for confidential treatment of certain materials filed June 9, 2023.

Both parties over-designated testimony and documents as confidential in their initial filings and did not show good cause to treat such wholesale redacted material as confidential in their motions for confidential treatment. As a result, on May 26, 2023, the parties were ordered to review the Initial Order instructions regarding how to file confidential material and the need to demonstrate by motion for confidential treatment "good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information." Order to Correct Filings at 2 (emphasis omitted). The Order to Correct Filings reiterated how to properly mark exhibits and how to designate confidential information in their briefs, proposed findings of fact, and responses to proposed findings of fact. In addition, the parties were ordered not to designate portions of documents that they had already made public in other filings that were not under a protective or confidentiality order. It was noted that "[s]uch wholesale redaction means that the public will be unable to determine if the parties' dispute is similar to one they may have," and "if all exhibits and all witness testimony with the exception of one declaration and portions of a few emails are considered confidential, the undersigned will be unable to issue a public decision that adequately addresses the facts at issue in this case." *Id*. at 1-2.

In its Supplemental Motion for Confidential Treatment, MSRF asserts that its revised filings "only [seek] to keep confidential the contents of the Service Contract and Amendments to the Service Contract, the Damages Spreadsheet, and the booking information in the Service Contract." MSRF Supplemental Motion for Confidential Treatment at 1-2. In support of its motion, MSRF contends that "[t]his information must remain confidential because it contains sensitive pricing information and other commercially sensitive rates and terms." *Id.* at 2.

However, the revised filings continue to contain inconsistencies in confidential designation, for example, indicating that a number is confidential, while the same number in word form is not (*See* Declaration of David Reich ("Reich Decl."), CX 3); indicating that certain terms of the Service Contracts and amendments thereto are confidential, yet including a link to a New York Times article in the public version of its Reply Brief where Mr. Reich disclosed some of those same terms during an interview (*See* link at page 4 of Reply Brief,[5] also attached as Exhibit 4 to Complainant's Reply Brief, but not referenced as included in either party's appendix); and, redacting the minimum quantity of forty-foot equivalent units ("FEUs") in the public version of its Reply Brief while including the originally contracted amount in the

[5] https://www.nytimes.com/2022/05/04/business/shipping-container-shortage.html

Complaint and Brief (*See* Reply Brief at 5; Complaint at 3 ¶ 11 and 5-6 ¶¶ 25 and 26; Brief at 1, 3 and 4).

To be clear, only those items that constitute "a trade secret or other confidential research, development, or commercial information" within the meaning of 46 C.F.R. § 502.141(j)(1), as so stated in the revised motion, and which are not already in the public domain, will be accorded confidential treatment for purposes of this decision.

Respondent asserts in its Revised Motion for Confidential Treatment that "HMM does not have a position on whether the material designated by Complainant should be accorded confidential treatment, but for its part HMM does not seek to designate any transcript material or correspondence as confidential." HMM Revised Motion for Confidential Treatment at 2. HMM further stated that "[t]he only document HMM seeks to designate as confidential is the Service Contract because of its commercial sensitivity, including rate details and other terms that are unique to that agreement." *Id.* HMM seeks confidential designation for the Service Contract and the amendments to that contract, found at RX 7-200. In addition, it seeks to designate the rate column in HMM's summary table at RX 325 as confidential. HMM asserts that both the Service Contract and amendments and the rate column in the summary table contain non-public rates, terms, and other sensitive commercial information as well as references to the same sensitive commercial information. *Id.* at 3.

46 C.F.R § 502.5(b), requiring parties to justify confidential treatment by motion, states in part:

> This motion must identify the specific information in a document for which protection is sought and show good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information pursuant to § 502.141(j)(1)(vii). The burden is on the party that wants to protect the information to show good cause for its protection.

46 C.F.R § 502.5(b). The parties' revised motions for confidentiality significantly limit the material for which they now request confidential treatment. However, as noted, some designations continue not to be consistent with the motion or are inconsistently applied in the revised filings. For example, HMM's revised motion is properly limited to seeking confidential treatment regarding the Service Contract and its amendments because those documents contain "rates, terms, and other sensitive commercial information." However, some of those terms and rates have been disclosed in public versions of filings or in other public forums. Indeed, some terms from the Service Contract were disclosed publicly prior to the date that the Protective Order Motion was filed, which was nearly four months after the complaint was filed, and several months after the answer was filed. As an example of information that has been made public, HMM's minimum quantity commitment to MSRF of 25 containers from Asia to the United States is available in numerous places including in the Complaint, the public version of HMM's appendix, and in a New York Times article. *See, e.g.*, RX 216; Reply Brief, Exh. 4. Additional portions of the service contract are also now public because of their inclusion in proposed findings of fact filings and in public versions of party appendices, including deposition transcripts. *See, e.g.*, CRPFF at ¶ 41, RX 215.

Further, the parties make no good argument for why phrases like "additional lanes" or "Asia to US" would constitute information that is a "trade secret or other confidential research, development, or commercial information," as those phrases are utilized here in context. *See, e.g.*, RPFF at ¶ 30-33; CRPFF at ¶ 32.[6] There is similarly no confidential information contained in the effective or expiration dates of amendments, nor in the fact of the service contract being extended by ten weeks. *See, e.g.*, RPFF at ¶ 33.

Otherwise, to the extent that the parties' confidential designations are consistent with their motions and have not been made public by previous filings or in publicly available exhibits, they are reasonable. But, once information is made public, it cannot be later designated as confidential.

This decision will strive to minimize reference to rates, terms, and other sensitive commercial information regardless of whether it is in the public domain. However, to the extent that these contradictions exist, information is not accorded confidential treatment throughout this decision in those instances when it impacts the readability of the decision and where it has already been made public. For clarity, any data or statement detailed or made explicit in this decision is not confidential.

Accordingly, to the extent that rates or terms have not already been made public, it is hereby ordered that the revised motions requesting confidentiality be **GRANTED IN PART**. To the extent that information has been inconsistently designated by the parties as confidential or not sufficiently supported, the revised motions requesting confidentiality are **DENIED IN PART**. The parties are not required to refile any of their public filings.

E. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of

[6] These are also marked as public in filings by the parties. *See, e.g.*, Reply Brief at 7; RX 213; RX 217; RX 219.

law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT ("FOF")

A. Entities

1. MSRF is a Delaware corporation, with its principal place of business located in Illinois, which manufactures and imports gourmet foods and gifts. Complaint at ¶ 12; RPFF at ¶ 1; CRPFF at ¶ 1.

2. MSRF relies on David Reich, its founder, and Rochi Mirasol, manager of international logistics, to procure and manage ocean carrier services in transporting MSRF's goods to and from the United States. RPFF at ¶ 2; CRPFF at ¶ 2; RX 204; RX 259.

3. HMM is a vessel-operating ocean common carrier as that term is defined by 46 U.S.C. § 40102(18) and is organized under the laws of the Republic of Korea. Answer at ¶ 13; RPFF at ¶ 3; CRPFF at ¶ 3.

B. 2021-2022 Contract Year

4. During the 2021-2022 period, MSRF had service contracts with four ocean carriers. RX 205; RX 230; RX 210; RPFF at ¶ 4; CRPFF at ¶ 4.

5. Specifically, during the 2021-2022 contract period, MSRF contracted with Yang Ming and two other ocean carriers, in addition to contracting with HMM. RX 205; RX 230; RX 210; RPFF at ¶¶ 5-7; CRPFF at ¶¶ 5-7.

6. During the negotiation period for the 2021-2022 ocean shipping contract season, MSRF encountered difficulty securing space commitments from ocean carriers. RX 230-231; RPFF at ¶ 8; CRPFF at ¶ 8.

7. MSRF entered into negotiations with HMM in early 2021 for a new service contract, which contemplated the delivery of containers from Asia to the United States under certain lanes, and the delivery of containers from the United States to Asia under certain lanes. RX 205; RPFF at ¶ 10; CRPFF at ¶ 10.

8. The negotiation of the new service contract took place during the COVID-19 pandemic when market conditions had been disrupted and ocean shipping services were experiencing significant constraints, colloquially called the "supply chain crisis." RX 215; RX 356; RPFF at ¶ 11; CRPFF at ¶ 11.

9. Among other things, the supply chain crisis included shortages of shipping containers, chassis to carry them, workers at all levels, and significant port backlogs in Asia and the United States West Coast. *See, e.g.*, RX 215; RX 230-231; RX 263; RPFF at ¶ 12; CRPFF at ¶ 12.

10. When negotiating the new service contract with HMM, MSRF was aware of the supply chain crisis and the limitations imposed thereby on the transportation of goods. RX 230-231; RPFF at ¶ 13; CRPFF at ¶ 13.

C. Initial 2021-2022 HMM Service Contract

11. The negotiations between MSRF and HMM culminated in Service Contract US2124083, which duration was set from May 1, 2021 through April 30, 2022 ("Service Contract"). RX 7-18; RPFF at ¶ 21; CRPFF at ¶ 21.

12. The Service Contract has two separate sections, the first covering Asia to the United States and the second covering United States to Asia. RX 8; RX 15. MSRF alleges only a violation of the Shipping Act as it relates to the Asia to United States services.[7] RPFF at ¶ 24; CRPFF at ¶ 24.

13. Per the Service Contract, HMM's minimum quantity commitment to MSRF was 25 FEUs from Asia to the United States. RX 8; RX 216. This was reflected in Section 4 of the Service Contract. RX 8; *see also* RX 15.

14. Paragraph 14 of the Service Contract provides that after a contract agreement has been filed with FMC, the parties may enter into subsequent amendments to this agreement, with an electronic signature and confirmed via e-mail confirmation. RX 14; *see also* RX 216 (Marisol Dep., "Q. [I]n sum and substance [Paragraph 14] requires any amendments to the contract to be in writing, signed and confirmed by email, correct? A. Yes."); RX 373 ("After this initial filing HMM will just require your E-signature for any further amendments. Meaning [you] just reply with your approval.").

15. The Service Contract specifically incorporated Rule 208-A of Tariff HDMU-047 by reference in Section 5 (Service Commitment), Section 7 (Liquidated Damages), Section 11 (Records), and Section 13 (Governing Tariff). RX 8; RX 13; RX 14 ("This contract incorporates by reference (A) HDMU-047, essential terms tariff (Service Contract Rules)"); RX 215; RPFF at ¶ 26; CRPFF at ¶ 26.

16. MSRF was aware that the tariffs were incorporated into the Service Contract at the time the Service Contract was entered into. RX 216; RPFF at ¶ 27; CRPFF at ¶ 27.

17. However, MSRF did not obtain a copy of the tariff or review it prior to executing the Service Contract. RX 216; RPFF at ¶ 28; CRPFF at ¶ 28.

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[7] Because MSRF's allegations only concern the Asia to United States services, references in this decision to the MQC will refer to the Asia to United States portion of the Service Contract only, unless otherwise specified.

18. Tariff Code HDMU-047 Rule No. 208-A states that the "term Carrier means Hyundai Merchant Marine Co., Ltd. [HMM]." RX 1.

19. Tariff Code HDMU-047 Rule No. 208-A, paragraph 5, states:

> The Shipper agrees to tender for shipment on vessels of the Carrier during the term of this Contract the Minimum Quantity Commitment of cargo specified in Appendix to this Contract. However, the Carrier shall have the right to cancel the Contract by giving a written notice of such cancellation any time after the Minimum Quantity Commitment has been satisfied. . . . In consideration for Merchant's MQC, Carrier shall provide container equipment for booked shipments and shall accept each shipment timely offered by Merchant in order to meet Merchant's MQC : provided that carrier shall have no obligation with respect to cargo tendered in excess of an amount equal to 10% of the annualized MQC during any of the sequential 30 day periods covered by this contract first of which commences with the effective date of the contract.

RX 2 at ¶ 5.

20. In her deposition, Ms. Marisol was asked:

> Q. So doesn't that mean that of the 25 Asia to U.S. containers that HMM undertook to carry under this Service Contract, that those containers needed to be spaced out on a monthly basis with about 10 percent each month?
>
> A: Correct.
>
> Q: . . . [T]hat is an agreement by MSRF to provide no more than about two containers per 30-day period, right?
>
> A: Yes.

> The Carrier agrees to make available during the term of this Contract vessel capacity & container equipment adequate to carry (1) the Minimum Quantity Commitment of cargo and (2) at the Carriers option any additional cargo tendered by the Shipper during the term of this Contract. The Shipper agrees that as far as possible cargo committed under this Contract will be shipped evenly throughout the duration of the contract. The Shipper agrees to give fourteen (14) days booking notice, if possible, but in general not less than seven (7) days notice to the carrier.

RX 2-3 at ¶ 7(a).

applicable during the time service to or from the port or point is not provided.

RX 3 at ¶ 7.

25. Tariff Code HDMU-047 Rule No. 208-A, paragraph 8, states:

(a) If the Shipper fails to tender the Minimum Quantity Commitment specified in Appendix to this Contract, and per the Article (7)(b) the Carrier shall invoice the Shipper and the Shipper agrees to pay deficit charges on the difference between the quantity of cargo actually shipped and the Minimum Quantity Commitment at the rate of U.S. $250 per FEU. The total amounts due hereunder shall be paid directly to the Carrier within thirty (30) days following notification by the Carrier.

(b) If the Carrier fails to fulfill its service commitment in clause hereof during the Contract term, the Shippers remedy options shall be either (1) reduction of the Minimum Quantity Commitment by the quantity of cargo tendered but not carried and/or (2) extension of the Contract terms as specified in Clause (7)(b). The Carrier shall not be liable to the Shipper for any direct, consequential or other damages under this Contract, except as set forth in clause 7 nor shall any liabilities or obligations of the Shipper to the Carrier be subject to any offset or credit by virtue of any moneys which the Shipper may claim are due him under this Contract or otherwise.

RX 3-4 at ¶ 8.

26. Tariff Code HDMU-047 Rule No. 208-A, paragraph 13, provides:

(a) This Contract is subject to early termination prior to the expiration date as follows: (1) by either Party with a thirty (30) days written notice after the MQC or adjusted MQC has been satisfied; . . . .
(b) Termination or expiration of this Contract shall not relieve or release either Party from any rights, liabilities, or obligations that have previously accrued under law or the terms of this Contract.

RX 4-5 at ¶ 13.

27. Tariff Code HDMU-047 Rule No. 208-A, paragraph 18, states:

In case of a dispute, the carrier and the shipper each agree to submit the matter under dispute to arbitration each appointing an arbitrator and the two so chosen shall select an umpire which shall constitute the Arbitration committee. All data requested in connection with the matter in dispute shall be made available. Decision of two or more of the said Committee shall be binding on the parties and the arbitration shall me made under and

> pursuant to the terms and conditions of the United States Arbitration Act . . . . Arbitration shall be held in Dallas, Texas, U.S.A. Cost of arbitration, including reasonable attorneys fees, may be assessed against one or more party(ies), at the discretion of the arbitrators.

RX 6 at ¶ 18.

D. 2021-2022 Service Contract Amendments & Performance

28. The Service Contract was amended a total of fourteen times. RX 19-200.

29. Service Contract Amendments 1 through 5 added additional lanes at the request of MSRF. RX 19 (Amend. 1, effective May 7, 2021); RX 32 (Amend. 2, effective June 3, 2021); RX 45 (Amend. 3, effective June 7, 2021); RX 58 (Amend. 4, effective June 15, 2021); RX 71 (Amend. 5, effective June 22, 2021); RPFF at ¶ 30; CRPFF at ¶ 30.

30. Service Contract Amendments 6 and 7 added surcharges for certain lanes. RX 84 (Amend. 6, effective July 9, 2021); RX 97 (Amend. 7, effective August 4, 2021); RPFF at ¶ 31; CRPFF at ¶ 31.

31. Service Contract Amendments 8 through 11 added additional lanes at MSRF's request. RX 110 (Amend. 8, effective August 9, 2021); RX 123 (Amend. 9, effective November 1, 2021); RX 136 (Amend. 10, effective November 2, 2021); RX 149 (Amend. 11, effective August 4, 2021); RPFF at ¶ 32; CRPFF at ¶ 32.

32. As of Service Contract Amendment 11, the contract was set to expire April 30, 2022. RX 156.

33. By mid-April 2022, 10.125 FEUs had been carried by HMM constituting nine bookings made by MSRF. CX 206 (bookings under US2124083); RX 273; RX 275.

34. MSRF never formally invoked paragraph 7(b) of Tariff Code HDMU-047 Rule No. 208-A, to make an election. RPFF at ¶ 40; CRPFF at ¶ 40; RX 218 (Mirasol Dep., "Q: So no notice was given under paragraph 7B . . . by MSRF, right? A: No, we do not do that with any of our Service Contract.")

37. The morning of April 29, 2022, HMM account executive Christopher McDonald emailed Ms. Mirasol, writing:

> Management has directed me to advise MSRF that the s/c US2124083 will be extended for 10 weeks to meet the original 25F MQC. Please confirm by reply ASAP if you will accept this extension for filing.
>
> Additionally there is an extra loader on PF2/PS3 wk 20. Would MSRF be interested in taking advantage of this opportunity to use the extra loader?

RX 388.

38. Ms. Mirasol replied at 2:25 PM on April 29, 2022, writing: "Yes go ahead." RX 388. Mr. McDonald responded at 2:45 PM, writing: "Laura will work it up to send over for review. We will need a reply for esig approval and filing, but then that should get this completed today." RX 387.

39. Ms. Trometer emailed Ms. Mirasol at 4:12 PM on April 29, 2022, writing:

> Attached service contract will reflect the MQC showing 25 FEU with an expiration date of 7/8/22.
>
> Please review and reply with your approval for FMC Filing.. this will serve as your E-signature.

RX 386 (punctuation as in original).

40. Mr. McDonald sent a follow-up email at 4:39 PM April 29, 2022, writing "Hi Rochi, We need your approval by reply today as soon as possible so we can get it filed today. Thank you." RX 386. Ms. Mirasol replied at 9:47 PM writing "Yes, I already accepted it on my first email below. If I need to sign, I am not in my laptop now. Go ahead & file it." RX 386.

41. Amendment 13 formalized the extension of the term of the Service Contract by ten weeks, to July 8, 2022. RX 175 (Amend. 13, effective April 29, 2022); RPFF at ¶ 33; CRPFF at ¶ 33.

42. Following Amendment 13, MSRF requested a final amendment to add an additional service lane, which change was formalized by Amendment 14. RX 188 (Amend. 14, effective June 16, 2022); RPFF at ¶ 34; CRPFF at ¶ 34; RX 224.

43. Although HMM did not have to agree, HMM accepted MSRF's request to add an additional lane and agreed to Amendment 14. RX 188; RPFF at ¶ 45; CRPFF at ¶ 45.

44. All the Service Contract Amendments were signed by MSRF and HMM and were filed with the FMC. RX 19-200; RPFF at ¶ 35; CRPFF at ¶ 35.

45. The term of the Service Contact, as amended, concluded on July 8, 2022. RX 188; RPFF at ¶ 47; CRPFF at ¶ 47.

46. HMM carried a total of 46.875 FEUs on behalf of MSRF from Asia to the United States during the term of the Service Contract. CX 206; RX 273-274; RPFF at ¶ 48; CRPFF at ¶ 48.

47. HMM therefore accepted bookings requested by MSRF in excess of the 25 MQC required under the Service Contract, even though HMM was not required to provide excess capacity under the Service Contract. CX 206; RX 273-274; RX 1-6; RPFF at ¶ 54; CRPFF at ¶ 54; RX 8; RX 176; RX 189.

48. These 46.875 FEUs were carried by HMM over the course of 24 bookings made by MSRF. RX 273; CX 206.

49. Of this total, 10.125 FEUs had been carried by HMM up through the end of April 2022, and 37.875 FEUs were carried by HMM during the extension of the Service Contract, pursuant to Amendment 13. CX 206; CRPFF at ¶ 53; RX 224.

50. In Ms. Mirasol's deposition, Amendment 13 was discussed as follows:

> Q. So amendment No. 13 was signed, right?
> A. Yes.
> Q. And it . . . extended the term of the Service Contract by ten weeks, right?
> A. Correct.
> Q. So for May 1, 2022, through July 8, 222, MSRF was able to ship containers under this Service Contract but at 2021 rates, correct?
> A. Yes.

RX 220.

51. During the Service Contract's extended term, MSRF described its benefit of shipping at HMM's 2021-2022 rates during June of 2022 favorably, saying that "[p]aying below $5k for the base freight all the way to Chicago, is like winning a casino jackpot." RPFF at ¶ 55; CRPFF at ¶ 55; RX 331; *see also* RX 224 (Marisol Dep., "Q. So you understood the ability to ship these containers in 2022 at 2021 rates was a significant benefit to MSRF, right? A. Correct. Q. And MSRF took advantage of that, correct? A. We did, yes.").

52. MSRF acknowledged that the Service Contract extension provided a significant benefit and that MSRF took advantage of the low rates during the extended term by shipping over 46 FEUs instead of only 25 FEUs provided for in the MQC. RPFF at ¶ 57; CRPFF at ¶ 57.

53. MSRF also stated that it wished HMM would provide a further extension of the Service Contract beyond the term, because of the savings MSRF was experiencing at the time. RPFF at ¶ 56; CRPFF at ¶ 56; RX 331; RX 224.

54. Specifically, on June 24, 2022, Ms. Mirasol emailed Mr. Reich and others, stating "I wish Hyundai [HMM] will extend this SC after July 31st. Paying below $5K for the base freight all the way to Chicago, is like winning a casino jackpot." RX 331; RX 224; *see also* RX 224 (Mirasol Dep., Q. "[T]hat's $180,000 approximate savings, right? A. I would say, yeah.")

55. MSRF acknowledged that HMM did not refuse to negotiate with MSRF. RX 208 (Mirasol Dep., "Q. Did HMM refuse to negotiate with MSRF? A. No.").

56. MSRF acknowledged that it initiated many of the amendments, and that HMM provided a benefit to MSRF via the addition of lanes. RX 219 (Marisol Dep., "Q. This Service Contract was amended, correct? A. Yes. Q. And who initiated those amendments? Who sought those amendments? A. Usually it's me. Q. . . Isn't it fair to say that many of the amendments either add lanes or service provisions . . . to what had been initially agreed? A. Yes. Q. And isn't it fair to say that the addition of lanes provided a benefit to MSRF? A. Correct."); *see also* RX 271 (Reich Dep., "Q. So is it fair to say that amendment 14, at least the part that we've looked at, adds an additional lane so that MSRF could meet a customer need? A. Yes.").

57. Email correspondence between MSRF and HMM demonstrates that the two companies communicated and negotiated regarding the MQC, additional lanes, freight rates, surcharges added, and the contract extension. *See, e.g.*, RX 353-357; RX 359-370; RX 386-390.

58. Email correspondence also demonstrates examples of reasons provided to MSRF for HMM's inability to accept certain requests for space. For example, a November 3, 2021, email from Ms. Trometer to Ms. Mirasol referenced "ongoing vessel space issues across the board." Reply Brief, Exh. 2 (HMM0015923). In a series of July 2021 emails between MSRF and HMM, HMM also described a lack of space on a particular route for certain dates, and HMM encouraged MSRF to "request booking for week 35 or beyond as Vessel space will fill up quickly once India able to accept bookings." Reply Brief, Exh. 1 (HMM0034807-34814).

59. There is no indication that reasons provided by HMM for its inability to accept certain requests for space were false. *See, e.g.*, Reply Brief, Exhs. 1-2.

60. There is no evidence of duress or undue pressure by HMM concerning the Service Contract's amendments. *See, e.g.*, RX 353-357; RX 359-370; RX 386-390.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

MSRF contends that the Commission has jurisdiction over its claims because it alleges violations of the Shipping Act, including "that HMM engaged in unreasonable and unjust shipping practices and regulations by arbitrarily refusing to provide MSRF with the agreed upon

shipping container space when MSRF needed it the most." Reply Brief at 8. Citing to *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.,* 28 SRR 1635, 1645 (2000), MSRF asserts "that 'where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume . . . that the matter is appropriately before the agency.'" Reply Brief at 8-9. MSRF further contends that the Commission has a duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act, even though another forum may be available to the parties under the terms of their service contract to resolve some of their disputes. Reply Brief at 9.

HMM argues that the Commission does not have subject matter jurisdiction over this case because the allegations merely assert a breach of contract for which "'the exclusive remedy is . . . an action in an appropriate court.'" Opposition at 16 (citations omitted). Further, HMM argues that the Commission should defer to an arbitration clause in the service contract that requires their disputes be arbitrated in Dallas, Texas applying Korean law, because the Commission has long followed the federal policy favoring enforcement of arbitration agreements in contracts. *Id.* at 16-17.

Under 46 U.S.C. § 41301(a), any "person may file with the Federal Maritime Commission a sworn complaint alleging a violation" of the Shipping Act. In addition, § 40502 of the Shipping Act governs service contracts (formerly Section 8(c) of the 1984 Act), and subsection (f) provides that "[u]less the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court." Pub. L. 109-304, §7, Oct. 6, 2006, 120 Stat. 1533. This exclusive remedy language is unchanged in meaning from the previously cited 8(c) that is discussed in the cases below, and through the period at issue is this case (the section on service contracts was formerly cited as 46 U.S.C. §1707).

Discussion of the FMC's jurisdiction in cases where breach of contract is raised in conjunction with allegations of Shipping Act violations is best understood by examining the evolution of the case law and in particular, the Commission's holdings in several cases discussed below.

In *Vinmar, Inc. v. China Ocean Shipping Co.*, Docket No. 91-43, 26 S.R.R. 420 (FMC July 29, 1992), an early case that examined the Commission's jurisdiction in breach of contract cases, the Commission discussed whether the limitations of Section 8(c) of the 1984 Act precluded its jurisdiction to award remedies for a breach of contract, while retaining its jurisdiction to "institute…an investigation and assess civil penalties if a violation was found." *Id*. at 424. After examining the legislative history and finding no explanation for "what Congress intended by the 'exclusive remedy' limitation in Section 8(c)," the Commission stated:

> This leads the Commission to conclude that Congress placed the limitation in Section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court. Where, as here, the alleged conduct under a service contract would constitute a breach of contract *as well as* a violation of one or more of the prohibited acts, the limitation in Section 8(c) requires the aggrieved party to proceed in a breach of contract action.

Id. at 424 (emphasis in original). As the Commission noted in a separate case, the "issue then becomes whether the provision in section 8(c) that the 'exclusive remedy for a breach of contract . . . shall be an action in an appropriate court" deprives the Commission of jurisdiction to hear this case." *DSR Shipping Co. v. Great White Fleet, Ltd.*, Docket No. 91-54, 26 S.R.R. 627, 631, 1992 WL 366152, at *5 (FMC Oct. 2, 1992). In *Vinmar*, the Commission found that "[i]t is reasonable and appropriate to assume that Congress placed the limitation in Section 8(c) to prevent the Commission from adjudicating actions that might otherwise have been filed under Section 11(a) of the 1984 Act[;]" which "permits any person to file a complaint with the Commission 'alleging a violation of this Act, other than Section 6(g), and may seek reparation for any injury caused to the complainant by that violation.'" 26 S.R.R. at 424. The Commission in *DSR Shipping* further noted that while complainant DSR cited to the 1984 Act in its complaint, "the claims are ultimately based on rights and obligations under the service contract." *DSR Shipping*, 1992 WL 366152, at *6.

The Commission revisited *Vinmar* and the 8(c) limitation to its jurisdiction that it found in *DSR Shipping* in another case, *Cargo One, Inc. v. COSCO Container Lines, Co.*, Docket No. 99-24, 28 S.R.R. 1635, 2000 WL 1648961 (FMC Oct. 31, 2000) (Order Vacating the Administrative Law Judge's Order Denying Respondent's Motion to Dismiss and Remanding the Proceeding to the Administrative Law Judge). In *Cargo One*, unlike *Vinmar* and the line of cases that preceded *Cargo One,* the Commission found that it is appropriate to assert jurisdiction over Shipping Act violations, regardless of whether they may overlap with breach of contract claims that could be addressed in an appropriate court. The Commission stated:

> The *Vinmar* rationale has been applied to subsequent complaint cases involving potential breach actions, resulting in dismissals . . . . While the Commission in *Vinmar* was expressly concerned with giving meaning to each section of the Shipping Act, in effect, that decision and those that followed significantly narrowed the scope of the right to file complaints under section 11, and substantially limited an injured party's ability to obtain reparations for violations arising from service contract-related disputes.

Cargo One, 2000 WL 1648961, at *12. Here, the parties disagree on whether the complainant alleges, and the evidence supports, violations of the Shipping Act, or merely alleges breach of contract claims couched as Shipping Act violations. The Commission's test as set forth in *Cargo One* is applicable and helpful:

> We believe the more 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 breach of contract 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 a claim, that the matter is appropriately before the agency.

2000 WL 1648961, at *14 (footnote omitted). Carrying that rationale forward in the context of overlapping breach of contract claims that had been arbitrated under the parties' arbitration clause prior to complainant filing a private complaint before the FMC, the Commission found:

> Anchor's complaint contains allegations specific to the Shipping Act such as: unfair or unjustly discriminatory practices, undue or unreasonable preferences, and undue or unreasonable prejudice or disadvantage. The Commission has an interest in ensuring that service contracts are used in a manner that complies with the Shipping Act and the Commission's regulations, so that it can be certain that the public and the shipping industry are protected. This interest outweighs the intentions of two private parties, as set forth in the arbitration clause of their service contract.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., Docket No. 02-04, 30 S.R.R. 991, 999, 2006 WL 2007808, at *10 (FMC May 10, 2006). The Commission further found that "the exception that the *Cargo One* test provides, that claims primarily contractual in nature should be dismissed, is inapplicable because Anchor alleges certain violations that are particular to the Shipping Act. Thus, Anchor's complaint was prematurely dismissed." *Id.*

Similarly, *in Global Link*, the Administrative Law Judge ("ALJ") found that the Commission had jurisdiction over the complaint:

> The [service] 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." Therefore, the Commission has jurisdiction over . . . the Complaint alleging that Hapag-Lloyd, a common carrier, violated sections 41104(10), 41104(3), and 41102(c) of the Shipping Act.

Global Link Logistics, Inc. v. Hapag-Lloyd AG, Docket No. 13-07, 33 S.R.R. 512, 2014 WL 5316345, at *13 (ALJ April 17, 2014) (citations omitted), proceeding dismissed due to settlement, 2015 WL 3955128 (FMC April 14, 2015).

HMM further argues that all MSRF's claims emanate from a breach of contract allegation and as such, should be addressed through the Service Contract's arbitration clause. Opposition at 16-17. MSRF responds that HMM waived its opportunity to arbitrate the dispute between the parties by participating in the FMC proceeding that MSRF brought.

The parties' arbitration clause does not preclude the Commission's jurisdiction over Shipping Act claims. The D.C. Circuit has found that "a mandatory arbitration clause does not negate a Federal agency's independent regulatory duty…." *Anchor Shipping*, 2006 WL 2007808, at *8 (citing *Duke Power Co. v. Federal Energy Regulatory Commission*, 864 F2d 823 (D.C. Cir 1989)) (Federal Energy Regulatory Commission "was not precluded from retaining its jurisdiction…despite the presence of an arbitration clause in the agreement among the utilities." *Anchor Shipping*, at 997). Relying on these and other cases, the Commission in *Anchor Shipping* vacated the ALJ's order dismissing the complaint, even though the complainant had already secured a sizable arbitration award, finding that "[t]he arbitration clause in the parties' service contract does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act." 2006 WL 2007808, at *9.

MSRF raises allegations that are "peculiar to the Shipping Act" in the Complaint, including that HMM violated § 41102(c), § 41104(a)(2), (9), and (10). *Cargo One*, 2000 WL 1648961, at *14. While inartful in its choice of language, MSRF sufficiently "rebut[s] the presumption that the claim[s] involve[] no more than a simple breach of contract" so as to warrant review of the elements that must be proved to support each alleged violation. *Anchor Shipping,* 2006 WL 2007808, at *4. Accordingly, the Commission has jurisdiction over these claims.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. §§ 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

3. Remaining Claims

In its Brief, MSRF states it is no longer pursing Count III of the Complaint, which alleged a violation of 46 U.S.C. § 41104(a)(5). However, rather than also clarifying that it is no longer pursing Count IV of the Complaint alleging that Respondent HMM violated 46 U.S.C. § 41104(a)(9), MSRF continues to list Count IV in its Brief, but then omits any discussion of it in its Reply Brief. Brief at 1 (stating that MSRF "moves for a summary decision on Counts I, II, IV, and V" and "MSRF is no longer proceeding on Count III (violation of 46 U.S.C. 41104(a)(5)."));
but see Reply Brief at 3 (citing only to alleged violations of 46 U.S.C.§§ 41102(c), and 41104(a)(2) and (a)(10)). Accordingly, Complainant's allegation brought under § 41104(a)(5) is dismissed. Because Complainant did not make clear whether it is continuing to pursue the allegation that Respondent HMM violated 46 U.S.C. § 41104(a)(9), this will be discussed briefly below, along with the other claims remaining, falling under §§ 41102(c), 41104(a)(2), and 41104(a)(10).

B. Discussion

1. Section 41102(c) - Just and Reasonable Regulations and Practices

MSRF asserts that the Service Contract required MSRF to tender a minimum quantity of 25 FEUs of cargo for shipment by HMM from Asia to the United States; however, between May 2021 and April 2022, HMM refused to provide MSRF with the agreed allotments of space; HMM's refusal to provide MSRF with the agreed upon cargo space between May 2021 and April 2022 was not in accordance with standard shipping practices; and this "forced MSRF to

make alternate transportation arrangements with other common carriers at substantially higher spot market prices or forgo shipping its cargo altogether." Reply Brief at 5.

HMM contends that 46 U.S.C. § 41102(c) is not applicable to the transportation of property; MSRF does not state what regulation or practice is allegedly unjust or unreasonable on the part of HMM; nor does MSRF show that any allegedly violative practice occurred on a normal, customary, or continuous basis. Opposition at 11-12; Sur-Reply at 4.

During the period covered by the Complaint's allegations, Section 41102(c) stated that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

The elements that must be established to prove a Section 41102(c) claim were specified by the Commission on December 17, 2018, as follows:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); 46 C.F.R. § 545.4. After determining that there is "a practice relating to and connected with the receiving, handling, storing, or delivering of property," it may be assessed whether the practice is "unjust and unreasonable." *California Stevedore & Ballast Co. v. Stockton Port Dist.*, Docket No. 898, 7 F.M.C. 75 (FMC Jan. 25, 1962). Therefore, the question of whether the practice at issue relates to the receiving, handling, storing or delivering of property will be addressed, prior to assessing the reasonableness of HMM's conduct.

As discussed below, HMM is undoubtedly a common carrier, and it is also established that the practice or regulation at issue relates to or is connected with the receiving, handling, storing, or delivering of property. However, MSRF has not carried its burden of demonstrating that any unjust or unreasonable practice has occurred. Therefore, there is no need to address whether the acts or omissions are occurring on a normal, customary, and continuous basis, nor is there a need to address whether the practice or regulation is the proximate cause of the claimed loss.

a. Common Carrier

The Shipping Act defines a common carrier to be 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(7). The parties agree that HMM is a vessel-operating common carrier ("VOCC") as that term is defined by 46 U.S.C. § 40102(18). FOF 3. This element is not in dispute and is met.

b. Receiving, Handling, Storing, or Delivering of Property

The crux of MSRF's reasonableness argument is that between May 2021 and April 2022, HMM refused to provide MSRF with the agreed allotments of space.[8] Then in terms of whether this relates to the receiving, handling, storing, or delivering of property, MSRF argues that "Section 41102(c) is clearly applicable to the transportation of property because it applies to 'common carriers'" and "the Shipping Act defines a 'common carrier' as a person that provides transportation by water of cargo between the U.S. and a foreign country for compensation." Reply Brief at 4 (emphasis and citations omitted).[9]

HMM contends in response that Section 41102(c) "does not relate to the transportation of property" citing to *Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (1962) among other cases. Opposition at 12.

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[8] Brief at 2 ("HMM failed to perform under the service contract with MSRF which is a violation of various statutes by not providing the requisite number of forty-foot equivalent units . . . to ship cargo as provided in the service contract."); Reply Brief at 3 ("HMM's conduct towards MSRF was unreasonable and unjust under [Section 41102(c)] . . . because HMM refused to provide the agreed upon cargo space that MSRF requested and needed between May and April of 2022" and HMM failed "to provide service (the agreed upon cargo space) that was in accordance with the rules and practices contained in the underlying Service Contract."); Reply Brief at 4 ("HMM's refusal to provide MSRF with the agreed upon cargo space between May 2021 and April 2022 was not in accordance with standard shipping practices.")

[9] MSRF also argues "there is no doubt that HMM violated Section 41102(c) of the Shipping Act by failing to observe just and reasonable practices relating to the ***storing*** of MSRF's cargo" but does not explain how the 'storing of cargo' relates to its allegations. Reply Brief at 5 (emphasis added).

Whether the practice at issue is considered to be 'transportation' or 'allocation of space,' in either instance, there is good reason to conclude that this does relate to the receiving, handling storing, or delivering of property. Section 41102(c) was previously numbered as Section 10(d)(1). The Commission's reflections in the context of 10(d)(1) are therefore instructive. In *Cargo One*, complainant's claims included a 10(d)(1) claim that COSCO had "fail[ed] to receive containers tendered by Complainant at service contract rates, den[ied] container space aboard eastbound vessels . . . contrary to what was agreed under the service contract, and fail[ed] to respond to and rectify complaints from Cargo One regarding the problems with the use of the service contract." *Cargo One*, 2000 WL 1648961, at *1. In evaluating whether the violations alleged by complainant were properly before the Commission, the Commission concluded:

> Given the specificity the Shipping Act provides with respect to the types of complaints a person may not bring (i.e., only section 6(g)), and given the specificity as to types of relief available for various violations of the Prohibited Acts, we believe that Congress did not intend that the section 8(c) "exclusive remedy" language would nullify the sections 10 and 11 rights of complainants to bring suit on any matter tangentially or even substantially related to service contract obligations. Moreover, if parties were not meant to obtain reparations for violations of section 10 ***stemming from transportation under service contracts***, it is likely that the statute would have clearly limited either the types of proceedings which can be initiated by private complainants, or the availability of reparations.

Cargo One, 2000 WL 1648961, at *12 (emphasis added). The Commission further assessed "Congress' intention that the Commission is the appropriate forum for resolving allegations of violations of certain section 10 Prohibited Acts, ***even if they arise from transportation governed by a service contract***" concluding that to "find otherwise would give little or no meaning to those provisions of section 10, as well as to the right to file a complaint seeking reparations under section 11." *Cargo One*, 2000 WL 1648961, at *12 (emphasis added).

There is as well good reason to conclude that space allocation is within the ambit of "receiving, handling, storing or delivering of property." As one indication, space allocation is core to a freight forwarder's role, and the Supreme Court has held that "[b]y the nature of their business, independent forwarders are intimately connected with" the activities listed under section 17, that is, "the receiving, handling, storing or delivering of property." *United States v. American Union Transport*, 327 U.S. 437, 442, 449 (1946) ("The forwarder must arrange for necessary space with the steamship companies"); *see also* 46 U.S.C. § 40102(19) ("The term 'ocean freight forwarder' means a person that . . . dispatches shipments from the United States via a common carrier and ***books or otherwise arranges space for those shipments*** on behalf of shippers") (emphasis added).

Altieri, cited by HMM, further supports that allocation of space is a practice related to or connected with the "receiving, handling, storing or delivering of property." In particular, *Altieri* distinguishes between generalized "unreasonable practices" and "practices intended to fall within the coverage of this section," i.e. "shipping practices." 7 F.M.C. at 419. Given the choice between these two buckets, space allocation of cargo is more accurately deemed a "shipping practice" appropriately assigned to the "special expertise of the Agency." *Id.* at 419. Accordingly, MSRF has satisfied this element of a § 41102(c) violation.

c. Reasonableness

The core of MSRF's reasonableness argument is that the Service Contract required MSRF to tender a minimum quantity of 25 FEUs of cargo for shipment by HMM from ports in Asia to the United States; but between May 2021 and April of 2022, "HMM refused to provide MSRF with a paucity of the agreed allotments of space;" MSRF then points to specific email exchanges with HMM and argues "in each instance, HMM gave no explanation for their failure to provide MSRF with the space requested – they simply refused thereby breaching the terms of the Service Contract." Reply Brief at 4-5. MSRF does not point to any cases in support of its reasonableness argument.

HMM asserts in response that MSRF has failed to adduce any evidence that HMM acted in an unreasonable manner related to MSRF's property during transportation or otherwise; since the MSRF Brief does not cite to any evidence that HMM acted unreasonably in "receiving, handling, storing, or delivering" MSRF's property, this allegation is unsustainable; MSRF's alleged evidence shows only that HMM twice could not immediately provide space as requested by HMM, with the same port of origin, over the entire term of the Service Contract; it is incorrect that "HMM gave no explanation" for its inability to provide space, as the email correspondence clearly shows this lane and load port had limited capacity, long lead times for bookings, and that HMM was experiencing "ongoing vessel space issues across the board;" MSRF fails to show or even allege with specificity that HMM adopted a regulation or practice consistent with the Commission's definition of "practice;" and even if it were true that HMM did not meet the MQC under the Service Contract (although in fact HMM shipped nearly double the MQC) finding that such a breach violated the Shipping Act would render 46 U.S.C. § 40502(f) meaningless. Opposition at 11-12; Sur-Reply at 4-8.

At the outset, the proponent of the proposition that a practice is unreasonable, here MSRF, "bears the burden of proving that proposition, including the burden of producing evidence adequate to persuade the Commission. Respondent is not required to show that the practice is reasonable." *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, Docket No. 94-10, 1996 WL 264720, at *13 (FMC May 15, 1996); *see also Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 26 S.R.R. 886, 898 (FMC Apr. 14, 1993). Once a *prima facie* case of unreasonableness is raised, however, the burden of producing evidence justifying the practices shifts to Respondent. *Id.*

The terms "unjust" or "unreasonable" are not defined in the Shipping Act. However, the Commission has recently discussed reasonableness as it relates to the establishment of the demurrage and detention rule. While this case is not about demurrage and detention, the Commission's discussion is nevertheless useful:

> The main thrust of the rule is that although demurrage and detention are valid charges when they work, when they do not, there is cause to question their reasonableness. This derives from the well-established principle that to pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended purpose, that is, ''fit and appropriate for the end in view.'' The Commission determined that because the purpose of demurrage and detention are to incentivize cargo movement, it will consider in the reasonableness analysis

> under section 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.

Final Rule: Interpretive Rule on Demurrage and Detention Under the Shipping Act, Docket No. 19-05, 85 Fed. Reg. 29638, 29651 (May 18, 2020) (citations omitted). In *California Stevedoring & Ballast Co*., the Commission similarly considered whether the practice or regulation served its intended purpose and what the impact of the practice was on the general public and the shipping community. *California Stevedoring & Ballast Co. v. Stockton Port District,* 7 F.M.C. 75, 81 (Jan. 25, 1962) (evaluating the reasonableness of a stevedoring structure).

In another case, the Commission provided the following explanation:

> 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 v. Hapag-Lloyd A.G., Docket No. 10-06, 2013 WL 9808671, at *9 (FMC July 12, 2013) (Order Vacating Initial Decision in Part and Remanding for Further Proceedings).

The Commission has also emphasized the degree to which assessments of reasonableness turn on the facts of the case at hand. *See, e.g.*, *All Marine Moorings*, 1996 WL 264720, at *13 ("Our decisions have emphasized various commercial, physical and competitive factors affecting our view of what is reasonable in these individual cases.").

Here, the facts make clear under any assessment that MSRF has not carried its burden of demonstrating any unreasonable practice or regulation by HMM. What has been established is that MSRF entered into a service contract with HMM, including a minimum quantity commitment of 25 FEUs from Asia to the United States. FOF 11, 13. HMM and MSRF subsequently amended this service contract a total of fourteen times, frequently at the initiation of MSRF, and for the benefit of MSRF, for example to add additional lanes. FOF 28-31, 36, 41-44, 56. The thirteenth amendment, agreed to by both MSRF and HMM, extended the end of the service contract term by ten weeks, to July 8, 2022. FOF 37-41, 44. By July 8, 2022, HMM had carried more than 46 FEUs for MSRF from Asia to the United States, nearly twice the 25 FEU MQC. FOF 13, 45-47. MSRF agreed that the service contract extension provided a significant

benefit to MSRF, which MSRF took advantage of. FOF 50-52. Indeed, MSRF acknowledged wishing that HMM would provide a further extension of the Service Contract, because of the savings MSRF was experiencing at the time through shipping at HMM's 2021-2022 rates during June of 2022. FOF 50-51, 53.

No arguments made by MSRF support this factual history being unreasonable or unjust towards MSRF. MSRF contracted with HMM and this contract was more than fulfilled. It is inconsistent and untenable for MSRF to accept amendments, benefit by them, and then complain about their execution. There have been no allegations – and no evidence presented – of duress or undue pressure exerted by HMM concerning the Service Contract's amendments. Brief at 1-5; Reply Brief at 1-12; FOF 60. Indeed, MSRF described the benefit of the contract extension, writing that "[p]aying below $5k for the base freight all the way to Chicago, is like winning a casino jackpot." FOF 51, 54.

Although HMM exceeded the Service Contract's MQC, MSRF points to a handful of instances when no space was available leaving from a particular port at a particular time. Reply Brief at 5; *but see* FOF 58-59. However, HMM did not agree to fulfill every shipment request submitted, in any lane, at any time. MSRF has not carried its burden of producing evidence adequate to persuade that HMM has engaged in a practice that is unjust or unreasonable. Therefore, MSRF's claim under Section 41102(c) is denied.

2. Section 41104(a)(2) - Service Not in Accordance with Rates, Charges, Classifications, Rules, and Practices

MRSF asserts that HMM failed to provide service that was in accordance with the classifications, rules and practices contained in the Service Contract because it refused to provide MSRF with the agreed upon minimum quantity of cargo space from May 2021 to April of 2022; HMM had already breached the terms of the Service Contract prior to providing MSRF with more than the agreed upon 25 FEUs of shipping space; and, even though "HMM provided MSRF with the agreed upon minimum quantity of cargo space in 2022 does not erase their breach of the Service Contract in 2021." MSRF further argues that HMM violated this section "because its own tariff rules require HMM to accept an amount equal to 10% of the annualized MQC for each sequential 30 day (sic) period of the contract. HMM Rule 208-A of Tariff HDMU-047*."* Reply Brief at 6, 7.

HMM contends that Section 41104(a)(2) does not create jurisdiction for Shipping Act claims before the Commission without "extraordinary aspects of the allegation [that] distinguish it substantially from a contract claim;" MSRF fails to state, under 46 U.S.C. § 41104(a)(2), what "rates, charges, classifications, rules, and practices contained in a tariff published or a service contract" were violated; MSRF cites no specific rate, rule, practice or action on the part of HMM which would fall into any one of these categories; rather MSRF states in conclusory fashion that HMM violated this Section of the Shipping Act by failing "to provide service that was in accordance with the classifications, rules, and practices in the Service contract because it refused to provide MSRF with the agreed upon minimum quantity of cargo space;" thus MSRF's argument again conflates a breach of contract claim with a violation of almost every component of 46 U.S.C. § 41104(a)(2). Sur-Reply at 8-9 (citations omitted).

During the period covered by the Complaint's allegations, Section 41104(a)(2) stated that:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is - (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under Chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title;

46 U.S.C. § 41104(a)(2). To prove a violation of Section 41104(a)(2), MSRF must establish that HMM is a common carrier that failed to provide service in accordance with the classifications, rules and practices contained in its published tariff or service contract.

a. Common Carrier

Section 41102(a) governs the activities of common carriers, so to violate it, an entity must be a common carrier within the meaning of the Shipping Act. The parties do not dispute this, and as found above, HMM is a common carrier within the meaning of the Shipping Act, so the first element is met.

b. Provide Service in Accordance with Classifications, Rules, and Practices Contained in a Service Contract or Tariff

MSRF and HMM agreed to a service contract, the terms of which were amended multiple times pursuant to paragraph 14 of the Service Contract. FOF 11-14, 28-32, 36, 41-44. MSRF's contention that "HMM failed to provide service that was in accordance with the classifications, rules and practices contained in the Service Contract because it refused to provide MSRF with the agreed upon minimum quantity of cargo space from May 2021 to April of 2022" does not recognize the multiple amendments reached between the parties as modifications to the Service Contract. *Id.* No authority is provided supporting that the terms of an initial service contract should be considered independent of or without reference to amendments. Because the Service Contract includes the amendments in accordance with paragraph 14, it is not apparent what "rates, charges, classifications, rules, and [or] practices" HMM failed to follow, and MSRF does not identify them.

In addition to the terms in the Service Contract and subsequent amendments, the contract incorporated by explicit references Rule 208-A of Tariff HDMU-047, which states in part:

> In consideration for Merchant's MQC, Carrier shall provide container equipment for booked shipments and shall accept each shipment timely offered by Merchant in order to meet Merchant's MQC : provided that carrier shall have no obligation with respect to cargo tendered in excess of an amount equal to 10% of the annualized MQC during any of the sequential 30 day periods covered by this contract first of which commences with the effective date of the contract.

FOF 19. MSRF's assertion that HMM violated Section 41104 (a)(2) by not accepting 10% of the annualized MQC it offered for shipment during each sequential 30-day period fails to consider the entirety of the tariff rule to which it points. Specifically, paragraph 7(b), states:

(b) ***In the event that the Minimum Quantity Commitment set forth in Appendix is not fulfilled due to Carriers inability to supply space*** or container equipment for causes not covered in Article 10, on any particular vessel of the Carrier after giving fourteen (14) days booking notice then, upon the Shippers written request within seven (7) working days of such occurrence together with essential supporting documents which are later confirmed to be accurate, ***shipper may elect one of the following options***.

(i) The Carrier will adjust the contractual Minimum Quantity Commitment set forth in Appendix by the actual quantity of cargo tendered but not carried on the Carriers vessel or on a pro-rate basis, whichever lower. Such pro-rate basis shall be defined as the Minimum Quantity Commitment divided by the Carriers total number of sailings during the term of the Contract.

(ii) If the Shipper does not elect to reconcile the shortage by reducing the minimum quantity commitment set forth in Appendix with aforementioned method, then such shortage will be reconciled upon expiration of the contract by extending the term of the Contract by {Contract Duration times (x) number of TEUs that was tendered to Carrier per Article (7)(a) herein but failed to be carried divides (/) Total MQC}. The extension of Contract term must be filed in writing on or before the expiration date with FMC as per 46 CFR 530.8. In no case will the extension exceed ten (10) consecutive weeks.

FOF 23 (emphases added). Because MSRF did not elect option (i), the shortage was addressed as provided above in option (ii), by extending the term of the contract for 10 weeks. FOF 34, 37-41. The parties discussed the extension and agreed to extend the term of the contract by electronic mail dated April 29, 2022, per the terms of the tariff rule. FOF 22, 37-41, 44, 50.

MSRF has not established that HMM acted "not in accordance" with the rates, charges, classifications, rules, and practices contained in the service contract. Accordingly, there is no violation of this section.

3. Section 41104(a)(9) - Undue or Unreasonable Preference or Advantage

MSRF appears to have abandoned this allegation in its reply brief. *See* Reply Brief at 3 (where MSRF leaves out the section in a list of violations it alleges) and Reply Brief at 4-8 (where MSRF replies to the HMM's opposition brief and does not include a discussion of this section).

During the period covered by the Complaint's allegations, Section 41104(a)(9) stated that a common carrier may not:

> (9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port;

46 U.S.C. § 41104(a)(9).

As described above, HMM is a common carrier, satisfying the first element, and in relation to MSRF, HMM provided service pursuant to a service contract, satisfying the second element. However, no evidence was provided to establish that HMM gave a preference or advantage or imposed a prejudice or disadvantage regarding use or avoidance of any port to the detriment of MSRF. Accordingly, the third element fails and the allegation that HMM violated Section 41104(a)(9) is dismissed.

4. Section 41104(a)(10) - Refusal to Deal

MSRF asserts that HMM violated Section 41104(a)(10) by refusing to provide the promised vessel space pursuant to the terms of the Service Contract; between May 2021 and April 2022, "MSRF requested, during multiple occasions, cargo space to ship containers from certain ports in Asia into the United States . . . but in almost every single instance where MSRF attempted to deal or negotiate for space, HMM refused to provide the space requested;" and "[a]s such, HMM's conduct was unreasonable because it refused to deal or negotiate with MSRF regarding vessel space accommodations from May 2021 to April of 2022." Reply Brief at 7-8. MSRF does not argue that HMM refused to deal and negotiate for a service contract, but asserts that each time MSRF attempted to book space with HMM and HMM failed to provide it, HMM violated § 41104(a)(10). Reply Brief at 7-8. MSRF offers no case authority to support its position that the May 2021 to December 2021 period when it alleges it most needed and sought to book space, or even the original contract duration of May 2021 to April 2022, should be considered separate instances of HMM refusing to bargain. Although it complains of conduct occurring during the May 2021 to December 2021 period (and alternately May 2021 to April 2022), MSRF cites to the amended language of § 41104(a)(10), Brief at 3, which did not take effect until June 16, 2022. Pub. L. No. 117-146, §7, 136 Stat. 1272, 1274 (2022).

HMM asserts that "[t]here is no precedent which would suggest that a failure to satisfy the MQC under a Service Contract, if that were to occur, would amount to a Shipping Act violation;" "[t]he allegation that HMM refused to deal with MSRF is ludicrous because the gravamen of MSRF's complaint is that HMM breached the very Service Contract negotiated by MSRF;" and MSRF admitted "that HMM had not refused to negotiate." Sur-Reply at 12, 15; Opposition at 14.

During the period covered by the Complaint's allegations, Section 41104(a)(10) stated that:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (10) unreasonably refuse to deal or negotiate;

46 U.S.C. § 41104(a)(10).

To establish a violation of Section 41104(a)(10), MSRF must establish that HMM is a common carrier, that refused to deal or negotiate, and that such refusal was unreasonable. *New Orleans Stevedoring Co. v. Bd. Of Commissioners of the Port of New Orleans*, Docket No. 00-11, 29 S.R.R. 1066, 1070, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom. New Orleans Stevedoring Co. v. FMC*, 80 Fed. Appx. 681 (D.C. Cir. 2003) (a common carrier should "refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors."); *Canaveral Port Authority*, 2003 WL 723336, at *13, *18 ("Refusals to deal or negotiate are factually driven and determined on a case-by-case basis," but the burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable).

The discussion of the elements below does not include the June 2022 amendment to 46 U.S.C. § 41104(a)(10) because the conduct complained of occurred prior to the amendment enacted by OSRA 2022. However, to the extent that the Commission refers to historical bases on which it relies in the current rulemaking effort regarding § 41104(a)(10), the proposed rulemaking is referenced. 87 Fed Reg. 57676-57677; 88 Fed Reg. 38789-38808. Prior to the OSRA 2022 Shipping Act amendments and the proposed rulemaking that is underway, Section 41104(a)(10) did not include the language, "including with respect to vessel space accommodations provided by an ocean common carrier," but as the Commission's discussion of the history below shows, shippers securing transportation of their cargo has been the focus of Section 41104(a)(10).

a. Common Carrier

HMM's status as a common carrier has been established and is not in dispute. Accordingly, MSRF has proved this element.

b. Unreasonably Refuse to Deal or Negotiate

The Commission was tasked by Congress with the implementation of OSRA 2022 "to define unreasonable refusal to deal or negotiate with respect to vessel space accommodation provided by an ocean common carrier." *FMC Seeking Public Comment on Unreasonable Refusal to Deal Proposed Rule*, posted at https://www.fmc.gov/fmc-seeking-public-comment-on-unreasonable-refusal-to-deal-proposed-rule/ on September 13, 2022. The Commission sought public comments to its proposal to establish a definition of "vessel space accommodations" and the elements that must be met to establish "an unreasonable refusal to deal with respect to vessel space accommodation…." *Id.* As noted in the beginning of this section, the conduct alleged by MSRF in the case *sub judice* occurred prior to OSRA 2022.

In its notice of supplemental proposed rulemaking regarding the amendment to §41104(a)(10), the Commission stated:

> In the Commission's history, many cases found the essence of the prohibition on unreasonable refusals to deal or negotiate in contravention of the amended section 41104(a)(10) ***and its predecessors*** to be ***the imposition by a common carrier of an unreasonable impediment to a shipper's access to common carriage***. Such impediments can take many forms, and no legislation or regulatory process can

> predict or attempt to encompass every possible scenario in which an unreasonable refusal to deal or negotiate might occur. Thus, the caselaw is instructive when considering new legislation. Commission determinations will be factually driven and determined on a case-by-case basis.

SNPRM, 88 Fed Reg. at 38791 (emphasis added).

In determining whether the prohibition of § 41104(a)(10) prior to OSRA 2022 applies to a refusal to deal and negotiate individual attempts to book space after a service contract is in place, as MSRF urges, it is instructive to consider the Commission's statement regarding the temporal difference between § 41104(a)(10) and (a)(3)[10]:

> The restrictions that 46 U.S.C. 41104(a)(3) and (a)(10) impose on ocean carriers are distinct but closely related. Both provisions address refusals by ocean common carriers to accommodate shippers' attempts to secure overseas transportation for their cargo. The distinction between the conduct covered by these two provisions is timing, more specifically whether the refusal occurred while the parties were still negotiating and attempting to reach a deal on service terms and conditions (negotiation stage) or after a deal was reached (execution stage). If the refusal occurred at the negotiation stage, 46 U.S.C. 41104(a)(10) would apply. If the refusal occurred at the execution stage, after the parties reached a deal or mutually agreed on service terms and conditions, then 46 U.S.C. 41104(a)(3) would apply.

88 Fed Reg. at 38791. Where the negotiation stage ends and the execution stage begins is somewhat murky and, after reviewing the comments submitted by stakeholders in the shipping community regarding ocean carrier practices which lead to failure to transport cargo, the Commission further stated:

> Comments . . . highlight the fallacy of presuming that as a practical matter, it will always be feasible to draw a discernible line between unreasonable refusals covered by section 41104(a)(10) as distinguished from those covered by section 41104(a)(3). . . . What these concerns mean as a practical matter is that discerning whether a common carrier has unreasonably refused cargo or vessel space accommodations is not a simple binary question of determining what prevented the shippers' cargo from actually being loaded aboard an outbound vessel. That

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[10] MSRF did not plead a violation of § 41104(a)(3) – and the facts here do not warrant it – which, prior to the OSRA 2022 amendments, provided that "A common carrier, either alone or in conjunction with any other person, directly or indirectly, 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(a)(3). OSRA 2022 amended § 41104(a)(3) to state that a common carrier shall not "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods."

> question may be bound up with an unbroken series of interactions and communications that cannot always be neatly separated in the negotiation stage (covered by 46 U.S.C. 41104(a)(10)) and the execution stage (covered by U.S.C. 41104(a)(3)) of the parties' interactions.

Id. at 38795-38796. While the above statements could be read to consider each attempt at booking an individual negotiation that is independently actionable under § 41104(a)(10), the facts in this case do not support finding a refusal to negotiate. Here, the interactions between the parties demonstrate continued negotiations at each stage of the relationship, culminating in 14 amendments to the Service Contract by mutual agreement of the parties and movement of nearly double the MQC. FOF 28-31, 36, 41-44, 51-54. Indeed, contrary to its claims, MSRF admitted that HMM did not refuse to negotiate with MSRF. FOF 55.

Some of the reasons provided to MSRF for HMM's inability to accept certain requests for space were "ongoing vessel space issues across the board," and space filling up quickly due to high demand, requiring early booking. FOF 58. The COVID-19 pandemic disrupted ocean shipping services, and MSRF acknowledged that the supply chain crisis created significant port backlogs in Asia and the United States and limited the transportation of goods. FOF 8-10. There was no evidence presented that the reasons HMM could not provide space at various times were false. FOF 59. An inability to provide sufficient space for these reasons is not evidence of an "imposition by a common carrier of an unreasonable impediment to a shipper's access to common carriage." *Supra* at 88 Fed Reg. 389792. Rather, the evidence demonstrates that HMM continued negotiating with MSRF to address the shortfall, including by agreeing to additional lanes, offering a contract extension, and ultimately accommodating more than the MQC. FOF 31, 37-44, 46-47, 49, 57.

Taking into consideration the arguments of the parties and the facts particular to this case, MSRF has not established that HMM unreasonably or unjustly refused to deal or negotiate.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that HMM, Co. Ltd. did not violate the Shipping Act, it is hereby

ORDERED that Complainant MSRF, Inc.'s and Respondent HMM, Co. Ltd.'s respective revised motions for confidentiality be **GRANTED IN PART** and **DENIED IN PART**. It is

FURTHER ORDERED that MSRF's Complaint against HMM be **DENIED**. It is

FURTHER ORDERED that this claim be **DISCONTINUED**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

COPPERSMITH GLOBAL LOGISTICS INC., *Claimant* v. ZIM USA INC., *Respondent*.	**DOCKET NO. 1996(I)**

Served: December 11, 2023

BEFORE: Theresa DIKE, *Small Claims Officer*.

INITIAL DECISION[1]

I. INTRODUCTION AND SUMMARY OF DECISION

Claimant Coppersmith Global Logistics Inc. ("Coppersmith") initiated this proceeding by filing a Claim against ZIM USA Inc. ("ZIM") at the Federal Maritime Commission ("FMC" or "Commission") alleging that ZIM violated 46 U.S.C. § 41102(c) of the Shipping Act and the Commission's Regulations at 46 C.F.R. § 545.4 by collecting a double payment for the same demurrage charge from Coppersmith and failing to refund the overpayment. Claimant asks for reparations in the amount of $8,095, which it alleges ZIM owes it for the overpayment.[2]

A. Background and Procedural History

Coppersmith, a customs brokerage and freight forwarding company, received notice from its Chicago branch office that ZIM was withholding release of its client's shipment against a $48,718 past due balance owed by Coppersmith. Included in the balance was a demurrage charge of $8,095 assessed against shipments belonging to Coppersmith's client, Janel Group LLC ("Janel"). Coppersmith states that Janel had not previously received notice of the demurrage charges, and that once notified of the charges it immediately paid the charge. In the interim, because Coppersmith wanted to secure prompt release of its client's cargo, it paid ZIM the $48,718 invoice charges, intending to later dispute the charges and request a refund where appropriate. When, according to Coppersmith, ZIM never refunded the $8,095 which it had twice been paid, despite acknowledging receipt of Janel's payment, and after repeated requests

[1] Pursuant to 46 C.F.R. § 502.304(g), this decision will become final unless the Commission elects to review it within 30 days of service.

[2] As discussed *infra*, in a later filing, Claimant stated that ZIM agreed to also refund it for other overpayments, bringing the total owed to $19,915, but Claimant did not ask to amend its request for reparations to that amount, rather than the $8,095 it requested in its Claim.

from Coppersmith for a refund, Coppersmith filed this Complaint with the Federal Maritime Commission ("FMC" or "Commission"), seeking reparations for the double payment. Coppersmith alleges that ZIM's failure to refund the double payment constitutes a violation of section 41102(c).

On August 3, 2023, the Commission issued a Notice of Filing of Small Claims Complaint and Assignment ("Notice"), instructing ZIM to file a response to the Claim by August 28, 2023, and to indicate whether it consented to the use of the Commission's informal procedures at Subpart S for adjudication of the complaint. The Commission also assigned this proceeding to the Chief Administrative Law Judge ("Chief ALJ") to designate a small claims officer ("SCO") to adjudicate the proceeding. On August 28, 2023, ZIM filed a response to the complaint and consented to the use of the informal procedures. On August 30, 2023, the Chief ALJ assigned this proceeding to the undersigned for adjudication.

Pursuant to 46 C.F.R. § 502.301(a) and (e) of the Commission's Rules, which authorize the SCO in a Subpart S proceeding to request, if deemed necessary, additional documents or information from the parties, on September 6, 2023, an Order to Submit Discovery Requests ("Order") was issued directing the parties to submit any discovery requests that would aid them in establishing their claims and defenses, and upon review, the SCO would incorporate any of their requests deemed appropriate and relevant to the SCO's forthcoming request for additional information. No party submitted a request. On October 10, 2023, a Request for Additional Documents and Information ("Request") was issued, directing the parties to provide certain information and documents by October 24, 2023, and permitting any party wishing to file a response to the opposing party's submission to do so by October 31, 2023. On October 23, 2023, Coppersmith submitted answers to the Request ("C. Supp. Info"), while ZIM submitted its response on October 24, 2023. ("R. Supp. Info"). Neither party submitted a reply to the other's response. The record is now complete.

As discussed in greater detail below, Claimant Coppersmith fails to demonstrate that all elements required to find a violation of section 41102(c) and recover reparations under section 545.4 are present in this case as Respondent is not a regulated entity. Nevertheless, in its Verified Answer Respondent ZIM commits to refund the $8,095 overpayment to Coppersmith and asserts that it has refunded the amount due.

B. Argument of the Parties

1. Coppersmith's Arguments

Coppersmith states that it paid ZIM's past due invoice, including the $8,095 assessed against Janel's shipments, to obtain immediate release of its withheld cargo, intending to later review ZIM's invoice "to verify [its] validity, dispute the charges and request a refund where warranted." Complaint pg. 1 at ¶ III. Coppersmith states:

> formal refund request as well. We've even tried to have them offset with ocean freight and that didn't work.

Complaint pg. 2 at ¶ III(B). Coppersmith states that "[t]here was no injury, and no additional funds are required other than what is owed." Complaint pg. 2 at ¶ V.

Coppersmith further asserts that ZIM "agree[d] to pay all charges owed to us which would include not only this refund but others which total 19,915 . . . and still the refund has not been paid." C. Supp. Info. pg. 1 at no. 4. Coppersmith submitted emails containing communications with ZIM, in which ZIM informed Coppersmith that it would issue a refund for the overpayments. Coppersmith maintains that it never received a refund from ZIM and that the alleged conduct by ZIM constitutes a violation of section 41102(c).

2. ZIM's Arguments

ZIM admits that it received duplicate payments from Coppersmith and Janel for the detention charges assessed against Janel's shipments and also admits that it has not refunded the double payment to Coppersmith. Answer pg. 1 at ¶ IV. In addition, ZIM acknowledges that Coppersmith is entitled to a refund from it for the overpayment. Answer pg. 1 at ¶ V. ZIM agrees with Coppersmith's statement that "there was no injury and that no monies in excess of the claimed $8,095 are owed" and states that "on August 25, 2023, [it] notified Claimant of its intent to refund the monies, subject to completion of routine administrative documentation." Answer pg. 2 at ¶¶ VII – VIII. However, ZIM "denies that Claimant made 'repeated requests for [Respondent] to do so'" or that "Claimant 'made a formal refund request' or 'tried to have them offset with ocean freight.'" Answer pg. 1 at ¶ IV. Further, ZIM denies that it committed any violations of the Shipping Act. Answer pg. 2 at ¶ VI.

ZIM asserts that it "forwarded payment of the claimed amount, $8,095 by check dated 10/24/2023. Payment was forwarded via UPS, Tracking No. 1Z50V8720191647501." R. Supp. Info pg. 1 at No. 1.

ZIM explains regarding the double payment:

> Claimant, Coppersmith Global Logistics, Inc. was not charged twice. Claimant, acting in its capacity as a Non-Vessel Operating Common Carrier, was the Shipper of Record for twelve (12) consignments transported from Laem Chebang, Thailand, and discharged at the port of Houston, Texas, in May, 2021. (*See* Respondents Answer, Exhibit A). Following delivery of the cargoes at the port of Houston, Claimant - or its underlying receiver - interchanged the cargoes out and then returned each to the port of Houston and subsequently received Invoices for accrued Detention, totaling $8,095.00 (S*ee* Respondents Answer, Exhibit B; *see also*, Claimant's Complaint, dated July 28, 2023).
>
> A payment of $23,663.17 was received from Coppersmith, along with remittance instructions, on August 10, 2022. Those instructions extended to payment of the $8,095 at issue in this matter.

> Prior to that time, Respondent received a payment of 8,095.00 from Andre Prostinc that did not include remittance details or payment instructions. As Respondent had no active account under Andre Prostinc's name, the funds were posted to a temporary account to allow us to determine how to apply those funds. On September 16, 2022, Respondent informed Claimant that the $8,095.00 payment from Andre Prostinc had been located and moved to the Coppersmith account. In that same communication, Claimant was informed that the account was "almost eligible for a refund," indicating that in accordance with ZIM policy, overdue invoice payments would need to be cleared before a refund could be issued; a Statement of Account was attached to that communication (See Attachment B).

R. Supp. Info pgs. 1 - 2 at no. 2. ZIM asserts that it did not issue a refund to Claimant prior to its initiation of this litigation because "Claimant's accounts were not, during the period of September 2022 to July 2023, brought into Terms." R. Supp. Info pg. 2 at no. 3.

II. PERTINENT FACTS ESTABLISHED BY THE RECORD ("PF")

1. Claimant Coppersmith is a customs brokerage and freight forwarding corporation, with its principal place of business in El Segundo, California. Complaint pg. 1 at ¶ I.

2. Respondent ZIM's corporate name is ZIM American Integrated Shipping Services Co. LLC. Answer pg. 1 at ¶ II.

3. ZIM is the General Agent for ZIM Integrated Shipping Services Ltd ("ZIM Israel"), a vessel-operating common carrier ("VOCC") located in Israel. Answer Pg. 1 at ¶ II.

4. ZIM is not an ocean common carrier. Answer Pg. 1 at ¶ II.

5. ZIM Israel, the VOCC that transported the shipments in question, is not a party in this litigation. Complaint pg. 1.

6. Claimant was listed as consignee and notify party on bills of lading issued by ZIM Israel, including for the shipments at issue, shipped from the Port of Laem Chabang, Thailand, to the Port of Houston, Texas. R. Supp. Info pg. 1at no. 2; Answer Ex. A.

7. When Janel's shipments arrived in Houston, for reasons undisclosed by the parties, they accrued demurrage totaling $8,095.00. R. Supp. Info pg. 1 at no. 2; Answer Ex. B.

8. On August 8, 2022, Coppersmith was notified by its Chicago branch office that ZIM was withholding one of Coppersmith's VIP customer's shipments against a $48,718.00 past due balance owed by Coppersmith. Complaint pg. 1 at no. III.

9. The past due invoice included demurrage charges in the amount of $8,095.00, assessed against shipments belonging to Janel, Coppersmith's customer. Complaint pg. 1 at no. III.

10. On August 8, 2022, Coppersmith notified Janel of the past due demurrage charges and Janel's employee, Andre Prostinc, immediately made payment to ZIM in the amount of $8,095. Complaint pg. 1 at no. III; R. Supp. Info pg. 1 at no. 2.

11. Andre Prostinc did not indicate that the payment was for the Janel shipments and ZIM had no active account under Andre Prostinc's name. R. Supp. Info pg. 1 at no. 2.

12. On August 10, 2022, Coppersmith made a payment in the amount of $23,663.17 to ZIM, along with remittance instructions indicating that the payment included the charges on the Janel shipments. R. Supp. Info pg. 1 at no. 2.

13. On September 16, 2022, ZIM notified Coppersmith that it had moved the payment from Andre Prostinc to the Coppersmith account but that, according to "ZIM policy, overdue invoice payments would need to be cleared before a refund could be issued." R. Supp. Info pg. 1 - 2 at no. 2.

14. On August 3, 2023, the Commission notified ZIM that Coppersmith had filed a Claim against it and instructed it to file a response to the Claim by August 28, 2023. Notice at pg. 1.

15. On August 25, 2023, ZIM sent an email to Coppersmith stating in pertinent part:

> After review of your account and file, ZIM will issue a refund for the $8,095 duplicate payment on your account. To begin the processing, please complete the attached forms and return them to me at your earliest convenience.

Coppersmith Supp. Ex. 1 (Email from ZIM employee, Martin Adrienne dated August 25, 2023, 3:00 PM, to Coppersmith and ZIM employees).

16. On August 25, 2023, Coppersmith responded, stating in pertinent part:

> I already did 2 requests for the amounts owed as they're from different customers. See attached emails to James and Cameron which went unanswered. We also have a dispute that has yet to be resolved. See below; DLAX1670099996 - $2500 ZIMULIS70008574 - ZIMU2896596 100022437. This was for demurrage and the gate ticket was sent to ZIM disputes with our claim showing we picked up the container on time. So along with the attached emails you owe us a total of $19,915. There is about $3000 more outstanding but it's been so long that I have to go back into my emails to find it.

Coppersmith Supp. Ex. 1 (Email from Coppersmith dated August 25, 2023, 3:42 PM, to Coppersmith and ZIM employees).

17. On August 31, 2023, ZIM responded:

> I am initiating the refund payment process for $19,915. ZIM issues all payments via ACH and therefore I need your banking information. Please complete the attached forms for us to set your account up for payments.

Coppersmith Supp. Ex. 2 (Email from ZIM employee, Martin Adrienne dated August 31, 2023, 2:20 PM, to Coppersmith and ZIM employees).

18. Coppersmith completed the required forms but had not yet received a refund at the time it submitted its response to the Request for information issued to the parties on October 23, 2023, as part of the proceeding. C. Supp. Info pg. 1 at no.1.

19. ZIM states that it "forwarded payment of the claimed amount, $8,095.00 by check dated 10/24/2023. Payment was forwarded via UPS, Tracking No. 1Z50V8720191647501." R. Supp. Pg. 1 at no. 1.

20. Official notice is taken of UPS records showing that on October 25, 2023, a package identified as tracking No. 1Z50V8720191647501 was received by someone named "Jackson" at El Segundo, California, the location of Coppersmith's principal place of business. https://www.ups.com/track?loc=en_US&Requester=NES&tracknum=1ZA8E5820447658148/trackdetails (accessed on December 8, 2023).

III. DISCUSSION

A. Controlling Authority

ZIM states that it is the General Agent for ZIM Israel, a vessel-operating-common carrier, which transported the shipments at issue. A vessel-operating-common carrier is defined under the Shipping Act as "a person that -- (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

A "common carrier" is 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(7).

Coppersmith alleges that ZIM's failure to refund the double payment gives rise to a violation of section 41102(c) which provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

Pursuant to section 545.4 of the Commission's regulations, in order to establish a successful claim for reparations" under section 41102(c), the claimant must demonstrate that:

> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

B. Evidence and Burden of Proof

"In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. Thus, a claimant alleging a violation of the Shipping Act bears the burden of proving its allegations against the respondent. The term, "burden of proof" is understood to mean "the burden of persuasion." *Director v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *In re South Carolina State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1161 (FMC 1997). *See also Steadman*, 450 U.S. at 101 ("Where a party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted."). When direct evidence is unavailable, inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993) adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994). If the evidence produced by both parties is evenly balanced, the party with the burden of persuasion will not prevail. *Greenwich Collieries*, 512 U.S. at 281.

C. Coppersmith Fails to Demonstrate that ZIM Violated Section 41102(c)

Coppersmith does not dispute that it owed demurrage charges in the amount of $8,095, to ZIM on behalf of its customer, Janel. Similarly, ZIM does not dispute that it received an overpayment from Coppersmith in the amount of $8,095, for the demurrage charges and that Coppersmith is entitled to a refund from ZIM for the overpayment. Answer pgs. 1-2 at IV-VIII. Nevertheless, Coppersmith's section 41102(c) claim fails because it does not satisfy the threshold requirements to establish a violation of section 41102(c) and recover reparations under section 545.4.

To succeed in a claim for reparations under section 41102(c), the claimant must show that:

1) the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
2) the alleged illegal conduct is "occurring on a normal, customary, and continuous basis;"
3) the alleged practice or regulation relates to or is connected with receiving, handling, storing or delivering property;
4) the alleged practice or regulation is unjust or unreasonable; and,
5) the alleged practice or regulation in question is the proximate cause of the loss the claimant alleges it suffered.

See 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4. To prevail, all five elements must be proven.

Respondent ZIM is not an ocean common carrier, marine terminal operator, or ocean transportation intermediary, the first element required under section 545.4 to file a successful claim. ZIM denies that it is an ocean common carrier and asserts that rather, it is "the General Agent" for ZIM Israel, the ocean common carrier that transported the shipments at issue. Answer Pg. 1 at ¶ II; PFs 3 and 4. Coppersmith did not dispute ZIM's denial, and the evidence of record does not contradict ZIM's defense.

The Commission has found that an agent for a VOCC can be subjected to FMC jurisdiction if it is named as a respondent in an FMC proceeding along with its principal VOCC. *TCW, Inc. v. Evergreen Shipping Agency (AM.) Corp.*, FMC Docket No. 1966(I), 2022 WL 18068977 at *1 (FMC Dec. 29, 2022). However, ZIM Israel, the VOCC principal, is not named as a party in this proceeding. Complaint pg. 1, PF 5. Accordingly, Coppersmith fails to satisfy the first element under section 545.5. Because all five elements under section 545.4 must be demonstrated to prevail in a section 41102(c) claim and Coppersmith fails to demonstrate the first element, it is not necessary to determine whether the other elements are satisfied in this case.

Moreover, ZIM represents that it sent a refund check to Coppersmith for $8,095.00, the amount Coppersmith requested as reparations. R. Supp. Pg. 1 at no. 1; PF 19. Curiously, the parties did not seek to dismiss this proceeding prior to the issuance of this Initial Decision, which is what would normally be expected to happen when a respondent makes a complainant whole by paying its claimed damages. While ZIM did not provide a copy of its refund check as evidence, the tracking number it sent as proof of the refund indicates that a package was

delivered to the location of Coppersmith's principal place of business (PF 20) at El Segundo, California, and Coppersmith did not dispute ZIM's contention that it has now refunded the double payment to Coppersmith.

Accordingly, Coppersmith's section 41102(c) claim is dismissed. While it only requested reparations in the amount of $8,095 in its Claim, Coppersmith indicates that the actual refund amount owed to it by ZIM is $19,915, and the evidence shows that ZIM committed to refund that amount to Coppersmith. PF17. If it has not yet done so, ZIM is urged to refund the full amount owed to Coppersmith to avoid further litigation on this issue.

IV. CONCLUSION

Claimant Coppersmith fails to demonstrate that Respondent ZIM violated section 41102(c), as alleged. Accordingly, it is hereby **ORDERED** that Coppersmith's request for reparations be **DENIED** and its complaint be **DISMISSED WITH PREJUDICE**.

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Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

MSRF, INC., *Complainant*

v.

HMM CO. LTD., *Respondent*.

DOCKET NO. 22-20

Served: December 26, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 22, 2023, Initial Decision has expired. Accordingly, this decision has become administratively final.

Mary Thien Hoang
Acting Secretary