

FEDERAL MARITIME COMMISSION

DOCKET NO. 21-09

**HAPAG-LLOYD, A.G. and HAPAG-LLOYD (AMERICA) LLC.—POSSIBLE
VIOLATIONS OF 46 U.S.C. § 41102(c)**

OPENING BRIEF OF THE BUREAU OF ENFORCEMENT

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I. INTRODUCTION

This proceeding involves the obstacles a motor carrier faces when returning empty containers (empties) to vessel-operating common carriers (VOCCs). The primary legal issue is the interpretation of 46 C.F.R. § 545.5 and what constitutes an unjust and unreasonable practice with respect to detention charges. Although this proceeding asks the court to resolve novel legal issues, the facts of the proceeding, the Shipping Act of 1984, 46 U.S.C. § 40101 et seq (2019) and the Commission's regulations, and case law show that Respondents Hapag-Lloyd AG and Hapag-Lloyd (America) LLC (collectively, Hapag-Lloyd or Respondent) acted knowingly and willfully in contravention of published law.

A. Procedural History

On November 10, 2021, the Federal Maritime Commission (FMC or Commission) initiated this proceeding by issuing an Order of Investigation and Hearing (Order of Investigation & Hearing or Investig. & Hr'g), served on November 10, 2021 pursuant to 46 U.S.C. §§ 41102(c), 41302(a), and 46 C.F.R. § 502.63. Investig. & Hr'g at 5. The Commission ordered this proceeding to determine whether Hapag-Lloyd, A.G. and/or Hapag-Lloyd (America) LLC have violated Section 41102(c) of the Shipping Act by failing to establish, observe, and enforce just and reasonable regulations and practices relating to its assessment of charges on containers when return locations with corresponding appointments were unavailable. *Id.*

The Commission further designated Hapag Lloyd, A.G. and Hapag-Lloyd (America) LLC as Respondents and the Bureau of Enforcement (BOE) as a party to this proceeding. *Id.* at 5–6. The proceeding was then placed before the Commission's Office of Administrative Law Judges and assigned to the Honorable Erin Wirth (ALJ). *Id.* at 5; Order Designating Administrative Law Judge, FMC Docket No. 21-09 (Nov. 17, 2021).

The Scheduling Order established that Hapag-Lloyd's and BOE's (the Parties) discovery period was to end on March 4, 2022 and that BOE's brief, findings of fact, and appendix were to be filed on March 11, 2022. Scheduling Order, FMC Docket No. 21-09 (Jan. 6, 2022). The Parties actively participated in good faith throughout the discovery process. BOE now submits its brief, including findings of fact, and the appendix pursuant to the Scheduling Order.

B. Summary of the Case

Section 41102(c) of Title 46 of the United States Code provides 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).

On May 18, 2020, the Commission published an interpretive rule providing guidance as to what it may consider in assessing whether a detention practice is unjust or unreasonable. 46 C.F.R. § 545.5(c)(1); 85 FR 48850 (May 18, 2020) *also available at* https://www2.fmc.gov/readingroom/docs/19-05/19-05_fnl_rul_fr.pdf/. This guidance applies to

practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass 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.

46 C.F.R. § 545.5(b). In terms of reasonableness, 46 C.F.R. § 545.5(c)(1) states “in assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.” The Commission made clear that “the guidance on the incentive principle, demurrage and detention policies, and that transparent terminology would apply in situations involving exports.” *Final Rule: Interpretive Rule on Demurrage and Detention*

under the Shipping Act (Interpretive Rule), 85 Fed. Reg. 29638, 29650 (Fed. Mar. Comm'n May 18, 2020)

In the final rule, the Commission noted the well-established principle that under § 41102(c), a regulation or practice must be tailored to meet its intended purpose. *Interpretive Rule*, 85 Fed. Reg. at 29651 (citing *Distribution Services, Ltd. V. Trans-Pacific Freight Conference of Japan and its Member Lines*, 1988 FMC LEXIS 52, 17 (FMC 1988)). Even if a practice has a valid purpose, if it goes beyond what is necessary to achieve that purpose, it may still be unreasonable. *Id.*

Section 41102(c) derives from Section 17 of the 1916 Act, which was described by the Commission as requiring a practice to be “fit and appropriate to the end in view.” *Investigation of Free Time Practices, Port of San Diego*, 9 F.M.C. 524, 547 (FMC 1966). Courts have also included within the standard of reasonableness, “whether the charge levied is reasonably related to the service rendered.” *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 282 (1968). This reasonableness requirement extends to carrier practices relating to demurrage and detention. These are fees imposed by carriers on shippers and others (such as truckers) for use of the carrier’s containers, or, in some instances, imposed by carriers on shippers and others for use of marine terminal land. Fact Finding Investigation No. 28 Order of Investigation at 2 (Mar. 5, 2018) https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/; 46 C.F.R. § 545.5(b).

The documentation BOE received for eleven containers substantiates that Hapag-Lloyd issued invoices for detention charges when, for multiple free days, and/or multiple days under detention, Hapag-Lloyd offered no return locations or appointments were unavailable at the designated return location for the subject containers. The invoiced party provided Hapag-Lloyd with screenshots verifying these restrictions and requested a waiver. BOE Exhibit A, Hapag-Lloyd Dispute Emails at 1, 3 5, 7,9, 10–11, 13–14, 19; *see also* BOE Exhibit M, Hapag-Lloyd Dispute

Screenshots. Further, Hapag-Lloyd denied the request to waive the charges. BOE Exhibit A, Hapag-Lloyd Dispute Emails at 2, 4, 6, 8, 9–10, 12, 15–18. Its justification was that Hapag-Lloyd was unable to waive the charges because it does not control the appointment system. *Id.* This rationalization meets neither of the purposes of detention charges nor reflects the Interpretive Rule’s guidance. Therefore, pursuant to § 41102(c), Respondent’s actions are an unreasonable practice.

C. Container Shipping and Returns Background

In a typical container shipping transaction, the throughput of cargo and equipment is dependent on a motor carrier returning the VOCC’s empty container (hereinafter, “empty” or “empties”) to a designated marine terminal or depot. Fed. Mar. Comm’n, *Report, U.S. Container Port Congestion & Related International Supply Chain issues: Causes, Consequences & Challenges (FMC Congestion Report)* at 75 (July 2015), https://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf; *Interpretive Rule*, 85 Fed. Reg. 29638, 29649 n.173 (Fed. Mar. Comm’n May 18, 2020) (“steamship line holds the motor carrier responsible until [the container] has a secured appointment and terminate the container.”) Motor carriers tasked with returning empties have an allotted amount of time to return their empty container (free time). FMC Congestion Report at 75. If the empty container is returned outside of the allotted time span, the motor carrier is charged a detention or per diem fee (hereinafter, detention). *Id.*

A motor carrier must coordinate with the VOCC to successfully return empty containers. *See generally, Interpretive Rule*, 85 Fed. Reg. at 29655. A motor carrier typically does not have any service contracts with a VOCC. *Id.* at 29662 n. 381. But upon the direction of the VOCC, a motor carrier must check with one or more marine terminal operators (MTO) with whom the VOCC may have a terminal service agreement so that the motor carrier may return the empty. BOE

Exhibit B, Cruz Dep. Tr. at 21. To return an empty at most MTOs in the ports of Los Angeles and Long Beach (collectively, LALB), a motor carrier must make an appointment with the MTO's terminal operating system and check the MTO's website to determine if that terminal is accepting empties for that particular VOCC depending on the size and type of container. *Id.*; *see also* BOE Exhibit C, V.S. Gabriel Padilla at 2; Exhibit D Second V.S. Gabriel Padilla at 1.

A motor carrier may be barred from returning an empty if there is a lack of appointments at the VOCC's designated MTO. BOE Exhibit B, Cruz Dep. Tr. at 29; BOE Exhibit C, V.S. Gabriel Padilla at 2; BOE Exhibit D, Second V.S. Gabriel Padilla at 1. This can happen if all the appointments for a certain time have already been booked or if the MTO cannot accept certain containers due to the VOCC's dictated restrictions or dual transaction restrictions.¹ BOE Exhibit C, V.S. Gabriel Padilla at 2–3; BOE Exhibit D Second V.S. Gabriel Padilla at 1. One day of free time, or time in detention, will have lapsed if a motor carrier is barred from returning an empty due to the above conditions. *Investig. & Hr'g* at 3–4. If a motor carrier is barred from returning an empty for more than the allotted free time and exceeds the allotted free time, the VOCC will send an invoice to the motor carrier for each day beyond the free days to which the empty container was entitled. *Id.* The motor carrier may either pass along the detention charge to its customer or dispute the charge. BOE Exhibit C, Cruz Dep. Tr. at 23–24.

This dispute process and the resolution of such disputes is at issue here.

II. BOE PROPOSED FINDINGS OF FACT

BOE PFF1. The Federal Maritime Commission issued its interpretive rule regarding detention and demurrage on April 28, 2020. 46 C.F.R. § 545.5(a); *See also Interpretive Rule*, 85 Fed. Reg 29638.

¹ A dual transaction is where a motor carrier drops off a container and then picks up a container in the same transaction. As opposed to a single transaction when a motor carrier may only pick up or drop off.

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- BOE PFF2. The Interpretive Rule was published in the Federal Register on May 18, 2020. *Interpretive Rule*, 85 Fed Reg at 29638.
- BOE PFF3. Hapag-Lloyd was a regulated entity of the FMC on April 28 and May 18, 2020 and was made aware of the interpretive rule and had knowledge of its contents. BOE Exhibit E, Response of Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC to Bureau of Enforcement's First Request for Admission (Hapag-Lloyd RFA).
- BOE PFF4. Hapag-Lloyd was aware of the Interpretive Rule for at least one year before the present controversy occurred in the Spring and Summer of 2021. Investig. & Hr'g at 4.
- BOE PFF5. Hapag-Lloyd, AG is a vessel-operating common carrier (VOCC) headquartered in Hamburg, Germany at Postfach, 102626, Ballindamm 25, 2000 Hamburg 1, Germany. Investig. & Hr'g at 2-3.
- BOE PFF6. Hapag-Lloyd (America) LLC operates as Hapag-Lloyd AG's agent in the United States and has offices at 5515 Spalding Drive, Peachtree Corners, GA 30092. BOE Exhibit F, *Resp. of Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC to Bureau of Enforcement's Third Interrogs. Request for Production of Documents* at 1, FMC Docket No. 21-09.
- BOE PFF7. Hapag-Lloyd AG is a common carrier as defined by 46 U.S.C. § 40102(7). BOE Exhibit E, Hapag-Lloyd RFA at 1.
- BOE PFF8. Hapag-Lloyd AG provides ocean transportation for property to and from LALB and foreign countries. *Id.* at 2.
- BOE PFF9. Hapag-Lloyd AG receives, handles, stores and delivers property at West Basin Container Terminal (WBCT); TraPac Terminal, LLC (TraPac); Yusen Terminals LLC (YTI); SSA Terminal at Pier A (Pier A); International Transportation Service, Inc.; and Total Terminals, Inc. (TTI). *Id.* at 3.

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BOE PFF10. Hapag-Lloyd AG discharges property and/or collects empties related to such cargo and property at: WBCT; TraPac; YTI; Pier A; International Transportation Service, Inc.; and TTI. *Id.*

BOE PFF11. Hapag-Lloyd AG provided ocean transportation for the following eleven cargo containers (the Containers):

Container Number
GESU3644906
TEMU1467361
FFAU2104882
FFAU2094681
SEGU5670431
HLBU1593348
HLXU9003126
HLBU8048860
HLBU8039554
HLBU8038687
HAMU1302165

Id. at 2.

BOE PFF12. Golden State Logistics (GSL) is a motor carrier company that is not regulated by the Commission. BOE Exhibit B, Cruz Dep. Tr. at 13–14.

BOE PFF13. GSL provided ground transportation for the Containers. *Id.* at 22.

BOE PFF14. For each of the Containers, GSL attempted to make an appointment to return the empties to Hapag-Lloyd after being notified by their customer that the empty was ready. *Id.* at 21, 22–23.

BOE PFF15. While attempting to return each of the Containers, GSL was met with difficulties in obtaining appointments. *Id.* at 23.

BOE PFF16. At Hapag-Lloyd’s direction, GSL attempted to return the Containers at the following marine terminals: WBCT; TraPac; YTI; Pier A. *Id.* at 24–28; *see also* BOE Exhibit M, Hapag-Lloyd Dispute Screenshots.

BOE PFF17. Hapag-Lloyd (America) LLC, serving as Hapag-Lloyd AG’s agent, issued the following detention invoices to GSL on behalf of Hapag-Lloyd AG and held them valid after GSL disputed them:

<u>No.</u>	<u>Container Number</u>	<u>Invoice No.</u>
1	GESU3644906	2119642180
2	TEMU1467361	2119704796
3	FFAU2104882	2119711233
4	FFAU2094681	2119721993
5	SEGU5670431	2119731378
6	HLBU1593348	2119739508
7	HLXU9003126	2119739508
8	HLBU8048860	2119741085
9	HLBU8039554	2119748477
10	HLBU8038687	2119748477
11	HAMU1302165	2119752845

BOE Exhibit E, Hapag-Lloyd RFA at 3.

BOE PFF18. GSL has not paid the above invoices. BOE Exhibit B, Cruz Dep. Tr. at 23.

BOE PFF19. GSL has not billed these invoices to their customers. *Id.* at 24.

BOE PFF20. Hapag-Lloyd directed GSL via e-mail where to return the Containers. *Id.* at 26.

BOE PFF21. More specifically, Hapag-Lloyd gave GSL an “empty broadcast”, which is a chart with instructions about where to return/terminate certain sized containers. *Id.* at 34.

BOE PFF22. After receiving the “chart,” GSL attempted to make appointments to return the Containers according to Hapag-Lloyd’s instructions. *Id.* at 28.

BOE PFF23. The chart specified information as to container and location, GSL understood it to mean that they would be able to return the Containers at the locations specified by Hapag-Lloyd. *Id.* at 34–35.

BOE PFF24. For example, if an empty broadcast chart specified that “20-foot dry containers, single” could be returned at Pier A or TracPac, GSL understood that to mean

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they could return an empty 20-foot dry container at Pier A or TracPac under a single transaction. *Id.* at 34–35; 37.

BOE PFF25. To return the Containers at the directed terminals, GSL used third-party data information systems to broadly check appointment availability at those terminals. *Id.* at 40.

BOE PFF26. The third-party data information is a chart (Appointments Chart) that displayed the LALB MTOs and their appointment availabilities. *Id.*; *see also* BOE Exhibit G, Gabriel Padilla Demo. Session at 3.

BOE PFF27. To demonstrate GSL’s difficulties in obtaining appointments to return the Containers, GSL presented the Appointments Chart to show the lack of appointments. BOE Exhibit E, Hapag-Lloyd RFA at 3.

BOE PFF28. The Appointments Chart is an aggregate of appointment data directly “scraped” from MTO websites. Cruz Dep. Tr. at 40–41; *see also* BOE Exhibit G, Gabriel Padilla Demo. Session at 3–5.

BOE PFF29. The Appointments Chart is updated every five minutes. BOE Exhibit B, Cruz Dep. Tr. at 41; BOE Exhibit G Gabriel Padilla Demo. Session at 19

BOE PFF30. The Appointments Chart allows motor carriers to check all available terminal appointments at different MTOs faster than if they were to individually sign on to each MTO website and check for appointments. BOE Exhibit B, Cruz Dep. Tr. at 41, 62; BOE Exhibit G, Gabriel Padilla Demo. Session at 3–5.

BOE PFF31. Although terminal appointments are dynamic, the Appointments Chart presents an expeditious overview of MTO appointments as it would be impossible for motor carriers to sign into each MTO website and check appointment availability within the amount of time the Appointment Chart updates itself. BOE Exhibit B, Cruz Dep. Tr. at 62.

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BOE PFF32. The Appointments Chart is demonstrative of the lack of appointments when GSL tried to return the Containers. *Id.* at 40–50.

BOE PFF33. To make an appointment, motor carriers must go directly to an MTO platform (or website) to secure an appointment. BOE Exhibit C, V.S. Gabriel Padilla at 3; BOE Exhibit D, Second V.S. Gabriel Padilla at 2; BOE Exhibit H, Napoli Dep. Tr. at 5.

BOE PFF34. Appointments are only able to be booked two to five days in advance, depending on the MTO, type of container, and day of the search. BOE Exhibit C, V.S. Gabriel Padilla at 3; BOE Exhibit D, Second V.S. Gabriel Padilla at 3; BOE Exhibit H, Napoli Dep. Tr. at 11–12.

BOE PFF35. VOCCs, such as Hapag-Lloyd, direct MTOs as to the vessel load projections and then the size and type of containers able to be received. BOE Exhibit C, V.S. Gabriel Padilla at 3; BOE Exhibit D, Second V.S. Gabriel Padilla at 1; BOE Exhibit H, Napoli Dep. Tr. at 9–10.

BOE PFF36. This information is communicated daily. BOE Exhibit C, V.S. Gabriel Padilla at 1; BOE Exhibit D, Second V.S. Gabriel Padilla at 1; BOE Exhibit H, Napoli Dep. Tr. at 9–10.

BOE PFF37. Although appointment allocation limits are ultimately controlled by MTOs, VOCCs control if and when the MTO can receive the VOCC's empty equipment. BOE Exhibit C, V.S. Gabriel Padilla at 3; BOE Exhibit D, Second V.S. Gabriel Padilla at 3; BOE Exhibit H, Napoli Dep. Tr. at 9–10; 16.

BOE PFF38. For example, at TTI, an appointment to return an empty container can only be made if the VOCC authorized TTI to receive the VOCC's empty container. BOE Exhibit D, Second V.S. Gabriel Padilla at 3.

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BOE PFF39. After receiving the invoices for the Containers and demonstrating GSL's difficulties in obtaining appointments to return the Containers, Hapag-Lloyd denied GSL's dispute and held the invoices as valid. BOE Exhibit 3, Hapag-Lloyd RFA at 3.

BOE PFF40. Hapag-Lloyd reviews disputes via employees (the Reviewer) who are web-trained and taught how to evaluate disputes via a lecture style and quiz format. BOE Exhibit I, Saavedra Dep. Tr. at 9–11.

BOE PFF41. The training has not been updated or renewed since the publication of the Interpretive Rule. *Id.* at 11.

BOE PFF42. When reviewing a dispute, the Reviewer first analyzes the plain documentation that a disputing party provides. *Id.* at 6.

BOE PFF43. Then the Reviewer goes to Hapag-Lloyd's operating system and looks to see if there are any remarks or documents attached to the shipment. *Id.* at 6–7.

BOE PFF44. If the Reviewer determines that the dispute is valid and that the invoice had not yet been cancelled, the Reviewer will then have to request a waiver from a supervisor. *Id.* at 7, 24.

BOE PFF45. Conversely, if a Reviewer decides that the dispute is invalid, they have autonomy to reject the dispute and hold the invoices as valid. *Id.* at 7, 24.

BOE PFF46. When reviewing a detention invoice with claims of no appointments, the Reviewer looks at documentation or remarks from their Equipment department "to see if Equipment wrote anything saying to waive a certain date" as well as the revenue screen to ensure that the "overdue" calculator, that computes detention fees, has taken relevant shut-out dates into account. *Id.* at 12.

BOE PFF47. If the Reviewer finds these calculations to be correct, they will invalidate the dispute and hold the invoices as valid. *Id.*

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BOE PFF48. Shut-out dates, according to the Reviewer, are dates where MTOs had no available appointments at all. *Id.* at 13.

BOE PFF49. Hapag-Lloyd's Revenue Dispute department elaborated that the term "shut-out" or "shut out" is used "for a container type at a port as a day on which all terminal operators at that port were not accepting empty returns of that container type during their first shift." BOE Exhibit F, *Resp. of Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC to Bureau of Enforcement's Third Interrogs. Request for Production of Documents* at 1–2, FMC Docket No. 21-09.

BOE PFF50. Thus, the Reviewer does not consider situations where an MTO may offer appointments but is not able to provide appointments to certain size or type of containers or where motor carriers are unable to secure appointments due to a high demand. *Id.* at 13–18, 23.

BOE PFF51. This is in contrast to Hapag Lloyd's account of its "unwritten policies" that "if appointments to return equipment are not available on the first shift, [Hapag-Lloyd, A.G.] waives detention for the entire day, even if there are appointments on the second shift." BOE Exhibit J, *Answers of Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC to Bureau of Enforcement's First Interrogs.* at 2, FMC Docket No. 21-09.

BOE PFF52. Hapag-Lloyd denied GSL's disputes and held its invoices as valid on the grounds of whether an MTO offered appointments, and not whether MTOs offered any appointments specific to the size and type of container, nor whether the appointments were unavailable when GSL tried to obtain an appointment. BOE Exhibit I, *Saavedra Dep. Tr.* at 13–18, 23

BOE PFF53. Hapag-Lloyd then denied GSL's disputes and held the invoices as valid by maintaining, for ten out of the eleven disputes, that "Per [their] Equipment department, as

Hapag Lloyd neither controls nor monitors the terminal's appointment system, [Hapag-Lloyd] [was] unable to waive these charges.” BOE Exhibit E, Hapag-Lloyd RFA at 4.

BOE PFF54. After the Commission issued the Order of Investigation and Hearing, BOE received additional information with similar fact patterns as the one alleged above. BOE Exhibit K, Hapag-Lloyd Resp. BOE Third Interrogatories E-Mail Addendum at 3–51.

BOE PFF55. A private Complaint was filed that alleged similar activity. See FMC Docket No. 21-10, Orange Avenue Express, Inc. v. Hapag Lloyd, AG; see also BOE Exhibit L V.S. Orange Avenue Express, Inc. (V.S. OAE).

BOE PFF56. Hapag-Lloyd was often quoted using the same language to convey that it did not control the terminal appointment system when holding that its detention invoices were valid. See BOE Exhibit L, V.S. OAE at ¶8; BOE Exhibit K, Hapag-Lloyd Resp. BOE Third Interrogatories E-Mail Addendum at 1–2.

A. Violation of 46 U.S.C. § 41102(c)

The Shipping Act of 1984 (Shipping Act or Act) states, at 46 U.S.C. § 41102(c), “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.”

1. Respondent is a Common Carrier and Liable for the Actions of its Agent

The Federal Maritime Commission regulates ocean shipping between the United States and foreign countries. Shipping Act of 1984, 46 U.S.C. § 40101 et seq (2019). Under the Act,

the term “common carrier” means a person that 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; and assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

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uses, for all or part of that transportation, a vessel operating on the high seas . . . between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102 (7) (2019). Furthermore, the term “ocean common carrier” includes a vessel-operating common carrier or “VOCC.” 46 U.S.C. § 40102(18) (2019).

Hapag-Lloyd is a VOCC under the Shipping Act as it holds itself out to the general public to provide transportation by water between the United States and a foreign country, it assumes responsibility for cargo from the point of receipt to the point of destination, and it uses a vessel for all or part of the transportation. Shipping Act of 1984, 46 U.S.C.S. § 40101 et seq (2019). In this matter, to further its business operations, Hapag-Lloyd employed Hapag-Lloyd (America) LLC as its agent.²

It is well established that a principal is liable for the acts of its agent when the agent is acting within its scope:

The norm of agency is that a principal is liable for the wrongful acts of the agent taken within the scope of the agency—that is, the authority to complete the task assigned by the principal. *See* Restatement (Third) of Agency § 7.08. A principal that learns of the illegal behavior committed by its agents, chooses to do nothing, and continues to receive the gains, is liable for the agent’s acts. *See NECA-IBEW Rockford Local Union 364 Health and Welfare Fund v. A.A. Drug Co.*, 736 F.3d 1054, 1059 (7th Cir. 2013).

United States v. Dish Network LLC, 954 F.3d 970, 976 (7th Cir. 2020). Although agency law alone is not dispositive of a Shipping Act violation proceeding, *West Gulf Maritime Assc. v. Port of Houston Authority*, 22 FMC 420 (FMC 1980), Respondents entered into an agency agreement relating to charges connected with ocean transportation, contracting themselves into a position of responsibility for their agent’s acts. BOE PFF 6. The Agency Agreement between Hapag-Lloyd, AG and Hapag-Lloyd (America) LLC specifically [REDACTED]

² For example, on its webpage Hapag-Lloyd America offers services such as “export booking, documentation, imports, and finance,” <https://www.hapag-lloyd.com/en/services-information/offices-localinfo/north-america/usa/north-america-regional-headquarters.html> (last visited Mar. 9, 2022). BOE PFF 6.

[REDACTED] } BOE Exhibit N, Hapag-Lloyd Agency

Agreement and Billing Totals at HL000231.

2. Respondent Failed to Establish, Observe and Enforce Just and Reasonable Regulations and Practices

a. Respondent's Failure to Establish, Observe and Enforce Just and Reasonable Regulations and Practices

Respondent has admitted it was aware of the interpretive rule and admitted it has taken no specific action in response. BOE PFF 3–4, 41. Respondent has claimed that at LALB, "...if appointments to return equipment are not available on the first shift, HLAG waives detention for the entire day, even if there are appointments on the second shift". BOE PFF 51. However, there is no evidence that this policy has been established, disseminated to staff, or enforced. BOE PFF 39–53. Staff has no recollection of receiving training related to the rule. BOE PFF 41. There exist no written policies or guidelines for adherence to the rule for staff to reference in their deliberations. BOE PFF 41, 51. On whole, Respondent has failed to establish just and reasonable practices—as related to the Interpretive Rule, it has established no conforming practices at all. Instead, Respondent's established practice is to continually deny disputes without regard to the Interpretive Rule's guidance.

Respondent stated that in considering detention disputes, it looks only to "shut outs". BOE PFF 46. Respondent defines "shut out" as when a terminal has no appointments at all. BOE PFF 48, 49. Hapag-Lloyd's Revenue Dispute department defines "'shut out' for a container type a port, as a day on which all terminal operators at that port were not accepting empty returns of that container type during their first shift." BOE PFF 49. In other words, if a terminal has limited appointments, if appointments have been filled by other motor carriers, if a terminal is only able to

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accept Respondent's containers as part of a dual transaction, or is not receiving Respondent's containers, those factors are not even considered in evaluating whether or not detention charges are valid. BOE PFF 50. Under the Interpretive Rule, this is identified as unreasonable.

b. Respondent's Practices are Unreasonable

i. Respondent's Practices are Normal, Customary, and Continuous

The Commission has framed its understanding of normal, customary, and continuous as "the activities of maritime regulated entities that negatively affect the broader shipping public." *Final Rule, Interpretive Rule*, 83 Fed. Reg. 64478 (Fed. Mar. Comm'n December 17, 2018). "To find a violation of § 41102(c), the Commission consistently requires that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business." *Final Rule, Interpretive Rule, Shipping Act of 1984*, 83 Fed. Reg. 64478 (Fed. Mar. Comm'n Dec. 17, 2018); *see also European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979), *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 432 (1935), *European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979). The violations here meet this standard.³ In rejecting ten of the eleven disputes mentioned in the Order of Investigation & Hearing, Respondent uses identical language: "Per our Equipment department, as Hapag Lloyd neither controls nor monitors the terminal's appointment system, we are unable to waive these charges." BOE PFF 53. Additional evidence shows a repeat of Respondent's adherence to a policy of denying disputed invoices regardless of the terminal appointment system:

Please note your dispute has been reviewed and ruled invalid. Our records indicate that there were available return locations. Hapag-Lloyd does not control Marine Terminal Appointment systems. You must check with terminals on appointment availability;

³ It should be noted that 46 C.F.R. § 545.4 applies to claims for reparations, and not explicitly enforcement actions. However, element (b) is met here.

Please kindly note LAX/LGB does not allow per diem exemptions for lack of appointment availability as Hapag-Lloyd does not control marine terminal appointment systems.

BOE PFF 56, *see also* BOE Exhibit K, Hapag-Lloyd Resp. BOE Third Interrogatories E-Mail Addendum at 1–2. Respondent’s agent describes the process used to evaluate disputes—a process that does not even consider the unavailability of appointments—which it employs around 100 times a day, BOE PFF 40–47; *see also* BOE Exhibit I, Saavedra Dep. Tr. at 7–8, and employed almost { [REDACTED] } times between { [REDACTED] } [REDACTED] } BOE Exhibit N, HAPAG-Lloyd Agency Agreement and Billing Totals at HL000242. Although not all those disputes may involve detention charges on containers, the nature of the dispute resolution practice is that of a normal routine. BOE PFF 40–47.

The broader shipping public has expressed its frustration with demurrage and detention billing through a 2016 Petition and throughout two Fact Finding Investigations. *See Petition for Rulemaking Submitted by the Coalition for Fair Port Practices*, FMC Docket No. P4-16 (Dec. 7, 2016), *also available at* https://www2.fmc.gov/readingroom/docs/P4-16/P4-16_petition.pdf/; *see also Fact Finding 28*, FED. MAR. COMM’N, <https://www.fmc.gov/fact-finding-28/> (last visited Mar. 11, 2022); *Fact Finding 28*, FED. MAR. COMM’N, <https://www.fmc.gov/fact-finding-29/> (last visited Mar 11, 2022). As early as 2014, when the Commission hosted forums on port congestion, “shipper and trucker discontent with free time, demurrage, and detention practices was ‘palpable.’” *Interpretive Rule*, 85 Fed. Reg. at 29639. Since the filing of the Order of Investigation & Hearing, two additional motor carriers have reported receiving similar rejections of detention disputes from Respondent, demonstrating that Respondent’s practices are customarily applied to multiple entities. BOE PFF 54–56. To date, none of the invoices mentioned in the Order of Investigation & Hearing, or by these additional entities, has been waived in full—Respondents’ practice is ongoing. BOE PFF 18–19; *see also* BOE Exhibit A, Hapag-Lloyd Dispute Emails at 2, 4, 6, 8, 9–10, 12, 15–18.

ii. Respondent's Practices are Unreasonable

The “Commission has stated that “[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.” *Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, Docket 11-12 at 18 (Order Affirming Dismissal of Complaint) (FMC Nov. 20, 2014) (quoting *W. Gulf Mar. Ass'n v. Port of Horn. Autk*, 18 S.R.R. 783, 790 (FMC 1978), *aff'd* without opinion sub nom. *W. Gulf Mar. Ass'n. v. FMC*, 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980)). In *Maher Terminals*, the test for reasonableness was laid out as “whether the charge levied is reasonably related to the services rendered.” *Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595, 602 (FMC 1987), reaffirmed on reconsideration, 24 S.R.R. 1242, 1248 (FMC 1988) (quoting *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 282 (1968)). “[Section 411029(c)]⁴ requires that the practices of terminals be just and reasonable. “Reasonable” may mean or imply “just, proper,” “ordinary or usual,” “not immoderate or excessive,” “equitable,” or “fit and appropriate to the end in view.” Black's Law Dictionary, Fourth Edition; *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (FMC 1966). 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.” *Kawasaki Kisen Kaisha*, 2014 FMC Lexis 36, 27 (FMC Nov. 20, 2014) (quoting *Indiana Port Comm'n v. Federal Maritime Commission*, 521 F.2d 281, 285 (D.C. Cir. 1975)).

Building upon this case law, on May 18, 2020, the Commission published its Interpretive Rule on Demurrage and Detention Under the Shipping Act, now codified at 46 C.F.R. § 545.5. In its Interpretive Rule, the Commission explained that demurrage and detention charges have

⁴ “Section 17” in the original. Section 41102(c) of the 1984 Act derives from the second paragraph of section 17 of the 1916 Act.

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“intended primary purposes as financial incentives to promote freight fluidity.” 46 C.F.R.

§ 545.5(c)(1). The Commission’s regulations at 46 C.F.R. § 545.5(c)(ii) state as follows regarding returns of empty containers, “[a]bsent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.” More specifically, the Commission addressed the fact pattern at issue here: “[I]f an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, no amount of detention can incentivize its return.” *Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention Under the Shipping Act (Notice Interpretive Rule)*, 84 Fed. Reg. 48850, 48853, 48855 (Fed. Mar. Comm’n Sept. 17, 2019) (“Absent extenuating circumstances, assessing detention in such situations, or declining to pause the free time or detention clock, would likely be unreasonable.”).

Recently, in *TCW, Inc. v. Evergreen Shipping Agency (America) Corp. & Evergreen Line Joint Services Agreement*, Docket 1966(I), (FMC 2021), the Small Claims Officer applied the Interpretive Rule and held that detention charges “were unreasonable because they could not have incentivized cargo movement given that the port was closed on those days, making it impossible for Claimant to return the equipment.”

The present case is similar in that the motor carrier made a concerted effort to return containers but was unable to due to a lack of appointments at the terminal which Respondent directed it to return the containers. Nor did the charge levied relate to an actual service performed. In fact, the reverse is true—the entity being charged is already burdened by the container. Chassis fees, storage fees, and the operational difficulties of continually seeking opportunities to relieve itself of the unwanted container are the opposite of a benefit. The additional charges associated

with retention of a container already serve an incentive for its return; Respondent's punitive detention charges serve no additional purpose when a lack of appointments at the Respondent's designated location prevent timely return.

Nor did Respondent provide guidance in its rejection of the disputes. "Dispute resolution policies that lack guidance about the types of evidence relevant to resolving demurrage and detention disputes, are likely to fall on the unreasonable side of the spectrum". *Notice Interpretive Rule*, 84 Fed. Reg. at 48854. In response to the motor carrier's dispute, Respondent simply replied that charges could not be waived because it did not control appointment systems. BOE PFF 53.

iii. Practices are Related to or Connected with Receiving, Handling, Storing, or Delivering Property

The return of a VOCC's empty containers to a terminal is integral to receiving, handling, storing, and delivering property. Empty container return is specifically mentioned in 46 C.F.R. § 545.5(c)(ii). Each of these containers was involved in ocean transportation of property and shipping containers generally are equipment belonging to a VOCC specifically for this purpose. BOE PFF 8–11. Respondent's practices regarding charging detention associated with empty containers returns meets this element of the statute.

B. Civil Penalties Should be Assessed for Respondent's Violations

In assessing a civil penalty for violations of the Shipping Act, the Commission must take into consideration "the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes." 46 C.F.R. § 502.603(b). In addition, consideration must be given to "the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." *Id.*

1. Nature, Circumstances, Extent and Gravity of the Violations

The nature of this violation is a grave one. In circumstances of unprecedented port congestion, and its associated burden on American businesses, the Commission offered clear guidance on reasonable practices related to detention. BOE PFF 1–3. Respondent has chosen to ignore this guidance. BOE PFF 17. While motor carriers struggle to return empties and marine terminals struggle to maintain cargo fluidity, Respondent has contributed to the pain by imposing additional, purposeless fees. It is Respondent’s disregard for the published Interpretive Rule that makes this violation knowing and willful, to which a higher penalty is applied. The Commission’s predecessor, the Federal Maritime Board, defined “knowing and willful” as conduct “purposely or obstinately” disregarding the statute or is plainly indifferent to its requirements. *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483 (FMB 1954). This definition was subsequently expanded to include “purposely or obstinately; it means gross recklessness, heedlessness, or a callous disregard of the consequences of one’s acts, or a plain indifference to the law’s requirements.” *Brokerage on Shipments of Ocean Freight—Max LePack, Jack Pollack, Phyllis Pollack, Lynne Forwarding Inc., United Export Clothing Co., Inc., Bimor Textile Company, Inc.*, 5 F.M.B. 435 (FMB 1958). This concept of “plainly indifferent” was ultimately narrowed to “something more than casual indifference, and equates with wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of ‘gross negligence.’” *Equality Plastics, Inc. and Leading Forwarders, Inc.—Possible Violations of Section 16 First Paragraph, Shipping Act, 1916*, 17 F.M.C. 217 (FMC 1973).

Here, Respondent is a regulated entity and had knowledge of the Interpretive Rule. BOE PFF 3,5. The Interpretive Rule had been published for a year before Respondent rejected these disputes. BOE PFF 4. Respondent admits to knowing the interpretive rule, which is clear about unreasonable behavior. BOE PFF 3. Despite the clarity of the Interpretive Rule, Respondent

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charged detention fees on motor carriers who were unable to make appointments and return empties, and then after the motor carriers disputed the charge with corroborating evidence, Respondent continues to hold the charges as valid. BOE PFF 11, 15, 17, 50, 54. Respondent willfully charged unjust and unreasonable detention fees as a practice of receiving, handling, storing, and delivering property.

As for the extent of the violations, during the Spring and Summer of 2021, BOE learned through a private party complaint, and materials sent directly to BOE, that the containers presented in the Order of Investigation & Hearing are part of a larger universe of violations. BOE PFF 54–56. The statute itself speaks to “extent,” since the violation is one relating to a carrier’s practices. Based on the evidence, Respondent’s practice seems to be to deny charges as a matter of course, looking only to whether the terminal had any appointments at all, rather than considering specific factors as encouraged by the Interpretive Rule. BOE 42–46, 50. Here, we know of at least three separate motor carriers who experienced Hapag-Lloyd’s rejection of disputes, and Respondent’s agent has admitted to this behavior as a typical response. BOE PFF 53; *see also* BOE Exhibit I, Saavedra Dep. Tr. at 25 (Q: “In this exhibit, the language you are using in your comments back to the disputing party, this is a typical response for you; that correct?” A: “Yes.”). Further, Respondent has provided staff with no specific guidance as to how to evaluate a dispute as per the Interpretive Rule. BOE PFF 41; *see also* BOE Exhibit I, Saavedra Dep. Tr. at 10–11, 28–30. The appropriate inference is that others similarly situated have also been exposed to these violative behaviors, whether those individual entities have already come forward to the FMC with specific container numbers or not.

2. Respondent's Culpability and History of Prior Offenses

Respondent is culpable for this conduct. As established through its agency relationship, and settled agency law, Hapag-Lloyd, A.G. is culpable for the actions of its agent.

As for history of prior offenses, Respondent has not been the subject of an enforcement action since 1990, when it participated in an informal settlement of malpractices in the Trans-Pacific trade.⁵ However, the Commission recognizes that a scant history of prior offenses only means “that there is no history of any formal Commission proceeding regarding” a respondent or its principals. *Pacific Champion Express Co., Ltd. — Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1185, 1192 (ALJ 1999). The Commission is allowed “to draw reasonable inferences from the evidence and reach conclusions in the absence of a ‘smoking gun.’” *Id.*

3. Respondent's Ability to Pay a Civil Penalty

Respondent is one of the largest ocean carriers in the world. In 2021 Respondent ranked as the number sixth VOCC for imports to the United States, transporting over 2 million TEUs, and ranked fourth VOCC for exports from the United States, transporting over 1.14 million TEUs.⁶ Respondent boasts a container stock of over 3 million TEUs. Press Release, HAPAG-LLOYD, https://www.hapag-lloyd.com/content/dam/website/downloads/press_and_media/publications/22-02-01_HLAG_PM_Prelims_ENG.pdf (last visited Mar. 11, 2022). Additionally, Respondent has reported record profits during the period at issue. Hapag-Lloyd Achieves Extraordinary Strong Result in First Nine Months Of 2021, HAPAG-LLOYD, <https://www.hapag-lloyd.com/en/company/press/releases/2021/11/hapag-lloyd-achieves-extraordinary-strong-result-in->

⁵ Fact Finding 18. Agreement number E-36-90. Respondents entered informal compromises of civil penalties on November 23, 1981 (\$2,500), May 5, 1982, (\$5,000), August 2, 1984 (\$1,500), and July 12, 1990 (\$75,000).

⁶ According to Datamyne, a publicly searchable trade database, located at www.datamyne.com.

first-nine-m.html (last visited Mar. 11, 2022); Hapag-Lloyd is the Latest to report Extraordinarily Strong Results, MARITIME EXECUTIVE, <https://www.maritime-executive.com/article/hapag-lloyd-is-the-latest-to-report-extraordinarily-strong-results> (last visited Mar 11, 2022). Hapag-Lloyd has been experiencing unprecedented financial performance. From Q2 to Q3 2021 alone, their EBITDA (earnings before interest, taxes, depreciation, and amortization) *increased* by \$3.2 Billion, and their sales/revenue growth was up over 100 percent. HAPAG-LLOYD AG, WSJ MARKETS, <https://www.wsj.com/market-data/quotes/DE/XMUN/HLAG/financials> (last visited Mar. 11, 2022). Respondent reports collecting over { [REDACTED] } dollars in detention and demurrage fees between { [REDACTED] } BOE Exhibit N, HAPAG-Lloyd Agency Agreement at HL000242. Respondent is able to pay a substantial civil penalty, commensurate with its violation.

4. Commission's Policies for Deterrence and Future Compliance

Other actions by the Commission have not deterred Respondent. This includes the Interpretive Rule, the Commission's many press releases related to the subject, and not even the filing of this litigation. *See generally* <https://www.fmc.gov/new-guidance-detention-demurrage/>; <https://www.fmc.gov/fmc-vocc-audit-team-urges-carriers-to-adopt-detention-demurrage-best-practices/>; <https://www.fmc.gov/interim-report-in-investigation-of-detention-demurrage-practices-released>. To date, Respondent has not waived the charges at issue, nor changed its practices, nor changed its language in communications to the public. BOE PFF54–56. Considering these factors, justice requires a significant penalty to deter the violative behavior at issue and ensure future compliance.

5. Calculation of Penalty to be Assessed

A Section 41102(c) violation is one relating to a respondent's business practices in general, not just to a limited number of shipments. However, for ease of calculation, BOE bases its calculations on the eleven containers that were included in the Order of Investigation & Hearing .

As previously established, this is a knowing and willful violation. The Commission published its factors for determining when, under Section 41102(c), a charge would be considered unreasonable, and Respondent was aware of this guidance over a year before these containers were returned. BOE PFF 1-4. Respondent was on direct notice at least by May 18, 2020 yet ignored the guidance. The statutory maximum for a knowing and willful violation of Section 41102 is \$65,666. 46 U.S.C. § 41107(a).⁷ This amount multiplied by eleven totals to \$722,326. Respondent could have waived these charges in accordance with the Interpretive Rule at any time. Instead, Hapag-Lloyd rejected the disputes on July 26, 2021, 228 days before the filing of this brief. Each day of a continuing violation is a separate offense. 46 U.S.C. § 41107(a). This calculation generates a statutorily authorized penalty of \$164,690,328 for these eleven containers alone. BOE contends that a minimum of 10% of this amount is necessary to deter future violative behavior since no other actions by the Commission have been effective. Hence, a substantial civil penalty is appropriate and warranted by the facts of this case. Therefore, BOE respectfully requests the ALJ impose a penalty of at least \$16.5 million on Respondent. This amount is less than {█}% of what Respondent reports to have collected between {█} in demurrage and detention fees. BOE Exhibit N, HAPAG-Lloyd Agency Agreement and Billing Totals at HL000242.

⁷ Effective January 14, 2022, the maximum amount for knowing and willful violations was adjusted for inflation to \$65,666. These adjustments were made applicable to violations predating the increase which are assessed after January 15, 2022. 46 C.F.R. §§ 506.4 and 506.5.

C. Cease and Desist Orders Should be Issued Against Respondent

Cease and desist orders are appropriate:

when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity One reason to issue such an order is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order, if necessary.

Ever Freight Int'l Ltd., et al. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329, 333 (ALJ 1998). In addition to an appropriate deterrent civil penalty amount, a cease-and-desist order is proper in this case. BOE requests that Respondent be ordered to follow the previously published Interpretive Rule. Respondent should be ordered to cease collection of detention charges on the containers at issue, and on other containers similarly situated.

To address future behaviors, Respondent should be ordered to desist from collecting detention charges from motor carriers when they dispute such charges and provide evidence to Respondent that points to their inability to return containers in a timely manner due to circumstances beyond their control. When a motor carrier produces evidence such as screenshots reflecting appointment unavailability, or email communications, demonstrating a lack of appointments and a genuine effort to timely return the containers, detention charges should be waived because they do not achieve the purpose of promoting freight fluidity.

III. CONCLUSION

BOE respectfully requests that the ALJ (1) find that Respondent knowingly and willfully violated the Shipping Act at 46 U.S.C. § 41102(c); (2) assess a civil penalty of not less than \$16,500,000; and (3) order Respondent to cease and desist from violating Section 41102(c) by refusing to waive detention charges on motor carriers when presented with evidence that containers could not be returned due to exigent circumstances.

Respectfully submitted,

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Benjamin K. Trogdon, Director
Maryanne G. Mundy, Trial Attorney
mmundy@fmc.gov
Serena L. Tang, Trial Attorney
stang@fmc.gov
Bureau of Enforcement
Federal Maritime Commission 800
N. Capitol St., N.W.
Washington D.C. 20573
(202) 523 5783

CERTIFICATE OF SERVICE

I hereby certify that on this **16th day of March, 2022**, a copy of the foregoing BOE Opening Brief has been served upon all counsel of record in accordance with 46 C.F.R. Part 502.

Signing Attorney

Counsel for Respondents Hapag-Lloyd, A.G., and Hapag-Lloyd (America) LLC

Wayne R. Rohde
Joshua P. Stein
COZEN O'CONNOR
1200 Nineteenth Street, NW
Suite 300
Washington, DC 20036
Telephone: (202) 463-2504
Emails: wrohde@cozen.com; jstein@cozen.com

Presiding Administrative Law Judge

Erin M. Wirth, Chief Administrative Law Judge
Office of Administrative Law Judges
Federal Maritime Commission
800 N. Capitol St., N.W.
Washington D.C. 20573-0001
judges@fmc.gov