FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

BAKERLY, LLC, *Complainant* v. SEAFRIGO USA, INC., *Respondent*.	**DOCKET NO. 22-17**

Served: January 3, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

This proceeding began on July 27, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant Bakerly, LLC ("Bakerly") had filed a complaint against Respondent Seafrigo USA, Inc. ("Seafrigo"). The complaint alleges that Seafrigo violated the Shipping Act of 1984 ("Shipping Act") filed rate doctrine at 46 U.S.C. § 41104(a)(2)(A); demurrage and detention rules at § 41102(c) and 46 C.F.R. § 545.5(d); and the Ocean Shipping Reform Act of 2022 ("OSRA 2022") at §§ 41104(a)(14), 41104(a)(15), and 41104(d). On August 22, 2022, Seafrigo filed an answer denying the allegations and raising affirmative defenses.

Seafrigo provided reefer (refrigerated) transportation services for Bakerly from 2015 through early 2022, as a non-vessel operating common carrier ("NVOCC"), a type of ocean transportation intermediary ("OTI"). The dispute involves over a thousand invoices and $2,774,923.42 of demurrage and detention charges which Seafrigo has paid to nonparties for Bakerly's shipments from December 2020 through March 2022. Bakerly seeks a refund of $973,227.05 in demurrage and $278,172.37 in detention that it paid Seafrigo. Bakerly also seeks an order that Seafrigo cease and desist collection of an additional $1,288,809.92 in demurrage and $234,714.08 in detention. Seafrigo states that it is not seeking reimbursement for $159,849.08 of charges.

[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.

According to Bakerly, the dispute began after a snowstorm and port closure during which, Bakerly argues, it should not have been responsible for demurrage and detention charges. Bakerly's concern expanded to include Seafrigo's staffing shortages and billing practices. By October 2021, Bakerly told Seafrigo that it would automatically reject certain invoices. Seafrigo contends that Bakerly's nonpayment of detention and demurrage charges is not justified.

The demurrage and detention charges were imposed by entities other than Seafrigo: marine terminal operators ("MTOs") or vessel-operating common carriers ("VOCCs"). Demurrage charges accrue on a daily basis and must be paid in order for containers to be released, while detention charges are incurred after a shipment is delivered if a container is not returned timely. As Seafrigo explains, "NVOCCs advance funds because requiring shippers and consignees to pay such charges in advance would unnecessarily grind transportation to a halt with containers sitting at ports and terminals for extended periods of time." Opposition at 6. This decision does not rule on OSRA 2022's new requirements for invoices. In the future, the Commission's new Charge Complaint process should be able to resolve disputes over invoice charges in a much more efficient manner. *See* https://www.fmc.gov/osra-2022-implementation.

As explained below, Bakerly has not established that Seafrigo violated the Shipping Act. Commission rules and the parties' negotiated rates and tariffs permitted Seafrigo to pass through charges without markup to Bakerly, including demurrage and detention charges, unless attributable to Seafrigo. The evidence shows that Seafrigo acted reasonably, exercised due diligence, and that the demurrage and detention charges were not attributable to Seafrigo, at least not in excess of the $159,849.08 for which Seafrigo accepts responsibility. This decision is limited to determining whether Seafrigo violated the Shipping Act in effect at the time the alleged violations occurred. Moreover, the evidence is viewed in the context of that timeframe. As Seafrigo notes, supply chain disruptions "plagued the ocean transportation industry in 2020 through early 2022." Opposition at 2. Additionally, this decision does not establish best practices; rather, it is limited to determining whether the Shipping Act was violated.

The evidence does not establish that the detention and demurrage charges at issue were inconsistent with the negotiated rates and tariffs and therefore they do not violate the filed rate doctrine. In addition, the evidence does not establish either that Seafrigo had a practice, or if it had a practice, that the practice was unreasonable, in violation of the demurrage and detention rule and section 41102(c). Moreover, OSRA 2022 does not apply to these shipments, which occurred before it was adopted. Therefore, a violation of the Shipping Act is not established.

B. Procedural History

On July 27, 2022, the Commission issued a notice of filing of complaint and assignment initiating this proceeding. On August 22, 2022, Seafrigo filed an answer. The parties began discovery. On February 7, 2023, an order was issued dismissing Bakerly's partial motion for summary decision. On March 30, 2023, an order was issued quashing three notices of depositions.

On May 8, 2023, Bakerly filed its brief ("Brief"), proposed findings of fact, and appendix. On May 31, 2023, Seafrigo filed its opposition brief ("Opposition"), supplemental proposed findings of fact, appendix, and response to proposed findings of fact. On June 14, 2023,

Bakerly filed its reply brief ("Reply"), a reply to Seafrigo's responses to Bakerly's proposed findings of fact ("BReply/SFResponse/BPFF"), and a response to Seafrigo's proposed findings of fact ("BResp/SFPFF"). On June 21, 2023, Seafrigo filed a motion to address the request for sanctions raised in Bakerly's reply brief and a memorandum in response to the request for sanctions.

On June 29, 2023, the proceeding was reassigned to the undersigned and both parties were ordered to provide a table of contents for their appendices, including the excel files, and Seafrigo was ordered to refile portions of its appendix to add Bates numbers. The required filings were received on July 14, 2023.

C. Arguments of the Parties

Bakerly asserts that: Seafrigo violated the filed rate doctrine by charging Bakerly demurrage in contradiction to Seafrigo's rules tariff; Seafrigo established an unreasonable practice and policy of sending duplicative invoices that gave Bakerly cause to distrust Seafrigo invoicing for demurrage and detention; Seafrigo should not have paid demurrage when the ports were closed due to a snowstorm; and Seafrigo's responses to Bakerly's discovery request violated Rule 33. Brief at 28-62; Reply at 12-36.

Seafrigo contends that: Bakerly's argument ignores the governing contracts and the parties' course of conduct; Bakerly is obligated to pay for charges assessed as a result of its negligence or that of its warehouser; charges caused by reasons independent of either party were not Seafrigo's responsibility; Seafrigo's invoicing was not improper; and Bakerly failed to act in good faith. Opposition at 17-51.

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 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 that 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.

Evidence in the record that was not in English as required by Commission Rule 7 was not considered. *See, e.g.*, CX 220, CX 586. Additionally, the record is significantly longer than necessary because parties submitted multiple copies of the same documents. *See, e.g.*, CX 221-

24 and CX 622-24; CX 472-78 and CX 1310-16; and CX 833-34 and RX 4609-10. Appendices should have a logical organization and if the evidence were organized by date or transaction, this might have been less likely to occur. Indeed, the best explanation of the organization of Seafrigo's evidence is provided by Bakerly in its Reply at 33-34. Bakerly's objections to Seafrigo's evidence are discussed below, in section III.A.3.

The findings in this decision are based on the totality of the evidence and no particular piece of evidence was determinative. Many of the facts below are from emails between the parties. Multiple conversations were occurring at the same time. Therefore, for ease of reading, conversations are loosely grouped together, which means the facts are not entirely chronological. Minor typographical changes are made in the quotes, primarily spacing changes, for example, combining paragraphs. The findings of fact summarize some of the over six thousand pages of evidence provided by the parties, but it does not attempt to summarize the entire record, trace the journey of every container, or match every invoice with every charge listed in the various spreadsheets. Rather, it focusses on the most relevant contemporaneous evidence pertaining to the alleged Shipping Act violations.

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

II. FINDINGS OF FACT

A. Relevant Entities

1. Bakerly, LLC is a United States company that imports specialty French food products. CX 19; Bakerly Proposed Findings of Facts with Respondent's Responses and Bakerly's Replies ("BReply/SFResponse/BPFF") 1.[2]

2. Charles Lefort was Bakerly's Vice-President, Supply Chain and on January 1, 2023, became Vice President, Sales & Operations Planning and IT. CX 19, CX 1318.

3. Seafrigo is a non-vessel operating common carrier licensed by the Federal Maritime Commission as that term is defined at 46 U.S.C. § 40102(17). CX 3; BReply/SFResponse/BPFF ¶ 2.

4. Alfonse "Al" Raffa served as Seafrigo's Managing Director. RX 1.

5. Jérôme Lorrain was Seafrigo's CEO from January 1, 2021, to May 5, 2022. RX 38.

6. Bakerly's affiliated companies in France had for a lengthy period utilized the Seafrigo affiliates in France and Europe for distribution of their food products to most of Bakerly's affiliates. CX 19.

[2] Citations to the parties proposed findings of fact are to: (1) Bakerly's Proposed Findings of Facts with Respondent's Responses and Bakerly's Replies ("BReply/SFResponse/BPFF") and Bakerly's Response to Respondent Seafrigo's Supp. Statement of Facts ("BResp/SFPFF").

7. Bakerly LLC, the United States company, started importing refrigerated containers of Bakerly food products from its parent companies in France with Seafrigo in September 2015. CX 19.

8. Bakerly, in February 2019, decided to start buying from its Bakerly parent companies in France pursuant to FOB terms and to have Seafrigo USA handle the transportation from the port to door delivery. CX 19; CX 162.

9. Bakerly shipped in the range of 1,000 FEUs annually. CX 19.

10. Bakerly also transacted with a company called Lineage to handle some of Bakerly's warehousing, including a warehouse at Allentown, Pennsylvania. *See, e.g.*, Bakerly's Response to Respondent Seafrigo's Supp. Statement of Facts ("BResp/SFPFF") ¶¶ 27, 51; BReply/SFResponse/BPFF ¶¶ 30, 34, 51.

B. Agreements

11. Seafrigo sent quarterly rate proposals to Bakerly which stated: "This Rate Proposal does not include demurrage and detention charges, for which the shipper and/or consignee may be liable and port terminal handling charges." CX 226, CX 232, CX 239, CX 245, CX 251.

12. Seafrigo's quarterly rate proposals also stated: "All shipments are subject to the rules in Seafrigo's bill of lading, its Rules Tariff and its standard trading conditions." CX 226, CX 232, CX 239, CX 245, CX 251.

13. Seafrigo's quarterly rate proposals included Seafrigo's USA Standard Accessorials Tariff listing per diem charge as "At cost per terminal or carrier" and both demurrage and detention as "At cost per carrier." CX 230, CX 237, CX 243, CX 249, CX 255.

14. Seafrigo Tariff Rule 15, effective 22 Feb. 2017, under the heading "FREE TIME, DETENTION AND DEMURRAGE," states:

> 15.1 Carrier is a non-vessel operating common carrier and the equipment it uses to provide transportation services to Merchant is provided by the vessel-operating common carrier (VOCC) that operates the vessel transporting the cargo.
>
> 15.2 The VOCC imposes detention charges if empty containers released for loading and/or loaded containers released for unloading are not returned within a specified period of time (free time). Merchant shall be liable to Carrier for any detention charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time.
>
> 15.3 The VOCC imposes demurrage charges if loaded containers are not removed from the marine terminal within a specified period of time (free time). Where service is port at destination and removal of containers from

the VOCCs marine terminal is responsibility of Merchant, Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time.

CX 111.

15. Seafrigo Tariff Rule 17, under the heading "USE OF EQUIPMENT" states:

> 17.1 General Provisions
>
> Merchant acknowledges and agrees that Carrier, as an NVOCC, does not own or operate equipment (i.e., chassis or containers). Merchants use of chassis and containers shall be subject to the requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants cargo. Merchant, by tendering shipments to Carrier for transportation, appoints Carrier as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis used for such transportation, all of which shall be for the account of the Merchant except to the extent solely attributable to actions or omissions of Carrier.
>
> 17.2 Merchants Risk and Expense
>
> Except as otherwise specifically provided in this Tariff Rule, and Carrier's bill of lading terms and conditions, the following shall be at the Merchants risk and all expenses in connection therewith shall be for the Merchants account:
>
> 1. The pickup, transport, and delivery of the containers/goods moving between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand, except to the extent the goods are door cargo; and
>
> 2. The care and custody of equipment.

CX 113.

16. Seafrigo's bill of lading terms and conditions provide at Clause 6.5 that Seafrigo "shall not be liable for any loss or damage arising from: (a) an act or omission of Merchant" and at Clause 6.5(h) that Seafrigo cannot be held liable for any "cause or events" which it could not avoid, and which could not be prevented by the exercise of due diligence. CX 57.

17. Seafrigo's bill of lading section 9, labeled "CARRIER'S CONTAINERS," includes the statement: "9.4 Merchant undertakes to return such containers to Carrier within the time

provided for in Carrier's applicable tariff; otherwise, Merchant shall pay Carrier for the demurrage or detention charges applicable to the containers." CX 57.

C. Communications

1. Winter 2020/2021 Billing

18. As early as November 2020, Seafrigo noted container delays, "due to short week and availability," and "its been a mess lately due to vessel delays and having to deliver containers," described as a "roller coaster for all of us." CX 943, CX 938; *see* CX 935-49.

19. Seafrigo stated that it "met with the two primary VOCCs for Bakerly, CMA and MSC[] and sought to have them waive detention and demurrage charges" but that because "those carriers had significant leverage in an extremely tight market, they flatly refused to waive such charges." RX 18.

20. On January 5, 2021, Bakerly's warehouser Lineage emailed Seafrigo and Bakerly stating: "Please request the appointments when the containers are released from the port." CX 954. Seafrigo then wrote an email to Bakerly stating: ""[T]his kind of response is not going to help. We need to be proactive with our appointments" but "I don't want to step on any toes so I will not answer just yet. What do you think?" CX 953. Bakerly replied that they would call Lineage and Bakerly requested some specific appointments from Seafrigo. CX 953.

21. On January 4, 2021, Bakerly emailed Seafrigo, subject "Priority List Week 2," stating: "thanks for the time this afternoon. Right now, we have 70 [containers] waiting for drivers in NJ and NY port; as we discussed during the meeting, we have specific products out stock . . . . please see below how many [containers] we need per item# and its final destination . . . you may deliver the first available container from the references listed below[.]" CX 711. Seafrigo responded and suggested a telephone call. CX 711.

22. On January 5, 2021, Seafrigo emailed Bakerly stating:

> After speaking with Yudith about demurrage, here is a brief report of how this is being handled. Up to this point, Seafrigo has been financing all of the demurrage on behalf of Bakerly for the sake of ease and to avoid confusion with multiple parties getting involved. We do not have a grand total at this time, but just want to give you guys a rough idea of where we are in terms of cash outlay. Up to this point we paid around 100K to 125K in demurrage within the port of NJ. In port of Oakland, I believe we paid around 40K-45K so far. We will keep you posted as to how this progresses and as to when the situation is back under somewhat of normal control.

CX 709-10.

23. Later on January 5, 2021, Seafrigo emailed Bakerly stating: "I assigned 4 more containers. Please see attached [Bakerly Report excel file]. Sorry for the emails but I am

going to keep sending this whenever I have an update so we are not redundantly looking for drivers on covered containers." CX 709.

24. On January 20, 2021, Seafrigo emailed Bakerly, subject "Preferred Jersey City," stating:

> We have a potential serious issue brewing here. Despite making a great push to get all these containers delivered, we now have an issue that they are not unloading the containers in a reasonable amount of time. Some containers have been sitting there for over a week and rumor has it, they intend to keep them there longer. I know this is "he said, she said" but my reliable sources are telling me that "This customer brought in too many containers at the same time, and we do not have the time to unload them fast enough". The obvious issue here is per diem costs which you are already aware of. But the other residual issue here is that some of these truckers (including Seafrigo transport) are using our own chassis to service containers that we pay for, and they are now sitting in Jersey City for an undetermined period of time. That is costing we as truckers money as we need that equipment back. I know this week is a slow week in terms of imports for Jersey City so it would be great if there could be a catch up period for PFS JC to focus on unloading what they have so we can get our equipment back and containers returned back to the port. For all new shipments coming in? My recommendation would be to bring all those containers to Seafrigo's freezer and unload them here until PFS JC can catch up again. Then we can truck them to PFS JC when they are ready to receive them. Please let us know your thoughts.

CX 720.

25. On February 3, 2021, Bakerly emailed others at Bakerly stating:

> Last recap on demurrage :
>
> - Total $: $359,149.35
>
> - 50 containers
>
> - Average 13 days of demurrage (after free time expired – 2 free days).
>
> - Average $550 per day (after 10 days)
>
> Our actions:
>
> - Find drivers while Seafrigo could not : Yudith pulled 7 containers directly that had been in the port for 22 days accruing $90k in demurrage.
>
> - Divide the work between NJ and Allentown containers : Al focused on finding drivers for NJ containers (C017) and Yudith focused on finding drivers for Allentown containers - to get the maximum out of the port.
>
> - Estimation is that we gained, thanks to our intervention $68k:

o + 7 containers that Yudith pulled directly which could have easily stayed one additional week in demurrage : $27k

o At least one week of demurrage, which would be an equivalent of $41k (43 containers / 4 weeks X 7 days X $550).

CX 339.

26. On February 24, 2021, Bakerly emailed Seafrigo with the subject "per diem invoices recap ⎪Bakerly," stating: "We are looking for a recap on an excel file on the detention charges accrued during the snow storm. Would you have that available please? (same as the one you send for the demurrage)." CX 707.

27. On February 25, 2021, Seafrigo responded:

> I can send you something as of today but per diem is something that accumulates over time based on when the carriers bill Seafrigo. In some cases it takes them 1 month+ to send us their invoice. On a general basis, I can send you a report of all containers with: · ETA · Date container left port · Date empty container returned to the port[.] This will give you an idea of the timing per container. Then average around $550.00 per container per day after our free time (on average 3 WD)[.] It's not perfect but it still give you an idea of what to expect. Does that work for you?

CX 706-07.

28. On February 25, 2021, Bakerly emailed Seafrigo stating: "Finance is just looking for the per diem accrued at the same time of demurrage, after the snow storm in December. They want to see the total amount received for the period so far. No need to have that on a regular basis but just for that same period. If you have that handy would be great. Attached is what we had for demurrage." CX 706.

29. On February 26, 2021, Seafrigo emailed Bakerly stating: "I ran a report based on the same timeframe and we have accounted for close to 40K in per diem charges that Seafrigo has already paid on behalf of Bakerly. Seafrigo has already billed Bakerly for this 40K of per diem. This is over 35 different containers. Please keep in mind this type of cost could continue to accumulate down the road." CX 705.

30. Later on February 26, 2021, Bakerly emailed Seafrigo stating: "Would you have the detail of the invoices? Sorry for the additional questions but our finance team is asking for it." CX 705. On March 2, 2021, Bakerly emailed Seafrigo again stating: "Sorry just to clarify, we just need the invoices number added to the file you sent." CX 704. On March 2, 2021, Seafrigo replied to Bakerly stating: "You mean your 4 digit PO# right?" CX 704.

31. On February 28, 2021, Seafrigo emailed Bakerly, subject "Shipping line invoices Demurrage and Per diem," stating: "we have not received any invoices that support any demurrage or per diem. Please note that if you do not send me the invoices of the

shipping companies that support your invoices, they will not be approved in a timely manner until Seafrigo provides all the necessary documents." CX 718.

32. On February 28, 2021, Seafrigo responded "Let me review this situation. I have a pack of demurrage invoices with back-up that might match up with these invoices." CX 718.

33. On March 2, 2021, Seafrigo responded to Bakerly stating: "I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you." CX 723.

34. On March 2, 2021, Bakerly emailed Seafrigo asking if they "have this info in a spreadsheet?" CX 722.

35. On March 2, 2021, Seafrigo responded: "I would have to run a customized report trying to capture a timeframe. We might have some overlapping from previous invoices that you have already received. Will that work for you?" CX 722.

36. On March 3, 2021, Bakerly responded to Seafrigo, thanking them for running "a customized report, of course, this would work for us, we really want to see all the containers that have had demurrage / per diem so far this year." CX 721.

37. On March 5, 2021, Seafrigo emailed Bakerly "2 reports based on invoicing dates of Jan 1st 2021," attaching excel documents labeled "Bakerly Per Diem 2021" and "Bakerly Demurrage 2021." CX 721.

38. Seafrigo agreed to provide Bakerly a $30,000 credit after Bakerly agreed to pay charges incurred during the NY snowstorm. CX 19; *see also* RX 11; CX 181 (referencing a $30,000 credit in March 2021 for January 2021 demurrage and detention charges).

39. On March 8, 2021. Seafrigo emailed Bakerly stating:

> Based on our last week discussion, please find herewith the confirmation that SeaFrigo will be issuing a $30k credit to Bakerly. This credit is only issued as a commercial gesture based on the business relationship between Bakerly and SeaFrigo. This credit should under no circumstances be an admittance of responsibility or liability of any kind from SeaFrigo towards Bakerly. Credit will be issued over the coming 2 months March and April 2021). As stated this gesture is purely out of pocket from SeaFrigo. Thank you for your business.

CX 259.

40. In December 2022, Bakerly again agreed it would not dispute Seafrigo's right to be reimbursed for the snowstorm charges, which amounted to $361,178.54. RX 10.

41. If "Seafrigo had been informed that Bakerly thought that Seafrigo was assuming the obligation to pay detention, demurrage, per diem, and other ancillary charges, it would have refused to advance the millions of dollars in advances it made on behalf of Bakerly"

from that point forward, and that it would have been "economically unfeasible" for Seafrigo to assume the obligation for these charges. RX 21.

2. Invoice Management

42. "During the period in question, VOCCs and MTOs were not obligated to provide detailed invoices as is now required under OSRA. Seafrigo forwarded information as provided by MTOs and VOCCs." RX 15.

43. "Seafrigo admits that on occasion it had to issue separate invoices for detention and demurrage charges that accrued or were invoiced by third parties at different times." RX 16. "If containers sit on a terminal or at a warehouse for an extended period of time, more than one invoice for that container may be issued. That simply reflects the billing practice of the underlying carrier or terminal." RX 14.

44. From January 29-June 25, 2021, the parties exchanged emails, subject "Invoices Management," regarding how to share invoices. CX 1335-50. The first email, on January 29, 2021, from Bakerly to Seafrigo, stated: "We were brainstorming on a way to optimize the invoices approval process. Right now, we are receiving one invoice per PO. With 40 POs per week, approval of each invoice separately is becoming too much time consuming. I understand the need to have one invoice per PO to match the booking, yet do we have a way to send a batch per week?" CX 1350.

45. On January 29, 2021, Seafrigo responded: "Indeed we do have a way. We are doing this for one other customer. The only invoices that may not be included in these weekly batches would be additional charge type invoices like demurrage, per diem, exam charges, etc… We are sending this manually along with the back-up." CX 1349.

46. From January 29-February 9, 2021, the parties discussed what to include and shared an example spreadsheet. CX 1342-48.

47. On April 1, 2021, Bakerly requested a container scheduled for delivery in Allentown the next day to be delivered to Easton that same day or the next day. CX 950.

48. On April 9, 2021, Bakerly emailed Seafrigo, subject "Per Diem / Demurrage," requesting per diem and demurrage reports and also asking for the support documents. CX 904-05. Seafrigo responded that they could not "combine the support documents with a general report. All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed." CX 904.

49. On April 9, 2021, Bakerly asked for two backup invoices and on April 12, 2021, asked for a copy of the documents related to these invoices. CX 903-04. Seafrigo responded on April 14, 2021, stating to see the attached. CX 902.

50. On April 21, 2021, Bakerly emailed Seafrigo stating: "Al or Kizzy, please provide proof of per diem/ detention for all invoices attached. Please note if you don't send us any support those invoices cannot be approved as per accounting request. To do this process earlier please send both documents at the [same] time." CX 902.

51. On April 28, 2021, Bakerly emailed Seafrigo stating: "Al and Kizzy, it is very important that you send us the information complete, unfortunately our account department is requesting proof or any support to approve payments. Please let do this process earlier and get back to old procedure and I will be all happy. Please send this invoice together with the shipping line attached[.] Please note that all detention since February are on hold until we receive what is requested." CX 901.

52. Later on April 28, 2021, Seafrigo responded to Bakerly that "I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay." CX 901.

53. On June 22, 2021, Bakerly reached back out to Seafrigo, subject "RE: Invoices Management │Seafrigo," stating:

> We are still receiving individual invoices only, without a recap of all invoices for a faster approval. Our goal is to have a first page that recaps all invoices (invoice number + amount + date), and then the individual as from the second page for reference. With all containers that we have, the invoicing approval is getting extremely time consuming and this is delaying the whole operation.

CX 1342. Bakerly also asked that the weekly recap of invoices be in excel as Bakerly had migrated to a new ERP system. CX 1341.

54. On June 22, 2021, Seafrigo responded, stating that "we left off that we would send to Bakerly on weekly basis batches of invoices," and addressing the three types of invoices: freight invoices and custom clearance invoices, both of which are not "an issue to send in weekly batch," and third:

> Accessorial Invoices – this is where it gets tricky. The problem with these types of invoices is that there is no fixed timeframe when Seafrigo receives these types of charges and so we are generating the invoices "as we get them". This is the most time consuming part of the process. With that said, I do not see any reason why we couldn't also "batch" these invoices but we also do not want to fall behind in getting you the invoice + back-up.

CX 1340.

55. On June 22, 2021, Bakerly responded, requesting the invoices in 3 batches and attached an upload template. CX 1339. Seafrigo responded that some data is not in the dataset, shouldn't the invoice amount also be listed, and asked how this would work "in terms of timing and invoice redundancy? I am just thinking theoretically, if we are able to do this, we have no way of knowing if the data is duplicated or not. We would simply do a data dump week to week." CX 1338-39.

56. The parties set a meeting and then on June 25, 2021, Seafrigo sent a sample asking if it would "do the trick ?" CX 1335-38.

57. The new format was approved by the parties on June 28, 2021, and the first batch sent by Seafrigo on July 12, 2021. CX 1332-34. However, as of July 22, 2021, Bakerly had only received one excel file and Seafrigo continued to send individual invoices. CX 1331.

3. Allentown Drop & Pick Program

58. Seafrigo had continuing issues with Bakerly's Lineage warehouse in Allentown, PA. On February 26, 2021, Seafrigo sent an email to Lineage, copying Bakerly, forwarding a complaint from a trucker and stating "This is not the first complaint from one of several truckers that I am using… Can't keep this up with this kind of service. I am losing truckers left and right…." RX 4606. The trucker described that a container had been at Lineage on time for an appointment at 2:30pm, and "[a]t 1am the driver was still waiting to be called in to get a door, dispatcher tried contacting them and they also would not give the driver an answer with any idea of when he would be unloaded. . . . [I] instructed them to have the driver bring the loads back to our yards, please note charges will apply but most importantly this has to be rescheduled." RX 4606.

59. On March 29, 2021, Seafrigo emailed Lineage, copying Bakerly, subject "LayOver Issues," stating:

> I am writing this email to you in order to understand what is the process for these late night appointments. I am finding that anytime one of our drivers delivers a container for appointments that are 630pm and later, they are kept there overnight. Naturally, the more this happens, the more drivers are not going to want to go you your location…. We really need to get some answers on this because I am getting major pushback from good drivers that I am working with for years now.

CX 833-34.

60. Bakerly responded to all, but addressed Frank Palaia, Sales Manager of Lineage Allentown PA, stating: "Frank, we would like to read your comments about Al e-mail, because this situation is strongly impacting our drayage cost, additionally we need our 5 inbound per day. We cannot lose drivers or continue paying detention + Layover fees." CX 833, RX 4609; *see also* BReply/SFResponse/BPFF ¶ 51.

61. On March 31, 2021, Lineage emailed Seafrigo and Bakerly at 12:20 PM stating: "Certainly understand the issue with the layover. We have addressed this internally, and you should not see this issues moving forward. You have 5 standing inbounds *every day* of the week (no weekends)." CX 832 (emphasis in original).

62. On March 31, 2021, Seafrigo responded at 1:20 PM: "Meanwhile we have a driver sitting in your yard for 10:30AM appointment still waiting for a door…." CX 832.

63. On April 14, 2021, Seafrigo emailed Bakerly, subject "Lineage – Allentown PA" which proposed implementing a "drop & pick program" and stated that "We gave this 2 weeks to see if the situation has improved and I am afraid our drivers are not happy and they are all threatening to not go back there." RX 4632.

64. Later on April 14, 2021, Bakerly responded that Lineage stated that "the major factor is manpower (which they are working on)" and explained: "Our major concern with the drop trailer is the fact that Lineage operations will not be efficient enough to have a regular in & out flow of fulls & empties. We have addressed that with Lineage : let us have their confirmation that drop trailer solution will not delay us further and we will go back to you shortly." RX 4631-32. Seafrigo responded in part that "our truckers are running out of patience." RX 4631.

65. On April 15, 2021, Seafrigo stated it received "a message from one of our good truckers rejecting all future loads to this location. We just lost 25% of our truck capacity…." RX 4630. Bakerly responded that they would have "final confirmation from Allentown tomorrow" and that they "need their operation team onboard with the drop trailer efficiency, otherwise the inventory will be sitting there and containers will run per diem." RX 4629-30.

66. On April 16, 2021, Bakerly stated: "We have the confirmation from Allentown so we can start the drop trailer program as from next week. We will be following closely to ensure empty containers are released on time for the pick up." RX 4628.

67. On May 20-25, 2021, Bakerly emailed Lineage asking about containers. CX 559-67. One email from Bakerly to Lineage stated:

> Cannot list all the delays[.] Outbounds orders : customers are yelling on all Memorial orders still not received because still not loaded! We are talking days now. Inbounds : 11 containers stuck on drop trailer program still not ready to pick up. And now the transfers to our plant that have still not been delivered : we are out of stock for orders this week. Transfers from our plant to Lineage are taking 1 week to be received. I have seen some delays on Walmart orders as well due to "delays at origin". Sorry but … what a mess! We have discussed other facilities during our visit but we still have our inventory at Allentown – we cannot drop the ball and impact so much our customers during our peak season! We need help here, pls!

CX 559-60. Bakerly states that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo containers." BResp/SFPFF ¶ 48-52.

68. On May 25, 2021, Lineage responded:

> The site continues to be severely impacted by labor and volume. We are doing everything possible to schedule and accommodate customer needs and unfortunately are behind across multiple segments. I will engage with Frank to help address your most severe needs to see if we can plan around priority-Are any needs, and I apologize that there are multiple segments impacted right now, more urgent than any other?

CX 559. Bakerly states again that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo containers." BResp/SFPFF ¶ 48-52.

69. On June 14, 2021, Seafrigo emailed Bakerly stating that "we are no longer going to perform Drop & Picks as it has done more harm than aid" and stating that they could use the Seafrigo storage yard only for a confirmed appointments the next day. CX 275. Seafrigo explained "as you know, we have been pulling containers and bringing them to our yard for storage . . . . We currently do not have any more yard plugs and we cannot store containers in our yard any longer for long stretches of time. We can, however, pull a container on day A, bring it to our yard for a 'confirmed' appointment the next day. Anything beyond that puts your containers at risk." CX 275.

70. Bakerly acknowledged, regarding the drop and pick program that it "indeed proved unsuccessful as Lineage, PA could not keep up with the drops at the time following limited resources due to the COVID-19 outbreak" and that the drop and pick program "was abandoned to return to live unload." BResp/SFPFF ¶ 44.

71. Bakerly also informed Seafrigo on June 9, 2021 that it was terminating its partnership with Lineage; however, two days later, Bakerly decided instead not to terminate its partnership with Lineage and rather to reduce its volume to Lineage. BResp/SFPFF ¶ 53.

4. Linden Inbounds

72. A series of emails, subject "Bakerly Inbounds," from June 9-16, 2021, discusses containers going to Linden, NJ, including a shipment that was received by Lineage Allentown and at the port. CX 851-62.

73. On June 16, 2021, Kizzy Hall, Ocean Import Coordination for Seafrigo, emailed Bakerly and Lineage, subject "Amended***** Bakerly Inbounds," stating:

> At this time Carriers have driver shortage, port congestion, insufficient equipment (GENSET) ETC. Trucking companies are booked to capacity, drivers are quitting on them, trucks are breaking down. Receiving stations are booked, pulling containers before Demurrage applies has been impossible. We are doing our best at this time to get containers pulled. Customer service will get better. Please call me if you have urgent matters and need my immediate attention. I communicate via the phone daily with Jessica, it's been extremely hectic.

CX 852.

74. On June 16, 2021, Bakerly responded: "This is the first time in 2 weeks that you provided an overview/recap of our current situation Kizzy!" CX 851.

75. On June 16, 2021, Seafrigo emailed Bakerly stating: "She is under a lot of pressure Yudith. Please don't scare her off. She is doing the best that she can. Everything is a mess

again like it was Dec and Jan… On a side note, we are looking to hire another person to assist with the account to help alleviate the pressure." CX 851.

76. A series of emails, subject "Linden Containers," from June 11-24, 2021, discuss containers at port, to be delivered to Linden. CX 863-76. On June 23, Seafrigo stated that a driver had gone to collect a particular container, but that the container was not empty and therefore could not be picked up. CX 871. Lineage said the container had been empty since June 16 and that it was sitting in the yard waiting to be picked up; Bakerly stated it would not cover per diem. CX 870-71.

77. On June 25, 2021, Seafrigo emailed Bakerly and Lineage stating: "If you don't mind, lets go back to the beginning and stick to the facts. @Jersey City – when the container is empty, you usually send us an email that the container is now empty. Would you mind please forwarding that email so we know which date we were notified? Just an FYI, this empty was returned back to the port on 6/23/2021." CX 869.

78. Lineage emailed Seafrigo and Bakerly stating "this is Linden. Not JC. Not sure if that was the confusion." CX 868. Seafrigo responded: "Based on your email, Yudith is right. Per diem, if any, in this case will not be billed to Bakerly." CX 868.

5. Bakerly Warehouse Reduced Capacity

79. On July 12, 2021, at 8:29 PM, Bakerly emailed Seafrigo, subject "STOP Seafrigo** Stop immediately BAKERLY CONTAINERS FOR BAKERLY - CARRIER SEAFRIGO" which stated:

> Seafrigo team, we regret to inform you that we must limit your inbounds due to complications and internal decisions. Starting now 07/13 only drop 2 containers per day until further notice. Inform your carriers do not request more allocations. In case they do, they will receive a resounding NO by Bakerly or Linden Team. We have priorities with our production.
>
> We are aware of the additional costs of demurrage, storage, or detention that this decision implies, but we do not have a choice. Please inform your carriers and avoid any misunderstandings. Keep in mind that of *all confirmed appointments, only 2 have been left active.*

RX 4594; CX 838 (emphasis in original).

80. On July 13, 2021, Seafrigo responded to Bakerly stating: "What does this mean? This sounds serious. Could we please have a conversation about this ? Also, regarding the demurrage, we are going to run into a financing issue at some point. These are charges that Seafrigo does not have any credit terms so it will be out of pocket on demand." CX 837.

81. On July 13, 2021, Seafrigo sent an internal email, subject "STOP Seafrigo** Stop immediately BAKERLY CONTAINERS FOR BAKERLY - CARRIER SEAFRIGO" which stated: "Team – we need to have a serious internal conversation about potentially

limiting the volume of bookings with this customer until the local situation in the US is more clear. We cannot continue to stockpile containers on the USA side without a 'home' for them.… Let's talk please." RX 4593.

82. On July 21, 2021, Seafrigo internally responded:

> I have issued this warning already so I will raise it again. This account is crippling our credit line. Containers are piling up in port of NY/NJ faster than they can be routed to a warehouse with availability. FYI – Bakerly management is MIA, nobody returning my phone calls. We cannot continue this way! Please see attached list. We have containers that arrived since end of June still sitting at the ports and/or staged in a yard somewhere with another wave of containers arriving next week !

RX 4589.

83. On July 21, 2021, Seafrigo emailed Bakerly, subject "Bakerly Volumes / Finance," stating "We were hoping to have a conversation with you regarding your current activity. We have noticed another red flag of volumes which is creating quite a bit of demurrage / per diem for Bakerly and we would like to discuss a few points ASAP." CX 625.

84. On July 22, 2021, Seafrigo again emailed Bakerly stating: "I am sorry but we are running out of credit and we are dangerously close to being unable to move any of your containers out of the port of NY/NJ currently so we really need to open up a discussion now before this situation disgresses [sic]." CX 625, CX 835.

85. For another container, in August 2021, Bakerly asked about the ETA. CX 909, CX 910. Seafrigo explained to Bakerly that the "movements of this container have not been updated by . . . their system" and web tracking of the container had a problem. CX 910, CX 911. Seafrigo stated that they "got off the phone with MSC. They confirmed ETA is 8/16." CX 907-08; *see also* CX 906-20.

6. Fall Lineage Emails

86. On October 11, 2021, Seafrigo emailed Lineage, copying Bakerly, listing 4 loads scheduled to be dropped the next day in Jersey City. Seafrigo then sent an updated schedule asking for confirmation that it would be OK to drop all 6 and noting that there are another 9 loads to be dropped in Jersey City, "all have LFD of tomorrow as well as 3 more with LFD of 10/13. Please advise if there's any room to increase the amount p/day so that we can do as many as possible for tomorrow and remaining of the week." CX 477.

87. On October 12, 2021, Lineage asked for clarification of the number of loads and dates and Seafrigo said that is correct and does not include what is already in schedule for today. CX 476. Lineage stated "I'm lost, what are you asking to deliver today? Please send a complete list of what you're requesting." CX 475. Seafrigo responded that it was sent yesterday and again attached a list of 6 containers. CX 475. Lineage responded:

> Understood, I see where you've provided this list of 6 containers. However, I believe that you're also stating there are 3 additional containers with LFD of 10/12. I'm trying to understand what you're requesting. If you have 9 containers with an LFD of 10/12 please send a list of 9 containers. If you have 15 containers with an LFD of 10/12, please send a list of 15 containers. If you're not clear on what I'm requesting please call me. The information you've provided thus far is insufficient for proper planning.

CX 474.

88. Later on October 12, 2021, Seafrigo emailed Bakerly asking if any of the containers could be diverted from Jersey City to Linden. Bakerly identified three containers that could be diverted to Linden and noted that two container numbers were not found and that some of the containers on the list were missing the last digit. CX 472-73.

89. On October 14, 2021, Seafrigo responded to Bakerly with a list of the containers that were able to be diverted and noting that one of the containers on the previous list had been for the "same location but another customer" and that it had been deleted from the list. CX 471-72.

90. Later on October 14, 2021, Seafrigo emailed Bakerly stating:

> Now we need to know how you'd like us to proceed, all of the below loads are either in demurrage or have LFD of tomorrow. Not sure which ones we should give priority to since either way there will be more charges added to whatever we can't pull tomorrow. Main issue is that majority of these are to be dropped in JC and they can only accept 4 to 5 loads p/day.

CX 469-70.

91. As of October 2021, Bakerly was still asking Seafrigo to pay demurrage fees, even when Bakerly was helping to find drivers. CX 986 ("please send us DO and pay demurrage."); CX 988 ("Please pay demurrage fees, send us the payment confirmation and D/Os.")

92. On October 15, 2021, at 5:02 PM, Bakerly emailed Seafrigo, subject "Reroute- From Jersey City to Elizabeth/Philadelphia," stating: "please note that we need to divert the following containers originally planned to Jersey City. Please see below the new destinations" with a chart showing two containers diverted to Seafrigo-Elizabeth and two containers diverted to "Honor Foods Phillys." CX 1000. The "Confirmed ETA US port" was 10/15/2021 for three of the containers and 10/13/2021 for one container

93. On October 18, 2021, Seafrigo emailed Bakerly stating: "These are noted and updated on our system, note that they all have LFD of tomorrow and we're at fully capacity this week, not sure when we will be able to deliver to Philly but we will keep you posted." CX 999.

7. 2021 Finance Discussions

94. In addition to the $30,000 credit in February 2021, Seafrigo agreed to provide another $30,000 credit to Bakerly in July or August 2021. CX 20; RX 10-11.

95. On August 19, 2021, Seafrigo emailed Bakerly, with the subject "Additional Commercial Gesture Bakerly," stating:

> Based on our meeting last week, and after discussing with Jerome, Seafrigo has agreed to issue another $30k credit to Bakerly. This credit is only issued as a commercial gesture based on our business relationship between Bakerly and SeaFrigo. This credit should under no circumstances be an admittance of responsibility or liability of any kind from Seafrigo. Credit will be issued based on payment received for the outstanding demurrages/per diem Seafrigo has already laid out of pocket. As stated, this gesture is purely out of pocket from Seafrigo. Thank you for your business.

CX 627.

96. On September 16, 2021, Seafrigo sent an internal email, subject "Bakerly updated statement," and attached the current statement with a list of overdue amounts. CX 697.

97. On September 16, 2021, Seafrigo forwarded the internal email to Bakerly stating:

> Sorry to come back to this subject, but it seems that we are in a routine of having over 1 million of outstanding again. Could you please have a discussion with your AP team so that we can get on a regular schedule of keeping the account up-to-date ? We are not asking to have every penny at 30 days, but certainly, we do not have deep enough pockets to float 1 million dollars on a regular basis.

CX 697.

98. On September 16, 2021, Bakerly responded to Seafrigo stating:

> Your timing is quite perfect as I just came out of a meeting with AP regarding the Seafrigo account. They have showed me quite a few examples where we are struggling to get invoices from Seafrigo, we do receive the past due notices but are having a hard time getting the invoices as well as the weekly excel report meant to breakdown the costs. To add to that Yudith has been fighting for a couple months now on the demurrage/per diem invoices to get backup, without backups we can't approve those charges. All we want to be is good partners and pay you on time but it seems to be getting increasingly harder for us to do so as we struggle to get the info we need. Attached you will find 2 examples of daily communication from our team on 2 topics: … invoice that appear on the statement and that we never received [and] . . . missing backups to

> approve demurrage/per diem invoices[.] Here to help to improve flow of invoices on both sides.

CX 696.

99. Later on September 16, 2021, Seafrigo responded to Bakerly stating: "Based on Alissa's message • 472K – not at all sure why you would not receive these invoices as we are sending them weekly in batches. Anyhow, all the invoices were resent • 500K demurrage/per diem/other – is there anything requires on our side to expedite whatever the delay is from the Miami team?" CX 695.

100. On September 16, 2021, Bakerly responded to Seafrigo stating: "Appreciate the help. • 472: Alissa will process payment accordingly[.] • 500K: we need the backup of the demurrage/per diem/other charges to see what happened with the container and approved invoices. Bethzaida should know what the team needs exactly[.]" CX 699-700.

101. On September 17, 2021, Seafrigo responded to Bakerly:

> For the demurrage – we have been sending all the invoices with the back-up on a case by case basis. There is no way we did not do it for all 500K of invoices. Maybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against. Anyhow, please keep us posted what is needed so we can get through. We understand that maybe you could be missing some back-up from time to time. All that we ask is for the base freight invoices and demurrage / per diem invoices (which you have the back-up and nothing is in dispute) to please get on a regular payment clock of 30 days.

CX 699.

102. On October 7, 2021, Seafrigo issued a Demurrage per Diem Finance Schedule stating:

> As you already know, we are working in an extremely aggressive market. Import volumes have increased significantly creating port congestion. There is also a lack of trucker capacity to cover the spike in volumes. Finally, the surrounding 3pl warehouses continue to be full creating longer than usual dwell times on containers.
>
> This has created a massive amount of demurrage and per diem charges to be paid to the various steamship lines. Seafrigo is the acting NVOCC and consignee delivering this equipment to you. We have inherited the responsibility of paying demurrage and per diem charges on behalf of our customer base. These charges are significant and are passed through charges only. This cash outlay has created major stress on our cash flow.
>
> From now on, any cash outlay related to Demurrage / Per diem, will incur the following:

- Admin fee (per transaction): $45
- 5% unsecured finance charge: 5% of the amount paid

CX 1403.

103. Seafrigo's 2022 Standard Accessorials Tariff lists a "Finance Fee/Per Diem/Demurrage/ Detention" charge as "5% of total demurrage/detention cost." CX 255.

104. Seafrigo imposed a "Finance Fee 5%" on selected shipments. CX 156 (Inv. date 8-Oct-21); RX 4997 (Inv. date 8-Oct-21); RX 5010 (Inv. date 20-Jan-22**)**.

105. On October 20, 2021, Bakerly emailed Seafrigo stating:

> I understand your concern and please know that we are absolutely not trying to undermine the current situation, we are fully aware of the market situation with the drivers. We just need you to understand our concern as well regarding Seafrigo's latest performances and how our containers are being serviced.
>
> We have had too many situations recently where we incurred demurrage because Seafrigo couldn't find drivers. In an effort to limit demurrage fees we exceptionally decided to go ahead and source a carrier ourselves for those containers which we were able to do in less than a day. Those are the concerns I want to discuss with you as I currently don't have the guarantees that Seafrigo is doing everything they can to secure drivers ahead of time or putting the correct resources into finding one in crisis situation like blank sailing.
>
> We are also still waiting for the weekly D&D report I discussed on my last call with Jerome. Without this report we are flying completely blind and have not control/vision over the demurrages we are incurring. It's also preventing us from approving the invoices in a timely manner as we have to manually research what happened with the containers in order to approve the charges. I can't stress enough how important this report is for us, it would help for instance highlight demurrage for containers where bakerly is responsible like the ones in this email thread below where we made a last minute change.
>
> For those reasons I instructed the team to reject invoices for demurrage due to lack of carriers until we can have that conversation. I don't feel right owning 100% of the financial exposure when we clearly have performance issues on Seafrigo's side.
>
> Also want to take that opportunity to give you a recap of the findings from the team during the last 2 weekends. We had Yudith and Jessica research 165 invoices during the last 2 weekends to either approve or reject the invoices (which shouldn't and wouldn't happen should we have had a weekly D&D report).

CX 310; *see also* CX 319 (October 19, 2021, email from Bakerly to Seafrigo stating "please note that we are not covering demurrage or per diem due to lack of drivers.").

106. On November 12, 2021, Bakerly emailed Seafrigo stating:

> I'm very concerned by the lack of answer we are getting from Seafrigo; as of today:
>
> - I have not received any reply/feedback to my email below
> - We are still not receiving the weekly D&D file we discussed despite our many follow up – the only version we received to date was on 10/21 but did not include any comments on the D&D making it impossible for us to control and approve D&D invoices
>
> We already invested 2 full weekends of work with the team to go thru the analysis below and do not have the resources to continue doing the work we expect Seafrigo (as service provider) to do. Please note that as of today we have taken the below decisions to limit bakerly's exposure given the current situation:
>
> - We will not approve any D&D invoices without proper reporting showing details/explanations on the reasons for D&D
> - We will start transitioning drayage services to a third-party provider to limit the impact on the lack of drivers for which we have no daily/weekly updates from Seafrigo
>
> I mention this every time we exchange on this subject; we only want to be a good partner and are willing to do everything that is needed from us to do so – we are just not able to operate the way we would like to because of the points mentioned above. As always I'm available to exchange on the phone as needed.

CX 578.

107. On November 13, 2021, Seafrigo replied to Bakerly stating:

> We understand your frustration. We are equally as frustrated. Our priority has been since day one to secure trucking and service all of your containers within the [best] time frame possible. I apologize for not getting you this weekly recap on time. This is a result of a system change and the report is only able to supply line by line information of what is being paid.
>
> Regarding the required explanations, this is something that is not possible to track on such a granular level meaning that if you are expecting a finite timeline on each and every container as why demurrage is being paid, I'm afraid we would spend more time on that type of analysis than actually

> servicing your containers. There are combinations of reasons (through no fault of Seafrigo) that we have already discussed on numerous occasions and any one of them are contributing to the demurrage, not only driver capacity.
>
> I know this is not what you want to hear, but this is the reality and we are trying our best to be as transparent about it. We are more than happy to arrange another call to see what you have in mind on the trucking part of the transactions. In the meantime, I will generate another recap for the month of Sept2021 and Oct2021 so you have an idea where we are. Thanks for your partnership and hoping that we can find solutions together during this very challenging time.

CX 577.

108. On December 16, 2021, Seafrigo emailed Bakerly stating: "please let us know if there is possible a planned payment to Seafrigo for tomorrow. The overdue has gone past $900K as of today. It is critical that you reply to this email." CX 687. Bakerly replied: "We have a planned $94,440.56 payment on the schedule for today." CX 687.

109. Later on December 16, 2021, Seafrigo replied and suggested a January meeting in Miami, also asking: "Is there anything holding up the payment process ? We seem to be not be seeing larger payments that we normally would see based on the due dates." CX 686.

110. On December 23, 2021, Seafrigo emailed Bakerly stating:

> Given our last exchanges on the subject of demurrage, and for the sake of not experiencing any future business interruption, Seafrigo will no longer pay demurrage on behalf of Bakerly from this point forward until we reach an agreement. If any future containers require demurrage, we will inform your team, and you will be responsible for paying the charges directly to the source (source being the terminals and/or steamship lines). As an alternative, we would like to introduce you to a well-known tool called PayCargo. PayCargo is a user friendly website and pays vendors "real-time". As a matter of fact, this is the tool that Seafrigo uses in order to pay all of the demurrage for Bakerly's business real time to secure capacity for you. If you choose this route, go onto their website and create an account ASAP. Here is the website. https://paycargo.com/ Let us know if you have any further questions.

CX 495.

111. On December 26, 2021, Bakerly emailed Seafrigo in response, stating:

> I had a phone conversation with Jerome on Friday and I just wanted to clarify in writing, to make sure we are on the same page, as from what I understood there appeared to be a misunderstanding. We have recently engaged a secondary freight forwarder, as well as a secondary drayage

> partner. For all shipments pertaining to those companies, we do not expect Seafrigo to be coordinate with the terminal/shipping lines on any demurrage payments. For all Seafrigo lines, and Jerome confirmed this over the phone, there will be no change in the way we have been doing things up until now, including who pays what to terminal and the [shipping] lines.

CX 494. Seafrigo confirmed "No change in how we are managing your containers through Seafrigo's Freight Forwarding services." CX 494.

112. "In some instances, Seafrigo had to re-send invoices to Bakerly because apparently Bakerly lost track (or claimed to have lost track) of invoices that had previously been issued." RX 14; *see also* RX 8 ("charges began accruing and multiple invoices were necessitated").

8. Custom Holds, Winter 2022

113. On January 4, 2022 Seafrigo emailed Lineage with subject "Re: DELIVERY REQUEST – ALLENTOWN," stating "Please see below PO's we would like to set up the final delivery" and listing three containers with dates and times: January 7 at 16:30, January 10 at 6:30, and January 10 at 14:30. CX 460. On January 5, 2022, Lineage replied stating: "The earliest we would be able to get these in would be Monday the 10th at 0430. That is your first open inbound appointment." CX 456.

114. Lineage also indicated that it had 41 team members out with COVID and another 40 who had called in sick. CX 456-57. Seafrigo asserted that these were employees of Bakerly's Lineage Allentown PA warehouse. RX 5. Bakerly clarified that "Seafrigo is correct that Bakerly misidentified the contents of this email. As a note, this staffing issue is only for one of Bakerly's warehouses—roughly 11% of shipments [went] to the Lineage warehouse in January 2022." BReply/SFResponse/BPFF ¶ 51).

115. Bakerly responded that they understood but identified the same three POs with the original dates and times and requested Lineage "try to unload them ASAP." CX 456.

116. On January 5, 2022, Bakerly emailed Lineage and Seafrigo, and asked Seafrigo to "please make sure these containers are delivered on the appointment dates," referring to the January 7 and January 10 dates and times. On January 6, 2022, Seafrigo emailed Bakerly and Lineage, stating "we need morning appointment for 1/7 .. we cannot deliver at 4:30pm that's too late for our drivers. we start the day at 5am." CX 454. Bakerly replied to Seafrigo on January 6 stating:

> Those containers are released since 12/28. They have been waiting at the port since then accruing demurrage and your drivers cannot deliver them at 4:30pm to the warehouse because it is too late? 4:30pm? Bakerly, as a client, has been pushing for those containers for days now. It's Seafrigo's responsibility to find drivers and remove the containers from the port. We need this inventory at the warehouse and we need those containers out of the port. Please intervene.

CX 452-53.

117. On January 18, 2022, Bakerly emailed Seafrigo asking the reason for a hold on two containers. CX 881. On January 18, 2022, Seafrigo responded to Bakerly that one container was "on customs hold and our broker is trying to get in touch with the customs officer" and the other container was on hold due to demurrage but should be cleared that day. CX 880.

118. On January 19, 2022, Seafrigo emailed Sunteck tts ("Sunteck"), subject "BAKERLY – HOUSTON, LA PORTE DELIVERY" and listed 12 containers and requested Sunteck "plan accordingly in order to [deliver] before the LFD expires." CX 649-50.

119. On February 1, 2022, Sunteck emailed Seafrigo listing two container numbers and stating these "containers have arrived into Houston but have customs hold. Please help to remove them before LFD. Port's LFD is 2.7. Can you please advise the line LFD?" CX 649. Sunteck also emailed Seafrigo on February 2 listing six containers and asking to please advise once these containers were fully released. CX 647.

120. On February 3, 2022, Sunteck emailed Seafrigo with a list of ten containers, writing "Friendly reminder, the below containers are still on hold with LFD 2/4. We cannot schedule drop appointments until they are fully released. Please advise ASAP." Seafrigo responded to Sunteck later on February 3 stating "thank you for your follow up but this is totally out of our control. Waiting on customs to release these shipments." CX 646.

121. On February 1, 2022, Seafrigo emailed Bakerly, subject "LIST OF CONTAINERS ON HOLD PORT OF HOUSTON," with a list of containers and stating: "Please note that these containers are under CBP/USDA hold, I have sent an email to CBP/USDA. Will keep you posted for the latest update." CX 811. On February 2, 2022, Bakerly responded, asking if there was any update on these containers. CX 809-10.

122. On February 2, 2022, Seafrigo responded to Bakerly stating "Unfortunately customs holds are out of our control. Hopefully they get released soon. Unfortunately if customs does not release in time we might have demurrage on some containers." CX 809. Seafrigo sent another update later on February 2, 2022, stating that the containers were still on hold, Seafrigo has sent another reminder to CBP/USDA, and "also called a couple of times today and nobody is picking up the phone." CX 808.

123. On February 3, 2022, Seafrigo sent Bakerly a list of containers and the USDA concerns, including regarding requirements for commodities containing yeast. CX 807-08.

124. On February 4, 2022, Seafrigo emailed CPB, stating:

> After consulting our local CBP management along with the Animal Products Manual the below request does not apply to the products filed on these entries. The products are FULLY FINISHED products and not pure yeast products coming in raw form. Therefore your assessment is incorrect and all entries need to be released immediately. Also, please include your supervisor in your response.

CX 804.

125. On February 4, 2022, Seafrigo and CBP exchanged emails regarding the contents of the containers (croissants or flour), ingredient lists, product labels, etc. Bakerly was copied on these emails and requested to provide photos of the items. CX 802-04.

126. On February 4, 2022, Seafrigo emailed CBP, copying Bakerly stating: "Again, we are talking about Frozen baked bread FINISHED products that has been imported for the last 6 years into multiple US ports. I am sorry but this back and forth is costing our client thousands of unnecessary dollars being that you are holding 13 containers because of such back and forth." CX 812.

127. On February 7, 2022, Sunteck emailed Seafrigo stating that ten containers "were released an hour ago. Can you please cleared [sic] storage through 2/8 and 2/9? LFD was Friday 2/4. Please see below what is needed and confirmed once storage is paid." CX 645.

128. On February 7, 2022, Seafrigo responded to Sunteck, coping Bakerly, stating that they would "clear the below accordingly" and "Bakerly team, please be advised that due to customs hold, I will have to clear the containers as per dates below." CX 644.

129. On February 7, 2022, Bakerly emailed Seafrigo asking about LFD and stating "Please note that we were informed about this hold on 2/1, not before." CX 643. Seafrigo then provided a list of the containers with the LFD date for each (February 2 through 7). CX 642.

130. On February 7, 2022, Bakerly emailed Seafrigo stating "Please note that we cannot cover demurrage fees for these 12 containers because we were not notified with enough time considering that you can have this information 10 days before the vessel arrival." CX 641.

131. On February 7, 2022, Seafrigo emailed Bakerly stating:

> These were on USDA holds and this is completely out of our control. Customs can place any shipment under customs hold at any given time for further checkup of the products in the container. Further Argel has advised you and your team that customs needed more information about the ingredients and this made the release process take longer than usual.

CX 640.

132. On February 8, 2022, Al Raffa from Seafrigo emailed Bakerly stating:

> Your comments are unjustified here. Why do you say "we were not notified with enough time considering that you can have this information 10 days before the vessel arrival." ?? These containers were placed on USDA hold (Seafrigo has no control over this whatsoever) 10 days before vessel arrival ?? How are we supposed to know this ? we cannot even file the Customs entry until 5 days prior to a vessel arrival (this is Customs

> regulations). We communicated this situation to you every step of the way. I am sorry but these demurrage charges are due in full. If your intentions are not to pay the demurrage, then Seafrigo cannot pay any more of these fees out of our own pockets.

CX 640.

133. On February 8, 2022, Bakerly emailed Seafrigo stating "Al, your team notified us late. If your team had been file 5 days prior the vessel arrived we would have enough time to send pictures and all yeast statements [required] and avoid at least 3 days of demurrage." CX 639.

134. On February 8, 2022, Seafrigo replied to Bakerly stating "We did not notify you late. We notified exactly when USDA notified us of what they were asking for. This is not a Seafrigo issue and the demurrage is due." CX 639.

135. On March 1-2, 2022, another container was reported as released from a hold on February 25, 2022. Bakerly requested that it be pulled from the port on March 1, 2022, to avoid demurrage but Lineage said that they did "not have the capacity at this time to pick up" the container that day but added it for the next day. March 1, 2022, was the last free day, so demurrage was due for March 2, 2021. CX 884-90.

136. The record also includes emails about containers on freight hold in September of 2021. CX 842-50.

137. The record also contains emails documenting a March 7, 2022, loss of 30 cases of food items, the request for compensation, and responses. CX 925-34.

9. 2022 Finance Discussions

138. On January 5, 2022, Bakerly emailed Seafrigo, subject "Containers Update / Urgent Information," with a list of containers "pending for status" for which Bakerly had not received "information about delivery appointments yet." CX 828-31.

139. Later on January 5, 2022, Bakerly emailed Seafrigo again, including the earlier email, copying additional Bakerly personnel, and stating:

> I don't know what's happening, but we are tracking and babysitting our containers, if you notice Jessica is constantly requesting information, warehouses are complaining about deliveries, Seafrigo is not being proactive, we must beg for information all the time. It would be great to review the SOP related to this account, it is not working for us, we have zero visibility and poor customer service.

CX 828.

140. On January 6, 2022, Seafrigo responded: "I will ensure that our local carriers add you in CC to all appointments. I will continue to push our carriers to ensure you see visibility of

your containers. We will work to ensure our customer service gets to the way it was when I first took on this account." CX 827.

141. On January 6, 2022, Bakerly responded to Seafrigo that "it is not the carrier" but is Seafrigo, adding:

> we had container since 12/13 at the port and you don't provide status on those, Bakerly (your client) is advising every morning that Seafrigo has containers in the port, that they are late for the app, that we do not have the AN yet, that we do not see the container in a certain vessel, that Seafrigo must go to pick up the empty container. We are exhausted, it is frustrating!!. Just keep in mind that we are not going to cover any demurrage or per diem.

CX 826.

142. Later on January 6, 2022, Bakerly forwarded the email to Seafrigo leadership stating:

> Another example where the service Seafrigo US is providing is unacceptable. Bakerly is pushing for a feedback on containers that arrived for days now, again accruing demurrage AND losing shelf life at the port. Remember this is reefer. Bakerly team is not asking to be in copy of emails with drivers that Seafrigo is hiring. Bakerly team is requesting prompt communication from Seafrigo – as our service provider – on status of containers, delivery appointments and empty pick up.

CX 826.

143. On January 6, 2022. Seafrigo responded: "This is something I need to discuss with the import team. I was under the impression that you are getting a daily report of all containers and from there, information should be transferring from Seafrigo to Bakerly." CX 825.

144. On January 6, 2022, Bakerly responded:

> The report does not say anything about deliveries at the warehouses, nor holds or empty pick ups. That's the problem. We need to be asking for the info every time. . . . All this info should be provided by Seafrigo. We have been asking for this info for months and months – this is not new request. It's also a support to the demurrage and detention explanation that we have been asking for a long time as well. We are still in the dark.

CX 824. Seafrigo responded that they would discuss next week. CX 824.

145. On January 25, 2022, Seafrigo emailed Bakerly, subject "Bakerly-SeaFrigo," stating:

> Further to the meeting we had at your Miami office on January 13th, we have reviewed the entire situation related to port congestion we have

experienced and are still experiencing. We, at SeaFrigo, are conscious that the current situation across the shipping and logistics industry represents massive challenges to Bakerly's supply chain, especially for all imported goods. While we have tried during 2020 and 2021 our very best to mitigate the situation and find solutions, there are a series of reasons which are beyond SeaFrigo's control and our multiple exchanges make us believe you are aware and understand.

The main reasons for our point of view are the combination of:

1. Overall unreliable shipping lines schedules and punctuality

2. Port congestion across North America which are, for the main ports, running at over 100% capacity, creating operational challenges for port operators to retrieve containers

3. Massive productivity issues related to the 2 items above impacting the number of dray moves in and out of ports

4. Lack of chassis and genset availability having as a consequence of operators not being able to retrieve containers at ports

5. Massive driver shortage across the industry

6. Frozen warehouse infrastructure running above full capacity with all the challenges it represents in terms of inventory management and setting up appointment

Over the past 6 or 7 quarters, the situation has only worsened, and while we hoped the situation would improve, there is at this stage very little signs of improvements. On our side and because the entire situation has forced SeaFrigo to outlay and advance massive amount of cash on behalf of our customers to allow them to be able to keep their supply chain afloat, we are experiencing now a massive cash drain which is not sustainable.

The immediate actions taken to mitigate this cash exposure linked to the outlay of demurrage fees to the shipping lines, has been to identify and contract two external container yards off port. This will have several immediate advantages:

a. Upon first available dray options we will pull the containers out of the port and de-facto limit the exposure in terms of demurrages

b. Once the containers will be on our controlled yard, they will become readily available and not exposed to terminal congestion

c. This will give you and SeaFrigo options to prioritize delivery to door for better/smoother planning.

> We can surely make this solution available to Bakerly should you expressed any interest.
>
> In full transparency, this will not mean less costs on the total chain but will offer smoother solutions and limit SeaFrigo's cash exposure. This might mean very little to you but this is a great solution considering the space scarcity at ports and the chassis, genset, trucks and drivers availability. It will not solve the final piece of the equation which is the warehouse congestion, which also remains a major element of the situation as it comes towards the end of the process. Now and as promised, SeaFrigo, like any other industry players had suffered challenges in terms of staffing and we won't try to escape from it.
>
> [Proposal for settlement of invoices, including an immediate credit of $120k against all demurrage due amounts incurred in 2021, subject to Bakerly clearing all its overdue amounts within the coming 15 days.]
>
> To conclude, we ran a small calculation for 2021. For the Bakerly account, SeaFrigo has advanced a total of $1,713,579.40 in demurrage charges to the shipping lines to keep Bakerly's product moving. . . .
>
> As stated in calls and meetings, the cash exposure SeaFrigo had to absorb and is still absorbing has reached its absolute limit and we would therefore be grateful for an acceptance by Bakerly as well as prompt payment of all overdues amounts deduction made from the credit order aforementioned.

CX 622-23.

146. On January 28, 2022, Bakerly replied to Seafrigo stating:

> As we've detailed to you numerous times in writing, over the phone, and more recently in person, we believe that a majority of the D&D charges over the last 12 months are Seafrigo's responsibility. This is supported by the Federal Maritime Commission's statutes, rules and recent caselaw. More precisely, of the approximately $1.8 M D&D invoices we've received in 2021, we approve only of $600K – leaving $1.2M that are being unfairly invoiced to Bakerly, for the following reasons:
>
> • Supporting documents: We received D&D invoices without a single supporting document, even though we have repeatedly asked for them. You had promised you would be sending D&D reports on a weekly basis, but nothing has come. How can you possibly expect us to pay amounts this large without supporting documentation? In November of 2021, we informed you that we would not be paying any D&D related invoices without proper justification. It's been radio silence on that front from you and your team. This conduct is not, "transparent, consistent, and reasonable", as required by the FMC's Interpretive Rule on Demurrage and Detention Under the Shipping Act, as of 05/18/2020.

• Demurrage: We pay for a service of moving containers from FOB Le Havre to our warehouses in the US: if Seafrigo does not find drivers to take the containers from the port, it is the responsibility of Seafrigo, not ours. That said, the few times we were made aware of a delay on finding drivers, we were able to secure drivers. So it is possible! Moreover, some of our container stay at the port more than 20 days! It's not just missing drivers. . . we just do not think that you are properly tracking these containers. Under the Governing Rules Tariff, as of 22-February-2017, this is not our responsibility. On this matter, we have dozens of communications with Seafrigo showing that we offered to help. . . without any response on your part.

• Detention: Empty containers are regularly not retrieved in time by Seafrigo. We are constantly needing to alert Seafrigo that a container needs to be retrieved, when they should be tracked by Seafrigo, not us. Detention sometimes goes up to 14 days for a forgotten container, which clearly shows a lack of control of your operations.

• Tracking: Seafrigo has clearly not been tracking containers correctly. Moreover the staffing issues you refer to most likely lead you to being unable to perform the service that we are paying you to perform. We also understood you changed IT systems / ERP during 2021. Staffing and IT changes are matters internal to Seafrigo, and we should not be paying for them.

• Industry standard We've been working with a competitor of yours for the past 3 months – whenever there are demurrage charges due to driver shortages. . . these demurrage charges are not invoiced to us. When demurrage is included in the freight, forwarding service, that finding a driver is the responsibility of that freight forwarder. Not the client's. . .

• Sharing of information If we had been made aware of issues in real time. . . in some cases we could have helped. We are not alerted of issues when they happen. . . we just get an invoice a few weeks later. Obviously, this is not "transparent", as required. Given the above, for 2021 invoices, any proposal short of a $1.2M credit cannot be excepted – that said, we are open to spreading the credit over a reasonable period of time.

After the meeting with our team in Miami, we were hopeful that you understood our point of view. Moreover, you told us in that same meeting that there would be an improvement both in terms of service and back up documentation – we have not seen that improvement yet, which adds to our concern. Yet we continue to be hopeful that we will reach an amicable solution. However, should we not be able to reach an amicable solution, the importance of this issue to us would leave us no other choice than having it arbitrated by the Federal Maritime Commission.

CX 662-63; CX 211-20.

147. On January 31, 2022, Bakerly emailed Seafrigo stating: "Following our Friday call, please find attached random invoices for January… You told us that the situation is going to improve thanks to all the processes you are putting in place. BUT: Demurrage: $7,927 for 1 container - $11,125 for another one…$11,602….$10,299 etc… It is not a full January analysis of course, (we are still receiving a very high number of invoices) but it's giving you a perspective of what still going on in January…Crazy numbers." CX 661.

148. On February 3, 2022, Seafrigo responded to Bakerly: "Thank you for sharing. The team and I will look into these specific cases and will revert. Please allow us some time as the "going back" exercise is quite time consuming." CX 661.

149. On February 1, 2022, Bakerly forwarded an email from Seafrigo back to Seafrigo, subject "SEAFRIGO USA INC – IMPORT – Daily Status Report – Bakerly" stating: "Please see below another example – especially the containers arrived since beg of January. The report is been sent regularly but the info there is missing + no explanation on containers over the free time period, demurrage or detention." CX 659-60.

150. Later on February 1, 2022, Seafrigo responded to Bakerly stating "Its true that the report itself does not reflect this granular information at the moment. You are receiving that type of details via email from the account handlers. Based on the snapshot below, are you saying that your team has no email information regarding the appointment process on any of these containers ?" CX 659.

151. On February 10, 2022, Bakerly emailed Seafrigo stating "We are going in circles here, we discussed that several times. The goal of a report is to report a complete information, and not to put half of the information and then to look for the rest via email." CX 658.

152. On February 10, 2022, Seafrigo responded "I do understand your point and looking to achieve what you want. If is just that we do not have that 'free text' commentary available in this report just yet and simply have to rely on emails for the time being when it comes to 'lengthy' explanations." CX 658.

153. On February 10, 2022, Seafrigo emailed Bakerly, subject "Bakerly-SeaFrigo," stating:

> We have connected internally and have initiated a review, whenever possible, container by container for all moves as of Oct 2022. As you can imagine this is a very tedious and detailed task we have undertaken, so while we are compiling all the details, we would like to inform you that we would need at least a week more to compile all the data and revert back to you.
>
> In the meantime, and as the environment is still very volatile with the shipping lines, you will find attached a customer advisory note from one of the carrier, shared day before yesterday. The note is very clear and despite the fact it is not mentioned in this message this will put even more pressure on the drayage services and as a consequence retrieving reefer

> containers will become even more challenging in the weeks/months to come. The day after this announcement from Maersk we have received the confirmation of the same from another major carrier of the same. This will create significant disruption and equipment scarcity will be exacerbated.

CX 219.

154. On February 17, 2022, Bakerly replied to Seafrigo stating:

> I suppose you meant Oct 2021, not Oct 2022? Can you please go back to May 2021, as our claim goes back to that date? More specifically, attached is the list of invoices for which we have no backup or explanations – these add up to the $1.2M we've mentioned before for 2021. Some of these were paid by mistake (or in good faith, you could say) – but we do need back up / justifications for all.
>
> We've also received D&D invoices in January 2022 amounting to $681K:
>
> - Can you also provide backup / justifications?
>
> - If I may be honest… these invoices received in January 2022 are quite upsetting. It appears the issue is getting worse, not better. Difficulty at the port is nothing new and our other drayage and ocean freight partners are taking steps to ensure satisfactory levels of service.

CX 219.

155. On March 7, 2022, the parties agreed to have a video conference on March 16, 2022. CX 218.

156. "Bakerly had requested that Seafrigo identify the charges it was claiming for demurrage and detention into three buckets: a) Seafrigo caused; b) Bakerly caused; and c) third party or outside circumstance caused. This document was produced three times. SUI003470, CX01291 (produced on 4/14/23, referred to herein as "Round 2"); SUI001435, CX01010 (produced on 4/4/2023)." CX 1322.

157. "In Round 1, Seafrigo identified that it was at fault for $168,792.58 worth of charges, but in Round 2, Seafrigo identified that it was only at fault for $159,849.08." CX 1325.

158. Bakerly contested Seafrigo's analysis. "Bakerly, after researching what had been a troubled period with one specific warehouse, identified that it caused $198,551.87 of demurrage for failure to be capable of receiving containers during that period. This amount should have been reflected as a credit at 100% in the 'Bakerly Warehouse' cause of charge identified by Seafrigo, but it is not the case. Analysis below shows that this amount is split across all categories including $16,040.37 in the 'Seafrigo Fault' and $109,695.42 in the unidentified cause of charge[.]" CX 1325.

159. Seafrigo accepted responsibility for $159,849.08 of the charges at issue that resulted from its own delays in scheduling the pickup or return of containers. CX 1325; Opposition at 4 n.3, Opposition at 15-16.

10. Invoices

160. The record includes sample invoices from Seafrigo to Bakerly which include: the identity of the consignee (Bakerly LLC), a description of the goods, the vessel, destination, master BL number, house BL number, departure date, arrival date, container number, balance due, description of charges, and other data. CX 732, CX 736, CX 739.

161. The record also includes sample PayCargo receipts which list the invoice number (matching the container number) with the amount paid and date. CX 737.

162. As an example, for container TEMU09281481: CX 736 shows a bill for demurrage of $1073; CX 737 shows a PayCargo receipt for $815.50 ($808 plus $7.50 shipper fee); and CX 738 shows an invoice for $250 and lists Port Newark Container Terminal. Respondent asserts that terminals require payment by credit cards and often charge a fee, such as 3.99%. Opposition at 15, 45; *see also* CX 1359. The $250 fee plus 3.99% credit card fee equals $259.975. This added to the $815.50 PayCargo would equal $1075.475, just slightly above the invoice amount of $1073.

163. The record shows instances where Seafrigo admits to an overcharge. For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55. RX 24 (Raffa Affid. ¶ 139); BReply/SFResponse/BPFF ¶ 46 ("Seafrigo admits that in this isolated instance it overcharged Bakerly by $8,879.55.").

164. The record also shows instances where Seafrigo admits to double billing. For example, a duplicate charge of $3,659.50 was acknowledged by Seafrigo. BReply/SFResponse/BPFF ¶ 83(c)(iii) (not disputed); RX 32 (Raffa Affid. ¶ 175) ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited.").

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. 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, 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).

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. Discovery Dispute

Bakerly asserts that Seafrigo's responses to Bakerly's discovery requests violated the Federal Rules of Civil Procedure ("FRCP") and requests that Seafrigo be barred from relying on the documents, arguing that late discovery caused unnecessary delay, needlessly increased the cost of litigation, and was unreasonable. Brief at 60-62. Seafrigo contends that the parties discussed and agreed to extending time for document production; the vast majority of documents were produced timely; and a new spreadsheet reflecting charges in smaller invoices with a "small number of additional documents" were later provided. Opposition at 46 n.43.

In its reply brief, Bakerly asserts that Seafrigo's responses to Bakerly's discovery request violated FRCP 33 and Seafrigo made additional untrue statements to the ALJ in its response that merit sanctions, arguing that Seafrigo's discovery response was unduly burdensome and lacked clear information in violation of FRCP 33; statements made in Seafrigo's response brief amount to sanctionable misconduct; Bakerly is prejudiced by Seafrigo's bad faith conduct; and Bakerly is entitled to attorneys' fees for the violations. Reply at 31-35. Bakerly's reply also alleges that Seafrigo failed to provide a filing in word-processing format by the deadline and that their appendix lacked cover pages, sequentially numbered page numbers, a table of contents, and included emails already in the record. Reply at 5 n.1.

Seafrigo filed a motion requesting leave to file a limited response to Bakerly's request for sanctions and filed a memorandum in response to the request for sanctions raised in Bakerly's reply brief ("Sur-reply"). Bakerly's initial brief did not request sanctions; rather, that request was first raised in its reply brief. Therefore, if this motion were not granted, Seafrigo would not have an opportunity to respond. Thus, good cause exists to allow Seafrigo's sur-reply memorandum in response to the request for sanctions. Accordingly, the request to file a sur-reply is **GRANTED**.

In the sur-reply, Seafrigo states that "Bakerly's allegations are baseless, its request for sanctions should be rejected," and argues that Seafrigo produced the documents in files labeled with corresponding Bates numbers; Bakerly does not dispute that it agreed to extend the deadline for Seafrigo to produce discovery; Bakerly was granted five additional days to file its initial brief; and word-processing format was provided within less than two hours of being notified of the oversight. Sur-reply at 1-2.

The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.141(e)(1). Commission Rule 145 governs interrogatories to parties and is similar to Federal Rule 33. *Compare* 46 C.F.R. § 502.145 *with* FRCP 33. The Commission's Rules governing the production of documents or electronically stored information provide that parties "must produce the documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request" and "need not produce the same electronically stored information in more than one form." 46 C.F.R. § 502.146(b)(2)(v)(A, C).

The specific comments that Bakerly asserts warrant sanctions include statements that Seafrigo provided documents in labeled folders, including the Seafrigo Managing Director Alfonse Raffa declaration statement that folders were labeled with the Seafrigo invoice number. Reply at 33. Seafrigo clarifies in its sur-reply that "the documents were converted to being labeled with Bates stamps by a third-party vendor. Production of documents with Bates stamps is done in the ordinary course of litigation. It was not done to make review more difficult and did not have any appreciable impact on Bakerly's ability to review such documents." Sur-reply at 1 n.1.

The documents supporting Seafrigo's charges were not well-organized and were confusing. Indeed, Seafrigo's appendix was so confusing that the undersigned required it to resubmit portions of its appendix with Bates numbers and required both parties to submit a table of contents for their appendices. June 29, 2023, Order to Correct Filings at 2. However, it is not clear that this was willful or an inappropriate litigation tactic, but rather appears to be the manner in which the information was kept in the usual course of business with the addition of Bates numbers. Thus, the confusing presentation was apparently due to the manner in which the information was kept, attempts to include required Bates stamps on the evidence, and the sheer number of invoices that were in dispute between the parties. This is not a sufficient basis to warrant sanctions.

The other alleged violations alleged similarly do not warrant sanctions. Of the late-provided information, some of it was only one day late and the rest was fifteen days late; Seafrigo did not object to Bakerly's request for additional time to file its initial brief; and Seafrigo provided a word processing version of a filing within hours of being notified of the deficiency. Therefore, sanctions are not appropriate. Moreover, the request for attorney fees is premature as there is no mechanism for the presiding officer to award fees prior to the resolution of a proceeding. *See* 46 U.S.C. § 41305(e) and Commission Docket No. 15-06.

B. Relevant Law

The complaint alleges that Seafrigo violated the Shipping Act filed rate doctrine at 46 U.S.C. § 41104(a)(2)(A); demurrage and detention requirements at 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.5(d); and OSRA 2022 rules at 46 U.S.C. §§ 41104(a)(14), 41104(a)(15), and 41104(d). Before discussing the violations, it is helpful to discuss the type of agreement between the parties.

1. NVOCC, NSA, and NRA Definitions

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20); 46 C.F.R. § 515.2(m).

"The term 'non-vessel-operating common carrier' means a common carrier that - (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17); 46 C.F.R. § 515.2(m)(2). To be an NVOCC on a particular shipment, an entity must meet the Shipping Act's definition of "common carrier" on the shipment.

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

46 U.S.C. § 40102(7).

NVOCC Service Arrangements ("NSAs") and NVOCC Negotiated Rate Agreements ("NRAs") have specific requirements, including regarding charges such as demurrage and detention. These rules were adopted by the Commission in "Final Rule: Non-Vessel-Operating Common Carrier Service Arrangements," 69 Fed. Reg. 75850 (Dec. 20, 2004), and amended by the Commission in the "Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements," effective August 22, 2018. 83 Fed. Reg. 34780 (July 23, 2018) ("NSA/NRA Final Rule"). Commission rule 532.5, "Requirements for NVOCC negotiated rate arrangements," states in relevant part:

> (2) *Surcharges, assessorial*[3] *charges, and GRIs.*
>
> > (i) If the rate is not an "all-in rate," the NRA must specify whether additional surcharges, additional assessorial charges, or ocean common carrier general rate increases ("GRIs") will apply.
> >
> > (ii) The NRA may list the additional surcharges or assessorial charges, including pass-through charges, or reference specific surcharges or assessorial charges in the NVOCC's rules tariff.

[3] For the purposes of this decision, "accessorial" and "assessorial" are treated as synonyms. *See Global Link Logistics, Inc. v. Hapag-Lloyd*, 2014 WL 5316345, at *4 n.6 (ALJ April 17, 2014); *see also* 83 Fed. Reg. 34786-87 (treating assessorial and accessorial charges interchangeably).

> (iii) If the additional surcharges or assessorial charges are included in the NVOCC's rules tariff, those additional surcharges or assessorial charges and the corresponding amounts specified in the rules tariff must be fixed once the first shipment has been received by the NVOCC until the last shipment is delivered, subject to an amendment of the NRA.
>
> (iv) For any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup.

46 C.F.R. § 532.5(d)(2). Therefore, the rules permit NVOCCs to pass through charges, although "the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." 46 C.F.R. § 532.5(d)(2)(iv).

2. Filed Rate Doctrine

Complainant asserts a violation of the filed rate doctrine, found at Section 41104 of the Shipping Act, which states:

> (a) In General.-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).

The Commission described an initial decision regarding the filed rate doctrine, stating:

> [T]he ALJ first set out to examine the genesis and current applicability of the filed rate doctrine. He found that "[t]he 'filed rate doctrine' simply holds that a carrier must charge the rates duly filed under law in the carrier's tariffs and if those rates are reasonable under the applicable law the carrier must charge them notwithstanding misrepresentations by carriers' agents, ignorance of the filed rates by the shippers, or virtually any other defense that shippers could raise against the carriers' demands for payment of the duly filed tariff rates." He further determined that the doctrine has been recently affirmed by the Supreme Court in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) ("Maislin"). The ALJ found that the Commission has consistently followed the doctrine, and observed that the doctrine is applied "regardless of equities and possible hardship on shippers." He concluded that Worldlink's refusal to ratify Cargocare's unfiled rate quote cannot be found to have been in violation of the Act because it reflects Worldlink's attempt to adhere to the filed rate.
>
> The ALJ then undertook to explore the limits to the filed rate doctrine. He found that "when a carrier violates some substantive provision of applicable law and the complaining party is not asking that an unfiled, negotiated rate be applied because

> the complainant relied on that rate, the 'filed rate doctrine' will not suffice to insulate the carrier from liability for harm caused a shipper." The ALJ found that Supreme Court precedent in *Maislin* and *Reiter v. Cooper*, 507 U.S. 258 (1993) ("Reiter"), indicates that alleging an unreasonable practice against a carrier for quoting one rate and then charging another, higher filed rate is no defense against the filed rate doctrine, but that the Court did hold that the Interstate Commerce Commission could find a filed rate unreasonable under its rate-fixing authority. The Federal Maritime Commission, the ALJ noted, does not have rate-fixing authority, but nevertheless may find other substantive violations of the Act despite the filed rate doctrine so long as the shipper is not merely asking that an unfiled, negotiated rate be applied.

Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc., Docket No. 1831(F), 1998 WL 940255, at *4-5 (FMC Dec. 10, 1998) (citations to the record omitted); *petition for review denied per curiam* 203 F.3d 54 (table) (D.C. Cir. 1999) ("the Supreme Court has indicated that the filed-rate doctrine yields to agencies' statutory authority to require a different rate").

The Commission then found:

> The premise of the Initial Decision is that a violation of the Act can be found despite the filed rate doctrine. That is, that there are substantive violations which may arise in the context of, but apart from, filed rate collections. This is in accordance with Commission precedent. In *Valley Evaporating*, the Commission held that "a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the [A]ct." 14 F.M.C. at 20. The Commission thus found that substantive violations may arise to render a rate unlawful even if it has been filed. The filed rate doctrine does not function as a carte blanche to justify whatever action a carrier believes is appropriate; the provisions of the Act relating to unreasonable discrimination still apply. *See Maislin*; *Reiter*; *see generally* McCallister, The Filed Rate Doctrine Under the Interstate Commerce Act and the Shipping Acts, 19 Tul. Mar. L.J. 81 (1994).

Total Fitness Equipment, 1998 WL 940255, at *10; *see also American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 1994 WL 33488, at *9-10 (FMC Jan. 13, 1994) (The filed rate doctrine "basically requires a carrier whose rates are governed by a tariff-filing system to collect the full amount of the rate filed in its tariffs.").

In *Taylors Resources*, the Commission affirmed the dismissal of a section 41104(a)(2)(A) claim where the "ALJ found that Mitui's actions were consistent with the applicable tariff, the service contract, and the waybill, and rejected Complainant's assertion that Mitsui unreasonably delayed disposal of the unclaimed cargo and then collected excessive detention/demurrage fees." *Taylors Resources, Inc. (USA) v. Mitsui O.S.K. Lines Ltd.*, Docket No. 1954(I), 2018 WL 1757672, at *5 (FMC Apr. 4, 2018). So, generally the agreed to rate (whether filed in tariffs or negotiated in a service contract or NRA) must be charged – not more and not less. However, that filed or negotiated rate may not be enforceable if it violates the Shipping Act, for example, if it is an unreasonable practice under section 41102(c).

3. Demurrage and Detention

a. Section 41102(c)

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states 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 December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4 states:

> 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.

46 C.F.R. § 545.4.

Failure of an NVOCC to "carry out the obligation it was paid to perform" may constitute a violation of section 41102(c). *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 1861, 1866-67, 2013 WL 9808692, at *5 (FMC Sept. 4, 2013), *aff'd sub nom. Chief Cargo Serv. v. Federal Maritime Commission*, 586 Fed. Appx. 730 (2nd Cir. 2014). In *Gruenberg-Reisner,* the Commission stated that it "has recognized in numerous decisions that NVOCCs or freight forwarders violate § 41102(c) when they fail to fulfill NVOCC or freight forwarder obligations, …" *Gruenberg-Reisner FMC*, 34 S.R.R. at 620. The Commission has found that "an NVOCC is not absolved of liability for imposing avoidable charges" because even if the charges stemmed from its agent, the NVOCC violated § 41102(c) by imposing additional charges that should have been avoided. *Gruenberg-Reisner* v. *Overseas Moving Specialists, Inc.*, 34 S.R.R. at 622 (FMC 2016) (citing *Orolugbagbe v. A.T.I., U.S.A., Inc.*, 33 S.R.R. 1300, 1309 (FMC Oct. 2015)). The Commission provided specific guidance on factors to consider in determining whether demurrage and detention charges violate section 41102(c) in the Demurrage and Detention Rule.

b. Demurrage and Detention Rule

The Commission has a long history of addressing demurrage and detention practices. As early as 1937, the Commission adjudicated the appropriate amount of free time at ports. *Storage of Import Property*, Docket No. 221, 1 U.S.M.C. 676 (FMC Nov. 16, 1937). Issues regarding port congestion, detention, and demurrage charges have continued as ship size and shipping cargo volumes have increased. The Commission held four regional port forums in 2014, issued a 2015 report, received a 2016 petition and held hearings, conducted a fact-finding investigation leading to a report in 2018, and issued a notice of proposed rulemaking in 2019. *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC-Possible Violations of 46 U.S.C.* § *41102(c)*, Docket No. 21-09, 2022 WL 1239377, at *23-25 (ALJ April 22, 2022) (proceeding resolved by settlement, 2022 WL 2209416 (FMC June 8, 2022)).

On April 28, 2020, the Commission issued an Interpretive Rule on Demurrage and Detention Under the Shipping Act, effective May 18, 2020, with minor changes from the proposed rule. 85 Fed. Reg. 29638 (May 18, 2020) ("Demurrage and Detention Rule"). "The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control." 85 Fed. Reg. at 29638. The demurrage and detention rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable" under section 41102(c). 85 Fed. Reg. 29638.

Commission Rule 545.5 provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule 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.
>
> (c) *Incentive principle*—(1) *General.* 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.
>
> (2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
>
> (ii) *Empty container return.* Absent 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.

(iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

46 C.F.R. § 545.5.

4. OSRA 2022

The Ocean Shipping Reform Act of 2022 ("OSRA 2022") was signed into law on June 16, 2022. Pub. L. No. 117-146, 136 Stat. 1272 (June 16, 2022). The Commission described the changes:

> OSRA 2022 addressed the balance between common carriers and the shipping public in dealing with complaints about demurrage and detention charges. OSRA 2022 § 10, 46 U.S.C. § 41310. Specifically, pursuant to OSRA 2022, common carriers "bear the burden of establishing the reasonableness of any demurrage or detention charges pursuant to [the demurrage and detention interpretive rule] or successor regulations." OSRA 2022 § 10, 46 U.S.C. § 41310(b)(2). This provision shifts the burden of proof regarding the reasonableness of detention or demurrage charges from the invoiced party to the common carrier.
>
> Second, OSRA 2022 requires common carriers to provide certain information on invoices for demurrage and detention charges to demonstrate that the charges comply with the demurrage and detention interpretive rule. OSRA 2022 § 7, 46 U.S.C. § 41104(a)(15) and (d)(2). Specifically, common carriers must include a statement that the charges are consistent with the Commission's demurrage and detention rules. 46 U.S.C. § 41104(d)(2)(L). This provision requires common carriers to ensure invoiced demurrage or detention charges are consistent with the Commission's rules, especially the demurrage and detention interpretive rule.

Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. - Possible Violations of 46 U.S.C. § 41102(c), Docket No. 21-16, 2022 WL 17830693, at *4-5 (FMC Dec. 15, 2022) (footnotes omitted).

The complaint alleges violations of sections 41104(a)(14), 41104(a)(15), and 41104(d), which became law after these shipments occurred. These three claims are dismissed as the sections were not in effect at the time the charges were incurred. Although OSRA 2022 is not

controlling during the time period at issue here, to the extent that OSRA 2022 codified preexisting requirements, including from the demurrage and detention rule, they may be relevant to the other claims and are discussed.

Sections 41104(a)(14) and 41104(a)(15) state that:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- …
>
> (14) assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations);
>
> (15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with-
>
> (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and
>
> (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule).

46 U.S.C. §§ 41104(a)(14), (15) (effective June 16, 2022).

Section 41104(d) creates requirements for "Detention and demurrage invoice information" including:

> (1) Inaccurate invoice.-If the Commission determines, after an investigation in response to a submission under section 41310, that an invoice under subsection (a)(15) was inaccurate or false, penalties or refunds under section 41107 shall be applied.
>
> (2) Contents of invoice.-An invoice under subsection (a)(15), unless otherwise determined by subsequent Commission rulemaking, shall include accurate information on each of the following, as well as minimum information as determined by the Commission:
>
> (A) Date that container is made available.
>
> (B) The port of discharge.
>
> (C) The container number or numbers.
>
> (D) For exported shipments, the earliest return date.
>
> (E) The allowed free time in days.

(F) The start date of free time.

(G) The end date of free time.

(H) The applicable detention or demurrage rule on which the daily rate is based.

(I) The applicable rate or rates per the applicable rule.

(J) The total amount due.

(K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.

(L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.

(M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

46 U.S.C. § 41104(d) (effective June 16, 2022).

Section 41104(e), which was not alleged as a violation, creates a safe harbor for some pass-through charges, stating:

> (e) Safe Harbor.-If a non-vessel operating common carrier passes through to the relevant shipper an invoice made by the ocean common carrier, and the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge, then the ocean common carrier shall be subject to refunds or penalties pursuant to subsection (d)(1).

46 U.S.C. § 41104(e) (effective June 16, 2022).

C. Discussion

1. Violations Alleged

The complaint alleges improper demurrage and detention charges. Complaint at 9. In the complaint, Bakerly sought $2,973,475.29, but has since removed $198,551.87 for invoices for which Bakerly accepts responsibility. Complaint at 15; Brief at 62. In its brief, Bakerly seeks a ruling on $2,774,923.42 of demurrage and detention charges, requesting a refund of demurrage payments of $973,227.05 and detention payments of $278,172.37, plus an order that Seafrigo cease and desist collection of $1,288,809.92 in demurrage and $234,714.08 in detention charges. Brief at 62-63. These are the charges at issue in this proceeding.

Seafrigo seeks an order rejecting Bakerly's claims, finding that Bakerly has failed to establish any Shipping Act violation by Seafrigo, and holding that Bakerly is responsible for payment of $2,130,783.32 in demurrage and detention charges that Seafrigo paid on its behalf.

Opposition at 51. Seafrigo, however, acknowledges that it is not seeking to be reimbursed for charges that resulted from its shortcomings, which it asserts totals $159,849.08. Opposition at 4 n.3; Opposition at 15-16.

Because Seafrigo is not the complainant, this proceeding will not determine the specific amount that Bakerly may owe Seafrigo; rather, this proceeding will determine whether or not Bakerly established that Seafrigo violated the Shipping Act and is therefore entitled to reparations or a cease and desist order.

The complaint does not allege improper freight charges, so those charges are not at issue here. Nonetheless, Bakerly addresses the status of freight charges in its brief, stating:

> The parties have resolved most of the outstanding freight charges. Bakerly had stopped paying the freight because of the unexplained egregiously high charges being assessed by Seafrigo on demurrage and detention. Seafrigo claimed that Bakerly owed $865,336.89 in outstanding freight. Through negotiations involving document backup from Seafrigo, the outstanding amount is now $38,184.50. Bakerly made two payments of $672,823.55 and $11,506.51 for a total of $684,330.06. Of the full $865,336.89, Seafrigo agreed that $142,122.33 were not valid charges: either misidentified as alleged D&D (for $102,810.46) or completely abandoned by Seafrigo ($39,311.87). The parties are still negotiating the final disputed $38,184.50.

Brief at 18-20 (citations omitted); CX 1328-29.

The complaint alleges that the disputed demurrage and detention charges were improper because they violated the filed rate doctrine, the demurrage and detention rules, and OSRA 2022. Complaint at 9-14. As explained above, the OSRA 2022 violations are dismissed because these charges were for shipments prior to the enactment of OSRA 2022. Therefore, the remaining issues are whether the charges violated the filed rate doctrine or section 41102(c). The factual evidence regarding both the alleged filed rate violations and 41102(c) violations are intertwined. Therefore, the legal analysis will be discussed in this section, followed by a discussion of the facts established and how those facts impact determination of the legal issues.

a. Filed Rate Doctrine

Bakerly asserts that Seafrigo violated the filed rate doctrine by charging Bakerly demurrage in contradiction to Seafrigo's rules tariff, Brief at 28-30, and asserts that Bakerly is not liable for demurrage charges according to the bill of lading and rules tariff that it did not cause, Brief at 30-35, or alternatively, argues that even if the Rules Tariff does not exempt Bakerly from demurrage that it did not cause, Seafrigo failed to exercise due diligence and is liable for the charges, Brief at 35-40.

Seafrigo alleges that it acted in accordance with the governing contracts and the parties' course of conduct and states that it "does not contend that the parties' course of conduct negates the Tariff Rules; rather, Seafrigo maintains that the parties' course of conduct shows Bakerly and Seafrigo both shared the correct understanding of those rules over a long course of dealing." Opposition at 17-28.

The parties dispute who was responsible for the demurrage and detention charges at issue under the agreements and tariffs. These arguments are addressed below in the section regarding agreements between the parties (III.C.2). If the charges assessed were consistent with the negotiated rates and tariffs, then there would not be a violation of the filed rate doctrine. Even if the charges assessed are consistent with the negotiated rates and tariffs, there could still be a violation of another section of the Shipping Act. Therefore, the next question is whether there is another violation of the Shipping Act.

b. Section 41102(c)

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; the claimed acts or omissions occurred on a normal, customary, and continuous basis; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. The three elements not in dispute are discussed first, followed by the two contested elements.

i. Common Carrier

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. Bakerly asserts that as "an NVOCC, Seafrigo is an ocean transportation intermediary." Brief at 41. Seafrigo does not dispute that it is an NVOCC, and therefore an OTI, licensed by the FMC. SFResponse/BPFF ¶ 2. Accordingly, the first element is met.

ii. Connected with Receiving, Handling, Storing, or Delivering Property

Bakerly asserts the "invoicing at issue is related to the delivery of Bakerly's property" so that this element is not at issue. Brief at 41. Seafrigo does not specifically address this element, but discusses "delivery" throughout its brief. *See*, *e.g.*, Opposition at 18-19. The disputed charges were imposed as part of invoicing demurrage and detention charges related to the delivery of Bakerly's cargo. The element requiring that the practice be connected with receiving, handling, storing, or delivering property is, thus, also established.

iii. Proximate Cause of Loss

Bakerly asserts that the duplicative invoices are the proximate cause of the claimed loss. Brief at 57; Reply at 29. Seafrigo does not explicitly address this element. If the charges violated the Shipping Act, those charges would be the proximate cause of the fees assessed. It is noted, however, that the majority of the charges have not been paid by Bakerly.

iv. Normal, Customary, and Continuous Practice

Bakerly asserts that the claimed regulations or practices occurred on a "normal, customary, and continuous basis," arguing that Seafrigo stated that its policy was to issue supplemental invoices and that "duplicative invoicing is an industry practice." Brief at 42, 44-45;

Reply at 27-28. Bakerly did not discuss this element with regard to any other of Seafrigo's practices. Seafrigo did not directly address this element.

The evidence demonstrates that some of the practices at issue were part of Seafrigo's normal, customary, and continuous practices, such as passing through demurrage and detention charges and issuing supplemental invoices. However, as discussed more below, some of the practices were not part of Seafrigo's normal, customary, and continuous practices – such as lack of drivers, chassis, or genset availability – and Complainant does not specifically argue that these were part of Seafrigo's normal, customary, and continuous practices.

Bakerly's strongest argument may be its assertion that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly for demurrage and detention." This implies that Seafrigo had a normal, customary, and continuous practice of, essentially, sloppy recordkeeping. In addition, Bakerly asserts that Seafrigo's practices contributed to their driver shortage. Whether staffing or invoicing practices rise to the level of a normal, customary, and continuous practice and whether they are unreasonable is addressed further below.

v. Unjust and Unreasonable

The primary dispute between the parties is the reasonableness of Seafrigo's practices. Whether or not Seafrigo's practices were unreasonable is discussed in detail below. However, none of the practices at issue are found to be unreasonable.

2. Agreements Between the Parties

Bakerly asserts that its shipments were "on a door delivery basis" so that "Bakerly is not liable for demurrage charges that Bakerly did not cause." Brief at 28-29. Seafrigo contends that Bakerly's argument is "baseless and flatly contrary to: 1) the express terms [of] Seafrigo's tariff; 2) Seafrigo's bill of lading terms and conditions; 3) the parties' carefully crafted Negotiated Rate Agreements (NRAs); 4) the parties' longstanding billing and payment practices; and 5) the well-established practice in the industry;" and therefore "absent negligence on the part of Seafrigo, Bakerly is liable for detention and demurrage charges." Opposition at 2.

As discussed earlier, the Commission permits NRAs to include pass-through charges as long as there is no markup.

> The Commission also is amending its rules at 46 CFR part 532 to permit NVOCC Negotiated Rate Arrangements (NRA) to be amended at any time and to allow the inclusion of non-rate economic terms. In addition, an NVOCC may provide for the shipper's acceptance of the NRA by booking a shipment thereunder, subject to the NVOCC incorporating a prominent written notice to such effect in each NRA or amendment. In addition, the Commission is including clarifying language in part 532 to reflect the current treatment of third-party, pass-through assessorial charges and the enforceability of NRAs.

83 Fed. Reg. 34781 (July 23, 2018). Specifically, Commission Rule 532.5 states: "For any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the

NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." 46 C.F.R. § 532.5.

The shipping agreements between these parties met the requirements of an NRA because Seafrigo provided quarterly rate proposals, in writing, prior to Seafrigo accepting receipt of Bakerly's cargo. Each of Seafrigo's quarterly rate proposals clearly stated that the "Rate Proposal *does not include demurrage and detention charges, for which the shipper and/or consignee may be liable* and port terminal handling charges." CX 226, CX 232, CX 239, CX 245, CX 251 (emphasis added). Moreover, each of Seafrigo's quarterly rate proposals included Seafrigo's USA Standard Accessorials Tariff listing per diem charge as "[a]t cost per terminal or carrier" and both demurrage and detention as "[a]t cost per carrier." CX 230, CX 237, CX 243, CX 249, CX 255.

The parties' NRA also refers to Seafrigo's tariff, which states in Tariff Rule 17 that demurrage and detention shall be for the account of the Merchant "except to the extent solely attributable to actions or omissions of Carrier." The relevant portion of Tariff Rule 17 regarding use of equipment states:

> Merchant acknowledges and agrees that Carrier, as an NVOCC, does not own or operate equipment (i.e., chassis or containers). Merchants use of chassis and containers shall be subject to the requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants cargo. Merchant, by tendering shipments to Carrier for transportation, appoints Carrier as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis used for such transportation, all of which shall be for the account of the Merchant *except to the extent solely attributable to actions or omissions of Carrier*.

CX 113 (emphasis added). In addition, Seafrigo's bill of lading terms and conditions provide at Clause 6.5 that Seafrigo "shall not be liable for any loss or damage arising from: (a) an act or omission of Merchant" and at Clause 6.5(h) that Seafrigo cannot be held liable for any "cause or events" which it could not avoid, and which could not be prevented by the exercise of due diligence. CX 57.

Bakerly argues, in part based on Tariff Rule 15.3 that "Seafrigo took on the risk, control, and management of the loaded containers when they arrived in Port in the United States because they were door delivery shipments" and since "these shipments are door delivery, Bakerly as merchant would not be liable for the risk and exposure of pickup, transport and delivery." Brief at 19, 59-60. Seafrigo responds that: Tariff Rule 15.3 provides "that the Merchant, i.e., Bakerly, shall be responsible if a VOCC imposes demurrage charges when loaded containers are not removed from the marine terminal within a specified period of time (free time)" and that while "the demurrage provision cited therein does not apply if failure to remove the container from the terminal is the responsibility of the Carrier, as set forth herein, the failure to remove the containers from the terminal was not the responsibility of Seafrigo." Opposition at 17-18.

Tariff Rule 15.3 states: "Where service is port at destination and removal of containers from the VOCCs marine terminal is responsibility of Merchant, Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time." CX 111. This section is confusing because it applies to demurrage charges for failure to pick up containers but concludes by assessing responsibility for detention charges for failure to return containers. It is possible that the last sentence should say that "Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to *remove* containers within applicable free time." Either way, this rule applies to port delivery and is silent as to door delivery. At most, therefore, it is ambiguous and it is appropriate to look to other parts of the parties' agreement.

Bakerly also relies on Tariff Rule 17.2 to assert that when service "is door delivery, the Merchant cannot bear the (sic) any risk, between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand." Brief at 33-34. Seafrigo asserts that 17.2.1 means "that in cases of door moves, the Merchant is not liable for the pickup, transport, and delivery of the containers" but that the rule "conspicuously does not refer to detention, demurrage, or storage charges, in fact *does not relate* to detention, demurrage, or storage charges." Opposition at 19 (emphasis in original).

Tariff Rule 17.2.1 states in relevant part:

> [T]he following shall be at the Merchants risk and all expenses in connection therewith shall be for the Merchants account: 1. The pick up, transport, and delivery of the containers/goods moving between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand, except to the extent the goods are door cargo.

CX 113. This section indicates that the Merchant is responsible for all expenses from the port to the Merchant's facility. In contrast, in door delivery, the carrier, here Seafrigo, pays costs to pick up, transport, and deliver containers, such as truck drivers. This section does not clearly apply to demurrage or detention.

While the evidence shows that the parties agreed to door delivery, Seafrigo's quarterly rate proposals explicitly stated that the rates did not include demurrage and detention charges so that the door delivery was not an "all-in" rate where Seafrigo would be responsible for demurrage and detention. Indeed, the contemporaneous evidence shows that Bakerly did not object to the charges because this was door delivery, but rather argued that Seafrigo was responsible for the charges due to failure to meet its obligations, for example with regard to staffing and invoicing. Therefore, the parties agreements indicate that Bakerly would be responsible for demurrage and detention charges.

The Commission has held that "assessing pass-through charges with no markup is a just and reasonable practice, in accordance with § 41102(c)." *Gruenberg-Reisner*, 34 S.R.R. at 622. And, although not in effect at the time, the 2022 changes to the Shipping Act require a common carrier to include a statement that: "the common carrier's performance did not cause or contribute to the underlying invoiced charges" and there is now a safe harbor provision which states that: "If a non-vessel operating common carrier passes through to the relevant shipper an

invoice made by the ocean common carrier, and the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge, then the ocean common carrier shall be subject to refunds or penalties pursuant to subsection (d)(1)." 46 U.S.C. §§ 41104(d)(2)(m), 41104(e). Seafrigo's tariff rule is slightly broader, permitting it to pass through demurrage and detention charges "except to the extent solely attributable to actions or omissions of Carrier." CX 57. However, these differences do not impact this decision. As discussed below, the evidence does not show that Seafrigo "caused or contributed" or is "otherwise responsible" for the charges, nor that the charges are "solely attributable" to Seafrigo; thus, the disputed charges are not attributable to Seafrigo.

Seafrigo's tariff rule permitting it to pass through charges with no markup is consistent with Commission case law and is a reasonable practice. Per the parties' agreements, this is appropriate as long as the charges are not attributable to actions or omissions of Seafrigo. This is consistent with the incentive principle because if an NVOCC fears that it will not be reimbursed and therefore hesitates to pay the demurrage and detention necessary to pick up containers, then the flow of commerce will slow.

3. Specific Categories of Charges at Issue

Pursuant to Commission rules and the parties' agreement, Seafrigo was permitted to pass through charges without markup that were not attributable to Seafrigo. Here, there are a number of specific categories of charges or practices that are disputed, including: (1) snowstorm charges, (2) staffing shortages; and (3) invoice practices, such as documentation of pass-through charges; confusing invoices; multiple invoices, referred to by Bakerly as duplicative; and overcharges.

a. Snowstorm

Bakerly asserts that Seafrigo should not have paid demurrage and detention charges amounting to $361,178.54 when the New York ports were closed due to a snowstorm from December 2020 to January 2021, arguing that "Seafrigo was not at fault for the weather-related event and therefore should not have paid the D&D assessed in the first place by the ocean common carrier/terminal, and did so at its own risk" and citing *TCW, Inc. v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement*, 2022 WL 18068977 (FMC Dec. 29, 2022). Brief at 58-60; Reply at 30-31.

Seafrigo contends that snowstorms are one of the charges at issue that were caused independent of either party; the tariff and bill of lading terms and conditions "recognize Seafrigo is not liable for events which it could not avoid and the consequences of which it could not prevent by the exercise of due diligence;" the "snowstorms which resulted in closures of New York ports are classic examples of such unavoidable occurrences which Seafrigo did not cause and for which it is not responsible;" and Seafrigo was under no obligation to "bring legal action against [VOCCs and MTOs] on behalf of Bakerly." Opposition at 12, 22, 37-38.

The evidence shows that Seafrigo was not responsible for the weather-related closure of the port and resulting delays in picking up containers. Bakerly is correct that charging detention when the port was closed may not be consistent with the incentive principle and may violate the demurrage and detention rule, although the Commission decision Bakerly relies on was not

issued until long after this snowstorm. 46 C.F.R. § 545.5; *TCW, Inc. v. Evergreen Shipping Agency*, 2022 WL 18068977. Moreover, Seafrigo's request to waive the charges was denied, Seafrigo needed to pay the charges in order to obtain release of the containers, and Seafrigo did not have the power to waive the charges.

The Commission has advised "that 'passing on' a charge is not necessarily a defense under § 41102(c)." *Tereno Sdn Bhd v. C.H. Robinson Int'l*, 4 F.M.C.2d 45, 2022 WL 3093190, at *1 (FMC March 22, 2022). In that case, the claimant alleged that the OTI respondent failed to respond to Customs and Border Protection's request for documents, causing the shipment to incur demurrage charges. *Tereno Sdn Bhd v. C.H. Robinson Int'l*, 4 F.M.C.2d 30, 2022 WL 3093188, at *2 (SCO Jan. 27, 2022). The Commission affirmed the Small Claim Officer's dismissal of the claim, clarifying that the "claim fails, not because Respondent was passing on the charge, but because Claimant did not prove that Respondent acted unreasonably and because there was evidence that Claimant did not satisfy its obligation to timely provide the documentation needed to release its cargo." *Tereno*, 2022 WL 3093190, at *1. So, passing on charges may not be a defense if a complainant establishes that the respondent violated section 41102(c) by having an unreasonable practice.

Bakerly has not established that Seafrigo had an unreasonable practice that led to the demurrage and detention charges during the snowstorm. Seafrigo does not point to any authority suggesting that the responsibility of filing litigation to enforce the Shipping Act is part of the due diligence required from NVOCCs or that NVOCCs assume the risk of nonpayment when paying demurrage and detention charges on behalf of shippers. Indeed, these charges need to be paid before containers will be released. Moreover, Seafrigo's testimony is not contested that Seafrigo "met with the two primary VOCCs for Bakerly, CMA and MSC[] and sought to have them waive detention and demurrage charges" but that because "those carriers had significant leverage in an extremely tight market, they flatly refused to waive such charges." RX 18. Therefore, Seafrigo made a reasonable attempt to contest the charges, which is sufficient to meet its obligation not to impose avoidable charges.

The flow of cargo would be slowed if NVOCCs had to litigate contested charges or run the risk that they would not be reimbursed, as NVOCCs would be incentivized not to pay the charges which would result in delays picking up containers and additional charges being incurred. Permitting an NVOCC to pass through detention and demurrage charges it has reasonably paid is consistent with the incentive principle as it promotes freight fluidity and ensures that containers do not sit at the port accruing additional charges. While not binding here, such a finding is also consistent with OSRA 2022's safe harbor provision that refunds for improper invoices are paid by the ocean common carrier, not the NVOCC. 46 U.S.C. § 41104(e).

In February 2021, the parties had a video meeting to discuss the charges and "Bakerly agreed to pay those charges and Seafrigo agreed to send Bakerly a $30,000 credit as a commercial gesture but that it did not represent admission of fault." CX 19; RX 11. After agreeing to pay the charges in February 2021, in December 2022, Bakerly again agreed it would not dispute Seafrigo's right to be reimbursed for the snowstorm charges, which amount to $361,178.54. RX 10. Seafrigo's statement is credible that if "Seafrigo had been informed that Bakerly thought that Seafrigo was assuming the obligation to pay detention, demurrage, per diem, and other ancillary charges, it would have refused to advance the millions of dollars in

advances it made on behalf of Bakerly" from that point forward and that it would have been "economically unfeasible" for Seafrigo to assume the obligation for these charges. RX 21.

Indeed, in December 2021, Seafrigo stated that it would "no longer pay demurrage on behalf of Bakerly from this point forward until we reach an agreement" and Bakerly responded that there was a "misunderstanding" and for Seafrigo lines, "there will be no change in the way we have been doing things up until now, including who pays what to the terminal and the [shipping] lines." CX 494-95. Bakerly wanted Seafrigo to continue paying these charges on its behalf. It is noted that this occurred prior to the Commission's new Charge Complaint process, whereby such disputes over demurrage and detention charges can be promptly resolved.

Bakerly has established that Seafrigo had a normal, customary, and continuous practice of passing through demurrage and detention charges, including those caused by weather delays such as the snowstorm. However, Bakerly has not established that it was unreasonable for Seafrigo to pass through the demurrage and detention charges for the snowstorm under these circumstances. Moreover, Bakerly has not established that this would be a violation of the filed rate doctrine as the parties' NRA states that the "Rate Proposal does not include demurrage and detention charges, for which the shipper and/or consignee may be liable." CX 226, CX 232, CX 239, CX 245, CX 251. It is not explicitly argued in this briefing, but the same approach would apply to other delays outside of the NVOCC's control, such as port congestion, customs holds, and chassis or genset shortages which are not attributable to actions or omissions of Seafrigo.

b. Staffing Shortages

Bakerly asserts that: Seafrigo lacked sufficient drivers; Bakerly suggested that Seafrigo pay more competitively to procure drivers; Seafrigo is responsible for finding drivers to take containers from the port and to retrieve empty containers; Bakerly was able to find drivers faster than Seafrigo; and another provider was able to find sufficient truck drivers. Brief at 14; Reply at 23-24. Seafrigo argues that truckers began refusing to deliver containers to Bakerly warehouses due to the warehouse's inability to timely accept deliveries and return empty containers and that there was a nationwide shortage of truckers which was caused by reasons independent of either party. Opposition at 9, 13, 32-33, 40.

As early as January 2021, Seafrigo alerted Bakerly to problems with their warehouse, stating:

> We have a potential serious issue brewing here. Despite making a great push to get all these containers delivered, we now have an issue that they are not unloading the containers in a reasonable amount of time. Some containers have been sitting there for over a week and rumor has it, they intend to keep them there longer.
>
> I know this is "he said, she said" but my reliable sources are telling me that "This customer brought in too many containers at the same time, and we do not have the time to unload them fast enough".
>
> The obvious issue here is per diem costs which you are already aware of. But the other residual issue here is that some of these truckers (including Seafrigo

> transport) are using our own chassis to service containers that we pay for, and they are now sitting in Jersey City for an undetermined period of time. That is costing we as truckers money as we need that equipment back.
>
> I know this week is a slow week in terms of imports for Jersey City so it would be great if there could be a catch up period for PFS JC to focus on unloading what they have so we can get our equipment back and containers returned back to the port.
>
> For all new shipments coming in? My recommendation would be to bring all those containers to Seafrigo's freezer and unload them here until PFS JC can catch up again. Then we can truck them to PFS JC when they are ready to receive them. Please let us know your thoughts.

CX 720.

Moreover, evidence shows that from February 2021 to April 2021, Seafrigo was receiving complaints from truckers trying to find appointments at Bakerly's warehouse, having drivers be kept overnight, and refusing to go to Bakerly's warehouse. Seafrigo sent Bakerly emails documenting these issues, for example: "I am losing truckers left and right," "I am getting major pushback from good drivers that I am working with for years now," "our drivers are not happy and they are all threatening not to go back there," "our truckers are running out of patience," and "one of our good truckers [is] rejecting all future loads to this locations." RX 4606, CX 833-34, RX 4632, RX 4631, RX 4630.

Additionally, in July 2021, Bakerly limited inbounds "due to complications and internal decisions" and specifically stated that "[w]e are aware of the additional costs of demurrage, storage, detention that this decision implies, but we do not have a choice." RX 4594; *see also* CX 469-70 (in October 2021, Jersey City "can only accept 4 to 5 loads p/day."). This led Seafrigo to have its own internal conversation where they discussed "potentially limiting the volumes of bookings with the customer . . . [as we] cannot continue to stockpile containers on the USA side without a 'home' for them." RX 4593. Seafrigo further noted that:

> This account is crippling our credit line. Containers are piling up in port of NY/NJ faster than they can be routed to a warehouse with availability. FYI – Bakerly management is MIA, nobody returning my phone calls. We cannot continue this way! Please see attached list. We have containers that arrived since end of June still sitting at the ports and/or staged in a yard somewhere with another wave of containers arriving next week !

RX 4589. Thus, the record shows significant and long-standing issues by Seafrigo's drivers in delivering containers to Bakerly's warehouses. The demurrage and detention charges caused by these delays are not attributable to Seafrigo.

The record also includes evidence of numerous delays at the Lineage warehouses, for example from May 20-25, 2021. CX 559-67. However, Bakerly states that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo

containers." BResp/SFPFF ¶ 48-52. These emails further demonstrate delays caused by Bakerly's warehouses.

At the time, Seafrigo was transparent about the issues impacting demurrage and detention charges. For example, in June of 2021, Seafrigo acknowledged:

> At this time Carriers have driver shortage, port congestion, insufficient equipment (GENSET) ETC. Trucking companies are booked to capacity, drivers are quitting on them, trucks are breaking down. Receiving stations are booked, pulling containers before Demurrage applies has been impossible. We are doing our best at this time to get containers pulled.

CX 852.

There are some instances in the record of demurrage and detention charges that were due to Seafrigo's challenges finding truck drivers. For example, as early as February 2021, Bakerly asserted to Seafrigo that Bakerly employee Yudith was able to find drivers when Seafrigo could not. CX 339. Bakerly also complained in early January 2022 regarding containers, that had been released since December 28, 2021, but not yet delivered. On January 6, 2022, Bakerly stated to Seafrigo that "Bakerly, as a client, has been pushing for those containers for days now. It's Seafrigo's responsibility to find drivers and remove the containers from the port. We need this inventory at the warehouse and we need those containers out of the port." CX 452-53; *see also* CX 826 ("Bakerly (your client) is advising every morning that Seafrigo has containers in the port, . . . that Seafrigo must go to pick up the empty container. We are exhausted, it is frustrating!!."); CX 826 ("Bakerly is pushing for a feedback on containers that arrived for days now, again accruing demurrage AND losing shelf life at the port. Remember this is reefer."). But, on January 4, 2022, when Seafrigo attempted to set up the final delivery, it was told by Bakerly's warehouser, Lineage, that the "earliest we would be able to get these in would be Monday the 10th at 0430." CX 456. Lineage also revealed at this time that it had 41 team members out with COVID and another 40 who had called in sick. CX 456-57. In any event, the evidence does not support finding that these amounts exceeded the amount for which Seafrigo takes responsibility.

The record also shows that Seafrigo on occasion listed containers in emails that were for other customers. *See, e.g.* CX 471-73. The record does not establish that Bakerly is seeking demurrage and detention charges for these containers.

In addition, the record includes information about twelve containers placed on customs hold by Customs and Border Protection ("CBP") and the United States Department of Agriculture ("USDA.") The record shows that Seafrigo followed up with CBP/USDA, provided the required information, and advocated for release of the containers. CX 802-12. Moreover, the record shows that Bakerly was copied on the emails and there is no evidence that Seafrigo delayed notifying Bakerly or contributed to the delay in having the containers released. Other containers were also put on government holds but the record does not indicate that these were attributable to Seafrigo. CX 842-50, CX 880-81. At most, one day of demurrage was incurred after a container was released from a government hold and Lineage did not have capacity to pick

up on the last free day. CX 884-90. Therefore, the record does not show that demurrage and detention charges for the containers on government holds was attributable to Seafrigo.

Bakerly does not devote a particular section of its briefs to this issue, instead, raising it throughout. However, the evidence does not support a finding that Seafrigo had a practice of failing to secure drivers that was unreasonable. The evidence primarily shows that Lineage, Bakerly's warehouser, struggled with significant staffing issues and that Bakerly's warehouses were limited in the number of containers they could accept and that they did not always empty and return containers in a timely fashion. *See, e.g.,* CX 832 ("5 standing inbounds every day of the week (no weekends)"; CX 838 ("only drop 2 containers per day until further notice")). While the evidence does show instances where Seafrigo was delayed in picking up or returning a container, those isolated instances to not rise to the level of a practice. Moreover, Seafrigo accepts responsibility for $159,849.08, Opposition at 15-16, and the isolated instances in the record do not suggest a higher amount of the charges are attributable to Seafrigo. Finally, Seafrigo twice provided Bakerly with $30,000 credits. CX 259; CX 627. Therefore, the record does not support finding that Bakerly has been overcharged for demurrage and detention that was attributable to Seafrigo's staffing.

c. Invoices

i. Documentation of Pass-Through Charges

Bakerly contends that Seafrigo's invoices "violate the basic requirement that pass through of invoices must be substantiated by the NVOCC with the underlying ocean carrier/terminal invoices" and asserts that the "regulations require invoices to be substantiated." Brief at 42, 48, 49. Seafrigo asserts that: invoices and backup documentation were timely provided to Bakerly; some details regarding demurrage and detention charges were not provided because that information was not provided by third parties; and OSRA 2022's safe harbor provisions confirm that NVOCCs such as Seafrigo are not liable for demurrage and detention assessed by third parties for which the NVOCC is not responsible. Opposition at 13-14.

This is one of the most significant areas of contention between the parties – whether and how pass-through charges should be substantiated; for example, whether the NVOCC is required to provide a copy of the ocean carrier or terminal invoice and if so, how those invoices should be provided. This subsection addresses whether particular documentation is required in order for pass-through charges to be permitted by the Shipping Act.

Bakerly does not identify which section of the Shipping Act or NSA/NRA Final Rule it alleges supports its position that charges must be substantiated with invoices, however, it is presumed that Bakerly is referring to the Commission's discussion of the *Gruenberg-Reisner* v. *Overseas Moving Specialists (FMC)* case.

> [T]he Commission has clarified through case law the treatment of pass-through assessorial charges for which no specific amount is fixed in either the NRA or the rules tariff. Specifically, in *Gruenberg-Reisner* v. *Overseas Moving Specialists, Inc.*, 34 S.R.R. 613, 622-623 (FMC 2016), the Commission found that *an NVOCC was entitled to collect pass-through assessorial charges without any markup,*

> *which it substantiated with invoices*. The NVOCC described in its rules tariff the types of charges that were not included in the rate and provided that any of those charges assessed against the cargo would be for the account of the cargo, even if the NVOCC was responsible for the collection thereof. *Id.* The Commission found that Respondent was "entitled to payment for . . . destination terminal handling charges and the additional floor fee, and . . . local port fees, customs fees, parking permit, and elevator fee because these were reasonable accessorial charges that Respondent passed through to the Claimants without any markup." *Id.* at 623. The Commission also stated that "assessing pass-through charges with no markup is a just and reasonable practice, in accordance with [section] 41102(c)." *Id*. at 622.
>
> The Commission has determined to incorporate the interpretations in *Gruenberg-Reisner*, subject to a few clarifications, into part 532. Specifically, pass-through assessorial charges need not be fixed at the time of receipt of the first shipment, in light of the Commission's decision in *Gruenberg-Reisner*, which found it permissible for an NVOCC to collect pass-through assessorial charges that were not fixed upon receipt.
>
> In summary, the final rule adopts the following requirements. If the NRA rate is not an "all-in rate" the NRA must specify which surcharges or assessorial charges will apply by either including the specific additional charges in the NRA itself or referencing in the NRA the specific charges contained in the rules tariff. For applicable charges contained in the rules tariff, the charges and amounts for those charges (if the amounts are specified in the tariff) are fixed once the first shipment has been received by the NVOCC until the last shipment is delivered, subject to further amendment of the NRA by mutual agreement of the NVOCC and shipper. For pass-through charges and ocean carrier GRIs for which the NRA or rules tariff does not include a specified amount, the *NVOCC may invoice the shipper for only those charges the NVOCC actually incurs, with no markup*.

NSA/NRA Final Rule, 83 Fed. Reg. at 34787 (emphases added).

A more detailed description of the *Gruenberg-Reisner* case may be helpful. In *Gruenberg-Reisner*, the NVOCC substantiated some of its charges with invoices. However, Bakerly goes too far in asserting that substantiation with invoices is always required. Indeed, although the Commission found the *Gruenberg-Reisner* Respondent entitled to payment for local customs fees, parking permit fee, elevator fee, and customs inspection fees, the Commission remanded the issues of the fuel surcharge and U.S. terminal handling charges to determine whether Respondent reasonably assessed those charges. *Gruenberg-Reisner FMC*, 34 S.R.R. at 623. Although the record did not contain supporting documentation for these charges, the Commission stated that it did "not believe that Respondent had sufficient time to contact the vessel ocean common carrier and track down the exact amount of these charges." *Gruenberg-Reisner*, 34 S.R.R. at 623. The Commission found that invoices were "not the only indication of whether the charges were reasonable," explaining:

> The Commission has found that a carrier, under some circumstances, may recover reasonable charges it incurred without providing evidence that it incurred those charges. *C.H. Leavell & Co. v. Hellenic Lines, Ltd.,* 13 F.M.C. 76, 89 (FMC 1969). In *C.H. Leavell & Co.,* the Commission found that:
>
> > [R]espondent's showing of increased voyage distance and duration is sufficient to overcome any presumption of unreasonableness; and there is no basis for a finding that the surcharges assessed were unreasonable, in the absence of any proof of unreasonableness. On the contrary, the record supports a positive finding that the surcharges assessed for the extra services rendered to complainant's cargoes represented, in each case, a reasonable extra charge for such services.
>
> *Id.*
>
> Therefore, we remand the issue of whether Respondent's assessment of these charges was a just and reasonable practice. On remand, we recommend that the SCO request the invoices again. The invoices, however, are not the only indication of whether the charges were reasonable. *See id.* If the NVOCC is unable to produce the invoices, we recommend that the SCO look at other factors such as whether the charges were similar to those assessed by other NVOCCs.

Gruenberg-Reisner FMC, 34 S.R.R. at 623.

Therefore, case law does not support Complainant's position that pass-through charges must always include the underlying ocean carrier/marine terminal invoices or that failure to include such invoices justifies non-payment of the charges. It appears that the best reading of the comment after the comma in that NRA/NSA Final Rule – that "the Commission found that an NVOCC was entitled to collect pass-through assessorial charges without any markup, *which it substantiated with invoices*" – was descriptive and not prescriptive.

NVOCC duties include "[c]ollecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf." 46 C.F.R. § 515.2(k)(11). Indeed, NVOCCs have been found to have unreasonable practices in the domestic trades, a violation of the Shipping Act of 1916, by failing to "pay applicable demurrage charges," subjecting "property of the shipping public to vessel-operating common carrier's liens." *Maritime Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655, 1662, 21 FMC 198, 203-04 (ALJ Jan 18, 1978), *aff'd*, 18 S.R.R. 853, 21 FMC 194 (FMC Aug. 14, 1978).

Moreover, Commission Rule 532.5(d)(2) only requires that for pass-through charges which are not included in the NRA or the rules tariff, "the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." The rules do not specify how demurrage and detention charges should be communicated. Failure to communicate the charges in a manner preferred by a shipper, without more, would not justify stopping payment for services rendered, particularly where the cost was clearly incurred – for example, where a container was not picked up or an empty container returned within the available free time.

As the Small Claims Officer stated in the *Gruenberg-Reisner* remand decision:

> It is undisputed that the Commission "permit[s] carriers to recover their additional expenses." *See* [*Gruenberg-Reisner* FMC, 34 S.R.R. at 622] (quoting *Imposition of Surcharge at U.S. Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Lain Am. Ports.*, 10 F.M.C. 13, 26 (FMC 1966)). However, "[t]he basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their service, and which costs the carriers are not recovering in their basic freight rates." [*Gruenberg-Reisner FMC*, 34 S.R.R. at 622] (quoting *Imposition of Surcharge at U.S. Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Lain Am. Ports.*, 10 F.M.C. 13, 26 (FMC 1966)).

Gruenberg-Reisner SCO Remand, Docket No. 1947(I), 2017 WL 2241031 at *20 (SCO May 17, 2017) (SCO Decision on Remand) (administratively final June 19, 2017).

The evidence shows that Seafrigo did provide back-up documentation and the exhibits suggest that it made a good faith attempt to provide as much information as possible about these pass-through charges. *See* RX 45-4470. For example, there are a number of references in the record to Seafrigo mailing the underlying invoices to Bakerly. *See, e.g.*, CX 723 ("I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you."); CX 901 ("I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay."). The evidence shows that the underlying invoices were often sent in batches and were occasionally sent late. However, the evidence does not show that Seafrigo had a practice of refusing to provide the information that it had regarding the charges.

On September 16, 2021, Seafrigo sent Bakerly an updated statement and then emailed again stating:

> Sorry to come back to this subject, but it seems that we are in a routine of having over 1 million of outstanding again. Could you please have a discussion with your AP team so that we can get on a regular schedule of keeping the account up-to-date ? We are not asking to have every penny at 30 days, but certainly, we do not have deep enough pockets to float 1 million dollars on a regular basis.

CX 697. Bakerly responded, saying:

> I just came out of a meeting with AP regarding the Seafrigo account. They have showed me quite a few examples where we are struggling to get invoices from Seafrigo, we do receive the past due notices but are having a hard time getting the invoices as well as the weekly excel report meant to breakdown the costs. To add to that Yudith has been fighting for a couple months now on the demurrage/per diem invoices to get backup, without backups we can't approve those charges.

CX 696.

Later on September 16, 2021, Seafrigo responded: "Based on Alissa's message • 472K – not at all sure why you would not receive these invoices as we are sending them weekly in batches. Anyhow, all the invoices were resent • 500K demurrage/per diem/other – is there

anything requires on our side to expedite whatever the delay is from the Miami team?" CX 695. Bakerly responded: "Appreciate the help. • 472: Alissa will process payment accordingly[.] • 500K: we need the backup of the demurrage/per diem/other charges to see what happened with the container and approved invoices. Bethzaida should know what the team needs exactly[.]" CX 699-700.

On September 17, 2021, Seafrigo emailed Bakerly stating:

> For the demurrage – we have been sending all the invoices with the back-up on a case by case basis. There is no way we did not do it for all 500K of invoices. Maybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against. Anyhow, please keep us posted what is needed so we can get through. We understand that maybe you could be missing some back-up from time to time. All that we ask is for the base freight invoices and demurrage / per diem invoices (which you have the back-up and nothing is in dispute) to please get on a regular payment clock of 30 days.

CX 699.

This exchange in September suggests that, at times, Bakerly was delaying payment without good cause. Seafrigo's statements are credible that "[m]aybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against" and "[w]e understand that maybe you could be missing some back-up from time to time." CX 699. However, this does not justify nonpayment of freight or the charges for which documentation has been provided.

The next month, Seafrigo imposed a finance charge, stating "[w]e have inherited the responsibility of paying demurrage and per diem charges on behalf of our customer base. These charges are significant and are passed through charges only. This cash outlay has created major stress on our cash flow." CX 1403.

Later in October 2021, Bakerly complained that there were "too many situations recently where we incurred demurrage because Seafrigo couldn't find drivers," that Bakerly was "still waiting for the weekly D&D report" and Bakerly didn't "feel right owning 100% of the financial exposure when we clearly have performance issues on Seafrigo's side." CX 310; *see also* CX 578 (November 12, 2021 email from Seafrigo stating "please note that we are not covering demurrage or per diem due to lack of drivers"). Seafrigo apologized "for not getting you this weekly recap on time" stating that this "is a result of a system change and the report is only able to supply line by line information of what is being paid" and there "are combinations of reasons (through no fault of Seafrigo) that we have already discussed on numerous occasions and any one of them are contributing to the demurrage, not only driver capacity." CX 577.

The evidence supports Seafrigo's argument that "the charges assessed largely were straight pass-throughs of amounts that Seafrigo paid to third parties" and the "only additional charges imposed by Seafrigo were finance charges in late 2021 when Seafrigo's finances were being impacted by Bakerly's failure to reimburse it for millions of dollars Seafrigo had advanced on Bakerly's behalf." Opposition at 45.

The evidence also shows that on October 7, 2021, Seafrigo issued a demurrage per diem finance schedule stating: "From now on, any cash outlay related to Demurrage/Per diem, will incur the following," listing an "Admin fee (per transaction)" of $45 and a "5% unsecured finance charge: 5% of the amount paid." CX 1403. Seafrigo's 2022 standard tariff lists a "Finance Fee/Per Diem/Demurrage/Detention" charge as "5% of total demurrage/detention cost." CX 255. Invoices in the record confirm that these charges were imposed in October 2021 and January 2022. CX 156; RX 4997; RX 5010. Bakerly does not specifically object to this admin fee and finance charge, which were clearly disclosed both by email notice and listing on the tariff. Rather, Bakerly seems to object to passing through unsubstantiated invoices and confusing invoices. Opposition at 5, 27.

As complainant, Bakerly has the burden of proof. Bakerly has established that Seafrigo had a normal, customary, and continuous practice of passing through demurrage and detention charges. Indeed, this practice is identified in the parties' agreement and Seafrigo's tariff. However, Bakerly has not established that this practice is unreasonable under the Shipping Act. In addition, this practice would not violate the filed rate doctrine as it is consistent with the parties' negotiated rate or tariff. Therefore, Seafrigo passing through demurrage and detention charges without mark-up does not violate the Shipping Act. Moreover, the caselaw does not support Bakerly's contention that all pass-through charges must be substantiated or documented with the underlying invoice and the evidence shows that Seafrigo reasonably provided Bakerly with back-up documentation of the charges. The impact of confusing invoices is discussed next.

ii. Confusing Invoices

The next issue that Bakerly asserts made the invoices unreasonable was that they were "incoherent" and "failed to note any required information about the charge, such as the number of free days, the date the demurrage started, and when it ended." Brief at 42, 48. Bakerly acknowledges that "through discovery, it is clear that Seafrigo did not maliciously withhold information from Bakerly," but asserts instead that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly." Brief at 7.

Seafrigo primarily disputes these arguments on a factual basis, arguing that the invoices "detailed the amounts owed and specified the basis for the charges;" that if "Seafrigo had not made the payment, Maher Terminal would not have released the container and demurrage would have continued to accrue;" and "[s]imply reviewing the ETA and the pickup date one can determine the approximate number of days the container sat at the terminal undelivered and the basis for the demurrage charges assessed." Opposition at 44-45. Seafrigo also contends that "Maher Terminal, which assessed the vast amount of detention and demurrage charges at issue, does not issue invoices reflecting the basis for amounts charged but instead requires credit card payment of all amounts due in order for the containers to be released." Opposition at 45.

Bakerly asserts that to be reasonable, invoices in 2020-21 were required by the Demurrage and Detention Rule to include information such as the number of free days, the date the demurrage started, and when it ended. Brief at 55-57. Seafrigo asserts that Bakerly is attempting to shift the burden of proof; no such obligation existed pre- or post- OSRA 2022; and OSRA 2022's safe harbor confirms that "NVOCCs such as Seafrigo are not liable for detention

and demurrage assessed by third parties for which the NVOCC is not responsible." Opposition at 45-46.

After these shipments, OSRA 2022 imposed new requirements on the contents of a demurrage and detention invoice and required a "statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges." 46 U.S.C. § 41104(d)(2) (June 16, 2022). These requirements were not in effect during the time of these shipments and these requirements appear to apply to the entity initially imposing the charge.

An NVOCC can only make available to the shipper the information that it receives from the ocean common carrier or marine terminal imposing the charge. During the timeframe at issue, ocean common carriers and marine terminals were not required to provide the detailed information that Bakerly was seeking from Seafrigo. While that information would have been helpful and there are now new requirements regarding the contents of invoices, Bakerly has not established that as an NVOCC, at that time, Seafrigo acted unreasonably by not providing additional information beyond what it received from the entities initially imposing the charges. Moreover, while not providing certain information may make the invoices confusing, they do not make the invoices inaccurate or justify non-payment. Bakerly has not shown that any lack of back-up documentation caused the demurrage or detention charges to accrue.

Moreover, Seafrigo asserts that it did provide this information and the exhibits suggest that it made a good faith attempt to provide as much information as possible about these pass-through charges. As noted earlier, there are a number of references in the record to Seafrigo mailing the underlying invoices to Bakerly. *See, e.g.*, CX 723 ("I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you."); CX 901 ("I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay.").

The evidence shows that Seafrigo provided information about particular charges in a mix of spreadsheets, emails, and hard copy by mail. However, lack of details in backup documentation or provision of that information in a mix of formats does not cause detention or demurrage to accrue or permit non-payment. Moreover, to the extent that Bakerly suggests that Seafrigo is responsible for the charges because the delays were attributable to Seafrigo, for example because of a driver shortage, the underlying invoice would not shed light on that issue. It would just indicate that demurrage and detention were charged; it would not identify the cause of or responsibility for the charges.

While data could be taken from underlying invoices and entered into a spreadsheet, if Bakerly wanted to see those invoices, they would have to match the underlying invoices with the charges in the spreadsheet because these are separate documents. As Seafrigo explained, they could not "combine the support documents with a general report. All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed." CX 904.

The evidence shows that Bakerly asked and Seafrigo attempted to provide information in a variety of formats. For example, Bakerly requested a combined weekly spreadsheet and

Seafrigo acknowledged that it was unable to provide that level of granular detail requested in the spreadsheets. Seafrigo explained on November 13, 2021:

> Regarding the required explanations, this is something that is not possible to track on such a granular level meaning that if you are expecting a finite timeline on each and every container as why demurrage is being paid, I'm afraid we would spend more time on that type of analysis than actually servicing your containers . . . .

CX 577. Again, on February 1, 2022, Seafrigo told Bakerly:

> Its true that the report itself does not reflect this granular information at the moment. You are receiving that type of details via email from the account handlers. Based on the snapshot below, are you saying that your team has no email information regarding the appointment process on any of these containers ?

CX 659; *see also* CX 658 ("I do understand your point and looking to achieve what you want. It is just that we do not have that 'free text' commentary available in this report just yet and simply have to rely on emails for the time being when it comes to 'lengthy' explanations.").

A sample of the Seafrigo invoices shows that they list: the identity of the consignee (Bakerly LLC), a description of the goods, the vessel, destination, master BL number, house BL number, departure date, arrival date, container number, balance due, description of charges, and other data. CX 732, CX 736, CX 739. The record also includes sample PayCargo receipts which list the invoice number (matching the container number) with the amount paid and date. CX 737.

Seafrigo provided credible testimony that: "During the period in question, VOCCs and MTOs were not obligated to provide detailed invoices as is now required under OSRA. Seafrigo forwarded information as provided by MTOs and VOCCs." RX 15. "Seafrigo admits that on occasion it had to issue separate invoices for detention and demurrage charges that accrued or were invoiced by third parties at different times." RX 16. To the extent that the underlying invoices do not include information that Bakerly wanted, Bakerly has not identified any Shipping Act requirement that the NVOCC passing through the invoice must supplement or add information to each invoice.

Bakerly has also argued that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly." Brief at 7. Bakerly has established that Seafrigo's recordkeeping was sometimes confusing and documentation sent late. Bakerly hired another NVOCC in October 2021 and asserts that the other NVOCC performed better, with no demurrage and detention charges during certain time periods. Brief at 39-40; Reply at 9-10. However, even if this were the case, the fact that one practice is more efficient than another does not, without more, make the less efficient practice unreasonable. The record here does not support finding that the demurrage and detention charges incurred were attributable to Seafrigo because of a lack of systemic controls. Moreover, it is not clear that Seafrigo lacked systemic controls, as part of the problem was Bakerly's continuing desire for additional information for each charge and the large number of unpaid charges that Seafrigo needed to continue to track for Bakerly. Additionally, the lack of detail available is not attributable to Seafrigo as it can only provide the information that it received from the VOCC or MTO.

Bakerly has the burden of proof. Bakerly has established that Seafrigo had a normal, customary, and continuous practice of issuing demurrage and detention invoices and subsequently mailing the underlying invoices, sometimes with delays. However, Bakerly has not established that Seafrigo's invoicing practices were unreasonable under the Shipping Act. In addition, passing through detention charges would not violate the filed rate doctrine as it is consistent with the parties' negotiated agreement regarding rates. Therefore, Seafrigo's failures to provide underlying invoices substantiating the charges in the precise manner requested by Bakerly does not violate the Shipping Act.

iii. Multiple Invoices

Bakerly asserts that "Seafrigo had a practice of issuing duplicative invoices for detention, demurrage, and per diem and the practice was unjust and unreasonable," where "duplicative invoicing," is defined by Bakerly as meaning "that Seafrigo issued multiple invoices for one activity (such as demurrage, detention, per diem, freight, accessories)." Brief at 40, 40 n.8; CX 1319. Seafrigo contends that "the charges are not duplicative," but rather, "they reflect additional demurrage or detention charges that accrued and were invoiced after an initial invoice had been issued" and "the mere fact that more than one invoice for detention or demurrage was issued for the same container does not in any way reflect that the charges were duplicative or incorrect." Opposition at 11.

The use of the term "duplicative" is misleading because it is used by Bakerly to encompass both overcharges, where Bakerly is billed inaccurate amounts, and supplemental billing, where Bakerly is issued multiple bills with different charges (for example, a January bill for January charges and a February bill for February charges). This order will use the terms "overcharge" and "supplemental billing" to distinguish between the two.

Bakerly asserts that "Seafrigo is issuing duplicative invoices principally due to the fact that Seafrigo's invoices were issued before demurrage stopped accruing" and the multiple invoices for the same shipment were "incoherent" and "uncertain" as Bakerly could not determine whether the invoices were proper charges or overcharges. Brief at 42. This "possibility of overcharges by the unreasonable multiple invoicing," and Bakerly's belief that some containers had been overcharged, "caused Bakerly to cease paying for demurrage." Brief at 43.

Seafrigo argues that: Bakerly does not satisfy its burden of proof by "highlighting a tiny number of supposed discrepancies;" Bakerly "identified a handful of invoices which it claims are incorrect;" a "handful of errors in invoices totaling less than $15,000 do not justify a refusal to pay almost $2 million in charges owed;" and some of the discrepancies are caused by credit card fees imposed by terminals. Opposition at 15, 43.

There is nothing inherently unreasonable about issuing supplemental invoices. Even if, as Bakerly asserts, the previous practice had been to include all charges regarding one shipment in one invoice, Bakerly has not identified anything in the Shipping Act that requires all billing regarding a shipment to be included in one invoice statement or that prohibits supplemental bills. Further, it may be that the unprecedented strain on the shipping industry during this timeframe justified departures from prior practice. *See* RX 14 ("If containers sit on a terminal or at a warehouse for an extended period of time, more than one invoice for that container may be

issued. That simply reflects the billing practice of the underlying carrier or terminal."); CX 1340 (for accessorial invoices, "there is no fixed timeframe when Seafrigo receives these types of charges and so we are generating the invoices 'as we get them.'").

The evidence shows that at the time Bakerly requested the excel spreadsheets, Seafrigo warned that they might contain duplicates or "invoice redundancy." *See, e.g.*, CX 722 ("I would have to run a customized report trying to capture a timeframe. We might have some overlapping from previous invoices that you have already received."); CX 1338-39 ("if we are able to do this, we have no way of knowing if the data is duplicated or not. We would simply do a data dump week to week."). Seafrigo also explained early on that in "some cases it takes [carriers] 1 month+ to send us their invoice." CX 706-07. Seafrigo explained: "The only invoices that may not be included in these weekly batches would be additional charge type invoices like demurrage, per diem, exam charges, etc… We are sending this manually along with the back-up." CX 1349. Bakerly acknowledged that with "all containers that we have, the invoicing approval is getting extremely time consuming and this is delaying the whole operation," especially as Bakerly had migrated to a new system. CX 1341.

Moreover, because Bakerly refused to pay for many invoices, those invoices remained in an unpaid and billable status. Follow-up bills meant to document the extent of the arrearage would not violate the Shipping Act, nor would additional information sent by Seafrigo at Bakerly's request or to obtain payment. *See* RX 8 ("charges began accruing and multiple invoices were necessitated"); RX 14 ("In some instances, Seafrigo had to re-send invoices to Bakerly because apparently Bakerly lost track (or claimed to have lost track) of invoices that had previously been issued."). The attempt to document all of the unpaid invoices in the various formats requested by Bakerly, for example in various spreadsheets, contributed to the confusion. *See, e.g.*, CX 904 ("Seafrigo stated "All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed."). In part, the multiple bills resulted from Seafrigo's continuing attempts to collect the mounting charges that it had paid to others on behalf of Bakerly.

The Shipping Act prohibits billing an additional amount that was not disclosed and agreed to but permits passing through charges with no markup. Here, the rate proposal stated that the rates did not include demurrage and detention charges, for which the shipper and/or consignee may be liable, but also did not state that these charges would be increased or billed beyond what Seafrigo was required to pay. If Seafrigo were expecting to be paid twice for demurrage or detention, that would exceed the agreement in the rate proposal and would be unreasonable. However, the record shows that where Seafrigo found an error, it did not expect payment. RX 24, RX 32. The record does not, however, support finding under these circumstances that the practice of sending multiple invoices was unreasonable.

iv. Overcharges

Bakerly points to two examples in the record that it believes are overcharges. Brief at 42-43, 50-53; Reply at 10-11. Seafrigo argues that "Bakerly's identification of supposed errors in isolated invoices is largely inaccurate" but admits that in a few isolated instances, it overcharged Bakerly. Opposition at 14-15.

Commission precedent supports finding that overcharges violate the filed rate doctrine. In *Total Fitness*, the Commission found that "the ALJ was correct in determining that Worldlink violated section 10(d)(1) of the Act by billing Total Fitness a second time without giving credit for the earlier payment to Worldlink's agent Cargocare." *Total Fitness*, 1998 WL 940255 at *10-11. Here, if there were any overcharges, they would violate the Shipping Act as both an unreasonable practice and a violation of the filed rate doctrine. However, the record does not support finding that Seafrigo overcharged Bakerly by more than the amount for which Seafrigo already accepts responsibility.

The evidence shows instances where Seafrigo admits to an overcharge. For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55. RX 24; BReply/SFResponse/BPFF ¶ 46 ("Seafrigo admits that in this isolated instance it overcharged Bakerly by $8,879.55."). The record also shows instances where Seafrigo admits to double billing. For example, a duplicate charge of $3,659.50 was acknowledged by Seafrigo. BReply/SFResponse/BPFF ¶ 83(c)(iii); RX 32 ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited."). Regarding another containers, Seafrigo stated "[p]er diem, if any, in this case will not be billed to Bakerly." CX 868. Therefore, the record supports Bakerly's argument that overcharges occurred, but the record also supports Seafrigo's argument that these were isolated instances for which it is no longer seeking payment.

To support its allegations of overcharges, Bakerly also points to emails it sent to Seafrigo, stating that they would not pay invoices without proper substantiation and discussing evaluations that Bakerly's team made about the invoices. However, this is not persuasive evidence that the invoices were, in fact, inaccurate or that Bakerly was being overcharged. Moreover, Bakerly often raised concerns about underlying documents and other complaints in response to Seafrigo's request for payment of past due freight, as well as demurrage and detention charges. *See, e.g.*, CX 699-700 and CX 696. Often, Bakerly ended up eventually accepting responsibility for and paying a significant amount of the past due charges.

Section 41102(c) prohibits unreasonable charges when they are practices. However, here, the evidence does not support finding that overcharges were systemic or a regular practice but rather isolated instances of errors. There are over a thousand invoices and 2.7 million dollars at issue. The overcharges that were identified by the parties are a tiny fraction of the charges. Moreover, Seafrigo is not claiming that it is entitled to collect overcharges and has identified $159,849.08 for which it is not seeking payment, as well as providing credits totaling $60,000 to Bakerly. Opposition at 15-16; CX 259; CX 627.

Bakerly has established that overcharges, above what Seafrigo paid on behalf of Bakerly, are unreasonable as they would constitute a markup on passed through charges. Bakerly has not established, however, that Seafrigo's normal, customary, and continuous practice was to invoice with the expectation of being paid twice or being overpaid. Rather, the evidence establishes that the actions complained of were often the result of Bakerly's continuing requests for additional information about charges and were not part of Seafrigo's practices. Contemporaneous documents show that any overcharges were a deviation from normal procedure; were outside of Seafrigo's normal, customary, or continuous practices; and that Seafrigo is not currently seeking payment for any overcharges.

Complainant has the burden to establish a violation of the Shipping Act. Thus, Bakerly has the obligation to establish that overcharges occurred on a normal, customary, or continuous basis. The evidence does not support finding that overcharges were a practice as required by Section 41102(c) and the evidence does not show more than occasional minor mistakes in Seafrigo's billing. Bakerly would not be responsible for paying any overcharges or amounts beyond the pass-through charges described in Seafrigo's tariff. But, Bakerly has not established that Seafrigo had an unreasonable practice of overbilling, rather, the evidence establishes that Seafrigo was reasonably attempting to obtain payment for significant amounts that it had paid on Bakerly's behalf. Therefore, because Bakerly has not established a practice of overcharging, Bakerly has not met its burden to establish a violation of section 41102(c) with regard to the so-called duplicative invoices.

4. Conclusion

As explained above, Bakerly has not established a violation of the filed rate doctrine, section 41104(a)(2)(A), as it has not established that the charges were inconsistent with the negotiated rates or tariffs. In addition, Bakerly has not established a section 41102(c) violation, as it has not shown that Seafrigo's practices were unreasonable or because it was not established that the practices were normal, customary, and continuous practices of Seafrigo, in violation of section 41102(c) and 46 C.F.R. § 545.5(d). The alleged violations of sections 41104(a)(14), 41104(a)(15), and 41104(d) are dismissed because the conduct occurred prior to those sections being adopted.

Because a violation of the Shipping Act is not established, it is not necessary to reach the issue of damages. However, even if Bakerly had established a violation, it is not clear that it would be entitled to reparations.

Bakerly asserts that it was billed $2,774,923.42 in invoices for which it does not take responsibility. Brief at 36. Bakerly further asserts that it has already paid $973,227.05 demurrage and $278,172.37 for detention for which it is seeking a refund. Brief at 36. In addition, Bakerly seeks an order that Seafrigo cease and desist collection of $1,288,809.92 in demurrage and $234,714.08 in detention. Brief at 36-37. Although the math does not quite add up, Bakerly admits that is has not paid over half of what it has been billed for demurrage and detention. Moreover, Seafrigo acknowledges that it is not seeking to be reimbursed for charges that resulted from its shortcomings, which total $159,849.08. Opposition at 15-16. As explained above, the Shipping Act does not justify non-payment of demurrage and detention charges under these circumstances.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, and the findings and conclusions set forth above, it is hereby

ORDERED that Bakerly's Complaint be **DENIED**. It is

FURTHER ORDERED that Seafrigo's motion to file a sur-reply be **GRANTED**. It is

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

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

Erin M. Wirth
Chief Administrative Law Judge