FEDERAL MARITIME COMMISSION

BAKERLY, LLC, *Complainant*, v. SEAFRIGO USA, INC., *Respondent*.	Docket No. 22-17

Served: October 30, 2024

BY THE COMMISSION: Daniel B. MAFFEI, Chairman; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max M. VEKICH, Commissioners.

Order Denying Exceptions and Affirming Initial Decision

Complainant Bakerly, LLC (Bakerly), a shipper, hired Respondent Seafrigo USA, Inc. (Seafrigo), a non-vessel operating common carrier (NVOCC), to provide transportation for its imported food shipments from U.S. ports to inland warehouses, and Seafrigo provided the services under a negotiated rate arrangement (NRA). Seafrigo passed through demurrage and detention charges, including charges imposed when the port was closed due to a snowstorm. Bakerly disputes Seafrigo's interpretation of the NRA

terms and contends that Seafrigo was contractually responsible for all detention and demurrage charges, while Seafrigo contends that it is only contractually responsible for charges caused by negligence.

Bakerly alleges that Seafrigo's pass through charges and billing practices violate 46 U.S.C. §§ 41104(a)(2)(A) and 41102(c) because it was contractually responsible for all disputed charges and that even if Seafrigo was only responsible for the charges it caused—its negligence led to the charges Bakerly disputes. Bakerly seeks reparations for the charges already paid, and a cease and desist order barring Seafrigo from attempting to collect charges still outstanding.

Chief Administrative Law Judge Erin Wirth dismissed claims based on Ocean Shipping Reform Act of 2022 (OSRA 2022) amendments not in effect when the claims arose, and found that Bakerly failed to prove the remaining claims. Bakerly argues that Judge Wirth erred in denying its motion for discovery sanctions, misapplied applicable law, and entered findings contrary to the weight of the evidence. Initial Decision (I.D.) (Jan. 3, 2024).

Judge Wirth's decision is consistent with applicable law and her findings are supported by the record. The NRA documents assign responsibility to the shipper (Bakerly) for the disputed charges unless they resulted from Seafrigo's failure to exercise due diligence, and the parties' contemporaneous emails show that Bakerly acknowledged and followed those terms until pandemic-related disruptions caused demurrage and detention charges to spike in 2020 and 2021.

Seafrigo followed reasonable billing practices and exercised due diligence in arranging for pick-ups, deliveries, and inland transportation to Bakerly's warehouses. With respect to disputed charges incurred when the port was closed due to a snowstorm, Seafrigo acted reasonably by requesting the vessel operating ocean common carriers (VOCCs) to waive the charges, but was not

required under the circumstances to press the matter further by filing an action to compel the VOCCs to waive or refund those charges.

The Commission denies Bakerly's exceptions and affirms the Initial Decision in its entirety. All claims asserted in the Complaint are dismissed.

I. BACKGROUND

A. Relevant Facts

Bakerly is a U.S. company engaged in importing specialty foods from France. Seafrigo is an NVOCC licensed by the Commission. Bakerly contracted with Seafrigo for port to door transportation for imports arriving at the Ports of New York and New Jersey from 2015 to 2022. Seafrigo arranged transportation by motor carrier for Bakerly's refrigerated containers from the port to Bakerly's warehouse locations in Linden, New Jersey and Allentown, Pennsylvania. Bakerly's Allentown facility was managed by Lineage, which is not a party to the case. In February 2019, Bakerly began purchasing its inventory from its French parent company under free-on-board (FOB) terms, with Seafrigo handling approximately 1,000 FEUs annually arriving at the New York/New Jersey port.

Bakerly contracted for those services by accepting Seafrigo's quarterly rate proposals, which incorporated terms from its rules tariff and bills of lading. Seafrigo's quarterly rate proposals stated that the rates quoted did not include "other carrier-imposed charges" for which the shipper or consignee might be liable under the terms of its USA Standard Accessorial Tariff (submitted with the rate proposals), rules tariff, and bills of lading.[1] Seafrigo Tariff Rules 15 and 17 described its policies regarding free time and

[1] Complainant's Appendix filed May 8, 2023, Exhibits (CX) 226, 232 239, 245, 251.

demurrage and detention charges imposed by ocean common carriers or marine terminal operators (MTOs).

Port congestion and labor shortages caused by the global pandemic complicated the pick-up and delivery of Bakerly's imported shipments. In November 2020, Seafrigo commented on the "roller coaster" like conditions that affect "all of us" and complicate efforts to schedule and execute timely pick-ups and deliveries to inland locations and return the empty containers. CX 935-49. Problems escalated in early 2020 and deliveries were further complicated by a port closure during December 2020 and January 2021 due to a snowstorm. The ocean common carriers continued charging demurrage during the closure. Seafrigo met with the ocean common carriers and asked them to waive charges incurred when pick-ups and deliveries were impossible, but they flatly refused that request. Given the tight market and the carriers' significant leverage in that market, Seafrigo decided that further negotiations would not be fruitful and passed the charges imposed during the port closure through to Bakerly.

At the start of 2021, cascading problems with port congestion, driver shortages and warehouse space and staffing led to more delays and further difficulties picking up and returning containers within the allotted free time. Seafrigo continued its usual practice of passing through demurrage and detention charges to Bakerly. Those costs spiraled and the parties communicated frequently about conditions at the port, at Bakerly's warehouses, and how to coordinate pick-ups and deliveries to keep delays in check and hold down the escalating demurrage and detention charges.

The parties regularly traded information by email about containers awaiting pick up, scheduled deliveries, and shipments assigned or awaiting an assigned truck driver. CX 711. Seafrigo also flagged its concerns about "serious issues brewing" due to unloading delays at Bakerly's inland destination points. CX 720. For example, Seafrigo reminded Bakerly early in 2021 that the "obvious issue" is that unloading delays increase "per diem costs" and also

pointed to a related consequence. *Id.* Seafrigo stated that some truckers "including Seafrigo transport are using their own chassis to service containers that we pay for and they are now sitting in Jersey City for an undetermined period of time." *Id*. Seafrigo noted that the truckers need the chassis returned because delays cost them money. *Id*. Seafrigo also offered a proposed solution--deliver newly arrived containers to Seafrigo's freezer and unload them there and truck them to Jersey City when they are ready to receive more cargo. *Id.*

The parties corresponded by email weekly and sometimes daily about delayed arrivals, containers awaiting pick-up at the port, empty containers awaiting return, per diem charges, and myriad other details. Some exchanges included Bakerly's warehouse manager, Lineage.

Despite the parties' frequent exchanges and efforts to solve the delays, the situation did not improve and demurrage and detention charges that Seafrigo passed through to Bakerly remained high. Bakerly fell behind in making payments to reimburse Seafrigo for the demurrage and detention charges it advanced to the ocean common carriers. Seafrigo urged Bakerly to bring its accounts current and reminded Bakerly that it was advancing the charges for convenience and to avoid confusion by introducing multiple parties to the transaction. CX 709-10. But, Seafrigo cautioned that its ability to continue advancing the payments was dependent on Bakerly bringing and keeping its reimbursement payments current. *Id.* Seafrigo reminded Bakerly at one point that that it was owed $100,000 to $125,000 for demurrage charges it paid on Bakerly's shipments arriving at the Port of New York/New Jersey. *Id.*

By the end of 2021, Seafrigo decided that advancing funds to pay demurrage and detention charges on Bakerly's shipments was no longer sustainable without some compensation for delayed payments, and it began imposing a finance charge. At or around the same time, Seafrigo suggested that Bakerly begin paying the demurrage and detention charges directly to the ocean common carriers. Bakerly persuaded Seafrigo to continue advancing the

money for demurrage and detention and pass through the charges. Their relationship eventually broke down, and Bakerly filed this action seeking reparations for demurrage and detention charges it claims were never owed and an order barring Seafrigo from collecting any further charges.

B. Procedural History

Bakerly alleges that Seafrigo's billing practices and collection of pass through charges violate 46 U.S.C. §§ 41102(c) and 41104(a)(2)(A) and the Commission's interpretive rule, 46 C.F.R. § 545.5. Bakerly disputes $2,774,923.42 in demurrage and detention charges passed through by Seafrigo from December 2020 through March 2022. Bakerly seeks reparations for $973,227.05 in demurrage charges and $278,172.37 in detention charges paid to Seafrigo. The total charges in dispute were reduced by $198,551.87 when Seafrigo acknowledged responsibility for some disputed charges. I.D., 44. Bakerly also asks the Commission to order Seafrigo to cease and desist efforts to collect an additional $1,288,809.92 in demurrage and $234,714.08 in detention charges that Seafrigo claims are still outstanding. In February 2023, Judge Wirth denied Bakerly's partial motion for summary decision. After the parties concluded discovery, they exchanged briefs on the merits and submitted appendices with supporting documents.

Judge Wirth issued an Initial Decision in January 2024, finding that Bakerly failed to prove the Shipping Act claims alleged. I.D., 1-2. Judge Wirth cautioned that the findings are limited to the facts of this case and should not be considered to be minimum performance requirements or best practices endorsed by the Commission. *Id.*

The Commission issued a notice of intent to review, and Bakerly also filed timely exceptions in which it argues that the findings are not supported by the evidence and that it has proved the violations alleged. Seafrigo opposes the exceptions and urges the Commission to affirm the Initial Decision in its entirety.

II. DISCUSSION

A. Standard of Review and Burden of Proof

The Commission conducts a de novo review when exceptions are filed to an Initial Decision, can exercise "all the powers" it would have had in ruling on the motion initially, and may enter its own findings. 46 C.F.R. § 502.227(a)(6). Under the Administrative Procedure Act, the complainant has the burden of proving its allegations by a preponderance of the evidence, meaning that it must persuade the Commission that the allegations are more probable than not. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, the complainant does not prevail. *Waterman Steamship Corp. v. General Foundries, Inc*., Docket No. 93-15, 1994 WL 279898, at *9 (FMC June 13, 1994) (complainants "must carry the burden of proving every element of the" claim that respondent engaged in conduct prohibited by the Shipping Act).

B. Bakerly's Motion for Discovery Sanctions

Bakerly argues that Seafrigo should be precluded from relying on late discovery productions and sanctioned for allegedly misrepresenting to Judge Wirth that its document production was organized by file folders. Exceptions, 21-23. Judge Wirth found no basis for sanctioning Seafrigo. I.D., 35-36. Judge Wirth acknowledged that Seafrigo's original document production was not well-organized and directed it to take remedial steps and provide a table of contents for its appendix. *Id.* at 36. Judge Wirth attributed the disorganization to the sheer number of documents produced, the manner in which they were originally stored, and outsourcing the Bates-stamping and conversion process. *See id*. Judge Wirth also dismissed as insignificant the delays that Bakerly protested as sanctionable conduct, noting that one production was a day late and another was 15 days late. *Id*. Judge Wirth concluded that Seafrigo

was not trying to unduly burden Bakerly or prejudice its ability to litigate its claims and that sanctions were not warranted. *Id.*

Bakerly challenges that ruling and reasserts the grounds Judge Wirth found insufficient to prove Seafrigo engaged in sanctionable conduct. It argues that Seafrigo misrepresented the state of its discovery production in filings before Judge Wirth by falsely describing them as organized by file folder when the production consisted of zip files containing pdfs and folders labeled Images and Natives. Exceptions, 21. Seafrigo denies those assertions as baseless. Seafrigo explains the file organization and structure was the result of outsourcing the conversion of files into pdfs and the Bates stamping process. Reply, 10, 22-23. Seafrigo adds that the outsourcing was done in the ordinary course of preparing to turn over the documents, was not done for any improper or nefarious purpose, and that the production format did not prejudice Bakerly.

Seafrigo acknowledges that there were problems with its initial production but states that it complied with Judge Wirth's order and remedied the issues identified. *Id.* Seafrigo's Managing Director Alfonse Raffa states that: "Seafrigo provided documents in discovery properly labeled in folders along with supporting documents reflecting what amounts Seafrigo paid, email conversations related to same, and copies of its invoices sent to Bakerly." Raffa Decl., ¶ 166. He also states that Bakerly already had many of the documents and access to the information they contained because they consisted of communications between Bakerly and Seafrigo. *See id*., ¶ 186.

There is a precursor to moving for discovery sanctions that Bakerly appears to have skipped in this case. Parties seeking relief from alleged discovery abuses must first move to compel the opposing party to comply with outstanding discovery requests or correct deficiencies in their responses or document production. *See* 46 C.F.R. § 502.150(a). Motions to compel give the responding party an opportunity to identify and correct deficiencies before

sanctions are imposed. Bakerly does not mention taking that initial step, nor does Judge Wirth refer to a prior order which Seafrigo failed to follow. *See* I.D., 35-36; Exceptions, 21-23. That alone would be grounds for rejecting Bakerly's request to exclude Seafrigo's evidence.

Further, Bakerly does not prove grounds for sanctioning Seafrigo. The Commission's rules allow parties to "produce documents or electronically-stored information requested in discovery in the manner they are maintained "in the usual course of business." 46 C.F.R. § 502.146. In the alternative, parties can label and organize documents to correspond to individual discovery requests. *Id.* Parties are not required to produce "electronically stored information" in more than one format. *Id.* It is not clear that Seafrigo's document production was so deficient that it violated these rules. Bakerly complains about the organization but Seafrigo's explanation suggests that it turned over the documents in the order they were kept to a third party for processing which led to the issues Bakerly complains about. *See* Exceptions, 21-22. Bakerly does not claim that it was unfairly prejudiced by the disorganization or unable to access documents needed to prepare and brief its Shipping Act claims.

The Commission denies Bakerly's exceptions and affirms Judge Wirth's ruling denying its motion for discovery sanctions against Seafrigo.

C. Weight of the Evidence and Alleged Inconsistencies

Bakerly challenges Judge Wirth's findings of fact as contrary to the weight of the evidence and contends that Seafrigo's justifications for the charges are not credible. Bakerly bases its contention on alleged inconsistencies between two sets of spreadsheet summaries Seafrigo produced. Exceptions, 2-3. Seafrigo's spreadsheets sort the disputed charges into categories and total the amounts in each category. Seafrigo explains that when it

prepared the first spreadsheets (Round 1), it did not include invoices for "smaller amounts" which it understood Bakerly was not contesting. Reply, 43-44. That perception later changed and when Seafrigo prepared the second spreadsheets (Round 2), it included charges not incorporated into Round 1. *Id.* Mr. Raffa, Seafrigo's Managing Director, explains that the Round 2 spreadsheets added "numerous invoices for smaller amounts, which '[n]ot surprisingly. . . resulted in a larger number of transactions for which Bakerly was responsible'" and still owed. Raffa Decl., ¶ 168; *see also id*., ¶ 170.

When it prepared the Round 2 spreadsheets, Seafrigo combed through the invoices and traced the origins of charges previously listed as "cause unknown." It was able to link additional charges to a specific event and attribute them to a particular cause—decreasing the charges and totals attributed to unknown causes in the Round 1 spreadsheets and correspondingly increasing the totals linked to specific cause or event. *Id*., ¶ 170. As Mr. Raffa explains: "Charges not caused by Bakerly (or Seafrigo) or not falling within other categories such as terminal closures, are rightly attributed to Port Congestion. While Seafrigo had allocated certain detention and demurrage charges as cause unknown, careful analysis reveals they are properly attributable to Port Congestion." Raffa Decl., ¶ 58.

Bakerly also contends that notations on the Seafrigo spreadsheets show that it unreasonably reassigned charges previously attributed to unknown causes as resulting from port congestion. Exceptions, 2-5. Mr. Raffa explains that Bakerly is misconstruing what the notations signify. Reply, 44. For example, Mr. Raffa explains that "no" signifies there was no further follow up communication with Bakerly about those charges. *Id.* He also explains that Seafrigo used comments or notes on the Excel spreadsheets as a tool to identify and sort the charges and related data. Raffa Decl., ¶ 168; *see also id.*, ¶ 170.

Seafrigo logically explains the reasons the Round 1 and Round 2 spreadsheets differ. Those differences are not grounds for rejecting Seafrigo's documents or testimony as inherently

untrustworthy. The disputes charges were incurred over a year or more and recorded on more than 1,000 spanning invoices. It is not surprising that sorting them and tracing the origins of specific charges were monumental tasks or that totals changed as the process evolved and more data was reviewed.

The Commission denies Bakerly's exceptions asserting that Judge Wirth's findings are contrary to the weight of the evidence.

D. Section 41104(a) Claims

Bakerly alleges that Seafrigo violated the filed rate doctrine codified in 46 U.S.C. § 41104(a)(2)(A) by billing charges not compatible with its published tariff or the terms of the parties' negotiated rate arrangement. Exceptions, 24. Bakerly also alleges that Seafrigo violated § 41104(a)(14) and (15) but does not address those claims in its Exceptions beyond stating in the conclusion that it is entitled to relief based on those claims. *See* Exceptions, 48. Those provisions of § 41104(a) were added by OSRA 2022 which became effective after the pass through charges Bakerly challenges were incurred. Bakerly's § 41104(a)(14) and (15) claims were properly dismissed by Judge Wirth, because the changes to § 41104(a) made by OSRA 2022 are not retroactive.

Bakerly's § 41104(a)(2)(A) claim rests on its interpretation of the NRA governing the parties' arrangement as designating Seafrigo, not Bakerly, as the party responsible for all demurrage and detention charges incurred in connection with Bakerly's shipments, absent negligence or a dereliction of duty on Seafrigo's part. *See id.* That being the case, Bakerly argues, Seafrigo's actions in billing for and collecting those charges violated § 41104(a)(2)(A) because Seafrigo was not providing transportation services under the terms of its NRA *or* its published tariff.

Seafrigo disputes Bakerly's interpretation of the NRA as flatly contrary to the NRA's express terms in the quarterly rate proposals that Bakerly accepted. Seafrigo also contends that

Bakerly's interpretation of Seafrigo's rules tariff, its bills of lading, standard maritime industry practices, and the parties' course of dealing are erroneous. Reply, 35-36. It points to language in quarterly rate proposals and Tariff Rules 15 and 17 that expressly state that charges imposed by VOCCs, like demurrage and detention, are not included in the rates quoted and are the shippers' responsibility. *Id*. at 36-37.

Judge Wirth applied the Commission's regulations on NRAs and pass through charges and applicable case law to decide which party was responsible for the demurrage and detention charges under the NRA terms memorialized in the quarterly rate proposals, rules tariff and other documents. I.D., 47-49. Judge Wirth relied on language in the quarterly rate proposals "explicitly stat[ing] that the rates [quoted] did not include demurrage detention charges" in concluding that "the door delivery" rates Seafrigo quoted to Bakerly were not 'all-in' rates," meaning that Seafrigo did not assume overall responsibility for all "demurrage and detention" regardless of fault. *Id.* at 49. Judge Wirth also noted as telling 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." *Id.*

Judge Wirth also addressed the language in Seafrigo's Rules Tariff Rule 17.2 applicable to "door delivery" service which Bakerly argued applied since it contracted to have Seafrigo pick up its containers at the port and transport them inland by motor carrier to Bakerly's Pennsylvania and New Jersey facilities. Rule 17.2 states in part that the merchant (Seafrigo) assumes responsibility for expenses incurred in transporting the container from the port to the shipper's facility. *See id.* Bakerly argues that provision overrides language to the contrary in other documents because any ambiguity in Seafrigo's tariff must be construed against it. Exceptions, 26-28. Judge Wirth found that although Bakerly had arranged for "door delivery," Rule 17.2 was not referring to charges incurred for demurrage and detention which are more specifically addressed in other documents that define the NRA terms—like the quarterly rate

proposals, which expressly disclaim responsibility for carrier-imposed charges outside the rates quoted. *See* I.D., 47-50. Judge Wirth concluded that under the terms of the NRA, the shipper (Bakerly) was responsible for demurrage and detention so billing Bakerly for those charges was consistent with the parties' contract and not a violation of § 41104(a)(2)(A) or the Commission rules governing NRAs. *Id.* at 66.

1. Section 41104(a)(A)(2) and NRA Requirements

Section 41104(a) provides that common carriers can only provide ocean transportation services "in accordance with the rates, charges, classifications, rules and practices" in their published tariff or service contract unless an exception applies. 46 U.S.C. § 41104(a)(2)(A). The Commission's regulations carve out an exemption for licensed NVOCCs that allows them to offer transportation services under a negotiated rate arrangement as long as they comply with the conditions set forth in 46 C.F.R. §§ 532.4 and 532.2. Those conditions include allowing electronic public access to its rules tariff free of charge. *Id.* § 532.4. The NRA must also be in writing, name the parties and their representatives, and state the terms agreement prior to receipt of the cargo by the NVOCC. *Id*. § 532.2.

The shipper "is considered to have agreed" to the NRA terms if they: (1) return a signed agreement to the NVOCC; (2) send written communication (including an email) to the NVOCC accepting the terms; or (3) book a shipment after receiving the NVOCC's terms provided they include a warning that booking "constitutes acceptance of the rates and terms." *Id.* § 532.5. The NVOCC's rates and terms of service must be clearly spelled out. "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." *Id*. § 532.5(d)(2)(i). Other specifications also 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.

(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.

Id. § 532.5(d)(2)(ii)-(iv).

NVOCCs must adhere to the terms of their NRA with that particular shipper. Those terms apply even if the shipper asserts that they were not aware of or did not understand the NVOCC's rates or service terms. *See generally Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc*., Docket No. 1831(F), 1998 WL 940255, at *4-5 (FMC Dec. 10, 1998); *pet. for review denied per curiam*, 203 F.3d 54 (table), 1999 WL 1021940 (D.C. Cir. 1999). That being the case, shippers can still challenge NRA terms or NVOCC actions under an NRA as violating Shipping Act requirements and restrictions. 1998 WL 940255, at *10. In issuing the rule authorizing NVOCCs to operate under NRA, the Commission reminded shippers and NVOCCs that: "cargo moving pursuant to an NRA may properly be interpreted as service pursuant to a tariff; tariff rules will apply, as will" other Shipping Act restrictions on common carriers. Non-Vessel-Operating Common Carrier Negotiated Rate

Arrangements, 76 Fed. Reg. 11351, 11359 (Mar. 2, 2011). "An NVOCC entering into an NRA is still a common carrier." *Id.*

2. NRA Service Terms

Bakerly accepted Seafrigo's NRA terms by using its NVOCC services after it received Seafrigo's quarterly rate proposals. Those proposals expressly stated that the quoted rates did not include "other carrier-imposed charges" for which the shipper or consignee might be responsible under the terms of Seafrigo's USA Standard Accessorial Tariff (submitted with the rate proposals), rules tariff and bills of lading.[2] The USA Standard Accessorials Tariff listed the per diem charge as "[a]t cost per terminal or carrier" and specified that demurrage and detention would be "[a]t cost per carrier." *See* CX 0054; *see also* CX 1412 (Raffa Decl., ¶ 5 (Dec. 7, 2022).

Seafrigo Tariff Rule 15 described its policies under the heading "Free Time, Detention and Demurrage" and explained that Seafrigo uses equipment owned by VOCCs who charge detention if containers are not returned within the allotted free time. CX 111 (Tariff Rule 15.2). Rule 15.2 pointedly states that: "Merchant [Shipper] shall be liable to Carrier [Seafrigo] for any detention charges imposed on Carrier by VOCC as a result of Merchants [Shipper's] failure to return containers within applicable free time." *Id.* Tariff Rule 15.3 further explains that demurrage charges are imposed by the VOCC "if loaded containers are not removed from the marine terminal within" the allotted free time. It further clarifies that: "Where service is port at destination and removal of containers from the VOCCs' marine terminal is [the] responsibility of the Merchant [Shipper], Merchant [Shipper] shall be liable to Carrier [Seafrigo] for any demurrage charges imposed on Carrier [Seafrigo] by VOCC as a result of Merchants [Shipper's] failure to return containers within applicable free time." CX 111.

[2] *See* CX 226, 232, 239, 245, 251.

Seafrigo's Tariff Rule 17 covers "Use of Equipment" and repeats the information conveyed in Rule 15 about Seafrigo (identified as Carrier in the tariff) not owning or operating the equipment (i.e., chassis or containers) used to move shippers' cargo. It further explains Seafrigo's use of the equipment is "subject to requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants [Shipper's] cargo." CX 113 (Tariff Rule 17.1). Rule 17.1 further specifies that the shipper "by tendering shipments to [Seafrigo] for transportation, appoints [Seafrigo] 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." *Id.* Seafrigo's bill of lading likewise describes responsibility for charges incurred in connection with the carrier's (VOCC's) containers. CX 57 (Section 9.4). It provides that the Shipper will "undertake[] to return such containers to Carrier [VOCCC] within the time provided for in Carrier's [Shipper's] applicable tariff; otherwise, [Shipper] shall pay Carrier [VOCC] for the demurrage or detention charges applicable to the containers." *Id*.

Tariff Rule 17.1 assigns responsibility for demurrage, detention and other carrier-imposed charges to the Shipper with one notable exception. If such charges are "solely attributable to actions or omissions of [the] Carrier [Seafrigo]," they are not the Shipper's responsibility. *Id*. Seafrigo's bill of lading similarly disclaims any responsibility or liability on Seafrigo's part for "any cause or events' which it could not avoid, and which could not be prevented by the exercise of due diligence." *Id*. Section 9.4 provides that the Merchant (Bakerly) will "undertake[] to return . . . containers to [the] Carrier within the time provided for in Carrier's applicable tariff," and if that is not done, "Merchant shall pay. Carrier for the demurrage or detention charges applicable to the containers." *Id.* (Finding No. 17). It also includes a general disclaimer excusing Seafrigo from liability for "any loss or damage arising from" the Merchant's act or omission or for any "cause or events" which Seafrigo could not avoid and which could not have been avoided

through due diligence. *Id*. at 6 (Finding No. 16), and 48; CX 113 (Clause 6.5 of Bill of Lading).

Seafrigo's documents memorializing its NRA with Bakerly clearly and repeatedly convey that demurrage and detention charges are Bakerly's responsibility unless caused by a lack of due diligence on Seafrigo's part. This interpretation is also consistent with Seafrigo's Managing Director's statements on the parties' arrangement. Mr. Raffa stated that having NVOCCs assume responsibility for demurrage and detention charges "rather than having such charges be the responsibility of the shipper and/or consignee" would not be economically feasible. Raffa Decl., ¶¶ 121-122. He added that over his decades of experience in the industry, it is customary for the shipper/consignee to pay demurrage and detention charges unless the NVOCC failed to perform its duties. *Id*.

Contrary to Bakerly's arguments, a general statement in Rule 17.2 indicating that the merchant (Seafrigo) assumes the risk for expenses incurred between the port of loading and port of discharge does not override the specific provisions clearly assigning responsibility for the disputed charges to the shipper/consignee (Bakerly). The more specific provisions are controlling.

Further, Bakerly's contemporaneous emails and actions from November 2020 to February 2022 clearly show that it understood demurrage and detention charges were its responsibility and that it routinely paid those charges until they spiraled upward during the pandemic. *See* I.D., 45. Throughout the parties yearlong exchanges about invoices and amounts billed for demurrage and detention, Bakerly questioned the amounts, asked for back-up documents, requested summaries, and raised various other concerns. *See* Reply, 5-6. But Bakerly it did not argue that their contract Seafrigo was required to pay claim that all such charges were Seafrigo's responsibility under the terms of the NRA. *See id.* at 6-7. In fact, when Seafrigo notified it that was going to discontinue advancing the charges on Bakerly's behalf because it was no longer fiscally sustainable and Bakerly should instead pay them up front,

Bakerly urged Seafrigo to continue advancing the charges and gave assurances that it would work to make the arrangement more stable and fiscally sustainable. *See* Reply, 7; CX 709-10. Bakerly did not assert that Seafrigo was shirking its contractual obligation to bear the charges. *See id.* These actions support Seafrigo's claims that "Bakerly was fully aware that Seafrigo was paying steamship lines and terminals" out of its own funds so the carriers would release Bakerly's containers, and fully acquiesced in that arrangement until costs spiraled. Raffa Decl., ¶116-18.

The Commission finds that Seafrigo's NRA with Bakerly clearly imposes responsibility for demurrage and detention charges on Bakerly as the shipper unless the charges were caused by Seafrigo's lack of diligence.

3. Pass Through Billing under NRAs

Bakerly contends that even if Seafrigo's NRA allowed it to pass through demurrage and detention charges, Seafrigo did not adequately substantiate the payments due. Exceptions, 37-41. Bakerly does not identify the standard that applies or specifically how Seafrigo's invoices fell short of that standard. *See id*. Although it cites the 2018 Final Rule amending 46 C.F.R. Part 532, it does not explain how the discussion or the rule text supports its position. *See id.* (citing Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780 (July 23, 2018) [hereinafter 2018 Final Rule]. Rule 532.5 authorizes NVOCCs to collect pass through charges under an NRA but does not dictate what supporting or backup documents they must provide to the shipper. It only specifies that if a specific amount is "not included in the NRA or the rules tariff," the NVOCC can pass through "only" the charges that it "incurs, with no markup." 46 C.F.R. § 532.5(d)(2)(iv).

In issuing the 2018 Final Rule, the Commission incorporated with some "clarifications" its 2016 decision in *Gruenberg-Reisner v. Overseas Moving Specialists, Inc*., Docket No. 1947(I), 2016 WL

11942284, at *7 (FMC Oct. 7, 2016). Permitting common carriers "to recover their additional expenses" not covered by "basic freight costs" is justified because they temporarily incurred those costs in serving their shippers. *Id.* Judge Wirth applied Rule 532.5 and pass through billing requirements endorsed in *Gruenberg-Reisner*. I.D., 49-50. Bakerly contends that Judge Wirth misconstrued *Gruenberg-Reisner*, applied less stringent documentation requirements than the Commission requires, and erred in failing to "investigate" Seafrigo's charges. Exceptions, 42. It does not specifically define what documents or further substantiation Seafrigo was required to provide to bill for and collect the demurrage and detention charges—only that the invoices and spreadsheets it submitted to demand payment fell short of what is required. *See id.* Judge Wirth reviewed the 2018 Final Rule, Commission case law, and relevant case law but found no support for the more stringent requirement that Bakerly asserted must apply.

Gruenberg-Reisner did not establish specific or minimum requirements for billing and recouping pass through charges. 2016 WL 11942284, at *9. The Claimants in that case retained the NVOCC's services to ship their household goods overseas. Due to an error by the NVOCC or its agent, the goods were shipped under two Shipping Agreements—one qualified as an NRA and one did not because it was issued after receipt of Claimants' cargo. *Id.* at *7. As a result, the NVOCC could not rely on the NRA tariff publication exemption for cargo shipped under the second agreement. *Id.*

The charges evaluated in *Gruenberg-Reisner* fell into two categories. For some, there was not enough information in the record to confirm they were actually incurred and reasonable in amount. The Commission remanded the claims related to those charges to the Small Claims Officer (SCO) so the NVOCC could supplement the record. The Commission recommended the SCO request the invoices a second time, but emphasized that the invoices were not required evidence and instructed that if they could not be produced, the SCO consider circumstantial evidence, such as whether they were comparable to charges imposed by other NVOCCs. *Id*. at *10.

Gruenberg-Reisner established that: (1) NVOCCs can reasonably bill for pass through charges; (2) invoices showing no markup are sufficient to substantiate pass through charges but not required evidence: and (3) circumstantial evidence demonstrating that the charges were legitimately incurred in handling the shipper's cargo and the amounts are reasonable may be sufficient. *See generally* 2016 WL 11942284, at *5-*10. In acknowledging that circumstantial evidence may be sufficient, the Commission's relied on *C.H. Leavell & Co. v. Hellenic Lines, Ltd*., 13 F.M.C. 76, 89 (FMC 1969). *See id.*

Bakerly's arguments that Judge Wirth misinterpreted Commission precedent, including a statement in the 2018 Final Rule and the principle articulated in *Leavell*, are not supported. Bakerly argues that *Leavell* requires the common carrier to submit evidence establishing surcharges are reasonable and payable to the common carrier. Exceptions, 39. Bakerly bases that assertion on text it takes out of context from the sentences that immediately follow and divorces from the facts the Commission was addressing. Read in context, the Commission's statements make clear that a common carrier invoking an emergency clause or some other extraordinary circumstance must justify that action as reasonable, but can rely on invoices or even circumstantial evidence (such as unexpected rerouting or other events) to show that the charges are reasonable and accurate.

Leavell was decided when common carriers were restricted to providing transportation services under their published tariffs. Leavell, a construction contractor, arranged to ship construction materials for a project it was building in the Sudan aboard Hellenic's vessels in May 1967. After the ships set sail, hostilities prompted Egypt to close the Suez Canal, and Hellenic's ships were rerouted. Hellenic's published tariffs and bill of lading provided that if the cost of transiting the Suez Canal increased or Hellenic decided it was unsafe to sail its vessels through the Suez Canal, it might levy a "[s]urcharge on all freights and charges . . . without notice" payable by the cargo owners. 13 F.M.C. at 81. Hellenic's bill of

lading also reserved the right to alter its scheduled route if there was a risk of capture, delay or damage to the vessel or the cargo and rerouting would allow it to collect "reasonable extra compensation."

Leavell challenged the surcharges as unreasonable and a violation of Section 18(b) of the Shipping Act of 1916. *Id.* at 84. The Commission found that Hellenic was justified in rerouting the vessels and imposing surcharges under its tariff and bills of lading. *Id.* at 86-88. It was in that context that the Commission stated that "the fact of substantial surcharges alone is sufficient to require the carrier to come forward with some proof of their propriety." *Id.* The Commission did not *require* Hellenic to "justify its surcharge by showing its actual costs and the increase therein attributable to the lengthened voyage." *Id.* The Commission explained that demonstrating the actual costs is not the only way to show the surcharges are reasonable, and that Hellenic could rely on the increased distance and duration as evidence of reasonableness. *Id.* Hellenic was not required to produce a "dollars and cents justification for the level of its surcharge." *Id.* at 90.

In this case, the Commission finds that invoices are reliable evidence of pass through charges incurred and amounts paid by NVOCCs, but are not required evidence or the only means of substantiating those charges. NVOCCs can also rely on circumstantial evidence to validate charges incurred and amounts owed.

4. Compliance with Pass Through Billing Requirements

Under the Commission's regulations and the terms of Seafrigo's NRA, Seafrigo was authorized to bill and collect from Bakerly pass through charges without a markup unless the charges were caused by Seafrigo's lack of diligence. *See* 46 C.F.R. § 532.5. Judge Wirth found that nearly all the charges in dispute were "straight pass throughs of amounts that Seafrigo paid to third parties" with one exception. I.D., 8. The exception was finance

charges that Seafrigo began billing in late 2021 when it decided it was no longer financially sustainable to carry Bakerly's outstanding debts on its books. *Id.*

Bakerly's allegations that Seafrigo failed to adequately substantiate the pass through charges are refuted by multiple emails between the parties in which Seafrigo routinely and consistently responded to Bakerly's request for more information or assistance with verifying or tracking particular charges and attempted to supply whatever was requested. If that was not feasible or practical, Seafrigo typically suggested a substitute or offered to provide what was readily available or could be compiled. Seafrigo consistently went to some lengths to provide additional documents, summaries or spreadsheets, responsive to Bakerly's requests. While Seafrigo undoubtedly had an interest in supplying requested information to facilitate Bakerly processing and paying the outstanding charges, the substance and tone of its communications suggest a good-faith undertaking on its part to address Bakerly's questions and provide information useful in validating the charges and verifying the amounts owed.

An email exchange in early 2021 is typical of Seafrigo's response to Bakerly. Bakerly requested shipping line invoices for the demurrage and per diem charges Seafrigo billed and noted the "necessary documents" were needed for Bakerly's timely approval. CX 718. Seafrigo responded days later and stated: "I have attached back-up 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." *Id.* at 723. In another exchange, Bakerly requested the demurrage charges presented in a spreadsheet format. *Id.* at 722. Seafrigo responded that would require running a customized report "trying to capture a timeframe," cautioned that it might include "some overlapping from previous invoices that you have already received," and asked it that would be acceptable. *Id.* Bakerly accepted the suggestion and thanked Seafrigo for its help. Seafrigo did not accommodate every request Bakerly made but would explain why that was not possible or proposal an alternative.

For example, when Bakerly asked for supporting documents to be sent or sent along with summary reports, Seafrigo explained the original invoices had already been sent to Bakerly so were not available to resend with account summaries. *Id.* at 904.

These email exchanges with Bakerly seeking and Seafrigo providing back-up information, explanations or summaries continued throughout 2021. They show that Seafrigo routinely entertained Bakerly's requests and provided information or further verification. Bakerly explains in some exchanges that its accounting department needs certain information to justify payment and link the charges to particular containers or shipments. Bakerly paid pass through bills totaling over $1 million involving over 1,000 carrier invoices. Bakerly's payments are further evidence that it ultimately had the information its accounting system required to process and track the charges.

Bakerly points to a limited number of errors, alleged errors and oversights as proving that Seafrigo had a flawed billing process and systematically overcharged. During the course of the parties' dealing and, in this litigation, Seafrigo credited Bakerly's account or withdrew certain charges it misclassified or discovered were billed in error. Seafrigo credited Bakerly's account with $30,000 as "a commercial gesture" of good will but emphasized that credit was not an admission that it had erred. CX 259. Seafrigo has also acknowledged sporadic errors that led to overbilling. *See, e.g.*, Raffa Decl., ¶ 139 ("For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55."). It also acknowledges some instances of billing for duplicate charges. *Id.* ¶ 175 ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited."). Seafrigo's admission to some errors in pass through billing does not prove the claims alleged—it was entitled under terms of the NRA to pass through these charges and the fact that its process was not error-free does not prove it failed to comply with § 41104(a)(2)(A).

Given that Seafrigo depended on the VOCCs and MTOs for the invoices, and had to make sense of their billing in passing the charges along to Bakerly and the number of invoices involved, occasional errors or misstatements or misclassification of charges does not prove that Seafrigo purposefully marked up the VOCC/MTO charges, taking them outside the § 532.4 restriction on charges for which specific amounts are not identified in the NRA or the rules tariff. Exceptions, 45-48.

The Commission finds that Bakerly has not proved that Seafrigo purposefully or routinely violated the terms of its NRA by marking up or misclassifying VOCC or MTO charges as Bakerly's responsibility in violation of the Shipping Act.

5. Bakerly Allegations of Negligence

Bakerly argues even if the NRA assigns it responsibility for all charges not caused by Seafrigo's negligence, Seafrigo was not diligent in arranging pick-ups, deliveries and transportation between the port and Bakerly's inland facilities. Bakerly points in particular to Seafrigo's decision to pay and pass through charges incurred when the Port of New York/New Jersey was closed due to a snowstorm and Seafrigo's alleged problems with hiring enough drivers to timely pick up and deliver shipments to Bakerly's inland warehouses.

Judge Wirth measured Seafrigo's performance by considering whether it met its obligation "not to impose avoidable charges." I.D., 50. Measured against that standard, Judge Wirth found that Seafrigo exercised due diligence made a sound decision to pay the charges incurred during the port closure because its efforts to get the charges waived were not successful and refusing to pay would have resulted in more charges accruing. *Id.* Judge Wirth concluded that "Seafrigo made a reasonable attempt to contest the charges," and that was sufficient to meet its obligation not to impose avoidable charges." *Id.* at 51. Bakerly did not assert, and Judge Wirth did not explore, whether Seafrigo had an obligation to further

contest the charges by filing an action against the VOCCs or MTOs. *Id.*

The standard that Judge Wirth applied is consistent with the terms stated in Seafrigo's bill of lading which provides that Seafrigo is not responsible for charges incurred as the result of any "causes or events" that Seafrigo could not avoid and which it could not have prevented through the exercise of due diligence. *Id.* at 6 (Finding No. 16); CX 57. Bakerly does not argue that Judge Wirth applied the wrong standard or cite to a different standard that should have been applied. It has the burden of proving that Seafrigo did not use due diligence and relies principally on the Commission interpretive rule's incentive principle in arguing its position. Seafrigo's decision to pay rather than refusing and letting charges continue to accrue is consistent with the incentive principle. Seafrigo could not pick up the containers without paying the charges first. Outstanding charges are generally due before cargo is released because common carriers waive their lien against the cargo for unpaid charges if they release the cargo without providing notice in their tariff or otherwise of a continuing lien. *Capitol Transportation, Inc. v. U.S.*, 612 F. Supp. 2d 1312, 1324 (1st Cir. 1979).

Seafrigo's Managing Director explained that despite a provision in Maher Terminal's Marine Schedule stating that collecting demurrage for the ocean common carrier is optional, Maher refused to release Bakerly's containers unless the charges were paid. Raffa Decl., ¶ 141. According to Mr. Raffa, Maher always required payment before it would release Bakerly's containers, and had Seafrigo refused to pay, the containers would have remained at the port, accruing further charges. *Id.,* ¶¶ 104, 109, 111, 179.

Seafrigo's Jerome Lorrain explains that he and Mr. Raffa met separately with the VOCCs primarily engaged to carry Bakerly's shipments and asked them to waive charges incurred while the port was closed. He reports that the VOCCs "flatly refused" to waive the charges and given their significant leverage in

a tight shipping market, they were not likely to relent. Lorrain Decl, ¶¶ 14-15. Seafrigo also "kept Bakerly informed of its efforts in this regard." *Id.* ¶ 16. Under the circumstances, paying the charges to promptly pick up Bakerly's containers was a reasonable decision, consistent with due diligence, and with the incentive principle in that it kept Bakerly's shipments moving toward their destination.

That brings us to the question of whether paying the charges and passing them through to Bakerly was all that due diligence required, or whether Seafrigo had a further obligation to challenge the VOCCs' refusal to waive the charges and file a claim to recoup the money it paid out or an obligation to assume the obligation itself and forgo collecting the money from Bakerly. Judge Wirth found that Seafrigo had no obligation to file a legal claim against the VOCCs to recoup the money and that imposing such a duty would be contrary to the incentive principle. I.D., 51. Judge Wirth reasoned that NVOCCs would be far less likely to advance payments to keep cargo moving if forced to assume the risk that they would not be paid by the shipper or obligated to file a complaint against the VOCC to recoup the money they paid out. *Id.* Judge Wirth noted that although OSRA 2022 does not apply to this case because the claims predate its June 2022 effective date, finding no obligation to file a complaint on the part of NVOCCs is consistent with OSRA 2022's safe harbor provision insulating NVOCCs from responsibility for improper invoices issued by VOCCs. *Id.* (citing 46 U.S.C. § 41104(e)).

In deciding whether to pay the charges and how to handle reimbursement from Bakerly, Seafrigo was confronted with several options: (1) refuse to pay legally questionable charges and contest them while charges continue to accrue which carried additional risks, i.e. that it might not prevail and could be held accountable for the charges that accrued while it battled the VOCCs; (2) pay legally questionable charges, forgo any pass through to the shipper (Bakerly) and seek a refund from the VOCCs; (3) pay the charges to secure the containers' release, pass them through to Bakerly while also pursuing a claim against the VOCCs and pay any charges

refunded to Bakerly upon receipt; or (4) pay legally questionable charges and pass them through to Bakerly but take no further action against the VOCCs to recoup the charges. Seafrigo chose to pay the charges after attempts to obtain a waiver from the VOCCs failed, and pass them through to Bakerly without filing a legal action to recoup them from the VOCCs.

Bakerly does not point to any provision of the Shipping Act, the Commission's rules, or the NRA that required Seafrigo to bring a claim against the VOCCs to recoup charges incurred while the port was closed. *See* Exceptions, 45-46. Seafrigo denies any such obligation. *See* Raffa Decl., ¶ 104; Lorrain Decl., ¶ 17.

The Shipping Act requires NVOCCs to establish and follow reasonable and just practices in assessing charges, but does not impose a specific duty to refuse to pay or contest unfair or legally questionable charges. *See* 46 U.S.C. § 41102(c). Commission regulations provide a non-exclusive list of services that NVOCCs may provide to shippers: (1) purchasing transportation services from a common carrier and offering them for resale; (2) paying port-to-port or multimodal transportation charges; (3) arranging for inland transportation and paying for inland freight charges on through transportation movements; (4) "paying lawful compensation ot ocean freight forwarders"; and (5) "collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf." 46 C.F.R. § 515.2(k).

Several authorized NVOCC services relate to retaining and paying for services from VOCCs or others. The functions that most directly relate to Seafrigo paying or contesting VOCC charges are collecting "freight monies from shippers" and remitting those payments to the VOCC. *See id*. Here, Seafrigo reversed the sequence and paid the VOCC charges, then sought reimbursement from Bakerly. Beyond authorizing NVOCCs to pay freight charges, § 515.2(k) does not provide further guidance on obligations the NVOCC owes the VOCC in carrying out that duty. The rules governing NRAs limit pass through charges "for which a specific

amount is not included in the NRA or the rules tariff" to "charges the NVOCC incurs, with no markup" but do not address contesting legally questionable charges. *See id*. § 532.5.

Commission regulations and case law make clear that NVOCCs have responsibilities to shippers and the ocean common carriers whose services they engage on behalf of their customers. Generally, those obligations are not in conflict, but there is sometimes tension between the two. NVOCCs have a responsibility to pay freight and other charges lawfully owed to ocean common carriers for services provided on behalf of the NVOCC's shippers. 46 C.F.R. § 515.2(k)(11). If an NVOCC refuses to pay legitimate charges, it may risk liability under the Shipping Act for failing to perform its obligations to the VOCC and placing its shipper's cargo at risk. *See generally Capitol Transportation*, 612 F.2d at 1322.

Here, Bakerly agreed to have Seafrigo act as its agent in acquiring and using chassis and containers and handling related charges under the terms of the NRA. Seafrigo's Tariff Rule 17.1 specifies that the shipper "by tendering shipments to [Seafrigo] for transportation, appoints [Seafrigo] 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." CX 113 (Tariff Rule 17.1.

While NVOCC practices that violate § 41102(c) or other Shipping Act prohibitions likely fall outside the bounds of due diligence, there is not a bright line test. In those cases, due diligence is judged by considering all the relevant circumstances, such as the duties the NVOCC was retained to perform, conditions impeding its ability to provide those services, available options or decision points, and whether it exercised reasonable judgment in reaching or carrying out those decisions. Its actions should be assessed based on what it knew or should have known at the time, not with the benefit of hindsight. They must also be judged based on the law applicable at the time.

Several factors are relevant in assessing whether due diligence required Seafrigo to bring a claim against the VOCCs. The services it contracted to provide to Bakerly and the nature of NVOCCs services generally weigh against such a finding. NVOCC services are generally more closely associated with the cargo itself—handling it, arranging transportation, and otherwise ensuring that it is responsibly moved to the port or its destination. Bringing a legal action against a VOCC (or another entity) is in a different category altogether and not directly related to NVOCCs' routine cargo handling/transportation duties.

Depending on the size and sophistication of the NVOCC and the type of claim, pursuing legal action against a VOCC to dispute questionable charges might require hiring legal counsel to draft pleadings, engage in discovery, and other activities necessary to prove the claim and obtain relief. There are certainly instances where the task would be less onerous than that depending on nature of the claim and total amount at issue. Here, for example, Seafrigo conceivably could have challenged charges under the $50,000 threshold for the Commission's small claims process and spent less time and resources pursuing that claim. *See* 46 C.F.R. §§ 502.301-502.305. But it is also conceivable that the VOCCs would not have consented to the small claims process and would have vigorously defended the legitimacy of their charges in costly, resource-intensive, and lengthy litigation.

Second, NVOCCs are not obligated to pursue claims that are not legally or factually supportable. In this instance, a claim against the VOCCs for charging demurrage and detention during an unexpected port closure caused by a snowstorm was legally supportable. *See* 46 U.S.C. § 41102(c); 46 C.F.R. § 545.5(c). In fact, charging for demurrage and detention during an unanticipated port closure is one of the examples the Commission cited in issuing the Interpretive Rule as a situation outside shippers' control where charges are likely to be found unreasonable under § 41102(c). Interpretative Rule on Demurrage and Detention under the Shipping Act, 85 Fed. Reg. 29638, 29653 (May 18, 2020). That is not to say

Seafrigo was certain to prevail in an action against the VOCCs and it still would have to commit time and resources to proving the charges were unreasonable and rebutting the VOCCs defenses.

A third factor is the shippers' ability to pursue a claim against the charging VOCC. It appears likely that Bakerly had that capability here as an established importer bringing in regular refrigerated container shipments from Europe under a service arrangement with Seafrigo. Bakerly's staff engaged with Seafrigo on a weekly basis about the charges and Seafrigo forwarded invoice copies and summaries of charges paid or due. Bakerly staff regularly quizzed Seafrigo about particular charges or amounts, and its staff was clearly familiar with the charges regularly incurred. All of which suggests that Bakerly was equally capable of bringing a claim against the VOCCs that refused to waive demurrage and detention charges imposed during the port closure.

Here, the relevant factors in assessing whether Seafrigo had a duty to challenge charges VOCCs imposed while the port was closed due to a snowstorm weigh against finding any such obligation. Filing a claim against VOCCs for charges incurred during an unscheduled port closure is not the type of service Seafrigo contracted to provide Bakerly. Further, Bakerly could have brought a claim against the VOCCs on its own. While there was a legal and factual basis for challenging charges levied during the snowstorm-related port closure, that does not outweigh the other relevant considerations or lead to the conclusion that Seafrigo had duty to pursue that claim in this instance. Bakerly had access (through Seafrigo) to supporting evidence and was equally capable of assessing whether the charges appeared compliant with Shipping Act prohibitions against unreasonable practices. All of which points to the conclusion that Seafrigo did not have an obligation to bring a claim against the VOCCs when they refused to waive the snowstorm-related charges.

The Commission finds that due diligence did not require Seafrigo bring a claim against the VOCCs to compel them to cancel

or refund charges imposed during the snowstorm-related port closure. Because Bakerly was responsible for those charges under the NRA, Seafrigo did not violate § 41104(a) in passing them through to Bakerly.

6. Alleged Mishandling of Container Pick-ups and Returns

Bakerly argues that responsibility for all the disputed charges shifted to Seafrigo because it did not diligently perform the NVOCC services it contracted to provide. It asserts that Seafrigo's inefficiencies in ensuring sufficient coverage by truck drivers and related delays picking up and returning causing the disputed charges.

Seafrigo disputes that assertion and contends that it was Bakerly's chronic management problems at its warehouses that caused the delays and increased charges. It asserts that Bakerly is pointing to "isolated, misleading instances involving [Seafrigo] truckers" as a way of diverting attention away from systemic and chronic problems at Bakerly's warehouses—the actual cause of the disputed charges. Raffa Decl., ¶ 22. Seafrigo contends that it was Bakerly's inability to resolve the problems that plagued its warehouses and unloading operations that prevented on-time pick-ups and deliveries and kept containers out of circulation past the allotted free time. *Id*. According to its Managing Director, Mr. Raffa, "Bakerly chose warehouses that not only were unable to handle the volume of shipments required by Bakerly but also unable to provide reasonable delivery appointment times in order for Seafrigo drivers to comply with DOT regulations." *Id.* ¶ 26.

Seafrigo points to a string of contemporaneous emails about the chronic inefficiencies at Bakerly warehouses and describes how they interfered with returning containers on time. Mr. Raffa describes long delays in unloading and truck turn times (even with scheduled appointments) caused by inadequate staffing or insufficient warehouse space. Raffa Decl., ¶¶ 16-42. Mr. Raffa

describes instances where drivers waited hours for Bakerly's warehouse manager to unload a container only to be forced to leave and come back again another day. *See id.* He also points out that Bakerly's arguments faulting Seafrigo and its drivers fail to take into account Department of Transportation restrictions on the hours truck drivers can lawfully work before taking mandatory rest breaks. *Id*. ¶ 23. Seafrigo acknowledges that its pool of drivers was strained by global conditions and labor shortages caused by the pandemic, but maintains that those issues were greatly exacerbated by Bakerly's inefficiencies which taxed its pool of available drivers still further. *Id.* ¶¶ 39-42.

Finally, Bakerly points to disparities between Seafrigo and CEVA's performances as evidence that Seafrigo's performance was substandard. *See* Exceptions, 19-20. Bakerly does not identify CEVA or explain its role, but Mr. Raffa's supplies that information in his declaration. *See* Raffa Decl., ¶¶ 132, 158, 160. Mr. Raffa explains that CMA CGM owns CEVA—which gave CEVA "operational priority"—an advantage that Seafrigo did not have. *Id*. As Mr. Raffa explains, CEVA's performance in handling some cargo moves is not a fair comparison given its relationship with CMA CGM and the advantages that relationship conferred. *Id*. ¶¶ 158, 160. Those are valid points, and this is not a fair comparison.

The Commission finds that Bakerly has not proved a lack of diligence on Seafrigo's part in providing the NVOCC services it contracted to perform under the NRA. Consequently, responsibility for the disputed charges did not shift from Bakerly to Seafrigo under the "due diligence" clause in the NRA.

E. Section 41102(c) Claim Based on Billing Practices

Judge Wirth found that Bakerly failed to prove that Seafrigo's billing practices are unreasonable under section 41102(c). I.D., 66. Bakerly challenges that determination as contrary to the weight of the evidence. Exceptions, 41-52. It argues that the evidence shows Seafrigo's billing practices were confusing

and that errors were made, which confounded Bakerly's ability to trace and verify the amounts owed.

1. Elements Required to Prove a Section 41102(c) Claim

Section 41102(c) requires common carriers "not fail to establish, observe, and enforce just and reasonable regulations and practices" related to "receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Proving a violation requires the Complainant to show: (1) Respondent is a common carrier; (2) "claimed acts or omissions" that were "normal, customary, and continuous;" (3) which relate to "receiving, handling, storing or delivering property;" (4) are unjust or unreasonable; and (5) proximately caused Complainant's alleged loss. 46 C.F.R. § 545.4. The first three elements of Bakerly's § 41102(c) claim are not in dispute. Seafrigo is a common carrier and the claimed acts and omissions occurred while it was handling and delivering Bakerly's imported cargo. So, the discussion focuses on whether Seafrigo established and followed reasonable practices in billing pass through charges for demurrage and detention and, if not, whether Bakerly was harmed as a result.

2. Demurrage and Detention Reasonableness Standards

The Commission determines whether a common carriers' demurrage and detention policies for handling containerized cargo are unreasonable by applying the incentive principle explained in Rule 545.5(c) which means that it "consider[s] the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c). Factors considering in making that assessment include: (1) whether "demurrage or free time" is related "to cargo availability for retrieval;" (2) whether detention fees apply to periods when empty containers cannot be returned; (3) when and

how notice that cargo is available for retrieval is provided; and (4) whether the policies serve the intended purposes if cargo is held or detained for government inspection. *Id.*

The Commission also considers the reasonableness of common carriers' demurrage and detention policies in a broader context by evaluating the policies' accessibility and clarity, available dispute resolution procedures, information about points of contact, timeframes, and "corroboration requirements." *Id*. § 545.5(d). It may also factor into its reasonableness analysis whether policy terms are clearly defined and whether the definitions differ from standard usage in other contexts. *Id.* § 545.5(e).

Bakerly's arguments related to OSRA 2022 and whether it endorsed or adopted the concepts found in Rule 545.5 are irrelevant. *See* Exceptions, 23. Rule 545.5 became effective in May 2020 before Seafrigo billed for the disputed charges, so it applies in determining whether Seafrigo's billing policies were unreasonable or unjust under § 41102(c). The regulations governing demurrage and detention billing requirements issued in February 2024, 46 C.F.R. §§ 541.1-541.8, do not apply to the disputed charges. Like the OSRA 2022 billing requirements it implements set forth in 46 U.S.C. § 41104(a)(15) and (d), Rule 541 became effective after the disputed charges were incurred and is not retroactive.

3. Seafrigo's General Billing Practices

Bakerly challenges Seafrigo's billing process for pass through charges and collection of those charges as unreasonable and unjust under § 41102(c). To prevail on that claim, it must prove that Seafrigo's alleged acts or omissions in billing for pass through charges were unreasonable or unjust and were its normal, customary and continuous practice. *Crocus Investments, LLC v. Fed. Mar. Comm'n*, No. 21-1199, 2022 WL 3012275, at *4 (D.C. Cir. July 29, 2022). Judge Wirth found the evidence insufficient to prove Bakerly's allegations because it failed to establish that the practices it complained about, such as overcharges and charges appearing on

more than one billing statement, were systemic or Seafrigo's regular practices. I.D., 47. Rather, the evidence indicated that they were sporadic or irregular occurrences. *Id.*

Judge Wirth found that Bakerly's "strongest argument" in support of its § 41102(c) claim may be its assertion that: "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly for demurrage and detention [which] implies that Seafrigo had a normal, customary, and continuous practice of, essentially, sloppy recordkeeping." *Id.* Judge Wirth found that argument was not substantiated because the sporadic or isolated errors that Bakerly pointed to did not prove they were Seafrigo's customary billing practice. *See id.* at 66.

Bakerly points to the same evidence that Judge Wirth found insufficient in arguing that the Commission should reverse the Initial Decision. Judge Wirth's assessment of the evidence Bakerly relies upon is accurate. Exceptions, 34-43. The evidence of select instances of errors and mix-ups that Bakerly relies on do not match or prove its allegation that Seafrigo "had a practice of issuing duplicative invoices for detention, demurrage, and per diem and the practice was unjust and unreasonable." *Id.* at 35. Bakerly points to some instances of overcharging, carrier charges being repeated on a second billing statement, and similar mix-ups over the course of a year or longer. *Id.* at 34-43.

The inadequacy of these incidents in proving Seafrigo violated 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.5(d) is particularly evident when viewed in the context of the sheer number of invoices Bakerly is contesting and the amounts billed, collected or still outstanding. Bakerly is contesting over one thousand invoices totaling $2.7 million for pass through charges Seafrigo billed from December 2020 through the end of 2021. I.D., 65. But the admitted or alleged overcharges are only a small part of that total. Further, Seafrigo is not seeking payment for $159,849.08 in overcharges it has identified or conceded were made in error. Seafrigo's willingness to acknowledge when it made errors speaks

in its favor and counters allegations that overcharging and purposely or carelessly sending inaccurate bills were its standard practices. *Id.*

Seafrigo's reliance on the VOCCs or MTOs for accurate billing statements is also relevant. Mr. Raffa states that Seafrigo provided Bakerly with the invoices/information that it received from the billing carriers, but obviously could not provide information they did not supply. Raffa Decl., ¶ 84. The detailed billing requirements introduced by OSRA 2022 were not yet in effect. *See id.* ¶¶ 81, 115. In the pre-OSRA 2022 era, Mr. Raffa states, carriers "frequently failed to provide detailed invoices"—one of the factors which actually led to the changes effected by OSRA 2022. *Id*. ¶ 138. Mr. Raffa also explains that issuing multiple invoices for the same container was generally due to a container remaining at the port or terminal across for a longer period or billing cycles and in that respect, was a function of how the ocean common carrier billed, not a deliberate choice or strategy on Seafrigo's part. *Id*. ¶¶ 74, 99.

When Seafrigo's errors and alleged errors are viewed in the broader context of the pandemic-related unpredictable conditions it and other NVOCCs were operating under in 2020-2021, they have even less evidentiary weight. Seafrigo and Bakerly were dealing with a tidal wave of challenging conditions. As the parties chronicle in their email exchanges, they were dealing on a weekly basis with problems finding drivers to pick up containers at the port, labor shortages at Bakerly's warehouses which delayed unloading and container returns, unpredictable schedules, and other conditions outside their control. All of those conditions contributed to the unpredictability that both parties had to contend with while also sorting out charges imposed by VOCCs and MTOs on earlier shipments.

4. Seafrigo's Practices for Handling Disputed Charges

Bakerly's challenge to the reasonableness of Seafrigo's practice for handling questionable or potentially unlawful charges

imposed by ocean common carriers is addressed above in Part D-5. For reasons already discussed, Seafrigo's attempt to have the VOCCs waive charges imposed while the port was closed and inaccessible for pick-ups or drop offs met its obligation to act with due diligence to protect Bakerly's interests and fulfill its duties as an intermediary between Bakerly and the VOCCs that transported its containers to the port.

The Commission finds that Bakerly has not proved that Seafrigo's customary billing practices for pass through charges were unreasonable or unjust under 46 U.S.C. § 41102(c) or 46 C.F.R. § 545.5.

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Complainant's Exceptions to the Initial Decision;

(2) **DENIES** Complainant's Motion for Discovery Sanctions;

(3) **AFFIRMS** the Initial Decision in its entirety; and

(4) **DISMISSES** with prejudice all claims asserted in the Complaint.

By the Commission.

David Eng
Secretary