FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MSRF, INC., *Complainant* v. HMM CO. LTD., *Respondent*.	**DOCKET NO. 22-20**

Served: November 22, 2023

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

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

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

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

[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.

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

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

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

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[2] The parties' filings are abbreviated as follows: Complainant's Motion for Summary Decision accepted as the initial brief ("Brief"), Complainant's proposed findings of fact ("CPFF"), Respondent's reply brief ("Opposition"), Respondent's proposed findings of fact ("RPFF"), Respondent's response to Complainant's proposed findings of fact ("RRPFF"), Complainant's reply brief ("Reply Brief"), Complainant's response to Respondent's proposed findings of fact ("CRPFF"), and Respondent's sur-reply brief ("Sur-Reply").

[3] *Compare* Brief at 1, 2, and 5 (alleging HMM violated 46 U.S.C. §§ 41102(c) and 41104(a)(2), (9), and (10)), with Reply Brief at 3, 6-8 (no discussion of § 41104(a)(9) allegation); and, Complainant's Response to Respondent's Motion to Strike at 3 (alternately claiming HMM violated 46 U.S.C. §§ 41102(c) and 41104(a)(2) and (10), and then that HMM violated §§ 41102(c) and 41104(a) and (a)(1), and no discussion of a § 411014(a)(9) violation).

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

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

B. Procedural History

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

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

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

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

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

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

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

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

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

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

C. Arguments of the Parties

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

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

D. Motions for Confidential Treatment

On December 12, 2022, the parties filed a joint motion for confidentiality and protective order. In the joint motion, the parties define confidential information and state that materials designated as such "shall have a bona fide need for confidential treatment of information including trade secret or other confidential research, development, or commercial information pursuant to 46 C.F.R. § 502.141(j)(1)(vii)." Protective Order Motion at 3. The parties agreed to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Evidence

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

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

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

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

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

II. FINDINGS OF FACT ("FOF")

A. Entities

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

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

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

B. 2021-2022 Contract Year

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

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

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

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

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

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

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

C. Initial 2021-2022 HMM Service Contract

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

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

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

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

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

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

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

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

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

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

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

RX 2 at ¶ 5.

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

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

RX 217.

21. Tariff Code HDMU-047 Rule No. 208-A, paragraph 7(a), provides:

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

RX 2-3 at ¶ 7(a).

22. In the event that the MQC was not met, the Parties agreed to a specific mechanism whereby MSRF could either adjust the MQC to reflect those containers actually shipped or, if MSRF took no action, the term of the Service Contract would be extended to give MSRF an opportunity to meet the MQC. RPFF at ¶ 38; CRPFF at ¶ 38; RX 3 at ¶ 7(b).

23. Tariff Code HDMU-047 Rule No. 208-A, paragraph 7(b), details:

> (b) In the event that the Minimum Quantity Commitment set forth in Appendix is not fulfilled due to Carriers inability to supply space or container equipment for causes not covered in Article 10, on any particular vessel of the Carrier after giving fourteen (14) days booking notice then, upon the Shippers written request within seven (7) working days of such occurrence together with essential supporting documents which are later confirmed to be accurate, shipper may elect one of the following options.
>
> (i) The Carrier will adjust the contractual Minimum Quantity Commitment set forth in Appendix by the actual quantity of cargo tendered but not carried on the Carriers vessel or on a pro-rate basis, whichever lower. Such pro-rate basis shall be defined as the Minimum Quantity Commitment divided by the Carriers total number of sailings during the term of the Contract.
>
> (ii) If the Shipper does not elect to reconcile the shortage by reducing the minimum quantity commitment set forth in Appendix with aforementioned method, then such shortage will be reconciled upon expiration of the contract by extending the term of the Contract by {Contract Duration times (x) number of TEUs that was tendered to Carrier per Article (7)(a) herein but failed to be carried divides (/) Total MQC}. The extension of Contract term must be filed in writing on or before the expiration date with FMC as per 46 CFR 530.8. In no case will the extension exceed ten (10) consecutive weeks.

RX 2-3 at ¶ 7 (spelling as in original); *see also* RPFF at ¶ 37; CRPFF at ¶ 37.

24. Tariff Code HDMU-047 Rule No. 208-A, paragraph 7, further provides:

> (c) Except as may be otherwise explicitly stated in this Contract, there is no guarantee by Carrier of service to or from any port or point within the geographic scope of this Contract. If during the term of this Contract, Carrier changes the number or size of vessels, port rotation, routings or any other aspect(s) of its services within the geographic scope of this Contract, such change shall not be considered a breach of this Contract. In addition, if at any time during the term of the Contract, vessel or intermodal service is no longer provided to or from any port or point for which a rate is provided in this contract, that rate shall no longer be

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

RX 3 at ¶ 7.

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

> (a) If the Shipper fails to tender the Minimum Quantity Commitment specified in Appendix to this Contract, and per the Article (7)(b) the Carrier shall invoice the Shipper and the Shipper agrees to pay deficit charges on the difference between the quantity of cargo actually shipped and the Minimum Quantity Commitment at the rate of U.S. $250 per FEU. The total amounts due hereunder shall be paid directly to the Carrier within thirty (30) days following notification by the Carrier.
>
> (b) If the Carrier fails to fulfill its service commitment in clause hereof during the Contract term, the Shippers remedy options shall be either (1) reduction of the Minimum Quantity Commitment by the quantity of cargo tendered but not carried and/or (2) extension of the Contract terms as specified in Clause (7)(b). The Carrier shall not be liable to the Shipper for any direct, consequential or other damages under this Contract, except as set forth in clause 7 nor shall any liabilities or obligations of the Shipper to the Carrier be subject to any offset or credit by virtue of any moneys which the Shipper may claim are due him under this Contract or otherwise.

RX 3-4 at ¶ 8.

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

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

RX 4-5 at ¶ 13.

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

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

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

RX 6 at ¶ 18.

D. 2021-2022 Service Contract Amendments & Performance

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

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

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

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

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

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

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

35. On April 18, 2022, HMM representative Laura Trometer emailed Ms. Mirasol, writing "Contracted MQC reduced to activity at 9 FEU. Please review and reply with your approval in order to close out this contract." RX 389.

36. Service Contract Amendment 12, signed by MSRF and HMM and which became effective April 13, 2022, revised the MQC downward. RX 220; RX 162 (Amend. 12); *see also* CRPFF at ¶ 32; RX 220 (Marisol Dep., "Q: And just looking at the first page, the date of this amendment is April 13, 2022, right? A: Yes. Q: So that's just shortly before the expiration of the Service Contract, right? A: Correct. Q: And this reduction in MQC would be consistent with the language that we reviewed in paragraph 7 of the tariff, right? . . . A: Yes.").

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

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

RX 388.

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

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

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

RX 386 (punctuation as in original).

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

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

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

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

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

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

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

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

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

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

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

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

RX 220.

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

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

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

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

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

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

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

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

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

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

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

> We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple breach of contract claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support a claim, that the matter is appropriately before the agency.

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

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

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

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

> The [service] contract governs the parties' relationship for transportation of cargo by water between ports or points in Asia and ports or points in the United States (2012 Service Contract Annex B), transportation for which Hapag-Lloyd would operate as a common carrier and Global Link a shipper within the meaning of the Act. Some of the alleged violations alleged in the Complaint "involve elements peculiar to the Shipping Act." Therefore, the Commission has jurisdiction over . . . the Complaint alleging that Hapag-Lloyd, a common carrier, violated sections 41104(10), 41104(3), and 41102(c) of the Shipping Act.

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

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

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

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

2. Burden of Proof

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

3. Remaining Claims

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

B. Discussion

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

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

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

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

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

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

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

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

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

a. Common Carrier

The Shipping Act defines a common carrier to be a person that:

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

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

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

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

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

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

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

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

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

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

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

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

c. Reasonableness

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

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

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

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

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

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

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

In another case, the Commission provided the following explanation:

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Common Carrier

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46 U.S.C. § 41104(a)(9).

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

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

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

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

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

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

46 U.S.C. § 41104(a)(10).

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

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

a. Common Carrier

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

b. Unreasonably Refuse to Deal or Negotiate

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

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

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

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

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

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

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

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

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

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[10] MSRF did not plead a violation of § 41104(a)(3) – and the facts here do not warrant it – which, prior to the OSRA 2022 amendments, provided that "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(a)(3). OSRA 2022 amended § 41104(a)(3) to state that a common carrier shall not "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods."

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

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

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

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

IV. ORDER

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

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

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

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

Linda S. Harris Crovella
Administrative Law Judge