

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT ZIM INTEGRATED SHIPPING SERVICES LTD.'S
REPLY BRIEF, PROPOSED FINDINGS OF FACT, REPLY TO COMPLAINANT'S
PROPOSED FINDINGS OF FACT, AND APPENDIX**

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PROPOSED FINDINGS OF FACT, AND APPENDIX**

Respondent ZIM Integrated Shipping Services Ltd. ("ZIM"), through counsel, hereby submits its reply brief, proposed findings of fact ("RPFF"), reply to Complainant's proposed findings of fact ("CPFF"), and appendix ("RX").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complainant Samsung Electronics America, Inc. ("Samsung") seeks to shift blame for problems caused in large part by its own acts or omissions to respondent ZIM, and to characterize those problems as violations of the U.S. Shipping Act of 1984, as amended ("Shipping Act"). In so doing, Samsung seeks to recover the entirety of certain categories of charges it paid to ZIM and third parties, even though the evidence demonstrates that Samsung's acts and omissions and those of its agents contributed to these charges being incurred.

In a nutshell, Samsung's argument is "ZIM did some things we think it shouldn't have and/or failed to do some things we think it should have, so we're entitled to every nickel we paid

in demurrage, detention, rail storage, and other charges over a three-year period.” In making this brazen contention, Samsung is not only wrong with respect to ZIM’s alleged shortcomings, but it also utterly fails to demonstrate any causation between the alleged conduct of ZIM and the amounts paid by Samsung. By seeking to recover all of the charges it paid – even those for which it admits it is liable – Samsung has failed to prove ZIM was the proximate cause of the alleged damages and to prove the alleged damages with reasonable certainty as required by the Shipping Act.

Samsung’s arguments with respect to retaliation, unreasonable refusal to deal, and invoicing deficiencies are also without merit.

Two common themes emerge in Samsung’s brief and proposed findings of fact. First, the factual record and legal precedent are twisted and stretched beyond the breaking point. Simply put, documents, testimony, and legal precedent often do not say what Samsung claims they say. This will become readily apparent from a review of ZIM’s reply to Samsung’s Proposed Findings of Fact. The Presiding Officer should use extreme caution in relying on Samsung’s characterization of testimony, documentary evidence, and legal precedent.

Second, Samsung uniformly places all blame for any problem on someone else. For example, Samsung sent ZIM a Notice of Demand for Action dated September 23, 2022, asserting claims similar to those at issue in this proceeding. On October 5, 2022, within the time period for a reply established by the Notice of Demand For Action, ZIM sent an email and letter to Samsung, requesting additional information about the claims. RX-0016 through RX-0022. Samsung’s “response” was the filing of this proceeding. ZIM’s request for additional information was produced by Samsung in discovery, which indicates that it was received by Samsung. Yet, Mr. Rapske of Samsung did not recall responding to ZIM’s request (CX_02204,

32:11-21), and no response was ever received by ZIM or produced by Samsung, despite ZIM specifically requesting a copy of any response. Rapske Tr., CX_02262, 90:22-91:1. Samsung took the position that ZIM never responded to the Notice of Demand and therefore initiated this action. In short, it blames ZIM for its own failure even when it comes to this correspondence.

This is a theme played out again and again in the factual record – every operational problem, every breakdown in communication – is always someone else’s fault. Samsung is never responsible for anything.

With respect to the merits of Samsung’s arguments, the so-called “finance holds”¹ imposed by ZIM were in fact the reasonable and lawful exercise of ZIM’s contractual lien rights, justified by Samsung’s chronic failure to pay invoices on time or to protest invoices. In this regard, the evidence shows that Samsung’s invoice approval process was at best inefficient, while a more cynical observer would posit that it is designed to delay payment for inordinate periods of time. Each and every lien exercised by ZIM was justified by outstanding sums owed by Samsung, some of which were acknowledged by and/or paid by Samsung and/or Samsung’s affiliated companies. Each and every lien exercised by ZIM was reasonably calculated to achieve and in fact achieved two legitimate objectives: the payment of outstanding sums due ZIM and the resumption of the flow of Samsung cargo.

In addition to Samsung’s chronic delinquency, the evidence shows that many of the charges which Samsung seeks to have reimbursed are attributable to acts or omissions of the customer-nominated truckers (“CNTs”) that Samsung required ZIM to use to provide inland transport. Contrary to Samsung’s position, the evidence shows use of the CNTs was required – it

¹ As noted in its reply to Samsung’s Proposed Findings of Fact, ZIM rejects Samsung’s use of the term “finance hold,” which improperly conflates a credit suspension with a cargo hold. These two separate actions were distinguished by ZIM as separate steps in the collection of receivables. *See, e.g.*, Yaacoub Tr., CX_03099, 42:22-24. Accordingly, ZIM rejects Samsung’s attempt to improperly combine them into a single concept.

was not “recommended” or “suggested,” as SEA now maintains. Moreover, despite its efforts to portray itself as an innocent bystander in its own supply chain process, Samsung was in fact actively involved in the management of the CNTs that it required ZIM to use, and frequently directed those CNTs in a manner that caused delays in the delivery of cargo and resulted in the imposition of the charges Samsung now challenges as unlawful.

The record also shows that ZIM established lawful and reasonable policies with respect to demurrage and detention, and readily available means for customers to dispute these charges.

Finally, an examination of Commission precedent and Samsung’s arguments shows that Samsung has failed to meet its burden of proof with respect to establishing ZIM’s alleged conduct as the proximate cause of its alleged damages, and has also failed to prove the alleged damages with reasonable certainty.

II. ZIM’S RESPONSE TO SAMSUNG’S PROPOSED FINDINGS OF FACT

ZIM’s response to Samsung’s proposed findings of fact is attached hereto as Exhibit #1. Because of the extent to which Samsung has distorted the record in its proposed findings, ZIM’s responses are longer and more detailed than might otherwise be the case and, in many instances, cite to testimony and documents which confirm Samsung’s distortions.

III. ZIM’S PROPOSED FINDINGS OF FACT

ZIM’s proposed findings of fact are attached hereto as Exhibit #2.

IV. ARGUMENT

A. ZIM’s Exercise Of Its Lien Rights Was Reasonable Under §41102(c)

Charges imposed on cargo that was delayed in transit by ZIM’s exercise of its contractual lien rights comply with the Shipping Act.

Section 41102(c) of the Shipping Act, 46 U.S.C. §41102(c), requires common carriers to establish, observe and enforce just and reasonable regulations and practices in connection with

the receiving, handling, storing and delivering of property. In order to be considered reasonable, a practice must be “otherwise lawful but not excessive and...fit and appropriate to the end in view.” *Distribution Services, Ltd. v. Trans-Pacific Freight Conference of Japan*, 24 S.R.R.714 at 721-22 (FMC 1988). ZIM’s exercise of its contractual lien rights comports with this standard.

1. *The Exercise Of The Lien Was Otherwise Lawful*

As an initial matter, ZIM’s contractual lien rights are otherwise lawful.² Under common law, a common carrier has a lien on cargo in its possession for freight charges payable on that cargo. *The Bird of Paradise*, 72 U.S. 545, 554 (1866)(“Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made...”). Moreover, it is legally permissible for a carrier and its customer to agree to expand the scope of the carrier’s lien via contract:

Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien.

Id. at 555. This rationale remains valid, having been adopted and applied by federal courts in recent years. *See, e.g., In re World Imports Ltd.*, 820 F.3d 576 (3rd Cir. 2016)(lien on goods in possession of carrier for amounts due on previously released shipments valid and lawful based on agreement between the parties).

² Samsung’s challenge to the lawfulness of ZIM’s lien rights appears to be inconsistent with its affiliate’s statement that “We understand and respect ZIM’s rules and procedures such as credit suspensions and holds.” CX_05733.

The service contracts which covered the transport of the cargo consigned to Samsung granted ZIM an expanded lien consistent with the foregoing precedent. Specifically, the contracts contained the following provision:

8 – FREIGHT, CHARGES AND INVOICING

The Merchant and all affiliates, subsidiaries, association members and agents acting on Merchant's behalf, as well as all other parties responsible for freight under the Bill of Lading, and the cargo itself, are jointly and severally obligated to pay, on demand, all freight charges, dues, taxes, per diem, collection fees, or charges and/or other expenses in connection with the goods.

The Carrier, its servants or agents, shall have both a maritime and contractual lien on the goods or any part thereof, and the Carrier or its Agent shall have the right to sell such goods, whether privately or by public auction, upon reasonable notice to the Merchant, for all freight (including additional freight payable as is herein stipulated) primage, deadfreight, demurrage, detention, container demurrage, charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties. The lien hereby accorded may be exercised by the Carrier, its servants or agents notwithstanding that it or they may have parted with actual or constructive possession of the goods. Nothing in this clause shall prevent the Carrier from recovering from the Merchant the difference between the full amount due, and the net amount realized by the exercise of the rights given to the Carrier under this Clause.

See, RX-1792; RX-1819-20; RX-1855; RX-1883 and RX-1922-23. Thus, the liens were otherwise lawful.

2. *The Adenariwo Decision Is Not Applicable*

Samsung unsuccessfully attacks the lawfulness of the liens by arguing that ZIM's conduct was found to be unlawful in *Adenariwo v. BDP International, et al.*, 33 S.R.R. 223 (FMC 2014). However, *Adenariwo* involved the assertion of a general lien clause in the terms and conditions of shipment. 33 S.R.R. at 223. It did not involve an expanded lien granted in a contract signed by the customer. Here, the Samsung entity that contracted with ZIM knowingly and willfully signed a contract that granted ZIM a lien broader than the common law possessory

lien. Accordingly, *Adenariwo* is inapplicable, Samsung's argument on this point is without merit, and ZIM's assertion of its lien rights was lawful.

3. *The Exercise Of The Lien Rights Was Consistent With The Incentive Principle and the Interpretative Rule*

Samsung argues that ZIM's conduct with respect to asserting its lien rights was unreasonable for two reasons: (i) charging demurrage when cargo could not be picked up due to a cargo hold violates the incentive principle because the cargo was not available for pick-up and because such charges do not incentivize the fluidity of cargo movement; and (ii) the assertion of lien rights in the absence of actual credit concerns is not appropriate to a legitimate end in view. Samsung is mistaken on both counts.

Samsung makes a fatal error in arguing that the cargo holds imposed by ZIM violate the incentive principle and the interpretative rule – it ignores its own behavior.³ In adopting the interpretative rule, the Commission cited a cargo interest's compliance with its customary responsibilities (including payment of freight) as an example of extenuating circumstances that would be considered in assessing the reasonableness of carrier conduct. 85 *Fed. Reg.* 29638, 29647 (May 18, 2020). In other words, the issue of whether Samsung complied with its customary responsibilities should be considered in assessing the reasonableness of the cargo liens.

The record demonstrates that Samsung did not fulfill its customary responsibilities in that it was chronically delinquent in paying ZIM. In fact, each time ZIM exercised its lien rights, Samsung was hundreds of thousands of dollars in arrears to ZIM, as the following chart demonstrates:

³ It is not possible to violate the incentive principle or 46 C.F.R. §545.5, as those regulations and the principles they set forth do not impose any requirements or mandates and cannot be the basis of a reparation action. 85 *Fed. Reg.* 29638, 29642 (May 18, 2020).

Duration of Lien	Amount Outstanding on Date of Initiation	Amount Paid to Release Lien
August 5-mid-August, 2020	\$143,225.26	\$36,710
May 27, 2021-June 30, 2021	\$857,914.64	\$510,975
September 27, 2021-October 16, 2021	\$943,708.14	\$638,870
January 11, 2022-March 17, 2022	\$1,538,200.64	\$119,615

CX_01570. In light of the sums owed to ZIM by Samsung, and the extensive periods of time that these receivables were outstanding, ZIM’s conduct was not excessive and was fit and appropriate to the end in view.

In this regard, a carrier’s common law possessory lien arises from the right of the shipowner to retain possession of the goods until freight is paid. *World Imports* at 584, citing *Bird of Paradise*. Because it would “frustrate commerce to require shipowners to retain their liens only by actual possession of the implicated cargo,” *World Imports* at 584, a contractually expanded lien facilitates the movement of cargo by allowing the carrier to release cargo without payment while still retaining a means to secure payment at a later date should it become necessary to do so. This is precisely what ZIM did here. Samsung would not have been in arrears to ZIM had ZIM insisted on payment prior to release from the outset. Thus, by releasing cargo without payment, ZIM was promoting the flow of cargo. It was only when the amounts outstanding became substantial in size and tardiness that ZIM exercised the contractual rights it had been granted in order to protect itself. *See, e.g., CX_07208-CX_07217* (showing invoices outstanding for months or even years); *CX_07276-CX_07283* (showing approved payment of \$347,045, but still requiring another copy of invoices to be sent); *CX_01570* and *CX_05439*

showing past due balance of \$943,708.14); CX_01570 (showing past due balance of slightly more than \$1.5 million).

If the Commission were to find that exercise of a contractual lien broader than the common law possessory lien is unreasonable under the Shipping Act, this would have the adverse impact on freight fluidity that the Third Circuit warned of in *World Imports*. Carriers would be forced to require payment prior to releasing cargo, which would lead to higher costs for shippers and potentially congestion and delays.

Moreover, the exercise of the lien rights incentivized the movement of the cargo. A portion of the demurrage charges due on cargo was assessed by and payable to marine terminal operators. Rapske Tr., CX_02198, 26:5-15. The marine terminals would not release the cargo unless those charges were paid. By exercising its lien rights, ZIM incentivized Samsung to make the payments necessary for the cargo to be released. Samsung cites the testimony of Yaacoub Yaacoub for the proposition that the exercise of the lien rights did not incentivize cargo movement. However, the testimony of other ZIM witnesses (which Samsung ignores in its brief) was that the exercise of the lien rights incentivized cargo movement. Cleva Tr., CX_04579-80, 50:3-51-8; Rosenberg Tr., CX_05329-31, 26:12-28:2.

4. *The Exercise Of The Lien Rights Was Not Excessive*

Samsung argues that the exercise of the lien rights was excessive for two reasons: (i) some of the outstanding amounts were not payable by Samsung; and (ii) the absence of “actual credit concerns.” Both of these arguments are specious.

Any argument that Samsung was not responsible for payment of any charges on the cargo being transported by ZIM fails for three reasons. First, the Commission has previously ruled that the consignee of cargo can be held liable for charges even if it is not responsible for paying freight to the carrier. *Meat Importers Council of America Inc. v. Australia-Pacific Coast Rate*

Agreement, 26 S.R.R. 371 (FMC 1992). Second, the service contracts between ZIM and Samsung's affiliate make the consignee jointly and severally liable for payment of freight charges, dues, taxes, per diem, collection fees, or charges and/or other expenses in connection with the goods. RX-1792; RX-1819-20; RX-1855; RX-1883; and RX-1992-23. Third, even the Samsung affiliates contracting with ZIM acknowledged Samsung's responsibility for paying ZIM. CX_07471.

In addition to the foregoing, Samsung's denial of responsibility for payment of local charges (Samsung Brief at 13) is inconsistent with its admission that it is responsible for local charges in certain circumstances (Samsung Brief at 14)⁴ and with its actions. For example, in the middle of the second cargo hold listed above, Samsung approved payment of over \$347,000 in charges to ZIM. RX-0755. Similarly, in January of 2022, shortly after the final lien listed above was put in place, Samsung approved payment of approximately \$650,000 in charges, and indicated approximately \$500,000 in charges were allegedly associated with containers of affiliated entities.⁵ It is no coincidence that the approval of long outstanding invoices occurs shortly after the exercise of lien rights, showing the efficacy of that tool in focusing an otherwise unresponsive customer.

Samsung's denial of responsibility for local charges such as demurrage and detention is also contradicted by the position taken by its affiliates. For example, in an email that Samsung cites to support its claim that it was being held liable for charges payable by its affiliates, one of those affiliates acknowledges that Samsung is delinquent in its payments to ZIM. CX_07471.

⁴ See also Rapske Tr., CX_02247-CX_02248, 75:16 – 76:10; CX_02249-CX_00250, 77:23 – 78:11.

⁵ Samsung's handling of invoices it alleges were incorrectly sent to the wrong division/department within Samsung – simply sending such invoices back to ZIM without instructions about where to send it rather than forwarding it to the correct division/department – contributed to any problems that may have existed. See, section A.7, *infra*.at pp. 14-16.

Similarly, in an October 1, 2021, email from Joy Lee of Samsung SDS (an affiliate of Samsung), Samsung SDS offers to pay past due amounts owed by Samsung. CX_02286. Furthermore, throughout the period in question, Samsung SDS reviewed and disputed a number of charges that were for the account of Samsung. The fact that Samsung SDS did not dispute far more charges on behalf of Samsung undermines the challenges raised now. RX-0148-49.⁶

At the end of the day, two facts stand out: (i) a substantial portion of the amounts outstanding at the times ZIM exercised its lien rights were attributable to Samsung, which was responsible for paying them; and (ii) the liens were lifted when Samsung paid an amount substantially less than the full sum due and owing. These facts indicate that ZIM had a legitimate basis for exercising the lien rights⁷ and that Samsung was not forced to pay the full

⁶ Samsung's responsibility for local charges such as demurrage and detention is also reinforced by the provisions of the service contracts under which the cargo was transported. These contracts provide as follows:

12 – LAND TRANSPORTATION

12a – DESIGNATION OF TRUCKING VENDOR

For shipments designated for pick up or delivery at any U.S. location or facility located outside the Port or Container Yard (i.e., "Door" pick up or delivery, also referred to as "Carrier Haulage"), Carrier shall normally nominate the Vendor to provide such services. If, upon Contract of the parties, the Merchant is to nominate the Vendor ("Preferred Trucker"), the following shall apply:

Compensation rates shall be as set forth at Appendix G, and shall be subject to review and / or change in accordance with subparagraph 12b (below).

Should Merchant's Preferred Trucker fail to accept a Transport Order within twenty-four (24) hours of issue, or fail to perform as ordered, Carrier shall nominate and provide instruction to an alternate Vendor; and

Any expense or charge in excess of the Compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant's nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker's failure to accept or perform a Transport Order, shall be to the account of the Merchant.

RX-1794; RX-1821-22; RX-1857; RX-1885; and RX-1925.

⁷ For example, a contractor can impose a mechanic's lien on a home even though the value of the home far exceeds the value of the work for which the contractor has not been paid. Similarly, automobiles can be repossessed if a single payment is missed, even though the value of the automobile exceeds the amount past due or even the total outstanding balance of the loan and a lender may foreclose on a home if the borrower is late on a single payment, even though the value of the home exceeds the amount of the delinquent payment or even the outstanding balance of

amount outstanding to have the liens lifted. In other words, the liens were reasonable and were not excessive.

5. *The Assessment Of Demurrage During The Lien Periods Was Reasonable*

Samsung's argument that the exercise of cargo holds was unreasonable because it resulted in additional demurrage charges accruing on the cargo being held fails for three reasons.

First, as explained above, Samsung was in arrears because it abused ZIM's willingness to facilitate the movement of cargo by releasing it without receiving payment. To find ZIM's conduct unreasonable for this reason would ignore Samsung's failure to fulfill its customary responsibilities.

Second, to suggest (as Samsung does) that the exercise of a lien must have no adverse consequences to the cargo interest beyond the holding of the cargo is contrary to logic and commercial reality. The lien rights of a carrier would be rendered meaningless if the cargo interest was not liable for storage during the period of time that the lien was being exercised. If this were the law, a cargo interest could obtain free storage of its cargo by giving immediate notice that it was not paying the carrier, who would then impose a lien and effectively put the cargo in storage at no cost to the cargo interest. That is both unfair to the carrier and provides no incentive whatsoever to the cargo interest to move the cargo.⁸ Moreover, such a suggestion is divorced from reality. It is a common practice to charge for storage of property that is not

the loan. If such conduct is lawful with respect to an individual consumer, it is also reasonable under the Shipping Act in a business-to-business context.

⁸ The Commission's suggestion that shippers and truckers have commercial reasons for wanting to get containers off terminal and returned in timely fashion (Samsung Brief at 12) is unsupported by any extrinsic evidence and is contradicted by numerous facts, including the existence of demurrage and detention charges, the acknowledged use by cargo interests of containers and terminal facilities as cargo storage areas, and the large amounts of additional free time customers frequently seek in negotiations with carriers. If, as the Commission suggests, there were in fact meaningful incentives for shippers and truckers to remove cargo and return equipment, demurrage and detention charges would be unnecessary.

accessible until payment is made. For example, when an automobile is towed from an illegal parking spot, the owner of the vehicle must pay towing and storage charges to recover the vehicle. The same concept applies to cargo in storage at a warehouse – if non-payment causes the warehouseman to impose a lien, storage charges on the cargo continues to accrue until the charges are paid and the cargo is removed from the warehouse. *See*, U.C.C. §7-209. It is reasonable to assess demurrage in a business-to-business context when similar charges are common in a consumer context.

Third, the argument fails as a matter of logic. During much of the period herein at issue, freight rates had reached historically high levels. To suggest that ZIM was seeking to maximize profit by collecting demurrage charges (much of which were actually paid to marine terminals and/or railroads) rather than by getting its equipment returned promptly and using it to generate revenue by moving cargo at historically high rates is unsupported by any record evidence and makes no sense whatsoever.

6. *The Liens Were Based On Legitimate Payment Concerns*

As for “actual credit concerns,” Samsung (as it often does) tries to have its cake and eat it, too. On the one hand, Samsung portrays itself as a small company (Samsung Brief at 14; PFF #25-26). On the other hand, it portrays itself as having a market capitalization of \$354 billion and being the 20th most valuable company in the world. McCown Report, ¶ 39, CX_08551. Samsung portrays itself as large and substantial when it suits (e.g., when it wants to argue it is creditworthy) and as small when it suits (e.g., when it wants to argue that it had insufficient capacity to handle inland transportation). Samsung can’t have it both ways. Fortunately, when it comes to the legitimacy of ZIM’s concerns about payment, it doesn’t really matter which hat Samsung dons. The amounts outstanding in and of themselves establish that

ZIM had a basis to be concerned about receiving payment.⁹ This is confirmed by the fact that SEA currently owes ZIM approximately \$2 million in charges which it can and has safely ignored because it has not shipped any more cargo with ZIM that could be subject to a contractual lien. RX-0002, ZIM0072248.

7. *Samsung Was Chronically Delinquent In Paying ZIM*

The reasonableness of the exercise of ZIM's lien rights and its payment concerns is further demonstrated by the fact that Samsung was chronically delinquent in paying ZIM. See, e.g., CX_07208-CX_07217 (showing invoices outstanding for months or even years); CX_07276-CX_07283 (showing approved payment of \$347,045, but still requiring another copy of invoices to be sent); CX_01570 and CX_05439 showing past due balance of \$943,708.14); CX_01570 (showing past due balance of slightly more than \$1.5 million). This chronic delinquency was caused in large part by Samsung's own conduct.

Samsung had an inefficient and unreasonably cumbersome invoice approval process that made timely payment difficult if not impossible. In order to get an invoice paid by Samsung, ZIM had to submit its invoice to Samsung's Logistics group via two different email addresses. After that group approved the invoice, it would return the invoice to ZIM for resubmission to a different group at Samsung for payment. RX-0159-RX-1060 and Fernando Tr., CX_02391, 71:10-10-18.¹⁰ This needlessly bureaucratic procedure not only increased the time necessary for payment to be made, but increased the likelihood of errors and resulting delays. In addition, Samsung would on occasion require that previously submitted and approved invoices be

⁹ ZIM's concern about payment and creditworthiness are reflected in contemporaneous documents. See, RX-0152 and RX-0155-158.

¹⁰ Ms. Fernando was deposed on May 18, 2023. As of June, 2023, Ms. Fernando is no longer employed by Samsung. <https://www.linkedin.com/in/maria-kristina-fernando-macc-ba704497/> (last visited September 25, 2023).

resubmitted before they could be paid, indicating that if invoices which had already been sent and approved were not sent again, ZIM would not be paid. RX-0769.

Samsung also took a very passive role in dealing with billing issues, putting the onus on ZIM to figure out where to send invoices for the various Samsung entities (RX-0159) and refusing to assist in resolving problems until a cargo hold was imminent or in place. *Id.* Samsung made it clear that if an invoice was not sent to multiple “correct” departments, it would simply be returned to ZIM – it would not be forwarded to the correct department, Samsung would not tell ZIM where to send the invoice, and it would certainly not be paid. Fernando Tr., CX_02401, 81:16 – 23; RX-0769. Moreover, if an invoice was sent to the wrong SEA department, SEA would simply return it to ZIM without identifying the correct department for ZIM. Fernando Tr., CX_02443-44, 123:20 – 124:5.

Samsung made the invoicing process difficult in other ways. For example, invoices were not sent to the same department at Samsung for all Samsung cargo. One department received invoices relating to cargo moving directly to the ultimate consignee (“direct business”) and a different department received invoices for cargo moving to Samsung for eventual distribution to customers (“import business”). CX_02470; Fernando Tr., CX02399-CX02403, 79:14-81:11. Again, this bifurcated invoicing process increased the likelihood of errors and resulting delays. And, SEA did not lift a finger to facilitate the process – it did not forward the invoice to the correct department nor did it inform ZIM where it should be sent. Fernando Tr., CX_02443-44, 123:20-24:5.

The chronic delinquency in making payment was also caused in part (or at least exacerbated) by Samsung continually demanding information from ZIM when it had in fact already been provided with such information. For example, Samsung would request invoices

when it had already received the actual invoices (RX-0769) or would demand additional copies of invoices previously approved for payment. RX-0793; CX_07208-CX_07217.

B. Samsung Is Liable For Acts and Omissions Of Its CNTs

In an effort to shift blame for the non-performance of the motor carriers that Samsung required ZIM to use from itself to ZIM, Samsung characterizes the designation of customer-nominated truckers (“CNTs”) as a “mere recommendation.” Samsung Brief at 30. This argument is flatly contradicted by the record.

1. *Use Of The CNTs Was Mandatory*

The 2021 request for quote (“RFQ”) for Ocean Freight issued by the Samsung affiliate contracting with ZIM clearly and expressly states that use of the CNTs designated by the consignee of the cargo moving under the service contract is mandatory (“Carriers are required to provide local delivery service with consignee’s preferred trucker if any”). RX-0041. This requirement was incorporated into at least two of the relevant service contracts. *See*, Note 2 at RX-1870 and RX-1939. There is no dispute that Samsung designated CNTs, and there is a list of such CNTs. RX-0023 through RX-0028. Thus, by any objective measure, ZIM was required to use the CNTs designated by Samsung. The deposition testimony of ZIM’s witnesses confirms that this was ZIM’s subjective understanding of the arrangement with respect to CNTs. Michalski Tr., CX_03835-CX_03836, 39:24-40:4; Frigo Tr., CX_02526, 53:21-25.

In addition, on occasions when CNTs were designated by Samsung but not used by ZIM, Samsung protested and called for use of the CNT. RX-0805; RPF #51. This further undermines Samsung’s “mere recommendation” position.

Samsung’s characterization of the designation of CNTs as a “mere recommendation” is yet another attempt by Samsung to have its cake and eat it, too. On the one hand, Samsung claims it was “entirely reliant” on ZIM to transport cargo on a through basis because it lacked the

capacity and expertise to arrange and manage inland moves on its own. Brief at 14. On the other hand, the company with no capacity for managing inland transport was “recommending” motor carriers on the basis of good performance and capacity. Fernando Tr., CX_02345, 25:8-9. It also appears that in some instances Samsung was requiring use of a specific motor carrier because that requirement was being imposed on Samsung by its customer. Rebuttal Report of Lee Clair, ¶ 54, CX_06779; RX-0805.

Samsung’s involvement with CNTs was not limited to requiring the use of specific motor carriers. Samsung also actively supervised the CNTs it required ZIM to use and on which it was supposedly “entirely reliant” on ZIM to manage. For example, in an email dated February 8, 2022, Byung Choi of Samsung instructed Harvest Transport, a motor carrier, to give priority to delivery of the 126 containers transported by CMA CGM over containers transported by other ocean carriers, including 19 containers transported by ZIM. RX-1208. The previous day, Peter Kim of Samsung suggested that the reason Samsung had 194 containers sitting in the Port of New York was either that customers were not providing delivery appointments and/or that the motor carrier did not have sufficient capacity to pull containers from the port and store them at its yard. *Id.*

Samsung also frequently issued instructions to its CNTs regarding the required delivery date (“RDD”) of its customers. See, e.g., RX-0807. In many cases, the RDD was after the expiration of free time, meaning that demurrage was incurred because Samsung’s customer was not ready to take delivery of the cargo. RX-1025 and RX-0814.

In light of the foregoing, Samsung’s claim that the CNT designations were “mere recommendations” is simply not credible and its attempts to recover from ZIM demurrage resulting from Samsung’s management of the CNTs is inappropriate.

2. *Samsung's CNTs Failed To Perform*

As the record demonstrates, demurrage charges were frequently incurred because of the failure of Samsung's CNTs to perform for reasons wholly unrelated to ZIM.

One example is set forth in a February 8, 2021, email from Maria Kristina Fernando of Samsung to both the motor carrier and other Samsung personnel. In response to a demand by the motor carrier that Samsung pay \$302,000 in demurrage, Samsung noted that the demurrage was caused by "AV's carrier capacity issue and negligence." RX-0821.

The same motor carrier had difficulty performing in late December of 2020. In an email dated December 29, 2020, the motor carrier informed Samsung that it did not have the capacity to deliver or store 22 containers and was unable to move them for another two weeks. Maria Kristina Fernando's December 30 reply indicates that Samsung expected the CNTs to communicate with Samsung directly (belying Samsung's suggestion that they were relying on ZIM to manage the CNTs). RX-0833.

There are other examples of motor carriers designated as CNTs by Samsung failing to perform. RPF #65.

Samsung also acknowledged that there were circumstances in which motor carriers refused to move Samsung containers because they were not being paid. Fernando Tr., CX_02365-CX_02366, 45:25-46:3; RPF #74.

3. *Samsung Is Liable For The Acts And Omissions Of Its CNTs*

Samsung is liable for the acts and omissions of its CNTs, and therefore for the charges arising therefrom.

While it is hornbook law that a principal is liable for the acts/omissions of an agent acting within the scope of the agent's authority, the same is not true of a contractor and its subcontractor. Generally, a contractor is not liable for the acts or omissions of a subcontractor

unless one of two exceptions apply: (1) the work is inherently dangerous, or (2) the general contractor interferes with, controls or directs the manner in which the subcontractor performs the work. Restatement (Second) of Torts § 414 (1965); *Evergreen Int'l, S.A. v. Marinex Const. Co.*, 477 F. Supp. 2d 690, 691 (D.S.C. 2007)(general contractor not liable to plaintiff for dredging sub-contractor's negligent performance in the absence of evidence that the contractor retained or exercised control over the subcontractor's work).¹¹

Here, the services provided by the CNTs are not of the type which would make the contractor (ZIM) liable for the acts/omissions of the subcontractor CNTs – there is no duty of ZIM's that cannot be delegated to the motor carrier, and the transportation of cargo is not the type of inherently dangerous activity for which a contractor is potentially liable for the acts/omissions of the subcontractor. Moreover, ZIM was not exercising control over the CNTs or supervising their activities such that it should be held responsible. On the contrary, ZIM's "use" of the CNTs was a forced marriage imposed on ZIM by Samsung. As illustrated by the examples cited in Section B.1 of this brief, Samsung was exercising a much greater degree of control over the CNTs than was ZIM.

ZIM did not abdicate its common carrier responsibilities for store door delivery, or shift the responsibility for inland transportation to Samsung. All ZIM is saying is that to the extent problems were caused by sub-contractors selected by and imposed on it by Samsung, those problems and the consequences thereof are lawfully and properly the responsibility of Samsung. One such example is the situation in which Samsung instructed the motor carrier to give CMA

¹¹ Reliance on tort principles is appropriate here, as it has been used by the Commission in consideration of damages in past cases. See, e.g., *Bermuda Container Line Ltd. v. SHG International Sales, Inc., et al.*, 28 S.R.R. 492, 500-501 (ALJ 1988); adopted 28 S.R.R. 1052.

CGM containers priority over containers transported by other ocean carriers, including 19 containers transported by ZIM. RX-1208.

It would turn existing law on its head for the FMC to hold that a shipper can require a carrier to use a specific motor carrier for the inland leg of a through cargo movement, but that the ocean carrier bears all risk of any failure on the part of that motor carrier. This is particularly true where, as here, the shipper was actively supervising and directing the motor carrier to the detriment of ZIM.¹²

C. ZIM's Policies and Procedures Were Reasonable

As explained below, ZIM's policies and procedures with respect to demurrage and detention were and are reasonable.

1. *ZIM Has Meaningful Dispute Resolution Policies and Procedures*

Contrary to Samsung's allegations, ZIM has meaningful dispute resolution policies and procedures.

Section 545.5(f) of the FMC's regulations provides non-binding guidance as to the factors the Commission may consider when assessing the reasonableness of carrier conduct:

The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

ZIM's policy regarding the implementation of demurrage practices and regulations is clear and readily accessible in its tariff. More specifically, Rule 4.G of ZIM's tariff ZIMU-136 provides:

¹² See also the discussion of contractual provisions imposing liability on Samsung in the event the CNT did not perform at p. 11, *supra*.

G) CARRIER CONTROLLED INLAND DOOR OR RAIL SERVICE

(1) IN THE EVENT THAT CARRIER IS, FOR ANY REASON, UNABLE TO DELIVER CARGO WITHIN FREE TIME DUE TO A CARRIER DISABILITY OR SERVICE FAILURE, NO DEMURRAGE CHARGE SHALL BE ASSESSED FOR ANY DAY DURING THE PERIOD OF SERVICE FAILURE. FOR GOOD ORDER, IF THE CARGOES ARE IN FREE TIME AT THE COMMENCEMENT OF THE DISABILITY OR SERVICE FAILURE, FREE TIME SHALL BE EXTENDED FOR A PERIOD EQUAL TO THE DURATION OF THE DISABILITY OR SERVICE FAILURE; IF THE CARGOES ARE NO LONGER IN FREE TIME, ASSESSMENT OF DEMURRAGE SHALL BE SUSPENDED FOR THE DURATION OF THE DISABILITY OR SERVICE FAILURE, RESUMING AT THE RATE APPLICABLE UPON COMMENCEMENT OF THE DISABILITY.

The content of that rule¹³ is consistent with Section 41102(c) as interpreted by the Commission in its interpretative rule. Moreover, ZIM personnel uniformly testified that the foregoing represents ZIM's policy. Samsung Brief at 29. Thus, ZIM's demurrage practice is accessible, clear, compliant with applicable law, and is the policy used by ZIM in evaluating demurrage disputes.

Insofar as dispute resolution policies, practices and regulations, Samsung admits that ZIM has established an email address for customers to submit billing disputes. Samsung Brief at 42. In fact, ZIM has three separate dispute email addresses for different types of disputes. <https://www.zim.com/tools/detention-demurrage-and-freight-disputes>. Also available on this same page is a dispute checklist showing the information required to lodge a dispute with ZIM and providing a format for the submission of that information. RX-1908. The same webpage provides a timeline for the submission of disputes. Thus, ZIM has established clear contact information, timeframes, and corroboration requirements, as recommended by the FMC's regulations.

¹³ Rule 4.G of ZIMU-136 is ZIM's current rule. The rule in effect during the period from late 2019 to mid-2022 was Rule 23.F of ZIM-480. The latter is slightly less detailed than, but consistent with, the current rule. The Presiding Officer can take official notice of both rules pursuant to 46 C.F.R. §502.226.

Samsung cites the testimony of Barbara Speight for the proposition that ZIM has not established uniform procedures and regulations to evaluate demurrage and detention disputes. Samsung Brief at 42-43. However, as it frequently does when citing the testimony of ZIM witnesses, Samsung omits relevant testimony. Ms. Speight testified that that the Dedicated Service Group has self-created documents that are shared with colleagues. Speight Tr., CX_2830, 31:8-9. Moreover, as noted above, ZIM's tariff establishes a clear policy that is consistent with the Shipping Act, and ZIM personnel uniformly testified that this is in fact the policy followed when evaluating demurrage charges. Thus, while there may not be an internal ZIM document entitled "Criteria To Be Used In Evaluating Demurrage Disputes," all evidence indicates that ZIM published a policy in its tariff and adhered to that policy when evaluating demurrage disputes.

Samsung does not directly contest any specific detention charges. Its arguments regarding ZIM's policies/procedures appear to apply equally to demurrage and detention. Accordingly, ZIM simply notes that it follows the same procedure for detention as for demurrage, with one of the three email addresses on the ZIM dispute website identified above indicating it is for detention disputes. Indeed, ZIM waived detention for Samsung where warranted under ZIM's legally compliant policy. RX-0838.

2. ZIM Provided Employees With Shipping Act Training.

Contrary to Samsung's allegations, ZIM provided relevant personnel with appropriate Shipping Act compliance training.

Samsung cites to the depositions of various ZIM witnesses to support its allegation that Zim does not provide guidance or training on FMC regulations, the Shipping Act, or the interpretative rule. While a few employees testified that they did not receive such training, other employees testified that they did receive compliance training. See, e.g., Yaacoub Tr.,

CX_03176-CX_03179, 119:6 – 122:10 (describing formal training and interim information distributed by ZIM in-house counsel).

Moreover, a closer examination of the evidence cited by Samsung in support of its argument reveals that Samsung is grossly mischaracterizing the testimony of ZIM witnesses.

For example, Samsung cites the deposition of Tera Haynie for the proposition that she did not receive training on the incentive principle. While Ms. Haynie did indeed testify she was not familiar with the incentive principle (CX_04136, 130:11-18), Samsung conveniently ignores her testimony about the training she did receive, including “very formal” training on the 2022 Shipping Act, consultation with in-house counsel regarding how to apply the Shipping Act to a billing dispute, and information on legal developments from counsel or other sources.

CX_04132, 126:17-130:10.

Similarly, Samsung cites to page 24 of the transcript of the deposition of Carrie Ramage for the proposition that she received no training on the FMC or the Shipping Act. However, on the preceding page Ms. Ramage testified that she has a copy of the Code of Federal Regulations on her desk that she refers to (CX_04401, 23:12-13) and on the page cited by Samsung she testified that she receives emails on compliance subjects. CX-04402, 24:23-25.

Perhaps the most egregious example of Samsung’s distortion of the factual record with respect to ZIM’s compliance training is its citation of page 61 of the transcript of the deposition of Thomas Weingartner for the proposition that there was no Shipping Act compliance training. In fact, Mr. Weingartner testified that there are elements of Shipping Act compliance training in ZIM corporate training. CX_04866, 62:10-1. Samsung also appears to have overlooked the following exchange:

Q: Okay. Is the FMC – the Federal Maritime Commission’s Interpretative Rule on demurrage and detention and the incentivizing principle something that you have conveyed to your team?

A: Yes. It’s been conveyed from our in-house counsel.

Q: So you conveyed it or your in-house counsel conveyed it?

A: Both.

CX_04869, 63:8-15.

While different ZIM personnel with different job responsibilities may have received different training based on the extent to which various regulatory requirements apply to their day-to-day job responsibilities, the record simply does not support a conclusion that ZIM failed to provide guidance or training.

3. *ZIM Had Publicly Available Dispute Resolution Procedures*

As explained in Section C.1 above, ZIM established dispute resolution procedures and had them available on its website. Interestingly, Samsung claims it was not aware of the ZIM dispute resolution email addresses (Fernando Tr., CX_02392; 72:22-73:5), even though it appears to have submitted some disputes via that mechanism. RX-0148-RX-0149. Ms. Fernando was also the recipient of a number of emails which specifically included the email address for submitting disputes to ZIM. *See, e.g.* RX-0846.

Samsung’s objection to ZIM’s procedures appears to be that there is no detailed roadmap of ZIM’s internal processes made available to the public. However, nothing in the Commission’s regulations requires a carrier to establish the equivalent of the Federal Rules of Civil Procedure or the Commission’s Rules of Practice and Procedure with respect to its internal dispute resolution procedures.

When adopting what is now 46 C.F.R. §545.5, the Commission noted that some commenters had suggested that internal appeals processes be required as part of carriers’ dispute

resolution policies. 85 *Fed. Reg.* 29638, 29661 (May 18, 2020). While recognizing that such a process might be helpful, the Commission declined to require it or to state conclusively that the absence of such an internal appeals process is unreasonable. *Id.*

While ZIM did not make an internal appeals process known to the public, it had just such a process – the Demurrage Committee. The Demurrage Committee was made up of several senior executives of ZIM’s U.S. agency that managed demurrage and detention in the United States. Yaacoub Tr., CX_03088, 31:11-15. ZIM employees had the ability to elevate any demurrage or detention dispute to the Demurrage Committee, including customer disputes or waiver requests that may have been rejected at a lower level. Weingartner Tr., CX_04899, 93:6-15. The Demurrage Committee would consider disputes referred to it on a case-by-case basis based on ZIM’s demurrage policy, as well as commercial criteria. Yaacoub Tr., CX_03090, 33:10-13.; Michalski Tr., CX_03883, 87:3-23; Michalski Tr., CX_03895, 99-10-20. In addition, ZIM personnel and customers also had recourse to senior management. Yaacoub Tr., CX_03091, 34:16-21; CX_03093, 36:3-11; Weingartner Tr., CX_04901, 95:4-10.

Thus, although they were not publicized, ZIM had internal appeals processes for demurrage/detention disputes.

4. *Samsung’s Arguments With Respect To ZIM’s Policies Are Inconsistent And Without Merit*

Samsung’s allegations with respect to ZIM’s demurrage and detention policies are inconsistent and without merit.

At page 15 of its brief, Samsung alleges that ZIM began to assess exorbitant amounts of demurrage and detention beginning in 2021. On page 26 of its brief, Samsung suggests that the “dramatic” increase in demurrage and detention began in 2020. Mr. Rapske testified that the alleged “change in policy” took place in the beginning of 2021 (CX_02215-CX_02216, 43:24 –

44:4) and also that it began in late 2021. CX_02216, 44:12. Thus, Samsung's allegations are contradictory and not credible.¹⁴

Perhaps more importantly, Mr. Rapske's testimony reveals the true nature of Samsung's grievance:

Q. And is ZIM one of the ocean carriers that engaged in this change in policy that you identify?

A. We believe so, yes.

Q. And approximately when would that change in policy have taken place?

A. I believe it was the beginning of 2021.

Q. Okay. And can you describe for me in more detail precisely what this change was?

A. Yeah. Prior to this, steamship lines would guarantee the charges through the ports. We would then be able to go back, negotiate, show why we shouldn't have to pay this fee, and it was a discussion or it was a negotiation on the charges. I believe it was late 2021 it was changed, so there was no -- there was no way to -- I guess, to fight the charge. It was either you pay or the container doesn't get released. We had to pay the ports directly at those times, and that's when it -- the policy to us changed at that period.

CX_02215CX_02216, 43:24-25-44:1-17. What the foregoing makes clear is that Samsung was always potential liable for charges (contrary to what it now claims with respect to local charges), but that market conditions enabled it to get carriers and terminals to waive or absorb the charges. When market conditions changed due to increased demand and Samsung no longer had as much commercial leverage, it was not able to obtain the waivers/absorptions to which it had become accustomed. ZIM did not shift responsibilities to Samsung or change its demurrage and detention policies, as Samsung alleges. All that happened was that there was an increase in the amount of demurrage and detention charges due to increased cargo volumes and trade

¹⁴ Samsung's expert witness, Gregory Smith, testified that if ZIM's practices did not change until 2021 it might impact his damages calculation. CX_05990, 44:9-14.

conditions. This increase in demand resulted in market conditions that Samsung found less than favorable. That is what Samsung is really complaining about – its inability to extract concessions in a market that reduced its commercial leverage.

Similarly, Samsung's complaints about ZIM's conduct during the pandemic ring hollow. There appear to be two allegations here: that ZIM changed its demurrage and detention policies to increase revenue while simultaneously failing to make operational changes to deal with the pandemic.

As explained above, ZIM's policies and procedures were not "changed to increase revenues" during the pandemic. The policies and practices remained the same, but were applied more consistently due to a change in market conditions. In criticizing ZIM's alleged lack of operational changes, Samsung appears to be suggesting that any failure by an ocean carrier to do whatever is necessary to provide Samsung with whatever it believes it is entitled to receive is somehow a violation of law. This is a perfect example of Samsung's "it's all someone else's fault" attitude. Samsung kept shipping increased cargo volumes throughout the pandemic in order to meet consumer demand and maximize its own profits despite its awareness of limits on marine terminals, motor carriers, and receiving warehouses. Yet, there was no obligation on the part of Samsung to modify its behavior in any way. Instead, Samsung is entitled to do what it pleases and it is somehow incumbent on everyone else in the supply chain to move heaven and earth to accommodate Samsung. There is simply no legal precedent to suggest that the Shipping Act requires ocean carriers to behave in a manner that is consistent with Samsung's unrealistic expectations.¹⁵

¹⁵ As Samsung appears to interpret the law, an ocean carrier should refuse bookings from a customer during periods of congestion. Samsung would present the carrier with a Hobson's choice: decline the cargo and be exposed to a claim for refusal to deal, or accept the cargo and absorb all adverse consequences associated with the inland transportation. Once again, the customer bears no responsibility for anything.

5. *ZIM's Invoicing Practices Were Reasonable*

Samsung's attack on ZIM's invoicing practices are also non-starters. It has been established that a failure on the part of a carrier to follow the most efficient possible policies and procedures does not constitute unreasonableness within the meaning of the Shipping Act. *Intermodal Motor Carriers Conference, American Trucking Associations, Inc. v. Ocean Carrier Equipment Management Association Inc., et al.*, Order Denying Respondents' Motion for Leave to File Interlocutory Appeal, FMC Docket No. 20-14 (ALJ, January 29, 2021) at 6. ("While the Commission may have an interest in efficiency, it will be Complainant's obligation to establish that the regulations and practices are unreasonable, not Respondents' obligation to establish that the practices are the most efficient.") Thus, Samsung's attempt to equate problems in the invoicing process with unreasonableness fail.

Samsung also argues that aggressive collection of outstanding sums in the U.S. was somehow unreasonable. Samsung Brief at 50. However, what Samsung fails to recognize is that the overdue sums referenced in the testimony found at CX_05436 include ocean freight in addition to detention and demurrage. See, CX_05627-CX_05629. Accordingly, this testimony and the document on which it is based do not support Samsung's efforts to paint ZIM's collection practices with respect to demurrage and detention as unreasonable.

Finally, Samsung has not demonstrated that it received and was asked to pay any of the allegedly delinquent invoices sent by ZIM in November of 2021.¹⁶

In light of the foregoing, Samsung has failed to fulfill its burden of proof with respect to its allegations concerning ZIM's invoicing practices.

¹⁶ Samsung's alleged evidence of a practice of sending late invoices is unpersuasive. For example, CX_04761 shows invoices that were sent to an entity unrelated to Samsung.

6. *Samsung's Empty Container Returns Argument Is Without Merit*

Samsung's arguments with respect to detention charges are without merit.

Detention charges apply if an empty container is not returned within a certain amount of time after it left the terminal loaded ("free time"). Samsung's claims with respect to detention charges lack merit for two reasons.

First, Samsung personnel lack even the most basic understanding of the return of empty containers and the billing of detention charges. Mr. Choi of Samsung testified that if a motor carrier fails to pick up an empty container and return it before the expiration of free time, ZIM would be responsible because it is ZIM's responsibility to check whether the container is empty and to return the container to the terminal. CX_02125, 76:14-21. Of note, neither ZIM nor Samsung has produced any communications between them attempting to ascertain whether empty containers are ready to return. There is a simple reason for this: it is not the responsibility of the ocean carrier to notify the motor carrier of when the delivered container is empty and ready for return – that is the responsibility of the consignee. Once again, it seems nothing is Samsung's responsibility.

Maria Kristina Fernando of Samsung testified that if empty containers are not returned on time, the steamship line would send the bill to Samsung. CX_02387, 67:17-21. However, detention/per diem charges for failing to return the container on time are billed to the motor carrier, not to the cargo interest. See, e.g., RX-0883 and RX-0908.

Second, detention is primarily a function of how quickly the consignee can unload the container. It does not matter who is responsible for the inland transportation – the ocean carrier or the cargo interest – the free time clock runs from the same point in time and for the same amount of time whether the delivery is accomplished via carrier haulage or merchant haulage.

Samsung's own data (CX_02284) shows that the amount of detention it paid varied from quarter to quarter. Samsung paid relatively low amounts of detention in the last two quarters of 2019 and the first quarter of 2020. The amount paid increased in the 2nd quarter of 2020, but dropped in the 3rd and 4th quarters of 2020 and the first quarter of 2021. It was slightly higher in the 2nd quarter of 2021 than in the 2nd quarter of 2020. The amount of detention peaked in the 3rd quarter of 2021, dropped significantly in the 4th quarter of 2021 and again in the 1st quarter of 2022. There was no detention paid in the 2nd quarter of 2022, and the 2nd highest amount paid in the 3rd quarter of 2022. This pattern is inconsistent with an allegation that detention increased as a result of, or is otherwise attributable to, a change in ZIM's policies or practices. If, as Samsung alleges, ZIM had changed its policy in either early 2020 or early 2021 (depending on which of Samsung's conflicting allegations one uses for purposes of analysis), one would expect there to be an increase from the date of that change. However, the drop in demurrage from Q3 2020 through Q1 2021 shows there was no change in policy or practice beginning in early 2020. Similarly, the fact that Q2 2021 detention was only slightly higher than in Q2 2020 and that detention dropped significantly after peaking in Q3 2021 shows that there is no correlation between ZIM's alleged conduct and the amount of detention being paid by Samsung.¹⁷

D. Samsung Has Failed To Demonstrate That ZIM's Alleged Conduct Was The Proximate Cause of Harm

Even if Samsung demonstrated violations of the Shipping Act on the part of ZIM (which it has not), it would not be entitled to reparations because it has failed to demonstrate that ZIM's conduct was the proximate cause of damages.

¹⁷ The fact that Samsung was paying detention prior to the Covid-19 pandemic also demonstrates the lack of merit in its argument that it is not responsible for local charges.

Complainants bear the burden of proving that they are entitled to reparations. *Kobel v. Hapag-Lloyd A.G.*, 33 S.R.R. 594, 597 (ALJ 2014). As the Commission has explained: (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003)(quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)). Establishing a Shipping Act violation alone does not justify reparations -- complainants must also show that they sustained a pecuniary loss as a result of the unlawful act. *Kobel* at 605. Samsung does not meet this standard.

Samsung makes absolutely no effort – none -- to attribute any particular charge to any particular act or omission on the part of ZIM. Samsung’s argument, distilled to its essence, is: ZIM did some things that were wrong, so we’re entitled to get back every cent of charges we paid. Samsung totally and utterly ignores the requirement that it prove those charges were the results of ZIM’s allegedly unlawful actions.

Samsung attempts to whitewash its failure by claiming that: (i) it need not prove violations on a shipment-by-shipment basis; (ii) payment of the charges is sufficient proof of damages; and (iii) ZIM does not dispute the amount of charges paid by Samsung. None of these arguments has merit when it comes to causation.

Insofar as proving violations on a shipment-by-shipment basis, FMC precedent suggests this is in fact required. In *Euroussa Shipping Inc., Tober Group, Inc., and Container Innovations Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 967 (ALJ 2009), the Commission’s Bureau of Enforcement argued that under the Administrative Procedure Act it was not required to show

each element of an alleged Shipping Act violation on a shipment-by-shipment basis. The ALJ rejected that argument and, relying on Commission precedent, found that a shipment-by-shipment analysis was required. 31 S.R.R. at 984.

Although *Euroussa* involved an enforcement action rather than a private complaint for reparations, the same rationale which required a shipment-by-shipment analysis in that case applies with equal or greater force in a proceeding seeking reparations in light of the requirement that the complainant is required to prove proximate causation. Other decisions support this conclusion. The Commission has indicated quite clearly that the reasonableness of demurrage and detention charges are to be determined on a case-by-case basis, 85 *Fed. Reg.* 29638, 29639 (May 18, 2020), which strongly suggests a shipment-by-shipment analysis. In the *Hapag-Lloyd, A.G.*, decision cited by Samsung, the ALJ criticized the parties for dealing in generalities, saying: “Future proceedings would benefit from a greater focus on the specific shipments.” 4 F.M.C.2d 53, 82. All of the foregoing strongly support a requirement for a shipment-by-shipment analysis.

The cases cited by Samsung for the proposition that payment of the charges is sufficient proof of causation do not help Samsung when it comes to proving causation. As an initial matter, the *Hapag-Lloyd, A.G.* decision does not actually say anywhere that payment of the charges is sufficient, in large part because the charges at issue in that case were never paid. 4 F.M.C.2d 53, 89 (ALJ 2022). The other decision relied upon by Samsung, *A Customs Brokerage, Inc. v. Cargocare Logistics USA, Inc. and Cargocare Logistics America, Inc.*, FMC Docket No. 1987(I)(July 17, 2023), is no more helpful. In that case, an NVOCC’s failure to apply payment received from the customer to obtain the release of the cargo forced the customer to pay freight a second time. In both of these cases, there was a single policy or act that was challenged as unlawful, and the impact of that act on a finite number of containers/shipments that

were specifically identified (11 containers in *Hapag-Lloyd* and shipments covered by three (3) bills of lading in *A Customs*) was clear on its face. Thus, there was little or no question about causation.

The facts are quite different in this case, where Samsung is challenging the lawfulness of nearly 10,000 charges assessed on 2,980 containers over more than a 3-year period on the basis of a panoply of alleged Shipping Act violations. Unlike the cases cited by Samsung and discussed above, it is not clear from the face of the allegations which alleged violation(s) caused which charge or charges to be incurred unlawfully. As noted above, Samsung makes no effort whatsoever to address that issue. Instead, Samsung would have the Federal Maritime Commission ignore the burden of proof and the law of proximate causation and hold ZIM liable for each and every charge Samsung incurred during a 3-year period without making the necessary finding that the violation in question caused the harm for which reparations are sought. Such a position is legally untenable particularly because, as explained later in this section, the evidence shows that at least some of the charges being challenged were caused by Samsung.

Samsung is correct that ZIM and its expert witness Ricardo Zayas did not and do not challenge the amounts Samsung claims to have paid. However, ZIM and its expert witness maintain that Samsung and its expert, Gregory Smith, have failed to prove that the charges were incurred as a result of any wrongdoing on the part of ZIM.

Mr. Smith's report does little more than parrot Samsung's allegations, assume they are correct with respect to ZIM's liability, and attempt to confirm that Samsung paid what it claims to have paid. Nothing in Mr. Smith's report connects any particular alleged wrongdoing on the part of ZIM to any specific charges challenged by Samsung.

The Rebuttal Report of Mr. Zayas explains why Mr. Smith's methodology is defective, including Mr. Smith unreasonably assuming that ZIM was responsible for all inland charges post-pandemic, even though Samsung was responsible for some charges pre-pandemic or that Samsung and its customers directly caused some of the charges paid. CX_06504; CX_06508; RX-1208. As noted by Mr. Zayas, Mr. Smith failed to comply with applicable professional standards when he uncritically accepted unreasonable assumptions and failed to analyze whether charges were causally connected to factors other than the actions of ZIM. CX_06510. What this means is that the Smith Report does not address the issue of causation.¹⁸

The failure of Samsung to make any effort to prove causation is particularly damning because, in his deposition, Michael Rapske of Samsung admitted there were situations in which Samsung would be liable for additional inland charges, including demurrage and detention. More specifically, Mr. Rapske testified that the Summary of Handling Charges found at CX_02284:

(i) contains all amounts paid by Samsung in each of the listed categories from mid-2019 to August 31, 2022. CX_02200, 28:8-13.

(ii) contains any detention paid by Samsung during 2022 as a result of destination facilities being unable to unload the container in a timely manner. CX_02229-CX_02230, 57:17 – 58:4.

(iii) contains any demurrage paid by Samsung from 2020 to 2022 as a result of CNT failures to perform. CX_02238, 66:20-25.

(iv) contains any demurrage paid by Samsung as a result of Samsung failing to obtain customs clearance of inbound cargo, clearance which is the responsibility of Samsung. CX_00241, 69:17-20; CX_00247-CX_00248, 75:16 – 76:10.

(v) contains any demurrage paid by Samsung as a result of a facility being unable to receive cargo. CX_00249-CX_00250, 77:23 – 78:11 and CX_02251, 79:13-21.

¹⁸ In particular, the Zayas Rebuttal report highlights several anomalies in the data relied upon by Smith, and explains why Smith's failure to consider and address these anomalies render Smith's report both inconsistent with applicable professional standards and unreliable.

Each of the foregoing events – destination facilities unable to take delivery of or unload containers in a timely manner, CNTs failing to perform, and Samsung failures to clear Customs - - occurred during the period in question. RPF# 56, 58, 60-62, 65, and 74.

Despite Samsung's admission that charges arising from destination facilities being unable to receive or unload containers and from a failure to clear Customs are its responsibility, it has knowingly included these charges in the damages being sought. This demonstrates that (a) even if ZIM did violate the Shipping Act (which it denies) it did not cause all of the damages Samsung is seeking to recover; and (b) Samsung has failed to prove causation with respect to any of its damages.

ZIM has shown that Samsung is seeking to recover amounts for which Samsung is responsible. That fact demonstrates why it is imperative to hold Samsung to its burden of proof with respect to proximate causation, a burden which it has utterly and completely failed to meet. Accordingly, Samsung should not be awarded any reparations, even if ZIM is found to have violated the Shipping Act (which it has not).

E. Samsung Has Failed To Prove Damages With Reasonable Certainty

Under the Shipping Act, the Commission is to “direct the payment of reparations to the complainant for actual injury caused by a violation” of the Act. 46 U.S.C. § 41305(b). “Actual damages” are damages recoverable “as compensation for the actual loss or injuries sustained” due to the violation of the Shipping Act. *Cal. Shipping Line, Inc. v. Yang Ming Marine Transp. Corp.*, 25 S.R.R. 1213, 1230 (FMC 1990). Complainants alleging Shipping Act violations must prove those damages by reasonable certainty in order to recover. *See, Rose Int'l, Inc. v. Overseas Moving Network*, 29 S.R.R. 119, 187 (FMC 2001) (“Complainant must prove with ‘competent evidence’ that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with ‘reasonable certainty.’” (citing *Adair v. Penn-Nordic*

Lines, Inc., 26 S.R.R. 11, 25 (ALJ 1991)). Although mathematical precision is generally not required to prove damages with reasonable certainty, the complainant must nonetheless provide evidence sufficient to support a reasonable inference of the accuracy of their losses. *See, MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, 5 F.MC.2d 109, 114 (FMC 2022). Accordingly, while damages need not be proven by absolute mathematical precision, an award of damages based on calculations that are unreliable or merely speculative would be improper. *See Rose Int'l at 187.*

Here, Samsung has failed to prove damages with reasonable certainty because it has included ALL amounts paid over a three-year period for various charge categories despite acknowledging that there are circumstances in which it is responsible for the charges and acknowledging that any charges for which it is responsible are nonetheless included in the reparations being sought. This is a defect in Samsung's case very similar to its failure to prove causation.

In his deposition testimony, Mr. Smith testified that his loss analysis does not include any adjustment or consideration of inland transportation charges which may be the responsibility of Samsung. CX_05987, 41:6-14. Put another way, Samsung's alleged damages include charges that were incurred due to acts or omissions of Samsung. In addition to examples of this cited in Section D above, Samsung also instructed CNTs to deliver cargo on a timeline that led to demurrage, prepull charges, and/or storage costs based on customers constraints (such as warehouse receiving/processing limitations)(RPF #76) and/or ordered truckers to deliver other cargo before that transported by ZIM. RX-1208.

Samsung has admitted that it is responsible for charges in certain circumstances and that if charges were incurred in those circumstances they are included in its damages claim. ZIM has

demonstrated that charges were in fact incurred in circumstances that are the responsibility of Samsung. Accordingly, Samsung cannot be found to have met its burden to prove damages with reasonable certainty.

In addition, the lack of clarity about when the alleged change in ZIM’s practices began – 2020 or 2021 – also renders Samsung’s claim for damages insufficiently certain to permit an award of same.

F. Samsung’s Other Legal Arguments Are Without Merit

Samsung’s allegations of violations of the Shipping Act other than Section 41102(c) are without merit.

1. *ZIM Did Not Retaliate Against Samsung*

Section 41104(a)(3), as in effect through June 15, 2022, made it unlawful for a common carrier, either alone or in conjunction with another person, directly or indirectly, to:

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). On June 16, 2022, the Ocean Shipping Reform Act of 2022 (“OSRA 2022”) revised the Shipping Act of 1984. The changes made by OSRA 2022 included revising what had been 41104(a)(3) and moving it to a new Section 41102(d), which reads:

(d) Retaliation and Other Discriminatory Actions.—A common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not—

(1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or

(2) resort to any other unfair or unjustly discriminatory action for—

(A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has—

(i) patronized another carrier; or

(ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or

(B) any other reason.

46 U.S.C. §41102(d). Samsung argues that ZIM’s exercise of its lawful contractual lien rights constituted unlawful retaliation. Samsung is wrong.¹⁹

Samsung does not allege that ZIM refused it cargo space accommodations. Samsung does not allege that ZIM exercised its lien rights because Samsung patronized another carrier or because Samsung had filed a complaint against ZIM. Thus, the only basis upon which a finding of retaliation could be found is that ZIM resorted to an unfair or unjustly discriminatory action for “any other reason.” Any argument to this effect fails for two reasons.

First, as explained at length earlier in this brief, ZIM’s actions were the lawful exercise of contractual lien rights. Thus, ZIM’s actions were not unfair or unjust, meaning there was no retaliation within the meaning of the statute. Second, even if ZIM’s conduct was unfair or unjustly discriminatory (something which Samsung does not allege and which ZIM denies), it still would not constitute retaliation because the phrase “any other reason” has been limited in scope by the Commission.

The December 18, 2021, Statement of the Commission on Retaliation (FMC Docket 21-15) states:

The Commission interprets “any other reason” to mean that protected activity under § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS’ dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission. Further,

¹⁹ The press release which Samsung quotes in support of its argument has no legal significance whatsoever.

providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within same class of conduct as filing a complaint.

Statement at 7 (footnote omitted). Samsung did not engage in any of the protected conduct that the Commission indicated is to be included within the meaning of “any other reason.”

Accordingly, ZIM did not retaliate against Samsung.

2. *ZIM Did Not Refuse To Deal With Samsung*

ZIM did not refuse to deal with Samsung, unreasonably or otherwise.

Section 41104(a)(10), as in effect through June 15, 2022, made it unlawful for a common carrier, either alone or in conjunction with another person, directly or indirectly, to “unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41104(a)(10). As of June 16, 2022, Section 41104(a)(10) was revised to make it unlawful for a common carrier to:

(10) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier;

As explained below, ZIM did not engage in a refusal to deal or otherwise.

In interpreting this prohibition as it relates to a refusal to deal, the FMC has stated:

The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA. All that is required is that common carriers . . . refrain from ‘shutting out’ any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, 29 S.R.R.

345, 351 (ALJ 2001), aff’d 29 S.R.R. 1066 (FMC 2002), aff’d *New Orleans Stevedoring*

Company v. Federal Maritime Commission, 30 S.R.R. 1066 (D.C. Cir. 2002). Samsung does not argue that ZIM engaged in a “shut out.”

Instead of relying on settled law, Samsung points to a notice of proposed rulemaking issued in September of 2022 (after most of the activity which forms the basis of its allegations

occurred) and which has not yet been finalized in a desperate attempt to convince the Commission to enforce a proposed rule that has been highly criticized in comments on a retroactive basis. Under existing and applicable law described above, ZIM's conduct was not unlawful because ZIM did not shut out Samsung.

Moreover, Samsung's argument fails because it once again chooses to ignore the facts in the record, which show that ZIM did in fact waive/refund (or offer to waive) demurrage and detention charges relating to Samsung shipments when doing so was warranted under ZIM's legally compliant policy. Speight Tr., CX_02918-CX_2919, 119:3,120:17; CX_02944 – CX_02945, 145:19-146:9; CX_03045; RX-0838 (waiving charges disputed by Samsung); RX-0914 (ZIM covered storage for house trucker delays); RX-0005 (waiving \$3MM in D&D for SEA); Yaacoub Tr., CX_03278-CX_03279, 221:8-222:2 (discussing RX-0005).

So, even if one unlawfully applies a proposed rule retroactively to ZIM's conduct, there is still no refusal to deal, unreasonable or otherwise, because ZIM did waive/refund charges relating to Samsung shipments.

3. Samsung's OSRA Invoicing Claims Are Devoid Of Merit

Samsung cites one example, SEA00112539 (CX_07492), of a ZIM invoice that allegedly violates 41104(a)(15) because it allegedly does not include the date each container was made available and because the start of free time is not the same for each container. However, the box in the upper left-hand corner of the second page of the invoice (CX_07493) clearly shows the container availability date of May 22, 2022. Since May 22, 2022, was a Sunday, any containers for which free time began on May 22, 2022 (the date of discharge), have one excluded day and have the same amount of free time as containers discharged on May 23, 2022, a Monday. CX_07942.

Samsung also argues that ZIM violated 46 U.S.C. §41104(a)(14) by issuing invoices that did not comply with all applicable statutory provisions and regulations. That argument fails because, as set forth at length in this brief, ZIM's practices and charges were lawful and reasonable.

Even if Samsung's allegations with respect to ZIM's invoices are true (which they are not), the invoice requirements applied as from June 16, 2022, and do not apply to any invoices issued prior to that date. Accordingly, even if Samsung's argument on this issue is correct (which it is not), the argument does not support an award of reparations with respect to any charges invoiced prior to June 16, 2022.

VI. CONCLUSION

For the foregoing reasons, the Presiding Officer should conclude that ZIM did not violate the Shipping Act, that Samsung has not demonstrated proximate causation or proven damages with reasonable certainty, and should dismiss the complaint with prejudice and discontinue this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2023, a true and correct copy of Respondent's Reply Brief, Proposed Findings of Fact, Reply To Complainant's Proposed Findings of Fact, and Appendix on counsel for Samsung Electronics America, Inc. in FMC Docket No. 22-30.

s/ Christopher Raleigh