

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-35

M.E. DEY & CO., INC.

COMPLAINANT,

v.

HAPAG-LLOYD AG and HAPAG-LLOYD (AMERICA) LLC

RESPONDENTS.



AMENDED COMPLAINT

1. Complainant M.E. Dey & Co., Inc. (“Complainant” or “Dey”) by its undersigned attorneys, brings this Amended Complaint against Respondents Hapag-Lloyd AG and Hapag-Lloyd (America) LLC (“Hapag AG” and “Hapag USA,” respectively; collectively, “Respondents”) based upon Respondents’ violations of the Ocean Shipping Reform Act of 2022, 46 U.S.C. § 40101, *et. seq.* (OSRA 2022), alleged herein.

2. The Complaint arises from Respondents’ failure to timely make available for pickup multiple containers, on which demurrage and storage charges improperly were assessed by Respondents and their subcontractor, despite Respondents having caused said charges to accrue, and despite Complainant’s inability to pick up said containers due to Respondents’ negligence.

I. COMPLAINANT

3. Complainant is a non-vessel-operating common carrier (NVOCC) as defined by 46 U.S.C. § 40102(17), is licensed by the Commission, and is organized and existing under the laws

of Wisconsin. Its principal place of business is located at 700 W. Virginia Street, Suite 300, Milwaukee, Wisconsin, 53204.

II. RESPONDENTS

4. Respondent Hapag-Lloyd AG is a global ocean carrier company based in Germany. It has its headquarters at Ballindam 25, D-20095 Hamburg, Germany. Hapag by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation. Hapag is and was at all times pertinent to this Complaint a common carrier within the meaning of the Shipping Act, 46 U.S.C. § 40102(7), subject to regulation by the Federal Maritime Commission (“FMC”).

5. Respondent Hapag-Lloyd (America) LLC is a United States subsidiary and agent of Hapag AG. Its office is located at 3 Ravinia Drive NE, Suite 1650, Atlanta, Georgia, 30346. The claims against Hapag USA arise out of a common nucleus of operative facts with those against Hapag AG, over which the Commission has jurisdiction as a vessel operating common carrier (VOCC).

6. For the relevant period and with regard to the relevant containers, Respondents’ subcontractor was CSX Corporation, a rail carrier engaged to transport Complainant’s containers on behalf of Respondents.

III. JURISDICTION

7. The FMC has subject-matter jurisdiction over this Complaint pursuant to the Shipping Act of 1984, as amended by the Ocean Shipping Reform Acts of 1998 and 2002, 46 U.S.C. § 40101, *et seq.*

8. This Complaint is being filed pursuant to Section 11(a) of the Shipping Act, 46 U.S.C. § 41301. Dey is seeking reparations for injuries caused to it by Respondents due to their violations of 46 U.S.C. § 41102(c).

9. The FMC has personal jurisdiction over Hapag AG as a “common carrier” as defined in 46 U.S.C. § 40102(7) and “ocean common carrier” as defined in 46 U.S.C. § 40102(18).

10. The claims against Hapag USA arise out of a common nucleus of operative facts with those against Hapag AG, over which the Commission has jurisdiction as a VOCC. Accordingly, the FMC has pendent jurisdiction over Hapag USA.

11. Respondents’ actions alleged herein constitute failures by Respondents “to establish, observe, and enforce just and reasonable regulations and practices relating to receiving, handling, storing, or delivering property” of Dey, which proximately caused Dey’s loss, in violation of 46 U.S.C. § 41102(c) and 46 C.F.R. §§545.4 and 545.5.

12. The storage and demurrage charges in this action do not serve the FMC’s goal to ensure that detention and demurrage act as a financial incentive to promote the efficient movement of cargo. 46 C.F.R. § 545.5(c)(1).

13. The Commission maintains jurisdiction over rail transport with such an ocean nexus, where the cargo moves intermodally under one bill of lading, and Respondents are responsible for the improper storage charges of their subcontractor, CSX.

IV.FACTUAL ALLEGATIONS

A. The Commission’s Interpretive Rule

12. In 2019, the Commission published an interpretive rule regarding factors it may consider when assessing the reasonableness of demurrage and detention practices and regulations under 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4(d)

13. 46 U.S.C. § 41102(c) provides in relevant part that “[a] common carrier... 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.”

14. The Interpretive Rule “applies to practices and regulations relating to demurrage and detention for containerized cargo” and such detention and demurrage “encompass[es] any charges, including ‘per diem,’ assessed by ocean common carriers...related to the use of marine terminal space...or shipping containers, not including freight charges.” 46 C.F.R. § 545.5(b).

15. The Interpretive Rule identifies detention and demurrage charges as being properly assessed where they serve an “[i]ncentive principle,” basing its assessment thereof on “the extent to which demurrage and detention are serving their intended primary purposes as *financial incentives to promote freight fluidity*.” 46 C.F.R. § 545.5(c)(1) (emphasis added).

16. Regarding cargo availability, the Commission noted that it “may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval,” 46 C.F.R. § 545.5(c)(2)(i), *e.g.*, whether demurrage has been assessed on cargo that actually can be picked up.

17. Most broadly, in its recommendations for an Interpretive Rule, the Commission’s Fact Finding Officer identified a “longstanding principle that practices imposed by tariffs, which are implied contracts by law, *must be tailored to meet their intended purpose*,” FF28 Letter at 1. (emphasis added), and stated, “when incentives such as demurrage and detention no longer function because shippers are prevented from picking up cargo...,’ absent extenuating circumstances, ‘charges should be suspended.” *Id.* at 2. (An NVOCC “*is a shipper* in its relationship with an ocean common carrier” such as Hapag. 46 U.S.C. § 40102(17)(B) (emphasis added).)

B. Contractual Relationship between Dey and Hapag

18. Dey through its NVOCC agent EDCR, in the Netherlands, contracted with Hapag AG in early August 2022 for the intermodal transport of sixteen (16) containers from Rotterdam to Nashville.

19. The goods moved by ocean transport from Antwerp, Belgium to Charleston, South Carolina and then were transported by rail by Respondents' subcontractor, CSX, from Charleston to CSX's rail terminal in Nashville, Tennessee.

20. For all sixteen containers, Hapag AG acted as ocean common carrier and Respondents' subcontractor, CSX, acted as rail carrier under the same bills of lading.

21. The goods moved under bill of lading numbers HLCURTM220676293, HLCURTM220688938, and HLCURTM220688916.

C. Timeline of Container Movement or Lack Thereof

22. Between September 3 and 5, 2022, a total of three (3) of the sixteen) containers were made available for pickup by Dey's trucker, New Age Logistics ("New Age") prior to the last free day on September 7, 2022 so as to avoid storage and demurrage charges from accruing. There are no disputed charges regarding these three containers.

23. Beginning on September 6, 2022, however, New Age was informed that some of the remaining containers were not available for pickup at the CSX rail terminal in Nashville, Tennessee because they had not been mounted on chassis and the trucker was not being allowed to provide its own chassis.

24. On September 7, 2022, the last free day before rail storage and demurrage accrued, Dey attempted again to ascertain the availability status of its remaining containers.

25. New Age responded that although it was giving its best effort to move the containers as soon as possible, CSX in Nashville was “making things very difficult.” New Age continued to attempt to obtain the release and availability of the containers to arrange pickup.

26. On September 8, 2022, one day after expiration of the last day of free time for storage and demurrage, one container, CXDU1776387, was made available for pickup and released by CSX, allowing pickup and delivery to Dey’s customer. All other containers remained unmounted to chassis and unavailable.

27. The following day, September 9, 2022, New Age requested that Dey pay storage charges to CSX on the following thirteen (13) containers:

- i. BMOU4036699
- ii. CAAU5331464
- iii. CAIU4978886
- iv. FANU1717857
- v. FCIU8466490
- vi. HLBU2016783
- vii. HLXU6366766
- viii. HLXU8505460
- ix. TCNU8372313
- x. TGBU6221391
- xi. TGHU9589856
- xii. UACU5901170
- xiii. UETU5799967

28. On September 12, 2022, Dey was informed that the containers were not mounted on chassis and therefore were not available for pickup and had not been pulled over the preceding weekend.

29. On September 13, 2022, one container, TCNU8372313, was mounted on a chassis by CSX and made available, and was picked up and delivered to Dey's customer. The following twelve (12) containers, however, remained unmounted not available for pickup:

- i. BMOU4036699
- ii. CAAU5331464
- iii. CAIU4978886
- iv. FANU1717857
- v. FCIU8466490
- vi. HLBU2016783
- vii. HLXU6366766
- viii. HLXU8505460
- ix. TGBU6221391
- x. TGHU9589856
- xi. UACU5901170
- xii. UETU5799967

30. On September 14, 2022, Dey again contacted New Age regarding the status of the containers. Dey was informed that two (2) more of the remaining containers, FCIU8466490 and CAIU4978886, had been mounted and pulled. The remaining containers were still unavailable for pickup.

31. As of September 15, 2022, some ten (10) containers remained unmounted on chassis:

- i. BMOU4036699
- ii. CAAU5331464
- iii. FANU1717857
- iv. HLBU2016783
- v. HLXU6366766
- vi. HLXU8505460
- vii. TGBU6221391
- viii. TGHU9589856
- ix. UACU5901170
- x. UETU5799967

32. On September 16, 2022, Dey again contacted New Age to ascertain the status of the remaining ten (10) containers. Dey was told that none of the containers had been mounted on chassis and therefore could not be pulled.

33. On September 20, 2022, after yet another attempt to ascertain the status of the containers, Dey was informed that the remaining ten (10) containers still had not been mounted or pulled. The failure to mount and pull the containers continued despite New Age's offer to send in a carrier with its own chassis to pull the containers. which offer CSX refused.

34. On September 22, 2022, Dey again attempted to ascertain the status of the remaining ten (10) containers. Once again, New Age informed Dey that none of the containers had been mounted on chassis or pulled and that New Age was continuing to contact CSX regarding availability.

35. On September 26, 2022, Dey again was informed that the remaining ten (10) containers had not been mounted on chassis or pulled.

36. From September 27, 2022 through September 30, 2022, Dey made repeated, daily requests for information regarding the status of the containers. In all cases, Dey was informed the containers remained unmounted and unavailable for pickup.

37. On September 30, 2022, New Age informed Dey that it had contacted CSX again proposing bringing in bare chassis to mount the remaining containers, but had been informed that the containers were in a stack that could not be accessed.

38. From October 3, 2022 through October 5, 2022, New Age daily informed Dey that the containers remained unmounted. New Age additionally informed Dey of CSX storage charges that were continuing to accumulate during that time.

39. On or around October 6, 2022 and October 7, 2022, the remaining containers were finally mounted on chassis.

D. Communication with Hapag and its Subcontractor, CSX

40. During the time period at issue, Dey contacted Hapag USA regarding the mounting storage and demurrage charges, in an attempt to prevent the rail storage charges and Respondents' demurrage charges at issue from accumulating and to request waiver of such charges,

41. On October 10, 2022, Dey contacted CSX regarding waiving of the storage charges because containers were not available.

42. At that time, CSX advised that the reason the chassis were not mounted was due to Respondents' failure to provide chassis on arrival.

43. CSX further advised that Dey's trucker could not come in to recover the containers with its own chassis because the containers were owned by the steamship line. CSX further

reported that the failure of Respondents to provide chassis to transport the containers at issue was why they were placed into stacks at the rail terminal.

44. CSX reported that Hapag USA refused to accept any responsibility for this matter, that CSX could not request that Hapag USA approve that charges be waived, and that it was up to Dey to contact Hapag USA to request that they directly advise CSX to waive their storage fees.

45. Hapag USA refused to take any action to reduce the charges being assessed by CSX despite the fact that Respondents' own actions caused the demurrage to occur.

46. On October 10, 2022, Dey telephoned Hapag USA four times regarding disputing the storage charges. Dey additionally sent an escalation request through the Hapag website in an attempt to induce Respondents to address the matter.

47. On October 11, 2022, Dey spent a significant portion of the day attempting to get the issues resolved with Hapag USA. Hapag USA, however, was wholly unresponsive.

48. Dey was later advised by Hapag that it would not be able to speak to a manager without a second escalation request.

49. Dey therefore initiated a second such request.

50. Also on October 11, 2022, a Hapag USA representative informed Dey that Respondents would waive their own demurrage charges (then totaling in excess of \$153,000) but stated that Dey would be responsible for any negotiation or payment of storage charges to Respondents' subcontractor, CSX, which charges total \$136,500 and were already paid by Dey. Subsequently, Hapag USA represented that Respondents' share of the demurrage charges at issue was \$214,860.

51. Hapag USA later sought to renege on that agreement to waive demurrage and issued a final demand letter to Dey on December 1, 2022, informing it that Dey's account would be

“inactivated” and its business relationship with Respondents severed, unless Dey immediately paid \$156,932.90 on Respondents’ own demurrage charges. Later Hapag USA changed its position again, and agreed to waive Respondents’ demurrage charges against Dey. However, Hapag USA did not and has not acted to waive or request that Respondents’ subcontractor CSX waive the identically unjustifiable \$136,500 in rail storage charges it was assessed.

52. Dey was forced to pay the \$136,500 in storage charges assessed by Respondents’ subcontractor CSX in order to obtain the release of the containers at issue.

53. For each of these containers, the storage charges were the result of failing to mount the containers on chassis, which failure was beyond Dey’s control.

54. Due to Respondents’ and their subcontractor’s actions, Dey has been forced to pay \$136,500 in rail storage charges for fees accrued while the containers were unavailable for pickup as a result of Respondents’ and their subcontractor’s actions.

55. Despite Dey’s demand to be refunded, neither Respondents, nor their subcontractor, CSX, have repaid the funds.

56. The charges accrued were solely the result of Respondents’ actions or those of their subcontractor, CSX. Dey was unable to timely obtain the containers at issue due to no fault of its own. Assessing demurrage in such case flies in the face of the Commission’s longstanding “[i]ncentive principle,” which determines the reasonableness of demurrage charges based on “the extent to which...[they] serv[e] their intended primary purposes as *financial incentives to promote freight fluidity*.” 46 C.F.R. § 545.5(c)(1) (emphasis added).

V. VIOLATIONS OF THE SHIPPING ACT

COUNT I: VIOLATIONS OF 46 U.S.C. § 41102(c)

57. Dey repeats and realleges each of the allegations contained in paragraphs 1-56 as if fully stated herein.

58. Section 41102(c) of the Shipping Act prohibits a common carrier or marine terminal operator from failing to “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

59. Respondent Hapag AG is an ocean common carrier as defined by the Shipping Act. 46 U.S.C. § 40102(18).

60. Respondent Hapag USA acted as Hapag AG’s agent in collecting the unjustified demurrage charges at issue.

61. Respondents engaged CSX as subcontractor to transport Complainant’s containers on their behalf.

62. Respondents’ practices and regulations relating to the assessment of demurrage/detention are directly related to receiving, handling, storing, or delivering property, are occurring on a normal, customary, and continuous basis, and are unjust and unreasonable.

63. Respondents have failed to establish and observe just and reasonable practices in violation of § 41102(c) by failing to provide chassis on arrival for the relevant containers, thereby causing them to accrue demurrage charges, which demurrage charges in the amount of \$136,500 were paid by Dey to CSX.

64. Respondents have failed to establish and observe just and reasonable practices in violation of § 41102(c) by allowing their subcontractor to bill demurrage charges during periods when containers were not available for pickup by the shipper or NVOCC.

65. Respondents have failed to establish and observe just and reasonable practices in violation of § 41102(c) by allowing their subcontractor to refuse to release containers in its possession until demurrage charges are paid, which charges accrued during periods when containers were not available for pickup by the shipper or NVOCC.

66. Respondents have failed to establish and observe just and reasonable practices in violation of § 41102(c) by assessing demurrage charges that serve no incentivizing principle and do not promote freight fluidity.

67. Respondents have failed to establish and observe just and reasonable practices in violation of § 41102(c) by refusing to extend free time and/or waive storage and demurrage charges for the containers, which are the result of Respondents' and/or their subcontractor's own actions.

**COUNT II:
VIOLATIONS OF 46 U.S.C. § 41104(a)(14) -
OSRA – UNREASONABLE CHARGES**

68. Complainant Dey repeats and realleges each of the allegations contained in paragraphs 1-67 as if fully stated herein.

69. As amended by OSRA, 46 U.S.C. § 41104(a)(14) provides that a “common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not . . . assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations).”

70. Respondents' practices and actions in connection with assessment of demurrage charges in September and October 2022, after OSRA 2022 became effective on June 16, 2022, are in violation of 46 U.S.C. §41104(a)(14).

71. The primary goal of detention and demurrage is to act as a financial incentive to promote the efficient movement of cargo. 46 C.F.R. § 545.5(c)(1). The assessment of demurrage charges that do not provide an incentive are deemed to be an unreasonable practice under the Shipping Act and OSRA.

VI. CAUSATION AND INJURY TO COMPLAINANT

72. As a result of Respondents' violations of the Shipping Act and OSRA, the Complainant has sustained injuries and damages of at least \$136,500, the amount wrongly assessed by CSX, which amount has not been refunded.

VII. ALTERNATIVE DISPUTE RESOLUTION

73. As detailed above, Dey has repeatedly attempted to resolve this matter with Hapag USA and Respondents' subcontractor, CSX. On November 30, after multiple phone calls and e-mails from Dey and its trucker New Age to Hapag USA and CSX, Dey sought resolution by sending a letter detailing the unreasonable charges to Hapag.

74. Although Hapag USA ultimately waived Respondents' own demurrage charges in the amount of \$156,932.90, neither Respondents nor their subcontractor, CSX, have agreed to refund the \$136,500 in demurrage charges paid under duress to CSX by Dey.

75. As a result, Dey has not sought alternative dispute resolution procedures nor has it consulted with the Commission's Dispute Resolution Specialist regarding ADR under 46 C.F.R. § 502.64.

VIII. PLACE OF HEARING

76. Complainant requests a hearing on this matter, and further requests that the hearing be held at the Federal Maritime Commission, 800 N. Capitol St., NW, Washington, D.C. 20573-0001.

VIV. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that Respondents be required to answer the charges in this Complaint, and that after the Commission's investigation and hearing, the Commission issue an order:

- 1) Requiring Respondents to pay Complainant reparations for the unlawful conduct described herein, along with interest and Complainant's attorneys' fees and costs pursuant to 46 U.S.C. § 41305;
- 2) Requiring the payment of any other amounts that the Commission deems appropriate; and,
- 3) Providing such other and further relief that the Commission deems just and proper.

DATE: February 1, 2023

Respectfully submitted,



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VERIFICATION

I, Sandi J. Siegel, am the President of M.E. Dey and hereby declare and attest under penalty of perjury that I have read the forgoing Verified Amended Complaint and believe, to the best of my knowledge, information, and belief, that the facts stated therein are true and correct.

Dated: February 1, 2023



Sandi J. Siegel