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 AND THIRD-PARTY COMPLAINANTS,

v.

CSX TRANSPORTATION, INC.,

THIRD-PARTY RESPONDENT.

COMPLAINANT'S RESPONSE TO THIRD-PARTY RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Complainant M.E. Dey & Co., Inc. ("Complainant" or "Dey") by its undersigned attorneys, hereby submits its response to Third-Party Respondent CSX Transportation, Inc.'s ("CSX's" or "Third-Party Respondent's") Motion to Dismiss for Lack of Jurisdiction a Third-Party Complaint brought by Respondents and Third-Party Complainants Hapag-Lloyd AG and Hapag Lloyd (America) LLC ("Hapag AG" and "Hapag USA," respectively; collectively, "Respondents" or "Third-Party Complainants").

I. SUMMARY OF ARGUMENT

CSX asserts that CSX is not subject to Commission jurisdiction. CSX's argument fails because, as set forth in the initial decision affirmed by the Commission in *TCW, Inc v. Evergreen Shipping Agency (am.) Corp. & Evergreen Line Joint Service Agreement*, 2022 WL 18068977, at *3 (FMC 2022), the Commission has jurisdiction over complaints inherently related to Shipping Act violations. That decision reaffirmed that entities not traditionally regulated by the Commission can be subject to Commission jurisdiction. In *TWC, Inc.*, an otherwise non-regulated entity who was acting as an agent on behalf of the ocean carrier and assessing charges in violation of the Shipping Act was held subject to Commission jurisdiction. The same principle applies here, where CSX is acting as agent on behalf of Hapag in assessing charges violative of the Shipping Act, as part of intermodal transportation.

CSX's argument also fails because CSX's actions here fall squarely within the definition of a marine terminal operator. Pursuant to 49 U.S.C § 40102(15), the term "marine terminal operator means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49." Here, there is no legitimate dispute that CSX provided terminal facilities in connection with a common carrier (Hapag) who was providing ocean transportation on behalf of Dey. Thus, CSX's action in charging Dey for over a $100,000 in demurrage charges, despite the fact that by CSX's own admission the containers at issue were so haphazardly stacked that they were not capable of being placed on chassis, constitutes a Shipping Act violation.

Finally, CSX's interpretation of the Shipping Act produces unfair, if not absurd, results. The Surface Transportation Board (STB) specifically exempts from its watch intermodal transportation, including rail storage charges incurred during such transportation. 49 C.F.R. §

1090.2. If adopted, CSX's jurisdictional argument would permit rail carriers to -- as CSX has done here -- not only refuse to allow shippers and consignees access to their cargo but to punitively bill them for demurrage charges arising therefrom knowing that they can do so with impunity because their actions are immune from regulatory oversight.

A. Amended Complaint

Dey's Amended Complaint alleges, in relevant part, that the FMC has personal jurisdiction over the Hapag Defendants because Hapag-Lloyd AG is an ocean common carrier and Hapag-Lloyd (America) is an agent of Hapag AG. Am. Compl. at 4-5, 9-10.[1] It further asserts that a claim against Hapag Lloyd (America) arises out of a common nucleus of operative facts as those against Hapag AG. *Id.* at 5.

The Amended Complaint asserts that sixteen (16) containers moved by ocean transport from Belgium to Charleston, South Carolina and then were transported by rail by Hapag's subcontractor, CSX, from Charleston to CSX' terminal in Nashville, Tennessee. *Id.* at 19. Beginning in early September 2022, Dey's trucker, New Age, was informed that numerous containers were not available for pickup at the CSX terminal because they were not mounted on chassis and the truckers was not permitted to provide its own chassis for pickup. *Id.* at 23. Over the course of the next approximately 23 days, Dey and New Age made repeated attempts to pick up containers to prevent demurrage from accruing. *Id.* at 25-36. On September 30, 2023, New Age contacted CSX again and proposed bringing in bare chassis to mount the remaining containers but was informed that the containers were in a stack that could not be accessed. *Id.* at 37. The remaining containers were made available for pickup on October 6th and 7th. *Id*. at 39.

[1] Citations for the Amended Complaint are to paragraph numbers.

Shortly thereafter, on October 10, 2022, Dey contacted CSX regarding waiving storage charges because the containers were not available during the time that storage charges were being assessed. *Id.* at 41. CSX refused to waive the storage charges. *Id*. at 42-44. Dey was forced to pay CSX $136,500 in storage charges in order to recover its cargo. *Id.* at 52.

B. Third Party Complaint

Hapag's Third-Party Complaint asserts, in relevant part, that the FMC has personal jurisdiction over CSX through pendent jurisdiction because Hapag's claims against CSX arise out of a common nucleus of operative facts as Dey's claims against Hapag. Third-Party Compl. at 9.[2] It further asserts that the basis for jurisdiction over CSX is the same as that for jurisdiction over Hapag USA. *Id.* at 10.

The Third-Party Complaint asserts that CSX had exclusive control over the facility where Dey's containers were stored. *Id.* at 28. It further asserts that CSX independently established, assessed, billed, and collected the storage charges. *Id.* at 29-32. It asserts that CSX retained all of the $136,500 in storage charges assessed on Dey's containers and Hapag did not receive any of the charges. *Id.* at 33. It further asserts that CSX has been unwilling to waive the storage charges imposed on Dey. *Id.* at 34.

In Count 1, Hapag claims that its own obligations were satisfied by delivering the Containers to a CSX facility and that CSX was responsible for Dey's cargo after the expiration of free time. *Id.* at 37-38. Hapag argues that if Hapag is found liable to Dey because CSX's storage charges are unreasonable, then CSX is responsible for the charges and liable to Hapag. *Id.* at 42. Further, Hapag argues that this analysis is unchanged if CSX was acting as Hapag's subcontractor.

[2] All numbered references relating to the Third-Party Complaint are to paragraph numbers.

Id. at 43. Hapag asserts that CSX's failure to allow Dey to provide its own chassis is an unreasonable practice under section 41102(c). *Id.* at 44.

In Count Two, the Third-Party Complaint asserts that CSX acted as "any other person", as described in section 4111014(a)(14), when it billed, charged, and collected the storage charges. *Id.* at 45-46 ("a common carrier, either alone or in conjunction with *any other person*, directly or indirectly shall not… assess any party for a charge that tis inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102…") (emphasis added). Thus, it asserts that CSX is the party responsible if Hapag is found to have violated the Shipping Act. *Id.* at 48.

C. Standard for Motions to Dismiss for Lack of Jurisdiction

Because the Commission's Rules of Practice and Procedure do not specifically provide procedural rules regarding motions to dismiss, the "Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *Way Interglobal Network, LLC v. Shenzen Unifelix SCM Ltd.*, Docket No. 22-28, Doc. No. 13, at 1-2 (FMC 2023); *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2020 FMC LEXIS 216, at *6 (FMC Oct. 29, 2020).

The Commission holds that when "jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies." *MAVL Capital*, 2020 FMC LEXIS 216 at *6 (*citing Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009)). "Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, 2020 FMC LEXIS 216 at *6 *(citing Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54 (FMC Dec. 18, 2015)).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136 (FMC 2011).

II. ARGUMENT

The law is well established that the Commission has jurisdiction over Shipping Act violations such as those at issue, including the inland portion of through transport and the persons involved in it like the third-party respondent. CSX's contention that it is not subject to Commission jurisdiction because it is not an ocean carrier and was not acting as a marine terminal operator, *see* CSX Mem. in Support of Mot. To Dismiss, at 8 n.20, ignores Commission precedent.

In *TCW, Inc. v. Evergreen Shipping Agency (am.) Corp. & Evergreen Line Joint Service Agreement*, 2022 WL 18068977, at *3 (FMC 2022), the Commission recently recognized that it has jurisdiction over complaints inherently related to Shipping Act violations:

> Because the facts show that the practice at issue occurred during the through transportation of international ocean borne shipping provided by a VOCC…the Commission has jurisdiction to adjudicate whether the per diem charges imposed by…Principal's agent during the inland portion of the through transportation…violate the Shipping Act.

The Commission in *Evergreen* appropriately relied upon the Ninth Circuit's holding in *Action Embroidery Corp. v. Atl. Embroidery, Inc.,* 368 F.3d 1174, 1180 (9th Cir. 2004) ("A court may assert pendent jurisdiction over a defendant with a respect to a claim for which there is no independent basis or personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction."). In holding that not only was the ocean carrier, but also its agent, liable for Shipping Act violations,

the Commission reaffirmed that entities not traditionally regulated by the Commission are subject to Shipping Act claims. Thus, the Commission has jurisdiction over otherwise non-regulated entities who are engaged in Shipping Act violations while acting on behalf of carriers.[3]

The facts here are analogous to those presented in *TCW*. Thus, even if one were to accept CSX's contention that it was not acting as a marine terminal operator here, at a minimum, it was acting as an agent on behalf of the ocean carrier in assessing charges violative of the Shipping Act. Accordingly, it is subject to the Commission's jurisdiction. Quite simply, there is no valid reason that the same principle set forth in *TCW* would not apply here where it is CSX acting on behalf of Hapag in assessing charges violative of the Shipping Act.

A. The Commission Has Jurisdiction over Inland Travel Pursuant to Maritime Contracts

The Supreme Court recognized in *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14, 27 (2004), that the Commission's jurisdiction does not automatically stop at the port. Instead, so long as a bill of lading requires substantial carriage of good by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract." *Id*.

Not surprisingly, Commission rulings and federal courts have followed that established precedent. As the Sixth Circuit explained in *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 419 (6th Cir. 2008), "*Kirby's* reasoning affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules."

[3] Here, the Amended Complaint naming Hapag-Lloyd (America) LLC as a Respondent in its capacity as an agent of an ocean carrier Hapag-Lloyd AG because the claim arises from the same nucleus of operative facts, is governed by the same principle.

Comporting with the understanding of the Courts, the Commission has long and unambiguously held that its jurisdictional reach extends to the inland portion of through transportation. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 133 (FMC 2011) (emphasizing, "congressional intent that the Commission have jurisdiction over through intermodal transportation, including the inland segment of the through transportation, and the Commission's acknowledgment of this jurisdiction" in finding jurisdiction over inland rerouting of transported goods).

As explained more recently in *Intermodal Motor Carriers Conference, American Trucking Associations, Inc. v. Ocean Carrier Equipment Management Association Inc.*, 2021 WL 409620, at *3 (FMC 2021), "although the question of subject matter jurisdiction is a controlling question of law, there is not a substantial ground for difference of opinion…. The Commission has indicated that it has jurisdiction over the domestic inland segment of a through movement and nothing presented by Respondents provides a substantial ground for difference of opinion."

In *Intermodal Motor Carriers Conference*, the Presiding Judge was confronted with the question of whether the Commission had subject matter jurisdiction in a proceeding where regulated entities exerted control over the chassis used in inland transportation. The Presiding Judge confirmed that the Commission's jurisdiction extends to all alleged violations of the Shipping Act. "While the Commission generally may not have jurisdiction based on domestic inland movements only, there is no dispute that the Commission has jurisdiction over ocean common carriers and chassis used" in ocean transportation. *Id* at 25. In so holding, the Presiding Judge extended FMC regulatory oversight to detention and demurrage practices involving chassis providers moving cargo under maritime contracts.

The holding in *Intermodal Motor Carriers Conference*, just as in *TCW,* makes clear that the Commission's regulatory oversight extends to detention and demurrage practices regarding

cargo moving under maritime contracts. There is no principled reason that rail carriers moving cargo under maritime contracts would be exempt from Commission jurisdiction.

Because Respondents and Third-Party Complainants have alleged that CSX violated the Shipping Act, they are right to recognize the Commission is the essential and appropriate forum to evaluate those claims. *See, e.g.,* Third-Party Compl. at 3 ("Considering that the Complainant's claim is a Shipping Act Claim arising out of the terms and conditions controlled by CSX and applicable directly to Dey, this is the only applicable venue for this claim").

B. <u>The Motion to Dismiss is Premature</u>

The Commission's Chief Administrative Law Judge held in a ruling entered earlier this year that respondents challenging whether they were regulated entities was not grounds for granting a motion to dismiss where the jurisdictional inquiry is bound up with the merits. *Thompson Pipe Group, Inc. v. Omni Logistics LLC,* 2023 WL 2240480, at *3 (FMC 2023). As CSX has done here, Respondent moved to dismiss the complaint against it because it claimed it "did not provide any common carrier services on behalf of Complainant" and did not "issue[] an ocean bill of lading to Complainant or directly arrange[] for a single ocean shipment of goods." *Id.* at 3. Nonetheless, Chief Judge Wirth explained that dismissal was not warranted because the Respondent's role was part of a common nucleus of operative facts and was bound up with the merits of the proceeding. *Id.* Therefore, there was no reason to dismiss the proceeding for lack of subject matter jurisdiction.

Here, as in *Thompson Pipe Group*, CSX's contention that it is not a regulated entity despite acting as the direct subcontractor of an ocean carrier, and despite assessing charges on goods moving in the inland leg of ocean transportation is without merit. Instead, such transportation is so "bound up with the merits" as to preclude dismissal. CSX's assertion that it is merely an unregulated entity raises a similar factual issue as that in *Thompson Pipe Group* regarding CSX's

role. A full hearing as to CSX's role is particularly appropriate given Third-Party Complainant's repeated reference to CSX's "exclusive control," arguing CSX "*independently* assessed," "*independently* billed," and "*independently* collected" the storage charges at issue. Third-Party Compl. at 5 (emphasis added).

Hapag plausibly asserts that "the FMC has personal jurisdiction over CSX through pendent jurisdiction because claims against CSX arise out of a common. Instead, the FMC has jurisdiction because it arises from the same nucleus of operative facts as the claim against Hapag. Third-Party Compl. at 3.[4] Characterization of CSX's role in this matter is a central question in need of the Commission's guidance and is, at a minimum, therefore inappropriate for dismissal at this stage. CSX implicitly concedes as much in contending that "the further one gets away from the terminal, the more complicated the inquiry [regarding whether an entity acts as a common carrier] may become, and it is not a question that can always be answered in the abstract." Mot. To Dismiss at 11. Even if the Presiding Judge determines that the matter requires a "complicated…inquiry," however, that does not warrant dismissal at this juncture.

C. CSX Acted as a Marine Terminal Operator

Accepting as true the allegations of Dey and Hapag in their respective Amended Complaints and Third Party Amended Complaints, as the Presiding Judge is required to do in considering a motion to dismiss, Hapag has established that CSX was acting as a marine terminal operator for the shipments at issue.

The Shipping Act defines a "marine terminal operator" as a "person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier

[4] In so arguing, Hapag explicitly concedes the Commission's personal jurisdiction over Hapag-Lloyd America LLC.

subject to subchapter II of chapter 135 of title 49." 49 U.S.C Section 40102(15). Here, there is no legitimate dispute that CSX provided terminal facilities in connection with a common carrier (Hapag) who was providing ocean transportation on behalf of Dey. Thus, CSX's action in charging Dey for over a $100,000 in demurrage charges, despite the fact that by CSX's own admission the containers at issue were so haphazardly stacked that they were not capable of being placed on chassis, constitutes a Shipping Act violation.

CSX's argument that the Presiding Judge should baldly accept its assertion that it was not acting as a marine terminal operator here is not only contrary to the actual language of the Shipping Act, it is contrary to established precedent. In *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 543 (D.C. Cir. 1988), the D.C. Circuit affirmed the Commission's expansive reading of what constitutes a marine terminal, finding the Louisiana Port Authority acted as marine terminal operator within the meaning of the Shipping Act despite not operating any terminal facilities. There, because the Respondent had sufficient involvement to discriminate under the Act, the Commission properly exercised jurisdiction over it. *See id.* ("Ownership or operation of terminal facilities is not a necessary prerequisite to the ability to discriminate."). Here, because CSX has complete control over the facility and exercises that control so as to prevent the release of maritime cargo until demurrage charges are paid in violation of the Shipping Act, the Commission has jurisdiction over it.

D. <u>Adoption of CSX's Position Would Invite Unfettered Shipping Act Violations</u>

CSX's interpretation of the scope of the Commission's jurisdiction would promote rampant Shipping Act violations by leaving such violations immune from regulatory review. The STB specifically exempts from its watch intermodal transportation, including rail storage charges incurred during such transportation. 49 C.F.R. § 1090.2. Thus, the only regulatory oversight of actions such as those at issue here -- where the rail carrier is charging over one hundred thousand

dollars in demurrage charges despite refusing access to the containers – is the Commission. Exercise of jurisdiction over an entity who is directly involved in assessing demurrage charges is particularly appropriate given that the Supreme Court in *United States v. American Union Transp*., 327 U.S. 437, 447-57 (1946) recognized that the 1916 Shipping Act's legislative scheme required a broad construction to make effective the regulation at issue. *See also Plaquemines Port*, 838 F.2d at 543 ("It should be clear by now that allowing such discrimination [by the Port] would nullify the Shipping Acts for the first 100 miles of the Mississippi River north of the Gulf."). Given that ocean carriers frequently are delegating invoicing responsibility to their rail subcontractors, as to avoid their obligation to comply with the Interpretive Rule and OSRA 2022, the Commission should exercise its full authority to govern Shipping Act violations. Any other decision would permit rail carriers to act with impunity as they have done here.

III. CONCLUSION

For the reasons set forth herein, Third-Party Complainant's Motion to Dismiss for Lack of Jurisdiction should be denied.

Respectfully submitted,

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June 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 2023, the foregoing was served via electronic mail on:

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