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.

THIRD-PARTY RESPONDENT'S REPLY TO COMPLAINANT'S AND THIRD-PARTY COMPLAINANTS' OPPOSITIONS TO THIRD-PARTY RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Third-Party Respondent, CSX Transportation, Inc. ("CSXT") hereby submits this combined reply ("Reply") to the (1) Opposition to Third-Party Respondent's Motion to Dismiss for Lack of Jurisdiction, filed by Third-Party Complainants, Hapag-Lloyd AG and Hapag-Lloyd (America) LLC ("Third-Party Complainant" or "Hapag"), and (2) Complainant's Response to Third-Party Respondent's Motion to Dismiss for Lack of Jurisdiction, filed by M.E. Dey & Co.,

Inc. ("Complainant" or "Dey") (individually, the "Hapag Opp." and the "Dey Opp." and collectively, the "Oppositions").[1]

I. SUMMARY OF REPLY

The Motion to Dismiss must be granted because the Third-Party Complaint fails to allege that CSXT was a Marine Terminal Operator ("MTO") or that CSXT acted as an MTO, which is a required element of the Shipping Act causes of action alleged in the complaint, 46 U.S.C. § 41102(c) or § 41104(a)(14). While Hapag and Dey argue in the Oppositions about how the definition of MTO should be interpreted, and as a result they argue that CSXT should somehow qualify as a regulated MTO, those arguments do not re-write the Third-Party Complaint to add allegations that are not there.

The strained attempts to argue new and far-fetched jurisdictional theories also fail to provide a basis to oppose dismissal for lack of subject matter jurisdiction. It should suffice to say that the Federal Maritime Commission (the "Commission") does not have jurisdiction under the Shipping Act to adjudicate demurrage and detention charges in all maritime contracts, as Dey asserts. Hapag's argument that the Commission in *TCW* repealed seminal Shipping Act jurisdiction precedents by implication, that is, without doing so clearly or expressly, is only a bit less extreme. *TCW* does not do the kind of violence to Shipping Act precedent and jurisdiction that the Oppositions' arguments would entail, *TCW* is not a binding jurisdictional standard for Third-Party Complaints, and it is not binding or appropriate here.

[1] Intervenor Bureau of Enforcement, Investigations, and Compliance ("BEIC") did not file an opposition to CSXT's Motion to Dismiss.

As highlighted in the Motion to Dismiss, and in response to Dey's position on the appropriate forum for its intermodal transportation causes of action, the Commission has jurisdiction over Hapag for Dey's complaints in connection with inland transportation under a though bill of lading, Dey has a Shipping Act remedy against the common carrier Hapag, and the Third-Party Complaint against CSXT should be dismissed for lack of subject matter jurisdiction.

II. REPLIES

A. The Third-Party Complaint Does Not Allege that CSXT Is a "Marine Terminal Operator" or Was "Acting as a Marine Terminal Operator"

The Third-Party Complaint does not allege that CSXT was an MTO. Nor does the Third-Party Complaint allege that CSXT *acted* as an MTO. To the contrary, the Third-Party Complaint alleges that CSXT "is a rail and intermodal transportation carrier." Third-Party Complaint ¶ 6. In order to avoid addressing this inconvenient truth in the Oppositions, Hapag and Dey instead argue that the definition of MTO should be interpreted to include CSXT, and then argue that CSXT *acted* as an MTO. *Id*. The arguments suffer from a threshold flaw: the Oppositions' arguments do not rewrite the Amended Complaint or the Third-Party Complaint. Whether or not the definition of MTO should be interpreted to include CSXT is academic for the purpose of this Motion to Dismiss because neither Dey nor Hapag allege that CSXT is an MTO or acted as an MTO.

The arguments also fail because they are erroneous. Hapag's argument is that the phrase "or other terminal facilities in connection with a common carrier" in the definition of MTO, 46 U.S.C. § 40102(15), expands the meaning of a "*marine* terminal operator" to include any persons who provide "arrangements, mechanical and engineering, which make easier transfer of passengers and goods at either end of a stage of transportation service" *Id*. 7. If Hapag's broad interpretation were adopted, nearly every person providing services at either end of a stage of

transportation service would be defined as a "marine terminal operator," including dray operators, chassis providers, trans-loaders, and more. Hapag's reliance on *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946) and 46 C.F.R. § 525.1(c)(13) for an expansive interpretation of "marine terminal operator" is inapposite. *Carloaders* addressed the scope of "other persons" required to file agreements with common carriers by water subject to Section 15 of the 1916 Act, not the definition of an MTO under 46 U.S.C. § 40102(15) or the jurisdiction of the Shipping Act for causes of action against MTOs pursuant to 46 U.S.C. § 41102(c) or § 41104(a)(14).[2]

The possibility that a railroad could qualify as an "other person" subject to the 1916 Act is not in any case surprising nor determinative here. The Commission addressed this issue when it promulgated MTO filing rules for "other persons subject to act" in the 1960s. The Commission recognized that railroads were under the jurisdiction of the ICC (predecessor to the STB), while also recognizing that any entity actually operating a marine terminal is subject to regulation as a marine terminal operator. 30 Fed. Reg. 12,681, 12,681 (Oct. 5, 1965). The Commission explained that the determinative factor was whether "the function is of a marine terminal nature." *Id*. The Commission observed that "courts hold that a railroad is an 'other person' subject to the Shipping Act, 1916, when it is engaged in the business of *operating an ocean terminal* in connection with common carriers by water. *B. & O. R. Co. v. United States,* 201 F. 2d 795 (1953) and *B. & O. R. Co. v. United States*, 208 F. 2d 734 (1953)." *Id*. (emphasis added). The Commission also explained that "[n]othing in these rules requires the filing of rates in connection with terminal

[2] Dey's citation to *United States v. American Union Transp*., 327 U.S. 437, 447-57 (1946) as support for a similar "broad construction" of jurisdiction under the 1916 Act is similarly inapposite. Dey Opp. 12.

services included in the line haul rates of railroads." *Id*. The language in the final rule reflected the Commission's understanding of the limited circumstances that a railroad might qualify as an "other person" if (1) they "perform *port* terminal services" that are (2) "not covered by their line haul rates." 30 Fed. Reg. at 12,682 (promulgating regulations then appearing at 46 C.F.R. §§ 533.1 and 533.3).

Hapag recognizes that the same "port terminal services" language is in the Commission's current MTO definition, Hapag Opp. 8, citing 46 C.F.R. § 525.1(c)(13), but argues without support that the regulations "do not preclude" railroads from qualifying as MTOs "in other circumstances." *Id*. Not surprisingly, Hapag concludes that the Third-Party Complaint is one of its speculative "other circumstances." That is not supported by the regulations at 46 C.F.R. §§ 525.1(c)(13) and (18), which give meaning to the word "port" in "port terminal services" and the word "marine" in "marine terminal operator" that Hapag's argument would simply ignore.

Dey's argument is more blunt. Dey argues that using an inland rail terminal for intermodal transportation of ocean carrier containers establishes that CSXT was acting as a regulated MTO within the meaning of *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 543 (D.C. Cir. 1988). While the *Plaquemines* court held that owning or operating terminal facilities was not essential where the port could control access to the terminal facilities, the issue in *Plaquemines* was the degree of control over furnishing access to terminal facilities. The qualifying nature of the marine terminal facilities—the ability of vessels to access docks and marine terminals—was not at issue. *Plaquemines* does not support the argument that because CSXT "has complete control over [its] facility," CSXT becomes a regulated MTO regardless of the nature of the facility it is providing.

B. The Shipping Act Has Not Been Extended to "All Maritime Contracts" or Over All Complaints "Inherently Related to Shipping Act Violations"

Dey argues that the Supreme Court decision in *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd*., 543 U.S. 14 (2004) (*Kirby*) was the genesis of a line of Commission precedent allegedly supporting Dey's remarkably sweeping argument that "the Commission's regulatory oversight extends to detention and demurrage practices regarding cargo moving under maritime contracts." Dey Opp. 7-9. Dey misstates the Commission's jurisdiction.

Dey's opening reliance on *Kirby* is innocuous. Although *Kirby* is an important maritime case, the holding that an ocean bill of lading is a maritime contract is not germane to the instant Motion to Dismiss. Similarly, precedent establishing that the Commission has jurisdiction over practices in connection with the ocean and inland portion of transportation under through bills of lading, in *Kawasaki Risen Kaisha, Ltd. v. Regal-Beloit Corp*., 130 S. Ct. 2433 (2010) (*"K" Line*) and *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc*., 32 S.R.R. 126, 2011 WL 7144008 (FMC 2011), are relevant concepts, but they are also not germane to the Motion to Dismiss.

Dey's argument veers sharply off-course with the Initial Decision in *Intermodal Motor Carriers Conference, American Trucking Associations, Inc. v. Ocean Carrier Equipment Management Association Inc*., 2021 WL 409620, at *3 (ALJ 2021) ("*IMCC*"). Dey cites *IMCC* for the proposition that "the Presiding Judge extended FMC regulatory oversight to detention and demurrage practices involving chassis providers moving cargo under maritime contracts." Dey Opp. 8-9. First, the *IMCC* decision did not extend Commission jurisdiction over chassis providers or on the basis of all maritime contracts. The chassis providers were not parties to the *IMCC* case. The *IMCC* decision found jurisdiction over ocean carriers for practices *not* under through bills of lading. The decision found that practices in connection with regulated through transportation

allegedly affected otherwise unregulated inland transportation. The IMCC decision shows the ALJ exerting jurisdiction over regulated entities in connection with inland transportation, but it does not show an extension of jurisdiction over unregulated entities, nor jurisdiction over demurrage and detention in all maritime contracts.

C. The Commission's Application of Pendent Jurisdiction in *TCW* Does Not Overturn the Commission's Subject Matter Jurisdiction Precedent

Hapag argues that the Commission's test for subject matter jurisdiction in a Third-Party Complaint is not whether the Third-Party Complaint establishes subject matter jurisdiction for the cause of action alleged, but solely whether the claims alleged in the Third-Party Complaint arise out of the same nucleus of operative facts as the claims in the Complaint. Hapag Opp. 5. Hapag cites no authority in support of that argument, except the *TCW* decision itself, which comes nowhere close to supporting those sweeping claims.

The *TCW* decision is materially distinguishable from the instant Third-Party Complaint. As a threshold matter, the *TCW* decision did not involve a third-party complaint. Pursuant to FMC Rule 62(b)(4), a third-party complaint "must allege and be limited to violations of the Shipping Act within the jurisdiction of the Commission" and the third-party complaint is subject to the same rules governing complaints and answers. *TCW*, and the *Hapag* case below, involved Respondents to the initial Shipping Act complaints filed by the respective complainants. In both cases, the express agent of the regulated ocean carrier was already brought before the Commission by the complainants. Here, the Third-Party Complaint seeks to bring an entirely new party before the Commission. The Ninth Circuit's pendent personal jurisdiction reasoning in *Action Embroidery Corp. v. Atl. Embroidery, Inc*., 368 F.3d 1174, 1180 (9th Cir. 2004), cited with approval by the Commission in *TCW*, does not apply to the same degree in a third-party complaint context: "When

a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts. We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine." *Id*. at 1181.

Indeed, the decisions citing favorably to pendent jurisdiction under *TCW* appear to share a common theme that is missing here: the allegedly unregulated entity at issue is either the express agent acting at the direction of, and for the benefit of, the regulated ocean carrier, as in *TCW* and *Hapag* below, or it appears that the allegedly unregulated entity might in fact be a regulated party. *E.g., Thompson Pipe Group, Inc. v. Omni Logistics LLC*, 2023 WL 2240480, at *3 (FMC 2023)(cited by Dey at Dey Opp. 9-10) (finding that it "appears that the Respondents are regulated entities" but that future facts could potentially show that it was not acting in a regulated capacity); *see also DNB Exports LLC, v. Barsan Global and Impexia Inc*., 2011 FMC LEXIS 26, *7, *12 (ALJ July 7, 2011) (in a decision predating *TCW*, the ALJ determined that a factual challenge to subject matter jurisdiction of a Respondent as a regulated entity failed to establish jurisdiction, but deferred the motion pending further discovery that might succeed in showing regulated entity status).

In those contexts judicial economy and piecemeal litigation may be appropriate considerations, but those considerations are not present here, where the procedural posture is materially different and the facial challenge does not present questions of fact for future determination.[3] There is also good reason that pendent jurisdiction is not a substitute for the

[3] Notably, neither of the Oppositions challenged the argument that Hapag lacks an independent basis to bring its Shipping Act complaint against CSXT directly. See Mot. Dismiss 8 n.20.

existence of subject matter jurisdiction, because the party against whom pendent jurisdiction is found must still still have a cognizable claim against them to adjudicate. Aside from the new and novel argument in the Oppositions that CSXT actually is an MTO—if that had been alleged in the Third-Party Complaint or the Amended Complaint, which it was not— the Third-Party Complaint does not allege a violation of the Shipping Act that would be cognizable *against CSXT* unless it is a regulated Marine Terminal Operator. *See* Mot. Dismiss 8.

As to Dey's fall back argument that the Motion to Dismiss is "premature," Dey Opp. 9-10, there are no jurisdictional allegations in the Third-Party Complaint bound up with the merits that should be deferred. Unlike the likely regulated carrier at issue in *Thompson Pipe* seeking to factually challenge its capacity in relation to the shipments, here the "characterization of CSX[T]'s role in this matter" is not "a central question in need of the Commission's guidance" as Dey argues. Dey Opp. 10. The facial challenge by its nature does not raise fact issues, the allegations in the Third-Party Complaint, taken as true for this purpose, support the *lack* of a jurisdictional basis for CSXT as a regulated entity, and the allegations do not support applying the same pendent jurisdiction rationale here as is in *TCW*.[4]

The *TCW* decision does not overrule the Commission's Shipping Act jurisdiction precedent expressly or by implication. Hapag Opp. 5 (arguing that "[CSXT] relies on precedent that is either non-binding or no longer applicable" merely because Hapag asserts the cases predated *TCW*).

[4] These include the allegations in the Third-Party Complaint cited by Dey: the "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," Id. citing Third-Party Compl. at 5 (emphasis in original); as well as Hapag's allegations in the Third-Party Complaint suggesting that Hapag's common carrier obligations under its intermodal through bills were completed "after free time expired" and before CSXT's charges, see Third-Party Complaint ¶¶ 36-41; Mot. Dismiss 14.

Hapag cites no authority for an implicit repeal of precedent allegedly "displaced by []reasoning." Nor does Hapag disclose its reasoning for selectively claiming that *some* pre *TCW* precedents are allegedly "no longer applicable,"[5] while Hapag continues to rely on others. For example, the Motion to Dismiss prominently cites *Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431, at *4 (F.M.C. Aug. 2, 2007) for the proposition that whether a respondent is a regulated entity subject to the Shipping Act provisions or prohibitions at issue is a question of subject matter jurisdiction, and describing the Commission's holding in *Lake Charles* affirming dismissal for lack of subject matter jurisdiction in Section 10(d)(1) and 10(d)(4) claims on the basis of respondent's failure to qualify as an MTO. Mot. Dismiss 5. Despite *Lake Charles* noticeably predating *TCW*, Hapag does not claim that decision is "no longer applicable" and affirmatively cites to *Lake Charles* in its own Opposition. Hapag Opp. 3.[6]

Hapag's argument that the Interpretive Rulemaking is not-binding is beside the point. The Motion to Dismiss does not cite the Interpretive Rulemaking to challenge the *TCW* decision, which does not address rail jurisdiction, rather, the Motion to Dismiss cites the Interpretive Rulemaking because the Commission specifically expressed its views on jurisdiction over inland rail terminals under through bills of lading. While Hapag argues generally that an agency can depart from its prior interpretations with reasoned explanations, the Commission in *TCW* does not provide any reasoned explanation to depart from the Commission's rail jurisdiction statements in the

[5] Hapag Opp. 5 (citing *Pate* and *Mitsui*).
[6] *Lake Charles* and many other jurisdictional cases predating *TCW* of course include well-known and prominent Shipping Act precedents that the Commission would not merely disregard or overrule by implication, which the ALJ is bound to follow unless overturned by more than speculation of counsel, and even if it was actually the Commission's intent to overrule by implication, that approach to changing established precedent would be challenging to square with the Administrative Procedure Act, a point that Hapag makes in its Opposition.

Interpretive Rulemaking, in no small part because *TCW* does not address rail jurisdiction at all. Nor does Hapag rebut the Commission's reiteration of the same position on inland rail jurisdiction in its June 2022 response to the NSAC Recommendation seeking to "expand the scope of the Federal Maritime Commission to include oversight over all carriers, subcontractors, rates, demurrage, detention, storage under any other name, terms and conditions, and modes reflected on any Bill of Lading issued by an ocean carrier." *See* Mot. to Dismiss 11-12, 15 n.27.

In a nutshell, Hapag and Dey are asking the Presiding Officer to interpret *TCW* as binding precedent by implication on third-party complaints and intermodal rail matters not addressed in the decision, while at the same time asking the Presiding Officer to ignore positions that the Commission has specifically expressed on relevant matters. These arguments, Dey's sweeping maritime contracts assertion, strain credulity.

D. The Commission's Jurisdiction Over Hapag's Transportation Practices Do Not Leave Violations "Immune From Regulatory Review"

Dey does not respond or specifically contest Section III(b) of the Motion to Dismiss explaining that the Commission has jurisdiction over Hapag for the alleged violations of the Shipping Act in the Amended Complaint. And, while Dey asserts without support that the STB's intermodal regulation leaves violations "immune from regulatory review," Dey then concedes the thrust of Section III(b) of the Motion to Dismiss, stating that "the only regulatory oversight of actions such as those at issue here ... is the Commission." Dey Opp. 11-12. That oversight is properly before the Commission in Dey's Amended Complaint against Hapag.

Dey's reliance on OSRA 2022 also supports CSXT's arguments to Dismiss. Dey claims 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," and therefore

asks that "the Commission should exercise its full authority to govern Shipping Act violations." Dey Opp. 12. OSRA 2022 reiterates that the "full authority" is the action against the regulated ocean carrier. In OSRA 2022, the new causes of action in 46 U.S.C. §§ 41104(a)(14) and (15) with respect to charges and invoicing are expressly causes of action against *FMC regulated common carriers* (alone or in conjunction with any other person).

As discussed in the Motion to Dismiss, the "in conjunction with" language does not extend jurisdiction to non-regulated entities, which the Oppositions do not contest, rather, it supports that position that the ocean carrier invoicing liability that Dey cites is cognizable against the ocean carrier regardless of alleged delegations to rail subcontractors. The OSRA 2022 charge complaint process is similarly only applicable to the common carrier, with NVOCCs entitled to a safe harbor for passing on ocean carrier invoices. 46 U.S.C. § 41104(e). The Shipping Act provides a forum and a remedy for Dey's allegations of transportation charges and practices in connection with intermodal through bills of lading: via Dey's Amended Complaint against Hapag, not the Third-Party Complaint against CSXT, which should be dismissed.

III. Conclusion

For the foregoing reasons, the Third-Party Complaint against CSXT should be dismissed with prejudice because CSXT is not an ocean common carrier or marine terminal operator, and is not subject to 46 U.S.C. § 41102(c) or § 41104(a)(14).

Dated: June 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June 2023, the foregoing Third-Party Respondent's Motion to Dismiss was served via electronic mail on:

Complainant:
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Respondent and Third-Party Complainant:
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By:/s/ Kristine O. Little
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