

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 23-09

HUBBELL INCORPORATED,

and

HUBS, INC.,

COMPLAINANTS,

v.

DSV AIR & SEA, INC.,

and

DSV OCEAN TRANSPORT A/S,

RESPONDENTS.

VERIFIED COMPLAINT

Complainants Hubbell Incorporated (“Hubbell Incorporated”) and HUBS, Inc. (“HUBS”) (each a “Complainant” and collectively “Complainants” or “Hubbell”), by their undersigned attorneys, file this Verified Complaint against Respondents herein, alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40101, *et. seq.* (the “Shipping Act”) as follows:

I. COMPLAINANTS

1. Complainant Hubbell Incorporated is a Connecticut corporation with its corporate headquarters at 40 Waterview Drive, Shelton, Connecticut 06484.



2. Complainant HUBS is a Delaware corporation with its principal place of business at 40 Waterview Drive, Shelton, Connecticut, 06484.

3. Hubbell Incorporated is an international manufacturer of quality electrical and electronic products for a broad range of non-residential and residential construction, industrial and utility applications. Hubbell Incorporated operates manufacturing facilities in the U.S. and around the world. HUBS is a wholly-owned subsidiary of Hubbell Incorporated.

4. In connection with the international nature of its manufacturing and product sales, Hubbell regularly utilizes shipping and other logistics services to transport its materials and products, including containerized ocean shipping between U.S. and foreign locations, and as relevant here, using “Non-Vessel Operating Common Carriers” (“NVOCCs”).

II. RESPONDENTS

5. Respondent DSV Air & Sea, Inc. is an entity organized under the laws of the state of Delaware, with its principal place of business at 200 Wood Avenue South, Suite 300, Iselin, New Jersey 08830 (“DSV US”).

6. Respondent DSV Ocean Transport A/S is a foreign entity with an address at Hovedgaden 630, Hedehusene 2640, P.O. Box 210, Denmark (“DSV A/S” and when used collectively with DSV US, “Respondents” or “DSV”).

7. DSV holds itself out as part of a global transport and logistics company, and part of “an international network of partners and agents.”

8. DSV US is an NVOCC pursuant to 46 U.S.C. § 40102(17), having Federal Maritime Commission (“FMC”) organization No. 020615, and holding FMC license No. 017331.

9. Pursuant to 46 U.S.C. § 40501 and 46 C.F.R. § 520.3, DSV US has published an NVOCC tariff of rates and rules, bearing the title Ocean Freight Tariff No. 008, the current version

of which is available at <https://www.dsv.com/en-us/our-solutions/modes-of-transport/sea-freight/tariffs>, and file name “DSV_Traiff_Rule_020615_008_24-June-2023.pdf” (the “DSV US Tariff”).

10. DSV A/S is an unlicensed (registered) foreign-based NVOCC pursuant to 46 U.S.C. § 40102(17), having Federal Maritime Commission (“FMC”) organization No. 020627, but it does not have an FMC license.

11. Pursuant to 46 U.S.C. § 40501 and 46 C.F.R. § 520.3, DSV A/S has published an NVOCC tariff of rates and rules, bearing the title Ocean Freight Tariff No. 007, the current version of which is available at <https://www.dsv.com/en-us/our-solutions/modes-of-transport/sea-freight/tariffs>, and file name “DSV_Tariff_Rule_020627-007_24-June-2023.pdf.” (the “DSV A/S Tariff”).

III. JURISDICTION

12. The FMC has subject-matter jurisdiction over this Complaint pursuant to the Shipping Act.

13. The FMC has personal jurisdiction over the Respondents as regulated and registered NVOCCs as defined in 46 U.S.C. § 40102(17).

14. This Complaint is being filed pursuant to 46 U.S.C. § 41301. Hubbell is seeking a cease and desist order and reparations for injuries proximately caused by DSV’s violations of the Shipping Act.

15. DSV’s actions alleged herein constitute violations of the Shipping Act under multiple Shipping Act prohibitions:

- a. 46 U.S.C. § 41104(a)(2) and 46 C.F.R. § 531.6(c) (NVOCC service not in accordance with NSA);

- b. 46 U.S.C. § 41102(c) (unreasonable practices); and
- c. 46 U.S.C. §§ 41102(a)(3) and 41104(d)(2)(B) (retaliation and any other unfair or unjustly discriminatory action for any other reason).

IV. STATEMENT OF FACTS AND MATTERS COMPLAINED OF

Summary of Complaint

16. This Complaint is about an NVOCC, DSV, not providing service in accordance with negotiated service arrangements (“NSAs”) to an NSA Shipper, Hubbell. DSV’s conduct has involved multiple, interrelated violations of the Shipping Act alleged in this Complaint.

17. On April 1, 2022, Hubbell and DSV finalized their agreement on negotiated service arrangements for two services between ports in the U.S. and Asia. The arrangements were expressly subject to the terms and conditions of a pre-existing master negotiated service agreement between Hubbell and DSV (as successor in interest to Panalpina, Inc.).

18. There were problems from the start. DSV almost immediately began trying to revise the terms of the arrangements. DSV claimed that it had unspecified FMC concerns and needed to make only “some FMC wording changes,” but DSV’s multiple proposed drafts actually sought material and substantive changes well beyond regulatory issues. It became apparent that DSV’s real concern was with Hubbell’s right to terminate the three-year arrangements by giving 90-days advance written notice. In addition, Hubbell became increasingly concerned with DSV’s performance and billing problems, including documenting over \$900,000 in overbilled and/or improper charges.

19. By December 2022, Hubbell had lost confidence in DSV and gave notice of termination in accordance with the termination provision.

20. Having failed to secure Hubbell's agreement to modify or remove the 90-day termination right, and having failed to secure Hubbell's agreement to rescind the termination that had been delivered, DSV filed an action in Delaware federal court mischaracterizing these Shipping Act matters as an alleged breach of contract (the "Delaware Complaint").¹ The Delaware Complaint and attachments filed therewith are attached as **EXHIBIT 1**. It is apparent that DSV's race to the courthouse is an attempt to deter Hubbell from pursuing its claims against DSV under the Shipping Act, and from having DSV's conduct scrutinized under the Shipping Act in the proper FMC forum. As a result, Hubbell is filing this Shipping Act complaint with the FMC and taking actions to stay the Delaware Complaint.

NVOCC Master Service Arrangement Between Hubbell Incorporated and Panalpina, Inc.

21. On June 17, 2019, Hubbell Incorporated, as an NSA Shipper, and Panalpina, Inc. ("Panalpina US"), as an NVOCC, entered into that certain "NVOCC Service Arrangement for Hubbell Incorporated Ocean Related Services" (the "Master Service Agreement") with an effective date of July 1, 2019. *See* **EXHIBIT 2**.²

22. Panalpina US was then a corporation organized and existing under the laws of the State of New York, FMC Organization No. 375F, holding itself out as an FMC licensed NVOCC.

23. The Master Service Agreement was an NSA within the meaning of applicable FMC regulations, structured as a master or main terms agreement with specific NSA ocean pricing terms and rates set forth in addenda. *See* Exhibit 2, Master Service Agreement at 13.

¹ Case 1:23-cv-00708-UNA, Filed 6/29/2023, Served 6/30/2023.

² The version of the Master Service Agreement attached by DSV as Exhibit A to the Delaware Complaint was not signed by Hubbell and did not include any of the referenced addenda. *See* Ex. A to Exhibit 1. Exhibit 2 hereto is the version signed by both parties. Except for providing the signed version, and providing the main terms in the correct page order, Exhibit 2 is the same main terms of the Master Service Agreement, without any addenda, as filed in Delaware by DSV.

24. The Master Service Agreement had an initial one (1) year term (from 7/1/2019), with annual renewals, which could be effected either “by mutual agreement of the parties in the form of a written amendment to this agreement or as evidenced by continued performance by the parties.” *Id.* § 10.

25. Upon information and belief, on or about August 19, 2019, DSV A/S closed on a public exchange of all publicly held stock of Panalpina’s parent company effectively purchasing and obtaining full control of all of Panalpina’s operations and subsidiaries, a then 14,500 employee enterprise operating in 70 countries, including Panalpina US.

26. As a result of the transaction, DSV is the successor in interest to Panalpina, including the successor in interest to the Master Service Agreement with Hubbell.

27. DSV and Hubbell continued to perform under the Master Service Agreement, which thereafter was subsequently renewed via performance.

The 2022 Hubbell-DSV NSAs

28. On or about April 1, 2022, representatives of Hubbell and DSV US finalized agreement on two “Price and Freight Capacity Agreements,” each in a materially similar form, with respect to NVOCC services and rates for shipments between Houston, TX and Shanghai, and Savannah, GA and Charleston, SC and Yantian (respectively referred to as the “Yantian Terms” and the “Shanghai Terms”).

29. Each of the Yantian Terms and the Shanghai Terms expressly incorporated by reference the Master Service Agreement terms and conditions.

30. The Yantian Terms document and the Shanghai Terms document, each incorporating the Master Service Agreement, constitute NSAs within the meaning of 46 C.F.R. §

531.6 (each a “2022 NSA,” and together the “2022 NSAs,” and collectively with the Master Service Agreement, the “NSAs”). See **Exhibit 3** and **Exhibit 4**.³

31. Among other things, the 2022 NSAs agreed to certain ports, price terms, service commitments, and minimum quantity commitments, to be valid from May 1, 2022 to April 30, 2025, and other terms and conditions therein and incorporated by reference from the Master Service Agreement, including, but not limited to, an express early termination provision providing either party a right to terminate without cause “on not less than ninety (90) days prior written notice, or at any time by mutual agreement of the Parties.” See Exhibits 2 and 3 and Exhibit 4 § 10.

32. On April 1, 2022, Hubbell’s Director of Operations, David Horvath signed the two 2022 NSAs for Hubbell Incorporated on behalf of HUBS, and the signed copies were returned via the DocuSign system to Trevor Shuman, DSV’s Business Development Manager, Global Sales, North America.

DSV’s Attempts to Modify the 2022 NSAs

33. On April 1, 2022, DocuSign verified that Mr. Shuman received the copies from Hubbell; however, upon information and belief, DSV did not execute the documents via DocuSign at that time, nor did DSV provide copies signed by any other means at that time, including any versions purportedly signed and dated “4/4/2022” in the form attached to the Delaware Complaint.

³The versions of the 2022 NSAs that DSV attached as Exhibit B and Exhibit C to the Delaware Complaint reflect the execution on behalf of Hubbell via DocuSign dated 4/1/2022, with the addition of a handwritten signature on behalf of DSV added at some time later, purportedly on 4/4/2022. However, Hubbell did not receive the allegedly DSV-executed versions at the time and Hubbell did not receive them after asking DSV to provided signed versions several times thereafter. The first time that Hubbell saw the versions purportedly signed by DSV on April 4, 2022 was when it saw the Delaware Complaint. The versions attached hereto as Exhibits 3 and 4 are the versions Hubbell signed via DocuSign. Specific rate information has been redacted in both forms of the Exhibits for confidentiality and to protect commercially sensitive rate information.

34. Instead, on May 11, 2022, DSV's Mr. Shuman emailed Hubbell's Mr. Horvath asking Hubbell to resign the 2022 NSAs because DSV's team had allegedly discovered some FMC compliance issues and they "need to make a couple of modifications to the wording." DSV attached proposed revised versions for review, representing that "[n]othing is changing as far as the agreement is concerned" (these proposed drafts referred to hereinafter as the "May Versions").

35. On June 7, 2022, Mr. Shuman emailed Mr. Horvath enclosing a second set of proposed draft modifications, noting that "they will need signatures due to the FMC wording changes. I have also added to the contract reading Yantian the addition [sic] capacity based on the EC4. Please let me know if you have any questions or concerns?" (these proposed drafts referred to hereinafter as the "June Versions").

36. Both the May Versions and the June Versions proposed far more than "FMC wording" changes, including substantive changes to material provisions. Among other things, the May and June and Versions sought to:

- a. delete the incorporation by reference of the Master Service Agreement terms and conditions from the Shanghai Terms, and insert language in both 2022 NSAs creating conflicts and ambiguity with the termination provisions (*e.g.*, adding "This Agreement is valid until the stated expiration date or until the stated quantity has been received by DSV, whichever occurs first").
- b. add DSV Ocean Transport A/S as another party and a carrier; and designating the NVOCC as FMC Organization No.: 020627 (referring to DSV A/S);
- c. designate and referring to the "DSV Rules Tariff";
- d. change the MQC shortfall terminology from "Customer Volume Performance Compensation amount, as outlined in this Agreement," which was an undefined

terms and concept in the 2022 NSAs, to “Base Rate Compensation amount, as outlined in this Agreement,” which was a defined term in the proposed draft and would establish a direct financial liquidated damages/penalty calculation; and

- e. add language that would be needed or appropriate for *stand-alone* NSAs, but was not necessary because of the incorporated Master Service Agreement provisions (e.g., adding record retention provisions required for NSAs pursuant to 46 C.F.R. § 531.6(a)(10), but which were already substantively covered in the Master Service Agreement).

37. The June Versions adopted and built on the May Versions, with additional changes.

38. On July 19, 2022, Mr. Shuman emailed Mr. Horvath again seeking modifications and replacement of the 2022 NSAs, asserting that: “I have just learned from my FMC compliance team that we are out of FMC compliance because we do not have the attached document signed [referring to the proposed June Versions]. Can you please review sign [sic] asap?”

39. On September 15, 2022, DSV’s Mr. Shuman emailed Hubbell with a dramatically new position on the 2022 NSAs. DSV no longer wanted or needed Hubbell to sign revised NSAs: “Just to let you know we worked out the filing situation with the FMC. Attached please find a copy of the rates that have been submitted to the FMC. We will not [sic] longer need an amended signature to the contract. We are all set know [sic].”⁴

40. Mr. Shuman’s September 15, 2022, email enclosed two excel worksheet documents described as Negotiated Rate Agreements (“NRAs”) and purporting to substitute or supplement the 2022 NSAs. Like DSV’s previous draft NSA revisions, the new NRA drafts contained significant non-economic terms attempting to again revise the terms of the 2022 NSAs by

⁴ It is not clear what FMC rate filing DSV was describing in referring to the excel document as a “copy of the rates that have been submitted to the FMC.” NVOCC arrangement rates are not submitted to the FMC.

proposing to incorporate by reference the 2022 NSAs in the NRAs (hereinafter, the “September Versions”).

41. Hubbell was increasingly concerned with DSV’s shifting positions and actions. On September 19, 2022, Hubbell responded to DSV that it could not agree to the proposed September Versions and requested additional information from DSV on the purported underlying FMC concerns:

“We cannot agree to this proposed NRA (in excel form) because our corporate policy requires any contract to be signed by an authorized party of the company. Even if we were to add signatures lines to this file, it is still unclear why the existing agreement is an issue and how this document resolves those concerns. Per our previous discussions, please respond to the open questions below and explain how the proposed NRA relates to them. [listing 4 questions]”

42. DSV responded to Hubbell on September 21, 2022. Regarding Hubbell’s first question, “[c]ould you clarify the reasons why DSV believes our agreement is insufficient for FMC?” DSV responded as follows:

“Response: we would be happy to have a call with their legal counsel to discuss DSV’s FMC compliance views. If the view is that the 2019 agreement is valid as an NSA, at least based on the documentation we have, per the Exhibit E, the validity of the agreement as an NSA appears to have ended in June 2020 (even if the 2019 agreement itself is still in effect). Thus, in our view, the parties could either update the 3 year agreement with some technical updates to fully align with the regulations as an NSA, or alternatively, we have proposed not amending the 3 year agreement and adding the NRA which is itself compliant with FMC requirements, and to make sure all the client documents are tied together and the client has the benefit of the agreements, we added language to refer to the 3 year signed agreement and 2019 MSA.”

43. Hubbell’s team reviewed the proposed drafts and sought to reconcile the drafts with the stated FMC concerns. However, DSV’s actual proposed language still went well beyond “some technical updates,” and rather than making “sure all the client documents are tied together and the client has the benefit of the agreements,” the proposed revisions would have changed the

terms to Hubbell's detriment. Other than some modest technical changes, DSV's proposals continued to include significant and material changes likely to be beneficial to DSV, including, but not limited to, negatively impacting Hubbell's termination rights.

44. Hubbell did not agree to sign DSV's proposed revised NSAs or NRAs. In addition, by this time Hubbell also had growing concerns with DSV's billing practices under the NSAs.

DSV's Overcharges

45. Hubbell's evaluation of DSV's charging practices revealed significant overcharges by DSV in excess of \$900,000.

46. The overcharges can be grouped generally into 4 types/circumstances:

- a. charges for certain surcharges and accessorials not in accordance with the NSAs, such as charging Peak Season Surcharges not properly chargeable under agreed upon rates and terms;
- b. other charges not accordance with the standards and requirements for charges under the terms of the NSAs, including timing of billing and supporting documentation issues;
- c. erroneous and/or misrepresented freight billing at spot/FAK rates instead of applicable NSA rates for shipments that DSV reported to Hubbell as shipped at NSA agreement rates but that DSV invoiced Hubbell at higher spot/FAK rates; and
- d. demurrage and detention overbilling and repeated billing errors and discrepancies, including improper calculation of demurrage days, rates, double billing, among other billing errors and discrepancies.

December 6, 2022, Notice of Termination

47. On December 6, 2022, in light of the foregoing events and concerns, Hubbell provided DSV advance written notice of its election to terminate the Master Service Agreement and the 2022 NSAs, pursuant to the 90-day early termination provision in Section 10 of the Master Service Arrangement, and as incorporated into the 2022 NSAs (the “Notice of Termination”). See Ex. D to Exhibit 1 (DSV attached the Notice of Termination as Exhibit D to the Delaware Complaint).

48. The Notice of Termination highlighted, among other things, Hubbell’s concern with DSV’s efforts to revise or replace the 2022 NSAs on the basis of purported FMC regulatory concerns, while seeking more substantive changes, and Hubbell’s uncertainty over DSV’s compliance with regulatory requirements generally.

49. On December 20, 2022, DSV emailed Hubbell yet another proposal to replace the 2022 NSAs (and by that time also asking Hubbell to revoke the Termination Notice), including proposing significant changes to the rates, terms and conditions. DSV noted that “[a]ssuming we can move forward . . . we will need to address and lock the following items: 1. Removal of the termination notice by Hubbell; 2. Amending the NYSHEK agreement to the MSA to eliminate any confusion or miss understanding [sic]. Resigning of the document[s] will be required. a. Finalize the D&D conversation and the 120 day rule – adjust wording to make sure that all are in agreement going forward and closing the discussion on the old invoices.”⁵

50. On January 24, 2023, DSV provided drafts of the new “updated” proposed agreements following its December 20, 2022 email (hereinafter, the “January 2023 Versions”).

⁵ The references to the “D&D conversation,” the “120 day rule” and “old invoices” referred to some of the billing/overcharge issues already under discussion at that time.

The January 2023 Versions reverted back to the NSA form of revisions proposed in the May and June Versions.

51. The January 2023 Versions would have also expressly precluded the 90-day termination provision from applying to the revised NSAs.

52. Hubbell did not agree to the proposed new (or replacement) NSAs.

53. On March 6, 2023, the Termination Notice took effect. Consistent with termination, Hubbell ceased bookings under the 2022 NSAs.

DSV's Response to the Termination Notice

54. On March 28, 2023, outside counsel for DSV first responded to the December 6, 2022 Notice of Termination, which by that time had already effected termination almost three weeks before, on March 6, 2023 (“DSV’s Belated Termination Response”).

55. DSV’s Belated Termination Response acknowledged that the Master Service Agreement was an NSA between the parties and that it contained the 90-day termination provisions.

56. DSV nevertheless asserted that “[t]he Service Agreement and NYSHEX Agreements, while related, are separate, enforceable ocean transportation agreements, and there is no language in either indicating that one is entirely contingent upon the other.”

57. Hubbell responded through outside counsel on April 10, 2023, among other things, rejecting the unsupported assertion that the 2022 NSAs did not incorporate the Master Service Agreement terms and conditions (the “Hubbell Response”).

58. The Hubbell Response also reiterated Hubbell’s concerns with respect to DSV’s FMC regulatory compliance generally and further highlighted Hubbell’s claims against DSV

regarding its charges and overcharges that Hubbell explained “appear to violate the Shipping Act and which Hubbell is considering its legal rights to pursue against DSV.”

59. On or about May 4, 2023, Hubbell received an invoice from DSV for purported “MAR 2023 Nyshex Shortfall” in the amount of \$560,000. **EXHIBIT 5.**

60. On or about May 31, 2023, Hubbell received an invoice from DSV for purported “APRIL 2023 Nyshex Shortfall” in the amount of \$496,000. **EXHIBIT 6.**

61. On or about June 19, 2023, Hubbell received an invoice from DSV for purported “May 2023 Nyshex Shortfall” in the amount of \$608,000. **EXHIBIT 7.**

DSV’s Delaware Complaint Filing

62. A number of active discussions among counsel followed, and were ongoing, when Hubbell was surprised to discover that DSV filed the Delaware Complaint against Hubbell in Delaware federal district court, served on Hubbell’s registered agent on the Friday before the Fourth of July holiday.

63. The Delaware Complaint advances two causes of action, seeking declaratory judgment and recovery for alleged damages.

64. The declaratory judgment cause of action alleges, *inter alia*, that:

- a. the Master Service Agreement and the 2022 NSAs are each “separate and distinct enforceable ocean transportation agreements (as an NSA and NRAs, respectively)” under the Shipping Act. Exhibit 1 ¶¶ 17, 24; and
- b. the 2022 NSAs could not be terminated by Hubbell’s Termination Notice on the basis of DSV’s allegations that the 2022 NSAs do not incorporate the terms and conditions of the Master Service Agreement. Exhibit 1 ¶ 25 (alleging that the 2022 NSAs “do not” incorporate the Master Service Agreement), ¶ 29 (alleging “[u]nlike

the Service Agreement, which contains a 90-day termination provision, the [2022 NSAs] do not contain any termination provision”); ¶ 36 (alleging termination was pursuant to an allegedly “unrelated [Master] Service Agreement”).

65. The damages cause of action alleges, *inter alia*, that:
 - a. The damages cause of action in Count II is necessarily predicated on first obtaining the declaratory judgement sought in Count I. *See* Exhibit 1 ¶¶ 38-39 (alleging that a declaration that the 2022 NSAs were not terminated by the incorporated 90-day termination provision “is necessary and appropriate at this time so that DSV may pursue its claims for breach”); *see also* Exhibit 1 ¶¶ 44-45 (Count II predicated on declarations that the 2022 NSAs are separate from the Master Service Agreement and were not terminated).
 - b. the Delaware Complaint then argues that Hubbell “wrongfully stopped booking shipments” and/or wrongfully terminated 2022 NSAs, and as a result DSV argues that Hubbell is “obligated to pay DSV the ‘Customer Volume Performance Compensation Amount [sic]’, per Section 1.6 of the Capacity Agreements.” Exhibit 1 ¶¶ 30, 47-50, and
 - c. “DSV has suffered and will continue to suffer damages and out-of pocket expense, in an amount not less than \$2,500,000.00.” Exhibit 1 ¶ 52 and Prayer, second.

V. VIOLATIONS OF THE SHIPPING ACT

COUNT I - VIOLATIONS OF 46 U.S.C. § 41104(a)(2); 46 C.F.R. § 531.6(c)

(Service Not in Accordance with Agreement)

66. Complainants repeat and reallege each and every allegation above as if fully set forth herein.

67. 46 U.S.C. § 41104(a)(2) prohibits a common carrier from providing service in the liner trade that is “not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under . . . this title,” and 46 C.F.R. § 531.6(c)(1) provides that “[f]or service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in an NSA.”

68. The Master Service Agreement is an NSA as defined in 46 C.F.R. § 531.3(i).

69. The 2022 NSAs expressly incorporate by reference the terms and conditions of the Master Service Agreement.

70. The 2022 NSAs are NSAs as defined in 46 C.F.R. § 531.3(i).

71. DSV US is an NVOCC as defined in 46 CFR § 515.2(m)(2) and for the purposes of 46 C.F.R. § 531.2.

72. DSV A/S is an NVOCCs as defined in 46 CFR § 515.2(r) and for the purposes of 46 C.F.R. § 531.2.

73. DSV’s actions alleged herein violate the requirement that “[f]or service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in an NSA.”

DSV’s Ongoing Efforts to Renegotiate Service Arrangements and Not Provide Service in Accordance with Service Arrangement Terms

74. As early as May 11, 2022, less than six weeks after the 2022 NSAs were signed by Hubbell, DSV started what became an ongoing effort to change the terms of service as agreed upon in the 2022 NSAs.

75. DSV claimed that the reason for seeking changes was to address unspecified FMC issues, and it represented that resigning the agreements was needed to reflect some changes to FMC wording and that otherwise “[n]othing is changing as far as the agreement is concerned.”

76. Contrary to DSV’s asserted reasons and representations, DSV actually sought substantive and material changes to the agreed upon terms of service, and it did so on multiple occasions and by different proposed means, as demonstrated by the May Versions, the June Versions, the September Versions, and the January 2023 Versions.

77. Among other things, DSV consistently sought to remove or modify the applicability of Hubbell’s right of early termination, which permitted Hubbell to terminate the agreements by giving DSV 90-days written notice of termination.

78. Despite Hubbell not agreeing to DSV’s first two efforts to propose NSA changes (i.e., the May Versions and the June Versions), DSV then implied that it could unilaterally change the terms of the agreements without Hubbell’s signature by re-styling the agreements as NRAs. DSV employed this tactic in the September Versions, abandoned it in the January 2023 Versions, and is now attempting to do it again in a similar way, by arguing in the Delaware Complaint that the 2022 NSAs were actually NRAs when they were originally signed.

79. DSV’s actions demonstrate not only its concerted efforts to change the terms of the agreements, but also that DSV did not in fact perform in accordance with the terms of the agreements, specifically with regard to applying the termination provision and erroneously billing Hubbell for “shortfalls” under the auspices of the “Customer Volume Performance” provisions in the 2022 NSAs.

80. Although DSV’s conduct involves NSAs, this is not a breach of contract cause of action; this is a Shipping Act cause of action arising from DSV’s pattern, practice and

determination to not provide service in accordance with NSAs, which is prohibited by 46 U.S.C. § 41104(a)(2) and 46 C.F.R. § 531.6(c). And, as set forth below, DSV's actions which gave rise to the cause of action in Count I, also constitute separately cognizable Shipping Act causes of action in violation of the prohibitions in Count II and Count III.

Reporting Shipments Under NSA Rates, but Shipping and Invoicing Under Higher Spot/FAK Rates

81. DSV's practice of reporting bookings to Hubbell under NSA rates, but instead booking, shipping and/or invoicing for the shipments under higher FAK or spot rates, violates 46 U.S.C. § 41104(a)(2) and 46 C.F.R. § 531.6(c).

COUNT II - VIOLATIONS OF 46 U.S.C. § 41102(c)

82. Unjust and Unreasonable Practices in Handling Property.

83. Complainants repeat and reallege each and every allegation above as if fully set forth herein.

84. Section 46 U.S.C. § 41102(c) prohibits common carriers from failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

85. FMC regulations provide that establishing a 46 U.S.C. § 41102(c) violation requires the following elements: (1) the respondent is a common carrier; (2) claimed acts or omissions are occurring on a normal, customary, and continuous basis; (3) the practice or regulation relates to or is connected with receiving, handling, storing, or delivering property; (4) the practice or regulation is unjust or unreasonable; and (5) the practice or regulation is the proximate cause of the claimed loss.

86. DSV is a common carrier and an NVOCC as defined by the Shipping Act.

87. DSV's actions and practices at issue have been repeated and ongoing for a lengthy period of time. DSV repeatedly sought to change the agreed upon terms of the 2022 NSAs; engaged in a pattern and practice of overcharges occurring on a continuous and ongoing basis; and DSV's actions and practices continue into the present and are anticipated to continue into the future, including issuing and attempting to collect erroneous invoices and charges for alleged "Customer Volume Performance," which are likely to continue unless DSV is directed to cease and desist in this proceeding.

88. DSV's actions and practices relating to containers, charges, demurrage, detention, per diem, and accessorial charges are directly related to receiving, handling, storing, or delivering property, *e.g.* containerized cargo.

89. DSV's foregoing actions and practices are unjust and unreasonable in violation of Section 41102(c), including, but not limited to:

- a. Overcharging for freight, demurrage and detention, and accessorial charges;
- b. Feigning regulatory compliance concerns as a means to obscure and/or coerce renegotiation of agreed upon commercial and economic terms; and
- c. Unreasonably denying the applicability of service arrangement termination rights and obligations, including DSV's improper billing practices.

90. The foregoing actions and practices are the proximate cause of Hubbell's claimed injury and damages.

COUNT III - VIOLATIONS OF 46 U.S.C. § 41104(a)(3) and 41102(d)(2)(B)
(Retaliation and any other unfair or unjustly discriminatory action for any
other reason).

91. Complainants repeat and reallege each and every allegation above as if fully set forth herein.

92. Section 41104(a)(3) (as codified prior to Section 5 of the Ocean Shipping Reform Act of 2022 (“OSRA 2022”)) and Section 41102(d)(2)(B) as codified thereafter, provide in relevant part that: “A common carrier . . . alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper . . . by refusing, or threatening to refuse . . . cargo space accommodations . . . or resort to other unfair or unjustly discriminatory [methods/actions]” because a shipper . . . has patronized another carrier, or has filed a complaint, or for “any other reason.” 46 U.S.C. §§ 41104(a)(3) and 41102(d)(2)(B) (post-OSRA 2022); *see also, Statement of the Commission on Retaliation*, Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128 (FMC Dec. 28, 2021) (“Statement on Retaliation”).

93. The Commission’s Statement on Retaliation notes that the “resort to other unfair or unjustly discriminatory “methods clause is a “catchall” that may cover a broad range of conduct, including conduct to “deter [a] shipper and other shippers from complaining to the Commission.” *Statement on Retaliation*, 3 F.M.C.2d at 208.

94. DSV’s actions and practices described in this Complaint, and giving rise to the violations alleged in Counts I and II herein, also constitute “unfair or unjustly discriminatory methods” (*e.g.*, DSV’s actions and practice of seeking material changes to the agreements under the guise of alleged regulatory concerns and its erroneous billing and enforcement efforts), and which were undertaken for “any other reason” (*e.g.*, undertaken by DSV for its own commercial

benefit), give rise to a cause of action under the prohibitions at 46 U.S.C. § 41104(a)(3) and now codified at 46 U.S.C. § 41102(d)(2)(B).

95. DSV's Delaware Complaint is another example of, and is in furtherance of, the same pattern of unlawful actions with respect to the 2022 NSAs alleged above. The core issue and argument presented in the Delaware Complaint—that the 2022 NSAs allegedly do not incorporate the 90-day termination right—seeks the same result that DSV repeatedly attempted, but failed, to obtain by other unlawful means.

96. DSV was on notice of significant facts that would lead a reasonable person to conclude that a Shipping Act complaint might be filed against DSV. DSV had expressed concerns with its FMC compliance, DSV was on notice of Hubbell's concerns with DSV's FMC compliance, DSV was aware that Hubbell had over \$900,000 of overcharge claims against DSV, DSV had sent and was seeking to collect disputed Customer Volume Performance invoices from Hubbell, and DSV ultimately failed to obtain Hubbell's agreement to rescind the termination or otherwise enter into new or replacement agreements.

97. Upon information and belief, DSV prepared and filed the Delaware Complaint to deter Hubbell from bringing DSV's conduct under the full scrutiny of the Shipping Act. Delaware is neither the proper forum for causes of action arising under the exclusive jurisdiction of the FMC, and Delaware federal court is far less familiar with Shipping Act law and regulations than is the FMC. By first filing an action in Delaware in these circumstances, DSV's actions give rise to a cause of action under 46 U.S.C. §§ 41104(a)(3) and 41102(d)(2)(B).

VI. CAUSATION AND INJURY TO COMPLAINANTS

98. As a result of Respondents' violations of the Shipping Act, Hubbell has sustained injuries and monetary damages, including but not limited to overcharges in excess of \$900,000,

liability for erroneous “shortfall” invoices received currently in excess of \$1.67 million, and future anticipated invoices if DSV continues to violate the Shipping Act. DSV’s unreasonable and unlawful conduct is continuing and Hubbell continues to sustain injury and damages.

VII. ALTERNATIVE DISPUTE RESOLUTION

99. Hubbell has unsuccessfully attempted to resolve this matter with Respondents prior to filing this Verified Complaint. In light of the prior exchanges and efforts between the principals and counsel, and the filing of the Delaware Complaint during ongoing discussions in an effort to deter Complainants from exercising their Shipping Act rights, and to avoid Shipping Act scrutiny, Hubbell did not seek to use the FMC’s alternative dispute resolution process prior to filing this Verified Complaint.

100. Complainants have not had any preliminary consultations with the FMC’s Dispute Resolution Specialist regarding the availability of alternative dispute resolution under the FMC’s ADR program. 46 C.F.R. § 502.64.

VIII. REQUEST FOR ORAL HEARING

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

IX. PRAYER FOR RELIEF

WHEREFORE, Complainants respectfully request that Respondents be required to answer the charges in this Complaint, and that after a hearing, the FMC issue an Order:

1. Ordering that Respondents cease and desist from the unlawful conduct;

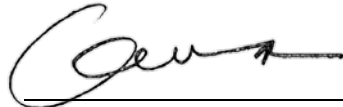
2. Requiring Respondents to pay Complainants reparations for the unlawful conduct described above, along with interest and Complainants' attorneys' fees and costs as described in 46 U.S.C. § 41305;
3. Requiring the payment of any other amounts that the FMC deems appropriate; and
4. Providing Complainants such other and further relief that the FMC deems is just and proper.

Dated: August 23, 2023

Respectfully Submitted,

HOLLAND & KNIGHT LLP

By:



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Counsel to Complainants

VERIFICATION

I, Scott Wagner, Director of Transportation, Hubbell Incorporated, hereby declare and attest under penalty of perjury on behalf of Complainants that I have read the foregoing Verified Complaint and believe, to the best of my knowledge, information, and belief, that the facts stated therein are true and correct.

Dated: August 23, 2023

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Name: Scott Wagner
Title: Director of Transportation