

**FEDERAL MARITIME COMMISSION**  
**Office of Administrative Law Judges**

HAPAG-LLOYD, A.G. AND HAPAG-LLOYD (AMERICA) LLC –  
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)

**DOCKET NO. 21-09**

Served: April 22, 2022

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**ORDER OF:** Erin M. WIRTH, *Chief Administrative Law Judge.*

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**INITIAL DECISION<sup>1</sup>**

**I. INTRODUCTION**

**A. Overview**

On November 10, 2021, the Commission issued an Order of Investigation and Hearing (“OIH”) initiating this adjudatory proceeding against Respondents Hapag-Lloyd, A.G. (“HLAG”) and Hapag-Lloyd (America) LLC (“Hapag-Lloyd America”), (collectively “Hapag-Lloyd”), and naming the Commission’s Bureau of Enforcement (“BOE”) as a party. The OIH initiated this proceeding to:

determine whether Hapag is in violation of 46 U.S.C. § 41102(c) of the Shipping Act of 1984 by its practice of assessing detention charges when: either (a) Hapag Lloyd failed to provide an equipment return location, or (b) if Hapag Lloyd did provide an equipment return location, appointments were unavailable for equipment return during the allocated free time. Furthermore, upon such charges being disputed and evidence being produced to Hapag-Lloyd that no such appointments were available during free time, Hapag-Lloyd failed to waive detention. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease-and-desist order should be issued.

OIH at 5.

On December 6, 2021, Hapag-Lloyd filed an answer, denying the allegations in the complaint and asserting that the Commission lacks jurisdiction, any inability to return empty containers within free time was due to the acts and/or omissions of the motor carrier and/or the

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<sup>1</sup> This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

cargo interest, and Hapag-Lloyd's conduct was reasonable in light of the totality of the circumstances. Answer at 3.

Goods arrive at the port of LA and Long Beach ("LALB") on ships laden with thousands of standard size containers, which are picked up by trucks with chassis, the wheels used to transport the containers over land, and delivered to customers. Once the customer unloads the container, a truck and chassis are scheduled to pick up the empty container and return it. Non-party terminals accept a limited number and type of empty containers on a schedule which changes daily. Typically, an appointment is required to return an empty container and those appointments fill up. If a container is not returned within a specified period of free time, per diem detention fees are imposed by the ocean common carrier, also referred to as the steamship line. This case is about the detention fees imposed for eleven empty containers returned from one to eleven days after free time expired.

The Commission has a long history of addressing demurrage and detention practices. As early as 1937, the Commission adjudicated the appropriate amount of free time at ports. *Storage of Import Property*, Docket No. 221, 1 U.S.M.C. 676 (FMC Nov. 16, 1937). The issues regarding port congestion and detention and demurrage charges have continued as ship size and shipping cargo volumes have increased. As explained in more detail below, the Commission held four regional port forums in 2014, issued a 2015 report, received a 2016 petition and held hearings, conducted a fact finding investigation leading to a report in 2018, and issued a notice of proposed rulemaking in 2019, which culminated in a final *Interpretive Rule on Demurrage and Detention under the Shipping Act* ("demurrage and detention rule"). 85 FR 29638 (May 18, 2020). This proceeding is the Commission's first enforcement proceeding alleging a violation of the demurrage and detention rule.

Golden State Logistics ("GSL"), a drayage company, provided transportation for the eleven containers at issue. This decision addresses the question of whether it is appropriate to impose detention when empty containers cannot be returned because there are insufficient appointments available, described by BOE as scarcity or finite opportunity. As a simplified example of the argument, if there are 100 appointments and 125 containers that need to be returned, even though 100 containers were returned, no amount of detention fees could incentivize the return of the remaining 25 containers.

As discussed more fully below, BOE, which has the burden of proof, does not establish by a preponderance of the evidence that *all* of the detention charges for these eleven containers were unreasonable. However, BOE does establish that on some of the days for which detention was charged, there were not sufficient appointments to return the containers, and Hapag-Lloyd, A.G.'s policy and practices regarding detention charges were unreasonable. Therefore, the evidence supports a finding that Hapag-Lloyd, A.G. violated section 41102(c) by imposing and refusing to waive detention charges where there were insufficient appointments to return these empty containers. Accordingly, civil penalties and a cease and desist order are imposed.

## **B. Procedural History**

The Commission ordered an expedited proceeding, with discovery completed within 90 days of service of Respondents' answer, and the initial decision issued within 75 days after

completion of discovery. OIH at 7-8. Discovery was completed on March 4, 2022, and briefing concluded on March 25, 2022. Accordingly, the initial decision is due by May 18, 2022. The Commission also waived the requirements of a pre-enforcement process under 46 C.F.R. § 502.63(d) for the expeditious conduct of business and to “help alleviate the unprecedented stress being placed on the supply chain, including the significant role that unreasonable detention plays in congestion and freight fluidity.” OIH at 5.

On December 16, 2021, the parties filed a joint status report with proposed schedule. On December 20, 2021, an order was issued rejecting the parties’ proposed schedule and requiring a second joint status report. Pursuant to the presiding officer’s right to waive rules “if the expeditious conduct of business so requires,” 46 CFR § 502.10, all deadlines were shortened to half the time allowed by the Commission’s Rules, rounded up. Order Rejecting Proposed Schedule at 2. On January 6, 2022, a scheduling order was issued.

Orange Avenue Express, Inc. (“OAE”) filed a motion to intervene in this proceeding after filing a complaint in Docket No. 21-10 alleging that Hapag-Lloyd violated the Shipping Act regarding the return of empty reefer (refrigerated) containers. Motion to Intervene at 2. On December 30, 2022, OAE’s motion to intervene was denied due to the factual and legal differences between the cases.

On March 11, 2022, BOE filed its brief with proposed findings of fact (“BOE Brief”) and an appendix with exhibits. On March 16, 2022, BOE filed a corrected appendix and public versions of the brief and appendix (version 2). On March 21, 2022, Hapag-Lloyd filed their opposition brief, labeled as a reply, with proposed findings of fact and responses to BOE’s proposed findings of fact (“HL Opposition”) and an appendix with exhibits. On March 25, 2022, BOE filed its reply brief (“BOE Reply”).

On March 25, 2022, Hapag-Lloyd filed a motion for leave to file a supplement to the record (“Motion to Supplement”) with the supplement, an affidavit, and two exhibits. On March 31, 2022, the parties filed a timely joint motion for confidential treatment of certain materials (“Motion for Confidential Treatment”). On April 15, 2022, BOE filed a revised public appendix (version 3) correcting the bates page numbers so that citations are accurate.

### **C. Arguments of the Parties**

BOE argues that Hapag-Lloyd, A.G. is a common carrier, liable for the actions of its agent Hapag-Lloyd America and that the Hapag-Lloyd entities failed to establish, observe, and enforce just and reasonable regulations and practices. BOE Brief at 17-24. BOE requests civil penalties and a cease and desist order. BOE Brief at 24-30. In its reply, BOE responds to Hapag-Lloyd’s arguments, although it did not file specific responses to Hapag-Lloyd’s proposed findings of fact.

Hapag-Lloyd assert that the proceeding should be discontinued on legal grounds, BOE has the burden of proof, Hapag-Lloyd have not violated the Shipping Act, and BOE’s penalty calculation is not supported by the facts or law. HL Opposition at 2-4, 25-48.

## **D. Evidence**

### **1. Standard**

Under the Administrative Procedure Act, an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

### **2. Evidentiary Issues**

The parties submitted a document labeled as joint stipulations of fact (“JSF”), signed by both parties. In it, Hapag-Lloyd, A.G. stipulated to certain facts, while BOE stipulated to another fact. No objections were raised regarding the facts in the stipulation. The stipulated facts are admitted into the record as facts to which both parties jointly agree.

Hapag-Lloyd objects to the admission of two verified statements and a demonstration by the Commission’s LALB area representative Gabriel Padilla on the basis that they are hearsay. HL Opposition at 10, Reply to BOE PFF 26. BOE replies that hearsay is admissible, the testimony is not hearsay, and the statements are trustworthy and probative. BOE Reply at 8-9. Mr. Padilla describes his understanding of terminal operations and provides context and background. BOE 101.<sup>2</sup> This testimony will be admitted, although it has limited relevance and significant portions are hearsay. The evidence discusses Mr. Padilla’s understanding of operations at the YTI and TTI terminals and the Blue Cargo website, but does not address these eleven containers specifically. Moreover, some of the statements are unclear. For example, Mr. Padilla states that at YTI, “there are unused appointments daily for import/export appointments” but it is not clear whether or not this includes appointments to return empty containers. BOE 103. Ms. Cruz’s testimony, which is based on GSL’s experiences with these specific containers, is more reliable regarding the availability of appointments and the appointment making process they used and therefore is given greater weight.

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<sup>2</sup> Citations to the appendices are listed by bates numbers, such as BOE 101 or HL 37. More detailed citations are provided in the findings of fact.

BOE objects to an affidavit by Hapag-Lloyd manager Sandeep Govil, dated March 21, 2022, asserting that it was not previously produced and he was not disclosed. BOE Reply at 6-7. Hapag-Lloyd states that Mr. Govil is a manager with greater insight into corporate policies than Hapag-Lloyd employee Ms. Saavedra. HL Opposition at 33. The Govil affidavit could be excluded for failure to produce the document or disclose the witness. However, BOE had an opportunity to respond to the evidence and given the expedited nature of this proceeding, it will be admitted. In future proceedings, however, such undisclosed evidence may be excluded. In addition, greater weight is given to the contemporaneous emails between the parties and to the testimony of Ms. Saavedra, who was deposed in this proceeding and who emailed GSL about the detention charges for these specific containers.

On March 25, 2022, Hapag-Lloyd filed a motion for leave to supplement the record, arguing that it just uncovered relevant factual information and justice requires its consideration. Motion to Supplement at 1. Hapag-Lloyd state that they provided the exhibits to BOE on March 24, 2022, in time for BOE to review prior to filing their reply brief. Motion to Supplement at 1; BOE Reply at 18-19. BOE argued in its reply brief that the new evidence did not alter its analysis of the case nor the reasonableness of Hapag-Lloyd's practices. BOE Reply at 18-19. The new evidence is relevant, newly discovered, and not contested. Accordingly, it is admitted into the record.

Although BOE did not provide specific responses to Hapag-Lloyd's proposed findings of fact, proposed findings must be supported by the evidence. The failure to respond was not treated as an admission. In addition, parties are reminded that an appendix of exhibits should always have a table of contents, all exhibits should have legible bates numbers on every page, public versions must have page numbers matching the confidential versions, and briefs should have accurate citations to the bates numbers on exhibits.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in section three, and the order in section four.

## **II. FINDINGS OF FACT**

### **A. Hapag-Lloyd**

1. Hapag-Lloyd, A.G. is a vessel-operating common carrier ("VOCC") headquartered in Hamburg, Germany at Postfach, 102626, Ballindamm 25, 2000 Hamburg 1, Germany. Joint Stipulations of Fact ("JSF") at 1, No. 1.
2. Hapag-Lloyd Container Line GmbH converted into a stock company known as Hapag-Lloyd, A.G. on or about July 21, 2006. JSF at 1, No. 3.
3. Hapag-Lloyd, A.G. is a member of THE Alliance. JSF at 1, No. 4.
4. Hapag-Lloyd (America) LLC is a wholly-owned subsidiary of Hapag-Lloyd, A.G. and acts as Hapag-Lloyd, A.G.'s agent in the United States, with its offices at 5515 Spalding Drive, Peachtree Corners, GA 30092. JSF at 1, No. 2; Response of Hapag-Lloyd to BOE's Third Interrogatories and Request for Production of Documents ("HL Resp. to 3rd BOE Interrog."), Ex. F, BOE 118, No. 2.

5. Hapag-Lloyd America is not an ocean common carrier, marine terminal operator, or ocean transportation intermediary. JSF at 3, No. 1.
6. Hapag-Lloyd, A.G. is a common carrier as defined by 46 U.S.C. § 40102(7). JSF at 2, No. 5, line 1.
7. Hapag-Lloyd, A.G. provides transportation for property between the United States, including the ports of LALB and foreign countries. JSF at 2, No. 6; Response of Hapag-Lloyd to BOE's First Requests for Admission ("HL Resp. BOE First RFA"), Nos. 1, 2, 9, BOE Ex. E at BOE 111, 113.
8. Hapag-Lloyd, A.G. receives, handles, stores, and delivers property at West Basin Container Terminal ("WBCT"); TraPac Terminal, LLC ("TraPac"); Yusen Terminals, LLC ("YTI"); SSA Terminal at Pier A ("Pier A"); International Transportation Service, Inc. ("ITS"); and Total Terminals, Inc. ("TTI"). HL Opposition at 6, HL Reply to BOE's Proposed Finding of Fact ("Reply to BOE PFF"), No. 9.
9. Hapag-Lloyd, A.G. discharges cargo and/or collects empty containers at marine terminals including WBCT, TraPac, YTI, Pier A, ITS, and TTI. JSF at 2, No. 7; HL Opposition at 6, Reply to BOE PFF 10.
10. Hapag-Lloyd, A.G. also receives, handles, stores, and/or collects empty containers at APM Terminals ("APMT"). BOE Ex. M at BOE 290, 304; HL Opposition at 21, HL Proposed Finding of Fact ("RPF") RPF 26.
11. Hapag-Lloyd America has internal reports based on equipment events that enable it to estimate the number of each type of container dwelling at a terminal. Hapag-Lloyd has industry standard electronic data interface connections with its marine terminals, which are used to report container movement information (e.g., gate-in, gate-out, vessel load, vessel discharge) as well as information about containers to be loaded or discharged. HL Resp. to 3rd BOE Interrog., BOE Ex. F, BOE 119, Nos. 4-6.
12. Hapag-Lloyd America receives a daily report from the terminals identifying the number and type of Hapag-Lloyd containers on the terminal. This report is typically transmitted via email but can be supplemented via telephone conversations. HL Resp. to 3rd BOE Interrog., BOE Ex. F, BOE 119, Nos. 4-6.
13. Hapag-Lloyd, A.G. allows free time on shipments. HL Resp. BOE First RFA, No. 4, BOE Ex. E, BOE 112.
14. Under Hapag-Lloyd, A.G.'s tariff rules, detention charges are imposed on shipments transported by Hapag-Lloyd when free time is exceeded, which rules may be modified by individual service contracts. Hapag-Lloyd Resp. BOE First RFA, No. 5, Ex. E, BOE 112.
15. Hapag-Lloyd, A.G. provided ocean transportation for the eleven containers at issue. JSF at 2, No. 8.

16. Hapag-Lloyd America, on behalf of Hapag-Lloyd A.G., issued invoices to Golden State Logistics (“GSL”) for detention charges on all eleven containers. JSF at 2-3 at No. 9; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; BOE Ex. M at BOE 283-365.
17. At most, detention of \$10,135 was charged for these eleven containers. BOE Ex. M at BOE 283-365; *see also* Answer at 3 (Admitting “that invoices for detention charges ranging from \$160.00 to \$1,845 were issued for the containers” at issue here.).

**B. Golden State Logistics**

18. GSL, a company whose business is in the drayage of international ocean containers, provided transportation for the eleven containers for which Hapag-Lloyd America charged detention. Transcript of Deposition of Kimberly Lissette Cruz (“Cruz Dep.”), BOE Ex. B at BOE 37, page 13, line 21 – BOE 38, page 14, line 3; BOE 46, page 22, lines 13-20.
19. Kimberly Lissette Cruz is an employee of GSL who mainly works in equipment control and manages per diem issues, as well as empty containers going in and out of the port. Cruz Dep., BOE Ex. B at BOE 32, page 8, lines 4-14.
20. GSL understands per diem charges to be charges that the ocean carrier assesses when the equipment is not returned within the allotted free time. Cruz Dep., BOE Ex. B at BOE 47, page 23, lines 11-17.
21. GSL uses the term “per diem” interchangeably with the term “detention.” Cruz Dep., BOE Ex. B at BOE 81, pages 57, lines 3-10.
22. GSL works exclusively in the LALB area, has about 75 drivers, and handles approximately 500 containers a week. Cruz Dep., BOE Ex. B at BOE 37, page 13, line 14-BOE 38, page 14, line 19; Cruz Dep., BOE Ex. B at BOE 40, page 16, lines 13-19.
23. Ms. Cruz mainly works in equipment control managing empties but the five dispatch employees also make appointments. Cruz Dep., BOE Ex. B at BOE 41, page 17, lines 4-12; Cruz Dep., BOE Ex. B at BOE 53, page 29, line 18-BOE 54, page 30, line 2.
24. When GSL receives notice from a customer that a container is empty and ready to return, dispatch employees look for an appointment and try to match up loads out of the terminal with empties going in. Cruz Dep., BOE Ex. B at BOE 51, page 27, lines 1-12.
25. GSL tries to jump on appointments as soon as they are released but sometimes they don’t have a driver to get the empty. Cruz Dep., BOE Ex. B at BOE 56, page 32, line 17-BOE 57, page 33, line 7.
26. GSL does not take a screen shot each time it looks for appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, lines 9-12; Cruz Dep., BOE Ex. B at BOE 79, page 55, lines 5-8.

27. Ms. Cruz usually takes screen shots in the morning, when she and dispatch have been unable to make appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, line 9-BOE 74, page 50, line 3.
28. GSL knows where to take the empty container and which terminal the container is supposed to go to, because the steamship lines send GSL an empty broadcast, also referred to as the empty container matrix, by 4:00 pm the day before the container is scheduled to be returned, and that empty broadcast matrix is an instruction from the steamship lines advising GSL where to return the steamship lines' containers. Cruz Dep., BOE Ex. B at BOE 48, page 24, line 12 - BOE 49, page 25, line 11; BOE Ex. M at BOE 283-365.
29. GSL then tries to create an appointment to return the container based on the empty broadcast matrix from the steamship line. Appointments can be made in two ways – GSL may receive an empty broadcast and then create an appointment when it receives confirmation of an empty container, or GSL may receive confirmation of an empty container before receiving an empty broadcast matrix and upon receiving an empty broadcast it would then create an appointment based on the return locations indicated in the empty broadcast matrix. Cruz Dep., BOE Ex. B at BOE 51, page 27, line 14 – BOE 52, page 28, line 7.
30. Appointments must be made through each individual terminal's website. HL Opposition at 9, Reply to BOE PFF 22; Padilla Demo, Ex. G, page 5, BOE 127.
31. An appointment cannot be created to return containers without entering specific information, such as the container type, number, size, what steamship line the container belongs to, and the chassis the container is sitting on. Cruz Dep., BOE Ex. B at BOE 82, page 58, line 12 – BOE 83, page 59, line 9.
32. After finding an available appointment, a person only has a limited time to enter the container information before the appointment window closes and sometimes they are not able to gather all information required to create an appointment before the appointment window closes. The information regarding available appointments changes minute to minute. Cruz Dep., BOE Ex. B at BOE 86, page 62, lines 4-15.
33. Appointments are listed by shifts, typically three shifts but sometimes two shifts, depending on the terminal. Cruz Dep., BOE Ex. B at BOE 83, page 59, lines 11-19.
34. The first shift for empty appointments starts at 8:00 am and ends at 4:00-5:00 pm, depending on the terminal; the second shift starts from 6:00-7:00 pm and ends at approximately 1:00-2:00 am, the following day. Cruz Dep., BOE Ex. B at BOE 84, page 60, lines 8-14.
35. GSL preplans its appointments the day before and tries to make appointments throughout the day. Cruz Dep., BOE Ex. B at BOE 52, page 28, lines 11-19.

36. GSL has found it more difficult to make appointments since the start of the COVID-19 pandemic, roughly since March 2020. Cruz Dep., BOE Ex. B at BOE 52, page 28, line 21-BOE 53, page 29, line 9.
37. In order to return a container to a terminal not indicated in a steamship line's return instructions, GSL would have to obtain authorization from the steamship line, typically by reaching out to them for permission. Cruz Dep., BOE Ex. B at BOE 60, page 36, lines 1-8.
38. In the event that there are no appointments at the terminals where steamship lines instruct, GSL reaches out to the steamship lines daily, asking them for alternate locations, or exemptions to allow return of the containers on time. Cruz Dep., BOE Ex. B at BOE 60, page 36, lines 14-21 – BOE 61, page 37, line 1.
39. Sometimes GSL has, without authorization from Hapag-Lloyd, returned a container at a terminal not designated by Hapag-Lloyd in order to free up space in GSL's yard due to congestion and to allow the use of chassis needed to pick up loaded containers out of the port. To do so, GSL sometimes calls in favors to the terminals, which sometimes grants them permission to do so. GSL is sometimes charged a fee by the steamship lines for delivering a container to a destination not designated by the steamship line. Cruz Dep., BOE Ex. B at BOE 61, page 37, line 15 – BOE 63, page 39, line 4; BOE 85, page 61, lines 5-15.
40. GSL uses Blue Cargo, a third-party website, to create data information regarding appointment availability at terminals. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 12-14.
41. GSL had difficulty obtaining appointments to return each of the eleven containers at issue and presented appointment charts, created using Blue Cargo, to demonstrate its difficulty obtaining appointments from the terminal to return the containers. HL Resp. BOE First RFA, No. 3, BOE Ex. E at BOE 113; HL Opposition at 10, Reply to BOE PFF 27; BOE Ex. M at BOE 286-365.

**C. These Eleven Containers**

42. GSL followed its regular procedures with regard to the eleven containers at issue and there was nothing different or unusual about returning the empties other than the difficulties in obtaining an appointment. Cruz Dep., BOE Ex. B at BOE 47, page 23, lines 3-10.
43. There are a series of emails from GSL employee Kim Cruz to the Hapag-Lloyd equipment team about these eleven containers. They generally state: "Please see below empty restrictions and back up. Kindly assist with alternate return locations and/or empty exemptions. Thank you for your help." BOE Ex. M at BOE 286-365.
44. Each of these emails has the Hapag-Lloyd empty return broadcast matrix on the bottom and GSL's email with a chart of containers of concern and appointment availability screen shots which list the next available appointment for Hapag-Lloyd containers, of

specific sizes, on a specific date and time. The emails are frequently sent to Hapag-Lloyd after the screen shot times but the screen shot times are the best evidence of when GSL checked and found no appointments, so they are listed below. BOE Ex. M at BOE 286-365.

45. This chart summarizes the shipments, explained in more detail below, including number, container number, invoice number (all start with 2119), type, gate out date (all dates in 2021), end free time date, return date, dates when appointments were unavailable, and return terminal. For the final columns, U is number of days unavailable on/after return date, W is number of days waived, and V is the number of days of violations. For appointment unavailable column: **bold** are on/after return date, **[brackets]** are the return date, and ~~strikethrough~~ were waived.

| No | Container Number | Invoice 2119... | Type | Gate Out 2021 | End Free Time | Ret Date | Appt. Unavailable                                                                      | Ret      | U         | W        | V         |
|----|------------------|-----------------|------|---------------|---------------|----------|----------------------------------------------------------------------------------------|----------|-----------|----------|-----------|
| 1  | GESU3644906      | 642180          | 20   | 5/5           | 5/19          | 5/20     | 5/11, 5/12, 5/17, <b>5/19</b>                                                          | YTI      | 1         | 0        | 1         |
| 2  | TEMU1467361      | 704796          | 20   | 5/20          | 6/4           | 6/10     | 5/24, 5/26, 5/27, 5/28, <del>5/25, 5/31</del> , 6/3, <b>6/4, 6/7, 6/8, 6/9, [6/10]</b> | YTI      | 4         | 2        | 2         |
| 3  | FFAU2104882      | 711233          | 40HC | 5/24          | 6/8           | 6/11     | 5/26, 5/27, 5/28, <del>5/31</del> , <b>[6/11]</b>                                      | ITS      | 0         | 0        | 0         |
| 4  | FFAU2094681      | 721993          | 40HC | 5/24          | 6/8           | 6/14     | 5/26, 5/27, 5/28, <del>5/31</del> , <b>6/11, [6/14]</b>                                | WB<br>CT | 1         | 0        | 1         |
| 5  | SEGU5670431      | 731378          | 40HC | 5/24          | 6/8           | 6/17     | 5/26, 5/27, 5/28, <del>5/31</del> , <b>6/11, 6/14, 6/15, 6/16</b>                      | WB<br>CT | 4         | 0        | 4         |
| 6  | HLBU1593348      | 739508          | 45   | 6/10          | 6/16          | 6/21     | <del>6/14</del> , 6/15, <b>6/16, 6/18</b>                                              | YTI      | 2         | 1        | 1         |
| 7  | HLXU9003126      | 739508          | 45   | 6/10          | 6/16          | 6/18     | <del>6/14</del> , 6/15, <b>6/16, [6/18]</b>                                            | YTI      | 1         | 0        | 1         |
| 8  | HLBU8048860      | 741085          | 45   | 6/11          | 6/18          | 6/21     | <del>6/14</del> , 6/15, 6/16, <b>6/18, [6/21]</b>                                      | YTI      | 1         | 0        | 1         |
| 9  | HLBU8039554      | 748477          | 45   | 6/10          | 6/16          | 6/22     | <del>6/14</del> , 6/15, <b>6/16, 6/18, 6/21</b>                                        | YTI      | 3         | 1        | 2         |
| 10 | HLBU8038687      | 748477          | 45   | 6/11          | 6/18          | 6/22     | <del>6/14</del> , 6/15, 6/16, <b>6/18, 6/21</b>                                        | YTI      | 2         | 1        | 1         |
| 11 | HAMU1302165      | 752845          | 40HC | 5/24          | 6/8           | 6/11     | 5/26, 5/27, 5/28, <del>5/31</del> , <b>[6/11]</b>                                      | YTI      | 0         | 0        | 0         |
|    | <b>TOTALS</b>    |                 |      |               |               |          |                                                                                        |          | <b>19</b> | <b>5</b> | <b>14</b> |

JSF at 2-3 at No. 9<sup>3</sup>; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; BOE Ex. M at BOE 283-365.

<sup>3</sup> This joint stipulation of fact was mislabeled as No. 5 in the parties' filing. Because it follows JSF No. 8, it is hereby corrected to read as No. 9.

## **1. 20-Foot Containers 1-2**

46. GSL emailed Hapag-Lloyd regarding the first container, GESU3644906, due May 19, returned May 20, showing no available appointments as of May 11 at 11:34,<sup>4</sup> May 12 at 10:52, May 17, 2021 at 12:49 pm, and May 19 at 11:00. BOE Ex. M at BOE 286-290; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
47. On May 12, prior to detention being charged, the email from GSL shows an appointment available at WBCT for a 20 ST, but WBCT is not listed as an option on the Hapag-Lloyd empty return broadcast matrix. BOE Ex. M at BOE 287.
48. For container one, the evidence shows that appointments were full and therefore unavailable on May 11, May 12, and May 17, before free time ended on May 19; and on May 19. BOE Ex. M at BOE 286-290; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
49. GSL emailed Hapag-Lloyd regarding the second container, TEMU1467361, due June 4, returned June 10, showing no available appointments as of May 24 at 9:59, May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, June 3 at 11:09, June 4 at 10:12, June 8 at 10:51, June 9 at 9:39, and June 10 at 10:17 (date returned; available appointment for 40 HC but not 20 ST). BOE Ex. M at BOE 293-304; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
50. On June 3, there was an appointment for June 4 at WBCT for a 20 ST, but by June 4 at 10:12 am, there were no appointments showing for a 20 ST. BOE Ex. M at BOE 299-300.
51. Hapag-Lloyd states that they waived two days of detention for this container, but their shut-out calendar suggests it waived two days prior to the end of free time (May 25, May 31) and one day after free time (June 7) for all 20-foot containers. Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
52. For container two, the evidence shows that appointments were full and therefore unavailable on May 24, May 25, May 26, May 27, May 28, May 31, and June 3, before free time ended; and on June 4, June 7, June 8, June 9, and June 10 (return date). BOE Ex. M at BOE 293-304; Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived two days, therefore, GSL was charged detention for two days, excluding the return date, when appointments were unavailable.

## **2. 40 HC Containers 3-5, 11**

53. GSL emailed Hapag-Lloyd regarding the third container, FFAU2104882, due June 8, returned June 11, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, and May 28 at 12:09 pm. BOE Ex. M at BOE 305-309, 318; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

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<sup>4</sup> The times cited are the “Next available appointments” just before the “stop the clock” button on the appointments calendar. All times are in the morning (am) unless noted.

54. Container three was returned on June 11, 2021, to ITS, which was not listed in the Hapag-Lloyd matrix. HL Opposition at 19, HL RPF 19.
55. GSL emailed Hapag-Lloyd regarding the fourth container, FFAU2094681, due June 8, returned June 14, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, and June 14 at 10:10. BOE Ex. M at BOE 312-325; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
56. GSL emailed Hapag-Lloyd regarding the fifth container, SEGU5670431, due June 8, returned June 17, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, June 14 at 10:10, June 15 at 10:21, and June 16 at 11:50. BOE Ex. M at BOE 312-328; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
57. Container five was returned on June 17, 2021, to WBCT, which was not listed in the matrix. HL Opposition at 19, HL RPF 19.
58. GSL emailed Hapag-Lloyd regarding the eleventh container, HAMU1302165, due June 8, returned June 11, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, and June 10 at 10:17. BOE Ex. M at BOE 358-365; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
59. Hapag-Lloyd state that they waived detention charges for all 40' HC containers for May 31, which is before free time ended for these four containers. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12.
60. On June 10, as of 10:17 am, GSL sent an email indicating no appointments for the second container and also listing the four 40 HC containers, however, the attached appointment calendar shows appointments available at ITS and APMT and the Hapag-Lloyd empty return broadcast matrix shows that APMT is a location for 40 High Cube containers. BOE Ex. M at BOE 304.
61. When GSL submitted its disputes for the four 40 HC containers, it did not include the June 10 email, or it was submitted and did not support the dispute. BOE Ex. M at BOE 305-322, BOE 358-365.
62. Hapag-Lloyd submitted supplemental exhibits from Blue Cargo for June 14 as of 8:07, which shows appointments at YTI from 9:00-10:00, which is approved, but by 10:10, no appointments are available. BOE Ex. M at BOE 321; HL Supp., Exhibit A at 1-2; HL Supp., Exhibit B at 5.
63. Similarly, as of June 16 at 9:37 am, there were 40 HC appointments for the next day, on June 17 shift 1, 8:00-9:00 and shift 2, 18:00-19:00, which compares with a search on June 17 at 11:17 am, which shows for June 17th, no appointments first shift and 21:00-22:00 for second shift. HL Supp., Exhibit A at 6-7.
64. The supplemental evidence shows no appointments for 40 HC containers at Hapag-Lloyd approved locations for June 11 at 7:52 (ITS not on the return list), June 14, June 15, and June 16. HL Supp., Exhibit B at 4-7; BOE Ex. M at BOE 302, 304, 324-328.

65. Supplemental evidence for the four 40 HC containers show available appointments at terminals on Hapag-Lloyd's return matrix: June 8 at 8:02, June 9 at 7:54, June 10 at 10:17, and June 17 at 11:17. HL Supp., Exhibit B at 1-8.
66. For container three, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE Ex. M at BOE 306-309, 318; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; HL Opposition at 18, HL RPPF 8; Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12.
67. For container four, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 and June 14 (return date). BOE Ex. M at BOE 312-325; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; HL Supp., Exhibit B at 4-7. Therefore, GSL was charged detention for one day (June 11), excluding the return date, when appointments were unavailable.
68. For container five, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11, June 14, June 15, and June 16. BOE Ex. M at BOE 312-328; HL Supp., Exhibit B at 4-7; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for four days (June 11, June 14, June 15, and June 16) when appointments were unavailable.
69. For container eleven, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE Ex. M at BOE 358-365; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

### **3. 45-Foot Containers 6-10**

70. GSL emailed Hapag-Lloyd regarding the sixth container, HLBU1593348, due June 16, returned June 21, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, and June 18 at 10:48. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
71. Hapag-Lloyd states that they waived detention charges for all 45' HC containers for June 14, which is before free time ended for these five 45' containers. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12-13.
72. For container six, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived one day, therefore, GSL was charged detention for one day when appointments were unavailable.
73. GSL emailed Hapag-Lloyd regarding the seventh container, HLXU9003126, due June 16, returned June 18, showing no available appointments as of June 14 at 10:10, June 15

at 10:21, June 16 at 11:50, and June 18 at 10:48. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

74. For container seven, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18 (return date). BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable.
75. GSL emailed Hapag-Lloyd regarding the eighth container, HLBU8048860, due June 18, returned June 21, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 339-347; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
76. For container eight, the evidence shows that appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21 (return date). BOE Ex. M at BOE 339-347; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable.
77. GSL emailed Hapag-Lloyd regarding the ninth container HLBU8039554, due June 16, returned June 22, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
78. For container nine, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on and June 16, June 18, and June 21. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for two days when appointments were unavailable.
79. GSL emailed Hapag-Lloyd regarding the tenth container, HLBU8038687, due June 18, returned June 22, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.
80. For container ten, the evidence shows that appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for one day when appointments were unavailable.

#### **4. Hapag-Lloyd Responses**

81. Hapag-Lloyd responded to the May 17, 2021, email stating “Containers are NOT off-hire. Please return per empty return matrix. There are no alternate locations.” BOE Ex. M at BOE 288.

82. Hapag-Lloyd responded to the May 26, 2021, email stating “Hello, for returning HLC empties, please refer to the below empty return matrix” and on May 28, 2021, responded “Please follow the empty return matrix. There are no alternate return locations.” BOE Ex. M at BOE 306, 308.
83. Hapag-Lloyd responded to the June 8, 2021, email stating “At this time these are the only return locations allowed by terminals. Hopefully more locations and spots will open later for this week.” BOE Ex. M at BOE 301.
84. Hapag-Lloyd responded to the June 9, 2021, email stating “Our empty return matrix shows all available return locations. There are never any alternate locations.” BOE Ex. M at BOE 302.
85. Hapag-Lloyd responded to the June 10, 2021, email stating “Pls see attached empty return matrix.” BOE Ex. M at BOE 304.
86. Hapag-Lloyd responded to the June 14, 2021, email stating “I’m truly sorry but Hapag Lloyd does not regulate nor monitor appointment openings. Please continue to monitor for the next available appointment slots. For returning HLC empties, please refer to the below empty return matrix.” BOE Ex. M at BOE 321.
87. Hapag-Lloyd responded to the June 16, 2021, email stating “This is most current matrix, terminals set allocations/appointments.” BOE Ex. M at BOE 328.

**D. Blue Cargo**

88. Blue Cargo is a third-party website that GSL uses to determine appointment availability at the terminals. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 8-14.
89. Blue Cargo aggregates appointment data directly obtained from marine terminal operator websites and puts it in one place. Cruz Dep., BOE Ex. B at BOE 64, page 40, line 15 – BOE 65, page 41, line 2; HL Opposition at 10, Reply to BOE PFF 28.
90. The Blue Cargo website has a search function, where GSL could search by shipping line, container type, date, and time. The search returns data for seven terminals and shows if there are no appointments for the search criteria (gray) or available appointments (white). HL Supp. Ex. B at 1. The time defaults to a last refresh time of 8:00 am PST. *Id.*
91. Every few minutes, the Blue Cargo system automatically refreshes itself. Cruz Dep., BOE Ex. B at BOE 65, page 41, lines 3-6; BOE 85, page 61, line 20 – BOE 86, page 62, lines 13- 15.
92. Blue Cargo gets the data regarding appointment availability from the terminal’s website. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 15-18.
93. Blue Cargo’s data is sometimes inaccurate. Cruz Dep., BOE Ex. B at BOE 65, page 41, lines 3-6; BOE 77, page 53, lines 10-19.

## **E. Terminals**

### **1. WBCT**

94. Guiseppe Napoli is the terminal manager for West Basin Container Terminal (“WBCT”), and supervises the daily operation of all departments at the terminal. Virtual Deposition of Guiseppe Napoli (“Napoli Dep.”), BOE Ex. H at BOE 150, page 3, lines 8-17.
95. WBCT discharges imports, loads exports, and empties for Hapag-Lloyd when their vessels call at the terminal. Napoli Dep., BOE Ex. H at BOE 151, page 4, line 20 - BOE 152, page 5, line 2.
96. WBCT uses an appointment system on its website called “Voyager track,” that makes appointment information available. Napoli Dep., BOE Ex. H at BOE 152, page 5, line 10 – BOE 153, page 6, line 7.
97. Hapag-Lloyd usually will send emails on a daily basis to WBCT telling WBCT what they would like to do with their empties. Napoli Dep., BOE Ex. H at BOE 157, page 10, lines 5-22.
98. In terms of receiving empties, WBCT offers over 1000 empty appointments per shift and 2000 appointments or more per day. There are two shifts. Most of the time, every appointment available on the first shift is booked, and then on the second shift, which is at night, most of the time about 70% of the empty available appointments are booked. Napoli Dep., BOE Ex. H at BOE 158, page 11, lines 1-17; *see also* BOE 170, page 23, line 15 – BOE 171, page 24, line 9.
99. WBCT posts open appointment slots roughly about 48 hours in advance. Napoli Dep., BOE Ex. H at BOE 159, page 12, lines 3-5.
100. However, equipment return information is only available in real time. By reaching out directly to the steamship line a trucker could find out in advance where its equipment should be dropped off and then make an appointment without waiting for the real time information. The risk to doing this is that the equipment return information could change. Napoli Dep., BOE Ex. H at BOE 169, page 22, line 15 – BOE 170, page 23, line 8.
101. WBCT’s appointment system will only allow appointments to be made when WBCT is receiving a particular carrier’s empty. Napoli Dep., BOE Ex. H at BOE 159, page 12, line 15 – BOE 160, page 13, line 5.
102. During the 48 hours when appointment slots are posted, the first 24-hour block of two-shift available appointments are typically stable and stay the same, but appointment slots may be cancelled during the latter 24 hours of two-shift periods and would need to be rebooked. WBCT tries to give a 24-hour notice if appointments are going to change. Napoli Dep., BOE Ex. H at BOE 160, page 13, line 6 – BOE 162, page 15, line 16.

## 2. YTI

103. Gabriel Padilla is employed by the Commission as an Area Representative for the LALB region and in his position has been privy to the daily business operations of the terminals at issue and also had in depth conversations with them about their daily business transactions concerning the return of empty containers. Verified Statement of Gabriel Padilla (“Padilla Aff.”) Ex. C, BOE 101 at ¶¶ 1-2; Second Verified Statement of Gabriel Padilla (“Padilla 2<sup>nd</sup> Aff.”) Ex. D, BOE 106 at ¶¶ 1-2.
104. Yusen Terminal LLC (“YTI”) and Total Terminal International, LLC (“TTI”) receive the VOCC empty containers as directed by the VOCC. Padilla Aff. Ex. C, BOE 101 at ¶ 4; Padilla 2<sup>nd</sup> Aff. Ex. D, BOE 106 at ¶ 4.
105. At YTI, notice regarding appointments for empty returns is provided to beneficial cargo owners (“BCOs”) and the trucking community by posting the Empty Receiving Schedule on YTI’s public website up to five days in advance; communication broadcasts to the local industry through eModal; offering appointments for empty returns within YTI’s appointment system; and through simultaneous messaging from the VOCCs to BCOs and truckers (returnlocation.com). Padilla Aff. Ex. C, BOE 101 at ¶ 4.
106. YTI uses a third-party appointment platform, which is accessible to all customers, to allocate empty appointments to be received. These appointments are allocated by hour on the third-party appointment platform and based on the VOCCs directions for container size and type. The appointment platform is always live and accessible to customers and can be adjusted to accommodate optimal receiving. If there is a service disruption, eModal broadcasts are sent out to notify customers. Padilla Aff. Ex. C, BOE 102-103, at ¶ 8.
107. At YTI, if an appointment is made for an empty return and the VOCC directs the terminal not to receive the empty, YTI will honor all empty appointments already secured. Once the VOCC shuts off or changes its policy, YTI will no longer make empty return appointments available for booking. Padilla Aff. Ex. C, BOE 102 at ¶ 5.
108. At YTI, appointments are able to be booked three to five days in advance, depending on the category of appointment. For example, import appointments are based on delivery velocity in import areas and export appointments are controlled by the projected cargo loading plan from the VOCC. Padilla Aff. Ex. C, BOE 103 at ¶ 11.
109. YTI offers same day appointments for all categories of cargo. Appointment allocation limits are ultimately controlled by terminal management, but the VOCC controls if and when the terminal can receive their empty equipment. Padilla Aff. Ex. C, BOE 103 at ¶ 13.
110. At YTI, appointments are on a first come, first serve basis, and there are unused appointments daily for import/export appointments. Padilla Aff. Ex. C, BOE 103 at ¶ 10.

### **3. TTI**

111. Notice for appointments at TTI is provided to BCOs and the trucking community directly by the VOCC. Padilla 2<sup>nd</sup> Aff. Ex. D, BOE 106 at ¶ 5.
112. VOCCs communicate vessel load projections and requests for empty receiving to TTI daily. TTI, in turn, posts the receiving schedule and its terminal website for all motor carriers and VOCCs. Padilla 2<sup>nd</sup> Aff. Ex. D, BOE 106 at ¶ 6.
113. TTI uses its own proprietary appointment platform, TNS, which is accessible to customers approved by the VOCC, to book appointments. These appointments are allocated in hourly intervals and updated live. Padilla 2<sup>nd</sup> Aff. Ex. D, BOE 107 at ¶ 7.
114. TTI does not require an empty appointment when performing a dual transaction, when the terminal is open for VOCC container size/type, or if the import appointment is confirmed. All import deliveries require appointments. Padilla 2<sup>nd</sup> Aff. Ex. D, BOE 108 at ¶ 12.

### **F. Waivers**

115. GSL does not take a screen shot of the appointments chart each time it looks for appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, lines 7-12.
116. GSL usually takes screen shots in the morning. Ms. Cruz checks with the dispatch department as to whether containers can be returned and then generates emails and then takes screen shots of everything. Cruz Dep., BOE Ex. B at BOE 72, page 48, line 7 – BOE 74, page 50, line 3.
117. When GSL receives an invoice for detention charges it audits the invoice, checking for accuracy. GSL checks the days that the container was out as well as the day that the container was returned, and then looks for restrictions preventing the container from being timely returned for the days that the detention charges were imposed on the container. GSL then sends a screenshot showing the restrictions preventing a timely return as well as emails documenting that it reached out to the steamship line for help finding alternate locations to return the containers. GSL attaches the emails and the screenshots and sends them to the entities imposing the detention charges as backup for its dispute of the detention charges. Cruz Dep., BOE Ex. B at BOE 87, page 63, lines 1-20; BOE Ex. M at BOE 286-365.
118. Ms. Cruz testified that she disputes roughly ninety percent of invoices received and that at least fifty percent or more are waived, depending on the steamship line. Cruz Dep., BOE Ex. B at BOE 89, page 65, lines 2-14.
119. GSL disputed the detention charges for the eleven containers at issue and asked for a waiver from payment of Hapag-Lloyd's invoice for detention. HL Resp. BOE First RFA, No. 13, BOE Ex. E at BOE 113; BOE Ex. M at BOE 286-365.

120. Hapag-Lloyd admits that they denied GSL's requests for waivers. HL Opposition at 13, Reply to BOE PFF 39.
121. On July 26, 2021, Sally Beteta Saavedra, Hapag-Lloyd Customer Service emailed Kim Cruz of GSL, a series of emails denying GSL's request for a waiver. Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 2-23.
122. For example, Ms. Saavedra, Hapag-Lloyd Customer Service USA (Hapag-Lloyd America) sent an email to Ms. Cruz (of GSL), dated July 26, 2021, stating:

Good afternoon. Unfortunately, your dispute has been found invalid. Per our equipment department, as Hapag-Lloyd neither controls nor monitors the terminals appointment system, we are unable to waive these charges. The days where there were truly no appointments available have been exempted from detention. We do not have record of the terminal being shut out during these dates. The invoice remains valid and all owing. Thanks and have a great day!

Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 7 (Invoice # 2119704796, Container No. TEMU1467361), *see also* BOE 2-23.

123. On September 1, 2021, Kim Cruz of GSL emailed Hapag-Lloyd customer service a series of emails responding to Hapag-Lloyd's refusal to waive the invoices. Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 3-23; Sally Beteta Saavedra Deposition ("Saavedra Dep."), BOE Ex. I at BOE 206, page 25, lines 2-5.
124. For example, Ms. Cruz (of GSL) emailed Hapag-Lloyd Customer Service USA, dated September 1, 2021, with regard to Invoice # 2119704796 issued for Container No. TEMU1467361, stating:

Adding the FMC and UIIA

We are not paying this invoice. There were no appointments available and the terminal appointment system is out of our control. There were no appointments. We reached out to HLC daily to ask for help or alternate return locations and HLC **FAILED** to provide help or even respond to our numerous emails. Now we are being held accountable for per diem for your failure. How does any of this make sense?

This is a violation of California Law SB-45. You cannot bill per diem due to events that are out of our control. Lack of appointments at the terminal is out of our control. I showed you back up proof. These are unfair business practices that must be stopped **immediately**.

Confirm once the invoice has been waived. Thank you.

Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 6 (emphasis in original); *see also* BOE 4-22.

125. GSL did not pay the detention charges on the eleven containers for which Hapag-Lloyd America issued GSL invoices for detention. Cruz Dep., BOE Ex. B at BOE 47, pages 23, line 21 – BOE 48, page 24, line 1.
126. GSL did not bill its customers for the detention charges on the eleven containers for which Hapag-Lloyd America invoiced it for detention charges. Cruz Dep., BOE Ex. B at BOE 48, page 24, lines 2-4.
127. Hapag-Lloyd has not refused to allow GSL to transport Hapag-Lloyd containers based on GSL's failure to pay the detention charges on the eleven containers at issue. Cruz Dep., BOE Ex. B at BOE 48, page 24, lines 5-8.

### **G. Hapag-Lloyd Waiver Process**

128. Sally Beteta Saavedra is a senior import coordinator for Hapag-Lloyd, whose duties involve investigating and resolving disputes. Saavedra Dep., BOE Ex. I at BOE 186, page 5, lines 1- 4; BOE 187, page 6, lines 12-15.
129. Hapag-Lloyd reviews disputes through employees (the Reviewer) who are web-trained and taught how to evaluate disputes via a lecture style and quiz format. HL Opposition at 13, Reply to BOE PFF 40; Saavedra Dep., BOE Ex. I at BOE 191, pages 10, lines 1-17.
130. The training has not been updated or renewed since the publication of the detention and demurrage rule. HL Opposition at 21, HL RPPF 41; Saavedra Dep., BOE Ex. I at BOE 192, page 11, lines 7-10; BOE 209, page 28, line 17-BOE 211, page 30, line 14.
131. Hapag-Lloyd has not communicated any internal policy or written policy to Ms. Saavedra describing how to evaluate disputes. Saavedra Dep., BOE Ex. I at BOE 209, page 28, lines 4-13.
132. When Hapag-Lloyd receives a dispute, the Reviewer goes to Hapag-Lloyd's operating system to see if there any remarks or documents attached to the shipment. If the Reviewer determines that the dispute is valid and that the invoice has not yet been canceled, the Reviewer must request a waiver from a supervisor. If the Reviewer determines that the dispute is not valid, they have autonomy to reject the dispute and hold the invoices as valid. Saavedra Dep., BOE Ex. I at BOE 187, page 6, lines 16-22; BOE 188, page 7, lines 1-15; HL Opposition at 13-14, Reply to BOE PFF 42-45.
133. When reviewing a detention invoice with claims of no appointments, the Reviewer looks at documentation or remarks from their equipment department "to see if Equipment wrote anything saying to waive a certain date" as well as the revenue screen to ensure that the "overdue" calculator, that computes detention fees, has taken relevant shut-out dates into account. Saavedra Dep., BOE Ex. I at BOE 193, page 12, line 4-BOE 194, page 13, line 2; HL Opposition at 14, Reply to BOE PFF 46.

134. In reviewing a dispute, Hapag-Lloyd's Reviewers define the term, "shut-out" to mean that "the terminal had no appointments available at all that day." Saavedra Dep., BOE Ex. I at BOE 194, page 13, lines 3-11; BOE 195, page 14, lines 6-11.
135. According to Hapag-Lloyd's revenue dispute department, the term "shut-out," is used "for a container type at a port as a day on which all terminal operators at that point were not accepting empty returns of that container type during their first shift." HL Resp. to 3rd BOE Interrog., No. 3, BOE Ex. F at BOE 118-119; HL Opposition at 14, Reply to BOE PFF 49.
136. Hapag-Lloyd does not inform the disputing party about other documents consulted and evaluated in reviewing the dispute or the criteria or methods used. Saavedra Dep., BOE Ex. I at BOE 206, page 25, lines 7-10.
137. While the amount of detention charges imposed by Hapag-Lloyd, A.G. have changed since May 18, 2020, the effective date of Rule 545.5, its basic tariff rules governing detention in the U.S. have not changed. Respondents 1st Interrogatory ("Resp. 1st Interrog.") No. 3, BOE Ex. J at BOE 218.
138. Both Hapag-Lloyd and GSL are signatories to the Uniform Intermodal and Facilities Access Agreement ("UIIA"). Cruz Dep., BOE Ex. B at BOE 75, page 51, lines 14-19, BOE 76, page 52, lines 2-3.
139. GSL did not file a dispute under UIIA with respect to the containers at issue. Cruz Dep., BOE Ex. B at BOE 76, page 52, lines 5-8.
140. Hapag-Lloyd was aware of the detention and demurrage rule published in the Federal Register on May 18, 2020, for at least one year before the present controversy occurred in the spring and summer of 2021. HL Opposition at 5, Reply to BOE PFF 4.
141. After the issuance of the interpretive rule, Hapag-Lloyd reviewed its procedures with respect to the assessment and waiver of detention charges, and concluded its existing procedures were in compliance with the interpretive rule. Affidavit of Sandeep Govil ("Govil Aff.") ¶ 5, Hapag-Lloyd Ex. B at HL 9.
142. In line with Hapag-Lloyd's policy and practice to charge detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container, Hapag-Lloyd has waived detention charges at LALB between January 1, 2020, and April 21, 2021, when Hapag-Lloyd has received sufficient evidence that in its opinion constitutes reasonable evidence indicating that it was not possible for the motor carrier to return the empty container within free time. Govil Aff. ¶ 6-7, Hapag-Lloyd Ex. B at HL 9.
143. Prior to May 2021, if any size/type of equipment could not be returned, detention was waived on that date for all sizes/types of equipment. Since July 2021, Hapag-Lloyd, A.G. waives detention only for those sizes/types of equipment that could not be returned on a particular day. Govil Aff. ¶ 9, Hapag-Lloyd Ex. B at HL 9.

144. If appointments are unavailable during the daytime shift at the terminals, it is the policy and practice of Hapag-Lloyd, A.G. to waive detention for the entire day, even if appointments were available during the terminals' other shifts. Govil Aff. ¶ 10, Hapag-Lloyd Ex. B at HL 10.
145. Hapag-Lloyd waived one day of detention on three of the containers identified in the Order of Investigation and Hearing and waived two days of detention on one of the containers because the motor carrier was unable to return those containers on the dates for which detention was charged. Govil Aff. ¶ 18, Hapag-Lloyd Ex. B at HL 11; Hapag-Lloyd Ex. 2 at HL 37.
146. On weekdays during May and June of 2021, an average of 110 empty 20-foot containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12.
147. On weekdays during May and June of 2021, an average of 327 empty 40' HC containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12.
148. On weekdays during May and June of 2021, an average of 10 empty 45' containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 23, Hapag-Lloyd Ex. B at HL 12-13.
149. GSL returned a total of thirty-six (36) empty Hapag-Lloyd containers to terminals used by Hapag-Lloyd during May and June of 2021. HL Opposition at 19, HL RPPF 18.
150. GSL returned empty Hapag-Lloyd containers not involved in this proceeding to Hapag-Lloyd designated terminals on dates when it was unable to return equipment of the same size at issue here. HL Opposition at 20, HL RPPF 21.

### **III. ANALYSIS AND CONCLUSIONS OF LAW**

#### **A. Preliminary Issues**

##### **1. Jurisdiction**

The Shipping Act provides that a “person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at \*33, 30 S.R.R. 991, 997-99 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, Docket No. 99-24, 2000 FMC LEXIS 14, at \*34, 28 S.R.R. 1635, 1645 (FMC Oct. 31, 2000). Complainants allege a violation of the Shipping Act within the Commission’s jurisdiction.

“It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy.” *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, Docket No. 98-23, 28 S.R.R. 1178 (ALJ Nov. 23, 1999 ); *see also River Parishes Co. Inc. v.*

*Ormet Primary Aluminum Corp.*, Docket No. 96-06, 28 S.R.R 751, 762 (FMC Feb. 3, 1999) (“As the ALJ correctly held, an agency must reach jurisdictional issues before addressing the merits of a case”) (internal citations omitted).

Hapag-Lloyd argue that the Commission lacks personal jurisdiction over Hapag-Lloyd America, asserting that it is not a regulated entity subject to the Shipping Act. HL Opposition at 2. Hapag-Lloyd further assert that BOE stipulated that Hapag-Lloyd America is not a common carrier, marine terminal operator, or an ocean transportation intermediary, and therefore, Hapag-Lloyd America should be dismissed due to lack of personal jurisdiction. HL Opposition at 2.

BOE does not address jurisdiction in its opening brief, although it should do so in future proceedings. In its reply, BOE acknowledges that the stipulation was completed after BOE’s brief and “[b]ecause of the timing of these stipulations, Hapag-Lloyd (America) LLC was still included on BOE’s Opening Brief. This, however, does not mean the proceeding should be discontinued in its entirety.” BOE Reply at 9.

The parties agree that in this proceeding, the appropriate respondent is Hapag-Lloyd, A.G. The parties stipulated that Hapag-Lloyd, A.G. is a vessel-operating common carrier, Hapag-Lloyd America operates as Hapag-Lloyd, A.G.’s “agent in the United States,” Hapag-Lloyd, A.G. provided the ocean transportation for these eleven containers, Hapag-Lloyd America issued the detention invoices at issue on behalf of Hapag-Lloyd, A.G., and Hapag-Lloyd America “is not an ocean common carrier, marine terminal operator, or ocean transportation intermediary.” JSF at 1-2. There are no allegations that Hapag-Lloyd America, as agent for Hapag-Lloyd, A.G., operated outside the scope of its authority or is otherwise an appropriate respondent in this proceeding.

The evidence supports a finding that Hapag-Lloyd America was operating as the agent of a disclosed principal and that Hapag-Lloyd, A.G. is responsible for the conduct of its agent, Hapag-Lloyd America, with regard to the eleven containers at issue. Moreover, Hapag-Lloyd America was not operating as a regulated entity as required by section 41102(c). Accordingly, Hapag-Lloyd America is dismissed. The case will proceed against Hapag-Lloyd, A.G.

## **2. Burden of Proof**

To prevail in a proceeding to enforce the Shipping Act, the party alleging a violation bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, at \*34 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics*, Docket No. 15-04, 2021 FMC LEXIS 125, at \*4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at \*29-30 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

### **3. Prima Facie Case**

Hapag-Lloyd assert that the proceeding should be discontinued because BOE has failed to establish a prima facie case. HL Opposition at 2-3. Hapag-Lloyd argue that BOE must “establish that the container or containers on which detention was assessed were in fact empty and available for return to a marine terminal,” asserting that “[a]bsent such proof, cargo interests and motor carriers could escape the payment of detention by ‘demonstrating’ that no appointments were available to return a container that was in fact still sitting loaded at the consignee’s facility.” HL Opposition at 3.

BOE contends that the standard of proof in administrative proceedings is preponderance of the evidence and summarizes its arguments that it met the five elements required for a section 41102(c) claim. BOE Reply at 10-13.

Hapag-Lloyd do not cite any legal support for their assertion that claimants contesting detention charges must establish that containers were empty and available for return. While these may be relevant factors to consider in determining the reasonableness of charges, the Commission declined to create such a bright line test. There are no specific evidentiary requirements to object to demurrage and detention charges or to claim that such charges are unreasonable and no requirement that BOE present such specific evidence. Moreover, as discussed more below, the record contains contemporaneous evidence of good faith attempts to return these eleven containers well before free time expired and there is no evidence of extraordinary circumstances which would justify imposition of all of these detention fees. Accordingly, the request to dismiss the proceeding for failure to present a prima facie case is denied.

### **4. Confidential Treatment**

The parties filed a joint motion requesting confidential treatment of the following five categories of documents.

1. Marine terminal services agreements of Hapag-Lloyd, A.G., which include “commercially and competitively sensitive information (such as the rates paid for marine terminal services)” of Hapag-Lloyd, A.G. and terminal operators.
2. Demurrage/Detention data produced by Hapag-Lloyd, A.G. that contains “commercially and competitively sensitive” data.
3. Hapag-Lloyd, A.G.’s agency agreement that contains the financial and other terms of the relationship between Hapag-Lloyd, A.G. and its agent.
4. Hapag-Lloyd detention waivers indicating the days on which Hapag-Lloyd has granted waivers from detention charges and is “highly sensitive commercial information” that is competitively sensitive.
5. The demonstrative exhibit explaining the features and operations of a non-party website which is proprietary information of the website operator.

Joint Motion for Confidential Treatment at 1-4.

The District Court for the District of Columbia discussed the strong presumption in favor of public access to judicial proceedings, stating:

As this Court has explained previously, *see In re McCormick*, 2017 U.S. Dist. LEXIS 90491 [(D.D.C. 2017)] there is a “strong presumption in favor of public access to judicial proceedings.” *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409, 321 U.S. App. D.C. 243 (D.C. Cir. 1996) (quoting *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277, 293 U.S. App. D.C. 1 (D.C. Cir. 1991)). “This right extends to judicial records[;] . . . whether something is a judicial record depends on ‘the role it plays in the adjudicatory process.’” *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, at 6 (D.D.C. 2013) (quoting *United States v. El-Sayegh*, 131 F.3d 158, 163, 327 U.S. App. D.C. 308 (D.C. Cir. 1997)). “A court proceeding . . . is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court . . . are maintained as the official ‘record’ of what transpired.” *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 906, 319 U.S. App. D.C. 256 (D.C. Cir. 1996). “Indeed, the meaning and legal import of a judicial decision is a function of the record upon which it was rendered.” *Id.*

*In re McCormick & Co., Pepper Prods. Mktg. & Sales Practices Litig.*, 316 F. Supp. 3d 455, 463 (D.D.C. 2018). Public access to judicial records is not limitless, however, and may be denied “to protect trade secrets . . . and to minimize the danger of an unfair trial by adverse publicity.” *U.S. v. Hubbard*, 650 F.2d 193, 315-16 (D.C. Cir. 1980).

Commission Rule 5 outlines the procedure for filing documents containing confidential information and the initial order in this proceeding provided additional requirements. 46 C.F.R. § 502.5. Rule 5 authorizes confidential treatment for confidential commercial information, such as the information identified by the parties. Although not all of the information in the confidential exhibits constitutes confidential information, the request is sufficiently limited to be permissible. The parties request confidential treatment for only a small number of pages and for specific, commercially-sensitive information. Therefore, the request for confidential treatment is reasonable and is **GRANTED**.

To the extent that BOE wants adjudications to deter or inform non-parties, it may consider limiting reliance on confidential material, where practicable. No confidential information is included in this Initial Decision, although there are citations to confidential exhibits.

## **B. Relevant Law**

### **1. Section 41102(c)**

BOE alleges that Hapag-Lloyd violated section 41102(c) of the Shipping Act, previously section 10(d)(1), which states that a “common carrier, marine terminal operator, or ocean transportation intermediary 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.” 46 U.S.C. § 41102(c).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements for a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4, states:

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

- (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
- (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- (d) The practice or regulation is unjust or unreasonable; and
- (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

## **2. Demurrage and Detention**

BOE alleges that Hapag-Lloyd’s imposition of detention or per diem charges on these containers runs contrary to the Commission’s demurrage and detention rule.

In 2014, the Commission held four regional port forums regarding congestion in the international supply system and discussed the “hard feelings felt by those shippers or motor carriers who incur additional congestion-related charges when the cause of that congestion lies outside their control,” for example, when terminals refuse to accept empty equipment. *U.S. Container Port Congestion & Related International Supply Chain Issues* at 48 (FMC July 2015), [www.fmc.gov/wp-content/uploads/2019/04/PortForumReport\\_FINALwebAll.pdf](http://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf). In 2015, the Commission issued a report compiling concerns and potential areas for improvement. *Report, Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* at 3 (April 3, 2015), [www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf](http://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf).

In 2016, shippers, intermediaries, and truckers petitioned the Commission to adopt a rule specifying when it would be unreasonable to collect demurrage or detention. 85 FR 29639. After receiving numerous comments and holding two days of public hearings, in 2018, the Commission launched a non-adjudicatory fact finding investigation to develop a record on: “(a) comparative commercial conditions and practices in the United States vis-à-vis other maritime nations; (b) tender of cargo; (c) billing practices; (d) practices regarding delays caused by intervening events; and (e) dispute resolution practices.” *Conditions and Practices Related to*

*Detention, Demurrage, and Free Time in Int'l Oceanborne Commerce*, 1 F.M.C.2d 1, 2-3 (FMC 2018) (Order of Investigation), [www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28\\_ord2.pdf/](http://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/).

The Fact Finding Investigation, which lasted 17 months and involved written discovery, field interviews, and group discussions with industry leaders, “revealed a situation marked by: (1) increasing demurrage and detention charges even after controlling for weather and labor events; (2) complexity; and (3) a lack of clarity and consistency regarding demurrage and detention practices, policies, and terminology.” *Fact Finding Investigation No. 28 Interim Report* at 5-14 (Sept. 4, 2018), [www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28\\_int\\_rpt2.pdf](http://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf).

On December 3, 2018, the Fact Finding Officer made a number of suggestions, including clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes as well as explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes. *Fact Finding Investigation No. 28 Final Report* at 32 (Dec. 3, 2018) (“Final Report”), [www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28\\_FR.pdf](http://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf).

On September 6, 2019, the Commission adopted the Fact Finding Officer’s recommendations. *Commission Approves Dye’s Final Recommendations on Detention and Demurrage* (Sept. 6, 2019), [www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/](http://www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/). On September 17, 2019, the Commission issued a *Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention under the Shipping Act* (“NPRM”), 84 FR 48850 (Sept. 17, 2019).

On April 28, 2020, after receiving over one hundred comments, the Commission issued the demurrage and detention rule, effective on May 18, 2020, with minor changes from the proposed rule. 85 FR 29638 (May 18, 2020). “The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control.” 85 FR at 29638. The demurrage and detention rule provides “guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable.” 85 FR at 29638.

Rule 545.5, provides in pertinent part:

(a) *Purpose*. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and §545.4(d) in the context of demurrage and detention.

(b) *Applicability and scope*. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including “per diem,” assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (“regulated entities”) related to the use of marine terminal space (*e.g.*, land) or shipping containers, not including freight charges.

(c) *Incentive principle*—(1) *General*. In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider

the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) *Particular applications of incentive principle*—(i) *Cargo availability*.

The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) *Empty container return*. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

46 C.F.R. § 545.5.

In *Evergreen*, the Small Claim Officer addressed the demurrage and detention rule in the context of days when port facilities are closed, such as weekends, holidays, and port closures, finding that it is not appropriate to charge detention or demurrage on those days. *TCW, Inc. v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement*, Docket No. 1966(I), 2021 FMC LEXIS 233, 3 F.M.C.2d 1 (SCO Feb. 19, 2021). That decision is currently on appeal before the Commission. This case explores the demurrage and detention rule in finer detail, focusing on days when port facilities are open but containers cannot be returned because the terminal appointments have been filled, are not accepting containers of that size or type, or are only accepting dual transactions, where one container is dropped off and another is picked up.

### **C. Section 41102(c) Elements**

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; the claimed acts or omissions occurred on a normal, customary, and continuous basis; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed below.

#### **1. Common carrier**

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. As discussed above, the parties agree that Hapag-Lloyd, A.G. was a vessel-operating common carrier and a regulated entity. 46 U.S.C. § 40102(17); JSF at 1. Accordingly, the first element is met.

#### **2. Connected with Receiving, Handling, Storing, or Delivering Property**

BOE asserts that “return of a VOCC’s empty containers to a terminal is integral to receiving, handling, storing, and delivering property” and that each “of these containers was involved in ocean transportation of property and shipping containers generally are equipment belonging to a VOCC specifically for this purpose.” Brief at 24. Hapag-Lloyd does not

specifically address this element. The disputed charges were imposed for failure to return the shipping container used to deliver cargo to the recipients' facility. The element requiring that the practice be connected with receiving, handling, storing, or delivering property is, thus, also established.

### 3. Unjust and Unreasonable

BOE asserts that the conduct at issue falls squarely within the prohibitions in the demurrage and detention rule and Commission precedent, arguing that practices should promote freight fluidity and that charges levied must be reasonably related to the services rendered. BOE Brief at 22-24. Hapag-Lloyd contend that they have established a reasonable policy with respect to the return of empty containers, with respect to the waiver of detention, and as applied to these containers. HL Opposition at 25-41.

Section 545.5, provides in pertinent part: "In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider 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). More specifically, section 545.5 addresses empty container return, stating: "Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable." 46 C.F.R. § 545.5(c)(2)(ii).

The demurrage and detention rule states that section 41102(c) is intended to reflect *inter alia*, the principle that:

importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals "because under those circumstances the charges cannot serve their incentive function."

85 FR at 29638. In addition, the Commission noted with regard to return of empty containers:

The rule states that absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable. The Commission explained that such practices, absent extenuating circumstances, weigh heavily in favor of a finding of unreasonableness, because if an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, no amount of detention can incentivise its return.

85 FR at 29655.

The reasonableness of Hapag-Lloyd's policy will be reviewed with regard to the return of these eleven containers, the return policies, and the waiver policy.

**a. Return of these Eleven Containers**

For these eleven containers, BOE asserts that “the motor carrier made a concerted effort to return containers but was unable to due to a lack of appointments at the terminal which Respondent directed it to return the containers” and that “Respondent’s punitive detention charges serve no additional purpose when a lack of appointments at the Respondent’s designated location prevent timely return.” BOE Brief at 23-24.

Hapag-Lloyd contend that they had a reasonable policy of charging “detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container” and that they provide “at least as much advance notice of empty return locations as the rest of the industry by providing notice of return locations not later than 4 p.m. of the previous day.” HL Opposition at 26- 27.

GSL works exclusively in the LALB area, has about 75 drivers, and handles approximately 500 containers a week. BOE 37-40. Ms. Cruz mainly works in equipment control managing empties but the five dispatch employees also make appointments. BOE 41, 53-54. When GSL receives notice from a customer that a container is empty and ready to return, dispatch employees look for an appointment and try to match up loads out of the terminal with empties going in. BOE 51. To make an appointment, GSL needs the chassis number and container type, size, number, and steamship line. BOE 82-83. GSL tries to jump on appointments as soon as they are released but sometimes they don’t have a driver to get the empty. BOE 56-57. GSL does not take a screen shot each time it looks for appointments. BOE 72-79. Ms. Cruz usually takes screen shots in the morning, when she and dispatch have been unable to make appointments. BOE 72-74.

The evidence includes emails from GSL with screen shots of appointment calendars showing days when appointments were unavailable. However, these are not *all* the days when detention was charged and BOE did not identify which specific days it believes that detention was improperly charged. It does not appear that witnesses were asked about these specific shipments, for example, whether there were appointments available on the days when there are no emails. The undersigned endeavored to determine, based on the evidence in the record, the specific days for which documentation establishes that appointments were full and empty containers could not be returned. Future proceedings would benefit from a greater focus on the specific shipments. So, for example, rather than just listing invoice numbers, it would be helpful to identify who handled the shipments, the dates free time ended and detention was charged, the amounts invoiced, etc.

GSL provided Hapag-Lloyd with evidence of a lack of appointment availability by using the Blue Cargo website, which aggregates appointment data directly obtained from terminals and refreshes every few minutes. BOE 64-65, 85-86. There is evidence that Blue Cargo data can sometimes be inaccurate. BOE 65, 77. However, Hapag-Lloyd does not point to a more reliable system to determine container return appointment availability and, at times, relies on this evidence itself.

Evidence does not show documentation of attempts to return containers on every day possible, but the evidence shows that not every attempt to find an appointment is documented by GSL. BOE 72, 79. While there is evidence that GSL looked for appointments frequently, there is also evidence that, at times, they could not return containers for other reasons, such as lack of a driver. BOE 56-57. Therefore, the evidence is not sufficient to find that appointments were unavailable on days that are not documented. There may have been additional days when appointments were unavailable for these containers but there is not sufficient evidence in the record to make a finding in this proceeding for those days.

For two of these shipments, it appears that the documented unavailable appointment days were during free time. BOE does not directly address whether detention charges should be waived based on unavailability of appointments prior to free time ending. For other shipments, appointments filled up on the day that the specific container was returned. The evidence does not show whether detention is charged for the day the container is returned. Since there is no evidence on these issues and BOE has the burden of proof, the evidence does not support a finding of a violation based on unavailable appointments prior to free time ending or for the day that containers were returned.

Regarding the two 20-foot containers, the evidence shows that for container one, appointments were full and therefore unavailable on May 11, May 12, and May 17, before free time ended on May 19; as well as on May 19. BOE 286-290. Therefore, GSL was charged detention for one day when appointments were unavailable. For container two, appointments were full and therefore unavailable on May 24, May 25, May 26, May 27, May 28, May 31, and June 3, before free time ended; and on June 4, June 7, June 8, June 9, and June 10 (return date). BOE 291-304; HL 37. Hapag-Lloyd waived two days, therefore, GSL was charged detention for two days when appointments were unavailable.

Regarding the four 40-foot high cube containers, the evidence shows that for container three, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE 305-309, 318. For container four, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 and June 14 (return date). BOE 312-325; HL Supp., Exhibit B at 4-5. Therefore, GSL was charged detention for one day (June 11), when appointments were unavailable. For container five, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11, June 14, June 15, and June 16. BOE 315-322; HL Supp., Exhibit B at 4-7. Therefore, GSL was charged detention for four days (June 11, June 14, June 15, and June 16) when appointments were unavailable. For container eleven, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE 358-365.

Regarding the five 45-foot containers, the evidence shows that for container six, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18. BOE 323-336. Hapag-Lloyd waived one day, therefore, GSL was charged detention for one day when appointments were unavailable. For container seven, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18 (return date). BOE 323-336. Therefore, GSL was

charged detention for one day, excluding return date, when appointments were unavailable. For container eight, appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21 (return date). BOE 340-347. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable. For container nine, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16, June 18, and June 21. BOE 340-347. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for two days when appointments were unavailable. For container ten, appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on and June 18 and June 21. BOE 340-347. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for one day when appointments were unavailable.

Hapag-Lloyd argue that GSL failed to fulfill its customary obligations because there is no evidence that GSL attempted to make appointments to return any 40-foot HC containers from June 1-9; GSL had no standard procedure for seeking appointments; and because screenshots taken between 9:30 am and 1 pm do not show that GSL was attempting to make appointments promptly and diligently. HL Opposition at 41-42. BOE responds that GSL attempted to secure appointments, they have a standard procedure, and motor carriers cannot devote their time solely to searching for appointments. BOE Reply at 18.

While failure to comply with customary responsibilities could be a relevant factor, 85 FR at 29647, the evidence does not support the allegation that GSL failed to comply with its customary responsibilities. GSL checked for available appointments throughout the day and emailed Hapag-Lloyd about the inability to return all eleven of these containers prior to the expiration of free time. BOE 52; BOE 330-336 (two days before for containers six and seven); BOE 291-302 (eleven days before for container two). In addition, these emails show that appointments were full by 9:39 am to 12:49 pm. BOE 286-302. Moreover, GSL emailed Hapag-Lloyd on at least twelve days requesting assistance and although Hapag-Lloyd responded eight times, Hapag-Lloyd never provided any alternate return locations or other assistance. BOE 288, 301, 302, 304, 306, 308, 321, 328. The detention and demurrage rule states that extenuating circumstances may include not fulfilling customary obligations. Here, there are no such extenuating circumstances. Rather, the balance of evidence demonstrates a good faith effort to return these containers.

Hapag-Lloyd point to the empty containers that were returned by GSL on the days at issue as evidence that containers could be returned. Hapag-Lloyd is correct that there were some appointments on the days at issue and some containers were returned. However, BOE's argument is not that there were no appointments available, but rather that there were insufficient appointments available. In addition, this evidence undermines the argument that GSL failed its customary obligations as they were often returning containers on a timely basis.

Hapag-Lloyd further claims that other motor carriers were able to return equipment to the terminals to suggest that GSL should have been able to return these eleven containers. HL Opposition at 38-39. Again, BOE's argument is not that there were no appointments available, but rather that there were not sufficient appointments available. The evidence demonstrates that GSL alerted Hapag-Lloyd to its problems finding appointments and attempted to enlist Hapag-Lloyd's help to return the containers. However, Hapag-Lloyd did not suggest other options for

returning the containers and did not identify to GSL locations that had sufficient available appointments. Without more, evidence of other containers being returned on a particular day does not support a finding that there were sufficient appointments available when evaluating allegations of an inability to return containers because all appointments have been filled.

Hapag-Lloyd argue that the empty return matrix is not a list of exclusive return locations or instructions to return containers only to the terminals listed on the matrix. HL Opposition at 18. However, Hapag-Lloyd employees told GSL: “There are no alternate locations,” “There are never any alternate locations,” and “At this time these are the only return locations allowed by terminals. Hopefully more locations and spots will open later for this week.” BOE 289, 302, 306, 308. Moreover, there is evidence that return locations are not set until the day before and making an appointment for more than one day ahead may result in the need to rebook. BOE 160-162. In addition, GSL stated that it may be charged a fee for returning a container to a terminal that is not authorized. BOE 61-63, 85, 90. Therefore, the evidence does not support Hapag-Lloyd’s argument that truckers knew they could return empty containers to locations not on the empty return broadcast matrix.

Hapag-Lloyd recognizes that the demurrage and detention rule does not require a “first out, first back” policy but asserts that the incentive principle “is served by assessing detention on equipment that a motor carrier does not return because it has chosen instead to return other equipment of the ocean carrier that has been out on delivery for less time.” HL Opposition at 37. The return of an empty container has a number of moving parts, including the container, the truck driver, and the chassis. The incentive principle is not met by requiring containers ready to be returned to wait for containers which arrived earlier. Rather, the focus should be on whether there were sufficient appointments available for a container to be returned prior to imposing a detention fee.

The preponderance of the evidence shows that GSL was not able to return empty Hapag-Lloyd containers on nineteen days after free time ended, excluding return dates, and that Hapag-Lloyd waived detention for five days. Therefore, Hapag-Lloyd charged detention for fourteen days when there is evidence that sufficient appointments were not available. This policy and practice is unreasonable because no amount of detention could have incentivized the return of the containers on those fourteen days.

#### **b. Return Policy**

BOE asserts that although Hapag-Lloyd admits it was aware of the demurrage and detention rule, it did not train its staff or create any policies to ensure compliance with the rule. BOE Brief at 19.

Hapag-Lloyd contend that under BOE’s approach, “there is no consideration of whether the motor carrier was seeking appointments in a timely and responsible matter,” the incentive principle is lost if “motor carriers can unilaterally extend free time by waiting until the last minute to seek non-existent appointments,” carriers should be able to consider other factors regarding whether containers could be returned during free period, and Hapag-Lloyd has waived a substantial amount of detention charges. HL Opposition at 28-31.

If a motor carrier can obtain a waiver of detention for any day for which it can produce a screenshot showing no appointments are available, all it has to do is wait until late in the day on the last day of free time (when appointments are likely to be booked), attempt to obtain an appointment it knows is not available, and then produce a screenshot to that effect. If this is what the Act means, then a great deal of the incentive principle of detention has been lost because motor carriers can unilaterally extend free time by waiting until the last minute to seek non-existent appointments.

HL Opposition at 28-29 (footnote omitted).

In reply, BOE asserts that “[m]otor carriers do not seek to keep containers, they want to return containers,” and that in this case, the “motor carrier testified that they attempted to secure appointments and that they have a standard procedure of seeking and obtaining appointments.” BOE Reply at 17-18.

There is no doubt that the reasonableness inquiry may consider attempts by the motor carrier to return empty containers. However, BOE’s broad assertion that motor carriers always want to return containers is not supported by the record. There may be times when a motor carrier is not able to return a container, such as when the recipient has not finished unloading the container or if the trucking company is unable to secure a driver or chassis. BOE 56-57. So, it is also not appropriate to categorically assume that containers are always available for return. Each case must be reviewed on its facts to determine if the imposition of demurrage and detention charges was reasonable.

Hapag-Lloyd set up a straw man, asserting that truckers could wait until late in the day on the last day of free time or wait “until the last minute to seek non-existent appointments” and argues against that scenario. HL Opposition at 29. However, that is not what the facts show here. In this case, there is no evidence that GSL waited until late in the day on the last day of free time or until the last minute. Rather, the evidence shows that for all of the containers, GSL attempted to return them prior to free time ending but appointments were full. Moreover, the evidence shows that GSL employees checked for appointments throughout the day and that GSL contacted Hapag-Lloyd prior to the end of free time about problems returning all eleven containers.

To impose detention for failure to return an empty container after the expiration of free time, Hapag-Lloyd must have a reasonable basis, pursuant to long-standing Commission caselaw as well as the demurrage and detention rule. Hapag-Lloyd imposed detention because the containers were not returned by the expiration of free time. However, GSL notified Hapag-Lloyd of the unavailability of appointments to return these containers both before and after the end of free time. Because there were not sufficient appointments, GSL objected to the detention fee, providing documentation that they were unable to return the containers. Therefore, for these containers on these fourteen days, no amount of fees would incentivize their return.

BOE has the burden of proof to establish that Hapag-Lloyd’s practices were unreasonable. That does not necessarily mean that BOE has the burden to show that container return appointments were unavailable. Rather, it means that BOE has the burden to show that Hapag-Lloyd’s policies or practices were not reasonable. BOE has established that it was Hapag-

Lloyd's policy and practice to charge detention for empty containers not returned within free time even when there were not sufficient appointments available to return containers and BOE has established that this policy and practice is unreasonable because it fails to meet the incentive principle.

### **c. Waiver Policy**

BOE asserts that Hapag-Lloyd did not provide guidance when rejecting the disputes and that Hapag-Lloyd's policy of only waving detention when a terminal had no appointments at all is not reasonable because if a "terminal has limited appointments, if appointments have been filled by other motor carriers, if a terminal is only able to accept Respondent's containers as part of a dual transaction, or is not receiving Respondent's containers, those factors are not even considered in evaluating whether or not detention charges are valid." BOE Brief at 19-20, 24.

Hapag-Lloyd contend that their waiver policy is reasonable and they charge "detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container," primarily based on their shut-out calendar. HL Opposition at 26-27.

The evidence shows that Hapag-Lloyd was aware of the detention and demurrage rule published in the Federal Register on May 18, 2020, for at least one year before the present controversy occurred in the spring and summer of 2021. HL Opposition at 5. After the issuance of the interpretive rule, Hapag-Lloyd reviewed its procedures with respect to the assessment and waiver of detention charges, and concluded its existing procedures were in compliance with the interpretive rule. HL 9. Training for Hapag-Lloyd dispute reviewers has not been updated or renewed since the publication of the detention and demurrage rule. HL Opposition at 13; BOE 192, 209-211. Hapag-Lloyd has not communicated any internal policy or written policy to Ms. Saavedra, who reviewed these disputes, describing how to evaluate disputes. BOE 209.

Hapag-Lloyd dispute reviewers rely on the shut-out calendar prepared by the equipment department. BOE 193-194; HL Opposition at 14. Hapag-Lloyd defines the term shut-out to mean that "the terminal had no appointments available at all that day" or "a day on which all terminal operators at that point were not accepting empty returns of that container type during their first shift." BOE 194-195, 118-119; HL Opposition at 14. The shut-out calendar relied upon by Hapag-Lloyd is too narrow because it only excludes days where it was not possible to return any containers. No amount of detention will incentivize the return of empty containers if all appointments are full. Hapag-Lloyd's waiver process does not waive detention for days when truckers were unable to return containers because all of the appointments were full. Therefore, the policy is unreasonable.

BOE asserts that the similarity of the language used in the emails denying requests for waivers is relevant evidence. However, there is no basis to infer from standardized language that there is a violation. In fact, GSL's emails requesting assistance from the Hapag-Lloyd equipment operators used standardized language. This would seem to be an efficient business practice.

Hapag-Lloyd state that they accept any type of evidence from motor carriers. If Hapag-Lloyd has a preference for types of evidence that they prefer, for example screen shots that show

the date and time, they should make that clear. The Fact Finding 28 report states that “[b]oth cargo interests and ocean transportation intermediaries stated that the only way a trucker could corroborate a lack of available appointments was to take a screenshot with a mobile phone.” FF 28 Final Report at 18. Here, GSL emailed Hapag-Lloyd prior to free time expiring and included a copy of the Blue Cargo appointment calendar showing no available appointments. This contemporaneous evidence should have been sufficient for Hapag-Lloyd to waive detention charges for these eleven containers for the days when there were not sufficient appointments available.

The Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) governs relationships between signatory ocean carriers and truckers. “Because not all ocean carriers or truckers participate in the UIIA, and because ocean carrier practices may be contained in their addenda as opposed to the standard UIIA itself, the Commission cannot simply assume that the processes outlined in the UIIA sufficiently address concerns about ocean carrier detention practices vis-à-vis truckers.” 85 FR at 29649. As the detention and demurrage rule notes, ocean carrier practices, “whether incorporated in the UIIA or not, are within the Commission’s purview.” 85 FR at 29649. Parties cannot escape the requirements of the Shipping Act through contracts with other entities. The UIIA provisions are not a defense to this violation.

BOE has established that it was unreasonable for Hapag-Lloyd not to waive detention for the days when there were insufficient appointments. BOE has also established that Hapag-Lloyd failed to revise its policies and sufficiently train its staff after the demurrage and detention rule was issued. In addition, although Hapag-Lloyd permits any evidence to be submitted to support a waiver request, Hapag-Lloyd’s waiver policies are not transparent. Accordingly, BOE has established a violation of the Shipping Act because Hapag-Lloyd failed to waive detention charges on days when the evidence shows that appointments filled up and were therefore unavailable. Accordingly, BOE has established this element of a section 41102(c) violation.

Although the waiver policy is discussed separately, the violation is the same, specifically Hapag-Lloyd’s policy and practice, absent extenuating circumstances, of imposing and failing to waive detention charges when there are insufficient appointments available to return empty containers.

#### **4. Normal, Customary, and Continuous Basis**

BOE asserts that Respondents’ practices are normal, customary, and continuous, arguing that ten of the eleven dispute denials used identical language; there was a policy to not consider the unavailability of appointments; and the invoices are still outstanding. Brief at 20-21. Hapag-Lloyd argue that its policies and practices are reasonable and does not appear to contend that this element is not met. HL Opposition at 4-5, 25-30. BOE has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a “regulation or practice” by Respondent. In this case, the evidence shows that it is Hapag-Lloyd’s normal, customary, and continuous policies and practices regarding imposing detention and waiver of charges that are at issue. Accordingly, this element of a section 41102(c) violation is met.

## 5. Proximate Cause of Loss

It is not entirely clear how the proximate cause of loss element of Rule 545.4 applies in enforcement cases and the parties do not address this element. However, the detention and demurrage invoices are outstanding and the collection of these fees would impose financial costs on shippers and trucking companies. Accordingly, this element is met.

### D. Civil Penalties

#### 1. Relevant Law

Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act, stating:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$12,363] for each violation or, if the violation was willfully and knowingly committed, [\$61,820] for each violation.

46 U.S.C. § 41107(a). The Shipping Act originally provided for maximum penalties of \$5,000 and \$25,000. 61 Fed. Reg. 52704, 52705 (Oct. 8, 1996) (codified at 46 C.F.R. § 506.4(d) (Table) (1996)). These amounts have been adjusted for inflation. In 2021, the Commission increased the amounts to \$12,363 and \$61,820. 86 Fed. Reg. 2560, 2561 (Jan. 13, 2021) (codified at 46 C.F.R. § 506.4(d) (Table) (2021)).

Section 13(c) of the Act provides that in “determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b). These factors have been codified in the regulations which state:

In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

46 C.F.R. § 502.603(b).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1)*, Docket No. 99-18, 2001 FMC LEXIS 20, 29 S.R.R. 665, 681 (FMC Oct. 18 2001); *Refrigerated Container Carriers Pty. Ltd. – Possible Violations*, Docket No. 98-20, 28 S.R.R. 799, 805 (ALJ April 13, 1999) (Admin. final May 21, 1999).

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 SRR 1007, 1018 (I.D., F.M.C. administratively final, 1986):

... in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. Obviously, “[t]he prescription of fair penalty amounts is not an exact science,” and “[t]here is a relatively broad range within which a reasonable penalty might lie.”

*Universal Logistic Forwarding Co. – Possible Violations of Sections 10(a)(1) and 10(b)(1)*, Docket No. 00-10, 2001 FMC LEXIS 29, 29 S.R.R. 323, 333 (ALJ Feb. 20, 2001), adopted in relevant part, 29 S.R.R. 474 (2002) (citation omitted). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers*, 28 S.R.R. at 805.

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed. In “Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable.” *Stallion Cargo*, 29 S.R.R. at 678-79.

Although there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6,000 in this case. *See, e.g., EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) (\$22,500 per violation assessed for 120 knowing and willful violations); *Green Master Int’l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1319, 1323 (FMC 2003) (\$22,500 penalty per knowing and willful violation affirmed) (*Green Master II*); *Green Master Int’l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) (\$22,500 per violation assessed for 68 knowing and willful violations); *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) (\$20,000 per violation assessed for 72 knowing and willful violations); *Stallion Cargo*, 29

S.R.R. at 682 (\$10,000 per violation assessed for 134 knowing and willful violations).

*Anderson Int'l Transport – Possible Violations of Sections 8(A) and 19*, Docket No. 07-02, 2013 FMC LEXIS 19, \*37-38, 32 S.R.R. 1678, 1693-94 (FMC June 25, 2013) (footnote and citations to record omitted).

In *Hudson Shipping*, the Administrative Law Judge imposed a civil penalty of \$7,900,000, or \$22,500 for each of 120 violations of section 10(a)(1) and \$25,000 for each of 208 days (September 4, 2002 to March 31, 2003) that Hudson continued to operate as an OTI/NVOCC without a surety bond in violation of section 19(b)(1) of the Act. *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, Docket No. 02-06, 29 S.R.R. 1381, 1386, 2003 FMC LEXIS 13 (ALJ 2003, admin. final February 6, 2004).

## **2. Arguments of the Parties**

BOE requests civil penalties of at least \$16.5 million, asserting that Respondent's violations were knowing and willful, each day of a continuing violation is a separate offense, and "a substantial civil penalty is appropriate and warranted by the facts of this case." BOE Brief at 29. Hapag-Lloyd contend that no violation was committed and that no penalty should be imposed. HL Opposition at 47. However, if a penalty is imposed, Hapag-Lloyd propose that an appropriate penalty would be \$144,452, based on the penalty for violations that are not knowing and willful. HL Opposition at 47. To determine the appropriate penalty, the relevant factors will be reviewed.

## **3. Discussion of Relevant Factors**

### **a. Knowing and Willful**

BOE asserts that Hapag-Lloyd acted unreasonably and willfully when Hapag-Lloyd "charged detention fees on motor carriers who were unable to make appointments and return empties, and then after the motor carriers disputed the charge with corroborating evidence, Respondent continues to hold the charges as valid" and that it is "Respondent's disregard for the published Interpretive Rule that makes this violation knowing and willful, to which a higher penalty is applied." BOE Brief at 25-26.

Hapag-Lloyd asserts that this is a novel issue and it "is simply not plausible to claim that there can be a knowing violation in a situation involving novel issues arising under a statutory provision interpreted pursuant to a rule that imposes no specific requirements." HL Opposition at 43. They also assert that they neither ignored guidance provided by the demurrage and detention rule nor is it Hapag-Lloyd's policy to reject disputes. HL Opposition at 44.

The Commission has addressed the knowing and willful factor, stating:

In order to prove that a person acted "knowingly and willfully," it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act,

or purposeful or obstinate behavior akin to gross negligence. The Commission has further held that a person's ““persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.””

*Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, Docket No. 96-05, 29 S.R.R. 119, 164-165 (FMC June 1, 2001) (citations omitted). *See also Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1)*, Docket No. 99-02, 28 S.R.R. 1397, 1403 (FMC April 21, 2000) (similar language).

The Commission has been raising concerns about demurrage and detention for many years, has provided multiple opportunities for parties to weigh in on potential resolutions, and provided specific requirements in the demurrage and detention rule regarding charging detention for the return of empty containers. Despite the Commission's efforts, Hapag-Lloyd failed to change its behavior or practices.

The evidence shows that Hapag-Lloyd reviewed, but did not change, its policies in response to the demurrage and detention rule. The rule explicitly addressed the return of empty containers. Hapag-Lloyd's argument that the rule did not apply to these containers is not supported by the demurrage and detention rule, caselaw, or other legal basis. If the rule was unclear, Hapag-Lloyd could have sought guidance from the Commission, but there is no evidence that it did so. Instead, it continued to impose detention charges in violation of the Shipping Act.

The Commission provided extensive notice and opportunity to comment prior to enacting the demurrage and detention rule, which explicitly addressed the standards for imposing detention for the return of empty containers. Here, BOE established that it was unreasonable for Hapag-Lloyd to impose, and not waive, detention charges for the fourteen days when there was documentation that there were insufficient appointments to return these containers. BOE has also established that Hapag-Lloyd failed to revise its policies and sufficiently train its staff after the demurrage and detention rule was issued. The evidence is therefore sufficient to find that this was a knowing and willful violation.

#### **b. Nature, Circumstances, Extent, and Gravity of the Violation**

BOE asserts that the nature of this violation is grave and that the extent is significant as Hapag-Lloyd imposed detention fees even when there were not sufficient numbers of appointments available as a matter of course. BOE Brief at 25-26.

Hapag-Lloyd argue that BOE “gravely exaggerates the nature of the alleged violation” and “extent of the alleged violation” because “a portion of the detention charges on the containers covered by the Order” were waived, the containers at issue were all returned shortly after free time expired, the detention charges assessed have not been paid by the motor carrier nor passed to the cargo interests, and the motor carrier has been able to continue transporting containers despite non-payment of the invoices. HL Opposition at 48-49.

Hapag-Lloyd asserts that only \$8,125 in detention was assessed for these eleven containers. HL Opposition at 1. The invoiced amounts from Hapag-Lloyd's July 26, 2021,

emails totaled \$10,135, although it is not clear if this amount accounts for the waived days. BOE 5-23. The evidence supports a finding that, at most, detention of \$10,135 was charged for these eleven containers. The evidence suggests that detention was charged for fourteen days when there is documentation that appointments were full.

In their favor, Hapag-Lloyd did have a policy to waive certain detention days, which met their definition of a shut-out. Although Hapag-Lloyd's definition of unavailable was too limited to comply with the incentive principle, they did waive five days of detention for these containers. In addition, the detention charges of approximately \$10,000 were not paid by the motor carrier, not passed on to the motor carrier's customer, and Hapag-Lloyd has continued to carry shipments transported by GSL. There is no evidence of retaliation or other aggravating factors.

While this is not a significant number of containers or days, Hapag-Lloyd has been clear that this was their normal policy and practice. Therefore, it may be presumed that this issue was not isolated to these shipments but that detention was imposed, and not waived, on other empty containers that could not be returned due to insufficient appointments. There is no evidence in the record to determine the extent of the shipments impacted and the civil penalty must be based on the allegations that were established in this proceeding. Therefore, the nature, circumstances, extent, and gravity of the violation weigh toward a high, but not the highest, penalty.

**c. Culpability and History of Prior Offenses of the Violator**

BOE acknowledges that Hapag-Lloyd, A.G. has not been the subject of an enforcement action since 1990 but is culpable for the actions of its agent. BOE Brief at 27. Hapag-Lloyd state that they have not been the subject of an enforcement action since 1990, and admit that they are responsible for their actions, but maintain that their actions in this context were reasonable and do not warrant a penalty. HL Opposition at 49.

Hapag-Lloyd, A.G. has no history of prior violations since 1990. Hapag-Lloyd took responsibility for its policies and practices and was entitled to argue for its interpretation of the demurrage and detention rule. It is noted that this is BOE's first prosecution under the demurrage and detention rule and that no other Commission cases have addressed the specific issue of detention charges when there are not sufficient appointments to return empty containers. Accordingly, these factors weigh against imposing the highest penalty.

**d. Ability to Pay a Civil Penalty**

BOE asserts that Respondent is one of the largest ocean carriers in the world, has reported record profits during the period at issue and therefore, is able to "pay a substantial civil penalty, commensurate with its violation." Brief at 27-28. Hapag-Lloyd, A.G. concedes that "it is a substantial company and does not argue for a lower penalty on the basis of the ability to pay." HL Opposition at 50.

There is no basis to lower the penalty based on ability to pay. Indeed, the evidence shows that Hapag-Lloyd could pay a significant penalty from the detention payments it receives. BOE 380.

#### e. **Deterrence and Future Compliance**

BOE argues that actions by the Commission, including the demurrage and detention rule, the Commission's many press releases related to the subject, and the filing of this litigation have not deterred Hapag-Lloyd, and furthermore, that Hapag-Lloyd "has not waived the charges at issue, nor changed its practices, nor changed its language in communications to the public." Thus, BOE asserts that a significant penalty is required to both deter Hapag-Lloyd's violative behavior and ensure future compliance. BOE Brief at 28. Hapag-Lloyd argue that "no meaningful purpose would be served by imposition of a significant penalty" because they have been and remain compliant. HL Opposition at 50.

Hapag-Lloyd's policy and practices do not comply with the demurrage and detention rule. Therefore, a significant penalty is required to deter future violations and ensure compliance with the demurrage and detention rule. However, that penalty must be proportional to the violation established, particularly where BOE did not establish a violation for all eleven shipments or for all days of detention. This factor weighs in favor of a higher penalty.

#### 4. **Civil Penalty Calculation**

BOE calculates the requested penalty using the statutory maximum for a knowing and willful violation in 2022, for eleven containers, for a continuing violation of 228 days until the filing of BOE's brief ( $\$65,666 \times 11 \times 228 = \$164,690,328$ ) and argues that ten percent is necessary to deter future violations and therefore requests a civil penalty of \$16.5 million. BOE Brief at 29.

Hapag-Lloyd assert that the proposed penalty is excessive, not supported by the facts or the law, and is "arbitrary and capricious on its face." HL Opposition at 1, 42-43, 45. Hapag-Lloyd argue that they have not violated the Shipping Act but that if they are found to have violated the Act, an appropriate penalty would be "\$144,452 (11 containers x \$13,132, the maximum penalty for a violation of the Act that was not knowing and willful during 2021)." HL Opposition at 47.

BOE asserts that the 2022 penalty amounts should apply, arguing that that the penalty amount adjustments "were made applicable to violations predating the increase." BOE Brief at 29 n.7. Hapag-Lloyd assert that the 2021 penalty amounts should apply, contending that BOE "cites no precedent and no rationale for using the date of its brief as the cutoff date for the alleged violation." HL Opposition at 45. In previous cases, the Commission set the penalty based on the amount at the time of the offense. *OC Int'l Freight, Inc. v. OMJ Int'l Freight, Inc.*, 2014 FMC LEXIS 14, \*13 n.14 (FMC July 31, 2014) ("these penalty levels corresponded with the maximum civil penalties available at the time the violations were committed."); *Anderson Int'l Transport*, 2013 FMC LEXIS 19, at \*37-38 (assessing violations based on penalty amounts "at the time these violations occurred."); *Sea-Land Service, Inc. – Possible Violations of Sections 10(b)(1), 10()(4) and 19(d) of the Shipping Act of 1984*, Docket No. 98-06, 2003 FMC LEXIS 8 (ALJ Jan. 30, 2003). Therefore, the penalty amount for 2021, at the time of the violations, will be used.

BOE asserts that this is a continuing violation and calculates the penalty by multiplying the number of shipments (11) by the number of days between Hapag-Lloyd's denial of GSL's waiver request to the date of BOE's brief (228). BOE Brief at 29. Hapag-Lloyd maintains that they have "not located a single decision in a Commission enforcement proceeding in which a violation of Section 41102(c) was found to be a continuing violation," BOE "cites no authority to support its contention that the alleged violation in this case is continuing," and that there is no basis to find every day since the denial of the waiver request to be a separate violation. HL Opposition at 43. BOE cites 46 U.S.C. § 41107 to argue in its reply that "[e]ach day of a continuing violation is a separate violation." BOE Reply at 20.

Basing the violation amount on the number of days until BOE filed its brief would make the speed of litigation a central element in determining a penalty amount. There is no basis in the caselaw to do so and it would seem to punish the parties for legitimate use of the legal process. Per day penalties have been imposed against entities which operated without a license or a bond for each day those entities operated in violation of the Shipping Act. It would, therefore, be appropriate to impose a penalty for every day that detention was improperly charged. This ensures that the penalty is proportionate to the violation established and the penalty is inherently lowered by the number of days that Hapag-Lloyd waived detention.

The record shows that appointments to return empty containers were unavailable on nineteen days after the expiration of free time, excluding the date returned, for these eleven containers. Hapag-Lloyd waived five days of detention charges. Therefore, there are fourteen days for which the evidence shows that detention was imposed when documentation shows that sufficient appointments were not available.

It is not clear if detention was charged for the day that containers were returned. As BOE has the burden of proof, and there is not sufficient evidence in the record to resolve this question, those days are excluded from the damages calculation. In addition, the parties did not brief whether detention should be adjusted or waived when there is evidence of attempts to return containers prior to free time expiring. No legal finding is made regarding these scenarios. With regard to the facts in this proceeding, the evidence does not support imposing penalties for the return date or for days when empty containers could not be returned prior to the expiration of free time. Other cases, with a different factual basis and thorough briefing, may warrant a different conclusion.

Giving due consideration to all of the factors, Hapag-Lloyd, A.G. is ordered to pay a civil penalty of \$58,730 per violation for fourteen violations equaling a total penalty of \$822,220 for violation of section 41102(c) of the Shipping Act.

#### **E. Cease and Desist Order**

The Commission has held that the evidence in the record must justify entry of a cease and desist order.

The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, 27 SRR 1335, 1342 (ALJ 1997) ("a cease and

desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses”); and *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 SRR 80, 86 (ALJ 1998) (“the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities”). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

*Maher Terminals, LLC v. Port Authority of New York and New Jersey*, Docket No. 08-03, 32 S.R.R. 1185, 1190 n.8 (FMC Jan. 31, 2013).

A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, Docket No. 85-13, 23 S.R.R. 857, 871-72 (ALJ Feb. 13, 1986). In addition to protecting the shipping public, a cease and desist order will alert the shipping industry, forestall future violations, and facilitate injunctions against possible unlawful activity in the future. *Pacific Champion*, 28 S.R.R. at 1190-91.

BOE requests that Hapag-Lloyd be ordered to follow the previously published demurrage and detention rule, cease collection of detention charges on the containers at issue and similarly situated containers, and “desist from collecting detention charges from motor carriers when they dispute such charges and provide evidence to Respondent that points to their inability to return containers in a timely manner due to circumstances beyond their control.” BOE Brief at 30. In the future, BOE should propose specific language for cease and desist orders. Respondents do not directly address the requested cease and desist order.

A preponderance of the evidence demonstrates that Hapag-Lloyd, A.G. failed to follow the requirements of the demurrage and detention rule, failed to revise its policies or train its staff, and continued to impose detention when the incentive principle was not met. Therefore, there is a reasonable likelihood that Hapag-Lloyd, A.G. would continue to violate the Shipping Act without a cease and desist order. Accordingly, a cease and desist order is entered, prohibiting Hapag-Lloyd, A.G. or its agents, absent extenuating circumstances, from imposing demurrage or detention charges when there are insufficient appointments available, including the fourteen days identified above, and prohibiting Hapag-Lloyd, A.G. and its agents from violating the Shipping Act or Commission regulations, including the demurrage and detention rule.

#### **IV. ORDER**

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Hapag-Lloyd, A.G. violated the Shipping Act, it is hereby

**ORDERED** that Hapag-Lloyd (America) LLC be **DISMISSED WITH PREJUDICE**. It is

**FURTHER ORDERED** that Hapag-Lloyd, A.G. is liable to the United States for the sum of \$822,220 as a civil penalty for fourteen willful and knowing violations of section 41102(c) of the Shipping Act of 1984. It is

**FURTHER ORDERED** that Hapag-Lloyd, A.G. and its agents cease and desist, absent extenuating circumstances, from imposing demurrage or detention when there are insufficient appointments available, including the fourteen days identified above. It is

**FURTHER ORDERED** that Hapag-Lloyd, A.G. and its agents cease and desist from violating the Shipping Act or Commission regulations, including the demurrage and detention rule. It is

**FURTHER ORDERED** that this claim be **DISCONTINUED**.

  
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Erin M. Wirth  
Chief Administrative Law Judge