S E R V E D
August 1, 2017
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 16-02

D.F. YOUNG, INC.

v.

NYK LINE (NORTH AMERICA) INC.

INITIAL DECISION DENYING COMPLAINANT'S SUMMARY DECISION MOTION AND GRANTING RESPONDENT'S SUMMARY DECISION MOTION[1]

I. Introduction

A. Summary

Both Complainant D.F. Young, Inc. ("DFY"), a licensed freight forwarder, and Respondent NYK Line (North America) Inc. ("NYK Line" or "NYK"), an ocean common carrier, filed motions seeking summary decision in this proceeding. DFY claims that it operated as a freight forwarder on shipments of vehicles transported by NYK Line pursuant to service contracts with Ford Motor Company ("Ford") and that NYK Line failed to pay freight forwarder fees stated in its tariff. NYK Line contends that the tariff did not apply to the vehicles transported pursuant to the service contracts and that there is no legal or contractual right to the payments sought by DFY from NYK Line.

The heart of this dispute is a legal issue – whether this particular tariff for freight forwarder compensation applied to this particular cargo. The parties identified and discussed freight forwarder compensation prior to signing a power of attorney agreement between themselves. Unable to reach an agreement on whether DFY was entitled to collect freight forwarder compensation for the cargo in question, the parties signed a power of attorney agreement which was silent on the issue. DFY

[1] 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.

now seeks $537,213.33[2] in compensation based on NYK Line's tariff. NYK Line asserts that the tariff does not apply to this cargo which was shipped under service contracts.

Both DFY and NYK Line filed motions seeking summary decision. Although the legal issues in the two motions are similar, the factual analysis differs as factual disputes must be construed in the light most favorable to the non-moving party when evaluating motions for summary decisions. As discussed more fully in section II below, DFY's motion for summary judgment[3] arguing that payment is due under NYK Line's tariff provisions is denied because DFY has not shown that it is entitled to compensation under NYK Line's tariff and because even if the tariff applied, there is a factual dispute regarding whether DFY met the tariff requirements for payment of freight forwarder compensation.

As discussed more fully in section III below, NYK Line's motion for summary decision is granted because DFY is not entitled to tariff freight forwarder compensation where the tariff only applied to tariff rates, there was no agreement which obligated NYK Line to pay freight forwarder compensation, DFY had actual knowledge that the cargo was being shipped pursuant to service contracts, NYK Line had indicated to DFY that it would not pay freight forwarder compensation, and such compensation had not been paid to the previous provider. Each motion will be addressed separately.

B. Procedural History

On January 29, 2016, DFY commenced this proceeding by filing a complaint alleging that NYK Line violated the Shipping Act of 1984 ("Shipping Act").[4] DFY alleges that it performed freight forwarder services in connection with shipments of cars by Ford and that NYK Line violated the Shipping Act by "refusing to compensate Complainant for the freight forwarding services performed on Ford shipments placed on vessels [owned and/or] operated by Respondent and/or its agents or affiliates, for which Respondent received freight charges." Complaint at 11, ¶ 47. DFY alleges violations of 46 U.S.C. § 41102(c) and 46 C.F.R. § 515.42. Complaint at 11, ¶ 47.

NYK Line filed its answer on March 8, 2016, denying that it owed the freight charges or had violated the Shipping Act, and alleging three affirmative defenses: DFY did not perform any freight forwarding services; unjust enrichment; and, lack of consideration. Answer at 11, ¶ VIII. On

---

[2] This amount includes freight fees and bunker adjustment fees. Complainant's Motion at 17. The complaint seeks in excess of $252,776.89. Complaint at 11, ¶ 48-49.

[3] Administrative Law Judges are authorized to issue initial decisions, 46 C.F.R. § 501.5(e), so the motion is more properly described as a motion seeking summary decision.

[4] "On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to 'reorganize[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.' H.R. Rep. 109-170, at 2 (2005).

August 24, 2016, NYK Line filed a motion to amend its answer in part to add a fourth affirmative defense that the shipments at issue "were Service Contract shipments, not tariff shipments and therefore do not qualify for freight forwarder compensation." Amended Answer at 11, ¶ VIII. The motion seeking to amend the answer was granted on September 23, 2016.

The parties engaged in extensive discovery. On October 13, 2016, the proceeding was transferred to the undersigned. On December 1, 2016, a telephonic pre-hearing conference was held with counsel for the parties. Counsel indicated that discovery was complete and there were no pending motions. Both parties reasserted their desire for an oral hearing and indicated that such a hearing could last up to ten days. They indicated that settlement discussions had not resolved the proceeding, in part due to a disagreement regarding legal issues impacting the case. Both parties requested an opportunity to file motions for summary decision, in the hope of resolving the matter without the time and expense of a hearing. On December 6, 2016, a scheduling order was issued granting the request to file motions for summary decision and providing filing deadlines.

DFY's motion seeking summary judgment, including a statement of material facts in support of the motion and appendix with exhibits ("Complainant's Motion") was filed on January 10, 2017. NYK Line filed its opposition brief, opposition to Complainant's proposed findings of facts, proposed counter facts, and appendix with exhibits ("Respondent's Opposition") on January 30, 2017. DFY filed its reply brief ("Complainant's Reply") on February 7, 2017.

NYK Line's motion seeking summary decision including proposed findings of fact and addendum, as well as an appendix with exhibits, ("Respondent's Motion") was filed on January 9, 2017. DFY filed its opposition brief ("Complainant's Opposition") on January 31, 2017. NYK Line filed its reply brief ("Respondent's Reply") on February 7, 2017.

In addition, NYK Line filed motions seeking confidential treatment on January 15, 2017; January 30, 2017; and, February 7, 2017. Given the outcome of the summary decision motions, the request for an oral hearing is moot.

C. Preliminary Matters

1. Jurisdiction

The Shipping Act provides that a "person may file with the . . . 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 Logistica Ltda.*, 30 S.R.R. 991, 997-98 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). DFY alleges violations of the Shipping Act, including violations of the Commission's tariff and freight forwarding regulations. There is no challenge to the Commission's jurisdiction over the allegations or the parties.

2. Motion for Confidential Treatment

NYK Line filed three motions seeking confidential treatment of certain materials in its motion for summary decision, opposition to Complainant's motion for summary decision, and its reply on its own motion for summary decision. NYK Line specifically states that the material for which confidentiality is sought concerns or arises out of service contracts between Respondent and two non-parties. NYK Line marked material for which it sought confidential treatment with a yellow highlighter in the confidential versions of the briefs and filed public versions of the briefs. Confidential exhibits are excluded from the public version of the filings.

DFY also filed confidential and public versions of its briefs. Material marked with a yellow highlighter in DFY's confidential versions does not appear in the public versions, so it is presumed that DFY is seeking confidential treatment of this material. Confidential exhibits are excluded from the public versions of the filings.

Pursuant to 46 U.S.C. § 40502, covered service contracts are filed confidentially with the Commission. 46 U.S.C. § 40502(b)(1). Pursuant to Commission Rule 530.4, "[a]ll service contracts and amendments to service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence." 46 C.F.R. § 530.4. In addition, the parties entered into a stipulation and order of confidentiality regarding how to handle confidential material in this proceeding.

The requests for confidential treatment will be granted. However, it is noted that the parties marked more information as confidential than necessary. These broad confidentiality requests hinder the public's ability to understand this proceeding and Commission regulations. In future filings, the parties should limit the material marked as confidential, otherwise, the filings may be rejected. Because this initial decision rules on summary decision motions, where factual issues are not central and the focus is on questions of law, it was possible to write this initial decision without including discussion of any confidential material. This was done, in part, to ensure the public's understanding of this proceeding and the legal issues involved.

D. Relevant Law

Summary decision is appropriate when the material facts are not in dispute and a party is entitled to judgment as a matter of law. To understand the issues in this case, it is helpful to review the laws governing motions for summary decision, freight forwarder compensation, ocean carrier tariffs, and service contracts.

1. Motion for Summary Decision Standard

The Commission has emphasized that:

> At the summary judgment stage, the role of the judge ". . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a

genuine issue for trial." The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact.

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., 31 S.R.R. 540, 545 (FMC 2008) (citations omitted).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 618 (D.D.C. 1984). *See also* Fed. R. Civ. P. 56 advisory committee notes, 2007 amendments ("there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

2. Freight Forwarder Compensation

Freight forwarder compensation is governed by section 40904 of the Shipping Act and part 515 of the Commission's Rules. 46 U.S.C. § 40904; 46 C.F.R. § 515. Section 40904 permits, but does not require, common carriers to pay freight forwarder compensation. 46 U.S.C. § 40904.

> § 40904. Compensation by common carriers
>
> (a) Certification of License and Services.-A common carrier may compensate an ocean freight forwarder for a shipment dispatched for others only when the ocean freight forwarder has certified in writing that it holds an ocean transportation intermediary's license (if required under section 40901 of this title) and has-
>
> (1) engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of the space; and
>
> (2) prepared and processed the ocean bill of lading, dock receipt, or other similar document for the shipment.

(b) Dual Compensation.-A common carrier may not pay compensation for services described in subsection (a) more than once on the same shipment.

(c) Beneficial Interest Shipments.-An ocean freight forwarder may not receive compensation from a common carrier for a shipment in which the ocean freight forwarder has a direct or indirect beneficial interest. A common carrier may not knowingly pay compensation on that shipment.

46 U.S.C. § 40904.

Section 515.42 provides in relevant part:

§ 515.42 Forwarder and carrier compensation; fees. . . .

(b) *Certification required for compensation.* A common carrier may pay compensation to a licensed freight forwarder only pursuant to such common carrier's tariff provisions. When a common carrier's tariff provides for the payment of compensation, such compensation shall be paid on any shipment forwarded on behalf of others where the forwarder has provided a certification as prescribed in paragraph (c) of this section and the shipper has been disclosed on the bill of lading as provided for in paragraph (a) of this section. The common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The common carrier shall retain such certifications for a period of five (5) years.

(c) *Form of certification.* When a licensed freight forwarder is entitled to compensation, the forwarder shall provide the common carrier with a certification which indicates that the forwarder has performed the required services that entitle it to compensation. The required certification may be provided electronically by the forwarder or may be placed on one copy of the relevant bill of lading, a summary statement from the forwarder, the forwarder's compensation invoice, or as an endorsement on the carrier's compensation check. Electronic certification must contain confirmations by the forwarder and the carrier identifying the shipments upon which forwarding compensation may be paid. Each forwarder shall retain evidence in its shipment files that the forwarder, in fact, has performed the required services enumerated on the certification. The certification shall read as follows:

The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No. __, issued by the Federal Maritime Commission and has performed the following services:

(1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and

(2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

(d) *Compensation pursuant to tariff provisions.* No licensed freight forwarder, or employee thereof, shall accept compensation from a common carrier which is different from that specifically provided for in the carrier's effective tariff(s). No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation, as provided for by section 19(e)(4) of the Act (46 U.S.C. 40904(d)) and 46 CFR part 535.

(e) *Electronic data interchange.* A licensed freight forwarder may own, operate, or otherwise maintain or supervise an electronic data interchange-based computer system in its forwarding business; however, the forwarder must directly perform value-added services as described in paragraph (c) of this section in order to be entitled to carrier compensation.

(f) *Compensation; services performed by underlying carrier; exemptions.* No licensed freight forwarder shall charge or collect compensation in the event the underlying common carrier, or its agent, has, at the request of such forwarder, performed any of the forwarding services set forth in §515.2(h), unless such carrier or agent is also a licensed freight forwarder, or unless no other licensed freight forwarder is willing and able to perform such services.

(g) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in paragraph (c) of this section more than once on the same shipment. . . .

(i) *Compensation; beneficial interest.* A licensed freight forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

46 C.F.R. § 515.42. *See also Pacon Express, Inc. – Possible Violations of Sections 10(a)(1) and 19(d)(4) of the Shipping Act*, 28 S.R.R. 352, 353-356 (ALJ 1998) (discussing in detail the background and potential issues with freight forwarder compensation).

3. Ocean Carrier Tariffs

Ocean freight forwarder tariffs are governed by section 40501 of the Shipping Act and part 520 of the Commission's Rules.

Title 46 U.S.C. Section 40501 states:

> Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.

46 U.S.C. § 40501(a)(1). Section 40501 also states that a "tariff under subsection (a) shall . . . state the level of compensation, if any, of any ocean freight forwarder by carrier or conference." 46 U.S.C. § 40501(b)(3). Section 40501(a)(1) does not apply to "new assembled motor vehicles." 46 U.S.C. § 40501(a)(2).

The Commission has promulgated regulations regarding carrier tariffs.

> § 520.1 Scope and purpose.
>
> (a) *Scope*. The regulations of this part govern the publication of tariffs in automated systems by common carriers and conferences in the waterborne foreign commerce of the United States. They cover the transportation of property by such carriers, including through transportation with inland carriers. They implement the tariff publication requirements of section 8 of the Shipping Act of 1984 (''the Act'') (46 U.S.C. 40501–40503), as modified by the Ocean Shipping Reform Act of 1998 and section 424 of Public Law 105–258.
>
> (b) *Purpose*. The requirements of this part are intended to permit:
>
> (1) Shippers and other members of the public to obtain reliable and useful information concerning the rates and charges that will be assessed by common carriers and conferences for their transportation services;
>
> (2) Carriers and conferences to meet their publication requirements pursuant to section 8 of the Act (46 U.S.C. 40501-40503);
>
> (3) The Commission to ensure that carrier tariff publications are accurate and accessible and to protect the public from violations by carriers of section 10 of the Act (46 U.S.C. 41101-41106); and
>
> (4) The Commission to review and monitor the activities of controlled carriers pursuant to section 9 of the Act (46 U.S.C. 40701-40706).

46 C.F.R. § 520.1.

The Commission requires that published tariffs "[s]tate the level of ocean transportation intermediary, as defined by section 3(17)(A) of the Act (46 U.S.C. 40102(18)), compensation, if any, to be paid by a carrier or conference." 46 C.F.R. § 520.4(a)(3). The Commission also requires tariffs to include "sample copies of any bill of lading, contract of affreightment or other document evidencing the transportation agreement" and "copies of any loyalty contract, omitting the shipper's name." 46 C.F.R. § 520.4(a)(5)-(6). Ocean transportation tariffs are also required to include "any rule that affects the application of the tariff." 46 C.F.R. § 520.4(d).

The Commission excepts tariff requirements on shipments of "bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper and paper waste." 46 C.F.R. § 520.13(c)(1). The Commission defines "motor vehicle" as "a wheeled vehicle whose primary purpose is ordinarily the non-commercial transportation of passengers, including an automobile, pickup truck, minivan, or sport utility vehicle." 46 C.F.R. § 520.2.

4. Service Contracts

Service contracts are governed by section 40502 of the Shipping Act and part 530 of the Commission's Rules.

a. Definition

The Commission recently discussed the history and profound impacts of service contracts.

> In 1984, Congress passed the Shipping Act of 1984, which introduced the concept of carriage under service contracts filed with the Federal Maritime Commission. The pricing of liner services via negotiated contracts, rather than exclusively by public tariffs, was a change that had profound effects on the liner industry. FMC regulations require all ocean freight rates, surcharges, and accessorial charges in liner trades be published in ocean common carrier tariffs or agreed to in service contracts filed with the Commission. Contemporaneous with the filing of service contracts, carriers are also required to make available to the public a concise statement of essential terms in tariff format.

Amendments to Regulations Governing Service contracts and NVOCC Service Arrangements, final rule, 82 Fed. Reg. at 16288 April 4, 2017 (Effective Date: May 5, 2017) (citation omitted).

> The term "service contract" means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which – (A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined

service level, such as assured space, transit time, port rotation, or similar service features.

46 U.S.C. § 40102(20). The Shipping Act sets forth specific requirements for service contracts.

> (a) In general. – An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part.
>
> (b) Filing requirements. – (1) In general. Each service contract entered into under this section by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission. (2) Exemptions. – Paragraph (1) does not apply to . . . new assembled motor vehicles . . . .
>
> (c) Essential terms. – Each service contract shall include (1) the origin and destination port ranges; (2) the origin and destination geographic areas in the case of through intermodal movements; (3) the commodities involved; (4) the minimum volume or portion; (5) the line-haul rate; (6) the duration; (7) service commitments; and (8) the liquidated damages for nonperformance, if any.
>
> (d) Publication of certain terms. – When a service contract is filed confidentially with the Commission, a concise statement of the essential terms specified in paragraphs (1), (3), (4), and (6) of subsection (c) shall be published and made available to the general public in tariff format. . . .
>
> (f) Remedy for breach. – Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. . . .

46 U.S.C. § 40502. The complaint does not allege violations of the service contracts, so the exclusive remedy provision does not apply.

The Commission's Rule 8 provides specific guidance for filing service contract terms, requiring:

> (b) Every service contract filed with the Commission shall include the complete terms of the service contract including, but not limited to, the following:
>
> (1) The origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;
>
> (2) The destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(3) The commodity or commodities involved;

(4) The minimum volume or portion;

(5) The service commitments;

(6) The line-haul rate;

(7) Liquidated damages for non-performance (if any);

(8) Duration, including the (i) Effective date; and (ii) Expiration date;

(9) The legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed, except that in the case of a contract entered under the authority of an agreement or by a shippers' association, individual members need not be named unless the contract includes or excludes specific members. . . .

(10) A certification of shipper status;

(11) A description of the shipment records which will be maintained to support the service contract and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 530.15 of this part; and

(12) All other provisions of the contract.

(c) *Certainty of terms*. The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the service contract itself unless those terms are readily available to the parties and the Commission.

46 C.F.R. § 530.8. Certain information included in otherwise confidential service contracts must be made available to the public. 46 C.F.R. § 530.12.

The Shipping Act exempts contracts regarding "new assembled motor vehicles" from filing requirements. 46 U.S.C. § 40502(b)(2); 46 C.F.R. § 530.13. The Commission defines a "motor vehicle" as "a wheeled vehicle whose primary purpose is ordinarily the non-commercial transportation of passengers, including an automobile, pickup truck, minivan or sport utility vehicle." 46 C.F.R. § 530.3(m).

b. Freight Forwarder Compensation in Service Contracts

The introduction of service contracts has had a significant impact on the industry. The Commission's 2001 report titled *The Impact of the Ocean Shipping Reform Act of 1998* included a section labeled "Suggestions for Further Legislative Consideration." The Commission indicated that it "has identified several provisions in the statute which are either ambiguous or could be revised in order better to effect the intentions of Congress." Complainant's Opposition, Exhibit 3, *The Impact of the Ocean Shipping Reform Act of 1998* ("Impact Report") at 49 (FMC Report, Sept. 2001). The Impact Report includes a sub-section labeled "Freight Forwarder Compensation" which states:

> Section 8(a)(1)(C) of the 1984 Act, 46 U.S.C. app. § 1707(a)(1)(C) [currently 46 U.S.C. § 40501(b)(3)], requires that a tariff state the level, if any, of freight forwarder compensation to be paid by a carrier or conference. Section 19(e)(4), 46 U.S.C. app. § 1718(e)(1) [currently 26 U.S.C. § 40904(d)(1-2)], provides that no conference or group of two or more carriers authorized to agree on the level of compensation, may either deny any member or group the right to take independent action on the level of compensation to be paid, or agree to limit that compensation to less than 1.25 percent of the aggregate of the applicable rates and charges. The level of freight forwarder compensation is now being included as a negotiable term in many service contracts, independent of the level set forth in the applicable tariff.
>
> Congress may wish to clarify whether, under sections 8(a)(1)(C) and 19(e)(4), the level of freight forwarder compensation paid for shipments moving under a service contract may be different from the level of compensation paid for shipments rated according to a tariff rate. That is, did Congress intend that parties to a service contract be permitted to negotiate the level of freight forwarder compensation to be paid on shipments moving under the service contract?

Impact Report at 49. In this case, the level of compensation is not at issue and there are no allegations that the service contracts set the freight forwarder rate. However, there may be legitimate business reasons that parties, particularly ocean common carriers, might want to consider freight forwarding costs when negotiating service contracts.

Two Commissioners, in recent dissents, discussed the background of the revisions that Congress made to the Shipping Act in the 1998 amendments. "The Reform Act abolished the inflexible ocean shipping regime based on public tariffs and replaced it with a system based on confidential service contracts between carriers and their customers. Today, there is competition among carriers in the ocean transportation marketplace, with 98 percent of cargo carried under confidential service contracts." *In re OC Int'l Freight, Inc.*, 33 S.R.R. 567, 575 (Dye, dissenting) (FMC July 31, 2014).

> Section 8(c). Tariffs, was amended in two significant ways. First, certain contract "essential terms" that previously were required to be made available to the general

> public in published tariffs were now protected from public disclosure and further, the Commission was required to maintain such information as confidential. . . . Second, the statutory requirement that these four essential contract terms, together with the remaining published terms be offered and made "available to all shippers similarly situated" was expressly excised from the Act. *See* 46 U.S.C. § 40502.
>
> Thus the meaning of "greater reliance on the marketplace" is clearly revealed to reference reliance on private one-on-one contract negotiation and private confidential contracting between parties in the shipping community. Further, we see revealed the express Congressional abandonment and rejection of (i) reliance on a tariff freight rate that is published in a public tariff format, (ii) the concept that such published tariff freight rate must be offered to any and all shipping parties, and (iii) that such publicly available and ascertainable tariff freight rate is the single and only freight rate that is permitted, by law, to be charged to any and all parties in the shipping community.

In re OC Int'l Freight, Inc., 33 S.R.R. at 584 (Khouri, dissenting) (FMC July 31, 2014). This background, not discussed by the majority, provides historical perspective.

II. Complainant's Motion for Summary Decision

In its motion seeking summary decision, DFY asserts that there is no dispute of material facts and as a matter of law, it is entitled to payment pursuant to NYK Line's tariff. Even if DFY were entitled, as a matter of law, to compensation under the tariff, a factual dispute would exist regarding whether DFY meets the tariff requirements. As discussed below, DFY did not show entitlement to tariff compensation as a matter of law. Even if it did, DFY's motion seeking summary decision must be denied because of the factual disputes regarding the nature of the work done by DFY and whether that work met the Commission's requirements for freight forwarder compensation.

A. Arguments of the Parties

DFY argues that there is no genuine dispute that DFY has performed freight forwarding services on Ford shipments meriting compensation under NYK Line's tariff and applicable law and neither Ford nor DFY has waived DFY's right to freight forwarder compensation from NYK Line. Complainant's Motion at 23-28.

NYK Line asserts that, as a matter of law, it is not required to pay forwarder compensation for service contract shipments and DFY has not proved otherwise; the absence of a waiver of forwarder compensation is irrelevant; NYK Line payments of freight forwarder compensation to other shippers is irrelevant; even if NYK Line's tariff is held applicable to service contracts, DFY's summary decision motion must still be denied because it has not proven as a matter of law that it complied with 46 C.F.R. 515.42(c) which is a condition of compensation; and, all of the motor

vehicles shipped under the Ford service contracts were noncommercial and new. Respondent's Opposition at 1-26.

In its reply, DFY contends that NYK Line admitted much of Complainant's statement of material facts; NYK Line fails to demonstrate how any service contract incorporated and/or negated the tariff; the parties agree that neither the service contracts nor the power of attorney agreement waive freight forwarder compensation; NYK Line is not free to disregard its own published tariff as it sees fit; there is no genuine dispute that DFY booked and confirmed space for Ford shipments and that its work on bills of lading was on behalf of NYK; and, the language of service contracts determines if they are exempt from publication, not the performance of the parties. Complainant's Reply at 1-13.

B. Analysis of Complainant's Motion

DFY asserts that it is entitled to summary decision on the merits of the case and relies upon 86 separate proposed findings of fact to support its motion. Complainant's Motion at 3-17. NYK Line disputes many of these proposed facts and the conclusions to be drawn from those facts and provides 32 additional proposed facts. Respondent's Counter Proposed Findings of Fact on Complainant's Motion for Summary Judgment at 1-7. The parties present factual disputes that prohibit summary determination on the issue of whether or not DFY performed specific freight forwarder duties on all of the alleged shipments.

There are issues on which the parties agree. For example, the parties agree that shippers select and pay freight forwarders and that ocean carriers are not obligated under the Shipping Act to include freight forwarder compensation in applicable tariffs. Complainant's Reply at 7 ("It is a legal truism that ocean carriers are not obligated under the Shipping Act as currently enacted and amended to automatically include freight forwarder compensation in applicable tariffs."); Respondent's Opposition at 10 ("An individual carrier is free to pay or not pay forwarder compensation as it sees fit.").

The parties also are in agreement about the terms of the three relevant documents: (1) the DFY/NYK Line power of attorney agreement between the parties; (2) the Ford/NYK Line service contracts; and, (3) NYK Line's tariff. The relevant rule in NYK Line's tariff states:

> The compensation which is paid under this rule shall be on the gross freight. The gross freight includes the tariff rate and Heavy Lift and Extra Length Charges, if applicable, but shall not, for the purpose of computing compensation, include charges assessed for containerization of cargo, container rental fee, war risk compensation, port surcharges, port detention charges, demurrage, bunker surcharges, port arbitraries, harbor dues or any other charge or surcharge designed to cover specific costs. Compensation will not be paid on any shipment on which brokerage is payable.

Complainant's Motion, Exhibit B at 1; Respondent's Motion at 8-9 and Exhibit C (RX 26).

The parties also agree that the power of attorney agreement and service contracts are silent regarding freight forwarder compensation. DFY includes a number of emails exchanges between the parties while they were negotiating the power of attorney agreement. The emails show that the primary issue of contention was whether DFY was acting as a freight forwarder and was entitled to compensation. Complainant's Motion, Exhibit W.

The parties do not, however, agree about the legal impact of these documents. Specifically, DFY believes it is entitled to freight forwarder compensation under the terms of NYK Line's tariff, while NYK Line does not believe the tariff applied to service contract shipments and that even if it did, DFY did not perform freight forwarding services. For example, NYK Line argues that:

> In this case, having not shown its entitlement to compensation under Tariff Rule 9; and having done nothing to comply with Reg. 515.42(c)(1), and nothing . . . to comply with subpara. (c)(2), DFY is far removed from the traditional rule of freight forwarders and has rendered no services (much less services adding value) for NYK to justify forwarder compensation.

Respondent's Opposition at 26. Determination of whether DFY performed freight forwarding services would require a factual analysis of the job duties performed by DFY's employees. At this stage of the proceeding, that factual analysis is premature.

Among the factual questions raised by the pleadings and not resolved by Complainant's motion are whether DFY performed freight forwarding services; whether DFY engaged, booked, secured, reserved, or contracted directly with the carrier for space aboard a vessel or confirmed the availability of the space; whether DFY prepared and processed the ocean bill of lading, dock receipt, or other similar document for the shipments; whether the shipments contained new assembled motor vehicles; the number of shipments involved; and, determination of damages. These issues require determination of disputed material facts, would benefit from full development, and are better resolved with the merits of the case.

Summary decision is only proper if the movant is entitled to a decision as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. DFY has not established that it is entitled to a decision as a matter of law when the evidence is viewed in the light most favorable to NYK Line. There are unresolved genuine issues of material facts which preclude granting summary decision at this stage of the proceeding. Moreover, as discussed below, DFY has not established as a matter or law that the tariff applied to these service contract shipments. Instead, NYK Line, as discussed below, has established that the tariff did *not* apply to these shipments. Accordingly, DFY's motion seeking summary decision is denied.

III. Respondent's Motion for Summary Decision

NYK Line's summary decision motion focuses on the legal issues at the heart of this dispute. There are no facts in dispute regarding the language of the power of attorney agreement, service contracts, or tariff. Rather, the dispute is about the legal implications of these documents. These legal issues can be resolved at the summary decision stage.

A. Arguments of the Parties

NYK Line moves for a summary decision dismissing the proceeding as a matter of law, arguing that ocean carriers are not obligated to pay forwarder compensation absent some agreement or undertaking to do so; that there was no such agreement or undertaking; and, that there is no statutory or contractual basis for reading NYK Line's tariff into the service contracts or the service contract rates into the tariff as neither refers to the other expressly or by implication. Respondent's Motion at 13-22.

DFY opposes the motion to dismiss, asserting that NYK Line's motion fails to demonstrate the absence of a genuine issue of material fact; NYK Line is seeking to avoid paying a legal debt obligation; service contracts do not exclude freight forwarding compensation obligations owed to a third party non-signator; and, NYK Line is bound by its voluntarily published tariff. Complainant's Opposition at 1-7.

NYK Line contends in its reply brief that DFY's interpretation of the tariff is without merit and that DFY has misinterpreted NYK Line's defense, and as a result, has put forth arguments that are irrelevant to the questions raised by the motion. NKY Line Reply at 2-15.

B. Facts Alleged in the Complaint

At this stage of the proceeding, the facts are viewed in the light most favorable to the non-moving party. Therefore, NYK Line's motion for summary decision requires viewing the facts in the light most favorable to DFY. At a hearing, these facts would need to be established and could be contested. The relevant facts alleged by DFY in the complaint are as follows.

A. TARIFFS

8. At all times applicable to the facts alleged in this Complaint, Respondent had tariffs in effect that established the rate and requirements for compensation to entities providing freight forwarding services on shipments accepted by Respondent as a common carrier.

9. Such tariffs stated, "[e]xcept as otherwise provided, compensation to a freight forwarder shall be one-and-one-fourth percent (1.25%) of the applicable freight rates and Outport Arbitraries to ports" named in said tariffs." (sic)

10. Such tariffs also stated that "[p]ursuant to the United States Tariff Act of 1986, earners shall pay freight forwarder compensation on all Bill of Lading charges when such compensation is claimed by an FMC Licensed Freight Forwarder which is also a Treasury Department Licensed Customs House Broker."

11. Such tariffs further provide that "[c]laims for freight forwarder compensation must be presented to the Carrier within six (6) months of the sailing of the vessel from the port at which the cargo in question was loaded."

B. COMPLAINANT FREIGHT FORWARDING

12. Beginning on or about March 25, 2015, Complainant performed freight forwarding services related to shipments of automobiles from the Ford Motor Company and its affiliated companies ("Ford") by, *inter alia*, arranging for shipment of such vehicles on vessels owned and/or operated by Respondent and/or its agents or affiliates.

13. On or about April 2, 2015, Complainant and Respondent entered into an Agreement in order to simplify the issuance of bills of lading for transportation of shipments from Ford by Complainant on Respondent's vessels ("the Agreement").

14. Though Respondent proposed a paragraph to the Agreement which would have waived any brokerage or freight forwarder compensation, Complainant expressly refused to include such a provision.

15. The Agreement included an integration clause that stated that "[t]his Agreement sets forth the complete understanding and agreement of the parties, and can be amended only in writing signed by the party against whom enforcement is sought."

16. The freight forwarding services performed by Complainant included engaging, booking, securing, reserving, and/or contracting directly with Respondent and/or its agents for space aboard its/their vessels and/or confirmed availability of that space for Ford shipments.

17. Furthermore, Complainant prepared and processed the ocean bills of lading and related documents respective of Ford shipments placed on Respondent's vessels.

18. Complainant had no beneficial interest in any of the Ford shipments for which it performed freight forwarding services and for which it arranged shipment on Respondent's vessels.

19. At all relevant times, Complainant held a valid FMC license.

20. To date, Complain[ant] has provided freight forwarding services on hundreds of Ford shipments placed on Respondent's vessels, and continues to do so.

21. The freight charges Respondent has received from Ford shipments placed on its vehicles as a result of Complainant's freight forwarding to date exceed $20,000,000.00.

22. To date, Respondent has provided no compensation to Complainant for any of the freight forwarding services performed on any of the Ford shipments placed on the vessels of Respondent and/or its agents or affiliates.

Complaint at 3-5.

C. Analysis of Respondent's Motion

DFY asserts that it is entitled to payment of freight forwarder compensation under NYK Line's tariff. However, NYK Line asserts that the tariff did not apply to service contract shipments and the shipments at issue were transported pursuant to service contracts that did not contain provisions requiring payment of freight forwarder compensation. DFY and NYK Line signed a power of attorney agreement with each other that was silent on the issue.

At a hearing, DFY would need to demonstrate a right to freight forwarder compensation. According to the facts alleged by DFY, there are three relevant documents: (1) the DFY/NYK Line power of attorney agreement; (2) the Ford/NYK Line service contracts; and, (3) NYK Line's tariff. Questions of law, including the legal effect of contracts, may be determined at the summary decision phase of the proceeding. *Pate Stevedore Co. of Mobile v. Alabama State Docks Department*, 24 S.R.R. 1221, 1228 (FMC 1988); *Int'l Ass'n of Machinists & Aerospace Workers v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976) ("It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate."). Each agreement will be discussed in turn.

1. Power of Attorney Agreement

The parties entered into a power of attorney agreement that gave DFY the authority to print bills of lading for Ford shipments. Prior to signing the power of attorney agreement, the parties disagreed about whether the NYK Line tariff's freight forwarder provisions should apply. NYK Line sought an explicit waiver of freight forwarding compensation but DFY objected. After these discussions, the parties signed a power of attorney agreement that was silent regarding freight forwarder compensation, effectively agreeing to disagree.

DFY admits that "NYK successfully - no one knows how - acquired an agreement from Ford's prior freight forwarder (Schenker, Inc.) to waive freight forwarding compensation."

Complainant's Opposition at 5. Moreover, DFY concedes that when "Complainant became the designated freight forwarder of the Ford (sic), Respondent tried to have DFY waive the right to any freight forwarder compensation. DFY did not agree." Complainant's Opposition at 5. "NYK even threatened to nullify the Power of Attorney that DFY needs in order to perform some of its freight forwarder services on (behalf of both Ford and NYK) if DFY ever brought the current claim." Complainant's Opposition at 6.

Viewing the facts in the light most favorable to DFY, the facts alleged in DFY's complaint will be accepted as true for this motion. The complaint alleges that "Complainant and Respondent entered into an Agreement in order to simplify the issuance of bills of lading for transportation of shipments from Ford by Complainant on Respondent's vessel;" that "[t]hough Respondent proposed a paragraph to the Agreement which would have waived any brokerage or freight forwarder compensation, Complainant expressly refused to include such a provision; and, that the "Agreement included an integration clause that stated that '[t]his Agreement sets forth the complete understanding and agreement of the parties, and can be amended only in writing signed by the party against whom enforcement is sought.'" Complaint at 4, ¶¶ 13-15.

"In determining whether contract terms are ambiguous, courts consider extrinsic evidence as well as the language of the contract. Extrinsic evidence may include the structure of the contract, bargaining history, and the parties' conduct that reflects their understanding of the contract's meaning." *ANERA and its Members – Opting out of Service Contracts*, 28 S.R.R. 1215 at 1229-1230 (FMC 1999) (citations omitted). Here, the agreement between the parties is intentionally silent on the material issue of whether DFY would be entitled to freight forwarder compensation. The silence in the agreement makes the agreement ambiguous.

DFY's opposition brief appendix and exhibits includes an email from NYK Line to DFY which attaches the signed limited power of attorney and which states:

> The execution of this limited Power of Attorney does not entitle DF Young to receive any compensation from NYK. Any and all compensation that DF Young receives shall come from Ford and not NYK. We expect that DF Young will not issue any invoice to NYK for providing this in-house service for Ford. The previous agent for Ford did not receive compensation of any kind from NYK and both Ford & NYK expect that to remain unchanged. In the event DF Young issues an invoice to NYK, this Power of Attorney shall be terminated immediately and the invoice shall be returned unpaid.

Complainant's Opposition, Exhibit 7 at CX 254.

DFY thought that the tariff applied and a compensation agreement was not necessary to include in the power of attorney. NYK Line thought that the tariff did not apply and DFY was not entitled to freight forwarder compensation whether or not a waiver was included. Had this issue been addressed in the power of attorney agreement, then determination of this proceeding could

consider the parties' agreement. The parties, however, did not have a meeting of the minds regarding whether freight forwarder compensation listed in the tariff applied to these service contract shipments. Accordingly, the power of attorney agreement does not create a right, as a matter of law, for DFY to recover freight forwarder compensation from NYK Line and DFY does not argue that it does.

2. Service Contracts

The cargo at issue was shipped under service contracts between NYK Line and non-party Ford. NYK Line asserts that as a freight forwarder, DFY was not a party to the service contracts and by law could not have been as only common carriers and shippers may enter into service contracts. Respondent's Motion at 9. NYK Line also contends that the service contracts do not contain any language obligating NYK to pay freight forwarding compensation to DFY. Respondent's Motion at 10. NYK Line asserts in its reply brief that "[i]f DFY has been clear about anything, it is that there is nothing in the Ford Service Contracts which purported to grant or waive forwarder compensation." Respondent's Reply at 15; *see also* Complainant's Reply to Respondent's MSD at 3.

DFY argues regarding the service contracts that DFY is not a party; the contracts do not mention freight forwarder compensation; and, NYK Line "never intended to eliminate its freight forwarder compensation obligation until after DFY brought this claim." Complainant's Opposition at 2. DFY objects to a "secret agreement," presumably the confidential service contract, arguing that "secret agreements to eliminate published Tariff obligations to non-signatories are void." Complainant's Opposition at 4.

DFY asserts that NYK Line did not argue a service contract defense until after this case was filed. Complainant's Statement of Material Facts at 29. However, according to the complaint, "Respondent proposed a paragraph to the [power of attorney] Agreement which would have waived any brokerage or freight forwarder compensation." In this case, NYK Line was very clear, from before it signed the power of attorney agreement with DFY, that it did not intend to pay freight forwarder compensation to DFY for the Ford shipments and that it had not paid freight forwarder compensation to the previous provider. NYK Line's argument is not based upon any particular clause in the service contracts but rather based upon the fact that the cargo shipped pursuant to the service contracts rather than the tariff, so that the tariff, by its express provisions, did not apply.

Although the service contracts at issue are confidential, the undersigned and the Commission have the opportunity to review them. As indicated by the parties, there is nothing in the Ford Service Contracts which addresses forwarder compensation. Most relevant to this decision, the service contracts do not form a basis, as a matter of law, for DFY to recover freight forwarder fees from NYK Line.

3. Tariff

NYK Line has a tariff in place that the parties agree would apply to cargo shipped pursuant to the tariff. NYK Line states: "If the Ford Shipments had been tariff moves as DFY alleges, then the governing tariff would have been NYKS-156 which was and is the NYK Tariff governing worldwide Ro-Ro services. RX-72, para. 8." Respondent's Motion at 8. Tariff NYKS-156 has a Rule 9 governing freight forwarder compensation which states:

> The compensation which is paid under this rule shall be on the gross freight. The gross freight includes the tariff rate and Heavy Lift and Extra Length Charges, if applicable, but shall not, for the purpose of computing compensation, include charges assessed for containerization of cargo, container rental fee, war risk compensation, port surcharges, port detention charges, demurrage, bunker surcharges, port arbitraries, harbor dues or any other charge or surcharge designed to cover specific costs. Compensation will not be paid on any shipment on which brokerage is payable.

Respondent's Motion at 8-9 (quoting RX-26); *see also* Complainant's Opposition at 23-25. The tariff does not specifically mention non-tariff, negotiated, or service contract rates. The parties agree about the language of the tariff; however, they disagree about the legal conclusions to be drawn from the tariff's language.

a. Tariff language

The Commission frequently interprets tariff provisions.

> The Commission has repeatedly held that tariff provisions should be construed reasonably, and without a strained or unnatural construction. Furthermore, tariff interpretation is governed by the "express language" of the tariff, not the "unexpressed intent" of the author. The tariff provision relied upon in this proceeding is quite explicit in its application to customs of the port and to local tariffs. Neither could be reasonably interpreted to include ocean common carrier tariffs. Even if the tariff were ambiguous in any sense, a tariff's ambiguity should be construed against the carrier which developed it, not against that carrier's customer.

S.A. Chiarella v. Pacon Express Inc., 29 S.R.R. 335, 337 (FMC Aug. 15, 2001) (citations omitted).

The tariff at issue here states that "compensation which is paid under this rule shall be on the gross freight. The gross freight includes the tariff rate and Heavy Lift and Extra Length Charges, if applicable." The parties disagree on the meaning of these sentences.

NYK Line argues that the tariff does not apply to service contract rates; DFY is not entitled to compensation under the tariff because the cargo at issue was not transported under the tariff; the

terms "gross freight" and "tariff rates" do not include service contract freight and rates; and, "if applicable" refers to the heavy lift and extra length charges, not the tariff rate." Respondent's Reply at 2-7.

DFY contends that NYK Line is bound by its voluntarily published tariff; NYK Line's proposed waiver of tariff compensation shows that NYK Line knew it was owed; and, NYK Line must adhere to the tariff provisions. Complainant's Opposition at 3-7. DFY states:

> The potential components of what might make up the "gross freight", to the extent that they apply, are listed. The "gross freight"[] already paid on the Ford shipments is fixed. That amount was the amount that Ford agreed to pay NYK. Mentioning a tariff freight, or anything else does not add to the meaning of "gross freight" in this specific situation. If indeed NYK intended that the word "freight" have a meaning other than what was agreed to be paid under a service contract or a tariff, it should have listed those specific, non-exclusive and alternate definitions or meanings in its tariff.

Complainant's Opposition at 23-24.

Construing the tariff reasonably, its definition of "gross freight" as the "tariff rate" limits the provision to shipments on which tariff rates have been paid. The shipments on which tariff rates have been paid are those which have shipped under the tariff. The phrase "if applicable" most logically refers to heavy lift and extra length charges, which are by their nature conditional, not to the tariff rate. Reading the tariff reasonably, and giving effect to all of its terms, "if applicable" only refers to the heavy lift and extra length charges. If "if applicable" referred to the tariff rate, then the "gross freight" would not be clearly defined. Reading this tariff and giving it a reasonable meaning, the tariff would not apply to service contract shipments where there is no "tariff rate." Accordingly, DFY is not entitled to freight forwarder compensation under the express terms of NYK Line's tariff.

DFY asserts that "[y]ou don't ask, at arms length negotiation, a person to waive a right that you know that person doesn't have." Complainant's Opposition at 11. To the contrary, wise counsel will address possible issues when drafting an agreement to ensure that both parties have the same understanding to avoid costly litigation. The waiver request put DFY on notice that the cargo was being shipped under a confidential service contract and that NYK Line did not intend to pay freight forwarder compensation. Indeed, if the parties had successfully negotiated resolution of this issue, either through a waiver or specific grant of compensation in the power of attorney agreement, both sides could have saved the time and expense of this litigation. The requested waiver does not create a right to compensation that otherwise does not exist.

b. Service contracts are alternatives to tariffs

The Commission addressed the relationship between tariffs and service contracts in *Application of Evergreen International (U.S.A.) Corp. for the Benefit of Service Contract Shipper*,

not discussed by either party. *Application of Evergreen International (U.S.A.) Corp. for the Benefit of Service Contract Shipper ("Evergreen ALJ")*, 24 S.R.R. 575 (Special Dkt 1513) (ALJ Oct. 15, 1987), *adopted in part* ("Evergreen FMC") 24 S.R.R. 753 (FMC 1988).

The applicant in *Evergreen* sought permission to waive collection of freight charges where a service contract had been signed but inadvertently filed late, raising the issue of whether section 8(e) of the Shipping Act (currently 46 U.S.C. section 40503 and formerly section 18(b)(3)) regarding tariff refunds applied to service contracts so as to allow for the refund of freight charges. The ALJ stated:

> It is clear from all of the above that a service contract is not a tariff. Certainly, it contains provisions relating to rates and practices which provisions are similar to those found in tariffs, but that is hardly sufficient to warrant classifying them as tariffs. Rather, unlike tariffs which unilaterally provide for rates and practices, service contracts are commercial agreements between independent parties which, in addition to the rates and services, may contain many other terms completely foreign to the traditional tariff.

Evergreen ALJ, 24 S.R.R. at 579. The ALJ concluded that since "service contracts are not tariffs they cannot give rise to a waiver or refund of freight charges as contemplated by section 8(e), and here the application must, therefore, be denied on jurisdictional grounds." *Evergreen ALJ*, 24 S.R.R. at 579.

The Commission reviewed the ALJ's decision and adopted the ALJ's conclusion that section 8(e) is not available for service contracts, stating:

> Although service contracts contain rates, they are more than a mere rate offering in a tariff. Congress distinguished service contracts from tariff rates throughout the 1984 Act. Service contracts are not required to be filed in tariffs pursuant to section 8(a) of the 1984 Act, 46 U.S.C. app. § 1707(a), and many of the prohibitions of that Act that apply to tariff rate actions specifically do not apply to service contracts because of their unique nature, *i.e.*, they may selectively favor some shippers. *See* H.R. Rep. No. 600, 98th Cong., 2d Sess., 40 (1984). Therefore, an error in a service contract, regardless of its nature, is not "an error in a tariff" for which section 8(e) relief can be granted.

Evergreen FMC, 24 S.R.R. at 754. While the situation in this proceeding is not the same as the issue in Evergreen, the distinction between shipments pursuant to tariffs and shipments pursuant to service contracts provides helpful guidance.

It appears that the industry appreciates the distinction between tariffs and service contracts as well. A 1999 article for the Journal of Commerce advised:

> When the Ocean Shipping Reform Act takes effect May 1, there will no longer be a statutory obligation requiring vessel-operating common carriers, VOCCs, to pay freight-forwarder compensation for shipments moving under service contracts. Forwarders desiring compensation for shipments moving under service contracts must see to it that the pact contains a compensation provision. Unless the service-contract parties make provision for such compensation, the forwarder will be out of pocket.

Respondent's Motion, Addendum 3 (Leonard J. Fleisig, "*Bundling Unaffiliated Shipper*," Journal of Commerce, (02/16/99)).

c. Service contract cross-references to tariffs are permitted but not required

It is clear that service contracts may, but are not required to, refer to tariffs. If tariff terms were automatically incorporated into every service contract, these rules would not be necessary as it would be clear that tariff rules applied to shipments transported via service contracts.

The Commission addressed cross-referencing of general tariff terms in service contracts when it promulgated regulations implementing OSRA.

> Presently, most filed service contracts contain re-occurring terms common to all of a carrier's or conference's service contracts (including matters such as free time and demurrage, bunkering rates, currency matters, etc.) the complete text of which would be very cumbersome for the carrier party to file with the service contract. Therefore, service contracts almost always make cross-reference to terms contained in that carrier's or conference's tariff or an essential terms publication.
>
> The Commission recognizes that it was Congress' intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. The proposed rule, § 530.9(c)(2), thus permits filed service contracts to refer to terms outside the four corners of the filed service contract, but only if they are contained in the carrier's or conference's tariff publication.

OSRA Regs. – NPR, Service Contracts Subject to the Shipping Act of 1984, 63 Fed. Reg. 71062, 71066 (Dec. 23, 1998) (Notice of Proposed Rulemaking) (*OSRA Regs. – NPR*). The Commission proposed a rule that would permit service contracts to reference terms in the carrier's tariff: "The [essential] terms described in paragraph (b)(1) - (8) of this section may not: . . . (2) Make reference to terms not explicitly detailed in the service contract filing itself, unless those terms are contained in a tariff publication in accordance with the requirements of 46 CFR part 520." *OSRA Regs. – NPR*, 63 Fed. Reg. at 71070 (proposed section 530.9(c)).

The Commission received comments on the proposed rule that caused it to expand the universe of publications that a service contract could cross-reference.

> The Commission, in an effort to make filing less burdensome for carriers, but while ensuring that it had the entire contents of, or access to, the service contract terms, proposed that carriers may "cross-reference" their own tariff publications or their conference tariff publications in their filed service contracts. This provision was intended to allow carriers to refer to rules of general applicability (free time and demurrage, bunkering rates, currency matters, etc.) for the "boilerplate" or terms which appear in all their contracts. Further, the Commission recognized that it was Congress' intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. For those reasons, the proposed rule, originally numbered Sec. 530.9(c)(2), was drafted to permit filed service contracts to refer to terms outside the four corners of the filed service contract, but only if they are contained in the carrier's or conference's tariff publication. . . .
>
> [I]n response to comments that allowing cross-referencing only to published tariff matter would unduly stifle the parties' contract terms, the Commission has decided to allow cross-reference to a "publication widely available to the public and well known within the industry." Sec. 530.8(c)(2) [renumbered from section 530.9(c)(2)]. The Commission wishes to stress, however, that exact terms of the contract must be determinable and certain, in keeping with the requirements of the Act.

Service Contracts Subject to the Shipping Act of 1984; Interim final rule, 64 Fed. Reg. 11186, 11196 (Mar. 8, 1999) (*OSRA Regs. – Interim Rule*). In the interim final rule, section 508.8(c) stated: "The terms described in paragraph (b) of this section may not: . . . (2) Make reference to terms not explicitly contained in the service contract filing itself, unless those terms are contained in a publication widely available to the public and well known within the industry." *OSRA Regs. – Interim Rule*, 64 Fed. Reg. at 11209.

The Commission received additional comments before it published the confirmation of the interim rules.

> [B]ecause tariffs are published and widely available, cross-referencing to those publications in service contracts does not appear to pose any new issues. The Commission notes, therefore, that a tariff published pursuant to part 520 of the Commission's regulations will be considered "a publication widely available and well known within the industry" for the purposes of cross-referencing in service contracts.

The Commission therefore revises Sec. 530.8(c) to clarify its approach to cross-referencing, particularly references to "service contract register" filings.

Service Contracts Subject to the Shipping Act of 1984: Confirmation of interim final rule with changes, 64 Fed. Reg. 23782, 23788 (May 4, 1999) (*OSRA Regs. – Conf. Interim Rule*). In the confirmation, section 530.8(c) was revised to read:

> The [essential] terms . . . may not: . . . (2) Make reference to terms not explicitly contained in the service contract itself unless: (i) Those terms are contained in a publication widely available to the public and well known within the industry; or (ii) Those terms are contained in a service contract register filing duly filed in the Commission's dial-up filing system and are available to all parties to the service contract. Service contract register filings are subject to the same requirements of this part as service contracts and amendments.

OSRA Regs. – Conf. Interim Rule, 64 Fed. Reg. at 23793. Therefore, Commission regulations permit a service contract to cross-reference and incorporate terms set forth in the carrier's general tariff.

If tariff terms were automatically incorporated into every service contract, these rules would not be necessary as it would be clear that tariff rules applied to shipments transported via service contracts. The rules are clear that reference to tariff provisions is optional and voluntary – these rules do not suggest that reference to tariffs is automatic or required. In this case, there are no allegations that the service contracts incorporated the tariff.

D. Conclusion

Ocean common carriers are not required to pay freight forwarder compensation. Because 46 U.S.C. § 40904 provides *inter alia* that a "common carrier *may* compensate an ocean freight forwarder for a shipment dispatched for others," it does not follow that a common carrier which chooses not to pay ocean freight forwarder compensation automatically violates the Shipping Act as a matter of law. 46 U.S.C. § 40904 (emphasis added).

Freight forwarders are not always entitled to freight forwarding compensation from carriers, similar to brokers who are not always entitled to brokerage. The D.C. Circuit upheld the Commission's determination that a broker could not recover brokerage, stating:

> The appointment of AUT as a broker by Central could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. AUT was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage. Everything is to the

> contrary and AUT was promptly put on notice that the carriers would not pay. Nevertheless, having this notice, AUT elected to proceed. It did so at its own risk.

Am. Union Transp., Inc. v. United States, 257 F.2d 607, 613 (D.C. Cir. 1958). Similarly, here, DFY knew that NYK Line contested DFY's right to freight forwarder compensation and decided to proceed anyway.

The undersigned shares DFY's concerns about secret agreements, in the form of confidential service contracts, which impact the rights of third parties. As suggested in 2001, it may be helpful for additional guidance to be provided on this issue. However, in this case, NYK Line was very clear with DFY about its position. NYK Line made DFY aware that the cargo was being shipped via service contracts, that there was no provision for freight forwarder compensation, and that the prior freight forwarder did not receive such compensation. Under these facts, even DFY admits that it was aware that NYK Line was refusing to pay freight forwarder compensation. This is more than sufficient notice and DFY took a calculated risk to go ahead and work on the shipments, knowing that it might not receive compensation from NYK Line.

To be successful in this proceeding, DFY must establish a basis to find that NYK Line is required to pay DFY freight forwarder compensation. DFY points to Rule 9 of NYK Line's Tariff NYKS-156, governing freight forwarder compensation, as basis to require payment. However, that tariff applies to tariff rates, not service contract rates, and the shipments at issue were not transported under the tariff but rather under service contracts. DFY does not argue that it is entitled to payments under the service contracts. The power of attorney, which is the only agreement between DFY and NYK Line, is silent on the question of freight forwarder compensation. As such, it cannot form the basis for the requested payments. Therefore, as a matter of law, based on the material facts to which the parties agree, NYK Line has established that there is no basis to require it to pay freight forwarder compensation to DFY for these shipments. Accordingly, NYK Line's motion seeking summary decision is granted.

IV. Order

Upon consideration of the findings and conclusions set forth above, it is hereby

ORDERED that the Motions for Confidential Treatment be **GRANTED**. It is

FURTHER ORDERED that the Complainant's Motion for Summary Judgment be **DENIED**. It is

FURTHER ORDERED that the Respondent's Motion for Summary Decision be **GRANTED**. It is

FURTHER ORDERED that the complaint be **DISMISSED WITH PREJUDICE.** It is **FURTHER ORDERED** that this proceeding be **DISCONTINUED.**

Erin M. Wirth
Administrative Law Judge