

1 HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

9 STARR INDEMNITY & LIABILITY CO. as  
10 subrogee of NAVISTAR, INC.,

11 Plaintiff,

12 v.

13 TRANSFAIR NORTH AMERICA  
14 INTERNATIONAL FREIGHT  
15 SERVICES D/B/A TRANSFREIGHT,

16 Defendant.

CASE NO. C17-697 RAJ

ORDER

17 This matter comes before the Court on Defendant and counterclaimant Transfair  
18 North American International Freight Services, LLC d/b/a Transfreight Express Lines'  
19 ("Transfreight") Motion for Summary Judgment. Dkt. # 14. Plaintiff opposes, and  
20 Transfreight has filed a Reply. Dkt. ## 15, 16. Having considered the submissions of the  
21 parties, the relevant portions of the record, and the applicable law, the Court finds that  
22 oral argument is unnecessary. For the reasons that follow, Transfreight's Motion for  
23 Summary Judgment is **GRANTED**. Dkt. # 14.

24 **I. BACKGROUND**

25 The parties do not dispute the facts of this case. Transfair North America  
26 International Freight Services, LLC and its corporate predecessor provide international

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1 ocean transportation and transportation-related services to its customers, including as a  
2 non-vessel-operating common carrier (“NVOCC”) in international commerce with  
3 licensing from the Federal Maritime Commission. Dkt. # 14-2 at p. 4, ¶ 5. As an  
4 NVOCC, Transfair North America International Freight Services, LLC books ocean  
5 transportation for its customers’ cargoes aboard ships owned or operated by steamship  
6 companies, in some cases by chartering the ships. *Id.* at ¶ 6. Transfair North America  
7 International Freight Services, LLC now uses the trade name “Transfreight Express  
8 Lines.” *Id.* at ¶¶ 7-8.

9 In early to mid-May 2016, Transfreight received a request from Navistar to  
10 arrange the transportation of 700 used tractor units from the Port of Houston, Texas to  
11 Hai Phong Port, Vietnam. *Id.* at ¶ 9. Transfreight Express Lines chartered the ship M/V  
12 THORCO ALLIANCE from Thorco Projects (“Thorco”) to perform the carriage of 153  
13 of the used tractor units (the “Cargo”). *Id.* at p. 5, ¶ 10. Transfreight Express Lines  
14 issued bill of lading number 93716-06008 for that carriage. *Id.* at ¶ 11; Dkt. # 14-1 at 12-  
15 15.

16 The M/V THORCO ALLIANCE started its voyage to Vietnam on or about July 8,  
17 2016. Dkt. # 14-2 at p. 5, ¶ 12. On August 15, 2016 the M/V THORCO ALLIANCE  
18 experienced a total engine breakdown that required the ship’s towing to Japan. *Id.* at ¶  
19 13, pp. 9-11. Transfreight Express Lines notified Navistar of the breakdown on that same  
20 date. *Id.* at ¶ 14, pp. 12-20.

21 Since the time of the booking, Transfreight Express Lines knew from Navistar that  
22 the Cargo’s delivery in Vietnam had to take place by a certain date to allow the Cargo’s  
23 entry into that country, for the Cargo’s sale there. *Id.* at ¶ 15. After learning of the  
24 breakdown and notifying Navistar of the same, for the next several weeks, Transfreight  
25 Express Lines communicated regularly with Thorco and Navistar to arrange for the  
26 Cargo’s timely delivery to Vietnam. *Id.* at ¶ 16. In the first instance, Thorco arranged to

1 tow the M/V THORCO ALLIANCE, still laden with the Cargo, to Japan. *Id.* at pp.6-7, ¶  
2 17. After more than two months of negotiations between Transfreight Express Lines and  
3 Thorco and communications between Transfreight Express Lines and Navistar,  
4 Transfreight Express Lines arranged for the Cargo’s transshipment onto the ship  
5 FREDENSBORG, to continue the Cargo’s carriage to Vietnam. *Id.* at p. 7, ¶ 18.

6 In an October 18, 2016 e-mail, Navistar stated to Transfreight Express Lines:  
7 “This email is confirming that we want Transgroup [Transfreight Express Lines] to move  
8 forward with the booking of the ship.” Dkt. # 14-2 at p. 7, ¶ 19, pp. 21-23. At Navistar’s  
9 request, Transfreight arranged to change the port of discharge from Haiphong to Ho Chi  
10 Minh City. *Id.* at ¶ 20, pp. 24-26. Transfreight Express Lines issued a revised bill of  
11 lading on or about November 2, 2016, again with Navistar as the shipper, which bill of  
12 lading was for the Cargo’s continued carriage to Vietnam (the “Revised Bill of Lading”).  
13 *Id.* at pp.7-8, ¶ 21; Dkt. # 14-1 at pp. 16-20. The Original Bill of Lading and Revised Bill  
14 of Lading contain identical “Terms & Conditions” on their reverse pages. *Id.* at pp. 12-  
15 20. Those Terms & Conditions state in relevant part:

16 1. Definitions “Carrier” means TRANSFREIGHT EXPRESS

17 LINES, a division of Transgroup International. “Merchant”  
18 includes the shipper, the consignee, the receiver of the goods,  
19 the holder of this Bill of Lading, any person having a present  
20 or future interest in the goods or any person acting on their  
21 behalf.

22 . . .

23 14. Route of Carriage: Matters Affecting Performance . . . If  
24 at any time the carriage is or is likely to be affected by any  
25 hindrance, risk, delay, difficulty or disadvantage of any kind  
26 (including the condition of the goods), whenever and however  
27 arising (whether or not the carriage has commenced) Carrier  
28 may a) without notice to Merchant abandon the carriage of  
the goods and where reasonably possible place the goods or  
any part of them at Merchant’s disposal at any place which  
Carrier may deem safe and convenient and the responsibility  
of Carrier in respect of such goods shall then cease. b)  
without prejudice to the Carrier’s right subsequently to  
abandon the carriage under a) above, continue the carriage.

1 In any event the carrier shall be entitled to full freight charges  
2 on goods received for carriage and Merchant shall pay any  
3 additional costs resulting from the above mentioned  
4 circumstances.

5 15. Freight shall be deemed fully earned on receipt of  
6 the goods by Carrier and shall be paid whether or not the  
7 cargo was lost or damaged. Merchant shall be liable to Carrier  
8 for freight and all other charges regardless of whether the  
9 shipment was prepaid or freight collect.

10 *Id.* The FREDENSBORG timely delivered the Cargo to Vietnam. Dkt. # 14-2 at p.8, ¶  
11 22. Transfreight Express Lines sent Navistar an invoice for \$252,500, which was for the  
12 carriage’s freight, plus charges to discharge the Cargo from the M/V THORCO  
13 ALLIANCE, to load the Cargo onto the FREDENSBORG, and other terminal-handling  
14 and coordination charges. *Id.* at ¶ 23, pp. 27-28.

15 On May 4, 2017, Plaintiff Starr Indemnity and Liability Company (“Plaintiff”), as  
16 subrogee of Navistar, filed suit against Navistar and the M/V THORCO ALLIANCE for  
17 recovery of the \$252,500 in additional freight charges, which Plaintiff had paid to  
18 Navistar under its insurance policy. Dkt. # 1. Although Plaintiff did not cite any  
19 particular law or statute, Plaintiff claimed that Transfreight and the M/V THORCO  
20 ALLAINCE “were negligent, breached their contractual obligations, and failed to  
21 exercise due diligence to render the vessel seaworthy at the commencement of the voyage  
22 from Houston, Texas.” *Id.* at p. 3, ¶ 9. Transfreight counterclaimed for a declaratory  
23 judgment that it had no obligation to pay the \$252,500 sought by Plaintiff’s Complaint.  
24 Dkt. # 8.

25 On March 23, 2018, Transfreight filed this Motion for Summary Judgment;  
26 Plaintiff opposed, and Transfreight filed a Reply. Dkt. ## 14, 15, 16.

## 27 **II. LEGAL STANDARD**

28 Summary judgment is appropriate if there is no genuine dispute as to any material  
fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
56(a). The moving party bears the initial burden of demonstrating the absence of a



1 insurance policy), signed two bills of lading that expressly allocated the risk of delay (and  
2 any costs arising therefrom) to Navistar, not Transfreight. Dkt. # 14 at 3.

3 As to Plaintiff's claim under the bill of lading, the Court applies traditional  
4 contract law. Federal courts interpret and resolve disputes concerning maritime contracts  
5 according to federal law. *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir. 2007)  
6 (citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004)). "Since the bill of lading is a  
7 contract of carriage between shipper and carrier, familiar principles of contract  
8 interpretation govern its construction." *Yang Ming Marine Transport Corp. v. Okamoto*  
9 *Freighters, Ltd.*, 259 F.3d 1086, 1092 (9th Cir. 2001) (quoting *Henley Drilling Co. v.*  
10 *McGee*, 36 F.3d 143, 148 n. 11 (1st Cir. 1994)). "Contract terms are to be given their  
11 ordinary meaning," and "[w]henever possible, the plain language of the contract should  
12 be considered first." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206,  
13 1210 (9th Cir. 1999). "A basic principle of contract interpretation in admiralty law is to  
14 interpret, to the extent possible, all the terms in a contract without rendering any of them  
15 meaningless or superfluous." *Starrag*, 486 F. 3d at 616 (citing *Chembulk Trading LLC v.*  
16 *Chemex Ltd.*, 393 F.3d 550, 555 (5th Cir. 2004)).

17 The parties do not disagree on the existence or applicability of each bill of lading,  
18 the meaning of the terms, or the right and duties created by the terms. Indeed, Plaintiff  
19 does not dispute that it sued Transfreight under the bills of lading and in so doing  
20 accepted their terms. *All Pac. Trading v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1432  
21 (9th Cir. 1993) ("At the very least, Plaintiffs' initiation of this suit constituted acceptance  
22 of the terms of the Hanjin bills of lading.") *cert. denied sub nom. Hanjin Container Lines*  
23 *v. Tokio Fire & Marine Ins. Co.*, 510 U.S. 1194 (1994). Plaintiff does not dispute that  
24 Navistar was a "Merchant" under the bills of lading. Dkt. # 14 at 12-13. Nor does  
25 Plaintiff dispute that the bills of lading expressly allocated to the "Merchant" the  
26 additional freight costs associated with "any hindrance, risk, delay, difficulty or  
27

1 disadvantage of any kind” in the delivery of the cargo. *Id.* at 13-15; Dkt. # 14-1 at pp.  
2 12-20. Plaintiff does not dispute that under the bill of lading, freight was due upon  
3 receipt of the cargo. Dkt. # 14-1 at pp. 14, 18, ¶ 15. The Court, having independently  
4 reviewed both bills of lading, finds these constructions to be valid. Accordingly, the  
5 Court concludes that, under the bills of lading, Plaintiff does not have a right to recovery  
6 for the freight charges.

7 Plaintiff’s only argument in response is that Transfreight violated a duty to  
8 exercise due diligence to make the ship seaworthy under the Carriage of Goods by Sea  
9 Act (“COGSA”), 46 U.S.C. § 30701 *et seq.* Dkt. # 15. Plaintiff argues that  
10 Transfreight’s status as a “carrier” under COGSA meant that it had to guarantee a  
11 seaworthy vessel, and the fact that the M/V THORZCO’s engine failed mid-voyage  
12 indicates that Transfreight violated this duty.<sup>1</sup> *Id.* Plaintiff argues that because of this  
13 violation, Transfreight should be liable for the additional freight costs associated with the  
14 transport of the cargo from Japan to Vietnam, and should repay Plaintiff for the amount it  
15 paid to Navistar under its insurance policy.

16 COGSA sets forth the responsibilities, liabilities and rights of carriers involved in  
17 the carriage of goods into the United States from ports outside of the United States. A  
18 “carrier” is defined in the statute as the “owner, manager, charterer, agent, or master of a  
19 vessel.” 46 U.S.C. § 30701. The statute imposes a duty upon carriers to properly load,  
20 handle, stow, care for, and discharge the goods carried, and prohibits them from

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22 <sup>1</sup> The Court notes that Plaintiff does not cite to any evidence in the record that would indicate  
23 that the engine failure of the M/V THORCO ALLIANCE was the result of any lack of due  
24 diligence before the voyage commenced. *See, e.g., Squillante & Zimmerman Sales, Inc. v.*  
25 *Puerto Rico Marine Mgmt., Inc.*, 516 F. Supp. 1049, 1052 (D.P.R. 1981), *aff’d*, 685 F.2d 421 (1st  
26 Cir. 1982) (“Although the duty of the carrier to exercise due diligence to make the ship  
27 seaworthy applies before and at the beginning of the voyage, the obligation of making the vessel  
28 seaworthy is either fulfilled or not fulfilled when the vessel breaks ground on the  
voyage.”)(citing Gilmore and Black, *The Law of Admiralty*, 2d Ed. 1975, p. 152). The Court  
will not assume, without evidence as to cause, that the M/V THORCO ALLIANCE was  
unseaworthy solely because it had an engine failure mid-voyage. However, because COGSA  
does not apply in this case, the Court finds resolution of this issue unnecessary.

1 contracting out of liability for breach of this duty. *See* 46 U.S.C. § 30704. The statute  
2 also imposes a duty upon the carrier to “exercise due diligence to . . . make the vessel  
3 seaworthy,” 46 U.S.C. § 30705(a)(1), (b), with seaworthiness being defined as ““the  
4 ability of a vessel adequately to perform the particular services required of her on the  
5 voyage she undertakes.”” *GTS Indus. S.A. v. S/S “Havtjeld”*, 68 F.3d 1531, 1535 (2d Cir.  
6 1995) (quoting *McAllister Lighterage Line, Inc. v. Ins. Co. of N. Am.*, 244 F.2d 867, 870  
7 (2d Cir. 1957)).

8 The parties both agree that Transfreight is a “non-vessel-operating common  
9 carrier,” which is “an ocean transportation intermediary who is ‘a common carrier that  
10 does not operate the vessels by which the ocean transportation is provided, and is a  
11 shipper in its relationship with an ocean common carrier.’” *Tarnawski v. Schenker, Inc.*,  
12 No. C02-5659FDB, 2003 WL 22721987, at \*1 (W.D. Wash. May 6, 2003). Dkt. # 14 at  
13 6-7, Dkt. # 15 at 4-7. As an NVOCC that issued a bill of lading, Transfreight could be  
14 considered a “carrier,” within the meaning of COGSA. *See Strickland v. Evergreen*  
15 *Marine Corp. (Taiwan)*, No. 05-695 PK, 2007 WL 539424 (D. Or. Feb. 15, 2007) (“An  
16 NVOCC is a carrier in relation to the shipper, although it is a shipper in relation to the  
17 vessel . . . Carriers, including NVOCCs, are subject to COGSA . . .”).

18 Here, Plaintiff seeks to impose a duty on Transfreight to exercise due diligence to  
19 make the ships it charters seaworthy. It is true that as a “carrier,” NVOCCs would  
20 seemingly be held to all responsibilities and liabilities applied to “carriers” under  
21 COGSA, a law initially passed in 1936, including the duty to exercise due diligence to  
22 make a ship seaworthy. However, it is not clear to this Court that this result was intended  
23 or warranted. By definition, NVOCCs are non-vessel-operating intermediaries, and do  
24 not have physical control over specific vessels. NVOCCs, which do not operate vessels,  
25 are not likely to have the right or practical ability to inspect ships for seaworthiness or  
26



1 order repairs. It strikes this Court as unrealistic to hold NVOCCs to impossible duties.<sup>2</sup>  
2 Indeed, a recent law review article observed that “[n]o American case has expressly held  
3 that an NVOCC has a duty to exercise due diligence to make a ship seaworthy.” Andrew  
4 D. Kehagiaras, Duty Call: Do Nvoccs Have A Duty to Exercise Due Diligence to Make  
5 A Ship Seaworthy?, 27 U.S.F. Mar. L.J. 37, 63 (2015).

6 Nonetheless, the Court need not reach this issue now, because COGSA does not  
7 apply to the present dispute. To make a claim under COGSA, a shipper has the burden of  
8 proving that the cargo was damaged while in the custody of the carrier (i.e., loaded in  
9 good condition, discharged in damaged condition). *American Home Assur. Co. v.*  
10 *American President Lines, Ltd.*, 44 F.3d 774, 777 (9th Cir. 1994). Once such evidence  
11 has been received, a prima facie case has been shown and the burden of proof shifts to the  
12 carrier to establish that the loss came under a statutory exception to COGSA. *Taisho*  
13 *Marine & Fire Ins. v. M/V Sea-Land Endurance*, 815 F.2d 1270, 1274-75 (9th Cir. 1987);  
14 *Stucco & Const. Materials, Inc. v. Trans-Net, Inc.*, No. C08-1299RSM, 2010 WL  
15 546912, at \*2 (W.D. Wash. Feb. 11, 2010).

16 Transfreight argues that COGSA is inapplicable to the present dispute because the  
17 cargo in question was not damaged in any way. The Court agrees. A prima facie  
18 COGSA claims requires proof of damage to cargo. *Am. Home Assur. Co. v. Am.*  
19 *President Lines, Ltd.*, 44 F.3d 774, 777 (9th Cir. 1994)(“To establish a prima facie case,  
20 American Home had to prove that the fruit was delivered to APL in good condition and  
21 that APL delivered the fruit in a damaged condition.”). COGSA applies to loss or  
22 damage to the cargo itself. *Travelers Indem. Co. v. Vessel Sam Houston*, 26 F.3d 895,  
23 898 (9th Cir. 1994)(“COGSA regulates the liability of international carriers for loss or  
24 damage to cargo”). Had cargo damage been suffered because of the engine malfunction  
25 in the instant case, COGSA would control the rights, responsibilities, and liabilities of the

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26 <sup>2</sup> Plaintiff does not provide, and the Court cannot otherwise find, any authority that applies any  
27 common law duty to make a ship seaworthy outside of COGSA to NVOCCs.

1 parties. *Id.*; see also *Narcissus Shipping Corp. v. Armada Reefers, Ltd.*, 950 F. Supp.  
2 1129, 1141 (M.D. Fla. 1997), *amended*, 986 F. Supp. 1383 (M.D. Fla. 1997). However,  
3 absent cargo damage, COGSA does not govern the parties' dispute. See, e.g., *Canon*  
4 *USA, Inc. v. Nippon Liner Sys., Ltd.*, No. 90 C 7350, 1992 WL 82509 (N.D. Ill. Apr. 17,  
5 1992)(“Therefore, because there is no contention that the copiers were damaged while at  
6 sea or over any other waterway, we hold COGSA to be inapplicable”). Plaintiff provides  
7 no authorities that suggest that COGSA can apply in cases where there is no damage to  
8 cargo. Plaintiff relies most heavily on *Marine Office of Am. Corp. v. Lilac Marine Corp.*,  
9 296 F. Supp. 2d 91 (D.P.R. 2003), but even this case makes clear that “[i]n order to  
10 establish the carrier's liability for loss or damage to cargo under COGSA, the claimant  
11 must first establish a prima facie case to demonstrate that the goods were damaged while  
12 in the custody of the carrier.” *Marine Office of Am. Corp. v. Lilac Marine Corp.*, 296 F.  
13 Supp. 2d 91, 100 (D.P.R. 2003). Plaintiff makes no such claim here, and has conceded  
14 that the Cargo was delivered to Vietnam undamaged.

15 Even if Transfreight did not arrange the second voyage from Japan to Vietnam,  
16 resulting in the Cargo remaining in Japan and the delayed delivery thereafter, it is  
17 doubtful that Plaintiff would have a remedy under COGSA because there is no evidence  
18 of any resulting “damage” to the Cargo. COGSA does not require that goods be  
19 delivered by a specific time and there are no provisions in COGSA relating to delay. As  
20 this Court has already recognized, COGSA has “no statutorily imposed duty or obligation  
21 on the part of a carrier to deliver goods in a timely fashion or by an agreed upon date.”  
22 *Pioko Fashions, Inc. v. Am. President Lines, Ltd.*, No. C92-1210C, 1993 WL 597151  
23 (W.D. Wash. June 30, 1993). Detention or delay that is “wholly unconnected with  
24 physical loss or damage to [cargo]” is outside the scope of COGSA. *Hellenic Lines, Ltd.*  
25 *v. Embassy of Pakistan*, 467 F.2d 1150, 1156 (2d Cir. 1972). Thus, a provision  
26 disclaiming liability for delay is not in conflict with COGSA. *In re Tidewater Barge*

