Federal Maritime Commission

Informal Docket No. 1971(I)

Mohawk Global Logistics Corp. DBA Mohawk Global Logistics (Claimant)

vs.

MSC Mediterranean Shipping Company (USA) INC. as agent for

Mediterranean Shipping Company, S.A., Geneva (Respondent)

RESPONSE OF MSC MEDITERRANEAN SHIPPING COMPANY (USA) INC.

Respondent MSC Mediterranean Shipping Company (USA) Inc. ("Respondent" or "MSC USA"), through counsel, hereby responds to the claim submitted by Mohawk Global Logistics Corp. ("Claimant" or "Mohawk").[1]

I. Statement Of Non-Consent To Informal Adjudication

Pursuant to 46 C.F.R. §502.304(e), MSC USA advises that it does not consent to this claim being adjudicated informally pursuant to Subpart S of Part 502 of the FMC's regulations.

II. Facts

MSC, the parent company and principal of Respondent MSC USA, was engaged to transport four containers of frozen scallops from Paita, Peru to Fall River, Massachusetts (the "Containers").

[1] For the reasons set forth in Section III.A of this Response, MSC Mediterranean Shipping Company, S.A. ("MSC") is not a respondent in this proceeding and submission of this Response shall not be construed as an admission by MSC that it is a respondent. However, in the event that MSC is determined to be a respondent, then the arguments set forth in Sections III.B and III.C, as well as Sections IV and V, are asserted on behalf of MSC as well as MSC USA.

The Containers arrived at the Port Newark Container Terminal on or about December 9, 2020. See, Affidavit of Laura Cappiello, attached hereto (hereinafter "Cappiello Aff."), ¶ 2. Arrival notices for the Containers were sent to Mohawk Logistics at an email address (info@mohawkwglobal.com) provided by Sociedad Exportadora T&A Cordova S.A.C., the shipper named on the bills of lading. Cappiello Aff., ¶ 4. This email address proved to be an unmonitored general email address. The last day of free time for the Containers was December 15, 2020. Cappiello Aff., ¶ 3.

By the time the arrival notice issue was resolved, the Containers could not be released and delivered prior to the end of free time. Cappiello Aff., ¶ 5. Had the Containers been released during free time, they could have been delivered to the consignee without delay. Cappiello Aff., ¶ 6. By the time the charges were paid on the Containers, the terminal was closed for almost two full days (December 16 and 17) due to a winter storm. In addition, there was a shortage of trucks and no trucks available to deliver the Containers until December 23, 2020. Cappiello Aff., ¶ 7.

On or about December 18, 2020, an MSC USA employee spoke with Ice Cube Cold Storage, the location to which the Containers were to be delivered, and was informed that Ice Cube Cold Storage could not accept delivery of the Containers until December 28, 2020. Cappiello Aff., ¶ 8.

III. Claimant Has Failed to State a Claim for Which Relief May Be Granted

Claimant has failed to meet the criteria for a valid claim as set for in an interpretative rule adopted by the Federal Maritime Commission ("FMC" or "Commission"). Accordingly, its claim must be denied.

In 2018, the Commission has adopted an interpretative rule that sets forth the elements that any claimant must show in order to prevail on an alleged violation of 46 U.S.C. §41102(c). See 46 C.F.R. §545.4. As explained in detail below, Claimant has failed to satisfy two of these criteria.

A. Claimant Fails To State A Claim Under 46 C.F.R. §545.4(a)

46 C.F.R. §545.4(a) requires Claimant to establish that Respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary. Because Claimant has failed to do this, the claim must be dismissed.

In paragraph II of the claim, Claimant states:

> Upon information and belief, **Respondent** is incorporated in New York State as agent for a Vessel Operating Common Carrier that is headquartered in Geneva, Switzerland. Agent lists their principal place of business as 420 5t^{h} Ave, New York, NY 10018.

(underscored emphasis added). By Claimant's own admission, Respondent MSC USA is not an ocean common carrier – it is merely an agent for such a carrier. Claimant therefore has failed to establish that Respondent is an ocean common carrier and its claim of a violation of section 41102(c) must be dismissed.

Claimant does not name MSC as a respondent – only MSC USA. This is not only the plain meaning of paragraph II quoted above, but is further evidenced by the fact that the FMC served the claim only on MSC USA by emailing it to Marco Sidoti, Head of Detention Demurrage and Per Diem at MSC USA, and not emailing it to MSC.

B. Claimant Fails to State A Claim Under 46 C.F.R. §545.4(b)

46 C.F.R. §545.4(b) requires Claimant to establish that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis. In addition to

the fact that Respondent is not a regulated entity (as explained in III.A above), Claimant has not met its burden with respect to this requirement.

In adopting 46 C.F.R. §545.4(b), the Commission stated:

> To find a violation of §41102(c), the Commission consistently required that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business.

83 *Fed. Reg*. at 64479 (December 17, 2018)(footnotes omitted). Here, Claimant does not allege, much less prove, that the conduct of which it complains is normal, customary, often repeated, systematic, uniform, habitual, and continuous. Indeed, this dispute involves a single shipment of four containers. Therefore, even if all the facts are construed in a manner favorable to Claimant, the claim must be dismissed as a matter of law because Claimant has failed to establish a prima facie case with respect to a necessary element of a §41102(c) violation.

For the foregoing reasons, the claim must be denied.

IV. Imposition Of Demurrage Is Reasonable

Although the applicable law outlined in Section III above makes it unnecessary to reach the issue of the reasonableness of the Respondent's conduct, Respondent nonetheless addresses that issue for the sake of thoroughness.

A. The Proper Application Of The Incentive Principle

One of the key factors in determining the reasonableness of demurrage charges is the incentive principle, i.e., do the charges create an incentive for the cargo interest to collect the cargo in a timely manner? Here, Claimant argues that the "incentive principle" makes it unreasonable to charge demurrage whenever a terminal is closed or some other event impedes cargo movement. This is an overly broad and incorrect reading of the Commission's

interpretative rule. It is simply not true that imposition of demurrage is unreasonable whenever a terminal is closed or cargo movement is impeded.

It is the prospect of having to pay detention charges for each day after the expiration of free time that serves as the incentive for cargo interests to pick up or arrange for delivery of their cargo. Terminals are routinely closed at night, on weekends, and on holidays. There is nothing unreasonable about charging demurrage at those times. Moreover, the incentive principle is not a per se rule – it is merely the starting point of the reasonableness analysis. Even if cargo could not be picked up or delivered for reasons beyond the control of the cargo interest, imposition of demurrage charges may still be reasonable. As explained in section III.B below, imposition of demurrage charges were in fact reasonable in this instance.

B. Demurrage Was Incurred Due To The Actions Of The Cargo Interest

Because demurrage would not have been incurred but for the omission of the cargo interest, imposition of demurrage is reasonable.

In its interpretative rule on demurrage and detention, the Commission included the following provision:

> Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

46 C.F.R. 545.5(f). This language was included in the interpretative rule to make clear that the analysis of reasonableness under section 41102(c) does not begin and end with the incentive principle, or other factors specifically enumerated in the interpretative rule. See, 85 Fed. Reg. at 29641 (May 18, 2020).

Among the other factors that may be considered under the interpretative rule are "extenuating circumstances," which the Commission explained by saying:

> Regarding "extenuating circumstances" specifically, the Commission used that phrase as a way of indicating that it would consider all arguments raised by the parties, including those involving considerations not listed in the rule. As to what these "extenuating circumstances" could be, the NPRM specified one: "An example of an extenuating circumstance is whether a cargo interest has complied with its customary responsibilities, especially regarding cargo retrieval (e.g., making appointments, paying freight, submitting paperwork, retaining a trucker). If it has not, this could be factored into the analysis." Many of the arguments raised by ocean carriers and regulated entities about things such as cost, technical feasibility, and the conduct of shippers, intermediaries, and truckers are issues that could be raised as "extenuating circumstances" in a particular case.

85 *Fed. Reg*. at 29647 (May 18, 2020)(footnotes omitted).

It is the responsibility of the cargo interest to comply with its customary responsibilities, such as providing accurate contact information for the party that is to receive the arrival notice so that delivery can be organized in a prompt and efficient manner. Here, the cargo could and would have been delivered on time if the correct email address had been provided by the party booking the cargo. Cappiello Aff., ¶ 6. But for the fact that the email address provided by the shipper was incorrect, delivery notices would have been received, charges resolved, and cargo delivered prior to the end of free time. *Id.* Similarly, at least some demurrage charges would have been avoided if the facility selected by the cargo interest had been able to accept delivery in a timely manner. Cappiello Aff., ¶ 8.

In short, demurrage charges were incurred here not because of any act or omission on the part of any regulated entity, but because of the failure of the cargo interest to provide accurate contact information and to arrange for a facility that could accept delivery in a timely manner. As a result, imposition of demurrage charges is reasonable.

Indeed, if Claimant is not liable for demurrage under these circumstances, then cargo interests would be free to shirk their responsibilities and use marine terminals to store their cargo free of charge by claiming demurrage is "unreasonable."

C. The "Once In Demurrage" Rule Is Not Unreasonable Per Se

The Claimant is mistaken in arguing that the assessment of demurrage in this instance is unreasonable because it involves the "once in demurrage, always in demurrage" rule.

A number of persons commenting on the proposed interpretative rule cited Commission precedent which suggested that if cargo was subject to demurrage charges (i.e., free time had expired) when an event made it impossible for the consignee to pick up the cargo, it was reasonable to continue assessing demurrage on that cargo. This concept has been referred to as the "once in demurrage, always in demurrage" rule.

The Commission addressed these comments and the precedent on which they were based, saying that the cases stand for the proposition that it is likely reasonable for a carrier to recover certain costs for storing and protecting cargo for cargo in demurrage that cannot be retrieved, while imposition of punitive demurrage would likely be unreasonable. 85 *Fed. Reg*. at 29653 (May 18, 2020). Thus, contrary to the position taken by Claimant, there is nothing unreasonable per se about collecting some level of demurrage during a period when cargo cannot be delivered if that cargo was in demurrage at the time the event that renders delivery impracticable occurred.

Here, the Containers were reefer containers that required energy to remain cooled to the proper temperature and monitoring of that temperature. Thus, services were provided and costs incurred during the period the Containers remained on the terminal. The Commission, in adopting the interpretative rule, explained that recovery of cost of this type is reasonable. Claimant has not produced any evidence which would support an allegation that the charges were punitive.[2] Accordingly, the claim must be denied.

[2] Claimant suggests, without support, that MSC deliberately delayed delivery of the cargo to collect additional demurrage charges and share those charges with the terminal. Aside from the recklessly speculative nature of that

V. Claimant's Argument With Respect To Shipping Terms Is Irrelevant

Claimant's attempt to challenge the legitimacy of the demurrage charges on the basis of the terms of sale is without merit and must be disregarded.

According to the Claimant, the consignee purchased the cargo under DAP Incoterms, freight prepaid to door, and has therefore disputed these charges as not for their account. The DAP Incoterm means "Delivered At Place." This means the seller is responsible for arranging carriage and for delivering the goods, ready for unloading from the arriving means of transport, at the named place. Claimant appears to suggest that since the consignee purchased the goods in the Containers on DAP terms, the consignee cannot be liable for demurrage charges. Claimant is confusing the contract of sale with the contract for transport, and is incorrect.

The Commission has previously addressed arguments regarding the imposition of charges by ocean carriers based on the terms of sale. In *Meat Importers Council of America, Inc. v. Australia-Pacific Coast Rate Agreement, et al*., 26 S.R.R. 371 (FMC 1992), a group of importers argued it was unlawful for carriers to assess a terminal handling charge against U.S. consignees that had purchased the cargo they were importing on a cost, insurance and freight (C.I.F.) basis, meaning freight costs were included in the purchase price paid by the importer. The Commission ruled in favor of the carriers, finding that unless the carrier had entered into an agreement to the contrary with the shipper and the consignee, the carrier may look to either of them for payment of charges. 26 S.R.R. at 374. Thus, Claimant's argument on this point is without merit.

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allegation, it fails as a matter of common sense. The maritime trade press is routinely reporting record high levels of cargo demand and ocean freight rates. MSC could have easily generated far more revenue by delivering the Containers promptly and using them to move other cargo than it did from demurrage charges.

VI. Conclusion

For the reasons set forth above, the claim must be denied.

Respectfully submitted,

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September 3, 2021

CERTIFICATE OF SERVICE

I, Wayne R. Rohde, do hereby certify that on September 3, 2021, a copy of the foregoing Response was served via email on the following:

Richard Roche
Mohawk Global Logistics
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Wayne R. Rohde