BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC, Complainant v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG and HAMBURG SUD NORTH AMERICA, INC. Respondents.	)	DOCKET NO. 21-11

RESPONDENTS' REPLY TO COMPLAINANT'S OPPOSITION TO RESPONDENTS' PARTIAL MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

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August 17, 2022

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Respondents Hamburg Südamerikanische Dampfschifffahrtts-Gesellschaft A/S ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"), through counsel, hereby reply to the Opposition ("Opposition") of Complainant OJ Commerce, LLC ("OJC") to Respondents' Motion to Dismiss and/or for Summary Judgment ("Motion").[1] For the reasons set forth below, the Motion should be granted.

I. INTRODUCTION

The Motion seeks dismissal of four claims made in the Verified Amended Complaint (the "Complaint"), specifically those under Sections 41102(b)(2) (failure to operate under filed agreement), Sections 41104(5) and 41104(9) (discrimination, prejudice/disadvantage with

[1] This Reply is limited to substantive arguments relevant to the Motion. The fact that this Reply does not respond to every argument or allegation made in Complainant's Opposition should not be construed to suggest that Respondents in any way accept or admit such arguments or allegations.

respect to ports), and 41104(10) (unreasonable refusal to deal) of the Shipping Act of 1984 (the "Act"). The Motion also seeks dismissal of HSNA as a respondent.

As explained below, the arguments advanced in the Opposition fail to address the merits of the Motion, which should be granted.

II. ARGUMENT

A. OJC's Claim Under Section 41102(b)(2) Is Invalid

The Motion sought dismissal of OJC's claim under Section 41102(b)(2) of the Shipping Act on the grounds that this prohibition does not apply to service contracts. OJC did not address this argument in its Opposition, thereby conceding Respondents' point. Accordingly, the Section 41102(b)(2) claim should be dismissed.

B. OJC's Claims Under Sections 41104(5) and 41104(9) Are Without Merit

OJC's arguments with respect to Sections 41104(5) and 41104(9) are also without merit. These two provisions of the Act prohibit discriminatory, prejudicial, or preferential treatment with respect to any port. In this regard, the phrase "with respect to any port" does not mean that a port happens to be involved in the conduct. Indeed, any international ocean transportation by definition involves a minimum of two ports and thus virtually any ocean common carrier activity can be said in some sense to be "with respect to" a port. Congress used the phrase "with respect to any port" in a specific and much narrower manner.

In this regard, Congress has spoken directly and explicitly to the meaning of the phrase "with respect to any port":

> *First, sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would protect localities from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts. The Committee intends the application of these prohibitions to a locality to be limited to circumstances in which the prohibited actions are clearly targeted at the locality, not to circumstances where the actions are*

> *targeted at a particular shipper or ocean transportation intermediary which happens to be associated with that locality.*

S. Rep. 61, 105th Cong., 1st Sess., p. 28 (1997) (emphasis added). There can be no doubt: Congress used the phrase "with respect to a port" to mean that in order to violate these statutory provisions, conduct must be targeted at the port. Conduct targeted at a shipper does not and cannot violate these statutory prohibitions.

As noted in the Motion, and as OJC concedes at pages 19-20 of its Opposition, OJC is alleging that the conduct was aimed at it, not at a specific locality:

> *Respondents' conduct during the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until expiration of the service contract, constituted an unfair and unjustly discriminatory practice against Complainant in the matter of rates or charges with respect to the ports identified in the service contract…*

Complaint, ¶ 12 (emphasis added). The Complaint also alleges that:

> *Respondents' conduct during the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until the contract expired on May 31, 2021, gave undue and unreasonable preference and advantage to shippers other than Complainant and imposed an undue and unreasonable prejudice and disadvantage to Complainant with respect to the ports identified in the parties' service contract…*

Complaint, ¶ 13 (emphasis added).

The foregoing quotations from the Complaint, and a closer examination of the basis for OJC's characterization of its allegations, display the fatal flaw in OJC's argument. OJC alleges that Respondents failed to meet their quantity and price commitments to OJC because Respondents allegedly took advantage of trade conditions in which demand exceeded supply and allegedly chose to transport cargo paying higher rates rather than to transport OJC's cargo under the service contract between them. Complaint, ¶¶ 18-19. Even assuming arguendo that these allegations are true (which Respondents deny), paragraphs 12 and 13 of the Complaint concede

that this conduct was aimed at OJC rather than at any port(s). Accordingly, the conduct does not fall within the scope of Sections 41104(5) and 41104(9).

Moreover, the Complaint fails to meet the minimum pleading standard cited at pages 8-9 of the Opposition. The Complaint does not allege a single fact that would nudge the 41104(5) and 41104(9) claims from conceivable to plausible. The Complaint does not contain a single fact that would support a conclusion the alleged conduct was targeted at one or more ports. The Complaint does not allege a single fact identifying any particular port that was advantaged or disadvantaged. The Complaint merely alleges, in a vague and general way, that all the ports covered by OJC's service contract with Respondents were adversely impacted. As such, the Complaint merely offers 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action,' which are insufficient to state a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Because the Act requires that conduct be aimed at a port in order to violate Sections 41104(5) and 41104(9), because the Complaint alleges that the conduct was aimed at OJC, and because OJC has not alleged a single fact that would move these allegations from conceivable to plausible, the claims under Sections 41104(5) and 41104(9) should be dismissed.

C. OJC's Section 41104(10) Claim Should Be Dismissed Or, Alternatively, Summary Judgment Granted In Favor Of Respondents

Section 41104(10) makes it unlawful for a carrier such as HSDG to:

unreasonably refuse to deal or negotiate

The Opposition relies on factual allegations in opposing dismissal of this claim. The flaw in relying on factual allegations is that such reliance ignores the applicable law.

OJC appears to allege that Respondents refused to deal with OJC because (a) OJC did not receive all the space to which it was entitled under its service contract; and (b) OJC did not get a

new service contract. However, even if these allegations are true, under applicable law they do not constitute a refusal to deal (unreasonable or otherwise).

Previous decisions interpreting the Act have addressed what the prohibition against an unreasonable refusal to deal requires of ocean common carriers:

> All that is required is that common carriers ... refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

Global Link Logistics, Inc. v. Hapag-Lloyd AG, 33 S.R.R. 512, 527 (ALJ 2014), citing *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001), aff'd, 29 S.R.R. 1066, 1070 (FMC 2002). OJC acknowledges in the Complaint that it was not "shut out." On the contrary, Respondents transported 185 of the 200 containers they committed to transport under the service contract. Complaint, ¶ 32. Since OJC was not "shut out" under its service contract, the failure to provide space for 15 containers does not constitute a refusal to deal as a matter of law.[2]

As noted in the Motion, the Act does not require a common carrier to offer or provide a service contract to every customer that requests one, and not entering into a service contract does not, in and of itself, constitute a refusal to deal. *Consumer Elec. Shippers Ass'n, Inc. v. Asia North America Eastbound Rate Agreement*, 26 SRR 85 (ALJ 1991). This conclusion was validated in the *Global Link* decision, which stated:

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of OSRA. All that is required is that common carriers ... refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

Global Link Logistics at 527.

[2] If failure to provide some space under a service contract constitutes an unlawful refusal to deal on the part of the ocean common carrier, then such a failure could never constitute a simple breach of the contract and would always constitute a violation of the Act. Such a reading of the Act would read 46 U.S.C. § 40502(f) out of the statute contrary to principles of statutory interpretation and also would be contrary to FMC precedent.

The evidence attached to the Motion demonstrates that Respondents were willing to provide space to OJC on a case-by-case basis and offered to do so. Thus, Respondents did not "shut out" OJC by not offering it a new service contract, and did not refuse to deal with OJC as a matter of law. The facts cited by OJC cannot and do not change the applicable law.

D. HSNA Should Be Dismissed As A Respondent Due To The Lack Of Jurisdiction

Because the Commission lacks jurisdiction over HSNA, HSNA must be dismissed as a respondent. Although it is true that Respondents previously made this same motion, that earlier motion was not supported by the agency agreement that is attached to the Motion. In light of the agency agreement, the allegation of the Complaint – which OJC failed to support in its Opposition – is not a sufficient basis for the Commission to assert jurisdiction for two reasons. First, the original complaint in this case alleged that HSNA was a marine terminal operator and the Complaint alleged that HNSA was an ocean transportation intermediary. Given that two verified complaints have attributed different regulatory statuses to the same entity, neither can be considered reliable or probative. More importantly, the Complaint does not contain any factual allegations regarding the activity of HSNA that would support the allegation that it is an OTI. In any event, the agency agreement more than overcomes the lack of factual allegations in the Complaint and conclusively demonstrates that HSNA is an agent, not an OTI.

Moreover, HSNA's status is not inextricably intertwined with the merits of this case. The issues in this case relate to the actions of HSDG with respect to performance of the service contract between it and OJC and the decision by HSDG not to grant a new service contract to OJC. HSNA is irrelevant to the issues in this proceeding.

As an agent, HSNA does not act as a common carrier, marine terminal operator, or ocean transportation intermediary. Accordingly, it is not subject to the Shipping Act, and the FMC has no jurisdiction over HSNA. Therefore, HSNA should be dismissed as a respondent. Agents

have been dismissed in similar circumstance in other proceedings. See, e.g., *Hapag-Lloyd AG and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c),* FMC Docket No. 21-09, Initial Decision, p. 23 (April 22, 2022).

III. CONCLUSION

For the foregoing reasons, the Motion should be granted and the claims identified above should be dismissed and/or summary judgment granted in favor of Respondents.

Respectfully submitted,

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Dated: August 17, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2022, the foregoing Respondents' Reply to Complainant's Opposition to Respondent's Partial Motion To Dismiss And/Or For Summary Judgment was served via electronic mail on:

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