

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

ACME FREIGHT SERVICES CORP., *Complainant*

v.

TOTAL TERMINALS INTERNATIONAL, *Respondent*.

DOCKET NO. 22-07

Served: May 26, 2022

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

ORDER DENYING MOTION TO DISMISS

I. Introduction and Procedural Background

On April 29, 2022, Respondent Total Terminals International (“TTI”), a marine terminal operator, filed a motion to dismiss (“Dismissal Motion”) the complaint filed on March 10, 2022, by Complainant Acme Freight Services Corp. (“Acme”). On May 16, 2022, Acme filed a memorandum in opposition to the motion to dismiss (“Dismissal Opposition”). On May 23, 2022, TTI filed a reply (“Dismissal Reply”).

For the reasons set forth below, TTI’s motion to dismiss is **DENIED**. TTI shall file its response to the complaint by June 10, 2022, and the parties shall submit a joint status report with proposed schedule by June 27, 2022, as required by the March 22, 2022, initial order.

II. Motion to Dismiss

A. Arguments of the Parties

TTI asserts that the complaint should be dismissed for failure to state a claim because Acme fails to allege that TTI was the proximate cause of Acme’s damages; Acme fails to allege that the challenged acts occur normally, customarily, or continuously within the meaning provided under § 41102(c) of the Shipping Act; if TTI did charge Acme demurrage, it was reasonable; and Acme cannot amend its complaint to state a claim against TTI. Dismissal Motion at 15-27; Dismissal Reply at 6-15.

Acme contends that the factual allegations in the complaint are sufficient; that TTI assessed demurrage and Acme paid those charges; the complaint adequately pleads that TTI’s demurrage practices are normal, customary, and continuous as interpreted by recent case law; that the demurrage charges assessed on containers subject to a government hold were unreasonable; and that Acme is prepared to file an amended complaint addressing any deficiencies. Dismissal Opposition at 5-12.

B. Motion to Dismiss Standard

Although the Commission's Rules do not explicitly provide for motions to dismiss, Commission Rule 12 states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. The "Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *MAVL Capital v. Marine Transport Logistics*, 2020 FMC LEXIS 216 at *6 (FMC 2020).

"When, as here, jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies." *MAVL Capital*, 2020 FMC LEXIS 216 at *6 (citing *Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009)). "Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, 2020 FMC LEXIS 216 at *6 (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54, 2015 FMC LEXIS 43 at *36 (FMC 2015)).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12 at *31-32 (FMC 2011). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 U.S. Dist. LEXIS 125179 at *5 (M.D. Tenn. 2014).

C. Discussion

1. Proximate Cause

TTI asserts that it was not the proximate cause of Acme's damages for two reasons: Acme failed to allege in the complaint that TTI directly charged Acme demurrage, and Acme failed to allege that demurrage was paid directly to TTI. Dismissal Motion at 17-19. TTI offers an alternative possibility that MSC was charged demurrage by TTI and, acting as agent for TTI, passed on this charge to Acme. Dismissal Motion at 18. TTI points to publicly available records of Acme showing that the demurrage rates paid by Acme correspond to the rates posted by MSC

in its tariff. TTI contends that MSC is the proper party against whom Acme should have brought suit. Dismissal Motion at 12-14.

Acme contends that the language of the complaint, taken as true, as well as all reasonable inferences drawn in favor of Acme, are sufficient to plead that TTI was the proximate cause of Acme's damages. Dismissal Opposition at 5-8. Acme included email correspondences in its opposition that show the communications between Acme and TTI and between Acme and MSC. Dismissal Opposition, Exhibits A and B. Acme asserts that these emails also prove that TTI was aware that it was charging demurrage on the containers in question, and that Acme paid demurrage to TTI directly for the same containers. Complaint Opposition at 7.

The complaint alleges that "TTI assessed demurrage charges on the Containers while they were subject to a government hold in the total amount of \$185,000" and "ACME was required to pay, and did pay, the demurrage charges imposed by TTI under duress in order to be permitted to re-export the Containers and thereby avoid the accrual of additional demurrage and potential governmental penalties." Complaint at 3.

TTI asserts that "[i]n reality, TTI is not the party that 'assessed' or 'imposed' the \$185,000 demurrage against ACME" but rather that MSC billed the demurrage according to MSC's tariff. Dismissal Motion at 6 n.1. In its reply, TTI again asserts that "MSC's tariff is evidently the one that applied here, not TTI's" and that "what matters is which tariff was actually applied and what demurrage was actually paid, not some hypothetical demurrage discussed but never collected." Dismissal Reply at 10, 12.

The issues regarding whose tariff was applied, who assessed, and who collected the charges are factual questions that can be explored during discovery. At this early stage of the proceeding, Acme plausibly alleges that TTI assessed the demurrage and that Acme was required to pay the charges to avoid additional charges. As the parties develop the factual basis, they should also more clearly explain what occurred from July 2021, after the CBP ordered the containers re-exported back to Malaysia, and November 2, 2021, when the containers were re-exported. Accordingly, this argument does not support dismissal at this stage of the proceeding.

2. Normal, Customary, and Continuous Practice

TTI asserts that the acts in question do not amount to "regulations and practices" as defined by the § 41102(c) of the Shipping Act. TTI further points to the interpretive rule, which states that a complainant must allege facts showing that the "claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis." 46 C.F.R. § 545.4(b). Dismissal Motion at 21. TTI asserts that section 41102(c) does not extend to "one-off situations" like the one in question. Dismissal Motion at 21. TTI also contends that Acme failed to properly plead facts that could prove that the demurrage practices are normal, customary, or continuous because the complaint uses only "conclusory legal statements" that mirror the language of the statute. Dismissal Motion at 21.

Acme contends that the complaint contains sufficiently pleaded facts to support its claim that TTI's demurrage practices were normal, customary, and continuous. Dismissal Opposition at 8-10. Acme first asserts that the complaint's allegations of "repeatedly refus[ing] to waive or

discount the demurrage is sufficient to demonstrate at the pleading stage that TTI's policy of assessing demurrage on containers subject to a government hold occurs on a normal, customary, and continuous basis." Dismissal Opposition at 9. Second, Acme asserts that alleging repeated occurrences is not necessary when the conduct is related to a tariff. Dismissal Opposition at 9.

The complaint alleges that the practices and regulations at issue "are occurring on a normal, customary, and continuous basis" and that the charges were part of TTI's tariff. Complaint at 3-4. At this early stage of the proceeding, this is sufficient to plausibly allege a violation of section 41102(c). Accordingly, this argument does not support dismissing the complaint.

3. Unreasonable Practices

TTI contends that the demurrage charged against Acme was reasonable despite being subject to a hold by Customs and Border Patrol ("CBP"). Dismissal Motion at 22-27. To support this assertion, TTI draws upon case law from 1948 that analyzed similar situations involving government investigations and other obstacles that impeded the parties' ability to move the container by the end of free time, but was nonetheless held to be a reasonable practice. Dismissal Motion at 22-23. TTI further asserts that the new interpretive rule cannot overrule this precedent for two reasons: agencies may not overrule precedent with an interpretive rule, and even if they could, the rule expressly declined to adopt a bright line rule regarding government inspections' impact on demurrage charges, instead adopting the incentivizing principle to promote freight fluidity. Dismissal Motion at 24.

TTI claims that the demurrage charges in question were issued in accordance with the interpretive rule because they serve the purpose of incentivizing and encouraging freight fluidity. Dismissal Motion at 25. Further, companies usually decide among themselves who will bear the risk of reasonably foreseeable obstacles, like a CBP hold. Dismissal Motion at 25-26. TTI also contends that charging demurrage was a reasonable means of compensating the terminal operator for ten months of storage space. Dismissal Motion at 26. TTI drew attention to the context of the disputed demurrage to further demonstrate reasonableness, emphasizing the beginning of the COVID-19 pandemic and a major shipping crisis when space at the terminals was a valuable commodity. Dismissal Motion at 27.

Acme asserts that the interpretive rule does not claim to overrule precedent, but instead "gives notice that the 'incentivizing principle' will apply in future considerations of demurrage and detention practices." Dismissal Opposition at 10-11. Acme also acknowledges that the Commission declined to adopt a bright line rule on this issue, and as such "it will determine whether demurrage practices are reasonable or unreasonable on a case-by-case basis considering all relevant facts and circumstances." Dismissal Opposition at 11. Drawing upon this interpretation, Acme asserts that granting the motion in question without discovery would essentially "rul[e] on the merits of the case at the pleading stage." Dismissal Opposition at 11. Finally, Acme makes clear that "[n]o amount of demurrage assessed against Acme could have incentivized Acme to remove the Containers from the Port because the Containers were subject to a government-imposed hold," and TTI's assertion that Acme was to blame for the fraudulent shipment is "inaccurate and unfair." Dismissal Opposition at 12.

The complaint alleges that “the assessment of demurrage charges during the CBP hold on the Containers was inconsistent with the FMC’s interpretative rule on demurrage and detention found at 46 C.F.R. §545.5 and Section 41102(c) of the Shipping Act.” Complaint at 4. Whether these charges were appropriate under these circumstances will depend on the facts that are established. At this early stage of the proceeding, the complaint plausibly alleges a violation of the Commission’s Detention and Demurrage Rule. Accordingly, the motion to dismiss is denied.

4. Conclusion

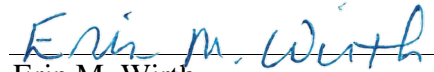
The complaint makes sufficient factual allegations to plausibly allege a violation of the Shipping Act. Complainant will need to further develop and establish the factual basis supporting its complaint and must demonstrate that the facts support finding a violation of the Shipping Act. At this stage of the proceeding, however, Complainant has plausibly alleged a Shipping Act claim and will be permitted to move forward.

III. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that TTI’s motion to dismiss be **DENIED**. It is

FURTHER ORDERED that TTI shall file its response to the complaint by June 10, 2022, and the parties shall submit a joint status report with proposed schedule by June 27, 2022.


Erin M. Wirth
Chief Administrative Law Judge