MSRF Inc.,

v.

HMM Company Limited

Docket No. 22-20

Complainant’s Reply to Respondent’s Opposition Brief
COMPLAINANT MSRF, INC.’S REPLY BRIEF

Complainant MSRF, Inc. (“MSRF”), through its undersigned attorneys, hereby submits this Reply Brief to the Opposition Brief (“HMM Response Brief”) filed by Respondent HMM Company Limited (“HMM”) against MSRF’s Initial Brief (“MSRF Brief”). The Federal Maritime Commission (“FMC”) should rule that HMM violated Service Contract US2124083 (“Service Contract”) and award reparations to MSRF.

INTRODUCTION

The record demonstrates that HMM violated multiple provisions of the Shipping Act by refusing to provide MSRF with the agreed upon minimum quantity of shipping container space between May 2021 and April 2022. As a result of these violations, MSRF was forced to use other carriers at higher prices causing significant damages to MSRF. Contrary to HMM’s claims, MSRF’s Brief provides a legal argument showing that HMM violated the Shipping Act because of their failure and refusal to abide by the terms of the Service Contract, which is supported by the documents produced during discovery. As a result, a judgment should be granted in MSRF’s favor because the record clearly shows that HMM violated the Shipping Act by breaching the terms of the Service Contract and by engaging in conduct that was unjust and unreasonable.

RESPONSE TO HMM’S PROPOSED FINDINGS OF FACT

Please see separately filed Response to HMM’s Proposed Findings of Fact which is fully incorporated herein.
ARGUMENT

I. MSRF’s Brief Complied With 46 C.F.R. § 502.214(c)(3).

MSRF complied with 46 C.F.R. § 502.214(c)(3) because its argument was based on principles of law—HMM’s violations of the Shipping Act. Section 502.214(c)(3) requires an opening or initial brief to include an “argument based upon principles of law with appropriate citations of the authorities relied upon.” 46 C.F.R. § 502.214(c)(3).

In its brief, MSRF argued that HMM violated provisions of the Shipping Act, including violations of 46 U.S.C. §§ 41102(c), 41104(a)(2), and 41104(a)(10), by breaching the terms of the Service Contract and by enforcing regulations and practices that were unreasonable and unjust. MSRF Brief pp. 2-3. MSRF further argued that HMM’s conduct towards MSRF was unreasonable and unjust under 46 U.S.C. §§ 41102(c) and 41104(a)(10) because HMM refused to provide the agreed upon cargo space that MSRF requested and needed between May and April of 2022. Additionally, in its brief, MSRF argued that HMM violated 46 U.S.C. § 41102(c) by failing to provide service (the agreed upon cargo space) that was in accordance with the rules and practices contained in the underlying Service Contract. MSRF Brief pp. 3-4.

Accordingly, MSRF’s brief complied with Section 502.214(c)(3). HMM’s claim that MSRF’s brief failed to comply with Section 502.214(c)(3) is nothing more than an attempt to distract the Presiding Officer from the main issues of this case—HMM’s violations of the Shipping Act.

II. HMM Violated the Shipping Act Through Its Refusal to Provide MSRF with the Vessel Space Required Pursuant to the Terms of the Service Contract.

The record shows that, between May 2021 and April 2022, HMM violated the Shipping Act by refusing to provide MSRF with vessel space accommodations as required by the terms of the Service contract.
a. **HMM Violated 46 U.S.C. § 41102(c).**

In its response brief, HMM incorrectly claims that Section 41102(c) does not apply to the transportation of property. HMM Response Brief p. 11. HMM’s interpretation of *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962) is plainly wrong. *J.M. Altieri* stands for the proposition that the “practices that are intended to fall within the coverage of this section are shipping practices.” *Id.* The failure to follow routing instructions or claims for loss of or damage to cargo are not considered shipping practices. *See id.* Here, MSRF is not claiming that HMM failed to follow routing instructions nor is MSRF claiming that HMM damaged MSRF’s cargo. Rather, MSRF is claiming that HMM’s refusal to provide MSRF with the agreed upon cargo space between May 2021 and April 2022 was not in accordance with standard shipping practices.

However, Section 41102(c) is clearly applicable to the transportation of property because it applies to “common carriers.” And the Shipping Act defines a “common carrier” as a person that provides transportation by water of cargo between the U.S. and a foreign country for compensation. 46 U.S.C. § 41102(c); 46 U.S.C. § 40102(7)(A)(i)-(iii). There is no question that HMM is considered a common carrier because they provide transportation of cargo by water, such as MSRF’s cargo, between the United States and foreign countries for compensation. Moreover, HMM is registered with the FMC as a Vessel Operating Common Carrier with the organization number of 001452. As a result, Section 41102(c) undoubtedly applies to the transportation of property. *See* 46 U.S.C. § 40102(7)(A)(i)-(iii).

Further, HMM also argued in their response brief that there is no evidence that proves HMM violated Section 41102(c) of the Shipping Act, which is belied by the actual evidence in this case. HMM Response Brief p. 11. Section 41102(c) provides in relevant part that a common carrier … may not fail to establish, observe, and enforce just and reasonable regulations and
practices relating to or connected with receiving, handling, storing, or delivering property. 46 U.S.C. § 41102(c).

Here, the record is filled with evidence that shows HMM’s refusal to observe and enforce reasonable and just regulations and practices relating to the storing of MSRF’s cargo. To be clear, the Service Contract required MSRF to tender minimum quantity of forty-foot equivalent units (FEUs) of cargo for shipment by HMM via ocean vessels from ports in Asia to the United States. See MSRF’s Appendix (Group Exhibit A). Between May and April of 2022, however, HMM refused to provide MSRF with a paucity of the agreed allotments of space. For example, on July 19, 2021, MSRF requested a booking out of [redacted] via email, and Laura Trometer, a representative from HMM, responded by stating that “[redacted]” See July 2021 email correspondence between MSRF and HMM attached and incorporated herein as Exhibit 1, (HMM0034807).

On November 3, 2021, MSRF again requested a booking from [redacted] but HMM refused to provide HMM with the space requested. See November 2021 email correspondence between MSRF and HMM attached and incorporated herein as Exhibit 2, (HMM0015921). In each instance, HMM gave no explanation for their failure to provide MSRF with the space requested—they simply refused thereby breaching the terms of the Service Contract. HMM’s unreasonable and unjust conduct between May 2021 to April of 2022 forced MSRF to make alternate transportation arrangements with other common carriers at substantially higher spot market prices or forgo shipping its cargo altogether. As a result, there is no doubt that HMM violated Section 41102(c) of the Shipping Act by failing to observe just and reasonable practices relating to the storing of MSRF’s cargo.
b. **HMM Violated 46 U.S.C. § 41102(a)(2).**

HMM also claims that it did not breach the Service Contract because it shipped more than [redacted] of MSRF’s containers during the term of the Service Contract. HMM Response Brief p. 12. Surprisingly, HMM ignores one obvious and crucial fact—HMM had already breach the terms of the Service Contract prior to providing MSRF with more than the agreed upon [redacted] FEUs of shipping space.

Section 41102 (a)(2) provides in relevant part that a common carrier cannot provide service that is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract. 46 U.S.C. § 41102(a)(2). Here, HMM failed to provide service that was in accordance with the classifications, rules and practices contained in the Service Contract because it refused to provide MSRF with the agreed upon minimum quantity of cargo space from May 2021 to April of 2022. See MSRF’s Appendix (Group Exhibit A). Just because HMM provided MSRF with the agreed upon minimum quantity of cargo space in 2022 does not erase their breach of the Service Contract in 2021. Despite HMM’s contractual commitment to ship the minimum quantity tendered by MSRF, HMM continuously refused to provide MSRF with more than approximately [redacted] out of the promised [redacted] FEUs of the allotted space during May 2021 to April of 2022. Even HMM’s staff acknowledged the problems they were causing MSRF. In a June 15, 2021 email chain, Laura Trometer, an HMM representative, stated [redacted] See November 2021 email correspondence between MSRF and HMM attached and incorporated herein as Exhibit 3, (HMM0027028). See also American Importers Accuse Shipping Giants of Profiteering, https://www.nytimes.com/2022/05/04/business/shipping-container-shortage.html (last visited [date]).
May 19, 2021) attached as *Exhibit 4* (explaining how shippers prioritized larger customers over smaller companies like MSRF).

HMM’s assertions that it fulfilled the MQC further fails because its own tariff rules require HMM to accept an amount equal to 10% of the annualized MQC for each sequential 30 day period of the contract. HMM clearly failed to meet this commitment. Therefore, HMM’s claim that they did not breach the Service Contract fails because there is no question that HMM violated the terms of the Service Contract and Section 41102(a)(2) since they refused to provide MSRF with the agreed upon cargo space between May and April of 2022.


HMM claims in their response brief that they did not violate Section 41104(a)(10) of the Shipping Act. However, the record shows that HMM violated Section 41104(a)(10) by refusing to provide the promised vessel space pursuant to the terms of the Service Contract. 46 U.S.C. § 41102(a)(10) states that a common carrier cannot unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier. Here, between May and April of 2022, MSRF requested, during multiple occasions, cargo space to ship containers from certain ports in Asia into the United States or Canada, but in almost every single instance where MSRF attempted to deal or negotiate for space, HMM refused to provide the space requested. See *Ex. 1-4*. HMM gave no explanation nor did it attempt to remedy the issues they caused because of their refusal to provide the space MSRF requested.

Even more relevant are the shipments included in MSRF’s damages worksheet that were moved aboard HMM vessels. These shipments are identified in file numbers 86, 98, 157, 161 and 162. See MSRF’s Appendix Exhibit F, Damages Calculations (CX_247 to CX_251). It is
interesting that HMM repeatedly had “no space available” for MSRF’s shipments, but was able to book space when requested by the freight forwarders with whom MSRF booked the shipments on the spot market. Of these shipments (161 and 162) were loaded into HMM’s containers. See MSRF’s Appendix Exhibit F, Damages Calculations (CX_247 to CX_251). If HMM had service contracts with the freight forwarders through whom MSRF booked the shipments, then HMM discriminated against MSRF in favor of those freight forwarders.

As such, HMM’s conduct was unreasonable because it refused to deal or negotiate with MSRF regarding vessel space accommodations from May 2021 to April of 2022.

III. MSRF’s Brief Includes Violations of the Shipping Act.

In their response brief, HMM also argues that MSRF’s Motion for Summary Decision should be dismissed because it does not contain any violations of the Shipping Act. See HMM Response Brief p. 15. But this argument is unsupported by the actual evidence and MSRF’s arguments. In its brief, MSRF argued that the breach of the Service Contract by HMM gave rise to the violations of the Shipping Act. Section 41104(a)(2) states that common carriers must provide services in accordance with the rules and practices contained in a service contract. 46 U.S. Code § 41104(a)(2). By breaching the terms of a service contract, the common carrier (HMM) violated Section 41104(a)(2) (the Shipping Act) because it failed to provide service that was in accordance with the rules and practices of the Service Contract.

Also, MSRF is not only claiming that HMM breached the Service Contract. MSRF also claimed, in its brief and during discovery, that HMM engaged in unreasonable and unjust shipping practices and regulations by arbitrarily refusing to provide MSRF with the agreed upon shipping container space when MSRF needed it the most. See MSRF Brief pp. 2–4. The HMM Brief cited Cargo One, Inc. v. COSCO Container Lines Company, Ltd., to support the claim that MSRF is
only alleging a breach of contract claim. This case also states that “where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume … that the matter is appropriately before the agency.” (10/31/00, FMC p. 35), Docket No. 99-24. Here, MSRF is raising issues beyond contractual obligations—HMM’s unreasonable and unjust practices and regulations relating to standard shipping practices.

Moreover, the Commission has held that jurisdiction over a complaint alleging violations of the Shipping Act exists even though a proceeding in another forum may have resolved some issues between the parties. Cargo One, Inc. v. Cosco Container Lines Co. Ltd., 28 S.R.R. 1635, 1645, 2000 FMC Lexis 14 (FMC Oct. 31, 2000). In Anchor Shipping, the Commission held that the fact the service contract between the parties’ required arbitration does not outweigh the Commission’s duty to protect the public by ensuring that the service contracts are implemented in accordance with the Shipping Act. Anchor Shipping Co. v. Alianca Navegacao E Logistica Ltda., 30 S.R.R. 991, 998 (FMC 2006).

As such, the Commission has jurisdiction to hear MSRF’s claims because the claims arise out of HMM’s violations of the Shipping Act and because the Commission has a duty to protect the public by ensuring that service contracts, such as the contract between HMM and MSRF, are implemented in accordance with the Shipping Act.

IV. MSRF’s Damages Spreadsheet is Supported, Logical and Understandable.

HMM spends considerable time discussing its various issues with the Damages Spreadsheet. In reality, however, the Damages Spreadsheet is a very simple, straightforward document.

The Damages Spreadsheet is based on information maintained by MSRF in the ordinary course of managing its business. It lists all shipments where MSRF paid freight charges in excess
of the Service Contract rates. See MSRF’s Appendix Exhibit F, Damages Calculations (CX_247 to CX_251). The difference between the freight charges paid and the Service Contract rate was calculated for each shipment. The total of this difference was then divided by the total number of containers to determine the average excess charge per container. The average excess charge was then multiplied by the number of containers that HMM failed to ship during the original term of the Service Contract. This is the amount claimed as damages.

A similar calculation was used to determine the transload and chassis expenses incurred by MSRF due to HMM’s failure to provide CY to CY service as provided in the Service Contract. Instead, MSRF was forced to obtain carriage to ports, then transload the shipments into trucks for transport to inland destinations.

The documents supporting the Damages Spreadsheet were provided to HMM in discovery. References to the Bates numbers of the documents relevant to each line of the Damages Spreadsheet were included in the Damages Spreadsheet for ease of reference.

The specific issues raised in HMM’s Brief were also raised in its proposed statement of facts and are addressed in MSRF’s response thereto. One example is relevant to show HMM’s willful misunderstanding of the Damages Spreadsheet. HMM claims that the shipment referenced on Tab 2, Row 38, is for air freight. This is incorrect. The documents produced by MSRF for this shipment are identified by Bates Nos. 0010126-0010128. House bill of lading MQDE21081456 was issued by Unipac for this shipment. This house bill of lading indicates that this shipment was carried by One Motivator on voyage 057E. This was clearly not an air shipment.
V. HMM Waived Their Opportunity to Exercise the Arbitration Clause in the Service Contract by Actively Participating in the Present Litigation Without Asserting Their Right to Arbitrate.

HMM further alleges that MRSF’s claims are subject to the Service Contract’s choice of law and jurisdiction clauses, which require claims to be arbitrated in Dallas, Texas. However, HMM waived their right to enforce the arbitration provision in the Service Contract by willingly and actively participating in this matter without asserting their right to arbitrate.

A party may waive its contractual right to arbitration when the party actively participates in litigation or acts inconsistently with its rights to proceed with arbitration. See, e.g., Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 757 (7th Cir. 2002) (holding that the plaintiff filed the complaint against [defendant] on December 7, 1999, and in the months following, [defendant’s] actions indicated an intention to proceed with the adversary proceeding in litigation, not in arbitration). While there is no bright-line rule as to what constitutes waiver, conduct such as filing responsive pleadings while not asserting a right to arbitration, filing a counterclaim, filing pretrial motions, engaging in extensive discovery, use of discovery methods unavailable in arbitration, and litigation of issues on the merit have all been considered by courts to amount to a waiver of the right to arbitration. See, e.g., Nat’l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 778 (D.C. Cir. 1987) (finding that the movant’s delay in seeking arbitration, its extensive participation in discovery, its motion for summary judgment, and the resulting prejudice to the opposing party constituted waiver); U.S. v. Darwin Constr. Co., 750 F.Supp. 536, 538–539 (D.D.C.1990) (finding plaintiff’s conduct in filing eight motions with the court, conducting extensive discovery, and filing motion to stay two months before trial date inconsistent with intent to enforce arbitration right).
In their Response Brief, HMM cited to *DSR Shipping Co., Inc. v. Great White Fleet, Ltd. d/b/a Chiquita Brands, Inc.* to support their position that MSRF’s claims should be denied because the Parties agreed to arbitrate MSRF’s claims. (10/2/92, FMC) Docket No. 91-54. *DSR Shipping Co.* is distinguishable because the defendant immediately asserted, in its answer to the plaintiff’s complaint, that the Commission lacked jurisdiction over the plaintiff’s complaint. Here, HMM never asserted that the Commission lacked jurisdiction until now.

As a result, HMM waived its contractual right to enforce the arbitration provision in the Service Contract because they actively participated in the pending litigation by filing a response to MSRF’s complaint, engaging in written discovery, participating in depositions, among other activities. Thus, the Presiding Officer should deny HMM’s attempt to invoke the arbitration clause in the Service Contract because it is untimely and has been waived.

**CONCLUSION**

The record clearly shows that HMM violated the Shipping Act by engaging in conduct that was unjust and unreasonable and by breaching the terms of the Service Contract between May and April 2022. Accordingly, MSRF respectfully request that the Presiding Office grants its Motion for Summary Decision on Counts I, II, IV and V of its Complaint in the amount of $228,171.52, for its attorney’s fees and costs, and for all other relief the Commission deems fair and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 24, 2023, a true and correct copy of the foregoing document was served by email on all counsel of record in accordance with 46 CFR Part 502 and the Commission’s Initial Order of August 22, 2022.

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