BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-35

HAPAG-LLOYD AG and HAPAG-LLOYD (AMERICA) LLC

RESPONDENTS AND THIRD-PARTY COMPLAINANTS,

v.

M.E. DEY & CO., INC.,

COMPLAINANT,

v.

CSX TRANSPORTATION, INC.,

THIRD-PARTY RESPONDENT.

OPPOSITION TO THIRD-PARTY RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

I. BACKGROUND

On December 23, 2022, M.E. Dey ("Dey" or "Complainant") filed a Complaint against Hapag-Lloyd (America) LLC, alleging violations of Sections 41102(c) and 41104(a)(14) of the Shipping Act of 1984, 46 U.S.C. § 40101, *et. seq*., as amended (the "Shipping Act").[1] Hapag-Lloyd (America) LLC moved to dismiss these allegations on January 17, 2023, stating that the Federal Maritime Commission ("the Commission") lacked jurisdiction.[2]

[1] *See* Verified Complaint, FMC Docket No. 22-35 (December 23, 2022).
[2] *See* Respondent's Motion to Dismiss, FMC Docket No. 22-35 (January 17, 2023).

On February 1, 2023, Dey filed for leave to amend its Complaint.[3] On February 28, 2023, the Presiding Officer granted Dey's motion for leave, and denied Hapag-Lloyd (America) LLC's motion to dismiss.[4] Dey's Amended Complaint, filed on March 1, 2023, added Hapag-Lloyd AG as a respondent (together with Hapag-Lloyd (America) LLC, "Hapag" or "Respondent").[5] On March 27, 2023, Hapag filed an Answer denying Dey's allegations that Hapag's actions violated the Shipping Act.[6]

On March 31, 2023, the FMC's Bureau of Enforcement, Investigations, and Compliance ("BEIC") filed a motion to intervene in the proceeding.[7] The Presiding Officer granted BEIC's motion on April 10, 2023.[8]

On April 13, 2023, Hapag filed a Motion for Leave to File a Third-Party Complaint against CSX Transportation, Inc. ("Third Party Respondent" or "CSX").[9] On April 27, 2023, the Presiding Officer denied Hapag's motion, stating that Hapag set forth factual allegations that alleged causation and injury to the Complainant, but that the motion did not clearly state a violation of the Shipping Act.[10] Hapag filed a Renewed Motion for Leave to File a Third-Party Complaint on May 4, 2023.[11] On May 8, 2023, the Presiding Officer granted Hapag's motion to file a third-party complaint, stating that the renewed motion clearly alleged violations of Sections 412102(c) and 41104(a)(14) of the Shipping Act.[12]

[3] *See* Motion for Leave to Amend Complaint, FMC Docket No. 22-35 (February 1, 2023).
[4] See Order on Motion to Amend Complaint and Motion to Dismiss, FMC Docket No. 22-35 (February 28, 2023).
[5] *See* Amended Complaint, FMC Docket No. 22-35 (March 1, 2023).
[6] *See* Answer to Amended Complaint, FMC Docket No. 22-35 (March 27, 2023).
[7] *See* BEIC Motion for Leave to Intervene, FMC Docket 22-35 (March 31, 2023).
[8] *See* Order on BEIC's Motion to Intervene, Docket No. 22-35 (April 10, 2023).
[9] *See* Respondent's Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35 (April 13, 2023).
[10] *See* Order on Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35 (April 27, 2023).
[11] *See* Renewed Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35 (May 4, 2023).
[12] *See* Second Order on Motion for Leave to File Third-party Complaint, FMC Docket No. 22-35, (May 8, 2023).

On June 5, 2023, CSX filed a motion to Dismiss the Third-Party Complaint, arguing that the Commission lacks jurisdiction over CSX because CSX is not an ocean common carrier or marine terminal operator.[13] For the reasons set forth below, CSX's Motion to Dismiss should be denied.

II. LEGAL STANDARD

The Federal Maritime Commission's ("FMC" or "the Commission") Rules and Regulations do not expressly provide for motions to dismiss, so Third-Party Respondents rely on the well-established procedure of bringing a motion to dismiss pursuant to the procedures under Federal Rules of Civil Procedure Rule 12(b)1. *See e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor, and Terminal District*, Docket No. 06-02, 2007 FMC LEXIS 33, *4 (August 2, 2007). Accordingly, the standard for the FMC's review of a motion to dismiss is the same as the standard used in federal court. *Id.*

In considering any motion to dismiss, the Presiding Officer must construe the complaint in the light most favorable to the non-moving party and must accept all well-pled facts alleged in the complaint as true. *See Combustion Store Ltd. v. Unigroup Worldwide, Inc.*, Docket No. 15-02, 2015 FMC LEXIS 36, at *14-17 (October 9, 2015). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *See Choice of Texas v. Greenstein*, 691 F. 3d 710 (5th Cir. 2012). Motions to dismiss a complaint for lack of subject matter jurisdiction must assert either a factual attack or a facial attack to jurisdiction. *Combustion Store*, 2015 FMC LEXIS 36, at *14-17. A factual attack challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such

[13] *See* Third-Party Respondent's Motion to Dismiss for Lack of Jurisdiction, FMC Docket No. 22-35 (June 5, 2023).

as testimony and affidavits are considered. *Id.* In a facial attack, all allegations are accepted as true, and the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. *Id.* Here, Third-Party Respondents set forth a facial attack to the Commission's subject matter jurisdiction over CSX. Third-Party Respondents' facial attack to subject matter jurisdiction falls short because the Third-Party Complaint sufficiently establishes that the Commission has jurisdiction over the allegations that Third-Party Respondent violated Sections 41102(c) and 41104(a)(14) of the Shipping Act, as set forth below.

III. ARGUMENT

Third-Party Respondent's Motion to Dismiss should be denied because the Commission has jurisdiction over CSX with respect to the causes of action alleged by Complainant, and further alleged by Respondent, under the Shipping Act. The Commission has jurisdiction over CSX because (1) the claims against CSX arise out of "the same nucleus of operative facts" as the claims against Hapag, over which the Commission has jurisdiction as an ocean common carrier, and (2) because CSX was operating as a marine terminal operator for the shipments at issue and is therefore a regulated entity under the Shipping Act.

a. The FMC Has Jurisdiction Over CSX Because the Claims Against CSX Arise Out of the Same Nucleus of Operative Facts as the Claims Against Hapag

The Amended Complaint alleges that Hapag violated 46 U.S.C. § 41102(c) and § 41104(a)(14) of the Shipping Act. *See* Amended Complaint at 12-13. The Third-Party Complaint alleges that CSX violated 46 U.S.C. § 41102(c) and § 41104(a)(14) of the Shipping Act. *See* Third-Party Complaint at 5-6.

In its recent *TCW v. Evergreen* decision, the Commission held that it had pendant jurisdiction over Evergreen Shipping Agency, which was not itself an entity subject to regulation under the Shipping Act, because the claims against Evergreen Shipping Agency arose out of the

same nucleus of operative facts as those levied against Evergreen Line Joint Service Agreement, over which the Commission had jurisdiction as a VOCC. *TCW v. Evergreen*, Docket No. 1966(I) (December 29, 2022).

Therefore, to establish whether the Commission has jurisdiction over CSX in the instant case, the Commission must determine whether the claims against CSX arise out of the same nucleus of operative facts as the claims against Hapag.[14] Clearly, they do. Both Complainant's claims against Respondent and Respondent's claims against Third-Party Respondent involve the charges that CSX imposed on Dey with respect to the 16 containers located at CSX's terminal facility during September and October 2022.

Third-Party Respondent argues that FMC case law establishes that the Commission does not have jurisdiction over CSX. *See* Third-Party Motion to Dismiss at 19-20. However, Third-Party Respondent relies on precedent that is either non-binding or no longer applicable to the case at issue. Third-Party Respondent cites only to case law that pre-dates the *TCW* decision. *See e.g., Pate Stevedore Company of Mobile, et. al. v. Alabama State Docks Department, et. al. v. Aetna Casualty & Surety Company*, 1987 FMC LEXIS 25 (December 2, 1987, Kline, ALJ); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, Docket No. 09-01, 2011 FMC LEXIS 12 (August 1, 2011). These decisions, while perhaps once relevant to Third-Party Respondent's argument, have been displaced by the reasoning in *TCW* – the logic of which now controls the application of pendant jurisdiction under the Shipping Act.

[14] Pendant jurisdiction under *TCW* rests solely on whether the relevant claims arise from the same nucleus of operative fact. Nevertheless, the relationship between CSX and Hapag is analogous to that of Evergreen Shipping Agency and Evergreen Line Joint Service Agreement, because much like a wholly-owned subsidiary or agent, CSX transported and provided storage facilities for and on behalf of Hapag with respect to the containers at issue in this proceeding. There is no legitimate factual basis to distinguish CSX from other unregulated entities over which the Commission has asserted jurisdiction.

Third-Party Respondent also argues that the application of the FMC's Interpretive Rule on Demurrage and Detention means that the Commission may not assert jurisdiction over the practices of unregulated subcontractors of ocean carriers in connection with inland/intermodal cargo. *See* Third-Party Motion to Dismiss at 10. However, the Commission's Interpretive Rule on Demurrage and Detention is a non-binding interpretive rule. *See* Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29641. While the Interpretive Rule may serve as industry guidance on how the Commission analyzes detention and demurrage disputes, the Rule and related supplemental information is not legally binding precedent, so the Commission is free to depart from it if it provides a reasoned explanation for doing so. *See Vietnam Veterans of Am. V. Sec'y of the Navy*, 843 F. 2d 528, 537-38 (D.C. Cir. 1988). Here, the Commission, through its holding in the *TCW* decision, has created binding precedent on the application of pendant jurisdiction in Shipping Act cases. That binding precedent is more recent than the non-binding interpretative rule and thus sets forth the only jurisdictional analysis that is relevant here.

Furthermore, the precedential nature of the *TCW* case and its application to this case has already been resolved. Third-Party Respondent argues that Respondent's decision to question the application of pendant jurisdiction to Hapag-Lloyd (America) LLC means that Respondent cannot meritoriously argue that pendant jurisdiction applies to CSX. To the contrary, the Presiding Officer's denial of Hapag's Motion to Dismiss further cements the foundation for the Commission's jurisdiction over CSX. Hapag argued that the Commission had no jurisdiction over Hapag-Lloyd (America) and lost that argument. Accordingly, *TCW's* pendant jurisdiction approach is now the law both generally and in this proceeding.

Therefore, due to the Commission's decision in the *TCW* case and the fact that the claims against CSX arise out of the same nucleus of operative facts as the claims against Hapag, the Commission has pendant jurisdiction over CSX, and CSX's Motion to Dismiss should be denied.

b. The FMC has Jurisdiction Over CSX Because CSX is a Marine Terminal Operator and is Therefore a Regulated Party Under the Shipping Act.

Terminals are an essential element of the supply chain. Terminals are in the business of regularly supplying the public with a service of great consequence, and the actions, or lack thereof, of a terminal operator has significant downstream effects on ocean carriers and the shipping public. *See e.g.*, *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C 525, 547-48 (1966). As such, the regulation of marine terminal operators is a vital tool that serves the FMC's mission to ensure a competitive and reliable international ocean transportation supply chain that supports the U.S. economy and protects the public from unfair and deceptive practices. *See id.* Taking a broad, but reasoned, approach as to what entities qualify as marine terminal operators under the Shipping Act furthers the FMC's mission by benefitting those in the public that may otherwise be harmed by entities on which the shipping industry and public depends, but that otherwise fall outside of the scope of the Commission's jurisdiction. *Id.*

CSX acted as a marine terminal operator with regards to the 16 containers at issue. 46 U.S.C. § 40102(15) defines a marine terminal operator as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or *other terminal facilities* in connection with a common carrier" (emphasis added). The term "other terminal facilities" is not further defined by the statute. The Commission has held that "other terminal facilities" is defined as "all those arrangements, mechanical and engineering, which make easier transfer of passengers and goods at either end of a stage of transportation service." *See Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946). Here, the CSX facility was integral in the transfer of the containers

from rail to motor transport, so it is clearly an "other terminal facility" as defined by FMC precedent.

The regulations also directly contemplate the classification of a railroad as a marine terminal operator. 46 CFR § 525.1(13) states that the designation of an entity as a marine terminal operator "includes, but is not limited to, terminals owned or operated by states and their political subdivisions; *railroads who perform port terminal services not covered by their line haul rates*; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities" (emphasis added).

While railroads are to be classified as marine terminal operators when they are performing port terminal services, the FMC regulations do not preclude such classification of railroads in other circumstances. To the contrary, FMC case law and the plain language of the regulations suggest that entities other than ports can act as marine terminal operators in certain instances. CSX is a marine terminal operator because, regarding the shipments at issue and the importance of rail facilities in intermodal movements, it qualifies as an "other terminal facility" as defined by FMC case law. It was CSX's responsibility to transfer the containers from rail to motor transport in Nashville so that the intermodal transport of the containers could run smoothly and on time. In light of the forgoing, CSX should be classified as a marine terminal operator with respect to the container shipments at issue in this proceeding.

IV. CONCLUSION

For the foregoing reasons, CSX's Motion to Dismiss Third-Party Complaint should be denied.

DATE: June 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 20, 2023, a true copy of the foregoing Opposition filed via electronic mail with the Secretary of the Federal Maritime Commission, and a copy was served via electronic mail on the following counsel:

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