

BEFORE THE
FEDERAL MARITIME COMMISSION

TIR AUTO TRANSPORT LLC,

Complainant,

v.

DOCKET No. 23-07

V&S BROTHERS, INC. and
V&S CARGO, INC.,

Respondents.

**RESPONDENTS V&S BROTHERS, INC. AND V&S CARGO, INC.'S
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM**

Respondents, V&S BROTHERS, INC. (“VBI”) and V&S CARGO, INC. (“VCI”) (together, “V&S”), by and through their undersigned counsel, hereby respectfully submit their Answer and Affirmative Defenses, and VBI submits its Counterclaim, to the Complainant filed by Complainant, TIR AUTO TRANSPORT LLC (“TIR”), and alleges as follows:

ANSWER

Parties

Admitted that VCI is a corporation registered in the State of New Jersey and has a principal place of business at 395 Route 34, Matawan, NJ 07747, email s@vsbrothers.com, and that VBI is a registered used-car dealer and freight forwarding Non-Vessel-Operating Common Carrier company and has a principal place of business at 395 Route 34, Matawan, NJ 07747, email s@vsbrothers.com.

Without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this section and, therefore, those allegations are denied.

Jurisdiction

Admitted for purposes of jurisdiction. The remaining allegations of this section are denied.

Statement of the Factual Allegations

1. Denied that V&S “engaged on a customary basis” in not following shipping instructions or releasing fully-paid-for containers for any reason. Without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this section and, therefore, those allegations are denied.

2. Admitted that the containers were sent to the country of Georgia. The remaining allegations in Paragraph 2 of the Complaint are denied.

3. Denied. V&S have provided TIR with access to TIR’s online account and access to their accounting records, as confirmed by Philip Lee of the FMC Dispute Resolution Office.

4. Without knowledge or information sufficient to form a belief as to the truth of the allegations of this section and, therefore, those allegations are denied.

Romanian Containers

5. Denied. As of the time of this filing, V&S has made payments sufficient to secure the release of all the containers. The sums that V&S paid to release these containers remain in dispute between the parties.

Failure to follow in-land freight instructions:

6. Denied.

7. Without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph pertaining to TIR being “forced to pay these charges” and, therefore, those allegations are denied. The remaining allegations in this Paragraph are denied.

8. Without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph pertaining to “inexplicable” fee and, therefore, those allegations are denied. The remaining allegations in this Paragraph are denied.

Unidentified charges and inflated invoices

9. Without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph stating that “TIR AUTO began to notice unidentified charges” and, therefore, those allegations are denied. The remaining allegations in this Paragraph are denied.

10. Denied. TIR’s allegation has no support in material fact or applicable law.

Causes of Action-All Respondents

11. Responses to the allegations contained in Paragraphs 1 through 10 above are realleged as if set forth herein verbatim.

12. Denied. TIR cannot substantiate its cause of action against VCI or VBI.

Damages

Denied. TIR is not entitled to recover any damages in this action from V&S.

AFFIRMATIVE DEFENSES

As their First Affirmative Defense, V&S state that TIR's cause of action is barred, in whole or in part, by its own violation of the Shipping Act. As more fully set forth in the Counterclaim below, which is incorporated herein by reference, TIR violated the Shipping Act by failing to pay in full the amounts due to VBI without any legal justification or excuse, therefore.

As their Second Affirmative Defense, V&S state that TIR is barred from recovery, in whole or in part, by the doctrines of set-off or off-set. To the extent TIR has suffered any damages for which V&S are liable, which is expressly denied, such damages should be set-off, in an amount to be proven at trial, all amounts due and owing to V&S, including sums for unpaid shipments and for demurrage paid which rightfully should have been paid by TIR.

As their Third Affirmative Defense, V&S state that this action is moot. At the time of this filing, all five containers referenced in the Complaint have their demurrage and detention charges paid by V&S (subject to further dispute and allocation between the parties in this proceeding) and have been released. TIR's claim is moot and does not present a case or controversy.

As their Fourth Affirmative Defense, V&S state that TIR is barred from recovery, in whole or in part, because its alleged damages were caused by conduct of TIR or third parties (including the war in Ukraine) whose conduct V&S had no reason to anticipate and for which V&S are not responsible and by the doctrine of unclean hands. Upon information and belief, TIR's failure to provide clear instructions, failure

to pay freight billing and demurrage, and intentional misrepresentations to V&S are the cause of any harm that TIR has suffered.

As their Fifth Affirmative Defense V&S state that TIR is barred from recovery, in whole or in part, because its alleged damages were caused by supervening or intervening causes, including but not limited to the force majeure event, the Russia-Ukraine War. The Parties' 2017 "Forwarding Contract No. 01," possibly the same "forwarding contract" referenced throughout the Complaint, contains a "Force Majeure" Section which excuses performance upon the occurrence of "circumstance which prevent either Party hereto from the performance" under the contract. *See attached Exhibit A*, "Forwarding Contract," § 5, p. 3. The Russia-Ukraine War altered shipping lanes and port access, causing certain shipments to be redirected to other ports. V&S had and continue to have no control over alterations to shipping routes and port access affected by the Russia-Ukraine War. To the extent that any containers were unable to be sent to their intended destination, the Russia-Ukraine War was the sole cause and not any action of V&S.

As its Sixth Affirmative Defense, V&S state that TIR is barred from recovery, in whole or in part due to its own failure to mitigate its damages, if any. Upon information and belief, TIR failed to adequately pursue other means of delivery where it alleges V&S failed to make proper shipments. Moreover, TIR intentionally elected not to pay demurrage charges for the release of containers when it was fully able to do so.

As its Seventh Affirmative Defense, V&S state that TIR's Complaint fails to state a claim upon which relief can be granted. TIR improperly comingles facts and fails to set forth clear and ultimate facts giving rise to the cause of action alleged against V&S.

As its Eighth Affirmative Defense, V&S state that TIR cannot maintain the instant cause of action, as it has failed to attach the following documents to its Complaint, as required by *Key Club Assocs., Ltd. P'ship v. Biron*, No. 91-1573-CIV-T-17B, 1992 WL 56797, at *2 (M.D. Fla. Mar. 17, 1992) (quoting *Goshen Veneer Co. v. G. & A. Aircraft, Inc.*, 3 F.R.D. 344 (E.D. Pa. 1944), a seminal case that held that in disputes regarding a contract, plaintiff has the options of quoting the writings verbatim, attaching the writings as exhibits or pleading them according to their legal effect): i) the "forwarding contract(s);" ii) the "May 2, 2022 email;" iii) invoice for damages alleged in Paragraph 4; iv) receipts showing full payment for Romanian containers; v) various instructions by TIR mentioned in Complaint; and vi) invoices from V&S containing alleged fees.

As its Ninth Affirmative Defense, V&S state that TIR's damages are too speculative in nature or have not been pled with the required specificity.

As its Tenth Affirmative Defense, V&S states that TIR's claims are barred by the doctrines of waiver, estoppel, assumption of the risk, and acceptance.

As its Eleventh Affirmative Defense, V&S state they complied in full, with all provisions of and performed work in compliance with the executed agreements.

As its Twelfth Affirmative Defense, V&S states that TIR failed to comply with conditions precedent in filing the lawsuit. Specifically, V&S and TIR were in settlement negotiation with clear agreement that TIR would not file a complaint. Philip Lee of the FMC Dispute Resolution Office confirmed such discussions. TIR breached this agreement.

As its Thirteenth Affirmative Defense, V&S states that they committed no Shipping Act violation and are not liable to TIR on the cause of action alleged in the Complaint. TIR brings a breach of contract action, not a Shipping Act violation.

As its Fourteenth Affirmative Defense, V&S states that its practices were not the proximate cause of TIR's alleged loss.

V&S state that TIR lacks jurisdiction to bring this suit through the FMC. The Complaint fails to state a claim under Section 41102(c) of the Shipping Act by merely restating the language of the Act and making conclusory assertions.

RESPONDENT VBI'S COUNTERCLAIM

VBI brings this claim pursuant to 46 U.S.C. § 41102(a) and 46 C.F.R. § 545.2.

1. VBI realleges and reincorporates all admissions, denials, and defenses as if set forth herein verbatim.

2. V&S Brothers, Inc. is a registered used-car dealer and freight forwarding Non-Vessel-Operating Common Carrier company having the following principal place of business: 395 Route 34, Matawan, NJ 07747.

3. Upon information and belief, TIR Auto Transport, LLC is a limited liability having the following principal place of business: Tiraspol, Moldova, 133 K. Marx St., Apt. 121.

4. VBI has provided transportation services for TIR but TIR has failed to fulfill its monetary obligation for those services despite such services being provided.

5. TIR owes \$80,268.51 plus interest, for such transportation services. *See attached Exhibit B*, “TIR Customer Balance Detail.” TIR has engaged in a pattern and practice of employing unfair devices or means in order to secure transportation services for less than agreed rates.

6. VBI also transported five containers for TIR, which were later diverted to Romania as a result of the war in Ukraine. Three were shipped with Maersk as carrier under non-negotiable waybills, Container Nos. 224561898, 224499043, and 224669441 (the “Maersk Containers”), and two with Hapag-Lloyd as carrier under sea waybills, Container Nos. 66545866 and 67545351, (the “Hapag Containers”). *See attached Composite Exhibit C*, “Maersk Waybills,” and *Composite Exhibit D*, “Hapag Waybills.”

7. While docked in Romania, the Maersk Containers incurred \$47,930.00 of demurrage and detention charges. *See attached Composite Exhibit E*, “Maersk Demurrage and Detention Charge Invoices.”

8. VBI paid the demurrage and detention charges incurred on the Maersk Containers on August 17, 2023, and the Maersk Containers were subsequently released to TIR.

9. While docked in Romania, the Hapag Containers incurred \$30,041.80 of demurrage and detention charges. *See attached Composite Exhibit F*, “Hapag Demurrage and Detention Charge Invoices.”

10. VBI paid the demurrage and detention charges incurred on the Hapag Containers on August 30, 2023, and the Hapag Containers were subsequently released to TIR.

11. The demurrage and detention charges were the responsibility of TIR.

12. By not reimbursing VBI for its payment of the demurrage and detention charges and not paying VBI for the prior transportation services provided, TIR has effectively obtained or attempted to obtain transportation of its containers for less than the properly applicable rates.

Count I: Violation of Section § 41102(a) of the Shipping Act

13. VBI realleges and reincorporates Paragraphs 1 through 12 of the Counterclaim as if set forth herein verbatim.

14. TIR obtained or attempted to obtain transportation for its property at less than the properly applicable rates through unfair and unjust means, i.e., by failing to pay in full charges owed to VBI or reimburse VBI for its payment of the demurrage and detention charges for the Maersk and Hapag containers.

WHEREFORE, Respondents, V&S Brothers, Inc. respectfully requests that this Counterclaim be granted for an award for the amount owed by TIR for transportation services of \$80,268.51, plus interest, the reimbursement for the

demurrage and detention charges paid of \$77,971.80 plus interest, reasonable costs and attorneys' fees, and any other relief that the Commission deems just and proper.

Dated: September 5, 2023

Respectfully submitted,

/s/ Andrew J. Steif

Andrew J. Steif

Florida Bar No. 42475

Justin T. Delise

Florida Bar No. 1039356

GUNSTER, YOAKLEY & STEWART,
P.A.

1 Independent Drive, Suite 2300

Jacksonville, FL 32202

Phone: (904) 354-2980

Fax: (904) 354-2170

Primary: asteif@gunster.com

idelise@gunster.com

Secondary: krubin@gunster.com

*Attorneys for V&S BROTHERS, INC.
and V&S CARGO, INC.*

CERTIFICATE OF SERVICE

I certify that, on September 5, 2023, a true and correct copy of the foregoing Notice was filed via electronic mail with the Secretary of the Federal Maritime Commission at secretary@fmc.gov, and a copy was served via electronic mail on the following counsel:

Garry Pogil
1120 6th Avenue, 4th Floor
New York, NY 10036
Phone: (212) 626-6825
Fax: (646) 349-3468
garry.pogil@gmail.com

*Attorney for TIR AUTO
TRANSPORT LLC*

/s/ Andrew J. Steif _____
Andrew J. Steif