

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 24-04

ICL USA, Inc.,
COMPLAINANT,

v.

Dependable Highway Express, Inc.,
RESPONDENT.

**ICL RESPONSE TO RESPONDENT’S SUPPLEMENTAL REPLY AND
REQUEST FOR REINSTATEMENT OF MSC TO THIS PROCEEDING**

Complainant ICL USA, Inc. (“ICL”) filed a notice of dismissal, dismissing Mediterranean Shipping Company, (USA) Inc. on behalf of Mediterranean Shipping Company, S.A. (“MSC”) from this proceeding on March 1, 2024.

Respondent Dependable Highway Express, Inc. (“DHE”) filed a supplement on March 6, 2024 to its Reply that it filed on February 27, 2024. ICL files this response to DHE’s supplement requesting that the Commission deny DHE’s motion to dismiss and requesting that MSC be reinstated in this case, as a result of developing facts.

A. DHE’s arguments as to the billed party are inconsistent with its position, as the billed party—and do not offer any new information as to the motion to dismiss that has been fully briefed.

While the FMC’s new Final Rule¹ has little bearing on this proceeding, DHE’s arguments based on the rulemaking record are irrelevant to this proceeding because *DHE was the billed party*. DHE argues that the FMC does not have jurisdiction over DHE and highlights that “the billed party is in a better position . . . to analyze the accuracy of the charge.” Supp. Reply at 1-2 (citing 89 Fed. Reg. at 14,356-57). Far from the rulemaking “validat[ing] everything that [DHE] has been arguing” (Supp. Reply at 1), DHE has always been the billed party vis-à-vis ICL for the invoices from MSC. MSC invoiced DHE directly. And DHE is the proper contractual party per the UIIA agreement between MSC and DHE that provided for MSC invoicing DHE detention (per diem). MSC, as the billing party, had the obligation to invoice the correct party. *See* 89 Fed. Reg. at 14,330-63. ICL clearly was not the correct party to be billed since it had obtained waivers from MSC for all the pertinent detention charges in this matter.

Additionally, DHE advanced detention charges on its own volition or negligently—but not on behalf of ICL—because ICL was never the billed party. Yet, ICL took the initiative and expense to have all invoices to DHE waived. DHE advanced detention invoices at its own risk since pursuant to its own motor carrier rules, DHE was required to obtain ICL’s approval to advance charges, but DHE never requested this approval from ICL nor did ICL ever extend this approval. Compl. ¶ 15. Contrary to the cited material from the Final Rule, in this case the trucker (DHE)—the billed party—was the most knowledgeable of a) the facts of the invoices it received (not ICL); b) the advances of payments DHE made to MSC, and c) the payments it

¹ FMC, *Final Rule on Demurrage and Detention* 89 Fed. Reg. 14,330 (Feb. 26, 2024) (effective May 28, 2024).

received from MSC. On the other hand, DHE had no incentive to mitigate or to make efforts to waive detention because DHE is commercially incentivized to blindly advance funds, even contrary to its own rules, due to the interest rates it charges on those amounts, as those sums are substantial. Comp. ¶¶ 15, 21, 30-33.

DHE's opposition to participating in this FMC proceeding is consistent with making the resolution of these alleged unpaid charges difficult, since as noted, DHE's claims for interest are mounting dramatically. This is even more baffling since the major recipient of monies as a result of this proceeding would be DHE, if the FMC finds that MSC does owe them the unrefunded amounts they claim. Because of this, ICL requests that DHE's motion to dismiss be denied.

B. Dismissal of MSC and Request for Reinstatement

ICL dismissed MSC from the FMC proceeding when it received the following from MSC:

1. Proof of DHE paying detention by credit card to MSC in the amount of \$142,115.
2. Statement that all monies had been refunded by MSC to DHE in the same amount.
3. MSC confirmed that it made a cash refund of \$142,115 to DHE for all monies owed to it through a check to DHE which was cashed November 21, 2023.

Upon receipt of this confirmation from MSC, ICL petitioned the FMC to dismiss MSC from the proceeding without prejudice, thinking the matter had been resolved between DHE and MSC.

But to ICL's surprise, DHE counsel communicated to ICL counsel on March 1, 2024 (following ICL's filing) that MSC still owed DHE a refund of \$45,565:

“Based on the FMC Complaint (page 11), and the Opposition to DHE's Motion to Dismiss (page 22), it appears that ICL's records show that the amount of remaining detention that DHE has paid to MSC for ICL shipments that has not been refunded is \$45,565.”

ICL counsel immediately made this information known to MSC counsel, and to-date ICL counsel has not received any explanatory information from MSC as to the claimed \$45,565 in refunds still owed to DHE by MSC.

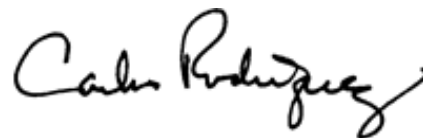
What is clear is that these detention invoices, alleged advances of payment, and issues dealing with amounts refunded—contrary to DHE’s assertions—are not best resolved by ICL since ICL is worst positioned of all three parties to know these facts. The activities in dispute are within the sole knowledge and control of MSC and DHE, as these facts have now demonstrated. Based on this, ICL requests that MSC be brought back into the case upon the Commission’s Order and through this filing and that MSC be required to file an Answer within a reasonable time, with respect to DHE’s claim that it is owed \$45,565 in monies paid for detention that had been previously waived. DHE and MSC are clearly the right parties for that determination.

Conclusion

As such, ICL respectfully requests that the Commission deny DHE’s motion to dismiss and reinstate MSC in this case.

Dated: March 6, 2024

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this **sixth day of March 2024**, a copy of the foregoing Response to Respondent's Supplemental Reply and Request to Reinstate MSC has been served upon all counsel of record in accordance with 46 C.F.R. § 502.

A handwritten signature in black ink, appearing to read "Julia Banegas", written in a cursive style.

Julia Banegas
Counsel for ICL USA, Inc.