

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

ICL USA, INC., *Complainant*

v.

DEPENDABLE HIGHWAY EXPRESS, INC. AND
MEDITERRANEAN SHIPPING COMPANY, (USA) INC., ON
BEHALF OF MEDITERRANEAN SHIPPING COMPANY, S.A.,
Respondents.

DOCKET NO. 24-04

Served: March 15, 2024

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

ORDER ON DEPENDABLE’S MOTION TO DISMISS AND ICL’S NOTICE OF DISMISSAL

I. Introduction

On February 5, 2024, Respondent Dependable Highway Express, Inc. (“Dependable”) filed a motion to dismiss the complaint (“Motion”) on behalf of itself but not the other Respondent, Mediterranean Shipping Company S.A. on behalf of MSC Mediterranean Shipping Company (USA) Inc. (“MSC”). On February 20, 2024, Complainant ICL USA, Inc. (“ICL”) filed a response (“Opposition”) to Dependable’s motion to dismiss. On February 27, 2024, Dependable filed a reply (“Reply”) in support of its motion and on the same day filed an errata to its reply.

On March 1, 2024, ICL filed a notice of dismissal requesting that MSC be dismissed without prejudice. On March 6, 2024, Dependable filed a supplement to its reply (“Supplemental Reply”) addressing the notice of dismissal. Later on March 6, 2024, ICL filed a response to Dependable’s supplemental reply and a request for reinstatement of MSC to this proceeding (“ICL Response Supp. Reply”). The request for dismissal is discussed prior to discussing the motion to dismiss.

II. Dismissal of MSC

ICL’s request to dismiss MSC without prejudice and its subsequent request to reinstate MSC are addressed first. The notice of dismissal was filed pursuant to Commission Rule 72(a)(1) which states:

When no settlement agreement is involved, the complainant may dismiss an action without an order from the presiding officer by filing a notice of dismissal before the opposing party serves either an answer, a motion to dismiss, or a

motion for summary decision. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

46 C.F.R. § 502.72(a)(1).

Thus, a complainant “may dismiss an action without an order from the presiding officer” before “the opposing party serves either an answer, a motion to dismiss, or a motion for summary decision.” 46 C.F.R. § 502.72(a)(1). Here, MSC had not filed an answer, motion to dismiss, or motion for summary judgment. Therefore, the proceeding against it could be dismissed as a matter of course. However, before a dismissal was entered, ICL filed a request to reinstate MSC. Requests are generally treated as motions, *see* initial order at 4, and it is therefore appropriate for the undersigned to rule on the motion for reinstatement.

The notice of dismissal states that MSC is being dismissed “because MSC has now provided proofs of monies paid by Respondent Dependable Highway Express (“DHE”) which were refunded to DHE in their entirety (less \$270) by MSC.” Notice at 2. The request to reinstate MSC indicates that Dependable’s counsel “communicated to ICL counsel on March 1, 2024 (following ICL’s filing) that MSC still owed DHE a refund of \$45,565.” ICL Response Supp. Reply at 3.

Pursuant to Rule 72(a)(1), a notice of dismissal is without prejudice and the specific notice of dismissal here explicitly requested that the dismissal be without prejudice. Because a dismissal would be without prejudice, the proceeding could be reinstated against MSC. However, the dismissal was never issued. Therefore, it is more efficient to treat the request for reinstatement as a motion by ICL to deny the notice of dismissal it filed. It could also be treated as a request to withdraw the notice, however, the notice and related filings are relevant to other issues and better left in the record. Under these unusual circumstances, ICL’s request to deny the notice of dismissal is granted and it is requested that dismissal pursuant to ICL’s March 1, 2024, notice not be issued. MSC should respond to the complaint by March 29, 2024.

III. Motion to Dismiss

A. Parties’ Arguments

Respondent Dependable moves to dismiss, asserting that the Commission lacks personal jurisdiction over Dependable because it is not a regulated entity and the complaint fails to state a claim against Dependable upon which relief can be granted, and Dependable also moves for sanctions against ICL. Motion at 5-15.¹

Complainant ICL contends that Dependable’s motion to dismiss should be denied, arguing that: the verified complaint adequately alleges FMC’s jurisdiction over the disputed matter and parties therein; the verified complaint adequately states a claim for a Shipping Act violation by Dependable; and any claims of filing this case based on improper purpose are meritless. Opposition at 12-25.

¹ All four of Dependable’s filings lack page numbers, in violation of the initial order. Future filings lacking page numbers may be summarily rejected.

In its reply, Dependable asserts that: it is not a “regulated entity” and does not “become” a regulated entity by virtue of the conduct alleged; precedent involving FMC proceedings initiated by aggrieved non-regulated third parties or by the Commission is inapplicable; *TCW v. Evergreen* is distinguishable on its facts and the “common nucleus of operative facts” doctrine is not applicable; and Dependable is not a necessary or indispensable party under FRCP 19. Reply at 3-15.

Dependable filed a supplemental reply, asserting that there are recent changes to law and fact, arguing that: with the dismissal of MSC, the allegations against Dependable based on MSC’s violations of the Shipping Act fail as a matter of law to state a claim against Dependable upon which relief can be granted; the remaining allegation that Dependable charged a 10% administrative fee without actually paying detention does not confer jurisdiction over Dependable and fails as a matter of law to state a claim upon which relief can be granted; and Dependable has never been a “necessary and indispensable” party under FRCP 19 and has never had evidence that was “necessary and indispensable.” Supplemental Reply at 3-6.

ICL filed a response to the supplemental reply, asserting that Dependable’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, which has been fully briefed. ICL Response Supp. Reply at 2-3.

Supplemental replies are generally not permitted and significant portions of this supplemental reply are not related to a change in law or facts. The supplemental reply will be permitted this time to expedite the proceeding, however, in the future such supplements may not be accepted. Because Dependable’s supplemental reply is accepted, this response from ICL is also accepted.

B. Motion to Dismiss Standard

Although the Commission’s Rules of Practice and Procedure (“Rules”) do not explicitly provide for motions to dismiss, Rule 12 of the Commission’s Rules 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. Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). F.R.C.P. 12. Motions to dismiss a complaint for lack of jurisdiction may assert either a facial attack based on the pleadings or a factual attack based on matters outside the pleadings. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 WL 7144008, at *11 (FMC Aug. 1, 2011).

When “jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies.” *MAVL Capital v. Marine Transport Logistics*, 2 F.M.C.2d 198, 203, 2020 WL 13512925, at *5 (FMC Oct. 29, 2020) (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 WL 13512925, at *5 (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 2015 WL 9426189, at *12 (FMC Dec. 18, 2015)).

C. Jurisdiction

The complaint alleges violations of 46 U.S.C. § 41104(a)(2)(A), § 41102(c) and 46 C.F.R. § 545.4 and § 545.5 and alleges that Dependable is a motor carrier which “performed port drayage services for ICL” and which “acted as an entity which assessed per diem related charges while not qualified to do so as a motor carrier, ocean common carrier, and/or a marine terminal operator in violation of the Shipping Act.” Complaint at 1-2. The complaint further alleges that the FMC has “personal jurisdiction over [Dependable] as a party for purposes of this proceeding when it acted in some instances directly or indirectly in conjunction with MSC as a person that was invoiced per diem while acting as a motor carrier by picking up container loads and returning empties to MSC” and that while Dependable “acted on behalf of ICL,” “invoiced ICL for such demurrage and detention and other related per diem charges,” and “added a 10% surcharge for such per diem charges, for which it had no authority to assess pursuant to the Shipping Act.” Complaint at 2-3. Specifically, the complaint alleges, Dependable “allegedly as a trucker, provided invoicing and collection services of detention or per diem in the liner trade on behalf of MSC.” Complaint at 3.

Dependable asserts that it is not a regulated entity and that the complaint does not allege that it is a regulated entity, stating that:

There is no legal or regulatory support for the allegation that a trucker, dragged into a billing dispute between two parties to a service contract, who has been forced to pay detention charges in order to avoid being “shut out” of a port terminal, and who transparently seeks reimbursement of such charges from its NVOCC customer by including the VOCC’s original detention invoices within its bills, thereby becomes subject to Commission jurisdiction.

Motion at 6-7. Dependable points to Commission statements that “ocean carriers should bill their customers, rather than imposing charges contractually-owed by cargo interests on third parties.” Motion at 7-8 (quoting 85 FR 29638, at 29661); *see also* Supp. Reply at 1-2. Therefore, Dependable argues that it was not an agent of MSC and that “drayage truckers are largely innocent third-parties being dragged into billing disputes involving service contracts between two parties unrelated to the truckers.” Motion at 9. Dependable states that it “is not an originating biller or assessor of charges in violation of the Shipping Act, instead it rather unfairly bears the brunt of such charges. And, having been forced to pay detention charges and in seeking reimbursement, Dependable is not ‘acting on behalf of’ or ‘in conjunction with’ regulated entities.” Motion at 9-10.

ICL contends that the Commission has jurisdiction over Dependable because (1) Dependable “was acting in conjunction with MSC and is therefore a regulated entity under the Shipping Act,” (2) Dependable “is a necessary and indispensable party to this matter,” and (3) the claims against Dependable “arise out of ‘the same nucleus of operative facts’ as the claims against MSC.” Opposition at 12.

“It is elementary law that a tribunal should determine its jurisdiction before addressing the merits of a controversy brought before it. This principle is especially relevant when the tribunal has limited jurisdiction such as this Commission.” *Crowley Liner Serv., Inc. and Trailer*

Bridge, Inc. v. Puerto Rico Ports Auth., 29 S.R.R. 394, 396, 2001 WL 1632555, at *3 (ALJ Sept. 20, 2001) (citing *The Government of the Territory of Guam v. Sea-Land Serv., Inc.*, 28 S.R.R. 252, 265 (FMC 1998); *River Parishes Co. Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 762 (FMC 1999); *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1519 (ALJ 2000)). “Complainants bear the burden of demonstrating that the Commission has jurisdiction to adjudicate their claims.” *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C.2d 403, 406 (FMC July 16, 2019) (citing *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201 (ALJ 1998), *aff’d* 28 S.R.R. 751 (FMC 1999)).

A carrier’s status is determined by the nature of its service offered to the public and not upon its own declarations. *Bernhard Uhlmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (FMC Feb. 11, 1952). The Commission has found that no single factor of an entity’s operation is determinative of its status as a common carrier. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC Feb. 3, 1999); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC Sept. 28, 1965) (“*Containerships*”). Rather, “the Commission must evaluate the indicia of common carriage on a case-by-case basis.” *Rose International, Inc. v. Overseas Moving Network*, 29 S.R.R. 119, 162, 2001 WL 865708, at *44; *see also Worldwide Relocations*, 32 S.R.R. at 503, 2012 WL 11914713, at *5-6 (FMC Mar. 15, 2012).

To determine if an entity is a common carrier, it “is important to consider all the factors present in each case and to determine their combined effect.” *Containerships*, 9 F.M.C. at 65. The Commission has indicated that it will “look beyond documentary labels.” *Containerships*, 9 F.M.C. at 66. For example, “it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status.” *Containerships*, 9 F.M.C. at 66. To determine whether an entity meets this standard, “an intermediary’s conduct, and not what it labels itself, will be determinative of its status.” *Bonding of Non-Vessel-Operating Common Carriers*, 56 Fed. Reg. 51,987 at 51,991 (Oct. 17, 1991). This is a fact intensive inquiry.

In MAVL Capital, the Commission reversed the ALJ’s dismissal of a section 41102(c) claim about shipment of a Mercedes for lack of jurisdiction and failure to state a claim, stating: the “ALJ erred, however, in framing the question as whether the parties had a contract to ship the Mercedes overseas. Rather, . . . the jurisdictional question in § 41102(c) cases is whether the respondent was acting as a regulated entity when it allegedly violated the Shipping Act.” *MAVL Capital*, 2 F.M.C.2d 198, 204, 2020 WL 13512925, at *6 (citing *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C. 2d 403, 415 (FMC 2018)).

Here, Dependable claims that it “has nothing to do with this dispute,” stating that “Dependable is not a party to the service contract between Complainant and MSC Respondents, had no control over MSC Respondent’s calculation of free days, had no influence over MSC Respondents’ acceptance of empty container returns, and had no involvement in MSC Respondent’s decision to invoice detention charges.” Reply at 2.

However, Dependable acknowledges that:

MSC Respondents billed Dependable for certain detention charges, Dependable paid such charges, and Dependable sought reimbursement from Complainant of such charges in its federal court action, in addition to a 10% administrative fee pursuant to Dependable's online tariff terms and conditions that were incorporated by reference into its written contract with Complainant.

Supplemental Reply at 3 n.6. Dependable mentions at least three times in its motion that it was "forced to pay detention charges" to "avoid being 'shut out.'" Motion at 6, 9, 10, 14. Dependable's reply errata states that "Dependable is only seeking from Complainant recovery of the 10% administrative fee for detention charges that it in fact has actually advanced and paid to carriers." Reply Errata at 1.

Therefore, Dependable admits that it paid charges and sought reimbursement for charges, with an additional fee, imposed pursuant to the MSC—ICL service contract. Moreover, the complaint specifically alleges that "[t]hese charges and attempted collection of such charges consist of violations of the provisions of the Shipping Act, which require that only ocean common carriers as defined at 46 U.S.C. § 40102(18) and maritime terminal operators as defined at 46 U.S.C. § 40102(15) may assess and collect such charges." Complaint at 4. So, it appears that the complaint alleges that Dependable was improperly acting as a regulated entity.

Moreover, Dependable argues that the notice of dismissal of MSC means that either (i) MSC "did not bill detention charges during periods when empty containers could not be returned, or (ii) refunded to Complainants any detention that Dependable had paid to MSC Respondents that had been charged for periods when empty containers could not be returned." Supplemental Reply at 3-4. But any refunds from MSC for charges in violation of the Shipping Act may be paid to Dependable and ICL's desire to keep Dependable in the proceeding suggests that Dependable may not have passed those reimbursements on to ICL. Clearly the facts are disputed, and it is not clear that the parties know who has paid what fees. Discovery will help clarify the factual record which will in turn help to clarify the role played by Dependable in these transactions.

Determination of jurisdiction requires an analysis of whether Dependable is or was acting as a regulated entity. This issue is also central to determining the merits of the claim. "[T]hough the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer its jurisdictional decision until the merits are heard." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992). Accordingly, at this time, Dependable will not be dismissed on the basis of jurisdiction to give the parties an opportunity to conduct discovery, clarify the roles of each entity, and brief the merits of the proceeding.

D. Failure to State a Claim

Dependable asserts that "the statute only prohibits conduct by the regulated entity, the common carrier" and therefore, the complaint fails to state a claim upon which relief can be granted. Motion at 11-13. ICL contends that it "has stated a claim for relief that is plausible on its face" and that this claim should be heard by the FMC. Opposition at 20-23.

Dependable's arguments here focus on whether or not it was a regulated entity. As discussed above, the complaint makes a plausible claim that Dependable was acting as a regulated entity. Therefore, at this time, Dependable will not be dismissed on the basis of failure to state a claim. Complainant will have the burden of proof and must be able to establish that Dependable was a regulated entity. Dependable should respond to the complaint by March 29, 2024.

E. Sanctions

Given the findings above, sanctions are not appropriate and Dependable's requests for sanctions are denied.

IV. Schedule

The parties are encouraged to utilize the Commission's Office of Consumer Affairs and Dispute Resolution Services ("CADRS") to determine whether refunds have been made and if so, to whom. This factual exchange may assist the parties in resolving the proceeding. In the joint status report with proposed schedule, required by the initial order, consultation with CADRS is required.

Respondents shall file their answer by March 29, 2024, and the parties should file a joint status report with a proposed schedule as required by the initial order by April 12, 2024. To expedite the discovery process, any discovery exchanged by the parties in any other cases may be utilized in this proceeding. The parties should also discuss whether there are facts to which they can stipulate, to limit the need for discovery.

The parties are reminded that all filings must be sent to both the secretary@fmc.gov and copied to judges@fmc.gov. In addition, all filings must have page numbers. The parties should review and follow the requirements in the initial order.

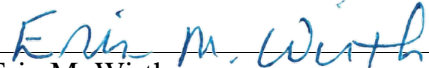
V. Order

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

ORDERED that ICL's request to deny the notice of dismissal is **GRANTED** and it is requested that a notice of dismissal pursuant to ICL's March 1, 2024, Notice of Dismissal not be issued. It is

FURTHER ORDERED that Dependable's motion to dismiss be **DENIED**. It is

FURTHER ORDERED that Respondents should file their response to the complaint by March 29, 2024, and the parties shall contact CADRS and shall submit a joint status report with proposed schedule by April 12, 2024.


Erin M. Wirth
Chief Administrative Law Judge