

BEFORE
THE FEDERAL MARITIME COMMISSION

DOCKET NO. 24-04

ICL USA, Inc.

vs.

Dependable Highway Express, Inc. and Mediterranean
Shipping Company, (USA) Inc. on behalf of Mediterranean
Shipping Company, S.A.

**RESPONDENT’S REPLY TO COMPLAINANT’S OPPOSITION TO MOTION TO
DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM**

For the reasons more fully set out below, Respondent Dependable Highway Express, inc. (“Dependable”, or “DHE” in Complainant’s Opposition) respectfully submits this Reply to Complainant ICL USA, Inc.’s Opposition to Dependable’s Motion to Dismiss the complaint (“Complaint”), as against Dependable only, for lack of jurisdiction over Dependable and for the failure to state a claim against Dependable upon which relief can be granted, and Request for sanctions.

REPLY

Like the Complaint, Complainant’s Opposition to Dependable’s Motion reads as a cacophony of jumbled and confusing issues, most of which have little to do with the preliminary and foundational issue whether the Commission has regulatory jurisdiction over Dependable, a non-regulated entity.

To simplify, this is a fairly standard dispute arising out of the service contract between an NVOCC (Complainant) ¹ and a VOCC (Mediterranean Shipping Company, S.A. and Mediterranean Shipping Company (USA), Inc. - previously identified together as “the MSC Respondents”). The dispute involves the terms and conditions in the service contract involving free days and detention charges and whether in violation of the Shipping Act the MSC Respondents charged detention during periods when empty containers could not be returned.

Dependable has nothing to do with this dispute. 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.

Completely separate from its service contract with MSC Respondents, ICL has a written contract with Dependable which governed port drayage services performed between August 2021 and March 2022. ICL has not paid Dependable in full for the port drayage services performed. In August of 2023 Dependable filed a civil action against Complainant in federal court in California based on contract and state law theories in order to enforce payment of the fees and charges owing. Included in that action is a claim for reimbursement of certain detention charges that MSC Respondents billed to Dependable and that Dependable paid in order to avoid being “shut out” of MSC Respondent’s terminal in southern California.

¹For simplicity’s sake, and primarily because of its lack of knowledge, Dependable has referred to the “service contract” at issue in this matter as being between Complainant and MSC Respondents, although in reality such service contract might be between MSC Respondents and an entity known as Unicargo Ltd. A search of the Commission’s website indicates no NVOCC or OTI with the name ICL USA, Inc. In its answer to the complaint in Dependable’s federal court action, Complainant “admits that Unicargo Ltd., an affiliate of ICL, is a non-vessel operating common carrier (“NVOCC”) registered with the Federal Maritime Commission which shipments it serviced that are the subject of this Complaint”. It would thus appear that the service contract at issue is between Unicargo Ltd., an affiliate of Complainant, and MSC Respondents. Dependable does not know the relationship between Complainant and Unicargo Ltd. None of this, however, impacts the regulatory jurisdiction issue raised by Dependable’s Motion to Dismiss.

The only connection between Complainant's claim against MSC Respondents and Dependable's state law claim against Complainant is that the former involves alleged detention billing practices that violate the Shipping Act and in the latter Dependable seeks reimbursement of detention charges. But this is a superficial connection that is not complicated, has no causative effect on the damages that Complainant may have suffered due to MSC Respondent's detention billing practices, does not impair Complainant's ability to obtain complete relief against MSC Respondents for any Shipping Act violations, and does not provide a basis for regulatory jurisdiction over Dependable.

Naming Dependable as an additional respondent in its Complaint against the MSC Respondents is a litigation tactic designed to delay Dependable's state contract law claim against Complainant in federal court, a litigation tactic that the Commission should not reward.

A. Dependable is Not a "Regulated Entity" and Does Not "Become" a Regulated Entity by Virtue of the Conduct Alleged

The Complaint does not allege that Dependable is a regulated entity. The Complaint does however allege jurisdiction over Dependable based on a novel "invoicing and collections agent" theory. The Motion to Dismiss and the accompanying Verification of Michael Dougan have established factually that Dependable is not and has never been an agent of any kind for the MSC Respondents.

Complainant now alleges at the top of page 12 of its Opposition to the Motion to Dismiss something a bit different: that Dependable "was acting in conjunction with MSC and is therefore a regulated entity under the Shipping Act". The allegation is thus that Dependable, while not initially a regulated entity, somehow "became" a regulated entity by virtue of the conduct alleged in the Complaint. The Complaint only asserts violations of certain statutes/regulations, specifically 46 U.S.C. § 41104(a)(2)(A), 46 U.S.C § 41102(c), 46 U.S.C. § 41104(a)(2)(a), and 46 C.F.R. §

545.5. The “in conjunction with” language relied on by Complainant is only found in 46 U.S.C. § 41104(a). Thus, Complainant appears to be alleging that, by acting “in conjunction with” MSC Respondents within the meaning of 46 U.S.C. § 41104(a)(2)(a), that statute somehow converts Dependable from a non-regulated entity to a regulated entity.

As demonstrated in Dependable’s Motion to Dismiss (but worth re-emphasizing here), 46 U.S.C. § 41104(a)(2)(a), by its express terms, only applies to common carriers². Furthermore, there is nothing in 46 U.S.C. § 41104(a)(2)(a) that even remotely supports Complainant’s argument that a party who is not a common carrier somehow “becomes” a common carrier by virtue of the conduct alleged of Dependable in the Complaint. According to the definition in 46 U.S.C § 40102(7):

The term “common carrier” (A) means a person that

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; but

(B) does not include a carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker or by vessel when primarily engaged in the carriage of perishable agricultural commodities—

(i) if the carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) only with respect to the carriage of those commodities.

² 46 U.S.C. § 41104(a) only prohibits conduct by a common carrier. 46 U.S.C § 41104(a) only says that *the common carrier* shall not engage in the prohibited conduct, either alone or in conjunction with any other person, directly or indirectly. 46 U.S.C. § 41104(a) does not say that “a common carrier *or any other person in conjunction with such common carrier*, shall not” engage in the prohibited conduct. If Congress wanted to make additional entities or other persons liable under 46 U.S.C. § 41104(a), thereby conferring Commission jurisdiction over such parties, it could have easily done so. Congress, however, did not do this, and this statute must therefore be interpreted according to its plain meaning. And, applying the Rule 12(b) standard as described in Dependable’s Motion to Dismiss, to assume the truth of the factual allegations and determine whether they plausibly give rise to an entitlement of relief, the only conclusion available to the Commission is that Complainant is not entitled to relief under 46 U.S.C § 41104(a)(2)(A) since there is no violation of that statute because Dependable is not a common carrier.

This is a very specific definition, and at the very least it requires that the entity in question provide transportation by water, which is something that Dependable does not do.

The statutory definition of “common carrier” does not allow for a trucker who is not a common carrier to somehow become a common carrier by being invoiced detention charges, by paying such charges, and by attaching to its invoices true and correct copies of the carrier’s detention invoices and seeking reimbursement of such charges. Dependable is not a regulated entity and 46 U.S.C. § 41104(a) does not permit Dependable to “become” a regulated entity by these actions.

B. Precedent Involving FMC Proceedings Initiated by Aggrieved Non-Regulated Third Parties or by the Commission Is Inapplicable

In support of its argument that the Commission has regulatory jurisdiction over Dependable, Complainant cites 46 U.S.C § 41301(a) and numerous Commission cases that establish that a trucking company can initiate proceedings before the Commission against regulated entities³.

Non-regulated entities can obviously initiate proceedings before the Commission, and the Commission can obviously initiate its own investigations and complaints against regulated entities based on information brought to the Commission’s attention by non-regulated entities. The distinction here is that Dependable has not initiated proceedings before the Commission against regulated entities who may have violated the Shipping Act and has not brought violations of the Shipping Act to the Commission’s attention such that the Commission initiates its own proceeding.

³ See Complainant’s Opposition to Motion to Dismiss, footnote 1, with reference to *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC. — Possible Violations Of 46 U.S.C. § 41102(c)*, in which the Commission itself initiated a regulatory proceeding against certain Hapag-Lloyd entities in which the trucker was not even a party. See also the Commission cases referenced at the top of page 11 of Complainant’s Opposition to Motion to Dismiss. All of these cases confirm only that the Commission has jurisdiction over violations of the Shipping Act by regulated entities, a point with which Dependable agrees.

In this matter Dependable has not come before the Commission of its own volition. To the contrary, its preferred venue for its state law contract claim against Complainant for unpaid port drayage charges is in federal court in southern California⁴. It has actually been dragged involuntarily into this dispute involving the service contract between Complainant and MSC Respondents, a service contract to which it is not a party and about which it knows nothing, over its own strenuous jurisdictional objections.

Statutes or case law that support Commission jurisdiction over violations of the Shipping Act generally, or that involve shippers or truckers or other aggrieved non-regulated third party entities who have initiated proceedings against regulated entities (or who have brought alleged Shipping Act violations to the Commission's attention), are distinguishable on that basis, and do not apply to justify the assertion in this case of jurisdiction over a non-regulated entity like Dependable over its objections.

C. **TCW v. Evergreen Is Distinguishable on its Facts and the “Common Nucleus of Operative Facts” Doctrine Is Not Applicable**

Like the Hapag-Lloyd case cited by Complainant and referenced in footnote 4, above, the TCW v. Evergreen case⁵ also involved an aggrieved trucker voluntarily cooperating with the Commission in order to obtain redress from regulated entities for violations of the Shipping Act. Because of that fact alone, as set forth in the previous section of this Reply, TCW v. Evergreen is inapplicable. However, the TCW v. Evergreen case requires further discussion because it also relies on the “Common Nucleus of Operative Facts” doctrine to confer Commission jurisdiction over non-regulated entities in certain limited circumstances.

⁴ Southern California is, incidentally, where all of the port drayage services were performed and where all of the evidence and witnesses are located in order to determine the elements of Dependable's state law contract claim against Complainant such as performance, breach, and damages.

⁵ See *TCW v. Evergreen Shipping Agency (Am.) Corp & Evergreen Line Joint Service Agreement*, cited at page 15 of the Opposition to Motion to Dismiss.

In *TCW v. Evergreen*, the Commission asserted jurisdiction over the agent of a regulated VOCC entity when the claim against that agent arose “out of a common nucleus of operative facts” with the claim against the VOCC over which the Commission already had jurisdiction. In *TCW v. Evergreen*, the issue was whether jurisdiction could be asserted over the Evergreen agent based on its practice of issuing (on behalf of the Evergreen VOCC) to TCW (the trucker) invoices for detention charges during periods when the Port of Savannah, GA, was closed. The Commission found that the Evergreen agent’s “practice” of issuing detention invoices during periods when the port was closed arose “out of a common nucleus of operative facts” with the Evergreen VOCC’s service contract with the shipper. This is logical, because that service contract contained the relevant terms and conditions regarding detention upon which the “practice” of issuing detention invoices was necessarily based. Such terms would include the number of available free days, whether detention was chargeable during weekends, holidays and port closures, and what the daily detention rate was.

The Evergreen agent’s practice that was ultimately found to have violated the Shipping Act arose out of the Evergreen VOCC’s contract itself, which also violated the Shipping Act because it permitted charging detention during port closures when empty containers could not be returned. Unlike *TCW v. Evergreen*, there is no similar commonality of essential facts in this case. The only common facts here are superficial and immaterial at best: Complainant’s claims against MSC Respondents involve the allegedly wrongful invoicing of detention charges (when empty containers could not be returned) and Complainant’s claims against Dependable involve Dependable being invoiced by MSC Respondents for the detention charges at issue, Dependable paying such charges, and Dependable seeking their reimbursement⁶.

⁶ See footnote 2, above, for a brief inquiry into the question whether Complainant’s “claim” against Dependable is even a claim at all or is rather a defense disguised as a claim.

Complainant's argument seems to be that, simply because MSC Respondents' detention invoices went through Dependable, then every operative fact involving MSC Respondents' unlawful conduct (charging detention when empty containers could not be returned in violation of the Shipping Act) must also somehow taint Dependable. Complainant articulates this argument at the bottom of page 12 and at the top of page 13 of its Opposition to the Motion to Dismiss. Reduced to its essence, Complainant's reasoning based on the doctrine of "common nucleus of operative facts" is as follows:

1. MSC Respondents violated the Shipping Act in its detention billing practices;
2. MSC Respondents' detention billing practices are attributable to Dependable because the detention invoices went through Dependable;
3. Therefore, Complainant's claim against Dependable arises out of a "common nucleus of operative facts" with its claims against MSC Respondents.

This is a house of cards, and the circular nature of the reasoning here is obvious. And it conveniently ignores the fundamental point that the statutes and regulations alleged to be violated *only apply to regulated entities, not to Dependable*. *TCW v. Evergreen* is inapplicable to the facts at hand and the "Common Nucleus of Operative Facts" doctrine does not support the assertion of jurisdiction over Dependable.

D. Dependable is not a Necessary or Indispensable Party under FRCP 19⁷

1. **FRCP 19(a)(B).** Dependable first addresses the second prong (part B) of FRCP 19(a) because it is the easiest to dispose of. Complainant blithely asserts that Dependable "claims an interest" in this proceeding (which would trigger the application of FRCP 19(a)(B)). *Dependable emphatically does not claim an interest in this proceeding*. It does not matter to Dependable whether Complainant prevails against the MSC Respondents or not. If MSC Respondents did in fact bill detention during periods when empty containers were not being

⁷ Federal Rules of Civil Procedure 19(a)(1) are transcribed verbatim in Complainant's Opposition to Motion to Dismiss and are not repeated here.

accepted then it follows that they were in violation of the Shipping Act and they must refund that detention back to Complainant. If MSC Respondent's did not in fact bill detention during periods when empty containers were not being accepted then perhaps they were not in violation of the Shipping Act, and perhaps those detention charges are valid and need not be refunded to Complainant.

In addition to the allegations that MSC Respondents violated the Shipping Act, Complainant appears to allege an additional claim against MSC Respondents. The allegations are somewhat confusing⁸, but this claim appears to arise out of a negotiated settlement agreement involving the "waiver" of certain detention charges, and an alleged breach by MSC Respondents of that settlement agreement by not actually refunding such detention charges agreed to be waived. Dependable knows nothing about Complainant's settlement negotiations with MSC Respondents, and it has no interest in whether or not MSC Respondents breached any settlement agreement with Complainant involving a waiver of detention charges.

None of these issues have any bearing on ICL's contractual liability under state law to Dependable under a separate port drayage services contract to pay for services performed including reimbursement of all detention charges that Dependable was required to pay on ICL's behalf. ICL's contractual liability under state law has nothing to do with whether MSC Respondents violated the Shipping Act in their detention invoicing practices or whether MSC Respondents breached a settlement agreement to waive detention charges. ICL's contractual liability under state law depends on the terms of the written contract for port drayage services, whether Dependable performed that contract, whether Complainant breached it, the extent of Dependable's damages,

⁸ The "waiver" allegations are confusing because if there were in fact waivers of detention charges, then where is the money? At the top of page 23 of its Opposition, Complainant states that Dependable "will get fully reimbursed for paying" the MSC invoices. That would be ideal, but Dependable's invoices are now two years old, and Dependable has no interest in waiting any longer.

and related California state law indemnity issues. Dependable does not claim an interest in this proceeding and therefore FRCP 19(a)(B) does not apply.

2. FRCP 19(a)(A).

Complainant argues that without jurisdiction over Dependable, it cannot be accorded complete relief within the meaning of FRCP 19(A)(a) by proceeding only against the MSC Respondents. Although Complainant's Opposition to the Motion to Dismiss is somewhat difficult to understand on this point (beginning with Section 1 on page 18 of the Opposition and continuing up to Section 2 on page 19), the argument seems to rest on the suggestion that for purposes of detention, Dependable is the "billing party", and therefore a necessary party.

a) Dependable is Not the Detention "Billing Party"

Contrary to Complainant's allegations, Dependable is not the "billing party" for purposes of the detention charged by MSC Respondents. Dependable is not a party to, and knows nothing about, the service contract from which the essential terms of detention applicable to these shipments emanate, such as the number of free days, the daily detention rate, and whether detention is to be charged regardless whether empty containers can be returned. Dependable has no control over whether detention is charged in a manner which serves the intended primary purpose to promote freight fluidity in accordance with the Incentive Principle set forth in the Commission's *Final Interpretive Rule on Demurrage and Detention Under the Shipping Act*⁹ and codified in 46 C.F.R § 545.5(c).

The recent amendments to the Shipping Act passed by Congress and signed into law by President Biden in 2022 indicate that trucking companies are not the "invoicing parties" for purposes of demurrage and detention billing practice compliance under the Shipping Act. These

⁹ Fed. Mar. Comm'n, *Final Interpretive Rule on Demurrage and Detention Under the Shipping Act* Issued April 28, 2020, published at 85 FR 29638 – 29666 on May 20, 2020.

amendments to the Shipping Act were the culmination of years of investigations and fact finding by the Commission into demurrage and detention practices, more fully summarized in Dependable's Motion to Dismiss. These amendments added subsection (15) to 46 U.S.C § 41104(a), requiring that demurrage and detention invoices comply with 46 C.F.R Part 545 and the principles contained in the Commission's "*Final Interpretive Rule on Demurrage and Detention Under the Shipping Act*". These amendments also added subsection (d) to 46 U.S.C § 41104, requiring specific elements to be contained in all demurrage and detention invoices.

Notably, 46 U.S.C § 41104(a)(15) and 46 U.S.C § 41104(d) *only apply to common carriers*. Thus from a statutory and regulatory perspective, common carriers are the invoicing parties of demurrage and detention invoices. Common carriers, not truckers, are the parties who are in a position to ensure that demurrage and detention billing practices comply with the Incentive Principle.

Moreover, Dependable did not invoice detention under its own letterhead, as if it was a party originating the detention invoice. Dependable invoiced Complainant in a fully transparent manner, always attaching a true and correct copy of the MSC Respondents' underlying detention invoice. This makes clear to the recipient of the invoice that Dependable is not the originating detention invoicing party. For every single MSC Respondent detention invoice at issue that was passed through Dependable, Complainant can readily see that the originating detention invoicing party is MSC Respondents, the carrier with whom it has the service contract.

b) Complainant Can be Accorded Complete Relief

Complainant has received from Dependable, and has had in its possession for two years now, a true and correct copy of each and every one of the original actual detention invoices from all of the carriers who transported the containers that Dependable drayed, including MSC Respondents. Because it possesses each original carrier invoice, Complainant has all that it needs

to be afforded complete relief if any one of these carriers charged detention in violation of the Shipping Act.

Complainant can compare the MSC Respondents' detention invoices with the terms of its service contract with MSC Respondents to ensure compliance with the service contract and can compare the calculation of the free days and the days between pick-up of the full container and return of the empty container with its own records. Complainant can compare the days that detention has been charged with historical data of empty return appointment availability at MSC Respondents' southern California terminal to ensure that detention is not being charged when empty containers were not able to be returned. To the extent Complainant seeks remedies for the breach of a settlement agreement involving waivers of certain detention charges, Complainant can compare the original MSC Respondent detention invoices with those detention charges allegedly waived in the written settlement agreement¹⁰ and can pursue its remedy against MSC Respondents for such breach.

Because Dependable provides each underlying original detention invoice, Complainant has no more and no less information about the detention charges than if it had been billed detention directly from MSC Respondents. There is absolutely nothing about the fact that MSC Respondents billed detention to Dependable that impairs or impedes Complainant's ability to obtain complete relief from MSC Respondents in this proceeding, without Dependable being a "necessary party".

When it was invoiced by Dependable two years ago, Complainant could have timely paid the fees and charges incurred for the port drayage services rendered, including reimbursement of the detention charges, and could still have initiated this regulatory action against MSC

¹⁰ Does Complainant even have a written settlement agreement with MSC Respondents to be enforced? If there is a written settlement agreement that identifies certain detention charges that MSC Respondents agreed to waive, then it should not be that difficult to identify them and enforce the settlement agreement. If there is not a written settlement agreement, then why is Complainant alleging that such detention charges have been waived by MSC Respondents?

Respondents. Even now, Complainant could write a check to Dependable for the outstanding port drayage fees and charges and make Dependable whole, and could still pursue its regulatory claims against MSC Respondents.

Regarding the “evidence” that Complainant states that it needs from Dependable, Dependable notes that it has been attempting to collect from Complainant for almost two years since the services were performed, and this is the first time that the materials referenced at page 20 of Complainant’s Opposition have been requested. Dependable has never refused any request from Complainant or its counsel for materials to support its claims. Specifically, Dependable notes the following:

- (i) Dependable has not had any negotiations with MSC Respondents for the waiver of detention paid. To the extent that Dependable has received refunds or credits from MSC Respondents, such refunds or credits have been received “out of the blue”, with no explanation or context, and Dependable has had to follow up with Complainant’s counsel to inquire whether such credits or refunds were the result of Complainant’s efforts and should be applied against Dependable’s claim against Complainant.
- (ii) Among the reasons that Complainant states that it need evidence, one is “to properly defend itself (ICL) in the proceeding brought by DHE”. Dependable submits that any evidence needed by Complainant to defend itself in the federal court action brought against it by Dependable can be obtained through discovery in that federal court action.
- (iii) As to item (1) on page 20 of the Opposition, proof of payments by Dependable to MSC Respondents for detention incurred, all of Dependable’s invoices were received in the ordinary course by Complainant almost two years ago. In the last two years, Dependable’s counsel has had numerous email exchanges, telephone calls, and Teams (or Zoom calls) with Complainant or Complainant’s counsel, all in an effort to get paid, and not once has Complainant or its counsel questioned that detention was in fact paid or requested proof of such payment¹¹. FRCP 19 allows the Commission to “shape relief” in order to lessen or avoid any prejudice. Dependable would be happy to provide proof of payment of all the detention paid to MSC Respondents as a condition to the granting by the Commission of Dependable’s Motion to Dismiss.
- (iv) As to item (2) on page 20 of the Opposition, proof of any refunds from MSC Respondents to Dependable of any detention payments, Dependable has already

¹¹ Complainant states at the top of page 20 of its Opposition that Dependable “has not provided proof of” having made the detention payments for which it seeks reimbursement. This is correct. Such proof has never been requested, so naturally it has never been provided.

provided Complainant's counsel with notice of every instance of a refund or credit received from MSC Respondents for detention previously paid. Complainant's counsel has never requested proof of such refund or credit. Again, FRCP allows the Commission to "shape relief" in order to lessen or avoid any prejudice, and Dependable would be happy to provide proof of any refunds or credits as a condition to the granting by the Commission of Dependable's Motion to Dismiss.

(v) As to item (3) on page 20 of the Opposition, communications between MSC Respondents and Dependable, Dependable initially notes that such communications would be in the possession of MSC Respondents, who are parties before the Commission, and subject to discovery. Additionally, Dependable has had no communications with MSC Respondents related to "waivers" of detention, or the reasons why certain detention will not be refunded. Again, FRCP allows the Commission to "shape relief" in order to lessen or avoid any prejudice, and Dependable would be happy to provide copies of communications related to any refunds or credits as a condition to the granting by the Commission of Dependable's Motion to Dismiss.

(vi) As to item (4) on page 20 of the Opposition, communications related to shipments for which Dependable had not advanced the payment of detention, no such communications exist¹². MSC Respondents have not issued refunds or credits to Dependable for detention that Dependable has not paid to MSC Respondents.

In short, Complainant has had two years to request from Dependable the evidence that it now claims is necessary and indispensable, and is obviously only now requesting such evidence as part of its patten to obfuscate and delay. As indicated, to the extent it exists, such evidence can be provided as a condition to the granting of the Motion to Dismiss. In any event, jurisdiction over Dependable should not be asserted based on any lack of evidence available to Complainant.

3. FRCP 19(b).

Dependable does not believe that FRCP 19(b) is applicable here, because Dependable is not a necessary party under FRCP 19(a)¹³. Nevertheless, under FRCP 19(b) Dependable is not an

¹² Complainant has repeatedly and falsely alleged in its Complaint and Opposition that Dependable is seeking recovery and/or interest and/or the 10% administrative fee (see Opposition, at the bottom of page 21, and the reference to "advancement fee"). Dependable is not seeking from Complainant recovery of detention, or interest, or the 10% administrative fee for detention that it has not paid.

¹³ FRCP 19(b) only applies if a party is deemed "necessary" under FRCP 19(a) but joinder of that party is not feasible.

indispensable party because Complainant will not be prejudiced by a judgment rendered in Dependable's absence.

As set forth above, if Complainant prevails by demonstrating that MSC Respondents violated the Shipping Act by assessing detention charges when empty containers could not be returned, then MSC Respondents must refund those detention charges to Complainant.

If Complainant does not prevail and the detention charges at issue were found not to have been assessed in violation of the Shipping Act, then MSC Respondents would not have to refund those detention charges to Complainant. No prejudice inures to Complainant, who enjoyed the benefit of the use of the containers past the free days, and who is therefore not entitled to a refund of the detention charges that were assessed in compliance with the Shipping Act.

E. Sanctions Under 46 C.F.R. § 502.6(a)

When one thinks about it, one has to wonder if Complainant's "claim" against Dependable is even a claim at all. Complainant appears to have a legitimate dispute with MSC Respondents over their detention billing practices. The dispute involves the terms and conditions related to detention found in the service contract between Complainant and MSC Respondents. MSC Respondents have appeared before the Commission as the proper parties to this service contract dispute and are not contesting jurisdiction. The issue whether MSC Respondents charged detention in violation of the Shipping Act when empty containers could not be returned is a simple one to resolve, by comparing days detention charged with historical data on empty return appointment availability at MSC Respondents' southern California terminal.

The “claim” against Dependable (as it were) is simply that Dependable received the invoices for detention charges, paid them¹⁴, and seeks reimbursement for such charges. Ignoring for a moment the fundamental jurisdictional issue whether this constitutes a violation of the Shipping Act, how is this even a “claim” at all? How does this add to the damages allegedly suffered by Complainant due to the MSC Respondents’ alleged violation of the Shipping Act? How is Complainant harmed by Dependable’s alleged conduct?

The fact is, Dependable’s conduct as alleged does not add to Complainant’s damages, and Complainant is not harmed by the fact that Dependable received, paid, and seeks reimbursement for detention charges among all of the other unpaid charges long past due for the port drayage services performed. Complainant’s only harm stems, if at all, from MSC Respondents conduct, if in fact it turns out that MSC Respondents’ charged detention when containers could not be returned in violation of the Shipping Act.

This is just an example of the “best defense is a good offense” theory in action. As a litigation tactic to delay Dependable’s state law contract action in federal court in California, Complainant named Dependable as an additional respondent in this proceeding against MSC Respondents before the Commission. This is a blatant violation of 46 C.F.R 502.6(a) and is why Dependable seeks sanctions under that code section.

CONCLUSION

¹⁴ One might also ask, since Complainant seems so indignant that Dependable paid MSC Respondents’ detention invoices, what did Complainant expect Dependable to do? Complainant seems to think it would have been perfectly reasonable for Dependable to simply not pay the detention invoices and be “shut out” of the ability to access and perform drayage services at MSC, one of the busiest terminals in southern California. And Complainant certainly was not leaping to Dependable’s aid in resolving this issue, it took almost two years after the port drayage services were performed and the commencement of a federal court action for Complainant to actually commence this proceeding against MSC Respondents and initiate resolution of the dispute between them.

Although ICL and the MSC Respondents and the service contract between them are all subject to Commission jurisdiction, and although the Complaint alleges that the MSC Respondents engaged in practices that violate the Shipping Act:

- (i) none of this justifies the assertion of Commission jurisdiction over a non-regulated entity such as Dependable,
- (ii) ICL has failed to state claims against Dependable upon which relief can be granted because the statutes and regulations alleged to be violated only apply to regulated entities and not to Dependable; and
- (iii) this proceeding involving parties to a service contract and allegations of detention being charged when empty containers could not be returned can be fully adjudicated by the Commission, Complainant can be accorded complete relief and will suffer no prejudice due to Dependable not being a party to the proceeding.

On the basis of the foregoing, Respondent Dependable Highway Express, Inc. therefore moves that the Complaint against it be dismissed, and for an award of sanctions.



February 27, 2024

Robert J. Williams
Law Office of Robert J. Williams
135 Tamal Vista Drive
San Rafael, California 94901

**ATTORNEYS FOR RESPONDENT
DEPENDABLE HIGHWAY EXPRESS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 27th day of February, 2024, a true and correct copy of the foregoing

**REPLY TO OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION
AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE
GRANTED; AND REQUEST FOR SANCTIONS**

was served by email on all counsel of record in accordance with 46 CFR Part 502 and the
Commission's Order of May 12, 2020.

ATTORNEYS FOR RESPONDENT DEPENDABLE HIGHWAY EXPRESS, INC.



Robert J. Williams

robert@logisticscounsel.com

Tel: (415) 847-0233

Law Office of Robert J. Williams

1135 Tamal Vista Drive

San Rafael, California 94901

