

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 “SUPPLEMENT TO” REPLY
TO COMPLAINANT’S OPPOSITION TO MOTION TO DISMISS
BASED ON RECENT CHANGES TO LAW AND FACT**

On Friday February 26, 2024, the Commission published in the Federal Register its long-awaited final rule (“Final Rule”) on demurrage and detention billing practices¹. Although not effective until May 28, 2024, the Final Rule and its commentary validates everything that Dependable has been arguing in its Motion to Dismiss.

“When demurrage or detention invoice disputes do arise, the billed party is in a better position than third parties such as truckers ... to analyze the accuracy of the charge. Further, when the billed party disputes a charge, they have an existing commercial relationship with the billing party and are in a better position to resolve the dispute”.²

“The billing party should only be issuing a demurrage and detention invoice to a billed party based on their contractual privity with that billed party, and ... this invoice should be sent to the correct party in the first instance. The burden of issuing a correct invoice should not rely on an incorrectly billed party to dispute the incorrect invoice”.³

“Motor carriers frequently find themselves locked out from marine terminals for failure to pay detention charges as the motor carriers wait to receive payment from their customers.

¹ Fed. Mar. Comm’n, *Final Rule on Demurrage and Detention* issued February 23, 2024, published at 89 FR 14330 – 14363 on February 26, 2024.

² Id. at 14356 – 14357.

³ Id. at 14348.

Essentially, under the current system, motor carriers, who are threatened with being locked out of terminals, can be trapped in situations where they have no contractual leverage or negotiating power to fight back”.⁴

There are many more relevant quotations in the Final Rule and its commentary, but suffice it to say that as of the issuance of this Final Rule, it should have been crystal clear to Complainant and its FMC-specialist counsel that Dependable, a port drayage trucker, (i) is not a common carrier subject to FMC jurisdiction, (ii) does not “become” a common carrier because it has been invoiced and has paid detention in order to avoid being locked out of a terminal, (iii) is not an “invoicing and collections” agent acting “on behalf of” a common carrier because it seeks reimbursement from its drayage customer the detention charges paid, (iv) is not a “billing party” of the detention charges because it seeks reimbursement from its drayage customer of the detention charges paid⁵, (v) is not acting “in conjunction with” a common carrier within the meaning of 46 U.S.C. § 41104(a)(2)(A) and does not violate that statute because it seeks reimbursement from its drayage customer of the detention charges paid, (vi) does not belong in the middle of a dispute between two parties to a service contract that it has never seen and that contains terms regarding free days and detention charges that it knows nothing about, and (vi) is not a “necessary or indispensable” party to a detention dispute between such parties to such service contract.

On Friday March 1, 2024, following briefing by all parties on the Motion to Dismiss the complaint against it filed by Dependable Highway Express, Inc. (“Dependable”, or “DHE”), ICL USA, Inc. (“Complainant”) voluntarily dismissed from this proceeding Mediterranean Shipping Company, (USA) Inc. and Mediterranean Shipping Company, S.A. (the “MSC Respondents”). Despite that the Commission issued the Final Rule a week before, *Complainant did not*

⁴ Id. at 14338

⁵ Id. at 14362. “*Billing party*” is specifically defined in the new 46 CFR § 541.3 as “the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.”

simultaneously dismiss Dependable and continues to maintain its prosecution of Dependable in this proceeding as a respondent! This is a dramatic and inexplicable turn of events that justifies an opportunity for additional briefing, with particular emphasis on the request for sanctions.

ARGUMENT FOR DISMISSAL AND SANCTIONS

This has never been anything more than a dispute between Complainant and MSC Respondents involving the service contract between them, and whether MSC Respondents violated the Shipping Act by charging detention during periods when empty containers could not be returned⁶. But Complainant also named Dependable as a respondent in this proceeding⁷.

There are two kinds of causes of action against Dependable alleged in the Complaint: (i) one is “derivative” of liability of MSC Respondents who allegedly violated the Shipping Act (Dependable allegedly acted as agent “on behalf of” MSC Respondents by providing “invoicing and collection services” related to detention⁸, and Dependable acted “in conjunction with” MSC Respondents to engage in detention billing practices that were in violation of 46 U.S.C. § 41104(a)(2)(A)⁹), and (ii) the second is that Dependable allegedly charged the 10% administrative fee in instances when it did not pay detention on behalf of Complainant¹⁰.

With the Dismissal of MSC Respondents, the Allegations Against Dependable Based on MSC Respondents’ Violations of the Shipping Act Fail As A Matter of Law to State a Claim Against Dependable Upon Which Relief Can Be Granted

The dismissal of MSC Respondents must mean that MSC Respondents evidently either (i) proved to the satisfaction of Complainant that MSC Respondents did not bill detention charges

⁶ As a reminder, the only reason that Complainant dragged Dependable into this dispute with MSC Respondents, is because 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.

⁷ Dependable submits that the dismissal of the MSC Respondents while maintaining its FMC Complaint against Dependable should be analyzed for purposes of the sanctions request as the initiation of an FMC Complaint against Dependable alone.

⁸ See Complaint, paragraph 9(b) at page 3.

⁹ See Complaint, paragraph 9(a) at page 2, paragraphs 20 and 21, page 11, and paragraph 28 at page 13.

¹⁰ See Complaint, paragraph 25 at page 14.

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. Given that the MSC Respondents have no more liability for violations of the Shipping Act over which the Commission has jurisdiction, then even assuming that Dependable once had some “derivative” liability for acting “on behalf of” or “in conjunction with” the MSC Respondents (which is denied), then that “derivative” liability is extinguished as well. Having dismissed the MSC Respondents, the Complaint now fails as a matter of law to state any claim upon which relief can be granted against Dependable for its alleged “derivative” liability based on MSC Respondents’ violations of the Shipping Act.

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

With Dependable’s “derivative” liability having been extinguished, in order for Complainant to have acted in good faith by continuing this proceeding against Dependable after dismissing the MSC Respondents, there must be some violation of the Shipping Act by Dependable, independent of the allegations of liability that was “derivative” of the liability of the MSC Respondents, over which the Commission has jurisdiction.

Paragraph 25 of Count II of the Complaint contains the only cause of action alleging independent liability of Dependable, that it charged a 10% administrative fee for detention that it did not pay in violation of 46 U.S.C. § 41104(a)(2)(A)¹¹. But Complainant has not paid that 10% administrative fee. Complainant currently has suffered no “damages” by virtue of having been assessed such fee and Dependable is not “liable” to Complainant for assessing such fee. If

¹¹ This Supplemental Reply only focuses on the new issues made relevant by the dismissal of the MSC Respondents following the issuance of the Final Rule. Dependable continues to rely on the incontrovertible and fundamental arguments established in its Reply to Opposition to Motion to Dismiss that 46 U.S.C. § 41104(a)(2)(A) only applies to common carriers, that a common carrier is specifically defined by 46 U.S.C § 40102(7) as a provider of transportation by water, and that Dependable is not a common carrier and does not “become” a common carrier even assuming (which it denies) that it charged a 10% administrative fee when it did not pay detention.

Complainant had paid that 10% administrative fee, it could “potentially” have an actionable claim against Dependable to recover it¹². Thus, Complainant’s “claim” is in fact not a “claim”, it is rather a “defense” to Dependable’s claim for payment of fees and charges¹³. Instead of asserting this contract defense in the federal court action in California that Dependable has filed against Complainant, Complainant has “forum shopped” and has creatively disguised its contract defense as an actionable “claim” against Dependable in this proceeding¹⁴.

Dependable Has Never Been A “Necessary and Indispensable” Party Under FRCP 19 and Has Never Had Evidence That Was “Necessary and Indispensable”

Only two weeks ago, Complainant alleged that “without DHE’s involvement in this case, ICL cannot receive complete relief between MSC and DHE...¹⁵. Complainant alleged that certain facts were “solely within the capability of DHE to provide and propound as a necessary and indispensable Party for ICL’s purposes of meeting the evidentiary requirements of this Complaint in proving the Shipping Act violations against MSC...”¹⁶.

Yet two weeks later, these allegations turned out not to be true. The two parties to the service contract were evidently able to fully and finally resolve their issues regarding alleged violations of the Shipping Act based on charging detention while empty containers could not be returned, without involving Dependable at all. Dependable is obviously not a “necessary or indispensable” party to the dispute between Complainant and MSC Respondents, and Dependable

¹² “Potentially” is in quotes because Dependable denies the allegation that it is charging Complainant the 10% administrative fee for detention that it did not pay. Dependable is only charging the 10% administrative fee for detention that it paid. During ten months of negotiations with Complainant’s counsel, Complainant never asked for proof of payment of detention, and Dependable is surprised that this has, two years after the port drayage services were performed, become an issue. The first time Complainant requested proof of payment of detention was in its Opposition to Motion to Dismiss in arguing that Dependable had “necessary and indispensable” evidence. This is something easily provable, and if Complainant had a good faith reasonable doubt that Dependable in fact paid detention, it would have asked for it in the last ten months of negotiations between counsel, rather than raising it for the first time in response to Dependable’s Motion to Dismiss.

¹³ Such “defense” is (as Complainant points out in its Opposition) based on Dependable’s tariff terms and conditions incorporated by reference into the written port drayage contract, which only permit the assessment of the 10% administrative fee when underlying charges are actually paid.

¹⁴ Additionally, the Commission has no jurisdiction over the assessment of the 10% administrative fee and Complainant’s contractual defenses to it. The fee is not “detention”, it is a separately identified administrative fee assessed on the payment of the underlying carrier’s detention invoices, true and correct copies of which are transparently attached to Dependable’s invoices.

¹⁵ See Complainant’s Opposition, page 18.

¹⁶ See Complainant’s Opposition, page 19.

obviously does not possess evidence that is “necessary or indispensable” to the resolution of that dispute.

CONCLUSION

Following the issuance of the Final Rule, the dismissal of MSC Respondents and the continued maintenance of this proceeding against Dependable can only be seen as an abuse of process that warrants sanctions under 46 C.F.R. § 502.6(a). Complainant conducted no inquiry as required by that code section as to whether Dependable was an “invoicing and collections” agent of MSC Respondents, or whether Dependable in fact paid detention when it charged a 10% administrative fee. Complainant simply made up whatever allegations fit its arguments. Complainant’s filings are not “well grounded in fact” within the meaning of that code section, rather Complainant has simply made up facts that were not true, such as Dependable being an agent of MSC Respondents, such as Dependable having sole possession of evidence “necessary and indispensable” to the resolution of its dispute with MSC Respondents, and such as Dependable charging a 10% administrative fee on detention that it did not pay. Complainant’s filings are not “warranted by existing law or a good faith argument”, rather Complainant (knowing that Dependable is not a common carrier) has alleged specious arguments that Dependable “becomes” a common carrier by paying and seeking reimbursement for detention charges, that Dependable has violated statutes that only common carriers can violate, and now maintains this proceeding against Dependable solely on the basis of a “defense” to a contract claim that is disguised as a claim (about an administrative fee over which this Commission has no jurisdiction).

This pattern of conduct permits no other interpretation than that Complainant has done all of this for an “improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation” within the meaning of 46 C.F.R. § 502.6(a). The complaint against Dependable should be dismissed, and Dependable should be awarded sanctions under 46

C.F.R. § 502.6(a), in an amount equal to its attorneys' fees incurred in connection with its Motion to Dismiss, subject to proof.

A handwritten signature in blue ink, appearing to read "R. Williams", followed by a horizontal line.

March 5, 2024

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

CERTIFICATE OF SERVICE

I certify that on the 5th day of March, 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.

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