

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-04

EDAF ANTILLAS, INC.

v.

**CROWLEY CARIBBEAN LOGISTICS, LLC;
IFS INTERNATIONAL FORWARDING, S.L.; and
IFS NEUTRAL MARITIME SERVICES**

**RESPONSE TO MOTION TO DISMISS
BY CROWLEY CARIBBEAN LOGISTICS, LLC;**

Respondent CROWLEY CARIBBEAN LOGISTICS, LLC (CCL) alleges that the Complaint against them should be dismissed because the Commission lacks subject matter jurisdiction over CCL with regard to the claims raised in Complaint. Respondent CCL argues that the three causes of action under the Shipping Act of 1984 are fatally flawed because the Commission lacks subject matter jurisdiction. Respondent CCL further argues that two of the three claims asserted by the Complainant should be dismissed for failure to state a claim. Complainant disagrees. The Commission has subject matter jurisdiction over Respondent CCL. Furthermore, both claims that CCL seeks to have dismissed properly and sufficiently pled.

ARGUMENTS

A. Commission has Subject Matter Jurisdiction over Respondent CCL.

Respondent CCL argues that Section 10(d)(1), Section 10(b)(8), and Section 10(b)(3) claims do not apply to them because subject matter jurisdiction is absent. Respondent argues that CCL is not a “common carrier” under the specific circumstances that control this suit. However, CCL meets all three of the criteria that define a “common carrier” under the Shipping

Act. Furthermore, it meets these criteria, not because of the particular contractual obligations it might have with Respondents IFS INTERNATIONAL FORWARDING SERVICES and NEUTRAL MARITIME SERVICES (IFS and NEUTRAL, respectively) establish otherwise, but because the statutory language is precise. A “common carrier” means:

“[A] person that – (i) holds itself out to the general public to provide transportation by water of customers 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;”
46 U.S.C. §40102(6).

While CCL may have had nothing to do with the cargo at origin (a presumption that at this stage in the proceedings, while plausible, we cannot make) it is certain that CCL played a role, perhaps a prominent one, in how that cargo was mishandled on both of the occasions that the container was unloaded in Puerto Rico. While *Landstar* may be relevant in the case of parties regulated by the Commission who choose to contract with unlicensed parties in the export of cargos from the United States to foreign ports, we are not certain why it is relevant to the facts in this proceeding.¹ Under CCL's argument, an otherwise regulated party is not subject to the Commission's jurisdiction if the terms of a private contract limit the parties' responsibility. This contract is presumably confidential and outside the reach of any regulatory body. Even if CCL were found not to be under the Commission's subject matter jurisdiction for the purposes of the movement from Spain to Puerto Rico, which are not yet able to answer at this stage in these proceedings, we certainly cannot obviate any role CCL might have played in the exportation of the container from Puerto Rico, a U.S. port, to Sint Maarten, a foreign port. Thus, any argument against the Commission exercising subject matter jurisdiction over CCL would be premature at this stage in the proceedings.

¹ Indeed, CCL's argument implies that any import shipments shipped by a foreign freight forwarder who has an unlicensed agent the U.S. are completely outside the jurisdiction of the Commission.

B. Complainant's Section 10(b)(3) And 10(b)(8) Allegations State A Claim

1. Complainant's Section 10(b)(3) Claim is Sufficiently Plead and is Sustained by the Facts.

CCL asserts that Complainant's pleading with regard to Section 10(b)(3) violations cannot stand up to either the statutory language or case law. The crux of CCL's assertion is that Complainant failed to include the term "retaliation" in its cursory "parroting" of the statutory language of Section 10(b)(3).

While the Complainant's "parroting" may have failed to "parrot" the magic words that would have opened a gate in Alibaba's cave, sufficient facts were provided in the Complaint to substantiate their Section 10(b)(3) claim. Complainant had to wait nearly 60 days beyond the original date their cargo should have first been available for delivery.² Complainant emailed Respondent CCL repeatedly regarding his cargo. After 29 August, Respondent CCL ceased to acknowledge any of Complainant's requests regarding the resolution matter. The delay was not resolved until yet another month had passed. These facts should, in and by themselves, be sufficient to establish that CCL violated Section 10(b)(3). Complainant's claim as pled should be sufficient to survive and move onto the next round.

2. Complainant's Section 10(b)(8) claim is Sustainable

Respondent CCL asserts that the Section 10(b)(8) claim is fatally defective because Complainant's cargo was not transported pursuant to a tariff and that they failed to state that Respondents transported their cargo pursuant to a tariff. Complainant fails to see the "fatally defective" flaw. Complainant's cargo was transported under someone's tariff and CCL included

² Under Hamburg Rules, a 60 day delay in delivering a cargo beyond the scheduled date creates a presumption of damages in favor of the shipper. The Commission's standard might necessarily be a different one.

some charges on their invoice that, presumably, appear in their tariff. Furthermore, CCL itself has asserted that parties “in similar circumstances [...] received better treatment to Complainant’s detriment”.³ CCL admits that they processed 428 containers from Spain during 2013.⁴ Thus, during the 60 days that Complainant's cargo was delayed beyond its first visit to Puerto Rico, CCL processed approximately 70 other containers from Spain. Each container, and each of the cargos contained within, were afforded a preference over the Complainant's cargo. That each of the 70 containers preferred over the one containing the Complainant's cargo might all have been compliant, is not relevant. It would be relevant had Respondents not violated Section 10(d)(1). Complainant believes that the facts already demonstrate that the *Ceres*, *Volkswagenwerk*, and *New Orleans Stevedoring Company* tests are fulfilled.⁵

Indeed, we could not agree more that “[p]reference, like negligence, does not exist in the air”⁶ Complainant’s claim has everything to do with how other shippers were treated while his cargo sat on the wharf. We don't mean the other shippers whose cargos were carried in the non-compliant container. We do mean the shippers of cargo that was transported in the 70 containers that were, allegedly, compliant.

CCL asserts that any disparity of treatment was due to “the inevitable effect of U.S. Customs laws”.⁷ presumably as a prelude to arguing that Customs laws cannot impact upon the performance of Respondent's business of providing transportation. Customs violations aren't the proximate cause of the damage suffered by the Complainant, although they might be the proximate cause of Respondent CCL's damages with respect to NEUTRAL and IFS.

³ Memorandum in Support of CCL's Motion to Dismiss, at page 12.

⁴ CCL's Answer, Ninth Affirmative Defense, at page 7.

⁵ *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 SRR 1251, 1270-71 (FMC 1997). *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968). *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans*, 29 SRR 345, 352 (ALJ 2001), *aff'd*, 29 SRR 1066 (FMC 2002)

⁶ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

⁷ Memorandum, *Ibid.* at page 12.

Respondents' violations of Section 10(d)(1), Section 10(b)(3) and Section 10(b)(8) are the proximate cause of the Complainant's damages.

C. Conclusion

Complainant EDAF respectfully requests that the Complaint not be dismissed with regard to Respondent CCL. As shown above, CCL has not demonstrated that the Commission lacks subject matter jurisdiction over the Respondent. Furthermore, Complainant's 10(b)(3) and 10(b)(8) claims should not be dismissed. In the alternative, Complainant respectfully asks the Commission for leave to Amend the Complaint as deemed appropriate.

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Respectfully submitted,

BY: 

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