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December 22, 2014					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-16

BALTIC AUTO SHIPPING, INC.

v.

**MICHAEL HITRINOV a/k/a MICHAEL KHITRINOV and
EMPIRE UNITED LINES CO., INC.**

ORDER ON RESPONDENTS' MOTION FOR A MORE DEFINITE STATEMENT

On November 28, 2014, complainant Baltic Auto Shipping, Inc. (Baltic) commenced this proceeding by filing a Complaint with the Secretary. The Complaint alleges that respondent Empire United Lines Co., Inc. (Empire or EUL) is licensed by the Commission as a non-vessel-operating common carrier (NVOCC), FMC No. 012052. I take official notice of Commission records that indicate that Empire licensed as an NVOCC. See Commission NVOCC list, <http://www2.fmc.gov/oti/NVOCC.aspx> (last visited December 16, 2014). Respondent Michael Hitrinov a/k/a Michael Khitrinov is alleged to be the sole principal and officer of Empire. Empire and Hitrinov are referred to collectively as Empire.

On December 11, 2014, Empire filed a motion for a more definite statement. On December 18, 2014, Baltic filed its response. With the limited exception set forth below on a matter not raised by Empire's motion, the motion for a more definite statement is denied. Baltic is ordered to file an Amended Verified Complaint on or before January 9, 2015. Respondents are ordered to file their answer to the Amended Complaint on or before January 23, 2015. The parties are reminded of their obligation set forth in the Initial Order. *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16 (ALJ Dec. 5, 2014) (Initial Order).

I. ALLEGATIONS IN THE COMPLAINT.

The Complaint alleges that between November 2007 and January 2012, Empire transported by water more than 4000 used automobiles in containers for Baltic from ports in the United States to foreign ports. Baltic became concerned about the rates it was charged and conducted an audit of the shipping documents. The Complaint alleges that the audit determined that Empire charged rates in excess of the amounts set forth in Empire's tariff. Baltic alleges on information and belief that Empire did not have tariffs on file for some Baltic shipments. Baltic contends that it did not know nor could it have known that Empire charged rates in excess of its public tariff. Baltic contends that Empire charged Baltic rates greater than those it charged other shippers. Baltic alleges that Empire accepted money from Baltic for some shipments, but then refused to release the containers. Baltic alleges that Empire failed to provide bills of lading and other shipping documents. (Complaint ¶¶ 11-21.)

Baltic contends that Empire violated the following sections of the Shipping Act:

- A. EUL violated 46 U.S.C. § 41104 by charging Complainant rates greater than those it charged other shippers.
- B. EUL violated 46 U.S.C. § 41104 by charging Complainant rates greater than those reflected in its published tariff.
- C. EUL violated 46 U.S.C. § 40501 by failing to keep open to public inspection in its tariff system tariffs showing all its rates charges classification rules and practice between all points or ports on its own route and on any through transportation route that has been established.
- D. EUL violated 46 U.S.C. § 40101, et Seq. by failing to provide Complainant with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport even though Complainant paid respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

(Complaint Part V.)

II. MOTION FOR A MORE DEFINITE STATEMENT.

A. Empire's Motion.

Commission Rules provide that a respondent may respond to a complaint by filing a motion for more definite statement.

If a pleading (including a complaint, counterclaim, crossclaim, or third-party complaint filed pursuant to § 502.62) to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably prepare a response, the party may move for a more definite statement before filing a responsive pleading. The motion must be filed within 15 days of the pleading and must point out the defects complained of and the details desired. If the motion is granted and the order of the presiding officer is not obeyed within 10 days after service of the order or within such time as the presiding officer sets, the presiding officer may strike the pleading to which the motion was directed or issue any other appropriate order. If the motion is denied, the time for responding to the pleading must be extended to a date 10 days after service of the notice of denial.

46 C.F.R. § 502.67. Empire contends that:

[T]he Complaint involves a large number of shipments with Respondent Empire. Yet even with the audit, Complainant has provided no factual statements supporting its claims – only conclusions, and without specificity as to what shipments, what rates, what tariffs and what “other shippers” which were more favored are the subject of the Complaint. Such pleading does not comport with either the Commission’s Rules or the Federal Rules of Civil Procedure, and Respondents are without the ability to make a meaningful response or Answer – the Respondents simply do not know what the Complainant is specifically complaining of.

(Motion for a More Definite Statement at 2.) Empire contends that Baltic should be required to identify the shipments, dates of shipments, Empire tariffs, amount of the overcharge for each shipment, and other specific information for each shipment at issue for each section of the Act Baltic alleges was violated. (*Id.* at 2-4.)

B. Baltic’s Response.

On December 18, 2014, Baltic filed its response to the motion. Baltic contends that its Complaint complies with Commission Rule 62, which requires “[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law, and a statement showing that the complainant is entitled to relief.” 46 C.F.R. § 502.62(a)(3)(iii).

III. DISCUSSION.

Commission Rule 67 is substantially the same as Federal Rule 12(e), which states: “A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). It is appropriate to be guided by judicial interpretations of this rule when considering a motion for more definite statement under the Commission rule.

Rule 12(e) is designed to prevent unintelligibility in complaints in order for a party to interpose a responsive pleading. An underlying aim of the Federal Rules is “to discourage motions to compel more definite complaints and to encourage the use of discovery procedures to apprise the parties of the basis for the claims made in the pleadings.” *Asip v. Nielsen Media Research, Inc.*, No. 03 Civ. 5866, 2004 U.S. Dist. LEXIS 2350, at *7, 2004 WL 315269, at *2 (S.D.N.Y. Feb. 17, 2004) (quoting *Markovic v. New York City Sch. Constr. Auth.*, No. 99 Civ. 10339, 2000 U.S. Dist. LEXIS 13130, at *3, 2000 WL 1290604, at *3 (S.D.N.Y. Sept. 13, 2000)); *Vapac Music Publ'g, Inc., v. Tuff 'n' Rumble Mgmt*, No. 99 Civ. 10656, 2000 U.S. Dist. LEXIS 10027, at *16, 2000 WL 1006257, at *6 (S.D.N.Y. July 11, 2000). Accordingly, motions pursuant to Fed. R. Civ. P. 12(e) “should not be granted unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it. The Rule is designed to remedy unintelligible pleadings, not to correct for lack of detail.” *Maxwell v. N.Y. Univ.*, No. 08 Civ. 3583, 2008 U.S. Dist. LEXIS 105211, 2008 WL 5435327, at *2 (S.D.N.Y. Dec. 31, 2008) (internal citations and quotation marks omitted).

Leviton Mfg. Co. v. Reeve, 942 F. Supp. 2d 244, 269 (E.D.N.Y. 2013).

Baltic accurately describes its Complaint in its response to the motion.

The Complaint clearly defines a specific period of time during which the Complainant alleges that: (1) Complainant, via EUL, shipped containers with automobiles to ports abroad (from approximately November of 2007 through January of 2012); (2) Complainant conducted an audit of the shipping related documents provided to Complainant by EUL for the period from 2007 through January of 2012, which revealed that EUL charged Complainant for shipments in excess of the amounts set forth in EUL’s tariff; (3) During the time period from November of 2007 through January of 2012, EUL billed Complainant in excess of \$200,000.00 for shipments for which it had no tariff on file; (4) Complainant believes that EUL has overcharged it by billing amounts in excess of its lawful tariff from 2007 through January of 2012.

(Complainant’s Brief in Opp. to Mot. for More Def. Statement at 3.)

Baltic has pleaded “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Complaint gives Empire “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). “[T]he test of a complaint’s sufficiency simply is whether the document’s allegations are detailed and informative enough to enable the defendant to respond.” 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ. 3d* § 1215 (2004). See also *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011) (discussing motions to dismiss under Federal Rules 12(b)(1) and 12(b)(6)). I find that Baltic’s Complaint is not “so excessively vague and ambiguous as to be unintelligible,” *Maxwell v. N.Y. Univ.*, 2008 WL 5435327,

at *2, but “state(s) a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570.

Baltic alleges that the shipments of “in excess of 4000 used automobiles,” (Complaint ¶ 12), are at issue in this proceeding. Through its motion, Empire seeks an order requiring Baltic, for each of these more than 4000 automobiles and for each of the sections of the Act Baltic alleges Empire violated, to set forth in its Complaint specific information for each shipment. For example, for the allegation that Empire charge Baltic rates in excess of its tariff, Empire contends the Complaint should state:

- a. What shipments were involved?
- b. What were the dates of the shipments?
- c. What tariffs were being interpreted by Complainant?
- d. How much was the overcharge on the respective shipments?

(Motion for a More Definite Statement at 23.) If Baltic were ordered to file a Complaint, Empire would then be required to file an answer with a “specific admission, denial, or explanation,” 46 C.F.R. § 502.62(b)(2)(iii), for each of these more than 4000 automobiles. The Rules are structured so that this information is appropriately sought in discovery, not at the pleading stage. 5C Wright & Miller, *Federal Practice & Procedure Civ. 3d* § 1376 (2004).

Baltic’s Complaint is deficient in one point. Commission Rule 62 requires a complaint to set forth a “specific designation of the statutory provisions alleged to have been violated.” 46 C.F.R. § 502.62(a)(3)(ii). The references in Complaint Part V to sections 41104, 40501, and 40101 are insufficiently specific to meet the requirements of this rule. Therefore, on or before January 9, 2015, Baltic is ordered to file an amended complaint with a revised Part V specifically designating the statutory provisions, including subsections, alleged to have been violated.

Federal Rule 12 states: “Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)(2). “[A] litigant moving . . . for a more definite statement should be barred from making a second preliminary motion based on any Rule 12 defense that he reasonably was capable of asserting with the initial motion.” 5C Wright & Miller, *Federal Practice & Procedure Civ. 3d* § 1388 (2004). Wright and Miller continue:

A different result might obtain when an initial Rule 12(e) . . . motion is granted. Logically, if the original complaint was “so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading” . . . , the pleading also may not have afforded the defendant reasonable notice of all the bases for asserting various Rule 12(b) defenses. Under these circumstances, it would be appropriate for the district court to conclude that the Rule 12(b) defense was not “available” at the time the initial Rule 12(e) . . . motion was made.

Id.

In this proceeding, despite the deficiency identified above – the fact that the Complaint does not specifically identify the statutory provisions allegedly violated as required by Commission Rule 62 – the Complaint afforded Empire reasonable notice for asserting Rule 12(b) defenses. Therefore, these defenses were available to Empire when it filed its motion for a more definite statement and a second motion asserting Rule 12(b) defenses would not be appropriate. Furthermore, as discussed above, the Complaint gives Empire fair notice of Baltic’s claim and the grounds upon which it rests. Therefore, the Complaint states a claim on which relief can be granted that meets the requirements of Rule 12(b)(6). By filing its motion for a more definite statement, Empire, a licensed NVOCC, acknowledged that it has notice of this proceeding. It has waived any objections it may have had to personal jurisdiction. *See* Fed. R. Civ. P. 12(h)(1) (“A party waives any defense listed in Rule 12(b)(2)–(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2).”).

“Objections to a tribunal’s [subject matter] jurisdiction can be raised at any time” *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). *See also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). The appropriate test for the Commission’s jurisdiction is whether a complainant’s allegations “involve elements peculiar to the Shipping Act.” *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). Baltic alleges that Empire, a non-vessel-operating common carrier licensed by the Commission, violated the Shipping Act on transportation of cargo by water between ports in the United States and ports in a foreign country. To expedite this proceeding, I affirmatively find that the Commission has subject matter jurisdiction over this proceeding.

O R D E R

Upon consideration of Respondents’ Motion for a More Definite Statement, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents’ motion be **GRANTED** in part and **DENIED** in part. On or before January 9, 2015, complainant Baltic Auto Shipping, Inc., must file and serve an Amended Verified Complaint with a revised Part V specifically designating the statutory provisions alleged to have been violated. In all other respects, the motion for a more definite statement is denied. It is

FURTHER ORDERED that on or before January 23, 2015, Respondents file and serve their verified answer to the Amended Verified Complaint.



Clay G. Guthridge
Administrative Law Judge