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October 9, 2015					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

DOCKET NO. 15-02

COMBUSTION STORE LIMITED

v.

UNIGROUP WORLDWIDE, INC.

ORDER DENYING MOTION TO DISMISS

BACKGROUND

I. THE COMPLAINT.

Complainant Combustion Store Limited (Combustion), principal place of business East Sussex, England, is engaged in the business of buying and selling used airplane parts. On May 1, 2015, Combustion filed a Complaint alleging that UniGroup Worldwide, Inc. (UniGroup),¹ an ocean transportation intermediary (OTI), violated section 41102(c) of the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. § 41102(c), when it transported a Combustion shipment from Newnan, Georgia, to London, England. I take official notice, 46 C.F.R. § 502.226, that UniGroup Worldwide, Inc., is licensed by the Commission as a non-vessel-operating common carrier (NVOCC), FMC NVOCC list, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited Oct. 8, 2015, and as an ocean freight forwarder. FMC OFF list, <http://www2.fmc.gov/oti/FF.aspx>, last visited Oct. 8, 2015. On June 19, 2015, UniGroup filed a motion to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim. Combustion filed an opposition and UniGroup filed a reply. The motion is ripe for decision.

¹ Combustion identified the respondent as “UniGroup Worldwide – UTS” in its original Complaint. Because the parties agree that respondent is UniGroup Worldwide, Inc., the caption is corrected in another order issued today. *Combustion Store Ltd. v. UniGroup Worldwide, Inc.*, FMC No. 15-02 (ALJ Oct. 9, 2015) (Order Amending Caption and Granting Motion for Leave to Amend Complaint to Provide Additional Verification).

Combustion alleges the following facts in its Complaint. For the purposes of a motion to dismiss, these facts are taken as true.

Combustion purchased two used Rolls Royce aircraft engines and accompanying log books from Excel Turbines (Excel), located in Newnan, Georgia. Excel apparently acted as a broker selling the engines for their actual owner. Aircraft and their component parts are closely regulated by the Federal Aviation Administration (FAA). FAA regulations require maintenance log books for each aircraft engine.

(a) Except for work performed in accordance with §§ 91.411 and 91.413, each registered owner or operator shall keep the following records for the periods specified in paragraph (b) of this section:

(1) Records of the maintenance, preventive maintenance, and alteration and records of the 100-hour, annual, progressive, and other required or approved inspections, as appropriate, for . . . each engine

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(2) Records containing the following information:

(i) The total time in service of . . . each engine. . . .

(ii) The current status of life-limited parts of . . . each engine. . . .

(iii) The time since last overhaul of all items installed on the aircraft which are required to be overhauled on a specified time basis.

(iv) The current inspection status of the aircraft, including the time since the last inspection required by the inspection program under which the aircraft and its appliances are maintained.

(v) The current status of applicable airworthiness directives (AD) and safety directives including, for each, the method of compliance, the AD or safety directive number and revision date. If the AD or safety directive involves recurring action, the time and date when the next action is required.

(vi) Copies of the forms prescribed by § 43.9(d) of this chapter for each major alteration to . . . currently installed engines. . . .

(b) The owner or operator shall retain the following records for the periods prescribed:

(1) The records specified in paragraph (a)(1) of this section shall be retained until the work is repeated or superseded by other work or for 1 year after the work is performed.

(2) The records specified in paragraph (a)(2) of this section shall be retained and transferred with the aircraft at the time the aircraft is sold.

(3) A list of defects furnished to a registered owner or operator under § 43.11 of this chapter shall be retained until the defects are repaired and the aircraft is approved for return to service.

(c) The owner or operator shall make all maintenance records required to be kept by this section available for inspection by the Administrator or any authorized representative of the National Transportation Safety Board (NTSB). . . .

14 C.F.R. § 91.417.

Any owner or operator who sells a U.S.-registered aircraft shall transfer to the purchaser, at the time of sale, the following records of that aircraft, in plain language form or in coded form at the election of the purchaser, if the coded form provides for the preservation and retrieval of information in a manner acceptable to the Administrator:

(a) The records specified in § 91.417(a)(2).

(b) The records specified in § 91.417(a)(1) which are not included in the records covered by paragraph (a) of this section, except that the purchaser may permit the seller to keep physical custody of such records. However, custody of records by the seller does not relieve the purchaser of the responsibility under § 91.417(c) to make the records available for inspection by the Administrator or any authorized representative of the National Transportation Safety Board (NTSB).

14 C.F.R. § 91.419. Aircraft “engines are for all intents and purposes worthless without the log books that record their service, maintenance and repair history.” (Complaint ¶ IV.Q.)

Combustion alleges that it contacted Connexion World Cargo Ltd. (Connexion), an English corporation, to arrange for the transportation arranged for the shipment of the engines from the Excel warehouse in Newnan, Georgia, to Combustion’s place of business in England. I take official notice that Connexion does not appear on the Commission’s list of licensed ocean transportation intermediaries as a licensed OTI or as a foreign-based unlicensed NVOCC. FMC NVOCC list, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited Oct. 8, 2015. The allegations in the Complaint and the supporting documents attached to it or incorporated into it identify several different entities that were involved in this transportation. Connexion engaged respondent UniGroup to handle the shipment. (Complaint ¶ IV.D.) “Carotrans [International, Inc.], a NVOCC licensed as an ocean transportation intermediary by the FMC, was engaged by UniGroup to handle the move.” (Complaint ¶ IV.J.) Carotrans is licensed by the Commission as an NVOCC. FMC NVOCC list, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited Oct. 8, 2015.

Carotrans contracted with a motor carrier broker, MIQ Logistics, LLC, to arrange for the inland pick up of the shipment and delivery to the port of export. MIQ, in turn, engaged the services of a motor carrier, Southeastern Freight Lines (“SEFL”), to pick up the shipment and deliver it to Carotrans’s agent in Atlanta.

(Complaint ¶ IV.K.)

Combustion alleges that on May 4, 2012, SEFL picked up “two engines and a 17x17x12 inch box containing the log books” (Complaint ¶ IV.E) from Excel in Newnan and delivered them to Carotrans in Atlanta, GA. “Excel’s president, Damon Garcia, personally verified that the box contained the log books.” (Complaint ¶ IV.E.)

As [SEFL’s] driver was loading the engines, Mr. Garcia asked the driver if he was going to affix a label to the box or if UniGroup planned to ship the box separately by another carrier such as FedEx or UPS. The driver replied “No. They will ride up front with me.” [SEFL’s] driver then took possession of both engines and the log books and departed Excel’s premises.

(Complaint ¶ IV.F.) SEFL prepared a bill of lading indicating “ship date: 05/04/2012” identifying Excel as the shipper and “Carotrans c/o Forward Air Atlanta” in Atlanta as the consignee, and describing the articles carried as two pallets of used Rolls Royce engines. There is no mention of a 17x17x12 inch box. Newnan was identified as the place of receipt and Atlanta as the place of delivery on the SEFL bill of lading. I note that what appears to be the date “5/3/2012,” the day before the pickup, appears at the bottom of the bill of lading. (Complaint Exhibit 3.)

Combustion alleges that on an unstated date:

UniGroup issued a “Master Bill of Lading” for the shipment showing itself as “Shipper/Exporter” and as “Forwarding Agent,” and Connexion . . . as “consignee.” The place of receipt is Newnan, GA, port of loading is Charleston, and place of delivery is London. The cargo is described as “2 Used Rolls Royce Aircraft Engines.” There is no mention of any log books.

(Complaint ¶ IV.I and Exhibit 2.) The “Master Bill of Lading” in Exhibit 2 does not appear to identify the entity that issued it. The allegation in the Complaint that UniGroup issued the bill of lading is taken as true for this motion.

Carotrans issued a bill of lading dated May 19, 2012, showing UniGroup as both the Shipper/Exporter and as the Forwarding Agent, and Connexion as the Consignee. This document shows “Pre-Carriage By Newnan Georgia,” “Place of Receipt by Pre-Carrier Atlanta,” “Port of Loading Charleston,” and “Port of Discharge London.” Again, the cargo is shown as 2 used Rolls Royce Aircraft Engines, without any mention of log books.

(Complaint ¶ IV.J. *See also* Motion to Dismiss, Exhibit A (Carotrans bill of lading).)

Combustion alleges that “[t]he engines were delivered to Combustion [in England] without the log books.” (Complaint ¶ IV.N.) Combustion alleges that it corresponded with UniGroup after the engines were delivered without the log books. (Complaint Part IV.N.)

- G. Erik Koistinen of UniGroup Worldwide later informed Combustion through Fred Parshley (UniGroup Vice President, Airfreight in Ft. Wayne, IN) as follows:

“After we where [*sic*] given the instructions by Connexion to set up the booking for this shipment, Doug Wright with our office in Charlotte, NC was also requested by Connexion to confirm with the shipper, Excel Turbines and/or their agent Global Jet that they would have the log book(s) with the shipment prior to pick up. The shipper’s agent, Debra Odell with Global Jet confirmed that she would have the log book(s) delivered to Excel Turbines and that they would be with the engines prior to Doug Wright dispatching the pick up of the engines. When the pick up was made, the truck bill of lading was signed off by Excel Turbines, the shipper, as 2 engines, with no written or oral mention to us of a separate third piece. It was Doug Wright’s understanding that the log book(s) where [*sic*] with the engines as mentioned earlier.”

- H. Mr. Parshley forwarded this communication by email to Combustion on July 25, 2013 (in the course of Combustion’s investigation of the facts), along with the following additional message which he had received from Erik Koistinen:

[“[W]hen the shipper called they confirmed the shipment was ready with the log books. They gave instructions to pick up 2 pcs so we then set up the pick up. Nothing was on the paperwork regarding a separate box for the log books. The shipper never told us about a separate box. They only said they had the log books with the engines ready to ship.”

(Complaint Part IV.)

Combustion stored the engines while it attempted to track down the log books, but eventually sold the engines as scrap, because without the log books, the engines could not be installed on an airplane. “[T]he value of the engines with the log books was \$230,000 each, less needed repairs of \$65,000, giving them a combined resale value of approximately \$395,000, provided they were accompanied by the log books.” (Complaint ¶ IV.B.) Combustion “accepted an offer to sell the engines for scrap [for] or a total of about \$1900.” (Complaint ¶ IV.C.)

Combustion alleges that “UniGroup knew from the outset that the log books were to be included in the shipment, but failed to exercise due diligence in supervising the activities of its subcontracted service providers to make sure that the log books were transported along with the engines, as the Shipping Act requires.” (Complaint ¶ IV.Q.) Combustion contends that UniGroup violated section 41102(c) of the Act by failing “to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering

property” when it failed to transport or lost the log books. (Complaint Part V.) Combustion seeks a reparation award of \$397,517. (Complaint Part VI.)

II. CONTROLLING LAW.

Combustion filed its Complaint pursuant to section 11 of the Act.

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a). The Complaint alleges that UniGroup is an ocean transportation intermediary within the meaning of the Act. (Complaint Part II.) The Act defines and regulates a number of different types of entities that are involved in the international shipment of cargo by water, including two kinds of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19).

The term “ocean freight forwarder” means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(18). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC on a shipment, the intermediary must meet the Act’s definition of “common carrier.”

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.

46 U.S.C. § 40102(6).

As summarized by the District of Columbia Circuit:

Both OFFs [ocean freight forwarders] and NVOCCs are intermediaries between (i) shippers, who seek to export cargo, and (ii) ocean carriers, who physically carry

the cargo on their vessels. An Ocean Freight Forwarder is “a person that . . . dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers,” and “processes the documentation or performs related activities incident to those shipments.” In practice, that typically means that the OFF “secures cargo space with a shipping line (books the cargo), coordinates the movement of cargo to shipside, arranges for the payment of ocean freight charges,” and provides other “accessorial services . . . such as arranging insurance, trucking, and warehousing.” OFFs receive compensation from both the shipper and the carrier.

[An NVOCC], meanwhile, is “a common carrier that . . . does not operate the vessels by which the ocean transportation is provided” and “is a shipper in its relationship with [a vessel-operating] common carrier.” Although NVOCCs usually do not own or operate vessels to actually carry the cargo, they lease facilities and services from other firms – making them the “common carrier[s]” responsible for transportation of the cargo from origin to destination. Most NVOCCs consolidate small parcels from multiple shippers bound for the same destination and arrange for them to be shipped as a single, large, sealed container under one bill of lading. Upon arrival, NVOCCs arrange for the container to be broken down and for each parcel to be distributed to each customer. Thus, unlike an OFF, the NVOCC issues its own bill of lading to each shipper, and the vessel-operating common carrier issues a bill of lading to each NVOCC. Unlike OFFs, NVOCCs receive compensation only from the shipper.

Landstar Express America, Inc. v. FMC, 569 F.3d 493, 494-495 (D.C. Cir. 2009).

III. RESPONDENT’S MOTION TO DISMISS.

UniGroup makes three arguments in its motion to dismiss. Two arguments contend that the Commission does not have subject matter jurisdiction over the Complaint. UniGroup contends that because Combustion claims its shipment consisted of three items – two engines and one box containing the log books – but the bills of lading only identify two items acknowledged by Combustion to be the engines, there is no evidence that the log books entered into ocean commerce. Therefore, UniGroup argues, the Commission does not have subject matter jurisdiction over the Complaint. UniGroup contends that the comprehensive regulatory scheme established by the FAA to require maintenance log books and transfer of the books with the engines imposes a duty on the seller to transfer the logbooks. Therefore, Combustion’s remedy is against the prior owner of the engines, not UniGroup. UniGroup also argues that the Complaint fails to state a claim upon which relief may be granted.

DISCUSSION

I. THE COMMISSION MAY CONSIDER A MOTION TO DISMISS.

The Commission's Rules of Practice and Procedure, 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss. As stated by the Commission:

Rule 12 of the Commission's Rules of Practice and Procedure (the 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. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads 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, 677] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1215 (3d ed. 2010) ("[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.").

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., 32 S.R.R. 126, 136 (FMC 2011).

Federal Rule 12(d) provides:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

[O]n a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough. See [*Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)].

Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (emphasis and ellipses in original) (footnote omitted). Combustion attached four exhibits to the Complaint that are considered as part of the Complaint when ruling on a motion to dismiss.

UniGroup attached two exhibits to its motion to dismiss: Exhibit A, a copy of the Carotrans bill of lading; and Exhibit B, a Declaration signed by the SEFL driver who picked up the shipment in Newnan. Combustion relied on the Carotrans bill of lading in its Complaint. (Complaint ¶ IV.J, quoted in full above.) Therefore, I conclude that Carotrans bill of lading may be considered on a motion to dismiss for failure to state a claim. The driver's declaration is offered to rebut the allegation in the Complaint that SEFL picked up the 17x17x12 box containing the log books when it picked up the two engines. Combustion did not rely on the declaration of the driver when it drafted the Complaint, and the allegations in the Complaint must be accepted as true on a motion to dismiss for failure to state a claim. Therefore, the Declaration may not be considered on the motion to dismiss for failure to state a claim. The Declaration may be considered on the motion to dismiss for lack of subject matter jurisdiction.

II. UNIGROUP OPERATED AS AN NVOCC ON THE COMBUSTION SHIPMENT.

It is first necessary to determine UniGroup's role in this shipment, at least as it appears from the Complaint and supporting documents. Combustion expresses some uncertainty about whether UniGroup was acting as an ocean freight forwarder or as an NVOCC on the shipment.

- R. UniGroup handled this shipment acting under the authority of its license as an [OTI] regulated by the . . . Commission UniGroup's negligence in arranging and supervising the shipment violated the Shipping Act, which provides in relevant part that an [OTI] "may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Further, the FMC has long held that a licensee under the Shipping Act has a fiduciary duty to its customer to exercise due care in making the shipping arrangements, and is liable for any resulting damages ("reparations"), including interest and attorney's fees, in complaint proceedings before the Commission. See 46 U.S.C. §§ 41301(a) and 41305.
- S. UniGroup holds an OTI license from the FMC to provide services as either a NVOCC (carrier) or an ocean freight forwarder (shipper's agent). Under the FMC's regulations, the duties of an OTI wearing either of these hats overlap and include arranging for inland transportation to the port as well as ocean shipment, and overseeing the preparation of the necessary shipment documentation. 46 CFR §§ 515(h) and (1). Those same regulations require the exercise of due diligence in performing these services. 46 CFR § 515.32(c).

(Complaint Part IV.)

A person or entity operates as an NVOCC "only when it 'holds itself out to the general public to provide transportation' and 'assumes responsibility for the transportation.'" *Landstar*, 569 F.3d at 497 (emphasis added). There is a well-established methodology for determining whether an entity is operating as an NVOCC.

[T]o 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." [*Activities, Tariff Filing Practices and Carrier Status of Containerships [Inc.]*, 9 F.M.C. [56,] at 65 [(F.M.C. 1965)]]. The Commission has indicated that it will "look beyond documentary labels." [*Id.*] 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." [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity's conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. [1679,]

at 1684 [(F.M.C. 1991)]; see also *Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 [(F.M.C.) 1996] (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments). This is a fact intensive inquiry.

. . . Resolution of that factual question requires an examination of [an entity's] conduct on a particular shipment to determine whether it operated as either an NVOCC or an [Ocean Freight Forwarder] on that shipment.

Worldwide Relocations, Inc. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 as Well as the Commission's Regulations at 46 C.F.R. 515.13, 515.21, and 520.3, 32 S.R.R. 495, 503 (FMC 2012), quoting *Worldwide Relocations, Inc. – Possible Violations*, 31 S.R.R. 1471, 1519 (ALJ 2010).

“In answering the question of whether an entity is operating as an NVOCC, the Commission first determines whether the entity was ‘holding itself out to the general public to provide transportation by water.’” *Worldwide Relocations, Inc. – Possible Violations* (FMC), 32 S.R.R. at 503. UniGroup is licensed by the Commission as an OFF and an NVOCC. As a licensed NVOCC, UniGroup holds itself out as a common carrier. Second, the Commission determines whether the entity assumed responsibility for transportation of the shipment by water on the high seas or the Great Lakes for all or a portion of the cargo movement. *Id.* at 505. The Combustion Complaint alleges that UniGroup issued a “Master Bill of Lading” for Combustion’s shipment showing itself as shipper, place of receipt as Newnan, port of loading as Charleston, and place of delivery as London, and indicating that the shipment would be transported by water on the vessel *APL Indonesia*. (Complaint ¶ IV.I and Exhibit 2.) “NVOCC services include ‘issuing bills of lading or equivalent documents.’ 46 C.F.R. § 515.2(l)(4).” *Worldwide Relocations, Inc. – Possible Violations* (FMC), 32 S.R.R. at 505. Carotrans also issued a bill of lading indicating that Combustion’s shipment would be carried on the high seas. (Motion to Dismiss Exhibit A.) Furthermore, Carotrans issued a bill of lading identifying UniGroup as the shipper. (Motion to Dismiss Exhibit A.) When evidence establishes that an entity held itself out as a common carrier and the shipment at issue was transported on the high seas, there is a presumption that the entity operated as an NVOCC on that shipment. *Id.* at 503-506. See also *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27*, 32 S.R.R. 1906, 1912-1914 (FMC 2013); *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, 32 S.R.R. 1678, 1684-1686 (FMC 2013). Accepting the allegations in the Complaint as true, UniGroup operated as an NVOCC within the meaning of the Act by holding out to the public as a common carrier and assuming responsibility for transportation by water of Combustion’s shipment between the point of receipt in Newnan, Georgia, and the point of delivery in England.

III. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT.

The Commission has jurisdiction over complaints that allege violations of the Shipping Act.

[T]he . . . appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (FMC 2000) (footnote omitted).

A. **Accepting the Allegations in the Complaint as True, the Engine Log Books Were Part of Combustion's Shipment and Entered into Ocean Commerce.**

UniGroup asserts a factual attack on subject matter jurisdiction, contending that because the underlying bills of lading and other shipping documents do not mention log books, the Complaint and documents do not support a conclusion that the log books entered into ocean commerce.

Complaint is notably vague and imprecise about the specifics of UniGroup's actions and, more pointedly, UniGroup's alleged failure "to establish, observe, and enforce just and reasonable regulations and practices . . ." Instead, the Complaint generally describes a complex international shipping transaction in which the two used aircraft engines were transported from the United States to England, moving through a chain of multiple forwarders, brokers, warehouse providers, ocean freight forwarders, non-vessel operating common carriers, and at least one domestic U.S. motor carrier.

(Motion to Dismiss at 4.)

Combustion explicitly acknowledges at several points in the Complaint that underlying shipping documents make no mention of the missing log books. The Complaint also refers to, but does not attach, a Bill of Lading issued by Carotrans, an NVOCC involved with this transaction. Like Exhibits 2 and 3, the Carotrans bill records two aircraft engines as constituting the entire shipment, and contains no mention of log books. The Complaint cites no contract or document binding UniGroup to transport, no commitment by UniGroup to transport, and no obligation to transport, the missing log books. All proffered or cited documents in the

Complaint describe the shipment as consisting only of the two used aircraft engines. Put simply, the Complaint, when weighed along with its exhibits, fails to state how UniGroup allegedly violated 46 U.S.C. § 41102(c) and, no doubt inadvertently, provides support for the conclusion that the log books never entered ocean commerce.

(Motion to Dismiss at 4-5 (citations to Complaint omitted) (footnotes omitted).)

UniGroup identifies the owner, Excel, Connexion, Carotrans, MIQ Logistics, LLC, and SEFL as other entities that were involved in transportation of Combustion's shipment.

According to the Complaint, a truck driver loaded the engines on or about May 4, 2012. The Complaint avers that an officer of Excel handed the driver an unlabeled box alleged to contain the log books. There is no factual allegation in the Complaint that UniGroup personnel were present at the scene of the handover of the engines by either the prior owner of the engines and/or his origin warehouse releasing representatives to the motor carrier. With shipping documents in hand that did not mention the log books, Excel appears from the Complaint to have allowed the truck driver to leave Excel's premises without any documentation accepting the log books for transport, not even documentation confirming the driver's receipt of the log books. The carelessness that the Complaint alleges, and the only carelessness that reasonably may be inferred from the Complaint, was that of the prior owner of the engines, and/or the origin warehouse tendering the engines (Excel).

The Complaint alleges that UniGroup knew that the log books were to be included with the engines in transit. However, the shipping documents tendered with the Complaint indicate that the piece count for the shipment was "2" used aircraft engines. There is no shipping documentation that has been produced to support that any other items were to be included or were included. As best as can be discerned from the Complaint and reasonable inferences therefrom, UniGroup did not know of, and Combustion, Connexion, John Bone/Maritime Air Charters, and Excel did not inform UniGroup of, the existence of a "box" or its contents. The Complaint is devoid of references to UniGroup ever seeing, handling, storing or otherwise having the log books in its possession.

(Motion to Dismiss at 6-7 (citations to Complaint omitted) (footnotes omitted).)

The Complaint is not explicit about the geography of the alleged interaction between the motor carrier and the owner of the engines, but recites that the engines started their transit to England "from a warehouse in Georgia" and refer to a "driver" picking up the engines at an unidentified facility, presumably Excel's Georgia warehouse. Although the Complaint refers to the driver as "UniGroup's representative," "UniGroup's subcontracted driver" and "UniGroup's driver," these characterizations

rely on conclusory and contestable legal categorizations, not “clear and concise factual statement(s)” that are the appropriate content of a complaint, whether before the FMC or a federal court. FMC Rule 63(a)(3)(iii); Fed. R. Civ. P. 8.

(Motion to Dismiss at 6 n.9 (citations to Complaint omitted).)

UniGroup attached a declaration from the driver who picked up the shipment. (Motion to Dismiss, Exhibit B.) As noted above, this declaration may be considered on a motion to dismiss for lack of subject matter jurisdiction. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. at 136, quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d at 1260. The driver states that he picked up the engines on May 9, 2012. (Motion to Dismiss, Exhibit B, Declaration ¶ 5.) “As reflected in the attached [Carotrans] Bill of Lading and Delivery Receipt, the crated engines were the only two items that I picked up and took possession of on May 9, 2012.” (*Id.*)

6. I understand that someone claims to have also given me a box with paper logs and further claim that I placed this box in the cab of my truck. This is not accurate. As I said above, the two crated engines were the only items that I received. I did not receive or take possession of a box with paper logs;
7. Everything I took possession of that day is listed on Attachment A [Carotrans bill of lading]. I did not and would not put anything in the cab of my truck because it is against Southeastern’s Safety Rules and Regulations. Moreover, I would not take possession of any items that were not properly labeled, marked, and packaged for shipment.
8. Again, I recall picking up the two crates but did not pick up a box or anything else.

(Motion to Dismiss, Exhibit B, Declaration.)

Accepting the allegations of the Complaint as true, the UniGroup bill of lading states that UniGroup received the shipment in Newnan, GA, and assumed responsibility for transporting Combustion’s shipment from Newnan to England. (Complaint ¶ IV.I and Exhibit 2.) UniGroup contends that “[t]here is no factual allegation . . . that UniGroup personnel were present at the seen of the handover of the engines,” (Motion to Dismiss at 6), but there is an allegation that UniGroup’s “subcontracted driver” (Complaint ¶ IV.F) picked up the box with the log books in addition to the engines. The UniGroup bill of lading acknowledging that it received Combustion’s shipment in Newnan would support a finding that the driver picked up the shipment as agent for UniGroup.

The verified Complaint alleges that the driver picked up three items. The driver claims that he only picked up two items. While it is acknowledged that Sacha Vincent, Combustion’s Managing Director who signed the Complaint, was not present when the driver picked up the shipment, the Complaint alleges that Damon Garcia, Excel’s president, was present and witnessed the driver place

the box with the engine logs into the cab of the truck. (Complaint ¶¶ IV.E and IV.F.) UniGroup does not cite any authority holding that the person who verifies a Commission complaint must have first-hand knowledge of every fact in the complaint, and a requirement that each allegation in a Commission complaint be supported by the verified signature of a person with first-hand knowledge of the allegation does not appear to be contemplated by the Act or Commission rules. The factual dispute between the Complaint alleging that SEFL picked up three items and the declaration of the driver alleging that SEFL picked up two items cannot be resolved on a motion to dismiss or on a motion for summary judgment.

Accepting the allegations in the verified Complaint as true, Combustion has provided evidence supporting a finding that the log books were part of Combustion’s shipment and entered into ocean commerce.

B. FAA Regulations Governing Transfer of Aviation Records Do Not Deprive the Commission of Jurisdiction to Resolve a Dispute Between a Shipper and a Carrier.

In a facial attack on subject matter jurisdiction, UniGroup argues:

Pursuant to the Federal Aviation Act of 1958, the FAA is charged with the exclusive authority to implement and enforce FAA Regulations (“FARs”) in order to ensure the safety of civil aviation in the national airspace system. One way in which the FAA accomplishes this goal is to require owners and operators of aircraft and aircraft engines to adhere to specific, detailed maintenance record keeping requirements. Under the FARs, each owner or operator of aircraft engines is required to keep records of maintenance, preventive maintenance, and alteration of those engines as well as records of all applicable inspections of those engines. . . .

The FAA regulates the content and transfer of log books. Under the FARs, the FAA imposes a duty upon an owner who transfers a U.S.-registered aircraft or aircraft engine to transfer log books to the purchaser at the time of sale. 14 C.F.R. § 91.419. . . .

The FAA is authorized to, and does, impose civil penalties on owners/sellers for failure to transfer log books to purchasers in accordance with the owner/seller's duty as set forth in 14 CFR § 91.419. A prior owner’s failure to transfer log books to a purchaser is a matter primarily within the purview and jurisdiction of the FAA, not this Commission.

. . . [I]t is standard and prudent industry practice to make specific arrangements by contract, at the time of sale, for the delivery of the log books. There is no evidence that any such arrangements were made here. Consistent with 14 CFR

§ 91.419, recovery for the failure to make such arrangements should be sought from the prior owner, not UniGroup.

(Motion to Dismiss at 11-14.)

UniGroup's contention that the existence of FAA regulations requiring maintenance records for aircraft engines and governing the transfer of the records with the engines deprives the Commission of jurisdiction to regulate the actions of an NVOCC alleged to have violated the Act in connection with transportation of the records by water between a port or point in the United States and a port or point in a foreign country is without merit. A contention that the FAA regulations grant this jurisdiction to the FAA is also without merit.

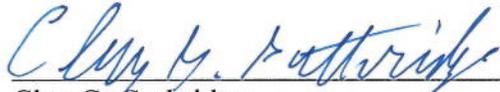
IV. THE COMPLAINT STATES A CLAIM OF VIOLATION OF SECTION 41102(c).

As UniGroup recognizes (Motion to Dismiss at 8 n.12), the Commission has held that “[a] common carrier, MTO, or OTI can establish just and reasonable regulations and practices that are applicable to all their potential customers, but may still fail to observe and enforce the established regulations and practices with respect to a single shipment, a single transaction, or a single shipper.” *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1731 (FMC 2013). “[C]onstru[ing] the complaint in the light most favorable to [Combustion] and accept[ing] all well-pled facts alleged . . . in the complaint as true,” *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d at 1260, UniGroup, through its agent the driver, picked up a shipment consisting of three items, but prepared a bill of lading for only two items. At this stage of the proceeding, these allegations support a claim that UniGroup violated section 41102(c) by failing to observe and enforce regulations and practices governing the receipt of property.

ORDER

Upon consideration of respondent UniGroup Worldwide, Inc.'s Motion to Dismiss the Complaint of Combustion Store Limited, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the Motion to Dismiss be **DENIED**. UniGroup must file an answer within ten days of the date of this Order. 46 C.F.R. § 502.62(b)(1).



Clay G. Guthridge
Administrative Law Judge