

Before the Federal Maritime Commission

COMBUSTION STORE LIMITED,	§	
	§	
Complainant,	§	
	§	Docket No. 15-02
v.	§	
	§	
UNIGROUP WORLDWIDE - UTS,	§	
	§	
Respondent.	§	

COMPLAINANT’S OPPOSITION TO RESPONDENT’S MOTION TO DISMISS

Complainant, Combustion Store Limited (“Combustion”), by and through undersigned counsel, hereby opposes Respondent UniGroup Worldwide, Inc.’s (“UniGroup”) Motion to Dismiss (“Motion”). The Complaint plainly sets forth a cause of action and establishes that jurisdiction lies before the Commission. UniGroup’s attempts to argue to the contrary founder on the Complaint’s allegations, the Commission’s precedent, and UniGroup’s own Motion. For these reasons, Combustion respectfully requests the Commission to deny UniGroup’s Motion entirely.

BACKGROUND

Combustion filed the instant Complaint to seek reparations for UniGroup’s failure to “establish, observe, and enforce just and reasonable regulations” with regard to UniGroup’s shipment of two airplane engines and their associated log books from Atlanta to London. Compl. ¶ III, IV(A) (quoting 46 U.S.C. § 41102(c)). As the Complaint alleges, UniGroup’s representatives picked up the engines and the log books on May 4, 2012, but delivered only the engines to Combustion. *Id.* ¶¶ IV(E), (N). Without the log books, the engines lost most of their

value.¹ *Id.* ¶ IV(P) & Ex. 4. Combustion seeks reparations for UniGroup’s failure to establish and enforce practices to ensure the proper delivery of the log books. Compl. ¶ VII.

ARGUMENT

I. THE COMPLAINT ALLEGES A VIOLATION OF THE SHIPPING ACT

In its Motion, UniGroup insists that the Complaint fails to state a cause of action for a Shipping Act violation under 46 U.S.C. § 41102(c).² UniGroup misapprehends the law and the Complaint.

As the Commission has held, “a Complaint may be dismissed only if, construing all inferences in favor of the complainant, ‘no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in [the] complaint.’” *Mitsui O.S.K. Lines*, 31 S.R.R. 1369, 1380, *aff’d in relevant part and remanded*, 32 S.R.R. at 136-37, 155. Under Supreme Court case law construing the Federal Rules of Civil Procedure, a complaint need merely contain sufficient factual allegations to state a plausible claim for relief, and the court must accept the Complaint’s allegations as true, construing all inferences in favor of the non-moving party.³ *Bell Atlantic v. Twombly*, 550 U.S. 544, 556, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009).

Section 10(d)(1) of the Shipping Act, which governs this case, provides that an ocean transportation intermediary “may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering

¹ Indeed, this is why the Federal Aviation Administration (“FAA”) imposes civil penalties on owners and sellers for failing to transfer log books to purchasers. 14 C.F.R. § 91.419.

² Bizarrely, UniGroup repeatedly insists that the Complaint is not sworn or verified. However, a review of the Complaint shows that it was verified not once, but twice. However, to resolve this issue, and to obviate any argument that the Complaint cannot be used as evidence, Combustion today is filing a Motion for Leave to Amend Complaint to Provide Additional Verification, seeking leave to file a Complaint identical to the instant Complaint, with the addition of a verification pursuant to 46 C.F.R. § 502.6.

³ The Federal Rules of Civil Procedure apply to this case. 46 C.F.R. § 502.12,

property.” 46 U.S.C. § 41102(c). “The proper test for determining if § 10(d)(1) has been violated is ‘whether there was a failure in observing and enforcing the established just and reasonable regulations and practices, regardless of whether the question involves a single shipment or multiple shipments.’” *Adenariwo v. BDP Int’l*, Informal Docket No. 1921(I) (February 20, 2014) (quoting *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1731 (FMC July 12, 2013)).

Under the foregoing standard, Combustion’s Complaint, which follows the model on the Commission’s website, alleges a Shipping Act violation.⁴ It alleges that:

- UniGroup was engaged to handle a shipment of airplane engines, including the associated log books (Compl. ¶ IV(D))
- UniGroup’s representatives arrived to remove the engines and the log books (¶ IV(E));
- UniGroup issued a “Master Bill of Lading” for the shipment showing itself as the “Shipper/Exporter” and as “Forwarding Agent.” (¶ IV(I));
- Although UniGroup took possession of the log books, UniGroup delivered the engines to Combustion without the log books (¶ IV(N));
- “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.” (¶ IV(Q));
- UniGroup handled this shipment acting under the authority of its license as an ocean transportation intermediary (“OTI”) regulated by Commission. UniGroup’s negligence in arranging and supervising the shipment violated the Shipping Act of 1984, as amended (“Shipping Act”), 46 U.S.C. 41102(c), which provides in relevant part that an ocean transportation intermediary “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.” (¶ IV(R));
- UniGroup assumed the obligation to exercise due diligence and reasonable care in carrying out the instructions of Combustion, as relayed through Connexion, to make sure that the log books accompanied the shipment. *Id.* IV(W).
- UniGroup failed to confirm that the log books were with the shipment, and in so doing, failed in its responsibility for the safe transportation of the

⁴ The Commission’s model can be found at <http://www.fmc.gov/assets/1/Page/FormalComplaintFormat.pdf>.

cargo in question and in its duties of due diligence and reasonable care.
Id. ¶¶ IV(X), (Y).

The foregoing allegations clearly set forth a Shipping Act violation. They allege that UniGroup failed to establish or observe proper shipping practices and that this failure caused Combustion damages. Combustion need allege nothing more.

UniGroup attempts to avoid this reasoning by arguing that the Complaint fails to specify precisely which practices it failed to observe. UniGroup is mistaken. Paragraph IV(X) alleges that “UniGroup failed to confirm that the log books were with the shipment.” Paragraph IV(Y) alleges that UniGroup failed to “supervis[e] the performance of its underlying or subcontracted service providers” and failed to provide “the safe transportation of the cargo in question.” These allegations, together with the allegations described above, amply satisfy the requirement that the Complaint provide “[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). Had UniGroup required more specificity, it could have moved for a more definite statement pursuant to 46 C.F.R. § 502.67. Having failed to do so within the time allowed, it can now avail itself of discovery. 46 C.F.R. § 502.201.

UniGroup also contends that the Complaint does not refer to UniGroup “seeing, handling, storing, or otherwise having the log books in its possession.” Mot. at 7. However, the Complaint plainly alleges: “UniGroup’s driver . . . took possession of both engines and the log books . . .” *Id.* ¶ IV(F). UniGroup’s contention is therefore without merit.

Finally, UniGroup contends that the Complaint does not allege that Combustion tried to find the log books once it noticed that UniGroup failed to deliver them. Mot. at 7. This is not an element of a Shipping Act claim, so UniGroup’s observation is irrelevant. It is also factually

incorrect, as the Complaint specifically references Combustion's attempts to find the log books and notes UniGroup's admission that the shipment was to contain the log books. Compl. ¶ IV(G). The Commission should disregard this argument accordingly.

In short, the Complaint fully and completely sets forth allegations sufficient to establish a Shipping Act violation by UniGroup. For this reason, Combustion respectfully requests the Commission to deny UniGroup's Motion.

II. THE COMMISSION POSSESSES SUBJECT MATTER JURISDICTION OVER THIS CASE

A. The Verified Complaint Alleges, the Complaint's Exhibits Establish, and UniGroup Does Not Deny That UniGroup Moved the Shipment In Ocean Commerce.

Second, UniGroup argues that the Complaint does not allege subject-matter jurisdiction, because it does not allege that the materials moved in "ocean commerce." As an initial matter, this claim is spectacularly disingenuous. UniGroup knows for certain how it transported the shipment. If UniGroup shipped these materials by any method other than "ocean commerce," it could have specifically denied this allegation and attached proof of same to its motion, but it did not. In fact, the Motion not only fails to deny that the shipment traveled in ocean commerce, but it actually concedes that the shipment "mov[ed] through a chain of . . . *ocean freight forwarders*." Mot. at 4 (emphasis added). Thus, UniGroup's Motion strongly suggests that it knows that it transported the shipment by ocean commerce.

Further, contrary to UniGroup's assertion, the verified Complaint contains an array of allegations that the shipment, including the log books, moved in ocean commerce. The Complaint alleges that the shipment included the log books. Compl. ¶¶ IV(E), (F); *see also id.* at ¶ IV(L). The Complaint further alleges that UniGroup engaged Carotrans to move the shipment

and that Carotrans is “a NVOCC licensed as an *ocean transportation intermediary*.”⁵ Compl. ¶ IV(J) (emphasis added). The Complaint further alleges that “UniGroup handled this shipment [which included the log books] acting under the authority of its license as an *ocean transportation intermediary* (*‘OTI’*) regulated by the Federal Maritime Commission.” *Id.* ¶ IV(R) (emphasis added). Elsewhere, the Complaint notes that “UniGroup holds an *OTI* license from the FMC to provide services as either a NVOCC (carrier) or an *ocean freight forwarder* (shipper’s agent).” *Id.* ¶ IV(S) (emphases added); *see also id.* ¶ IV(Y). Moreover, UniGroup engaged Carotrans to handle the move, and Carotrans’s bill of lading referenced UniGroup as the “*ocean freight forwarder*.” *Id.* ¶ IV(J) (emphasis added); *see also* Compl. Ex. 3.

UniGroup also alleges that the bills of lading that are attached to the Complaint provide evidence that the log books did not accompany the shipment and thus did not travel by ocean. As an initial matter, the bills of lading are not authenticated and thus are not competent evidence for lack of jurisdiction. To the extent that they are competent evidence, that UniGroup may have negligently failed to note the presence of the log books provides only a potential additional Shipping Act violation rather than evidence that the log books did not travel by ocean. Moreover, to the extent that the bills of lading are competent evidence, the Master Bill of Lading, which is attached to the Complaint as Exhibit 2, refers to “*Port* of Loading Charleston” and “*Port* of Discharge London” – references that indicate that the shipment (including the log books) moved in ocean commerce. *Id.* ¶ IV(J) (emphases added). Finally, it appears that at least one of the bills of lading may have indicated the presence of log books. *Id.* ¶ IV(L).

In light of the allegations and the evidence, the shipment, including the log books, clearly moved in ocean commerce, and the Complaint sufficiently alleges and establishes the

⁵ Because the Commission does not require an OTI license to forward shipments by air or ground, UniGroup’s designation as an ocean freight forwarder is evidence that the shipment moved through ocean commerce.

Commission's jurisdiction. Contrary to UniGroup's assertions, the verified Complaint repeatedly alleges that the shipment, including the log books, moved in ocean commerce, and it attaches evidence of such movement. By contrast, UniGroup cannot and does not even attempt to deny that the shipment moved on ocean commerce, much less provide evidence to buttress its assertion. To the contrary, its own Motion indicates that the shipment moved in ocean commerce. Mot. at 4. Given the array of allegations in the Complaint and supporting evidence that the shipment moved in ocean commerce, and in light of UniGroup's prominent failure even to deny that the shipment moved in ocean commerce, Combustion respectfully requests the Commission to reject UniGroup's argument in this regard and deny its Motion entirely.

B. The Verified Complaint Provides Sufficient Evidence That UniGroup's Agent or Subcontractor Took Possession of the Log Books

UniGroup also argues that there is no evidence for the Complaint's allegation that an agent or subcontractor of an OTI took possession of the log books. However, the verified Complaint plainly alleges: "UniGroup's driver . . . took possession of both engines and the log books" *Id.* ¶ IV(F). The verified Complaint serves as competent evidence on this matter. *E.g., Stauffer v. Gearhart*, 741 F.3d 574, 581 (5th Cir. 2014); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) ("A verified complaint may be treated as an affidavit . . ."). Thus, Combustion has sufficiently alleged and established that UniGroup had possession of the log books. Any further disputes regarding evidence must wait for discovery and hearing. 46 C.F.R. §§ 502.201; 502.154.

Further, even if UniGroup had failed to take possession of the log books, that would not exonerate it. As the Complaint alleges, UniGroup knew that it was supposed to pick up log books, so its failure to do so would still violate the Shipping Act and entitle Combustion to reparations. Compl. ¶¶ IV(G), (H).

C. The Shipping Act Grants the Commission Jurisdiction Over This Case Despite the FAA's Rules

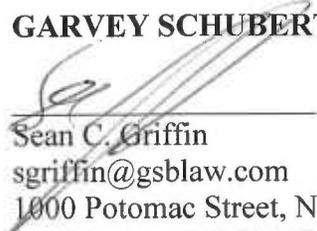
Finally, UniGroup complains that this Complaint would require the Commission to rule on an issue regarding the transportation of engine log books, which the FAA regulates. This argument makes little sense. UniGroup does not and cannot legitimately argue that the FAA has exclusive jurisdiction over the transportation of log books, or that log books can only legally be shipped by air. Rather, it appears to argue that the Commission is incapable of reviewing the evidence to determine whether UniGroup failed to establish, observe, or enforce just and reasonable regulations and practices related to delivering log books. Given the array of complex, technical material that ocean transportation intermediaries ship every day, it remains unclear what would place log books uniquely beyond the Commission's understanding. UniGroup cites no statute, regulation, or case for this odd proposition. Section 10(d)(1) makes so such exception. 46 U.S.C. § 41102(c). Given the complete lack of legal support for this proposition, Combustion respectfully requests the Commission to reject this argument and deny UniGroup's Motion entirely.

CONCLUSION

For the reasons set forth above, Combustion respectfully requests the Commission to deny UniGroup's Motion entirely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of July served the foregoing document upon counsel for Respondent (C. Jonathan Benner, Warren L. Dean, Deona R. DeClue, Scott McMickle, Chandler L. Smith) via electronic mail and by mailing a copy via the US Postal Service.



Sean C. Griffin

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