

**BEFORE THE
FEDERAL MARITIME COMMISSION**

FMC DOCKET NO. 16-12

**PRO TRANSPORT, INC.,
PRO TRANSPORT JACKSONVILLE, INC.,
PRO TRANSPORT SAVANNAH, INC., and
PRO TRANSPORT CHARLESTON, INC.**

Complainants,

vs.

**SEABOARD MARTINE OF FLORIDA, INC., and
SEABOARD MARINE LTD.**

Respondents.

RESPONDENTS' MOTION TO DISMISS

Pursuant to Rule 70 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. §502.70, Respondents Seaboard Martine of Florida, Inc. and Seaboard Marine Ltd. (collectively "Seaboard") by and through their undersigned counsel, respectfully move to dismiss the amended complaint filed on September 2, 2016 (the "Complaint") in the above-captioned case. As set forth in detail in the attached Memorandum of Law, the Commission lacks jurisdiction over the Complaint and the Complaint fails to state claims upon which relief may be granted.

WHEREFORE, Respondents respectfully request that their motion to dismiss be granted; that an order to dismiss the Complaint be granted; and a judgment awarding Respondents reasonable attorneys' fees be issued.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wayne R. Rohde", is written over a horizontal line.

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DATED: September 16, 2016

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Pursuant to Rule 70 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. §502.70, Respondents Seaboard Martine of Florida, Inc. and Seaboard Marine Ltd. (collectively "Seaboard") by and through their undersigned counsel, respectfully move to dismiss the amended complaint filed on September 2, 2016 (the "Complaint") in the above captioned case. Seaboard submits this Memorandum of Law in support of their Motion to Dismiss.¹

I. Introduction

The three complainants in this matter ("Complainants") are motor carriers. Complaint,

¹ Although the FMC's Rule of Practice and Procedure do not expressly address a motion to dismiss, such motions are permissible pursuant to 46 C.F.R. §502.12. See, e.g., *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 861, 866 (ALJ 2015).

¶1. They allege that the conduct of two Seaboard entities violates various provisions of the U.S. Shipping Act of 1984, as amended (the “Act”).

II. The Complaint Must Be Dismissed For Lack of Subject Matter Jurisdiction

The Federal Maritime Commission lacks subject matter jurisdiction over the Complaint on two separate grounds, each of which is discussed below.

A. Complainants Have Failed To Allege Facts Sufficient To Establish Subject Matter Jurisdiction

Because Complainants have failed to allege facts sufficient to establish subject matter jurisdiction under the Act, the Complaint must be dismissed.

As noted in the Presiding Officer’s August 16, 2016 order in this proceeding (“Order”), the Commission has jurisdiction over the transportation by water of cargo between the United States and a foreign country. Order at p. 4. Although the Order directed Complainants to file an amended complaint to address certain deficiencies of the original complaint filed in May of 2016, the Complaint still does not allege and does not provide any details from which it can be determined that the services which are the subject of the Complaint involved the transportation of cargo moving in the foreign commerce of the United States. In other words, the Complaint does not allege facts from which it can be determined that the Commission has jurisdiction over this matter.

The Commission has held that in order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Maier Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54 (FMC 2015). Here, even if all of the facts stated in the Complaint are accepted as true, the Complaint lacks sufficient factual matter to state a plausible claim for relief because it fails to

assert any facts that would support a finding that the Commission has jurisdiction over the Complaint. Accordingly, the Complaint must be dismissed.

B. The FMC Has No Jurisdiction Over The Conduct At Issue

Because Complainants are motor carriers that are not regulated under the Act, the Complaint falls outside of the FMC's jurisdiction and must be dismissed.

It is well-established that in administering the shipping laws, the Commission's primary objective is to protect the shipping industry's customers from unfair or discriminatory practices.² The Commission is not responsible for protecting the interests of the myriad business entities, such as suppliers, shipyards, and sales agents, who have commercial relationships with carriers. *Sea-Land*, 26 S.R.R. at 582, 584. Accordingly, as motor carriers, Complainants are not members of the class of persons intended to be protected by the Act. Indeed, there is nothing in the language or the legislative history of the Act or in Commission precedent which supports the proposition that the relationship between a motor carrier and an ocean common carrier is to be regulated by the Commission. To the extent Complainants have a dispute with Respondents, the appropriate forum for resolution of that dispute is a court.³

In *American Union Transport*, the U.S. Maritime Commission dismissed for lack of subject matter jurisdiction a complaint which raised similar jurisdictional issues to the Complaint.⁴ The U.S. Maritime Commission held that:

We are not convinced that the duties imposed upon [the carrier] by sections 14, 16, and 17 of the [1916 Act] were owed by [the carrier] to complainant broker whose only

² See, *Sea-Land Dominicana v. Sea-Land Service, Inc.*, 26 S.R.R. 578 (FMC 1992)(FMC lacked jurisdiction over dispute between ocean carrier and agent because agent was not regulated entity); *Boston Shipping Association v. FMC*, 22 S.R.R. 78 (1983); *American Union Transport, Inc. v. Italian Line*, 2 U.S.M.C. 553 (USMC 1941)(predecessor of FMC lacked jurisdiction over complaint by broker because broker was not among entities protected by statute); see also, *H.R. Rep. 53, Part I, 98th Cong., 1st Sess.*, at p. 4 (1983).

³ Complainants have filed and are pursuing an action against Respondents in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County Florida, Case No. 16-009612-CA-01(08).

⁴ *American Union Transport*, 2 U.S.M.C. at 556-57.

interest in the transportation involved was the compensation it expected to receive from [the carrier] in return for supplying cargo for [the carrier's] vessels. Complainant's cause of action against [the carrier], if any, is not cognizable under the provisions of the [1916 Act] alleged to have been violated.

American Union Transport, 2 U.S.M.C. at 556-7. Sections 14, 16, and 17 of the 1916 Act at the time of the decision in *American Union Transport* contained language virtually identical to that of sections 41104 and 41106 of the Act alleged to have been violated by Respondents here.

In *Sea-Land*, the Commission reaffirmed the position taken by its predecessor in *American Union Transport* by holding that entities, such as a carrier's sales representative, are "not among the interests to be protected under the shipping statutes." *Sea-Land*, 26 S.R.R. at 582. Then-Chairman Koch explained the rationale underlying the Commission's refusal to assert jurisdiction in his concurring opinion:

Suppliers . . . and a wide array of business enterprises have commercial relationships with ocean carriers and may have commercial disagreements with them. That does not mean the [FMC] is the forum to resolve those disagreements. . . . Section 1 (sic) of the Shipping Act clearly states that the Commission should undertake its responsibilities "with a minimum of government intervention and regulatory costs." Nothing could be further from this objective than asserting jurisdiction over business relationships that have never before been regulated by the Commission.

Sea-Land, 26 S.R.R. at 584.

Here, like the complainants in *American Union Transport* and *Sea-Land*, Complainants are suppliers of services whose complaint is entirely based on a commercial disagreement, i.e., that Seaboard made a business decision to discontinue use of their services and not to pay certain outstanding invoices, decisions made because of what Seaboard believes to be improper conduct on the part of Complainants that is the subject of Seaboard's counterclaim in the state court litigation between the parties. However, regardless of the reasons why Seaboard declined to pay certain of the Complainants' invoices and to end its use of Complainants' trucking services, there is no remedy available to Complainants under the Act to challenge or contest that determination.

At most, this is a pure commercial dispute which is not within the jurisdiction of the Commission to entertain. The alleged damages caused to a trucking company are not among the interests the Act was to protect, particularly where Complainants have and are pursuing an adequate remedy in an alternative forum, i.e., state court.

As noted in *Sea-Land*, the Act states that the Commission's policy should be to undertake its responsibility "with a minimum of government intervention and regulatory costs." 46 U.S.C. §40101(1). Congress clearly intended that regulated persons under the Act be permitted as much decisional flexibility as possible, and that intrusions into a carrier's operations and business judgment be minimized. Asserting jurisdiction over a commercial dispute between a carrier and one of its trucking company suppliers, in which the primary issue is the carrier's right to decide whom it employs, would directly contravene this policy.

In *Joseph Singer v. Trans-Atlantic Passenger Conf.*, 1 U.S.S.B.B. 520 (1936), the U.S. Shipping Board held that a refusal by a passenger conference and its member lines to pay commissions to persons other than their authorized agents on passenger tickets and transportation orders purchased for customer was not violative of the 1916 Act. The Board concluded that the relation of a ticket agent to a carrier it serves was of a fiduciary nature and the "lines should be permitted all possible latitude in their appointment and supervision" *Singer*, 1 U.S.S.B.B. at 523.

In light of the Congressionally mandated policy set forth in section 40101(1) of the Act and the Commission's reaffirmation of the holding in *Singer*, the Commission should dismiss the Complaint for lack of jurisdiction.

III. The Complaint Must Be Dismissed For Failure To State A Claim Upon Which Relief May Be Granted

In addition to a lack of subject matter jurisdiction over the Complaint generally, there are separate grounds which warrant dismissal of the specific claims made in the Complaint.

A. The Complaint Fails To State A Claim Upon Which Relief May Be Granted Under 46 U.S.C. §41106(1)

Complainants' claims made under 46 U.S.C. §41106(1) must be dismissed because Complainants have failed to allege a claim upon which relief can be granted under this provision of the statute.

46 U.S.C. §41106(1) makes it unlawful for a marine terminal operator to:

Agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the *provision of terminal services to, a common carrier or ocean tramp*.

(emphasis added). As is evident from the plain language of §41106(1) emphasized above, this statutory prohibition applies only to conduct directed at a common carrier or ocean tramp.

Complainants are neither common carriers nor ocean tramps. Complainants are motor carriers. Complaint, ¶1. They do not claim to hold themselves out to provide transportation by water of passengers or cargo between the United States and a foreign country by means of a vessel operating on the high seas between a port in the United States and a port in a foreign country. Accordingly, they are not common carriers within the meaning of the Act. See, 46 U.S.C. §40102(6). Similarly, they are not ocean tramps in that they do not operate vessels in the foreign commerce of the United States.⁵

⁵ While it may be difficult to distinguish between an ocean common carrier and a tramp in some circumstances, see *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 28 S.R.R. 188, 204-205 (ALJ 1998), it is clear that both entities operate vessels. As noted above, Complainants do not operate vessels. Thus, they cannot be tramps within the meaning of 46 U.S.C. §41106(1).

Moreover, the conduct which is the subject of the Complaint (non-payment for inland transportation of containers) has nothing to do with the provision of terminal services, which are defined to include services such as checking, dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage and wharf demurrage. See 46 C.F.R. §535.309(a). Since §41106(1) relates only to the provision of marine terminal services, the conduct which is the subject of the Complaint also falls outside the scope of this statutory provision.

In light of the fact that Complainants are not entities of a type protected by §41106(1), and that the conduct which is the subject of the Complaint also falls outside of scope of §41106(1), Complainants have failed to state a claim for which relief may be granted under that section. Therefore, Complainants claims under §41106(1) must be dismissed.

B. The Complaints Fails To State A Claim Upon Which Relief May Be Granted Under 46 U.S.C. §41106(2)

The Complaint fails to allege facts necessary to a finding of a violation of Section §41106(2), and must be dismissed.

Section 41106(2) of the Act makes it unlawful for a marine terminal operator to give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person. The Commission has held that in order to prevail on a claim under this provision of the Act, a complainant must show four elements: (i) two parties are similarly situated or in a competitive relationship; (ii) the parties were accorded different treatment; (iii) the unequal treatment is not justified by differences in transportation factors; and (iv) the resulting prejudice or disadvantage is the proximate cause of injury. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 861, 877-78 (ALJ 2015),

citing *Ceres Marine Term., Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270 (FMC 1997).

However, the Complaint does not identify any person or persons similarly situated to or in competition with Complainants that have been accorded different treatment by Respondents. Accordingly, the Complaint fails to allege facts necessary to a showing of a violation of Section 41106(2) and must be dismissed.

C. The Complaint Fails To State A Claim Upon Which Relief May Be Granted Under 46 U.S.C. §§41104(5) And (9)

Those portions of the Complaint alleging violations of 46 U.S.C. §§41104(5) and 41104(9) must also be dismissed because Complainants have failed to state a claim upon which relief may be granted under these two statutory provisions.

Both §§41104(5) and 41104(9), by their terms, apply only to “service pursuant to a service contract.” A service contract is a contract between one or more shippers on the one hand and an individual ocean common carrier or agreement between or among ocean common carriers on the other hand. 46 U.S.C. §40102(20). Complainants are motor carriers and are not “shippers” within the meaning of the Shipping Act. See, 46 U.S.C. §40102(22). Moreover, Complainants do not allege that they were party to any service contract with either of Respondents. Hence, none of the allegations in the Complaint involve “service pursuant to a service contract.”

In light of the foregoing, Complainants have failed to state a claim for which relief may be granted under 46 U.S.C. §§41104(5) and 41104(9) and their claims under those provisions of the Act must be dismissed.

D. The Complaint Fails To State A Claim Upon Which Relief May Be Granted Under 46 U.S.C. §§41106(3) And 41104(10)

Those portions of the Complaint alleging violations of 46 U.S.C. §§41106(3) and 41104(10) must also be dismissed because Complainants have failed to state a claim upon which relief may be granted under these two statutory provisions.

These provisions each make it unlawful for an ocean common carrier or marine terminal operator to “unreasonably refuse to deal or negotiate.”⁶ As noted in Section II.B above, the primary purpose of the Act’s so-called “prohibited acts” is to protect the shipping public and other regulated entities. Since the common carrier obligations of an ocean common carrier involve the holding out of and provision of service to the shipping public, the prohibition against an ocean common carrier engaging in an unreasonable refusal to deal must be read as a prohibition against unreasonably refusing to deal with shippers. Since marine terminal operators provide services to ocean common carriers, the prohibition against a marine terminal operator engaging in an unreasonable refusal to deal must be read as a prohibition against unreasonably refusing to deal with ocean common carriers.

In short, Complainants (as motor carriers) do not fall within the class of persons protected by either section 41106(3) or section 41104(10) of the Act. Accordingly, they have failed to state a claim upon which relief may be granted and the Complaint must be dismissed.

Even assuming *arguendo* that sections 41106(3) and/or 41104(10) protect Complainants, there has been no unreasonable refusal to deal in this case. There is no written contract between

⁶ The Complaint is legally defective in that it does not identify which Seaboard entity acts as an ocean common carrier and which acts as a marine terminal operator. Further, it does not identify which Seaboard entity is alleged to have committed the acts which are the basis of the Complaint. However, for the sake of brevity and solely for purposes of this Motion, Respondents have adopted Complainants’ practice of referring to the two Seaboard entities as “Seaboard.” This practice is for convenience only, and Respondents reserve the right to challenge the sufficiency of the Complaint as to each of the two separate Seaboard entities.

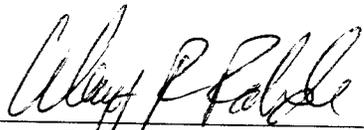
Complainants and Seaboard. Hence, Seaboard was free to terminate Complainants' services at any time and for any reason. Given Seaboard's unfettered right to terminate Complainants' services, the fact that Seaboard has chosen to exercise that right cannot be considered unreasonable within the meaning of the Act.

Accordingly, Complainants have failed to state a claim upon which relief may be granted under Sections 41106(3) and 41104(10).

IV. Conclusion

For the foregoing reasons, the Complaint must be dismissed.

Respectfully submitted,



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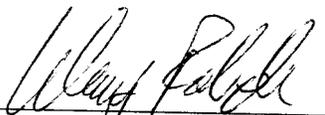
*Counsel for Seaboard Martine of Florida,
Inc., and Seaboard Marine Ltd.*

DATED: September 16, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2016, a true and correct copy of the foregoing Motion to Dismiss and Memorandum of Law were served, via electronic mail and via first-class mail, postage prepaid on:

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