

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Formal Docket No. 1954(F)

TAYLORS RESOURCES INC (USA) d/b/a BRIDGEWATER LANDING INC (USA)

COMPLAINANT

v.

mitsui o.s.k. lines, ltd.

RESPONDENT

RESPONSE BRIEF OF RESPONDENT MITSUI O.S.K. LINES, LTD.

Introduction

In 2013, Respondent, Mitsui O.S.K. Lines, Ltd. (“MOL”), in accordance with its service contract obligations, carried a shipment of plastic scrap from the U.S. to China. The shipper of the cargo was the Complainant. Unfortunately, the consignee never took delivery. In vain, MOL spent almost one year seeking assistance from the Complainant to have the cargo delivered or otherwise removed. Thereafter, at its own expense, MOL made arrangements to have the cargo transported to Hong Kong, for disposal.

After making what turned out to be futile demands for the Complainant to pay the service contract charges associated with the excessive use of the container and for the charges MOL incurred in disposing of the cargo, MOL commenced suit in New Jersey. In response, the Complainant brought this action, alleging MOL has acted unreasonably under the Shipping Act.

The facts will show that MOL has acted reasonably, in accordance with the contract and the controlling law. For this reason, MOL respectfully requests that the (amended) complaint be dismissed in its entirety.

Proposed Findings of Fact

1. MOL transported a shipment of goods said to contain 32 pieces of plastic scraps from Atlanta, Georgia to Xingang, China under waybill no. MOLU26005510205, dated January 19, 2013. MOL-001 – MOL-002.
2. The carriage was performed in accordance with the terms and conditions of MOL's bill of lading (MOL-003 – MOL-013) and service contract between the parties (MOL-014 – MOL-022).
3. On March 12, 2013, the shipment arrived at the port of Xingang. (Admitted by the parties.)
4. The consignee failed to pick up the cargo at destination. (Admitted by the parties.)
5. Under the service contract (MOL-014 – MOL-022) and Section 20 of MOL's bill of lading (MOL-011), the Merchant (which would in this case include the Complainant and the consignee) had fourteen free days to take delivery of the cargo (MOL-022).
6. On April 22, 2013, MOL notified Complainant that the consignee had failed to take delivery of the cargo. MOL-038 – MOL-039.
7. For approximately one year following the arrival of the shipment, MOL and Complainant exchanged regular messages concerning the consignee's failure to take delivery. MOL-032 – MOL-071.

8. On May 6, 2013, after receiving no response to its April 22, 2013 email to Complainant, MOL sent another email requesting assistance in contacting the consignee. MOL-038.
9. Complainant responded later that day, thanking MOL for the update and confirming that it would try to reach the consignee. MOL-037 – MOL 038.
10. On the following day, May 7, 2013, MOL again followed up with Claimant to ask for the consignee's contact details.
11. Complainant responded the following day that it would let MOL know. MOL-037.
12. Following a period of silence, MOL followed up again on May 16, 2013 asking for assistance from Complainant. MOL-036 – MOL-037.
13. Only on May 28, 2013 did Complainant respond to MOL indicating that the problem may be due to the "Green Fence" policy in China, and that the consignee feared the cargo would not clear Customs. MOL-036.
14. However, curiously, other shipments of Complainant to Xingang with the same cargo description were delivered without incident. MOL-091 – MOL-099.
15. On May 29, 2013, in response to Complainant's request for "an economic rate" to transport the cargo from Xingang to Hong Kong (MOL-036), MOL advised Complainant that it did not have the legal authority to transport "coastal" cargo and suggested that the container be stripped as soon as possible. MOL-035 – MOL-036.
16. The following day, MOL advised Complainant that the shipment could be transported to Hong Kong via Busan, with a quote for the applicable ocean freight and charges. MOL-040.

17. In response to Complainant's inquiry as to any other fees, on May 31, 2013, MOL confirmed it would ascertain the costs related to the accrued demurrage to date. MOL-045.
18. On June 5, 2013, MOL provided Claimant with the outstanding detention charges. MOL-050.
19. Almost a month later, on July 1, 2013, MOL received an email request from Claimant asking MOL to grant "free detention days" for nine bills of lading, including the shipment at issue. MOL-058.
20. MOL responded the following day by advising that the applicable free time at destination would be fourteen days, and inquiring as to why the nine shipments have not been picked up for over six weeks. MOL-057.
21. Almost two weeks later, Complainant responded by claiming that the shipments had been affected by the "Green Fence" policy in China. MOL-056.
22. Thereafter, on July 1, 2013, MOL advised Claimant it was unable to provide additional free time. MOL-056.
23. On September 30, 2013, MOL again asked Complainant for assistance in contacting the consignee. MOL-059.
24. However, on October 1, 2013, Complainant advised that it, too, was unable to reach the consignee.
25. The following year, on January 7, 2014, Complainant inquired about a new service contract, the details of which were provided by MOL on the following day. MOL-063 – MOL-064.

26. On January 14, 2014, MOL provided Complainant with a recap of the outstanding cargo issue and asked Complainant for a letter of abandonment in order for MOL to dispose of the cargo. MOL-062.
27. On January 23, 2014, MOL asked Complainant for a response. MOL-065.
28. Complainant responded on February 3, 2014 that it no longer owned the cargo and was therefore unable provide a letter of abandonment. MOL-068.
29. Thereafter, on February 13, 2014, MOL requested that Claimant provide MOL with a copy of the sales contract necessary to take legal action against the consignee in China. MOL-068.
30. However, on February 27, 2014, Complainant disclaimed any responsibility for the shipment by simply advising that it believed the underlying sales transaction was based on a verbal contract and that by virtue of a telex release, it no longer owned the cargo.
31. After many futile attempts to resolve this longstaying cargo issue with Complainant, MOL attempted to search for options to auction or otherwise dispose of the cargo.
32. However, due to the difficulty in selling longstaying plastic scrap in Xingang and the prohibitively expensive costs for disposal, MOL decided to re-export the cargo to Hong Kong. MOL contracted with Shanghai Sanshi International Logistics Co., Ltd. to arrange for the cargo disposal.
33. Attached at MOL-100 is a copy of the original Cargo Disposal Agreement, in Chinese, which is accompanied by a verified translation thereof (MOL-101 – MOL-102).
34. Shanghai Sanshi International Logistics Co., Ltd. then subcontracted with the cargo receiver (Chi New Resource Trading Company) to dispose of the cargo.

35. Attached as MOL-103 is a copy of the invoice associated with the disposal cost, in Chinese, which is accompanied by a verified translation thereof (MOL-104).
36. MOL also retained a freight forwarder to arrange for the customs clearance of the cargo for re-export.
37. Attached at MOL-105 is a copy of the original Cargo Return Shipment Disposal Agreement, in Chinese, which is accompanied by a verified translation thereof (MOL-106).
38. The bill of lading for ocean transportation from Xingang to Hong Kong is attached as MOL-107, accompanied by invoices for the ocean freight and export charges, in Chinese (MOL-108 – MOL-109), translations of which are attached at MOL-110 – MOL-112.
39. The name of the shipper on the bill of lading, “Tianjin [Teda] Haijie Logistics Co., Ltd.” was erroneously referenced in MOL’s demand letter to Complainant of August 10, 2015 (see MOL-089).
40. Not until April 3, 2015, did MOL regain the use of its container. Detention charges accrued up until that time.
41. On August 10, 2015, MOL sent Complainant a demand (MOL-089) to the address listed in the service contract and the waybill in question and, after no response was received, MOL engaged the services of a collections agency whose efforts were also futile (MOL-090).
42. The Complainant continued to refuse to pay any of these charges, and as a result, MOL filed suit in New Jersey approximately twelve months after all of the charges had accrued, on April 4, 2016, well within the applicable period of limitations. MOL sued in accordance with the dispute resolution process set forth in the service contract. MOL-

018 – MOL-019. (“MOL may bring an action for unpaid freight or charges due for transportation services performed for Shipper in any court of competent jurisdiction”).

43. On September 22, 2016, the court in New Jersey entered a default judgment against Claimant in the sum of \$116,374.77, together with costs, attorney’s fees and interest.

Legal Argument

The Complainant argues that, by not bringing its action in New Jersey earlier than it did, MOL acted unreasonably. However, as stated in *Mediterranean Shipping Company, (USA) Inc. v. International Freight Services, Inc.*, 2014 AMC 1442, 1447 (S.D.N.Y. 2014):

“There is a strong presumption that a plaintiff’s delay in bring[ing] suit for monetary relief is not unreasonable as long as the analogous statute of limitations has not lapsed.” *SL Serv., Inc. d/b/a CSX Lines v. Int’l Food Packers, Inc.*, 217 F.Supp.2d 180, 186 (D.P.R. 2002) (internal quotation omitted) (citing *Herman v. Miller, Inc. v. Palazzetti Imps. & Exps., Inc.* 270 F.3d 298, 321 (6th Cir. 2001).

In its action in New Jersey, MOL seeks to recover destination demurrage, detention and disposal costs, pursuant to the provisions of its service contract and tariff.¹ These constitute freight claims, for which a shipper is liable. *Kerr Steamship Company Inc. v. Petroco, Inc.*, 1991 AMC 2193, 2195 (S.D.N.Y. 1991), citing *Ocean Transport Line v. American Philippine Fiber*

¹ In the U.S., demurrage is commonly understood to be a charge on shipments that are not picked up from a terminal following the expiration of free time; detention is a charge imposed whenever carrier equipment is not, following delivery, returned to the terminal within the agreed free time. In China, it appears that these two terms may be interchangeable. This is of no consequence, because both types of charges are imposed as a result of delay attributable to cargo interests that deprives the carrier of the use of its own equipment.

Industries, 743 F.2d 85, 92 (2nd Cir. 1984); *Gulf Puerto Rico Lines v. Associated Food Co.*, 366 F.Supp. 631, 635 (D.P.R. 1973). “Demurrage is a standard fee associated with shipping through common carriers; so much so that courts have found it to be an implied term in maritime contracts.” *Mediterranean Shipping Company, (USA) Inc. v. International Freight Services, Inc.*, 2014 AMC 1442, 1447 (S.D.N.Y. 2014), citing *Mediterranean Shipping Co., (USA) Inc. v. Worldwide Freight Servs., Inc.*, 2012 WL 3740683 at *6 (S.D.N.Y. Aug. 29, 2012).

“Demurrage, per diem and detention charges will be levied and payable by the Merchant [after the expiration of free time] in accordance with the tariff. *Id.*”

See also *Mediterranean Shipping Co. v. Best Tire Recycling, Inc.*, 2015 WL 6695817, 2015 AMC 2828, 2833 (D.P.R. 2015):

The Supreme Court has explained that ‘[o]rdinarily, the person from whom the goods are received for shipment assumes the obligation to pay freight, and his obligation is ordinarily a primary one.’ *Louisville & N.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 67 (1924).

Where, as in this case, claims are prescribed by tariffs, the Shipping Act’s three year statute of limitations is the most analogous statute of limitations. *Mediterranean Shipping Company, (USA) Inc. v. International Freight Services, Inc.*, 2014 AMC 1444-1445 (S.D.N.Y. 2014), citing *SL Serv., Inc. d/b/a CSX Lines v. Int’l Food Packers, Inc.*, 217 F.Supp.2d 180, 184-185 (D.P.R. 2002).

Here, the cargo was carried from Atlanta, Georgia, to the requested place of delivery, Xingang, China, arriving March 12, 2013. Thereafter, neither the consignee nor any other party

attempted to take delivery. For almost one year thereafter, MOL repeatedly asked the shipper to assist. Unfortunately, no assistance was forthcoming. Charges continued to accrue until, under MOL's arrangement, and at its own considerable expense, the cargo was taken to Hong Kong and dumped. MOL did not regain the use of its container until April 3, 2015. Charges continued to accrue up until that time.

Therefore, MOL's suit in New Jersey, which was filed on April 4, 2016, was commenced one year following the accrual of the charges for which the Complainant is liable, well within the analogous three-year statute of limitations.

The Complainant further argues that MOL's recovery should be limited to the value of the container. This is wrong for three reasons. First, MOL operates containerships. Its only means of generating revenue is through the use of containers. In other words, MOL was deprived of the use of an asset that is vital to its operation. Secondly, the parties specifically agreed ahead of time, in their service contract, that destination free time was to be extended for a total of fourteen calendar days, following which demurrage and detention charges were to apply in accordance with MOL's tariff. *See* MOL-022.

Thirdly, and most importantly, courts have rejected Complainant's very argument. For example, in *Mediterranean Shipping Company, (USA) Inc. v. International Freight Services, Inc.*, 2014 AMC 1442, 1448 (S.D.N.Y. 2014), the court held as follows:

Further, damages need not be limited to the fair market value of the container because "[d]emurrage is an accepted form of liquidated damages in shipping." *Mediterranean Shipping Co. (USA) v. Cargo Agents, Inc.*, 2012 AMC 769, 778, 2011 WL 6288422, at*5 (S.D.N.Y. 2011) (citing *Ocean Transp. Line v. AM.*

Philippine Fiber Ind., 1985 AMC 741, 747, 743 F.2d 85, 90 (2 Cir. 1984)). “[O]nce a plaintiff has demonstrated that there has been loss, that is, the loss of use of a container, the amount of loss is measured by the demurrage rate.” *Id.* I agree with other courts in this district that have observed, with respect to demurrage: “plaintiff is not attempting to reap a ‘windfall profit’ based on ‘fine print’; rather, it is only attempting to collect fees to which it is entitled under a ‘longstanding industry practice and the terms of its agreement’” *Mediterranean Shipping Co. (USA) v. Cargo Agents, Inc.*, 2012 AMC at 776, 2011 WL 6288422 at *4 (S.D.N.Y. 2011)).

Complainant further argues that MOL should have done more to solve the problem. However, the record shows that, for almost one year, MOL repeatedly asked the Complainant for cooperation, but received none. At no time did the Complainant suggest that the shipment was being abandoned. In fact, after it appeared that there was not going to be a solution, MOL specifically asked the Complainant to abandon the cargo (see MOL-062 and MOL-065). In response, the Complainant very clearly refused to do so (see MOL-068).

The United States Court of Appeals for the Ninth Circuit, in *Yang Ming Marine Transport Corporation v. Oceanbridge Shipping International Inc.*, 259 F.3d 1086 (9th Cir. 2001) considered this very issue. The court rejected the argument that the ocean carrier’s recovery of should have been reduced because of its alleged failure to do more:

A nondefaulting party to a contract usually is not required to spend more money to avoid further damage, since compelling an innocent party to make additional expenditures to mitigate damages would force upon him risks beyond those he assumed in his contract. However, a party may be required to make

expenditures...[if] the expenditures are small in comparison to the possible losses.... Damages will not be decreased if it is only shown that a substantial expenditure would have minimized the total loss.... A party in default is supposed to assume the risk that further expenditures will be needed to remedy his breach, and cannot cast this risk on plaintiff.

Id., citing Am. Jur. 2d *Damages* §514.

See also *Mediterranean Shipping Co. v. Cargo Agents*, 2012 AMC 769, 776 (S.D.N.Y. 2011) (“Defendant’s vague insinuations that [the carrier] may have acted in bad faith to maximize demurrage costs is no more than conjecture, and conjecture does not create a dispute about a material fact.”).

The Complainant in this case, the service contract shipper of the cargo, clearly falls within the definition of “Merchant” as set forth in MOL’s bill of lading (see MOL-003). This makes the Complainant responsible for the freight and all related charges incurred in this case. The Complainant freely negotiated the free time provisions as well as the charges that were to apply following the expiration of free time. The Complainant failed to take any steps to remedy the fact that its cargo was picked up by no one. Under these facts, the Complainant has no basis to allege unreasonableness on the part of MOL.

Conclusion

For all of the foregoing reasons, Respondent MOL respectfully requests that the Amended Complaint be dismissed in its entirety and that the Federal Maritime Commission grant such other, further or different relief as is just and proper in the circumstances.

Dated: Woodbridge, New Jersey
November 4, 2016



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Certificate of Service

I hereby certify that I have this 4th day of November, 2016, served a copy of the foregoing Response Brief upon the following by e-mail, and copies by courier shall follow:

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I further certify that the electronic copy of the Response Brief served by e-mail is a true and correct copy of the paper original, and that the signed paper original and five (5) copies are being forwarded to the Secretary of the Commission via courier.



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