

**BEFORE THE
FEDERAL MARITIME COMMISSION**



MAC Industries, Inc. d/b/a

MAC Container Line,

Complainant,

v.

Docket No. 20-09

COSCO SHIPPING Lines Co., Ltd.,

Respondent.

VERIFIED COMPLAINT

INTRODUCTION

1. Complainant Mac Industries, Inc. d/b/a MAC Container Line (“MAC” or “Company”) by its attorneys at Husch Blackwell LLP brings this Verified Complaint against COSCO SHIPPING Lines Co., Ltd. (“COSCO” or “Respondent”) pursuant to violations of 10(b)(5) of the Shipping Act of 1984, as amended (“the Shipping Act”), 46 U.S.C. §41104 (a)(3) by COSCO, and pursuant to the Federal Maritime Commission’s (“FMC[’s]”) authority to permit the filing of complaints under Section 11(a) of the Shipping Act, 46 U.S.C. § 41301(a), in response to Respondent’s violations of the Shipping Act.

2. Complainant alleges upon information and belief the following:

PARTIES AND OTHER ENTITIES

3. Complainant MAC is a corporation organized and existing under the laws of the State of California, with its principal place of business at 971 Calle Negocio, #100A, San Clemente, CA 92673.

4. Complainant MAC is a non-vessel-operating common carrier (“NVOCC”) as that term is defined at 46 U.S. Code § 40102 (17) that provides transport, logistics and related shipping

services to customers in the United States and worldwide. MAC is licensed by the FMC as an NVOCC, *i.e.* as an Ocean Transportation Intermediary (“OTI”), under license no. 022081, pursuant to 46 C.F.R. Part 515 of the Federal Maritime Commission (the “Commission”) Regulations.

5. Respondent COSCO SHIPPING Lines Co., Ltd. is a corporation organized and existing under the laws of The Peoples Republic of China (“PRC”) with its principal place of business at No. 378 Dong Da Ming Road, Shanghai 200080, China.

6. COSCO is an ocean common carrier and controlled carrier by the PRC as those terms are defined at 46 U.S. Code § 40102 (7)(9) and (18).

7. COSCO SHIPPING Lines (North America) Inc. (“COSCO Agent”), 100 Lighting Way, 4th Floor, Secaucus, New Jersey, acts as agent for COSCO SHIPPING Lines Co., Ltd. in the United States for all matters subject of this Complaint.

JURISDICTION

8. The FMC has subject matter jurisdiction over this action pursuant to the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*

9. The FMC has personal jurisdiction over Respondent COSCO as an ocean common carrier and controlled carrier by the Peoples Republic of China (“PRC”) as those terms are defined at 46 U.S. Code § 40102 (7)(9) and (18).

MEMORANDUM OF THE FACTS

10. Complainant MAC has acted as an NVOCC with a specialty of exporting foodstuff and agricultural products, and other general commodities such as Reefer (refrigerated goods), resin, hay, cotton, and chemicals from the United States since it first became a licensed Ocean Transportation Intermediary in 2009, and in the shipper role of an NVOCC has entered service contracts as that term is defined at 46 U.S. Code § 41102 (21).

11. MAC as an NVOCC is a major exporter of many types of commodities and transports approximately between 60,000 and 65,000 TEUs annually pursuant to various service contracts with many ocean common carriers since 2009 to the present, and MAC has shipped

pursuant to COSCO service contracts between 8,000 and 12,000 TEUs annually since 2016, to the present, and as a result of these volumes MAC has earned a VIP Partner status with COSCO since 2013.

12. COSCO's VIP Partner program, defined by COSCO as volume shippers, for shippers who ship similar to MAC's volumes, entitles such shippers to receive competitive rate structures from COSCO, on an as needed basis, and, more specifically, MAC routinely expected and received competitive Agri Rates, for example, which were provided to MAC, and its COSCO VIP Partner competitors, within the Service Contract structures of MAC and the service contract structures of other VIP Partners of COSCO. While COSCO includes rate structures for VIP Partners in those partners' service contracts, COSCO also generates special pricing for VIP Partners in various category of goods for example: Metal Scrap, Wastepaper, Lumber, KLB, Wood pulp or Forest Products, Cargo Nos, Reefer (refrigerated goods), Resin, Hay, Cotton, Chemicals, Clay, Agri, Hides, Plastic Scrap In Gauge Special Equipment. For example, for Agri Rates for VIP Partners, COSCO has a separate set of rates made available to VIP Partners which are not explicitly included in the service contracts, but which the parties understand are part of the quid pro quo of the service contracts and which COSCO incorporates into the VIP Partner service contracts as amendments as required by the VIP Partner. Prior to this retaliatory activity by COSCO, MAC participated in VIP Partner rates for all of these commodity groups.

13. On or about February 28, 2020, COSCO unilaterally attempted to increase rates pursuant to Service Contract No. LAN20287 ("subject Service Contract") whereby COSCO intended to unilaterally amend certain rates contained in subject Service Contract for cargo originating in Detroit, MI destined to Jakarta. See attached **Exhibit 1**, pages 1 and 95 of Amendment 20 of subject Service Contract wherein the base rate between Detroit, MI and Jakarta for a 40' container was \$308, and also see attached **Exhibit 2**, pages 1 and 95 of Amendment 21 of subject Service Contract wherein the base rate was increased by \$600 per 40' container between Detroit, MI and Jakarta for a 40' container to \$908. This was a unilateral increase of rates intended to take place on or about February 28, 2020 for past and prospective shipments. COSCO applied those rate increases of \$600 per 40' container unilaterally and informed MAC of these increases by issuing invoices for shipments already completed or which were in route to be completed on or after February 28, 2020, as well as for prospective shipments to take effect on or about February

28, 2020 date. See **Exhibit 3** hereto, the Excel spreadsheet prepared by MAC, which illustrates the effect of these retroactively applied COSCO invoices which indicates unlawful invoicing by the application of retroactively filed rates for MAC in the amount of \$54,040.25 for the retroactive application of the increases.

14. MAC advised COSCO senior management, through counsel, on or about March 3, 2020, that it was unlawful in violation of 46 U.S. Code § 41104 (a) (2)(A) of the Shipping Act of 1984, as amended (“the Act”), and that Federal Maritime Commission regulations at 46 CFR §530.10(a)(1) required that an amendment to a service contract “. . . [have] prospective effect and. . . [be] mutually agreed upon by the service contract parties.” MAC indicated, however, that it would accept the rate increases prospectively from on or about February 28, 2020, provided that COSCO agreed to withdraw the unlawful retroactive charges which COSCO had unilaterally and unlawfully initiated. (See counsel’s letter to COSCO herein as **Exhibit 4**). MAC, subsequently through counsel, by letter dated March 13, 2020 acknowledged to COSCO’s senior management that COSCO had revised its invoices with retroactive rates to MAC consistent with the terms of the Service Contract, and thanked COSCO senior staff for that. MAC further made known to senior management of COSCO that it was informally aware from COSCO staff that COSCO intended to take retaliatory steps against MAC for the actions it had taken related to its complaint concerning the retroactive charges made against MAC by COSCO. MAC, through counsel, further indicated that such retaliation would be in violation of 46 U.S. Code § 41104 (a) (3), and that MAC reserved all rights with respect to exercising its rights pursuant to that provision. (See second counsel’s letter herein as **Exhibit 5**).

15. Between March 23, 2020 and the present, COSCO has taken retaliatory steps against MAC in response to the complaint made by MAC related to COSCO’s unlawful assertion of freight charges by not treating MAC as a VIP Partner shipper to its detriment in competing with other COSCO VIP Partner shippers:

a) **On March 23, 2020** COSCO implemented a General Rate Increase (“GRI”) in relation to the novel Corona Virus (“COVID-19”) impact on the ocean shipping freight market. COSCO’s GRI was for \$240 / 20’ containers and \$300 / 40’ containers. COSCO mitigated these GRI’s for VIP Partner shippers to \$80/20’ container and \$100/40’ container. COSCO retaliated against MAC, even though it was a VIP Partner, by not applying the mitigated VIP Partner GRI

rates, but rather by applying the higher full GRI rates to MAC.

b) **On April 1, 2020**, Reina McClure, U.S. West Coast Sales Manager, confirmed to MAC that MAC was no longer being treated as a VIP Partner level account from a pricing standpoint. Ms. McClure confirmed that this retaliation was being implemented by Ms. Qing Yi, Director of Trade. MAC further confirmed retaliation by the Cargo, NOS contract amendment intended for consolidated cargo of “less than containerload cargo” (“LCL”) after application of the GRI, in contrast to the COSCO VIP rate guidelines for the same LCL market segment. MAC confirmed MAC’s rates are in many cases \$400 higher than VIP Partner levels in this specialized market segment. These rates would be un-usable for an NVOCC in that specialized market segment. While the Cargo, NOS contract is an insignificant portion of MAC’s business model, it is further evidence that MAC is again the subject of retaliation.

c) **On April 2, 2020**, Rachel Ang (US/CSLNA/SSG), withdrew its prior offered rate on March 27, 2020, to MAC and accepted by MAC for a shipment from Minneapolis to Aqaba, with the following statement from Ms. Ang: “Apology here, made an earlier offer on 3/27 which is not approved by Trade.” “Trade” is a reference again to Ms. Qing Yi from COSCO. The rate difference was \$486.00 greater for the revised rate offered on a 40’ container on April 2, 2020 than the rate offered and accepted on March 27, 2020. MAC again lost this business as a result of COSCO’s retaliatory action renegeing on the VIP Partner rate. See the string of e-mails which demonstrates the above rate quote process attached hereto as **Exhibit 6**. Also, on April 2, 2020, MAC obtained a copy of the COSCO VIP Agri Rates which COSCO offered to VIP Partners which were clearly \$200 lower per 40’ container than the service contract rates in MAC’s subject Service Contract. See attached **Exhibit 7**, a string of e-mails demonstrating that Joseph C. Ahn, COSCO Container Lines North America Inc., District Sales Manager, Export, New York, NY provided a copy of admittedly VIP Agri Rates noted above, and see also the attached subject VIP Agri Rates provided by Joseph Ahn, but not offered to MAC by COSCO which the parties understand are part of the quid pro quo of the Service Contracts for VIP Partners.

d) **On April 9, 2020**, Preston Chinn, Account Executive (Long Beach), COSCO Shipping Lines (North America), Inc., admits to MAC that MAC is not being provided VIP Partner rate support, and that “Reina and Kenny” are working on this with “Trade”, Ms. Qing Yi. See e-mails, **Exhibit 8**.

e) **On April 14, 2020**, both Preston Chinn and Reina McClure, COSCO managers, admit the deprivation of VIP Partner status to MAC by COSCO “Trade”, Ms. Qing Yi, and that they are now ready to meet with “Trade” to apply the VIP Partner amendments to MAC. See **Exhibit 9**, attached e-mail strings, and corresponding amendments to allow MAC VIP Partner rates, which were never approved by Ms. Qing Yi.

f) **On April 24, 2020**, again Jamie Kales, Sr., Account Executive – Exports, COSCO Shipping Lines Americas, Inc. again admits that “Trade” did not accept a VIP-Partner rate for MAC. See **Exhibit 10**.

g) **On April 27, 2020**, a customer stated, “You are close to \$300 high from my best, and in a few, more than that. Guess that goes with my previous comment of others getting lower GRI from COSCO in the last round.”

h) **On May 4, 2020**, Reina McClure admits for the first time that MAC is not on the VIP Partner list, by stating, “[w]e are also still working on our end to put you back on the VIP list.” See **Exhibit 11**.

i) **On May 14, 2020**, Jamie Kales, Sr. again communicates rates to MAC that “Please note that these are not at VIP levels, per trade.” “Trade”, again, is Ms. Qing Yi. See **Exhibit 12**.

j) On May 15, 2020, Ms. Reina McClure communicated for the first time that “Trade” is Ms. Qing Yi, wherein she states, “Please be advised I have mentioned once again with Kenny and we are going to meet again to discuss our strategy again with Ms. Yi to get these numbers back in place for your Agri contract along with Cargo, NOS contract.” See **Exhibit 13**. She states: “[we] will work with trade and Ms.Yi to get your rates back at the VIP levels.”

CAUSES OF ACTION

COUNT I: VIOLATION OF 46 U.S.C. §41104 (a)(3)

16. Complainant MAC incorporates by reference each of the facts and allegations stated in paragraphs 1 through 15 as though set forth herein.

17. 46 U.S.C. §41104 (a)(3) prohibits “[a] common carrier, either alone or in

conjunction with any other person, directly or indirectly, [to] retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.”

18. Between March 23, 2020 and the present, COSCO has taken retaliatory steps against MAC in response to the complaint made by MAC related to COSCO’s unlawful assertion of freight charges by not treating MAC as a VIP Partner shipper to its detriment in competing with other COSCO VIP Partner shippers. COSCO has purposely, in retaliation for MAC’s complaint to COSCO for COSCO’S attempt to unlawfully implement retroactive rates against MAC, or for other reasons, “unfair[ly] or unjustly [utilized] discriminatory methods” by denying MAC access to VIP Partner Agri Rates, and other Rates which were and are being made available to MAC’s VIP Partner competitors. MAC has repeatedly and consistently not been able to offer competitive pricing to compete with other COSCO VIP Partners. MAC has, therefore, had to cancel bookings made based on competing pricing, and has also not been able to attract shippers since MAC cannot meet shipper pricing expectations. As a result, MAC has experienced serious financial setbacks, and expects to experience further serious economic harm as a result of COSCO’s retaliatory denial of VIP Partner pricing to MAC. As a result of these repeated violations of 46 U.S.C. §41104 (a)(3), MAC has sustained and continues to sustain financial and reputational harm in the United States due to the rerouting of COSCO shipments to MAC’s competitors as a result of COSCO’S discriminatory acts against MAC and which favor COSCO’s other VIP Partners to MAC’s detriment.

19. Respondents also knowingly and improperly as a result of these repeated violations of 46 U.S.C. § 41104(a)(3), have caused and will cause MAC to sustain financial harm by the application of deadfreight penalties by COSCO for failure to ship minimum volume commitments pursuant to the terms Service Contract No. LAN20287.

INJURY SUFFERED BY MAC

20. MAC has been actually and materially injured by Respondent COSCO for financial damages of at least \$1,000,000 as a direct result of Respondents' repeated violations of 46 U.S.C.

§41104(a)(3). Specifically, MAC suffered damages and is continuing to be damaged in excess of \$1,000,000.00 as a direct result of Respondents' repeated violations of 46 U.S.C. § 41104(a)(3).

DAMAGES

21. As a direct consequence of the unlawful conduct engaged in by Respondent, MAC has suffered injury and continues to suffer damages in excess of \$1,000,000 as described herein, and as may be further demonstrated in this proceeding, and seeks relief as provided below.

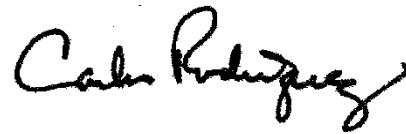
PRAYER FOR RELIEF

WHEREFORE, MAC respectfully prays for relief from the Commission as follows:

1. An Order compelling Respondent to answer the charges made herein and scheduling a hearing in Washington D.C. during which the Commission may receive evidence in this matter;
2. An Order, after due investigation and hearing, finding Respondent to have violated 46 U.S.C. §41104(a)(3);
3. An Order compelling Respondent to cease and desist its discriminatory and retaliatory activities by denying MAC VIP Partner rates for the remainder of the current service contract term, and subsequent service contracts to the extent that MAC maintains VIP Partner volume standards;
4. An Order compelling Respondent that to the extent that MAC cannot meet its minimum volume commitments for this service contract period, that Respondent cease and desist from seeking of deadfreight in violation of §41104(a)(3);
5. An Order awarding MAC damages in an amount in excess of \$1,000,000 to be proven under 46 U.S.C. § 41305, interest under 46 U.S.C. § 41305(a), and reasonable attorneys' fees under 46 U.S.C. § 41305(e); and
6. Such other and further relief as the FMC determines to be just and proper.

Dated: June 5, 2020

Respectfully Submitted:



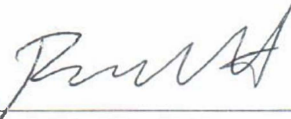
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Counsel for Complainant, MAC Container
Line

VERIFICATION

Mr. Brad Heier, President of Mac Industries, Inc. d/b/a MAC Container Line, pursuant to 28 USC §1746, the undersigned hereby declares under penalty of perjury that he has read the foregoing Verified Complaint, and that the facts stated therein to the best of his knowledge, information and belief further declares that the foregoing is true and correct on information, belief, and upon information received from others.

Dated: June 5, 2020



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