



Before the
FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 21-05

MCS INDUSTRIES, INC. v. COSCO SHIPPING LINES CO., LTD. AND
MSC MEDITERRANEAN SHIPPING COMPANY SA

VERIFIED COMPLAINT

I. INTRODUCTION

1. Complainant MCS Industries, Inc. (“MCS”), by its undersigned counsel, brings this Verified Complaint against Respondents COSCO SHIPPING Lines Co., Ltd. (“COSCO”) and MSC Mediterranean Shipping Company SA (“MSC” and, collectively with COSCO, “Respondents”) pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to MCS caused by Respondents’ violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.
2. Since the beginning of the COVID-19 pandemic, global ocean carriers, including the foreign-owned Respondents named herein, have, as alleged herein, and upon information and belief, unjustly and unreasonably exploited customers, vastly increasing their profitability at the expense of shippers and the U.S. public generally, which bears increased freight cost in the form of inflation.
3. Upon information and belief, the bulk of ocean carriage secured by shippers traditionally has been pursuant to written service contracts, negotiated in advance at reasonable rates. Although a “spot market” for ocean carriage also exists, historically it has been used, upon

information and belief, primarily by smaller shippers making small and/or one-time shipments, or for unexpected needs, such as a one-time or seasonal increase in shipping needs for a larger shipper.

4. With the onset of the COVID-19 pandemic, global ocean carriers began taking parallel and strikingly similar actions to prop up ocean carriage pricing and improve their profitability at the expense of shippers and the public. These actions included, among other things, “blank sailings” that deprived shippers of capacity, creating artificial scarcity and boosting prices on the spot market.
5. Even with returning demand, however, global ocean carriers have not returned to the just and reasonable pricing and contracting practices of pre-pandemic times. Instead, they have doubled down on policies and practices that manipulate prices and deliver unprecedented windfall profits to them by forcing shippers into an artificially inflated spot market. A container that in 2019 might have cost approximately \$2,700 to ship from China to the West Coast of the United States now might cost \$15,000 or more on the spot market.
6. MCS has experienced this misconduct by global ocean carriers firsthand, as they have unreasonably refused to deal and negotiate with MCS. In a stark break from pre-pandemic practice, several ocean carriers refused to negotiate or provide service contracts to MCS, and those that did provide such service contracts, including the Respondents named herein, refused to provide more than a fraction of the cargo capacity that MCS requested and needs, despite the fact that the Respondents overall have continued to operate at or near pre-pandemic capacity.

7. To make matters worse, Respondents then proceeded to engage in a common practice of refusing to perform even under those limited service contracts, instead forcing MCS to buy space on the inflated spot market.
8. MCS's written service contracts with each of the Respondents (collectively, the "Service Contracts") included minimum quantity commitments ("MQC") by MCS to each Respondent to tender cargo from various points in East Asia for Respondents to transport via ocean vessels to the United States at agreed intervals and for agreed prices.
9. By definition, the Service Contracts required Respondents to "commit[] to a certain rate or rate schedule ***and a defined service level, such as assured space***, transit time, port rotation, or similar service features."¹
10. The ink was scarcely dry on those Service Contracts, however, before Respondents began flouting their contractual service commitments, providing MCS with only fractions of the agreed allotments of space on their respective ocean vessels, and instead forcing MCS to make alternate transportation arrangements at substantially—often outrageously—higher spot market prices.
11. Upon information and belief, Respondents have changed their practices in parallel and seemingly coordinated fashion, depriving MCS of its contractually agreed space allotments

¹ 46 U.S.C. § 40102(21) (emphasis added); *accord* 46 C.F.R. § 530.3(q); *see also* 46 U.S.C. § 40502(c)(7) (requiring service contracts to include "service commitments" as essential terms); 46 C.F.R. § 530.8(b)(5) (same); 46 C.F.R. § 530.8(c) (providing for the certainty of terms in service contracts by, *inter alia*, prohibiting such essential terms from being "uncertain, vague or ambiguous").

and instead selling their respective capacity, including space actually allotted to MCS under its Service Contracts, and then subsequently withdrawn, to the highest bidder on the very spot market to which their conduct has forced MCS to turn.

12. Upon information and belief, Respondents have engaged, and are continuing to engage, in substantially similar conduct with respect to other shippers.
13. In doing so, Respondents have unjustly and unreasonably obliterated the previously stable and well-established structure of the global ocean freight industry. Now, instead of securing reliable service contracts in advance, MCS is forced to (1) agree in advance to exorbitant rates for whatever portion of its needed capacity global ocean carriers are willing to cover with service contracts, (2) make up the difference on the spot market, and then (3) rush to the spot market again each time Respondents refuse to honor their limited service commitments in pursuit of even more profit-taking.
14. Respondents' actions have contributed to, and greatly benefited from, exorbitant spot market prices. For example, on July 7, 2021, COSCO issued a profit alert to the Hong Kong Exchange citing a 133.86% increase in spot market prices in the second quarter of 2021, compared to the same quarter in 2020, and noted that COSCO was "expected to record a net profit . . . for the Reporting Period of approximately RMB 37,021 million, as compared to that of approximately RMB 882 million for the six months ended 30 June 2020"—an incredible year-over-year increase of *more than forty times*.²
15. As a result of the collective conduct and profiteering by Respondents and, upon information and belief, their fellow global ocean carriers, ocean carriage costs on the spot

² <https://www1.hkexnews.hk/listedco/listconews/sehk/2021/0707/2021070701353.pdf>.

market have risen to crisis levels, threatening shippers' businesses and generating price inflation to support massive windfalls for the carriers at the expense of the public. This conduct is unjust, unreasonable, and unlawful.

16. Respondents have also greatly benefited by organizing themselves, along with other major non-U.S. shipping lines, into collusive "alliances" at the expense of shippers. Upon information and belief, the three global alliances—*i.e.*, the "2M Alliance", which includes Respondent MSC, the "Ocean Alliance", which includes Respondent COSCO, and the "THE Alliance"—collectively control *over 90 percent of all transpacific trade*.
17. These collusive ocean alliances give Respondents venue and opportunity to coordinate discriminatory practices such as those alleged herein to violate contracts with shippers like MCS in favor of exploiting profit opportunities on the spot market. In the May–July 2021 period, each Respondent has grossly flouted its contractual service commitment, providing MCS only small fractions of the space required under the Service Contracts—specifically, just over one-third (approximately 35%) by MSC and an infinitesimal 1.6% by COSCO.
18. Respondents' conduct alleged herein with respect to the receipt, handling, storage, and delivery of the property of MCS and, upon information and belief, of other shippers is occurring on a normal, customary, and continuous basis, and, as alleged herein, shows no sign of abating.

II. THE COMPLAINANT

19. Complainant MCS is a corporation existing under the laws of the Commonwealth of Pennsylvania with its principal place of business located at 2280 Newlins Mill Road, Easton, Pennsylvania 18045, telephone (610) 253-6268, email care of Sara Faubert, sfaubert@mcsframe.com, and via its undersigned counsel's telephone numbers and email

addresses listed below. For purposes of its service contracts with Respondents, MCS is a “shipper” as that term is defined by 46 U.S.C. Section 40102(23).

III. THE RESPONDENTS

20. Upon information and belief, Respondent COSCO is a company existing under the laws of the People’s Republic of China with its principal place of business located at No. 378 Dong Da Ming Road, Shanghai 200080, China, acting in the United States by and through its agent, COSCO SHIPPING Lines (North America) Inc., a company existing under the laws of the State of Delaware with its principal place of business located at 100 Lighting Way, Secaucus, New Jersey, 07094. COSCO is a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with organization number 015614. Upon information and belief, COSCO also is a “controlled carrier” of China as that term is defined by 46 U.S.C. Section 40102(9).
21. Upon information and belief, Respondent MSC is a company existing under the laws of Switzerland with its principal place of business located at 12-14 Chemin Rieu, 1208 Geneva, Switzerland. MSC is a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with organization number 001699.

IV. JURISDICTION AND LEGAL AUTHORITY

22. The Federal Maritime Commission (“FMC”) has subject-matter jurisdiction over this Verified Complaint pursuant to the Shipping Act and, in particular, 46 U.S.C. Sections 41301 through 41309.
23. The FMC has personal jurisdiction over each of the Respondents as “ocean common carriers” as that term is defined by 46 U.S.C. Section 40102(18) that have entered into “service contracts” as that term is defined by 46 U.S.C. Section 40102(21) with MCS.

Upon information and belief, the FMC also has personal jurisdiction over Respondent COSCO as a “controlled carrier” of China as that term is defined by 46 U.S.C. Section 40102(9).

24. Respondents’ actions alleged herein constitute failures by each Respondent to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of MCS and other shippers, in violation of 46 U.S.C. Section 41102(c).
25. Respondents’ actions alleged herein constitute the provision of service in the liner trade that is not in accordance with the rules and practices contained in their Service Contracts with MCS, in violation of 46 U.S.C. Section 41104(a)(2).
26. Respondents’ actions, done in connection with their provision of service pursuant to their Service Contracts with MCS, individually and collectively constitute unfair and unduly discriminatory practices against MCS in the matter of rates or charges with respect to the ports for which MCS contracted with them, in violation of 46 U.S.C. Section 41104(a)(5).
27. Respondents’ actions with respect to their Service Contracts individually and collectively also have given undue and unreasonable preference and advantage to shippers other than MCS and imposed undue and unreasonable prejudice and disadvantage on MCS with respect to the ports for which MCS contracted with them, in violation of 46 U.S.C. Section 41104(a)(9).
28. Respondents’ actions in the course of negotiating their Service Contracts with MCS and providing service to MCS pursuant to those Service Contracts constitute unreasonable refusals to deal or negotiate with MCS, in violation of 46 U.S.C. Section 41104(a)(10).

V. THE MATTERS COMPLAINED OF (ALLEGED FACTS)

29. Prior to last year, MCS, like most significant shippers, was able to secure advance service contracts to cover the bulk of its ocean carriage needs at reasonable, pre-negotiated prices.
30. In negotiations for the current shipping year, Respondents and other global ocean carriers collectively refused to provide MCS sufficient commitments in their advance service contracts, instead providing only a fraction of the space MCS needed at substantially higher prices, which MCS accepted in order to secure such space, believing that such higher prices would fully compensate Respondents for current market disruptions. Each Respondent engaged in this refusal to deal.
31. Respondents then proceeded to flout even the limited commitments they had provided by refusing to honor their Service Contracts, forcing MCS to purchase services for which it had already contracted on the spot market.
32. These parallel actions by Respondents and, upon information and belief, their fellow global ocean carriers, artificially inflated spot market prices by forcing unexpected demand—demand that was supposed to have been covered by written service contracts—into the market.
33. MCS and COSCO entered into a written “service contract” as that term is defined by 46 U.S.C. Section 40102(21) dated and effective as of January 1, 2021 (the “COSCO Service Contract”).
34. MCS and COSCO agreed in the COSCO Service Contract that MCS would tender a certain minimum quantity of twenty-foot equivalent units (“TEUs”) of cargo for shipment by COSCO via ocean vessels from China, Hong Kong, and/or Indonesia to the United States at agreed prices.

35. Despite COSCO's essential contractual service commitment to provide adequate and assured vessel space and regularly scheduled service to carry MCS's contractual MQC, in May through July 2021, COSCO has refused to provide MCS more than a tiny fraction—1.6%—of that allotted space, forcing MCS to make alternate transportation arrangements with other common carriers at substantially higher spot market prices or forgo shipping its cargo altogether.
36. Upon information and belief, COSCO is capitalizing on its violations of the Shipping Act alleged herein by re-selling the capacity allotted to MCS under the COSCO Service Contract to other shippers on the same spot market at substantially higher rates than those to which it agreed in the COSCO Service Contract.
37. For example, COSCO requested a shipping forecast for MCS for the week of May 9–15, 2021, and after receiving the requested confirmation of the space MCS needed for that week, COSCO provided two vessel options. Despite being told that either vessel would work for MCS, weeks later COSCO wrote that all space up to May 24, 2021 had been released. *None* of that space was released to MCS.
38. Upon information and belief, COSCO is violating the Shipping Act in similar fashion with respect to other shippers, as well as discriminating against U.S. shippers such as MCS by favoring Chinese shippers with greater space allotments than those provided to MCS.
39. COSCO's financial results demonstrate that COSCO has been able to boost profits by discriminating against service contract shippers like MCS in favor of other shippers paying inflated spot market prices. As alleged above, the 133.86% increase in spot market prices

cited in COSCO's recent profit alert has led COSCO to project a net profit more than forty times higher than the same period last year.³

40. MCS and MSC entered into a written "service contract" as that term is defined by 46 U.S.C. Section 40102(21) effective as of May 1, 2021 (the "MSC Service Contract").
41. MCS and MSC agreed in the MSC Service Contract that MCS would tender a certain minimum quantity of TEUs of cargo for shipment by MSC via ocean vessels from China to the United States at agreed prices.
42. Despite MSC's essential contractual transportation commitment to ship MCS's contractual MQC, in May through July 2021, MSC has continuously refused to provide MCS more than approximately one-third—35%—of that allotted space, forcing MCS to make alternate transportation arrangements with other common carriers at substantially higher spot market prices or forgo shipping its cargo altogether.
43. Upon information and belief, MSC is capitalizing on its violations of the Shipping Act alleged herein by re-selling the capacity allotted to MCS under the MSC Service Contract to other shippers on the same spot market at substantially higher rates than those to which it agreed in the MSC Service Contract.
44. Just this month, for example, MSC issued a booking confirmation, and subsequently provided vessel information for the booking, but then, days later, claimed that their sales staff was still working on space allocation, and ultimately refused to release the booked space to MCS.

³ <https://www1.hkexnews.hk/listedco/listconews/sehk/2021/0707/2021070701353.pdf>.

VI. CAUSES OF ACTION

COUNT I: VIOLATION OF 46 U.S.C. § 41102(c) (AGAINST BOTH RESPONDENTS)

45. Complainant repeats and realleges each and every allegation above as if fully set forth herein.
46. The foregoing continuous, ongoing conduct by each Respondent in connection with its respective receipt, handling, storage, and delivery of the property of MCS and, upon information and belief, of other shippers, constitutes failures by each Respondent to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of MCS and other shippers, in violation of 46 U.S.C. Section 41102(c).

COUNT II: VIOLATION OF 46 U.S.C. § 41104(a)(2)

(AGAINST BOTH RESPONDENTS)

47. Complainant repeats and realleges each and every allegation above as if fully set forth herein.
48. The foregoing conduct by each Respondent constitutes provision of service in the liner trade that is not in accordance with the rules and practices contained in its respective service contract with MCS, for which no exception or exemption applies and that has not been suspended or prohibited by the FMC, in violation of 46 U.S.C. Section 41104(a)(2).

COUNT III: VIOLATION OF 46 U.S.C. § 41104(a)(5)

(AGAINST BOTH RESPONDENTS)

49. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

50. The foregoing conduct by each Respondent in the course of providing service to MCS pursuant to its respective service contract with MCS, which is continuous and ongoing, constitutes an unfair and unjustly discriminatory practice against MCS in the matter of rates or charges with respect to the ports identified in each respective service contract, in violation of 46 U.S.C. Section 41104(a)(5).

COUNT IV: VIOLATION OF 46 U.S.C. § 41104(a)(9)

(AGAINST BOTH RESPONDENTS)

51. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

52. The foregoing conduct by each Respondent in the course of providing service to MCS pursuant to its respective service contract with MCS, which is continuous and ongoing, gives undue and unreasonable preference and advantage to shippers other than MCS and imposes an undue and unreasonable prejudice and disadvantage to MCS with respect to the ports identified in each respective service contract, in violation of 46 U.S.C. Section 41104(a)(9).

COUNT V: VIOLATION OF 46 U.S.C. § 41104(a)(10)

(AGAINST BOTH RESPONDENTS)

53. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

54. The foregoing conduct by each Respondent in the course of negotiating its service contract with MCS and providing service to MCS pursuant to that service contract, which is continuous and ongoing, constitutes unreasonable refusal to deal or negotiate with MCS, in violation of 46 U.S.C. Section 41104(a)(10).

VII. CAUSATION

55. The foregoing alleged illegal acts of Respondents have directly and proximately injured MCS by forcing MCS to make alternate transportation arrangements for cargo that was supposed to be shipped by Respondents pursuant to the terms of their respective Service Contracts at substantially higher spot market prices or forgo shipping such cargo altogether.

VIII. COMPLAINANT'S DAMAGES

56. MCS has been, and continues to be, actually and materially injured by each Respondent's continuous conduct in violation of the Shipping Act alleged herein.
57. Respondents' violations alleged herein are causing direct, proximate, and ongoing financial damages to MCS in an amount already believed to exceed \$600,000, currently accruing, and to be further demonstrated in this proceeding.

IX. PRAYER FOR RELIEF

WHEREFORE, MCS respectfully requests that the FMC require Respondents to answer the charges made in this Verified Complaint and prays for relief from the FMC as follows:

1. An investigation by the FMC of the allegations in this Verified Complaint pursuant to 46 U.S.C. Section 41301(c);
2. An Order, after due investigation pursuant to 46 U.S.C. Sections 41302 and 41303 and a hearing pursuant to 46 U.S.C. Section 41304, finding that Respondents have violated 46 U.S.C. Section 41102(c) in connection with their respective receipt, handling, storage, and delivery of the property of MCS, that Respondents have violated 46 U.S.C. Sections 41104(a)(2), 41104(a)(5), and 41104(a)(9) in connection with their respective service contracts with MCS, and that Respondents have violated 46 U.S.C. Section 41104(a)(10) by unreasonably refusing to deal or negotiate with MCS;

3. An Order compelling Respondents to cease and desist from violation of the Shipping Act and putting in place lawful and reasonable practices to preclude Respondents from refusing to provide MCS with its allotted space at the prices agreed under their respective service contracts with MCS for the remaining terms of those service contracts;
4. An Order requiring Respondents to pay MCS reparations for the unlawful conduct alleged herein in an amount to be proven pursuant to 46 U.S.C. Section 41305, with interest pursuant to 46 U.S.C. Section 41305(a), MCS's reasonable attorneys' fees as "the prevailing party" pursuant to 46 U.S.C. Section 41305(e), and any other sum the FMC determines to be proper; and
5. Such other and further orders or relief as the FMC deems just and proper.

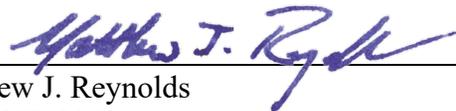
X. REQUEST FOR ORAL HEARING

Complainant requests an oral hearing in Washington, DC.

Dated: July 28, 2021

Respectfully submitted,

HUTH REYNOLDS LLP



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VERIFICATION

I, Richard Master, am Chief Executive Officer of Complainant MCS Industries, Inc., 2280 Newlins Mill Road, Easton, Pennsylvania 18045, telephone (610) 253-6268, email care of Sara Faubert, sfaubert@mcsframe.com. I have read the foregoing Verified Complaint and believe, to the best of my knowledge, information, and belief, including information received from others, that the facts stated therein are true and correct. I declare under penalty of perjury that the foregoing is true and correct. Executed on July 28, 2021.

