

**FEDERAL MARITIME COMMISSION**  
Office of Administrative Law Judges

OJ COMMERCE, LLC, *Complainant*

v.

HAMBURG SÜDAMERIKANISCHE DAMPFSCIFFFAHRTS-  
GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH  
AMERICA, INC., *Respondents*.

**DOCKET NO. 21-11**

Served: June 29, 2022

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**ORDER OF:** Erin M. WIRTH, *Chief Administrative Law Judge*.

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**ORDER ON RESPONDENTS' MOTION TO COMPEL AND REVISED SCHEDULE**

**I. Introduction and Procedural Background**

On May 16, 2022, the parties filed a joint motion to modify the scheduling order. Also on May 16, 2022, Complainant OJ Commerce ("OJC") filed a motion to compel discovery and for reimbursement of attorneys' fees and costs ("Motion"). On May 23, 2022, Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft-A/S & Co. KG and Hamburg Sud North America, Inc. (collectively "Hamburg") filed their response to the motion to compel ("Opposition").

This proceeding began on December 13, 2021, when the Commission issued a notice of filing of complaint and assignment, indicating that OJC had filed a complaint against Hamburg. An amended complaint, filed on February 18, 2022, alleges that Hamburg violated 46 U.S.C. §§ 41102(c), 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10).

For the reasons set forth below, both OJC's motion to compel and the joint motion to modify the scheduling order are **GRANTED IN PART AND DENIED IN PART**.

**II. Motion to Compel**

The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.141(e)(1).

On motion or on its own, the presiding officer may limit the frequency or extent of discovery otherwise allowed by these rules if the presiding officer determines that:

(A) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

46 C.F.R. § 502.141(e)(2)(ii). The Commission's Rules also permit the presiding officer to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 46 C.F.R. § 502.141(j). Further, the Commission's Rules governing the production of documents or electronically stored information provides that parties "must produce the documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request" and "need not produce the same electronically stored information in more than one form." 46 C.F.R. § 502.146(b)(2)(v)(A, C).

Complainant seeks to compel scheduling, allocation of space, and pricing on relevant sailings; service contract business practices; and deposition expenses. Motion at 10-19. Hamburg asserts that the requests are burdensome or otherwise improper; the material sought does not meet the applicable legal standard; and the claim for reimbursement of attorneys' fees should be denied because it seeks relief that the presiding officer lacks the authority to grant and is also unwarranted. Opposition at 2-9.

#### **A. Scheduling, allocation of space, and pricing on relevant sailings**

OJC requests responses to interrogatory 9 ("OJC INT 9") and request for production 9 ("OJC RFP 9") which seek specific information from January 1, 2020, to the present for each sailing from specific cities in China and Vietnam to Los Angeles or Long Beach, including the date of departure and arrival; cargo capacity; unbooked or available cargo capacity; each shipper whose cargo was carried; and for each shipper, the volume of cargo, dates booked, total contractual minimum quantity commitment ("MQC"), total volume, and price charged. Motion at 10-11. OJC asserts that these requests relate directly to Complainant's allegations of offering carriage to other shippers at higher contracted or spot market rates, undue and unreasonable preference, unfair and unjust discriminatory practices, undue and unreasonable prejudice or disadvantage, and profiting from violation of the Shipping Act. Motion at 12-13.

Hamburg asserts that the information sought is not reasonably calculated to lead to the discovery of admissible evidence because there is no factual dispute with the allegation that the complainant did not receive all of the space for which it had contracted. Opposition at 4-5. Regarding these specific requests, Hamburg argues that the burden outweighs the benefit because Complainant is seeking 24 data points per week for a period of approximately 120 weeks which would need to be compiled from four different databases and that determining the rate charged may require identifying as many as 168,000 separate rates. Opposition at 5-7.

Moreover, Respondents assert that the data sought will not make any facts more or less probable as there was in all likelihood some cargo paying higher rates and some cargo paying lower rates.

OJC INT 9(a)-9(f) request information regarding the Respondents' sailings from the cities at issue, including the total cargo capacity and the cargo capacity that remained unbooked. This information is within the Respondents' control and is relevant. It is not overly burdensome to require production of information from multiple databases. *SMD Software, Inc. v. EMove, Inc.*, 2011 U.S. Dist. LEXIS 66742, at \*18 (E.D.N.C. June 22, 2011) ("It is not clear why providing information readily available in databases – even if that information is spread across three or more databases – causes the undue burden described by defendants"). Therefore, OJC INT 9(a)-9(f) is compelled, although the timeframe will be limited to January 1, 2020, to January 1, 2021.

OJC INT 9(g)-9(l) request information regarding non-party customer data, including shipper identity, cargo, MQC commitments, volume, and pricing that is commercially sensitive to non-parties. While the requested responses may have marginal relevance to issues in the proceeding, the burden and expense of production outweigh their probative value. Regarding rates charged to non-party shippers, "there could be as many as 168,000 rates alone." Opposition at 7. Moreover, rates are determined based on a number of factors and the rate, without all of those other factors, has limited value. Accordingly, the information requested in OJC INT 9(g)-9(l) is not compelled.

OJC RFP 9 will be similarly limited, with only documents relevant to OJC INT 9(a)-9(f) from January 1, 2020, to January 1, 2021, compelled. The parties are encouraged to stipulate to facts to reduce discovery expenses. Stipulations should be agreed to by all parties and may be filed without a motion as they do not need to be approved.

## **B. Service contract business practices**

OJC requests responses to requests for production 13 and 26 which seek documents concerning which shippers were offered a service contract, what MQC each of those shippers received in their service contracts as compared to what MQC they requested, and which shippers were not offered a service contract despite a request for one, including policies, considerations, decisions, or determinations concerning the reasons why each entity was offered or not offered a service contract and how prices charged for shipments under service contracts or the spot market are determined. Motion at 13-14.

Hamburg asserts that responding to these questions would require a manual review of approximately 800 service contracts; that there is no way to search for service contracts that were not signed; and the pricing information requires reviewing a massive amount of commercially sensitive materials. Opposition at 8-9.

OJC RFP 13 requests documents regarding which shippers were offered a service contract, the MQC requested versus the MQC received, and which shippers were not offered a service contract. Responding to this request would require a manual review of all correspondence as it is not maintained in the normal course of business, a burden which outweighs the potential benefit. Accordingly, OJC RFP 13 is not compelled.

OJC RFP 26 requests documents showing pricing, including how prices are determined and why prices may vary between shippers. Respondents state that “prices vary among customers based on a number of factors, including the volume committed in a particular trade lane and in other trade lanes.” Opposition at 9. This request will be narrowed to any policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices charged for shipments under service contracts and on the spot market. Respondents will not be required to review or provide documents regarding pricing for individual shippers. So, for example, the negotiations with individual shippers would not be disclosed but an email with information about pricing on a specific route must be disclosed. Accordingly, OJC RFP 26 is compelled as limited.

### **C. Deposition expenses**

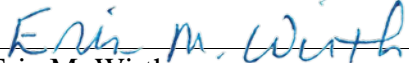
OJC seeks attorney’s fees related to a deposition of an employee who was included in Respondents’ initial disclosures but when deposed, was found not to have knowledge of the claims and defenses in this matter. Motion at 16-19. Hamburg asserts that the request for attorneys’ fees “must be denied because it seeks relief the presiding officer lacks the authority to grant and is unwarranted.” Opposition at 2.

Pursuant to the Howard Coble Coast Guard and Maritime Transportation Act of 2014, 46 U.S.C. § 41305(e), and Commission Docket No. 15-06, under certain circumstances, attorney fees may be awarded to the prevailing party in a complaint proceeding. However, there is no mechanism for the presiding officer to award fees prior to the resolution of a proceeding. Accordingly, the request for deposition expenses is denied.

### **III. Revised Scheduling Order**

The parties seek an approximately sixty-day extension of the schedule. Given the Commission deadline for this proceeding of December 13, 2022, a shorter extension is approved and a joint status report deadline is added. The procedure for briefing outlined in the initial scheduling order remains in effect.

July 15, 2022	Joint status report.
August 5, 2022	Disclosure of initial expert reports.
August 30, 2022	Last day to serve discovery requests.
September 2, 2022	Disclosure of rebuttal expert reports.
September 16, 2022	Close of all discovery (fact and expert).
October 10, 2022	Complainant’s brief, findings of fact, and appendix.
November 14, 2022	Respondents’ brief, findings of fact, appendix, and response.
November 30, 2022	Complainant’s reply brief.

  
Erin M. Wirth  
Chief Administrative Law Judge