

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: February 18, 2022

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

ORDER ON MOTION TO AMEND COMPLAINT AND MOTION TO DISMISS

I. Introduction and Procedural Background

On December 13, 2021, the Commission issued a Notice of Filing of Complaint and Assignment, indicating that Complainant OJ Commerce (“OJC”) had filed a complaint alleging that Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft-A/S & Co. KG and Hamburg Sud North America, Inc. (collectively “Hamburg”) had violated 46 U.S.C. § 41102(c) and 46 C.F.R. §§ 545.4 and 545.5, in connection with the delivery of OJC’s containers.

On January 18, 2022, Respondents filed a partial answer to the complaint, as well as a motion to dismiss and/or for summary judgment (“Dismissal Motion”). On February 2, 2022, Complainant filed an opposition to the Dismissal Motion (“Dismissal Opposition”). On February 7, 2022, Respondents filed a reply to the Dismissal Opposition (“Dismissal Reply”).

On February 2, 2022, Complainant also filed a motion seeking leave to file an amended complaint (“Amended Complaint Motion”), along with the proposed amended complaint. On February 7, 2022, Respondents filed an opposition to the amended complaint motion (“Amendment Opposition”).

On February 7, 2022, Complainant and Respondents filed a joint status report, as instructed in an initial order issued on December 14, 2021.

For the reasons set forth below, OJC’s motion to amend the complaint is granted, and Hamburg’s motion to dismiss and/or for summary judgment is denied as moot. Respondents may file a response to the amended complaint by March 1, 2022. The parties shall file a joint status report, as discussed below, by March 8, 2022.

II. Motion to Amend Complaint

Complainant asserts that the amended complaint provides additional factual bases regarding the Commission's jurisdiction over Hamburg Sud North America, Inc. ("Hamburg NA"), the amendments are timely as the amended Complaint was filed only 15 days after Respondents filed their partial answer and less than two months after filing of the original complaint, the amended complaint will not unduly prejudice Respondents as the additional facts in the amended complaint "are well known to Respondents, as they solely relate to the parties business relationship during 2020-2021," the amendments also address the alleged deficiencies raised in Respondents' motion to dismiss and/or for summary judgment, and the amended complaint alleges additional facts and claims under sections 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9) and 41104(a)(10), based on Respondents' failures to comply with the Shipping Act. Amended Complaint Motion at 1-8. Complainant notes that because the amendments are being sought prior to the start of discovery, Respondents have adequate time to prepare for the amended issues. Amended Complaint Motion at 8.

Respondents oppose the amended complaint motion, asserting that the motion to amend is unduly delayed, as "Complainant knew or should have known of the facts/claims it seeks to add to the complaint at the time the complaint was originally filed," and because the amendment seeks to add new Shipping Act claims and address deficiencies identified in Respondents' motion to dismiss which would "turn the complaint into a moving target for Respondents." Amendment Opposition at 2-3. Respondents argue that the motion to amend the complaint has and will prejudice Respondents because if the motion is granted, Respondents would be forced to file another dispositive motion, even if Respondents' original motion to dismiss is granted in whole or in part. Amendment Opposition at 3-4.

Pursuant to Commission Rule 66, amendments to a complaint "will be permitted or rejected, either in the discretion of the Commission or presiding officer." 46 C.F.R. § 502.66(a). The rules do not provide criteria for evaluating whether to grant or deny a motion to amend a complaint, however, Commission Rule 12 provides that "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Under Federal Rule 15(a)(1)(B), "a party may amend its pleading once as a matter of course" within 21 days after service of a responsive pleading. F.R.C.P. 15(a)(1)(B). After that period, an amended pleading is permitted with opposing party's written consent or leave of court. Courts "should freely give leave when justice so requires." F.R.C.P. 15(a)(2).

As Complainant notes, its motion seeking leave to amend its complaint comes only 15 days after Respondents filed their partial answer and their dismissal motion. Thus, Complainant is well within the time limit under Federal Rule 15(a)(1)(B), to amend its complaint once as a matter of course. "Denial of leave to amend therefore constitutes an abuse of discretion unless the court gives sufficient reason, such as futility of amendment, undue delay, bad faith, dilatory motive, undue prejudice, or repeated failure to cure deficiencies by previous amendments." *Bancoult v. McNamara*, 214 F.R.D. 5, at *8 (D.D.C. 2003); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has permitted amendment of a complaint to allow a party to further develop their allegations of Shipping Act violations. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC Lexis 19, at *23 (FMC 2006).

Respondents also assert that the motion for amendment comes six weeks after the complaint was served. Amendment Opposition at 3. However, Commission Rule 66 and Federal Rule 15(a) do not include a time limitation and a “court should not deny leave to amend based solely on time elapsed between the filing of the complaint and the request for leave to amend.” *Bancoult v. McNamara*, 214 F.R.D. 5, at *8. Moreover, this proceeding is still in the early stages and discovery has not yet begun. Therefore, Respondents will not be prejudiced based on the timing of Complainant’s request to amend its complaint. Respondents may utilize discovery to obtain information necessary to address the new allegations raised in the amended complaint. Similarly, Respondents’ contention that they would be forced to file another dispositive motion should the amendment be allowed is not a basis to deny a well-founded motion requesting leave to amend a complaint. For the foregoing reasons, the amended complaint will be permitted.

The parties filed a joint status report (“JSR”) in which they state that they have exchanged initial disclosures but have been unable to reach agreement regarding a discovery schedule. Complainants proposed a schedule, but Respondents believed that it was premature to establish a discovery schedule or begin discovery pending a ruling on Respondents’ dismissal motion and Complainant’s amended complaint motion. JSR at 1-2.

Respondents should file a response to the amended complaint by March 1, 2022. The parties must file a joint status report by March 8, 2022, outlining a proposed schedule, and stating whether they have exchanged settlement offers, but not the content of any settlement offers.

III. Motion to Dismiss or for Summary Judgment

Respondents’ dismissal motion addresses the allegations in the original complaint. Since Complainants’ have been granted permission to file their amended complaint, which replaces the original complaint, Respondents’ motion is now moot. Respondents’ motion to dismiss and/or for summary judgment is, therefore, denied. However, their arguments, which may apply to the amended complaint, are addressed briefly below to provide guidance and avoid unnecessary motions practice.

Respondents state in their amendment opposition that if Complainant’s motion to amend “is granted, either before or after a ruling on Respondents’ motion to dismiss, Respondents will be forced to file another dispositive motion, even if Respondents’ original motion to dismiss is granted in whole or in part.” Amendment Opposition at 4. The parties are encouraged to begin discovery prior to filing any additional motions. It is noted that the amended complaint provides additional details and factual allegations and the discussion below is provided as guidance as the parties move forward.

Respondents assert that the complaint should be dismissed in its entirety with regard to Hamburg NA for lack of personal jurisdiction because, according to them, section 41102(c) applies only to common carriers and marine terminal operators, and Hamburg NA is not a marine terminal or common carrier but rather, “its only business was to act as the general agent of its ocean common carrier parent, [Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft-A/S & Co. KG (“Hamburg Germany”)]. Dismissal Motion at 1-2. Respondents also assert that the complaint must be dismissed to the extent it involves an alleged breach of service contract

because the Commission lacks jurisdiction over breach of contract claims, the complaint fails to state a claim under the Act with respect to the alleged breach of service, and an alleged breach of service contract does not fall within the scope of section 41102(c). Dismissal Motion at 3-6.

OJC asserts that Respondents' motion for dismissal should be denied because, according to OJC, its amended complaint renders moot all of Respondents' arguments for dismissal. Dismissal Opposition at 1. OJC notes that the amended complaint alleges that Hamburg NA is an ocean transportation intermediary ("OTI"), which may be held liable for section 41102(c) violations, and over which the Commission has personal jurisdiction as a "person" subject to regulation by the Commission, based on its acts in conjunction with Hamburg Germany. Dismissal Opposition at 1-2. OJC also notes that the amended complaint adds more detail and dates of Respondents' alleged repeated refusal over the course of 10 months to operate in accordance with the parties' service contract on a normal, customary, and continuous basis, which are Shipping Act violations rather than breach of contract claims, alleges that Respondents' failure to operate in accordance with the terms or modified terms of an agreement required to be filed with the Commission, constitutes a violation of section 41102(b) rather than section 41102(c), and adds specific dates showing conduct by Respondents over the course of 10 months, in violation of section 41102(b). Dismissal Opposition at 5-6. In addition, OJC argues that the motion for summary judgment is premature as discovery that would allow the parties to obtain information pertinent to the case has not yet occurred. Dismissal Opposition at 6-9.

1. Dismissal for Lack of Jurisdiction over Hamburg NA

Respondents argued in their motion to dismiss that the Commission lacks jurisdiction over Hamburg NA because the complaint alleges a section 41102(c) violation, which is applicable only to common carriers and marine terminal operators, and according to Respondents, Hamburg NA is neither a common carrier nor a marine terminal operator, as alleged by Complainant. The amended complaint alleges that Hamburg NA is an ocean transportation intermediary ("OTI"), an issue which is inextricably intertwined with the merits of the case, as an OTI is a Commission-regulated entity subject to the section 41102(c) prohibitions. The amended complaint thus raises a sufficient basis for the Commission to assert jurisdiction over the complaint, and over Hamburg NA.

2. Dismissal for Lack of Jurisdiction over Breach of Contract Claims

Respondents also argue that the complaint is subject to dismissal because "[o]ne of the alleged violations of Section 41102(c) enumerated in the complaint is the failure to fulfill service obligations under a service contract," but in actuality Complainant's allegation represents "a claim for a breach of contract, not a claim of a violation of the Act." Dismissal Motion at 3.

The amended complaint provides greater specificity regarding Complainants' allegations that Respondents violated section 41102(c), and alleges additional violations of the Shipping Act by Respondents. These allegations go beyond mere breach of contract claims to comprise allegations of conduct prohibited under the Shipping Act. The Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the allegations may constitute both breach of contract claims and claims that the entity violated the Shipping Act.

See, e.g., Baltic Auto Shipping, Inc. v. Hitrinov, Docket No. 14-16, 33 S.R.R. 1230, 1232-33 (ALJ Feb. 2, 2015) (Order Denying Request for Stay).

3. Dismissal Based on Summary Judgment

If Respondents intend to file a motion for summary judgment, it is noted that summary judgment is not appropriate when issues of material fact are disputed by the parties. Reviewing the parties' filings, it is apparent that material facts in the case are disputed by the parties. As an example, Complainant alleges that Hamburg NA is an OTI (Amended Complaint at No. 2), while Respondents assert that Hamburg NA's "only business was to act as the general agent of its ocean common carrier parent, [Hamburg Germany]." Dismissal Motion at 2. This is a material disagreement because it goes to the core of whether the Commission has jurisdiction to adjudicate the complaint against Hamburg NA, and whether the alleged Shipping Act violations apply to Hamburg NA. Similarly, the parties disagree as to the gate out dates for the containers alleged to have been improperly subjected to demurrage charges. These are also material disagreements because the gate out dates are important to determine whether demurrage should have been imposed on the containers, and in what amount. Discovery would allow the parties to obtain information pertinent to material facts in the case. Thus, a motion for summary judgment is not appropriate at this stage in the proceedings.

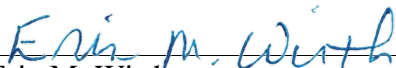
IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that the motion to amend the complaint be **GRANTED**. The Secretary is requested to file the amended complaint attached to Complainant's motion for leave to file an amended complaint. Respondents may file an answer to the amended complaint by March 1, 2022. It is

FURTHER ORDERED that Respondents' motion to dismiss and/or for summary judgement be **DENIED AS MOOT**. It is

FURTHER ORDERED that the parties shall submit a joint status report with proposed schedule by March 8, 2022.


Erin M. Wirth
Chief Administrative Law Judge