

**BEFORE THE
FEDERAL MARITIME COMMISSION**

OJ COMMERCE, LLC,)	
)	
Complainant,)	
)	
v.)	
)	
HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG)	DOCKET NO. 21-11
)	
and)	
)	
HAMBURG SUD NORTH AMERICA, INC.)	
)	
Respondents.)	
)	

**Respondents’ Opposition to Complainant’s
Motion for Clarification of the Presiding Officer’s August 31, 2022 Order**

Respondents Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft A/S & CO KG and Hamburg Sud North America, Inc. hereby oppose the Motion for Clarification of the Presiding Officer’s August 31, 2022 Order filed by Complainant OJ Commerce, LLC (“OJC”) on September 22, 2022.

I. Introduction

OJC’s motion for clarification of the August 31, 2022 Order is unnecessary as OJC concedes in the motion that “Respondents have already agreed to” the requested clarification. Motion at 4. The motion appears to be a pretext for OJC’s actual focus, which is an attempt to obtain sanctions against Respondents for not producing documents that the Presiding Officer previously ruled did not have to be produced. The motion should be denied in its entirety.

II. The Clarification Requested by OJC Is Unnecessary

The motion for clarification asks the Presiding Officer remove the January 1, 2021 time limitation on the period covered by OJC's RFP 26. However, Respondents voluntarily agreed to produce responsive documents through mid-2022. Pursuant to that agreement, on or before September 16, 2022, Respondents produced spot rate information through mid-2022. Therefore, the requested "clarification" is unnecessary and should be denied.

III. The Request for Sanctions Should Be Denied

The motion for clarification appears to be a pretext for OJC's actual focus – a request for sanctions based the alleged failure of Respondents to produce "all documents responsive to OJC RFP 26." Motion at 3.¹ As explained below, however, the Presiding Officer expressly ruled that Respondents are not required to produce all documents sought by RFP 26.

OJC's RFP 26 sought production of:

Documents sufficient to show Your pricing for shipping, including how You determine the prices charged for shipments under Service Contracts and for shipment on the spot market, and how and why Your prices may vary between one Shipper and another.

Respondents objected to RFP 26, OJC moved to compel production and, in her June 29, 2022 Order, the Presiding Officer ruled:

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.

¹ The request for sanctions should also be denied because it is included in a motion for clarification, does not address the legal standards for the imposition of sanctions, and cites no authority for the imposition of sanctions in this situation.

June 29, 2022 Order at 4. The Presiding Officer also declined to compel production of specific pricing information sought by portions of OJC Interrogatory #9/RFP #9 and OJC RFP 13. Order at 2-3. In short, the Presiding Officer held that Respondents were not required to produce all documents responsive to RFP 26, or to produce specific rate information. Rather, Respondents were compelled to produce “policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices...”.

In response to the Order, Respondents produced documents reflecting spot market pricing instructions to their organizations for a portion of 2019, all of 2020, all of 2021, and the first half of 2022. Respondents located a limited number of documents relating to service contract pricing policy for 2021-22, and also produced those documents. Respondents believe they have responded fully to RFP 26 “as limited” by the June 29, 2022 Order.

OJC complains that the spot rate documents do not reflect “the prices that Respondents really charged shippers.” Motion at 2. As noted above, however, Respondents were not required to produce documents showing the actual, bottom line prices charged to customers for shipments on the spot market. OJC also complains that “Respondents still have provided no service contract pricing at all.” As noted above, however, the Presiding Officer ruled that Respondents are not required to provide specific service contract rate information.

In compliance with the June 29, 2022 Order, Respondents produced documents relating to policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices under service contracts. Specifically, Respondents produced documents relating to their contracting strategy for the 2021-22 service contract season. OJC appears to argue that there should be more policy/guideline type documents relating to service contract pricing. As OJC knows from the numerous depositions it has taken in this proceeding, there is sworn testimony

from Respondents' witnesses that there are few such documents. For example, Matthew J. Hill, Head of Import Markets and Product Management for North America, testified:

Q. Okay. Now, I asked you before whether you have a written policy that you go through in determining pricing on a contract, I believe you said you do not have a written policy. Is that correct?

A. I said I was not aware of one.

Transcript of Deposition of Matthew J. Hill, p. 118, lines 17-21.

This is not surprising. Policy/guideline type documents relating to service contract pricing are not common because service contracts typically have a duration of one year. Due to the variety of factors related to commercial conditions in the market, operational considerations, customer needs, cargo mix, and Respondents' capacity to support a customer, much of the decision-making and guidance with respect to service contract pricing is informal and made on a case-by-case basis by personnel who rely on their experience and knowledge of the foregoing factors.

IV. Conclusion

The requested "clarification" is unnecessary and appears to be a pretext for another attempt by OJC to seek sanctions against Respondents. The request for sanctions is without merit and should be denied. Respondents produced documents responsive to RFP 26 "as limited" by the Presiding Officer. Respondents should not be sanctioned because OJC did not receive documents the Presiding Officer ruled Respondents do not need to produce, or because the type of documents Respondents were ordered to produce do not exist in the quantity or form expected by OJC.

In light of the foregoing, the motion for clarification should be denied in its entirety.

Respectfully submitted,

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Dated: September 26, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2022, the foregoing was served via electronic mail on:

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and

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