BEFORE THE

FEDERAL MARITIME COMMISSION

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

RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION TO COMPEL

Respondents Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & CO KG ("HSDG") and Hamburg Sud North America, Inc. ("HSNA" and, together with HSDG, "Respondents"), through undersigned counsel, hereby respond to Complainant OJ Commerce LLC's Motion to Compel Discovery And For Reimbursement of Attorneys' Fees and Costs ("Motion"). For the reasons set forth below, the Motion should be denied.

I. Introduction

The Motion seeks an order compelling responses to certain discovery requests to which Respondents have objected, and an order compelling reimbursement of certain attorneys' fees

and expenses relating to the only deposition taken thus far in the case. [1] The Motion also appears to engage in argument with respect to the merits of certain of Complainant's claims in this proceeding. In so doing, it makes a number of subjective statements, quotes emails out of context or mischaracterizes their content, or otherwise makes statement with which Respondents disagree. However, beyond noting their disagreement with much of what Complainant alleges or mischaracterizes, Respondents will not engage in an argument as to the substantive claims and will limit their argument herein to the specific relief sought by the Motion.

II. The Claim For Reimbursement Of Attorneys' Fees And Costs Should Be Denied

Complainant's request for attorneys is fees must be denied because it seeks relief the presiding officer lacks the authority to grant and is unwarranted.

Under 46 U.S.C. §41305(e), the prevailing party may be awarded reasonable attorneys' fees in a complaint proceeding before the FMC. A complainant is generally considered to have prevailed when the presiding officer awards reparations or issues a cease-and-desist order. *Statement of the Commission on Attorney Fees,* FMC Docket No. 21-14 (December 28, 2021), pp. 2-3 (citations omitted). In such instances, a petition for attorneys' fees is to be filed within 30 days of a decision becoming final. 46 C.F.R. §502.254(c). For purposes of this regulation, "decision" means an initial decision or dismissal order issued by the administrative law judge. Here, there has been no decision within the meaning of the applicable regulation and no award of reparations or issuance of a cease-and-desist order. Accordingly, Complainant's request does not meet the criteria for an award of attorneys' fees and must be denied.

Moreover, the request must be denied because it lacks merit. Complainant correctly cites the Commission's regulation and the Federal Rules of Civil Procedure governing initial

[1] The Motion fails to comply with 46 C.F.R. §502.71(d), which limits non-dispositive motions and replies to 10 pages, exclusive of exhibits and appendices, without leave of the presiding officer.

disclosures, both of which require disclosure of persons who are likely to have discoverable information that the disclosing party may use to support its claims or defenses. However, Complainant then suggests that this somehow means Respondents are required to identify in their initial disclosures any and all persons that have "knowledge about the dispute between the parties." This misstates the legal obligation of Respondents. The Committee Notes on the 2000 amendments to Rule 26(a)(1) of the FRCP make clear: "The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position." In other words, Respondents were and are under no legal obligation to identify any and all persons with "knowledge about the dispute between the parties."

The designation of Mr. Urso as a person likely to have information that Respondents may use to support their claims or defenses meets the applicable legal criteria.[2] Mr. Urso may not have been able to articulate how his knowledge of Respondents' demurrage and detention collections is relevant, but Mr. Urso is neither counsel to Respondents nor is he responsible for defense strategy. Mr. Urso was a sender or recipient of approximately 40 emails pertaining to OJ Commerce that were produced in discovery. Several of these emails were circulated as exhibits for his deposition, but were never introduced at the deposition. He occupies a unique position in the company and has knowledge that Respondents may use in their defense of this matter.

In light of the foregoing, he was properly identified in the initial disclosures, Complainant's claim is without merit, and must be denied.[3]

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[2] Complainant's reliance on *Sub Zero Franchising, Inc. v. Frank Nye Consulting, LLC* is misplaced. That case involved the filing of a fraudulent claim by plaintiff and the listing of witnesses who did not and could not have knowledge of the claim. It is easily distinguished from the present case.

[3] Complainant characterizes the deposition of Mr. Urso as a "complete waste." Respondents question how this could be the case when it lasted approximately 4 hours and produced a transcript of 157 pages.

III. Complainant's Motion To Compel Must Be Denied

A. <u>The Material Sought Does Not Meet The Applicable Legal Standard</u>

In order to be discoverable, material must be reasonably calculated to lead to the discovery of admissible evidence 46 C.F.R. §502.141(e). The threshold test for the admissibility of evidence is relevance. Under Federal Rule of Evidence 401, evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and that fact is of consequence in determining the action. The material sought by Complainant does not satisfy this criteria.

Complainant's claims against Respondents boil down to three core allegations: (i) demurrage was improperly assessed; (ii) Respondent HSDG breached the service contract and discriminated against Complainant by failing to provide Complainant with all of the space for which it had contracted; and (iii) Respondents retaliated against Complainant. Complainant seeks information about (a) the volume of cargo carried for other customers and the rates charged to those customers; (b) the identity of customers that did or did not receive a service contract; and (c) Respondents' pricing. None of these categories of documents/information are reasonably calculated to lead to the discovery of facts that are of consequence in determining its claims.

None of the information sought in the Motion relates in any way to events surrounding the assessment of demurrage, and thus none of that information is reasonably calculated to lead to the discovery of admissible evidence with respect to that claim.

There is no factual dispute with respect to the allegation that Complainant did not receive all of the space for which it had contracted – Respondents concede that Complainant did not receive the space for which it had contracted, and so advised counsel for Complainant. None of

the information sought will lead to any facts that make that fact any more probable. The discrimination claims arise out of the alleged failure to provide space and, as explained below, none of this information will lead to any facts that make those allegations any more probable.

Finally, none of the information sought will lead to facts that make the allegation of retaliation any more or less probable. Respondents' relationships with other customers – including rates, volumes, and contract terms – do not bear on whether Respondents retaliated against Complainant.

In short, none of the information sought is reasonably calculated to lead to the discovery of admissible evidence and thus is not discoverable.

Moreover, in determining whether or not to allow discovery, the presiding officer is to consider whether the burden or expense of the discovery outweighs its likely benefit, considering a number of factors. 502.141(e)(2)(ii)(C). As explained below with respect to specific requests, Complainant also fails to satisfy these criteria.

B. The Specific Requests Are Burdensome Or Otherwise Improper, Particularly In Light Of The Benefit Of The Information

1. Interrogatory #9/RFP #9

In Interrogatory #9, Complainant seeks six (6) categories of data with respect to each sailing from various ports from January 1, 2020 to the present. During that time period, Respondent HSDG offered space on weekly sailings of seven (7) different services, four of which called at the ports identified in the interrogatory. This means Complainant is seeking 24 data points per week for a period of approximately 120 weeks (the majority of which fall outside the term of the service contract which is at issue in this proceeding), or 2,880 pieces of data. None of the information sought about vessel sizes, sailing and arrival dates, vessel capacity, or vessel utilization will shed any light on Complainant's claims with respect to demurrage,

retaliation, or the provision of space under its contract. This is particularly true with respect to sailings which occurred before or after the term of the service contract between the parties to this dispute.

Complainant seeks six (6) additional categories of data about the customers whose cargo was carried on those sailings, and the cargo itself. This adds a significant number of additional data points. For example, one of these data points is the rate charged for the carriage of the cargo. Since HSDG was carrying approximately 1,400 containers per week during the period in question, responding to this interrogatory would require HSDG to identify up to as many as 168,000 separate rates (1400 containers per week x 120 weeks). Although cargo carried on the three services that did not call at the ports at issue would be excluded, this remains a massive request.

None of the massive volume of data requested relates to Complainant's demurrage or retaliation claims. Moreover, contrary to Complainant's allegations, this data does not relate to their claim that they did not receive space (a fact that is not in dispute). Even if Complainant receives this data, the data could not be used to support Complainant's claim that Respondents engaged in unlawful discrimination by declining Complainant's cargo in favor of higher paying cargo, because it will not show which cargo (if any) supposedly displaced the cargo of Complainant. In other words, the best possible outcome for Complainant is that it may be able to point to some cargo on the vessel paying a higher rate than it paid to move its cargo. However, it would not be able to show that cargo paying a higher rate in fact displaced its cargo. Moreover, since there was in all likelihood cargo on these sailings paying lower rates than those paid by Complainant, Respondents could point to such cargo as evidence which contradicts

Complainant's discrimination claims. Thus, the data sought do not make any facts more or less probable.

The sheer volume of data that would have to be produced in response to this request makes a response unduly burdensome and expensive for Respondents, particularly when that burden is weighed against the lack of utility of the information. The burden is considerable given that the requested information does not reside in a single database and cannot be generated with the push of a button. Responding to this interrogatory would require consultation of at least four different sources of information: an operational database for the vessel information; a booking database for information about booking dates; a loading database for cargo volumes; and a rating database for rate information. Information from each of these databases would have to be collated to match voyages to bookings to loadings to ratings. As noted above, there could be as many as 168,000 rates alone. Respondents should not be forced to incur this burden and expense when the information sought is not reasonably calculated to lead to admissible evidence relevant to any of Complainant's claims.

2. RFP #13

Complainant seeks documents relating to which customers did and did not receive a service contract, including all documents and communications with shippers, as well as the volume commitment requested by the customers and the volume commitment they eventually received in their service contract.

Service contracts in the trade from Asia to the U.S. typically run from May 1 to April 30. During 2021-21, Respondent had approximately 400 service contracts in this trade. During 2021-22, Respondent had a similar number of service contracts in this trade. Responding to this request would require manual review of all correspondence relating to each of these contracts to

determine the volume requested vs. the volume contracted. This is unduly burdensome, given that the minimum quantity commitment requested vs. the minimum quantity commitment eventually concluded with other customers has nothing whatsoever to do with Complainant's claims with respect to demurrage, failing to receive space, or retaliation. The fact that Customer X originally proposed an MQC of 100 containers and eventually concluded a contract for 90 or 110, sheds no light whatsoever on anything that would in any way impact Complainant's claims.

With respect to correspondence with customers who did not receive a service contract, Respondents' counsel has explained to counsel for Complainant that searching for customers who did receive a contract is searching for the contents of a null set. There is simply no way to provide this information short of all relevant personnel of Respondents searching their emails and files in an effort to identify customers who did not sign a contract. Since such a search could not be conducted through use of key words, it would be a manual search that would be labor-intensive, time consuming, and expensive. The burden of such a search far outweighs the value of the information that might eventually be uncovered, particularly given the fact that there are any number of reasons a customer might not sign a service contract with a particular carrier (such as a better rate and/or service offering from a competing carrier).[4]

3. <u>RFP #26</u>

This request seeks all documents reflecting pricing for shipping, how prices are determined, and why prices vary from shipper to shipper. The request is unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

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[4] Nothing in the Shipping Act requires a carrier to offer a service contract to a customer, or entitles a customer to a service contract. Moreover, the 1998 revisions to the Shipping Act were intended to increase the flexibility of carriers in offering service contracts. S. Rep. 61, 105th Cong., 1st Sess., p. 29 (1997) ("The Committee intends that common carriers be afforded maximum flexibility to differentiate their service contract terms and conditions with respect to individual shippers and ocean transportation intermediaries in this more competitive environment.").

As an initial matter, responding to this request requires production of Respondent HSDG's tariff and all changes thereto between January 1, 2020 and the present, as well as all of its service contracts (and amendments thereto) during that period. It also requires production of all correspondence with customers regarding possible prices or changes thereto, as well as all internal correspondence regarding each and every pricing decision. Even if the request is limited to the geographic trade covered by Complainant's service contract with Respondent (a limitation not stated in the request itself), it is still massive and would require production of a huge volume of some of Respondents' most commercially sensitive documents.

This burden is not justified in the context of this proceeding. None of this information relates to Complainant's allegations with respect to demurrage or retaliation. It is also duplicative of the pricing information sought in Interrogatory #9 and, like that information, would not be probative of anything, in 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. Just as easily as Complainant might point to customers paying rates higher than its rates, Respondents could point to customers paying lower rates. Again, the information is simply not probative with respect to any element of Complainant's claims.

IV. Conclusion

For the foregoing reasons, Complainant's motion should be denied in its entirety.

Respectfully submitted,

Wayne R. Rohde
Kathryn Sobotta
COZEN O'CONNOR
1200 Nineteenth Street, NW
Suite 300
Washington, DC 20036
(202) 463-2507

Dated: May 23, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Respondents' Response to Complainant's Motion to Compel upon Complainant's counsel of record:

Aaron W. Davis, Esq. (davis@valhallalegal.com)

Shlomo Hecht, Esq. (sam@hechtlawpa.com)

Dated: May 23, 2022

By: /s/ Wayne R. Rohde
Wayne R. Rohde