

Before the
FEDERAL MARITIME COMMISSION
Washington, DC 20573
Docket No. 22-14



MSRF Inc. v. HMM Company Limited, and Yang Ming Marine Transport Corporation

VERIFIED COMPLAINT

I. INTRODUCTION

1. Complainant MSRF, Inc. (“MSRF”), by its undersigned counsel, brings this Verified Complaint against Respondents HMM Company Limited (“HMM”) and Yang Ming Marine Transport Corporation (“Yang Ming”), pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to MSRF 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 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 has traditionally 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 currently reviving demand, however, global ocean carriers have not returned to the just and reasonable pricing and contracting practices of pre-pandemic times. Instead, they have continued 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 \$25,000 or more on the spot market.
6. MSRF has experienced this misconduct by global ocean carriers firsthand. Respondents agreed to service contracts with MSRF and then refused to provide more than a fraction of the cargo capacity that MSRF requested and needs, even though Respondents overall have continued to operate at or near pre-pandemic capacity.
7. To make matters worse, each Respondent then proceeded to engage in a practice of refusing to perform their full commitments even under those limited service contracts, instead forcing MSRF to buy space on the inflated spot market.
8. MSRF’s written service contracts with each of the Respondents (collectively, the “Service Contracts”) included minimum quantity commitments (“MQC”) by MSRF to each

Respondent to tender cargo from various points in 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. Shortly after entering into the Service Contracts with MSRF, Respondents began breaching their contractual service commitments by providing MSRF with hardly any of the agreed allotments of space on their respective ocean vessels, and instead forcing MSRF 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 MSRF of its contractually agreed space allotments and instead selling their respective capacity, including space actually allotted to MSRF under its Service Contracts and then subsequently withdrawn, to the highest bidder on the very spot market to which their conduct has forced MSRF 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 so doing, Respondents have unjustly and unreasonably disrupted the previously stable and well-established structure of the global ocean freight industry. Now, instead of securing reliable service contracts in advance, MSRF is forced to (1) agree in advance to exorbitant rates for whatever portion of its needed capacity global ocean carriers are willing

¹ 46 U.S.C. 40102(21) and 46 C.F.R. § 530.3(q). *See also* 46 U.S.C. § 40502(c)(7) and 46 C.F.R. 530.8(b)(5) which require service contracts to include service commitments as essential terms.

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 profiteering.

14. Respondents' actions have contributed to, and greatly benefited from, exorbitant spot market prices. For example, on November 11, 2021, Yang Ming reported record profits of \$1.83 billion for the third quarter of the year (Taipei Times – November 12, 2021) and HMM reported record third-quarter results in November 2021 with a nearly ten-fold increase in net profit over 2020 (Journal of Commerce -- December 2, 2021). And a new review by Accountable.US reports that the world's top five container shipping companies saw profits soar by triple digit percentages in their 2021 fiscal years (<https://www.accountable.us/wp-content/uploads/2022/04/2022-04-01-Research-on-Shipping-Company-Profiteering-By-Market-Cap-FINAL.pdf>).
15. As a result of the collective conduct and profiteering by Respondents and, upon information and belief, by their fellow global ocean carriers, ocean carriage costs on the spot 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 also have 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, two global alliances—*i.e.*, the "Ocean Alliance" and "The Alliance", which includes Respondents Yang Ming and HMM—collectively have a market share of 90% in the trans-Pacific trade.

17. These collusive ocean alliances give Respondents the incentive and opportunity to coordinate discriminatory practices such as those alleged herein, so as to violate contracts with shippers like MSRF in favor of exploiting profit opportunities on the spot market. In the May–December 2021 period, each Respondent has flouted its contractual service commitment, providing MSRF only small fractions of the space required under the Service Contracts—specifically, just 9 of 25 containers by HMM, and 4 of 100 by Yang Ming.
18. Respondents’ conduct alleged herein with respect to the receipt, handling, storage, and delivery of the property of MSRF 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 MSRF is a corporation organized under the laws of the State of Delaware with its principal place of business located at 9815 Leland Avenue, Schiller Park, Illinois 60176. MSRF is a “shipper” under its Service Contracts with Respondents pursuant to 46 U.S.C. 40102(23). MSRF was founded in 1995 as a manufacturer and importer of gourmet foods and food gifts. The company’s seasonal and holiday products are sold in big box retailers throughout the U.S. MSRF also sells products licensed by Starbucks, Jim Beam and other prominent brands.

III. THE RESPONDENTS

20. Upon information and belief, Respondent HMM is a company organized under the laws of the Republic of Korea. HMM is a vessel-operating ocean common carrier as that term is defined by 46 U.S.C. § 40102(18) with organization number 001452. HMM’s North

American headquarters office is located at 222 West Las Colinas Boulevard, Suite 700, Irving, TX 75039.

21. Upon information and belief, Respondent Yang Ming is a company organized under the laws of Taiwan. Yang Ming is a vessel-operating ocean common carrier as that term is defined by 46 U.S.C. § 40102(18) with organization number 000138. Yang Ming's North American headquarters office is located at 1085 Raymond Boulevard, 9th Floor, Newark, New Jersey 07102.

IV. JURISDICTION AND LEGAL AUTHORITY

22. The Federal Maritime Commission ("FMC") has jurisdiction over this Verified Complaint pursuant to 26 U.S.C. §§ 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 MSRF.
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 MSRF 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 MSRF, 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 MSRF, individually and collectively constitute unfair and unduly

discriminatory practices against MSRF in the matter of rates or charges with respect to the ports for which MSRF 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 MSRF and imposed undue and unreasonable prejudice and disadvantage on MSRF with respect to the ports for which MSRF 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 MSRF and providing service to MSRF pursuant to those Service Contracts constitute unreasonable refusals to deal or negotiate with MSRF, in violation of 46 U.S.C. Section 41104(a)(10).

V. ALLEGED FACTS

29. Prior to last year, MSRF, 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 2021-2022 shipping year, each Respondent and other global ocean carriers collectively refused to provide MSRF sufficient commitments in their advance service contracts, instead providing only a fraction of the space MSRF needed at substantially higher prices, which MSRF accepted in order to secure such space, believing that such higher prices would fully compensate Respondents for current market disruptions.
31. Respondents then proceeded to flout even the limited commitments they had provided by refusing to honor their Service Contracts, forcing MSRF to purchase services on the spot market for which it had already contracted with Respondents.

32. These parallel actions by Respondents and, upon information and belief, by 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. MSRF and HMM entered into a written service contract (SC US2124083) as that term is defined by 46 U.S.C. Section 40102(21) effective as of May 1, 2021 (the “HMM Service Contract”).
34. MSRF and HMM agreed in the HMM Service Contract that MSRF would tender a minimum quantity of twenty-five (25) forty-foot equivalent units (FEUs) of cargo for shipment by MSRF via ocean vessels from ports in Asia to the United States, and from ports in the United States to Asia at agreed prices.
35. Despite HMM’s contractual commitment to ship the minimum quantity tendered by MSRF, HMM has continuously refused to provide MSRF more than approximately 9 of the promised 25 FEUs of that allotted space, forcing MSRF 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, HMM is capitalizing on its violations of the Shipping Act alleged herein, by re-selling the capacity allotted to MSRF under the HMM Service Contract to other shippers on the same spot market at substantially higher rates than those to which it agreed in the HMM Service Contract.
37. MSRF and Yang Ming entered into a written service contract (SC 494721) as that term is defined by 46 U.S.C. Section 40102(21) effective as of May 1, 2021 (the “Yang Ming Service Contract”).

38. MSRF and Yang Ming agreed in the Yang Ming Service Contract that MSRF would tender a minimum quantity of one hundred (100) containers of cargo for shipment by MSRF via ocean vessels from ports in Asia to the United States, and from ports in the United States to Asia at agreed prices.
39. Despite Yang Ming's contractual commitment to ship the minimum quantity committed by MSRF, Yang Ming has continuously refused to provide MSRF more than approximately 4 percent of that allotted space, forcing MSRF to make alternate transportation arrangements with other common carriers at substantially higher spot market prices or forgo shipping its cargo altogether.
40. Upon information and belief, Yang Ming is capitalizing on its violations of the Shipping Act alleged herein, by re-selling the capacity allotted to MSRF under the HMM Service Contract to other shippers on the same spot market at substantially higher rates than those to which it agreed in the HMM Service Contract.

VI. CAUSES OF ACTION

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

(AGAINST ALL RESPONDENTS)

41. Complainant repeats and realleges the allegations above as if fully set forth herein.
42. The foregoing continuous, ongoing conduct by each Respondent in connection with its respective receipt, handling, storage, and delivery of the property of MSRF 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 MSRF 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 ALL RESPONDENTS)

48. Complainant repeats and realleges the allegations above as if fully set forth herein.
49. 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 MSRF, to which no exception or exemption applies and which 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 ALL RESPONDENTS)

50. Complainant repeats and realleges the allegations above as if fully set forth herein.
51. The foregoing conduct by each Respondent in the course of providing service to MSRF pursuant to its respective service contract with MSRF, which is continuous and ongoing, constitutes an unfair and unjustly discriminatory practice against MSRF 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 ALL RESPONDENTS)

52. Complainant repeats and realleges the allegations above as if fully set forth herein.
53. The foregoing conduct by each Respondent in the course of providing service to MSRF pursuant to its respective service contract with MSRF, which is continuous and ongoing, gives undue and unreasonable preference and advantage to shippers other than MSRF and imposes an undue and unreasonable prejudice and disadvantage to MSRF 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 ALL RESPONDENTS)

54. Complainant repeats and realleges each and every allegation above as if fully set forth herein.
55. The foregoing conduct by each Respondent in the course of negotiating its service contract with MSRF and providing service to MSRF pursuant to that service contract, which is continuous and ongoing, constitutes unreasonable refusal to deal or negotiate with MSRF, in violation of 46 U.S.C. Section 41104(a)(10).

VII. CAUSATION

56. The foregoing alleged illegal acts of Respondents have directly and proximately injured MSRF by forcing MSRF 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

57. MSRF has been, and continues to be, actually and materially injured by each Respondent's continuous conduct in violation of the Shipping Act alleged herein.
58. Respondents' violations alleged herein are causing direct, proximate, and ongoing financial damages to MSRF in an amount already believed to exceed \$2,200,000, currently accruing, and to be further demonstrated in this proceeding.

IX. PRAYER FOR RELIEF

WHEREFORE, MSRF 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:

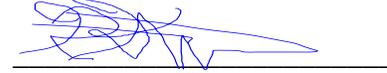
1. An investigation by the FMC of the allegations in this Verified Complaint pursuant to 46 U.S.C. Section 41301(c);
2. An Order, after due investigation pursuant to 46 U.S.C. Sections 41302 and 41303 and a hearing pursuant to 46 U.S.C. Section 41304, finding that Respondents have violated 46 U.S.C. Section 41102(c) in connection with their respective receipt, handling, storage, and delivery of the property of MSRF, 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 MSRF, and that Respondents have violated 46 U.S.C. Section 41104(a)(10) by unreasonably refusing to deal or negotiate with MSRF;
3. An Order requiring Respondents to pay MSRF 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), MSRF'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
4. 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.

Respectfully submitted,

CLARK HILL PLC



R. Kevin Williams
Mark R. Ludwikowski
Mark J. Andrews
312.985.5907
kwilliams@clarkhill.com
130 E. Randolph Street, Suite 3900
Chicago, IL 60601
Counsel for Complainant MSRF, Inc.

June 2, 2022

VERIFICATION

I, David Reich, hereby verify as follows:

1. I am President of Complainant MSRF, Inc.
2. I am authorized to make this verification on behalf of Complainant MSRF, Inc.
3. I hereby verify that the facts contained in the foregoing Verified Complaint are true and correct to the best of my knowledge, information and belief.
4. I verify the foregoing under penalty of perjury under the laws of the United States.



David Reich, President
MSRF, Inc.

May 27, 2022