

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 22-14

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

**CONSENT MOTION OF RESPONDENT
YANG MING MARINE TRANSPORT
CORPORATION TO REQUIRE COMPLAINANT
TO INDIVIDUALLY IDENTIFY RESPONDENTS**

Pursuant to Federal Maritime Commission (“FMC”) Rule 71, 46 C.F.R.502.71, Respondent Yang Ming Marine Transport Corporation (“Yang Ming”) hereby moves for an order requiring Complainant to identify each Respondent individually in any future claims, allegations, statements, and subsequent pleadings, including but not limited to discovery requests, briefs, and findings of fact.

Counsel for Yang Ming has conferred with counsel for Complainant regarding this motion and counsel for Complainant has graciously consented hereto.¹

Complainant has in its Complaint asserted separate claims about two separate alleged breaches of two separate contracts by two separate ocean common carriers – Yang Ming and HMM Company, Limited (“HMM”). There is, however, no claim asserting joint action by Yang Ming and HMM or of any joint and several liability by the two carriers.

¹ Counsel for the respective Parties believe that this result could probably have been achieved by stipulation, but out of an abundance of caution and the lack of a specific rule, have chosen to file it as a motion. We apologize if we have put an unnecessary burden on the Presiding Officer.

Yang Ming does not necessarily object to such effective consolidation of cases, as there may well be some common issues of law, but does recognize the potential legal and practical concerns by such a procedure, including confidentiality and inadvertent sharing of information between competitors.² We leave such matters for future consideration, and address here only a single issue of separately identifying HMM and Yang Ming.³

As the Presiding Officer has recently explained, each respondent in a case involving multiple respondents is entitled to know precisely what is being alleged as to it. She noted that this is not just a trivial matter of nomenclature, but rather an issue of fundamental due process:

“Due process requires that persons charged with unlawful conduct be given prior notice of the charges and an opportunity to be heard in defense before the government can take enforcement action.’ *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981). Pursuant to the Administrative Procedures Act, in an administrative adjudication, the respondent is entitled to notice of “the matters of fact and law asserted.” 5 USC § 554(b). The decision in *Holt Cargo* was predicated on the respondents’ due process rights, and supports the arguments made in the motion. Each entity named as a respondent in a proceeding has the right to understand what allegations are being made against it.” *Ocean Network Express Pte. Ltd. and Ocean Network Express (North America) Inc. - Possible Violations Of 46 U.S.C. § 41102(c)*, Docket No. 21-17 (Order dated March 28, 2022).

Thus, the Presiding Officer concluded:

² Conjoining two cases may raise multiple procedural and logistical issues. In answering the Complaint, for example, Yang Ming will need to answer almost every allegation twice – one as to Yang Ming and the other an insufficient information answer as to HMM. There may be differences between the schedule appropriate for one respondent and that appropriate for the other. Additional issues of this sort will likely arise as the case proceeds – e.g., what happens if counsel for one respondent needs an extension, but counsel for the other respondent does not. Those may be raised, if necessary, as they arise.

³ We note that the Complaint itself evidences the difficulty of keeping the two respondents separate. For example, Allegation 40 states: “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.” (Emphasis added). We assume this is a typo, which Yang Ming believes may be fixed without amendment, but it underscores the need to specify which respondent allegedly did what.

Accordingly, it is hereby ORDERED that Respondents' motion be GRANTED. BOE shall, from this date forward, identify each entity individually in any claims, allegations, statements, and subsequent pleadings, including discovery requests, briefs, and proposed findings of fact. This does not require filing separate documents, but rather using precise language to clarify when the parties are speaking about ONE, ONE NA, or both Respondents." Id.

The Presiding Officer's Order discussed above cited to and followed a similar order issued in *Holt Cargo Systems, Inc. v. Delaware River Port Authority*, 22 SRR 1582 (ALJ Order Requiring that each Complainant Individually be Identified with each Claim or Allegation" 2000), where the Presiding Officer required that the individual Complainants (there were three) be identified with respect to each claim or allegation that any of the Complainants made against Respondents.

As indicated above, this motion is forward-looking; it does not seek the filing of an amended complaint. Although Yang Ming cannot speak for HMM of course, for its own part Yang Ming is willing to take on the additional burden of providing two-part answers to the Complaint. Yang Ming is also willing to allow Allegation 40 to be deemed amended *nunc pro tunc* so that the references therein to the HMM Service Contract will be read as references to the Yang Ming Service Contract. The only confusion as to which Yang Ming requests formal clarification – which could be done in Complainant's Initial Disclosures – is to state how the

\$2,200,000 in alleged injury set out in Allegation 58 is allocated to Yang Ming specifically.

DATED: June 20, 2022

Respectfully submitted,

/s/ Rebecca A. Fenneman

Rebecca A. Fenneman

D.C. Bar: No: 1722599

Eric C. Jeffrey

D.C. Bar: No: 252585

Jeffrey/Fenneman Law + Strategy, PLLC

700 12th Street, NW Suite 700

Washington, DC 20005

Telephone: 202-904-2301

Email: EJeffrey@JeffreyFenneman.com

RFenneman@JeffreyFenneman.com

ATTORNEYS FOR RESPONDENT

YANG MING MARINE TRANSPORT CORPORATION

CERTIFICATE OF SERVICE

I certify that on the 20th day of June, 2022, a true and correct copy of the foregoing document was served by email on all counsel of record in accordance with 46 CFR Part 502 and the Commission's Order of May 12, 2020.

ATTORNEYS FOR COMPLAINANT

CLARK HILL PLC

Mark J. Andrews
1001 Pennsylvania Avenue, NW
Suite 1300 South
Washington, DC 20004
Tel.: 202-552-2352
Fax: 202-571-8684
mandrews@clarkhill.com

R. Kevin Williams
130 E. Randolph Street
Suite 3900
Chicago, IL 60601
Tel.: 312-985-5907
Fax: 312-985-5956
kwilliams@clarkhill.com

/s/ Rebecca A. Fenneman

Rebecca A. Fenneman
RFenneman@JeffreyFenneman.com
Tel: (202) 904-2301
Jeffrey/Fenneman Law + Strategy, PLLC
700 12th Street, NW Suite 700
Washington, DC 20005