

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

20230930-DK-BUTTERFLY-1, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
MSC MEDITERRANEAN SHIPPING COMPANY SA	)	
	)	<b>DOCKET NO. 23-12</b>
	)	
Respondent.	)	
	)	

**MEMORANDUM IN SUPPORT OF  
RESPONDENT’S PARTIAL MOTION TO DISMISS**

Respondent MSC Mediterranean Shipping Company SA, through undersigned counsel, hereby moves to dismiss Complainant 20230930-DK-Butterfly-1, Inc.’s (“Complainant”) claim of retaliation in violation of former 46 U.S.C. §41104(a)(3).

**I. MOTION TO DISMISS STANDARD**

While the Commission’s Rules of Practice and Procedure (the “Rules”) do not explicitly provide for motions to dismiss, Commission Rule 12 (46 C.F.R. §502.12) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Rules, if consistent with sound administrative practice. The “Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim.” *MAVL Capital v. Marine Transport Logistics*, 2 F.M.C. 2d 198 (FMC 2020).

Under Fed. R. Civ. P. 12(b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant’s favor.” *Id.*, citing *Maier Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54 (FMC 2015). To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

As explained below, Complainant fails to meet this standard with respect to its retaliation claim.

## II. SECTION 41104(a)(3) APPLIES TO THIS PROCEEDING

The first issue which must be addressed in this proceeding is which version of the prohibition on retaliation applies in this proceeding: 41104(a)(3), which was in effect at the time of the conduct that is the basis of the retaliation claim, or 41102(d), which went into effect in mid-June of 2022 (after the conduct that is the basis of the retaliation claim had concluded).

Absent an express Congressional directive to apply a new or revised statute retroactively, courts apply the statute that was in effect on the date that the underlying conduct occurred, not the statute in effect on the date when the complaint was filed. See, *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F. 3d 908, 916 (4<sup>th</sup> Cir. 2013) (holding that the earlier version of a statute must apply to conduct that occurred before the statute was amended, regardless of whether the statute was amended before the complaint was filed). The Commission follows this

rule and applies the law in effect at the time the conduct occurred when assessing civil penalties. See, *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c)*, 4 F.M.C.2d 53, 94 (ALJ 2022) and cases cited therein.

The reluctance to apply new or revised statutory requirements to past conduct is founded upon elementary considerations of fairness, which dictate that the settled expectations of parties should not be lightly disrupted, and that parties should have an opportunity to know what the law in effect is and conform their conduct accordingly. See, *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Application of the law in effect at the time the conduct occurred is required when the change in statute leads to the increase of a party's liability for past conduct, or the imposition of new duties with respect to transactions already completed. See, *id.* at 280. These considerations require application of section 41104(a)(3) in this proceeding.

Section 41104(a)(3), as in effect at the time of the conduct at issue, made it unlawful for a common carrier, either alone or conjunction with another person, directly or indirectly, to:

Retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022). Historically, the Commission interpreted the “other unfair or unjustly discriminatory methods” clause of section 41104(a)(3) as other unfair or unjustly discriminatory *retaliatory* actions or methods, not general acts of “unfair” or “unjustly discriminatory methods.” *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1225 (1990)(holding that the statute does not apply to any unfair or unjustly discriminatory methods, but rather “solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier”); *Consumer Electronics Shippers Ass’n v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 85, 91(1991)(stating that the retaliation statute should not be interpreted so broadly as to read out of

the statute the opening reference to retaliation, and that if the statute “were applied to any act of discriminatory conduct, it could render the other provisions of the Act prohibiting discrimination superfluous.”).

Effective June 16, 2022, former section 41104(a)(3) was revised and moved to section 41102(d), which provides:

A common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not—

(1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or

(2) resort to any other unfair or unjustly discriminatory action for—

(A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has—

(i) patronized another carrier; or

(ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or

(B) any other reason.

It is unclear whether Congress intended the division of the prohibition into paragraphs (1) and (2) to limit the application of the sub-paragraphs (2)(A) and (2)(B) to paragraph (2) only, or if subparagraphs 2(A) and 2(B) also apply to paragraph (1).

When Congress enacts new law or revises existing law, it is assumed to be aware of then-existing law. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). In light of the lack of any legislative history explaining the Congressional intent in adopting Section 41102(d) and the Commission’s past interpretation of Section 41104(a)(3), Respondent believes Section 41102(d) should be read in the same manner as former Section 41104(a)(3), i.e., that subparagraphs (2)(A) and (2)(B) of Section 41102(d) apply to paragraph (1) of that provision.

If Respondent is correct, then former Section 41104(a)(3) and Section 41102(d) are identical with respect to scope of the prohibition against retaliation as relevant to this proceeding – meaning that both provisions address unfair or unjustly discriminatory action that is retaliatory, but not general acts of unfairness. If, however, Section 41102(d) is viewed as a substantive change to former Section 41104(a)(3) that broadened the prohibition against retaliation, then principles of elementary fairness, due process, and the settled expectations of the parties dictate that 41104(a)(3) – with its narrower scope – must apply. Applying section 41102(d) to this proceeding rather than 41104(a)(3) would improperly apply a version of the statute that was not in effect at the time that the alleged conduct in the complaint occurred and would potentially create liability for past conduct after the fact.

For the foregoing reasons, the standards applicable under former section 41104(a)(3) should be applied to this proceeding.

III. COMPLAINANT FAILS TO STATE A CLAIM FOR RELIEF UNDER 41104(a)(3)

Section 41104(a)(3), as in effect at the time of the conduct at issue, made it unlawful for a common carrier, either alone or in conjunction with another person, directly or indirectly, to:

Retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022).

The issue for purposes of this motion is whether Complainant makes sufficient factual allegations which, if taken as true, establish a plausible claim for relief. Thus, the starting point of the analysis is the allegations of the Complaint with respect to retaliation.

It is clear from the Complaint that the conduct of Respondent alleged to constitute retaliation is the non-provision of space under the 2021 Service Contract as a result of

complaints from Complainant directed to the Respondent about the failure of Respondent to provide space under the 2020 Service Contract. *See*, Complaint at ¶¶ 26, 62, and 100. The critical issue is whether the Complaint alleges this purported refusal was for one of the three reasons prohibited by Section 41104(a)(3), i.e., (a) patronizing another carrier; (b) filing a complaint; or (c) any other reason.

The Complaint does not allege that Respondent retaliated against Complainant because Complainant patronized another carrier. Similarly, Complainant does not allege that it filed any type of complaint against Respondent with the Commission. There is no allegation whatsoever in the Complaint that Complainant sought to bring what it now alleges was unlawful conduct to the attention of the Commission.

Thus, the only circumstance in which the Complaint could possibly be found to make factual allegations sufficient to establish a plausible claim for relief is if it alleges that Respondent's purported conduct constitutes "any other reason" within the meaning of the statute. As explained below, it does not.

On December 28, 2021, the Commission issued a Statement on Retaliation in its Docket No. 21-15 (the "Statement on Retaliation"), in which the Commission indicated that it:

interprets 'any other reason' to mean that protected activity under 46 U.S.C. § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures.

Statement on Retaliation at 7. In other words, only conduct which brings allegations of unlawful activity to the attention of the Commission via some recognized Commission procedure can constitute "for any other reason." Here, the Complaint makes clear that the basis of Complainant's retaliation claim is that it complained to *Respondent* about the provision of

space under the 2020 Service Contract. This does not involve bringing allegations of unlawful activity to the attention of the *Commission*.

Thus, the Complainant fails to make factual allegations that support a plausible claim of relief because the alleged “retaliation” is not the result of any of the activity protected by the prohibition on retaliation. Accordingly, the claim of a violation of Section 41104(a)(3) should be dismissed.

Respectfully submitted,



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Dated: January 5, 2024


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of January, 2024, the foregoing Partial Motion to Dismiss and the Memorandum in support of same were served via electronic mail on:

Karl C. Huth, Esq. ([huth@huthreynolds.com](mailto:huth@huthreynolds.com))

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