

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

20230930-DK-BUTTERFLY-1, INC., *Complainant*

v.

MSC MEDITERRANEAN SHIPPING CO. SA, *Respondent*.

DOCKET NO. 23-12

Served: March 25, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

ORDER GRANTING RESPONDENT’S PARTIAL MOTION TO DISMISS

I. Introduction and Summary

On November 28, 2023, the Commission issued a Notice of Filing of Complaint and Assignment, noting that Complainant 20230930-DK-Butterfly-1, Inc.’s (“BBBY” or “Complainant”), had filed a complaint alleging that Respondent MSC Mediterranean Shipping Co. SA (“MSC” or “Respondent”), violated 46 U.S.C. §§ 41102(c), 41102(d), 41104(a)(2), 41104(a)(10) and the Commission’s Regulations at 46 C.F.R. § 545.5 in connection with the receiving, handling, storing and delivery of goods pursuant to a service contract. Among other allegations, Complainant asserts that Respondent retaliated “against Complainant’s efforts to enforce MSC’s service commitment by systematically failing to meet its remaining service commitments to Complainant, and other conduct alleged herein...in violation of the former 46 U.S.C. Section 41104(a)(3), now codified at 46 U.S.C. Section 41102(d).” Complaint at 7-8, ¶ 26; 31-32 ¶ 101.

On January 5, 2024, MSC filed Respondent’s Partial Motion to Dismiss and Memorandum (jointly, “Motion”), seeking to dismiss Complainant BBBY’s allegation of retaliation in violation of 46 U.S.C. § 41104(a)(3) because it fails to state a claim for relief. Motion at 6-8. Preliminarily, MSC asserts that because the conduct alleged in the Complaint occurred prior to the enactment of the Ocean Shipping Reform Act (“OSRA 2022”) of June 16, 2022, a violation of 46 U.S.C. Section 41102(d) cannot be considered. *Id.* at 3-6. On January 19, 2024, BBBY filed Complainant’s Memorandum in Opposition to Respondent’s Partial Motion to Dismiss (“Opposition”).

MSC seeks to dismiss BBBY’s claim that MSC violated § 41104(a)(3) of the Shipping Act for failure to state a claim upon which relief can be granted. Specifically, MSC asserts that the language of § 41104(a)(3) at the time of the conduct alleged in the complaint—and as it contends is made clear in the December 28, 2021 Statement of the Commission on Retaliation—required BBBY to bring “allegations of unlawful activity to the attention of the Commission via some recognized Commission procedure” in order to “constitute ‘for any other reason.’” Motion

at 7, citing Statement of the Commission on Retaliation, Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128 (F.M.C. Dec. 28, 2021). Since BBY only complained to MSC, the latter contends, “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.” *Id.*

BBY maintains that “Respondent fails to satisfy its burden under the applicable legal standard, based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, because it fails to identify any legal authority that entitles it to relief.” Opposition at 1. BBY contends that the meaning of “any other reason” was recently analyzed in the Initial Decision by the Chief Administrative Law Judge (“ALJ”) in *OJ Commerce, LLC v. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & C., KG and Hamburg Sud North American, Inc.*, Docket No. 21-11, 2023 WL 3969857 (ALJ June 7, 2023) (Initial Decision) (“*OJ Commerce*”), and that analysis supports BBY’s position. Opposition at 2. There, the ALJ found that threatening to file a complaint with the Commission is “conduct closely related to the listed violations without being one of the listed violations.” *OJ Commerce*, 2023 WL 3969857 at *38. BBY contends that the complaints it made to MSC are similarly “closely related to the listed violations” and support its allegations of retaliation.

For the reasons discussed below, Respondent’s partial motion to dismiss is granted. The parties must file a joint status report, as discussed below, by April 12, 2024.

II. Motion to Dismiss Standard

Although the Commission’s Rules of Practice and Procedure (“Rules”) do not explicitly provide for motions to dismiss, Rule 12 of the Commission’s Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission’s Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. The “Commission looks to the Federal Rules of Civil Procedure... 12(b)(6) when considering dismissals based on failure to state a claim.” *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2020 WL 6445041 at *4 (FMC Oct. 29, 2020). “In other words, all well-pleaded allegations are accepted as true and interpreted in the light most favorable to the complainant.” *Id.* at *5, citing *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). “Although a fact finder ‘generally may not rely on facts “outside” the pleadings in deciding a motion...it may consider ‘matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.’” *U.S. v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 772 F.Supp.2d 191, 197 (D.D.C. 2011) (citations omitted).

Further, in *Maher II*, the Commission stated: “[w]e hold that the ALJ set forth the correct legal standard—the *Iqbal/Twombly* ‘plausibility’ standard that the Commission adopted in *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011), and reaffirmed in *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014).” *Maher Terminals, LLC v. The Port Authority of New York and New Jersey* (“*Maher II*”), Docket No. 12-02 (Dec. 18, 2015), 2015 WL 9426189, *6 (F.M.C. 2015). Thus,

The facts alleged must ‘state a claim to relief that is plausible on its face.’ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)....The facts alleged must

allow the Commission to reasonably infer that respondent may be liable for the conduct alleged and provide ‘fair notice’ of the nature of the claims and bases for asserting them. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Twombly*, 550 U.S. at 555.

MAVL Capital, supra at *5.

III. DISCUSSION

A. Relevant Law

Section 41104(a)(3), prior to OSRA 2022, stated:

(a) In general.-- A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not--...

(3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodation 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).

OSRA 2022 amended Section 41104(a)(3) by striking “may not” and replacing it with “shall not” in part (a), and “by striking paragraph (3) and inserting...: (3) unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods;...” 136 Stat. 1274 Public Law 117-146—June 16, 2022.

OSRA 2022 amended Section 41102(d) by adding a retaliation provision to the end of that section:

(d) RETALIATION AND OTHER DISCRIMINATORY ACTIONS.—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.

Id.

B. Arguments of the Parties

BBBY filed the complaint in this proceeding after the June 16, 2022, amendments to the Shipping Act were enacted, primarily alleging conduct violative of the Shipping Act prior to OSRA 2022 (*e.g.*, Complaint at 21-24, ¶¶ 69-78). While some of the conduct alleged in the Complaint appears to have occurred shortly after OSRA 2022 was codified, it involved detention and demurrage allegations, not the alleged retaliation. *Id.* at 24-25, ¶¶ 79-83. BBBY alternately alleges “retaliation against Complainant in violation of 46 U.S.C. Section 41104(a)(3), now codified at 46 U.S.C. 41102(d)” and “retaliation against Complainant in violation of 46 U.S.C. Section 41102(d) (formerly codified at 46 U.S.C. Section 41104(a)(3)).” Complaint at 7-8, ¶ 26, 29, ¶ 100; 31-32, ¶ 101.

MSC argues that 46 U.S.C. § 41104(a)(3) applies to the allegations in Count V of the Complaint, not § 41102(d), “which went into effect in mid-June of 2022 (after the conduct that is the basis of the retaliation claim had concluded).” Motion at 3. “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.” *Id.* (citations omitted). MSC contends that because § 41104(a)(3) applies, “[t]he 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.” Motion at 7. The first two, MSC asserts, are clearly not alleged in the complaint, and as to the third reason, “[t]here 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.” *Id.* Rather, MSC notes, “Complainant 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.” *Id.* at 7-8. Relying on the Commission’s December 28, 2021 Statement on Retaliation in Docket No. 21-15, MSC concludes that “any other reason” refers to “only conduct which brings allegations of unlawful activity to the attention of the Commission via some recognized Commission procedure...” MSC does not argue that Count V should be dismissed because BBBY alleges a violation of Section 41102(d) while simultaneously referring to it as the former § 41104(a)(3).

BBBY opposes the motion, stating it has established a plausible claim for relief under Count V of its complaint “for retaliation in violation of 46 U.S.C. Section 41102(d) (formerly codified at 46 U.S.C. Section 41104(a)(3)).” Opposition at 1. BBBY does not squarely address the issue of whether it is alleging and relying on the post-OSRA 2022 Section 41102(d) amendments, versus the pre-OSRA Section 41104(a)(3) language, but continues in its opposition to reference both, as it does in Count V of the complaint,¹ by asserting a violation of § 41102(d)

¹ Complaint paragraph 100, however, states that MSC entered “into the 2021 Service Contract after Complainant had previously raised issues with MSC’s performance, but then violated its service commitments to BBBY under the 2021 Service Contract, which continued throughout the

while referencing it as “formerly codified at 46 U.S.C. Section 41104(a)(3).” Complaint at 31-32. Contrary to MSC, BBY asserts that the phrase “for any other reason” is not limited to conduct brought to the Commission’s attention “via some recognized commission procedure.” *Id.*; Motion at 7. BBY counters that “for any other reason” includes retaliation for complaints it brought to Respondent’s attention, citing to the ALJ’s Initial Decision in *OJ Commerce*, supra. Specifically, BBY draws parallels between the conduct it alleges in the complaint—that it complained to Respondent about cargo space allocation and then suffered retaliation—and the conduct the ALJ found violative of § 41104(a)(3) in *OJ Commerce*—“the threat to file a Commission proceeding.” 2023 WL 3969857 at *39. BBY notes that MSC failed to discuss, let alone distinguish, *OJ Commerce*, and the Commission’s Statement on Retaliation “does **not** say that the list of retaliatory actions that it provides is exhaustive or exclusive....” Opposition at 3. MSC did not file a reply to BBY’s opposition.

C. Findings

The Motion raises only two issues to be decided: which version of the retaliation statute applies to this proceeding, and does Complainant make out a plausible claim for relief by alleging that its complaints to Respondent about insufficient space allocation fall within the scope of violations described in either version of the statute as “any other reason.”

BBY alleges that it brought complaints regarding allocation of space to MSC’s attention during the course of both the 2020-2021 and 2021-2022 service contract years. The retaliation allegations in Count V specify dates of conduct prior to the passage of OSRA 2022. *See* Complaint paragraphs 79-80, 82-83 (allegations in late June 2022, but in regard to detention and demurrage, not retaliation). Accordingly, pre-OSRA Section 41104(a)(3) applies to the instant proceeding regarding Count V, BBY’s claim of retaliation.

The Complaint alleges that BBY complained to and questioned Respondent about its allocation of space to BBY, and MSC responded “by systematically failing to meet its remaining service commitments to Complainant....” Complaint at 7-8. Complainant does not dispute that it did not report this conduct to the Commission by participating in an investigation or enforcement proceeding, rulemaking commentary, bringing the dispute to the Commission’s Office of Consumer Affairs and Dispute Resolution Services (CADRS), or filing a complaint with the Commission during the term of the two service contracts. However, it likens its complaints to MSC to the threat to file a complaint found to violate § 41104(a)(3) by the ALJ in *OJ Commerce*.

The Commission is currently reviewing the ALJ’s Initial Decision in *OJ Commerce*, so the case is not yet of precedential value as to the novel legal issue presented of whether the threat to file a complaint (petition) with the Commission is protected activity similar to the listed violations in § 41104(a)(3) and clarified in the Commission’s Statement on Retaliation. Even if a threat to file a complaint with the Commission constitutes “any other reason,” the complaint *sub judice* does not plead facts that demonstrate that BBY threatened to file a complaint, or engage in any way, with the Commission. It is not necessary to discuss the other elements of the

2021-2022 shipping year, constitute[s] retaliation against Complainant in violation of 46 U.S.C. Section 41104(a)(3), now codified at 46 U.S.C. 41102(d).” Complaint at 29 (emphasis added).

retaliation claim because MSC did not raise them in the Motion and this required element of the retaliation claim is not met.

In *OJ Commerce*, the complainant sent two demand letters to the respondent ocean carrier. In the first, complainant demanded that respondent honor the service agreement rates and minimum quality commitments and warned that failure to cure the breach by a date certain could lead to legal action. In the second letter, complainant's attorney again demanded respondent cure the breach and again threatened "legal action," but also threatened to file "a petition" with the Federal Maritime Commission (FMC) if respondent did not meet its commitment of space allocation under the terms of the service contract. *OJ Commerce*, supra, at *7, *12. After receipt of the second letter, a senior vice president instructed a subordinate by email to end negotiations for another service agreement and added that "in light of the potential litigation, I would also not provide them with space under the existing contract." *Id.* at *13-14; *35. The ALJ considered these facts as applied to the Commission's Statement on Retaliation in finding that a threat to file a complaint with the FMC is encompassed under the statutory language, "for any other reason." *Id.* at *38.

The statutory language, by including the phrase 'or for any other reason' explicitly applies this section beyond cases where the shipper has patronized another carrier or has filed a complaint. The extent of that expansion is not unlimited, however, and the closeness of the alleged misconduct to the other items listed is relevant. Here, the action alleged to constitute an 'other reason' is the threat to file a complaint with the Commission. This conduct is closely related to the listed violations without being one of the listed violations. It is reasonable to anticipate that threats of prohibited conduct would be encompassed under the 'for any other reason' language, and so finding is consistent with the Commissions' Policy Statement regarding interpreting the anti-retaliation provision broadly.

Id.

BBBY does not plead facts that it engaged in any of the listed protected conduct in § 41104(a)(3), or that it threatened to do so. Rather, BBBY alleges that it complained to MSC without threatening to or going to the Commission with its complaints. BBBY asserts in its opposition that it is not the threat to engage in protected conduct that is paramount to the ALJ's decision in *OJ Commerce*, but that the threats are "**made to the carrier.**" Opposition at 2 (emphasis in original). Without more than just complaints to the carrier about it not providing the contracted space allocation, retaliation cannot plausibly be established. BBBY misses the critical point of the decision: threats to engage in protected activity are "closely related to the listed violations." *Id.*

The Commission's Statement on Retaliation acknowledged that it "has infrequently discussed retaliation aimed at shipper complaints but has condemned the practice." Supra at *2. In the Statement on Retaliation, the Commission sought to clarify the retaliation provision and in doing so, discussed the meaning of the phrase "for any other reason:"

The Commission interprets 'any other reason' to mean that protected activity under § 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 CDRS' dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission.

Id. at *5. BBY's complaints to MSC, with nothing more, do not "serve in assisting the Commission with its mission," whereas a threat to invoke Commission procedures can be interpreted as doing so. *Id.* Accordingly, even accepting BBY's facts as true regarding Count V of the Complaint and interpreting them in a light most favorable to BBY, the Complaint does not make out a plausible claim for relief under § 41104(a)(3).


IV. ORDER

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondent's Partial Motion to Dismiss be **GRANTED**. It is

FURTHER ORDERED that Respondent shall file its answer to the complaint regarding the remaining allegations on April 4, 2024, consistent with the December 21, 2023 Order Granting Joint Motion for Extension of Time. It is

FURTHER ORDERED that as required by the Initial Order, the parties contact the Office of Consumer Affairs and Dispute Resolution Services ("CADRS") and submit a joint status report with proposed schedule by April 12, 2024.



Linda S. Harris Crovella
Administrative Law Judge