

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

OL USA LLC, *Complainant*

v.

MAERSK A/S, *Respondents*.

DOCKET NO. 24-11

Served: July 26, 2024

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

SECOND ORDER ON MOTION TO COMPEL

I. Background

On June 6, 2024, Respondent Maersk A/S (“Maersk”) filed a Motion to Compel Discovery Responses (“MTC”), and a request for a 30-day extension of the discovery and briefing schedule. Respondent sought complete responses to its timely served outstanding document requests and interrogatories and requested that Complainant OL USA be directed to submit its responses no later than June 17, 2024. MTC at 1-2.

On June 13, 2024, OL USA filed a response to the MTC and agreed with the request to extend the schedule (“Response to MTC”). Additionally, OL USA stated that it would provide written responses and “those relevant, responsive documents it has collected and reviewed by June 17, 2024.” Response to MTC at 1.

On June 14, 2024, an Order on Motion to Compel and Amended Scheduling Order (“MTC Order”) issued, allowing a 30-day extension of the discovery schedule. The MTC Order generally instructed OL USA to provide responses to the remaining outstanding document requests and interrogatories by June 17, 2024, but the motion to compel as to specific requests was deferred pending OL USA’s compliance with the June 17 deadline. MTC Order at 1. If OL USA responded to the requests, then the motion to compel would be denied as moot. *Id.* If OL USA failed to respond to the requests, then Maersk was directed to submit a supplement to the motion to compel that set forth the requests made and the responses received. *Id.* at 2.

On June 19, 2024, Maersk filed a supplement to its MTC (“MTC Supplement”). There, Maersk noted that OL USA had timely answered Maersk’s requests for admissions and had “subsequently served late partial responses to Maersk’s First Document Requests and First Set of Interrogatories on June 17, 2024.” MTC Supplement at 1. Based on those documents, Maersk filed its supplement to address “deficiencies in OL USA’s responses” to its first document requests and first set of interrogatories. *Id.*

OL USA submitted its response to the MTC Supplement (“Supplement Response”) on June 26, 2024. In the response, OL USA states it “served responses to Maersk’s Interrogatories and Requests for Production and made a document production” on June 17, 2024. Supplement Response at 1. When Maersk informed OL USA on June 18th that it would file a supplemental motion to compel, OL USA allegedly responded that it would “produce additional damages related documents on June 20, 2024,” a day after the June 19th federal holiday. *Id.* Maersk did not wait to receive OL USA’s additional documents, but instead filed its supplemental motion on June 19th. *Id.* OL USA produced the additional damages documents on June 20, 2024. *Id.*

Respondent filed a motion to dismiss (“MTD”) on July 18, 2024. A separate order will issue to address the arguments raised there.

II. Motion to Compel Standard of Review

The Commission permits discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” 46 C.F.R. § 502.141(e)(1). Further, “for good cause, the presiding officer may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* An order may also be issued to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” 46 C.F.R. § 502.141(j).

The presiding officer has the authority to limit the frequency or extent of discovery if the discovery sought is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” 46 C.F.R. § 502.141(e)(2)(ii)(A). Additionally, discovery may be limited if “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action” or if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” 46 C.F.R. § 502.141(e)(2)(ii)(B, C).

When producing documents or electronically stored information, “a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” 46 C.F.R. § 502.146(b)(2)(v)(A). Parties do not need to “produce the same electronically stored information in more than one form.” 46 C.F.R. § 502.146(b)(2)(v)(C).

In discovery proceedings, “the grounds for objecting to an interrogatory must be stated with specificity.” 46 C.F.R. § 502.145(b)(4). Notably, “any ground not stated in a timely objection is waived unless the presiding officer, for good cause, excuses the failure.” *Id.*

III. Respondent’s First Document Request

Maersk’s First Document Request No. 1 seeks “All Tariffs filed or published by You.” MTC Supplement Exhibit A at 9. In response, Complainant objected to the relevance of Complainant’s tariff to the Complaint, but also added that the tariff is public information and provided the URL. Maersk asserts that it is entitled not just to the URL, but to written instructions on how to access OL USA’s published tariff because Maersk provided written instructions to access its tariff in response to the Complaint. MTC Supplement at 2-3.

The Complaint raises Maersk's reference to its published Tariff as a justification for using Complainant's container(s) at paragraph 36, but nowhere does the Complaint allege or refer to its own tariff. Complaint at 5. Similarly, Respondent does not raise any defense regarding OL USA's tariff in its Answer. Maersk offers no argument to explain why access to OL USA's tariff is relevant to Maersk's defenses or to any allegation in the complaint. Maersk has not sufficiently demonstrated how OL USA's tariff is relevant to the instant proceeding, accordingly, this request to compel is denied.

Maersk next asserts that it has not received documents responding to its First Document Request Nos. 14 and 15, which relate to damages and alleged lost profits. MTC Supplement at 2. Document Request No. 14 asks for "all documents relating to or reflecting Your alleged loss or cancellation of any shipment booking or other loss of business or revenue claimed by You as a result of the unavailability of the Containers." *Id.* at 13. OL USA objects to that request as neither relevant to this proceeding nor "reasonably calculated to lead to the discovery of relevant evidence whether Maersk maintained a tariff in compliance with the FMC Rules and the Shipping Act. Subject to and without waiving the foregoing general and specific objections, OL USA will produce relevant, non-privileged responsive documents to this Request, within its possession, custody, and control to the extent they exist and can be located after a diligent search and a reasonable inquiry." *Id.* Complainant raises unspecified damages in its Complaint, and accordingly, the request for documents that show loss or cancellation of shipment bookings, or any loss of business or revenue is relevant. If any such documents exist, Complainant must provide them by the date below, or definitively state that there are no such documents.

Request No. 15 requests "all documents relating to or reflecting Your alleged lost profits referenced in paragraph '28' of the Complaint." *Id.* OL USA objects, but states that it will "produce relevant, non-privileged documents to this Request, within its possession, custody, and control to the extent they exist and can be located after a diligent search and a reasonable inquiry." *Id.* Maersk argues that the responses to Document Requests Nos. 14 and 15 are deficient because OL USA does not specify "how much longer that will take." *Id.* at 3.

OL USA counters by asserting that it "has produced responsive documents" and that it is "unclear why Maersk takes issue with OL USA's representation" of producing relevant documents "after a diligent search and a reasonable inquiry." Supplement Response at 3. Complainant adds that it "has produced all damages related documents in its possession." *Id.* at 1. If OL USA maintains that it has no further documentation regarding damages, it must be taken at its word. In this regard, OL USA would be precluded from relying on any additional documents in its brief. Thus, if there are no further documents to support OL USA's damages claim, then there is nothing to compel. If Complainant has found any further documents that are responsive to this document request it must provide them by the date below.

Respondent additionally seeks a date by which Document Request Nos. 3-8, 10-13, and 16-18 will be provided. MTC Supplement at 3. Request No. 3 asks for shipping documents "relating to the transportation, storage, handling or movement of the Containers..." and Request No. 4 asks for "all written agreements between You and any Honour Lane Shipping entity relating to the Containers, including but not limited to service agreements, container leasing agreements, container purchase agreements and invoices." *Id.* Requests Nos. 5-8 ask for all written communications between OL USA and Honour Lane Shipping, Maersk, "any other entity

concerning any Maersk Tariff relating to the Containers,” “any customer, shipper or consignee relating to the Containers,” and “any container drayage carrier relating to the Containers.” *Id.* at 4-5. Requests Nos. 10-13 ask for internal records, documents reflecting the return of the Containers, the tracking or monitoring of the Containers’ movements, and payment receipts to any Honour Lane Shipping entity. *Id.* at 6-7. Finally, Requests Nos. 16-18 ask for documents reflecting efforts to mitigate alleged damages, efforts to access Maersk’s Tariff, and any investigation made or requested to any alleged Shipping Act violation by Maersk. *Id.* at 7-8.

To the extent that it has not already done so, Complainant must produce non-privileged documents responding to the above requests by the date set forth below, with the exception of documents regarding any requests for the FMC to investigate potential Shipping Act violations. The relevancy of that request to this proceeding is not clear because Document Request No. 18 is undefined and overbroad, and unless Respondent can establish relevancy, the motion to compel is denied as to any requests for the FMC to investigate (further, Complainant requests such investigation in the Complaint, and the March 20, 2024 Scheduling Order addresses this request at page 2, noting a private party complaint is not the proper vehicle by which to request an FMC investigation).

IV. Respondent’s Interrogatories

Maersk further asserts that OL USA has failed to provide adequate responses to two interrogatories. MTC Supplement at 2.

Interrogatory No. 7 asks for OL USA to

“Identify each and every loss of any shipment booking, loss of business or loss of revenue alleged by You as a result of the unavailability of the Containers and with respect to each such alleged loss, provide the following:

- (A) the date of the loss;
- (B) the nature of the loss;
- (C) the actual or potential customer, shipper or consignee involved;
- (D) the dollar amount of the loss; and
- (E) all documents You rely on or refer to in answering this Interrogatory.”

Id. at 22.

Maersk’s dispute with Complainant’s answer is that “OL USA’s response evasively fails to identify the requested information or state that it does not exist.” *Id.* at 2. It further contends that “the documents requested by Maersk directly relate to causation and the quantum of the damages claimed by OL USA which are generally alleged to be ‘financial harm’ and deprivation of property.” *Id.* at 3. In its response, OL USA asserts its objection, pointing out that “but for Maersk’s misconduct, it would not have purchased the Containers ... if it was able to timely recover its Containers, it could have used them for shipments or sold them.” *Id.* at 22. This is not an adequate response to the interrogatory. By the date below, Complainant must respond to the interrogatory and identify the documents on which it relies for the response. Complainant need not provide the documents a second time if it provided them in response to a document request, but it must identify those documents.

Interrogatory No. 8 asks OL USA to “set forth in detail how You calculate each element of Your alleged economic losses or damages claimed in this action and with respect to each such element, provide the following: (A) the mathematical formula used for Your calculation; and (B) all documents You rely on or refer to for Your calculation.” *Id.* at 22-23. OL USA responded that its lost profits can be calculated by “multiplying the number of trips inbound, the number of containers, and the extra margin.” *Id.* at 23. Furthermore, Complainant explains that its “lost profits claim is primarily supported by testimonial evidence, hence the relatively small universe of damages related documents.” Supplement Response at 1. Finally, Complainant asserts that “the nature of the lost opportunity is such that there are no further documents to support it.” *Id.* at 1-2. The Supplement Response posits that the documentary evidence of carrier discounts or guaranteed space on vessels that would have allowed OL USA to realize a greater profit margin are “within the possession, custody, and control of Maersk.” *Id.* at 2.

Maersk argues that OL USA’s “response reiterates that it does indeed claim lost profits, but evasively fails to provide the requested information” because the “nebulous answer is devoid of substance and amounts to a failure to respond.” MTC Supplement at 2.


Maersk’s Interrogatory No. 8 asks Complainant to provide the formula on which it relies to calculate lost profits, and all documents that it relied on for the calculation. This interrogatory seeks relevant information, and while Maersk did not attempt to clarify what it found lacking in the response, Complainant is compelled to provide a more detailed response. If Complainant intends to rely on other carrier discounts or vessel space information, and it has that data, then it should provide that information if it affects the formula on which it intends to rely. OL USA’s lost profits calculation must include greater detail, including but not limited to, how many inbound trips are included in the formula and from what locations, how it is defining and determining the “extra margin,” and what time frame it is applying to the calculation. OL USA’s response that Maersk would have possession or custody of carrier discounts or guaranteed space on other companies’ vessels is confusing, at best. If such information exists, other ocean carriers would seem the more likely source of information on the discounts they offer. If Complainant has obtained that information and relies on it in calculating the “extra margin,” it must provide it in response to Interrogatory No. 8 by the date below.

V. 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 Maersk’s Motion to Compel Discovery Responses is **DENIED IN PART and GRANTED IN PART**. It is

FURTHER ORDERED that Complainant provide the additional responses to the document requests and interrogatories no later than August 1, 2024.



Linda S. Harris Crovella
Administrative Law Judge