BEFORE THE
FEDERAL MARITIME COMMISSION

FMC DOCKET NO. 24-13

ACCESS ONE TRANSPORT, INC.
Complainant,

v.

COSCO SHIPPING LINES CO. LTD.
Respondent.

COMPLAINANT'S OPPOSITION TO RESPONDENT'S

MOTION FOR PARTIAL DISMISSAL

Comes now Access One Transport, Inc. ("Access" or "Complainant") and hereby submits its opposition to Respondent, COSCO Shipping Lines Co. Ltd.'s ("COSCO" or "Respondent") motion for partial dismissal of Access' complaint.

Access filed its complaint against COSCO alleging violations of the Shipping Act of 1984, as amended (the "Act") at 46 U.S.C. §§41102(c), 41104 (a)(3) & (8). COSCO has only sought to dismiss claims under 46 U.S.C. §§41104(a)(3) & (8). While Access is confident it has proffered sufficient allegations to support claims under 46 U.S.C. §§41104(a)(3) & (8), if COSCO's motion is granted, the complaint would remain viable as to the §41102(c) claim(s).

BACKGROUND

COSCO is an ocean common carrier. Access is a motor carrier. As alleged in the complaint from on or about April 2021 through August 2022, Access in its ordinary course of business, pulled

full containers from COSCO designated terminals in the Ports of Los Angeles and Long Beach for delivery to its customers (Complaint ¶16). Access' customers would fall into the definition of "Merchant" under the COSCO bills of lading[1]. After its customers had unloaded the cargo therein, Access in the regular course would attempt to return the empty containers to COSCO within the free time allowed (Complaint ¶16). COSCO would designate the available terminals for return of empty containers but Access found that either the terminals did not have any appointments available for return of the empties or were requiring "dual" transactions in order to return an empty container (see Complaint ¶¶ 17 – 22).

The challenged violations of 46 U.S.C. §§41104 (a)(3) & (8) are predicated on the unlawful practice of requiring "dual" transactions to return an empty container (Complaint ¶36(a)).

As explained in the complaint, "A dual transaction requires the motor carrier to pick up a full container at the same time it dropped off an empty container. If a motor carrier does not have a corresponding full pick up at the terminal it may not drop off the empty" (Complaint ¶ 19). Access alleges that it was unable to return empty containers when a "dual" transaction was required (Complaint ¶24, 36(a)). As noted by the Commission at 85 FR 29638, 29655[2] "The Commission is particularly concerned about the reasonableness of dual move requirements, or more specifically, an ocean carrier imposing detention when a trucker's inability to return a container

[1] COSCO's publicly available bill of lading terms can be found at https://lines.coscoshipping.com/lines_resource/pdf/coscon_tidan_cn.pdf. Per the bill of lading terms, "Merchant" is defined as: "the Consignor, the Shipper, the Receiver, the Consignee, the Owner of the Goods, the Holder or Endorsee of this Bill of Lading, any Person owing, entitled to or claiming the possession of the Goods or this Bill of Lading and anyone acting on behalf of any such person."

[2] As related to the final Interpretive Rule on Demurrage and Detention under the Shipping Act, 46 CFR part 545.

within free time is due to it not being able to satisfy a dual move requirement." (Complaint Page 8, fn. 2).

As an independent violation of the Act, Access has alleged any requirement of a dual transaction for the return of an empty container and the resulting detention charges when the empty is not returned as part of a dual transaction constitutes an unreasonable preference or practice per 46 U.S.C. §41104(a)(3) and (8) and thus is an independent violation of the Act (Complaint ¶36(a)).

ARGUMENT

1. Access has alleged sufficient facts for cognizable legal theories or is otherwise entitled leave to amend.

COSCO brings this motion for failure to state a claim.[3] A Rule 12(b)(6) dismissal is proper only when the complaint either: fails to allege a "cognizable legal theory"; or fails to allege sufficient facts "to support a cognizable legal theory." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). COSCO does not seek to dismiss the entire complaint. A Rule 12(b)(6) motion may be directed to fewer than all of the claims raised in a complaint, *Godlewski v. Affiliated Computer Services, Inc.,* 210 FRD 571, 572 (ED VA 2002). Thus, the Presiding Officer may rule on each count individually if necessary. Further as indicated above, COSCO's motion does not attack the alleged violation(s) of 46 U.S.C. §41102(c).

In resolving this Rule 12(b)(6) motion the Presiding Officer should:

1. construe the well pleaded allegations in the Complaint *in the light most favorable to Plaintiff*;

2. accept all well-plead factual allegations as true; and

[3] 46 CFR §502.12. The Commission will look to FRCP Rule 12(b)(6) when considering a dismissal for failure to state a claim. *MAVL Capital v. Marine Transport Logistics*, 2 FMC 2d 198, 202 (FMC 2020).

3. determine whether Plaintiff can prove *any set of facts* to support a claim that would merit relief.

Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996) (emphasis added).

When a complaint's allegations are capable of more than one inference, the court must adopt whichever plausible inference supports a valid claim. *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011). Thus, no matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), *Ocasio-Hernández v. Fortuño-Burset,* 640 F.3d 1, 12-13 (1st Cir. 2011) (court may not "attempt to forecast a plaintiff's likelihood of success on the merits").

A plaintiff's ability to prove his or her allegations, or possible difficulties in making such proof, is generally of no concern in ruling on a Rule 12(b)(6) motion: "In considering a 12(b)(6) motion, we do not inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims." *Nami v. Fauver,* 82 F.3d 63, 65 (3rd Cir. 1996); see also, *Peterson v. Grisham,* 594 F.3d 723, 727 (10th Cir. 2010) (a court does not weigh potential evidence parties may present at trial).

Further, even if the motion is deemed meritorious, as a practical matter, leave to amend is almost always granted, at least once. FRCP 15(a)(2) expressly states the court "should freely give leave when justice so requires." See also *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011)(standard for granting leave to amend is "generous"). Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice. *National Council of La Raza v. Chegavske,* 800 F.3d 1032, 1041 (9th Cir. 2015) ("black-letter law" that district court must give at least one chance to amend absent clear showing amendment would be futile); *Davoodi v.*

Austin Independent School Dist. 755 F.3d 307, 310 (5th Cir. 2014) (dismissal after giving plaintiff only one chance to state case is ordinarily unjustified).

2. Access has adequately alleged a violation of 46 U.S.C. §41104(a)(8)

46 U.S.C. §41104(a)(8) provides:

"(a) In General.—A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage…"

COSCO argues Access is not entitled to relief based on two arguments: (1) that the service provided was not pursuant to a "tariff"; and (2) that other drayage providers were not given undue preference as compared to Access. COSCO fails on both accounts.

A. Dual transactions result in an unreasonable preference and impose an unreasonable disadvantage.

Simply, a dual transaction is by its own nature is obviously preferential in nature. When a dual move is required to return an empty container it is essentially precluding any motor carrier from returning an empty container unless it has a corresponding full container to pick up. Thus, it is giving preference to any motor carrier which has the ability to pick up a full container at the same time as returning an empty. This ad hoc, after the fact limitation on returning empty containers is a violation of the Act since it places undue restrictions and preference on returning empty containers to the detriment of some motor carriers and their customers.

Commission is also aware of this practice and has concerns. As noted by the Commission at 85 FR 29638, 29655 (2020) "The Commission is particularly concerned about the reasonableness of dual move requirements, or more specifically, an ocean carrier imposing

detention when a trucker's inability to return a container within free time is due to it not being able to satisfy a dual move requirement." The Commission's concerns are well founded. As in this case, Access has alleged that it has been charged detention when it was unable to return an empty container if it did not have a corresponding dual move. It is COSCO's obligation to have adequate terminal space to allow for the return of empty containers without such restrictions, 85 FR 29638, 29650 (2020).

B. COSCO's Detention Rules and Charges are Found in its Tariff.

It is disingenuous for COSCO to argue that detention charges are not part of its tariff. Clearly, they are part of its tariff. A copy of the relevant portion of its publicly available tariff is filed concurrently herewith as Exhibit A[4]. The Complaint also includes allegations related to COSCO's detention rates provided to its customers at Paragraph 14 which Access would benefit from. Those rates would be included in its tariff.

While it is true that Access had entered into the UIIA of which COSCO is a signatory, any violations of the Act under the guise of compliance with the UIIA will not stand, 85 FR at 29649 (2020). Thus, Access has sufficiently alleged violation(s) of 46 U.S.C. § 41104(a)(8).

3. Access has properly alleged violations of 46 U.S.C. §41104(a)(3)

Access concedes that 46 U.S.C. §41104(a)(3) was amended in June of 2022. Nevertheless, whether the Presiding Officer addresses the motion to dismiss based upon the pre OSRA[5] 2022 language or the post OSRA 2022 language, in either case Access as alleged sufficient information and facts to support a claim.

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[4] Printed from COSCO's publicly available tariff on May 6, 2024 https://world.lines.coscoshipping.com/statics/sites/main/local/na/en/dndp/dndtr/Documents/US%20import%20Detention%20at%20USA%20tariff%20rule%20effective%20from%20January%2013,%202024.pdf

[5] Ocean Shipping Reform Act of 2022

A. <u>Access has alleged sufficient allegations to support a claim for the post OSRA 2022 version of 46 U.S.C. §41104(a)(3)</u>

OSRA 2022 amended 46 U.S.C. §41104(a)(3) to read:

"(a) In general. A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—…

(3) unreasonably refuse cargo space accommodations when available, *or resort to other unfair or unjustly discriminatory methods*;…" (emphasis added)

First, COSCO acknowledges Access has alleged that violations occurred after the implementation of OSRA 2022, including shipments through August 2022 (see Complaint ¶16). Thus, COSCO's temporal argument must fail since Access has alleged such violations after the implementation of OSRA, which should be accepted as true.

Second, Access has explained above how "dual" requirements are unfair and unjust. To briefly recap, a dual requirement requires the motor carrier to have an order to pick up a full container at the same terminal at same time it desires to return an empty container. Without the full container order, as long as dual moves are required, a motor carrier could be potentially required to hold an empty container indefinitely and subject to detention charges. The Commission is equally concerned with dual moves, see 85 FR 29638, 29655. Thus, any argument that Access has not adequately plead violations of post OSRA 46 U.S.C. §41104(a)(3) must fail.

B. <u>Access has alleged sufficient allegations to support a claim for the pre OSRA 2022 version of 46 U.S.C. §41104(a)(3)</u>

Prior to OSRA 2022 46 U.S.C. §41104(a)(3) provided:

"(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 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…"

COSCO argues that Access fails to state a claim under pre OSRA 2022 §41104(a)(3) since Access is not "shipper" as contemplated by the Act and Access has not alleged "retaliation". COSCO fails on both accounts.

Access, concedes that as a motor carrier, it is not in and of itself a "shipper" of the cargo. However, as alleged by Access, it picks up full containers and returns empties on behalf of its customers, which are shippers as to COSCO. Also, Access has alleged the actions of COSCO effected its customers, i.e. the potential "shippers" (see Complaint ¶16, 29, 37). In this context, the Commission has also clarified that "shipper" is not limited to the factual shipper on a VOCC bill of lading. Instead, "[t]he term "shipper" means a cargo owner, the person for whose account the ocean transportation of cargo is provided, the person to whom delivery is to be made, a shippers' association, or a non-vessel operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract."=Statement of the Commission on Retaliation, Docket no. 21-15 citing *Hepner v. The Peninsular & Oriental Steam Navigation Co*., 27 F.M.C. 563, 565 (FMC 1984). Access, at minimum, is acting on behalf of a "shipper".

COSCO myopically argues that a pre OSRA 2022 §41104(a)(3) must be predicated on "retaliation". Howver, §41104(a)(3) is not so limited. As explained by the Commission in Statement of the Commission on Retaliation, Docket no. 21-15 "Put differently, the provision

prohibits a common carrier from: Resorting to other unfair or unjustly discriminatory methods because …

a. the shipper has patronized another carrier,

b. the shipper has filed a complaint, or

c. for any other reason…."

Dual moves are by their very nature unjust and unfair, because COSCO is unfairly penalizing Access for patronizing another carrier. COSCO and its terminals, by refusing to accept the return of empty containers unless there is a corresponding full container pick up at that terminal, is in effect unjustly and unfairly discriminating for the lack of additional shipments by COSCO or through COSCO's terminal. If a full container pick up was available at another terminal on behalf of another carrier, Access would have to forgo returning the empty container. Clearly that is a form of unjust and unfair discrimination for patronizing another carrier.

The Commission succinctly summarized the requirements of a pre OSRA 2022 §41104(a)(3) claim as follows: "A complainant must show that ***a carrier engaged in*** prohibited conduct (refusing cargo space accommodations or ***other unfair or unjustly discriminatory methods***), with respect to a protected entity (shipper), because the protected entity engaged in protected activity (***patronizing other carriers***, filing a complaint, or other activities of the same class)" (emphasis added). Commission in Statement of the Commission on Retaliation, Docket no. 21-15 . As explained above, clearly dual move requirements are a form of unjust and unfair discrimination resulting from patronizing other carriers.

4. Conclusion

Access has adequately explained it has pled sufficient facts to withstand this motion for partial dismissal. In the alternative, if the Presiding Officer should find the motion meritorious in whole or part, Access should be allowed an opportunity to amend.

Date: May 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, the foregoing COMPLAINANT'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL DISMISSAL has been served upon all interested persons and parties by electronic means pursuant to the below list.

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Exhibits

Tariff Code: 098 - Rule Number: 021-007

Tariff Code: 106, 108, 201, 205 - Rule Number: 021-A

Rule Name: FREE TIME/DETENTION AT DESTINATION USA

Effective From: 01/13/2024

Rule Context:

Equipment Free Time and Detention at U.S. destination:

Provisions of rule 021-A-1 apply.

A. During the period that the container(s) is in the possession of the Consignee, the charges set forth below shall be assessed for each day or fraction thereof beyond the allowed free time.

B. Free time at all U.S. locations for cargo moving under service contract or tariff rates shall apply to containers only and shall not apply to chassis.

C. Detention Charges:

Detention counting shall start with the day of full container release to Consignee at Carrier's last CY facility, and shall continue to apply until empty container's return to Carrier's designated facility, except that Saturdays, Sundays and Holidays shall not be counted when computing free time. Detention (Per-Diem) charges in U.S.A. shall be collected through trucker, covered under our interchange agreement with the trucker.

1) For SEA REGION (SEA REGION shall mean to include U.S. states of Alaska, Idaho, Montana, Oregon,

Washington):

Detentions charges are to be assessed per each calendar day or fraction thereof after expiration of free time (Saturdays, Sundays and Holidays included).

DETENTION CHARGE

(PER CALENDAR DAY)

(IN USD)

CTR TYPE	DAY	20'CTR	40'CTR	45'CTR	53'CTR
Standard/HQ/ Hanger/*NOR	1-4	Free	Free	Free	Free
	5-9	125	125	125	190
	10 & over	180	180	180	225
OT/FL/FB/PL	1-4	Free	Free		
	5-9	190	190		
	10 & over	225	225		
RF/RQ	1-3	Free	Free		
	4-8	325	325		
	9 & over	425	425		

*NOR= Non Operating reefer

2) For LAX/SF0 REGION (LAX/SFO REGION shall mean to include U.S. states of Arizona, California, Colorado, Nevada, Utah):

Detention charges are to be assessed per each working day or fraction thereof (Saturdays, Sundays and Holidays excluded) after expiration of free time.

DETENTION CHARGE

(PER WORKING DAY)

(IN USD)

CTR TYPE	DAY	20'CTR	40'CTR	45'CTR	53'CTR
Standard/HQ/ Hanger/*NOR	1-4	Free	Free	Free	Free
	5-9	125	125	125	190
	10 & over	180	180	180	225
OT/FL/FB/PL	1-4	Free	Free		
	5-9	190	190		
	10 & over	225	225		
RF/RQ	1-3	Free	Free		
	4-8	325	325		
	9 & over	425	425		

*NOR= Non Operating reefer

3) For US EAST/SOUTH/NORTH REGIONS (US EAST/SOUTH/NORTH REGIONS shall mean to include all other U.S.

states except those listed under SEA/LAX/SFO REGIONS):

Detentions charges are to be assessed per each calendar day or fraction thereof after expiration

of free time (Saturdays, Sundays and Holidays included.

DETENTION CHARGE

(PER CALENDAR DAY)

(IN USD)

CTR TYPE	DAY	20'CTR	40'CTR	45'CTR	53'CTR

Standard/HQ/				
Hanger/*NOR	1-4	Free	Free	Free
	5-9	125	125	125
	10 & over	180	180	180

Standard/HQ	1-3	Free
	4-8	190
	9 & over	225

OT/FL/FB/PL	1-3	Free	Free
	4-8	190	190
	9 & over	225	225

RF/RQ	1-3	Free	Free
	4-8	325	325
	9 & over	425	425

*NOR= Non Operating reefer

D. Extra free time for door service:

1. Cargo moving to door service inland points under carrier's haulage will be granted 4 free additional

working days with a cap of:

- total 8 free working days for dry containers and
- total 7 free working days for refrigerated containers.

2. Service contracts containing provisions for detention free time of less than the capped total days as

specified in paragraph D.1. will be granted the total of capped days specified in paragraph D.1. above.

3. Service contract(s) containing provisions for detention free time greater than the total capped days

specified in paragraph D.1. above will be granted the free time as filed in the service contract(s).

E. Additionally, the tri-axle/super chassis rental fee as stated in rule 21-001 of this tariff shall apply

when a tri-axle or super chassis is rented by COSCO SHIPPING Lines Co., Ltd.

F. Disputes on Detention (Per Diem) charge at US destination.

Customer can submit dispute on Detention (Per Diem) charge incurred in United States through email to SHAPERDIEM@coscon.com, within 30 days after invoice date.

Disputes should contain full details of the shipment information, dispute reason, along with supporting documentation as outlined below.

1. Bill of Lading number
2. Container number
3. Detention bill
4. Reason of dispute, for example:

- Incorrect free time.
- Incorrect Detention rate.
- Incorrect date.
- Terminal or port close due to inclement weather.
- Appointment time not available for empty return.

5. Supporting documentation, for example:

- Customer contract number and free time in the contract.
- Cosco Detention tariff which show correct detention rate.
- Traffic Interchange Receipt(TIR) to show correct date of the empty return.
- Screen shot of the weather closure notification.

- Screenshot of marine terminal or carrier nominated depot website which demonstrate the appointments list

unavailability.

Customer can access below web site for empty container return.

- Empty return locations in Long Beach/Los Angeles: https://www.emodal.com
- Empty return at city other than Long Beach /Los Angeles:

https://sites.google.com/view/coscoshippinglinesna/emptyreturns