Before the

FEDERAL MARITIME COMMISSION

DOCKET NO. 24-13

ACCESS ONE TRANSPORT,

v.

COSCO SHIPPING LINES CO., LTD.,

RESPONDENT'S REPLY TO COMPLAINANT'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL DISMISSAL

Respondent COSCO Shipping Lines Co., Ltd. ("COSCO" or "Respondent"), by and through its undersigned attorneys, hereby replies to the May 7, 2024 opposition ("Opposition") of Complainant Access One Transport ("Complainant" or "Access One") to COSCO's April 8, 2024 Motion for Partial Dismissal of the Complaint ("Motion"). As we demonstrate below, the Opposition itself confirms that the Complaint must be dismissed insofar as it asserts claims under 46 U.S.C. §§ 41104(a)(3) and (a)(8).[1]

[1] Although not to be considered for purposes of the instant motion, COSCO notes that Access One's critique of dual transactions is addressed to the wrong party. Dual transaction requirements have nothing to do with COSCO, but instead ***are determined entirely by the terminals,*** for their own interests. Although COSCO may grant a shipper's request for a refund or waiver because a terminal's dual transaction requirement prevented the trucker from returning an empty containers on a particular day, COSCO has absolutely no role in imposing the requirement or assessing compliance therewith. Likewise, COSCO notes that dual transactions need not be for any specific customer; that is, a motor carrier may return an empty container to one ocean carrier and pick up a full container transported by a different ocean carrier. COSCO will address these misunderstandings of Complainant later in the proceedings, if necessary.

BACKGROUND

On March 1, 2024, Complainant filed its Complaint. Although the Complaint does not contain separate counts and focuses on an alleged violation of 46 U.S.C. § 41102(c), it also asserts that COSCO independently violated 46 U.S.C. §41104(a)(3) and (8). Compl. ¶¶ 8, 38.

Respondent in its Motion challenged these alleged independent violations, showing, in short:

(i) That 46 U.S.C. § 41104(a)(3), as in effect before and after OSRA22, applies only to acts of retaliation against a "shipper" based on specified predicate actions, but the Complaint does not (and ethically could not) allege either that Access One was a "shipper," as that term is defined in the Shipping Act and FMC regulations, or that COSCO's alleged retaliation was a result of a predicate act of the type required by 46 U.S.C. § 41104(a)(3).

(ii) That 46 U.S.C. § 41104(a)(8) applies only where the respondent provided service to the complainant pursuant to a tariff, but the Complaint does not (and ethically cannot) allege that COSCO provided any service at all to Access One, much less that COSCO provided such service pursuant to tariff service, as required by the statute.

As demonstrated below, the Opposition not only fails to rebut the showing COSCO made in its Motion, but actually reaffirms that the Complaint fails to state a claim as to either 46 U.S.C. §§ 41104(a)(3) or 46 U.S.C. §§ 41104(a)(8).

ARGUMENT

I. The Complaint Fails to State a Claim under 46 U.S.C. § 41104(a)(3)

As explained in the Motion, 46 U.S.C. § 41104(a)(3) was amended by OSRA22, so it is necessary to examine the provision both before and after OSRA 22 became effective on June 16,

2022. We address both below, starting with the provision as it currently stands, i.e., after June 16, 2022.

a. 46 U.S.C. § 41104(a)(3) Post-OSRA 2022

Post-OSRA 46 U.S.C. § 41104(a)(3)[2] forbids an ocean carrier to "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods." COSCO showed in the Motion that the allegations of the Complaint do not plausibly assert such a claim, because Access One does not allege that it sought cargo space from COSCO (as it could not plausibly allege). Nor does it allege any discrimination at all against Access One compared to similarly situated entities (i.e., other drayage providers), much less unjust or unreasonable discrimination. Thus, the Complaint does not identify a single drayage provider that received better terms from COSCO than did Access One. Indeed, such discrimination would have been impossible since, as the Complaint admits, Access One, when not benefiting from a shipper's service contract, is subject to the COSCO tariff on free time and per diem, which necessarily applies to everyone alike.

The Opposition pretends that Post-OSRA 46 U.S.C. § 41104(a)(3) does not contain the word "discriminatory," referring (at p. 7) to the dual transaction requirement as "unfair and unjust." But the statutory provision ***does*** use that word and the FMC is not free to change the congressional language or to render the congressional requirement of discrimination meaningless.[3]

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[2] Post-OSRA 46 U.S.C. § 41104(a)(3) applies only to about two and a half months of the period covered by the Complaint. Although it is the tail, not the dog, we address it, nevertheless.

[3] As the Commission explained in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* 25 S.R.R. 1213, 1220 (FMC 1990) (emphasis added): "Courts have made it clear that federal agencies must give effect to every word of as statute so that no part will be rendered inoperative, superfluous, void or insignificant." See, e.g., *National Association of Recycling Industries, Inc. Inc. v. ICC,* 660 F.2d 795, 799 (D.C. Cir. 1981); *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980).

In any event, it is clear that this provision was not intended to apply to drayage providers, but rather to protect shippers, including NVOCCs, that need cargo space. As a principal sponsor of OSRA22 explained, this provision was intended to ensure that "ocean carriers make a good-faith effort to negotiate vessel space and accommodate the cargo bookings for U.S. exports."[4]

b. 46 U.S.C. § 41104(a)(3) Pre-OSRA 2022

As stated in the Motion, 46 U.S.C. § 41104(a)(3), as in effect before OSRA22, stated that common carrier could not "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." **(**Emphasis added). It is thus clear beyond peradventure that 46 U.S.C. § 41104(a)(3), as in effect before OSRA22, applies only to retaliation against a "shipper."

Complainant does not allege that it is a shipper. Much to the contrary, it "concedes that as a motor carrier, it is not in and of itself a 'shipper' of cargo." Access One Opposition p. 8. This alone is enough to dispose of Complainant's claim. Instead, Complainant argues that it "is acting on behalf of [an unmentioned] 'shipper,'" which may use COSCO (or some other entity) as an ocean carrier and urges the Presiding Officer to expand the protection of this provision from only "shippers," as Congress wrote, to anyone who claims to act in any respect on behalf of unspecified shippers. Complainant offers nothing to support this bold and unprecedented assertion – such as a case where the FMC allowed a motor carrier or someone else claiming to act on behalf of the shipper to file a retaliation complaint on its own behalf.

[4] Statement of Rep. Garamendi, H. 5466, Congressional Record (June 13, 2022).

The few things that Access One offers in support of its assertion actually prove the contrary of its argument. The Opposition refers to the definition of shipper (Opposition at p. 8) but does not (and cannot) claim to be any of the entities referred to thereunder. Second, Complainant cites a snippet from an FMC statement that itself states expressly that the only entity protected by 46 U.S.C. §41104(a)(3) pre-OSRA was a "shipper."

Finally, Access One urges the Presiding Officer to ignore the inconvenient word "retaliate," and to treat it as if it meant do anything the complainant does not like. But the very FMC statement the Response relies upon specifically states that retaliation for a specific act is a necessary element of a violation. This has recently been interpreted, consistent with the FMC statement, to require an allegation that the purported retaliatory act occurred in response to the shipper: (i) patronizing another ocean carrier, or (ii) filing a complaint with the Commission or otherwise bringing the specific matter to the direct attention of the Commission. *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA*, 2024 WL 1299768 (ALJ 2024).

Complainant makes no allegation of bringing the matter to the attention of the FMC before the alleged retaliation, so that cannot serve as a predicate act. It does make a garbled attempt to claim that the alleged retaliation was in response to Access One patronizing other ocean carriers, presumably by picking up and delivering containers from/to the terminals they use, but that assertion cannot bear even the briefest scrutiny.

There is no way that a motor carrier can be said to "patronize" an ocean carrier. The word "patronize," when used in a non-derogatory sense, means: "to act as patron of**:** provide aid or support for" or "to be a frequent or regular customer or client of." *See* Merriam Webster's Unabridged Dictionary. In neither of those senses does Access One "patronize" ocean carriers. The patrons of a motor carrier are the shippers/consignees that hire them. These are their

customers/clients that pay them. Furthermore, the tariff provisions under which Access One was assessed fees apply equally to all motor carriers, not just Access One, so cannot be considered retaliation for anything done by Access One.

II. The Complaint Fails to State a Claim under 46 U.S.C. § 41104(a)(8)

As with 46 U.S.C. § 41104(a)(3), Access One asks the Presiding Officer to rewrite the Shipping Act by changing the term that Congress actually used in 46 U.S.C. § 41104(a)(8) – "for service pursuant to a tariff" – to something in the nature of any matter where a tariff may be involved. Whether or not Access One was charged pursuant to a tariff is irrelevant – the only pertinent question is whether there was "service pursuant to a tariff." Clearly there was not. COSCO did not provide any service at all to Access One, much less service pursuant to a tariff. The "service" Congress referred to in 46 U.S.C. § 41104(a)(8) was the transportation service that ocean carriers provide to the parties listed on the bill of lading – the shipper and the consignee. Access One does not (and again cannot) allege that it was either of these.

Adopting Access One's re-interpretation of the Shipping Act would also do violence to the deliberate distinction that Congress made between "service pursuant to a tariff" in 46 U.S.C. § 41104(a)(4) and 46 U.S.C. § 41104(a)(8) and "service pursuant to a service contract" in 46 U.S.C. § 41104(a)(9) and 46 U.S.C. § 41104(a)(16). In repeatedly making this distinction, Congress recognized that tariffs are required to be universal and non-discriminatory, while service contracts are, by their very nature, individualized and preferential. Under Complainant's rewriting of the statute, there would be no difference between the two formulations, because every service contract involves an underlying tariff.

III. Complainant Fails to Show a Basis for Filing An Amended Complaint

In the normal course, it is generally appropriate to allow a complainant that has filed a defective complaint an opportunity to file an amended complaint fixing the defects. In this case, however, Complainant has said nothing about what it would add in an amended complaint and how that would remedy the deficiencies identified above and in the original Motion. It is thus impossible to tell whether any proposed amendment would be useful or futile, requiring more effort and more legal fees for no good reason. Unless and until Complainant identifies the proposed amendments, there is no basis upon which COSCO could consent or oppose. There is equally no basis upon which the Presiding Officer could determine whether or not to allow an amendment.

CONCLUSION

For the reasons stated in the original Motion and in this Reply, the Presiding Officer should dismiss the Complaint with respect to claims brought under 46 U.S.C. § 41104(a)(3) and (a)(8).

DATED: May 14, 2024

Respectfully submitted,

/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2024, a true and correct copy of the foregoing **RESPONDENT'S REPLY TO COMPLAINANTS' OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL DISMISSAL** 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.

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