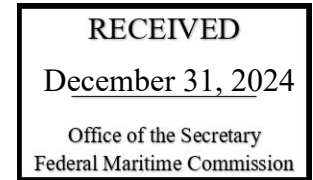




Before the
FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 25-01



20230930-DK-BUTTERFLY-1, INC. v. BAL CONTAINER LINE CO., LIMITED

VERIFIED COMPLAINT

I. INTRODUCTION

1. Complainant 20230930-DK-Butterfly-1, Inc., formerly known as Bed Bath & Beyond Inc. (“BBBY” or “Complainant”), by its undersigned counsel, brings this Verified Complaint (the “Complaint”) against Respondent BAL Container Line Co., Limited (“Respondent” or “BAL”) pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to Complainant caused by BAL’s violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.

2. The COVID-19 pandemic caused unprecedented challenges to trade and the global economy. During these difficult times, as alleged herein, BAL took advantage of disruptions to the container shipping sector and unfairly charged its customers detention and demurrage costs for reasons outside of shippers’ control. During this time, shippers were charged unjust and unreasonable costs for detention and demurrage of containers. These improper charges were particularly damaging to Complainant, which was forced to file a Chapter 11 bankruptcy petition on April 23, 2023.

3. Upon information and belief, during the 2021-2022 shipping year, at least a substantial majority of the demurrage and detention charges (the “Charges”) assessed by BAL and

paid by Complainant were assessed for periods of time in which Complainant's ability to pick up containers at the ports, or return empty containers promptly, was constrained due to circumstances outside the control of Complainant, such as congestion at ports and shortage of equipment.

4. Upon information and belief, BAL's practices were knowing and deliberate.

5. Upon information and belief, BAL has profited greatly from the conduct alleged herein.

6. During the COVID-19 pandemic, many companies, similar to Complainant, faced severe pressure from freight costs and "could potentially go bankrupt because of the current situation with extremely high freight rates" as described by one maritime commenter and industry consultant, Vespucci Maritime CEO Lars Jensen. Mr. Jensen further stated that "[i]f the situation ends up not lasting long, most will be able to hold their breath and weather the storm. But the longer it lasts, the more will end up in a situation they're unable to manage." The contemporary impacts of increased unjust and unreasonable detention and demurrage charges across the entire shipping industry were devastating to shippers' businesses. Indeed, the International Monetary Fund released an Analytical Series report on January 24, 2023 indicating that "[t]he 2021 surge in global shipping costs was a canary in the coal mine for the persistent rise in inflation" and that "[g]iven the actual increase in global shipping costs during 2021, we estimate that the impact on inflation in 2022 was more than 2 percentage points—a huge effect that few central banks would dismiss."

7. BAL's conduct alleged herein with respect to the receipt, handling, storage, and/or delivery of the property of Complainant and, upon information and belief, of other shippers, occurred on a normal and customary basis.

8. Accordingly, pursuant to 46 U.S.C. Section 41301, Complainant brings this Complaint seeking reparations for injuries caused by BAL's violations of the Shipping Act, as alleged herein.

II. THE COMPLAINANT

9. Complainant 20230930-DK-Butterfly-1, Inc. is a corporation existing under the laws of New York with a mailing address: P.O. Box 1596, Union, New Jersey 07083, reachable via telephone via (954) 468-2444, and via its undersigned counsel's telephone numbers and email addresses listed below. Prior to filing a change of name certificate to its present name with the New York State Division of Corporations, State Records, and Uniform Commercial Code on September 21, 2023, Complainant's corporate name was Bed Bath & Beyond Inc. For purposes of the allegations of this Complaint, Complainant was a "shipper" as that term is defined by 46 U.S.C. Section 40102(23).

III. THE RESPONDENT

10. Upon information and belief, Respondent BAL Container Line Co., Limited is a company existing under the laws of the Hong Kong Special Administrative Region of the People's Republic of China with its principal place of business located at Office No. 2, 20/F, 135 Bonham Strand Centre, 135 Bonham Strand, Sheung Wan, Hong Kong. Respondent BAL is an inactive vessel-operating "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with organization number 029233. Respondent was an active vessel-operating ocean common carrier during the time period relevant to this Complaint.

IV. JURISDICTION AND LEGAL AUTHORITY

11. The Federal Maritime Commission (the “FMC” or “Commission”) has subject-matter jurisdiction over this Complaint pursuant to the Shipping Act and, in particular, 46 U.S.C. Sections 41301 *et seq.*

12. The FMC has personal jurisdiction over BAL as an “ocean common carrier”, as that term is defined by 46 U.S.C. Section 40102(18).

13. BAL’s assessment of the Charges, or a substantial majority thereof, and the alleged acts or omissions of BAL that led to the assessment of such Charges constitute failures by BAL to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant, in violation of 46 U.S.C. Section 41102(c) and the FMC’s Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020) (partially codified at 46 C.F.R. Section 545.5) (the “Interpretive Rule”), and in particular the Incentive Principle articulated in the Interpretive Rule.

14. BAL’s assessment of the Charges, or a substantial majority thereof, and the alleged acts or omissions of BAL that led to the assessment of such Charges also constitute violations of 46 U.S.C. Section 41104, including in particular 46 U.S.C. Section 41104(a)(10)’s prohibition on unreasonable refusals to deal or negotiate and 46 U.S.C. Section 41104(a)(14).

V. THE MATTERS COMPLAINED OF (ALLEGED FACTS)

15. For the period from 2021 through 2022, Complainant paid, in connection with BAL voyages, approximately \$9.5 million in detention and demurrage charges.

16. Upon information and belief, the Charges assessed by BAL and paid by Complainant were assessed during periods of time in which such Charges were not reasonable or

fair because of circumstances outside the control of Complainant and its agents and service providers, such as congestion, lack of appointments, and equipment shortages at port terminals.

17. During the period from November 2021 to September 2022, congestion at California ports reached unprecedented levels. In late 2021 and early 2022, the number of container ships waiting for a dock at a U.S. port more than doubled, peaking at more than 150 in early February. This congestion was driven by record-breaking cargo volumes resulting from increased consumer demand during the pandemic.

18. These disruptions at critical entry points led to widespread issues across the country, affecting inventory levels and contributing to delays and increased costs in the supply chain. These widespread delays outside of Complainant's control led to significant charges from BAL during this period. Complainant also documented issues with its agents being unable to track and trace containers due to issues with BAL's data, resulting in charges for delayed pickups beyond BBY's control.

19. For example, one of BBY's logistics agents working on behalf of BBY to book with BAL repeatedly advised in its delivery updates that congestion at port terminals and lack of equipment impeded its ability to pick up and return containers. On December 14, 2021, a logistics agent employee wrote to BBY: "We are continuing to see terminal congestion and chassis shortages across all terminals but will keep doing our best to move as many containers as possible." On December 22, 2021, the same employee followed up, "All other appointments from yesterday had to be rescheduled due to chassis shortages or terminal congestion." The next day she added, "We have more scheduled for this afternoon and evening. We ran into a few hiccups with dwell fees and high amounts of demurrage due[,] so we had to reschedule those loads." On December 30, 2021, the employee noted ongoing problems, "Terminal congestion continues to be a big issue

our carriers are seeing[,] as well as chassis shortages[,] which is cause for many rescheduled appointments.” By early January 2022, the situation had not improved. On January 6, 2022, the employee wrote, “We’re continuing to see many of the same issues at each terminal – chassis shortages and terminal congestion which is causing many delays to our carriers and has resulted in many rescheduled appointments.” On January 11, 2022, she provided another update: “Several loads were rescheduled yesterday due to terminal congestion and no available chassis.”

20. Complainant’s records also reflect the astronomical scale of the demurrage Charges for idling containers (charges that would in many instances run into multiple tens of thousands of dollars). These exorbitant demurrage fees were imposed even though Complainant’s drayage providers were working to secure appointments as soon as possible and despite market conditions outside of Complainant’s control that created long dwell times.

21. In addition to the broad effects of port congestion cited above, Complainant’s communications record also reflects that BAL frequently imposed detention Charges despite diligent efforts by Complainant and its drayage providers to move and return containers, and when the causes for the detention and demurrage were outside of the control of Complainant.

22. In an email dated September 23, 2021, a logistics agent employee wrote to BAL’s US agency, Norton Lilly International (“Norton Lilly”), and stated:

“[our agency] is in need of assistance in returning the below BAL equipment in Long Beach, CA, ***as there are (no available return locations to or no available appointments to) return your equipment for today:*** Please advise if you can provide an alternate return location and exempt the appointment, ***or if you are able to extend the per diem last free day and/ stop the per diem clock?*** In accordance with UIIA regulations and applicable state laws, please note that [we are] unable to accept per diem charges during periods when we are unable to terminate equipment due to marine terminal operator or steamship line return restrictions and for a period of one port business day following any such restrictions (two port business days in California).”¹

¹ Except where otherwise noted, all bold and italicized text reflects added emphasis.

23. Norton Lilly replied that there was one terminal accepting empty containers, but a dual transaction was required. Complainant's agent followed up, writing, "WBCT does not have any appointments available. Do we have any other options for returns?" Norton Lilly replied, "Not today/tonight. Maybe on Monday but we need to confirm."

24. On October 10, 2021, an employee of one of BBY's drayage providers updated BBY on the delivery status of empty containers, writing, "***BANR = Bal Lines No return Location for over a week***" for 26 BAL containers. These delays impacted BBY immensely, with the inability to return such containers creating further issues down the supply chain, increasing BBY's costs.

25. In an email dated October 14, 2021, the president of this drayage provider wrote to BBY's Vice President of Global Transportation and stressed the challenge of returning empty containers due to a lack of appointments, writing "[Empty] returns are by far the most impactful problem that the Motor Carrier community sees currently. ***The current [empty] appointment requirement, while wonderful in the quest to reduce turn-times, is now simply ineffective and actually impedes [empty] returns.***"

26. Upon information and belief, the Charges assessed by BAL and paid by Complainant were assessed during periods of time in which such Charges were not just or reasonable because of circumstances outside the control of Complainant and its agents and service providers, such as congestion at ports, lack of appointments, and shortage of equipment. On numerous occasions, BAL would impose charges on Complainant despite the lack of appointments being outside Complainant's control. For example, in a delivery update email dated April 27, 2022, one of BBY's drayage providers wrote to BBY employees and stated, "No Available Appts at PIER A" for BAL containers. In another delivery update email dated May 25, 2022, another

drayage provider employee wrote to BBY employees and stated, “No Available Appts at PCT” for BAL containers.

27. As Commissioner Rebecca F. Dye emphasized in her Final Report from the FMC’s Fact Finding Investigation 29, “the Interpretive Rule on Detention and Demurrage promulgated by the Commission pursuant to Fact Finding 28 provides the shipping public with an *enforceable principle* that the Commission employs to assess the reasonableness of demurrage and detention practices and regulations under the Shipping Act of 1984, as amended.”

28. As illustrated in the FMC’s Interpretive Rule, “the purpose of demurrage and detention are *to incentivize cargo movement*,” and therefore the FMC “will consider in the reasonableness analysis under section 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.” BAL itself has acknowledged that charges must be just and reasonable, complaining in litigation brought against SSA Marine Terminal that certain congestion surcharges imposed by SSA against BAL would not help alleviate congestion and that the congestion was no fault of BAL.

29. As alleged herein, BAL’s assessment of the Charges, or a substantial majority thereof, and the acts or omissions of BAL that led to the assessment of such Charges, were incapable of incentivizing cargo movement and therefore unreasonable.

30. Upon information and belief, the Charges assessed by BAL and paid by Complainant were assessed during periods of time in which such Charges were not just or reasonable because of circumstances outside the control of Complainant and its agents and service providers, such as congestion at ports, lack of appointments, and shortage of equipment.

31. The Charges imposed on Complainant did not serve, and could not have served, as a financial incentive to promote freight fluidity, but instead operated only as a punitive penalty on

Complainant for circumstances over which Complainant and its agents and service providers had little to no control.

32. BAL's wrongful imposition of the Charges directly injured Complainant, in amounts up to or exceeding \$9.5 million in improper detention and demurrage charges.

33. Abusive, unjust, and unreasonable practices by major international ocean carriers, such as the conduct alleged herein, are likely to wield outsized influence over general practices in the industry. If not corrected, BAL's unlawful practices may become industry standard, sending a message to all global container lines that it is acceptable to impose punitive detention and demurrage charges upon shippers because of delays and conditions outside of shippers' control.

VI. CAUSES OF ACTION

COUNT I: VIOLATION OF 46 U.S.C. § 41102(c) & 46 C.F.R § 545.5

34. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

35. BAL's assessment of the Charges, and the alleged acts or omissions of BAL that led to the assessment of such Charges, constituted failures by BAL to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant, in violation of 46 U.S.C. Section 41102(c), 46 C.F.R. Section 545.5, and the FMC's Interpretive Rule.

36. Furthermore, Respondents' practices and actions related to the assessment of demurrage and detention Charges under bills of lading with Complainant are inconsistent with or do not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations), in violation of 46 U.S.C. Section 41104(a)(14).

COUNT II: VIOLATION OF 46 U.S.C. § 41104(a)(10)

37. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

38. BAL's practices and actions related to the assessment of the Charges, and the alleged acts or omissions of Respondents that led to the assessment of the Charges, constituted unreasonable refusals to deal or negotiate with Complainant in violation of 46 U.S.C. Section 41104(a)(10).

VII. CAUSATION

39. BAL's assessment of the Charges has directly and proximately injured Complainant by forcing Complainant to pay unjust and unreasonable Charges.

40. BAL's conduct has caused Complainant to incur other injuries, including delays, failures to receive time-sensitive merchandise, reduced inventory for sale, unnecessary expenses, lost profits, as well as attorneys' fees and expenses relating to litigation.

VIII. REPARATIONS SOUGHT

41. During the 2021–2022 shipping year and from 2021 through 2022, Complainant paid at least approximately \$9.5 million in detention and demurrage Charges. Complainant believes that a substantial majority of the Charges, in an amount to be determined by the FMC in this proceeding, were unjustly and unreasonably assessed, and requests reparations for all such Charges that the FMC determines did not comply with 46 U.S.C. Section 41102(c) or 41104(a) or determines to be unreasonable under 46 C.F.R. Section 545.5 and the FMC's Interpretive Rule.²

² The Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272 (Jun. 16, 2022) ("OSRA 2022"), included a new procedure for complaints about charges assessed by common carriers, now codified at 46 U.S.C. Section 41310, which, *inter alia*, requires the common carrier to "bear the burden of establishing the reasonableness of any demurrage or detention charges pursuant to" 46 C.F.R. Section 545.5. 46 U.S.C. § 41310(b)(2). Complainant respectfully submits that nothing in the text of OSRA 2022 purports to limit the availability of this *procedure*,

42. In addition to the injuries stated in the preceding paragraph, Complainant also suffered other injuries to be calculated at trial.

IX. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that the FMC require BAL to answer this Complaint pursuant to 46 U.S.C. Section 41301(b), and prays for relief from the FMC as follows:

1. An investigation by the Commission pursuant to 46 U.S.C. Section 41301(c) of the allegations in this Complaint and the Charges' compliance with 46 U.S.C. Sections 41102(c) and 41104 and reasonableness pursuant to 46 C.F.R. Section 545.5 and the FMC Interpretive Rule;

2. An Order, after due investigation pursuant to 46 U.S.C. Section 41301(c), finding that BAL has violated 46 U.S.C. Section 41102(c), 46 C.F.R. Section 545.5, and the FMC's Interpretive Rule by assessing unjust and unreasonable Charges, or a substantial majority thereof, in connection with its receipt, handling, storage, and delivery of the property of Complainant; that the detention and demurrage Charges are inconsistent with or do not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations), in violation of 46 U.S.C. Section 41104(a)(14); and that BAL's assessment of the Charges or a substantial majority thereof constituted

including the aforementioned burden allocation, as long as a complainant's *substantive* claims regarding the charges at issue are based entirely on pre-existing (i.e., pre-OSRA 2022) Shipping Act provisions and associated regulations, and do not invoke any of OSRA's new *substantive* provisions or protections with respect to such charges. For that reason, Complainant believes that the *procedure* set forth in 46 U.S.C. Section 41310 with respect to the Charges complained of herein should be available to Complainant notwithstanding the FMC's July 14, 2022 "Industry Advisory – Interim Procedures for Submitting 'Charge Complaints' Under 46 U.S.C. § 41310", which suggested that filing parties must "[c]onfirm[] that the disputed charge[s] [were] incurred on or after the enactment of P.L. 117-146" (i.e., June 16, 2022), and the FMC's additional Guidance that "Charge Complaint procedures do not apply to . . . Charges invoiced or assessed prior to the effective date of OSRA on June 16, 2022." Accordingly, Complainant respectfully requests that the Presiding Officer issue an Order that the procedure set forth in 46 U.S.C. Section 41310 is available to Complainant with respect to all of the Charges challenged herein (including those assessed prior to the enactment of OSRA 2022) and afford Complainant an opportunity to proceed separately pursuant to 46 U.S.C. Section 41310 with respect to the Charges.

unreasonable refusals to deal or negotiate with Complainant and Complainant's agents and service providers, in violation of 46 U.S.C. Section 41104(a)(10);

3. An Order compelling BAL to cease and desist from violation of the Shipping Act and to put in place lawful and reasonable practices to preclude BAL from assessing unfair and unreasonable detention and demurrage charges to Complainant and other shippers and their respective agents;

4. An Order requiring Respondents to pay Complainant reparations for the unlawful conduct alleged herein in an amount to be proven pursuant to 46 U.S.C. Section 41305, with interest pursuant to 46 U.S.C. Section 41305(a), Complainant's reasonable attorneys' fees as "the prevailing party" pursuant to 46 U.S.C. Section 41305(e), and any other sum the FMC determines to be proper; and

5. Such other and further orders or relief as the FMC deems just and proper.

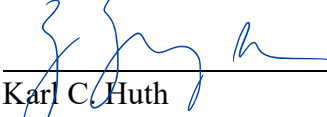
X. REQUEST FOR ORAL HEARING

Complainant requests such hearing to be conducted in Washington, DC.

Dated: December 31, 2024

Respectfully submitted,

HUTH REYNOLDS LLP



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*Counsel for Complainant 20230930-DK-
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VERIFICATION

I, David M. Kastin, am an authorized signatory of Complainant 20230930-DK-Butterfly-1, Inc. (formerly known as Bed Bath & Beyond Inc.), P.O. Box 1596, Union, New Jersey, 07083, email david.kastin@butterflywdd.com. I have read the foregoing Verified Complaint and believe, to the best of my knowledge, information, and belief, including information received from others, that the facts stated therein are true and correct. I declare under penalty of perjury that the foregoing is true and correct. Executed on December 31, 2024.

A handwritten signature in blue ink, consisting of a stylized 'D' followed by a series of loops and a horizontal line at the end.