

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 13-04

STREAK PRODUCTS, INC.

and

SYX DISTRIBUTION INC.

COMPLAINANTS,

v.

UTi, UNITED STATES, INC.,

RESPONDENT.

**COMPLAINANTS' OPPOSITION TO RESPONDENT'S MOTION TO AMEND
COMPLAINT AND COUNTERCLAIM**

Streak Products, Inc. ("Streak") and SYX Distribution Inc. ("SYX") (collectively "Complainants") opposes the motion by UTi, United States, Inc. ("UTi") to amend its answer and to file a Counterclaim. As reflected in the Complainants' previous submission to Your Honor, UTi's Counterclaim must be denied because it fails to allege a Shipping Act violation. Further, its motion to amend its answer to include a new affirmative defense should be rejected because the newly asserted defense is patently devoid of merit.

Futile Amendments Should Not be Permitted

Pursuant to Fed. R. Civ. P. 15, amendments to pleadings should not be permitted where such amendments would be futile. *See, e.g., Virtue v. Int'l Brotherhood of Teamsters Retirement*

& Family Protection Plan, 893 F. Supp. 2d 46, 47 (D.D.C. 2012) (futility of amendment is valid basis for denying motion to amend). Denial of a motion to amend on futility grounds is specifically aimed at preventing the waste of resources of the court and of the parties. *Frederick v. Michigan Dep't of Corrections*, 2012 WL 1079958 at * 6 (E.D. Mich. 2012); *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1255 (11th Cir. 2008) (motion for leave to amend denied because justice does not require court to waste their time on hopeless cases). Here, because UTi's amended pleading would be futile, its Motion for Leave to Amend should be denied.

The Commission's Jurisdiction is Limited to Shipping Act Violations

UTi's Counterclaim seeks to assert a claim against SYX in the amount of \$40,958 arising out of SYX's alleged failure to pay U.S. Customs and Border Protection duties. *See* Proposed Amended Complaint at IV (A). Because UTi's Counterclaim constitutes a breach of contract claim rather than a claim arising out of an alleged Shipping Act violation, it must be dismissed.

The Commission's jurisdiction is limited to claims involving alleged violations of the Shipping Act. *See, e.g., Pasha Auto Warehouse, Inc. v. Philadelphia Regional Port Authority*, 1998 WL 188848 at * 6 (E.D. Pa. 1998); *Tugz Int'l, LLC v. Canaveral Port Authority*, 2004 WL 1368689 at * 3 (M.D. Fl. 2004); *In re Containership Co.*, 466 B.R. 219, 226 (Bankr. S.D.N.Y. 2012). The Commission elaborated on this point in *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda*, 30 S.R.R. 991 (2006). There, it observed that questions as to the Commission's jurisdiction turn on whether a claim essentially constitutes a breach of contract claim or whether it involves elements peculiar to the Shipping Act. *Id.* at 998. Thus, "as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is not more than simply

a breach of contract claim.” *Id.*, quoting *Cargo One, Inc. v. COSCO Container Lines Co.*, 28 S.R.R. 1635, 1645 n. 17 (2000).

Consistent with the jurisprudence in this regard, the Commission’s regulations require that a private party’s complaint allege a Shipping Act violation. *See* 46 C.F.R. § 502.62 (a)(3)(v). If the Complaint fails to allege the section of the Shipping Act violated or to state facts which support the allegations, the Commission may, *sua sponte*, require the Complainant to do so.

Here, it is apparent that the Counterclaim asserted by UTi asserts a straightforward breach of contract claim for an alleged failure to pay Customs’ duties. While UTi now cites 46 U.S.C. § 41102(a) as the section of the Shipping Act that has been violated, a review of that section confirms its inapplicability.

Section 41102(a) provides that a person may not

knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjustified or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

UTi fails to cite any false billing or any other unjustified or unfair device or means employed by SYX. The most that it can allege is that SYX failed to make a payment to it as SYX was purportedly contractually obligated to do. On its face, such an allegation sounds in breach of contract, and does not involve elements peculiar to the Shipping Act. *See Cargo One*, 28 S.R.R. at 1645 (alleged violations must raise issues beyond mere contractual obligations to provide basis for Commission jurisdiction). Indeed, the Commission’s regulations explicitly provide that the mere failure to make a payment is insufficient to confer jurisdiction over contract claims. In discussing what constitutes a Section 41102(a) violation, the regulations provide that:

An essential element of the offense is use of an ‘unjust or unfair device or means.’ In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an ‘unjust or unfair device or means’ from the failure of a shipper to pay ocean freight.

46 CFR § 525.2.

In its Opposition to the Complainants’ previous motion to dismiss UTi’s defective counterclaim, UTi asserted the fact that it is not uncommon for NVOCCs to pay import duties. Even accepting such an assertion as true, however, does not somehow confer Commission jurisdiction over what is patently a contract dispute based upon the alleged failure of a shipper to pay freight and related charges. Similarly, the fact that the Commission’s Office of Consumer Affairs and Dispute Resolution Services purportedly may receive consumer complaints regarding payment of Customs and other freight charges, does not transform what are contract disputes into Shipping Act violations.

Because UTi’s generic assertion fails to identify any facts to overcome the presumption that its claim is one for breach of contract, its counterclaim must be dismissed.

UTi’s Affirmative Defense is Baseless

UTi’s proposed new affirmative defense must be dismissed because it is frivolous.

The Shipping Act expressly provides that there is a three year statute of limitations for filing a complaint with the Commission alleging violations thereunder. *See* 46 U.S.C. § 41301. This provision routinely has been considered and enforced by the Commission. Indeed, the Commission in construing prior versions of the Shipping Act has made explicit that carriers cannot alter the time period set forth therein by setting shorter time periods for asserting such claims under the terms and conditions of their bills of lading or service contracts. *See Proposed Rules for Covering Time Limits on the Filing of Overcharge Claims*, 10 FMC 1, 5 (1967) (making clear that failure to promulgate rules at that time could not be interpreted to allow

carriers to limit the right of a shipper to claim injury under the Act within the statute of limitations set forth therein); *see also*, *United States v. American Export Isbrandtsen Lines, Inc.*, 11 FMC 298, 330 (1968) (same). In *Minnesota Mining and Manufacturing Co. v. American Export Isbrandtsen Lines, Inc.*, 12 FMC 11, 12 (1969), the Commission again reiterated that conference rules providing that claims for adjustment of freight charges must be presented within 6 months after the shipment dates, cannot bar recovery of complaints brought under the Shipping Act.

In the face of this well-established authority, UTi nonetheless argues that 46 U.S.C. § 40503 negates the three year time limitation set forth under 46 U.S.C. § 41301. This position is belied by the plain language of the provision, the section's legislative history and binding Commission precedent. Section 40503 allows a carrier or shipper to file a special docket application seeking permission to refund or waive collection of a portion of freight charges. *See* 46 CFR 502.271. Pursuant to the Commission's regulations, the carrier must publish a new corrected tariff before such a special docket application can be submitted. Further, if the special docket application is based upon a carrier's failure to publish a tariff, it must specify when the carrier intended to or agreed to publish a new tariff. *See* Exhibit 1 to 46 CFR 502.27 ¶ 3.

From the language of the Shipping Act and the Commission's regulations governing it, it is apparent that Section 40503 is intended to address a situation where a carrier voluntarily agrees to refund freight charges due to its own error in failing to publish a tariff. Indeed, the Commission so held in *Total Fitness Equipment Inc. d/b/a A Professional Gym v. World Link Logistics, Inc.*, 28 S.R.R. 45 (I.D. 1997), adopted at 28 S.R.R. 534 (1998). There, the Administrative Law Judge recognized that both the legislative history of Section 40503 and prior Commission authority establish that the remedial special docket program was designed to be

permissive and voluntary not coercive. Initial Decision at 53. Indeed, the I.D. cites legislative history to the effect that the provision is designed to permit the Commission to allow carriers to make “voluntary refunds to shippers.” *Id.*; see also *D.F. Young v. Compagnie Nationale Algerienne de Navigation*, 21 FMC 730, 731 (1979) (the legislative history clearly indicates that the purpose of the provision was to allow a carrier to make a *voluntary* refund or waive the collection of a portion of the freight charges where as a result of a bona fide mistake the shipper is charged more than he understood the rate to be).

Here, of course, UTi has not made such a voluntary admission or offered a voluntary refund. Indeed, even in the face of its own original admission that it did not have a published tariff on file, UTi appears to be back-tracking and arguing that its own internal documents setting forth the rates it wanted to charge, which rates were not published with the Commission, should somehow be construed as the equivalent of a tariff. Such an argument is ludicrous.

No amount of obfuscation by UTi can alter the fact that the plain language of the Shipping Act allows a complaint for overcharges to be filed within three years of the date of accrual of such a claim. The fact that parties acting in good faith can open a special docket to address refunds involving inadvertent errors in failing to publish certain rates cannot be construed as somehow vitiating the ability of the Commission to provide meaningful reparations in instances such as this where an NVOCC has flouted its tariff publishing obligations under the Act. Accordingly, UTi’s Motion for Leave to Amend should be denied.

Respectfully submitted,



Edward D. Greenberg
Brendan Collins
GKG LAW, PC
1054 Thirty-First Street, NW
Suite 200
Washington, DC 20007
Telephone: 202/342-5200
Facsimile: 202/342-5219
Email: egreenberg@gkglaw.com
bcollins@gkglaw.com

*Attorneys for Streak Products, Inc. and SYX
Distribution*

Dated: May 20, 2014

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document was delivered to the following addressees at the addresses stated by depositing same in the United State mail, first class postage prepaid, and/or by electronic transmission, this 20th day of May 2014:

Ashley W. Craig, Esquire
Rachel M. Fiorill
Elizabeth K. Lowe
VENABLE LLP
575 Seventh Street,, NW
Washington, DC 20004
Telephone: 202.344.4351
Facsimile: 202.344.8300
Email: awcraig@venable.com
rmfiorill@Venable.com
eklowe@venable.com

Attorneys for Respondent *UTi, United States, Inc.*


