

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-04

STREAK PRODUCTS, INC., and SYX DISTRIBUTION, INC.

v.

UTi, UNITED STATES, INC.

**MEMORANDUM AND ORDER ON RESPONDENT'S
MOTION TO AMEND ANSWER TO AMENDED COMPLAINT**

BACKGROUND

Complainant Streak Products, Inc. (Streak) is a Delaware corporation that manufactures computer storage devices. Respondent UTi, United States, Inc. (UTi) is a non-vessel-operating common carrier (NVOCC) licensed by the Commission, License No. 001792. UTi has provided services to Streak since at least 2003 transporting full container load (FCL) and less-than-container load (LCL) shipments by water between United States ports and foreign ports.

Due to concerns about the rates it was being charged for transportation services, Streak retained an expert to review freight invoices Streak paid to UTi during the period 2009 through 2011 and learned that on FCL shipments, UTi charged Streak rates in excess of the amounts set forth in UTi's tariff. Streak also learned that UTi did not have tariffs on file for LCL shipments. Streak claims that it only learned that UTi was charging rates other than that set forth in published UTi tariffs when it retained the expert. Streak contends that prior to the expert's review, it neither knew nor could have known that UTi was charging the allegedly excessive amount.

In late 2012, Streak contacted UTi about its findings to attempt to negotiate a settlement of its claims, and on December 20, 2012, Streak and UTi signed an agreement tolling the statute of limitations during their negotiations. On April 12, 2013, Streak filed a Complaint with the Secretary alleging that UTi violated three sections of the Shipping Act of 1984: (1) 46 U.S.C. § 41104(2) by charging Streak rates greater than those stated in its published tariff; (2) 46 U.S.C. § 41104(4) by charging Streak rates greater than those it charged other shippers; and (3) 46 U.S.C. § 40501 by

failing to keep open to public inspection in its tariff system tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and any through transportation route that has been established. Streak contends that it has suffered actual injury as a result of UTi's violations.

On May 28, 2013, UTi filed a motion to dismiss in lieu of an answer. UTi conceded it violated the Act in the manner that Streak alleges. "Streak correctly alleges that UTi failed to comply with the tariff publishing requirements of the Shipping Act During the relevant period from 2009 to 2011, UTi had no published tariff rate in effect for any of the FCL or LCL shipment services it provided to Streak Products." (Respondent UTi, United States, Inc.'s Memorandum in Support of Motion to Dismiss the Verified Complaint of Streak Products, Inc. at 3.) Despite the admitted violations of the Act, UTi argued that Streak's claim that UTi violated section 40501 must be dismissed for lack of standing because Streak does not and cannot allege any actual injury resulting from the violation and UTi has already voluntarily self-disclosed its tariff publishing violation to the FMC. Therefore, UTi contended, the section 40501 claim is moot. On October 23, 2013, the motion to dismiss was denied. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Oct. 23, 2013) (Order Denying Respondent's Motion to Dismiss).

On November 5, 2013, UTi filed an Answer to the Complaint. The Answer did not include a counterclaim.

On January 23, 2014, Streak's motion to amend the Complaint to add its distribution agent and affiliate SYX Distribution, Inc. (SYX Distribution) as a complainant was granted. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Jan. 23, 2014) (Order Granting Motion for Leave to File Amended Complaint). On February 18, 2014, UTi filed an answer to the Amended Complaint. This answer included a counterclaim alleging:

IV. Statement of Facts

- A. UTi has paid \$40,958.56 in duties to U.S. Customs and Border Protection on behalf of SYX Distribution.
- B. SYX Distribution has refused to repay UTi for the monies it has paid on SYX Distribution's behalf.

V. Violation of the Shipping Act of 1984

- A. Streak [*sic*] has violated the Shipping Act of 1984, Shipping Act, 47 [*sic*] U.S.C. § 40101 et seq.

(UTi Answer and Counterclaim at 6-7.) On March 12, 2014, Complainants filed a motion to dismiss the counterclaim. On April 15, 2014, the counterclaim was dismissed without prejudice because:

UTi's motion does not "indicate the sections of the Act alleged to have been violated." 46 C.F.R. § 502.62(a)(3)(v). Therefore, it does not comply with Rule 62(a)(3)(v). UTi's counterclaim is dismissed without prejudice to filing a motion to amend the answer to include a counterclaim that complies with the Rules. A motion to amend must be filed on or before April 22, 2014.

Streak Products, Inc. v. UTi, United States, Inc., FMC No. 13-04 (ALJ Apr. 15, 2014) (Order Dismissing Respondent's Counterclaim Without Prejudice).

On May 12, 2014, twenty days after the April 22 deadline set in the April 15, 2014, Order, UTi filed a motion for leave to file an amended answer to the Amended Complaint. On May 15, 2014, the motion was dismissed *sua sponte* because it did not state within the body of the motion what attempt was made to discuss the anticipated motion with Streak in a good faith effort to determine whether there was any opposition to the relief sought and to narrow the areas of disagreement as required by Commission Rule 71(a), 46 C.F.R. § 502.71(a). The dismissal was without prejudice to refile a motion to amend. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ May 15, 2014) (Order Dismissing Without Prejudice Respondent's Motion to File Amended Answer to Amended Verified Complaint).

On May 16, 2014, UTi filed a second motion for leave to file an amended answer to the Amended Complaint using the same title as the first motion. The second motion added the sentence "[p]ursuant to 46 C.F.R. § 502.71(a), UTi's counsel conferred with Complainants' counsel regarding this motion. Complainants' counsel informed UTi's counsel that it opposes UTi's Motion." (Respondent and Counterclaimant UTi, United States, Inc.'s Motion for Leave to File an Amended Answer to the Amended Verified Complaint of Streak Products, Inc. and SYX Distribution, Inc. (UTi Motion to Amend (May 16, 2014) at 1.) UTi wants to add a counterclaim and an affirmative defense to its Answer. On May 20, 2014, Complainants filed an opposition arguing that "because UTi's amended pleading would be futile, its Motion for Leave to Amend should be denied." (Complainants' Opposition to Respondent's Motion to Amend Complaint and Counterclaim at 2.)

DISCUSSION

The proposed counterclaim and the proposed affirmative defense raise different issues and will be addressed separately.

I. COUNTERCLAIM.

The proposed counterclaim alleges:

IV. Statement of Facts

- A. UTi has paid \$40,958.56 in duties to U.S. Customs and Border Protection on behalf of SYX Distribution.

B. SYX Distribution has refused to repay UTi for the monies it has paid on SYX Distribution's behalf.

V. Violation of the Shipping Act of 1984

A. Streak [*sic*] has violated the Shipping Act of 1984, Shipping Act, 46 U.S.C. § 41102(a).

VI. Prayer for Relief

A. UTi seeks reimbursement from SYX Distribution for the \$40,958.56 it paid to U.S. Customs and Border Patrol on SYX Distribution's behalf.

(UTi Amended Answer and Counterclaim (lodged May 16, 2014) (Amended Answer (May 16, 2014)) at 7.)¹ UTi contends:

Because the amendment only further clarifies UTi's counterclaim against SYX, it is neither futile, nor will SYX suffer any prejudice from it. Furthermore, it is clear that there has been no undue delay, nor has UTi acted in bad faith or with any dilatory motive. Accordingly, UTi should be permitted to amend the counterclaim.

(UTi Motion to Amend (May 16, 2014) at 3.)

Streak and SYX Distribution oppose the motion. They contend that UTi's counterclaim alleges breach of contract claim, not a violation of the Shipping Act.

The Commission's jurisdiction is limited to claims involving alleged violations of the Shipping Act. . . . 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."

(Complainants' Opposition at 2-3.)

UTi's motion to amend its answer is denied for three reasons, any one of which by itself would support denying the motion. First, UTi originally raised this claim in its original answer to

¹ I note that in its motion to dismiss, UTi stated: "Streak Products has paid in full for all transportation services provided by UTi." (UTi Motion to Dismiss at 3.)

the Amended Complaint that it filed February 18, 2014, more than ten months after Streak filed its Complaint and more than one year after Complainants first contacted UTi about their claim. The order dismissing without prejudice the counterclaim in UTi's original answer required UTi to file a motion to amend on or before April 22, 2014, a requirement intended to prevent additional delay in this proceeding. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Apr. 15, 2014) (Order Dismissing Respondent's Counterclaim Without Prejudice). UTi did not file its motion to amend until May 12, 2014, nearly three weeks late. I note that UTi did not mention that it had filed the motion to amend the counterclaim during the telephone scheduling conference conducted with the parties on May 13, 2014.

Second, the proposed counterclaim fails to state a claim of violation of section 41102(a). Section 41102(a) states:

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 unjust 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.

46 U.S.C. § 41102(a) (emphasis added). In 1993, the Commission promulgated an interpretive rule intended to clarify jurisdiction in proceedings under section 41102(a), at that time codified as section 10(a)(1). *Unpaid Freight Charges*, FMC No. 92-46, 58 Fed. Reg. 7190 (Feb. 5, 1993), 26 S.R.R. 735 (FMC 1993) (Final Interpretive Rule).

Section 10(a)(1) of the Shipping Act . . . states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." 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 . . . Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

46 C.F.R. § 545.2. *See also Shipco Transport Inc. v. Jem Logistics, Inc.*, FMC No. 12-06, Decision at 13-15 (ALJ Mar. 26, 2013) (Initial Decision on Default), *aff'd.*, Aug. 21, 2013.

Commission rules require a counterclaim to provide a "clear and concise factual statement sufficient to inform each [counter]respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law" 46 C.F.R. § 502.62(a)(3)(iii); 46 C.F.R. § 502.62(b)(4). UTi's counterclaim merely states that UTi has paid \$40,958.56 in duties to U.S. Customs and Border Protection on behalf of SYX Distribution and that SYX Distribution has refused to pay UTi for the money UTi paid on SYX Distribution's behalf. It does not provide a clear and concise factual

statement informing Complainants of the unjust or unfair devices or means UTi alleges they used to obtain transportation for property at less than the properly applicable rates, an essential element of a violation of section 41102(a).

Third, discovery was originally scheduled to close April 4, 2014. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Dec. 3, 2013) (Discovery Schedule). Granting Complainants' motion to compel additional discovery responses from UTi necessitated extending that date. *See Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Apr. 7, 2014) (Memorandum and Order on Complainants' Motion to Compel). One purpose of the May 13, 2014, telephone scheduling conference was to establish a date by which discovery would conclude, which, with the exception of a report and deposition of Complainants' expert witness, is now closed. *See Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ May 15, 2014) (May 15, 2014, Procedural Order). Permitting UTi to assert a counterclaim that Complainants used an unjust or unfair device would necessitate reopening discovery to permit Complainants to conduct discovery into allegations that Complainants used unjust and unfair devices to obtain transportation at less than the properly applicable rates. This would then require adjustment of the briefing schedule set forth in the May 15 Order and cause further delays to this proceeding.

For these reasons, UTi's motion to amend its answer to include the counterclaim must be denied.

II. AFFIRMATIVE DEFENSE.

The proposed affirmative defense alleges: "Streak Products and SYX Distribution's allegations are time-barred pursuant to 46 U.S.C. § 40503." (Amended Answer (May 16, 2014) at 6.) UTi contends:

Section 40503 states that an application for a refund of freight charges must be filed with the Commission *within 180 days* from the date of shipment. *See* 46 U.S.C. § 40503 (2014) (emphasis added).

Streak and SYX filed the Amended Verified Complaint pursuant to Section 11(a) of the Shipping Act, 46 U.S.C. § 41301, seeking reparations for purported injuries caused by violations of the Shipping Act. *See* Amended Verified Complaint, ¶¶ III, V. Pursuant to § 41301, a party must file the complaint within three (3) years after the claim accrues. *See* 46 U.S.C. § 41301 (2014) ("A person may file . . . a sworn complaint alleging a violation of this part. . . [i]f the complaint is filed within 3 years after the claim accrues, the complainant may seek reparation for an injury . . . caused by the violation"). Streak and SYX attempt to take advantage of the longer three-year statute of limitations period under § 41301 by claiming they are entitled to "reparations for injuries" caused by violations of the Shipping Act when, in actuality, they are merely seeking a refund of freight charges under § 40503. Accordingly, pursuant to § 40503, Streak and SYX should have filed an application

for a refund within 180 days of the shipment date for their claims to be considered timely.

The proposed affirmative defense would not be futile; should Your Honor find the proposed defense meritorious, it follows that Streak and SYX's claim would be time-barred, as the 180 days had already lapsed when Streak filed the initial Complaint. Additionally, Streak and SYX would not be prejudiced if leave is granted, since they could (and should) have easily discovered the applicable provisions and deadlines under § 40503. Furthermore, UTi has not acted in bad faith or with any dilatory motive. For these reasons, UTi's proposed affirmative defense should be permitted.

(UTi Motion to Amend (May 16, 2014) at 3-4 (emphasis in original).)

The provision of the Act on which UTi relies provides authority for the Commission to permit a carrier to refund or waive freight charges. This provision states:

The Federal Maritime Commission, on application of a carrier or shipper, may permit a common carrier or conference to refund a portion of the freight charges collected from a shipper, or to waive collection of a portion of the charges from a shipper, if –

(1) there is an error in a tariff, a failure to publish a new tariff, or an error in quoting a tariff, and the refund or waiver will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference, before filing an application for authority to refund or waive any charges for an error in a tariff or a failure to publish a tariff, has published a new tariff setting forth the rate on which the refund or waiver would be based; and

(3) the application for the refund or waiver is filed with the Commission within 180 days from the date of shipment.

46 U.S.C. § 40503.

Congress first granted the authority to the Commission to authorize refund or waiver of freight charges in a 1967 amendment to section 18(b) of the Shipping Act, 1916. Pub. L. 90-298, 82 Stat. 111 (1968), codified at 46 U.S.C. § 817(b)(3).

The legislative history of the amendment to section 18(b) . . . which gave the Commission authority to permit a carrier subject to its jurisdiction to make a voluntary refund or to waive the collection of a portion of the freight charges clearly

indicates that such waiver or refund was to be allowed where as a result of a bona fide mistake the carrier failed to file an “intended rate.” Thus, the House Report accompanying the Bill which ultimately added the refund/waiver authority to section 18(b) states:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the . . . Commission must charge the shipper under the aforementioned circumstances the higher rates. [quoting House Report No. 920 November 14, 1967 [To accompany H.R. 9473, 90th Congress 1st Sess. (1967)].]

Likewise the Senate Report in setting forth the Purpose of the Bill explains

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to *file a tariff reflecting an intended rate*. (Emphasis added) [quoting Senate Report No. 1078, April 5 1968 [To accompany HR 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, 90th Cong., 2d Sess. (1968).]

Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which “such refund or waiver will be based.” When read in conjunction with the statements in the House and Senate reports, it is clear that “the new tariff” is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.

Munoz y Cabrera v. Sea-Land Services, Inc., 20 F.M.C. 152, 153 (FMC 1977). Section 18(b)(3) of the 1916 Act was reenacted as section 40503 of the 1984 Act.

Complainants do not contend that the Commission should exercise its discretion to permit UTi to waive or refund charges greater than the amount on which UTi and Complainants agreed because of a bona fide mistake by UTi in filing its tariffs, the situation covered by section 40503. Complainants paid the rate on which they agreed. Complainants allege that the rate UTi charged and Complainants paid for transportation is unlawful because UTi failed to comply with other sections of the Act. Their claims are unrelated to section 40503 and the 180 day statute of limitations is inapplicable in this proceeding. Therefore, UTi’s motion to amend the answer to include this affirmative defense must be denied.

O R D E R

Upon consideration of Respondent and Counterclaimant UTi, United States, Inc.'s Motion for Leave to File an Amended Answer to the Amended Verified Complaint of Streak Products, Inc. and SYX Distribution, Inc., the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the motion to amend be **DENIED**.


Clay G. Guthridge
Administrative Law Judge