

**BEFORE THE
FEDERAL MARITIME COMMISSION**

STREAK PRODUCTS, INC.,

AND

SYX DISTRIBUTION, INC.,

Complainants,

v.

UTi, UNITED STATES, INC.,

Respondent.

Docket No. 13-04

**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.**

Respondent and counterclaimant UTi, United States, Inc. (“UTi”) submits this Motion for Leave to File an Amended Answer (the “Motion”) pursuant to the Federal Maritime Commission’s Rules of Practice and Procedure, Rules 12 and 66, 46 C.F.R. §§ 502.12 and 502.66. Specifically, UTi seeks to: (1) amend the counterclaim against SYX Distribution, Inc. (“SYX”) to include the specific provision of the Shipping Act of 1984 (the “Shipping Act”) that SYX violated; and (2) add an affirmative defense that Streak Products, Inc. (“Streak”) and SYX’s claims are time-barred, pursuant to 46 U.S.C. § 40503.

ARGUMENT

I. Standard of Review

Rules 12 and 16 of the Federal Maritime Commission’s Rules of Practice and Procedure establish the standards applied to requests to amend or supplement pleadings. 46 C.F.R. §§

502.12, 502.66 (2014). Rule 66 states that “[a]mendments or supplements to any pleading . . . will be permitted or rejected, either in the discretion of the Commission or presiding officer.” 46 C.F.R. § 502.66 (2014). “Pleadings in administrative proceedings are easily amendable, even more so than in federal courts, and are not considered to be critically important. Rather they are general notice-giving instruments that allow respondents to prepare their defense.” *Tak Consulting Eng’rs v. Sam Bustani*, Docket No. 98-13, 1998 WL 940845, at *7-8 (F.M.C. Oct. 22, 1998) (holding that a complaint could be amended and finding no prejudice to the respondents). To this end, the Federal Maritime Commission has “flexible rules allowing amendments liberally.” *John Barbeau v. M. Anderson, Ocean Beach Transfer & Storage, Inc.*, Docket No. 91-13, 1991 WL 382895, at *2 (F.M.C. May 16, 1991).

Rule 12 of the Federal Maritime Commission’s Rules of Practice and Procedure further explains that “for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12 (2014). Federal Rule of Civil Procedure 15 governs the amendment and supplement of pleadings. *See* Fed. R. Civ. P. 15. Pursuant to Rule 15, “the court should freely give leave [to amend] when justice so requires.” *Id.* As the Supreme Court has explained, “this [is a] mandate to be heeded . . . [and] [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive . . . undue prejudice . . . futility of amendment, etc. – the leave sought should, as the rules require, be ‘freely given.’” *Forman v. Davis*, 371 U.S. 178, 181 (1962).

Attached hereto, as Exhibit A, is UTi’s proposed Amended Answer, Affirmative Defenses and Counterclaim to the Amended Verified Complaint of Streak Products, Inc. and SYX Distribution Inc.

II. UTi should be Permitted to Amend its Counterclaim.

On April 15, 2014, Your Honor dismissed UTi's counterclaim against SYX alleging a violation of the Shipping Act for failure to reimburse UTi for expenses incurred on SYX's behalf. In dismissing UTi's counterclaim, Your Honor found that UTi failed to comply with Rule 62(a)(3)(v) by not identifying the specific provision of the Shipping Act alleged to have been violated. However, Your Honor dismissed UTi's counterclaim "without prejudice to filing a motion to amend the answer to include a counterclaim complying with the Rules." Accordingly, the proposed amended counterclaim includes the applicable section of the Shipping Act that SYX has violated—46 USC § 41102—and now complies with the Rules. 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.

III. UTi should be Permitted to Amend its Answer to Add an Affirmative Defense.

UTi seeks to amend its Answer to add an affirmative defense that Streak and SYX's claims are time-barred, pursuant to 46 U.S.C. § 40503. 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.

CONCLUSION

UTi respectfully requests that Your Honor grant UTi’s Motion for Leave to File an Amended Answer.

Dated: May 12, 2014

Respectfully Submitted,

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2014, a true and complete copy of the foregoing Motion was served on the following by FedEx Overnight and electronic mail:

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