

**BEFORE THE
FEDERAL MARITIME COMMISSION**

BALTIC AUTO SHIPPING, INC.)	
)	
)	
COMPLAINANT,)	
)	
v.)	
)	DOCKET NO. 14-16
)	
)	
MICHAEL HITRINOV a/k/a)	
MICHAEL KHITRINOV,)	
EMPIRE UNITED LINES CO., INC.,)	
)	
)	
RESPONDENTS.)	
)	

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION
FOR LEAVE TO AMEND ITS COMPLAINT**

Respondents herewith file and serve their Memorandum in opposition to Complainant's Motion to amend its Complaint.

POINT 1:

**COMPLAINANT FAILS TO EXPLAIN WHY THERE WILL BE "JUDICIAL
ECONOMY"; THE MOTION SHOULD BE DENIED AS UNWARRANTED UNDER
APPLICABLE RULES AND LAW**

Complainant seeks to amend its Complaint “for the sake of judicial economy” (Motion, p. 1), with no explanation of how such “economy” would be achieved. It is Respondents’ position that not only will no judicial economy be realized (quite the contrary), but the requested leave to amend should be denied as not in accord with the Commission’s Rule 66, nor the non-binding guidance of federal courts on amendment generally.

Commission Rule 66 provides that, “[a]mendments or supplements to any pleading (complaint . . . counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding officer.” 46 C.F.R. § 502.66(a) (emphasis added)

Because leave to amend is “covered by a specific Commission rule,” the Federal Rules and federal court decisions construing them do not govern the Presiding Officer’s discretion on the issue. Notably, the Commission Rule does not include any provision favoring amendment, in contrast to the Federal Rule. *Compare* Fed. R. Civ. P. 15(a) (2) (“The court should freely give leave when justice so requires.”).

Indeed, Rule 66 indicates that an undue broadening of the issues is disfavored: “No amendment will be allowed that would broaden the issues, without opportunity to reply to such amended pleading and to prepare for the broadened issues.” 46 C.F.R. § 502.66(a)

The proposed Second Amended Complaint adds new parties and completely different issues, and comes in the midst of a motion to dismiss the Complainant’s claims on the basis of Statute of Limitations, and barred by the terms of the Settlement Agreement and Mutual Release. To permit such a sweeping and broadening amendment at this time is highly prejudicial to the Respondents.

District Courts will find prejudice when the amendment substantially changes the theory of the case, would require significant new preparation, would result in a more complicated trial or

comes years after the case began. *Atchinson v. District of Columbia*, 73 F.3d 418, 426-428 (upholding denial of motion for leave given litigation pending two years, was set for trial the day motion was made, and would have required additional discovery).

As the instant matter now stands, the focus of this tribunal is on what happened to Complainant's shipments in 2011, and what has transpired – with respect to those shipments – since. The instant matter has nothing to do with the disputes concerning which forum should be adjudicating the re-opening of the Settlement Agreement and Mutual Release, nor the charges levied by counsel-against-counsel in a completely different proceeding. The proposed amendment not only changes the theory of the case, it introduces completely unrelated counts. It changes the case.

Further, the Motion for Leave comes, if not on the eve of trial, in the midst of a motion that might well severely narrow the issues of the case. Such narrowing would result in significant judicial economy. Adding new parties against whom claims are asserted that are independent of the underlying case would result in the consumption of undue judicial resources. Widening this case makes no sense from a judicial economics point of view. This should not be permitted as it will require substantial additional discovery, and will unduly complicate any trial or hearing. *See, Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977). Simply as a matter of discretion, the Motion should be denied.

Further grounds to deny the motion at this time is that there is a strong indication that as a facial matter, the allegations appear not to even allege Shipping Act violations (see Point 2, below). This distraction itself, in the midst of a summary disposition motion, is sufficient grounds for the exercise of discretion and denying the motion, as to include these unrelated and irrelevant issues in this case is “judicial economy” turned on its head.

POINT 2:

**THE PROPOSED COMPLAINT DOES NOT PLEAD SHIPPING ACT VIOLA-
TIONS, MISUNDERSTANDING THE KIND OF “RETALIATION” THAT THE
SHIPPING ACT PROHIBITS**

The proposed Second Amended Complaint fails to state a Shipping Act violation. The proposed amended Complaint asserts: “All of the foregoing motions [filed in other non-FMC proceedings] were filed for the sole purpose of retaliating against the Complainant, to discourage the Complainant from proceeding forward in the instant matter, and to unnecessarily cause complainant to incur legal fees.” (proposed Second Amended Verified Complaint ¶ 65). Even if true, the claim should be addressed in those proceedings not at the Commission.

Further, the behavior complained of has nothing to with the Complainant’s shipments. At best it is a post-relationship dispute, not affecting further future shipments and therefore not a Shipping Act violation.

Assuming that everything alleged is true (which is denied), retaliatory actions occurring after the commercial relationship has ended will not “stifle completion” and thus are not within the purview of 46 USC 41104 (3).

Federal Maritime Board v. Isbrandtsen Co., Inc., 356 U.S. 481 (1958) (hereafter “*Isbrandtsen*”) discussing the predecessor, but identical provision in the 1916 Shipping Act in connection with “dual rate” practices of conferences, explains the nature of and reason for the prohibition of “retaliation”.

“The second half of the Nineteenth Century saw a tremendous rise in the development of ocean transportation by steamship. Unfortunately, the supply of cargo space increased during this period much more rapidly than demand for it. The inevitable was cut-throat competi-

tion among steamship owners. This in turn, was followed ... by concerted efforts among individual owners to limit competition. The practices by which this end was pursued led to abuses and demands for their correction ... (*Isbrandtsen*, Frankfurter dissent at 503-504) (emphasis added)

“... the Alexander Committee also found evidence of other predatory practices. Shippers who patronized outside competitors were denied accommodations for future shipments even at full rates of freight, or were discriminated against in the matter of lighterage and other services (*Isbrandtsen*, majority opinion at 489)

... The Congress in [the predecessor Act’s clause] has flatly prohibited practices of conferences which have the purpose and effect of stifling competition ... Similarly [predecessor clause] prohibits another practice, common in 1913: to ‘retaliate against any shipper by refusing space accommodations when such is available’ ...” (*Isbrandtsen*, majority opinion at 491) (emphasis added)

“Congress ... flatly outlawing conference practices designed to destroy competition of independent carriers. Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful”. (*Isbrandtsen*, majority opinion at 492-493) (emphasis added)

“In view of the fact that, in the present case, the dual rate system was instituted for the purpose of curtailing *Isbrandtsen*’s competition, thus becoming a device made illegal by Congress in [predecessor clause] ...” (*Isbrandtsen*, majority opinion at 500) (emphasis add-

ed)

The Shipping Act's prohibitions were to prevent the curtailing or stifling of competition. There is no competition at issue in this case. Accordingly, there is no Shipping Act-prohibited "retaliation".

As Complainant has already admitted, "In or around September 2011, [Complainant] notified [Respondents] that the business relationship between the parties would be wound down and ultimately discontinued." (Complaint, ¶ 30, *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc. et al*, 11-cv-06908 (FSH) (PS), U.S. District Court for the District of New Jersey; November 23, 2011) (emphasis added)

Even if the acts alleged by Complainant in the proposed Amended Complaint are "retaliatory" (which is denied), they are not within the purview of the Shipping Act or the Commission's jurisdiction as they will have absolutely no effect on competition. Complainant remains free, without penalty or cost, to do business with any carrier, whether vessel-operating or non-vessel-operating, as it chooses. Respondents' acts will have absolutely no effect on competition the market.

The alleged actions do not stifle competition and they do not affect future competition, and therefore are not cognizable by the FMC (*Isbrandtsen*). The allegations should not be introduced into the instant matter, and the Motion should be denied.

Respectfully submitted,

By:



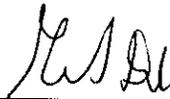
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Dated in Short Hills, NJ fourth day of May 2015.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid and by email (marcus.nussbaum@gmail.com); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.



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Dated in Short Hills, NJ. this fourth day of May, 2015.