

THE FEDERAL MARITIME COMMISSION
800 North Capitol Street, NW, Washington, D.C.

D. F. YOUNG, INC., Complainant, v. NYK LINE (NORTH AMERICA) INC., Respondent.

DOCKET NO. 16-02

RESPONDENT'S MOTION FOR LEAVE
TO FILE A REPLY ON ITS MOTION TO
AMEND ITS ANSWER
46 C.F.R. 502.71(c)

A. RELIEF REQUESTED BY THIS MOTION

Respondent moves pursuant to Rule 71(c) for leave to file the attached reply in support of its motion to amend its answer. The motion to amend was filed August 24, 2016. Complainant's opposition was filed August 31, 2016.

B. THE RULES

1. Respondent's motion to amend its answer is a non-dispositive motion within the meaning of Rule 69(g).
2. The Rule governing non-dispositive motions [Rule 71(c)] says:

The moving party may not file a reply to a response to a non-dispositive motion unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances.

C. BASIS FOR MOTION

1. "Extraordinary circumstances" means "out of the ordinary factors" or "[f]actors . . . not usually associated with a particular thing or event" BLACK'S LAW DICTIONARY, p. 568 (6th ed. 1991).

2. This is an extraordinary circumstance in that Complainant's opposing papers make material allegations going to the merits of the case that Respondent contests. It is not just respondent's motion to amend, but its defense of the claims that would be prejudiced by allowing the misstatements to go unchallenged.

D. RULE 71(a) STATEMENT

A copy of this motion was forwarded to opposing counsel with an inquiry as to whether they consent. They have emailed that they cannot consent.

E. REQUEST FOR RELIEF

Respondent asks that its motion be granted.

Dated: White Plains, NY, September 1, 2016

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[Signed with authority by Joseph De May, Esq.]

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RESPONDENT'S REPLY IN SUPPORT
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46 C.F.R. 502.71(c)

Reference in this Reply to respondent's "Service Contract Defense" is to the defense set out in Section G. of respondent's August 24, 2016 motion to amend its answer.

COMPLAINANT'S MISSTATEMENTS

A. RENEWAL OF THE "FORD/NYKK" CONTRACT

1. Complainant alleges that the 2012-2015 Service Contract between Ford and respondent ended on December 31, 2015; did not automatically renew; and no document has been produced to show that it was. *See, Compl. Opp., pp. 1, 5.* The implication is that there was no renewed Service Contract.

2. In fact, the Service Contract between Ford and respondent was renewed for a period of three years beginning January 1, 2016. Such Service Contracts have been renewed between respondent and Ford every three years since 2007 on identical terms and conditions. Only the ports and rates have changed.

3. It is my recollection that the 2016 renewal came up at a deposition in this case taken during the week of August 24th just past. In fact, counsel for Complainant

corrected me when I inadvertently referred to an incorrect renewal date, so Complainant's counsel knows that there was in fact a renewal. However, I cannot set forth precisely what was said until I get back the deposition transcript.

B. TARIFF 156

1. Complainant alleges that Tariff 156 provides that it is incorporated into respondent's "Loyalty Contracts" and argues that Loyalty Contracts should be considered the same as Service Contracts due to the absence of a deferred rebate. *Compl. Opp., pp. 2-3.* We disagree.

2. The Shipping Act defines "Loyalty Contract" and "Service Contract" separately. Compare, 46 U.S.C. 40102(13) and (20). The two Contracts are subject to different filing requirements. *Sample Loyalty Contracts must be filed as part of the carrier's tariff.* 46 CFR 520.4(a)(6). *Service Contracts are not.* They have their own filing requirements [46 CFR 530.5] and Part 530 governing Service Contracts does not cover Loyalty Contracts. Since Service contracts are not included in the carrier's tariff, service contract shipments cannot be considered tariff shipments for purposes of forwarder compensation under 46 CFR 515.42.

3. The Service Contracts between Ford and respondent contain the following merger clause [no. 13] which shows that all tariffs were superseded:

13. CARRIER DOCUMENTS; ENTIRE AGREEMENT: ... this Agreement supersedes all tariffs, ... and only those terms and provisions of such documents that are expressly incorporated into the Agreement in a writing signed by both parties shall apply to the Shipments transported under the Agreement. ... This Agreement may not be waived, altered, modified or amended except by a written instrument, duly executed by all the parties to this Agreement. * * *

The full text of Clause 13 can be viewed at Exhibit A to Complainant's Opposition.

4. No signed writing exists whereby any tariff or other provision calling for forwarder compensation was made a part of the Ford Service Contracts

C. ALLEGED ADMISSIONS IN RESPONDENT'S DISCOVERY RESPONSES

1. Contrary to Complainant's allegations, respondent's discovery answers do not contain admissions which preclude assertion of the proposed Service Contract Defense or which render the proposed amendment futile. *See, Compl. Opp., pp. 4-5, 7-8, 9-10.*

- (a) Exhibit C, Interrogatory Response 2 says that Tariff 156 is the only tariff applicable to the RoRo Trade. It does not say that the Tariff is applicable to the subject shipments or to any service contracts, nor does it say that no Ro-Ro's move under Service Contracts rather than tariffs.
- (b) Exhibit C, Interrogatory 10 asked only for the "factual" bases that Complainant did not perform the required freight forwarding services. Respondent's answer was limited to what the interrogatory asked for. Respondent is not giving up its defense that Complainant did not perform the services required for compensation. Respondent is simply asking to plead another defense, i.e., its Service Contract Defense. Interrogatory 10 did not ask for the factual basis for all defenses.
- (c) Exhibit C, Interrogatory 14 asked only if anyone "claimed" that respondent violated the terms of its effective tariff in the last 5 years. Saying that no one had made such a claim is not an admission as to any specific tariff

claimed to be effective, nor does it negate or contradict a Service Contract Defense.

- (d) Exhibit C, Interrogatory 15 asked only whether there was a factual basis that any freight forwarding compensation Complainant might have been owed had been waived. Respondent's answer did not go beyond what was asked. There was no waiver because no services were performed.
- (e) Exhibit H, Admission 1 admits only that Tariff 156 applies to the Ro-Ro Trade. It does not say that the Tariff applies to service contracts or that all Ro-Ro's move as tariff shipments.
- (f) Exhibit H, Admission 2 says only that Tariff 156 has not been amended, revoked, or changed. It does not say that it is applicable to the shipments at issue or to the service contract.
- (g) Exhibit H, Admissions 5 and 6 admit nothing more than what 46 CFR 515.42(b), (d) already requires, and that regulation also makes no reference to service contracts.

2. Nothing in respondent's foregoing discovery responses contradicts its Service Contract Defense. All the foregoing discovery answers show is that they do not mention the Service Contract Defense. That is true but irrelevant since if they did mention that defense, a motion to amend would not be necessary.

3. In any event, complainant candidly acknowledges that the Service Contract Defense was referred to in respondent's answers to complainant's requests for admissions dated almost 5 months ago on April 8, 2016. *Compl. Opp.*, p. 5 citing *Exhibit H, Answer 3*.

D. RESPONDENT'S ALLEGED JUDICIAL ADMISSIONS [Compl. Opp., p.6]

As explained by one federal appeals court:

[A]lthough "a statement in a complaint may serve as a judicial admission," the admission is no longer binding if the party subsequently amends the pleading.

AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 961 (9th Cir. 2006). If the status of a pleading allegation as a judicial admission were the only consideration, no pleading could ever be amended.

E. SUFFICIENCY OF PLEADINGS [Compl. Opp., p.6]

The pleading standards of "Iqbal/Twombly" have to do with the sufficiency of a pleading and not whether a pleading can be amended. Complainant has not objected to the sufficiency of respondent's proposed amended pleading.

F. DELAY AND BAD FAITH

1. Complainant's allegation of bad faith and undue delay makes no sense.
2. Respondent's Service Contract Defense is that the subject shipments were pursuant to service contracts (with no forwarder compensation provision or tariff included) and not tariff shipments. Thus, they are ineligible under Reg. 515.42 as a *matter of law* for forwarder compensation. That defense, if valid, is *fully dispositive*. It would make absolutely no sense for respondent to deliberately hold back such a defense. Doing so would add nothing to the validity or effect of the defense, it would only risk losing it and thus prejudicing respondent's case. At the very least, it would needlessly run up the costs of defense.

G. OTHER CONSIDERATIONS

1. Complainant has made no allegation of prejudice. It does not contend that witnesses have been lost or evidence has become unavailable because the Service Contract defense was not specifically pleaded. It does not say that its litigation strategy would have been different or that needless discovery has been had or that discovery will have to be retaken.

2. Respondent's Service Contract defense is essentially a legal one that will not complicate or prolong the case. Either a governing Service Contract exists or it doesn't. Either the Service Contract provides for forwarder compensation (explicitly or by incorporating a tariff) or it doesn't. In any event, the one thing Complainant has not done is to show that respondent's Service Contract Defense is, by its own terms, invalid under governing statutes or regulations.

3. Absent prejudice to the opposing party, the law always prefers to have disputes decided on their merits rather than by one party'

Dated: White Plains, NY, September 1, 2016

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