

FEDERAL MARITIME COMMISSION

DOCKET NO. 16-02

D.F. YOUNG, INC.

v.

NYK LINE (NORTH AMERICA) INC.

ORDER GRANTING MOTION FOR LEAVE TO AMEND ANSWER

BACKGROUND

On January 29, 2016, complainant D.F. Young, Inc. (Young) commenced this proceeding by filing a Complaint with the Secretary alleging that respondent NYK Line (North America) Inc. (NYK). Young alleges that it performed freight forwarder services in connection with shipments of cars by Ford Motor Company pursuant to a service contract between Ford and NYK. Young contends that NYK violated several sections of the Shipping Act of 1984 (Shipping Act or Act) by “refusing to compensate Complainant for the freight forwarding services performed on Ford shipments placed on vessels [owned and/or] operated by Respondent and/or its agents or affiliates, for which Respondent received freight charges.” (Complaint ¶ 47.)

NYK filed its Answer on March 7, 2016, denying that it owed the freight charges or had violated the Act. NYK included three affirmative defenses. NYK admitted “that Respondent had in effect its Tariff NYKS-156 applicable to the shipments in question.” (Answer Paragraph IV.A.8.)

The parties have engaged in extensive discovery. In their August 19, 2016, joint status report, the parties asked that the deadline be extended to November 15, 2016, a request that was granted. *D.F. Young, Inc. v. NYK Line (North America) Inc.*, FMC No. 16-02 (ALJ Sept. 14, 2016) (Second Order Amending Discovery Deadlines).

On August 24, 2016, NYK filed a motion to amend its Answer to delete the phrase “applicable to the shipments in question” from Paragraph IV.A.8 of the Answer and to add a fourth

affirmative defense contending that the shipments at issue “were Service Contract shipments, not tariff shipments and therefore do not qualify for freight forwarder compensation.” (Respondent’s Motion to Amend Its Answer at 3-4.) NYK states:

3. When we filed Respondent’s answer, we were under the impression that the shipments for which Complainant sought compensation were pursuant to a forwarder compensation tariff incorporated into the relevant Service Contract.

4. We have since learned that the Service Contract did not incorporate that tariff and the tariff does not say that it applies to shipments under a Service Contract.

(Motion at 4.) NYK contends that no additional discovery will be needed because “[e]ach of the shipments generated a finite set of documents, and these documents – or representative samples – have already been produced. The amendment will simply allow an alternative theory of defense and conform the allegation of the answer to the known facts.” (Motion at 5.)

On August 30, 2016, Young served a confidential version and a public version of an opposition to the motion for leave to amend. Young contends that the original Answer admits that Tariff NYKS-156 applied to the shipments and that this is a judicial admission that is binding on NYK. Young also argues that NYK had the Ford service contract and the tariff in its possession before Young filed its Complaint. Despite possessing the documents, NYK either did not read them before filing the Answer or is not being truthful when it claims to have learned of the claimed inapplicability of the tariff after filing the Answer. Young also contends that NYK’s responses to discovery contain admissions that the tariff applies.

On September 2, 2016, NYK filed a motion for leave to file a reply to Young’s opposition with the opposition attached. The motion states that Young’s counsel was contacted about the motion for leave to reply and responded that they cannot consent. Young did not file an opposition to the motion for leave to reply. The motion for leave to file the reply is granted and the reply accepted for filing and consideration.

NYK contends that the claimed admissions in NYK’s discovery responses do not amount to the admissions claimed by Young. NYK also contends that the “service contract defense” was set forth in one of its responses to Young’s requests for admission and argues that if judicial admissions set forth in a pleading were binding, no pleading could be amended.

DISCUSSION

Commission Rule 66 provides:

Amendments or supplements to any pleading (complaint, Order of Investigation and Hearing, counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding

officer. 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. The Commission generally follows the principles of Federal Rule of Civil Procedure 15. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 29 SR.R.1047, 1060 (ALJ 2002).

Courts consider several factors in determining whether to permit a party to amend a pleading, including (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the party has previously amended the pleadings. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). Young's opposition to the motion relies primarily on claims that the amendment is unduly delayed and is in bad faith.

Denying leave to amend the answer in this circumstance would be comparable to entering default on this issue. "The reluctance to decide cases by default judgment is consistent with the underlying philosophy regarding proceedings before administrative agencies like the Commission. Under this philosophy agencies prefer to decide cases based on evidence rather than on defaults and technicalities" *Tak Consulting Engineers v. Bustani*, 28 S.R.R. 581, 583 (ALJ 1998).

I find that it is consistent with Commission principles to decide the issues added in NYK's amended answer on the merits rather than on the technicality that it was not included in its original answer. Discovery has not yet ended and a briefing schedule has not yet been established. To the extent that the amendment broadens the issues, Young has an opportunity to prepare. Therefore, the motion for leave to amend is granted.

O R D E R

Upon consideration of Respondent's Motion for Leave to File a Reply on its Motion to Amend its Answer and the record herein, it is hereby

ORDERED that the motion be **GRANTED**.

Upon consideration of Respondent's Motion to Amend Its Answer, the opposition thereto, and the record herein, it is hereby

ORDERED that the motion to amend be **GRANTED**. Respondent's Amended Verified Answer is accepted for filing.


Clay G. Guthridge
Administrative Law Judge