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SEC

SERVICE DATE - MARCH 28, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.

v.

MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

Decided: March 27, 2002

DHX, Inc. (DHX), a freight forwarder, has filed a complaint challenging the reasonableness of certain rates and practices of two water carriers in the noncontiguous domestic trade, Matson Navigation Company and Sea-Land Service, Inc., now SL Service, Inc. (defendants). On December 21, 2001, the Board served a decision in this proceeding (December 21 decision) denying motions to dismiss the complaint and directing the parties to consult with each other and jointly recommend a procedural schedule by January 30, 2002. In a decision served on January 28, 2002, the due date for recommending a procedural schedule was extended until February 15, 2002. On February 14, 2002, DHX filed a motion to establish a procedural schedule. Defendants filed a similar motion on February 15, 2002.

According to the motions, the parties have been unable to agree on a schedule. The primary issue in dispute concerns whether DHX should file an amended and more specific complaint. DHX argues that there is no need for an amended complaint because defendants' motion to dismiss, or in the alternative their motion for summary judgment, clearly suggests that the defendants understood the gist of DHX's complaint. Thus, DHX submits that the proper procedure would be for defendants to commence discovery and simply request that DHX provide specificity. For their part, defendants argue that any schedule must begin with the submission by DHX of an amended and more specific complaint that, at a minimum: (1) identifies the multi-container shipment rates that DHX is challenging; (2) identifies the specific practices that DHX alleges support an unreasonable practice claim; and (3) identifies the essential grounds, factual and legal, for each claim. Defendants assert that, without clarification, they will not have fair notice of the claims against them, nor be able to properly answer the complaint or determine whether any discovery that DHX may seek is relevant and within the scope of what is being investigated. Under their proposed schedule, defendants would be allowed a 20-day period to answer the amended complaint.

The parties also disagree on the need for an extended discovery period. DHX argues that, due to the complex and difficult issues involved, the statement filing schedule should be delayed

in order to provide a preliminary 180-day period for completion of discovery.<sup>1</sup> Also, DHX seeks an order requiring that all documents and information that could be realistically considered to be confidential business information be identified by way of a “Vaughn Index”<sup>2</sup> and be accompanied by a proposed protective order. Finally, DHX requests that, at the end of the discovery period, the parties be required to file a joint “pre-trial” type statement of undisputed facts in order to narrow the facts in dispute.<sup>3</sup>

The intent of the Board in the December 21 decision was for the parties to submit a joint proposed procedural schedule designed to foster the efficient processing of the proceeding, not to add additional rounds of pleadings in which the parties trade recriminations.<sup>4</sup> The schedules proposed by the parties will not be adopted. Moreover, the parties are admonished that the Board expects that they will cooperate with each other in the future in providing discovery material and

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<sup>1</sup> In a reply to DHX’s motion for a procedural schedule, defendants indicate that they would be willing to revise their proposal to eliminate the requirement that DHX file an amended complaint if the Board requires DHX to file a written statement that clearly identifies the rates and practices that it intends to challenge. In addition, defendants suggest that, to facilitate discovery and move the proceeding toward a prompt disposition, the Board enter a protective order to protect commercially sensitive information. Under their revised proposal, there would be no specified date for discovery to end but the schedule would allow a 90-day period before the opening statement is due.

The issuance of a protective order under 49 CFR 1114.21(c) is premature at this stage of the proceeding. However, if defendants choose to file a motion for a protective order at the appropriate time, the sample order attached to the reply is consistent with the content of protective orders issued in similar proceedings. See Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104 (STB served May 10, 2000).

<sup>2</sup> See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>3</sup> In a subsequent reply to defendants’ motion for a procedural schedule, DHX generally argues that the motion is nothing more than an untimely, back-door motion under 49 CFR 1111.5 to make the complaint more definite.

In a related motion, DHX moves to strike portions of defendants’ reply to DHX’s motion for a procedural schedule. First, DHX unpersuasively argues that a statement in defendants’ reply was scandalous and impertinent. Second, DHX seeks to strike defendants’ suggestion that a protective order be issued. Notwithstanding that issuance of a protective order is premature at this stage of the proceeding, DHX’s argument that the Board strike a “suggestion” lacks merit. Under the circumstances, the motion to strike will be denied.

<sup>4</sup> See Decatur County Commissioners, et al. v. Central Railroad Company of Indiana, STB Finance Docket No. 33386 (STB served Sept. 30, 1997).

any other information required for the prompt, efficient disposition of this proceeding.

In the December 21 decision, slip op. at 6, the Board stated that, although DHX has framed its case as principally a rate case, it appears to us that the gravamen of its complaint is that defendants have engaged in unreasonable practices in an effort to put consolidators such as DHX out of business. The arguments contained in DHX's motion for a procedural schedule and accompanying correspondence support that determination.<sup>5</sup> Under the circumstances, it is reasonable that DHX be required to submit an amended or supplemental complaint that properly identifies the grounds for action and the relief sought.<sup>6</sup> Moreover, DHX has not demonstrated a need for the protracted discovery period it seeks, or for an order requiring the parties to submit a joint statement of undisputed facts. Under the circumstances, a 30-day period following the due date for answers to the amended complaint should be sufficient for the parties to complete discovery.

It is ordered:

1. DHX's motion to strike is denied.
2. The procedural schedule in this proceeding is as follows:

April 29, 2002	Amended complaint due.
May 20, 2002	Answers due.
June 19, 2002	End of discovery period.
July 19, 2002	Opening statement due.
August 19, 2002	Reply statements due.
September 9, 2002	Rebuttal statement due.

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<sup>5</sup> It is also unclear whether DHX plans to pursue the rate reasonableness challenge contained in the original complaint. If it does, as directed in the December 21 decision, slip op. at 5, DHX must specify which particular multi-container rates it is challenging and state why those rates are unreasonable.

<sup>6</sup> Indeed, such a filing is in keeping both with: (1) the Board's statement in the December 21 decision, slip op. at 1, that, for DHX to prevail, it will have to support with particularity its general claim that the carriers' practices are unlawful; and (2) DHX's request, contained in its reply to the motions to dismiss, that it be allowed to amend the complaint if the Board finds that the original complaint fails to state a cause of action.

3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary