

SERVICE DATE – OCTOBER 29, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35290

WEST POINT RELOCATION, INC. AND ELI COHEN—PETITION FOR DECLARATORY
ORDER

Digest:¹ The Board finds that a challenged water carrier tariff provision cannot hold an individual responsible for a corporation's debts when there is no other indication that the individual has expressly agreed to assume that obligation.

Decided: October 28, 2010

By petition filed on August 13, 2009, West Point Relocation, Inc. (West Point), and Eli Cohen (Cohen) (collectively, petitioners) seek a declaratory order that a particular provision of a Horizon Lines LLC (Horizon) tariff is an unreasonable practice under 49 U.S.C. § 13701. The provision at issue provides that “principals” of the billed party are personally liable for the billed party's failure to pay charges due. The matter was referred by the United States District Court for the Central District of California in Horizon Lines v. West Point Relocation, No. CV 08-6362 RSWL (JTLx). Horizon initiated the court proceeding to collect from West Point and Cohen unpaid amounts accrued between 2007 and 2008, allegedly due for the shipment of goods between Hawaii and the United States mainland. The court stayed the case against Cohen, granting his motion to refer to the Board the issue of whether the terms of the tariff were reasonable.²

Pursuant to the Board's authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board instituted a declaratory order proceeding on October 26, 2009, to resolve the controversies at issue here. The decision instituting the proceeding found that the matter had been referred by a court of competent jurisdiction and otherwise appeared to be within the Board's primary jurisdiction. The Board is considering the matter under the modified procedure rules at 49 C.F.R. pt. 1112. West Point and Cohen filed their opening brief on December 28, 2009. Horizon filed its reply statement on January 25, 2010. Petitioners filed their rebuttal statement on February 5, 2010. On March 17, 2010, Horizon filed a supplemental brief. On March 24,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In its referral order, the court noted that only the action against Cohen would be stayed and that the remainder of the action against West Point would continue.

2010, the Board held an oral argument, at which all parties were represented by counsel. On May 25, 2010, petitioners filed a copy of a Horizon tariff that they had entered as an exhibit at the March 24 oral argument.

Background

Horizon is a water carrier that transports cargo between Hawaii and the U.S. mainland and is therefore subject to Board jurisdiction under 49 U.S.C. § 13521. West Point describes itself as a freight forwarder.³ West Point failed to pay Horizon a total of \$410,207.48 that was billed for 107 shipments that were transported between October 2007 and May 2008. Horizon sued West Point and Cohen in Federal district court to recover the unpaid freight charges. Shortly thereafter, West Point sought bankruptcy protection.⁴

The tariff under which Horizon seeks to collect from Cohen states that “[t]he shipper, consignee, holder of the bill of lading, bill to party, owner of the goods and *principals* of said liable parties shall be jointly and severally liable to Carrier for the payment of all freight charges” (collection provision).⁵ Horizon claims that the tariff is incorporated into the terms of the 107 shipments by the following clause found at the bottom of the freight bills, invoices, and remittance copies sent to West Point:

Shipments invoiced herein are subject to the terms and conditions of Horizon Lines tariffs as filed with the Surface Transportation Board. Failure to pay charges herein on a timely basis may subject invoiced shipment(s) to penalty and may result in suspension of credit privileges.

Although the record indicates that Cohen, acting on behalf of West Point, received bills of lading for the shipments, and personally made arrangements for the shipments, there is no record evidence that any of the documentation actually provided to Cohen contained the operative language relating to binding “principals.” There likewise is no record that West Point or Cohen ever obtained, received, or reviewed the tariff through any other avenue, prior to litigation. Horizon asserts, however, that its domestic water carrier tariffs are publicly available through its website, and therefore “posted” as required by 49 C.F.R. § 1312.12.

³ A freight forwarder is an entity that holds itself out to the general public to provide transportation of property for compensation, usually by assembling and consolidating smaller shipments to take advantage of volume rates offered by the carrier actually hauling the goods. See 49 U.S.C. § 13102(8). A freight forwarder maintains the dual status of both carrier (vis-à-vis its shippers) and shipper (vis-à-vis the underlying carrier that it uses). See *DHX, Inc. v. STB*, 501 F.3d 1080 (9th Cir. 2007).

⁴ According to Horizon, after West Point sought bankruptcy protection, an apparent successor entity named WPR Hawaii, Inc., began shipping the same sorts of loads West Point had shipped. That company also owes Horizon for unpaid shipping charges. Horizon Reply 8, 20.

⁵ Pet’rs Opening App. C (emphasis added).

In an order entered on July 20, 2009, United States District Court Judge Ronald S.W. Lew referred the issue of the reasonableness of the challenged Horizon tariff to the Board. The determination of the reasonableness of a tariff provision lies within the jurisdiction of the Board. 49 U.S.C. § 13701(a), (b); see also DHX, 501 F.3d at 1092-93 (upholding STB authority to apply reasonableness determinations to water carriers).

Arguments

West Point and Cohen argue that corporate law insulates individuals from personal liability for the actions of the corporation, absent unusual circumstances (e.g., a showing of fraud or inequitable conduct). They ask the Board to declare Horizon's tariff unreasonable to the extent it purports to override well-established principles of corporate law.⁶ West Point and Cohen argue that a tariff provision cannot, on its own, circumvent the legal protections afforded by the distinction between corporations and their officers.

West Point and Cohen further argue that, for a tariff to be reasonable, the carrier must provide actual notice of tariff provisions that are not mandated by law. It follows, petitioners contend, that Horizon had an obligation to provide specific notice that it sought to impose liability on the West Point "principal", because the imposition is not mandated by law and, indeed, runs counter to normal legal and commercial rules. West Point and Cohen argue that the general reference to Board-filed tariffs on the invoices and freight bills they received from Horizon does not provide sufficient notice of the collection provision in the applicable tariff, and thus cannot operate to contravene the applicable legal framework.⁷

Horizon replies that tariffs are enforceable as valid and binding contracts for shipments they govern. Horizon argues that, contrary to petitioners' arguments, this proceeding is not a matter of corporate "veil piercing," but instead merely a matter of strictly applying the tariff language on its face.⁸ In its supplemental brief, Horizon cites several U.S. District Court cases in which similar tariff provisions were found binding as applied to "officers" of a corporation. Maersk, Inc. v. Neewra, Inc., 687 F.Supp. 2d 300 (S.D.N.Y. 2009); Maersk, Inc. v. Royal Brands Int'l, No. 98 CIV 8396 LAP, 2001 WL 456343 (S.D.N.Y. May 1, 2001); Maersk Inc. v. Atcom Indus., 73 F.Supp. 2d 387 (S.D.N.Y. 1999); Maersk Inc. v. Am. Midwest Commodities Export Cos., No. 94 Civ. 0475 (NRB), 1998 U.S. Dist. Lexis 12219 (S.D.N.Y. Aug. 7, 1998); Maersk Inc. v. Alan Mktg., No. 97 Civ. 3495(HB), 1998 WL 167323 (S.D.N.Y. Apr. 10, 1998) (collectively, Maersk Cases).

Horizon further argues that the collection provision is reasonable because it helps to create a system that promotes expeditious movement of cargo and relieves both shippers and Horizon of burdens associated with more complex credit and collection methods. Horizon also

⁶ Pet'rs Opening 5-8.

⁷ Pet'rs Opening 8-14.

⁸ Horizon Reply 6-7.

argues that this provision allows it to extend credit to small businesses that have minimal attachable assets and unknown credit status.⁹ Horizon states that at least 1 other carrier in the domestic water trades of the United States employs a similar protective measure.¹⁰

Discussion and Conclusions

We find the collection provision of Horizon’s tariff unreasonable under 49 U.S.C. § 13701, as sought to be applied to Cohen, because: (1) while the tariff is binding on parties operating under its terms, Cohen was not personally operating under the tariff; and (2) West Point’s operations under the tariff do not establish that Cohen intended to assume personal responsibility for any unpaid freight charges.

When courts have considered whether written provisions that purport to hold corporate officers or shareholders directly and personally responsible for corporate activity are enforceable, they typically evaluate whether those officers or shareholders have made “personal guarantees” (i.e., agreements to meet corporate obligations personally) on that activity.¹¹ Requiring a personal written guarantee from a corporate officer or shareholder may well be a step taken by creditors, including those rendering service in advance of payment, seeking to mitigate or hedge against the risks of a debtor’s failure to perform and insolvency.¹²

When considering the validity of a plaintiff’s claim regarding corporate officer or shareholder personal guarantees, courts will look to whether the clear and unambiguous language of the agreement referred to the officer or shareholder in his personal capacity.¹³ Moreover, state

⁹ Horizon Reply 6-9.

¹⁰ Horizon Reply 3.

¹¹ See, generally Oncology Therapeutics Network Connection v. Va. Hematology Oncology PLLC, No. C 05-3033 WDB, 2006 WL 334532 (N.D. Cal. Feb. 10, 2006); Smith v. Simmons, 638 F.Supp. 2d 1180 (E.D. Cal. 2009). Petitioners do not focus their argument on personal guarantees, but argue that the tariff is improper because it seeks to “pierce the corporate veil.” Piercing cases involve a judicial inquiry into whether the protections of the corporate form should be disregarded so that individuals may be held responsible for corporate conduct. Here, however, the Board is determining whether a tariff collection provision that imposes personal liability on corporate officers or shareholders of the billed party is a reasonable term of service for transportation by a carrier. Such a determination neither exclusively depends on the corporate form nor requires an inquiry into the conduct of either West Point or Cohen. Petitioners’ corporate veil arguments thus are not the basis of the Board’s analysis in this proceeding.

¹² E.g., Int’l Marine Sales, Inc. v. Compania Maritima Georgia ‘P’, Inc., No. 83 Civ. 5552 (RWS), 1985 WL 1521 at *3 (S.D.N.Y. June 5, 1985) (“Given the clarity of [defendant’s] liability, it is indeed regrettable that [plaintiff] failed to obtain the [defendant shareholder’s personal] guarantee on the second bunkering that it had achieved for the first.”).

¹³ Smith v. Simmons, 638 F.Supp. 2d at 1194-95 (contract language referred only to
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law presumptions against the inferred creation of such personal guarantees may require that plaintiffs prove that the contract language clearly and directly establishes the parties' mutual intention to impose personal liability.¹⁴

The Board finds that the collection provision that Horizon seeks to enforce here fails to satisfy these standards and is unreasonable. A corporation is a legally distinct entity from its officers and agents, and corporate actions, as a general rule, do not personally bind individuals. While the conditions of a tariff are binding on the parties operating under its terms, Horizon and West Point were the parties operating under the tariff, not Cohen.

There likewise is no clear indication of Cohen's intention to assume personal responsibility for the freight charges. Cohen did not individually sign for or otherwise indicate his personal guarantee for the shipping charges. Carriers certainly have the right to protect their ability to collect for shipments tendered, and the Board does not wish to impede efficiency in contract and tariff movements. But the mere inclusion of tariff language purporting to hold principals of shippers personally liable does not constitute a personal guarantee by Cohen. Also, Horizon's interpretation of the collection provision unravels as it is applied across the industry to all shippers. Taken to its logical conclusion, Horizon's tariff interpretation could allow it to pursue individually the officers and shareholders of a multi-billion dollar corporation to satisfy corporate shipping debts, even though those officers or shareholders have not agreed to assume those debts. The potential pursuit of officers and shareholders much further removed than Cohen from tariff-related corporate operations supports the logic of our finding that Horizon's tariff interpretation is unreasonable.¹⁵

Neither the Maersk Cases that Horizon cites, nor a similar 2009 court case involving Horizon,¹⁶ convince us otherwise. Although they appear to endorse application of the collection

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corporate obligation and failed to contain provisions requiring personal assumption of outstanding corporate debt); Oncology Therapeutics Network Connection, 2006 WL 334532, at *8-*11 (court rejected personal guarantee language as ambiguous).

¹⁴ E.g., id. at *7-*8 (plaintiff failed to overcome California law presumptions that: (1) the agent of a disclosed principal does not bind himself individually absent clear evidence; and (2) guaranty agreements are strictly construed to avoid imposing burdens not contained in, or inferable from, the contract language).

¹⁵ The use of the word "principal" adds to the Board's reluctance to adopt Horizon's interpretation of the collection provision. Under the commonly accepted laws of agency, Cohen, a corporate officer acting to secure shipping services for West Point, would appear to be an agent, with West Point acting as the principal. Black's Law Dictionary 62 (7th ed. 1999). Moreover, it is unclear to the Board whether Cohen is actually a shareholder or whether, if so, he could be considered a "principal" on the face of the tariff.

¹⁶ Horizon Lines v. Expert Forwarders, Inc. (Expert Forwarders), No. C08-5756JRC, 2009 WL 2578981 (W.D. Wash. Aug. 19, 2009). The tariff provision and the circumstances in that case closely parallel those here: the Horizon tariff stated that the "principals" of the "bill to

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provision, the Board finds those cases unpersuasive and will not apply them here. The courts in those proceedings do not address the question before the Board in this proceeding: whether the tariff provisions imposing liability on principals, without some form of accompanying personal guarantee from those principals, are reasonable. Rather, they seem to take as a given that the tariff language is reasonable, and then simply apply a strict reading of that language. Pursuant to 49 U.S.C. § 13701(a), it is the Board that is charged with determining what is reasonable with regard to transportation and service by carriers, and the procurement of transportation and service. The Maersk cases and Expert Forwarders are thus inapposite and we need not follow them.

The Board is concerned with carriers failing to receive compensation for their services duly rendered. Likewise, West Point is expected to review and understand the terms of the publicly available tariff and is responsible for all reasonable terms of service and the charges it incurs thereunder. Based on the facts of this case, however, we find that Horizon has not taken steps adequate to bind an officer or shareholder individually, rather than the corporation. Should Horizon believe that Cohen, or any corporate officer or shareholder of a shipper, has acted in bad faith, Horizon retains the option to make the case in a court of law to pierce the corporate veil to collect unpaid charges. Furthermore, Horizon may have other options to insulate itself from the risk of nonpayment in the future. The Board understands that carriers have required payment before they accept cargo for shipment, or expressly obtained written personal guarantees for payment.

Ancillary Issue

Horizon requests that the Board address the reasonableness of tariff terms such as the collection provision prospectively through a rulemaking, and not in this proceeding. Horizon argues that a decision adverse to its interests would cause undue hardship because it has relied on its ability to enforce the contractual provisions in its published tariff.¹⁷ West Point and Cohen argue that Horizon agreed, in its district court pleadings, that the matter of Cohen's liability should be taken off of the district court docket pending the Board's resolution on the issue. Petitioners argue that Horizon's request that the Board instead make a decision through prospective rulemaking is contradicted by Horizon's district court stipulation that the Board has

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party" were liable for shipping charges and the corporation was identified as the "bill to" party; Horizon sought a judgment against an individual defendant as a "principal;" and the individual defendant was an officer of the defendant corporation. The court found that Horizon could enforce a tariff provision against a defendant's corporate officer.

The court in another Horizon enforcement matter, Horizon Lines v. Container Innovations, Inc., Civ. No. 06-2366 (DRD), 2008 WL 2165175 (D.N.J. May 20, 2008), focused on the propriety of a default judgment and therefore did not directly address the collection provision's merits.

¹⁷ Horizon Reply 8-9.

authority to resolve the parties' dispute over the reasonableness of the collection provision. We agree with West Point and Cohen, and deny Horizon's request.¹⁸

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The collection provision of Horizon's tariff is found to be unreasonable under 49 U.S.C. § 13701 as sought to be applied to Cohen.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

¹⁸ Horizon has cited NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), as support for the argument that the Board should instead address the reasonableness of the collection provision in a rulemaking. However, NLRB establishes that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." The agency has long addressed the reasonableness of particular tariff provisions in adjudications. E.g., John Hawkins & Sons v. Director General, 80 I.C.C. 225 (1923) (respondent railroad's interpretation of demurrage tariff provision found unreasonable).