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SERVICE DATE - JULY 27, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-102

OCEAN LOGISTICS MANAGEMENT, INC.

v.

NPR, INC., AND HOLT CARGO SYSTEMS, INC.¹

Decided: July 22, 1999

By complaint filed October 6, 1998, under 49 U.S.C. 13701(c), Ocean Logistics Management, Inc. (OLMI or complainant), a non-vessel operating common carrier,² seeks a finding that NPR, Inc., doing business as NPR, Navieras and Navieras Puerto Rico (NPR), a vessel operating common carrier providing transportation between the United States and Puerto Rico, has engaged in certain unreasonable practices in violation of 49 U.S.C. 13701(a)(1)(B), as a result of which petitioner has suffered damages of \$4 million.³

Concurrent with its complaint, OLMI filed a "motion for stay as to regulated commodities," to which NPR and Holt (defendants) consented. In its motion, complainant indicated that an action regarding the involved matter was pending before the United States District Court for the District of

¹ This proceeding was initially entitled Ocean Logistics Management, Inc.--Petition for Declaratory Order--Certain Rates and Practices of NPR, Inc., and Holt Cargo Systems, Inc., based on the moving party's apparent belief that it was primarily seeking a declaratory order. Due to the nature of the proceeding and relevant statutory guidelines, we have now determined that this matter actually involves a complaint for which damages are sought. See 49 U.S.C. 13701(c). The title has been revised accordingly.

² A non-vessel operating common carrier (NVOCC), as defined by section 3(17) of the Shipping Act of 1984, 46 U.S.C. App. 1702(3)(17), is a "common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." In essence, NVOCCs are middlemen (analogous to freight forwarders in land transportation), holding themselves out as carriers to the shipping public and as shippers to the underlying carrier. See Exemption of Freight Forwarders in the Noncontiguous Domestic Trade from Rate Reasonableness and Tariff Filing Requirements, STB Ex Parte No. 598 (STB served Feb. 21, 1997, and published at 62 FR 9110 Feb. 28, 1997).

³ OLMI also named as a defendant Holt Cargo Systems, Inc. (Holt), which complainant believes gained control of NPR after the latter had engaged in the conduct that is the subject of this complaint.

Puerto Rico in Ocean Logistics Management, Inc. v. NPR, Inc., D/B/A Navieras; XYZ Insurance Co., Civil Action No. 96-2388 (DRD). In a decision served November 6, 1998, the Board initiated a proceeding to determine whether defendants have violated the requirements of section 13701(a)(1)(B). As requested, the Board held the proceeding in abeyance pending the District Court's disposition of the related action.

On March 25, 1999, OLM I filed a notice that the District Court had entered a decision on March 2, 1999, and complainant therefore requested that the Board establish a procedural schedule for its processing of the complaint in light of the court's decision. Also on March 25, 1999, OLM I filed an amended complaint. The due date for an answer to these filings was April 14, 1999. On April 1, 1999, NPR and Holt jointly filed a request for a 30-day extension of the due date for their answer. The Board granted this request in a decision served April 9, 1999, and set the new due date as May 14, 1999.

By separate motions filed on April 28, 1999, NPR seeks dismissal of the complaint as to Holt, and a protective order to quash discovery in the form of a deposition of Thomas Holt, Sr., Chairman of the Board of Directors of The Holt Group, Inc. (The Holt Group). NPR then filed an answer to OLM I's amended complaint on May 17, 1999. On May 18, 1999, OLM I filed replies to both of NPR's procedural motions. On May 20, 1999, OLM I filed a motion to strike NPR's answer and requested that a default judgment be entered against NPR and Holt. Defendants filed a reply on June 8, 1999.

DISCUSSION AND CONCLUSIONS

1. The Motion to Dismiss. The complaint provisions of 49 U.S.C. 14701(b) permit us to dismiss a complaint that "does not state reasonable grounds for investigation and action." Rules 1111.4(a) and 1111.5 of our General Rules of Practice implement these provisions by providing that we may issue a final decision upon the filing of an answer or on a motion to dismiss. Our predecessor, the Interstate Commerce Commission, has, with judicial approval, exercised its authority to dismiss complaints without holding an evidentiary hearing where the issues involved were essentially legal. See ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc., 8 I.C.C.2d 645 (1992), aff'd mem. 998 F.2d 1007 (3d Cir. 1993). Thus, a complaint will be dismissed if there are no material issues of fact to be resolved in the proceeding. Caribbean Shippers Assoc., Inc. v. NPR, Inc. et al., STB Docket No. WCC-100 (STB served Mar. 25, 1997), aff'd sub nom Caribbean Shippers Assoc. V. STB, 145 F.3d 1362 (D.C. Cir. 1998). In considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant. See, e.g., Sierra Pacific Power Co. & Idaho Power Co. v. Union Pacific Railroad Co., STB Docket No. 42012 (STB served Jan. 26, 1998).

NPR argues that the complaint with respect to Holt should be dismissed because Holt had no involvement in the underlying transaction forming the basis for the complaint. NPR also contends that Holt is not the parent company of, and does not control, NPR, as alleged by OLM I in its amended complaint. Rather, NPR avers, Holt is a sister corporation with a common parent, The

Holt Group. NPR adds that The Holt Group is also not a proper party as it did not acquire NPR until November 20, 1997, one year after the events giving rise to OLMI's complaint. This parent-subsidary relationship, NPR contends, is not sufficient to permit the Board to disregard the separate legal existence of the two corporations and include The Holt Group as a party to this proceeding.

OLMI, in explaining why Holt was joined as a defendant, relies on an affidavit filed in the District Court of Puerto Rico by the Senior Vice President and General Counsel of NPR, which states that the entity purchasing NPR was "Holt Cargo Systems, Inc." According to complainant, any confusion regarding the name of NPR's parent is thus the result of an incorrect affidavit filed by NPR. Further, OLMI argues, the parent company of NPR, whether it be Holt or The Holt Group, is a proper party to this proceeding under the legal theories of de facto merger, business continuation, and alter ego, and because Holt is jointly and severally liable with NPR under the unreasonable practice count of the amended complaint.⁴

Due to the high standard of proof accompanying a motion to dismiss, we will not grant the motion to dismiss the complaint as to Holt at this time. We simply cannot rule as a matter of law, based on the limited record now before us, that there are no circumstances present that might require us to include Holt as a party. Rather, there are material issues of fact that remain controverted. Accordingly, we must deny NPR's motion to dismiss.

2. The Motion for a Protective Order. Generally, the standards for discovery before the Board are broad. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. 49 CFR 1114.21(a). A party may, however, by motion seek an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues that are untimely or inappropriate to the proceeding. 49 CFR 1114.22(c).

NPR argues that the subject matter of this complaint is an alleged unreasonable practice involving a Time Value Agreement reached by OLMI and NPR in the fall of 1996. According to NPR, The Holt Group did not acquire NPR until November of 1997 and, as such, Mr. Thomas Holt, Sr., has no information that is relevant to this proceeding, nor information that would reasonably lead to the discovery of admissible evidence. Further, NPR argues, even if Mr. Holt does possess such information, his deposition would not be appropriate at this time as there exist other employees of NPR and Holt with equal or greater knowledge who should be deposed first. NPR adds that a deposition of Mr. Holt at this time would serve only to unduly burden and harass the defendants. In response, OLMI alleges that Mr. Holt has extensive personal knowledge of, and full control over, both defendants' finances, operations, and business practices. As such, OLMI argues, Mr. Holt is a proper deponent in the circumstances.

⁴ Although OLMI also contends that NPR may not represent Holt before the Board in seeking dismissal of the latter party, defendants reply that one allied party may file a motion to dismiss on behalf of another, and note that Holt here adopts as its own the NPR motion to dismiss.

While it is possible that Mr. Holt has information that is either directly relevant to this proceeding or may reasonably lead to the discovery of admissible evidence, we believe that complainant can, in fact, acquire any such information that might exist through other means less burdensome to the defendants. In particular, we agree with NPR that there are undoubtedly employees of Holt and NPR who, unlike Mr. Holt, have direct knowledge of the events surrounding the 1996 agreement. We will therefore grant defendants' motion for a protective order to quash Mr. Holt's deposition at this time.

3. The Motion to Strike Answer and Request for Default Judgment. The Board's Complaint and Investigation Procedures state that an answer to a complaint must be filed within 20 days after the service of the complaint or within such time as the Board may provide. 49 CFR 1111.4(b). Averments in a complaint are admitted when not denied in an answer. 49 CFR 1111.4(d).

OLMI argues that NPR's answer to the amended complaint should be stricken because it was not timely. Complainant also asserts that a default judgment should be entered against NPR on that basis. Moreover, OLMI urges that Holt should also be found to be in default for failure to have filed an independent answer to the amended complaint. In reply, defendants admit that NPR's answer was filed 1 business day (3 calendar days) late,⁵ but assert that complainant's interests were not harmed by the delay. Defendants also claim that Holt was justified in withholding an answer to the complaint pending adjudication of the motion to dismiss.

Due to the brief delay in NPR's filing of its answer, and because there is no evidence that the interests of OLMI have been harmed because of the late filing, we will not strike NPR's answer. For the same reason, we will also not take the unusual step of entering a default judgment against NPR. NPR is, however, cautioned in the future to adhere to all filing deadlines in this proceeding.

We will also not find Holt in default for failure to file an answer to the complaint on its own behalf in view of the pending motion to dismiss. In light of our denial here of that request, Holt is now directed to file an answer or formally adopt the positions of NPR. See 49 CFR 1112.5 ("Parties with common interests are encouraged to prepare joint pleadings whenever possible."). Holt will have 20 days from the date of service of this decision to file a response or, by failing to do so, will admit as true the charges in OLMI's amended complaint.

4. Other Matters. Our General Rules of Practice require that:

In all complaint proceedings, other than those challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters

⁵ NPR's answer was due on Friday, May 14, 1999, but was not filed until Monday, May 17, 1999.

within 12 days after an answer to a complaint is filed. Within 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case.

49 CFR 1111.10(a). In light of the fact that we are requiring Holt to file an answer (or formally adopt the answer of NPR) in this proceeding within 20 days from service, the above procedural meetings and submission of a schedule will be measured from that date, or 32 days and 39 days, respectively, from the date of service of this decision.

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

It is ordered:

1. The motion to dismiss the complaint as to Holt is denied.
2. The motion for a protective order is granted.
3. OLMI's motion to strike NPR's answer and for entry of a default judgment against both defendants is denied.
4. Holt is directed to file an answer or formally adopt the answer of NPR by August 16, 1999.
5. The parties are directed to meet by August 30, 1999 to discuss discovery and procedural matters.
6. The parties shall file a proposed procedural schedule by September 7, 1999.
7. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary