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SERVICE DATE – DECEMBER 19, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35039

HORIZON LINES, LLC—PETITION FOR DECLARATORY ORDER

Decided: December 18, 2007

By a petition for declaratory order filed on May 23, 2007, Horizon Lines, LLC (Horizon) asks the Board to issue an order declaring that certain movements of goods by Sunmar Shipping, Inc. (Sunmar) and American Seafoods Company LLC (ASC) between Alaska and Boston, MA, on through bills of lading via foreign-flag vessels and Canadian rail lines, and truck lines operating in Canada and the United States are “sham movements” designed to circumvent Section 27 of the Merchant Marine Act of 1920, as amended (popularly known as the “Jones Act”)<sup>1</sup> because they do not meet the reasonableness standard of 49 U.S.C. 13701 and are not through routes recognized by the Board. ASC replied on June 12, 2007. We are denying the petition.

BACKGROUND

Horizon is a Jones Act qualified water carrier<sup>2</sup> that directly competes with non-Jones Act water carriers, such as Sunmar and ASC, that operate in the noncontiguous domestic trade pursuant to an exception to the Jones Act.<sup>3</sup> Sunmar and ACS provide the service at issue pursuant to 46 U.S.C. 55116 (commonly referred to as the “Third Proviso” of the Jones Act). The Third Proviso provides an exception for transportation of merchandise between through points in the continental United States, including Alaska, over through routes in part over Canadian rail lines and connecting water facilities if the routes are “recognized” by the Surface

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<sup>1</sup> See Pub. L. No. 66-261, 41 Stat. 998 (1920), codified, as amended, 46 U.S.C. 55102, 55116 (2006), formerly codified as 46 U.S.C. 883. See 46 U.S.C. app. 883.

<sup>2</sup> Under the Jones Act, a vessel may not provide transportation of merchandise by water or by land and water between two points in the United States either directly or via a foreign port, unless the vessel is owned by citizens of the United States. See 46 U.S.C. 55102.

<sup>3</sup> The noncontiguous domestic trade is defined as domestic water carrier transportation “involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.” 49 U.S.C. 13102(17).

Transportation Board and if rate tariffs for the routes have been filed with the Board.<sup>4</sup> See 46 U.S.C. 55116.

The United States Customs and Border Patrol (CBP) administers the Jones Act. In an administrative ruling issued on August 9, 2001, CBP found that Sunmar's movement of frozen fish from Dutch Harbor, AK, to Boston, MA, via a Canadian rail line qualified those movements for the Third Proviso exception to the Jones Act.<sup>5</sup> Horizon asked CBP to reconsider its ruling. However, by letter dated January 21, 2004, CBP denied Horizon's request.

Horizon challenged CBP's ruling before the U.S. District Court for the District of Columbia.<sup>6</sup> The court remanded CBP's original decision for several reasons, including CBP's failure to explain adequately its conclusion that Sunmar qualified for the exemption under the Third Proviso, as the carrier had not filed a tariff with the Board for the route. Horizon Lines, LLC v. U.S. et al., 414 F. Supp. 2d 46 (D.C. 2006), reh'g denied, 414 F. Supp. 2d 92 (D.D.C. 2006). As to Horizon's argument that the Third Proviso contains an implied prohibition against commercially impractical routings, the court stated that "[i]f Congress wishes to limit the use of the Third Proviso to specific routes or to require the STB to evaluate the commercial soundness of a proposed route, it has the authority to do so, but the Third Proviso as currently written contains no such requirement." Id. at 55 n.6.

Sunmar and ASC have since filed tariffs with the Board under 49 U.S.C. 13702 for the movements at issue.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. Horizon has asked the Board for a determination that the route described above is unreasonable under our statute at 49 U.S.C. 13701 and that,

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<sup>4</sup> Specifically, section 55116 provides that: "Section 55102 . . . does not apply to the transportation of merchandise between points in the continental United States, including Alaska, over through routes in part over Canadian rail lines and connecting water facilities if the routes are recognized by the [Board] and rate tariffs for the routes have been filed with the Board."

<sup>5</sup> The goods are shipped from Dutch Harbor to the Bayside Marine Terminal in New Brunswick, Canada, near the U.S. point of entry for the goods. The goods are transported by truck to McAdam, New Brunswick (approximately 30 miles from the U.S. point of entry), or Saint John, New Brunswick (approximately 50 miles from the U.S. point of entry), for placement on a Canadian rail line. The goods travel by rail either from McAdam to Saint John or from Saint John to McAdam and are then placed on trucks for transportation into the United States.

<sup>6</sup> ASC intervened in the proceeding before the District Court to protect its interest in a virtually identical CBP ruling.

because it is unreasonable, the Board should not “recognize” the route under 46 U.S.C. 55116. However, the Board does not find it appropriate to issue a declaratory order here.

Horizon argues that we have a duty to enforce the Jones Act and to declare that the routes used by the parties are unlawful under that statute. But we are not charged with administering the Jones Act. As the District Court found, CPB is “responsible for interpreting and enforcing the cabotage laws of the United States, including the Jones Act.” Horizon Lines, 414 F.2d at 48.<sup>7</sup> The Third Proviso does not contain a requirement that the Board “evaluate the commercial soundness of a proposed route.” Id. at 55 n.6. See also Central Vermont Transp. Co. v. Dunning, 294 U.S. 33, 40 (1935) (the ICC “was not given the authority to enforce” Section 27 of the Jones Act).

Likewise, the ICC in Rail-Lake-And-Rail Rates, 96 I.C.C. 633, 642 (1925), concluded that, because it did not administer the Jones Act, it “was not within [the ICC’s] province to construe [that Act’s] provisions.” The ICC acknowledged that its acceptance of tariff sheets for filing could be construed by courts as “recognition” under the Third Proviso, but it found no resulting requirement for it to make a substantive determination whether the filed route complied with the Jones Act. As the ICC stated, if the filing of a tariff with the agency constitutes recognition, then “we have recognized these routes.” Id. Courts have treated the filing of tariff sheets as recognition by the ICC under the Third Proviso. See Central Vermont Transp. Co. v. Dunning, 71 F.2d 273, 274 (2d Cir. 1934), aff’d, 294 U.S. 33 (1935).

Under our statutory scheme at 49 U.S.C. 13701,<sup>8</sup> the Board has authority to determine if a route is reasonable.<sup>9</sup> The Supreme Court has stated that the Interstate Commerce Act was intended “for the protection of those who pay or bear the rates.” Texas & Pac. Ry. v. United States, 289 U.S. 627, 638 (1933). Thus, cases regarding the reasonableness of the circuitry of routing typically involved shipper-carrier disputes. See, e.g., Service Pipe Line Co. v. Chicago,

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<sup>7</sup> “Cabotage” is generally understood as the transport of goods or passengers between two points in the same country. Many countries, including the United States, place limitations on the ability of foreign carriers to engage in domestic movements of passengers and goods.

<sup>8</sup> That section, which applies to “a movement by or with a water carrier in noncontiguous domestic trade” (subsection (a)(1)(B)), provides that “[t]hrough routes and divisions of joint rates for such transportation or service must be reasonable” (subsection (a)(2)).

<sup>9</sup> The two cases cited by Horizon – Hudson Transp. Co. v. United States, 219 F. Supp. 43 (D.N.J. 1963) and Service Trucking Co. v. United States, 239 F.2d 519 (D. Md. 1965) – are not on point. Neither involved a determination whether a through route was reasonable under the Interstate Commerce Act. Rather, in both cases, the ICC was called upon to interpret the operating authority that the agency had granted in motor carrier licenses and to determine whether the transportation of goods between points in a single state over a circuitous routing through a neighboring state were in interstate commerce.

B & Q. R. Co., 296 I.C.C. 411 (1955); Burdette Ginning Ass'n. v. Yazoo & Miss. Valley R.R. Co., 243 I.C.C. 546, 547-48 (1941); and Wuille & Co. v. S.P. & S. Ry., 123 I.C.C. 190 (1927). And, historically, the fact that a carrier might, for competitive or other reasons, route its traffic over “unusually circuitous routes” was not, in and of itself, a cause for concern, but rather “a matter of common knowledge.” Christian Brokerage Co. v. Cincinnati, New Orleans, & Tex. Pac. Ry., 281 I.C.C. 195, 197 (1951).

Here, Horizon is not asserting that there are shippers whose needs are not being met, nor are there actual shippers complaining that this route does not meet their needs. Horizon argues that this route is unreasonable because it is a “sham movement” designed for the sole purpose of avoiding the Jones Act. But as noted, we do not administer or enforce the Jones Act. Absent a credible allegation of harm to a shipper, we are not prepared to second guess the commercial reasonableness of the carriers’ decision to offer the route and the shippers’ decision to utilize it.

It is ordered:

1. Horizon’s request for a declaratory order is denied.
2. This decision is effective on its date of service.

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

Vernon A. Williams  
Secretary