SERVICE DATE – DECEMBER 15, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.
v.
MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

Decided: December 13, 2004

This case involves an amended complaint filed by DHX, Inc. (DHX), a freight forwarder, challenging the reasonableness of certain rates and practices of Matson Navigation Company (Matson) and Sea-Land Service, Inc. (formerly known as Sea-Land, now known as Horizon[1]), two water carriers operating in the noncontiguous domestic trade between Hawaii and United States ports (collectively, defendants). DHX's opening statement was filed on October 30, 2003, reply statements were filed on December 23, 2003, Horizon's corrected reply statement was filed on January 9, 2004, and DHX's rebuttal statement was filed on February 3, 2004. For the reasons discussed below, the amended complaint will be denied.

BACKGROUND

The noncontiguous domestic trade involves domestic water transportation that originates or terminates in Alaska, Hawaii, or a United States territory or possession. See 49 U.S.C. 13102(15). In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress consolidated jurisdiction over this traffic at a single agency, the Board. See 49 U.S.C. 13521. Prior to ICCTA, the Federal Maritime Commission (FMC) had jurisdiction over challenges to the reasonableness of "port-to-port" rates (rates that do not involve the services of an inland U.S. railroad or motor carrier); and the Board's predecessor, the Interstate Commerce Commission (ICC), had jurisdiction over challenges to the reasonableness of rates in the domestic offshore trade held out jointly

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[1] In 2000, Sea-Land advised that its name had changed to SL Service, Inc. (SL). SL's business and operations were subsequently transferred to a separate company known as CSX Lines, LLC (CSXL). Thereafter, in 2003, Horizon Lines, LLC (Horizon), became the successor entity to CSXL. Hereafter, "Horizon" will be used to refer to this defendant.

by water carriers and inland rail or motor carriers. See Joint ICC/FMC Policy Statement, 8 I.C.C.2d 243 (1991).[2]

Freight Forwarders. At the heart of the dispute in this case is the fact that DHX is a freight forwarder. A freight forwarder is an entity that holds the dual status of carrier (vis-a-vis its customers) and shipper (vis-a-vis the underlying carrier it uses). See Exem. of Freight Forwarders From Tariff Filing Requir., 2 S.T.B. 48, 50 (1997). Like carriers in other modes of transportation, water carriers typically charge lower rates for traffic they can handle more efficiently. Thus, a shipper with larger volumes may pay less per pound than a shipper that wants to ship a single, smaller item; and a shipper is typically rewarded, in terms of rates, when it can ship a full containerload (FCL), which requires minimal handling on the part of the carrier. Forwarders many years ago established a business niche by helping their customers (as to whom they are carriers) take advantage of more favorable rates for their traffic by assembling and consolidating, for a charge, the traffic of several shippers into larger lots (typically full containers); the forwarder then tenders these larger lots to the water carrier in order to obtain a rate lower than the rate that any of the individual shippers could obtain if they were to tender their lower volumes of traffic individually. Thus, forwarders and their underlying carriers have a unique relationship: the forwarder is a shipper-customer of the carrier, but at the same time, it is itself a carrier that competes for business with the underlying service provider.

This Dispute. DHX is a forwarder that, for years, has used the "overflow" provisions of defendants' tariffs in the Hawaii trade. Defendants, who are the underlying water carriers, expect their shippers to tender their shipments in FCL lots, and so the rates that they offer are generally FCL rates. But sometimes, the traffic volume of a single shipper exceeds the capacity of a FCL–for example, a large volume shipper may tender more than one container but less than two. In that situation, to accommodate their shippers, the carriers established rates for the overflow containers that were far lower than the shipper could have obtained by shipping the partially filled container separately.[3]

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[2] At that time, the noncontiguous domestic trade was often referred to as the "domestic offshore trade."

[3] In particular, the charges for the full ("stand-alone") container are assessed on the basis of the per-100-pound rate for the commodity to be shipped, subject to a minimum weight requirement that varies depending on the size of the container. The charge for the accompanying partially filled or "overflow" container is also determined by applying the per-100-pound rate to the actual weight of the commodity, but the overflow container is subject to a flat (not weight-related) minimum charge that varies depending on the size of the container. Because the flat minimum charge for the overflow container is generally less than the weight-based minimum charge for a stand-alone container, shippers pay a lower charge than would be applicable if there were no overflow provision.

The water carrier's main traffic base is the larger shipper that tenders FCL traffic (and, often, overflow traffic along with the full containers) on a regular basis. DHX apparently developed a large customer base and a high volume business by soliciting a variety of traffic, including FCL shipments; and then mixing and matching loads and using the reduced overflow rates to produce total charges lower than those the "beneficial" shippers themselves could obtain. For example, according to Matson, DHX relied on various provisions, such as treating shipments on different voyages as if they were tendered at the same time, and other provisions, in such a way that it could obtain for some shippers a better deal than they could obtain on their own, even by shipping FCLs with overflow containers. Thus, even after adding its own profit, DHX was able to offer certain shippers sufficiently low rates to attract a substantial amount of FCL-plus-overflow traffic.

When defendants realized they were losing some of the profits from their FCL traffic to competitors such as DHX–indeed, according to Matson, at one point up to 98% of the revenues from overflow traffic came from forwarders–they began taking specific actions designed to induce their FCL shippers to begin dealing directly with them again. Such actions included adopting tariffs setting up more favorable rates with specific limitations such as shipper name, street address, and zip code; and entering into agreements–typically with large shippers that own the merchandise and have their own logistics departments that manage the transportation and control the routing of their cargo–providing particular rates for specified periods of time.

<u>The Original Complaint</u>. In its original complaint, DHX raised various claims, but its most prominent argument was that defendants' rates had become unreasonably high because the increases in the overflow rates exceeded the statutory zone of reasonableness (ZOR) set forth in 49 U.S.C. 13701(d)(1) ("a rate or division of a . . . water carrier for port-to-port service in [noncontiguous domestic] trade is reasonable if the aggregate of increases . . . in any such rate or division is not more than 7.5[%] above . . . the rate or division in effect 1 year before the effective date of the proposed rate or division."). In a decision served on December 21, 2001 (<u>December 2001 Decision</u>), denying defendants' motions to dismiss the complaint, the Board, at 5, cautioned DHX that a rate is not unreasonable simply because it exceeds the ZOR, and that, to support a rate reasonableness challenge, DHX would have to indicate which particular multi-container rates it was challenging and show why those rates, if outside of the ZOR, were unreasonable. The <u>December 2001 Decision</u>, at 1, also explained that DHX would have to support with particularity its general claim that the carriers' practices were unlawful.

<u>The Amended Complaint</u>. DHX subsequently filed an amended complaint challenging various tariffs of each defendant.[4] While the original complaint focused mainly on the reasonableness of

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[4] In particular, DHX challenges Matson's Tariffs 14-F, 2016-D, and 2034-E, and Horizon's (continued...)

defendants' rates covering overflow containers, the amended complaint–a lengthy document with diffuse allegations ranging from discrimination and improper tariff format to deceit and fraud–appears to be much broader.

DHX now says that all of the actions that defendants have taken to get the large shippers to ship their FCL and overflow traffic directly with the carriers rather than through DHX as an intermediary, and thus to recapture profits that had been diverted to DHX, constitute destructive, unreasonable practices in violation of 49 U.S.C. 13701(a). (Section 13701(a) provides that a rate, classification, rule, or practice related to transportation by or with a water carrier in the noncontiguous domestic trade must be reasonable.) DHX contends that defendants' practices are unlawful because they do not advance the general Transportation Policy, which directs the Board to regulate in a manner that will recognize and preserve the inherent advantage of each mode of transportation; promote safe, adequate, economical, and efficient transportation; encourage sound economic conditions in transportation, including sound economic conditions among carriers; and encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices. 49 U.S.C. 13101(a)(1)(A)-(D). DHX also contends that defendants' practices do not advance the "water" transportation policy provision directing the Board to encourage and promote service and price competition in the noncontiguous domestic trade. 49 U.S.C. 13101(a)(4). DHX argues that what it calls violations of these policies equates to a violation of the reasonable practice provision of 49 U.S.C. 13701(a). DHX seeks an order requiring defendants to stop committing unreasonable practices, to more openly embrace DHX's competition, and to pay damages.

The May 2003 Decision. In a decision served on May 14, 2003 (May 2003 Decision), the Board denied DHX's motion to compel Matson to supplement its answers to the complaint, finding that DHX's numerous allegations had already been answered by defendants. The Board also rejected DHX's argument that, for a period of time, Horizon had had no rates in effect because it had not issued tariffs reflecting the name change described in supra note 1. The Board granted Horizon's motion to dismiss two counts of the amended complaint. Specifically, the Board found no possible merit in the allegation that Horizon had charged DHX too much by failing to bill it under tariff provisions that apply to motor carriers. And the Board found the allegation that DHX's rates are unreasonably high because they are above those for cargo-owning shippers to be no more than an end-run around the ICCTA provision repealing the non-discrimination provision for traffic in the noncontiguous domestic trade. See Government of the Territory of Guam v. Sea-Land Service, Inc., STB Docket No. WCC-101, slip op. at 5 (STB served Nov. 15, 2001).

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[4](...continued)
Tariffs SEAU 468, CSXL 468, and HRZD 468.

DISCUSSION AND CONCLUSIONS

Substantive Claims. The principal substantive issue that remains to be resolved in this case is whether the actions that defendants took to recapture traffic and profits that they had lost to DHX constitute unreasonable practices. Contrary to DHX's claims that defendants are only willing to work with the cargo-owning shippers, the record shows that, where it makes business sense to do so, defendants do in fact give DHX favorable treatment. Indeed, DHX (and indirectly its customers) is itself the beneficiary of many of the tariff provisions about which DHX complains, and although DHX argues that defendants' objective is to put it out of business, defendants point out that DHX's business has grown since the original complaint was filed. The record further shows that other particular claims of bad behavior–for example, DHX's allegation that Matson's Tariff 2034-E, Rule 950 provides for the unreasonable and discriminatory absorption of wharfage fees (fees for use of piers for the receipt, delivery, and handling of cargo) for shippers other than DHX–are factually incorrect. But review of every single allegation that DHX makes is not necessary, because the Board's decision here does not turn on the accuracy of any of DHX's numerous specific claims of wrongdoing.

Historically, the role of the freight forwarder has been to consolidate less-than-containerload (LCL) shipments into FCL shipments, so that, even with the forwarder's fee, the shippers get a better deal than they would without the services of the forwarder. DHX, however, acted beyond the bounds of that traditional role. When defendants realized that their rate provisions were being manipulated by their forwarder-competitor DHX in a way that was counterproductive to their intended purpose, they took action to fix the problem. DHX wants the Board to order defendants to offer rates and terms to DHX that would be competitively disadvantageous to the water carriers so that DHX can regain a larger share of defendants' FCL business. But it is not an unreasonable practice for a carrier to act in a manner, as here, designed to protect its profits and its market share from diversion to its competitors, and the Board will not interfere with actions that have not been shown to be anything more than prudent responses to competitive threats.

To support its claim that defendants' practices violate 49 U.S.C. 13701(a), DHX argues that they contravene the Transportation Policy at 49 U.S.C. 13101(a). But the transportation policy simply sets forth a variety of (sometimes conflicting) policy objectives for the agency to consider in regulating the industry. See, e.g., Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108, 112, 115 (D.C. Cir. 1987) (rail transportation policy); Global Van Lines, Inc. v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983) (Transportation Policy is for general guidance and is not an independent source of rulemaking power in motor carrier cases); accord Central Forwarding, Inc. v. ICC, 698 F.2d 1266, 1283-84 (5th Cir. 1983). Thus, a claim under the general Transportation Policy alone does not provide a right of action. See Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, slip op. at 3 (STB served Dec. 10, 1999).

In any event, all of DHX's complaints amount to nothing more than allegations of discrimination. DHX complains about the "favorable" treatment that cargo-owning shippers receive through various shipper-specific tariffs (many of which apply to DHX itself) or through contracts. But contracts in the noncontiguous domestic trade are explicitly permitted under 49 U.S.C. 14101, and when motor carriers were more heavily regulated the ICC explicitly rejected claims that trucking tariffs containing rates applicable only to named shippers and receivers or to specific addresses were unlawfully discriminatory. See Pet. For Declar. Order – Discounts and Customer Acct. Codes, 8 I.C.C.2d 47 (1991); Rates for a Named Shipper or Receiver, 367 I.C.C. 959 (1984). And most importantly, as noted in an earlier Board decision in this case, for the noncontiguous domestic trade cases, the discrimination remedy was repealed in ICCTA, and a claim of discrimination is thus not a proper basis for finding a rate or practice to be unreasonable. See May 2003 Decision at 8.

Technical Claims. Finally, DHX argues that defendants' tariffs identified above contain technical violations of the tariff filing requirements of 49 U.S.C. 13702 and 49 CFR 1312 because certain tariffs do not define all service terms and privileges given, do not identify participating carriers, and do not show routes for through movements. The Board finds that defendants have met the minimum requirements for tariffs in terms of both content and clarity. In this regard, it should be noted that no other shipper or forwarder has joined in this case to complain about this issue. Moreover, although a carrier is not required to identify in its tariffs its inland routings or the inland carriers participating in those routings, both defendants provide substantial information of this sort in their tariffs or the files that they have made available to DHX.

Conclusion. In sum, it appears that the challenged practices reflect business decisions intended to increase defendants' respective market shares of the noncontiguous domestic trade. When it solicits traffic from cargo-owning shippers, DHX is, in important respects, a competitor to the defendant water carriers. The fact that defendants' actions to recapture some of the profits from that traffic could cut into DHX's bottom line does not make defendants' actions unlawful. Under the circumstances here, DHX has failed to show that defendants' rates are unreasonable or that defendants have engaged in unreasonable or destructive competitive practices in violation of 49 U.S.C. 13701(a), or that defendants have violated the tariff filing requirements of 49 U.S.C. 13702 and 49 CFR 1312. Accordingly, the amended complaint will be denied.

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

It is ordered:

1. The amended complaint is denied.

2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary