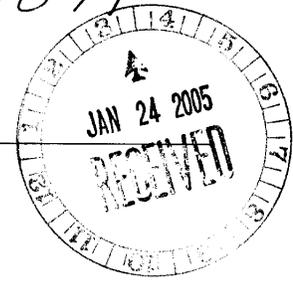


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January 24, 2005

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
JAN 24 2005
Part of
Public Record

Re: *DHX, Inc. v. Matson Navigation Company, et al.*
STB Docket No. WCC-105

Dear Secretary Williams:

Please accept for filing an original and 11 copies of the "Defendant's Reply in Opposition to Complainant DHX's Petition for Reconsideration or, in the Alternative, for Clarification of Order". Please acknowledge receipt and filing of the enclosed material by date-stamping the eleventh copy of this letter and returning it to the individual making this filing for return to me.

If there are any questions concerning this filing, please contact me at 202-274-2880.

Yours very truly,

C. Jonathan Benner
C. Jonathan Benner

cc: (w/encl.)
Richard A. Allen, Esquire
Rick A. Rude, Esquire

Before the
SURFACE TRANSPORTATION BOARD



DHX, Inc.)

Complainant,)

v.)

Matson Navigation Company, Inc. and)
Sea-Land Service, Inc.,)

Defendants.)
_____)

Docket No. WCC-105

**DEFENDANT'S REPLY IN OPPOSITION TO COMPLAINANT
DHX'S PETITION FOR RECONSIDERATION OR, IN
THE ALTERNATIVE, FOR CLARIFICATION OF ORDER**

Defendant Horizon Lines LLC ("Horizon")¹ replies in opposition to a Petition for Reconsideration filed by Plaintiff DHX, Inc. ("DHX"). Filtered of extraneous material, the core of the DHX Petition appears to be a request that the Board re-visit its May 9, 2003 Order dismissing certain elements of DHX's Amended Complaint. As best we can discern, the primary basis for this unusual request is a contention that there is a fatal and irreconcilable conflict between the Board's disposition of certain Count III issues in this matter and a 2002 decision of the United States District Court for the Central District of California dismissing a parallel complaint filed against Horizon by DHX in that forum. *See Attachment 6 to Complainant's Petition for Reconsideration.* Alternatively, DHX seeks "clarification" from the Board that rate

¹ Horizon was formerly known as CSX Lines, which was the successor in interest to SL Service, and Sea-Land Service. This reply refers to the defendant as Horizon.

discrimination claims against water carriers (or perhaps all STB-regulated carriers) can and should be maintained before the courts of the United States.²

Horizon opposes these requests on several grounds, any of which would support peremptory denial. The DHX petition is untimely, whether viewed as a challenge to the Board's May 9, 2002 order, its more recent disposition of the merits in this case (December 13, 2004), or as an indirect attack on the 2002 order of Judge Kelleher in the district court proceeding. DHX's stated predicates for the requested relief reflect a fairly exuberant misstatement of not only the Board's orders in this case, but also of the arguments of the parties and the 2002 decision of the District Court in Los Angeles. Finally, DHX misinterprets and misapplies the content and meaning of both section 13701 of the ICC Termination Act ("ICCTA") and 49 C.F.R. § 1312.2.

I. THE PETITION IS UNTIMELY

DHX, Inc. seeks reconsideration pursuant to Rules 1115.3(a) and 1115.3(b) of the Board's Rules. 49 C.F.R § 1115.3. Although the Rules provide the Board with discretionary authority to entertain such a petition, the Board's rules are clear that petitions are granted only on a showing that the prior action will be affected materially because of new evidence or material error. *Id.*

Despite the Board's discretionary authority to entertain a Petition for Reconsideration, the Board's rules require that such "[p]etitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. 49 C.F.R. § 1115(e). The relief sought by DHX is the reconsideration of the Board's May 9, 2003 Order dismissing Count III of DHX's Amended Complaint against Horizon Lines. In order to

² It is not clear whether DHX believes such claims could be pursued in state courts.

fall within the ambit of the Rules DHX should have sought reconsideration by May 29, 2003, not January 2005.

The May 9, 2003 Order was a final order of this Board as it relates to the dismissal of Count III. DHX had several procedural options available to it in the period immediately following its issuance. It chose not to avail itself of those procedures and thus is left with the necessity of constructing awkward and elaborate arguments that are without merit.

DHX asserts that the issues now brought before the Board are new or recent. DHX's claim that it is attempting to bring the Board's attention "the *recent* decision and order of the United States District Court for the Central District of California" (*Petition* at 1 (emphasis added)), is both wrong and disingenuous. DHX's Complaint before the United States District Court for the Central District of California was dismissed by Order dated January 24, 2003. More importantly, the Board was made aware of the District Court action and the District Court's summary disposition of DHX's federal court complaint on December 23, 2003. *See Reply Statement of Horizon Lines, LLC*, pgs. 18-19. DHX cannot in good conscience claim that the information it contends is "recent" or news to the Board or the parties.

Almost two years have passed between the entry of that Order and the filing of the instant Petition. Over a year has passed since the Board was provided with Notice of the District Court's decision. DHX sat on its rights. The Board should not exercise its discretionary authority on the facts presented.

II. THERE IS NO CONFLICT BETWEEN THE STB'S MAY 3, 2003 ORDER AND THE DISTRICT COURT'S GRANT OF HORIZON'S MOTION TO DISMISS

In August 2002, following the initiation of this action before the Board against Horizon and defendant Matson Navigation Company, DHX also filed a civil complaint against Horizon in the United States District Court for the Central District of California. That action purported to be based on what DHX termed "common law price discrimination," a concept that, according to DHX, created a justiciable right against STB-regulated carriers (or at least against Horizon) in the federal court system.

Horizon immediately moved to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim upon which a federal district court could grant relief.³ Horizon contended that there was no "federal common law" governing rate discrimination and that California precedent did not support such a complaint. Horizon also argued that DHX was essentially advancing its STB complaint under the guise of a district court action and that the district court should, under the doctrine of primary jurisdiction, defer to the Board's disposition of the pending matter at the STB. *See Attachment 5 to Complainant's Petition for Reconsideration.*

After briefing and oral argument, the district court accepted this position and issued an order dismissing the complaint with prejudice. DHX did not appeal the decision. The court concurred in Horizon's contention that the matter was "based on essentially the same operative facts" as was DHX's STB complaint. The court took no position on the merits of DHX's alleged commercial grievances against Horizon, but made clear that the body to hear these issues in the first instance was the Board. The court correctly noted that ICTA section 13701 contemplates

³ A copy of Horizon's Motion to Dismiss is attached to DHX's Petition.

that rate differentials between shippers might be relevant to a reasonableness determination, but in no way directed or constrained the Board to reach a given result in its deliberations. Finally, the court fully concurred in Horizon's argument that there was no "federal common law cause of action for rate discrimination against an ocean carrier."

The court's decision was narrow. It deferred procedurally to the Board on primary jurisdiction grounds and made clear that there was no federal or California common law support for causes of action based on differential pricing for transport services. *See Attachment 6 to Complainant's Petition for Reconsideration*, ¶ 1. It is important to note that the "discrimination" complained of by DHX in federal court was rooted in the Common Law. Although the court agreed with Horizon that DHX could not sustain its complaint on common law principles, the court in no way purported to be making substantive dispositions of section 13701 claims.

Having been told by a federal court that its attentions should be focused on the statutory remedies and procedures provided by ICCTA, DHX now asks the Board to assist it in returning to the judicial arena. DHX asks that the Board "reaffirm" that 49 C.F.R. § 1312.2(d) permits shipper rate claims to be pursued in a judicial context.⁴ Horizon has no knowledge of any prior commentary by the Board on section 1312.2(d) that would be "reaffirmed" by acceding to DHX's request. DHX offers no support for its interpretation. The regulation is quite clear on its face. Carriers may not interpose defenses to allegations of substantive violations of the Act when those defenses are based solely on the tender or acceptance of a tariff. It is excruciatingly

⁴ The syntax of DHX's contention is confusing and subject to misinterpretation: "Secondly, that the Board re-affirm its regulation [presumably section 1312.2(d)] that the filing of a rate, item or service designation in a tariff does NOT protect, exclude nor in any manner pre-empt any claim by any shipper that such a tariff item, rule or provision may not be the subject of a judicial suit." [emphasis in DHX text]. In the context of the preceding discussion in DHX's petition, Horizon takes this to mean that DHX wishes the Board to bless collateral suits at law by shippers where, as was the case in DHX's district court action against Horizon, there is a claim based on rate discrimination.

obvious that DHX has had no difficulty gaining hearings on its complaints. That the merits of DHX's arguments in two separate forms have been found wanting is not a circumstance against which the statute or the Board's regulations provide protection.

III. THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT APPLICABLE

DHX makes sweeping, unsupported generalizations about collateral estoppel. Collateral estoppel, also known as issue preclusion, is designed to prevent the re-litigation of issues in a subsequent proceeding when: "(1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issues was necessary to the result; and (4) the issues are identical." *Gildhorn Savings Association v. Commerce Savings Bank*, 804 F.2d 390, 392 (7th Cir. 1986). DHX's issue preclusion arguments fail on all four counts.

With regard to the identity of the party against whom the doctrine is asserted and with regard to the identical nature of the issues, DHX's own assertions render the doctrine inapposite. If estoppel is to be applied here it should be applied against DHX and not the carrier defendants.⁵ During oral argument before the District Court on November 18, 2003 on Horizon's Motion to Dismiss, counsel for DHX asserted "DHX in that forum [STB] is pursuing reasonableness claims, Your Honor, different from the discrimination claims here and also against different defendants." Transcript p.19:16-18. (Copies of the pertinent pages of the transcript are annexed as Attachment A to Horizon's Reply). DHX's local counsel reiterated these factual assertions

⁵ Matson was not a party to the district court proceeding and cannot be estopped from advancing any issue. Further, and contrary to the representation made by DHX in its Petition, Matson opposed Horizon's Motion to Dismiss Count III of the Complaint. DHX's incorrect and misleading assertion to the contrary should be ignored.

after conferring with counsel for DHX in this proceeding: “Your Honor, in consulting with my administrative counsel, he has confirmed my representation to the court and I may offer this further specification, the issues before the STB, again, against different defendants” Transcript 20:12-16.

DHX made repeated allegations about the corporate identities of Horizon’s predecessor corporations in the district court case that contradict the assertions of fact DHX makes in the instant Petition. Horizon has never accepted those allegations with regard to the corporate identity issue. However, for purposes of this Petition, it is DHX and not Horizon that has asserted that there is a distinction between the defendants in the two proceedings and a difference in the issues raised in each. If anyone should be precluded from re-litigating those issues it is DHX and not Horizon.

The factual issues before the district court were not “necessarily decided” by the district court. DHX’s district court suit was decided on a Motion to Dismiss, a motion in which all facts were presumed to be as stated by the plaintiff. The facts were not contested nor were they decided because the case was dismissed purely as a matter of law. As noted by the Court at oral argument “[t]here are no findings of fact involved in any way in a proceeding such as a 12(b)(6) motion.” Transcript 32: 2-4. Consequently, the resolutions of the factual issues that DHX claims should be precluded were not necessary to the result *See, Karamoko v. New York City Housing Authority*, 170 F. Supp. 2d 372, 379 (S.D.N.Y. 2001) (Because the lower court proceeding was dismissed on procedural grounds prior to any litigation of the substantive issues “it cannot possibly be said that resolution of the issue was ‘essential to the decision.’ ‘actually decided,’ or ‘actually litigated and resolved in the prior proceeding.’”) *See, also Cepeda v. Coughlin*, 785 F.Supp. 385, 390 (S.D.N.Y. 1992).

The Board generally adheres to the doctrine of issue preclusion. *See Santa Fe Southern Pacific Corp.-Control-Southern Transportation Company*, (Finance Docket 30400), 1996 STB LEXIS 311 (November 26, 1996). Agency adherence to the principle of issue preclusion is discretionary, according to the Board. *See St. Louis Southwestern Railway Company Arbitration Appeal*, (Finance Docket 28799), 1995 ICC LEXIS 209 (August 15, 1995) (We are not necessarily bound by the judicial doctrines of res judicata and collateral estoppel).

Interestingly, the Board in the *St. Louis Southwestern Railway* proceeding noted that “we encourage parties to raise all disputes and issues in one proceeding to assure the full resolution of all relevant matters.” *Id.* DHX has taken the opposite approach and has engaged in piecemeal litigation for no apparent purpose other than to create an appearance of preclusion. DHX’s actions in this proceeding and in district court proceeding lead Horizon to conclude that DHX is actively engaging in the type of piecemeal, multi-jurisdictional litigious behavior that the doctrines of res judicata and collateral estoppel were designed to deter. The Board should not countenance such behavior.

IV. DHX’S STATEMENT OF FACTS DOES NOT STATE FACTS, BUT REPEATS UNSUBSTANTIATED TESTIMONY

The Statement of Facts contained in DHX’s Petition does not state facts but, rather, repeats unsubstantiated allegations made in its submission dated October 28, 2003. This recitation of contested factual allegations is irrelevant for two reasons.

First, Motions to Dismiss presume that the facts alleged by the non-moving party to be correct. The May 9, 2003 Order dismissing Count III stated explicitly that in “considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant.” May 9, 2003 Order at 4. Count III was dismissed without holding an evidentiary

hearing because the issues involved were essentially legal. *See ZoneSkip, Inc. v. UPS, Inc.*, 8 I.C.C.2D 645, aff'd mem, 998 F.2d 107 (3rd Cir. 1993). DHX has provided no legal authority in which a motion to dismiss may be reconsidered because of 'facts' adduced during a later evidentiary hearing on non-related counts. DHX cannot cite to any authority because there is no authority.

DHX then makes the stunning assertion that Horizon somehow admitted "99.98% of the factual premise of Complainant's case." Petition at 5, fn. 4.⁶ DHX asserts that Horizon did not respond to a list of facts contained in DHX's Rebuttal Statement. The Board's rules do not provide for a sur-reply. Any recitation of the alleged facts contained in a final pleading necessarily remains un rebutted under the Board's Rules. Further, there is no provision in either the Board's Rules or the Federal Rules of Civil Procedure for the submission of a statement of uncontested facts at trial. Horizon therefore had no obligation or procedural capability to respond to DHX's recitation of self-described facts.⁷

In this instance, DHX's submission, which included entire deposition transcripts, was not made in furtherance of a motion for summary judgment. Further, these alleged facts were not supported with specific pin-point references to the record and would not have been accepted as uncontradicted statements of fact even if they had been submitted to a district court in

⁶ DHX neglected to number the pages of its Petition and DHX's numbering system may differ from Horizon's.

⁷ DHX may have been thinking of certain federal district court local rules governing motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Many local district courts require a party moving for summary judgment under Rule 56 of the Federal Rules of Civil Procedure to submit a numbered statement of facts, with pin-point references to the record in support. See, e.g. Local Rule 56(1) of the Southern and Eastern Districts of New York. The non-moving party is required to respond to those facts and if the non-moving party fails to respond the district court may (it is not mandatory) admit the uncontested facts into evidence for purposes of deciding a motion for summary judgment. See, *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-151 (D.C. Cir. 1996). As noted, this is a discretionary local rule and not one required by the Federal Rules.

furtherance of a motion for summary judgment *See, Burke v. Gould*, 2886 F.3d 513, 517-518

(C. Cir. 2002). As the D.C. Circuit set out so succinctly:

A district court judge should not be obliged to sift through hundreds of pages of depositions, affidavits, and interrogatories in order to make his own analysis and determination of what may, or may not, be a genuine issue of material disputed fact. In this respect, a district court may legitimately look to and reply upon counsel to identify the pertinent parts of the record, to isolate the facts that are deemed to be material, and to distinguish those facts which are disputed from those that are undisputed.

Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988).

In any event, the reply submissions of both Horizon and Matson effectively rebutted the entirety of DHX's case and, in so doing, left no significant assertions of fact rebutted or uncontested.

V. THE BOARD SHOULD DENY THE ALTERNATIVE RELIEF SOUGHT BY DHX

DHX requests that the "Board clarify its final Order in regard to the question of the forum for rate and service discrimination claims." Horizon respectfully suggests that the Board's Orders issued in this docket are crystal clear and require no further clarification.

The dearth of discrimination or other complaints against water carriers in the noncontiguous domestic offshore trades belies the unfounded concluding assertion by DHX that the "issue of rate discrimination has only increased since the date of the initiation of this proceeding." Petition at next to last unnumbered page. A clear articulation of the law has already been made by this Board and if any party wishes to "avoid a repeat of this type of litigation" they

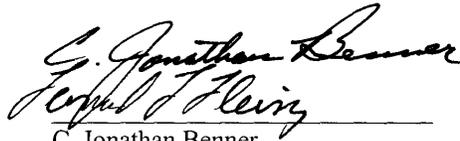
need do no more than undertake a comprehensive reading of the Board's Orders in this docket and in WCC-101.⁸

VI. CONCLUSION

For the reasons set forth above, DHX's Petition should be denied.

Respectfully submitted,

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Counsel for Horizon Lines LLC.

Dated: January 24, 2005

⁸ DHX has no standing to seek any relief or reconsideration in WCC-101. The mere fact that DHX and the intervenors in WCC-101 have counsel in common does not vest DHX with standing.

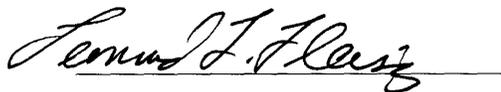
CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2005 a copy of the foregoing "Defendant's Reply in Opposition to Complainant DHX's Petition for Reconsideration or, in the Alternative, for Clarification of Order" was served by overnight delivery on the following counsel for DHX, Inc.:

Rick A. Rude, Esquire
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Falls Church, Virginia 22046

and upon:

Richard A. Allen, Esquire
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Washington, D.C. 20006



ATTACHMENT A

C O P Y

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE ROBERT J. KELLEHER,
UNITED STATES DISTRICT COURT JUDGE

DHX, INC.,)
)
Plaintiff,)
)
vs.) CASE NO. CV02-6740-RJK
)
CSX LINES, LLC, et al,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Monday, November 18, 2002
10:15 a.m.

SHERI S. OGATA,
CSR 10340

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APPEARANCES

In behalf of the Plaintiffs:

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P R O C E E D I N G S

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4 LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 18, 2002;

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10:15 A.M.

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8

THE CLERK: All rise. United States District
9 Court is now in session. Honorable Robert J. Kelleher
10 presiding.

11

Please be seated.

12

Item No. 3, Civil docket No. 02-6740-RJK:

13

DHX, Inc., vs. CSX Lines, LLC, et al.

14

Please state your appearances.

15

MR. MILLS: Good morning, Your Honor.

16

Michel Mills appearing for plaintiff DHX.

17

THE COURT: Hello, Mr. Mills.

18

MR. WISE: Good morning, Erich Wise for

19

defendant CSX Lines, LLC, and with me today is

20

Jonathan Benner of Troutman and Sanders, Washington,

21

D.C., admitted pro hoc, who will argue the motion on

22

behalf of CSX.

23

THE COURT: Very well, Mr. Wise. It seems

24

to the court that we have somewhat unusual and

25

somewhat challenging threshold questions presented

1 here as a result of this Complaint and the motion,
2 12(b)6 motion to dismiss.

3 Is there and should there be a dispute
4 between you as to whether one of the parties, the
5 defendants, is a party to the administrative
6 proceedings? What does the plaintiff say to that?

7 MR. MILLS: Your Honor, if I understand
8 the first question --

9 THE COURT: Perhaps you'll be a little
10 more comfortable at the lectern.

11 MR. MILLS: Yes, Your Honor.

12 To better understand the Court's question,
13 was the court inquiring as to whether CSX should be a
14 part?

15 THE COURT: No. I'm asking whether the
16 record sustains the contention, at least made by one
17 side, that CSX is a party to the administrative
18 proceeding. The question is: Is there a dispute
19 between you in that regard? What's the plaintiffs
20 view? Do you disputes whether CSX is a party to the
21 administrative Complaint?

22 MR. MILLS: CSX is not a party.

23 THE COURT: And the defendant contends the
24 contrary, do you not?

25 MR. BENNER: We do, Your Honor. We

1 contend that we are a party. The complaint says we
2 are a party. We assume that until that Complaint is
3 amended, we will remain a party.

4 THE COURT: What do you say to that, Mr.
5 Mills?

6 MR. MILLS: Your Honor, we have submitted
7 for the Court's review correspondence between the
8 parties in the
9 STB action indicating that CSX is not a proper party,
10 and if the court requires a technical modification of
11 that Complaint in the STB, that could be made to
12 happen.

13 THE COURT: Well, we never deal with
14 anything that is just technical. Under a 12(b)6
15 motion, the Court's job is to examine the pleadings,
16 look nowhere else except within the allegation of the
17 Complaint, and make a determination as to whether
18 under 12(b)6 the cause of action has been stated, and
19 if so, against which defendants.

20 I have no interest whatever at the present
21 time in correspondence that may have taken place in
22 anyway. Your contention -- what do you say the
23 Complaint says in that regard? Does it say -- does it
24 allege CSX as a party?

25 MR. MILLS: It is my understanding that it

1 is silent on that point, specifically, Your Honor.

2 THE COURT: Does the defendant say that --
3 wherein do you point out to plaintiff that that
4 allegation is contained?

5 MR. BENNER: Your Honor, we attached to
6 our memorandum of points and authorities on our
7 initial filing a copy of the STB Complaint. I would
8 refer the court to paragraphs 58 through 60 of that
9 Complaint as examples of indications that CSX is
10 indeed a party. It says in those paragraphs -- I
11 won't read them in their entirety.

12 THE COURT: Are you reading now from the
13 administrative complaint?

14 MR. BENNER: I am, Your Honor.

15 THE COURT: And is the court at liberty to
16 consider that in the 12(b)6 motion?

17 MR. BENNER: We contend that the court may
18 take judicial notice of the pleadings in another
19 administrative proceeding, federal administrative
20 proceeding. I certainly don't dispute the Court's
21 view that it is bound by the documents before in this
22 proceeding, but we have looked into the point and
23 briefed it and said that you can take a judicial
24 notice of the pleadings before the STB.

25 THE COURT: All right.

1 MR. MILLS: Your Honor, if I may be heard
2 on that.

3 THE COURT: You may.

4 MR. MILLS: In responding to the Court's
5 inquiry, I was responding to the complaint presently
6 before this court on this 12(b)6 motion. It is my
7 understanding that the present complaint before this
8 court for determination does not distinguish CSX in
9 the fashion the court asked.

10 What I mentioned earlier as to the
11 correspondence, the correspondence related to the
12 Complaint which counsel just referred to, that is, the
13 operative complaint in the STB action. My response to
14 this court is that in the complaint before this court
15 presently, it is not referenced specifically.

16 THE COURT: You say it's -- you use the
17 word "silent." Are you saying on that context that
18 the complaint is silent as to if CSX is or is not a
19 defendant in the administrative complaint?

20 MR. MILLS: That is my recollection, Your
21 Honor, yes.

22 THE COURT: Well, what is your -- well,
23 your recollection ought to be sustained somewhat by
24 taking a look at what the piece of paper says,
25 shouldn't it?

1 MR. MILLS: Yes, Your Honor. If I may
2 have a moment.

3 THE COURT: Yes, you may. You should take
4 a look and see if you concur with Mr. Wise as to his
5 contention that he has put in the record a copy of the
6 administrative complaint and that therein there is a
7 reference to CSX as a party defendant to that
8 proceeding and that from his point of view, judicial
9 notice is properly taken of that for the purposes of
10 ruling on the 12(b)6 motion.

11 Take a look. Take what time you need.
12 But take a look from that point of view and tell me
13 what your answer is. And there can't be any dispute
14 between you as to what is or what is not alleged in
15 the administrative complaint, I would suggest.

16 MR. MILLS: If I may respond, Your Honor.

17 THE COURT: Yes.

18 MR. MILLS: The allegations of the
19 complaint mention two defendants being Matson and
20 Sealand. It does not mention CSX. That is the civil
21 complaint before this court. CSX at one time was
22 referenced in the Sealand STB complaint. Through the
23 process of a correspondence, that defendant was agreed
24 to not be before the STB action. And that is the
25 distinction that we are drawing. So at this point,

1 CSX is only a party to this action.

2 THE COURT: Well, I don't know. Maybe I'm
3 wasting your time and the Court's time in pursuing
4 this in depth because it may very well be that the
5 matter will be disposed of on a different basis, that
6 at least the basic rule will be on a different issue.
7 But it does seem to the court to be a messy kind of
8 situation for a case to involve a question as to
9 whether a party is or is not before the court as a
10 named party defendant. And so I think I have the
11 position to both of you. The position of the
12 plaintiff is CSX is nowhere involved in this case
13 because it's not alleged to be a defendant in the
14 complaint in this case.

15 MR. MILLS: If Your Honor --

16 THE COURT: The defendants' position is
17 that it is before this court because they have made it
18 so asking the court to take judicial notice of what is
19 alleged and set forth in the administrative complaint.
20 And you'll come back, Mr. Wise, and say that
21 regardless of what's set forth in the administrative
22 complaint, it was deleted therefrom by agreement
23 between the parties.

24 Is that not a fair summary of your
25 respective positions?

1 MR. MILLS: No, Your Honor.

2 THE COURT: All right. Tell me what's
3 wrong with that view.

4 MR. MILLS: CSX is a defendant before this
5 court on this Complaint in this action. It is not a
6 defendant in the Complaint before the STB.

7 THE COURT: Because you say the
8 correspondence indicated an agreement to delete the
9 party on the
10 administrative proceedings.

11 MR. MILLS: Yes, Your Honor. CSX --

12 THE COURT: All right. I have your
13 respective positions, I think. We now get down to a
14 really surprising issue in the case, and that is the
15 existence or nonexistence of federal common law as the
16 basis upon which the plaintiff is pursuing his claim,
17 and that is the exclusive basis on which the plaintiff
18 pursues it's claim, is it not?

19 MR. MILLS: Yes, Your Honor.

20 THE COURT: And have you fully briefed
21 that question, have you, in support of your position?

22 MR. MILLS: Yes, Your Honor.

23 THE COURT: All right. Is the defendant
24 satisfied that you have fully briefed your position in
25 regard to the common law, federal common law issue?

1 MR. BENNER: Your Honor, your phrasing of
2 the question gives me pause because I often find that
3 I am never satisfied that I have seen everything, but
4 we are ready to rest on our pleadings. Just as you
5 indicated, this is an unusual and interesting issue,
6 and it required us to delve into a situation where we
7 believe this cause of action has never been asserted
8 as part of the common law. And therefore, I'm in a
9 position where I'm telling the court that we don't
10 find it, but we will rest on our pleadings today.

11 THE COURT: Well, spoken like a lawyer at
12 the outset, I suppose you ought to respond that way
13 because we shouldn't always be totally satisfied.
14 There's always something more to be done. But what do
15 you say to the citations of authorities on the part of
16 the plaintiff in support of their contention that
17 despite the statute, despite the statute which limited
18 the ICC that nevertheless there is authority to the
19 effect that there still exists common law jurisdiction
20 for this claim? What do you say to those citations?

21 MR. BENNER: May I step to the lector,
22 Your Honor?

23 THE COURT: You may indeed. You may both
24 stay there if you want.

25 MR. BENNER: Thank you. Your Honor, I

1 think that plaintiff overstates our view on this to
2 some extent. We are not saying that there is never
3 something called federal common law. What we are
4 saying is that federal common law is really a
5 reflection of an accepted consensus of principles that
6 are ancient and well accepted that are generally
7 uncontroversial. What we see in this particular case
8 is a cause of action based on what is called rate
9 discrimination or price discrimination by an ocean
10 carrier. That's where we don't find any precedence in
11 the common law for this kind of action.

12 THE COURT: And the citation cited by the
13 plaintiff in support of the position are carriage by
14 air. Is that a correct understanding?

15 MR. BENNER: That's correct. Or in other
16 modes. I don't think we have anything directly on
17 point, Your Honor. I would concede to the court -- I
18 don't think it's a very big concession -- but I would
19 acknowledge that there are often instances revolving
20 around regulated transportation or regulated
21 communications or regulated services where there's
22 some aspect on the periphery of those regulated areas
23 where there is some common law claim.

24 For example, someone who moves household
25 goods recklessly and willfully damages an heirloom in

1 front of the customer, and they are making an action
2 there that common
3 law -- that would deal with something like intentional
4 infliction of emotional distress.

5 But what we are saying is that in the
6 review of the common law of England and the United
7 States when it does not find any clear indication that
8 there ever was a claim for rate discrimination by
9 common carriers -- we find a lot of precedence and we
10 acknowledged it and cited it to the court -- that
11 common carriers and common law were required to
12 maintain reasonable rates. But we also cited to the
13 court cases -- and I think importantly, fairly -- a
14 lot of the new cases, even in the California Supreme
15 Court, says this does not require equal rates to be
16 charged, and that's the gravamen of the complaint
17 that's coming here from the plaintiffs.

18 THE COURT: I take it what you are saying
19 is in any event, there is no such thing as a restraint
20 on monopolistic practices under the common law.

21 MR. BENNER: Well, you're challenging me
22 here, Your Honor.

23 THE COURT: Good.

24 MR. BENNER: There are certainly cases in
25 the common law that look very much like some of our

1 statutory controls on unlawful competition, for
2 example, but as is the case for the particular cause
3 of action being pursued here, we would contend that
4 all of that has been subsumed by federal statutory
5 law. It all came in to federal statutory law.

6 The wrinkle that I suppose I have to be
7 clear about is that in this case we do not concede
8 that there was ever a common law rate to pursue rate
9 differentials in the context of DHX, the plaintiff,
10 here pursues them. It's a twofold argument. We are
11 saying that the common law the best we understand it,
12 if it may relate to here, contains the principles that
13 common law carriers have to charge reasonable rates.

14 By the late 19th Century all of that had
15 been subsumed in this fairly extensive federal body of
16 law that was administered by the Interstate Commerce
17 Commission and now by the Service Transportation
18 Board. Those statutes were amended by Congress as
19 they were in the 70's and again in the 90's to
20 consolidate sections and to somewhat deregulate that
21 field, Congress didn't cause to spring in to being a
22 common law right that had never existed before.
23 Blackstone describes these common law rights as the
24 kind of things that are so embedded in antiquity that
25 the mind of man know it not to the contrary of these

1 principles. Instead what you see here -- and you see
2 it very clearly in the responsive pleadings of
3 plaintiff -- they're really trying to litigate the
4 residuum of the old Interstate Commerce Act. They are
5 claiming that this is a section 2, Interstate Commerce
6 Act discrimination claim, but now that Congress has
7 amended that act and eliminated discrimination from
8 the armory of the Interstate Commerce Commission, it
9 springs into common law.

10 We don't think that's what goes on here at
11 all. We think that the body of law still at the
12 Service Transportation Board is perfectly capable of
13 dealing with the kinds of complaints that they are
14 dealing with and indeed their complaint pending at
15 Service Transportation Board makes that point more
16 eloquently than I put it.

17 THE COURT: I take it, to put it a
18 slightly different way than what you said to the court
19 that although you concede that there did exist under
20 the common law a requirement with respect to
21 reasonableness and the requirements of reasonableness
22 on a carrier such as this that that did not in any
23 touch upon the question that reasonableness did not
24 invoke any considerations of competition or unfair
25 competition or anything of that sort.

1 Is that another way to state your view?

2 MR. BENNER: It's very close, Your Honor.

3 I suppose the way I would say it is it didn't subsume
4 the
5 issue -- the reasonableness did not address equality
6 of rates separately. In other words, the general
7 reasonableness -- any customer could come and complain
8 under the common laws, I suppose, whether it be
9 England or the United States, that a rate was
10 unreasonable. It might be that it's unreasonable for
11 reasons that relate to comparisons with other charges;
12 however, what we are saying is that that whole
13 reasonableness element of the common law -- which is
14 not what these plaintiffs are arguing, by the way --
15 they are arguing discrimination, pure and simple. But
16 the reasonableness elements of the common law were
17 subsumed into the federal body of law that still
18 exists and still is active, and that's where this
19 cause should be pursued.

20 THE COURT: Very well. Fine.

21 Do you want to be heard further with
22 respect to this matter, Mr. Mills?

23 MR. MILLS: Yes, Your Honor. Thank you.
24 We disagree that there was no common law pre-existent
25 of the ICC Act. We cited it. Western Union Telegraph

1 Company versus Cal Publishing, 181 U.S. 45. Our
2 research has shown that that case remains viable. It
3 is not been overturned or materially questioned.

4 THE COURT: Let's pursue in a broader
5 sense and that is what's done by counsel. Defendants
6 contention is that although there did exist a federal
7 common law, some recognition of the duty imposed upon
8 the carriers to be reasonable in the rates that they
9 set, but that that did not in any way address the
10 question of whether there was a requirement that they
11 be equal or noncompetitive or otherwise.

12 Do you understand that to be the view
13 expressed by by CSX?

14 MR. MILLS: I understand that to be the
15 view, Your Honor.

16 THE COURT: What do you say to that?

17 MR. MILLS: I believe we answered that
18 wholeheartedly in our papers. However, I would
19 surmise it to say this: In the papers, CSX suggests
20 that the theory plaintiffs pursued was abrogated by
21 the Abilene and Cotton oil case. Abilene cotton oil
22 remained good law until the ICC Act was repealed.

23 Abilene cotton oil tells us two thing:
24 First, it tells us that there is a historical marker.
25 This discrimination cause of action did exist. And

1 the Supreme Court said that at that time, the ICC Act
2 took the field, and indeed that remained the law until
3 the ICC Termination Act came into being and
4 resurrected the common law rights that existed prior
5 to the ICC Act.

6 Now, looking at the rule that Western
7 Union tells us and combining it with the second point
8 that we have a termination and a reservation -- or I
9 should say a reinvigoration -- of the preexisting
10 common law rights, that's where we get to here.
11 Western Union sets forth the law. Abilene cotton oil
12 recognizes that law but also that that law has been
13 changed by the ICC Act. When we get to the ICC
14 Termination Act, it brought us back to the time
15 preceding the ICC implementation and was recognized by
16 Abilene cotton oil, the discrimination.

17 THE COURT: In that respect, let me ask
18 you what do you understand the jurisdictional basis
19 and reach under the statutes of STB?

20 MR. MILLS: The STB is empowered to decide
21 reasonableness issues. It is not entitled or
22 empowered under the statute to decide discrimination
23 issues. We cited the
24 STB's own interpretation of it's authority and
25 jurisdiction in the Govwa case. There they made this

1 distinction and recognized that discrimination claims
2 are different from reasonableness claims, and not
3 properly before the STB for that reason.

4 They can hear reasonableness. They can
5 hear matters relating to whether a rate has been filed
6 properly. But they do not hear discrimination issues,
7 and as a result, they do not have jurisdiction under
8 the ICC Termination Act where they might have before
9 the termination act.

10 THE COURT: What remedy -- first of all,
11 you have a matter pending before the administrative
12 body, do you not?

13 MR. MILLS: Yes, Your Honor.

14 THE COURT: What relief do you seek there?

15 MR. MILLS: CSX in that -- strike that.
16 DHX in that forum is pursuing reasonableness claims,
17 Your Honor, different from the discrimination claims
18 here and also against different defendants.

19 THE COURT: Well, what is the allegations
20 in your Complaint, administrative complaint, in which
21 you set forth claimed violations? Expressly what does
22 it violate? What is the claim of violation,
23 specifically?

24 MR. MILLS: Your Honor, if I may consult
25 with -- I have my administrative counsel here

1 presently who is much more qualified to discuss the
2 administrative side of the equation.

3 THE COURT: You can take whatever time is
4 necessary to form what you feel is an adequate
5 response. We were indulged in a lecture this morning
6 and that made this matter the only law and motion
7 matter before the court. You may have the morning if
8 you need it.

9 MR. MILLS: Thank you. Thank you for the
10 court's patient.

11 THE COURT: Sure.

12 MR. MILLS: Your Honor, in consulting with
13 my administrative counsel, he has confirmed my
14 representation to the court and if I may offer this
15 further specification, the issues before the STB,
16 again, against different defendants --

17 THE COURT: Don't tell me the issues, if
18 you will, but tell me and read the charging
19 allegations in the administrative complaint of
20 wrongdoing on the part of the defendant here.

21 MR. MILLS: I do not have it to read into
22 the record presently, Your Honor, but I can have it on
23 file this afternoon. But I can state to the court the
24 charging language --

25 THE COURT: Hold on. There's a copy of it

1 before you. I'm told it's the next exhibit to
2 defendant's response, is it not?

3 MR. BENNER: Thank you. It is, Your
4 Honor.

5 THE COURT: In other words, it is before
6 you, and you can search it out and answer the Court's
7 question and direct the Court's attention to the
8 charging allegations in the administrative complaint
9 as to the wrongdoing on the part of the defendant. I
10 suspect your administrative colleague has it in his
11 hip pocket and could direct your attention to it very
12 easily.

13 MR. RUDE: Your Honor, may I approach?

14 THE COURT: You may. Perhaps you should
15 state your name for the record.

16 MR. RUDE: Rick A. Rude, R-u-d-e.

17 May I request leave of the court to
18 address the court?

19 THE COURT: You may.

20 MR. RUDE: I believe I can answer your
21 question regarding the administrative complaint. I
22 not only have it in my hip pocket, I have most of
23 it in my head.

24 To answer your question what were the
25 charging allegations, the Complaint itself is in

1 three counts. There is an introductory section of
2 approximately 20, 24 paragraphs which is a general
3 information count. The second set regards specific
4 allegations regarding Matson, which is not a party to
5 this proceeding. The second section of the general
6 information count deals with Sealand Service, Inc.,
7 which changed it's name to SL Service, Inc., and in
8 the spring of 19 -- no, pardon me -- Spring of 2000.
9 They
10 formally filed a name change in July -- June 8, 2000
11 with
12 Delaware. The counts in the administrative complaint
13 regarding Sealand are shorter.

14 They are -- I believe it's a six count
15 claim against Sealand Service. The amended complaint
16 was filed on April 29 on the direction of the STB to
17 detail the issue of the destructive business practices
18 and to identify the unreasonable -- the rates that the
19 complainant in that case, DHX, felt to be
20 unreasonable.

21 THE COURT: On the part of Sealand or on
22 the part of CSX?

23 MR. RUDE: On the part of Sealand and on
24 the part of Matson. What was discovered between the
25 original filing of this complaint, which was filed on

1 October 31st of 1999, and April -- actually, it was
2 discovered, oh, May, May 20th, May 22nd of 2002 is
3 that the defendant Sealand Service, Inc., had been
4 liquidated and put out of business. That individuals
5 who had been employees of Sealand -- and this was done
6 at the direction of Sealand's corporate parents CSX
7 corporation in Richmond.

8 They continued to represent to the public
9 that Sealand would remain in business in the domestic
10 offer of trades, which is services between the United
11 States, Hawaii, Puerto Rico, Guam, and Alaska. They
12 represented to the public and they represented to the
13 Service Transportation Board that the name CSX Lines
14 was a trade name. That they then started using that
15 name, and when the Administrative Complaint was filed,
16 I believe somewhere in the first 20 paragraphs -- I
17 can't tell you which paragraph off the top of my
18 head -- it specifically states that CSX Lines, LLC, is
19 a trade name for Sealand Service also known as SL
20 Service.

21 I can tell you that when I got their
22 answer on
23 May 20th of 2002, they denied that. I then can also
24 tell you that the matter was researched with the State
25 of Delaware, and it was discovered that CSX Lines,

1 LLC, was a name change effectuated in approximately
2 November of 1999, that they began filing registration
3 documents for interstate transportation in December of
4 1999, and they actually commenced operations on or
5 about January 25th of 2000.

6 Now, remember, Your Honor, these people
7 represented that they in fact were only a trade name
8 for Sealand Service. What we had was an elaborate
9 corporate roos. When that issue was brought to their
10 attention -- "Okay. Who are you? Are you in or are
11 you out," when you look at the answer, you find the
12 answer is filed by SL Service, Inc., also known as
13 Sealand Service. There is no answer in the
14 administrative proceeding anywhere by CSX Lines, LLC.
15 The matter went back and forth, and the point of that
16 was to simply say, "Okay. Who are you? We now know
17 you are not a trade name. You are a separate
18 corporation. You were originally incorporated in
19 August of 1998." It is totally inappropriate for a
20 company to pretend to be another corporation.

21 THE COURT: Let me interrupt with a
22 question here, if I may. How is CSX characterized in
23 the allegations of the complaint as a trade --

24 MR. RUDE: In this proceeding? In this
25 court?

1 THE COURT: Yes, in this proceeding, .

2 MR. RUDE: As a named corporate defendant
3 in its own right and its own step. We also
4 subsequently
5 identified --

6 THE COURT: Hold on. Let's inquire.
7 What's CSX's position with respect to being
8 characterized in that allegation as having the
9 existence of the corporation?

10 MR. BENNER: Your Honor, I am always -- I
11 have to confess -- somewhat confused by Mr. Rude's
12 recitation of these issues. The question from the
13 court related to the allegations and the --

14 THE COURT: I'm not involved or concerned
15 or worried or upset or bothered or anything else about
16 the characterization of issues. My questions have to
17 do with matters of fact. It is a matter of fact that
18 the complaint, the administrative and the complaint
19 here -- each does or does not make an allegation. And
20 that has been my inquiry.

21 MR. BENNER: I understand, Your Honor.
22 I'll try to address that flat out.

23 CSX Lines is a named defendant in both the
24 STB proceeding and in this proceeding before the
25 court.

1 THE COURT: And are either or both
2 characterized as a corporation?

3 MR. BENNER: As a limited liability
4 corporation, LLC. CSX Lines, LLC, Your Honor.

5 THE COURT: Very well.

6 MR. BENNER: You know, I've never quite
7 known what to do with that lengthy recitation. I've
8 heard it before in other context, but I'm trying to
9 address the Court's question about what the complaint
10 said. At page 14 of our memorandum in support of our
11 motion to dismiss, we laid out side by side in tabular
12 form what we felt were some of the operative
13 paragraphs in the complaints so you can compare --

14 THE COURT: Right.

15 MR. BENNER: -- at that point.

16 THE COURT: Very well.

17 MR. BENNER: They seem to be very much the
18 same.

19 THE COURT: I've not had a full answer to
20 my inquiry. Specifically what is or are the charging
21 allegations in the administrative complaint as against
22 CSX? So I want to hear further in answer to that
23 specific question.

24 MR. RUDE: Certainly. The amended
25 complaint at paragraph 15, identifies CSX Lines as a

1 name change and trade name for Sealand Service. The
2 claims against Sealand Service are destructive
3 business practices in the elimination of a pricing
4 structure which resulted in the elimination of a
5 market for full container load services by DHX as a
6 regulated freight forwarder in the United States
7 offshore trade to Hawaii.

8 THE COURT: That being contended as a
9 violation of what? The regulations?

10 MR. RUDE: No, it's a violation of 49
11 U.S.C. 13701(a). Actually (a)1.

12 THE COURT: What does that statute say?

13 MR. RUDE: It prohibits a carrier from
14 engaging in unreasonable business practices,
15 unreasonable rates, and unreasonable classifications.
16 The administrative complaint also alleges a
17 classification violation in that the defendants
18 Sealand Service improperly classified cargo
19 commodities under more than one -- under more than one
20 standard. It also alleges a violation of the
21 Interstate Commerce Act, the ICC Termination Act, in
22 regard to overcharges. It also alleges a failure to
23 publish -- which, Your Honor, I will point out it is
24 also an Elton's Act violation. It also alleges a
25 refusal to deal by refusing the publication. It also

1 alleges an improper publication.

2 THE COURT: So there is a specific parts
3 of the statute which prohibits a refusal to --

4 MR. RUDE: It's an unreasonable practice
5 to refuse to deal.

6 THE COURT: And let --

7 MR. RUDE: And the --

8 THE COURT: Is that the number of the
9 complaints before the administrative body that the
10 wrongdoing on the part of CSX or of it's principal
11 that's involved is to violate the terms of the statute
12 in its refusal to deal?

13 MR. RUDE: No, sir.

14 THE COURT: What is the claim?

15 MR. RUDE: The claim is essentially
16 twofold. The dominant claim is the destructive
17 business practice claim which was the elimination of
18 pricing and the carrier has the absolute discretion to
19 file its rates, and it has the absolute discretion to
20 withdraw those rates subject to consequences under the
21 statute. The second -- and the provisions which the
22 defendants cite because this is approximately a
23 270-something paragraph complaint. The defendants
24 there demanded a detailed complaint. They got one. I
25 don't think they anticipated it to be as detailed as

1 it was. What they speak to is a count three --
2 unreasonable rates count which is a joint count
3 between Sealand and Matson Navigation Company.

4 Under the section 13701(a) and under
5 13702(b), which are within that count of the
6 defendants in that case engaged in a pattern of
7 failing to publish and which includes the filing and
8 making available to the public all of the terms and
9 conditions of the rates and charges.

10 THE COURT: Let me interrupt again. Each
11 of the recitals you've now given to the court
12 constitute in the plaintiff's position as violation --

13 MR. RUDE: Yes.

14 THE COURT: -- on the part of CSX of its
15 duties under the law.

16 MR. RUDE: It's a violation of the named
17 defendant's duties under the law. One the
18 difficulties that transpired, Your Honor, is that for
19 a lengthy period of time CSX Lines was able to
20 convince everybody they were somebody else. Now, that
21 seems -- and that perhaps is your -- is somewhat
22 perplexing to the court because that's an extremely
23 unusual situation. But that's what was done here.

24 THE COURT: Yes, all right. Let me
25 interrupt.

1 MR. RUDE: Yes.

2 THE COURT: I take it that you made a
3 response to the court's inquiries, specifically what
4 are the allegations, charging allegations, in the
5 administrative complaint of wrongdoing on the part of
6 the defendant here CSX. You responded to that?

7 MR. RUDE: Right. CSX Lines, LLC --

8 THE COURT: You responded. Very well.

9 MR. RUDE: -- is not there.

10 THE COURT: What do you contend or what do
11 you say are the charging allegations of the complaint
12 here of wrongdoing on the part of CSX?

13 MR. RUDE: The allegations in this
14 complaint -- it's a very narrowly defined and
15 constructed document --

16 THE COURT: And what is it?

17 MR. RUDE: -- which is specifically the
18 charging of different prices to different customers
19 for the transportation of the same commodities between
20 the same points.

21 THE COURT: Specifically a violation of
22 what duty under the law imposed on CSX to be
23 reasonable or to agree to deal or not to deal or what?
24 What is the charge of wrongdoing in the complaint
25 here?

1 MR. RUDE: The charge of wrongdoing in the
2 complaint here is the violation of its duty of equal
3 treatment which is more commonly known as
4 discrimination. The whole issue of equality under the
5 law runs throughout our federal codes. More
6 importantly, one of the things that needs to be
7 clarified is the reasonableness of a rate is an issue
8 separate and distinct from an issue of price
9 discrimination.

10 A price discrimination issue is actually
11 involves the application of the file rate. It does
12 not impeach the file rate. It does not require the
13 court to impose its own judgment as to the value
14 prescribed to a service. It simply looks at -- this
15 is the rate you charged Costco; this is the rate you
16 charge DSX. Was the service the same? Yes. Were the
17 commodities the same? Yes.

18 At that point you have a situation
19 specifically where the plaintiff is showing a prima
20 facia case of discrimination. The defendant then must
21 step forward and say, well I had a legitimate reason
22 that the law recognizes to do that. It's -- there's
23 no great finding of fact involved.

24 THE COURT: All right, sir. I think you
25 are going far beyond what my inquiry is.

1 MR. RUDE: I hope I clarified it.

2 THE COURT: Hold on. There are no
3 findings of fact involved in any way in a proceeding
4 such as a 12(b)6 motion. You've answered the court's
5 question.

6 MR. RUDE: That's correct.

7 THE COURT: Please state your name again
8 for me, if you will.

9 MR. RUDE: First name is Rick, R-i-c-k.

10 THE COURT: Yes, sir.

11 MR. RUDE: Middle initial is "A" as in
12 Alpha. Last name is Rude, R-u-d-e. If I may, if it
13 may please the court --

14 THE COURT: Yes.

15 MR. RUDE: -- I'm an attorney admitted to
16 practice law in the District of Columbia since
17 December 1976.

18 THE COURT: Very well, sir. And you were
19 admitted for the purposes of this case by the order of
20 this court.

21 MR. RUDE: Thank you.

22 THE COURT: All right. Mr. Wise, what
23 response do we now to these responses we read from
24 both Mr. "Wise" and Mr. Rude? Mr. Benner.

25 MR. BENNER: Thank you, Your Honor. I

1 issues are very much the same. When the STB is asked
2 to rule on the reasonableness of our rates and
3 practices and all the various other charges that DHX
4 has leveled against us at the STB, they will be
5 dealing with the very same issues that you would have
6 to be dealing with.

7 THE COURT: Fine. You've answered. That
8 being so, what do you suggest to the court is the
9 implication or meaning thereof in a 12(b)6 motion?
10 That is that there be, assuming the position you
11 stated, that is, that there is a hundred percent
12 identity overlap between the administrative complaint
13 and the lawsuit pending here. What is the
14 significance of that for the purposes of this 12(b)6
15 motion, if any?

16 MR. BENNER: Your Honor, we proceeded
17 under 12(b)1 and 12(b)6. It was our view that the --
18 the absence of an effective common law precedent for
19 this kind of action suggested that the plaintiffs had
20 not pled an action upon which this court could grant
21 relief. That was the nub of our 12(b)6 motion.

22 Under 12(b)1, we are suggesting that the
23 court, given this vast presence of the federal law
24 dealing with exactly these same issues that puts these
25 issues in the first instance before the administrative

1 agency that the court lacks subject matter
2 jurisdiction to deal with these claims. Now, it is
3 our view that plaintiffs have cited federal common law
4 to invest this with some kind of federal question hook
5 that would give the court a place to give
6 jurisdiction.

7 We don't think that's the case. We think
8 it's very clear that the place you go to get these
9 kinds of problems solved in the first instance is the
10 Service Transportation Board.

11 THE COURT: And is there some -- is there
12 some rule that applies there generally to the effect
13 that these issues pending now before an administrative
14 body -- they must be exhausted before we proceed with
15 the lawsuit? Is that sort of rule involved?

16 MR. BENNER: Your Honor, I'm tempted to
17 say, yes, because it would be convenient for me to do
18 so. But I think the more correct formulation is that
19 this series of events that underlies the complaint
20 must be tried at the STB, and it will go into the
21 federal courts as an appeal for ruling there.

22 THE COURT: I see. I might suggest, Mr.
23 Benner, that in order that the court might have as
24 fully refined statement of positions in the support of
25 your motion to dismiss, that you submit a proposed

1 order granting the motion. I'm going to take a
2 submission on the matter regardless of what further we
3 do this morning. I'm going to want to look for my own
4 curiosity into some things -- this is new to me and
5 somewhat challenging -- before I do rule, but assuming
6 I am to rule by way of granting the defendant's
7 motion, I would like you to prepare and submit,
8 pursuant to our local rules, a proposed order of the
9 court granting that motion.

10 How much time do you need within which to
11 do so?

12 MR. BENNER: Your Honor, would Friday be
13 adequate?

14 THE COURT: Take what time you want.

15 MR. BENNER: I confess that I have a brief
16 due tomorrow on another matter back on the East coast,
17 and if I could have the court and my colleagues'
18 indulgence until the middle of next week that would be
19 good.

20 THE COURT: You are afforded ten days from
21 and after this date within which to submit a proposed
22 order granting the motion, which, of course, is to be
23 served and filed in accordance of our local rule and
24 as to which the plaintiff will have the ruling timely
25 responded thereto.

1 All clear?

2 MR. BENNER: Very good, Your Honor.

3 THE COURT: All right. What else should I
4 hear from the plaintiff beyond what is already before
5 the court? Do you wish further opportunities, either
6 Mr. Rude or Mr. Benner -- excuse me -- Mr. Rude or
7 Mr. Mills? Mr. Rude or Mr. Mills, either of you wish
8 further to address what's been now put before the
9 court?

10 MR. MILLS: Yes, Your Honor, in
11 particular, addressing the court's question as to what
12 extent is there overlap.

13 THE COURT: Yes.

14 MR. MILLS: On that matter, we already
15 have the STB's position on that; that is, there's no
16 overlap, that the discrimination claim is separate and
17 outside of their jurisdiction.

18 THE COURT: And where would I look to find
19 that?

20 MR. MILLS: That is our submission, Your
21 Honor. We attached that to our opposition. We cited
22 the decision of the government of Guam case, a ruling
23 by the STB.

24 THE COURT: In the companion case to this?

25 MR. MILLS: We attached it as an exhibit

1 to the opposition of the court.

2 THE COURT: That's a ruling by the
3 administrative body as to the issues in common to this
4 case?

5 MR. RUDE: It's on point, Your Honor.

6 THE COURT: It's a citation with
7 authority, I take it not a ruling in the companion
8 case.

9 MR. RUDE: There's a separate proceeding
10 at the STB. The government of Guam filed a race and
11 discrimination case against --

12 THE COURT: That's enough. I understand.
13 You -- hold on.

14 MR. RUDE: And the --

15 THE COURT: That's enough.

16 MR. RUDE: Yes, the full commission issued
17 a decision, holding --

18 THE COURT: I understand. You cite that
19 as an authority. That is not a ruling in the
20 companion administrative case to this case, is it?

21 MR. RUDE: No, sir.

22 THE COURT: All right. You answered.
23 What is it you --

24 MR. RUDE: I would point out to the court
25 that this court, you, raised the question of

1 exhaustion of remedies. Under the Interstate Commerce
2 Act and certainly under the ICC Termination Act, it
3 is not a matter of exhaustion of remedies. It's a
4 matter of primary jurisdiction.

5 THE COURT: It has the same implications,
6 does it not?

7 MR. RUDE: No, sir. They have profoundly
8 different implications. In 1990 the state court
9 discussed the differences in Rider v. Cooper. Under
10 the exhaustion of remedies, a district court is
11 compelled to dismiss the claim. Under primary
12 jurisdiction, they retained jurisdiction, but they
13 refer issue.

14 THE COURT: They are permitted to retain
15 jurisdiction, but not required to, is that not the
16 law?

17 MR. RUDE: That's the court's discretion,
18 Your Honor.

19 THE COURT: All right. Very well.

20 MR. RUDE: Thank you.

21 THE COURT: I think it's clear as it now
22 stands that the matter in which the court now intends
23 to proceed. It will within ten days have from the
24 defendant this submission of a proposed order,
25 granting the 12(b)6 motion. You tell me it's a

1 12(b)1. It should be an order addressing whatever the
2 motions are, and that in accordance with your local
3 rule, it will be served upon counsel for the
4 plaintiff -- the copy of that proposed order. You
5 have a week in which to make your response, as you may
6 be advised.

7 All clear?

8 MR. MILLS: Yes, Your Honor.

9 THE COURT: All right. Anything further
10 from either side?

11 MR. RUDE: No, sir.

12 THE COURT: All right. The matter stands
13 submitted.

14 MR. BENNER: Thank you, Your Honor.

15 THE CLERK: All rise. The United States
16 District Court is now out of session.

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CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

SHERI S. OGATA, CSR
Official Court Reporter

Date