

**WEINER
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224675

March 12, 2009

BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

FILED
MAR 12 2009
SURFACE
TRANSPORTATION BOARD

RE: STB Finance Docket No. 35229, Pacific Harbor Line, Inc. –
Petition for Declaratory Order

ENTERED
Office of Proceedings
MAR 12 2009
Part of
Public Record

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Pacific Harbor Line, Inc.'s Petition for Declaratory Order. Also enclosed is our check in the amount of \$1,400 to cover the filing fee for this proceeding.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,


Mark H. Sidman

Enclosures

cc: Andrew Fox (by e-mail)

FEE RECEIVED
MAR 12 2009
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED

MAR 12 2009

**SURFACE
TRANSPORTATION BOARD** ARD
**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FILED
MAR 12 2009
**SURFACE
TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35229

PACIFIC HARBOR LINE, INC. – PETITION FOR DECLARATORY ORDER

224675

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Office of Proceedings

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Public Record

INTRODUCTION

Pursuant to 5 U S C § 554(e), Pacific Harbor Line, Inc (“PHL”) hereby respectfully petitions the Surface Transportation Board (the “Board”) to institute a declaratory order proceeding to remove uncertainty regarding certain payment-related responsibilities of an agent of a consignee. More specifically, PHL requests the Board to clarify the affirmative obligations of one of its consignees that refuses to pay lawfully-assessed accessorial charges, based solely on its assertion of agency status. It is PHL’s position that, under such circumstances, its customer has the following affirmative obligations: (1) to notify PHL of its agency status prior to the due date of the first invoice issued to the customer by PHL, (2) to forward the PHL invoices for accessorial charges, in a timely manner, to its principal for payment; and (3) if PHL does not timely receive payment from the customer’s principal, to identify the principal to PHL (along with appropriate contact information), upon the PHL’s request.

STATEMENT OF FACTS

PHL is a class III common carrier by rail. Under PHL Freight Tariff 8100, PHL assesses certain storage charges when the customer cannot or does not timely accept a car. Pursuant to that tariff, PHL issued invoices for storage charges to one of its

customers, Los Angeles Harbor Grain Terminal (“LAHGT”) LAHGT received such invoices on a regular basis from July 2007 to August 2008 During that time, LAHGT accrued more than \$300,000 in unpaid storage fees, and never advised PHL that it was acting as an agent for a third party with respect to the shipments in questions

In August 2008, LAHGT sent PHL a letter indicating that LAHGT is not responsible for the outstanding storage charges because it is not a consignee, but only an agent for the consignee ¹ In February 2009, PHL sent to LAHGT’s counsel a letter with the subject invoices attached, and requested that (1) LAHGT identify each car on the attached invoices for which it was acting in an agency capacity, and (2) for each such car, LAHGT provide contact information for its principal, so that PHL could pursue collection of the storage charges from the purported principal PHL requested LAHGT to respond to its letter by March 4, 2008 LAHGT has not provided PHL with the requested information, nor has it otherwise responded to PHL’s letter

PHL’s position is that LAHGT’s assertion that it is acting as an agent for a consignee does not inoculate LAHGT from all responsibility with respect to the outstanding storage charges PHL is not the originating carrier for traffic to LAHGT, and accordingly does not generate or have access to the applicable bills of lading In addition, even if it did have access to this information, (1) some courts have ruled that a third party’s characterization of a customer’s status as a consignee in a bill of lading is not binding on the consignee, and (2) to the extent the bill of lading characterizes the

¹ LAHGT’s attorneys sent to PHL a copy of a letter addressed to counsel for BNSF Railway Company (“BNSF”), in response to BNSF’s attempts to collect outstanding demurrage charges In that letter, LAHGT claims it is not responsible for the outstanding demurrage charges as a result of its agency status PHL understands that LAHGT sent the same letter to PHL because LAHGT is raising the same agency defense with respect to LAHGT’s outstanding storage charges

customer as an agent, no information about the principal/consignee is provided on that document

The absence of affirmative obligations on the part of LAHGT would not only provide LAHGT with a shield that protects it from payment of charges arising directly from the post-delivery actions of LAHGT, but also would provide LAHGT with a sword that prevents PHL from seeking payment from LAHGT's purported principal. If that were the case, PHL would be placed in the untenable position, in which, on the one hand, LAHGT, without any prior notice, could refuse payment of lawfully-imposed accessorial charges by the mere assertion of agency status, and on the other hand, LAHGT would have no obligation either to arrange for payment of those charges by the principal or to provide the PHL with the contact information necessary for the railroad to seek payment directly from the principal.

GENERAL ISSUES TO BE ADDRESSED IN PROCEEDING

PHL petitions the Board to institute a declaratory order proceeding that clarifies the affirmative obligations of a receiver of loaded rail cars, like LAHGT, which accrues accessorial charges post-delivery, and then claims to be acting as an agent for an undisclosed third party principal. Under such circumstances, it is PHL's position that LAHGT has at least three affirmative obligations: (1) to notify PHL of its agency status prior to the due date of the first invoice PHL issued to LAHGT, (2) to forward the PHL invoices for storage charges, in a timely manner, to its principal for payment, and (3) if PHL does not timely receive payment from LAHGT's principal, to provide PHL with the identity of the principal, upon PHL's request.

A finding by the Board that LAHGT, when claiming to be a consignee's agent, incurs the affirmative obligations outlined above would be appropriate for several reasons *First*, these affirmative obligations would inform PHL of LAHGT's claim of agency status prior to the accrual of large outstanding balances for post-delivery charges *Second*, these obligations would provide a mechanism whereby LAHGT's purported principal timely receives notice of such invoice *Third*, these obligations would provide a mechanism whereby the purported principal timely can challenge LAHGT's claim of agency status and/or its lack of an obligation to pay the storage charges (as a result of a contract with LAHGT or otherwise) *Finally*, if LAHGT fails to forward the invoices to its purported principal or such principal fails to pay them, these obligations would provide the PHL with access to information necessary to seek collection directly from the principal

PROCEDURAL SCHEDULE

PHL requests the adoption of the following procedural schedule for this proceeding

- Day 1 Board institutes a declaratory order proceeding
- Day 20 Petitioner's Opening Statement is due
- Day 40 Respondent's Reply Statement is due
- Day 55 Petitioner's Rebuttal Statement is due

Because this Petition is limited to the narrow issue of the procedural obligations of a receiver of rail cars, such as LAHGT, when it claims to be acting as a consignee's agent, the resolution of this Petition does not require the development of a factual record Accordingly, discovery in this proceeding should not be necessary or appropriate The

procedural schedule proposed above, therefore, should provide ample time for submission by both PHL and LAHGT (should LAHGT choose to participate in this proceeding)

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark H. Sidman', written over a horizontal line.

Mark H Sidman
Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
1300 19th Street NW
Fifth Floor
Washington DC 20036-1609
Attorneys for Pacific Harbor Line, Inc.

Dated March 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Pacific Harbor Line, Inc. – Petition for Declaratory Order was served on March 12, 2009, by first-class mail, postage pre-paid, on the following:

Ellis Ross Anderson, Esq.
Anderson & Poole, P.C.
601 California Street
Suite 1300
San Francisco, CA 94106-2618

A handwritten signature in black ink, appearing to read "Mark H. Sidman", written over a horizontal line.

Mark H. Sidman, Esq.