

U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

DHX, INC.,

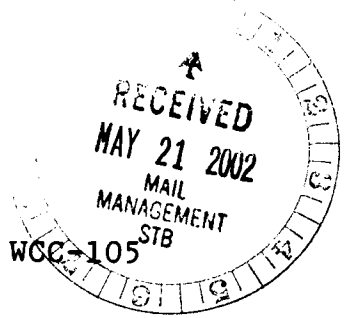
Complainant,

v.

MATSON NAVIGATION COMPANY
and
SL SERVICE, INC.,
f/k/a SEA-LAND SERVICE,
INC. and Now Trading As
CSX LINES, LLC,

Defendants.

205454
STB Docket No. WCC-105



ENTERED
Office of the Secretary

MAY 22 2002

Public Records

MOTION TO MAKE ANSWER MORE DEFINITE

COMES NOW, Complainant, DHX, Inc., by and through its counsel, pursuant to Rules 1111.4(a), 1111.4(c) and 1111.5, 49 CFR(2000 ed.) and moves this Board for an Order directing that Matson Navigation Company (hereinafter referred to as "MNC") submit more definite responses to certain averments in the Amended Complaint, or in the alternative, that the Board find that MNC's responses constitute admissions to the involved averments.

The Board, by Order served March 28, 2002 directed the Complainant to file an Amended Complaint in which Complainant provided detailed averments of the destructive competitive practices and unreasonable rates to which Complainant has been subjected by Defendants. Complainant timely filed the required Amended Complaint. Defendants, MNC and CSX Lines, LLC, did serve Answers to the Amended Complaint. It is to the responses of MNC that the instant motion is addressed.

The instant motion is directed to the responses of MNC in two respects--(1) those responses wherein MNC neither admits nor denies the averment but instead states that (as example) "Matson avers that the contents of the Tariff 2034-E speaks for itself".(Amended Compl't. ¶43, MNC Response 43). The Answer of MNC makes that representation in fifty (50) separate responses to the Amended Complaint.^{1/} The second area in which Complainant seeks clarification is in regard to MNC's responses to three averments (Amended Compl't. ¶76, ¶77, ¶78). The responses do not clearly articulate MNC's position on the matter and could be construed as both an admission and a denial.

The Board's Rules of Procedure are patterned after the Federal Rules of Civil Procedure. Rule 1111.4(a) simply requires that an answer should be responsive to the complaint. Rule 1111.4(c) makes it clear that

"Averments in a complaint are admitted when not denied in answer to the complaint." ^{2/}

The response that a document "speaks for itself" does not constitute either an affirmative answer nor a 'denial'. It

^{1/}

The averment paragraphs in the Amended Complaint to which MNC has provided the involved "non-answer" answer are contained in Attachment "A" hereto. While it would seem that MNC's responses are or could be construed as admitting the affirmative facts contained in the Amended Complaint corresponding paragraphs, the MNC responses refer to a document rather than give a "yes or no" response. It is also noteworthy that they generally refer to a document with no specificity therein. Such a response would not pass muster under the discovery rules and should not be permitted at the initial pleading stage of this proceeding.

^{2/}

This language is the same as contained in Fed.R.Civ.Proc. 36 and should be interpreted in the same manner--to avoid any equivocation by defendants.

3.

is submitted that an Order requiring MNC to either properly admit, deny, or otherwise find the MNC responses subject to Rule 1111.4(c) is appropriate.

The responses to paragraphs 76, 77 and 78 are as follows (with the averment stated):

Amended Compl't. ¶76

76. Matson, at all times material to this complaint, did not issue through bills of lading for shipments received by Matson and rates under the Proportional rates contained in Matson Tariff 2034-E.

MNC Answer

"Matson cannot fully admit or deny the allegations of this paragraph because the amended complaint fails to explain what is meant by the phrase "at all times material to this complaint". Matson admits the allegations of this paragraph as of the present time".

77. Matson, at all times material to this complaint, did issue freight invoices that reflected a "CY to CY" service and not a through route service for shipments rated under the Proportional rates in Tariff 2034-E.

MNC Answer

"Matson cannot fully admit or deny the allegations of this paragraph because the amended complaint fails to explain what is meant by the phrase "at all times material to this complaint". Matson admits the allegations of this paragraph as of the present time".

78. Matson, at all times material to this complaint, did not publish nor identify any through routing applicable on the shipments rates by Matson under the Proportional rates in Matson Tariff 2034-E.

MNC Answer

"Matson cannot fully admit or deny the allegations of this paragraph because the amended complaint fails to explain what is meant by the phrase "at all times material to this complaint". Matson admits the allegations of this paragraph as of the present time".

Matson, at page 2, of its Answer stated that it could not response to certain of the Amended Complaint's averments due to the constant changing nature of Matson's tariffs. It is worthy to note that the tariff provisions cited included Rules which were NOT changed except as identified. Further, the time frame of the complaint is likewise reflected at pages 45-46 of the Amended Complaint. The averments, in so far as paragraphs 76, 77 and 78 of the Amended Complaint are concerned, reflect consistent and unchanging facts. It is interesting that in response to Averment number 50 of the Amended Complaint, MNC refers the Complainant to the subject tariff.^{3/}

3/

Paragraph 50 of the Amended Complaint states: "Matson Tariff 2034-E, section 5, does not contain any reference to nor state any through routes over which such rates as are contained in section 5 are to be applied".

5.

Conclusion

Wherefore, the premises considered, it is hereby respectfully requested that the Board issue an Order directing Matson Navigation Company to fully response to the Averments listed on Attachment "A" hereto and to further Order that the averments of paragraphs 76, 77, and 78 of the Amended Complaint stand as admitted unless defendant demonstrate that such averments are untrue.

Respectfully submitted,



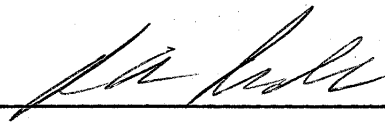
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Attorney For Complainant
DHX, Inc.

Dated - 21 May 2002

Certificate Of Service

I hereby certify that a copy of this motion has been served, by first class mail, postage prepaid, upon the below listed parties of record. Dated this 21st day of May 2002.



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ATTACHMENT "A"
Motion To Make Answer
More Definite

Paragraph Numbers of Amended Complaint to Which
Matson Navigation Refers to its Tariffs

25,26,27,28,30,32,33,34,39,40,41,42,43,44,45,46,47,48,
49,50,51,52,54,70,82,83,84,85,86,95,96,97,104,105,117,
118,119,120,121,134,138,156,162,163,164,165,166,171,
180,185