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May 29, 2002

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BY HAND

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



Re: **DHX, Inc. v. Matson Navigation Company and Sea-Land Service, Inc.,**
Docket No. WCC-105

Dear Secretary Williams:

Enclosed for filing in this proceeding are the original and 10 copies of "Matson Navigation Company's Reply To DHX's 'Motion To Make Answer More Definite,'" as well as a 3.5" computer disk containing the text of the pleading in WordPerfect 5.0 format.

Please date-stamp and return to our messenger the two additional enclosed copies of this pleading.

Many thanks. Please feel free to call if you have any questions.

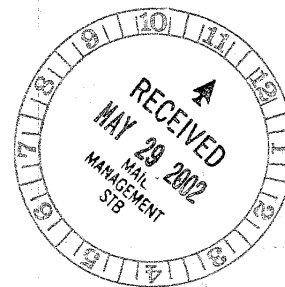
Sincerely,

Scott M. Zimmerman

Enclosures

ENTERED
Office of the Secretary
MAY 29 2002
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



DHX, Inc.,

Plaintiff,

v.

MATSON NAVIGATION COMPANY and
SEA-LAND SERVICE, INC.,

Defendants.

Docket No. WCC-105

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**MATSON NAVIGATION COMPANY'S REPLY TO
DHX'S "MOTION TO MAKE ANSWER MORE DEFINITE"**

Defendant Matson Navigation Company opposes DHX's motion asking the Board to require Matson to supplement its answers to certain specified paragraphs of DHX's complaint.¹ The specific paragraphs of Matson's answer challenged by DHX fairly respond to the corresponding paragraphs of the complaint, and there is no basis for the Board to intervene to order any additional or different response.

The paragraphs DHX complains about fall into two categories: (1) Matson's responses to paragraphs 76, 77, and 78 of the complaint, in which Matson admitted the allegations in those paragraphs "as of the present time," and (2) Matson's responses to various paragraphs of the complaint that purported to characterize the contents of certain Matson tariffs. We will respond to each of those categories in turn.

¹ For brevity, DHX's amended complaint dated April 29, 2002 will be referred to simply as the "complaint."

Paragraphs 76, 77, and 78.

Paragraphs 76, 77, and 78 of the complaint pertain to things that Matson allegedly did, or did not do, "at all times material to this complaint," with respect to issuing bills of lading, issuing freight invoices, and identifying through routings. Those paragraphs, and Matson's answers to them, are as follows:

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

Matson's 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.

Matson's 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 rated by Matson under the Proportional rates in Matson Tariff 2034-E.

Matson's 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.

Paragraphs 76, 77 and 78 thus allege facts without reference to a fixed, identified period of time, but rather “at all times material to this complaint,” an argumentative, vague and conclusory phrase that the complaint never defines. Now, belatedly, DHX tries, in effect, to re-write its complaint yet again, asserting that what it meant by “at all times material to this complaint” should be inferred from unrelated passages at pages 45 and 46 of the complaint, in which DHX recites its request for various types of damages measured from October 1, 1997 to the date of the complaint.

In light of the poorly-worded and ill-defined allegations of paragraphs 76, 77 and 78, Matson’s objections were absolutely correct and well-founded. DHX’s assertion that the time period applicable to those paragraphs should somehow have been inferred from later, unrelated portions of the complaint is simply baseless. Nowhere does the complaint define the phrase “at all times material to this complaint,” either in reference to the period DHX now claims to apply or otherwise, and there is no reason to have inferred an intention to do so. Indeed, elsewhere in the complaint DHX showed that it was perfectly capable of incorporating language by reference when it meant to. See, e.g., complaint ¶¶ 81, 93, 102, 109, 131, 155, 161, 170, 179, 192, 206, 213, 221, 229, 237, and 250. Moreover, DHX has gone to great lengths to define certain terms and phrases in its pleadings – including intended time frames – when it wants them to have a particular meaning. See, for example, Attachment A to “Complainant’s First Interrogatories and Second Request For Production of Documents to Defendant Matson Navigation Company” (attached hereto as Exhibit 1) which includes instructions for

defining no fewer than 12 different words or phrases (including three different definitions for the word “identify” alone) and the time period intended to be covered by the discovery requests. In light of DHX’s demonstrated ability to incorporate language by reference and define terms in a certain way when it intends to, DHX’s use of terminology in paragraphs 76, 77 and 78 *different* than that used in its prayer for relief implies, if anything, that DHX intended the meanings *not* to be the same.

Matson submits that, for the foregoing reasons, it would have been fully within the bounds of fair pleading for Matson simply to have stated its objections to the vague allegations of paragraphs 76, 77, and 78 and leave its response at that. But, in an effort to fairly answer the allegations of those paragraphs to the extent possible, Matson went further and provided a substantive response to each of those paragraphs with respect to the state of affairs at a time that Matson could reasonably identify – namely, the present. There is no basis to conclude that Matson’s answers to these paragraphs violated its obligation of fair response to the complaint, and no basis for requiring Matson to do more now.

Paragraphs characterizing Matson’s tariff provisions

DHX also objects to Matson’s responses to various paragraphs of the complaint that purport to characterize certain provisions of Matson’s publicly-available tariffs, to which Matson responded, *in part*, by asserting that the contents of Matson’s tariffs speak for themselves. DHX, however, ignores most of what Matson said about those paragraphs of the complaint. Because Matson’s answer fully explains the reasons why Matson responded the way it did, it is worth setting out in full what Matson said in its

answer about those paragraphs of the complaint that described or characterized Matson tariff provisions. In its answer, under the heading “General Answer,” Matson said:

“Additionally, the amended complaint includes numerous paragraphs that purport to describe certain provisions of various Matson tariffs. Some of these are stated in the present tense (see, e.g., amended complaint ¶ 27), some are stated in the past tense without identifying the intended time period (see, e.g., amended complaint ¶ 30), and some refer to “all times material to this complaint” – an undefined period of time of unspecified duration (see, e.g., amended complaint ¶ 31). Matson’s tariffs are always subject to review, revision and modification over time; what a particular tariff provision says today might differ from what it said a year ago, or what it might say tomorrow. For that reason, it is neither necessary nor prudent to attempt to admit or deny the plaintiff’s numerous characterizations of Matson tariff provisions at various undefined times as set forth in the amended complaint. Rather, what a particular tariff provision says at a certain point in time is conclusively determinable by direct reference to the tariff provision itself in effect at that time. In other words, the tariffs, as modified from time to time, speak for themselves, and for that reason Matson will respond accordingly below to those various allegations of the amended complaint. *Matson generally denies all of DHX’s descriptions or characterizations of Matson’s tariffs that do not accurately reflect the actual terms of such tariffs.*”

Matson Navigation Company’s Answer to the Amended Complaint, at 2-3 (emphasis supplied). Consistent with that discussion, in response to specific numbered

paragraphs of the complaint that purported to describe or characterize the contents of portions of Matson's tariffs, Matson responded that the contents of the tariffs speak for themselves.

The foregoing makes clear that DHX's motion is baseless, and DHX's assertion that Matson "neither admits nor denies" the allegations related to its tariff provisions is incorrect. Matson's answer clearly fulfilled the purpose of fairly responding to DHX's assertions concerning the content of Matson's tariffs by directing DHX to the definitive source of information about what Matson's tariffs say – namely, the relevant tariffs themselves, to which DHX indisputably has access,² and Matson further generally denied all characterizations or descriptions of its tariffs in the complaint that are inconsistent with the actual language of the tariff provisions. Finally, Matson also explained at length, in the passage quoted above, why that response is appropriate, and those same reasons explain why any different or additional response by Matson is neither necessary nor appropriate now.

In short, DHX already has available to it the most "definite" information about what is in Matson's tariffs – the tariffs themselves. *Cf.* 49 CFR § 1114.26(b) ("Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained . . ."). While

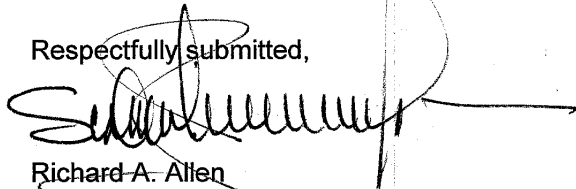
² One of the Matson tariffs discussed in the complaint, Tariff 2034-E, Matson has provided to DHX in discovery. The other two, Tariff 14-F and Tariff 2016-D, are available on Matson's website, www.matson.com.

DHX is free, in its evidentiary submission, to try to draw whatever inferences and frame whatever arguments it can from the provisions of Matson's tariffs, the purpose of the initial pleadings is to identify, clearly and simply, the facts upon which the complaint is based and the extent to which the defendants contest those facts. That purpose, however, would not be served (and in fact would be disserved) by requiring Matson to respond one by one to DHX's argumentative, conclusory and subjective descriptions, characterizations, and restatements of what Matson's tariffs allegedly say or provide, when the content of the tariffs is conclusively and objectively discernable from the tariffs themselves. The only appropriate alternative response to DHX's allegations would be for Matson, in response to each individual paragraph alleging the content of a tariff provision, to simply quote back the actual language of the tariff itself – a time-consuming and needless makework exercise.

CONCLUSION

For the foregoing reasons, Matson respectfully requests that DHX's motion to make Matson's answer more definite be denied.

Respectfully submitted,



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Dated: May 29, 2002

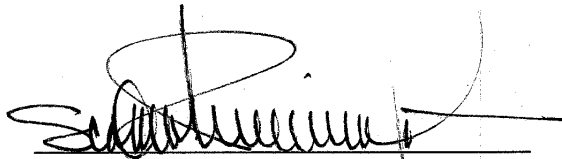
Attorneys for Matson Navigation Company

CERTIFICATE OF SERVICE

I certify that on May 29, 2002, a true and correct copy of "Matson Navigation Company's Reply To DHX's 'Motion To Make Answer More Definite'" was served by overnight delivery upon:

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Scott M. Zimmerman

ATTACHMENT AAdditional Instructions

1. The references to defendant Sea-Land Service, Inc. or SL Services, Inc., including all successor entities and further specifically include the following commonly owned corporations which are - (a) Sea-Land Motor Freight, Inc., (b) Sea-Land Freight Service, Inc., (c) CSX/Sea-Land Intermodal, Inc., and CSX Lines, LLC.
2. The term 'agreement' includes any and all contracts, including 'motor contract carriage agreements', 'contracts of affreightment', 'agreements for contract carriage', 'service contracts' and includes any oral or written statement(s), arrangements, understandings, or other documents which in any manner reflect any written or oral understandings between Matson Navigation Company and any other entity or person as identified in this discovery request.
3. The term 'document' shall mean any medium upon which intelligence or information can be recorded or retrieved and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, publication, article(s), brochure, manual, letter, correspondence, journal, memorandum (including any memorandum or report of a meeting or conversation), invoice, bill, bill of lading, order form, receipt, voucher, check, financial statement, accounting entry, instruction, schedule, record, report, shop order, diary, calendar, telex, telegram, telefax, cable, minutes, notice(s), drafts, demands, chart(s), paper, print, laboratory record, drawing or sketch, diagram, form, graph(s), index, list, tape, photograph(s), microfilm, data sheet(s), data processing card(s), or any other written, recorded, transcribed, punched, taped, filmed, electronically recorded, or graphic matter, however produced or reproduced, that is in your possession, custody or control or over which you have any right of possession or control and in the possession and control of any third party. The term further shall include and mean exact copies of any tangible written, typed, printed or other form of recorded or graphic matter of every kind and description, however produced or reproduced, whether mechanically or electronically recorded, draft, final, original, revised, reproduction, signed or unsigned, sent, received, redrafted, or executed.
4. The time frames covered by these admission requests and document production requests, unless otherwise specified in a particular request, shall be from January 1, 1996 to the date of service of this discovery request. Defendant is under a continuing obligation to supplement or amend any responses given or produced pursuant to Rule 1114.29, 49 CFR (2000 ed.)

5. The term 'communication' means any oral, written or electronic statement, dialogue, colloquy, discussion or conversation, and also means any transfer of thoughts or ideas between persons by means of documents and includes any transfer of data from location to another by electronical or similar means.
6. The term 'relates to' shall mean directly or indirectly, refer to, reflect, describe, pertain to, arise out of or in connection with, or in any way legally, logically, or factually connected with the matter discussed.
7. The term 'complainant' refers to DHX, Inc., including any other person or entity acting or purporting to act on its behalf or under its control.
8. The words 'and' and 'or' shall be construed either disjunctively or conjunctively as necessary to bring within the scope hereof any documents or communications which might otherwise be construed to be outside the scope hereof.
9. If not expressly stated, 'control' means in your possession, custody, or control or under your direction, and includes in the possession, custody, or control of those under the direction of you, your employees, subordinates, counsel, accountants, consultant(s), expert(s), parent or affiliated corporation, and any person purporting to act on your behalf.
10. 'Identify' when used in reference to a natural person means to state his/her full name, present residential address, telephone number, present business title, present business address and affiliation if known. If the above are not known, such information as was last known and his/her residential address and telephone number, business title, business affiliation and business address at the time in question.
11. 'Identify' when used in reference to a document means to state the type of document (e.g. letter, memorandum, contract, e-mail, etc.) or some other means of identifying it, its date, author(s), addressess or addressees, if any, and its present location or custodian. Such request shall include any and all matter in what form so ever maintained by defendant(s), including computer discs, tapes, hard-drives, e-mail repositories and the like. If any such document is no longer in the possession of the defendant(s) or subject to the control of defendant(s), 'identify' also means to state what disposition was made of it and the date(s) of such disposition.
12. 'Identify' when used in reference to an act, occurrence, transaction, decision, statement(s), communications, or conduct (hereinafter referred to collectively as 'act'), means to describe in substance, unless specificity is requested, the event or events constituting such act, what transpired, the place and date thereof, and to identify the person(s) present, the persons involved and the documents referring or relating thereto.

13. All documents and records produced pursuant hereto are to be produced as they are kept in the usual course of business or shall be organized and labeled (without permanently marking the item produced) so as to correspond with the categories or each numbered request hereof.
14. If any privilege is claimed as to any document, state the nature of the claimed privilege and the basis for claiming the privilege as to each specified document or point of information, identifying the document by date, general subject matter, the person(s) that signed or issued the document(s), the person(s) to whom such document was directed, circulated or distributed. All such claims of privilege shall be further identified/summarized and listed in a list of claimed documents subject to privilege which may then be made the subject of a protective agreement or order or otherwise such disposition of documents as is appropriate to this proceeding.
15. To the extent not otherwise defined or described herein, the terms: rates, charges, terms of service, increases, decreases, changes, publication, filing, and the like shall have the same scope and meaning as those terms are defined in the Board's tariff regulations, 49 CFR Part 1312 (1999 ed.)
16. The term 'freight forwarder' is defined to include: freight forwarders as defined under the ICC Termination Act of 1995; Ocean Transportation Intermediaries as defined under the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998; and to further include all persons that tender cargo for transport by defendants that do not have legal title to the cargo tendered and to not come within defendants' term "Beneficial Owner" or that do not have "Beneficial Ownership" of the cargo so tendered to defendants. This term includes all persons that act as shipper's agents or 'third party logistical service providers' whether or not so registered or licensed with any State, Federal or other governmental authority.
17. The term "VOCC" or vessel operating ocean common carrier includes all persons that operate any vessels in the United States ocean trades wheresoever located or with which defendants have any form or arrangement or agreement for the performance of any services, facilities or equipment that may be included in the definition of 'transportation' as stated in the ICC Termination Act of 1995. This specifically does include any and all VOCCs no matter whether such services are provided or received pursuant to any contract, charter, or agreement of any nature whatsoever as defined herein.