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October 7, 2003

BY HAND

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

ENTERED  
Office of Proceedings

OCT -7 2003

Part of  
Public Record



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

Dear Secretary Williams:

I enclose for filing in this proceeding an original and 10 copies of a Matson Navigation Company's Reply to DHX's "Motion to Stay Procedural Schedule, To Renew Motion To Compel Production of Documents And To Defer Filing of Public Version of Complainant's Case."

Sincerely,

  
Richard A. Allen

cc: (w/encl.)  
Rick A. Rude, Esq.  
C. Jonathan Benner, Esq.

Before the  
SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
DHX, Inc.

Complainant,

v.

\_\_\_\_\_  
Matson Navigation Company, Inc. and  
Sea-Land Service, Inc.,

Defendants.  
\_\_\_\_\_

Docket No. WCC-105



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**MATSON NAVIGATION COMPANY'S REPLY TO DHX'S  
"MOTION TO STAY PROCEDURAL SCHEDULE, TO RENEW MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS AND TO DEFER FILING OF PUBLIC VERSION OF  
COMPLAINANT'S CASE"**

Defendant Matson Navigation Company, Inc. ("Matson") hereby responds to DHX, Inc.'s "Motion To Stay Procedural Schedule, To Renew Motion To Compel Production Of Documents And To Defer Filing Of Public Version Of Complainant's Case," dated October 3, 2003. The motion asks the Board to (1) compel Defendant Sea-Land Service ("SL") to produce certain documents, (2) stay the procedural schedule so that DHX's initial evidence and argument will not be due until 30 days after the requested documents are produced, with the time frames thereafter kept the same as at present, and (3) permit the parties to defer filing the public version of their evidentiary submissions until 20 after the filing of DHX's rebuttal case.

Matson takes no position on point 1, as the motion to compel pertains to SL alone. Matson objects strongly, however, to points 2 and 3. Each of those requests are

baseless and, if granted, would severely prejudice the presentation of Matson's case and its ability to respond to the case of DHX.

First, as to the procedural schedule, depositions were completed on August 1, 2003, thereby concluding discovery. The present schedule, set forth in Decision No. 5, was agreed to by all parties. It provides for DHX's opening evidence to be filed on October 21, 2003, Matson's and SL's reply statements on December 5, 2003 and DHX's rebuttal on January 7, 2004. DHX claims that it needs more time because SL has not furnished all documents requested by DHX in discovery, which DHX claims are relevant to one of the 14 counts in the Amended Complaint that DHX filed on April 29, 2002. This count, Count 6 of Part II of the Amended Complaint, alleges, in brief, that SL is offering volume pricing to other shippers in the Hawaii trade but has declined to offer such pricing to DHX.<sup>1</sup>

Matson believes that this allegation is patently without merit as a matter of law, but putting aside the merits (which will be addressed in the parties evidentiary submissions), DHX's claim that it cannot prepare and file its opening evidentiary statement by October 21, 2003 until SL furnishes all copies of various correspondence between SL and its shippers pertaining to rates and volumes is plainly insubstantial. DHX's motion itself shows that SL has provided some examples of the requested

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<sup>1</sup> The Amended Complaint originally contained 16 counts, but the Board granted SL's motion to dismiss two of the counts in its decision served May 14, 2003. The Board granted the motion to dismiss the count in Part III of the amended complaint because it "appears to be no more than a broad ranging allegation that all of defendants' rates are discriminatory. But the discrimination remedy was repealed as to this trade in ICCTA. " Decision at 8. Count 6 of Part II, which similarly appears to allege that SL's rates are discriminatory, was not contained in the complaint DHX originally filed against Matson and SL on October 12, 1999.

correspondence to DHX's counsel, and Matson understands that SL will provide others shortly.<sup>2</sup> More importantly, the substance and much of the details of the correspondence at issue was described at some length by an SL witness during his deposition by DHX's counsel on July 8, 2003, the transcript of which is attached to DHX's motion for extension. DHX's claim that it cannot meet the procedural schedule set by the Board on September 5, 2003 because SL has not provided copies of all correspondence between it and certain shippers, which relate to only one of 14 counts in the Amended Complaint and the substance of which was provided to DHX three months ago, is utterly groundless.

Furthermore, the present procedural schedule was jointly proposed by the parties after negotiation. Matson's consideration of the length of time appropriate to prepare its evidence following the submission of DHX's was based, in part, upon consideration of the relative amounts of time the schedule would give to all parties to prepare their submissions. DHX's requested relief would negate that consideration; it would give DHX an indeterminate, but possibly substantial, extension of time to prepare its case against Matson, but would give Matson no additional time following the receipt of DHX's evidence to prepare its response. The inequity of that proposal, Matson submits, is obvious. To the extent that the Board orders any extension of the deadline for DHX to file its case in chief, fundamental fairness would require that Matson (and SL) be given

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<sup>2</sup> The undersigned was present during a discussion of this matter between counsel for DHX and counsel for SL on this matter, and it is the recollection of the undersigned that counsel for SL and DHX informally agreed that SL's production of some unspecified number of examples of such correspondence would satisfy SL's discovery obligations.

an equivalent elongation of the period between DHX's filing date and the date for Matson and SL to submit their evidentiary filings.

Matson also respectfully submits that DHX's request to permit deferral of the public versions of the parties' filings must be rejected. Under the DHX proposal, Matson and SL would be required to assemble their entire evidentiary filings without ever being able to show their own clients *any* part of the DHX evidentiary submission to which they must respond, or even say anything of substance to them about it. Aside from likely being unprecedented, such a situation would be completely unworkable and, again, a violation of fundamental fairness and principles of due process.<sup>3</sup> DHX has provided no sound reason for the extraordinary departure from the practice that other parties have managed to follow in innumerable cases, and the Board should reject the request.

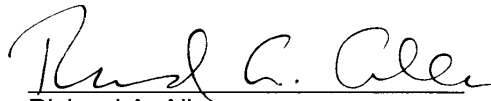
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<sup>3</sup> DHX asserts, remarkably, that such a restriction "can not harm Defendants," apparently, in DHX's view, because "Defendants have already been provided the designation of the information that remains confidential versus public." To the contrary, the extraordinary prejudice DHX's proposal would impose is obvious. While it is true that, as is typical in cases involving a protective order, some information produced in discovery by DHX (and some produced by the carriers) has been designated "Highly Confidential" and some "Public," the carriers do not know, and will not know until DHX's evidentiary submission is filed, what evidence DHX will choose to present, how it will choose to present it, and, most importantly, *what DHX will say about it*. Under DHX's proposal, *all* of that information will be off limits to the carriers themselves until after the carriers' submissions, and DHX's rebuttal, are filed. The extraordinarily prejudicial effect of that proposal should be glaringly apparent.

### CONCLUSION

The Board should deny DHX's requests to stay the procedural schedule and to permit the parties to defer the filing of public versions of their pleadings until after DHX's rebuttal is filed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard A. Allen", is written over a horizontal line.

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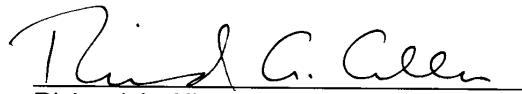
Dated: October 7, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7th, 2003 a copy of the foregoing pleading was served by overnight delivery on the following:

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