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RICHARD A. ALLEN

January 24, 2005

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BY HAND

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

ENTERED
Office of Proceedings

JAN 24 2005

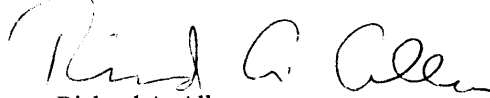
Part of
Public Record

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

Dear Secretary Williams:

I enclose for filing in the above-captioned proceeding an original and ten copies of
Matson Navigation Company's Reply in Opposition to Complainant's Petition for
Reconsideration.

Sincerely,


Richard A. Allen

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

213070



Docket No. WCC-105

JAN 24 2005

**Part of
Public Record**

MATSON NAVIGATION COMPANY'S REPLY IN OPPOSITION TO COMPLAINANT'S PETITION FOR RECONSIDERATION

January 24, 2004

DHX, Inc.)
)
 Plaintiff,)
)
 v.) Docket No. WCC-105
)
 MATSON NAVIGATION COMPANY and)
 SEA-LAND SERVICE, INC.,¹)
)
 Defendants.)
)
)

Defendant Matson Navigation Company opposes complainant DHX, Inc's petition for reconsideration filed January 4, 2005 ("Petition") and asks that it be denied. In its Petition, DHX does not challenge any aspect of the STB's decision served December 15, 2004, in which the Board denied DHX's amended complaint in its entirety ("December 2004 Decision"). Instead, the Petition seeks reconsideration only of a portion of an earlier decision served May 14, 2003 ("May 2003 Decision") in which the Board dismissed Part III of DHX's amended complaint.² As an "alternative to reconsideration," DHX seeks (1) "clarification" that "claims of service and price discrimination are not within the jurisdiction of the Board and therefore need not be

² The May 2003 Decision addressed other issues as well, but its dismissal of the Part III count is the only issue raised in the Petition.

brought to the Board,” and (2) “affirmance of the continuing effect of 49 CFR 1312.2(d) (2004).” Petition at 2.³

DHX’s essential argument appears to be that in dismissing Part III of the amended complaint, the Board’s analysis of the relationship between “discrimination” and rate reasonableness under 49 U.S.C. §13701(a) somehow “conflicts” with language in an order of the United States District Court for the Central District of Florida in *DHX, Inc. v. CSX Lines, LLC*, Case No. CV 02-6740 RJK-MAN (C.D. Cal. filed January 28, 2003) (the “court decision”). There is, however, no such conflict. DHX’s Petition fails to show that reconsideration is warranted or that any other “clarification” is needed. The Petition therefore should be denied.

BACKGROUND

Part III of the Amended Complaint

Part III of DHX’s amended complaint comprises a single count entitled “Complainant’s Claim As To Both Defendants.” In that count, DHX alleges that Matson and Horizon engaged in certain acts that resulted in a “failure of market competition” in the Hawaii trade (§260). As a result, it alleges, DHX has been “denied the benefit of a competitive market” for transportation services in the Hawaii trade (§261) and “has been obliged to pay unjust, discriminatory and unreasonable rates and charges” in violation of 49 U.S.C. §13701(a). (§ 262). DHX asserts as damages (i) the amount by which the rates DHX had paid for certain shipments exceeded the rates the carriers allegedly charged each other for similar shipments under a reciprocal services agreement (§265), and (ii) the amount by which the rates DHX had paid for certain shipments exceeded the

³ The pages of the Petition are not numbered; we cite them as if the cover were page 1.

rates the carriers had established in tariff provisions for similar shipments for the benefit of other specific shippers (§266). Part III, in sum, amounts to a complaint that the carriers have charged DHX higher rates than they have charged either themselves or other shippers for similar shipments.

The May 2003 Decision

In its May 2003 Decision, the Board granted Horizon's motion to dismiss the count in Part III. The Board noted that "DHX itself has conceded that its objection in Part III is to demonstrate that defendants' rates, overall, are unreasonable because they are allegedly discriminatory." Slip op. at 8. In other words, DHX's conceded intent in Part III, said the Board is "to compare rates that one shipper pays to a carrier with those paid by another shipper to the same carrier." *Id.* But, citing its prior analysis in *GovGuam*,⁴ the Board observed that "the discrimination remedy was repealed as to this trade in ICCTA," and therefore concluded that "DHX cannot possibly prevail in its argument that the assailed rates are unreasonable even if it did show that different shippers pay different rates for arguably similar services." *Id.* Thus, the Board held, "we cannot say that Part III of the amended complaint states reasonable grounds or a basis on which we can grant the relief DHX seeks," and the Board accordingly dismissed Part III. *Id.* at 8-9.

The District Court Action

In August of 2002, while the amended complaint was pending before the Board, DHX sued Horizon in the U.S. District Court for the Central District of California. Matson was not a party to that suit. The complaint included one count, entitled

⁴ *Government of the Territory of Guam v. Sea-Land Service, Inc.*, STB Docket No. WCC-101 (decision served November 15, 2001).

“Common Law Price Discrimination.” *See* Petition, Attachment 4 at ¶¶ 16-36. In that count, DHX alleged, in sum, that Horizon had offered to certain shippers rates and service terms more favorable than those offered to DHX. *See id.* ¶¶ 23-25, 30-32, 36. According to DHX, this violated Horizon’s “federal common law duty” to “treat all shipping customers equally.” *Id.* ¶¶ 33-34. DHX sought compensatory damages, punitive damages, and injunctive relief.

In its January 28, 2003 decision, the court granted Horizon’s motion to dismiss the complaint with prejudice. The Court held that the complaint failed to state a claim as to which relief could be granted, as DHX had “failed to establish the existence of a common law cause of action for rate discrimination against an ocean carrier.” Petition, Attachment 6 at 3, ¶1. Instead, said the court, the subject matter of the complaint “lies within the primary jurisdiction of the [STB], not this Court,” because “[d]etermining whether the rates and practices of an ocean carrier in the non-contiguous domestic trades are reasonable (*i.e.*, lawful) is a matter committed to the expertise of the STB.” *Id.*, ¶2 (citing 49 U.S.C. §13701(a) and case law). Indeed, the court noted the pendency of this STB proceeding, which the court said “is based on substantially the same operative facts” as the court case, and that the STB had already said it would “consider DHX’s claims” that Horizon was “trying to put DHX out of business” through Horizon’s “pricing and other practices.” *Id.* at 4.

In discussing its decision to dismiss the complaint before it, the court noted that “[w]hether allegedly discriminatory rates are improper historically has been closely tied to the reasonableness of the rates. *See MCI Tel. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230, 114 S. Ct. 2223, 129 L.Ed. 2d 182 (1994),” and further that “[t]he statute

administered by the STB indicates that discrimination remains relevant to the agency's decision-making, 49 U.S.C. §§13101(a)(1)(D) and 13702(b)(4) (2000), despite elimination of a specific discrimination cause of action previously benefiting freight forwarders." Those two sentences are the thread on which DHX's entire argument for reconsideration hangs. DHX asserts, essentially, that the Board's analysis in the May 2003 Decision of discrimination and rate reasonableness under §13701(a) somehow conflicts with those statements by the court. That conflict, according to DHX, amounts to "material error" by the Board that must be remedied on reconsideration. *See* Petition at 6; 49 C.F.R. §1115.3(b)(2).

As we will now discuss, DHX's position is meritless; there is no conflict between the May 2003 Decision and the court decision, the Board has committed no "material error," and there is no basis for granting reconsideration.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE MAY 2003 DECISION AND THE COURT'S DECISION.

As the court noted, the claim before it was "based on substantially the same operative facts" as the amended complaint then pending before the Board—they both alleged, in essence, that the carriers were acting unlawfully by charging DHX rates higher than they were charging other shippers for similar shipments. The issue that the court decision addressed was simply: Who is to decide that species of complaint—a court (*i.e.* itself) or the Board? The Court's answer was the Board, and it accordingly dismissed the complaint. Later, in the May 2003 Decision, the Board, acting on the authority *that the court agreed it possessed*, decided the *merits* of DHX's complaint. The Board held, on the merits, that a claim amounting to simply an allegation of differential

pricing—that is, charging different rates to different shippers for similar shipments—is simply not unlawful under ICCTA. Nothing in the Board’s decision on the *merits* of that question conflicts with the Court’s earlier conclusion that the Board was the proper forum to decide it.

The fundamental flaw in DHX’s Petition is that it confuses the question of *who* has the authority to decide a claim like DHX’s with the question of *what* the deciding body decides. On the former question the court decision and the STB’s May 2003 Decision agree: it is the Board. On the latter question, the STB held that, as a matter of law, the rate differentiation alleged by DHX did not demonstrate that the rates charged to DHX were unreasonable, while the court expressed no view on the matter. On neither issue was there any conflict between the court’s decision and the May 2003 Decision.

1. The court only decided who should decide—namely, the STB. The court, faced with the question of identifying the proper forum for resolving the type of complaint raised by DHX, held that the complaint failed to state a claim on which the court could grant relief, and it therefore dismissed the complaint, because (a) DHX failed to show that there existed any common law cause of action for rate discrimination, Petition attachment 6, p. 3, ¶1, and (b) claims such as DHX’s “lie[] within the primary jurisdiction of the [STB],” because of the Board’s “exclusive and primary jurisdiction” under §13701(a) “to determine rate reasonableness.” *Id.*, pp. 3-4, ¶2. The court stated:

Determining whether the rates and practices of an ocean carrier in the non-contiguous domestic trades are reasonable (*i.e.*, lawful) is a matter committed to the expertise of the STB. 49 U.S.C. § 13701(a) (2000); *Sea-Land Service v. Atlantic Pacific International*, 61 F. Supp. 2d 1102, 1113 (D.C. Haw. 1999); *Ocean Logistics Management, Inc. v. NPR, Inc.*, 38 F.Supp.2d 77, 83-84 (D.P.R. 1999). *See also RTC Transportation, Inc. v. Motor Carrier Audit & Collection Co.*, 971 F.2d 368, 372 (9th Cir. 1992)

(the ICC had “exclusive primary jurisdiction” to determine rate reasonableness).

Id.

In sum, the court dismissed the complaint because it held the STB, not the court, was the proper forum for deciding such claims, based on the Board’s exclusive jurisdiction to decide questions of rate reasonableness. This ruling was clearly correct, as the authorities cited by the court show, and nothing in DHX’s Petition refutes that conclusion.

2. The court expressed no view on what the result of the STB’s analysis should, or must, be. While the court decided that the STB was the proper forum for DHX’s complaint, nothing in the court’s decision, including the two sentences DHX relies on, purports to tell the STB what the result of its analysis on the merits should be. Indeed, the effect of those two sentences is simply to reinforce and emphasize the court’s conclusion that it is *the STB*, not the court, that is to decide legality of the carriers’ actions.

The first sentence DHX relies on—“Whether allegedly discriminatory rates are improper historically been closely tied to the reasonableness of the rates” (citing to *MCI Tel. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994))—merely makes the point that the issue of rate discrimination is one that historically (*i.e.*, pre-ICCTA) has been analyzed in conjunction with the agency’s determination of rate reasonableness, thus supporting the conclusion that the Board, not the court, is the proper forum for the complaint. Note the court’s use of the word “whether”: It does not say or imply that discriminatory rates *are* unreasonable; it simply notes that the question of *whether* they

are has historically been for *the agency* to decide under its authority to decide the reasonableness of rates.

The next sentence—“The statute administered by the STB indicates that discrimination remains relevant to the agency’s decision-making . . . despite elimination of a specific discrimination cause of action previously benefiting freight forwarders”—simply confirms that the same principle applies post-ICCTA: Despite ICCTA’s elimination of a specific discrimination cause of action, a claim like DHX’s still is one that is within the power of the Board to decide.

DHX seeks to create the impression of a conflict between the court decision and the May 2003 Decision by repeatedly mischaracterizing what the court says. For example, DHX incorrectly describes the court as “rul[ing]” that Part III of the amended complaint before the Board “state[s] a claim under section 13701(a)” — *i.e.*, that such allegations, if proven true, would constitute a violation of §13701(a). Additionally, DHX repeatedly asserts that the court held that discrimination is an “element” or an “integral part” of a claim of unreasonable rates under §13701(a). *See* Petition at 4, 11.

But the court held nothing of the kind. DHX overstates and mischaracterizes what was purely a jurisdictional decision by the court. All the court said is that, post-ICCTA, discrimination remains “relevant” to the agency’s decision-making, meaning that it is still within the ambit of the Board’s authority to consider under the umbrella of its rate reasonableness power, thus supporting the court’s conclusion that it should dismiss the claim before it and leave the matter to the STB. The court did not hold that DHX’s complaint “states a claim” under §13701(a), nor that, in applying §13701, a finding of discriminatory treatment must be construed negatively as an indicia or “element” of

unreasonableness. The court made no value judgment about *how* the Board, in exercising its jurisdiction, should view discrimination or analyze the interplay between rate reasonableness and discrimination in resolving claims presented to it, or what result the Board should, or must, reach. It merely held that it is up to the STB, not the court, to decide those questions.⁵

The two statutory provisions the court cites (Petition, Attachment 6 at 4) to support its statement about discrimination's continued "relevance" make clear that DHX's characterizations of the court's decision are wrong. The first, 49 U.S.C. §13101(a)(1)(D), is an excerpt from the national transportation policy⁶ providing that one aspect of the policy is "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." A general policy directive to the Board to "encourage" reasonable rates without unreasonable discrimination is not, however, equivalent to a legislative decree that rates are unreasonable merely because they differ for different customers. The statute only requires rates to be "reasonable," and ICCTA's repeal of a previous statutory provision that specifically banned "unreasonable discrimination"

⁵ Because the court did not hold, as DHX contends it did, that Part III of the amended complaint "states a claim" under §13701(a), DHX's argument that Horizon is barred by collateral estoppel principles from disputing that alleged holding (Petition, Argument III) proceeds from a false premise. Moreover, even if that argument were valid it would not apply to Matson in any event, as Matson was not a party to the court case and Horizon's motion to dismiss Part III of the amended complaint before the Board was not filed "on behalf of" Matson as DHX wrongly claims, although Matson fully agrees with the Board's reasoning in granting it.

⁶ The national transportation policy, as the Board and the courts have held, is a set of policy objectives that constitute "general guidance" and not an independent source of rulemaking power or right of action. See December 2004 Decision, slip op. at 5 and authorities cited.

clearly supports the Board's determination that rates are *not* unreasonable merely because they are different for different customers, as DHX alleged.

The other statute the court cites, 49 U.S.C. §13704(b)(4), makes the point just as clearly. It provides that a carrier can vary the rates it charges based on the volume of cargo shipped—an example of rate discrimination being not only not prohibited, but in fact expressly condoned. That statute thus also confirms that the court's allusion to discrimination "remaining relevant" to the agency's decision-making was *not* intended to suggest a pejorative gloss on the term "discrimination," as DHX apparently believes, but was simply a statement of jurisdictional fact: Post-ICCTA, the STB retains the exclusive authority to review, under a rate reasonableness inquiry, situations involving allegations of differential pricing—that is, discrimination—by carriers among shippers.

3. Consistent with the court's decision, the Board exercised its jurisdiction to decide the allegations in Part III of the amended complaint. In the May 2003 Decision, the Board exercised the power, which the court acknowledged the Board possessed, to decide on the merits whether DHX's allegations of discriminatory treatment in Part III would, if proven, violate the rate reasonableness requirement of §13701(a). The Board concluded they would not, following the reasoning it first articulated in *GovGuam*. There, the Board reasoned that ICCTA's repeal of a previously-existing express statutory prohibition on discrimination reflected Congress' determination that mere rate discrimination among shippers by water carriers in the noncontiguous domestic trades is not to be considered unlawful, and that to read a specific, repealed provision into another section of the statute "would plainly violate the Congressional intent." *GovGuam*, slip op. at 5. In the May 2003 Decision the Board reiterated that "the

discrimination remedy was repealed as to this trade in ICCTA,” and therefore concluded that “DHX cannot possibly prevail in its argument that the assailed rates are unreasonable even if it did show that different shippers pay different rates for arguably similar services.” May 2003 Decision, slip op. at 8 (citing *GovGuam*).⁷

In sum, the Board did, as the court indicated it should, resolve the merits of DHX’s claim of discrimination under its authority to decide rate reasonableness. It dismissed Part III not because it concluded that it lacked jurisdiction to decide discrimination claims, but rather because the complained-of discrimination is simply not unreasonable under §13701(a) as a matter of law. The court, on the other hand, expressed no opinion as to whether the complained-of actions were lawful or unlawful. There is, therefore, no conflict between the court decision and the May 2003 decision, and thus no “material error” warranting reconsideration.

II. THE “ALTERNATE” RELIEF REQUESTED BY DHX IS PRECISELY CONTRARY TO THE CONSISTENT CONCLUSIONS OF THE COURT AND THE BOARD.

As an “alternative to reconsideration,” DHX seeks (1) “clarification” that “claims of service and price discrimination are not within the jurisdiction of the Board and therefore need not be brought to the Board,” and (2) “affirmance of the continuing effect

⁷ DHX asserts (Petition at 4-5) that: (1) the Board’s justification for dismissing Part III was that the Board was “developing the appropriate methodology” in the *GovGuam* case for assessing the individual rates in Part III, but that (2) the Board is *not*, in fact, developing that type of methodology in *GovGuam*, and therefore (3) the dismissal of Part III was “plain error” because its asserted justification was incorrect. The plain error, however, is DHX’s. While the May 2003 Decision notes, as an aside, that the Board is developing a rate reasonableness methodology in the *GovGuam* case, that statement was not the basis for the Board’s dismissal of Part III. The Board dismissed Part III because it concluded that the elimination of a specific discrimination remedy in ICCTA signaled Congress’ intent that, as a matter of law, mere rate differentiation does make rates unreasonable under §13701(a).

of 49 CFR 1312.2(d) (2004).” Petition at 2. Both requested “clarifications” are completely backward and should be rejected.

As the entire foregoing discussion shows, DHX’s requested clarification that “claims of service and price discrimination are not within the jurisdiction of the Board and therefore need not be brought to the Board,” (and thus remain, in DHX’s view, available for resolution in the first instance by a court) is precisely the *opposite* of the conclusion reached by both the court and the Board. The entire thrust of the court’s decision is that, post-ICCTA, allegations of discriminatory conduct *are* still within the Board’s power to decide under its rate reasonableness authority; that is why the court dismissed the claim before it. Consistent with that holding, the Board took jurisdiction of DHX’s discrimination claim in Part III of the amended complaint and concluded, on the merits, that conduct of the type alleged in that count simply *is not unlawful* under §13701(a). Holding that the complained-of conduct is not unlawful is not the same as holding that the Board has no *jurisdiction* over the claim. DHX’s requested “clarification” is flat wrong and would contradict both the court’s holding and the May 2003 Decision.

DHX’s wish for the Board to “affirm” the “ongoing effect” of 49 C.F.R. § 1312.2(d) is equally misplaced. DHX asserts that the Board should “re-affirm its regulation [*i.e.*, § 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*.” Petition at 16 (*italics supplied*). Thus, it appears that DHX wants to read § 1312.2(d) as a sort of

back-door substantive grant of jurisdiction to courts to hear in the first instance claims of rate discrimination involving published tariffs, and seeks “clarification” to that effect.

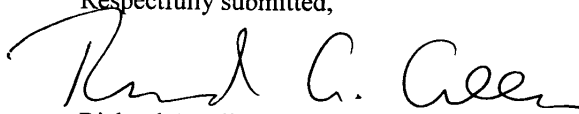
That, however, is emphatically not what that provision means, and DHX’s reading, again, is exactly contrary to the jurisdictional conclusion reached by the court and the Board that claims involving the reasonableness of rates (including those alleging some sort of discriminatory conduct) belong before the STB. Section 1312.2(d) is not a grant of court jurisdiction; it simply provides that a carrier cannot avoid liability for an otherwise unlawful rate or practice simply by memorializing that rate or practice in a published tariff.⁸ It is completely irrelevant to this case. No argument pertaining to § 1312.2 has been raised in this case, and neither the court nor the Board held that an otherwise illegal rate or practice by the carriers has been immunized by publication in a tariff. Rather, the Board has determined that the rates and practices DHX complains about *are simply not illegal in the first place*. Section 1312.2(d) has no relevance here. If anything, the Board should disabuse DHX of the false notion that § 1312.2(d) is in any way a grant of jurisdiction to the courts or gives shippers a right of action to bring rate discrimination cases in court rather than to the Board.

⁸ “(d) Effect of filing. The tender of a tariff and its receipt and acceptance by the Board do not relieve a carrier of liability for violations of the Act, other laws, the Board's regulations, or any decision of the Board or a court, or have any effect on the rights of persons to file complaints for substantive violations of the Act or the Board's regulations.” 49 C.F.R. §1312.2(d).

CONCLUSION

For the foregoing reasons, DHX's Petition For Reconsideration should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard A. Allen". The signature is fluid and cursive, with the first name "Richard" being more prominent and the last name "Allen" following in a similar style.

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Attorneys for Matson Navigation Company

Dated: January 24, 2005

CERTIFICATE OF SERVICE

I certify that on January 24, 2005 a true and correct copy of "Matson Navigation Company's Opposition To Complainant's Petition For Reconsideration" was served by facsimile and by U.S. mail, postage pre-paid, upon:

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