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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.
v.
MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

Decided: June 7, 2005

We are denying a petition filed by DHX, Inc. (DHX), seeking reconsideration of the decision served on May 14, 2003 (May 2003 decision), which dismissed DHX's amended complaint in part. We are also denying DHX's alternative request for clarification of the decision served on December 15, 2004 (December 2004 decision), which denied the remainder of DHX's amended complaint.

BACKGROUND

DHX is a freight forwarder, which is an entity that holds the dual status of carrier (vis-à-vis its customers) and shipper (vis-à-vis the underlying carrier it uses). See Exem. of Freight Forwarders From Tariff Filing Requir., 2 S.T.B. 48, 50 (1997). As a freight forwarder, DHX is both a user and a competitor of the underlying water carriers to which it tenders traffic. Defendants Matson Navigation Company (Matson) and Sea-Land Service, Inc. (formerly known simply as Sea-Land, now known as Horizon) (collectively, defendants) are two water carriers operating in the noncontiguous domestic trade[1] between Hawaii and United States ports. DHX uses the services of Matson and Horizon.

In recent years, DHX began to go beyond the traditional role of a freight forwarder – aggregating smaller shipments into larger lots that qualify for the water carriers' lower volume rates – and to instead target the water carriers' larger customers that already tendered volume traffic to the carriers. When defendants realized that DHX was targeting shippers that had previously been tendering goods directly to the carriers in full containerload ("FCL") lots, they began taking specific actions designed to induce their FCL shippers to begin dealing directly with them again. Among other things, they amended their tariffs so that certain discounts originally meant for their direct FCL shippers would now be limited to apply only to those shippers, and would not apply to freight forwarders such as DHX.

[1] The noncontiguous domestic trade involves water transportation that originates or terminates in Alaska, Hawaii, or a United States territory or possession. See 49 U.S.C. 13102(15).

DHX then filed a complaint with the Board. Its complaint initially was premised on the argument that the carriers' increased rates to DHX were unlawful because they were not protected by the "zone of reasonableness" (ZOR) provisions of 49 U.S.C. 13701(d), which establish a safe harbor for certain levels of rate increases. However, the Board observed, in a decision in this proceeding served on December 21, 2001, that DHX could not prevail simply by arguing that the rate increases exceeded the ZOR. The Board also explained that, although DHX had framed its cases as a challenge to the reasonableness of defendants' rate levels, DHX's complaint appeared to be directed instead at the reasonableness of the defendants' pricing practices. DHX amended its complaint in April 2002 to include, among other things, an unreasonable practice claim, but it also continued to allege that defendants' rate levels were unreasonable because they exceeded the rates that defendants charged their direct FCL shippers.

In August 2002, DHX also filed a civil complaint against Horizon in federal district court, based on a claim of common law rate discrimination. In an order dated January 24, 2003,[2] the district court dismissed the complaint on the ground that there is no common law cause of action for rate discrimination against a carrier operating in the noncontiguous domestic trade. The court recognized that the Interstate Commerce Act as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), contains no specific statutory prohibition against discrimination by carriers in the noncontiguous domestic trade; and found that primary jurisdiction to determine the lawfulness of a water carrier's conduct regarding the transportation that it provides resides in the Board, which, the court noted, was already entertaining DHX's complaint.

In the May 2003 decision, the Board found that DHX's claim that rates charged to DHX were unreasonably high if they exceeded the rates assessed to defendants' direct FCL shippers amounted to a claim of unreasonable discrimination, which is not statutorily prohibited as to water carriers in the noncontiguous domestic trade. Accordingly, the Board dismissed that part of DHX's amended complaint. Subsequently, in the December 2004 decision, the Board denied the remainder of DHX's amended complaint. As here pertinent, the Board found that it was not an unreasonable practice for defendants to treat their freight forwarder customers/competitors differently from the way they treat their direct FCL shippers.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration of a decision of the entire Board will be granted only if the petitioner shows that (1) the prior action will be "affected materially" because of "new evidence or changed circumstances" or (2) the prior action involves "material error." DHX presents a laundry list of alleged errors made in prior decisions in this matter, but its argument is essentially that it is discriminatory for water carriers to treat their freight forwarder competitors differently from their direct FCL shippers and that this conduct must be unlawful and actionable. Our prior decision did find that it was not an unreasonable practice for the defendants to treat DHX differently from their other shippers, and DHX does not directly seek reconsideration of that finding. Instead, DHX argues that either there was error in finding that there is no statutory remedy for such pricing or that there must be a common law remedy.

[2] DHX, Inc. v. CSX Lines, LLC, Case No. CV 02-6740 RJK (C.D. Cal. Jan. 28, 2003).

DHX has not demonstrated that we should reverse or clarify the prior decisions. DHX cannot point to any antidiscrimination provision in the Interstate Commerce Act applicable to the noncontiguous domestic trade. The finding that there is no regulatory remedy of the sort envisioned by DHX is not inconsistent with the district court's ruling that there is no common law discrimination claim available. Here, the district court found that we have primary jurisdiction to address the lawfulness of the conduct that DHX challenges, and that is exactly what we did in the December 2004 decision by finding that defendants' treatment of DHX vis-à-vis their direct FCL shippers did not constitute an unreasonable practice. There is no incompatibility that would require us either to change the May 2003 decision or to clarify our December 2004 decision.

DHX raises several other specific allegations of error, but none has merit. It claims that the Board overlooked the transportation policy articulated in 49 U.S.C. 13101(a)(1)(D) in favor of nondiscriminatory pricing; but the Board, while pointing out that section 13101 does not create a substantive right of action, in fact considered whether it was permissible under other provisions of the Interstate Commerce Act for defendants to treat forwarders differently from their direct FCL shippers. December 2004 decision at 3-6; May 2003 decision at 7-8. DHX objects to the Board's references to the decision in Government of the Territory of Guam v. Sea-Land Servs. Inc., STB Docket No. WCC-101 (STB served Nov. 15, 2001) (GovGuam), where the Board similarly found no express statutory prohibition against discrimination, but we stand by the statutory analysis in both cases. DHX also seems to claim that we improperly relied on a new maximum rate analysis being considered in GovGuam in dismissing its rate reasonableness claim here. Our ruling in the May 2003 decision was based not on any new inquiry in GovGuam but on DHX's attempt to equate discrimination and rate reasonableness. DHX reiterates its assertion, which was properly rejected in the December 2004 decision, that the carriers' tariffs were technically deficient, but it provides no new evidence or argument to support its claim. Finally, complaining about the defenses that have apparently been made by carriers in various court cases that matters contained in a tariff cannot be challenged in the courts, DHX asks us to clarify our regulation at 49 CFR 1312.2(d), which provides that the filing of a tariff does not protect carriers from liability for violations of the Interstate Commerce Act. That regulation, however, is clear on its face.

In sum, DHX has failed to show any basis for reconsideration or clarification, and its petition will therefore be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied.

2. The request for clarification is denied.

3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary