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March 6, 2002

**BY HAND**

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

ENTERED  
Office of the Secretary

MAR 07 2002

Part of  
Public Record



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 the Reply Of Matson Navigation Company, Inc. And Sea-Land Service Inc. To Complainant DHX, Inc.'s Motion To Establish A Procedural Schedule, 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 three additional enclosed copies of this pleading.

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

Sincerely,

Scott M. Zimmerman

Enclosures

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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**REPLY OF MATSON NAVIGATION COMPANY, INC. AND SEA-LAND SERVICE INC.  
TO COMPLAINANT DHX, INC.'S MOTION TO ESTABLISH A PROCEDURAL  
SCHEDULE**

Defendants Matson Navigation Company, Inc. ("Matson") and Sea-Land Service, Inc. ("Sea-Land"), pursuant to 49 C.F.R. § 1104.13, hereby respond to Complainant's Motion to Establish a Procedural Schedule served February 14, 2002 ("DHX Motion"). Motions proposing divergent schedules were submitted by both sides in this dispute in response to the Board's December 21, 2001 order ("Decision") that directed consultations among the parties and the submissions of proposals for the scheduling of further proceedings. The parties were unable to reach agreement and hence submitted separate proposals.

The primary points of contention between the parties are defendants' suggestion that DHX be required to clarify, by amendment, its complaint, and differing views on the length of time that should be required to complete the proceeding. The carriers'

advocacy of an amended complaint followed by a relatively compressed schedule is based on the breadth and vagueness of the original complaint. The carriers' position that an amended, focused complaint is essential to a disciplined and cost-effective resolution of the proceeding has been reinforced by statements of DHX counsel both in DHX's proposed schedule and in correspondence leading to the initial filings of the parties. DHX has done little to allay our fears that DHX views this litigation not as a response to a particularized actionable grievance, but as a platform from which a lengthy scavenger hunt can be conducted to determine whether actionable issues presently unknown to complainant might be revealed.<sup>1</sup>

If there is a way to narrow the differences between the parties, it lies in points already made by the Board in its Decision denying the carriers' Motions to Dismiss. The Board acknowledged numerous deficiencies in the complaint and provided the following points of guidance:

1. Overflow rates are "components of rates applicable to multi-container shipments" and DHX cannot challenge their lawfulness as if they were separate rates. Decision at 5;
2. DHX cannot invoke an "unreasonable practices" theory to sustain an otherwise deficient attack on rates. Decision at 6;

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<sup>1</sup> DHX also suggests that the Board should impose a lengthy discovery process as a means of forcing a settlement. DHX Motion at 2, n.1. We trust that mere mention of this position is sufficient to defeat DHX's effort to enlist the Board's aid in such an abuse of pre-hearing discovery.

3. Policy statements in 49 U.S.C. § 13101 do not provide DHX with independent causes of action. See *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104 (STB served Dec. 10, 1999).

An amended complaint is essential to reflect these limitations and to identify with precision the particular rates DHX is challenging.

Contrary to DHX's assertions, there is nothing peculiar or unique about this complaint that merits according DHX unlimited roaming room in its conduct of the proceeding. The issues contained in the Complaint, as limited by the Board's Decision, are substantially similar to issues routinely disposed of by the Board and its predecessor agency since 1887. The procedures and time frames suggested by *Matson* and *Sea-Land* are consistent with past proceedings. The schedule we advance depends, however, on confidence that all parties understand the nature of DHX's claims at the outset.

Similarly, the Board should reject DHX's argument that a protracted discovery period is dictated by other proceedings before the Board. DHX Motion at 2, n.1. None of the parties is a party to the two specific proceedings cited by DHX. Whatever issues have arisen in those matters should not be deemed to pre-ordain similar disputes in this case. DHX presages even further elongation of the discovery period by proposing that motions to compel will automatically suspend the running of the time for completion of discovery. Such a provision would simply encourage the use of motions to compel in instances where negotiation of discovery issues is more appropriate. *Matson* and *Sea-Land* have no doubt that the Board will be capable of making reasonable decisions about scheduling impacts of discovery disputes if and when they arise. We suggest,

however, that such disputes are least likely in an environment where the points of contention are clearly defined by a well-pleaded complaint and where the parties are under some degree of scheduling pressure to move quickly through the discovery phases of the proceeding.

The Board should implement a procedural schedule similar to the timeframes used in other similar Board cases and similar to the schedule proposed by defendants. If any unforeseen problems arise, those issues can be dealt with as appropriate to the specific points in issue. In that vein, Matson and Sea-Land are agreeable to the Board's appointment of an Administrative Law Judge to expedite resolution of discovery disputes

Based on the positions of the parties in their motions regarding procedural schedules and in an effort to narrow the differences between them, Matson and Sea-Land suggest the following revised schedule:

- D Board Order Establishing Schedule
- D+90 DHX Submits Opening Statement and Evidence
- D+150 Matson and Sea-Land File Responsive Statements and Evidence
- D+180 DHX Files Rebuttal Statement

This schedule is generally consistent with Board schedules in other cases, and provides more than enough time to permit DHX to prepare and submit its case.<sup>2</sup> There

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<sup>2</sup> This schedule does not require the parties to agree upon or submit stipulations, pre-trial statements or a joint statement of undisputed facts. While such a stipulation may be possible, our proposal leaves the parties to accomplish that task if their assessment of the record so permits at some point prior to submissions of their cases.

is no need, we submit, to specify an ending date for discovery. The filing deadlines we suggest should give the parties ample time under the Board's rules to conduct discovery and prepare their submissions.<sup>3</sup>

Our proposed revised schedule is based on several conditions. First, if the Board does not require DHX to file an amended complaint, we strongly urge the Board, at a minimum, to require DHX to identify in writing and with specificity (1) the particular multi-container rates which it is alleging have been unlawfully applied by the carriers in conjunction with DHX's allegations concerning the so-called "overflow rates," and (2) the specific practices DHX intends to challenge as part of an "unreasonable practices" claim, if any. The Board should state that DHX shall be deemed to have waived any challenge to any rate or practice that DHX does not identify in writing within 10 days of issuance of the Board's scheduling order.

Second, because both sides may seek information during discovery that is commercially sensitive, we respectfully suggest that the Board enter a protective order along the lines of the attached draft.<sup>4</sup> With these qualifications, and in express reliance on the Board's previously stated constraints on the nature and content of DHX's complaint, Matson and Sea-Land are willing to recede from their previous position favoring an amended complaint. The value of such an amended document is

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<sup>3</sup> DHX has had more than two years to commence discovery and could have used that time to advantage had it indeed felt that its discovery needs were urgent and pressing. In addition, more than two months have elapsed since the denial of pending motions to dismiss.

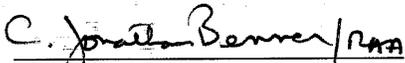
<sup>4</sup> Defendants, for example intend to seek documentation from DHX of any claims of damages arising from allegations concerning Defendants' administration of their tariffs.

outweighed by our desire to commence activity and to move the proceeding toward a prompt disposition.

### CONCLUSION

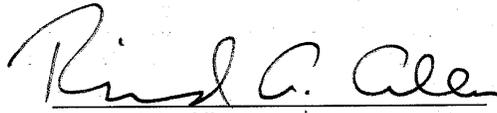
DHX's "fundamentally flawed" complaint lays a poor foundation for this case. Matson and Sea-Land have grave concerns that DHX's proposed procedural schedule lays out a curiosity-driven scavenger hunt spread over six months of discovery. The Board should not pre-judge this case on problems that may have arisen in other cases. Instead, the Board should establish a procedural schedule similar to the schedules that the Board has proposed in the past and deal separately with any issues that may arise later. Consequently, the Board should adopt the procedural schedule proposed by Matson and Sea-Land.

Respectfully submitted,



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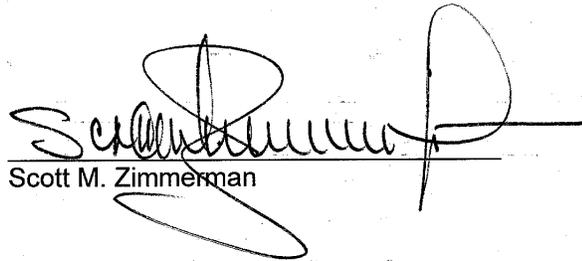
*Counsel for Matson Navigation Company, Inc.*

Dated: March 6, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2002 a copy of the foregoing "Reply of Matson Navigation Company, Inc. and Sea-Land Service, Inc. to Complainant DHX Inc.'s Motion to Establish Procedural Schedule" was served by overnight delivery on the following counsel for DHX, Inc.:

Rick A. Rude  
Attorney At Law  
207 Park Avenue  
Suite 103  
Falls Church, Virginia 22046

  
Scott M. Zimmerman

### Protective Order And Confidentiality Undertaking

1. This Order shall apply to all documents, information and other products of discovery (including testimony and transcripts of testimony taken at deposition) obtained by any party to this proceeding pursuant to discovery requests (including workpaper requests), whether directed to another party or to a person not a party to this proceeding, or submitted through evidentiary filings in this proceeding.

2. Any party or person responding to a discovery request (including a workpaper request) may designate as "Confidential Information" any response (including production of documents) or portion thereof that it in good faith contends contains confidential, proprietary or commercially sensitive information. Any party or person responding to such a request may also designate as "Highly Confidential Information" any "Confidential Information" that it in good faith contends contains such highly sensitive information (e.g., the non-public terms of transportation agreements involving any of the parties, customer-specific traffic, revenue, price or cost information, or traffic and revenue projections) that disclosure to employees or agents of another party, even subject to the restrictions of this Order governing the use and dissemination of "Confidential Information," could reasonably threaten significant economic or competitive harm to the producing party or person. Except as provided by Paragraph 5, "Confidential Information" and "Highly Confidential Information" as used herein include all such designated responses, any copies, extracts, abstracts or summaries or all or part of such responses, and all or any portion of information contained in such responses.

3. Responses to discovery requests (including workpaper requests) may be designated as "Confidential Information" or "Highly Confidential Information" as follows:

(a) Responses or portions of responses to interrogatories, written deposition interrogatories, requests for admission or workpaper requests may be designated by stamping or printing "Confidential" or "Confidential Information." or "Highly Confidential" or "Highly Confidential Information," in the front thereof and, if only portions of the response are to be so designated, clearly marking the confidential or highly confidential portions.

(b) Prior to the production of documents to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they contain "Confidential Information" or Highly Confidential Information." Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing "Confidential Information" or "Highly Confidential Information" or stamping "Confidential" or "Confidential Information" on each page containing "Confidential Information," or stamping "Highly Confidential" or "Highly Confidential Information" on each page containing "Highly Confidential Information," and, if only portions of a document page are to be so designated, clearly marking the confidential portions.

(c) A deponent or the attorney for a deponent may designate the deponent's entire testimony and the transcript thereof to be treated as "Confidential Information" or "Highly Confidential Information" by so requesting on the record prior to the conclusion of the deposition. Such designation shall be effective only until 15 days after the availability of the transcript of the deposition, after which portions of the deposition testimony may be designated "Confidential Information" or "Highly Confidential Information" only by informing each party in writing of the pages, and the portions thereof, that contain "Confidential Information" or "Highly Confidential Information."

4. If a party or person inadvertently fails to designate discovery or other material as "Confidential Information" or "Highly Confidential Information" in a timely fashion as provided herein, it may make such a designation subsequently by notifying the parties in writing. After receipt of such information, such materials and information shall be treated as if they had been designated in a timely fashion.

5. Any party at any time may by written notice request that the producing party or person cancel the "Confidential Information" or "Highly Confidential" designation of any transcript, document or discovery response or portion thereof. Such request should identify particularly the designated responses it contends should not be treated as "Confidential Information" or "Highly Confidential Information," provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted ten (10) days after receipt of the request, unless the producing party or person, prior to the end of the ten-day period, sends the requesting party a written denial of the request by telecopier or hand delivery. If such request is denied in whole or in part, the requesting party may file a motion with the Board to have the "Confidential Information" or "Highly Confidential Information" designation removed as to the discovery responses listed in the request. The burden of establishing that the responses should not be afforded the protections of this Order shall be on the moving party.

6. Other than as provided in Paragraph 7 below, "Confidential Information" and "Highly Confidential Information" may only be disclosed to "Authorized Persons." An "Authorized Person" is a person who, prior to the receipt of any "Confidential Information" or "Highly Confidential Information," has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and who, in the case of "Confidential Information," is:

(a) an attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(b) a person who is an employee or agent of a party and is actively involved in this proceeding;

(c) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(d) a reporter employed to record depositions;

or who, in the case of "Highly Confidential Information," is:

(x) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(y) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(z) a reporter employed to record depositions.

Each such undertaking by an "Authorized Person" shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such undertaking shall be served upon counsel of record for each party no later than ten (10) days after such undertaking is executed.

7. "Confidential Information" and "Highly Confidential Information" may also be disclosed to:

(a) an employee of the producing party during a deposition of such employee;

(b) a deponent employed by an organization that also employs the person who produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to the deponent; or

(c) any person so authorized either (i) in writing by the party or person that produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to such person, or (ii) by the Board upon motion by any party for good cause.

8. Storage, transmission or communication of "Confidential Information" and "Highly Confidential Information" must be such as to reasonably ensure that the "Confidential Information" and "Highly Confidential Information" will not be disclosed, accidentally or otherwise, to non-authorized persons.

9. No person may be present at a deposition during the discussion of "Confidential Information" or "Highly Confidential Information" who has not been authorized by this Order to review the "Confidential Information" or "Highly Confidential Information" to be discussed. If any party intends to use "Confidential" and/or "Highly Confidential" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and all portions of the deposition at which any such "Confidential" and/or "Highly Confidential" material is used shall be restricted to persons who may review that material under this Protective Order.

10. "Confidential Information" and "Highly Confidential Information" may be used by the receiving party, and by any "Authorized Person," solely for purposes of this proceeding and any directly related proceedings involving judicial review of any Board decision or order in this

proceeding, and not for any other purpose whatsoever (including any business or commercial purpose). "Confidential Information" and "Highly Confidential Information" may not be used in any other litigation unless obtained in that litigation.

11. All "Confidential Information" and "Highly Confidential Information" filed with the Board, and any pleading, motion, or other paper filed with the Board that contains or discloses "Confidential Information" or "Highly Confidential Information" shall be filed under seal and kept under seal until further order of the Board. If any party intends to use "Confidential" and/or "Highly Confidential" material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "Confidential" and/or Highly Confidential" material to the Administrative Law Judge, the Board or the Court to (a) restrict attendance at the hearings during discussion of such "Confidential" and/or Highly Confidential" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "Confidential" and/or Highly Confidential" material in accordance with this Protective Order.

12. All documents containing "Confidential Information" or "Highly Confidential Information" shall, at the option of the producing party/person, be destroyed or returned to the producing party/person at the termination of this proceeding, including all appeals; provided, however, that outside counsel may retain file copies of any unredacted pleadings and materials filed with the Board or a court.

13. The provisions of this Order that restrict the handling, communication and use of "Confidential Information" and "Highly Confidential Information" shall continue to be binding after the termination of this proceeding, including any related court litigation or judicial appeals, unless the Board or the producing party/person authorizes in writing alternative handling, communication or use of the information.

14. This Order shall not bar or otherwise restrict:

(a) a party or producing person from opposing production of any information under the Board's Rules of Practice;

(b) an "Authorized Person" from making copies, abstracts, digests and analyses of "Confidential Information" and "Highly Confidential Information" for use in connection with this proceeding subject to the requirement that all such copies, abstracts, digests and analyses be treated as "Confidential Information" or "Highly Confidential Information," as the case may be, and clearly marked as such;

(c) an "Authorized Person" from rendering advice or opinions with respect to this proceeding to his or her client or employer based upon his or her examination of "Confidential Information" or "Highly Confidential Information" as long as such person does not disclose the "Confidential Information" or "Highly Confidential Information" itself to a person not authorized by this Order to have access to the "Confidential Information" or "Highly Confidential Information," as the case may be;

(d) a party from using any "Confidential Information" or "Highly Confidential Information" during hearings in this proceeding, subject to any further order of the Board;

(e) a party or purchasing person from using its own "Confidential Information" or "Highly Confidential Information" in any manner it sees fit, or from revealing such "Confidential Information" or "Highly Confidential Information" to whomever it chooses, without the prior consent of any other party or of the Board; and

(f) a party or producing person from applying to the Board at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires.

15. If "Confidential Information" or "Highly Confidential Information" in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such "Confidential Information" or "Highly Confidential Information" on less than four (4) business days' notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

16. Information that is obtained outside of this proceeding shall not be subject to this Order even if the same information is produced and designated as "Confidential Information" or "Highly Confidential Information" in this proceeding.

17. To the extent that "Confidential Information" or "Highly Confidential Information" is produced by a party or other person in this proceeding and held and used by the receiving party in compliance with the terms of this Order, such production, disclosure and use of such "Confidential Information" or "Highly Confidential Information" are deemed essential for the disposition of this proceeding and shall not be deemed a violation of 49 U.S.C. § 11904.

18. This Order shall be effective on the date served.

**Before the  
SURFACE TRANSPORTATION BOARD**

DHX, Inc.

Complainant,

v.

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

Defendants,

Docket No. WCC-105

CONFIDENTIALITY UNDERTAKING

I, [Name], am [Position or Job Title], of [Company, Firm or Employer], [Address of Company, Firm or Employer]. I am:

- an outside attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;
- an attorney who is a regular employee of a party and is actively involved in this proceeding;
- a person who is an employee or agent of a party and is actively involved in this proceeding;
- a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision;
- a court reporter employed to record depositions in the captioned proceeding,

and affirm that I have read and understand the Protective Order served \_\_\_\_\_ in the captioned proceeding, and that I agree to abide by the terms of such Protective Order.

\_\_\_\_\_  
Dated: \_\_\_\_\_