

(S E R V E D)
(JULY 3, 1996)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 3, 1996

DOCKET NO. 96-09

**SOUTHERN PACIFIC TRANSPORTATION COMPANY AND THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY**

v.

PORT OF LONG BEACH

**CONDITIONAL SETTLEMENT APPROVED;
COMPLAINT DISMISSED WITH PREJUDICE**

Complainants Southern Pacific Transportation Company ("SP") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), by complaint served April 17, 1996, contend that Item 550 of respondent Port of Long Beach's ("Port")¹ FMC Tariff No. 004 constitutes an unreasonable practice in violation of section 10(d)(1) of the Shipping Act of

¹The term "Port of Long Beach" is commonly used in both an organizational context to mean the City of Long Beach, acting by and through its Board of Harbor Commissioners and Harbor Department staff, and in a geographical context to mean the Harbor District of the City of Long Beach and other areas, premises and facilities which are under the jurisdiction of the Board of Harbor Commissioners. (Motion fn. 1.)

1984 ("1984 Act"), 46 U.S.C. app. § 1709(d)(1), because Item 550 imposes a per car \$7.50 charge² on respondent's railcars for the use of municipal railroad tracks located in Long Beach Harbor District east of the Long Beach Harbor Entrance Channel, which charge is significantly higher than the \$1.00 per car revenue charge established by a 1934 Agreement among predecessors of the parties for the same service. Complainants also contend that Item 550 is not reasonably related to the benefit conferred on the parties charged and imposes charges against rail carriers for operations that are within the exclusive subject matter jurisdiction of the Surface Transportation Board ("STB"). See 49 U.S.C. §§ 10501, 10901, 11321 and 11323.³

Respondent filed on June 11, 1996, a motion to dismiss for failure to state a claim within the jurisdiction of the Commission noting that the Port established this charge on inland carriers unregulated by the 1984 Act; that there is no allegation of activity at an operating marine terminal, or of any impact on cargo, shippers or consignees. Respondent states that this charge for usage by railcars of municipal tracks is too remote to be "relating to or connected with receiving, handling, storing, or delivering property" by a marine terminal. If the complaint is dismissed, the Port is willing to annotate Item 550 "to advise users that the charge is not 'FMC-sanctioned'" as was done in *Port of Ponce v. Puerto Rico Ports Authority*, 25 SRR 1417, 1418 n. 2 (FMC 1991) ("*Ponce*"). Respondent requested oral argument and a further enlargement of time to start and complete discovery under 46 CFR

²Any single railcar or a single platform of a double stock railcar, whether loaded or empty, will be assessed a charge of \$7.50 whenever entering the harbor district and traveling on Port owned rail tracks."

³There is no indication that Long Beach has established a similar tariff item in an STB tariff or that a companion complaint proceeding has been filed there.

§ 502.102, but these requests will not be considered further in view of the proffered settlement, *infra*.

By letter received June 25, 1996, complainants replied stating that the parties have resolved the issues pending before the Commission and as a result of the settlement complainants have agreed to request dismissal of the complaint with prejudice, subject to the withdrawal of Item 550 by the Port. Complainants state that they have been advised now that the Port will promptly withdraw Item 550 from its tariff filed with the Commission as soon as (1) the complaint is dismissed with prejudice on the ground that the Commission has no jurisdiction over the charge in Item 550, and (2) the dismissal of the complaint by the Commission becomes administratively final and the period for judicial review expires with no review sought.

Discussion

Commission decisions and regulations evince a policy favoring settlement of disputes brought before the Federal Maritime Commission. The Commission reviews all proposed settlements to ascertain whether they run afoul of any law or public policy and whether they are fair, reasonable and adequate.

In this proceeding it is clear that the complaint assailing as violative of the 1984 Act, Item 550 of the Port of Long Beach's FMC Tariff No. 004 providing a \$7.50 charge on SP and Santa Fe cars entering on the Port-owned rail tracks, located in the Long Beach Harbor District east of the Long Beach Harbor Entrance Channel, does not present a claim over which the Commission has jurisdiction. The complaint alleges a violation of section 10(d)(1)

of the 1984 Act which states in pertinent part that "No . . . marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. app. § 1709(d)(1). A "marine terminal operator" is defined at section 3(15) of the 1984 Act as a person engaged "in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702(15). The Port is a marine terminal operator regulated by the 1984 Act as a municipality which owns real property leased to and operated by others as marine terminals. *California v. United States*, 320 U.S. 577, 580 (1944), reh'g denied, 321 U.S. 802 (1944). (Motion fn. 4 and 46 CFR 572.104(O).) However, as noted, there is no allegation in the complaint of marine terminal operation or activity by the Port which would come within the meaning of "receiving, handling, storing or delivering property." *Id.* The access charge applies on cars of rail carriers unregulated by the 1984 Act. The complaint does not allege that the railroad access charge involves or applies to or has any impact on cargo, shippers or consignees. The Port charge on rail cars running over municipal tracks at the Port is too remote to relate to or connect with "receiving, handling, storing or delivering property" under 46 U.S.C. app. § 1709(d)(1) to be the source of subject matter jurisdiction for this Commission. As noted, SP and Santa Fe also believe such a charge would come within the jurisdiction of the STB.

The Port explains that Item 550 was filed in prudence because failure to file a required charge violates the filed rate doctrine, the Shipping Act and FMC regulations. *Marine Terminal Practices of the Port of Seattle*, 21 F.M.C. 397, 433 (1978), and see *Trans*

Ocean-Pacific Forwarding, Inc.--Possible Violations/1984 Act, 27 SRR 409, 412 (ALJ 1995)
FMC notice of non-review February 9, 1996.

The complaint alleges no impact on shippers or consignees much less undue or unjust discrimination from the Port charge on rail cars unregulated by the 1984 Act. No case has been cited or found holding that the 1984 Act provides jurisdiction in the Commission in such circumstances. As confirmed in *Puerto Rico Ports Authority v. FMC*, 919 F.2d 799, at 807 (1st Cir. 1990):

Congress only intended to regulate local governmental agencies when they discriminated in their role as operators of municipal wharves.

It is thus clear that this complaint must be dismissed with prejudice because the Commission lacks subject matter jurisdiction over the \$7.50 charge on rail cars in Item 550 of respondent Port of Long Beach's FMC Tariff No. 004. Respondent has receded from its position in its motion to dismiss that it would follow *Ponce* and insert a note in the tariff disclaiming that Item 550 was FMC-sanctioned and is now willing to delete Item 550 from its tariff which is the option selected in *Burlington Northern Railroad Co. v. M.C. Terminals, Inc.*, 26 SRR 934 (FMC 1993) (without a clear and substantial independent legal basis for the charges continued inclusion in the tariff would unjustifiably burden FMC resources and might lead to further litigation).

Since the settlement meets the criteria set forth by the decision in *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia*, ____ F.M.C. ____, 24 SRR 1129, 1134 (1988), F.M.C. notice of finality, September 19, 1988, it will be approved. The Commission has previously approved settlements and dismissed complaints in proceedings in which there

were issues concerning the Commission's jurisdiction. See *Thai-Agri Food Co., Ltd. et al. v. ANERA*, 26 SRR 963 (1993); Docket No. 93-09, *Sun Lee v. ANERA*, (I.D.) F.M.C. notice of finality, August 5, 1993 (unreported); and Docket No. 92-43, *Accord Craft Co. Ltd. v. ANERA*, (I.D.) F.M.C. notice of finality, April 20, 1994 (unreported) (alleged breach of service contracts). See also Docket No. 93-18, *Alaska Gold Seafood, Inc. v. Fortune Network, Ltd.*, complaint dismissed (ALJ, November 15, 1993) F.M.C. notice of finality, January 12, 1994 (unreported) (respondent allegedly misdelivered cargo in violation of admiralty law principles).

IT IS ORDERED:

The settlement reached by the parties in this proceeding is approved and the complaint is dismissed with prejudice on the condition that respondent Port of Long Beach delete Item 550 from its FMC Tariff No. 004 when the dismissal order becomes administratively final and when the period for judicial review expires with no review sought. When the Port has effected the tariff change it should so inform the Commission and the parties when this has been achieved.


Frederick M. Dolan, Jr.
Administrative Law Judge