

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITRANS INTERNATIONAL, INC. : CIVIL ACTION
Plaintiff, :
v. :
SEPTA RAIL "A" CAR BODYSHELL : NO. 96-7572
NO. 1013, in rem, et. al., :

MEMORANDUM AND ORDER

Yohn, J.

June, 1997

This maritime dispute involves two legal proceedings. In this court, plaintiff UniTrans International, Inc., is suing defendants ABB-Daimler-Benz Transportation (Australia) Pty. Ltd., ("ABB Australia"), and ABB Daimler-Benz Transportation (North America), Inc., ("ABB North America"), ("the ABB entities"), under the parties' maritime contract for payment of additional freight charges owed to UniTrans. Before the Federal Maritime Commission ("FMC"), defendants complain that Unitrans's request for additional freight violates the Shipping Act of 1984, 46 U.S.C. app. § 1701 et. seq. Defendants have filed a motion pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure to stay the district court action pending determination of the issues before the FMC. After consideration of defendants' motion, plaintiff's response and defendants' reply thereto, the court WILL GRANT defendants' motion to stay.

BACKGROUND¹

UniTrans is in the business of ocean carriage of cargo as a non-vessel operating common carrier ("NVOCC")² pursuant to the authority of, and in accordance with, its tariff on file with the FMC.³ ABB Australia is in the business of manufacturing equipment for rail transportation and was the manufacturer of light rail car body shells (subway cars) for a project of the South Eastern Pennsylvania Transportation Authority ("SEPTA"). ABB Traction, Inc. ("ABB Traction"), and its successor corporation ABB North America, are or were also in the business of supplying equipment for rail transportation, including incorporating car body shells manufactured by ABB Australia into assembled subway cars for the SEPTA rail project.

1. The following background information is undisputed and is taken from UniTrans's Amended Complaint filed with this court on November 12, 1996 and the complaint of the ABB entities filed with the FMC on December 27, 1997.

2. A "'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." See 46 U.S.C. app. § 1702 (17). An "'ocean common carrier' means a vessel-operating common carrier." See 46 U.S.C. app. § 1702 (18). A "'shipper' means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made." See 46 U.S.C. app. § 1702 (23).

3. As required by the Shipping Act, UniTrans maintains a world-wide water-intermodel tariff on file with the Commission. That tariff sets forth UniTrans's rates and services. See 46 U.S.C. app. § 1707 (a) (1) ("[E]ach common carrier and conference shall file with the [Federal Maritime Commission], and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any transportation route that has been established.").

On or about January of 1995, ABB Traction and UniTrans entered into a written Time-Volume Agreement ("Agreement") for the transportation of cargo from Melbourne, Australia to Philadelphia, Pennsylvania. According to defendants, the agreement provided for UniTrans to transport a minimum of ten (10) rail car body shells and several bogey frames and bolsters (the corresponding wheel assemblies to the rail car body shells) from Australia to Philadelphia during the period between March 1, 1995 and June 30, 1998 at a discounted Time-Volume Rate ("TVR") of \$15,450 per unit. See 46 U.S.C. app. § 1707 (b) ("TIME-VOLUME RATES.--Rates shown in tariffs . . . may vary with the volume of cargo offered over a specified period of time."). According to plaintiff, the agreement provided that the discounted TVR was available only to "eligible shippers" who met the minimum shipment requirements, who shipped only "car body shells," and who shipped after the effective date of the filing of the TVR. Both parties agree that the agreement also provided that UniTrans would transport only one (1) forty-foot container of handling accessories with the first rail car body shell shipment at a cost of \$4,800.00.

UniTrans filed the TVR with the FMC on April 15, 1996 and it became effective May 15, 1996. Three rail car bodies (shell nos. 1004, 1005 and 1006) were transported by UniTrans before the effective date of the TVR, whereas nine rail car bodies (1008, 1001, 1009 through 1015) were transported after the effective date of the TVR. In addition, UniTrans carried six

containers containing bogey frames and bolsters from Melbourne, Australia to Philadelphia, Pennsylvania. Two of these containerized transports occurred before UniTrans filed the TVR and one occurred after the TVR became effective.

For the transport of all twelve of the rail car body shells and the six containers of bogey frames and bolsters, UniTrans received payment according to the TVR as opposed to UniTrans's regular and higher tariff rate.

In October, 1996, UniTrans received a letter entitled "Cancellation of Contract" from the Transportation Administrator of ABB North America, Edward Barto, who advised UniTrans that 1) the ABB entities had complied with the terms and conditions of the agreement by shipping with UniTrans the minimum of ten (10) car body shells and 2) that in the future the ABB entities would no longer be transporting goods with UniTrans.⁴

On or about November, 1996, UniTrans reviewed its previous transactions with the ABB entities. According to UniTrans, it discovered that the deliveries of rail car body shells and containerized cargo were wrongfully billed at the discounted TVR because 1) a number of the car body shells were shipped at a time when the TVR was not in effect, 2) a number of the shipments were made by ABB Australia, a party "not enrolled

4. The "cancellation" was apparently the result of a corporate restructuring within and between ABB Traction, ABB North America and ABB Australia pursuant to which ABB Australia took exclusive responsibility for shipment and payment of future car body shells and accessory equipment.

to take advantage of the tariff time-volume rate," 3) defendants failed to ship the requisite number (ten (10)) of rail car bodies to take advantage of the discounted TVR, and 4) the agreement did not include the shipment of six containerized bogey frames and bolsters.

UniTrans therefore submitted "re-rated" freight charges to the ABB entities. In total, these re-rated charges, which represented UniTrans's regular as opposed to TVR freight rates for the "nonqualifying" rail car body shells and containerized cargo, amounted to an additional \$1,344,535.00 (approximately \$ 1.1 million for shipments of 12 car body shells and \$ 200,000 for the bogey frames and bolsters). However, the ABB entities refused to pay the additional amounts requested by UniTrans.

On November 12, 1996, UniTrans filed this district court action to recover the unpaid freight charges. UniTrans complains that defendants' shipments and subsequent failure to pay the additional freight charges constituted a breach of the parties' maritime contract. UniTrans's action was filed in rem, against three rail car body shells that were still in transit at the time of the suit, as well as in personam, against ABB Australia and ABB North America.

On November 12, 1996, UniTrans obtained from this court a Warrant of Arrest against the three in rem car body shells and a Process of Maritime Attachment and Garnishment of the property of ABB Australia. Subsequently, ABB North America obtained a bond in the amount of \$ 411,000.00 from Federal Insurance Company

in order to protect its interest in the cargo and to obtain the release of the three rail car body shells.

On or about December 27, 1997, ABB Australia and ABB North America filed a complaint against UniTrans before the FMC seeking a determination with respect to the freight rate question. Before the FMC, defendants complain that UniTrans violated:

(1) Section 10 (b)(1) of the Shipping Act of 1984 by charging greater compensation for the transportation of property than the applicable TVR;

(2) Section 10 (b)(5) of the Shipping Act of 1984 by retaliating against the ABB entities because they terminated their relationship with UniTrans and patronized another carrier;

(3) Section 10 (b)(6)(A)&(B) of the Shipping Act of 1984 by unfairly and unjustly delaying the filing of the TVR until after the ABB entities had accepted and transported three (3) rail car body shells; and,

(4) Section 10 (d)(1) of the Shipping Act of 1984 by seeking collection of containerized freight cargoes at inapplicable and higher cargo rates.

Defendants request over \$30,000 in damages for Unitrans's delay in delivering the cargo and for fees related to the judicial proceedings, and a ruling by the FMC that defendants do not owe UniTrans \$1,344,535.00 in additional freight charges.

DISCUSSION

Defendants argue that under the doctrine of primary jurisdiction, the FMC, not the district court, is the most appropriate forum for handling this freight rate dispute.⁵ Therefore, defendants request that the district court refrain from hearing plaintiff's case until the FMC resolves the issues before it.

The doctrine of primary jurisdiction was developed by the United States Supreme Court in United States v. Western Pacific R. Co., 352 U.S. 59, 63 (1956). The doctrine, simply stated, allows courts to defer consideration of issues which fall within the special knowledge or expertise of a federal administrative agency until the administrative agency has been afforded an opportunity to act. See id.; Richman Bros. Records Inc. v. U.S. Sprint Comm. Co., 953 F. 2d 1431, 1435 n. 3 (3d Cir. 1991), cert. denied, 505 U.S. 1230 (1992). "When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1970).

5. Defendants agree that the district court has both admiralty and diversity jurisdiction to hear plaintiff's in rem and in personam actions. See, e.g., Logistics Management, Inc. v. One Pyramid Tent Arena, 86 F. 3d 908 (9th Cir. 1996).

The doctrine of primary jurisdiction does not implicate the jurisdictional power of the federal courts; it is rather a method by which courts structure proceedings to provide for the "orderly and sensible coordination of the work of agencies and courts." Cheyney State College Faculty v. Hufstedler, 703 F. 2d 732, 736 (3d Cir. 1983)); Richman, 953 F. 2d at 1435; (A party's "filing of a suit in federal court, however, does not deprive [an agency] of primary jurisdiction."). A "determination of [an] agency's primary jurisdiction involves a . . . pragmatic evaluation of the advantages and disadvantages of allowing the agency to resolve the issue in the first instance." 2 K. Davis and R. Pierce, Jr., Administrative Law Treatise, § 14.1 at 272 (3rd ed. 1994).

The policies which underlie this doctrine include: the promotion of uniformity and consistency in the regulation of a business entrusted to a particular agency, the utilization of an agency's specialized knowledge and insight gained through experience, and the exercise of administrative discretion in affecting regulatory policy entrusted to an agency. See Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-04 (1976).

In deciding whether a particular issue is most appropriate for administrative agency consideration, courts generally will consider several factors reflecting the underlying policies of the doctrine. Such factors include (1) whether the question at issue is within the conventional experience of judges; (2) whether the question at issue lies peculiarly within

the agency's discretion or requires the exercise of agency expertise; (3) whether there exists a danger of inconsistent rulings disruptive of the statutory scheme; and (4) whether a prior application to the agency has been made. See, e.g., AT&T v. People's Network, Inc., No. 92-3100, 1993 WL 248165, * 4 (D.N.J. March 31, 1993); see also 2 Davis, § 14.1 at 272 ("[t]here is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute").

The purposes of the Shipping Act of 1984 are

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs; (2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; and (3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs.

46 U.S.C. app. § 1701.

In furtherance of these purposes, the Shipping Act establishes an extensive tariff filing system, see 46 U.S.C. app. § 1707, and a plethora of prohibited shipping activities, including false weighing and measuring, false billing, rebating, retaliating, operating under a disapproved agreement, and charging a different compensation for one's services than those shown in filed tariffs. See 46 U.S.C. app. § 1709. The FMC is the administrative body set up to obtain and enforce compliance with these provisions. See 46 U.S.C. app. § 1710. It can

conduct investigations on its own or receive and remedy outside complaints which allege Shipping Act violations. See id.

Some courts have declined to decide Shipping Act issues under the doctrine of primary jurisdiction, see e.g., Maritrend v. Galveston Wharves, 152 F.R.D. 543, 554 (S.D. Texas 1993) (allowing the FMC to determine the propriety of defendant's denial of plaintiff's stevedore license), others have decided the issues, or similar ones, entirely on their own. See, e.g., F.P. Corp. v. Golden West Foods, Inc., 807 F. Supp. 1228, 1228 (W.D. Va. 1992) (determination of whether or not tariff was duly filed and adopted was question of law which did not require referral to Interstate Commerce Commission), aff'd, 27 F. 3d 562 (4th Cir. 1994); Ataei v. M/V Barber Tonsberg, 639 F. Supp. 993, 998 (S.D.N.Y. 1986) (resolving all of the Shipping Act issues of the case on its own, including issues involving the proper filing, interpretation and application of tariffs filed with the FMC). The decision is entirely discretionary with the district court. See P.R. Maritime Shipping Auth. v. Valley Freight System, 856 F. 2d 546, 549 (3d Cir. 1988).

In this case, the following important issues are apparent: 1) whether the agreement's definition of "shipper", "included all of the ABB entities; 2) whether the TVR applied to the three car body shell shipments shipped between March, 1995 and May, 1996, even though the TVR did not become effective until May, 1996; 3) whether the required minimum number of rail car body shells was shipped by defendants such that the nine

shipments which occurred after the effective date of the TVR were subject to the favorable rate; 4) whether the agreement's definition of "car body shells" included containerized bogey frames and bolsters and therefore did not require the "Cargo N.O.S." rate; 5) whether UniTrans violated Sections 10 (b)(1), (5), (6)(A) & (B) of the Shipping Act by allegedly delaying the filing of the TVR without the knowledge of defendants, by reclassifying and rerating cargo before the expiration of the TVR, and by reclassifying and rerating cargo in alleged "retaliation" for defendants' termination of the parties' business relationship; 6) whether UniTrans violated Section 10 (d)(1) of the Shipping Act by seeking collection of containerized freight cargoes at the "Cargo N.O.S." rate; and finally 7) whether a contractual definition of "shipper" can be narrower than the one set forth in the Shipping Act, 46 U.S.C. app. § 1702 (23).

Considering the Federal Maritime Commission's specialized knowledge and expertise in this area of the law, and the unique factual circumstances involved, the court concludes that the FMC is best suited to dispose of these issues, and any other issues it considers are appropriate. Therefore, under the doctrine of primary jurisdiction, this court will grant defendants' motion to stay and refer the matter to the FMC for resolution. In the event that the FMC does not ultimately resolve all the issues in this dispute, either party may make an application to remove the stay.

An appropriate order follows.

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SEPTA RAIL "A" CAR BODY SHELL	:	NO. 96-7572
NO. 1013, <u>in rem, et. al.,</u>	:	

ORDER

AND NOW, this day of June, 1997, upon consideration of the "Motion to Stay Action Pending Federal Maritime Commission Determination" of defendants ABB Australia and ABB North America, plaintiff's response and defendants' reply thereto, it is HEREBY ORDERED that defendants' motion is GRANTED. The action is stayed pending a decision by the Federal Maritime Commission in the matter of ABB Daimler-Benz Transportation (North America), Inc., et al. v. UniTrans International, Inc., FMC, Docket No. 96-24.

William H. Yohn, Jr., Judge