

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

In the Matter of the Petition for : CIVIL ACTION  
the Enforcement of Subpoenas of the :  
Federal Maritime Commission Issued :  
to Jose Diaz/Tioga Fruit Terminal, :  
Inc. and Chilean Line, Inc. : NO. 97-mc-21

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.

JULY 22, 1997

Holt Cargo Systems, Inc., Astro Holdings, Inc. and Holt Hauling and Warehousing Systems, Inc., (collectively, "Holt"), filed a petition to enforce two Federal Maritime Commission ("FMC") subpoenas issued to Jose Diaz/Tioga Terminal, Inc. and Chilean Line, Inc. (collectively, "Tioga"). The petition was referred to Magistrate Judge Angell who filed a Report and Recommendation. After careful and independent consideration of the Report and Recommendation and the Objections filed thereto by Petitioner, the subpoenas will be enforced in part and quashed in part.

Facts

This miscellaneous matter is related to an action assigned to this judge, Holt v. Delaware River Port Authority ["DRPA"], the Port of Philadelphia and Camden, Inc., ["PPC"] and the Philadelphia Regional Port Authority ["PRPA"], Civil Action No. 94-7778. Part of the multi-count complaint in that action included several counts related to the Packer Avenue Marine Terminal lease (the "Packer Avenue lease"). Defendants responded that the lease-related allegations were within the primary

jurisdiction of the FMC. The court allowed the FMC to participate as amicus curiae; it was of the view that alleged violations of the Packer Avenue lease were within the jurisdiction of the FMC under the Shipping Act of 1984. The parties were granted leave to respond to the FMC's submission (see, opinion, April 19, 1996); however, Holt then elected to voluntarily dismiss the counts related to the lease and submit the lease-related claims to the FMC. Holt filed the lease-related claims with the FMC on June 5, 1996.

In connection with the action pending before the FMC, Holt has served subpoenas on numerous third parties, including Tioga; Tioga challenged those subpoenas before the FMC. FMC Administrative Law Judge Dolan, after modifying the subpoenas by memoranda and orders of December 10, 1996, and January 2, 1997, ordered the documents produced. Tioga refused to produce the documents and Holt filed this Petition to Enforce Subpoenas; Tioga responded with a motion to dismiss or in the alternative in opposition to petition for enforcement.

The subpoena directed at Tioga, as modified by Judge Dolan, orders the production of:

1. All contracts, proposed contracts or any other contractual documents with any of the respondents relating to: (a) a lease; (b) dockage, wharfage or usage agreement; and/or (c) any other agreement relating to the loading or unloading and/or storage of cargo.
2. A schedule of rates charged to customers.
3. Price studies or comparisons performed, or requested to be performed, which examine the impact on

[Tioga's] business and/or revenue of charging particular rates for services at the Port of Philadelphia.

4. All documents reflecting, referring or relating to communications between [] any of the respondents, and/or any third parties regarding Holt.

Holt and Tioga, through counsel, have agreed that the request for production covers the time period January, 1992 to the present. (Transcript of 6/27/97, at 33-34).

#### Discussion

Magistrate Judge Angell, relying heavily on the opinions and orders of Judge Dolan (December 10, 1996 and January 2, 1997), recommended that the motion to enforce the subpoenas be granted on the conditions that a confidentiality order be entered and the production be shielded from Holt's in-house counsel. Tioga, filing objections to the report and recommendation, argued that: Judge Angell was unduly deferential to the findings of Judge Dolan; Judge Angell did not require a showing of relevance from Holt; and Judge Angell did not adequately consider the harm to Tioga if the subpoenas were enforced. The district court reviews the report and recommendation on a subpoena enforcement proceeding de novo because the decision is a final disposition on the merits. See NLRB v. Frazier, 966 F.2d 812, 816 (3d Cir. 1992).

"A district court should enforce an agency subpoena if the subpoena is for a proper purpose, the information is relevant to that purpose, and statutory procedures are observed." NLRB v. Frazier, 966 F.2d 812 (3d Cir. 1992). The Court of Appeals for

the Third Circuit has acknowledged that other factors may be considered; those factors include privacy, breadth, potential for harm from subsequent nonconsensual disclosure, adequacy of safeguards, and burden of production. FDIC v. Wentz, 55 F. 3d 906, 908-09 (3d Cir. 1995), citing Whalen v. Roe, 429 U.S. 589, 599 (1977) and United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980). Whether the subpoena was initiated by the agency for a regulatory purpose or by a private party in aid of private litigation may also be a factor.

Tioga agreed to comply with requests 1 and 4, modified in the December 10, 1997 opinion of Administrative Law Judge Dolan, Appendix B. Those modified provisions of the subpoena will be enforced.

As for modified requests for production 2 and 3, the relevance is unclear; Judge Dolan stated Holt's view as to relevance (opinion at 9-10), but did not actually rule that the documents requested in modified requests 2 and 3 were relevant or explain why. If Holt's allegation is that the PPC, the DRPA, and the PRPA are treating Holt's competitors more favorably, Tioga's contracts with the defendants are clearly relevant: the relevance of Tioga's schedule of rates to its own customers and any pricing studies obtained or requested is quite tenuous and limited. The schedule of rates and price studies, while not relevant to liability, may conceivably be relevant to damages if Holt prevails on liability.

Tioga argues that the subpoenas are overbroad and that responding to modified requests 2 and 3 would require them to divulge confidential business information to their competitor. There is a serious issue whether the information sought is for a proper purpose. Judge Dolan's opinion did not address this. Holt and Tioga compete for the business of unloading cargo on their terminals. If Tioga were forced to produce the schedule of rates and its pricing studies, Holt could use this information to routinely underbid Tioga and ultimately drive Tioga out of business. As Holt has not shown the information is essential to its action before the FMC, the court is not convinced that Holt seeks the information for a proper purpose.

The court has also considered the procedures followed in this action. The statutes governing the FMC do not expressly authorize the FMC to delegate its authority to private parties. See 46 App. U.S.C. § 876(6)(e) ("[T]he Commission may seek enforcement [of a subpoena] by a United States District Court having jurisdiction over the parties, and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce the order. . . .") and 5 U.S.C. App. 1 § 105 ("The [Federal Maritime] Commission shall have the authority to delegate . . . to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board . . . ."). The court is aware that the FMC regulations provide for enforcement actions by "any injured party," 46 C.F.R. § 502.210(2)(b), but the court could not find or elicit at the

hearing any statutory authority allowing the FMC to delegate its enforcement authority to a private party. The court recognizes that the FMC upheld the subpoenas after a hearing and issued them in an appendix to its opinion and an argument could be made that the FMC adopted the subpoenas as its own. However, the court is of the view that it may consider that this is private litigation not an FMC enforcement proceeding.

Most enforcement actions are by a government entity to pursue an investigation authorized by statute. This action was not on behalf of the FMC to enforce its own subpoena, but was brought on behalf of a party to an action before the FMC; in such circumstances, the relevance and the purpose for which the information is sought must be carefully scrutinized. This is especially true where the parties to the enforcement action are business competitors and the information sought is very confidential business information.

Modified requests for production 2 and 3 are extremely burdensome; they require third-parties to produce confidential documents extremely useful to a competitor like Holt for purposes unnecessary to the FMC proceeding, at least at the present time. Even if the proposed confidentiality stipulation could have been more narrowly drawn to prevent any Holt affiliate from access to the confidential business information, such access is unnecessary at this stage of the litigation. Holt should be able to prove any preferential treatment of his competitors by the defendants with information provided in the response to those portions of

the subpoenas that will be enforced. Holt will be allowed adequate discovery to establish whether or not preferential treatment exists; how and if Holt's competitors pass their benefits along to their customers is not relevant to defendants' liability. This information may be relevant to damages, but third parties certainly should not be required to provide such confidential information before a finding of liability. At the present time, there is not even a prima facie showing of need. The danger to Tioga is great and the benefit to Holt, even if the information is used solely for the FMC litigation, is minimal; this is a classic case for strictly limited, staged discovery.

Requests 2 and 3 of the modified subpoenas will not be enforced at this time. The recommendation of the Magistrate Judge is accepted in part and denied in part upon de novo review.<sup>1</sup>

An appropriate order follows.

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1. If the standard of review is more restricted, the report and recommendation is clearly erroneous for the reasons stated in this opinion.

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ORDER

AND NOW, this 22nd day of July, 1997, after a hearing on June 27, 1997, upon careful and independent consideration of the petition, the Report and Recommendation of Magistrate Judge Angell, and the Objections filed thereto by respondents, and consistent with the memorandum filed on this date, it is **ORDERED** that the petition to enforce is **GRANTED IN PART AND DENIED IN PART** as follows:

1. The report and recommendation of Magistrate Judge Angell is **ACCEPTED IN PART AND DENIED IN PART**.

2. The subpoena will be **ENFORCED** with respect to modified requests for production 1 and 4 by consent of the parties to the enforcement action; Jose Diaz/Tioga Fruit Terminal, Inc. and Chilean Line, Inc. shall produce the documents requested in modified requests 1 and 4 for the period of January, 1992 to the present.

3. The subpoena will be **QUASHED WITHOUT PREJUDICE** to renew at an appropriate time, with respect to modified requests for production 2 and 3.

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Norma L. Shapiro, J.