

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASSOCIATION OF SHIP BROKERS AND
AGENTS (U.S.A.), INC.;
BOYD, WEIR & SEWELL, INC.;
KERR STEAMSHIP COMPANY, INC.; and
NORTON, LILLY & CO., INC.,

Defendants.

Civil No. H-84-1939

Filed: May 10, 1984

Entered: November 15, 1984

FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint in this action on May 10, 1984 and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law in this action, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law in this action and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action. To the extent that any defendant might object to personal jurisdiction or to venue, all such objections are waived for purposes of this action only. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

As used herein, the term:

(a) "person" means any individual, single proprietorship, partnership, firm, corporation, or association;

(b) "port agent services" means the services performed for the benefit of an owner or charterer of a cargo ship while the ship is in port, including, among other things: supervising the loading and unloading of cargo; arranging for berths, pilots and tugs; securing the necessary documentation; outfitting and repairing the ship; and attending to the needs of the crew;

(c) "port agent" means any person that, for a fee or commission, provides port agent services;

(d) "port agent defendants" means Boyd, Weir & Sewell, Inc.; Kerr Steamship Company, Inc.; and Norton, Lilly & Co., Inc.;

(e) "tramp vessel" means a cargo ship that moves without being governed by a schedule of regular port calls, and does not include a liner vessel which regularly travels between specified ports according to a schedule;

(f) "tramp agency services" means port agent services provided to tramp vessels;

(g) "rate" means any rate, price, tariff, charge, fee, or commission for port agent services and its associated terms and conditions; and

(h) "the port of New York" means the The New York - New Jersey Port District, which encompasses parts of the States of New York and New Jersey within an approximate 25 mile radius of the Statue of Liberty.

III.

This Final Judgment applies to each defendant and to its respective officers, directors, employees, committees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service, service under Sections VII or VIII hereof, or otherwise. For purposes of this Section III, a member of the defendant association, Association of Ship Brokers and Agents (U.S.A.), Inc. (hereinafter "ASBA"), shall not be deemed to be in active concert or participation solely by virtue of its membership in ASEA.

IV.

(A) Defendants are enjoined and restrained from directly or indirectly entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan, or program to fix, maintain, suggest, or recommend the rates to be charged for tramp agency services in any United States port.

(B) The port agent defendants are enjoined and restrained from preparing, disseminating, maintaining or otherwise creating or issuing any schedules of rates to be charged for tramp agency services in any United States port, except for such schedules prepared independently and unilaterally by an individual port agent to set forth its own rates.

(C) Nothing in this Final Judgment shall prohibit any port agent defendant from:

- (1) negotiating or agreeing with any customer that is not a port agent regarding the rates for tramp agency services provided to that customer;
- (2) negotiating or agreeing with another port agent regarding rates for tramp agency services for a transaction in which one agent is the bona fide customer of the other agent (i.e., the agent receiving tramp agency services is not acting on behalf of a third party to the transaction);
- (3) establishing a rate or schedule of rates for tramp agency services by or on behalf of another port agent when the port agent defendant has a bona fide existing

or anticipated subagency relationship with the other port agent in a port where one party to the subagency relationship does not itself (i.e. without the use of a subagent) provide tramp agency services and when the rate or schedule of rates established is limited to the rate or schedule of rates to be charged for tramp agency services pursuant to the subagency relationship;

(4) negotiating or agreeing on behalf of any customer with a second port agent regarding the second port agent's rates for tramp agency services furnished to or paid for by that customer;

(5) negotiating or agreeing with a second port agent acting on behalf of any customer regarding the port agent defendant's rates for tramp agency services furnished to or paid for by that customer; or

(6) preparing, disseminating, maintaining, reproducing or otherwise creating or issuing any schedules of rates established in compliance with paragraph (C) of this section.

V.

(A) Defendant ASBA is enjoined and restrained from preparing, disseminating, maintaining, reproducing or otherwise creating or issuing any schedules of:

(1) rates to be charged by a port agent or port agents for tramp agency services in any United States port;
or

(2) current or historical representative, average, minimum, or maximum rates charged by port agents for tramp agency services in any United States port.

(B) Nothing in this Final Judgment shall prohibit defendant ASEBA from publishing schedules of rates for tramp agency services in any United States port, provided that:

(1) defendant ASBA shall include all such schedules in a single annual publication;

(2) defendant ASEBA shall publish only schedules of rates that were unilaterally and independently established by port agents;

(3) defendant ASBA shall publish a schedule of rates only if the port agent submitting the schedule for publication also simultaneously submits to defendant ASEBA an affidavit in the form contained in Appendix A to this Final Judgment and signed by a responsible official of the port agent;

(4) defendant ASEBA shall retain for the term of this Final Judgment all affidavits it receives pursuant to Section V(E)(3), except defendant

ASBA may be required to provide one or more affidavits to the Department of Justice in accordance with Section XI(a)(1);

(5) defendant ASEA shall publish separate schedules for at least five different port agents for any port for which defendant ASEA publishes schedules in any year; and

(C) such publication includes a notice in the form contained in paragraph (A) of Appendix B to this Final Judgment.

VI.

In the event that any defendant receives a request from any person for a schedule of mandatory, standard, recommended, suggested or minimum rates for tramp agency services in any United States port, other than a request for a port agent defendant's own rates for such services, such defendant shall advise the inquiring person that under United States law, each port agent must unilaterally and independently establish its own rates for tramp agency services, except for rates established in compliance with Section IV(C) of this Final Judgment.

VII.

(A) Within thirty (30) days of the entry of this Final Judgment, each port agent defendant shall furnish a copy of the Complaint and Final Judgment in this action to each of its

directors and officers and each of its employees who has any responsibility for negotiating, establishing, or charging rates for tramp agency services in any United States port.

(E) Each port agent defendant shall furnish a copy of the Complaint and Final Judgment in this action to each person who, after the date of entry of this Final Judgment, becomes a director or officer of the port agent defendant or assumes any of the responsibilities described in Section VII(A).

(C) Within sixty (60) days of the entry of this Final Judgment, each port agent defendant shall have adopted

(1) a written policy requiring its compliance with this Final Judgment which shall explain this Final Judgment and the obligations it imposes on the port agent defendant, and

(2) a written policy requiring its compliance with the antitrust laws which shall explain the forms of conduct that are prohibited as unlawful price fixing under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the civil liabilities and criminal sanctions imposed by the Act,

and shall furnish a copy of such written compliance policies to each of the persons enumerated in Section VII(A) and (B).

(D) Within ninety (90) days of the entry of this Final Judgment, each port agent defendant shall serve upon plaintiff an affidavit as to the fact and manner of its compliance with Section VII(A), (E) and (C).

VIII.

(A) Within thirty (30) days of the entry of this Final Judgment, defendant ASBA shall furnish a copy of the Complaint and Final Judgment in this action to each of its officers, directors and members. ASBA shall also promptly furnish a copy of the Complaint and Final Judgment to each person who becomes a member of ASEA after the date of entry of this Final Judgment.

(B) Defendant ASBA is ordered to publish a notice, in the form contained in Appendix E to this Final Judgment, in the first edition of its Year Book published after the effective date of this Final Judgment.

(C) Within ninety (90) days of the entry of this Final Judgment, defendant ASBA shall serve upon plaintiff an affidavit as to the fact and manner of its compliance with paragraphs (A) and (B) of this section.

IX.

(A) Within fifteen (15) months of the entry of this Final Judgment, defendant ASBA shall convene a membership meeting, of which at least thirty (30) days' notice shall previously have been given to all members. At such meeting, counsel or other qualified persons shall:

(1) describe and explain this Final Judgment, the obligations it imposes on the association and its members, and the compliance obligations that are imposed herein;

(2) describe and explain the forms of conduct that are prohibited as unlawful price fixing under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the civil liabilities and criminal sanctions imposed by the Act; and

(3) answer members' questions concerning this Final Judgment and the provisions of the Sherman Act relating to price fixing.

(E) Similar meetings shall be convened, with similar notice to all members, no less frequently than once every twelve (12) months thereafter during the three years following the first such meeting.

(C) Within seven days after each such meeting, defendant ASBA shall forward to the plaintiff an affidavit confirming that the required notice of the meeting was given and that the meeting was held and listing the persons in attendance at the meeting.

X.

Each port agent defendant shall require, as a condition of the sale or other disposition of all, or substantially all, of its assets used in the provision of port agent services, or all, or substantially all, of its assets used in the provision of port agent services in any United States port, that the acquiring party agree to be bound by the provisions of the Final Judgment in this action and furnish a copy of the

Complaint and Final Judgment to such acquiring party. The acquiring party shall serve upon plaintiff its consent to be bound by this Final Judgment.

XI.

For the purpose of determining or securing compliance with the Final Judgment in this action, and subject to any legally recognized privilege, from time-to-time:

(a) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant made to its principal office, be permitted:

(1) Access during office hours of such defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

(b) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

(c) No information or documents obtained by the means provided in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(d) If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party or divulging such material under the Freedom of Information Act, 5 U.S.C. § 552.

XII.

The Final Judgment in this action will expire on the tenth anniversary of its date of entry or, with respect to any particular provision, on any earlier date specified.

XIII.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to the Final Judgment in this action to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

XIV.

Entry of the Final Judgment in this action is in the public interest.

/s/ Judge Alexander Harvey II
UNITED STATES DISTRICT JUDGE

APPENDIX A

I have read the provisions of the Final Judgment entered by the District Court in United States v. Association of Ship Brokers and Agents (U.S.A.), Inc., et al. and understand the obligations which it imposes on the defendants in that case. I submit this affidavit in connection with the transmission to the ASBA of (name of corporation's) schedule of tramp agency fees and have knowledge of the circumstances relating to the creation and intended use of that schedule of fees.

Accordingly, I hereby certify that:

1. the schedule was unilaterally and independently established;
2. no one representing (name of corporation) has agreed with any representative of any other port agent to adhere to the rates contained in this schedule; and
3. prior to this submission, no one representing (name of corporation) has discussed with any representative of any other port agent the rates contained in this schedule [except for discussions permitted by subparagraphs IV (C) (2-6) of the above-referenced Final Judgment].

s/ _____

Sworn and subscribed to before me at _____
this _____ day of _____, 19__.

Notary Public

APPENDIX P

(A) Notice is hereby provided of the following:

1. The Association of Ship Brokers and Agents (U.S.A.), Inc. (hereinafter "ASBA") does not authorize the creation, distribution or use of any mandatory, standard, recommended, suggested, or minimum rates for port agent services provided to tramp vessels in any United States port;

2. ASBA takes no position with respect to what constitutes an appropriate rate for such port agent services; and

3. Under United States law, each port agent must unilaterally and independently establish its own rates for port agent services, except for rates for services provided pursuant to a bona fide subagency relationship.

(E) This notice is provided as required by the terms of the settlement of a civil lawsuit filed by the Department of Justice (hereinafter the "Department") on _____, 1984, challenging as a violation of the antitrust laws the creation, distribution, and use of schedules of rates for port agent services provided to tramp vessels in the port of New York. On the same date, the Department filed three other civil lawsuits challenging similar conduct in the ports of Philadelphia, Baltimore and the West Gulf. The following defendants were named in the four lawsuits:

1. With respect to the port of New York - ASBA; Boyd, Weir & Sewell, Inc.; Kerr Steamship Company, Inc.; and Norton Lilly & Co., Inc.;

2. With respect to the port of Philadelphia - Philadelphia Marine Trade Association; Lavino Shipping Company; Rice, Unruh Co.; Robinson & Mastrangelo, Inc.; and Stockard Shipping & Terminal, Co.;

3. With respect to the port of Baltimore - Steamship Trade Association of Baltimore, Incorporated; John S. Connor, Inc.; ITC Corporation of Baltimore; and Pamsay, Scarlett and Company, Inc.; and

4. With respect to the West Gulf ports - West Gulf Maritime Association; Biehl & Co.; Hansen & Tidemann, Inc.; and Strachan Shipping Company.

(C) In each of these cases the Department and the defendants agreed upon the terms of a consent decree, and all four proposed judgments were then presented to the district court. After providing an opportunity for public comment, the Court accepted the proposed decrees, thus settling the four civil actions. As part of the Court's order, the defendants were enjoined from creating, distributing or using jointly established schedules of rates and were also required to develop and implement antitrust education and compliance programs. The consent decrees do not constitute an admission or finding of violation of law by any of the defendants.