

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	84 Civ. <u>84-</u> (1939)
)	Filed: May 10, 1984
ASSOCIATION OF SHIP BROKERS AND)	
AGENTS (U.S.A.), INC.;)	
BOYD, WEIR & SEWELL, INC.;)	
KERR STEAMSHIP COMPANY, INC.; and)	
NORTON, LILLY & CO., INC.,)	
)	
Defendants.)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), the United States hereby files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this case. The defendants have stipulated their acceptance of the proposed Final Judgment.

I.

The Nature and Purpose of the Proceeding

On May 10, 1984 the United States filed a civil antitrust suit alleging that the defendants, Association of Ship Brokers and Agents (U.S.A.), Inc., ("ASBA"); Boyd, Weir & Sewell, Inc.; Kerr Steamship Company, Inc.; and Norton, Lilly & Co., Inc.,

engaged in a combination and conspiracy to raise, fix and maintain the prices for port agent services provided to tramp vessels in the port of New York ("the port") in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint charges that the defendants agreed on, prepared, revised, published, disseminated, and used schedules of fees for port agent services provided to tramp vessels in the port.

The Complaint seeks a judgment by the Court declaring that each defendant has engaged in an unlawful combination and conspiracy in restraint of interstate and foreign commerce of the United States in violation of the Sherman Act. In addition, the Complaint seeks an order to enjoin and restrain defendants from engaging in such activities, or in other activities having a similar purpose or effect, in the future.

This civil case follows a related criminal prosecution against these four defendants, filed on December 16, 1983 in the United States District Court for the Southern District of New York. That prosecution similarly charged a violation of the antitrust laws of the United States and challenged the creation, distribution, and use of schedules of rates for port agent services provided to tramp vessels in the port of New York. Pursuant to a plea agreement, the defendants entered pleas of nolo contendere and were fined by the Court.

II.

Description of the Practices Giving Rise to the Alleged Violation

Port agents are hired by the owners or the charterers of tramp vessels or liner vessels to provide port agent services while such vessels are in a particular port. Port agent services include, 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. A tramp vessel is a cargo ship that moves without being governed by a schedule of regular port calls, unlike a liner vessel which regularly travels between specified ports according to a schedule.

Defendant ASBA is a trade association which includes among its members firms that provide port agent services. The other defendants are port agent firms and are members of ASBA.

The Government contends, and was prepared to show at trial, that, beginning at least as early as 1976 and continuing until at least 1981, the defendants and co-conspirators engaged in a combination and conspiracy consisting of a continuing agreement, understanding and concert of action to raise, fix and maintain the prices charged for port agent services provided to tramp vessels in the port.

The Government's proof would have showed that the defendant port agent firms and co-conspirators periodically agreed on, prepared and revised schedules of rates for port agent services provided to tramp vessels in the port. With the assistance of ASBA, the defendant port agent firms and co-conspirators published and disseminated these schedules. Further, the defendant port agent firms used the fee schedules as a substantial part of their pricing structure in determining the amounts to be charged for services provided to tramp vessels in the port. The defendant firms were among the principal companies providing port agent services to tramp vessels in the port, and in 1980, these firms generated revenues of more than \$400,000 from servicing over 400 tramp vessels in the port. During the period covered by the Complaint, the tramp vessels for which these services were performed moved and carried cargo from one state to another or between the United States and foreign countries in a continuous and uninterrupted flow of interstate and foreign commerce.

The Complaint alleges the practices described above had the following effects, among others:

(a) fees for port agent services provided to tramp vessels in the port were raised, fixed and maintained at artificial and noncompetitive levels;

(b) competition for port agent services provided to tramp vessels in the port was restrained and suppressed; and

(c) the public was denied the benefits of free and open competition for port agent services provided to tramp vessels in the port.

III.

Explanation of the Proposed Final Judgment

The United States and the defendants have stipulated that a Final Judgment, in the form filed with the Court, may be entered by the Court at any time after the sixty-day waiting period provided by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16. The proposed Final Judgment provides that the entry of that Judgment does not constitute any evidence against, or admission by, any party with respect to any issue of law or fact. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon the Court finding that entry of the Judgment will be in the public interest.

The proposed Final Judgment contains two principal forms of relief. First, the defendants are enjoined from repeating the behavior that characterized the combination and conspiracy. Second, the proposed Final Judgment places affirmative obligations on the defendants to provide certain affected persons in the industry with notice of this action and the Judgment in order to avoid a repetition of the unlawful conduct.

A. Prohibited Conduct

Section IV of the proposed Final Judgment prohibits the defendants from directly or indirectly agreeing to fix, suggest, or recommend the rates to be charged for port agent services for tramp vessels in any United States port. That section also prohibits the defendant port agent firms from jointly creating or revising schedules of rates for port agent services, except as provided in Paragraph (C) of Section IV. Paragraph (C) allows the defendant port agent firms to engage in certain practices that are unlikely to be anticompetitive. First, Paragraph (C) specifies that the port agent defendants are not prohibited from entering into fee agreements with their customers, including other port agents that are purchasing, as consumers, tramp agency services from a defendant. Second, Paragraph (C) permits port agent defendants to establish rates jointly pursuant to a bona fide subagency relationship. In a subagency relationship, the subagent acts as an extension of the primary agent, enabling the primary agent to obtain services for its customers in ports that the primary agent does not itself serve. Third, it is common in the port agent industry for the owner and the charterer of a single vessel to be represented by separate port agents. Contracts between the owner and charterer of a particular vessel often call for the charterer's agent to be paid by the owner. In that context, it may be necessary for the owner's agent to discuss with the

charterer's agent the fee to be charged by the charterer's agent. Paragraph (C) permits such discussion and negotiation among port agents in these circumstances.

Section V of the proposed Final Judgment prohibits defendant ASBA from preparing, disseminating, maintaining, reproducing or otherwise creating or issuing any lists or schedules of: (1) fees or rates to be charged by a port agent or port agents for tramp vessels in any United States port; or (2) current or historical representative, average, minimum, or maximum fees or rates charged by port agents for tramp vessels in any United States port. Paragraph (B) of that section, however, would allow ASBA to disseminate a single annual publication that would include the independently-established price lists of port agent firms, provided that the publication includes separate schedules from at least five different port agents for any port for which defendant ASBA publishes schedules. The purpose of this provision is to allow defendant ASBA to disseminate information about prices for port agent services in a manner that may promote competition among port agents.

B. Affirmative Obligations of the Defendants

Section VI of the proposed Final Judgment requires any defendant that receives a request for a schedule of mandatory, standard, recommended, suggested or minimum rates for port agent services provided to tramp vessels in any United States

port, other than the defendant's own rates, to advise the inquiring person that, under United States law, each port agent must unilaterally and independently establish its own rates for port agent services, except for those rates established in accordance with Section IV(C) of the Final Judgment.

Section VII requires each port agent defendant to furnish a copy of the Complaint and Final Judgment to its officers and directors and each of its employees with pricing responsibility for port agent services. Each port agent defendant must also furnish both documents to each person who becomes a director or officer or who assumes such pricing responsibility after the entry of the Judgment. In addition, each of the port agent defendants is required to establish a written policy ensuring its compliance with the antitrust laws and the requirements of the Judgment.

Section VIII requires defendant ASEPA to furnish a copy of the Complaint and the Judgment to each of its officers, directors and members, and to furnish both documents to each person who becomes a member after the entry of the Judgment. In addition, defendant ASEPA is required to publish in its Year Book a notice, in the form contained in Appendix B to the proposed Final Judgment, containing information about the lawful establishment of rates for port agent services. The published notice will also describe the four civil actions that the United States has filed against the trade associations and

port agent firms involved in providing port agent services to tramp vessels in the ports of New York, Philadelphia, and Baltimore and in the West Gulf ports.

Section IX requires defendant ASBA to convene a membership meeting at which counsel or other qualified persons must describe and explain the Final Judgment and the obligations it imposes, describe and explain the forms of conduct that are prohibited as price fixing under Section 1 of the Sherman Act and the penalties imposed by that Act, and answer members' questions concerning the Judgment and the Sherman Act. ASBA must convene similar meetings no less frequently than once every twelve (12) months thereafter during the three years following the first such meeting.

Finally, under Section XI of the proposed Final Judgment the Justice Department will have access, upon reasonable notice, to the records and personnel of the defendants to determine and secure their compliance with the Judgment.

C. Scope of Proposed Final Judgment

(1) Persons Bound by the Decree. The proposed Final Judgment provides in Section III that its provisions apply 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 receive actual notice of the Final Judgment by personal service, service under Sections VII or

VIII of the Judgment, or otherwise. Section III also provides that, for purposes of Section III, a member of ASBA shall not be deemed to be in active concert or participation solely by virtue of its membership in ASBA. Section X of the Judgment prohibits each port agent defendant from selling or transferring 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, unless it furnishes to the acquiring party a copy of the Complaint and Final Judgment and the acquiring party agrees to be bound by the provisions of the Judgment. Section X also requires the acquiring party to serve upon the plaintiff confirmation of the acquiring party's consent to be bound by the Final Judgment.

(2) Duration of the Decree. Section XII provides that the proposed Final Judgment will expire on the tenth anniversary of its date of entry.

D. Effect of the Proposed Final Judgment on Competition

The Proposed Judgment is designed to prevent any recurrence of the unlawful conduct alleged in the Complaint. Compliance with the proposed Judgment will prevent collective action by port agents on rates charged for port agent services to tramp vessels.

IV.

Alternatives to the Proposed Final Judgment

The alternative to the proposed Final Judgment would be a full trial of the case. In the view of the Department of Justice, such a trial would involve substantial costs to the United States and is not warranted since the proposed Final Judgment provides the relief that the United States sought in its Complaint.

V.

Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney fees. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), this Final Judgment will have no prima facie effect in any lawsuit which may be brought against any defendant.

VI.

Procedures Available for Modification of the Proposed Consent Judgment

The proposed Final Judgment is subject to a stipulation between the Government and the defendants which provides that the Government may withdraw its consent to the proposed

Judgment any time before entry of the proposed Judgment. By its terms, the proposed Judgment also provides for the Court's retention of jurisdiction in this action in order to permit any of the parties to apply to the Court for such orders as may be necessary or appropriate for the modification of the Final Judgment.

As provided by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, any person wishing to comment upon the proposed Judgment may submit, within the statutory sixty-day period, written comments to the United States Department of Justice, Attention: Elliott M. Seiden, Chief, Transportation Section, Antitrust Division, U.S. Department of Justice, Washington, D.C. 20530. Such comments, and the Government's response to them, will be filed with the Court and published in the Federal Register. The Government will evaluate all such comments to determine whether there is any reason for withdrawal of its consent to the proposed Final Judgment.

VII.

Determinative Materials and Documents

No materials or documents were considered determinative by the United States in formulating the proposed Final Judgment. Therefore, none is being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

Dated: May 10, 1984

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Competitive Impact Statement has been served by mail, this 10th day of May, 1984, on the following:

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