

room at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances:

For Interstate: Michael R. McElroy, Esq.
For IHSF: Mark J. Hagopian, Esq., and
Jon G. Hagopian, Esq.
For the Department of
Attorney General: Paul J. Roberti, Esq.
Assistant Attorney General

The basis for Interstate’s complaint and petition is its contention that IHSF simply does not have authority from the Division to transport bicycles on its vessel. In support of this position, Interstate referred to the record in Division Docket No. 98-MC-16¹ to identify several testimonial references wherein IHSF witnesses previously stated that IHSF’s vessel would not be carrying bicycles.

In further support of this position, Interstate points out that the Division’s report and order, issued in Docket No. 98-MC-16, granted IHSF’s application upon the condition “*that the services provided conform with the evidence in the record*” (Interstate Exh. 10, Order No. 15662, p. 44). Interstate further observed that the certificate of public convenience and necessity issued to IHSF similarly limits IHSF’s authority to the condition that the services provided conform with the evidence in the record (Interstate Exh. 11).

¹ This docket was established by the Division in response to an application filing by IHSF, wherein IHSF sought authority to operate as a water carrier, pursuant to the requirements of R.I.G.L. § 39-3-3.

Interstate maintains that because the record in Docket No. 98-MC-16 specifically reflects that bicycles would not be carried, it would be improper to allow IHSF to unilaterally expand the scope of its authority without another hearing on the merits to determine whether such an expansion of operating authority would be appropriate.

Moreover, Interstate argued that IHSF's decision to carry bicycles for free is eroding the rate differential established by the Division to safeguard Interstate from destructive competition.

In response to IHSF's cross-complaint, Interstate asserted that the rate it charges for transporting bicycles has been approved by the Public Utilities Commission ("Commission") and is, therefore, lawful. Interstate also contends that free bicycle transportation service would be illegal unless first approved by both the Commission and Division. Interstate cited Rhode Island General Laws, Sections 39-2-3, 39-2-4 and 39-2-5; and the Rhode Island Supreme Court decision in O'Neil v. Interstate Navigation Company, 565, A.2d 530 (1989), in support of its argument (Interstate Exhs. 2 and 4).

Interstate proffered two witnesses in support of its petition/complaint. These witnesses were offered to first, quantify the number of bicycles being carried by IHSF, and secondly, to calculate the potential revenue losses to Interstate.

Interstate and IHSF ultimately agreed to adopt an average of 33 bicycles per day as a representative volume of IHSF's bicycle carrying experience to date. From this stipulated daily average, Interstate calculated a potential

annual loss of approximately \$90,192. Based on these potential losses, Interstate contended that it was being financially harmed by the bicycle transportation services now being provided by IHSF.

IHSF contended that the authority it received from the Division in 1998 did not prohibit the transportation of bicycles. IHSF explained that its comments about not carrying bicycles in Docket No. 98-MC-16 were based exclusively on the fact that the particular vessel it was planning to use at the time (the "Friendship IV") did not accommodate bicycles. IHSF noted that it lost access to its originally planned vessel after its initial operations were delayed due to appeals filed by Interstate. IHSF indicates that its current vessel (the "Athena") is capable of carrying bicycles. A diagram of the vessel was proffered to demonstrate its passenger and bicycle storage configurations (IHSF Exh. 3).

IHSF argues that the Division's decision in Docket No. 98-MC-16 not only did not prohibit the carrying of bicycles, but did not even consider the matter as a basis for granting IHSF's original application. IHSF asserts that the Division's report and order in Docket No. 98-MC-16 reflected that IHSF's application was granted principally predicated upon passenger number considerations as evidenced by the following language contained in the decision:

... the magnitude of the difference in scope of passenger operations ... The evidence demonstrated that Interstate's passenger operations will be approximately eight times that of Hi-Speed's projected passenger capacity. For this reason (coupled with the ticket price differential), the Division finds that the Applicant's operations are not likely to have a

significant impact on Interstate Navigation (quoting from Order No. 15652, p. 33).

IHSF opined that the magnitude of Interstate's bicycle operations is much greater than eight times IHSF's small bicycle operations. IHSF characterized its bicycle operations as having a "*de minimus impact upon Interstate, if it has any at all*" (IHSF Exh. 1).

IHSF asserts that Interstate "is mixing apples with oranges" when it alleges that IHSF's failure to charge for bicycles impacts the passenger ticket price differential (Id.). IHSF called this argument "specious," and suggested that the same argument could be applied to IHSF's failure to charge for luggage, groceries, coolers, surfboards and other items of personal property (Id.).

Regarding its cross-complaint and petition, IHSF states that there is abundant and persuasive law that would treat bicycles as the carry-on possessions of passengers rather than a form of freight. IHSF proffered several legal citations on this point. Accordingly, IHSF requested that the Division undertake an investigation to determine whether it is appropriate for Rhode Island's water carriers to exact freight charges for carrying bicycles (Id.).

The Department of Attorney General ("Attorney General") expressed support for IHSF's decision to not charge its passengers for transporting their bicycles. With respect to the issue of IHSF's authority to carry bicycles in the first instance, the Attorney General recommended that the Division decide this issue based on what would be best for the public interest.

FINDINGS

The Division has carefully considered the arguments raised by the parties in this matter. The Division has also thoroughly examined the report and order it issued in Docket No. 98-MC-16 and the myriad other exhibits proffered in this proceeding.

Predicated on the record and arguments proffered, the Division finds that IHSF may not rely on the Division's report and order in Docket No. 98-MC-16 or the certificate of public convenience and necessity issued thereunder as the legal basis for its claim to have authority to carry bicycles.

There is incontrovertible evidence on the record that IHSF declared in Docket No. 98-MC-16 that it would not be carrying bicycles on its vessel. Now, while it may be true that IHSF's decision was solely based on the carrying capacity and deck plan of its originally selected vessel (the Friendship IV), rather than on all vessels to be ever used by IHSF in the future, the Division finds that this distinction or nuance was not made clear by IHSF, and consequently, was not considered by the Division or addressed in the report and order issued in Docket No. 98-MC-16.

The Division, therefore, must find that the authority conferred to IHSF through Docket No. 98-MC-16 was indeed limited to passengers and reasonable carry-on possessions. However, by virtue of the fact that the record in Docket No. 98-MC-16 definitively reflects that bicycles would not be carried,

it would be unreasonable and inconsistent with the record in Docket No. 98-MC-16 to now treat such items as carry-on possessions.

Based on the aforementioned finding, the Division shall grant Interstate's petition for a cease and desist order. The Division does not find, however, that the circumstances surrounding this matter warrant the imposition of penalties or other relief. Further, in order to facilitate the service adjustment required pursuant to this decision, the Division will afford IHSF a service transition period of one calendar week from the issue date of this report and order to accommodate patrons that may now be vacationing on Block Island and who anticipate a return trip with their bicycles.

Furthermore, the Division is issuing the instant cease and desist order without prejudice. Accordingly, the Division will entertain any future petition filing from IHSF that seeks to augment IHSF's currently effective operating authority.

The Division additionally finds insufficient justification to grant IHSF's cross-complaint/petition for an investigation into "the propriety of a public water carrier to charge for bicycles." The record does not reflect the existence of a de facto prohibition against this practice. Moreover, the tariffs in question have been historically approved by the Commission and consequently carry a presumption of reasonableness that remains until the contrary is proven.²

Accordingly, it is

(16698) ORDERED:

² In Re: Island Hi-Speed Ferry, LLC, 746 A.2d 1240 (2000)

1. That the Interstate Navigation Company's August 5, 2001 petition is hereby granted in part and denied in part as discussed herein.
2. That Island Hi-Speed Ferry shall cease and desist from carrying bicycles, beginning one calendar week from the issue date of this report and order.
3. That the instant cease and desist order is issued without prejudice and that Island Hi-Speed Ferry may subsequently petition the Division for authority to carry bicycles aboard its vessel. The Division agrees to consider such an application as expeditiously as practicable.
4. That Island Hi-Speed Ferry's petition for an investigation into the "propriety of a public water carrier to charge for bicycles," is hereby denied.

Dated and Effective on August 30, 2001 at Warwick, Rhode Island.

John Spirito, Jr., Esq.
Hearing Officer

Thomas F. Ahern
Administrator