

ORIGINAL

**U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD**

GOVERNMENT OF THE TERRITORY
OF GUAM,

Complainant,

Vs.

STB DOCKET NO. WCC-101

AMERICAN PRESIDENT LINES, LTD.,
MATSON NAVIGATION COMPANY,
And SL SERVICE, INC., f/k/a SEA-
LAND SERVICE, INC.,

Defendants.

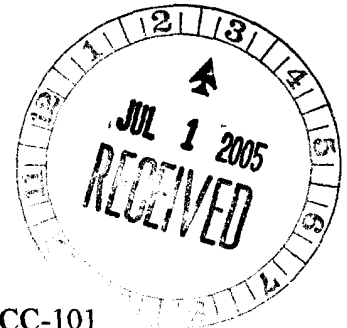
**INTERVENOR CARIBBEAN ASSOCIATION'S
COMMENTS IN RESPONSE OF THE GOVERNMENT
OF THE TERRITORY OF GUAM TO THE ORDER OF THE
SURFACE TRANSPORTATION BOARD TO SHOW CAUSE**

ENTERED
Office of Proceedings
JUL 1 2005
Part of
Public Record

Submitted By:

RICK A. RUDE, Esq.
Suite 103
207 Park Avenue
Falls Church, VA. 22046
(AC 703) 536-3063 Tele.
(AC 703) 536-4841 Fax.

Counsel For Intervenor
CARIBBEAN SHIPPERS
ASSOCIATION



214282

Introduction

The Board issued a Show Cause Order in Docket WCC-101 based upon the apparent abandonment of this proceeding by the Complainant (Government of the Territory of Guam, hereinafter "GovGuam"). The Order was served on June 8, 2005 and permitted Defendants and Intervenor until July 8, 2005 in which to file comments in response to any submission that might be made by GovGuam. The Caribbean Shippers Association (hereinafter "CSA") was granted to leave to intervene and participate as a party in Phase II of this proceeding. The following Comments are submitted by CSA in response to the June 28, 2005 submission by GovGuam.

CSA COMMENTS

The CSA, in its March 10, 1999 Petition to Intervene, pointed out that the complaint filed with the Board by GovGuam was a continuation of the complaint proceeding filed by GovGuam before the Federal Maritime Commission on December 7, 1989. That case, which presently remains before the FMC is identified as FMC Docket NO. 89-26, *The Government of the Territory of Guam v. Sea-Land Service, Inc. and American President Lines, Ltd.*¹ The complaint before the Surface Transportation Board seeks \$150 Million in

¹ The most recent substantive decision in that case was issued August 29, 2003 in which the presiding Administrative Law Judge, Frederick M. Dolan, denied the request for reparations demanded by GovGuam. He found that GovGuam had failed to establish any connection between the defendants' excessive rates of return and the required unreasonableness of defendants' specific commodity rates. Judge Dolan re-affirmed the June 1, 1998 decision of the full Commission that a 'rate of return' analysis may not be employed to challenge the reasonableness of individual commodity rates. This legal conclusion is grounded in many years of Commerce Law precedent both before the Federal Maritime Commission and the Interstate Commerce Commission. Attached hereto and identified as Attachment "A" are the relevant portions of the June 1, 1998 FMC decision and as Attachment "B" the relevant portions of the August 29, 2003 decision of Judge Dolan. It is also noted that GovGuam abandoned a primary foundation of its complaint to the Federal Maritime Commission. GovGuam abandoned the jurisdictional issues contained in Docket No. 89-26. See, Attachment "B" at pages 109-110. GovGuam's pursuit of reasonable rates now borders on obsession without regard to the extended passage of time, present reality, or the obvious legal infirmity of GovGuam's theory of recovery. The enactment of the ICC Termination Act of 1995 extinguished the jurisdiction of the Federal Maritime Commission and therefore extinguished the only remedy available in

“reparations” from the defendant carriers. The legal basis is that the carriers are obtaining excessive profits (‘rates of return on assets used in the trade’) and should be made to return those profits to GovGuam.

The parties to Docket WCC-101 mutually agreed upon a protracted multi-phase procedure. It has now been 7 years since the complaint was filed with the Board. Likewise, it has been 3 years since the parties, including CSA, submitted their comments and proposals regarding the methodology to be adopted. On February 2, 2005 CSA submitted the required Summary of Presentation to the Board for Oral Argument. CSA pointed out that the matters raised and contained in Docket WCC-101 had long since been overtaken by events some of which were noted to the Board in the CSA’s 2002 filings. Nothing has changed since that February 2, 2005 submission which is incorporated herein.

HAS THE GOVGUAM RATE CASE BECOME FUTILE?

It is the belief of CSA that the GovGuam rate complaint case has become a futile exercise. Further, the continuation of this proceeding only serves to delay the institution of a proper rulemaking proceeding to establish regulations for the measure of reasonableness of rates for water carriers in the domestic offshore trades. The statutory requirement of “reasonable rates” has been in place for 9 years—yet there is an absence of any articulated standards or criteria by which a shipper(s) can make any analysis regarding whether or not a carrier’s rate is appropriate. This Board must weigh and balance the general public interest as against the political and provincial interests of the

Docket No. 89-26. GovGuam’s relief was to be a prospective order for reduction in rates—i.e. a rate rollback. However, the FMC without jurisdiction over the defendant carriers or their tariffs, was ‘divested’ of the authority to make and enforce such a remedial order.

Territory of Guam in deciding whether or not to permit the continuation of this overly protracted proceeding.

The decisions of the Federal Maritime Commission clearly reflect that a complainant cannot employ general revenue standards in the analysis of individual rates. That is again the same theory being advanced by GovGuam in STB Docket No. WCC-101. The defendants publish COMMODITY RATE tariffs in the Guam Trade. The decisions of the Federal Maritime Commission note that the carriers' rates average 23% (Sea-Land @26.5% and APL@19.5%=ave.23%) greater than an appropriate level. The period involved was 1987 to 1990. What relevance do such findings have 15 years later? None.

The CSA is concerned regarding the clear pattern of parallel pricing, lack of pricing competition and carrier capacity rationalization that is driving excessive rate levels in the domestic offshore trades. However, protracted litigation with the utilization of a flawed theory of recovery cannot remedy these serious problems. Such cases only serve to obstruct the pursuit of real relief. The extraordinary lack of diligence by complaint also countenances a level of skepticism regarding the future course of this proceeding.

GovGuam has invoked a basic legal right to be heard—GovGuam should be heard. However, it is patently unreasonable for Board to permit the continuation of a proceeding based upon a discredited legal premise. GovGuam did not take issue with the Federal Maritime Commission's June 1, 1998 ruling that individual commodity rates cannot be shown to be unreasonable based upon overall excess revenue/carrier profits. GovGuam should not be permitted to continue pursue such a legal theory and remedy in docket WCC-101.

The Board, in addition to the balancing of the interests between GovGuam and that of the general public, such as CSA, must take an active involvement and participation in this proceeding if there is ever to be any conclusion. This includes making it clear that the form of relief being sought by GovGuam is not appropriate.² Such a pronouncement will clarify this matter for the parties and the public and substantially move this case forward. To give due regard to the defendant carriers, they raised this legal point in March 1990 but had to endure 8 years of litigation to obtain that basic legal ruling. The Board has not been shy about reformation of complaints in which the Board seeks to distill the essence of the matters in issue. It should do the same thing in this case. Unless the Board undertakes active involvement, this case is in fact a futile undertaking.

CONCLUSION

The CSA does not object to the withdrawal of the Board's Order to Show Cause provided the Board takes an active involvement to move this case to an expeditious conclusion, issue an order clarifying the remedies available, and addressing the concerns raised by the CSA as outlined in its Summary submitted to the Board on February 2, 2005.

² It has been noted in a number of recent newspaper articles that the Government of Guam has intimated that they expect to recover "millions of dollars" from the defendant carriers. This is not a remedy within those remedies available as framed by the complaint filed in Docket WCC-101. This is highly problematic as it is the belief of CSA that if this proceeding goes forward, that it needs to be made clear the scope of remedies available under the terms of the statute as well as 'from whom', 'for whom' and 'how' such reparations would be obtained. The FMC case is to be decided shortly and after 16 years it is clear that the methodology sought 'does not work'. CSA would make a fundamental objection to the continuation of this case if such a protracted 'time frame' for resolution were to evolve in docket WCC-101.

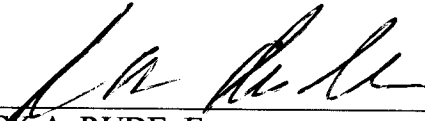
Territory of Guam in deciding whether or not to permit the continuation of this overly protracted proceeding.

The decisions of the Federal Maritime Commission clearly reflect that a complainant cannot employ general revenue standards in the analysis of individual rates. That is again the same theory being advanced by GovGuam in STB Docket No. WCC-101. The defendants publish COMMODITY RATE tariffs in the Guam Trade. The decisions of the Federal Maritime Commission note that the carriers' rates average 23% (Sea-Land @26.5% and APL@19.5%=ave.23%) greater than an appropriate level. The period involved was 1987 to 1990. What relevance do such findings have 15 years later? None.

The CSA is concerned regarding the clear pattern of parallel pricing, lack of pricing competition and carrier capacity rationalization that is driving excessive rate levels in the domestic offshore trades. However, protracted litigation with the utilization of a flawed theory of recovery cannot remedy these serious problems. Such cases only serve to obstruct the pursuit of real relief. The extraordinary lack of diligence by complainant also countenances a level of skepticism regarding the future course of this proceeding.

GovGuam has invoked a basic legal right to be heard—GovGuam should be heard. However, it is patently unreasonable for Board to permit the continuation of a proceeding based upon a discredited legal premise. GovGuam did not take issue with the Federal Maritime Commission's June 1, 1998 ruling that individual commodity rates cannot be shown to be unreasonable based upon overall excess revenue/carrier profits. GovGuam should not be permitted to continue pursue such a legal theory and remedy in docket WCC-101.

Respectfully submitted,



RICK A. RUDE, Esq.
Suite 103
207 Park Avenue
Falls Church, VA. 22046
(AC 703) 536-3063 Tele.
(AC 703) 536-4841 Fax.

Counsel for Intervenor
Caribbean Shippers Association

Certificate of Service

I hereby certify that a copy of this document has been served, by first class mail, postage prepaid, upon all parties of record dated this 120 day of July 2005 at Falls Church, VA. 20046.



Richard A. Allen, Esq.
888 -17th St., N.W.
Suite 600
Washington, DC 20036

Robert S. Zuckerman
2101 Rexford Road
Charlotte, NC 28211

C. Jonathan Benner
401 Ninth St., N.W.
Suite 1000
Washington, DC 20004

Bruno Maestri
Norfolk Southern Corp.
1500 K St., N.W. Suite 375
Washington, DC 20005

Edward D. Greenberg
1054 31st St., N.W.
Washington, DC 20007

Kevin C. O'Rourke
Matson Navigation Co.
555 - 12th Street
Oakland, CA. 94607

Joseph A. Guthrie
Deputy Attorney General
287 West O'Brien Drive
Hagatna, Guam 96910

Peter J. Shudtz
CSX Corp.
901 E. Carry Street
1 James Center
Richmond, VA. 23119

Robert Basseches
901 New York Avenue
Washington, DC 2001

(S E R V E D)
(JUNE 1, 1998)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 89-26

THE GOVERNMENT OF THE TERRITORY OF GUAM, ET AL.

v.

SEA-LAND SERVICE, INC. AND
AMERICAN PRESIDENT LINES, LTD.

Cargo which was tendered directly to Respondent Sea-Land Service, Inc. by the shipper at a Sea-Land terminal is port-to-port cargo and is subject to the Commission's jurisdiction. The proceeding will be remanded to the Administrative Law Judge to permit Complainants to prove their damages with respect to such cargo.

Complainants' contention that tariffs filed by Sea-Land Service, Inc. at the Interstate Commerce Commission (now Surface Transportation Board) are not supported by valid joint-through arrangements between Sea-Land and the inland carriers is a matter which, in the first instance, should have been addressed to the agency where the tariffs were filed.

The Commission's jurisdiction is port-to-port. It has no jurisdiction over the transportation of cargo by Sea-Land Service, Inc. in its through service from Hawaii to interior points in Guam.

The preponderance of the evidence shows that Sea-Land Service, Inc. did not enter into joint-through arrangements with truckers on Guam until 1993. Absent a joint-through arrangement, the Commission has jurisdiction over the transportation of cargo by Sea-Land Service, Inc. in its through service to Guam to the extent the cargo was delivered within the port of Apra.

Sections 18 and 22 of the Shipping Act, 1916, gave the Government of Guam the right to file a complaint challenging the overall rate levels of Respondent carriers.

Reparations may be awarded only to named complainants under Section 22 of the Shipping Act, 1916.

The complainant in a complaint case has the ultimate burden of proof. Those parties advocating a financial methodology other

ATTACHMENT "A"

than that provided for in General Order 11 have the burden of showing that the alternative methodology is necessary to achieve a fair and reasonable result.

The incremental cost study proffered by Respondent American President Lines, Ltd. is not an appropriate method to determine whether the rate levels of Respondents are just and reasonable.

Comparing the rates in the Guam trade with rates in other trades is not an appropriate method to determine whether the rate levels of Respondents are just and reasonable. Likewise, the lack of shipper complaints is of no weight in determining whether the overall rate levels of Respondents are just and reasonable.

Respondents' "capacity use days" method of allocation has not been shown to be necessary in order to achieve a fair and reasonable result.

Only leased vessels which are capitalized on the carrier's books and which meet the AICPA guidelines for capitalization may be included in rate base.

The comparable earnings test, which was prescribed by G.O. 11 during the operative period, is the appropriate methodology to determine whether Respondents' rates were just and reasonable. The fact that it was replaced by the "Before Tax Weighted Average Cost of Capital" methodology in 1995 is irrelevant.

American President Lines, Ltd. exceeded the allowable rate of return in the Guam trade in the years 1988, 1989 and 1990.

Sea-Land Service, Inc. exceeded the allowable rate of return in the Guam trade in the years 1988 and 1989.

A rate of return analysis may not be employed to challenge the reasonableness of individual commodity rates. Respondents' ten percent increase on eighteen commodity rates has not been shown to be unjust, unreasonable or otherwise unlawful.

Roger A. Berliner and William R. Koerner, for Complainant Government of Guam.

Robert T. Basseches, David B. Cook, and David Reich, for Respondent American President Lines, Ltd.

C. Jonathan Benner and Leonard L. Fleisig, for Respondent Sea-Land Service, Inc.

has the burden of proof. APL claims that its witnesses demonstrated that the G.O. 11 analysis of GovGuam's expert witness Nadel was seriously deficient. It contends that the ALJ correctly found that G.O. 11 cannot be used in this case where "the regulatory focus is on (i) a very small and (ii) very atypical regulated piece of (ii) [sic] a very large and highly integrated system (iii) [sic] which is otherwise unregulated and (iv) [sic] which utilizes mobile assets that move in and out of regulated service as deployments change." APL Reply to Exceptions at 10.

Sea-Land also observes that as the Complainant, GovGuam had the burden of proof. It contends that it is GovGuam's responsibility to identify the elements necessary to make its case. Sea-Land contends that GovGuam failed to meet its burden relative to the affirmative defenses raised by Respondents. It is said that in some cases GovGuam failed even to respond to the affirmative defenses which were raised.

With respect to Complaint Count II, the unreasonableness of individual commodity rates, Sea-Land argues that there is no nexus between a finding that overall revenues are too high and a finding as to the reasonableness of any specific commodity rates. Accordingly, Sea-Land contends that, assuming arguendo that the general level of rates was found to be too high, GovGuam has no basis to claim that Respondents have the burden of proof with respect to the reasonableness of the individual commodity rates

identified in Count II.

3. Disposition

As Respondents correctly point out, Complainants have the ultimate burden of proof or the burden of persuasion in this case. This is true with respect to both the general level of rates and the reasonableness of the individual commodity rates identified in Complaint Count II. Moreover, because Sea-Land is correct in arguing that there is no nexus between the reasonableness of overall revenues and the reasonableness of individual commodity rates, GovGuam's burden as to this element of its case is to prove that the individual commodity rates are unreasonable. Accordingly, GovGuam cannot rely on a finding that overall revenues are unreasonably high to establish the unreasonableness of individual commodity rates.

The more difficult burden of proof question is where the burden lies with respect to the methodology to be employed to determine the reasonableness of Respondents' overall level of rates. GovGuam's case relies heavily on G.O. 11 methodology. The ALJ started from the premise that "[t]here is no established 'standard methodology' for applying G.O. 11 to Guam." I.D., App. C at 1. He was critical of GovGuam for failing to demonstrate that G.O. 11 methodology was reasonable and appropriate in the Guam trade. He based this ruling on the language of the "Purpose" section of G.O. 11, which provided that the Commission might

unreasonable.⁴⁵ The crux of its argument is as follows:

Under the facts established in this case, the Guam trade is characterized by revenue abundance, not revenue inadequacy. This negates the need for any rate increase on any commodity, even those commodities at the lower end of the tariff structure. [Footnote omitted.]

Complainant's Post-Trial Memorandum on Rate of Return Issues, at 239. GovGuam argues that APL's average ocean freight rates for these commodities equaled or exceeded the average allowable cost for each year at issue.

The ALJ declined to find that any of the eighteen commodity rates were unreasonable because GovGuam's case was based solely on its G.O. 11 analysis of APL's overall rates. He found that the economic concepts and cost accounting methods necessary to a rate of return analysis of overall rate structure were not appropriate to an analysis of individual commodity rate reasonableness. I.D. at 48 - 50, App. C at 105 - 107.

APL contends that GovGuam is attempting to apply a rate of return standard to individual commodity rates. APL Reply to Exceptions at 306 - 309. It states that the criteria for evaluating the reasonableness of a carrier's overall rate of return are quite different from the criteria used for assessing the reasonableness of an individual commodity rate. APL argues that carriers take a

⁴⁵ GovGuam did not except to the ALJ's finding that Respondents' tariff provision regarding household goods did not violate section 16, First of the 1916 Act. I.D. at 50 - 52. The Initial Decision is adopted with respect to this issue.

number of factors into consideration in establishing individual rates. APL identifies the following: general economic conditions in the trade; market and competitive forces in the trade; physical and economic characteristics of the product involved, including its value; the volume moved; commodity-specific expenses; the relationship of the commodity rate to other rates in the tariff; and the sensitivity of the volume shipped to the rates. APL Reply to Exceptions at 308.

The ALJ and APL are correct. The increase of eighteen commodity rates (1) changed the relationship of rates in the tariff of the Guam Rate Agreement, and (2) increased the revenue to the member lines. The rate of return analysis in this case addresses APL's overall rate of return but it does not address the relationship of individual rates in the Guam Rate Agreement tariff. If APL's revenues are found to produce an excessive rate of return, each commodity rate in the tariff would be excessive by the same percentage. In other words, the eighteen commodity rates would be excessive by the same percentage as every other commodity rate in the tariff. Likewise, any reparations would be borne equally by each commodity rate including the eighteen commodity rates in question. The relationship of the eighteen commodity rates to the other rates in the tariff would remain unchanged. In sum, under a rate of return analysis, the eighteen commodity rates are no less reasonable than any other rate in the Guam Rate Agreement tariff.

Because we reject GovGuam's legal theory that a rate of return analysis can be used to determine the reasonableness of individual commodity rates, it is unnecessary for us to reach the various contentions advanced by the parties regarding the appropriate accounting methodology to determine the costs attributable to the carriage of the eighteen commodities.⁴⁶

CONCLUSION

For the reasons set forth above, the Commission holds that Respondents' rates have been shown to be unreasonable for the years indicated. The Commission has further decided to remand the proceeding to the ALJ for a determination of the reparations due Complainants, and to quantify the number of Sea-Land containers subject to the Commission's jurisdiction, as explained above.

Any Exceptions not specifically addressed herein were fully considered by the Commission and are denied.

THEREFORE, IT IS ORDERED, That the Complainants' Exceptions to the Initial Decision are granted consistent with the above discussion of specific issues, and denied in all other respects;

IT IS FURTHER ORDERED, That the Respondents' Protective Exceptions to the Initial Decision are denied;

⁴⁶In rejecting a rate of return analysis as an appropriate standard to evaluate the reasonableness of the eighteen rates, the Commission does not wish to imply that GovGuam could not have challenged these rates. However, any challenge of individual commodity rates must focus on the rate making factors traditionally considered in fixing such rates.

IT IS FURTHER ORDERED, That the proceeding is remanded to the Administrative Law Judge for a determination of the reparations due Complainants;

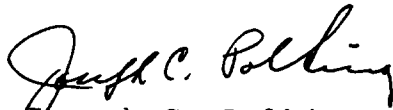
IT IS FURTHER ORDERED, That the proceeding is also remanded to the Administrative Law Judge to quantify the number of Sea-Land containers subject to the Commission's jurisdiction and as to which reparations may be awarded to Complainants;

IT IS FURTHER ORDERED, That the Petition requesting substitution of MTMC for MSC as an intervenor in this proceeding is granted;

IT IS FURTHER ORDERED, That Sea-Land's Motion objecting to the Commission's determination to request the work papers related to the parties' calculation of Cargo Handling Expense is denied; and

FINALLY, IT IS ORDERED, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, the Initial Decision on remand of the Administrative Law Judge shall be issued by December 4, 1998 and the final decision of the Commission shall be issued by April 5, 1999.

By the Commission.


Joseph C. Polking
Secretary

(FEDERAL MARITIME COMMISSION)
(SERVED AUGUST 29, 2003)
(EXCEPTIONS DUE 9-22-03)
(REPLIES TO EXCEPTIONS DUE 10-14-03)

FEDERAL MARITIME COMMISSION

DOCKET NO. 89-26

THE GOVERNMENT OF THE TERRITORY OF GUAM, ET AL.

v.

**SEA-LAND SERVICE, INC. AND
AMERICAN PRESIDENT LINES, LTD.**

Consistent with the June 1, 1998 order of remand, holding that respondents' rates have been shown to be unreasonable for the years indicated, complainants were accorded the opportunity to establish the amount of reparations which may be awarded to them. Complainants' methodology fails to demonstrate a requisite causal link between the excess revenues earned by respondents and the "just and reasonable" rate for any of the shipments in issue and otherwise fails to meet the requirements of sections 18(a) and 22 of the 1916 Act, 46 U.S.C. app. §§ 817(a) and 821(a), and section 4 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. § 845(a), as amended in 1978. Complaint dismissed.

MaryEva Candon and Peter G. Hirsh for complainants.

C. Jonathan Benner and Leonard L. Fleisig for respondent Sea-Land Service, Inc.

Robert T. Basseches, David B. Cook, and Eric C. Jeffrey for respondent American President Lines, Ltd.

ATTACHMENT "B"

APL's and Sea-Land's tax rate. Dr. Nadel states that at a 40% tax rate, each dollar of after-tax excess return corresponds to \$1.6667 of pre-tax excess return.

Dr. Nadel states that the excess after-tax returns for APL equate to pre-tax excess returns of \$8,998,992, \$9,783,113, and \$9,106,171 for 1988, 1989, and 1990, respectively, or about \$27.9 million for the three full years, and that the excess after-tax returns for Sea-Land equate to pre-tax excess returns of \$7,914,309, and \$2,543,127 for 1988 and 1989, or about \$10.5 million for the two half-years as reported by Sea-Land.

Dr. Nadel explains that another formula expresses the overcharges for APL as a percentage of the revenues that APL charged in each respective year, and that, therefore, by division, the overcharges, as a percentage of carrier revenue, were 21.4%, 20.1% and 17.1%, respectively.

Dr. Nadel used three annual percentage overcharges to determine the overcharge associated with each payment made to APL, depending on which year the shipment was made. He measured each payment by the amount shown on each complainant's APL Bill of Lading. Dr. Nadel explained that the same formulas express the overcharges for Sea-Land as a percentage of the revenues that Sea-Land actually charged in each respective year; that the FMC found that Sea-Land's revenues were \$25,282,000 and \$11,518,000, respectively, for these half-years; and that, therefore, by division, the overcharges as a percentage of revenue were, for Sea-Land, 30.9% and 22.1% for 1988 and 1989, respectively.

Dr. Nadel used a proportional methodology to distribute the tradewise overcharge, from each respective carrier, among all the trade's shippers and consignees, since the damages they suffered are only proportional to their share of the total excess revenues earned by APL and Sea-Land, respectively, in the trade.

What constitutes a just and reasonable rate is determined by a number of interdependent facts, among which are value of service, necessity, cost of service, capacity, volume and competition.

citing *Hawaii Meat Co. v. Matson Navigation Co.* (FMC Docket No. 77-45), 21 F.M.C. 43, 18 S.R.R. 479, 484 (I.D. 1979) (citing *Chicago Board of Trade v. United States*, 223 F.2d 348, 351 (D.C. Cir. 1955)).

Sea-Land states that GovGuam's theory of the case carries with it the implicit assumption that all cargo is fungible and susceptible of the same economic analysis; that important concepts such as value of service, competitive conditions in the Trade, and competition for the commodity at issue no longer be referenced to the economic and physical characteristics of the cargo being transported; that this lack of individual analysis neglects long held Commission precedent that:

... [E]ven a finding . . . that [respondents'] rates were unreasonably high would not be tantamount to a finding that its rates on particular commodities were unreasonable. It is well-settled that the reasonableness of rates for particular commodities is not measured by the reasonableness of a carrier's general level of rates.

citing *Matson Navigation Co. -Increased Rates*, FMC Docket No. 73-22 et al., 17 S.R.R. 175, 180 (ALJ 1976); and that GovGuam has been aware of these requirements for over a decade.

Sea-Land states that, traditionally, the factors involved in analyzing a carrier's cost of transporting a particular commodity include handling factors peculiar to that commodity as well as such other transportation factors as the value of the commodity, the value of the service to the shipper, and the effect of the carrier's rate on the market for that commodity.

Sea-Land states that the Commission has confirmed that attempts to mix commodity-specific claims with general rate of return analysis are "extraneous," "futile," "essentially irrelevant" and

something other than what it said there, then its Decision, indeed the entire proceeding is meaningless; and that the respondents, however, urge precisely that interpretation.

GovGuam states that respondents base this extraordinary conclusion almost entirely on their reading of the Commission's disposition of one small aspect of the case that has nothing whatever to do with the fundamental ruling of the Commission that the carriers' rates—all of them—were unreasonably high because they afforded an excessive rate of return as shown by the G.O.-11 analysis.

GovGuam states that, in addition to bringing the G.O.-11 case against the respondents' entire rate structure in Count 1 of the complaint, complainants also singled out, in Count 2, 18 specific rates that had been increased, and complained that those rates individually were unreasonably high, and that the Commission, however, ruled that proof of the unreasonableness of these 18 Count 2 rates—as distinct from the entirety of a carrier's rates challenged in Count 1—could not separately be proven by the G.O.-11 methodology (Commission decision at 54).¹⁴ GovGuam states that the respondents seize on this comment for the proposition that it applies not to the 18 Count 2 rates, but to all of the rates at issue in the proceeding, and precludes finding that any of their rates were unreasonable.

GovGuam asserts that this position is remarkable in its contrast to the express findings of the Commission, as well as to APL's position on the import of the unquoted portion of the second passage on which it otherwise so heavily relies.

GovGuam states that, first, the fundamental holding of the Commission's decision is that proof of an excessive rate of return supports a finding that a carrier's rates—all of them—are unjust

¹⁴The Count II allegations in the complaint are thus considered abandoned.

make the company refund not only the excess earnings it retained, but also the amounts it paid to federal and state taxing authorities.

APL states that for the foregoing reasons and the reasons given in APL's opening brief, complainants' reparations claims must be dismissed.

DISCUSSION AND CONCLUSIONS

Preliminary

The Commission also remanded this proceeding "to permit GovGuam to quantify the port-to-port containers handled by Sea-Land after it withdrew from the Guam Rate Agreement and to permit the named complainants to prove injury and damages as a consequence of Sea-Land's failure to file a tariff with the Commission covering the movement of port-to-port shipments in violation of section 2 of the 1933 Act, 46 U.S.C. app. § 844." (Footnote omitted.) June 1, 1998 Order. *Id.* at 40. The Order also stated, ". . . the Commission rules that cargo tendered by shippers directly to Sea-Land at Sea-Land terminals is port-to-port and is subject to the Commission's jurisdiction. The proceeding is remanded for a determination of the number of containers that fall within this category." *Id.* at 46. The Order also stated, "Finally, the Commission finds that while it does not have jurisdiction over transportation between Hawaii and Guam that involved inland transportation beyond the port of Agana, it nevertheless does have jurisdiction over port-to-port cargo that did not move pursuant to a joint-through arrangement with a Guam motor carrier. The proceeding is remanded for a determination of the number of containers, if any, falling within this category." *Id.* at 46. The Order concluded that the proceeding is remanded "to quantify the number of Sea-Land

containers subject to the Commission's jurisdiction and as to which reparations may be awarded to Complainants." *Id.* at 132.

Conclusion

Despite the foregoing invitation by the Commission for GovGuam to quantify the number of described containers, GovGuam has not provided any such evidence in Phase II and has made no effort to address the matter which it raised in its Exception No. 2. As Sea-Land states in fn. 7 of its opening brief, "in the absence of any jurisdictional predicate GovGuam is foreclosed from seeking reparation for any post-June 23, 1989 shipments." GovGuam did not respond to this in its reply brief. This office has no separate capability to obtain the requested information and in the circumstances the contentions of GovGuam, raised earlier in its related Exception No. 2 as to jurisdiction, will be considered as abandoned and will not be further considered. Cf. *Baer Bros. v. Denver & R.G. R.R.*, 233 U.S. 479, 491 (1914) (other assignments of error were not discussed in the railroad's brief and they were treated as abandoned).

The Complaint, as Now Relevant

In Count I, GovGuam alleges that, in violation of section 18(a) of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. § 817(a) (amended 1984), and section 2 of the Intercoastal Shipping

Scope of the Further Remand

At pages 128-132 of the Order, the Commission found that the respondents earned excessive rates of return in the years at issue and remanded the proceeding, stating as follows:

2. Conclusions Regarding Rates of Return

The Commission finds that the rates of return earned by APL in the FMC-regulated Guam trade during the years 1988, 1989, and 1990 as shown in Appendix 9, Rate of Return for APL, exceeded the allowable (benchmark) rates of return by the amounts shown in Appendix 10, APL's Excess Return Earned in the Guam Trade. The Commission also finds that the rates of return earned by Sea-Land in the FMC-regulated Guam trade during 1988 and the first six months of 1989 as shown in Appendix 9, Rate of Return for Sea-Land, exceeded the allowable rates of return [by the amounts] shown in Appendix 10, Sea-Land's Excess Return Earned in the Guam Trade. Based on these findings, the proceeding is remanded to the ALJ for further proceedings to determine the amount of reparations which may be awarded to Complainants herein, consistent with our findings above as to the form of remedy available under section 22 of the 1916 Act.

F. Individual Rates⁴⁴

In 1989, The Guam Rate Agreement, on behalf of its members APL and Sea-Land, filed a 10 percent increase applicable to eighteen specific commodity rates. GovGuam contends that this increase was unreasonable. (Footnote omitted.) The crux of its argument is as follows:

Under the facts established in this case, the Guam trade is characterized by revenue abundance, not revenue inadequacy. This negates the need for any rate increase on any commodity, even those commodities at the lower end of the tariff structure. (Footnote omitted.)

⁴⁴This section addresses GovGuam Exception #5 and Respondents' Replies thereto. [In its exception No. 5, GovGuam avers that the Initial Decision improperly finds that evidence of the overall reasonableness of Respondents' rates may not, as a matter of fact or law, be the basis for finding that rates charged individual shippers in those trades during that period of time are unjust and unreasonable under section 18(a) of the 1916 Act. Order at 26.]

Complainant's Post-Trial Memorandum on Rate of Return Issues, at 239. GovGuam argues that APL's average ocean freight rates for these commodities equaled or exceeded the average allowable cost for each year at issue.

The ALJ declined to find that any of the eighteen commodity rates were unreasonable because GovGuam's case was based solely on its G.O. 11 analysis of APL's overall rates. He found that the economic concepts and cost accounting methods necessary to a rate of return analysis of overall rate structure were not appropriate to an analysis of individual commodity rate reasonableness. I.D. at 48 - 50, App. C at 105 - 107.

APL contends that GovGuam is attempting to apply a rate of return standard to individual commodity rates. APL Reply to Exceptions at 306 - 309. It states that the criteria for evaluating the reasonableness of a carrier's overall rate of return are quite different from the criteria used for assessing the reasonableness of an individual commodity rate. APL argues that carriers take a number of factors into consideration in establishing individual rates. APL identifies the following: general economic conditions in the trade; market and competitive forces in the trade; physical and economic characteristics of the product involved, including its value; the volume moved; commodity-specific expenses; the relationship of the commodity rate to other rates in the tariff; and the sensitivity of the volume shipped to the rates. APL Reply to Exceptions at 308.

The ALJ and APL are correct. The increase of eighteen commodity rates (1) changed the relationship of rates in the tariff of the Guam Rate Agreement, and (2) increased the revenue to the member lines. The rate of return analysis in this case addresses APL's overall rate of return but it does not address the relationship of individual rates in the Guam Rate Agreement tariff. If APL's revenues are found to produce an excessive rate of return, each commodity rate in the tariff would be excessive by the same percentage as every other commodity rate in the tariff. Likewise, any reparations would be borne equally by each commodity rate including the eighteen commodity rates in question. The relationship of the eighteen commodity rates to the other rates in the tariff would remain unchanged. In sum, under a rate of return analysis, the eighteen commodity rates are no less reasonable than any other rate in the Guam Rate Agreement tariff. Because we reject GovGuam's legal theory that a rate of return analysis can be used to determine the reasonableness of individual commodity rates, it is unnecessary for us to reach the

various contentions advanced by the parties regarding the appropriate accounting methodology to determine the costs attributable to the carriage of the eighteen commodities.⁴⁶

⁴⁶In rejecting a rate of return analysis as an appropriate standard to evaluate the reasonableness of the eighteen rates, the Commission does not wish to imply that GovGuam could not have challenged these rates. However, any challenge of individual commodity rates must focus on the rate making factors traditionally considered in fixing such rates.

CONCLUSION

For the reasons set forth above, the Commission holds that Respondents' rates have been shown to be unreasonable for the years indicated. The Commission has further decided to remand the proceeding to the ALJ for a determination of the reparations due Complainants, and to quantify the number of Sea-Land containers subject to the Commission's jurisdiction, as explained above.

* * *

IT IS FURTHER ORDERED, That the proceeding is remanded to the Administrative Law Judge for a determination of the reparations due Complainants;

* * *

FINALLY, IT IS ORDERED, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, the Initial Decision on remand of the Administrative Law Judge shall be issued by December 4, 1998 and the final decision of the Commission shall be issued by April 5, 1999. [These dates were later extended from time to time at the Judge's request.]

What are the "just and reasonable" rates? - Summary

Section 4 of the 1983 Act provides:

. . . That upon such finding of unjustness or unreasonableness in a proceeding instituted by a complainant pursuant to the provisions of section 22 of the Shipping Act, 1916, the Commission shall direct full reparation to the complainant of the

board uniform increase in rates."²² *Matson Navigation Co. -Rate Increase*, 19 S.R.R. 263, 270 (1979). However, in the subsequent complaint case, *MSC v. Matson* (written after the 1978 amendments), the Commission held that an award of reparations was not automatic and that Matson could raise various equitable and policy considerations in arguing that reparations could not be awarded. These considerations include the lack of FMC guidance regarding reasonable rates of return, prior Commission decisions regarding Matson's permissible rate of return and Matson's historically low rates of return. 21 S.R.R. 465. In holding that Matson could raise these factors in opposing an award of reparation, the effect of the use of "shall" in section 4 on the Commission's normal discretion under section 22 to determine whether reparations are appropriate in the circumstances was not specifically addressed. No further comment on this issue is appropriate at this time.

Even if GovGuam is correct that Congress removed the Commission's discretion whether to award reparation in a complaint case for unjust and unreasonable rates and made it mandatory that the Commission "shall direct full reparation . . . of the difference between the charge collected and the just and reasonable rate . . .," the Commission has always held that the mere proof of a violation of law without proof of pecuniary loss and without a showing of proximate causation did not warrant an award of reparation. Thus, almost 40 years ago, in *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.*, 5 S.R.R. 67, 77 (1964), after remanding the case to the presiding examiner to determine whether to award reparation after a violation of law had been found, the examiner and the

²²Because each commodity bore the general rate increase by the same percentage proportion, the extent to which it was found to be excessive applies equally to all commodities that took the increase. The contrary would be true, however, if this case involved a multi-tiered general increase in rates designed to bring the comparative levels of commodity rates into line with their individual transportation factors. 19 S.R.R. at 270.

Commission dismissed the complaint. The Commission dismissed the complaint partially on equitable grounds but also on legal grounds because the type of violation (failure to file an agreement) was not the proximate cause of the alleged injury. The Commission explained:

Additionally, there is a legal bar to such award, because Northland's lower rates, which the Commission has found not unlawful, were the proximate cause of complainant's alleged injury, not the technical violation of Section 15. In *Waterman v. Stockholms Reder. Svea et al.*, 3 F.M.B. 248, 249 (1950), the Commission's predecessor stated: "It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation." (Citing *Pennsylvania R.R. Co. v. Int'l Coal Co.*, 230 U.S. 184, 203, 206. See also *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936).)

Moreover, as discussed earlier, GovGuam has not proved what would be the "just and reasonable rate" for the shipments in question so that the statutory measure of damages cannot be applied.

In sum, GovGuam has not presented a methodology by which the difference between the charges paid by the complainants for the cargo in each container and the just and reasonable rate for that commodity could be determined. Moreover, there has been no proof of proximate cause and no quantification of injury or economic harm suffered by any complainant. These are all well-established requisites for the relief sought by a shipper contending that it was charged unjust and unreasonable rates. See *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 1054 (FMC 1984)²³

²³Cited with approval in Docket No. 94-32, *James J. Flanagan Shipping Corporation d/b/a James J. Flanagan Stevedores, Inc. v. Lake Charles Harbor and Terminal District and Lake Charles Stevedores, Inc.*, Slip Opinion, August 26, 2003 (Commission order upholding ALJ's decision on remand and denying request for additional reparations for failure to prove that lost profits were caused by invalid switching charge).

(complainant had adequately shown that the respondent carrier had violated sections 18(c)(1) and (3) of the 1916 Act, but had failed to prove its right to reparations by establishing a causal connection between the violations and the alleged injury). ". . . An essential element in a complainant's case for reparations is a demonstration of injury and the statutory violation as proximate cause of such injury. See, e.g., *West Indies Fruit Co. v. Flota Mercante Grancolombiana*, 7 F.M.C. 61, 70 (1962); *Ballmill Lumber & Sales Corp. v. The Port of New York Authority*, 11 F.M.C. 494, 510-511 (1968)." *Id.* a 1058.

Therefore, assuming *arguendo* that GovGuam had otherwise met its burden of proof, consideration could then be given to the respondents' arguments as to (1) whether an award of reparation would be proper because GovGuam's proposed methodology would retroactively reduce trade-wide revenues even though there was no advance determination of APL's allowable rate of return and no clearly understood methodology for calculating that rate of return until the June 1, 1998 Decision; (2) whether APL's excess revenues were caused in substantial part by a strong shift in consumer demand due to major service improvements made by APL which allowed it to offer a weekly service with a faster transit time than Sea-Land and gave APL an increased share of the market for time sensitive commodities and increased APL's G.O.-11 return resulting in the excess revenues that GovGuam equates with reparations; (3) whether consideration could be given, for damage assessment purposes, to whether APL's use of leased vessels to provide weekly rather than bi-weekly service calls at Guam (which greatly reduced APL's rate base and greatly increased its G.O.-11 return and excess revenues) caused any damage or instead resulted in improved service to shippers; and (4) whether Dr. Nadel's adjustment to the carriers' rates to account for taxes is proper.

ORDER

Requested findings not specifically discussed have been considered but found unnecessary for a proper disposition of the issues presented.

IT IS ORDERED, That, for the reasons stated in this Initial Decision, GovGuam's request for an award of reparations is denied and the complaint is dismissed.



Frederick M. Dolan, Jr.
Administrative Law Judge

Washington, D.C.
August 29, 2003