

214304

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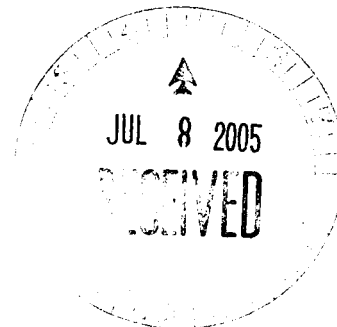
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July 8, 2005

BY HAND

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: Government of the Territory of Guam v. Sea-Land Service, Inc.,
and Matson Navigation Company, Inc., STB Docket No. WCC-101

Dear Secretary Williams:

I filed earlier today an original and ten copies of the Reply of Matson Navigation Company To Complainant's Response to Order To Show Cause Why The Proceeding Should Not Be Dismissed. Two pages of the copies were miscopied and missing. Accordingly, I enclose another original and ten corrected copies of this pleading. I apologize for any inconvenience this error may have caused.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Richard A. Allen'. The signature is fluid and written in dark ink.

Richard A. Allen

Encl.

cc: (w/encl.) All Parties of Record

214304

Before the
Surface Transportation Board



Government of the Territory of Guam,

Complainant,

v.

Sea-Land Service, Inc.
and Matson Navigation Company, Inc.,

Defendants.

Docket No. WCC-101

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Office of Proceedings

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**REPLY OF MATSON NAVIGATION COMPANY
TO COMPLAINANT'S RESPONSE TO ORDER TO SHOW CAUSE
WHY THE PROCEEDING SHOULD NOT BE DISMISSED**

Introduction and Summary of Argument

The Board has ample reasons to dismiss this seven-year old case and should do so. The first reason is failure of the Complainant, the Government of the Territory of Guam ("GovGuam") diligently to prosecute the complaint. Indeed, GovGuam has abused the Board's processes and shown disrespect for the Board by simply disregarding its orders and schedules without explanation or apology. Not to dismiss the complaint in these circumstances would amount to rewarding GovGuam for its failures by, in effect, granting it a lengthy extension – in fact, a much longer extension than the one GovGuam requested seven months ago and the Board denied. The Board has bent over backward to accommodate GovGuam throughout this proceeding, but further indulgence would

undermine the Board's authority and the integrity of its processes. In these circumstances, the Board's authority to dismiss the complaint is well established.

GovGuam's Reply to the Board's June 8, 2005 order provides no adequate excuse for these defaults or any other good reason why the proceeding should not be dismissed. GovGuam attempts, in sum, to excuse its conduct by asserting lack of funds, but that excuse is inconsistent with previous representations to the Board, and it also fails to explain (1) GovGuam's failure even to communicate with the Board, (2) why the supposed remedy could not have been effected much earlier or (3) why the Board should believe the supposed remedy will be adequate.

The Board should also dismiss the complaint because it has no legal merit, as the Board can readily determine on the basis of the existing filings and administrative record. The basic theory of the complaint, which contends in effect that *all* of the defendants' thousands of rates to Guam in effect since 1996 are unreasonable in the aggregate, has no support in the governing statute, the decisions of the Board or its predecessor, the Interstate Commerce Commission, or sound regulatory policy. Although GovGuam appears to concede that at least some of those rates are not unreasonable, it seeks an order reducing, and ordering reparations for, all of the rates by a set percentage amount, even those that are not unreasonable.

The complaint relies on a 1998 decision of the Federal Maritime Commission ("FMC") involving rates of other carriers, not Matson, that were in effect more than 15 years ago. GovGuam contends that the rates challenged in this case should be evaluated by a variation of a methodology once employed, but no longer employed, by the FMC under a different statute for evaluating the reasonableness of *general rate increases*. This

case, however, does not involve a challenge to a general rate increase. In addition to major differences between the governing statutes and regulatory principles of the FMC and those of the STB, the obvious inapplicability of any variation of the FMC methodology to a rate reasonableness challenge to existing rates is demonstrated by the fact that, after 15 years of litigation, an FMC administrative law judge has determined that GovGuam has failed to demonstrate entitlement to any relief in its case at the FMC. This agency should spare itself and the parties the burden of similarly protracted but ultimately fruitless litigation by dismissing this case now because of want of prosecution, lack of substantive merit, or both.

ARGUMENT

I. GOVGUAM HAS FAILED TO RESPECT BOARD ORDERS AND TO PROSECUTE ITS CASE DILIGENTLY.

It is well established that the Board may, and in appropriate cases should, dismiss complaints when the complainant has failed to pursue its case diligently or otherwise failed to comply with the Board's orders. *See, e.g., Mo-Ark Truck Services, Inc. – Petition for Declaratory Order*, STB Docket No. 40980, 1998 STB Lexis 662 (Aug. 24, 1998) (dismissing for want of prosecution due to parties' failure to submit additional evidence in response to ICC decision reopening proceeding and establishing a procedural schedule); *CSX Transportation, Inc. – Abandonment Exemption – In Marion and Sequatchie Counties, TN*, STB Docket No. AB-55 (Sub-No. 518X), 1997 STB Lexis 2920 (Feb. 26, 1997) (dismissing for lack of prosecution trail and public use requests after the requester failed to file a written response or otherwise correct deficiencies); *CSX Corp. – Motion to Revoke Securities Conditions*, Finance Docket No. 30836, 1987 ICC Lexis 468 (Jan. 20, 1987) (dismissing for failure to prosecute CSX's proceeding because

CSX failed to timely file an initial statement of evidence and argument in support of removing the conditions and rebuttal statement).¹

1. The Facts Show GovGuam's Failure to Prosecute.

The facts of this case amply warrant dismissal for failure to prosecute. The complaint in this case was filed on September 10, 1998, almost seven years ago. It was filed against three ocean carriers that serve or have served Guam from the continental United States: Sea-Land Service, Inc. (now Horizon Lines, LLC ("Horizon")), American President Lines ("APL") and Matson. Matson started serving Guam in February 1996. APL ceased serving Guam in March 1996.

In early 1999, the Board divided the case into three phases: The first phase addressed the carriers' motion to dismiss; the second, which is still pending, is to determine whether there exists a reasonable methodology for assessing Guam's complaint; and the third would determine the merits of the complaint based on the standard established in Phase II.

¹ Further, in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962), the Supreme Court recognized an inherent power in the federal courts to dismiss proceedings for want of prosecution:

The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the [court's calendars].

Id. at 628. The Court further held that this authority may be exercised *sua sponte*: "[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630. As the cited Board decisions reflect, the same principles apply to administrative agencies acting in an adjudicatory capacity.

In a decision served on November 15, 2001, the Board granted in part and denied in part the defendants' motion to dismiss the complaint. In addition to dismissing APL from the case based on the statute's two-year statute of limitations, the Board dismissed the allegations that the defendants' rates, rules and practices are discriminatory. Although it ruled that the applicable statute, 49 U.S.C. § 13701(a), does not "on its face" preclude GovGuam from challenging the totality of the defendants' rates, the Board did not reject the defendants' contention that permitting such a challenge would be unworkable, but concluded that the argument was premature and that the Board would consider in Phase II "whether there is a reasonable methodology for assessing a rate structure complaint in this case." Decision at 4-5.

In 2002, the parties filed submissions addressing the appropriate standard for determining the reasonableness of the challenged rates. Both sides filed initial submissions on April 23, 2002 and reply submissions on June 17, 2002. Defendants Matson and Horizon contended that there is no feasible or reasonable methodology for assessing the totality of their widely varying rates in the Guam trade. They also contended that if the Board nevertheless held there was a feasible method, the Board should apply the constrained market pricing principles that it and the ICC have developed in railroad cases, which would first require the threshold inquiry of whether there was effective competition in the Guam trade in September 1996.

GovGuam has done nothing since June 2002 to further its case before the Board. On the contrary, by decision served October 19, 2004, the Board announced that it would hold an oral argument in the case on November 10, 2004. On October 26, 2004, attorney MaryEva Candon, representing herself as counsel for GovGuam, filed a motion on behalf

of GovGuam requesting a six-month extension of the oral argument date to May 10, 2005. Although Ms. Candon had been one of the attorneys on the initial complaint and on all subsequent pleadings for Guam, this motion asserted that the complaint had been filed under a different Guam administration, that the new administration needed more time "to become familiar with the many and complex issues of this six year proceeding," and that three weeks' notice was insufficient time for the new administration to prepare for oral argument. The motion also stated that the new administration was willing to explore settlement of the case and that the requested extension would "allow such settlement discussions to be explored."

This motion thus represented that the current administration of GovGuam has no knowledge of the merits of its case and clearly shows that it has little interest in its expeditious resolution. Perhaps reflecting Ms. Candon's own assessment of the case, the motion also opined that the case "demands a broader, more complex but succinct oral argument than that based on precedent." Why six months was felt necessary to prepare such an argument was not explained.

Matson and Horizon opposed the requested six-month extension but they stated that, in view of GovGuam's stated willingness to discuss settlement, they would not oppose a 60-day extension. Intervenor Caribbean Shippers Association also opposed the requested extension, proposing a 30-day extension instead.

While this motion was pending, the attorneys for Matson and Horizon prepared for the argument scheduled for November 10. On November 3, 2004, however, the Board issued a decision denying GovGuam's request for a six-month extension but extending the oral argument three months, to February 10, 2005.

Attorneys for Matson and Horizon continued to prepare for oral argument on that date. At the same time, Matson intensified the efforts it had made from the beginning to settle the case, but these efforts were not successful.

On February 3, 2004, the Board issued a decision canceling the scheduled oral argument. The decision stated:

The Board has been unable to confirm that Complainant is ready to proceed with the oral argument scheduled for February 10, 2005, despite repeated attempts to reach Complainant's counsel by telephone. Accordingly, the scheduled oral argument will be canceled and this proceeding will be held in abeyance until the Board hears from Complainant. It should be noted that, when cases have been held in abeyance for an extended period of time, the Board often issues show cause orders for why such cases should not be dismissed.

Decision at 2.

On February 6, 2005, Horizon filed a motion asking the Board to reconsider its decision canceling the argument or, alternatively, immediately to issue a show cause order. Ms. Candon filed a response to this motion on February 9, 2005, in which she asserted: "Government of Guam is in the process of selecting additional counsel for its legal team in this case, and needs more time to complete this important process." She stated that GovGuam had initiated this process by issuing a request for proposal on December 15, 2004 and suggested that the Board hold the case in abeyance until May 10, 2005. Ms. Candon's response, however, did not explain why she had not responded to the Board's phone calls or why neither she nor any other representative of GovGuam had bothered to notify the Board earlier of this "important process" or that no one representing Guam would be appearing at the argument scheduled for February 10, 2005, even though, as she later advised the Board on April 21, 2005, she had kept the Office of the GovGuam Attorney General advised of the Board's notices.

After it became apparent that its intensified settlement efforts were unsuccessful, Matson filed a motion on March 15, 2005, joining Horizon's request that the Board issue a show cause order. GovGuam filed no response.

On April 8, 2005, the Board's Director of the Office of Proceedings wrote the attorneys for the parties, including Ms. Candon, that there would be a status conference on April 20, 2005 "to determine the position of the parties prior to addressing the petitions for show cause orders" The letter stated that "each party should identify the persons who will attend the conference on behalf of that party by April 18, 2005."

To Matson's knowledge, GovGuam never informed the Board who, if anyone, would attend the conference on its behalf, and no person who attended the conference was authorized to speak for GovGuam. Ms. Candon attended on her own initiative, but she informed the Board staff and other parties that she had not been asked to attend by the Office of the Attorney General and had not been authorized to speak for GovGuam.

By decision served June 7, 2004, the Board issued an order to GovGuam to show cause why the proceeding should not be dismissed. The order observed: "To date, we have not heard from GovGuam that it is ready to move forward with this proceeding generally or participate in an oral argument specifically."

2. The Facts Demonstrate A Complete Disregard For The Board's Processes.

These events reflect a complete disregard of and disrespect for the Board's processes and orders on the part of GovGuam as well as a clear lack of intent to prosecute its case with reasonable diligence. Although Ms. Candon appears no longer authorized to represent GovGuam in this case, she was its counsel of record and has advised the Board that she has kept the Attorney General's Office informed of all Board notices. Despite

this, GovGuam has repeatedly ignored those notices. Indeed, GovGuam did not even bother to inform the Board or the other parties that it would not appear at the argument scheduled for February 10, 2005 or the status conference of April 20, 2005, and it has done nothing to explain or apologize for its actions to the Board. It would be difficult to imagine clearer grounds for dismissing a case for want of prosecution.

3. GovGuam's Reply To The Show Cause Order Is Wholly Inadequate.

On June 28, 2005, GovGuam's Deputy Attorney General, Joseph Guthrie, filed a letter "to inform" the Board that GovGuam "will participate in the hearing on rate reasonableness in the above-referenced case, in the person of myself . . . , or in the person of Attorney General of Guam Douglas B. Moylan, or a duly authorized representative." This letter further requested "that the hearing be scheduled for September, 2005."

On the same day, two other attorneys, Edward Greenberg and David Monroe, and their law firm filed a notice of appearance as counsel for GovGuam in the case, as well as a reply to the show cause order ("GovGuam Reply"). But that reply fails entirely to excuse GovGuam's defaults or provide other good reason why the case should not be dismissed.

The only excuse provided is the claim that "Guam did not have the funds necessary to continue the efforts required in the complex and expensive litigation." GovGuam Reply at 2. The reply further asserts that this alleged "disability has now been cured" by an executive order of the Governor, and that "Guam has appointed the undersigned as new counsel to represent its interests in this case. . . ." *Id.* at 2, 3.

These assertions in no way excuse GovGuam's conduct. If anything, they exacerbate it. The following points should be noted about these claims:

First, the claim that GovGuam could not proceed because it had no funds in *not* among the reasons GovGuam previously gave for requesting extensions of the scheduled arguments, which were: (1) the new GovGuam administration needed more time “to become familiar with the many and complex issues”;² (2) the desire to explore settlement discussions;³ and (3) the desire to “select[] additional counsel for its legal team in this case”⁴ If lack of funds is in fact the reason for GovGuam’s previous inaction, GovGuam was not candid with the Board in its previous filings.

Second, the alleged lack of funds provides no excuse for GovGuam’s failure to notify the Board and the other parties that no representative of GovGuam would be appearing at the scheduled February 10, 2005 oral argument or the April 20, 2005 status conference.

Third, if the lack of funds has now been cured by an executive order of the Governor, GovGuam’s reply offers no reason why it could not have been not so cured last Fall, in time to permit counsel for GovGuam to appear and prosecute its case in accordance with the original oral argument schedule set by the Board.

Fourth, GovGuam’s reply provides no assurance or reason to believe that the funds allegedly made available by the Governor’s order will be sufficient to prosecute the case to its conclusion or with reasonable dispatch. Even if the Board were to conclude that there is some reasonable methodology for evaluating GovGuam’s challenge to the totality of the defendants’ rates, the application of that methodology to the facts would, in all likelihood, entail years of exceedingly complex litigation to determine whether defendants’ rates during the relevant periods were reasonable and what, if any, remedial

² GovGuam Motion For Extension of Oral Argument (filed October 26, 2004) at 1.

³ *Id.* at 2.

⁴ GovGuam Response To Motion For Reconsideration (filed February 9, 2005) at 1.

orders are appropriate. As an example, GovGuam's complaint at the FMC was filed 16 years ago, has cost GovGuam a reported \$14 million in legal expenses and appears far from over.⁵ There is no reason to believe that the funds made available by the Governor's order are sufficient for that task.⁶

Finally, while GovGuam may be entitled to have counsel of its choosing, it, like any litigant, has an obligation to prosecute its case with reasonable dispatch and efficiency. For example, GovGuam has not explained why the Governor could not have released funds nine months ago or why Ms. Candon could not have adequately represented GovGuam at the oral argument on Phase II at the times scheduled by the Board, in view of the fact that she represented GovGuam from the beginning and participated in every pleading. If GovGuam wants to engage new counsel, who will have to learn from scratch what Ms. Candon described as the "many and complex issues in this six-year proceeding" and thereby cause the substantial delays and additional expenses that inevitably would result, that simply underscores the absence of any serious intention on its part to pursue the case with diligence and efficiency.

⁵ See article in June 28, 2005 Pacific Daily News, "Governor Chooses Law Firm," attached to this reply.

⁶ The Governor's Order, which was not submitted with GovGuam's Reply but is attached to this Reply, cites a Guam statute, 5 G.C.A. § 22402, which authorizes the Governor "to utilize no more than Two Hundred Fifty Thousand Dollars (\$250,000) from General Fund appropriations for the Executive Branch for expenses resulting from civil defense, public safety or health care emergencies" Putting aside the question how this litigation could be said to constitute one of those specified emergencies, there is no reason to believe that the sum authorized would be sufficient to complete Phases II and III of this proceeding even if all of it were devoted to that effort and none left for any other "civil defense, public safety or health care emergencies" that may confront the people of Guam.

In sum, the GovGuam Reply provides no good reason why this case should not be dismissed for failure to prosecute.⁷

4. GovGuam's Conduct has Substantially Prejudiced Defendants.

GovGuam's conduct has also imposed substantial and unnecessary costs on defendants. First, it has required defendants' counsel to expend substantial time preparing for two cancelled arguments, attending a conference that GovGuam ignored, and seeking Board assistance in the form of a show cause order. Furthermore, the very pendency of the case keeps a large potential liability hanging over the defendants, which is a substantial burden for public companies like Matson's parent company, Alexander & Baldwin, Inc. GovGuam's complaint, filed seven years ago, alleged entitlement to reparations exceeding \$50 million. This requires Alexander & Baldwin to note these claims in its reports to the Securities and Exchange Commission and its stockholders. Although the prejudice cannot be precisely quantified, it is clearly substantial and it is compounded by GovGuam's failure to prosecute its case diligently.

II. THE COMPLAINT ALSO HAS NO LEGAL MERIT.

The Board also need have little concern that dismissing this case will deprive the people and shippers of Guam of remedies for meritorious claims because of the misfeasance of its representatives. The fact is, the complaint had no legal merit and little factual substance from the beginning, as the Board can determine from existing administrative record. If any shipper believes that the rates it is paying for Matson's or

⁷ The letter filed by Deputy Attorney General Guthrie is not responsive to the show cause order and provides no reason at all why the case should not be dismissed. It simply "inform[s]" the Board that GovGuam "will participate in the hearing" and requests that the hearing be scheduled for September – a nearly year-long extension from the Board's originally-contemplated date, which GovGuam seeks, in effect, to obtain for itself as a result of its irresponsible and dilatory behavior.

Horizon's services are unreasonable, that shipper has always been, and will remain, free to file a complaint with the Board and obtain reparations if its complaint is upheld. To date, no shipper in Guam has done so.⁸ Instead, GovGuam filed this complaint in 1998 purportedly on behalf of all Guam shippers. The complaint did not assail any specific rate or set of rates, but instead assailed all of the defendants' in the aggregate, contending that in the aggregate, the rates produced revenues for each carrier that exceeded a reasonable rate of return for that carrier and seeking reparations based on those alleged excesses.

The basic theory of the complaint and its obvious flaws are not complex or difficult to understand. Since there is a six or seven-fold differential between the lowest and highest container rates among the thousands of the defendants' rates and since each defendant's costs of service and "rate base" are, in all likelihood, significantly different, it is obvious and indisputable that the basic theory of the complaint, if upheld, would lead to astonishing and irrational results in at least two respects, as explained more fully in defendants' prior submissions:⁹ (1) defendants would be required to provide reparations and/or other rate relief to shippers with respect to all of their rates and by the same percentage amounts, even rates that are very low and, by all accepted criteria, very reasonable; and (2) the maximum reasonable (and thus lawful) rates would be different for each carrier, with the probable result that the less efficient carrier would be forced to leave the trade. Because an assessment of defendants' aggregate revenues and aggregate

⁸ That may well be because most shippers feel, like Charles Castro, General Manager of wholesaler International Distributors, quoted in the attached news article, that the rates they are paying for shipping containers to Guam are not unreasonable.

⁹ See Motion To Dismiss Complaint at 17-20 (filed Feb. 16, 1999); Defendants' Initial Submission In Phase II – Appropriate Standards of Rate Reasonableness at 11-12 (filed April 22, 2002).

rates of return cannot lead to any remedial order that would be rational and non-arbitrary, defendants have contended that there is no feasible or reasonable methodology for assessing rates in the aggregate that would be of any practical utility.¹⁰ GovGuam has made no coherent or convincing response to that contention.¹¹

GovGuam filed its complaint in this case shortly after the FMC issued a ruling in a case GovGuam filed at that agency in 1989 challenging, under various shipping acts, rates charged by APL and Horizon's predecessor. In its ruling, the FMC, applying a methodology known as General Order 11 (G.O. 11), held that those carriers' overall rates of returns during the period 1988-1990 were excessive.¹² GovGuam clearly hoped this Board would adopt the same methodology and conclusion, despite the fact that this case is governed by a very different statute and, equally importantly, the fact that the G.O 11 methodology had been developed to assess the reasonableness not of existing rate structures but of *general rate increases* taken from time to time by ocean carriers. Until

¹⁰ See Defendants' Initial Submission In Phase II – Appropriate Standards of Rate Reasonableness (filed April 22, 2002) at 7-13.

¹¹ Indeed, GovGuam in its pleadings has *acknowledged* that a determination concerning the carriers' overall revenues and rates of returns would have no relevance to the reasonableness of any individual rate. See Reply Submission of the Government of Guam in Phase II [etc.] (filed June 17, 2002) at 7.

¹² *GovGuam v. Sea-Land and American President Lines*, 28 S.R.R. 252 (FMC 1998). Interestingly, the FMC found that, even though competition made the rates of both carriers very similar, the rates of return of the two carriers were excessive by different amounts. Seven years later, there has been no determination by the FMC whether GovGuam or any shipper is entitled to any relief, although an FMC administrative law judge has ruled that neither GovGuam nor any individual shipper had shown entitlement to any relief. FMC Docket No. 89-26, *The Government of the Territory of Guam, et al. v. Sea-Land Service, Inc. and American President Lines, Ltd.* (Initial Decision on Remand, served August 29, 2003), *appeal to FMC pending*. The judge concluded: "In sum, GovGuam has not presented any 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." *Slip op.* at 69.

the Guam case, the FMC had never applied that methodology to assess anything other than general rate increases.

The filings submitted three years ago by Matson and Horizon demonstrate at length and in detail why the G.O 11 methodology applied by the FMC and the variation of it advocated by GovGuam cannot reasonably be applied to determine the reasonableness of existing rates, either individually or in the aggregate. They also show that, as this Board has held repeatedly and GovGuam's own expert asserted, rate regulation is appropriate only if there has first been a determination that effective competition is lacking. This fundamental precept of rate regulation would therefore require a threshold determination that there was an absence of effective competition in the Guam trade during the relevant period.¹³

There is simply no basis, however, for believing that there has been an absence of effective competition among ocean carriers serving Guam, at least in recent years. On the contrary, any claim that Guam has not enjoyed effective competition is not only at odds with an extensive study of the Guam trade performed by the Department of

¹³ As defendants explained in their submissions in Phase II, the relevant period for purposes of GovGuam's complaint must be September 1996 in order to give effect to the "zone of reasonableness" ("ZOR") provision enacted by ICCTA, now codified in 49 U.S.C. §13701(d)(1). The ZOR allows carriers in the noncontiguous domestic trades to raise rates without the raise being subject to a rate complaint if the raise is no more than 7.5 percent higher than the rate in effect one year earlier. In its November 12, 2001, decision, the Board ruled that the ZOR did not preclude GovGuam from challenging the carriers' "base rates." In their initial and reply submissions in Phase II, Defendants showed that, if the ZOR is to have any meaning and effect, the base rates that GovGuam can challenge must be those in effect two years before its complaint was filed – *i.e.*, those in effect on September 10, 1996. *See* Defendants' Initial Submission In Phase II – Appropriate Standards of Rate Reasonableness (filed April 22, 2002) at 5-7 and Defendants' Reply In Phase II – Appropriate Standards of Rate Reasonableness at 11-12 (filed June 17, 2002) at 4-5. GovGuam's submissions have not refuted that showing.

Transportation mandated by ICCTA, but is also squarely refuted by the evidence submitted by GovGuam's own expert.¹⁴

It is not Matson's purpose here to reiterate the extensive arguments and evidence previously submitted by the carriers. It is simply to stress that the existing administrative record provides the Board with ample grounds to dismiss this complaint not only for GovGuam's egregious failure to respect the Board's orders and prosecute its case but also for lack of legal and factual merit to the complaint.

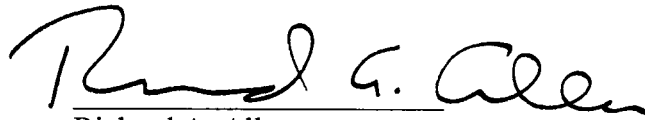
Although the Board in its November 12, 2001 decision, giving GovGuam a large measure of deference and benefit of the doubt, declined to dismiss the complaint in its entirety, it now has more than enough grounds to terminate the case. It is not necessary to subject the Board and the parties to years of further litigation to conclude, as the ICC concluded in dismissing a complaint by Zoneskip, Inc., that "we see no basis for going through discovery and protracted proceedings in order to permit Zoneskip to pursue legal claims that will inevitably prove fruitless." *Zoneskip, Inc. v. United Parcel Service, Inc.*, 8 I.C.C. 645, 650-51 (1992).

¹⁴ See Initial Submission of the Government of Guam in Phase II, Appendix A (Verified Statement of Ernest Nadel) at 13-14 (filed April 23, 2002), where Mr. Nadel described an instance in which Matson withdrew a proposed general rate increase of its Guam rates because the other carrier declined to file for a similar increase and Matson feared that "it would lose significant volumes of its cargo" if it let the increase go into effect. This describes a classic example of effective competition under the Board's precedents. See Defendants' Reply In Phase II – Appropriate Standards of Rate Reasonableness at 11-12 (filed June 17, 2002) at 9-11 and cases cited therein.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard A. Allen". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Richard A. Allen
Scott M. Zimmerman
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, NW
Suite 700
Washington, D.C. 20006
(202) 298-8660
Counsel for Matson Navigation Co.

Date: July 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2005, I served a copy of the foregoing
"Reply Of Matson Navigation Company To Complainant's Response To Order To Show
Cause Why The Proceeding Should Not Be Dismissed" by first class mail, postage
prepaid upon:

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Governor chooses law firm

By Steve Limtiaco
Pacific Daily News
slimtiaco@guampdn.com

Guam's legal battle with shipping companies is expected to continue now that the governor has selected a mainland law firm to take up the maritime case for the island.

The governor's office yesterday selected the law firm of Galland, Kharasch, Greenberg, Fellmen & Swirsky PC, based out of Washington, D.C. As of yesterday, a contract had not been signed, however.

It is one of three law firms that responded to a request for proposals issued by the Office of the Attorney General, said governor's spokeswoman Erica Perez. Gov. Felix Camacho on Friday signed an executive order, tapping his \$250,000 emergency spending authority in order to pay for legal services, said Perez.

The government of Guam in the late 1980s sued shipping companies for allegedly overcharging millions of dollars for shipping to and from Guam. The government's goal was to recover alleged overpayments from shipping companies and to reduce the cost of shipping, with the hope that consumer prices would drop as well.

The local government has invested more than \$14 million during the

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TO THE POINT

- Days before a U.S. Surface Transportation Board hearing to determine whether Guam's case against shipping companies should be thrown out, the governor's office has selected a law firm to handle the maritime case.

TIME LINE

Sept. 10, 1998: The government of Guam files a complaint with the Surface Transportation Board against shipping companies Sea-Land Service, Inc. (Horizon), American President Lines Ltd., and Matson Navigation Company for allegedly overcharging Guam customers.

Jan. 6, 1999: The board adopts a three-step

past 15 years to pursue its claims, but the case faced dismissal by the U.S. Surface Transportation Board this week because Guam has not had an attorney or representative present at recent hearings.

The Port Authority of Guam stopped paying Guam's legal fees in 2003, said port spokesman Michael Henderson yesterday, because it is not a port-related issue.

"We have no standing in it and we were basically asked to be the cash cow," Henderson said. "The current board said, 'No more.'"

The governor's attorneys negotiated a settlement with Matson Navigation early this year, but Attorney General Douglas Moylan refused to sign it, saying it was for less money than the government had hoped to receive, and had been negotiated by attorneys with limited knowledge of maritime law.

Moylan said he was unable to hire a specialist in maritime law because of the local government's restrictions on contract work.

The shipping companies asked that that case be dismissed, and the Surface Transportation Board on June 5 asked Guam to show why the case should not be dismissed.

Camacho, in a letter last week to the attorney general, said a settlement is in the best interests of the public, and the government must pay for legal services.

Camacho in his letter promised to speed up the procurement of legal services in order to ensure that more than a decade of work turns out favorably for the people of Guam.

The Federal Maritime Commission in 1998 ruled that American President Lines Ltd. and Sea-Land Service Inc. overcharged Guam shippers by about \$23 million between 1988 and 1990. Guam's attorneys at the time estimated that shipping companies had been overcharging by about \$700 per container, which they said added about \$350 to the price of a new car.

The ruling was appealed, however, and a second suit was pressed in 1998 against Sea-Land Service and Matson Navigation for alleged overcharges between 1996 and 1998.

Charles Castro, general manager of wholesaler International Distributors Inc., yesterday said it costs about \$6,200 to ship a container from the U.S. West Coast to Guam, but said he does not believe that price is unreasonable.

process for resolving the matter. In Phase I, the board addresses the defendants' joint motion to dismiss the complaint. In Phase II, the board is scheduled to address an appropriate method for determining reasonable rates. In Phase III, the board will consider the merits of the complaint.

Nov. 15, 2001: The board grants part of a motion to dismiss.

Nov. 10, 2004: An oral argument on the case is scheduled, but at the request of GovGuam, the argument is rescheduled for Feb. 10, 2005.

Feb. 3, 2005: The board cancels the scheduled hearing pending communication from GovGuam.

Feb. 7: Horizon files a motion requesting that the board either proceed with the scheduled oral argument or issue a "show cause" order on why the board should not dismiss the case.

March 15: Matson also files a motion for a "show cause" order to dismiss the case.

April 20: Board staff convenes a conference with the parties to understand what was delaying the matter. No GovGuam representative attends the meeting.

June 28: The board will hold a hearing on whether to dismiss the case.

SOURCE: Surface Transportation Board, Washington, D.C.

Castro said the company also brings in goods from foreign countries, including Australia, but said it takes much longer for those goods to make it to Guam because shipments usually must be routed through Hong Kong.

While it takes about 2 weeks for goods to arrive on Guam from the U.S. West Coast, it can take four weeks for goods to arrive from Australia, he said.

According to the law firm's Web site, it has been one of the leading maritime firms in the nation for 50 years.

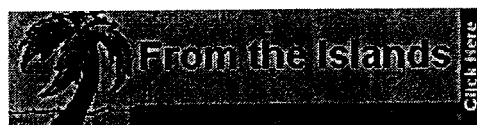
"We have participated in virtually every major legal issue affecting the maritime industry in the United States," the Web site states.

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**ISLAND OF GUAM
OFFICE OF THE GOVERNOR
HAGATÑA, GUAM 96932
U.S.A.**

EXECUTIVE ORDER NO. 2005 - 24

**RELATIVE TO DECLARING AN EMERGENCY FOR PROCUREMENT
OF LEGAL SERVICES SPECIALIZING IN MARITIME LAW RELATIVE
TO ONGOING GOVERNMENT OF GUAM MARITIME CASES**

WHEREAS, the government of Guam has been involved in ongoing cases before the Surface Transportation Board and the Federal Maritime Commission for several years, both requiring legal services specializing in maritime law procured through the Attorney General of Guam, and both of which are heard in the Washington, D.C. area; and

WHEREAS, the Surface Transportation Board has just issued a notice of an Order to Show Cause to the government of Guam to show why the case before it should not be dismissed unless the government shows its readiness to argue the rate reasonableness issue, and the hearing is scheduled for June 28, 2005; and

WHEREAS, the government of Guam does not want the case before the Board dismissed because the public's welfare will be jeopardized; and

WHEREAS, an emergency exists for the government with respect to the procurement of legal services to handle the maritime cases, predominantly because of the order to show cause hearing scheduled in less than two weeks, but also because the government needs representation in general for the two cases, all of which should be handled by the same legal representative;

NOW, THEREFORE, I, FELIX P. CAMACHO, Governor of Guam, by virtue of the authority vested in me by the Organic Act of Guam, as amended, and the laws of Guam, do hereby order the following:

- 1) **Declaration of Emergency.** A state of emergency that threatens the island's welfare exists for the government of Guam because the government must procure legal representation prior to June 28, 2005 or have an important maritime case dismissed
- 2) **Emergency procurement and emergency expenses.** Pursuant to 5 G.C.A. § 5215, authorizing emergency procurement upon executive order, and pursuant to 5 G.C.A. § 22402, authorizing the Governor to utilize no more than Two Hundred Fifty Thousand Dollars (\$250,000.00) from General Fund appropriations for the Executive Branch for expenses resulting from civil defense, public safety or health care emergencies, the Director of Bureau of Budget and Management Research is authorized to transfer to the Office of the Governor an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) from unexpended appropriations within the General Fund for immediate use by the Office of the Governor to acquire legal representation with a specialty in maritime law in the Washington, D.C. area using emergency procurement procedures, and the services may be acquired for a period to exceed thirty days because the thirty-day limitation in the emergency procurement procedures applies only to goods and



ISLAND OF GUAM
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HAGATÑA, GUAM 96932
U.S.A.

supplies, and not services. This emergency is not being declared to circumvent the regular procurement procedures, but a genuine emergency threatening the public's welfare exists for the government of Guam.

- 3) Documentation of expenses. The Office of the Governor is hereby instructed to keep appropriate documentation on all emergency expenses for inspection by the Executive and Legislative Branches and by the Public Auditor of Guam.

SIGNED AND PROMULGATED at Hagatña, Guam this 24th day of June, 2005.

FELIX P. CAMACHO
I Magsa' Låhen Guåhan
Governor of Guam