

U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

GOVERNMENT OF THE TERRITORY
OF GUAM,

Complainant,

vs.

STB Docket WCC-101
(PHASE II)

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

Defendants.

COMMENTS OF THE CARIBBEAN SHIPPERS ASSOCIATION, INC.

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Introduction

These Comments are submitted by the Caribbean Shippers Association, Inc. (hereinafter "CSA") in accordance with the decision and order of the Surface Transportation Board (hereinafter "STB") dated November 13, 2001. The STB, by order dated January 6, 1999, split this proceeding into three distinct parts. Phase II of this proceeding, within which the CSA has been permitted to intervene and participate, is intended to establish or otherwise determine the "appropriate standard of rate reasonableness" in the evaluation of the complaint in this proceeding. However, it is not unreasonable to believe that the STB will adopt a uniform standard to be applied throughout the domestic offshore trades regulated by the STB. While there is flexibility for 'case-by-case' adjustment, it can not be contended that there will be no commonality of substance, form and application.

The instant complaint case was filed in September 1998. Since that time there have been significant developments in the domestic offshore trade between the mainland United States and Guam (hereinafter referred to as the "Guam Trade" or the "Trade in Issue"). The ICC Termination Act of 1995, P.L. 104-88, shifted substantive regulation of the Trade in Issue from the Federal Maritime Commission (hereinafter "FMC") to this newly established Board. There remains pending at the FMC Case No. 89-26, The Government of the Territory of Guam Et Al. v. Sea-Land Service, Inc. And American President Lines, Ltd. A copy of the June 1998 FMC decision was attached to the complaint in

proceeding. To contend or allege that this proceeding is not in some manner associated with Docket 89-26, is to deny the obvious. This Board, as a successor to the Interstate Commerce Commission, is obligated to recognize the decisions of the FMC in this matter but only so far as the record has been previously developed and facts established--the legal conclusions reached by the FMC under the rate reasonableness criteria contained in 46 CFR Part 552 (1995) apply to that proceeding and are not necessarily dispositive the case brought before this Board as STB Docket WCC-105. The methodology established in FMC Docket 89-26 is one of the alternatives to be considered in Phase II of this proceeding.

History Of The Trade In Issue

The Interstate Commerce Commission, and now this Board, has had only a brief exposure to the domestic offshore trades in general--and Guam in particular. It is not the point of these Comments to provide numerous details regarding the Guam Trade but to point out what the CSA considers to be major and key facts. Specifically, the CSA notes as follows:

- 1) Guam is the smallest of the domestic offshore trades and is comprised of approximately 25,000 - 30,000 containers per year; 1/
- 2) From 1954 to 1989, the rates charged by carriers to Guam were set by the Guam Rate Agreement--an FMC sanctioned price fixing arrangement;

1/ Puerto Rico, on the other hand, is ten (10) times larger in volume. Likewise Alaska and Hawaii have significantly larger volumes of cargo which could be impacted by the Board's decision in this case. It is the belief of the CSA that one-third of the Guam Trade cargoes are U.S. Military and therefore beyond this proceeding by virtue of 49 U.S.C. 13712 (1999).

- 3) After complaints to the FMC by the Government of Guam in 1988 and early 1989, the carriers to the Guam Rate Agreement abandoned and voluntarily surrendered the involved price fixing agreement after the FMC instituted an investigation into the workings of the agreement;
- 4) In June 1989, the carriers cancelled tariffs at the FMC and filed intermodal joint rates tariffs with the ICC which generally reflected the same level of rates and charges as contained in the FMC Agreement tariff;
- 5) The Territory of Guam is located much closer to Asia than to the United States. Under the routings used by the carriers the port of Apra Harbor, Guam is 5,546 Nautical Miles from Long Beach/Los Angeles, California (via Honolulu, HI.);
- 6) The Territory of Guam is 1,822 Nautical Miles from Hong Kong, ROC and the total distance with the stop offs in Honolulu and Apra Harbor to Hong Kong is a total of 7,368 Nautical Miles (988 mile deviation);
- 7) The Guam Trade is a "Jones Act" trade and is thereby limited under U.S. laws to shipping/liner companies that are American owned, American operated, American crewed, and operated under the American flag. See, 46 U.S.C. 883 (1999) (Section 27 of the Merchant Marine Act of 1936, as amended);
- 8) The Jones Act, section 27, further requires that all vessels operated in the domestic off shore trades be built in the United States.
- 9) In 1996 the Congress passed the Maritime Security Act of 1996, P.L. 104-239 (October 8, 1996), 46 App.U.S.C. §§1187 (1999). This program included "caps" or limitations on the amount of containers (cargoes stated in FEUs--forty foot equivalent units--i.e. a standard 40 ft shipping container) that U.S. participating vessel operators would^{2/} be permitted to carry in each domestic trade. 46 App.U.S.C. 1187e(1999);

2/

See the discussions and decisions in Sea-Land Service, Inc. --Petition To Increase Service in the Non-Contiguous Domestic Trade For Puerto Rico, U.S. Maritime Administration Docket No. MSP-002 and 008 (Decided June 8, 1998). The carriers have used section 1187e as a tool to restrict capacity and thereby competition in the trades. See NPR, Inc. v. Slater, U.S.D.D.C. Case No. 1:97CV01000 (filed June 7, 1997).

- 10) Defendant Sea-Land Service, Inc. provided service to the Territory of Guam on a 'pass-by' basis between West Coast U.S. port and ports in Asia from 1987 to approximately January 2000;
- 11) Defendant American President Lines, Ltd. provided service to the Territory of Guam on a 'pass-by' basis from at least 1987 to 1996 after which APL sold its operations to Matson Navigation Company and Matson has continued service to the Territory of Guam on a 'pass-by' basis;
- 12) The 1996 sale of APL's Guam Trade operations to Matson Navigation included (1) a charter (lease) arrangement whereby the involved vessels would be turned over to APL at Asian ports and (2) operated by APL from these Asian ports on an eastbound foreign service to ports on the West Coast of the United States;
- 13) In December 1999, the parent of Sea-Land Service, Inc., CSX Transportation, sold all of the foreign service operations, vessels and equipment, including the name of "Sea-Land Service" to Maersk Lines which formed and now continues the international foreign operations of Sea-Land as "Maersk Sea Land".
- 14) In 1997, American President Lines, Ltd. was sold to a Singapore conglomerate that also owned Neptune Orient Lines and they are now identified as the "NOL Group" with APL as a defined subsidiary;
- 15) In each of the above sales, it is the information and belief of CSA that both Sea-Land Service, Inc., now SL Service, Inc. and Matson Navigation Company have agreed to non-competition clauses and to forego any competitive services in the United States foreign trades--to include any services from points and port in Asia or the far east to the United States; and
- 16) The rates assessed and paid by shippers in the Guam Trade, upon most recent review, are 300% higher than comparable rates in the United States westbound foreign trades on the same commodities carried by these carriers that are defendants herein. 3/

3/

A comparison of Freight All Kinds rates in the current domestic tariffs, STB CSXL 353, Item 299000-0000-0002, with the rates described in FMC Docket No. 98-06, Sea-Land Service, Inc.--Possible Violations of Sections 10(b)(1) etc., (I.D. Served March 5, 2002), page 15, Finding of Fact No. 18. The comparison, using the route of Los Angeles-Honolulu-Guam (5,546NM) versus Los Angeles-Hong Kong (6,380 NM) showed revenues of 89 cents/per NM to Guam and 30 cents/per NM to Hong Kong.

Summary of Comments

The pendency of FMC Docket No. 89-26 and the period of time which has elapsed since the initiation of this proceeding has resulted in a situation wherein positions and contentions taken in earlier times are either no longer applicable or now simply moot/stale. The identity of the carriers, actually even the existence of one of the defendants, has changed; the operations which the purported rates reflect, have changed; and the maritime industry (U.S. that is) has changed. The period 1996 to 2000 has reflected a withdrawal of United States companies from the international maritime service industry-- either by way of merger, outright foreign acquisitions, or simply liquidation/withdrawal. The United States can no longer be said to have any significant maritime presence in the United States foreign trades. Two of the three named defendants in this case have been effectively 'sold out foreign' and the third named defendant, has an agreement with a foreign owned carrier NOT to provide service or compete in the foreign trades on its own vessels or with its own vessel.

The service to Guam is most efficiently and practically provided on a 'pass-by' basis. In the analysis of a carrier's rates/operations, the onward and Asia return cargoes/business is essential. The arguments of FMC General Order No. 11 Rates of Return, versus "SAC" Stand Alone Costing both would require that the "use" on the backhaul of any vessel service to Guam be considered. The provisions of the Ocean Shipping Reform Act of 1998, P.L. Law 105, 258, 112 Stat. 1902 (October 14, 1998)

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require that all service contract rates be kept confidential. 46 App.U.S.C. 1707(c)(3) (2000 Supp.). In September 2001 the Federal Maritime Commission issued a study entitled "The Impact Of The Ocean Shipping Reform Act Of 1998". The FMC noted that 80% or more of all international ocean shipping now takes place under confidential contracts. FMC Report at pages 2, 16-24. The decisions of the defendants to structure their business in such a fashion that they can not provide what might be described as being a "balanced" operation requires that the STB limit any analysis to a strict cost basis. This strict cost is to be further limited to (1) consideration of only the assets actually used in the service, on adjusted cost/expense basis, and (2) with no factor for "risk" of capital. In the alternative, it is submitted that the Board adopt the methodology, with further suggested limitations, as established by the Federal Maritime Commission in Docket No. 94-07, Financial Reporting Requirements and Rate of Return Methodology in the Domestic Offshore trades, 60 Fed.Reg. 46047-46063 (September 5, 1995). Such an approach would provide much needed consistency and would further maintain uniformity with the regulations of the Maritime Administration.^{4/} See 46 CFR 232 (1997 Ed.).

^{4/} FMC regulations were amended in July 1985 in order to match the reporting and information/accounting requirements of the Maritime Administration. See FMC Docket No. 85-17, Financial Reports Of Vessel Operating Carriers By Water In the Domestic Offshore Trades, 28 F.M.C. 13 (1985).

COMMENTSI. THE STATUTORY STRUCTURE PROVIDES
LIMITED DISCRETION TO THE BOARD.

The STB, in its November 13, 2001 decision, noted the limited history surrounding 49 U.S.C. §§13701(a). Order at 3. The Board noted that Congress intended the Board to handle rate reasonableness requirements under "current" standards. The Board, without recognizing the same, did in fact draw a distinction between the "FMC regulatory approach" and the ICC's approach to "railroad and motor carrier cases" (albeit cited from the party's contentions). The language that the Board cited from House Report No. 104-311 states:

"This section virtually eliminates existing ICC motor carrier rate regulation by limiting the rate reasonableness requirement only to household goods movements paid for by the householder and movements by or with a water carrier in noncontiguous trade. The section maintains the current basic rate reasonableness requirements for those two limited areas and transfers the regulatory authority to the Panel to prescribe a rate when the carrier's rate is not reasonable."
(H.Rpt. 104-311, page 112-113, Nov. 6, 1995)

This language was carried over into the Conference Report with only the change that motor carrier collective ratemaking was added as a 3rd area for regulation. H.Conf.Rpt. No. 104-422, page 205 (December 18, 1995). The provisions of section 13701(a) are to be governed by and interpreted by the National Transportation Policy stated at 49 U.S.C. §§13101 (2000 Supp.). The Interstate Commerce Commission, in Delaware and Hudson Railway Company--Unilateral Joint Rate Cancellation, 2 I.C.C.2d. 631 (1986), noted and restated the axiom that when Congress has

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adopted a "new" law that incorporates sections of the prior law, it is presumed to be aware of the administrative and judicial interpretation of that law and to adopt those standards. See 2 I.C.C.2d. at 637, citing Lorillard v. Pons, 434 U.S. 575, 580-581 (1978) and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) specifically the case affirms the Supreme Court's contention that

"...the presumption is particularly appropriate where Congress has a detailed knowledge of the provisions and judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation ..."

A consideration of the I.C.C.'s current "regulation" (i.e. pre-1996) shows that rate regulation under that regime was limited by 49 U.S.C. §§10703(a)(4)(D) (1978 Supp.). That statute stated:

"A through route and rate, classification, rule, or practice related to a through route with a water common carrier referred to in this subparagraph is subject to the provisions of this subtitle governing the type of carrier establishing the rate, classification, rule or practice."

Simply, under pre-STB caselaw, the water carrier's rates were subjected to the same governing criteria as their corresponding ICC regulated connecting carriers. See, as example, Joint Rail-Water Rates To Hawaii, Matson Navigation Company, 351 I.C.C. 213 (1975). It is clear that each of the primary parties to this case are trying to read too much into both the statement in the House Report (No. 104-311) and the statute. It is submitted that Congress is intimately familiar with the term and understanding of the words "reasonable rate" as that term is used repeatedly in numerous federal regulatory structures and schemes. It is also

submitted that Congress understood the term "current". The term simply means that which 'belonging to the time actually passing'--The form of rate methodology that existed and was in use at the time of enactment of the ICC Termination Act of 1995. It is noted that the statute, §§13701((d)(1), does distinguish the types of water carrier service--(1) joint rate and (2) port to port. See also, the discussion in H.Conf.Rpt. 104-422, pages 205-206. In fact, that Report carries over the FMC's tariff filing standards/practices. It is not necessary to go beyond the word "current" in search of some other undefined and ephemeral rules or criteria. It is also submitted that the Board has the necessary discretion to treat 'local' trucking (whether performed as pickup/delivery service, or as an ostensible 'joint' service) as a fixed expense for the VOCC. It is noted that no matter the commodity rate published in the carriers' 'intermodal' tariffs, the inland trucking costs remain fixed and the same under either 'joint' or 'local pickup/delivery' designation. Cf. Delaware and Hudson, supra, at 2 I.C.C. 635.

II. THE APPROPRIATE RATE MEASURE
METHODOLOGY AND CRITERIA IS
THAT APPLICABLE IN 1995 FOR
PORT TO PORT SERVICES.

As noted above, the Congress appears to have made its desires clear. However, in order to make CSA's position clear, it is the position of the CSA that the rate standards that were in existence under 46 CFR 552, as amended in September 1995, are those standards that should be applied. I am attaching

hereto and identifying as Attachments A and B, a summary issued on June 7, 1995 by the FMC regarding FMC Docket 94-07. I have identified as "B" some excerpt pages from the FMC's June 1998 decision in Docket No. 89-26 which appear to reflect that at least one of the defendants (APL) accepted the new FMC rate regulations as modified to use "cost of capital". The use of cost of capital has been employed by this Board and is therefore not a major departure.

A. The Board Should Not Include Any Factor
For "Risk" Associated With Cost Of Capital

As noted above, the dynamics of the U.S. maritime industry have changed substantially since 1996. The Jones Act acts as a very significant barrier to entry. Defendant Sea-Land Service has not built a ship in the United States since 1984. Matson, on the other hand, built one ship in 1992. The domestic offshore trades indirectly subsidize the U.S. maritime industry through the payment of rates and charges that were and remain much higher than those of international operators. The effect over many years has been the 'aging' of the ships in use, a minimal if any effort at replacement, and trades with fewer and fewer competitors. It is now important to note that the Alaska Trade and Hawaii Trade are controlled by two carriers. The Guam Trade is not only controlled by the defendants, they have now undertaken to establish reciprocal vessel service arrangements. Attached hereto and noted as Attachment "C" is an article from the Journal of Commerce in which it notes that Matson and CSX Lines (Sea-Land's domestic successor-in-interest) are expanding an 'agreement' which re-

flects a history of cooperation. Simply, a review of the tariffs reflects that Sea-Land/CSX now routinely ships containers and cargo on Matson's vessels. The reason for the original agreement was 'represented' as space sharing. See, Sea-Land Service, Inc. v. Atlantic Pacific International, Inc., U.S.D.HI. Case No. 98-00369, (July 12, 1999) 28 S.R.R.(Pike&Fischer) 1646 at page 1652 wherein the cooperative agreement is discussed. In any event, this represents a reduction in vessel capacity and an associated reduction in any competition between the defendants.

In addition to the above, the Federal Maritime Commission, in a 1997 proceeding, recognized that it was the pricing policy of Sea-Land Service of "mirroring its competitors' filings". See Mar-Mol Co. and CopyCorp. v. Sea-Land Service, Inc., FMC Docket No. 95-07, 27 S.R.R.(Pike&Fischer) 1085, 1089 (June 5, 1997). This practice of using tariffs to match prices is explicitly condemned in House Report No. 104-311, page 113. The "policy" to maintain price levels works to stabilize prices/rates at levels higher than in a truly competitive environment. In the absence of competition and the dearth of vessels in order to make entry 'effective', there is no risk of rate increases resulting in increased competition.^{5/}

^{5/}

The Board should not confuse 'vessel' services which ocean going 'barge' services. The cargo safety issues, the ability to 'reach' the cargo in case of a problem, the slower transit schedules all work to limit barge competition to limited distances and 'non-perishable cargoes'. It would take the average tug and barge service over one month to make one outbound trip from the west coast U.S. to Guam--that is assuming good weather all the way. The only real competition in these trades are the forwarders and cargo brokers that market space on these ships.

B. The Board Should Not Include Any Factor For
Vessel Depreciation NOR Replacement Costs
In The Involved Methodology.

A major issue in the domestic offshore trades is the quality of the equipment and services. Carriers are not replacing their vessels even though the carriers have such 'costs' built into their prices/rates and even though they have "CCF" (Capital Construction Funds) accounts into which they 'park' substantial funds on a tax deferred basis. The ships are obsolete under the federal standards contained in Title V of the Merchant Marine Act of 1936. See, 46 App.U.S.C. 1156(g) (1999), 1157, 1160(g). Section 1160(g) noted that no ship owned or controlled by Marad which is over 25 years old may be used "for commercial operation". It is also worthy of note that such vessels require higher maintenance, have much higher operating costs, are much more expensive to insure-- both hull and cargo wise, and are less safe when operated on the high seas. One carrier in the domestic trades has been forced to discontinue use of some of its ships due to their unsafe and unseaworthy condition. The Board must be very mindful that it is not compensating carriers for obsolete equipment that remains on their asset lists at inflated values.

C. The Board lacks Jurisdiction To Determine
The Reasonableness Of A Rate When The Car-
rier Is Operating As A Forwarder.

As noted above, the carriers are reducing vessel capacity and have a cooperative arrangement under which they place cargo on each other's vessel. Under such circumstances, these carrier to carrier shipments are really "shipper" to carrier. Cf.

Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 225 U.S. 326, 341-342, 56 L.Ed. 1107, 1112 (1912) (carrier that is transporting another carrier's fuel coal must treat that carrier like any other 'shipper' and may not make special discriminatory rate arrangements with the other carrier). The defendants, as noted above, have entered into business arrangements that changed their operations. Whether the 'service' is that of a shipper-carrier service, or an F.M.C. 'vessel sharing' agreement, the fact remains that neither Matson nor Sea-Land (now known as CSX Lines, LLC) operates in the U.S. foreign trades. While these defendants claim to be operating as VOCC water carriers, it is now a question of fact. It is well established that the 'services' and the tariffs must match. If it were to be determined that one or more of these carriers was conducting business as a forwarder, then the VOCC tariff is not applicable and such a carrier would not be entitled to the benefit of 'reasonable' compensation.

D. The Board's Use of Stand Alone cost
Models Can Not Work Effectively In
The Involved Offshore Trade.

The operations of carriers in the domestic offshore trades, if attempted to be duplicated under an SAC Model, will not be reflective of the actual service. The board has noted that SAC Models require "the current cost" of assets be used. See, e.g. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d. 520, 545, n.67 (1985). As recently as November 21, 2001, the Board discussed the fact that an SAC Model would be required to use "present" costs of a stand alone carrier.

In addition to the clear distortion of the carriers' costs and asset values, SAC Models would include a feature for the measure of "other traffic" needed to make the Model feasible. Since any SAC carrier model would be required to be established as a "pass-by" operation, a measure of eastbound Asian traffic and revenues would be necessary. This is not something which a shipper complainant can perform. There are only confidential service contracts--the website tariffs contain "paper rates" and do not reflect either actual traffic nor actual prices/rates.

The idea of a "one-way" service is not realistic either. The carriers would not provide such a service if they did not have a 'captive' market. The regulatory statutes should not be interpreted to create and foster a monopoly situation. This carrier approach would not be consistent with efficient and economical management of an enterprise.

CONCLUSION

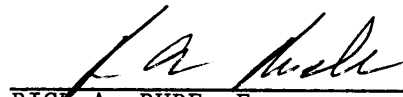
Wherefore, in consideration of the above, it is hereby respectfully submitted that the Board should adopt the rate methodology contained in the Federal Maritime Commission's regulations as amended through 1995. Such would provide for consistency, uniformity of approach to the domestic offshore trade involved, and expeditiously resolve the involved case. Further, any adopted methodology should be addressed to overall carrier rate levels and not address individual rate item issues.

The utilization of the term "current" means just that. As the Board noted in its November 13, 2001 Order, the Interstate Commerce Commission was "never called upon" to exercise the I.C.C. rate regulation jurisdiction over complaints involving joint rates in the domestic offshore trades. It therefore begs the question as to "which" rate making methodology to employ. The I.C.C. therefor did not have a "current" methodology--- only the Federal Maritime Commission has established a rate reasonableness methodology in the domestic offshore trades.

It is the practice and common sense policy that the differing modes of transportation be regulated in a manner that is appropriate for that mode. The I.C.C. and this Board has reaffirmed the legal point that what is correct for the regulation of one (rail as example) is not necessarily correct nor applicable to another mode. The effort to "mix" motor carrier regulation with regulation of water carrier oligopolies in the offshore trades is both a legal mistake and an error of practical application as well. The Congress established separate National Transportation Policies (i.e. rail, motor, water carriage) for a reason. The Board should be guided by the NTP for water carriage contained in §§13101(a)(1)(A) through (F) and (a)(4). If the Board properly follows these policy guidelines, then the Board should reach a just and fair result.

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Respectfully Submitted,



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Certificate Of Service

I hereby certify that a copy of these Comments have
been served by first class mail, postage prepaid, upon the fol-
lowing parties of record. Dated this 22nd day of April 2002.

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ATTACHMENT "A"

News	Federal Maritime Commission
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FINAL RULE IN
FMC DOCKET NO. 94-07
NR 95-08

Washington, D.C. 20573

CONTACT Austin L. Schmitt at (202) 523-5787

FOR RELEASE: June 7, 1995

The Federal Maritime Commission voted today to adopt a final rule in Docket 94-07, *Financial Reporting Requirements and Rate of Return Methodology in the Domestic Offshore Trades*, which amends its regulations governing the financial reporting requirements and rate of return methodology applicable to vessel-operating common carriers in the domestic offshore trades. The rule changes the method of determining the reasonableness of a carrier's return on rate base from the comparable earnings test to the weighted average cost of capital methodology on a before-tax basis.

The final rule also specifies that in calculating a projected rate of return on rate base for general rate increases, carriers would 1) calculate the projected rate of return on a before-tax basis rather than the after-tax basis specified in the Commission's current rules, and 2) include in working capital insurance expenses for the average length of a voyage rather than the existing 90-day allowance. The final rule preserves the current treatment of deferred taxes and the Capital Construction Fund (*i.e.*, regulated carriers are not required to deduct from rate base the amount of accumulated deferred taxes, including those arising from the Capital Construction Fund). Finally, the Commission voted to eliminate the

requirement to use the Capital Asset Pricing Model, while retaining the Discounted Cash Flow and Risk Premium models, to determine the cost of equity component of the weighted average cost of capital formula.

The final rule implementing the Commission's action will be available in the near future.

ATTACHMENT "B"

(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

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.

collected, it argued that the comparable earnings test should not be applied here because it is inferior to the weighted average cost of capital test adopted by the Commission in 1995. APL Proposed Findings at 673-78.

In APL's case below, Kolbe did not use the comparable earnings approach in his analysis of the allowable rate of return. Kolbe states that the benchmark rate of return should equal a carrier's cost of capital. He states that the cost of capital is an economic concept that corresponds to the U.S. Supreme Court's description of the standard that ought to apply to the returns allowed to firms whose prices are subject to government regulation. Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). Kolbe claimed that the standard comparable earnings method is an unreliable way of estimating the cost of capital, and therefore is unreliable in determining the allowable rate of return. Kolbe claimed that, because the comparable earnings approach calculates the cost of capital as the average earned book rate of return on a sample of comparable-risk companies, it is not a good measure of the appropriate allowable rate of return. The most fundamental problem with the comparable earnings approach, according to Kolbe, is that the cost of capital is a market-based concept and the comparable earnings approach is based on book values. Kolbe claims that economics literature on this topic shows that average accounting (book value) rates of

return are not good estimates of the actual rate of return. Thus, Kolbe concludes that the comparable earnings approach is an unreliable way to estimate the cost of capital.

Kolbe uses the risk positioning approach to estimate the carrier's cost of capital. The risk positioning method estimates the cost of capital as the sum of a current interest rate and a risk premium. Kolbe calculated three risk positioning analyses. All three analyses involve two basic steps which determine the market risk premium investors expect for the period 1988-1990. The third step, which varies among the three analyses, is to include a measure of the relative risk of sample companies which operate in the maritime industry.

In his first step, Kolbe determined the risk premium of stocks over the risk-free rate to be 8.5 percent. Kolbe's second step was to determine the interest rate forecast, which measures the risk free rate, at 7.3 percent in 1988, 8.1 percent in 1989, and 7.5 percent in 1990. The last step, determining the risk specific to the maritime industry, has three variations. For the first two variations, Kolbe chose the following companies to determine industry risk: Alexander Baldwin, American President Companies, OMI Corporation, Overseas Shipholding, CSX Corporation, and Sea Containers, Ltd. He calculated a weighted average cost of capital on all the companies and then averaged the results. In the first variation, Kolbe measured the pre-tax cost of capital. In the

second variation he calculated the after-tax cost of capital. In the third variation, Kolbe first calculated a small stock premium and then measured the sensitivity of the marine transportation companies to the small stock effect. All three variations are sorted into results for pre-tax and after-tax groups and averaged.

Kolbe finds the carriers' weighted average cost of capital, which he uses as his allowable rate of return, to be 13.6 percent in 1988, 14.4 percent in 1989, and 12.5 percent in 1990.

APL also contended below that Nadel's conclusion that the Guam and Hawaii trades are sufficiently similar so as to require the same downward adjustment of the benchmark rate of return is not supported by evidence of record. APL Proposed Findings at 679 - 82. It points out that Guam enjoys a partial exemption from the Jones Act which allows foreign-built U.S.-flagged vessels to serve the trade. This, it is said, greatly increases the number of vessels that are eligible to serve the trade. In addition, APL alleges that Guam, unlike Hawaii, is not subject to section 805(a) of the Merchant Marine Act of 1936. 46 U.S.C. app. § 1223(a). This allows subsidized carriers such as APL to serve the Guam trade. APL also contends that competition from foreign carriers operating from the Far East is greater in the Guam trade than in the Hawaii trade. Finally, APL believes that the Guam trade is more unstable than the Hawaii trade.

c. Disposition

APL points to a number of weaknesses in the comparable earnings test. These weaknesses were recognized by the Commission in its Notice of Proposed Rulemaking in Docket No. 94-07, 59 Fed. Reg. 16592 (proposed Apr. 7, 1994). Nevertheless, the comparable earnings test withstood challenge as recently as 1992 and its constitutionality cannot be seriously questioned. Matson Navigation Company, Inc. v. Federal Maritime Comm'n, 959 F. 2d 1039 (D.C. Cir. 1992). The court therein affirmed the Commission's determination that the comparable earnings test

fulfills the basic requirements of [Bluefield Waterworks and Improv. Co. v. Public Serv. Comm'n, 262 U.S. 679 (1923)] and [Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944)] in that Matson will be allowed to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks and which also generates enough revenue to allow it to maintain its credit and attract capital.

Docket No. 90-09, aff'd, 959 F. 2d at 1052. Moreover, we believe it appropriate and fair to apply the standard which was in effect as part of G.O. 11 when the rates at issue were assessed and collected and the complaint in this proceeding was filed.

While APL may have demonstrated that its methodology, which is generally consistent with that adopted by the Commission in Docket No. 94-07, is superior to the comparable earnings test using the carrier's return on rate base, it has not shown that use of its methodology is necessary to achieve a fair and reasonable result. 46 C.F.R. § 552.1(d) (1994). Accordingly, the Commission will use

the comparable earnings test for purposes of this case. The results of the Commission's calculation of the comparison of the carriers' rates of return with the benchmark rate are reflected in Appendix 10, APL's Excess Return Earned in the Guam Trade, and Sea-Land's Excess Return Earned in the Guam Trade.

Nadel's calculation of the unadjusted benchmark rate of return generally follows the G.O. 11 methodology used in rate cases involving Matson, which we find appropriate. However, his adjustment for risk requires scrutiny. Nadel simply adopted the 1.25 percent downward adjustment for risk which the Commission used in Docket No. 90-09, involving Matson's service in the Hawaii trade. He defended the adjustment on the grounds that competitive conditions were the same in the Hawaii and Guam trades. This conclusion has little or no support in the record. He seems to have adopted the 1.25 percent adjustment used in Docket No. 90-09 to avoid having to make a detailed assessment of the competitive conditions in the Guam trade. As a result, GovGuam has not carried the burden of proof on the risk adjustment issue. Accordingly, no adjustment to the benchmark rate of return will be made on account of risk.

Because no adjustments were made to the benchmark rates of return that are peculiar to APL, the same figures can be used to determine the reasonableness of Sea-Land's rates of return. In the case of Sea-Land, the benchmark for 1989 must be reduced by half to

account for the fact that Sea-Land only operated in the FMC-regulated trade during the first six months. App. 10.

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 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

⁴⁴ This section addresses GovGuam Exception #5 and Respondents' Replies thereto.

ATTACHMENT "C"



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Ocean Shipping**Did you know??****CSX, Matson in U.S.-Hawaii deal**

Updated 10:01 a.m. ET, Fri Jul 20, 2001

BY CHRIS DUPIN
JoC ONLINE

CSX Lines has entered into an agreement to ship Hawaii-bound cargo on Matson Navigation Co. vessels.

Starting on August 1, CSX will ship some boxes on Matson's midweek service out of Southern California. CSX, which offers weekly sailings to Hawaii from Long Beach every Friday and had offered sailings every other Wednesday, will now offer sailings every Wednesday.

Previously, CSX had trucked boxes up to Oakland to catch Wednesday sailings by CSX vessels to Hawaii from northern California.

Tom Cowan, a senior vice president at CSX Lines, said the company may continue to dray some boxes to Oakland, but would now have the option of putting boxes on Matson vessels. He would not disclose how many slots CSX will purchase from Matson on a weekly basis.

Cowan also said that CSX is evaluating the future deployment of the CSX Producer, the 1,500 TEU ship that currently operates the midweek sailings out of Long Beach.

Matson spokesman Jeff Hull said the two companies have a long history of cooperation, and that the agreement was an "extension" of that cooperation.

Chris Dupin can be reached at cdupin@joc.com.

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