

214303

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

401 9TH STREET, N.W. - SUITE 1000
WASHINGTON, D.C. 20004-2134
www.troutmansanders.com
TELEPHONE: 202-274-2950

Leonard L. Fleisig
leonard.fleisig@troutmansanders.com

Direct Dial: 202-274-2863
Fax: 202-654-5645

July 8, 2005 ENTERED
Office of Proceedings

JUL 08 2005

Part of
Public Record



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

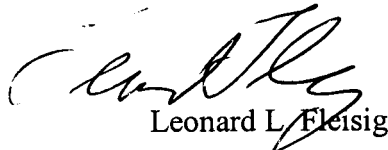
RE: Government of the Territory of Guam. v. Sea-Land Service, Inc. *et al.*
STB Docket No. WCC-101

Dear Secretary Williams:

Please accept for filing an original and 11 copies of the "*REPLY OF HORIZON LINES, LLC TO COMPLAINANT'S RESPONSE TO ORDER TO SHOW CAUSE*" in the above referenced proceeding. Please acknowledge receipt and filing of the enclosed material by date-stamping the eleventh copy of the Reply and returning it to the individual making this filing for return to me.

If there are any questions concerning this filing, please contact me at 202-274-2863.

Yours very truly,


Leonard L. Fleisig

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

ENTERED
Office of Proceedings

JUL 08 2005

**Part of
Public Record**



**REPLY OF HORIZON LINES, LLC TO COMPLAINANT'S
RESPONSE TO ORDER TO SHOW CAUSE**

The Board, by Order dated June 7, 2004, directed the Complainant, the Government of the Territory of Guam (“GovGuam”), to show cause why this proceeding should not be dismissed. The Order to Show Cause was issued following an extended period in which GovGuam failed to participate or respond to Board orders issued in this matter. Pursuant to the schedule established by the Board in its June 7th Order, defendant Horizon Lines, LLC (“Horizon”), responds to the Board’s Show Cause Order and GovGuam’s recent (June 28, 2005) submissions.¹

Given GovGuam's lack of activity in a costly and attenuated proceeding, Horizon urges prompt dismissal. If the Board deems the issues raised concerning evaluation of the lawfulness of water carrier rates to be worthy of further examination, it can initiate

¹ Horizon Lines, LLC existed as Sea-Land Service, Inc. at the 1998 commencement of this proceeding, prior to a series of changes in its ownership and ownership structure.

rulemaking proceedings that will evaluate those issues in an environment more respectful of the resources of the parties and more likely to yield meaningful results. By dismissing this case, the Board will impart the important message that its processes are not a debating society in which complainants can burden defendants with extravagant claims and potential liabilities while activating and deactivating the pace of proceedings unilaterally over a period of many months.

GovGuam's lack of focus and initiative have inflicted substantial costs on all the parties, as well as federal taxpayers and business interests who, directly or indirectly, fund the operations of Guam's Government and who ultimately share the burdens of the financial harm inflicted on the carriers by GovGuam's desultory behavior. Failure to dismiss this proceeding risks conveying to potential STB litigants that it is acceptable for a party who initiates costly proceedings (based on widely bruited claims of entitlement to large sums) to withhold from defendants and from the Board information about a complainant's readiness and ability to proceed. Such conduct is anathema to any theory of orderly justice, whether administrative or judicial, and should not be countenanced.

The last substantive submissions in this proceeding were filed by all parties in the spring of 2002.² In November 2004, only two weeks before scheduled oral presentations and after defendants had spent considerable time and resources preparing for oral argument, GovGuam sought a six-month delay of oral argument, until May 10, 2005. Horizon and Matson Navigation Company ("Matson") opposed such an extensive delay. On November 3, 2004, the Board granted GovGuam a three-month extension (until

² As noted below in the text, these filings are extensive and provide an adequate record for decision in Phase II of this proceeding should the Board choose to decide the methodological issues presented.

February 10, 2005), after which nothing was heard in these proceedings from GovGuam until the June 28 Response to the Board's Order to Show Cause.

As the date of the February 10, 2005 oral argument approached, both carrier defendants again undertook to prepare for the presentation of complex positions on the novel issues presented in GovGuam's complaint. As with preparations prior to the originally scheduled oral argument set for November 2004, the time and expense involved in preparation for the February 2005 oral argument were substantial. One week prior to the rescheduled oral argument, the Board cancelled the scheduled hearing, citing an inability to establish contact with authorized representatives of GovGuam. Horizon promptly sought reinstatement of the date or, alternatively, issuance of a show cause order.

In response to Horizon's filings, Mary Eva Candon, then counsel of record for GovGuam, responded that GovGuam was seeking "additional counsel" and suggested a rescheduling of the oral argument until May 10, 2005, the date originally sought by GovGuam and rejected by the Board. This terse communication arrived only in response to Horizon's February 6th motion and was utterly devoid of explanation of what GovGuam had been up to in the three months since it had first requested postponement of the November 10th, 2004 argument. In retrospect, it now seems quite clear that if the Board had proceeded with the February 10th argument, GovGuam simply would not have favored the Board or the defendants with its presence.

In April of 2005, the Board convened a status conference at which defendant carriers and intervenor Caribbean Shippers Association appeared. GovGuam did not participate, despite representations from its former counsel, Ms. Candon, that she had

provided GovGuam with copies of all notices and correspondence relating to the status conference. Following this conference, the Board issued its Show Cause Order.

GovGuam's response to the Show Cause Order consists of a letter from the Attorney General's Office and a submission by new counsel, Messrs. Greenberg and Monroe. Mr. Joseph Guthrie, Deputy Attorney General of Guam, states that someone "duly authorized" to represent Guam will appear at a "hearing on rate reasonableness" and that such a hearing should be scheduled for September of this year. New counsel for GovGuam inform the parties and the Board that a lack of funds prevented GovGuam's participation in earlier phases of the proceeding (Reply at 2), that funding is now available by executive action of the Governor (Reply at 2-3), and (we submit rather cavalierly) opine that the defendants have not been harmed by GovGuam's behavior.

Nothing in the responses from GovGuam explains or mitigates the impacts of GovGuam's conduct. This action was filed in September of 1998 and alleges that the defendant carriers owe GovGuam (acting in its self-appointed capacity as representative for shippers and others in Guam) millions of dollars in refunds for what GovGuam claims are overcharges. No individual commercial shipper has filed rate complaints. The trade has been one of generally stable rate levels for twenty years. Both carriers are adversely affected by the pendency of such claims, no matter how novel or frivolous they might be. Horizon's ownership has changed twice since 1998. The mere assertion of liabilities of this magnitude has significant impacts on market perceptions concerning the value of the company. Substantial legal fees have been incurred, no small portion of which is directly attributable to GovGuam's casual regard for the processes of the Board and the circumstances of the carriers. GovGuam has felt no obligation to inform the parties or

the Board in real time of its constraints in litigating this proceeding. All parties and the Board are expected to await the convenience or whim of GovGuam, while it unilaterally suspends and resuscitates its activities in a proceeding that it chose to commence.

The unsupported assumption that the carrier defendants have not been prejudiced by these untoward delays is contradicted by the repeated expense of preparation for oral argument and the ongoing impact of having contingent liabilities sitting on their books. The Board should not accept GovGuam's attitude that the carrier defendants have not been prejudiced by these delays and the implicit corollary that the sustained pendency of multi-million dollar claims is a matter of no moment.

Finally, GovGuam's response provides the Board and the carrier defendants with no assurance that GovGuam will continue to prosecute this case through Phase II and then on to Phase III. GovGuam has represented that funds have been released. The amounts reported do not appear to be sufficient to provide on-going representation through subsequent litigation that may require extensive discovery and expert testimony. Nothing has been introduced by GovGuam that establishes that this proceeding will not grind to yet another halt once this emergency allocation of funds has been consumed.

It would be manifestly unjust for GovGuam's conduct to be tolerated, indulged or excused. The Board has been exceedingly patient. The Phase II submissions of the parties are substantial and provide an adequate record for determining that the unorthodox nature of GovGuam's claims (*i.e.*, an attack on aggregate carrier revenue levels, as opposed to complaints about the levels of specific commodity rates in a multi-commodity rate structure) is incompatible with the requirements and structure of the controlling statute (49 U.S.C. § 10101 *et seq.*). It is similarly clear that there exists direct

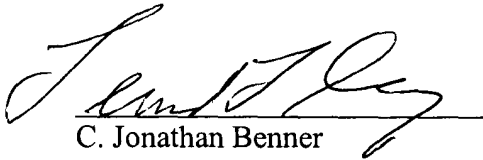
competition between the two carriers in the Mainland/Guam ocean trades, a competition that contributes to the rate stability that has characterized this trade for nearly two decades.

If the Board concludes, as a matter of policy, that there need be a general examination of methodologies for evaluating the lawfulness of water carrier rates in the noncontiguous ocean trades of the United States, the Board has at its disposal the institution of a rulemaking proceeding to explore these issues. Such a proceeding would not be confined to the Guam trade. As matters now stand, GovGuam is asking the Board to establish standards of rate reasonableness in a highly idiosyncratic trade. These standards, as GovGuam seeks to apply them, would have retroactive impacts on Horizon and Matson. Both Matson and Horizon have long asserted that the imposition of a newly-defined methodology to a retroactive rate complaint is both illogical and inequitable.

CONCLUSION

GovGuam should not be permitted to obtain yet another delay in this proceeding. The Board has been forbearing of GovGuam's actions and its failure to keep the Board and defendants apprised of its ability to maintain this action. GovGuam has been less than forthcoming in advising the STB and Horizon and Matson about the actual reasons for these delays. Defendants have been forced to spend time and money preparing for the litigation, preparing for oral arguments, only to find the matter delayed for unknown reasons. The matter should be dismissed with prejudice.

Respectfully submitted,



C. Jonathan Benner
Leonard L. Fleisig
TROUTMAN SANDERS LLP
401 Ninth Street, NW
Suite 1000
Washington, D.C. 20004
(202) 274-2880

Robert S. Zuckerman
Horizon Lines, LLC
2101 Rexford Road
Charlotte, NC 28211
(704) 973-7012

Counsel for Sea-Land Service, Inc.

July 8, 2005

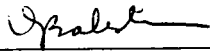
CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2005 a copy of the foregoing Reply of Horizon Lines, LLC to Complainant's Response to Order to Show Cause was served by fax delivery (copy by U.S. mail) upon:

Edward D. Greenberg, Esquire
Daniel K. Monroe, Esquire
Galland, Kharasch, Greenberg,
Fellman & Swirsky, P.C.
1054 Thirty-First Street, N.W.
Suite 200
Washington, DC 20007

Richard A. Allen, Esquire
Scott Zimmerman, Esquire
ZUCKERT, SCOUTT &
RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006

Rick A. Rude, Esquire
Attorney At Law
207 Park Avenue
Suite 103
Falls Church, Virginia 22046



Virginia Brunelli Balestrieri