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July 12, 2005

VIA MESSENGER

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

ENTERED
Office of Proceedings

JUL 12 2005

Part of
Public Record



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

Dear Secretary Williams:

We enclose for reference by the Board an Order of the Federal Maritime Commission issued on Monday 11 July 2005, in an FMC proceeding addressing water carrier rates in the U.S. Mainland/Guam ocean trades (*Government of the Territory of Guam v. Sea-Land Service, Inc. and American President Lines, Ltd.*, FMC Docket No. 89-26). We submit this FMC order as subsequently-decided authority that we regard as relevant to issues pending before the Board in Docket No. WCC-101, both with regard to the merits of Phase II and in relation to pending issues concerning the Board's Show Cause Order.

Yours very truly,


C. Jonathan Benner

cc.: All parties of record (with enclosure)
(by mail)

Enclosures



FEDERAL MARITIME COMMISSION

THE GOVERNMENT OF THE
TERRITORY OF GUAM,

Complainant,

v.

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

Docket No. 89-26

ENTERED
Office of Proceedings

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Public Record

Served: July 11, 2005

ORDER DENYING EXCEPTIONS TO 2002 DISMISSAL ORDER AND 2003 INITIAL DECISION, DENYING REPARATIONS, AND DISMISSING THE PROCEEDING

BY THE COMMISSION: Steven R. BLUST, *Chairman*; A. Paul
ANDERSON, Harold J. CREEL, Rebecca F. DYE, *Commissioners*;
Commissioner Joseph BRENNAN, concurring and dissenting.

INTRODUCTION

This proceeding was initiated by a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") by the Government of the Territory of Guam ("GovGuam" or "Complainant") against American President Lines, Ltd. ("APL")

and Sea-Land Service, Inc. ("Sea-Land" or "Horizon Lines")¹ (collectively referred to as "Respondents").

The complaint consisted of four counts. In Count I, GovGuam alleged that APL and Sea-Land charged unjust and unreasonable rates pursuant to tariffs filed with the Commission. GovGuam also averred that Sea-Land charged unjust and unreasonable port-to-port rates after it canceled its FMC tariffs.² GovGuam contended that APL and Sea-Land charged similarly situated shippers different rates and charges. Finally, GovGuam alleged that APL and Sea-Land charged unjust and unreasonable demurrage charges, and engaged in unreasonable preference and prejudice with respect to the assessment of demurrage fees.

In Count II, GovGuam alleged that APL and Sea-Land unjustly and unreasonably increased rates on 18 tariff items.

In Count III, GovGuam alleged that Sea-Land continued to operate port-to-port between the U.S. West Coast and Guam after withdrawing from the Guam Rate Agreement tariff.

In Count IV, GovGuam alleged that Sea-Land continued to

¹ Horizon Lines, LLC is Sea-Land's successor-in-interest. Horizon Lines filed exceptions to the 2003 Initial Decision; therefore, we will reference both entities interchangeably in this Order.

² APL and Sea-Land were parties to the Guam Rate Agreement tariff, in the trade between the U.S. mainland and Guam. Sea-Land also had a tariff covering the Hawaii-Guam trade. However, Sea-Land withdrew from the Guam Rate Agreement tariff and canceled its Hawaii-Guam tariff on June 22, 1989. After that date, it had no FMC tariffs covering the Guam trade. APL also terminated its participation in the Guam Rate Agreement tariff, but substituted an individual tariff.

operate port-to-port between Hawaii and Guam after canceling its applicable FMC tariff.

The proceeding was assigned to an administrative law judge ("ALJ") and discovery commenced. On GovGuam's motion, the ALJ bifurcated the proceeding into liability and reparations phases, Phase I and Phase II, respectively. The ALJ issued an Initial Decision addressing liability in 1996. GovGuam filed exceptions to the 1996 Initial Decision, to which APL and Sea-Land filed replies.

In 1998, the Commission issued an Order, The Government of the Territory of Guam v. Sea-Land Service, Inc. and American President Lines, Ltd., 28 SRR 252 (1998) ("1998 FMC Order"), in which the Commission determined that Respondents' rates were unreasonable for the years 1988-1990. The Commission remanded the proceeding to the ALJ "for a determination of the reparations due Complainants, and to quantify the number of Sea-Land containers subject to the Commission's jurisdiction." 28 SRR at 267.

Following the 1998 FMC Order, GovGuam and Respondents submitted evidence, including expert testimony regarding what reparations were owed GovGuam. APL and Horizon Lines each filed motions to dismiss, seeking dismissal of 517 APL shipments and 257 Sea-Land shipments based on a lack of standing and the inadequacy of GovGuam's evidence. The ALJ granted Respondents' motions, thereby decreasing the number of shipments for which GovGuam could recover reparations to 37 APL shipments and 5 Sea-Land shipments. The Government of the Territory of Guam v. Sea-Land Serv., Inc. and American President Lines, Ltd. – Respondents' Motions for Dismissal of Specified Claims Granted; Proceeding Assigned for Conference; Respondents to Prepare Draft Orders, 29 SRR 894

(administratively final, May 22, 2002) ("2002 Dismissal Order").³

On August, 29, 2003, the ALJ issued an Initial Decision ("2003 I.D.") on remand from the 1998 FMC Order. The ALJ found that GovGuam failed to demonstrate what the "just and reasonable rate" for any shipment at issue would have been, and therefore, denied GovGuam's request for an award of reparations and dismissed the complaint. The Government of the Territory of Guam v. Sea-Land Serv., Inc. and American President Lines, Ltd., 29 SRR 1509 (ALJ 2003).

GovGuam filed exceptions to the 2003 I.D. on December 1, 2003.⁴ GovGuam contends, *inter alia*, that the ALJ in his 2002 Dismissal Order dismissed many of the claims based upon two findings: failure to provide sufficient evidence that it paid for 517 APL shipments and 297 Sea-Land shipments, specifically GovGuam's inability to submit cancelled checks; and GovGuam's failure to show "economic harm." GovGuam's Exceptions at 63-64.

³ The ALJ issued two dismissal orders, dated March 27, 2002 and April 16, 2002. These two orders were consolidated and became administratively final on May 22, 2002; therefore, we reference only the single administratively final order.

⁴ We note that GovGuam excepts to both the 2002 Dismissal Order and the 2003 I.D. Pursuant to 46 C.F.R. § 502.227(a)(1), a party may file exceptions within 22 days after the date of service of the initial decision or order of dismissal. GovGuam filed its exceptions to the 2002 Dismissal Order approximately a year and a half after April 16, 2002, the date of service of the 2002 Dismissal Order, which became administratively final on May 22, 2002. The 2003 I.D. was served on August 29, 2003. GovGuam's exceptions to the 2003 I.D., as well as APL's and Horizon Lines' replies, were timely filed.

APL and Horizon Lines filed replies to GovGuam's exceptions. Both Respondents assert that GovGuam's exceptions to the 2002 Dismissal Order should be denied for untimeliness. APL and Horizon Lines aver that GovGuam is not entitled to an award of reparations, even though the Commission found that Respondents earned an excessive overall rate of return.

This proceeding is presently before the Commission on exceptions for the purpose of determining: (1) whether the ALJ properly granted Respondents' motions to dismiss specified claims; and (2) whether the 2003 I.D., which denied reparations and dismissed GovGuam's complaint, is properly grounded. For the reasons set forth below, we deny GovGuam's exceptions to the 2002 Dismissal Order and the 2003 Initial Decision. Furthermore, we affirm the 2003 I.D. denying reparations and dismissing GovGuam's complaint.

BACKGROUND

A. Shipping Act, 1916 and the Intercoastal Shipping Act, 1933

The Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. § 801 et seq., as amended, and the Intercoastal Shipping Act, 1933, ("1933 Act"), 46 U.S.C. app. § 843 et seq., as amended, Pub. L. No. 95-475, 92 Stat. 1494 (1978) ("1978 Amendments"), were the statutes at issue in this case. The relevant provisions of the 1916 Act required carriers in the domestic offshore trades to have "reasonable" rates, authorized the Commission to investigate violations, and provided that persons may file complaints seeking reparations for violations. The 1933 Act allowed the Commission to create "guidelines" for determining "reasonable rates of return" for carriers in the domestic offshore trades, and permitted the Commission to investigate, suspend and/or refund changes in

rates, *i.e.*, general rate increases ("GRI") or decreases, but not pre-existing rates.⁵ Both statutes have since been repealed, and jurisdiction over domestic offshore trades now lies with the Surface Transportation Board.⁶

B. The 1998 FMC Order

In the 1998 FMC Order, the Commission made several pertinent findings. First, the Commission held that port-to-port cargo movements were subject to the FMC's jurisdiction. Second, the Commission found that GovGuam had the ultimate burden of proof to demonstrate that Respondents' trade-wide revenues were excessive under General Order 11 ("G.O. 11"), but that Respondents bore the burden of demonstrating that a financial methodology other than that found in the Commission's G.O. 11 would achieve a fair and reasonable result.⁷ Third, the

⁵ Section 1 of the 1933 Act defined a General Rate Increase as "any change in rates. . . which will (A) result in an increase in not less than 50 per centum of the total rate. . . items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in an increase in gross revenues of such carrier for the particular trade of not less than 3 per centum." 46 U.S.C. app. § 843(2).

⁶ All the relevant statutory provisions of the 1916 and 1933 Acts were repealed, effective September 30, 1996, by the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995).

⁷ The Commission's regulations governing financial reports of vessel-operating common carriers in the domestic offshore trades, such as the Guam-U.S. trade, were designated originally as G.O. 11, which has been used generally over the years and in this proceeding even though that designation was superseded by Part 552 of Title 46, Code of Federal Regulations.

Commission found that the methodology submitted by APL was not an appropriate method to determine whether Respondents' rate levels were just and reasonable. Fourth, the Commission found that the comparable earnings test was the appropriate methodology to determine whether Respondents' rates were just and reasonable. Fifth, the Commission found that a rate of return analysis was unsuitable for challenging the reasonableness of individual commodity rates. Lastly, the Commission found that APL exceeded the allowable rate of return for 1988, 1989, and 1990; and Sea-Land exceeded the allowable rate of return for 1988 and 1989. 28 SRR at 287-88.

C. 2002 Dismissal Order

On March 27, 2002, the ALJ issued an order granting Respondents' motions for dismissal of specified claims. 2002 Dismissal Order, 29 SRR at 894. With respect to jurisdiction, the ALJ dismissed certain shipments based largely upon the following rationales. First, the ALJ noted that certain shipments were beyond the scope of the litigation because they were either interior point intermodal movements or shipments whose ultimate destinations were beyond Guam. *Id.* at 907. These shipments included 50 shipments to Saipan, and 17 shipments that APL received at U.S. East Coast or inland points that GovGuam failed to demonstrate were shipped in the FMC's jurisdiction. *Id.* Second, the ALJ dismissed certain APL shipments, finding that because they originated in Singapore and Canada, and therefore, were from one foreign destination to another rather than between two places in the United States, they were not subject to the Commission's jurisdiction. *Id.*

D. 2003 Initial Decision

In 2003, the ALJ issued an I.D. on remand from the

Commission's 1998 FMC Order. The issues to be determined were: (1) the number of port-to-port shipments over which the Commission had jurisdiction; (2) whether Complainant had injuries and damages resulting from Sea-Land's failure to file a tariff concerning these shipments; and (3) what reparations, if any, Respondents owed GovGuam. 29 SRR at 1553.

1. Jurisdiction

In determining the number of port-to-port shipments, the ALJ concluded that GovGuam provided no evidence to deduce the number of port-to-port movements over which the Commission had jurisdiction. The ALJ noted that GovGuam failed to address Sea-Land's contention regarding a lack of jurisdiction over post-June 23, 1989 shipments. Consequently, the ALJ held that any jurisdictional claims GovGuam had were abandoned and would not be considered further in the proceeding. Id.

2. Number of Sea-Land containers and Sea-Land's failure to file a tariff covering port-to-port shipments

The ALJ concluded that GovGuam provided no evidence in Phase II quantifying the number of Sea-Land port-to-port containers. The ALJ also found that GovGuam failed to respond to Horizon Line's assertion that GovGuam could not collect reparations on shipments occurring after June 23, 1989, because GovGuam failed to identify such shipments and, hence, failed to establish Commission jurisdiction over them.

3. Reparations

With respect to reparations, the ALJ discussed three issues:

first, whether GovGuam may seek reparations for violations of section 18 of the 1916 Act or section 3 of the 1933 Act; second, whether the Commission must award reparations if a complainant pays an unjust or unreasonable rate pursuant to section 22 of the 1916 Act; and third, whether GovGuam met the evidential burden necessary to recover reparations.

a. Burden of proof

On remand, the ALJ found that GovGuam did not meet its burden of proving what the “just and reasonable rates” would have been for the commodities shipped by GovGuam, and therefore, denied GovGuam’s request for reparations and ordered the complaint dismissed. *Id.* at 1563. The ALJ stated that, in accordance with section 4 of the 1933 Act, GovGuam must show the following in order to obtain reparations:

[t]hat upon such finding of unjustness or unreasonableness in a proceeding instituted by complainant pursuant to the provisions of section 22 of the Shipping Act, 1916, the Commission shall direct full reparation to the complainant of the difference between the charge collected and the just and reasonable rate, fare, or charge, plus interest.

Id. at 1562. (citing 46 U.S.C. app. § 845A) (emphasis added).

In order for reparations to be awarded under section 22 of the 1916 Act, the ALJ also determined that Commission and judicial precedent require a complainant to prove that: (1) it has suffered an injury; and (2) the proximate cause of the injury is the statutory violation found by the Commission. *Id.* at 1563.

The ALJ found that GovGuam did not prove that the

proximate cause of its alleged injury was due to the unreasonable rates charged by Respondents. The ALJ determined that GovGuam's methodology for calculating reparations did not meet the requirements of section 4 of the 1933 Act (i.e., the difference between the amounts paid to the Respondents and the "just and reasonable" rates that should have been charged for each of GovGuam's shipments). 29 SRR at 1563.

b. Guam's methodology for calculating reparations

The ALJ found that GovGuam's methodology used a rate of return, or general revenue, analysis that relied on a single, proportional, overcharge percentage derived by GovGuam from the trade-wide revenues, which the Commission found unreasonable in its 1998 FMC Order. *Id.* at 1557. GovGuam's revenue proportionality methodology is described in APL's findings of fact, which were adopted by the ALJ:

[c]omplainants rely on the Affidavit of Dr. Nadel [GovGuam's expert witness] which asserts that reparations for the complainants' shipments should be calculated as follows: (i) For every year, the entirety of the carrier's annual trade-wide after-tax "excess return" as calculated in Appendix 10 of the 6/1/98 [Commission] Decision should be converted to "excess revenue" by grossing up to pre-tax dollars. (ii) The entirety of this trade-wide excess revenue should be considered "overcharges" to be refunded to shippers. (iii) For every year, the ratio of the carrier's excess revenue to its actual revenue should be deemed to constitute an "overcharge percentage." (iv) For any given shipment by any given shipper during any given

year, damages equal the annual overcharge percentage times total Bill of Lading. . . revenue for the shipment (plus interest).

29 SRR at 1510.

c. The ALJ's reparations methodology and rejection of GovGuam's methodology

The ALJ ruled that, rather than GovGuam's methodology, the "just and reasonable" rates must be determined by individually analyzing the commodity rates for each of the shipments made by GovGuam, taking into consideration traditional rate-making factors such as: (1) the general economic conditions in the trade; (2) market and competitive forces in the trade; (3) physical and economic characteristics of the product involved, including its value; (4) the volume moved; (5) commodity-specific expenses; (6) the relationship of the commodity rate to other rates in the tariff; and (7) the sensitivity of the volume shipped to rates. 29 SRR at 1510-11, 1557, 1559.

The ALJ found that GovGuam considered alternative methods for determining the difference between the unreasonable rates collected by Respondents and the "just and reasonable" rates, including physical measure of cargo, costs and other transportation characteristics. Nonetheless, GovGuam based its claim for reparations solely on its revenue proportionality methodology. *Id.* at 1557. The ALJ opined that the record in the case before him "does not support the conclusion that substituting revenue evidence for rate evidence comports with the requirement of the statute to establish 'the just and reasonable rate.'" *Id.* at 1559 (emphasis added).

The ALJ rejected GovGuam's contention that the

Commission, in its 1998 FMC Order, required the use of a proportional methodology such as that employed by GovGuam. Id. at 1559. The ALJ found that GovGuam had taken several sentences in the Commission's 1998 FMC Order out of context in order to arrive at the conclusion that the Commission called for an equiproportional method of calculating damages. Id.

The sentences from the Commission's 1998 FMC Order that the ALJ found to be taken out of context by GovGuam are underscored below:

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

reasonableness of individual commodity rates, it is unnecessary for us to reach the various contentions advanced by the parties regarding the appropriate accounting methodology to determine the costs attributable to the carriage of the eighteen commodities.

1998 FMC Order, 28 SRR at 288 (footnote omitted).

The ALJ found that the underscored sentences in the foregoing quotation were a paraphrase by the Commission of GovGuam's argument that a general revenue analysis must be used to determine whether the eighteen individual rates (increased by Respondents in 1989) were unreasonable. The ALJ further found that the Commission had clearly rejected a rate of return analysis with respect to individual rates in that same paragraph, as well as in the footnote to that paragraph, and that the sentences did not announce a new method of calculating reparations in this proceeding. 2003 I.D., 29 SRR at 1558, 1560.

The ALJ also rejected GovGuam's argument that it is appropriate to use a proportional method to determine reparations because the Commission uses a proportional calculation when ordering refunds after making findings of excess rates of returns in Commission initiated proceedings (to determine whether rates were just and reasonable). The ALJ found that there was no basis to borrow the refund methodology used in Commission initiated proceedings to apply in this complaint proceeding where no GRI, uniform or otherwise, had been shown by GovGuam to have been taken by either of the Respondents. *Id.* at 1560.

d. The reparations methodology applied in
Matson 1979

The ALJ found that Matson Navigation Co. -- Proposed Rate Increases, 19 SRR 263 (1979) ("Matson 1979"), did not support GovGuam's argument. In that proceeding, the Commission found that the increases in Matson's rates, resulting from an across-the-board, single percentage GRI, were unreasonable. The GRI there applied the same percentage increase to each of the affected rates. The Commission indicated in Matson 1979 that a complainant, in a separate complaint proceeding, could receive reparations based upon a rate of return analysis only where the GRI raised rates by the same percentage for every commodity covered by the GRI, making the difference between the amount paid and the amount that should have been charged vary by the same proportion for every commodity that took the GRI. Matson 1979, 19 SRR at 270.

e. The Commission's discretion to award
reparations

The ALJ stated that "[s]ection 22 of the 1916 Act provides that the Commission 'may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.'" Id. (citing 46 U.S.C. app. § 821). The ALJ noted that although the 1978 Amendments to the 1933 Act stated that the Commission "shall" direct full reparations upon finding unjustness and unreasonableness, the Commission still has discretion in determining whether to award reparations. The ALJ stated further that courts may interpret a statute to best fulfill the purpose of that statute. Id. at 1556, 1562. The ALJ opined that there was no indication in the legislative history that Congress intended to remove the Commission's discretion in complaint proceedings under section 22 of the 1916 Act. Id.

In support of his finding, the ALJ cited Consolo v. Federal Maritime Commission, 383 U.S. 607 (1965). In that case, the Supreme Court ruled that, with respect to section 22 of the 1916 Act, the Commission could consider “whether the shipper had suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of culpability of the carrier.” Consolo, 383 U.S. at 621-22. The ALJ also cited Military Sealift Command v. Matson Navigation Co., 21 SRR 459 (1982) (“Matson 1982”), a section 22 complaint proceeding for reparations (brought after a finding of unreasonable rates in a Commission-initiated proceeding) where the Commission held that an award of reparations was not automatic and that the carrier could raise various equitable and policy considerations in arguing that reparations should not be awarded. 2003 I.D., 29 SRR at 1562.

Nonetheless, the ALJ held that it was unnecessary to make a finding on the meaning of “shall,” because he determined that GovGuam failed to prove what the “just and reasonable rates” should have been for its shipments. Id. at 1562.

f. ALJ’s rejection of GovGuam’s argument that reparations should disgorge the excess revenues collected by Respondents

The ALJ also found that GovGuam’s proportional methodology attempted to disgorge the excess revenues found by the Commission to have been collected by Respondents rather than compensating GovGuam for its actual injury. 2003 I.D., 29 SRR at 1560-61. The ALJ found no probative evidence of a nexus between Respondents’ excessive trade-wide revenues and the just and reasonable rates. The ALJ noted that GovGuam failed to file a reparations statement, pursuant to Rule 252 and Exhibit No. 1 of

the Commission's Rules of Practice and Procedure, which requires the details for each shipment, including the rate and amount "as charged" and the rate and amount as it "should be." *Id.* at 1561 (citing 46 C.F.R. § 502.252 and Part 502, Subpart O, Exhibit No. 1) (2004).

E. Exceptions

GovGuam filed its exceptions to the 2003 I.D. and 2002 Dismissal Order on December 1, 2003. GovGuam contends that the shipments the ALJ dismissed in his 2002 Dismissal Order, were based upon two findings: GovGuam's failure to provide sufficient evidence that it paid for 517 APL shipments and 297 Sea-Land shipments, specifically its failure to submit cancelled checks; and GovGuam's failure to show that it suffered "economic harm." GovGuam's Exceptions at 63-64.

With respect to the ALJ's finding that GovGuam submitted insufficient evidence demonstrating proof of payment for transport of the dismissed shipments, GovGuam asserts that the law is flexible regarding proof of payment for shipments, and therefore, the bills of lading it submitted are reasonably reliable documentation. GovGuam argues that Rule 252 provides that bills of lading and other documents may be submitted to support an award of reparations. GovGuam contends that the ALJ also could have considered circumstantial evidence such as Respondents' continuous acceptance for years of GovGuam's prepaid shipments; the documentation Respondents never disputed regarding shipping costs from GovGuam; and the shipping costs that GovGuam's agents calculated as part of the costs of shipment. GovGuam asserts that Commission policy does not support denying reparations to a complainant who has paid unreasonable rates solely because the complainant did not provide cancelled checks for shipments. *Id.*

GovGuam also proffers several rebuttal arguments to the ALJ's finding that GovGuam failed to demonstrate economic harm. GovGuam asserts that there is no requirement that economic harm must be demonstrated to recover reparations. Id. at 64. GovGuam further asserts that its ability to absorb or cover losses due to carrier overcharges should not be presumed. On the contrary, if any presumption is made, it should be that "an unreasonable rate or charge is in and of itself a harm to the customer." Id. at 65. Moreover, GovGuam contends that since it has shown that it was overcharged by Respondents for three years, it has sufficiently proven and quantified the harm suffered. Id.

F. Replies

1. APL

APL proffers three contentions in support of its request that GovGuam's exceptions be denied. First, APL disputes GovGuam's argument that it was automatically entitled to reparations because the Commission found in Phase I of this proceeding that APL earned an excessive rate of return. APL's Reply at 19-21. Second, APL contends that during Phase II, the ALJ's order dismissing the majority of GovGuam's shipments was correct. Third, APL argues that the 2003 I.D. correctly dismissed the remaining shipments because GovGuam failed to show what the commodity rates should have been. Id. at 19-21.

a. Phase I

APL avers that during Phase I the Commission used the G.O. 11 methodology in its 1998 FMC Order to determine APL's rates of return because it was the best method to use at the time. Id. at 2-5. However, APL contends that the Commission did not

affirmatively find the results of the G.O. 11 method accurate for several reasons. Id. at 5. APL explains that the methodology does not account for each type of carrier operation; thus, it is necessary to consider different methods to accurately determine a carrier's rate of return. Further, APL argues that its Guam trade is very small compared to its much larger international trade. This is significant, APL argues, because G.O. 11 applies a portion of the carrier's cost and investments of its entire trade (which in APL's case, included domestic and international) to the carrier's domestic trade to obtain a rate of return. APL contends that its rate of return using this method would be inaccurate because its international trade is much larger than its domestic, which includes Guam. Id.

b. Phase II

APL offers several arguments to support its position that GovGuam is not entitled to reparations. First, APL asserts that GovGuam's exceptions relating to the 2002 Dismissal Order should be denied for untimeliness. APL's Reply at 71-73. Second, APL claims that the Commission has a duty to consider whether or not to award reparations. Finally, APL contends that GovGuam failed to demonstrate that APL's rate of return harmed GovGuam because GovGuam failed to prove what the just and reasonable rates were. Id. at 19-21.

i. GovGuam untimely filed exceptions to the 2002 Dismissal Order

APL argues that the Commission should uphold the 2002 Dismissal Order dismissing the majority of the shipments, as GovGuam filed exceptions to the 2002 Dismissal Order approximately a year and a half after the time allowed under Commission rules. APL argues further that, absent a timely appeal

or a determination by the Commission to review the 2002 Dismissal Order sua sponte, it became administratively final and became the decision of the Commission. Id. at 71 (citing 46 C.F.R. § 502.227(c)). APL asserts that GovGuam's exceptions are wholly unsupported, and fails to identify with particularity the specific findings of fact and/or legal conclusions that the Commission should review.

Should the Commission determine that GovGuam's late-filed exceptions may still be considered, APL contends that the Commission should nonetheless affirm the 2002 Dismissal Order, as GovGuam failed to submit sufficient evidence demonstrating that GovGuam paid for the dismissed shipments. Id. at 72-73. APL avers that GovGuam failed to submit sufficient evidence to demonstrate proof of payment, such as bills of lading marked "paid or the equivalent." Id. at 73.

ii. Commission has a duty to consider whether to award reparations

APL contends that GovGuam is not automatically entitled to receive reparations, despite the Commission's finding that APL earned an overall unreasonable rate of return. The Commission, APL avers, has a duty to consider whether awarding reparations would "enhance the purpose of section 22 of the 1916 Act." Id. at 61. APL claims that the 1978 Amendments to section 4 of the 1933 Act clarified that the Commission has authority to award reparations in unreasonable rate cases, as it was unclear whether the Commission could award reparations prior to the 1978 Amendments. APL avers that the Commission drafted the wording adopted in section 4 of the 1933 Act. Id. at 61.

With respect to calculating reparations, APL claims that GovGuam's method is flawed because it does not take into

account the many factors that must be considered in order to establish a link between APL's overall returns and the individual rates APL charged for the shipments in this case. Id. at 19-21.

APL avers that the Commission has the power to order rate refunds for GRIs, provided that the GRIs went into effect and the Commission finds that the GRIs are unreasonable within the 180-day period pursuant to the 1933 Act. Id. at 27. APL avers further that there was no GRI in this proceeding, as all of the rates did not increase by a single percentage and the tariff structure did not remain the same.

c. Remaining shipments were appropriately dismissed

APL contends that the remaining shipments were also appropriately dismissed because GovGuam failed to indicate the statutorily required "difference between the charge collected and the just and reasonable rate, fare, or charge." Id. at 19 (citing 46 U.S.C. app. § 845a). APL argues that under the statute, a complainant seeking reparations must identify the commodity rate that was charged for the shipment and what that rate should have been. GovGuam, APL claims, failed to do either. APL further claims that GovGuam's methodology is based on the revenues paid, not on the identification of the commodity or particular rate. APL asserts that GovGuam's methodology does not correctly focus on compensating the complainant for the difference between the rate paid and the rate it should have paid.

2. Horizon Lines

a. GovGuam waived its right to appeal the
2002 Dismissal Order

On February 27, 2004, Horizon Lines, the successor-in-interest to Sea-Land, filed its reply to GovGuam's exceptions. With respect to the 2002 Dismissal Order, Horizon Lines argues that GovGuam waived any rights it had to an appeal. Horizon Lines argues that, pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, GovGuam had 22 days after the date of service to except to the decision and failed to do so. Horizon Lines further contends that the Administrative Orders Review Act ("Hobbs Act") "provides a 60-day period within which a party seeking review of a reviewable final order may seek appellate relief." Horizon Lines' Reply at 8 (citing 28 U.S.C. § 2344).

Horizon Lines argues that even if the Commission entertains GovGuam's exceptions, GovGuam has no standing to collect reparations pursuant to section 22 of the 1916 Act. *Id.* at 11. Horizon Lines contends that only the party that directly paid for the allegedly unlawful freight may make a claim for reparations, and therefore, GovGuam would be unable to collect reparations for violations of section 22 of the 1916 Act.

b. GovGuam failed to submit adequate
evidence indicating payment

Horizon Lines claims that the ALJ's dismissal of 262 shipments was correct, as GovGuam failed to provide sufficient evidence demonstrating proof of payment. Horizon Lines asserts that shipments marked "freight prepaid" were paid by the shipper's forwarder before delivery to Guam. Therefore, Horizon

Lines contends that GovGuam must show that it paid its freight forwarder who in turn paid Horizon Lines to sufficiently demonstrate proof of payment for the "freight prepaid" shipments. Shipments marked "freight collect" were paid upon or after delivery in Guam. *Id.* at 21-22. Horizon Lines avers that while some entity paid for these shipments, there is no evidence that GovGuam paid for all of these shipments. Horizon Lines notes that GovGuam failed to provide cancelled checks for all but five of the "freight collect" shipments. *Id.* at 22-23.

c. ALJ correctly denied reparations on remaining five shipments

With respect to the five remaining shipments, Horizon Lines asserts that GovGuam is not entitled to reparations because it failed to demonstrate that Horizon Lines charged unjust and unreasonable rates for these shipments. *Id.* at 28-29. GovGuam's reparations theory, Horizon Lines argues, ignores the criteria set forth in Rule 252. *Id.* at 50. Horizon Lines claims that "Rule 252 requires a prevailing plaintiff to set forth for each shipment at issue, the commodity, rate charged, and rate 'as it should be.'" *Id.* (citing 46 C.F.R. Part 502, Subpart O, Exhibit No. 1). The Commission's 1998 FMC Order remanded the proceeding for a determination of the reparations due GovGuam; however, Horizon Lines notes that GovGuam failed to submit a reparations statement pursuant to Rule 252.

Horizon Lines asserts that GovGuam's reparations theory is fundamentally flawed, as it seeks to "put the carrier into the position it would have experienced but for the overcharge."⁸ *Id.*

⁸ Although Horizon Lines cites this quote as an assertion of GovGuam, it does not identify the pleading where it appears.

at 53. According to Horizon Lines, the purpose and function of the law of damages is to “put the shipper, not the carrier, into the position it would have experienced but for proven economic damage.” *Id.* Thus, Horizon Lines claims that GovGuam’s reparations theory is inadequate and should not be relied upon by the Commission in determining whether to award reparations.

Horizon Lines argues that the record in Phase II does not identify any measurable economic harm that GovGuam suffered. Horizon Lines asserts that the relief GovGuam seeks is not contemplated by the 1916 Act or the 1933 Act and “inappropriately seeks to use the provisions of these statutes in a manner outside the lawful authority of the Commission.” *Id.* at 66.

DISCUSSION

A. Timeliness of GovGuam’s exceptions to the 2002 Dismissal Order

Commission Rules require that exceptions to an order must be filed within twenty-two days, unless a shorter time is established. 46 C.F.R. § 502.227(a)(1). Rule 227(a)(1) also requires exceptions to indicate alleged errors with particularity. *Id.* GovGuam filed no exceptions by this deadline, although the 2002 Dismissal Order was duly served. GovGuam did not file exceptions until December 1, 2003, when it filed its exceptions to the 2003 I.D., or approximately one and a half years after the 2002 Dismissal Order became administratively final on May 22, 2002. *Id.* Although the Commission has discretion to allow GovGuam’s exceptions to the 2002 Dismissal Order, we find that: GovGuam never addressed its failure to file its exceptions to the 2002 Dismissal Order in a timely manner; GovGuam failed to request an enlargement of time; GovGuam never requested a

waiver of any of the Commission's rules to permit a late filing of its exceptions; and the record does not warrant the grant of a waiver.

1. GovGuam's failure to address its extreme tardiness

GovGuam filed exceptions to the 2002 Dismissal Order a year and a half after it became administratively final on May 22, 2002, but never provided an explanation. GovGuam's total silence as to its failure to file exceptions makes it impossible to assess whether there were exceptional circumstances that prevented timely filing.

Rule 228 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.228, permits parties to a proceeding to request additional time to file exceptions, if there are exceptional circumstances. However, GovGuam made no attempt to obtain an extension pursuant to this rule and provided no explanation for its failure to file. Therefore, there are no exceptional circumstances to consider. Accordingly, we cannot conclude that any circumstances might justify GovGuam's extraordinary lateness.

2. GovGuam's failure to request a Rule 10 waiver

Rule 10 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.10, permits waiver of the Commission's procedural rules to prevent undue hardship, manifest injustice, or if the expeditious conduct of business requires a waiver. While parties to a proceeding normally initiate requests for waivers under Rule 10, the Commission may initiate a waiver sua sponte.

GovGuam has demonstrated its familiarity with Rule 10. On December 10, 2003, GovGuam requested, and was granted, a

Rule 10 waiver of the 50-page limit requirement for exceptions and the five-day advanced filing requirement for that page limit extension under Rule 227. The Government of the Territory of Guam v. Sea-Land Serv., Inc. and American President Lines, Ltd., 30 SRR 49 (2004). Respondents did not object to GovGuam's request on the condition that, inter alia, Respondents would have the same page limit. The Commission ruled that GovGuam's waiver request was fair given the case's extensive history and Respondents being treated similarly. Id.

In view of GovGuam's familiarity with Rule 10 and its failure to request a Rule 10 waiver for its exceptions to the 2002 Dismissal Order, there is no basis for the Commission to grant a waiver sua sponte. Allowing GovGuam's late-filed exceptions would further delay this proceeding and would require the Commission to take an extraordinary step and reopen matters that have become administratively final. GovGuam failed to file exceptions to the 2002 Dismissal Order in a timely manner and failed to provide any explanation regarding its lateness. Accordingly, we deny GovGuam's exceptions to the 2002 Dismissal Order as untimely.

B. Jurisdiction over certain shipments

We next address whether the Commission had jurisdiction over certain shipments between 1989 and 1990 for which GovGuam is currently seeking an award of reparations. The Commission issued its order in 1998, which remanded the proceeding to the ALJ for a determination of the number of containers falling within the Commission's jurisdiction. The 2002 Dismissal Order decreased the total number of reparations claims for APL shipments from 554 to 37 and Sea-Land shipments from 312 to 5.

1. 1998 FMC Order

In its 1998 FMC Order, the Commission addressed jurisdiction by dividing it into four issues. First, the Commission determined that the ALJ erred in a previous ruling by failing to address jurisdiction questions before delving into the merits of the case. Second, the Commission found that the cargo that shippers at Sea-Land's west coast terminals gave directly to Sea-Land, was port-to-port and thus subject to the Commission's jurisdiction. Accordingly, the Commission remanded the proceeding to ascertain the number of GovGuam containers that were within this category. Id. at 265.

Third, with respect to whether the tariffs filed by Respondents were properly within ICC jurisdiction, the Commission declined to rule on the validity of joint-through arrangements that were filed with the ICC. The Commission stated that it was not the appropriate body to draw such a conclusion. The Commission held that "GovGuam could have challenged the legality of Sea-Land's ICC tariffs at the ICC. Having failed to do so, it cannot raise the issue here." Id. at 267.

Lastly, the Commission found that while it lacked jurisdiction over movements between Hawaii and Guam that involved inland transportation within the Port of Apra, Guam, it nonetheless had jurisdiction over any port-to-port movements that did not occur pursuant to a joint-through arrangement with a Guam motor carrier. Thus, the Commission ordered that on remand the ALJ determine the number of containers that fell within this category be established. Id.

2. 2002 Dismissal Order

This proceeding is before the Commission on exceptions

from the 2003 I.D. As explained above, we have determined to deny GovGuam's exceptions to the 2002 Dismissal Order as untimely. Nonetheless, we believe that with respect to jurisdiction it is necessary to initially address the 2002 Dismissal Order, which disposed of the majority of the claims for which GovGuam seeks reparations.

a. 50 Saipan shipments

The ALJ concluded in his 2002 Dismissal Order that 50 claims covering APL shipments to Saipan, Commonwealth of Northern Mariana Islands ("Commonwealth") were dismissed because the Commission lacked jurisdiction over them. 2002 Dismissal Order, 29 SRR at 907. As explained below, however, the Commission had jurisdiction with respect to shipments to Saipan during the time relevant to this proceeding. Nonetheless, the 50 Saipan shipments are not part of this proceeding because GovGuam's complaint was limited to shipments in the Guam/mainland United States trades and the Guam/Hawaii trades.

During the time relevant to this proceeding, the Commission had jurisdiction over the trade between the United States and the Commonwealth pursuant to the 1916 Act and the 1933 Act, under section 502(a)(2) of Article V of "The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America."⁹ See

⁹ That section reads:

The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

"Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1801 (2000)). See also Saipan Shipping Co., Inc. v. Island Navigation Co., Ltd. and Oceana Line, Inc., 18 SRR 420, 424-25 (ALJ 1978) (discussion of history of the Commonwealth and finding that subpoenas could be served pursuant to the Commission's Rules of Practice and Procedure as the Commonwealth was not a foreign country as a result of the Covenant and that U.S. laws administered by the Commission have not been excepted by the Covenant).

Notwithstanding Commission jurisdiction over the trade, the Saipan shipments are not part of this proceeding and remain dismissed. GovGuam's Complaint (as originally filed and as amended) only covers shipments made in the Guam/mainland United States trades and the Guam/Hawaii trades. Additionally, the inclusion of these claims appears to have been a result of the inclusion of Saipan rate data in G.O. 11 reports regularly submitted by APL to the Commission prior to this litigation and the use of those reports by GovGuam in presenting its case. APL's Motion for Summary Disposition at 38-45. GovGuam agrees with APL that it was not seeking recovery for any shipments made in the Saipan trade and that these, and other, claims were "inadvertent and largely based upon the manner in which the financial data of the Respondents was constructed." Complainants' Opposition to Respondent American President Lines, Ltd.'s Motion for Summary Disposition of Certain of GovGuam's Claims for Reparations at 12-13. In sum, the 50

....

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States.

Saipan claims remain dismissed.

b. 17 APL shipments

The ALJ found that the 17 shipments that APL received at U.S. East Coast or interior intermodal points were not port-to-port, and therefore, not subject to FMC jurisdiction. *Id.* In its reply motion, GovGuam asserted that it would not pursue such complaints. Moreover, it is well established that the ICC had jurisdiction over such shipments. See Puerto Rico Maritime Shipping Auth. v. Interstate Commerce Comm'n, 645 F.2d 1102 (D.C. Cir. 1981) (finding that the FMC has no jurisdiction over through-route transportation that begins or ends at an inland point); and Trailer Marine Transp. Corp. v. Federal Maritime Comm'n, 642 F.2d 379 (D.C. Cir. 1979). The ALJ appears to have properly dismissed these shipments for lack of jurisdiction, and thus, we affirm this ruling.

c. Shipments not subject to the 1916 Act

The ALJ dismissed two shipments from Singapore to Guam and two shipments from Canada to Guam for presumptively not being subject to the 1916 Act, as these shipments originated in foreign countries. These four shipments would be subject to the Shipping Act of 1984, which “establish[es] a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States.” 46 U.S.C. app. § 1701. Thus, it would have been proper for GovGuam to seek reparations for these shipments under the Shipping Act of 1984. However, GovGuam failed to make this claim and the ALJ appropriately dismissed these shipments. Accordingly, we affirm the ALJ’s dismissal of these shipments.

d. 2003 Initial Decision

In 2003, the ALJ issued an Initial Decision on remand, which disposed of all remaining jurisdiction issues. 2003 I.D., 29 SRR at 1509. The ALJ noted that the Commission had remanded this proceeding to determine the number of containers that were subject to Commission jurisdiction. Thus, those containers that were tendered by shippers directly to Sea-Land at Sea-Land terminals were considered port-to-port and the number of shipments that fell in this category would need to be determined. Shipments that did not move pursuant to a joint-through arrangement within the Port of Apra, Guam, were also considered port-to-port and the number of shipments that fell within this category would need to be determined. *Id.* at 1553.

The ALJ stated that despite the Commission's directive in its 1998 FMC Order, GovGuam failed to identify the number of shipments that were considered port-to-port and therefore subject to Commission jurisdiction. Further, the ALJ noted that Sea-Land asserted in its opening brief that, "in the absence of any jurisdictional predicate GovGuam is foreclosed from seeking reparation for any post-June 23, 1989 shipments." *Id.* (quoting Sea-Land's Phase II Opening Brief at 1 n.1). Consequently, the ALJ found that "the contentions of GovGuam, raised earlier in its related Exception No. 2 as to jurisdiction, will be considered abandoned and will not be further considered." *Id.* Given GovGuam's inability to support any of its previously raised contentions regarding jurisdiction, we affirm the ALJ's ruling that claims relating to jurisdiction are abandoned and will not be considered further in this proceeding.

C. Reparations

1. What must be shown to prove reparations

In the 1998 FMC Order, the Commission ruled that GovGuam could challenge the Respondents' overall rate of return under section 22 of the 1916 Act for violations of section 18 of the 1916 Act. The scope of relief under section 22 of the 1916 Act, however, must be determined by reference to the 1978 Amendments to section 4 of the 1933 Act. Section 4 of the 1933 Act provides:

[t]hat upon such finding of unjustness or unreasonableness in a proceeding instituted by complainant pursuant to the provisions of section 22 of the Shipping Act, 1916, the Commission shall direct full reparation to the complainant of the difference between the charge collected and the just and reasonable rate, fare, or charge, plus interest.

46 U.S.C. app. § 845 (emphasis added). In short, GovGuam is required to show: (1) the commodity rate it actually paid for each shipment that remains before the Commission in this proceeding; and (2) the rate it should have paid for each such shipment (i.e., the just and reasonable rate). Rule 252 similarly requires a complainant to identify both the rate it was charged and the rate it "should have been" charged. 46 C.F.R. § 502.252.

The ALJ found that GovGuam met the requirements for the first part of the calculation required by section 4 by identifying the rates it had paid to Respondents for shipments that remain in this proceeding. 2003 I.D., 29 SRR at 1556. However, the methodology GovGuam used to calculate the just and reasonable rates that should have been charged was rejected by the ALJ.

2. Methodology for calculation of reparations

a. GovGuam's methodology

GovGuam states in the introduction to its exceptions that the whole case is about the meaning of three sentences in the Commission's June 1, 1998 Report and Order, or "52 words." GovGuam's Exceptions at 2. There GovGuam quotes from page 288 of the 1998 FMC Order:

[i]f APL's revenues are found to produce an excessive rate of return, each commodity rate in the tariff would be excessive by the same percentage Likewise, any reparations would be borne equally by each commodity rate. . . .

* * * *

[sic] The Commission holds that Respondents' rates have been shown to be unreasonable for the years indicated.

GovGuam's Exceptions at 2 (quoting 28 SRR at 288) (footnotes omitted). GovGuam further avers that its interpretation and the interpretation of the ALJ are "diametrically opposed and are not capable of reconciliation." GovGuam contends that:

[i]f they [the above quoted words from the Commission's 1998 FMC Order] mean what they appear plainly to [GovGuam] to mean, the first passage adopts [GovGuam's] reparations calculation as a central holding; every rate in Respondents' Guam tariffs was excessive and

unreasonable by a known and measurable percentage based on the excessive revenues in the Guam trade, and that excess portion must be refunded to the Complainants who paid it. That holding gives a remedy, and therefore a meaning, to the second passage: Respondents' rates – each and every one of them – were unreasonable.

Id. (emphasis added).

GovGuam's revenue proportionality methodology was described in APL's findings of fact that were adopted by the ALJ:

[r]eparations for the complainants' shipments should be calculated as follows: (i) For every year, the entirety of the carrier's annual trade-wide after-tax "excess return" . . . should be converted to "excess revenue" by grossing up to pre-tax dollars. (ii) The entirety of this trade-wide excess revenue should be considered "overcharges" to be refunded to shippers. (iii) For every year, the ratio of the carrier's excess revenue to its actual revenue should be deemed to constitute an "overcharge percentage." (iv) For any given shipment by any given shipper during any given year, damages equal the annual overcharge percentage times total Bill of Lading. . . revenue for the shipment (plus interest).

Id. at 1510.

b. The ALJ's methodology

This argument by GovGuam on exceptions is, in all material respects, the same argument made by GovGuam to the ALJ. The ALJ found that GovGuam's "equiproportional reparations methodology" was not supported by the passage from the 1998 FMC Order (because it was taken out of context) and rejected it, relying on Matson 1979. 19 SRR at 263. The ALJ found that GovGuam did not establish the just and reasonable rate for each of the contested shipments. Such an analysis would entail a consideration of traditional transportation factors. Id. at 270 n.25.

The Commission in Matson 1979 initiated two docketed proceedings, each of which was to inquire into the reasonableness of the carrier's rates after implementation of GRIs. Docket No. 75-57¹⁰ involved a "variable or multi-tiered" GRI and the other, Docket No. 76-43,¹¹ involved an across-the-board single percentage GRI, where the Commission held that the increases in the carrier's rates under each GRI were unreasonable. Petitions for reconsideration were filed in both proceedings, with the Military Sealift Command ("MSC"), a shipper of cargo in Docket 76-43, petitioning the Commission to provide a remedy to shippers for the carrier's collection of excessive revenues. Matson 1979, 19 SRR at 265. The Commission, which consolidated the proceedings for purposes of issuing a single order on the petitions,

¹⁰ Matson Navigation Co. – Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Off-shore Trade, 18 SRR 1351 (1978).

¹¹ Matson Navigation Co. – Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade, 18 SRR 1441 (1978).

held that a shipper that had paid the GRI had a cause of action under section 22 of the 1916 Act and could initiate a complaint proceeding to collect reparations.

Significantly, the Commission also ruled that MSC could receive reparations based upon a rate of return analysis because the GRI raised rates by the same percentage for every commodity covered by the GRI. *Id.* at 270. The Commission found that the GRI percentage itself could be used to calculate reparations because it would yield a reparations amount corresponding precisely to the complainant's injury on each shipment. (*i.e.*, the rate that should have been paid was the same percentage portion of the rate actually paid). The Commission, however, made it clear that such a single percentage method of determining reparations was not permitted in the absence of a uniform GRI:

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

Matson 1979, 19 SRR 270 n.25 (emphasis added).

The Commission's Matson 1979 ruling is an acknowledgement that, in the absence of an across-the-board single percentage GRI, a carrier's trade-wide revenue total is a composite figure made up of revenue from rates on many commodities fixed by consideration of the transportation factors for each commodity. Further, the determination of the justness

and reasonableness of a carrier's trade-wide rate structure bears no relation to the analysis necessary for ascertaining the complainant's actual injury. In other words, absent a single percentage GRI, for some rates the portion attributable to excess revenue may be significant, the "excess" portion for other commodity rates may be much smaller and still other shipped commodities may have no portion that is unjust or unreasonable. Hence, absent a uniform GRI, it is this commodity-by-commodity proof of excess revenue that a complainant must adduce to establish the actual injury it suffered to support an award of reparations.

We find that the ALJ properly concluded that GovGuam failed to prove that it was due reparations for its individual shipments.

c. Whether the Commission set out a reparations methodology in its 1998 FMC Order

Although the Commission's decision in Matson 1979 provides the basis for rejecting GovGuam's single percentage methodology, inasmuch as GovGuam places great reliance on the passage from the Commission's 1998 FMC Order as the primary basis for its single percentage methodology, the Commission will clarify the meaning of the passage. The entire paragraph in which the passage at issue appears reads:

[t]he ALJ and APL are correct. The increase of eighteen commodity rates (1) changed the relationship of rates in the tariff of the Guam Rate Agreement, and (2) increased the revenue to the member lines. The rate of return analysis in this case addresses APL's overall rate of return but it does not address the relationship of individual rates

in the Guam Rate Agreement tariff. If APL's revenues are found to produce an excessive rate of return, each commodity rate in the tariff would be excessive by the same percentage. In other words, the eighteen commodity rates would be excessive by the same percentage as every other commodity rate in the tariff. Likewise, any reparations would be borne equally by each commodity rate including the eighteen commodity rates in question. The relationship of the eighteen commodity rates to the other rates in the tariff would remain unchanged. In sum, under a rate of return analysis, the eighteen commodity rates are no less reasonable than any other rate in the Guam Rate Agreement tariff. Because we reject GovGuam's legal theory that a rate of return analysis can be used to determine the reasonableness of individual commodity rates, it is unnecessary for us to reach the various contentions advanced by the parties regarding the appropriate accounting methodology to determine the costs attributable to the carriage of the eighteen commodities.

1998 FMC Order, 28 SRR at 288 (emphasis added).

The ALJ found that the Commission was simply paraphrasing GovGuam's argument that a proportional single percentage could be used to determine whether the 18 individual rates were unreasonable, as the Commission rejected GovGuam's rate of return analysis three separate times in the quoted paragraph. He further opined that GovGuam's interpretation was strained and extraordinary in light of decades of Commission precedent. 2003 I.D., 29 SRR at 1559.

The ALJ is correct that the Commission rejected GovGuam's rate of return analysis and that it did not set out the methodology for computing reparations in this phase of the proceeding. The passage describes the consequences of a complainant's failure to address the relationship of individual rates in the tariff where individual rates are separately challenged as they were in Count II of GovGuam's complaint. The relationships of the 18 individual rates to the other tariff rates are critical to the determination of whether they are reasonable, hence the need to consider traditional rate-making factors. Failure to consider such rate-making factors would leave GovGuam's methodology as the only measure of unreasonableness. The Commission, however, rejected this approach in its 1998 FMC Order and has previously rejected it with respect to reparations.

In its 1998 FMC Order, the Commission clearly required the relationship of individual rates in Respondents' tariff to be addressed where there has been no uniform GRI. Id. Moreover, the consequence of a failure to address the traditional rate-making factors relative to individual rates when determining reparations would not comport with the Commission's holding in Matson 1979, which requires such factors to be considered with respect to reparations in the absence of a single percentage GRI. Therefore, the Commission did not set out a reparations methodology in its 1998 FMC Order and, accordingly, GovGuam's arguments to the contrary are rejected.

- d. Whether Respondents would be denied due process rights if the Commission decided reparations issues in the liability phase of a bifurcated proceeding

GovGuam's argument that the Commission set out a methodology to determine reparations in its 1998 FMC Order is

undercut by the fact that this proceeding was bifurcated, at the request of GovGuam, into a liability phase (Phase I) and a separate reparations phase (Phase II). Phase I was completed with the issuance of the Commission's 1998 FMC Order, and Phase II began with the remand of the proceeding to the ALJ. The proceeding was bifurcated before any evidence was rendered by GovGuam, or the Respondents, relative to reparations. For example, Respondents' economic expert's testimony on reparations was submitted pursuant to a procedural order issued after the 1998 FMC Order that governed Phase II of the proceeding. As discussed below, any ruling on reparations by the Commission in its (Phase I) 1998 FMC Order would have no controlling effect in Phase II. If a ruling were to have such an effect, this would deprive Respondents of their due process rights to notice of the issues to be addressed in Phase I and to adduce evidence before the Commission addressed reparations issues in Phase II.

In Verizon v. Federal Communications Commission, 269 F.3d 1098 (D.C. Cir. 2001), the court held that an agency's statements that the defendants should pay damages were not controlling in the second phase of a bifurcated proceeding for calculation of damages, even though the agency made the statements before the bifurcation. Id. at 14 (citing 269 F.3d at 1112). The court ruled that the question of whether damages must be paid must be left open for respondents to address in the second phase of the proceeding. Verizon, 269 F.3d at 1112.

With respect to the instant proceeding, the Commission's statements, purported by GovGuam to dispose of reparations issues, were made in an order that post-dated the bifurcation order by approximately six years, and consequently, well before any testimony on reparations was submitted in Phase II. As a result, the Verizon decision applies even more strongly here because the

Commission statements at issue not only post-dated the bifurcation order, they came in the decision addressing the first phase established by that order.

If the Commission had decided reparations issues in Phase I of this proceeding while Respondents only addressed liability issues in reliance on the bifurcation order, the Respondents would be denied the due process right to notice of issues to be addressed and the opportunity to present evidence and legal argument relevant to such issues. See In re Julien Co., 146 F.3d 420, 425 (6th Cir. 1998) (holding that due process was denied by a trial court that prematurely decided issues that were to be decided in a later phase of the proceeding pursuant to a bifurcation order)).

Consideration of the reparations issues began with the remand of the proceeding to the ALJ following issuance of the Commission's 1998 FMC Order. Similarly, the use of a single percentage formula based on Respondent's trade-wide excess revenues, as advocated by GovGuam, would be impermissible, and GovGuam's failure to provide the requisite evidence of injury does not support an award of reparations.

GovGuam should not be given an additional opportunity to perfect its case as discovery was reopened in Phase II at its request. GovGuam, nonetheless, failed to obtain evidence necessary to meet the requirements of Matson 1979 relative to calculation of reparations. GovGuam made the conscious decision to rely solely on its proportional methodology to calculate reparations and to eschew providing evidence (using traditional rate-making criteria) of what the rates should have been. There is no reason to again remand this proceeding to the ALJ to allow GovGuam another opportunity to prove its case.

3. Effect of Commission's finding of unreasonable rates

GovGuam argues in its exceptions that the I.D. erroneously requires proof of economic harm beyond the overcharge found by the Commission in Phase I of this proceeding. GovGuam's Exceptions at 42. GovGuam also argues that the ALJ's discussion of Commission cases addressing the requirement that the violation of law found to be the proximate cause of the injury supports GovGuam's argument as the Respondents' overcharges themselves serve as the proximate cause and the injury itself.¹² In other words, GovGuam claims that the excess revenue finding from Phase I would mean nothing if a separate analysis of the transportation factors of individual rates is required in the reparations phase of this complaint proceeding. *Id.* at 3. GovGuam has misconstrued the effects of the Commission's finding of excess revenues in its 1998 FMC Order.

As previously discussed, the Commission held in Matson 1979 that: (1) reparations may only be obtained based upon the uniform percentage used to increase rates pursuant to an across-the-board single GRI; and (2) reparations must take into account the particular transportation factors affecting the individual commodity rates in the absence of a uniform across-the-board percentage GRI.

¹² Because we hold that GovGuam has failed to prove its specific injury, there is no need to address whether the ALJ's reference to an "injury or economic harm," is different from the requirement of section 4 of the 1933 Act to show the difference between the rate paid and the "just and reasonable" rate that should have been charged. Similarly, GovGuam's failure to prove its specific injury makes it unnecessary to address the issue of proximate causation.

From the time GovGuam initiated its complaint challenging Respondents' trade-wide revenues, its burden to prove the specific injury it suffered was long established in Matson 1979. The Commission's 1998 FMC Order did not reduce, or otherwise alter, GovGuam's burden of proof. The Commission's finding of excess revenues is not undermined by holding GovGuam to the standard of proof applied to others before it. GovGuam simply chose to prove the wrong case in Phase II, possibly with a view to causing the Commission to reverse Matson 1979; however, we decline to do so.

4. Whether the 1978 Amendments to the 1933 Act modified the Commission's discretion over award of reparations under section 22 of the 1916 Act

GovGuam argues that section 4 of the 1933 Act, as amended in 1978, leaves no discretion to the Commission whether to award reparations where a finding of unjust or unreasonable rates has been made. GovGuam's Exceptions at 45-47. GovGuam's argument is based upon language in section 4 of the 1933 Act:

[t]hat upon such finding of unjustness or unreasonableness in a proceeding instituted by complainant pursuant to the provisions of section 22 of the Shipping Act, 1916, the Commission shall direct full reparation to the complainant of the difference between the charge collected and the just and reasonable rate, fare, or charge, plus interest.

46 U.S.C. § app. 845a (emphasis added). GovGuam excepts to the ALJ's rulings that Congress expressed no intention to remove the Commission's discretion to award reparations under section 22 of the 1916 Act. Id. Section 22 provides, in pertinent part, that

the Commission “may direct the payment . . . of full reparations to the complainant for the injury caused by such violation.” 46 U.S.C. § app. 821 (emphasis added).

In Consolo, the Supreme Court ruled, with respect to section 22 of the 1916 Act, that the Commission could consider “whether the shipper had suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of culpability of the carrier.” Consolo, 383 U.S. at 621-22. Further, in Matson 1982, a section 22 complaint proceeding for reparations brought after a finding of unreasonable rates by the Commission, the Commission found that an award of reparations was not automatic and that the carrier could raise various equity and policy considerations in arguing that reparations should not be awarded. Matson 1982, 21 SRR 459. GovGuam, however, argues that Matson 1982 is inapposite because it does not address the 1978 Amendments.

The Commission’s discretion to award reparations under section 22 of the 1916 Act was unaffected by the 1978 Amendments. Matson 1982 is not the only Commission case decided after the 1978 Amendments that addresses reparations in a complaint proceeding brought under the 1916 Act. For example, in Matson Nav. Co. – Proposed Bunker Surcharge, 19 SRR 1411 (1980) (“Matson Surcharge”), holding that complaints may be filed for reparations but that an award of reparations is discretionary. Id. at 1413.

The Commission did not decide Matson 1982 without cognizance of the impact of the 1978 Amendments. Before enactment of the 1978 Amendments reparations in unreasonable

rate cases was doubtful¹³ and, hence, that there could have been no Matson Surcharge or Matson 1982 reparations proceedings without the 1978 Amendments. Also of significance, Matson 1982 was initiated by a complaint filed by the Military Sealift Command as a result of the Commission's decision in Matson 1979 (in which the findings of unreasonable rates were made and were relied upon by MSC in the complaint it filed in the later case). Moreover, in Matson 1979, the Commission noted that the decisions¹⁴ finding unreasonable rates were issued on December 12, 1978, prior to the effectiveness of the 1978 Amendments. Matson 1979, 19 SRR at 264 n.5.

The Commission's discretion to award reparations in unreasonable rate proceedings is not necessary to a decision in this proceeding because GovGuam failed to prove its case on the merits. Therefore, we have limited our discussion relating to the Commission's discretion to relevant Commission cases that touch upon the issue. If, however, it were necessary to fully address this issue, the Commission believes that it retains the discretion found under the 1916 Act, notwithstanding the enactment of the 1978 Amendments.

¹³ See Hearings on H.R. 6503 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine & Fisheries, 95th Cong., 1st Sess. 356 (May 23, 1977); and Hearing on H.R. 6503 Before the Subcomm. on Merchant Marine & Tourism of the Senate Comm. on Commerce, Science, & Transportation, 95th Cong., and Sess. 15-16, 21 (Aug. 29, 1978).

¹⁴ See supra, at p. 34 n. 10 and 11.

CONCLUSION

THEREFORE, IT IS ORDERED, That GovGuam's late filed exceptions to the 2002 Dismissal Order are denied;

IT IS FURTHER ORDERED, That GovGuam's exceptions to the 2003 Initial Decision are denied;

IT IS FURTHER ORDERED, That the 2003 Initial Decision is adopted, as modified and clarified above; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.*


Bryant L. VanBrakle
Secretary

**Commissioner Brennan's concurrence and dissent:*

I concur in the present Order except with respect to the denial of reparations and the dismissal of the Complaint. In 1998 the Commission determined that the Respondents' unreasonable rates in the overall Guam trade had yielded excess revenue of approximately \$23 million for 1988-1990. The Commission remanded the proceeding for a determination of the reparations due Complainants.

In order to calculate reparations with respect to individual shipments, the ALJ should have ordered briefing on any difference between the charge collected and the "just and reasonable" rate or charge within the meaning of § 4 of the Intercoastal Shipping Act, 1933. The Commission should again remand the proceeding for the taking of additional evidence and for further briefing as necessary.

The Respondents were unjustly enriched in the overall Guam trade. Any overcharge suffered by the Government of the Territory of Guam with regard to the relevant shipments was part of that illegal revenue. Sound public policy dictates that those who make financial gains by violating the law should not be able to retain those gains.