

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309

Telephone [202] 298-8660 Fax [202] 342-0683

www.zsrlaw.com



RICHARD A. ALLEN

November 9, 2005

BY HAND

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

ENTERED
Office of Proceedings

NOV 09 2005

Part of
Public Record

215120

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

Dear Secretary Williams:

Pursuant to the Board's decision served October 3, 2005, I enclose an original and 10 copies of Summary of Oral Argument of Matson Navigation Company, Inc.

I will present oral argument on behalf of Matson next Wednesday, November 16, 2005. The attached summary represents the points that I expect to make, although my actual argument will be responsive to the prior argument of counsel for the Complainant and questions that may be posed by the Board.

I understand that this summary is for the convenience of the Board and its staff, that it will not be filed in the docket or posted on the Board's website and that it need not be served on other parties.

Sincerely,

Richard A. Allen

cc: David Konschnik (by fax)

ENTERED
Office of Proceedings
NOV 09 2005
Part of
Public Record

SUMMARY OF ORAL ARGUMENT POINTS OF
MATSON NAVIGATION COMPANY



GovGuam filed this rate complaint in 1998 against three carriers then in the Guam trade — Horizon Lines (then Sea-Land Service, Inc.), Matson Navigation Co., and APL (which has since been dismissed as a defendant).

GovGuam's complaint was unprecedented in the annals of STB and ICC rate complaints because it did not challenge the reasonableness of any identified rate or rates from the hundreds of individual, widely varying, rates published by the Defendants for the Guam trade. Instead, the complaint challenges the reasonableness of *all* of the Defendants' rates; it claims that the *aggregate* revenues produced by those rates produces an unreasonably high rate of return for the carriers. The complaint demands refunds to *all* shippers for *all* shipments since September 1996 measured by the percentage by which the aggregate revenues are ultimately found to exceed a maximum rate of return.

As to Horizon (and APL), GovGuam's complaint was the "second chapter" of a proceeding GovGuam brought in 1989 before the FMC. That complaint likewise assailed the totality of those carriers' rates on an unreasonable rate of return theory. In this case, GovGuam relies on the same essential methodology it urged before the FMC, under so-called "General Order No. 11," or "GO-11." Mr. Benner, Horizon's counsel, will explain the deficiencies in that methodology in more detail in his argument. I would only note here that, after 16 years of very expensive and burdensome litigation, the FMC recently *rejected* GovGuam's claim for relief.

The purpose of Phase II of this proceeding is to determine whether there is a reasonable methodology for assessing a rate structure complaint in this trade and, if so, what the appropriate standard is. We contend as follows:

1. There simply is *no* reasonable methodology for determining the reasonableness of rates in a trade *in the aggregate*. Sixteen years of litigation at the FMC has conclusively so shown. The fundamental flaw in GovGuam's attempt to apply its peculiar variation of the G.O. 11 methodology is that G.O. 11 was developed to determine the reasonableness of *general rate increases* and its application only makes sense in that context. But it makes no sense in this case, which does not involve any general rate increases, and it would have very perverse and absurd results if it were attempted to be applied to the totality of a carrier's existing and widely varying rates. First, it would require the carriers to provide reparations or other relief with respect to all of their rates, even rates that are very low and, by all accepted criteria, very reasonable. Second, the maximum reasonable (and therefore lawful) rates for each carrier would be different, with the probable result that the less efficient carrier would be forced to leave the trade.

2. If the Board nevertheless concludes that there is a reasonable method for assessing the reasonableness of a carrier's rates in the aggregate, it should apply the "constrained market pricing" standards developed by the ICC and the Board. While these standards were developed primarily in the context of railroad rates, they are based on carefully considered principles of regulatory theory and policy applicable to all forms of rate regulation. They are based on the now well accepted principle that rate regulation is appropriate only when there is an absence of effective competition and should endeavor to ensure rates that reflect a competitive environment.

3. If the Board applies constrained market pricing standards to this case, it should consider and decide a basic threshold issue – whether there was effective competition in

the Guam trade during the relevant period – before accepting evidence on the reasonableness of rates in the aggregate. GovGuam’s own arguments and expert agree that rate regulation is warranted only where there is “insufficient actual competition or potential competition to control prices to captive customers.” In this case, there is a strong prima facie case that there is and always has been strong and effective competition in the Guam trade – a case supported by a congressionally-mandate study by DOT in 1997. This trade has always had at least two scheduled carriers serving it (as well as numerous other non-scheduled carriers), and, unlike railroads, ocean carriers face few barriers to entering and exiting a trade. Indeed, GovGuam’s own expert witness cited an instance when Matson withdrew a proposed rate increase because its competitor declined to make a similar increase and because Matson feared it “would lose significant volumes of its cargo.” Under the Board’s decisions, this is a textbook example of effective competition at work. Accordingly, it would likely impose a large and needless burden on the parties and the Board to require the parties to adduce evidence both on competition and rate reasonableness at the same time.

4. If the Board concludes that there was not effective competition in the Guam trade in September 1996, then it should apply the stand-alone-cost test to determine the reasonableness of the aggregate rates in effect at that time. Over the course of many cases, the Board has correctly found that that test is the best method for simulating competitive rates while ensuring carriers adequate revenues.

November 9, 2005