

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**EX PARTE No. 657 (Sub-No. 1)**

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**MAJOR ISSUES IN RAIL RATE CASES**

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**REPLY COMMENTS OF HORIZON LINES, LLC  
AND MATSON NAVIGATION COMPANY**

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On February 27, 2006, the Surface Transportation Board ("Board") issued a notice instituting a proceeding in STB Ex Parte No. 657 (Sub-No. 1) ("Notice"). In the Notice, the Board sought comments on proposed changes to rail rate cases, which are intended to resolve major issues common to all rail rate complaints seeking relief under the Board's stand-alone cost ("SAC") test.

The Government of the Territory of Guam ("GovGuam") has used the comment procedure in this rail docket to re-argue positions already thoroughly briefed and under consideration in STB Docket WCC-101. *See Government of the Territory of Guam v. Sea-Land Service, Inc. and Matson Navigation Company, Inc.* ("WCC-101"). In that proceeding, GovGuam challenges the reasonableness the two water carrier defendants' rates for the movement of freight between the mainland United States and the Territory of Guam.<sup>1</sup>

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<sup>1</sup> A series of corporate changes affecting the operations of named defendant, Sea-Land Service, Inc., resulted in Horizon Lines, LLC ("Horizon") succeeding Sea-Land Service, Inc. as a defendant of record in WCC-101. Horizon filed an appearance in this proceeding on March 20, 2006 to enable it to have ready access to comments filed and notices from the Board. Although Matson Navigation Company ("Matson") did not file an appearance in this rail proceeding, it joins in this reply because it, like Horizon, believes the arguments made by GovGuam are entirely inappropriate and because it had no reason to anticipate that GovGuam would seek to reargue issues in WCC-101 in this rail proceeding. If the Board believes a motion is necessary, Matson respectfully requests leave to appear in this proceeding for purposes of joining this reply.

As relevant here, GovGuam in WCC-101 has urged the Board to reject the application of the SAC methodology to ocean transportation in the U.S./Guam trade, while the defendant-carriers have offered reasons for its application in the first post-ICCTA review of water carrier rate issues. The briefing of the matter has been extensive. The record was essentially closed and complete for Phase II of that proceeding upon the conclusion of oral argument in November of 2005.

GovGuam's comments in this rail docket extensively argue points that can have no application to freight movements to Guam if the docket is confined, as the Notice stated, to rail carriage. It is clearly improper for GovGuam to attempt to use this rail rate docket as a device to re-try the Phase II issues of WCC-101. This is not the proper venue to re-litigate water carrier issues or to seek litigation advantage in a two-carrier competitive trade that is the subject of a pending Board proceeding.

Horizon and Matson had every right to regard this proceeding as being confined to rail carriage issues. The Notice clearly indicated that this proceeding would address only issues of rail carriers and their captive shippers:

"We are instituting a rulemaking proceeding in STB Ex Parte No. 657 (Sub-No. 1) to address major issues regarding the proper application of the stand-alone cost (SAC) test in *rail rate cases* and the proper calculation of the floor for any *rail rate* relief." Notice at 2 [emphasis added].

"These proposals are designed to ensure that both the SAC test and the jurisdictional floor for rate relief are applied fairly and in conformity with our statutory responsibilities. Because the issues they address go to the heart of the SAC test and have industry-wide significance for *rail carriers* and their *captive shippers*, all interested parties will have an opportunity to comment on these proposed changes." *Id.*

Moreover, the proposed changes set forth in the Notice are to be applied to future SAC rate cases and certain identified railroad rate pending proceedings. The Board clearly identifies the application of the proposed changes, as follows:

"The changes we adopt here will be applied in *future SAC rate cases*, as well as to STB Docket No. 42095 (the KCP&L case), a pending SAC case in which the record has not yet begun to be developed. Accordingly, the procedural schedule for discovery and the submission of evidence in the KCP&L case is suspended.

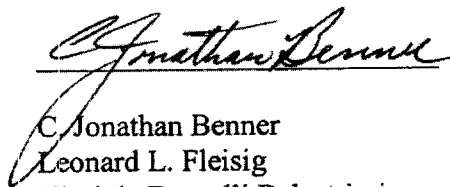
Because several of these issues have been raised or are implicated in the rail rate cases pending before us, we are holding STB Docket No. 41191 (Sub-No. 1) (the AEP Texas case) and STB Docket No. 42088 (the Western Fuels case) in abeyance while we examine these important issues. The parties to those proceedings are invited to comment here on whether or to what extent it would be inequitable to apply the changes proposed herein, or parts thereof, to their pending cases." Notice at 2 [emphasis added].

Horizon and Matson therefore understood that the changes proposed for consideration in the Notice would not impact the Board's current evaluation of pending water carrier rate cases involving the application of the SAC methodology, and specifically, would not affect WCC-101. In view of the explicitly limited scope of the Notice, for the Board in this proceeding to decide issues relevant to the disposition of issues in proceedings not involving rail carriers, and specifically WCC-101, would contravene the Administrative Procedure Act and basic principles of due process. See 5 U.S.C. §553(c). See also, e.g., *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

The parties in WCC-101 are now waiting for a Board's decision in Phase II, the purpose of which is to determine whether there is a reasonable methodology for assessing a rate structure complaint in the Guam trade and, if so, what the appropriate standard is. The defendants in that proceeding have argued that there is no reasonable methodology for assessing Guam's challenge to their rates in the aggregate, but that if the Board concludes otherwise, it should apply the

general principles of Constrained Market Pricing and the SAC test.<sup>2</sup> The proper resolution in WCC-101 of the specific issues GovGuam addresses in its comments in this proceeding – for example, whether the Board should apply a percentage reduction method or some variation of it in WCC-101 – will depend on the specific facts that will be developed in Phase III of WCC-101 if such a phase is required to dispose of GovGuam’s claims against Horizon and Matson. For that reason alone, it would be completely inappropriate for the Board to consider in this proceeding how those issues should be resolved in WCC-101.

Respectfully submitted,



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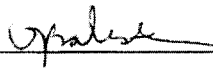
*Attorney for Matson Navigation Co.*

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<sup>2</sup> The Defendants have also contended that, if the Board decides that principles of Constrained Market Pricing and the SAC test should be applied in WCC-101, the Board should bifurcate Phase III to first determine whether there was effective competition in the Guam trade during the relevant period. In connection with that issue, Matson has filed with the Board the recent report of the Department of Transportation’s Maritime Administration on “Competition in the Noncontiguous Domestic Trades” (May 2006), which finds, among other things, that “[e]xcess capacity in the U.S. mainland to Guam trade may now be the most effective limit on increasing freight rates,” that “shipping services from foreign flag carriers based in Asia and Europe . . . provid[e] a significant source of indirect competition for the two [U.S.-flag] carriers,” and that “[o]ver the 1991-2003 period, in real terms, average freight revenues per FEU in the trade declined significantly, an average annual rate of 2.2 percent (Figure 14).” Report at 31-32.

**CERTIFICATE OF SERVICE**

This is to certify that on this 31<sup>st</sup> day of May, 2006, I caused the foregoing "REPLY COMMENTS OF HORIZON LINES, LLC AND MATSON NAVIGATION COMPANY" in the Ex Parte No. 657 (Sub-No. 1) proceeding to be served upon counsel for all known parties of record by first class mail, postage prepaid.

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Virginia Brunelli Balestrieri