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RICHARD A. ALLEN

June 19, 2006

BY HAND

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

216 811

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:

I enclose for filing in this proceeding an original and 10 copies of the Reply of Matson Navigation Company to Filings of Complainant and Intervenor Regarding the Recent Report of the Maritime Administration of the United States Department of Transportation.

Sincerely,

Richard A. Allen

Encl.

cc: (w/encl.) All parties of record

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Office of Proceedings

JUN 19 2006

Part of
Public Record

Before the
Surface Transportation Board

216811



Government of the Territory of Guam,

Complainant,

v.

Sea-Land Service, Inc.
and Matson Navigation Company, Inc.,

Defendants.

Docket No. WCC-101

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**REPLY OF MATSON NAVIGATION COMPANY
TO FILINGS OF COMPLAINANT AND INTERVENOR REGARDING
THE RECENT REPORT OF THE MARITIME ADMINISTRATION
OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

Pursuant to 49 C.F.R. § 1104.13(a), Matson Navigation Company ("Matson") submits this reply to two filings in this proceeding, a letter dated June 1, 2006 from counsel to the Government of the Territory of Guam ("GovGuam") and a pleading dated June 8, 2006 by intervenor Caribbean Shippers Association ("CSA"), concerning the recently issued report of the United States Department of Transportation Maritime Administration entitled "Competition in the Noncontiguous Domestic Maritime Trades" and dated May 2006 (hereafter, "MARAD Report"). Counsel for Matson filed a copy of this report with the Board on May 31, 2006 as supplemental authority relevant to the

issue whether there is a prima facie case that there is effective competition in the Guam trade.

In submitting the report for the Board's information, Matson's counsel made no arguments about the contents of the MARAD Report or what conclusions the Board should draw from it. GovGuam's and CSA's filings, however, make a number of arguments about the report, all to the effect that the Board should disregard it. CSA, indeed, specifically argues that the Board should "decline to accept [the MARAD Report] into the record at this time." CSA Response at 5. Because those arguments are incorrect, this reply is necessary.¹

1. GovGuam Is Wrong In Claiming That The Issue Of Effective Competition Has Been Decided By The Board.

GovGuam first asserts that the issue whether there is effective competition in the Guam trade is "an issue that has already been decided by the Board when it refused to dismiss this proceeding" in its decision served November 15, 2001. GovGuam Letter at 1. That claim is incorrect. In that decision, the Board merely said that "defendants' general assertions about the state of competition in the Guam trade cannot be regarded as establishing facts *sufficient to warrant summary dismissal*." Decision at 3, n. 8 (emphasis supplied.) That statement clearly does not reflect, or even imply, any

¹ This reply is permitted by 49 C.F.R. § 1104.13(a). It is not a reply to a reply prohibited by § 1104.13(c), because it is not replying to any arguments made by GovGuam or CSA in reply to arguments made by Matson. Matson made no arguments; it merely submitted the MARAD Report as supplemental authority relevant to the issue of competition in the Guam trade, and neither GovGuam nor CSA dispute that the report is relevant to that issue.

determination by the Board about the degree of competition in the Guam trade or whether the facts are sufficient to warrant bifurcating Phase III of this proceeding in order to make the determination first whether there is effective competition in the trade (or, more precisely, whether there was effective competition in the trade on September 10, 1996) before trying to determine what the maximum reasonable aggregate rates were in the trade on that date. The statement merely indicates, as it said, that defendants' assertions about competition in the trade did not warrant summary dismissal of the case.

Furthermore, Matson and Horizon Lines are not contending that the Board should now make a determination whether there is or was effective competition in the trade. They are merely contending that, under principals of rate regulation long accepted by the Board, that is a determination that the Board should make, after all parties have had a chance to present evidence and arguments on the issue, before finding any rates to be unreasonable. They are also contending that there is enough evidence already in the record that there is effective competition in the trade to warrant bifurcating Phase III and making that determination first before embarking on the maximum reasonable aggregate rate inquiry.²

2. The MARAD Report Strongly Supports A Conclusion That There Is Effective Competition In The Guam Trade.

GovGuam is also wrong in contending that the MARAD Report "provides no basis that there is allegedly effective competition in the Guam trade." GovGuam Letter

² This evidence is discussed at length in the Defendants' submissions in Phase II. See Defendants' Initial Submission in Phase II – Appropriate Standards of Rate Reasonableness at 19-25 and the attached verified statements of Peter P. Wilson, Mark D. Miller and Daniel Downes, filed April 23, 2002; Defendants' Reply in Phase II – Appropriate Standards of Rate Reasonableness at 6-12 and the attached verified statements of John C. Klick and A. Lawrence Kolbe, filed June 17, 2002. That evidence includes the March 1997 Report of the U.S. Department of Transportation on "Competition in the Noncontiguous Domestic Maritime Trades" and also the testimony of GovGuam's own expert, which is discussed in Defendants' Reply in Phase II at 9-11.

at 2. On the contrary, the report strongly supports the conclusion that there continues to be effective competition in the trade, reinforcing the findings to the same effect in the March 1997 Report of the United States Department of Transportation on “Competition in the Noncontiguous Domestic Maritime Trades.”

The Board, of course, will read the full report and draw its own conclusions, but the report’s findings include the following:

- “In real terms, U.S.-Mainland-Guam freight rates over the 1991-2003 [period] have declined by about 25 percent.” MARAD Report at 33. Rates over that period thus declined by an annual average of 2.2 percent (*id.* at 32), despite the fact that over the same period traffic volumes grew by the same annual percentages (*id.* at 25). Furthermore, over the same period, rates in the U.S.-Guam trade declined more than rates in the Asia-to-U.S. and Europe-to-U.S. shipping markets (*id.* at 33).
- “[R]ates [in the Guam trade] are subject to competitive factors. Excess capacity in the U.S. Mainland to Guam trade may now be the most effective limit on increasing freight rates.” *Id.* at 31.
- “. . . Guam also receives shipping services from foreign-flag carriers based in Asia and Europe, providing a significant source of indirect competition for the two [U.S.-flag] carriers. According to the Federal Maritime Commission (FMC), 40 percent of Guam’s total waterborne commerce is with foreign countries.” *Id.* at 31.

While it is true, as GovGuam notes (Letter at 2), that the MARAD Report found that, with only two carriers providing scheduled service, “concentration remains high in

the U.S.-Mainland-Guam trade” (MARAD Report at 30), GovGuam fails to mention the report’s explanation for that fact. The report states: “Although entry barriers are not insurmountable, the limited volume of traffic moving in the U.S. Mainland to Guam trade presents a significant market entry barrier as carriers can probably only serve this market in connection with a transpacific voyage.” *Id.* at 31. In short, there’s not enough traffic to support more than two carriers. But steadily declining rates over a substantial period of time despite growing volumes are strong indicia that those carriers are competing effectively for that traffic.

3. GovGuam’s and CSA’s Attacks on MARAD’S Objectivity Are Baseless.

Both GovGuam and CSA impugn the accuracy and objectivity of the MARAD Report’s findings because they are based in part by a study by Reeve & Associates conducted at the behest of an organization of which Matson and Horizon are members. This attack indicates that GovGuam’s and CSA’s appreciate the significance of the MARAD Report for the issue of effective competition in the Guam trade, but their suggestion that an agency of the Department of Transportation is a dupe of the defendants and that its report lacks objectivity is baseless. MARAD is a government agency that has no interest in this proceeding, and there is no basis for believing that it did not evaluate all the data on which its report is based carefully and objectively. Its authoritative report is a document of which Board can and should take official notice. *See, e.g., Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served October 20, 2004 at 6; *Commonwealth Edison Co. v. Aberdeen & Rockfish R. Co.*, 2 I.C.C.2d 642, 645 (1986).

4. The Board Can And Should Take Official Notice Of The MARAD Report.

For the reasons just discussed, there is no merit to CSA's argument that the Board should decline to accept the MARAD Report into the record and may not take official notice of it without giving other parties an opportunity to comment on it. CSA Response at 2, 5. As the cited *Duke Power* and *Commonwealth Edison* cases show, the Board can and has taken official notice of reports and studies by other government agencies on issues relevant to proceedings before the Board. In *Duke Power*, the Board took official notice of forecasts for coal use and production published by the Energy Information Agency, an arm of the U.S. Department of Energy. The Board noted that "EIA forecasts have the advantage of coming from a neutral, authoritative source." In *Commonwealth Edison*, the Interstate Commerce Commission ("ICC") took official notice of a draft Mission Plan for the Civilian Radioactive Waste Management Program that parties submitted in an ICC proceeding after the close of the evidentiary phase of the proceeding. The ICC noted that the plan "was not prepared for use in this proceeding," and that it "is germane to the issues in this proceeding and is precisely the type of document . . . of which we may take official notice." *Commonwealth Edison*, 2 I.C.C.2d at 645. The foregoing comments are fully applicable to the MARAD Report and support the Board's taking official notice of it.

Furthermore, as noted earlier, if this proceeding progresses to Phase III,³ GovGuam and CSA will have every opportunity to provide contrary evidence on the

³ Matson and Horizon have argued at length in their pleadings that this proceeding should *not* progress to Phase III because there is no reasonable methodology for determining the reasonableness of the carriers' rates in the aggregate given the enormous variation in such rates and the shipping conditions and other circumstances pertaining to them. As they also discussed at the oral argument on November 16, 2005, they believe their position has been confirmed by the final decision of the Federal Maritime Commission in FMC Docket No. 89-26, *The Government of the Territory of Guam, et al. v. Sea-Land Service, Inc. and*

issue of effective competition and to try to rebut the data on which the MARAD Report's findings are based if indeed that data is inaccurate. On its face, however, the MARAD Report provides substantial additional evidence that there is effective competition in the Guam trade.⁴

CONCLUSION

Contrary to the arguments of GovGuam and CSA, the Board can and should take official notice of the MARAD Report, which provides substantial additional evidence that there continues to be effective competition in the Guam trade.

Respectfully submitted,



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Dated: June 19, 2005

American President Lines, Ltd. (decision served July 11, 2005), rejecting a similar complaint by GovGuam after 16 years of litigation.

⁴ On the other hand, there is no basis for the Board to take any notice, official or otherwise, of a so-called "White Paper" submitted with CSA's reply which was presented at a conference sponsored by the Journal of Commerce by the president of DHX, Inc. Aside from the fact that DHX, Inc. is not a government agency, not authoritative and not neutral but is the complaining party in another proceeding filed at the Board against Matson and Horizon (*DHX, Inc. v. Matson Navigation Co. and Horizon Lines, LLC.*, STB No. WCC-105, (served December 15, 2004), *pending judicial review sub. nom. DHX, Inc. v. STB*, 9th Cir. No. 05-74592), the "White Paper" does not discuss competition in the Guam trade at all (contrary to CSA's assertion (CSA Reply at 3)), but only discusses competition in the U.S.-Hawaii trade, which is the only trade in which DHX competes.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2006, I served a copy of the foregoing "Reply of Matson Navigation Company to Filings of Complainant and Intervenor Regarding the Recent Report of the Maritime Administration of the United States Department of Transportation" by first class mail, postage prepaid upon:

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