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SERVICE DATE – LATE RELEASE SEPTEMBER 15, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-101

GOVERNMENT OF THE TERRITORY OF GUAM

v.

SEA-LAND SERVICE, INC., AMERICAN PRESIDENT LINES, LTD., AND
MATSON NAVIGATION COMPANY, INC.

Decided: September 15, 2005

By complaint filed September 10, 1998, the Government of the Territory of Guam (GovGuam) challenged the reasonableness of the rates, rules, classifications and practices for all transportation by water (including the water portion of intermodal transportation) provided by Sea-Land Service, Inc. (now Horizon Lines, LLC) (Horizon), American President Lines, Ltd. (APL), and Matson Navigation Company, Inc. (Matson) (collectively, defendants), in the noncontiguous domestic trade to and from Guam. GovGuam seeks reparations and damages.

In a decision served on January 6, 1999, the Board adopted a three-step process for resolving this matter. In Phase I, the Board addressed the joint motion to dismiss the complaint, and in a decision served on November 15, 2001, the Board granted the motion to dismiss GovGuam's discrimination claim (but denied the remainder of the motion), dismissed APL as a defendant and allowed the Caribbean Shippers Association (CSA) to intervene. In Phase II, the Board is scheduled to address an appropriate methodology for assessing rate reasonableness. In Phase III, the Board will consider the merits of the complaint. This proceeding is currently in Phase II and all evidence in this Phase has been submitted.

On October 19, 2004, we scheduled an oral argument for November 10, 2004. At the request of GovGuam, we rescheduled that hearing for February 10, 2005. However, in a decision served on February 3, 2005, we canceled the scheduled oral argument and held the proceeding in abeyance pending communication from GovGuam.

In a decision served on June 8, 2005, we directed GovGuam to show cause why this proceeding should not be dismissed (June 2005 decision). On June 28, 2005, GovGuam filed its response and on July 8, 2005, Matson and Horizon filed replies. CSA also filed a reply on July 1, 2005.

PRELIMINARY MATTER

On July 12, 2005, Horizon filed a copy of an Order of the Federal Maritime Commission (FMC) issued July 11, 2005, in the FMC proceeding addressing water carrier rates in the United States Mainland/Guam ocean trades.¹ We accept this filing, which is public information, because no party will be prejudiced and accepting it will produce a more complete record.

On July 28, 2005, GovGuam filed a request for leave to file a reply to Matson's reply, as well as the reply itself, requesting that the Board strike Matson's reply to the extent that it raises or addresses issues that are not responsive to the June 2005 decision. The purpose of the June 2005 decision was to determine whether GovGuam is ready to move forward with this proceeding, not to address the legal and factual merits of the case as they pertain to Phase II. Therefore, we will strike Matson's reply to the extent that it seeks dismissal of the proceeding under the show cause order based on issues other than whether GovGuam is ready, willing and able to move forward with this phase of the proceeding.

DISCUSSION AND CONCLUSIONS

GovGuam asserts that its inability to move forward before was not because of a lack of interest or a decision not to prosecute. Rather, GovGuam asserts that the delays in this proceeding were because of political and budgetary considerations. It had been unable to find the funds necessary to continue the effort required in this complex and expensive litigation. According to GovGuam, this situation has been cured by the Governor of Guam's issuance on June 24, 2005, of Executive Order 2005-24 entitled "Relative To Declaring An Emergency For Procurement Of Legal Services Specializing In Maritime Law Relative To Ongoing Government Of Guam Maritime Cases." GovGuam argues that dismissing this proceeding now would jeopardize the public welfare of the citizens of Guam and that the citizens should not be prejudiced by a temporary budget situation that has now been resolved. Moreover, GovGuam argues that, as this minor delay should not have caused harm to the carriers, it should not serve as a basis for dismissal and denial of relief to Guam shippers and receivers.

Citing costs associated with legal fees and the impact of having contingent liabilities on their books, both Matson and Horizon claim that they have been harmed by GovGuam's tactics. Matson and Horizon both argue that the Board should dismiss this proceeding under the show cause order because GovGuam did not explain or mitigate the impact of its conduct. They maintain that not dismissing this proceeding would allow GovGuam to disregard and abuse the Board's processes. While GovGuam explained that it had financial difficulties, Matson and Horizon submit that GovGuam did not give a justification for failing to respond to Board Orders, nor did it inform the Board that it would not appear at the oral argument or status conference. Additionally, Matson and

¹ The Government of the Territory of Guam v. Sea-Land Service, Inc., and American President Lines, Ltd., FMC Docket No. 89-26.

Horizon argue that the inability to obtain funds is not justification to prevent dismissal under the show cause order and that there is nothing in the record to show that GovGuam could not have secured the necessary funding earlier, thus preventing this situation. Moreover, Matson and Horizon are concerned that the amount of funds released are not sufficient to provide ongoing representation through the end of this proceeding and that GovGuam has provided no assurance that it will continue to prosecute this case once its emergency funds have been exhausted.

While we make no projections regarding GovGuam's future funding, we find that, at this time, GovGuam has shown sufficient justification to allow it to move forward with this proceeding. Accordingly, GovGuam has shown that this proceeding should not be dismissed. We note, however, that a party that initiates a proceeding should not withhold from the Board or the defendants information about its ability or intent to proceed with its complaint and we expect GovGuam to be more forthcoming during the remainder of this proceeding.

Although GovGuam has requested that the Board issue an order requiring the parties to meet to set a date for the oral argument, the Board will schedule an oral argument in this proceeding in a decision served at a later date.

It is ordered:

1. Phase II of this complaint will continue; the Board, in a separate decision, will set a date for oral argument.
2. GovGuam's motion to strike portions of Matson's reply is granted.
3. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary