

APPEARANCES:

PRIMARY PETITIONERS

On Behalf of West Point Relocation and
Eli Cohen:

BRENDAN COLLINS, Esq.

of: GKG Law
1054 31st Street, N.W.
Suite 200
Washington, DC 20007
[202] 342-6793

PRIMARY RESPONDENT

On Behalf of Horizon Lines:

C. JONATHAN BENNER, Esq.

MICHAEL B. ROBERTS, Esq.

of: Reed Smith, LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, DC 20005

[202] 414-9287

ROBERT S. ZUCKERMAN, Esq.

of: Horizon Lines, Inc.
4064 Colony Road
Suite 200
Charlotte, NC 28211

[704] 973-7012

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P-R-O-C-E-E-D-I-N-G-S

(9:31 a.m.)

CHAIRMAN ELLIOTT: Good morning and welcome. We're going to hear oral arguments in the West Point Relocation and Eli Cohen petition for declaratory order, Docket Number Finance Docket 35290.

In an effort to move things along, the board members will not be making any opening remarks this morning, but I wanted to cover a few procedural matters before we begin.

We've asked each party to make a short statement of their arguments. Each counsel should be prepared to answer questions from the Board at any time during their allotted time. I assure you that we have read your pleadings. There's no reason to repeat every argument.

Speakers, please note that the timing lights are in front of me. You will see a yellow light when you have one minute

1 remaining, and a red light when your time is
2 expired. The yellow one-minute light will be
3 accompanied by a single chime, and the red
4 light signifying that your time is expired
5 will be accompanied by two chimes.

6 Please keep to the time you have
7 been allotted. When you see the red light and
8 hear the double chime, please finish with
9 that, and take a seat. Additionally, just a
10 reminder to everyone: please turn off your
11 cell phones.

12 One procedural matter before we
13 proceed. I noticed that there was a document
14 submitted to us this morning. Which counsel?

15 MR. COLLINS: Brendan Collins,
16 sir.

17 CHAIRMAN ELLIOTT: Is there any
18 objection from opposing counsel to this
19 document?

20 MR. BENNER: Your Honor, Mr.
21 Collins and I discussed this briefly before
22 the proceedings commenced. In general

1 principal, I don't object to this being
2 entered. It's tariff material. It's matters
3 that are on file here. But I've not had a
4 chance to review it in detail, so I would like
5 to reserve a reasonable period to comment if
6 we find that for some reason this is not an
7 accurate statement of the current tariff, or
8 something like that.

9 So, I suggest a period of five
10 business days or something like that, within
11 which we could indicate if we have some
12 objections to the authenticity or something
13 like that.

14 CHAIRMAN ELLIOTT: Okay.

15 MR. BENNER: But I don't object in
16 principal.

17 CHAIRMAN ELLIOTT: Great. Then
18 probably you're going to submit it maybe to
19 some kind of affidavit or something. I guess
20 if it's on file here, we could take notice of
21 it.

22 MR. COLLINS: I was actually going

1 to simply ask Commissioners take judicial
2 notice of it, but I wanted you to have access
3 to it.

4 CHAIRMAN ELLIOTT: Okay. If it's
5 on file, we can take notice of it. So, if
6 there is any issue, we'll let you know if it's
7 not on file. I assume it is. Okay, great.
8 I guess you're up. So, we'll now proceed with
9 counsel for West Point Relocation.

10 You have been allotted a total of
11 20 minutes. Please introduce yourself, and
12 indicate if you have reserved any time for
13 rebuttal, when you begin.

14 MR. COLLINS: Thank you. Good
15 morning, Commissioners. Brendan Collins from
16 GKG Law, on behalf of the petitioners, West
17 Point Relocation and Eli Cohen. I'm reserving
18 five minutes for rebuttal.

19 CHAIRMAN ELLIOTT: Okay.

20 MR. COLLINS: The issue presented
21 today is the reasonableness of terms and
22 conditions contained in Horizons tariff, and

1 specifically whether it's a reasonable
2 practice to impose personal liability upon
3 principals of corporate entities without
4 providing actual notice to them that they are
5 assuming such liability.

6 The petitioners submit that it is
7 an unreasonable practice, contrary to 49 USC
8 section 13701(a), for the tariff rules of
9 Horizon to disregard the existence of
10 corporate entities, and to seek to hold
11 undefined, "Principals of corporations
12 personally liable for the actions of the
13 corporation."

14 The petitioners further submit
15 that the term principal in Horizon's tariff is
16 ambiguous, and Horizon cannot impose liability
17 upon individuals without at least defining who
18 falls within the definition of a principal.

19 Finally, although Horizon argues
20 that Mr. Cohen is liable as a principal
21 pursuant to the tariff it identified, which
22 was attached as Exhibit C to our brief, and

1 Exhibit A to their reply, in fact, we request
2 that the Commissioners take judicial notice of
3 the document we just referred to, which is
4 also on file: the Bills of Lading Tariff.

5 The Bills of Lading Tariff at the
6 yellow page, where we've identified, has a
7 different definition of who is jointly and
8 severally liable, and in fact, it makes no
9 reference to principals. That's extremely
10 significant because it's flatly contrary to
11 the language.

12 Essentially, their argument is,
13 "If you had just looked at the tariff, you'd
14 have known that we're liable." You're
15 assuming personal liability. But that's not
16 the case. When you look at -- it depends on
17 which portion of the tariff you look at. And
18 it is very significant here because we were
19 never given the tariff.

20 The tariff was never identified.
21 It says, "Look at our tariffs." Never
22 identified which particular tariff out of the

1 16 tariffs they have. It never identified
2 which particular provision of the tariff they
3 were relying upon to impose liability.

4 Under these circumstances, we
5 would submit that it's far from a reasonable
6 practice to assume that if someone is going to
7 know, "Gee, we meant this to apply, but not
8 that," or --

9 VICE CHAIRMAN MULVEY: Are you
10 saying that the bill of lading mentions the
11 shipper, the consignee, or the owner of the
12 goods, but does not specifically refer to the
13 principal or the owner of the company?

14 MR. COLLINS: What it says is they
15 -- I can read the language. It's tabbed
16 there. "The shipper, consignee, holder hereof
17 and owner of the goods shall be jointly and
18 severally liable to carrier." It does not
19 refer to principals, which is the basis that
20 they're seeing to impose liability upon our
21 client here.

22 VICE CHAIRMAN MULVEY: You also

1 say principal is an ambiguous term here, but
2 isn't Mr. Cohen the sole owner of West Point
3 Relocation? I mean who else could be the
4 principal if not the sole owner?

5 MR. COLLINS: Well, we submit as a
6 matter of law he is the president of the
7 company. I believe that his sister was
8 actually the shareholder of the company, owned
9 the stock of the company. So, I've linked
10 those -- I should clarify. I'm not positive
11 on that. So, let me say I believe she was the
12 stockholder, and she was the president.

13 VICE CHAIRMAN MULVEY: Okay, thank
14 you.

15 CHAIRMAN ELLIOTT: How long had
16 West Point Relocation been doing business
17 under this tariff with Horizon?

18 MR. COLLINS: I believe 2006.

19 CHAIRMAN ELLIOTT: 2006? And then
20 during that entire time, they never had looked
21 at the tariff?

22 MR. COLLINS: No, they didn't.

1 They never had any reason to. They were doing
2 business. They were -- they -- they -- and
3 we're not submitting -- explain -- we're not
4 submitting -- I understand the filed rate
5 doctrine that we're subject to the tariff, the
6 rate in a tariff regardless of whether we've
7 familiarized ourselves with it, but we would
8 distinguish those cases as -- as the courts
9 have done in the cases where it's a non-
10 mandatory provision in a tariff.

11 There is not -- courts of the 2nd
12 Circuit, the 9th Circuit, the 11th Circuit, all
13 have held it's a non-mandatory provision,
14 especially if it's contrary to accepted
15 practice, then there's an obligation on the
16 part of a carrier to bring that to the
17 shipper's attention if they're seeking to
18 impose an unusual obligation or requirement,
19 or to excuse themselves from liability.

20 Under those circumstances the 2nd
21 Circuit, recognizing that it is impractical to
22 assume that a shipper is going to read every

1 bill of lading that comes across his desk, and
2 I'm sure you're aware the fine print you'd
3 need a magnifying glass, and it goes on for
4 days. It's a very difficult thing for even
5 someone trained in the law to understand. For
6 someone who is out practicing, it's
7 unreasonable to assume they're going to -- to
8 -- "Oh, and said principals, that must mean
9 a director, a shareholder, a corporate
10 officer."

11 CHAIRMAN ELLIOTT: I have one
12 other question. The record is fairly sparse
13 in this case. Are there any other documents,
14 like any kind of credit application? Four
15 hundred thousand dollars is a lot of money.
16 Were there any other type of documents between
17 the parties?

18 MR. COLLINS: No. The only thing
19 that was done here, and that is significant
20 that leads into their argument is, "Gee, you
21 need to be able to -- we need to be able to go
22 against the principals. Otherwise, we're

1 going to be held -- we're going to be stuck."

2 Well, we submit that there's no
3 requirement to -- to simply bury a term
4 "principal" in the tariff. The tariff that
5 they refer to specifically says, "You're
6 entitled to get a credit guarantee. If you
7 want to hold the principal or the shareholder,
8 or someone else liable, you can specifically
9 do that under the tariff provision."

10 CHAIRMAN ELLIOTT: Basically what
11 happens here is Mr. Cohen calls up Horizon,
12 and makes a deal verbally, and then relies on
13 the tariff and the bill of lading.

14 MR. COLLINS: Well, what they've
15 done here is they submitted bills of -- they
16 submitted just simple invoices and freight
17 bills. That's the only thing that was
18 submitted. They called up, and said, "Can you
19 ship some goods for us?" And they shipped the
20 goods, and they sent invoices and freight
21 bills. They never sent a bill of lading.

22 CHAIRMAN ELLIOTT: Did you have to

1 sign anything?

2 MR. COLLINS: No.

3 CHAIRMAN ELLIOTT: Okay.

4 MR. COLLINS: I don't believe
5 there's any signature. I haven't seen it, and
6 I don't believe there is. I think it is
7 simply invoices and freight bills were sent.
8 Those contained a generic reference to refer
9 to the tariffs. It doesn't identify which of
10 the 16 tariffs that Horizon had on file. It
11 didn't specify any particular term within the
12 tariff. And therefore, that's the only
13 notice.

14 VICE CHAIRMAN MULVEY: You
15 mentioned that these tariffs are very, very
16 long, and very, very complicated. But was
17 West Point operating as a broker, or -- you
18 said shipper, but wasn't West Point operating
19 as a freight forwarder?

20 MR. COLLINS: It was a forwarder,
21 but it -- I said -- I didn't mean to misstate,
22 but shipper or forwarder is -- the terms apply

1 to -- regardless. What they've drafted here
2 obviously applies equally to a shipper as to
3 a forwarder.

4 So, a shipper who is doing a one-
5 time shipment is --

6 I think it's understandable that
7 the filed rate doctrine, as you said, is still
8 the law. A lot of people were upset that the
9 filed rate doctrine was being applied to
10 shippers who are fairly unsophisticated. But
11 a lot of people understood that large
12 shippers, like the big auto companies and the
13 big food processing companies, they should've
14 understood the filed rate doctrine.

15 VICE CHAIRMAN MULVEY: Wouldn't
16 any freight forwarder who, by law is a common
17 carrier, shouldn't they be familiar with all
18 the provisions of the applicable tariffs?

19 MR. COLLINS: I don't believe that
20 is reasonable under these circumstances.
21 Again, there are 16 different tariffs.
22 There's numerous contradictory provisions. I

1 don't think it's reasonable for them to assume
2 that they know all of the provisions contained
3 therein.

4 Again, I think that's what the 2nd
5 Circuit and the Encyclopedia Britannica Case
6 said. "We don't think as a matter of law."
7 One of the reasons COGSA was enacted was such
8 disparity between shippers and forwarders and
9 carriers. Carriers have all of the leverage.
10 They simply put whatever language they want
11 into the bills of lading, and then decide --
12 and then say, "Wait. This is in our tariff.
13 It has the force of law."

14 Well, the 2nd Circuit and the 9th
15 Circuit specifically addressed that issue, and
16 said, "That doesn't make sense. We're going
17 to enforce the rates, but we're not going to
18 allow somebody to simply insert whatever
19 onerous conditions they want into a tariff,
20 and then automatically rubber stamp it."

21 And indeed, that's the very
22 function of the Commission, we would submit.

1 The Commission's role is to determine that --
2 the courts have even said it at times. This
3 language in this tariff seems very unfair to
4 us, and unjust. But that's not our decision.
5 That's for the -- for the Surface
6 Transportation Board to make a fairness
7 determination, or a reasonableness
8 determination, and that's what we're
9 submitting: that the courts need guidance from
10 the board in that regard.

11 What is fair? Is it fair to
12 simply -- again, they've suggested we have to
13 do this because otherwise, we can't -- we
14 can't protect ourselves. It's easy to protect
15 themselves. They have -- not only do they
16 have the credit guarantee that they could
17 easily obtain, there is also statutory liens
18 and contractual liens.

19 The UCC specifically provides that
20 as long as you have goods in your possession,
21 you have a lien on those goods. So, you don't
22 have to release them until you get paid.

1 COMMISSIONER NOTTINGHAM: Mr.
2 Collins, I'd like to understand the underlying
3 transaction that gave rise to this dispute
4 with a little more clarity, if I could. We're
5 talking about 107 containers that were
6 forwarded -- were handled in some capacity by
7 West Point Relocation, Mr. Cohen's firm, for
8 an amount due to Horizon of 410,000 some
9 dollars.

10 What type of -- what type of
11 commodities or products are we talking about?
12 What -- what was generally in these
13 containers?

14 MR. COLLINS: I believe it was
15 furniture that was primarily being
16 transported.

17 COMMISSIONER NOTTINGHAM: And so,
18 these would've been -- this would've been
19 furniture that was owned by large number of
20 different individuals?

21 MR. COLLINS: Yes. I believe
22 individuals. And in fact, just -- there was -

1 - and again, I am not -- I did not handle the
2 district court case. So, I'm not positive
3 that that's the case, but I believe that's
4 correct.

5 There was a counter claim asserted
6 in that as well, as to whether
7 misrepresentations made as to the condition of
8 the -- as to the condition of the containers.
9 The containers were supposed to have been in
10 good condition. My client alleges in that
11 complaint in the counter claim that because
12 the containers were not in good condition,
13 damage occurred to those goods, and as a
14 result, liability was -- the shippers
15 themselves sought recovery from him.

16 COMMISSIONER NOTTINGHAM: So, the
17 nature of the business is West Point
18 Relocation receives payment from a variety of
19 individuals, and guarantees the safe movement
20 of furniture and other -- whatever was in
21 these containers.

22 The payment process: does West

1 Point Relocation typically get paid up front
2 in those -- in those types of transactions?

3 MR. COLLINS: I think it depended.
4 Again, I apologize. I'm not positive whether
5 they received payment up front or not under
6 those circumstances.

7 COMMISSIONER NOTTINGHAM: But
8 you're not saying that they handle this -- all
9 these materials and commodities without being
10 paid?

11 MR. COLLINS: No, I'm not saying
12 that that's --

13 COMMISSIONER NOTTINGHAM: What
14 happened to the money? What's --

15 MR. COLLINS: Unfortunately,
16 again, there was a dispute as to whether in
17 fact all of the amounts were owed. There was
18 a dispute as the district court level, which
19 was being litigated in regards to whether in
20 fact there was -- there was proper
21 misrepresentation as to how the goods were
22 being shipped, and the value of the

1 containers, how new the containers were,
2 whether in fact damage occurred to some of the
3 goods.

4 But nonetheless, the corporate
5 entity, we can see has filed for bankruptcy
6 because of financial difficulty.

7 COMMISSIONER NOTTINGHAM: And so,
8 is your position that Horizon, the carrier in
9 this case, failed to meet its end of the
10 bargain?

11 MR. COLLINS: That is the position
12 that has been taken by my client in the
13 district court case, yes. That's still on --
14 that was saved, but I mean we -- for a
15 resolution of the personal liability question
16 by the board. So, that -- well, they filed
17 bankruptcy. I don't think it's necessarily
18 being -- going to be ultimately resolved, but
19 essentially, the question is that was not a
20 question that was presented here, but that was
21 being litigated in the district court.

22 COMMISSIONER NOTTINGHAM: Now,

1 assuming that Horizon did meet its end of the
2 bargain, wouldn't you agree that they deserve
3 to be paid?

4 MR. COLLINS: Well, the question -
5 - they can certainly have recourse against --
6 against West Point, but that doesn't mean that
7 they're entitled to go against principal,
8 against officers or directors or shareholders
9 of companies.

10 There's law governing when the
11 corporate veil may be pierced, but the mere
12 fact that a corporation has financial
13 difficulty, and is unable to pay all of its
14 bills has never been sufficient justification
15 for piercing the corporate veil, and we would
16 suggest that that would not be sufficient
17 justification here.

18 There's been no allegation of
19 fraud or anything that satisfies the criteria
20 for imposition of personal liability under
21 piercing the corporate veil standards.

22 Again, we submit, Your Honor, that

1 for centuries the lynchpin of corporate law
2 is the corporate entity assumes liability for
3 corporate debts, rather than the individuals
4 behind it, and that's indeed one of the very
5 fundamental reasons corporations were brought
6 into existence, and they exist.

7 VICE CHAIRMAN MULVEY: So, you're
8 suggesting that the -- Horizon then should be
9 able to go after the individual shippers
10 rather than the principals of West Point.
11 Let's assume for a moment that many of them
12 paid West Point up front. Wouldn't that
13 require many of the shippers to in effect be
14 paying twice for the same service?

15 MR. COLLINS: What I'm suggesting
16 is they certainly can go after West Point.
17 And in fact, if they want to protect
18 themselves against -- as to suits against
19 additional individuals, they can get corporate
20 guarantees, individual guarantees, which their
21 -- their tariff specifically allowed. Or,
22 they can hold the goods until payment is

1 received, which is certainly entitled to do
2 under UCC law, or they can provide
3 contractually for that.

4 What we submit is that it'd be
5 inappropriate to, under these circumstances,
6 to disregard centuries of corporate -- of
7 corporate law, and simply say, "By inserting
8 a word into a -- into the tariff, they can go
9 after individual corporate" --

10 COMMISSIONER NOTTINGHAM: Mr.
11 Chairman, can I just ask one follow up
12 question to that point.

13 CHAIRMAN ELLIOTT: Sure. I know
14 you have five minutes for rebuttal, too.

15 COMMISSIONER NOTTINGHAM: Okay.

16 CHAIRMAN ELLIOTT: Go ahead.

17 COMMISSIONER NOTTINGHAM: I think
18 it's timely right at this point because
19 counsel just touched on this on the corporate
20 veil document. But I thought I saw in your
21 own pleadings, counsel, that you -- you
22 acknowledge that the corporate veil, even if

1 we were to follow the logic that this case
2 should be handled under -- under corporate
3 veil principles and concepts, in your own
4 brief, I thought I saw reference to the
5 corporate veil properly should be able to be
6 pierced in cases of inequitable conduct.

7 And I would hazard to guess that
8 the owner of these -- of all this furniture,
9 or the owners, who have already paid to have
10 the furniture delivered, when asked to go pay
11 again because the shipper had -- the carrier
12 had no other choice but to seize some of the
13 goods and hold them, I would hazard to guess
14 they'd be before us, describing that as
15 inequitable conduct that led to them having to
16 pay twice for one service that they never
17 actually received: timely delivery of their
18 goods.

19 MR. COLLINS: Under the -- I think
20 the facts would need -- need to be developed
21 at the district court level before we would
22 assume that there's been inequitable conduct.

1 I think assumptions are being made in that
2 regard. But again, I think the important
3 thing is let's focus on the language of -- the
4 language of the tariff doesn't say, "We can go
5 after the principals if there's been --
6 against corporate individuals if there's been
7 inequitable conduct."

8 It says, "We can simply go after
9 the individuals." They don't need to show any
10 inequitable actions whatsoever. It's just as
11 a matter of course, they can collect.

12 If a shareholder of a corporation,
13 who owns stock in GE; GE ships goods. Does
14 that mean under that language it would appear
15 that their argument is you can be sued
16 individually because you -- you're a
17 shareholder in GE, and that -- that's within
18 the definition of a principal.

19 I would submit that that would not
20 be fair and reasonable. Thank you.

21 CHAIRMAN ELLIOTT: Thank you,
22 Counsel. Next, Counsel for Horizon Lines.

1 You have been allotted 20 minutes for your
2 argument. Please introduce yourself for the
3 record and begin.

4 MR. BENNER: Thank you, Mr.
5 Chairman. May it please the Board. I am
6 Jonathan Benner of Reed Smith. I'm
7 accompanied today by Mr. Robert Zuckerman,
8 General Counsel of Horizon Lines, and my
9 colleague, Michael Roberts, also of Reed
10 Smith.

11 The Board well understands what's
12 going on here, I think based on the colloquy
13 between the Board and Mr. Collins. Horizon's
14 position about this particular provision is
15 that it's not uncommon in shipping. It has
16 been around a long time. It crops up here and
17 there.

18 We've cited to you at least one
19 other domestic water carrier that has a
20 provision similar to this, and we've given you
21 supplemental authority that we filed last week
22 that refers not only in the case that we

1 cited, but in cases cited within the case,
2 numerous instances where the courts have
3 routinely upheld this kind of provision.

4 VICE CHAIRMAN MULVEY: You
5 mentioned another carrier with the same
6 provision in its tariffs. Could you name that
7 carrier?

8 MR. BENNER: I believe the carrier
9 was Totem. It's in the Daugherty Declaration
10 that's appended to our filing.

11 VICE CHAIRMAN MULVEY: And are
12 they in the same market, the same US/Hawaii
13 market?

14 MR. BENNER: No.

15 VICE CHAIRMAN MULVEY: Is it a
16 different market?

17 MR. BENNER: This is in the Alaska
18 market, I understand.

19 VICE CHAIRMAN MULVEY: The Alaskan
20 market. So, how many total carriers are there
21 in the Alaskan to the US market, and Hawaii to
22 the US market in total? My understanding is

1 it's a fairly small number.

2 MR. BENNER: It is a fairly small
3 number. I can't give you an exact number off
4 the top of my head. Mr. Zuckerman might be
5 able to. He follows these things rather more
6 closely than I do.

7 VICE CHAIRMAN MULVEY: Because I'm
8 suggesting that a large percentage, even if
9 it's only two, it's a fairly large percentage
10 of the carriers in the market have this kind
11 of a clause in their tariffs.

12 MR. BENNER: Well, I think I'm
13 making a slightly different point, and I want
14 to be precise about this. I'm not taking a
15 census and saying that this is more than half,
16 or a great percentage.

17 What I'm saying is that in ocean
18 shipping, this kind of provision is not
19 unknown. It has a track record. It has a
20 history. The courts are familiar with it.
21 The courts have knocked down repeatedly the
22 kind of evasions that we're seeing here from

1 Mr. Cohen, and I think if you read the case we
2 cited, excuse me, the Maersk v. Neewra Case
3 that we submitted previously in the case as
4 cited in there, you get a flavor for how the
5 courts deal with these kinds of issues.

6 VICE CHAIRMAN MULVEY: That's the
7 case in the supplemental filing you just made,
8 but that also refers to the provision that was
9 cited in the bill of lading, rather than just
10 in the tariff. So, the case that's being made
11 by West Point is that it was not in the bill
12 of lading. It was buried, as they argue, in
13 the tariff itself. Correct?

14 MR. BENNER: That's correct, and I
15 will -- I will look at the materials submitted
16 by Mr. Collins today to determine whether that
17 has any impact on it. But let's not lose this
18 point. We contend that the notice in the
19 tariff is completely -- complete and adequate
20 to provide notice to the shipper in this case,
21 West Point and its principal.

22 And by the way, there can't be any

1 doubt that Mr. Cohen is a principal because of
2 the structure of the company. And we've also
3 offered you as an exhibit to Mr. Daugherty's
4 affidavit the reference to bankruptcy filings,
5 which identify Mr. Cohen as a principal.

6 CHAIRMAN ELLIOTT: May I ask along
7 those lines? I read that language at first,
8 and I'm not sure with respect to the
9 ambiguity. I was following West Point's
10 argument, but what I was thinking along those
11 lines is with respect to agency law.

12 If the individuals that were
13 shipping their goods were considered
14 principals, and then Mr. Cohen or West Point
15 Relocation was considered the agent, and under
16 agency definition in this instance, it would
17 be my understanding that Mr. Cohen or West
18 Point wouldn't be a principal, or Mr. Cohen
19 wouldn't be a principal in this situation.

20 MR. BENNER: Mr. Cohen is a
21 principal by virtue of the corporate structure
22 of West Point. I'm not -- I'm not primed to

1 dispute you on agency law on the theory you've
2 set out. That may be true, but I think your
3 question fairly goes to another point that's
4 very important here, and this is the colloquy
5 with Mr. Collins from the Commissioner: that
6 these shippers are -- they contracted with
7 West Point for this carriage.

8 As far as we know, we have no
9 reason to believe they didn't pay West Point.
10 It has not been alleged by West Point that
11 West Point did not get paid for these
12 shipments. West Point did not pay for the
13 underlying carriage on the shipments that are
14 in question, and that's where the inequity is.

15 If we were to go against the
16 shippers, and I think we actually would have
17 a technical legal right to do that, but if we
18 were to go against those shippers --

19 CHAIRMAN ELLIOTT: But doesn't it
20 say in your tariff the owners of goods are
21 subject to liability?

22 MR. BENNER: Yes.

1 VICE CHAIRMAN MULVEY: Well, under
2 the filed rate doctrine of course you can go
3 after the shippers as well. Well, what if you
4 had a case as here where you only have a
5 single shareholder. Apparently, who is it,
6 the sister of the owner?

7 MR. BENNER: Yes.

8 VICE CHAIRMAN MULVEY: What if you
9 had a case where there's a true corporation
10 where there's hundreds or thousands of
11 shareholders? How would Horizon have
12 proceeded against a freight forwarder that had
13 many, many shareholders instead of just one in
14 the same circumstances? Would you have gone
15 against them jointly?

16 MR. BENNER: Well, I don't know
17 how we'd handle that hypothetical if there
18 were hundreds. Here we have one. We know who
19 this man is, and we know that we have an
20 inequitable situation. Frankly, by the way --
21 and perhaps I'm veering off your questions.
22 So, pull me back if I don't get back to it,

1 but I don't want to miss this point that --
2 the -- well, now I've lost it. I'm sorry. I
3 missed your point, and I missed mine all in
4 one fell swoop.

5 COMMISSIONER NOTTINGHAM: Mr.
6 Benner, this may help you collect your
7 thoughts, and also address Vice Chair Mulvey's
8 point. As I was preparing for arguments, I
9 thought perhaps I was -- I thought I'd go look
10 at the dictionary, look up the word principal.

11 It's pretty easy to find, and it's
12 in Webster's New International Dictionary,
13 Second Edition. It -- it defines the noun
14 principal as, "A leader, chief, or head; one
15 who takes the lead; one who acts
16 independently, or who has controlling
17 authority; as, the principal of a faction, a
18 firm, etcetera; ... distinguished from
19 subordinate, abetter, auxiliary, assistant,
20 etcetera." And then that's the first
21 definition.

22 It goes down and actually

1 helpfully provides definition number
2 applicable to law, which is, "One who employs
3 another to act for him," "distinguished from
4 agent; ... one primarily liable on an
5 obligation, as distinguished from an endorser,
6 surety, etcetera."

7 I think looking at that plain
8 definition would allow any situation where a
9 larger number of shareholders, none of whom
10 control the firm or can bind the firm, or --
11 or make the firm liable for something would
12 never be able to be pursued under some kind of
13 principal theory --

14 MR. BENNER: It's an interesting
15 hypothetical because it does focus the inquiry
16 a bit. On the other hand, it's not what we
17 have here. Here we have a very small number
18 of targets. We have the company, and we have
19 Mr. Cohen. The company is bankrupt. Mr.
20 Cohen is attempting to evade responsibility.

21 We believe Mr. Cohen knows full
22 well, and we can't prove this, but Mr.

1 Daugherty, our witness, says, "These people
2 deal with tariffs all the time." That's how
3 the courts deal with it. If you look at those
4 cases, you see that the courts say, "Look,
5 they see the tariffs. They know what's in the
6 tariffs."

7 Mr. Cohen doesn't say he doesn't
8 know what's in the tariff. He said he didn't
9 review the tariff.

10 COMMISSIONER NOTTINGHAM: Can I
11 pursue that? Because we just confirmed
12 earlier in the arguments today that West Point
13 Relocation was acting as a forwarder, and
14 freight forwarder, in this -- in these
15 transactions.

16 Why would individuals who need to
17 move stuff contract with a freight forwarder
18 rather than just picking up the phone, and
19 calling Horizon? Is there some benefit that
20 the business model of freight forwarders is,
21 if I understand it correctly, they package
22 different shipments together to fill

1 containers, and then develop a business plan
2 to offer to move those containers at a lower
3 price than -- than perhaps the carrier would
4 be able to offer if they just got a phone call
5 saying, "I've got some furniture I need
6 moved?"

7 MR. BENNER: Reputable,
8 knowledgeable freight forwarders offer a
9 valuable service to individual shippers. Many
10 of these movements are household goods of
11 military dependents moving to Hawaii, or other
12 -- or even civilians moving to Hawaii.

13 It's a very occasional act that
14 they would have to make this kind of
15 transaction. A forwarder who does this kind
16 of work day in and day out knows the various
17 carriers involved, knows the rates. That's
18 why they study tariffs closely. And they know
19 how to get the best deal.

20 He also can combine shipments in
21 different proportions to take advantage of
22 volume rates in the --

1 COMMISSIONER NOTTINGHAM: In your
2 experience, and I'll certainly let Mr. Collins
3 address this on rebuttal, how likely would it
4 be that somebody would engage in the business
5 of forwarding without regard to the details of
6 tariffs? In other words, how do you set your
7 prices and basically compete with the carrier,
8 which is in essence what they're doing, and
9 the carrier's prices, if you're oblivious to
10 the terms and conditions and prices in the
11 tariff.

12 MR. BENNER: I think it's not
13 credible that Mr. Cohen/West Point did not
14 have knowledge of what's in that tariff.

15 COMMISSIONER NOTTINGHAM: But if
16 they did have knowledge, assuming they did,
17 and they objected to a provision such as the
18 principal liability provision here, what sort
19 of recourse could they have chosen? Another
20 carrier, or opted to not do business with
21 Horizon?

22 MR. BENNER: They have a number of

1 options. They can negotiate with carriers for
2 different terms. They can go to another
3 carrier. They can take business from one
4 carrier to another. They're not locked in.
5 This isn't some kind of contract of adhesion.

6 Mr. Collins said that West Point
7 is disputing the charges in the -- in the
8 district court case. How do you know what the
9 correct charges are? You look to the tariff.
10 The tariff is a central document the way ocean
11 transportation has been set up in this
12 country.

13 We're entitled to rely on that
14 tariff to inform people of what their
15 obligations are. There are many instances
16 where people have attempted to evade their
17 financial obligations by making arguments such
18 as are being made here.

19 The courts don't buy it, and
20 that's one point I'd like to ram home, too.
21 The court is capable of sorting out the kinds
22 of arguments that Mr. Collins is making. The

1 only issue that is within your peculiar
2 expertise is is this provision reasonable
3 under the law?

4 VICE CHAIRMAN MULVEY: Let me ask
5 you a question on that. You said many, many
6 times this happens. So, you are doing this to
7 protect the interests of Horizon and make sure
8 it gets paid for its services. Has Horizon
9 had occasion to bring these kinds of cases
10 before, in terms of somebody violating the
11 provision of the principal not being
12 responsible -- being responsible for the
13 ultimate payment of the -- of the charges?

14 MR. BENNER: I don't have a
15 factual answer for you, Commissioner. I can't
16 tell you off the top of my head whether that
17 has happened before or not.

18 VICE CHAIRMAN MULVEY: Another
19 problem is that it's argued that the
20 application and notification of this provision
21 were inadequate. There are 16 tariffs, I
22 believe, that are applied to this trade, and

1 only one of these tariffs, the one governing
2 here, contains this provision.

3 If this is such an important
4 provision to protect Horizon -- to make sure
5 that they are being paid, why wasn't it
6 included in the bill of lading? Or, why
7 wasn't it highlighted more than simply a
8 reference to all of the tariffs, not even the
9 specific tariff, that is at issue here?

10 MR. BENNER: Well, it is in the
11 specific tariff that applies to this trade of
12 the -- there are 16 tariffs on file with this
13 board. They apply to different trades. This
14 is the only tariff that would apply to West
15 Point's shipments.

16 VICE CHAIRMAN MULVEY: How long is
17 that tariff? Do you know just -- how many
18 pages it is?

19 MR. BENNER: I do not know off the
20 top of my head. We have attached elements of
21 it to -- to the submission we made.

22 VICE CHAIRMAN MULVEY: We do have

1 it back here, yes.

2 MR. BENNER: But I -- that's not
3 the complete tariff.

4 COMMISSIONER NOTTINGHAM: Mr.
5 Benner, speaking of the tariff that's before
6 us here, let me just make sure I'm looking at
7 the correct one. It is numbered 468, and it
8 references the --

9 MR. BENNER: That is the correct
10 one.

11 COMMISSIONER NOTTINGHAM: -- trade
12 between the US, Puerto Rico, Canada and
13 Hawaii. While not really at issue, or at
14 least not raised by any of the parties before
15 us, I had to start with the beginning of the
16 tariff, with the first section, A, which is
17 labeled, "Freight payment."

18 It says that, "Full freight to the
19 port or point of discharge named on the bill
20 of lading and all advance charges against the
21 goods shall be considered completely earned
22 and due on receipt of the goods by Carrier,

1 even though the vessel or goods are damaged or
2 lost or the voyage is frustrated or
3 abandoned."

4 Is Horizon's position that even if
5 the -- their ship turns around and never
6 actually delivers, as long as they received
7 the furniture in this case, or -- or whatever
8 the goods might be, that there are -- they're
9 owed payment?

10 MR. BENNER: Technically, we could
11 take that position as a matter of commercial
12 activity. We would not. I mean obviously,
13 you have to work with their customers when
14 there are interruptions and deviations and so
15 forth, and that's a standard part of running
16 the business, but that is standard language.

17 It's very important to define when
18 freight is due and owing because it affects
19 other issues, such as liens on the cargo when
20 it arrives at the other end.

21 By the way, this type of cargo,
22 when it was apparent that West Point had not

1 paid the freight, was subject to detention at
2 the destination end. So, the underlying
3 shippers could not get their household goods,
4 their personal items, until Horizon released
5 that cargo.

6 Now, technically, we could've held
7 it until the shippers showed up and paid us.
8 We don't want to do that. Because West Point
9 is in bankruptcy, we've had to get permission
10 from the bankruptcy trustee to release this
11 cargo to the underlying owners, and then were
12 creditors in the bankruptcy suit.

13 VICE CHAIRMAN MULVEY: It's my
14 understanding that there's a new firm that is
15 a successor, I suppose, to West Point, called
16 WPR. Are they shipping now with Horizon also,
17 and are there problems with paying the bills
18 with this company also?

19 MR. BENNER: I don't know whether
20 they're shipping with Horizon now as we speak.
21 When we were looking at these issues in
22 preparation for briefing this case, it became

1 apparent that there was a company called WPR
2 that owed Horizon approximately 30,000-some
3 dollars in unpaid freights.

4 I don't know whether the term
5 successor is exactly correct in a legal sense,
6 but we believe there's a close relationship
7 between WPR and West Point. And the filings,
8 the corporate filings of WPR, which are public
9 records in the State of Hawaii, show that
10 there -- Mr. Cohen was involved in that -- in
11 that company.

12 There is a footnote in the
13 rebuttal brief that Mr. Collins and Mr.
14 Greenberg submitted, that takes issue with our
15 characterization of WPR, but we strongly
16 believe that they're related, and we strongly
17 believe that if we had not acted to stop
18 accepting shipments from WPR, we soon would've
19 been in the position with them that we find
20 ourselves with West Point and Mr. Cohen.

21 CHAIRMAN ELLIOTT: I would like to
22 get back to the reasonableness of -- I'm just

1 kind of looking at just the language itself.

2 If we look at your principal, and take it from
3 your definition, my agency thought aside, my
4 understanding is you have a common carrier
5 obligation: file the tariff, and these people
6 have to operate under that tariff or contract
7 with you.

8 In this situation, do you see it
9 reasonable to have the tariff contain a
10 provision that requires an individual like
11 Mr. Cohen to be personally liable, and then
12 not just that instance, but in every instance
13 across the board? So, in order to ship with
14 you, they'd always have to be personally
15 liable. Do you find that to be, especially in
16 light of your common carrier obligation?

17 MR. BENNER: Yes, I think it's not
18 only reasonable, it's essential for a carrier
19 that has to deal with the public generally to
20 have this kind of provision.

21 Obviously, the carrier uses its
22 best commercial judgment about when to pursue

1 these kinds of claims. It might not happen in
2 every case that we would take an individual
3 principal to court in addition to the company.

4 Here it seemed justified, and we
5 need to have that authority. It won't work.
6 We've explained a little bit in our filing how
7 you have to be able to accept cargo quickly.
8 Yes, there may be other ways to do it. Mr.
9 Collins had that point. But this works for
10 us.

11 What we're saying to the Board is
12 let the court sort this out. This is not an
13 unreasonable practice in a 13701 context. You
14 can't make those decision devoid of the
15 factual surroundings.

16 If you think that this issue bears
17 investigation or some kind of look at it as an
18 industry issue about how do you deal with
19 collections; how do you deal with the poor
20 sods who tender the cargo pay, and then don't
21 get the underlying service? All those things
22 might be worth looking at.

1 I'm sure Horizon would be a
2 supporter of that if you decided to do it.
3 But this is not an unreasonable practice in a
4 13701 case. This is a case where a
5 sophisticated, knowledgeable forwarder who
6 shipped hundreds of shipments over a period of
7 years with us is now trying to avoid
8 responsibility for his business practices.

9 The rule addresses reasonably
10 exactly the kind of practices that Mr. Cohen
11 and West Point are guilty of.

12 CHAIRMAN ELLIOTT: Thank you, Mr.
13 Benner. You have five minutes for rebuttal.

14 MR. COLLINS: I'd just like to
15 make a few points. One is a statement was
16 made by counsel that this is not a contract of
17 adhesion. Overwhelming weight of authority,
18 the Supreme Court, and every court that has
19 ever looked at this issue has held these are
20 contracts of adhesion.

21 Clearly, they have the weight of
22 authority. The 2nd Circuit, the 9th Circuit,

1 the 7th Circuit have all held these are
2 contracts of adhesion. They may be
3 enforceable, but clearly, they're contracts of
4 adhesion. So, it's not as if these are
5 equally negotiated between two parties.

6 They dictate this -- "These are
7 our conditions. Take it or leave it."
8 There's two people who ship -- two companies
9 who ship out of Hawaii. It's not as if, "Gee,
10 you don't have to ship with us. You can
11 somehow put it on a plane and fly it over, but
12 you don't have a whole lot of options."

13 So, this isn't an issue of, "Gee,
14 go out and get a better deal." Unless you
15 want to build your own ship, you don't have a
16 whole lot of choices in that regard.

17 The case they cited, the
18 supplemental authority, they don't -- again,
19 I just emphasize the courts do not have the
20 authority to make reasonableness
21 determinations. They're simply looking at the
22 language of the contract. That is the

1 authority of the Commission, of the Board, to
2 make the determination: Is this reasonable?

3 Is it reasonable to simply say in
4 every instance that there's -- when there's a
5 corporation involved, "You can go after the
6 principal?" Now, the question is what does a
7 principal mean? Is it a director? Is it an
8 officer?

9 You say, "Well, here he happened
10 to be -- we think he was the primary owner."
11 But the language is unclear. The Chairman
12 made the point under principal in agency law,
13 he's clearly not a principal.

14 Is that the concept they're
15 determining principal? Or, is it maybe some
16 Webster's definition of principal? There's a
17 lot of meanings to the term principal, and
18 it's certainly not clear here which one
19 they're referring to, said principal.

20 I submit given that it is a
21 contract of adhesion, we recommend that you
22 again look at the cases we've cited that all

1 say the contracts of adhesion must be
2 construed against the drafter.

3 VICE CHAIRMAN MULVEY: If Mr.
4 Cohen is not the principal, who would be the
5 principal of this company? Would there be any
6 principal at all?

7 MR. COLLINS: I'm not sure.

8 VICE CHAIRMAN MULVEY: Would it be
9 his sister?

10 MR. COLLINS: I'm not sure it's
11 talking about principal of the company. It
12 could be talking about principal in agency
13 determination.

14 VICE CHAIRMAN MULVEY: The shipper
15 then?

16 MR. COLLINS: The shipper. So,
17 I'm not sure. Again, we asked them
18 specifically, "What do you mean by principal?"
19 And they didn't answer that in the reply.

20 VICE CHAIRMAN MULVEY: Another
21 thing I wanted to ask you: you mentioned there
22 was another shipper -- another carrier,

1 rather, in the market. Given that this
2 provision was in the contract, are you
3 suggesting that if Mr. Cohen, who obviously
4 has some business problems since the company
5 did go bankrupt, if he would've known about
6 this provision, he probably would've gone to
7 the other carrier, who did not require that
8 the principal pay?

9 MR. COLLINS: I'm not sure whether
10 that other -- I can't say whether that other
11 carrier also includes a language in its bill
12 of lading or tariff. But I know that he -- he
13 would've had --

14 VICE CHAIRMAN MULVEY: The
15 suggestion was --

16 MR. COLLINS: -- that opportunity
17 if he had known that they were seeing to hold
18 personal liability against a corporate entity.

19 VICE CHAIRMAN MULVEY: Well, the
20 suggestion was that only two carriers that we
21 were aware of, one in the Alaskan trade, and
22 one in the Hawaiian trade, which is this one,

1 Horizon, only they have that provision in
2 their tariff. And presumably then, the other
3 one does not.

4 MR. COLLINS: I don't want to say
5 for sure on that. I just don't want to
6 mislead the board in any way by making a
7 statement that I'm not sure is correct.

8 CHAIRMAN ELLIOTT: I'll follow up
9 one bit on Chairman Nottingham's questions
10 earlier. With respect to -- I mean is it
11 plausible that Mr. Cohen or West Point could
12 have done business in this manner without
13 looking at all at the tariff? Because you
14 would think that he would have to make a
15 financial decision to know the economic of
16 shipping, and that he'd have to at least look
17 at the tariff to -- to determine that.

18 MR. COLLINS: I would submit it's
19 not -- in our experience in the transportation
20 law, it's found -- tariffs are published, and
21 sometimes you have to check a ding to -- you
22 know, it identifies how many people have read

1 the tariff.

2 In clients we've represented over
3 the course of three years, the only person
4 that has ever looked at tariffs have been the
5 people who drafted them. They simply aren't
6 looked at. You get the information for how
7 much is the cost.

8 If there's a bill of lading, you
9 might look -- you might look through the bill
10 of lading. You never go to the tariff as a
11 practical matter. It's a myth. And in fact,
12 here if they had provided a bill of lading,
13 they'd have a much stronger argument to say,
14 "We should hold you liable. Here is the bill
15 of lading." But they never even provided the
16 bill of lading, obviously because it doesn't
17 have the principal's language. Thank you, I
18 appreciate you --

19 CHAIRMAN ELLIOTT: Thank you, Mr.
20 Collins.

21 COMMISSIONER NOTTINGHAM: Mr.
22 Chairman, just to touch on one of Mr. Collins'

1 points, he talked about the agency and
2 principal theories, and involved the point
3 that you very skillfully raised, that
4 different parties and individuals can meet
5 certain definitions depending what their
6 capacity is.

7 Clearly, you can be both. You can
8 be an agent. As a forwarder, you can be an
9 agent for your customer because you're
10 promising to handle his or her goods. But
11 then when you go and contract with a carrier,
12 you can also be, if you're the president or
13 the sole shareholder or the chairman, you can
14 be the principal in that agreement.

15 In other words, there's no privity
16 -- there's no real privity of contract between
17 underlying owners of this furniture and these
18 goods that were shipped, and the carrier.

19 So, just because somebody plays an
20 agency role as it relates to the owner of the
21 household good and furniture, doesn't mean
22 that the person can't also be a principal in

1 contracting with the carrier.

2 MR. COLLINS: Can I answer that?
3 I don't want to go over my time. I believe
4 that's correct. You can be a principal and an
5 agent. But I think the point I was trying to
6 make was in reading the tariff, because
7 there's no definition of principal, you have
8 no idea which one they're talking about.

9 Are they talking about principal
10 agency relationship? Are they talking about
11 a principal like the head? It's unclear, and
12 we submit that under the laws governing
13 contracts of adhesion they have to -- any
14 ambiguity has to be construed against the
15 drafter. So, that was the point I was trying
16 to make.

17 COMMISSIONER NOTTINGHAM: Mr.
18 Collins, I guess I'm a little bit troubled by
19 the lack of an insurance safety net in
20 transactions such as this. It seems to me
21 that the history of shipping and the history
22 of insurance go hand in hand back many

1 centuries. Lloyd's of London was founded
2 basically to ensure shipping, and shipments.

3 Here we are in the 21st Century,
4 and people can enter the business of
5 forwarding or handling goods for shipment, and
6 not have any kind of insurance? I can't get
7 a licensed plumber or roofer to come work on
8 my house without an underlying insurance or
9 surety bond. Yet you're telling me that
10 commodities can just routinely get shipped
11 thousands of miles, incurring all kinds of
12 risk in handling, and there's just no
13 protection out there in our system to protect
14 the owners of the goods from having to be --
15 having their goods seized or be charged twice
16 for the same service?

17 MR. COLLINS: I don't believe I
18 addressed that issue. If I did --

19 COMMISSIONER NOTTINGHAM: Are
20 freight forwarders required to be licensed by
21 the US Department of Transportation or
22 certified in any way?

1 MR. COLLINS: There are licensing
2 requirements.

3 COMMISSIONER NOTTINGHAM: And are
4 there any insurance or surety requirements
5 that go along with that?

6 MR. COLLINS: I looked at this
7 question in an unrelated case years ago. I
8 believe there are bonding requirements. I
9 believe is my recollection. But it's been a
10 few years since I've looked.

11 COMMISSIONER NOTTINGHAM: Do you
12 know how much? How much dollar value those
13 bonds --

14 VICE CHAIRMAN MULVEY: Are those
15 state requirements or federal requirements,
16 for the bonding? I believe they're state
17 requirements, aren't they, the bonding
18 requirements? Or, are there federal
19 requirements as well?

20 MR. COLLINS: I believe there --
21 I'm sorry.

22 VICE CHAIRMAN MULVEY: Freight

1 forwarders used to be regulated, but they were
2 deregulated awhile back. I think even before
3 we deregulated motor carriers or the
4 railroads.

5 MR. COLLINS: My recollection is
6 that the FMC I believe has licensing and
7 bonding requirements. I believe that's the
8 case, but again, I haven't -- I haven't gone
9 back recently and looked at that issue. But
10 I believe there are licensing and bonding
11 requirements for FMC to be -- to qualify -

12 COMMISSIONER NOTTINGHAM: And on
13 the carrier side -- and maybe Mr. Benner is in
14 a better position to answer this, but I'll go
15 ahead and ask you, Mr. Collins. If the
16 carrier goes bankrupt in the middle of a
17 transaction, and decides to just not pay its
18 bills and not deliver its -- its goods, isn't
19 there some kind of underlying surety or bond
20 or insurance that protects all the customers
21 of that carrier?

22 MR. COLLINS: I believe carriers

1 also have to be bonded and licensed. And I
2 think -- I believe that is the case. And
3 indeed, I think as you pointed out under the
4 terms of the tariff, it -- they're obligated
5 to be paid whether they deliver it or not, or
6 whether it's delivered in bad condition.

7 I would submit that perhaps that's
8 not a reasonable condition, but that's the way
9 the law has evolved, and that's -- so that is
10 -- there is an obligation to pay, regardless
11 of whether they perform. But again, I believe
12 there are licensing and bonding requirements
13 under the FMC for carriers.

14 CHAIRMAN ELLIOTT: Thank you, Mr.
15 Collins. Thank -- thank you all for your
16 attendance today, and your excellent
17 arguments, and we'll take this matter under
18 advisement. The meeting of the board is now
19 adjourned. Thank you.

20 (Whereupon, the above-entitled
21 matter went off the record a 10:24 a.m.)
22

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TARIFF HORIZON LINES, LLC- STB HRZD-468 (BETWEEN US, PR, CN& HI)

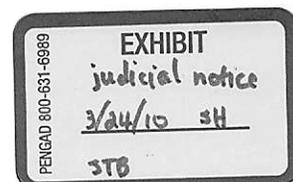
RULE# CYC# APP TITLE

360- BILLS OF LADING

Filed on: 14MAR2003 Effective: 17MAR2003 Thru: Expire:

RULE TEXT

1. A. All property to be transported shall be held, carried and delivered subject to the conditions of the regular current Bills of Lading. While in possession of Motor Carrier, and the terms and conditions shown in Rule 360(2) while in possession of Carrier.
- B. Government Cargo will be accepted on and subject to provisions of the U.S. Government Bill of Lading standard form 1103, the terms of which are shown in Rule 360(3).
- C. Bills of Lading must show the name and address of both Shipper and Consignee: and on shipments "To Order" the name and address of the party to be notified must also appear.
- D. Shipments on straight Bills of Lading may be delivered by Carrier without requiring surrender of original straight Bill of Lading.
- E. Shippers requiring that original Bill of Lading properly endorsed be surrendered to Carrier before delivery, must secure an Order Bill of Lading.
- F. Cargo moving under an order Bill of Lading will be delivered only upon surrender by the holder of the properly endorsed original order Bill of Lading, unless a satisfactory explanation has been given for the failure to surrender and a financially responsible person has agreed in writing to indemnify Carrier against claims of misdelivery.
- G. Shippers should tender Carrier's required cargo document at or before the time a shipment is tendered to Carrier. Carrier's required document is the Carrier's dock receipt, container load movement form or equivalent document as approved by the Carrier and containing sufficient information to enable the Carrier to completely prepare rate and extend a Bill of Lading. Commodity description requires a written, English, description of the cargo. (Cargo moving under Government Bill of Lading may be described by government codes.)
- H. Carrier reserves the right to decline to accept



for carriage, or having accepted, to return to Shipper, any Non-Perishable Cargo for which this required cargo document has not been received by Carrier. In any event, except for Perishable Cargoes, no shipment will be delivered to a Consignee until Carrier has received the required cargo document.

2. Bills of Lading - Terms and Conditions as described in Carrier's current Bill of Lading
3. Bills of Lading - U.S. Government Standard Form 1103, Terms and Condition Reverse of SF 1103 and SF 1131

Terms and Conditions

It is mutually agreed and understood between the United States and Carriers, including Forwarders who are parties to this Bill of Lading that: This Bill of Lading is governed by the regulations relating thereto as published in Title 4 Part 52 of the Code of Federal Regulations.

Except as provided in 4 CFR 52 or as otherwise stated herein, this Bill of Lading is also subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the Carrier.

Prepayment of charges shall in no way be demanded nor the Carrier make any collection of charges at time of delivery.

General Instructions and Administrative Directions

1. Continuation sheets of the prescribed form should be used and attached hereto, other space under description of Articles on the face of this Bill of Lading is inadequate.
2. Where Assessorial or special services, such as exclusive use of car or truck, expedited service, protective service, reconsignment, etc. are ordered incidental to the line-haul transportation, the Bill of Lading shall be endorsed to show the name of the Carrier upon which the request was made and the kind and scope of the special services ordered. The endorsement may be placed on the face hereof under the "Description of Articles" or in the block reserved for "Marks" if space is available, or in the space provided on this page for "Special Services Ordered" and shall be signed by or for the person who ordered the services. If such an endorsement is impractical, the same information may be set forth in a statement bearing the number of the covering Bill of Lading, which shall be signed by or for the person who ordered the services and, if possible, attached to the Bill of

Lading. If the Bill of Lading is not available, the original and one copy of the statement shall be surrendered to the Carrier from which the services were ordered, the original to be transmitted to the last line-haul Carrier for presentation in connection with the bill for line-haul transportation charges.

Where assessorial or special services are shown as ordered but were not furnished, the Bill of Lading shall be so annotated.

3. Shortage or dunnage reports shall be made on agency designated forms, not on the Bill of Lading. Consignees shall observe the instructions on the reverse of the Consignee's Copy of the Bill of Lading.
4. 5 GAD 3 issued by the Comptroller General of the United States contains detailed billing instructions. Copies may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

***** End of Report *****

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TARIFF HORIZON LINES, LLC- STB HRZD-468 (BETWEEN US, PR, CN& HI)

RULE# CYC# APP TITLE

361- BILL OF LADING TEXT

Filed on: 03MAY2006 Effective: 03MAY2006 Thru: Expire:

RULE TEXT-----
All property transported, shall be held, carried, and delivered subject to the terms and conditions of this tariff and Carrier's bill of lading. Carrier's form of bill of lading can be obtained gratis on application for the convenience of shippers who desire to prepare their own bills of lading. Carrier will issue a bill of lading upon information furnished in writing by shipper, giving name of shipper, destination, name of consignee, correct description of cargo, marks, number, and gross weight of packages (see also back of Carrier's bill of lading). For terms and conditions of Carrier's Bills of Lading, see Rule 361-01.

***** End of Report *****

TARIFF RULES LISTING
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Date: 23JAN2009

TARIFF HORIZON LINES, LLC- STB HRZD-468 (BETWEEN US, PR, CN& HI)

RULE# CYC# APP TITLE

361-01 BILL OF LADING TEXT

Filed on: 03MAY2006 Effective: 03MAY2006 Thru: Expire:

RULE TEXT

RECEIVED in apparent good order and condition from the shipper, or shipper s agent, the number of containers or other packages or units said by shipper to contain the goods described in the Particulars Furnished By Shipper, to be transported from the Port of Loading (Box 15) or, if applicable, the Place of Initial Receipt (Box 13) to the Port of Discharge (Box 16) or, if applicable, the Place of Delivery by On-carrier (Box 17), there to be delivered to consignee or on-carrier on payment of all charges due thereon. Carrier makes no representation as to the the correctness of the particulars furnished by the shipper.

In accepting this bill of lading, the shipper consignee, holder hereof and the owners of the goods (each of whom is sometimes referred to herein as Merchant) agree, the same as if signed by each of them, that the receipt, custody, carriage, relay, delivery and any transshipping of the goods are subject to the terms appearing on the face and back hereof, which shall govern the relations, whatsoever they may be, between shipper, consignee, the owners of the goods and any holder hereof and Carrier, its agents, contractors, employees, master and vessel in every contingency occurring and whether Carrier be acting as such or bailee. Carrier shall have the right to stow containers, vans or trailers on deck and without notice as per Clause 9. The terms hereof shall not be deemed waived by Carrier except by written waiver signed by Carrier or its duly authorized agent.

1. CLAUSE PARAMOUNT. This bill of lading shall have effect subject to all the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, as if set forth herein. However, insofar as it may provide greater rights to the holder hereof, the provisions of the International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading signed at Brussels, August 25, 1924 as amended by the Protocol , signed at Brussels, February 23, 1968 (VISBY RULES) and at Brussels, December 21, 1979 (S.D.R. Protocol) shall apply to goods whether carried on or under deck, to carriage of goods between U.S. ports, or between non-U.S. ports, before the goods are loaded on and after they are discharged from the vessel, and throughout the entire time the goods are in the actual custody of Carrier, whether acting as carrier, bailee or stevedore.

If this bill of lading is issued in or the goods are delivered to a locality where there is in force a compulsorily applicable Carriage of Goods by Sea Act, ordinance of statute similar to the International

Convention for the Unification of Certain Rules Relating to Bills of Lading dated at Brussels, August 25, 1924, then it is subject to such Act, ordinance or statute before the goods are loaded on and after they are discharged from the vessel and throughout the entire time the goods are in the actual custody of Carrier, whether acting as carrier, bailee or stevedore.

Carrier shall be entitled to the full benefit of all rights and immunity under, and all limitations of or exemptions from liability contained in any law of the United States or any other place whose law shall be compulsorily applicable. If any term of this bill of lading be repugnant to the Carriage of Goods by Sea Act of the United States or any other law compulsorily applicable, such term only shall be void to that extent but no further.

This bill of lading shall be construed and the rights of the parties hereunder determined according to the laws of the United States.

2. PARTIES COVERED. If the vessel or other craft in use is not owned by or chartered by demise to Carrier Horizon Lines, LLC, this bill of lading shall take effect for purposes of limitation of liability only, as a contract with the owner or demise charterer, as the case may be. If it shall be adjudged that any person other than the owner or demise charterer (including the master, time charterer, agents, stevedores, lashers, watchmen and other independent contractors) is the carrier or bailee of the goods, or is otherwise liable in contract or in tort, all rights, exemptions, and limitations of liability provided by law and by the terms of this bill of lading shall be available to such other persons. In contracting for the foregoing rights, exemptions, and limitations of liability, Carrier is acting as agent and trustee for the persons above mentioned. Particulars of the ownership of the vessel or other craft used may be obtained from Carrier or its agents.

3. SCOPE OF VOYAGE. The voyage herein contracted for shall include ports in or out of the advertised, geographical, usual or ordinary route or order. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may before or after proceeding toward the port of discharge, make trial trips or tests, take fuel or stores at any port in or out of the regular course of the voyage, sail with or without pilots, tow and be towed, and save or attempt to save life, vessels in distress or other property; and all of the foregoing are included in the contract voyage.

Carrier shall have the right, without notice, to substitute or employ a vessel, watercraft, or other means rather than the vessel named herein to perform all or part of the carriage. When the port of destination or discharge is not served by Carrier's containership, Carrier may, at any intermediate port, break bulk of cargo shipped in containers.

4. RISKS AND LIBERTIES. In any situation which in the

judgment of Carrier or the master is likely to give rise to risk of seizure, arrest, detention, damage, delay to, or loss of any goods or the vessel, or to make it imprudent for any other reason to receive, keep or load the goods, or continue the voyage, or discharge the goods. Carrier or the master shall have the right (a) to decline to receive, keep or load the goods or to discharge or devan them at any convenient port or place and to require the shipper or person entitled thereto to take delivery and if he fails to do so, to store them at the risk and expense of the goods; or (b) to discharge or devan the goods into any lighter, craft, depot or other place; or (c) to retain the goods on board until the return trip or until such time as Carrier or the master deems advisable; or (d) to substitute another vessel or to transship or forward the goods, or any part thereof, by any means, but always at the risk and expense of the goods. Any disposition of the goods pursuant to this clause shall constitute complete performance of this contract by Carrier who shall be free of further responsibility. For any and all service rendered as herein provided, Carrier shall be entitled to reasonable extra compensation and shall have a lien on the goods.

Goods shut out or not loaded on a vessel for any reason can be forwarded on a subsequent vessel or by feederships, lighters, aircraft, trucks, trains or other means in addition to the ocean vessel, or its substitute, to accomplish the carriage herein.

5. GOVERNMENTAL ORDERS. Carrier or the master shall have liberty to comply with any orders, directions, regulations, requests or suggestions given by or received from the government of any nation or by any person purporting to act with the authority of such government. Any disposition of the goods pursuant to this clause shall constitute completion of the contract of carriage by Carrier, and the goods thereafter shall be solely at their own risk and expense.

6. PACKING OF CONTAINERS - SHIPPER S GUARANTY - INDEMNITY. Carrier shall not be responsible for the safe and proper stowing of cargo in containers if such containers are packed by the shipper or shipper s agent and no responsibility shall attach to Carrier for any loss or damage caused to contents by shifting, overloading, or failure to label or properly chock, lash or pack the goods in the container within their individual packages. The shipper or shipper s agent shall properly seal containers loaded by them. The shipper, or its agent shall carefully inspect and clean containers, if necessary, before packing them. Acceptance and packing of the containers shall be prima facie evidence that the containers were sound, clean and suitable for use and shall relieve Carrier of responsibility for any damage to goods carried resulting from the condition of the container used. Containers as used herein include all types of containers for dry, liquid, and perishable cargo, as well as vans and trailers.

The shipper, consignee, holder hereof and owner of the goods agree to be liable for and shall hold harmless and

indemnify Carrier for any injury, loss or damage, including fines, penalties, and reasonable attorney s fees arising from the shipper s failure to properly describe, label, # stow or secure the goods in containers or to clean containers and also for damage or expense caused by the goods to the containers, other property, or for injury or death to persons.

7. PERISHABLE GOODS. Goods of a perishable nature are carried in dry containers without environmental or atmospheric control or other special services unless the face of this bill of lading notes that the goods are to be carried in a refrigerated, heated, specially ventilated or otherwise specially equipped container. This carriage is subject to the special services and charges offered in the Carrier s tariff.

The Merchant is responsible for bringing the goods to the proper temperature before loading the goods into the containers, for the proper stowage of the goods within the container, for setting the temperature (including maintenance and repair), during all times before containers are delivered to the Carrier and after they are delivered by the Carrier. The Carrier is not responsible for product deterioration caused by inherent vice, defects in the merchandise or transit times in excess of the product s shelf life. Refrigerated, heated, specially ventilated or otherwise specially equipped containers are not equipped to change the temperature of goods. (They are equipped only to maintain temperature.) Merchant will give written notice of requested temperature setting of the thermostatic controls before receipt of the goods by the Carrier. When a loaded container is received, the Carrier will verify that the thermostatic controls are set to maintain container temperature as requested. The Carrier is unable to determine whether the goods were at the proper temperature when they were loaded into the container or when the container is delivered to the Carrier. Air temperature at the unit sensor will be maintained within a range of plus or minus 5 degrees Fahrenheit of the temperature requested by the shipper on the face of this bill of lading., if the goods were at that temperature when loaded into the container and if the temperature controls were properly set when the container was loaded. The Carrier is not responsible for temperature fluctuations that do not exceed 4 hours duration.

8. LIVE ANIMALS. Live animals, birds, and fish are received, kept and carried solely at shipper s risk of accident, disease or mortality and without warranty or undertaking whatsoever by Carrier.

9. STOWAGE ON DECK. Goods may be stowed in any covered-in space or loaded in or on a container, van or trailer and carried on deck and such shall be deemed to be stowed under deck for all purposes, including General Average and the Carriage of Goods by Sea Act, the Hague Rules or other compulsorily applicable legislation.

If the goods are shipped on deck not in containers, they will be carried solely at the risk of the goods and

without any liability but, in any event, the Carrier shall have the benefits, defenses and limitations of liability available under the Carriage of Goods by Sea Act, the Hague/Visby Rules or as contained herein.

10. TRANSSHIPMENT. If the goods are destined for a port or destination not served by Horizon Lines, LLC, or other carriers serving through routes with Horizon Lines, then upon the request and at the risk of the shipper, the goods will be delivered for transshipment or forwarding at the Port of Discharge or Place of Delivery by On-carrier served by Carrier s() vessel(s) or other mode of transport. In such case, Horizon Lines, LLC or participating carriers will have not further duty or responsibility whatsoever as Carrier, this bill of lading operating only as a document of title thereafter.

11. DELIVERY AND STORAGE. Except at ports where Carrier delivers goods directly to the consignee, delivery shall take place and Carrier shall have no further responsibility when the goods are landed upon a safe dock, lighter, or other craft and custody is take by port or government authorities, terminal operator or lighterman. At ports where Carrier delivers goods to consignee, if the consignee does not take delivery as soon as the goods are ready, the goods shall thereafter be at their own risk and expense. Carrier shall have the right, but not the duty, to store containers in the open before loading or after discharge.

12. EXPENSE, FINES. The shipper and consignee shall be liable for, and shall indemnify Carrier and vessel and hold them harmless against, and Carrier shall have a lien on the goods for all expenses and charges of mending, coopering, repairing, fumigating, devanning, restowing, storing or reconditioning, and all expenses incurred for the benefit or protection of the goods, also for any payment, duty, fine or other expenses including but not limited to court costs, expenses, and reasonable attorney s fees incurred or levied upon Carrier or the vessel in connection with the goods because of shipper s failure to comply with any laws or regulations.

13. FREIGHT, LIENS, QUANTITY. Freight shall be payable, at Carrier s option, on gross weight, measurement ton, or on value as set forth in Carrier s tariff. Carrier shall have the right, but not the duty to open packages or containers and, if shipper s particulars are found to be erroneous, the shipper, consignee and the goods shall be liable for the correct freight charge and any expenses incurred in examining, weighing, measuring or valuing the goods.

Full freight to the port of discharge named on the face of this document and all advance charges against the goods shall be considered completely earned on receipt of the goods by Carrier, even though the vessel or goods are damaged or lost or the voyage is frustrated or abandoned.

All sums payable to Carrier are due when incurred and shall be paid in full, in United States currency, or, at

Carrier's option, in its equivalent in the currency of the port of loading or the port of discharge, or as specified in tariffs or conference agreement.

The shipper, consignee, holder hereof, and owner of the goods shall be jointly and severally liable to Carrier for the payment of all freight, demurrage, General Average and other charges, including but not limited to court costs, expenses and reasonable attorney's fees incurred in collecting sums due Carrier. Payment of ocean freight and charges to a freight forwarder, broker or anyone other than Horizon Lines, LLC or its authorized agent, shall not be deemed payment to the Carrier and shall be made at payor's sole risk.

Carrier shall have a lien on the goods, which shall survive delivery, for all charges due and may, without notice, enforce this lien by public or private sale of the goods and other property belonging to the shipper, consignee, holder hereof or owner of the goods which may be in Carrier's possession.

14. BOTH TO BLAME COLLISIONS. If the vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or of the servants of Carrier in the navigation or in the management of the vessel, the owners of the goods carried hereunder will indemnify Carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners if said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision, contact, stranding or other accident.

15. GENERAL AVERAGE. General Average shall be adjusted, stated and settled according to York Antwerp Rules 1974, except Rule XXII thereof, at the place selected by Carrier, and as to matters not provided for by these Rules, according to the laws and usage at the port of New York. Average agreement or bond and such additional security as may be required by Carrier, must be furnished before delivery of the goods.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, Carrier is not responsible, by statute, contract or otherwise, the goods, the shipper and the consignee shall contribute with Carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges

incurred in respect of goods. If a salvaging ship is owned or operated by Carrier, salvage shall be paid for as fully and in the same manner as if the salvaging ship belonged to strangers. Cargo shall pay its contribution to General Average even when such average is the result of fault, neglect or error of the master, pilot or crew. The shippers and consignees expressly renounce all codes, statutes, laws or regulations which might otherwise apply.

16. FIRE. Carrier shall not be liable for any loss or damage to goods occurring at any time, even though before loading on or after discharge from the vessel, by reasons or by means of any fire whatsoever, unless such fire shall be caused by the actual fault or privity of Carrier.

17. VALUATION. In the event of loss, damage or delay to or in connection with goods, exceeding in actual value the equivalent of \$1,000 lawful money of the United States, per package, or in case of goods not shipped in packages, per shipping unit, the value of the goods shall be deemed to be \$1,000 per package or unit, unless the nature and higher value of goods have been declared by the shipper herein and extra charges paid as provided in Carrier's tariff. However, Carrier's liability shall not exceed the invoice value of the goods. The word package shall include a unitized load, group, assemblage or dunnage, including a skid, cradle, or pallet. When the U.S. Carriage of Goods by Sea Act does not apply of its own force, the \$1,000 limitation shall apply to each shipping or customary freight unit or piece, provided always that any compulsorily applicable limitation which is greater than the \$1,000 limitation shall apply in place of the \$1,000 limitation.

18. NOTICE OF CLAIM-TIME FOR SUIT-JURISDICTION. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days after delivery.

Carrier and the vessel shall be discharged from all liability in respect of loss or damage unless a claim in writing has been made within one year after delivery of the goods or the date when the goods should have been delivered; or, if a claim has been timely made, but declined, suit is not brought within two years from the date of declination of the claim in whole or part. Suit shall not be deemed brought against Carrier or vessel until jurisdiction shall have been obtained over Carrier or the vessel, or both, by service of process thereon.

Carrier may, at its sole discretion, and on the basis that it has not been prejudiced by the passage of time, waive notice requirements or other time limits. Nevertheless, Carrier will not entertain claims which are

filed later than three years from the date of delivery of the goods, or the date when the goods should have been delivered.

19. FINAL AGREEMENT. All prior agreement, docks receipts or freight engagements for the shipment of the goods and all other arrangements are superceded by this bill of lading and Frieght Tariff Rules and Regulations on file with the Surface Transportation Board, which are incorporated herein by reference and form part of this bill of lading as if set forth herein at length. Copies of the Freight Tariff Rules and Regulations are available upon request.

20. SHIPPER S WARRANTIES. The shipper warrants that he is the owner of and entitled to possession of the goods or has the authority of the owner and all persons entitled to possession of the goods to agree to the terms hereof.

21. THROUGH AND ON BOARD BILLS OF LADING. When used in or endorsed on this bill of lading the words ON BOARD shall mean on board the exporting vessel or on board another mode of transportation operated by or on behalf of the originating carrier and enroutte to the port of loading for loading aboard the participating carrier s vessel.

The participating land carrier s bill of lading lawfully in effect on the date of issue of this bill of lading shall, together with the rules, tariffs and classifications of such participating carrier and applicable rules and regulations of government agencies with jurisdiction over such land carriage govern and control the possession and carriage of the goods by such participating carrier, Copies of said bill of lading form are available from such participating carrier or its agents on request. However, insofar as Clauses 1, 9, 17, 18 and 22 shall give greater rights to the holder hereof, they shall be applied.

22. CLAIMS. Claims for loss of or damage to the goods agreed to be carried under the terms of this bill of lading may be filed against Horizon Lines, LLC, which agrees to be solely responsible for processing said claims to conclusion. It is agreed that in the event of payment of any such claims by Horizon Lines, LLC it consignee against all others, including participating carriers, on account of such loss or damage. Claims must be filed and suit commenced within the time limits provided by law and the terms of the bill of lading and tariff. When loss or damage occurs at any time from the time the cargo has been delivered to Carrier at the Port of Loading or, if applicable, Place of Initial Receipt until it has been delivered to the Consignee or its agent at the Port of Discharge or if applicable, the Place of Delivery by On-carrier, it shall be deemed, as between the shipper, consignee or holder hereof and Horizon Lines, LLC that the loss or damage occurred aboard the vessel while in the custody or control of Horizon Lines, LLC, All adjustments of such loss or damage shall be made in accordance with Clause 1, CLAUSE PARAMOUNT of this bill of lading.

However, should Horizon Lines, LLC recover an amount greater than such adjustment from the actual person which was responsible for the loss or damage, such amounts shall be forwarded to the claimant upon receipt.

Except as otherwise provided herein, Carrier will not be liable for indirect, special or consequential damages.

***** End of Report *****