

cc: OS
GC
ALJ(2)
Pub

ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

WESTERN HOLDING GROUP, INC.; MARINE EXPRESS, INC. and
CORPORACIÓN FERRIES DEL CARIBE, INC.

Complainants

vs.

THE MAYAGÜEZ PORT COMMISSION;
HOLLAND GROUP PORT INVESTMENT (MAYAGUEZ), INC.

Respondents

FMC Docket
No. 08-06

FEDERAL MARITIME COMMISSION

2009 JUL 10 PM 2:01

RECEIVED

**WESTERN HOLDING GROUP, INC.; MARINE EXPRESS, INC. AND
CORPORACIÓN FERRIES DEL CARIBE, INC.
ANSWER TO COUNTER-COMPLAINT**

Western Holding Group, Inc.; Marine Express, Inc. and Corporación Ferries del Caribe, Inc. (hereinafter "Western Holding, Marine Express and Ferries del Caribe" respectively, or collectively the "Counter-Respondents") hereby respond to the Counter-Complaint presented by Holland Group Port Investment (Mayagüez), Inc. ("Holland Group") as follows:

I. COUNTER-COMPLAINANT/RESPONDENT

The Counter-Complaint Respondents, Western Holding, Marine Express and Ferries del Caribe admit and accept the corporate descriptions of the Counter-Complainant Holland Group as set out in part I of the Counter-Complaint filed on June 10, 2009.

II. COUNTER-RESPONDENT'S/COMPLAINANT

The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit and accept the corporate descriptions of the Counter-Complainant Holland Group as set out in Part I of the Counter-Complaint filed on June 10, 2009.

III. JURISDICTION

The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit and accept that the Commission has jurisdiction over the Complaint and the Counter-Complaint. This jurisdiction is, nevertheless, subject to the statutory power and authority of the Mayagüez Port Commission to interpret and enforce its own Tariff pursuant to the Mayagüez Port Commission Act, Law. No. 10 of 1959, Title 21 P.R. Laws Ann. §§551-560.

=====

IV. MATTER OF COMPLAINT

Tariff Violations:

A. The Counter-Respondent, Marine Express, admits that it has published a freight tariff with respect to certain commodities for carriage. The terms of this Tariff speak for themselves.

B. The Counter-Respondent, Marine Express, admits that it has published a freight tariff, the terms of which speak for themselves.

C. The Counter-Respondent, Marine Express, admits that it has published a freight tariff, the terms of which speak for themselves.

D. The Counter-Respondent, Marine Express, admits that it does not have service contracts filed with the Federal Maritime Commission ("FMC").

E. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have filed a Second Amended Verified Complaint before the FMC, the terms and allegations contained therein speak for themselves.

F. The Counter-Respondent, Marine Express, denies the allegations of Part IV-F of the Counter-Complaint.

G. The Counter-Respondent, Marine Express, denies the allegations of Part IV-G of the Counter-Complaint.

H. The Counter-Respondent, Marine Express, denies the allegations of Part IV-H of the Counter-Complaint.

I. The Counter-Respondent, Marine Express, denies the allegations of Part IV-I of the Counter-Complaint.

J. The Counter-Respondent, Marine Express, denies the allegations of Part IV-J of the Counter-Complaint.

Unreasonable Practices:

K. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny the allegations set forth in Part IV-K of the Counter-Complaint.

=====

L. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny the allegations set forth in Part IV-L of the Counter-Complaint. The Counter-Respondents herein adopt and incorporate all of the allegations set forth at the Second Amended Verified Complaint filed in this matter on May 27, 2009.

M. The Counter-Respondent, Marine Express, admits that it is an ocean common carrier of cargo and passengers under the Shipping Act of 1984; it denies the reasonableness of charges and conditions of the Tariff No. 1 of the Port of Mayagüez, and herein adopts and incorporates all of the allegations set forth at the Second Amended Verified Complaint filed in this matter on May 27, 2009.

N. The Counter-Respondent, Marine Express, admits that it is an ocean common carrier of cargo and passengers under the definition of the Shipping Act of 1984; and herein adopts and incorporates all of the allegations set forth at the Second Amended Verified Complaint filed in this matter on May 27, 2009.

O. The Counter-Respondent, Ferries del Caribe, admits that it provides transportation by sea of passengers for compensation.

P. The Counter-Respondent, Marine Express, admits that it has a Federal Maritime Commission organizational number and publishes a freight tariff pursuant to the regulations of the Federal Maritime Commission.

Q. The Counter-Respondent, Ferries del Caribe, admits that it has on file passenger performance and casualty bonds with the Federal Maritime Commission.

R. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have filed a Second Amended Verified Complaint in this matter on May 27, 2009, the terms of which speak for themselves.

S. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have filed a Second Amended Verified Complaint in this matter on May 27, 2009, the terms of which speak for themselves.

=====

T. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have filed a Second Amended Verified Complaint in this matter on May 27, 2009, the terms of which speak for themselves.

U. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny the allegations of Part IV-U of the Counter-Complaint. The Port of Mayagüez Tariff No. 1 has no designation for an entity identified as an "ocean common carrier". The Counter-Respondents have historically applied apply the only definition applicable to their operation within the terms of the present Tariff, as well as all previous Tariffs, applicable at the Port of Mayagüez. This practice follows the same interpretation of this Section, as well as to a similar section in the preceding Tariff, applied by the Puerto Rico Ports Authority, and the Mayagüez Port Commission, and Holland Group. Under the terms of Tariff No. 1, and the definitions and descriptions set forth therein, this is the only category applicable to the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, and as further resolved in the Mayagüez Port Commission Resolution and Order of June 26, 2009 (CPM-2009-05).

V. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, refer to the terms of the Shipping Act (46 U.S.C. § 40102(6)(B)), which speak for themselves. The applicable interpretative case law on the Shipping Act makes clear that the Shipping Act term "ferry boat" is not applicable to the operations of the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe; and the terms of the Shipping Act should not be confused or misinterpreted with the definitions adopted under Tariff No. 1 of the Port of Mayagüez, and as further resolved in the Mayagüez Port Commission Resolution and Order of June 26, 2009 (CPM-2009-05).

W. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have submitted various complaints to both Holland Group and the Mayagüez Port Commission with respect to charges imposed by Holland Group, allegedly under the definitions set forth by Tariff No. 1. The terms and allegations set forth in those complaints are adopted herein.

=====
For purposes of the record the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, affirmatively allege that the definitions found in Tariff No. 1 for "cruise vessels" are not applicable under the terms set forth under said definition. The Mayagüez Port Commission issued its Resolution and Order of June 26, 2009 (CPM-2009-05), which is herein adopted.

X. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have submitted numerous complaints to Holland Group and to the Mayagüez Port Commission with respect to attempts by Holland Group to collect charges and fees under a capricious and strained interpretation of Tariff No. 1. The Mayagüez Port Commission issued its Resolution and Order of June 26, 2009 (CPM-2009-05), which is herein adopted.

Y. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they have filed numerous complaints with Holland Group and the Mayagüez Port Commission with respect to the capricious and strained interpretation of Tariff No. 1 made by Holland Group in modifying the terms of charges imposed on the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe. The Mayagüez Port Commission issued its Resolution and Order of June 26, 2009 (CPM-2009-05), which is herein adopted.

Z. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, admit that they attended and presented views on certain Tariff provisions in public hearings conducted by the Mayagüez Port Commission with respect to the administrative process in the adoption of Tariff No. 1 in 2007. The Mayagüez Port Commission and the Holland Group correctly interpreted Sections 16.4.2 and 16.5.3 between 2007, 2008 and up to April 1, 2009. The acts of the Holland Group in reversing its interpretation of Tariff No. 1 was done in bad faith and to retaliate against the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe.

AA. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-AA of the Counter-Complaint. It should be mentioned that Mayagüez Port Tariff No. 1 has no definition for a category identified as "ocean common carrier."

=====

BB. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-BB of the Counter-Complaint. It should be mentioned that Mayagüez Port Tariff No. 1 has no definition for a category identified as "ocean common carrier." The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, have at all times applied the only definition as per the specific terms of Tariff No. 1 that was applicable to them; this being, the definition which was accepted and imposed by the Puerto Rico Ports Authority, the Mayagüez Port Commission and Holland Group from 1998 up to April 1, 2009.

CC. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-CC of the Counter-Complaint. It should be mentioned that Mayagüez Port Tariff No. 1 has no definition for a category identified as "ocean common carrier." The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, have at all times made full and complete payment of all charges, impositions and fees that were proper and correct under the terms of Tariff No. 1.

DD. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-DD of the Counter-Complaint. The proper application of Tariff No. 1 could in no manner cause any disruption to the Port, or any interference with other potential Port users. The proper application and interpretation of Mayagüez Port Tariff No. 1 could in no manner be considered a deceptive practice.

EE. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-EE of the Counter-Complaint. The proper application of Tariff No. 1 could in no way, form, or manner cause the disruption to the Port or the interference with other potential Port users. The proper application and interpretation of Mayagüez Port Tariff No. 1 could in no way, form, or manner, be considered a deceptive practice. Mayagüez Port Tariff No. 1 contains no definition, class or category of users identified as "ocean common carriers" and it is the self serving scheme of the Holland Group to confuse the terms set out in the Shipping Act with definitions set out in the Mayagüez Port Commission Tariff No. 1.

=====

FF. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-FF of the Counter-Complaint. The proper application of Tariff No. 1 could in no manner cause any disruption to the Port, or any interference with other potential Port users. The proper application and interpretation of Mayagüez Port Tariff No. 1 could in no manner be considered a deceptive practice. The Port of Mayagüez Tariff No. 1 contains no description, class or category of users identified as "common carrier cruise operators", and the Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, have strictly applied the definitions set forth in Tariff No. 1 in the same manner and form as had been done by the Puerto Rico Ports Authority, the Mayagüez Port Commission, and Holland Group between 1998 and April 1, 2009.

GG. The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part IV-GG of the Counter-Complaint.

V. Violations of the 1984 Act And Commission Regulations

(A) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(A) of the Counter-Complaint.

(B) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(B) of the Counter-Complaint.

(C) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(C) of the Counter-Complaint.

(D) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(D) of the Counter-Complaint.

(E) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(E) of the Counter-Complaint.

(F) The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny in their totality the allegations set forth in Part V-(F) of the Counter-Complaint.

=====

VI. INJURY SUFFERED BY COMPLAINANT

The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, deny that any acts taken by them have caused any injury, damage or loss to Holland Group. It is specifically denied that Holland Group has suffered any damages or loss of revenue. Any deleterious impact on the reputation of the Port, or the reputation of Holland Group, is caused solely and exclusively by the acts and omissions of Holland Group.

VII. PRAYER OF RELIEF

The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe, respectfully pray that the claims and charges alleged in the Counter-Complaint be dismissed, with prejudice and that an award of costs and attorney fees be entered in favor of the Counter-Respondents.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Counter-Complaint fails to state a claim against Western Holding, Marine Express or Ferries del Caribe upon which relief or a remedy can be granted.

SECOND AFFIRMATIVE DEFENSE

The Counter-Respondents, Western Holding, Marine Express and Ferries del Caribe incorporate and adopt by reference all of the factual allegations contained in the Second Amended Verified Complaint.

THIRD AFFIRMATIVE DEFENSE

Holland Group lacks standing to invoke, assert or prosecute the claim or claims set out under Part IV of the Counter-Complaint.

=====

FOURTH AFFIRMATIVE DEFENSE

The claims set forth in Part V of the Counter-Complaint have been fully submitted to decision before the Mayagüez Port Commission. The Mayagüez Port Commission has entered final Resolutions and Order, CPM-2009-05-06-07, all dated June 26, 2009, which are herein adopted. The claims under this part are baseless, unwarranted and filed only to oppress and harass the complainants.

FIFTH AFFIRMATIVE DEFENSE

The definition of "cruise ship" under Mayagüez Port Tariff No. 1 is:

"Means ships designed with cabins and engaged for transporting or carrying twelve or more passengers, used primarily for conducting cruises or tour services **and not designed for carrying Cargo.**" (bold added)

The definition of "ferryboat" under Mayagüez Port Tariff No. 1 is:

"Vessels used for transporting passengers and/or merchandise in regular periodic and continuous sailing and **which may at the same time render Cargo services.**" (bold added)

SIXTH AFFIRMATIVE DEFENSE

Marine Express, Inc. establishes, observes and enforces just and reasonable regulations, tariffs and practices related to receiving, handling, carrying and invoicing cargo in ocean transit.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 30th day of June, 2009.

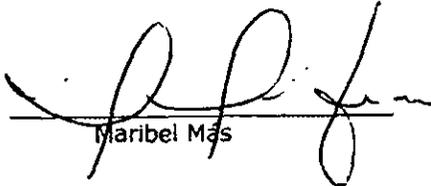
VERIFICATION

I, Maribel Más, of legal age, single, executive, and resident of Mayagüez, Puerto Rico, duly state as follows:

1. That my personal circumstances are as described above.
2. That I am Vice-President of Western Holding Group, Inc.; Marine Express, Inc. and Corporación Ferries del Caribe, Inc.
3. The present Answer to Counter-Complaint in the case of Western Holding Group, Inc.; Marine Express, Inc., and Corporación Ferries del Caribe, Inc. vs. The Mayagüez Port Commission;

and Holland Group Port Investment (Mayagüez), Inc.; before the Federal Maritime Commission, Case No. 08-06 has been prepared by the legal representatives at our instructions.

4. I declare under penalty of perjury that the foregoing is true and correct.



Maribel Más

CERTIFICATE OF SERVICE

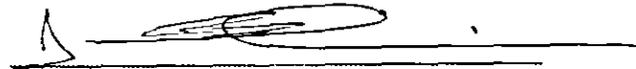
I certify that on this same date, a copy of the foregoing was served by e-mail and post mail upon the following:

José Raúl Cancio Bigas
Charles E. Vilaró Valderrábano
Cancio, Covas & Santiago, LLP
255 Ponce de León Ave.
MCS Plaza, Suite A-267
San Juan, PR 00917
[jraulcancio@ccsllp.com, cvilaro@ccsllp.com]

Elliot J. Halperin
Deana E. Rose
Michael Selter
Manelli Denison & Selter PLLC
2000 M Street NW, Suite 700
Washington, DC 20036
[ehalperin@mdslaw.com, drose@mdslaw.com,
mselter@mdslaw.com]

Antonio Valiente
Quiñones & Arbona, PSC
PO Box 71405
San Juan, PR 00936-8505
[avaliente@qalawpr.com]

In San Juan, Puerto Rico, this 30th day of June, 2009.



Jorge F. Blasini
USDC-PR #213001
J. Ramón Rivera Morales
USDC-PR No. 200701
Jiménez, Graffam & Lausell
Counsel for Plaintiffs Western Holding Group, Inc.,
Marine Express, Inc. and
Corporación Ferries del Caribe, Inc.
PO Box 366104
San Juan, PR 00936-6104
Tel. 787-767-1030 / Fax 787-751-4068
E-Mail: jblasini@jgl.com; rrivera@jgl.com