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BEFORE THE  
FEDERAL MARITIME COMMISSION

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Docket No. 09-01

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 ORIGINAL

MITSUI O.S.K. LINES, LTD.,

COMPLAINANT,

v.

GLOBAL LINK LOGISTICS, INC.; OLYMPUS PARTNERS, L.P.;  
OLYMPUS GROWTH FUND III, L.P.; OLYMPUS EXECUTIVE FUND, L.P.; LOUIS J.  
MISCHIANI; DAVID CARDENAS; KEITH HEFFERNAN;  
CJR WORLD ENTERPRISES, INC.; and CHAD J. ROSENBERG,

RESPONDENTS.

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**GLOBAL LINK'S MOTION TO BE PERMITTED TO INTRODUCE AN EXPERT  
WITNESS REPORT AND TESTIMONY SHOULD THERE BE A NEED FOR  
EVIDENCE ON REPARATIONS**

In the Procedural Order and Briefing Schedule of October 16, 2012, the Presiding Judge directed that the Respondents will be permitted to submit expert testimony upon a showing as to why their expert or experts were not previously identified during discovery. *See* Order at 3. Because the current filings being submitted to the Administrative Law Judge do not address the issue of the amount of reparations, if any, to which MOL is entitled, Global Link is not seeking to introduce an expert report or expert witness testimony at this stage of the proceeding. Indeed, Global Link anticipates that there will be no need for evidence to be presented on reparations in the case given that MOL was a willing participant in the split routing at issue. Should there be a need for evidence on reparations, however, Global Link should be entitled to depose MOL's expert, and to present expert witness reports and testimony in that regard, given that MOL did not submit its expert final report until 8 days before expert discovery was to be completed.

Indeed, in recognition of the unfairness of giving the Respondents such a limited time to: 1) review tens of thousands of pages of transportation records and 14 boxes of source materials; 2) depose MOL's expert; and 3) prepare their own expert reports, MOL itself joined in a motion to extend the deadline for completion of expert discovery. Under these circumstances, the then Presiding Judge's failure to rule on that request should not prejudice the Respondents defense in this action.

### **Relevant Scheduling History**

MOL filed its Complaint in this matter in May of 2009. Over a year later, on June 22, 2010, the ALJ issued a Procedural Order which provided for the completion of all discovery on October 20, 2010. It further provided that MOL would submit its proposed Findings of Fact on November 19, 2010.

On September 3, 2010, MOL requested to extend the deadlines set forth in the Procedural Order on the grounds that the documents at issue in the case are extensive and that it was taking longer than MOL had anticipated to search, retrieve, and scan the shipping documents at issue. *Id.* at 2. In so doing, MOL stated that total number of documents to be produced would possibly be in the hundreds of thousands and that once document production and review was complete, twelve or more depositions would probably need to be taken. *Id.*

As result of MOL's Motion, the Procedural Order was revised and a deadline of March 21, 2011 for the completion of discovery was established. *See* September 21, 2010 Order on Complainant's Unopposed Motion for an Extension of Deadlines.

On March 14, 2011 the Respondents sought a further extension of the discovery deadline on the grounds that MOL had recently produced 40,000 pages of additional documents in response to their discovery requests. MOL did not oppose the relief sought. As a result, the

deadline for completion of discovery was extended until July 18, 2011. *See* March 16, 2011 Order on Respondents' Unopposed Motion for an Extension of Deadlines.

On July 15, 2011, the deadline for the completion of discovery was further extended until October 21, 2011, due to the fact that on May 27, 2011, MOL produced an additional 22,000 pages of documents in discovery. *See* July 15, 2011 Order on Respondents' Unopposed Motion Filed June 28, 2011 for an Extension of Deadlines.

### **Expert Discovery Orders**

On October 19, 2011, MOL filed a Motion for Enlargement of Time for Expert Discovery on the grounds that there were still tens of thousands of shipments it had not yet "analyzed and compared to various tariffs and service contracts in order to calculate any alleged differences in freight rates and accessorial charges." *See* MOL Motion at 1. As a result, MOL sought to extend the time for the completion of expert discovery from October 21, 2011 to January 20, 2012. The Presiding Judge extended the deadline as requested. *See* October 25, 2011 Revised Procedural Order.

On January 12, 2012, eight days before the deadline for completion of expert discovery, MOL finally submitted its expert's final report. *See* January 23, 2012 Joint Status Report and Unopposed Motion for Enlargement of Time for Expert Discovery at page 2. MOL justified its delay in preparing the report on the grounds that "it took longer than anticipated to audit the tens of thousands of transportation records and issue a final narrative report, plus associated spreadsheets." *Id.* at 2. MOL further noted that it was making available a total of fourteen (14) boxes of source material in its office for inspection and review by Respondents' counsel. The Status Report also noted that the parties reserved their right to depose each other's experts. *Id.* As result, the parties sought to extend the expert discovery deadline in the case for ninety days.

The ALJ never ruled on the January 23, 2012 Motion. Given that, absent a ruling on that motion, the discovery deadline had expired, the Respondents' hands were tied in regard to proceeding with the deposition of MOL's expert or identifying their own experts.

**1. The Respondents Should Not Be Punished Due to MOL's Delay in Preparing its Expert Report**

In light of the procedural history set forth above, the Respondents should not be precluded from deposing MOL's expert and from submitting their own experts' reports because they did not do so in the eight (8) days from the time they received MOL's expert report until the completion of expert discovery on January 20, 2012. MOL's expert had years to review hundreds of thousands of documents "in order to analyze and compare various tariffs and service contracts in order to calculate any alleged differences in freight rates and accessorial charges." It would be fundamentally unfair to penalize Global Link and the other Respondents for failing to prepare their own expert reports, rebut such findings, and to take MOL's expert's deposition in eight days.

Such a result would be particularly unjust here in that there has been no prejudice to MOL as a result of the Respondents' failure to submit expert reports and take MOL's expert's deposition in the eight days between January 12, 2012 and January 20, 2012. The Scheduling Order in place, consistent with the Commission's Rules, 46 C.F.R. § 502.251 provides that there will be a ruling on the issue of liability before reaching the issue of reparations. Accordingly, there is no need for expert discovery directed to damages at this juncture. If there is a determination that MOL was a party to the split routing practices at issue, as Respondents have asserted, it will be unnecessary for the parties, the Presiding Judge, and ultimately the Commission, to spend countless hours reviewing the hundreds of thousands of shipping records potentially at issue in this case to determine the amount of reparations.

Further, as reflected in Global Link's submission on the merits, even absent a definitive ruling dismissing MOL's case in its entirety, a ruling addressing whether MOL knew about Global Link's split routing would dispose of the need to review documents associated with the majority of MOL's reparations claims, *i.e.*, for shipments that occurred in 2004, 2005 and the first half of 2006, because they would be time barred pursuant to 46 U.S.C. § 41301.

Under these circumstances, where the Respondents were only given 8 days to depose MOL's expert and to prepare their own expert reports, there is no legitimate basis for precluding the Respondents from preparing expert reports or deposing MOL's expert should the need arise.

Accordingly, Global Link requests that the Respondents, be permitted, if necessary to MOL's expert and to identify their own experts and submit their own expert reports.



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*GLOBAL LINK LOGISTICS, INC.*

DATE: March 1, 2013

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 1st day of March, 2013:

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