

September 6, 2012

Karen V. Gregory Secretary
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Re: *Minto Explorations Ltd. v. Pacific and Arctic Railway and Navigation Co.*
Docket No. 11-21

Dear Ms. Gregory,

Pursuant to 46 C.F.R. 502.2(e), we hereby submit an original and five (5) copies of the Settlement Agreement and the parties' Joint Memorandum for Approval of Settlement and Dismissal of the Complaint with Prejudice. As the settlement resolves all outstanding matters at issue in Docket 11-21, Complainant and Respondent seek dismissal of this proceeding upon approval of the settlement by the Presiding Judge and the Commission.

Respectfully submitted,

_____/s/_____
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Attorneys for Complainant

cc: Hon. Clay G. Guthridge
Administrative Law Judge

James Walsh, Esq.
Counsel for Respondent

Attachments

BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

MINTO EXPLORATIONS, LTD.)	
)	
Complainant)	Docket No. 11-21
)	
v.)	Honorable Clay C. Guthridge
)	Administrative Law Judge
PACIFIC AND ARCTIC RAILWAY AND)	
NAVIGATION COMPANY)	
)	
Respondent)	
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**JOINT MEMORANDUM FOR APPROVAL OF SETTLEMENT AND
DISMISSAL OF THE COMPLAINT WITH PREJUDICE**

Pursuant to Rule 91, 46 C.F.R. § 502.91, Complainant Minto Explorations, Ltd. ("Minto") and Respondent Pacific and Arctic Railway and Navigation Company ("PARN") respectfully submit this joint memorandum in support of their agreement to dismiss this proceeding with prejudice pursuant to a settlement agreement. The settlement agreement meets the Commission's criteria for approval of agreements resolving claims, and the parties therefore respectfully request that it be approved.

INTRODUCTION

In this private complaint action, filed November 18, 2011, Minto challenges PARN's berthage charges applicable to vessels carrying its ore as an undue or unreasonable prejudice and disadvantage to Minto and an undue or unreasonable preference or advantage to others, within the meaning of 46 U.S.C. § 41106 (2), and as a failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, with in the meaning of 46 U.S.C. § 41102 (c). The action sought monetary

reparations, attorney's fees, interest and other appropriate relief. Minto had challenged these charges in the United States District Court for the District of Alaska as an unlawful discrimination under Alaska Stat. § 42.30.020, but on PARN's motion to dismiss or to stay that claim under the doctrine of primary jurisdiction, the Alaska court ruled that these allegations stated a claim under the Shipping Act and stayed its proceedings so that the issue could be presented in the first instance to the Commission.¹

Minto and PARN have engaged in discovery and a motion to compel has been litigated and decided. The parties have also carefully evaluated their claims in the course of the proceeding, as well as the costs and risks of continued litigation, and have negotiated the resolution reflected in the settlement agreement accompanying this memorandum. While each party believes that its position has merit, the parties recognize the potentially high remaining costs of this litigation and the inherent risks in contested cases, and accordingly believe that the settlement agreement reflects a fair and cost-effective resolution of their dispute. Upon approval of the proposed settlement by the Presiding Judge and the Commission, the parties seek dismissal of Docket 11-21.

AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act (APA), 5 U.S.C. § 554(c)(I), requires agencies to give interested parties the opportunity to, *inter alia*, submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

¹ The court's ruling was Attachment 1 to Minto's Complaint filed Nov. 18, 2011. Upon dismissal of this action the parties will also stipulate to dismissal of the Alaska action.

[E]ven where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248-79, at 24 (2d Sess. 1946). Rule 91 borrows language from the APA to give all interested parties the opportunity to submit offers of settlement “[w]here time, the nature of the proceeding, and the public interest permit.” 46 C.F.R. § 502.91(b).

Courts have endorsed use of the APA provision “to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Likewise, “[t]he Commission has a strong and consistent policy of ‘encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid.’” *Valero Refining-Texas, L.P. v. Port of Corpus Christi Authority*, No. 11-18 (I.D. July 11, 2012)(quoting *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978))(brackets omitted).

As explained more fully in *Old Ben Coal*:

‘The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy The resolution of controversies by means of

compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.’

18 S.R.R. at 1092 (citation omitted). *See also Del Monte Corp. v. Matson Navigation Co*, 19 S.R.R. 1037, 1039 (1979); *Behring International, Inc. -Independent Ocean Freight Forwarder License No. 910*, 20 S.R.R. 1025, 1032-33 (Initial Decision; administratively final June 30, 1981).

CRITERIA FOR APPROVAL OF SETTLEMENT

The Presiding Officer “reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake.” *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing (a. k. a. Johnny Yu) Possible Violations of Section 10 of the Shipping Act of 1984 (“World Chance Logistics”)*, 31 S.R.R. 1346, 1350 (FMC 2010) (citations omitted). The Presiding Officer will also review the terms of a settlement agreement, “to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment.” *Id.*

“The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval.” *Id.* The potential costs and uncertainties of success are valid factors to be considered both in the negotiation of a settlement, and in review of a settlement agreement. *Investigation of Urifiled Agreements -Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas*

Container Line, Inc., (“*Yangming*”) 24 S.R.R. 910 (Order Adopting Initial Decision, Mar. 30, 1988).

The parties, who are represented by experienced counsel, have determined based on their careful assessment of the case that the freely negotiated arms’ length agreement between them represents a fair resolution of the matter that avoids the costs and risks of further litigation. There is no indication or evidence whatsoever of fraud, duress, undue influence or mistake or harm to the public. The parties’ assessment that the settlement is a fair one in light of the potential outcomes of further litigation and the desire to avoid the expense and disruption of additional litigation are the types of considerations to which the Commission has regularly deferred in approving settlements. See *World Chance Logistics*, 31 S.R.R. at 1352 (noting that “the parties have presumably weighed their respective chances of success against the cost of achieving such success, and entered into terms that reflect such risk.”)(citing *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia - New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1998) and *Freeman v. Mediterranean Shipping Co. S.A.*, 31 S.R.R. 336, 337 (ALJ 2008)). “Such calculations are common and promote efficient use of adjudicatory resources.” *Id.*

CONCLUSION

Because the agreement does not violate any law or policy, is free of fraud, duress, undue influence, mistake, or other defects that might make it unapprovable, and meets the Commission’s well established criteria for approval, the parties respectfully request that it be approved. The parties further request that upon approval Docket No. 11-21 be dismissed in its entirety with prejudice.

Respectfully submitted,

/s/

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/s/

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Attorneys for Respondent

September 6, 2012

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AND RELEASE AGREEMENT ("Agreement") is made and effective as of the date of the last signature set forth below (the "Effective Date"), between Pacific and Arctic Railway and Navigation Co., an Alaska corporation ("PARN") and Minto Explorations Ltd, a British Columbia corporation ("MINTO"), collectively referred to as the "Parties."

WHEREAS, MINTO filed a Complaint in Federal District Court (the "Federal Action") in Anchorage, Alaska (Case No. 3:11-cv-00031-JWS) alleging three claims against PARN: (1) breach of contract; (2) discrimination in violation of AS 4230.020 and (3) a request for a declaratory judgment that PARN cannot charge ships transporting ore for MINTO a higher dockage fee or tariff than it charges for other vessels;

WHEREAS, the Federal District Court, on August 12, 2011, ruled in favor of MINTO on summary judgment with respect to the breach of contract claim, denied PARN's Motion to dismiss with respect to the discrimination claim, and ruled that MINTO's discrimination claim is subject to the primary jurisdiction of the Federal Maritime Commission;

WHEREAS, the Federal District Court stayed the Action pending the outcome of proceedings before the Federal Maritime Commission;

WHEREAS, MINTO subsequently filed a Complaint against PARN with the Federal Maritime Commission (Docket No. 11-21) (the "FMC Proceeding"), to which PARN filed an Answer;

WHEREAS, the proceeding in the FMC is still underway and not yet determined by the assigned Administrative Law Judge;

WHEREAS the Parties desire to completely and finally resolve and settle any and all claims, rights and actions arising under the Federal Action and the FMC Proceeding and the Parties have negotiated a settlement of all claims arising under the Federal Action and the FMC Proceeding, which is set forth below.

NOW, THEREFORE, for and in consideration of the commitments made herein, the Parties agree as follows:

1. PARN agrees to amend its tariff to set a dockage/berthage rate of \$4.00 per foot for all ore vessels taking on ore concentrates until expiration of PARN's lease (including any extensions) with the Skagway Municipal Borough, subject to an annual increase of no more than the increase in the Consumer Price Index for the Anchorage Municipality (not seasonally adjusted, all items/all urban consumers, annual numbers). The 2011 number for the Index is 201.427 and 2011 will serve as the base year. The adjustment will occur once a year, after the calendar year end numbers are published, usually in February. No rate increase will be retroactive. The first rate increase shall be in February 2013. The percentage rate increase applicable as of February 2013 shall be equal to the change from the year end Index number in 2011 (201.427) to the year end Index number in 2012. The dockage/berthage tariff will be calculated on the basis of each linear foot of ore dock occupied by the vessel at any time during

loading of ore concentrate during any portion of a port call and not the linear footage (or length) of the vessel itself.

To illustrate the calculation of the annual increase: If the year end Index number in 2011 is 201.427 and the year end index number for 2012 is 204.427, that represents an increase of 1.49 percent from the base year of 2011. The \$4.00 per foot dockage/berthage rate will increase to \$4.06. If the year end Index number for 2013 is 208.427, that represents an increase of 3.48 percent from the base year of 2011. The \$4.00 per foot dockage/berthage rate will increase to 4.14 per foot.

2. MINTO will not seek recovery of payments for dockage/berthage. Further, MINTO will not seek recovery of additional charges it paid to the shipowner in August 2009 because PARN breached the agreement by allegedly causing the ore carrier engaged by MINTO to wait by claiming a false emergency.

3. PARN reserves the right to pursue the M/V PAC STAR and its owner for damage to PARN's ore dock. However, PARN agrees not to pursue MINTO for any such damage.

4. Subject to these conditions, MINTO, acting on behalf of itself, its representatives, heirs, executors, administrators, trustees, predecessors, successors, affiliates, subrogors, subrogees, lessees, lessors, grantees, assignees, assignors, parents, subsidiaries, insurers, agents, employees, servants, owners, alter egos, attorneys, general partners, limited partners, representatives, and present, former and future officers, directors, shareholders, agents, and professional advisors, hereby releases PARN and its representatives, heirs, executors, administrators, trustees, predecessors, successors, affiliates, subrogors, subrogees, lessees, lessors, grantees, assignees, assignors, parents, subsidiaries, insurers, agents, employees, servants, owners, alter egos, attorneys, general partners, limited partners, representatives, and present, former and future officers, directors, shareholders, employees agents, and professional advisors, from any and all claims, demands, actions, causes of action, losses and expenses of every nature whatsoever, known or unknown, filed or unfiled, under the Federal Action and the FMC Proceeding that accrued or existed at any time prior to and including the Effective Date.

PARN, acting on behalf of itself, its representatives, heirs, executors, administrators, trustees, predecessors, successors, affiliates, subrogors, subrogees, lessees, lessors, grantees, assignees, assignors, parents, subsidiaries, insurers, agents, employees, servants, owners, alter egos, attorneys, general partners, limited partners, representatives, and present, former and future officers, directors, shareholders, agents, and professional advisors hereby releases MINTO and its representatives, heirs, executors, administrators, trustees, predecessors, successors, affiliates, subrogors, subrogees, lessees, lessors, grantees, assignees, assignors, parents, subsidiaries, insurers, agents, employees, servants, owners, alter egos, attorneys, general partners, limited partners, representatives, and present, former and future officers, directors, shareholders, employees agents, and professional advisors, from any and all claims, demands, actions, causes of action, losses and expenses of every nature whatsoever, known or unknown, filed or unfiled, under the Federal Action and FMC Proceeding that accrued or existed at any time prior to and including the Effective Date.

5. The mutual releases given by the parties in paragraph 4 above are intended to include the following understandings:

- a) It is understood that the nature and extent of any potential damages and injuries which may have been sustained by either party may substantially change or worsen and that new damages may be discovered in the future. It is nevertheless each parties' intent to unequivocally release and forever discharge the opposite party from any and all claims accrued, accruing or which may accrue in the future as a result of, in connection with, or related to any changes in the nature and extent of said damages or injuries or as a result of the discovery of new damages or injuries. With respect to the foregoing, each of the parties acknowledge their familiarity with the decision in the case of Witt v. Watkins, 579 P.2d 1065 (Alaska 1978), and it is still each of the parties' intent to release the opposite party from any and all claims accrued, accruing, or which may accrue in the future.
- b) The parties acknowledge their familiarity with the decisions in the cases of Young v. State, 455 P.2d 889 (Alaska 1969) and Totem Marine T. & B. v. Alyeska Pipeline, 584 P.2d 15 (Alaska 1978), and any protections of the holdings therein relevant to the present case are hereby waived. The parties state that it is their true intent and desire to fully release all the individuals, firms or corporations who may in any way have been connected with any claims release herein as fully as though they were specifically listed and named herein. The parties specifically represent that they understand that they are not required or compelled to agree to the terms of the Mutual Release and acknowledge the availability of other reasonable alternatives and adequate remedies, but have nonetheless freely, voluntarily and intelligently chosen not to pursue the same for the purposes of making a full, final and complete compromise of the claims released herein.

6. MINTO and PARN further agree (a) to sign and file in the Federal Action a standard form of Dismissal with Prejudice of the Action immediately upon execution and delivery of a signed copy of this Agreement; and (b) to sign the appropriate settlement forms necessary to dismiss the FMC Proceeding with prejudice.

7. Counsel for each of the Parties to this agreement represents that he/she has fully explained to his/her clients the legal effect of this agreement and of the Release and Dismissal with Prejudice provided for herein and that the settlement and compromise stated herein is final and conclusive forthwith, and each attorney represents that his/her clients have freely consented to and authorized this agreement.

8. Each Party will bear its own attorneys' fees and court costs.

9. Each party hereto expressly warrants and represents that the person executing this Agreement on its behalf is legally competent to and is authorized to enter into this Agreement and to bind said party to its representations, terms, conditions and covenants as set forth herein.

10. Each party hereto agrees to cooperate, in good faith, in executing any and all documents that may be necessary or appropriate to implement the purpose and intent of this Agreement.

11. This Agreement is made and entered into in the State of Alaska, and shall in all respects be interpreted, enforced and governed under the laws of the State of Alaska. An action to enforce this Agreement shall be brought in the appropriate state or federal court in the State of Alaska.

12. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

13. This Agreement sets forth the entire agreement between the Parties and fully supersedes any and all prior agreements or understandings of any kind whatsoever, whether written, oral, express, implied or otherwise, between MINTO, on the one hand, and PARN, on the other hand. Any modification or amendment to this Agreement must be in writing and must be signed and dated by all of the parties, and must explicitly state that it is intended to be an amendment to or modification of this Agreement.

14. This Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the Parties.

15. The Agreement shall not be amended except by an instrument in writing, signed by each of the Parties. No failure to exercise and no delay in exercising any right, remedy, or power under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy or power under this Agreement preclude any other or further exercise thereof, or the exercise of any other right, remedy, or power provided herein or by law or in equity.

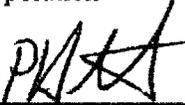
16. The Agreement may be executed in counterparts and all such counterparts taken collectively shall constitute one agreement.

Signature Page Follows

THE PARTIES INDICATE THEIR AGREEMENT TO THE FOREGOING BY SIGNING BELOW:

Dated: ~~August~~ ^{Sept. 4} __, 2012

MINTO EXPLORATIONS LTD., a British
Columbia Corporation

By: 
Name: Peter Hamstead
Its: VP, Marketing & Treasurer

Dated: August 30, 2012

PACIFIC AND ARCTIC RAILWAY AND
NAVIGATION COMPANY, an Alaska
Corporation

By: 
Name: E. HRETZAY
Its: PRESIDENT

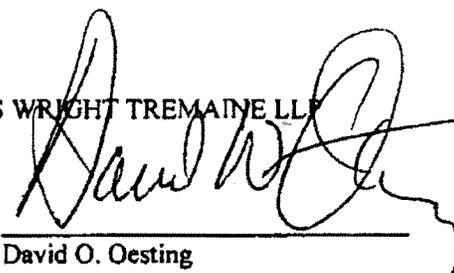
The undersigned attorneys at law for the respective parties represent that they have fully explained the legal effect of this Agreement provided for herein to their respective clients, who have acknowledged an understanding of these terms and conditions and the legal effect thereof.

APPROVED AS TO FORM AND SUBSTANCE:

Dated: August 30, 2012

DAVIS WRIGHT TREMAINE LLP

By:


David O. Oesting

Counsel for PACIFIC AND ARCTIC
RAILWAY AND NAVIGATION COMPANY

sect 4
Dated: ~~August~~ , 2012

K&L GATES LLP

By: *Joan Travostino*
Joan Travostino

Counsel for MINTO EXPLORATIONS LTD.