

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-13

**METRO FREIGHT SERVICES, INC. d/b/a MARITIME EXPRESS LINES –
POSSIBLE VIOLATIONS OF
SECTION 19(e)(3) OF THE SHIPPING ACT OF 1984 AND 46 C.F.R. PART 515**

**JOINT MEMORANDUM IN SUPPORT OF
PROPOSED SETTLEMENT**

Metro Freight Services, Inc. d/b/a Maritime Express Lines (Metro Freight or Respondent) and the Bureau of Enforcement (BOE) hereby submit this joint memorandum in support of the proposed settlement agreement appended hereto. The parties believe that the proposed agreement meets the Federal Maritime Commission's (Commission) criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved.

INTRODUCTION

By Order of Investigation and Hearing served September 29, 2014, the Commission commenced an investigation to determine: (1) whether Metro Freight violated (a) the Commission's regulations at 46 C.F.R. § 515.18(a)(6) and (c) by failing to promptly notify the Commission of the death of its QI and to timely seek and obtain approval of a replacement QI;

and (b) section 19(e)(3) of the Shipping Act, 46 U.S.C. § 40904(c), and the Commission's regulations at 46 C.F.R. §515.42(i), by receiving freight forwarder compensation for shipments in which the forwarder had a direct or indirect beneficial interest; (2) whether, in the event violations of the Shipping Act or the Commission's regulations are found, civil penalties should be assessed against Metro Freight, and in what amount; (3) whether the OTI license of Metro Freight should be suspended or revoked pursuant to section 19 of the Shipping Act; and (4) whether appropriate cease and desist orders should be entered.

The Order of Investigation and Hearing designated BOE as a party to the proceeding. Following commencement of this proceeding, Respondent appeared through counsel and filed an answer. Following issuance of the Initial Order by the Administrative Law Judge (ALJ), the parties commenced discovery, jointly submitted a procedural schedule to the ALJ, engaged in settlement discussions and reached the agreement submitted herewith.

The Settlement Agreement (Agreement) accompanying this memorandum is the result of good faith negotiations between the parties. Absent approval of settlement, various procedural steps remain in this proceeding, including: additional discovery, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. Respondent has admitted the violations which formed the basis of the Commission's investigation, and the settlement agreement therefore reflects what the parties believe to be an appropriate resolution of the matter. The Agreement includes Respondent's consent to entry of a Commission Order that will suspend Respondent's OTI license for 90 days, or until the date of approval of an application by Respondent for a replacement QI, if later.¹ Suspension will commence on the date

¹ Respondent had filed an application for approval of a replacement QI prior to the Agreement and therefore filing the application was not made a condition of settlement. Respondent understands that it cannot engage in Commission-regulated OTI activities until it is in full compliance with the requirements of the Shipping Act and Commission regulations.

that a Commission Order approving the Agreement in its entirety becomes administratively final. In addition, Respondent has agreed to dissolve G & M Export Corporation, identified in the Order of Investigation and Hearing as an affiliate of Respondent and the putative shipper for many of Respondent's forwarding transactions.

The Agreement also includes payment of a significant civil penalty. The parties have agreed to a mechanism whereby payment of the penalty shall be made to an escrow account and, subsequently, payment from the escrow agent to the Commission within 5 days of final approval of the Agreement. Payment of the penalty into escrow by March 16, 2015, is a condition precedent to the effectiveness of all other provisions in the Agreement. Upon receiving notice of compliance with this condition, BOE would immediately advise the ALJ that the condition has been met. In the event that Respondent fails to deposit the funds into the escrow account by the prescribed deadline, BOE would immediately notify the ALJ, and the Agreement would be without force or effect and deemed withdrawn.²

Respondent and BOE believe it is in the best interests of the parties and the shipping public to resolve this proceeding rather than engage in further litigation. Upon approval of the proposed settlement by the Presiding Officer and the Commission, Respondent and BOE seek dismissal of Docket No. 14-13.

AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act (APA), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes

² The parties do not contemplate such an occurrence. Nevertheless, in the event of such a default, BOE believes that it could present its case without undue delay.

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:

[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).

Courts have endorsed the use of the APA settlement 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).

The Commission has long recognized that the law strongly favors settlements:

'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.'

Old Ben Coal Company v. Sea-Land Services, Inc., 18 S.R.R. 1085, 1092 (1978) (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); *Sinicway International Logistics Ltd. – Possible Violations*, 31 S.R.R. 1762, 1764 (Initial Decision; administratively final Mar. 25, 2011); and *Indigo Logistics, LLC, et al. – Possible Violations*, 32 S.R.R. 385, 387-88 (Initial Decision; administratively final Nov. 21, 2011).

The Commission's regulations embody a policy of encouraging settlements. Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with the provisions of Rule 91 and its policy favoring settlements, the Commission has frequently approved settlements of administrative and investigative proceedings.³ The regulations recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.63. The regulations also require that such settlement agreements in formal proceedings be submitted to the Presiding Officer for approval. 46 C.F.R. § 502.603(a).

CRITERIA FOR APPROVAL OF SETTLEMENT

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Officer must decide whether the proposed settlement satisfies the appropriate criteria for approval. In so deciding, the Presiding Officer generally "reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to

³ See *Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarding Application - Possible Violations, Section 44, Shipping Act, 1916, (Eastern Forwarding)*, 20 S.R.R. 283, 286 (Initial Decision; administratively final Sept. 8, 1980); *Far Eastern Shipping Co. - Possible Violations of Sections 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916, (FESCO)*, 21 S.R.R. 743, 764 (Initial Decision; administratively final, May 7, 1982); *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line, (Armada)* 23 S.R.R. 946, 949 (Initial Decision; administratively final Apr. 25, 1986); *Member Lines of the Transpacific Westbound Rate Agreement - Possible Violations of the Shipping Act of 1984, (TWRA)*, 23 S.R.R. 1329, 1340 (Initial Decision; administratively final Oct. 9, 1986); *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements, (Royal Caribbean)*, 26 S.R.R. 64 (Order Approving Settlement and Discontinuing Proceeding, Dec. 4, 1991).

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)*, 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.*

In Commission-initiated proceedings such as the instant one, the Presiding Officer must also decide whether the proposed settlement agreement satisfies the appropriate criteria for approval with regard to the issue of penalty assessment. A summary of the Commission's view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada, supra*:

As seen, Section 13(c) of the Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 C.F.R. § 505, in 1979. Under those rules the 'criteria for compromise, settlement or assessment' might 'include but need not be limited to those which are set forth in 4 C.F.R. Parts 101-105.' . . . Those standards, particularly, the standards enumerated in 4 C.F.R. § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. 'They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings.' 23 S.R.R. 956 (emphasis in original) (footnote and citations omitted).

See also, Marcella Shipping Co. Ltd., 23 S.R.R. 857, 866 (Initial Decision; administratively final Mar. 26, 1986).

In *FESCO*, *supra*, the ALJ summarized the appropriate criteria for approving proposed settlements where a penalty assessment is present as follows:

[S]ettlement may be based upon a determination that the agency's 'enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon'; that 'the amount accepted in compromise. . .may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection'; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled 'for one or for more than one of the reasons authorized in this part.' 21 S.R.R. at 759 (emphasis added) (footnotes omitted).

Subsequent to *FESCO*, the Commission reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in the negotiation of a settlement, and in view of a settlement agreement. *Investigation of Unfiled 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). *See also Royal Caribbean, supra*, 26 S.R.R. 64.

In accordance with the Commission's analysis as enunciated in *World Chance*, *FESCO*, *Eastern*, *Armada*, *Yangming*, and *Royal Caribbean*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence,⁴ with the litigative probabilities,

⁴ The parties note that third-party shipper complaints were not a basis for the allegations in the Order of Investigation and Hearing, and were not part of the settlement discussions between the parties. No third party has come forward to contest the approval of the proposed settlement. Accordingly, the parties submit that the shipping public will not now be harmed by the approval of this settlement agreement. *See World Chance*, 31 S.R.R. at 1351-52.

litigative and administrative costs, and such other matters as justice may require. That balance favors approval of this proposed settlement.

As stated in the Introduction, several procedural steps remain in this proceeding. Although Respondent has thrice admitted the violations alleged,⁵ both parties face significant expenditures of resources through additional discovery, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. Absent approval of the Agreement, the potential litigative and administrative costs of this proceeding thus weigh heavily in favor of approval of this proposed settlement agreement.

In addition to such unnecessary costs, the proposed settlement avoids the uncertainties involved in any litigation and in particular the penal phase of the proceeding. Approval of the proposed agreement concludes the matter and allows Respondent to plan its future; the Agreement assures Respondent of a suspension of its OTI license of limited duration,⁶ provides certainty with respect to the penalty amount, and ensures the termination of G & M Export Corporation through which Respondent achieved certain of the violations at issue.

With respect to the policy of enforcement, the proposed settlement would serve as a disincentive to future unlawful activities. The agreed civil penalty, coupled with the suspension of Respondent's OTI license, takes into account the Commission's policies for deterrence and future compliance with the Commission's rules and regulations and applicable statutes. *See* 46

⁵ Respondent admitted the violations alleged in its Answer to the Order of Investigation, next in its response to BOE's Requests for Admissions (RFA), and then in the Settlement Agreement.

⁶ The Order of Investigation and Hearing allows for the possible suspension or revocation of Respondent's OTI license, and for a cease and desist order of all OTI activities. In the past, the Commission has found violations similar to Respondent's to merit those penalties. *See, e.g.,* Docket No. 14-01, *Revocation of Transportation Intermediary License No. 022025 Cargologic USA LLC*, slip op. (August 28, 2014) (Order Revoking Ocean Transportation Intermediary License) (show cause proceeding resulting in the revocation of OTI license and a cease and desist order when OTI failed to notify Commission of resignation of QI, failed to file a replacement QI, and failed to respond to a Commission inquiry); *Revocation of Ocean Transportation Intermediary License No. 021899 – Trans World Logistics Corporation*, 32 S.R.R. 758, 760 (FMC, 2012) (in show cause proceeding, Respondent ordered to cease and desist operating as OTI based upon violations of failure to report the resignation of its qualifying individual and failure to reply to lawful inquiries by Commission).

C.F.R. §502.603(b). The Commission has recognized that its enforcement policy is furthered in approving settlement agreements in which respondents agree to refrain from engaging in activities regulated by the Commission for finite periods of time. *Indigo Logistics, supra; FSL International, Inc., et al. – Possible Violations of the 1984 Act and 46 C.F.R. 502.515*, 30 S.R.R. 255, 258 (I.D., Administratively Final April 14, 2004); *Sea Dragon Navigation Ltd., et al. – Possible Violations*, 28 S.R.R. 527, 529 (I.D., Administratively Final Nov. 27, 1998); and *I Chen “Jenny” Chiang d/b/a/ Prestige Forwarding Co. – Possible Violations*, 28 S.R.R. 1080, 1083 (I.D., Administratively Final August 12, 1999).

In this case, the 90 day license suspension recognizes the seriousness of Respondent’s OTI activities over an extended period without an approved replacement QI in violation of a fundamental requirement of all licensees. By the same token, this sanction recognizes that Respondent has applied for approval of a replacement QI and permits Respondent to resume its OTI activities within a defined period of time deemed sufficient for enforcement purposes without putting the company out of business. Respondent understands that it cannot engage in OTI activities regulated by the Commission until it is in compliance with the requirements of the Shipping Act and the Commission’s regulations.

The combination of sanctions and remedies found in the Agreement will have a deterrent effect upon Respondent, and on the industry as a whole. The suspension of Respondent’s OTI license, the settlement amount, and the dissolution of Respondent’s affiliated company, “will have the desired effect on Respondent and others because it would serve as a disincentive to future unlawful activity.” *World Chance*, 31 S.R.R. at 1352, (quoting *FESCO*, 21 S.R.R. at 759) (internal quotations omitted). Accordingly, the parties submit that the proposed settlement agreement will further the Commission’s enforcement policy.

CONCLUSION

The proposed settlement agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims. Therefore, the parties jointly request that:

1. The Settlement Agreement be approved in its entirety;
2. The Commission issue an order suspending Respondent's OTI license for a period to commence on the date that a Commission Order approving the Agreement in its entirety becomes administratively final and terminating on the later of 90 days from the commencement date, or the date of approval of an application by Respondent for a replacement QI;
3. Upon approval of the settlement and issuance of the Commission Order described herein, Docket No. 14-13 be discontinued in its entirety.

Respectfully submitted,



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