

ORIGINAL

(S E R V E D)
(June 29, 1999)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

June 29, 1999

DOCKET NO. 99-01

**DIRECT CONTAINER LINE
POSSIBLE VIOLATIONS OF SECTIONS 10(a)(1) AND 10(b)(1)
OF THE SHIPPING ACT OF 1984**

DOCKET NO. 99-06

**DIRECT CONTAINER LINE INC. AND OWEN GLENN
POSSIBLE VIOLATIONS OF SECTION 10(a)(1)
OF THE SHIPPING ACT OF 1984**

**MOTION TO APPROVE SETTLEMENT AGREEMENT AND TO
DISMISS AND DISCONTINUE PROCEEDINGS GRANTED¹**

The parties have reached settlement and request that their agreement incorporating the settlement be approved and that these two proceedings be discontinued and dismissed as regards the

¹As requested, the two Commission proceedings are consolidated for purposes of ruling on the parties' joint motion. See 46 C.F.R. 502.148.

personal respondent, Mr. Owen Glenn. They have submitted a thorough and well-researched memorandum of law which persuasively supports their requests and are to be commended for acting prudently to terminate what could have been time-consuming and expensive litigation that would needlessly have taxed the resources of the Commission as well as respondents'. The following explanation will provide the necessary background leading up to the parties' settlement.

Respondent Direct Container Line, Inc. (DCL) is a tariffed and bonded non-vessel operating common carrier (NVOCC) that furnishes transportation services worldwide, including services from U.S. ports and points to ports and points in the Far East and South America. Respondent Owen Glenn is the Chairman and Chief Executive Officer of DCL. The Commission initiated two formal investigatory proceedings into the activities of these respondents. On January 15, 1999, Docket No. 99-01 was begun to investigate allegedly unlawful activities by respondent DCL in the South American trade, specifically, allegations that DCL had misweighed and mismeasured cargoes in order to pay vessel-operating carriers less freight than what they were allegedly due, and also that DCL had not properly charged its own shippers the rates filed in its tariff. Such conduct violates sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, in effect at the time of the alleged misconduct. The Commission also wished to determine if civil penalties should be assessed against DCL, if so, the amount of such penalties, and whether DCL's tariff should be suspended and a cease and desist order should be issued.

Docket No. 99-06 is an investigation begun by the Commission on April 29, 1999, to determine if DCL had been receiving rebates in its South American services under an arrangement set up by DCL's principal, Mr. Owen Glenn, which arrangement had allegedly been operating subsequent to October 1994. Such conduct violates section 10(a)(1) of the 1984 Act and the Commission wished to determine if DCL's tariff should be canceled or suspended, its license as an

ocean transportation intermediary revoked, whether, and in what amounts, civil penalties should be assessed and whether a cease and desist order should be issued.

The Commission's Bureau of Enforcement (BOE) states that it would introduce evidence in support of the allegations contained in the Orders of Investigation in both dockets. BOE explains that its evidence in Docket No. 99-01 would show that DCL misdeclared cargo weights and measurements on bills of lading so as to pay lower rates to two vessel-operating carriers and that its documentary evidence, such as DCL's internal container manifest, would corroborate the fact that DCL routinely restated cargo measurements and weights for the same purpose. Moreover, BOE states that it would introduce evidence showing that DCL's "house" bills of lading issued to DCL's shippers show that DCL used higher figures than those on the bills of lading tendered to the vessel-operating carriers and that DCL concealed equipment-substitution practices whereby DCL obtained larger containers than those for which it was charged.

In Docket No. 99-06, BOE asserts that it would establish that DCL entered into an arrangement with a vessel-operating carrier for the receipt of rebates and that an officer of another shipping company would testify that in 1996 it was agreed that DCL and the other company would share in the rebates from the vessel-operating carrier. BOE asserts that it has documentary evidence to support the testimony. Moreover, BOE states that it would offer testimony of a second witness, a high ranking sales and traffic manager of another vessel-operating carrier, such testimony showing that DCL and its officer, respondent Owen Glenn, established a rebate arrangement which covered hundreds of shipments during the period from 1994 through 1997. This second witness, according to BOE, would testify that respondent Owen Glenn suggested the method by which the vessel-operating carrier would pay rebate amounts that had been agreed upon. Under the rebate arrangement, the testimony would indicate that DCL received close to \$500,000 in payments during

the period 1995 through 1997. BOE indicates, furthermore, that it would offer documentary evidence to corroborate the testimony.

Both parties initiated some discovery in Docket No. 99-01, and in Docket No. 99-06, there were discussions among counsel and conferences before the undersigned judge dealing with respondents' efforts to ascertain and evaluate BOE's evidence and to consider respondents' contentions that continuation of the proceeding was detrimental to respondents' business. See Docket No. 99-06, rulings issued following two conferences, served April 29 and May 26, 1999. After respondents recognized that BOE could submit a compelling case against DCL, both DCL and BOE came to the conclusion that it would be in the best interests of the parties and the shipping public to resolve the issues in both proceedings by settlement, which settlement would include possible violations by DCL with regard to a third vessel-operating carrier under that carrier's equipment-substitution rule and an agreement that BOE would support dismissal of Mr. Owen Glenn as a respondent.

Discussion and Conclusions

The Settlement Agreement, which is attached to these rulings as an appendix pursuant to 46 C.F.R. 502.603(a), reduced to its essence, provides for respondent DCL to tender the sum of \$800,000 into an interest-bearing account which shall be paid over to the Commission within 25 days of approval of the agreement by the undersigned judge. In return the Commission would be barred from instituting any proceeding against DCL or its officers, directors, employees and successors that could lead to suspension or revocation of DCL's Ocean Transportation Intermediary license or suspension or cancellation of DCL's published tariff for the alleged violations of the

Shipping Act of 1984 that have been disclosed by DCL in the two proceedings. The two proceedings will also be discontinued. Moreover, as agreed to separately, the parties move that Mr. Owen Glenn, DCL's Chairman and Chief Executive Officer, be dismissed as a respondent with prejudice. See Motion to Dismiss Owen Glenn as a Respondent, June 25, 1999.

It would unnecessarily burden and lengthen the instant rulings to recite in great detail the overwhelming authority encouraging and approving settlements in Commission as well as in court proceedings. The parties have submitted a joint memorandum which is thorough and comprehensive and cites numerous cases and authorities both in the legislative history to the Administrative Procedure Act (APA), the Commission's rules, and case law. The policy of encouraging and approving settlements is firmly embedded in precedent and is especially welcome as a means for the Commission and respondents to conserve their resources. See, e.g., APA, 5 U.S.C. sec. 554(c)(1), regarding settlements, and its legislative history in the report of the Senate Committee on the Judiciary, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946), quoted in the parties' Joint Memorandum at 5; 46 C.F.R. 502.91, which codifies the APA provision; *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

Although there are countless Commission decisions approving settlements, two of them stand out as leading cases establishing the nature of the Commission's responsibility when examining proffered settlements and the applicable standards of approval. The two cases are *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512-513 (1978) (18 S.R.R. 1085, 1092); and *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 (I.D., administratively final May 7, 1982). *Old Ben* establishes that the Commission does not merely rubberstamp proffered settlements but examines them essentially to determine if they violate some law or public policy. *FESCO*

establishes that a settlement may be based upon a determination that the settlement will adequately serve the Commission's enforcement policy in terms of deterrence and securing future compliance with law and will realistically evaluate litigative costs and the risks of proving alleged violations of law.

It is obvious to the undersigned judge that the proffered settlement agreement is a just and prudent means of satisfying the interests of both BOE and respondents. In making their decisions to settle, the parties have followed the advice of a well-known lawyer named Abraham Lincoln who gave the following advice:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.²

I commend the parties for following the advice of Mr. Lincoln and, subject to Commission review, approve their settlement agreement, dismiss Mr. Owen Glenn as a respondent, and discontinue both proceedings. It is so ordered.


Norman D. Kline
Administrative Law Judge

²See *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860,863 (7th Cir.1974), for the source of this quotation.

BEFORE THE
FEDERAL MARITIME COMMISSION

DIRECT CONTAINER LINE INC.)

POSSIBLE VIOLATIONS OF SECTIONS 10(A)(1) AND)

10(B)(1) OF THE SHIPPING ACT OF 1984)

Docket No. 99-01

DIRECT CONTAINER LINE INC.)

AND OWEN GLENN)

POSSIBLE VIOLATIONS OF SECTIONS 10(A)(1))

OF THE SHIPPING ACT OF 1984)

Docket No. 99-06

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into between:

1) the Federal Maritime Commission ("Commission") Bureau of Enforcement ("BOE"),

and

2) Direct Container Line Inc., the corporate Respondent in Docket Nos. 99-01 and 99-06,
hereinafter "DCL" or "Respondent".

WHEREAS, the Bureau of Enforcement believes that:

1. Between October 1994 and December 30, 1997, DCL obtained transportation at less than the applicable tariff or service contract rates from Compañia SudAmericana de Vapores (“CSAV”) on ocean shipments to Chile, Peru and destinations on the East Coast of South America, through the device or means of unlawful rebates, and that DCL received rebates from Maersk Line with respect to 19 shipments transported during 1996, which rebate payments were shared by DCL with Mercator Shipping Ltd., and
2. Between January 1, 1996 and May 1998, DCL obtained transportation at less than the applicable tariff or service contract rates from ocean common carriers providing service in the outbound trades from the United States to the Far East through the device or means of misdeclaring cargo weights or measurements on the master bill of lading in order to obtain lower freight rates from OOCL and Maersk Line available under the carriers’ applicable equipment substitution rules, and that DCL charged, demanded, collected or received from its customers greater, less or different compensation for the transportation of property than the rates and charges shown in DCL’s tariff with respect to such shipments.

WHEREAS, the Commission acted upon such alleged violations by instituting FMC Docket No. 99-01 to which DCL has been named the Respondent, and FMC Docket No. 99-06, to which DCL and Owen Glenn have been named as Respondents;

WHEREAS, Respondent has disclosed that, between January 1, 1996 and May 1998, DCL may have obtained transportation at less than the applicable tariff or service contract rates from ocean common carriers providing service in the outbound trades from the United States to the Far East through the device or means of misdeclaring cargo weights or measurements on the master bill of lading in order to obtain lower freight rates from Hyundai available under the carrier's applicable equipment substitution rules;

WHEREAS, Respondents have requested, and BOE has agreed to support, dismissal of Owen Glenn as a Respondent in FMC Docket No. 99-06;

WHEREAS, Respondent recognizes that the Bureau of Enforcement could submit a compelling case in support of its allegations that DCL knowingly and willfully obtained or attempted to obtain ocean transportation of property for less than the rates and charges shown in applicable tariffs or service contracts;

WHEREAS, the Bureau of Enforcement and Respondent believe it is in the best interests of the parties and the shipping public to resolve the above referenced proceedings rather than engage in litigation; and

WHEREAS, Respondent has instituted and indicated its willingness to institute and to maintain measures designed to eliminate the practices by Respondent which are the basis for the alleged violations set forth herein;

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the alleged violations set forth and described herein, Respondent and the Commission's Bureau of Enforcement hereby agree upon the following terms of settlement:

1. On or before Friday, June 25, 1999, Respondent shall make a monetary payment to an interest bearing escrow account, in the total amount of \$800,000 (Eight Hundred Thousand Dollars), for the benefit of the Federal Maritime Commission. No later than Friday, June 25, 1999, Respondent shall provide written verification to the Commission that the total monetary payment of \$800,000 was placed in such interest bearing escrow account in accordance with this Agreement.
2. Upon approval by the Administrative Law Judge of the settlement with Respondent hereunder, the \$800,000 shall be paid from such interest bearing escrow account to the Commission, together with any interest accruing thereon, within twenty-five (25) days.
3. This Agreement shall forever bar the commencement or institution by the Commission of any civil penalty assessment proceeding or other claim for recovery of civil penalties against DCL or its officers, directors, employees and successors, any action for the suspension or revocation of Respondent's Ocean Transportation Intermediary ("OTI") license, or for the suspension or cancellation of Respondent's published OTI tariff, for the alleged violations of the Shipping Act of 1984 as disclosed by DCL and as set forth above. Upon approval of this Settlement Agreement, FMC Docket No. 99-01 and Docket No. 99-06 shall be discontinued.

4. This Agreement shall become effective upon approval by the Commission in accordance with 46 C.F.R. 502.603 (a).

ON BEHALF OF RESPONDENT
DIRECT CONTAINER LINE INC.

By: /s/ O w e n G l e n n

Title: Chairnman

Date: 22nd June 1999

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: /s/ Vem W. Hill

Vem W. Hill, Director
Bureau of Enforcement

Subject to Approval by the Commission in accordance with paragraph 4 hereof.

Date: 25 June 1999