

(S E R V E D)
(March 23, 2004)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

March 23, 2004

DOCKET NO. 01-06

**EXCLUSIVE TUG FRANCHISES -
MARINE TERMINAL OPERATORS
SERVING THE LOWER MISSISSIPPI RIVER**

**SETTLEMENT APPROVED; RESPONDENT CARGILL
DISMISSED FROM PROCEEDING**

A well-known lawyer, who practiced in the State of Illinois, once commented on the desirability of settling cases. This lawyer, whose name was Abraham Lincoln, stated in this regard:

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.¹

¹See *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974), for the source of this quotation.

The American humorist Ambrose Bierce once defined litigation as “a machine you go into as a pig and come out as a sausage.”²

The Commission’s Bureau of Enforcement (BOE) and respondent Cargill, Incorporated, after intensive litigation approaching three years’ duration, have followed Lincoln’s advice and have decided to avoid being ground up into sausages. Thus, over a period of some time involving serious negotiations, these two parties have succeeded in reaching a detailed Settlement Agreement which will enable both parties to discontinue expensive and burdensome litigation and allow respondent to institute a new practice which is acceptable to BOE and Cargill as a means for Cargill to continue its marine terminal operations without a continuing cloud of litigation hanging over its head. These parties have submitted the text of their Settlement Agreement together with a joint memorandum in support of its approval. As explained below, I am happy to recommend its approval and commend these parties for their most prudent decision.

Background and History of This Case

A brief look at the long and involved history of this proceeding will amply demonstrate the wisdom of BOE and Cargill in reaching their Settlement Agreement. In brief, this case is a massive one originally involving 12 respondent marine terminal operators doing business on the lower Mississippi River, who, it is alleged, have been violating sections 10(d)(1) and 10(d)(4) of the Shipping Act of 1984 by engaging in unreasonable practices and by unreasonably preferring or disadvantaging certain interests, respectively, specifically, by entering into exclusive contracts with

²See Ambrose Bierce, *The Devil’s Dictionary*.

particular tug boat companies who provide tug-assist services to ships calling at the marine terminals. The case began on June 11, 2001, when the Commission issued an Order to Show Cause. However, the Commission's Order triggered an outburst of protest from the 12 respondents, who argued vigorously that this type of procedure, which called merely for factual and legal submissions with little or no discovery, was unfair and denied respondents their due-process rights. On October 15, 2001, the Commission converted the proceeding into a more traditional investigation, by which procedure all respondents as well as BOE, would have full rights to develop their claims and defenses by means of the Commission's discovery processes, to be followed by whatever procedure would be necessary to resolve outstanding issues. Following the Commission's October 15 Order, all parties engaged fully in discovery, taking numerous depositions of parties and nonparties, and examining numerous documents. This discovery process also included inspection by respondents of many materials and documents that the Commission's staff had obtained prior to the June 11, 2001 Order to Show Cause. The discovery process has not yet concluded as there are numerous depositions of respondents' and BOE's expert witnesses that are to be conducted during April and May of this year. By entering into the subject Settlement Agreement, BOE and Cargill will no longer have to participate in such expensive and time-consuming exercises as regards Cargill. This is the second Settlement Agreement which BOE has reached with respondents in this case, the first being with respondent St. James Stevedoring Company, Inc. See Settlement Agreement Approved; Respondent St. James Stevedoring Company, Inc. Dismissed from Proceeding, September 29, 2003 (ALJ), administratively final, October 31, 2003 (30 S.R.R. 70).

Overview of the Subject Settlement Agreement

In their joint memorandum supporting approval of their Settlement Agreement, BOE and Cargill provide ample explanation of its terms and ample precedent for approval of such settlements in Commission proceedings. They explain that their settlement is the result of good-faith negotiations between Cargill and BOE and reflects each party's view that their agreement represents a fair resolution in view of the difficulty, time and expense involved for them to fully litigate the issues, especially in view of their opposing positions on Commission jurisdiction, market power, and possible harm or benefits relating to Cargill's exclusive tug arrangement. Upon approval of their agreement by the presiding judge and the Commission, both parties ask that Cargill be dismissed as a party to the proceeding.

The subject Settlement Agreement comprises 14 paragraphs plus a preamble and is attached to this ruling. The parties describe these paragraphs in their joint memorandum. Because the full text of the Settlement Agreement is attached to this ruling, I only briefly describe it at this time. The proposed settlement covers all four of Cargill's facilities on the lower Mississippi River (i.e., three dry land terminals and its floating rig operated at its buoy/mooring location) and permits Cargill to continue operating under its exclusive tug arrangement covering its terminal facilities but with several modifications to such operations. This well-crafted settlement appears to be a compromise between two extreme positions, i.e., a middle position between the total elimination of the current exclusive contracting system with a return to the previous system of *ad hoc* selection of tug boat companies by carriers under apparently negotiated rates and the current system whereby carriers have no choice in selecting which tug boat company will service their ships. The parties

have also addressed the Commission's concern that under the present system Cargill could increase tug-assist charges beyond reasonable levels that would otherwise be controlled by competition and would even allow smaller vessels to opt out of the new arrangement and to select tug boat companies of their choice. The new arrangement thus preserves competition and respects the interests and rights of carriers as well as marine terminal operators to obtain providers of necessary services so that the terminal operators and carriers can carry out their respective duties under law. More specifically, in brief, the agreement provides as follows:

There will be a two-tier system of docking and undocking charges tied to the commercial environment for tug services on the lower Mississippi River where no exclusive tug arrangements are in place. The upper tier applies to vessels of 13,501 Gross Registered Tons (GRT) or more while the lower tier applies to smaller vessels and there are ceilings placed on both tiers for docking and undocking tug-assist rates. Rates for tug-assist services other than for docking and undocking are capped at the rates charged by the tug company selected by Cargill as set forth in the company's public tariff. Companies operating smaller vessels are free to select the tug company of their choice. The difficult question of whether Cargill is serving common carriers and is thus subject to Commission jurisdiction need not be determined because Cargill will not require certification by carriers as to their status for five years after approval of the Settlement Agreement. The current exclusive contract that Cargill has with its tug boat company will be subject to renewal and Cargill will invite bidding from all tug boat companies serving the lower Mississippi. This bidding process will take place at the termination of a new three-year agreement between Cargill and its current

tug-assist provider, E.N. Bisso, such new agreement to take effect coincident with the approval of the Agreement by the Commission.³

Approvability of the Settlement Agreement Under Relevant Law

There is no question but that the subject Settlement Agreement fully comports with relevant law and policy that strongly favor settlements. Furthermore, in this very case, the Commission strongly encouraged the parties to enter into good-faith settlement negotiations after a number of respondents had asked me to establish a settlement procedure. See Order Addressing the Possible Establishment of Settlement Procedures (F.M.C., March 6, 2003), 29 S.R.R. 1464; Notice of Settlement Procedure Established (ALJ, March 27, 2003), 29 S.R.R. 1466. In their joint memorandum, BOE and Cargill cite ample authority for the proposition that the law favors settlements and that both the Administrative Procedure Act (APA) and the Commission's rules of procedure embody this principle. Because of the vast number of settlements that have been approved by the Commission in many previous cases it is not necessary to belabor the reader with extensive citations. Therefore, the following brief discussion should suffice.

The basis of the policy favoring settlements in administrative proceedings such as the instant one is, of course, the APA. That statute states in relevant part (5 U.S.C. sec. 554(c)(1)):

³For the full details of how the new system would work the reader should consult the attached text of the Agreement. For example, for the new docking and undocking rates, Cargill agrees to cap its charges at 75-percent of the corresponding rates in effect at Cargill's Reserve, Louisiana facility and then ties in any new rates to changes in the tug company tariff of the tug company that operates at Reserve. For smaller vessels, a 65-percent cap is used. Also, Cargill agrees not to establish any new tug-assist charge that is not also established in the tariffs of its contract tug company and to cap other tug-assist charges at the levels contained in its contract tug company's tariffs and any new contracts with tug companies would not exceed five years in duration. It is also agreed that Cargill may choose to elect any more favorable provision in any other settlement or under a Commission decision. In return for these concessions, it is agreed that no penalties will be sought or actions commenced against Cargill.

(c) The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit;

As BOE and Cargill correctly argue, the legislative history of the APA makes clear that Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one. Thus, as the Senate Committee on the Judiciary stated relating to the bill that became the APA:

. . . even when 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 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, APA—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (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 Company v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission’s rules of procedure incorporate the APA language quoted above and encourage settlements, mediation and the like throughout the rules. See, e.g., 46 C.F.R. 502.91(b); 502.94(a)(1); 502.61(d); 502.401 *et seq.* (Subpart U—Alternative Dispute Resolution). There are far too many Commission cases in which settlements have been approved to cite them here and BOE and Cargill have cited many of them in their joint memorandum at 10-11. However, a few of the

leading cases that can be consulted are *Old Ben Coal Company v. Sea-Land Service, Inc.*, 18 S.R.R. 1085 (1978); *Del Monte Corp. v. Matson Navigation Co.*, 19 S.R.R. 1037 (1979); *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 20 S.R.R. 1025 (I.D., administratively final, June 30, 1981).

As the cases cited above and others cited by these parties indicate, parties are motivated into settling cases because, after weighing the risks and costs of litigation, they become convinced that they may achieve valid purposes of deterrence of objectionable conduct from BOE's perspective, or avoidance of costly and burdensome litigation from Cargill's perspective at minimal cost. BOE and Cargill cite several pertinent Commission decisions in this regard. See *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, 759 (I.D., administratively final, May 7, 1982); *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, March 30, 1988). In urging approval of the Settlement Agreement, BOE and Cargill argue persuasively as follows (Joint Memorandum at 12):

As discussed above, the proposed settlement would save Cargill, BOE and their respective witnesses time and expense in litigating the issues in this proceeding relative to Cargill's exclusive tug arrangement. Such savings, along with the commitment of Cargill to modify its tug arrangement as described above, favor approval of the proposed Agreement. Moreover, dismissing Cargill as a respondent under these circumstances is unlikely to hinder the Presiding Judge or the

Commission from reaching appropriate findings of fact or conclusions of law in this proceeding as to remaining Respondents.⁴

As explained above, BOE and Cargill have amply justified approval of their Settlement Agreement and dismissal of Cargill as a respondent from this proceeding. Accordingly, the Settlement Agreement is approved and Cargill is dismissed as a respondent subject, of course, to Commission review of this ruling. See 46 C.F.R. 502.227(b)(c)(d).



Norman D. Kline
Administrative Law Judge

⁴By entering into the Settlement Agreement, of course, Cargill does not admit to having violated the Shipping Act of 1984 nor even to the Commission's jurisdiction. Such admissions are not necessary for approval of settlement agreements. Moreover, the Commission's relevant rule (46 C.F.R. 502.91(b)) provides that parties may make offers of settlement "without prejudice to the rights of the parties." As noted in my ruling approving the previous settlement with respondent St. James Stevedoring Company, cited above, it is not necessary to settle all issues nor that all parties agree to the settlement. See ruling cited at 8-9 and the discussion about *Pennsylvania Gas and Water Company v. Federal Power Commission*, cited above, 463 F.2d 1242. The fact that some other party might not like a first party's settlement does not prevent the first party from enjoying the benefits of its settlement. As has been noted in a previous Commission case, "the law considers the settlement of a claim not as an admission that the claim is valid but merely as an admission that there is a dispute and that an amount is paid to be rid of the controversy. 15A C.J.S., *Compromise and Settlement*, s. 22." *Merck Sharp & Dohme v. Atlantic Line*, 17 F.M.C. 244, 247 (14 S.R.R. 232, 235) (1973).



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EXCLUSIVE TUG FRANCHISES -)
MARINE TERMINAL OPERATORS) Docket No. 01-06
SERVING THE LOWER MISSISSIPPI RIVER)
_____)

**SETTLEMENT AGREEMENT
BETWEEN CARGILL, INCORPORATED
AND
THE BUREAU OF ENFORCEMENT**

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

- I. The Federal Maritime Commission's Bureau of Enforcement ("BOE"); and
- II. Cargill, Incorporated ("Cargill" or "Respondent")

WHEREAS, the Commission named Cargill as a Respondent in this proceeding in its June 11, 2001 *Order to Show Cause* to show cause why its exclusive arrangement with E.N. Bisso & Son, Inc. (to perform all tug assist services at its facilities on the lower Mississippi River) had not violated section 10(d)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1709(d)(1), as an unreasonable practice, or section 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(d)(4), as resulting in an unreasonable preference or advantage or unreasonable prejudice or disadvantage;

WHEREAS, the Commission made the Bureau of Enforcement a party to this proceeding in its June 11, 2001 *Order to Show Cause*;

WHEREAS, in its October 15, 2001 *Order Establishing New Procedural Schedule and Referring Case to the Office of Administrative Law Judges*, the Commission referred this proceeding to the Office of Administrative Law Judges for management of the case in all its aspects, including

discovery, development of a factual record, weighing the evidence and credibility of witnesses and making findings of fact and conclusions of law in an initial decision;

WHEREAS, BOE and Cargill have differing contentions with respect to issues of Commission jurisdiction, market power, possible harm and possible benefits related to the exclusive arrangement between Cargill and E.N. Bisso & Son, Inc. to provide tug assist services for all vessels calling at the terminal facilities of Cargill on the lower Mississippi River;

WHEREAS, Cargill and BOE desire to avoid the further expense, delay and uncertainty of litigating the alleged status of Cargill as a marine terminal operator or the alleged unlawful practices through to a final decision by the Commission or beyond to a possible appeal to a court of competent jurisdiction;

NOW, THEREFORE, in consideration of the premises herein, and in settlement of all matters arising under the 1984 Act from the alleged violations set forth and described in the Commission's June 11, 2001 *Order to Show Cause*, Respondent and BOE agree as follows:

1. That Cargill will establish rates for tug assist services (*i.e.*, docking and undocking) provided to vessels of 13,501 Gross Registered Tons, or more, calling at terminal facilities (*i.e.*, dry land and buoy systems) owned and/or operated by Cargill which are located on the lower Mississippi River at a level no higher than seventy-five percent (75%) of the rate which would otherwise be applicable at Cargill's facility in Reserve, Louisiana (Above Head of Passes ("AHP") Mile 139.6) as set forth in the tariff of the assist tug company with which Cargill has a contract to provide services at the Cargill terminal ("Cargill's contract tug company"), provided, however, that Cargill shall maintain its current rate until such time as an increase in Cargill's contract tug company's tariff rate otherwise applicable at Cargill's Reserve facility when multiplied by 75% yields a product

greater than the current rate. Computations of rates required in this paragraph shall be made using only the zone charge in the tariff of Cargill's contract tug company which would otherwise apply to Cargill's Reserve facility. Such computations shall not include any Gross Registered Ton rate or charge, or any other rate or charge, which may be set forth in Cargill's contract tug company's tariff.

2. That Cargill will establish rates for tug assist services (*i.e.*, docking and undocking) provided to vessels of 13,500 Gross Registered Tons, or less, calling at the above identified facilities on the lower Mississippi River at a level no higher than sixty-five percent (65%) of the rate in the tariff of Cargill's contract tug company which would otherwise apply to Cargill's Reserve facility. Computations of rates required in this paragraph shall be made using only the zone charge in the tariff of Cargill's contract tug company which would otherwise apply to Cargill's Reserve facility. Such computations shall not include any Gross Registered Ton rate or charge, or any other rate or charge, which may be set forth in Cargill's contract tug company's tariff.

3. That Cargill will establish charges for tug assist services other than docking and undocking (*e.g.*, standby and hold-in charges) to vessels calling at the above identified facilities on the lower Mississippi River at a level no higher than the corresponding charge in the tariff of the assist tug company with which Cargill has a contract to provide services at such Cargill terminal facility.

4. That Cargill will establish no new tug assist charges which have not also been established in the tariff of the assist tug company with which Cargill has a contract to provide services at Cargill's terminal facilities and that any such new charges will be no higher than the corresponding charges in such assist tug company's tariff.

5. Cargill will set out in its tariff(s), and/or schedule of charges, including every revision or republication thereof, covering the above identified facilities, and such facilities as may be covered by Paragraphs 8 and 9 below, and in its Berth Application form(s) for such facilities, the following

notice permitting each vessel owner or operator whose vessel is 13,500 Gross Registered Tons, or less, to choose not to use the tug assist company designated by Cargill and instead use a tug assist company of its choosing:

OPT-OUT PROVISION; NOTICE APPLICABLE TO VESSELS OF 13,500 GROSS REGISTERED TONS, OR LESS: The owner or operator, as the case may be, of a vessel of 13,500 Gross Registered Tons, or less, may elect to use a tug assist company other than the tug assist company designated by Cargill, Incorporated. Such an election shall be made by the owner or operator or by their authorized agent, on the berth application (or other document as may be accepted by Cargill in lieu of a berth application) submitted for each vessel call at terminal facility(ies) owned or operated by Cargill, Incorporated on the Lower Mississippi River. If such an election is made, however, the vessel is responsible for ensuring that its chosen tug assist company provides the required services on a timely basis and without delay. The tug company chosen must be certified under the Responsible Carrier Program of the American Waterways Operators, or, if not so certified, otherwise meet the criteria for such certification. Tugs utilized must be adequate in number, power and/or type of power as determined by the mandatory pilot and the vessel master. The vessel interest will be responsible for compensating Cargill pursuant to the terms and conditions of Cargill's tariff for any delay caused by its chosen assist tug operator.

6. Cargill will not introduce into its terminal tariff(s), and/or schedule of rates, any oral or written certification(s) from a vessel owner, operator, charterer, or their respective agents or other representatives, ("vessel owner") as to their status as a "common carrier" under the Shipping Act of 1984, as amended. Certifications prohibited by this paragraph include, but are not limited to, certifications that a vessel operator has, or has not, entered into service contracts filed with the Commission, filed a Form FMC-1 with the Commission or published a tariff on the Internet, as well as certifications that a vessel operator is not a common carrier. Cargill also undertakes to include no provision in its terminal tariff(s), and/or schedule of rates which makes reference to the application, or non-application, of any statute other than the Shipping Act of 1984, as amended, including state or federal statutes, relative to the common carrier status of a vessel owner. This paragraph will remain in effect for a period of five (5) years after the date on which the Commission

approves this Agreement.

7. For all of the terminal facilities owned or operated by Cargill, Incorporated on the lower Mississippi River, Cargill intends to enter into sole provider tug arrangements for periods of at least three years but no longer than five years. The contract will be awarded pursuant to a transparent bid process.

8. That Cargill, its successors and assigns or purchasers of the Cargill facility covered by this Agreement are to be bound by this Agreement from the date on which the Commission approves this Agreement. In accordance herewith, Cargill will affirmatively undertake to include specific provisions in affected documents of transfer, sale or conveyance that the transfer, sale or conveyance is made subject to this Agreement. Cargill will provide the Commission with written notice of any transfer, sale or conveyance, regardless of to whom the transfer, sale or conveyance is made, within 30 days after the effective date of same.

9. It is also intended that this agreement apply in full measure to any facility(ies) on the Lower Mississippi River (*e.g.*, from Baton Rouge to Head of Passes) which Cargill may acquire, manage or operate where Cargill has the authority (explicit or implied) to implement a tug arrangement like, or similar to, that which it currently has with E.N. Bisso & Son, Inc.

10. Nothing herein requires Cargill to contract or to continue to contract with an assist tug company to provide or to continue to provide assist tug services to vessels calling at the Cargill terminal facilities.

11. That as a result of this Agreement, no penalties will be sought from, nor other proceedings or actions commenced against, Cargill regarding issues raised in the Commission's June 11, 2001 *Order to Show Cause* with respect to Cargill's facilities on the lower Mississippi River.

12. That this Agreement is not, and is not to be construed as, an admission by Cargill of any

violation of law or regulation.

13. That, upon approval of this Agreement by the Commission, Cargill will be dismissed as a party to this proceeding.

14. Notwithstanding the foregoing, in the event of a settlement agreement, or agreements, entered into between BOE and any of the other Respondents in this proceeding after the date of this Agreement and such agreement contains a provision which affords, in the sole judgment of Cargill, a more favorable provision than in this Agreement, or in the event that any decision by the Commission or any Federal Court, in the sole judgment of Cargill, affords a more favorable provision than in this Agreement, then Cargill may elect to have such provision(s) apply under the terms of this Agreement. Such election must specify, in writing to the Bureau of Enforcement: (1) the settlement agreement which Cargill wishes to adopt in whole or in part; (2) whether Cargill is adopting the entire settlement agreement or decision or, if not, the provision(s) Cargill wishes to adopt. Cargill's written election shall be made within 45 days after the Commission approves the settlement agreement sought to be adopted. Cargill's election shall become effective upon the date on which the Director of the Bureau of Enforcement counter-signs such writing. A copy of such counter-signed writing shall be promptly dispatched to Cargill. Elections by Cargill under this

paragraph shall not require a separate approval by the Presiding Administrative Law Judge or the Commission.

CARGILL, INCORPORATED

By: _____
Rick Calhoun, Vice President

Date: March __, 2004

BUREAU OF ENFORCEMENT

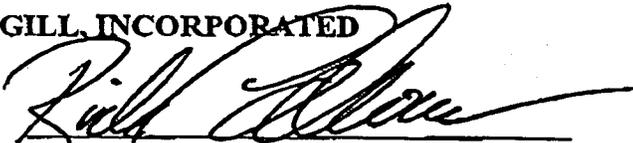
By: *Vern W. Hill*
Vern W. Hill, Director

Date: March 18, 2004

paragraph shall not require a separate approval by the Presiding Administrative Law Judge or the Commission.

CARGILL, INCORPORATED

By:


Rick Calhoun, Vice President

Date: March 18, 2004

BUREAU OF ENFORCEMENT

By:

Vern W. Hill, Director

Date: March __, 2004