

FEDERAL MARITIME COMMISSION

HAPAG-LLOYD, A.G. AND HAPAG-LLOYD (AMERICA) LLC – POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)

Docket No. 21-09

Served: June 8, 2022

BY THE COMMISSION: Daniel B. MAFFEL, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*.

Order Denying Motion to Intervene and Granting Joint Petition to Approve Proposed Settlement Agreement

On May 18, 2022, the Commission's Bureau of Enforcement (BOE) and Respondent Hapag-Lloyd, A.G. jointly petitioned the Commission to approve a proposed settlement. The settlement proposal followed an Initial Decision by the Administrative Law Judge (ALJ) in which Hapag-Lloyd was determined to be in violation of 46 U.S.C. § 41102(c), assessed civil penalties, and ordered to cease and desist from future violations, including imposing demurrage or detention when there are insufficient appointments available. Orange Avenue Express (OAE or Orange Avenue), the Complainant in FMC Docket No. 21-10, *Orange Avenue Express v. Hapag-Lloyd*, moved to intervene on the grounds

that the proposed settlement terms may adversely affect its claims against Hapag-Lloyd and establish a “safe harbor” that will insulate Hapag Lloyd from future 46 U.S.C. § 41102(c) claims challenging its detention policy or practices as unreasonable. Hapag-Lloyd opposes Orange Avenue’s motion to intervene and argues that it does not qualify to intervene as of right or meet the criteria for permissive intervention.

As a preliminary matter, this joint petition to approve the proposed settlement is properly before the Commission and does not require approval of the ALJ. The Commission approves the proposed settlement and denies as moot the motion to intervene.

I. Joint Petition to Approve Proposed Settlement

Parties seeking a voluntary dismissal based on a settlement must submit the settlement agreement so the Commission can determine whether terms “appear[] to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable.” 46 C.F.R. § 502.72(a)(3). The Commission has a longstanding policy of encouraging settlements and applies presumptions favoring a finding that the terms are fair, correct and valid. *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*, Dkt. No. 09-07, 2010 FMC LEXIS 27 at *5 (FMC 2010). However, that does not mean that the Commission reflexively approves any settlement proposed by the parties. *See, e.g., Foreign Tire Sales Inc. v. Evergreen Shipping Agency (America) Corp.*, Dkt. No. 22-05, 2022 WL 1485894 (ALJ May 3, 2022) (admin. final. June 2, 2022). Before granting its approval, the Commission reviews the terms to ensure they are consistent with § 502.72(a)(3) and that the terms are fair, reasonable, and adequate. *World Chance*, 2010 FMC LEXIS 27 at *5.

In petitioning for Commission approval, both parties in this case are represented by counsel and affirm that the settlement is the

“result of good faith negotiations between the [p]arties.” Joint Mem. in Supp. of Proposed Settlement, 2 (May 18, 2022). If the settlement is not approved, the parties state that they both anticipate filing exceptions to the ALJ’s Initial Decision and will assert multiple errors in the ALJ’s legal and factual findings which will require further extensive briefing and more costly litigation. *Id.* It is clear from the parties’ statements that the settlement is not the result of fraud or duress or similar defects.

The Commission carefully reviewed the substantive terms negotiated by Hapag-Lloyd and the Bureau of Enforcement. Although there is uncertainty in some of the terms, the Commission finds that the uncertainty is not sufficient to warrant rejection of the negotiated Agreement. The terms do not appear to be unreasonable per se and the Commission’s policy is to favor fairly negotiated settlement agreements. Therefore, the Commission’s approval of this Agreement is based solely on the facts and circumstances of this particular case. The remedial measures that Hapag-Lloyd commits to in this Agreement are not, and will not be considered by the Commission as creating, a “safe harbor” insulating future conduct from being found unreasonable or unjust or otherwise in violation of the Shipping Act.

Each case and all actions by regulated entities allegedly violating the Shipping Act or the Commission’s regulations will be reviewed and judged on their own merits based on the facts of that particular case and consistent with the applicable law and regulations. That will be the case for allegations or claims made against Hapag-Lloyd or any other entity regulated by the Commission. Stated otherwise, in approving this Agreement the Commission does not certify, determine that, or otherwise endorse the remedial measures Hapag-Lloyd agrees to establish and implement as per se reasonable or just or otherwise fulfilling obligations imposed by the Shipping Act or the Commission’s regulations.

II. Motion to Intervene

Orange Avenue moves to intervene in this action pursuant to 46 C.F.R. §§ 502.68(c)(1) and (c)(2)(i) to address its concerns that the Commission’s approval of the settlement terms might impact its claims against Hapag Lloyd or establish a “safe harbor” that insulates regulated entities from claims challenging detention and per diem charges or related conduct. Hapag Lloyd argues that Orange Avenue’s concerns that the parties’ settlement in this case will impact its claims in FMC Docket No. 21-10 are groundless, allowing it to intervene would unduly delay this case, and that intervention is unnecessary in any event given BOE’s participation.

Section 502.68(c)(1) governs intervention as of right and provides that any person who “claims an interest relating to the property or transaction that is subject of the proceeding” which may “as a practical matter impair or impede” their ability to protect that interest should be permitted to intervene as of right “unless existing parties adequately represent that interest.” Section 502.68(c)(2)(i) governs permissible intervention and provides that any person demonstrating a “common issue of law or fact” between their interests and the proceeding may be permitted to intervene provided that certain conditions are met.

As discussed above, the Commission does not interpret the Agreement as creating a “safe harbor” if regulated entities establish and follow the remedial measures agreed to by Hapag-Lloyd. As discussed in this Order, the Commission’s approval of this Agreement is not an endorsement of those remedial measures as per se reasonable, just, or otherwise meeting obligations imposed by the Shipping Act or the Commission’s regulations. Because the concerns that Orange Avenue raises are addressed in this Order, the motion to intervene is denied as moot.

III. Conclusion

The Commission hereby:

(1) grants the joint motion and approves the Agreement; and

(2) denies as moot the motion to intervene.

By the Commission.

William Cody
Secretary