

**FEDERAL MARITIME COMMISSION**  
**Office of Administrative Law Judges**

WAN HAI LINES, LTD. AND WAN HAI LINES (USA) LTD. -  
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)

**DOCKET NO. 21-16**

Served: March 13, 2023

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**ORDER OF:** Erin M. WIRTH, *Chief Administrative Law Judge.*

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**INITIAL DECISION APPROVING REMAND SETTLEMENT AGREEMENT<sup>1</sup>**

**I. BACKGROUND AND HISTORY**

On February 24, 2022, the Bureau of Enforcement, Investigations, and Compliance (“BEIC”) and Respondents Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. (collectively “Wan Hai”) filed a motion and joint memorandum in support of proposed settlement (“Motion”), together with a copy of the proposed settlement agreement. The parties seek approval of the settlement agreement and dismissal of this proceeding with prejudice.

The Federal Maritime Commission (“Commission”) initiated this proceeding on December 30, 2021, by issuing an Order of Investigation and Hearing (“OIH”) to determine whether Respondents violated section 41102(c) of the Shipping Act regarding Respondents’ charges relating to empty container returns. OIH at 1. In addition, the Commission ordered the proceeding to be expedited. OIH at 9.

The parties reached a previous settlement agreement. On June 7, 2022, an order was issued denying the previous joint settlement motion. The parties filed a joint appeal of the order denying the joint settlement motion. On December 15, 2022, the Commission issued an order affirming the denial of the joint settlement motion and returning the proceeding for further proceedings and resolution within four months.

On December 16, 2022, the parties were ordered to file a joint status report with proposed schedule. On December 27, 2022, a remand scheduling order was issued. The parties filed a joint petition for stay and revision of the schedule. On February 9, 2023, the Commission served an order denying the joint petition for stay. Earlier on February 9, 2023, the parties had filed a joint motion for stay of deadlines pending settlement. On February 10, 2023, an order was issued granting a two-week extension of deadlines as the parties finalized the settlement.

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<sup>1</sup> This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

## II. LEGAL STANDARD

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a long history of approving settlement agreements that meet the required criteria, including in enforcement proceedings.

The Commission's decisions and regulations have long indicated a broad policy favoring settlement. In reviewing a proposed settlement, the Commission evaluates whether it would contravene any law or public policy, and whether it is "fair, reasonable, and adequate." As the parties note, the Commission weighs enforcement policy in terms of deterrence and compliance, likely costs and delay, and "pragmatic litigative possibilities" regarding the proceeding's potential outcomes.

*Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A.*, Docket No. 97-07, 2000 FMC LEXIS 2 at \*4 (FMC May 2, 2000) (citing *Old Ben Coal Co. v. Sea-Land Serv.*, 21 F.M.C. 506, 512-513; 18 S.R.R. 1085, 1091 (ALJ Nov. 29, 1978); *Far Eastern Shipping Co. – Possible Violations of Sections 16, Second Paragraph 18(b)(3) and 18(c), Shipping Act, 1916*, 21 S.R.R. 743, 1014 (ALJ Mar. 25, 1982)).

The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval. The Commission has consistently adhered to a policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid. Despite the general preference for approval of settlement agreements, the Commission does not merely rubber stamp any proffered settlement. Instead, the Commission typically 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. The Commission also reviews the terms of settlement agreements 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.

*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*, Docket No. 09-07, 2010 FMC LEXIS 27 at \*5, 31 S.R.R. 1346, 1350 (FMC May 20, 2010) (internal citations omitted).

This is an enforcement proceeding and Commission Rules require consideration of the Subpart W factors. Under Subpart W, Commission Rule 603(b), in “determining the amount of any penalties assessed,” the Commission is required to “take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.” 46 C.F.R. § 502.603(b). These factors have since been codified in 46 U.S.C. § 41109 by the passage of the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

In addition, Commission Rule 603(a), governing the assessment of civil penalties in Commission-instituted proceedings, states that the “full text of any settlement must be included in the final order of the Commission.” 46 C.F.R. § 502.603(a); *see also* Remand Order at 6.

### **III. SETTLEMENT AGREEMENT ANALYSIS**

#### **A. Settlement Terms**

The parties state that the “revised Settlement Agreement addresses the purpose the Commission articulated in its OIH and Order Reversing the Initial Decision and Remand; specifically, the rules in Subpart W, which govern, among other things, the assessment of civil penalties 46 C.F.R. §§ 502.601-502.605.” Motion at 2 (footnote omitted). In addition, the parties state:

The Parties agree to resolve their legal dispute in the Settlement Agreement and agree that settlement is in the interest of both parties, as it conserves litigative and administrative resources. Furthermore, the Settlement Agreement addresses the Commission’s enforcement interests of deterrence and compliance. A summary of terms of the Settlement Agreement are as follows:

1. Within ten (10) calendar days after a decision approving this Settlement Agreement becomes administratively final, Wan Hai shall make monetary payment of civil penalties to the Commission, by cashier’s or certified check or by online payment, in the total amount of \$950,000.00.
2. Within fifteen (15) calendar days after a decision approving this Settlement Agreement becomes administratively final, Wan Hai shall refund to the underlying parties charges collected under the twenty-one (21) invoices at issue in this proceeding as listed in Attachment A to the Order of Investigation and Hearing).
3. Upon submission of this Settlement Agreement to the Administrative Law Judge, Wan Hai agrees to cease and desist from knowingly assessing detention charges where: (a) Wan Hai failed to provide an equipment return location; (b) where Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) where appointments were unavailable for equipment return, so as to comply hereafter with the Interpretive Rule regarding Detention and Demurrage, 46 C.F.R. § 545.5(c)(1); 85 FR 29638 (May 18, 2020).

4. BEIC and Wan Hai shall jointly submit to the Administrative Law Judge a motion seeking approval of this Settlement Agreement.

5. Wan Hai hereby waives all rights now and, in the future, to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to this Agreement.

6. Upon a decision of the Administrative Law Judge or the Commission approving this Settlement Agreement becomes administratively final, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claim for recovery of civil penalties from Wan Hai arising from the alleged violations set forth above as related to the twenty-one (21) invoices identified in Attachment A to the Order of Investigation and Hearing.

7. It is expressly understood and agreed that this Agreement is not, and is not to be construed as, an admission by Wan Hai to the alleged violations set forth above.

8. This agreement is subject to approval by the Commission in accordance with 46 C.F.R. § 502.603. If the agreement is not approved, all Wan Hai's obligations hereunder shall cease.

Motion at 2-3.

Consistent with Commission Rule 603(a), the full text of the settlement agreement is attached to this order. 46 C.F.R. § 502.603(a). In addition, the settlement agreement has been posted on the docket on the Commission website.

## **B. Criteria**

### **1. Rule 72 Factors**

Commission Rule 72 requires consideration of “whether the settlement appears 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 parties assert that the agreement is public and therefore “the agreement will inform other carriers and the shipping public so they may take note of its terms and conform their conduct thereto.” Motion at 5. The parties further contend that the settlement agreement “is free of fraud, duress, undue influence, mistake, or other defects which would otherwise result in its disapproval” and that “the settlement is the result of arms-length, good-faith negotiations conducted with the advice of counsel.” Motion at 5-6.

Both parties are represented by counsel who have engaged in arm's length negotiation and there is no indication of fraud, duress, undue influence, mistake, or other defects. The settlement promptly resolves an issue important to the shipping industry and avoids the potential costs and uncertain outcome inherent in litigation. Moreover, the agreement does not appear to violate any law or policy and is consistent with Commission requirements as outlined below.

## 2. Rule 603 Factors

Commission Rule 603(b) requires consideration of “the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.” 46 C.F.R. § 502.603(b). The parties have different positions regarding a number of these factors.

Regarding the nature, circumstances, extent, and gravity of the violation, Wan Hai indicates that it has evidence that “contradicts the position taken in the OIH and by BEIC in this proceeding and supports the reasonableness of its conduct” and asserts that it “would vigorously argue that the nature, circumstances, extent and gravity of the alleged violations do not warrant imposition of a significant penalty.” Motion at 6-7.

BEIC contends that “the violations are serious, and that the nature, circumstance, extent, and gravity are all aggravating factors that compel a commensurate civil penalty” and that “this penalty amount will serve as a deterrent against future violations.” Motion at 7. BEIC further asserts that:

Beyond the dollar amount of the civil penalty, the Settlement Agreement importantly provides for Wan Hai’s agreement to immediately comply with the Interpretive Rule and related statutory and regulatory requirements in the U.S. foreign trades. The Settlement Agreement coupled with the issuance of a cease-and-desist order will deter future similar violative acts by Wan Hai. Moreover, it will serve as notice to other VOCCs that violative acts in contravention of the Interpretive Rule, 46 C.F.R. § 545.5(c)(1) run afoul of the Shipping Act.

Motion at 7.

Unlike the prior settlement agreement, this settlement agreement is clear, narrowly tailored to the specific facts of this case, and does not contain prescriptive measures which may or may not be reasonable as applied to future litigants. The civil penalty is significant and is consistent with the nature, circumstances, extent, and gravity of the 21 violations alleged. Moreover, there is a benefit to the shipping public in having an expeditious resolution which imposes a clear cease and desist order. While it is difficult to determine the degree of culpability at this stage of the proceeding, the civil penalty is significant and the cease and desist order ensures that further violations do not occur. Therefore, the proposed settlement is reasonable.

Regarding the enforcement policy of deterrence and compliance, the parties assert:

With respect to the policy of enforcement, BEIC stresses the importance of ensuring compliance with the law. Wan Hai supports the Commission’s objectives and has, in addition to payment of a civil penalty, agreed to comply with the Interpretive Rule, 46 C.F.R. § 545.5(c)(1) for all shipments within the jurisdiction of the Commission. The relief agreed to by Wan Hai provides assurances of deterrence and future compliance. Wan Hai’s commitment to these changes is reflected in its agreement to a cease-and-desist order. The agreed civil penalty adds further weight to the deterrent effect. Wan Hai also recognizes that

its failure to comply with the cease-and-desist order may result in much higher penalties being demanded by the Commission in any enforcement action resulting from such failure. Additionally, approval of the Settlement Agreement would put other ocean common carriers on notice and is likely to deter them from engaging in similar practices.

Motion at 7-8. These factors also significantly weigh in favor of approving the proposed settlement agreement.

Regarding litigative realities, the parties assert that the “litigative realities and cost of continued litigation weigh in favor of approving the Settlement Agreement” and that the “decision to settle reflects the consideration that, if the matter were not settled, both parties would be expected to vigorously defend their respective positions.” Motion at 11. The parties state:

The litigative realities and cost of continued litigation weigh in favor of approving the Settlement Agreement. The decision to settle reflects the consideration that, if the matter were not settled, both parties would be expected to vigorously defend their respective positions and incur substantial administrative and financial costs based on the fact that several procedural steps remain in this proceeding. Acknowledging the Parties remain divergent on the merits of the case, they have carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests, as well as that of the shipping public. Both sides recognize the litigation reality that resolution of the proceeding by trial would be an expensive undertaking that would divert resources from each of the Parties. Moreover, it is likely that, even with the expedited schedule required by the Remand Order, as implemented by the ALJ’s Remand Scheduling Order issued on December 27, 2022, the likelihood of appeal to the Commission and the courts, the matter would take significant time to reach a final resolution. The Settlement Agreement by contrast, would resolve the matter without extended litigation thereby bringing substantial, valuable, and immediate relief to the shipping public, including refunds of charges on the 21 invoices at issue in this proceeding. Accordingly, consideration of these benefits along with the risks, costs, and uncertainties of continued litigation weighs in favor of approval of the Settlement Agreement.

Motion at 8. The prompt settlement of this proceeding benefits the parties as well as the shipping public and therefore is a reasonable balance of the relevant factors.

Regarding history of prior offenses and ability to pay, the parties state that “Wan Hai has no recent history of prior offenses” and “Wan Hai is one of the smaller ocean common carriers serving the U.S. Transpacific trade.” Motion at 8-9. These factors are consistent with the proposed penalty.

A review of the settlement agreement and the relevant factors indicates that it satisfies the criteria for approval. Therefore, the settlement agreement is reasonable and will be approved, including imposition of civil penalties and a cease and desist order.

#### IV. ORDER

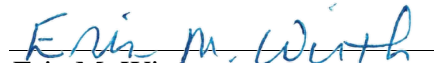
Accordingly, upon consideration of the motion, settlement agreement, and the record, and good cause having been stated, it is hereby:

**ORDERED** that the motion to approve the settlement agreement between the Bureau of Enforcement, Investigations, and Compliance and Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. be **GRANTED**. It is

**FURTHER ORDERED** that Wan Hai is hereby **ORDERED** to refund the underlying parties for charges collected under the twenty-one (21) invoices at issue in this proceeding as listed in Attachment A to the Order of Investigation and Hearing. It is

**FURTHER ORDERED** that the request for a cease and desist order be **GRANTED**. Wan Hai is hereby **ORDERED** to cease and desist from knowingly assessing detention charges where: (a) Wan Hai failed to provide an equipment return location; (b) where Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) where appointments were unavailable for equipment return, so as to comply hereafter with the Interpretive Rule regarding Detention and Demurrage, 46 C.F.R. § 545.5(c)(1); 85 FR 29638 (May 18, 2020). It is

**FURTHER ORDERED** that this proceeding be **DISMISSED WITH PREJUDICE**.

  
Erin M. Wirth  
Chief Administrative Law Judge