

FEDERAL MARITIME COMMISSION

WAN HAI LINES, LTD.
AND WAN HAI LINES (USA) LTD. –

POSSIBLE VIOLATIONS OF 46 U.S.C. §
41102(C)

Docket No. 21-16

Served: February 9, 2023

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

Order Denying Joint Petition for Stay

On December 15, 2022, the Commission issued an order affirming the Administrative Law Judge's (ALJ) denial of the proposed settlement agreement submitted by the Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) (formerly known as the Bureau of Enforcement (BOE)), and Respondents Wan Hai Lines, Ltd., and Wan Hai Lines (USA), Ltd. (Wan Hai). The Commission returned the matter to the ALJ so the proceeding could continue, and directed the ALJ to issue an initial decision within four months of the date of the order. On December 27, 2022, the ALJ issued an order that adopted the schedule proposed by the parties to meet this timeline.

On December 29, 2022, BEIC and Wan Hai jointly petitioned the Commission, under 46 C.F.R. § 502.261(a)(1), to stay the proceeding and to revise the schedule.

The Commission denies the parties' joint petition for stay for the reasons below.

I. BACKGROUND

On December 30, 2021, the Commission instituted this adjudicatory proceeding to determine whether Wan Hai's practices relating to empty container returns violated 46 U.S.C. § 41102(c). Order of Investigation and Hearing (Order of Investigation) (Dec. 30, 2021). The Commission sought to determine whether Wan Hai was violating 46 U.S.C. § 41102(c) by its practice of assessing detention charges where: (a) Wan Hai failed to provide an equipment return location; (b) Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) appointments were unavailable for equipment return. In the Order of Investigation, the Commission directed the ALJ to issue an initial decision within six months. *Id.* at 9.

The parties filed several joint status reports and, after requesting a continuance, filed a proposed settlement agreement and jointly moved for approval of this agreement. *See* Joint Mot. for Continuance (April 1, 2022); Joint Mot. for Approval of Proposed Settlement Agreement (May 2, 2022). The ALJ rejected the proposed agreement and found that it "lacks clarity" and may not be consistent with 46 U.S.C. § 41102(c). Order Denying Mot. to Intervene and Joint Settlement Mot. at 12 (June 7, 2022). Specifically, the ALJ outlined several concerns with the proposed procedure for contesting detention charges in section 5 of the agreement and found that that the agreement sets out a procedure that is potentially confusing. *Id.* at 8-12. To "prevent substantial delay, expense or detriment to the public interest, or undue prejudice to a party," the ALJ granted the parties leave to appeal the order

rejecting the proposed settlement. *Id.* at 12 (citing 46 C.F.R. § 502.221(a)).

The parties filed a joint appeal challenging the ALJ's rejection of the agreement. *See* Joint Appeal of the Order Denying Joint Pet. Mot. (June 16, 2022). The parties argued that the agreement's terms are reasonable and the ALJ's concerns are unwarranted. *Id.* at 3-6. The parties also asserted that the rationale in the Commission's approval of a settlement agreement in Docket No. 21-09, *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LCC, Possible Violations of 46 U.S.C. § 41102(c)*, supports approval of the agreement. *Id.* at 3.

On December 15, 2022, the Commission issued an order that affirmed the ALJ's denial of the settlement agreement submitted by BEIC and Wan Hai. Order Affirming Denial of Joint Settlement Motion, December 15, 2022 (Order Affirming Denial). The Commission stated that without additional discussion regarding the interpretation and application of section 5, the proposed agreement lacked clarity and may violate 46 U.S.C. § 41102(c) or 46 C.F.R. § 545.5, the interpretive rule on unjust and unreasonable practices with respect to demurrage and detention. Order Affirming Denial at 7.

In addition, the Commission concluded that the proposed settlement agreement may contravene new provisions of law and policy provided in the Ocean Shipping Reform Act of 2022. *Id.* at 8. Furthermore, the Commission disagreed with the parties' assertion that section 5 of the settlement agreement should provide guidance to the industry related to demurrage or detention charges for container returns. *Id.* at 9. The Commission stated that the more appropriate mechanism to provide such industry guidance would be a rulemaking proceeding in which the Commission could receive input from stakeholders that are not parties to this proceeding. *Id.* at 9-10.

The Commission affirmed the ALJ’s denial of the settlement agreement and returned the matter to the ALJ so that the proceeding could continue. *Id.* at 10. The Commission directed the ALJ to issue an initial decision within four months of the date of the order. *Id.*

II. JOINT PETITION FOR STAY

On December 29, 2022, the parties jointly petitioned the Commission to stay the proceeding and to revise the schedule. Joint Petition for Stay and Revision of Schedule, December 29, 2022 (Joint Petition). Specifically, they requested that the Commission stay the proceeding, pursuant to 46 C.F.R. § 502.261(a)(1), until 60 days after the effective date of a final regulation in Docket No. FMC-2022-0066, *Demurrage and Detention Billing Requirements Notice of Proposed Rulemaking*. Joint Petition at 2. The parties asserted that staying the proceeding until 60 days after the effective date of a final rule is warranted because they cannot revise the settlement agreement “without first receiving further guidance from the Commission on the nature and scope of the requirements of [the Ocean Shipping Reform Act of 2022 (OSRA 2022)] in the form of a final rule in Docket No. FMC-2022-0066.” *Id.* at 3.

Furthermore, the parties noted that the Order Affirming Denial suggested that “guidance to the industry on container return processes and billing/waiver of demurrage and detention charges is most appropriately provided in a rulemaking proceeding.” *Id.* (citing Order Affirming Denial at 9). The parties claimed that the phrase “a rulemaking proceeding” is a reference to Docket No. FMC-2022-0066. *Id.* Therefore, the parties asserted that they need to review the final rule in Docket No. FMC-2022-0066 to successfully negotiate a settlement agreement that is consistent with current law and policy.

The parties also requested that the Commission reconsider the application of an expedited schedule to this proceeding and revise the four-month deadline established in the Order Affirming Denial. Joint Petition at 4, n.2. The parties argued that this request

is proper under 46 C.F.R. § 502.261 because there has been a change in material fact (rejection of the settlement) and of applicable law. *Id.* The parties stated that the basis for establishing an expedited schedule, the “unprecedented stress being placed on the United States’ supply chain, including the significant role that unreasonable detention plays in congestion had freight fluidity[,]” has been overtaken by the enactment of OSRA 2022. *Id.* at 5. In addition, the parties claimed that the enactment of OSRA 2022 and the Commission’s rulemaking on demurrage and detention billing practices have reduced the urgency of issuing a decision in this proceeding for purposes of providing legal guidance to the industry. *Id.*

The parties also asserted that the requested relief is necessary for them to fully develop the evidentiary record and to advocate their respective positions. They claimed that to comply with the deadlines established by the Order Affirming Denial, they would need to conclude depositions by January 30, 2023, and discovery by February 10, 2023. *Id.* The parties stated that this schedule would not allow for proper notice prior to depositions, assumed that all persons to be deposed would be available in this period, and would preclude depositions of additional witnesses that may be identified during discovery. *Id.* Moreover, the parties argued that because OSRA 2022 amended the governing statute, they need additional time to supplement or redo the discovery already completed in this proceeding. *Id.* at 6.

Finally, the parties asserted that the port congestion that this proceeding purportedly sought to alleviate has largely disappeared. *Id.* They contended that this further justifies revising the deadline.

III. DISCUSSION

A. Reconsideration Under 46 C.F.R. § 502.261

The parties base their request for a stay on 46 C.F.R. § 502.261, which provides that:

“Within thirty (30) days after issuance of a *final decision or order* by the Commission, any party may file a petition for reconsideration A petition will be subject to summary rejection unless it:

- (1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
- (2) Identifies a substantive error in material fact contained in the decision or order; or
- (3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. A petition shall be verified if verification of the original pleading is required and shall not operate as a stay of any rule or order of the Commission.”

(emphasis added).

The Commission denies the Joint Petition for a stay as procedurally improper because the Order Affirming Denial is not a final decision or final order by the Commission. For a Commission decision or order to be final, it must: (a) mark the end of the agency’s decision-making process; and (b) be a decision or order by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Carolina Marine Handling, Inc. v. S. Carolina State Ports Auth.*, Case No. 99-16, 2006 FMC LEXIS 13, at *8 (FMC Nov. 28, 2006). Here, the Order Affirming Denial does not mark the end of the agency’s decision-making process. Instead, the Commission remanded the proceeding back to the ALJ and clearly contemplated further decision making by the ALJ. Order Affirming Denial at 10. Because the Order Affirming Denial is not a final order, 46 C.F.R. § 502.261 is not applicable, and the request is procedurally improper.

Furthermore, the Joint Petition does not meet any of the three standards for reconsideration enumerated in 46 C.F.R. § 502.261. The parties argued that the passage of OSRA 2022, which was signed on June 16, 2022, warrants a stay. Section 502.261(a)(1) requires that a petition for reconsideration or stay specify that “there has been a change in material fact or in applicable law, which change has occurred *after* issuance of the decision or order.” 46 C.F.R. § 502.261(a)(1) (emphasis added). The Commission issued the Order Affirming Denial on December 15, 2022, approximately six months after OSRA 2022 became law. The parties failed to identify any change in material fact or in applicable law that occurred after the Commission issued the Order Affirming Denial. In addition, the parties did not identify a substantive error in material fact contained in the decision or address a finding or conclusion or other matter upon which the parties did not previously had the opportunity to comment that would warrant reconsideration and stay under section 502.261(a)(2) or (3).

In addition, staying the proceeding until 60 days after the effective date of the final rule in Docket No. FMC-2022-0066 would not provide the guidance sought by the parties. The proposed rule would specify minimum information that common carriers must include in a demurrage or detention invoice; add to this list additional information that must be included in or with a demurrage or detention invoice; further define prohibited practices by clarifying which parties may be appropriately billed for demurrage or detention charges; and establish billing practices that billing parties must follow when invoicing for demurrage or detention charges. *Demurrage and Detention Billing Requirements*, 87 Fed. Reg. 62341 (proposed Oct. 14, 2022) (to be codified in 46 C.F.R. part 541). Unless the Commission revises the proposed rules to include provisions on the return of empty containers in Docket No. FMC-2022-0066, the final rule will not provide guidance related to the container return processes or what evidence must be provided when disputing a related demurrage or detention charge. Therefore, staying the proceeding until 60 days after the effective date of a final

rule in Docket No. FMC-2022-0066 would not provide the parties with the benefit they claim to need.

The Commission is skeptical that the parties require such guidance to reach a revised settlement agreement. The Commission previously stated that “any settlement agreement between the parties *must be narrowly tailored* to the specific facts of this case and *must not contain prescriptive measures* which may or may not be reasonable as applied to future litigants.” *Id.* at 10 (emphasis added). A potential settlement agreement in this proceeding need not outline a procedure for the return of empty containers. Instead, the Commission reiterates that the appropriate mechanism for providing industry guidance on the process to return of empty containers would be a rulemaking proceeding where the Commission can consider input from stakeholders that are not parties to this enforcement proceeding.

B. Petition To Revise the Schedule Under 46 C.F.R. § 502.94

Alternatively, the parties requested that the Commission revise the schedule pursuant to 46 C.F.R. § 502.94. *Id.* at 4, n.2. Section 502.94 provides that “[e]xcept when submitted in connection with a *formal proceeding*, all claims for relief or other affirmative action by the Commission, including appeals from Commission staff action, except as otherwise provided in this part, must be by written petition[.]” 46 C.F.R. § 502.94 (emphasis added). Because Docket No. 21-16 is a formal proceeding excepted by this section, section 502.94 does not apply. The Commission denies the parties’ request under 46 C.F.R. § 502.94.

However, the denial of the Joint Petition does not foreclose further consideration of the parties’ concerns regarding the schedule in this proceeding. The parties may file an appropriate motion with the ALJ for a revision of the schedule. The Commission’s rules of procedure provide that “an application or request for an order or ruling not otherwise specifically provided for in this part must be made by motion.” 46 C.F.R. § 502.69(a). Section 502.69 also notes

that “[a]ll motions must be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter must be referred to the Commission.” *Id.* Here, a potential motion to revise the deadlines established by the Commission would be properly referred to the Commission because revising such deadlines appear to be beyond the authority of the presiding officer.¹

IV. CONCLUSION

For the reasons set forth above, the Commission **DENIES** the Joint Petition for Stay.

By the Commission.

William Cody
Secretary

¹ See Dkt. No. 20-14, *Intermodal Motor Carriers Conf., American Trucking Ass’n, Inc. v. Ocean Carrier Equip. Mgmt. Ass’n Inc.; Consol. Chassis Mgmt., LLC; CMA CGM S.A.; COSCO SHIPPING Lines Co. Ltd.; Evergreen Line Joint Serv. Agreement, FMC No. 011982; Hapag-Lloyd AG; HMM Co. Ltd.; Maersk A/S; MSC Mediterranean Shipping Co. S.A.; Ocean Network Express Pte. Ltd.; Wan Hai Lines Ltd.; Yang Ming Marine Transp. Corp.; and Zim Integrated Shipping Serv.*, Served Notice of Extension of Time, August 18, 2022 (after several ALJ orders revising the procedural schedule, the Commission issued a notice stating that it determined to extend the deadline for issuance of an initial decision).