

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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WAN HAI LINES, LTD.)	
AND WAN HAI LINES (USA) LTD. –)	DOCKET NO. 21-16
)	
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C))	
)	

JOINT APPEAL OF THE ORDER DENYING JOINT SETTLEMENT MOTION

Pursuant to 46 C.F.R. § 502.227 and the Order Denying the Joint Settlement Motion entered on June 7, 2022 (the “Order”), the Bureau of Enforcement (“BOE”) and Respondents Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. (“Wan Hai” or “Respondents,” and together with BOE, the “Parties”), submit this Joint Appeal of the Order Denying the Joint Settlement Motion.

I. PROCEDURAL HISTORY

On December 30, 2021, the Federal Maritime Commission (“FMC” or “Commission”) initiated this proceeding by issuing an Order of Investigation and Hearing pursuant to 46 U.S.C. §§ 41102(c), 41302(a), and 46 C.F.R. § 502.63. Order Investig. Hr’g at 4, (Dec. 30, 2021). The Parties began discovery and exchanged initial disclosures and some other discovery requests pursuant to the Administrative Law Judge’s Initial Order. Initial Order at 2–3, (Jan. 6, 2022). The Parties also conducted simultaneous settlement negotiations pursuant to the Initial Order. *Id.* at 2.

The Parties reached an agreement in principle to settle the case and filed a joint motion for continuance to further discuss settlement details. Jt. Mot. Continuance at 1–2, (Apr. 1, 2022); *see also* Order Granting Mot. Continuance Part, (Apr. 4, 2022) (“Order of Continuance”). Pursuant to 46 C.F.R. § 502.75 and the Order of Continuance, the Parties jointly filed a motion

for approval of the settlement agreement, the Parties' settlement agreement, and an accompanying memorandum in support of the Parties' settlement agreement. *See* Jt. Mot. Appr. Settlement Agreement, (May 5, 2022); Jt. Memo. Supp. Proposed Settlement, (May 5, 2022) ("Jt. Mem."); Settlement Agreement, (May 5, 2022).

After supplemental briefing on the Settlement Agreement, the ALJ denied the Joint Settlement Motion because the ALJ had ongoing "concerns regarding section 5 of the settlement agreement" and found that "the settlement agreement lacks clarity and may not be consistent with section 41102(c) and the Demurrage and Detention Rule." Order at 12. Notwithstanding the foregoing, the ALJ granted the Parties leave to file an appeal of the denial. Subsequent to the entry of the Order, by order dated June 8, 2022 (the "21-09 Order"), the Commission approved the settlement agreement in Docket 21-09 which is substantially similar to the Settlement Agreement in all material respects.

The Parties appeal the Order and request that the Commission approve the Settlement Agreement because 1) the Settlement Agreement was fairly negotiated; and 2) the terms of the Settlement Agreement are reasonable.

II. The Settlement Agreement was Fairly Negotiated

As explained by the Commission in the 21-09 Order:

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.

21-09 Order at 1.

In approving the settlement agreement in Docket 21-09, the Commission noted that both

parties were represented by counsel and had affirmed that the settlement was the “result of good faith negotiations” and that disapproval would result in significant additional briefing and costly litigation. *Id.* at 2–3. The same factors cited by the Commission warrant approval of the Settlement Agreement in this proceeding. Namely, both of the Parties are represented by counsel and have affirmed that the settlement is the “result of good faith negotiations between the Parties.” Jt. Mem. at 2. Thus, it is clear that the Settlement Agreement is “not the result of fraud or duress or similar defects.”

If the Settlement Agreement is not approved, both sides will incur substantial additional administrative and financial costs based on the fact that several procedural steps remain in this proceeding, including additional responses to BOE’s discovery requests, outstanding replies to third-party subpoenas, depositions (of Respondents and third parties), as well as the briefing and submission of the Parties’ respective cases.

III. The Terms of the Settlement Agreement are Reasonable

In approving the settlement agreement in Docket 21-09, the Commission found that while there may be some “uncertainty in some of the terms,” such uncertainty was “not sufficient to warrant rejection of the negotiated Agreement” and that the terms of the agreement did not appear to be unreasonable. 21-09 Order at 3. As such, the Commission followed its longstanding policy in favor of approving fairly negotiated settlement agreements. *Id.* at 4. Especially in light of the fact that the settlement agreements in the two proceedings are substantially similar in all material respects, the same rationale supports approval of the Settlement Agreement in this proceeding. Furthermore, as explained below, some concerns regarding terms of the Settlement Agreement are not warranted.

First, the ALJ pointed to two possible readings of the Settlement Agreement’s screen shot

requirement with respect to the day prior to the waiver request stating that “[i]t is not clear whether the screen shot for the day prior to the waiver date is supposed to show whether appointments were available on the day prior or whether appointments were available on the day for which the waiver is requested.” *Id.* at 9. The ALJ correctly noted that the former reading could result in denials of waiver requests based on information that is not relevant to the ability to return equipment on the date for which the waiver is requested (for example, under such a reading, with respect to charges assessed for Tuesday, the screenshot on Monday would show that no appointments were available to return the equipment on Monday). This was not the intent of the Parties. Rather, as stated in Section 5.iii.a. of the Settlement Agreement, the required screenshot is intended to provide proof of unavailability of appointments on the *Waiver Date* (for example, with respect to charges assessed for Tuesday, the screenshot on Monday would show that no appointments were available to return the equipment on Tuesday). The purpose of this requirement was to provide a mechanism through which a party seeking a waiver of detention charges could demonstrate, and Wan Hai could confirm, that a motor carrier satisfied its customary obligation to make a good faith effort to return equipment in a timely fashion. *See* 85 Fed. Reg. 29638, 29652 (May 18, 2020) (the Commission’s interpretative rule “presupposes that shippers, intermediaries, and truckers have complied with their customary obligations, including those involving cargo retrieval.”).

Furthermore, while the ALJ was concerned that an entity “may not know what terminals to check” until after Wan Hai had posted an updated list of terminals by 4 pm, such concern appears to have been based on the mistaken assumption that absent an update, *no* list would be posted on Wan Hai’s website. Order at 10. In actuality, the list will be updated on a rolling basis and the intent of the Parties was that an entity claiming a waiver would be able to rely upon

the list as posted on Wan Hai's website as of the date and time the relevant screenshot was taken.¹

With respect to dual transactions, the ALJ stated that the requirement to submit a statement from the motor carrier affirming its good faith attempt to arrange for a dual-transaction was "duplicative" of the requirement in section 5(A)(iii)(c) to provide an explanation of why an appointment shown as available on a submitted screenshot could not be used. Order at 11. However, these items are not duplicative. In situations where a dual-transaction requirement is in place, a party would not be seeking an appointment for the empty return at all, nor would they need to show a screenshot. Rather, in such instances, the ability to return empty equipment is tied to whether the motor carrier has a pickup transaction to match to the empty return that is the subject of the waiver request. The agreement does not include a requirement of screenshots for appointments for import pick-ups. The Settlement Agreement merely requires that a statement from the motor carrier be included in the dispute packet if dual transaction restrictions were at issue in that dispute. Simply stated, this is something unrelated to the requirements of section 5(A)(iii)(c).

Lastly, the Settlement Agreement is narrowly tailored to the specifics of the fact pattern presented in this case and does not replace the customary communications between the vessel operator and the disputing party. There remains, during the dispute process, opportunity to

¹ As noted in Respondents' Opposition to Motion for Leave to Intervene and Supplemental Briefing ("Respondents' Supplemental Briefing"), "[c]urrently, when a specific container number is entered on the Wan Hai website, the website provides a default return location" and "[i]t appeared during the course of discovery and pleading in this proceeding that there may have been confusion on the part of motor carriers who mistakenly believed that the identification of the default return location meant that equipment could be returned *only* to the listed location." Respondents' Supplemental Briefing at 5. To address this, Respondents agreed to post disclaimer language intended to make clear that the default location is not the only location to which Wan Hai equipment may be returned and to post the referenced list of locations to identify other locations where equipment could potentially be returned. "The list assists motor carriers by identifying the individual terminal websites that should be checked for the most up to date and complete information with respect to the return of Wan Hai equipment." *Id.*

clarify any misunderstandings about the guidance provided. Additionally, the Settlement Agreement is not meant to cover every scenario for which a party may dispute a charge. For scenarios outside the scope of the Settlement Agreement, such disputes would be decided on a case-by-case basis, as they have been and are at present.

As explained above, the concerns regarding the terms of the Settlement Agreement identified by the ALJ in the Order were not warranted. Additionally, in reviewing a substantially similar agreement in Docket 21-09, the Commission found that the terms were not unreasonable and any uncertainty regarding the terms did not warrant denial. The same rationale holds true in the instant proceeding.

V. Conclusion

Absent a settlement, the ALJ would need to make the binary determination of whether the Respondents' actions in this proceeding were violative of the Shipping Act or not. Either determination would leave no clear affirmative guidance and could lead to repetitive litigation as Respondents explore alternative practices only to be rebuffed by BOE. Motor carriers would then be forced to participate in Respondents' changing procedures, which would impose an undue burden as they try to meet ever changing industry "standards." Thus, it is in the best interest of the shipping public at large to have the clear procedures that this Settlement Agreement offers—procedures which balance the burden of traditional obligations between both parties in a detention billing dispute.

Nothing in the Settlement Agreement forecloses the possibility of it being superseded by Regulation or Statute; nor does the Settlement Agreement prohibit private legal actions. Should an entity believe they have been unreasonably denied a waiver, the Settlement Agreement does not preclude them from pursuing private litigation, or from providing the FMC with evidence

and allegations for a future investigation and enforcement proceeding.

The Settlement Agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well-established criteria for approval of agreements settling administrative enforcement claims and, therefore, should be approved. In light of the foregoing, the Settlement Agreement should be approved. And upon approval of the Settlement Agreement, FMC Docket No. 21-16 should be discontinued in its entirety.

DATED: June 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2022, the foregoing Appeal was served via electronic mail on:

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By: _____

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