

**ORIGINAL**

**(S E R V E D)**  
**( OCTOBER 22, 1997 )**  
**(FEDERAL MARITIME COMMISSION)**

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D. C.**

October 22, 1997

**DOCKET NO. 97-09**

**TOPOCEAN CONSOLIDATION SERVICE LTD.,  
TOPOCEAN CONSOLIDATION SERVICE (LOS ANGELES) INC.,  
TOPOCEAN CONSOLIDATION SERVICE (NEW YORK) INC.  
POSSIBLE VIOLATIONS OF SECTIONS 8,23(a) AND  
10(a)(1) OF THE SHIPPING ACT OF 1984**

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**DOCKET NO. 97-10**

**APEX MARITIME CO., INC.  
POSSIBLE VIOLATIONS OF SECTION 10(a)(1) OF THE  
SHIPPING ACT OF 1984 AND 46 CFR 510.22(i)**

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**PROPOSED SETTLEMENT APPROVED AND INVESTIGATIONS IN  
DOCKET NOS. 97-09 AND 97-10 DISCONTINUED**

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Topocean Consolidation Service Ltd., Topocean Consolidation Service (Los Angeles), Inc., Topocean Consolidation Service (New York), Inc., Apex Maritime Co., Inc. (collectively "respondents") and the Bureau of Enforcement ("BOE") submitted a joint memorandum in

support of a proposed settlement of these proceedings.<sup>1</sup> The proposed settlement meets the Federal Maritime Commission's ("Commission") criteria for approval of agreements resolving administrative enforcement claims and, therefore, will be approved.

## INTRODUCTION

By Order of Investigation dated May 29, 1997, in Docket No. 97-09, the Commission commenced an investigation into (1) whether respondent **Topocean** Consolidation Services, Ltd. violated (a) section 8 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1707, by providing common carrier services without an effective tariff filed at the Commission between September 16, 1995 and June 11, 1996, and (b) section 23(a) of the 1984 Act, 46 U.S.C. app. § 1721(a), by operating as a non-vessel-operating common carrier without an effective bond filed with the Commission between September 16, 1995 and May 2, 1996, (2) whether **Topocean** Consolidation Service (New York), Inc. and **Topocean** Consolidation Service (Los Angeles), Inc. violated section 10(a)(1), 46 U.S.C. app. § 1709(a)(1), by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise applicable by means of misdescribing the commodities actually shipped and by means of false cargo measurements between September 1, 1995 and April 30, 1997, and (3) whether **Topocean** Consolidation Service Ltd. violated section 10(a)(1), 46 U.S.C. app. § 1709(a)(1), by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise

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<sup>1</sup>Pursuant to a request of the parties Docket Nos. 97-09 and 97-10 were consolidated by order served October 17, 1997.

applicable by means of **misdescribing** the commodities actually shipped by means of false cargo measurements between June 12, 1996 and April 30, 1997.

By Order of Investigation dated June 2, 1997, in Docket No. 97-10, the Commission instituted an investigation into whether respondent Apex Maritime Co., Inc. violated (1) section IO(a)( 1) of the 1984 Act, 46 U.S.C. app. § 1709(a)(1), by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise applicable by means of **misdescribing** the commodities actually shipped and by means of false cargo measurements between September 1, 1996 and April 30, 1997, and (2) 46 CFR § 510.22(i) by rendering freight forwarding services free of charge or at reduced fees.

**BOE,**<sup>2</sup> which was designated a party to the proceedings, averred that at the evidentiary hearings it would introduce evidence in support of the allegations set forth in the Orders of Investigation.

Respondents averred that at the evidentiary hearings they would introduce evidence to disprove the allegations set forth in the Orders of Investigation.

However, recognizing the potential costs of litigation and the inherent uncertainties attending resolution of disputed issues, the parties agreed to conduct settlement discussions. The settlement agreement attached to this ruling is the result of negotiations between

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<sup>2</sup>**Official** notice is taken of the fact that, through investigative personnel, BOE conducts investigations into the activities of **NVOCCs** and other persons to ensure compliance with the statutes and regulations administered by the Commission. 35th Annual Report, fiscal year 1996, page 131. Customs personnel can now isolate shipments which enter U.S. commerce with a description other than that which had appeared on the ocean common carrier's manifest. This information permits Commission personnel to become more selective in determining which entities should be investigated for violations of the 1984 Act. As Customs refines its procedures this avenue of cooperation is expected to increase dramatically in the import and export trades of the U.S. *Id.*, p. 133.

counsel for respondents and BOE and reflects each party's view of the cases and potential outcome of the investigations. Conditioned upon approval of the proposed settlement by the Presiding Judge and the Commission, the parties seek dismissal of Docket Nos. 97-09 and 97-10.

### **AUTHORITY FOR SETTLEMENT**

The Administrative Procedure Act ("**APA**"), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *infer alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the **APA** makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

. . . even where 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 more 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, Administrative Procedure Act--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 v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission itself has long recognized that the law strongly favors settlements:

. . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

*Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 512 (1978), 18 SRR 1085, 1092. See also *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365 (1979), 19 SRR 1037, 1039; *Behring International, Inc.--Independent Ocean Freight Forwarder License No. 910* (Initial Decision, March 17, 1981, administratively final, June 30, 1981), 20 SRR 1025, 1032-33.

Rule 91 of the Commission’s Rules of Practice and Procedure, 46 CFR § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlements of administrative and investigative proceedings. *Eastern Forwarding International, Inc. --Independent Ocean Freight Forwarding Application--Possible Violations, Section 44, Shipping Act, 1916* (Initial Decision, July 30, 1980, administratively final, September 8, 1980), 20 SRR 283, 286 (“*Eastern*”); *Far Eastern Shipping Co.--Possible Violations of Sections 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916* (Initial

Decision, March 25, 1982, administratively final, May 7, 1982), 21 SRR 743,764 ("*FESCO*"); *Armada Great Lakes/East Africa Service, Ltd; Great Lakes Transcaribbean Line* (Initial Decision, March 21, 1986, administratively final, April 25, 1986), 23 SRR 946, 949 ("*Armada*"); *Member Lines of the Transpacific Westbound Rate Agreement--Possible Violations of the Shipping Act of 1984* (Initial Decision, August 27, 1986, administratively final October 9, 1986), 23 SRR 1329, 1340 ("*TWRA*"); *Royal Caribbean Cruises Ltd. Possible violations of Certification Requirements* (Order Approving Settlement and Discontinuing Proceeding, December 4, 1991), 26 SRR 64 ("*Royal Caribbean*").

The Commission's regulations reflect its policy of encouraging settlements. 46 CFR §§ 502.91 and 505.3. They also recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 CFR §§ 502.42 and 502.61. The regulations also require that the Presiding Judge approve all such settlement agreements in formal proceedings. 46 CFR § 505.3(a).

#### **CRITERIA FOR APPROVAL OF SETTLEMENT**

To discharge the duty imposed by 46 CFR § 505.3(a), the Presiding Judge must decide whether the proposed settlement satisfies appropriate criteria for approval. Among the criteria to be considered in evaluating settlement offers are the Commission's enforcement policy, litigative probabilities and litigative and administrative costs.

A summary of the Commission's view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada*:

As seen, Section 13(c) of the Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission.

Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted.] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR § 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105" . . . . Those standards, particularly the standards enumerated in 4 CFR § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing *Eastern* and *Behring International, Inc., supra*] (Emphasis in the original.)

*Armada, supra*, 23 SRR at 956. See also *Marcella Shipping Co. Ltd.* (Initial Decision, February 13, 1996, administratively final, March 26, 1986), 23 SRR 857, 866.

The appropriate standards for approving proposed settlements in assessment proceedings were **summarized** in *FESCO* as follows:

. . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, *i.e.*, the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled [footnotes omitted] "for one or for more than one of the reasons authorized in this part."

*FESCO, supra*, 21 SRR at 759.

The Commission has reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in negotiation of settlement and in view of a settlement agreement. *Investigation of Unfiled Agreements-Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas Container Line, Inc.* (Order Adopting Initial Decision, March 30, 1988), 24 SRR 910 ("*Yangming*"). See also *Royal Caribbean, supra*.

In line with the Commission's analysis as enunciated in *FESCO, Eastern, Armada, Yangning*, and *Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as justice may require. That balance clearly favors approval of this proposed settlement.

With respect to the policy of enforcement, BOE stresses the importance of ensuring compliance by conferences and carriers with the 1984 Act. Respondents support the Commission's objective. The proposed settlement agreement will further the Commission's enforcement policy. In regard to the amount of money involved it is well settled that the amount of payment in settlement of claims is a matter for the parties to determine after good-faith negotiations and not something which the Commission customarily upsets. This doctrine has even greater application in an investigation involving BOE since its expertise in the matter of the amount of fines is well-established as part of its normal governmental practice. During fiscal year 1996, the Commission through the efforts of BOE collected \$876,959.68 in the compromise of civil penalties. 35th Annual Report, p. 22 and Appendix E.

There are bona fide disagreements between respondents herein and BOE as to certain facts and legal issues pertaining to the instant cases. Although each party is confident it would prevail, the outcome of any litigation is uncertain. In view of the litigative probabilities, the parties seek a settlement of these proceedings. Inasmuch as these proceedings could be complicated, time consuming, and costly, the proposed settlement would save all parties time and expense. The litigative probabilities and potential litigative and administrative costs of these proceedings favor approval of this proposed settlement. The proposed settlement agreement meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, will be approved and the investigations in Docket Nos. 97-09 and 97-10 will be discontinued with respect to the respondents.

IT IS ORDERED:

The attached Settlement Agreement is approved and the investigations in Docket Nos. 97-09 and 97-10 are discontinued.

  
Frederick M. Dolan, Jr.  
Administrative Law Judge

Attachment

FEDERAL MARITIME COMMISSION

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DOCKET NO 97-09

Topocean Consolidation Service Ltd.,  
Topocean Consolidation Service (Los Angeles) Inc. and  
Topocean Consolidation Service (New York) Inc.  
Possible Violations of Sections 8, 23(a) and IO(a)( 1)  
of the Shipping Act of 1984

AND DOCKET NO 97-10

Apex Maritime Co., Inc.  
Possible Violations of Section 10 (a)( 1)  
of the Shipping Act of 1984 and  
46 CFR 5 10.22(i)

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SETTLEMENT AGREEMENT

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

- (1) the Federal Maritime Commission's ("Commission") Bureau of Enforcement, and
- (2) Topocean Consolidation Service Ltd , Topocean Consolidation Service (Los Angeles)

Inc , Topocean Consolidation Service (New York) Inc and Apex Maritime Co , Inc

(collectively, "Respondents")

WHEREAS, the Commission believes that

1. Topocean Consolidation Service Ltd. violated section 8 of the 1984 Act by operating as a common carrier without an effective tariff on file at the Commission

between September 16 , 1995 and June 11, 1996, and

2       **Topocean** Consolidation Service Ltd violated section 10(a)( 1) of the 1984 Act between June 12, 1996 and April 30, 1997, by directly or indirectly obtaining ocean transportation for property at less than the rates and charges otherwise applicable by means of misdescriptions of commodities or false cargo measurements; and

3       **Topocean** Consolidation Service Ltd. violated section 23(a) of the 1984 Act, by providing non-vessel-operating common carrier services without an effective bond filed at the Commission between September 16, 1995 and May 2, 1996, and

4       **Topocean** Consolidation Service (Los Angeles) Inc , **Topocean** Consolidation Service (New York) Inc and/or Apex Maritime Co , Inc violated section 10(a)(1) of the 1984 Act between September 1, 1995 and April 30, 1997, by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise applicable by means of misdescribing the commodities actually shipped and by means of false cargo measurements; and

5       Apex Maritime Co., Inc , in its capacity as an ocean freight forwarder, violated 46 CFR 5 10 22(i) between March 1, 1993 and April 30, 1997, by rendering freight forwarding services free of charge or at a reduced fees;

WHEREAS, the Commission has acted on said belief by instituting FMC Docket No 97-09 (“**Topocean** Consolidation Service Ltd , **Topocean** Consolidation Service (Los Angeles) Inc. and **Topocean** Consolidation Service (New York) Inc - Possible Violations of Sections 8, 23(a) and

1 O(a)(1) of the Shipping Act of 1984”) and FMC Docket No 97-10 (“Apex Maritime Co., Inc - Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984 and 46 CFR 510.22(i)”) directed to Respondents, and

WHEREAS, Respondents believe that they have complete and adequate defenses to the Commission’s contentions; and

WHEREAS, the Bureau of Enforcement and the Respondents believe it is the best interest of the parties and the shipping public to resolve the above referenced proceedings rather than engage in costly litigation, the outcome and timing of which is uncertain, and

WHEREAS, Respondents have instituted and indicated their willingness to maintain measures designed to eliminate the practices by Respondents, their officers, directors or employees which are the basis for the alleged violations set forth herein, and

WHEREAS, certain of the Respondents have provided disclosures to the Bureau of Enforcement with respect to their transportation activities

NOW, THEREFORE, in consideration of the premises herein, it is hereby agreed as follows.

1 Respondents shall make a monetary payment on Monday, October 27, 1997, to an interest bearing escrow account, in the total amount of \$150,000 (One hundred and fifty thousand dollars) On Tuesday, October 28, 1997, Respondents shall provide written verification to the Commission that the total monetary payment of \$150,000 was placed in an interest bearing escrow account on October 27, 1997

2 Upon approval by the Commission of the settlement, the \$150,000 plus interest shall be paid to the Commission within five business days

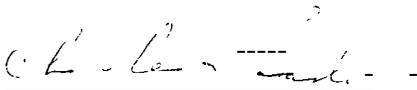
3 Upon compliance by Respondents with the terms set forth in this Agreement, this

instrument shall forever bar the commencement or institution by the Commission of any civil penalty assessment proceeding or other claim for recovery of civil penalties against Respondents for the alleged violations of the Shipping Act of 1984 and the Commission's regulations set forth in FMC Docket No. 97-09 and FMC Docket No 97-10

4. Upon compliance by Respondents with the terms set forth in this Agreement, this instrument shall forever bar the commencement or institution by the Commission of any investigation seeking the suspension or cancellation of Topocean Consolidation Service Ltd. or Topocean Consolidation Service (Los Angeles), Inc 's tariffs for the alleged violations of the Shipping Act of 1984, which are set forth in FMC Docket No. 97-09

5 Upon compliance by Respondents with the terms set forth in this Agreement, this instrument shall forever bar the commencement or institution by the Commission of any investigation seeking the suspension or revocation of Apex Maritime Co , Inc 's freight forwarder license for the alleged violations of the Shipping Act of 1984 and the Commission's regulations, which are set forth in FMC Docket No 97- 10, and shall forever bar the commencement or institution by the Commission of any investigation seeking the suspension or cancellation of Apex Maritime Co., Inc 's tariff for the alleged violations of the Shipping Act of 1984, which are set forth in FMC Docket No. 97-10.

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

BY   
Vern W Hill, Director

Subject to Approval by the Commission in accordance with paragraph 2 hereof

Date 10 10 1997

ON BEHALF OF

TOPOCEAN CONSOLIDATION SERVICE LTD.  
TOPOCEAN CONSOLIDATION SERVICE (LOS ANGELES), INC  
TOPOCEAN CONSOLIDATION SERVICE (NEW YORK), INC  
APEX MARITIME CO, INC

BY

W. J. [Signature]

Title.

Attorney in Fact

Date

10/15/97