

ORIGINAL

(S E R V E D)
(July 11, 2001)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 11, 2001

DOCKET NO. 00-01

KAWASAKI KISEN KAISHA, LTD.

v.

INTERCONTINENTAL EXCHANGE, INC.

**SETTLEMENT APPROVED;
COMPLAINT DISMISSED WITHOUT PREJUDICE;
MOTION FOR CONFIDENTIALITY GRANTED**

Complainant Kawasaki Kisen Kaisha ("K" Line) and respondents Intercontinental Exchange, Inc. ("Intercontinental") and Mr. Ignacio Gomez have reached a settlement agreement that includes mutual releases and a contract of settlement and resolves all issues that were before this Commission and before the United States District Court for the Southern District of Texas, Houston Division.¹ They request that their agreement be held confidential and that it be approved and that the complaint

¹The court proceeding is entitled *Kawasaki Kisen Kaisha, Ltd v Intercontinental Exchange, Inc*, C.A., No. H-99-1425, United States District Court for the Southern District of Texas, Houston Division.

be dismissed without prejudice to possible reinstatement under conditions specified in the settlement agreement. Their request is presented in a motion which is well prepared and supported by ample case law. As explained below, I find that it comports with the strong policy in the law favoring such settlements and that the parties' motion should be and hereby is approved subject to review by the Commission pursuant to 46 C.F.R. 502.227(c) and (d).

History of the Case

The case began with the filing of a complaint that was served over one and one-half years ago on January 7, 2000. Complainant "K" Line alleged that although it had carried numerous shipments from the United States to Europe for respondents, respondents failed to pay some \$265,126.23 in freight money to "K" Line for "K" Line's services, which had been performed under a service contract. "K" Line alleged that respondents had incurred this indebtedness with no intention of discharging their obligations and had carried out a "fraudulent scheme" to obtain ocean transportation at less than the applicable rates and charges, including such conduct as uttering false checks without having funds to pay for them, making numerous false representations and even threats of reprisal for the collection efforts of "K" Line. If so, such conduct would violate section 10(a)(1) of the Shipping Act of 1984.²

Initially the corporate respondent Intercontinental moved to dismiss the complaint or, in the alternative, to stay the proceeding because of the parallel court action that had been filed in

²Section 10(a)(1) of the Shipping Act of 1984 states in pertinent part:

(a) IN GENERAL.—No person may—(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification . . . or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation of property at less than the rates or charges that would otherwise be applicable.

U.S. District Court in Houston, Texas, and also contended that the dispute should have been heard in Japan under a forum-selection clause in “K” Line’s service contract. I denied Intercontinental’s motion, finding that the issues raised by “IS’ Line were peculiar to the Shipping Act. (See Respondent’s Motion to Dismiss Complaint or to Stay Proceeding Denied, March 7, 2000.) After the District Court had “administratively closed” the action before it, “K” Line filed an amended complaint naming Mr. Ignacio Gomez, Intercontinental’s president, as a respondent. Both respondents denied the allegations in the amended complaint and raised certain affirmative defenses. In addition, respondent Intercontinental served a counter-complaint on “K” Line, alleging that “IS’ Line had violated several sections of the Shipping Act by retaliating against Intercontinental, detaining cargoes, providing false information to Intercontinental’s clients, and doing other things to harm Intercontinental’s business. “K” Line denied the allegations in the counter-complaint.

The proceeding experienced some delay owing to complications during the discovery phase, mainly because of the opposition of a former employee, a Ms. Ellen Red, who initially resisted a subpoena ordering her to be deposed by “K” Line and later because of a possible jurisdictional problem related to the fact that the subject shipments had been carried under a service contract rather than under a tariff. However, because of the Commission’s clarifying ruling in Docket No. 99-24 - *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635 (2000), it appeared that the Commission might have retained jurisdiction of the primarily Shipping Act issues notwithstanding section 8(c)(1) of the 1984 Act that had purportedly transferred jurisdiction over cases involving service-contract breaches from the Commission. Furthermore, the District Court finally stayed the court action pending Commission decision in the instant case.

“IS’ Line thereafter deposed Mr. Gomez and the parties entered into serious settlement discussions involving third persons. Eventually these discussions produced the settlement agreement that is now before me and that was filed on July 5, 2001.

Approvability of the Settlement

The parties have fashioned a carefully detailed settlement agreement that disposes not only of the Commission proceeding but the parallel court action in Houston, Texas. It fully comports with the strong policy followed by the Commission and the courts favoring settlements and presuming that they are just and reasonable absent any showing that they violate any law or public policy. The parties cite ample case authority for this proposition, such as *AZ Kogan d/b/a Galaway International v. World Express Shipping, et al.*, 29 S.R.R. 68, 70 (I.D., administratively final, January 17, 2001); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (18 S.R.R. 1085 (1978); and *Great White Fleet v. Southeastern Paper Products, Inc.*, 26 S.R.R. 1487 (1994). There is also ample precedent for holding the terms of the settlement agreement confidential when confidentiality is an essential component of a settlement agreement. See, e.g., *Amsov Co., Inc. v. Dan-Transport Corp.*, 27 S.R.R. 496, 498 (I.D., administratively final, Sept. 7, 1995); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (I.D., administratively final, March 14, 1996); *Adtranz (North America), Inc., etc. v. Unitrans International, Inc.*, 28 S.R.R. 542, 544 n. 3 (I.D., administratively final, January 7, 1999). Another point in favor of approval of the instant settlement agreement is the fact that it also settles the parallel court case in Houston.

Finally, the parties have been careful to provide for the unfortunate possibility that if any party defaults on its obligations under the settlement agreement, the complaint may be revived. Such

defaults have occurred in some previous Commission cases and the dismissal of the complaint without prejudice to its reinstatement is accordingly prudent. See *Safmarine Container Lines N. V., et al. v. Garden State Spices, Inc.*, 28 S.R.R. 1498, 1499 (I.D., administratively final, July 27, 2000); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (1993); *CTM International, Inc. v. Medtech Enterprises, Inc.*, 28 S.R.R. 834 (1999).

Description of the Settlement Agreement

As noted above, the parties have requested that the terms of the settlement agreement remain confidential, a request that the Commission has honored in previous cases when parties deem confidentiality to be essential to their settlement agreements. The text of the settlement agreement will be held confidential pursuant to the Commission's rules but of course it is available for inspection by the Commission. See 46 C.F.R. 502.119(c). The following is a brief description.

The parties have entered into a contract of settlement that contains mutual releases but, as is typical, no admissions of liability by either side. The detailed settlement agreement reflects the fact that "K" Line has spent considerable time investigating respondents' financial resources and, based upon its findings, has agreed to certain compensation from respondents in return for settling the case. The contract of settlement shows that respondents' financial resources are somewhat limited but that such resources as are accessible will be used to compensate "K" Line for its alleged monetary damages. More specifically, it appears that respondent Intercontinental, an NVOCC, had a bond and that the parties agree that they will enter into a judgment in the District Court case so that respondent Intercontinental's surety can make a payment to "IS" Line that will satisfy "K" Line into terminating the court case. As for the Commission proceeding, it appears that respondents had

access to certain contingent assets. One is an agreement that respondents had with a transportation company by which respondents would be paid commissions in return for soliciting business for the company. A second one is a claim that respondents have against a Mexican citizen, which claim is pending in a Mexican court. Respondents have assigned their rights under these two arrangements to "K" Line and, with certain exceptions, "K" Line would be entitled to any financial benefits that could result from enforcement of the commission agreement and the Mexican court suit.

Conclusion

The parties have worked out a careful settlement arrangement that avoids the risks and costs of litigation and reflects the realities of respondents' financial resources. I find that it fully comports with the strong policy in the law favoring settlements and presuming them to be just and reasonable, as many cases have stated. Accordingly, the settlement is approved, "K" Line's complaint is dismissed without prejudice, the counter-complaint is also dismissed, and the text of the settlement agreement and related contracts are held confidential pursuant to 46 C.F.R. 502.119(c), as requested.

Norman D. Kline

Norman D. Kline
Administrative Law Judge