

ORIGINAL

(S E R V E D)
(May 9, 2002)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

May 9, 2002

DOCKET NO. 00-03

INLET FISH PRODUCERS, INC.

v.

SEA-LAND SERVICE, INC.

**JOINT MOTION TO APPROVE CONFIDENTIAL
SETTLEMENT AGREEMENT AND RELEASE
AND DISMISS THE COMPLAINT GRANTED**

History of This Proceeding and Prior Rulings

In its complaint in this proceeding, filed January 21, 2000, Inlet Fish Producers, Inc. ("Inlet Fish") alleged that respondent Sea-Land Service, Inc. (now known as A.P. Moller Maersk Sealand ("MSL")) had transported Inlet Fish's seafood products from Alaska to foreign destinations from June 1996 to August 1996, and that at some point in time, MSL moved identical or similar products for similarly situated shippers, Inlet Fish's competitors, from the same or similar

points to the same or similar points. Inlet Fish further contended that MSL had permitted the similarly situated shippers to subtract the weight of packaging and wrapping (the “tare weight”) from the weight of their cargo for the purpose of determining freight rates, but that Inlet Fish was not permitted to subtract the tare weight from its cargo weight when its rates were calculated. Inlet Fish contended that this resulted in it paying higher freight charges than its competitors, and constituted violations of various sections of the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, including sections 10(b)(6) and 10(b)(12).¹ Inlet Fish sought reparation of \$35,091.25 plus interest, costs, attorney’s fees and an order commanding MSL to establish and enforce lawful and reasonable practices.

MSL filed a motion to dismiss contending that the complaint was filed more than three years after the cause of action accrued and that the complaint was time-barred under section 1 l(g) of the 1984 Act, 46 U.S.C. app. § 171 O(g). Inlet Fish replied thereto arguing that it had not learned of the possible cause of action until 1998, when it discovered that its competitors had allegedly received the previously described preferential treatment. MSL contended that Inlet Fish knew or should have known that it had a cause of action as early as the Fall of 1996.

MSL’s motion to stay discovery was granted and its motion to dismiss the complaint was denied. MSL’s resulting motion for leave to appeal the interlocutory ruling denying its motion to dismiss was granted, and the Commission found in its “Report and Order,” served September 19, 2001, that Inlet Fish’s cause of action against MSL accrued in May 1998 when Inlet Fish learned that it had such a cause of action. MSL’s appeal of the order denying its motion to dismiss was denied

¹Sections 10(b)(6) and 10(b)(12), 46 U.S.C. 1710(b)(6) and (b)(12), may now be found in substantially similar form at sections 10(b)(4) and 10(b)(8) pursuant to the Ocean Shipping Reform Act of 1998 (“OSRA”), Public Law 105-258, effective May 1, 1999, 46 U.S.C. app. §§ 1709(b)(4) and (b)(8).

and the proceeding was remanded for further proceedings addressing the merits of Inlet Fish's claims. On September 20, 2001, the parties were directed to consult the Commission's Alternative Dispute Resolution Specialist, *infra*.

Because of the precedent-setting ruling in the Commission's September 19, 2001 Report and Order, it will be discussed next. The question was whether to adopt the rule that such a complaint alleging unjust discrimination or undue or unreasonable preference accrues under section 1 l(g), 46 U.S.C. app. § 1710(g), and Rule 63(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.63(a), when the complainant either knew, or with the exercise of due diligence could have discovered, that it had been subjected to purported violations of the 1984 Act and that its cause of action had accrued. This is termed the "discovery rule"² and was supported by Inlet Fish. MSL had urged adoption of the "time of injury rule," i.e., that "accrual" means when the shipments took place.

In Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991), Judge (now Justice) Ruth Bader Ginsburg, writing for a panel of the D.C. Circuit, found that the general rule in federal courts is the "discovery rule" according to which a claim for relief does not accrue, and the limitations period begin to run, until the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action. Then Judge (now Justice) Ginsburg continued:

At least eight federal courts of appeals have . . . agreed. . . that the discovery rule is the general accrual rule in federal courts. As the Seventh Circuit has put it, the discovery rule is to be applied in all federal question cases "in the absence of a contrary directive from Congress." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir.1990) Judge Posner, writing for a Seventh Circuit panel, has

²This should not be confused with the discovery rules in 46 C.F.R. § 502.201.

explained that the “time of injury” rule can be considered analytically as but a particular instance of the discovery rule: if the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury. *See Cada*, 920 F.2d at 450 (“Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often *the same, but sometimes later-on* which plaintiff discovers that he has been injured.”) (Emphasis in original.) (Internal citations omitted.)

In its September 19, 2001 Report and Order, the Commission determined “to adopt the discovery rule, and to hold that Inlet Fish’s cause of action accrued when it knew or should have known [or discovered] that it had a case against MSL.” The Commission continued:

. . . To find that the cause of action accrued when the shipments took place would appear to be overly restrictive. It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place.

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations—such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

The Shipping Act itself suggests this result. Section 13(f)(2), 46 U.S.C. app. § 1712(f)(2), provides that “proceeding[s] to assess a civil penalty under this section shall be commenced within 5 years from the date the violation occurred” (emphasis added by Commission). Section 14(e), 46 U.S.C. app. § 1713(e), provides

that “action[s] seeking enforcement of a Commission order must be filed within 3 years after the date of the violation of the order” (emphasis added by Commission). This is notably different from the use of the phrase “after the cause of action accrued” in section 1 l(g), and would appear to raise a presumption that if Congress had intended claims under section 11 seeking the payment of reparations to be filed within three years “from the date the violation occurred,” it would have used such language.” *Id.* at 17.

Since the Commission adopted the “discovery rule”³ (for purposes of determining when a cause of action accrues under section 1 l(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), and Rule 63 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.63), the following is highlighted from the aforesaid September 19, 2001 Report and Order:

Furthermore, implementing the rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeals. *In Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule should apply. Explaining the practical application of the rule, the court in *Connors* held:

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

* * *

Based upon the foregoing, the Commission has decided to apply the discovery rule in this case to determine when Inlet Fish’s cause of action accrued under section 1 l(g) of the Shipping Act. *Id.* at pages 18 and 19.

³This should not be confused with the discovery rules in 46 C.F.R. § 502.201.

The Commission thus applied the “discovery rule” and proceeded to find, at pages 19-21, that Inlet Fish was not aware, and could not reasonably have been aware (or discovered), that its cause of action has accrued and that it had a cause of action against MSL until May 1998 (when Mr. Vincent Goddard, the sole shareholder of Inlet Fish, had a conversation with a former MSL employee who told him about the alleged tare weight practice; that one of the shippers subtracting the tare weight was Cook Inlet Processing (a competitor); that Inlet Fish located some copies of bills of lading showing that Cook shipped cartons of frozen salmon which allegedly weighed 55 pounds gross but Cook’s bills of lading stated a gross weight of 52.5 pounds and a net weight of 50 pounds with the result that Cook’s freight was computed on the basis of the 2.5 pound per carton lower weight).

**The Present Motion to Approve Confidential Settlement
Agreement and Release and Dismiss Complaint**

After intensive negotiations and with the assistance of the Commission’s ADR Specialists, the parties have reached a settlement and filed an appropriate motion. The terms and conditions of the settlement are set forth in a Confidential Settlement Agreement and Release, which is being filed with the Commission and marked “CONFIDENTIAL” in accordance with Rule 119 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.119 (2001), and for which approval is sought.

In previous proceedings, requests have been granted to maintain the confidentiality of settlement agreements and the settlements have been approved. *See International Association of NVOCCs v. ACL, et al.*, 25 S.R.R. 1607, 1609 (ALJ, FMC notice of finality, Sept. 6, 1991); *Accord*

Craft Co., Ltd. v. ANERA, 26 S .R.R. 13 85 (ALJ, FMC notice of finality, April 20, 1994); *Amsov Co. Inc. v. Dan-Transport Corp.*, 27 S.R.R. 496,498 (ALJ, F.M.C notice of finality, Sept. 7, 1995); and Docket No. 00-02 - *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority* (ALJ, April 22, 2002). The full terms of the settlement agreement are available for the Commission to consider although they will be maintained confidential pursuant to 46 C.F.R. § 502.119.

The parties seek approval of the Settlement Agreement and Release, dismissal of the complaint, and discontinuance of the proceeding with prejudice and without attorney's fees. It is also indicated by Mr. Ronald D. Murphy that especially helpful mediation services have been provided by Mr. Allen Jackson, also of the Commission's ADR Services. In addition, the parties in their Joint Motion agree that "The settlement was reached with input from, and valuable assistance by, the Commission's Bureau of Consumer Complaints and Licensing."

Applicable Principles of Law

The Commission has consistently adhered to a policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 512 (ALJ 1978). Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91 (2001), codifies the *Old Ben Coal* holding in language borrowed in part from the Administrative Procedure Act ("APA"), in particular 5 U.S.C. § 554(c)(1), which requires agencies to give interested parties *an opportunity, inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permits." Indeed, the 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 Comm’n*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). This policy was reaffirmed in 1990 with the enactment of the Administrative Dispute Resolution Act (“ADRA”), Public Law No. 101-552, which amended the APA, 5 U.S.C. § 554(c)(1). ADRA encourages administrative agencies’ use of consensual alternative dispute resolution techniques such as settlement negotiations, mediation and arbitration. The Commission implemented ADRA in July 1993, 58 F.R. 38648 (July 16, 1993). In addition, the Commission, at 66 FR 43513, Aug. 20, 2001, expanded its ADR services and promulgated new regulations, including a new policy statement, encouraging the use of ADR, 46 C.F.R. § 502.401 *et seq.* (2001). These actions go beyond the doctrine favoring settlements in *Old Ben Coal*, and reflect the Commission’s determination actively to encourage settlements by making ADR services available.

After consideration of the significant disputes between the parties on various questions of law and fact, the amount of the claims, the costs associated with continuing to contest the issues, some of which are of first impression, the uncertain nature of success, and all other factors, the parties have decided to resolve their differences in a commercially reasonable manner and terminate the expense and uncertainty of continuing to litigate. By compromising and entering into the present settlement, the parties have enabled themselves to conduct their affairs without continued dispute. It would not be proper to deny the parties the benefit of their settlement agreement under the circumstances present here. There are numerous issues in dispute. In addition, it has been more than two years since the parties began litigating this case. The Commission has been fully apprised of the various reasons for the parties’ desire to settle this case without further expense and litigation.

The settlement negotiated with the aid of Mr. Allen Jackson and Mr. Ronald D. Murphy, the Commission's ADR Specialists,⁴ meets the requisite criteria. Furthermore, a Commission proceeding can be settled by mutual agreement for an amount less than that sought in the complaint and without admission of any statutory violations. *Del Monte Corp.*, 19 S.R.R. 1037 at 1040-41 (ALJ 1979). Both parties to the settlement have weighed the strength of their cases against the risks and costs of continued litigation and have concluded that, based on the uncertainty of the underlying issues, it is in both their interests to avoid further expensive litigation. Accordingly, in view of the foregoing factors and the parties' desire to reach a commercially sound and mutually acceptable compromise, the settlement negotiated by the parties herein is found to be just and reasonable and will be approved.

IT IS ORDERED:

The Joint Motion to Approve Settlement and Dismiss is granted, the Confidential Settlement Agreement and Release is approved, the complaint in Docket No. 00-03 is dismissed, and the proceeding is discontinued with prejudice and without an award of attorney's fees to any party. The Settlement Agreement is made without admission of liability by any party. The agreement is not,

⁴Alternative Dispute Resolution Services have also been provided in the following proceedings in which settlements were reached:

1. *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, Docket No. 99-24 (Voluntary Order of Dismissal granted 2/12/2002, Supplemental Order Approving Settlement 2/19/2002)
2. *Al Kogan d/b/a Galaway International v. World Express Shipping, Transportation and Forwarding Services, Inc. d/b/a W.E.S.T. Forwarding Services (FMC Lic. #3118-R)*, Docket No. 00-04 (Settlement Approved; Case Dismissed with Prejudice 12/14/2000)
3. *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority*, Docket No. 00-02 (Complaint dismissed; Settlement Approved 4/22/2002)

and is not to be construed as, an admission by A.P. Moller Maersk Sea-Land of any liability or violation of the Shipping Act of 1984, or an admission or acceptance of any of the underlying allegations set forth in Inlet Fish Producers, Inc.'s complaint and filings.


Frederick M. Dolan, Jr.
Administrative Law Judge