

FEDERAL MARITIME COMMISSION

**EXCLUSIVE TUG FRANCHISES -
MARINE TERMINAL OPERATORS
SERVING THE LOWER MISSISSIPPI
RIVER**

Docket No. 01-06

Served: March 6, 2003

ORDER ADDRESSING THE POSSIBLE ESTABLISHMENT OF SETTLEMENT PROCEDURES

On June 11, 2001, the Commission issued an Order to Show Cause in this proceeding directing twelve marine terminal operators on the lower Mississippi River to show cause why they should not be found to have violated sections 1 O(d)(1) and 10(d)(4) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1709(d)(1) and (d)(4). In October, 2001, the Commission referred the entire case to the Office of Administrative Law Judges to handle all aspects of the proceeding because of its complexity and factual nature; Chief Administrative Law Judge Norman D. Kline ("ALJ") assigned the proceeding to himself. Currently before the Commission is a memorandum from the ALJ certifying to the Commission, pursuant to Rule 73(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.73(a), the issue of the possible establishment of settlement procedures for some of the parties.

2 EXCLUSIVE TUG FRANCHISES - LOWER MISSISSIPPI RIVER

The ALJ states that at least six respondents request that he establish a settlement procedure and, in addition, appoint himself as settlement judge while remaining as the trial judge. The Commission's Bureau of Enforcement ("BOE") opposes the appointment of a settlement judge or the use of the Commission's Alternative Dispute Resolution program, arguing that it would cause undue delay. If a settlement judge is appointed, however, BOE contends that it should not be the same person as the trial judge.

The ALJ agrees with BOE that the settlement judge and trial judge should not be the same person. Moreover, the ALJ questions his authority to order settlement negotiations and thus seeks the Commission's guidance on this matter. The ALJ states that he would "order established a settlement procedure using a settlement judge who would not be the trial judge, as provided by 46 C.F.R. 502.91(f), or perhaps enlist the aid of the Commission's Dispute Resolution Specialist" if the Commission approves his authority to do so.

DISCUSSION

The Commission's Rules of Practice and Procedure provide that any party may request the appointment of a settlement judge, mediator or other neutral to assist the parties in reaching settlement. 46 C.F.R. §§ 502.91(e) and (f); see also 46 C.F.R. § 502.41 1(b). If that request is not opposed, the Chief Administrative Law Judge may appoint a settlement

judge, mediator or other neutral acceptable to all parties.’ Id. At least six respondents have requested the establishment of a settlement procedure; BOE, however, opposes the request and, therefore, the ALJ seeks Commission guidance.

The Commission generally advocates the use of settlement procedures as an alternative means of resolving proceedings. “Parties are encouraged to make use of all the procedures of this part which are designed to simplify or avoid formal litigation, and to assist the parties in reaching settlements whenever it appears that a particular procedure would be helpful.” 46 C.F.R. § 502.91(a). This rule applies to all proceedings, whether initiated by a private party or the Commission. Although settlement negotiations are a voluntary process, the Commission encourages all parties to be open to genuine attempts at settlement, particularly in a complex and difficult proceeding such as this one. The rules do not provide for mandatory settlement negotiations; however, it is clear that the ALJ believes that such negotiations would be beneficial in this proceeding, as it involves twelve respondents whose factual situations may differ and any settlement reached would provide substantial savings to the Commission and the respondents.

Rule 10 of the Commission’s rules, 46 C.F.R. § 502.10, provides that the Commission or the presiding officer in any particular case may waive any rule in this part² “to prevent

¹See also 46 C.F.R. § 502.41 l(b) (stating that if a request for a mediator or other neutral is made in a proceeding assigned to an ALJ, Rule 91 applies).

²Rules 11 and 153, 46 C.F.R. §§ 502.11 and 502.153, relating
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4 EXCLUSIVE TUG FRANCHISES - LOWER MISSISSIPPI RIVER

undue hardship, manifest injustice, or if the expeditious conduct of business so requires,” except to the extent that it would be inconsistent with any statute. Pursuant to this rule, the ALJ has the authority to waive that part of Rule 91 that prohibits the establishment of a settlement procedure if a party opposes it, except to the extent that it is inconsistent with any statute. Therefore, we find that the ALJ may require the parties to enter into good-faith settlement discussions with a settlement judge who is not the trial judge or to enter alternative dispute resolution with a mediator or other neutral if he finds that requiring such discussions would prevent undue hardship, manifest injustice or if the expeditious conduct of business so requires, and he finds that it would not be inconsistent with any statute.

CONCLUSION

THEREFORE, IT IS ORDERED That this proceeding is returned to the ALJ for further actions consistent with this Order.

By the Commission.


Bryant L. VanBrakle
Secretary

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to ex parte communications and appeals from rulings of the presiding officer other than orders of dismissal in whole or in part, respectively, may not be waived. **These rules** do not appear to apply in this case.