

S E R V E D
June 9, 2009
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 07-04

**NORLAND INDUSTRIES, INC.,
LINNA TEXTILES MANUFACTURING LIMITED,
MEDCORP DISTRIBUTORS, INC.,
MALAN GARMENT LIMITED, and
MALAN GARMENT, INC.**

v.

**RELIABLE LOGISTICS, LLC and
WASHINGTON INTERNATIONAL INSURANCE COMPANY**

**MEMORANDUM AND ORDER ON
JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AND
DISMISSAL WITH PREJUDICE OF CLAIMS AGAINST
WASHINGTON INTERNATIONAL INSURANCE COMPANY and
MOTION FOR APPROVAL OF DISMISSAL WITHOUT PREJUDICE AGAINST
RELIABLE LOGISTICS, LLC¹**

On May 22, 2009, Complainants Norland Industries, Inc., Linna Textiles Manufacturing Limited, Medcorp Distributors, Inc., Malan Garment Limited, and Malan Garment, Inc. (Complainants) and respondent Washington International Insurance Company (Washington International) submitted a Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, and on May 27, 2009, they submitted the Settlement Agreement. Complainants and Washington International ask that the Settlement Agreement be approved and the proceeding be dismissed with prejudice with regard to the claims against Washington International. On June 2, 2009, Complainants filed a Motion for Approval of Dismissal without Prejudice against Reliable Logistics, LLC (Reliable). I grant both motions and approve the Settlement Agreement.

¹ The dismissal will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

BACKGROUND

On April 11, 2007, Complainants commenced this proceeding by filing a complaint alleging that respondent Reliable violated the Shipping Act of 1984 (the Act). The original complaint alleges that Complainants are related entities engaged in the business of importing into and trading cargoes of clothing within the United States. Complainants allege that Reliable is a corporation, limited liability company, or entity engaged in the business of acting as a non-vessel-operating common carrier, freight forwarder, bailee and/or warehouseman for hire.² Complainants state that they hired Reliable to provide transportation-related services for a number of import shipments of clothing and department store merchandise.

Complainants allege that on April 20, 2004, Reliable abruptly and without notice informed Complainants that it wished to terminate their business relationship. Complainants claim that Reliable wrongfully seized twelve containers of Complainants' goods, allegedly as leverage for wrongful demand of immediate payment of all invoices for freight and other charges notwithstanding the extension of credit and thirty-day payment terms to Complainants. Through payments and under protest, Complainants were able to secure eleven of the seized containers. Complainants allege that Reliable violated section 10(d) of the Act by failing to establish, observe, and enforce just and reasonable regulations and practices in connection with transportation services.

The Secretary's attempt to send notice of this proceeding to Reliable was returned. By letter to the Secretary dated September 19, 2007, counsel for Complainants informed the Commission that Reliable "is no longer an active business and has left no forwarding address" and "request[ed] that this matter remain pending, but inactive, on the FMC docket." Counsel also stated that Complainants had commenced a parallel action against Reliable in a New York state court. Counsel asked that the Commission proceeding remain pending, but inactive, until resolution of the New York state court case. (Letter dated September 19, 2007, from counsel for Complainants to Secretary, FMC.) This proceeding was stayed while Complainants pursued their New York case to judgment. The court entered judgment on May 21, 2008. *Norland Industries, Inc. v. Reliable Logistics, LLC*, Index No. 7039-07 (N.Y. Sup. Ct. (County of Queens) May 21, 2008) (Judgment After Inquest) (entering judgment for Plaintiffs/Complainants in the amount of \$181,375.03).

In a status report filed June 9, 2008, Complainants stated they would present the New York judgment against Reliable's FMC OTI bond³ and requested that the stay of this proceeding continue pending collection under the bond. The stay continued while Complainants contacted Reliable's surety and discussed the matter with the surety's counsel. On December 18, 2008, Complainants

² A bill of lading attached to the Amended and Supplemental Complaint indicates that Reliable held OTI License 18357N. (Amended and Supplemental Complain Exhibit 5B.)

³ "A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety." 46 U.S.C. § 40902(a). *See also* 46 C.F.R. part 515, subpart C.

submitted a Status Report stating that its counsel's efforts to resolve the matter with the surety's counsel had not been successful and stating that Complainants would submit an amended complaint adding the surety as a respondent.

On January 15, 2009, Complainants filed a Motion to File Amended and Supplemental Complaint and served the motion on Reliable, Washington International (Reliable's surety), and counsel for Washington International. Neither Reliable nor Washington International replied to the motion. On March 18, 2009, I granted the motion to amend. *Norland Industries, Inc. v. Reliable Logistics, LLC and Washington International Insurance Co.*, FMC No. 07-04 (ALJ Mar. 18, 2009) (Memorandum and Order on Motion to File Amended and Supplemental Complaint).

The Amended and Supplemental Complaint alleges that Washington International is the insurance company that underwrote Reliable's \$75,000.00 OTI bond, adds Washington International as a party to this proceeding, and sets forth events occurring after the original complaint was filed. Complainants claim that their attempts to receive payment from Washington International by presenting their New York judgment against Reliable's OTI bond were unsuccessful. Complainants allege that Washington International's denial of their claim undermines the reason OTI bonds are required. Complainants seek an order for reparations against Washington International and such other, proper, and further relief as the Commission may deem just, proper and equitable in the circumstances.

On April 3, 2009, Washington International filed a motion to dismiss. First, Washington International contends that the Commission does not have personal jurisdiction over it.

Section 10(d)(1) of the . . . Act . . . regulates and governs the activities of only certain statutorily specified entities that are engaged in ocean transportation. Those entities are "Common Carriers(s)," . . . [Marine] Terminal Operators, . . . and "Ocean Transportation Intermediaries . . ." [Washington International] is none of the above entities. Therefore, the Commission has no jurisdiction over [Washington International].

(Motion to Dismiss at 6-7.) Second, Washington International contends that the Commission does not have subject matter jurisdiction because the "alleged claim filed by Complainants . . . does not fall within the scope of the alleged violation of section 10(d)(1), and therefore, does not relate to or is 'connected' to with [*sic*] 'receiving, handling, storing, or delivering property.'" (*Id.* at 7.) Third, Washington International contends that:

Complainants^[1] only allegation against [Washington International] is that [Washington International] violated Section 10(d)(1) of the . . . Act . . . by alleging [*sic*] "Reliable failed to establish, observe, and enforce just and reasonable regulations and practices in connection with its transportation services provided to Complainants." . . . The Commission lacks subject matter jurisdiction over the Complaint against [Washington International]. The subject matter jurisdiction of the

Commission over this matter may be supported by Section 10(d)(1) of the . . . Act . . . which requires a common carrier or an ocean transportation intermediary to maintain reasonable regulations and practices relating to or connected with receiving or delivering property. However, [Washington International] is none of these entities, and is not a person subject to the . . . Act.

(*Id.* at 7-8.) “[T]he . . . statutory provisions do not include sureties as regulated entities under the . . . Act.” (*Id.* at 9.) Fourth, Washington International contends that Complainants have not acted in good faith. (*Id.* at 9-10.)

Washington International consented to extend the time for Complainants to respond to the motion to dismiss. In an unrecorded telephone conference on May 7, 2009, counsel for Complainants and Washington International informed me that they appeared to have settled this case and asked that they be permitted to file appropriate papers by May 15, 2009. After being granted an extension, on May 22, 2009, Complainants and Washington International filed the pending Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, followed by the Settlement Agreement itself on May 27. On June 2, Complainants filed the Motion for Approval of Dismissal without Prejudice against Reliable Logistics, LLC.

DISCUSSION

It is “well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid.” *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 512, 18 S.R.R. 1085, 1092 (ALJ 1978). *See also Ellenville Handle Works v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981). Using language borrowed in part from the Administrative Procedure Act,⁴ Rule 91 of the Commission’s Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement “where time, the nature of the proceeding, and the public interest permit.” 46 C.F.R. § 502.91(b).

Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.

⁴ “The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.” 5 U.S.C. § 554(c).

Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia - New Zealand Conference and Columbus Line, Inc., 24 S.R.R. 1129, 1134 (ALJ 1988).

Complainants and Washington International contend that the Settlement Agreement meets these criteria. Complainants allege that Washington International engaged in unreasonable conduct in violation of the Act. Washington International contends that the Commission does not have jurisdiction over a surety of an OTI, a question that the Commission apparently has not answered. Assuming the Commission has jurisdiction, the question of reasonableness would have to be litigated. “Thus, the cost of litigation would most certainly exceed the amount of damages sought, particularly if [a party] appeals the jurisdiction issue.” (Memorandum of Points and Authorities in Support of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice at 4.)

In light of the foregoing, the settlement is fair, adequate and reasonable, particularly given the costs and risks of litigation and the amount of damages claimed. Moreover, as all parties [*sic*]⁵ are represented by competent counsel and have entered into this settlement willingly, the settlement is not the product of collusion or coercion.

Finally, the settlement does not contravene any law or public policy. The dispute herein relates to a single shipment. There is no allegation of any on-going course of conduct that would present larger policy issues.

(*Id.*)

I find that Complainants and Washington International have established that the Amended and Supplemental Complaint on its face presents a genuine dispute. The proceeding raises significant questions of law regarding the jurisdiction of the Commission over sureties for OTIs licensed by the Commission. Resolution of this question could involve extensive litigation before the Commission and possible review in a court of appeals. *See Norland Industries, Inc. v. Reliable Logistics, LLC and Washington International Insurance Company*, FMC No. 07-04 (ALJ Apr. 13, 2009) (Invitation to the Bureau of Enforcement to File Brief Amicus Curiae). Assuming jurisdiction is found, the proceeding could involve extensive litigation regarding the obligations of OTI sureties to shippers allegedly harmed by an OTI. *See Norland Industries, Inc. v. Reliable Logistics, LLC and Washington International Insurance Company*, FMC No. 07-04 (ALJ Mar. 18, 2009) (Memorandum and Order on Motion to File Amended and Supplemental Complaint) (reference to Commission’s discussions regarding its financial responsibility regulations). The costs of the litigation could exceed the \$75,000.00 that Complainants seek from Washington International in the Amended and Supplemental Complaint. I find that the settlement is fair, correct, and valid, and a bona fide attempt by Complainants and Washington International to terminate their controversy and not a device to

⁵ As noted above, respondent Reliable has not appeared in this proceeding and is not represented by counsel. The settlement agreement does not impose any obligations on it, however.

obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Act. Therefore, I will approve the Settlement Agreement.

Complainants have also moved for approval of their dismissal without prejudice their complaint against Reliable. Complainants state that Reliable is no longer in business and is listed as inactive by the Secretary of State of the State of New York and that it would not make economic sense to pursue this claim. The record demonstrates that Complainants have obtained a judgment in the New York state court against Reliable for its alleged misdeeds and Complainants have obtained at least partial satisfaction of its damages from Washington International. In these circumstances, I will approve dismissal of Complainants' claims against Reliable without prejudice. *See Fed. R. Civ. P. 41(a)(1)(A)* ("the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment"); 46 C.F.R. § 502.12 (Commission may follow Federal Rules of Civil Procedure).

ORDER

Upon consideration of the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, the proposed Settlement Agreement, the Motion for Approval of Dismissal Without Prejudice against Reliable Logistics, LLC, and good cause having been stated, it is hereby

ORDERED that the Settlement Agreement between Complainants and respondent Washington International Insurance Company be **APPROVED**. It is

FURTHER ORDERED that the Amended and Supplemental Complaint against respondent Washington International Insurance Company be **DISMISSED** with prejudice. It is

FURTHER ORDERED that Complainants' claims against respondent Reliable Logistics, LLC, be **DISMISSED** without prejudice. It is

FURTHER ORDERED that this proceeding be **TERMINATED**.



Clay G. Guthridge
Administrative Law Judge