

ORIGINAL

S E R V E D
October 4, 2010
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-01

AMC USA, INC.

v.

**INTERNATIONAL FIRST SERVICE S.A. a/k/a IFS S.A.;
INTERNATIONAL FIRST SERVICE ARGENTINA a/k/a AR-IFS;
INTERNATIONAL FIRST SERVICE USA, INC. a/k/a IFS USA, INC.;
GLOBAL WINE LOGISTICS USA INC. a/k/a GWL USA, INC.;
ANITA McNEIL; and IPSEN LOGISTICS GmbH**

**INITIAL DECISION APPROVING SETTLEMENT AGREEMENT
AND GRANTING MOTION TO DISMISS¹**

I.

On August 9, 2010, complainant AMC USA, Inc. ("AMC") and respondents International First Service USA, Inc. ("IFS USA"), International First Service S.A. ("IFS S.A."), and Anita McNeil filed a *Motion for Approval of Settlement Agreement and Dismissal Without Prejudice* ("Motion"), a copy of the Settlement and Stand-Still Agreement among AMC USA, Inc., International First Service S.A., International First Service USA, Inc., and Anita McNeil ("Agreement"), and a *Memorandum of Points and Authorities in Support of the Motion for Approval of Settlement Agreement and Dismissal Without Prejudice* ("Memorandum").

On September 20, 2010, an Order on Motion for Approval of Settlement Agreement was served, requiring additional information from the parties. On September 28, 2010, the parties filed a Supplement to Motion for Approval of Settlement Agreement and Dismissal Without Prejudice

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.

("Supplement") stipulating that International First Service Argentina ("AR-IFS") is a non-existent company which should be dismissed without prejudice.

For the reasons set forth below, the Settlement Motion is **GRANTED**, and the complaint against respondents IFS USA, IFS S.A., AR-IFS, and Anita McNeil and the counter-complaint against AMC are dismissed without prejudice. Previously, respondents Ipsen Logistics GmbH and Global Wine Logistics USA Inc. were dismissed with prejudice. *AMC v. International First Service* (ALJ May 25, 2010) (Order on Motions to Dismiss, Motion to Strike, and Request for Stay of Discovery Deadline).

II.

On February 4, 2010, the Complainant filed this action alleging violations of the Shipping Act of 1984 ("Shipping Act"), including violations of sections 8, 10, and 19. Complaint at 11. According to the parties:

AMC's Complaint asserts that Respondents violated the Shipping Act of 1984 by failing to keep open to the public in an automated tariff system tariffs showing all rates charges classifications rules and practices between all points and ports on its route and on any through transportation that has been established; failing to file with the Commission the service contracts entered into with vessel operating common carriers; engaging in a willful and deliberate fraudulent scheme to steal customers employees and proprietary information from Complainant in order to gain an unfair business advantage and/or in order to provide ocean transportation for property for less than the rates and/or charges that would otherwise have applied; operating under agreements that were required to be filed under the Shipping Act that were not effective pursuant to the Shipping Act; working together to allow parties to obtain transportation for property at less than the rates or charges that would have applied by unjust and unfair means; failing to establish observe and enforce just and reasonable regulations and practices, relating to or connected with receiving handling and delivering property; and knowingly and willfully accepting cargo for the account of an ocean transportation intermediary that does not have a tariff and a bond insurance or other surety. Finally, AMC's Complaint also alleges that Respondents acted as ocean transportation intermediaries in the United States without a license in violation of the Shipping Act and the Commission regulations.

Memorandum at 2-3 (punctuation as in original).

On March 8, 2010, respondents IFS S.A. and IFS USA filed their Verified Answer and Affirmative Defenses. The parties state that:

IFS S.A.'s Counter Complaint alleges that AMC's knowingly disclosing, offering, soliciting and receiving information concerning the nature, kind, quantity,

destination, consignee, and routing of the property tendered or delivered to the common carriers without the consent of the shippers or consignees and using that information to the detriment and disadvantage to IFS S.A., a common carrier, and inappropriately disclosing that information to competitors constitutes a violation of Section 10(b)(13) of the Shipping Act, 46 U.S.C. § 41103(a), and that AMC's allowing for the payment of rebates constitutes a violation of Section 10(b)(1) of the Shipping Act, 46 U.S.C. § 41104(1), which prohibits common carriers from allowing such rebates not otherwise provided in their tariff or NVOCC service arrangement.

Memorandum at 3.

A motion to dismiss, filed on March 8, 2010, is still pending. The parties recognize that the motion to dismiss would narrow the issues in the case. They indicate:

As stated and argued in Respondents' Motion to Dismiss, it is the belief of Respondents that most of the violations pled by AMC would be dismissed in due course under Motions to Dismiss standards as clearly not applicable to any Respondents, except for the following which are clearly the relevant factual and legal issues, not only in the context of the Complaint, but also in the context of a license application by IFS USA:

1) As to IFS S.A.----only Section 10 (b)(11) of the Shipping Act, 46 U.S.C. § 41104 (11), would survive as sufficiently pled. In other words, did IFS S.A., the only Respondent that could be in violation of this section, accept cargo from an unlicensed, [unbonded] ocean transportation intermediary ("OTI")? Sufficient information and documentation has been shared by the parties' counsel to conclude that IFS USA never tendered cargo to IFS S.A. as an OTI, never acted as an OTI, but rather acted as its sales and administrative agent at all times.

2) As to IFS USA -----only Sections 8 (a) and 19 of the Shipping Act, 46 U.S.C. §§ 40501 (a) and 40901-[41904], and 46 C.F.R. § 515.3 and § 520 would survive as sufficiently pled. Sufficient information and documentation has been shared by the parties' counsel to be able to raise reasonable questions as to whether IFS USA:

a) has ever conducted any freight forwarding services from the United States to a foreign country since it was incorporated on August 27, 2009 to-date.

b) has ever acted as a non-vessel [operating] common carrier (“NVOCC”) in the United State-foreign trades since it was incorporated. In fact, it has not even developed a housebill format for usage as an NVOCC.

c) has only performed as a marketing and administrative agent for its affiliate IFS S.A, registered with the FMC as an NVOCC.

There are complex issues related to the alleged violations as to whether Respondents’ alleged conduct constitutes ocean transportation intermediary services. If this matter were to proceed to litigation, it would be necessary to request expert witnesses to testify whether the alleged conduct falls within the definition of OTI services; the parties feel that there are sufficient fact[ual] and legal bases to make this a most difficult and would be excessively expensive to the parties to litigate [sic].

Memorandum at 7-8 (punctuation as in original).

The parties also contend that the alleged injury of customer relations and reputation in the industry cannot be quantified with any certainty and it would be necessary for the parties to engage in extensive discovery which would be time-consuming and costly. Memorandum at 8-9. In addition, the parties indicate that discovery would be lengthy and costly while developing evidence regarding piercing the corporate veil, the lawfulness of rebates, and damages. Memorandum at 9.

Therefore, with due consideration of the legal and factual issues, scope of discovery, and potential damages involved in the case, the parties reached a mutually acceptable settlement. The Settlement Agreement states:

This Settlement and Stand-Still Agreement (“Agreement”) is entered into as of the nineteenth day of July, 2010 by and among AMC USA, Inc., International First Service S.A., International First Service USA, Inc. and Anita McNeil.

WHEREAS, AMC USA, Inc. (“AMC USA”) has filed a Complaint against, inter alia, International First Service S.A. (“IFS S.A.”), International First Service USA, Inc. (“IFS USA”) and Anita McNeil (“McNeil”) with the U.S. Federal Maritime Commission (Docket No. 10-01), alleging, inter alia, various violations of the U.S. Shipping Act and the Regulations promulgated by the Federal Maritime Commission; and

WHEREAS, IFS S.A. and IFS USA have filed an Answer and Affirmative Defenses to the Complaint, and IFS S.A. has filed a Counter Complaint against AMC USA alleging, inter alia, that AMC USA itself has violated various aspects of the U.S.

Shipping Act, and IFS S.A., IFS USA and McNeil have also filed motions for the dismissal of the Complaint; and

WHEREAS, the parties have retained and conferred with counsel;

WHEREAS, the parties are cognizant of the increasing costs and risks associated with litigation, and this proceeding in particular, it is their intention to settle this matter in a fair and equitable manner with full consideration of public policy issues; and

WHEREAS, the parties have come to an agreement about the terms under which each would withdraw their Complaint or Counter Complaint (as the case may be) in settlement of the disputes between them.

NOW, THEREFORE, the parties agree:

1. The parties have reconsidered their initial positions in the litigation before the Federal Maritime Commission and have since developed additional facts and uncovered new material from which they have concluded that further litigation before the Federal Maritime Commission, at this time, is unlikely to achieve the satisfaction each had sought.
2. Accordingly, the parties have agreed to terminate the current litigation, but on a "stand still" basis, affording no right, benefit or detriment to any party, and to preserve all legal rights, obligations and responsibilities of the parties, and each of them, that are in existence immediately preceding the signing of this Agreement.
3. Each of the parties will formally withdraw their Complaint or Counter Complaint (as the case may be), before the Federal Maritime Commission, and any party may deliver a copy of this Agreement to the Federal Maritime Commission to effect the withdrawal of the pleading of the other party.
4. By entering into this Agreement, no party concedes or admits liability as to any claim made by another party, nor is the entering into this Agreement an admission of any wrongdoing by any party.
5. Each party represents and warrants that it has not heretofore assigned or transferred or purported to transfer to any person or entity whatsoever any claim, demand or right that it might have hereunder,

and that any such purported assignment would be void and unenforceable as against any other party.

6. It is agreed and understood that neither this Agreement, nor the fact of the settlement, the circumstances leading to this Agreement, nor any action taken by a court or regulatory body with respect to this settlement or this Agreement may be cited, referred to, relied upon or used in any way to support or oppose a request for attorneys' fees or costs[.]

WHEREFORE, each of the parties has executed this Settlement and Stand-Still Agreement as of the date first set forth above.

Settlement Agreement at 1-2.

The parties urge the approval of the settlement, stating:

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 and counter claimed. Moreover, as all remaining parties have entered into this settlement willingly, the settlement is not the product of collusion or coercion, and is not inconsistent with public policy issues that the Commission is obliged to consider.

Memorandum at 10.

In addition, the parties "stipulate that International First Service Argentina a/k/a AR-IFS is a non-existent company, and therefore, the parties further move that International First Service Argentina a/k/a AR-IFS be dismissed without prejudice." Supplement at 1.

III.

Using language borrowed in part from the Administrative Procedure Act,² 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).

² "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).

The Commission has a strong and consistent policy of “encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid.” *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). See also *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

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 courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. 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. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.” *Id.* However, if “a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.” *Old Ben Coal*, 18 S.R.R. at 1093. “[I]f 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.” *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

“Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation.” *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties have determined that it is not in their best interest to pursue this matter after taking into consideration the complex legal and factual issues, the scope and cost of discovery, including the need for expert testimony, and the potential for recovery. The settlement does not impose any monetary penalty, does not admit any wrongdoing, and does not impose obligations regarding future conduct. Essentially, it returns the parties to the position they were in prior to initiating the litigation. Given that the case “would be excessively expensive to the parties to litigate” (Memorandum at 8), the decision to settle on these limited terms seems reasonable.

Based on the representations in the pleadings, the parties have established that the Complaint on its face presents a genuine dispute, the non-monetary settlement is a bona fide attempt by the parties to resolve their controversy, the settlement does not appear to violate any law or policy, and the settlement appears free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Accordingly, the Settlement Agreement is approved.

IV.

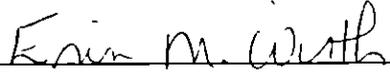
Upon consideration of the Settlement Motion, the Settlement Agreement, and Memorandum, it is hereby:

ORDERED that the Settlement Agreement among AMC, IFS USA, IFS S.A., and Anita McNeil be **APPROVED**; and it is

FURTHER ORDERED that the supplemental motion to dismiss International First Service Argentina a/k/a AR-IFS without prejudice be **APPROVED**; and it is

FURTHER ORDERED that any pending motions be **DISMISSED** as moot; and it is

FURTHER ORDERED that this proceeding be **DISMISSED** without prejudice.



Erin M. Wirth
Administrative Law Judge