

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 11-21**

**MINTO EXPLORATIONS, LTD.**

**v.**

**PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY**

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**INITIAL DECISION APPROVING SETTLEMENT AGREEMENT  
AND DISMISSING THE COMPLAINT<sup>1</sup>**

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On September 6, 2012, complainant Minto Explorations, Ltd. (Minto) and respondent Pacific and Arctic Railway and Navigation Company (PARN) filed a Joint Memorandum for Approval of Settlement and Dismissal of the Complaint with Prejudice (Joint Memorandum), attaching a Settlement Agreement and Release.

**I. BACKGROUND.**

On November 18, 2011, the Secretary received a Complaint filed by Minto, a Canadian corporation, alleging that PARN violated the Shipping Act of 1984 (Shipping Act or Act). Minto states that it owns and operates a copper-gold-silver mine in the Yukon Territory. (FMC Complaint ¶ 1.) Minto alleges that it ships

copper concentrates . . . by water from Skagway, Alaska to Asia using common carrier vessels owned by Oldendorff Carriers GmbH & Co. that operate in the foreign commerce of the United States. Minto is a “shipper” within the meaning of 46 U.S.C. § 40102(22) and Oldendorff is a “common carrier” within the meaning of 46 U.S.C. § 40102(6).

(FMC Complaint ¶ 2.)

PARN operates three deepwater marine terminal facilities in Skagway, Alaska: “an ore dock used by Minto, and the Broadway and Railroad docks used primarily by common carrier passenger

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<sup>1</sup> This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

vessels.” (FMC Complaint ¶ 4; Answer ¶ 4.) Minto alleges that PARN, a wholly owned subsidiary of White Pass & Yukon, U.S., Inc., is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14).

Minto alleges that PARN requires vessels transporting Minto’s cargo to pay a dockage (or berthage) fee of \$4.00 per foot of overall vessel length per 24 hour period. Passenger vessels of similar length pay a dockage fee of \$2.10 per foot of overall vessel length per 24 hour period. Barges pay a dockage fee of \$1.15 per foot of overall vessel length per 24 hour period during the first five days of their stay and \$0.95 of overall vessel length per 24 hour period for subsequent days. (FMC Complaint ¶ 14.) Minto contends that by charging a higher dockage fee per foot for ore vessels than for passenger vessels, PARN has violated 46 U.S.C. § 41102(c), which requires marine terminal operators to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, and 46 U.S.C. § 41106(2), which prohibits marine terminal operators from imposing any undue or unreasonable prejudice and disadvantage on Minto or granting any undue or unreasonable preference or advantage to another person. Minto contends that PARN’s actions also constitute unlawful discrimination under Alaska Stat. § 42.30.020. Minto seeks a cease and desist order, an order requiring PARN to establish and put in force lawful and reasonable practices, and a reparation award for past overpayments.

In its Answer, PARN admits some of the factual allegations and denies other factual allegations. PARN denies that it has violated the Shipping Act or Alaska Stat. § 42.30.020. (Answer ¶ 19.) PARN also pled four affirmative defenses. (Answer at 4.)

Prior to commencing this proceeding, Minto filed a civil action against PARN in the United States District Court for the District of Alaska. *Minto Explorations, Ltd. v. Pacific and Arctic Railway and Navigation Co.*, No. 3:11-cv-00031-JWS (D. Alaska). Count I of the district court complaint alleged that PARN’s imposition of a wharfage charge in addition to the dockage charge violated the PARN/AIDEA Purchase Agreement. See FMC Complaint ¶¶ 8-12. On December 5, 2011, the court entered judgment in favor of Minto in the amount of \$117,617 plus costs and interest on Count I of the district court complaint. *Minto Explorations, Ltd. v. Pacific and Arctic Railway and Navigation Co.*, No. 3:11-cv-00031-JWS (D. Alaska Dec. 5, 2011) (Amended Final Judgment). On February 14, 2012, Minto filed notice that the judgment on Count I has been satisfied. *Minto Explorations, Ltd. v. Pacific and Arctic Railway and Navigation Co.*, No. 3:11-cv-00031-JWS (D. Alaska Feb. 14, 2012) (Satisfaction of Judgment). I take official notice of the records of the district court pursuant to Commission Rule 226. 46 C.F.R. § 502.226.

Count II of the district court complaint alleged that PARN discriminated against Minto in violation of Alaska statute 42.30.020 “by charging ships hired to ship ore concentrates a higher per foot dockage fee than other ships using PARN’s docks and by charging Minto a wharfage fee in addition to a dockage fee.” *Minto Explorations, Ltd. v. Pacific and Arctic Railway and Navigation Co.*, No. 3:11-cv-00031-JWS, Order at 5 (D. Alaska Aug. 12, 2011). The court denied without prejudice PARN’s motion to dismiss Count II “on the grounds that it is within the primary jurisdiction of the [Federal Maritime Commission]. Count II . . . is referred to the [Commission] for a determination of any and all issues within its jurisdiction.” *Id.* at 9.

## II. DISCUSSION.

Using language borrowed in part from the Administrative Procedure Act,<sup>2</sup> 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).

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. 777-78 (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).

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<sup>2</sup> "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).

“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 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Minto and PARN state that they

have engaged in discovery and a motion to compel has been litigated and decided. The parties have also carefully evaluated their claims in the course of the proceeding, as well as the costs and risks of continued litigation, and have negotiated the resolution reflected in the settlement agreement accompanying this memorandum. While each party believes that its position has merit, the parties recognize the potentially high remaining costs of this litigation and the inherent risks in contested cases, and accordingly believe that the settlement agreement reflects a fair and cost-effective resolution of their dispute. Upon approval of the proposed settlement by the Presiding Judge and the Commission, the parties seek dismissal of Docket 11-21.

(Joint Memorandum at 2.) “Upon dismissal of this action the parties will also stipulate to dismissal of the Alaska [district court] action.” (*Id.* n.1.) Minto and PARN are each represented by counsel.

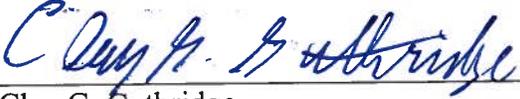
Based on the representations in the motion, the Settlement Agreement and Release, and other documents filed in this matter, the parties have established that the Settlement Agreement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Accordingly, the Settlement Agreement and Release is approved.

## O R D E R

Upon consideration of the Joint Memorandum for Approval of Settlement and Dismissal of the Complaint with Prejudice (construed as a motion), the Settlement Agreement and Release, and the record, and good cause having been stated, it is hereby:

**ORDERED** that the joint motion for approval be **GRANTED**. It is

**FURTHER ORDERED** that this proceeding be **DISMISSED WITH PREJUDICE**.

  
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Clay G. Guthridge  
Administrative Law Judge