

S E R V E D
October 14, 2016
FEDERAL MARITIME COMMISSION

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DOCKET NO. 15-08

GENERAL MOTORS LLC

v.

**NIPPON YUSEN KABUSHIKI KAISHA;
WALLENIUS WILHELMSSEN LOGISTICS AS; and EUKOR CAR CARRIERS INC.**

**INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT BETWEEN
GENERAL MOTORS AND NIPPON YUSEN KABUSHIKI KAISHA ¹**

I.

On September 12, 2016, complainant General Motors LLC (“GM” or “General Motors”) and respondent Nippon Yusen Kabushiki Kaisha (“NYK Line”), collectively the Settling Parties, filed a joint motion seeking dismissal with prejudice of the complaint against NYK Line due to a settlement (“settlement motion”) and a joint motion to seal the confidential settlement agreement (“motion to seal”). The Settling Parties provided a copy of the confidential Settlement Agreement. The Settling Parties jointly move for (1) approval of the confidential Settlement Agreement; (2) dismissal of the Complaint against NYK Line with prejudice; and (3) an order that the confidential Settlement Agreement be treated as confidential and sealed.

II.

On September 3, 2015, a Notice of Filing of Complaint and Assignment was issued indicating that General Motors filed a complaint against NYK Line, Wallenius Wilhelmsen Logistics AS (“WWL”), and Eukor Car Carriers, Inc. (“Eukor”). General Motors alleged that the Respondents violated the Shipping Act of 1984 (“Shipping Act”), including 46 U.S.C. §§ 40302(a), 41102(b)(1),

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

41102(c), 41103(a)(1) and (2), 41104(10), 41105(1) and (6), and 46 C.F.R. § 535.401, *et seq.*, in connection with General Motors's purchase of vehicle carrier services from the Respondents. Respondents entered a special appearance for the limited purpose of requesting a stay of proceedings and to contest the sufficiency of service of process.

On September 21, 2015, General Motors and the specially appearing Respondents filed a joint motion to stay this proceeding pending resolution of a federal district court complaint filed by General Motors against Respondents which was transferred into multi-district antitrust litigation in the United States District Court for the District of New Jersey. On January 5, 2016, this proceeding was stayed.

The Settling Parties state that they:

engaged in good-faith and arms-length settlement negotiations in light of the anticipated substantial costs of continued litigation and the uncertainties inherent in the outcome of complex litigation. Specifically, the Settling Parties concluded that each stands to face the substantial costs of further litigation associated with voluminous documentary discovery, numerous depositions, expert discovery related to GM's alleged damages, briefing of complex issues of law, a trial of disputed facts, and appeals. Consequently, the Settling Parties have entered into the Settlement Agreement.

Settlement Motion at 2.

The Settling Parties assert that:

The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval.

Settlement Motion at 4.

In addition, the Settling Parties request that the Commission keep the Settlement Agreement confidential, contending that under “the terms of the Settlement Agreement, the Settling Parties must keep the terms of the Settlement Agreement confidential. This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality.” Settlement Motion at 5.

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).

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 &*

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).

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

Based on the representations in the settlement motion, the Settlement Agreement, and other documents filed in this matter, the Settling Parties have established that the Settlement Agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. The Settlement Agreement has already been approved by the federal district court. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the Settlement Agreement is approved.

The parties request that the Settlement Agreement be kept confidential and filed under seal. Motion to Seal. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. “If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests.” *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ Sept. 15, 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int’l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See, Streak Products, Inc., and SYX Distribution, Inc. v. Uti, United States, Inc.*, 33 S.R.R. 641, 644-45 (2014); *see also, Schoeps v. The Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the Settlement Agreement has been reviewed by the undersigned and is available to the Commission. Given the parties’ request for confidentiality, confidential information included in the Settlement Agreement, and the Commission’s history of permitting agreements settling private complaints to remain confidential, the parties’ motion to seal the Settlement Agreement is granted. The Settlement Agreement will be maintained in the Secretary’s confidential files.

The other respondents in this proceeding, WWL and Eukor, filed a settlement agreement which was approved in an Initial Decision on July 29, 2016, and affirmed by the Commission on October 13, 2016. Accordingly, this settlement resolves this proceeding.

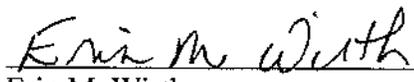
IV.

Upon consideration of the settlement motion, the confidential Settlement Agreement, the motion to seal and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential Settlement Agreement between General Motors and NYK Line be **GRANTED**. It is

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

FURTHER ORDERED that the joint motion to seal the confidential Settlement Agreement be **GRANTED**.



Erin M. Wirth
Administrative Law Judge