

FEDERAL MARITIME COMMISSION

APM Terminals North America, Inc.

v.

Port Authority of New York and
New Jersey

and

Port Authority of New York and
New Jersey

v.

Maher Terminals, LLC

Docket No. 07-01

Served: April 1, 2009

BY THE COMMISSION: Joseph E. BRENNAN, Harold J. CREEL, Jr., and Rebecca F. DYE, *Commissioners*.

Order Denying Exceptions and Petition for Stay

On December 29, 2006, APM Terminals North America, Inc. (APM), commenced this proceeding by filing a complaint alleging that respondent Port Authority of New York and New Jersey (PANYNJ) violated sections 10(a)(3), 10(d)(1), 10(d)(3),

10(b)(10) and 10(d)(4) of the Shipping Act of 1984. APM claimed that it has been harmed by the Port Authority's failure to tender an additional portion of marine terminal property (the Added Premises) by the date provided for in Lease EP-248 between APM and the Port Authority. APM also claimed that the delay showed a preference in favor of Maher Terminals, LLC, also a marine terminal operator, which occupied the Added Premises pursuant to lease with PANYNJ prior to and throughout the period in which the property transfer was delayed. PANYNJ denied liability and filed a counter-complaint against APM for allegedly failing to perform construction work required by Lease EP-248. APM answered the counter-complaint, denying liability.

PANYNJ also filed a third-party complaint against Maher claiming that Maher failed to timely surrender the same Added Premises as required by its Lease EP-249, (and thereby adversely affected the Port Authority's ability to turn the premises over to APM). Maher filed an answer to PANYNJ's third-party complaint denying liability and filed a counter-complaint against the Port Authority alleging that PANYNJ failed to give notice of reasonably certain dates by which Maher was to vacate the Added Premises and failed to make improvements required by the lease with Maher.

APM and PANYNJ entered into settlement negotiations resulting in the proposed Settlement Agreement and a Third Supplemental Agreement to Lease EP-248, resolving their claims and counter claims in this proceeding as well as other matters related to Lease EP-248. The ALJ approved the Settlement Agreement in his Initial Decision dated October 24, 2008. Pursuant to Commission Rule 227, 46 C.F.R. §502.227, Maher filed Exceptions to the Initial Decision on November 19, 2008; PANYNJ and APM filed a joint Reply to the Exceptions on December 10, 2008.

I. Maher's Exceptions

In its Exceptions, Maher alleges a number of errors, both procedural and substantive. With respect to Maher's claims of

substantive errors, Maher argues that the Settlement Agreement should not be approved because: (1) the value of preferences given to APM and the value of APM's claim were not properly evaluated; (2) PANYNJ violated the Shipping Act by refusing to deal with Maher; (3) the Settlement Agreement is a result of collusion between APM and PANYNJ; (4) Maher will suffer legal prejudice; and (5) APM should not be dismissed because the preferences implicate APM.

On January 15, 2009, Maher filed a Petition to stay the Commission's consideration of the Initial Decision pending consideration of Maher's petition to determine claims that PANYNJ waived subject matter privilege concerning evidence material to the settlement and/or to PANYNJ's alleged spoliation of such evidence. Maher argues that evidence as to the nature and value of the settlement is material to determining whether, and to what degree, PANYNJ's settlement concessions overvalue APM's claim and therefore may show to what extent the settlement constitutes a preference in violation of the Shipping Act. PANYNJ and APM each submitted a reply in opposition to the petition. Subsequently on February 19, 2009 Maher submitted a petition for leave to reply to those responses.

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 Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), quoting *Old Ben Coal Co v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (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,¹ 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

¹ "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).

proceeding, and the public interest permit.” 46 C.F.R. § 502.91(b). “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.” *Old Ben Coal*, 18 S.R.R. at 1092, quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

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.

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) (citations omitted); *Freeman v. Mediterranean Shipping Co. S.A.*, 31 S.R.R. 336, 337 (ALJ 2008).

The FMC observes long-established precedent giving deference to the parties when it comes to the valuation of settlement concessions. There is no burden on the settling parties to prove that the settlement involves concessions of equal value on both sides. See *Perry's Crane Serv. v. Port of Houston Auth.*, 19 S.R.R. 517, 520 n. 3 (ALJ 1979) (“In respect to the particular amount of damages upon which the parties have agreed, the Commission has recognized that this is a matter for the parties to determine.”). When determining whether to approve a settlement agreement it is not necessary to make final determinations of violations or lack of violations since to do so might discourage parties from even attempting to propose settlement in the first place. *Old Ben Coal*, 18 S.R.R. at 1093. 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. *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004).

The ALJ is responsible for ensuring the record forms an adequate basis for determining whether to approve the settlement; however, FMC case law is clear in that settlements are presumed fair and the presiding officer has "a relatively limited role to perform when scrutinizing them." *Puerto Rico Shipping Ass'n v. Puerto Rico Ports Authority*, 27 S.R.R. 645, 647 (ALJ 1996). It appears that the ALJ adequately addressed that role by ordering the parties, through two separate Orders, to provide additional information to insure that all matters were carefully examined and considered before making the decision of whether to approve the settlement. Initial Decision, p. 22-28. Accordingly, Maher has the burden of demonstrating that the ALJ erred in making a finding of fairness and reasonableness in the settlement. 46 C.F.R. § 502.155. See also *HUAL AS v. Puerto Rico Ports Authority*, 29 S.R.R.1472, 1474 (ALJ 2003), citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 89-90 (1981) (judges should not prevent parties from realizing the benefits of their settlement agreement which does not violate law and was freely negotiated). Maher has not carried that burden here.

Maher is incorrect in its assertion that, in approving a settlement, the ALJ and Commission must necessarily find that the Shipping Act has not been violated. *Id.* As discussed above, approving a settlement does not entail a final adjudication of the merits and does not mandate either party to admit liability. See *Old Ben Coal*, 18 S.R.R. at 1094 n.7, citing *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973). Because a requirement that the ALJ make final determinations of legal issues might discourage parties from even attempting to propose settlement, it appears that the ALJ applied the correct standard of review in finding that the Settlement Agreement does not appear to violate any law or policy. Initial Decision, p. 44.

Maher will not be prejudiced by a dismissal of these proceedings. In fact, the approval of the Settlement Agreement would extinguish PANYNJ's claim against Maher, thereby releasing Maher of potential liability were this proceeding to continue. Neither are Maher's own claims against the Port Authority foreclosed by approval of this settlement agreement and termination of this proceeding.²

Neither does the convenience of compulsory discovery stand as sufficient reason to continue this proceeding. Maher will not be precluded from seeking discovery against APM, albeit as a non-party to Docket No. 08-03, subject to the requirements of 46 C.F.R. §502.131 *et seq.*

II. Maher's Petition for Stay

More than thirty days after APM and PANYNJ submitted their reply to Maher's exceptions, Maher submitted a Petition seeking to stay consideration of approving the settlement agreement pending determination of PANYNJ's subject matter waiver of privilege concerning the settlement and/or PANYNJ's spoliation of such evidence. Maher asserts that the stay is needed in order to consider whether evidence to be produced by reason of PANYNJ's waiver of privilege and protection will reveal the true nature and value of the settlement and thus the extent of any undue preference provided to APM in violation of the Shipping Act. Petition, p. 22.

There is no burden on the settling parties to prove that the settlement involves concessions of equal value on both sides. See *Perry's Crane Serv. v. Port of Houston Auth.*, 19 S.R.R. at 520 n. 3. As the need to provide evidence to prove the valuation of the

² While all claims between the settling agreement parties would be dismissed, the counter-complaint by Maher in Docket 07-01 would remain active. In the interest of efficiency in managing the Commission's docket, the Commission will therefore consolidate the remaining issues between Maher and PANYNJ into Docket 08-03.

settlement is not required, it is thus irrelevant and unnecessary for purposes of this proceeding to make a determination as to whether PANYNJ waived privilege or caused spoliation with respect to documents to be produced, if at all, in conjunction with the ALJ's consideration of the proceedings in Docket No. 08-03. Maher's claims of waiver of privilege presently remain before the ALJ in Docket No. 08-03, and the ALJ has not yet ruled whether production should be had, much less whether such documentation would be relevant and admissible at hearing in demonstrating an unreasonable preference to Maher's competitor. Maher thus fails to assert a valid objection necessitating a stay in approving the Settlement Agreement here in Docket No. 07-01.

III. Maher's Petition for Leave

Following receipt of APM Terminal's Reply and PANYNJ's Memorandum in Opposition to Maher's Petition for Stay, Maher submitted on February 19, 2009 its request for leave to file a reply. Rule 74(a)(1) of the Commission's Rules of Practice and Procedure provides that with regard to replies to motions, "a reply to a reply is not permitted." 46 C.F.R. § 502.74(a)(1).

Rule 74(a)(1) unequivocally prohibits replies to replies, and Maher's arguments for allowing such a filing are unpersuasive. Opposition from PANYNJ should reasonably have been foreseen, and Maher has not shown that a lack of expectation is a valid basis on which to depart from procedural requirements. Maher's contention that the reply would be of assistance in considering its original motion and would allow Maher to respond to PANYNJ's arguments is exactly the type of filing the rule seeks to avoid. 46 C.F.R. § 502.74(a)(1). See, *Exclusive Tug Franchises - Marine Terminal Operators Serving the Lower Mississippi*, 30 S.R.R. 278, 282 (FMC, 2004); *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 30 S.R.R. 1243, 1245 (FMC, 2006).

All of the pleadings have been given thorough consideration. We have considered the other arguments presented

by Maher such as refusal to deal, collusion, and procedural errors, but deem them immaterial in view of our findings and conclusions as set forth above.

Conclusion

NOW THEREFORE, IT IS ORDERED That the Exceptions of Maher Terminals LLC to the Initial Decision are hereby DENIED;

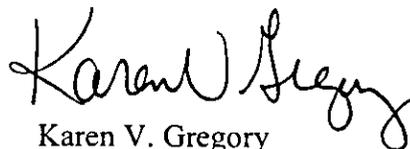
IT IS FURTHER ORDERED That Maher Terminals, LLC's Petition to stay the Commission's consideration of the Initial Decision approving settlement is DENIED;

IT IS FURTHER ORDERED That Maher Terminals, LLC's February 19, 2009 Petition for Leave to file a reply to a reply is DENIED;

IT IS FURTHER ORDERED That the counter-complaint of Maher Terminals, LLC is hereby transferred and consolidated with proceedings in Docket No. 08-03, *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*; and

IT IS FURTHER ORDERED That this proceeding is hereby DISMISSED.

By the Commission.



Karen V. Gregory
Secretary