

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-56

JOSE BUENAVENTURA D/B/A PHILIPPINE EXPRESS¹ POSSIBLE
VIOLATION OF SECTIONS 16, INITIAL PARAGRAPH, AND 44(A),
SHIPPING ACT, 1916

Alan J. Jacobson, Hearing Counsel, *John Robert Ewers*, Director, Bureau of Hearing Counsel.

Bernard Ferrera, attorney for respondent.

APPROVAL BY WILLIAM BEASLEY HARRIS, ADMINISTRATIVE
LAW JUDGE, OF AGREEMENT OF SETTLEMENT

Finalized June 20, 1984

The Order of Investigation and Hearing in this proceeding was served December 8, 1983; it was published in the *Federal Register*, Vol. 48, No. 240, on Tuesday, December 13, 1983, pages 55510-55511.

A prehearing conference was held in the proceeding on Tuesday, January 31, 1984.

In a letter dated February 29, 1984, Hearing Counsel requested that April 19, 1984 be set as the date for submission of a joint stipulation of facts, a proposed settlement and a memorandum in support thereof. The respondent supported the request. The request was granted.

The parties entered into the following stipulation:

STIPULATION

Pursuant to Rule 162 of the Federal Maritime Commission's Rules of Practice and Procedure (46 C.F.R. § 502.162), the Commission's Bureau of Hearing Counsel and Respondent Philippine Express Corp. and Jose Buenaventura hereby respectfully submit this stipulation of facts to the presiding Administrative Law Judge and request that he include the facts so agreed upon in the record in the instant proceeding.

¹Title change from Philippine Express Corp. used in Order of Investigation and Hearing served December 8, 1983, for purpose of clarification. Rule 147, 46 CFR 502.147. This is in response to motion of Hearing Counsel served April 19, 1984, to delete the words "Philippine Express Corp." wherever they appear in the Order of Investigation and Hearing and substitute the words "Jose Buenaventura d/b/a Philippine Express." The reason for the change is simple. The Commission thinking Philippine Corporation was indeed a corporation in existence, named it as respondent. Mr. Buenaventura informed Hearing Counsel and Hearing Counsel confirmed through the New York Secretary of State Office, that he had not incorporated. Therefore, the true party-at-interest in this proceeding is Mr. Buenaventura.

1. Philippine Express, formerly located at 467 Tenth Avenue, New York, New York, was started in 1977 as an importer/exporter of general merchandise. It is no longer operating.

2. Mr. Jose Buenaventura, at all times relevant, was the President of Philippine Express and is responsible for the activities described herein.

3. During the course of 1980, Mr. Buenaventura, as Philippine Express, knowingly engaged in a scheme, involving six shipments of Cocoa Beans from New York to Manila, the Philippines, to obtain transportation by water at less than the applicable ocean carrier tariff rates.

4. The six shipments of cocoa beans were all carried aboard Maersk Line vessels and are represented by the following:

Vessel	Bill of Lading	Bill of Lading Date
ALBERT	NYCY 11969	1-11-80
AXEL	NYCY 14824	2-8-80
ARILD	NYCY 16976	2-27-80
ANDERS	NYCY 17858	3-7-80
ADRIAN	NYCY 19048	3-21-80
ALVA	NYCY 20121	3-28-80

5. On these shipments, Mr. Buenaventura first billed for and collected the proper freight charges from the underlying shippers. Balfour Maclaine International, Ltd. was the underlying shipper for the first five shipments listed in 4 above. Warren G. Harting & Co., Inc. was the underlying shipper for the last shipment.

6. Then, by using inaccurate dock receipts substituted in the carrier's files for the actual dock receipts, Mr. Buenaventura made it appear to the carrier that the shipments weighted approximately one-half of their actual weight.

7. Maersk Line rated these shipment based upon the false weight declarations on the dock receipts and on the corresponding bills of lading, also prepared by Philippine Express.

8. Relying on the inaccurate weight declarations, Maersk Line billed, and Philippine Express paid, approximately one-half the proper freight charges, and approximately one-half the amount paid to Philippine Express by the underlying shippers.

9. Philippine Express did not reimburse its underlying shippers for the difference between the amount they paid to Philippine Express and the amount Philippine Express paid to Maersk Line.

10. The total monetary difference on these shipments between the amount Philippine Express collected from the underlying shippers and the amount Philippine Express paid Maersk Line is \$14,716.00.

11. On July 27, 1981, Mr. Buenaventura, of Philippine Express, entered an Affidavit of Confession of Judgement, in 80 Civ. 3830, United States District Court, Southern District of New York, a case initiated by complaint filed by Maersk Line to recover monies

owed it by Philippine Express in connection with the above described facts.

12. In said Confession of Judgment, Mr. Buenaventura acknowledged the facts as alleged in the complaint, and agreed to pay Maersk Line the sum of Thirty Thousand Dollars (\$30,000).

13. During the period beginning on December 27, 1978 and running at least through April 18, 1980, Philippine Express carried on the business of ocean freight forwarding without an independent ocean freight forwarder's license issued to it by the Commission.

14. These freight forwarding activities were in connection with the six shipments described above as well as at least 97 other shipments.

15. Philippine Express performed the freight forwarding functions on these shipments, but pursuant to an arrangement with a licensed forwarder (that is no longer in business), listed that forwarder's license number in the forwarder block of the ocean carriers bill of lading.

/s/ Bernard Ferrara
Bernard Ferrara
Attorney for Respondent
April 18, 1984
New York City, N.Y.

Respectfully submitted,
/s/ John Robert Ewers 4-19-84
John Robert Ewers, Director
Bureau of Hearing Counsel

/s/ Alan J. Jacobson
Hearing Counsel

The parties entered into the following proposed settlement of Civil Penalties and Promissory Note Containing Agreement for Judgment:

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel (Hearing Counsel) and Philippine Express Corp. and Jose Buenaventura (Respondent). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. §5053) and is to be incorporated into the Final Order in the instant proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served December 8, 1983, the Commission instituted the present investigation to determine whether Respondent had violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 (46 U.S.C. §§ 815 and 841(b)) during the period December 29, 1978 through April 18, 1980, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 so found;

WHEREAS, Hearing Counsel believe that the facts as described in the Stipulation submitted in this proceeding indicate that Respondent engaged in specific conduct violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, and Respondent chooses not to contest the question of violative conduct;

WHEREAS, Respondent has terminated the practices which are the basis of the Commission's allegations in this proceeding, and has indicated its willingness and commitment to maintain measures designed to eliminate discourage and prevent such practices in the future;

WHEREAS, the parties, in order to avoid the delays and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues of alleged violation and civil penalties in accordance with the terms and conditions of this Agreement; and

WHEREAS, Section 32(e) of the Shipping Act, 1916 (46 U.S.C. § 831(e)), authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from conduct set forth in the factual record submitted in the present proceeding, Respondent agrees, as a condition of this Agreement, to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Respondent hereby agrees, as a condition of this Agreement, to pay the Federal Maritime Commission the monetary amount of Ten Thousand Dollars (\$10,000) which shall be payable according to the terms of the Promissory Note attached hereto as Appendix 1.

2. Respondent consents as a condition of this settlement agreement, to the entry of an Order directing it to cease and desist from practices which have resulted in the alleged violations described above. This Order shall expressly require the Respondent to:

- a. Cease and desist from misdeclaring the weight of shipments to ocean carriers and obtaining or attempting to obtain transportation by water of property at less than rates and charges which would otherwise be applicable; and

- b. Cease and desist from refusing to pay applicable ocean carrier tariff rates.

3. Except as provided in paragraph five (5) below, this Agreement shall forever bar the commencement or institution by the Commission of any assessment proceeding or other claims for recovery of civil penalties from Respondent arising from the conduct set forth and described in the factual record submitted in the present proceeding.

4. Respondent agrees to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916.

5. Respondent hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to December 8, 1988, by or on behalf of the Commission, to recover civil penalties for violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Respondent, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Respondent by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Respondent's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Respondent will not impose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

6. In the event of changes of law or other circumstances at any time during the term of this Agreement that Respondent believes warrant modification or mitigation of any of the requirements imposed on Respondent by this Agreement, the Commission agrees, as an inherent part of this Agreement, to Respondent's right to petition the Commission to this end.

7. It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Respondent or its owners, officers, directors, employers or affiliates of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

8. Respondent acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it, other than the agreements and the consideration herein expressed.

The undersigned represents that he is properly authorized to execute this Agreement on behalf of Respondent and to fully

bind Respondent to all of the terms and conditions set forth herein.

	John Robert Ewers 4-19-84
Philippine Express	John Robert Ewers, Director
Jose Buenaventura	Bureau of Hearing Counsel
By: _____	/s/ Alan J. Jacobson
	Alan J. Jacobson
April 18, 1984	Hearing Counsel

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

For value received, Jose Buenaventura promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Ten Thousand Dollars (\$10,000) to be paid at the offices of the Commission in Washington, D. C., by bank cashier's or certified check in the following installments:

One Thousand Dollars (\$1,000) on or before ten (10) days following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before three (3) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before nine (9) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before fifteen (15) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before twenty one (21) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

One Thousand One Hundred Twenty Five Dollars (\$1,125.00) on or before twenty four (24) months following the approval

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by the Commission of the Proposed Settlement in FMC No. 83-
56.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of the approval of the Commission of the Proposed Settlement in No. 83-56 and be computed at the rate of twelve percent (12%) per annum.

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the Commission shall give Respondent written notice of the amount unpaid. Respondent shall have five (5) days thereafter to pay all unpaid principal and interest. If any payment of principal and interest shall remain unpaid following this five (5) day period, then the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, Jose Buenaventura does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for him, and to enter and confess judgment against Jose Buenaventura for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon Jose Buenaventura in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment. Jose Buenaventura hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Jose Buenaventura by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

By: _____
Jose Buenaventura

Date: April 18, 1984

Hearing Counsel submitted the following memorandum in support of the proposed settlement:

MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT

I. INTRODUCTION

The Federal Maritime Commission began this proceeding by an Order of Investigation and Hearing served December 8, 1983. The Order alleged that Philippine Express may have violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916. Specifically, the Commission ordered that the following issues be resolved in this proceeding:

1. Whether Philippine Express Corp. violated sections 16, Initial Paragraph, and/or 44(a) of the Shipping Act, 1916, during the period December 29, 1978 through April 18, 1980.
2. Whether civil penalties should be assessed against Philippine Express Corp. for violations of section 16, Initial Paragraph and/or 44(a) and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible aggravation and mitigation of such penalty.
3. Whether the Commission should order Philippine Express Corp. to cease and desist from carrying on the business of forwarding without a license obtained pursuant to section 44 of the Shipping Act, 1916.

By Notice of March 1, 1984, the presiding Administrative Law Judge granted the parties' request to submit a proposed settlement agreement with supporting memoranda and record on or before April 19, 1984. The record in this proceeding consists of a stipulation of facts submitted herein. In this memorandum, Hearing Counsel explain the proposed settlement offered by the parties, and we indicate the reasons we believe support acceptance of the settlement.

II. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. Authority for Settlement

It is well established that settlement is an acceptable means of terminating an administrative proceeding. The Administrative Procedure Act ("APA") provides in part that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit . . .", 5 U.S.C. § 554(c)(1). The actual authority, however, to use settlement as a means to terminate a proceeding comes from judicial precedent and the agency's rules. See *Pennsylvania Gas & Water Co. v. FPC*, 463 F.2d 1242, 1247, n. 17 (D.C. Cir. 1972). The Court of Appeals for the District of Columbia in that case noted that the "purpose of the informal settlement provisions [in the APA] is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach

a result of their own which the appropriate agency finds compatible with the public interest," and that settlement should not be discouraged. *Id.*

The Commission's rules provide authority for settlement of penalties for violations which are the subject of a formal proceeding, stating that "Hearing Counsel shall have full authority to enter into stipulations and settlements." 46 C.F.R. § 505.3 (1980).

The Commission has thus approved settlements under this authority for violations of many different sections of the Shipping Act, 1916, which fact indicates that "there is a very strong policy favoring settlements in lieu of needless expensive litigation and . . . the Commission has been following this policy frequently, especially in most recent years." *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 316, 322 (1981).

Section 505.3 of the Commission's Rules for Compromise, Assessment, Settlement and Collection of Civil Penalties also requires that settlements be submitted for approval to the presiding officer. (46 C.F.R. § 505.3.) The presiding Administrative Law Judge in his determination has to follow the stricture that "the settlement must not contravene any law or public policy." *Old Ben Coal Company v. Sea-Land Service*, 21 F.M.C. 506, 512 (1978). If the settlement is not invalid under this principle, the presiding Administrative Law Judge may look to other criteria to decide whether "the settlement is fair, reasonable and adequate." *Id.*

In determining whether the settlement amount is sufficient to warrant approval of proposed settlements, the presiding Administrative Law Judge is assisted by the standards set forth in 4 C.F.R. Parts 101-105, which are referred to in section 505.1 of the Commission's Rules and Regulations (46 C.F.R. § 505.1). These standards under Part 103 of Chapter 4 provide criteria that can be considered in settling a case. Among those mentioned are ability of the respondent to pay and furtherance of enforcement policy. (4 C.F.R. § 103.)

B. Proposed Settlement Agreement and Stipulation

The proposed settlement agreement provides for Jose Buenaventura to pay a civil penalty in the amount of \$10,000. This penalty is to be paid over a period of two years with interest according to a promissory note. In addition, as part of the settlement, Respondent agrees to the entry of an Order directing it to cease and desist from practices which have resulted in those complained of here.

Philippine Express knowingly obtained transportation by water of property at less than the applicable ocean carrier tariff rates. This involved six shipments of cocoa beans from New York to the Philippines, all during the first three months of 1980. (See Stipulation Nos. 3-12.) In addition, during the period beginning on December 27, 1979, and running through April 18, 1980, Philippine Express carried on the business of ocean freight

forwarding without an independent ocean freight forwarder's license issued to it by the Commission. (See Stipulation Nos. 13-15.)

Rather than fully litigate the issues raised in the Order of Investigation and Hearing, Respondent and Hearing Counsel entered into the proposed settlement and agreed upon a stipulated record.

C. Criteria For Settlement

The proposed settlement meets the criteria established by the Commission as set out in 4 C.F.R. parts 101-105 (1980). Part 103 of that Title includes standards to be used as guidelines in settling claims. Relevant to this proceeding are the factors mentioned previously; ability to pay and furtherance of agency enforcement policy.

Both of these factors figured prominently in Hearing Counsel's decision to enter into the settlement in this proceeding. In the first instance, a payment of \$10,000 is a significant amount which will serve to emphasize the Commission's determination to eliminate practices such as those involved here.

It is also a penalty reasonable in light of Respondent's status as an individual and his agreement to pay Maersk Line the sum of Thirty Thousand dollars as compensation for the complained of practices as well as other matters.

Further support of the settlement amount is found in Respondent's financial status. Mr. Buenaventura is personally responsible for payment of the promissory note. His business, Philippine Express, is no longer functioning, and he was evicted from his office space. He has no business assets at all. He has also stated that he is personally without sufficient funds to pay a large penalty. He indicates, however, that he is trying "to get back on his feet" and, recognizing his obligation in this matter, will try to pay the \$10,000 settlement amount.

Hearing Counsel believe the factors outlined above should be given considerable weight by the Administrative Law Judge in reviewing the settlement proposal. The settlement amount should operate to prevent recurrence of the practices upon which the proceeding was predicated and thereby serve the Commission's enforcement policy. It will also serve the Commission policy of favoring settlements in lieu of needless expensive litigation.

III. CONCLUSION

Hearing Counsel, by reason of the foregoing, urge the Presiding Administrative Law Judge to approve the proposed settlement.

Respectfully submitted,
John Robert Ewers, Director
Bureau of Hearing Counsel

Alan J. Jacobson
Hearing Counsel

DISCUSSION

Upon review of the above and the entire record in this presiding, the Presiding Administrative Law Judge is satisfied that the settlement is fair and reasonable, and should be approved. The Judge *finds* and *concludes* that the parties have made out a proper case for settlement and supplied stipulations and reasons in support which are found acceptable.

Wherefore, it is *ordered*, subject to approval by the Commission as provided in its Rules of Practice and Procedure:

(A) The settlement is approved pursuant to the proposed settlement and promissory note containing Agreement for Judgment.

(B) The parties shall notify the Commission promptly upon their carrying out the terms of the settlement.

(C) The case name shall be clarified as noted herein above.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge