

ORIGINAL

S E R V E D
May 7, 2010
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 10-02

BDP INTERNATIONAL, INC.

v.

UNITED TRANSPORT TANKCONTAINERS, INC.

**INITIAL DECISION APPROVING SETTLEMENT AGREEMENT AND
GRANTING REQUEST TO DISMISS COMPLAINT¹**

Complainant BDP International, Inc. (BDP) commenced this action by filing a Complaint received by the Secretary on March 23, 2010. On March 26, 2010, the Secretary served the Complaint on respondent United Transport Tankcontainers, Inc. (United Transport). On May 5, 2010, the parties filed a Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Memorandum of Points and Authorities in Support of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, and a proposed Settlement Agreement. For the reasons stated herein, I grant the motion and approve the proposed Settlement Agreement.

BACKGROUND

Complainant BDP is licensed by the Commission as an ocean freight forwarder, FMC License No. 001127F. Respondent United Transport is licensed by the Commission as a non-vessel-operating common carrier (NVOCC), FMC License No. 009862.

The Complaint alleges that during the period January 2006 through August 2009, BDP provided ocean freight forwarding services for shipments on which United Transport operated as an NVOCC. United Transport's tariff requires it to pay ten percent of the base freight amount for a shipment as compensation to a licensed ocean freight forwarder that provides services on the

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.

shipment. BDP claims that United Transport has not paid BDP compensation on several hundred shipments and owes BDP \$143,765.63 for services rendered. BDP alleges United Transport has violated section 10(b)(2)(A) of the Shipping Act of 1984. *See* 46 U.S.C. § 41104 (“A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title.”). BDP seeks reparations in the amount of \$143,765.63 plus interest, cost, and attorneys’ fees.

United Transport did not answer or otherwise respond to the Complaint. On April 14, 2010, a representative of United Transport sent an email to the Secretary stating:

“Per our telephone conversation I am confirming that through negotiations with BDP’s Chief Legal Officer Catherine Muldoon, we have reached a settlement in the complaint. Catherine has confirmed that the wheels are in motion with Gonzalez and Williams, P.C. to withdraw the complaint.” (Email dated April 14, 2010, from Steve Brendgord to Secretary).

BDP International, Inc. v. United Transport Tankcontainers, Inc., FMC No. 10-02 (ALJ Apr. 28, 2010) (Order Regarding Settlement Discussions). Since the parties had not submitted a proposed settlement or other papers, on April 28, 2010, I issued an Order requiring the parties to file appropriate papers seeking approval of the settlement, or in the alternative, a Joint Status Report stating when they expected to finalize the settlement, on or before May 10, 2010. *Id.*

On May 5, 2010, the parties submitted a thorough, detailed, and well-supported Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Memorandum of Points and Authorities in Support of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, and a proposed Settlement Agreement addressing the factors that the Commission requires to be considered when approving a settlement agreement. The parties contend that hundreds of shipments are in dispute and, as United Transport’s liability is a question of fact, it would be necessary for the parties to engage in extensive, expensive, and time-consuming discovery. A number of the shipments occurred more than three years before BDP filed the complaint and may be barred by the Shipping Act’s statute of limitations. *See* 46 U.S.C. § 41301(a) (“A person may file with the . . . Commission a sworn complaint alleging a violation of this part If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.”); 46 U.S.C. § 41305(b) (“If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.”). Complex legal issues related to “first in first out” (that is, whether BDP could apply payments that United Transport made for later shipments to claims for compensation allegedly owed for earlier shipments, thus reducing the number of shipments subject to a statute of limitations defense) would have to be resolved. The parties contend that “the cost of litigation could be substantial and could erode significantly into the amount of damages sought. . . . Therefore, the

parties have agreed to compromise and settle this matter based upon the terms and conditions set forth [in the settlement agreement].” (Memorandum of Points and Authorities in Support of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice at 4.)

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. Moreover, as both 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 obligated to consider.

(*Id.*)

The proposed Settlement Agreement summarizes the facts set forth above. The settlement obligates United Transport to pay BDP \$106,140.00 as full compensation for the ocean freight forwarding services BDP performed on the shipments.

DISCUSSION

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) (*Old Ben Coal*). See also *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981). 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 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

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).

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.

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.

Id. at 1093.

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). See also *APM Terminals North America, Inc. v. Port Auth. of New York and New Jersey*, 31 S.R.R. 623, 625-626 (2009).

I find that the parties have established that the Complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. The parties identify significant genuine issues that could require extensive litigation to resolve. I also find that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act.

The parties have agreed that United Transport will pay BDP \$106,140.00 as full compensation for the ocean freight forwarding services BDP performed on the shipments.

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.”). . . . 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).

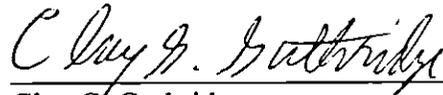
APM Terminals North America, Inc. v. Port Auth. of New York and New Jersey, 31 S.R.R. at 626. There is no indication of any harm to the public interest that would be caused by approval of the settlement agreement. Therefore, I approve the Settlement Agreement.

O R D E R

Upon consideration of the Complaint, the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Memorandum of Points and Authorities in Support of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, and the proposed Settlement Agreement, and good cause having been stated, it is hereby

ORDERED that the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice be **GRANTED**. The Settlement Agreement is approved. It is

FURTHER ORDERED that this proceeding be **DISMISSED** with prejudice.



Clay G. Guthridge
Administrative Law Judge