

ORIGINAL

(S E R V E D)
(October 26, 1998)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

October 26, 1998

DOCKET NO. 98-15

**HUAL AS – SERVICE CONTRACTS AND TIME-VOLUME
RATE ARRANGEMENTS WITH OCEAN FREIGHT FORWARDERS**

SETTLEMENT APPROVED AND PROCEEDING DISMISSED

With commendable diligence and promptness, the Commission's Bureau of Enforcement (BOE) and respondent HUAL AS have successfully reached settlement of the issues in this proceeding and ask that their settlement agreement be approved so that this proceeding may be dismissed. The parties have submitted a most thorough and careful memorandum of law containing ample authority for approval of the settlement agreement and examination of the terms of that agreement demonstrates its reasonableness and the fact that it merits approval. Accordingly, their request is hereby approved, as explained below.

The Commission began this formal investigatory proceeding on August 14, 1998, to determine whether respondent HUAL, formerly known as Hoegh-Ugland Auto Liners A/S, an ocean

common carrier, had violated four different sections of the Shipping Act of 1984 and three implementing Commission regulations in connection with HUAL's practices relating to its service contracts and time-volume rate arrangements with licensed ocean freight forwarders. The Commission was concerned that licensed freight forwarders might not be shippers within the meaning of the Shipping Act, might not be eligible to enter into service contracts or enjoy time-volume rates in their capacities as freight forwarders, and that payments to such freight forwarders under HUAL's arrangements or contracts might have violated the various prohibitions against deviations from filed tariff rates and against forwarders' receiving compensation from ocean carriers without performing and certifying to their services or when such forwarders retained beneficial interests in the cargoes being transported by HUAL. Moreover, the Commission was concerned that HUAL might not have filed all the essential terms of its service contracts or the complete service contracts with the Commission, as required by law. Thus, as more completely described in the attached Settlement and Agreement for Entry of Consent Order and the Joint Stipulations, the Commission wished to determine whether HUAL had violated four Shipping Act sections (sections 1 O(b)(1), 1 O(b)(4), 19(d)(1), 19(d)(4)) and three Commission regulations (46 C.F.R. 514.17(d)(7)(vi); 46 C.F.R. 514.4(d)(5)(i)(A); and 46 C.F.R. 514.17(a)(1)), dealing with these various questions.

BOE commenced discovery within the time period required by the Commission's rules. However, the parties promptly began to discuss settlement so that it became unnecessary for formal litigation to continue. The discussions resulted in a settlement agreement in which HUAL admitted that the practices under investigation had violated the laws and regulations as specified in the Commission's Order of Investigation, terminated the practices, agreed to the entry of a cease and desist order to ensure that the practices would not recur, and agreed to pay the sum of \$130,000 plus

accrued interest to the Commission, the payment to be effectuated within five business days after approval of the settlement by the Commission. In return, upon compliance by HUAL with the terms of the settlement agreement, the Commission would not institute any civil penalty assessment proceeding or other claim for recovery of civil penalties against HUAL for the violation alleged to have been committed in the instant proceeding nor would the Commission institute any investigation seeking the suspension or cancellation of HUAL's tariffs for the violations alleged in the instant proceeding. See Joint Stipulations and the Settlement and Agreement for Entry of Consent Order, attached to this ruling. Thus, it appears that BOE has obtained virtually all that could have been achieved by litigation and HUAL has removed the possibility that its tariffs could have been suspended or cancelled and the risk that a greater monetary payment could have been ordered.

Approval of the Settlement Agreement
Under Relevant Principles of Law

It is clear that the parties' proposed settlement agreement fully comports with all applicable principles of law and Commission policy that strongly favor settlements. As the parties' thorough Joint Memorandum of Law supporting their agreement illustrates, all agencies subject to the Administrative Procedure Act (APA) (5 U.S.C. sec. 554(c)(1)) are required to give interested parties an opportunity to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the parties state, the legislative history of the APA shows that Congress intended this provision to be read broadly so as to encourage the use of settlements in proceedings such as the instant one. Thus, the parties quote the following language from the Senate Committee Report to the APA:

. . . even when formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication. . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreement, or stipulations. Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

The courts have endorsed the use of the APA settlement provision “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.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). There are also countless cases in which the Commission has approved settlements when they do not contravene any law or public policy and relieve the Commission and the litigating parties of the costs, burdens, and risks of litigation while achieving objectives, albeit through compromises. See the discussion in *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506,512 (1978) (18 S.R.R. 1085, 1092), and the cases cited by the parties in their Joint Memorandum at 4-5. See also 46 C.F.R. 502.91, which codifies the APA settlement provision, cited above, and the Administrative Dispute Resolution Act (ADRA), P.L. 101-552 (1990), re-enacted by P.L. 104-320, 110 Stat. 3870, as the ADR Act of 1996; see also *Alternative Dispute Resolution*, 26 S.R.R. 1032 (1993), and the Commission’s Policy Statement, 58 Fed. Reg. 38651 (1993), implementing the ADRA.

In their Joint Memorandum, the parties clearly show how their settlement agreement meets established criteria justifying approval. They explain that their agreement comports with the Commission’s enforcement policy while reducing the parties’ costs of litigation. They stress that

the agreement enforces the requirements of the four statutory sections and three Commission regulations specified in the Commission's Order of Investigation and in particular obtains an admission by HUAL that an ocean freight forwarder, acting in its capacity as an ocean freight forwarder, is not eligible to enter into service contracts or into time-volume rate arrangements. Moreover, the settlement agreement contains provisions to ensure that HUAL does not resume the practices in question. The parties request that their agreement be approved without modification. I find that their agreement confers substantial benefits, is most definitely in the public interest, is a considerable achievement redounding to the credit of both parties, and should be approved as written. It is so ordered and this proceeding is accordingly discontinued subject to the Commission's review.



Norman D. Kline
Administrative Law Judge

Appendix

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 98-15

HUAL AS-
SERVICE CONTRACTS AND TIME-VOLUME RATE
ARRANGEMENTS WITH
OCEAN FREIGHT FORWARDERS

JOINT STIPULATIONS

In support of the attached Agreement for Consent Order, the parties, Respondent HUAL AS and the Bureau of Enforcement, do hereby agree and stipulate to the following:

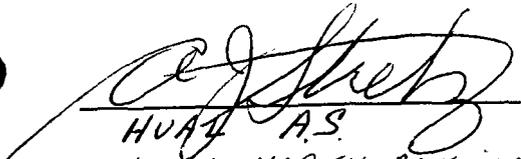
1. An ocean freight forwarder, acting in its capacity as an ocean freight forwarder, is not a person for whose account the ocean transportation of cargo is provided.
2. An ocean freight forwarder cannot enter into a service contract in its capacity as an ocean freight forwarder.
3. An ocean freight forwarder cannot enter into a time-volume rate in its capacity as an ocean freight forwarder.

4. HUAL AS violated section 10(b)(1) of the Shipping Act of 1984 by charging, demanding, collecting or receiving less compensation for the transportation of property than the rates or charges that are set forth in its tariffs.
5. HUAL AS violated section 10(b)(4) of the Shipping Act of 1984 by allowing freight forwarders and shippers to obtain transportation for property at less than the rates or charges established in HUAL AS' tariffs by an unjust or unfair device or means.
6. HUAL AS violated section 19(d)(1) of the Shipping Act of 1984 by paying freight forwarder compensation on shipments without obtaining certifications from the freight forwarders.
7. HUAL AS violated section 19(d)(4) of the Shipping Act of 1984 by paying freight forwarder compensation on shipments to freight forwarders who had beneficial interests in the shipments.
8. HUAL AS violated 46 C.F.R. § 514.17(d)(7)(vi), 46 C.F.R. § 514.4(d)(5)(i)(A) and 46 C.F.R. § 514.17(a)(1), by failing to file complete essential terms for its service contracts.
9. HUAL AS violated 46 C.F.R. § 514.4(d)(5)(i)(A) by failing to file complete service contracts at the Federal Maritime Commission.

These joint stipulations agreed and executed this 20th day of October, 1998.

Respectfully submitted,

FOR RESPONDENT


HVAL A.S.
HVAL NORTH AMERICA, INC.
AS AGENTS

FOR THE BUREAU OF ENFORCEMENT


Martha C. Smith, Trial Attorney

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 98-15

HUAL AS-
SERVICE CONTRACTS AND TIME-VOLUME RATE
ARRANGEMENTS WITH
OCEAN FREIGHT FORWARDERS

**SETTLEMENT AND AGREEMENT
FOR ENTRY OF CONSENT ORDER**

Whereas, the Federal Maritime Commission ("Commission" or "FMC") has instituted a formal proceeding, FMC Docket No. 98-15, against the undersigned Respondent HUAL AS, to determine whether HUAL AS violated:

1) Section 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(1), by charging, demanding, collecting or receiving less compensation for the transportation of property than the rates or charges that are set forth in its tariffs,

2) Section 10(b)(4) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(4), by allowing freight forwarders and shippers to obtain transportation for property at less than the rates or charges established in HUAL AS' tariffs by an unjust or unfair device or means,

3) Section 19(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1718(d)(1), by paying freight forwarder compensation on shipments without obtaining certifications from the freight forwarders,

4) Section 19(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. § 1718(d)(4), by paying freight forwarder compensation on shipments to freight forwarders who had beneficial interests in the shipments,

5) 46 C.F.R. § 514.17(d)(7)(vi), 46 C.F.R. § 514.4(d)(5)(i)(A) and 46 C.F.R. § 514.17(a)(1), by failing to file complete essential terms for its service contracts, and

6) 46 C.F.R. § 514.4(d)(5)(i)(A) by failing to file complete service contracts at the Federal Maritime Commission.

Whereas, this course of action is the result of practices believed by the Commission to have been engaged in by Respondent, to wit:

Respondent entered into services contracts and time-volume rates with ocean freight forwarders who were acting in their capacity as ocean freight forwarders. Respondent also allowed freight forwarders and shippers to obtain the service contract and time-volume rates for shipments even though the freight forwarders and shippers were not entitled to obtain those rates. Furthermore, Respondent filed the service contracts at the Commission without shipper status certifications. In addition, Respondent paid freight forwarder compensation to the ocean freight forwarders for the shipments which were rated in accordance with the freight forwarder's service contract or time-volume rate. Respondent did

not file in its essential terms publication the service contract provision in which Respondent committed to paying compensation to the service contract signatory. Furthermore, Respondent paid freight forwarder compensation for the service contract and time-volume rate shipments without obtaining certifications from the freight forwarders regarding the freight forwarding services performed.

Whereas, section 13(c) of the Shipping Act of 1984, and Part 502 of the Commission's Regulations, 46 C.F.R. Part 502, authorize the Commission to enter compromise agreements and settlements in formal proceedings arising from alleged violations; and,

Whereas, Respondent has terminated the practices which are the basis of the alleged violations set forth herein, and has instituted and indicated its willingness to eliminate these practices;

Now Therefore, in consideration of the premises herein, Respondent and the Bureau of Enforcement hereby agree upon the following terms:

1. Respondent shall make a monetary payment on Tuesday, October ²⁰~~13~~, 1998, to an interest bearing escrow account, in the total amount of \$130,000. On Wednesday, October ²¹~~14~~, 1998, Respondent shall provide written verification to the Commission that the total monetary payment was placed in an interest bearing escrow account on October ²⁰~~13~~, 1998. *EDG/MS*

2. Upon approval by the Commission of the settlement, the \$130,000 plus interest shall be paid to the Commission within five business days.

3. Respondent agrees that, from the date of this Agreement, Respondent will not engage in any of the following practices: (a) enter into services contracts and time-volume rates with ocean freight forwarders who are acting in their capacity as ocean freight forwarders,

(b) allow freight forwarders and shippers to obtain service contract and time-volume rates for shipments when the freight forwarders and shippers are not entitled to obtain those rates, and (c) file service contracts at the Commission without shipper status certifications.

4. Respondent also agrees that, from the date of this Agreement, Respondent will not engage in any of the following practices: (a) pay freight forwarder compensation to ocean freight forwarders for shipments where the freight forwarder has a beneficial interest, (b) fail to file in its essential terms publication any service contract provision in which Respondent commits to making payments to the service contract signatory, and (c) pay freight forwarder compensation without obtaining certifications from the freight forwarders regarding the freight forwarding services performed.

5. Respondent consents to the entry of an Order by the Commission directing it to cease and desist from engaging in any of the practices enumerated above in paragraphs 3 and 4.

6. Upon compliance by Respondent with the terms set forth in this Agreement, this instrument shall forever bar the commencement or institution by the Commission of any civil penalty assessment proceeding or other claim for recovery of civil penalties against Respondents for the alleged violations of the Shipping Act of 1984 and the Commission's regulations set forth in FMC Docket No. 98-15.

7. Upon compliance by Respondent with the terms set forth in this Agreement, this instrument shall forever bar the commencement or institution by the Commission of any investigation seeking the suspension or cancellation of Respondent's tariffs for the alleged violations of the Shipping Act of 1984, which are set forth in FMC Docket No. 98-15.

8. Upon approval of this settlement agreement and the entry of a cease and desist order by the Commission as specified above, the Commission shall discontinue FMC Docket No. 98-15.

FOR THE RESPONDENT:



HUAL AS
HUAL NORTH AMERICA, AS AGENTS
Date: 10/19/98

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: 

Vem W. Hill, Director
Subject to Approval by the Commission in accordance with paragraph 8 hereof.

Date: 10/20/98