

ORIGINAL

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FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 08-06

**WESTERN HOLDING GROUP, INC.;
MARINE EXPRESS, INC.; and
CORPORACIÓN FERRIES DEL CARIBE, INC.**

v.

**MAYAGÜEZ PORT COMMISSION and
HOLLAND GROUP PORT INVESTMENT (MAYAGÜEZ), INC.**

**INITIAL DECISION APPROVING PARTIAL SETTLEMENT AND GRANTING
REQUEST TO DISMISS RESPONDENT MAYAGÜEZ PORT COMMISSION ¹**

I.

On September 1, 2009, complainants Western Holding Group, Inc., Marine Express, Inc., and Corporación Ferries del Caribe, Inc. ("Complainants") and respondent Mayagüez Port Commission ("Port Commission") filed a Partial Settlement Stipulation and Motion for Partial Voluntary Dismissal ("Settlement Motion"). On September 10, 2009, an Order Requiring Additional Briefing by Settling Parties was issued. On September 30, 2009 the settling parties filed a Joint Memorandum Requesting the Approval of Partial Settlement Agreement ("Joint Memorandum").

On September 24, 2009, non-settling respondent Holland Group Port Investment (Mayagüez), Inc. ("Holland Group") filed a Motion Concerning Motion to Dismiss as to Mayagüez Port Commission and Motion for Reduction of Time to Reply reserving its right to respond to the Settlement Motion. On October 13, 2009, Holland Group filed a Response to Partial Settlement

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.

Stipulation and Motion for Partial Voluntary Dismissal and to Joint Memorandum Requesting Approval of Partial Settlement Agreement (“Holland Settlement Response”).

On October 15, 2009, Complainants served a Requested Leave to File Further Reply to Response of Holland Group Port Investment (Mayagüez), Inc. to Partial Settlement Stipulation (“Complainants’ Sur-Reply Motion”) (docketed on Oct. 29, 2009). On October 15, 2009, the Port Commission also filed a Petition Requesting Leave to File Brief Sur-Reply to Holland Group’s Response to Partial Settlement Stipulation and Motion for Partial Voluntary Dismissal and to Joint Memorandum Requesting Approval of Partial Settlement Agreement (“Port Commission Sur-Reply Motion”). On October 26, 2009, Holland Group filed an Opposition to Mayagüez Port Commission’s Petition to File Sur-Reply and to Mayagüez Port Commission’s Sur-Reply (“Holland Sur-Reply Response to Port Commission”) and also filed an Opposition to Complainants’ Motion for Leave to File Further Reply to Response of Holland Group (“Holland Sur-Reply Response to Complainants”).

For the reasons set forth below, the Settlement Motion is **GRANTED**, the complaint against respondent Mayagüez Port Commission is dismissed with prejudice, and the motions for leave to file sur-replies are **DENIED**.

II.

Complainants Western Holding Group, Inc., Marine Express, Inc., and Corporación Ferries del Caribe, Inc. are for-profit corporations organized and existing under the laws of the Commonwealth of Puerto Rico. Second Amended Verified Complaint (“Second Complaint”), ¶¶ 1-3. The Mayagüez Port Commission is a public corporation established under Law No. 10 of May 19, 1959. Port Commission’s Answer to the Second Complaint, ¶ 4.

Non-settling respondent Holland Group is a for-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico. The purpose of its incorporation was to enter into a long-term agreement with the Mayagüez Port Commission to lease and develop the port of Mayagüez. Second Complaint, ¶ 5; Holland Group’s Answer to the Second Complaint, ¶ 5.

Complainants filed this action alleging violations of the Shipping Act of 1984 including unjust, unreasonable, and unlawful practices in violation of 46 U.S.C. § 41102(c) and unreasonable refusals to negotiate, unreasonable discrimination, and undue or unreasonable prejudice or disadvantages in violation of 46 U.S.C. § 41106(1)-(3). Second Complaint, pp. 26-28. Holland Group filed a counter-complaint against Complainants, alleging tariff violations and unreasonable practices, in violation of 46 U.S.C. §§ 40501(a)(1), 41102(c), 41104(1) and (2)(A) of the Shipping Act and 46 C.F.R. § 520.3(a) of the Commission’s regulations. Holland Group’s Counter-Complaint against Complainants, pp. 9-11.

The settling parties have reached an agreement on all issues that were or could have been raised in the complaint. They move that the partial settlement be approved pursuant to 46 C.F.R. §§ 502.1, 502.12, 502.91(a) and 502.147(a), and Federal Rules of Civil Procedure, Rule 41(a). They

request that the action against the Port Commission be dismissed with prejudice, stating that pursuant to Rule 54(b) there is no just reason to delay the entry of the final partial decision and that the settling parties hereby waive any and all rights to appeal said final decision, in accordance with the terms of the instant stipulation and without the imposition of costs, attorney's fees, and expenses.

In August of 2009, the settlement agreement was approved by the Port Commission at a regular port meeting. Joint Motion at 4. Complainants indicate that pursuant to the settlement agreement:

1. The [settling] parties have reached an agreement to bring to an end all the controversies among themselves resulting from the instant case upon terms that each of them accepts as fair, reasonable and satisfactory.
2. The complainants have proposed and consented to and the Mayagüez Port Commission has accepted and approved a Partial Decision dismissing the action as against the Mayagüez Port Commission with prejudice it being the intention of the [settling] parties to forever settle and conclude amongst themselves this litigation and all claims which have, or could have been, set forth in FMC Docket 08-06 before the Federal Maritime Commission or in Civil Action 08-2335 (ADC) before the United States District Court for the District of Puerto Rico.
3. The [settling] parties accept and agree that the partial dismissal of this action is with prejudice and without special imposition of costs or attorney fees against the [settling] parties. They also accept and agree that each of the [settling] parties is to bear its own costs, expenses and attorney's fees incurred in or related to FMC Docket 08-06 or Civil Action 08-2335 (ADC). Each of the [settling] parties waives and, therefore, forever releases and discharges, the other [settling] party from any and all claims and causes of action for the costs, expenses, and attorney fees incurred in or related to FMC Docket 08-06 or Civil Action 08-2335 (ADC).
4. The complainants and the Mayagüez Port Commission also accept and agree that the above settlement is not to be construed in any way as an admission of liability on their part, or any other persons.
5. The [settling] parties agree and so stipulate that the proportionate share rule of *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), and *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 511 U.S. 222 (1994) applies to the [settling] parties with regards to the partial settlement in FMC Docket 08-06 and/or Civil Action 08-2335 (ADC). Thus, for example, in the event that the court and/or the FMC determine X percentage of liability on the Port Commission, said percentage will be deducted from the complainants' damages (assuming complainants are awarded damages).
6. Pursuant to the terms of Rules of the Federal Maritime Commission, 46 C.F.R. §§ 502.1, 502.12, 502.91(a) and 502.147(a) and Rule 54(b), Fed. R. Civ. P., the

complainants request the entry of a Final Partial Decision upon the express determination that there is no just reason to delay the entry of the Final Partial Decision.

7. The [settling] parties hereby waive any and all rights to appeal the final decision of dismissal with prejudice, also in accordance with the terms of the instant stipulation.

Settlement Motion at 1-3.

A substantially identical settlement stipulation and motion were filed with the district court in the companion case *Western Holding Group, Inc. v. Mayagüez Port Comm'n*, Civ. No. 08-2335 (ADC) (D.P.R. Aug. 26, 2009). Motion at 1-2. Official notice has been taken that the District Court entered partial judgment dismissing with prejudice the district court claims against the Port Commission and its commissioners in *Western Holding Group, Inc. v. Mayagüez Port Comm'n*, Civ. No. 08-2335 (ADC) (D.P.R. Sept. 4, 2009). Complainants' claims against respondent/defendant Holland Group will apparently continue in both fora.

III.

In their Joint Memorandum, the settling parties argue that discovery, briefing, and litigation of the claims will require a heavy investment in attorney fees, expert fees, stenographers, and translation fees without advancing the goals of either party; that the settlement does not violate any law or policy and is free of duress, undue influence, mistake, or other defects; that both parties are better served in putting their resources to more productive endeavors, particularly as the Port Commission is a public entity; and, that the settlement will simplify the litigation between Complainants and Holland Group. Joint Motion at 4.

Holland Group opposes the settlement, contending that there is an undisclosed settlement agreement or *quid pro quo* which would allow Complainants to return to the port of Mayagüez as the sole cruise provider in return for terminating the FMC and court proceedings. Response at 3-6. Holland Group states that the Port Commission's actions in collusion with Complainants will put Holland Group out of business because the Port Commission terminated the lease with Holland Group. Response at 6-7. Holland Group relies primarily on the timing of the agreement to support its claim that the settlement agreement requires the Port Commission to terminate the lease with Holland Group, put Holland Group out of business, allow only Complainants to provide service to the port of Mayagüez, and prevent other passenger vessels from calling. Response at 7-8. Moreover, Holland Group argues that the public interest will not be served by approving the settlement, ousting Holland Group, and impeding Holland Group's intent to expand, develop, and enhance the port. Response at 8-9. Essentially, Holland Group is arguing that the settlement agreement is contrary to law and detrimental to the public interest in protecting and promoting competition at the port of Mayagüez.

IV.

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). 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 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.

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).

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 Conf. and Columbus Line, Inc., 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted). See also *Norland Indust., Inc. v. Reliable Logistics, LLC and Washington Int'l Ins. Co.*, F.M.C. No. 07-04 (ALJ June 9, 2009) (Memorandum and Order on Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice of Claims against Washington International Insurance Company and Motion for Approval of Dismissal Without Prejudice against Reliable Logistics, LLC); *Nathan Freeman v. Mediterranean Shipping Co. S.A. and Shipco Transport, Inc.*, F.M.C. No. 08-01 (ALJ Apr. 24, 2008) (Memorandum and Order on Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice). It is not in the public interest to delay approval of a settlement agreement pending the determination of unrelated claims. *APM Terminals North America, Inc. v. Port Auth. of New York and New Jersey*, F.M.C. No. 07-01, 33 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice) (exceptions denied April 1, 2009).

The proposed settlement agreement was approved by the Port Commission's commissioners during the August monthly meeting that is open to the public. Joint Motion at 4. In addition, the district court approved the agreement in the companion litigation. The settling parties contend that the costs of litigation, changes of circumstances, and lack of duress, undue influence, or mistake weigh in favor of approving the agreement. The settling parties indicate that they "are better served in putting their resources to more productive endeavors, particularly the Port Commission being a public entity." Joint Motion at 4. These issues all weigh in favor of allowing the settlement and are consistent with Commission precedent encouraging parties to resolve matters through settlement.

A thorough reading of the complaint indicates that Complainants' primary objection is the manner in which Holland Group administered the port of Mayagüez. The allegations against the Port Commission involve its selection and support of Holland Group. Indeed, none of the sixteen specific violations alleged, on their face, involve unilateral actions of the Port Commission. For example, violation sixteen alleges that the "Port Commission unreasonably fail[ed] to observe reasonable practices and [sic] not ordering the Holland Group to comply with the Tariffs No. 1 and the Lease and Development Agreement." Second Complaint, p. 27-28. Given the nature of the complaint, Complainants' decision to focus the litigation on Holland Group is not unreasonable.

Holland Group, as the non-settling respondent, opposes the settlement agreement and argues that the settling parties have not fully disclosed their agreement. Holland Group contends that the Port Commission, in collusion with Complainants, terminated its lease with Holland Group as part of the settlement. However, the settling parties represented the terms of the settlement agreement to this court and to the district court. Moreover, those terms have been discussed in a public meeting

of the Port Commission. Holland Group believes that there are additional terms but provides no evidence, beyond mere speculation, of such terms. However, legitimate, pro-competitive reasons for the Port Commission's termination of the lease with Holland Group could be inferred from the evidence provided. There is not sufficient evidence that the Port Commission's lease termination with Holland Group was a part of or a *quid pro quo* for the settlement agreement. While a secret, side, or *quid pro quo* agreement could represent an effort to circumvent the requirements of the Shipping Act, in this case, there is not sufficient evidence of such an agreement.

The lease termination between Holland Group and the Port Commission is not raised in the complaint or in Holland Group's counter-complaint against Complainants. Thus, it raises an issue separate from the issues raised in the complaint and addressed by the settlement between Complainants and the Port Commission. It is noted that Holland Group and the Port Commission have no claims pending against each other in these proceedings. It is not in the public interest to delay approval of the settlement agreement because of tangential claims. There is nothing in the settlement agreement itself that would undermine competition at the port of Mayagüez or that would be contrary to the public interest. Moreover, nothing in the settlement precludes Holland Group from raising the Port Commission's actions as a defense in these proceedings or other proceedings.

Based on the representations in the pleadings, the settling parties have established that the Second Amended Complaint on its face presents a genuine dispute, the non-monetary settlement is a bona fide attempt by the parties to resolve their controversy, the settlement does not appear to violate any law or policy, and the settlement appears free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Accordingly, the settlement agreement is approved. This Order does not rule on the merits of the pending litigation between Complainants and Holland Group nor does it rule on the merits of the lease termination between the Port Commission and Holland Group.

V.

Complainants and the Port Commission filed requests to file a sur-reply, arguing that Holland Group's implications of back room dealings or *quid pro quo* agreements are without factual support, offensive, and inaccurate. Complainants' Sur-Reply Motion; Port Commission Sur-Reply Motion. Holland Group filed responses to the sur-reply motions contending that the settling parties have not provided a reason to deviate from the general rule prohibiting replies, that the proposed replies offer no additional settlement justification, and asserting that there is no change in circumstances because Complainants' ships continue to dock at the port of Mayagüez. Holland Sur-Reply Response to Complainants; Holland Sur-Reply Response to Port Commission.

Pursuant to Commission Rule 502.74(a)(1), "a reply to a reply is not permitted." The presiding judge may waive this rule in a particular case "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." Rule 502.10; *see also Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, 30 S.R.R. 1243, 1245 (2006 FMC).

The parties have not demonstrated good cause to waive the general rule that a reply to a reply is not permitted. There is no indication that undue hardship, manifest injustice, or the expeditious conduct justify allowing replies. Accordingly, the motions seeking leave to file for sur-replies are denied and the pleadings will be stricken from the record.

VI.

Upon consideration of the Settlement Motion, the Joint Memorandum, the Response, and the record, and good cause having been stated, it is hereby:

ORDERED that the Settlement Agreement between Complainants and the Mayagüez Port Commission be **APPROVED**; it is

FURTHER ORDERED that this proceeding be **DISMISSED** with prejudice as to respondent Mayagüez Port Commission; it is

FURTHER ORDERED that the Mayagüez Port Commission be removed from the case caption; and, it is

FURTHER ORDERED that the following pleadings be stricken from the record:

- (1) Complainants' Motion Requesting Leave to File Further Reply to Response of Holland Group Port Investment (Mayagüez), Inc. to Partial Settlement Stipulation;
- (2) Port Commission's Petition Requesting Leave to File Brief Sur-Reply to Holland Group Port Investment (Mayagüez), Inc.'s Response to Partial Settlement Stipulation and Motion for Partial Voluntary Dismissal and to Joint Memorandum Requesting Approval of Partial Settlement Agreement;
- (3) Holland Group's Opposition to Complainant's Motion for Leave to File Further Reply to Response of Holland Group; and,
- (4) Holland Group's Opposition to Mayagüez Port Commissions's Petition to File Sur-Reply and to Mayagüez Port Commission's Sur-Reply.



Erin M. Wirth
Administrative Law Judge