

(S E R V E D)
(AUGUST 15, 1996)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 15, 1996

DOCKET NO. 96-08

**LONGROW SHIPPING LIMITED
POSSIBLE VIOLATIONS OF SECTIONS 8 AND
10(b)(1) OF THE SHIPPING ACT OF 1984
AND COMMISSION RULE 514.1(e)(1)**

SETTLEMENT APPROVED; PROCEEDING DISCONTINUED

The Commission's Bureau of Enforcement (BOE) and respondent Longrow Shipping Limited have entered into a settlement agreement which they have tendered for my approval, as required by 46 CFR 502.603(a).¹ If it is approved, they ask that the instant proceeding be dismissed. To support their request for approval of their settlement, the parties have submitted a thorough and persuasive joint memorandum. For the reasons provided in the joint memorandum and, as discussed herein, the settlement agreement is approved and this proceeding is discontinued.

¹The Commission's regulations governing compromise, assessment and settlement of penalties are contained in Subpart W of Part 502 of title 46 C.F.R. More particularly, the regulations governing amounts of assessments of penalties or settlements are set forth in 46 C.F.R. 502.603, particularly, 502.603(a). These regulations were formerly found in 46 C.F.R. Part 505 and, more particularly, 46 C.F.R. 505.3(a). They were transferred verbatim, effective May 7, 1993. See *Miscellaneous Amendments to Rules of Practice and Procedure*, 26 SRR 902, 906 (1993).

This proceeding was instituted by the Commission's Order of Investigation, served April 16, 1996, to determine whether respondent Longrow, a non-vessel operating common carrier (NVOCC) incorporated in Hong Kong, violated sections 8(a)(1) and 10(b)(1) of the Shipping Act of 1984 and the implementing Commission regulations (46 CFR 514.1(e)(1)) by providing common-carrier services without an effective tariff on file and by failing to charge rates shown in its tariff at various times between May 30, 1994 and February 21, 1995. The Commission also wanted to determine, if the above violations were proven, whether civil penalties should be assessed against Longrow and, if so, in what amount.

Negotiations between BOE counsel and counsel for Longrow seeking to reach a settlement agreement commenced early in this proceeding and were concluded successfully. In their joint memorandum seeking approval of the settlement, both parties aver that they could have introduced evidence supporting their respective positions. However, recognizing the potential costs and risks of litigation, the parties' evaluations of their claims and defenses, and the potential outcome were litigation to continue, they have reached agreement to terminate the proceeding and ask that it be dismissed upon final approval of the terms of the settlement agreement. As explained below, I find that the settlement agreement comports with all previous cases approving such settlements and thereby approve it and grant the request to discontinue the proceeding.

Discussion and Conclusions

According to the terms of the proposed settlement agreement, which agreement is attached to these rulings, respondent Longrow has deposited the sum of \$35,000 in an

account with the law firm of Ross and Associates, which sum will be paid over to the Commission upon final approval of the settlement agreement by the Commission. In return for such payment, it is agreed that the instant proceeding will terminate, and no other proceeding, formal or informal, seeking to assess civil penalties will be instituted by or on behalf of the Commission dealing with the same violations of law alleged to have occurred in the Commission's Order of Investigation.

As discussed in the parties' joint memorandum of law supporting approval of the settlement agreement, there are now countless cases in which the Commission, following the strong policy in the law favoring settlements in lieu of costly litigation, has approved settlement agreements and discontinued both Commission-instituted investigations and private complaint proceedings. As the parties have correctly noted, the Administrative Procedure Act (APA), 5 U.S.C. sec. 554(c)(1), requires agencies to give interested parties an opportunity to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." They cite legislative history to the APA, which shows clearly that Congress intended this provision of the APA to be read broadly so as to encourage the use of settlement proceedings. Thus, as the Senate Committee stated:

. . . even where 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, agreements, or stipulations. Senate Committee on the

Judiciary, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

The parties have also noted that 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 Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). As they have also noted, the Commission's own Rule 91(b), 46 CFR 502.91(b), codifies the APA provision, and they cite numerous cases showing that the Commission adheres to the strong policy favoring settlements provided that they do not contravene any law or public policy. Among the numerous cases cited are *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978); *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973, 891-986 (1981); and *Armada Great Lakes/East Africa Service Ltd.*, 23 SRR 946 (I.D.), administratively final, April 25, 1986. In recent years, Congress has encouraged agencies to settle cases and curtail costs by using various means to resolve disputes other than formal litigation, and the Commission has amended its regulations to implement the Administrative Dispute Resolution Act of 1990 (ADRA) P.L. 101-552, 104 Stat. 2736, 5 U.S.C. secs. 571 *et seq.* (expired October 1, 1995). See discussion in *Great White Fleet, Ltd. v. Southeastern Paper Products Export, Inc.*, 26 SRR 1487 (1994); and *Gulf Atlantic Transport Corp.--Possible violations, Sec. 16, Second, 1916 Act*, 26 SRR 826, 827-828 (I.D.), administratively final, March 26, 1993.

The amounts of settlement payments are usually left to the parties after good-faith negotiations and are not customarily upset unless they are egregiously out of line with the nature of the claims or defenses. See *CDM International v. Vencaribe, C.A.*, 26 SRR 78 (ALJ), FMC notice of finality, November 6, 1991; *Armada Great Lakes/East Africa Service Ltd.*, cited above, 23 SRR at 955 (amounts falling within zone of reasonableness and neither exorbitant nor inadequate to protect public rights approvable). There is nothing before me to indicate that the present amount was reached other than by good-faith negotiations between BOE counsel and respondent. Furthermore, although a court has placed the burden of adducing evidence concerning a respondent's ability to pay a penalty when determining the amount of such penalty on the Commission,² in this case respondent has mooted the question by agreeing to pay the amount settled upon. Therefore, by settling, BOE counsel and the Commission's staff need not pursue inquiries into the question.

As the parties explain in their memorandum, the relevant law (section 13(c) of the 1984 Act) sets forth several criteria for determining the amounts of civil penalties (e.g., nature and gravity of the violations, history of prior offenses, degree of culpability, "and such other matters as justice may require"). Furthermore, the Commission's criteria for assessment and for compromise of penalties, according to case law, are interrelated, as the parties note, citing *Armada Great Lakes/East Africa Service Ltd.*, cited above, 23 SRR at 956. Moreover, as the parties note, in determining appropriate amounts of settlements in assessment proceedings, the Commission has sanctioned consideration of the question whether the settlement will serve the Commission's policy of deterrence and of securing

²See *Merritt v. United States*, 960 F.2d 15 (2d Cir. 1992).

compliance and that the amount settled upon will reflect an appropriate discount for the administrative and litigative costs of collection and the risks of litigation. See *Far Eastern Shipping Co. - Possible Violations of Sections 16, Second Paragraph, 18(b)(3), and 18(c), Shipping Act, 1916*, 21 SRR 743, 759 (I.D.), administrative final, May 7, 1982. As the parties note further, more recently the Commission has reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in the negotiation of a settlement and in subsequent review of a settlement agreement. See *Investigation of Unfiled Agreements--Yangming Marine Transport et al.*, 24 SRR 910 (1988); *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements*, 26 SRR 64 (1991).

Both BOE and respondent, citing Commission case law, contend that "proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as justice may require." (Joint Memorandum at 7.) They argue that the "balance favors approval of this proposed settlement." (*Id.*) BOE urges approval of the proposed settlement as being consistent with the Commission's policy of enforcement and the importance of ensuring compliance by carriers with the Shipping Act of 1984. Respondent supports this objective. (*Id.*) The parties therefore "submit that the proposed settlement agreement will further the Commission's enforcement policy." (*Id.*) They conclude by arguing (*Id.* at 8):

The proposed settlement agreement meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, should be approved and certified to the Commission. The parties also request that if the settlement is approved, Docket No. 96-08 should be dismissed with respect to the Respondent.

I agree. Accordingly, the proposed settlement agreement is approved and the proceeding is discontinued subject to Commission review of this order.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

DOCKET NO. 96-08

LONGROW SHIPPING LIMITED-
POSSIBLE VIOLATIONS OF SECTIONS 8 AND 10(B)(1)
OF THE SHIPPING ACT OF 1984
AND COMMISSION RULE 514.1(e)(1)

PROPOSED SETTLEMENT JOINTLY SUBMITTED
BY LONGROW SHIPPING LIMITED AND
THE BUREAU OF ENFORCEMENT

WHEREAS, by Order of Investigation dated April 16, 1996, the Federal Maritime Commission ("Commission") commenced an investigation to determine whether Longrow Shipping Limited ("Respondent") violated section 8 of the Shipping Act of 1984, 46 U.S.C. app. § 1707, and Commission rule 514.1(e)(1), 46 CFR § 514.1(e)(1), by providing common carrier services without an effective tariff filed at the Commission between May 30, 1994 and July 16, 1994, and whether Respondent violated section 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(1), and Commission rule 514.1(e)(1), by failing to charge the rates shown in its tariff between July 17, 1994 and February 21, 1995;

WHEREAS, the parties desire to settle expeditiously the allegations contained in the Order of Investigation and thereby minimize the time and expense of further agency proceedings concerning these claims; and

WHEREAS, the parties believe they have meritorious positions;
NOW THEREFORE, Longrow Shipping Limited and the Bureau of
Enforcement propose the following settlement:

1. That upon execution of this agreement, Longrow Shipping Limited shall deposit the sum of thirty-five thousand dollars, \$35,000, in an interest bearing account under the control of the law firm of Ross and Associates. Said sum of \$35,000, together with all accrued interest, shall be paid over to the Commission upon final approval of this Proposed Settlement by the Commission.

2. That upon final approval of this Proposed Settlement, any institution, commencement or continuation by or on behalf of the Commission of any formal or informal investigation, any assessment proceeding, demand for payment of civil penalties or any other claims for recovery of civil penalties from Respondent arising from the alleged violations set forth and described in the Order of Investigation in this proceeding forever shall be barred.

The above terms and conditions stated herein are hereby agreed to and accepted by the undersigned parties.

BUREAU OF ENFORCEMENT
By: *W. W. Hill*
Director, Bureau of
Enforcement
Dated: 8/8/96

For and on behalf of
LONGROW SHIPPING LIMITED 有限公司
LONGROW SHIPPING LIMITED
By: *Charles Ch...*
Authorized Signature(s)
Title: MANAGER
Dated: 29 JUL., 1996