FEDERAL MARITIME COMMISSION

ONE NETWORK EXPRESS PTE. LTD. – POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

Docket No. 21-17

Served: October 27, 2022

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, Commissioners.

Order Reversing the Initial Decision and Remanding

On June 28, 2022, the Administrative Law Judge ("ALJ") in Docket No. 21-17, *One Network Express Pte. Ltd.*[1] *– Possible Violations of 46 U.S.C. § 41102(c)*, issued an Initial Decision ("I.D.") approving a confidential settlement between Respondent and the Bureau of Enforcement ("BOE"), and dismissing the proceeding with prejudice. I.D., Doc. 42. On July 15, 2022, the Commission requested review of the I.D. The Secretary's corresponding Notice of Commission Determination to Review rendered the I.D. inoperative and settlement agreement

[1] At the Bureau of Enforcement's request, former Respondent Ocean Network Express (North America) was dismissed from this action in May 2022. *See* Order on Mots. to Compel and Dismiss, Doc. 36.

unenforceable. Notice, Doc. 43; *see* 46 C.F.R. § 502.227.

Having reviewed the I.D., the settlement agreement, and all other relevant materials, the Commission now reverses the I.D. and remands the action to the ALJ for further proceedings consistent with this Order.

I. BACKGROUND

On December 30, 2021, the Commission instituted this adjudicatory proceeding to determine whether the apparent practice of ocean common carrier Ocean Network Express Pte. Ltd. ("ONE") of attempting to collect charges from persons who did not agree to be bound under the relevant bills of lading, is unreasonable under 46 U.S.C. § 41102(c). Order of Investigation and Hearing, Doc. 1.

A. Private Party Litigation Involving ONE

In May 2020, ONE filed suit against Greatway Logistics Group, LLC ("Greatway"), a licensed non-vessel operating common carrier ("NVOCC"), in federal district court, demanding payment for charges accrued on the shipments covered under two bills of lading relating to shipments of cargo from Brazil to the Port of Houston. *Id.* ¶¶ 11-12. [2] One of the bills of lading listed Greatway as (only) the Notify Party. *Id.* ¶ 14. The other did not identify Greatway at all. *Id.* ¶ 15.

According to ONE, the bills of lading "govern the relations between [] Carrier[s] and [] Merchant[s]." *Ocean Network Express (North America) Inc. v. Pacific Lumber Resources, Inc.*, Compl. ¶¶ 18-19, No. 4:20-cv-01734 (filed May 18, 2020). Also according to ONE, per the bills of lading, "Merchants" are "liable to the Carrier for the payment of all Freight and/or expenses[;]" and "Merchant," as defined on the standard contract itself, "includes the Shipper,

[2] The case named five other entities also alleged to be "merchants" responsible for the charges who were all eventually voluntarily dismissed from the case.

Consignee, owner, Person owning or entitled to the Person owning or entitled to possession of the Goods or of this Bill, Receiver, Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors, [] NVOCCs[], and freight forwarders." *Id.* (quoting ONE's bills of lading). Greatway, in response, asserted that it had acted only to arrange for customs clearance; it did not agree to be bound by the bills of lading, have any interest in the cargo, or act as an agent for any relevant party. *See* Doc. 1 ¶¶ 16-19. In short, Greatway maintained that it was not liable for the charges. *See id.*

On May 25, 2021, ONE sought to dismiss its claims against Greatway voluntarily stating that it had "settled with other defendants regarding the underlying occurrence and no longer desire[d] to pursue further litigation related to these bills of lading," and moved to dismiss a counterclaim filed by Greatway. *Ocean Network Express*, No. 4:20-cv-01734, ECF No. 66 ¶ 10. The district court granted ONE's motion, thereby terminating the action.

Also on May 25, 2021, Greatway filed a complaint with the Commission alleging that ONE Pte.'s attempt to collect demurrage, storage, and freight charges violated 46 U.S.C. § 41102(c). FMC Dkt. No. 21-04. BOE subsequently intervened in the Commission case. In November 2021, ONE Pte. and Greatway moved for approval of a settlement agreement and dismissal of Greatway's complaint. Although BOE took no position on the commercial terms of the settlement agreement, BOE made clear that the commercial resolution of ONE Pte.'s and Greatway's dispute did not address BOE's concerns about application of the "Merchant" clause. BOE Resp. to Jt. Mot. at 3, Dkt. No. 21-04 (Nov. 12, 2021). The ALJ approved the settlement agreement and dismissed the complaint on November 30, 2021, and the Commission issued a notice not to review the ALJ decision on January 5, 2022.

B. FMC Notice of Inquiry

In October 2020, the Commission issued a Notice of Inquiry ("NOI") regarding vessel-operating common carriers ("VOCCs") defining "Merchant" in their bills of lading to apply to persons and entities with whom the carriers did not contract. *See* FMC Dkt. No. 20-16. This included those who might not be in privity of contract, or should otherwise be deemed to have consented to be bound by the contract of carriage. The Order of Investigation in this case referenced the Notice of Inquiry as part of the determination to initiate this enforcement action.

C. Procedural History of Docket No. 21-17

On December 30, 2021, the Commission ordered the initiation of this action. Order of Investigation and Hearing, Doc. 1.

The parties here proceeded to discovery, and, after several discovery disputes, jointly moved for approval—and confidential treatment—of their settlement agreement, and for the action to be dismissed with prejudice. *See* Docs. 21-35; Joint Mot., Doc. 41.

On June 28, 2022, the ALJ approved the confidential settlement in her I.D., which the Commission now reverses for the following reasons.

II. DISCUSSION

A. Standard of Review

The Commission reviews an ALJ's decision *de novo*. 46 C.F.R. § 502.227(a)(6) (when the Commission reviews an initial decision, it "will have all the powers which it would have in making the initial decision").

The Commission has a longstanding policy of encouraging settlements and applies presumptions favoring a finding that the

terms are fair, correct and valid. *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu –Possible Violations of Section 10 of the Shipping Act of 1984*, Dkt. No. 09-07, 2010 FMC LEXIS 27, at *5 (FMC 2010). However, that does not mean that the Commission reflexively approves any settlement proposed by the parties. *See, e.g.*, *Foreign Tire Sales Inc. v. Evergreen Shipping Agency (America) Corp.*, Dkt. No. 22-05, 2022 WL 1485894 (ALJ May 3, 2022) (admin. final. June 2, 2022). Before granting its approval, the Commission reviews the terms to ensure they are consistent with § 502.72(a)(3) and that the terms are fair, reasonable, and adequate. *World Chance*, 2010 FMC LEXIS 27, at *5.

There are additional procedural requirements, described in Subpart W of the Commission's Rules of Practice and Procedure, for settlement agreements in formal, docketed proceedings instituted by order of the Commission. *See* 46 C.F.R. §§ 502.601-502.605.

B. The Settlement Agreement

There are several issues with the settlement agreement and the parties' arguments in support thereof.

First, although the parties state that they are moving under Rule 72, 46 C.F.R. § 502.72, which is in Subpart E of the Commission's Rules of Practice and Procedure and governs dismissals in formal actions, their motion is void of *any* reference to the rules in Subpart W, which govern, among other things, the assessment of civil penalties and settlements in enforcement actions seeking civil penalties, *id.* §§ 502.601-502.605. *See* Doc. 41. Under § 502.603(b), "[i]n determining the amount of any penalties assessed," the Commission is required to: "take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other

matters as justice requires."[3]

The joint motion of the parties does not address these factors which renders the Commission unable to definitively determine whether the settlement agreement conforms with the requirements in Subpart W. Based on the information the Commission does have about these factors from the record, it does not appear that the civil penalty and other terms proposed in the settlement agreement are sufficient to resolve the serious allegations in this case.

Moreover, enforcement action settlements are not to be kept confidential. 46 C.F.R. § 502.603(a) ("The full text of any settlement [assessing a civil penalty] must be included in the final order of the Commission."). In the I.D., the ALJ acknowledges that the parties did not "address this requirement." Doc. 42 at 4. The ALJ nevertheless granted the parties' request for confidentiality because this "expedited proceeding [] has been heavily litigated" and the "confidentiality provision is central to the agreement to settle this proceeding." *Id.*

The Commission does not agree that these are sufficient reasons to waive the no-confidentiality requirement, especially in the absence of any request to do so. To be sure, the Commission regularly agrees to keep confidential various settlements in private party actions. As § 502.603(b) makes clear, however, in an enforcement action, the Commission is interested in deterring unlawful conduct and otherwise encouraging compliance with the statutes and regulations that it administers. Confidential settlements do not further these important goals.

Because the Commission finds that the terms of the agreement violate the Commission's Rules of Practice and Procedure and are objectionable from a policy perspective, it hereby reverses the I.D.'s approval of the agreement. *See id.* § 502.72(a)(3)

[3] These factors have since been codified in 46 U.S.C. § 41109 by the passage of the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

(settlements that appear to violate any law or policy will not be approved).

III. CONCLUSION

For the reasons set forth above, the Initial Decision Approving Settlement Agreement is **REVERSED**.

THEREFORE, IT IS ORDERED that this action be **REMANDED** to the ALJ for further proceedings.

It is further **ORDERED** that the ALJ promptly issue a scheduling order setting dates for the parties to submit briefs, findings of fact, and appendices.

It is further **ORDERED** that the ALJ issue an Initial Decision on the merits of the case by January 26, 2023.

It is further **ORDERED** that the Commission's deadline for a final decision in this case is extended to April 26, 2023.

By the Commission.

William Cody
Secretary