

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

OCEAN NETWORK EXPRESS (NORTH AMERICA), INC. AND
OCEAN NETWORK EXPRESS, PTE., LTD. - POSSIBLE
VIOLATIONS OF 46 U.S.C. § 41102(C)

DOCKET NO. 21-17

Served: June 28, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge.*

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT¹

I. Background and History

On June 23, 2022, Respondent Ocean Network Express, Pte., Ltd. (“ONE”) and the Bureau of Enforcement (“BOE”), filed a joint motion for approval of a proposed settlement agreement by the parties and a joint memorandum for, and memorandum in support of, a proposed settlement (“Motion”), together with a copy of the settlement agreement. Respondent Ocean Network Express (North America), Inc. was dismissed from this proceeding on May 4, 2022, and is no longer a party. The parties seek approval of the settlement agreement, confidential treatment of the settlement agreement, and, upon approval of the settlement agreement, dismissal of this proceeding with prejudice. Motion at 1, 6.

The Federal Maritime Commission (“Commission”) initiated this proceeding on December 30, 2021, by issuing an Order of Investigation and Hearing (“OIH”) to determine whether Respondents violated section 41102(c) of the Shipping Act by overbroadly defining and applying the definition of merchant in ONE’s bill of lading in such a manner as to unilaterally impose joint and several liability for freight and/or charges on a party with whom ONE was not in contractual privity and who had not consented to be bound by the terms of the bill of lading. OIH at 2. In addition, the Commission ordered the proceeding to be expedited, with an initial decision issued by an Administrative Law Judge within six months of the date of the OIH and the final decision of the Commission issued within ninety days of service of the Initial Decision. OIH at 7-8.

The proceeding was temporarily stayed while the Commission considered a petition seeking reconsideration and rescission, which was denied on January 28, 2022. A motion to dismiss was denied on February 23, 2022. The parties engaged in discovery, with an order granting a motion to individually identify respondents issued on March 28, 2022, and an order on motions to compel and to dismiss issued on May 4, 2022. Briefing deadlines were set but the parties requested multiple extensions while they negotiated the settlement agreement.

¹ This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

II. Settlement Agreement

The parties describe the settlement agreement, stating:

The Settlement Agreement addresses the conduct alleged in the [OIH] to constitute potential violations of the Shipping Act. It resolves the proceeding in the best interests of the Parties and the shipping public, without the need for further litigation, and it requires ONE to take certain measures intended to address the conduct alleged in the [OIH], without any admission of violations by the Respondent.

Motion at 2.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 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. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a long history of approving settlement agreements that meet the required criteria, including in enforcement proceedings.

The Commission's decisions and regulations have long indicated a broad policy favoring settlement. In reviewing a proposed settlement, the Commission evaluates whether it would contravene any law or public policy, and whether it is "fair, reasonable, and adequate." As the parties note, the Commission weighs enforcement policy in terms of deterrence and compliance, likely costs and delay, and "pragmatic litigative possibilities" regarding the proceeding's potential outcomes.

Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A., Docket No. 97-07, 2000 FMC LEXIS 2 at *4 (FMC May 2, 2000) (citing *Old Ben Coal Co. v. Sea-Land Serv.*, 21 F.M.C. 506, 512-513; 18 S.R.R. 1085, 1091 (ALJ Nov. 29, 1978); *Far Eastern Shipping Co. – Possible Violations of Sections 16, Second Paragraph 18(b)(3) and 18(c), Shipping Act, 1916*, 21 S.R.R. 743, 1014 (ALJ Mar. 25, 1982)).

The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval. The Commission has consistently adhered to a policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid. Despite the general preference for approval of settlement agreements, the Commission does not merely rubber stamp any proffered settlement. Instead, the Commission typically reviews a settlement

agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake. The Commission also reviews the terms of settlement agreements to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment.

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, Docket No. 09-07, 2010 FMC LEXIS 27 at *5, 31 S.R.R. 1346, 1350 (FMC May 20, 2010) (internal citations omitted).

Here, the parties assert that the settlement agreement “negotiated by BOE and ONE, with the advice and assistance of their respective counsel, is reasonable and not inconsistent with any law or policy;” that the parties “have carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests, as well as that of the shipping public;” and that the settlement “was reached without fraud, duress, undue influence, or any other defect that would bar its approval.” Motion at 3. The parties further assert that “proposed settlements are to be evaluated on the basis of balancing agency enforcement policy, deterrence by respondents, the industry, and the shipping public with the litigative probabilities, litigative and administrative costs, and such other matters as justice may require” and that the “balance favors approval of this proposed settlement.” Motion at 5.

A review of the settlement agreement indicates that it satisfies the criteria for approval. The terms of the settlement agreement appear to be fair, reasonable, and adequate; the agreement does not appear to contravene law or public policy; and the agreement serves the interests of both BOE and Respondent by preventing the need for them to engage in costly, uncertain, and protracted litigation of the issues in contention. “The policy of encouraging and approving settlements is firmly embedded in precedent and is especially welcome as a means for the Commission and respondents to conserve their resources.” *Direct Container Line Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984; Direct Container Line Inc. and Owen Glenn Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket Nos. 99-01 and 99-06, 1999 FMC LEXIS 7 at *6 (ALJ June 29, 1999). Therefore, the settlement agreement is reasonable and will be approved.

III. Confidential Treatment Request

The parties further request that the settlement agreement be held confidential by the Commission, stating that the Commission routinely honors such requests and citing Commission Rule 5 and private party decisions. Motion at 4. In addition, the terms of the settlement agreement require the parties to keep the terms of the settlement agreement confidential. Motion at 4. The parties state that this “confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality. The Parties therefore respectfully request that the Commission keep the unredacted copy of the Settlement Agreement confidential.” Motion at 4. Because the entire settlement agreement is confidential, no public version is provided. Motion at 4.

Commission Rule 603(a), governing the assessment of civil penalties in Commission-instituted proceedings, states that the “full text of any settlement must be included in the final order of the Commission.” 46 C.F.R. § 502.603(a). The parties do not address this requirement.

This is an expedited proceeding which has been heavily litigated. The confidentiality provision is central to the agreement to settle this proceeding. Given both of these factors, the confidentiality provision will be permitted due to the unique circumstances of this particular proceeding. However, in future enforcement proceedings, the parties must address the requirements of Commission Rule 603(a) when submitting settlements and should not assume that confidentiality provisions will be approved.

If enforcement proceedings are meant to deter violations of the Shipping Act and Commission regulations as well as to inform the shipping public of regulatory requirements, reliance on confidential material impedes those goals. The requirement that the full text of settlements be included in the Commission’s order benefits the public. This is especially true where an agreement requires a respondent “to take certain measures intended to address the conduct alleged” and where a respondent has “agreed to adjust their conduct to address the Commission’s concerns.” Motion at 2, 5. Even where it may be appropriate to redact particular words in a settlement agreement, confidential treatment should not be requested or expected for the entire agreement.

For the reasons outlined above, under the unique circumstances of this settlement and this expedited proceeding, the confidentiality provision will be permitted. The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission to review while maintaining the required confidentiality.

IV. Order

Accordingly, upon consideration of the motion, settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between the Bureau of Enforcement and Ocean Network Express, Pte., Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED** and the settlement agreement be maintained in the Secretary’s confidential files. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.



Erin M. Wirth
Chief Administrative Law Judge