

S E R V E D
April 3, 2008
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 07-03

ARMSTRONG WORLD INDUSTRIES, INC.

v.

EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.

MEMORANDUM REGARDING STIPULATION OF DISMISSAL¹

On April 9, 2007, complainant Armstrong World Industries, Inc. (Armstrong) commenced this action by filing a complaint with the Commission alleging that respondent Expeditors International of Washington, Inc. (Expeditors) violated the Shipping Act of 1984. Armstrong alleges that it used Expeditors' services for its ocean transportation requirements around the world, including from the Far East to Armstrong's facilities in the United States through United States West Coast Ports. Armstrong asserts that during the 2005 peak shipping season Expeditors "triple charged [Armstrong] for the pass-through peak season shipping charges assessed under [Expeditors'] ocean shipping contracts with its Vessel-Operating Common Carriers." *Armstrong World Industries, Inc. v. Expeditors International of Washington, Inc.*, 72 Fed. Reg. 18996 (Apr. 16, 2007) (Notice of

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.

Complaint and Assignment) (*quoting* Complaint). Armstrong alleges that the additional charges constitute violations of the following sections of the Shipping Act: section 10(b)(4)(a) (46 U.S.C. app. § 1709(b)(4)(a)) (now 46 U.S.C. § 41104) for unfair or unjustly discriminatory practices in the matter of rates and charges; section 10(b)(8) (46 U.S.C. app. § 1709(b)(8)) (now 46 U.S.C. § 41104) for the imposition of undue and unreasonable prejudice and disadvantage; and section 10(d)(1) (46 U.S.C. app. § 1709(d)(1)) (now 46 U.S.C. § 41102(c)), for failure to establish just and reasonable regulations and practices relating to or connecting with receiving or handling of property. Armstrong asks the Commission: (a) to find Expeditors to have violated the above referenced sections of the Act; (b) to direct Expeditors to pay \$216,765.00 and such other amounts proven by evidence in this proceeding, interest, and attorney's fees; and (c) to impose any other relief as the Commission determines to be proper, fair, and just. *Id.*

Expeditors included a counter-complaint with its answer received by the Commission on June 7, 2008. The counter-complaint alleges that Armstrong and Expeditors had an ongoing relationship for several years. From time to time, they would negotiate rates and surcharges that Expeditors would publish in the rate section of its tariff. When Armstrong first notified Expeditors of its claims that led to the filing of this proceeding, Expeditors conducted an internal audit of the Armstrong account and discovered some inadvertent undercharges and overcharges netting to \$26,357.08 due Armstrong. Expeditors alleges that Armstrong commenced this proceeding to exploit a clerical error in the rules section of Expeditors' tariff. Expeditors claims that the clerical error was contrary to the agreement of the parties as to the charges Armstrong would pay Expeditors for ocean transportation and related services. Expeditors alleges that Armstrong's actions violate section 10(a)(1) of the Shipping Act. (Answer, Affirmative Defenses and Counterclaim at 5-6.)

On February 28, 2008, the Secretary received a letter from counsel for Armstrong with an enclosed Stipulation of Dismissal signed by counsel for both parties. The letter asked the Secretary to “file the original and request Judge Guthridge to sign and return the copy to the undersigned.” (Letter dated February 27, 2008, from counsel for Complainant to Secretary, FMC.) In the Stipulation itself, the parties “stipulate to the dismissal of this action in its entirety, including all counterclaims, with prejudice, with each party to bear its own attorney’s fees and costs.” (Stipulation of Dismissal.) No other information was submitted.

It is “well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid.” *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 512, 18 S.R.R. 1085, 1092 (ALJ 1978) (*Old Ben Coal*). See also *Ellenville Handle Works 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 Commission examines settlement agreements carefully, however, especially where the controversy involves rate matters.

[T]o insure that the Commission’s processes are not used to circumvent the requirements of the statute and that settlements and compromises do not serve as a means for carriers to disregard their obligations under the tariff, we will permit the settlement of a claim [involving a rate dispute] if the following conditions are met:

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).

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, . . . ;
3. The complaint on its face presents a genuine dispute and facts critical to the resolution of the dispute are not reasonably ascertainable.

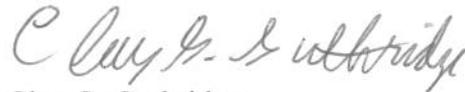
Organic Chemicals (Glidden-Durkee) Corp. v. Atlantrafik Express Service, 18 S.R.R. 1536a, 1539-1540 (1979). See *Cargo One, Inc. v. Cosco Container Lines Co.*, 29 S.R.R. 623 (ALJ 2002) (citing *Glidden-Durkee*) (Shipping Act of 1984); *Interconex, Inc. v. Finn Container Cargo Services, Inc.*, 27 S.R.R. 900, 901-902 (ALJ 1996) (same); *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia*, 24 S.R.R. 1129, 1134 (ALJ 1988) (same).

Armstrong's Complaint alleges a rate dispute. While the parties had submitted a signed agreement purporting to resolve the dispute, they had not met the second and third conditions required by the Commission's decision in *Glidden-Durkee* before permitting settlement of a claim. Therefore, I entered an Order requiring the parties to submit information that meets the conditions set forth in the Commission's decision in *Organic Chemicals (Glidden-Durkee) Corp. v. Atlantrafik Express Service*, 18 S.R.R. 1536a, 1539-1540 (1979). *Armstrong World Industries, Inc. v. Expeditors International of Washington, Inc.*, FMC No. 07-03, slip op. at 4 (ALJ Mar. 3, 2008).

On March 27, 2008, Armstrong filed a Memorandum of Complainant re Stipulation of Dismissal accompanied by the affidavit of William C. Rogers, the vice-president, Supply Chain, for Armstrong, and Expeditors filed a Memorandum of Respondent/Countercomplainant Expeditors International of Washington, Inc. Relating to Stipulation of Dismissal accompanied by the affidavit

of Philip Coughlin, the executive vice-president for North America for Expeditors. The affidavits establish that Rogers and Coughlin are familiar with the facts underlying this proceeding. (Rogers Aff. ¶¶ 4-7; Coughlin Aff. ¶¶ 2-3.) Rogers and Coughlin agree that the parties are settling to reduce costs and avoid the time and expense related to complex litigation, (Rogers Aff. ¶ 8; Coughlin Aff. ¶ 5), and that the settlement is a bona fide attempt to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirement of the Shipping Act. (Rogers Aff. ¶ 9; Coughlin Aff. ¶ 5.)

I find that the parties have established that complaint and counter-complaint on their faces present a genuine dispute and facts critical to the resolution of the dispute are not reasonably ascertainable. I also find that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act. Therefore, I have signed the Stipulation of Dismissal.



Clay G. Guthridge
Administrative Law Judge