

FEDERAL MARITIME COMMISSION

American Warehousing of New York,
Inc.

Docket No. 04-09

v.

and

Port Authority of New York and
New Jersey

Docket No. 05-03

Served: April 1, 2009

BY THE COMMISSION: Joseph E. BRENNAN, Harold J. CREEL, Jr., and Rebecca F. DYE, *Commissioners*.

Order Approving Settlement Agreement

American Warehousing of New York, Inc. (American Warehousing) filed its complaint, commencing Docket No. 04-09, against the Port Authority of New York and New Jersey (PANYNJ) on August 5, 2004, and filed its companion complaint, also against PANYNJ, commencing Docket No. 05-03, on June 15, 2005. These proceedings were consolidated by the Presiding Administrative Law Judge (ALJ) by order served July 20, 2005.

On July 24, 2006, the ALJ served his Initial Decision (I.D.) ruling that PANYNJ's decision not to enter a long-term lease

renewal with American Warehousing was neither an unreasonable refusal to deal or negotiate nor an undue or unreasonable preference or prejudice. The ALJ found that, because the most serious rent disputes between the parties took place after a July 2002 Port Authority Board resolution limiting its staff's authority to negotiate a longer term lease, PANYNJ's arguments that American Warehousing's poor rental payment history and use of warehouse space not included in the lease could not serve as the basis for the PANYNJ's decision not to enter a long-term lease. PANYNJ and American Warehousing ultimately entered into a lease in November 2002 that expired April 30, 2003, one year earlier than authorized in the July 2002 resolution.

The ALJ found that PANYNJ's refusal to enter into a long-term lease was based upon valid transportation factors. The ALJ also found that the treatment American Warehousing received in leasing Pier 7 was reasonable because of PANYNJ's need to balance differences between the large container terminals operating within the Port's jurisdiction and those of tenants like AW, which require barge service to use its facilities. Subsequently American Warehousing filed exceptions to the Initial Decision, PANYNJ submitted replies thereto and American Warehousing then submitted a motion to strike portions of the Port's reply to exceptions.

Between February 2007 and October 2008 several notices of extension of time were served. Based on prior published reports,¹ the Commission issued an Order on December 3, 2008 directing the parties to file a status report as to their progress in reaching a settlement agreement. The parties responded, indicating that, at that time, they were at an impasse. At its February 25, 2009 meeting the Commission approved issuance of a final thirty-day extension of time. The following day, the Commission received a Joint Motion for Approval of Settlement Agreement and

¹ E.g. Andy Newman, *Cargo Ships Leaving Red Hook? Maybe Not So Fast*, N.Y. TIMES, August 5, 2007; *Red Hook Gentrification Shelved*, JOURNAL OF COMMERCE, August 13, 2007; Charles V. Bagli, *Lease Ends Uncertainty for Red Hook Cargo Docks*, N.Y. TIMES, April 25, 2008.

Dismissal with Prejudice, along with the parties' Memorandum in Support of the Joint Motion. The Settlement Agreement provides that the parties release each other from any and all claims with respect to the matters covered by the FMC proceedings, as well as the landlord tenant proceedings (L and T Proceedings) for eviction presently being heard in the New York courts.

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 Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old Ben Coal Co v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978). 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). "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." *Old Ben Coal*, 18 S.R.R. at 1092, *quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

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

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).

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 Conference and Columbus Line, Inc., 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted); *Freeman v. Mediterranean Shipping Co. S.A.*, 31 S.R.R. 336, 337 (ALJ 2008).

The FMC observes long-established precedent giving deference to the parties when it comes to the valuation of settlement concessions. There is no burden on the settling parties to prove that the settlement involves concessions of equal value. See *Perry's Crane Serv. v. Port of Houston Auth.*, 19 S.R.R. 517, 520 n. 3 (ALJ 1979) ("In respect to the particular amount of damages upon which the parties have agreed, the Commission has recognized that this is a matter for the parties to determine."). When determining whether to approve a settlement agreement it is not necessary to make final determinations of violations or lack of violations since to do so might discourage parties from even attempting to propose settlement in the first place. *Old Ben Coal*, 18 S.R.R. at 1093. Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation. *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004).

The Settlement Agreement effectuates the desire of both parties to release each other from any and all claims they have against each other with respect to the matters covered by the FMC Proceedings as well as the L and T Proceedings. The Settlement Agreement does not appear to violate any law or policy and appears free of fraud, duress, undue influence, mistake or other defects. The settlement appears to have a reasonable basis and reflects the careful consideration by both parties.

Conclusion

NOW THEREFORE, IT IS ORDERED That the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice is hereby APPROVED;

IT IS FURTHER ORDERED That the Exceptions of American Warehousing of New York, Inc. to the Initial Decision and Complainant's Motion to Strike Portions of Respondents' Exception Brief are hereby DISMISSED as moot; and

IT IS FURTHER ORDERED That this proceeding is hereby DISMISSED, with prejudice.

By the Commission.


Karen V. Gregory
Secretary

SETTLEMENT AGREEMENT

This agreement, entered into this 9th day of February 2009 is between and among American Warehousing of New York, Inc., a New York corporation having a place of business at Pier 7, Brooklyn, New York ("American") and American Stevedoring, Inc. ("ASI") a New York corporation having a place of business at 70 Hamilton Avenue, Brooklyn, New York and the Port Authority of New York and New Jersey, an agency formed by compact between the States of New York and New Jersey ("Port Authority") (collectively, the "Parties").

Whereas the Port Authority is, and at all relevant times has been, the owner in fee of the premises known as Pier 7, located at the corner of Atlantic Avenue and Columbia Street in Brooklyn ("Pier 7"); and whereas American has since on or about 1999 occupied certain areas of Pier 7 and whereas the Port Authority has commenced four landlord tenant proceedings ("L and T Proceedings") against American to obtain its eviction from Pier 7 and that such L and T Proceedings are styled Port Authority of New York and New Jersey v. American Warehousing of New York, Inc., Index Nos. 021541-02, 02153-04, 014787-6, and 18968-06, the first two of which were dismissed and the latter two of which have been stayed pending the FMC Proceedings (hereafter defined); and

Whereas American has commenced two proceedings against the Port Authority before the Federal Maritime Commission ("FMC Proceedings") entitled American Warehousing of New York, Inc. v. The Port Authority of New York and New Jersey, Index Nos. 04-09 and 05-03 seeking among its relief damages alleged at \$15 million and attorney's fees under the United States Shipping Act and the Port Authority has denied the claims made in the FMC Proceedings and the FMC per Judge Krantz issued an Initial Decision in favor of the Port Authority and American has filed exceptions to the full FMC; and

Whereas the Parties have decided to amicably resolve the disputes by dismissing the L and T Proceedings, and the FMC Proceedings, between American and the Port Authority. With respect to the former, Stipulations reflecting this dismissal and discontinuance with prejudice and without costs are attached hereto as Exhibit A. With respect to the latter FMC Proceedings, attached hereto as Exhibit B is a draft motion and supporting documents whereby American will submit a joint motion with the Port Authority to dismiss the FMC Proceedings with prejudice and without costs as to either party. American further agrees to fully cooperate in having the FMC Proceedings dismissed with prejudice and without costs. Attached, as Exhibit C, is a new lease which has been executed by ASI and will be executed by the Port Authority upon the execution of this Settlement Agreement by both parties, of the for certain areas of Pier 7, the terms of which are set forth in the lease agreement. Exhibits A, B and C are incorporated by reference herein and form a part of this Settlement Agreement; and

Whereas the Parties desire to release each other for any and all claims they have against each other with respect to the matters covered by the FMC Proceedings and the Land T Proceedings, these releases having no effect on cross claims and third-party actions where the Port Authority and either ASI and/or American are being sued by other persons or entities, and now in consideration of the premises of covenants as set forth herein the Parties agree as follows:

1. The L and T Proceedings and the FMC Proceedings shall be dismissed forthwith with prejudice without fees or costs as against either party. To effectuate the dismissal of the FMC Proceedings, American and ASI shall fully cooperate with the Port Authority in any motion and/or joint motion necessary or appropriate to dismiss the FMC Proceedings including, without limitation, the execution of any and all documents and filings necessary to accomplish same.

2. With regard to Lease BP 302 between the Port Authority and American solely, the Port Authority, its agents, successors, and assigns (collectively Port Authority releasors) hereby release and discharge American and ASI, their agents, employees, officers, directors, successors, affiliates and assigns (collectively American releasees) from any and all actions, causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, summary judgments, whatsoever in law, admiralty or equity against the American releasees which the Port Authority releasors have, have ever had, or will in the future have upon reason of any matter or thing with respect to the American releasees, from the beginning of the world to the date of this Agreement. Nothing herein releases ASI from rent owed or other claims arising out of BP 309, effective May 1, 2008. Further, ASI will move with dispatch and in good faith to remove the pallets being stored upland of Pier 7. This release shall have no effect upon defenses and causes of actions in the defense of unrelated third party claims.

3. American and ASI, their agents, successors, and assigns (collectively American releasors) hereby release and discharge the Port Authority, its agents, employees, officers, commissioners, successors, and assigns (collectively Port Authority releasees) from any and all actions, causes of actions, suits, debts, dues, sums of money, account, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, summary judgments, executions, claims and demands whatsoever in law or equity against the Port Authority releasees which the American releasors have, or have ever had, or will in the future have upon reason of any matter or thing with respect to the Port Authority releasees, from the beginning of the world to the date of this Settlement Agreement. This release shall have no effect upon defenses and causes of actions in the defense of unrelated third party claims.

4. This Settlement Agreement sets forth the entire understanding between American and the Port Authority concerning the subject matter of this agreement.

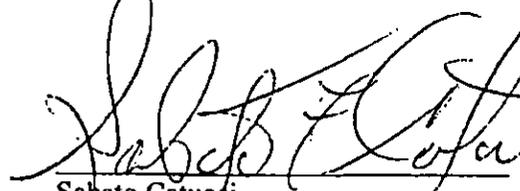
5. The Parties acknowledge that this Agreement is a compromise resolution of all released claims and that neither the disagreement nor the releases executed pursuant to this Agreement constitute an acknowledgment or admission of wrongdoing or liability in any way on the part of any party hereto all of whom expressly deny wrongdoing and liability for any and all claims of damages whatsoever in nature.

6. In the event that either party breaches this Settlement Agreement, the prevailing party shall have the right to obtain any judicial relief that it deems relevant based upon the actions of the other.

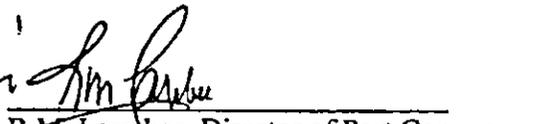
7. It is understood that this stipulation shall permit discussions by and among ASI, the Port Authority and Phoenix Beverage with respect to possible future leases between the Port Authority and Phoenix Beverage during the term of BP 309 for lease of Pier 7. Notwithstanding the foregoing, nothing in this paragraph shall be construed to modify the parties' proposed lease agreement annexed hereto as Exhibit C or obligate any party to engage in such discussions.

8 This Agreement can be executed in counterparts and facsimile copies are to be deemed an original for all purposes.

IN WITNESS WHEREOF, the undersigned, who represent that they are fully authorized to enter into this agreement, have executed this Settlement Agreement as of the day and year first above written.



Sabato Catucci
American Warehousing of New York,
Inc. & American Stevedoring, Inc.
Pier 7
Brooklyn, NY 11201



R.M. Larrabee, Director of Port Commerce
The Port Authority of New York and
New Jersey
225 Park Avenue South
New York, New York 10003

AMERICAN STEVEDORING INC.



PHONE (718) 875-0777
FAX (718) 643-7201

70 HAMILTON AVENUE
BROOKLYN, NY 11231

February 10th, 2009

Steve Borrelli
Leasing and Finance
Port Authority of NY & NJ
225 Park Avenue South
New York, NY
10003

Steve,

Dear Mr. Borrelli,

Further to our recent conversations, please accept this letter as both clarification of the current status between ASI and Phoenix, and also as a formal authorization by ASI for you to take the necessary next steps in removing Pier 7 from ASI's leasehold so as to move forward with a lease for Phoenix Beverages.

Over the last several weeks Phoenix and ASI have been jointly working to stabilize certain shipping/import arrangements at the Brooklyn port. Given the pressing nature of these commercial issues, as an expedient step ASI and Phoenix entered into an agreement, providing for Phoenix' use and occupancy at Pier 7, under the 'umbrella' of ASI's current arrangements at the pier (without debating here the extent to which those arrangements exist). To be clear, it was contemplated as an interim maneuver, so as to provide some kind of framework by which Phoenix could characterize a "solid state" status as they engage in dialogue with their key partners (shipping, finance etc).

We are in full agreement with the Port Authority that the mechanism of choice here is to simply remove any Pier 7 provisions from ASI's lease documents, and for PA to enter into a direct lease with Phoenix. As you are probably aware, Phoenix are similarly minded on this issue. We do not lack appreciation for the fact that this a pressing issue for PA, as they will capture additional revenue once the Phoenix lease is in place, as it is will provide for an increased rental rate.

Predicated on the above notion of efficient transfer, this letter shall serve as a Formal Undertaking by ASI to execute and deliver any required agreements to actualize the above. This shall include any modified lease agreements (without Pier 7). We also undertake to provide all necessary cooperation as you move forward with this alternate use for Pier 7, including any physical operation which may be required.

Please do not hesitate to contact me if you need anything further.

Yours Sincerely,

Matt Yates
Director of Commercial
Operations

cc Rod Brayman, Greg Brayman

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

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Index No.: L&T T 014787/06

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Petitioner (Landlord),

-against-

AMERICAN WAREHOUSING OF NEW YORK,
INC.,

Respondent (Tenant),

STIPULATION

Pier 7 Brooklyn, New York 11201

-----X
Petitioner's Business Address:
225 Park Avenue South, 13th Floor
New York, New York 10003

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties to this proceeding (i.e. the landlord and tenant), that whereas no party hereto is an infant, incompetent person for whom a committee has been appointed or conservatee, and no person not a party has an interest in the subject matter of this proceeding, the above-captioned proceeding is hereby discontinued with prejudice and without costs or attorneys' fees to any party as against the other.

Dated: New York, New York
February 25, 2009

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY
MILTON H. PACHTER, ESQ
Attorney for the Petitioner
225 Park Avenue South, 13th Floor
New York, New York 10003
212 435-3443

By: _____

Jay A. Selcov

MICHAEL S. HILLER
WEISS & HILLER, PC
Attorney for Respondent
AMERICAN WAREHOUSING OF NEW
YORK, INC.
600 Madison Avenue
New York, New York 10022

By: _____

Michael S. Hiller

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

-----X
Index No.: L&T 18968-06

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Dated: New York, New York
February 25, 2009

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY
MILTON H. PACHTER, ESQ
Attorney for the Petitioner
225 Park Avenue South, 13th Floor
New York, New York 10003
212 435-3443

By: _____

Jay A. Belcov

MICHAEL S. HILLER
WEISS & HILLER, PC
Attorney for Respondent
AMERICAN WAREHOUSING OF NEW
YORK, INC.
600 Madison Avenue
New York, New York 10022

By: _____

Michael S. Hiller