

BT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JERROLD GOLDBERG, KENNETH E.)
HULTEEN, GLENN GENTILE, and WILLIE)
JILES,)

Plaintiffs,)

v.)

DURHAM TRANSPORTATION d/b/a)
DURHAM SCHOOL SERVICES, A)
SUBSIDIARY OF NATIONAL EXPRESS)
GROUP; and MADELINE COOLEY,)
individually,)

Defendants.)

) No. 02 C 1125

) Judge Milton I. Shadur

MAR 21 2005
MAR 21 2005
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

**PARTIES' JOINT MEMORANDUM IN SUPPORT OF MOTION REQUESTING
FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AGREEMENT**

The parties, by their attorneys, submit this Memorandum of Law in support of their joint Motion For Final Approval of Settlement of Class Action Settlement:

I. BACKGROUND OF THE LITIGATION

This class action was brought by a class of former and current non-African American employees of Defendant Durham Transportation ("Durham"), alleging that Durham and the supervisor of Durham's Skokie Base, Madeline Cooley ("Cooley"), discriminated against non-African American drivers in the distribution of routes, charters, and extra work assignments during Ms. Cooley's tenure at the Skokie Base, from about June 2001 through the Skokie Base's closure in July 2002. Named Plaintiffs Jerrold Goldberg and Kenneth Hulteen brought discrimination and racial harassment class claims under Title VII of the Civil Rights of 1964, 42 U.S.C. §2000e *et seq.*, as amended by the Civil Rights Act of 1991 ("Title VII"), Pub. L. No.

102-166, and 42 U.S.C. §1981. Named Plaintiffs Goldberg and Hulteen also brought individual retaliation claims under both Title VII and 42 U.S.C. §1981, as did individual Plaintiffs Glenn Gentile and Willie Jiles.

On April 8, 2003, this Court certified a Class consisting of all non-African American bus drivers who worked out of Durham's Skokie base between July 2001 and June 2002 who received fewer routes, or fewer charters, and/or fewer extra work assignments because of Durham and Cooley's allegedly discriminatory policies and actions.

On April 29, 2003, this Court directed that Class Counsel send a class notice to Class members. On May 5, 2003, this notice was sent. There were 7 opt-outs; 31 individuals remain in the certified Class. This Court preliminarily approved the settlement on January 7, 2005.

II. DISCOVERY EFFORTS

The parties have conducted extensive discovery, including written interrogatories, document requests, and depositions of approximately 20 Class members. As the Court is well aware, this has been an exceptionally hard-fought and contentious case. There have been numerous motions to compel filed by both sides. In early 2004, Durham provided paper copies of payroll record data, which Plaintiffs' counsel thoroughly analyzed and investigated. Class Counsel also had numerous meetings and discussions with the named Plaintiffs concerning the class claims and defenses.

III. SETTLEMENT NEGOTIATIONS

The parties began exploring the possibility of settlement in early 2004. After exploring the possibility of settlement without making any progress, the parties agreed to enter into formal mediation in the hope of reaching an agreement. To this end, the parties jointly retained Lisa

Salkovitz Kohn, a private mediator formerly with JAMS with extensive experience in mediating class employment discrimination cases.

The mediation began on October 12 at 9 AM, and lasted until 9 PM that evening. The Class was represented in the mediation by Class Counsel and by all named and individual Plaintiffs. Extensive negotiations during the mediation led to the preliminarily-approved Settlement Agreement, whereby Durham will pay \$192,000. For reasons which will be explained further below, all parties believe that the Amended Settlement Agreement is fair, adequate, reasonable, and in the best interests of the certified Class.

A. Summary of the Settlement Agreement

The Settlement Agreement provides that Durham will pay \$192,000, broken down as follows: \$25,000 for the Class, \$40,000 to Jerrold Goldberg in settlement of his individual retaliation claims, \$15,000 to Kenneth Hulteen in settlement of his individual retaliation claims, \$10,000 apiece to Willie Jiles and Glenn Gentile in settlement of their individual retaliation claims, and \$92,000 to Plaintiffs' Counsel for fees and costs¹. Named and individual Plaintiffs' retaliation claims were not shared by the Class.

B. The Balance of the Relevant Factors Demonstrates That The Settlement Is Fair, Reasonable, Adequate, and in the Best Interest of the Class

In determining whether to approve a class action settlement, this Court must determine whether the compromise, taken as a whole, is fair, reasonable and adequate. *Isby v. Bayh*, 75 F.3d 1191,1196 (7th Cir. 1996). To make this determination, the Court should consider a variety of factors, including (1) the strength of the plaintiff's case, as balanced against the amount

¹At the time of settlement, Plaintiffs' Counsel's lodestar was approximately \$180,000.

offered in settlement; (2) the defendant's ability to pay, (3) the complexity, expense, and likely duration of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching the settlement; and, (6) the stage of the proceedings and the amount of the discovery completed. *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985).

C. The Strength of the Plaintiffs' Case, As Compared With The Amounts Offered By Durham In Settlement

The Class Complaint sets forth two theories of race discrimination: (1) intentional discrimination in distribution of extra work assignments, charters, and routes; and (2) racial harassment. Plaintiffs' counsel obtained through discovery anecdotal evidence of racial harassment of Class members, but in their opinion, this anecdotal evidence might not, at the point in time at which discovery was suspended, have been strong enough to withstand a summary judgment motion on the Class-based harassment complaints.

Plaintiffs' counsel also believe that there are other difficulties that might be encountered in establishing liability. For example, once Plaintiffs' counsel received the raw payroll record data in paper form, they began to collate that data with an eye toward creating an analyzable database; however, Plaintiffs' counsel estimated that this endeavor, while potentially fruitful, could take several months to complete.

Plaintiffs' counsel analyzed the summary payroll record data provided by Durham, and believed that their estimate of Class wide damages (approximately \$80,000) was reasonable. However, because Defendants contended that there were many variables not accounted for by Plaintiffs in their analysis, Plaintiffs recognized that their analysis was subject to attack in a number of ways. During the settlement negotiations, Durham provided more specifics

concerning its challenge to Plaintiffs' interpretation of the payroll records. According to Defendants, when said variables were included, the discrimination in pay based on extra work assignments, routes, and charters for the Class was between \$6,000 and \$17,000, depending on the mechanism one used to calculate the difference. Of course, Plaintiffs would have vigorously responded to these arguments, but there was a significant risk that a factfinder might accept Defendant's range of damages.

In short, the Class claims depended substantially on analysis of not only payroll records, but also independent variables, not necessarily reflected in the data. Thus, Plaintiffs accepted slightly more than 30 percent of their home-run damage number - a reasonable compromise under the circumstances.

D. Comparison of Benefits of Settlement to Uncertain Results at Trial

A trial on the merits would have required a substantial expenditure of resources by all parties, with an uncertain result. Given the contentious history of this litigation, an appeal by the losing party was very likely.

Plaintiffs' initial assessment of Durham's summary payroll record data indicated that the potential Class recovery appeared to be substantially less than Plaintiffs initially anticipated. It appeared that the two named Class representatives had suffered disproportionately greater losses than most Class members in terms of losing routes, extra work assignments, and charter assignments during Ms. Cooley's tenure at the Skokie Base. Therefore, this was a prototypical class case: each Class member suffered damages in an amount that is too small to justify the cost of individual litigation, but still large enough to be significant to each employee. The Settlement Agreement provides Class members with substantial monetary relief. The Settlement is a fair

compromise which addresses the strengths and weaknesses of both sides' positions.

E. Durham's Ability To Pay

This does not appear to be a factor in this case.

F. Complexity, Length, and Expense of Further Litigation

Absent the Settlement Agreement, further litigation would have been expensive and complex. At the time settlement negotiations were instigated, there were remaining to be taken approximately 10 non-named Class member depositions, depositions of the named Class representatives and the two non-Class individual Plaintiffs, as well as approximately ten depositions of Durham officials, including a 30(b)(6) deposition (in relation to which Plaintiffs were preparing an extensive Motion to Compel after lengthy negotiations pursuant to Fed.R.Civ.P. 37), probable additional written discovery, along with potential expert discovery. Should an expert have been employed, the parties would probably have exchanged the reports of their respective analyses of the payroll data, and then conducted expert depositions. This phase of litigation would also have been expensive and would have triggered motions to compel. Durham would probably have filed a motion for summary judgment as to payroll record data. If the case survived such a motion, a trial would have lasted probably at least two weeks, and appeal would have likely followed.

G. Amount of Opposition to the Settlement/Reaction of Class

On January 7, 2005, this Court approved the parties' Joint Motion Requesting Preliminary Approval of the Proposed Settlement Agreement. Pursuant to the Court's Order, Durham mailed Notice of the Settlement Hearing to all Class members. The Notice contained instructions for filing a written objection to the proposed settlement, setting a deadline of March 9, 2005 for

filing such objections. On information and belief, no such objections have been filed. If objections surface between now and the Fairness Hearing, scheduled for Wednesday, March 23, 2005 at 9:30 a.m., they will be addressed at the Hearing.

H. Presence of Collusion

There is no suggestion in the record or from any person that the parties colluded in reaching this Settlement.

The employment of a professional mediator virtually assures the absence of collusion. Even during the lengthy mediation, the parties' respective counsel conducted their negotiations separately from each other, with the mediator shuttling between them.

Moreover, the Court is aware of the exceptionally contentious nature of this litigation. Plaintiffs' motion for class certification was hotly contested, and briefing over that as well as the taking of all Class members' depositions lasted several months. Plaintiffs received the summary payroll record data from Durham only after filing and winning motions to compel.

Ultimately, the parties required the assistance of a professional mediator to help them resolve this case.

I. Opinion of Competent Counsel

The Court is entitled to give consideration to the opinion of competent counsel as to the strength of their own case. *Isby*, 75 F.2d at 1200. Class Counsel Futterman & Howard, Chartered, has litigated numerous class cases and are well equipped to evaluate the strengths and weaknesses of the present one. Like any settlement, this settlement required concessions by both sides which were necessary to finally resolve the case. Class Counsel firmly believes that this Settlement is in the best interests of the Class.

J. Stage of the Proceedings and Amount of Discovery Conducted

This Settlement Agreement was reached after more than a year of class and merits discovery, including document review, interrogatories, and eventually the production of payroll data. This factor heavily favors settlement.

IV. CONCLUSION

The Settlement Agreement offers substantial relief to the Class for Durham's alleged discrimination, while also offering a prompt resolution to the case. There was a risk, of course, as there always is, that no Class member would have received any relief if the case had gone to trial. On balance, the Settlement Agreement is fair, adequate, reasonable, and in the best interests of the Class.

Dated this 21st day of March, 2005.

Respectfully submitted,



Attorney for Plaintiffs

MADUFF, MEDINA & MADUFF

Aaron Maduff

1 East Wacker Drive, Suite 2122

Chicago, IL 60601

(312) 276-9000

(312) 276-9001 – fax

FUTTERMAN & HOWARD, CHARTERED

Ronald L. Futterman

William W. Thomas

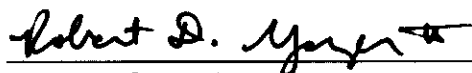
122 S. Michigan Avenue, #1850

Chicago, IL 60603

(312) 427-3600

(312) 427-1850 - fax

Attorneys for Plaintiffs



Attorney for Defendants

MCMAHON, BERGER, HANNA,

LINIHAN, CODY & MCCARTHY

James N. Foster, Jr.

Geoffrey M. Gilbert

Robert D. Younger

2730 N. Ballas Road, Suite 200

St. Louis, MO 63131

(314) 567-7350

(314) 567-5968 - fax

Attorneys for Defendants

Durham Transportation and Madeline Cooley