

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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FEDERAL MARITIME COMMISSION

Docket No. 10-10

DRAFT CARGOWAYS (INDIA) PVT. LTD.,

COMPLAINANT

v.

**DAMCO USA, INC., DAMCO A/S, A.P. MOLLER-MAERSK A/S,
GLENCORE LTD. AND ALLEGHENY ALLOYS TRADING, L.P.,**

RESPONDENTS

**JOINT MOTION FOR APPROVAL OF CONFIDENTIAL SETTLEMENT
AGREEMENT AND DISMISSAL WITH PREJUDICE**

Complainant Draft Cargoways (India) Pvt. Ltd. ("Draft Cargoways") and Respondents Damco USA, Inc., Damco A/S and A.P. Moller-Maersk A/S (collectively, the "Damco/Maersk Parties"), through their respective attorneys, hereby jointly move for approval of the Confidential Settlement Agreement attached hereto as Exhibit A, "Settlement Agreement"); and if the Settlement Agreement is approved, Draft Cargoways and the Damco/Maersk Parties further move for dismissal with prejudice of Draft Cargoways' complaint against the Damco/Maersk Parties in FMC Docket No. 10-10. Draft Cargoways and the Damco/Maersk Parties submit that the proposed settlement meets the Commission's criteria for approval of settlement agreements and therefore should be approved.

I. BACKGROUND

Draft Cargoways commenced this proceeding by filing a complaint on October 29, 2010, alleging that the Damco/Maersk Parties had violated Sections 8(a)(1), 10(b)(2)(A), 10(b)(11), 10(b)(13) and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. §§ 40501(a)(1), 41104(2) and (11), 41103(a) and 41102(c)¹, by collecting and attempting to collect demurrage charges from Draft Cargoways through a civil action originally filed by Damco USA, Inc. in the U.S. District Court for the Eastern District of Virginia (“Docket No. 1:10-cv-0929”).²

Draft Cargoways has filed a Motion to Dismiss and Alternatively Motion to Stay the Action in Docket No. 1:10-cv-0929 by asserting the primary/exclusive jurisdiction of the Federal Maritime Commission. The Damco/Maersk Parties have answered the complaint in this proceeding, and have asserted a variety of defenses.

Draft Cargoways and the Damco/Maersk Parties have agreed to settle the disputes between them.³ See Exhibit A. If the Settlement Agreement is approved by the

¹ This Motion includes for convenience citations to the provisions of the Shipping Act of 1984, which was repealed and codified by Public Law 109-304, 120 Stat. 1485 (2006). The corresponding new provisions of the U.S. Code are also cited. Citations to a Shipping Act section should be understood to include reference to the corresponding U.S. Code sections.

² Damco A/S was substituted for Damco USA, Inc. as plaintiff in this action, which was transferred to and is currently pending before the U.S. District Court for the Southern District of New York, Docket No. 1:10-cv-9117.

³ The parties respectfully submit that the Settlement Agreement is confidential and should be treated as such. There is ample Commission precedent supporting confidential treatment of a Settlement Agreement. See, e.g., *Trans-Net, Inc. v. Fesco Ocean Management Limited*, 30 S.R.R. 655 (ALJ 2005) (“fact that parties wish to keep the terms of their settlement confidential present no impediment to approval of their agreement and, indeed, the Commission has approved numerous settlements in numerous proceedings in which the parties have requested that their agreements no be made public.” and cases cited therein). See also, *Red Hot Transport v. Navajo Shipping Agency, Incorporated*; *Africa Mideast Line*, 27 S.R.R. 1082 (ALJ 1997); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503 (ALJ 1996). Accordingly, although this Motion is being filed publicly, the exhibit hereto, the Confidential Settlement Agreement, is being filed under seal.

Commission, both the complaint in this proceeding and the complaint in Docket No. 1:10-cv-9117 will be dismissed with prejudice, ending all litigation between the parties. The parties submit that the mutual concessions made in connection with the Settlement Agreement fairly address the outstanding issues between them in this matter.

II. AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act (“APA”), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement “when time, the nature of the proceeding, and the public interest permit.” As the legislative history of the APA makes clear, Congress intended this provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

... even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication ... The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision “to eliminate the need for often costly and lengthy formal hearings in those cases where parties are able to reach a result of their own which the appropriate agency finds compatible with the public

interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

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 Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 512 (1978); *see also Freeman v. Mediterranean Shipping Co.*, 31 S.R.R. 336 (ALJ, 2008); *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365 (1979); *United Van Lines, Inc. and United Van Lines International, Inc. v. United Shipping USA, Inc.*, 27 S.R.R. 769 (ALJ 1996) (administratively final May 29, 1996). The Commission itself has long recognized that the resolution of controversies by means of settlement is faster and cheaper than litigation, and results in savings of time for all parties. *Id.*

Rule 91 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlement of disputes between private parties. *See, e.g., United Van Lines, supra; Delhi Petroleum Pty. Limited v. U.S. Atlantic & Gulf/Australia-New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129 (ALJ 1988) (administratively final September 19, 1988).

The Commission will approve a settlement when it does not contravene any law or public policy, is fair, adequate, reasonable, and is not the product of collusion or coercion. *Delhi Petroleum* at 1134. The Commission also considers whether there is a reasonable basis for the settlement, and whether the settlement reflects the careful consideration of the parties with respect to factors such as the relative strengths of their

positions weighed against the risks and costs of continued litigation. *Id.* As discussed below, the Settlement Agreement in this proceeding clearly meets the foregoing criteria.

III. THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE AND DOES NOT VIOLATE PUBLIC POLICY

The Confidential Settlement Agreement between Draft Cargoways and the Damco/Maersk Parties should clearly be approved. The proposed settlement is fair and reasonable for both Draft Cargoways and the Damco/Maersk Parties, is not the product of collusion or coercion, and does not violate public policy.

A. The Settlement Agreement is Fair and Reasonable

Damco A/S alleged that Draft Cargoways was liable for payment of demurrage charges. Draft Cargoways alleged that the collection and the attempts to collect demurrage and detention by the Damco/Maersk Parties constituted a violation of the Shipping Act. The Confidential Settlement Agreement will relieve each of the parties of potential liability arising out of the claims of the other. It will also relieve both parties, the Commission and the federal courts of the need for expending further resources in litigating a complex dispute.

Thus, both parties are getting something and giving up something under the Confidential Settlement Agreement and have determined, in their respective business judgments, that it is a fair and adequate trade.

The Settlement Agreement is also a reasonable step to take at this juncture. While the parties have not yet expended significant time and resources in discovery and motion practice, they have reviewed transaction documents, and have upon this review formed an opinion on the difficulties for all Parties in pursuing claims and establishing defenses to claims. Given the overall amount at issue (approximately \$154,000), the cost of

potentially litigating two separate proceedings would soon become prohibitive, and would subject both parties to other substantial burdens and disruption.

The proposed Settlement Agreement, if approved, would eliminate the need for all such further litigation before the Commission and the federal courts on the issues to be settled, at great savings of the resources, the parties, the Commission and the courts.

The parties' decision to forgo substantial and complex, if uncertain, claims against each other in exchange for resolving any potential liability is thus obviously fair, adequate, and reasonable. The parties' decisions to settle were made independently, based upon careful consideration of its merits and the potential litigation costs, were made after consultation with counsel, and were not the product of any collusion or coercion.

The parties' mutual concessions clearly provide adequate consideration for their agreement to relinquish the claims at issue. In any event, "the matter of how much the parties agree to exchange in order to terminate litigation is not one which the courts or the Commission generally question, if, as here, the amount appears to have been determined in the exercise of the parties' business judgment after lengthy negotiations." *Trident Seafoods Corp. v. Coastal Transp., Inc.*, 91-49, 1993 WL 104677 (ALJ March 2, 1993) (citing *Int'l Ass'n of NVOCC's v. Atlantic Container Line et. al.*, 26 S.R.R. 151, 153 (ALJ 1991)). "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." *Delhi Petroleum*, 24 S.R.R. at 1134. The Presiding Officer in *Delhi Petroleum* went on to note that "if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be

outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.” *Id.*

B. The Settlement Does Not Violate Public Policy

“The Commission has a strong policy in favor of settlements.” *Holt Cargo Sys., Inc. et al. v. Delaware River Port Auth., et al.*, 28 S.R.R. 1273, 1274 (ALJ, 1999).⁴ Here, the Settlement Agreement is not reached as a result of fraud, duress, or mistake. *See Monarch Shipping Lines, Inc., et al.*, 30 S.R.R. 820 (FMC, 2005) (approving settlement where agreement was fair, reasonable and adequate and where there was no evidence of fraud, duress, or mistake).

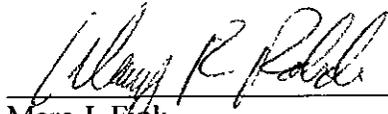
The decision to settle and dismiss the complaint in FMC Docket No. 10-10 and the complaint in Docket No. 1:10-cv- 9117 does not implicate any Shipping Act concerns and has no impact on any third parties.

IV. CONCLUSION

In sum, the Settlement Agreement should be approved as fair, adequate, and reasonable. This is particularly so given the amount at issue, the costs involved in litigating two separate proceedings and the disruption that would be associated with discovery and litigation of the complex factual issues at issue in these disputes. Moreover, the Settlement Agreement is consistent with, and does not violate, any public policy.

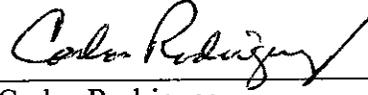
⁴ The Commission favors settlements which also dispose of ancillary proceedings pending before courts, because by settling other claims that might have led to other proceedings, the parties obviate the need to consume additional judicial resources. *See, e.g., Al Kogan v. World Express Shipping, Transp. & Forwarding Servs., Inc.*, 29 S.R.R. 68, 70 (ALJ, 2000) (“Finally, the settlement agreement has the added benefit of terminating the state court case, another point in its favor, and, as is obvious from my discussion, fully comports with the strong policy in the law favoring settlements.”).

Respectfully submitted,



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