S E R V E D
March 25, 2011
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 10-10

DRAFT CARGOWAYS (INDIA) PVT. LTD.

v.

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

ORDER GRANTING MOTION FOR APPROVAL OF CONFIDENTIAL SETTLEMENT AGREEMENT AND DISMISSAL WITH PREJUDICE OF RESPONDENTS DAMCO USA, INC., DAMCO A/S, AND A.P. MOLLER-MAERSK A/S

I.

On March 4, 2011, complainant Draft Cargoways (India) Pvt. Ltd. ("Draft Cargoways") and respondents Damco USA, Inc., Damco A/S, and A.P. Moller-Maersk A/S ("Damco/Maersk") filed a joint motion ("Motion") seeking approval of a confidential settlement agreement. The confidential settlement agreement is attached to the motion and will be kept in the Secretary's confidential files, although the full text has been reviewed by the undersigned and is available to the Commission. Separate settlement agreements have been reached with each of the other parties in the proceeding.

II.

Draft Cargoways filed a complaint on October 29, 2010, alleging that the Damco/Maersk respondents 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 ("Shipping Act"), 46 U.S.C. §§ 40501(a)(1), 41104(2), 41104(11), 41103(a), and 41102(c). Draft Cargoways alleges that the Shipping Act was violated by the attempt to collect demurrage charges from it through a civil action originally filed by Damco USA, Inc. in the United States District Court for the Eastern District of Virginia. On December 28, 2010, Damco/Maersk filed its answer, denying the allegations in the amended complaint, and asserting a variety of defenses.

The parties request approval of a confidential settlement agreement. If approved, both the complaint in this proceeding and the complaint in the district court will be dismissed with prejudice, ending all litigation between the parties. Motion at 2-3. The parties "submit that the mutual concessions made in connection with the Settlement Agreement fairly address the outstanding issues between them in this matter." Motion at 3. Specifically, the parties state that the 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." Motion at 5.

The parties contend that they both "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." Motion at 5. The parties "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." Motion at 5. The parties have determined that the costs of litigating two separate proceedings "would soon become prohibitive, and would subject both parties to other substantial burdens and disruption." Motion at 6. The parties indicate that their "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." Motion at 6.

In addition, the parties contend that the settlement does not violate any public policy. Motion at 7. Specifically, they state that the decision to settle and dismiss the complaints "does not implicate any Shipping Act concerns and has no impact on any third parties." Motion at 7. Accordingly, the parties urge that the settlement agreement be approved.

III.

Using language borrowed in part from the Administrative Procedure Act,[1] 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 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 Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (*quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold

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[1] "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).

> and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

"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." *Id.* However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f 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." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"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." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties request that the settlement agreement remain confidential under Commission precedent. Motion at 2 n.3. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 2000 WL 19204888, *3 n.7 (ALJ Sec. 15, 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See, e.g., Schoeps v. The Museum of Modern Art,* 603 F. Supp. 2d 673 (S.D.N.Y. 2009); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487

(1991). Accordingly, the request will be granted and the settlement agreement will be maintained in the Secretary's confidential files, although the full text has been reviewed by the undersigned and is available to the Commission.

Based on the representations in the joint motion, the confidential settlement agreement, and other documents filed in this matter, the parties have established that the agreement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. The parties have reviewed the relevant documents, and have determined that the costs of litigating in two separate proceedings would be prohibitive, and would subject both parties to other substantial burdens and disruption. Moreover, this dispute regarding collection of demurrage charges does not implicate the public interest. The parties are represented by counsel and there is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the proposed settlement agreement is approved.

IV.

Upon consideration of the joint motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the confidential settlement agreement between complainant Draft Cargoways (India) Pvt. Ltd. and respondents Damco USA, Inc., Damco A/S, and A.P. Moller-Maersk A/S be **APPROVED**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED** with prejudice.

Erin M. Wirth

Erin M. Wirth
Administrative Law Judge