

ORIGINAL

S E R V E D

October 27, 2009

FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 07-10

KAWASAKI KISEN KAISHA, LTD. ("K" LINE)

v.

**FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.; and
GEMINI SHIPPERS ASSOCIATION, INC.**

**MEMORANDUM AND INITIAL DECISION ON
JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AND
DISMISSAL OF COMPLAINT WITH PREJUDICE**

BACKGROUND

Kawasaki Kisen Kaisha, Ltd. ("K" Line) commenced this proceeding by filing a Complaint in November 2007. On February 25, 2008, I granted the unopposed motion to dismiss two named Respondents from the proceeding and the unopposed motion for leave to file an Amended Complaint. *Kawasaki Kisen Kaisha, Ltd. v. Fashion Accessories Shippers Association, Inc., and Gemini Shippers Association, Inc.*, FMC No. 07-10 (ALJ Feb. 25, 2008) (Memorandum and Order on Motion to Dismiss Filed by Sara Mayes and Harold Sachs and Motion for Leave to Amend Complaint). Respondents Fashion Accessories Shippers Association, Inc. (FASA) and Gemini Shippers Association, Inc. (Gemini) filed their Answer on March 7, 2008, denying the allegations of the Amended Complaint.

"K" Line contends that FASA purports to act as a shippers' association and enters into service contracts with ocean common carriers using the name "Gemini Shippers Association." "K" Line contends that it has entered into a number of service contracts with FASA and/or Gemini since April 2001. The service contracts include a clause requiring "K" Line to collect a "royalty payment" ranging from \$40.00 to \$70.00 per container from FASA/Gemini member shippers and forward the

payment to Gemini. The service contracts also include an exclusive dealing clause purporting to prohibit "K" Line from dealing with a member or former member of FASA while the service contract is in effect. A FASA member that had been shipping with "K" Line pursuant to the FASA service contracts approached "K" Line directly. "K" Line entered into a service contract with the member at rates lower than the FASA contract rate. FASA instituted a New York arbitration claiming royalties it would have received had "K" Line not directly entered into a service contract with a "so-called member" and a "former member" during the 2006-2007 contract term.

"K" Line contends that:

The FASA/Gemini principals superficially imitate a [shippers'] association as described in the Act, while in reality operating a service contract franchise business for the principals' benefit. They bar freedom of contract with the shippers they call "members" and "former members", require kickbacks on each container, threatened "K" Line with refusal to deal, and are laying out legal costs in an arbitration trying to enforce their scheme.

(Amended Complaint ¶ 16.) "K" Line contends that FASA and Gemini violated the Shipping Act of 1984 by: (1) Holding themselves out as a shippers' association when they are neither organized as a shippers' association nor function as one as defined by the Shipping Act; (2) requiring that "royalty payments" be made by "K" Line to Respondents for the "privilege of carrying cargoes under the contract rates," and through such "royalty payments," engaging in a scheme to obtain transportation at less than the otherwise applicable rates; and (3) implementing and enforcing an "exclusive dealing clause" that locks shippers into FASA contracts and controls rate levels. "K" Line asserts that these activities violate 46 U.S.C. §§ 40102(20), (22) and (23), 41102(a), 41104(10), and the Commission's regulations at 46 C.F.R. § 530.8(c).

The parties conducted substantial document and deposition discovery but did not complete discovery as a result of a number of unresolved discovery disputes between the parties. On July 25, 2008, further discovery was stayed by agreement of the parties pending briefing and consideration of "K" Line's Motion for Dispositive Ruling. *Kawasaki Kisen Kaisha, Ltd. v. Fashion Accessories Shippers Association, Inc., and Gemini Shippers Association, Inc.*, FMC No. 07-10 (ALJ July 25, 2008) (Order on July 24, 2008, Telephonic Conference). On September 12, 2008, FASA and Gemini filed a reply to "K" Line's motion and their own Motion for Dispositive Ruling and other relief.

The parties represent that:

While the cross-motions were pending, the Parties engaged in good faith settlement discussions in light of the likely substantial costs of continued litigation, the prevailing adverse economic conditions, and the uncertainties inherent in the outcome of complex litigation such as this proceeding. Specifically, the Parties have concluded and agreed that the costs of further litigation, including the possibility of substantial additional discovery, depositions, briefing of complex issues of law,

motions, trial of disputed facts, and appeals, may far exceed the reparations sought or any other tangible or intangible value to the Parties. Consequently, the Parties have entered into the attached settlement agreement, after good faith negotiation and with the benefit of legal counsel, settling their disputes with no payment by any party, mutual releases of claims, and dismissal of the proceedings in this docket

The Parties submit that the attached settlement agreement was reached in good faith, and is free of fraud, duress, undue influence, mistake or any other defect that would bar its approval. Moreover, as set forth more fully below, approval of the proposed settlement would be consistent with the Commission's longstanding policy of encouraging settlement. Accordingly, the Parties respectfully request that this motion for approval of the settlement and dismissal of this proceeding be granted.

(Joint Motion for Approval of Settlement Agreement and Dismissal of Complaint with Prejudice at 2.) The parties also contend that:

The settlement proposed by the Parties is reasonable and not inconsistent with any laws. The Parties to the proposed settlement have carefully considered the costs and benefits of further litigation and concluded that settlement is in their mutual interests. Similarly, the proposed settlement is not tainted by fraud, duress or other disqualifying defects. In fact, as stated in the settlement agreement, all Parties to the settlement have had the benefit of being represented by legal counsel and the opportunity to consider the settlement terms carefully. Consequently, the Parties to the settlement respectfully request that the settlement be approved and this proceeding dismissed with prejudice.

(*Id.* at 4-5.)

Inter alia, the Settlement Agreement provides that it settles and releases all claims, counterclaims, demands, rights, matters, and causes of action under the Shipping Act and Commission regulations related to the original or amended complaint without any admission of liability, and that each party shall bear its own legal fees and costs associated with the proceeding.

THE PROPOSED SETTLEMENT IS CONSISTENT WITH COMMISSION POLICY

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, 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 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).

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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 ALJ is responsible for ensuring the record forms an adequate basis for determining whether to approve the settlement; however, FMC case law is clear in that settlements are presumed fair and the presiding officer has “a relatively limited role to perform when scrutinizing them.” *Puerto Rico Shipping Ass’n v. Puerto Rico Ports Authority*, 27 S.R.R. 645, 647 (ALJ 1996).

APM Terminals North America, Inc. v. Port Authority of New York and New Jersey, 31 S.R.R. 623, 625-626 (2009) (footnote omitted).

I find that the parties have established that the Settlement Agreement 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. Therefore, I approve the Settlement Agreement.

O R D E R

Upon consideration of the Joint Motion for Approval of Settlement Agreement and Dismissal of Complaint with Prejudice, the proposed Settlement Agreement, the record herein, and for the reasons stated above, it is hereby

ORDERED that the Joint Motion for Approval of Settlement Agreement and Dismissal of Complaint be **GRANTED**. It is

FURTHER ORDERED that the Settlement Agreement between complainant Kawasaki Kisen Kaisha, Ltd., and respondents Fashion Accessories Shippers Association, Inc., and Gemini Shippers Association, Inc., be **APPROVED** and this proceeding **DISMISSED** with prejudice. In accordance with Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227, this Initial Decision will become final unless it is reviewed by the Commission.



Clay G. Guthridge
Administrative Law Judge