



"K" LINE AMERICA, INC.

RECEIVED
P.O. Box 9
Preston, MD 21655
JAN 11 10 48 AM '07 TEL: (410) 673-1010
FAX: (410) 673-1013
U.S. DEPARTMENT OF JUSTICE
FEDERAL MARITIME COMMISSION

January 10, 2007

VIA UPS NEXT DAY

Attn: Karen Gregory
Assistant Secretary
Federal Maritime Commission
800 North Capitol Street, NW, RM 1046
Washington, DC 20573

RE: Kawasaki Kisen Kaisha, Ltd. V. Fashion Accessories Shippers Association, et al.
Docket No. 07-10
Dear Ms. Gregory,

Per your request for additional copies please enclosed the following documents in regard to Kawasaki Kisen Kaisha, Ltd. V. Fashion Accessories Shippers Association, et al.

1. Eleven Reply of Kawasaki Kisen Kaisha, Ltd. to the Motion to Dismiss Respondents Sachs and Mayes.
2. Twelve copies of the Motion to Amend Complaint and the Amended Complaint.

Please contact this office at 410-673-1010 if you have questions.

Regards,

Victoria M. Olds
Secretary to John P. Meade

Enclosures

CC: GC/08
ORIGINAL ALJ (2)
RECEIVED PWB

BEFORE THE FEDERAL MARITIME COMMISSION - 7 PM 1:11

FEDERAL MARITIME COM.

_____)
KAWASAKI KISEN KAISHA, LTD.,)
))
Complainant,)
v.)
))
FASHION ACCESSORIES SHIPPERS)
ASSOCIATION, INC., GEMINI SHIPPERS)
ASSOCIATION, INC., SARA MAYES, AND)
HAROLD SACHS)
))
Respondents)
_____)

Docket No. 07-10

AMENDED COMPLAINT

I. THE PARTIES

A. Kawasaki Kisen Kaisha, Ltd. is a Japanese corporation operating as an ocean common carrier, FMC Organization No. 001466, with principal offices at Hibiya Central Building 2-9, Nishi-Shinbashi 1-chome, Minato-ku, Tokyo 105-8421, Japan.

B. "Gemini Shippers Association, Inc." is a Delaware corporation set up as a non-profit corporation. It is referenced on a "Gemini Shippers Group" website.

C. "Fashion Accessories Shippers Association, Inc." ("FASA) was set up as a Delaware non-profit corporation. It is referenced on the "Gemini Shippers Group" website. "Gemini Shippers Group" is a d/b/a of FASA. "Gemini Shippers Association" is a d/b/a of FASA.

D. Sara Mayes is president of FASA.

E. Harold Sachs is executive director of FASA.

F. Respondents are all located at 350 Fifth Avenue, Suite 2030, New York, NY 1011.

II. JURISDICTION

A. The Commission has jurisdiction under the Shipping Act of 1984, as amended, (“the Act”), 46 U.S.C. § 40502, to regulate service contracts and in fact does so in its regulations at 46 C.F.R. Part 530. 46 U.S.C. § 41301 (a).

B. The Commission has authority to rule on violations which occur in connection with service contracts. The Commission has both the authority and the duty to rule on the validity of service contracts and their implementation, regardless of arbitration clauses in the service contracts. Of paramount importance is the Commission’s obligation to ensure the legality of service contracts. 46 U.S.C. § 40502 and 46 C.F.R. § 530.1

C. The Commission exercises jurisdiction over persons, including individuals, as necessary to achieve its regulatory objectives. Particularly in this situation, where there is a number of entities, “d/b/as” and purported associations or groups, the principals behind the whole operation must be reached by the Commission in order for the Commission to exercise its regulatory power. 1 U.S.C. § 1.

D. The Commission has authority to determine whether any person or persons knowingly and willfully by false means or other unjust or unfair devices obtained or attempted to obtain transportation at less than the otherwise applicable charges. 46 U.S.C. § 41102 (a).

III. STATEMENT OF THE CASE

A. Introduction

1. Respondent, Fashion Accessories Shippers Association, Inc. (“FASA”) was set up as a non-profit Delaware corporation. FASA purports to act as a shippers’ association and enters into service contracts with ocean common carriers as “Gemini Shippers Association”. Respondent FASA also uses “Gemini Shippers Group” as a “d/b/a”, and maintains a website in that name (Excerpts in Attachment D hereto) soliciting the participation of shippers in service contracts which are signed by FASA under the d/b/a “Gemini Shippers Association”. In “K” Line’s experience, “K” Line negotiates shipper-specific (and non-specific) rates with the shippers, having negotiated certain non-specific rates or charges with FASA; “K” Line then brings those rates to the officers of FASA for incorporation into the “Gemini” contracts.

2. The “K” Line/“Gemini Shippers Association” contracts specify rates which include royalty payments to be made from “K” Line by check to “Gemini Shippers Association” for the privilege of carrying cargoes under the contract rates. The royalties paid by “K” Line (and undoubtedly other carriers) are deposited by FASA and, based on the number of “members” of FASA must total hundreds of thousands of dollars annually. The disposition of these monies is unknown.

3. FASA does not operate as a shippers’ association. Insofar as “K” Line can determine, there are no shippers who actually hold the status of members of FASA or any entity related to FASA. Their status is like that of subscribers to a FASA/Gemini service contract franchise. Shippers are

apparently denied access to financial records of the operation, and (at least in recent years) do not participate in any corporate or “association” governance regarding any FASA/Gemini entity.

4. The setup is a scheme whereunder the FASA principals purport to legitimize the shippers’ discounted rates and charge ocean carriers for the privilege of participating in the scheme, under a “royalty” clause (Attachment A hereto) in the service contracts. The FASA operation indirectly locks shippers into FASA contracts and controls rate levels, by means of an “exclusive dealing” clause in the service contracts (Attachment B hereto) which prohibits the ocean carrier signatory from contracting with either a “member” or a “former member”. The definitions of these two terms are unclear.

5. “K” Line seeks findings that the FASA/Gemini subscriber operation cannot lawfully enter into service contracts, that the royalty clause and the exclusive dealing clause are unlawful, that the receipt by FASA/Gemini and their principals of payments under the royalty clause is unlawful and that Respondents must cease and desist from pursuing any arbitration implementing these clauses.

B. Facts

1. “K” Line entered into a contract (No. 12842) signed in the name of Gemini Shippers Association” for the term April 18, 2001 to December 22, 2002. The Appendix referred to a “constituent shippers association...the Fashion Accessories Shippers Association, inc. (sic)”. A separate contract apparently was entered into for the period April 18, 2001 to December 1, 2002, signed by “Gemini Shippers Association.” As of October 10, 2003, the New York authorities have advised that a Certificate

of Assumed Name was filed by Fashion Accessories Shippers Association, Inc. for the use of the name “Gemini Shippers Group,” in New York County, and a second certificate to the same effect was filed December 19, 2003.

2. “K” Line entered into Service Contract No. 13473 signed by “Gemini Shippers Association” (Sara Mayes President) for the period December 23, 2002 to March 31, 2004. New York authorities have forwarded four Certificates of Assumed Name for New York County filed by Fashion Accessories Shippers Association, Inc., in February 2004, one for the initials “NAFA,” one for the initials “FASA,” one for the initials “NFAA.”, and one for “Gemini Shippers Association.”

3. “K” Line entered into Service Contract No. 14042 signed by “Gemini Shippers Association” (Sara Mayes President) for the period of April 1, 2004 to November 26, 2005. The Shipper and Contract Party listed in the Contract Appendix was “Gemini Shippers Association.” No affiliates were listed.

4. “K” Line entered into Contract No. 14682 on May 27, 2005 , with “Fashion Accessories Shippers Association, Inc d/b/a Gemini Shippers Association” (Sara Mayes President). The Appendix carried the same legend and the “Shipper” was listed as the same name. The Contract term was from June 1, 2005 to May 31, 2006.

5. Finally, ‘K” Line entered into Contract No. 15115 on June 15, 2006 with “Gemini Shippers Association” (Sara Mayes President) with a term ending May 31, 2007. “The Fashion Accessories Shippers Association” name did not appear on the signature page. It did appear in the

Appendix, once on the first page, once as the “shipper” and once as a “constituent shipper’s (sic) association,” under “Special Notes.”

6. The Appendix to No. 15115 contained the “royalty clause,” (Attachment A) whereunder “K” Line was supposed to “collect from the Member shipper and forward to the Contract Party Association....Gemini Association dues...for cargo transported by Carrier under this Contract....” The amount of the royalty/rebate ranged from \$40.00 to \$70.00, and was \$55.00 on a dry forty foot container. “K” Line was billed for such royalties on the billhead of “Gemini Shippers Group.” Upon recently being pressed for payment, “K” Line informed Gemini’s counsel that “K” Line had no contract with such an entity. Counsel merely scratched out the word “Group,” wrote in the word “Association,” and returned the invoice to “K” Line’s counsel.

7. “K” Line, in a meeting in 2006 with Sara Mayes, “President,” informed Mayes that “K” Line had been approached independently by a shipper who had contracted with “K” Line under the umbrella of the “Gemini” contract. Ms. Mayes agreed to “K” Line’s offering rates to the shipper, but only if they were higher than her contract rates, of course with the exclusive dealing clause as the vehicle to enforce her position. The “member” rejected the “K” Line offer of rates at the Gemini level, and “K” Line entered into a service contract with the “member” at lower rates.

8. The exclusive dealing clause in the Appendix to No.15115 (Attachment B) purports to prohibit “K” Line from dealing with either a “member” or a “former member” while the Service Contract is in effect with “K” Line. Apparently, the Gemini principals interpret “member” as including

all shippers who have checked in on the “Gemini Shippers Group” website, but they may define the term as including shippers whose rates are filed under any Gemini Contract with any ocean carrier.

9. “K” Line entered into contracts with the so-called “member” and a “former member” during the 2006-2007 contract term, Contract Numbers 15118 and 15669. “FASA d/b/a Gemini Shippers Association” then instituted a New York arbitration in 2006, demanding damages from “K” Line based on speculation that FASA would have received royalties, absent the “K” Line Contract, because the shippers would have shipped with “K” Line or another ocean carrier under the higher “Gemini” contract rates, which included the royalty amounts. FASA demanded \$75,000.00 (plus legal fees) to enforce the exclusive dealing clause. Respondents, through their counsel, advised they would not negotiate with “K” Line for a 2007-2008 service contract unless “K” Line withdrew its defense to the FASA arbitration demands, and agreed to the exclusive dealing clause.

10. The exclusive dealing clause requires “K” Line to attempt to ascertain the “membership” status of shippers (whatever that means). “K” Line must look not only to any current “members”, but must hark back to the first “K” Line contract in 2001 with the then-fictitious “Gemini Shippers Association,” or perhaps back to any “Gemini” contract with any carrier, or even strive to identify any shipper who checked in on the Gemini Group website or otherwise became a “member” in FASA’s eyes.

11. The royalty clause (Attachment A) requires “K” Line to pay a royalty per container to the Gemini operation, which monies are deposited to a FASA bank account (see Attachment C hereto). Whether the so-called “members” know their payments to “K” Line for freight include royalties is

unknown. Another unknown is whether the so-called “members” are aware of or agree to the exclusive dealing clause in the “association” contract or to the FASA arbitration seeking to collect money from “K” Line for the alleged breach of it.

12. FASA, by letter of November 3, 1986 to the Antitrust Division of the U.S. Department of Justice, requested a business review letter (“BRL”). The letter affirmed that “FASA members are not obligated to use FASA’s services, they are free to use other services for their shipping needs or route their own traffic and deal directly with carriers. They may join other shippers associations. FASA will simply be one of several alternatives a member may utilize for import transportation services.” *Business Review Letter Request, Fashion Accessories Shippers Association*, November 3, 1986, 1986 DOJBRL LEXIS 37. While FASA does not (insofar as “K” Line is aware) directly prohibit independent “member” or “former -member” contracting, such contracting is prohibited by the device of the exclusive dealing clause. The implementation and enforcement of the exclusive dealing clause are antithetical to the statutory definitions of service contract, shipper and shippers’ association. 46 U.S.C. § 40102(20), (22) and (23).

13. The Association letter further claimed that the members would be charged a “per container” membership fee and that any monies that the association received in excess of administrative and operational expenses would be distributed directly to the members. *Business Review Letter Request, supra*. These statements are incorrect, insofar as “K” Line is aware.

14. In the BRL opinion issued to FASA indicating no DOJ intention to challenge FASA’s conduct as set forth in its November 3, 1986 letter, the DOJ conditioned its opinion on FASA’s

representation that “FASA members will not be required to use any FASA Services and they will remain free to use other transportation options, such as making direct arrangements with carriers or participating in other shippers associations.” *Business Review Letter Opinion, U.S. Department of Justice, March 25, 1987, 1987 DOJBRL LEXIS 18.* That statement is incorrect.

15. The obvious mission of the FASA/Gemini principals is not to act as an association for the benefit of the shippers whom they call (sometimes) “members,” but to benefit the principals, the individual respondents, by amassing wealth from royalties on every box carried by the ocean carriers who bring their negotiated rates within the Gemini contract umbrella.

16. The FASA/Gemini principals superficially imitate a shipper’s 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.

17. FASA is a kind of service contract broker or franchise operator dedicated to controlling the ocean rates charged to its clients and restricting competition in the level of those rates. Once the client-specific rates are tailored to each client’s situation and filed under the Gemini contract, the exclusive dealing clause operates to lock any “member” or “former member” out of negotiating a better rate with that carrier (or apparently any other Gemini Group contracting carrier) or even to contract for service different from that specified in the Contract. For so long as a carrier has a service contract in effect with the Gemini Group, it is debarred from entering into any contract for any service in any trade with a

“former member”. FASA shipper-subscribers are, on information and belief, uninformed as to the exclusive dealing clause, much less have they consented to the clause or its enforcement. The respondents use the various entities’ names and “d/b/a’s” interchangeably, but there is no entity or association which is either organized as a shippers’ association or functions as one in accordance with the definition in 46 U.S.C. § 40102(20), (22) and (23). Through no fault of their own (it appearing the shippers are ignorant of the scheme) the shippers who negotiate their individual rates with “K” Line are not members of any shippers’ association, nor are they members of Fashion Accessories Shippers Association, Inc. or Gemini Shippers Association, Inc. No shipper participates as a member of either corporation. No books are open to the shipper members.

18. Respondent Mayes and perhaps other principals negotiate the royalties with each carrier and, insofar as “K” Line can ascertain, funnel the monies into FASA’s bank account, presumably for their own benefit in some way, shape or form. While FASA is nominally organized as a “non-profit” corporation, the Gemini operation does not appear to be non-profit, since there are huge profits from the royalties paid by the ocean carriers. The setup is a business operation.

19. Using the exclusive dealing clause and legal action as a club, the principals work to block carriers (based on “K” Line’s experience) from contracting with the shippers at lower rates than the filed Gemini rates, and to lock “members” in forever. When “K” Line acceded to a “member’s” and “former member’s” demands for separate contracts, FASA hired lawyers to enforce its anti-competitive scheme by punishing “K” Line for giving the shippers lower rates. The principals thus act in direct opposition to the defining purpose of a shippers association, which is to negotiate lower rates for its members. The FASA/Gemini principals act not primarily to get lower rates for the “members”, but for their own

financial benefit, contravening the essence of a Shipping Act shippers' association (46 U.S.C. § 40102(20), (22) and (23)).

20. The exclusive dealing clause is uncertain and vague. The clause is written to prohibit a carrier from contracting with "any member or any former member, except upon notice to the Association and subject to mutual agreement between the carrier and the Association." When approached by a shipper to negotiate a service contract, the ocean carrier would have to retrieve and pore over Gemini "membership" records going back to Gemini's inception in 1991, in an attempt to verify whether the shipper had ever been a "member," however briefly.

21. The FASA/Gemini principals do not negotiate the shipper-specific rates, which is the principal function defining a shippers' association (they do negotiate certain blanket charges). A shipper who has checked in on the Gemini Shippers Group site negotiates its own rates with the carriers outside the ambit of the Gemini operation, then the carrier takes those rates to the principals to be legalized by insertion in the Gemini Contract Appendix. The principals have devised a lucrative scheme for selling the carriers the opportunity to use the Gemini service contracts as safe harbors for rates negotiated with shippers. The only unknown is how the principals funnel the money to themselves.

IV. VIOLATIONS OF THE ACT

A. FASA, d/b/a "Gemini Shippers Association," is not a shippers association within the definition in the Act, for the following reasons:

1. There is no voluntary association known as "Gemini Shippers Association" or as "Fashion Accessories Shippers Association."

2. There are no shipper members of FASA or any other related entity and there is no shipper membership participation in FASA or any related entity.

3. FASA does not negotiate the shipper-specific rates, only some of the rates or charges of general application.

4. FASA is a broker/franchisor, in that it is not an association of shippers, but sells its service contract safe harbor to ocean carriers for a per container fee under its contract royalty clause.

5. FASA limits its shipper-subscribers' and its former shipper-subscribers' service and rate opportunities by means of its contract exclusive-dealing clause, which is blatantly anti-competitive and in direct opposition to the purpose of a legitimate shippers' association.

6. FASA denies its shipper-subscribers access to its books.

7. Neither FASA nor any FASA-related entity is a non-profit operation; FASA is amassing huge profits which undoubtedly are and/or will be funneled into the pockets of the FASA principals either by extraordinarily high salaries or by some other device or devices; obviously these large sums will not simply be allowed to accumulate (unless they are being rebated to the shippers).

B. Because there is no lawful shippers' association party to Contract No. 15115, all respondents are involved in a scheme to obtain transportation at less than the otherwise applicable (tariff) rates, and have obtained transportation at less than the otherwise applicable rates, all in violation of 46 U.S.C.41102(a).

C. Because there is no lawful shippers' association party to Contract No. 15115, the Contract is invalid under the Shipping Act of 1984, as amended, and the Commission's regulations, and is therefore unenforceable.

D. The New York arbitration is an attempt to enforce the invalid service contract, and more particularly the invalid loyalty and exclusive dealing clause, and to secure transportation at less than the otherwise applicable tariff rates, thus it is itself an unlawful activity.

E. The exclusive dealing clause in Contract No. 15115 is uncertain and vague, in violation of 46 C.F.R.530.8(c). The definitions of "member" and "former member" are not set out. No matter what those definitions may be in FASA's view, compliance with them requires reference to sources outside the service contract, which in itself is impermissible under 46 C.F.R.530.8(c), and is an imprecise and unreliable process. For these reasons, the clause is invalid and unenforceable.

F. The exclusive dealing clause may require carriers to refuse to deal with shippers who FASA claims are "members" or "former members" of FASA, in possible violation of 46 U.S.C.41104(10). For this reason, the clause is unlawful and unenforceable.

G. FASA's claim for "damages" and legal fees in the New York arbitration, based on "K" Line's lawfully contracting with shippers in accordance with the Act, is itself an attempt to obtain transportation at less than the otherwise applicable rates in violation of 46 U.S.C.41102 (a), thus it is an unlawful activity.

V. RELIEF REQUESTED

"K" Line submits the Commission should find as follows:

A. Neither FASA nor any related entity is a shippers' association entitled to enter into service contracts. There is no resemblance to a membership organization or any "member" participation in governance, nor is FASA, or any related entity, actually a non-profit association. FASA acts as a gatekeeper and toll collector regarding "member"-negotiated rates, selling its service contract umbrella to the contracting carriers.

B. Because the FASA operation is not a shippers' association as defined in the Act, it has no authority to enter into a service contract as a shippers' association, therefore the royalty and exclusive dealing clauses in Contract No. 15115 are unenforceable.

C. The exclusive dealing clause in Contract No. 15115 is invalid because it lacks clarity and requires a carrier to go outside the contract to try to determine whether a shipper was ever a "member" of one of the Gemini facades, then to breach confidentiality with the shipper by approaching the Group for "permission" to contract with the shipper.

D. The exclusive dealing clause in Contract No. 15115 attempts to force ocean carriers to refuse to deal in violation of the Act with shippers who are so-called “members” or “former members”.

E. The exclusive dealing clause in Contract No. 15115 is invalid because it is used as part of the Gemini principals’ scheme to control rates charged by ocean carriers, which is not a valid purpose of a shippers’ association.

F. Respondents, through their officers, have attempted to control rates negotiated by “K” Line with a so-called “member” by ordering “K” Line, pursuant to the exclusive dealing clause, not to negotiate rates with the shipper below the FASA contract rates.

G. The receipt of royalties under the royalty clause of Contract No. 15115 is either a receipt of a rebate by the service contracting party (FASA) or, if any proceeds are passed to the shipper-subscribers, by the shippers themselves, in violation of 46 U.S.C.41102(a).

H. “K” Line submits the Commission should order Respondents to cease and desist from representing the FASA/ Gemini operation, as it presently exists, as a shipper’s association, to cease and desist from negotiating or implementing contract clauses such as the royalty clause or the exclusive dealing clause and to cease and desist from any attempts to influence, by contract or threats, the rates charged by ocean carriers to shippers.

I. “K” Line submits the Commission should find the exclusive dealing clause and the royalty clause to be in violation of the Act; issue a cease and desist order against respondents’ use of

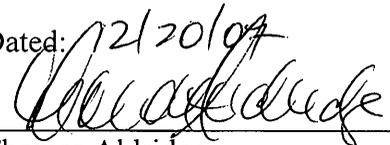
such devices in the future, find that FASA/Gemini's New York arbitration or any other means for seeking to enforce the unlawful exclusive dealing and royalty clauses is unlawful, and enjoin FASA/Gemini, Inc. and their principals from continuing their scheme as currently constructed.

J. Finally, in accord with these findings, the Commission should issue a cease and desist order against any respondent pursuing the New York arbitration against "K" Line or reinstating any similar arbitration for enforcement of either of the clauses.

K. Additionally, "K" Line submits that the Commission should order respondents FASA and Gemini Shippers Association, Inc. to pay reparations for the damages caused to "K" Line arising out of the violations described herein above, including interest and attorney fees as provided in 46 U.S.C. §§ 41301 and 41305 and 46 CFR §§ 502.251 through 502.254 in an amount to be determined; and that the Commission provide "K" Line such other and further relief as the Commission determines to be proper in the premises.

The parties have not engaged in mediation.

A hearing in Washington, D.C. is requested.

Dated: 12/20/07


Thomas Aldridge
Vice President-Sales
"K" Line America, Inc.
890 Mountain Ave
Suite 200
Murray Hill, NJ 07974

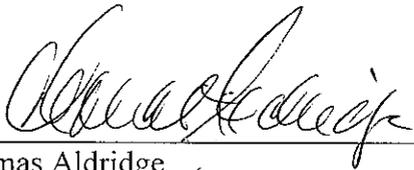


J. P. Meade
"K" Line America, Inc.
6009 Bethlehem Road
Preston, MD 21655
410-673-1010
John.Meade@us.kline.com
Attorney for Kawasaki Kisen Kaisha, Ltd.

Of Counsel:
Manelli Denison & Selter PLLC
2000 M Street, N.W., Suite 700
Washington, D.C. 20036
Eliot J. Halperin
Deana E. Rose
202-261-1012, ehalperin@mdslaw.com
202-261-1016, drose@mdslaw.com

VERIFICATION

I, Thomas Aldridge, Vice President-Sales of "K" Line America, Inc., signed the foregoing Complaint, and I state under penalty of perjury that I believe the facts stated therein to be true and correct, upon my knowledge, information and belief.



Thomas Aldridge
Vice President-Sales
"K" Line America, Inc.
890 Mountain Avenue
Suite 200
Murray Hill, NJ 07974

Date: 12/20/07