



RECEIVED "K" LINE AMERICA, INC.

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FEDERAL MARITIME COMMISSION
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January 7, 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,

Please enclosed the following documents in regard to Kawasaki Kisen Kaisha, Ltd. V. Fashion Accessories Shippers Association, et al.

1. Reply of Kawasaki Kisen Kaisha, Ltd. to the Motion to Dismiss Respondents Sachs and Mayes
2. Four copies of the Reply of Kawasaki Kisen Kaisha, Ltd. to the Motion to Dismiss Respondents Sachs and Mayes for service on the parties
3. Enclosed is a copy of the reply which we request you to stamp "received" and return to us in the enclosed self addressed envelope.

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

Regards,


Victoria M. Olds
Secretary to John P. Meade

Enclosures

OS/ ac:GIC ALJ(2) Pub

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DEPT. OF JUSTICE
FEDERAL MARITIME COMMISSION

BEFORE THE FEDERAL MARITIME COMMISSION

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

REPLY OF KAWASAKI KISEN KAISHA, LTD
TO MOTION TO DISMISS RESPONDENTS SACHS AND MAYES

Kawasaki Kisen Kaisha, Ltd. ("K" Line) submits the following reply to the Motion to Dismiss ("Motion") filed on December 14, 2007 by respondents Sachs and Mayes ("Movants") and the Memorandum in Support filed therewith ("Memo"). In view of "K" Line's non-opposition to the dismissal of these persons from the Docket, we will not burden the ALJ with a full discussion of all errors of fact and law in the Motion and Memo, but our forbearance in no way signifies agreement with anything in those papers unless so stated herein.

Movants are correct in one particular: there is no issue of individual violation of the Shipping Act by Movants raised in the complaint, aside from their actions as executives of Fashion Accessories Shippers Association, Inc. ("FASA"). Nor is there any allegation in the

complaint of wrongdoing or impropriety of any kind by Movants as individuals outside of the Shipping Act implications of their actions in the course of their employment.

Movants are, however, incorrect in saying that the complaint requested no relief against Movants: Paragraphs H, I and J of the "Relief Requested" section seek relief against all respondents, which includes Movants. Movants are also incorrect that "K" Line participated in unlawful conduct and this somehow bears on the absence of a reparations request in the original complaint: "K" Line's unwillingness to participate in the non-competitive action of refusing to offer shippers lower rates than the FASA Contract rates is precisely what gave rise to the New York arbitration and, as facts came to light, to this Docket. FASA's determination to block shippers from negotiating lower rates, and to punish "K" Line for not participating in that conduct, engendered our questioning FASA's status as a non-profit shippers' association. FASA does not come across as a benign non-profit existing for the good of its members, but as a business dedicated to its own financial goals.

This is an administrative proceeding concerned with issues under the Shipping Act. To the extent conduct of Movants or other FASA employees, or of any other persons, is the subject of analysis herein, it will be in the process of dealing with those issues. Movants are correct that there is no statement in the complaint regarding Movants' personal conduct, as distinct from actions in the conduct of FASA affairs.

The three principal issues (all bearing on violation of 46 U.S.C. § 41102(a)) can be stated as follows:

1. The legality under the Act of the clause in Service Contract No. 15115 prohibiting “K” Line from contracting with “members” or “former members” of FASA, as implemented by FASA to preclude “K” Line from contracting with a “member” and “former member” at rates below the levels filed under the FASA Contract, No. 15115.

2. The legality under the Act of the clause in Contract No. 15115 requiring a payment to FASA for each container “K” Line carries under the Contract.

3. FASA’s right to enter into service contracts under the Act as a shippers’ association, in light of the way it is structured and operated.

One aspect of the third issue is the question whether FASA is “non-profit,” as required by the definition of “shippers’ association” in the Act. This might seem to be a matter of concern only to the Commission, but “K” Line is not just raising it as a kind of *qui tam* endeavor. “K” Line has been required to contribute thousands of dollars in royalties to FASA, and FASA now seeks to collect a six-figure arbitration award, mainly to punish “K” Line for giving a FASA “former member” a lower rate than the FASA contract rate. We suggest “K” Line has a right to raise this issue vigorously, free of threats of lawsuits by Movants.

It would seem that if FASA is being run as a business rather than for truly non-profit purposes, for this reason alone it has no right to damages for breach of a service contract filed as a shippers’ association service contract. Discovery will be required to dig out the facts as to FASA’s operations. The only available documentation consists in FASA’s IRS Forms 990, which raise questions but give no answers. Movants must possess information relevant to this issue, and we doubt any information they have as to disposition of FASA income is on sacred

ground . One reason for naming them as parties was to make discovery procedures as to parties applicable.

If individuals or entities are profiting from the large sums which go into FASA's coffers in a way that is not consonant with a non-profit operation, it would seem to be a truism that FASA is not entitled to contract as a non-profit shippers' association. Respecting Movants' professed sensibilities, we hasten to add there would be nothing reprehensible in such an operation, although it would have significance under the Act. Movants state they are not profiting personally from FASA, other than via their employee salaries, and "K" Line does not suggest that they are. Large sums flow into FASA's account and should be used only for FASA's non-profit purposes. If some persons or entities reap benefits personally from FASA's activities, that would undermine FASA's status as a non-profit.

On the other hand, even if there is no profit being reaped directly, funds may find their way into activities not strictly consistent with FASA's non-profit purposes. While we submit this would undercut FASA's status as a non-profit shipper's association under the Act, we do not suggest it would be in any way unlawful or untoward as to Movants. If this Docket brings forth guidance on the meaning of "non-profit," Movants would be free to make any adjustments to FASA operations appropriate for compliance, whether in the financial area or otherwise. Meanwhile, Movants, as FASA's managers, have the opportunity to explain FASA's non-profit activities and open FASA's books to shed light on the money flow, to support FASA's non-profit nature.

Movants were also named as respondents to make them personally subject to orders of the Commission, hence the application of certain requests for relief to all respondents. We find Movants' discomfort about "harassment" and "intimidation" a bit hard to take seriously. Movants, as FASA's managers, obviously instructed their New York attorneys to press the New York arbitrator to proceed to a penalty award against "K" Line despite the pendency of this Docket. This conduct belies any effects of "harassment" or "intimidation." In any case, filing a complaint with the Commission is hardly "harassment" or "intimidation."

At the arbitrator's request, "K" Line informed the arbitrator of the primacy of Commission orders over arbitration awards insofar as Shipping Act issues are concerned (See Memorandum to the arbitrator attached). Nevertheless, at FASA's urging, the arbitrator decided to proceed to award. In a conference call on the subject, the arbitrator acknowledged that going forward would require him to rule on Shipping Act issues as to the legality (hence enforceability) of Contract No. 15115, before the Commission rules on them. Movants show no effects of intimidation, as they push hard for an award against "K" Line for giving shippers rates below FASA contract rates. One aspect of the relief requested herein, drafted prior to the arbitrator's decision to steam full speed ahead, was for an order running against Movants as respondents to forestall the arbitration. This would have required their being parties hereto.

Presumably, if the arbitrator (an attorney) finds the exclusive dealing and royalty clauses lawful under the Shipping Act, and finds FASA to be operating as a true non-profit shippers' association under the Act, he will award FASA damages in the amount of "lost" royalties claimed (plus attorneys' fees which will likely dwarf the royalties). It is to be expected that

royalties and fees will only be awarded if FASA can prove that the shippers would have shipped under the higher FASA rates but for “K” Line’s contract with them. While this looks like a dubious proposition to prove, a six-figure arbitration award enforcing the exclusive dealing clause is a possibility. Accordingly, “K” Line is moving to amend its complaint to seek reparations, since an arbitrator’s decision may come down before any order is issued by the Commission.

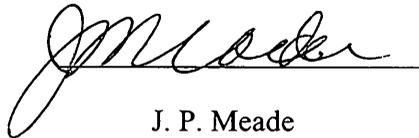
Movants have promised in the Motion that they “will be bound” by any Commission orders. This commitment affords some comfort to “K” Line, since it is not unheard of for individuals to ignore Commission orders.

The Commission has made clear that individuals, including corporate personnel, can be subject to liability under the Shipping Act. The Shipping Act applies to individuals, as well as to corporations and other entities. Section 41102(a) of the United States Code bars “a person” from knowingly obtaining transportation at less than applicable rates by false means, and “person” is defined as including individuals. 1 U.S.C. § 1. A colorful example is found in *Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt and Mary Anne Merritt - Submission of Materially False or Misleading Statements to the Federal Maritime Commission and False Representation of Common Carrier Vessel Operations*, 29 SRR 1408 (FMC 2003).

Since FASA is not subject to Commission control in the same way as a filed conference or rate agreement, and is not a voluntary association lacking a personality independent of its members, acquisition of personal jurisdiction over FASA management in this Docket supports

the effectiveness of any orders issued. However, while they refuse to defer to this Commission proceeding by delaying their arbitration , Movants do promise to obey any Commission orders which issue. We presume that cooperative attitude will carry over into non-party discovery. In view of this and the other considerations set out above, "K" Line will not oppose the relief sought in the Motion, dismissal of Movants from this Docket, without prejudice to subsequent action.

Respectfully submitted,



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January 7, 2008

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**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
AMERICAN ARBITRATION ASSOCIATION**

In the Matter of Arbitration Between:

Re: 50 125 T 00523 06

Fashion Accessories Shippers Association, Inc.
d/b/a Gemini Shippers Association
vs
K Line America as agent for Kawasaki Kisen Kaisha and
Kawasaki Kisen Kaisha, Ltd.

**MEMORANDUM OF LAW
ON BEHALF OF KAWASAKI KISEN KAISHA, LTD.**

I. Introduction

This is not a simple breach of contract case. The service contract involved is impressed with a public interest, derived from the congressional mandate that service contracts must be filed with the Federal Maritime Commission and overseen by the Federal Maritime Commission to protect the public interest.

All relevant authorities indicate this arbitration should be suspended in favor of Federal Maritime Commission resolution of the Shipping Act issues arising from the service contract that "K" Line entered into with "Gemini Shippers Association," a d/b/a of Fashion Accessories Shippers Association, Inc. This contract, FMC No. 15115, was filed with the Federal Maritime Commission as required by the Shipping Act of 1984, and is the subject of this arbitration.

The Arbitrator issued Preliminary Scheduling Order No. 2, directing that the parties file memoranda of law with respect to "the issue of the basis for suspending

proceedings pending the resolution of certain issues of illegality before the Federal Maritime Commission.” This memo is in response to that Order. “K” Line submits the arbitrator is required to defer to the Federal Maritime Commission on the issues raised in the “K” Line complaint, because a decision in “K” Line’s favor would nullify the contractual basis for this arbitration.

The Shipping Act issues are raised by Kawasaki Kisen Kaisha, Ltd. (“K” Line) in the attached Complaint (“K” Line Complaint”) before the Federal Maritime Commission (“FMC” or “Commission”) against Fashion Accessories Shippers Association, Inc. d/b/a Gemini Shippers Association (the complainants herein) (“FASA), Gemini Shippers Association, Inc.” and certain principals of the two. The “K” Line Complaint seeks an FMC determination that neither FASA nor any related entity was or is a lawful Shipping Act shippers' association eligible to enter into service contracts with ocean carriers such as “K” Line; that any such contracts between “K” Line and FASA/Gemini or their counterparts were not lawful Shipping Act service contracts; that specific terms of the contract at issue here (No. 15115) rendered it unlawful and that such terms should be held invalid and unenforceable; that the Gemini operation is a device to obtain unlawful discounted rates under the Shipping Act through the surreptitious use of service contracts; and that payments from “K” Line through an arbitration proceeding would constitute of unlawful rebates under the Shipping Act of 1984, as amended. (the “Shipping Act” or the “Act”). The only forum which can determine the legality of the contract and its terms under the Shipping Act, the eligibility of either corporate respondent or any related entity to enter into service contracts as Shipping Act shippers' associations and the legality under the Act of FASA’s demand for payments under the

arbitration is the FMC, the expert administrative agency designated by Congress to resolve issues arising under the Shipping Act of 1984, as amended. 46 U.S.C. 40101, *et seq.*

II. Argument

A. Arbitration Is Required to be Suspended in Favor of Adjudication by Federal Maritime Commission

An arbitral determination under service contract No. 15115 would not bring finality to the issues between “K” Line and FASA/Gemini and would foment continuing litigation. To avoid those consequences and to ensure this proceeding is in accord with the statutory and decisional authority vested in the FMC, this arbitration should be suspended. Authority has been reserved to the FMC to exercise priority of jurisdiction over arbitration provided for in agreements and contracts, such as service contracts, which are required to be filed at the FMC; and authority to reject the outcome of the arbitration has been reserved to the FMC as well. *Swift & Co. v. Federal Maritime Commission*, 306 F.2d 277, 282 (DC Cir. 1962) (“*Swift*”). Continuing this arbitration before the FMC ruling would defeat the objective of arbitration to facilitate resolution, since arbitration cannot negate the FMC’s obligation to determine the legality of contracts assigned to it, notwithstanding a prior arbitration proceeding on the same issues. *Id.* “K” Line’s Complaint before the FMC has placed before the FMC issues fundamental to the validity of this arbitration; Gemini, FASA and others are required to respond; and the FMC is required to adjudicate these issues. 46 U.S.C. § 41301(c). See, Attached “K” Line Complaint. In sum: Invalid service contract, invalid arbitration; Invalid exclusive dealing or royalty clause, nothing to arbitrate.

B. Case Law and Congressional Intent Dictate FMC Assertion of Authority Over Violations in Connection with Service Contracts

“K” Line’s position on the legitimacy of this arbitration and “K” Line’s claims in its Complaint at the FMC are that the FASA group and FASA’s officers have misrepresented the contracting party as a shippers’ association eligible to enter into a lawful service contract and that the contract and its implementation violate the Shipping Act prohibition that no person may obtain or attempt to obtain ocean transportation at less than the lawfully applicable charges by any unjust or unfair device or means. 46 U.S.C. § 41102 (a).

In a controlling FMC decision, *Cargo One Inc. v. COSCO Container Lines Company, Ltd.*, 28 SRR 1635 (FMC 2000); voluntarily dismissed 29 SRR 621 (ALJ 2002) (“*Cargo One*”) (Attached hereto), the FMC distinguished between service contract issues that Congress clearly intended to be within FMC authority to adjudicate and garden variety breach of service contract claims not reserved to the FMC. Only the latter are exclusively subject to judicial or arbitral determination. 46 U.S.C. § 40502(f) (formerly referred to as Section 8 (c) of the Shipping Act of 1984).¹ The FMC articulated in *Cargo One* that it is the intent of Congress to designate the FMC as “the proper forum for determining certain violations even when they arise from alleged breach of service contract terms. Otherwise, the right of any party to file a complaint seeking relief from such violations would be meaningless.” 28 SRR at 1644.

¹ **Sec. 40502. Service contracts**

(f) REMEDY FOR BREACH- Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

In situations involving Shipping Act prohibitions against unfair practices, the *Cargo One* decision reiterates the congressional intent that service contract claims involving such prohibited conduct “are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission.” 28 SRR at 1645. This interpretation, according to the FMC, is consistent with the statutory mandate to the FMC:

[W]e believe that Congress did not intend that the section 8(c) "exclusive remedy" language would nullify the . . . rights of complainants to bring suit on any matter tangentially or even substantially related to service contract obligations.

28 SRR at 1643. The FMC further said:

[We] find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action.

28 SRR at 1645.

Where Shipping Act issues involving a service contract, such as the contract’s validity under that Act, arise in connection with routine contract issues, the FMC has declared that the FMC is the forum to hear and determine the former. When a violation allegation raises issues beyond contract obligations, the presumption is that the issue is one for the FMC unless the facts prove otherwise. *Id.*

C. The Issues Herein are Shipping Act Legal Issues That Must Be Referred to the FMC for Resolution

1. An Arbitration Clause Cannot Defeat The FMC Primary Obligation to Protect Public Interest in FMC Filed Service Contract

The issues raised by the FASA attempt to enforce Contract No. 15115 in arbitration and set out in the “K” Line Complaint demand FMC resolution not merely

because they raise legal questions concerning the validity of the contract under the Shipping Act, but because these issues importantly implicate FMC authority over service contracts which owe their legal existence to a statute under which they must be filed with the FMC. *A/S Ivarans Rederi v. United States of America, et al.*, 938 F.2d 1365, 1367 (D.C. Cir. 1991) (“*Ivarans II*”). Service contracts with ocean common carriers, including shippers’ association service contracts, cannot lawfully exist except in compliance with the Shipping Act and FMC regulations thereunder.

It is the FMC’s obligation to ensure:

. . . that service contracts are used in a manner that complies with the Shipping Act and FMC regulations, so that it can be certain that the public and the shipping industry are protected. This interest outweighs the intentions of two private parties as set forth in the arbitration clause of their service contract.

Anchor Shipping Co. v. Aliança Navegação E Logística LTDA., 30 SRR 991, 999 (FMC 2006) (“*Anchor Shipping*”). In fulfilling this obligation, the FMC’s duty “to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act” overrides any arbitration clause in the contract. 30 SRR at 998.

In *Anchor Shipping*, the shipper initiated arbitration against an ocean carrier, claiming damages based on a service contract dispute. The shipper was awarded damages in the arbitration (\$381,880.59) which the carrier paid. 30 SRR at 992-993. The complainant then filed a complaint at the FMC against the ocean carrier, seeking reparations under the Shipping Act based on essentially the same facts and circumstances. The FMC overruled the presiding law judge’s dismissal of the complaint and remanded the case to the judge for further proceedings. *Anchor Shipping, supra*.

A prior arbitral determination therefore would not preclude FMC authority to adjudicate or re-adjudicate issues arising out of the arbitration where the FMC’s

obligation to exercise its statutory duties is necessitated. 30 SRR at 999. Moreover, the FMC will assert its statutory decisional authority even when “alleged Shipping Act violations are intertwined with breach of contract issues.” *Id.* The FMC’s authority to review an arbitration award in connection with Shipping Act service contract issues is paramount; otherwise, “parties, through arbitration could eviscerate the filing requirements that Congress considered necessary for the public interest [46 U.S.C. § 40502(b)(1) for service contracts].” *A/S Ivarans Rederi v. United States of America, et al.*, 895 F.2d 1441, 1446 (D.C. Cir. 1990) (“*Ivarans I*” case). Thus, an arbitration taken to finality has no more weight as to Shipping Act issues than a pending arbitration.

2. Long Line of Court and FMC Cases Holds that Service Contract Arbitration Cannot Divest FMC of Primary Authority Over Service Contracts and Related Allegations of Shipping Act Violations

FMC and court decisions dictate that the content of service contracts and the parties’ conduct under these contracts are subject to FMC primary regulation, notwithstanding an arbitration clause. The recently decided *Anchor Shipping* FMC case, discussed above, affirms the FMC’s mandate to assert primary authority over service contracts. *Anchor Shipping* cited FMC and court cases equating such authority with that delegated to the FMC in connection with other types of contracts or agreements statutorily required to be filed with the FMC and subject to FMC jurisdiction, i.e., carrier agreements and dual rate contracts. 30 SRR at 997 and 998, f.n. 7. The *Anchor Shipping* decision also cited *Duke Power Co. v. Federal Energy Regulatory Commission*, 864 F.2d 823 (D.C. Cir. 1989) (“*Duke Power*”) for the proposition “that a mandatory arbitration clause does not negate a Federal agency’s independent duty.” 30 SRR at 997.

In the *Swift* D.C. Circuit decision, cited by *Anchor Shipping*, the court dealt with dual-rate contracts (now defunct), the conceptual predecessors of service contracts. Both types of contracts were designed to incorporate rate terms more favorable to the shipper than those provided by the ocean carriers to shippers not having such contracts; and both were required to be filed with the FMC subject to statutory and regulatory requirements that the FMC enforced. The court in *Swift* said that “[n]o private arbitration could negate the Board’s [the FMC’s predecessor] statutory power to determine the validity of the dual-rate agreement” since the “Board’s function is to interpret and rule on the legality of the agreement’s language and effect in light of the public interest.” 306 F.2d at 282. ²

In *Ivarans I*, a 1990 D.C. Circuit decision relied upon in the *Anchor Shipping* decision, the FMC was concerned with an agreement among ocean carriers to participate in a revenue pooling agreement required to be filed with the FMC. The court held that the FMC had authority to review an arbitration award arising from the agreement’s arbitration clause. Otherwise, reasoned the court, the parties through arbitration could eliminate the filing requirements mandated by Congress as essential to the public interest. 895 F.2d 1446.

² See, also, other dual rate cases involving FMC assertion of authority notwithstanding arbitration clauses: *Gulf & South Atlantic Havana Conference*, 1 SRR 265, 272 (FMC 1961), which held that arbitration cannot limit the FMC’s authority under the Shipping Act to exert “independent responsibility to determine the scope of agreements. . .”; *Parsons and Whittemore, Inc. v. Johnson Line*, 3 SRR 505, 514 (FMC 1964), in which the FMC, relying on *Swift*, said it was not necessary to submit a contract dispute to arbitration before consideration of the issues by the FMC and that regardless of a contractual obligation to submit a dispute to arbitration before seeking other recourse, “the arbitration clause could not oust the Commission of jurisdiction”; and *The Dual Rate Cases*, 5 SRR 164, 165 and 166 (FMC 1964), in which the FMC held that a contract pursuant to arbitration terms cannot relieve the FMC of its responsibilities under the Shipping Act, especially where there are “substantial questions of Shipping Act violations. . .” and that the FMC may overturn an arbitration decision that does not conform with the Shipping Act.

In *Duke Power*, also relied on by the FMC in *Anchor Shipping*, the court said that the Federal Energy Regulatory Commission had a public responsibility to enforce a utility's commitments, especially where violations have a serious impact on the public interest. The presence of an arbitration clause in certain industry agreements did not nullify FERC's authority over disputes at issue; the court accepted FERC's recognition "that a two-step procedure [arbitration and then FERC adjudication] would add needless cost and delay to the proceeding, given that it would not necessarily be constrained by any decision rendered by arbitration." 864 F.2d at 829 and 830.

D. Federal Maritime Commission Retains Primary Authority to Resolve Legal Issues Concerning the Validity of Service Contracts

1. Shipping Act Service Contracts Must Satisfy Definitional Requirements

Enforceability of the contract between "K" Line and FASA/Gemini depends on whether, under the Shipping Act and FMC regulations, it is a lawful service contract between eligible contract parties. The statutory definition of a Shipping Act service contract³ requires that on one side there must be an ocean common carrier or agreement, which is not in dispute as to "K" Line; and on the other side must be one or more shippers⁴, which is in significant dispute as to FASA/Gemini. "The term '**shippers**'

³ The term '**service contract**' means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which--

- (A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and
- (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. 46 U.S.C. § 40102(20).

⁴ The term '**shipper**' means--

association' means a group of shippers that consolidates or distributes freight on a **nonprofit basis** for the **members** of the group to obtain carload, truckload, or other volume rates or service contracts." 46 U.S.C. § 40102(23). (Emphasis supplied.)

"K" Line's position is that FASA/Gemini does not actually operate on a nonprofit basis and that FASA/Gemini does not have members, which is detailed fully in the attached "K" Line Complaint.⁵ FASA/Gemini thus fails to meet the definitional requirements to qualify as a shippers' association under the Shipping Act; Contract No. 15115 is not a contract between an ocean carrier and an eligible shipper; thus the contract falls outside the Shipping Act definition of a service contract. It is therefore unenforceable in all respects.

2. The Federal Maritime Commission Is The Required Forum To Determine That FASA Is Not A Lawful Shippers' Association, Particularly When Allegations of Shipping Act Violations Are Implicated

Serious Shipping Act issues are raised by "K" Line's allegation that FASA fails to meet the statutory definition of "shippers' association" and therefore fails to qualify as a shippers' association statutorily permitted to enter into service contracts in order to enjoy discounted rates. A lawful Shipping Act service contract has not been executed and

-
- '(A) a cargo owner;
 - '(B) the person for whose account the ocean transportation of cargo is provided;
 - (C) the person to whom delivery is to be made;
 - (D) **a shippers' association**; or
 - (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract. 46 U.S.C. § 40102(23).

⁵ ¶¶ III.A.3; III.B.15 and 16; IV.A.2 and 7, "K" Line Complaint.

implemented between FASA/Gemini and “K” Line because neither association qualifies as “non-profit” and neither association has “members” -- required elements of a shippers' association.

The “K” Line Complaint alleges that FASA/Gemini, the contracting party, is not a legitimate shippers' association and was formed as an unfair device for the purpose of obtaining transportation at less than the applicable rates (rebates) in violation of the Shipping Act, 46 U.S.C. § 41102 (a). FASA/Gemini is using the arbitration to enforce an unlawful device to interfere with Gemini current “members” and former “members” entering into service contracts with “K” Line directly, and demanding damages from “K” Line under the contract “royalty clause.” This is an attempt by FASA, by an unjust or unfair device, to impose penalties on “K” Line based on unlawful service contract provisions payment of such royalties and/or penalties by “K” Line would result in FASA and possibly its “members” receiving an unlawful rebate in violation of the Shipping Act, 46 U.S.C. § 41102 (a). Further, by means of the exclusive dealing clause and the arbitration clause in Contract No. 15115, Gemini is trying to force “K” Line to refuse to deal with shippers who are current “members” of the association and with shippers who were former “members” of the association and who have no present contractual relationship with the association or with “K” Line, based on arbitrary and unclear terms in Contract No. 15115, in violation of FMC regulations set forth at 46 CFR § 530.8(b) and (c)(1) and (2).⁶

3. FMC and Court Decisions Dictate that FMC Adjudication Take Precedence Over Arbitration in Determining the Validity of Shipping Act Service Contracts

⁶ ¶¶ III.B.10; IV.E and F, “K” Line Complaint.

The FMC has held that a decision concerning a required element of a service contract can have ramifications beyond the contract immediately at issue, requiring the FMC to decide the issue. *Western Overseas Trade and Development Corp. v. Asia North America Eastbound Rate Agreement*, 26 SRR 874 (FMC 1993). See, also, *Universal Fixture Manufacturing Co., Inc. v. Asia North America Eastbound Rate Agreement*, 26 SRR 1046 (FMC 1993), in which the FMC, relying on *Western Overseas*, stated that the FMC is charged with the authority to determine whether a service contract under review was a valid service contract under the Shipping Act and, notwithstanding the service contract's arbitration clause, such a determination should be made by the FMC and not the arbitrator. 26 SRR at 1050.

Conversely, the FMC determined that an FMC proceeding concerning the validity of a contract should not be stayed in order to permit an arbitration to go forward on that issue. The FMC, citing *Swift*, held that because the arbitration decision could not be conclusive on the issue of the contract's validity, a stay pending arbitration would serve no purpose except to delay a decision by the FMC, the forum statutorily assigned the task of ruling on the contract's validity. *U.S. Borax & Chemical Corp. v. Pacific Coast European Conference, et al.*, 10 SRR 75, 86 (FMC 1968).

The D.C. Circuit in *Ivarans II* ruled on an appeal by an ocean carrier concerning an FMC decision approving certain agreement clauses. The FMC had ignored the arbitration clause in the agreement and interpreted the agreement language. In upholding the FMC's actions, the court held that a shipping contract owes its legal existence to the statute under which it was filed, that the FMC always has jurisdiction to hear complaints

about that agreement and that the court must defer to the FMC's reasonable construction of the terms of such a filed agreement. 938 F.2d at 1368-1369.

4. Federal Maritime Commission Determination of Whether a Service Contract Meets the Requirements for Certainty and Clarity Is a Matter of Law To Be Decided by the FMC

The "K" Line Complaint⁷ alleges that the FASA/Gemini/"K" Line service contract exclusive dealing clause at issue in this arbitration is ambiguous, unclear and incomplete in violation of Commission regulations requiring that every filed service contract "include the complete terms of the service contract" and that such terms may not

- (1) Be uncertain, vague or ambiguous; or
- (2) Make reference to terms not explicitly contained in the service contract itself unless those terms are contained in a publication widely available to the public and well known within the industry.

46 CFR § 530.8 (b) and (c)(1) and (2).

The FMC has underscored the importance that exact contract terms "must be determinable and certain, in keeping with the requirements of the Act." *Service Contracts Subject to the Shipping Act of 1984*, 28 SRR at 708. There is precedent for the FMC to find that an entire contract is unlawful when a provision of a service contract is found to be in violation of the Shipping Act. *U.S. Borax & Chemical Corp. v. Pacific Coast European Conference et al.*, 10 SRR 75, 87 and fn. 13 (FMC 1968).

In another proceeding, the FMC concluded that an "opt out" clause contained in a service contract deprived the contract of rate terms that were certain and clear enough to be understood by all the parties to the contract. *Anera and Its Members – Opting Out of Service Contracts*, 28 SRR 1215 (FMC 1999). In particular, the FMC noted that service

⁷ ¶¶ III.A.4; III.B.9, "K" Line Complaint.

contracts are not ordinary contracts, being “subject to certain statutory requirements as to their content and the relationships established between the parties. . . .” (28 SRR at 1224):

“[T]he question of whether ANERA’s opt out provision comports with the requirements of the statute and regulations for certainty and clarity is a question of law. Whether contract terms are ambiguous is generally considered a question of law.”

28 SRR at 1229.

It is clear that the issue of ambiguity and completeness in a service contract goes to the validity of the service contract and is an issue Congress has expressly reserved for resolution by the FMC.

III. Conclusion

An arbitral determination on the issue as to the legality of the service contract cannot and would not bring finality to those issues. Statutory and judicial authority reserves to the FMC priority over arbitration provided for in Shipping Act service contracts, and authority to reject the outcome of an arbitration has been reserved to the FMC. The various issues as to this service contract’s legality, are all within the primary jurisdiction of the FMC to decide. Where these legal issues are intermingled with factual issues, the decisional authority remains with the FMC.

Accordingly, FMC authority overrides arbitration jurisdiction. The arbitration clause in the service contract is subservient to the authority of the FMC to hear and determine issues relating to the validity or legality of service contracts under the Shipping Act and the eligibility of parties to enter into such service contracts. This conclusion derives from the statutory terms governing the parties, their activities and the subject

matter of this arbitration, and from FMC and court case law stating and restating that the FMC is the proper forum to entertain and decide these matters.

October 31, 2007

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Kawasaki Kisen Kaisha, Ltd.

BEFORE THE FEDERAL MARITIME COMMISSION

_____)	
KAWASAKI KISEN KAISHA, LTD.,)	
)	
Complainant,)	
v.)	
)	
FASHION ACCESSORIES SHIPPERS)	Docket No. 07-10
ASSOCIATION, INC., GEMINI SHIPPERS)	
ASSOCIATION, INC., SARA MAYES, AND)	
HAROLD SACHS)	
)	
Respondents)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2008 a copy of the foregoing Motion of Kawasaki Kisen Kaisha, Ltd. for Leave to Amend Complaint was served on the following by email and United States mail.



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