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## **I. INTRODUCTION**

Complainant “K” Line appeals from the ALJ’s dismissal of its complaint in this Docket by Order of February 5, 2014, and requests the Commission to issue findings and conclusions of law on the undisputed facts, which the ALJ sidestepped, blaming unfulfilled discovery orders. The ALJ ordered unchecked “discovery.”<sup>1</sup> This dismissal was ostensibly the product of that and the ALJ’s insistence on an evidentiary hearing. Underlying the dismissal, however were fundamentally different views of 46 U.S.C. § 41102(c); the present truncated state of this case is bound up with the obligation of an ALJ to make findings in a case without pointless exercises in discovery or an evidentiary hearing, when the facts are undisputed and the ALJ has actually decided the major legal issue against Complainant. Although the ALJ blocked simplification of the complaint, the remaining Complainant, “K” Line, continues to seek a declaration that the Respondent Port violates 46 U.S.C. § 41102(c) in forcing “K” Line, on pain of effective expulsion from the Port, to pay a “cargo facility charge,” a port user fee, (“CFC”) for every container or cargo unit transiting leased or public terminal facilities in Respondent’s port area. Several other decision-ripe issues were ignored by the ALJ.

The main issue is of great significance to Commission policy. The ALJ’s purported basis for dismissal, discovery default, is a red herring. Long ago there ceased to be any material issues of fact warranting discovery or a hearing. Nevertheless, the ALJ decreed wide-open discovery and an evidentiary hearing. The dismissal focused on scheduling orders, while serious issues have been teed up for decision since December, 2012. The ALJ actually decided against “K” Line on the overriding Shipping Act issue, but declines to subject that decision to Commission review.

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<sup>1</sup> The ALJ accepted Respondent’s fallacious discovery philosophy: “We are entitled to discovery to put on the best case we can,” although there are no disputed facts.

This overriding Shipping Act issue, whether a marine terminal operator (“MTO”) violates section 41102(c) (former section 17) by forcing vessel operator payment of a flat charge per container or cargo unit transiting the Port, puts in play the Commission’s historic position that MTO charges to vessels operators can only be “user charges” for which an identified, measurable service must be rendered to that operator. A fee to use the Port has never been countenanced. The concomitant rule that such charges must be reasonably related to the service rendered is not in play, since no service is rendered in return for the CFC payments. “K” Line will not argue about the value of a bundle of ambient “benefits” available to Port users, because they are not acceptable substitutes for quid pro quo services under section 41102(c). “K” Line argues the CFC is just a tax on vessel operations.

Respondent did not articulate any defense but interposed a legal theory supporting discovery by semantic legerdemain, claiming that a basket of “benefits” smoothing the way for vessel operators (among the many other classes of Port beneficiaries) is the same as “services” which can support this charge on vessel operations. The ALJ, by giving no credit for the massive discovery furnished by Complainants, and blessing unlimited far-fetched Port discovery, let the Port make defendants out of Complainants. The Port was allowed to make Complainants, not the legality of the CFC, the whole subject of the Docket. The Port could not and did not defend the CFC in its “Corrected Answer” or at any other point in the years this has dragged on. Its only defense is grasping for endless discovery. The Port won the battle without ever firing a substantive shot, while “K” Line carried its burden of proof with undisputed facts and undisputed precedent, and is entitled to judgment.

The Port pulled this off by convincing the ALJ of the bogus proposition that “services” and “benefits” are synonymous under the precedents, that every disagreement about perceptions, opinion, or the law is a factual dispute and that the ALJ has the power to demand immaterial

discovery and evidentiary hearing without disputed facts. The ALJ created a novel definition of “fact”, whereunder any cat fight qualifies its subject as a “fact,” and a novel theory that guts section 41102(c). The overwhelming case presented by “K” Line was cast aside in favor of trumped-up pleas for “more” discovery, accompanied with the “Big Lie” that there are “hotly disputed” facts. The case cries out for a Commission de novo decision, in accord with Rule 56, FRCP. See *McKenna Trucking Co., Inc. v. A.P. Moller Maersk*, 27 S.R.R 1045, 1050-60 (June 23, 1997(Kline, ALJ))(discussing summary judgment and dismissal).

## **II. HISTORY**

The history of this Docket is one of obfuscation, the Port’s refusal to join issue, and denial of hearing and findings on “K” Line’s final case. After massive Complainant discovery responses, a merits decision was withheld on “discovery” grounds despite Complainants’ refusal to dispute facts. Ignoring “K” Line’s and other Complainants’ cooperation in extensive discovery of useless information, the ALJ stood still for transparently frivolous discovery tactics.

On August 5, 2011, nine (9) vessel operators filed a Complaint asking for a declaratory order that Respondent Port’s collection of its “Cargo Facility Charge” violates 46 U.S.C. §§ 41106(2) and 41102(c), the former sections 16 First and 17 of the Shipping Act of 1984. Eight Complainant carriers operate only container ships at private terminals in the Port. “K” Line also operates ro/ros handling wheeled cargoes at public Port facilities.

On March 14, 2011, the Port had published in section H of its FMC Schedule No. PA 10 a “fee” of \$4.95 per container twenty-foot equivalent and \$1.11 per non - containerized cargo unit passing through the Port. Section H lists no service of any kind in exchange for payment of the CFC. The Port initially struck the cosmetic pose that the CFC was to support three things: 1. Its off-dock “Express Rail” intermodal facility; 2. Port infrastructure; 3. Security. The CFC is

not linked to a vessel operator's use of any of those three nor are CFC collections channeled to supporting them, but the latter point is in no way necessary to decision.

Interrogatories and document production requests were exchanged. Scores of thousands of pages of documents were produced. No argument, status conference, or other meeting with the ALJ was ever held. The Port has not used the material it discovered to defend the CFC. "K" Line turned over boxes of documents along with the other complainants (including useless "metadata"). "K" Line responded to all the Port's document demands except a few of its most outrageous, including deposition demands; this was all laid out in detail for the ALJ, to no avail. The Port claimed to need a primary education in the ocean carrier business, by intruding on confidential contracts and interviewing affiliated third party logistics providers to analyze "benefits." Obviously, everyone who uses the Port directly or indirectly benefits from the roads, reduced truck traffic and police protection. The Shipping Act, in tune with the Tonnage Statute and the Constitution, forbid singling out the vessel operators to pay the Port for providing those "benefits."

All Complainants but "K" Line ultimately dropped out, the last three citing the imposition of frivolous discovery demands. "K" Line fights on, not only to preserve the Commission's right to prohibit this Port's taxation of vessel operators, but to prevent a precedent for vessel taxation by MTOs across the land.<sup>2</sup> As "K" Line pointed out to the ALJ, the Shipping Act issue is freighted with public policy considerations.

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<sup>2</sup> While state port authorities have immunity, that immunity does not protect them against the Commission itself acting to strike down vessel taxes like the CFC.

Complainants had made several dispositive motions, but the ALJ never made findings on any factual or legal issue. The ALJ plainly rejected “K” Line’s primary argument in roundabout fashion, but did not dignify other issues by discussion.<sup>3</sup> They were left to die on the vine.

After document production, Complainants still in the game moved to amend the Complaint by simplification, and by focusing it solely on violations of section 41102(c), “unreasonable practices.” Amazingly, the Port fought simplification. Just as amazingly, the ALJ denied the motion but Complainants had already abandoned as unnecessary the section 41106 allegation, leaving only the section 41102(c) violations. It did not matter, since the ALJ had no intention of disposing of the remaining issues. Since the ALJ would not issue a decision on the main legal issue, Complainants tried unsuccessfully to get the case to the Commission in July, 2012.

“K” Line repeatedly showed in full detail that there were no factual disputes, that all the facts on which its case turns are undisputed. The ALJ nevertheless accepted the Port’s position of entitlement to production of confidential service contracts and interrogation of corporate family members because the Port has the right to put on any show it desires. The ALJ decreed that a full hearing must go on to decide “hotly disputed” facts that do not exist. The ALJ ignored “K” Line’s refusal to dispute any *facts*, including the irrelevant level of Port “benefits” to all and sundry. The ALJ miscast “K” Line’s position to the end.

“K” Line filed multiple motions with the ALJ, irrefutably proving, point-by-point, that there were no factual disputes and no material facts in existence left to discover. The only discovery demands which “K” Line refused were for production of vendor contracts, 1152 customer service contracts and pointless depositions, including of its affiliates who are logistics

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<sup>3</sup> The ALJ did issue something on Complainants’ “Motion for Partial Summary Judgment,” holding without analysis that the meaning of words in Section H raised a factual dispute and calling for briefing at some later time. Order, served February 5, 2014, at 3.

providers. The ALJ never credited “K” Line’s agreement to extensive Port discovery demands, nor ever recognized that an earlier Order had apparently vindicated “K” Line’s discovery objections. The ALJ adopted blindly and without supporting reference, the Port’s absurd claim to imaginary “hotly disputed” facts – the “Big Lie.”

This is a simple case under the Act: Since there is no quid pro quo for the CFC, and no other category of Port user is charged, the CFC is per se unreasonable under Section 41102(c). “K” Line does not challenge the level of “benefits” derived by it, its affiliates, or anyone else, from Port facilities or ongoing Port services. The value of the “benefits” to the “K” Line corporate family or to its customers is not contested because it is irrelevant. No “benefits” can substitute for the exchange of a fee for a service, which has always been required by Commission and Court precedents. A simple “yes or no” and the fundamental issue in the case is decided. If the answer were to be “no,”<sup>4</sup> then the CFC’s orphan status under the Act would arise, as would various obvious infirmities in the Schedule which render it unlawful.<sup>5</sup>

To concede that “benefits” have anything to do with the lawfulness of the CFC would be to concede the case. To concede that “K” Line’s third party logistics affiliates’ and customers’ “benefits” from the Port’s ongoing operations is material would be to surrender on the question whether the value of “benefits” is related to the primary issue in this case – it would be an admission that fewer traffic jams and fewer cargo thefts can justify a charge on vessel operations under section 41102(c). “K” Line would happily stipulate that the “benefits” are enjoyed, just not that they are relevant.

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<sup>4</sup> Sound reasons are required for such a change in position in overturning uniform precedents.

<sup>5</sup> These are listed at pages 13-17 of Attachment A (Motion for Judgment That Respondent’s Cargo Facilities Charge Violates 46 U.S.C. § 41102(c)).

The amount of the CFC is not an issue under the Act, and the CFC is not even authorized by the MTO provisions in the Act. It is, however, clearly within the Commission’s jurisdiction to judge the reasonableness of an MTO imposing a non-user charge on vessel operators, particularly one enforced by the threat of termination of services by terminal tenants of the Port.<sup>6</sup>

The CFC is a bold bid for deregulation – a move to break free of the decades-old section 17 limit of reasonableness on user charges to vessel operators. Measuring “reasonableness” of a flat charge like the CFC is a chimera, utterly lacking in substance.

“K” Line submits the Commission should act as the decision-maker of first instance, as it did in the *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 SRR 1134 (FMC 1997) case, and on an issue ignored by the ALJ in *McKenna Trucking Co., Inc. v. A.P. Moller Maersk*, 27 S.R.R 1045, June 23, 1997. The ALJ here would not make findings formalizing the affirmative rejection of “K” Line’s legal position on the main issue or the rejection (by neglect) of the issues presented by Schedule PA-10 on its face. The ALJ did not make reviewable findings to support the “discovery” dismissal.

### **III. THE PRESENTATION TO THE ALJ ON DISCOVERY AND THE MERITS**

Excerpting core arguments here will fill the vacuum left by the ALJ’s Dismissal Order. The Commission would get no sense of this case from reading that Order, but this recap should present a clear picture of the “K” Line case on the main issue.

#### **A. The “CARGO FACILITY CHARGE”– A Tax on Vessel Operators**

Herein is the “Cargo Facility Charge” – the “CFC.”

#### SECTION H

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<sup>6</sup> Maher Terminals defends against a complaint for anticipatory breach in New Jersey based on the Port’s authority to compel it to terminate services to “K” Line for CFC non-payment. *Kawasaki Kisen Kaisha, Ltd., et al. v. Maher Terminals LLC*, Civil Action No. 2:2012-CV-06178 (U.S.D.C. N.J.).

## THE CARGO FACILITY CHARGE

SUBRULE 34-1200 ISSUED 1 JANUARY 2011 EFFECTIVE 14 MARCH 2011  
CARGO FACILITY CHARGE – DEFINITION OF CARGO SUBJECT TO FEE  
This fee shall apply to all cargo containers, vehicles and bulk cargo, break-bulk cargo, vessels at Port Authority leased and public berths.

SUBRULE 31-1210 ISSUED 1 JANUARY 2011 EFFECTIVE 14 MARCH 2011  
CARGO FACILITY CHARGE – RATES

Container cargo	\$4.95 per TEU*
Vehicles	\$1.11 per unit/vehicle
Bulk cargo, break-bulk cargo, general cargo, heavy-lift cargo and other special cargo	\$0.13 per metric ton

\*Any containers larger than forty-feet shall be considered to be the equivalent of two TEUs.

Section H confused “Rules and Regulations” and “Rates and Charges.” (The latter it says apply only at public areas, but it is imposed by “Rules and Regulations”).

Port minutes had drawn a picture of three imaginary components of the CFC, including recovery of “capital expenditures incurred to construct our Express Rail infrastructure;” something about the CFC being “charged proportionately to recover the cost of important Port roadway projects;” and charging “proportionately for the partial recovery of the Port Authority’s incremental post-9-11 security costs.” (Port Board of Directors Minutes, at 356-57, *cited in* Motion for Implementation of ALJ’s Rulings, at 2). Bosh: The Port admitted in discovery “that Carrier CFC payments ‘are not earmarked for particular expenditures’” (Port’s Objection and Responses to Complainants’ First Request for Production of Documents, Responses Nos. 52 & 56, at 36-37, *quoted in* Motion for Implementation, at 2 n.1).

### **B. Complainants’ Partial Summary Judgment Motion on Empty Container Fees.**

Complainants’ first request for decision of a legal issue was filed on January 11, 2012. Complainants’ Motion for Partial Summary Judgment. It argued the CFC does not apply to

empty containers, by the very terms of Section H. Over two years later, the ALJ ruled that the meaning of the words in the Rate Schedule is a “factual dispute.” (Order served February 5, 2014, at 3.)

**C. “K” Line’s Supplemental Reply in March, 2012 Atomized the Foundation for Respondent’s Discovery Fishing Expedition.**

Complainants produced boxes of documents, even spinning their wheels on “Metadata” production, but drew the line at overblown, immaterial “discovery” demands. “K” Line’s Supplemental Reply to a Port Motion to Compel Discovery (March 14, 2012), showed the Port was vastly overreaching in its discovery demands:

The Motion’s fundamental flaw, aside from its prolixity, is in not presenting a coherent basis for Respondent’s right to the categories of documents requested. All Respondent offers is high-flown theory with nothing specific to evidence relevant to issues in this Docket....

**STANDARD FOR DISCOVERY**

Judge Oberdorfer made the following statement in *Hoai v. Sun Refining & Marketing Co.* (199 WL 16766, D.D.C. 1991), “Discovery requests must, therefore, be ‘reasonably calculated to lead to the discovery of admissible evidence.’ *Id.* ‘[M]atters entirely without bearing either as direct evidence or as leads to evidence’ are not relevant and, thus, not discoverable. Advisory Committee Notes to Subdivision (b), 1946 Amendment to the Federal Rules of civil Procedure...”

Magistrate Judge Facciola ruled as follows in *Peskoff v. Faber* (230 F.R.D. 25, 2005, D.D.C. 2005, at 2-4)

It bears emphasis that a party is only entitled to discovery of information relevant to the claims or defenses asserted in the case. Fed.R.Civ.P. 26(b)(1)

The application of Rule 9(b) to discovery requires the Court to assess the relevance of the information sought in light of particularized claims, rather than general assertions. Therefore, to order the production of the defendant’s personal bank records, the Court would have to find a connection between the defendant’s accounts and specific allegations in the plaintiff’s complaint. On this record, the Court fails to find such a connection.

\* \* \*

There is nothing in Respondent's Motion but flossy generalities like 'ascertaining benefits' of imaginary projects with no link to the CFC. The issues in this case are lost in the fog. The ream of discovery issues Respondent's Motion raises should be secondary to an evaluation of Respondent's rights to this panoply of data.

"K" Line's Supplemental Reply went on to review its discovery posture:

"K" Line has produced documents in response to specific requests covered by Respondent's Motion, excepting the following numbered requests:

3. 'All documents relating to any agreements, contracts, vessel sharing agreements, or service agreements entered into, proposed, discussed, or negotiated between any Complainant and any customer, ocean carrier, rail carrier, trucker, port authority, or marine or container terminal operator from 2009 to the present.' One can only wonder what possible utility these documents could have relative to Section 41102(c).

Respondent's attempts to justify its demand for this far-ranging collection of agreements with virtually any person with whom "K" Line deals commercially in service from/to the Port are appended hereto (taken from pages 8, 19, 31, 32 and 44 of the Motion). They do not begin to justify this request.

Respondent has no need whatsoever for these documents in connection with the issues in this Docket. There is no relationship between the issues and all these commercial contracts, nor has Respondent seriously attempted to show such a relationship. This document request is a classic example of the contemporary practice of using the discovery process as a tool to make litigation intrusive, burdensome and expensive so as to frustrate the process of resolving the issues. We submit this should not become the practice in Commission cases.

6. 'All documents relating to any communications between any Complainant and any rail carrier relating to the utilization or potential utilization of such carrier from 2004 to the present.'

Again, no attempt to tie this request to issues in this case. Respondent says the request 'seek[s] critical facts in Complainant's allegations.' Respondent shows no link between this request and any discoverable facts or potential facts. It cannot be imagined how every communication between "K" Line and any railroad since 2004 could bear on this case. Respondent should be required to show its cards, if any, or stop wasting the time of the Presiding Officer and the Complainants.

22. 'All documents sufficient to show by month, and separately for each Complainant, the payment for trucking containers to or from the container terminals at the Port of New York or New Jersey during the effectiveness of the

current or earlier effective versions of the Tariff, for the period January 1, 2004 through the present.’

Seven years of trucking records because Respondent wants to argue ‘that the CFC’s funding of rail, roadway, and security infrastructure benefits all users’ (Motion at 31)?

Respondent claims it ‘needs a thorough understanding of Complaints’ costs associated with shipping goods both by rail and by truck, including how those costs have changed over time.’ (*Id.* at 32). Respondent cannot possibly explain how all this “K” Line business information has anything to do with the relationship between the CFC and any benefit received by “K” Line as a result of the CFC. In fact, “K” Line has derived no benefit whatsoever as a result of “K” Line’s CFC payments. We challenge Respondent to point to one iota of benefit to “K” Line from its CFC payments. If Respondent doesn’t know, then who does know? Allowing Respondent to dig into “K” Line’s historic costs will not afford the remotest hint as to whether there has been (or may be in the future) any benefit to “K” Line out of CFC payments.

25. ‘All communications between any Complainant and any former, potential, or actual customer, ocean carrier, rail carrier, trucker, port authority, or marine or container terminal operator relating to the CFC from 2009 to present.’

“K” Line’s communications cannot possibly bear on the benefit to “K” Line from the CFC. “K” Line has no well-kept, secret knowledge of benefit bestowed on it by Respondent.

26. ‘All documents relating to any Complainant’s ability to transfer, whether directly or indirectly and whether expressly or impliedly, any costs associated with the CFC, the Rail Fee, or the Truck Fee to any entity besides the Complainant, including but not limited to any former, potential or actual customer from 2004 to the present.’ If Respondent thinks this is a defense, it has offered no authority for that proposition. It is fantasy with no place in this case.

27. ‘Any agreements, contracts, vessel sharing agreements, or service agreements in effect between any Complainant and any customer, ocean carrier, rail carrier, trucker, port authority, or marine or container terminal operator from 2009 to the present.’

For Respondent to have the right to probe into “K” Line’s business in a case where the legality of [R]espondent’s charge is the only issue, we suggest that Respondent should be put to an objective test of showing the information is relevant or likely to lead to relevant evidence, not just a cavalier gesture in that direction. Respondent obviously assumes it has no such burden, but is free to roam unfettered through “K” Line’s business affairs.

There have been discussions of limiting or narrowing certain document requests, but they do not alter the fundamental flaw in Respondent's position.

"K" Line submits the Presiding Officer should rule that Respondent's vague and superficial arguments supporting its document requests are insufficient and deny Respondent's Motion.

"K" Line's Supplemental Reply to Motion to Compel Discovery (March 14, 2012), at 1-7.

The ALJ never discussed any of these points. The Port's discovery philosophy is whatever the Port wants, the Port gets, and the ALJ agrees. That is not the law.

**D. Another "K" Line Reply Displayed the Port's Mindless Appetite for Irrelevant Materials.**

A "K" Line Supplemental Reply to a Port Motion for Leave to Reply (April 12, 2012) pointed out the absence of any coherent Port defense by which discovery demands could be measured and showcased the Port's discovery frivolity:

What Respondent should be doing is amending its answer (defenses are attached) to state coherent defenses to serve as foundations for its discovery. So far there are none. ("K" Line Supplemental Reply at 1-2).

\* \* \*

Leading up to the acknowledgement that requested documents must be relevant, Respondent's counsel advised [in a discovery meeting] that No. 3 was aimed at 'any agreement to provide services' to the carrier. *Id.* at 104, 105. Complainants' counsel took the position 'that's much too broad.' *Id.* at 106. Respondent's counsel then replied 'we are trying to understand your business,' and 'I am trying to get a sense of what the heck the company does, who it does business with, who it has contracts with for all various things.' *Id.* at 106-108. Then, Respondent's Counsel made the rather astounding statement that 'I have never heard of most of these carriers.' *Id.* at 108. These are eight of the fifteen largest container carriers in the U.S. foreign trade. ("K" Line Supplemental Reply at 2-3).

Complainants' counsel suggested: 'If you could check into this with your port, your client, see if you could be a little more precise, this would be helpful.' *Id.* at 107. That request was ignored. So, counsel refused to discuss with his client, the Port Authority of New York/New Jersey, who the mysterious complainants are, how container shipping works, and what types of 'service agreements' they would have that would be relevant to any Port Authority defense. The first conclusion we might reach from this is that counsel is uncooperative, but more importantly, that counsel prefers to ask for thousands of irrelevant documents. ("K" Line Supplemental Reply April 12 at 2-3).

This exchange made clear the Port's mentality of entitlement – entitlement to whatever it wants with no need to link it to a defense. Counsel for the Port is apparently ignorant of the ocean transportation business and refuses to ask the Port for information. This makes a mockery of discovery. The ALJ October Discovery Order brushed aside this Reply.

In this Supplemental Reply, "K" Line quoted the Supreme Court regarding the interaction of pleading allegations and the right to discovery:

'Probably, then, it is only by taking care to require allegations that reach the level of suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence to support a §1 claim. *Dura*, 544 U.S. at 347 (quoting *Blue Chip Stamps*, *supra*, at 741; alteration in *Dura*.' *Bell Atlantic v. Twombly*, 550 U.S. at 559-560.

The Court's disapproving comment on *Conley v. Gibson* rings true here: 'So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. 425 F. 3d at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case, see *Dura*, 554 U.S. at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741); Mr. Micawber's optimism would be enough.' *Bell Atlantic v. Twombly*, 550 U.S. at 561.

"K" Line Supplemental Reply at 6-7.

The Port's Corrected Answer was utterly devoid of substance – an empty vessel. Neither any of its responses to the allegations of the Complaint nor any of its five affirmative defenses contained one iota of substance. But the ALJ did not favor "K" Line's arguments with any discussion in the Discovery Order which came out six months later, in October, 2012. A new era of "discovery" in FMC cases was dawning, where a party's right to discovery is untrammelled by materiality to any claim or defense.

**E. In May, 2012, the ALJ Abdicated Responsibility For Controlling Discovery.**

When Complainants' original counsel withdrew from the case, the Port filed a motion to interfere with the turnover of their files to new counsel. Making passing reference to this battle and other pending discovery problems, the ALJ announced: "It is preferred that the parties work out discovery disputes between themselves." (Order of May 31, 2012, at 2). This was a license for the Port to plunge its hands into Complainants' business activities. The ALJ took no notice of Complainants' discovery exertions or the Port's intransigence. The ALJ's laissez-faire approach is not suited to this adversary proceeding, where Complainants are interested in a clear, quick resolution and the Port is blatantly dedicated to delay and confusion. They cannot join hands as partners as the ALJ hoped. An impasse was guaranteed.

**F. In October 2012, the ALJ Apparently Agreed with Complainants on Discovery Issues. – Two More Complainants Withdrew.**

On October 11, 2012, the ALJ seemed to rule on pending discovery disputes. The ALJ recognized the principle "that the scope of discovery is not limitless and is restricted by the concepts of relevancy." Citing *American Presidents Lines Ltd. v. Cypress Mines Corp. & Cypress Minerals Co.*, 26 S.R.R. 1227, 1234 (FMC 1994). The ALJ also recognized a reasonable request "would be limited to the identification of the material or principle [sic] facts and documents supporting the legal contentions." (Order at 1).

Agreeing with the Complainants' objections to the Port document requests, the ALJ ruled that "it does not appear that the requested documents, except those which Complainants have agreed to provide, are relevant to the dispute." (Order at 5). So, the ALJ apparently denied the Port discovery via pending document requests which Complainants resisted. This was encouraging, but proved to be a false harbinger.

**G. In December, 2012, Five Remaining Complainants Requested Judgment that the CFC Violates Section 41102(c).**

On December 7, 2012, the remaining Complainants (Hanjin, “K” Line, NYK, United Arab Shipping and Yang Ming) filed a Motion for Judgment (not “summary judgment”).<sup>7</sup> The basis was stated as follows:

Complainants move the Presiding Officer to find that Respondent’s Terminal Tariff (Section H) and its implementation, imposing on Complainants’ vessels a ‘Container Facility Charge’ (‘CFC’) for each loaded or discharged container or non-containerized cargo unit at the Port of New York and New Jersey, violates 46 U.S.C. § 41102(c).

The facts persuasive of this finding are simple and undisputed. The terms of Respondent’s Tariff itself condemn the CFC, together with the facts that Complainants only receive container vessel services at the Port of New York and New Jersey (‘Port’) by contract exclusively with private terminals operating under leases from Respondent, and non-container vessel services from private stevedores. The Port’s own statements then show the CFC is nothing but a vessel tax, severed from any benefit to the only interest paying it, vessel operators.

If the CFC could survive the internal flaws in the Port Tariff itself, the CFC would not survive under controlling precedents: The Port, as a marine terminal operator, violates 46 U.S.C. § 41102(c) by force-feeding a tariff charge to vessel operators and rendering no service in return for the charge, much less service reasonably commensurate with the charge. There must be a reasonable *quid pro quo*; a terminal tariff charge on vessels cannot be justified by theoretical analysis purporting to show that, over time, some untethered benefits may trickle down to vessel operators as one class in a universe of beneficiaries, while other classes pay nothing. The two-step analysis mandated by precedent regarding section 41102(c), determining the benefit, then determining if the benefit is reasonably related to the charge, cannot be implemented when there is no service which can be identified as rendered in return for a charge.

Complainants will not pursue violation of any provision of the Shipping Act of 1984, as amended, other than 46 U.S.C. §41102(c). It has become apparent it would be superfluous and duplicative to do so.

Complainants’ Motion for Judgment at 1. It beggars understanding how the ALJ could misinterpret this statement. This Motion laid out the undisputed, documented facts, including the forced collection of the CFC from vessel operators by threat of effectively blockading their ships

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<sup>7</sup> Attachment A hereto.

from calling the Port of New York. The Motion pointed out various flaws in the structure of Section H which violate 41102(c)'s "unreasonable practice" standard. (Attachment A at 17-10). The Motion reviewed in detail pertinent Commission decisions implementing the *Volkswagenwerk* Supreme Court decision requiring an MTO charge to be "reasonably related to an actual service performed or a benefit conferred on the person charged." (Motion at 21). All these decisions follow the rubric of examining the benefits which flow to the payor of a fee from the actual use of an MTO's services and facilities, as in *Baton Rouge Marine Contractors, Inc. v. FMC*, 655 F.2d 1210, 1214 (D.C. Cir. 1981). No precedent confuses the benefits with the services which confer the benefits. No precedent has accepted ambient benefits available to those paying the charge in question as nullifying the need for use of identifiable services and facilities (such as the use of Port docks to discharge ro/ro cargo, for which wharfage is charged). The ALJ would not accept these authorities.

Movants included a Statement of Facts not in Dispute listing 91 factual items. On February 1, 2013, the Port opposed Complainants' Motion and responded to Complainants' Statement of Facts not in Dispute with a host of claimed disputes and a statement of additional facts. The Motion was denied six months later with no findings of any substance.

#### **H. Complainants' 97 Page Reply of February, 2013, Showing There Are No Factual Disputes Went Unheeded**

On February 15, 2013, Complainants filed a 97 page Reply to the Port's Response to Complainants' Statement of Facts Not in Dispute and Port Authority's Statement of Additional Facts. Complainants' Reply first went through each one of 91 factual statements regarding the subject matter of the docket and showed that no factual dispute exists as to any of them. Complainants then dealt with Respondent's additional fact statements, bringing the total fact items up to 152. The ALJ took no notice. The ALJ ignored Complainants' presentation.

Some of the Port attempts to manufacture factual disputes were comical. One example deals with “fact number 4”: Complainants stated the fact that “The Port furnishes none of the services provided to Complainants at those leased terminals.” The Port responded: “private marine terminal operators (“MTO”) provide certain services to Complainants....” The Port then said “the Port Authority provides different services and/or benefits to Complainants, which are separate and distinct from the services performed by private MTOs.” It then lists “services and benefits” *which are not provided at the leased terminals*. Pure gibberish. The respective statements were “ships passing in the night;” like so many others, there is no dispute regarding this fact. (Reply at 8).

The Port did not move for judgment. The Port presented no defense, either to elicit a decision in its favor, or to justify discovery. It just demanded more discovery. Its perceived discovery need was its excuse for not articulating a defense. The ALJ backed the Port.

**I. A June, 2013 Order Denying “Summary Judgment” Confused the Main Issue, Ignored the Purely Legal Issue, and Reversed Course on Discovery.**

Four months after filing, Complainants’ Motion for Judgment was denied, in an Order characterizing it as a “Motion for Summary Judgment.” The motion was not “summary.” The facts supporting the motion were all finished products – Complainants’ complete factual case. This Motion was Complainants’ case, period. The motion was founded on the absence of any service rendered in exchange for the CFC tax on vessel operations and on defects in the words of Section H itself. The Port Reply propounded a legal theory that random “benefits” omitted from Section H, but subliminally present and painted into the picture ex post facto, support the CFC. It claimed that a “service” to a vessel is synonymous with a “benefit” to a vessel. That is the Port’s whole case on the main issue, but it is offered not for decision, only to delay the case with discovery. All the rest of the Port’s paper was pure sophistry, but the ALJ bought into it.

The ALJ misstated Complainants' position regarding jurisdiction (Order at 3). Complainants' position is not that the Commission totally lacks jurisdiction over the CFC; it is that the Commission has no jurisdiction to measure the CFC by the "reasonableness" standard under the Act for MTO service charges, because the CFC is not a charge for a service. Extraction of the CFC from vessel operators by the MTO Port is an unreasonable practice over which we submit Commission jurisdiction should be exercised.

The very summary, 6 page, Order Denying Summary Judgment ignored Complainants' Reply to the "combined 168 facts." (Order at 4). All Complainants' effort regarding the facts was wasted. In a few unenlightening paragraphs, the Order cited perceived "fact disputes" as a bar to judgment. A prime example was the Order's reference to the Complainants' "subjective and legal conclusion that it was in any way 'fair' to charge an ocean common carrier for a service that carrier does not use." The Order conceives "fairness" as a "fact potentially relevant to the reasonableness of the fee." (Order at 5). Determinations of "fairness" are not facts, they are legal judgments. The Oxford Advanced American Dictionary defines "fact" thusly: "used to refer to a particular situation that exists; a thing that is known to be true, especially when it can be proved."<sup>8</sup> The Order confuses facts with legal conclusions, and ignores Complainants' Reply showing there are absolutely no factual disputes in the case. (Order at 5).

The Order conceived part of Complainants' argument correctly: "that fees can only be assessed when a specific service is provided (as opposed to a general benefit)", then misstated Complainants' argument by ascribing to them an allegation that "the fees [must] fund that specific service (as opposed to a general fund)." (Order at 5). Complainants made no such argument. *It was the Port* that came up with the fairy tale that the CFC would pay for "the three

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<sup>8</sup> <http://oaadonline.oxfordlearnersdictionaries.com/dictionary/fact>

components.” Complainants have never argued that collections of a fee must be funneled into supporting the specific service for which it is charged.

The June Order did not analyze the legal issue of “service” versus “benefit”, but accepted the Port’s argument that they are synonyms, and announced a confused rule, rejecting Complainants’ primary arguments on the merits, when it made the following abstruse pronouncement:

Determination of whether the cargo facility charge violates that [*sic*] Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed. This requires a finding of whether benefits received by shippers or Complainants’ affiliates should be taken into consideration, an issue best resolved after discovery and a complete understanding of the relationship between the Complainants and their affiliates. While Complainants contend that they receive no service in return for the cargo facility charge, they do acknowledge receiving a benefit, and the extent of that service/benefit will be a material fact that impacts the ultimate decision. Resolution of these issues will depend on the facts, and implication of the facts, in this case. (Order at 5).

While muddling the concepts of “service” and “benefit,” the statement clearly rejected the Complainants’ legal position, holding “benefit” to be a material fact, maybe even benefit to customers and affiliates! The case should have ended then, with proper, reviewable findings made incorporating the ALJ’s view of the law. But the case proceeded in a state of unreality, as if Complainants had not repeated their position over and over that the CFC violates 41102(c) because no *service* is rendered in return for it and that Complainants do not quarrel with the level of so called “benefits” which they (or their relatives) might enjoy from Port operations, even if they never set foot in the Port. The Port, with the ALJ’s backing, sees its various operations as having a “ripple effect” which can satisfy the Act by spreading “benefits” as far as the Port’s imagination extends.

The distinction between “services” and “benefits” is critical. The naked eye can see it: if the CFC were charged in return for a service, the service would be enumerated in the Port Schedule PA-10 imposing the CFC. The CFC would then be a “user fee.” It would be a charge within the Commission’s jurisdiction under the Act and the exercise of measuring the benefit from service against the user fee would be in accordance with the string of precedents regarding the reasonableness of MTO charges under Section 41102(c).

In any lexicon but the Port’s, the dichotomy between “service” and “benefit” from the service is obvious. A service station customer benefits from the bays, the pumps, the lifts and the tools, but gets no service until he requests it and pays the precise charge for it. So it is with the Port’s facilities and services. If a container carrier uses Express Rail, it should pay a reasonable user fee. If a ro/ro ties up at a wharf, it should pay a wharfage user fee. But if the wharf or the road or a rail facility is just THERE, and the vessel operator does not or cannot use it, then the fact that it is THERE is not a service.

The Port strategy is harassment and delay, and should any Complainant stick it out, the making of a record stuffed with irrelevancies, hoping to make the heads of the Commission and the Court spin, to drown the difference between a “benefit” bestowed generally by Port operations and a “service” to vessel operators. Both the discovery arguments and the merits of the case revolve around the distinction between the “service” and the “benefit” that flows from the “service.” The ALJ’s concept of that distinction does not stack up to Commission precedent.

## **J. The June 20, 2013 Order on Discovery Motions Reverses Course.**

A June 20, 2013, discovery order retreated from the ALJ's previous decision approving Complainants' objections to Port Authority document requests. The Order proceeded as if that ruling were never made. The Order persevered in misstating Complainants' position as being "that the information is not relevant because Complainants do not receive any service for the Cargo Facility Charge *and because the Cargo Facility Charge payments are maintained in a general fund.*" (Emphasis added: Order at 2, Citing Complainants' Opposition at 1-3). Complainants said no such thing.

We reproduce excerpts from pages 1-3 of Complainants' Opposition, cited in the Order, to show the Order's mischaracterization of Complainants' position, both on the merits and on discovery.

The Motion presses Respondent's unique and erroneous version of the test for lawfulness of charges under 46 USC 41102(c). Respondent's version posits a first step of recognizing all manner of floating, indirect 'benefits' to Complainants and their affiliates, without reference to a particular identifiable service. This is the linchpin of its demand for Complainants' service contracts, rail contracts and trucking contracts. Whether this new version of the test under 41102(c) will be accepted by the Presiding Officer should be decided in the decision on Claimants' pending Motion for Judgment. Meanwhile, we submit Respondent should not be allowed to intrude into Complainants' and third party confidential commercial affairs, since Respondent has offered no convincing argument in the Motion that its unique test is a proper one.

### **II. Respondent's Version of Complainants' 41102(c) Test**

The Motion's first device (at 4) is to miscast Complainants' position to be that Complainants 'do not benefit in any meaningful way from the port projects and activities funded by the CFC.' 'Meaningful' is a vague adjective, not appropriate for or reflected in the jurisprudence under section 41102(c) or its predecessors, but Complainants' December 6 Motion (at 13) did explicitly concede for the purposes of that motion that there would be some benefits to Complainants from expenditures facilitated by the CFC (just as there are to other classes who come and go at the Port) as a result of the Port's collection of money. All Port collections keep the Port operating so Complainants' vessels can call (which is 'meaningful' in the sense that the sun rising daily is 'meaningful') but it is not significant under the line of cases explaining how terminal charges are

tested under 41102(c) and its predecessor, section 17 of the Shipping Act, 1916. Keeping the Port running and generally funding the Port's operations and development is not a service to the class paying the charge, as required by the precedents. It is a service to all who use the Port.

As explained in the December 6 motion, the section 41102(c) reasonableness standard requires that the 'charge levied [must be] reasonably related to the services rendered.' *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 282 (1968); see also *Baton Rouge Marine Contractors, Inc. v. FMC*, 655 F.2d 1210 (D.C. Cir. 1981); *Plaquemines Port, Harbor and Terminal District v. FMC*, 838 F.2d 536 (D.C. Cir. 1988). In *Flanagan v. Lake Charles Harbor & Terminal District*, 27 SRR 1123 (1997), the Commission, explained that for a port charge to stand, a service (and a recipient of that service) must be identified:

[I]t is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. '*The Boston Shipping Ass'n, Inc. v. Port of Boston*, 10 FMC 409, 415 (1967)...Furthermore, "[a] just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service." [citation omitted] *West Gulf Maritime Ass'n v. Port of Houston Authority*, 21 F.M.C. 244, 248 (1978). (emphasis added). Thus, the inquiry here is whether Flanagan is a user of, and consequently enjoys a benefit from, the supplemental rail switching, and if so, whether the switching charge is reasonably related to that benefit.

\* \* \*

In *Philippine Merchants Steamship Co. Inc. v. Cargill, Inc.*, 9 F.M.C. 155,166 (1965), the Commission held that where custom indicates that weighing costs are to be borne by the cargo interest, those costs may not be imposed on the vessel, which benefits from the weighing only to the extent that such weighing is necessary for a determination of the proper freight rate. Thus, the weighing assisted in the general flow of cargo, but conferred no particular benefit on the vessel. The Commission's holding demonstrates its concern with allocating expenses to the proper party, and preventing the improper allocation of expenses to parties which do not enjoy a specific benefit from the services at issue. *Flanagan* at 1131.<sup>9</sup>

Opposition to Motion to Compel at 1-3.

The *Flanagan* analysis fits the CFC like a glove.

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<sup>9</sup> The Commission in *Flanagan* also relied on the *Cargill* line of cases holding a port to an "actual use" standard for evaluating charges, and holding that the Commission may not impose on parties charges in disproportion to costs allocated to others who may reap equal or greater benefit from the port facilities. *Id.* at fn. 8, citing *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Commission*, 655 F.2d 1210 (D.C. Cir. 1981).

At this point in the Docket, the ALJ had radically mischaracterized Complainants' position on the violation of 41102(c) and wholeheartedly embraced the Port's position that "improvements to rail, transit, and security...justify imposing the Cargo Facility Charge and Complainants have admitted that they benefit, at least to some extent, from these improvements." (Order at 3). At this point, Complainants' case was dead – *finis*- but the runaway train rolled on.

#### **K. Complainants' Simultaneous Tries for Commission Review Filed July 9, 2013.**

Faced with the ALJ's oblique but absolute rejection of Complainants' "quid pro quo" position, and acceptance of the Port's "benefits" position, the Complainants tried for Commission review. Complainants took two tacks, filing a Petition for Review of Administrative Law Judge's Order with the Commission and a Petition for Leave to Appeal with the ALJ, both on July 9, 2013.

##### **1. Petition for Review**

Complainants made the following statement in their Petition for Review by the Commission:

While the legal issues may seem narrow and technical, the practical stakes for the shipping industry of this docket are hard to overstate. At stake in this docket is the critical question of whether the Shipping Act allows local ports and other governmental entities to impose per-unit cargo taxes or 'fees' on shipping lines, in order to raise general revenue to fund regional road-building, rail infrastructure, security and other regional infrastructure for the general benefit of all stakeholders. An affirmative answer would have grave precedential impacts for waterborne trade, inviting a proliferation of similar local taxes and fees on shipping nationwide. (Petition for Review at 2).

Complainants pointed out the essence of the main issue at page 3 of their Petition:

Longstanding Shipping Act precedents have first determined that there is a service rendered to vessels, then evaluated the amount of the charge in light of the benefits to the vessel from the service. The Order broke totally new ground, skipping the service requirement, and directed that discovery proceed into indirect benefits not linked to any service to vessels. There is no dispute that all services to Complainants' vessels are furnished by private lessee terminals (save for wharfage to non-container vessels). Without Commission intervention, this Docket would proceed on the faulty basis that when the Commission has used the

word ‘service,’ it included benefits flowing indiscriminately to vessels as part of the universe of interests and stakeholders enjoying the Port facilities and services, such as local roadways and rail lines. Complainants have not argued this and submit it is clear error. The Docket, as sculpted by the Order, would depart from the allegations in the complaint, and head off into uncharted territory with no basis in Commission precedent. (Petition for Review at 3).

Complainants pointed out the other violations:

The [ALJ’s] Order did not rule (or even discuss) the laundry list of other § 41102 violations perpetrated by the Port in imposing the CFC, which were enumerated in Complainants’ Motion at 13-20. (Petition for Review at 4).

Finally, Complainants pointed out the CFC has no place under the Shipping Act:

Because the CFC fee itself is outside Shipping Act jurisdiction – that is, if it is not being charged by the Port in exchange for any services ‘receiving, delivering, handling, or storing property’ – the Port cannot lawfully exploit the [*sic*] Shipping Act’s provisions for marine terminal operators, 45 USC § 40501(f), as a basis for demanding payments from vessel operators with which it has no privity or contractual relationship. Respondents’ [*sic*] improperly seek to use 46 USC § 40501(f) like an FMC-sanctioned taxing power, allowing ports to use marine terminal operator schedules to extract payments from any party, regardless of whether the Port itself is providing any services in exchange. (Petition for Review at 13).

So, the CFC is an unsanctioned orphan, with no basis in the Act.

The Commission Secretary’s office held that the pendency of the Complainants’ Appeal Petition to the ALJ defeated Commission jurisdiction over Complainants’ Petition for Review.

## **2. Petition for Leave to Appeal Denied by the ALJ in July, 2013**

The ALJ having decided the main issue against Complainants without findings, leave to appeal was requested. This Petition also pointed out the issues presented by the wording of Section H itself.

Complainants Petitioned the ALJ for Leave to Appeal in these words:

Complainants presented their case on the second threshold issue that the CFC cannot be extracted by an MTO from a vessel operator unless the MTO furnishes a service to the vessel operator, or the MTO is engaging in a practice that violates 46 U.S. C. § 41102(c). Complainants’ case on this issue stands or

falls on the record as it exists. The Presiding Officer decided this issue of the applicable legal standard against Complainants, thereby effectively dismissing Complainants' case as to that issue, because Complainants decline to press any further case regarding 'benefits' that might indirectly accrue to Complainants, their affiliates and shippers.

The difference between a service to a vessel and a benefit from the existence of port facilities generally is not obscure; it is patently obvious. The Port furnishes roadways, rail facilities, security, and other infrastructure in and around the Port area. The Port could charge for any of these specific services based on its use, and the reasonableness test would be applied to the charge in light of the service rendered. The Port does not do so, however; rather, it collects fixed cargo charges from carrier – specifically without regard to whether a particular service has been utilized – and uses the proceeds to underwrite a diverse and indefinite array of past, present and future projects. Nevertheless, the Presiding Officer has decided that benefits without services can support charges to vessel operators. The Order represents 'game over' on that issue, the most important issue in the case.

Petition for Leave to Appeal at 3-4. But with the ALJ, the case could not end until the Port's counsel got their shipping education and the witness parade was held, a la the "Music Man".

The ALJ held fast to the position that documents and witnesses must be produced "in order for the case to proceed." (Order at 2). Despite Complainants' efforts to show the ALJ that the ultimate issue in the case requires no additional facts for decision, and despite the laundry list of legal problems defeating Section H by its own terms, the ALJ refused to rule. There would be an evidentiary hearing whether Complainants wanted it or not.

The July 24 Denial of Leave to Appeal blithely bypassed Complainants' arguments regarding the "Section H issues," as if they did not exist. Pages 4, 5 and 6 of the Petition had laid out the utter absence of any fact issues regarding the words of the Port's Section H, which the Complainants' previous Motion for Judgment had already stated simply and clearly. Once again, the ALJ left Complainants' case in the dust.

## **L. Complainants' Last Gasp Motion for Final Judgment, August 9, 2013.**

Trying to pierce the fog which clouded this docket, the remaining Complainants filed, on August 8, 2013, a Motion for Final Judgment On The Record As It Stands. At the same time, to formalize their narrowing of the issues, they filed the Motion to Amend the Complaint. The Motion for Final Judgment made the following statement:

In preparing the revised statement of undisputed facts, filed herewith, the Vessel Operators discarded a skein of irrelevant 'facts.' Our objective is to clear the decks for an initial decision. The presiding officer's earlier statement<sup>10</sup>, did not accurately state the Vessel Operators' position. . . . Complainant's legal position is only this: there must be a discrete service performed for the vessel by the Port in consideration for the CFC paid by the vessel; . . . it is necessary to satisfy the Act that a vessel (via its operator) pay the CFC and directly in return for the CFC be served in some discrete way by the Port, as distinct from the Port's merely maintaining ambient facilities and services . . . .

Complainants' position is that it matters not what the Port does with the actual CFC proceeds. The point about the use of the money not being for the claimed purposes was only made as background to lend context to the CFC.

Motion for Final Judgment at 2-3.

Struggling with the task of eliciting a decision on the simple threshold issue, Complainants also made the following statement:

There is no fight over 'reasonableness' of the level of the CFC; the Port has nothing to defend against as to 'reasonableness.' The Vessel Operators are saving it that labor because they do not contest the reasonableness of the current level of the CFC in comparison to the myriad benefits which may come to them and their affiliates as participants in commerce at the Port. We repeat, we do not contest 'reasonableness' of the amount of the CFC. There is nothing to 'discover.' There is no allegation of 'unreasonableness' to defend against in this regard. This being a complaint case, not an investigation, this will no doubt be welcomed by all.

The Port's response to the Vessel Operators' first statement of undisputed facts did not try to point to any discrete service rendered to vessels in consideration for the CFC. (Statement of Undisputed Facts, *passim*). It pointed

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<sup>10</sup> "Complainants seem to argue that fees can only be assessed when a specific service is provided (as opposed to a general benefit) and when the fees fund that specific service (as opposed to a general fund." Order Denying Motion for Summary Judgment, at 5.

out facilities and services which are in place regardless of whether a vessel pays the CFC. If the CFC is not paid, no Port service is discontinued; only private lessee container terminals' services are terminated according to the Port diktat (Statement of Facts, at ¶¶ 39-55). If this is a reasonable practice under the Act, then we request that the Presiding Officer so rule in an initial decision so vessel operators know where they stand in this Port, and can act accordingly. (Motion for Final Judgment at 3, 4).

Neither the ALJ nor the Port welcomed it – they were wedded to free-range discovery. The ALJ was dedicated to having a full-dress hearing which would incinerate more months of time, but refused oral argument to correct the misunderstandings. Complainants never gave up trying to put across their argument on the main issue, using simple terms:

Our case on the CFC (plus the coercion of lessee container terminals to enforce payment) is that it violates section 41102 (c) because it is not a user fee – there is no identifiable quid pro quo service rendered BY THE PORT TO VESSELS ALONE in return for the CFC PAID BY VESSELS ALONE. If others who enjoy Port facilities and services shared the burden, that would be a different matter altogether, but they reap the harvest for free. That is the beginning and end of the Vessel Operators' case on the CFC itself, the practice of coercive collection being a separate issue.

The first leg of the case depends on one fact, undisputed by the Port: there is no discrete service rendered to the vessel by the Port in consideration for the CFC. There are all sorts of helpful facilities and services going on at the Port which are of value to vessels, but nothing that the Port gives or withholds depending on whether the vessel pays the CFC. All the Port does for Vessel Operators other than let them enter the Port and enjoy what is in place there is forbear from terminating services to their vessels, either via the private terminals or directly at public berths. (Statement of Undisputed Facts, *passim*).

The Vessel Operators submit the English language conveys an easily grasped meaning of the words 'service to the vessel.' There is no real difficulty in understanding the concept, as distinct from benefits from structures and facilities which are in place for the benefit of all vessels as well as others who use the Port; things like rail facilities, roadways, intersections, police, port security programs etc. The CFC schedule says to the Vessel Operators: 'If you choose to load or discharge your vessels in this Port, you alone among Port users will pay the Port for these benefits.' All can understand that is not a charge in return for a vessel service. The Vessel Operators say that is unlawful, and solicit the Presiding Officer's initial decision. The distinction between this tax and a charge for a service is by no means an elusive concept.

The Vessel Operators accompany this Motion with a Statement of Facts not in Dispute. They are the unadorned essentials: There is no Port service rendered for the CFC, the Port does not load/discharge or otherwise service the vessels, and the Port's so-called 'Tariff' purports to order termination of the private Terminal services in the Port for non-payment. The Port did not dispute that non-container vessels would be barred from public berths for non-payment, although it tried to dodge the issue. The statement is shorn of the background which illuminated the Port's thinking in establishing the CFC and underlined its disconnect from any service to the vessels. While illuminating, the background is not critical, because on the one necessary fact the Vessel Operators and the Port have a meeting of the minds. The Port cannot dispute the undisputable.

Although it has striven to avoid the issue throughout this case, the Port does not and cannot quibble over the undisputed fact that it furnishes nothing to a vessel which pays the CFC that it does not furnish to a vessel that refuses to pay it (revised statement of undisputed facts, *passim*). All the Port can do is cling for justification to the ambient structures, facilities and services for which it is responsible.

The Port cannot shut off any Port CFC service for non-payment, because there is none. All the landlord Port can do when payment is refused by container vessel operators is coerce the lessee terminals into shutting off vessel services. If the Port were straightforward, the Port would just deny entry to the Port to the container vessels or their containers if the CFC were not paid. Of course, as we continually repeat, the Port can always just charge the CFC as a toll on cargo to transit the Port, rather than coerce the vessels into paying it.

Motion for Final Judgment at 5-7.

#### **M. Complainants' Motion to Amend Complaint, August 8, 2013.**

Complainants' Motion to Amend Complaint explained:

The purpose of the amendment to the original complaint is to eliminate misunderstanding of the case Complainants are presenting, formally delete a Shipping Act allegation of section 41106(2) violation, and streamline the complaint. Since the original complaint was filed, progress through the pleading and discovery process has enabled Complainants to cull parts of the complaint which only distract from the central issues and to pursue only the allegation of section 41102 (c) violation. Complainants do not allege that CFC proceeds must fund the discrete service furnished in return for the CFC.

Complainants' case is that the Cargo Facility Charge ('CFC') violates section 41102 (c) of the Shipping Act. The CFC is unlawful because the Port does not provide a discrete service to the Complainants' vessels as consideration for the CFC and because the CFC and its rules order discontinuance of service to

Complainants' container vessels by marine terminals operated by private lessee terminal operators as punishment for Complainants' failure to pay the CFC to the Port.

Parts of the original complaint that are not within that focus are deleted from this amended complaint in order to narrow the issues and clarify Complainants' allegations. Included in the amended complaint is only the allegation of section 41102(c) violation. Complainants do not seek a finding of section 41106(2) violation, thus substantially limiting the issues for resolution.

Motion at 1-2.

The Motion reviewed authorities supporting amendment of complaints in FMC proceedings (Motion at 2-3). The ALJ ignored them, without discussion, and denied Complainants' motion on September 5, 2013.

#### **N. Orders Denying Motions For Final Judgment and to Amend, September 5, 2013**

On September 5, 2013, the Orders Denying Complainants' Motions for Final Judgment and to Amend Complaint were issued. The heart of the denial of final judgment was this:

Complainants are correct that 'the point of litigation before the Commission is to resolve actual disputes.' Resolution of actual disputes requires a factual basis on which to make the decision. Complainants' contention that there are no factual disputes remaining after the pleadings are amended is not persuasive. The fundamental factual disputes which prevented the motion for summary judgment continue. This duplicative request, previously denied in two orders, will not be permitted. The proceeding is not ripe for decision until discovery is completed and a decision can be rendered on a full and complete record, as indicated previously. (Order on Motions for Final Judgment at 3).

Complainants and the ALJ are speaking different languages. These "fundamental factual disputes" exist only in the imaginations of the Port and the ALJ. The ALJ could not describe them (because there are none). The ALJ also denied Complainants' Motion to Amend the Complaint, with the following observation:

In this case, the hearing schedule has been set and the parties are expected to proceed expeditiously. To the extent that the parties are able to narrow the issues to be litigated, that is encouraged. However, the motion to amend was filed in conjunction with the motion seeking final judgment. Since that motion has

been denied, the Complainants will be given an opportunity to determine how best to proceed with a hearing on the merits. If the Complainants and Respondent agree that an amended complaint would economize litigation and narrow the issues to be decided, they may file another motion to amend the complaint. The motion to amend the Complaint is denied without prejudice. (Order on Motions for Final Judgment at 4).

So, there would be a full-dress hearing with no fact issues, and Complainants could only amend their own Complaint if Respondent joined, as if the case were a joint venture, not an adversary proceeding with a Respondent determined to frustrate the decision process. The bottom line was the ALJ was not going to decide the case without a time-wasting full evidentiary hearing, fact disputes or no. At this point all Complainants except “K” Line threw up their hands and withdrew.<sup>11</sup> “K” Line stayed, because it has at stake here and in other potential venues not only CFC payments on loaded and empty containers, but CFC charges on wheeled cargoes delivered and loaded at the public dock, where it seemingly even impressed the ALJ, just not enough for a decision on it. “K” Line believes it is worth the effort to try to elicit a final decision on the merits, so it tried one more time.

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<sup>11</sup> The Complainants made clear why they gave up: “ The Withdrawing Complainants have not changed their views regarding the unlawfulness of the Container Facility Charge at issue in this docket. Nevertheless, Complainants have determined not to proceed with this litigation. The Presiding Officer’s decision to compel boundless irrelevant discovery into Complainants’ confidential and proprietary business arrangements and contracts would subject the Complainants to extraordinary prejudice, cost, burden and risk of disclosure of confidential and sensitive information. The mass disclosure of these irrelevant facts and documents would harm not just Complainants but also their contract counterparty shippers, inland carriers and other parties, who may have protectable nondisclosure interests in their own right. In the meantime, Complainants have not been able to obtain a decision on either their still-pending partial summary judgment motion, filed January 11, 2012, nor have they been able to secure a ruling on the key legal issue remaining in the case, as to which there are no factual disputes.”

**O. Motion for Implementation of ALJ'S Rulings by Order of Dismissal October 10, 2013.**

Left to fight alone, "K" Line made one more try for closure: A Motion that the ALJ implement the various rulings against "K" Line touching on the merits by dismissing the complaint on the merits. The Motion summarized the "K" Line case:

The ALJ has directly rejected law established in the precedents offered by complainants, as epitomized in *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*, 838 F.2d 536 (D.C. Cir. 1988). The ALJ also has rejected that law by ordering continuation of discovery inquiries which are utterly immaterial under those precedents. So, even if the ALJ feels some reluctance to enshrine the rejection of Commission precedents in a dismissal on the merits, a dismissal based on "K" Line's resistance to unnecessary forays into confidential service contracts or depositions of "K" Line affiliates, is, at bottom a dismissal based solidly on the ALJ's erroneous rejection of the governing precedents, because those precedents render such adventures immaterial to the issue presented in this case. *See, e.g.*, June 20, 2013, Order on Discovery Motions, at 4 & 5; June 20, 2013, Order Denying Complainants' Motion for Summary Judgment, *passim*.

*I. The CFC is Unreasonable Per Se Under Plaquemines Because Many Users of the Same Infrastructure and Security Services Financed by the CFC Benefit, But the Fee is Imposed Only on Vessel Operators*

The stalemate in this case is not about discovery quibbles, as the Port wants to cast it. It is solely the product of radically different, simple and clear views of the governing law. Some of the discovery differences should be eliminated by a supplementary status report which "K" Line will file this week, based on a confirmation received from the Port today as to outstanding requests. Differences will still remain, but the real issue the imposition of the CFC presents the Commission is a major policy question, which will resonate with ports throughout the United States and if left in place will spawn copycat taxes by other ports. The issue will have to be faced sooner or later.

Freewheeling intrusive discovery probing into the precise extent and scope of services/benefits received by "K" Line, directly and indirectly, is unnecessary to decide the fundamental issue upon which *Plaquemines* turned, and which "K" Line directly presents in this case. *Plaquemines* stands for the proposition that, where entities who do not pay a charge derive a significant benefit from the same services or facilities charged to and paid exclusively by other users, the charge cannot be regarded as a properly-calibrated, reasonable fee for purposes of Section 41102(c). 838 F.2d at 547-48. Here, the CFC is not imposed in exchange for cargo loading, unloading, or handling services or facilities provided by the Port to complainant container and "roll on-roll off" vessel operators.

\* \* \*

It is undisputed that the CFC is:

- Imposed on containers containing no cargo whatsoever;
- Imposed on ro-/ro vessel operators, who make no use whatsoever of the RailExpress system or the roadway trucking infrastructure, that, together, comprise the vast majority of the Port improvements the CFC is designed to recover;
- Not imposed on beneficial owners/shippers of containerized cargo or vehicles transported on ro-/ro vessels;
- Not imposed on inland roadway truck or railway carriers who are the primary users of the roadway improvements and Rail Express [sic] system;
- Not imposed on Non-Vessel [sic] Ocean Common Carriers or Third Party Logistics Providers

All of these entities benefit from the services and infrastructure the CFC is designed to finance, some obviously to a much greater and more direct degree than ocean vessel operators, yet none pays the CFC. The ALJ and the Port make much of “K” Line’s concession that it derives some benefit from the services and facilities the CFC is designed to fund, but this entirely misses the point: “K” Line, along with the entire universe of Port users derives some benefit, but only vessel operators like “K” Line bear the burden of the fee. Under the authority of *Plaquemines*, the undisputed fact that many other users of the same facilities and services who benefit significantly entirely escape responsibility for paying the CFC, means that the CFC is *per se* unreasonable under Section 41102(c).

*II. Because it Uniquely Burdens International Maritime Commerce, and is Levied on the Volume of Import and Export Cargo, The Reasonableness of the CFC Must Be Assessed in Light of Strong Federal and Constitutional Policies Forbidding Unreasonable Burdens on International Commerce*

Also highly significant, both under Section 41102(c)’s reasonableness analysis, and under important public policy and Constitutional considerations, is that the Port has elected to lay the burden of the fee exclusively on instrumentalities of international commerce and assess it by the volume of cargo in international maritime commerce. Viewed in this light, the Port’s “Cargo Facility Charge” is not, as the Port suggests, in the nature of a “user fee” assessed to recover the costs of specific cargo handling facilities or services from the actual users of those facilities. Rather, it is in the nature of a tax or duty, imposed exclusively (in “K” Line’s case) on the volume of containers and wheeled vehicles in international import and export transit, . . . which lie beyond the Port Authority’s power to impose.

Any analysis of the CFC tax rightfully begins with the Compact which gave birth to the Port. The Compact forbids the imposition of taxes by the Port. See *United States v. United States Trust Co.*, 431 U.S. 1, 5 n.5 (1977). Yet the CFC effectively operates as a tax, in that it is extracted exclusively from container vessel operators in international trade for loading/discharging of containers, which are instrumentalities of international commerce, whether empty or loaded, and on ro/ro vessel operators furnishing port-to-port services.

The CFC is imposed on export cargo, containerized and non-containerized loaded at the Port, and is in fact paid by ocean common carrier vessel operators (not NVOs or TPLs). These charges on each container of export cargo or each unit of wheeled cargo are not charges uniformly levied on all “common carriers.” A charge on “common carriers” for one facility which directly benefits only those who use it (Express Rail) and for other services which benefit all categories of Port users, is no less offensive under the Act (or the Constitution). It is particularly offensive when ro/ro vessels which cannot use Express Rail at all are charged for that facility.

That the CFC is a tax, not a “user fee” is indicated by authorities that have considered that issue. In *U.S. v. United States Shoe*, 523 U.S. 360 (1998) the U.S. Supreme Court struck down as unconstitutional under the Export Clause a federal port maintenance “user fee” on exports based in part on the quantity and value of export cargo, because the fee did not “correlate reliably” with the harbor services actually used by the exporter, and because of the Export Clause’s clear prohibition of export taxes and duties. For a charge on export trade to be upheld as a “user fee” [u]nder the Export Clause, “the connection between a service the Government renders and the compensation it receives” must “fairly match the exporter’s use of port services and facilities.” A fee based on value, volume or quantity charged for the general support of the taxing authority delineates a tax or duty, whereas a fee directly based on the amount or manner of use of specific facilities (insensitive to the volume or quantity of a commodity) is more readily classified as a user fee.

A charge must either be a “user fee” or a tax. The Port clings to the fiction that the CFC is a “user fee,” when it does not bear any resemblance to a user fee. The CFC is not linked in any way to actual use of the facilities the Port claims it funds, e.g. the Express Rail facility, roadway infrastructure, and security. On the other hand, the Port admitted in discovery that the CFC proceeds cannot be traced anywhere, so the CFC cannot possibly be a user fee.

A charge levied on instrumentalities of international commerce like the CFC directly implicates strong federal and constitutional policies central to Supreme Court cases striking down state taxes on containers on Commerce Clause and Import-Export Clause grounds. These same policies underlie the Shipping Act’s requirement that marine terminal operators must establish just and reasonable regulations and practices with respect to the receiving, handling, storage and delivery of property – a requirement enacted by Congress in the

exercise of its power under the Constitution to regulate foreign commerce. U.S. Constitution, Art. I, 8, cl. 3.

In addition to its inconsistency with strong federal policies reflected in the Export, Commerce and Import-Export clauses of the Constitution, the CFC also violates the Tonnage Clause of the Constitution. *See Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 165-66 (1935) (Tonnage Clause prohibits “all taxes and duties regardless of their name or form, even though not measured by the tonnage of a vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port.”).

\* \* \*

As far as non-container vessels are concerned, the imposition of the CFC tax on loading cargo units constitutes a blatant tax on exports, since use of Express Rail is an impossibility for them. Imposition of the CFC on loading and discharging cargoes by all types of vessels with no vessel service rendered in return, while charging no other category of Port user, transgresses the principle of federal occupation of the field of taxing movement of cargoes in and out of ports, and is an unreasonable practice under section 41102(c) of the Act.

III. *“K” Line is Entitled to A Ruling on the Merits; A Difference Between the ALJ’s View of the Dispositive Effect of Applicable Legal Principles on the Basis of the Record as it Stands and “K” Line’s View Lies at the Heart of the ALJ’s Discovery Rulings*

The Port’s weak objection to a ruling against “K” Line on the merits is semantical and sophomoric. “K” Line is an operator of container ships, the ships’ containers, and ro/ro carriers.

That is undisputed. That the containers taxed by means of the CFC, empty or loaded, are instruments of international commerce is a legal certainty, whether they are considered in their status as appurtenances of the vessels, or as international commerce instruments in their own right. *See Japan Lines*, 441 U.S. at 445-46 & fn. 9&10 (‘containers, however, are instrumentalities of foreign commerce, both as a matter of fact and as a matter of law.’)

That “K” Line operates its vessels and containers as a common carrier in international commerce is undisputed, as it is excluded by the Jones Act from domestic commerce. That it owns other transportation/logistics companies who do not pay the CFC and whose business is facilitated by the Port’s operation is undisputed but only material to the extent that it illustrates that other such entities, for example, other transportation/logistics operators *not* affiliated with vessel operators, benefit from the facilities and services the CFC finances, but do not pay it. That the vessels and containers “K” Line operates over the Port benefit from roads and police, and (container ships only) potentially from Express Rail, to that general extent, is undisputed.

That the customers of “K” Line’s logistics affiliates benefit from these facilities or services, thus those affiliates somehow benefit, is undisputed, and material only to the extent that they, too, along with all other beneficial owners of cargo, pay no part of the CFC. That only vessel-operating ocean common carriers must pay the CFC tax is undisputed. That the facilities and services which the Port’s own statement (binding on the Port)<sup>12</sup> cites as the basis for the CFC actually benefit all who use the Port for container traffic, (excepting ro/ro operators in the case of Express Rail) is a truism. The level of the CFC is not a subject of “K” Line’s case nor a disputed matter in this case, so the level of container operations benefit to “K” Line or its affiliates is immaterial. There is no MATERIAL fact the Port could adduce that “K” Line would dispute.

There is nothing material left to discover. The emptiness of the ‘discovery’ issue can be seen by the ALJ and the Commission in reviewing the actual, pending requests to “K” Line, (not ‘discovery’ in a vacuum”). Please see the supplemental status report to be filed shortly. The key to the viability of ‘discovery’ is the word ‘material’ in the ‘Appeal/Stay Order’ cited by the ALJ in the Order served September 5, 2013. To qualify for discovery, a fact inquiry surely must be material, not just to the general subject matter, but to the allegations made by the complaining party. Only a few material facts are relied upon to support the allegations of violation, as set out in the latest statement of facts. None of them is disputed by the Port, as has been demonstrated.

The ALJ’s position on what is ‘material’ is based on a vision of the law that controls this case that is flatly contrary to “K” Line’s position. The ALJ’s view of the applicable law differs from “K” Line’s. In this situation, there is nothing more to do in the case but to make explicit the rejection of “K” Line’s legal position that is implicit in the ALJ’s rulings, and to dismiss based on these opposing views, so that “K” Line may seek review.

“K” Line appeals to the principles in *Plaquemines* and the other Commission precedents cited in the previous pleadings herein, while the ALJ believes that the ‘case law does not draw such clear lines.’ June 20, 2013, Order Denying Complainants’ Motion for Summary Judgment, at 5. The D.C. Circuit in *Plaquemines* implemented the Supreme Court *Volkswagenwerk* principle that ‘the question under section 17 is not whether the petitioner has received some substantial benefit..., but whether the correlation of that benefit to the charges imposed is reasonable.’ (*Plaquemines* 838 F.3d at 547).

*Plaquemines* went on to say that ‘application of the *Volkswagenwerk* standard requires matching costs assessed to the benefits received.’ (*Id.*). While the *Plaquemines* court approved the concept of exempting entities from the port

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<sup>12</sup> February 1, 2013, Peter Zantal Declaration, at ¶¶ 10-15 & 28; Port Board of Directors Minutes at 356-357 (discussion of capital expenditures CFC designed to recover).

charge who received a small benefit, the core principle was held to be that they must be ‘apportioned as closely as is practicable.’ (*Id.*, at 548, n. 11). This core principle is violated by the CFC because there is no apportionment at all, either within the class of vessel operators who may or may not use Express Rail, or between vessel operators and other Port users who benefit from the three categories of facilities/services. The Port does not claim any apportionment among various users underlying the amount of the CFC. It is based purely on the volume of containers and non-containerized cargo, and assessed solely on vessel operator common carriers. The thrust of the *Volkswagenwerk* test was emphasized by the D.C. Circuit to be that ‘allocation of charges among multiple direct users of a common service...Must ensure that no user of the services pays a disproportionate amount.’ (*Plaquemines*, 838 F.3d at 549). When one user group is singled out to pay for facilities/services, and all other users pay nothing, the test is violated *per se*. That is the essence of “K” Line’s case regarding 41102(c).

The ALJ’s course, then, is clear: “K” Line’s factual case, which is contained in the most recent complainants’ statement of facts, is inadequate in the ALJ’s view. The necessary implication of the ALJ’s rejection of “K” Line’s argument that the record, as it stands, demonstrates a *per se* Section 41102 violation is that “K” Line’s final case fails on the facts and the law. Accordingly, the ALJ should dismiss the complaint on the merits, not prolong the agony to no purpose. The Port need not invest further in the defense. It has won at the ALJ level. The only thing the Port has to fear is review of the CFC. Under policy scrutiny, the CFC will be seen to be a dangerous, threatening precedent, if left in place, for Port taxation of vessel operators and instruments of international commerce throughout the United States, in violation of the Act and of the Constitution.

\* \* \*

At this stage of the proceedings, on the record before the Commission as it stands now, no additional discovery is needed to establish that the CFC is [*sic*] unlawfully and unreasonably burdens ocean vessel owners, particularly those in export trade. “K” Line is entitled to a ruling on our claim that the record as it stands now establishes a *per se* violation of Section 41102(c). The ALJ is duty bound to render an initial decision on all contested material issues of law presented, pursuant to 5 U.S.C. § 557(c)(3).

#### *IV. This Case and the CFC Raise Major Policy Issues of National and International Importance, Which Demand the Attention of the Commission*

The issue presented in this case is of great importance to the U.S. shipping community. The Port imposes a charge on vessel operators (‘common carriers’) which it does not impose on any other category of parties in the Port’s user universe. Meanwhile, the ‘benefits’ to which the Port clings as justification for the charge are wide open for enjoyment by every person who has any relationship to container cargo moving over the Port, and security facilities and services (but not RailExpress and related infrastructure) are available to the ro/ro shipping community.

\* \* \*

In addition to Section 41102 of the Shipping Act, the fourth purpose cited in section 40101 is to promote exports. Export promotion is a high priority of the Obama administration, as has been emphasized strongly by the former Chairman of the Commission. As we have surveyed above, where a charge disguised as a user fee exclusively burdens international maritime commerce, and is levied on the volume of cargo and directly on instrumentalities of international trade, issues uniquely within the province of the Federal Government of Constitutional import are raised. The ALJ is not presiding over a discovery squabble-this is a case about a major policy issue, represented by a difference of viewpoint over what is material, so as to be legitimate subjects of discovery.

The Commission should seriously consider the significance of allowing the CFC tax on ro/ro vessel and container vessel operators to remain in place on the basis of an umbrella of 'benefits' enjoyed directly or indirectly by the shipping world involved in operations at the Port, or on an excuse of incomplete discovery. Leaving the CFC in place would create a precedent that a Port need not allocate a charge equitably and reasonably among all the beneficiaries of facilities, services and 'benefits' afforded by the Port. It would allow the Port to saddle ro/ro and container vessel operators with a charge neither linked to nor correlated with specific facility use or service furnished, citing a gossamer link only to whatever 'benefits' the Port can claim inure to them. The Port even goes to the absurd length of claiming benefit to ro/ro vessels from a rail container facility.

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The Port rightly fears recognition of the significance of a tax on vessels and their containers and on vessels and their wheeled cargoes, both in the import and export trade of the Port. It has striven, so far successfully, to obscure this issue by making absurd discovery demands covering total non-issues, which have no place in the case, as prosecuted by "K" Line. All the froth is gone-we are down to the essential issue of whether a range of existing services to the Port community can be the excuse for a general charge on operators of non-container vessels as well as container vessels and their appurtenant containers, and on no other category of persons.

\* \* \*

In coming up with the CFC, the Port encroaches on a field uniquely the province of Federal policy governing regulation of international commerce and foreign trade relations, which demand that the Federal Government speak clearly, and with one voice. The CFC must be recognized under the Shipping Act as an unreasonable practice (recognizing that the Commission will not pass on its constitutionality). The ALJ disagrees, and should so rule in order for the review process to proceed.

Thus, “K” Line put before the ALJ a case stripped to its essentials. In the full-dress hearing demanded by the ALJ, “K” Line would only offer the case it had already presented to the ALJ. “K” Line would stipulate to the facts relevant to its complaint and would even stipulate to the Port’s irrelevant fantasies. It would be a war to which “K” Line would not come except as a re-enactment. But, along the way to “hearing,” the Port would be able to harass “K” Line and its corporate family with absurd discovery, and play with silly straw men like whether “K” Line is a “common carrier” or a “vessel operator.” If the Port knew anything about the Shipping Act, it would know Vessel-Operating Common Carriers pay the CFC, while other common carriers do not, and vessel operations, not common carrier status, triggers the tax.

**P. “K” Line’s October 21, 2013 Status Report on Discovery Demands**

“K” Line introduced a significant status report with the following statement:

This is a status report to the ALJ on the discovery demands “K” Line’s files show to be outstanding as of this date. Further litigation over these demands is pointless. The responses set forth herein demonstrate for the ALJ that there are no remaining discovery demands material to the issues in the case in its present posture. “K” Line is the last complainant standing, the remaining other three having been driven away by burdensome and oppressive ‘discovery’ demands, which will not, and are not reasonably calculated, to lead to evidence material to the limited issues remaining in this case.

“K” Line focuses in this report on the ‘real world’ discovery situation, which must be considered in light of the limited issue upon which the sole remaining Complainant seeks relief. This report and the responses herein focus on the information actually requested of “K” Line by the Port, and the materiality of that information to the limited issue now presented by “K” Line to the ALJ and the Commission for decision. The Report also defines a very narrow category of confidential information which “K” Line will not turn over to prying eyes for no purpose material to this case. This exercise reveals the discovery ‘fight’ to be nothing but posturing over nothing meaningful.

This is a case initiated by private complainants, of which only “K” Line remains, not a Commission investigation. As is its right as the complaining party and summary judgment movant to limit the issues it presents for decision, “K” Line has moved to amend its complaint and conceded a large number of issues

which were once active in the case. [sic] Materiality must be driven by the parameters of the single principal issue “K” Line is now litigating in this Docket, stated in its recently-filed motion for implementation of rulings: *Whether the CFC is a tax on a single category of port user which unreasonably burdens international maritime commerce in violation of core federal interests, not a user fee apportioned in any way among all port users who benefit from the facilities supported by the fee, and, therefore, unreasonable per se?*

\* \* \*

The overview is that there are no ‘material’ facts which remain ‘undiscovered,’ either via interrogatories, documents, or deposition.

As to documents: “K” Line has furnished a massive volume of materials (several boxes of documents when printed out) in a spirit of cooperation, none of which can be of any use in deciding the issue presented. Nevertheless, “K” Line is willing to furnish some additional materials, as discussed herein in Section II, below. This presentation is made based on materials available.

As regards interrogatories, “K” Line has largely abandoned the allegations of the complaint which are the subject of Respondent’s contention interrogatories, as set forth below in Section III hereof. Obviously, none of those interrogatories can possibly seek material information.

Section IV of this reports addresses correspondence from the Port’s counsel relating to “K” Line’s purported discovery deficiencies.

That no facts material to the remaining issue in the case can be garnered in a deposition sought by the Port is reviewed below, in Section V.

Status Report of Only Remaining Complainant at 3.<sup>13</sup>

“K” Line reviewed the Port’s demand for all “K” Line’s service contracts, pointing out that the redaction authorized by the ALJ which would be necessary to preserve confidentially would remove anything of content from the 1,151 service contracts, all of which relate to container ship operations. As to the other document request for all “K” Line’s rail contracts, “K” Line agreed to furnish a redacted version of its only rail contract. (Status Report at 4). As to motor carrier contracts the Port requested, “K” Line pointed out that “there are none.” (Status Report at 5).

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<sup>13</sup> “K” Line’s October 21, 2013, Status Report is attached hereto as Attachment B.

“K” Line slogged through the outstanding Interrogatories. “K” Line pointed out that the allegations subject to the following Interrogatories had all been abandoned: 1; 4; 5; 6; 7; 8; 10; 11; 12; 13; 14; 15 and 27.

“K” Line responded to the following Interrogatories that there is no such information or it is not in “K” Line’s possession; 19; 25; 30; 31 and 32.

There remained just a few outstanding Interrogatories of which “K” Line was aware to which “K” Line made the following individual answers: Number 2: The response to this Interrogatory was that the Complaint allegation referenced was based on the Port’s own materials; “K” Line answered number 3; “K” Line answered number 5; “K” Line answered number 9; “K” Line answered number 18; and “K” Line answered number 26. (Status Report at 5-18).

“K” Line then turned to a letter, dated February 25, 2013, from Port counsel regarding “K” Line’s purported discovery obligations, organizing its comments under the headings of the Port’s letter.<sup>14</sup> Those comments can be seen at pages 18-23 of the Status Report, Attachment B hereto.

**Q. “K” Line’s Metadata Supplement October 23, 2013.**

“K” Line Produced on October 23, 2013 a Metadata Status Report Supplement, as promised. The Report presents in excruciating detail the metadata debacle, which does not bear repeating in this Petition. Instead, we attach it<sup>15</sup> because it is a beautiful example of the absurd discovery situation in this Docket. It does deserve reading, particularly the summary of documents identified by the Port as requested to be reproduced with metadata by “K” Line. It

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<sup>14</sup> The Port’s February 25, 2013, letter is attached hereto as Attachment C.

<sup>15</sup> Attachment D hereto.

presents a fitting conclusion to the discussion of discovery in this Docket because it leaves no doubt that the Port's "discovery" argument was a frivolous sham. A shining example is the Port's demand for metadata for a printout of 1,121 pages of "K" Line Container numbers pulled from the "K" Line database. (Status Report at 5). This Status Report should have made a strong impression on the ALJ, but apparently it was not even noticed.

**R. The Presiding Officer's Abdication of Duty under the APA and the Commission's Regulations**

Terminating a case before the FMC by dismissal is a drastic remedy which "should be applied only in extreme circumstances." *Interconex, Inc. v. FMC*, 572 F.2d 27 (2d. Cir. 1978), citing *Independent Productions Corp. v. Loew's*, 283 F.2d 730 (2d. Cir. 1960). The ALJ's February 5, 2014 Orders denied "K" Line's Motion for Partial Summary Judgment and dismissed its complaint under the guise of "discovery sanctions." The ALJ ignored "K" Line's prima facie case on undisputed facts. "K" Line's case was never rebutted by the Port, which argued only that "K" Line's complaint should be dismissed because of violations of the ALJ's discovery orders.<sup>16</sup>

The ALJ denied "K" Line its right to fair consideration of the merits of its claim as a matter of law on the undisputed facts of record. "K" Line showed that the Port's claim of "hotly disputed" facts was fake. Its claim could and should have been decided efficiently based on the record alone, without additional discovery or a full-dress evidentiary hearing. The Port had ample opportunity to rebut "K" Line's case, but elected instead to demand more discovery. See *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335 (D.C. Cir. 1967) (no evidentiary hearing required where issue is one of law; FMC procedure resulting in cease and desist order

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<sup>16</sup> Prominently lacking in the ALJ's rulings terminating "K" Line's case was any finding by the ALJ that the Port made any proffer (by statement and/or evidence) of what the "hotly disputed" facts are or how they are in *any way material to the Port's defense*.

regarding unfiled Section 15 agreement adequate because petitioner was afforded opportunity to denominate undisputed material facts and explain their relevance and materiality, and because question “ultimately determined was a question of law”). *Accord, Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (no oral hearing required to resolve dispute over inferences to be drawn from undisputed facts); *U.S. v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971) “settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory”) (citations omitted).

An evidentiary **hearing** is not necessary to address the weight to be assigned to particular evidence. [emphasis original.]

Generally, agencies may hold evidentiary or trial-type **hearings** involving live testimony and cross-examination of witnesses when there are genuine issues of material fact in dispute, as to which such testimony is likely to produce a resolution of the issue. Section 556(d) of the APA provides in relevant part that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). But, unless material facts are in dispute there is no right to cross-examination and confrontation. See National Trailer Convoy, Inc. v. Interstate Commerce Comm’n, 293 F. Supp. 643, 636 (N.D. Okla. 1968). Cross-examination is thus not an absolute right in administrative cases. See, e.g., I John Henry Wigmore, *Wigmore on Evidence* § 4(c) (Tilers 1983).

FMC Docket No. 02-09, *Ocean Common Carrier Status of Shanghai Hal Hua Shipping Co., Ltd. (HASC0)*, Order served January 13, 2003 at 14. The Port waived its right to defend against “K” Line’s case, as illustrated in the following statement: “[a]nd *the Port Authority has never sought judgment on the merits . . .*” Response to Complainant’s Motion for Implementation of ALJ Rulings, at 2. (emphasis added).

The ALJ’s Orders constituted final disposition of the adjudication, within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. § 151(6) (defining “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an

agency in a matter other than rule making . . .”) and (7) (defining adjudication” as an “agency process for the formulation of an order”). Those Orders failed to address, with thorough findings and reasoning adequately supported by the record, the merits of material issues “K” Line presented to the ALJ. The Orders did not even present adequate findings and reasoning on the discovery issue – there was no analysis of the discovery situation: at no time in the case did the ALJ engage on the discovery argument – the ALJ only wished the parties would make the issue go away, then swallowed whole the Port’s “hotly disputed” bait.

While the APA does not oblige an administrative adjudicator to resolve and make subsidiary findings on all issues before it, the APA requires a decision and specific findings on “those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amerep*, 102 F.T.C. 1362, 1670 (1983). Before issuing the Orders that ended “K” Line’s case, the ALJ was duty-bound to “consider [] the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, substantial and probative evidence,” and to decide “all material issues of fact, law, or discretion presented on the record.” *See* 5 U.S.C. §§ 556(d) and 557(c)(A). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981). Likewise, the FMC’s Rules of Practice and Procedure require the ALJ to rule on *all* material issues, and to state the reasons and bases of those rulings on the record. *See* 46 CFR § 502.223 (all decisions “will include a statement of the findings and conclusions, as well as the reasons or basis therefor, upon *all material issues presented on the record.*” (emphasis added). This was required on the merits of “K” Line’s final case, but was also required on the discovery issues, because this was a final order dismissing the case. *See, e.g., McKenna Trucking*, 27 S.R.R. 1054-55 (articulating reasons for dismissing claims under four sections of the Shipping Act based on record before ALJ). The ALJ punished “K” Line for pointing out, repeatedly, that the question whether the Port’s wholly unapportioned CFC was

unreasonable was ripe for resolution, without the necessity of endless intrusive discovery into “K” Line’s relationships with counterparties to transportation contracts and affiliates. This was an abuse of discretion and was arbitrary, capricious, and contrary to law and Commission regulations.

Due process and fundamental fairness required the ALJ to address and resolve the issues on the merits. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (fundamental elements of procedural due process are notice and an opportunity to be heard). The Orders evidence no consideration of “K” Line’s position that the merits of this case can be resolved on the undisputed facts of record or of “K” Line’s extensive discovery arguments. “An agency is generally under at least a minimal obligation to provide adequate reasons explaining why it has rejected uncontroverted evidence.” *Soltane v. U.S. Department of Justice*, 381 F.3d 143, 151 (3d Cir. 2004). *See also Lwin v. INS*, 144 F.3d 505, 513 (7<sup>th</sup> Cir. 1988)(“Agencies must respond to the arguments presented to them;” (ALJ decision vacated for disregarding party’s arguments). Apart from considerations of due process and basic fairness, the Orders’ failure to adequately address “K” Line’s case on its merits, or the discovery issues, renders the ALJ’s ’s decision to reject “K” Line’s position essentially unreviewable. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (to facilitate effective review, the reviewing tribunal requires more than just the result; it needs the reasoning for the result).

This appeal suspends the finality of the ALJ’s Orders, and, upon review, the Commission is not bound by the ALJ’s decision to ignore the merits of “K” Line’s position and summarily dismiss for discovery shortfall. *See* 46 CFR § 502.227(a)(4) (“a decision or order of dismissal by an administrative law judge shall only be considered final for purposes of judicial review if the party has first sought review by the Commission pursuant to this section.”). The Commission’s review is *de novo*. Under 46 CFR § 502.227(a)(6), when the Commission reviews an order of

dismissal, its own Rules of Practice and Procedure expressly provide that “the Commission, except as it may limit the issues upon notice or by rule, will have all the power which it would have in making the initial decision.”

As painstakingly set out herein above, the ALJ’s denial of “K” Line’s dispositive motion for judgment and the ALJ’s dismissal ruling with prejudice on strictly procedural grounds suffered from irreparable material defects and deprived “K” Line of its right to a fair hearing. Ruling *de novo* now by the Commission is necessary to right this wrong. The Commission’s *de novo* ruling in the *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1134 (FMC 1997) provides authoritative precedent and underscores this necessity:<sup>17</sup>

Normally, at this point in a proceeding, the Commission can dispose of the issues on consideration of the errors in fact or law assigned to the I.D. by the parties in Exceptions and arguments made in Replies to the Exceptions. Unfortunately, the I.D. presents no lucid line of reasoning or presentation of issues upon which we can exercise review [Footnote deleted]. Summaries of the parties' contentions are interspersed with "findings" on factual and legal issues, without warning to the reader and without any hint of the ALJ's reasoning, resulting in a general lack of coherence. In addition, the I.D. fails to analyze and assess the record in terms of the specific issues raised by the parties and specified in the Commission's May 1 Order and to apply the relevant standards of the 1984 Act in such an analysis. Although the APA requires that every initial decision include a statement of "findings and conclusions, and the reason or basis thereof, on all the material issues of fact, law, or discretion presented on the record . . . ," the I.D. contains no clear statement of findings or conclusions. 5 U.S.C. §557(c). The I.D.'s ultimate findings of law are merely conclusory restatements of the specific issues referred in the May 1 Order. I.D. at 24-25.

\* \* \*

We have reviewed the record as a whole, which we have summarized at some length above, and decide the issues in this proceeding *de novo*. Footnote 21/  
Footnote 21/

"Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission . . . will have all the powers it would have in making the initial decision." FMC Rules of Practice and Procedure, Rule 227, 46 C.F.R. §502.227. See also 5 U.S.C. 557(b). Where the

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<sup>17</sup> The ALJ’s dismissal in this proceeding constitutes a final disposition of the adjudication matter, as would the issuance of an initial decision (FMC’s Rule of Practice and Procedure, Rule 69, 46 CFR 502.69).

Commission finds that the administrative law judge has failed to provide an adequate basis for Commission review in his initial decision,... the Commission can either vacate the initial decision and remand the case for reassignment to another judge, *Universal Cargo Management, Inc. v. Hyundai Merchant Marine Co., Ltd.*, \_\_\_ F.M.C. \_\_\_, 27 S.R.R. 813, 816 (1996), or vacate the initial decision and decide the case de novo on the basis of the existing record, *AAEL America Africa Europe Line GMBH v. Virginia International Trade and Investment Group LLC and William W. Joyce III*, \_\_\_ F.M.C. \_\_\_, 27 S.R.R. 825 (1996). In the interest of bringing this already protracted proceeding to a close, we have chosen the latter course.

*Id.* at 1157-1158.

Here, the ALJ turned away a Complainant who disputed not one fact, closing the Commission's doors to "K" Line. The ALJ accepted the Port's twisted definition of a "fact" which cannot be found in any dictionary, and the Port's warped definition of the word "service," to turn "K" Line away. Throughout the case, except for one false move in a discovery ruling, the ALJ adopted the Port's positions uncritically. The ALJ abdicated the responsibility imposed by the APA and the Commission's Rules to treat the litigants seriously, to review the record and to make findings supported by clear explanations. The dismissal Order is unreviewable for lack of content.

#### **S. The Dismissal Order**

After all these years and all these motions, the ALJ dismissed this proceeding for failure to obey discovery orders. The ALJ continued to misstate "K" Line's position. (Order at 2.) The first leg of "K" Line's argument is that, regardless of "benefits," there is no service rendered as a quid pro quo for the CFC. This renders the CFC unlawful under Section 41102(c).

The second leg of the argument is that, whatever benefits "K" Line and other vessel operators enjoy from the existence and operation of Port facilities, the Port cannot lawfully single out vessel operators for a charge which purportedly goes to support those operations. So, aside from all the deficiencies in Section H in addition to the main issue, "K" Line's position is it

is unlawful for an MTO to levy any charge on vessel operators which is not a fee for an actual service to the vessels regardless of what benefits the vessel operators may enjoy from the Port's operations. "K" Line also argues it is an unreasonable practice for the Port to condition access to private terminals services upon payment of the CFC to the Port.

"K" Line is not arguing that there are "services" to vessel operators and "services" to all other Port users, but that the Port cannot make vessel operators pay the Port for enjoying the benefits of using the Port operations just like so many others. The ALJ devoted a paltry few words to "K" Line's position in this vein, devoting much more print to the policy considerations which "K" Line submits make the issue important. Then the ALJ falls back on prior Orders, devoting several pages to them.

The Order reaches into "K" Line's Discovery Status Report and plucks out a single sentence, expressing surprise that "K" Line is "turning the focus to whether the fee may be imposed (at any level) against [vessel operators]." Order at 5. This is precisely "K" Line's position: We have said over and over that the level of the CFC is immaterial and uncontested. We have done everything but stand on our heads to make this clear. We are not trying to remove "the issue of the reasonableness of the cargo facility fee," and our focus is exactly that the amount of the fee is immaterial – the fee cannot be imposed on vessel operators without a service in return. Only if there is a service in return can the reasonableness of the amount of the fee be measured against the service furnished to vessel operators.

The heart of the dismissal is the statement that "Complainant has indicated that it will continue to refuse to provide the required discovery...Complainant's failure to produce discovery is therefore willful." The dismissal Order, nor any previous Order, has ever evaluated in the slightest degree, has never turned a hair to evaluate the positions of "K" Line and Respondent regarding discovery. The Order characterizes the discovery sought as a "limited

amount.” (Order at 7). The ALJ has never responded to the objections of “K” Line or the other Complainants to the discovery demanded by the Port. The ALJ does not do so in this Order. The ALJ is fixated on previous Orders, seemingly under the impression that an ALJ’s authority to order discovery is unbridled, and an ALJ has no responsibility or obligation to become involved in the merits of discovery demands.

The Order makes the incredible statement that “the discovery that has been ordered and not produced goes to the heart of this issue of whether the Cargo Facility Charge is being leveled against vessel operators or against integrated global shipping and logistics enterprises and whether the charges have been apportioned as closely as is practicable.” (Order at 8). There is no such issue. The ALJ simply refuses to accept the requirement that a particular service must be rendered to a vessel in order for an MTO to charge a fee to the vessel operator. The ALJ has done the following: 1. Rejected the long-standing rule that an MTO must render a specific, identifiable service to a vessel operator in order to charge the vessel operator a fee; 2. Refused to accept the fact that no service is rendered to vessels in exchange for the CFC; 3. Unilaterally transformed the consistent historical requirement that an MTO render a specific service in return for a fee into a rule that an MTO can justify a fee imposed on vessel operators with benefits enjoyed by vessel operators and in some indirect fashion by vessel operators’ extended corporate families; 4. Refused to consider the reasonableness under Section 41102(c) of an MTO practice of forcing payment of a fee by coercion of private terminal operators into denying their services to vessel operators in default of paying the fee; 5. Discarded “K” Line’s arguments as to the unreasonableness of the wording and implementation of Section H as if they did not exist; and 6. Used this novel theory of the reasonableness of MTO fees and their collection to deny “K” Line a hearing on the main issues and subsidiary issues without ever, during the years this proceeding has been pending, offered a reasoned analysis applying the law to the undisputed facts or

evaluating the legitimacy of the Port's discovery demands in the face of the massive discovery responses on the Complainants' side and "K" Line's thorough debunking of the Port's fatuous discovery arguments. The Order concludes with the preposterous statement that "it very well may be that the relationship between "K" Line and its affiliates demonstrates the unfairness of the Cargo Facility Charge. However, without the relevant evidence, it is not possible to reach the merits and make that determination." "That determination" is utterly alien to any Commission or Court precedent.

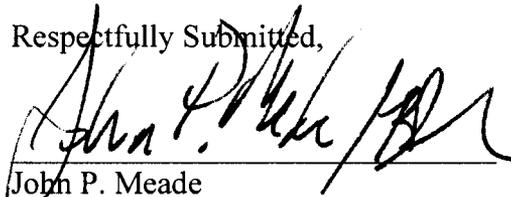
#### **T. Relief Requested**

"K" Line respectfully request the Commission to make the following Findings and Order the following Relief:

1. Order that the ALJ committed reversible error in dismissing with prejudice on procedural grounds pursuant to FMC Rule 502.223 and APA 5 USC 557(c)(3)(A)(B)), and find that ALJ dismissal was not founded on "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.
2. Find that the ALJ committed reversible error in not issuing a decision and findings on motions for judgment in this docket, when all material facts are undisputed.
3. Find that the discovery furnished to the Port by Complainant "K" Line included all facts material to resolution of the lawfulness of the CFC, under § 41102(c).
4. Find that the ALJ committed reversible error in ordering discovery on non-material matters, thus forcing at least three complainants to withdraw from the case.
5. Find that since all material facts are undisputed and "K" Line is willing to stipulate to any material facts, but not to inferences, arguments or legal conclusions or facts involving other than services rendered to vessel operators in return for the CFC (as the term "services" is universally understood), an evidentiary hearing in this Docket is not warranted and would be a waste of the ALJ's and the litigant's time and resources, thus the ALJ's insistence on such hearing was an abuse of discretion constituting reversible error.
6. Find that the ALJ committed reversible error in holding that benefits accruing to vessel operators from ongoing Port facilities and services, without the Port rendering a service to the vessel (thus the vessel operator) in exchange for the CFC which generates such benefits, could support the lawfulness of the CFC, under 46 USC § 41102(c).

7. Find that the CFC is an unreasonable practice under 46 USC § 41102(c) because it is imposed by the Port on vessel operators without any service being furnished to the vessel/vessel operators as a quid pro quo for the payment of the CFC.
8. Find that the Port's CFC collection method, forcing tenant private terminal operators to stop serving any vessel of any operator in default of paying the CFC for 60 days is an unreasonable practice under 46 USC § 41102(c).
9. Find that the CFC is not authorized under the MTO provisions of the Shipping Act of 1983, as amended, 46 USC § 41106.
10. Find that while the imposition of the CFC is a matter within the jurisdiction of the Commission, including whether the level of the CFC is reasonable, adjustment of the level of the CFC is not.
11. Find that the Motions for Judgment of December 7, 2012 and of August 9, 2013, should have been granted, and so order that they shall and be granted.
12. Find that "K" Line is entitled to reparations from the Port in the total amount of all "K" Line CFC payments to date.
13. Find that "K" Line is entitled to interest on such reparations total from the Port.
14. Find that "K" Line is entitled to all attorney's fees it expended in relation to this Docket from the Port.
15. Order the Respondent Port of New York/New Jersey to cease and desist, from the date of the Commission Order, from collecting the Cargo Facility Charge, or any like charge imposed on vessels/vessel operators without a specific, discrete service rendered to the vessel which is rendered solely in return for the payment of such charge, and not to force payment of any charge by ordering or arranging for tenant terminal operators to discontinue any service to any vessel.
16. Remand to the Administrative Law Judge for expeditious determination of the amounts due under "12, 13 and 24," above.
17. Find that only issues under the Shipping Act of 1984, as amended, are within Commission jurisdiction over Respondent Port in this proceeding, and all constitutional and statutory issues referenced by "K" Line must be decided in any review of this decision.

Respectfully Submitted,



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April 24, 2014

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**CERTIFICATE OF SERVICE**

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*John P. Meade*  
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# Attachment A

**CONFIDENTIAL**

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

<b>HANJIN SHIPPING CO., LTD.; KAWASAKI KISEN KAISHA LTD.; NIPPON YUSEN KAISHA; UNITED ARAB SHIPPING COMPANY (S.A.G.); and YANG MING MARINE TRANSPORT CORPORATION,</b>	)	
	)	
<b>Complainants,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

**Docket No. 11-12**

**MOTION FOR JUDGMENT THAT RESPONDENT'S CARGO FACILITY  
CHARGE VIOLATES 46 U.S.C. § 41102(c)**

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**I. INTRODUCTION**

Complainants move the Presiding Officer to find that Respondent's Terminal Tariff (Section H) and its implementation, imposing on Complainants' vessels a "Container Facility Charge" ("CFC") for each loaded or discharged container or non-containerized cargo unit at the Port of New York and New Jersey, violates 46 U.S.C. § 41102(c).

The facts persuasive of this finding are simple and undisputed. The terms of Respondent's Tariff itself condemn the CFC, together with the facts that Complainants only receive container vessel services at the Port of New York and New Jersey ("Port") by contract exclusively with private terminals operating under leases from Respondent, and non-container vessel services from private stevedores. The Port's own statements then show the CFC is nothing but a vessel tax, severed from any benefit to the only interest paying it, vessel operators.

If the CFC could survive the internal flaws in the Port Tariff itself, the CFC would not survive under controlling precedents: The Port, as a marine terminal operator, violates 46 U.S.C. § 41102(c) by force-feeding a tariff charge to vessel operators and rendering no service in return for the charge, much less service reasonably commensurate with the charge. There must be a reasonable *quid pro quo*; a terminal tariff charge on vessels cannot be justified by theoretical analysis purporting to show that, over time, some untethered benefits may trickle down to vessel operators as one class in a universe of beneficiaries, while other classes pay nothing. The two-step analysis mandated by precedent regarding section 41102(c), determining the benefit, then determining if the benefit is reasonably related to the charge, cannot be implemented when there is no service which can be identified as rendered in return for a charge.

Complainants will not pursue violation of any provision of the Shipping Act of 1984, as amended, other than 46 U.S.C. §41102(c). It has become apparent it would be superfluous and duplicative to do so.

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### II. FACTS

#### **A. Foundational Facts**

##### **The Parties**

1. Complainants are ocean common carriers under the Shipping Act, 46 U.S.C. §§ 40102(6) and (17). *See* Statement of Facts Not in Dispute, ¶ 1. Each Complainant's container vessels regularly call at private terminals in the Port where they are furnished all services within the Port limits by those marine terminal operators at their leased facilities. *Id.* ¶¶ 3-4, 6-7. The Port is a public port only as to the Port's public marine terminals. Vehicle shipping and processing terminals are located at the Port's public berths where private stevedores service Complainant's roll-on/roll-off vessels. *Id.* ¶ 5. At public berths where two Complainants' non-container vessels berth, those vessels use no services furnished by, or participated in, by the Port in connection with loading, handling or discharging cargo. *Id.* ¶¶ 8, 10-12. The Port is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14) (FMC Organization No. 002021). *Id.* ¶ 2.

##### **The CFC**

2. Section H of the Port Authority of New York and New Jersey's Tariff (FMC Schedule No. PA 10, effective February 2011, ("the Tariff") instituted the Cargo Facility Charge ("CFC") and contains the subrules for imposing and enforcing it. SUBRULE 34-1200 of Section H of the Port's Tariff applied the CFC, effective March 14, 2011, to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths. *Id.* ¶¶ 13, 18-22.

3. The Tariff says the CFC "appl[ies] to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port Authority leased and public berths." Tariff, Section H, Subrule 34-1200. *See* Statement of Facts Not in Dispute, ¶ 19.

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4. The Tariff announced a CFC of \$4.95 per TEU of “container cargo.” Tariff, Section H, Subrule 34-1210. The assessment, by the Port’s description, is supposed to be against cargo in containers, but it is collected from the vessels for their container operations in the Port, whether or not cargo is involved. Non-container vessel operators are charged \$1.11 per unit. *See* Statement of Facts Not in Dispute, ¶¶ 20-23.

5. The Tariff provides for the CFC to be assessed against each so-called terminal “user.” *Id.* ¶ 24. In implementing the CFC, the Port implicitly reads “user” to mean any vessel calling at any terminal, leased or public, at the Port. *Id.* ¶¶ 25-26.

6. The Tariff provides, for the first time, a definition of “Port User” in Section H, Subrule 34-1220(1)(a): “‘User’ shall mean a user of cargo handling services.” The Tariff does not define “cargo handling services.” *See* Statement of Facts Not in Dispute, ¶¶ 24-25, 57.

7. Whether using the services of leased terminals or berthing at public terminals, all transiting vessels are held responsible by the Tariff for payment of the CFC. The CFC is charged against the handling by private entities of all containers and non-containerized cargoes on and off all carriers’ vessels, including containers operated by vessel space charterers. Tariff, Section H, Subrule 34-1220(3)(a)(ii). *See* Statement of Facts Not in Dispute, ¶ 29.

8. Section H does not pretend the CFC is a charge in return for any service provided by the Port to container vessels or non-container vessels. *Id.* ¶ 37.

9. “Terminal operator” is recognized by the Tariff to be a “leased berth operator.” Tariff, Section H, Subrule 34-1220. *See* Statement of Facts Not in Dispute, ¶ 27. The Port scheme was facially that the lessee terminal operator would collect the CFC from each container vessel operator and forward the payments to the Port. *Id.* ¶ 30. APM Terminals objected, so the Port began to invoice carriers “c/o” the terminals. *Id.* ¶ 36. Certain container vessel operators actually pay the charge directly to the Port. *Id.* ¶ 31. Terminal operators must send a monthly Vessel Activity Report (“Report”) to the Port

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detailing all vessel activity at their terminals. The Report must identify container vessel operations from which the terminal operator did not receive the CFCs billed in Port invoices submitted to the vessel operator. Tariff, Section H, Subrule 34-1220(3)(b)(ii). *See* Statement of Facts Not in Dispute, ¶ 32.

**Collecting From Vessel Operators by Blockade Threat**

10. The Port announced enforcement for lack of compliance with the CFC and its supporting rules in Section H, beginning August 15, 2011. *Id.* ¶ 48.

11. The Port issues monthly invoices to each “user” of a leased terminal and to each “user” of a public berth. *Id.* ¶ 34. Invoices to those “users” of leased terminals are issued “c/o” the terminal based on the prior month’s terminal Report. Tariff, Section H, Subrule 34-1220(3)(b)(i). *See* Statement of Facts Not in Dispute, ¶¶ 35-36. If a “user” does not pay the CFC for two consecutive Report periods, Section H directs the Port to require all terminal operators to cease service to all vessels whose operator did not pay the CFC and provides that the Port will issue a port-wide blockade order:

...the Port Authority shall issue a directive to every terminal operator prohibiting them from providing any service that would be subject to a Cargo Facility Charge to the delinquent user for a period from no later than 5 calendar days from the date of the directive until receipt of notice from the Port Authority that such unpaid Cargo Facility Charges have been paid.

Tariff, Section H, Subrule 34-1220(3)(b)(iii). *See* Statement of Facts Not in Dispute, ¶ 37. This effectively blockades not only all that operator’s vessels and appurtenant containers, but, as well, all the containers to be carried on that operator’s vessels under space charters, and all that operator’s containers in slots chartered on other operator’s vessels. *See* Statement of Facts Not in Dispute, ¶¶ 39-40. So, the Port is closed to all these ships.

12. If a terminal operator continues serving a vessel despite a prohibition on service ordered by the Port, the port punishes that terminal operator by making it fully liable to the Port indefinitely for the CFC charges assessed against that vessel. Tariff,

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Section H, Subrule 34-1220(3)(b)(iv). *See* Statement of Facts Not in Dispute, ¶ 41. This puts teeth into the blockade order.

13. Since March 14, 2011, each Complainant has been, and continues to be, invoiced for the CFC by the Port “c/o” container terminal operators. *Id.* ¶ 45. Each Complainant has been, and continues to be, invoiced for the CFC for containers listed in its bills of lading whether carried on its own vessels or on other carriers’ vessels under space charter and handled at any Port terminal facility. Tariff, Section H, Subrule 34-1220(3)(a)(ii). *See* Statement of Facts Not in Dispute, ¶ 46. Each Complainant is forced by the blockade threat to then pay the CFC to the Port. *Id.* ¶¶ 47-54.

14. The CFC blockade threat applies to all space charterers on container vessels. If one signatory to a vessel-sharing agreement were ordered barred by the Port from all Port terminals, all other signatories would be punished. Tariff, Section H, Subrule 34-1220(3)(a)(ii). All vessels in that signatory’s fleet would be barred, all containers of other signatories to cooperative arrangements would be barred, as would the fleets of other cooperating operators. This “scorched earth” threat of berth denial forces Complainants to pay the CFC or cease operations at the Port. *Id.* ¶¶ 29, 38-42.

**The Lessee Container Terminals**

15. The lessee container terminals publish tariffs and assess tariff charges in accordance with their published tariffs, or in accordance with rates specified in contracts with Complainants whose vessels call at these leased terminals. Complainants have contracts with the lessee container terminals for all container services at the Port. *Id.* ¶¶ 7, 14-17, 55.

16. The Port has no contractual relationship with any Complainant whose vessels berth at leased terminals or public terminals. *Id.* ¶¶ 4-9.

17. The Terminal Agreements (FMC filed leases from the Port to the lessee MTOs) contain no provision that makes the Port’s Tariff applicable to activities at the MTO’s terminals. The Tariff excludes application of the Tariff, and its Rules and

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Regulations, to any leased terminal unless the lease provides for it. Tariff Subrule 34-090, published February 2011, states:

...entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations [of the Port]; provided, however, that unless provision is made in the lease for application of said Rules and Regulations to the leased premises, such Rules and Regulations shall not apply to such leased premises.

*See* Statement of Facts Not in Dispute, ¶¶ 59-62.

**Public Berths**

18. For their vessels' use of a public (non-leased) berth, the Tariff directs Complainants to pay the CFC directly to the Port. Tariff, Section H, Subrule 34-1220, 4. *See* Statement of Facts Not in Dispute, ¶¶ 19, 33. Private stevedores furnish all services to vessels at public berths. The Port provides no "cargo handling services" at public berths. *Id.* ¶¶ 5, 8, 12, 28-29.

**Port Adoption of the CFC**

19. The Port adopted the CFC in 2010 as a port-wide, supposedly "cargo-based" charge to be imposed on Complainants and other carriers. The Port supported its adoption, stating the goal of the CFC assessment on "cargoes," as follows:

Increasing the operational efficiency for the movement of goods at the Port and throughout the region is a key strategic goal. To achieve that goal, the proposed Cargo Facility Charge would be assessed on all cargoes that benefit from capital investments in security, rail and road improvements. The proposed Cargo Facility Charge would be levied on all types of waterborne cargo moving through Port Authority marine terminal facilities — containers, vehicles, and bulk/breakbulk, general, heavy lift and special cargo.

*See* Statement of Facts Not in Dispute, ¶ 90.

20. The CFC levy on "waterborne cargo" was described in the Port Authority's December 7, 2010 Board Minutes ("Board Minutes"), p. 356, as:

. . . a new Port Authority cargo-based port infrastructure and security fee, to be known as the Cargo Facility Charge, that will be applicable to waterborne cargo discharged from or loaded on to vessels at Port Authority leased and public berths. . .

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*Id.* ¶ 90.

21. When the CFC was adopted, the Port painted this picture of imaginary “components” of the CFC:

- i. One component of the fee would recover capital expenditures incurred to construct our ExpressRail infrastructure. In addition to those who directly utilize the rail system, given the long-standing issues of road congestion in the Port, those who ship by truck have benefited from the investment in the ExpressRail system and continue to do so. Accordingly, it is fair and appropriate that they share in the cost of the investment in the ExpressRail system.
- ii. In 2004, an intermodal lift fee was implemented to recover the expenditures to date to construct Port-wide ExpressRail facilities. Rail cargo movements remove trucks from our terminals’ gates and the Port’s and region’s highways, and benefit regional cargo with the increased roadway and gate capacity they provide. The ExpressRail System is an important link in the Port’s logistics chain, the existence of which creates a more efficient transportation network for the transportation of containers while also mitigating negative environmental impacts to the region. Implementation of the Cargo Facility Charge (which includes the rail component) would eliminate the need for the Intermodal Container Lift Fee and be a broader and fairer assessment on the direct and indirect beneficiaries of the investment in ExpressRail.
- iii. As the agency continues to invest in the ExpressRail System, sufficient capacity on the Port’s roadway system also must be provided, because the truck is, and will remain, the dominant mode of transport in the Port, due to the large local market we serve. The second component of the proposed Cargo Facility Charge would be charged proportionately to recover the cost of important Port roadway projects at Port Newark and the Elizabeth-Port Authority Marine Terminal (EPAMT), to reduce truck idling times and mitigate the attendant negative environmental impact caused by idling.
- iv. Under the third component of the Cargo Facility Charge, all cargoes would be charged proportionately for the partial recovery of the Port Authority’s incremental post-9-11 security costs. ...
- v. The security component of the fee may be adjusted in the future to reflect later investments of security-related capital costs.

*Id.* ¶ 90. Board Minutes, pp. 356-357. The CFC is portrayed falsely as a charge on cargo, not vessel operations, and the “components” are phantasmagoric. *Id.* ¶ 90.

22. Latterly, the Port faced the reality that carrier CFC payments “are not earmarked for particular expenditures.” “The Port Authority of New York and New

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Jersey's Objections and Responses to Complainant's First Request for Production of Documents," FMC Docket No. 11-12, Oct. 4, 2011, Document Requests Nos. 52 and 56, pp. 36 and 38. See Statement of Facts Not in Dispute, ¶ 91. So, the puffery has evanesced: the CFC proceeds go into general revenue.

**B. The Substitution of the CFC Tax for the Rail User Fee**

The Port's own words and its favored customers' show the CFC is a tax on vessel operators for facilities used by the universe of port customers.

**User Fees Considered**

23. In January 2008, the Port Commerce Department issued a Confidential Draft memo exploring "user fees." The draft memo explained user fees and taxes thusly:

As Wikipedia states: 'A fee is the price one pays as remuneration for services.' A user fee is a direct charge for a service rendered or a benefit conferred and requires a close nexus between the two. A tax in this context is a compulsory charge for the privilege of access to or use of the facility, regardless of any benefit derived.

\* \* \*

Our ExpressRail user fee is a good example of a user fee program that has worked well for us, which has also been accepted by the industry.

The memo explained the history of the successful Express Rail user fee program in financing the Port's on-port rail system and noted user fees at other ports as well as proposed state and federal container fees which actually "appear to be taxes not user fees". So, in 2008, the Port could see the difference between taxes and user fees. See Statement of Facts Not in Dispute, ¶ 63.

24. A second section "II" examined other potential "user fees" including a security fee to recover security costs, a harbor deepening fee, and interestingly a federally mandated Cargo Facility Charge. Finally, a CFC on cargoes by the Port was considered, "Perhaps best modeled after the rail and security fee, i.e. only used to recover PA costs that provide specific user benefits, only imposed after benefit is implemented." That sound concept was destined not to be followed. *Id.* ¶ 63.

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### Complaint by a 500-Pound Gorilla

25. The genesis of the CFC as it eventually appeared seems to have been on June 24, 2010, when CMA/CGM wrote the Port asking withdrawal of the PA's "Intermodal Fee" to keep CMA/CGM from diverting intermodal rail cargo through Norfolk. *See* Statement of Facts Not in Dispute, ¶ 64. On June 25, CMA-CGM demanded quick action. *Id.* ¶ 65. A spread sheet either CMA-CGM's or the Port's showed that CMA-CGM and four other carriers had been routing about a quarter of their total Port throughput via rail, while others like Evergreen, Hanjin, "K" Line, NYK and Yang Ming route between virtually nil and 5% by rail. *Id.* ¶ 66.

### The Port's Epiphany; Salvation in the CFC

26. The Port snapped to attention, with a July 9, 2010 draft contemplating a "Cargo Facility Charge" ("CFC"). *See* Statement of Facts Not in Dispute, ¶ 67. This draft was finalized (undated) with supporting data. *Id.* ¶ 68. It recognized the added cost (then \$55) for carriers to route intermodal cargo through the Port's Express Rail facility, a disadvantage for containers subject to diversion. The "Vision" was to make the Port more competitive by eliminating the rail fee (Capital Recover Fee or "CRF") equalizing costs for local containers and intermodal containers. *Id.* ¶ 69. Initially, it would be "revenue neutral," but would be increased to fund "the port's overall improvement." *Id.* ¶ 70. Loss of market share to Norfolk and Halifax was noted, two reasons being their infrastructure investment and "lower cost structure for the intermodal cargo." *Id.* ¶¶ 71-72.

27. The Port's memo recognized that, depending on ocean carriers' "percent of intermodal [rail] cargo, it has the possibility to cost more with the CFC." A delicate understatement: Attached data showed big winners and losers using 2009 figures, with MSC saving \$1.6 million, CMA-CGM \$446,000, while Evergreen, Hanjin, "K" Line, NYK, Yang Ming and UAS would go negative by \$360,000 to \$899,000. *Id.* ¶ 72.

28. A June 2010 memo from the Port's Mr. Zantal announced a "Rationale for a Cargo Facility Charge." *See* Statement of Facts Not in Dispute, ¶ 73. It noted the

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CRF's burden on the most price-sensitive intermodal market. It saw potential for charging all cargo "passing through the Port," recouping not only the rail investments but "other selected capital and operating costs," such as "roadway and security improvements." *Id.* ¶ 74. Increasing the fee over \$10 per container was foreseen in 2013. *Id.* ¶ 75.

29. Another memo by Mr. Zantal of October 16, 2010, claimed that the CFC "would be assessed on those cargoes that benefit from certain capital investments and attendant operations and maintenance costs for the projects." The memo presented an artificial breakdown of the CFC into "baskets":

The CFC is comprised of two separate baskets:

- Security fee to recoup non-reimbursable incremental post-9/11 expenses needed to meet federally mandated and other security measures would be assessed on a proportional basis to all types of cargo – containers, vehicles, bulk/breakbulk, general, heavy lift and special cargo – that flow through port Authority marine terminal facilities. Over 70 ports in the USA presently charge a security fee to recoup their expenses.
- A landside mobility fee to provide for continued investment in our intermodal ExpressRail system and the capital for three essential roadway projects in Port Newark/Elizabeth that will provide needed roadway capacity to further reduce Port congestion." (Emphasis added).

Statement of Facts Not in Dispute, ¶ 76. The memo then recognized that eliminating the \$57.50 CRF would prevent "diversion of cargo" by "three major ocean carriers." *Id.* ¶ 77. The Port did not analyze the benefit of actual services to vessel operators or the reasonableness of the CFC in relation thereto.

30. On February 9, 2010, an internal Port memo reiterated the CMA threat that unless the Port lifted the CFR and laid on the CFC, CMA would re-route 32,000 containers through southern ports, while the CFC substitution would have "a positive net affect on CMA's yearly NYNJ budget." It succinctly laid out the impact of the CFC, insofar as its competitive benefit to the Port and financial benefit to CMA, while anticipating that the CFC would fund increased roadway capacity, but noted CMA's

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concern “that the CFC will increase to unacceptable levels.” *Id.* ¶ 79. CMA feared too much of a good thing.

**Imaginary “Components” of the CFC**

31. A “Q & A for PCD Staff” dated the day the Port Board of Commissioners established the CFC (December 7, 2010) stuck to the fanciful narrative that “a component of the fee would recover capital expenditures incurred to construct our Express Rail infrastructure,” that a “second component of the proposed Cargo Facility Charge would be charged proportionately to recover the cost of important Port roadway projects” (Emphasis added). Finally, it described a “third component,” charging “proportionately” for recovery of “security-related operations and maintenance costs, and to recover a portion of previously unamortized capital investments.” The prospect of raising the CFC was acknowledged, as was the opportunity to fund any projects the Port chooses. *See* Statement of Facts Not in Dispute, ¶ 80. The “proportional” concept was fantasy.

32. Under date of December 20, 2010, Maersk Line protested the CFC, saying the CFC “contradicts ‘user fee’ principles, where cargo interests should be tasked in infrastructure development and security.” *See* Statement of Facts Not in Dispute, ¶ 81. New Jersey Senator Joseph Pennacchio agrees, having introduced a bill requiring a Port CFC levied on cargo only. *Id.* ¶ 82.

33. In an email dated January 20, 2011, a Mr. Scott Polin captured the essence of the CFC scheme, saying:

Brian, the general opinion on this is that the Port Authority catered to the 3 or so lines that this actually benefits leaving everyone else to make up for these 3 line’s cost reduction.

What would you tell a terminal operator that has a line who has a “no new surcharges” clause in their contract? Also, I can’t believe it’s remotely legal for the Port Authority to instruct terminals to discontinue business relationships with clients who don’t pay this. Basically a government entity demanding that a private corporation discontinue operations with a 3<sup>rd</sup> party private company.

*See* Statement of Facts Not in Dispute, ¶ 83.

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34. A March 7, 2011 memo showed how the Port originally set up the CFC to be billed to the private terminal operators, but terminal protests caused it to be switched to invoicing the vessel operators, using the terminals as mail drops. The memo also acknowledged the feasibility of charging the CFC to shippers *a la* Pier Pass, with “customization” for vehicles and bulk, but noted that charging the vessels is cheaper for the Port. *Id.* ¶ 84.

35. In a letter to two terminal operators (undated but responsive to July 2011 communications), the Port still clung to the myth of the specific “infrastructure projects that are related to the Section H charges.” *Id.* ¶¶ 85-86. That this was a fiction was admitted in the course of discovery. *Id.* ¶ 91.

36. The Port has informed various vessel operators that they would be barred from container services in the Port if they did not pay outstanding CFC charges by August 15, 2011. *Id.* ¶¶ 50-54.

**Angst Over User Fees**

37. The Port produced a very interesting undated draft memo on “The Funding of Supply Chain Infrastructure by Means of a Cargo Facility Charge Program: A Proposal.”

The memo defined user charges thusly:

A user charge is a fee charged to a user of a specific service on a facility, the fee for which does not exceed the reasonable value (benefit) received by the user of the facility or services for which the fee was charged.

Examples cited were “Pier Pass” and the Port’s Express Rail charge (CRF). The memo expounded on the benefit theme, saying “the value of the benefits accrued by the user should correspond to the fee paid by users to the facility or service funded by the fee.” The memo’s “unavoidable conclusion” was that “some sort of national cargo facility charge (CFC) program is needed,” similar to the “Passenger Facility Charge (PFC) Program” for airports. *See* Statement of Facts Not in Dispute, ¶ 87.

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38. An undated memo from the Port, apparently meant for the Governor of New Jersey, noted Maersk's observation that the CFC contradicts "user fee principles." Under the heading "Our Message," the Port admits the "rail-lift fee" is a user fee, which somehow "punishes" the ocean carriers using rail, while the CFC "levels the playing field." *Id.* ¶ 88. The Port's spreadsheet shows their own view of the CFC, replacing the rail user fee with a charge against all vessel operators using the Port. *Id.* ¶ 89.

### **C. The Winners and Losers Vessel Operators - By the Port's Calculations**

We attach the Port's spreadsheet showing its portrayal of the winners and losers from the switch to the CFC. Complainants are featured losers under the new tax. *Id.* ¶ 89.

To avoid misunderstanding, we stress that all the foregoing utterances and other communications are presented not for the truth of statements therein (except for data), but for the undeniable facts that the statements therein were made in the documents disclosed to Complainants in the course of discovery and the data were compiled by the Port.

## **III. ARGUMENT**

### **A. Summary**

The CFC is a tax on vessel loading and discharging. The Port admits the proceeds are not funneled to support any identifiable services. The Port bills all container vessels \$4.95 per TEU, replacing a rail user fee of \$57.50 per load, using private terminals as mail drops for invoices. The Port will order the leased terminals to stop handling a non-paying operator's containers, blocking its vessels and other cooperating vessels from the Port. The Port bills non-container vessels directly, \$1.11 per cargo unit.

For purposes of this motion, Complainants can concede they would enjoy some benefit from expenditures which might be facilitated by Respondent's cancelling its rail user fee and collecting the CFC instead. Complainants are not going to argue the point, because it is not germane. Better roadways, improvements in intermodal rail, cleaner air, more port police, or even better on-time records at LaGuardia are good for various classes of beneficiaries. These improvements for the common good might more readily

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eventuate with an ever-escalating CFC tax in place of a rail user fee, if the CFC gives the Port more disposable income, but they carry no weight in measuring the CFC against section 41102(c). Respondent disclaimed in discovery any identifiable uses of CFC receipts. When a charge is not linked to a service, it is inherently impossible to measure benefit – it is a constantly moving target.

Some favorite vessel operators (*e.g.*, CMA-CGM) enjoy a windfall from replacement of the use-based rail charges with the CFC (as the Port calculated), while others less important to the Port (*e.g.*, Complainants) are penalized (as the Port calculated). Container operators might find their intermodal truck movements facilitated by road or bridge work (if that is how the proceeds are spent) or enhanced port security might benefit non-container operators in some amorphous way. None of this is significant under the protocol established by the courts and the Commission to measure the legality of terminal charges under section 41102(c).<sup>1</sup>

Respondent's original narrative created for the CFC was that its proceeds would fund amortization of Respondent's rail facility and certain other projects. Maybe they will, maybe they won't - as any other general revenue tax on vessel operations. The Port admits it displaced the rail user fee purely for Port competitive reasons, generating cash to plug holes in its balance sheet, to be used (and increased) at Respondent's whim. The Port admits, to protect its intermodal market share and favor certain vessel operators, it decided to replace cash flow from a rail facility user fee, the CRF, with cash flow from CFC proceeds. The port made no cost-benefit analysis when it established the CFC, nor could it have because the CFC has no link to services: the CFC does not pass muster under section 41102(c).

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<sup>1</sup> 46 USC § 41102(c) states that a marine terminal operator "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." It is the recodification of section 10(d)(1) of the 1984 Act, 46 U.S.C. App 1709(d)(1), a standard carried forward from section 17 of the Shipping Act, 1916, 46 U.S.C. App. 816.

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Respondent leases out all the container terminal facilities at the Port to the private terminals where Complainants' container vessel loading and discharging are performed. Respondent's Tariff (Section H)<sup>2</sup> charges the CFC only to vessels, but tries to camouflage it by making container terminals mail drops for the CFC invoices to the vessels. Encountering terminal resistance, Respondent switched in mid-stream from invoicing the terminals to the cosmetic ruse of invoicing the CFC to Complainants, "c/o" terminals.

Section H presumed to order the terminals to collect the CFCs billed by Respondent to Complainants and remit to Respondent the CFCs "collected from each user."<sup>3</sup> But, Complainants are not "users" (defined in the Tariff as "a user of cargo handling services"); their vessels use no cargo-handling services provided by Respondent. Lessee terminals are the only "users" of actual Port services, while container cargo and vessels merely transit the Port. Forcing non-user vessel operators to pay the CFC under the guise of a "user" fee is an unreasonable practice.

Section H says the CFC is charged "to all cargo containers . . . discharged from or loaded into vessels at Port Authority leased and public berths," but containers are (at least when owned/operated by vessel owners) legally appurtenances of the vessel, so the charge is to the vessel. Section H does not impose the CFC on cargo<sup>4</sup> or the terminals; it imposes the CFC exclusively on vessel activities of loading and discharging containers and non-containerized cargoes. That is an unjust and unreasonable practice under section 41102(c), closely analogous to the unconstitutionality of vessel tonnage taxes.

It is an unjust and unreasonable practice for a marine terminal operator tariff to impose a charge exclusively on vessels without giving any vessel service in return. Laid bare, the CFC is a pure tax. Complainants pay the tax whether their vessels load/discharge empty containers,<sup>5</sup> loaded containers or break-bulk cargo. Section H does

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<sup>2</sup> Statement of Facts Not in Dispute ¶ 13.

<sup>3</sup> *Id.* ¶ 13 Tariff Subrule 34-1220(3)(b)(2).

<sup>4</sup> Respondent would charge a CFC to cargo under the pending NJ Senate Bill 2325, "Port Authority of New York and New Jersey Cargo Facility Charge Act," introduced November 19, 2012.

<sup>5</sup> A separate Motion for a Summary Judgment regarding charges on empty containers is pending.

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not impose the CFC for services upon parties receiving the services. It is in no sense a user charge. It has no legs to leave the starting gate for the running of the two-part test of “benefits” and “reasonableness” under § 41102(c). It is a true “non-starter” under 41102(c).

Viewed another way, it is an unjust and unreasonable practice for Respondent’s MTO Tariff to surcharge Complainants for cargo “handling” services furnished solely by private terminal operators. The CFC is a surcharge by Port fiat on Complainants’ vessels transiting the Port. Respondent is extracting the CFC from Complainants just because it can - by using raw blockade power, abusing its dominant position.

There is no contract with vessel operators concerning the CFC implied by the Tariff’s terms, and there is no express contract to support the CFC either, so Respondent has no legal basis for the CFC, thus no defense against the charge of unreasonable practice.

Using the blockade threat as a hammer to force payment of the CFC is an unjust and unreasonable practice standing alone. Forcing the CFC on Complainants on pain of the Section H blockade penalty, to be imposed both on the whole fleet of a non-paying operator and on its space charterers, is an extreme example of an unreasonable practice, which goes far beyond what is needed as a remedy for non-payment.

There can be no *bona fide* disagreement over the level of benefit accruing to Complainants from services in return for the CFC — there are no services in return. Instead of facing the inevitable defenses in collection actions for non-payment, Respondent uses its blockade threat against any “delinquent’s” vessels and its shared vessels to bludgeon potential protesters into filling Respondent’s coffers. Vessel operators pay millions in unlawful charges, while Respondent, admitting it could readily collect the monies lawfully from cargo interests, refuses to set up the mechanism to do

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so. This strong-arm scheme put the burden on Complainants to seek redress under the Act.<sup>6</sup>

### **B. The Port Tariff Does Not Apply to Activities at Leased Terminals**

The first CFC flaw is Tariff inapplicability to activities at container terminals where Complainants' vessels are served. The Tariff is described on its cover page as "Naming Rules and Regulations Applying at Port Authority Marine Terminals and Rates and Charges Applicable for the Use of Public areas At Port Authority Marine Terminals". Tariff Subrule 34-090 requires compliance with the "Rules and Regulations" by anyone entering onto or using the Port's facilities. However, this Subrule includes an exception for leased premises. The Tariff states:

Any permission granted by the Port Authority directly or indirectly, expressly or implication, to any person or persons to enter upon or use a terminal or any part thereof (including) watercraft operators, crew members and passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of lessees and other persons occupying space at such terminal, persons doing business with the Port Authority, its lessees, sublessees and permittees, and all other persons whatsoever whether or not of the type indicated, is conditioned upon compliance with the Port Authority Rules and Regulations; and entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations; provided, however, that unless provision is made in the lease for application of said Rules and Regulations for leased premises, such Rules and Regulations shall not apply to such leased premises. [Emphasis added.]

### **C. The Port Cannot Charge the CFC to Vessel Operators Under the Terms of Section H, Contract Law, or the Shipping Act.**

Complainants are not obligated to pay the CFC under the terms of Section H set out above for two reasons: First, the Complainants are not "users" of the Port's cargo services in their containerized cargo operations or non-container operations. The Complainants are "users" of the leased terminal's services under contract with the leased

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<sup>6</sup> Summary judgment is appropriate when pleadings and record demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The administrative law judge must view the facts in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all justifiable inferences derived from the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine disputes of material fact do not exist. *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

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terminal operators and “users” of private stevedore services for roll-on/roll-off operations. Second, the wording of Subrule 34-090 does not obligate vessel operators to pay the Port in “compliance with the Port Authority Rules and Regulations” because 34-090 by its terms does not apply to vessel operators’ activities on leased premises.

The Port has a contractual relationship with the lessee terminal operators but no contract with Complainants. There is therefore no contract privity on which to make Section H apply to vessel operators. The Port, between Scylla and Charybdis, tries to slip through on the weak cosmetic ruse of invoicing through the MTOs.

Lastly, the Shipping Act and Commission regulations block the Port from collecting the CFC from vessel operators. Subrule 34-090 provides that any person’s entry onto or use of Port terminals “shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations,” which tracks the Shipping Act provision deeming an implied contract to exist between a tariff publishing MTO and its users. However, the Tariff, the Commission’s regulations and the legislative History of the Ocean Shipping Reform Act of 1998 all preclude application of the published tariff to facilities covered by actual contractual relationships between an MTO (the Port) and its users (here, lessee terminals).

The Shipping Act precludes a Port Tariff provision (e.g. Subrule 34-090) that applies its published Tariff to premises under a lease contract when the lease does not specifically so provide. OSRA’s legislative history, and the administration of OSRA by the Commission underscore this principle.

OSRA amended the Shipping Act of 1984, changing the manner in which marine terminal operators (including port authorities, such as PANYNJ) are regulated, particularly as to the terminal operators’ application and enforcement of marine terminal tariffs or schedules.

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Prior to OSRA, MTOs were required to file tariffs with the Commission.<sup>7</sup> OSRA eliminated mandatory tariff filing and gave MTOs alternatives: MTOs could make schedules of their rates, regulations and practices available to the public, or MTOs could opt not to make schedules publicly available. The immediate practical difference is that MTOs that make schedules publicly available and users of those MTO services automatically are bound by an implied contract that is enforceable in court, but not enforceable at the Commission.<sup>8</sup>

An MTO's published tariff ceases to be an implied contract with any particular user of MTO services if the MTO and user enter into a contract covering the services provided by the MTO to that user.<sup>9</sup> The MTO which binds a user by an actual contract has no authority to apply the tariff along with its contract. The purpose of the "implied contract" is to ensure that, absent an actual MTO/user contract, marine terminal operators are promptly and fairly compensated for the services they provide.<sup>10</sup> The presence of an actual contract serves that objective, and the addition of an implied contract would provide MTOs with no added protection, but only sow confusion as to the applicable governance of the MTO-user relationship.

The Senate report describes this situation fully:

This section adds a provision to section 8 of the 1984 Act which will permit marine terminal operators to establish and make available to the public. . . a schedule of rates, regulations, and practices. . . pertaining to the receiving, delivering, handling or storing of property on the marine terminal. . . . Such schedules shall be enforceable by an appropriate court, not by the FMC, as an implied contract, without proof of actual knowledge of its provisions. If a marine terminal operator has an actual contract with a person covering the services rendered, such a schedule would not be enforceable as an implied contract with respect to that person. In the past, marine terminal operators established and filed tariffs with the FMC for their services pursuant to FMC regulations. This new provision is necessary to ensure that the operators of essential marine terminal

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<sup>7</sup> 46 CFR § 514.1(c)(3)(i)(A) (October 1, 1998). Requiring marine terminals to file tariffs with the Commission, prior to OSRA, was derived from Section 10 of the 1984 Act.

<sup>8</sup> Senate Report 105-61, 105th, 1st Session (July 31, 1997), at 24.

<sup>9</sup> *Id.*; 46 CFR § 525.2(a)(3).

<sup>10</sup> Senate Report at 24.

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transportation facilities are promptly and fairly compensated for the services they provide to waterborne commerce.

The Act provides:

**MARINE TERMINAL OPERATOR SCHEDULES-A** marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions. 40501(f)

The Commission's regulations implement the congressional mandate and purposes:

A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act (46 U.S.C. 41102(c), 41103, 41106), a schedule of its rates, regulations, and practices.

Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.

If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

46 CFR §525.2(a), (a)(2) and (a)(3).

The Port cannot charge vessel operators by Tariff when it provides no service. It is trying to do by subterfuge what its Tariff does not authorize, and applicable law and regulations prohibit — invoicing the CFC to the vessel operators by name (as sample Port CFC invoices attached clearly show) - but passing the invoices through MTOs acting as billing or collection agents. The inapplicability of the CFC to the non-“user” carriers, combined with the inapplicability of the Tariff to vessel operations at leased terminals, plus the statutory/regulation prohibition, all render the entirety of Section H violative of the Act as an unreasonable practice employed by the Port to collect the CFC.

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**D. No Port Services Are Rendered to Vessel Operators to be Subjects of the Two-Step Test of Section 41102(c)**

**The Supreme Court Test**

*Volkswagenwerk* is the leading case that in 1968 established the test for measuring violation of 46 U.S.C. § 41102(c), formerly section 17 of the Shipping Act of 1984.<sup>11</sup> *Volkswagenwerk* rejected as “far too blunt an instrument” a Commission test of “substantial benefit.” The Court recognized “it may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under section 17, even though not all members of the group receive equal benefits.” *Id.* at 281. This does not apply to the CFC. The CFC is not levied on all groups which enjoy the purported benefits the Port envisions. It is only levied on vessel operators, benefits to whom are neither quantifiable nor reliable.

The Court instructed that receipt of a “substantial benefit” is not the question – “The proper inquiry under section 17 is, in a word, whether the charge levied is reasonably related to the service rendered.” (Emphasis supplied.) *Id.* at 282. Because the Port renders no actual services to vessels, and benefits are theoretical, not empirical, there is nothing to put under a microscope. This frustrates any analysis under the *Volkswagenwerk* test. The *Volkswagenwerk* Court noted with approval the FMC approach in an earlier case where the Commission looked beyond “substantial benefits” to the “relationship between the service and the charge.” (*Id.*, fn. 33). (Emphasis added.)

**West Gulf Maritime**

The Maritime Commission followed *Volkswagenwerk* in *West Gulf Maritime Association* (18 SRR 783, 1978) in which it held: “The level of a charge must also be reasonably related to an actual service performed or a benefit conferred on the person charged.” (Citing *Volkswagenwerk*). 18 SRR at 790, fn 14.

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<sup>11</sup> *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261 (1968)(assessment for fund to mitigate the labor effect of technology held to be unreasonable).

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**Baton Rouge**

The *Volkswagenwerk* standard dominated a decade-long dispute over charges by Cargill, operator of a grain elevator under lease with the Port of Baton Rouge. It went to the D.C. Circuit via the ALJ and the Commission twice, culminating in a 1981 D.C. Circuit decision. Throughout the saga, the D.C. Circuit and the Commission held to the principle that under section 17, a marine terminal operator's charge must be "reasonably related to services rendered."<sup>12</sup>

The Port cannot argue that vessel operators are the only recipients of whatever benefits come from the rail facility, infrastructure improvements, or security enhancements – things that seem to be on the Port's mind when it rakes in the CFC proceeds. The 1975 Commission decision in the *Baton Rouge* dispute picked apart and disapproved, under section 17, the terminal's allocation of benefits to stevedores as a foundation for the charge to those stevedores. The Commission found the total cost for on-dock facilities could not be attributed solely to stevedores.<sup>13</sup> The D.C. Circuit confirmed the Commission decision, including the Commission remand for a further determination of a benefits formula.<sup>14</sup> The dispute then wended its way back to the D.C. Circuit, on appeal from the Commission's favorable finding.

In 1981, the D. C. Circuit dissected the Commission decision determining the benefits to stevedores from the MTO's per ton charge on grain handled, and the reasonableness of the MTO's charge. The *Volkswagenwerk* comparative analysis of relative benefits, "to determine whether a "reasonable relation to benefits derived" from "services and facilities," was on display in *Baton Rouge*. It is a complex technical exercise.

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<sup>12</sup> *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 655 F.2d 1210 (D.C. Cir. 1981).

<sup>13</sup> *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.* 18 FMC 140 (1975).

<sup>14</sup> *Cargill Inc. v. Federal Maritime Comm'n*, 530 F.2d 1062 (D.C. Cir. 1976)

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At issue in *Baton Rouge* was the benefit to stevedores of the MTO's facilities, in particular an "automated shipping gallery" for loading grains. The charge was actually a user fee for using the MTO's facility, which triggered the voyage into the minutiae of benefits. The D. C. Circuit approved the methodology employed in the Commission's two-step analysis of the Cargill charge: The FMC "having concluded that stevedores derive substantial benefits from the use of Cargill's services and facilities, the FMC proceeded to determine whether the charge of ten cents per ton is unjust or reasonable under §17." 655 F.2d 1210 at 1214. However, the Court failed the Commission's effort both on the "attribution of benefits to stevedores from the Cargill facility," and on the reasonableness of the charge. *Id.* at 1216-17. The Port here, in dropping the CRF rail user fee, severed any connection between benefits to vessel operators and Port charges like the CFC.

The *Baton Rouge* court held the Commission departed from *Volkswagenwerk's* teaching:

There, the Supreme Court held that the FMC may not sustain a charge against a sec. 17 attack merely because the challenger derives "some substantial benefit: from the party imposing the charge. *Id.* at 282, 88 S.Ct. at 940-41. Rather, the correlation of that benefit to the charges imposed (must be) reasonable." *Id.* In particular, if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under section 17. 88 S.Ct. at 940.

*Id.* at 1217. Here, there being no Port facility used, except the public berths which already charge wharfage, and no other group charged, the "reasonableness" exercise is over before it begins. The Port could initiate a "security fee" for security, which would have to survive the *Volkswagenwerk/Baton Rouge* dissection; or, the Port could try an "infrastructure fee." But, the CFC cannot be dropped wholly on the shoulders of vessel operators who do not feel discernible impact any different from that of lessee terminals or cargo interests. Vessels are not the targeted beneficiaries of any Port service or facility other than public berthing, much less anonymous expenditures of CFC proceeds. If the service does not target the group, neither can the fee.

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**Dreyfus**

The 49 page Initial Decision in *Dreyfus v. Plaquemines*, 25 FMC 73, 21 SRR 219 (1981) (Adopted by the Commission, 25 FMC 59 (1982)) is a prime example of the analysis of the services furnished in relation to a tonnage charge under Section 17 of the 1916 Act. The tonnage charge was enforced by criminal penalties and blacklisting, which the Hearing Examiner found extreme under section 17. 21 SRR at 238, 268. The Examiner also found a section 17 violation in that the Tariff's contradictory terms were ambiguous, 21 SRR at 268, noting that a tariff is construed against its issuer. 21 SRR at 261.

The Examiner noted that, as here, when Plaquemines adopted the charge, it had no "evidence of the actual costs of the service to be defrayed or recompensed." 21 SRR at 241. The Examiner concluded Plaquemines violated section 17 "because it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port and...Complainants have been subjected to charges which are not reasonably related to any services performed in their behalf by Plaquemines Port." 21 SRR at 268.

The ALJ's decision in the *Dreyfus* case held that the practice of a port authority assessing cargo-based fees on vessels calling at private terminals constituted unlawful double-charging of wharfage:

The fee embodied in Item 145 of the tariff is denominated as a "Supplemental Harbor Fee" but in fact it is a fee assessed solely against cargo. It is in the nature of a wharfage fee. . . . The Supplemental Harbor Fee operates as a wharfage fee for the use of private facilities which in addition themselves charge wharfage or fees which are in lieu of wharfage. . . . The charging of wharfage by Plaquemines Port for the use of private facilities when the private facilities also charge wharfage is an unreasonable and unlawful practice contrary to section 17 of the Act. This practice is assuredly unlawful inasmuch as the charges assessed clearly are not reasonably related to the services provided.

*Dreyfus*, 25 FMC at 24.

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Here we have an identical scheme: Respondent is imposing an additional fee on cargo loaded and unloaded, effectively a secondary, duplicative terminal charge, but providing no services in return.

In *Dreyfus*, the Examiner and Commission separately held that the Port fee violated section 17 for being ambiguous on its face. The Port's Tariff fails for this same reason. The CFC tariff is vague and ambiguous, creating a tax on vessels without admitting it. As applied, the Port strains the language of the Tariff in ways both overinclusive (roping in "users" that use no port services) and underinclusive (reading "cargo handling" to mean only to services to vessels, and not to motor carriers or cargo interests who benefit). Respondents try to run a "bait and switch" by calling the CFC a cargo charge, but charging the vessel. The ambiguous tariff on its face is an unreasonable practice.<sup>15</sup>

Per the Examiner, Plaquemines argued that, under *Volkswagenwerk*, and section 17, there was "a reasonable approximation between the benefits which Plaquemines provides and the charges which it uses in coordination of those benefits, whereas the complainants argue that these benefits and charges are not reasonably related." 21 SRR at 266. The Examiner found "the fees imposed by respondent have been anything but fair, and...have not been imposed in a reasonable and evenhanded manner." *Id.* The same is precisely true of the CFC, imposed on one group for transiting the Port, with no link to services provided to that group.

**Flanagan**

Most recently, in *Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 S.R.R. 1123, 1132 (F.M.C. 1997) the Commission held:

In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and

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<sup>15</sup> *Dreyfus*, 25 FMC 59, 69 (1982)(ambiguous port fee provision which obscured the rights of the charged parties held unreasonable)

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reasonable, to first determine for whom the service is performed." The *Boston Shipping Ass'n, Inc. v. Port of Boston*, 10 F.M.C. 409, 415 (1967) ("*Boston Shipping*")(emphasis added). Furthermore, "[a] just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service." [citation omitted] *West Gulf Maritime Ass'n v. Port of Houston Authority*, 21 F.M.C. 244, 248 (1978)(emphasis added). Thus, the inquiry here is whether Flanagan is a user of, and consequently enjoys a benefit from, the supplemental rail switching, and if so, whether the switching charge is reasonably related to that benefit.

There are Commission cases which have examined charges similar to the supplemental switching charge. *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 13 S.R.R. 422 (I.D. 1972), addressed, among other issues, a situation in which a port attempted to charge stevedores for the use of a "shipping gallery," a mechanized conveyor system which transported grain from the grain elevator to the vessel.

\* \* \*

This case is analogous to the present proceeding, as one can view the shipping gallery as serving a similar purpose to the disputed rail car switching. In both instances, stevedores are targeted for charges for a service necessary for the orderly flow of cargo but not performed primarily for the stevedores' benefit.

\* \* \*

In *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155, 166 (1965), the Commission held that where custom indicates that weighing costs are to be borne by the cargo interest, those costs may not be imposed on the vessel, which benefits from the weighing only to the extent that such weighing is necessary for a determination of the proper freight rate. Thus, the weighing assisted in the general flow of cargo, but conferred no particular benefit on the vessel. The Commission's holding demonstrates its concern with allocating expenses to the proper party, and preventing the improper allocation of expenses to parties which do not enjoy a specific benefit from the services at issue.

\* \* \*

LCS and the Port argue that Flanagan nevertheless benefits from the switching, since without switching, there would be no cargo for Flanagan to stevedore; they also argue that switching places the cargo closer to the vessel, allowing for easier stevedoring by Flanagan. These arguments are not compelling. The benefits that are alleged to flow to Flanagan are very general in nature, and are the sort of benefits that accrue from the business as a whole. Under LCS' and the Port's rationale, one could assign to stevedores benefits from nearly anything that assists the general flow of cargo to the Port. Such an allocation of benefits and expenses is not consistent with Commission case law. Shippers are billed for the preliminary switching and the unloading, so to charge stevedores for the process that occurs between these two is unreasonable. Under the *Volkswagenwerk* test and Commission precedent, a substantial, correctly allocable benefit from rail switching has not been shown to flow to the stevedore; absent such a benefit, no charge can be reasonable. The Commission therefore holds that imposing rail switching charges on stevedores is an unreasonable practice under section 10(d) (1) of the Act.

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These Commission's observations in *Flanagan* fit the claimed CFC benefits from the CFC like a glove.<sup>16</sup>

**IV. RELIEF REQUESTED**

Complainants, ocean common carriers, seek relief from, and redress for, actions of the Port that have violated, and continue to violate, the Shipping Act, 46 U.S.C. § 41102(c). Complainants seek a cease and desist order, plus reparations, interest and attorneys' fees from the Port, based on the Port's adoption and implementation of its published Tariff provisions by which it has violated the 46 U.S.C. § 41102 (c) requirement that it establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Complainants request an order declaring unlawful Respondent's Tariff rules regarding the CFC, imposing a cease and desist order against implementation or collection of Respondent's CFC or any similar charge for which a service is not rendered by Respondent to the payer in return for the charge, and the interference with any vessel

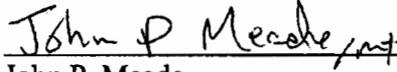
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<sup>16</sup> The fact that the Port's CFC is an impermissible tax masquerading as a fee is further supported by the Supreme Court's reasoning applying the Tonnage Clause of the U.S. Constitution. Art I, Sec. 10 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage"). While a user fee for specific services rendered by the government is permissible, the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-266 (1935)(approving fee for bona fide policing services). If a charge, like the CFC, "is intended to raise revenue in a general way, with nothing specifically provided in return" to those paying the charge, it is a tax, but "if the payor receives something specific in return, and the amount of the charge is reasonably related to the value of that something, the charge is a user fee and cannot be a duty of tonnage." See Erik M. Jensen, "Quirky Constitutional Provisions Matter: The Tonnage Clause, Polar Tankers, and State Taxation of Commerce," 18 *Geo. Mason L. Rev.* 669, 703 (2011), [www.georgemasonlawreview.org/doc/18\\_3-Jensen.pdf](http://www.georgemasonlawreview.org/doc/18_3-Jensen.pdf). See also *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 10 (2009) (Invalidating tax on vessels under the Tonnage Clause because it was "designed to raise revenue used for general municipal services."); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 220 (1870) ("Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners"); *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 81 (2d Cir. 2009), cert. denied, 130 S. Ct. 1075 (2010) (fee imposed by a port authority on ferry passengers violated Commerce and Tonnage Clauses because it was intended to raise general revenues and was unrelated in amount to the value of services provided by the port to those passengers).

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or its operation based on non-payment of the CFC or such other charge, and awarding reparations, interest and attorney's fees to Complainants.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing  
Complainants' Motion for Judgment That Respondent's Cargo Facility Charge Violates  
46 U.S.C. § 41102(c), Statement of Facts Not in Dispute and Exhibits to be served this 6<sup>th</sup>  
day of December, 2012, via overnight mail, upon the following:

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## **Shedding Light on Energy Subsidies in China: An Analysis of China's Steel Industry from 2000-2007**

Usha C.V. Haley

This report commissioned by the Alliance for American Manufacturing (AAM), shows that the Chinese government has exponentially boosted its steel output in the past decade through massive, trade-distorting energy subsidies.

Total energy subsidies to Chinese steel from 2000 to mid-year 2007 reached \$27.11 billion. Despite China's entry to the World Trade Organization (WTO) in 2002, energy subsidies grew, totaling \$25.07 billion through mid-year 2007. These energy subsidies include supports for thermal and coking coal, electricity and natural gas.

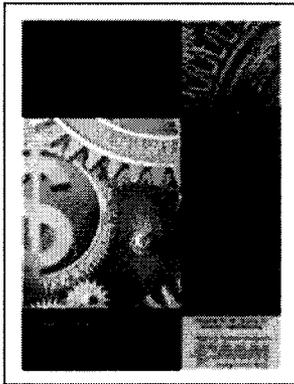
"Chinese subsidies exist, they are enormous and they are shaping the global steel market," said the report's author, Usha C. V. Haley, Ph.D.

China has identified steel as a strategic industry, and both the central and provincial governments have decided to ramp up steel production with massive subsidies that now have been confirmed.

China is the largest producer and consumer of steel in the world, accounting for 40 percent of the global market. Much has changed for China's steel industry in the last five years. In 2005, China went from a net steel importer to a steel exporter. In 2006, China became the largest steel exporter in the world by volume, up from fifth largest in 2005. This enormous increase in production has come at a cost for U.S. manufacturing; more than 1.8 million U.S. jobs have been displaced since China joined the WTO, according to the Economic Policy Institute.

"This shift from a net importer to the largest exporter in a span of only two or three years is staggering," said Dr. Haley. "Our analysis shows that energy subsidies have a very strong correlation with Chinese steel exports. In fact, the connection is so clear that, essentially, it's possible to almost perfectly predict China's steel exports from its energy subsidies."

Conducting an extensive market-based study was a difficult and daunting task. "There is an absolute lack of transparency and people were afraid to talk to us. The amount of the subsidies is enormous and they are conservatively estimated in this report," said Haley. In her report, Dr. Haley notes that Chinese energy subsidies fell in 2002 and 2003, after China joined the WTO. However, the subsidies surged in 2004 and have continued to grow exponentially. From 2000 to 2006, China's total energy subsidies to steel grew by 1365 percent. In 2007, energy subsidies to Chinese steel are estimated at approximately \$15.7 billion, showing a 3800 percent increase since 2000.



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# Attachment B

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 11-12**

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**HANJIN SHIPPING CO., LTD.;**  
**KAWASAKI KISEN KAISHA, LTD.;**  
**NIPPON YUSEN KAISHA;**  
**UNITED ARAB SHIPPING COMPANY (S.A.G.); and**  
**YANG MING MARINE TRANSPORT CORPORATION,**

**COMPLAINANTS**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

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**STATUS REPORT OF ONLY REMAINING COMPLAINANT KAWASAKI  
KISEN KAISHA, LTD. ON DISCOVERY DEMANDS REGARDING “K” LINE  
RO/RO VESSELS AND “K” LINE CONTAINER VESSELS**

**I. Introduction and Summary**

**This is a status report to the ALJ on the discovery demands “K” Line’s files show to be outstanding as of this date. Further litigation over these demands is pointless. The responses set forth herein demonstrate for the ALJ that there are no remaining discovery demands material to the issues in the case in its present posture. “K” Line is the last complainant standing, the remaining other three having been driven away by burdensome and oppressive “discovery” demands, which will not, and are not reasonably calculated, to lead to evidence material to the limited issues remaining in this case.**

**“K” Line focuses in this report on the “real world” discovery situation, which must be considered in light of the limited issue upon which the sole remaining Complainant seeks relief. This report and the responses herein focus on the information actually requested of “K Line by the Port, and the materiality of that information to the limited**

issue now presented by “K” Line to the ALJ and the Commission for decision. The Report also defines a very narrow category of confidential information which “K” Line will not turn over to prying eyes for no purpose material to this case. This exercise reveals the discovery “fight” to be nothing but posturing over nothing meaningful.

This is a case initiated by private complainants, of which only “K” Line remains, not a Commission investigation. As is its right as the complaining party and summary judgment movant to limit the issues it presents for decision, “K” Line has moved to amend its complaint and conceded a large number of issues which were once active in the case, . Materiality must be driven by the parameters of the single principal issue “K” Line is now litigating in this Docket, stated in its recently-filed motion for implementation of rulings: *Whether the CFC is a tax on single category of port user which unreasonably burdens international maritime commerce in violation of core federal interests, not a user fee apportioned in any way among all port users who benefit from the facilities supported by the fee, and, therefore, unreasonable per se?*

“K” Line believes that the Port’s discovery requests and the ALJ’s orders relating to discovery in this case thus far reflect a view of Section 41102 of the Shipping Act which fails to take into account major statutory amendments in 1984. As Commissioner Khouri thoroughly surveyed in his dissenting opinion in *Bimsha Int’l. v. Chief Cargo Services*, Shipping Act amendments in 1984 effectively removed the Commission’s former power under the pre-1984 Section 17 to order alteration of rates or practices deemed to be unjust or unreasonable. Memorandum Opinion and Order, FMC Docket No. 10-08 (Sept. 4, 2013), (Khouri, dissenting).

The Port here seeks extensive and wide ranging discovery a mass of data which would support a fine-grained quantitative analysis of what *level* of fee payable by complainant *would* be reasonable. That reflects a misconception of the proper and permissible scope of the Section 41102 legal inquiry under the currently-applicable 1984 Shipping Act, as amended, and fails to take into account the statutory change. As pertinent to this case, all the power that remains to the Commission and the ALJ under Section 41102 is to determine whether or not the CFC, borne exclusively by a single type of port user, an international cargo vessel operator, is reasonable, where the undisputed facts of record show myriad other users of the facilities and services underwritten by the CFC pay nothing. Quantifying the level of CFC payable by “K” Line and other vessel operator carriers and whether the relative value of benefits and services derived by that single category of users is reasonably commensurate with the fee, is not only unnecessary on the facts of this case, it lies outside the Commission’s power.

Two further aspects of “K” Line’s port operations are pertinent to the proper scope of discovery in this case- the roll-on/roll-off (ro/ro) vessel side and the container vessel side. “K” Line is not some amorphous “common carrier:” It is a vessel operating common

**carrier, which uses two radically different vessel types with completely different operating patterns.**

**Ro/ro vessels operate strictly port-to-port, carrying only wheeled cargo; containers are carried in slots on container vessels, moving both port-to-port and on a “through intermodal” basis as recently described by the Supreme Court in *Kawasaki Kisen Kaisha v. Regal-Beloit*, 130 S. Ct. 2433 (2010). Thus, in respects which must be included in any careful consideration of discovery issues or the merits, the “K” Line ro/ro vessels are in an altogether different category from container vessels.**

**Ro/ro vessel operations, by their very nature, are manifestly outside the scope of the Port’s claimed basis for the CFC as to rail facilities and infrastructure, thus eliminating those excuses offered by the Port to justify its discovery demands. “K” Line submits that is of great significance in the ro/ro side of this case.**

**The only “cargo facility” the ro/ros use is the dock, and a user fee, wharfage, is paid to the Port for such use. There is nothing to “discover” about ro/ro operations, except that “K” Line has paid high six figures in CFC taxes on its ro/ro operations while this case has been pending.**

**The overview is that there are no “material” facts which remain “undiscovered,” either via interrogatories, documents, or deposition.**

**As to documents: “K” Line has furnished a massive volume of materials (several boxes of documents when printed out) in a spirit of cooperation, none of which can be of any use in deciding the issue presented. Nevertheless, “K” Line is willing to furnish some additional materials, as discussed herein in Section II, below. This presentation is made based on materials available.**

**As regards interrogatories, “K” Line has largely abandoned the allegations of the complaint which are the subject of Respondent’s contention interrogatories, as set forth below in Section III hereof. Obviously, none of those interrogatories can possibly seek material information.**

**Section IV of this reports addresses correspondence from the Port’s counsel relating to “K” Line’s purported discovery deficiencies.**

**That no facts material to the remaining issue in the case can be garnered in a deposition sought by the Port is reviewed below, in Section V.**

## **II. Responses to Outstanding Document Requests**

### **1. All service contracts for cargo going through the Port.**

**Response:** The essential terms of containerized cargo service contracts, which are published by “K” Line, can be forwarded to the Port for its convenience, although they have nothing to do with “K” Line’s case (for or against). Beyond those essential terms, there is nothing “material” about our customers’ identities or the other confidential terms of “K” Line’s service contracts. “K” Line continues to object on the basis of undue burden, oppression, and lack of relevance to disclosure of all of its 1,151 service contracts involving service at the Port, moreover, we would redact all those terms which could indicate customer name, rate and charge information (as approved by the ALJ) , so there would be nothing of any content beyond the essential terms we are willing to copy for the Port. Breach of confidentiality would be contrary to the policy of the Act protecting contract confidentiality, and the customary terms of contracts, and customer, rate and charge information have no bearing on any issue remaining in this case. Demanding it is harassment to which “K” Line will not submit.

Ro/ro vessels do not operate under service contracts.

### **2. Rail contracts involving the Port.**

**Response:** “K” Line reiterates its objection on the basis of lack of relevance to production of its rail contract. There is nothing material to “K” Line’s case in its present posture in the terms of its rail contract for containers, there being nothing in “K” Line’s case about rail traffic. However, “K” Line would furnish a redacted version of its one rail contract in order to deflate this specious “discovery” issue.

Ro/Ro operations do not involve railroads for any purpose, so there is nothing to produce.

**3. Motor carrier contracts involving the Port.**

**Response:** There are none.

**III. Response to Outstanding Interrogatories**

**Interrogatory No. 1**

Identify the principal and material facts that Complainants contend support their allegations in section IV.B of the Complaint that “[t]he Cargo Facility Charge is unlawful because Complainants do not receive services commensurate with the fee; because it severely and unreasonably prejudices Complainants while unduly preferring other users of the Port’s facilities; and because the Cargo Facility Charge and the rules applying it provide for unlawful expulsion of the Complainants from the Port.”

**Response to Interrogatory No. 1:**

The complaints’ allegation and the subject of this interrogatory, concerning lack of “services commensurate with the fee,” has been abandoned. There is no “K Line contention as to whether the level of the CFC is “commensurate” with anything. The Port’s choice to charge only vessel operators, on every container and every unit of wheeled cargo, for Express Rail, infrastructure and security was a choice to impose a *per se* unreasonable tax on “K” Line. The first two categories of Port-claimed “benefit,” Express Rail and infrastructure are inherently inapplicable entirely to ro/ro operations, which makes the Port’s excuses for the CFC all the more unreasonable as to the ro/ro side of the case.

“K” Line does not make any case regarding the level of the CFC. Its case is that the CFC is per se unreasonable because it is imposed exclusively on the volume of import and export cargo on “K” Line’s ro/ro vessels and container vessels, but no category of port user other than vessel operators pays the fee. Reasonableness of THE LEVEL of “benefits” to the vessels and their operator “K” Line, which is a common carrier, from ambient Port facilities and services used or potentially used in common with all Port users (except the Express Rail and infrastructure, unused in ro/ro operations) is not contested by “K” Line. It is immaterial to “K” Line’s claim. The rules providing for expulsion from container terminals and port docks (in the case of ro/ros) are in the Port’s Rate Schedule 10 and Subrules 34-751 (denying access to port terminals) and 34-035 (defining “marine terminal”).<sup>1</sup> “K” Line no longer makes any claim of “preference and prejudice,” the subject of former section 16 of the Act.

**Interrogatory No. 2**

Identify the principal and material facts that Complainants contend support their allegations in section IV.D of the Complaint that “[t]he CFC was predicated on the elimination of two other fees: one fee was asserted in connection with the movements of containers by truck, and the other fee was assessed in connection with the movement of containers by rail.”

**Response to Interrogatory No. 2:**

The Port has stated its basis for the CFC, which is the basis for the statement: *See* February 1, 2013, Peter Zantal Declaration, at ¶¶ 10-15 & 28 (attached) and Port Board of Directors Minutes at 356-357 (discussion of capital expenditures CFC designed to recover, attached). The Port’s own admissions, whether reliable or not, form a mandatory basis for

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<sup>1</sup> Copies of the Subrules are attached hereto as Exhibit A.

evaluating the CFC. The Port cannot disavow them. Such statements of fact in the course of litigation are binding on litigants. If the Port's own words are unreliable, the Port can hardly be granted any credibility in this matter at all. Moreover, the Port has offered no other bases for the CFC.

**Interrogatory No. 3**

Identify each contract between any Complainant and a marine terminal operator as alleged in paragraph IV.N.

**Responses to Interrogatory No. 3:**

Maier Terminal. "K" Line has sued Maier for anticipatory breach of contract by threatening cutoff of container services for non-payment of the CFC in federal district court in New Jersey. That court has stayed the contract breach action in favor of this Docket.

Ro/ros have no terminal contracts.

**Interrogatory No. 4**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.V of the Complaint that "Complainants generally do not use the system for the interchange of containers between trucks and container terminals, the target of the now eliminated Truck Fee, because the movement of containers beyond the terminals by truck usually is not within the Complainants' terms of carriage."

**Response to Interrogatory No. 4:**

The complaint's allegation which is the subject of this interrogatory has been abandoned, because it is immaterial to "K" Line's case. Moreover, ro/ro vessels load and discharge their cargoes at the dock, with no responsibility for movement outside the dock area. This is a notorious, undisputed fact.

**Interrogatory No. 5**

Identify the principal and material facts that Complainants contend support their allegation in paragraph IV.X of the Complaint that "Complainants generally do not use the ExpressRail system."

**Response to Interrogatory No. 5:**

The complaint's allegation which is the subject of this interrogatory has been abandoned, as to container movements.

That the wheeled cargoes carried on "K" Line ro/ro vessels and loaded or discharged at the dock do not move over Express Rail is obvious and undisputable.

**Interrogatory No. 6**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.Z of the Complaint that "[a]s a result, the Port-imposed CFC relieves the predominant Express Rail users of their prior obligations under the Rail Fee, and those users now are being significantly subsidized by the Complainants."

**Response to Interrogatory No. 6:**

The complaint's allegation which is subject of this interrogatory has been abandoned.

**Interrogatory No. 7**

Identify the principal and material facts that Complainants contend support their allegation in paragraph IV.AA of the Complaint that "[t]he Port has nothing to show that the CFC or any portion of the CFC is commensurate with any benefit (direct or indirect) that the Complainants receive from the rail system."

**Response to Interrogatory No. 7:**

The complaint's allegation which is the subject of this interrogatory has been abandoned. The level of benefits enjoyed by "K" Line is not at issue in this case.

Benefit from the rail system to ro/ros is in any case self-evidently zero, since the cargoes are on wheels and are discharged into the custody of consignees at the dock.

**Interrogatory No. 8**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.CC of the Complaint that "[b]y implementation of the CFC, the Port is unreasonably preferring ocean carriers who depend on ExpressRail over the Complainants who use ExpressRail only minimally or not [sic] all. This unjustly prejudices Complainants"

**Response to Interrogatory No. 8:**

The complaint's allegation which is the subject of this interrogatory has been abandoned. "K" Line is no longer asserting a preference and prejudice claim.

**Interrogatory No. 9**

Identify the principal and material facts that Complainants contend support their allegation in paragraph IV.EE of the Complaint that “[t]he Port threatens to blockade the Port against Complainants’ vessels for nonpayment of the CFC, regardless of reason.”

**Response to Interrogatory No. 9:**

The facts responsive to this interrogatory are set forth in the so-called “Tariff” which is the subject of this action, PAMT FMC PA-10, Port Authority of New York and New Jersey FMC Schedule No. PA 10, the Port’s own document, excerpts attached. As to ro/ros, the support is also in the Port’s Subrules 34-751 and 34-035. See Note 1 & Exhibit A, excerpts attached. “K” Line has nothing to add to the Port’s words.

The Port absently forgot that ro/ro vessel cargoes cannot use Express Rail and “K” Line does not in-gate or out-gate ro/ro cargoes- customers do that. Ro/ro vessels are subject to the Port’s general provision that defaults in payment are punishable by shut-out of the operator’s vessels.

**Interrogatory No. 10**

Identify the principal and material facts that Complainants contend support their allegation in paragraph IV.GG of the Complaint that “[t]he legal obligation of the Complainants to pay the CFC is unclear.”

**Response to Interrogatory No. 10:**

The complaint’s allegation which is the subject of this interrogatory has been abandoned as unnecessary.

**Interrogatory No. 11**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.JJ of the Complaint that “[i]f one Complainant member of a vessel sharing agreement were ordered barred by the Port from all Port terminals, other Complainant members, or other members, would suffer unreasonably.”

**Response to Interrogatory No. 11:**

The complaint’s allegation which is the subject of this interrogatory has been abandoned. While anyone can see that if Maher Terminal refused to service a “K” Line vessel carrying containers belonging to other vessel operators who charter space from “K” Line, it would be disastrous, the allegation is unnecessary to “K” Line’s case.

**Interrogatory No. 12**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.KK of the Complaint that “[b]erth denial would cause severe disruption to the supply chain and U.S commerce and impose heavy expense burdens to Complainants as well as to their customers. So, not only would the CFC unfairly penalize Complainants, it would burden U.S. exporters and importers, as well.”

**Response to Interrogatory No. 12**

The complaint’s allegation and the subject of this interrogatory has been abandoned. Again, only casual acquaintance with ocean shipping is needed to see the accuracy of the statement, both as to ro/ros and container ships, but the allegation is unnecessary to “K” Line’s case. The case is fundamentally that the CFC is a tax on single category of port user which

unreasonably burdens international maritime commerce in violation of core federal interests, not a fairly apportioned user fee, and, therefore, *per se* unreasonable under Commission precedent, and the Commission should order all CFC payments refunded as reparations, together with attorney's fees and interest.

**Interrogatory No. 13**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.LL of the Complaint that “[t]he CFC is an unfair charge on Complainants, which is in no way commensurate with the services they receive at the Port. The CFC unduly prefers the class of carriers who utilize the Express Rail system to the detriment of Complainants, whose rail use at the Port is minimal. The CFC unreasonably discriminates in the provision of terminal services to Complainants.”

**Response to Interrogatory No. 13:**

The complaint's factual allegations which are the subject of this interrogatory have been abandoned. "Preference and prejudice" under former section 16 is superfluous to "K" Line's case, which sounds under former section 17. "K" Line's primary proposition, covering both container and ro/ro operations, is a simple, legal one; that the facilities and services the Port says the CFC was designed to finance (nor any other unspecified "benefits") cannot justify the CFC under the Act since no user segment other than vessel operators is charged for them. In other words, a charge only on vessel operators which is justified only by existing benefits not tied to payment of the charge is unreasonable *per se*.

The only "tie" to the CFC is that if "K" Line does not pay it for container transit, its container vessels will be routed from Maher terminal. If "K" Line does not pay the CFC for

ro/ro operations, the Port has authority to bar the ro/ro vessels from the Port. The latter scenario casts the CFC as an even more blatant tax on ro/ros than on container vessels. The Port gratuitously threw the ro/ros under the bus along with container vessels, blithely ignoring the huge differences in their operations.

**Interrogatory No. 14**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.LL of the Complaint that “[t]he CFC also prejudices the Complainants to the extent that they compete with carriers using other ports who are not required to subsidize rail users thereby providing them with an unreasonable cost advantage.”

**Response to Interrogatory No. 14:**

The complaint’s allegation which is the subject of this interrogatory has been abandoned. As to the ro/ros, no proof is required of the self-evident fact that the “K” Line ro/ros are burdened with an \$1.11 per unit tax on both import and export business..

**Interrogatory No. 15**

Identify the principal and material facts that Complainants contend support their allegations in paragraph IV.LL of the Complaint that “[t]he CFC unlawfully interferes in Complainant/terminal operator contracts by ordering terminal operators to refuse terminal facilities to Complainants. The CFC is an unconstitutional impairment of contracts.”

**Response to Interrogatory No. 15:**

The complaint’s allegation which is the subject of this interrogatory has been abandoned.

**Interrogatory No. 18**

Identify and describe in detail payments made by, or on behalf of, each Complainant pursuant to the Truck and Rail Fees from 2004 to the present, including, but not limited to, the dollar amount of such payments for each Complainant for each fee on an annual basis and the container numbers relating to such payments.

**Response to Interrogatory No. 18:**

Truck Fees were never paid by “K” Line for ro/ro cargoes. Rail Fees as defined in the interrogatories and notice to produce were terminated in approximately March 2011, when the Rail Fee was replaced by the CFC, but were never paid in connection with ro/ro cargoes, because they are moved solely port to port, and always have been. All responsibility for ro/ro cargoes passes to the consignee at the dock.

The ro/ro vessels never paid any fees, except wharfage to tie up and load/discharge. In regard to Rail Fee payments for containers, see for instance Bates CA-KL-000, but the amount of container rail fees “K” Line paid historically is immaterial, because “K” Line is not litigating the level of the CFC, either alone or in comparison to user fees paid historically. There is no place in “K” Line’s case for historical charges, because its case is that the CFC is unreasonable *per se*, without regard to its level alone or in comparison to user fees.

**Interrogatory No. 19**

Identify and describe in detail the amount of payments made by Complainant’s customers pursuant to the CFC, including, but not limited to, the dollar amount of such payments for each customer to the Complainant on a monthly basis and the container numbers relating to such payments.

**Response to Interrogatory No. 19:**

“K” Line has not charged any container cargo customer for the CFC or “pursuant to the CFC,” and did not receive payments from any customer for the CFC or “pursuant to the CFC.” “K” Line has not added any charges to its ro/ro customers receiving or delivering cargoes at the Port in any way related to the CFC since the CFC was instituted.

**Interrogatory No. 25**

Identify and describe in detail the monthly average wait and transit times at the Port of New York and New Jersey associated with containers shipped by, or on behalf of, each Complainant, which use the system for the interchange of containers between trucks and container terminals, including (i) on-port pre-gate transit times, (ii) gate processing and wait times, and (iii) transit times associated with the period spent between in-gating and out-gating for each monthly period from 2008 to the present.

**Response to Interrogatory No. 25:**

“K” Line does not prepare or maintain data in regard to in-port pre-gate transit links, gate processing and wait times or transit times associated with the period spent between in gating and out gating containers. The Port Authority however did conduct studies in this regard: see for instance Bates PA-CFC00010019, 36433, 45276 and 74064. “K” Line’s ro/ro vessels carry only wheeled cargoes and transfer responsibility to the customers at the dock, thus their operations are not concerned with trucking in any way.

**Interrogatory No. 26**

For each Complainant, identify and describe in detail (i) the total monthly number of containers transported by each Complainant which is subject to costs associated with trucking such containers to the first point of rest, (ii) the monthly percentage of those containers on which the Complainant bears responsibility for paying the cost to truck the container to the first point of rest, and (iii) the monthly percentage of those containers on which the originating shipper bears responsibility for paying the cost to truck the container to the first point of rest, for each monthly period from 2008 to the present.

**Response to Interrogatory No. 26:**

“K” Line’s only case, the per se unlawfulness of the CFC, makes such trivia immaterial. Of course, the interrogatory is inapplicable to ro/ro vessels. But see documents produced in response to Respondent’s Request for Production, for instance Bates CA-KL-000.

**Interrogatory No. 27**

For each Complainant, identify and describe in detail (i) the total monthly number of containers transported by each Complainant which was subjected to the Rail Fee, (ii) the monthly percentage of those containers on which the Complainant bore responsibility for paying the Rail Fee, and (iii) the monthly percentage of those containers on which the originating shipper bore responsibility for paying the Rail Fee, for each monthly period from 2008 to the present.

**Response to Interrogatory No. 27:** See Response to Interrogatory 26. Any allegation regarding Rail Fees has been abandoned and the role of the Rail Fee as a potential “benefit” to container vessel operators (not ro/ro operators), if it were pertinent, is not contested. That the

Rail Fee was a “user fee, “ and the CFC is not, is underscored by the interrogatory; use Express Rail, pay the Rail Fee; ignore Express Rail, pay no fee. That the CFC is a tax on non-users of Express Rail to support Express Rail, is self-evident, since the CFC, which the Port says supports Express Rail, is levied without regard to use of Express Rail. That distinguishes it as a tax from a user fee, like the Rail Fee. That is “K” Line’s contention, which has nothing to do with actual use of Express Rail. That ro/ro vessels have no relationship with Express Rail is open and notorious. But see responses previously submitted in response to Request for Production 4, 8-11, 21, 22. See for instance Bates CA-KL-000.

**Interrogatory No. 30**

Identify and describe in detail all communication, plan, analysis, or discussion by a Complainant, whether internal or external, relating to whether to seek payment from any customer of such Complainant in compensation for any costs resulting from the CFC, including, but not limited to, the dollar amount of any payments made for each customer to the Complainant on a monthly basis and the container numbers relating to such.

**Response to Interrogatory No. 30:**

“K” Line has no record of any such things, either regarding ro/ros or container vessel charges.

**Interrogatory No. 31**

For each Complainant, for all containers and percentages identified in response to interrogatory numbers 26 and 27 of the Port Authority’s First Set of Interrogatories, identify which portion of such containers or percentages were attributable to containers originating from or destined for locations greater than 260 miles from the Port of New York and New Jersey.

**Response to Interrogatory No. 31:**

This is confidential data in the possession of the New York Shipping Association, but immaterial to any issue in the case in its present posture. In any event, this request has no applicability to ro/ros.

**Interrogatory No. 32**

For each Complainant, for all containers and percentages identified in response to interrogatory numbers 26 and 27 of the Port Authority's First Set of Interrogatories, identify which portion of such containers or percentages were attributable to containers originating from or destined for locations less than 260 miles from the Port of New York and New Jersey.

**Response to Interrogatory No. 32:** .

Same response as to No. 31.

**IV. Discovery-Related Correspondence**

We now turn our attention to a letter of February 25, 2013, from Port counsel, regarding "K" Line's purported discovery obligations. We use headings from the Port's letter, without endorsing or agreeing with their characterizations.

**1. Information Complainants Have Agreed to Produce**

**Vessel Sharing Agreements.** These are available to the Port on the Commission's web site, but are immaterial to "K" Line's case.

**Rail cargo volume from 2009-present.** “K” Line’s ro/ros have no rail cargo volume. Container rail cargo volume is not material to the issue presented by “K” Line, which is the *per se* illegality of the CFC as pointed out in “K” Line’s recent motion.

**Truck cargo volume 2009-present.** “K” Line has none in ro/ro vessel operations. Container truck cargo volume is not material to the issue presented.

**“All-water” cargo volume from 2009-present.** This bears no relation to the issue presented by “K” Line as to container taxation, and certainly none as to the ro/ro side of the case.

**Breakdown of cargo volume shipped as carrier haulage versus merchant haulage from 2009-present.** There is no such breakdown for ro/ros. Carrier haulage vs. merchant haulage is utterly immaterial to the unlawfulness of the CFC tax imposed on container vessel operators.

**2. Information Complainants’ (sic) Have Informed the Port Authority They Would Consider Producing**

**Rail costs from 2009-present.**

Ro/Ros have no rail costs. Rail costs in connection with container operations have nothing whatsoever to do with the lawfulness and charging vessel operator “K” Line \$10 for every 40-footer that goes through Maher Terminal, with only ambient “benefits” supporting the charge. Exempting every other class of Port user violates the Act, *per se*.

**Trucking costs from 2009-present.** None for ro/ros. Such costs are not material to the issue presented as to containers.

**“K” Line’s ability to pass-through CFC costs.** Any such “ability” is not material. Under applicable precedent, including *Volkswagenwerk* and *Plaquemines*, the possibility that a port fee payor may or may not pass-through is not considered in evaluating reasonableness.

**“K” Line’s Failure to Provide Supplemental Interrogatory Responses.** The narrowing of the allegation of unlawfulness by “K” Line as evidenced in its latest motion to the ALJ renders all such subject matter non-material. Above, “K” Line has responded to interrogatories as appropriate.

**“K” Line’s Privilege Log.** There are no documents withheld on the basis of privilege which the Port can show are material to the issue of *per se* unreasonableness pressed by “K” Line. Blanket objections were made routinely on “K” Line’s behalf in the course of discovery, which subsume this point. However, a privilege log was prepared by Reed, Smith and if not already sent to Port counsel, will be sent.

**“K” Line’s Failure to Produce Metadata.** “K” Line has made more than a good faith effort, both in-house and by the efforts of counsel working with two different consultants, to serve “metadata” up to the Port’s counsel in a form that its system can read. “K” Line is preparing a “Metadata Supplement” chronicling those Sisyphean efforts in exhaustive detail. No more can be reasonably demanded of a litigant, most particularly when there is not the slightest chance that anything in the “metadata” can have any bearing on the issue presented for decision.<sup>2</sup>

As set forth in greater detail in the Metadata System, “K” Line, in a good faith attempt to respond, produced metadata in the form its systems could produce. That data was forwarded to

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<sup>2</sup> Due to the complexity of the effort, and difficulty in assembling information and documents to be attached to the Supplement, “K” Line was unable to file it today with this Report. We expect to file and serve the Supplement and attachments not later than October 23, 2013.

various of the complainants' attorneys and they strove to convert it to a format which the Port could read. We are confident that good faith attempts were made in turn to transmit the data to Port counsel, but "K" Line has no capability to take any further action regarding the data. In any case, it is not material to the issue pressed by "K" Line.

As stated in "K" Line's recent motion suggesting dismissal, if the ALJ finds the factual presentation supporting ""K" Line's case wanting in supporting its case regarding either ro/ro operations or container vessel operations, an elaborate factual "defense" by the Port would be senseless grandstanding. The horse is already dead, if the ALJ still believes the Port wins on the basis of the record as it now stands.

V. **Deposition Notice**

The Port's litigation machine also noticed "K" Line's deposition. The proposed subjects included:

**1. Relationships to logistics companies, including five subheadings.** As to ro/ros, answers to the five would all be "non-applicable," so a deposition would be futile. As to container ships, there is nothing in any of the five which can possibly be material to the issue of per se unreasonableness pressed by "K" Line. It is at bottom simply about who pays and gets benefit from the categories of facilities/services cited by the Port, and who does not pay. Ro/ro vessel operations are only the most glaring example of unreasonableness. Those operations are subjected to the tax, and all they get is a rail terminal impossible for them to use, infrastructure which their customers use, and some security for their customers' cargoes on the dock, or perhaps protection of their vessels from hijacking.

**2. Pass through of port and terminal charges, and CFC benefits and impact, with thirteen sub parts.**

“K” Line believes the precedents exclude “pass-through” from a proper analysis of a port fee challenged under Section 41102. The precedents do not define a payor’s potential ability to pass through such charges to customers as a matter reasonably calculated to lead to any evidence relevant to the reasonableness of a port fee.

Additionally, “K” Line has abandoned any dispute and does not contest that third parties with whom “K” Line may have relationships derive some benefit from the facilities financed by the CFC. Everyone involved with shipping through the Port does. “K” Line’s point is a proposition of law, that, where many entities who use port facilities, directly and indirectly, but all except vessel operators in international maritime trade are exempt from payment of the fee, the fee amounts to a tax which uniquely burdens international maritime commerce in violation of core federal interests, and not a fairly apportioned user fee, and the fee is unreasonable *per se* under Commission precedents.

Further, in contemplating this discovery situation, “K” Line requests the ALJ to particularly note the situation regarding charging of the CFC on ro/ro vessel operations. The “Container Facility Charge” and its purported basis in any of the three specified categories of benefits, or any other benefits which the Port might conjure, miss the mark regarding the ro/ro vessel charge. The only “benefit” claimed for the \$1.11 per unit charge applicable to ro/ros is security. There are no discovery demands outstanding which have any relationship to ro/ro cargo operations, so however the ALJ may view “K” Line’s positions regarding discovery as to container vessel operations, the ro/ro vessel category of operations presents a vastly different

picture. If nothing else, as to ro/ro operations, "K" Line is manifestly entitled to a decision on the merits now.

Respectfully Submitted,



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October 21, 2013

**Counsel for Complainant  
Kawasaki Kisen Kaisha, Ltd.**

# EXHIBIT A

PANYNJ – DEFINITION OF “MARINE TERMINAL”

SUBRULE 34-035 ISSUED 24 JANUARY 1994 EFFECTIVE 1 JULY 2004  
MARINE TERMINALS

Developments operated, managed, controlled, or leased by the Port Authority consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, intermodal container transfer facilities, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers.

**RULES AND REGULATIONS**  
Governing Traffic on Highways in Port Authority  
Air and Marine Terminals

“Marine terminals” shall mean developments operated by the Port Authority consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvement, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers.

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FAILURE TO PAY CHARGES

SUBRULE 34-096 ISSUED 1 OCTOBER 2006 EFFECTIVE 1 OCTOBER 2006 AUTHORIZATION  
TO USE AND PENALTY CHARGES ON SCHEDULE OF RATES

Failure to obtain authorization prior to the use of any areas of the Marine Terminals and/or failure to comply with the Rules and Regulations under Port Authority Marine Terminals FMC Schedule No. PA 10 will result in penalty charges assessed at twice the rate of the applicable stated fee. In addition, failure to comply with any of the Rules and Regulations covered in this document may result in future denial of port use.

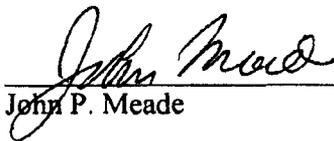
**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Status Report to be served October 21, 2013, via e-mail, upon the following:

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Jared R. Friedmann  
Reed Collins  
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\_\_\_\_\_  
John P. Meade

# Attachment C

## Weil, Gotshal & Manges LLP

BY E-MAIL

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February 25, 2013

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Re: *Hanjin Shipping Co., Ltd., et al. v.*  
*The PA Authority of New York and New Jersey, Docket No. 11-12*

Dear Matt:

I write regarding several of Complainants' outstanding discovery obligations. As you know, for over two months now, we have sought to meet and confer regarding these issues, but Complainants have refused even to provide dates on which they are available to do so. See Joint Status Report, dated December 17, 2012 ("December 17 Joint Status Report"). Therefore, we are writing to enumerate the various discovery issues that still exist and which we remain available to discuss. Although Complainants consented to the Port Authority's motion for an extension of time to complete depositions, this does not excuse Complainants from immediately fulfilling their obligations to produce documents and interrogatory responses, all of which was required to be completed by December 7, 2012—more than two months ago—pursuant to the Third Revised Scheduling Order, dated November 29, 2012 ("Nov. 29 Scheduling Order").

### **Documents That Complainants Have Not Produced**

None of the remaining Complainants have completed their discovery obligations with respect to producing documents, including documents that Complainants either: (i) agreed to produce; or (ii) advised both the Port Authority and Judge Wirth five months ago that they would consider producing, without any update since then. See generally Joint Status Report, dated September 14, 2012 ("September 14 Joint Status Report"). While it is possible that some, but certainly not all, of the missing information may be contained on spreadsheets produced in a needlessly cumbersome and confusing TIFF format, Complainants have inexplicably refused to reproduce those documents in a readable native format despite the Port Authority's numerous requests. See, e.g., Emails between Reed Collins to Jessica DeVivo, dated December 20, 2012; Emails between Jared Friedmann & Paul Keane, dated January 3, 2012. Further frustrating the issue has been Complainants' refusal to meet and confer to help

answer some of the Port Authority's questions regarding the content of these documents (many of which contain columns with data but no headers indicating what the data represents). In any event, the following is a tally of what appear to be the significant outstanding deficiencies in Complainants' respective productions:

Information Complainants Have Agreed to Produce

- Vessel Sharing Agreements ("VSA"). *See* September 14 Joint Status Report at 5.
  - While NYK has produced numerous VSAs, Yang Ming appears to have produced only one, and neither "K" Line, Hanjin, nor United Arab appears to have produced any.
- Rail cargo volume from 2009-present. *See id.*
  - "K" Line does not appear to have produced any information reflecting rail cargo volume from 2009-present. Further, while Hanjin, NYK, United Arab, and Yang Ming have produced spreadsheets that may contain rail cargo volume from 2009-present, those documents are not understandable in their current TIFF format.
- Truck cargo volume from 2009-present. *See id.*
  - None of the Complainants appear to have produced any information reflecting truck cargo volume from 2009-present.
- "All-water" cargo volume from 2009-present. *See id.*
  - None of the Complainants appear to have produced any information reflecting "all-water" cargo volume from 2009-present.
- Breakdown of cargo volume shipped as carrier haulage versus merchant haulage from 2009-present. *See id.*
  - None of the Complainants appear to have produced a breakdown of cargo volume shipped as carrier haulage versus merchant haulage from 2009-present.

Information Complainants' Have Informed the Port Authority They Would Consider Producing

- Rail costs from 2009-present. *See* September 14 Joint Status Report at 5.
  - Neither "K" Line nor United Arab appears to have produced rail costs from 2009-present. Further, while Hanjin, NYK, and Yang Ming appear to have produced spreadsheets that may contain rail costs from 2009-present, those documents are not understandable in their current TIFF format.
- Trucking costs from 2009-present. *See id.* at 6.

- Neither “K” Line nor NYK appears to have produced trucking costs from 2009-present. Further, while Hanjin, United Arab, and Yang Ming appear to have produced spreadsheets that may contain trucking costs from 2009-present, those documents are not understandable in their current TIFF format.
- Complainants’ ability to pass-through CFC costs to their customers. *See id.* at 6.
  - “K” Line and Yang Ming have not completed their production of documents relating to their ability to pass-through the CFC costs to their customers, despite having each produced at least one document demonstrating that they in fact contemplated doing so. *See* CA-KL-003084; CA-NYK-000530.

The above documents may not be withheld on the basis of confidentiality. *See* Order on Motions to Compel and to Reply, dated October 11, 2012 (“October 11 Order”), at 4 (stating that “redacting highly sensitive information prior to producing the documents in reasonable”).

#### **“K” Line’s Failure to Provide Supplemental Interrogatory Responses**

In addition to the deficiencies noted above, “K” Line in particular has failed to respond to the Port Authority’s interrogatories, despite the fact that its supplemental interrogatory responses were due over two months ago, on December 7, 2012. *See* Nov. 29 Scheduling Order. These deficiencies include, *inter alia*:

- “K” Line’s failure to supplement its interrogatory responses by “provid[ing] the principal and material facts requested in Respondent’s interrogatories with reference to Bates numbers of supportive documents” pursuant to Judge Wirth’s instruction. *See* October 11 Order at 6. Indeed, “K” Line has not updated its October 9 responses to interrogatories nos. 18, 26, and 27, which rather than identifying specific Bates numbers, only generally referenced documents that “have been or are to be provided” in responses to certain document requests. *See* “K” Line Interrogatory Responses, dated October 9, 2012 (“K” Line October 9 Responses”) at 5. “K” Line’s prior interrogatory responses likewise fail to comport with the instructions set forth in the October 11 Order. *See generally* “K” Line’s Objections and Responses to the Port Authority’s First Set of Interrogatories, dated October 21, 2011; “K” Line’s Objections and Responses to the Port Authority’s Second Set of Interrogatories, dated January 9, 2012.
- “K” Line’s failure to respond to the Port Authority’s interrogatories nos. 16 and 21, which seek the names of employees with knowledge of the information sought in each of the interrogatories served on Complainants. On October 9, 2012, “K” Line submitted “supplemental responses” to these basic interrogatories, but provided the requested information for only 6 of the 27 interrogatories. *See* “K” Line October 9 Responses at 2-4. Where “K” Line responded by stating “no facts or responses were provided” or “no factual

information was provided” rather than identify the person with knowledge of the information sought in the interrogatory, such a response makes no sense and is plainly insufficient. *See generally* “K” Line October 9 Responses.

### **Complainants’ Privilege Log**

Complainants appear to have withheld numerous documents on the purported basis of: (i) attorney-client privilege; (ii) attorney work product; and (iii) joint-defense privilege, absent any indicia of actual privilege. In fact, based on the privilege log entries, many of these documents could not possibly be privileged. For instance, in the privilege log produced on December 7, 2012:

- Many entries assert the attorney-client privilege despite listing Port Authority employees in the sender/recipient field, thus necessarily breaking the confidentiality required to maintain the attorney-client privilege. *See, e.g.*, Complainants’ Privilege Log at entries 223, 260, 264, 268, 705, 1306.
- Likewise, other entries assert the attorney-client privilege despite indicating that the referenced document was shared with other third parties. *See, e.g., id.* at entries 53, 56, 331, 340, 594, 597, 643.
- Many entries assert the attorney-client privilege but neither list any attorneys as either the sender or recipient of the document nor indicate that the information reflects legal advice. *See, e.g., id.* at entry 1, 2, 3, 4, 5.
- Many entries fail to “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that . . . will enable other parties to assess the claim,” as required by Federal Rule of Civil Procedure 25(b)(5)(A)(ii). *See, e.g., id.* at entry 1, 70, 237, 706.

### **Complainants’ Failure to Produce Metadata**

Complainants have not yet complied with the October 11 Order requiring them to produce metadata for certain documents that were previously produced without any. Judge Wirth specifically required the Port Authority to first “identify metadata for specific documents from the initial production, as requested by Respondent”—which we did three months ago—and that for such documents “it is reasonable for Complainants to provide similar metadata to that provided by Respondent.” October 11 Order, at 4. Pursuant to that order, the Port Authority provided Complainants’ counsel with a list of specific documents (by Bates number) for which it requires metadata. *See* Ltr. from Jared Friedmann to Paul Keane, dated November 12, 2012. However, we have yet to receive *any* of the requested metadata. And while Complainants indicate that they may have reproduced at least some of the documents at issue

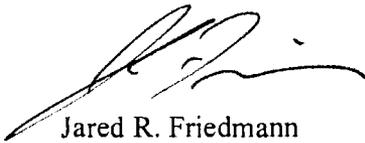
Matthew J. Thomas, Esq.  
February 25, 2013  
Page 5

**Weil, Gotshal & Manges LLP**

in subsequent productions, those documents have still not yet been specifically identified for the Port Authority. *See* December 17 Joint Status Report.

In closing, we reiterate our request to meet-and-confer regarding these issues and for Complainants to immediately fulfill their outstanding discovery obligations. Taking these steps may obviate the need for us to file yet another motion to compel, which would inevitably waste the parties' time and money. It will also ensure that if and when Judge Wirth orders depositions to proceed, the parties will have already completed the exchange of all other discovery (*i.e.*, documents and interrogatory responses) which may pertain to the deponents, thus avoiding the possibility of having to recall any deponents.

Sincerely,



Jared R. Friedmann

cc: Counsel of record (by e-mail)

# Attachment D

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

---

**Docket No. 11-12**

---

**HANJIN SHIPPING CO., LTD.;  
KAWASAKI KISEN KAISHA, LTD.;  
NIPPON YUSEN KAISHA;  
UNITED ARAB SHIPPING COMPANY (S.A.G.); and  
YANG MING MARINE TRANSPORT CORPORATION,**

**COMPLAINANTS**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

---

**METADATA SUPPLEMENT TO STATUS REPORT OF ONLY REMAINING  
COMPLAINANT KAWASAKI KISEN KAISHA, LTD. ON DISCOVERY DEMANDS  
REGARDING "K" LINE RO/RO VESSELS AND "K" LINE CONTAINER VESSELS**

"K" Line has produced some thousands of pages of documents by discs served on the Port. "K" Line made every effort in the production of documents to provide the metadata associated with the documents. However, for reasons set forth in the Status Report "K" Line filed Monday, October 21, 2013, none of the documents, much less the metadata, is material to the issue here by any stretch of the imagination.

The first question is, "what is metadata?"

The common definition of metadata is "data about data." In *Williams v. Sprint/United Mgmt. Co.* the Court defined metadata:

Metadata, commonly described as "data about data," is defined as "information describing the history, tracking, or management of an electronic document." n25 Appendix F to *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* defines metadata as "information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics

such as size, location, storage requirements and media information.)" n26 Technical Appendix E to the Sedona Guidelines provides an extended description of metadata. It further defines metadata to include "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity [\*18] of active or archival electronic information or records." n27 Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). n28 Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. n29 (230 F.R.D. 640, 646 (D. KAN. 2005) (2005 U.S. Dist. LEXIS 21966, at15)

In order to show how pointless the Port's metadata request is, the following describes the status of the Port's requests for production of documents to include metadata:

1. On September 1, 2011 the Port served on the Complainants the Port's First Request for Production of Documents consisting of twenty-four (24) separate Requests.
2. The responsive documents were collected by "K" Line America, Inc. (KAM) and the KAM ISD department creation of a disc containing the uploaded responsive electronic files with associated metadata on behalf "K" Line. This disc was sent to Attorney Halperin for drafting of "K" Line's First Response to Production of Documents. The disc received by Mr. Halperin was unreadable by Mr. Halperin's office. KAM's ISD department subsequently produced a thumb driving containing .pst files. These files were loaded onto the Flex system. The files were difficult to work with because many were produced in the form of emails sent to Mr. Halperin and all were duplicated more than once.
3. On November 23, 2011 Mr. Halperin served "K" Line's Response to the Port's First Request for Production of Documents in disc format covering document production for Bates CA-KL-000000 to CA-KL-001175. The responsive documents were in a foldering format on the disc. The folders on the disc contained the results of the efforts by the KAM ISD department to upload the responsive electronic files and the associated metadata.
4. On December 1, 2011 the Port served on Complainants their Second Request for Production of Documents consisting of three (3) additional separate Requests.
5. On March 9, 2012 Mr. Halperin served "K" Line's Response to the Port's Second Request for Production of Documents in disc format covering document production for Bates CA-KL-001176 to CA-KL-002368. The disc contained the responsive documents as uploaded by the KAM ISD department with the electronic files and associated metadata and as processed by Mr. Halperin's office in response to the Port's requests.

6. When Cichanowicz, Callan, Keane, Vengrow and Textor ("CCKVT") office took over the file, the corrupt CD and .pst thumb drive were provided along with access to the Flex system. CCKVT had the same problem reviewing the "K" Line files, particularly those related to metadata since the emails were attached to emails sent to Mr. Halperin and could not be extracted without changing the metadata. On October 18, 2012, CCKVT returned the "K" Line thumb drive to Mr. Theodorides at the ISD department at KAM's Richmond office for reproduction in order that the metadata could be properly provided to the Port.

7. On December 7, 2012 CCKVT served "K" Line's Supplemental Response to the Port's Request for Production of Documents, as provided by ReedSmith's office, in disc format covering document production for Bates CA-KL-002369 to CA-KL-004065. The disc contained the responsive documents as uploaded by the KAM ISD department with the electronic files and associated metadata and as processed by ReedSmith's office in response to the Port's requests. An email containing the "K" Line Privilege Log created by ReedSmith was also served by CCKVT on that same day.

8. Prior to the December 7, 2012 production, all "K" Line documents were reviewed by Mr. Matthew Thomas of ReedSmith as uploaded to Concordance. The ReedSmith offices screened for privilege and uploaded directly to Flex and the disc with the December 7 production was sent directly from Flex to the Port. Only those fields required to be produced were produced by Flex to the Port. In the event that the fields were not populated in the original document, they were left blank. This was the same as the metadata produced by the Port.

9. The Port demanded additional metadata in regard to "K" Line's first document production. Objections were made by "K" Line and the Judge ordered the Port to designate specific documents requiring metadata.

10. On October 14, 2013 in response to "K" Line's request for confirmation of outstanding discovery due from "K" Line, the Port's counsel responded, by way of electronic mail, and attached two documents in PDF format. The PDF attachments contained the Port's letter of November 12, 2012 to Mr. Paul Keane, requesting Complainants to provide metadata similar to that provided by the Port Authority for certain documents which were part of Complainants initial productions made on November 23, 2011. The other PDF attached to the Port's email of October 14, 2013 was titled "Additional Production - Metadata Requests" and contained a document consisting of "Exhibit A-E" which identified documents by Bates numbers already produced, but requested by the Port to provide metadata for those documents. Exhibit B of that PDF document detailed the Port's Request to "K" Line to produce metadata for specific documents which were previously submitted to the Port on November 23, 2011 as "K" Line's First Response to the Port's Document Request. Exhibit B identified Bates CA-KL-000008 to Bates CA-KL-001175 as the specific documents requiring production of metadata by "K" Line (See Attached Exhibit A).

11. A copy of the disc containing "K" Line's First Response to the Port's Document Request which was produced to the Port on November 23, 2011 has been reviewed for this report. The result of the disc review noted the disc had three main folders, the first of which was identified as "DATA"

and contained four subfolders identified as "CA-KL0001.scv," "CA-KL001.DAT," "CA-KL001.DII," "CA-KL001.LFP" and "CA-KL001.OPT." The "CA-KL0001.scv" folder contained an Excel document detailing the documents being submitted by "K" Line to the Port by columns with the documents identified by Bates CA-KL-000001 to, CA-KL-001175, by range of how many pages were associated with the specific document being submitted, a column confirming how many total pages were associated for that specific document and a column identifying the document as "Confidential." The remaining "DATA" subfolders identified as "CA-KL001.DAT," "CA-KL001.DII," "CA-KL001.LFP" and "CA-KL001.OPT" were inaccessible. Attempts to open the subfolders resulted in receipt of the message "You are attempting to open a file of type 'DAT file' (.DAT). These files are used by the operating system and by various programs. Editing or modifying them could damage your system." Or the message "To open this file, Windows needs to know what program created it. Windows can go online to look it up automatically, or you can manually select from a list of programs on your computer." Attempts to have Windows identify the program which created the document resulted in the message that "Windows does not recognize this file type."

12. The remaining folders on the disc, identified as "OCR" contained documents in a text (.TXT) format and the folder identified as "IMAGES" contained the documents as scanned images (TIF) of the documents being produced. These documents were accessed, reviewed and samples of the different document types were printed out.

A summary of the documents identified by the Port and requested to be reproduced with metadata by "K" Line by their identifying Bates numbers is as follows:

a. Bates CA-KL-000008 to Bates CA-KL-000021 consist of press announcements made by Norfolk Southern. The press announcements were received via email by "K" Line personnel as addressed by Norfolk Southern. Each announcement is a single event from Norfolk Southern to "K" Line personnel. The e-mails, on their face contain the necessary metadata (author, recipient, CCs, date, and content). Copies of such e-mails will be produced, if they can be located. Any other hidden metadata contained in the e-mails or their attachments is in the possession, custody and control of Norfolk Southern as the originator of the e-mails and attachments, not "K" Line. "K" Line personnel receiving the Norfolk Southern press announcement via email did not participate in the creation of the Norfolk Southern press announcement and did not revise the press announcement being made by Norfolk Southern. All metadata contained in the email and any attachment was the result of Norfolk Southern's action, not "K" Line's. The press announcement would have been widely and publically available on the Norfolk Southern web site at [http://www.nscorp.com/nscintermodal/Intermodal/News/Current\\_News/](http://www.nscorp.com/nscintermodal/Intermodal/News/Current_News/). If Norfolk Southern included other customers or persons, either in copy or blind copy, to receive that particular announcement via email that is not pertinent to this case. "K" Line has no interest in who Norfolk Southern chooses to receive their press announcements. Norfolk Southern is not a party to this case and it is immaterial to this case who Norfolk Southern chose to receive their electronic press announcements. (Attached Samples CA-KL-000008 to CA-KL-000011, .TIF and .TXT versions). **(See Attached Exhibit B).**

b. Bates CA-KL-000022 to Bates CA-KL-000022 is a letter dated September 24, 2004, sent via U. S. Mail and email, from Norfolk Southern to Mr. Dave Daly of KAM. The letter listed the date for closure of the ExpressRail facility and the grand opening of the new Intermodal terminal scheduled for September 27, 2004. The e-mail, on its face contains the necessary metadata (author, recipient, CCs, date, and content). A copy of such e-mail will be produced, if it can be located. Any other hidden metadata contained in the e-mail or its attachment is in the possession, custody and control of Norfolk Southern as the originator of the e-mail and attachments, not "K" Line. Mr. Daly did not participate in the creation of the Norfolk Southern letter of September 27, 2004 and obviously would not revise a letter created by Norfolk Southern. (Attached CA-KL-000022, .TIF and .TXT versions). (See Attached Exhibit C).

c. Bates CA-KL-000023 to Bates CA-KL-000038 consist of press announcements made by Norfolk Southern. The press announcements were received via email by "K" Line personnel as addressed by Norfolk Southern. Each announcement is a single event from Norfolk Southern to "K" Line personnel. The e-mails, on their face contain the necessary metadata (author, recipient, CCs, date, and content). Copies of such e-mails will be produced, if they can be located. Any other hidden metadata contained in the e-mails or their attachments is in the possession, custody and control of Norfolk Southern as the originator of the e-mails and attachments, not "K" Line. "K" Line personnel receiving the Norfolk Southern press announcement via email did not participate in the creation of the Norfolk Southern press announcement and did not revise the press announcement being made by Norfolk Southern. All metadata contained in the email and any attachment was the result of Norfolk Southern's action, not "K" Line's. The press announcement would have been widely and publically available on the Norfolk Southern web site at [http://www.nscorp.com/nscintermodal/Intermodal/News/Current\\_News/](http://www.nscorp.com/nscintermodal/Intermodal/News/Current_News/). If Norfolk Southern included other customers or persons, either in copy or blind copy, to receive that particular announcement via email that is not pertinent to this case. "K" Line has no interest in who Norfolk Southern chooses to receive their press announcements. Norfolk Southern is not a party to this case and it is immaterial to this case who Norfolk Southern chose to receive their electronic press announcements. (Attached Samples CA-KL-000023 to CA-KL-000026, .TIF and .TXT versions). (See Attached Exhibit D).

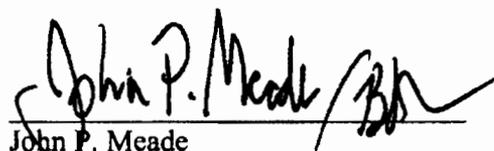
d. Bates CA-KL-000039 to CA-KL-001159 consist of nothing more than a printout of 1,121 pages of "K" Line container numbers which were pulled from the "K" Line database. (Attached Samples CA-KL-000039 to CA-KL-000043 .TXT version). (See Attached Exhibit E).

e. Bates CA-KL-001160 to CA-KL-001175 consist of cover letters and invoices of CFC charges by Maher Terminals ("Maher") to "K" Line and addressed to Ms. Melissa Spata at the "K" Line New Jersey office. The cover letters and invoices were received via email by "K" Line personnel as addressed by Maher. Each cover letter and invoice is a single event from Maher to "K" Line personnel. The e-mails, on their face contain the necessary metadata (author, recipient, CCs, date, and content). Copies of such e-mails will be produced, if they can be located. Any other hidden metadata contained in the e-mails or their attachments is in the possession, custody and control of Maher as the originator of the e-mails and attachments, not "K" Line. "K" Line personnel receiving the Maher cover letters and invoices did not participate in the creation of the Maher documents and did not revise the documents created by Maher. All metadata contained in the email

and any attachment was the result of actions by Maher, not "K" Line. Maher is not a party to this case and it is immaterial to this case who at Maher creates their cover letters or invoices, in what format and how they are altered prior to transmitting to "K" Line for payment. (Attached Bates CA-KL-001160 to CA-KL-001175, .TIF and .TXT versions). (See Attached Exhibit F).

In response to the Port's letter of November 12, 2012 requesting specific documents received by "K" Line, there is no metadata information available to "K" Line on "how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information)." There is nothing whatsoever material to the issue in this case in this information in the possession of non-parties.

Respectfully Submitted,

A handwritten signature in black ink that reads "John P. Meade" followed by a stylized flourish or initials.

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[john.meade@us.kline.com](mailto:john.meade@us.kline.com)

**Counsel for Complainant  
Kawasaki Kisen Kaisha, Ltd.**

**Dated: October 23, 2013**

**CERTIFICATE OF SERVICE**

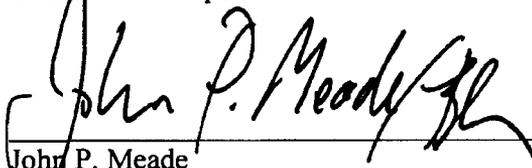
I hereby certify that I caused a true and correct copy of the foregoing Metadata Supplement to Status Report to be served October 23, 2013, via e-mail, upon the following:

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## **I. INTRODUCTION**

Complainant “K” Line appeals from the ALJ’s dismissal of its complaint in this Docket by Order of February 5, 2014, and requests the Commission to issue findings and conclusions of law on the undisputed facts, which the ALJ sidestepped, blaming unfulfilled discovery orders. The ALJ ordered unchecked “discovery.”<sup>1</sup> This dismissal was ostensibly the product of that and the ALJ’s insistence on an evidentiary hearing. Underlying the dismissal, however were fundamentally different views of 46 U.S.C. § 41102(c); the present truncated state of this case is bound up with the obligation of an ALJ to make findings in a case without pointless exercises in discovery or an evidentiary hearing, when the facts are undisputed and the ALJ has actually decided the major legal issue against Complainant. Although the ALJ blocked simplification of the complaint, the remaining Complainant, “K” Line, continues to seek a declaration that the Respondent Port violates 46 U.S.C. § 41102(c) in forcing “K” Line, on pain of effective expulsion from the Port, to pay a “cargo facility charge,” a port user fee, (“CFC”) for every container or cargo unit transiting leased or public terminal facilities in Respondent’s port area. Several other decision-ripe issues were ignored by the ALJ.

The main issue is of great significance to Commission policy. The ALJ’s purported basis for dismissal, discovery default, is a red herring. Long ago there ceased to be any material issues of fact warranting discovery or a hearing. Nevertheless, the ALJ decreed wide-open discovery and an evidentiary hearing. The dismissal focused on scheduling orders, while serious issues have been teed up for decision since December, 2012. The ALJ actually decided against “K” Line on the overriding Shipping Act issue, but declines to subject that decision to Commission review.

<sup>1</sup> The ALJ accepted Respondent’s fallacious discovery philosophy: “We are entitled to discovery to put on the best case we can.” although there are no disputed facts. <sup>1</sup>

This overriding Shipping Act issue, whether a marine terminal operator (“MTO”) violates section 41102(c) (former section 17) by forcing vessel operator payment of a flat charge per container or cargo unit transiting the Port, puts in play the Commission’s historic position that MTO charges to vessels operators can only be “user charges” for which an identified, measurable service must be rendered to that operator. A fee to use the Port has never been countenanced. The concomitant rule that such charges must be reasonably related to the service rendered is not in play, since no service is rendered in return for the CFC payments. “K” Line will not argue about the value of a bundle of ambient “benefits” available to Port users, because they are not acceptable substitutes for quid pro quo services under section 41102(c). “K” Line argues the CFC is just a tax on vessel operations.

Respondent did not articulate any defense but interposed a legal theory supporting discovery by semantic legerdemain, claiming that a basket of “benefits” smoothing the way for vessel operators (among the many other classes of Port beneficiaries) is the same as “services<sup>2</sup>” which can support this charge on vessel operations. The ALJ, by giving no credit for the massive discovery furnished by Complainants, and blessing unlimited far-fetched Port discovery, let the Port make defendants out of Complainants. The Port was allowed to make Complainants, not the legality of the CFC, the whole subject of the Docket. The Port could not and did not defend the CFC in its “Corrected Answer” or at any other point in the years this has dragged on. Its only defense is grasping for endless discovery. The Port won the battle without ever firing a substantive shot, while “K” Line carried its burden of proof with undisputed facts and undisputed precedent, and is entitled to judgment.

The Port pulled this off by convincing the ALJ of the bogus proposition that “services” and “benefits” are synonymous under the precedents, that every disagreement about perceptions,

The amount of the CFC is not an issue under the Act, and the CFC is not even authorized by the MTO provisions in the Act. It is, however, clearly within the Commission’s jurisdiction to judge the reasonableness of an MTO imposing a non-user charge on vessel operators, particularly one enforced by the threat of termination of services by terminal tenants of the Port.<sup>6</sup>

The CFC is a bold bid for deregulation – a move to break free of the decades-old section 17 limit of reasonableness on user charges to vessel operators. Measuring “reasonableness” of a flat charge like the CFC is a chimera, utterly lacking in substance.

“K” Line submits the Commission should act as the decision-maker of first instance, as it did in the *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 SRR 1134 (FMC 1997) case, and on an issue ignored by the ALJ in [Maersk v. McKenna-Trucking Co., Inc. v. A.P. Moller Maersk](#), 27 S.R.R 1045, June 23, 1997. The ALJ here would not make findings formalizing the affirmative rejection of “K” Line’s legal position on the main issue or the rejection (by neglect) of the issues presented by Schedule PA-10 on its face. The ALJ did not make reviewable findings to support the “discovery” dismissal.

### **III. THE PRESENTATION TO THE ALJ ON DISCOVERY AND THE MERITS**

Excerpting core arguments here will fill the vacuum left by the ALJ’s Dismissal Order. The Commission would get no sense of this case from reading that Order, but this recap should present a clear picture of the “K” Line case on the main issue.

#### **A. The “CARGO FACILITY CHARGE”– A Tax on Vessel Operators**

Herein is the “Cargo Facility Charge” – the “CFC.”

#### SECTION H

<sup>6</sup> Maher Terminals defends against a complaint for anticipatory breach in New Jersey based on the Port’s authority to compel it to terminate services to “K” Line for CFC non-payment. *Kawasaki Kisen Kaisha, Ltd., et al. v. Maher Terminals LLC*, Civil Action No. 2:2012-CV-06178 (U.S.D.C. N.J.).

specific service (as opposed to a general fund).” (Order at 5). Complainants made no such argument. *It was the Port* that came up with the fairy tale that the CFC would pay for “the three components.” Complainants have never argued that collections of a fee must be funneled into supporting the specific service for which it is charged.

The June Order did not analyze the legal issue of “service” versus “benefit”, but accepted the Port’s argument that they are synonyms, and announced a confused rule, rejecting Complainants’ primary arguments on the merits, when it made the following abstruse pronouncement:

Determination of whether the cargo facility charge violates that [*sic*] Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed. This requires a finding of whether benefits received by shippers or Complainants’ affiliates should be taken into consideration, an issue best resolved after discovery and a complete understanding of the relationship between the Complainants and their affiliates. While Complainants contend that they receive no service in return for the cargo facility charge, they do acknowledge receiving a benefit, and the extent of that service/benefit will be a material fact that impacts the ultimate decision. Resolution of these issues will depend on the facts, and implication of the facts, in this case. (Order at 5).

While muddling the concepts of “service” and “benefit,” the statement clearly rejected the Complainants’ legal position, holding “benefit” to be a material fact, maybe even benefit to customers and affiliates! The case should have ended then, with proper, reviewable findings made incorporating the ALJ’s view of the law. But the case proceeded in a state of unreality, as if Complainants had not repeated their position over and over that the CFC violates 41102(c) because no *service* is rendered in return for it and that Complainants do not quarrel with the level of so called “benefits” which they (or their relatives) might enjoy from Port operations, even if they never set foot in the Port. The Port, with the ALJ’s backing, sees its various operations as

At this point in the Docket, the ALJ had radically mischaracterized Complainants' position on the violation of 41102(c) and wholeheartedly embraced the Port's position that "improvements to rail, transit, and security...justify imposing the Cargo Facility Charge and Complainants have admitted that they benefit, at least to some extent, from these improvements." (Order at 3). At this point, Complainants' case was dead – *finis*- but the runaway train rolled on.

#### **K. Complainants' Simultaneous Tries for Commission Review Filed July 9, 2013.**

Faced with the ALJ's oblique but absolute rejection of Complainants' "quid pro quo" position, and acceptance of the Port's "benefits" position, the Complainants tried for Commission review. Complainants took two tacks, filing a Petition for Review of Administrative Law Judge's Order with the Commission and a Petition for Leave to Appeal with the ALJ, both on July 9, 2013.

##### **1. Petition for Review**

Complainants made the following statement in their Petition for Review by the Commission:

While the legal issues may seem narrow and technical, the practical stakes for the shipping industry of this docket are hard to overstate. At stake in this docket is the critical question of whether the Shipping Act allows local ports and other governmental entities to impose per-unit cargo taxes or 'fees' on shipping lines, in order to raise general revenue to fund regional road-building, rail infrastructure, security and other regional infrastructure for the general benefit of all stakeholders. An affirmative answer would have grave precedential impacts for waterborne trade, inviting a proliferation of similar local taxes and fees on shipping nationwide. (Petition for Review at 2).

Complainants pointed out the essence of the main issue at page 3 of their [MotionPetition](#):

Longstanding Shipping Act precedents have first determined that there is a service rendered to vessels, then evaluated the amount of the charge in light of the benefits to the vessel from the service. The Order broke totally new ground, skipping the service requirement, and directed that discovery proceed into indirect benefits not linked to any service to vessels. There is no dispute that all services to Complainants' vessels are furnished by private lessee terminals (save for wharfage to non-container vessels). Without Commission intervention, this Docket would proceed on the faulty basis that when the Commission has used the word

falls on the record as it exists. The Presiding Officer decided this issue of the applicable legal standard against Complainants, thereby effectively dismissing Complainants' case as to that issue, because Complainants decline to press any further case regarding 'benefits' that might indirectly accrue to Complainants, their affiliates and shippers.

The difference between a service to a vessel and a benefit from the existence of port facilities generally is not obscure; it is patently obvious. The Port furnishes roadways, rail facilities, security, and other infrastructure in and around the Port area. The Port could charge for any of these specific services based on its use, and the reasonableness test would be applied to the charge in light of the service rendered. The Port does not do so, however; rather, it collects fixed cargo charges from carrier – specifically without regard to whether a particular service has been utilized – and uses the proceeds to underwrite a diverse and indefinite array of past, present and future projects. Nevertheless, the Presiding Officer has decided that benefits without services can support charges to vessel operators. The Order represents 'game over' on that issue, the most important issue in the case.

Petition for Leave to Appeal at 3-4. But with the ALJ, the case could not end until the Port's counsel got their shipping education and the witness parade was held, a la the "Music Man".

The ALJ held fast to the position that documents and witnesses must be produced "in order for the case to proceed." (Order at 2). Despite Complainants' efforts to show the ALJ that the ultimate issue in the case requires no additional facts for decision, and despite the laundry list of legal problems defeating Section H by its own terms, the ALJ refused to rule. There would be an evidentiary hearing whether Complainants wanted it or not.

The July 24 Denial of Leave to Appeal blithely bypassed Complainants' ~~argument~~arguments regarding the "Section H issues," as if they did not exist. Pages 4, 5 and 6 of the Petition had laid out the utter absence of any fact issues regarding the words of the Port's Section H, which the Complainants' previous Motion for Judgment had already stated simply and clearly. Once again, the ALJ left Complainants' case in the dust.

ALJ. “K” Line would stipulate to the facts relevant to its complaint and would even stipulate to the Port’s irrelevant fantasies. It would be a war to which “K” Line would not come except as a re-enactment. But, along the way to “hearing,” the Port would be able to harass “K” Line and its corporate family with absurd discovery, and play with silly straw men like whether “K” Line is a “common carrier” or a “vessel operator.” If the Port knew anything about the Shipping Act, it would know Vessel-Operating Common Carriers pay the CFC, while other common carriers do not, and vessel operations, not common carrier status, triggers the tax.

**P. “K” Line’s October “ 21, 2013 Status Report on Discovery Demands**

“K” Line introduced a significant status report with the following statement:

This is a status report to the ALJ on the discovery demands “K” Line’s files show to be outstanding as of this date. Further litigation over these demands is pointless. The responses set forth herein demonstrate for the ALJ that there are no remaining discovery demands material to the issues in the case in its present posture. “K” Line is the last complainant standing, the remaining other three having been driven away by burdensome and oppressive ‘discovery’ demands, which will not, and are not reasonably calculated, to lead to evidence material to the limited issues remaining in this case.

“K” Line focuses in this report on the ‘real world’ discovery situation, which must be considered in light of the limited issue upon which the sole remaining Complainant seeks relief. This report and the responses herein focus on the information actually requested of “K” Line by the Port, and the materiality of that information to the limited issue now presented by “K” Line to the ALJ and the Commission for decision. The Report also defines a very narrow category of confidential information which “K” Line will not turn over to prying eyes for no purpose material to this case. This exercise reveals the discovery ‘fight’ to be nothing but posturing over nothing meaningful.

This is a case initiated by private complainants, of which only “K” Line remains, not a Commission investigation. As is its right as the complaining party and summary judgment movant to limit the issues it presents for decision, “K” Line has moved to amend its complaint and conceded a large number of issues which were once active in the case. [sic] Materiality must be driven by the parameters of the single principal issue “K” Line is now litigating in this Docket, stated in its recently-filed motion for implementation of rulings: *Whether the CFC is a tax on a single category of port user which unreasonably burdens international maritime commerce in violation of core federal interests, not a user*

operations. “K” Line also argues it is an unreasonable practice for the Port to condition access to private terminals services upon payment of the CFC to the Port.

“K” Line is not arguing that there are “services” to vessel operators and “services” to all other Port users, but that the Port cannot make vessel operators pay the Port for enjoying the benefits of using the Port operations just like ~~which is enjoyed by~~ so many others. The ALJ devoted a paltry few words to “K” Line’s position in this vein, devoting much more print to the policy considerations which “K” Line submits make the issue important. Then the ALJ falls back on prior Orders, devoting several pages to them.

The Order reaches into “K” Line’s Discovery Status Report and plucks out a single sentence, expressing surprise that “K” Line is “turning the focus to whether the fee may be imposed (at any level) against [vessel operators].” Order at 5. This is precisely “K” Line’s position: We have said over and over that the level of the CFC is immaterial and uncontested. We have done everything but stand on our heads to make this clear. We are not trying to remove “the issue of the reasonableness of the cargo facility fee,” and our focus is exactly that the amount of the fee is immaterial – the fee cannot be imposed on vessel operators without a service in return. Only if there is a service in return can the reasonableness of the amount of the fee be measured against the service furnished to vessel operators.

The heart of the dismissal is the statement that “Complainant has indicated that it will continue to refuse to provide the required discovery...Complainant’s failure to produce discovery is therefore willful.” The dismissal Order, nor any previous Order, has ever evaluated in the slightest degree, has never turned a hair to evaluate the positions of “K” Line and Respondent regarding discovery. The Order characterizes the discovery sought as a “limited amount.” (Order at 7). The ALJ has never responded to the objections of “K” Line or the other Complainants to

evaluating the legitimacy of the Port's discovery demands in the face of the massive discovery responses on the Complainants' side and "K" Line's thorough debunking of the Port's fatuous discovery arguments. The Order concludes with the preposterous statement that "it very well may be that the relationship between "K" Line and its affiliates demonstrates the unfairness of the Cargo Facility Charge. However, without the relevant evidence, it is not possible to reach the merits and make that determination." "That determination" is utterly alien to any Commission or Court precedent.

#### **T. Relief Requested**

"K" Line respectfully request the Commission to make the following Findings and Order the following Relief:

1. Order that the ALJ committed reversible error in dismissing with prejudice on procedural grounds—pursuant to FMC Rule 502.223 and APA 5 USC 557(c)(3)(A)(B)), and find that ALJ dismissal was not founded on "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.
2. Find that the ALJ committed reversible error in not issuing a decision and findings on motions for judgment in this docket, when all material facts are undisputed.
3. Find that the discovery furnished to the Port by Complainant "K" Line included all facts material to resolution of the lawfulness of the CFC, under § 41102(c).
4. Find that the ALJ committed reversible error in ordering discovery on non-material matters, thus forcing at least three complainants to withdraw from the case.
5. Find that since all material facts are undisputed and "K" Line is willing to stipulate to any material facts, but not to inferences, arguments or legal conclusions or facts involving other than services rendered to vessel operators in return for the CFC (as the term "services" is universally understood), an evidentiary hearing in this Docket is not warranted and would be a waste of the ALJ's and the litigant's time and resources, thus the ALJ's insistence on such hearing was an abuse of discretion constituting reversible error.
6. Find that the ALJ committed reversible error in holding that benefits accruing to vessel operators from ongoing Port facilities and services, without the Port rendering a service to the vessel (thus the vessel operator) in exchange for the CFC which generates such benefits, could support the lawfulness of the CFC, under 46 USC § 41102(c).

7. Find that the CFC is an unreasonable practice under 46 USC § 41102(c) because it is imposed by the Port on vessel operators without any service being furnished to the vessel/vessel operators as a quid pro quo for the payment of the CFC.
8. Find that the Port's CFC collection method, forcing tenant private terminal operators to stop serving any vessel of any operator in default of paying the CFC for 60 days is an unreasonable practice under 46 USC § 41102(c).
9. Find that the CFC is not authorized under the MTO provisions of the Shipping Act of 1983, as amended, 46 USC § 41106.
10. Find that while the imposition of the CFC is a matter within the jurisdiction of the Commission, including whether the level of the CFC is reasonable, ~~but~~ adjustment of the level of the CFC is not.
11. Find that the Motions for Judgment of December 7, 2012 and of August 9, 2013, should have been granted, and so order that they shall and be granted.
12. Find that "K" Line is entitled to reparations from the Port in the total amount of all "K" Line CFC payments to date.
13. Find that "K" Line is entitled to interest on such reparations total from the Port.
14. Find that "K" Line is entitled to all attorney's fees it expended in relation to this Docket from the Port.
15. Order the Respondent Port of New York/New Jersey to cease and desist, from the date of the Commission Order, from collecting the Cargo Facility Charge, or any like charge imposed on vessels/vessel operators without a specific, discrete service rendered to the vessel which is rendered solely in return for the payment of such charge, and not to force payment of any charge by ordering or arranging for tenant terminal operators to discontinue any service to any vessel.
16. Remand to the Administrative Law Judge for expeditious determination of the amounts due under "12, 13 and 24," above.
17. Find that only issues under the Shipping Act of 1984, as amended, are within Commission jurisdiction over Respondent Port in this proceeding, and all constitutional and statutory issues referenced by "K" Line must be decided in any review of this decision.

Respectfully Submitted,

~~March 31~~, April 24, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing CORRECTED Appeal Brief to be served ~~March 31~~, April 24, 2014, via e-mail, upon the following:

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