

**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

MOTION FOR IMPLEMENTATION OF ALJ'S RULINGS

BY ORDER OF DISMISSAL

(CORRECTED)

Complainant Kawasaki Kisen Kaisha, Ltd., hereby moves the Administrative Law Judge to implement the various rulings against "K" Line touching the merits of this case by dismissing the complaint on the merits, so that "K" Line may seek review. The other three complainants have withdrawn from the docket per a pending motion to withdraw, leaving "K" Line as the last surviving complainant of the original nine. This Motion was originally filed and served via electronic mail on October 7, 2013. This version corrects certain missing citations to the record on pages 5 and 7, but is otherwise the same as, the original Motion.

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.

Although it concedes that it cannot “trace” the CFC to any specific costs,¹ according to Port official Peter Zantal’s affidavit, the investments the Port seeks to recover through the CFC are for roadway improvements (\$83.9 million), the RailExpress system (\$600 million) and Port security enhancements implemented after 9/11 (\$125 million). 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). It is beyond cavil that many different users of the same truck and railway infrastructure facilities and security measures who benefit from them do not pay the CFC; the burden falls exclusively on vessel operators. The undisputed facts starkly

¹ CFC payments “are not earmarked for particular expenditures.” Port’s Objections and Responses to Complainant’s First Request for Production of Documents, Responses to Requests Nos. 52 and 56, at 36 & 38.

illustrate the lack of correlation between the CFC, and cargo handling services or facilities provided to the complainants who pay the fee.

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 RailExpress system;
- Not imposed on Non-Vessel 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, for the claims purposes of financing general roadway and railway infrastructure and security expenditures, 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. In discussing *Pace v. Burgess* 92 U.S. 372 (1876), a case the Court found controlling in distinguishing an export duty from a user fee, The U.S. Supreme Court in *U.S. Shoe* said of the excise tax on tobacco upheld in *Pace* ‘as compensation given for services in fact rendered’:

[T]he Court emphasized two characteristics of the charge: “‘*it bore no proportion whatever to the quantity or value of the package* on which the stamp was affixed; and the fee was not excessive, taking into account the cost of arrangements” needed to give the exporter the benefit of exemption from taxation and against fraud.

United States Shoe, 523 U.S. at 369 quoting *Pace v. Burgess* 92 U.S. 372, 375 (1876) (emphasis added). In other words, the amounts of charge were not based on the amount of exported goods or their value, but on the services rendered and their cost.

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 (*see* note 1, *supra*), 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.

The U.S. Supreme Court also struck down as unconstitutional a state tax on containers in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), in part, because it impaired federal uniformity in an area where federal uniformity is essential. The Court found that:

[T]he desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the Customs Convention on Containers which the United States and Japan have signed. Under this Convention, containers temporarily imported are admitted free of 'all duties and taxes whatsoever chargeable by reason of importation.' The Convention reflects a national policy to remove impediments to the use of containers as 'instruments of national traffic.' California's tax, however, will frustrate attainment of federal uniformity.

441 U.S. at 452-53.

Accordingly, the Court held that the tax was "inconsistent with Congress' power to regulate Commerce with foreign Nations," finding it unconstitutional under the Commerce Clause. While the basis of the Supreme Court’s ruling in *Japan Lines* was the Commerce Clause, the Court also address the Import-Export Clause infirmities of container taxes, as follows:

Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in

ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

441 U.S. at 450, & n.14.

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."). When a Port lays a charge on movement of cargo in foreign trade, calling it a user fee, and exempts all but ocean carriers from paying the charge, it is a tax or duty, and a burden on international commerce implicating strong federal interests of Constitutional magnitude, that demands very close scrutiny under Section 41102(c).

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 & nn. 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)² 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). The Port has not offered any correlation of “benefits” from the three categories of facilities/services it cites as its CFC justification, and obviously there is no benefit to ro/ro carriers from Express Rail.

² 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).

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 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.

The remaining discovery items are covered in the supplemental status report to be filed shortly. None of the items “K” Line objects to providing can possibly involve anything material, since none of the material facts in any way involve the subject matter of those items. A dismissal by the Commission for refusal to engage in “discovery” would be an abdication of responsibility. “Discovery” is not the issue in this case - that is a sham. Nothing the Port can adduce in its vexatious discovery could be any more relevant than if “K” Line deposed the Port on its transfer of the rights to the name “World Trade Center.”

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 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.

It is pure foolishness to debate this issue in a factual context. Everyone (except the ro/ro operators) arguably enjoys some direct or indirect benefits from the Port’s three categories, but only the vessel operators pay the CFC. That violates the Act. The ALJ has ruled against “K” Line on the merits of its case. “K” Line is not litigating the reasonableness of the amount of the CFC compared to benefits from Port operations; it disputes imposing the CFC solely on container and ro/ro vessel operators and containers with no correlation to use. No one else in the Port’s user universe is paying anything for these “benefits.” Big users of Express Rail get a free ride in comparison with others who may use Express Rail not at all. This is not a subject appropriate for litigation now; the precedents require that the Port base the CFC on the most practicable correlation of use vs. benefit, an apportionment which it has not even attempted to do.

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 enure to them. The Port even goes to the absurd length of claiming benefit to ro/ro vessels from a rail container facility.

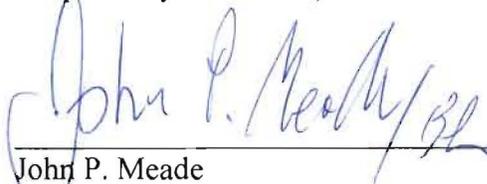
The weight of federal interests against this can be seen in the foregoing brief review of pertinent expressions of policy reflected in constitutional decisions. Those same uniquely Federal interests and allocation of Federal power over international maritime commerce reflected in the Constitutional clauses at issue in those cases are the source of the Shipping Act, which the Commission is charged to apply and enforce.

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.

Unmasked, the CFC's introduction was an elevation of the Port's parochial interest in its own competitiveness, by substituting for the Express Rail user fee a charge against all vessel operators using the Port because an honest, correlated user fee for Express Rail was harming the Port's competitiveness. 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.

WHEREFORE, for the foregoing reasons, Complainant Kawasaki Kisen Kaisha, Ltd., hereby moves the Administrative Law Judge to implement various prior rulings against "K" Line touching the merits of this case by dismissing the complaint on the merits, so that "K" Line may seek review.

Respectfully Submitted,



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CORRECTED
October 10, 2013

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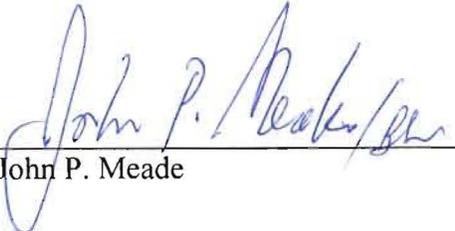
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Complainant's Corrected Motion for Implementation of ALJ's Rulings by Order of Dismissal to be served on this 10th day of October, 2013, via electronic mail, upon the following:

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