**BEFORE THE**
**FEDERAL MARITIME COMMISSION**

| | | |
|---|---|---|
| **KAWASAKI KISEN KAISHA, LTD.** | ) | |
| **Complainant,** | ) | **Docket No. 11-12** |
| **v.** | ) | |
| **THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,** | ) | |
| **Respondent.** | ) | |

**APPEAL FROM DISMISSAL OF COMPLAINT**
**OF COMPLAINANT KAWASAKI KISEN KAISHA, LTD.**

JOHN P. MEADE
6199 Bethlehem Road
Preston, Maryland 21655
(410) 673-1010
March31, 2014

*Counsel for Complainant Kawasaki Kisen Kaisha, Ltd.*

## TABLE OF CONTENTS

**I. INTRODUCTION** ..... 1

**II. HISTORY** ..... 3

**III. THE PRESENTATION TO THE ALJ ON DISCOVERY AND THE MERITS** ..... 7

A. The "CARGO FACILITY CHARGE"– A Tax on Vessel Operators ..... 7

B. Complainants' Partial Summary Judgment Motion on Empty Container Fees ..... 8

C. "K" Line's Supplemental Reply in March, 2012 Atomized the Foundation for Respondent's Discovery Fishing Expedition ..... 9

D. Another "K" Line Reply Displayed the Port's Mindless Appetite for Irrelevant Materials ..... 12

E. In May, 2012, the ALJ Abdicated Responsibility For Controlling Discovery ..... 14

F. In October 2012, the ALJ Apparently Agreed with Complainants on Discovery Issues. – Two More Complainants Withdrew ..... 14

G. In December, 2012, Five Remaining Complainants Requested Judgment that the CFC Violates Section 41102(c) ..... 15

H. Complainants' 97 Page Reply of February, 2013 Showing There Are No Factual Disputes Went Unheeded ..... 16

I. A June, 2013 Order Denying "Summary Judgment" Confused the Main Issue, Ignored the Purely Legal Issue, and Reversed Course on Discovery ..... 17

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

K. Complainants' Simultaneous Tries for Commission Review Filed July 9, 2013 ..... 23

1. Petition for Review ..... 23
2. Petition for Leave to Appeal Denied by the ALJ in July, 2013 ..... 24

L. Complainants' Last Gasp Motion for Final Judgment, August 9, 2013 .....25

M. Complainants' Motion to Amend Complaint, August 8, 2013 .....28

N. Orders on Motions For Final Judgment and to Amend, September 5, 2013 .....29

O. Motion for Implementation of ALJ'S Rulings by Order of Dismissal October 10, 2013.....30

P. "K" Line's October 21, 2013 Status Report on Discovery Demands .....38

Q. "K" Line's Metadata Supplement October 23, 2013.....40

R. The Presiding Officer's Abdication of Duty under the APA and the Commission's Regulations .....41

S. The Dismissal Order.....46

T. Relief Requested .....49

## TABLE OF AUTHORITIES

**Cases**

*In re Amerep,* 102 F.T.C. 1362, 1670 (1983) ..... 43

*American Presidents Lines Ltd. v. Cypress Mines Corp* and *Cypress Minerals Co.*
26S.R.R. 1227, 1234 (FMC 1994) ..... 4

*Baton Rouge Marine Contractors, Inc. v. FMC,*
*655 F.2d 1210, 1214 (D.C. Cir. 1981)* ..... 16, 22

*Bell Atlantic v. Twombly,*
550 U.S., 544, 561 (2007) ..... 13

*Clyde Mallory Lines* v. *Alabama,*
296 U.S. 261, 165-66 (1935) ..... 34

*Dura Pharmaceuticals, Inc. v. Broudo,*
*544 U.S. 336, 347 (2003)* ..... 13

*Flanagan v. Lake Charles Harbor & Terminal District,*
27 SRR 1123 (1997) ..... 22

*Ocean Common Carrier Status of Shanghai Hal Hua Shipping Co., Ltd.(HASCO),*
FMC Docket No. 02-09 ..... 42

*Hoai v. Sun Refining & Marketing Co.*
(199 WL 16766, D.D.C. 1991) ..... 9

*Independent Productions Corp.* v. *Loew's,*
283 F.2d 730 (2d. Cir. 1960) ..... 41

*Interconex, Inc.* v. *FMC*, 572 F.2d 27 (2d. Cir. 1978) ..... 41

*Japan Lines Ltd. v. County of Los Angeles,*
441 U.S. U.S. 434, 445-46 (1979) ..... 34

*Kawasaki Kisen Kaisha, et al. v. Maher Terminals LLC,* Civil Action No. 2:2012-CV-06178,
(U.S.D.C. NJ) ..... 7

*Lwin* v. *INS,*
144 F.3d 505, 513 (7th Cir. 1988) ..... 44

McKenna Trucking Co., Inc. v. A.D. Moeller-Maersk,
27 SRR 1045, 1048-51) (June 23, 1997) ..... 3, 7, 43

*Metropolitan Council of NAACP Branches* v. *FCC,*
*46* F.3d 1154 (D.C. Cir. 1995) ..... 42

*Minneapolis & St. Louis R.R. Co.* v. *United States,*
361 U.S. 173, 193-94 (1959) ..... 43

*Mullane* v. *Central Hanover Bank & Trust Co.,*
339 U.S. 306, 313 (1950) ..... 44

*Persian Gulf Outward Freight Conf.* v. *FMC,*
375 F.2d 335 (D.C. Cir. 1967) ..... 41

*Peskoff v. Faber,*
230 F.R.D. 25, 2005, D.D.C. 2005, at 2- 4 ..... 9

*Petition of South Carolina State Ports Authority for Declaratory Order*,
27 SRR 1134 (FMC 1997) ..... 7, 45, 46

*Philippine Merchants Steamship Co. Inc. v. Cargill*, Inc.,
9 F.M.C. 155, 166 (1965) ..... 22

*Plaquemines Port, Harbor and Terminal District v. FMC*,
838 F.2d 536 (D.C. Cir. 1988) ..... passim

*Soltane* v. *U.S. Department of Justice,*
381 F.3d 143, 151 (3d Cir. 2004) ..... 44

*Sprint Nextel Corp.* v. *FCC,*
508 F.3d 1129, 1132 (D.C. Cir. 2007) ..... 44

*Steadman* v. *SEC,*
450 U.S. 91, 102 (1981) ..... 43

*U.S.* v. *Consolidated Mines & Smelting Co.*,
455 F.2d 432 (9th Cir. 1971) ..... 42

*United States* v. *United States Trust Co.,*
431 U.S. 1, 5 n.5 (1977) ..... 33

**Statutes**

46 U.S.C. § 41102(c) ..... passim

46 U.S.C. § 41106 ..... passim

5 U.S.C. § 556(d) ..... 44

5 U.S.C. § 557((c)(A) ..... 44

5 U.S.C. § 557(c)(3) ..... 49

**Other Authorities**

46 CFR § 502.69 ..... 45

46 CFR § 502.223 ..... 43, 49

46 CFR. § 502.227(a)(4) ..... 44

46 CFR. § 502.227(a)(6) ..... 44

Fed.R.Civ.P. 9(b) ..... 9

Fed.R.Civ.P. 26(b)(1) ..... 9

Fed.R.Civ.P. 56 ..... 3

## 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."[1] 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.

---

[1] 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.[2] As "K" Line pointed out to the ALJ, the Shipping Act issue is freighted with public policy considerations.

[2] 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.[3] 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

[3] 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,"[4] then the CFC's orphan status under the Act would arise, as would various obvious infirmities in the Schedule which render it unlawful.[5]

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.

---

[4] Sound reasons are required for such a change in position in overturning uniform precedents.

[5] 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.[6]

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. 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

[6] 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 FACILTIY 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 untrammeled 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").[7] 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

[7] 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."[8] 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

[8] 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 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.[9]

Opposition to Motion to Compel at 1-3.

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

---

[9] 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 Motion:

> 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 unchartered 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' argument 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[10], 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

[10] "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.[11] "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.

---

[11] 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."

Motion of Nippon Yusen Kaisha, United Arab Shipping Company (S.A.G.) and Yang Ming Transport Corporation to Withdraw, filed September 20, 2013 at 1-2.

**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 6services.

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)[12] 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

[12] 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.

* * *

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.

Motion at 1-10.

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.[13]

"K" Line reviewed the Port's demand for all "K" Line's service contacts, pointing out that the redaction authorized by the ALJ which would be necessary to preserve confidently 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).

[13] "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.[14] 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[15] 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

---

[14] The Port's February 25, 2013, letter is attached hereto as Attachment C.

[15] 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.[16]

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

[16] 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-examiniation 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. (HASCO)*, 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 (7th 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:[17]

> 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

[17] 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 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 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. FMC Rule 502.223 and APA 5 USC 557(c)(3)(A)(B)) 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.

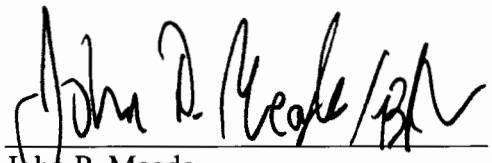
14. Find that "K" Line is entitled to all attorney's fees it expended in relation to this Docket from the Port.

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,



John P. Meade
**"K" Line America, Inc.**
6009 Bethlehem Road
Preston, MD 21665
(410) 673-1010
*john.meade@us.kline.com*

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

March 31, 2014

## CERTIFICATE OF SERVICE

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

Richard A. Rothman
Jared R. Friedmann
Reed Collins
**WEIL, GOTSHAL & MANGES LLP**
767 Fifth Avenue
New York, New York 10153
richard.rothman@weil.com
jared.friedmann@weil.com
reed.collins@weil.com

Peter D. Isakoff
**WEIL, GOTSHAL & MANGES LLP**
1300 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
peter.isakoff@weil.com

Ashley W. Craig
David G. Dickman
**VENABLE LLP**
575 7TH Street, N.W.
Washington, D.C. 20005
awcraig@venable.com
dgdickman@venable.com

John P. Meade