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BEFORE THE  
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMM

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

Docket No. 11-12

**MOTION FOR FINAL JUDGMENT ON THE RECORD**  
**AS IT STANDS**

Complainants Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation (“Complainants” or “Vessel Operators”) move the presiding officer to issue an initial decision ruling on their two remaining allegations of violation by the Respondent (“Port”), as stated in their amended complaint.

To clear up the ongoing misunderstanding of the case they are presenting, the Vessel Operators have filed contemporaneously herewith their motion to amend the complaint, and will further clarify their position in this motion.

The Vessel Operators also have filed herewith a statement of undisputed facts limited to the essentials needed for decision on the remaining two issues. These two issues are purely legal. The Vessel Operators state they do not dispute the Port's versions of the undisputed fact statements, excepting its claims of "disputes," and legal arguments. By these actions, the Vessel Operators will save themselves and the Port great expense, and save the Presiding Officer considerable time.<sup>1</sup>

**I. THERE ARE NO FACT DISPUTES REMAINING: THE CASE IS PRIME FOR FINAL DECISION**

In preparing the revised statement of undisputed facts, filed herewith, the Vessel Operators discarded a skein of irrelevant "facts." Our objective is to clear the decks for an initial decision. The presiding officer's earlier statement<sup>2</sup>, did not accurately state the Vessel Operators' position. We must accept responsibility for our presentation falling short insofar as clarity. 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; our position is that 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 which can or do inure to the benefit of the vessel.

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<sup>1</sup> The Vessel Operators, have already produced thousands of pages of documents in discovery, which seems to have been a wasted effort.

<sup>2</sup> "Complainants seem to argue that fees can only be assessed when a specific service is provided (as opposed to a general benefit) and when the fees fund that specific service (as opposed to a general fund)." Order Denying Motion for Summary Judgment at 5.

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 made only as background to lend context to the CFC.

The Vessel Operators understand the metric imposed by the precedents to be that if a vessel pays the CFC, it must in return have some discrete service bestowed on the vessel by the Port(not by a lessee terminal)- and if it does not pay the CFC, it does not get the Port service. We understand that if this metric is not honored, a charge to the vessel violates the Act. If this understanding of Commission precedent is wrong, or a new rule is to be announced, so be it. We submit the point of litigation before the Commission is to resolve actual disputes and clarify Shipping Act law in the most efficient manner possible. The Vessel Operators are striving to that end.

The Vessel Operators filed an initial complaint which it has become clear is broader than necessary. The pleading and discovery process has enabled the winnowing away of unnecessary parts of the case which would only distract from the central issues. The process should work this way, empowering the distillation of the controversy to the essential issues in the proffered amended complaint.

**II. THE PRIMARY ISSUE OF WHETHER THE CFC VIOLATES 46 U.S.C. 41102(e) IS PURELY LEGAL OTHER THAN FOR THE UNDISPUTED FACT THAT NO SERVICE IS RENDERED BY THE PORT SOLELY TO VESSELS IN CONSIDERATION FOR THE CFC PAID SOLELY BY VESSELS**

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 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 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.

The Vessel Operators concede, for purposes of this case only, that the CFC’s current level, if otherwise lawful, is not unreasonable. It is a charge for availability of all the ambient facilities and structures and for enjoyment of the services in place at the Port by vessels<sup>3</sup> and perhaps other members of the Vessel Operators’ corporate families. It may well be a bargain relative to amortization of facilities and provision of services to the universe of Port users, but only the vessels are saddled with it. We do not contest the “reasonableness” of today’s charge of \$4.95 per TEU or \$1.11 per cargo unit . We do not treat with it at all.

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<sup>3</sup> All references to “Vessels” includes their containers, which are legally vessel equipment. The dichotomy between “vessel” and “cargo” is a well-recognized convention in shipping terminology, referring to the respective interests, as well as the physical objects.

We doubt anyone could realistically calculate the value of all the Port's facilities and services to the universe of Port users or to the vessels. It is a fallacy that it could be done by an "expert." But the charge level is not at issue in this case, only the imposition of the charge solely on vessels. There are thus no discoverable facts related to "benefits" or reasonableness.

We stipulate for purposes of this case that there are "benefits" to vessels which call the Port (including their containers, if applicable) for which the current level of the charge is reasonable. Affiliates related to the Vessel Operators who somehow participate in commerce at the Port also benefit, and the Vessel Operators themselves benefit via their vessel instrumentalities. Indeed, there are many benefits bestowed by the Port.

The legal defect in the CFC is that the precedents we have analyzed at length previously do not countenance a Port charge, regardless of its reasonableness, solely on vessels for ambient facilities and services. If the presiding officer disagrees, the Vessel Operators urge an initial decision to that effect. This case needs to be laid to rest. The Vessel Operators and all others paying this CFC are entitled to know, as they continue to pay out millions in CFC's, if it is lawful without a discrete service rendered in consideration. .

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.

Complainants' have no agreement with the Port, implied or express, for any vessel service (except wharfage at public berths) and no Port vessel service (except wharfage) described in any Port rate schedule. No Vessel Operator negotiated or agreed with the Port for the furnishing by the Port of any container vessel service. All the Vessel

Operators negotiated and agreed with private terminals for each and every service to the container vessels.

Nothing is done by the Port for any vessel as consideration for the payment of the CFC. If the CFC is not paid, all Port-furnished facilities and services continue in place unchanged. If a Vessel Operator never uses Express Rail, its CFC charge is the same as an operator's who uses it constantly. The Port's only hope is that vessel enjoyment of Port infrastructure and security service broadly, which indeed benefit the vessel, will for the first time be held to fill the shoes of a discrete Port service furnished to the vessel in consideration for the CFC – a new departure in Commission jurisprudence. It is all these ambient benefits which the Port wants to belabor in discovery, but that horse is dead because the Vessel Operators do not dispute the reasonableness of the CFC amount, of course on the condition that focusing it solely on the vessels is indeed otherwise a reasonable practice.

### **III. THERE ARE NO FACT ISSUES REGARDING THE ENFORCEMENT OF THE CFC BY THE COERCIVE PRACTICE OF SHUTTING OFF PRIVATE TERMINAL SERVICES TO CONTAINER VESSELS**

The coercive collection aspects of the Port rate schedule implementation which the Vessel Operators allege constitute an unreasonable practice speak for themselves. Elaboration on them and their consequences is again not critical to the Vessel Operators' allegations, because the practice is unreasonable on its face. Hence such items are eliminated from the revised statement of undisputed facts, although in the main they only described circumstances and consequences quite obvious to anyone in ocean shipping.

**IV. THE VESSEL OPERATORS RELY ON THEIR REVISED STATEMENT OF UNDISPUTED FACTS AND INCORPORATE LEGAL ARGUMENT FROM THEIR PREVIOUS PLEADING TO SHOW THE CFC CHARGE WITHOUT A PORT SERVICE FURNISHED IN CONSIDERATION THEREFOR IS AN UNREASONABLE PRACTICE**

The Vessel Operators' allegation that the CFC is an unreasonable practice without an accompanying vessel service in consideration is supported by the legal arguments in their previous pleading (incorporated by reference herein), to wit: Motion for judgment that respondent's cargo facility charge violates 46 U.S.C. section 41102(c), pp. 21-27. This reliance does not include references to any facts beyond those contained in the Statement of Undisputed Facts.

**V. THE PRACTICE OF FORCING PAYMENT OF THE CFC BY SHUT OFF OF PRIVATE SERVICE TO THE VESSEL OPERATORS' CONTAINER SHIPS IS AN UNREASONABLE PRACTICE ON ITS FACE**

There is no need for a list of horrors which would follow from the cessation of terminal services to non-payers of the CFC under the Port's edict (Rate Schedule at Subrule 34-1220, 3(b)(iii)-(iv)). Indeed, they are not actually "facts," rather unavoidable, readily foreseen consequences of container vessels being shut out of terminals at the Port. No fact beyond the rate schedule itself is necessary for a disaster forecast.

Rather than collect the charge from container vessels itself, the Port avoids any defenses of illegality the Vessel Operators would assert in collection actions by using the terminal as its stalking horse. The device of interfering with terminal/vessel contractual relations to extort CFC payment is reminiscent of the "deal he can't refuse" in "The Godfather." The Vessel Operators will pay the legally uncollectible CFC "or else" - have their services shut down.

Oral argument is requested.

Dated: August 8, 2013

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Motion for Final Judgment to be served this 8<sup>th</sup> day of August, 2013, via e-mail and UPS, upon the following:

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