

S E R V E D  
February 5, 2014  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 11-12**

**KAWASAKI KISEN KAISHA, LTD.**

**v.**

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

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**ORDER DISMISSING PROCEEDING**

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**I. Introduction**

Complainant Kawasaki Kisen Kaisha, Ltd. (“K” Line) seeks dismissal of the proceeding it filed so that it may seek review. Respondent The Port Authority of New York and New Jersey (“Port Authority”) requests that the proceeding be dismissed due to the Complainant’s discovery violations and not on the merits.

As explained more fully below, this decision dismisses the proceeding with prejudice on the ground that Complainant has refused to provide required discovery. The decision does not reach the merits of the claim.

**II. Discussion**

**A. Procedural History**

Complainant “K” Line filed this proceeding over two years ago to contest a cargo facility charge (“CFC”) imposed by the Port Authority. Initially, there were eight other complainants, all of whom have withdrawn from the proceeding.

On June 20, 2013, Complainants’ Motion for Summary Judgment was denied (“Summary Judgment Order”). Also on June 20, 2013, an Order on Discovery Motions granted Respondent’s motion to compel production of contracts and motion to compel witness production (“Discovery Order”). In addition, on June 20, 2013, a Fourth Revised Scheduling Order was issued which required the parties to proceed expeditiously (“4th Scheduling Order”).

On July 8, 2013, Complainants filed a Petition for Leave to Appeal Order Served June 20, 2013, seeking leave to appeal the Order Denying Complainants' Motion for Summary Judgment. On July 11, 2013, Complainants filed a Motion to Stay Discovery Pending Appeal. On July 24, 2013, the Petition for Leave to Appeal and the Motion to Stay were denied ("Appeal/Stay Denial").

On August 8, 2013, Complainants filed a Motion for Final Judgment on the Record as it Stands and a Motion to Amend Complaint. On September 5, 2013, an Order on Motions for Final Judgment and to Amend Complaint and Order to File Status Report ("Final Judgment Order") denied the request for final judgment and ordered the parties to file status reports.

On October 17, 2013, "K" Line filed a Motion for Implementation of ALJ's Rulings by Order of Dismissal, and a corrected version, requesting a dismissal of the proceeding ("Dismissal Motion"). On October 24, 2013, the Port Authority filed a response, requesting that the proceeding be dismissed due to the Complainant's discovery violations and not on the merits ("Dismissal Response"). "K" Line did not file a reply.

On October 21, 2013, "K" Line filed a status report ("K" Line Status Report). On October 23, 2013, "K" Line filed a Metadata Supplement to Status Report of Only Remaining Complainant on Discovery Demands Regarding "K" Line Ro/Ro Vessels and "K" Line Container Vessels ("Metadata Supplement"). On October 24, 2013, the Port Authority filed its Response to "K" Line's Metadata Supplement to Status Report ("Metadata Supplement Response").

Concurrent with this Order, an Order Denying Complainants' Motion for Partial Summary Judgment is being issued as well as an Order Granting Three Complainants' Motion to Withdraw and Motion to Withdraw as Counsel. Any additional requests by Complainant to resolve this proceeding without providing additional discovery are hereby **DENIED**, whether in the form of a motion, status report, or comment in any other filing.

## **B. Arguments of the Parties**

"K" Line wants the Commission to rule on the imposition of the cargo facility charge, what it describes as a "major policy question." Dismissal Motion at 2. Complainant contends that the cargo facility charge is unreasonable *per se* under *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*, 838 F.2d 536 (D.C. Cir. 1988), because many users of the same infrastructure and security services financed by the cargo facility charge benefit, but the fee is imposed only on vessel operators; because it uniquely burdens international maritime commerce, and is levied on the volume of import and export cargo, the reasonableness of the cargo facility charge must be assessed in light of strong federal and constitutional policies forbidding unreasonable burdens on international commerce; "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; and this case and the cargo facility charge raise major policy issues of national and international importance, which demand the attention of the Commission. Dismissal Motion at 2-10.

The Port Authority objects that “K” Line is seeking dismissal on the merits so that it may seek review by the full Commission before discovery reveals additional facts that would be fatal to its claims. Dismissal Opposition at 2. Respondent asserts that dismissal for failure to prosecute is the appropriate consequence of Complainant’s willful and continuing failure to provide ordered discovery; and there is no basis for further reconsideration of the ruling that this case is not ripe for decision without discovery of the relevant facts. Dismissal Response at 3-13.

### **C. Prior Orders**

Previous orders addressed Complainants’ request for a decision on the current record. The Summary Judgment Order states:

Determination of whether the cargo facility charge violates that 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.

Summary Judgment Order at 5.

Complainants’ request to stay and appeal the denial of summary decision was denied in an order stating:

Complainants may not appeal the denial of summary decision as of right because the decision did not finally decide any issues in the case. Complainants fail to address the Rule 153 factors of substantial delay, expense, or detriment to the public interest, or undue prejudice to a party. Complainants were ordered to produce specific discovery relevant to the proceeding and a Protective Order is in place to protect confidential material which may need to be disclosed. Complainants must provide relevant documents and produce relevant witnesses in order for the case to proceed.

It may well be that Complainants’ allegation that the cargo facility charge (“CFC”) violates the Shipping Act has merit. However, Respondents are entitled to discovery and an opportunity to defend themselves in this proceeding. Once discovery has been completed, the parties will be in a better position to fully brief the issues and the decision will be based on a thorough understanding of the material facts. Sending the proceeding to the Commission without an adequate factual record would delay

the proceeding and add additional expense to the parties. Moreover, even if the legality of the cargo facility charge could be decided as a matter of law, to do so without an understanding of the underlying facts would be unwise.

Appeal/Stay Order at 2-3.

Complainants' request for a final judgment was also denied.

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.

Final Judgment Order at 3.

Complainants were previously warned that failure to produce discovery could lead to dismissal.

"A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Moreover, "[p]arties cannot control an agency's docket or procedures through agreement among themselves." *Simmons v. United States*, 698 F.2d 888, 893 (7th Cir. 1983). Under the Commission Rules, the presiding officer has the authority to "regulate the course of the hearing" and to "fix the time for filing briefs, motions, and other documents to be filed in connection with hearings and the administrative law judge's decision thereon." 46 C.F.R. § 502.147(a). The authority of courts to control their dockets is well settled. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962); *United States v. Hughey*, 147 F.3d 423, 429 (5th Cir. 1998).

Complainants initiated this proceeding over two years ago and the parties have been instructed multiple times to move the case along expeditiously. Complainants appear to prefer a ruling regarding the legality of the cargo facility charge without providing additional discovery. As discussed above, in July in the Appeal/Stay Order, and in June in the Summary Decision Order, this issue cannot be resolved without an opportunity for Respondent to obtain discovery and defend itself.

At this point, the Complainants have three options. They may immediately provide the required discovery and proceed to a determination on the merits; they may file a motion to withdraw the Complaint (indicating whether the withdrawal is because of a settlement or for other reasons); or, if they refuse to provide discovery, may have the case dismissed for discovery violations. Complainants are required to file a Status Report indicating which path they intend and indicating whether all required discovery has been provided. Respondent may file its own separate Status Report and may file a motion for sanctions if necessary. The Status Reports shall be filed by September 16, 2013, when the next joint status report is due. In following months, the parties shall file joint status reports. Failure to respond to discovery or failure to file the required status reports may result in dismissal.

Final Judgment Order at 5; *see also* Appeal/Stay Order at 4 (“Complainants may not refuse to participate in the proceeding that they brought. Failure to produce discovery or to meet deadlines may result in sanctions, including dismissal”).

#### **D. Status of Discovery**

In its “K” Line Status Report, Complainant explains its position:

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

“K” Line Status Report at 2. It appears that “K” Line hopes to obtain a decision on the merits by removing the issue of the reasonableness of the cargo facility fee and instead turning the focus to whether the fee may be imposed (at any level) against certain port users. The “K” Line Status Report then purports to provide responses to remaining discovery requests.

The Port Authority has consistently argued that if Complainants occupy the central position in the economic and logistical transport chain, they are the most appropriate parties to be charged the cargo facility charge. Discovery Order at 3 (citing Opposition to Protective Order Motion at 5). Indeed, the Port Authority has asserted:

“Because discovery of Complainants’ integrated global shipping and logistics enterprises—which coordinate the transportation of cargo from its point of origin,

across the ocean, through the port's infrastructure, and inland to its ultimate destination—would conclusively demonstrate that Complainants receive substantial services and benefits from the Port Authority infrastructure and security funded by the Cargo Facility Charge (“CFC”), Complainants have done everything they can to get the FMC to decide this case without the benefit of a complete record.”

Appeal/Stay Order at 3 (quoting Stay Opposition at 1).

The Port Authority responds that “K” Line’s discovery violations include the failure to:

(i) provide the information that “K” Line agreed to produce in the parties’ September 14, 2012 Joint Status Report (a representation on which the Port Authority relied in agreeing to table certain discovery disputes); (ii) supplement its interrogatory responses as directed by Your Honor’s First Discovery Order of October 11, 2012; (iii) produce the documents required by Your Honor’s Second Discovery Order of June 20, 2013; and (iv) appear for any of the depositions noticed by the Port Authority.

Response to Metadata Supplement at 1-2. The Port Authority asserts that the “K” Line Status Report is “an untimely attempt to supplement its motion by having Your Honor revisit discovery disputes long since resolved through motions to compel” and that the unsworn submissions by counsel are not responses but rather untimely legal argument. Dismissal Response at 7 n. 10.

### **III. Analysis**

Pursuant to new Commission Rule 72(c), “If the complainant fails to prosecute or to comply with these rules or an order in the proceeding, a respondent may move to dismiss the action or any claim against it.” 46 C.F.R. 502.72(c). Prior to adoption of this rule, the Commission looked to the federal rules when dismissing a case for failure to prosecute.

Absent a specific Commission rule, the Commission follows the federal rules of civil procedure to the extent that they are consistent with sound administrative practice. See 46 C.F.R. 502.12. Under the federal rules judges can dismiss complaints sua sponte for want of prosecution in the interest of controlling their dockets and achieving the orderly and expeditious disposition of cases. See *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962). Failure to prosecute has been recognized as grounds for dismissal of complaints in Commission proceedings and sometimes the dismissals are with prejudice. See *Consolidated Express Co. v. Sea-Land Service, Inc., et al.*, 19 F.M.C. 722, 723, 724 (1977), and cases cited in footnote 3 on page 724; *The Tagit Co. v. Luckenbach Steamship Co., Inc., et al.*, 1 U.S.S.B.B. 519 (1935); *Isbrandtsen Co., Inc.*, 3 F.M.B. 543 (1951). Dismissals with prejudice are recognized as being rather drastic and are scrutinized carefully by appellate courts. However, they are allowed in cases of willful default, contumacious conduct, and the

like. *Consolidated Express Co. v. Sea-Land Service, Inc.*, cited above, 19 F.M.C. at 724, and authorities cited therein.

*CTM Int'l, Inc. v. Medtech Enterprises, Inc.*, 28 S.R.R. 1091, 1094 (ALJ 1999) (footnote omitted).

In addition, the Commission rules have long permitted dismissal of a proceeding as a sanction for failure to comply with discovery orders. The current rules state that “[i]f a party or a party’s officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just.” 46 C.F.R. § 502.210(b) (previously 46 C.F.R. § 502.210(a)). As a sanctions for failure to comply with discovery orders, a presiding officer may issue an order “dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.” 46 C.F.R. § 502.210(b) (previously 46 C.F.R. § 502.210(a)).

The evidence demonstrates that “K” Line has failed to comply with the October 11, 2012, Order on Motions to Compel and to Reply and the June 20, 2013, Order on Discovery Motions. The prior rulings on motions to compel limited the amount of discovery required from “K” Line and provided for attorney’s eye’s only protection for commercially sensitive material produced. Order on Motions to Compel and to Reply at 1-8. Respondent contends that “K” Line has failed to supplement its interrogatory responses, failed to respond fully to document requests, and failed to make witnesses available for depositions. Complainant has refused to provide the required discovery despite specific orders to do so and despite specific warnings that the case may be dismissed if Complainant continues to refuse to provide the required discovery. *See* Appeal/Stay Order at 4; Final Judgment Order at 5.

Complainant has indicated that it will continue to refuse to provide the required discovery because it does not think the required discovery is relevant to the issues in this proceeding. “K” Line states that “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.” Dismissal Motion at 1-2, 7 (“There is nothing material left to discover”); *see also* “K” Line Status Report at 1 (“Further litigation over these [discovery] demands is pointless.”). Complainant’s failure to produce discovery is therefore willful.

While the required discovery, including the relationship between “K” Line and its affiliates, may substantiate “K” Line’s allegations about the cargo facility charge, that cannot be determined until the witnesses are deposed, documents reviewed, and interrogatories answered. The Port Authority has the right to defend itself in this proceeding. To do so, it has requested discovery regarding the Complainant’s relationships with its affiliates and any benefits received from the Port’s

infrastructure, intermodal, or security improvements. These discovery requests are relevant and narrowly tailored to the issues in this proceeding.

“K” Line argues that under *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).” Dismissal Motion at 3. However, the Port Authority contends that it “has offered evidence that the CFC is correlated as closely as practicable to use of the port services and infrastructure that are funded by the charge.” Dismissal Response at 11; *see also* Appeal/Stay Order at 3 (quoting Stay Opposition at 1) (alleging that Complainants are “integrated global shipping and logistics enterprises”) and Discovery Order at 3 (citing Opposition to Protective Order Motion at 5) (if Complainants occupy the central position in the economic and logistical transport chain, they are the most appropriate parties to be charged the cargo facility charge). The discovery that has been ordered and not produced goes to the heart of this issue of whether the cargo facility charge is being levied against vessel operators or against integrated global shipping and logistics enterprises and whether the charges have been apportioned as closely as is practicable. The *Plaquemines* case, which focuses on whether benefits and fees have been apportioned as closely as is practicable, does not create a well-defined class of *per se* violations and does not remove the need for discovery into the facts involved in imposition of the fees. *Plaquemines*, 838 F.2d at 545 n.8, 548 n.11.

In the “K” Line Status Report, Complainant discusses the roll-on/roll-off (ro/ro) vessel operations and the container vessel operations. “K” Line Status Report at 3. This expands upon an argument in the Dismissal Motion that there is no benefit to ro/ro carriers from the express rail services funded by the cargo facility charge. Dismissal Motion at 7, 9. At this point in the proceeding, the cargo facility charge will not be evaluated in such an inefficient piecemeal fashion.

Dismissal is a drastic sanction which should not be imposed lightly. In this case, however, the default is willful and the Complainant has specifically sought dismissal, albeit on different grounds, in order to obtain Commission review.

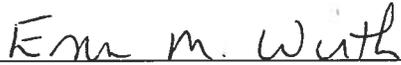
Significant time and expense has been spent litigating the same issues over and over. It is not reasonable to allow this proceeding to continue without the Port Authority being able to obtain the targeted discovery necessary to address the material issues presented. This “stalemate,” as “K” Line describes it, cannot be allowed to continue. Dismissal Motion at 2. Accordingly, the proceeding will be dismissed for failure to provide required discovery. The merits of the proceeding have not been reached, and indeed cannot be reached, without a full and fair record. 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.

**IV. Order**

For the above stated reasons, it is

**ORDERED** that Complainant's Motion for Implementation of ALJ's Rulings by Order of Dismissal be **GRANTED IN PART AND DENIED IN PART**. It is

**FURTHER ORDERED** that this proceeding be dismissed with prejudice because of Complainant's willful failure to provide discovery.

  
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Erin M. Wirth  
Administrative Law Judge