

# FEDERAL MARITIME COMMISSION

KAWASAKI KISEN KAISHA, LTD.

*Complainant,*

v.

THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY

*Respondent.*

Docket No. 11-12

Served: November 20, 2014

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*,  
Rebecca F. DYE, Richard A. LIDINSKY, Jr., Michael A.  
KHOURI, and William P. DOYLE, *Commissioners*.

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## Order Affirming Dismissal of Complaint

This proceeding is before the Commission for consideration of an appeal filed by Complainant Kawasaki Kisen Kaisha, Ltd. (K Line). Complainant appeals the Administrative Law Judge's (ALJ) February 5, 2014, order dismissing the proceeding with prejudice because of Complainant's willful failure to provide discovery. *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. Of N.Y. & N.J.*, No. 11-12, Order Dismissing Proceeding (ALJ Feb. 5, 2014). For the reasons discussed below, the Commission affirms the Order Dismissing Proceeding.

## **I. BACKGROUND**

### **A. Factual Background**

On March 14, 2011, the Port Authority of New York and New Jersey (PANYNJ or Respondent)<sup>1</sup> instituted a Cargo Facility Charge (CFC) as part of its tariff. Compl. at 5; Compl. Ex.; Answer at 5. The CFC applies to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at leased and public berths located at the Port of New York and New Jersey. Compl. at 6; Answer at 5. The CFC is assessed against “user[s] of cargo handling services,” and Respondent interprets the term “user” to mean any carrier calling at a leased or public terminal. *Id.*

### **B. Procedural History**

On August 5, 2011, K Line, along with eight other ocean common carriers,<sup>2</sup> filed a Complaint alleging that the imposition of the CFC violates 46 U.S.C. §§ 41102(c) and 41106(2) (sections 10(d)(1) and 10(d)(4) of the Shipping Act of 1984).<sup>3</sup> Compl. at 2–

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<sup>1</sup> Respondent is a marine terminal operator (MTO) within the meaning of 46 U.S.C. § 40102(14). Complainant’s Reply to Resp’t Resp. to Complainants’ Statement of Facts Not in Dispute (Statement of Facts) (filed 2/15/2013) at 4.

<sup>2</sup> Over the course of the two and a half years between the filing of the Complaint and the February 5, 2014, Order Dismissing Proceeding, the other eight Complainants voluntarily withdrew from the proceeding.

<sup>3</sup> The Shipping Act of 1984 was recodified as positive law on October 14, 2006. Pub. L. No. 109-304, 120 Stat. 1485 (2006). The purpose of the recodification was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifie[d] existing law rather than creating new law.” H.R. Rep. No. 109-170, at 2 (2005). The Commission, however, regularly references provisions of the Shipping Act by the section number in the Act’s original enactment.

3, 14. Section 41102(c) states, in relevant part, that a “marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). Section 41106(2) prohibits marine terminal operators from “giv[ing] any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2).

On October 14, 2011, Complainants and Respondent filed stipulations and a proposed protective order governing the designation and disclosure of confidential information during discovery, and the ALJ accepted the filing as a binding agreement among the parties on December 5, 2011. Decl. of Jared Friedmann (filed 1/3/2013), Ex. 21.<sup>4</sup>

On October 11, 2012, the ALJ denied several pending discovery motions, including Respondent’s February 16, 2012, motion to compel the production of certain documents and responses to interrogatories. *COSCO Container Lines Co. Ltd. v. The Port Authority of New York and New Jersey*, 32 S.R.R. 889 (ALJ 2012) (First Discovery Order). Among the documents sought by Respondent were certain contracts between Complainants and various entities, which the ALJ determined were not relevant to the dispute, based on the information provided by the parties. *Id.* at 893.<sup>5</sup> The ALJ also issued a revised scheduling

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<sup>4</sup> From late 2011 through May 2012, Respondent also filed several motions to disqualify Complainants’ counsel after the law firm representing Complainants hired a former Commission employee. On May 15, 2012, Complainants’ counsel moved to withdraw from the proceeding due to a substitution of counsel, and the ALJ granted the motion on June 20, 2012. *COSCO Container Lines Co. Ltd. v. The Port Authority of New York and New Jersey*, 32 S.R.R. 672 (ALJ 2012).

<sup>5</sup> The agreements sought by Respondent included:

order on October 11, 2012, which, among other things, noted Complainants' intention to file a motion for summary judgment and stated that discovery would continue pending a decision on the motion.<sup>6</sup>

Complainants filed their motion for summary judgment on December 7, 2012, asserting that, based on the undisputed facts, the CFC violated 46 U.S.C. § 41102(c),<sup>7</sup> and, in early 2013, the parties filed a number of discovery motions. The ALJ issued a series of orders on June 20, 2013, addressing these pending motions. The first order denied the motion for summary judgment. After discussing the relevant standard of review, the ALJ addressed Complainants' argument that the Commission lacks subject matter jurisdiction over the CFC.<sup>8</sup> The ALJ stated that

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- (1) Contracts with port authorities and marine terminal operators, other than New York;
  - (2) Contracts with Beneficial Cargo Owners ("BCOs") and Non-Vessel-Operating Common Carriers ("NVOCCs") for service to or from New York;
  - (3) Contracts with all East-Coast rail carriers (including New York).
  - (4) Contracts between Complainants and any party for the shipment of cargo by truck to or from the port of New York.

Joint Status Report (filed 9/14/2012) at 5.

<sup>6</sup> The revised scheduling order was amended on November 9, 2012, and November 29, 2012, in response to motions to extend the schedule. The second and third revised scheduling orders also stated that discovery would continue pending a decision on Complainants' anticipated motion for summary judgment.

<sup>7</sup> Complainants indicated that they would no longer be pursuing any claims that Respondent violated other sections of the Shipping Act. Mot. for J. at I.

<sup>8</sup> Although it is rare for a complainant to assert lack of jurisdiction, K Line clarified its position on appeal, asserting 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" but that

jurisdiction required a showing that Respondent provides terminal services, that the services are provided to common carriers, and that the charge at issue is related to handling cargo. Order Denying Complainant's Mot. for Summ. J. (Summ. J. Order) at 2-4. The ALJ found nothing in the record to suggest that the Commission lacks jurisdiction over the matter, stating that it appeared Respondent provides terminal services to common carriers "and that the cargo facility charge is levied upon, and therefore related to, the handling of cargo." *Id.* at 4.

Turning to Complainants' assertion that the CFC violates the Shipping Act as a matter of law, the ALJ rejected the argument that port fees (like the CFC) can only be assessed when a specific service (as opposed to a general benefit) is provided in return, citing *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261 (1968), and *Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist.*, 25 F.M.C. 59, 21 S.R.R. 1072 (FMC 1982) (*Plaquemines I*). Summ. J. Order at 5. Recognizing Complainants' admission that they received a benefit from the CFC, the ALJ stated that a determination as to whether the CFC violates the 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." *Id.* The ALJ further stated that the determination would also require a finding on the issue 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." *Id.* The ALJ concluded by finding that Complainants had not established entitlement to a decision as a matter of law when viewing the evidence in the light most favorable to Respondent. *Id.* at 5-6.

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"[e]xtraction of the CFC from vessel operators by the MTO Port is an unreasonable practice over which . . . Commission jurisdiction should be exercised." Appeal at 18.

The second order issued by the ALJ on June 20, 2013, addressed several pending discovery motions filed by the parties (Second Discovery Order). Specifically, the order: 1) granted Respondent's January 3, 2013, motion to compel Complainants to produce certain contracts; 2) denied Complainants' January 4, 2013, motion seeking a protective order staying Respondent's notices of depositions of Complainants and the suspension of discovery; 3) granted Respondent's January 11, 2013, cross-motion to compel Complainants to produce witnesses for deposition; and 4) denied the December 24, 2012, motion filed by five entities affiliated with Complainants to quash or modify several subpoenas requested by Respondent and issued by the ALJ. A revised scheduling order issued the same day set deadlines of July 8, 2013, for document production and August 15, 2013, for depositions. Fourth Revised Scheduling Order (served 6/20/2013) at 2.

Addressing Respondent's motion to compel production of certain contracts involving ocean services, intermodal services, and transportation services to or from the Port, the ALJ acknowledged that Respondent's earlier, broader document request, which included the requested contracts, had been denied previously, but stated that the requested documents appeared relevant, given the narrowing of the request and clarification of the issues. Second Disc. Order at 2. In particular, the ALJ indicated that Respondent had identified improvements to rail, transit, and security as justifying the CFC, and Complainants had admitted that they benefitted from those improvements to some extent. *Id.* Accordingly, the ALJ determined that the requested contracts between Complainants and shippers, rail carriers, and motor carriers were relevant and discoverable. The ALJ further determined that any confidential information in the requested agreements would be protected pursuant to the "Protective Order,"<sup>9</sup> and that the Respondent's request did not appear to be

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<sup>9</sup> Based on the record, it appears that the "Protective Order" to which the ALJ referred is the October 14, 2011, stipulations and proposed protective order

overly burdensome. *Id.*

Turning to the parties' dueling motions regarding Respondent's deposition notices, the ALJ denied the Complainants' motion for a protective order and granted Respondent's cross-motion to produce witnesses. The ALJ permitted Respondent to inquire about specific topics related to the impact of the CFC on Complainants, their use of rail and trucking services, and their relationships with their subsidiaries. *Id.* at 4.

Finally, addressing the motion to quash or modify several subpoenas served on Complainants' subsidiaries and affiliates, the ALJ reiterated that discovery regarding Complainants' relationships with their affiliates and any benefits they receive from the infrastructure, intermodal, or security improvements are relevant and discoverable. *Id.* at 5. The ALJ also noted that the subpoenaed entities were Complainants' affiliates and subsidiaries, not independent nonparties, and that the information was being sought by a port authority, rather than a competing ocean carrier. Based on the foregoing, the ALJ denied the motion.

On July 8, 2013, Complainants filed a petition for leave to appeal the June 20, 2013, Summary Judgment Order, and a petition for review of that order. Complainants also filed a motion on July 11, 2013, to stay discovery pending the appeal. The ALJ denied the petition for leave to appeal and dismissed the motion to stay discovery as moot on July 24, 2013. The ALJ discussed, among other things, Complainants' discovery obligations in light of the denial of their motion to stay, emphasizing that "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." Order Den. Pet. for Leave to Appeal and Mot. to Stay (Appeal/Stay Order) (served 7/24/2013) at 4.

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governing the disclosure of confidential information filed by the parties.

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, the ALJ denied the Motion for Final Judgment and dismissed the Motion to Amend Complaint without prejudice to allow Complainants to determine how to proceed in light of the denial of the Motion for Final Judgment. The ALJ described the Motion for Final Judgment as a duplicative request that had already been denied in two orders, the Summary Judgment Order and the Appeal/Stay Order. Order on Mot. for Final J. and to Amend Compl. and Order to File Status Report (Final J. Order) (served 9/5/2013) at 3. The ALJ further opined that “[t]he fundamental factual disputes which prevented the motion for summary judgment continue. . . . 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.” *Id.*

The ALJ also ordered Complainants to file a status report on or before September 16, 2013, indicating what progress had been made in discovery. *Id.* at 5. The ALJ cited the Second Discovery Order and Fourth Revised Scheduling Order, as well as Respondent’s assertions in its August 15, 2013, status report that Complainants had refused to produce documents or appear for depositions, in violation of the scheduling order. *Id.* at 4. Reiterating previous statements that the legality of the CFC could not “be resolved without an opportunity for Respondent to obtain discovery and defend itself,” the ALJ announced that Complainants had three options: they could immediately provide the required discovery and proceed to a determination on the merits; they could file a motion to withdraw the Complaint; or they could refuse to provide discovery and have the case dismissed. *Id.* at 5. The ALJ concluded by stating that failure to respond to discovery or file the required status reports could result in dismissal. *Id.*

K Line filed a Motion for Implementation of ALJ's Rulings by Order of Dismissal (Motion for Dismissal) on October 17, 2013, and a status report on October 21, 2013.<sup>10</sup> In its status report, K Line provided responses to a number of Respondent's outstanding interrogatories and indicated that it was willing to furnish some additional documents. K Line continued, however, to dispute the relevance of much of the discovery compelled by the Second Discovery Order, including the deposition topics requested by Respondent,<sup>11</sup> and continued to refuse to produce service contracts or witnesses for deposition. K Line Status Report (filed 10/21/2013) at 3-4. Respondent filed a response to K Line's motion for dismissal on October 24, 2013, requesting that the Complaint be dismissed due to K Line's discovery violations and not on the merits.

The ALJ issued an order on February 5, 2014, dismissing the proceeding with prejudice on the grounds that K Line had refused to provide required discovery.<sup>12</sup> K Line filed an appeal on March 31, 2014,<sup>13</sup> and Respondent filed its reply on May 22, 2014.

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<sup>10</sup> K Line filed a supplement to the status report regarding metadata on October 23, 2013.

<sup>11</sup> Despite K Line's stated willingness to produce its single rail contract, K Line Status Report at 4, there is no evidence in the record that this contract was ever actually provided to Respondent.

<sup>12</sup> Two additional orders were served on February 5, 2014. The first order denied Complainants' January 11, 2012, motion for partial summary judgment, in which Complainants asserted that, because empty containers are not subject to the CFC, Respondent's assessment of the CFC on empty containers violated 46 U.S.C. § 41102(c) (Partial Summ. J. Order). The second order granted a motion filed by three Complainants to withdraw from the proceeding, and a motion by their counsel to withdraw.

<sup>13</sup> K Line filed a corrected appeal on April 24, 2014.

**C. Order Dismissing Proceeding**

In the Order Dismissing Proceeding (Dismissal Order), the ALJ reviewed the recent procedural history, the prior orders responding to Complainants' several requests for a decision on the current record, and the status of discovery. The ALJ then discussed Commission Rule 72 (46 C.F.R. § 502.72), which permits dismissal of a proceeding if the complainant fails to prosecute or comply with the Commission's Rules or an order in the proceeding,<sup>14</sup> and Commission Rule 210(b), 46 C.F.R. § 502.210(b), which permits dismissal of a proceeding for failure to comply with discovery orders. Dismissal Order at 6–7. The ALJ determined that K Line, the sole remaining Complainant, failed to comply with the First and Second Discovery Orders and “refused to provide the required discovery despite specific orders to do so and despite specific warnings” that the case could be dismissed as a result of its refusal. *Id.* at 7. The ALJ referred to Complainant's statements in its motion to dismiss indicating that it would continue to refuse to provide the required discovery because it did not think such discovery was relevant to the issues in the proceeding, and the ALJ determined, accordingly, that Complainant's failure to produce the required discovery was willful. *Id.*

The ALJ described Respondent's requested discovery and found that “[t]hese discovery requests are relevant and narrowly tailored to the issues in this proceeding,” including “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.” *Id.* 7–8. The ALJ noted Complainant's position that under *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536 (D.C. Cir. 1988) (*Plaquemines II*), the CFC is unreasonable *per se* because other users of the same facilities

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<sup>14</sup> The Dismissal Order refers to Rule 72(c) but quotes Rule 72(b). Dismissal Order at 6.

and services benefit significantly but do not have to pay the fee. The ALJ rejected this argument, stating that *Plaquemines II* did not create a class of *per se* violations that removes the need for discovery into the facts involved in the imposition of fees. Dismissal Order at 8. The ALJ went on to state that the merits of the Complaint had not been reached, and could not be reached, without the relevant evidence and a full and fair record.

The ALJ stated that, although dismissal was a drastic sanction, the default in this case was willful, and Complainant had actually sought dismissal, albeit on different grounds. *Id.* The ALJ concluded that allowing the proceeding to continue without the Respondent “being able to obtain the targeted discovery necessary to address the material issues presented” was unreasonable. *Id.*

#### **D. Positions of the Parties**

##### **1. Complainant**

Complainant asserts that the ALJ erred in dismissing the proceeding on the basis of its failure to abide by various discovery orders. Appeal at 1. Complainant argues that the discovery required by those orders was not relevant to the determination of whether the Respondent violated 46 U.S.C. § 41102(c) by establishing the CFC. Specifically, Complainant contends the following: 1) fees charged by an MTO, e.g., the CFC, can only be “user charges” for which the payor receives an identified, measurable service, and such fees cannot be assessed in exchange for the type of benefits Respondent sought to show with the required discovery; and 2) the collection of fees from only one set of benefitting port users is *per se* unreasonable under 46 U.S.C. § 41102(c), and, therefore, the matters related to the required discovery are not relevant to Complainant’s claim. *Id.* at 2, 6, 46–49. Complainant also argues that further discovery was unnecessary because the CFC suffers from a number of

deficiencies, including, but not limited to, the issues described above, which render its imposition unlawful. *Id.* at 6. Complainant asserts that it discussed these deficiencies in its various motions for judgment, which the ALJ erred in denying. *Id.* at 6, 50.

Complainant further argues that the ALJ failed to comply with the relevant requirements of the Administrative Procedure Act (APA), the Commission's Rules, and the principles of due process and fairness. *Id.* at 41-46. Accordingly, Complainant urges the Commission to review the record and decide the issues in the proceeding *de novo*. *Id.* at 3, 7, 44-45.

Finally, Complainant argued in its Motion for Dismissal that the CFC is inconsistent with the Commerce and Import-Export Clauses of the Constitution and that it violates the Tonnage Clause. Mot. for Dismissal at 3-6. Although Complainant does not request in its appeal that the Commission determine whether the CFC is constitutional, it does request that the Commission find that only issues under the Shipping Act are within the Commission's jurisdiction in this proceeding. Appeal at 50.<sup>15</sup>

## **2. Respondent**

Respondent initially argues that the ALJ's Dismissal Order should be reviewed under an "abuse of discretion" standard. *Id.* at

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<sup>15</sup> Constitutional challenges to port tariffs are not within the mandatory jurisdiction of the Commission's enabling legislation. See *Plaquemines II*, 838 F.2d at 544 (discussing a claim that a port's tariff violated the Tonnage Clause). Constitutional considerations "are more appropriately the province of the courts," *New Orleans Steamship Ass'n v. Plaquemines Port. Harbor & Terminal Dist.*, 28 F.M.C. 556, 563, 23 S.R.R. 1363, 1373 (FMC 1986), and administrative agencies are not required to pass on constitutional claims. *Plaquemines II*, 838 F.2d at 544. Based on the foregoing, and because Complainant is not seeking a determination from the Commission as to the constitutionality of the CFC, the Commission declines to address these claims.

33–35. Respondent further asserts that the ALJ properly dismissed the proceeding with prejudice and that the discovery sought by Respondent, and required by the ALJ’s orders, was relevant to Complainant’s claims. Reply to Appeal at 35–45. Finally, Respondent contends that, based on the record, Complainant cannot prevail on its claim that the CFC is unreasonable under 46 U.S.C. § 41102(c). *Id.* at 45–49.

## II. DISCUSSION

### A. Standard of Review

Respondent argues that because Commission Rule 227 is silent as to the standard of review for orders of dismissal, the Commission should defer to the Federal Rules of Civil Procedure pursuant to Commission Rule 12. Reply to Appeal at 34; *see* 46 C.F.R. §§ 502.12, 502.227. Respondent states that appellate courts and other administrative agencies review discretionary dismissals pursuant to Fed. R. Civ. P. 41 and 37, upon which Commission Rules 72 and 210 are based, under an abuse of discretion standard. Reply to Appeal at 34–35. Respondent argues that, accordingly, the Commission should review the ALJ’s dismissal order in this case under that standard. *Id.* Complainant asserts that the Commission’s review of the ALJ’s order should be *de novo* pursuant to Rule 227(a)(6). Appeal at 3, 7, 44–45.

Commission Rule 227 governs the review of initial decisions and orders of dismissal. *See* 46 C.F.R. § 502.227. When reviewing an initial decision, “the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.” 46 C.F.R. § 502.227(a)(6). In other words, the Commission reviews an ALJ’s initial decision *de novo* and may enter its own findings. *OC Int’l Freight*, No. 12-01, slip op. at 8 (FMC July 31, 2014). Although Rule 227 permits appeal from an order of dismissal, it is silent as to the standard under which such orders are reviewed. *See*

46 C.F.R. § 502.227(b). Additionally, the Commission has not explicitly articulated a standard of review in the few decisions reviewing dismissal orders based on a party's failure to prosecute or failure to comply with discovery orders. *See Interpool, Ltd. v. Pac. Westbound Conference*, 22 F.M.C. 762, 19 S.R.R. 1719 (FMC 1980) (review of order dismissing proceeding for failure to comply with discovery orders); *Application of Korea Shipping Corp.*, 26 F.M.C. 42, 22 S.R.R. 341 (FMC 1983) (review of four proceedings dismissed for failure to prosecute).

Pursuant to Commission Rule 12, "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. In a number of decisions reviewing dismissal orders, including orders granting summary judgment and orders denying motions to dismiss, the Commission has looked to the analogous Federal Rule of Civil Procedure and adopted the relevant appellate court standard of review. *See, e.g., Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 1185, 1189 (FMC 2013) (stating that motions for summary judgment are reviewed *de novo* and citing *George v. Leavitt*, 407 F.3d 405, 410 (D.C. Cir. 2005) and *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004)); *SSA Terminals, LLC v. City of Oakland*, 32 S.R.R. 325, 328 (FMC 2011) (stating that the Commission, like the Courts of Appeals, reviews denials of motions to dismiss *de novo* and citing *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003), a case involving the denial of a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted).

The ALJ's Dismissal Order in this proceeding was issued pursuant to Commission Rules 72(b) and 210(b). When Rule 72 was promulgated in 2012, the Commission explained that the Rule is similar to Rule 41 of the Federal Rules of Civil Procedure, *Commission's Rules of Practice and Procedure*, 77 Fed. Reg.

61,519, 61,523 (Oct. 10, 2012), and the language of Rule 72(b) closely tracks that of Fed. R. Civ. P. 41(b). Federal appellate courts review dismissals pursuant to Fed. R. Civ. P. 41(b) under an abuse of discretion standard. See *Link v. Wabash R. Co.*, 370 U.S. 626, 632–33 (U.S. 1962) (“Whether such an order can stand on appeal depends . . . on whether it was within the permissible range of the court’s discretion.”); *Peterson v. Archstone Cmtys. LLC*, 637 F.3d 416, 418 (D.C. Cir. 2011); *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995).

The Commission established Rule 210(b) to incorporate provisions in Fed. R. Civ. P. 37 related to sanctions for failure to comply with discovery orders. *Rules of Practice and Procedure: Proposed Miscellaneous Amendments*, 39 Fed. Reg. 11,117, 11,118 (proposed Mar. 25, 1974); see *Rules of Practice and Procedure: Proposed Miscellaneous Amendments*, 39 Fed. Reg. 33,221, 33,223 (Sep. 16, 1974); see also *Commission’s Rules of Practice and Procedure*, 77 Fed. Reg. 61,519, 61,523 (Oct. 12, 2012) (“Section 502.210 is revised to more closely conform to FRCP 37(b)(2)(A) . . .”).

Federal appellate courts review dismissals pursuant to Fed. R. Civ. P. 37(b) under an abuse of discretion standard. *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 642 (1976) (per curiam) (“The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.”).

Additionally, although the Commission has not previously articulated a standard of review for dismissal orders based on discovery violations, the Commission has reviewed similar discovery-related procedural determinations, including sanctions for failure to respond, modifications of subpoenas, and denials of motions for protective orders, under an abuse of discretion standard. See *Parks Int’l Shipping, Inc.*, 33 S.R.R. 59, 63 (FMC

2013) (sanctions for failure to respond); *Banfi Products Corp.*, 26 S.R.R. 305, 306 (FMC 1992) (modification of subpoenas); *Interpool, Ltd.* 22 F.M.C. at 767, 19 S.R.R. at 1723-24 (denial of a motion for protective order). An abuse of discretion standard is consistent with the Commission's practice of allowing its presiding officers substantial latitude in issues relating to discovery and the presentation of evidence. *See Banfi Products Corp.*, 26 S.R.R. at 306; *see also Sea-Land Serv., Inc.*, 24 F.M.C. 164, 189 n.63, 20 S.R.R. 1627, 1648 n.63 (FMC 1981) ("Rule 210 of the Commission's Rules (46 C.F.R. [§] 502.210) contemplates that . . . [discovery-related] sanctions are to be imposed by the presiding officer. The Presiding Officer here refused to impose such sanctions and the Commission is not prepared to question that determination.").

Based on the foregoing, the appropriate standard of review for the ALJ's Dismissal Order is abuse of discretion. Applying this standard to discovery-related sanctions under Fed. R. Civ. P. 37, the Courts of Appeals examine the validity of the discovery orders on which the sanctions were based in determining the propriety of the sanction. *See Int'l Union, United Auto., etc. v. Nat'l Right to Work Legal Defense & Educ. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978); *Dunbar v. United States*, 502 F.2d 506, 509 (5th Cir. 1974). If the disputed information was not properly discoverable, e.g., because it was not relevant to the proceeding, then it follows that a party should not be sanctioned for refusing to produce the information. *See Fonseca v. Regan*, 734 F.2d 944, 948 (2d Cir. 1984); *Dunbar*, 502 F.2d at 509.

The courts also take into account the severity of the sanction administered, with dismissal being considered particularly drastic. *See, e.g., Nat'l Hockey League*, 427 U.S. at 643; *Dunbar*, 502 F.2d at 509. Dismissal is considered appropriate only if the court concludes that a party's failure to comply with discovery orders is due to willfulness, bad faith, or fault. *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958); *see also Nat'l*

*Hockey League*, 427 U.S. at 640–43. Relying on these cases, the Commission has upheld dismissal orders under Rule 210(b) when complainants' failure to respond to discovery orders is willful and deliberate. See *Interpool, Ltd.*, 22 F.M.C. at 764, 766, 19 S.R.R. at 1721, 1723.

In accordance with this framework, we first evaluate the validity of the ALJ's discovery orders and Complainant's arguments regarding the relevance and necessity of the required discovery. We then turn to whether the ALJ committed an abuse of discretion in dismissing the Complaint because of Complainant's failure to provide such discovery. As described in detail below, the record establishes that the ALJ did not commit an abuse of discretion in ordering Complainant to provide the discovery at issue or in dismissing the Complaint for failure to provide such discovery. We conclude by addressing Complainant's arguments that the ALJ failed to comply with the relevant requirements of the APA.

**B. Relevance of Discovery at Issue to Section 10(d)(1) Claim**

The Second Discovery Order required Complainants, including K Line, to produce three categories of contracts:

1. Contracts or agreements with all shippers, including beneficial cargo owners or non-vessel-operating common carriers for ocean and intermodal services to or from the Port of New York and New Jersey;
2. Contracts or agreements with all rail carriers for transportation services to or from the Port of New York and New Jersey; and

3. Contracts or agreements with all motor carriers for transportation services to or from the Port of New York and New Jersey.

Second Disc. Order at 1-2.

The order also required Complainants, including K Line, to produce witnesses for deposition on the following topics: Complainants' relationships with their subsidiary logistics companies regarding transportation of containers at the Port; the ability to pass port and terminal charges through to their customers; the impact of the CFC on Complainants' business; the impact of the use of rail and trucking; and document retention and collection. *Id.* at 4.

Section 10(d)(1) of the Shipping Act provides, in relevant part, that a "marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Section 10(d)(1) is a recodification of certain provisions in section 17 of the Shipping Act of 1916. *See Plaquemines II*, 838 F.2d at 546. Interpreting section 17, the Commission has stated that "[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *W. Gulf Mar. Ass'n v. Port of Hous. Auth.*, 21 F.M.C. 244, 248, 18 S.R.R. 783, 790 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n v. FMC*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980) (*WGMA I*).

Specifically, with regard to charges assessed by an MTO, the question under section 10(d)(1) is not whether a complainant has received some "substantial benefit," but whether the correlation of that benefit to the charges imposed is reasonable. *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390

U.S. 261, 282 (1968). Such a charge “is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged.” *Ind. Port Comm’n v. Fed. Mar. Comm’n*, 521 F.2d 281, 285 (D.C. Cir. 1975); see *WGMA I*, 21 F.M.C. at 248 n.14, 18 S.R.R. at 790 n.14.

### 1. CFC Benefits

Respondent has asserted throughout the proceeding that the CFC was designed to recoup expenditures incurred in making major infrastructure improvements, “including on-dock rail facilities, road improvements and enhanced security measures.” Reply to Appeal at 7–8; Opp’n to Complainant’s Mot. for J. at 1. Complainant does not challenge the level of benefits derived by it or its affiliates from the Port’s facilities and ongoing Port services, but argues that such benefits are irrelevant; fees charged by MTOs can only be “user charges” for which an identified, measurable service must be rendered to the payor. Appeal at 2, 6, 46.

Complainant’s argument is not supported by precedent. A review of relevant cases illustrates that the mere fact that a charge is imposed by a port in exchange for general benefits from port facilities or for general services provided by the port, rather than a specific, defined service provided to the payor, does not render the charge unreasonable *per se* under section 10(d)(1). In *Indiana Port Commission*, the Court of Appeals for the District of Columbia Circuit examined a charge assessed by the Indiana Port Commission (IPC) on all vessels entering the harbor. 521 F.2d at 285. The purpose of the charge was to recoup expenditures incurred in building the harbor and public terminal. *Id.* In the underlying order, the Commission determined that only vessels that used the terminal received any services, and, accordingly, imposing a charge on all vessels entering the harbor was an unreasonable practice. *Id.* at 284. On appeal, the court opined that the only way for the IPC to recover its investment in constructing the harbor was to charge vessels entering the harbor. *Id.* at 285.

The court reversed and remanded the case to the Commission to consider the extent of the benefits conferred upon ships as a result of IPC's capital expenditures relative to the harbor, and whether, in light of those benefits, the charge was reasonable. *Id.* at 287-88.<sup>16</sup>

The Commission and its predecessor, the Federal Maritime Board, have also evaluated charges associated with the construction of docking facilities and the provision of fire, police, and emergency services, which confer no quid pro quo service to the payor unless an emergency arises. In *Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 F.M.B. 415, 1 S.R.R. 377 (1961), the respondent charged a "wharf tollage charge" on all cargo and freight, and the complainant asserted that the charge was unreasonable because no specific service was rendered to it. 6 F.M.B. at 418, 1 S.R.R. at 378b. After discussing the specific benefits enjoyed by the complainant, including the dredging of the berth, the provision of mooring facilities, and police and fire protection, the Board upheld the ALJ's decision dismissing the complaint, stating that the respondent had "made a charge to help defray its cost of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the [respondent] is performing a service reasonably related to its charges." 6 F.M.B. at 418-19, 1 S.R.R. at 378b.

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<sup>16</sup> On remand, the Commission determined that the IPC's charge related to the navigational aspect of the harbor (its construction as a "container for water") and was not related to or connected with the receiving, handling, storing, or delivering of property. *Bethlehem Steel Corp. v. Indiana Port Commission*, 21 F.M.C. 629, 18 S.R.R. 1485 (FMC 1979), *aff'd sub nom. Bethlehem Steel Corp. v. Federal Maritime Commission*, 642 F.2d 1215 (D.C. Cir. 1980). Accordingly, the Commission determined that section 17 of the Shipping Act of 1916 was not applicable to the charge and discontinued the proceeding. 21 F.M.C. at 633, 18 S.R.R. at 1490-91.

Because the Commission's decision on remand was based on the nature of the infrastructure funded by the charge (the harbor), the decision does not undermine the court's statements regarding the general appropriateness of a charge levied to recoup investments in beneficial infrastructure.

Similarly, in *Plaquemines II*, the charge at issue was levied on vessels by a municipality for fire and emergency services. 838 F.2d at 543. The court found that the record supported the Commission's determination that various entities, including those who were not required to pay the fee, received substantial benefits from the port's fire and emergency services.<sup>17</sup> *Id.* at 548.

As noted above, Complainant does not challenge the level of benefits that it or its affiliates derive from the Port's facilities and ongoing Port services, but argues that such benefits are irrelevant. Appeal at 2, 6. As illustrated *supra*, however, Commission precedent does not support Complainant's argument that charges associated with general port benefits or services are *per se* unreasonable under section 10(d)(1). Accordingly, discovery pertaining to the nature and extent of benefits received by Complainant from the intermodal rail services, roadway improvements, and improved security enhancements provided by Respondent was relevant to Complainant's claim that Respondent's imposition of the CFC is an unreasonable practice.

## **2. Allocation of CFC**

Complainant also asserts that the CFC is *per se* unreasonable, and thus the required discovery was not relevant, because all port users benefit from the on-dock rail facilities, roadway improvements, and security enhancements, but only one set of users (Complainant and other ocean common carriers) is forced to pay the charge. Appeal at 27. Respondent asserts that the CFC is fairly allocated across all cargo, and is levied on the ocean common carrier responsible for the cargo, irrespective of whether the ocean transport is provided by that carrier's vessel. Reply to Appeal at 10, 48. Respondent further argues that the ocean common carriers, including K Line, are the most appropriate

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<sup>17</sup> The court then examined whether the allocation of the fee was reasonable, upholding the Commission's determination that exemptions for certain port users were unreasonable under section 10(d)(1). 838 F.2d at 548.

parties to charge the CFC to because they occupy the central position in the logistical transport chain and, to the extent that any benefits to them are derivative, they have the ability to allocate those costs through to the parties who most directly benefit. *Id.* at 49; Opp'n to Complainant's Joint Mot. for Protective Order and Cross-Mot. to Compel Produc. of Witnesses at 5.

The Commission's interpretation of section 10(d)(1) distinguishes between allocations of charges among direct users for direct benefits, which are analyzed under the standard enunciated in *Volkswagenwerk*, and collection practices which hold indirect users liable for the debts of their principals, which are analyzed under the standard established in *WGMA I. Plaquemines II*, 838 F.2d at 549-50 (upholding the Commission's interpretation); see *Harrington & Co., Inc. v. Ga. Ports Auth.*, 23 S.R.R. 1276, 1282-83 (FMC 1986). When applying the *Volkswagenwerk* standard, the Commission determines "whether the charge levied is reasonably related to the service rendered" based on a comparative cost/benefit analysis of concurrent users of a facility. *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 28 F.M.C. 556, 566 n.40, 23 S.R.R. 1363, 1375 n.40 (FMC 1986), *aff'd sub nom. Plaquemines II*, 838 F.2d 536 (D.C. Cir. 1988) (quoting *Volkswagenwerk*, 390 U.S. at 282) (internal quotation marks omitted).

The purpose of the *Volkswagenwerk* test is to ensure that no user pays a disproportionate amount. *Plaquemines II*, 838 F.2d at 549 (citing *Harrington & Co., Inc. v. Ga. Ports Auth.*, 23 S.R.R. 753, 769 (ALJ 1986)). The fact that some users benefit without being required to pay, however, does not render the charge unreasonable *per se*. See *Plaquemines II*, 838 F.2d at 548 n.11 (stating that exempting certain ships from paying a charge did not create an improper *Volkswagenwerk* allocation because the exempted ships received relatively small benefits and the administrative burden to collect the charge from them was great); *WGMA I*, 21 F.M.C. at 248-49, 18 S.R.R. at 790 (upholding the

port's decision to shift liability for wharfage charges from cargo owners and agents to vessel owners and agents).

Under the *WGMA I* framework, "the question is whether it is reasonable to hold indirect users liable for the debts incurred by their principals, the direct users." *Plaquemines II*, 838 F.2d at 549–50. The Commission "has consistently upheld such tariff collection practices as a reasonable means of collecting tariff fees due." *Id.*; see *WGMA I*, 21 F.M.C. at 248, 18 S.R.R. at 790. In *WGMA I*, the Commission upheld the port's practice of holding vessel agents liable for the wharfage charges incurred by their principals, the vessel owners, finding that the vessel agents were "users" of terminal facilities and derived benefits from those facilities, because, even though they did not directly use the facilities, their principals did. 21 F.M.C. at 248–49, 18 S.R.R. at 790.

Commission precedent thus makes clear that although the unreasonable allocation of a charge can plausibly be a violation of section 10(d)(1), see, e.g., *Plaquemines II*, 838 F.2d at 548, the mere fact that a charge is collected from one set of beneficiaries rather than the entire universe of those who benefit does not render the charge *per se* unreasonable under the Shipping Act.

### 3. Conclusion

Pursuant to the Commission's Rules, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.201(e). "[T]he scope of discovery is not limitless and is restricted by the concepts of relevancy." *Am. President Lines, Ltd. v. Cyprus Mines Corp.*, 26 S.R.R. 1227, 1234 (FMC 1994). "The party resisting production bears the burden of establishing lack of relevancy or undue burden." *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000); see *Possible Unfiled Agreements Among A.P. Moller-Maersk Line*, 28 S.R.R.

322, 323 (ALJ 1998). In this case, Respondent has asserted throughout the proceeding that the CFC is reasonably related to the benefits of the on-dock rail facilities (to both those carriers that use the facilities and those that do not), roadway improvements, and security enhancements.

As noted above, neither charges associated with the type of benefits asserted by Respondent nor charges collected from only one category of user (direct or indirect) are *per se* unreasonable under section 10(d)(1). See *Plaquemines II*, 838 F.2d at 548 & n.11, 549-50; *Ind. Port Comm'n*, 521 F.2d at 287-88; *WGMA I*, 21 F.M.C. at 248-49, 18 S.R.R. at 790; *Evans Cooperage Co., Inc.*, 6 F.M.B. at 418-19, 1 S.R.R. at 378b. Accordingly, information regarding the nature and extent of the benefits associated with the CFC, as well as the relationship between Complainant and other entities that benefit, is relevant to Complainant's claims. In particular, the documents and depositions sought by Respondent appear relevant to determining the nature and extent of the benefits of the CFC, whether and to what extent Complainant directly or indirectly benefits, whether and to what extent other port users benefit, and the relationship between Complainant and other benefitting port users. These are all material issues in determining whether the benefits of the CFC are reasonably related to the charge and whether Respondent's CFC collection practices are reasonable. Accordingly, the ALJ properly determined that the discovery was relevant to the proceeding.

In addition, the ALJ determined that Complainant's failure to produce discovery was willful. Dismissal Order at 7. Based on the relevance of the discovery sought by Respondent to a determination of whether it violated section 10(d)(1), and Complainant's repeated failures to produce discovery despite specific orders to do so, the ALJ did not commit an abuse of discretion by dismissing the Complaint with prejudice. See, e.g., *Nat'l Hockey League*, 427 U.S. at 640-43; *Interpool, Ltd.*, 22 F.M.C. at 764, 766, 19 S.R.R. at 1721, 1723.

Complainant chose to initiate this proceeding and was, therefore, required to abide by the ALJ's procedural determinations. Under the Commission's Rules, the presiding officer has the authority to "regulate the course of a hearing . . . dispose of procedural requests or similar matters; [and] hear and rule upon motions." 46 C.F.R. § 502.25(b)(3). The ALJ dismissed the Complaint with prejudice under Commission Rules 72 and 210. Pursuant to Commission Rule 72(b), "[i]f 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(b). Rule 72 is similar to Rule 41 of the Federal Rules of Civil Procedure, *Commission's Rules of Practice and Procedure*, 77 Fed. Reg. at 61,523, and the language of Rule 72(b) closely tracks that of Fed. R. Civ. P. 41(b).

Even before promulgating Rule 72 in 2012, "failure to prosecute" was recognized as grounds for dismissal of complaints in Commission proceedings. See *CTM Int'l, Inc. v. Medtech Enterprises, Inc.*, 28 S.R.R. 1091, 1094 (ALJ 1999) (citing *Consolidated Express Co. v. Sea-Land Service, Inc.*, 19 F.M.C. 722, 723-724, 17 S.R.R. 280, 281-82 (ALJ 1977)); *Prudential Lines, Inc. v. Waterman Steamship Corp.*, 28 F.M.C. 631, 632, 23 S.R.R. 1323, 1324 (ALJ 1986). Dismissals with prejudice are recognized as being a drastic remedy, but are permitted in cases of willful default or contumacious conduct by the complainant. *CTM Int'l, Inc.*, 28 S.R.R. at 1094; see *Prudential Lines, Inc.*, 28 F.M.C. at 632, 23 S.R.R. at 1324 ("[I]f a complainant fails to prosecute its complaint, continually ignores rulings, or is otherwise guilty of unexcused dilatoriness in lengthy cases, dismissal of the complaint with prejudice is an accepted sanction.").

Commission Rule 210(b) states 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). As a sanction 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)(3). Commission Rule 210(b) was established to incorporate certain provisions in Fed. R. Civ. P. 37 related to sanctions for failure to comply with discovery-related orders. *Rules of Practice and Procedure: Proposed Miscellaneous Amendments*, 39 Fed. Reg. at 11,118; *see Rules of Practice and Procedure: Miscellaneous Amendments*, 39 Fed. Reg. at 33,223; *see also Commission’s Rules of Practice and Procedure*, 77 Fed. Reg. at 61,523.

As noted above, the Commission has upheld dismissal orders under Rule 210(b) when complainants fail to respond to discovery orders and the conduct is willful and deliberate. *See Interpool, Ltd.*, 22 F.M.C. at 764, 766, 19 S.R.R. at 1721, 1723. The Supreme Court has cited similar factors as necessary to justify dismissal under Fed. R. Civ. P. 37(b). *Societe Internationale*, 357 U.S. at 212; *see also Nat’l Hockey League*, 427 U.S. at 640–43. As the Commission stated in *Interpool, Ltd.*:

Although administrative agencies are expected to exercise more flexibility and informality in their proceedings than do the courts, there are, nevertheless, limits to what the agencies may tolerate. Agencies must protect their integrity and assure the orderly conduct of business in order to maintain their effectiveness. Adherence to agency procedure is necessary to maintain the agency’s integrity and to ensure the orderly conduct of agency business in a manner protective of the rights of all parties.

22 F.M.C. at 767, 19 S.R.R. at 1723.

Based on Complainant's repeated failures to produce required relevant discovery, the ALJ did not commit an abuse of discretion in finding that Complainant acted willfully and in dismissing the Complaint with prejudice.

**C. Administrative Procedure Act**

Complainant asserts that the ALJ's orders failed to address, with thorough findings and reasoning adequately supported by the record, the merits of the material issues and discovery issues presented by Complainant. Complainant argues that such a failure violates the Administrative Procedure Act (APA) (specifically 5 U.S.C. §§ 556(d), 557(c)(3)(A)), Commission Rule 223 (46 C.F.R. § 502.223), and principles of due process and fundamental fairness, rendering the decision unreviewable and necessitating *de novo* review by the Commission. Appeal at 41–46. The APA provides, in relevant part, that a sanction may not be imposed or order issued “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d).

As noted above, the ALJ stated in the Dismissal Order that the “decision dismisses the proceeding with prejudice on the ground that Complainant has refused to provide required discovery.” Dismissal Order at 1. The ALJ went on to state that “[t]he decision does not reach the merits of the claim.” *Id.* The record reflects that the ALJ did address Complainant's contentions regarding discovery in the Second Discovery Order, the Appeal/Stay Order, and the Dismissal Order, and rejected Complainant's arguments that the discovery at issue was irrelevant or overly burdensome, citing relevant case law, and explaining the reasons for the decision. The ALJ also explained the reasons for dismissing the Complaint, citing Complainant's violation of various discovery orders and continued refusal to provide required discovery. The ALJ concluded that without the relevant evidence,

it was not possible to reach the merits of the Complaint. Dismissal Order at 8.

The APA permits employees presiding at hearings to take various actions, subject to published agency rules and within the agency's powers. 5 U.S.C. § 556(c). These actions include, but are not limited to, "regulat[ing] the course of the hearing," "dispos[ing] of procedural requests or similar matters," and "other action authorized by agency rule consistent with [5 U.S.C. §§ 551 et seq.]" *Id.*; see 46 C.F.R. § 502.25(b)(3). The Shipping Act, which includes provisions governing complaint proceedings, permits parties to "use depositions, written interrogatories, and discovery procedures under regulations prescribed by the Commission that, to the extent practicable, shall conform to the Federal Rules of Civil Procedure." 46 U.S.C. § 41303(a)(2). The discovery procedures in the Commission's Rules of Practice and Procedure include sanctions for failing to comply with an order compelling discovery, up to and including dismissal of the complaint. 46 C.F.R. § 502.210(b). As discussed above, these sanctions are based on those specified in Fed. R. Civ. P. 37(b).

Based on the foregoing, dismissal of a complaint for failure to comply with orders compelling discovery is explicitly permitted by the Commission's Rules and consistent with the relevant provisions of the Federal Rules of Civil Procedure, the Shipping Act, and the APA. Additionally, although Complainant did not receive a trial-like hearing on the merits because of its failure to produce required discovery, Complainant has failed to establish how the ALJ's dismissal violated the requirements of due process. The courts are mindful of the due process concerns associated with dismissing an action for discovery violations without affording a party the opportunity for a hearing on the merits. See *Societe Internationale*, 357 U.S. at 209-12; *Dunbar v. United States*, 502 F.2d 506, 509 (5th Cir. 1974). Nonetheless, the Supreme Court has determined that such a sanction "must be available . . . in appropriate cases, not merely to penalize those whose conduct may

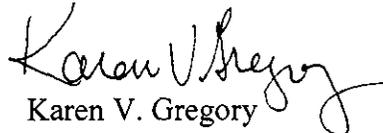
be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Nat’l Hockey League*, 427 U.S. at 643.

### III. CONCLUSION

THEREFORE, IT IS ORDERED, that the Order Dismissing Proceeding is affirmed.

IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

  
Karen V. Gregory  
Secretary