FEDERAL MARITIME COMMISSION

SYLVIA ROBLEDO D/B/A 81ST DOLPHIN PARKING,

Complainant,

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES,

Respondent.

Docket No. 14-06

Served: June 2, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners.*

Order Granting in Part and Denying in Part Petition for Reconsideration

Respondent, The Board of Trustees of the Galveston Wharves (Board), petitions for reconsideration of the Commission's Order on the Initial Decision on Remand issued on April 16, 2021 (April 2021 Order). The Commission found that the Board violated 46 U.S.C. § 41106(2) based on its disparate treatment of shuttle buses operated by the Complainant, Sylvia Robledo d/b/a 81st Dolphin Parking (81st Dolphin), and in failing to collect port access

fees from limousine operators while collecting fees from 81st Dolphin. The Commission remanded the case to the Administrative Law Judge (ALJ) to determine reparations on the § 41106(2) claim related to the Board's selective enforcement and treatment of limousines under its port access tariff. The Commission affirmed the ALJ's dismissal of all remaining claims.

The Board seeks reconsideration on numerous grounds and requests relief on several fronts. 81st Dolphin opposes the petition and argues that it should be summarily dismissed and the relief requested denied.

For the reasons discussed below, the Commission grants the Board's petition in part and denies in part. The Commission hereby amends the April 2021 Order to allow the parties to address on remand the end-date for reparations on the selective enforcement claim and the appropriate method for calculating reparations on the § 41106(2) claim related to limousines. This relief does not allow the parties to reopen discovery. The Commission denies the petition in all other respects.

I. BACKGROUND

A. Factual Background[1]

This case was initially filed by three private companies that own or operate parking lots near the cruise ship terminal on Galveston Island, Texas. Two of the three original complainants are no longer pursuing claims. Sylvia Robledo d/b/a 81st Dolphin Parking (81st Dolphin) is the remaining Complainant seeking reparations based on the Commission's findings in the April 2021 Order.[2] The Board operates the cruise ship terminal complex and

[1]The April 2021 Order provides a detailed background of the facts. *See* April 2021 Order, 2-10.

[2]As noted below, Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise) and Lighthouse Parking, Inc. settled their claims

issued a tariff establishing access fees for various commercial vehicles entering the port to discharge passengers. 81st Dolphin transports its customers to and from the port in shuttle buses subject to fees established by the Board's tariff.

The Board amended the tariff several times from 2003 through October 2014 to change the access fees imposed on different types of vehicles and operators. *See* April 2021 Order, 3-10. Over the years, the Board periodically amended the tariff schedule establishing different fees and fee structures depending on the type of vehicle or operator or other characteristics. *See id.* Initially, 81st Dolphin's shuttle buses were assessed a per trip fee ($10) while limousines and taxis were allowed unlimited access in exchange for paying a modest fee for an annual decal ($10 for limousines and $7.50 for taxis). *See id*. at 4. 81st Dolphin and other parking lot operators later negotiated a different fee structure and agreed to pay a flat monthly fee ($8.00) for each parking space in their lots but were not assessed a per-trip fee. *See id*. at 4-6. The October 2014 tariff amendment reinstated a per-trip fee for 81st Dolphin's shuttle buses. *See id*. at 9-10.

B. Procedural Background

The procedural history through March 2021 is set forth in the April 2021 Order. *Id*. at 8-9, 11-13. In that order, the Commission reversed the Initial Decision on Remand (I.D.R.) and upheld EZ Cruise's and 81st Dolphin's § 41106(2) claims with respect to the tariff imposed on and collected from limousines entering the port. The Commission reviewed de novo the ALJ's analysis regarding limousines and found that the Board's treatment of Complainants' shuttle buses "as compared to limousines was unreasonable." *Id.* at 25. The Commission found that Respondents

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against the Board and the Galveston Port Facilities Corporation (Galveston Port) after the Commission issued the April 2021 Order. The ALJ dismissed the claims against Galveston Port in the Initial Decision on Remand (I.D.R.), 35. Neither party challenged that dismissal, and the Commission affirmed the dismissal of Galveston Port in the April 2021 Order, 38 n. 20.

had not provided evidence that their decision to exempt certain limousines from paying the access fees was based on legitimate transportation factors and could not justify that distinction with "[p]ost-hoc rationalizations." *Id.* at 26. The Commission affirmed the ALJ's dismissal of Complainants' § 41106(2) claim with respect to the tariff fee structure for taxis. *Id*. at 20-22. The Commission remanded the case to the ALJ to determine the appropriate reparations award for the § 41106(2) claim with respect to the tariff fee structure for limousines and the failure to collect fees due from limousine operators. *Id*. at 14, 38-41.

In a timely filed petition, the Board seeks reconsideration of various aspects of the April 2021 Order related to the Commission's findings on the § 41106(2) claim, reparations to be awarded, and other matters. Respondent's Pet. for Reconsideration and Unopposed Mot. for Stay of Proceedings (Respondent's Pet.) (May 17, 2021).[3] 81st Dolphin argues that the petition should be summarily dismissed because the April 2021 Order is not a final order subject to review under 46 C.F.R. § 502.261 and also opposes the relief requested on substantive grounds. Complainant's Reply to Pet. for Recon. (Complainant's Reply) (June 1, 2021).

In July 2021, EZ Cruise, Lighthouse Parking, and the Board filed a joint petition seeking approval of an agreement settling all claims between them in this proceeding and in *Santa Fe Discount Cruise Parking, Inc. et al v. The Board of Trustees of the Galveston Wharves et al.* (*Santa Fe*), Civ. No. 3:14-00206 (S.D. Tex.). The Commission granted the joint petition and dismissed the settling parties' claims against each other with prejudice, with each settling party to bear their own costs and attorney fees with respect to each other. Order Granting Partial Settlement Pet. (FMC Sept. 10, 2021).

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[3]This order refers to Complainants and Respondents in the plural when referring to past events and filings and in the singular when referring to matters currently before the Commission. As noted above, 81st Dolphin and the Board are the only remaining parties.

II. DISCUSSION

A. Complainant's Procedural Challenge

81st Dolphin argues that the Board's petition should be summarily dismissed because the April 2021 Order does not qualify as a final order under § 502.261. 81st Dolphin argues that the April 2021 Order does not mark the consummation of the Commission's decision-making process since the Commission remanded the case to the ALJ to address reparations. Complainant's Reply, 1-3.

As the Commission recently explained:

> For a Commission decision or order to be final, it must: (i) mark the consummation of the agency's decision-making process; and (ii) determine rights or obligations or give rise to legal consequences.

One Network Express Pte. Ltd. and Ocean Network Express (North America) Inc.-Possible Violations of 46 U.S.C. § 41102(c), No. 21-17 (FMC Jan. 28, 2022) (citing *Bennet v. Spear*, 520 U.S. 154, 177-78 (1987)).

81st Dolphin is correct in asserting that the April 2021 Order does not technically qualify as a "final order" within the meaning of § 502.261(a), since the Commission remanded the case to the ALJ to determine an appropriate reparations award. However, the Commission or presiding officer may "properly reconsider and reverse interlocutory rulings made prior to the initial decision." *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, FMC No. 02-08, 2007 WL 666764, at *4 (ALJ Feb, 12, 2007); *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, No. 99-16, 2000 WL 10721111, at *1 (FMC July 12, 2000).

The Commission has authority to review and reconsider interlocutory orders under a different provision. As the ALJ explained in *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*,

No. 09-01, at *5 (ALJ Aug. 13, 2010), "Rule 261 is comparable to Federal Rule of Civil Procedure 60(b), which governs grounds for relief from a final judgment or proceeding." Under the federal rules, interlocutory orders are reviewable under Fed. R. Civ. P. 54(b). *Id.* The Commission's rules do not have a specific corollary to Fed. R. Civ. P. 54(b), so the Commission may follow the applicable federal rule to the extent it is consistent with sound administrative practice. 46 C.F.R. § 502.12 (absent an applicable Commission rule, the Commission looks to the federal rules to the extent they are consistent with sound administrative practice). Rule 54(b) provides in relevant part that:

> Otherwise any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.*

(emphasis supplied). Rule 54(b) is consistent with Commission authority and sound administrative practice. *See generally: Tractors and Farm Equipment, Ltd v. Waterman Steamship Corp.*, No. 81-57, 25 F.M.C. 375, 377 n. 9 (FMC Oct. 8, 1982) ("A presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned [ALJ]."); s*ee also Bookman v. United States*, 453 F.2d 1263 (Ct. Cl. 1972).

Addressing the issues that the Board raises in its petition is consistent with Fed. R. Civ. P. 54(b) and serves the interests of judicial economy. It is more efficient and a better use of the parties' and the Commission's time and resources to address the issues the Board raises before the ALJ rules on reparations. *See generally: Xingru Lin v. District of Columbia*, No. 16-645, 2020 WL 5816235, at *2 (D.D.C. Sept. 30, 2020) (finding that justice required reconsideration of legal issues not presented in original briefing);

Falco v. Washington Metropolitan Area Transit Auth., No. 18-2766, 2020 WL 12968925, *1 (D.D.C. Apr. 1, 2020) ("While the judicial interest in finality typically disfavors reconsideration, a court may do so 'as justice requires.'")

Rule 54(b) does not define specific grounds for revising an order, but federal courts have "inherent power" to revise their orders in the interest of justice. *Dale v. Stephens Cty. (Georgia) School District*, Civ. No. 2:04-151, 2008 WL 11408460, at *2 (N.D. Ga. June 6, 2008). The federal courts have revised interlocutory orders on three primary grounds: (1) "an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record and (3) [the] need to correct a clear error or prevent manifest injustice." *Pulte Home Corp. v. Montgomery Cty.*, Civ. No. 14-3944, 2015 WL 9480451, at *1 (D. Md. Dec. 29, 2015) (citation omitted); *see also Rhodes v. Comcast Cable Communications Management, LLC*, Civ. No. 14-1824, 2017 WL 11454920, at *2 (D. Md. July 25, 2017).

The Commission denies 81st Dolphin's request to summarily dismiss the Board's petition and follows Fed. R. Civ. P. 54(b) in addressing the issues raised by the Board.

B. Respondent's Petition for Reconsideration

The Commission found the Board in violation of § 41106(2) for disparate treatment of limousines and Complainants' shuttle buses under its tariff and for selectively enforcing the tariff by failing to collect the fees due from limousine operators. Section 41106(2) provides that a marine terminal operator may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2).

1. Alleged Ruling on an Unpled Claim

The Board argues that the Commission ruled on an unpled claim in finding that it violated § 41106(2) by treating limousines differently under the tariff and not collecting fees due from limousine operators. Respondent's Pet., 2-7; *see also* First Am. Compl. (Oct. 21, 2014). The Board bases its argument on its literal interpretation of the amended complaint read in conjunction with the tariff and contends that the amended complaint fails to allege a claim based on the disparate treatment of limousines or selective enforcement with respect to limousines. Respondent's Pet., 4-6. The Board also contends that the selective enforcement claim alleged in the amended complaint referred only to hotels. *Id.* at 3-4. The Board argues that the claims the Commission ruled on were first raised in post-discovery briefing and that was insufficient. *See id.* at 6. The Board asks the Commission to reconsider its ruling or in the alternative to allow discovery, fact-finding, and argument on the disparate treatment and selective enforcement claims regarding limousines. *See id.* at 6-7.

In response, 81st Dolphin asserts that the § 41106(2) claims regarding limousines were adequately pled and thoroughly briefed and addressed repeatedly throughout the lengthy history of this case. Complainant's Reply, 3-7. 81st Dolphin points to express discussions of those issues across multiple briefs and in the ALJ's Initial Decision. *See* id.

81st Dolphin is correct. Regardless of whether claims regarding the treatment of limousine issues were expressly pled, if those issues were plainly addressed in the briefs, they were tried by the parties' consent. The Commission's rules do not address trying claims by express or implied consent, so the Commission may look to the comparable Federal Rule of Civil Procedure under § 502.12. Rule 15(b)(2) of the Federal Rules of Civil Procedure provides that:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be

> treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

See Torry v. Northrop Grumman Corp. 399 F.3d 876, 878-79 (7th Cir. 2005) (finding that "four years of discovery and other pretrial maneuverings without objecting" sufficient to show claim tried by consent).

The. Board was plainly on notice that 81st Dolphin was asserting a § 41106(2) claim related to the treatment of limousines under the tariff and failing to collect fees due from limousine operators. Those issues were addressed in briefs filed as early as 2015. *See, e.g.*, Respondents' Br., 12-14, 27-30 (June 15, 2015) (arguing that Complainants' shuttle buses and limousines are not similarly situated); Respondents' Reply to Complainants' Exceptions to Initial Decision, 37 (Feb. 2, 2016). In the Initial Decision issued in December 2015, the ALJ addressed whether Complainants' shuttle buses and limousines are similarly situated. I.D., 30-32 (ALJ Dec. 4, 2015) (crediting Respondents' argument that limousines are *not* similarly situated or in a competitive relationship with Complainants' shuttle buses).[4] It is clear that the § 41106(2) claim the Commission decided was tried with the parties' consent.

[4] *Cf.* Order Affirming Initial Decision's Dismissal of the Complaint, 17-18 (FMC Jan. 13, 2017 (rejecting the ALJ's finding that Complainants' shuttle buses and limousines were not similarly situated to or in a competitive relationship with limousines because Complainants were not required to prove that element). The similarly-situated issue regarding limousines was not controverted on the appeal to the United States Court of Appeals for the D. C. Circuit. *See Santa Fe Discount Cruise Parking, Inc. v. Fed. Mar. Comm'n,* 889 F.3d 795, 796 (D.C. Cir. 2018) (noting that "Petitioners contend that they met their burden of showing that they were similarly situated to or in a competitive relationship with taxis and limos").

The Commission denies the Board's request for reconsideration on the grounds that the § 41106(2) claim related to limousines was not properly before the Commission.

2. Alleged "Statistical Irrelevance" of Selective Enforcement Violation

The Board argues that the Commission erred in finding it in violation of § 41106(2) for failing to collect the tariff fees from limousine operators (i.e. the selective enforcement claim), because the amounts it did not collect are "statistically irrelevant." Respondent's Pet., 7-11. The Commission found that:

> *Respondents failed to enforce the Tariffs against limousines for six years due to employee error* – the employee stopped keeping track of limousines . . . . This is not a reasonable basis for a marine terminal operator to apply its terminal schedule unevenly under the factors typically considered by the Commission . . . . Nor is this oversight the type of decision the Commission can defer to. To adopt Respondents' view would effectively allow a marine terminal operator to enforce its schedule against one person but not another so long as the marine terminal operator could show that recouping the uncollected fees would be expensive or difficult. *When coupled with the duration of the disparate treatment, Complainants have demonstrated that Respondents' conduct was not reasonable.*

April 2021 Order, 33 (emphasis supplied). The Commission determined that the Board consistently charged 81st Dolphin the per-space fee imposed by the tariff but failed to charge limousines the tariff fees they should have paid. *Id*. at 33-34.

The Board is essentially arguing that the Commission should excuse its failure to collect the fees from limousine operators over a

six-year period because those fees represent an insignificant part of the overall tariff fee revenue. *See* Respondent's Pet., 7-11. The Board does not cite any Commission or federal authority that supports its assertion that some violations are too insignificant based on the dollar amount or revenue percentage involved to justify finding a § 41106(2) violation. *See id.*[5]

81st Dolphin correctly asserts that the amount involved or the revenue percentage is not a defense that negates or excuses the violation. Complainant's Reply, 8-11. Respondent's failure to collect the fees due from limousine operators was not a one-time event or a minor oversight that was immediately discovered and corrected. This lapse persisted for six years during which time the Board consistently failed to collect fees from limousine operators without a reasonable justification for that decision. And at the same time, the Board continued to collect tariff fees from 81st Dolphin. A six-year lapse in consistently applying the tariff is not an insignificant or de minimis error and even if it were, the "statistical irrelevance" of the amount involved is not a defense that justifies reversing the Commission's determination that the Board violated § 41106(2).[6]

Further, the Commission previously addressed and rejected the Board's argument that attempted to justify or excuse its failure to collect fees from limousines operators. *See* April 2021 Order, 26-33. As the Commission found, these belatedly proffered excuses do not amount to a valid transportation factor that justifies the differential treatment, nor is "employee error" the type of decision

[5]The Board does not cite any support for its argument that "[t]he inequity of awarding reparations and finding of a violation based on a clerical error over such a disproportionately small amount" violates the intent of the Shipping Act. *See* Respondent's Pet., 8-11. Further, its characterization of the Commission's findings is not accurate. The Commission did not find that Respondents' systematic, years-long failure to collect from limousines was a one-time error. *See* April 2021 Order, 32-34.

[6]*See* April 2021 Order, 25-26 (addressing Respondents' failure to justify their decision to exempt certain limousines from per-trip access fees).

to which the Commission can defer. *Id*. Indeed, "employee error" is self-evidently not a "valid transportation factor." *Id.* [7]

Finally, the Board's argument that the Commission's findings on the § 41106(2) claim contravenes 46 C.F.R. § 545.4(b) is wholly without merit. The Board argues that the § 41106(2) claim should be denied because 81st Dolphin failed to show that the conduct at issue was normal, customary, or continuous. Section 545.4 defines the elements required to prove a § 41102(c) claim. It does not apply to or define the elements required to prove a § 41106(2) claim.

The Commission denies the Board's request to reconsider its findings on the grounds that the § 41106(2) violation was de minimis or the amount at stake was statistically irrelevant.

3. Equitable Relief

The Board argues that "equitable issues mi[li]tate against a finding against Respondents" on the § 41106(2) claim. Respondent's Pet., 19. The Board asserts that 81st Dolphin did not pay the per-trip access fee that applied to most commercial vehicles, negotiated for a special monthly per-space access fee, and yet continued to "game" the process. *Id*. at 18**.** 81st Dolphin responds that these assertions are not new and do not constitute grounds for revising the April 2021 Order. Complainant's Reply, 20.

81st Dolphin is correct. This argument repeats points the Board raised earlier in arguing that it was unfair for 81st Dolphin and

[7]The Board further argues that the Commission failed to properly defer to it as public port authority. This argument is also not new--it is just a reiteration of a prior argument which the Commission addressed in the April 2021 Order, noting that there must be some reasoned decision to which the Commission can defer in the first instance. April 2021 Order, 26. Here, there was no reasoned decision for the Commission to defer to, only post-hoc rationalizations untethered to any evidence of contemporaneous business decisions based on valid transportation factors. *See id*.

the other Complainants to negotiate a special per-space rate and then complain about it. *See, e.g.*, Respondents' Reply to Exceptions, 9-11 (Feb. 2, 2016); Respondents' Reply to Exceptions to Initial Decision on Remand, 17-18, 38-40 (Jan. 30, 2019).

Further, the Commission's authority is defined by Congress and it has not been granted equitable authority and does not have inherent equitable powers. *See South Carolina Maritime Services, Inc. v. South Carolina State Ports Auth.*, No. 99-21, 2000 WL 722270, at *7 (ALJ May 10, 2000) *7 (noting that the Commission is not a court of equity). Even if the Commission had such authority, the Board has not identified equitable grounds for reversing the Commission's findings on the § 41106(2) claim.

The Commission denies the Board's request to reconsider its ruling on equitable grounds.

4. End-Date for Calculating Reparations on the Selective Enforcement Claim

The. Board argues that the Commission erred in specifying August 2014 as the end-date for recovering reparations on the selective enforcement claim. Respondent's Pet., 13; April 2021 Order, 32-34. The Commission found that the Board selectively enforced the tariff by erroneously charging certain vehicles $10 per trip beginning December 17, 2007, the effective date of the 2007 Tariff, and that the conduct "appears to have ended on July 31, 2014." *Id.* at 29. The Commission also found that the Board selectively enforced the tariff by not collecting any per-trip fee from certain limousine operators from 2008 through August 2014. *Id.* at 32-34.

The Board argues that the evidence shows it began charging limousines "as early as April 2014" so that should be the end-date for calculating reparations. Respondent's Pet., 13. The Board contends that it acted reasonably and began billing limousines

"almost immediately" after discovering the error by as early as April 2014 and has supporting documents to that effect. *Id.* at 11-12.

81st Dolphin counters that the Commission based the August 2014 end-date on the Board's brief. *See* Complainants' Reply, 11; *see also* April 2021 Order, 29, 32-33. The Board argued earlier that it corrected the error in August 2014, when a new employee arrived and assumed responsibility. Respondents' Corrected Br., 21 n.5; *id*. at 23 n.6; *see also* April 2021 Order, 29, 32-33. The Commission acknowledged that there was no evidence about when in August 2014 the Board began enforcing per-trip fees on limousines, but because the burden of proof was on Complainants, the Commission assumed the earliest possible date, *i.e.*, that enforcement began on August 1, 2014 and considered July 31, 2014 the end-date for reparations on the selective enforcement claim. April 2021 Order, 38-39.

Although the Board's argument only affects reparations calculations to a limited degree, it merits addressing before the ALJ in the interest of definitively resolving questions about awardable reparations.

The Commission amends the April 2021 Order to allow the parties on remand to submit argument on the correct end-date for calculating reparations on the selective enforcement claim. This relief does not allow the parties to reopen discovery.

5. Method for Calculating Reparations and Reopening Discovery

The Board seeks clarification on the method for calculating reparations on remand and contends that this issue was not addressed earlier because the ALJ found no violation, so reparations were not at issue. Respondent's Pet., 13-15. Relatedly, the Board seeks an opportunity for further discovery on the limousine issues. *Id*. 81st Dolphin contends that these issues have been waived and point out that the Board previously represented to the ALJ in a joint

status report that no further discovery was required. Complainant's Reply, 15. The Board asserts that these issues have not been waived because it was not required to file exceptions to *dicta* in the Initial Decision on Remand. *See* Respondent's Pet., 13-15; *see also* 46 C.F.R. § 502.227.

The Commission stated in the April 2021 Order that reparations should be calculated based on the difference between the amount Complainants were charged for their shuttle buses and the amount limousine operators were charged during the relevant time period--with the latter figure being zero. April 2021 Order, 39-40. The Commission also stated that on remand, the ALJ should consider the extent to which decal fees affect the reparations calculation. *Id.* at 40. The Commission reasoned that this was the calculation method the ALJ provisionally specified in the I.D.R. and neither party objected. *Id.* On this issue, the ALJ provisionally stated that:

> If it were determined that [the Board] violated section 41106(2) by charging Complainants for access but not charging taxicabs and limousines, Complainants suffered injury from the violation.

Initial Decision on Remand (I.D.R.), 66 (ALJ Nov. 16, 2018). The ALJ explained that this calculation method was based on Commission case law which provides that:

> the appropriate measure of damages where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference and prejudice.

Id. (citing *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 29 S.R.R. 356, 374 (FMC 2001)). The ALJ also provisionally stated

that in this case, reparations "would be all of the access fees" that the Board collected from them. *Id.*

The Board correctly identifies the ALJ's statements on reparation calculations as *dicta* which it was not required to challenge in exceptions to the Initial Decision on Remand. Because the method for calculating reparations was not fully addressed earlier, the parties should have an opportunity to do so on remand.

The Board also seeks leave to reopen discovery based on statements in the April 2021 Order which it contends will allow a "one-sided" reopening of discovery that will assist 81st Dolphin while denying it the same opportunity. Respondent's Pet., 15-16. The Board contends that allowing 81st Dolphin an opportunity to prove the amount of access fees it paid for July 2014 but not allowing the Board an equal opportunity to discover and submit further evidence is unfair. *Id.* The Board's request is broader than the question of reparations--it seeks an opportunity for "discovery, fact finding and briefing on the issue of limousines, legitimate transportation factors that apply and distinguish limousines from Complainants' vehicles." *Id.* at 15-16. 81st Dolphin counters that this request contradicts the Board's earlier representation in a joint status report that no further discovery was necessary. *See* Complainant's Reply, 15. 81st Dolphin also asserts that the Board's broad request is actually an attempt to "turn the clock back on this proceeding to September of 2014" to give it an opportunity "to re-litigate this entire matter." *Id.*

The Board is not entitled to reopen discovery for the purpose of gathering information to relitigate or revisit issues that are now settled. The Commission found the Board in violation of § 41106(2) with respect to limousines and the only remaining issue is the amount of reparations awardable. *See* April 2021 Order, 40-41. That being the case, while the Board is not entitled to additional discovery, the parties should have an opportunity to brief reparations questions before the ALJ and argue their respective positions based on the record. Reparations calculation issues were not at the

forefront of the litigation before the Commission issued the April 2021 Order, so the parties should have an opportunity to address those issues now that they are squarely before the ALJ.

The Commission grants the Board's request to address the method for calculating reparations on remand and denies the request to reopen discovery.

6. Reparations Offset

The Board argues it is entitled to an offset to account for fees that 81st Dolphin and EZ Cruise should have been depositing into the court registry in connection with the *Santa Fe* action before the federal courts. Respondent's Pet., 16-17 (asserting that Robledo d/b/a 81st Dolphin owed approximately $99,000 more in access fees than was paid to the Board or into the court registry as of March 2020). The Board asserts that it "is entitled to an offset for any such unpaid amounts against any amounts claimed to be owed by Complainant[]." *Id*. at 17. That question is now moot with respect to EZ Cruise since EZ Cruise has settled its claims in this case and the *Santa Fe* action. 81st Dolphin's position is that when this case is finally resolved, "an audit and reconciliation" will be necessary and that ordering that action is outside the purview of this court and needs to be addressed by the federal court. *See* Complainant's Reply, 17-19.

The relief that the Board seeks would apparently involve determining how much 81st Dolphin has paid into the court registry and how much it should have paid. *See* Respondent's Pet., 16-17. The Board does not cite any authority for the Commission to grant the relief it seeks, and it is not clear that such authority exists. *See generally: In re Containership Co. (TCC) A/S*, 466 B.R. 219, 226-28 (S.D.N.Y. 2012) (discussing the Commission's exclusive jurisdiction and deferring to the Commission under the doctrine of primary jurisdiction); *LSB Industries, Inc. v. Prudential Lines, Inc.*, 736 F.2d 10, 12 (2nd Cir. 1984) (listing matters calling for the Commission's expertise).

The Commission denies the Board's request to determine or remand for the ALJ to determine offsets to a reparations award based on funds that should have been paid into the federal court registry under the *Santa Fe* action.

7. Prevailing Party Status and Attorney's Fees

Galveston Port Facilities Corporation (Galveston Port) argues that it is entitled to be named the prevailing party in the litigation as against Lighthouse Parking and that it should be found eligible to recover attorney's fees. Respondent's Pet., 19-20. 81st Dolphin argues that this issue was waived because "Respondent's Petition does not seek reconsideration of any finding with regard to Lighthouse" and asserts that apportioning attorney's fees among three inextricably intertwined parties is logistically impossible at this point since Galveston Port did not prevail against all Complainants. Complainant's Reply, 21-22. 81st Dolphin also contends that any claim for attorney fees for Galveston Ports is time-barred and moot. *See id.* at 20-23.

The Board and Galveston Port do not point to any reasons why the Commission should depart from its prior statements on these questions. As stated in the April 2021 Order, the Commission will not enter findings about attorney's fees, including prevailing party status, until they are presented in a timely filed petition for attorney's fees under 46 C.F.R. § 502.254(c). April 2021 Order, 40; *see also* Statement of the Commission on Attorney Fees, Docket No. 21-14 (Dec. 28, 2021). Galveston Port does not currently have a fee petition before the Commission. Respondents' fee petition filed on March 14, 2017 was premised on a Commission decision that was later vacated. *See* Respondent's Pet., 19 n. 5. Further, Galveston Port's July 2021 settlement with Lighthouse and EZ Cruise presumably makes its claims for attorney's fees from Lighthouse moot.

The Commission denies Galveston Port's request to declare

it the prevailing party for the purpose of deeming it eligible to recover attorney's fees.

8. Stay of Remand

The Board seeks a stay of the remand on reparations pending the Commission's decision on its petition. Respondent's Pet., 21. 81st Dolphin opposes that request. *See* Complainant's Reply, 23. After the Commission issued the April 2021 Order, 81st Dolphin filed an amended brief and supporting exhibits on the limited question of reparations and the Board filed a reply. The ALJ has not issued a decision on reparations following the April 2021 Order, so the proceedings have effectively been stayed pending the Commission's ruling on the Board's petition.

The Commission denies Respondent's request to stay the remand as moot.

III. CONCLUSION

The Commission GRANTS the Board's Petition for Reconsideration in part and ORDERS that on remand, the Board may introduce argument on when the reparations period for the selective enforcement claim should end, if not on July 31, 2014. The Board may also submit argument on remand on the method for calculating reparations. This order does not allow the parties to reopen or engage in additional discovery. The Commission DENIES the Petition in all other respects.

By the Commission.

William Cody
Secretary