

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

HAPAG-LLOYD, A.G. AND HAPAG-LLOYD (AMERICA) LLC –
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

DOCKET NO. 21-09

Served: November 17, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge.*

INITIAL ORDER

On November 10, 2021, the Commission issued an Order of Investigation and Hearing (“Order”) for this proceeding. The Order names the Commission’s Bureau of Enforcement as a party and requires the Respondents to file a response to the complaint. 46 C.F.R. § 502.63(c). The parties must submit a joint status report with proposed schedule, addressing the issues outlined below, within ten days of the service of the answer.

Pursuant to Commission Rule 141, parties have twenty days to confer to establish a schedule and 150 days to complete discovery. 46 C.F.R. § 502.141. Pursuant to Commission Rule 202 and the Administrative Procedure Act, every party has the right to present its case or defense “as may be required for a full and true disclosure of the facts.” 46 C.F.R. § 502.202; 5 U.S.C. §§ 554(c), 556(d). Commission hearings are usually held by means of written testimony and documentary evidence in the form of briefs and proposed findings of fact. Order at 6-7; 46 C.F.R. § 502.63(c)(3); Avoidance of Trial-Type Oral Hearings, Informal Statement of Policy, 17 S.R.R. 457 (FMC Mar. 23, 1977). Parties are typically provided approximately 75 days to present their briefs and proposed findings of fact, *i.e.* to conduct the hearing. If oral hearings are held, additional time is required to review transcripts and file briefs and proposed findings of fact after the oral testimony. *See, e.g.*, Docket No. 10-06. Initial decisions must be issued based 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); *see also* 46 C.F.R. § 502.223.

The Order requires an expedited proceeding with discovery completed within 90 days of service of Respondents’ answer and the initial decision issued within 75 days after completion of discovery so that the proceeding would take about six months. Order at 7-8. To allow time for consideration of the parties’ arguments and preparation of an initial decision, the briefing period will need to be shortened and/or included in the discovery period. Due to the expedited nature of the proceeding, the parties must confer and file a joint status report addressing the following issues within ten days of service of Respondents’ answer:

1. Proposals to limit discovery so that discovery can be conducted efficiently, for example limits on the number or length of depositions.
2. Stipulation of facts that are relevant to section 41102(c) claims, such as whether the Respondents are regulated entities and ocean common carriers.
3. Whether motions may be utilized to resolve legal issues which would facilitate settlement and, if so, the timing of such motions.
4. Whether expert witness testimony is required and, if so, what issues an expert would address.
5. Whether an oral hearing is requested.
6. A proposed schedule for resolution of the proceeding within six months that will provide sufficient time for a full hearing and considered decision.
7. Any anticipated impact that the proposed schedule may have on other proceedings, including demurrage and detention proceedings currently pending at the Commission.
8. Whether the proceeding may be resolved by mediation or settlement, although the parties are directed *not* to state the parties' positions on whether to agree to mediation or their settlement positions.

Due to challenges associated with COVID-19, the Commission is temporarily waiving certain requirements in 46 C.F.R. part 502 related to the paper filing of documents, ink signatures, and service by mail of complaints. Order (May 12, 2020), Docket No. 20-07, www2.fmc.gov/readingroom/docs/20-07/20-07_order.pdf; *see also* Temporary Adjustments in FMC Operations (Mar. 19, 2020), www.fmc.gov/temporary-adjustments-in-fmc-operations/.

In addition, the parties must abide by the following additional instructions:

ADDITIONAL INSTRUCTIONS

Filing

1. Information regarding where to find the Commission's rules of practice and procedure (46 C.F.R. § 502), Commission decisions, and other information helpful for parties may be found in the reading room section of the Commission's website, <https://www2.fmc.gov/readingroom>. Parties are strongly urged to familiarize themselves with the Commission's rules of practice and procedure. Filings may be rejected for failure to comply with the rules.
2. The proper number of copies of documents must be filed with the Secretary of the Commission as required by Rule 2 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.2, as modified by COVID protocols.

3. Parties are encouraged to file documents with the Office of the Secretary via email. In addition to filing with the Secretary, the parties should send courtesy copies to the presiding judge via email at *judges@fmc.gov*. A party must notify the Commission of any change of service address.
4. Attachments. When documents are attached to a filing, as far as practicable, the exhibits should be in one PDF document. The PDF should have sequential page numbers (bates numbers). Each separate exhibit should be clearly identified, for example by a cover sheet or bookmark. A table of contents should indicate what the exhibit is and the page where it starts.
5. Case citations. Because the Commission currently uses Lexis, citations to judicial opinions on Westlaw should include a parallel citation to Lexis, if possible. Citations to Commission decisions or rulings may be made to the official F.M.C. reporters including F.M.C.2d, Pike & Fischer Shipping Regulation Reports (S.R.R.), Lexis, or Commission slip opinions or orders by docket number, title, and date of service. If a document from another source is cited, the decision or ruling must be transmitted via e-mail to *judges@fmc.gov*.

Discovery

6. Rules regarding discovery require initial disclosures within seven days of filing of the answer, limit the number of interrogatories and depositions, and impose time limits to complete discovery. 46 C.F.R. §§ 502.141-502.150.
7. The parties are reminded of their obligation to ensure preservation of all relevant evidence, including electronically stored information. *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011); *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
8. Discovery materials must not be filed until used in the proceeding. 46 C.F.R. § 502.2(k).
9. Compliance with the date set for completion of discovery requires that the parties serve discovery requests sufficiently in advance of the discovery cutoff so that all responses and objections will be due on or before that date.
10. The parties must provide an electronic copy, in a word processing format, of all discovery requests served and all responses to discovery with the exception of documents produced. Answers, responses, and objections to interrogatories and requests for admissions or for production of documents must identify and quote each interrogatory or request in full immediately preceding the answer, response, or objection thereto.
11. A motion to compel must set forth verbatim the interrogatory or request, the response that the moving party argues is insufficient, a summary of the moving party's attempts to secure a sufficient response, and the moving party's argument on why the response is insufficient. The moving party must provide an electronic copy in a word processing format of the motion to compel with the hard copy of the motion.

The non-moving party must use the electronic copy of the motion to compel and add any counter-summary of the attempts to secure a sufficient response, then its argument on why the response is sufficient, below the moving party's summary and argument for each response claimed to be insufficient. The non-moving party must provide to the moving party and to the Presiding Officer an electronic copy in a word processing format of the motion to compel to which it has added its counter-summaries and arguments.

12. A party withholding documents because of an asserted privilege must serve a privilege log that complies with the requirements of Federal Rule of Civil Procedure 26(b)(5)(A).

Motions

13. Rules regarding motions impose time limits, page limits, address replies, and require the parties to confer prior to filing non-dispositive motions. 46 C.F.R. §§ 502.67-502.71.
14. Any request for action by the Commission or presiding officer must be made by motion, not by letter or email request. Each page of the motion should be sequentially numbered.
15. A party moving for summary decision must include in a separate document a statement of material facts as to which there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine dispute. Each paragraph must be limited as nearly as practicable to a single factual proposition. Each factual proposition must be followed by an exact citation to evidence that the party contends will establish the fact or demonstrate that it is uncontroverted; *i.e.*, a page number in the Appendix.¹ See 46 C.F.R. § 502.70(a). The party filing Proposed Findings of Fact must provide an electronic copy of the Proposed Findings of Fact in a word-processing format to all parties *and to the Office of Administrative Law Judges*.
16. A party opposing a motion for summary decision must file a responding statement either admitting or disputing each of the facts in the movant's statement. This document must set forth verbatim each material fact to which it responds, then admit or deny the fact. All material facts in the movant's statement that are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation demonstrating the existence of a genuine issue as to the fact. Each proposed finding of fact that the responding party denies must be followed by an exact citation to evidence that the responding party contends will rebut the evidence the proposing party claims supports the fact. An opposing party may also include in the responding statement additional facts that the party contends are material. Each such fact must be stated in separately numbered paragraphs with a citation to the motion record (page in the appendix) establishing the fact or demonstrating that it is controverted. Each paragraph must be limited as nearly as practicable to a single factual proposition. The party filing a

¹ Parties must designate specific facts and provide the court with their location in the record. *Orr v. Bank of Am.*, 285 F.3d 764, 775 (9th Cir. 2002). "General references [to evidence] without page . . . numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

Response to Proposed Findings of Fact must provide an electronic copy of the Response in a word-processing format to all parties *and to the Office of Administrative Law Judges.*

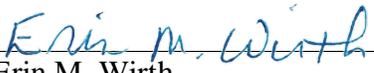
17. Each party must prepare and submit with its motion or reply an appendix containing the documentary evidence on which it relies for its claims regarding material facts. The pages of the appendix must be numbered sequentially.

Confidential Material

18. *Stipulation* – The parties may agree and stipulate between themselves regarding treatment of confidential documents and information obtained during discovery that is not filed with the Commission. The parties may, but are not required to, file a courtesy copy of the agreement with the Commission.
19. *Use in the proceeding* – If confidential information is filed in a memorandum or as an exhibit to a dispositive motion or as part of briefing on the merits, it must be accompanied by a motion justifying confidential treatment. This motion must identify each item for which protection is sought and show good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information. 46 C.F.R. § 502.141(j)(1). The burden is on the party seeking to protect the information to show good cause for its protection.
20. *Filing* – Parties should file two versions of confidential filings marked as the “confidential version” and the “public version.” The confidential version may be provided to the Presiding Officer by email but should not be filed with the Office of the Secretary by email pursuant to Commission Rule 5. 46 C.F.R. § 502.5.
21. *Marking confidential material* – In the confidential version, confidential information must be conspicuously and clearly marked on each page, for example by highlighting or braces. The public version must indicate on the cover page and on each affected page “Public version – confidential materials excluded.” The public version must clearly indicate any omissions, for example with blackout or braces, and its pagination and depiction of text on each page must be identical to that of the confidential version. For example, the confidential filing may read: “On January 1, 2010, Complainant entered into a {25} year lease with respondent for a monthly rent of {\$1000}.” The public version would read: “On January 1, 2010, Complainant entered into a {█} year lease with Respondent for a monthly rent of {█}.”
22. *Exhibits* – Confidential information in exhibits should be marked as above. If marking within the text is not feasible, individual pages may be replaced in the public version with a page indicating that confidential material was excluded. Entire exhibits should not be excluded, only those pages containing confidential material.
23. *Personal information* – Personally identifiable information such as social security numbers, birth dates, and financial account numbers must be redacted pursuant to Commission Rule 13. 46 C.F.R. § 502.13.

Hearing

24. The parties should review Commission Rules 502.75 and 502.209-502.210 with regard to settlement and prehearing procedures including the submission of prehearing statements.
25. The parties are expected to attempt to narrow the issues and to shorten the proceeding by stipulations. The parties may, by stipulation, agree upon any facts involved in the proceeding. 46 C.F.R. § 502.207. Stipulations should be signed by the parties and may be filed at any point in the proceedings.
26. The answer must indicate whether an oral hearing is requested and the desired place for such hearing. The presiding officer will determine whether an oral hearing is necessary. 46 C.F.R. § 502.63(b)(3).



Erin M. Wirth
Chief Administrative Law Judge