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June 17, 2011					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 08-04

TIENSHAN, INC.

v.

TIANJIN HUA FENG TRANSPORT AGENCY CO., LTD.

ORDER GRANTING PETITION FOR ATTORNEY'S FEES¹

BACKGROUND

On August 19, 2008, Tienshan, Inc. (Tienshan) commenced this proceeding by filing a Complaint alleging that Tianjin Hua Feng Transport Agency Co., Ltd. (Tianjin Hua Feng) violated section 10(d)(1) of the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. § 41102(c),² by refusing to give Tienshan, the consignee of a shipment, the original bill of lading that would permit it to take delivery of the shipment. On March 9, 2011, I issued an Initial Decision finding that Tianjin Hua Feng violated the Shipping Act and granting a reparation award in favor of Tienshan

¹ This Order will become the decision of the Commission on attorney's fees in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227; 46 C.F.R. § 502.254(f).

² On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Section 10(d)(1) is now codified at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., Indigo Logistics, LLC; Liliya Ivanenko; and Leonid Ivanenko – Possible Violations of Section 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Part 515*, FMC No. 11-06 (Apr. 7, 2011) (Order of Investigation and Hearing). I follow that practice in this Order.

in the amount of \$16,944.00 plus interest from August 15, 2008. *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831 (ALJ 2011). Neither party filed exceptions, and on April 12, 2011, the Commission served a Notice not to Review. *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04 (FMC Apr. 12, 2011) (Notice not to Review).

On April 29, 2011, Tienshan filed Complainant Tienshan, Inc.'s Petition for Attorney's Fees. The Petition seeks an award "in the total amount of \$75,130.50 billed by Complainant counsel for subject matter." (Petition at 2.) Tienshan attached the Declaration of Attorney Todd C. Fineberg in Support of Petition for Attorney's Fees in FMC Docket No. 08-04 (Fineberg Dec.). (Petition, Exhibit A.) Tienshan also attached the following detailed invoices identifying the dates of service, the attorney or paralegal performing the service, a summary of the service performed, the hours spent performing the service, the hourly rate charged for the person performing the service, and the total charge for the service. (Petition, Exhibit B.)

Invoice	Dates of Services	Fee Sought
37713	6/26-30/08	\$2,124.00
37843	7/1-31/08	\$6,628.50
38287	8/1-28/08	\$8,416.00
38632	Superseded by Invoice 38636	
38636	9/8-26/08	\$4,042.50
39274	10/1-11/24/08	\$11,000.00
40099	2/26-4/30/09	\$84.50
43432	4/23-8/31/09	\$16,041.00
44845	9/1/10-3/15/11	\$26,794.00
	TOTAL	\$75,130.50

On May 17, 2011, Tianjin Hua Feng filed Respondent Tianjin Hua Feng Transport Agency Co., Ltd.'s Response to Tienshan, Inc.'s Petition for Attorney's Fees (Response). Tianjin Hua Feng contends that Tienshan's Petition is an "exorbitant request" given the size of the reparation award and contends that the Petition does not comply with Commission Rule 254 governing petitions for attorney's fees. (Response at 2.) See 46 C.F.R. § 502.254. Tianjin Hua Feng sets forth several reasons that it contends justify denial of the Petition.

1. The fees requested are unreasonable for this case. The attorney's fee award requested (\$75,130.50) is more than four times the reparation award (\$17,111.60 including interest).

2. The declaration of Todd Fineberg should not be considered as he provided legal services to Tienshan and acted “Of Counsel.”
3. No evidence was presented as to the background of each attorney who worked in Tienshan’s case. Such evidence is necessary to determine the reasonableness of the hourly rates claimed by each attorney based on experience and credentials.
4. Tienshan is not entitled to pre-Complaint fees and costs. Tienshan filed its Complaint on August 19, 2008. Before filing the Complaint, Tienshan incurred \$14,635.50 in fees and costs. As this amount accrued before Tienshan commenced the litigation, Tienshan is not entitled to recover them.
5. Tienshan is not entitled to attorney’s fees for such unnecessary work as Tienshan’s Motion for Summary Judgment and work caused by Tienshan such as the opposition to Tianjin Hua Feng’s Motion to Compel Discovery Responses that the Commission partially granted.

(Response at 2-3.) Tianjin Hua Feng does not cite any case law or other authority in support of its arguments.

DISCUSSION

I. AUTHORITY FOR AN AWARD OF ATTORNEY’S FEES.

The Shipping Act provides that “[a] person may file with the . . . Commission a sworn complaint alleging a violation of this part. . . . If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a). “If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 41305(b). The Initial Decision (now final) directed the payment of a reparation award to Tienshan for its actual injury. Therefore, Tienshan is entitled to reasonable attorney’s fees.

The Commission has adopted the lodestar method of computing attorney’s fees in proceedings in Shipping Act cases. *Attorney’s Fees in Reparation Proceedings*, 23 S.R.R. 1698 (FMC 1987) (promulgating Commission Rule 254). *See also Transworld Shipping (USA), Inc. v. FMI Forwarding (San Francisco), Inc.*, 29 S.R.R. 876, 878 and n.3 (FMC 2002). Commission Rule 254 provides:

- (a) *Scope*. The Commission shall, upon petition, award the complainant reasonable attorney’s fees directly related to obtaining a reparations award in any complaint proceeding under section 11 of the Shipping Act of 1984 (46 U.S.C. 41301 - 41302, 41305 - 41307(a)). . . .

(b) *Content of petitions.* Petitions for attorney's fees under this section shall specify the number of hours claimed by each person representing the complainant at each identifiable stage of the proceeding, and shall be supported by evidence of the reasonableness of hours claimed and the customary fees charged by attorneys and associated legal representative in the community where the petitioner practices. Requests for additional compensation must be supported by evidence that the customary fees for the hours reasonably expended on the case would result in an unreasonable fee award.

(c) *Filing of petition.* (1) Petitions for attorney's fees shall be filed within 30 days of a final reparation award: (i) With the presiding officer where the presiding officer's decision awarding reparations became administratively final pursuant to § 502.227(a)(3) and § 502.304(g) (2) For purposes of this section, a reparation award shall be considered final after a decision disposing of the merits of a complaint is issued and the time for the filing of court appeals has run or after a court appeal has terminated.

(d) *Replies to petitions.* Within 20 days of filing of the petition, a reply to the petition may be filed by the respondent, addressing the reasonableness of any aspect of the petitioner's claim. A respondent may also suggest adjustments to the claim under the criteria stated in paragraph (b) of this section.

(e) *Ruling on petitions.* Upon consideration of a petition and any reply thereto, the Commission or the presiding officer shall issue an order stating the total amount of attorney's fees awarded. The order shall specify the hours and rate of compensation found awardable and shall explain the basis for any additional adjustments. An award order shall be served within 60 days of the date of the filing of the reply to the petition or expiration of the reply period; except that in cases involving a substantial dispute of facts critical to the award determination, the Commission or presiding officer may hold a hearing on such issues and extend the time for issuing a fee award order by an additional 30 days. The Commission or the presiding officer may adopt a stipulated settlement of attorney's fees.

(f) In cases where the presiding officer issues an award order, appeal of that order and Commission review of that order in the absence of appeal shall be governed by the procedures of § 502.227 of this part.

46 C.F.R. § 502.254.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The applicant for an award of attorney fees bears the burden of establishing entitlement to an award, documenting the

appropriate hours, and justifying the reasonableness of the rates. *See Blum v. Stenson*, 465 U.S. 889, 896 n.11 (1984) (“[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates.”); *Hensley v. Eckerhart*, 461 U.S. at 437 (“[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”).

II. THE TIMING OF THE PETITION FOR ATTORNEY’S FEES.

Rule 254 states that a petition for attorney’s fees “shall be filed within 30 days of a *final* reparation award.” 46 C.F.R. § 502.254(c)(1) (emphasis added). “For purposes of this section, a reparation award shall be considered *final* after a decision disposing of the merits of a complaint is issued and the time for the filing of court appeals has run or after a court appeal has terminated.” 46 C.F.R. § 502.254(c)(2) (emphasis added). *See also Attorney’s Fees in Reparation Proceedings*, 23 S.R.R. at 1700 (“[T]he point is well taken that fees should not be awarded until any review process that may reverse a reparations award is completed. Accordingly, for purposes of the attorney’s fee rule, a reparations award will not be final, and the time period for filing attorney’s fees petitions will not begin to run until such review period has expired.”). A party aggrieved by a final order of the Commission may seek review in a court of appeals. 28 U.S.C. § 2342(3)(B). The petition for review must be filed with the court within sixty days after entry of the order. 28 U.S.C. § 2344. Venue for review of a final Commission order “is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.” 28 U.S.C. § 2343. Tienshan has its principal office in Connecticut and Tianjin Hua Feng has its principal office in China. Therefore, venue would be proper in the Second Circuit or the District of Columbia Circuit.

The Commission issued its Notice not to Review on April 12, 2011. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04 (FMC Apr. 12, 2011) (Notice not to Review). The “time for the filing of court appeals” did not run until the sixty days provided by 28 U.S.C. § 2344 had run, or June 13, 2011. *See Fed. R. App. P. 26(a)(1)* (“if the last day [or a period] is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday”). Tienshan filed its Petition on April 29, 2011. Therefore, Tienshan’s Petition was filed prematurely.³

A June 16, 2011, Public Access to Court Electronic Records (PACER) search of the dockets of the Second Circuit and the District of Columbia Circuit found that neither Tienshan nor Tianjin Hua Feng filed a petition for review and the time for the filing of court appeals has run. The Commission’s Rules are to be “construed to secure the just, speedy, and inexpensive determination of every proceeding.” 46 C.F.R. § 502.1. Although the premature Petition for attorney’s fees

³ Commission Rule 227(a)(4) arguably could affect the timing of the filing of a petition for attorney’s fees. *See* 46 C.F.R. § 502.227(a)(4) (“A decision or order of dismissal by an administrative law judge shall only be considered final for purposes of judicial review if the party has first sought review by the Commission pursuant to this section.”).

arguably could be stricken and Tienshan required to refile it in the thirty-day period after June 13, 2011, I find that imposing this requirement would not be consistent with Commission Rule 1. I also note that Tianjin Hua Feng filed an opposition to the Petition, but did not object on the grounds that it was premature. Therefore, I will consider the Petition.

III. TIANJIN HUA FENG'S PROCEDURAL CHALLENGES TO THE AWARD.

Two of Tianjin Hua Feng's arguments are procedural in nature.

A. Tianjin Hua Feng Argues that the Declaration of Todd Fineberg Should not be Considered.

Tianjin Hua Feng argues that the declaration of Todd Fineberg should not be considered because Mr. Fineberg "served as Of Counsel for Tienshan in this matter . . . [and] provided services throughout the entire proceeding." (Response at 5.) "Therefore, Mr. Fineberg's statements about the reasonableness of the fees requested are biased and not independent." (*Id.*)

Tianjin Hua Feng does not cite any support for its argument. In contrast, in a treatise on court awarded attorney's fees, the affidavit of the partner in charge of the litigation is used as an example of a proper affidavit in support of a petition for attorney's fees. *See* M. Derfner & A. Wolf, *Court Awarded Attorney Fees*, ¶ 24.03 at 24-27, Form 6-11 (1998). The fact that Mr. Fineberg was involved in the case is not cause for disqualifying his declaration. Therefore, it is appropriate to consider the declaration of Mr. Fineberg in determining the attorney's fee award.

B. Tianjin Hua Feng Argues that Tienshan Failed to Present Evidence on the Background of the Attorneys.

Tianjin Hua Feng argues that Tienshan

does not provide any evidence as to each attorney's background. The majority of the hours billed were done by Zheng Xie However, there is no evidence about Ms. Zheng's background and experience, such as her law school, graduation year, practice area(s), etc. The same applies to Carlos Rodriguez There is no background, experience and expertise information provided about Mr. Rodriguez.

Therefore, as there is no evidence regarding each attorney's background, the Commission is left in the dark as to what the reasonable and customary fees are in this proceeding.

(Response at 6.) Tianjin Hua Feng does not cite any support for its argument.

The hourly rate that an attorney charges clients "is powerful, and perhaps the best, evidence of his market rate; that is most likely to be what he is paid as 'determined by supply and demand.' *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)." *Dillard v. City of Greensboro*, 213 F.3d 1347,

1354-1355 (11th Cir. 2000). “The legislative history [of 28 U.S.C. § 1988, the statutory authorization for awarding reasonable attorney’s fees in civil rights cases] explains that ‘a reasonable attorney’s fee’ is one that is ‘adequate to attract competent counsel’” *Blum v. Stenson*, 465 U.S. at 897 (quoting S. Rep. No. 94-10011, p. 6 (1976)).

One can begin with the premise that, in the ordinary case, a fee based on the actual rates an attorney charges would be prima facie reasonable. There is no better indication of what the market will bear than what the lawyer in fact charges for his services and what his clients pay. In an efficient market, a “reasonable” rate set by the court should mirror the attorney’s actual rate because no attorney will charge less than that rate if he can get it and no client will pay more.

Griffin v. Washington Convention Center, 172 F. Supp. 2d 193, 197 (D.D.C. 2001).

In [42 U.S.C. § 1988] attorneys’ fee cases, attorneys who customarily charge reduced fees reflecting non-economic, public-spirited goals may seek fees based on the prevailing market rates if the prevailing party demonstrates the reasonableness of the requested hourly rates. That burden entails the following: first, if the attorney customarily charges clients lower rates than plaintiff has requested under section 1988, the attorney must demonstrate that the customarily reduced rates are charged for non-economic reasons; second, the attorney must offer information documenting his or her skill, experience, and reputation; and third, the attorney must produce evidence of the prevailing market rates in the relevant community for attorneys of comparable skill, experience, and reputation.

Covington v. District of Columbia, 57 F.3d 1101, 1103 (D.C. Cir. 1995).

Tienshan has presented evidence that it agreed to pay and did pay the attorneys and paralegals working on its case at the following rates for the following hours:

PERSON	HOURS	RATE
Attorney Rodriguez	40.60	\$350.00
Attorney Lee	12.50	\$195.00
Attorney Fineberg	0.37	\$195.95 [<i>sic</i>]
Attorney Fineberg	1.90	\$200.00
Attorney Xie	175.90	\$185.00
Attorney Xie	199.40	\$195.00
Paralegal Rui	7.10	\$95.00
Paralegal Rui	6.70	\$140.00

(Petition, Exhibit B.)

Tienshan is not seeking an award in excess of the fees it agreed to pay because the attorney charged a reduced fee. This is an ordinary case, the fees are what the lawyers charged for their services and what the clients paid, and are prima facie reasonable. If Tienshan were attempting to obtain an award of attorney's fees paid at a rate exceeding that which it agreed to pay and did pay, the lack of information about the attorneys' background, experience, and expertise would be problematic. I find based on the un rebutted evidence in the exhibits submitted by Tienshan of the hourly rates charged by the attorneys and paralegal that Tienshan agreed to pay establishes that the fees are reasonable. Therefore, I will calculate the attorney's fee award based on those hourly rates.

IV. TIANJIN HUA FENG'S SUBSTANTIVE CHALLENGES TO THE AWARD.

A. Tianjin Hua Feng Argues That the Fees Requested Are Not Reasonable Compared to the Reparation Award.

Tianjin Hua Feng argues that the attorney's fees sought are unreasonable because the Tienshan seeks an award of \$75,130.50 for obtaining a reparation award of \$17,111.60. Tianjin Hua Feng does not cite any support for its argument.

Relying on *City of Riverside v. Rivera*, 477 U.S. 561 (1961), a civil rights case in which the courts awarded \$245,000 in attorney's fees although the money damages award was only \$33,350, the Commission has recognized that "[t]here is ample case law showing that courts do not limit the size of attorney's fees because the basic money damages awarded are relatively small." *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1359 (ALJ 2003) (reparation award of \$310.98, attorney's fee award of \$12,587.50), admin. final Feb. 12, 2003. Tianjin Hua Feng has not articulated any reason to depart from this principle. The attorney's fee award granted by this Order is well within the range permitted by *City of Riverside* and *Bernard & Weldcraft*.

B. Tianjin Hua Feng Argues That Tienshan Is Not Entitled to Pre-Complaint Fees and Costs.

Tianjin Hua Feng argues that Tienshan is not entitled to \$14,635.50 in fees incurred before the Complaint was filed on August 19, 2008.

As Rule 254 covers fees directly related to obtaining a reparations award, these fees are excluded and Tienshan cannot recover them. As the saying goes [*sic*], this is the cost of doing business. These fees were not incurred during this proceeding, but before. Thus, as an alternative argument, should the Commission rule that Tienshan met its burden under Rules 254, it should not be awarded fees incurred prior to this proceeding commencing. This would amount to a windfall to Tienshan and would be contrary to Rule 254 of the Commission Rules.

(Response at 7.)

Attorney's fees incurred while attempting to resolve a dispute without litigation are not recoverable as an award of attorney's fees connected with a reparation award, but attorney's fees relating to the preparation and filing of the complaint may be awarded. *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. at 1350.⁴ Therefore, Tienshan is entitled to an award for attorney's fees for services prior to August 19, 2008, that are directly related to the preparation and filing of its Complaint.

Invoices 37713, 37843, and 38287 record services performed prior to the date Tienshan filed its Complaint. No service recorded on Invoice 37712 or Invoice 37843 is related to the preparation and filing of the Complaint; therefore, the claim for attorney's fees for these services is disallowed. The following services⁵ on Invoice 38287 incurred prior to the filing of the Complaint on August 19, 2008, are directly related to the preparation and filing of the Complaint. All services performed after the filing of the Complaint are directly related to the reparation award.

INVOICE 38287

08/12/2008	ZX	Continued to drafted the Complaint.	1.00	\$185.00	\$185.00
08/12/2008	ZX	Completed the Complaint and drafted the request for discovery.	4.00	\$185.00	\$740.00
08/12/2008	ZX	Reviewed the supporting documents, drafted the Complaint, communicated with client.	5.20	\$185.00	\$962.00
08/13/2008	TCF	Reviewed draft discovery for FMC proceeding and consulted FMC regulations.	0.40	\$200.00	\$80.00
08/13/2008	ZX	Drafted the verified complaint.	0.30	\$185.00	\$55.50
08/13/2008	ZX	Reivewed the reuquest for discovery wiht attorney Finebergg	0.30	\$185.00	\$55.50

⁴ In at least one case, fees were found to be an element of damages and included as part of a reparation award. See *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. at 1350 n.6, citing *Bloomers of Cal., Inc. v. Ariel Maritime Group, Inc.*, 26 S.R.R. 183 (1992). The circumstances supporting this award in *Bloomers* are not present here.

⁵ Tienshan furnished this Office with word processing versions of the invoices in Exhibit B. The descriptions of the services are worded as set forth as in those versions.

08/14/2008	CR	Final draft of Complaint. Final draft of Discovery document. Telcon with R. Sterner. Telxon with Chrisiians P. agent for Wan Hai. Draft e-mails to agent related to escrow agreement. Review escrow agreement.	3.00	\$350.00	\$1,050.00
08/14/2008	ZX	Revised Request for Discovery.	0.20	\$185.00	\$37.00
08/14/2008	ZX	Reviewed the Complaint, worked with Attorney Rodriguez on revising the Complaint, communicated with the Carrier's agent and our client, drafted an escrow agreement.	1.50	\$185.00	\$277.50
08/15/2008	ZX	Reviewed and revised the Complaint and prepared Exhibits.	1.20	\$185.00	\$222.00
08/17/2008	ZX	Prepared filing package with FMC.	1.50	\$185.00	\$277.50
08/18/2008	ZX	Discussed the matter with Attorney Rodriguez and requested for FMC filing fee check from client.	0.20	\$185.00	\$37.00
08/18/2008	ZX	Revised the request for discovery, drafted certificate of service, communicated with client regarding release of the cargo.	4.00	\$185.00	\$740.00
08/19/2008	CR	Final draft of FMC Complaint case.	1.00	\$350.00	\$350.00
08/19/2008	ZX	Added the escrow agreement in our electronic file and added verification and check in our package.	0.10	\$185.00	\$18.50
08/19/2008	ZX	Prepared all documents, discussed with attorney Rodriguez, and filed the Complaint with supporting documents with FMC.	3.00	\$185.00	\$555.00
08/19/2008	ZX	Drafted cover letters and served Complaint and discovery to Respondent's agent, and sent counterparty copies to its attorney and surety.	0.70	\$185.00	\$129.50

08/20/2008	ZX	As per the FMC's request, added notary language in the complaint, and sent to our client for re-execution and notarization.	1.00	\$185.00	\$185.00
08/21/2008	ZX	Obtained notarized Verification, drafted a cover letter to FMC, sent a copy to all parties.	0.90	\$185.00	\$166.50
08/26/2008	ZX	Reviewed our client's request for receipt, and request for receipt from Wan Hai.	0.40	\$185.00	\$74.00
08/28/2008	ZX	Reviewed Wanhai's Letter regarding receipt of Tienshan's payments of demurrage and escrow funds.	0.10	\$185.00	\$18.50
		TOTAL	30.00		\$6,216.00

I award \$6,216.00 for services set forth on Invoice 38287 directly related to the reparation award. The request for attorney's fees for the remaining services totaling \$2,200.00 (\$8,416.00 - \$6,216.00) is denied.

C. Tianjin Hua Feng Argues That Tienshan Is Not Entitled to Attorney's Fees for "Unnecessary Work."

Tianjin Hua Feng argues that:

Tienshan spent a significant number of hours in its Motion for Summary Judgment, which the Commission denied, and opposing Hua Feng's Motion to Compel Discovery Responses, which the Court partially granted.

With respect to the latter, Hua Feng was forced to file a motion to compel Tienshan to respond to discovery requests. Tienshan refused to respond to Hua Feng's interrogatories, requests for admissions, and requests for production of documents. On October 20, 2010, the Commission ordered Tienshan to respond to the requests for production of documents. On November 10, 2010, Tienshan served its Responses to Respondent's Requests for Production of Documents ("Responses."). (Respondent's App. at 3-80).

Besides not cooperating with discovery, Tienshan also engaged in bad conduct to Hue Feng's detriment. In its Responses Tienshan admitted to spoliation of evidence, which the Commission also made a finding in its Initial Decision of March 18, 2011, which became final on April 12, 2011. In its Initial Decision, the Commission noted, "Tianjin Hua Feng has established that eighteen months after

filing its Complaint and acting with gross negligence, Tienshan lost or destroyed its electronically stored documents and discarded or shredded the hard copies of its business records.- (Initial Decision at 14, March 18, 2011).

(Response at 4.)

1. Motion for summary judgment and opposition to Tianjin Hua Feng's motion to compel.

On September 27, 2010, Tianjin Hua Feng filed a motion to compel discovery responses claiming that Tienshan had failed to respond to Tianjin Hua Feng's interrogatories, requests for production of documents, and requests for admission. Tienshan included its opposition to the motion to compel in its Motion for Summary Judgment and Reply to Respondent's Motion to Compel Discovery Responses filed September 28, 2010, and included the attorney time spent on responding to the motion to compel with the hours spent on a motion for summary judgment that was already being prepared. (See Invoice 44845, 09/24/2010 and 09/27/2010). Therefore, the claim for an award for these hours will be discussed together. Tienshan seeks attorney's fees for the motion for summary judgment in the amount of \$8,365.50 on Invoice 43432 and \$4,875.00 (including time attributed to opposing the motion to compel) on Invoice 44845.

With regard to the opposition to the motion to compel, because Tianjin Hua Feng had not been diligent about pursuing discovery, I denied its motion to compel responses to interrogatories and requests for admission, but granted the motion with regard to the documents it sought and ordered Tienshan to respond to the requests for production of documents. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 3-5 (ALJ Oct. 20, 2010) (Memorandum and Order on Respondent's Motion to Compel Discovery and Complainant's Motion for Summary Judgment). If Tianjin Hua Feng's motion to compel had been decided pursuant to the federal rules, it is likely that Tianjin Hua Feng would have been awarded reasonable attorney's fees for bringing the motion to compel. *Compare* Fed. R. Civ. P. 37(a)(5)(A) (requiring award of reasonable attorney's fees in connection with an order compelling responses to request for production of documents unless certain conditions are present) *with* 46 C.F.R. §§ 502.206 and 502.210(a) (no provision for award of attorney's fees).

I find that Tienshan attorney's fees incurred opposing the largely successful motion to compel discovery are not directly related to the reparation award. Although Tianjin Hua Feng's motion to compel was denied with respect to interrogatories and requests for admissions, *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ Oct. 20, 2010), *supra*, the only argument that Tienshan made in opposition to the motion to compel concerned the timeliness of Tianjin Hua Feng's service of all of the discovery. Therefore, it is not appropriate to apportion Tienshan's attorney's fees to account for arguments on which it prevailed and arguments on which it did not prevail. *See* Fed. R. Civ. P. 37(a)(5)(C) (expenses may be apportioned if motion granted in part and denied in part).

Because the attorney time spent on opposing the motion to compel is included in the 9.50 hours claimed for 09/24/2010 and 09/27/2010 on Invoice 44845, the record does not set forth how

much time was spent opposing the motion to compel. I attribute 5.00 hours of the time recorded for these two days to the motion to compel and disallow \$975.00 that I attribute to opposing the motion to compel.

With regard to the motion for summary judgment, the Procedural Order issued June 7, 2010, established a schedule for the parties to file briefs, proposed findings of fact, and evidence supporting their positions, with Tienshan's opening brief due on October 22, 2010. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ June 7, 2010) (June 7, 2010 Procedural Order). On September 28, 2010, three and one-half weeks before its brief was due, Tienshan served its motion for summary judgment. I denied the motion on October 20, 2010, noting that "Tianjin Hua Feng has articulated material facts that are in dispute. Therefore, summary judgment is improper." *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 6 (ALJ Oct. 20, 2010) (Memorandum and Order on Respondent's Motion to Compel Discovery and Complainant's Motion for Summary Judgment). I also noted that:

Even if summary judgment were technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. Tienshan has been ordered to file its opening brief and other papers October 23, 2010, two days from today. To decide Tienshan's motion for summary judgment, I would be required to review the record accompanying the motion for summary judgment handicapped by an inability to weigh the evidence and resolve any factual disputes, then, assuming that summary judgment is not appropriate, go through the presumably more expansive record that will be created by the parties' briefs and evidence armed with the power to resolve factual disputes. This would be an inefficient use of judicial resources. Therefore, Tienshan's motion for summary judgment is denied.

Id. at 6-7.

The Initial Decision demonstrates the appropriateness of denying the motion for summary judgment. Tienshan sought summary judgment on its claim for lost profits in the amount of \$106,115.00. The evidence that might have supported this claim had been destroyed by Tienshan, however. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Decision at 22 (ALJ Mar. 9, 2011) (Initial Decision of Administrative Law Judge Clay G. Guthridge). There was also a dispute of fact regarding whether Tienshan guaranteed the shipper's payments and Tianjin Hua Feng had a maritime lien on the merchandise. *Id.* at 18-19. Therefore, the hours spent on the summary judgment were not directly related to the reparation award. As discussed below, however, because some of the work done on the motion for summary judgment was readily transferrable to Tienshan's brief on the merits, I will award one-half of the attorney's fees attributed to the motion for summary judgment.

Tienshan requested the following attorney's fees for preparation of the motion for summary judgment and opposition to the motion to compel:

INVOICE 43432

06/16/2010	ZX	Researched on summary judgement on damages.	0.50	\$195.00	\$97.50
06/17/2010	ZX	Researched and reviewed the summary judgment procedure and pertinent law. Conference call with Respondent's counsel.	2.10	\$195.00	\$409.50
06/18/2010	ZX	Correspondence with Respondent's counsel, submitted a joint status report and started drafting Motion for Summary Judgement.	2.00	\$195.00	\$390.00
06/21/2010	ZX	Drafted a Motion for Summary Judgment.	3.00	\$195.00	\$585.00
06/22/2010	ZX	Continued to draft the Motion for Summary Judgment.	3.00	\$195.00	\$585.00
06/23/2010	ZX	Continued to draft Motion for Summary Judgment	2.50	\$195.00	\$487.50
06/29/2010	ZX	Continued to draft the motion for summary judgment.	3.00	\$195.00	\$585.00
07/05/2010	ZX	Legal research on standards governing motion for summary judgment and continued to draft motion for summary judgment.	3.00	\$195.00	\$585.00
07/14/2010	ZX	Drafted an affidavit in support of Tienshan's motion for summary judgment.	2.00	\$195.00	\$390.00
07/16/2010	ZX	Legal reselarch on Commission proceeding on summary judgment related to material facts and irrevant facts.	1.50	\$195.00	\$292.50
07/16/2010	ZX	Legal research on Commission proceeding related to summary judgment and issues on material facts and irrelevant facts.	1.50	\$195.00	\$292.50

07/20/2010	ZX	Discussed the motion for summary judgment with Attorney Rodriguez and responded to our client's inquiry regarding the proceeding status.	0.30	\$195.00	\$58.50
07/21/2010	ZX	Continued to draft the motion for summary judgment.	1.50	\$195.00	\$292.50
08/02/2010	ZX	Completed the motion for summary judgment and affidavit, and reviewed the Hua Feng's discovery request.	3.50	\$195.00	\$682.50
08/03/2010	ZX	Legal research in Lexis, and completed the motion for summary judgment and the affidavit in support of the motion.	3.00	\$195.00	\$585.00
08/10/2010	ZX	Completed the Affidavit and continued to draft the motion for summary judgment.	4.00	\$195.00	\$780.00
08/24/2010	ZX	Reviewed and revised the motion for summary judgment, telephone conversation with the client, and revised the affidavit.	3.00	\$195.00	\$585.00
08/31/2010	ZX	Reviewed and revised the motion for summary judgment, prepared new attachments, and prepared for filing to the Commission.	3.50	\$195.00	\$682.50
		TOTAL	42.90		\$8,365.50

INVOICE 44845

09/01/2010	ZX	Obtained legal fees info and reviewed, and drafted a claim for legal fees and revised the motion for summary judgment and affidavit, and completed the attachments.	3.00	\$195.00	\$585.00
09/01/2010	ZX	Drafted a transmittal letter to the Commission, and prepared for process of service of the documents.	1.00	\$195.00	\$195.00
09/03/2010	ZX	Reviewed and revised the motion for summary judgment, and prepared for filing the documents with the FMC.	3.50	\$195.00	\$682.50

09/23/2010	ZX	Worked on the motion for summary judgment and prepared attachments.	4.00	\$195.00	\$780.00
09/24/2010	ZX	Reviewed ledger history and invoices, and revised the affidavit for legal fees, and continued to draft the motion and response to Respondent's motion to compel to responde to Respondent's discover responses.	4.50	\$195.00	\$877.50
09/27/2010	ZX	Worked with Attorney Rodriguez on motion for summary judgment and reply to motion to compel, legal research on awarding attorneys fees in the FMC proceedings, and drafted petition for attorneys fees.	5.00	\$195.00	\$975.00
09/28/2010	ZX	Revised the affidavit for attorneys' fees, revised petititon for same, and prepared filing the motion for summary judgment with the FMC, and served copies to Respondent's counsel.	4.00	\$195.00	\$780.00
		TOTAL	25.00		\$4,875.00

The time spent researching and preparing the motion for summary judgment was readily transferrable to the brief and other documents filed shortly thereafter, and as a result, Tienshan only spent 34.5 hours preparing those filings. (*See Invoice 44845.*) Therefore, I find that one-half the hours spent on the motion for summary judgment is directly related to the reparation award. I will disallow attorney's fees for one-half the hours attributed to the motion for summary judgment on Invoice 43432 (\$4,182.75) and one-half the hours attributed to the motion for summary judgment on Invoice 44845 ($\$1,950.00 = (\$4,875.00 - \$975.00) \div 2$).

2. Supplemental brief on section 10(d)(1).

Neither party discussed the elements of a section 10(d)(1) violation or cited or discussed Commission precedent or other authority in its discussion of section 10(d)(1). Relying on Commission Rule 221, which requires a brief to contain "argument based upon principles of law with appropriate citations of the authorities relied upon," 46 C.F.R. § 502.221(d)(3), I invited the parties to file supplemental briefs with citation to case law and other authorities supporting their positions addressing the issue of whether and how Tianjin Hua Feng's actions violated section 10(d)(1). *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 6 (ALJ Dec. 15, 2010) (Memorandum and Order Requiring Additional Briefing). Tienshan seeks fees for preparing its response to this Order.

The citations to authority required by the December 15, 2010, Order should have been included in Tienshan's brief without the need for an invitation from the presiding officer. Therefore, I will not allow the attorney's fees claimed for the following services.

INVOICE 44845

12/16/2010	TCF	Worked on response to judge's order in FMC case.	1.30	\$200.00	\$260.00
12/27/2010	ZX	Reviewed the Judge's order to file additional briefs.	0.30	\$195.00	\$58.50
12/28/2010	ZX	Legal research on case law regarding violations of Section 10(d)(1) of the Shipping Act.	1.00	\$195.00	\$195.00
12/30/2010	ZX	Legal research in the FMC database regarding cases involving violations of section 10(d)(1) of the Shipping Act and maritime lien cases, and prepared a supplemental brief.	3.50	\$195.00	\$682.50
01/03/2011	ZX	Continued to draft the supplemental brief in issues of violation of Section 10(d)(1) of the Shipping Act.	3.00	\$195.00	\$585.00
01/04/2011	ZX	Added FMC cases citations pursuant to the Judge's Order.	0.50	\$195.00	\$97.50
01/05/2011	ZX	Continued to draft the supplemental brief regarding the violation of section 10(d)(1) of the Shipping Act.	1.00	\$195.00	\$195.00
01/06/2011	ZX	Reviewed and revised Tienshan's Supplemental Brief, drafted a table of contents and table of authorities, drafted a certification of compliance with words limitation, and drafted a transmittal letter, and prepared for filing the brief with the Commission.	3.50	\$195.00	\$682.50
01/07/2011	ZX	Filed the supplemental brief and served the Respondent counsel of same.	0.60	\$195.00	\$117.00
		TOTAL	14.70		\$2,873.00

3. Supplemental brief on spoliation.

When Tienshan responded to Tianjin Hua Feng’s request for production of documents, it revealed that a number of documents responsive to the request had been discarded or shredded after Tienshan commenced this proceeding. In its brief in response to Tienshan’s opening brief, Tianjin Hua Feng argued that Tienshan should be sanctioned for spoliation or as a discovery sanction. Accordingly, I invited Tianjin Hua Feng to file a supplemental brief expanding on its argument and invited Tienshan to respond to it. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 1-5 (ALJ Dec. 15, 2010) (Memorandum and Order Requiring Additional Briefing). Tienshan seeks fees for preparing its response to Tianjin Hua Feng’s brief.

Tienshan’s loss or destruction of evidence relevant to this proceeding was the direct cause of this additional briefing. The work was not directly related to the reparation award. Therefore, I will not allow the attorney’s fees claimed for the following services preparing Tienshan’s brief on spoliation.

INVOICE 44845

01/10/2011	ZX	Reviewed the Respondent’s supplemental brief regarding spoliation of evidence and sanctions, and legal research on pertinent Commission precedents.	1.50	\$195.00	\$292.50
01/11/2011	ZX	Reviewed a reply to motion for sanctions and the ALJ’s order on the motion on sanctions, and drafted Tienshan’s reply to Hua Feng’s Supplemental Brief.	2.00	\$195.00	\$390.00
01/12/2011	ZX	Legal research on spoliation of evidence, relevance requirements of the Federal Rules of Evidence, factors to impose sanctions, drafted Tienshan’s Reply to Hua Feng’s Supplemental Brief, drafted certification of word limitation, table of contents, table of authorities.	6.00	\$195.00	\$1,170.00
01/18/2011	ZX	Prepared filing of the supplemental brief, and legal research on spoliation of evidence, and burden of proof.	2.00	\$195.00	\$390.00
01/19/2011	ZX	Discussed the Tienshan issues with Attorney Rodriguez, and drafted an email in response to the client’s inquiry, and telephone conversation with the client.	1.00	\$195.00	\$195.00

01/20/2011	ZX	Final review of Tienshan's reply to Respondent's Supplemental Brief and prepared for filing of the documents and process of service.	3.00	\$195.00	\$585.00
		TOTAL	15.50		\$3,022.50

4. Withdrawal of foreign language documents.

The Appendix that Tienshan filed with its Brief contained a number of documents written partially in what appeared to be Chinese without the English translations required by Commission Rule 7. 46 C.F.R. § 502.7. I ordered Tienshan to file English translations or withdraw those pages as part of its Appendix. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ Nov. 16, 2010) (Order for Tienshan, Inc., to Supplement Record). Tienshan withdrew the documents. (Notice of Withdrawal of the Documents at Pages 53-154 of Tienshan's Appendix.) Tienshan seeks \$741.00 for 3.8 hours of attorney services complying with this Order. (Invoice 44845.)

If Tienshan needed the documents, it should not have filed them without the English translations. If Tienshan did not need to rely on the documents to prove its case, as appears to be the situation, it should not have filed them at all. I have determined that the work withdrawing the foreign language documents necessitated by the November 16, 2010, Order is not directly related to the reparation award. Therefore, I will not allow the attorney's fees claimed for the following services.

INVOICE 44845

11/16/2010	ZX	Reviewed the Order requesting providing Chinese translation of the documents submitted or withdrawing of the Chinese documents, responded to Respondent's request for an extension of time to file its brief.	0.50	\$195.00	\$97.50
11/18/2010	ZX	Reviewed the Judge's Order regarding the documents in Chinese, and reviewed the Chinese documents.	1.00	\$195.00	\$195.00
11/18/2010	ZX	Reviewed the Judge's order on Chinese documents and reviewed the documents in Tienshan's brief.	1.00	\$195.00	\$195.00
11/19/2010	ZX	Drafted a Notice of Withdrawl of the Documents in Tienshan's Brief, and prepared filing the notice and drafted a transmittal letter.	1.00	\$195.00	\$195.00

11/22/2010	ZX	Filed the Notice of Withdrawl of Chinese documents, and sent copies to Respondent's counsel.	0.30	\$195.00	\$58.50
		TOTAL	3.80		\$741.00

V. COSTS.

Tienshan asks to be awarded "expenses" (costs) in the amount of \$2,175.32. (Petition at 3.) The Commission is authorized only to award reasonable attorney's fees, a term that does not include "costs." *Global Transporte Oceanico S.A. v. Coler Independent Lines Co.*, 28 S.R.R. 1163 n.5 (1999). Therefore, the request for expenses is denied.

VI. SUMMARY AND CONCLUSION.

As the recipient of a reparation award pursuant to the Shipping Act, Tienshan is entitled to an award of reasonable attorney's fees. 46 U.S.C. § 41305(b). Tienshan has established that it is entitled to attorney's fees as follows:

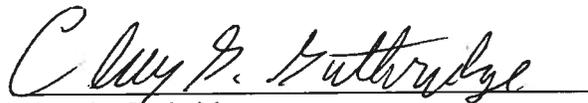
Invoice	Fee Sought	Reason Disallowed	Amount Disallowed	Net attorney's fee award
37713	\$2,124.00	Pre litigation	\$2,124.00	\$0.00
37843	\$6,628.50	Pre litigation	\$6,628.50	\$0.00
38287	\$8,416.00	Pre litigation	\$2,200.00	\$6,216.00
38636	\$4,042.50		\$0.00	\$4,042.50
39274	\$11,000.00		\$0.00	\$11,000.00
40099	\$84.50		\$0.00	\$84.50
43432	\$16,041.00	Summary judgment	\$4,182.75	\$11,858.25
44845	\$26,794.00	Summary judgment	\$1,950.00	\$17,232.50
		Motion to compel	\$975.00	
		Section 10(d)(1)	\$2,873.00	
		Spoilation	\$3,022.50	
		Foreign documents	\$741.00	
		Total	\$9,561.50	
	\$75,130.50	TOTAL	\$24,696.75	\$50,433.75

ORDER

Upon consideration Tienshan, Inc.'s Petition for Attorney's Fees and the supporting information, Tianjin Hua Feng Transport Agency Co., Ltd.'s opposition thereto, the record herein, and for the reasons stated above, it is hereby

ORDERED that Tianjin Hua Feng Transport Agency Co., Ltd., pay Tienshan, Inc., reasonable attorney's fees in the amount of \$50,433.75 in connection with the reparation award entered March 9, 2011. *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831 (ALJ 2011), Notice not to Review (FMC Apr. 12, 2011). It is

FURTHER ORDERED that the request for costs be **DENIED**.



Clay G. Guthridge
Administrative Law Judge