

S E R V E D
April 15, 2015
FEDERAL MARITIME COMMISSION

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DOCKET NO. 14-04

EDAF ANTILLAS, INC.

v.

**CROWLEY CARIBBEAN LOGISTICS, LLC;
IFS INTERNATIONAL FORWARDING, S.L.; and
IFS NEUTRAL MARITIME SERVICES**

INITIAL DECISION DISMISSING PROCEEDING FOR FAILURE TO PROSECUTE¹

BACKGROUND²

Complainant Edaf Antillas is incorporated in Puerto Rico. It is a subsidiary of Editorial Edaf, S.L. (Editorial Edaf), which is incorporated in Spain. Edaf Antillas is engaged in the distribution and marketing of Spanish language books. It is represented in this proceeding by its president, Carlos E. Matos Malec, who is an attorney.

Respondents IFS Neutral Maritime Service (Neutral) and IFS International Forwarding, S.L. (IFS) are affiliated corporations organized under the laws of Spain. Respondent Crowley Caribbean Logistics, LLC (CCL) is a Puerto Rico corporation that is controlled by an entity that is an ocean common carrier within the meaning of 46 U.S.C. § 40102(17). Neutral and CCL are licensed by the

¹ The initial decision will become the decision of the Commission 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.

² The facts, summarized from the allegations in the Complaint, are set out more fully in the order granting in part and denying in part Respondents' motion to dismiss. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Nov. 6, 2014) (Order on Motions to Dismiss).

Commission as non-vessel-operating common carriers (NVOCCs) and are ocean transportation intermediaries (OTI) within the meaning of 46 U.S.C. § 40102(16) and § 40102(19). FMC OTI List, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited Oct. 28, 2014. CCL and IFS are alleged to be ocean freight forwarders within the meaning of 46 U.S.C. § 40102(18). Edaf Antillas alleges on information and belief that CCL acts as the agent for IFS and Neutral in San Juan, Puerto Rico, collecting all fees from the consignee and remitting those portions that correspond to services provided by the origin port agents to IFS and Neutral.

On or about July 14, 2013, Editorial Edaf delivered a less-than-container load (LCL) consignment of books to its forwarding agent Space Cargo, S.L., in Madrid, Spain. Space Cargo engaged IFS and Neutral to transport the books by water to San Juan. Space Cargo delivered the books and export-related documentation to Neutral. Neutral consolidated Editorial Edaf's books with LCL cargo that Neutral transported for other shippers into one container and delivered the container to an ocean common carrier for transportation from the Port of Valencia, Spain, to the Port of San Juan, Puerto Rico. When the container arrived in San Juan, U.S. Customs and Border Protection (CBP) barred entry because a pallet in the container holding cargo transported by Neutral for another shipper did not comply with CBP wood pallet protocol.

After some delay allegedly caused by disagreement over who would pay the costs of curing the problem, the container was transported to St. Martin. Once the non-compliant pallet was replaced, the container and its cargo were returned to San Juan and CBP admitted the cargo into the commerce of the United States. On October 11, 2013, Edaf Antillas picked up its books from CCL.

In its Complaint, Edaf Antillas contends that Respondents violated three sections of the Shipping Act, that the violations caused delay in the delivery of its books, and that Edaf Antillas suffered actual injury from the delay. The Complaint alleges that Respondents violated section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), in three ways. First, Edaf Antillas contends that IFS and Neutral failed to establish reasonable regulations and practices that, if observed and enforced, would have prevented loading a non-compliant wood pallet transported for another shipper into the container with compliant shipments of Edaf Antillas and other shippers, or in the alternative, if IFS and Neutral had established reasonable regulations and practices, they failed to observe and enforce the regulations and practices in a manner that would have prevented loading a non-compliant wood pallet into the container for the shipment from Spain to San Juan. Second, Edaf Antillas contends that CCL, IFS, and Neutral failed to establish reasonable regulations and practices that, if observed and enforced, would have ensured that when CBP barred entry of the container, the matter would be cured for reentry and Edaf Antillas's shipment delivered in a timely and efficient manner. Third, Edaf Antillas contends that CCL violated section 10(d)(1) when it failed to give timely, accurate, and expeditious notification of the information solely required to complete a compliant CBP ISF 10+2 filing.

The Complaint alleges that Respondents violated section 10(b)(8) of the Act, 46 U.S.C. § 41104(8), by demanding payment for expenses that would be incurred in curing the defective cargo from one or more of the Respondents and/or the shipper or consignee of the offending cargo. The delay caused by this demand allegedly gave an "undue or unreasonable preference or advantage" to

both the shipper of the offending cargo and Respondents to the detriment of shippers whose cargo was compliant, and imposed upon each of the innocent shippers an “undue or unreasonable prejudice or disadvantage.” The Complaint alleges that CCL violated section 10(b)(3) of the Act, 46 U.S.C. § 41104(3), by resorting to unfair or unjustly discriminatory methods when it failed to take reasonable, prudent, and sufficient measures to cure the non-compliant container. Edaf Antillas contends that it suffered actual injury as a result of Respondents’ violations of the Act and is entitled to a reparation award.

IFS and Neutral filed a motion to dismiss and CCL filed its own motion to dismiss. After consideration of these motions, all claims against IFS were dismissed for failure to state a claim because the Complaint did not allege that IFS performed any activities that would make it a common carrier or OTI subject to the Act’s jurisdiction. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04, Order at 8-11 (ALJ Nov. 6, 2014) (Order on Motions to Dismiss). The section 10(b)(3) and 10(b)(8) claims against Neutral and CCL were dismissed for failure to state a claim. *Id.*, Order at 11-15. The Complaint was found to state claims that Neutral and CCL violated section 10(d)(1) and to state a claim for reparations. *Id.*, Order at 15-21. On December 8, 2014, the Commission issued a Notice Not to Review the decision. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (FMC Dec. 8, 2014) (Notice Not to Review).

On January 12, 2015, the parties filed a Joint Status Report with a proposed briefing schedule that was adopted. The Briefing Schedule required Edaf Antillas to file its proposed findings of fact, brief, and appendix on or before February 23, 2015. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Jan. 14, 2015) (January 14, 2015, Briefing Schedule). I take official notice of Commission records showing that on January 14, 2015, the Briefing Schedule was sent by email to Carlos E. Matos, Edaf Antillas’s representative, at his company email address, and that on January 15, 2015, Matos responded by email “Received. Thanks.” Edaf Antillas did not file the proposed findings of fact, brief, and appendix as required.

On February 24, 2015, IFS and Neutral filed a Motion to Dismiss the Action and for Attorney Fees. The motion to dismiss is based on their contention that by failing to comply with the January 14, 2015, Briefing Schedule, Edaf Antillas has failed to prosecute its claim. The motion for attorney fees is based on a December 18, 2014, amendment to the Shipping Act. This amendment deleted the phrase “plus reasonable attorney fees” from section 41305(b) of the Shipping Act and added a new section 41305(e): “*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees.” Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022 (Dec. 18, 2014) (Coble Act) (emphasis added). IFS/Neutral contend that IFS is already a prevailing party entitled to an award of attorney fees because the claims against it were dismissed by the November 6, 2014, Order. If the Complaint is dismissed for failure to prosecute, Neutral, already a prevailing party on some claims, will be a prevailing party on the remaining claims.

On February 25, 2015, CCL filed a motion to dismiss based on Edaf Antillas's failure to comply with the Briefing Schedule. CCL also contends the Complaint should be dismissed because Edaf Antillas failed to serve timely responses to discovery and failed to make its accountant available for deposition. CCL included a claim that it should be awarded attorney fees pursuant to the December 18, 2014, amendment to the Act.

On March 2, 2015, I issued an order for Edaf Antillas to show cause before March 12, 2015, why its Complaint should not be dismissed for failure to prosecute or for failure to comply with its discovery responsibilities. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Mar. 2, 2015) (Order for Complainant to File Papers and to Show Cause; Order for Respondents to File Supplemental Briefs). Commission records indicate that this Order was sent to Edaf Antillas at its email address of record on that date. After this order was issued, IFS and Neutral filed a supplement to their motion to dismiss joining in CCL's argument seeking dismissal for failure to comply with discovery responsibilities. As of the date of this Decision, Edaf Antillas has not filed the papers required by the Briefing Schedule or responded to the order to show cause. I also ordered Respondents to file supplemental briefs on or before March 19, 2015, addressing the issue of whether and why section 402 of the Coble Act should be applied in this proceeding. Edaf Antillas was permitted to file replies to these briefs on or before March 26, 2015. *Id.* IFS/Neutral and CCL filed their supplemental briefs. As of the date of this Decision, Edaf Antillas has not replied to the supplemental briefs.

DISCUSSION

I. MOTIONS TO DISMISS FOR FAILURE TO PROSECUTE AND FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS.

The January 14, 2015, Briefing Schedule required Edaf Antillas to file its proposed findings of fact, brief, and appendix on February 23, 2015. Edaf Antillas participated in preparing the proposed schedule and knew and agreed to the proposed schedule before it was entered. Commission records indicate that the Briefing Schedule was sent to Edaf Antillas's representative at his company email address, and its representative responded that he had received it. Furthermore, the records of the Office of Administrative Law Judges email address indicate that between June 2, 2014, and January 15, 2015, using his company email address, Edaf Antillas's representative sent email to judges@fmc.gov at least nine times. Therefore, I find that Edaf Antillas had notice of the requirement that it file its papers on February 23, 2015.

Edaf Antillas did not file its papers as required by the Briefing Schedule and Respondents filed motions to dismiss based on this failure. Commission rules provide that a Commission complaint may be dismissed for failure to prosecute. 46 C.F.R. § 502.72(b). A motion to dismiss is a dispositive motion. 46 C.F.R. § 502.69(g). A party has fifteen days to respond to a motion to dismiss. 46 C.F.R. § 502.70(b).

In response to the motions, I *sua sponte* enlarged the time for Edaf Antillas to respond to IFS/Neutral's motion to March 12, 2015, so responses to both motions to dismiss would be due on

the same day. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Mar. 2, 2015) (Order for Complainant to File Papers and to Show Cause; Order for Respondents to File Supplemental Briefs). I noted that there may have been some valid reason why Edaf Antillas failed to file its proposed findings of fact, brief, and appendix and failed to respond to discovery. Accordingly, I ordered that on or before March 12, 2015, Edaf Antillas must explain why it did not file its papers as required by the Briefing Schedule and show cause why its Complaint should not be dismissed for failure to file its papers timely and failure to respond to discovery. I also ordered Edaf Antillas to file its proposed findings of fact, brief, and appendix with its explanation of why it did not file them on time. If Edaf Antillas responded as required, Respondents' could file responses on March 19, 2015. The Order noted that "[i]f Edaf Antillas fails to respond to this Order by March 12, 2015, an initial decision dismissing its Complaint with prejudice and granting other remedies may be entered." *Id.* Edaf Antillas did not file a response.

Dismissal of the Complaint is appropriate in this proceeding.

[T]he policy of the law is to hear cases on their merits and not to dispose of controversies summarily on account of technicalities. . . . However, there is a limit to this policy, and if a complainant fails to prosecute its complaint, continually ignores rulings, or is otherwise guilty of unexcused dilatoriness in lengthy cases, dismissal of the complaint with prejudice is an accepted sanction. *See Link v. Wabash Railroad Co.*, 320 U.S. 626, 629-631 (1962); *Consolidated Express, Inc. v. Sea-Land Service, Inc., et al.*, 19 F.M.C. 722, 724 [17 S.R.R. 280] (1977); *Ace Machinery Co. v. Hapag-Lloyd A.G.*, 16 S.R.R. 1531 (1976); Dismissal for Failure to Prosecute, 20 A.L.R. Fed 488 (1974); 9 Wright and Miller, *Federal Practice and Procedure*, Section 2370; Federal Rule 41(b), 28 U.S.C.A.

Prudential Lines, Inc. v. Waterman Steamship Corp., 23 S.R.R. 1323, 1324 (ALJ 1986).

As of the date of this Decision, Edaf Antillas has not filed the papers required by the Briefing Schedule, oppositions to the motions to dismiss, or shown cause why its Complaint should not be dismissed. Although unlike earlier orders served on it by email, Edaf Antillas's representative did not acknowledge receipt of the March 12, 2015, Order, on at least nine occasions, Edaf Antillas has sent email to this office using the email address to which the March 12, 2015, order was sent. Edaf Antillas has an obligation to keep its email address current and notify the Commission if it changes. 46 C.F.R. § 502.2(i). It has not notified the Commission that its address has changed. Therefore, I find that Edaf Antillas received the order to show cause at its representative's email address. Edaf Antillas has failed to comply with the orders controlling this proceeding; therefore, its Complaint should be and is dismissed with prejudice for failure to prosecute. 46 C.F.R. § 502.72(b).

The motions for entry of sanctions for failure to comply with discovery obligations are dismissed as moot.

II. MOTIONS FOR ATTORNEY FEES.

A. Respondents' Eligibility for an Award of Attorney Fees Under the Shipping Act as Amended December 18, 2014, Should Be Determined Now.

As described more fully below, the Commission has had the authority to include an attorney fee award to a complainant receiving a reparation award since enactment of the Shipping Act of 1984. 46 U.S.C. § 41305(b). The Commission established a procedure under that provision that postponed consideration of the attorney fee award until the reparation award became final.

(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); or (ii) With the Commission, if exceptions were filed to, or the Commission reviewed, the presiding officer's reparation award decision pursuant to § 502.227 of this part.

(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.

46 C.F.R. § 502.254(c). Under this procedure, the question of an attorney fee award would not be addressed by the presiding officer at this point in the proceeding. This rule is consistent with the practice in the federal courts, as "an award of attorney's fees incident to a final judgment in a federal action is not an element of damages for the merits of the action, but is instead a collateral matter to be addressed by postjudgment motion." 1 Derfner and Wolf, *Court Awarded Attorney Fees* § 1.01[2][a] (2006 Rev.).

On December 18, 2014, the President signed the Coble Act into law. Section 402 of the Coble Act deleted the phrase "plus reasonable attorney fees" from section 41305(b) and added a new section 41305(e): "*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees." Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022 (Dec. 18, 2014) (emphasis added). The Commission has not promulgated a regulation providing guidance on the new attorney fee provision. I find that it is appropriate for me to consider applicability of the new provision to this proceeding and Respondents' eligibility for consideration of an attorney fee award at this point, but to postpone determination of the amount of attorney fees to be awarded, if any, until the Commission's decision on the merits becomes final.

B. Under the Shipping Act as Amended December 18, 2014, an Attorney Fee Award Is Available to a Prevailing Respondent.

The Administrative Procedure Act (APA) provides that in administrative proceedings: “A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.” 5 U.S.C. § 558(b). The Commission only has the authority to award attorney’s fees that Congress has granted to it. In a case involving another federal agency, the circuit court quoted with approval an order of a federal administrative law judge.

The federal courts have awarded attorney’s fees in certain classes of cases not covered by statute, and Turner argues by analogy that the [Federal Communications] Commission has authority to do the same thing. But the “foundation” for this practice in the courts is “the original authority of the chancellor to do equity in a particular situation,” *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166, 59 S. Ct. 777, 780, 83 L. Ed. 1184 (1939), and the Commission has no such equitable authority. Instead, the Commission must find its authority in its enabling statutes. *Regents v. Carroll*, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1949).

Turner v. F.C.C., 514 F.2d 1354, 1355-1356 (D.C. Cir. 1975), quoting *Radio Station WSNT, Inc.*, 27 F.C.C.2d 993 (1971). The court continued:

We affirm the [Federal Communications] Commission’s order. Congress, and not the Commission, can authorize an exception to the “American Rule” that litigants bear the expense of their litigation. The reasoning of the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society*, [421 U.S. 240 (1975)] is fully applicable to litigation before the Federal Communications Commission. Congress has no more extended a “roving commission” to the FCC than it has to the Judiciary “to allow counsel fees as costs or otherwise whenever the . . . (Commission) might deem them warranted.”

Turner v. F.C.C., 514 F.2d at 1356.

The Federal Maritime Commission has not always had the power to award attorney fees. The Shipping Act, 1916, provided for a reparation award to a complainant proving injury resulting from a violation of the Act.

[A]ny person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused by thereby. . . . The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant of the injury cause by such violation.

46 U.S.C. § 821(a) (1983). The 1916 Act did not provide for an award of attorney's fees to a complainant who won a reparation award.

Early versions of the bills that resulted in the Shipping Act of 1984 did not provide for an attorney fee award. The report from the House of Representatives Committee on the Judiciary noted that it added an attorney fee provision.

In section 11(f) of the bill, providing for reparations for persons injured by violations of the Shipping Act, the Committee added language to assure that an injured party receives interest compounded from the date of injury as well as attorneys' fees. Without this amendment, the injured person would receive only simple interest and would have no opportunity to recover attorneys' fees. The new language assures that injured persons [receive] full economic recovery

H.R. Rep. No. 98-53, pt. 2, at 29 (July 1, 1983). *Compare* H.R. Rep. No. 98-53, pt. 1, at 40 (July 1, 1983) (no provision for an attorney fee award in § 11(g)) *with id.* at 105 (adding phrase "plus reasonable attorneys' fees" to § 11(g)). The attorney fee provision was included in the Shipping Act of 1984 as enacted. *See* Shipping Act of 1984, § 11(g), Pub. L. 98-237, 98 Stat. 67, 80-81 (Mar. 20, 1984) ("For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this Act plus reasonable attorney's fees."). When the Shipping Act was reenacted as positive law in 2006, the language was modified, but not the substance.³

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). 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 Federal Maritime 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) (repealed Dec. 18, 2014).

On a December 18, 2014, the President signed the Coble Act into law deleting the phrase "plus reasonable attorney fees" from section 41305(b) and added the new section 41305(e) giving the Commission the power to award attorney fees to "the prevailing party." Congress did not explain the reason for this amendment. The Coble Act's legislative history indicates that it was introduced

³ 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).

in the Senate on June 5, 2014, as Senate Bill 2444, the “Coast Guard Authorization Act for Fiscal Y e a r s 2 0 1 5 a n d 2 0 1 6 . ” S e e <https://www.congress.gov/bill/113th-congress/senate-bill/2444/all-actions-with-amendments>, last visited March 25, 2015. This bill did not have a section amending section 41305 of the Shipping Act. See <https://www.congress.gov/bill/113th-congress/senate-bill/2444/text/is>, last visited March 25, 2014. On December 10, 2014, by unanimous consent, the Senate agreed to two amendments to Senate Bill 2444: Senate Amendment 3997 substituting a new bill containing the amendment to section 41305 and Senate Amendment 3998 amending the title to be the Howard Coble Coast Guard and Maritime Transportation Act of 2014. See <https://www.congress.gov/amendment/113th-congress/senate-amendment/3997>, l a s t v i s i t e d M a r c h 2 5 , 2 0 1 5 ; <https://www.congress.gov/amendment/113th-congress/senate-amendment/3998>, last visited March 25, 2015. See also <https://www.congress.gov/bill/113th-congress/senate-bill/2444/text/es> (containing section 402 amending section 41305 of the Act), last visited March 25, 2015. Apparently, there is no published committee report explaining the various provisions of the Coble Act, and in particular, the amendment to section 41305. The amendment appears in the enrolled bill signed into law. See <https://www.congress.gov/bill/113th-congress/senate-bill/2444/text/enr>, last visited March 25, 2015.

There are two effects of the amendment to section 41305. First, whereas before the amendment, in a complaint proceeding alleging a violation of the Shipping Act, the Commission could only award attorney fees to a complainant receiving a reparation award, now the Commission may award attorney fees to either a prevailing complainant or a prevailing respondent. Second, under repealed section 43105(b), an award of attorney fees to a complainant receiving a reparation award was mandatory. *American President Lines, Ltd. v. Cyprus Mines Corp. and Cyprus Minerals Co.*, 26 S.R.R. 1227, 1235 (FMC Jan. 31, 1994). See 46 U.S.C. § 41305(b) (before amendment) (“the Federal . . . shall direct the payment of reparations . . . plus reasonable attorney fees”) (emphasis added). Now, the Commission has been granted discretion on whether to grant an attorney fee award to a prevailing complainant or prevailing respondent. See 46 U.S.C. § 41305(e) (after amendment) (“the prevailing party may be awarded reasonable attorney fees”) (emphasis added). As noted above, the Commission has not yet promulgated a new rule governing applications for attorney fees under new section 41305(e).

C. The Commission May Award Attorney Fees to a Prevailing Respondent Pursuant to New Section 41305(e) for Services Performed after Enactment of the Coble Act.

1. The Order to file supplemental briefs.

When controlling law is changed mid-case, the question of retroactivity arises. In their motions to dismiss and for attorney fees, Respondents relied on the December 18, 2014, amendment to the Shipping Act to support their claims for attorney fees. IFS/Neutral contend that if the Complaint is dismissed, they will be “prevailing part[ies]” entitled to an award of attorney fees, IFS

for the dismissal of all claims against by the November 6, 2014, and Neutral for the claims other than section 10(b)(1) dismissed by the November 6, 2014, order, and for dismissal of the 10(b)(1) claims by this order. (IFS/Neutral Motion to Dismiss for Failure to Prosecute and for Attorney Fees at 3.) CCL contends that it will be the prevailing party if its motion to dismiss is granted. (CCL Motion to Dismiss for Failure to Prosecute at 2-3.)

Neither IFS/Neutral nor CCL submitted argument regarding retroactive application of section 41305(e). As stated in the Order to File Supplemental Briefs:

Respondents do not offer any justification supporting a contention that this is a situation where the Commission should “apply the law in effect at the time it renders its decision,” *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974) [*Bradley*], instead of a situation where “retroactivity is not favored in the law. . . . Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) [*Bowen*]. Therefore, Respondents are ordered to file supplemental briefs to their motions to dismiss addressing the question of whether and why the December 18, 2014, amendment to section 41305 of the Shipping Act should be applied in this proceeding.

Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services, FMC No. 14-04 (ALJ Mar. 2, 2015) (Order for Complainant to File Papers and to Show Cause; Order for Respondents to File Supplemental Briefs). Respondents have filed the supplemental briefs required by the order. Edaf Antillas has not replied.

There exists an apparent tension between the holdings of the two cases that prompted the order for the parties to file supplemental briefs. *Bradley* concerned litigation commenced in 1961 against the School Board of the city of Richmond, Virginia, seeking to desegregate the public schools. After a decade of litigation, including a couple of trips to the Supreme Court, a plan was approved by the Court. *Bradley*, 416 U.S. at 698-705. Plaintiffs/petitioners moved for an award of attorney’s fees. The district court noted that at that time there was no explicit statutory authorization for an award of fees in school desegregation actions. The court awarded fees, basing its power on two alternative grounds rooted in the court’s general equity power. First, the court observed that prior desegregation decisions demonstrated the propriety of awarding attorney fees when the evidence revealed “obstinate noncompliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed.” *Id.* at 706. As an alternative basis for the award, the district court “that plaintiffs in actions of this kind were acting as private attorneys general in leading school boards into compliance with the law, thereby effectuating the constitutional guarantee of nondiscrimination and rendering appropriate the award of counsel fees.” *Id.* at 708.

While the case was pending before the court of appeals, the Education Amendments of 1972 became law. Section 718 of that Act granted authority to a federal court to award a reasonable attorney’s fee when appropriate in a school desegregation case. The court of appeals heard argument

about section 718's applicability and held that only legal services rendered after the effective date of section 718 were compensable under that act. *Id.* at 710.

On review, the Supreme Court stated:

The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

Id. at 710. The Court anchored its holding “on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Id.* at 711. The Court rejected the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. The Court noted that concerns expressed in its earlier cases “relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.” *Id.* at 717. Regarding the parties, the Court contrasted the Board as a publicly funded governmental entity with a class of children whose constitutional right to a nondiscriminatory education had been advanced by the litigation.

With the Board responsible for the education of the very students who brought suit against it to require that such education comport with constitutional standards, it is not appropriate to view the parties as engaged in a routine private lawsuit. In this litigation the plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system.

Id. at 718. Regarding the nature of the rights, the Court noted that it “has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.” *Id.* at 720. It found that the Board did not have such a right. Regarding the nature of the impact of the change in law upon those rights, the Court found that section 718 did not alter the Board's responsibility for providing pupils with a nondiscriminatory education. The Board engaged in the course of conduct that resulted in the lawsuit:

with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718, if known, rather than simply the common-law availability of an award, would have

caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

The availability of § 718 to sustain the award of fees against the Board therefore merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees. It does not impose an additional or unforeseeable obligation upon it.

Accordingly, upon considering the parties, the nature of the rights, and the impact of § 718 upon those rights, it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause "manifest injustice," as that term is used in [*Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969)], so as to compel an exception of the case from the rule of [*United States v. Schooner Peggy*, 1 Cranch 103 (1801)].

Id. at 721.

Bowen concerned the power of the Secretary of Health and Human Services to promulgate regulations regarding reimbursement to health care providers for expenses incurred in providing medical services to Medicare beneficiaries. The question presented was whether the Secretary may exercise the rulemaking authority to promulgate cost limits that would apply retroactively.

In 1981, the Secretary promulgated regulations that affected the method for calculating the "wage index," a factor used to reflect the salary levels for hospital employees in different parts of the country. Two years later, a district court struck down the rules because the Secretary failed to provide notice and an opportunity for public comment before issuing the rule as required by the APA. The Secretary recognized the invalidity of the rule and settled the hospitals' pending cost reimbursement reports by applying the pre-1981 wage-index method.

In 1984, the Secretary published a notice seeking public comment on a proposal to reissue the 1981 wage-index rule with its effect being retroactive to July 1, 1981. *Bowen*, 488 U.S. at 205-207.

After considering the comments received, the Secretary reissued the 1981 schedule in final form on November 26, 1984, and proceeded to recoup sums previously paid as a result of the District Court's ruling In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside.

Id. at 207 (citation omitted). Georgetown Hospital and others filed suit in district court claiming that the retroactive schedule was invalid under both the APA and the Medicare Act. The district court held that retroactive application was not justified under the circumstances of the case. The court of

appeals affirmed, basing its holding on the alternative grounds that the APA, as a general matter, forbids retroactive rulemaking, and that the Medicare Act, by specific terms, bars retroactive cost-limit rules. *Id.* at 207-208.

The Supreme Court granted certiorari and affirmed. The Court began its analysis by recognizing that an agency's power is limited to that granted by Congress. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking." *Id.* at 208. The Court analyzed the statute in light of the Secretary's arguments and concluded: "The case before us is resolved by the particular statutory scheme in question. Our interpretation of the Medicare Act compels the conclusion that the Secretary has no authority to promulgate retroactive cost-limit rules." *Id.* at 215.

2. Respondents' arguments.

CCL notes that the Supreme Court addressed the tension between *Bradley* and *Bowen* in *Martin v. Hadix*, 527 U.S. 343 (1999), and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). "These maxims have been reconciled into a rule that courts must first identify any expressed congressional intent, and then, if need be, consider whether application of the new law would operate in a retroactive manner." (CCL's Supp. Memo. at 2.) CCL did not locate any legislative history or other indication of Congressional intent. CCL contends:

The question therefore is whether application of the amendment would have retroactive effect. It would not.

It is clear beyond peradventure that attorney's fees may be awarded to CCL for legal services rendered after the amendment. The Supreme Court has held that "[w]hen the intervening statute authorizes or affect the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, supra, 511 U.S. at 273; *See also Martin*, supra 527 U.S. at 360. . . .

Although not quite as obvious, the Presiding Judge is also authorized to award CCL attorney's fees for legal services rendered prior to December 18, because the conduct qualifying CCL for an award of attorney's fees occurred after the Shipping Act was amended. The D.C. Circuit, for example, has twice held that a congressional liberalization of the term "prevailing party," as used in FOIA, did not apply because the conduct making plaintiffs a prevailing party under the new definition had occurred well before the statutory change. *Davis v. U.S. Dep't of Justice*, 610 F.3d 750 (D.C. Cir. 2010); *Summers v. Dep't of Justice*, 569 F.3d 500 (D.C. Cir. 2009). By obvious implication, had the plaintiffs prevailed only after the law had changed, they would have been "prevailing parties" authorized to receive an award of attorney's fees. Here, CCL will not become a prevailing party unless and

until the Presiding Judge issues an Order dismissing the complaint. And the conduct underlying that dismissal and qualifying CCL as a prevailing party – failure to file the brief required by the January 14, 2015, Briefing Schedule and failure to respond [to] the March 2 Order to show cause – occurred on February 24, 2015 and March 13, 2015 respectively, well after December 18, 2014.

(*Id.* at 2-3.)

IFS/Neutral contend that *Bradley* sets forth:

a three-part inquiry to determine whether applying the law in effect at the time a court renders its decision would work a manifest injustice upon a party to an action. The possibility of an injustice depends “upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.” No injustice would be visited upon Edaf by applying section 41305 of the Shipping Act, as recently amended by the Howard Coble Act, in this case.

(IFS/Neutral Supp. Brief at 3, *quoting Bradley*, 416 U.S. at 717.) IFS/Neutral cite a district court case it contends summarizes the holdings on attorney fees of *Bradley* and *Landgraf*.

In distinguishing *Bradley* from the facts presented in *Landgraf*, the Supreme Court identified two material differences between the attorney’s fees award at issue in *Bradley* and the damages award issued in *Landgraf*: (1) the attorney’s fees issue was “collateral” and “uniquely separable” from the primary cause of action; and (2) even before the statute was enacted, the federal courts had authority to award attorney’s fees.

Gordon v. Pete’s Auto Service of Denbigh, Inc., 838 F. Supp. 2d 436, 444 (E.D. Va. 2012).

As the *Gordon* court recognized, the issue of whether to award attorney fees is collateral and separable from the primary cause of action. The award of attorney fees in the instant matter is similarly collateral and separable from the primary cause of action. Therefore, Neutral and IFS should be awarded their attorney fees incurred defending against Edaf’s claim.

(IFS/Neutral Supp. Brief at 9 (footnote omitted).) IFS/Neutral then cite and discuss a number of other attorney fee cases, none of which concern the power of a federal agency to award attorney fees. (*Id.* at 9-11.)

3. The Commission may not grant an attorney fee award to a prevailing respondent for work done prior to December 18, 2014.

Edaf Antillas filed its Complaint on April 28, 2014. Respondents incurred attorney fees for preparation and filing of answers, motions to dismiss, and other documents, and for other activities, most of which occurred before December 18, 2014. On December 17, 2014, the Commission did not have the power to grant an attorney fee award to a prevailing respondent. After enactment of the Coble Act on December 18, 2014, the Commission had the power to grant an attorney fee award to a prevailing respondent.

This fact pattern presents a recurring question in the law: When should a new federal statute be applied to pending cases? *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997). To answer this question, we ask first “whether Congress has expressly prescribed the statute’s proper reach.” *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. *Ibid.* If so, then in keeping with our “traditional presumption” against retroactivity, we presume that the statute does not apply to that conduct. *Ibid.* *See also Hughes Aircraft Co. v. United States ex rel. Schumer, supra*, at 946.

Martin v. Hadix, 527 U.S. at 352.

The answer to the first question is that the Coble Act does not expressly prescribe the temporal reach of the new attorney fee provision. Furthermore, there is no legislative history that would shed any light on its intention. Therefore, the Commission:

must determine whether application of [section 41105(e)] in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about “whether the new provision attaches new legal consequences to events completed before its enactment.” This judgment should be informed and guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.”

Martin v. Hadix, 527 U.S. at 357-358.

Martin v. Hadix concerned the application of section 803(d)(3) of the Prison Litigation Reform Act of 1995 (PLRA) placing limits on the fees that may be awarded to attorneys who represent prisoners in lawsuits against the prison system. As described by the Court, *see Martin v. Hadix*, 527 U.S. at 347-351, several years before enactment of the PLRA, the district court had

entered remedial orders in two cases alleging constitutional violations in the treatment of prisoners in the Michigan prison system. The orders provided that the plaintiffs were entitled to attorney fees for postjudgment monitoring of the defendants' compliance with the court's remedial decrees. Attorney fees would be paid at the prevailing market rate. At the time PLRA was enacted, the prevailing rate in the Eastern District of Michigan was set at \$150 per hour.

Section 803(d) of the PLRA placed a cap on the hourly rate at which attorney fees could be awarded in prison litigation suits:

(d) Attorneys fees (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent [authorized here]. . . . (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U.S.C. § 3006A (1994 ed. and Supp. III)], for payment of court-appointed counsel [in criminal cases].

42 U.S.C. § 1997e(d) (1994 ed., Supp. II). At the time the PLRA was enacted, court-appointed attorneys in the Eastern District of Michigan were compensated at a maximum rate of \$75 per hour. Therefore, under section 803(d)(3), the hourly rate for attorneys working on prison litigation suits translated into a maximum of \$112.50 per hour.

Plaintiffs' attorneys submitted fee requests for postjudgment monitoring that occurred before and after the effective date of PLRA. In the first submission, the district court held that the PLRA fee limitation did not apply to fees for services performed before the effective date and the Sixth Circuit affirmed. In the second submission for services, some of which were performed before the effective date of PLRA and some of which were performed after, the district court held that PLRA did not limit fees for services performed before PLRA, but did limit fees for services performed after PLRA. On appeal, the Sixth Circuit affirmed the ruling for pre-PLRA services, but held that if PLRA were applied to pending cases for services performed after the effective date of PLRA, "it would have an impermissible retroactive effect, regardless of when the work was performed." *Id.* at 351. The case reached the Court in this posture on the prison system's petition for review.

Much like Respondents herein, the prison system argued that the application of the PLRA limit on fees for postjudgment monitoring performed prior to the effective date of PLRA was proper because the fees were incidental to, and independent from, the underlying substantive cause of action.

They contend that the application of a new attorney's fees provision is "unquestionably proper," Brief for Petitioners 24 (quoting *Landgraf, supra*, at 273), because fees questions "are incidental to, and independent from, the underlying substantive cause of action." They do not, in other words, change the substantive

obligations of the parties because they are “collateral to the main cause of action.” Brief for Petitioners 24-25 (quoting *Landgraf*, 511 U.S. at 277) (internal quotation marks omitted).

Martin v. Hadix, 527 U.S. at 358-359. The Court rejected this argument. “When determining whether a new statute operates retroactively, it is not enough to attach a label (e.g., ‘procedural,’ ‘collateral’) to the statute; we must ask whether the statute operates retroactively.” *Id.* at 359. The Court distinguished its holding in *Bradley*, which had awarded attorney’s fees under a new statute for work prior to its enactment.

Because attorney’s fees were available, albeit under different principles, before passage of the statute, and because the District Court had in fact already awarded fees invoking these different principles, there was no manifest injustice in allowing the fee statute to apply in that case. *Id.*, at 720-721. We held that the award of statutory attorney’s fees did not upset any reasonable expectations of the parties. *See also Landgraf*, 511 U.S. at 276-279 (distinguishing *Bradley* on these same grounds). In this case, by contrast, from the beginning of these suits, the parties have proceeded on the assumption that 42 U.S.C. § 1988 would govern. The PLRA was not passed until well after respondents had been declared prevailing parties and thus entitled to attorney’s fees. To impose the new standards now, for work performed before the PLRA became effective, would upset the reasonable expectations of the parties.

Martin v. Hadix, 527 U.S. at 360.

The same principal controls the application of new section 43105(e) in this proceeding. When Edaf Antillas filed its Complaint, the Commission did not have the authority to award attorney fees to prevailing respondents. From the beginning of this proceeding until December 18, 2014, the parties proceeded on the assumption that now-repealed section 43105(b) would govern. The reasonable expectation of Edaf Antillas and of Respondents was that if Respondents prevailed, Edaf Antillas could not be required to pay Respondents’ attorney fees. Applying new section 43105(e) to award attorney fees to a prevailing respondent attorney for services performed prior to its effective date would upset these expectations.

IFS/Neutral cite a number of federal court cases in which an attorney fee statute was applied for services performed before enactment of the attorney fee provision. (IFS/Neutral Supp. Brief at 10.) In each of these cases, “even before the statute was enacted, the federal courts had authority to award attorney’s fees.” *Gordon v. Pete’s Auto Service of Denbigh, Inc.*, 838 F. Supp. 2d at 444. *See Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 299-305 (3d Cir. 2000) (attorney’s fees imposed as a discovery sanction authorized by Fed. R. Civ. P. 37(b) and (d); retroactivity not an issue); *Charles Labs, Inc. v. Banner*, 79 F.R.D. 55, 58 (S.D.N.Y. 1978) (court adopts magistrate’s recommendation “that plaintiff be directed, pursuant to Rule 37(d), F.R. Civ. P., to pay to the individual defendants reasonable attorneys’ fees, in the amount of \$250, incurred in the bringing of the portion of this motion seeking dismissal for failure to comply with discovery

demands”; retroactivity not an issue); *Cluck v. Osherow*, 91 F.3d 141, 1996 U.S. App. LEXIS 43821, at 1 (5th Cir. Tex. June 21, 1996) (district court has inherent power to impose sanctions), at 2 (court of appeals has authority to impose costs and attorney’s fees for frivolous appeal pursuant to Fed. R. App. P. 38; retroactivity not an issue); *Drayton v. The Assocs.*, No. 3:97-CV-2924-BC, 2000 U.S. Dist. LEXIS 1266, at 5, 2000 WL 49189 (N.D. Tex. Jan. 21, 2000) (“A federal district court has the inherent power to award attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”; retroactivity not an issue); *Barsoumian v. Szozda*, 108 F.R.D. 426 (S.D.N.Y. 1985) (court found that “plaintiffs should not have to suffer the consequences of their attorney’s negligence” and vacated order dismissing action for failure to prosecute when attorney inexcusably failed to appear for pretrial conference; \$200 court costs and \$300 attorney’s fee award for defendant imposed on plaintiff’s attorney for “having so multiplied the proceedings as to increase costs unreasonably”; retroactivity not an issue). These cases do not support an argument that new section 41305(e) gives the Commission the power to award attorney fees to prevailing respondents for services performed prior to December 18, 2014.

CCL contend that *Davis v. U.S. Dep’t of Justice*, 610 F.3d 750 (D.C. Cir. 2010), and *Summers v. U.S. Dep’t of Justice*, 569 F.3d 500 (D.C. Cir. 2009), support the “obvious implication, had the plaintiffs in those cases prevailed on their Freedom of Information Act (FOIA) after the law on prevailing parties had changed, they would have been “prevailing parties” authorized to receive an award of attorney’s fees.” (CCL’s Supp. Memo. at 2.) Under FOIA, the district court “may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred . . . in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). *Davis* and *Summers* concerned the retroactive effect of an amendment to this provision.

Summers sought FBI records to aid him in writing a biography of Richard Nixon. When the FBI did not timely comply, Summers filed a district court complaint under FOIA. The court granted the FBI’s motion for summary judgment regarding some of the documents and Summers appealed. The court of appeals referred the case to mediation. In 2005, the FBI agreed to disclose three names from a document in exchange for Summers’s voluntary dismissal. The parties entered into a Settlement Agreement that provided it “shall not constitute an admission of success on the merits for purposes of any claim for attorneys’ fees.” The Agreement notwithstanding, Summers moved the district court for an award of attorneys’ fees. The district court denied attorney’s fees because Summers had not received any court-ordered relief and was therefore ineligible to receive a fee award under the FOIA. *Summers v. U.S. Dep’t of Justice*, 569 F.3d at 502.

The court summarized the history of attorney fee awards under FOIA.

Prior to 2002 [the District of Columbia Circuit] applied the “catalyst theory” to determine whether a plaintiff had “substantially prevailed” and was therefore eligible for an award of attorneys’ fees. Under the catalyst theory, “[s]o long as the litigation substantially caused the requested records to be released, the FOIA plaintiff could recover attorney’s fees even though the district court had not rendered a judgment in the plaintiff’s favor.” If the catalyst theory still governed, then Summers would be

eligible to receive attorneys' fees; the district court, however, would retain discretion to deny an award

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*[, 535 U.S. 598 (2001)], the Supreme Court rejected the catalyst theory, as applied to fee provisions in the Americans with Disabilities Act of 1990 and the Fair Housing Amendments Act of 1988, because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” In [*Oil, Chem. & Atomic Workers Int’l Union v. DOE*, 288 F.3d 452, 454, 351 U.S. App. D.C. 199 (2002) (*OCAW*)], we applied the teaching of *Buckhannon* to a request for attorneys’ fees under the FOIA, stating that “in order for plaintiffs in FOIA actions to become eligible for an award of attorney’s fees, they must have ‘been awarded some relief by [a] court,’ either in a judgment on the merits or in a court-ordered consent decree.”

As part of the OPEN Government Act of 2007, the Congress amended the FOIA to incorporate the catalyst theory. A plaintiff now qualifies as having “substantially prevailed” regardless whether he obtained a judicial order or consent decree or “obtained relief through . . . a voluntary or unilateral change in position by the agency, if [his] claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E)(ii).

Summers argues the 2007 Act applies retroactively to his 2005 settlement of the case, thereby making him eligible to recover attorneys’ fees. Alternatively, Summers argues the district court erred in holding him ineligible under the pre-Act version of the FOIA.

Summers v. U.S. Dep’t of Justice, 569 F.3d at 502-503.

Davis was decided one year later. In 1986, Davis sought FBI audio tapes and filed suit in 1988 when they were not produced.

[T]he Department voluntarily released many of the requested tapes in 1995, one additional tape in 1999, but nothing more in the decade that followed. The district court granted summary judgment in favor of the Department in 2007, concluding that it had fulfilled its obligations under FOIA. Davis then moved for attorneys’ fees.

Davis v. U.S. Dep’t of Justice, 610 F.3d at 752 (citations omitted). In an earlier appeal before the 2007 amendment, the court of appeals had determined that Davis was not eligible for an attorney fee award under *Buckhannon* and *OCAW* and remanded for further proceedings on the merits. After the 2007 amendment, a magistrate agreed with Davis that the 2007 amendment was retroactive and awarded attorney fees, but the district court denied fees. *Id.* Regarding retroactivity, the court of appeals in *Davis* stated that *Summers*:

largely determined the temporal scope of the 2007 Act. *Summers* involved a request for attorneys' fees in a FOIA lawsuit that was settled in 2005, after *OCAW* but before the 2007 Act. The district court held the plaintiff ineligible for a fee award under *OCAW*. The 2007 Act took effect while the appeal was pending, and the plaintiff asked us to apply the new statute. The *Summers* court observed that because the government had voluntarily relinquished the records, it was not liable for attorneys' fees "under the pre-amendment rule of *Buckhannon*." Applying the new law would therefore "impose an 'unforeseeable obligation' upon the defendant by exposing it to liability for attorneys' fees for which it clearly was not liable before."

Davis v. U.S. Dep't of Justice, 610 F.3d at 753 (citations omitted).

What distinguishes *Bradley* – and by implication *Summers* – is the "prior availability" of attorneys' fees "under pre-existing theories." *Landgraf*, 511 U.S. at 278; see *Bradley*, 416 U.S. at 721. The statute at issue in *Bradley* did not operate retroactively because the "extent of the change in the law" was negligible. *Landgraf*, 511 U.S. at 270. *Davis*, unlike the *Bradley* plaintiffs, was not eligible for attorneys' fees before Congress enacted the relevant statute. See [*Davis v. U.S. Dep't of Justice (Davis IV)*, 460 F.3d 92, 105-106 (D.C. Cir. 2006)]. Although the magistrate judge found *Davis* entitled to a fee award, he did so only after applying the 2007 Act retroactively – wrongly as it turns out. He did not rely on any pre-existing authority.

Davis v. U.S. Dep't of Justice, 610 F.3d at 755.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208; *Turner v. F.C.C.*, 514 F.2d at 1356. See also CRS Report for Congress: Awards of Attorneys' Fees by Federal Courts and Federal Agencies (updated June 20, 2008) ("Federal agencies, like federal courts, may not, absent statutory authority, order one party to a proceeding to pay the attorneys' fees of another. Even the common law exceptions to the American rule are unavailable to federal agencies, as those exceptions stem from the inherent power of federal courts to do equity. *Turner v. Federal Communications Commission*, 514 F.2d 1354 (D.C. Cir. 1975).") (available at <http://www.fas.org/sgp/crs/misc/94-970.pdf>). Prior to the Coble Act, the Commission did not have the power to award attorney fees to a prevailing respondent. Application of the Coble Act amendment giving this power to the Commission for attorney services performed prior to its enactment would upset the reasonable expectations of the parties. *Summers* and *Davis* do not support CCL's argument that because the dismissal of Edaf Antillas's Complaint is based on Edaf Antillas' act (or failure to act) after the Coble Act means that an attorney fee award for services performed before the Coble Act would not be retroactive. The fact that "the conduct underlying that dismissal and qualifying CCL as a prevailing party," (CCL's Supp. Memo. at 2), the failure of Edaf Antillas to file the papers required by the Briefing Schedule, occurred after enactment of the Coble Act, does not give the Commission power to award attorney fees for services performed before enactment of the Coble Act. Therefore, I conclude that the Commission does not have the power

to award attorney fees to prevailing respondents for attorney services performed before December 18, 2014.

4. The Commission may grant an attorney fee award to a prevailing respondent for attorney work done after enactment of the Coble Act.

In *Martin v. Hadix*, the Court found that it is proper to apply the PLRA's attorney fee restriction to postjudgment monitoring performed after enactment of PLRA.

With respect to postjudgment monitoring performed after the effective date of the PLRA, by contrast, there is no retroactivity problem. On April 26, 1996, through the PLRA, the plaintiffs' attorneys were on notice that their hourly rate had been adjusted. From that point forward, they would be paid at a rate consistent with the dictates of the law. After April 26, 1996, any expectation of compensation at the pre-PLRA rates was unreasonable. There is no manifest injustice in telling an attorney performing postjudgment monitoring services that, going forward, she will earn a lower hourly rate than she had earned in the past. If the attorney does not wish to perform services at this new, lower, pay rate, she can choose not to work. In other words, as applied to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns.

Martin v. Hadix, 527 U.S. at 361-362. The reasonable expectation of the parties and the attorneys from that point is that the new attorney fee provision would apply.

In this proceeding, since the enactment of the Coble Act, the parties have been on notice (constructive, if not actual) that the Commission's power to issue an attorney fee award has been changed. From that point forward, the prevailing party – complainant or respondent – may be awarded reasonable attorney fees. The parties could adjust their litigation decisions at that point to account for this change. It does not upset the reasonable expectations of the parties to award attorney fees to a prevailing respondent. Therefore, I conclude that the Commission has the power to award attorney fees to respondents for attorney services performed after enactment of section 402 of the Coble Act.

D. Determination of an Attorney Fee Award Should Be Made after the Commission Decision Becomes Final.

As discussed above, the Commission promulgated a regulation governing attorney fee awards pursuant to repealed section 41305(b). 46 C.F.R. § 502.254. Under this rule, the attorney fee award normally is not determined until the Commission decision became final. Despite Rule 254, Commission precedent permits determination of the attorney fee award by the administrative law judge in circumstances of default.

[W]hen a respondent has defaulted and there is no reasonable possibility that such respondent will either file exceptions to the Initial Decision or a petition for judicial review, this rule has been waived and petitions have been filed earlier and even before the Initial Decision has been served. *See, e.g., [Global Transporte Oceanico S.A. v. Coler Ocean Independent Lines Co., 28 S.R.R. 1162 n.1 (administratively final, December 10, 1999)]. See also Classic International, Inc. v. Young Hee Ko d/b/a World Transport, et al., 28 S.R.R. 1086 (administratively final, August 3, 1999) (petition for attorney's fees filed before Initial Decision was served in default case).*

Tampa Bay International Terminals, Inc. v. Coler Ocean Independent Lines Co., 28 S.R.R. 1390, 1392 n.4 (ALJ 2000, administratively final May 2, 2000). A dismissal of a complaint for failure to prosecute is similar to a decision against a defaulting respondent and arguably could be addressed at this point in the proceeding.

The Commission has not yet promulgated regulations governing awards under section 41305(e). Regarding the temporal application of section 43105(e), the Commission may determine that section 41305(e) should be applied retroactively, as Respondents in this proceeding argue it should. In the alternative, cognizant of the fact that before the Coble Act, complainants filed their complaints without an expectation that they could be required to pay attorney fees of a prevailing respondent, the Commission could determine that section 41305(e) should only be applied in proceedings commenced after enactment of the Coble Act. The Commission also may provide regulatory guidance on how it intends to exercise the greater discretion it now has in awarding attorney fees. *Compare* 46 U.S.C. § 41305(b) (the Commission “shall direct the payment of reparations . . . plus reasonable attorney fees”) *with* 46 U.S.C. § 41305(e) (“the prevailing party may be awarded reasonable attorney fees”). Therefore, I find that it is not appropriate to determine the amount of an attorney fee award at this time, but that determination should be deferred until the Commission has had an opportunity to address this decision and provide guidance on the application of section 41305(e).

ORDER

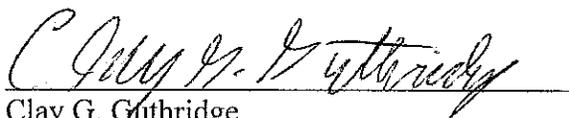
Upon consideration of the Motion to Dismiss the Action and for Attorney Fees filed by respondents IFS Neutral Maritime Service, Inc., and IFS International Forwarding, S.L., the Motion to Dismiss for Failure to Prosecute filed by respondent Crowley Caribbean Logistics, LLC, Respondents' supplemental briefs, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the motions to dismiss for failure to prosecute be **GRANTED**. The Complaint filed by complainant Editorial Edaf, S.L., is dismissed with prejudice. 46 C.F.R. § 502.72(b). It is

FURTHER ORDERED that the motions for entry of sanctions for failure to comply with discovery obligations be dismissed as moot. It is

FURTHER ORDERED that the motions for attorney fees be **GRANTED IN PART** and **DENIED IN PART**. Respondents may not be awarded reasonable attorney fees for work done prior to December 18, 2014. Respondents may be awarded reasonable attorney fees for work done after enactment of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, 128 Stat. 3022 (Dec. 18, 2014). It is

FURTHER ORDERED that the amount of the attorney fee to be awarded, if any, be determined after the Commission issues its final decision in this proceeding.


Clay G. Guthridge
Administrative Law Judge