

Federal Maritime Commission  
Washington, D.C.

Edaf Antillas, Inc.,

Docket No. 14-04

Complainant

v.

Crowley Caribbean Logistics, LLC,  
IFS International Forwarding, S.L.  
and IFS Neutral Maritime Services,

Respondents.

**IFS NEUTRAL MARITIME SERVICE, INC.'S AND**  
**IFS INTERNATIONAL FORWARDING, S.L.'S SUPPLEMENTAL**  
**BRIEF REGARDING THEIR ENTITLEMENT TO ATTORNEY FEES**

Respondents IFS Neutral Maritime Service, Inc. ("Neutral") and IFS International Forwarding, S.L. ("IFS"), by and through their attorneys, Betancourt, Van Hemmen, Greco & Kenyon LLC, file this Supplemental Brief in accordance with the March 17, 2016 Order of the Federal Maritime Commission, in support of an award of attorney fees to Neutral and IFS following the recent amendment to section 41305 of the Shipping Act.

Neutral and IFS, prevailing parties in this action, requested an award of attorney fees incurred in defending against Edaf Antillas, Inc's ("Edaf") claims. The basis for Neutral's and IFS' request was the Howard Coble Coast Guard and Maritime Transportation Act of 2014, which became Public Law 113-281 on December 18, 2014 ("Coble Act"). The Coble Act amended section 41305 of the Shipping Act to permit an

award of attorney fees to the prevailing party in an action brought under section 41301 of the Shipping Act. 46 C.F.R. § 502.254.

1) The ALJ Correctly Awarded Attorney Fees to Neutral and IFS for Work Performed On and After the Coble Act's Effective Date

The ALJ's decision to award respondents attorney fees for work performed on and after December 18, 2014 was fully in accord with the Coble Act. The discussion contained in the Final Rule specifically addressed the award of attorney fees in an action, such as the instant one, which was pending on the Coble Act's effective date:

Following the passage of the Coble Act, however, complainants were on notice that any prevailing party, including a prevailing respondent, was eligible for attorney fees. After that date, any expectation of continued immunity from liability for such fees would be unreasonable. Accordingly . . . awarding attorney fees for services performed by respondent's counsel on or after December 18, 2014 would not, as a general matter, attach new legal consequences to conduct completed before enactment and would not present a retroactivity problem.

81 Fed. Reg. 10517 (Mar. 1, 2016) (internal citations omitted). Accordingly, the award of attorney fees to Neutral and IFS for work performed on and after December 18, 2014 was proper and should be affirmed.

2) The Amendment to the Shipping Act Concerning Attorney Fees Authorizes an Award of Attorney Fees for Work Performed Prior to the Coble Act's Effective Date

The ALJ declined to award Neutral and IFS attorney fees for work performed prior to December 18, 2014. Neutral and IFS acknowledge that the comments to the final rule adopted by the Federal Maritime Commission on March 1, 2016, indicate that in the

majority of cases, awarding attorney fees to prevailing respondents for work performed on pending cases prior to December 18, 2014 would have an impermissible retroactive effect. 81 Fed. Reg. 10516-17 (Mar. 1, 2016). However, the Commission also emphasized that the prohibition would “not necessarily [be] binding in individual proceedings. The specific facts of each case, including the status of the proceeding on the Coble Act’s effective date, may materially alter the considerations discussed above in the retroactivity analysis.” *Id.* at 10517.

The specific facts of this case support awarding Neutral and IFS attorney fees for work performed prior to the Coble Act’s effective date. Edaf repeatedly disregarded the ALJ’s orders, causing Neutral and IFS significant expense in the defense of this action. As detailed in the January 30, 2015 Status Report of IFS Neutral Maritime Service, Inc. and Request for Relief (Doc. No. 38), Edaf refused to produce its accountant for his deposition. As also previously detailed, Edaf required substantial additional time to respond to routine discovery requests. See e.g. Third Joint Status Report, Doc. No. 34. Edaf ignored the court’s January 14, 2015 Briefing Schedule and never filed proposed findings of fact, brief, or appendix as ordered, despite acknowledging receipt of the Briefing Schedule. Edaf also totally ignored the ALJ’s March 2, 2015 Order to File Papers and Show Cause. As a result of Edaf’s meritless claim, which Edaf apparently abandoned, Neutral and IFS were forced to expend significant resources in their defense throughout the entirety of these

proceedings. An award of attorney fees is supported by the new regulations and the legal framework as argued to the ALJ, and summarized below.

The Supreme Court has directly addressed the issue of whether a recently enacted law permitting an award of attorney fees should be applied to attorney fees incurred in a case pending before the law was enacted. Bradley v. Sch. Bd. of City of Richmond, 416 U.S. 696 (1974). The Court determined that plaintiffs were entitled to an award of attorney fees for services performed before the effective date of the attorney fee statute and anchored its “holding in this case on the principle that a court is to apply the law in effect at the time it renders its decisions, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary.” Id. at 711. The Court expressly “reject[ed] 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.” Id. at 715.

The Bradley Court set 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.” Id. at 717. 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.

It is clear from the nature and identity of the parties that application of the amended attorney fees provision will not result in any injustice to Edaf. Edaf, Neutral, and IFS are all commercial entities, similarly situated, who were parties to a contract for the provision of services related to an international shipment of books. There is no disparity between the parties' abilities to adequately protect their interests. The transaction underlying Edaf's complaint was the result of an arms-length negotiation between commercial actors. The Howard Coble Act amendments to the Shipping Act, which now permit any prevailing party an award of attorney fees, further evidences the fact that in these commercial settings the parties are generally on equal footing.

Edaf also does not suffer any injustice when the amended attorney fees provision is applied in light of the nature of the affected right. The courts' "concern that injustice may arise from the retrospective application of a change in law relates to the nature of the rights effected by the change." *Id.* at 719. Edaf suffers no injustice in this instance because, as the Supreme Court has recognized, attorney fees "are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." Landgraf v. USI Film Prods., 511 U.S. 244, 277 (1994). The Howard Coble Act has not taken away any vested, substantive right, it has merely amended a provision collateral to the litigant's primary cause of action. Accordingly, because attorney fees issues are collateral to the primary cause of action, awarding Neutral and IFS attorney fees in this matter does not

affect any substantive right of Edaf.

The third part of the inquiry “has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard.” Bradley, 416 U.S. at 720. In the instant matter, the Howard Coble Act’s change to the Shipping Act’s attorney fees provision “does not impose an additional or unforeseeable obligation upon” Edaf. Id. at 721. There is no indication that Edaf would have refrained from bringing this action before the FMC had the Howard Coble Act amendments been in existence at the time Edaf filed its complaint.

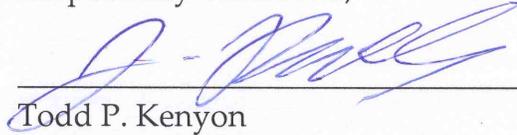
In a decision subsequent to Bradley, the Supreme Court confirmed that a court, when considering an award of attorney fees, should apply the law in effect at the time the court renders its decision. Landgraf v. USI Film Prods., 511 U.S. 244, 277 (1994). The Court highlighted the fact that attorney fee awards are not impermissibly “retroactive” and are collateral to the main cause of action. Id. at 277-78. The issue of attorney fees is separate and apart from the underlying claims at issue, and courts regard them differently. In the instant case, the award of attorney fees is similarly collateral and separable from the primary cause of action. Therefore attorney fees, which do not impose any additional obligations upon Edaf and are collateral to Edaf’s underlying claims in any event, should be awarded to Neutral and IFS.

CONCLUSION

For the aforementioned reasons, the Commission should grant Neutral and IFS the attorney fees incurred in defending against this action.

Dated: April 15, 2016

Respectfully Submitted,



Todd P. Kenyon

Joshua S. Parks

Betancourt, Van Hemmen, Greco & Kenyon LLC

151 Bodman Place, Suite 200

Red Bank, NJ 07701

Tel.: 732-530-4646

Fax: 732-530-9536

Email: tkenyon@bvgklaw.com

Email: jparks@bvgklaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing IFS Neutral Maritime Service, Inc.'s and IFS International Forwarding, S.L.'s Supplemental Brief Regarding Their Entitlement to Attorney Fees upon the following addressees by e-mail:

Carlos E. Matos Malec, Esq.  
Edaf Antillas, Inc.  
P.O. Box 11249  
San Juan, PR 00922-1249  
(787) 707-1792  
carlos@forsapr.com

Eric C. Jeffrey, Esq.  
Nixon Peabody LLP  
401 Ninth Street, N.W., Suite 900  
Washington, D.C. 20004-2128  
(202) 585-8000  
ejeffrey@nixonpeabody.com

Dated: April 15, 2016

  
\_\_\_\_\_  
Joshua S. Parks