

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 15-06

**IN THE MATTER OF
NOTICE OF PROPOSED RULEMAKING CONCERNING
PROPOSAL TO AMEND RULES OF PRACTICE AND PROCEDURE
GOVERNING THE AWARD OF ATTORNEY FEES IN
SHIPPING ACT COMPLAINT PROCEEDINGS**

**COMMENTS OF THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY**

Communications with respect to this document should be addressed to:

Adm. Richard M. Larrabee
Molly Campbell

Port Commerce Department
The Port Authority of New York
and New Jersey
4 World Trade Center
150 Greenwich Street, 18th Floor
New York, NY 10007

Richard A. Rothman, Esq.
Peter D. Isakoff, Esq.
Jared R. Friedmann, Esq.

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
richard.rothman@weil.com
(212) 310-8000

*Counsel to the Port Authority of
New York and New Jersey*

August 6, 2015

The Port Authority of New York and New Jersey (“the Port Authority”) respectfully submits these comments in response to the notice of proposed rulemaking concerning the proposal to amend the Federal Maritime Commission’s Rules of Practice and Procedure governing the award of attorney fees in Shipping Act complaint proceedings, issued July 2, 2015, appearing at 80 Fed. Reg. 38153-58.

Question: How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?

Response:

The statute as amended by the Coble Act permits the Commission to award attorney fees to a prevailing party at the Commission’s discretion, without any preferential treatment based on whether the prevailing party was the complainant or respondent. Accordingly, of the two standards identified by the Commission that federal courts use in determining fee entitlement, the standard used in connection with the Copyright Act would be more appropriate here. The nonexclusive list of factors that the Supreme Court has cited with approval for courts to consider when determining entitlement to attorney fees under the Copyright Act, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence”¹ are just as relevant here. Equally as important is the courts’ use of the same standard for prevailing plaintiffs and prevailing defendants when making such determinations. *See Fogerty*, 510 U.S. at 534-35. Indeed, the purpose of the amendment providing for the potential for attorney fees in all cases before the Commission would be subverted if applied in a less than evenhanded manner.

¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3rd Cir. 1986)) (internal quotation marks omitted).

There is nothing in the language or legislative history of the Coble Act of which we are aware to suggest that the standard should be more stringent or lenient depending on what side of the “v.” the prevailing party is on. For that reason, the other standard identified by the Commission, *i.e.*, the standard used when determining entitlement to attorney fees under the Civil Rights Act, would not be appropriate here. Under that standard, prevailing plaintiffs are treated more favorably than prevailing respondents when determining entitlement to attorney fees. There is no reason to have such an imbalance when determining entitlement to attorney fees under the Shipping Act, where both parties are often sophisticated businesses, in contrast to, for example, individual plaintiffs in employment discrimination cases. A standard that is less favorable to prevailing respondents may only encourage the filing of meritless complaints.

Question: How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014?

Response:

With respect to any proceedings pending on the date of the Coble Act’s enactment, the FMC should have the discretion to award attorney fees in a fully retrospective manner whenever it finds that an unsuccessful action or defense had been conducted in a vexatious and wasteful fashion. Such a rule would be entirely consistent not only with Congress’ intent to make attorney fees available in FMC proceedings, but also with Congressional policy to reimburse litigants for costs incurred due to vexatious and abusive litigation, and with the Supreme Court’s holding that the federal courts have the residual inherent power to award attorney fees for abusive litigation conduct even in the absence of any express statutory authorization or advance notice. *See, e.g.*, 28 U.S.C. 1927; *Chambers v. Nasco*, 501 U.S. 32, 45-46 (1991). Where losing litigants *have intentionally* engaged in such willful, improper conduct—conduct that will have

wasted the Commission's scarce resources as well as injured the prevailing party—the Commission *should* have the discretion to award fees, both in order to compensate the injured prevailing party and to deter such improper conduct in the future.

Moreover, any notion that to allow attorney fee awards for matters pending before the Commission when the Coble Act was enacted would give the Act impermissible retrospective effect would be incorrect. *See Martin v. Hadix*, 527 U.S. 343 (1999). A court's inquiry as to whether a new statute can apply retroactively should be "guided by familiar considerations of fair notice, reasonable reliance and settled expectations." *Id.* at 358-59. No litigant could have had a reasonable and legitimate expectation that it could engage in abusive, vexatious and wasteful litigation conduct without consequence, particularly since courts have always had the authority to sanction such conduct. Accordingly, the absence of any reasonable reliance and the inherent authority federal courts have to award attorneys' fees for equitable principles (*see Landgraf v. USI Film Prods.*, 511 U.S. 244, 277-78 (1994)), militate against any argument that retrospective application of such fees by the FMC would be inequitable or otherwise inappropriate.

Dated: August 6, 2015

Respectfully submitted,

Adm. Richard M. Larrabee
Molly Campbell

Port Commerce Department
The Port Authority of New York
and New Jersey
4 World Trade Center
150 Greenwich Street, 18th Floor
New York, NY 10007

Richard A. Rothman, Esq.
Peter D. Isakoff, Esq.
Jared R. Friedmann, Esq.

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
richard.rothman@weil.com
(212) 310-8000

*Counsel to the Port Authority of
New York and New Jersey*