



**WORLD SHIPPING COUNCIL**  
PARTNERS IN TRADE

Comments of the

## **World Shipping Council**

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Submitted to the

## **Federal Maritime Commission**

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In the Matter of

**Organization and Functions; Rules of Practice and Procedure; Attorney Fees**

**Notice of Proposed Rulemaking**

**Docket No. 15-06**

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**August 6, 2015**



The World Shipping Council (“WSC” or “the Council”) respectfully files these comments in response to the Notice of Proposed Rulemaking published in the above-referenced docket on July 2, 2015, 127 Fed. Reg. 38153 (the “Notice”). WSC limits these brief comments to two questions posed by the Commission in the Notice:

(1) When will a party be considered to have ‘prevailed’ in a covered action?”

and

(2) What standard should be applied in deciding whether to award attorney fees?

As discussed further below, existing judicial precedent provides answers to both of these questions.

#### **A. Prevailing Party**

The language in 46 U.S.C. § 41305(e) that was added by the Coble Act states that: “In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees.”

As the Commission notes (Notice at 38155), “there is abundant case law interpreting the term [prevailing party].” Much of that case law arises from application of Rule 54(d)(1) of the Federal Rules of Civil Procedure, which governs the award of costs. The D.C. Circuit has held that the standard for determining status as a “prevailing party” is “generally the same” under Rule 54(d)(1) and under discretionary statutory attorney fee provisions. *Tunison v. Continental Airlines Corp.*, 162 F.3d 1187, 1189 (D.C. Cir. 1998) (cited cases omitted). Under that standard, in order to be a prevailing party, the party seeking an attorney fee award “must obtain an enforceable judgment against the [party] from whom fees are sought. . . .” *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The Commission should apply that standard.

At page 38154 of the Notice, the Commission discusses the requirement in the Commission's current regulations that a prevailing complainant must prove actual damages in order to be eligible for an attorney fee award. That discussion suggests that the Commission may believe that the amendments in the Coble Act mean that a complainant no longer needs to prove actual damages in order to receive an award of attorney fees.

Although new subsection 41305(e) refers to "any action brought under section 41301," the Council urges the Commission not to read too much into the fact that the attorney fee provision was moved from subsection 41305(b) (which addresses reparations awards) to a new subsection 41305(e) (which addresses only attorney fees). The placement of the new language may best be explained by the fact that attorney fees now apply to *any* prevailing party, not just prevailing complainants, and therefore moving the language to a "neutral" subsection was intended to reflect that change rather than to express an intent about the relationship between the award of reparations and the eligibility for attorney fees. There is nothing in the placement of the new language that would compel or support a wholesale abandonment of the Commission's existing determination that the award of reparations is a prerequisite for the grant of attorney's fees to a prevailing complainant.

Even if the "any action brought under section 41301" language in new subsection 41305(e) were read to suggest that a broader range of actions is now covered by the attorney fee provision, the practical fact is that the vast majority of private cases before the Commission seek monetary reparations, and the award of compensatory damages is a critical touchstone in judicial precedent both for determining who is a "prevailing party" and also for determining what fee (if any) is "reasonable." Thus, even if the Commission determines that the award of reparations is not a *sine qua non* for an attorney fee award to a prevailing complainant, the presence or absence of such of a reparations award – and its amount – remains relevant to the exercise of the Commission's discretion in deciding whether and in what amount to award fees to a prevailing complainant.

**B. The Standard for Awarding Fees Should be the Same for Prevailing Complainants and Prevailing Respondents**

The Commission has asked (Notice at 38156) whether it should treat prevailing complainants and prevailing respondents equally in making decisions about discretionary attorney fee awards, or whether the Commission should treat prevailing plaintiffs more favorably. The Council respectfully submits that the U.S. Supreme Court has already answered that question. The treatment should be equal.

The Commission cites and discusses two lines of Supreme Court cases that apply the two different standards about which the Commission has sought comment. The earlier cases, which deal with fee awards under the Civil Rights Act, are *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), and *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978). The later case, which arose under the Copyright Act, is *Fogarty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The civil rights cases favor plaintiffs, and the copyright case provides for equal treatment of prevailing plaintiffs and prevailing defendants.

*Fogarty* directly addresses *Piggie Park* and *Christinsburg*, and expressly declines to extend the plaintiff preference applied under the civil rights laws to fee awards under the copyright laws. In doing so, the *Fogarty* court emphasized that the decision to favor plaintiffs in the civil rights context “was based on what we found to be the important policy objectives of the Civil Rights statutes, and the intent of Congress to achieve such objectives through the use of plaintiffs as ‘private attorneys general.’” *Fogarty*, 510 U.S. at 523. The court found no such intent to favor plaintiffs or for plaintiffs to fulfill the role of private attorneys general in the context of the Copyright Act, notwithstanding the important public policy goals that the Copyright Act seeks to achieve.

The Shipping Act is much more like the Copyright Act than it is like the Civil Rights Act. Although all three statutes seek to implement important public policy goals, only the Civil Rights Act seeks to do so through the use of “private attorney generals,” and only that statute routinely involves a mismatch in resources characterized by less powerful individuals litigating against more powerful businesses and organizations. In Shipping Act litigation both complainants and respondents run the gamut from individuals and small businesses to very large corporations and public port agencies. There is no consistency or predictability in what size of entity might end up in the complainant or respondent slot on a Commission docket. Most important, whatever the reason behind the previous Shipping Act fee provision that was available only to prevailing complainants, the Coble Act amendment to the attorney fee provision discarded that preference and replaced it with a facially neutral “prevailing party” provision. The Commission is not writing on a clean slate in this instance, and it would be implausible to conclude that Congress meant to preserve a preference for complainants when the congressional enactment that this rulemaking seeks to implement repealed just such a preference.

### **3. Conclusion**

The Coble Act, among other changes to the Shipping Act, replaced an attorney fee provision that favored complainants with a fee provision that is facially neutral and that allows

awards to any “prevailing party.” The test for determining who is a “prevailing party” is well settled by judicial precedent, and the Commission should apply that precedent in its own cases. Similarly, outside of the civil rights arena, the Supreme Court has applied facially neutral attorney fee provisions even-handedly to both plaintiffs and defendants. The Commission should do the same here, especially in light of the fact that Congress repealed a Shipping Act fee provision that favored complainants and replaced it with a fee provision that is facially neutral. It is difficult to imagine a more direct expression of congressional intent.

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