

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED JUNE 19, 2001)
(EXCEPTIONS DUE 7-11-01)
(REPLIES TO EXCEPTIONS DUE 8-2-01)

FEDERAL MARITIME COMMISSION

DOCKET NO. 00-05

**WORLD LINE SHIPPING, INC. AND
SAEID B. MARALAN (AK.4 SAM BUSTANI)
ORDER TO SHOW CAUSE**

On January 8, 2001, the Commission issued a Report and Order with findings that the respondents had committed twenty one violations of the Shipping Act of 1984 by operating as a non-vessel-operating common carrier without a public tariff, license or proof of financial responsibility. The Commission also found that the respondents had committed eleven violations of a cease and desist order issued in Docket No. 98-19 by operating as a non-vessel-operating common carrier without proof of financial responsibility and under fictitious business names not registered in the State of California. This proceeding was referred to the Office of Administrative Law Judges for a determination of the civil penalties, if any, to be assessed against the respondents for the aforesaid violations. It is held:

- (1) The authority of the Administrative Law Judge is limited by the scope of the referral from the Commission to the assessment of civil penalties. Evidence of additional violations by the respondents or in rebuttal of the Commission's findings will not be considered at this stage of the proceedings. Therefore, all but paragraphs 1, 3 1, 32 and 33 of the affidavit of Oliver E. Clark, which is part of the submission by the Bureau of Enforcement, will be excluded from evidence inasmuch as the excluded portions of that affidavit describe additional violations which the respondents are alleged to have committed.

- (2) The respondents are not entitled to foreclose the use of Federal Express, or of any other overnight delivery service, to effect service of pleadings and documents. The respondents have been served with and are charged with notice of all pleadings and documents in this proceeding in spite of their refusal to accept delivery other than by regular mail to an address at which they admit they are no longer located.
- (3) The failure of the respondents to produce financial records requested through discovery justifies an inference that those documents, if produced, would be adverse to their position.
- (4) The evidence justifies the contention of the Bureau of Enforcement that the maximum allowable penalty, in the amount of \$27,500, should be assessed for each of the respondents' violations.
- (5) Seven of the violations of the Act which were found by the Commission, i.e., operating without proof of financial responsibility, were also found to be violations of the cease and desist order. The assessment of penalties for multiple violations arising out of the same incidents would amount to an improper circumvention of the limits on civil penalties by, in effect, assessing double penalties.
- (6) The purpose of a cease and desist order is not to magnify legal liability for past violations but to restrain recalcitrant parties from committing future violations.
- (7) The respondents are assessed penalties of \$27,500 for each of twenty five violations for a total of \$687,500.

Vern W. Hill and *Heather M. Burns* for the Bureau of Enforcement.
No appearance for respondents.

**INITIAL DECISION OF PAUL B. LANG,
ADMINISTRATIVE LAW JUDGE'**

Procedural History

On January 8, 2001, the Commission issued a Report and Order in which it found that respondents Sam Bustani and World Line Shipping, Inc. had:

¹This will become the decision of the Commission in the absence of review (Rule 227, Rules of Practice and Procedure, 46 C F R § 502 227)

(a) violated section 8 of the Shipping Act of 1984 (“Act”) on seven occasions by operating as a non-vessel-operating common carrier (“NVOCC”) without a public tariff,

(b) violated section 19(a) of the Act on seven occasions by operating as a NVOCC without a license,

(c) violated section 19(b) of the Act on seven occasions by operating as a NVOCC without proof of financial responsibility,

(d) violated a cease and desist order issued in Docket No. 98-19, *Saezd B. Maralan (aka Sam Bustani), World Line Shipping, Inc., et al. - Possible Violations of Sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984*, 28 S.R.R. 1244 (1999), on seven occasions by operating as a NVOCC without proof of financial responsibility,

(e) violated a cease and desist order issued in Docket No. 98-19 on four occasions by operating as a NVOCC under fictitious business names not registered in the State of California.

The Commission also ordered the respondents to cease and desist from providing or holding themselves out to provide transportation as an ocean transportation intermediary (“OTI”)² between the United States and foreign countries unless and until they obtain a tariff which is available to the public and file proof of financial responsibility with the Commission.

The Commission also referred the proceeding to the Office of Administrative Law Judges for the assessment of civil penalties for the respondents’ violations of the Act and of cease and desist orders issued by the Commission in Docket No. 98-19.

BOE submitted its case in chief on February 19 in accordance with the procedural schedule. The respondents did not submit their answering case on February 26 as required by the schedule. However, on February 23 and 26 the respondents sent facsimile messages stating that they had not

²Section 3(17) of the Act, 46 U.S.C app. §1702(17), defines the term “ocean transportation intermediary” as including both ocean freight forwarders and NVOCC’s.

been served.³ They also proposed a revised procedural schedule extending through June 25. That proposal was rejected by Order dated February 27.

On March 1 BOE filed a motion to hold the proceeding in abeyance and to provide for formal discovery. The respondents did not reply to the motion. The motion by BOE was granted for the reasons set forth in the Order of March 23, 2001.

On May 14, 2001, after the expiration of the deadline for discovery and in accordance with the revised procedural schedule, BOE submitted its direct case along with a motion to admit it into the record. The respondents were to have submitted their own direct case with a motion for its admission into the record on or before May 30. They have not done so nor have they submitted a reply to the brief by BOE.⁴

Direct Case of BOE

BOE's direct case consists of paragraphs 31, 32 and 33 of an affidavit by Oliver E. Clark, the Los Angeles Area Representative of the Commission' and an affidavit by James F. Carey, the Washington, DC Area Representative of the Commission, along with attachments A through E. The portion of the Clark affidavit admitted into evidence describes his interviews with the representative of a business enterprise which occupied premises previously used by the respondents and

'The respondents' contentions as to service of documents and pleadings are addressed in a separate portion of the Initial Decision.

*On April 26, 2001, the Administrative Law Judge imposed sanctions on the respondents for failure to comply with an order compelling discovery. The respondents were barred from submitting then individual and corporate tax returns for 1999 or any documents related to then financial condition subsequent to 1999 That order specifically stated that BOE was not relieved of its burden of proof and that the respondents were not barred from submitting evidence not covered by the sanctions. The order also stated that a negative inference could be drawn from the respondents' failure to produce the requested documents, *McMahon v Po Folks, Inc* , 206 F.3d 626, 632 (6th Cir. 2000)

⁵The remainder of the Clark affidavit was excluded from evidence by order dated May 30, 2001. The excluded portion was entered into the record as an offer of proof in accordance with Rule 152, Rules of Practice and Procedure, 46 C.F.R. §502.152

a representative of the company which managed those premises during and after their occupation by the respondents. The gist of those interviews is that the respondents have not occupied the premises at 20003 South Rancho Way, Rancho Dominguez, CA 90220 since on or before November 13, 2000. Since that date a number of people have inquired as to Mr. Bustani's whereabouts because of problems arising out of their engagement of the respondents to arrange for the ocean transportation of goods.

The Carey affidavit states that he has a degree in accounting and has been employed by the Commission since 1972 (paragraph 1). He met Bustani and is familiar with his business activities due to his investigation with regard to two prior Commission proceedings (paragraphs 2 and 3). In addition, the affidavit describes the results of Mr. Carey's investigation into the financial status and business affairs of the respondents and of various other companies through which Bustani has been conducting business. One of those companies is Spencer Investment Services through which Bustani registered the fictitious name of International Shipping and Crating with the office of the Los Angeles County Clerk. Although the application for registration indicates that Spencer Investment Services is a Delaware corporation, a search of the Delaware Corporation & Limited Partnership records indicated that there was no information for a corporation of that name (paragraph 4).

In response to a subpoena Wells Fargo Bank produced records showing that Bustani had maintained at least five accounts in various names since 1994. One of the accounts was in the name of respondent World Line Shipping (paragraphs 5 and 6). The only account still open is in the name of Spencer Investment Services; it was opened in 1999 by Sam (or Saeid) Bustanabi Maralan as president. This is one of the names by which Bustani is known and by which he is identified in this proceeding. The monthly records of that account between September 9, 1999, and March 8, 2001, show that the accounts were active with deposits as high as \$60,694.28 as of November 8, 2000, and

withdrawals as high as \$63,765.67 during the same period. The highest balance as of the monthly reporting dates was \$20,497.74 as of September 9, 1999 (paragraphs 5, 6 and 7; attachment B).

In response to a subpoena Bank of America produced a signature card and monthly statements for an account opened by Saeid B. Maralan as president in the name of Cargo Express, Inc. Monthly reports from December 13, 2000, to February 12, 2001, show a deposit of \$30,361.25 as of January 16, 2001, and another in the amount of \$29,478.86 as of February 12, 2001 (paragraph 8; Attachment C).

Pursuant to a subpoena to Cushman & Wakefield, a real estate company, BOE obtained a copy of the front and signature pages of a lease to World Wide Cargo Express, Inc. for the premises at 1220 E. 29th Street, Signal Hill, CA 90806 for the period from November 1, 2000, to October 31, 2003. The lease was signed by Sam Bustani on behalf of the lessee (paragraph 9; Attachment D).

Cushman and Wakefield also provided BOE with a copy of a profit and loss statement provided by World Wide Cargo Express, Inc. The statement shows that the corporation earned \$463,363.47 in sales during the four month period of May through August of 2000; its total current assets were listed as \$992,765.37; its non-current assets (vehicles, machinery, equipment, furniture and fixtures minus accumulated depreciation) were valued at \$24,607.12; its total liabilities were shown as \$32,660.73; and its total equity was listed as \$984,711.76 (paragraphs 10, 11 and 12; Attachment E).

Upon review of the foregoing financial records, Mr. Carey expressed the opinion that World Wide Cargo Express, Inc. is financially strong and that it has a significant level of assets and equity for a company of its size (paragraph 14).

BOE has submitted an Opening Brief in which it argues that the violations of the Act and of the cease and desist order by the respondents should be considered as willful, and that the maximum

allowable civil penalty of \$27,500 should be assessed for each of 32 violations for a total of \$880,000.

Request by BOE for Reconsideration

BOE has included in its Opening Brief a request for reconsideration of the exclusion of the majority of the Clark affidavit. Only paragraphs 31, 32 and 33 were admitted into evidence because the excluded portions were relevant only to alleged violations of the Act and of the cease and desist order other than those set forth in the Report and Order of January 8, 2001. For the reasons stated in the order of May 30, 2001, consideration of those other violations is precluded as a matter of law.

As will be shown below, the maximum allowable civil penalty (\$27,500) has been assessed against the respondents for each violation described in the Report and Order.⁶ Since that determination has been made without recourse to the excluded evidence, the portion of the request for reconsideration relating to the evidence of other violations need not be addressed in detail. However, it should be noted that evidence of the respondents' continuing disregard of their statutory obligations and of the authority of the Commission, as described in the excluded portion of the Clark affidavit, would be highly relevant in a proceeding to enforce the cease and desist orders already in effect. It may well be that such enforcement is the only way in which the public can be protected against the respondents' unlawful activities.

BOE also maintains that paragraph 1 of the Clark affidavit, in which he identifies himself and states his position and tenure with the Commission, should be admitted as the predicate for admission of any other portion of the affidavit. That position is well taken and will be accepted.

⁶The Administrative Law Judge has not accepted the position of BOE as to the number of discrete violations. The grounds for that determination are unrelated to the subject matter of the excluded portion of the Clark affidavit

Therefore, the request for reconsideration by BOE is partially granted and paragraph 1 of the Clark affidavit is admitted into evidence along with paragraphs 31, 32 and 33.

Findings of Fact

1. Respondents Sam Bustani and World Line Shipping, Inc. maintained a business address at 20003 South Rancho Way, Rancho Dominguez, California 90220 until on or about October 31, 2000.

2. Bustani has operated a business known as World Wide Cargo Express, Inc., of which he is president, at 1220 E. 29th Street, Signal Hill, California 90806 since on or about November 1, 2000.

3. Bustani has at various times operated and controlled businesses under the names of World Line Shipping, Inc., World Wide Cargo Express, Inc., Spencer Investment Services and International Shipping and Crating.

4. Bustani has at various times identified himself as Saeid B. Maralan, Saeid Bustanabadi Maralan and Sam Bustanabadi Maralan.

5. From on or before November 1, 2000, to on or after January 30, 2001, Bustani and businesses controlled and operated by him have continued to hold themselves out to the public as providing services related to the overseas shipment of goods.

6. Records of a bank account opened by Bustani under the name of Spencer Investment Services show that, between September of 1999 and March of 2001, deposits of up to \$60,694.28 and withdrawals of up to \$63,765.67 were made in a single month.

7. Records of a bank account opened by Bustani under the name of Cargo Express, Inc. show that, between December of 2000 and February of 2001, deposits of up to \$30,361.25 and withdrawals of up to \$32,306.72 were made in a single month.

8. On or about October 24, 2000, Bustani submitted a profit and loss statement to the owner of the business premises at 1220 E. 29th Street, Signal Hill, California 90806 which indicated that, for the period from May 1 to August 31, 2000, World Wide Cargo Express, Inc. had total sales in the amount of \$463,363.47. The same statement also indicated that World Wide Cargo Express, Inc. had \$992,765.37 in total current assets and \$1,017,372.49 in total assets as well as \$728,677.98 in its capital account.

Discussion and Analysis

I. Service of Pleadings and Documents on the Respondents

Rule 114, Rules of Practice and Procedure, 46 C.F.R. § 502.114, provides that service of pleadings and other documents, other than initial pleadings, may be accomplished by:

. . . hand delivering in person; by mail, properly addressed with postage prepaid; by courier; or by facsimile transmission if agreed by both parties prior to service.

As shown by the following chronology of events, the respondents have attempted to avoid and disrupt the procedures for service of documents and pleadings provided for by the Commission's rules and by the Administrative Law Judge. They are, perhaps, preparing to argue that they are not bound by a Commission ruling in this proceeding because of lack of due notice. That argument would be without merit in view of the sequence of events set forth below.

By facsimile message dated January 29, 2001,' respondent Bustani, on the letterhead of respondent World Line Shipping, notified the Administrative Law Judge and BOE that the facsimile number that had previously been used to contact them was no longer valid and that they could only

⁴Copies of all **facsimile** messages and correspondence between the Administrative Law Judge, the respondents and BOE are in the **public** record.

be reached at 20003 Rancho Way, Rancho Dominguez, CA 90220.’ The electronic stamp on that message shows that it was sent from the facsimile number that had been hand written on a facsimile message from the respondents dated January 22, 2001.

Upon receipt of the foregoing message the Administrative Law Judge, by letter to the parties dated January 30, 2001 (which was hand delivered to BOE and transmitted to the respondents via Federal Express to the South Rancho Way address), modified the Schedule of Proceedings of January 29, which established deadlines for the submission of evidence and the filing of briefs, and directed that service of process be accomplished either by hand delivery or by a service which provides for delivery on the next business day such as Priority Mail or a commercial service such as Federal Express’. The Administrative Law Judge further stated that the letter had the same force as a formal order.

By letter dated January 30, 2001, from Heather M. Bums, Esquire, counsel for BOE (with copy to Bustani) she reported that the Los Angeles Area Representative of BOE had learned that World Line was no longer doing business at the Rancho Way address and was currently located at 1220 E. 29th Street, Signal Hill, CA 90806. Counsel for BOE also reported that the address had been confirmed by Bustani during the course of a telephone call on January 19, 2001. Enclosed with the letter was a copy of a Federal Express Airbill showing that delivery had been accepted on behalf of the respondents at the 29th Street address by a person identified as “M. Bustani.” Counsel for BOE

⁸This is the address which was used by the respondents until March 6, 2001. A ZIP code directory indicates that there is no such street as Rancho Way. It is designated as either North or South and the ZIP code on the respondents’ address corresponds to South Rancho Way. However, the record indicates that documents have been delivered regardless of whether the “South” designation was used

⁹The Administrative Law Judge precluded the use of regular mail to complete service pursuant to the authority granted by Rule 10, Rules of Practice and Procedure, 46 C.F.R § 502.10, which allows the waiver of any part of the rules in a particular case, “. . . if the expeditious conduct of business so requires ”

requested that respondents “be allowed” to provide an address where they will accept service and that they not be allowed to disavow service at their chosen address.

The Administrative Law Judge responded by letter dated January 31 to Ms. Bums (by hand delivery) and Mr. Bustani (by Federal Express) stating that all communications with the respondents were to be directed to the address indicated in Mr. Bustani’s letter of January 29 and that, in providing the Office of Administrative Law Judges with that address, the respondents had accepted responsibility for the receipt of documents even if the address were invalid. The letter further indicated that the respondents could change their address prospectively and that the schedule of proceedings would not be modified because of the respondents’ alleged failure to receive documents at the address which they had designated or might designate in the future.

On February 7, 2001, the respondents again communicated with the Administrative Law Judge and BOE by a facsimile message from the number which they had previously used and which they had stated was no longer available to them. The respondents indicated that then only valid address was the one on Rancho Way and that they could only accept mail (“no Fedex - no fax”) at that address.

On February 8, 2001, the Administrative Law Judge responded to the above letter by Federal Express and first class mail and confirmed the instructions in the letter of January 31. The Administrative Law Judge further stated that there would be no further communication by regular mail.

On February 14, 2001, the Administrative Law Judge received a telephone call from a representative of Federal Express in California. She stated that they were unable to complete delivery of a document to the Rancho Way address because it had not been accepted. She transmitted a copy of the Airbill dated February 8, 2001, by facsimile. The Airbill contains a

handwritten notation that, “Per Mr. Bustani they do not accept any deliveries from Fedex. Deliveries are by mail.” The handwritten notation “moved” appears next to the Rancho Way address.”

On February 14, 2001, the Administrative Law Judge sent yet another letter to the respondents by Federal Express and first class mail in which he informed them of the telephone call from the representative of Federal Express and enclosed a copy of the Airbill. Once again, he informed them that they would not be allowed to dictate the method by which documents are served in this proceeding and that all documents would be sent by overnight service either to the Rancho Way address or to such other address as they might designate. Finally, the respondents were informed that they would be held strictly responsible for the receipt of all documents delivered to their designated address regardless of whether the documents were accepted.

On February 15, 2001, the Administrative Law Judge was again contacted by a representative of Federal Express who reported that delivery of a document had been refused at the Rancho Way address. She transmitted a facsimile copy of the Airbill dated February 14 with a handwritten notation that, “Per 562-283-1 111 pkgs can only be sent to them by P.O. box which has a forwarding address.” It is significant to note that the telephone number in the notation is the number which was provided by the respondents in their facsimile message of February 22, 2001.

By letter dated February 21, 2001 (with copy to Bustani), counsel for BOE reported that documents sent to the respondents at the Rancho Way address by Federal Express and by U.S. Postal Service Express Mail (another overnight service) had been returned as undeliverable. She also reported that a document sent to the respondents at the 29th Street address by regular mail had been returned as undeliverable.

¹⁰Copies of all correspondence from Federal Express are in the public record

The respondents' next communication with the Commission was by a facsimile message from Bustani on the letterhead of World Line Shipping. The message was transmitted on February 23, 2001, again from the telephone number which had been submitted most recently by the respondents and which they later alleged was unavailable to them. In the message Bustani stated that he had not been served and that he could only receive documents by "U.S. Mail" at the Rancho Way address. He also denied that he had violated the Shipping Act and proposed a schedule terminating on June 15.¹¹ He did not explain why correspondence from BOE by Express Mail, a service of the U.S. Postal Service, had been returned as undeliverable.

On February 26, 2001, the respondents sent yet another facsimile message from the same telephone number." As before, it was signed by Bustani on the letterhead of World Line Shipping. This communication was identified as an affidavit to the effect that the undersigned Administrative Law Judge had threatened, insulted and hung up on him.¹³ Bustani again stated that he did not have access to a facsimile machine and that only U.S. mail could be accepted at this address. He also complained about an assessment of a penalty by Chief Administrative Law Judge Norman D. Kline (presumably in Docket No. 98-19), lodged a complaint against Judge Kline and requested that the

"By a facsimile message dated January 29, 2001, the respondents generally objected to the procedural schedule proposed by BOE. Although the deadline for that response was January 26, the Administrative Law Judge considered those objections and adopted the proposed schedule. On February 23 the respondents proposed a revised procedural schedule. That proposal was denied by Order of February 27, 2001.

¹²Bustani's use of facsimile messages as his sole means of written communication with the Commission is at odds with his repeated assertions that such facilities were unavailable to him

¹³The Administrative Law Judge neither threatened nor insulted Bustani. He did terminate a telephone conversation on February 15, 2001, when Bustani began to use profanity. Since that time Bustani has made numerous telephone calls to the Office of Administrative Law Judges demanding to speak to Judge Lang or "his supervisor" and often using profanity or otherwise offensive language. He has been told that Administrative Law Judges are independent and was advised to put all further communications into writing.

undersigned Administrative Law Judge be removed from the proceeding. Finally, Bustani requested that the respondents be provided with copies of all discovery papers and other documents.

BOE responded to Bustani's facsimile message of February 23 by letter dated February 26. In its letter, BOE reviewed its attempts to deliver documents to the respondents by Federal Express and Express Mail to the Rancho Way and 29th Street addresses and enclosed copies of reports from Federal Express which reflected unsuccessful attempts to deliver the documents. BOE also reported that Federal Express had obtained a forwarding address to a post office box which is in the name of Bustani's wife. BOE has been informed that Federal Express will not deliver to a post office box but that the Postal Service will do so in the case of Express Mail.

By letter to Bustani dated March 2, 2001 (which was transmitted by Federal Express and by facsimile to the number from which Bustani had most recently used), the Administrative Law Judge urged him to reconsider his refusal to accept documents served by Federal Express and again informed him that he could not claim lack of notice of the contents of those documents. He was also reminded that he could change the address for the future service of documents by informing the Commission and BOE. Several hours after the transmission of the facsimile message to Bustani he contacted the Office of Administrative Law Judges by telephone and demanded to speak to the undersigned Administrative Law Judge or, failing that, to Chief Administrative Law Judge Kline. The staff member answering the telephone was instructed to inform Bustani that all communications were to be in writing with copies to BOE.

By facsimile message dated March 6, 2001, (again from the number that Bustani had claimed was unavailable for messages to him) he stated that he had been "evicted" from the South Rancho

Way address and that all communication should be by regular mail to the South Rancho Way address for forwarding to the post office box which, as stated above, is in the name of his wife,"

By letter dated March 6 counsel for BOE reported that documents had been delivered to Bustani by courier at the 29th Street address. An attached photograph of that location shows a sign with the name of World Wide Cargo Express, Inc. The letter also states that a representative of BOE observed Bustani leaving the premises. On March 6 the Administrative Law Judge sent a letter to Bustani by Federal Express informing him that subsequent service would be directed to the 29th Street address.

On March 15 counsel for BOE submitted a letter with a copy of a facsimile transmission from Saeid B. Maralan (a name also used by Bustani) to the manager of the Bank of America. The facsimile message concerned an account named in a subpoena issued at the request of BOE to Bank of America. The electronic stamp indicates that the message was sent from the number which has been used consistently by Bustani. It was on the letterhead of Cargo Express, Inc. and included the 29th Street address as well as the same telephone and facsimile numbers which had been used by World Line Shipping, Inc. The respondents have subsequently refused to accept documents delivered to the 29th Street address by Federal Express. By letter dated March 26 counsel for BOE submitted an affidavit from a representative of a courier service in California which had been used to serve documents on the respondents. The affidavit states that a courier who knew Mr. Bustani from previous deliveries had delivered documents from BOE to the offices of World Wide Cargo Express at the 29th Street address. Bustani told the courier that he would not sign or accept the

¹⁴It is unclear why Bustani did not want mail to be sent directly to the post office box. However, the question is moot in view of the events of March 6.

documents. After consultation with a supervisor the courier left the documents at the 29th Street address and informed Bustani that he had been served. As the courier left the office someone threw the documents out the door.

On April 23, 2001, the Office of Administrative Law Judges received a telephone call from Federal Express to the effect that the respondents had refused to accept delivery at the 29th Street address of the most recent shipment from the Commission, which was an Order dated April 17 in which the Administrative Law Judge granted the motion of BOE to compel discovery. The substance of the telephone call was confirmed by a letter which was received by the Administrative Law Judge on April 27, 2001. Since that time the respondents' continuing refusal to accept documents delivered to the 29th Street address has been confirmed by correspondence from BOE and Federal Express. Pursuant to Rule 116, Rules of Practice and Procedure, 46 C.F.R. § 502.116, service of a document by a party is deemed to have occurred when it is deposited in the mail, delivered to a courier, delivered in person or transmitted by facsimile. The provisions of that rule clearly include delivery by Federal Express or Express Mail with instructions for delivery to the address designated by the respondents. Therefore, all documents which were sent either by Federal Express or Express Mail to the Rancho Way address prior to March 6, 2001, are deemed to have been served on the respondents. So too are documents sent to the 29th Street address on and after March 6. If the respondents have not actually received such documents it is their own fault. They were repeatedly advised that they were at liberty to change their address for their own convenience. However, they are not entitled to unilaterally foreclose the use of a method of service which has been authorized by the rules of the Commission or to obstruct the orderly and expeditious progress of this proceeding either by refusing to accept documents, by failing to keep the Commission informed of changes of address or by designating an address (such as a post office box) to which deliveries by

Federal Express may not be made and at which they are no longer located.¹⁵ The designation of a post office box is especially inappropriate when the respondents could be served at the 29th Street address.”

II. Assessment of Penalties

The respondents’ denial of violations of the Act and of the Commission’s cease and desist order will not be considered at this stage of the proceedings, nor have documents indicating additional violations been admitted into evidence. In view of the language of the order of remand from the Commission, the authority of the Administrative Law Judge is limited to a determination of the amount of civil penalties, if any, to be assessed against the respondents. The findings of fact by the Commission as set forth in its Report and Order of January 8, 2001, are binding on the Administrative Law Judge and the parties at this stage of the proceeding. Those are the only transactions which may be considered as justifying the assessment of penalties under the authority of the limited scope of the remand by the Commission.

The attempts by the respondents to refute the findings of the Commission in Docket No. 98-19 are barred by the doctrine of administrative finality. That doctrine is analogous to the common law doctrines of *res judicata* and collateral estoppel which have long been recognized by the courts. Their thrust is that parties are prohibited from relitigating legal and factual issues that have already been decided in proceedings to which they were parties. In *Astoria F.S. & L. Assn. v. Solomzno*, 501 U.S. 104, 107, 115 L. Ed. 2d 96 (1991), the Supreme Court indicated that it favored

¹⁵See paragraphs 31, 32 and 33 of the Clark affidavit and paragraph 9 of the Carey affidavit

¹⁶The unsuitability of the method of service proposed by the respondents is further illustrated by a facsimile message from Sam Bustani to the Secretary of the Commission in which he states that on March 19 he received a document from BOE dated March 6 which had either been mailed directly to his post office box or forwarded from the Rancho Way address. It is difficult to imagine a legitimate reason for the respondents’ repeated insistence upon a method of service by which actual delivery did not occur for almost two weeks.

the application of those doctrines to the determinations of administrative agencies when, as in this proceeding, the agencies are acting in a judicial capacity and in the absence of a clear statutory scheme to the contrary. The Commission has recognized the doctrine of collateral estoppel in cases such as *Ataei v. Barber Blue Sea Line*, 24 S.R.R. 647 (I.D., FMC notice of finality January 12, 1988).

III. Assessment of Penalties

The assessment of civil penalties for the violation of a provision of the Act or of an order of the Commission is authorized in section 13 of the Act, 46 U.S.C. app. § 1712. Section 13(a) provides that the amount of the penalty may not exceed \$5,000 for each violation or \$25,000 for each violation that was willfully and knowingly committed.” Each day of a continuing violation constitutes a separate offense.

Section 13(c) provides that:

In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit with or without conditions, any civil penalty.

In imposing penalties, the Commission must make specific findings with respect to each of those factors while bearing in mind that the burden of proof of ability to pay rests with BOE rather than with the respondents, *Merritt v. U.S.*, 960 F.2d 15, 17 (2nd Cir. 1992). Findings as to each of the factors are as follows:

“Pursuant to statutory authority, the Commission raised the monetary limit to \$27,500 as of November 7, 1996, 27 S.R.R. 809, and to \$30,000 as of August 15, 2000, 28 S.R.R. 1548. In view of the dates of the respondents’ violations of the Act and the cease and desist order, the maximum penalty for each violation is \$27,500.

Nature, circumstances, extent and gravity of violations. In the Report and Order of January 8, 2001, the Commission identified 25 separate instances of violations of the Act or of the cease and desist order; seven of the 25 violations of the Act (operation as an NVOCC without proof of financial responsibility) were also violations of the order. The violations were committed during the period from October 21, 1999, to April 9, 2000 (Report and Order, pages 6 - 10). The number of violations and the period over which they occurred is significant as indicating that they were not the result of a momentary lapse in judgment but rather were symptomatic of a consistent pattern of disregard by the respondents of their legal obligations.

The Commission's findings arose out of the determination that the respondents had operated without a valid tariff, license or proof of financial responsibility as well as under a fictitious name that had not been properly registered in the State of California. Each of those requirements is a fundamental safeguard to protect the public against incompetent and unscrupulous persons.

In view of the foregoing, the nature, circumstances and extent of the violations is an aggravating factor which serves to increase rather than mitigate the amount of civil penalties.

Degree of culpability. A course of conduct is considered to have been undertaken "knowingly and wilfully" if, ". . . marked by careless disregard whether or not one has the right to act." *U.S. v. Illinois Central R. Co.*, 303 U.S., 239, 242, 82 L.Ed. 773 (1938). *See also, Cari-Cargo Int., Inc.*, 23 S.R.R. 1007, 1019, footnote 10 (I.D., FMC notice of finality June 5, 1986).

Both the number and the nature of the violations found by the Commission in this proceeding as well as the period over which they occurred strongly suggest that the respondents' actions were knowing and wilful. As stated above, the respondents' violations were not mere technicalities nor were they likely to have been committed by accident. One does not forget to publish a tariff, file a

bond or register a trade name. The respondents' conduct with regard to the service of pleadings and documents is a further indication of a cavalier and irresponsible attitude.

History of prior offenses. The cease and desist order which the respondents were found to have violated in this proceeding is itself evidence of a history of prior offenses by the respondents. The order arose out of the ruling in Docket No. 98-19, *Saez B. Maralan (aka Sam Bustani), World Line Shipping, Inc., et al. - Possible Violations of Sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984*, 28 S.R.R. 1244 (1999).¹⁸ In that proceeding the Commission found that the respondents had violated the Act on sixteen occasions. The official records of the Commission clearly show that the respondents have a longstanding history of violations of the Act.

Ability to pay. The determination of any respondent's ability to pay a civil penalty is inherently subjective. Such a determination is rendered more difficult where the respondents have refused to cooperate in the discovery process and have persisted in a strategy of attempting to impede the progress of this proceeding by their ill advised refusal to accept pleadings and documents which have been properly served. However, in spite of the respondents' obstructive conduct, BOE has presented a convincing argument that they are able to pay significant penalties.

The Carey affidavit contains specific information as to the financial status of enterprises operated and controlled by Bustani. That data suggests that Bustani has recently conducted business in which there is a substantial cash flow and significant assets. His continued presence at the 29th Street address, as shown by periodic reports from counsel for BOE as well as correspondence from Federal Express, indicates that his business activities are ongoing.

¹⁸The Administrative Law Judge may take official notice of prior agency decisions pursuant to Rule 156, Rules of Practice and Procedure, 46 C.F.R. § 502.156 and Rule 201, Federal Rules of Evidence. The application of the doctrine of judicial notice to administrative proceedings has approved in cases such as *Don Lee Distributors, Inc. v NLRB*, 145 F.3d 834, 841, fir. 5 (6th Cir. 1998), *cert denied*, 525 U.S. 1102, 142 L.Ed.2d 768 (1999).

BOE is correct in its assertion that the diversity of corporate and business names shown in the Carey affidavit should not be considered as detracting from the significance of the financial data in view of the evidence of Bustani's pattern of attempting to mask his activities through the creation of numerous corporations and other entities. BOE is also correct in maintaining that the failure of the respondents to pay the civil penalties of \$100,000 which were assessed in Docket No. 98-19 should not serve to detract from evidence of their ability to pay. As a matter of policy the respondents will not be allowed to benefit from their disregard of prior Commission rulings.

It is significant to note that the respondents did not reply to a request by BOE pursuant to Rule 206, Rules of Practice and Procedure, 46 C.F.R. § 502.206, that they produce individual and corporate federal and state income tax returns for 1999 and other documents showing their financial status subsequent to 1999. By order dated April 26, 2001, the Administrative Law Judge imposed sanctions on the respondents for their failure to comply with discovery and indicated that an inference might be drawn to the effect that the documents which the respondents failed to produce would have been harmful to their position. The propriety of such an inference, which will now be drawn, has been recognized in cases such as *McMahon v PO Folks, Inc.*, 206 F.3d 627,632 (6th Cir. 2000). The inference, along with the evidence contained in the Carey affidavit, effectively eliminates ability to pay as a mitigating factor in the assessment of penalties.

In *Ever Freight Int'l, Ltd., et al. -Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 329,334 (I.D., FMC notice of finality June 26, 1998) a maximum civil penalty was imposed on an NVOCC in view of the deliberate nature of its violations. The respondent's lack of cooperation created problems in assessing its ability to pay. However, it was held that the statutory requirement of considering ability to pay was not intended to allow respondents to benefit from their own wrongdoing. It was further held that the Commission has discretion in weighing each factor. In this

proceeding the lack of more extensive evidence as to the respondents' ability to pay is far outweighed by the other factors set forth in the Act.

After carefully considering all of the evidence and applicable law, the Administrative Law Judge agrees with the contention of BOE that circumstances warrant the imposition of the maximum allowable penalty for each of the respondents' violations of the Act and of the cease and desist order. Although BOE has correctly stated that the Commission found 32 violations (21 violations of the Act and 11 violations of the cease and desist order), it has failed to take into account the fact that there is an overlap with regard to seven of them. Seven instances are cited in support of the finding that the respondents violated section 19(b) of the Act by failing to file the required bond (Report and Order, page 8). Seven of the violations of the cease and desist order arose out of the same instances, i.e., the respondents' operation as an NVOCC without having tiled proof of financial responsibility with the Commission (Report and Order, page 9). The assessment of multiple penalties for those actions by the respondents would amount to an improper circumvention of the monetary limits (see footnote 17) by, in effect, doubling the maximum penalty for a single occurrence.

The purpose of a cease and desist order is not to magnify legal liability for a statutory violation but to provide a means of restraining recalcitrant parties from future violations, *Precious Metals Assoc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 912 (1st Cir. 1980). A cease and desist order is, in the language of section 14(c) of the Act, 46 U.S.C. app. § 1713(c), a nonreparation order which may be enforced by a United States District Court by means of "an appropriate injunction or other process, mandatory or otherwise".

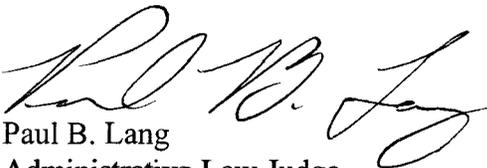
Civil penalties will be assessed against each of the respondents in the amount of \$27,500 for each of twenty five violations of the Act and of the cease and desist order of January 8, 2001, for a total of \$687,500.

Summary and Conclusions

For the reasons set forth above, it is hereby ordered that:

1. The motion by BOE for reconsideration is partially granted to the extent that paragraph 1 of the affidavit of Oliver E. Clark will be admitted into evidence in addition to other portions of the affidavit which have been admitted previously.

2. Civil penalties in the total amount of \$687,500 are assessed against each of the respondents for twenty five violations of the Act and of the cease and desist orders issued by the Commission on January 8, 2001.


Paul B. Lang
Administrative Law Judge

Washington, D.C.
June 19, 2001