

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED JULY 30, 2002)
(EXCEPTIONS DUE 8-21-02)
(REPLIES TO EXCEPTIONS DUE 9-12-02)

FEDERAL MARITIME COMMISSION

DOCKET NO. 01-10

GREEN MASTER INT'L FREIGHT SERVICES LTD.-POSSIBLE VIOLATIONS
OF SECTIONS 10(a)(1) AND 10(b)(1) OF THE SHIPPING ACT OF 1984

Respondent, Green Master Int'l Freight Services, Ltd., a Taiwan-based non-vessel operating common carrier, found to have violated section 1 O(a)(1) of the Shipping Act of 1984 on forty-eight occasions in 1998 and 1999, and section 1 O(b)(1) of the Shipping Act of 1984 on twenty occasions in 1997 and 1998 by knowingly and willfully obtaining ocean transportation at less than the applicable rates by accessing service contracts to which it was neither a signatory nor an affiliate.

Respondent fully participated in this proceeding, which revealed the existence of aggravating factors and the absence of mitigating factors with respect to the application of sanctions and penalties.

A cease and desist order is issued and a civil penalty of \$1,530,000 is assessed.

Vern W. Hill, Esq. and *Heather M. Burns, Esq.*, for the Bureau of Enforcement.
David P. Street, Esq., for Respondent.

**INITIAL DECISION' OF MICHAEL A. ROSAS,
ADMINISTRATIVE LAW JUDGE**

Procedural History

By Order, served July 30, 2001, the Commission instituted this proceeding to determine whether Green Master Int'l Freight Services, Ltd. (Green Master), a non-vessel operating common carrier (NVOCC) violated sections 10 (a)(1) and 10 (b)(1) of the Shipping Act of 1984 (the 1984 Act), as amended by the Ocean Shipping Reform Act of 1998, P.L. 105-258, 112 Stat. 1902. Based on extensive shipping documentation obtained by the Commission's Area Representatives in New York, Seattle and Los Angeles from Green Master's agents in the United States, it appeared that Green Master may have violated the 1984 Act on at least sixty-nine occasions between November 3, 1997 and May 3, 1999. The Commission ordered that an investigation be instituted to determine:

(1) whether Green Master violated section 10(a)(1) of the 1984 Act by knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means, obtaining or attempting to obtain ocean transportation for property at less than the rates or charges that would otherwise have been applicable;

(2) whether Green Master violated section 10 (b)(1) of the 1984 Act by charging, demanding, collecting or receiving less or different compensation for the transportation of property than the rates and charges shown in its NVOCC tariff;

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).

(3) whether, in the event violations of sections 1 O(a)(1) or 1 O(b)(1) of the 1984 Act are found, civil penalties should be assessed against Green Master and, if so, the amount of penalties to be assessed;

(4) whether, in the event violations of section 10 (b)(1) of the 1984 Act are found, the tariff of Green Master should be suspended; and

(5) whether, in the event violations of section 10 (b)(1) are found, an appropriate cease and desist order should be issued.

During the discovery phase of this proceeding, the Bureau of Enforcement (BOE) served Green Master with interrogatories and requests for document production. BOE submitted a proposed procedural schedule to Green Master on August 21, 2001. However, Green Master was in the process of retaining counsel and requested an extension of three weeks for submission of a schedule. BOE did not agree to Green Master's request and submitted a proposed schedule on August 30, 2001. Administrative Law Judge Paul Lang, then presiding, approved BOE's proposed schedule, with modifications. Green Master was to reply to BOE's outstanding discovery requests by September 6, 2001, further discovery requests, if any, were to be served by the parties by October 3 1, 2001 and discovery was to be completed by November 30, 2001.

On September 26, 2001, BOE moved to compel discovery from Green Master. On October 12, 2001, Judge Lang granted BOE's motion and issued an order compelling discovery within one week. On October 23, 2001, counsel entered an appearance on behalf of Green Master. On October 24, 2001, Judge Lang vacated the Order compelling disclosure, dated October 12, 2001, and revised the discovery schedule to require that Green Master reply to BOE's outstanding discovery requests and the parties serve any additional discovery requests by November 14, 2001.

He also directed that discovery be completed and proposals for further scheduling submitted by December 14, 2001.

BOE served amended discovery requests on November 6, 2001 and a second set of interrogatories and requests for production of documents on November 14, 2001. On November 21, 2001, the parties requested a two-week extension of time for the filing of discovery requests to November 28, 2001 and the completion of discovery to December 28, 2001. On November 23, 2001, Judge Lang granted the request and scheduled a conference for January 7, 2002. On November 28, 2001, BOE served a third set of interrogatories and requests for production of documents. Green Master responded to those requests on January 3, 2002. As a result of a telephone conference with counsel for the parties on January 7, 2002, Judge Lang directed that the parties submit their written evidence simultaneously on April 1, 2002, together with statements of the parties respective positions as to the need for oral testimony.

This proceeding was reassigned to me on February 11, 2002. On March 25, 2002, I granted BOE's request for an enlargement of time to file its direct case by April 22, 2002 due to delays in obtaining translation of Green Master's financial records from Chinese into English. On April 17, 2002, I granted the joint request of the parties to be able to submit responses to any requests for an oral hearing by April 26, 2002. However, no such requests were made. On May 6, 2001, I adopted the briefing schedule submitted by the parties. The parties were to submit briefs on May 14, 2002 and reply briefs by July 14, 2002.

The parties filed their direct cases on or before May 14, 2002. However, in a letter to BOE counsel on May 13, 2002, I informed her that BOE's direct case would be admitted, except that ¶¶ 6- 10 of the affidavit of Michael A. Moneck, the Commission's Area Representative in Seattle,

Washington, would be received on the condition that an adequate foundation be provided for the information by June 7, 2002.

On May 14, 2002, I granted the motions pursuant to 46 C.F.R. 502.157, with the foregoing condition. BOE's evidentiary case consists of three exhibits. Exhibit 1 is the Affidavit of Emanuel J. Mingione, the Commission's New York Area Representative, with Attachments A through L, consisting of excerpts of two service contracts, filed tariff information, two tables of calculations, forty-eight sets of bills of lading and invoices, two letters and one electronic mail message. Exhibit 2 is the Affidavit of Mr. Moneck, with Attachments A through F, consisting of an industry database report (PIERS), filed tariff information, twenty sets of bills of lading and invoices, and a table of rate calculations. Exhibit 3 is the Affidavit of James F. Carey, the Commission's Area Representative in Washington, D.C.

On May 14, 2002, but subsequent to my issuance of the Order admitting the parties' evidentiary cases into the record, BOE moved to supplement its direct case by submitting Exhibit 4, which consisted of the affidavit of Oliver E. Clark, the Area Representative for the Commission's Los Angeles, California office. Mr. Clark assisted Mr. Moneck during his investigation of Green Master by providing him with the documentation supporting Mr. Moneck's contentions at ¶¶ 6-10 of his affidavit. Accordingly, the affidavit of Mr. Clark is admitted into evidence as reliable, relevant, material and probative. Moreover, the affidavit of Mr. Moneck is now admitted in its entirety.

Green Master's evidentiary case consists of five exhibits. Exhibit A is an agreement between the parties containing Stipulations 1 through 5. Exhibit B is the verified statement of Jeff Sun, Green Master's General Manager. Exhibit C is the verified statement of Sunny Ng, the Chief Executive Officer of Hudson Shipping (HK) Ltd. Exhibit D consists of twenty-six pages of bills of

lading. Exhibit E contains five pages from a magazine article containing public statements by the Commission's Chairman.

FINDINGS OF FACT

(1) Green Master is a non-vessel-operating common carrier (NVOCC) designated by FMC Organization No. 014579 at www.fmc.gov.

(2) Green Master was registered in Taiwan as a private limited company, business registration number 97300073, on December 4, 1996, and maintains offices in Taipei, Taiching and Kaohsiung, Taiwan (Exhibit 1, ¶ 4; Exhibit 3, ¶¶ 18-19).

(3) According to the Commission's Organization Record, Green Master filed its tariff with the Commission on January 21, 1997 and the tariff became effective on February 20, 1997. Its tariff is also published by Ocean Tariff Bureau, Inc., a Commission-approved OTI tariff publisher, at www.oceantariff.com.

Findings With Respect to Section 10 (a) (1) Issues

(4) The Commission's New York Area Representative, Emanuel J. Mingione, began an investigation into Green Master's activities upon referral by Michael A. Moneck, the Commission's Seattle Area Representative, who received information that Green Master may have obtained transportation from vessel-operating common carriers (VOCC) under service contracts to which it was neither a signatory nor an affiliate (Exhibit 1, ¶¶ 1 and 7; Exhibit 2, ¶ 1).

(5) Leader International Express Corp. (Leader), a licensed NVOCC located in Fort Lee, New Jersey, has served as a destination agent for some of Green Master's inbound shipments to the east coast of the United States since March 1998. The agreement was made by Jim Hsieh of Leader and Martin Lee of Green Master (Exhibit 1, ¶ 8).

(6) Leader maintained records of shipments made by Green Master to the east coast of the United States using various VOCC's. Leader's records revealed that Green Master obtained water transportation by utilizing a service contract between Hyundai Merchant Marine Co., Ltd. (Hyundai), a VOCC, and Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines (Hudson), an NVOCC. The service contract, tiled with the Commission as number 98-6224, was effective May 1, 1998 to April 30, 1999 (Exhibit 1, ¶ 9).

(7) Leader did not have any type of agency relationship with Hudson during the period of 1998 to 1999 (Exhibit 1, ¶ 11).

(8) Shipping documentation provided by Leader relates to twenty-three shipments made by Green Master under the Hudson-Hyundai service contract from May 18, 1998 through May 2, 1999. The documentation for each shipment consists of a "master" bill of lading issued by a VOCC, a Green Master "house" bill of lading, and a Green Master freight invoice submitted to the destination agent (Exhibit 1, ¶ 15).

(9) In the documentation for each of those twenty-three shipments, Hyundai appeared in the shipper block and Green Master appeared in the freight forwarder block in the master bills of lading. In addition, there was a reference to the Hudson/Hyundai service contract in each master bill of lading (Exhibit 1, ¶ 16).

(10) D.K. Logistics, Inc., a customs broker, served as a destination agent for Green Master for a six or seven month period in 1998 (Exhibit 1, ¶ 12).

(11) D.K. Logistics, Inc. did not have any contact with Hudson with respect to Green Master shipments (Exhibit 1, ¶ 13).

(12) Shipping documentation provided by D.K. Logistics, Inc. for shipments made by Green Master revealed that Green Master obtained unauthorized water transportation under Senator service contract number FEEB 98-065 (Exhibit 1, ¶ 14).

(13) Shipping documentation provided by D.K. Logistics consists of twenty-five shipments made by Green Master under the Hudson-Senator service contract from May 16, 1998 through December 17, 1998. The documentation for each shipment consists of a master bill of lading, a Green Master house bill of lading and a Green Master freight invoice submitted to the destination agent (Exhibit 1, ¶ 15).

(14) For each of the twenty-five shipments made by Green Master under the Hudson-Senator service contract, Hudson appeared in the shipper block, while the freight forwarder block was blank, on the VOCC bills of lading. There is no reference to Green Master or the Hudson/Senator service contract in these master bills of lading. However, the amount of the charge for each shipment was significantly less than the applicable tariff rates or charges in Senator's tariff (Exhibit 1, ¶¶ 39-40).

(15) Shipping arrangements for Green Master's shipments were made by shippers in Taiwan (Exhibit 1, ¶ 13).

(16) Hudson, registered with the Commission as an NVOCC and designated Commission No. 012624, was located in Hong Kong. Its tariff was also published at www.oceantariff.com. Hudson does business under the trade name of Hudson Express Lines. Its business is located in Hong Kong.

(17) Hudson appeared as shipper on the bills of lading of DSR-Senator Lines GmbH (Senator), a VOCC, for 916 shipments from Taiwan under service contract number Senator FEEB 98-065. For each of these shipments, Green Master booked the shipment with Senator and issued a Green Master house bill of lading (Exhibit A, Stipulation No. 1).

(18) Hudson appeared as shipper on Senator bills of lading for 1,337 shipments from Taiwan under service contract number Senator FEED 99-063. For each of these shipments, Green Master booked the shipment with Senator and issued a Green Master house bill of lading (Exhibit A, Stipulation No. 2).

(19) Hudson appeared as shipper on Senator bills of lading for 106 shipments from Taiwan under service contract number Senator TPE01201. For each of these shipments, Green Master booked the shipment with Senator and issued a Green Master house bill of lading (Exhibit A, Stipulation No. 3).

(20) Hudson appeared as shipper on Hyundai bills of lading for 445 shipments from Taiwan under service contract number Hyundai 98-6224. For each of these shipments, Green Master booked the shipment with Hyundai and issued a Green Master house bill of lading (Exhibit A, Stipulation No. 4).

(21) Leader and D.K. Logistics also maintained documentation in connection with shipments by Green Master through VOCC's other than Senator and Hyundai. For those shipments, Green Master, not Hudson, appeared as shipper on the master bills of lading (Exhibit 1, ¶ 17).

(22) There was no evidence that Hudson was the actual shipper as stated on the Senator and Hyundai master bills of lading for the forty-eight shipments (Exhibit 1, ¶ 18).

(23) The Hudson-Hyundai and Hudson-Senator service contracts were filed with the Commission (Exhibit 1, ¶¶ 19-20).

(24) Hudson was the only NVOCC authorized to tender shipments under the Hudson-Hyundai service contract. There were no named affiliates for the service contract. Under the terms of the service contract, Hudson was not allowed to assign the contract to a third party or allow co-loading (Exhibit 1, ¶¶ 21-23 and Attachments A-B).

(25) Hudson was the only NVOCC authorized to tender shipments under the Hudson-Senator service contract. There were no named affiliates for the service contract. Under the terms of the service contract, Hudson was not allowed to assign the contract to a third party or allow co-loading (Exhibit 1, ¶¶ 25-26 and Attachments C-D).

(26) Green Master was not authorized to utilize either the Hudson-Hyundai or Hudson-Senator service contracts because it was neither a signatory nor listed as an affiliate for either contract (Exhibit 1, Attachments A-D).

(27) Twenty-one of the twenty-three shipments involving the Hudson-Hyundai service contract involved forty-foot containers. The other two were twenty-foot containers. Based on Hyundai's published tariff rates for water transportation from Asia to the United States, Green Master should have paid the rate of \$6,910.00 for a forty-foot container shipment. The rate for one of the twenty-foot containers was \$3,760.00, while the rate for the other was \$5,185.00 (Exhibit 1, ¶ 32-3 3 and Attachments E-F).

(28) By utilizing the Hudson/Hyundai service contract for twenty-three shipments, Green Master paid \$140,582.00 less than it would have paid based on Hyundai's published tariff (Exhibit 1, ¶¶ 34-36 and Attachment G).

(29) By utilizing the Hudson/Senator service contract for twenty-five shipments, Green Master paid \$126,181.53 less than it would have paid based on Senator's tariff (Exhibit 1, ¶¶ 37-40 and Attachment I).

(30) As a result of making forty-eight shipments under the Hudson-Hyundai and Hudson-Senator service contracts, Green Master paid the VOCC's \$266,763.53 less than the rates or charges that would otherwise be applicable (Exhibit 1, ¶ 41).

(31) On April 28, 1998, Sunny Ng of Hudson wrote to other NVOCC's throughout the Far East, discussed rates and terms under which they were authorized to use Hudson's service contracts, including Senator service contract number FEED 98-065. In exchange for each container shipped under Hudson's service contracts, the NVOCC's were requested to pay Hudson an administrative fee of US \$20.00 per container (Exhibit 1, ¶¶ 42-43 and Attachment K).

(32) Martin Lee of Green Master communicated with Sunny Ng of Hudson regarding shipments by the Green Master based on service contracts with Senator and Hyundai (Exhibit 1, ¶¶ 44-45 and Attachment L).

Findings with Respect to Section 10(b)(1) Issues

(33) The President of Green Master in March 1998 was Kuo Chang Chuang (Exhibit 2, ¶¶ 2-3).

(34) The General Manager of Green Master in March 1998 was Chieh Fu Sun, also known as Jeff Sun. In that capacity, he was responsible for supervision of Green Master's operations (Exhibit B, ¶ 2; Exhibit 3, ¶ 22).

(35) Green Master's tariff, No. 014579-001, which was filed and became effective on January 17, 1997, listed the following rates: Cargo NOS (Premium Service), Cargo NOS (Regular Service) and Cargo NOS (Superior Service). Green Master's tariff did not publish any per-container rates (Exhibit 2, ¶¶ 4, 11).

(36) Green Master's tariff rule number 2-A stated that when a shipper does not request a specific type of service level, then the applicable tariff freight rate is to be based on the Regular Service rate, and the rates apply on a per weight ton of 1,000 kilos or measurement ton of 1 cubic meter, whichever produces the greater revenue (Exhibit 2, ¶ 12).

(37) Green Master's tariff rule number 2-D required that a documentation handling charge of \$45.00 per bill of lading be paid by the consignee in the United States (Exhibit 2, ¶ 13).

(38) M7 Consolidation, Inc. ("M7"), based in Compton, California, served as Green Master's destination agent until December 1997 (Exhibit 2, ¶ 6).

(39) M7 acted as a consignee for Green Master's inbound shipments, and received the house bills of lading, the master carrier bills of lading and invoices from Green Master (Exhibit 2, ¶ 7).

(40) Green Master transported 256 shipments during the period of November 1997 to January 1998 (Exhibit 2, ¶ 5).

(41) M7 provided documentation for twenty shipments transported under Green Master's house bills of lading from November 3, 1997 to January 5, 1998. These records included a master bill of lading, the Green Master house bill of lading and an invoice issued by Green Master to M7 (Exhibit 2, ¶ 8).

(42) In eighteen of the twenty shipments transported under Green Master's house bills of lading from November 3, 1997 to January 5, 1998, Green Master is listed as the shipper on the master bill of lading. In the other two instances, Green Master's name does not appear on the master bill of lading.

(43) Each of the master bills of lading for the eighteen shipments in which Green Master appears as the shipper, as well as the house bills of lading for the other two shipments, reveals Green Master charged or collected less or different compensation than the freight rates applicable in its tariff (Exhibit 2, ¶ 9).

(44) As demonstrated by BOE's table of calculations, the aggregate undercharges resulting from Green Master's improper rating of cargo, based on the NOS Regular Service NVOCC tariff rate for the twenty shipments, was \$802,443.84 (Exhibit 2, ¶¶ 16-18).

(45) For all twenty shipments, Green Master failed to properly charge the shipper the \$45 documentation fee as required by its NVOCC tariff rule number 2-D (Exhibit 2,715).

(46) Additional rates were not added to Green Master's tariff until May 20, 1998, at which time rates for thirty commodities were listed (Exhibit 2, ¶ 11).

(47) Green Master currently publishes its tariff with Ocean Tariff Bureau at <http://www.oceantariff.com>. There have been no modifications to Green Master's tariff since June 14, 1999 with respect to rates or commodity filings (Exhibit 2, ¶ 19).

Findings with Respect to Respondent's Ability to Pay a Civil Penalty

(48) Green Master provided financial records consisting of the company's balance sheets and Income Tax Settlement and Return Sheets for fiscal years 1998, 1999 and 2000 (Exhibit 3, ¶ 3).

(49) The balance sheets and income statements for fiscal years 1998, 1999 and 2000 submitted by Green Master to BOE during this proceeding were accurately translated by the United States Department of State from Chinese into English (Exhibit A, Stipulation No. 5).

(50) During the years 1998, 1999 and 2000, Green Master had net operating income in the \$6,000,000-\$7,000,000 range. This period of time coincided with a period of weakened economic conditions in the shipping industry (Exhibit 3, ¶ 14).

(51) During the time period of 1998 through 2000, Green Master's total assets exceeded its total liability (Exhibit 3, ¶ 15).

(52) Green Master has fully paid capital of US \$239,902.00, which is the amount Green Master's shareholders have paid in excess of the par value of the common stock issued by the company (Exhibit 3, ¶ 16).

(53) Green Master employed approximately fifty people in July 1999 (Exhibit 3, ¶¶ 17-18, 20).

(54) Green Master owns and controls three companies, which share Green Master's office in Taiwan. These companies are J-Dar Express, Inc. (J-Dar), an airline forwarding service company; Platinum Service, Inc. (Platinum), a freight forwarding service company; and Polar International Forwarding Company (Polar), a tariffed and bonded NVOCC. J-Dar and Polar each employs 45 people. Platinum employs 49 people (Exhibit 3, ¶¶ 26-32).

(55) Green Master is a medium to large ocean transportation intermediary in a strong, healthy financial condition (Exhibit 3, ¶ 33).

(56) Effective January 7, 1997, Green Master maintained a surety bond, number 8941441, in the amount of \$50,000 with Washington International Insurance Company. This bond was increased to the amount of \$150,000 on April 15, 1999, in compliance with the Ocean Shipping Reform Act of 1998 (Exhibit 3, ¶ 2).

DISCUSSION AND CONCLUSIONS

The Section 10 (a)(1) Violations

Section 10(a)(1) of the Shipping Act prohibits any person from "knowingly and willfully" obtaining or attempting to obtain ocean transportation of property by various false activities, including false billing or classification, or by "any unjust or unfair device or means." A person is considered to have "knowingly and willfully" violated the Act if the person had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference or purposeful, obstinate behavior akin to gross negligence. *Rose International, Inc. v. Overseas Moving Network International, Ltd.* 21 S.R.R. 119 (2001); *Portman Square Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. SO, 84-85; *Ever Freight Int 'I - Possible Violations*, 28 S.R.R. 329,333 (I.D.), administratively final, June 26, 1998.

BOE contends that Green Master violated section 10(a)(1) on forty-eight occasions by conspiring with Hudson to deprive two VOCC's, Senator and Hyundai, of the compensation to which they were entitled for transporting goods based on applicable tariff rates. In each of these forty-eight shipments, Hudson was listed as the shipper, Green Master was listed as the freight forwarder and Hudson's service contract with either Senator or Hyundai was wrongly utilized as the basis for the tariff rate. As a result, Green Master obtained unwarranted freight savings of \$266,763.53 (BOE Brief at 14-17).

Green Master denies that it accessed service contracts to which it was not an accessory or an affiliate and insists that it booked the cargo as an authorized agent of Hudson under the latter's service contracts with Senator and Hyundai. Green Master contends that it has served as Hudson's agent, pursuant to an oral agreement, in Taiwan since 1997 because Hudson was not authorized to issue bills of lading in that country. As such, Green Master issued its own house bill of lading as a freight receipt in lieu of a house bill of lading by Hudson. Green Master's assertion is supported by the verified statements of Jeff Sun, General Manager of Green Master, and Sunny Ng, Chief Executive Officer of Hudson (Resp. Brief at 7-11).

BOE rebutted Green Master's agency argument in several respects. BOE notes that Green Master's evidence consists of self-serving statements by Ng and Sun, and is not supported by statements of shippers or documentation showing that shippers believed they were dealing with Green Master as agent for Hudson. BOE contends that it is likely that shippers relied on the house bills of lading to believe they were dealing only with Green Master, while Senator and Hyundai relied on the VOCC bills of lading to believe they were dealing with Hudson. BOE also rejects the notion that Green Master issued house bills of lading as freight receipts and notes that, by imputing different roles to its bills of lading, Green Master is attempting to avoid compliance with the laws

of the United States and Taiwan (BOE Reply Brief at 2-7). Green Master responded to BOE's assertions by noting that the excerpts of the Senator-Hudson and Hyundai-Hudson service contracts provided by BOE confirm that Hudson would appoint one loading agent to act on its behalf in each country covered under the contracts (Resp. Reply Brief at 2-3).

The evidence includes copies of pertinent portions of the Hudson-Senator and Hudson-Hyundai service contracts, forty-eight house bills of lading, forty-eight master bills of lading, affidavits from the three Commission Area Representatives, tables of calculations demonstrating the improper charges by which Green Master obtained water transportation pursuant to its improper use of the service contracts, and a letter, dated April 28, 1998, from Ng to "ALL AGENTS" confirming Hudson's agreement to allow them to access the service contracts for an administrative fee of \$20 per container.

The record includes information received from Green Master's destination agents in the United States. Although the role of a "destination agent" was not explained, the term has been used to describe one who receives and processes the relevant shipping documentation. Such documentation generally includes the master bill of lading issued by the VOCC and the NVOCC or house bill of lading indicating the consignee or party intended to take delivery of the goods at the destination point. *Kin Bridge Express Inc. and Kin Bridge Express (U.S.A.) Inc. -- Possible Violations*, 28 S.R.R.984, 986 (I.D.), administratively final, August 2, 1999.

Green Master's defense rests on the assertion that it had been acting as Hudson's agent in Taiwan since 1997. Under the alleged agreement, Green Master was given responsibility for soliciting customers for Hudson, booking arrangements with VOCC's, providing bills of lading to VOCC's and issuing freight receipts to Hudson's customers. It is further alleged that Green Master

issued its own bills of lading because Hudson was not a Taiwan company and its bills of lading were not registered or insured in Taiwan (Exhibit B, ¶¶ 5-7, Exhibit C, ¶¶ 4-5).

The evidence demonstrates that Green Master used unfair or unjust means to obtain transportation at less than the filed tariff rates by improperly accessing Hudson's service contracts with Senator and Hyundai. The fact that Green Master carried out this method on at least 48 occasions indicates that Green Master committed these violations of section 1 O(a)(1) "knowingly and willfully." *Universal Logistic Forwarding Co. Ltd. -Possible Violations*, 29 S.R.R. 325 (I.D.), modified on other grounds, 29 S.R.R. ___ (2002);² *Portman Square Ltd. -Possible Violations*, *supra*. Moreover, Green Master, as a tariff and bonded NVOCC, was familiar with the requirements of the Act and Commission regulations that common carriers pay and charge for water transportation based on rates on file with the Commission.

There is no doubt that Green Master, not Hudson, was the carrier with real interest in the forty-eight shipments. Green Master's destination agents had no involvement or familiarity with Hudson. They dealt only with Green Master. More importantly, the form of documentation used, a bill of lading, by its terms, is more than a mere freight receipt. It has long been utilized as an essential documentation in the shipping industry, acting as the contract of carriage, a final receipt and a document of title. Gerald H. Ullman, *Ocean Freight Forwarder, Exporter & The Law*, p. 3 (1967). The master bills of lading issued for the forty-eight shipments made no reference to Green Master acting as agent for Hudson. They stand in stark contrast to five master bills of lading provided by Green Master in which it is listed as agent for Hudson (Ex. D, pp. 14-26). As such, it is clear that the relationship between Green Master and Hudson was not one-dimensional and that

²FMC Docket No. 00-10, Report and Order, served January 18, 2002.

there were instances in which Green Master served as Hudson's agent and others, like here, where Green Master acted surreptitiously as the carrier.

Aside from the problem posed by the form of the bill of lading employed, the facts do not support an agency relationship between Green Master and Hudson in connection with the forty-eight shipments. An agency is "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1 (1957). As a fiduciary, the agent has a duty to act primarily for the benefit of the principal in connection with his undertaking. The agent's fiduciary duties include dealing fairly in all transactions between them, providing an accounting of profits arising out of the undertaking and a prohibition against competing with the principal in matters relating to the subject matter of the agency. An agent is also continuously subjected to the directions of the principal. The facts in each case must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other and the description given to the relationship by the parties is not determinative. *Id.* § § 13-1 4.

The fact that Green Master's agency agreement with Hudson is oral in nature is not the problem. As Green Master explains in its brief, agency relationships can be created orally. *Esso International, Inc. v. SS Captain John*, 443 F.2d 1144 (5th Cir. 1971). They can also exist where the agent fails to disclose the principal to a third party. *Indiana Gas Company, Inc. v. Home Insurance Company*, 141 F.3d 314 (7th Cir. 1998); *Southern Industries, Inc. v. United States*, 326 F.2d 221, 223-224 (9th Cir. 1964); See also 3 Am. Jur. 2d Agency § 3 16 (2000). Moreover, even in the absence of an agreement, implied authority can be created by knowledge of, and acquiescence in, an agent's acts. *Esso International, Inc. v. SS Captain John*, 443 F.2d at 1146.

Green Master's agency theory fails because the facts demonstrate that Green Master was acting primarily for its own benefit and was not subject to the continuous directions of Hudson. Green Master was required to provide twenty dollars for each container that it wanted to ship by accessing Hudson's service contracts with Senator and Hyundai. However, in an agency relationship, it is the principal that pays the agent, not the other way around.

This is not the first time that a carrier has attempted to disclaim its role in the shipping process by insisting that it was acting for someone else. However, it has long been held that an entity's practices, not the labels that it attaches to them, will determine its standing under our shipping laws. *United States v. California*, 297 U.S. 175, 181 (1936); *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252,254 (1916); *United States v. Brooklyn Terminal*, 249 U.S. 296 (1919); *Tariff Filing Practices, Etc. of Contaznerships, Inc.*, 9 F.M.C. 56, 62-64, 6 S.R.R. 483 (1965); *Bernard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 77 (1952); *Investigations of Tariff Filing Practices*, 7 F.M.C. 305, 321, 1 S.R.R. 819 (1962).

In *Possible Violations (Hawaiian Freight)*, 16 S.R.R. 425,434 (I.D.), administratively final, November 6, 1975, a carrier insisted that it acted merely as a shipper's agent and assumed no liability for loss or damage while goods were in the custody of the underlying ocean vessel. The Administrative Law Judge rejected the respondent's self-declaration and found that it acted as a carrier. Of significance was that the carrier solicited customers in its own name, provided a water transportation service for shippers utilizing VOCC's, provided consolidation services at its terminals, distributed the cargo to consignees at the point of destination, exercised exclusive control after delivery from shippers, made no oral disclaimer to shippers and paid claims presented by shippers.

The Administrative Law Judge's conclusion was on sound footing, having relied on the Supreme Court's decision in *Chicago Etc. R. Co. v. Acme Fast Freight*, 336 U.S. 465 , 484-485

(1949). In that case, the Supreme Court distinguished between forwarders who merely book or dispatch cargo and those who provide a coordinated transportation service. The former type was recognized as a mere shipper's agent but the latter was held to be a common carrier pursuant to section 402 (a) (5) of the Freight Forwarder Act, 49 U.S.C. § 1002(a)(5).

The Section 10 (b)(1) Violations

Section 1 O(b)(1) of the 1984 Act is an absolute-liability statute. While the intentions of the carrier are irrelevant to a determination of liability under the statute, they can be considered in mitigation when assessing penalties. *F & D Loadline Corp.*, 27 S.R.R. 764, 767 (I.D.), administratively final, June 28, 1996; *Trans Ocean-Paczjk Forwarding, Inc., Possible Violations of Section 10(b)(1)*, 27 S.R.R. 409, 412 (I.D.), notice of non-review, February 9, 1996; *Martyn Merritt-Possible Violations of Shipping Act of 1984*, 25 S.R.R. 1295, 1300 n. 3 (I.D.), adopted, 25 S.R.R. 1495 (1991). However, violations of section 10(b)(1) can be “willfully and knowingly committed” within the meaning of section 13(a) of the 1984 Act for purposes of assessing up to \$27,500 per violation in civil penalties. *Trans Ocean-Pacific Forwarding, Inc., Possible Violations*, 27 S.R.R. at 412.

Green Master concedes that it failed to file specific shipping rates when it filed its tariff on January 17, 1997. The tariff contained only a “Cargo NOS”³ rate from the date it was filed until March 20, 1998. Green Master attributes the failure to file specific shipping rates to mistake or oversight by a company just commencing operations. It further asserts that it discovered and corrected the mistake in early 1998, “on its own long before the investigation leading to this proceeding was commenced” by filing individual shipping rates in its tariff. As previously noted, section 1 O(b)(1) is an absolute-liability statute.

³ Not otherwise specified.

The filing of an “NOS” rate does not, in and of itself, violate the 1984 Act. Green Master concedes that it failed to charge the applicable tariff freight rates and documentation fees on eighteen occasions from November 3, 1997 to January 5, 1998, but disputes BOE’s reference to such a rate for the purpose of determining the amount of undercharges (Resp. Brief at 11-12). Green Master cannot have it both ways. It charged less than the amount set forth in its filed tariff and that is enough for a section 10(b)(1) violation and a determination of undercharges flowing therefrom. *Marcella Shipping Co., Ltd., Possible Violations*, 23 S.R.R. 857, 862-63 (I.D.), notice of finality, March 26, 1986.

Green Master also takes exception with respect to two of the shipments (Exhibits E- 1 through E-20). The two shipments listed Hudson, not Green Master, as the shipper (Exhibits E-8, E-17). Green Master contends that a section 10(b)(1) violation requires proof that one act in the capacity of carrier (Resp. Reply Brief at 10). I agree that section 10(b)(1) applies only to carriers, but note that the applicable house bills of lading demonstrate that Green Master acted as a carrier with respect to those shipments as well. Accordingly, Green Master undercharged shippers in the aggregate \$802,443.84 in violation of section 10(b)(1).

Green Master also disputes BOE’s assertion that Green Master likely failed to charge its tariff rates on the additional 256 shipments shipped from November 1997 to January 1998. BOE’s contention is premised on an article in an industry trade journal. It contends that the article’s reference to Green Master as the “overseas exporter” with respect to 256 shipments is not competent nor reliable evidence that it acted as an NVOCC in those instances (Resp. Brief at 11-12). I agree that such evidence must be excluded. Commission regulation requires that evidence be relevant, material, reliable and probative. 46 C.F.R. § 502.156. While the individual shipping information, contained in a widely used industry publication, is relevant, material and reliable, it is not

sufficiently probative. The fact that evidence was submitted by Green Master tending to show that, with respect to five other shipments, Green Master may have acted as Hudson's agent, renders the term of "overseas exporter" vague (Ex. D, pp. 14-26).

In an attempt to mitigate its violation of the statute, Green Master relies on public statements made by Commission Chairman Harold J. Creel, Jr. and former Commissioner John A. Moran in which they explained the Commission's primary objective of obtaining compliance with the Shipping Act rather than assessing penalties (Resp. Brief at 12-14). However, there is no reason to believe that their remarks regarding compliance were intended as directives that BOE discontinue enforcement of the 1984 Act. Moreover, there is even less reason to believe that their statements were intended to apply to a company such as Green Master, which includes the former managers and employees of Trans Ocean-Pacific Forwarding, Inc. (TOP), an NVOCC that defied the Commission by shutting down operations after being assessed significant civil penalties.

Assessment of a Civil Penalty

Having found violations of sections 1 O(a)(1) and 1 O(b)(1), the Administrative Law Judge is required to assess a civil penalty. Section 13(a) of the Act, as implemented by Commission regulations, imposes a penalty of up to \$27,500 for each violation committed willfully and knowingly during the period alleged. 61 FR 52705; 46 C.F.R. Part 506. However, section 13(c) requires that the Administrative Law Judge consider the following factors in determining the amount of the penalty: "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 any such other matters as justice may require." 46 U.S.C. app. § 1712(c).

Nature, Circumstances, Extent and Gravity of the Violations

The nature and circumstances of the violations are clear. Green Master violated section 1 O(a)(1) of the Act by improperly accessing service contracts between Hudson, another NVOCC, and two VOCC's, Hyundai and Senator. The agreement was not, as Green Master suggests, one which had a "negligible" or "non-existent" impact on the market (Resp. Reply Brief at 13-14). It was an arrangement that enabled Green Master to obtain ocean transportation from Hyundai and Senator by falsely stating on the VOCC bills of lading that Hudson was the shipper, when in fact Green Master acted as the shipper. By using Hudson's service contract rate, Green Master charged a shipment rate that was significantly below the tariff rate it filed in May 1998. The extent and gravity of the violations were substantial. As a result of making forty-eight shipments under the Hudson-Hyundai and Hudson-Senator service contracts over a one-year period, Green Master deprived the VOCC's of \$266,763.53 in compensation.

Green Master also violated section 10(b)(1) on twenty occasions. Its total charge of only \$55,715.50 for the twenty shipments was less than one-fourteenth of the applicable freight charges of \$802,443.84.

The parties stipulated to the fact that Green Master made an additional 2,756 shipments using the two service contracts at issue here and two other Hudson-Senator service contracts (Exhibit A, Stipulations 1-5). BOE contends that Green Master "knowingly undertook procedures to mislead the carriers as to the actual shipper, gain access to Hudson's service contracts, and subsequently pay lower freight rates than it was otherwise entitled to pay" because the latter issued its own house bill of lading and Hudson appeared as shipper on the master bill of lading (BOE Brief at 24-25). However, the record is not complete enough to enable me to draw inferences beyond the stipulated

facts. There is no indication whether Hudson appeared on those master bills of lading only as shipper or whether Green Master appeared as agent for Hudson as shipper, as was the case with respect to five bills of lading submitted by Green Master (Exhibits D, pp. 14-26). Furthermore, there is no information regarding the amounts charged by Green Master for those shipments. Accordingly, any inference drawn from such a vague stipulation would be pure speculation and I will not infer that Green Master violated the Shipping Act with respect to any of those shipments. *Alcoa S.S. Co. Inc. v. CIA. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962); *West Coast Line, Inc. et al. v. Grace Line, Inc. et al.*, 3 F.M.B. 586, 595 (1951).

Culpability

Green Master knowingly and willingly participated in an organized scheme to assume the identity of another NVOCC in order to cheat Senator and Hyundai out of their rightful compensation. Green Master paid Hudson \$20 for each container that it was able to ship under the cloak of a carrier bill of lading issued by Hudson. Green Master was operating under a tariff and, therefore, was chargeable with knowledge of the requirements of the 1984 Act and Commission regulations that it pay the published tariff rates of VOCC's. However, it deliberately ignored the 1984 Act in order to save, and thus deprive Senator and Hyundai of, approximately \$266,763.53 in transportation charges.

As previously noted, Jeff Sun, Green Master's General Manager, was personally familiar with the Commission's attitude towards violations of section 10(b)(1). After his former company was punished by the Commission with the assessment of \$1,450,000 in civil penalties in *Trans Ocean-Pacific Forwarding, Inc.*, *supra*, he joined Green Master. At Green Master, rather than implement lessons learned from Commission enforcement, he managed the company by filing essentially meaningless "NOS" rates with respect to the shipping industry. As noted by BOE, such rates are considered "hollow shell" tariffs when there is no intention to apply them. *Ever Freight Int'l Ltd.*,

et al. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329, 336 (I.D.), administratively final, June 26, 1998. Almost immediately after filing its tariff, it Green Master proceeded to charge less than the applicable tariff rate.

History of Prior Offenses

BOE concedes that Green Master does not have a prior history of violations with the Commission, but notes that Jeff Sun controlled TOP during the period of time that it committed fifty-eight violations of section 10(b)(1). BOE Opening Brief at 26. Green Master responds to this allegation by disputing BOE's contention that Jeff Sun is the same person who controlled TOP (Resp. Reply Brief at 14). BOE's contention is based on an "allegation" received by Area Representative Moneck from a Taiwan-based NVOCC that Sun, as well as several other former TOP employees, moved on to Green Master. This allegation led to the investigation by Monek that resulted in this proceeding.

Notably, Green Master does not refute the allegation with a statement by Sun, but merely attacks it for insufficiency. Under the circumstances, it is reasonable to infer that Jeff Sun was the same person involved in the control of TOP. Moreover, it can be inferred that the rest of Green Master's management knew or should have known that Sun had a history of ignoring the Shipping Act. *Port Authority of New York v. New York Shipping Association*, 22 S.R.R. 1329, 1353 (I.D.), modified on other grounds, 23 S.R.R. 21 (1985). I agree with BOE that Sun's history of Shipping Act violations, coupled with his embracement by Green Master, constitutes an aggravating factor in determining an appropriate penalty.

The Ability to Pay the Penalty

The proponent of an order imposing a fine must present evidence of the violator's ability to pay the fine. 46 App. U.S.C. §§ 1712; *Merritt v. United States*, 960 F.2d 15, 17 (2d Cir. 1992). BOE produced expert testimony by Area Representative Carey in which he concluded that Green Master's financial condition was strong. Green Master employed approximately fifty people, had a positive net worth and annual net operating income of approximately \$6,000,000-\$7,000,000 and \$239,902 in fully paid capital and had a \$50,000 bond on file with the Commission during the period of time the subject violations occurred. Green Master recently purchased three other companies involved in the transportation industry. These companies shared Green Master's office space as well as approximately forty-five to forty-nine employees (BOE's Opening Brief at 28-29).

Green Master contends that its financial position is not strong for several reasons: its cash position "drastically declined" between 1998 and 2000 from approximately \$550,000 to approximately \$106,000; its total net worth was only \$28 1,089 at the end of 2000; gross profits reflect revenue of approximately \$1 ,000,000 per year; and its total net worth increased only \$29,000 from 1999 to 2000 (Resp. Reply Brief at 15- 16). However, Green Master did not explain its connection with the three other companies that it owns and shares office space with, as well as the extent, if any, to which assets and liabilities are commingled among the four companies.

We are not confined to assessing a penalty based solely upon Green Master's operating revenues. Consideration must be given to the gravity and extent of the violations, Green Master's culpability, its history of prior offenses and the deterrence of violations by imposing greater civil penalties. Civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. - Possible Violations*,

29 S.R.R. ___ (2001);⁴ *Refrigerated Container Carriers Pty. Limited-Possible Violations*, 28 S.R.R. 799, 805 (I.D.), administratively final, May 21, 1999.

The maximum possible civil penalties under the Act are warranted where an NVOCC willfully obtains transportation at less than filed rates through a surreptitious agreement. *Universal Logistic Forwarding Co., Ltd., - Possible Violations*, 29 S.R.R. 325 (I.D.), modified on other grounds 29 S.R.R. 474 (2002) (\$1,237,500 maximum assessed for forty-five violations); *Refrigerated Container Carriers Pty. Limited - Possible Violations*, 28 S.R.R. at 806 (\$1,250,000 maximum assessed for fifty violations).

Such Other Matters as Justice May Require

Green Master is one of at least two carriers that participated with Hudson in a scheme to illegally access service contracts and cheat VOCC's out of their rightful compensation for the water transportation of cargo. The other carrier was found by me to have violated section 10(a)(1) on seventy-two occasions over a period of ten and one-half months. *Transglobal Forwarding Co., Ltd. - Possible Violations of Section 1 O(a)(1) of the Shipping Act of 1984*, 29 S.R.R. ___ (2002).⁵ In that proceeding, I found neither mitigating nor aggravating factors and assessed a civil penalty of \$1,440,000, or \$20,000 per violation of section 1 O(a)(1). In assessing the penalty, I noted, citing *Stallion Cargo, Inc. - Possible Violations, supra*, that the Commission has chosen, in certain instances, to assess less than the maximum penalty where the amount assessed was significant.

In this proceeding, there are no mitigating factors, but there is an aggravating factor due to the significant involvement of Jeff Sun, a serial violator of the 1984 Act, in the operation of Green

⁴ FMC Docket No. 99-18, served October 18, 2001.

⁵ FMC Docket No. 01-09 (I.D.), served May 10, 2002.

Master. Green Master appeared and cooperated in this proceeding. It also filed meaningful, specific tariff rates for numerous commodities on May 20, 1998. However, just as I refused to infer that Green Master violated the Act with respect to other shipments due to the vagueness of the information provided, I will not infer that Green Master's filing of a meaningful tariff on May 20, 1998, without more, resulted in it complying with that tariff.

Having considered the applicable statutory factors, as well as the need to send a message to the shipping industry that persistent violators will not be permitted to violate the law by shifting from one carrier to another, I conclude that Green Master should be ordered to pay a civil penalty of \$1,530,000, or \$22,500 for each of sixty-eight violations of the Act.

Issuance of a Cease and Desist Order

BOE does not believe that there is a need to suspend Green Master's tariff, but requests that an order be issued directing that Green Master cease and desist from violating sections 10(a)(1) and 10(b)(1) of the Act by shipping cargo under service contracts to which it is neither a signatory nor affiliate, or charging different compensation than that stated in its tariff (BOE Brief at 29-30). Green Master does not contest BOE's application for a cease and desist order.

A cease and desist order is generally issued when there is a reasonable likelihood or expectation that the respondent will continue or resume illegal activities. *Alex Parsznia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342-1343 (I.D.), administratively final, December 4, 1997. While there is no proof that Green Master continued to violate the Shipping Act after May 2, 1999, a cease and desist order should be issued since it appears that Green Master intends to continue in business. *Alex Parsinza*, 27 S.R.R. at 1342. Moreover, its General Manager, Jeff Sun, was a principal in TOP, an NVOCC found by the Commission to have violated section 10(b)(1) of

the Act on fifty-eight occasions.⁶ Therefore, the fact that another NVOCC managed by Sun has run afoul of the Shipping Act is hardly a strange coincidence.

A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd*, 23 S.R.R. at 871-872. The record shows that Green Master violated section 10 (a)(1) of the 1984 Act by knowingly and willfully accessed service contracts of other NVOCC's for the purpose of obtaining ocean transportation for property at less than the rates or charges that would otherwise have been applicable. Green Master also violated section 10 (b)(1) of the 1984 Act by charging less compensation for the transportation of property than the rates and charges shown in its tariff. Therefore, Green Master is ordered to cease and desist from violating section 10(a)(1) of the Act by accessing the service contracts of other NVOCC's for the purpose of charging lower rates than those lawfully applicable or for any other purpose. Similarly, as to section 10(b)(1) of the Act, Green Master is ordered to cease and desist from charging less than the rates published in its tariff.

IT IS ORDERED, that respondent, Green Master Freight Services, Ltd. is found to have violated section 10(a)(1) of the Shipping Act in 1998 and 1999; and

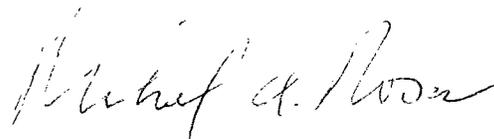
IT IS FURTHER ORDERED, that respondent, Green Master Freight Services, Ltd. is found to have violated section 10(b)(1) of the Shipping Act in 1997 and 1998; and

IT IS FURTHER ORDERED, that Green Master Freight Services, Ltd. is ordered to pay a civil penalty of \$1,530,000; and

⁶*Trans Ocean-Pa& Forwarding, Inc --Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, supra*

IT IS FURTHER ORDERED, that Green Master Freight Services, Ltd. is to cease and desist from knowingly and willfully, directly or indirectly, accessing the service contracts of other carriers for the purpose of obtaining ocean transportation for property at less than the rates or charges that would otherwise be applicable, and from receiving unlawful carrier compensation in violation of the Act;

IT IS FURTHER ORDERED, that Green Master Freight Services, Ltd. is to cease and desist from charging less than the rates published in its tariff.



Michael A. Rosas
Administrative Law Judge

Washington, D.C.
July 30, 2002