

BEFORE THE
FEDERAL MARITIME COMMISSION

PARKS INTERNATIONAL SHIPPING, INC., CARGO)
EXPRESS INTERNATIONAL SHIPPING, INC., BRONX)
BARRELS & SHIPPING SUPPLIES SHIPPING CENTER INC.,)
AND AINSLEY LEWIS a.k.a. JIM PARKS - POSSIBLE)
VIOLATIONS OF SECTIONS 8(a), AND 19 OF THE)
SHIPPING ACT OF 1984, AS WELL AS THE COMMISSION'S)
REGULATIONS AT 46 C.F.R. PARTS 515 AND 520)

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Docket No.
06-09

BRIEF OF
BUREAU OF ENFORCEMENT
ON REMAND

Peter J. King, Director
Julie L. Berestov, Trial Attorney

Bureau of Enforcement
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

June 1, 2012

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Before the
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Docket No. 06-09

**BRIEF OF
BUREAU OF ENFORCEMENT
ON REMAND**

I. INTRODUCTION.

This proceeding was instituted by Order of Investigation (Order) served September 19, 2006.

The Order was issued by the Commission pursuant to sections 8, 11, 13, and 19 of the 1984 Act, 46 U.S.C. §§ 40501-40503, 41301-41306, 41107-41108, and 40901-40904. The Order directed that the following specific issues be determined:

- 1) whether Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center, Inc., and/or Ainsley Lewis a.k.a. Jim Parks violated section 8(a) of the 1984 Act and the Commission's regulations at 46 C.F.R. Part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges;
- 2) whether Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks violated section 19 of the 1984 Act and the Commission's regulations at 46 C.F.R. Part 515 by operating as a non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility;

- 3) whether, in the event violations of sections 8(a) and 19 of the 1984 Act and/or 46 C.F.R. Parts 515 and 520 are found, civil penalties should be assessed against Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks and, if so, the amount of the penalties to be assessed; and
- 4) whether, in the event violations are found, appropriate cease and desist orders should be issued against Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks.

The Order named Parks International Shipping, Inc. (Parks), Cargo Express International Shipping, Inc. (Cargo Express), Bronx Barrels & Shipping Supplies Shipping Center Inc. (Bronx Barrels), and Ainsley Lewis a.k.a. Jim Parks as Respondents herein. The Commission's Bureau of Enforcement (BOE) was also named a party to this proceeding.

BOE initiated discovery procedures under Subpart L of the Commission's Rules of Practice and Procedure upon the submission of Interrogatories and Requests for Production of Documents directed to Respondents, served October 19, 2006. Discovery responses were due on or before November 20, 2006. Respondents failed to respond to any of the discovery requests and BOE filed a Motion to Compel Discovery from Respondents on November 28, 2006. Respondents did not file a response to BOE's motion. Administrative Law Judge Clay G. Guthridge (ALJ) granted BOE's motion to compel on April 9, 2007 and ordered Respondents to reply to the discovery requests no later than May 11, 2007. Respondents never furnished responses to any of BOE's Interrogatories and Requests for Production of Documents despite the presiding officer's mandate.

On October 26, 2007, BOE filed a Motion for Sanctions and Summary Judgment requesting, *inter alia*, that the presiding ALJ: (1) impose sanctions against all of the Respondents for their failure to comply with the ALJ's Order of April 9, 2007; (2) grant summary judgment against the Respondents for violations of sections 8(a) and 19 of the Shipping Act of 1984 (1984 Act); (3) enter

an order assessing civil penalties against Respondents; and (4) issue cease and desist orders against Respondents. BOE's Motion was accompanied by the Verified Statement of Emanuel James Mingione. On October 23, 2009, the ALJ issued a Memorandum and Order (Oct. 23 Order) granting BOE's Motion for Sanctions in part, but deferred ruling on BOE's request that Respondents be barred from presenting evidence as to whether they knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without publishing tariffs, obtaining licenses from the Commission, and providing proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act.

The ALJ further held that BOE had proven by a preponderance of the evidence that: 1) Parks, Cargo Express, and Bronx Barrels have not published tariffs, obtained OTI licenses, and provided proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act; 2) with respect to thirty-eight (38) shipments, Parks violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility; 3) with respect to fourteen (14) shipments, Cargo Express violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility; and 4) with respect to two (2) shipments, Cargo Express violated section 19 by operating as a freight forwarder that did not obtain a license and provide proof of financial responsibility. However, the ALJ held that, *inter alia*, BOE did not prove by a preponderance of the evidence that: 1) Bronx Barrels was involved in any shipments by water between the United States and a foreign port; and 2) Ainsley Lewis a.k.a Jim Parks, in his individual capacity, operated as either an NVOCC or a freight forwarder on any shipments.

The ALJ established a procedural schedule requiring BOE to submit its proposed findings of fact, supporting evidence, and brief on or before November 20, 2009.¹ The October 23 Order, Part III, provided that BOE “need not propose findings of fact reiterating” those findings already made by the ALJ. Therefore, in its Opening Brief BOE proposed facts and presented arguments limited solely to the issues of: (1) whether Parks and Cargo Express knowingly and willfully violated sections 8(a) and 19 of the 1984 Act with respect to the activity the ALJ already determined has been proven by a preponderance of the evidence; (2) the appropriate amount of civil penalties to be assessed against Parks and Cargo Express; and (3) the issuance of cease and desist orders against Parks and Cargo Express. Respondents did not appear or otherwise participate at any stage of this proceeding.

In an Initial Decision served on February 5, 2010, the ALJ assessed a civil penalty in the amount of \$18,000 against Parks for twelve (12) violations of sections 8(a) and 19 of the 1984 Act and ordered that Parks cease and desist from violating the 1984 Act by operating as an unlicensed OTI. The ALJ likewise assessed a civil penalty in the amount of \$412,000 against Cargo Express for sixteen (16) knowing and willful violations of sections 8(a) and 19 of the 1984 and also ordered Cargo Express to cease and desist from violating the 1984 Act by operating as an unlicensed OTI. Finally, the ALJ ordered that the claims against Bronx Barrels and Ainsley Lewis be dismissed. Parks International Shipping, Inc., et al. – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission’s Regulations at 46 C.F.R. Parts 515 and 520, 31 S.R.R. 1166 (ALJ 2010).

No exceptions were filed. However, the Commission issued a notice on March 4, 2010, to

¹ The ALJ directed in Part III of his October 23 Order that BOE not re-submit the documents which were included as exhibits in its Motion for Sanctions and Summary Judgment.

review the Initial Decision on its own motion. By subsequent Order dated April 26, 2012, the Commission vacated the ALJ's Initial Decision and remanded the case to the ALJ for further proceedings consistent with the Commission's decision in Docket No. 06-01, Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 as well as the Commission's Regulations at 46 C.F.R. 515.13, 515.21, and 520.3, ___ S.R.R. ___ (slip op. issued March 15, 2012).

By Order dated May 1, 2012, the ALJ directed BOE to file a supplemental brief addressing the issues raised by the Commission on remand.²

II. PRELIMINARY MATTERS.

This matter having been remanded to the ALJ for a new determination of whether the Respondents knowingly and willfully violated sections 8(a) and 19 of the 1984 Act and the appropriate level of civil penalties, BOE hereby incorporates by reference its substantive filings herein, including but not limited to the Verified Statement of Emanuel James Mingione along with Attachments A through Q, filed October 26, 2007 as part of BOE's Motion for Sanctions and Summary Judgment; and BOE's Opening Brief, Proposed Findings of Fact and legal arguments with Appendix, filed November 20, 2009.

The Commission's Order of April 26, 2012, vacated the ALJ's Initial Decision, but was silent with respect to the ALJ's Order of October 23, 2009. Consequently, BOE assumes that the latter Order remains in full force and effect. Among other things, the October 23 Order found that BOE had not proven that either Respondent Bronx Barrels or Respondent Ainsley Lewis had

² BOE's supplemental brief was originally due on May 22, 2012. BOE filed a request for an extension of time on May 21, 2012. The ALJ granted that request via Order dated May 22, 2012 extending BOE's filing deadline until June 1, 2012.

operated as an NVOCC or an ocean freight forwarder on any shipments. On that basis, the claims against both Respondents were dismissed in the initial decision. 31 S.R.R. 1205. As BOE did not file exceptions to the initial decision, BOE has determined not to further address the claims against Bronx Barrels or Ainsley Lewis.

III. DISCUSSION.

A. Inferences and Presumptions are Permissible Methods of Proof

The Commission's recent decision in Worldwide Relocations addressed acceptable methods of proving that an entity acts as NVOCC including the subsidiary considerations of holding out as a common carrier and assuming responsibility for transportation. From a more general perspective, the Commission sanctioned the use of inferences and presumptions as a method of supplementing and fulfilling the evidentiary standard to establish violations by a preponderance of the evidence. Significantly, the Commission recognized the practical difficulties of proof in cases where, as here, a party respondent absconds and/or shipment documentation is deemed incomplete or not adequately sponsored by testimony. The Commission specifically stated that "[a]dverse inferences are particularly appropriate when a party fails to produce documents, or when documents have been destroyed." Worldwide Relocations, slip op. at 9. In such instances, reasonable inferences may be drawn to fill in the blanks. Id. at 13. The inferences must be reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry. Id. at 14.

Presumptions are simply logical or reasonable inferences drawn from established facts that may be rebutted by evidence. Id. The Commission held that permissive presumptions may be employed to determine whether an entity operated as an NVOCC or as an ocean freight forwarder.

Id. “[P]ermissive presumptions may be used in situations where one party has superior access or control of facts, evidence, or proof resulting in an imbalance in the judicial proceeding.” Id. When the adverse party does not come forward to rebut the existence or correctness of the presumed fact, or the adverse party’s proffered evidence fails to rebut the logical inference of the presumption, then the presumed fact may stand as proven. Id. at 15. This framework is particularly applicable in this case where the Respondents, having access to and control of the evidence that was requested by BOE in discovery and subsequently compelled to production by the ALJ, consistently failed to produce same and have, therefore, created an imbalance in this proceeding.

The issues in Worldwide Relocations required a determination of the NVOCC status of the respondent companies that were operating without licenses, tariffs, or bonds. In this case, the ALJ has already determined that Parks and Cargo Express each violated sections 8(a) and 19 of the 1984 Act by operating as unlicensed OTIs. (See Oct. 23, 2009 Order). Nonetheless, inferences and presumptions are appropriate for the purpose of determining that Parks and Cargo Express violated the 1984 Act knowingly and willfully, assessing appropriate civil penalties against Parks and Cargo Express, and imposing cease and desist orders against Parks and Cargo Express.

B. Parks Knowingly and Willfully Violated Sections 8(a) and 19 of the 1984 Act

The ALJ’s Oct. 23, 2009 Order found, *inter alia*, that Parks violated sections 8(a) and 19 of the 1984 Act on thirty-eight (38) occasions by operating as an unlicensed, unbonded NVOCC. On the assumption that this finding remains in force, BOE restricts the discussion in this section to its argument that Parks committed those violations knowingly and willfully.

The term “knowing and willful” has been defined by the U.S. Supreme Court as meaning “purposely or obstinately” and is designed to describe the attitude of a person “who, having free will

or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” United States v. Illinois Central Railroad Co., 303 U.S. 239, 242-243 (1938), *citing* St. Louis & S.F.R. Co. v. United States, 169 F. 69, 71 (8th Cir. 1909). Similarly, the Commission has employed such descriptive phrases as “a ‘pattern of indifference’ to the requirements of regulatory law, a ‘persistent failure to inform’ oneself, ‘intentional disregard,’ ‘wanton disregard,’ and, of course, purposeful and obstinate behavior or something akin to ‘gross negligence’ to define ‘knowing and willful’ behavior in violation of regulatory statutes.” 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, 333 (ALJ 1998).

The Commission has also made clear that a knowing and willful violation does not require actual knowledge that the requirements of the statute are being violated or disregarded:

Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement. Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., et al., 11 F.M.C. 357, 363-364 (1968).

The federal courts likewise do not attach an actual knowledge requirement. See, e.g., Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10th Cir. 1967) (“[T]he term ‘knowingly’ imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited.”).

The Commission explained the criteria for finding that a violation was committed knowingly and willfully in Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397, 1403 (FMC 2000). as follows:

In determining whether a person has violated the 1984 Act “knowingly and willfully,” the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.” [citation omitted].

Malicious intent to break the law is not required. Shipman Int’l (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 C.F.R. Part 514, 28 S.R.R. 100, 109 (ALJ 1998). However, an NVOCC is obligated to “educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665, 677 (FMC 2001).

Parks has existed as a corporation since July 28, 1999, with Respondent Ainsley Lewis a.k.a. Jim Parks as its chief executive officer. PFF 1, 3, 4.³ The record establishes that Parks advertised itself as an OTI to the general public, signed a series of service contracts with an ocean common carrier, and tendered numerous shipments of household goods and personal effects pursuant to those contracts. PFF 9, 10, 11, 12. At least respect to the 38 shipments addressed by the ALJ in the Oct. 23 Order, Parks’ activities dated back to 2001, when it signed three (3) service contracts falsifying its shipper status to the ocean common carrier, and tendered multiple shipments of its customers’ household goods pursuant to one of those contracts. Indeed, in executing its first service contract with Tropical in April 2001 (number 010486), Parks was on notice, via subparagraph nos. 3 and 9,

³ PFF refers to BOE’s proposed findings of fact filed with its opening brief on November 20, 2009.

that it was entering a relationship potentially subject to regulation by the Commission and was also required to file a bond if acting as an NVOCC.⁴ Parks nevertheless falsified its status as cargo owner to Tropical while knowing that it was acting as an NVOCC and, therefore, should have known of its obligation to be a bonded entity with the Commission.⁵

Apart from Parks' likely acquisition of information about regulatory requirements disseminated among members in the shipping community, various Commission's rulemakings and formal proceedings addressing the licensing, bonding, and tariff provisions of the 1984 Act also serve to demonstrate that Parks knew, or should have known, that it was required to obtain a license and proof of financial responsibility prior to commencing its OTI operations. Significantly, these rulemakings and proceedings were contemporaneous with Parks' formation and startup in the business, and duly published in the Federal Register. Consequently, Parks is charged with or presumed to have notice of the statute's requirements. See 44 U.S.C. § 1508. (The filing and publication of documents required to be published by an Act of Congress is sufficient notice of the contents of the document to persons subject to or affected by it.).

Upon enactment of the Ocean Shipping Reform Act of 1998 (OSRA), Pub. L. 105-258, the Commission actively provided guidance to the shipping public by conducting a rulemaking proceeding, Docket No. 98-28, wherein it solicited comments from the industry and outlined the obligations of all OTIs pursuant to OSRA's new licensing and bonding requirements. See

⁴ Subparagraph 3, entitled "Effective and Expiration Dates", states as follows: "This agreement shall become effective upon the signatures of Tropical and Customer, and the filing of the agreement with the Federal Maritime Commission, if required." Furthermore, subparagraph no. 9 entitled "Status of Customer", states, *inter alia*: "If Customer or any listed Affiliate is an NVOCC, Customer agrees to provide Tropical a copy of its bond on file with the Federal Maritime Commission."

⁵ The requirement that shipper parties to service contracts certify their status, and in the case of NVOCCs, that they provide proof to the ocean common carriers that they are tariffed and bonded was imposed in Bonding of Non-Vessel-Operating Common Carriers, 25 S.R.R. 1679, 1681 (FMC 1991).

Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 28 S.R.R. 629 (FMC 1999), Notice of Proposed Rulemaking published 63 FR 70710 (Dec. 22, 1998). The Commission's Final Rule therein was published 64 FR 11156 (Mar. 8, 1999).

Also in 1999, the Commission undertook to bring its service contract regulations into alignment with OSRA by initiating Docket No. 98-30, Service Contracts Subject to the Shipping Act of 1984, Notice of Proposed Rulemaking published 63 FR 71062 (Dec. 23, 1998), Interim Final Rule published 64 FR 11186 (Mar. 8, 1999). See 28 S.R.R. 688 (FMC 1999). Revisiting the issue of the need for service contract certifications by shipper parties and confirming such requirement, the Commission emphasized the fact that "the shipper status certification requirement serves both to remind shippers in what capacity they may enter into service contracts, and to assist carriers to ensure they enter into a service contract only with compliant NVOCCs." Service Contracts Subject to the Shipping Act of 1984, 28 S.R.R. 724, 733 (FMC 1999), 64 FR 23782 (May 4, 1999).

Subsequently, in 2000, when multiple members of the OTI community failed to comply with OSRA's requirements, the Commission commenced a public proceeding, Docket No. 00-12, revoking a series of licenses as well as issuing cease and desist orders to enforce the new licensing requirements announced under OSRA. See Order to Show Cause, 65 FR 77879 (Dec. 13, 2000). In explaining the basis for its actions therein, the Commission explicitly acknowledged the actions of Commission staff "to inform and advise all OTIs of the new requirements and to encourage them to comply with those requirements promptly and voluntarily." Revocation of Licenses, Provisional Licenses and Order to Discontinue Operations in U.S.-Foreign Trades for Failure to Comply with the New Licensing Requirements of the Ocean Shipping Reform Act of 1998, 29 S.R.R. 193 (FMC 2001). Notice of the revocations was published subsequently, 66 FR 27143 (May 16, 2001).

In addition to publicizing the adoption of the aforementioned regulations, the Commission

also issued and published in the Federal Register several Orders as to other unlicensed, unbonded entities operating between the U.S. and the Caribbean, the same trade lanes in which Parks was competing as an OTI. See David P. Kelly and West Indies Shipping & Trading, Inc. – Possible Violations of the Shipping Act of 1984, 64 FR 44928 (Aug. 18, 1999)⁶ (Order of Investigation and Hearing is issued to determine, *inter alia*, whether Respondents violated sections 8 and 19 of the 1984 Act by operating as unlicensed, unbonded OTIs); World Line Shipping, Inc. and Saeid B. Maralan (aka Sam Bustani), 65 FR 24697 (Apr. 27, 2000)⁷ (Respondents are ordered to show cause why they should not be found in violation of sections 8 and 19 of the 1984 Act by operating as unlicensed, unbonded OTIs); Docket No. 01-07, Tignes, Inc. – Application for a License as an Ocean Transportation Intermediary, 66 FR 35436 (July 5, 2001)(Order of Investigation and Hearing is issued instituting a proceeding to determine whether applicant is qualified to render OTI services).⁸

Based on Parks' active participation in the industry as an NVOCC, as well as the various Commission pronouncements throughout the relevant time period, Parks knew, and must be presumed to have known of the licensing, tariff, and financial responsibility requirements of the 1984 Act.

At all times, Parks was obligated to diligently inform itself through normal business resources of such requirements applicable to its business and operations, Pacific Champion Express Co., Ltd., *supra*, said requirements to reasonably include the FMC licensing, bonding, tariff and service contracting provisions applicable to OTIs. Park's failure in this respect was at its own peril. Stallion Cargo, Inc., 29 S.R.R. at 677. At best, Parks was indifferent to the requirements of law; at

⁶ 28 S.R.R. 1057 (FMC 1999).

⁷ 28 S.R.R. 1395 (FMC 2000).

⁸ 29 S.R.R. 197 (FMC 2001).

worst, it deliberately disregarded the statute. In either case, its actions and inactions sufficiently establish that its violations were knowingly and willfully committed. Comm-Sino Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 27 S.R.R. 1201 (ALJ 1997); Ever Freight International Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329 (ALJ 1998); Best Freight International Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R.447 (ALJ 1998).

Of equal import, Parks chose not to participate in this proceeding or submit any materials rebutting the contents of the evidentiary record, and the inferences that may be reasonably drawn therefrom, that Parks had notice of and knowingly and willfully violated the Act. In accordance with the standards explained in Worldwide Relocations, slip op. at 15, BOE submits that it has established by a preponderance of the evidence that Parks knowingly and willfully violated sections 8(a) and 19 of the 1984 Act in at least thirty-eight (38) instances between 2001 and 2002. Anything short of such a finding would be tantamount to granting Parks the “ignorance of the law” defense specifically rejected by the Commission. Pacific Far East Lines, 11 F.M.C. at 363-364.

C. Cargo Express Knowingly and Willfully Violated Sections 8(a) and 19 of the 1984 Act

Cargo Express came into corporate existence on July 23, 2003, at the same address as Parks. Ainsley Lewis was its president. PFF 5, 7, 8. Like Parks, Cargo Express was also under the obligation to act diligently and inform itself through standard business resources of the statute’s licensing requirements prior to providing OTI services. However, there are several aggravating factors with respect to Cargo Express. As Chief Executive Officer of Parks, Ainsley Lewis was warned by the Commission’s New York Area Representative via correspondence dated November

13, 2002 of the consequences of operating as an OTI without a license and evidence of financial responsibility. PFF 16. Consequently, he possessed this knowledge as President of Cargo Express which can be imputed to Respondent. In addition, at a meeting with Commission representatives on February 14, 2005, Ainsley Lewis, in the presence of counsel, was advised of the necessity for Parks and Cargo Express to terminate their unlawful OTI operations at which point counsel for the Respondents expressed his clients' understanding of the situation. PFF 20. In deliberate disregard of these admonitions and the statutory requirements of the 1984 Act, Cargo Express under Ainsley Lewis' leadership nonetheless provided unlicensed OTI services with respect to at least sixteen (16) shipments between February 13, 2005 and July 21, 2006, which were found to constitute 16 violations of the Act.

The violations found to have been committed by Cargo Express were knowing and willful under settled Commission precedent. Pacific Champion Express Co., Ltd., supra; Stallion Cargo, Inc., supra; Comm-Sino Ltd., supra; Ever Freight International Ltd supra; Best Freight International Ltd., supra. Based on the undisputed evidence in the record, BOE submits that it has established by a preponderance of the evidence that Cargo Express knowingly and willfully violated sections 8(a) and 19 of the 1984 Act in at least 16 instances.

D. Civil Penalties Should be Assessed Against Parks and Cargo Express

In arriving at the appropriate amount that is tailored to the facts of the case, considers any factors in mitigation as well as in aggravation, does not impose unduly harsh or extreme sanctions, yet deters violations and achieves the objectives of the law, BOE submits that the statutory framework contemplates that each knowing and willful violation is subject to a minimum penalty, in this case, of \$6,001. Congressional intent in this regard is clearly expressed in the statute. The

increased penalty amount for knowing and willful violations of the 1984 Act was first authorized by the Shipping Act of 1984, P.L. 98-237. Its predecessor statute, the Shipping Act of 1916, authorized a singular maximum penalty of \$5,000 per violation. Congress believed that the penalties imposed under the 1916 Act failed to serve as an effective deterrent to prohibited acts and that violators could simply absorb penalties in these amounts as part of the “cost of doing business.” See H.R. REP. NO. 53, Part 1, 98th Cong. 1st Sess., *reprinted in* 1984 U.S.C.C.A.N. 167, 184. Accordingly, it added a separate penalty provision authorizing a penalty up to \$25,000 for each violation knowingly and willfully committed. Congress therefore intended that the Commission apply a two-level structure establishing maximum penalties. That is, one level for violations not shown to be knowing and willful and a substantially enhanced level of five times that amount for knowing and willful violations.

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. Martyn Merritt, AMG Services, et al. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 26 S.R.R. 663, 664-665 (FMC 1992). To effectuate this intent properly, a logical and natural reading of the statute should result in the imposition of the enhanced penalty for a knowing and willful violation that, at a minimum, exceeds the statutory threshold defining the maximum penalty amount for violations having a lesser requirement of intent or purpose, i.e., neither less than \$6,001 nor more than \$30,000 per violation.

Based on Respondents’ failure to comply with the ALJ’s earlier Order compelling them to respond to discovery seeking financial information, the ALJ properly drew the inference that each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for violations of the 1984 Act.

BOE addressed the remaining section 13(c) penalty factors in its Opening Brief and stressed the absence of mitigating factors. In fact, Respondents' pattern of operating multiple unlicensed companies and/or replacing one unlicensed entity with another in order to continue operating unlawfully should be considered as an aggravating factor warranting imposition of the maximum penalty. Accordingly, BOE reiterates its request that the ALJ assess the maximum civil penalty of \$30,000 per shipment against Parks in the total amount of \$360,000 for twelve (12) knowing and willful violations and Cargo Express in the total amount of \$480,000 for sixteen (16) knowing and willful violations.

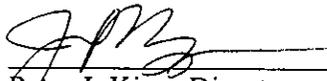
E. Orders to Cease and Desist Should be Issued Against Parks and Cargo Express.

For all the reasons stated in its Opening Brief, BOE reiterates its request that the ALJ issue orders requiring Parks and Cargo Express to cease and desist from violating sections 8(a) and 19 of the 1984 Act by operating as unlicensed, unbonded OTIs. Given Respondents' history of ignoring warnings from Commission representatives and thereafter continuing to provide OTI services to the detriment of the shipping public, cease and desist orders are necessary and appropriate with regard to both companies. PFF 16, 17, 20, 21, 24. In addition, Respondents' violations reflect a pattern rather than isolated instances, and a plain indifference to or intentional disregard of the requirements of the Shipping Act. Cease and desist orders against both Respondents are clearly warranted. Worldwide Relocations, slip op. at 21.

IV. CONCLUSION.

For the foregoing reasons, the Bureau of Enforcement respectfully requests the ALJ to (1) assess a civil penalty in the amount of \$360,000 against Parks for knowingly and willfully violating sections 8(a) and 19 of the 1984 Act, (2) assess a civil penalty in the amount of \$480,000 against Cargo Express for knowingly and willfully violating sections 8(a) and 19 of the 1984 Act, and (3) issue orders requiring Parks and Cargo Express to cease and desist from violating sections 8(a) and 19 of the 1984 Act by operating as OTIs in the United States without publishing tariffs, obtaining licenses, and providing evidence of financial responsibility.

Respectfully submitted,



Peter J. King, Director
Julie L. Berestov, Trial Attorney
Bureau of Enforcement
(202) 523-5783

June 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this date by first class mail, upon the parties of record, at their addresses of record with the Commission.

Signed in Washington, D.C. on June 1, 2012.



Julie L. Berestov