

S E R V E D
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FEDERAL MARITIME COMMISSION

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DOCKET NO. 06-09

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

**INITIAL DECISION ON REMAND –
CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE¹**

On September 19, 2006, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing to determine whether respondents Parks International Shipping, Inc. (Parks International or Parks), Cargo Express International Shipping, Inc. (Cargo Express), Bronx Barrels & Shipping Supplies Shipping Center, Inc. (Bronx Barrels), and/or Ainsley Lewis a.k.a. Jim Parks (Ainsley Lewis or Lewis) violated section 8 of the Shipping Act of 1984 (the Shipping Act or Act) by operating as non-vessel-operating common carriers (NVOCCs) without publishing tariffs showing rates and charges, and whether Respondents violated sections 19(a) and (b) of the Act by operating as ocean transportation intermediaries (OTIs) without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds. *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*, FMC No. 06-09 (Sept. 19, 2006) (Order of Investigation and Hearing).² The Secretary served the

¹ The initial decision on remand will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

² On October 14, 2006, after the Commission commenced this proceeding, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 8 of the Act is now codified at 46 U.S.C. § 40501(a) and sections 19(a) and (b) are now codified at 46 U.S.C. §§ 40901 and 40902. The Commission continues to cite provisions of the Act by their former section references. *See, e.g., OC International Freight, Inc., OMJ International Freight, Inc., and Omar Collado*, FMC No. 12-01

Order of Investigation and Hearing on Respondents, but Respondents did not cooperate in the investigation, respond to motions and other papers filed by the Bureau of Enforcement (BOE), respond to discovery despite orders to do so, cooperate in the establishment of a procedural schedule, or file proposed findings of fact, supporting evidence, or a brief. Despite Respondents' failure to participate, "it is the Commission's responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties." *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001).

This proceeding is one of four that the Commission commenced pursuant to 46 U.S.C. § 41302 to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act. *See also Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, FMC No. 06-01 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part); *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02 (ALJ Aug. 28, 2009) (Initial Decision), *vacated and remanded* (Apr. 26, 2012); *Embarque Puerto Plata, Corp. and Embarque Puerto Plata Inc. d/b/a Embarque Shipping and Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp. and Julio Mateo – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Matco Shipping Corp. and Julio Mateo), Notice Not to Review served Sept. 29, 2009. The Commission commenced a fifth proceeding to investigate the activities of three OTIs licensed by the Commission as NVOCCs that appeared to have violated the Act in their dealings with allegedly unbonded and untariffed NVOCCs. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing).

On February 5, 2010, I issued an Initial Decision in this proceeding.³ The Initial Decision found that respondents Parks International and Cargo Express had operated as OTIs. The evidence

(Apr. 2, 2012) (Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of the Shipping Act of 1984); . Accordingly, I follow that practice in this decision.

³ Three decisions in this proceeding are cited frequently: *Parks International – Possible Violations*, FMC No. 06-09 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment) (*Parks International S/J and Sanctions*); *Parks International – Possible Violations*, FMC No. 06-09 (ALJ Feb. 5, 2010) (Initial Decision of Clay G. Guthridge, Administrative Law Judge) (*Parks International ID*); and *Parks International – Possible Violations*, FMC No. 06-09 (FMC Apr. 26, 2012) (Order Vacating Initial Decision and Remanding for Further Proceedings) (*Parks International (FMC)*).

presented by BOE established by a preponderance of the evidence that Parks International operated as an NVOCC in violation of sections 8 and 19 of the Act on thirty-eight shipments. Twelve of these shipments occurred within the five-year statute of limitations for which a civil penalty may be assessed. 46 U.S.C. § 41109(e). The Initial Decision assessed a civil penalty for each of the twelve violations occurring within the limitations period for a total amount of \$18,000 and ordered that Parks International cease and desist from violating the Act.

The evidence established by a preponderance of the evidence that Cargo Express operated as an NVOCC in willful and knowing violation of sections 8 and 19 of the Act on fourteen shipments and operated as an ocean freight forwarder on two shipments. The Initial Decision assessed a civil penalty for each of the sixteen violations for a total amount of \$412,000 and ordered that Cargo Express cease and desist from violating the Act.

The Initial Decision found that the evidence did not establish by a preponderance of the evidence that respondents Bronx Barrels or Ainsley Lewis operated as an ocean transportation intermediary on any shipments and dismissed the claims against them.

BOE did not file exceptions to the Initial Decision. On March 4, 2010, the Commission issued a notice that it intended to review the Initial Decision on its own motion. 46 C.F.R. § 502.227(a).

On August 16, 2010, a Commission administrative law judge issued an Initial Decision in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, 31 S.R.R. 1471 (ALJ Aug. 16, 2010) (*Worldwide Relocations* (ALJ)). On March 15, 2012, the Commission issued an order approving in part, reversing in part, and modifying in part that Initial Decision. *Worldwide Relocations – Possible Violations*, FMC No. 06-01 (FMC Mar. 15, 2012) (*Worldwide Relocations* (FMC)). On April 26, 2012, the Commission vacated the Initial Decision and remanded this proceeding. “In light of the Commission’s recent decision in Docket No. 06-01, *Worldwide Relocations, LLC, et al.*, we now vacate the initial and supplemental decisions,⁴ and remand this matter to the ALJ for further proceedings consistent with the Commission’s holding in *Worldwide Relocations*.” *Parks International – Possible Violations*, FMC No. 06-09, Order at 5 (FMC Apr. 26, 2012) (Order Vacating Initial Decision and Remanding for Further Proceedings).

As discussed more fully below, in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, the Commission investigated entities alleged to have operated as ocean transportation intermediaries on shipments of household goods, but that did not have an OTI license issued by the Commission and did not keep open a tariff or furnish a bond as required by the Act. These

⁴ A supplemental decision was not issued in this proceeding. The Commission’s remand applies to the Initial Decision.

unlicensed entities dealt with members of the shipping public (proprietary shippers)⁵ and acted as intermediaries between the proprietary shippers and the downstream common carriers that transported the cargo by water from the United States to a foreign port. Of particular relevance to this proceeding against Parks International and the other Respondents is the Commission's discussion on how to distinguish when an entity (licensed or unlicensed) involved in a shipment as an ocean transportation intermediary operates as an ocean freight forwarder (sometimes abbreviated OFF) from when an entity operates as an NVOCC, and the use of presumptions and inferences in making that decision.

The Commission held that the person who the downstream common carrier that transported the cargo identified as the shipper when the downstream carrier issued its ocean bill of lading is critically significant in determining whether the unlicensed entity (Respondents in *Worldwide Relocations*) operated as an NVOCC or an ocean freight forwarder on a shipment.

[F]or a Bill of Lading [issued by the downstream common carrier] and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity [the unlicensed entity being investigated in FMC No. 06-01] did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading [issued by the downstream common carrier] with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility [for transportation] by the respondent entity for the shipment in question.

Worldwide Relocations (FMC) at 18-19.

On a Commission investigation of an entity that operated as an OTI without a license, bond, or tariff, it makes little difference whether the unlicensed entity operated as an NVOCC or an ocean freight forwarder on a particular shipment. If the entity operated as an OTI/NVOCC without a license, bond, and/or tariff, it has violated sections 8, 19(a), and/or 19(b) of the Act and is liable for a civil penalty of up to \$6000 for each violation, or up to \$30,000 per violation if the violation was willful and knowing (using the civil penalty amounts in effect when Respondents' shipments occurred). If the entity operated as an OTI/OFF without a license and/or bond, it has violated sections 19(a) and/or 19(b) of the Act and is liable for a civil penalty of up to \$6000 for each violation, or up to \$30,000 per violation if the violation was willful and knowing.

On May 1, 2012, I served an order requiring the parties to file briefs on the remand issues. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ May 1, 2012) (Order to File Briefs on Remand Issues). After moving for and receiving an extension of time, BOE filed its brief on June 1, 2012. No Respondent filed a brief.

⁵ The Commission used this term in *Worldwide Relocations*. *Worldwide Relocations* (FMC) at 18.

As set forth in greater detail below, the important discussion in *Worldwide Relocations* (FMC) applicable to this proceeding is the Commission's discussion of the methodology to be used when determining whether an entity operated as an NVOCC or an ocean freight forwarder on a particular shipment. The Commission articulated a permissive presumption or inference that an OTI is operating as an NVOCC, not an ocean freight forwarder. *Worldwide Relocations* (FMC) at 10-21.

In this proceeding, the Initial Decision found that Parks International operated as an NVOCC on each of thirty-eight shipments in the record and that Cargo Express operated as an NVOCC on fourteen shipments and as an ocean freight forwarder on two shipments. The *Worldwide Relocations* (FMC) permissive presumption or inference would not change the outcome on the thirty-eight Parks International shipments or the fourteen Cargo Express shipments on which they were found to have operated as an NVOCC. The *Worldwide Relocations* (FMC) permissive presumption or inference could change the outcome on the two Cargo Express shipments on which it was found to have operated as an ocean freight forwarder. Surprisingly, despite the fact Commission remanded *Parks International* for proceedings consistent with its holding in *Worldwide Relocations*, BOE does not argue in its Brief on Remand that Cargo Express operated as an NVOCC on those two shipments. (BOE Brief on Remand at 13-14.) Nevertheless, since the permissive presumption or inference may affect the holding on these two shipments, and the Commission remanded for proceedings consistent with *Worldwide Relocations* (FMC), I will reexamine these two shipments using the inferences and presumptions articulated in *Worldwide Relocations* (FMC).

When it remanded this proceeding, the Commission did not find error in the dismissals of the claims against Bronx Barrels and Lewis or the civil penalty imposed on Parks International and Cargo Express. In its Brief on Remand, BOE states:

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 operated as an NVOCC or an ocean freight forwarder on any shipments. On that basis, the claims against both Respondent were dismissed in the initial decision. 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.

(BOE Brief on Remand at 5-6.) BOE does address the civil penalty to be imposed for violations.

The Commission vacated the entire decision, which would include the civil penalty imposed on Parks International and Cargo Express and the dismissal of the claims against Bronx Barrels and Lewis. BOE submitted argument on the civil penalty, and *Worldwide Relocations* has holdings that are instructive on the civil penalty to be imposed. Therefore, this remand decision addresses and decides anew the civil penalty to be imposed on Parks International and Cargo Express. The claims against Bronx Barrels and Lewis are addressed in this decision. There is no documentation in the

record which can establish the fact that Bronx Barrels or Lewis was involved in shipments by water between the United States and a foreign port; therefore, the claims against them are dismissed.

This decision is organized into four parts. Part One provides the applicable statutory framework, summarizes the procedural history of this proceeding, and summarizes the Commission's decision in *Worldwide Relocations* (FMC). Part Two discusses the application of *Worldwide Relocations* (FMC) to this proceeding. Part Three sets forth the standard of proof and evidence used in this proceeding. Part Four discusses and applies the controlling law to the facts in the record of this proceeding.

PART ONE – BACKGROUND

I. TARIFF, LICENSING, AND BONDING REQUIREMENTS FOR OCEAN TRANSPORTATION INTERMEDIARIES.

The Act defines and regulates a number of different types of entities that are involved in the international shipment of cargo by water, including two kinds of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19).

The term “ocean freight forwarder” means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(18). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC, the intermediary must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The statutory definitions are echoed in the Commission’s regulations.

Ocean transportation intermediary means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that –

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

Common carrier means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 C.F.R. § 515.2(f).

As summarized by the District of Columbia Circuit:

Both OFFs and NVOCCs are intermediaries between (i) shippers, who seek to export cargo, and (ii) ocean carriers, who physically carry the cargo on their vessels. An Ocean Freight Forwarder is “a person that . . . dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers,” and “processes the documentation or performs related activities incident to those shipments.” In practice, that typically means that the OFF “secures cargo space with a shipping line (books the cargo), coordinates the movement of cargo to shipside, arranges for the payment of ocean freight charges,” and provides other “accessorial services . . . such as arranging insurance, trucking, and warehousing.” OFFs receive compensation from both the shipper and the carrier.

[An NVOCC], meanwhile, is “a common carrier that . . . does not operate the vessels by which the ocean transportation is provided” and “is a shipper in its

relationship with [a vessel-operating] common carrier.” Although NVOCCs usually do not own or operate vessels to actually carry the cargo, they lease facilities and services from other firms – making them the “common carrier[s]” responsible for transportation of the cargo from origin to destination. Most NVOCCs consolidate small parcels from multiple shippers bound for the same destination and arrange for them to be shipped as a single, large, sealed container under one bill of lading. Upon arrival, NVOCCs arrange for the container to be broken down and for each parcel to be distributed to each customer. Thus, unlike an OFF, the NVOCC issues its own bill of lading to each shipper, and the vessel-operating common carrier issues a bill of lading to each NVOCC. Unlike OFFs, NVOCCs receive compensation only from the shipper.

Landstar Express America, Inc. v. FMC, 569 F.3d 493, 494-495 (D.C. Cir. 2009) (*Landstar*). A person or entity operates as an NVOCC “only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation.’” *Landstar* at 497 (emphasis added).

Section 8 of the Act requires “[e]ach common carrier . . . [to] keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.” 46 U.S.C. § 40501(a); *Landstar* at 495. Since an NVOCC is a common carrier, it must keep open a tariff. An ocean freight forwarder is not a common carrier; therefore, it does not keep open a tariff.

Section 19(a) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person wanting to operate as an OTI to be licensed by the Commission.

A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the . . . Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

46 U.S.C. § 40901(a). “To be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the Commission that: (1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services.” 46 C.F.R. § 515.11(a). An intermediary violates section 19(a) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without a Commission license.

Section 19(b) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person operating as an ocean transportation intermediary to furnish proof of financial responsibility.

A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety – (1) in a form and amount determined by the . . . Commission to insure financial responsibility; and (2) issued by a surety company found acceptable by the Secretary of the Treasury.

46 U.S.C. § 40902(a). An ocean freight forwarder must “furnish evidence of financial responsibility in the amount of \$50,000,” 46 C.F.R. § 515.21(a)(1), and an NVOCC must “furnish evidence of financial responsibility in the amount of \$75,000.” 46 C.F.R. § 515.21(a)(2). An intermediary violates section 19(b) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without proof of financial responsibility.

“[A]n entity can operate as a freight forwarder and as an NVOCC” (Federal Maritime Commission Questions, Answers, and Helpful Information, <http://www.fmc.gov/questions/default.aspx>, last visited December 29, 2012.) An intermediary that is licensed by the Commission as an ocean freight forwarder and as an NVOCC must obtain separate proofs of financial responsibility for each type of operation. “The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC’s transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services.” (*Id.*)

The bond is to be used to satisfy any civil penalty or order of reparations and “may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities.” 46 U.S.C. § 40902(b).

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

- (1) for an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in § 515.2(i), and
- (2) for an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in § 515.2(l).

46 C.F.R. § 515.2(w). As a guide to determine what transportation-related activities are covered by the bond or surety for NVOCCs and ocean freight forwarders, the Commission promulgated regulations providing examples of freight forwarding services and NVOCC services performed by an ocean transportation intermediary that are necessary or customary in the provision of transportation services to a customer.

Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;

- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) paying lawful compensation to ocean freight forwarders;
- (7) leasing containers; or
- (8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(*l*).

The Commission has described the services of ocean freight forwarders and NVOCCs as follows:

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters. NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

(Federal Maritime Commission Questions, Answers, and Helpful Information, <http://www.fmc.gov/questions/default.aspx>, last visited December 29, 2012.)

II. ORDER OF INVESTIGATION AND HEARING AND PROCEDURAL HISTORY.

A. Order of Investigation and Hearing.

On September 19, 2006, the Commission issued the Order of Investigation and Hearing (Order) that commenced this proceeding. The Order alleges that Respondents violated sections 8 and 19 of the Act. The Order states that:

Based on evidence available to the Commission, it appears that Parks [International] has knowingly and willfully provided transportation services as an NVOCC with respect to shipments during 2001, 2002, 2004, and 2005 without obtaining an OTI license from the Commission and without providing proof of financial responsibility. Moreover, it appears that Parks [International] knowingly and willfully operated as a common carrier without publishing a tariff showing all of its active rates and charges. Cargo Express also appears to have knowingly and willfully provided transportation services as an NVOCC without obtaining an OTI license from the Commission and without providing proof of financial responsibility with respect to shipments commencing in 2004. It further appears that Cargo Express knowingly and willfully operated as a common carrier without publishing a tariff showing all of its active rates and charges. Bronx Barrels likewise appears to be knowingly and willfully holding itself out to provide transportation services as an NVOCC without obtaining an OTI license from the Commission and without providing proof of financial responsibility in the form of a surety bond. Additionally, Bronx Barrels appears to have been knowingly and willfully operating as a common carrier without publishing a tariff showing all of its active rates and charges. Finally, Ainsley Lewis, individually and through Parks, Cargo Express, and Bronx Barrels, appears to have been providing OTI services in 2001, 2002, 2004, 2005, and 2006 without publishing a tariff, obtaining an OTI license from the Commission, and providing proof of financial responsibility.

Parks International – Possible Violations, FMC No. 06-09, Order at 2-3 (Sept. 19, 2006) (Order of Investigation and Hearing). The Commission instituted the investigation to determine:

(1) whether [Parks International, Cargo Express, Bronx Barrels, and Lewis] violated section 8(a) of the 1984 Act and the Commission's regulations at 46 CFR part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges;

(2) whether [Parks International, Cargo Express, Bronx Barrels, and Lewis] violated section 19 of the 1984 Act and the Commission's regulations at 46 CFR part 515 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility.

Id. at 4. The Commission designated BOE as a party. *Id.* at 5. The Secretary served the Order on Respondents and published notice in the Federal Register. 71 Fed. Reg. 56147 (Sept. 26, 2006). BOE commenced the investigation authorized by the Order and served discovery on Respondents.

B. Discovery Served by BOE.

On October 19, 2006, BOE served discovery on Respondents. On November 28, 2006, BOE served a Motion of [BOE] to Compel Discovery from Respondents. On April 9, 2007, I entered an

order compelling Respondents to respond to discovery by May 11, 2007. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ Apr. 9, 2007) (Order Compelling Responses to Discovery).

On August 1, 2007, I entered an order requiring the parties to file a joint status report and proposed procedural schedule on or before August 28, 2007. On August 24, 2007, BOE alone filed a Status Report and Proposed Procedural Schedule. BOE summarized the events through the issuance of the order compelling Respondents to respond to discovery and reported that:

Respondents are in default of their duty to timely submit a response to the discovery served upon them, and to comply with the ALJ's Order directing them to respond to discovery. Respondents have not commenced any discovery on their own behalf, and the time within which they must commence such discovery effort has expired.

([BOE] Status Report and Proposed Procedural Schedule at 2.) BOE also reported that it had made several attempts to contact Respondents in an effort to obtain Respondents' participation in the preparation of a joint status report, but had been unable to contact them. (*Id.* at 2-3.) With regard to a proposed procedural schedule, BOE proposed that it would forego further attempts to obtain discovery from Respondents and proceed based on information in the records and materials already in its possession. BOE also stated that it would file a Motion for Sanctions and Summary Judgment along with supporting documents on or before October 19, 2007. Based on BOE's filing, I closed discovery with the exception of the discovery already served by BOE and order BOE to file a motion for summary judgment on or before October 26, 2007. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ Sept. 13, 2007) (Procedural Order).

C. BOE'S Motion for Summary Judgment.

On October 26, 2007, BOE filed a Motion for Sanctions and Summary Judgment. Regarding the motion for sanctions:

BOE . . . request[ed] that sanctions be imposed against all the Respondents by issuing an order prohibiting the Respondents from introducing any evidence which should have been submitted previously in response to BOE's discovery requests. BOE also [sought] an order prohibiting Respondents from contesting any of BOE's claims or evidence regarding those issues. Having failed to cooperate in the discovery process, the Respondents should be barred from attempting to contradict evidence presented by BOE at a later stage in the proceeding. Specifically, BOE request[ed] that Respondents be prohibited from submitting evidence as to whether they knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904. BOE further request[ed] that Respondents

be barred from introducing evidence as to whether they have the ability to pay a civil penalty.

(Motion for Sanctions and Summary Judgment at 4.)

Regarding their motion for summary judgment, BOE contended that:

Based upon advertisements, websites, service contracts, shipping documents, and business dealings with at least one ocean common carrier, Respondents have been operating as OTIs/NVOCCs since at least 2001. Throughout this period, Respondents have been aware that they are required to publish tariffs, obtain licenses, and furnish evidence of financial responsibility if they intended to conduct business as OTIs/NVOCCs in the foreign commerce of the United States. This awareness is evidenced by at least two warnings, both written and verbal, given by the Commission's New York Area Representative ("AR") Emanuel James Mingione to Respondents in 2002 and 2005 regarding the licensing and bonding requirements of the 1984 Act. Mingione Statement ¶¶ 10, 18.

(Motion for Sanctions and Summary Judgment at 7.)

Respondents did not reply to BOE's motion.

On October 23, 2009, I issued an Order granting in part and deferring in part BOE's motion for sanctions. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Because Respondents have failed to comply with the Order requiring them to respond to discovery seeking financial information, I draw the inference that the financial information would demonstrate that each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that the Respondent is found to have committed. 46 C.F.R. § 502.210(a)(2). The Bureau of Enforcement's prayer that Respondents be barred from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904 is deferred pending the additional briefing required by this Order.

Id. at 29.

I also granted in part and denied in part BOE's motion for summary judgment.

The Bureau of Enforcement has established that:

- The Bureau of Enforcement has proven by a preponderance of the evidence that Parks International Shipping, Inc., Cargo Express International Shipping, Inc., and Bronx Barrels & Shipping Supplies Shipping Center Inc., have not published tariffs pursuant to section 8 of the Act, obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and furnished proof of financial responsibility pursuant to section 19(b) of the Act
- The Bureau of Enforcement has proven by a preponderance of the evidence that on thirty-eight shipments, Parks International Shipping, Inc., violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.2 of this Memorandum and Order;
- The Bureau of Enforcement has proven by a preponderance of the evidence that on fourteen shipments, Cargo Express International Shipping, Inc., violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.3 of this Memorandum and Order; and
- The Bureau of Enforcement has proven by a preponderance of the evidence that on two shipments, Cargo Express International Shipping, Inc., violated the Shipping Act by operating as an ocean freight forwarder that did not have a license as required by section 40901 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.4 of this Memorandum and Order.

Id. at 29-30.

I denied the motion for summary judgment in all other respects. The order also found that BOE had not proven either Bronx Barrels or Lewis had operated as an OTI. I issued a procedural order requiring the parties to file proposed findings of fact, briefs, and appendices. *Id.* at 26-29. On November 22, 2009, BOE filed the required papers. Respondents did not respond to BOE's filings as required by the Order.

D. February 5, 2010, Initial Decision.

On February 5, 2010, I issued an Initial Decision finding that Parks International had operated as an NVOCC without a license, bond, or tariff on thirty-eight shipments. I imposed a civil penalty of \$18,000 on Parks for the twelve shipments that occurred in the limitations period. I found that Cargo Express operated as an NVOCC without a license, bond, or tariff on fourteen shipments and as an ocean freight forwarder on two shipments. I imposed a civil penalty of \$412,000 on Cargo Express for the sixteen shipments. I found that BOE had not established that Bronx Barrels or Lewis had violated the Act and dismissed the claims against them. Since Respondents had not tried to present evidence, I dismissed as moot BOE's motion for an order preventing them from presenting evidence. *Parks International ID*. Neither BOE nor Respondents filed exceptions to the Initial Decision. On March 4, 2010, the Commission issued a notice that it would review the decision. *Parks International – Possible Violations*, FMC No. 06-09 (FMC Mar. 4, 2010) (Notice to Review).

III. COMMISSION ORDER IN *WORLDWIDE RELOCATIONS – POSSIBLE VIOLATIONS*, FMC NO. 06-01 (FMC Apr. 12, 2012).

A. Additional Background.

Worldwide Relocations was a “proceeding against several household goods moving companies and related individuals who were the subject of more than 250 consumer complaints to the Commission.” *Worldwide Relocations – Possible Violations*, FMC No. 06-01, Order at 2 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations* (FMC)). The Commission issued the Order of Investigation and Hearing to determine whether respondents in that proceeding operated as OTIs without a license, bond, and/or tariff as required by the Act, claims substantially identical to the claims in this proceeding. *Compare World wide Relocations – Possible Violations*, FMC No. 06-01 (FMC Jan. 11, 2006) (“an investigation is instituted to determine: (1) Whether the Respondents violated sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility, [and] without publishing an electronic tariff”) with *Parks International – Possible Violations*, FMC No. 06-09 (FMC Sept. 19, 2006) (“an investigation is instituted to determine: (1) whether [Respondents] violated section 8(a) of the 1984 Act and the Commission’s regulations at 46 CFR part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges; (2) whether [Respondents] violated section 19 of the 1984 Act and the Commission’s regulations at 46 CFR part 515 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility”).

On August 16, 2010, the Administrative Law Judge issued the Initial Decision in [*Worldwide Relocations*]. In the decision, the ALJ determined that all seven corporate respondents then in the proceeding acted as [NVOCCs], and found that the entities had neither published tariffs nor been licensed and bonded as required by sections 8 and 19 of the Shipping Act The ALJ also determined that

all but one of the individual respondents in the proceeding should be held liable individually and thereby pierced their corporate veils, finding violations by both the corporate entities and the individuals who owned or operated them. The ALJ found a total of 649 violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals. The ALJ also issued an injunction barring the [individual] respondents from “serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation.” No party filed exceptions. The Commission issued a Notice of Commission Review on September 14, 2010.

Worldwide Relocations (FMC) at 2-3 (citations omitted).

With certain exceptions, the Commission affirmed the administrative law judge’s Initial Decision on liability and the amount of the civil penalty imposed on each Respondent as a sanction. The Commission modified three issues addressed in the Initial Decision.

First, after reviewing the record, we reverse the denial of [BOE’s] request for sanctions against International Shipping Solutions and Dolphin Shipping International because the entities did not respond to the ALJ’s Order compelling responses. Second, we note that while the question of whether certain conduct violates the Shipping Act is necessarily a fact-intensive inquiry, a finder of fact may draw reasonable evidentiary inferences and employ permissive presumptions in some circumstances in determining whether an entity operated as an NVOCC. The ALJ appears to have done so in the Initial Decision. Finally, we modify the injunctive aspect of the Initial Decision to future violations of the Shipping Act.

Id. at 3. The Commission affirmed the judge’s findings of fact “except where inconsistent with findings below.” *Id.* at 7.

B. *Worldwide Relocations* (FMC) Holdings.

1. *Worldwide Relocations* (FMC) Issue One – Request for Sanctions for Failure to Comply with Discovery Obligations.

In *Worldwide Relocations*, BOE filed a motion asking the administrative law judge to impose sanctions against some respondents, including:

Baruch Karpick, International Shipping Solutions, Dolphin International, Moving Services, Global Direct Shipping, and Sharon Fachler, for failure to respond to three discovery orders entered earlier in the case. Specifically, BOE sought an adverse inference against these parties for failure to answer interrogatories or provide documents, and asked the ALJ to strike any evidence offered on certain claims or

defenses, relying on Commission Rule 210 (46 C.F.R. § 502.210) and Commission precedent.

Worldwide Relocations (FMC) at 7. The judge entered sanctions against Moving Services, Global Direct Shipping, Sharon Fachler, and Baruch Karpick and the Commission adopted those findings. *Id.* at 8.

The ALJ, however, found that the record did not provide clarity on whether International Shipping Solutions and Dolphin International had complied with discovery orders. . . . Because BOE was the proponent on the issue of sanctions, and because BOE had not explained the discrepancy in accounts between the parties, the ALJ denied BOE's request for sanctions against International Shipping Solutions and Dolphin International.

Id.

The Commission analyzed the record and came to the opposite conclusion.

Because neither Dolphin International nor International Shipping Solutions complied with discovery obligations, we reverse the portion of the ALJ's decision that denied BOE's request for sanctions against Dolphin International and International Shipping Solutions. Had the ALJ imposed sanctions, she would also have drawn an adverse inference against the entities for the documents that they refused to provide or destroyed and for the interrogatories that they would have answered. We therefore reverse that portion of the ALJ's decision, and impose sanctions against Dolphin International and International Shipping Solutions for failure to comply with discovery obligations. We likewise infer that if documents would have been produced, they would be adverse to Dolphin International and International Shipping Solutions.

Id. at 10.

2. *Worldwide Relocations* (FMC) Issue Two – Reasonable Evidentiary Inferences and Permissive Presumptions Used to Determine NVOCC Status.

a. The Fact Finder's Inquiry.

In *Worldwide Relocations* (FMC), the Commission stated:

In the Initial Decision, the ALJ correctly stated the well-established methodology for determining whether an entity is operating as an NVOCC.

[T]o determine if an entity is a common carrier, it “is important to consider all the factors present in each case and to determine their combined effect.” [*Activities, Tariff Filing Practices and Carrier Status of Containerships [Inc.]*, 9 F.M.C. [56,] at 65 [(F.M.C. 1965)]. The Commission has indicated that it will “look beyond documentary labels.” [*Id.*] at 66. For example, “it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status.” [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity’s conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. [1679,] at 1684 [(F.M.C. 1991)]; *see also Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 [(F.M.C.] 1996) (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments). This is a fact intensive inquiry.

. . . Resolution of that factual question requires an examination of each entity’s conduct on a particular shipment to determine whether it operated as either an NVOCC or an [Ocean Freight Forwarder] on that shipment. Accordingly, after explaining how the evidence was weighed, each shipment alleged will be reviewed individually.

31 S.R.R. at 1519. We expressly affirm the ALJ’s articulation of the Commission’s approach to determining NVOCC status.

Worldwide Relocations (FMC) at 10-11.

b. “Holding out.”

The Commission addressed the requirement that to be a common carrier within the meaning of the Act, an entity must “hold[] itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.” 46 U.S.C. § 40102(6)(A)(i).

In answering the question of whether an entity is operating as an NVOCC, the Commission first determines whether the entity was “holding itself out to the general public to provide transportation by water.” 46 C.F.R. § 515.2(f). Among ocean transportation intermediaries, only an NVOCC holds “itself out to the general public to provide transportation by water” An Ocean Freight Forwarder (OFF) does not pass this threshold question.

A person or entity may hold out to the public “by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise.” *Common Carriers by Water – Status of Express Companies, Truck Lines and Other*

Non-Vessel Carriers, 1 S.R.R. 292 (FMC 1961). The FMC has previously found that advertising and solicitations to the public are important factors in determining the issue of “holding out” by an entity. *See Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 6 S.R.R. 483, 489 n.7 (FMC 1965).

Worldwide Relocations (FMC) at 11-12.

c. Inferences or presumptions on “holding out” issue.

The Commission noted that the administrative law judge

appear[ed] to have made inferences on the question whether an entity “held out” for determining common carrier status for certain shipments. . . . [T]he ALJ did not analyze each shipment . . . for specific evidence of “holding out” [but] simply considered the respondent’s overall activities relating to “holding out” during the relevant period of time, reviewed shipping documents as they related to other elements of NVOCC status, and concluded that the respondent acted as an NVOCC. *Id.*

Applying this type of inference is appropriate when there appears to be uniform evidence on one element for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period. Such an inference is especially appropriate . . . when dealing with an element that necessarily speaks to a course of conduct, such as “holding out.” This approach likewise comports with evidentiary rules pertaining to relevance of practices of an entity in order to prove that a practice is routine. *See Fed. R. Evid.* 406 (“Evidence . . . of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”).

Worldwide Relocations (FMC) at 12-13.

The Commission endorsed the use of permissive presumptions, or inferences of fact.

Commission cases have previously stated that permissive presumptions, or inferences of fact, may be employed in appropriate circumstances to determine whether an entity operated as an NVOCC as opposed to an OFF. A presumption of fact “is nothing more than a logical or reasonable inference drawn from established facts that may be rebutted by contrary evidence.” *International Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 684 (ALJ 1990). “Presumptions are widely employed in the law in a variety of contexts as an aid to the party having the burden of proof.” *Id.*

Such permissive 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. A properly applied permissive presumption does not shift the ultimate burden of proof, but it may shift the burden of producing evidence with regard to the presumed fact. *See id.* And of course the adverse party always must be given the opportunity to present rebuttal evidence. If the adverse party does not come forward with evidence 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. However, in all cases the ultimate burden of proof rests squarely on BOE or the complainant. *See* 46 C.F.R. § 502.155; 5 U.S.C. § 556(d).

Worldwide Relocations (FMC) at 12-13. The Commission made clear that

[t]he presumption that we describe is permissive, not mandatory and is consistent with reason and common sense. The permissive presumption would not be applicable when "the suggested conclusion is not one that reason and common sense justify in light of the proven facts." *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (emphasis added).

Worldwide Relocations (FMC) at 15 n.1.

d. "Assumes responsibility for transportation."

The Commission then discussed use of an inference or presumption drawn from the evidence in the proceeding on the question of whether an entity has assumed responsibility for the transportation of the cargo from the port or point of receipt to the port or point of destination and uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. The Commission noted that the "assume responsibility" factor is often less clear-cut than "holding out" because many ocean freight forwarder activities and NVOCC activities are similar. The Commission summarized its discussion of the use of inferences in determining whether an entity assumed responsibility for the transportation of a particular shipment as follows:

[T]he party with the ultimate burden of proof and persuasion must present evidence on each shipment concerning the "assumed responsibility" element; however, such party may have the benefit of the above-described permissive presumption. As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility by the respondent entity for the shipment in question. The opposing party may then have the duty to produce credible

evidence to rebut the presumption concerning the “assumed responsibility” element on each shipment.

Worldwide Relocations (FMC) at 18-19.

3. *Worldwide Relocations* (FMC) Issue Three – Modification of the Injunction Prohibiting Future Violations of the Shipping Act.

In *Worldwide Relocations*, the administrative law judge articulated the standard she applied to determine whether a cease and desist order would be appropriate and summarized BOE’s argument as follows:

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd.*, 28 S.R.R. at 86, citing *Alex Parsinia d/b/a Pac. Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997). 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. 857, 871-872 (ALJ 1986). The Commission has stated that “[c]ourts have sustained the use of a cease and desist order directed to individuals to prevent avoidance of the legal consequences of the past violations by the creation of new business entities to be used in the same or similar patterns of activity in the future.” *Ariel Mar. Group, Inc.*, 24 S.R.R. at 528.

BOE requests that both corporate and individual respondents be ordered to cease and desist from violating sections 8 and 19 of the Shipping Act and ask[ed] for the issuance of a cease and desist order: (1) directing all respondents to cease and desist from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and respondents publish a tariff and obtain a bond pursuant to Commission regulations, and (2) prohibiting each individual respondent from serving as an investor, owner, shareholder, officer, director, manager, or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such an entity.

Worldwide Relocations (ALJ) at 88-89.

The administrative law judge ordered the corporate and individual respondents she found to have violated the Shipping Act to “cease and desist from holding out or operating as ocean transportation intermediaries in the United States foreign trades until and unless receiving licenses by the Commission, publishing tariffs, and obtaining bonds pursuant to the Shipping Act and Commission regulations” and that the individual respondents “cease and desist from serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States

except as *bona fide* employees of such entities . . .” *Worldwide Relocations* (ALJ), 31 S.R.R. at 1543.

In language similar to that of the administrative law judge, the Commission articulated the standard to be applied.

After a factfinder has determined that a respondent has violated laws, “an injunction is appropriate if the court determines there is a reasonable likelihood that he will violate the laws again in the future.” *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994). The Commission has, in previous cases, enjoined parties from certain behavior, including future violations of the Shipping Act. See *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (F.M.C. 1998) (issuing order enjoining party from violating section 10(a)(1) of the Shipping Act); see also *Ariel Maritime Group Inc.*, 24 S.R.R. 517, 528 (F.M.C. 1987) (addressing injunctions against “individuals to prevent avoidance of the legal consequences of . . . past violations”).

In evaluating whether a reasonable likelihood of future violation exists, “the court considers ‘whether a defendant’s violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant’s business will present opportunities to violate the law in the future.’” *Bilzerian*, 29 F.3d at 695 (quoting *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). After a court has determined to grant injunctive relief, the injunction must be narrowly crafted to enjoin only the harmful behavior meriting injunctive relief. See *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990) (“The law requires that courts closely tailor injunctions to the harm that they address.”). See also *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 640 (D.C. Cir. 1982) (“[T]he scope of an injunction should be determined by balancing [the] harm to the plaintiff, other means of avoiding such harm, and the relative inconvenience to the defendant.”).

Worldwide Relocations (FMC) at 21-22.

The Commission affirmed entry of the cease and desist order entered by the administrative law judge with a modification for the individual Respondents subject to the injunction.

Where the Commission finds a proceeding record that is fully adequate to support the presiding officer’s decision to *pierce the corporate veil and subject individuals* to enforcement remedies, the Commission should not hesitate to enjoin *those individuals* from violating the Shipping Act. In addition to enjoining violations, the Commission may also enjoin related conduct as part of narrowly tailored prophylactic measures necessary to prevent future violations.

In this case, *the individuals* acted in numerous ways to justify a Commission decision to disregard the corporate form and look to the individual actors.

The individuals in the instant case acted with sufficient disregard of the Shipping Act and FMC regulations that they should be prohibited from participating in the described maritime industry in any capacity for a year, and from participating in any supervisory or management capacity for a reasonable period of time, in this case five years. We therefore adjust the ALJ's injunction slightly *to enjoin the individual respondents* from working for an ocean transportation company, sole proprietorship, or other entity in any way for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years. At that time, they could apply for a license to serve as an OTI or they could serve as an officer, director, or manager of an OTI. This is a normal restriction in other regulated industries.

On the other hand, we add one narrow exception to the ALJ's injunction *against the individuals acting as owners or shareholders* of ocean transportation companies. We do not foresee any harm flowing from *such individuals* owning shares of a publicly traded company, so long as they do not acquire more than a five percent stake of any class of equities issued by that company. It is highly unlikely that a simple shareholder with a small stake in a large, publicly traded company could exert sufficient control to harm the shipping public. By comparison, the Securities and Exchange Commission has determined that only shareholders exceeding five-percent stakes in companies must file notices of beneficial ownership or "control purpose." *See* 17 C.F.R. § 240.13d-1. We modify the ALJ's injunction accordingly.

Worldwide Relocations (FMC) at 22-24 (footnote omitted) (emphasis added).

4. Civil penalties.

In *Worldwide Relocations* (ALJ), the administrative law judge found that Respondents had committed "a total of 649 [willful and knowing] violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals." *Worldwide Relocations* (FMC) at 2. The judge imposed a civil penalty of \$4000 per violation for fifty willful and knowing violations, \$3000 per violation for 325 willful and knowing violations, and \$6000 per violation for 274 willful and knowing violations. *Worldwide Relocations* (ALJ) at 89. The Commission affirmed findings in the *Worldwide Relocations* Initial Decision, including the amount imposed by the administrative law judge as a civil penalty on each Respondent. Although the Commission did not discuss the issue of civil penalty in its review of the decision, affirming the civil penalties imposed by the judge is relevant to BOE's claim that the Act establishes a minimum civil penalty of \$6001 for a willful and knowing violation and is instructive in this proceeding alleging violations of the Act substantially identical to the violations found in *Worldwide Relocations*.

IV. APRIL 26, 2012, COMMISSION REMAND OF THE *PARKS INTERNATIONAL* INITIAL DECISION.

On April 26, 2012, the Commission vacated the Initial Decision and remanded this proceeding. The Commission summarized the procedural history and the findings and conclusions set forth in the Initial Decision. *Parks International* (FMC) at 1-5. The Commission did not identify any error in the findings of fact or conclusions of law. The Commission concluded: "In light of the Commission's recent decision in Docket No. 06-01, *Worldwide Relocations, LLC, et al.*, we now vacate the initial and supplemental decisions, and remand this matter to the ALJ for further proceedings consistent with the Commission's holding in *Worldwide Relocations*." *Id.* at 5.

V. BRIEFING AFTER THE *PARKS INTERNATIONAL* REMAND.

On May 1, 2012, I served an order requiring the parties to file briefs on the remand issues. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ May 1, 2012) (Order to File Briefs on Remand Issues). After moving for and receiving an extension of time, BOE filed its brief on June 1, 2012. No Respondent filed a brief.

In its Brief on Remand, BOE first summarizes the procedural history and Initial Decision. (BOE Brief on Remand at 1-5.) It then states that because the Commission vacated the Initial Decision, but did not vacate the finding in *Parks International* S/J and Sanctions that neither Bronx Barrels nor Lewis had operated as an OTI (these findings were repeated in *Parks International* ID) and BOE did not file exceptions to the Initial Decision, BOE would not address the claims against Bronx Barrels or Lewis. (*Id.* at 5-6.)

BOE then summarizes the Commission's decision in *Worldwide Relocations* (FMC), particularly the discussion on the use of inferences and presumptions to determine when an OTI is operating as an NVOCC from when it is operating as an ocean freight forwarder. (BOE Brief on Remand at 6-7, summarizing *Worldwide Relocations* (FMC) at 10-21.)

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.

(BOE Brief on Remand at 7.)

BOE then largely repeats the arguments made in its 2009 brief regarding the civil penalty that it contends should be imposed on Parks International and Cargo Express. (BOE Brief on

Remand at 7-16.) BOE seeks imposition of “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.” BOE also seeks entry of a cease and desist order against Parks International and Cargo Express. (*Id.*)

**PART TWO – APPLICATION OF *WORLDWIDE RELOCATIONS* (FMC) TO
*PARKS INTERNATIONAL***

I. *WORLDWIDE RELOCATIONS* (FMC) ISSUES ONE AND TWO ARE APPLICABLE TO THE *PARKS INTERNATIONAL* PROCEEDING.

A. *Applicability of Worldwide Relocations* (FMC) Issue One to the *Parks International* Proceeding.

In *Worldwide Relocations*, BOE moved for sanctions against several Respondents that failed to respond to discovery. The administrative law judge granted sanctions against most of those Respondents, but found that the record did not support imposition of sanctions against two Respondents. *Worldwide Relocations* (FMC) at 7-10. The Commission reversed the denial of sanctions and concluded “[h]ad the ALJ imposed sanctions, she would also have drawn an adverse inference against the entities for the documents that they refused to provide or destroyed and for the interrogatories that they would have answered.” *Id.* at 10. The Commission imposed sanctions against the two Respondents, and inferred that if the requested documents had been produced, the documents would have provided evidence adverse to the two Respondents. *Id.*

In this proceeding, BOE moved for sanctions against all Respondents for failing to respond to discovery and to motions ordering responses to discovery. Sanctions are imposed against Respondents in this proceeding for similar reasons. Therefore, *Worldwide Relocations* (FMC) Issue One is applicable to this proceeding.

B. *Applicability of Worldwide Relocations* (FMC) Issue Two to the *Parks International* Proceeding.

Worldwide Relocations (FMC) Issue Two concerns the approach for determining whether an entity has operated as an NVOCC on a particular shipment, analysis of the evidence in the record on the issues of “holding out” and assuming responsibility for transportation of the cargo, and inferences and presumptions that may be used when making those determinations. This issue is relevant to the *Parks International* proceeding.

II. *WORLDWIDE RELOCATIONS* (FMC) ISSUE THREE IS NOT APPLICABLE TO THE *PARKS INTERNATIONAL* PROCEEDING.

Worldwide Relocations (FMC) Issue Three concerns the scope of a cease and desist order against an individual found to have violated the Shipping Act. *See supra* at 32-34. The Commission commenced this proceeding against three related corporate entities (Parks International, Cargo

Express, and Bronx Barrels) and one individual, Ainsley Lewis, who controlled them. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Apr. 9, 2007) (Order Compelling Responses to Discovery). This Initial Decision on Remand finds that Lewis did not violate the Act and does not enter a cease and desist order against him. The two parties found to have violated the Act – Parks International and Cargo Express – are corporations, not individuals. Therefore, *Worldwide Relocations* (FMC) Issue Three – the Commission’s discussion of the scope of a cease and desist order entered against an individual determined to have violated the Shipping Act – has no application in this proceeding.

PART THREE – STANDARD OF PROOF AND EVIDENCE.

I. STANDARD OF PROOF.

To prevail in a proceeding brought to enforce the Shipping Act, BOE has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Worldwide Relocations* (FMC) at 15; *Sea-Land Service Inc. – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872, 889 (FMC 2006); *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-719 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994).

The Commission renders the agency decision in the proceeding. “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision” 5 U.S.C. § 556(e).

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

II. EVIDENCE.

BOE attached documents as exhibits to its Motion for Sanctions and Summary Judgment and supplemented those documents with its brief on the merits filed November 20, 2009. All of the documents are admitted into evidence. BOE did not submit additional evidence with its Brief on Remand.

PART FOUR – DISCUSSION AND CONCLUSION

I. MOTION FOR SANCTIONS.

As noted above, BOE sought sanctions against Respondents based on Respondents' failure to respond to discovery or participate in this proceeding.

BOE hereby requests that sanctions be imposed against all the Respondents by issuing an order prohibiting the Respondents from introducing any evidence which should have been submitted previously in response to BOE's discovery requests. BOE also seeks an order prohibiting Respondents from contesting any of BOE's claims or evidence regarding those issues. Having failed to cooperate in the discovery process, the Respondents should be barred from attempting to contradict evidence presented by BOE at a later stage in the proceeding. Specifically, BOE requests that Respondents be prohibited from submitting evidence as to whether they knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904. BOE further requests that Respondents be barred from introducing evidence as to whether they have the ability to pay a civil penalty.

As an additional matter, BOE requests that the presiding ALJ issue an Order to Show Cause giving Respondents thirty (30) days to explain why they have failed to participate in this proceeding, as well as to respond to BOE's Motion for Sanctions and Summary Judgment. An Order to Show Cause should notify Respondents that, if they fail to reply as directed, they will be found to have violated the 1984 Act as alleged and, BOE's Motion for Sanctions and Summary Judgment will thereby be granted.

([BOE] Motion for Sanctions and Summary Judgment at 4-5.) I granted the motion in part, granting the sanctions sought by BOE for failing to respond to discovery about Respondents' financial situations.

Respondents have failed to respond to the discovery or the Order. Therefore, imposition of sanctions under Commission Rule 210 is appropriate. Because Respondents failed to comply with the Order requiring them to respond to discovery seeking financial information, I draw the inference that the financial information would demonstrate that each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that the Respondent is found to have committed. 46 C.F.R. § 502.210(a)(2).

Id. at 4. I deferred ruling on BOE's prayer that Respondents be barred from presenting evidence as to whether they knowingly and willfully accepted cargo from or transported cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act pending the additional briefing required by the Order. *Id.*

The October 23, 2009, Order established a briefing schedule that required BOE to file proposed findings of fact, an appendix, and a brief. *Id.* at 26-27. The Order also established a date by which Respondents should respond to BOE's filings.

On or before December 11, 2009, Respondents shall file the following documents:

1. **Respondents' Show Cause.** Respondents have not participated in this proceeding. If Respondents choose[] to respond to BOE's [proposed findings of fact, appendix, and brief], Respondents shall show cause why additional sanctions should not be imposed on [them] for failing to respond to BOE's discovery and to other orders in this proceeding. 46 C.F.R. § 502.95; 46 C.F.R. § 502.210.

Id. at 27. Respondents did not choose to respond to BOE's filings or present evidence. Therefore, in the Initial Decision, BOE's motion to bar Respondents from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904, was dismissed as moot. *Parks International* ID at 14. All the relief sought by BOE's motion for sanctions was either granted by the October 23, 2009, Order or mooted by Respondents' failure to respond to BOE's filings or attempt to present evidence. BOE did not file exceptions to this treatment of the motion for sanctions.

The Commission's remand noted the October 23, 2009, Order. *Parks International* (FMC) at 3. The Commission then stated:

On February 5, 2010, the ALJ issued an Initial Decision in this matter. The ALJ first denied the remainder of BOE's Motion for Sanctions, noting that respondents never

sought to present evidence in this proceeding, rendering moot BOE's request for an order preventing respondents from presenting evidence. The ALJ did not address BOE's request for an Order to Show Cause notifying respondents that judgment may be entered in BOE's favor.

Id. at 4.

The Commission does not identify any error in the manner in which the motion for sanctions was addressed in the October 23, 2009, Order and the Initial Decision. In its Brief on Remand, BOE does not argue that there was any error. Nevertheless, *Worldwide Relocations* Issue One concerned sanctions to be imposed for failure to respond to discovery and the Commission remanded this proceeding for further proceedings consistent with *Worldwide Relocations*, however. Therefore, the sanctions must be addressed.

The sanctions imposed in the Initial Decision and this remand decision for failing to respond to discovery about financial information are substantially equivalent to the sanctions imposed in *Worldwide Relocations*. Therefore, *Worldwide Relocations* Issue One does not mandate different sanctions for failure to respond to discovery.

As discussed, BOE's motion for sanctions sought an order barring Respondents from presenting evidence. Respondents were ordered to respond to BOE's brief on remand. *Parks International – Possible Violations*, FMC No. 06-09 (ALJ May 1, 2012). Respondents have not responded to BOE's brief or sought to present evidence. Therefore, BOE's motion to bar Respondents from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904, is dismissed as moot. Since Respondents did not respond to BOE's filings, Respondents did not respond to the show cause order.

II. PARKS INTERNATIONAL AND CARGO EXPRESS VIOLATED THE SHIPPING ACT BY OPERATING AS OCEAN TRANSPORTATION INTERMEDIARIES.

A. Parks International Violated Section 8(a) of the 1984 Act and the Commission's Regulations at 46 CFR Part 520 by Operating as a Common Carrier Without Publishing Tariffs Showing All of Its Active Rates and Charges and Violated Section 19 of the 1984 Act and the Commission's Regulations at 46 CFR Part 515 by Operating as a Non-Vessel-Operating Common Carrier in the U.S. Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility.

The Initial Decision found that Parks International operated as an NVOCC without a license, tariff, or bond on each of thirty-eight shipments. *Parks International* ID at 14-16. Use of the

inferences and permissive presumptions articulated in *Worldwide Relocations* (FMC) does not change these findings.

1. **BOE has proven by a preponderance of the evidence that Parks International did not publish a tariff, did not have an OTI license, and did not furnish proof of financial responsibility.**

In his Verified Statement, AR Mingione states that he reviewed the Commission's Registered Persons Index and the Commission's FMC-1 database and determined that Parks International has not published tariffs pursuant to section 8 of the Act, has not obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and has not furnished proof of financial responsibility pursuant to section 19(b) of the Act. (Mingione Statement ¶ 5.) Therefore, BOE has established these facts by a preponderance of the evidence.

2. **BOE has proven by a preponderance of the evidence that Parks International operated as an NVOCC on thirty-eight shipments.**
 - a. **BOE has proven by a preponderance of the evidence that Parks International held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.**

During his investigation, AR Mingione obtained advertising published by Parks International. (Mingione Statement ¶¶ 8, 9, referring to Attachments D and E.) Parks International advertised on the Internet that customers could "[s]hip by air & sea to Jamaica and all other Caribbean Islands." (Attachment D.) Parks International stated that it ships automobiles, barrels, boxes, crates, containers, electrical appliances, and household furniture in its containers that "sail every Thursday." (*Id.*) Parks International stated it "provides top-notch services. Ship and stock barrels, crates, autos, containers, etc. to Jamaica and other [C]aribbean islands along with great customer support – a combination that can't be beat!" (*Id.*) Parks International placed a similar advertisement in a newspaper. (Attachment E.) This advertising establishes by a preponderance of the evidence that Parks International held out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

- b. **BOE has proven by a preponderance of the evidence that Parks International assumed responsibility for the transportation by water of shipments from the port or point of receipt to the port or point of destination.**

AR Mingione reviewed the Commission's service contract database and learned that Parks International had entered into three service contracts with Tropical between April 16, 2001, through October 25, 2002. (Mingione Statement ¶ 12.) In each of the service contracts, Parks certified "its

status . . . as Cargo Owner (Shp/Cog).” (Attachment G1 ¶ 9; Attachment G2 ¶ 4; Attachment G3 ¶ 4.)

AR Mingione also obtained bills of lading for thirty-eight shipments by water from a United States port to a foreign port on which Tropical identified Parks International as the shipper. (Attachments H1, H2.) Each ocean bill of lading identifies an individual in a foreign country as the consignee. One bill describes the goods being shipped as “2 pcs, 1 fridge, 1 microwave” (Attachment H2, Tropical B/L 01006493) and two bills describe the goods as “2 barrels personal effects.” (Attachment H2, Tropical B/L 01007281; Tropical B/L 01227452.) Each of the remaining thirty-five bills of lading describe the goods as “1 barrel personal effects.” (Attachment H2.) There is no evidence that Tropical, the downstream common carrier, issued bills of lading identifying anyone other than Parks International as the shipper on shipments in which Parks International was involved.

AR Mingione also obtained a copy of a letter dated November 18, 2002, from Tropical to Parks International referring to the Commission requirement that a shipper that is party to a service contract certify its status as the owner of the cargo, a shipper’s association, an NVOCC, or “other.” (Attachment I.) *See* 46 C.F.R. § 530.6 (“The shipper contract party shall sign and certify on the signature page of the service contract its shipper status (e.g., owner of the cargo, shippers’ association, NVOCC, or specified other designation), and the status of every affiliate of such contract party or member of a shippers’ association entitled to receive service under the contract.”). In the letter, Tropical stated that it had reason to believe that Parks International was not the party holding title to the goods as Parks certified in the service contracts. Tropical stated that it would terminate the service contract unless Parks provided proof that it owned the goods being shipped. (Attachment I.) AR Mingione stated that it was his understanding that Parks did not contest termination of the contract. (Mingione Statement ¶ 14.)

There is no direct evidence in the record that proves that the “personal effects” being shipped pursuant to the Tropical bills of lading belonged to anyone other than Parks International. I conclude based on the circumstantial evidence of Parks International’s advertising, its operations, and the number of shipments, however, that contrary to its certification in the Tropical service contracts, Parks did not own the personal effects, but received them from the owners (proprietary shippers) at Parks International’s place of business or some other location and assumed responsibility for their transportation by water from the United States to a foreign port, and falsely certified to Tropical that Parks International owned the goods. Therefore, BOE has proven by a preponderance of the evidence that on each of the thirty-eight Tropical shipments, Parks International assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

- c. **BOE has proven by a preponderance of the evidence that Parks International used, for all or part of that transportation of the shipments, a vessel operating on the high seas between a port in the United States and a port in a foreign country.**

The thirty-eight Tropical bills of lading establish that each shipment was loaded on board a vessel in the United States and discharged in a foreign port. Therefore, BOE has proven by a preponderance of the evidence that Parks International used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).

BOE has proven by a preponderance of the evidence that on thirty-eight shipments, Parks International violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act.

- B. Cargo Express Violated Section 8(a) of the 1984 Act and the Commission's Regulations at 46 CFR Part 520 by Operating as a Common Carrier Without Publishing Tariffs Showing All of Its Active Rates and Charges and Violated Section 19 of the 1984 Act and the Commission's Regulations at 46 CFR Part 515 by Operating as a Non-Vessel-Operating Common Carrier in the U.S. Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility.**

The Initial Decision found that Cargo Express operated as an NVOCC without a license, tariff, or bond on each of fourteen shipments. *Parks International* ID at 17-19. Use of the inferences and permissive presumptions articulated in *Worldwide Relocations* (FMC) does not change these findings. The Initial Decision found that Cargo Express operated as an ocean freight forwarder without a license or bond on each of two shipments. *Parks International* ID at 19-20. Although BOE does not argue in its Brief on Remand that the findings are incorrect and that applying the inferences and presumptions articulated in *Worldwide Relocations* (FMC) would change these findings, Commission's remand in this proceeding requires reexamination of these two shipments in light of the Commission's holding in *Worldwide Relocations* (FMC).

In his Verified Statement, AR Mingione states that he reviewed the Commission's Registered Persons Index and the Commission's FMC-1 database and determined that Cargo Express has not published tariffs pursuant to section 8 of the Act, has not obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and has not furnished proof of financial responsibility pursuant to section 19(b) of the Act. (Mingione Statement ¶ 6.) Therefore, BOE has proven these facts by a preponderance of the evidence.

1. **BOE has proven by a preponderance of the evidence that Cargo Express operated as an NVOCC on fourteen shipments.**
 - a. **BOE has proven by a preponderance of the evidence that Cargo Express held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.**

During his investigation, AR Mingione obtained a photograph of 3010 Eastchester Road, one of the locations used by Parks International and Cargo Express. (Mingione Statement ¶ 17; Attachment J.) The photograph, taken October 29, 2004, shows advertising reading "Cargo Express International Shipping Inc.," "5 days to Kingston, [Jamaica]," "8 days to Mobay, [Jamaica]." (Attachment J.) On June 3, 2005, AR Mingione obtained a photograph of a Cargo Express truck advertising "5 days to Jamaica" and a photograph of the premises at 4755 White Plains Road with advertising reading "Cargo Express International Shipping Inc.," "5 days to Jamaica." (Attachment K.)

AR Mingione also obtained copies of two "Shipper's Invoice Agreements" issued by Cargo Express to Carla Woolery. The "Shipper's Invoice Agreements," which also contain the "5 days to Jamaica" representation, identify Woolery at a New York address as the shipper, Woolery at a Jamaica address as the consignee, New Jersey USA as the port of sailing, Montego Bay, Jamaica, W.I. as the destination, and describe the goods as barrels of personal effects. (Attachment P.)

The advertising and the "Shipper's Invoice Agreements" establish by a preponderance of the evidence that Cargo Express held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

- b. **BOE has proven by a preponderance of the evidence that Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination.**

When AR Mingione photographed the Cargo Express truck on June 3, 2005 (Attachment K), "[t]he truck was backed up to a shipping container and Cargo Express employees appeared to be in the process of loading the container." (Mingione Statement ¶ 19.) AR Mingione traced the identification number of the container to Zim Container Service and learned that the container was assigned to Simpson's Shipping Enterprise (Simpson's Shipping), a licensed OTI. AR Mingione interviewed the head of Simpson's Shipping who stated that Simpson's Shipping had booked several containers for Cargo Shipping. Cargo Express loaded the containers and delivered them to ocean common carriers that carried them under the name of Simpson's Shipping and delivered them to a Parks/Cargo Express agent in Jamaica. (Mingione Statement ¶ 20.) AR Mingione obtained shipping documents for shipments of five containers for which Simpson's Shipping issued invoices to Cargo Express, then instructed Zim Israel Navigation Company, Ltd., to issue a bill of lading identifying

Simpson's Shipping as the shipper for containers loaded by Cargo Express. (Mingione Statement ¶ 21; Attachments L1- L5.) There is no evidence that any downstream common carriers issued an ocean bill of lading identifying the proprietary shipper as the shipper. I conclude based on the direct and circumstantial evidence of Cargo Express's advertising and its operations that Cargo Express did not own the goods in the containers, but assumed responsibility for their transportation. Therefore, BOE has proven by a preponderance of the evidence that on each of the five Simpson's Shipping/Zim shipments, Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

AR Mingione also contacted Naimoli, a licensed freight forwarder, and learned that Cargo Express had shipped two or three containers per month in 2004 and early 2005. (Mingione Statement ¶ 22.) AR Mingione obtained shipping documents for shipments of nine containers for which Sea Shipping Line issued bills of lading. (Attachment M1-M9.) On all nine shipments, Naimoli issued an invoice to Cargo Express for freight and other charges. On seven shipments, Sea Shipping Line issued bills of lading identifying Cargo Express as the shipper and Parks Int'l Shipping as the consignee. (Attachments M1, M3, M5-M9.) There is no evidence that any downstream common carriers issued a bill of lading identifying the proprietary shipper as the shipper. I conclude based on the direct and circumstantial evidence of Cargo Express's advertising and its operations that Cargo Express did not own the goods in the containers, but assumed responsibility for their transportation. Therefore, BOE has proven by a preponderance of the evidence that on seven Simpson's Shipping/Sea Shipping Line shipments, (Attachments M1, M3, M5-M9), Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii). On two shipments, Sea Shipping Line issued bills of lading clearly and unambiguously identifying the proprietary shipper (the owner of the goods) as the shipper and the consignee. (Attachments M2, M4.) I find that Cargo Express did not assume responsibility for the transportation of the goods on those two shipments.

The "Shipper's Invoice Agreements" that Cargo Express used for the Woolery shipments are the equivalent of bills of lading. (Attachment P.) A common carrier does not "lose that status if he uses shipping contracts other than bills of lading." *Containerships*, 9 F.M.C. at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950). The Agreements establish that Cargo Express took possession of the goods in the United States for delivery in a foreign country. There is no evidence that any downstream common carriers issued a bill of lading identifying the proprietary shipper as the shipper. Therefore, BOE has proven by a preponderance of the evidence that on the two Woolery shipments, Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

- c. **BOE has proven by a preponderance of the evidence that Cargo Express used, for all or part of that transportation of the shipments, a vessel operating on the high seas between a port in the United States and a port in a foreign country.**

The five Zim Container Service bills of lading, the seven Sea Shipping Line bills of lading, and the two Woolery "Shipper's Invoice Agreements" establish that each shipment was loaded on board a vessel in the United States and discharged in a foreign port. Therefore, BOE has proven by a preponderance of the evidence that Cargo Express used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).⁶

BOE has proven by a preponderance of the evidence that on fourteen shipments, Cargo Express violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act.

2. **BOE has proven by a preponderance of the evidence that Cargo Express operated as an ocean freight forwarder on two shipments.**

The Commission's holding in *Worldwide Relocations* (FMC) about the use of inferences and presumptions when determining whether an ocean transportation intermediary operated as an NVOCC or an ocean freight forwarder are considered in determining whether Cargo Express operated as an NVOCC on these two shipments.

As noted above, on two shipments, Sea Shipping Line issued bills of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. (Attachments M2, M4.) The bills of lading prove that part of the transportation was in a vessel operating on the high seas. As found above, when Cargo Express operated as an NVOCC, bills of lading identifying Cargo Express as the shipper or other information in the record supports a finding that Cargo Express assumed responsibility for transportation of the cargo. Although Cargo Express and Sea Shipping Line may have violated the Act or Commission regulations with some of their activities on these two shipment, these improper acts do not demonstrate that Cargo Express assumed responsibility for the transportation of the cargo within the meaning of the Act. There is

⁶ The record establishes that Woolery received a judgment against Cargo Express and Bronx Barrels in a New York court because the shipments were never delivered in Jamaica. (Mingione Statement ¶¶ 26-27; Attachment Q (*Woolery v. Cargo Express, et al.*, Index No. B3082/06-2 and B 3082/06-102 (Civ. Ct. of the City of New York Nov. 29, 2006) (Notice of Judgment))). While it is not free from doubt, based on Cargo Express's representation in the "Shipper's Invoice Agreements" that the barrels would travel by vessel from New Jersey to Jamaica, Fed. R. Evid. 801(d)(2), I find that Cargo Express used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on these shipments.

no evidence in the record to support a finding that Cargo Express issued bills of lading to the proprietary shippers on these two shipments. The combined effect of all the factors considered in the light of Sea Shipping Line's issuance of bills of lading clearly and unambiguously identifying the proprietary shipper as the shipper overcomes a presumption or inference that Cargo Express assumed responsibility for transportation of the cargo. Cargo Express was not a shipper in relation to Sea Shipping Line on these shipments. On these two shipments, Cargo Express performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on these two shipments. 46 U.S.C. § 40102(18). Therefore, BOE has proven by a preponderance of the evidence that on two shipments, Cargo Express violated the Shipping Act by operating as an ocean freight forwarder that did not have a license as required by section 40901 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

III. BRONX BARRELS AND AINSLEY LEWIS DID NOT VIOLATE THE SHIPPING ACT BY OPERATING AS OCEAN TRANSPORTATION INTERMEDIARIES.

A. BOE Has Not Proven by a Preponderance of the Evidence That Bronx Barrels Operated as an NVOCC or an Ocean Freight Forwarder on Any Shipments.

In the Memorandum and Order on BOE's motion for summary judgment, I found that BOE had proven by a preponderance of the evidence that Bronx Barrels⁷ held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation, but that

BOE has not designated specific facts and provided the Commission with their location in the record that would support a finding that Bronx Barrels was involved in any shipments by water between the United States and a foreign country. BOE has not proven by a preponderance of the evidence that Bronx Barrels operated as an NVOCC or an ocean freight forwarder in violation of the Act on any shipment. Therefore, BOE's motion for summary judgment with regard to Bronx Barrels is denied.

Parks International S/J and Sanctions at 23.

In its Opening Brief filed prior to the Initial Decision, BOE stated:

⁷ The Memorandum and Order states "Cargo Express." This has been corrected. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Feb. 5, 2010) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment – Erratum).

With respect to Bronx Barrels . . . , at the present stage of this proceeding, in the absence of Respondents' participation and cooperation, there is no documentation in the record which can establish the fact that Bronx Barrels was involved in shipments by water between the United States and a foreign port In particular, the issues of whether Bronx Barrels was involved in any shipments by water between the United States and a foreign port could have been substantively addressed had Respondents answer BOE's Request for Production No. 11. . . . With the exception of drawing adverse inferences regarding Respondents' ability to pay civil penalties, the ALJ deferred ruling on additional sanctions regarding Respondents' lack of cooperation in the discovery process pending the completion of the briefing schedule set out in the October 23 Order.

(BOE Opening Brief at 4-5.) BOE only sought relief against Parks International and Cargo Express. (*Id.* at 22.) In its Brief on Remand, BOE states “[a]s BOE did not file exceptions to the initial decision, BOE has determined not to further address the claims against Bronx Barrels” (BOE Brief on Remand at 6.)

As BOE stated in its Opening Brief, “there is no documentation in the record which can establish the fact that Bronx Barrels was involved in shipments by water between the United States and a foreign port.” (BOE Opening Brief at 4.) Nothing in the *Worldwide Relocations* (FMC) decision or the Commission's remand in this proceeding calls this finding into question. Therefore, the claims against Bronx Barrels are dismissed.

B. BOE Has Not Proven by a Preponderance of the Evidence That Ainsley Lewis Operated as an NVOCC or an Ocean Freight Forwarder on Any Shipments.

In the Memorandum and Order on BOE's motion for summary judgment, I found that

BOE does not designate specific facts and provided the Commission with their location in the record that would support a finding that Lewis as an individual operated as an OTI. Assuming Lewis is the chairman, chief executive officer, or otherwise has a controlling interest in Cargo Express and Bronx Barrels,⁸ BOE does not designate specific facts that support a conclusion that the corporate veils of Parks International, Cargo Express, and Bronx Barrels should be pierced and Lewis be found personally liable for their violations of the Shipping Act. *See Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. at 165-171 (factors considered in

⁸ The evidence submitted with BOE's motion for summary judgment established that Lewis is the chief executive of Parks International. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 23 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment). In the Appendix filed with its Opening Brief, BOE included evidence establishing that Lewis is the chief executive of Cargo Express. (BOE App. 2.)

piercing the corporate veil). Therefore, BOE's motion for summary judgment with regard to Ainsley Lewis is denied.

In its Opening Brief filed prior to the Initial Decision, BOE stated:

With respect to . . . Ainsley Lewis, at the present stage of this proceeding, in the absence of Respondents' participation and cooperation, there is no documentation in the record which can establish the fact that . . . Ainsley Lewis a.k.a. Jim Parks, in his individual capacity, operated as an OTI on any shipments. . . . [I]ssues regarding the personal liability of Ainsley Lewis a.k.a. Jim Parks likewise could have been substantively addressed had Respondents answered BOE's Interrogatory nos. 1, 2, 4, 5, 6, 7, and 9, as well as BOE's Requests for Production of Documents nos. 12 and 13. These discovery requests speak to the issue of Ainsley Lewis' involvement in the unlicensed OTI activities of the corporate Respondents, as well as those that may have been performed by Ainsley Lewis in his individual capacity. With the exception of drawing adverse inferences regarding Respondents' ability to pay civil penalties, the ALJ deferred ruling on additional sanctions regarding Respondents' lack of cooperation in the discovery process pending the completion of the briefing schedule set out in the October 23 Order.

(BOE Opening Brief at 4-5.) BOE only sought relief against Parks International and Cargo Express. (*Id.* at 22.) BOE's motion for sanctions has been fully decided. In its Brief on Remand, BOE states "[a]s BOE did not file exceptions to the initial decision, BOE has determined not to further address the claims against . . . Ainsley Lewis." (BOE Brief on Remand at 6.)

As BOE stated in its Opening Brief, "there is no documentation in the record which can establish the fact that . . . Ainsley Lewis a.k.a. Jim Parks, in his individual capacity, operated as an OTI on any shipments." (BOE Opening Brief at 4.) Nothing in the *Worldwide Relocations* (FMC) decision or the Commission's remand in this proceeding calls this finding into question. Therefore, the claims against Ainsley Lewis a.k.a. Jim Parks are dismissed.

IV. CIVIL PENALTIES ARE ASSESSED AGAINST PARKS INTERNATIONAL AND CARGO EXPRESS.

A. Statutory and regulatory considerations.

The Commission issued the Order of Investigation and Hearing to determine "whether, in the event violations of sections 8(a) and 19 of the 1984 Act and/or 46 CFR Parts 515 and 520 are found, civil penalties should be assessed against [Respondents] and, if so, the amount of the penalties to be assessed." *Parks International – Possible Violations*, FMC No. 06-09 (Sept. 19, 2006) (Order of Investigation and Hearing). Section 13(a) of the Act provides:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless

otherwise provided in this part, the amount of the penalty may not exceed [\$6000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).⁹ “BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed.” *Worldwide Relocations* (ALJ) at 76, *approved*, *Worldwide Relocations* (FMC) at 3. See also *Parks International* ID at 30-32 (discussing burden of persuasion).

The first question that must be answered in determining a civil penalty is whether the “violation was willfully and knowingly committed.” *Stallion Cargo, Inc. – Possible Violations*, 29 S.R.R. at 678. To assess a civil penalty in the higher amount, the evidence must establish that the violation was willful and knowing. In discussing the willful and knowing requirement, the Commission stated:

In order to prove that a person acted “knowingly and willfully,” it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. [*Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *Ever Freight Int’l Ltd.*, 28 S.R.R. 329, 333 (ALJ 1998)]. The Commission has further held that a person’s ““persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.”” *Id.* at 84 (quoting *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954)); see also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938).

Rose Int’l, Inc., 29 S.R.R. at 164-165. See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. 1397, 1403 (2000) (similar language).

Section 13(c) of the Act sets forth the factors to be considered in determining the amount of a civil penalty: “In determining the amount of a civil 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 other matters justice may require.” 46 U.S.C. § 41109(b). Once the first question – whether the “violation was willfully and knowingly committed,” *Stallion Cargo, Inc.*, 29 S.R.R. at 678 – has been answered,

⁹ The Act originally provided for maximums of \$5000 and \$25,000. In 2000, before Respondents allegedly violated the Act, the Commission increased these amounts to \$6000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table) (2008)). The maximums have since been increased to \$8000 and \$40,000. 74 Fed. Reg. 38114, 38115-38116 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2011)).

the eight factors set forth in section 13(c) must be weighed and balanced, bearing in mind the maximum penalty that may be assessed for the violation.

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986):

. . . in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. (Case citation omitted.) Obviously, “[t]he prescription of fair penalty amounts is not an exact science,” and “[t]here is a relatively broad range within which a reasonable penalty might lie.” (Case citation omitted.)

Universal Logistic Forwarding Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 323, 333 (ALJ 2001), adopted in relevant part, 29 S.R.R. 474 (2002). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd. – Possible Violations*, 28 S.R.R. at 805-806.

Although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *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, 681 (2001); *Refrigerated Container Carriers Pty. Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805 (ALJ 1999, admin. final May 21, 1999).

The penalty provision is equally applicable to NVOCCs and ocean freight forwarders. An NVOCC that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for each violation. An ocean freight forwarder that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for

each violation. A lesser or greater civil penalty is not warranted because an entity operated as an NVOCC rather than an ocean freight forwarder or vice versa.

B. BOE Contentions.

1. 2009 Brief.

BOE contends that:

The Commission's policies for deterrence and future compliance with the 1984 Act and the regulations are substantial factors which must be considered contemporaneously with the other factors in determining the appropriate amount of civil penalties. 46 C.F.R. § 502.603(b). Specifically, in enacting the 1984 Act, "Congress intended to increase the deterrent effect of penalties for violations" so they are not merely written off by companies as a cost [of] doing business. *Stallion Cargo, Inc.*, 29 S.R.R. at 681. See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. at 1191 ("[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress' efforts to augment the Commission's authority to assess penalties so as to deter future violations.") In this case, the deterrent effect on other companies who might be inclined to violate the 1984 Act by operating as OTIs without obtaining licenses from the Commission and providing proof of financial responsibility justifies assessment of the maximum civil penalty.

Additionally, a significant penalty sends a message to the shipping industry that enforcement action cannot be avoided simply by a Respondent's refusal to participate in a formal proceeding. As was appropriately noted in *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. 799, 805 (ALJ 1999), "[s]hould the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed 'compromise' discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings." *Id.*

(BOE Brief at 15-16.)

BOE's position assumes that only the maximum civil penalty permitted by statute would act as a deterrent. Assuming that only a maximum civil penalty imposed on one respondent would have a deterrent effect on other companies, that deterrent effect would be present in every case. BOE's argument would result in the assessment of the maximum civil penalty for every violation no matter what the particular facts of a violation might be and would nullify the Congressional mandate to

determine the amount of the penalty by “tak[ing] 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” by elevating consideration of the deterrent effect of a penalty (a factor found in the Commission’s regulation, but not found in section 13(c)) over the factors that Congress set forth in section 13(c).

In determining the amount of the civil penalty imposed on Parks International and Cargo Express, I have “tak[en] 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” while bearing in mind the need “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law.”

2. 2012 Brief on Remand.

a. BOE’s new argument.

In its brief on remand, BOE states an additional argument that it did not raise in 2009.

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 a knowing and willful violation is subject to a minimum penalty, in this case, \$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 civil 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 the Shipping Act*, 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.

(BOE Brief on Remand at 14-15.)

- b. The Shipping Act does not contemplate that a willful and knowing violation is subject to a minimum civil penalty that must exceed the maximum civil penalty for a violation that is not willful and knowing.**

BOE argues that a “logical and natural reading” of the Shipping Act leads to a conclusion that Congress “clearly expressed” an intention to establish a minimum civil penalty for a willful and knowing violation that must exceed the maximum civil penalty for a violation that is not willful and knowing. This argument is not persuasive for several reasons.

First, this is a matter of statutory construction. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004), quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The Act establishes a maximum civil penalty for a violation that is not willful and knowing and a higher maximum civil penalty for a willful and knowing violation, but does not say that the minimum civil penalty for a willful and knowing violation must be greater than the maximum for a violation that is not willful and knowing. While Congress could have easily written a statute imposing a civil penalty for a willful and knowing violation that, at a minimum, must exceed the statutory threshold defining the maximum civil penalty amount for a violation that is not willful and knowing, the Shipping Act does not say that.

Second, to the extent there is any ambiguity in the statute, the legislative history does not say Congress intended a two-level structure in which the minimum civil penalty for a willful and knowing violation must be greater than the maximum civil penalty for a violation that is not willful and knowing. Had that been the intention of the writers of H.R. Rep. No. 53, Part 1, 98th Cong. 1st Sess., the House Report cited by BOE, the Report would have said so.

Third, in the twenty-eight years since Congress amended the Act to add the increased maximum civil penalty for a willful and knowing violation, the Commission has never said in its regulations that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. On three occasions immediately after enactment of the Shipping Act of 1984, the Commission published items in the Federal Register concerning changes in the compromise, assessment, mitigation, settlement, and collection of civil penalties under shipping statutes, including changes necessitated by the 1984 Act: (A) Final Rules to Implement the Shipping Act of 1984 and to Correct and Update Regulations, 49 Fed. Reg. 16994-17001 (Apr. 23, 1984) (codified at 46 C.F.R. Part 505 (1984)

(amending 46 C.F.R. Part 505 to change the title to Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties and to add compromise and assessment authority for violations of the Shipping Act of 1984); (B) Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Act, 1933, 49 Fed. Reg. 18874-18877 (May 3, 1984) (proposing revision of rules governing the handling of penalty claims under the Shipping Act and other shipping statutes); (C) Final Rules in Subchapter A; General and Administrative Provision, 49 Fed. Reg. 44362 (Nov. 6, 1984) (promulgating the final rule proposed on May 3, 1984). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing on any of these occasions, nor did it when it redesignated Part 505 as 46 C.F.R. Part 502, Subpart W. Miscellaneous Amendments to Rules of Practice and Procedure, 58 Fed. Reg. 27208 (May 7, 1993).

Fourth, the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) (DCIA), requires the Commission to promulgate rules and adjust for inflation the maximum amount of each statutory civil penalty subject to Commission jurisdiction. A few months later, the Commission promulgated regulations and made its first adjustment under the DCIA. Inflation Adjustments of Civil Monetary Penalties, 61 Fed. Reg. 52704 (Oct. 8, 1996). Neither the preamble nor the Table included in the new regulation states that the minimum civil penalty for a willful and knowing violation of the Act must exceed the maximum civil penalty amount for a violation that is not willful and knowing. *Id.*, 61 Fed. Reg. at 52706 (codified at 46 C.F.R. Part 506) (increasing penalty for a willful and knowing violation to \$27,500 and for a violation not willful and knowing to \$5500). The Commission adjusted the civil penalty levels in 2000, Inflation Adjustment of Civil Monetary Penalties, 65 Fed. Reg. 49741-49742 (Aug. 15, 2000) (increasing penalty for a willful and knowing violation to \$30,000 and for a violation not willful and knowing to \$6000), and again in 2009. Inflation Adjustment of Civil Monetary Penalties, 74 Fed. Reg. 38114-38116 (July 31, 2009) (increasing penalty for a willful and knowing violation to \$40,000 and for a violation not willful and knowing to \$8000). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum to be imposed for a violation that is not willful and knowing.

Fifth, BOE does not cite to any Commission or administrative law judge decision in the twenty-eight years since the enactment of the Shipping Act of 1984 holding or even discussing an argument that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. In the case that BOE cites in its 2009 brief, the Commission gave the judge detailed instructions on factors used in calculating the civil penalty to be imposed in a proceeding remanded for a decision on the civil penalty for willful and knowing violations. *Martyn Merritt – Possible Violations*, 26 S.R.R. at 664-666. The Commission did not state or even suggest that the minimum civil penalty imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing.

Sixth, in *Worldwide Relocations* (ALJ), the administrative law judge found that Respondents had committed “a total of 649 [willful and knowing] violations and imposed civil penalties ranging

from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals.” *Worldwide Relocations* (FMC) at 2. The judge imposed a civil penalty of \$4000 per violation for fifty willful and knowing violations, \$3000 per violation for 325 willful and knowing violations, and \$6000 per violation for 274 willful and knowing violations. *Worldwide Relocations* (ALJ) at 89. I take official notice, 46 C.F.R. § 502.226, that the judge imposed an average civil penalty of slightly less than \$4343.61. The Commission reviewed the judge’s decision on its own motion and, with the exception of three issues not related to civil penalty, substantially adopted the Initial Decision, including the civil penalties imposed by the judge. *Worldwide Relocations* (FMC) at 3; at 24. I am confident that the Commission would not have adopted the decision imposing civil penalties if the maximum civil penalty imposed by the judge for willful and knowing violations were less (and the *average* civil penalty imposed by the judge \$1657.39 less) than the minimum “clearly expressed” civil penalty resulting from a “logical and natural reading” of the Act.

Seventh, BOE had an opportunity to file exceptions to the administrative law judge’s decision in *Worldwide Relocations* if it believed that the civil penalties imposed by the judge were less than the “clearly expressed” statutory requirement resulting from a “logical and natural reading” of the Act. See 46 C.F.R. § 502.227 (“any party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum”). BOE did not file exceptions, see *Worldwide Relocations* (FMC) at 3 (“No party filed exceptions”), which presumably BOE would have done if it believed that the “clearly expressed” statutory requirement resulting from a “logical and natural reading” of the statute requires that the minimum civil penalty imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. This suggests that BOE has enforced the civil penalty provision of the Act for twenty-eight years without believing that the Act requires the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. A “clearly expressed” statutory requirement resulting from a “logical and natural reading” of the statute would not have gone unrecognized for twenty-eight years by the Commission component charged with its enforcement. 46 C.F.R. §§ 501.5(i)(2), 501.28(a), and 502.604(g).

For the foregoing reasons, I find that the Shipping Act does not provide that a willful and knowing violation is subject to a minimum civil penalty that must exceed the maximum civil penalty imposed for a violation that is not willful and knowing.

C. Assessment of civil penalties against Parks International and Cargo Express.

The February 5, 2010, Initial Decision imposed a civil penalty of \$18,000 on Parks International for violations on twelve shipments on which it operated as an NVOCC that occurred in the limitations period and a civil penalty of \$412,000 on Cargo Express for knowing and willful violations on fourteen shipments on which it operated as an NVOCC and two shipments on which it operated as an ocean freight forwarder. Although the Commission did not explicitly address imposition of a civil penalty when it reviewed *Worldwide Relocations* (ALJ), its affirmance of the civil penalties imposed by the administrative law judge is instructive.

The orders of investigation and hearing in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, and this proceeding were issued to investigate substantially identical activity by respondents. *Compare World wide Relocations – Possible Violations*, FMC No. 06-01 (FMC Jan. 11, 2006) (“an investigation is instituted to determine: (1) Whether the Respondents violated sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility, [and] without publishing an electronic tariff”) with *Parks International – Possible Violations*, FMC No. 06-09 (FMC Sept. 19, 2006) (“an investigation is instituted to determine: (1) whether [Respondents] violated section 8(a) of the 1984 Act and the Commission’s regulations at 46 CFR part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges; (2) whether [Respondents] violated section 19 of the 1984 Act and the Commission’s regulations at 46 CFR part 515 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility”).

The violations found by the judge in *Worldwide Relocations* and the violations committed by Parks International and Cargo Express are substantially the same. In *Worldwide Relocations*, the judge found that Moving Services and Global Direct Shipping operated as NVOCCs that did not have a tariff, license, or bond. *Worldwide Relocations* (ALJ) at 71 (Moving Services); at 72 (Global Direct Services). Parks International and Cargo Express (at least on the fourteen shipments on which Cargo Express operated as an NVOCC), committed the same violations. The judge found that Moving Services and Global Direct Shipping willfully and knowingly violated the Act. *Id.* As explained more fully below, Parks International’s violations are found not to be willful and knowing and Cargo Express’s violations are found to be willful and knowing.

In *Worldwide Relocations*, the judge imposed determined a civil penalty amount per violation for each Respondent. These amounts were \$3000 per violation for *Worldwide Relocations*, Boston Logistics, and Tradewind, \$4000 per violation for International Shipping Solutions and Dolphin, and \$6000 per violation for Moving Services and Global Direct Shipping. *Worldwide Relocations* (ALJ) at 82. Regarding Moving Services and Global Direct Shipping, the judge stated:

Moving Services and Global Direct Shipping did not cooperate with discovery and provided no testimony. Pursuant to the sanctions imposed, they have an ability to pay. The only factor which weighs in their favor is the lack of prior violations although this is offset by an indication that Sharon Fachler may continue to be involved in international shipping companies in some way. Accordingly, a civil penalty of \$6000 per violation is assessed against Moving Services and Global Direct Shipping.

Worldwide Relocations (ALJ) at 82. Parks International and Cargo Express similarly did not cooperate in discovery and based on that nonparticipation, they have been determined to have the ability to pay a civil penalty. BOE has not demonstrated that Parks International and Cargo Express have a history of violations.

Although there is no requirement that the Commission impose a civil penalty in the same amount for identical violations, the Commission's affirmance of the civil penalties imposed in *Worldwide Relocations* strongly suggests that the \$30,000 per violation civil penalties sought by BOE may be greater than the Commission would think appropriate. The Commission's affirmance of the *Worldwide Relocations* civil penalties is factored into the decision below.

1. Parks International.

BOE has proven by a preponderance of the evidence that Parks International operated as an NVOCC in violation of the Act on thirty-eight shipments carried for it by Tropical. As BOE recognizes (BOE Opening Brief at 16), the Act has a five-year statute of limitations for assessment of a civil penalty. See 46 U.S.C. § 41109(e) ("A proceeding to assess a civil penalty under this section must be commenced within 5 years after the date of the violation."). The Commission commenced this proceeding on September 19, 2006. Therefore, the Commission may impose a civil penalty for those shipments that occurred on or after September 19, 2001. Tropical issued twelve of the thirty-eight bills of lading after September 19, 2001. (BOE Opening Brief at 16; BOE Attachment H1; Attachment H2.) (In its Brief on Remand, BOE seeks imposition of a civil penalty for twelve Parks International shipments. (Brief on Remand at 16.)) Therefore, a civil penalty may be imposed on Parks International for each of twelve violations of the Act. The twelve shipments are:

TABLE 1
PARKS INTERNATIONAL/TROPICAL SHIPMENTS (Attachment H1, H2)

DATE	TROPICAL B/L NO.	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ¹⁰
11/01/2001	01008952	1 BARREL PERSONAL EFFECTS	US\$105.00
11/22/2001	01009489	1 BARREL PERSONAL EFFECTS	US\$49.50
11/22/2001	01009492	1 BARREL PERSONAL EFFECTS	US\$49.50
12/13/2001	01227448	1 BARREL (WITH YELLOW TAPE) PERSONAL EFFECTS	US\$41.50
12/13/2001	01227449	1 BARREL PERSONAL EFFECTS	US\$51.50
12/13/2001	01227452	2 BARRELS PERSONAL EFFECTS	US\$103.00

¹⁰ This apparently would have been the charge to Parks International. There is no evidence of the amount Parks International charged the owners/shippers of the goods.

12/27/2001	01232334	1 BARREL S.T.C: 1 BARREL (WITH YELLOW TAPE) PERSONAL EFFECTS	US\$51.50
12/27/2001	01232336	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50
12/27/2001	01232337	1 BARREL PERSONAL EFFECTS	US\$46.50
02/07/2002	02000442	1 BARREL S.T.C. PERSONAL EFFECTS	US\$46.50
02/07/2002	02000447	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50
02/21/2002	02000700	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50

(BOE Attachment H2.)

BOE contends that Parks International willfully and knowingly violated the Act and seeks the maximum penalty of \$30,000 for each of the twelve shipments for a total of \$360,000. (BOE Opening Brief at 16; BOE Brief on Remand at 16.)

a. **“Willfully and knowingly.”**

The first question on which BOE bears the burden of persuasion is whether Parks International willfully and knowingly committed the violations. *Stallion Cargo, supra. Worldwide Relocations* (FMC) does not address the issue of willfully and knowingly violating the Act.

BOE contends that:

The uncontested facts, as presented in the Verified Statements of [AR] Mingione and Dorothy H Wade, reflect that Ainsley Lewis . . . is the chief executive officer of Parks [International] PFF 1, 3, 4.¹¹ At various times subsequent to its incorporation . . . , Parks advertised itself to the general public as an OTI/NVOCC PFF 9. Between April 16, 2001 and October 25, 2002, Parks entered into a series of three service contracts with Tropical PFF 10. With respect to each of its three service contracts with Tropical, Parks certified its status as owner of the cargo. PFF 11. The commodities which were to be transported by Tropical for Parks pursuant to the aforementioned service contracts were household goods and personal effects. PFF 12. On November 18, 2002, Tropical challenged Parks’ certification of its status with respect to one of the service contracts by requesting that Parks provide proof of ownership of the cargo in order to avoid immediate termination of the contract. PFF 13. Parks did not contest Tropical[’s] termination of the contract. PFF 14. At approximately the same time, by correspondence dated November 13,

¹¹ “PFF” followed by a number refers to a proposed finding of fact BOE submitted with its Opening Brief.

2002, Parks and its president . . . were warned by the Commission's New York Area Representative of the consequences of operating as an OTI without a license and evidence of financial responsibility. PFF 16. Despite this explicit warning, Parks continued its unlicensed OTI operations in March 2003 as evidenced by its loading of barrels onto a truck bearing the name of Parks at Parks' business address . . . in [the] Bronx PFF 17.

The evidence amply demonstrates that the violations of sections 8(a) and 19 of the 1984 Act are knowing and willful in light of the fact that Parks signed three (3) service contracts with an ocean common carrier and intentionally falsified its status as the owner of the thirty-eight shipments of household goods and personal effects that were transported pursuant to one of the contracts. As the ALJ recognized in his October 23 Order, the evidence shows that Parks made numerous shipments as shipper of goods obviously owned by third parties from whom Parks regularly solicited business through its advertisements. When requested by the ocean carrier to verify its ownership of the cargo, Parks was either unable or unwilling to do so. These activities demonstrate a "pattern of indifference" and an intentional disregard to the licensing and bonding requirements of the 1984 Act. Moreover, subsequent to receiving written notice from a Commission representative regarding the consequences of operating outside the OTI licensing and bonding requirements, Parks proceeded to disregard same and continue its OTI operation in a non-compliant manner. At this point, it is evident that Parks' level of awareness migrated from intentional disregard to purposeful and obstinate behavior which is tantamount to "gross negligence" according to Commission precedent. *See Ever Freight Int'l Ltd., et al.*, 28 S.R.R. at 333.

(BOE Opening Brief at 7-8 (footnote omitted).)

A number of the proposed findings of fact on which BOE relies to prove that Parks International's violations were willful and knowing have meager support in the record and/or are irrelevant to whether Parks International willfully and knowingly committed the violations:

PFF 13. On November 18, 2002, Tropical issued a letter to Parks challenging the certification of its status as owner of the cargo being shipped pursuant to service contract no. 021675 and requesting that Parks provide proof of ownership of the cargo in order to avoid immediate termination of the contract. Mingione Statement ¶ 14, Attachment I.

PFF 14. Parks did not contest Tropical's termination of contract no. 021675. Mingione Statement ¶ 14.

(BOE Prop. FF ¶¶ 13, 14.) AR Mingione states:

14. On November 18, 2002, Tropical sent a letter to Parks stating that Tropical had reason to believe that, contrary to its certification, Parks may not be the owner of the cargo being shipped pursuant to service contract no. 021675 which was ongoing at the time of the letter and was scheduled to expire on February 28, 2003. The letter further notified Parks that the service contract would be terminated immediately and all further shipments from Parks would be refused by Tropical unless Parks could provide proof of ownership of the cargo being shipped. It is my understanding that Parks did not contest the termination of the contract. A copy of this letter, which was provided to me by Tropical, is included as Attachment I.

(Mingione Statement ¶ 14.) Attachment I is a letter purportedly from Tropical to Parks International asking for proof that Parks International was the owner of that goods being shipped pursuant to the contract.

BOE does not provide much evidence on which a finding that Parks International received Tropical's letter can be based. "Proof that a letter properly directed was placed in a [United States] post office mail receptacle creates a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed." *United States v. Ekong*, 518 F.3d 285, 287 (5th Cir. 2007) (quoting *Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989)). This presumption does not require the use of certified mail; it simply requires that a letter be properly addressed, stamped, and placed in the care of the United States Postal Service. *See Mulder v. Comm'r of Internal Revenue*, 855 F.2d 208, 212 (5th Cir. 1988); *see also Lyle Cashion Co. v. McKendrick*, 204 F.2d 609, 611 (5th Cir. 1953). The placement of a letter in the mail may be proved by a sworn statement, *Ekong*, 518 F.3d at 287, or by circumstantial evidence such as the sender's customary mailing practice. *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 420 (5th Cir. 2007).

Other than stating "Tropical sent a letter to Parks," AR Mingione does not set forth any facts that would support a finding that Tropical's letter was placed in a United States post office mail receptacle on which a presumption that it reached its destination could be based. Assuming Parks International received the letter from Tropical, Tropical did not send and Parks International did not receive the letter until nearly nine months *after* the last Parks International shipment/violation for which BOE seeks a civil penalty. Therefore, even if received, the Tropical letter does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

PFF 15. By correspondence dated November 13, 2002, New York Area Representative Emanuel James Mingione ("AR Mingione") requested that Parks furnish documentation regarding its operation including, but not limited to, dock receipts, export declarations, and bills of lading. Mingione Statement ¶ 10, Attachment F.

PFF 16. By correspondence dated November 13, 2002, Parks and its president, Ainsley Lewis a.k.a. Jim Parks, were warned of the consequences of operating as an

OTI without a license and evidence of financial responsibility. Mingione Statement ¶ 10, Attachment F.

(BOE Prop. FF ¶¶ 15, 16.) AR Mingione states:

10. In an effort to obtain information regarding Parks' shipping practices, I issued a letter on November 13, 2002 requesting that Parks furnish certain documentation regarding its operation including, but not limited to, dock receipts, export declarations, and bills of lading. In the letter, I also warned Parks of the consequences of operating as an OTI without a license and evidence of financial responsibility. This letter is included as Attachment F.

(Mingione Statement ¶ 10.) Attachment F is a letter dated November 13, 2002, from AR Mingione to Jim Parks and Alphanso Jackson of Parks International.

AR Mingione does not set forth any facts in his statement that would support a finding that the letter was placed in a United States post office mail receptacle creating a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed. Attachment F includes a photocopy of a Federal Express Airbill indicating that the AR Mingione sent the letter by Federal Express to "Mr. Jim Parks" at Parks Int'l Shipping, Inc., however. Courts have held that the "presumption [that a letter reached its destination] can arise where the sender uses a private delivery service." *Murray v. TXU CORP.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003), citing *United States v. Wilson*, 322 F.3d 353, 362 (5th Cir. 2003) (invoking the rule where a party claimed to have sent a letter by Federal Express, but finding insufficient evidence to apply the presumption); *Bronia, Inc. v. Seo*, 873 F. Supp. 854, 859 (S.D.N.Y.1995). Given the ease with which a sender can obtain proof of delivery from Federal Express, one might wonder why BOE did not submit proof of delivery of the letter. Nevertheless, drawing the inference that BOE would not have included the photocopy of the FedEx Airbill unless AR Mingione used that FedEx Airbill to ship the letter, I find that Parks International received AR Mingione's letter.

As with the Tropical letter, AR Mingione did not send and Parks International did not receive the letter until nearly nine months *after* the last Parks International shipment for which BOE seeks a civil penalty. Therefore, Mingione's letter does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

PFF 17. On March 11, 2003, AR Mingione witnessed barrels being loaded onto a truck clearly bearing the name of Parks at Parks' business address of 3010 Eastchester Road in Bronx, New York. Mingione Statement ¶ 15.

(BOE Prop. FF ¶¶ 17.) AR Mingione states:

15. On March 11, 2003, I drove to Parks' location at 3010 Eastchester Road in Bronx, New York. I observed barrels being loaded onto a truck clearly bearing the name of Parks. A cargo van with Parks' name was also observed

at the premises. Parks' name was printed on an awning over the door, as well as painted on the side of the building.

(Mingione Statement ¶ 15.)

The fact that Parks International was loading barrels onto a truck more than two years after the last Parks International shipment for which BOE seeks a civil penalty does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

BOE indicates that consideration of the events that occurred long after the last violation are necessary to support a finding of willful and knowing violations. (BOE Opening Brief at 8 (“At this point, it is evident that Parks’ level of awareness migrated from intentional disregard to purposeful and obstinate behavior which is tantamount to “gross negligence” according to Commission precedent.”) (quoted *supra*.) The facts in BOE’s brief that occurred before or contemporaneous with the violations are:

- Parks advertised itself to the general public as an OTI/NVOCC;
- Between April 16, 2001 and October 25, 2002, Parks entered into three service contracts with Tropical on which it certified its status as owner of the cargo;
- The commodities which were to be transported by Tropical for Parks pursuant to the aforementioned service contracts were household goods and personal effects.

(See BOE Opening Brief at 7-8, quoted at 26 *supra*.) The fact that Parks International “advertised itself to the general public as an OTI/NVOCC” does not support a finding that Parks International willfully and knowingly transported the goods in violation the Act. The fact that the commodities transported by Tropical were household goods and personal effects does not support a finding that Parks International willfully and knowingly transported the goods in violation the Act. BOE does not identify any facts that would support a finding that Parks International or Lewis, its chief executive, knew of the existence of the Shipping Act and its license, bonding, and tariff requirements.

Only one fact identified by BOE could support a finding that Parks International willfully and knowingly violated the Act: The fact that Parks International misrepresented its ownership status on the three service contracts with Tropical. Although this evidence clearly establishes Parks International used deception to secure its contract with Tropical, it does not necessarily support a finding that Parks International knew of the existence of the Act or willfully and knowingly violated the Act by operating as an NVOCC without a tariff, license, or bond, and BOE does not identify any other evidence that Parks International knew of the existence of the Act or the Act’s requirements that an NVOCC have a license, bond, and tariff. Assuming Parks International did not know of the Act, it may have acted unreasonably when it opened its business without sufficient research into legal requirements, but the evidence does not support a finding that it acted recklessly. *Compare*

McLaughlin v. Richland Shoe Co., 486 U.S. at 135 n.13 (“If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner’s test, it should not be so considered under *Thurston* or the identical standard we approve today.”). Even if it is assumed that Parks International knew of the Act, BOE does not identify any evidence on which a finding of recklessness could be based.

In its Brief on Remand, BOE cites to the enactment of the Shipping Act itself and promulgation of Commission regulations pursuant to the Act and argues that “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.)” (BOE Brief on Remand at 10. See BOE Brief on Remand at 10-13.)

A basic principle of statutory interpretation is that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The modern variant is that statutes should be construed “so as to avoid rendering superfluous” any statutory language.” *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). If a finding that a respondent willfully and knowingly violated the Act could be based on the fact that the violation occurred after the Act was passed, *all* violations would be willful and knowing and Congress’s creation of a two-level structure establishing maximum penalties would be rendered superfluous.

BOE has proven by a preponderance of the evidence that Parks International committed thirty-eight violations of the Shipping Act. Twelve violations occurred within the limitations period. BOE has not established by a preponderance of the evidence that Parks International willfully and knowingly committed the violations. Therefore, I find that Parks International may be liable for a civil penalty that may not exceed \$6000 for each violation. 46 U.S.C. § 41107(a).

b. Section 13 factors.

BOE contends that:

Parks knowingly and willfully provided unlicensed, unbonded NVOCC services with respect to thirty-eight (38) shipments transported pursuant to one of its service contracts with Tropical between May 23, 2001 and February 21, 2002. PFF 10. Subsequent to receiving a written warning of the consequences of operating as an unlicensed OTI . . . , Parks was observed four months later loading barrels onto a truck bearing Parks’ name at Parks’ business address PFF 16, 17. Parks’ unwillingness to cease its unlicensed OTI activities or to come into compliance by obtaining a license is a significant aggravating factor in this proceeding. Moreover, members of the shipping public who tendered their cargo to Parks during the extended time period of Parks’ unlicensed operations were left completely

unprotected due to Parks' failure to provide proof of financial responsibility, such as a surety bond.

All of this activity coupled with Parks' intentional falsification of its shipper status to Tropical on no less than three occasions all the while knowing that it was not the owner of the cargo it was tendering makes Parks' degree of culpability extremely high. Parks' unwillingness or inability to satisfy Tropical's verification of Parks' shipper status speaks to Parks' failure to cooperate with the ocean carrier. PFF 14. Similarly, Parks remained uncooperative during the entirety of this docketed proceeding. Therefore, all of these factors combined, the nature, extent, gravity of the violations committed by Parks, Parks' degree of culpability, as well as the interests of justice support the imposition of the maximum civil penalty.

(BOE Opening Brief at 14-15 (footnote omitted).)

With regard to Parks International's "history of prior offenses," BOE contends:

Of those factors cited in section 13(c) of the 1984 Act, BOE submits that only the absence of a history of prior offenses appears to present a factual issue supporting mitigation of those civil penalties otherwise appropriate. Parks has no known history of prior offenses.

However, this factor should not be viewed in isolation inasmuch as Parks has been operating unlawfully since at least April 16, 2001 at which time Parks signed its first service contract and falsified its shipper status to Tropical. Therefore, it is reasonable to infer the significant likelihood that the thirty-eight (38) NVOCC shipments comprising the evidentiary record in this proceeding do not form the entire universe of Parks' operations since 2001. Had Parks complied with BOE's Request for Production of Documents No. 9, there is a considerable possibility that the evidentiary record would have been much more substantial by way of Parks' history of violations.

This approach is not novel to the discussion of a Respondent's history of prior offenses. In a previous matter, the ALJ recognized that an absence of a history of prior offenses only means "that there is no history of any formal Commission proceeding regarding" a Respondent or its principals. *Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1185, 1192 (ALJ 1999). The Commission, however, is allowed "to draw reasonable inferences from the evidence and reach conclusions in the absence of a 'smoking gun'." *Id. See also Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1404 n.11 (FMC 2000) ("The ALJ correctly found, in addition to violations of section 10(b)(1) on 35 shipments in 1997 and 1998, a 'history of prior offenses' dating back to 1993, when Respondent first filed its tariff.") Comparable to the ALJ's conclusion in

Pacific Champion, it is reasonable to infer that had BOE obtained evidence through discovery of other shipments handled by Parks, they would similarly demonstrate that Parks provided unlicensed OTI services to the shipping public.

(BOE Opening Brief at 13-14 (citation to record omitted).)

Addressing the nature, circumstances, extent, and gravity of the violation committed in another proceeding brought to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act, I found that the entity operated as an NVOCC. *Embarque Puerto Plata, Corp. – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision . . . on . . . Mateo . . .), Notice Not to Review served Sept. 29, 2009. In assessing the civil penalty, I found that:

Despite the fact that BOE does not set forth any argument about how the section 13 factors should be balanced “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law,” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018, the evidence in the record demonstrates that for each of the thirteen proven violations, the shipments of as many as fifty to one hundred shippers were at risk. Therefore, a civil penalty of \$30,000, the maximum civil penalty authorized by the Shipping Act, is appropriate for each of the thirteen violations for a total of \$390,000.

Id. at 27.¹² In this proceeding, by contrast, each of the twelve Parks International violations within the limitations period consisted of a shipment of one barrel (or in one case, two barrels) for one shipper. The freight charge was around \$50 per barrel for all but one barrel. *See* Table 1, *supra*. The nature and circumstances of a violation involving the goods of dozens of shippers justifies a far greater civil penalty than a violation involving one or two barrels of goods of one shipper. The record does not contain any evidence indicating that there were any problems with the twelve shipments, that Parks International demanded any additional payments from the shippers beyond the amount originally stated, or that the shipments were not delivered to their destinations.¹³

BOE states that Parks International “has no known history of prior offenses,” (BOE Opening Brief at 13), by which it apparently means that the Commission has not found that Parks International violated the Act in a prior Commission proceeding. The record demonstrates that Parks International operated illegally for several years, however, and BOE presented evidence of twenty-six violations that occurred more than five years before the Commission commenced this

¹² The Initial Decision in FMC No. 07-07 was issued before the Commission issued *Worldwide Relocations* (FMC).

¹³ The consignee for each shipment is identified in the bill of lading for the shipment. BOE does not state whether it contacted the consignees to learn of any problems receiving the shipments.

proceeding; therefore, the Act's statute of limitations precludes imposition of a civil penalty in this proceeding. Had the Commission commenced an earlier proceeding, found that Parks International violated the Act on the twenty-six shipments, and imposed a civil penalty, it is clear that the prior proceeding would establish a "history of prior offenses" that should be taken into account in assessing a civil penalty in this proceeding, even though the shipments occurred before the limitations period. It would not be logical to permit consideration of this prior history when assessing a civil penalty when a prior proceeding found the violations and a civil penalty was imposed, but not permit consideration when established in this proceeding. Therefore, I consider the twenty-six shipments for which a civil penalty is barred by the statute limitations as an aggravating "history of prior offenses" in assessing the civil penalty for the twelve violations Parks International committed.

The evidence regarding Parks International's misrepresentation of its ownership status on the three service contracts with Tropical makes its degree of culpability an aggravating factor. As noted above, I have drawn the inference that Parks International has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that it is found to have committed. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 4 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Balancing the relevant evidence of the section 13(c) factors in light of the obligation to ensure that the penalty be tailored to the particular facts of the case and not imposing unduly harsh or extreme sanctions while at the same time deterring violations and achieving the objectives of the law, I assess a civil penalty in the amount of \$1500 against Parks International for each of twelve violations for a total civil penalty of \$18,000. In light of the range of civil penalties approved by the Commission in *Worldwide Relocations*, see *Worldwide Relocations* (ALJ) at 82, the lowest of which was \$3000 and the highest of which was \$6000 for willful and knowing violation of the kind committed by Parks International, see *Worldwide Relocations* (ALJ) at 81, a civil penalty in the amount of \$1500 per violation is appropriate.

2. Cargo Express.

BOE has proven by a preponderance of the evidence that Cargo Express operated as an NVOCC in violation of the Act on fourteen shipments and as an ocean freight forwarder on two shipments. All sixteen shipments occurred within the limitations period. Therefore, a civil penalty may be imposed on Parks International for each of sixteen violations of the Act.

a. BOE's Contentions.

BOE contends:

Cargo Express knowingly and willfully provided unlicensed, unbonded OTI services with respect to sixteen (16) shipments between February 13, 2005 and July 21, 2006. PFF 22, 23. Ainsley Lewis, president of Cargo Express, was specifically advised on

February 14, 2005 by Commission representatives that Cargo Express was required to publish a tariff, obtain a license from the Commission, and furnish evidence of financial responsibility if it intended to provide OTI services in U.S. trades. PFF 7, 20. In blatant disregard of this advice, Cargo Express proceeded to advertise and originate ocean shipments of cargo obviously owned by third parties while utilizing licensed intermediaries to obtain containers and transportation from ocean carriers. PFF 21, 22. Such activity not only amounts to a pattern of indifference but rises to the level of “purposeful and obstinate behavior.” Cargo Express’ clear unwillingness to cease providing unlicensed OTI services is a significant aggravating factor in this proceeding.

Moreover, members of the shipping public who tendered their cargo to Cargo Express during the extended time period of Cargo Express’ unlicensed operation were left completely unprotected due to Cargo Express’ failure to provide proof of financial responsibility, such as a surety bond. Indeed, with respect to Cargo Express, there is specific evidence in the record that at least one shipper was harmed as a result of Cargo Express’ failure to deliver cargo to its destination and to subsequently compensate the shipper for the transportation costs, as well as the value of the lost goods. PFF 24. Because of Cargo Express’ unlicensed status, there was no surety bond for the shipper to rely upon for compensation.

(BOE Opening Brief at 18.) BOE seeks assessment of the maximum civil penalty of \$30,000 per violation against Cargo Express for a total of \$480,000. (BOE Brief on Remand at 16.) The sixteen shipments are:

TABLE 2
SIMPSON’S SHIPPING/ZIM CONTAINER SERVICE SHIPMENTS (Attachment L)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ON B/L ¹⁴
04/27/2005	ZIMUORF100088	40' high cube container SLAC: 210 household items and personal effects	US\$1666.00
05/04/2005	ZIMUORF100515	40' high cube container SLAC: 149 household items and personal effects	US\$1666.00

¹⁴ This apparently would have been the charge to Cargo Express. There is no evidence of the amount Cargo Express charged the owners/shippers of the goods.

05/23/2005	ZIMUORF102286	40' high cube container SLAC: 141 house hold items and personal effects	US\$1666.00
06/07/2005	ZIMUORF104493	20' std container SLAC: 110 household items and personal effects	US\$1106.00
02/19/2005 ¹⁵	ZIMUORF103969	40' high cube container SLAC: 164 household items and personal effects	US\$1666.00

TABLE 3
SIMPSON'S SHIPPING/SEA SHIPPING LINE SHIPMENTS - NVOCC (Attachment M)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ON B/L ¹⁶
02/09/2005	SSL57958	40' high cube container STC 165 pieces of personal effects	US\$1666.00
02/13/2005	SSL58281	40' HC container STC 166 pieces of personal effects	US\$1666.00
02/19/2005	SSL58573	40' HC container STC 170 pieces of personal effects	US\$1666.00
03/01/2005	SSL58689	40' HC container STC 158 pieces of personal effects	US\$1106.00
03/07/2005	SSL59219	40' HC container STC 137 pieces of personal effects	US\$1666.00
03/16/2005	SSL59227	20' STD container STC 149 pieces of personal effects	

¹⁵ The invoice accompanying this bill of lading is dated 06.09.05 and the master bill of lading is dated 06.03.05. The bill of lading number suggests that the shipment occurred after the other shipments. Whether the shipment occurred in February or June 2005 makes no difference to the outcome of this proceeding.

¹⁶ This apparently would have been the charge to Cargo Express. There is no evidence of the amount Cargo Express charged the owners/shippers of the goods.

03/30/2005	SSL60007	40' HC container STC 145 pieces of personal effects	
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TABLE 4
SIMPSON'S SHIPPING/SEA SHIPPING LINE SHIPMENTS - OCEAN FREIGHT FORWARDER (Attachment M)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	
02/13/2005	SSL58174	40' HC container STC 307 pieces of personal effects	
02/19/2005	SSL58282	40' HC container STC 131 pieces of personal effects	

TABLE 5
CARLA WOOLERY SHIPMENTS (Attachment P)

DATE	BOOKING NO.	QUANTITY AND DESCRIPTION OF GOODS	
07/14/06	M 5337	2 barrels p/effects	
07/21/06	M6134	1 barrel	

b. Willfully and knowingly.

The first question on which BOE bears the burden of persuasion is whether the violations were willfully and knowingly committed. *Stallion Cargo, supra.*

BOE contends that:

The uncontested facts, as presented in the Verified Statements of [AR] Mingione and . . . Wade, reflect that Ainsley Lewis . . . is the president of Cargo Express PFF 5, 7, 8. On April 14, 2003, three months prior to the official incorporation of Cargo Express, [AR Mingione] witnessed two trucks bearing the name of Cargo Express at Parks' business address PFF 18. On October 29, 2004, Cargo Express continued to occupy [Parks' business address] and, using storefront signs, advertised its name alongside the same phone number that had been previously advertised by Parks on its website. PFF 19.

On February 14, 2005, in a meeting between Commission representatives and Ainsley Lewis . . . , Erol Lewis, and their attorneys, Respondents and their counsel

were advised of the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. PFF 20. Counsel for Respondents indicated their clients' understanding of the situation. PFF 20. Nearly three (3) months following the meeting, on June 3, 2005, [AR Mingione] witnessed a truck with the Cargo Express logo backed up [to] a shipping container and Cargo Express employees were in the process of loading the container outside Cargo Express' premises PFF 21. Further investigation revealed that Cargo Express utilized two licensed OTIs, Simpson's Shipping Enterprise ("Simpson's Shipping") and A. Naimoli Freight Forwarding, Inc. ("Naimoli") to conduct its unlicensed transportation activities with respect to fourteen (14) shipments between February 13, 2005 and June 3, 2005. PFF 22. In at least two instances, on July 14 and July 21, 2006, Cargo Express issued its own bills of lading to a member of the shipping public for ocean shipments of personal effects to Jamaica. PFF 23.

There is an abundance of evidence in the record as presented by BOE that Cargo Express conducted its OTI activities purposefully and obstinately in contravention to the statutory requirements of the 1984 Act. Ainsley Lewis . . . is the chief executive of Parks and president of Cargo Express. PFF 3, 7. As discussed above, in his capacity as principal of Parks, Ainsley Lewis was placed on notice in 2002 by [AR Mingione] regarding the consequences of operating as an OTI without a license and evidence of financial responsibility. PFF 16. On February 14, 2005, Ainsley Lewis along with his counsel were advised again by Commission representative of the need for Cargo Express and Parks to come into compliance with the Commission's licensing process. PFF 20. Counsel for Ainsley Lewis and his companies confirmed his client's understanding of the situation. PFF 20. As this understanding was being communicated, Cargo Express was already involved in the handling the fourteen (14) shipments the ALJ determined are in violation of sections 8(a) and 19 of the 1984 Act. Rather than terminate its unlicensed activity after February 14, 2005, Ainsley Lewis proceeded to operating Cargo Express in an unlawful manner until at least July 21, 2006. PFF 23.

In conjunction with his determination that Cargo Express violated the 1984 Act, the ALJ appropriately recognized in his October 23 Order that, with respect to fourteen (14) shipments wherein Cargo Express acted as an NVOCC, the evidence shows that Cargo Express was not the owner of the cargo in the containers, but rather assumed responsibility for their transportation. BOE contends that, with respect to all sixteen (16) shipments irrespective of whether it was operating unlawfully as an NVOCC or an ocean freight forwarder, it did so knowingly and willfully.

(BOE Opening Brief at 9-11.)

A number of the proposed findings of fact on which BOE relies to prove that Cargo Express's violations were willful and knowing are irrelevant to whether Cargo Express willfully and knowingly committed the violations:

PFF 21. On June 3, 2005, AR Mingione witnessed a truck with the Cargo Express logo backed up to a shipping container and Cargo Express employees were in the process of loading the container outside Cargo Express' premises at 3010 Eastchester Road in Bronx, New York. Mingione Statement ¶ 19, Attachment K.

PFF 22. Cargo Express utilized two licensed OTIs, Simpson's Shipping Enterprise ("Simpson's Shipping") and A. Naimoli Freight Forwarding, Inc. ("Naimoli") to conduct its unlicensed transportation activities with respect to fourteen (14) shipments between February 13, 2005 and June 3, 2005. Mingione Statement ¶¶ 20-23, Attachments L1-L5 and M1-M9.

PFF 23. In at least two instances, on July 14 and July 21, 2006, Cargo Express issued its own bills of lading to a member of the shipping public for ocean shipments of personal effects to Jamaica. Mingione Statement ¶ 26, Attachment P.

(BOE Prop. FF ¶¶ 21-23.)

The facts that a truck with the Cargo Express logo backed up to a shipping container and Cargo Express employees were in the process of loading the container, that Cargo Express utilized two licensed OTIs to conduct its unlicensed transportation activities, and that Cargo Express issued its own bills of lading to a member of the shipping public do not make it more probable that Cargo Express willfully and knowingly committed the violations and are irrelevant to this issue. Fed. R. Evid. 401.

BOE has provided other evidence that is relevant to this issue.

PFF 20. On February 14, 2005, in a meeting between Commission representatives and Ainsley Lewis a.k.a. Jim Parks, Erol Lewis, and their attorneys, Respondents and their counsel were advised of the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. Counsel for Respondents stated that their clients understood the situation. Mingione Statement ¶ 18.

(BOE Prop. FF ¶ 20.) AR Mingione states:

18. On February 14, 2005, I accompanied the Director of the Bureau of Enforcement to a meeting with Ainsley Lewis . . . , Erol Lewis, and their attorneys from the law firm of Follick & Bessich. During this meeting, we stressed to Respondents and their counsel the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. Counsel for Respondents stated that their clients understood the situation.

(Mingione Statement ¶ 18.)

BOE has provided evidence proving that on February 14, 2005, Commission representatives provided Ainsley Lewis, the chief executive of Cargo Express, with information regarding the requirements of the Shipping Act and told Lewis that Cargo Express was operating illegally. Despite knowledge of its illegality, Cargo Express continued to operate illegally and provide services as an NVOCC and an ocean freight forwarder. With this evidence alone, BOE has proven by a preponderance of the evidence that Cargo Express willfully and knowingly operated as an NVOCC and/or as an ocean freight forwarder in violation of the Shipping Act on the shipments that occurred after February 14, 2005.

Three of the shipments occurred prior to February 14, 2005; therefore, the information conveyed in the February 14 meeting does not support a finding that Cargo Express willingly and knowingly violated the Act on those three shipments. Prior to the creation of Cargo Express as a corporation, however, Lewis learned in his meeting with AR Mingione on November 13, 2002, and in the letter dated November 13, 2002, (Mingione Statement ¶ 10; Attachment F, *supra*), of the consequences of operating as an OTI without a license and evidence of financial responsibility. A corporate officer's knowledge acquired before creation of the corporation may be imputed to the corporation when it is present in the officer's mind while the officer is acting for the corporation. 1 James D. Cox & Thomas Lee Hazen, *Cox & Hazen on Corporations*, § 8.15, at 359 (2d ed. 2003). See also *Bowen v. Mt. Vernon Sav. Bank*, 105 F.2d 796, 798 (D.C. Cir. 1939) (notice to the agent is notice to the principal not only as to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and still in his mind at the time of his acting as such agent, if the agent is at liberty to communicate such knowledge to the principal); Restatement (Second) of Agency § 276.

Lewis and Cargo Express have not participated in this proceeding and there is, of course, no evidence in the record of what was in Lewis's mind prior to February 14, 2005. A claim by Lewis that after learning of the Act's requirements in 2002, he "forgot" what he had learned from AR Mingione in 2002 while he continued to operate Parks International and formed Cargo Express, would strain credulity far beyond the breaking point. Therefore, BOE has proven by a preponderance of the evidence that Cargo Express willfully and knowingly operated as an NVOCC and/or ocean freight forwarder in violation of the Shipping Act on the three shipments that occurred prior to February 14, 2005. The Commission may assess a civil penalty that may not exceed \$30,000 for each violation.

c. Section 13 factors.

The evidence suggests that Cargo Express was created on January 23, 2003, as a result of Tropical's November 18, 2002, letter questioning Parks International's representations of ownership in its service contracts. Cargo Express apparently operated as an NVOCC in the two-year period between its creation and the first shipments for which BOE has presented the bills of lading as evidence supporting the violations. Therefore, I find that history of prior offenses and degree of culpability are aggravating factors. As noted above, I have drawn the inference that Cargo Express has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that it is found to have committed. *Parks*

International Shipping, Inc. – Possible Violations, FMC No. 06-09, Memorandum and Order at 4 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Cargo Express's NVOCC operation differed significantly from the operation of Parks International. Parks International assumed responsibility to the proprietary shipper for the transportation of a shipment, then the vessel operator identified Parks International as the shipper on the bill of lading it issued for each individual shipment.

On the two Simpson's Shipping/Sea Shipping Line shipments on which Cargo Express operated as an ocean freight forwarder (Attachments M2 and M4), Sea Shipping Line issued a bill of lading identifying the proprietary shipper as the shipper and the consignee for the container. This supports a finding that when an individual shipper was shipping enough goods to fill a container, Cargo Express filled the container with that shipper's goods.

The evidence also supports a finding that Cargo Express provided services to shippers of small loads as demonstrated by the Woolery shipments, one of which consisted of two barrels and the other one barrel. (Attachment P.) The five bills of lading that Zim issued identifying Simpson's Shipping as the shipper (Attachment L, *see* Table 2) and the seven bills of lading that Sea Shipping Line issued identifying Cargo Express as the shipper (Attachment M, *see* Table 3) indicate that one twenty-foot container held "110 household items and personal effects" (Zim Container Service B/L ZIMUORF104493) and the other twenty-foot container held "149 pieces of personal effects." (Sea Shipping Line B/L SSL59227.) The ten forty-foot containers held anywhere from 137 items (Sea Shipping Line B/L SSL59219) to 210 items. (Zim Container Service B/L ZIMUORF100088.) *See* Tables 2 and 3. In the *Mateo* proceeding, BOE presented direct evidence that on each of the shipments, Mateo consolidated the shipments of as many as fifty to one hundred shippers into one container. *Embarque Puerto Plata, Corp. – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision . . . on . . . Mateo . . .) While there is no similar direct evidence in this proceeding of the number of shippers whose goods Cargo Express loaded into one container, the facts that Cargo Express handled shipments as small as one barrel (Attachment P), that Cargo Express arranged to have the proprietary shipper identified as the shipper on the bill of lading of the downstream common carrier when a shipper was shipping a large number of goods (Attachments M2 and M4), that Cargo Express loaded the containers itself, and that the carrier identified Cargo Express (or Simpson Shipping) as the shipper (Attachments L and M), leads to a conclusion that the shipments of many shippers were at risk on the shipments represented by bills of lading ZIMUORF100088, ZIMUORF100515, ZIMUORF102286, ZIMUORF104493, ZIMUORF103969, SSL57958, SSL58281, SSL58573, SSL58689, SSL59219, SSL59227, and SSL60007.

Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law and in light of the range of civil penalties approved by the Commission in *Worldwide Relocations*, *see Worldwide Relocations* (ALJ) at 82, I find that a civil penalty in the amount of

\$30,000 should be assessed against Cargo Express for each of these twelve violations for a total of \$360,000.

The two Woolery shipments were small, comparable to the Parks International shipments described above. Evidence in the record demonstrates that these shipments were lost in transit, however, a circumstance that should serve to increase a civil penalty. Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law and in light of the range of civil penalties approved by the Commission in *Worldwide Relocations*, see *Worldwide Relocations* (ALJ) at 82, I find that a civil penalty in the amount of \$8000 should be assessed against Cargo Express for each of the two Woolery violations for a total of \$16,000.

On two shipment (Attachments M2, M4), Cargo Express violated the Shipping Act by operating as an ocean freight forwarder that did not have a license as required by section 40901 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act. There is no evidence in the record indicating that there was any problem with these shipments. Each shipment was large, consisting of one forty-foot container. The fact that Cargo Express operated as an ocean freight forwarder, not an NVOCC, on these two shipments does not affect the amount of a civil penalty to be imposed. Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law and in light of the range of civil penalties approved by the Commission in *Worldwide Relocations*, see *Worldwide Relocations* (ALJ) at 82, I find that a civil penalty in the amount of \$6000 should be assessed against Cargo Express for each of these two violations for a total of \$12,000.

Therefore, I assess a total civil penalty of \$388,000 against Cargo Express for its sixteen willful and knowing violations of the Shipping Act.

V. CEASE AND DESIST ORDERS ARE ISSUED AGAINST PARKS INTERNATIONAL AND CARGO EXPRESS.

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, citing *Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. “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. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

BOE contends that a cease and desist order should be entered in this proceeding.

As of November 12, 2009, Parks and Cargo Express continue to be active corporations according to information available online from the New York Department of State. PFF 2, 6. Respondents' knowing and willful disregard for the requirements of the 1984 Act combined with their ability to resume or continue unlawful OTI activities justify the issuance of cease and desist orders by the presiding officer.

(BOE Opening Brief at 20.)

BOE has demonstrated by a preponderance of the evidence that respondents Parks International and Cargo Express have histories of providing ocean transportation services in violation of the Shipping Act. I conclude that there is a reasonable likelihood that Parks International and Cargo Express will continue or resume their unlawful activities. Therefore, entry of a cease and desist order prohibiting respondents Parks International and Cargo Express from operating as an ocean transportation intermediary is appropriate and will be entered.

O R D E R

Upon consideration of the Bureau of Enforcement's renewed Motion for Sanctions, the record herein, and for the reasons discussed above, it is hereby

ORDERED that the Bureau of Enforcement's Motion for Sanctions seeking an order barring respondents 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 from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501(a) and 40901-40902, be **DISMISSED AS MOOT**.

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on twelve shipments within the statute of limitations period, respondent Parks International Shipping, Inc., violated section 8(a) of the Shipping Act of 1984, 46 U.S.C. § 40501(a), and the Commission's regulations at 46 C.F.R. part 520 by operating as a common carrier without publishing tariffs showing all of its active rates and charges, and violated section 19 of the Act, 46 U.S.C. §§ 40901-40902, and the Commission's regulations at 46 C.F.R. part 515 by operating as an ocean transportation intermediary in the United States trades without obtaining a license from the Commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondent Parks International Shipping, Inc., remit to the United States the sum of \$18,000.00 as a civil penalty for twelve violations of the Act. It is

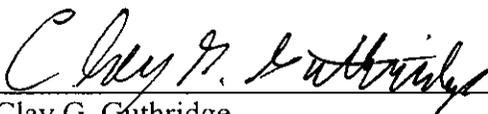
FURTHER ORDERED that Parks International Shipping, Inc., be enjoined from holding out or operating as an Ocean Transportation Intermediary in the United States foreign trades until and unless a license is issued by the Commission and Parks International publishes a tariff and obtains a bond pursuant to Commission regulations.

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that: (1) on fourteen shipments, respondent Cargo Express International Shipping, Inc., violated section 8(a) of the Shipping Act of 1984, 46 U.S.C. § 40501(a), and the Commission's regulations at 46 C.F.R. part 520 by operating as a common carrier without publishing tariffs showing all of its active rates and charges, and violated section 19 of the Act, 46 U.S.C. §§ 40901-40902, and the Commission's regulations at 46 C.F.R. part 515 by operating as an ocean transportation intermediary in the U.S. trades without obtaining a license from the Commission and without providing proof of financial responsibility; and (2) on two shipments violated section 19 of the Act, 46 U.S.C. §§ 40901-40902, and the Commission's regulations at 46 C.F.R. part 515 by operating as an ocean transportation intermediary in the United States trades without obtaining a license from the Commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondent Cargo Express International Shipping, Inc., remit to the United States the sum of \$388,000.00 as a civil penalty for sixteen willful and knowing violations of the Act. It is

FURTHER ORDERED that Cargo Express International Shipping, Inc., be enjoined from holding out or operating as an Ocean Transportation Intermediary in the United States foreign trades until and unless a license is issued by the Commission and Cargo Express publishes a tariff and obtains a bond pursuant to Commission regulations.

It is **FURTHER ORDERED** that the claims against Bronx Barrels & Shipping Supplies Shipping Center, Inc., and Ainsley Lewis a.k.a. Jim Parks be **DISMISSED WITH PREJUDICE**.



Clay G. Guthridge
Administrative Law Judge