

# FEDERAL MARITIME COMMISSION

PARKS INTERNATIONAL SHIPPING,  
INC., CARGO EXPRESS INTERNATIONAL  
SHIPPING, INC. BRONX BARRELS &  
SHIPPING SUPPLIES SHIPPING CENTER  
INC., AND AINSLEY LEWIS AKA 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

Docket No. 06-09

Served: September 16, 2013

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*;  
Richard A. LIDINSKY, Jr., Michael A. KHOURI, and  
William P. DOYLE, *Commissioners*. Rebecca F. DYE,  
*Commissioner*, dissenting.

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## **Memorandum Opinion and Order**

Pending before the Commission are the exceptions filed by the Bureau of Enforcement (BOE) to the Initial Decision on Remand (Remand I.D.) issued by the Administrative Law Judge (ALJ). For the reasons that follow, we affirm the Remand I.D. in part, and reverse in part.

## I. BACKGROUND

### A. Procedural History

On September 19, 2006, the Commission issued an order initiating an investigation to determine whether Respondents Parks International Shipping, Inc. (Parks), Cargo Express International, Inc. (Cargo Express), Bronx Barrels & Shipping Supplies Shipping Center, Inc. (Bronx Barrels), and/or Ainsley Lewis a.k.a. Jim Parks (Lewis) (collectively “Respondents”) violated section 8(a) of the Shipping Act of 1984 (46 U.S.C. § 40501) (the Act) by operating as non-vessel-operating common carriers (NVOCCs) without publishing tariffs showing rates and charges, and section 19 of the Act (46 U.S.C. §§ 40901-40902) by operating as NVOCCs without a license or proof of financial responsibility. 30 S.R.R. 1099, 1099-1101 (FMC 2006). The Order was properly served September 19, 2006, and notice of the Order was published in the Federal Register September 26, 2006. 71 Fed. Reg. 56147-56149. In what would become a pattern, Respondents did not enter an appearance or file any response to the Order of Investigation.

On November 28, 2006, BOE filed a Motion to Compel Discovery from Respondents. The ALJ granted this motion on April 9, 2007, ordering Respondents to respond to BOE’s discovery requests. Respondents did not file any response, and did not comply with the Order.

On August 1, 2007, the ALJ ordered the parties to file a joint status report and proposed procedural order. BOE filed its report on August 24, 2007, asserting that it made several attempts to contact Respondents regarding preparation of the joint status report, but that Respondents could not be reached. BOE stated in this report that BOE staff called telephone numbers previously belonging to Parks, Cargo Express, and Bronx Barrels, to no avail.

On October 26, 2007, BOE filed its Motion for Sanctions

and Summary Judgment (BOE's MSJ). In its Motion, BOE argued that sanctions were warranted pursuant to 46 C.F.R. § 502.210 (Rule 210) of the Commission's Rules of Practice and Procedure, because Respondents failed to respond to discovery requests despite having been ordered to do so. BOE asked for an order prohibiting Respondents from contesting any of BOE's claims or evidence on issues relating to BOE's discovery requests. BOE also asked the ALJ to issue an Order to Show Cause giving Respondents 30 days to explain why they failed to participate in the proceeding. BOE further requested that the Order to Show Cause notify Respondents that failure to respond would result in a finding that they had violated the Shipping Act of 1984. BOE then set out arguments and evidence in support of its request for summary judgment. Respondents did not file any response to BOE's MSJ.

On October 23, 2009, the ALJ granted BOE's Motion for Sanctions in part, drawing an inference that each respondent has the ability to pay a civil penalty. 31 S.R.R. 1060, 1062-63 (ALJ 2009). The ALJ deferred ruling on the remainder of BOE's request for sanctions. *Id.* at 1063.

The ALJ then turned to BOE's Motion for Summary Judgment, ruling that BOE had shown by a preponderance of the evidence that Parks, Cargo Express, and Bronx Barrels did not publish tariffs, obtain an OTI license from the Commission, or furnish proof of financial responsibility to the Commission; that Parks operated as an NVOCC on 38 shipments; that Cargo Express operated as an NVOCC on 14 shipments; and that Cargo Express operated as an ocean freight forwarder (OFF) on 2 shipments. *Id.* at 1063-75. The ALJ further found that BOE did not prove by a preponderance of the evidence that Bronx Barrels or Lewis operated as an NVOCC or OFF on any shipment, and that BOE failed to show that the corporate veils of Parks, Cargo Express, and Bronx Barrels should be pierced and Lewis held personally liable. *Id.* at 1075. The ALJ did not grant summary judgment as to civil penalties, finding imposition of penalties inappropriate at that stage in the proceeding. *Id.* at 1075-76.

On February 5, 2010, the ALJ issued the first Initial Decision (first I.D.) in this matter. 31 S.R.R. 1166. The ALJ 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. *Id.* at 1180. 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.*

The ALJ then turned to claims against Parks. *Id.* While the ALJ had previously found that Parks violated sections 8 and 19 of the Shipping Act of 1984 on 38 shipments, he imposed penalties for only 12 of these shipments, disregarding 26 shipments that occurred outside of the 5 year statute of limitations. *Id.* at 1180-81, 1192. The first I.D. imposed civil penalties of \$18,000 (\$1,500 per violation). The ALJ also ordered Parks to cease and desist from violating the Shipping Act. *Id.* at 1198, 1203.

With respect to Cargo Express, the ALJ assessed civil penalties for 16 violations of the Act, and also issued a cease and desist order. *Id.* at 1198-1203. The total penalty amount imposed was \$412,000 (penalties ranging from \$8,000 to \$30,000 per violation). The ALJ did not find that Bronx Barrels or Ainsley Lewis acted as NVOCCs in violation of the Shipping Act. *Id.* at 1203-05. Accordingly, these parties were dismissed from the proceeding without violations found against them. *Id.* at 1205.

No party filed exceptions to the first I.D. On March 4, 2010, however, the Commission served notice that it would review the first I.D. on its own motion. The Commission vacated and remanded the first I.D. on April 26, 2012. In its Order, the Commission instructed that "further proceedings [be] consistent with the Commission's holding in *Worldwide Relocations[, Inc. – Possible Violations of Shipping Act]*, 32 S.R.R. 495 (FMC 2012) (*Worldwide Relocations (FMC 2012)*)." The ALJ issued the Remand I.D. on December 31, 2012.

B. Remand I.D.

Respondents did not participate in the proceeding once it was again before the ALJ. BOE filed a brief after remand on June 1, 2012. In the brief after remand, BOE abandoned claims against Bronx Barrels and Ainsley Lewis, but argued that Parks and Cargo Express knowingly and willfully violated the Shipping Act, and that civil penalties of \$30,000 per violation should attach. BOE also argued that the ALJ should issue cease and desist orders against Parks and Cargo Express.

In the Remand I.D., the ALJ reviewed the request for sanctions in BOE's MSJ, evaluated whether Parks and Cargo Express violated the Shipping Act by acting as NVOCCs, and issued civil penalties. The ALJ denied the request for sanctions as moot, but imposed civil penalties in the amount of \$18,000 against Parks (\$1,500 for each violation), and \$388,000 against Cargo Express (\$30,000 for 12 violations, \$8,000 for two violations, and \$6,000 for two violations). The ALJ reissued the cease and desist orders based on the history of Parks and Cargo Express.

BOE filed exceptions after receiving an extension of time. In the exceptions, BOE alleges that the ALJ erred in three respects: 1) his failure to enter appropriate sanctions for the Respondents' failure to respond, 2) his determination that Parks did not act knowingly and willfully in its violations of the Shipping Act, and 3) the civil penalties imposed on Parks and Cargo Express were inadequately small.

II. DISCUSSION

A. De Novo Review

We have conducted a *de novo* review of the record in this case. The Commission's regulations specifically allow for such a review, stating that when the Commission reviews an initial

decision, it has “all the powers which it would have in making the initial decision.” 46 C.F.R. § 502.227(a)(6).

B. Default and Discovery Sanctions

Although BOE proceeded with the case before the ALJ, Respondents never entered an appearance or sought to dispute the allegations leveled against them. Had the current Rule 502.65<sup>1</sup> been in effect before 2012, the Respondents would have unquestionably been in default, and the remedy of decision on default would have been appropriate. What is unclear, however, is why the ALJ did not employ current Rule 502.65 on remand even though Rule 502.65 had been amended over a month before the Remand I.D. Although BOE filed a brief on remand, Respondents filed no documents with the Commission despite being affirmatively ordered to do so. *See* Order to file Briefs on Remand Issues (May 1, 2012) (ordering all Respondents to “file a response or responses to BOE’s brief” by June 5, 2012). That refusal alone would provide sufficient grounds to find the Respondents in default and issue a decision against them.

Courts routinely treat the failure by a party to respond to pleadings and motions as conceding the content of the pleading or motion. *See, e.g., Geller v. Randi*, 40 F.3d 1300, 1302 (D.C. Cir. 1994) (affirming a district court’s decision to treat as conceded a

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<sup>1</sup> 46 C.F.R. § 502.65(a-b), currently state in pertinent part:

(a) A party to a proceeding may be deemed to be in default if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the Commission or the presiding officer.

(b) When a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint or Order of Investigation and Hearing.

motion for summary judgment and motions for sanctions because the non-movant had not timely responded); *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997) (“Where the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule.”). Decisions for default and sanctions for failure to respond are generally reviewed under the deferential abuse of discretion standard. *F.D.I.C. v. Bender*, 127 F.3d 58, 67 (D.C. Cir. 1997) (“We review the district court’s decision under Rule 108(b) . . . only for abuse of discretion.”) (citing *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C.Cir.1988), cert. denied sub nom. *Twist v. Thornburgh*, 490 U.S. 1066 (1989)).

We believe that the ALJ should have treated as conceded both BOE’s MSJ and the arguments in BOE’s Brief on Remand, based on Rule 502.65. Similarly, as BOE filed exceptions with the Commission after the Remand I.D., we believe the Commission should treat the exceptions as conceded. We therefore address the issues raised in the exceptions by BOE in order to determine what the Respondents have conceded.

### C. Penalties

In determining the amount of a civil penalty to impose, the Shipping Act requires that the Commission take into account the so-called “section 13 factors” – 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; 46 C.F.R. § 502.603(b); *see also 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*, 31 S.R.R. 830, 850 (ALJ 2009) (admin. final September 29, 2009) (*Mateo*). The Commission’s regulations state that the Commission shall also take into account the policies for deterrence and future compliance with the Shipping Act and the Commission’s rules and regulations. 46 C.F.R. § 502.603(b). The

amount of a penalty in a case may not exceed \$6,000 for each violation unless the violation was willfully and knowingly committed, in which case a penalty of up to \$30,000 per violation may be assessed. 46 U.S.C. § 41107(a); 46 C.F.R. §§ 506.3-506.4 (regarding adjusting civil monetary penalties for inflation).<sup>2</sup> BOE has argued that the violations committed by both Parks and Cargo Express were knowing and willful.

### 1. Knowing and Willful Violations by Parks

In the Remand I.D., the ALJ determined that both Parks and Cargo Express acted as NVOCCs or OTIs without a license, and further found that Cargo Express knowingly and willfully violated the Shipping Act. In its exceptions, BOE alleges that Parks knowingly and willfully violated both sections 8(a) and 19 of the Shipping Act. In support of this argument, BOE relies on Parks' fraudulent actions in signing service contracts with VOCCs that indicated that Parks was a cargo owner.<sup>3</sup> The ALJ agreed that the misrepresentation by Parks to secure a service contract demonstrated "deception," but concluded that the misrepresentation did not result in actual knowledge of the Shipping Act. *See* Remand I.D. at 49-55.

For a violation of the Shipping Act to have been committed "knowingly and willfully," the evidence must show that the person has knowledge of the facts of the violation and intentionally

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<sup>2</sup> The maximum penalty for knowing and willful violations was increased to \$40,000 after this proceeding was instituted, but the \$30,000 maximum applies here. 46 U.S.C. § 41107(a); 46 C.F.R. §§ 506.3-506.4 (regarding adjustment of civil monetary penalty amounts).

<sup>3</sup> BOE also argued that Parks had the requisite knowledge of the Act and intent to disobey it willfully as demonstrated by the multiple amendments to the regulations administering the Act. It is not clear how this argument would impart any additional knowledge on the respondents, as parties are presumed to have knowledge of the law, and ignorance of the law is generally not a defense to legal obligations.

violates or acts with reckless disregard or plain indifference to the Act. *Rose Int'l v. Overseas Moving Network Int'l*, 29 S.R.R. 119, 164-65, 174 (FMC 2001). In assessing whether conduct is knowing and willful, the Commission has looked to whether a respondent has undertaken a persistent failure to inform or even to attempt to inform itself by means of normal business resources. *Id.* at 165; *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, 1403-04 (FMC 2000).

Here, BOE produced evidence showing that Parks entered into service contracts that contained a provision indicating that NVOCCs must file bonds with the Commission. This language put Parks on notice of its obligations under the Shipping Act, demonstrating that it is more likely than not that Parks violated the Act in a knowing and willful manner. The service contract containing this language became effective prior to the first shipment at issue in this case. Accordingly, this unchallenged and uncontroverted evidence warrants reversal of the ALJ's finding that Parks did not commit knowing and willful violations of the Act.

Because the evidence demonstrates that Parks knowingly and willfully committed violations of the Shipping Act, we hereby increase the penalties imposed on Respondent Parks to reflect this finding. Specifically, we impose a penalty of \$8,000 for each of Parks's 12 willful and knowing violations of the Shipping Act. The ALJ found that respondent Cargo Express handled two shipments comparable to Parks's shipments, and imposed \$8,000 for each of these two shipments. *See Remand I.D.* at 65; *see also* 31 S.R.R. at 1166 (noting that shipper Carla Woolery's two shipments moved by Cargo Express were comparable in size to each of Parks's shipments) and at 1202 (noting willful and knowing violations). Given the similarities between these two Cargo Express shipments and the 12 shipments handled by Parks, we believe it would be both consistent and appropriate to impose a penalty of \$8,000 per shipment for each of Parks's 12 shipments made in violation of the Act during the relevant period.

Accordingly, we impose a civil penalty against Parks of \$8,000 per shipment, for a total aggregate penalty of \$96,000.

## 2. Penalties imposed against Cargo Express

As noted above, the ALJ assessed penalties in the Remand I.D. against Cargo Express for 16 violations of the Act ranging from \$6,000 to \$30,000 per shipment, for an aggregate penalty of \$388,000. *See* Remand I.D. at 65. In the first I.D., the ALJ imposed a total civil penalty amount of \$412,000 against Cargo Express. 31 S.R.R. at 1198-1203. The amount was reduced by \$24,000 in the Remand I.D. based on the ALJ's comparison of penalties awarded by the ALJ in *Worldwide Relocations (ALJ 2010)*, that were subsequently adopted by the Commission. We find no error in these adjustments. We believe that the ALJ considered the appropriate factors in the Remand I.D., and the evidence supports the penalties imposed. Accordingly, we adopt the penalty of \$388,000 that the ALJ assessed against Cargo Express for the sixteen shipments it transported in violation of the Act.

## III. CONCLUSIONS

After review of the Initial Decision and exceptions, and for the reasons stated above, we adopt the Remand Initial Decision in part and reverse in part.

THEREFORE, IT IS ORDERED, That the Commission adopts the Remand Initial Decision in part and reverses in part.

IT IS FURTHER ORDERED, That Respondent Parks is liable for civil penalties in the amount of \$96,000 for 12 violations of the Act.

IT IS FURTHER ORDERED, That Respondent Cargo Express is liable for civil penalties in the amount of \$388,000 for 16 violations of the Act.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Rachel E. Dickon  
Assistant Secretary

*Commissioner DYE*, dissenting:

I dissent from the majority's order and would affirm the Administrative Law Judge's Initial Decision on Remand.