

# FEDERAL MARITIME COMMISSION

OC INTERNATIONAL FREIGHT, INC.; OMJ INTERNATIONAL FREIGHT, INC.; AND OMAR COLLADO	Docket No. 12-01
---	------------------

**Served: July 31, 2014**

---

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

---

## Memorandum Opinion and Order

### I. INTRODUCTION

The October 30, 2013, Initial Decision on Remand (Remand Decision) of the Administrative Law Judge (ALJ) is before the Commission for review on exceptions filed by Respondents OC International Freight, Inc. (OC), OMJ International Freight, Inc. (OMJ), and Omar Collado (Collado) (hereinafter Respondents), pursuant to 46 C.F.R. § 502.227. For the reasons set forth below, we: (1) affirm the ALJ's determination that Respondents committed 19 violations of section 10(a)(1) of the Shipping Act of 1984 (Shipping Act); (2) find that Respondents' 14 violations of section 19 of the Shipping Act were committed in a knowing and willful manner; and (3) affirm the amount of civil penalties imposed by the ALJ.<sup>1</sup>

---

<sup>1</sup> The President signed a bill recodifying the Shipping Act of 1984 as positive law on October 14, 2006. The purpose of the bill was to "reorganiz[e]

## II. BACKGROUND

### A. Factual Background

OMJ is a Florida corporation whose sole officer, President, Vice-President, Secretary and Director was Omar Collado. Findings of Fact (hereinafter Finding or Findings) 1 and 2, *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1577, 1582 (ALJ Mar. 26, 2013). OMJ was licensed by the Commission to operate as an ocean freight forwarder (OFF) and non-vessel-operating common carrier (NVOCC) from September, 2006 until January, 2010. Findings 5 and 10, *Id.* At that time, the Commission revoked OMJ's license for failure to maintain a bond. Finding 9, *Id.* Prior to that revocation, OMJ, as an NVOCC/shipper, entered into service contracts with Seaboard Marine (Seaboard), an ocean common carrier. Findings 22 and 39, *OC International Freight*, 32 S.R.R. at 1583, 1584. Island Cargo Services, Inc. (Island Cargo) is an unlicensed, unbonded NVOCC located in Nassau, Bahamas. Finding 24, *Id.* Respondents OMJ and Collado allegedly allowed Island Cargo, an unlicensed, unbonded, foreign entity, to access the confidential discounted freight rates found in OMJ's 2008 Seaboard service contract, thereby allowing Island Cargo to ship its cargo with Seaboard and obtain rates lower than the Seaboard tariff rate which would have otherwise been applicable.<sup>2</sup> OC is a Florida corporation whose sole officer, President, and Director is Omar Collado. Findings 12 and 13, *OC International Freight*, 32 S.R.R. at 1582. On December 10, 2010, OC filed a license

---

and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. No. 109-170, at 2 (2005). Section 10(a)(1) is codified as 46 U.S.C. § 41102(a). The Commission regularly, however, references provisions of the Act by the section number in the Act's original enactment.

<sup>2</sup> The Remand contains a full factual and procedural background of this proceeding.

application with the Commission to operate as both an NVOCC and OFF. Finding 16, *Id.* In its application, Collado was proposed as OC's qualifying individual. Finding 17, *Id.* The application was denied.

B. Procedural History

As cited above, on March 26, 2013, the ALJ issued an Initial Decision (Decision) in this proceeding. Both the Bureau of Enforcement (BOE) and Respondents filed exceptions to the Decision. On July 22, 2013, the Commission issued an Order Remanding for Further Proceedings (Remand). *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1783 (FMC 2013). In its Remand, the Commission affirmed: (1) the ALJ's findings of fact; (2) the conclusion that the Respondents violated section 19 of the Shipping Act; (3) the issuance of a cease and desist order; and (4) the denial of OC's ocean transportation intermediary (OTI) license application. The Commission vacated and remanded for further proceedings the ALJ's determination that the Respondents did not violate section 10(a)(1). The Commission also noted the ALJ failed to make an express finding that the section 19 violations were committed knowingly and willfully and remanded for a determination on the knowing and willful nature of the section 19 violations. Since the Remand could have affected the amount of civil penalties, the Commission vacated the ALJ's imposition of a \$60,000 civil penalty.

On July 24, 2013, the ALJ issued an order scheduling remand briefs. On August 14, 2013, BOE filed its remand brief and on September 4, 2013, Respondents filed their remand brief. On September 18, 2013, the ALJ heard oral argument to clarify issues raised by the remand briefs of the Parties and requested additional information from BOE, which was provided on September 20, 2013. The Parties submitted their respective remand reply briefs on September 30, 2013. On October 30, 2013,

the ALJ issued the Remand Decision. *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1992 (ALJ 2013). On November 22, 2013, Respondents submitted Exceptions. BOE submitted its Reply to Respondent's Exceptions on December 13, 2013.

C. ALJ's Remand Decision

The ALJ noted that BOE had clarified the allegations that Respondents violated section 10(a)(1) were concerned solely with OMJ's 2008 service contract with Seaboard and not with OMJ's 2009 service contract with the same company. *Id.* at 1995. The ALJ cited to evidence in the record of 24 shipments booked by OMJ with Seaboard pursuant to the 2008 service contract and the analysis of one of the Commission's Area Representatives showing that nineteen of those twenty-four shipments were moved at a lower rate than the tariff rate, which otherwise would have been applicable. *Id.*

The ALJ, citing the Commission's Remand Order, noted that in order to prove a violation of section 10(a)(1), it must be shown that Respondents utilized an unjust or unfair device or means, obtained transportation at less than the otherwise applicable rates, and acted knowingly and willfully. *Id.* at 1996, citing Remand at 18. With regard to Respondents utilizing an unjust or unfair device or means the ALJ, citing the Commission's Remand, noted that the fraud, which must be shown, may be either fraud to the underlying common carrier or to competing shippers. *Id.*, citing Remand at 18. The ALJ found by permitting a foreign, unlicensed, NVOCC, Island Cargo, to access the discounted freight rates available through OMJ's 2008 Seaboard service contract, "Respondents distorted the competitive marketplace," as Island Cargo would have been able to offer its customers lower rates than its competitors who did not have access to OMJ's service contract. *Id.* at 1997.

With regard to obtaining transportation, the ALJ noted BOE's argument that Respondents both obtained a benefit for themselves by obtaining freight forwarding business from Island Cargo for the shipments made by Island Cargo under the 2008 Seaboard service contract and allowed Island Cargo to obtain a benefit by accessing lower freight rates. The ALJ observed that the type of financial benefit here was different than those found in the *Hudson Shipping* case, cited by BOE, where the respondent charged an access fee for each container shipped under its service contract and avoided liquidated damages for failing to meet its minimum quantity commitment. *Id.* (citing *Hudson Shipping (Hong Kong) Ltd., d/b/a Hudson Express Lines*, 29 S.R.R. 1381, 1383 (ALJ 2003)). Here, the ALJ found there was evidence in the record showing that Respondents received a financial benefit (approximately \$24,000 in fees for providing freight forwarding services) and described the financial benefit as coming "from a tying relationship, i.e., that Respondents would not have performed the freight forwarding services without providing access to the service contract." *Id.* The ALJ further found that Respondents "stood to gain financially, by obtaining work they otherwise may not have obtained, and therefore benefited from the relationship." *Id.* at 1998. The ALJ found that Respondents "benefited from the fraud." *Id.*

As the ALJ found that Respondents obtained a benefit from their arrangement with Island Cargo, even though they did not actually obtain transportation at less than the applicable rates, the ALJ concluded it was "not necessary to reach the issue of whether the section 10(a)(1) prohibition against obtaining transportation for less than applicable charges includes permitting others to obtain transportation for less than applicable charges." *Id.*

The ALJ noted that knowing and willful activity is one of the elements of a section 10(a)(1) violation and that "[a] person is considered to have 'knowingly and willfully' violated the Shipping Act if the person had knowledge of the facts of the violation and

intentionally violated or acted with reckless disregard, plain indifference, or purposeful, obstinate behavior akin to gross negligence.” *Id.* (citations omitted). The ALJ also noted that knowing and willful behavior is both a required element of a section 10(a)(1) violation and a factor in determining the amount of a civil penalty. *Id.* The ALJ found that there was evidence in the record supporting a finding that Respondents had acted knowingly and willfully and found that Respondents had committed 19 violations of section 10(a)(1). *Id.* at 1999.

Turning to the section 19 violations, the ALJ did not make an explicit finding that Respondents committed the section 19 violations in a knowing and willful manner. The ALJ addressed the imposition of civil penalties, citing the factors contained in section 13 of the Shipping Act and noted, “[t]here is no minimum penalty amount for violations found to be knowing and willful,” although often penalties for knowing and willful violations exceed the maximum for violations that are not knowing and willful.” *Id.* at 10 (citing *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, 32 S.R.R. 1678, 1693 (FMC 2013)). The ALJ noted that on remand BOE sought civil penalties of not less than \$6,000 for the section 10 violations and not less than \$8,000 for the section 19 violations, while Respondents argued that the civil penalty should be consistent with the \$60,000 penalty initially imposed. The ALJ considered the section 13 factors and ordered Respondents to pay a penalty of \$114,000 (\$6,000 per violation) for 19 violations of section 10(a)(1) and \$112,000 (\$8,000 per violation) for 14 violations of section 19.<sup>3</sup>

---

<sup>3</sup> The ALJ noted that this corresponded with the maximum civil penalties available at the time of the violations for violations that were not knowing and willful.

### III. POSITIONS OF THE PARTIES ON EXCEPTIONS

#### A. Respondents' Exceptions

Respondents argue in their Exceptions that the ALJ's decision to retreat from the findings in the Decision that there was no fraud or concealment is without justification, not supported by the evidence, and therefore in error. Respondent's Exceptions at 3. Respondents also argue the imposed civil penalty of \$226,000 is disproportionate to the violations, is unfair, goes beyond the congressional purposes of deterrence and compliance, and is designed to destroy a business and the livelihood of a one-man operation.<sup>4</sup> *Id.* Finally, Respondents argue that the ALJ's decision to significantly increase the civil penalty is in error. *Id.*

#### B. BOE's Reply to Respondents' Exceptions

BOE argued in its Reply to Respondents' Exceptions that Respondents failed to demonstrate a set of facts in the record contrary to the ALJ's determination, noting Respondents offered

---

<sup>4</sup> As noted above, OMJ failed to maintain bonding resulting in the Commission revoking OMJ's license in 2010, thus ending OMJ's ability to lawfully operate as an OTI. Pursuant to section 19(b) (46 U.S.C. § 40902), no person may operate as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility. Further, no license shall remain in effect unless valid proof of financial responsibility is maintained on file with the Commission. "The spirit and basic policy that motivated Congress to enact the bonding and licensing provisions of the Shipping Acts of 1916 and 1984, the NVOCC Act, and OSRA were to provide protection to the shipping public from unqualified and potentially unscrupulous service providers." *In re Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries*, 31 S.R.R. 185 (FMC 2008) (citing HR.Rep.No.101-785 (1990); 136 Cong.Rec.E2211 (1990); S.Rep.No. 105-61, at 31-32 (1997)), *rev'd on other grounds, Landstar Exp. America v. Fed. Mar. Comm'n*, 569 F.3d 493 (D.C. Cir. 2009).

no evidence at the hearing<sup>5</sup> and proffered no findings of fact in their trial brief or in their brief on remand. BOE Reply at 3. BOE argued the ALJ followed the directions of the Commission in its Remand and reassessed whether fraud had been committed against the underlying carrier or other shippers. *Id.* at 4. BOE also argued the ALJ's decision was supported by evidence in the record and should be upheld. *Id.* at 7. With regard to the amount of civil penalties imposed, BOE argued the amount of penalties imposed by the ALJ was, in accordance with Commission pronouncements and the nature and timing of the violations, the minimum appropriate penalty for knowing and willful violations of the Shipping Act. *Id.* at 8.

#### IV. DISCUSSION

##### A. Standard of Review

Pursuant to the Commission's rules of practice and procedure, where exceptions are filed to or the Commission reviews, an initial decision, "the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission reviews the ALJ's decision *de novo* and may enter its own findings.

##### B. Violations of Section 10(a)(1)

Section 10(a)(1) provides that "no person may knowingly and willfully, directly by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would be otherwise be applicable." 46 U.S.C. §

---

<sup>5</sup> We note that BOE, not the Respondents, has the burden of proof in this proceeding. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155.

41102(a). In order to prove a violation of section 10(a)(1), BOE must show that the Respondents: (1) acted knowingly and willfully; (2) acted either directly through the actions enumerated in the statute or through any other unjust or unfair device or means; and (3) obtained or attempted to obtain ocean transportation for property at less than the otherwise applicable rate. The ALJ found that BOE had proven nineteen violations of section 10(a)(1). As discussed further below, we affirm the ALJ's determination.<sup>6</sup>

1. Knowing and Willful

The ALJ determined that Respondents acted knowingly and willfully as they had entered into the 2008 service contract with Seaboard and certified that OMJ was acting as an NVOCC when in fact it was Island Cargo acting in that capacity. *OC International Freight*, 32 S.R.R. at 1999. OMJ knew that Island Cargo was neither a signatory nor an affiliate to the Seaboard service contract; OMJ was the only NVOCC authorized to make shipments under the service contract.

The ALJ's holding is consistent with previous Commission determinations regarding the meaning of knowingly and willfully. *See Rose Int'l, Inc v. Overseas Moving Network Int'l Ltd.*, 29

---

<sup>6</sup> Although Respondents arguably could have been subject to a breach of service contract claim by Seaboard, Respondents' actions are "inherently related to Shipping Act prohibitions" and are within the Commission's jurisdiction to hear. *Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635 (FMC 2000). In that case, the Commission found that:

a number of prohibited acts enumerated in section 10 hinge primarily on elements and factors beyond those issues which overlap with a breach of contract allegation. There may, for example, be claims of undue discrimination, undue preference, undue prejudice or unreasonableness within the meaning of the Shipping Act, which are distinctly within the sphere of expertise Congress expected the Commission to utilize.

*Id.* at 1644.

S.R.R. 119, 164-165 (FMC 2001) (citing *Portman Square Ltd.*, - *Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84 and *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998) (must be shown that a 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 with purposeful or obstinate behavior akin to gross negligence)). The benefit that Respondents obtained by allowing the improper access (work and forwarding fees they may not otherwise have obtained) further supports a finding of a knowing and willful violation of section 10(a)(1).<sup>7</sup> We affirm the ALJ's finding that Respondents acted knowingly and willfully.

## 2. Unjust or unfair means

BOE argued on remand that Respondents committed fraud upon Seaboard by certifying that OMJ was acting as an NVOCC and would be the shipper of cargo moving under the service contract, when in fact Island Cargo, a foreign, unlicensed, NVOCC was accessing the discounted freight rates available through OMJ's 2008 Seaboard service contract and acting as NVOCC on the shipments. OMJ instead was acting as a freight forwarder for

---

<sup>7</sup> In the *Hudson Shipping* case, the ALJ found that the fact that Hudson received a financial benefit when it charged a fee for allowing access to service contracts and avoided dead freight rates was evidence that Hudson had committed violations of section 10(a)(1) knowingly and willfully. *Hudson Shipping*, 29 S.R.R. at 1384, (citing *Universal Logistic Forwarding Co. Ltd.*, 29 S.R.R. 325, 330 (ALJ 2001) and *Portman Square Ltd.* at 84. Likewise here, the OMJ service contract with Seaboard included a minimum quantity commitment and deadfreight penalty, though it is unclear whether Respondents so benefited under their scheme with Island Cargo. Regardless, the ALJ found there was evidence in the record showing that Respondents received a financial benefit: approximately \$24,000 in freight forwarding fees for the nineteen shipments for which transportation was obtained for less than the applicable rates. Remand Decision at 9. The ALJ further found that Respondents "stood to gain financially, by obtaining work they otherwise may not have obtained, and therefore benefited from the relationship." *Id.*

particular shipments and concealing the nature of the transactions from other shippers. BOE Remand Br. at 9. Respondents argued that no fraud had been committed.

The ALJ noted that, in the Commission's remand, it affirmed that a necessary ingredient of an unjust or unfair means is fraud or concealment, which may be fraud to the common carrier or competing shippers. *OC International Freight*, 32 S.R.R. at 1996 (citing *Rose Int'l* at 173, (citing *Hohenberg Brothers Co. v. Federal Maritime Commission*, 316 F.2d 381, 384 (D.C. Cir. 1963))). The ALJ found that "by permitting Island Cargo to access discounted rates available through Respondents' service contract, Respondents distorted the competitive marketplace," as "[t]he reason Island Cargo could offer these lower rates was not ascertainable by competitors." *Id.* at 1997. The ALJ further found the evidence was sufficient to find that Respondents obtained transportation by an unjust or unfair device. *Id.*

Respondents argue in their Exceptions that the ALJ's decision to retreat from the findings in the Decision that there was no fraud or concealment is without justification, not supported by the evidence, and therefore in error. BOE argues that Respondents' admissions establish that Respondents knew that OMJ was not acting as an NVOCC and assisted Island Cargo in gaining access to the rates and terms of its service contract with Seaboard. BOE argues, citing the Commission's decision in *Parks International Shipping Inc.* and the Commission's regulations, that Respondents had an ongoing obligation to refrain from preparing or assisting in preparation of any documents involving an OTI transaction which they had reason to believe were false or fraudulent as well as an obligation to decline to participate in such transactions. BOE Reply at 5-6, (citing *Parks International Shipping Inc., et al. – Possible Violations of Section 8(a) and 19 of the Shipping Act of 1984 as well as the Commission's Regulations at 46 C.F.R. Part 515 and 520*, Docket 06-09, (FMC September 16, 2013)), found at 33 S.R.R. 59 (FMC 2013). BOE also argues

that Respondents' activities constituted a fraud against other shippers and stifled competition, citing the line of cases discussed above. BOE Reply at 6.

The ALJ's holding is consistent with previous Commission determinations regarding the meaning of an unjust or unfair means.<sup>8</sup> We find that Respondents Collado and OMJ deceived Seaboard and competing shippers when they provided -- as ocean freight forwarders -- Island Cargo with confidential service contract rates, relied upon by Island Cargo. The Commission has previously found that unlawful access to service contracts amounts to an unfair device under section 10(a)(1). *Universal Logistic Forwarding Co. Ltd.*, 29 S.R.R. 325 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (FMC 2002). We concur with the ALJ's determination that proprietary shippers obtaining shipping quotes would presumably have been offered lower rates by Island Cargo than by competing NVOCCs who did not have access to the discounted rates in Respondents' service contract. *OC International Freight*, 32 S.R.R. at 1997. By enabling Island Cargo to access its service contract with Seaboard, Respondents provided an unfair competitive advantage. We affirm the ALJ's finding that Respondents acted through an unfair or unjust means.

3. Obtained Ocean Transportation at Less than the Applicable Rate

A required element of a section 10(a)(1) violation is to obtain or attempt to obtain ocean transportation for property at less than the otherwise applicable rate. A threshold issue is whether the prohibition applies also to those permitting *others* to obtain

---

<sup>8</sup> We do not find *United States v. Open Bulk Carriers & Union Camp*, 727 F.2d 1061 (11th Cir. 1984) to be analogous to this proceeding as to the meaning of unjust or unfair means. That case involved shipments moving pursuant to publicly filed tariffs and no lower transportation rates were obtained "by means" of an unjust or unfair means. Rather, Union Camp avoided deadfreight penalties. *Id.*

transportation for less than applicable charges.<sup>9</sup> The Commission has found violations of section 10(a)(1) even though a respondent has not itself utilized the transportation obtained.

Under Section 10(a)(1)'s predecessor, Section 16, the Commission found violations by respondents who did not utilize the "obtained" transportation themselves. *Brokerage of Ocean Freight Max LePack, et al.*, 5 F.M.B. 435 (1958); *U.S. Lines and Gondrand Bros. Violation of Section 16*, 7 F.M.C. 464 (1962). More recently in *Hudson Shipping*, a licensed NVOCC (Hudson) allowed two other NVOCCs to access its service contracts improperly, which enabled the two NVOCCs to obtain ocean transportation at less than applicable rates. Hudson was found to be in violation of section 10(a)(1). *Hudson Shipping*, 29 S.R.R. at 1381. Similarly in *Gstaad Inc., and Sergio Lemme*, the Commission approved a settlement agreement where respondent admitted knowingly and willfully allowing other shippers to make shipments under respondent's service contract and thereby obtain lower than applicable rates. Gstaad did not assume any NVOCC obligations with respect to the shipments. *Gstaad Inc., and Sergio Lemme – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1608 (ALJ 2000).

In each of the two most recent cases, an NVOCC provided access to its service contract to other NVOCCs. Here, respondent OMJ, then-licensed as a NVOCC (and OFF), provided access to a foreign, unlicensed, and unbonded NVOCC.<sup>10</sup>

---

<sup>9</sup> As noted above, the ALJ found that Respondents "obtained a benefit from their arrangement with Island Cargo even though they were not the ones obtaining transportation at lower rates." Remand at 9. The ALJ concluded it was "not necessary to reach the issue of whether the Section 10(a)(1) prohibition against obtaining transportation for less than applicable charges includes permitting others to obtain transportation for less than applicable charges." *Id.*

<sup>10</sup> In order for Island Cargo to lawfully provide OTI services for transportation to or from the U.S., it would need to furnish to the Commission evidence of financial responsibility in the amount of \$150,000. 46 C.F.R. §

The prohibitions of section 10(a)(1) and its precursor, section 16, are not limited to certain types of entities such as common carriers or NVOCCs. Rather, 10(a)(1)'s prohibitions apply to a "person" and were not modified by the Ocean Shipping Reform Act of 1998 (OSRA). The words "any person" are as fully broad as the words "shipper, consignor, consignee, forwarder, broker, or other person." *U.S. Lines and Gondrand Bros*, 7 F.M.C. at 471.

As discussed above, we affirm the ALJ's determination that Respondents committed 19 violations of section 10(a)(1). The evidence supports a finding that Respondents allowed Island Cargo to access the discounted freight rates available through OMJ's 2008 Seaboard service contract, thereby allowing Island Cargo to ship its cargo with Seaboard and obtain rates lower than the Seaboard rate, which would have otherwise been applicable. The Respondents dispossessed Seaboard of the ability to charge its proper rates<sup>11</sup> and Island Cargo was able to improperly offer its customers lower rates than its competitors who did not have access to OMJ's service contract.<sup>12</sup> In effect, Seaboard and Island

---

515.21(a)(2). Additionally, it would have to register with the Commission and publish a tariff. 46 C.F.R. § 515.19(a). The ALJ found in the Decision that Island Cargo was unlicensed and unbonded. Finding 24, *OC International Freight*, 32 S.R.R. at 1583. In order to sign a service contract with an NVOCC, an ocean common carrier must have proof the NVOCC has a published tariff and proof of financial responsibility. 46 C.F.R. § 530.6(b). Accordingly, it does not appear that Island Cargo would have been able to sign a service contract directly with Seaboard.

<sup>11</sup> Although much cargo is shipped under confidential service contract rates negotiated by the parties, as authorized under OSRA, 46 U.S.C. § 40502, the rules requiring the publication of tariffs were not repealed by OSRA. Ocean common carriers and NVOCCs must still publish tariffs for cargo not shipped pursuant to a service contract. *See* 46 U.S.C. § 40501; 46 C.F.R. Part 520.

<sup>12</sup> The existence of some of the essential terms of a service contract between two parties is a matter of public information. 46 U.S.C. § 40502(d). Island Cargo's competitors could have determined that no service contract

Cargo's competitors were the victims of Respondents' section 10(a)(1) violations.

C. Knowing and Willful Violations of Section 19

A person acts in a knowing and willful manner if he or she has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act. *See Rose Int'l, Inc v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. at 164-165, (citing *Portman Square Ltd.*, 28 S.R.R. at 84 and *Ever Freight Int'l*, 28 at 333). As stated in our Remand, there is ample evidence in both the record and the ALJ's Decision's discussion of facts to support a finding of knowing and willful violations of section 19. *OC International Freight*, 32 S.R.R. at 1793. Respondents admitted in their Rule 95 statement that they provided ocean freight forwarding services following the revocation of OMJ's license. *Id.* The ALJ noted evidence in the record that Respondent Omar Collado was warned that it was unlawful to operate as an OFF without a license but nevertheless continued to provide forwarding services. *OC International Freight*, 32 S.R.R. at 1594. The evidence supports a finding that Respondents acted in a knowing and willful manner. Therefore, we find that Respondents' violations of section 19 were committed knowingly and willfully.

D. Amount of Civil Penalty

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount. Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act.<sup>13</sup> Section 13(c) of the Act provides that when

---

existed between Island Cargo and Seaboard and assumed that Seaboard's published tariff rates would be applicable to Island Cargo's shipments.

<sup>13</sup> "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

“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). The Commission’s regulations also provide: “the Commission shall take into account . . . the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes.” 46 C.F.R. § 502.603(b).

The ALJ considered the section 13 factors, including Respondents’ ability to pay and lack of history of prior offenses as well as the knowing and willful nature of Respondents’ section 10(a)(1) violations and ordered Respondents to pay a penalty of \$114,000 (\$6,000 per violation) for 19 violations of section 10(a)(1) and \$112,000 (\$8,000 per violation) for 14 violations of section 19.<sup>14</sup> *OC International Freight*, 32 S.R.R. at 1999.

Respondents argue that the imposed civil penalty of \$226,000 is disproportionate to the violations, is unfair, goes beyond the congressional purposes of deterrence and compliance, and is designed to destroy a business and livelihood of a one-man operation. BOE argues that the amount of penalties imposed by the ALJ are in accordance with recent Commission

---

may not exceed [\$8,000] for each violation or, if the violation was willfully and knowingly committed, [\$40,000] for each violation.” 46 U.S.C. § 41107(a). The Shipping Act originally provided for maximum penalties of \$5,000 and \$25,000. These amounts have been adjusted for inflation. In 2009, the Commission increased the amounts to \$8,000 and \$40,000 from \$6,000 and \$30,000 respectively. 74 Fed. Reg. 38114, 38115 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2009)). The Commission corrected this table on December 1, 2011, to clarify that the \$8,000 civil penalty applies to violations that are “not knowing and willful.” 76 Fed. Reg. 74720 (December 1, 2011) (emphasis added).

<sup>14</sup> The ALJ noted that these penalty levels corresponded with the maximum civil penalties available at the time the violations were committed for violations that were not knowing and willful.

pronouncements and are the minimum appropriate penalty for knowing and willful violations of the Shipping Act.

As noted by the Commission in *Universal Logistic Forwarding*, determining the amount of a civil penalty “essentially requires the weighing and balancing of eight factors set forth in law, [section 13(c)] and is ultimately subjective and not one governed by science.” *Universal Logistic Forwarding*, 29 S.R.R. at 333. The amount of a penalty imposed by an agency is within its discretion, as “the relation of remedy to policy is peculiarly a matter for administrative competence.” *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 146 (1946). Although the Commission has discretion as to the weight given to each of the section 13(c) factors, it must make specific findings with respect to each of those factors. *Merritt v. United States*, 960 F.2d 15, 17-18 (2d Cir. 1992). As noted by the Commission in *Anderson International Transport and Owen Anderson*, setting a uniform penalty amount on all shipments handled by a Respondent, “is consistent with the primary purpose of civil penalties, which is to deter future violations.” *Anderson*, 32 S.R.R. at 1693, (citing *Stallion Cargo, Inc. - Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (FMC 2001)).

The Commission, when undertaking review of an initial decision, has all the powers that it would have had in making the initial decision and could, as has been done in the past,<sup>15</sup> analyze the section 13(c) factors as well as the exceptions filed by the Parties and impose a different penalty than that proposed by the ALJ. While in the past the Commission has not determined there

---

<sup>15</sup> For example, in *Sea-Land Service, Inc. - Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, the Commission determined that the section 13 factor of “other matters as justice may require,” specifically, the changes wrought by the passage of the OSRA, supported reducing the civil penalty assessed by the ALJ from \$4,082,500 to \$820,000. *Sea-Land Service, Inc.- Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872, 894 (FMC 2006).

should be minimum penalty amounts for violations found to be knowing and willful, the penalties generally exceed the maximum for violations that are not knowing and willful. *Anderson*, 32 S.R.R. at 1693, (citing *EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) (\$30,000 per violation penalty assessed for 13 knowing and willful violations)); *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) (\$22,500 per violation assessed for 120 knowing and willful violations); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) (\$22,500 per violation assessed for 68 knowing and willful violations); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 36 S.R.R. 1319, 1323 (FMC 2003) (\$22,500 penalty per knowing and willful violation affirmed) (*Green Master II*); *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) (\$20,000 per violation assessed for 72 knowing and willful violations); *Stallion Cargo*, 29 S.R.R. at 682 (\$10,000 per violation assessed for 134 knowing and willful violations).

On remand, the ALJ increased the amount of the civil penalty for the 14 shipments found to be in violation of section 19 from \$4,280 to \$8,000 per shipment, the maximum penalty for violations which are not knowing and willful, an increase of \$3,720 per shipment.

For the 19 shipments found to be in violation of section 10(a)(1), which necessarily involve a knowing and willful element, the ALJ imposed a penalty equal to the maximum penalty for violations which are not knowing and willful.

The penalty amounts imposed by the ALJ are comparable with penalties imposed in other recent Commission proceedings. We adopt the ALJ's well-reasoned analysis of the applicable section 13 factors and affirm the ALJ's determination as to the amount of civil penalties.

## **V. CONCLUSION**

For the reasons set forth above, we: (1) affirm the ALJ's determination that Respondents committed 19 violations of section 10(a)(1) of the Shipping Act; (2) find that Respondents' 14 violations of section 19 of the Shipping Act were committed in a knowing and willful manner; and (3) affirm the amount of civil penalties imposed by the ALJ.

By the Commission.

Karen V. Gregory  
Secretary

*Commissioner*, DYE, With Whom *Commissioner* KHOURI Joins,  
Dissenting:

The Majority's Memorandum Opinion and Order affirms the ALJ's Initial Decision on Remand that Respondent committed 19 violations of section 10(a)(1) of the Shipping Act (46 U.S.C. § 41102(a)); finds that Respondents' 14 violations of section 19 of the Shipping Act were committed in a knowing and willful manner; and affirms the amount of civil penalties imposed by the ALJ. I dissent from the Majority's Order, to the extent it differs from the Initial Decision of the ALJ, concerning violations of and penalties for 46 U.S.C. § 41102(a), and penalties for violations of sections 19(a) and 19(b) (46 U.S.C. §§ 40901 and 40902). *OC*

*International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1577. (ALJ 2013).

#### Need for Enforcement Guidelines

The Federal Maritime Commission has no enforcement strategy, no enforcement guidelines, and few regulatory interpretations and statements of policy. These regulatory tools are valuable because they allow Federal agencies to evaluate the application of the law in new situations from a policy perspective and inform the regulated public of their decisions. Agencies have an obligation not only to carefully consider the policy consequences of new legal interpretations but also to clearly inform the public of changes in the law as applied.

Another reason that enforcement strategy and guidelines are valuable is that they avoid the practice of establishing legal precedents in enforcement proceedings involving *pro se* respondents, settlements, or default judgments. In these situations, like the current proceeding, the Commission does not have the benefit of the full legal participation of two parties who fully develop the legal and policy issues involved in a proceeding. Enforcement strategy and guidelines would also avoid the negative consequences from overreaching to apply the law to factual situations for which the law was not intended.

#### New Shipping Act Violation

In this proceeding, the Majority overreaches to find a new violation of section 41102(a) of title 46 by relying on Commission precedent decided under the international ocean shipping regime that became obsolete over fifteen years ago. The business realities of international ocean shipping completely changed in the years following the Ocean Shipping Reform Act of 1998. The Reform Act abolished the inflexible ocean shipping regime based on public tariffs and replaced it with a system based on confidential service

contracts between carriers and their customers. Today, there is competition among carriers in the ocean transportation marketplace, with 98 percent of cargo carried under confidential service contracts.

The Majority's emphasis on Commission precedent and marketplace concepts decided before enactment of the 1998 Reform Act reflects a serious misunderstanding of the dynamics of today's international ocean shipping marketplace. Most important, the central presumption in this proceeding that cargo would be carried under a higher tariff rate if a lower contractual rate was not available to a shipper reveals a lack of understanding of the economic realities of ocean shipping today.

In fact, the Majority Order is constructed around a series of unrelated legal conclusions that are largely unsupported by the evidence in this proceeding. For the first time, a licensed Ocean Transportation Intermediary has been found to have violated 41102(a) by acting as a freight forwarder under his own service contract. This is despite the fact that, among other evidentiary deficiencies, the ALJ pointed out that "there was no specific evidence in the record regarding harm to competition." *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1992, 1996 (ALJ 2013). The ALJ also notes that "BOE does not point to any specific admission regarding whether Respondents used an unjust or unfair means or whether Respondents committed fraud or concealed their activities from the underlying common carrier or competing shippers." *Id.* at 1997. There is little contemporaneous evidence regarding the state of mind of the Respondent that supports a knowing and willful finding in this matter. Finally, the Majority has found a violation of 41102(a) in this proceeding without a showing that the Respondent obtained transportation or benefitted from an unjust or unfair means. *Hudson Shipping (Hong Kong) Ltd., d/b/a Hudson Express Lines*, 29 S.R.R. 1381 (ALJ 2003).

Although the ALJ determined in her Initial Decision on Remand that “it is not necessary to reach the issue of whether the section 10(a)(1) prohibition against obtaining transportation for less than applicable charges includes *permitting others* to obtain transportation for less than applicable charges,” the Majority disregards this conclusion and creates such a violation without statutory authority. *OC International Freight*, 32 S.R.R. at 1998.

#### Penalty Deficiencies

The Initial Decision also contained a thorough evaluation of the factors required to be considered under section 41109(b) to assess a civil penalty under the Shipping Act. The Majority Order contains little reassessment of the section 13(c) (46 U.S.C. § 41109(b)) factors and substitutes instead a recitation of penalties assessed in other proceedings. The “proportionality” of civil penalties is not among the factors to be considered under section 41109(b). Also, Commission regulations contain maximum per violation penalties, but do not require minimum penalties per violation. I am aware of no Commission policy that requires a threshold amount of civil penalty for any violation of the Shipping Act. Finally, the Majority Order fails to consider the impact of the additional licensing sanctions against the Respondent imposed by the ALJ in the Initial Decision in this proceeding.

#### Support for ALJ’s Initial Decision

The ALJ’s Initial Decision in this proceeding contained a well-reasoned analysis of the facts and the law, weighed the probative value of the evidence and thoroughly explained the basis for her legal and evidentiary decisions. The Majority Order ignores the ALJ’s initial analysis and her legal and evidentiary findings to direct a finding of a section 41102(a) violation in this proceeding.

Following is an analysis of the evolution of this proceeding, including the unsupported reasoning of the Majority's Order on Remand and the resultant ALJ's Initial Decision on Remand.

### **Initial Decision**

#### Evidentiary Findings

Twenty-four shipments were booked by OMJ with Seaboard Marine under a 2008 service contract. Island Cargo acted as an NVOCC on each of these shipments while OMJ provided freight forwarding services. An Area Representative of the Federal Maritime Commission stated that the tariff rate which should have been applied to nineteen of the 24 shipments carried under the 2008 Seaboard Marine service contract was higher than the actual service contract rate assessed. Affidavit of Andrew Margolis in the Bureau of Enforcement's Appendix submitted with their Initial Brief, BOE 139. The total difference between the tariff and contract rates for the 19 shipments at issue in this proceeding is \$3,541.00, ranging from \$139 to \$450 per shipment. Margolis Affidavit, BOE 145.

A Federal Maritime Commission Area Representative visited Omar Collado, OMJ principal, on March 9, 2009. The Area Representative stated that Mr. Collado said that he understood that OMJ was "not in compliance regarding allowing Island Cargo to utilize his service contract". Margolis Affidavit, BOE 140.

However, in his brief, Respondent Collado explained that "OMJ's interpretation of the Shipping Act was incorrect. It is undisputed that Island Cargo Services was provided access to OMJ's service contract with Seaboard Marine. However, OMJ innocently and without intent to deceive or defraud any person or entity allowed Island Cargo, a foreign company, this access with the understanding that this was permissible behavior so long as

OMJ was licensed as an OTI.” *OC International Freight, Inc., OMJ International Freight, Inc., and Omar Collado*, Respondent’s Brief, p. 5. (Nov. 12, 2012)

The Area Representative stated that Mr. Collado made assurances that he would amend his operations so as to comply with the Shipping Act and Commission regulations. Area Representative Affidavit, BOE 140. Only two days after meeting with the Area Representative, on March 11, 2009, the last of the 19 shipments was shipped. Margolis Affidavit, BOE 145.

Weight of the Evidence

In this proceeding, the Bureau of Enforcement primarily cited 175 requests for admission to support its case, although it also provided the supporting documents. The ALJ stated that while these requests for admission were admissible and relevant, the supporting documents were the strongest evidence in the proceeding. The ALJ explained that where the respondents are acting *pro se*, as here, relying on the parties admissions is not particularly persuasive where it is not clear that the party understands the legal terms of art or appreciates the implications of the request for admissions. *OC International Freight*, 32 S.R.R. at 1589.

No Violation of Section 41102(a)

The ALJ determined in the Initial Decision that the evidence did not establish that respondents violated section 41102(a) because:

(1) Evidence of Unjust or Unfair Means

The evidence did not support a finding that the respondents engaged in fraud or concealment as required to establish use of an unjust or unfair device or means. The Respondents made no

attempt to conceal Island Cargo's role in the 19 shipments. They cooperated with the investigation, and defended themselves by contending that they thought their actions were permissible so long as OMJ was licensed as an OTI. *Id.* at 1591.

(2) Evidence of Obtain or Attempt to Obtain Ocean Transportation

The evidence did not support a finding that the respondents obtained transportation or benefitted from allowing Island Cargo to access lower rates. Under section 41102(a), a person may not obtain or attempt to obtain ocean transportation for less than applicable charges. The Bureau of Enforcement cited *Hudson Shipping*, 29 S.R.R. at 1381, for the proposition that section 41102(a) also prohibits a person from *allowing other persons to obtain* transportation for less than applicable charges. The ALJ disagreed and distinguished *Hudson Shipping* from the facts in this proceeding. *OC International Freight*, 32 S.R.R. at 1591.

(3) Evidence of Knowingly and Willfully

The evidence did not support a finding that respondents knowingly and willfully violated the Shipping Act. The ALJ found that although respondent Collado knew that he should not permit Island Cargo to access his service contracts, it is not clear that he understood that this was a violation of the Shipping Act. If Mr. Collado had known, he may have attempted to hide his role in the transaction. Relying on contemporaneous documents as well as his testimony, the ALJ found no intent to deceive or defraud. The ALJ found that while permitting Island Cargo to access his service contracts may have violated the terms of his contract, the evidence does not rise to the level of a willful and knowing violation of the Shipping Act. *Id.* at 1592.

Significantly, ALJ stated that "Moreover, it is not clear that the section 41102(a) prohibition against obtaining transportation

for less than applicable charges includes *permitting others to obtain transportation for less than applicable charges*. Accordingly, it appears that respondents did not obtain transportation at lower rates but *rather permitted another entity to obtain such transportation*.” (emphasis added) *Id.* at 1591.

Civil Penalty for Violation of Sections 40901 and 40902

The ALJ found that the evidence does demonstrate that Respondents violated sections 40901 and 40902, and are not qualified to obtain an OTI license. The ALJ determined that Respondents operated without a license and bond after January 15, 2010, and that the Commission properly denied their application for an OTI license. The ALJ enjoined Respondents from operating as an OTI unless a license is issued by the Commission, from other involvement with an OTI for one year, and from serving in an OTI management role for five years. Finally, the ALJ affirmed the denial of the Respondents’ OTI license application.

After full consideration of the evidence regarding the factors required to be taken into account under section 41109(b), the ALJ assessed a civil penalty of \$60,000, finding that: Respondents admitted liability and cooperated with the investigation; that there is no evidence that any member of the shipping public has been harmed; and that the evidence is not clear regarding Respondent’s ability to pay. In addition, the ALJ determined that respondent’s income potential will be limited by the cease and desist order requested by BOE as well as the denial of an OTI license. It appears that Mr. Collado has primarily worked in the shipping industry and limitation of his ability to do so will hinder his ability to pay any civil penalty. *Id.* at 1599.

### **Majority's Order on Remand**

The Majority's Order Remanding for Further Proceedings reviewed the ALJ's Initial Decision *de novo* and remanded for proceeding to the ALJ "for a new determination as to whether Respondents violated section 10(a)(1)" and a determination of an "appropriate civil penalty" consistent with Commission guidance. *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1783, 1785 (FMC 2013).

#### Erroneous Statutory Construction

The Remand Order incorrectly describes the statutory basis for a finding of a violation of section 41102(a). The Remand Order states that in order to prove a violation of section 41102(a), it must be proved that:

- (1) The Respondent acted knowingly and willingly;
- (2) acted either directly through certain enumerated actions or through any other unjust or unfair device or means; and
- (3) obtained or attempted to obtain or allowed other persons to obtain ocean transportation for property at less than the otherwise applicable rate. *Id.* at 1785.

Section 41102(a) does not contain the phrase "or allowed other persons to obtain" ocean transportation. Section 41102(a) requires that the Respondent obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply. As historically applied, section 41102(a) provided a shipper counterpart to the common carrier prohibition contained in section 10(b)(1) (46 U.S.C. §41104(1)) against allowing other persons to obtain ocean transportation at less than applicable rates or charges. In the Initial Decision, the ALJ noted that it is not clear that the section 41102(a) prohibition against obtaining transportation for less than applicable charges includes

*permitting others to obtain* transportation for less than applicable charges. (emphasis added) *OC International Freight*, 32 S.R.R. at 1591.

In fact, there are only three Commission decisions dealing with the issue of allowing another person to access a service contract under section 41102(a). In each of these cases, an NVOCC provided access to its service contract to other NVOCCs. No case involves a freight forwarder as a respondent. Unlike the current proceeding, there was evidence in the record of these cases to support a determination that providing access to a service contract was part of an unjust or unfair device or means under section 41102(a). The case most closely related to this proceeding is *Hudson Shipping*, 29 S.R.R. at 1381. *Hudson Shipping* is a decision on summary judgment, discussed and distinguished from this proceeding below.

In another proceeding, *Gstaad Inc., and Sergio Lemme-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 1608 (ALJ 2000), the ALJ approved a settlement agreement concerning an NVOCC which, during 1997 and 1998, knowingly and willfully allowed other shippers to make shipments under Gstaad service contracts. The NVOCC also received additional compensation from other shippers and rebates from carriers in return for allowing the other shippers to obtain ocean transportation at less than applicable service contract rates, even though Gstaad performed no transportation function nor assumed any NVOCC obligation with respect to those shipments. In this case, unlike the current proceeding, there was sufficient evidence in the record to support a finding of an unjust or unfair device or means under section 10(a)(1) of the Shipping Act of 1984.

Finally, in *Rose International, Inc., v. Overseas Moving Network International, Ltd., et. al.*, 29 S.R.R. 119 (FMC 2001), the Commission found that Overseas Moving Network International (OMNI), an NVOCC, violated section 10(a)(1) of the Shipping

Act by utilizing the sham corporation OMNI Shipping Services, Inc., (OSSI) to allow other NVOCC's operating without tariffs and bonds to access OMNI's 1995 and 1996 service contracts. Unlike the current proceeding, OSSI was found to be an unfair device or means ("sham corporation") used by respondents to allow NVOCC's operating without tariffs and bonds to access the service contracts.

After relying on an erroneous interpretation of the statutory authority for the section 41102(a) violation and focusing an issue in this proceeding on "allowing other persons to obtain" transportation, the Remand Order systematically directs the ALJ to reach different legal conclusions based upon little evidentiary support.

#### Overrides Evaluation of Weight of the Evidence

The Initial Decision explained that the best evidence of the requests for admission in the record are the underlying documents submitted with the requests for admissions. The "conclusive" acceptance in the Remand Order of all requests for admissions is significant because one admission states that Mr. Collado knew, or had reason to know, that Island Cargo's access to the Seaboard Service Contract was unlawful under the Shipping Act. Despite the other evidence in the record concerning Mr. Collado's lack of understanding of the legal implications of his actions, his *pro se* status, his failure to respond to the requests for admission, and his failure to engage in discovery of his own, the Remand Order concludes that it was "inappropriate" for the ALJ to "discount" Respondent's admissions because they were acting *pro se*. The Remand Order overrides the thorough evaluation of the weight of the evidence by the trier of fact with no further analysis and directs the ALJ to consider all of the requests for admission as conclusively established. *OC International Freight*, 32 S.R.R. at 1791.

Directs Knowing and Willful Finding

The Majority directs the ALJ to analyze Respondents' activities using knowing and willful standards set forth in several Commission cases, with no analysis of how an application of those "standards" would require a different result from the Initial Decision. I note that one of these cases is not on the Table of Authorities for this proceeding; the other cases were included in the Table of Authorities, and were obviously considered previously by the ALJ. On the issue of knowledge, the Majority ignores the evidence in the record regarding Respondents' contemporaneous state of mind that his interpretation of the Shipping Act was incorrect and that he innocently and without intent to deceive or defraud any person or entity allowed Island Cargo access with the understanding that this was permissible behavior so long as Respondent was licensed as an OTI. Respondent's Brief, p. 5.

Confuses Obtaining Ocean Transportation

The most confusing discussion in the Majority's Order on Remand surrounds the significance of "benefit" under section 41102(a). A finding of a benefit to a respondent is not an element of section 41102(a). However, in one case considered by the Commission in which the respondent allowed others to access service contracts and obtain lower shipping rates, a benefit to the respondent was found "by means of" the unfair scheme or device that was illegally developed to provide access to a service contract.

In *Hudson Shipping* 29 S.R.R. at 1381, the ALJ found, on summary judgment, that Hudson Shipping, an NVOCC, permitted access to its service contracts with two ocean carriers on 120 occasions, totaling freight savings of over \$1.1 million. In that case, the bills of lading specified that Hudson was the shipper, when in fact the other NVOCC's acted as the shipper on each shipment. The ALJ found that Hudson benefited from this scheme in two respects: First, Hudson charged a \$20 "administrative fee"

for each container shipped under the service contract. Evidence of this scheme included a letter and e-mails. Second, Hudson received credit for the shipments and avoided paying liquidated damages for failing to meet the minimum quantity commitment in the service contracts.

The ALJ in *Hudson Shipping* determined that the “device” employed by Hudson through allowing others to access service contracts falls squarely within the prohibition of section 10(a)(1) of the Shipping Act of 1984, which was later codified as section 41102(a). The benefits of this scheme or “device” were also relevant to show that Hudson “knowingly and willingly” committed violations of section 10(a)(1).

The facts of Hudson Shipping are distinguished from the facts of this proceeding. There is no evidence in this proceeding of a scheme or device similar to that employed by Hudson Shipping from which the respondent could benefit. Also, although the service contract in this proceeding contained a minimum quantity commitment and deadfreight penalties, there is no evidence in the record that the respondent was credited for the Island Cargo shipments.

Finally, the Remand Order concludes, based on other Commission cases not related to the facts of the current proceeding, that the ALJ’s reading in the Initial Decision of the prohibitions contained in section 41102(a) “may” have been too narrow. The Remand Order states, without citing precedent or any other authority, that a finding of a violation of section 41102(a) does not require a finding that a respondent, as opposed to some other person, enjoy a benefit from a scheme or device. *OC International Freight*, 32 S.R.R. at 1791.

Unjust or Unfair Device or Means

The Order on Remand abandons the requirement that a necessary ingredient of an unjust or unfair device or means is concealment in favor of an approach based on fraud to the ocean carrier and to other shippers. However, the Remand Order does not cite precedent decided under the current international ocean shipping statutory regime but instead relies on case law decided under the statutory system repealed in the Ocean Shipping Reform Act of 1998.

Finally, the Remand Order directs the ALJ to reach legal conclusions supporting a violation of section 41102(a) based on erroneous legal conclusions and with little factual analysis of this proceeding.

**Initial Decision on Remand**

Ignores Ocean Shipping Reform Act/Unjust or Unfair Device or Means

Citing *Prince Line Ltd. v. American Paper Export, Inc.*, 55 F.2<sup>nd</sup> 1053 (2<sup>nd</sup> Cir. 1932) and *Pacific Far East Lines-Alleged Rebates to Foremost Dairies, Inc., et al.*, 10 S.R.R. 1, 9. (FMC 1968) the ALJ found that there is no requirement that actual competitive injury be established, “it is enough that the practice involved has the capacity or tendency to injure competition.” *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1992, 1996 (FMC 2013).

The ALJ determined that Respondents “distorted the competitive marketplace.” *Id.* at 1997. The ALJ also determined that this impact on the competitive marketplace is sufficient to find that respondents obtained transportation by means of an unjust or unfair means as required for a violation of section 41102(a). *Id.*

Significantly, the ALJ stated that “It is not clear whether the transition to confidential service contracts, with confidential rates and quantities, which are not known or ascertainable by competitors, alters the traditional analysis.” *Id.* at 1996.

Lack of Evidence in the Record

The ALJ also emphasized that there was no specific evidence in the record regarding harm to competition and BOE did not point to any specific admission regarding whether Respondents used an unjust or unfair means or whether Respondents committed fraud or concealed their activities from the underlying common carrier or competing shippers.

Willfully and Knowingly

The ALJ found that having determined that the Respondents’ conduct violated the Shipping Act, the evidence supports a finding that the violation was knowing and willful.

The Decision on Remand ordered the Respondent to pay a penalty of \$114,000 for 19 violations of section 41102(a)(1) and \$112,000 for the 14 willful and knowing violations of sections 40901 and 40902.

I dissent from the Majority’s Order.

*Commissioner KHOURI*, concurring in part and dissenting in part,  
With Whom Commissioner DYE Joins in his dissent.

I concur with the majority opinion in part and respectfully dissent in part as discussed below. Further, I concur with and join Commissioner Dye’s dissenting opinion.

Knowing and Willful Violations of Section 19

I agree with the application of the decision in *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119 (FMC 2011), solely as it regards the Section 19 violations and the requisite element of knowing and willful action by the Respondent.

Amount of Civil Penalties

I agree with the majority decision in the amount of civil penalties solely for the Section 19 violations. I do not agree with either an assessment of penalty or the amount of penalty for the alleged matters concerning Section 10(a)(1), 46 U.S.C. §41102(a), because I find that the Respondents have not violated Section 10(a)(1) of the Shipping Act of 1984 (“Shipping Act”).<sup>16</sup>

Violations of Section 10(a)(1)

In her October 30, 2013, Initial Decision on Remand (Remand Decision), the Administrative Law Judge (ALJ) points out the fundamental question that casts a pall over this case and many similar Section 10 (a)(1) decisions where she states:

It is not clear whether the transition to confidential service contracts, with confidential rates and quantities, which are not known or ascertainable by competitors, alters the traditional analysis.

*Id.* at 7.

---

<sup>16</sup> The President signed a bill recodifying the Shipping Act of 1984 as positive law on October 14, 2006. The purpose of the bill was to “reorganize( 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) The Commission regularly, however, references provisions of the Act by the section number in the Act’s original enactment.

I find that the significant changes to the Shipping Act adopted by Congress in the Ocean Shipping Reform Act of 1998 (“OSRA”) fundamentally alter the prior interpretation, application and enforcement of Section 10 (a)(1) of the Shipping Act.<sup>17</sup>

The case law history cited by the majority itself offers guidance toward a more logical and coherent outcome. The evidence offered by the Commission’s Bureau of Enforcement (BOE), together with potential evidence that is absent in these proceedings, allows for a more rational basis for the section 10 (a)(1) issues.

As an initial matter, I note that the Commission’s July 22, 2013, Order Remanding for Further Proceedings (Remand Order), *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1783 (FMC 2013), the majority held, “We adopt the ALJ’s well-organized findings of fact. . . we remand the proceeding to the ALJ for additional findings of law. . . “ *Id.* at 9 (emphasis added).

Based on the record and findings of the ALJ set forth in her March 26, 2013, Initial Decision (Decision) in this proceeding and the additional findings of fact in her October 30, 2013, Remand Decision, I find that:

- (1) the record evidence does not establish or support a factual finding or legal conclusion of fraud or concealment as to the vessel common carrier, and
- (2) the alleged fraud or concealment as to competition or competing shippers is no longer a viable theory in this case due to the amendments to the Shipping Act enacted in 1998.

---

<sup>17</sup> The Shipping Act of 1984 was amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, effective May 1, 1999.

First, to recite the actual words of the statute, Section 10(a)(1) provides that “no person may knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.” 46 U.S.C. § 41102(a).

The ALJ in her Decision and Remand Decision, as well as the majority in its decision herein, rely on several cases that interpret and apply Section 16 of the Shipping Act of 1916, which is the predecessor to section 10 (a)(1).<sup>18</sup> Judge Learned Hand begins the voyage with his decision in *Prince Line, Ltd .v. American Paper Exports, Inc.*, 55 F2d 1053 (2<sup>nd</sup> Cir. 1932). This was a fact pattern in which the shipper engaged in a regular and systematic scheme where it knew that its tendered cargo of paper was being falsely classified at a lower grade of paper and thus, under the publically published tariff which provided for different freight rates for different grades of paper, the shipper received the benefit of a lower tariff freight charge. The court ruled that:

It is conceded that the billing was to conceal the contents from the (shipper’s) competitors, and it thus facilitated the preference which had been conceded. This was an “unfair device or means,” for it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain.

*Id.* at 1055 (emphasis added).

In *Hohenberg Brothers Co. v. Federal Maritime Commission*, 316 F.2d 381 (D.C. Cir. 1963), we have a case under Section 16 of the 1916 Shipping Act which involves a shipper of

---

<sup>18</sup> Shipping Act, 1916, §16.

cotton bales whom, after tendering the cargo, would regularly claim that his cotton was misclassified as to the type of cotton, then claim a lower classified tariff category, and thereby demand a rebate. The record evidence supported the element that the shipper knew or should have known that the later claimed cargo classification was false.

Two important findings flowed from the *Hohenberg Brothers* court's analysis. First, the court relied upon a canon of statutory interpretation that holds that a general phrase at the end of a list is limited to the same type of things that are found in the specific list.<sup>19</sup> In applying the *ejusdem generis* canon, the court found that the rebate scheme was sufficiently similar in nature to the specific list of prohibited acts listed in Section 16 so as to "be considered to come within the comprehensive final phrase 'any other unjust or unfair device or means.'" *Id.* at 385.

Second, the court then relied on the *Prince Line* decision and found that:

The effect of the entire transaction was that petitioner obtained transportation by water at less than otherwise applicable rates (i.e., a higher category of cotton with a higher tariff charge) in such a way that its competitors were unaware of what had transpired.

*Id.* at 385 (emphasis added)(explanatory alteration added).

*Pacific Far East Lines – Alleged Rebates to Foremost Dairies*, 11 F.M.C. 357 (FMC 1968), presented the interesting scheme where the ocean carrier purchased a set amount of bunker fuel at a predetermined inflated price from its customer/shipper – a dairy with no prior involvement whatsoever in marine fuel sales. The dairy was given a fuel supply contract from the ocean carrier's

---

<sup>19</sup> William D. Popkin, *A Dictionary of Statutory Interpretation* 74 (2007).

normal fuel vendor at standard rates. The dairy thereby achieved a ten cent per gallon net “commission” through this two-step sequence of fuel purchases. The total effect was a sizable rebate each year to the shipper.

In 1968, the U.S. maritime community was subject to requirements for ocean common carriers to publicly publish their rates in a tariff format. Both the ocean carrier and the shipper argued that there was no concealment as to the bunker fuel contract and the “commission” paid to the shipper because the oil supplier, a credit bank and the Maritime Administration were aware of such contract. The FMC held that, “[t]his (disclosure) does not constitute disclosure to an important class of persons that this section (i.e. section 16 of the 1916 Act) was designed to protect; namely competing shippers.” *Id.* at 365.

In agreement with the decision of the ALJ, the Commission endorsed that ruling as follows:

The fatal defect in the arrangement between [ocean carrier] and [shipper] is the lack of any means whereby any actual or potential competitors of [shipper] could find out what [shipper’s] actual transportation costs were. Absent such knowledge, and without an arrangement providing them with exactly the same benefits, they would be at an obviously undue disadvantage.

*Id.* (emphasis added). The Commission concluded with:

Unlike section 16 First, there is no requirement under section 16, first paragraph, or 16 Second, that actual competitive injury be established. It is enough that the practice involved has the capacity or tendency to injure competition. We hold that the (ocean carrier-shipper) scheme was such a practice because it lowered (shipper’s) ocean transportation costs.

*Id.* (cite omitted). In other words, the practice lowered the transportation costs below the publically posted and published tariff rate.

In a 1984 decision, a federal appeals court addressed a factual situation that is most closely aligned with our current case. In *United States v. Open Bulk Carriers & Union Camp*, 727 F.2d 1061 (11<sup>th</sup> Cir. 1984), Union Camp entered into a contract with Open Bulk for ocean transportation of liner board from Savannah to Europe. The contract included terms for per voyage and per year minimum tonnages. The contract's commercial terms were filed with the Commission in tariff form. With the economic down turn in the early 1970's, Union Camp had trouble meeting the minimum tonnage requirement; so it solicited the industry Kraft Export Association and several competitors to determine if they would jointly consolidate their liner board shipments and move the cargo under the Union Camp agreement. Two competitors did utilize or "access" the Union Camp contract. Those shipments used Union Camp as the designated "shipper" in the shipping documents.

The circuit court addressed the government's case-in-chief as follows:

The government does not argue that consolidation in and of itself constitutes an "unjust or unfair device or means." Instead, it claims that Union Camp made a false claim to the lower rate because it alone had contracted to ship the required amounts of cargo. Allegedly, the consolidated shipments were unknown to the shipping public and the shipping documents provided further evidence of concealment . . . . Finally, the government asserts that the concealment need not be the means by which the lower rates are achieved but it is sufficient if they are "accompanied by any concealment . . ." (citing *Prince Lines*).

*Id.* at 1064 (emphasis added).

The court, in rejecting the Department of Justice's argument, recited the simple words of the statute with emphasis on the phrase, ". . . receiving the benefits of lower rates *by means of* . . . any other unjust or unfair device or means." "It therefore requires the lower rates to be achieved by *means* of the fraud or concealment." *Id.* at 1065 (emphasis in the original).

The court continued with the government's next theory that the concealment need only accompany the practice, citing *Prince Line*. The court's rejoinder simply cited Judge Hand's finding that, "the billing was to conceal the contents from the company's competitors, and it thus facilitated the preference which had been conceded." *Id.* (internal cite omitted) "The concealment involved helped effectuate the lower rates" *Id.* Last on this point, the court distinguished *Hohenberg Brothers* by noting, "the court also required evidence of fraud or concealment in the scheme of the shipper to procure lower rates". *Id.* (internal cite omitted).

Continuing to reject the government's multiple headed Hydra positions, the *Open Bulk* court disposed of the next argument. "The government attempts to characterize the actions of Union Camp as a fraud upon 'the shipping public.'" *Id.* The court, while conceding that the shipping documents could have a polysemic reading, nonetheless ruled that:

The shipping documents arguably constituted concealment of some information. But whatever concealment that did occur was not used as a means to achieve lower rates, which, as discussed above, is necessary to qualify as an unjust device or means . . . (a)ll the competitors were offered a similar rate and the other . . . shippers knew or could have known of the arrangement through the (export association) . . . In the same vein, we cannot accept the government's assertion that Union Camp made a false claim to lower rates because it promised, by its contract, to provide all the cargo itself. Although the contracts do not

specifically provide for consolidation of shipments, neither do they expressly prohibit it. The contracts do not set forth any conditions as to the ownership of the cargo. In any event, there is no violation of [section] 16 because there was no concealment. Troll (Open Bulk Carriers) and Union Camp's competitors knew that Union Camp did not own all the cargo.

*Id.* at 1066 (emphasis added).

Circuit Judge Johnson, writing in dissent in *Open Bulk*, drives home his single point of concern with the following commentary:

A central policy concern behind the Shipping Act of 1916 was the prohibition of discrimination in the rates that common carriers charge to the shippers whose cargo they transport. The Shipping Act . . . reflect[s] this 'rigorous policy which . . . prohibit[s] not only discrimination but the possibility of it . . . ' Thus, common carriers . . . are required to file with the (FMC) tariffs that set forth the rates and charges for specific goods carried between specific ports. Each tariff is required to reflect "the one and only rate to be charged and collected for the specified transportation service." A common carrier and shipper who wish to contract for a special service or rate can legally do so only if the carrier publishes the special service or rate in its tariff, thus making it equally available to all shippers.

*Id.* at 1066-67 (internal cites omitted)(emphasis added).

Federal Courts of Appeal decisions that are relevant and arguably dispositive of a Shipping Act issue are normally afforded serious discussion, analysis and deference in Commission proceedings. In her Decision, the ALJ raised the *Open Bulk*

decision.<sup>20</sup> The Commission's Order Remanding for Further Proceedings and the ALJ's Remand Decision neglected to recognize or include this decision in their discussion, analysis and ruling. The majority opinion now relegates its discussion of *Open Bulk* to a dismissive footnote.<sup>21</sup> The majority chooses to ignore the overall context of the *Open Bulk* decision's majority and dissenting arguments. The shipper had obtained a special rate with special terms and conditions. The court's decision references the "claim to the lower rate." 727 F.2d at 1066. Further, it was averred that there were certain suppliers and end users who were kept in the dark as to what parties were accessing the Union Camp shipping arrangement with Open Bulk. Thus, the majority's attempt to casually distinguish and thereby dismiss *Open Bulk* is inapt.

In *China Ocean Shipping Co. v. DMV Ridgeview, Inc.*, 26 S.R.R. 50 (ALJ 1991), the Commission's ALJ cites *Open Bulk* with full approval. "The Court agreed . . . regarding the need to show an element of fraud or concealment . . . and the Court held that what makes an act into an unjust or unfair device within the meaning of Section 16, initial paragraph, is its similarity to false billing, false classification, . . ." *Id.* at 56. Ultimately, the ALJ dismissed the underlying complaint, ruling it to be a simple VOCC freight collection claim against an exporter. "Something more is required involving falsification, fraud, concealment, deception, etc...." *Id.* at 57.

The Commission addressed a shipper's association and the bona fides of its operation in *Rose International, Inc.* Notwithstanding the post-OSRA date of the decision, the case

---

<sup>20</sup> *Decision*, at 19.

<sup>21</sup> *See Supra* note 8. "We do not find *United States v. Open Bulk Carriers and Union Camp*, 727 F.2d. 1061 (11<sup>th</sup> Cir. 1984) to be analogous to this proceeding as to the meaning of unjust or unfair means. That case involved shipments moving pursuant to publicly filed tariffs and no lower transportation rates were obtained 'by means' of an unjust or unfair means. Rather, Union Camp avoided deadfreight penalties."

involved shipping contracts executed in 1995 and 1996. The primary relevance of the *Rose International, Inc.* decision for the case *sub judice* lies in two points. First, “We believe that the evidence is insubstantial and does not prove that TACA [the conference of ocean common carriers that was the ‘carrier party’ to the service contract] was either defrauded by or in collusion with Respondents.” *Id.* at 173. Second, “There is . . . ample evidence to conclude that Respondents used a false device . . . to allow these entities to attempt to obtain lower transportation rates by accessing the 1995 and 1996 Contracts in a way that their competitors would be unaware of what had transpired (citing *Hohenberg*). *Id.* (emphasis added). Thus, the record evidence failed to show fraud or concealment perpetrated upon the ocean carrier. However, the single finding of fraud or concealment pertained solely to fraud or concealment as to competitor shippers.

The majority further relies on *Gstaad, Inc. and Sergio Lemme – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1608 (ALJ 2000). This case arose as a Commission Order of Investigation and was settled without formal adjudication. It is sufficient to note that the proscribed activity was described by BOE in its summary proffer of evidence as follows:

BOE avers . . . that it would show . . . that by virtue of arrangements made . . . by Sergio Lemme, Gstaad received unlawful rebate payments on hundreds of shipments during 1997 and 1998 . . . and that . . . Gstaad misused its service contracts thereby allowing other shippers to obtain less than applicable transportation rates, for which it received additional compensation from shippers and rebates from carriers.

*Id.* at 1609 (emphasis added).

Thus, *Gstaad* is fundamentally an improper rebate case with its operative facts arising prior to the Ocean Shipping Reform Act of 1998.

Last, I turn to the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, effective May 1, 1999. To briefly note the revisions that Congress made to the Shipping Act in the 1998 amendments and that are relevant herein:

- Section 2, Declaration of Policy, was amended by adding a new purpose of the Act; “to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.” 46 U.S.C. 40101(4) The meaning of this new “reliance on the marketplace” is made clear in the revisions to Section 8, set forth below.
- Section 8(c). Tariffs, was amended in two significant ways. First, certain contract “essential terms” that previously were required to be made available to the general public in published tariffs were now protected from public disclosure and further, the Commission was required to maintain such information as confidential. These newly confidential terms were (i) origin / destination pairs in through intermodal movements, (ii) line haul rate, (iii) service commitments, and (iv) liquidated damages for non performance, if any. Second, the statutory requirement that these four essential contract terms, together with the remaining published terms be offered and made “available to all shippers similarly situated” was expressly excised from the Act. *See* 46 U.S.C. § 40502.

Thus the meaning of “greater reliance on the marketplace” is clearly revealed to reference reliance on private one-on-one contract negotiation and private confidential contracting between parties in the shipping community. Further, we see revealed the express Congressional abandonment and rejection of (i) reliance on a tariff freight rate that is published in a public tariff format, (ii) the concept that such published tariff freight rate must be offered to any and all shipping parties, and (iii) that such publicly available and ascertainable tariff freight rate is the single and only freight rate that is permitted, by law, to be charged to any and all parties in the shipping community.

With the foregoing as foundation, I turn the focus to my two areas of disagreement first listed above: (i) allegation and proof of fraud or concealment as to the vessel operator common carrier and, (ii) fraud or concealment by Respondents upon competitor shippers and “impact on the competitive marketplace”. Remand Decision at 7.

A. Fraud or Concealment as to the Vessel Owner Common Carrier

In her Decision, the ALJ ruled on the basis of her analysis of the record evidence:

Seaboard Marine’s bills of lading list the shipper as “OMJ International Freight as agents,” the Consignee as “Island Cargo Services,” and states that “Charges, Including Freight Payable at: Destination by Island Cargo Services.” . . . It appears that respondents made no attempt to conceal Island Cargo’s role in the shipments.

Decision at 20 (emphasis added).

Following the Commission’s Remand, the ALJ made

further fact findings, BOE does not point to any specific admission regarding whether Respondent utilized an unjust or unfair means<sup>22</sup> or whether Respondent committed fraud or concealed their activities from the underlying common carrier or competing shippers.

Remand Decision at 7.

Further, I note that I find no reference in the record concerning the vessel common carrier, Seaboard Marine, that is responsive to issues of the carrier's knowledge, objection, acquiesce, or involvement in the shipments. There is no reference of inquiry, testimony, responses to interrogatories or any other form of record evidence on the alleged dishonorable and beguiling treatment that Seaboard Marine received from the Respondents in this matter.

Thus, the record does not support any finding that Respondent employed any device or means that were concealed from the view of the vessel common carrier. The Respondent's actions were there for the vessel common carrier to observe and to respond to in such manner as it deemed appropriate. Note that the *Open Bulk* court acknowledged that the fact that Union Camp was listed as the "shipper" when in fact the cargo was owned by other shippers was problematic; this listing was not used to achieve any freight rate charge that was lower than the contract rate.

---

<sup>22</sup> Recalling the above references to *ejusdem generis*, the rule of statutory interpretation that was called upon in the *Hohenberg Brothers* holding, there is nothing in the case record, *sub judice*, that discusses, much less supports a finding that the so named "accessing of a service contract" is sufficiently similar in nature to the specific list of prohibited acts listed in section 10(a)(1) so as to "be considered to come within the comprehensive final phrase 'or by 'any other unjust or unfair device or means.'" *Hohenberg Brothers*, 316 F.2d at 385. Without such averment, record evidence, discussion, analysis, and finding, BOE's case fails to meet the requirements of the statute.

At the outer edge of possible judicial review, Seaboard Marine might assert a common law contract claim for breach; however, upon inquiry of the record, I was informed that the subject contract did not contain a general prohibition on assignment.<sup>23</sup> As found in *China Ocean Shipping*, Seaboard Marine could claim that Respondent failed to meet its minimum commitment under the service contract in court adjudication; however, there is not a solid piece of meat or vegetable in the thin watery gruel offered as evidence of fraud or concealment as relates to the vessel owner common carrier.

B. Fraud or Concealment as to “Competing Shippers” or the “Competitive Marketplace”

Thus, the ALJ and the Majority move on to assert concealment from or fraud inflicted upon competing shippers. In the Remand Decision, the ALJ found that, “BOE does not point to any specific admissions regarding whether Respondents utilized an unfair or unjust means or whether Respondent committed fraud or concealed their activities from . . . competing shippers.” Remand Decision at 7. The ALJ continued her findings with the following factual findings and reasoning:

Nonetheless, by permitting Island Cargo to access discounted rates available through Respondents service contract, Respondents distorted the competitive marketplace. Proprietary shippers obtaining shipping quotes would presumably have been offered lower rates by Island Cargo than by competing NVOCCs who did not have access to the discounted rates in Respondents’ service

---

<sup>23</sup> While such fact is not in issue in this case, I would view a breach of non-assignment clause in a service contract as being most closely aligned with a contract law question that should be directed to a court of general jurisdiction. The holding in *China Ocean Shipping* could offer assistance in that something more than simple breach of a service contract is required in order to invoke section 10 of the Shipping Act.

contract. The reason Island Cargo could offer these lower rates was not ascertainable by competitors. Given this impact on the competitive marketplace, the evidence is sufficient to find that Respondent obtained transportation by “means of false billing, false classification, false weighting, false report of weight, false measurement, or any other unjust or unfair device or means” as required by the Shipping Act for a violation of Section 10 (a)(1).

*Id.*

In an attempt to stitch together inconvenient elements of the statute, the Majority relies on presumptions of facts that are not established by offers of evidence in the record. Including the citation above, examples follow:

- Discounted rates available through respondents’ service contract. Query: discounted as to what rate – the tariff rate or a hypothetically higher service contract rate that the other shippers would have been offered by the ocean carrier?
- Proprietary shippers . . . would presumably have been offered lower rates by Island Cargo than by competing NVOCCs who did not have access to the subject service contract. Query: Is this a purely naked factual assumption or is there evidence in the record to offer any support to this presumption?
- The Respondents dispossessed Seaboard of the ability to charge its proper rates. Query: would Seaboard agree that its tariff rate was the proper rate to charge all shippers who asked for freight service? Did Seaboard so testify? Did the Commission ask Seaboard to comment on any of these subjects?

- The existence of some of the essential terms of a service contract . . . is a matter of public record. Island Cargo's competitors [could have accessed the published tariff filings] such competitor could have determined that no service contract existed between Island Cargo and Seaboard and assumed that Seaboard's published tariff rates would be applicable to Island Cargo's shipments.<sup>24</sup> Query: is there any proffer of evidence in the record to indicate that any competitor, in fact, engaged in this sequence of hypothetical inquiries?

Since the Remand Decision and the majority opinion herein embrace speculation on evidence both within the record and elsewhere, I could speculate that Seaboard Marine, the vessel operating common carrier (VOCC), knew that the respondent did not itself own or control cargo as, during 2008, Respondent was both a licensed NVOCC and FF, and that as such, respondent would solicit for freight from whatever source. Perhaps the VOCC was unconcerned as a general matter as to where the cargo came from. As a matter of law, note that *Prince Line, Hohenberg, Pacific Far East lines, Open Bulk Cargo, and Rose International* all involve various situations where the vessel common carrier either had some knowledge of the activity, or further, engaged in knowing and actual participation. Those cases thus rely on the broader and generalized concept of fraud or concealment as to the competing shipper community. By comparison, *Universal Logistic Forwarding Co., Lt. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 325 (ALJ 2001), as

---

<sup>24</sup> See *Supra* note 12. “The existence of some of the essential terms of a service contract between two parties is a matter of public information. 46 U.S.C. § 40502(d). Island Cargo's competitors could have determined that no service contract existed between Island Cargo and Seaboard and assumed that Seaboard's published tariff rates would be applicable to Island Cargo's shipments.”

offered by BOE, involved a fact situation where a foreign NVOCC utilized a contract between a domestic NVOCC and a VOCC on hundreds of shipments without permission or any knowledge of the activity by the later two parties. Thus outright premeditated fraud and concealment as to both the domestic NVOCC and the VOCC was fully established in the record of those proceedings.

The last effort at sustaining the appearance of a steady navigating course through the prior Commission precedents is found in an innocuous footnote.

Although much cargo is shipped under confidential service contract rates negotiated by the parties, as authorized by OSRA . . . the rules requiring the publication of tariffs were not repealed by OSRA and ocean common carriers and NVOCCs must still publish tariffs for cargo not shipped pursuant to a service contract.<sup>25</sup>

The current commercial reality that this note obfuscates is that – not merely “much cargo” - but over ninety-five percent of cargo moving with vessel operators is under service contract. Virtually all traffic that moves under a NVOCC tariff is an individually negotiated spot move. Following agreement of the parties, the few essential terms are then published. The only reason that common carriers publish “place holder” public tariff rates is to comply with Commission rules. Subject to the most isolated of cases - there is no other commercial purpose or reason for such publically published tariff rates. The tariff rates are set at a high level so that all normal business can be conducted below such tariff ceilings. No informed reasonable commercial shipper looks to such tariff rates and considers them to be “proper rates”. On the NVOCC front, the Commission held in-depth public comment and hearings on NVOCC exemption to tariff rate publication and negotiated rate agreements. The clear consensus was that no one

---

<sup>25</sup> See *Supra* note 11.

looked to NVOCC published tariffs as commercial indicators of anything. Notwithstanding this current commercial reality, the majority's footnote on this subject does project an unmistakable blast of the Commission's horn that tariff rate publication is still the dominate rule of liner shipping in the United States and, further, that OSRA did not really change much of anything in the FMC's regulation of the commercial container shipping industry.

As discussed above, I find that the Shipping Act, as amended by OSRA in 1998, had the effect of legislatively repealing the foregoing legal theory of fraud or concealment as to competing shippers or the competitive marketplace. Pre OSRA, the cited cases faithfully followed the rubric of (i) legislatively mandating public publication of all rates, and, (ii) all shippers were entitled to equal treatment in that such published public rates were the only rates that a common carrier could lawfully charge.<sup>26</sup>

With a closing reference to the dissent in *Open Bulk*, I believe that Circuit Judge Johnson would reconsider his findings that the “. . . central policy concern behind the Shipping Act of 1916 was the prohibition of discrimination in the rates . . . [that each] tariff is required to reflect the one and only rate to be charged . . . [and] . . . if the carrier publishes the . . . rate in its tariff . . . [such rate would be] . . . equally available to all shippers.” 727 F.2d at 1066. I believe that the Judge would view the changes that

---

<sup>26</sup> See: *Prince Line*, (“(the unfair device) . . . destroyed that equality of treatment between shippers, which it was the primary purpose of the section . . . to maintain.” *Prince Line*, 55 F.2d at 1055; *Hohenberg Brothers*, (“unfair device operated) . . . in such a way that its competitors were unaware of what had transpired.” *Hohenberg Brothers*, 316 F.2d. at 385; *Pacific Far East Lines*, “. . . (unfair device effect) . . . is the lack of any means whereby any actual or potential competitors . . . could find out what (the) actual transportation costs were. Absent such knowledge, and without an arrangement providing them with exactly the same benefits . . . “*Pacific Far East*, 11 F.M.C. at 365; *Rose International*, (“unfair device operated) . . . in a way that their competitors would be unaware of what had transpired.” *Rose Int'l.*, 29 S.R.R. at 173.

Congress made to the 1916 Act – beginning in the Shipping Act of 1984 and then in the 1998 OSRA Amendments – as compelling an order to the helmsman to place the rudder hard to starboard and reverse course.

Based on the foregoing discussion, I find that the Respondents have not violated Section 10(a)(1) of the Shipping Act of 1984.