

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 12 – 01**

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**OC INTERNATIONAL FREIGHT, INC.,  
OMJ INTERNATIONAL FREIGHT, INC.  
AND OMAR COLLADO**

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**BRIEF UPON REMAND  
OF THE  
BUREAU OF ENFORCEMENT**

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# Table of Contents

|  |    |
|--|----|
| TABLE OF AUTHORITIES.....              | ii |
| I. RELEVANT PROCEDURAL BACKGROUND..... | 1  |
| II. ARGUMENT.....                      | 3  |
| A. Section 10(a)(1) Violations .....   | 4  |
| 1. Request for Admissions.....         | 5  |
| 2. Benefit to Respondents.....         | 6  |
| 3. Unjust or Unfair Means.....         | 8  |
| 4. Knowing and Willful Standard.....   | 11 |
| B. The Amount of Civil Penalty.....    | 13 |
| III. CONCLUSION.....                   | 16 |
| Certificate of Service.....            | 17 |

## TABLE OF AUTHORITIES

### Cases

|   |            |
|---|------------|
| <u>Anderson International and Owen Anderson – Possible Violations of Section 8(A) and 19 of the Shipping Act of 1984, Docket No. 07-02, Order Affirming in Part, Reversing in Part, and Vacating in Part Initial Decision on Remand (June 25, 2013)</u> ..... | 16, 18     |
| <u>Ever Freight International Ltd., et al – Possible Violations, 28 S.R.R. 329 (ALJ 1998, admin. final June 26, 1998)</u> .....   | 14         |
| <u>Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 29 SRR 1381 (ALJ 2003)</u> .....  | 7          |
| <u>Hohenberg Brothers Co. v. Federal Maritime Commission, 316 F.2d 381 (D.C. Cir. 1963)</u> .....   | 11, 12     |
| <u>Kin Bridge Express, Inc. et al – Possible Violations, 28 S.R.R. 984 (ALJ, 1999)</u> .....  | 14         |
| <u>Martyn Merritt, AMG Services, et al. - Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 26 S.R.R. 663 (FMC 1992)</u> .....  | 14         |
| <u>Misclassification and Misbilling of Glass Articles, 6 F.M.B. 155 (1960)</u> .....  | 14         |
| <u>Pacific Champion Express Co., Ltd. - Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397 (FMC 2000)</u> .....  | 13         |
| <u>Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., Connell Bros., Co., Ltd. and Advance Mill Supply Corp., 11 F.M.C. 357 (1968)</u> .....   | 11, 14     |
| <u>Petition of National Customs Brokers and Forwarders Association of America , 28 S.R.R. 1042 (FMC, 1999)</u> .....  | 9          |
| <u>Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053 (2<sup>nd</sup> Cir 1932)</u> .....  | 12         |
| <u>Rose Int’l, Inc. v. Overseas Moving Network Int’l Ltd., 29 S.R.R. 119 (FMC 2001)</u> .....   | 7, 11      |
| <u>Shipman Int’l (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 C.F.R. Part 514, 28 S.R.R. 100 (ALJ 1998)</u> .....  | 14         |
| <u>Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10 (b) (1) of the Shipping Act of 1984, 29 S.R.R. 665 (FMC 2001)</u> .....   | 13, 14, 17 |
| <u>Trans-Ocean Pacific Forwarding, Inc. – Possible Violations of the Shipping Act of 1984, 27 S.R.R. 409 (ALJ 1995)</u> .....   | 13         |
| <u>Union Petroleum Corp. v. United States, 376 F.2d 569 (10<sup>th</sup> Cir. 1967)</u> .....   | 14         |

### Statutes

|  |               |
|--|---------------|
| 46 U.S.C. § 40901 (Section 19(a)).....           | <i>passim</i> |
| 46 U.S.C. § 40902 (Section 19(b)) .....          | <i>passim</i> |
| 46 U.S.C. § 41302.....                           | 2             |
| 46 U.S.C. § 41304.....                           | 2             |
| 46 U.S.C. § 41102 (a) (Section 10(a)(1)).....    | <i>passim</i> |
| 46 U.S.C. § 41104(11).....                       | 6             |
| 46 U.S.C. § 41104 (12).....                      | 6             |
| 46 U.S.C. §§ 40501, 40102(a) and 40901-902 ..... | 10            |
| 46 U.S.C. §41102(a).....                         | 2             |

### Rules

|                               |    |
|-------------------------------|----|
| 46 C.F.R. § 515.31(f).....    | 10 |
| 46 C.F.R. § 530.6.....        | 6  |
| 46 C.F.R. § 515.31(e).....    | 10 |
| 46 C.F.R. § 530.5 (6)(a)..... | 10 |
| 46 C.F.R. § 502.207.....      | 2  |

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Pursuant to the Presiding Officer's Order of July 24, 2013, the Bureau of Enforcement (BOE) files its Brief Upon Remand addressing the issues vacated by the Commission's Order Remanding for Further Proceedings, served on July 22, 2013 (Remand Order).

**I. RELEVANT PROCEDURAL BACKGROUND**

This proceeding was instituted by a combined Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing, served April 2, 2012, pursuant to sections 11

and 19 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. §§ 40901, 40902, 41302 and 41304.<sup>1</sup>

On March 26, 2013, the Administrative Law Judge (ALJ) issued her Initial Decision. While holding that Respondents violated section 19 by acting as an unlicensed and unbonded ocean transportation intermediary for the period after January 15, 2010, the ALJ concluded that the evidence did not support findings that Respondents violated section 10(a)(1) of the Shipping Act, 46 U.S.C. §41102(a). The ALJ affirmed BCL's letter of intent to deny OC and Mr. Collado an OTI license, issued a cease and desist order with respect to all Respondents, and assessed a civil penalty of \$60,000 jointly and severally against all Respondents for 14 knowing and willful violations of section 19 (a) and (b), 46 U.S.C. §§ 40901 and 40902.

On April 17, 2013, BOE filed exceptions seeking Commission review. BOE asserted that (1) the ALJ erred in finding that Respondents did not violate section 10 (a)(1) by discounting Respondents' admissions under 46 C.F.R. § 502.207; by incorrectly assessing whether Respondents employed concealment of their unlawful access scheme; by incorrectly finding that Respondents did not obtain transportation; and by incorrectly finding that Respondents did not act knowingly and willfully; the ALJ failed to enter a specific finding that Respondents' violations of section 19 were committed knowingly and willfully; and (3) the ALJ erred in

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<sup>1</sup> The Order directed that an adjudicatory proceeding be instituted to determine:

- (1) Whether to affirm the Bureau of Certification and Licensing's (BCL) November 17, 2011 denial of the Ocean Transportation Intermediary (OTI) application of OC International Freight, Inc. (OC) and its qualifying individual, Omar Collado;
- (2) Whether OC International Freight, Inc. (OC), OMJ International Freight, Inc. (OMJ) and/or Omar Collado violated Section 10(a)(1) of the Shipping Act, 46 U.S.C. § 41102, by knowingly and willfully obtaining ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting other persons to unlawfully access OMJ's service contracts;
- (3) Whether OC, OMJ and/or Omar Collado violated Section 19 (a) and (b) of the Shipping Act, 46 U.S.C. §§40901 and 40902, by acting as an ocean transportation intermediary without a license or evidence of financial responsibility;
- (4) Whether, in the event violations of sections 10 or 19 were found, civil penalties should be assessed against OC, OMJ and/or Omar Collado, and, if so, the amount of penalties to be assessed; and,
- (5) Whether, in the event violations are found, appropriate cease and desist orders should be issued.

failing to assess an adequate civil penalty. Respondents filed exceptions on April 24, 2013, to which BOE replied on May 16, 2013.

On July 22, 2013, the Commission issued an Order Remanding for Further Proceedings in which it: (1) adopted the ALJ's findings of fact; (2) vacated the ALJ's section 10(a)(1) determination; (3) upheld the ALJ's findings of violations under Section 19; (4) upheld the issuance of a cease and desist order and letter of intent to deny OC's license application; and (5) vacated the ALJ's assessment of a civil penalty in the amount of \$60,000. The proceeding was accordingly remanded to the ALJ for further adjudication "consistent with this Order." July 22 Order, at 27.

On July 24, 2013, the ALJ directed BOE to submit a further brief "addressing only the issues remanded by the Commission." July 24 Order, at 1. The ALJ elaborated that only the issues vacated, namely the section 10(a)(1) violations and the level of the assessed civil penalty, will be revisited on remand. The parties were directed not to brief issues affirmed by the Commission. *Id.*

## **II. ARGUMENT**

On exceptions, the Commission vacated the ALJ's holdings with respect to key components of the ALJ's determinations as to the section 10(a)(1) findings and the corresponding civil penalties to be assessed for both the Section 10 and 19 violations. In light of BOE's exceptions relative to the section 10(a)(1) violations, the Commission addressed several aspects of the ALJ's analysis and vacated the ALJ's determination thereunder. The Commission then remanded with directions to the ALJ to reevaluate (1) whether, consistent with previous Commission adjudications regarding the meaning of "knowingly and willfully" under the

Shipping Act, Respondents should be found to have violated section 10(a)(1); (2) the proper weight to be accorded to Respondents' admissions; (3) whether, consistent with previous Commission adjudications, it must be shown that the Respondents, as opposed to some other person, accrued a benefit from the unfair or unjust device or means utilized in obtaining the transportation; and, (4) whether, consistent with previous Commission adjudications, Respondents should be found to have engaged in fraud or concealment of an unfair device or means by falsely certifying in signing service contracts that OMJ was acting as NVOCC, when it intended to act thereafter only as an ocean freight forwarder. Upon determining whether violations of section 10(a)(1) occurred and the knowing and willful nature of the section 19 violations, the ALJ was directed also to revisit the amount of any civil penalties to be assessed, applying the criteria of section 13 of the Shipping Act and Commission guidance as to recommended civil penalties.

Consistent with the approach employed by the Commission itself, we turn first to the section 10(a)(1) issues.

A. Section 10(a)(1) Violations

Upon its review of BOE's exceptions, the Commission identifies four issues under its section 10(a)(1) discussion. Since the ALJ's section 10(a)(1) holdings previously assigned little or no weight to the Respondents' admissions, BOE first addresses the dispositive effect of these admissions upon evaluating the record.

*1. Request for Admissions*

After citing Commission rule 46 C.F.R. 502.207, the July 22 Remand Order makes clear that “[i]n light of Respondents’ failure to respond, BOE’s requests for admissions are conclusively established.” July 22 Remand Order at 16-17. The Commission also noted that it is “inappropriate to discount Respondents’ admissions because they were acting pro se.” Id at 16.

While additive to the ALJ’s many findings of fact (now affirmed by the Commission), evidence produced by BOE in the form of various Requests for Admission is dispositive of Respondents’ activities, knowledge and intent in facilitating Island Cargo’s unlawful access to service contracts. Indeed, Respondents’ admissions go to the heart of BOE’s case: these admissions conclusively establish that Respondents certified to Seaboard that they would be acting as an NVOCC, RFA 11, 138, 139; that Respondents knew that OMJ was not acting as an NVOCC on the Seaboard shipments since OMJ was not issuing a bill of lading or collecting ocean freight, RFA 14, 16, 78, 79, 140; that Respondents knew that Island Cargo was acting as an NVOCC with respect to the Seaboard shipments, including issuing its own bill of lading and collecting ocean freight, RFA 15, 17; that Respondents knowingly assisted Island Cargo to gain access to the rates and terms of its service contract, RFA 42, 104, 148, 171, 173; and that Respondents knew these actions were unlawful under the Shipping Act. RFA Nos. 42, 43, 104, 105, 140, 148, 149, 171, 172; BOE 165, 173, 178 and 179. Both at the time of executing Seaboard service contract No. 2008-00682, and at the time of all relevant shipments to be accepted by Seaboard thereunder, Mr. Collado and OMJ had represented to Seaboard that they would be the shipper “acting as Non-vessel Operating Common Carrier(s),” BOE 185. Such continuing legal status was key to getting Seaboard to sign the service contract and inducing Seaboard thereafter to perform any transport of cargo on behalf of the putative shipper signatory.

See, e.g. 46 U.S.C. § 41104 (12) (prohibiting entering into a service contract with an unbonded NVOCC), and § 41104(11) (prohibiting transporting cargo on behalf of an unbonded NVOCC). See also 46 C.F.R. § 530.6.

Tellingly, Mr. Collado has never denied his actions<sup>2</sup> or his intent in seeking to facilitate such access for Island Cargo.

Whereas Respondents' admissions have now been recognized by the Commission as "conclusively established" for purposes of the instant proceedings, the Commission has directed the ALJ to give to those admissions full effect in determining whether Respondents violated section 10 (a)(1).

## *2. Benefit to Respondents*

The ALJ previously found that it was not established that Respondents received any benefit from their arrangements with Island Cargo, March 26 Initial Decision, at 21, noting that it is "not clear" that permitting others to obtain transportation for less than applicable charges is a violation of section 10(a)(1). Upon exceptions noting numerous cases reflecting the historical breadth of section 10(a)(1), the Commission observed that "it appears that the ALJ's reading of the prohibitions contained in section 10(a)(1) may have been too narrow." July 22 Remand Order, at 18. The Commission thus held that "finding a violation of Section 10(a)(1) does not necessarily require a finding that a Respondent, as opposed to some other person, enjoyed a benefit." *Id.*

BOE incorporates by reference herein those arguments and caselaw presented in BOE's

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<sup>2</sup> Upon his initial brief, Mr Collado concedes as much: "It is undisputed that Island Cargo Services was provided access to OMJ's service contract with Seaboard Marine." Respondents' Brief, at 5. Respondents' earlier prehearing statement is likewise consistent: "The facts are not in dispute as to OC and OMJ permitting Island Cargo Services to issue the applicable house bill." OC International Freight Inc., OMJ International Freight Inc. and Omar Collado Rule 95 Statement dated August 28, 2012, at 3.

Exceptions to the Initial Decision, submitted April 17, 2013 at 15-17. Based on those precedents, cited also by the Commission in its July 22 Remand Order (at 17-18), BOE submits that section 10(a)(1) is not so limited that the “benefit” of such unjust device must be received directly by Respondents, rather than passing to any other person. In Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 29 SRR 1381 (ALJ 2003), the Commission found a violation where the respondent’s benefit, as an intermediary facilitating unlawful access on behalf of other NVOCCs, was measured by Hudson’s fee of \$20 per container shipped and the otherwise intangible benefit of avoiding a dead freight penalty, 29 S.R.R. at 1383. Likewise, in Rose Int’l, Inc. v. Overseas Moving Network Int’l Ltd., 29 S.R.R. 119, 173 (FMC 2001), the benefit received by members of a shippers’ association was the ability to obtain more favorable rates and more favorable service contracts, through allowing unlicensed and unbonded NVOCC members to access its service contracts. The Commission’s July 22 Remand Order adopts that broader view of the reach of section 10(a)(1). *Id.* at 18.

BOE submits that Respondents *both* obtained a benefit themselves *and* allowed another person (Island Cargo) to obtain a benefit through the unlawful access to service contracts. Respondents devised a scheme to provide access to its service contracts to an entity that otherwise would have been unable to access rates or transportation services contained therein. For its part, Respondents secured the ability to provide services for the cargo so shipped and was paid for services on cargo that it otherwise may not have secured; and gained the intangible benefit of not incurring common carrier liability as an NVOCC. On the 24 shipments identified in the admissions as B1-24, Respondents benefitted between \$750 and \$5,278.30 per shipment, for a total of \$35,390.05, which was invoiced to and paid by Island Cargo. RFA Attachments

B1-24, at BOE 190-434. For the nineteen of these twenty four shipments identified by AR Margolis in which freight was obtained at less than the applicable rate, Island Cargo paid Respondents \$23,691.75. Margolis Affidavit, at 4-7; BOE 137-140; 145. When measured against the *de minimus* benefit condemned by the Commission in Hudson Shipping (Hong Kong) Ltd., (\$20.00 per shipment), Respondents secured direct and indirect benefits in the way of fees, services and an assured stream of future (albeit illicit) NVOCC cargo from Island Cargo sufficient to sustain findings of section 10(a)(1) violations. Island Cargo, for its part, secured the benefit of obtaining transportation and accessing lower rates than would otherwise have been applicable.

### 3. *Unjust or Unfair Means*

After concurring with the ALJ that a necessary ingredient of an unjust or unfair means is fraud or concealment (July 22 Remand Order at 18), the Commission diverges from the ALJ's assessment in holding that the fraud which must be shown "may be either to the underlying common carrier or to competing shippers." Id. at 20. Concluding that "the ALJ did not appear to consider the potential fraud committed by OMJ who, when signing its service contracts, certified that it was acting as an NVOCC for shipments... but then acted only as a freight forwarder. Nor does it appear the ALJ considered any fraud against other shippers," Id. at 20, the Commission vacated and remanded to the ALJ for a further determination of whether violations of section 10(a)(1) occurred.

When Mr. Collado signed both Seaboard service contracts, he certified that the shipper signatory (Respondent OMJ) would be acting as NVOCC. RFA 11, 45, 139; I.D. at 18. As Respondents' admissions conclusively establish, Respondents knew that OMJ was not then

acting as an NVOCC, RFA 140, BOE 178; and that Respondents knowingly, and directly, assisted Island Cargo to gain access to the rates and terms of its service contract, RFAs 42, 104, 148, 171; BOE 165, 173, 178. Viewed as a whole, Respondents deceived Seaboard by intentionally signing a service contract representing that they would be acting as an NVOCC while knowing full well that they would not meet the ongoing qualification of remaining a shipper<sup>3</sup> with respect to those shipments actually transported under such contract. Respondents knew they would be acting only as a freight forwarder for those shipments, RFA 16, 18-43, 140-141, 163-170; and that Island Cargo would instead be acting as the NVOCC for all such shipments. RFA 17, 52.

Respondents continued these practices over multiple years and through multiple service contracts, despite knowing that allowing Island Cargo to access its service contracts was unlawful under the Shipping Act. RFAs 43, 105, 149, 172, at BOE 165, 173, and 179. Respondents continued these practices even after the meeting with Mr. Margolis in which Mr. Collado stated that he understood that such a device was unlawful under the Act. FF 37. Not only was this practice fraudulent – but Respondents employed this device knowing plainly that it was a violation of the Shipping Act.

Respondents' false certification is not only deceptive; Mr. Collado knowingly violated Commission regulations in so doing. The Commission requires shippers to certify their shipper status on service contracts pursuant to 46 C.F.R. § 530.5 (6)(a). While falsely certifying shipper status is alone a violation of Commission regulations, Respondents retained an ongoing legal

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<sup>3</sup> Under 46 C.F.R. § 530.3(r), the term shipper “means a cargo owner; the person for whose account the ocean transportation is provided; the person to whom delivery is to be made; a shippers' association; or an NVOCC that accepts responsibility for payment of all applicable charges under the service contract.” An entity acting as forwarder does not qualify to execute, or perform under, a service contract. Docket No. P5-98, Petition of National Customs Brokers and Forwarders Association of America, 28 S.R.R. 1042, 1050-51 (FMC, 1999).

obligation under the OTI regulations not to prepare or assist in preparation of any paper or document concerning an OTI transaction which it has reason to believe is false or fraudulent; and not to impart to a “principal, shipper, common carrier or other person” false information relative to any OTI transaction, 46 C.F.R. § 515.31(e). To the extent that the licensee had reason to believe the true shipper (Island Cargo) has not complied with U.S. laws,<sup>4</sup> or has made any error or misrepresentation with respect to a shipment, OMJ and Mr. Collado were under an ongoing obligation to “decline to participate” in such transactions, 46 C.F.R. § 515.31(f). The present case underscores why Respondents’ device is unjust and unlawful under the Shipping Act and Commission regulations. It is not a mere breach of contract, whereby Seaboard arguably had notice of OMJ’s actions to facilitate access to Seaboard’s contract rates; it is a violation of Commission regulations and the Shipping Act for Respondents to falsely certify shipper status and to deceptively fail to remedy (or remove themselves) from such transactions. Id.

Separate and apart from deceiving Seaboard when signing the service contract and feigning OMJ’s performance thereunder, Respondents’ device also concealed the true nature of these shipping transactions from other shippers and stifled competition in doing so – yet another aspect of Respondents’ concealment. The Commission has long recognized the principle that section 10(a)(1) (formerly section 16 of the Shipping Act, 1916) was “aimed at protecting competing shippers and carriers from shippers who attempt to obtain (or who succeed in obtaining) transportation at reduced rates....” Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., Connell Bros., Co., Ltd. and Advance Mill Supply Corp., 11 F.M.C. 357, 362 (1968). In Hohenberg Brothers Co. v. Federal Maritime Commission, 316 F.2d 381, 385 (D.C. Cir. 1963), while affirming a Commission decision, the Court noted that in enacting

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<sup>4</sup> As one such law of the United States, violations of sections 8, 10(a)(1) and 19 of the Shipping Act would be included. See, 46 U.S.C. §§ 40501, 40102(a) and 40901-902.

section 16, “Congress was concerned both with protection of carriers against unscrupulous shippers, and of honest shippers against unscrupulous competitors, acting independently or in collusion with a carrier.” Id. at 384-85. Similarly, in Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053, 1055 (2<sup>nd</sup> Cir 1932), Judge Learned Hand writes that where the acts of a carrier render its competitors unaware of what transpired, the “equality of treatment” between shippers is destroyed. Judge Hand observed that such equality was one of the primary purposes of the Act and that concealment from shippers was one of the evils that Congress sought to address in enacting section 16. Id.

The equality of shippers, by and through the impacts on competition of service contract abuse, is no less of a concern today than when the Shipping Act of 1916 was first passed. In Rose Int’l v. Overseas Moving Network Int’l Ltd., 29 S.R.R. 119, 173 (FMC 2001), the Commission found that the respondents’ device of allowing access to service contracts was done “in a way that their competitors would be unaware of what had transpired” and found that the concealment amounted to an unjust or unfair means. Id., citing Hohenberg Brothers Co., 316 F.2d at 385. Here, shippers and the Respondents’ licensed OTI competitors would be unaware that Respondents were providing improper access to the Seaboard service contract, and that such access allowed an unbonded and untariffed OTI to compete unfairly with its licensed U.S. counterparts.

#### *4. Knowing and Willful Standard*

Whereas the ALJ initially determined that Mr. Collado knew that a foreign unbonded NVOCC should not be permitted to access OMJ’s service contracts, Respondents did not understand “that permitting such access actually violated the Act .... and, therefore, Mr.

Collado's behavior was not knowing and willing," July 22 Remand Order, at 11, the Commission found this holding inconsistent with previous Commission determinations regarding the statutory meaning of knowingly and willfully. *Id.*, citing Trans-Ocean Pacific Forwarding, Inc. – Possible Violations of the Shipping Act of 1984, 27 S.R.R. 409 (ALJ 1995); Pacific Champion Express Co., Ltd. - Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397 (FMC 2000); and Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10 (b) (1) of the Shipping Act of 1984, 29 S.R.R. 665 (FMC 2001). The Commission thus vacated the ALJ's prior holding and directed that Respondents' activities be evaluated employing "the knowing and willful standards set forth in the above-cited cases." July 22 Remand Order, at 14.

The Commission has determined that the "term 'willfully' means that a respondent "purposely or obstinately intended to perform the unlawful act not necessarily that it did so with the intent of maliciously breaking the law." Shipman Int'l (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 C.F.R. Part 514, 28 S.R.R. 100, 109 (ALJ 1998). Moreover, an NVOCC is obligated to "educate itself through normal business resources, and repeated failure to do so may indicate that it is acting 'willfully and knowingly' within the meaning of the statute." Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10 (b) (1) of the Shipping Act of 1984, *supra*, 29 S.R.R. at 683-84.<sup>5</sup>

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<sup>5</sup> The Commission long ago rejected the concept that the phrase knowing and willful entails "...actual or constructive knowledge that the requirements of the statute were being disregarded. Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement." Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., et al., 11 F.M.C. 357, 363-364 (1968). See also Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10<sup>th</sup> Cir. 1967) ("[T]he term 'knowingly' imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited.").

The record unambiguously shows that Respondents, at the very least, purposely intended to perform the acts which amount to a violation. According to FF 37, “Mr. Collado stated that he understood that OMJ was not in compliance regarding allowing Island Cargo to utilize his service contracts.” This statement plainly meets the Commission’s test for knowing and willful. See Misclassification and Misbilling of Glass Articles, 6 F.M.B. 155, 160 (1960) (“it was not necessary . . . that there should be an intentional violation of the law, but that purposely doing a thing prohibited by the statute amounted to an offense.”).

But there is more. The ALJ found that Mr. Collado certified that OMJ was acting as an NVOCC on the Seaboard service contract. FF 23. However, Respondents’ admissions conclusively establish that “Mr. Collado knew that OMJ was not acting as an NVOCC.” RFA 140, BOE 178. Despite such knowledge on the part of Mr. Collado, Respondents’ admissions conclusively establish that Respondents thereafter knowingly assisted Island Cargo to gain access to the Seaboard service contract, RFAs. 42, 104, 148, 171; BOE 165, 173, 178 and 179, and that Respondents knew that such access was unlawful under the Shipping Act. RFAs. 43, 105, 149, 172, at BOE 165, 173, 178 and 179.

BOE submits that the record, inclusive of Respondents’ admissions, more than adequately satisfies BOE’s burden of proof in establishing violations of section 10(a)(1) of the Shipping Act. In contrast, Respondents have not proffered a single piece of evidence which refutes their admissions.

#### B. The Amount of Civil Penalty

Upon reviewing whether violations of section 10(a)(1) occurred and the knowing and willful nature of both section 10 and 19 violations, the Commission remanded the issue of the

adequacy of the civil penalty with instructions to the ALJ to “revisit the amount of the civil penalty imposed in light of any changes in the amount and types of violations found, and, pursuant to those findings, apply the criteria of Section 13(c) and the Commission’s rules for recommended civil penalties....” July 22 Remand Order at 23. For reasons of brevity, BOE hereby incorporates by reference its discussion of the case law and civil penalty factors enumerated in BOE’s Opening Brief at 39-48, and in its Exceptions at 22-28.<sup>6</sup>

BOE submits that the Shipping Act contemplates that certain violations are exponentially more serious than others and therefore should be subject to a much higher penalty. Thus, a two-tiered range of penalties is provided – currently up to \$8,000 for each violation or, if knowingly and willfully committed, up to \$40,000 per violation.<sup>7</sup> In a case handed down since the Initial Decision was issued, the Commission observed “[a]lthough there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6000 in this case.” Anderson International and Owen Anderson – Possible Violations of Section 8(A) and 19 of the Shipping Act of 1984, Docket No. 07-02, Order Affirming in Part, Reversing in Part, and Vacating in Part

<sup>6</sup> The Commission has consistently addressed the twin Congressional purposes of deterrence and compliance when imposing civil penalties. Pacific Champion, 28 S.R.R. at 1404-1405, (the applicable statutory factors include “the need to send an appropriate message of deterrence”); Kin Bridge Express, Inc. et al – Possible Violations, 28 S.R.R. 984, 994 (ALJ, 1999) (“[t]he instant task is to fix civil penalties that will send a message of punishment and deterrence”); Ever Freight International Ltd., et al – Possible Violations, 28 S.R.R. 329, 335 (ALJ 1998, admin. final June 26, 1998); and Martyn Merritt, AMG Services, et al. - Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 26 S.R.R. 663, 664 (FMC 1992); Stallion Cargo, 29 S.R.R. at 681, and Portman Square Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 85 (ALJ 1998).

BOE notes that in consideration of the enumerated factors, the Initial Decision states that “[t]here is no evidence that any member of the shipping public has been harmed.” I.D. at 33. Except as found in the plain language of the statute or the Commission’s regulations, the ALJ should decline to embellish upon the prescribed civil penalty factors. Thus, the ALJ need not, and should not as a matter of law, consider such extraneous factors as whether or not there were problems resulting in harm to the shipper. Stallion Cargo, 29 S.R.R. at 678-679.

<sup>7</sup> Pursuant to statutory authority found at 28 U.S.C. 2461, the Commission periodically adjusts the penalty amounts set forth in 46 U.S.C. 41107. Under the Commission’s regulations at 46 C.F.R. Part 506, the Commission adjusted the maximum levels to \$6,000 and \$30,000, effective August 15, 2000. In 2009, the agency increased these amounts to \$8,000 and \$40,000, respectively. See 74 FR 38114-38116 (July 31, 2009).

Initial Decision on Remand, at 35 (June 25, 2013). The Commission then assessed a civil penalty for knowing and willful violations that was not less than the maximum for violations that were not knowing and willful – a logical demarcation and sound policy. *Id.*

Consistent with the Commission’s most recent pronouncement in *Anderson International*, and based on the timing of the violations and the updating of penalty amounts (as addressed *supra* at p. 14, fn. 7), BOE urges that any penalty for a knowing and willful violation should be not less than \$6,000 for the section 10 violations and \$8,000 for the section 19 violations under the circumstances presented here.<sup>8</sup>

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<sup>8</sup> As the section 10 violations occurred between May 9, 2008 and March 11, 2009 (BOE 192-434), the previous maximum level of \$6,000 would apply to these violations while the \$8,000 level is applicable for the section 19 violations, which occurred between January 26, 2010 and June 8, 2010 (BOE 470-757).

### **III. CONCLUSION**

For the foregoing reasons, BOE respectfully requests that the ALJ: (1) find that Respondents Collado, OC and OMJ acted willfully and knowingly in violation of section 10(a)(1) of the Shipping Act in assisting Island Cargo in unlawfully accessing the rates and terms of Seaboard Service Contract No. 2008-00682 in 19 instances; and (2) assess an appropriate civil penalty against Respondents Collado, OC and OMJ fully commensurate with the knowing and willful character of Respondents' violations of sections 10(a)(1) of the Shipping Act in an amount that is not less than \$6,000 nor more than \$30,000.00 per violation; and a penalty that is fully commensurate with the knowing and willful character of Respondents' violations of sections 19 of the Shipping Act that is not less than \$8,000 nor more than \$40,000.

Respectfully submitted,



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August 14, 2013

**CERTIFICATE OF SERVICE**

I certify that on this 14<sup>th</sup> day of August 14, 2013 the foregoing Bureau of Enforcement's Brief Upon Remand has been served upon the Respondents by electronic mail.

Signed in Washington D.C. on August 14, 2013.

  
Cory R. Cinque