

**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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**BUREAU OF ENFORCEMENT'S  
REMAND REPLY BRIEF**

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September 30, 2013

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The Bureau of Enforcement (BOE) hereby submits its Remand Reply Brief pursuant to the Administrative Law Judge's Order served September 12, 2013.

**I. Relevant Procedural Background**

On July 22, 2013, the Commission issued an Order Remanding for Further Proceedings, affirming certain findings and conclusions of the Administrative law Judge (ALJ), while vacating and remanding for further adjudication issues relating to section 10(a)(1) violations and the amount of penalty to be assessed herein.

On July 24, 2013, the ALJ directed the parties to submit a further brief "addressing only the issues remanded by the Commission." Order Scheduling Remand Briefs, p. 1. The parties were directed not to brief issues already affirmed by the Commission. *Id.* BOE filed its Brief Upon Remand on August 14, 2013, and Respondents filed their Brief on September 4, 2013.

On September 5, the ALJ issued an Order Regarding Oral Argument, scheduling a telephonic oral argument and specifying that the parties should be prepared to answer questions

regarding both the legal analysis and factual basis of their cases. On September 9, 2013, BOE filed a Motion seeking clarification of the specific legal and factual questions to be answered at oral argument. Respondents did not oppose this motion. Nonetheless, BOE's motion was denied on September 12, 2013.

Oral argument was held by conference call on September 18, 2013.

## **II. Discussion**

At the September 18, 2013 oral argument, several specific factual and legal issues were raised by the ALJ which warrant further discussion, as requested by the ALJ.<sup>1</sup> In order to most directly respond to the issues raised by the ALJ, BOE identifies below the issues presented by the ALJ for additional response:

- a. Provide a chart identifying the amounts invoiced by Respondents to Island Cargo for the shipments identified as Exhibit Nos. B1-B24 in BOE's Requests for Admissions*

The requested chart is attached hereto as Attachment A. The chart identifies the BOE exhibit number relating to that shipment, the page number in the record where the invoice(s) appear, the date of the invoice(s), the amount of the invoice(s), and whether, on that specific shipment, freight was obtained at less than the otherwise applicable rate. As further discussed at oral argument, BOE's chart covers all 24 shipments documented in BOE's Exhibit B, albeit that BOE asserts section 10(a)(1) violations only as to 19 of the cited shipments, Exhibits B-1, B-2,

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<sup>1</sup> The ALJ also requested submission of additional information, which was consented to by all parties. Oral Argument Tr. p. 47. The additional information was submitted, without objection, on September 20, 2013.

and B-8 thru B-24.<sup>2</sup> The amount of the invoice to Island Shipping corresponds to the tangible monetary benefits which Respondents sought to exact for their participation in a scheme of providing unlawful access to their service contracts.<sup>3</sup>

The last column (freight otherwise applicable) is significant in that it identifies those shipments for which the freight rate obtained was less than the rate that would otherwise be applicable, thereby constituting violations of section 10(a)(1). For shipments B-3 through B-7, the rate obtained was not less than the otherwise applicable rate; BOE is not seeking violations on those shipments. AR Margolis' affidavit at ¶11 and the corresponding chart on record page BOE 145, identify the basis for calculating the specific rate differential enjoyed by Island Shipping on the 19 shipments.

Accordingly, the evidence demonstrates that Respondents directly and indirectly benefitted on each of 19 specified shipments for which they allowed Island Cargo to access their service contract.

- b. Does the March 9, 2009 meeting between AR Margolis and the Respondents have any bearing on the knowing and willful character of the Respondents' activities on the B-1 through B-24 shipments? Does the record evidence indicate that Respondents altered their shipping practices as of that date so as to conform to the requirements of the Shipping Act?*

The March 9, 2013 meeting between AR Margolis and the Respondents does nothing to

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<sup>2</sup> BOE notes that the total amount identified in the invoices is slightly higher than the sum previously identified by BOE in our Remand Brief. The reason for this variation is that additional invoices to Island Shipping, inadvertently overlooked in our prior brief, were identified in the 5 shipment files for which BOE does not seek findings of section 10(a)(1) violations, i.e. Exh. B-3, B-4, B-5, B-6 and B-7. Similarly, as a matter of a mathematical correction, the sum identified as the amount invoiced on the 19 shipments which BOE submits as violations, amounts to \$70.00 more than previously reported in our Remand Brief, i.e. \$37,675.05 - \$13,913.30 (sum of all invoices for B-3 thru B-7) = \$23,761.75. The Remand Brief had previously reported this sum as \$23,691.75.

<sup>3</sup> At oral argument, the ALJ questioned whether the invoices were actually paid by Island Cargo. Handwritten notes on the invoices indicate that each was marked "Paid."

alter the knowing and willful nature of Respondent's activities prior to that meeting. Respondents' admissions conclusively establish that, at the inception of Seaboard service contract no. 2008-00682, Respondents:

- certified to Seaboard that they were acting as an NVOCC, RFA 11, 138, 139;
- knew that OMJ would not be acting as an NVOCC on shipments pursuant to the Seaboard service contract, RFA 14, 16, 78, 79, 140;
- knew that Island Cargo would be acting as an NVOCC, RFA 15, 17;
- knowingly assisted Island Cargo to gain access to the rates and terms of the Respondents' service contract, RFA 42, 104, 148, 171, 173; and
- knew that doing so was unlawful under the Shipping Act, RFA 43,105, 149, 172, 174.

*See also*, BOE's exceptions at p. 7 and BOE's Remand Reply Brief at 5. These admissions conclusively establish that the Respondents knowingly and willfully engaged in conduct that was a violation of section 10(a)(1). The March 9, 2009, meeting with AR Margolis serves as independent evidentiary support for these admissions in that Mr. Collado "stated that he understood that OMJ was not in compliance...." AR Margolis' Affidavit at ¶12.

The knowing and willful standard set forth in the Commission's Remand Order requires only that the Respondents intentionally perform the acts in question, not that they *know* that what they were doing was a violation of the Shipping Act.<sup>4</sup> Order Remanding for Further Proceedings, at 11-12, citing *Trans-Ocean Pacific Forwarding Inc. – Possible Violations*, 27 S.R.R. 409, 412 (ALJ, 2005); *Pacific Champion Express Co. Ltd. – Possible Violations*, 28 S.R.R. 1397, 1403 (FMC 2000); and *Stallion Cargo Inc. – Possible Violations*, 29 S.R.R. 665, 678 (FMC 2001). AR Margolis' advice to Respondents did not and could not impact whether

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<sup>4</sup> BOE hereby specifically incorporates by reference its discussion of the knowing and willful standard in its Remand Brief at p. 11-13, as well as in BOE's Exceptions at p. 18-20.

the prior activities were, in fact, a violation. See, e.g. *Shipman Int'l (Taiwan) Ltd. – Possible Violations*, 28 S.R.R. 100, 109 (ALJ 1998) in which it was found that respondent “purposely or obstinately intended to perform the unlawful act, not necessarily that it did so with the intent of maliciously breaking the law.”

Recent Commission decisions confirm this reading of the case law. *EuroUSA Shipping, Inc., et al. – Possible Violations*, Docket No. 06-06, Order Affirming in Part, Reversing in Part, and Vacating in Part Initial Decision on Remand (slip op at 32-33, 36) (FMC Sept. 10, 2013) (tariff violations found to be knowing and willful because the carrier “was charged with knowing the requirements of the Shipping Act” and *Parks International Shipping, et al.,- Possible Violations* Docket No. 06-09, Memorandum Opinion and Order (slip op. at 9)(FMC Sept 16, 2013).

The record also supports a finding that Respondents continued operating in evident disregard and indifference to the requirements of the Shipping Act even after the meeting with AR Margolis. Respondents' admissions conclusively establish that Respondents continued certifying that it was operating as an NVOCC on the Seaboard and Crowley service contracts, but the Respondents did not act as an NVOCC for shipments conducted under those service contracts, and Respondents directly assisted Island Cargo to gain access to the rates and terms of those contracts in violation of the Shipping Act. RFAs 44-46, 69, 70, 106,107, 108,124,125; BOE 165, 168, 173, 176. Further, the ALJ has already found that “BOE also establishes, relevant to the penalty phase, that Mr. Collado continued to provide freight forwarding services through a shell NVOCC, Source Consulting, Inc., even after this proceeding began.” Initial Decision at 26. There is nothing in the record to support the notion that the Respondents altered their course of conduct after the AR Margolis meeting in order to conform to the requirements of the Shipping Act. To the contrary, there is ample evidence in the record demonstrating a

continued course of conduct which disregards the requirements of the Shipping Act.

In light of the record evidence and the admissions, Respondents were under an obligation as a licensee to seasonably inform themselves of the requirements of the Shipping Act as it applied to Respondents' activities under the 2008 Seaboard service contract. All violations arising thereunder were therefore knowing and willful. BOE submits that the record readily satisfies the preponderance of the evidence standard to support a finding that Respondents violated section 10(a)(1) on the 19 shipments at issue.

*c. Is there a distinction between the knowing and willful standards set forth in sections 10(a)(1) and 13 of the Shipping Act? If not, why does the Act subject the same conduct to two evaluations of the standard?*

BOE is aware of no case law which distinguishes between the knowing and willful standards of section 10(a)(1) and the penalty provisions of section 13.

Not all violations of section 10 are subject to the knowing and willful standard. For example, sections 10(a) (2) and (3), as well as sections 10 (b)(1-9) do not require knowing and willful conduct in order for a violation to be found. These provisions are akin to a strict liability standard. Only at the penalty phase is the knowing and willful standard applied in order to assess an appropriate penalty. Under section 10(a)(1), however, only knowing and willful conduct can be a violation. BOE must meet this latter test under section 10(a)(1) both to find a violation and apply the penalty amounts applicable to such conduct.

### III. CONCLUSION

For the foregoing reasons and those in its Brief upon Remand, 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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September 30, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of September, 2013, the foregoing Remand Reply Brief has been served upon the Respondents by electronic mail.

Signed in Washington D.C. on September 30, 2013.

  
Cory R. Cinque

**Amounts Invoiced by Respondents to Island Cargo for  
Shipments Identified in BOE Exhibits B1-24**

Exhibit Number	Appendix page(s)	Date of Invoice(s)	Amount of Invoice(s)	Freight obtained for less than the otherwise applicable rate (pursuant to affidavit of Andrew Margolis, and corresponding chart located on record page BOE145)
B1	BOE193	5/07/2008	\$1,180.00	Yes
B2	BOE206	5/07/08	\$1,550.00	Yes
B3	BOE221-23	2/29/08	\$1,295.00 \$890.00 \$1,495.00	
B4	BOE238-41	3/28/08	\$650.00 \$1,650.00 \$1,808.30 \$1,170.00	
B5	BOE255	7/18/08	\$1,310.00	
B6	BOE262	7/16/08	\$1,245.00	
B7	BOE277-78	7/25/08	\$1,100.00 \$1,300.00	
B8	BOE287	7/28/08	\$2,116.75	Yes
B9	BOE296	7/30/08	\$1,185.00	Yes
B10	BOE303	8/4/08	\$1,205.00	Yes
B11	BOE312	8/4/08	\$500.00	Yes
B12	BOE324-25	8/11/08	\$1,310.00 \$925.00	Yes
B13	BOE337	8/11/08	\$1,100.00	Yes
B14	BOE345	8/13/08	\$1,240.00	Yes
B15	BOE353	8/22/08	\$1,170.00	Yes
B16	BOE360	8/27/08	\$1,100.00	Yes
B17	BOE367	10/20/08	\$750.00	Yes
B18	BOE374, 379	1/21/09	\$1,520.00 \$1,170.00	Yes
B19	BOE387	2/25/09	\$1,170.00	Yes
B20	BOE394	2/20/09	\$1,240.00	Yes
B21	BOE401	2/12/09	\$1,377.50	Yes
B22	BOE408	2/9/09	\$1,455.00	Yes
B23	BOE418	2/6/09	\$550.00	Yes
B24	BOE431	3/11/09	\$1,117.50	Yes
<b>Total</b>			<b>\$37,675.05</b>	<b>19 Shipments<sup>1</sup></b>

<sup>1</sup> The total amount invoiced for these 19 shipments is \$23,761.75.