

FEDERAL MARITIME COMMISSION

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

Docket No. 12-01

Served: July 22, 2013

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

Order Remanding For Further Proceedings

I. INTRODUCTION

The above captioned case is before the Commission on exceptions filed by the Bureau of Enforcement (BOE) and Respondents OC International Freight, Inc., OMJ International Freight, Inc., and Omar Collado (hereinafter Respondents), to the March 26, 2013 Initial Decision (hereinafter Decision) of the Administrative Law Judge (ALJ). For the reasons we set forth below, we: 1) adopt the ALJ's findings of fact; 2) remand the proceeding to the ALJ for a new determination as to whether Respondents violated Section 10(a)(1); 3) affirm the ALJ's determination that Respondents violated Section 19; 4) affirm the issuance of cease and desist orders and the letter of intent to deny OC's license application based on violations of Section 19; and 5) remand the proceeding to the ALJ for calculation of civil penalties.

II. BACKGROUND

A. Factual Background

OC International Freight, Inc. (OC) is a Florida corporation whose sole officer, President, and Director is Omar Collado. Initial Decision, Findings of Fact (hereinafter Findings or Finding) 12 and 13. OMJ International Freight, Inc. (OMJ) is a Florida corporation whose sole officer, President, Vice-President, Secretary, and Director was Omar Collado. Findings 1 and 2. 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. At that time, the Commission revoked OMJ's license for failure to maintain a bond. *Id.* Prior to that revocation, OMJ entered into service contracts with Seaboard Marine, an ocean common carrier. Findings 22 and 39. Island Cargo Services, Inc. (Island Cargo) is an unlicensed, unbonded NVOCC located in Nassau, Bahamas. Finding 24. On December 10, 2010, OC filed a license application with the Commission to operate as both an NVOCC and OFF. Finding 16. In its application, Mr. Collado was proposed as OC's qualifying individual. Finding 17.

B. Procedural Background

On November 17, 2011, the Commission's Bureau of Certification and Licensing (BCL) issued a letter¹ indicating its intent to deny OC's license application, alleging violations of Section 10(a)(1), 46 U.S.C. § 41102(a), and Section 19(a), 46 U.S.C. §40901, of the Shipping Act of 1984 (Act). Decision at 2. Based on those alleged violations, BCL, citing 46 C.F.R. § 515.14, determined that OC and Mr. Collado did not have the requisite

¹ 46 C.F.R. § 515.14(a) states that a license will be issued if the Commission determines that an applicant possesses the necessary experience and character to render ocean transportation intermediary services and has filed the required bond, insurance or other surety. This authority is delegated to BCL pursuant to 46 C.F.R. § 501.26(a)(1).

character to be granted a license. By letter dated December 2, 2011, OC requested a hearing pursuant to 46 C.F.R. § 515.15(c). *Id.* On April 2, 2012, the Commission issued an order (Order) initiating this proceeding to determine:

- 1) whether to affirm BCL's November 17, 2011, denial of OC's license application;
- 2) whether Respondents violated Section 10(a)(1) of the Act, 46 U.S.C. § 41102(a), by knowingly and willfully allowing other persons to obtain ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting such persons to unlawfully access OMJ's service contracts;
- 3) whether Respondents violated Section 19(a) and (b) of the 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 Section 10 or 19 of the Act are found, civil penalties should be assessed against the Respondents, and if so, in what amount, and
- 5) whether, in the event violations are found, an appropriate cease and desist order should be issued.

BOE was named a party to the proceeding. Order at 6.

BOE began discovery on April 18, 2012, by serving Respondents with interrogatories and a request for production of documents as well as a request for admissions. Decision at 3. BOE served a second set of interrogatories and a second request for production of documents on June 12, 2012. *Id.* Mr. Collado

responded to BOE's discovery requests, but did not respond to any of BOE's requests for admissions. *Id.* Respondents did not conduct any discovery of their own. BOE conducted a deposition of Mr. Collado on July 19, 2012. *Id.* BOE filed its Rule 95 statement on August 13, 2012 and Respondents' Rule 95 statement was filed on August 28, 2012, pursuant to an extension granted by the ALJ. BOE filed its proposed findings of fact, appendix (containing documentary evidence), and brief on October 12, 2012. Respondents filed a brief on November 21, 2012, but did not file any proposed findings of fact or evidence. BOE filed its reply brief on December 11, 2012. The brief contained affidavits from the Commission's South Florida Area Representative and the Commission's Secretary authenticating two e-mails complaining of Respondent's activities. On December 20, 2012, Respondents filed a motion requesting permission to respond to BOE's brief. Respondents objected to the e-mail attached to the affidavit of the Area Representative because the identity of the sender was redacted and they had not had an opportunity to review or respond to it. On December 21, 2012, BOE filed its response to Respondents' motion, indicating that it did not object to a reply as long as it was limited to the topic of the e-mail exhibit. On February 7, 2013, BOE filed a motion to supplement the record with a 2009 service contract between OMJ and Seaboard Marine, Ltd. which was inadvertently omitted from its appendix. Respondents did not submit a response to BOE's motion.

C. ALJ's Decision

In the Decision² issued on March 26, 2013, the ALJ:

² The ALJ ruled on the two pending procedural motions in the Decision, granting BOE's motion to supplement the record with a copy of a 2009 service contract between OMJ and Seaboard Marine, Ltd. and denying Respondents' motion that it be allowed to respond to BOE's reply brief. (The ALJ noted that the e-mail exhibit attached to BOE's reply brief had limited probative value as to the question of whether the Commission had ever received complaints regarding Respondents.) Additionally, the ALJ admitted as evidence all of the documents submitted by BOE.

- 1) dismissed the claim that Respondents violated Section 10(a) of the Act;
- 2) granted the claim that Respondents violated Section 19(a) and (b) of the Act;
- 3) found Respondents jointly and severally liable for civil penalties of \$60,000 for knowing and willful violations of Section 19(a) and (b) of the Act;
- 4) enjoined Respondents from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and Respondents provide evidence of financial responsibility pursuant to Commission regulations;
- 5) enjoined Respondents from serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States or for working for, as an employee or in any other capacity, any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years;
- 6) enjoined Respondents from controlling in any way or serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company or other entity engaged in providing ocean transportation services in the foreign commerce of the United States for a period of five years, except Respondents may own up to five

percent of a class of shares of a publicly traded company; and

7) affirmed BCL's letter of intent to deny OC and Mr. Collado an OTI license.

With regard to violations of Section 10(a), the ALJ determined that while Respondents may have allowed a foreign unlicensed, unbonded NVOCC to access their service contracts, there was no violation of Section 10(a), as it was not clear that Respondents had benefitted from the arrangement.³ The ALJ also determined that, in order to establish a violation of Section 10(a), an unjust or unfair device or means must be shown, which necessarily means showing fraud or concealment. Decision at 19. The ALJ found that because the Respondents did not conceal the identity of the foreign unlicensed, unbonded NVOCC on shipment documentation, there was no fraud or concealment. *Id.* The ALJ also noted the evidence showed that Respondents thought that their actions were permissible and, therefore, there was no fraud or concealment. *Id.* Finally, the ALJ determined that Respondents had not acted knowingly and willfully, an element of a violation of Section 10(a). *Id.* The ALJ rejected BOE's argument that Respondents, as regulated entities, were obligated to educate themselves regarding the requirements of the Act and a failure to do so equated to acting knowingly and willfully. *Id.* The ALJ determined that, although Mr. Collado knew that the foreign unbonded, unlicensed NVOCC should not be permitted to access OMJ's service contracts, the evidence did not show that he understood that permitting such access actually violated the Act, and therefore, Mr. Collado's behavior was not knowing or willful. *Id.*

D. BOE's Exceptions

³ The ALJ noted evidence in the record that Respondents may have improperly accessed another NVOCC's service contract to ship their cargo, but did not find enough evidence in the record to support a finding of a violation of Section 10(a) based on that behavior. BOE did not argue that the Respondents committed such violations.

BOE timely filed its exceptions on April 17, 2013.⁴ In summary, BOE's exceptions are as follows:

1) the ALJ erred in finding that Respondents did not violate Section 10(a)(1) of the Act by discounting Respondents' admissions; 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;

2) the ALJ failed to enter a finding that Respondents' violations of Section 19(a) and (b) were committed knowingly and willfully; and

3) the ALJ erred in failing to assess an adequate civil penalty against Respondents.

E. Respondents' Exceptions

Respondents timely filed their exceptions and brief on April 24, 2013.⁵ In summary, Respondents' exceptions are as follows:

1) the ALJ erred in upholding BCL's determination to deny OC's license application as Respondents have not been held involved in any scheme involving moral turpitude; have cooperated fully and been truthful during the Commission's

⁴ Respondents did not file a reply to BOE's exceptions.

⁵ On April 17, 2013, Respondents filed a motion requesting a 10-day extension of time to file exceptions and a supporting brief. On April 18, 2013, BOE filed a response in opposition to Respondent's motion for an extension, arguing that Respondents had failed to meet the deadline for filing a request for an extension of time contained in 46 C.F.R. § 502.228. On April 19, 2013, the Office of the Secretary issued a notice of extension, extending the deadline for Respondents to file exceptions and a supporting brief until April 24, 2013.

proceeding; and did not omit any material information from the application;

2) the ALJ erred in issuing cease and desist orders since the ALJ found no intent to deceive or defraud and Respondents should not be ordered to halt an activity in which they acted without malice or intent to deceive or defraud; and

3) the ALJ erred in imposing a civil penalty of \$60,000 against Respondents as the penalty, while less than BOE requested, is unduly harsh and extreme, particularly in light of the ALJ's finding that Respondents have a limited ability to pay.

F. BOE's Reply to Respondents' Exceptions

BOE's reply to Respondents' exceptions was timely filed on May 16, 2013. BOE argues that, although Respondents may disagree with the outcome of the proceeding, they have demonstrated no legal error in their exceptions. In particular, BOE points out that Respondents "offered no evidence at hearing and proffered no findings of fact in their trial brief" and that their exceptions do not cite to any facts from the record which contradict the ALJ's findings. BOE Reply at 2. BOE argues that Respondents have not contested the ALJ's findings that they violated Section 19(a) and (b), and those violations of the Act, without any showing of moral turpitude, constitute sufficient basis to sustain BCL's intent to denial of OC's license application. BOE also argues that Respondents' claim that their failure to disclose tax liens, judgments and bankruptcy proceeding was not material to OC's license application is contradicted by the Commission's regulations at 46 C.F.R. § 515.15 and case law providing examples of materially false statements. With regard to Respondents' argument that the ALJ improperly issued cease and desist orders since their actions did not reflect an intent to deceive or defraud, BOE argues that "no such finding or requirement attaches to issuance of a cease and desist order arising from violations of [s]ection 19(a) and (b)."

BOE Reply at 5.

BOE argues that the ALJ used the correct standard to determine whether a cease and desist order may issue: whether there is a reasonable likelihood that a respondent will resume their unlawful activities. BOE notes that the evidence in the record supports the finding made by the ALJ that Respondents will resume activities in violation of the Act. Finally, with regard to Respondents' argument that the amount of the civil penalty assessed by the ALJ was excessive, BOE points to the arguments raised in its exceptions. BOE requests that the Commission deny Respondent's Exceptions and affirm the ALJ's finding with respect to BCL's intent to deny OC's license application and the ALJ's entry of cease and desist orders. BOE requests that the Commission remand the proceeding to the ALJ "for further proceedings with respect to the [S]ection 10(a)(1) issue and to assess a civil penalty fully commensurate with the knowing and willful character of Respondents' violations of [S]ection 10(a)(1) and 19 of the Shipping Act." BOE Reply at 8.

III. DISCUSSION

A. Standard of Review by Commission

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. We adopt the ALJ's well-organized findings of fact. For the reasons discussed below, however, we remand the proceeding to the ALJ for additional findings of law and a determination as to an appropriate civil penalty consistent with the Commission's guidance.

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. § 41102(a). In order to prove a violation of Section 10(a)(1), BOE must show that 1) the Respondent acted knowingly and willfully; 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. At issue in this proceeding is whether Respondents acted knowingly and willfully and whether they used an unjust or unfair device or means to allow other persons to obtain ocean transportation at less than the otherwise applicable rate.

1. Knowing and Willful

The ALJ determined that Respondents had not acted knowingly and willfully and therefore had not violated Section 10(a)(1). The ALJ noted 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. *Rose Int'l*, 29 S.R.R. at 164-165; *Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998).

Decision at 21.

The ALJ determined that although Mr. Collado knew that the foreign unbonded, unlicensed NVOCC should not be permitted to access OMJ's service contracts, the evidence did not show that he understood that permitting such access actually violated the Act and made no attempt to hide his role in the transaction, and therefore, that Mr. Collado's behavior was not knowing and willful. Decision at 22. BOE points to this finding, as well as a number of its Requests for Admissions (RFAs), which it argues the ALJ incorrectly ignored (see discussion below), as support for its argument that Respondents did act knowingly and willfully. BOE Exceptions at 12.

BOE argues, citing *Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., et al.*, 11 F.M.C. 357, 363-364 (1968), that “[t]he Commission has rejected the concept that the phrase knowing and willful entails ‘actual or constructive knowledge that the requirements of the statute were being disregarded.’” BOE Exceptions at 18. BOE argues that knowing activity merely requires knowledge of the facts of the activity and not knowledge that the activity is prohibited. *Id.*, citing *Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (9th Cir. 1967). BOE further argues that the record shows that Respondents intended to perform the acts which amount to a violation. BOE Exceptions at 19. BOE argues that willfully means a person who “purposely or obstinately intended to perform the unlawful act not necessarily that it did so with the intent of maliciously breaking the law.” BOE Exceptions at 19, citing *Shipman Int’l (Taiwan) Ltd. – Possible Violations of Section 8, 109a)(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).

The ALJ's holding does not appear to be consistent with previous Commission determinations regarding the meaning of knowingly and willfully. In *Trans-Ocean Pacific Forwarding, Inc. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 409 (ALJ 1995), a case involving whether

violations of Section 10(b)(1) were committed knowingly and willfully, the Commission stated:

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938). A violation of [S]ection 10(b)(1) could be termed “willful” if the carrier knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act. *United States v. Murdoch*, 290 U.S. 389 (1933). The Supreme Court cited with approval these “reckless or careless disregard” standards in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-129 (1985).

Id. at 412.

Similarly, in *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), the Commission stated that:

In determining whether a person has violated the 1984 Act “knowingly and willfully,” the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-85 (ALJ 1998). The Commission has further held that “persistent failure to inform or even to attempt to inform himself by means of normal

business resources might mean that a [person] was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.” *Id.* at 84 (quoting *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1984)); see also *Illinois Cent. R.R. Co.*, 303 U.S. at 242-43; *Trans World Airlines*, 469 U.S. at 128; *Richland Shoe Co.*, 486 at 133.

Id. at 1403.

In *Stallion Cargo, Inc. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665 (FMC 2001), the Commission stated that:

A carrier “willfully and knowingly” violates the statute if, of its own free will or choice, it intentionally disregards the statute or is plainly indifferent to its requirements. Conduct is considered “willful” if it was “marked by careless disregard for whether or not one has the right so to act.” *Trans Ocean-Pacific*, 23 S.R.R. at 412. (citing *U.S. v. Murdock*, 290 U.S. 389 (1933)). Thus, when an NVOCC, possessing full information about the article it is shipping, chooses the wrong description consistently and continually ignores a more accurate classification, knowing of the discrepancy between what is being shipped and what has been described, such NVOCC “willfully and knowingly” obtains transportation by water for property at less than the rates or charges otherwise applicable, by means of a false classification.

Id. at 678 (citing *Comm-Sino Ltd.- Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 1201, 1204 (ALJ 1997)).

Respondents' activities should be analyzed using the knowing and willful standards set forth in the above-cited cases.

2. Admissions

The ALJ addressed BOE's requests for admissions as follows:

BOE primarily cites requests for admissions to support their case, although they also provide the supporting documents. While these requests for admission are certainly admissible and relevant, the supporting documents are the strongest evidence in the proceeding. So, for example, the actual service contract is stronger evidence than the requests for admission about what the service contract says. The supporting documents are preferred because they are contemporaneous and speak for themselves. Moreover, where the respondents are acting *pro se*, as here, relying on the party's 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 requests for admission. Therefore, the undersigned relied on all of the evidence and included citations to the supporting documents, where possible.

Decision at 17.

BOE argues that the ALJ incorrectly accorded no weight to Respondents' admissions.⁶ Specifically, BOE argues that the

⁶ BOE argues that during his deposition, Mr. Collado confirmed his receipt of

admissions establish that Respondents falsely certified⁷ that OMJ would be acting as the NVOCC on the shipments that would be assessed at the rate applicable under the service contracts it entered into with Seaboard Marine, an unfair and unjust means, and then knowingly and willfully allowed Island Cargo to access that service contract. BOE cites 46 C.F.R. § 502.207, arguing that: a request for admission is admitted unless denied within thirty days; any matter admitted is conclusively established;⁸ and the rule is binding upon presiding officers and private litigants alike, despite being *pro se*.⁹ BOE Exceptions at 9, citing *Kin Bridge Express Inc. and Kin Bridge Express (U.S.A.) Inc. - Possible Violations of Section 8, 10(A)(1) and 23 of the Shipping Act of 1984*, 28 S.R.R. 980, 985 (ALJ 1999); *Refrigerated Containers Carriers Pty. Ltd. – Possible Violations of Section 10(A)(1) of the Shipping Act of 1984*, 28 S.R.R. 799 (ALJ 1999); and *Eastern Mediterranean Shipping Corp. d/b/a Atlantic Ocean Line and Anil K. Sharma – Possible Violations of Section 10(A)(1), 10(B)(1) and 10(d)(1) of the Shipping Act of 1984*, 28 S.R.R. 781 (ALJ 1999).

BOE's request for admissions and that he had been advised of the effect of not answering the request. BOE Exceptions at 7.

⁷ Pursuant to 46 C.F.R. § 530.5(6)(a), "[t]he shipper contract party shall sign and certify on the signature page of the service contract its shipper status (e.g., owner of the cargo, shippers' association, NVOCC, or specified other designation), and the status of every affiliate of such contract party or member of a shippers' association entitled to receive service under the contract." The term "shipper" is defined in 46 C.F.R. § 530.3(r) as "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."

⁸ BOE argues that Rule 207(b) allows a presiding officer, on motion, to permit withdrawal or amendment of an admission when doing so will not be prejudicial to the party obtaining the admission, but argues that no such motion was made or ruled upon by the ALJ here.

⁹ We note that, although both BOE and the ALJ characterize Respondents as being *pro se*, in fact, Respondents were represented at the deposition conducted by BOE by an attorney. BOE Appendix at 765, 766. However, no notice of appearance was filed with the Commission and Respondents' pleadings were signed by Mr. Collado.

BOE argues that it was error for the ALJ to “set aside the effect of Respondents’ admission as not being ‘particularly persuasive’ where the Respondents might not appreciate the implications of the request for admission.” BOE Exceptions at 9, quoting Decision at 17. BOE notes that Respondents submitted no evidence in the proceeding; argues that the record does not support the ALJ’s conclusions; and further argues that the ALJ’s conclusions are supported only by “self-serving statements” in the Respondents’ trial brief. *Id.*

Both the Commission’s Rule 207 and Federal Rule of Civil Procedure (F.R.C.P.) 36 (on which Rule 207 is modeled) allow for requests for admissions that relate to statements or opinions of fact as well as the application of law to fact.¹⁰ Under the Commission’s rule, unanswered requests for admissions are conclusively established. 46 C.F.R. § 502.207. To the extent the ALJ did so, we believe it was inappropriate to discount Respondents’ admissions because they were acting *pro se*. In light of Respondents’ failure to

¹⁰ The Advisory Committee drafting F.R.C.P. 36 noted:

Not only is it difficult as a practical matter to separate ‘fact’ from ‘opinion,’ see 4 *Moore’s Federal Practice* 36.04 (2d ed. 1966); cf. 2A Barron & Holtzoff, *Federal Practice and Procedure* 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan, supra* [225 F.Supp 628 (E.D. Pa. 1963)], plaintiff admitted that ‘the premises on which said accident occurred, were occupied or under the control’ of one of the defendants, 225 F.Supp at 236. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

F.R.C.P. 36 advisory committee’s note.

respond, BOE's requests for admissions are conclusively established. We direct the ALJ to consider those admissions in determining whether Respondents committed violations of Section 10(a)(1).

3. Benefit to Respondents

The ALJ also determined that, while Respondents may have allowed a foreign unlicensed, unbonded NVOCC to access their service contracts, there was no violation of Section 10(a) as it was not clear that Respondents had benefitted from the arrangement.¹¹ The ALJ states that "it is not clear that the [S]ection 41102(a) prohibition against obtaining transportation for less than the applicable charges includes permitting others to obtain transportation for less than applicable charges." Decision at 15. BOE argues that "the ALJ implies that a violation of [S]ection 10(a)(1) arises when the Respondents 'obtain a benefit from accessing reduced rates,' but only if the [R]espondents were themselves shippers." *Id.*, citing Decision at 21. BOE cites Commission case law "attesting to the breadth of the prohibitions found in [S]ection 10(a)(1) of the Shipping Act." BOE Exceptions at 15, citing *Payments to Shippers by Wisconsin and Michigan SS Co*, 1 U.S.M.C. 744 (1938) (part of freight rate paid to shipper found a violation); *Brokerage of Ocean Freight – Max Le Pack et al.*, 5 F.M.B. 435 (1958) (forwarder's use of its ownership relationships to obtain transportation for garment shippers at reduced rates found a violation); *U.S. Lines and Gondrand Bros. – Section 16 Violation*, 7 F.M.C. 464 (1962) (Commission rejected argument that Section 16 applied only where a shipper or consignee were involved); and more recently, *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 S.R.R. 1381 (ALJ 2003)

¹¹ The ALJ noted evidence in the record that Respondents may have improperly accessed another NVOCC's service contract to ship their own customer's cargo, but did not find enough evidence in the record to support a finding of a violation of Section 10(a) based on that behavior. BOE did not argue in its initial Brief that the Respondents committed such violations.

(violation of Section 10(a)(1) found where Respondent allowed other transportation entities to access Respondent's service contracts and obtain ocean transportation at less than the applicable rate); *Universal Logistic Forwarding Co. Ltd. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 325 (ALJ 2001) (improper access to service contracts by NVOCC found to be a violation of Section 10(a)(1)); *Gstaad Inc., and Sergio Lemme – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1608 (ALJ 2000) (allowing other shippers access to less than otherwise applicable rates through misuse of service contracts found to be a violation of Section 10(a)(1)); and *Rose Int'l, Inc v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119 (FMC 2001) (Respondents' use of a sham corporation to allow shippers association members to access service contract rates found to be a violation of Section 10(a)(1)).

Nevertheless, BOE argues that Respondents did, in fact, receive a benefit by allowing Island Cargo to access its service contracts, as 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 also gained the intangible benefit of not incurring common carrier liability as an NVOCC." BOE Exceptions at 18. BOE argues that over \$35,000 in charges for freight forwarding services provided to Island Cargo by Respondents were invoiced to and paid by Island Cargo. *Id.*

Based on previous Commission cases interpreting the breadth of Section 10(a)(1), it appears that the ALJ's reading of the prohibitions contained in Section 10(a)(1) may have been too narrow. A finding of 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.

4. Unjust or unfair means

The ALJ correctly determined that a necessary ingredient of an unjust or unfair means is fraud or concealment. Decision at 19,

citing *United States v. Open Bulk Containers*, 727 F.2d 1061, 1064 (11th Cir. 1984); *Rose Intl* at 163; *Waterman S.S. Corp. v. General Foundries, Inc.*, 26 S.R.R. 1424, 1429 (FMC 1994). However, the ALJ found that because the Respondents did not conceal the identity of the foreign unlicensed, unbonded NVOCC on shipment documentation, there was no fraud or concealment. The ALJ also found that the evidence showed that Respondents thought their actions were permissible and, therefore, there was no fraud or concealment.

BOE argues that at the time of executing the service contract with Seaboard and during the time of all relevant shipments moving under the service contracts, Mr. Collado and Respondents represented to the ocean common carrier that they would be the shipper acting as an NVOCC, thereby obviating any concerns the ocean common carrier might have about transporting cargo for an unbonded NVOCC in violation of the Act and the Commission's regulations. BOE Exceptions at 6. BOE argues that the ALJ ignored admissions by Respondents that Respondents knew that allowing Island Cargo, an unbonded NVOCC, to access its service contracts was unlawful under the Act. BOE Exceptions at 13, n. 7. BOE argues that "the showing of fraud or concealment may either be based on fraud either to the underlying common carrier or to competing shippers." BOE Exceptions at 11, citing *Rose Int'l*, 29 S.R.R. at 173. BOE argues that Respondents committed fraud upon the ocean common carriers by certifying that it was acting as an NVOCC and would be the shipper of cargo moving under the service contracts but then acted only as a freight forwarder¹² for those shipments. BOE Exceptions at 12. BOE also argues that Respondents concealed the true nature of their activity from other shippers and, by allowing a foreign unbonded, unlicensed NVOCC to access service contract rates negotiated by a licensed NVOCC,

¹² BOE argues that an entity acting as a freight forwarder cannot qualify to execute a service contract, citing *Docket No. P5-98, Petition of National Customs Brokers and Forwarders Association of America*, 28 S.R.R. 1042, 1050-51 (FMC 1999). BOE Exceptions at 13.

stifled competition. BOE Exceptions at 14.

The fraud which must be shown in order to establish an unjust or unfair means may be either fraud to the underlying common carrier or to competing shippers. *Rose Int'l* at 173, citing *Hohenberg Brothers Co. v. Federal Maritime Commission*, 316 F.2d 381, 384; *China Ocean Shipping Co. v. DMV Ridgeview, Inc.*, 26 S.R.R. 50, 55 (ALJ 1991); *Pacific Far East Lines* at 6. 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 moving under the service contracts, but then acted only as a freight forwarder. Nor does it appear the ALJ considered any fraud against other shippers. We therefore remand the case to the ALJ for a further determination as to whether violations of Section 10(a)(1) occurred.

C. Assessment of Civil Penalties for Knowing and Willful Violations of Section 19

Respondents admitted in their Rule 95 statement that they provided ocean freight forwarding services following the revocation of OMJ's license and they have not filed exceptions to the ALJ's finding of violations of Section 19. Decision at 25. In its exceptions, BOE argues that, despite a discussion in the Decision implicitly supporting "a finding that the violations of Section 19 were committed 'knowingly and willfully' within the meaning of [S]ection 13 of the statute, no express finding of this effect was entered." BOE Exceptions at 21. BOE also argues that issue was not "explicitly addressed in the ALJ's consideration of the penalty factors." BOE Exceptions at 21, citing Decision at 32-34. BOE notes that the ALJ's determination that the violations were committed knowingly and willfully first appears in the ordering paragraphs¹³ of the Decision. BOE Exceptions at 21, citing Decision at 35. BOE initially argued in its exceptions that a finding that Respondents acted knowingly and willfully is supported by

¹³ The Ordering paragraphs are located at page 35 and 35 of the Decision.

substantial evidence in the record¹⁴ and that the Commission should enter a finding that Respondents' violations of Section 19 were committed knowingly and willfully, or direct the ALJ to enter such a finding on remand. In its reply to Respondents' exceptions, BOE now requests that the Commission remand the proceeding to the ALJ "for further proceedings with respect to the [S]ection 10(a)(1) issue and to assess a civil penalty fully commensurate with the knowing and willful character of Respondents' violations of Section [sic] 10(a)(1) and 19 of the Shipping Act." BOE Reply to Respondents' Exceptions at 8.

There is ample evidence in the record and, indeed, the Decision contains a discussion of facts supporting a finding of knowing and willful violations based on the knowing and willfully standards discussed above. Decision at 25-26. It appears that the ALJ's failure to make an express finding was a simple omission and the Commission could, based on the findings of fact in this case, enter a finding that Respondents' violations of Section 19 were committed knowingly and willfully. However, because a finding of a knowing and willful violation of Section 19 could affect the amount of the civil penalties imposed on the Respondents, we believe it is appropriate for the Commission to remand the proceeding to the ALJ for a determination on the knowing and willful nature of the Section 19 violations.

D. Joint and Several Liability of Respondents

In its Initial Brief, BOE argued that Mr. Collado should be held personally liable for the acts of his companies. Brief at 47. The ALJ determined to pierce the corporate veil, noting that some of the factors the Commission has relied upon in the past when piercing the corporate veil are the nature of corporate ownership and control and the failure to observe corporate formalities. Decision at 29. The

¹⁴ BOE points out that one of the shipments it had argued was a violation of Section 19 occurred prior to the revocation of OMJ's license and therefore should not be considered.

ALJ cited evidence showing that Mr. Collado controlled both companies; made all business decisions for both companies; and comingled personal and business funds. Decision at 28 and 29. The ALJ also noted that in some shipping transactions it was difficult to determine whether shipments were handled by OMJ, OC or both companies. *Id.* Additionally, the ALJ noted that OJM's corporate status in the State of Florida became inactive on September 26, 2008, for failing to file an annual report. *Id.* We believe it was appropriate for the ALJ to hold the Respondents jointly and severally liable for all civil penalties.

E. Amount of Civil Penalty

Respondents argue that the ALJ erred in imposing a civil penalty in the amount of \$60,000 and that the penalty was "unduly harsh and extreme," (citing *Cari-Cargo Int., Inc.*, 23 S.R.R. 1007, 1018 (FMC 1986)) particularly because the ALJ found that the Respondents have a limited ability to pay. Conversely, BOE argues that the ALJ erred in failing to assess an adequate civil penalty against Respondents.

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.¹⁵ Section 13(c) of the Act provides that when "determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation

¹⁵ "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 other provided in this part, the amount of the penalty 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 Act originally provided for maximums of \$5,000 and \$25,000. These amounts have been adjusted for inflation. The Commission increased the amounts to \$8,000 and \$40,000. 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 \$6,000 civil penalty applies to violations that are "not knowing and willful." 76 Fed. Reg. 74720 (December 1, 2011).

committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 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).

As we are remanding this proceeding to the ALJ for a determination as to whether violations of Section 10(a)(1) occurred and the knowing and willful nature of the Section 19 violations, we do not take up the adequacy of the amount of the civil penalties imposed by the ALJ at this time. We direct 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 in order to determine an appropriate civil penalty.

F. Issuance of Cease and Desist Orders

Respondents argue the ALJ erred in issuing cease and desist orders because the ALJ found no intent to deceive or defraud and Respondents should not be ordered to halt an activity in which they acted without malice or intent to deceive or defraud. BOE argues that Respondents have not contested the ALJ’s findings that they violated Section 19(a) and (b), and those violations of the Act, without any showing of moral turpitude, constitute sufficient basis to sustain BCL’s intent to deny OC’s license application. BOE also argues that Respondents’ claim that their failure to disclose tax liens, judgments and a bankruptcy proceeding was not material to OC’s license application is contradicted by the Commission’s regulations at 46 C.F.R. § 515.15 and case law providing examples of materially false statements.

With regard to Respondents' argument that the ALJ improperly issued cease and desist orders since their actions did not reflect an intent to deceive or defraud, BOE argues that "no such finding or requirement attaches to issuance of a cease and desist order arising from violations of [S]ection 19(a) and (b)." BOE's Reply to Respondents' Exceptions at 5. BOE argues that the ALJ used the correct standard to determine whether a cease and desist order is appropriate: whether there is a reasonable likelihood that a respondent will continue their unlawful activities. BOE notes that the evidence in the record supports the finding made by the ALJ that Respondents are likely to resume activities in violation of the Act.

The ALJ found the evidence showed that "Mr. Collado has a history of providing ocean transportation services in violation of the Shipping Act via multiple corporate forms, including a new scheme to operate without a license."¹⁶ Decision at 34. The ALJ noted that the Commission has found the issuance of cease and desist orders is appropriate when there is a reasonable likelihood that a respondent will continue violating the Act. *Id.*, citing *Portman Square, Ltd.* at 86, citing *Alex Parsinia d/b/a/ Pac. Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997); *Marcella Shipping Co., Ltd.*, 23 S.R.R. 857, 871 (ALJ 1986). The ALJ found that based on previous behavior, there was a reasonable likelihood that Respondents would continue or resume violating the Act and therefore, the ALJ issued a cease and desist order. Decision at 34.

The Commission addressed the issue of cease and desist orders most recently in *Worldwide Relocations, Inc. et al.*, 32 S.R.R. 495 (FMC 2012). There, citing *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994) and the *Portman Square* case referenced by the ALJ, the Commission found that it was appropriate to issue a cease and desist order when it was likely that future violations of a law

¹⁶ The ALJ is referring to evidence in the record showing that Respondents utilized the service contract of Source Consulting, an entity unrelated to Respondents, to make shipments from March 11, 2011 to April 2, 2012.

would occur. The Commission pointed to such factors as whether a violation was isolated, part of a pattern, or flagrant and deliberate and whether someone's occupation would present future opportunities to violate the law. *Worldwide Relocations, Inc.* at 507, quoting *Bilzerian*, 29 F.3d at 695 (quoting *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). Here, the evidence in the record shows that Respondents' unlicensed and unbonded OTI activities were not done in isolation and were done deliberately.¹⁷ The cease and desist order will limit future opportunities for Respondents to violate the law by preventing Respondents from engaging in providing ocean transportation services for certain periods of time. The evidence in the record supports the ALJ's determination and we affirm the issuance of the ALJ's cease and desist orders.

G. Intent to Deny OC's License Application

Respondents argue that the ALJ erred in upholding BCL's determination to deny OC's license application. Respondents argue that they have not been involved in any illegal scheme with indications of moral turpitude and have not acted illegally in concert with clients. Respondents' Exceptions at 3, citing, *inter alia*, *G.R. Minon – Freight Forwarder License*, 12 F.M.C. 75 (FMC 1968). Respondents also argue that their "failure to disclose tax liens and judgments was not done with intent to deceive and certainly should not be considered a 'materially false' statement." Respondents' Exceptions at 3, quoting Black's Law Dictionary. Respondents argue that the items not disclosed involved "relatively minor debts and matters part and parcel of operating and maintaining a business for many years" and that no "evidence or witness was presented whom [sic] cast any aspersions on the Respondents' operation of its business affairs for many years while it operated its OTI operations." Respondents' Exceptions at 3.

¹⁷ The issuance of a cease and desist order would also be supported by a finding of violations of Section 10(a)(1), however, Respondents' violations of Section 19 alone support the issuance of an appropriate cease and desist order.

BOE argues that Respondents have not contested the ALJ's findings that they violated Section 19(a) and (b), and those violations of the Act, without any showing of moral turpitude, constitute sufficient basis to sustain BCL's intent to deny OC's license application. BOE's Reply to Respondents' Exceptions at 3. BOE argues that Respondents' failure to disclose tax liens, judgments and bankruptcy proceeding was material to OC's license application, citing the Commission's regulations at 46 C.F.R. § 515.15 and case law providing examples of statements found to be materially false. BOE's Reply to Respondents' Exceptions at 4-5. BOE argues that Respondents' misstatements and omissions could affect the effective administration of the Commission's licensing program. *Id.*

46 C.F.R. § 515.15(a)-(c) provides that the Commission (who has delegated that authority to BCL) may send a letter of intent to deny a license if it determines that the applicant does not possess the necessary experience or character to render intermediary services; has failed to respond to any lawful inquiry of the Commission; or has made any materially false or misleading statement to the Commission in connection with its application. BCL issued its letter indicating its intent to deny OC's license application on November 17, 2011. The basis for the intent to deny OC's license application was the lack of requisite character to render intermediary services due to violations of Section 10(a)(1) and Section 19(a) of the Act. As noted by the ALJ, violations by Respondents OC and Mr. Collado of Section 19(a) and (b) are relevant to their fitness to hold an OTI license. We agree with BOE that a finding of moral turpitude is not necessary in order to issue an intent to deny an OTI license letter.

Additionally, discovery in this proceeding revealed a number of tax liens and judgments against OC as well as Respondent OMJ's bankruptcy filing, none of which were disclosed on OC's license application as required.¹⁸ As the ALJ noted, the Commission's

¹⁸ The ALJ notes that, although some of the tax liens were issued after Mr.

license application asks specifically about bankruptcy proceedings, tax liens and legal judgments and the Commission has determined that those questions are relevant “to whether or not to provide an OTI license because failure to maintain a bond puts the shipping public at risk.” Decision at 35. The ALJ correctly noted that the failure to disclose these items, a violation of 46 C.F.R. § 515.15(c), is in and of itself, grounds for denial of OC’s license application. For these reasons, the ALJ affirmed BCL’s letter of intent to deny OC’s license application. We believe the ALJ’s determination was correct and affirm this holding.

For the reasons discussed above, we: 1) adopt the ALJ’s findings of fact; 2) remand the proceeding to the ALJ for a new determination as to whether Respondents violated Section 10(a)(1); 3) affirm the ALJ’s determination that Respondents violated Section 19; 4) affirm the issuance of cease and desist orders and the letter of intent to deny OC’s license application based on violations of Section 19; and 5) remand the proceeding to the ALJ for calculation of civil penalties.

THEREFORE, IT IS ORDERED, That the ALJ’s findings of fact are adopted;

It is FURTHER ORDERED, That the determination that Respondents did not violate Section 10(a)(1) is vacated and remanded for further adjudication consistent with this Order;

It is FURTHER ORDERED, That the determination that Respondents violated Section 19 is affirmed;

Collado submitted OC’s license application, their existence should have been disclosed to BCL as a change pursuant to 46 C.F.R. § 515.12(d). The ALJ also notes that four tax liens were issued prior to the filing of OC’s license application as were five final judgments entered against OMJ, OC and/or Mr. Collado, all of which should have been disclosed. The ALJ also notes that OMJ’s Voluntary Petition for Bankruptcy was similarly filed prior to the submission of OC’s license application. Decision at 28-29.

It is FURTHER ORDERED, That the issuance of cease and desist orders and the letter of intent to deny OC's license application based on violations of Section 19 is affirmed; and

It is FURTHER ORDERED, That the imposition of a civil penalty of \$60,000 is vacated and remanded for further adjudication consistent with this Order.

Finally, it is ORDERED, That the ALJ shall issue an initial decision consistent with this Order on or before October 30, 2013, and the Commission's final decision shall be issued on or before February 28, 2014.

By the Commission.

Karen V. Gregory
Secretary

Commissioner DYE, with whom *Commissioner* KHOURI joins, dissenting:

I dissent from the majority's decision and would affirm the decision of the Administrative Law Judge. This would provide final agency action in Docket No. 12-01 and allow the Commission to request the Attorney General to seek enforcement of the ALJ's order enjoining respondents from holding out or operating as an ocean transportation intermediary. *See* 46 U.S.C. § 41308. I also agree with the ALJ that the respondents did not violate 46 U.S.C. §41102(a), and that it is not clear that the prohibition in section 41102(a) of title 46, United States Code, against obtaining transportation for less than applicable charges includes allowing other persons to obtain transportation for less than applicable charges.