FEDERAL MARITIME COMMISSION

DOCKET NO. 15-03

JOHN T. BARBOUR t/d/b/a BARBOUR AUTO GROUP; BARBOUR AUTO SALES; BARBOUR SHIPPING; AND BARBOUR SHIPPING AND TRANSPORTATION INC. – POSSIBLE VIOLATIONS OF SECTIONS 8 AND 19 OF THE SHIPPING ACT

BUREAU OF ENFORCEMENT MOTION FOR DECISION ON DEFAULT

Pursuant to Rule 63(c)(4)(ii) of the Federal Maritime Commission (Commission or FMC) Rules of Practice and Procedure, 46 C.F.R. §502.63(c)(4)(ii), the Bureau of Enforcement (BOE) files this Motion For Decision On Default. BOE requests the Administrative Law Judge (ALJ) to enter judgment against John T. Barbour (Barbour or Respondent)[1] for multiple violations of the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.*, (Shipping Act), assess civil penalties, and enter a cease and desist order as set forth herein.

In support hereof, BOE submits for the evidentiary record: (1) Verified Statement of Sandra Kusumoto, Director of the Bureau of Certification and Licensing (VS Kusumoto) (Appendix A); (2) Verified Statement of Ron Podlaskowich, FMC New York Area Representative

---

[1] Unless otherwise specified, reference to Barbour or Respondent also includes the various tradenames utilized by Respondent identified in the title of this proceeding.

(NYAR) (VS Podlaskowich) (Appendix B); (3) Verified Statement of Beverly Cherry, Program Assistant, Bureau of Enforcement (VS Cherry) (Appendix C); (4) a copy of BOE's First Requests For Admission Directed To John T. Barbour (Appendix D); (5) a copy of BOE's First Interrogatories and Requests for Production of Documents Directed to John T. Barbour (I&RFP) (Appendix E); and (6) Order entered July 27, 2015 by the U.S. District Court for the District of Massachusetts issuing preliminary injunction against Respondent (Appendix F).

I. PROCEDURAL BACKGROUND

This proceeding was instituted by Order of Investigation and Hearing (Commission Order), served May 27, 2015 to determine whether Respondent violated sections 8 and 19 of the Shipping Act, 46 U.S.C. §§ 40501, 40901, and 40902, by acting as a non-vessel operating common carrier (NVOCC) without a license, filing evidence of financial responsibility, or keeping open for public inspection a tariff containing its rates, charges, rules and practices; whether, in the event such violations are found, civil penalties should be assessed against Barbour, and in what amount; and whether appropriate cease and desist orders should be entered.[2] BOE was made a party to the proceeding.

Commission records reflect that the Commission Order was served upon Respondent via United Parcel Service (UPS) on May 28, 2015. *See also* BOE's First Requests For Admission Directed To John T. Barbour (RFA) ¶ 1. The Commission Order directed Respondent to file with the Commission and serve upon BOE a verified answer to the allegations set forth in the Commission Order within 25 days of publication in the Federal Register. On June 9, the ALJ issued

[2] The Commission Order was published in the Federal Register on June 2, 2015.

an Initial Order requiring the parties to submit a joint status report within 20 days of the service of Respondent's answer.

On June 17, 2015, BOE initiated discovery by serving Requests for Admission and Interrogatories upon Respondent via UPS requiring responses within 30 days of service. BOE's discovery requests were delivered to Respondent on June 18, 2015. (VS Cherry ¶ 8.)

BOE filed its status report on July 23, 2015 advising that Respondent had not filed with the Commission or served on BOE an answer to the Commission Order, entered an appearance, responded to BOE's discovery - including BOE's Requests For Admissions, or made any contact with BOE.

In a directly related matter, on June 12, 2015, the Commission commenced a proceeding in federal district court pursuant to 46 U.S.C. § 41307 to enjoin Respondent from acting as an NVOCC. *Federal Maritime Commission v. John T. Barbour,* Case No. 1:15-cv-12326-DLC (D. Mass.). The Commission's Motion For Preliminary Injunction and supporting argument explicitly advised the Court of the instant proceeding. Respondent appeared through counsel and agreed to entry of a preliminary injunction. On July 27, 2015, the Court entered an Order enjoining John T. Barbour and the same entities identified in the caption of this proceeding, officers, agents, employees, attorneys, successors, and all those in active concert or participation with them from acting or operating as a NVOCC without a license, bond, and tariff, until 10 days after a final order is issued in this proceeding. *See* Appendix F.

Although Respondent appeared in the district court proceeding, he has not appeared in this proceeding in any manner or capacity.

II. MOTION FOR DECISION ON DEFAULT

Respondent has received actual notice of this proceeding on numerous occasions, but has chosen not to participate. The Commission Order and BOE's RFAs clearly advised Respondent of his obligation to respond and of the consequences of failing to answer. As noted, the corresponding District Court proceeding (in which Respondent appeared) specifically referenced this proceeding. Throughout this proceeding, Respondent has chosen not to dispute the Commission's allegations nor defend against them. Having failed to file an answer to the Commission Order, comply with the ALJ's Initial Order, or respond to BOE's discovery, Respondent is clearly in default. 46 C.F.R. §502.65(a).

Consequently, the well-pleaded allegations in the Commission Order are deemed to be admitted pursuant to Rules 63 and 65 of the Commission's Rules of Practice and Procedure. *United Logistics (LAX), Inc. – Possible Violations,* 33 S.R.R. 438, 441 (ALJ 2013), *aff'd.* 33 S.R.R. 196, 198 (FMC 2014). All RFAs served on Respondent are likewise deemed admitted and the facts conclusively established under Rule 207(b). 46 C.F.R. § 502.207(b); *OC International Freight, Inc., OMJ International Freight, Inc. and Omar Collado,* 32 S.R.R. 1783, 1790-91 (FMC 2013).

BOE therefore files this Motion For Decision On Default. 46 C.F.R. § 502.63(4)(ii). A decision on default is provided for in the Commission rules when, as here, the respondent fails to answer the Order of Investigation. 46 C.F.R. §§ 502.63 and 502.65. Employment of these default rules in enforcement actions was affirmed by the Commission as proper in *United Logistics. United Logistics (LAX), Inc. – Possible Violations,* 33 S.R.R. 196, 198 (FMC 2014). The respondent in *United Logistics* defaulted and BOE filed a motion for summary judgement. Noting the Commission's then new default rules and the fact that "a default decision most clearly corresponds to the procedural posture of the case," the ALJ issued the Initial Decision as a default decision

rather than as a summary judgement.[3] *United Logistics,* 33 S.R.R. at 441. The Commission reviewed the Initial Decision *sua sponte*, approving the ALJ's reasoning and affirming the decision on default. *United Logistics,* 33 S.R.R. at 198. Following this precedent, the ALJ in *Oceanic Bridge* issued a decision on default. *Oceanic Bridge International Inc. –Possible Violations*, Dkt. No. 14-02 slip op., (ALJ I.D. on Default Oct. 21, 2014, admin. final Nov. 21, 2014).

To more fully address the issues set forth in the Commission Order, BOE has supplemented its motion with the evidence submitted in Appendices A-F hereto. "The Commission's default rule specifically permits consideration of the record, which would include evidence submitted with the motion for default decision." *United Logistics,* 33 S.R.R. at 441; 46 C.F.R. §502.65(c).

III. RESPONDENT ACTED AS AN NVOCC WITHOUT A LICENSE, BOND, OR TARIFF

Section 19 of the Shipping Act, 46 U.S.C. §§ 40901 and 40902, prohibits any person in the United States from acting as an ocean transportation intermediary without a license issued by the Commission or without filing evidence of financial responsibility with the Commission. Section 8 of the Shipping Act, 46 U.S.C. § 40501, requires common carriers to keep open for public inspection a tariff containing its rates, charges, rules and practices. The uncontested facts of record establish that Respondent acted as an ocean transportation intermediary, specifically a NVOCC, without a license, without filing evidence of financial responsibility, and without keeping open for public inspection a tariff containing its rates, charges, rules and practices:

[3] The ALJ simultaneously analyzed the case under summary judgement and reached the same conclusion.

a. Respondent acted as a common carrier

An NVOCC is by definition a common carrier. 46 U.S.C. § 40102 (16); 46 C.F.R. § 515.2(o)(2). To act as a common carrier, a person: 1) holds out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; 2) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and 3) uses for all or part of that transportation, a vessel operating on the high seas or on the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102 (6); 46 C.F.R. § 515.2(f).

i. Holding Out

The evidence documents Respondent's holding out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. (Commission Order at 3, ¶ 14; RFA ¶ 22.) Among the indicia of common carriage and of holding out are the entity's course of conduct, the issuance of bills of lading, and the number of shippers served. *See EuroUSA Shipping, Inc., et al – Possible Violations*, 32 S.R.R. 1906, 1912-13 (FMC 2013) (discussing the methodology for determining NVOCC status in *Worldwide Relocations, Inc., et al – Possible Violations*, 32 S.R.R. 495 (FMC 2012)); *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, 162 (FMC 2001); *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (FMC 1991) (stating an intermediary's conduct is determinative of its status).

At the outset, Respondent conceded to the Commission's NYAR that his business activities included providing ocean transportation of used vehicles owned by others from the U.S. to foreign countries and acknowledged that such activities required an NVOCC license. (VS Podlaskowich ¶ 17.) This admitted course of conduct dates back to at least 2012 when the Commission first

advised Barbour of the licensing requirements of the Shipping Act. (Commission Order at 4, ¶ 23; RFA ¶ 34; VS Podlaskowich ¶ 7.)

Shipment documents confirm Respondent's holding out. Submitted as exhibits to the verified statement of NYAR Podlaskowich are 74 NVOCC or "house" bills of lading issued by Respondent to his customers, the vehicle owners. (*See* VS Podlaskowich Sub-Ex. Nos. 3a-9p.) Each house bill is issued by Barbour Shipping, one of the many trade names under which Respondent conducts business. (Commission Order at 2, ¶ 1; RFA ¶ 3; VS Podlaskowich ¶ 5.) The named shippers on these house bills are both businesses and individuals. In all, thirty-four (34) different shippers are named on the 74 house bills, a volume and variety showing the extent of Respondent's customer base and of his holding out as a purveyor of common carriage for cargo. Each house bill demonstrates Respondent's holding out to undertake and provide ocean transportation of vehicles in foreign commerce. (Commission Order at 3, ¶ 14; RFA ¶ 22. *See also* VS Podlaskowich ¶¶ 25-28.)

ii. Assumes Responsibility for Transportation

The 74 house bills referenced above document that Respondent assumed responsibility for providing ocean transportation of his customers' cargo from the United States to foreign countries for compensation. (Commission Order at 3, ¶ 15; RFA ¶ 23.) These house bills show that Respondent dealt directly with the vehicle owners (Commission Order at 2, ¶6; RFA ¶ 12. *See also* VS Podlaskowich ¶ 17), booked ocean transportation on their behalf with the vessel operating common carrier, Liberty Global Logistics LLC (Liberty Global) (Commission Order at 3, ¶ 13; RFA ¶ 19; VS Podlaskowich ¶ 20), and paid the ocean freight charges to Liberty Global (RFA ¶ 26. *See also* VS Podlaskowich ¶ 20). In turn, Respondent charged the vehicle owners, his clients, at a level that he set over and above the amount he paid to Liberty Global. (Commission

Order at 3, ¶ 18; RFA ¶¶ 27-28.) Fundamentally, these 74 house bills are evidence of a contract of carriage between Respondent and his clients. By issuing these bills of lading, Respondent assumed responsibility for the transportation of his clients' cargo. *EuroUSA Shipping, Inc., et al – Possible Violations*, 31 S.R.R. 1131, 1146 (ALJ 2009).

iii. Used a Vessel Operating on the High Seas

To perform the ocean transportation of his clients' vehicles from the United States to Lebanon, Respondent employed the services of Liberty Global. Liberty Global's status as an ocean carrier is reflected in the service contracts it signed with Respondent (Commission Order at 2, ¶10; RFA ¶ 16; VS Podlaskowich ¶ 12), on the Commission's website,[4] and on Liberty Global's website.[5] Respondent's use of Liberty Global is documented by the master bills of lading (VS Podlaskowich Ex. Nos. 3-9), issued by Liberty Global to Barbour Auto Group, one of the various names under which Respondent traded. (Commission Order at 2, ¶ 1; RFA ¶ 3; VS Podlaskowich ¶ 5). Each Liberty Global master bill corresponds to one or more house bills issued by Respondent to his customers. (VS Podlaskowich ¶¶ 22 – 26.) Each Liberty Global master bill identifies one of Respondent's trade name as the shipper, one or more vehicles transported, an origin port and a destination port, name of the vessel and voyage number, and the charges for ocean freight. Respondent's use of ocean-going vessels for at least part of the cargo's transport is thus clearly established. (VS Podlaskowich, ¶ 19, Ex. Nos. 3-9.)

b. Respondent acted as an NVOCC

Through Respondent's holding out, his assumption of responsibility for the international ocean transportation of his clients' cargo, and by using Liberty Global vessels for part of the

[4] The Commission's website list vessel operator tariffs at: https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc
[5] www.libertygl.com

transportation, Respondent acted as a common carrier. More specifically, Respondent acted as a non-vessel operating common carrier (NVOCC).

An NVOCC is a common carrier that does not operate the vessels by which the ocean transportation is provided. 46 U.S.C. § 40102 (16); 46 C.F.R. § 515.2(o)(2). Respondent did not operate the vessels by which he provided the ocean transportation to his clients. (RFA ¶ 11.) Instead, Respondent contracted with vessel operating common carriers such as Liberty Global to provide the ocean transportation. (Commission Order at 2, ¶ 10; RFA ¶ 16; VS Podlaskowich ¶¶ 12, 16.) The 74 shipments documented in the exhibits to the NYAR's verified statement are a representative sample of Respondent's shipments transported by Liberty Global. (Commission Order at 3, ¶ 16; RFA ¶ 24; VS Podlaskowich ¶ 23-27.) Based on information that Liberty Global furnished to the NYAR, Liberty Global transported at least 1,108 vehicles for Barbour in 2013 and 2014. (Commission Order at 3, ¶ 20; RFA ¶ 30.)

When Respondent moved his clients' vehicles via Liberty Global, Respondent was the shipper in relation to Liberty Global. Being a shipper in relationship to the ocean common carrier is a component of acting as an NVOCC. 46 U.S.C. § 40102 (16); 46 C.F.R. § 515.2(o)(2). Proof of this relationship between Respondent and Liberty Global is found in the master bills of lading contained in the exhibits to the NYAR's verified statement. (VS Podlaskowich Ex. Nos. 3-9.) Liberty Global issued its master bills of lading to Respondent and on each one identifies a Respondent trade name as the shipper. (Commission Order at 3, ¶17; RFA ¶ 25.) Respondent was the party Liberty Global billed and held responsible for the payment of its ocean freight charges. (VS Podlaskowich ¶¶ 19-20.) The 74 house bills issued by Barbour to the true cargo owners (Commission Order ¶ 19; RFA ¶ 20; VS Podlaskowich Sub-Ex. Nos 3a-9p) establish his carrier

relationship with them and the corresponding master bills of lading evidence Respondent's shipper relationship with the ocean common carrier.

c. Respondent conducted NVOCC activities without a license, evidence of financial responsibility, or a tariff.

The evidence amply establishes that Respondent acted as a NVOCC on the shipments documented in this proceeding, and that he was located in, and conducted his NVOCC operations in, the United States. (Commission Order at 2, ¶¶ 3-4; RFA ¶¶ 8-9; VS Podlaskowich ¶¶ 15, 17.) Any person in the United States who acts as an NVOCC is required to have a valid FMC issued license (46 U.S.C. § 40901(a); 46 C.F.R. § 515.3), furnish a bond or have other form of financial security (46 U.S.C. § 40902; 46 C.F.R. § 515.21), and keep open to the public, a tariff showing all its rates, charges, classifications, rules, and practices (46 U.S.C. § 40501(a)(1); 46 C.F.R. § 520.3(a)).

Commission records indicate that Respondent is not now and has not previously been licensed by the Commission. (VS Kusumoto ¶ 5; VS Podlaskowich ¶ 10.) Nor has Respondent filed evidence of financial responsibility (VS Kusumoto ¶ 6; VS Podlaskowich ¶ 10), or maintained a tariff (VS Podlaskowich ¶ 10). Accordingly, Respondent is and has been acting as an NVOCC in violation of sections 8 and 19 of the Shipping Act, 46 U.S.C. §§ 40501, 40901, 40902, and Commission regulations, 46 C.F.R. §§ 515.3, 515.21, 520.3(a).

IV. RESPONDENT ACTED KNOWINGLY AND WILLFULLY

Respondent committed these violations of the Shipping Act in a knowing and willful manner. A person acts in a knowing and willful manner if he or she has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act. *OC Int'l Freight,* 33 S.R.R. at 571. As explained in *Trans Ocean-Pacific*

Forwarding, Inc. – Possible Violations, 27 S.R.R. 409, 412 (ALJ 1995), a knowing and willful act 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." In *Pacific Champion Express Co. Ltd. – Possible Violations*, 28 S.R.R. 1397, 1403 (FMC 2000), the Commission further explained: "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."

Between March 2009 and April 2013 Respondent sporadically filed five (5) separate OTI license applications to operate as a NVOCC. (VS Kusumoto ¶¶ 3-4.) Respondent was therefore aware of the licensing requirements of law, that the FMC issues licenses to OTIs, and that his operations likely required such a license. Respondent elected not to prosecute any of these applications.

Moreover, Respondent was expressly put on notice by BOE's letter of November 16, 2012 as to Respondent's obligations under the Shipping Act. (Commission Order at 4 ¶ 23; RFA ¶ 34; VS Podlaskowich ¶ 7.) That letter unambiguously advised Respondent that ocean transportation activities are subject to the statutory licensing requirements. Respondent chose to disregard the letter and continue his NVOCC operations unabated. (*See e.g.* Commission Order at 2, ¶¶ 10, 11; RFA ¶¶ 16, 17.)

Following BOE's letter, the Commission's Area Representatives twice interviewed Respondent at his place of business, each time advising Respondent of the relevant Shipping Act regulations and the need to obtain an NVOCC license. (Commission Order at 4, 24; RFA ¶ 35; VS Podlaskowich ¶¶ 15, 17-18.) Despite Respondent's acknowledging that his business activities

required an NVOCC license (VS Podlaskowich ¶ 19), Respondent again chose to ignore these admonitions and continued to provide unlicensed transportation as illustrated by the 74 shipments provided by Respondent. These shipments, dated between July 23, 2014 and October 29, 2014, occurred well after BOE's letter and months following the first AR visit in April 2014.

Respondent knew the requirements of the Shipping Act as related to his activities, yet continually refused to comply. Thus, Respondent's continued unlicensed operations constitute knowing and willful violations. *OC Int'l Freight,* 33 S.R.R. at 571.

V. A CIVIL PENALTY SHOULD BE IMPOSED

When violations are found to have been committed, the question before the ALJ is not whether to assess a civil penalty, but rather, the amount of penalty to assess. *EuroUSA Shipping, Inc., et al. – Possible Violations,* 32 S.R.R. 578, 581 (FMC 2012), citing *Stallion Cargo, Inc. – Possible Violations,* 29 S.R.R. 665, 678 (FMC 2001). The penalty provisions of the Shipping Act, 46 U.S.C. § 41107(a), provide a two-level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations. This five-to-one ratio evinces a stern Congressional intent to elevate the deterrent effects of those civil penalties assessed for the most serious violations. *Martyn Merritt, AMG Services – Possible Violations,* 26 S.R.R. 663, 664-65 (FMC 1992). Recognizing Congress' intent, "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." *Anderson International Transport and Owen Anderson – Possible Violations*, 32 S.R.R. 1678, 1693 (FMC 2013). *Accord United Logistics,* 33 S.R.R. at 445-46 (penalty of $25,000 per knowing and willful violation imposed compared to

maximum for not knowing and willful of $6,000 or $8,000); *Parks International Shipping, Inc., et al. – Possible Violations*, 33 S.R.R. 59, 63-64 (FMC 2013) (penalty of $8,000 per knowing and willful violation imposed on Parks compared to maximum for not knowing and willful of $6,000). As the evidence establishes that Respondent's unlicensed operations were conducted in knowing and willful violation of the Shipping Act, Barbour is subject to a civil penalty of not more than $45,000 for each violation.[6]

In determining the amount of a civil penalty, the Commission is required to take into account the nature, circumstances, extent and gravity of a violation, and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require when assessing a civil penalty. Section 13(c) of the Shipping Act, 46 U.S.C. § 41109. The Commission's regulations add to these factors the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. 46 C.F.R. §502.603(b). The Commission must make specific findings with regard to each statutory penalty factor, but may use its discretion to determine how much weight to place on each factor. *Merritt v. United States,* 960 F.2d 15, 17 (2nd Cir. 1992).

The nature and gravity of Respondent's violations are unquestionably serious since Respondent's unlicensed OTI activity undermines the regulatory purpose and structure set by Congress, devalues existing licenses, and exposes the shipping public to greater potential harm. *See Mateo Shipping Corp. and Julio Mateo-Possible Violations*, 31 S.R.R. 830, 850 (ALJ 2009) (Congressional intent of licensing and bonding requirements was to protect the shipping public

[6] The 74 violations at issue here occurred between July 23, 2014 and October 29, 2014. The current penalty maximums under 46 U.S.C. § 41107(a), as adjusted for inflation pursuant to the Commission's regulations at 46 C.F.R. Part 506 applicable to violations that occurred after July 11, 2014, are $9,000 for violations that are not knowing and willful, and $45,000 for those that are. Consequently, the amount of penalty to be assessed a knowing and willful violation should range from a low of $9,001 to the maximum of $45,000 per violation.

from unqualified and potentially unscrupulous service providers). Having committed the violations continuously and repeatedly over an extended period of time (Commission Order at 2, ¶ 6; RFA ¶ 12), with knowledge of the licensing requirements of the Shipping Act (Commission Order at 4, ¶¶ 22-24; RFA ¶¶ 32-35; VS Podlaskowich ¶¶ 7, 11, 17-18, Ex. No. 2; VS Kusumoto ¶¶ 3-4), the circumstances and extent of Respondent's violations can only be viewed as aggravating factors that compel a commensurate penalty.

Respondent bears a high degree of culpability for these violations. As a sole-proprietor he was responsible for his business decisions and actions. He was made aware of the requirements of the Shipping Act numerous times, twice directly by the NYAR during the investigation, and therefore knew that operating as an NVOCC without a license, bond or tariff constituted a violation. (Commission Order at 4 ¶¶ 23-24; RFA ¶¶ 34-35; VS Podlaskowich ¶¶ 7, 15, 17-18.) With every notification, however, Respondent repeatedly chose to disregard the Shipping Act and continue his operations unabated, a choice which makes Respondent highly culpable for his actions. *See e.g. Anderson Int'l*, 32 S.R.R. at 1693 (Respondents found highly culpable when they had continued operating unlawfully after direct warning to stop during investigation).

Respondent has not previously been the subject of a formal enforcement proceeding, nor has Respondent been the subject of a prior enforcement action. However, Respondent's repeated knowing and willful violations can offset this mitigating factor. *Refrigerated Container Carriers Pty Limited – Possible Violations*, 28 S.R.R. 799, 806 n.6 (ALJ 1999) (knowing and willful violative shipments made over two years' time more than offset a lack of prior history).

With respect to ability to pay, BOE sought to fully inform itself and the ALJ of Respondent's ability to pay by requesting Respondent's financial information and documentation in its First Interrogatories and Requests for Production of Documents Directed to John T. Barbour.

(*See* Appendix E). However, Respondent chose not to respond to the interrogatories or furnish any documents responsive to those requests. Notwithstanding Respondent's election against participation in this proceeding, BOE has become aware that Respondent is currently the Debtor in a Chapter 13 bankruptcy.[7]

According to documents filed in the bankruptcy proceeding,[8] Respondent claims that his annual gross business income in the 12 months prior to filing was $138,000, and estimates he will make that sum in the future. (*Business Income and Expenses*, No. 15-11855 John T. Barbour, at 24 (Bankr. D. Mass. Aug. 20, 2015) ECF No. 32) Accounting for all claimed business and personal expenses, Respondent does not have a deficit.[9]

While Respondent's bankruptcy might suggest that he has no or only a limited ability to pay a penalty, such a conclusion is not clear by any means. Respondent has filed for Chapter 13 on three prior occasions in the same U.S. Bankruptcy Court as his present bankruptcy and each case was dismissed for his failure to make required plan payments. No.14-13794, dismissed March 3, 2015; No. 10-12430, dismissed May 16, 2011, and No. 09-14378, dismissed Nov. 30, 2009. These cases and dismissals are available on P.A.C.E.R. and may be officially noticed. 46 C.F.R. §502.226. Respondent is exhibiting this pattern of behavior again: on October 6, 2015 the Bankruptcy Trustee filed a motion to dismiss the current case because Mr. Barbour failed to make the full required plan payment amount.

---

[7] U.S. Bankruptcy Court (D. Mass.), Case No. 15-11855. Commenced on May 9, 2015, the case originated as a Chapter 7 bankruptcy, but converted to Chapter 13 on July 28, 2015. .

[8] All of Barbour's bankruptcy filings are available on Public Access to Court Electronic Records (PACER). As publicly available federal court documents, the ALJ may take official notice of them. 46 C.F.R. 502.226.

[9] At a gross business income of $138,000/yr. or $11,500/mo., Respondent claims monthly business expenses of $1,275 netting him a monthly income of $10, 225. *Business Income and Expenses*, No. 15-11855 John T. Barbour, at 24 (Bankr. D. Mass. Aug. 20, 2015) ECF No. 32.Respondent's claimed monthly personal expenses are $6,416.48. *Schedule J*, No. 15-11855 John T. Barbour, at 18 (Bankr. D. Mass. Aug. 20, 2015) ECF No. 32.

Even if Respondent were found to have limited financial resources, ability to pay is but one of several factors the Commission must consider. 46 C.F.R. §502.603(b); *Refrigerated Container*, 28 S.R.R. at 806.

> Respondent may very well be unable to pay the penalty imposed by the Commission, but the other factors present – the severity of the violations, Respondent's continued disregard of the statutory requirements even after the initiation of a formal investigation, and the need to further the Congressional purpose to deter violations by imposing greater civil penalties – militate, on balance, that a substantial, though not the maximum, penalty be imposed.

Stallion Cargo, Inc. – Possible Violations, 29 S.R.R 665, 682, n. 41 (FMC 2001).

Considering all of the above factors, BOE submits that a civil penalty of not less than $9,001 for each of the 74 violations is warranted. This amount gives effect to the two-tiered penalty structure enacted by Congress in section 13 of the Shipping Act, 46 U.S.C. § 41107, which provides a maximum level of penalties for violations not shown to be knowing and willful and a substantially enhanced level for knowing and willful violations. The Commission has explained that although there is no minimum penalty amount for violations found to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful. *Anderson Int'l,* 32 S.R.R. at 1693.

The circumstances of this case do not warrant departure from that precedent. A penalty of not less than $9,001 reflects the knowing and willfulness of Respondent's actions. By the same token, assessment at the lowest end of the spectrum acknowledges such mitigating factors as lack of prior Shipping Act violations and Respondent's current status in bankruptcy. This is precisely the type of balancing process that the Commission performed in *Anderson Int'l,* where it weighed such mitigating factors against Respondent's culpability in continuing its unlawful operations after being warned to stop, the policy for deterrence, and the level of penalties for knowing and willful

violations in past proceedings. Application of this analysis fully supports a civil penalty of not less than $9,001 per violation.

VI. CEASE AND DESIST

The Commission's Order directs the ALJ to determine whether, if violations are found, appropriate cease and desist orders should be entered. (Commission Order at 6.) A cease and desist order is appropriate "when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity." *Ever Freight Int'l Ltd., et al. – Possible Violations*, 28 S.R.R. 329, 336 (ALJ 1998). Respondent is an individual in business for himself. Therefore, the present violations were, and any opportunity for future violations are, under his control. Respondent represented to the Court in his most recent bankruptcy proceeding that he intended to continue operating his current business: a "Self Employed Freight Forwarder".[10] *Schedules B, C, and I*, No. 15-11855 John T. Barbour, at 4, 7, 14-15 (Bankr. D. Mass. Aug. 20, 2015) ECF No. 32. This stated intent together with Respondent's established history of unlawful operations and a plain indifference to any effort to comply with the licensing and related requirements of the Shipping Act, indicates a reasonable likelihood that Respondent will commit future violations and compels an order to cease and desist.

A cease and desist order is warranted to prevent Respondent from operating without a license, bond or tariff. Issuing a cease and desist order would not only protect the shipping public, but it would also alert the shipping industry in an effort to forestall future violations by Respondent.

[10] The fact that Respondent acknowledges in these filings that his chosen occupation is "subject to bond" or to "Bond and Approval" (*Schedules B, C, and I*, No. 15-11855 John T. Barbour, at 4, 7, 15 (Bankr. D. Mass. Aug. 20, 2015) ECF No. 32) is not sufficient assurance that going forward he will not operate his business in the same unlawful manner. *SEC v. Bilzerian*, 29 F3d 689, 695 (DC Cir 1994) (court rejected defendant's filed affidavit declaring that he would "be careful and make every effort" not to violate the law in the future as insufficient assurance that defendant would indeed not commit future violations).

Ever Freight, 28 S.R.R. at 336. Further, if Respondent were to commit future violations, a cease and desist order would, "enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order." *Id.* Given Respondent's propensity to utilize a variety of trade names in conducting his business activities, a cease and desist order would aid in preventing Respondent from avoiding the legal consequences of his past violations, *Ariel Mar. Group*, 24. S.R.R. 517, 528 (FMC 1987). Further, BOE submits, such a propensity necessitates extending the cease and desist order to his employment by any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States for one (1) year, and to Barbour's ownership, control, and/or management of the same for five (5) years. *See e.g.*, *OC Int'l Freight,* 32 S.R.R. at 1600, *aff'd*, 32 S.R.R. 1783, 1794 (FMC 2013); *Anderson Int'l*, 32 S.R.R. at 1694; *Worldwide Relocations, Inc., et al. – Possible Violations*, 32 S.R.R. 495, 507-508 (FMC 2012).

VII. CONCLUSION

BOE respectfully requests the ALJ to: (1) enter judgment in the instant action, finding that Respondent violated sections 8 and 19 of the Shipping Act on at least 74 occasions; (2) assess a civil penalty of no less than $9,001 nor exceeding $45,000 for each of 74 knowing and willful violations; (3) order Respondent to cease and desist from holding out or operating as an ocean transportation intermediary in the United States' foreign trades until and unless a license is issued by the Commission, Respondent obtains a bond or other proof of financial security, and Respondent publishes and keeps open for public inspection a tariff containing its rates, charges, rules and practices; (4) order Respondent to cease and desist for one (1) year from 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; and (5) order Respondent to cease and desist for five (5) years from controlling in any way or serving as an investor, owner, shareholder, officer, director, manager, or administrator of any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States.

Respectfully submitted,

Peter J. King, Director
Brian L. Troiano, Deputy Director
Brenda Doty, Trial Attorney
Bureau of Enforcement
Federal Maritime Commission
800 N. Capitol St., N.W.
Washington D.C. 20573 – 0001
(202) 523-5783

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Bureau of Enforcement Motion For Decision On Default was served upon John T. Barbour t/d/b/a Barbour Auto Group; Barbour Auto Sales; Barbour Shipping; and Barbour Shipping and Transportation Inc. at 146 South St. West, Raynham, MA 02767, and at 735 Pleasant St., Fall River, MA 02723 by first class U.S. mail with postage prepaid this 30thday of October, 2015.

Brenda Doty