

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 SECTION 8 AND 19 OF THE SHIPPING ACT OF 1984**

INITIAL DECISION ON DEFAULT¹

On May 27, 2015, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing alleging that respondent John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation Inc. (Barbour) operated as a non-vessel-operating common carrier (NVOCC): (1) without keeping open for public inspection a tariff containing rates, charges, rules, and practices in violation of section 8 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. § 40501; (2) without a license issued by the Commission in violation of section 19(a) of the Act, 46 U.S.C. § 40901; and (3) without filing evidence of financial responsibility in violation of section 19(b) of the Act, 46 U.S.C. § 40902. *John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation Inc. – Possible Violations of Section 8 and 19 of the Shipping Act of 1984*, FMC No. 15-03 (FMC May 27, 2015) (Order of Investigation and Hearing). The Commission named the Commission's Bureau of Enforcement (BOE) as a party to the proceeding. *Id.* at 6.

As explained more fully below, Barbour has not filed an answer to the Order of Investigation and Hearing, responded to discovery served on him by BOE, responded to BOE's motion for decision on default, or responded to an order to show cause why an initial decision on default should not be entered against him. Barbour is (1) found to be in default; (2) found to have violated the Act; (3) assessed a civil penalty of \$666,074.00; (4) ordered to cease and desist from holding out or operating as an ocean transportation intermediary in the United States foreign trades until and unless the Commission issues a license permitting him to operate; (5) ordered to cease and desist for one

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

year from working as an employee of or in any capacity for any company or entity engaged in providing ocean transportation services in the foreign commerce of the United States; and (6) ordered to cease and desist for five 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 in a manner inconsistent with this Order. This Order, however, does not enjoin respondents from owning up to five percent of a class of shares of a publicly traded company.

I. BACKGROUND.

A. Order of Investigation and Hearing.

The Order of Investigation and Hearing alleges that Barbour is an individual who trades and does business under several fictitious names, including Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation Inc. Barbour and his businesses are referred to collectively as Barbour. The Order alleges that Barbour is engaged in buying, selling, and shipping used motor vehicles. Neither Barbour nor any of his trade names are licensed by the Commission as an NVOCC. Barbour does not have on file with the Commission evidence of financial responsibility and he does not maintain or keep open for public inspection a tariff containing rates, charges, rules, or practices governing ocean transportation services.

The Order alleges that since at least 2013, Barbour has been providing ocean transportation of used vehicles owned by other persons from the United States to foreign countries for compensation. As part of his operation, Barbour signed three service contracts with Liberty Global Logistics, LLC (Liberty Global), a vessel-operating common carrier (VOCC): No. 2013/1502, effective July 9, 2013; No. 2013/1503, effective October 23, 2013; and No. 2000, effective April 10, 2014. Barbour also signed service contract number 675507 with Maersk Line, a VOCC, effective June 10, 2013. In each of the service contracts, Barbour certified that he would be the owner of the cargo shipped pursuant to the contracts.

The Order alleges that between July and October 2014, Barbour booked and shipped by water 251 motor vehicles in seventy-four shipments between ports or points in the United States and ports or points in foreign countries.² Barbour was not the owner of the cargo being transported on any of the shipments. For each shipment, Barbour issued a house bill of lading to his customers under the name Barbour Shipping, thereby assuming the responsibility of transporting the cargo by water from points in the United States to points in Lebanon for compensation. Liberty Global provided the ocean transportation for each shipment pursuant to its service contract with Barbour and issued a bill of lading identifying Barbour Auto Group as the shipper. In his invoice to his customer, Barbour added his own charges to the ocean freight that Liberty Global charged Barbour for the ocean transportation. The Order also alleges that between July 2013 and December 3, 2014, Barbour

² The shipments are identified in Attachment A to the Order, and documents relating to the shipments were filed with BOE's motion for decision on default.

booked and shipped 1,108 or more vehicles from points in the U.S. to points in the Middle East under the Liberty Global and Maersk service contracts, and that Barbour operated as an NVOCC on each shipment transported under the Liberty Global and Maersk contracts.

The Order alleges that between March 2009 and March 2012, Barbour filed four incomplete FMC-18 forms (Application for a License as an Ocean Transportation Intermediary), and the head of the Commission's Bureau of Certification and Licensing states Barbour filed five applications. On November 16, 2012, BOE set a warning letter to Barbour stating that his operations may be in violation of the Shipping Act. On two occasions in 2014, the Commission's New York Area Representative advised Barbour that his operation as an NVOCC require a license. Nevertheless, Barbour continued to operate as an NVOCC without a license, bond, or tariff.

On May 27, 2015, the Secretary sent the Order of Investigation and Hearing by United Parcel Service (UPS) to Barbour at 146 South St. West, Raynham, MA 02767, 735 Pleasant St., Fall River, MA 02723, and 2151 G.A.R. Highway, Swansea, MA 02777. On May 28 2015, UPS delivered the Order to Barbour at the Raynham and Fall River addresses, but UPS was not able to deliver the Order sent to Barbour at the Swansea address and returned it to the Secretary.

B. BOE Written Discovery.

On June 17, 2015, BOE served two sets of written discovery on Barbour by UPS. Each set consisted of BOE's First Requests for Admission Directed to John T. Barbour and BOE's First Interrogatories and Requests for Production of Documents Directed to John T. Barbour. 46 C.F.R. §§ 502.205-502.207. One set was sent to Barbour's residence at the Raynham address and the other set to Barbour's place of business the Fall River address. UPS records indicate that both sets were delivered on June 18, 2015. As of the issuance of this Initial Decision, Barbour has not responded to BOE's written discovery.

C. Motion for Decision on Default.

On October 30, 2015, BOE filed a motion for decision on default and served the motion on Barbour by regular mail addressed to his Raynham and Fall River addresses. As grounds for the motion, BOE contends that Barbour is in default because he failed to file an answer to the Order of Investigation and Hearing, failed to comply with the Initial Order entered in this proceeding, and failed to respond to BOE's written discovery. (Motion at 4; Motion Certificate of Service.) See 46 C.F.R. § 502.63(c) (authorizing decision on default if respondent fails to file answer to Order of Investigation and Hearing); 46 C.F.R. § 502.210 (authorizing sanctions for failure to respond to discovery). Barbour did not respond to the motion.

D. Notice of Default and Order to Show Cause.

On December 8, 2015, the undersigned issued a Notice of Default and Order to Show Cause (Notice and Order). The Notice and Order required Barbour: (1) to file an answer to the Order of

Investigation and Hearing; (2) to serve responses to the discovery served on him by the Bureau of Enforcement; (3) to file a response to the motion for decision on default; and (4) to show cause why a decision on default should not be entered against him. The Notice required responses on or before January 8, 2016, and stated that if Barbour failed to respond, a decision on default may be entered against him, including assessment of a civil penalty and entry of a cease and desist order. *John T. Barbour – Possible Violations*, FMC No. 15-03 (FMC Dec. 8, 2015) (Notice of Default and Order to Show Cause). On December 8, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by regular mail to 146 South St. West, Raynham, MA 02767, 735 Pleasant St., Fall River, MA 02723, and 2151 G.A.R. Highway, Swansea, MA 02777. The copies sent to the Raynham and Fall River addresses have not been returned. On December 10, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by UPS to 146 South St. West, Raynham, MA 02767; 735 Pleasant St., Fall River, MA 02723; and 2151 G.A.R. Highway, Swansea, MA 02777. On December 15, 2015, UPS delivered the Notice to the Fall River address where a person named Demelo signed for it. Barbour has not responded to the Notice and Order.

II. CONTROLLING AUTHORITY.

A. Statutory and Regulatory Framework.

The Commission issued its Order of Investigation and Hearing pursuant to section 41302 of the Act: “The . . . Commission, on complaint or its own motion, may investigate any conduct or agreement that the Commission believes may be in violation of this part.” 46 U.S.C. § 41302(a). The Order alleges that Barbour violated sections 40501, 40901, and 40902 of the Act.

The Act defines and regulates a number of different types of entities that are involved in the international shipment of cargo by water, including two kinds of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC, the intermediary must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The term “shipper” means – (A) a cargo owner; (B) the person for whose account the ocean transportation of cargo is provided; (C) the person to whom delivery is to be made; (D) a shippers’ association; or (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(22).

Section 40501 provides:

(a) Automated tariff system. – (1) In general. – Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501(a). Section 40901 provides:

(a) In general. – A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the . . . Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

(b) Exception. – A person whose primary business is the sale of merchandise may forward shipments of the merchandise for its own account without an ocean transportation intermediary’s license.

46 U.S.C. § 40901. Section 40902 provides:

In general. – A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety –

(1) in a form and amount determined by the . . . Commission to insure financial responsibility; and

(2) issued by a surety company found acceptable by the Secretary of the Treasury.

46 U.S.C. § 40902(a).

The Commission has promulgated regulations governing enforcement actions under section 41302. Commission Rule 63 provides:

(a) The Commission may issue an Order of Investigation and Hearing commencing an adjudicatory investigation against one or more respondents alleging one or more violations of the statutes that it administers.

* * *

(c) Answer to Order of Investigation and Hearing. (1) Time for filing. A respondent must file with the Commission an answer to the Order of Investigation and Hearing and serve a copy of the answer on the Bureau of Enforcement within 25 days after being served with the Order of Investigation and Hearing

* * *

(4) Effect of failure to file answer. (i) Failure of a respondent to file an answer to an Order of Investigation and Hearing within the time provided will be deemed to constitute a waiver of the respondent's right to appear and contest the allegations in the Order of Investigation and Hearing and to authorize the presiding officer to enter a decision on default as provided for in 46 CFR 502.65. Well pleaded factual allegations in the Order of Investigation and Hearing not answered or addressed will be deemed to be admitted. (ii) The Bureau of Enforcement may make a motion for decision on default.

46 C.F.R. § 502.63.

B. Burden of Persuasion and Evidence.

Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). A party alleging a violation of the Shipping Act – BOE in this proceeding – “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not

available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

During BOE's investigation, Barbour produced seven ocean bills of lading issued by VOCC Liberty Global for Barbour shipments and the bills of lading that Barbour issued for those shipments. BOE attached the records as exhibits 3 through 9 of its motion for decision on default. Barbour's underlying bills of lading demonstrate that the seven Liberty Global and Barbour bills of lading covered seventy-four Barbour shipments, with each Barbour bill of lading identifying the cargo as one or more vehicles or, on one shipment, a boat. Barbour has not appeared or objected to admission of these documents. Furthermore, from all appearance, the documents are regularly kept business records of Barbour's shipping activities. All exhibits filed with BOE's motion for decision on default and the supplemental exhibits filed at the request of the undersigned are hereby admitted as evidence.

This initial decision addresses only issues of fact and law material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). To the extent findings of fact may be deemed conclusions of law, they should also be considered conclusions of law. Similarly, to the extent conclusions of law may be deemed findings of fact, they should also be considered findings of fact.

Pursuant to Commission Rules, well pleaded factual allegations in the Order of Investigation and Hearing not answered or addressed by the respondent are deemed to be admitted. 46 C.F.R. § 502.63(c)(4). When a party serves requests for admissions pursuant to Commission Rule 207, "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." 46 C.F.R. § 502.207(a)(3).

Failure to comply with order compelling disclosures or discovery. If a party or a party's officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just. . . . An order of the presiding officer may:
(1) Direct that the matters included in the order or any other designated facts must be taken to be established for the purposes of the action as the party making the motion claims.

46 C.F.R. § 502.210(b).

III. FINDINGS OF FACT.

The findings of fact are based on the exhibits (the declarations by Commission personnel and the Barbour shipping documents) filed with BOE's motion for decision on default, the well-pleaded allegations in the Order of Investigation and Hearing, the Requests for Admission to which Barbour failed to respond, and the supplemental information filed by BOE at the request of the undersigned.

1. Respondent John T. Barbour is an individual who trades and does business under the following fictitious names: Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation Inc. (Ord. Inv. & Hearing ¶ 1.)
2. Barbour resides at 146 South St. West, Raynham, MA 02767. (Ord. Inv. & Hearing ¶ 2.)
3. Barbour conducts business at offices located at 735 Pleasant St., Fall River, MA 02723. (Ord. Inv. & Hearing ¶ 3.)
4. Barbour formerly conducted business at offices located at 2151 G.A.R. Highway, Swansea, MA 02777. (Ord. Inv. & Hearing ¶ 4; BOE App. B, Ex.3 (Liberty Global bill of lading).)
5. Barbour is engaged in buying, selling, and shipping used motor vehicles. (Ord. Inv. & Hearing ¶ 5.)
6. Barbour is not licensed by the Federal Maritime Commission as an ocean transportation intermediary under his own name or any business name. (Ord. Inv. & Hearing ¶ 7; BOE App. A ¶ 5; BOE App. B ¶ 9.)
7. Barbour does not have on file with the Commission any evidence of financial responsibility. (Ord. Inv. & Hearing ¶ 8; BOE App. A ¶ 6.)
8. Barbour does not maintain or keep open for public inspection a tariff containing rates, charges, rules, or practices governing its ocean transportation services. (Ord. Inv. & Hearing ¶ 9.)
9. Barbour has provided ocean transportation of used vehicles owned by others from the United States to foreign countries for compensation since at least 2013. (Ord. Inv. & Hearing ¶ 6.)
10. Barbour signed three service contracts with Liberty Global Logistics LLC (Liberty Global), a vessel-operating common carrier (VOCC): No. 2013/1502, effective July 9, 2013; No. 2013/1503, effective October 23, 2013; and No. 2000, effective April 10, 2014. (Ord. Inv. & Hearing ¶ 10; BOE App. B ¶ 12.)
11. Barbour signed service contract number 675507 with Maersk Line, a VOCC, effective June 10, 2013. (Ord. Inv. & Hearing ¶ 11; BOE App. B ¶ 13.)

12. In each of the Liberty Global and Maersk contracts, Barbour certified that he would be the cargo owner of shipments transported pursuant to the contracts. (Ord. Inv. & Hearing ¶ 12; BOE App. B ¶ 14.)
13. Between July 19, 2014, and October 24, 2014, Barbour booked and shipped 251 vehicles in seventy-four shipments for ocean transportation pursuant to the Liberty Global service contract. (Ord. Inv. & Hearing ¶ 13; BOE App. B ¶ 22-25; BOE App. B Ex. 3-9.)
14. On each Liberty Global shipment, Barbour tendered the vehicles to Liberty Global to provide the transportation by water pursuant to a service contract. (Ord. Inv. & Hearing ¶ 16; BOE App. B Ex. 3-9.)
15. Liberty Global issued a bill of lading for each shipment identifying Barbour Auto Group, 251 G.A.R. Highway, Swansea, Massachusetts, as the shipper for the transportation by water of the cargo between a port in the United States for a point in Lebanon. (Ord. Inv. & Hearing ¶ 17; BOE App. B Ex. 3-9.)
16. On each shipment with Liberty Global, Barbour issued a house bill of lading under the name Barbour Shipping to his customer and assumed responsibility for transporting by water the cargo identified in the bill of lading shipped by that customer for compensation from a port or point in the United States to a point in Lebanon. (Ord. Inv. & Hearing ¶ 15; BOE App. B ¶ 25; BOE App. B Ex. 3-9.)
17. Each Barbour Shipping bill of lading identifies a person other than Barbour as the exporter/shipper. (BOE App. B Ex. 3-9.)
18. On each Liberty Global shipment, in his invoices to his customers, Barbour added his own charges to the ocean freight that Liberty Global charged Barbour for the ocean transportation. (Ord. Inv. & Hearing ¶ 18.)
19. Barbour did not own the cargo on any of the seven Liberty Global shipments. (Ord. Inv. & Hearing ¶ 19; BOE App. B ¶ 16.)
20. Between July 2013 and December 3, 2014, Barbour shipped 1,108 or more vehicles from points in the United States to points in the Middle East under the Liberty Global and Maersk service contracts. (Ord. Inv. & Hearing ¶ 20.)
21. Between March 2009 and April 2013, Barbour filed five Federal Maritime Commission form FMC-18 applications seeking a license as an ocean transportation intermediary. (Ord. Inv. & Hearing ¶ 22 (four applications through March 2012); BOE App. A ¶ 3 (five applications).)

22. Each of the five applications was incomplete. (BOE App. A ¶ 4.)
23. On November 16, 2012, BOE sent a warning letter to Barbour stating that his operations may be in violation of the Shipping Act. (Ord. Inv. & Hearing ¶ 23; BOE App. B ¶ 7; BOE App. B, Ex. 2.)
24. On April 24, 2014, and September 14, 2014, the Commission's New York Area Representative advised Barbour that business requires a license as an ocean transportation intermediary issued by the Commission. (Ord. Inv. & Hearing ¶ 24; BOE App. B ¶ 15-17.)
25. On May 27, 2015, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing against respondent John T. Barbour and Barbour acting under his trade names. (Official Notice of Commission Records.)
26. On May 27, 2015, the Secretary sent the Order of Investigation and Hearing by United Parcel Service (UPS) to Barbour at 146 South St. West, Raynham, MA 02767, 735 Pleasant St., Fall River, MA 02723, and 2151 G.A.R. Highway, Swansea, MA 02777. (BOE Response to Notice of Default and Order to Show Cause, Verified Statement of Karen V. Gregory ¶¶ 5-7 and n.1.)
27. On May 28 2015, UPS delivered the Order of Investigation and Hearing to Barbour at 146 South St. West, Raynham, MA 02767 and 735 Pleasant St., Fall River, MA 02723. (BOE Response to Notice of Default and Order to Show Cause, Verified Statement of Karen V. Gregory ¶¶ 5-7 and n.1.)
28. UPS was not able to deliver the Order of Investigation and Hearing sent to Barbour at 2151 G.A.R. Highway, Swansea, MA 02777 and returned it to the Secretary. (BOE Response to Notice of Default and Order to Show Cause, Verified Statement of Karen V. Gregory ¶ 5 and n.1.)
29. On June 12, 2015, pursuant to section 41307 of the Act, 46 U.S.C. § 41307, the Commission commenced a related proceeding in a United States district court to enjoin Barbour from operating as an NVOCC. *Federal Maritime Commission v. John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation, Inc.*, No. 15-CV-12326-DLC (D. Mass. June 12, 2015) (Complaint filed), ECF No. 1.
30. The federal district court Complaint identified this proceeding as an on-going proceeding. *Id.*, Complaint ¶¶ 29-32.
31. The Commission attached a copy of the May 27, 2015, Order of Investigation and Hearing filed in this proceeding to the federal Complaint. *Id.*

32. On June 23, 2015, the United States Marshals Service served the federal Complaint by leaving a copy with Barbour's daughter at Barbour's residence, 146 South St. West, Raynham, MA 02767. Process Receipt and Return, *Federal Maritime Commission v. John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation, Inc.*, No. 15-CV-12326-DLC (D. Mass. June 30, 2015) (filed), ECF No. 9.
33. On July 27, 2015, "[f]or the reasons stated in the Federal Maritime Commission's motion for a preliminary injunction and in light of the Defendant's assent to that motion," the court entered an order enjoining Barbour "from acting or operating as [an NVOCC] unless [Barbour] meets the qualifications for and obtains a valid Commission license to operate as [an NVOCC]; furnishes a bond, proof of insurance or other surety in the amount of \$75,000; and publishes a tariff of its rates, charges, classifications, rules and practices." Order, *Federal Maritime Commission v. John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation, Inc.*, No. 15-CV-12326-DLC (D. Mass. July 27, 2015), ECF No. 20.
34. The July 27, 2015, district court Order further provided that "the response date of the [district court] complaint, if any is needed, is extended until a period of five days after the completion of the administrative adjudication, FMC Docket No. 15-03, *John T. Barbour – Possible Violations of Section 19 of the Shipping Act of 1984 and the Commission's regulations at 46 C.F.R. Part 515 [sic].*" *Id.*
35. On June 17, 2015, BOE served two sets of written discovery on Barbour by UPS. Each set consisted of BOE's First Requests for Admission Directed to John T. Barbour and BOE's First Interrogatories and Requests for Production of Documents Directed to John T. Barbour. One set was sent to Barbour at Barbour's residence at 146 South St. West, Raynham, MA 02767, and the other set was sent to Barbour at Barbour's place of business at 735 Pleasant St., Fall River, MA 02723. (BOE App. C ¶¶ 4-8; BOE App. C Attachments 1-2.)
36. UPS records indicate that both sets of discovery were delivered on June 18, 2015. (BOE App. C ¶ 8; BOE App. C Attachments 1-2.)
37. As of the issuance of this Initial Decision, Barbour has not responded to BOE's written discovery.
38. On October 30, 2015, BOE filed a motion for decision on default and served the motion on Barbour by regular mail. (Official Notice of Commission Records.)
39. On December 8, 2015, a Notice of Default and Order to Show Cause was issued. The Notice and Order required Barbour: (1) to file an answer to the Order of Investigation and Hearing; (2) to serve responses to the discovery served on him by the Bureau of Enforcement; (3) to file a response to the motion for decision on default; and (4) to show cause why a decision

on default should not be entered against him. The Notice required a response on or before January 8, 2016, and stated that if Barbour fails to respond, a decision on default may be entered against him, including assessment of a civil penalty and entry of a cease and desist order. *John T. Barbour – Possible Violations*, FMC No. 15-03 (FMC Dec. 8, 2015) (Notice of Default and Order to Show Cause). (Official Notice of Commission Records.)

40. On December 8, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by regular mail to 146 South St. West, Raynham, MA 02767, 735 Pleasant St., Fall River, MA 02723, and 2151 G.A.R. Highway, Swansea, MA 02777. (Official Notice of Commission Records.)
41. The copy of the Notice and Order sent to Barbour by regular mail to the Swansea address was returned. The copies sent to the Raynham and Fall River addresses have not been returned. (Official Notice of Commission Records.)
42. On December 10, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by UPS to 146 South St. West, Raynham, MA 02767, 735 Pleasant St., Fall River, MA 02723, and 2151 G.A.R. Highway, Swansea, MA 02777. (Official Notice of Commission Records.)
43. UPS records indicate that delivery was attempted but refused at the Raynham address, attempted at the Swansea address but the recipient moved, and delivered to the Fall River address on December 15, 2015, with proof of delivery signed by Demelo. (Official Notice of Commission Records.)
44. As of the issuance of this Initial Decision, Barbour has not answered the Order of Investigation and Hearing, responded to BOE's discovery, responded to the motion for decision on default, or responded to the Notice and Order. (Official Notice of Commission Records.)
45. Barbour has not previously been the subject of a formal Commission enforcement proceeding or a prior enforcement action. (BOE Motion at 14.)
46. On May 9, 2015, Barbour commenced a bankruptcy proceeding. *In re John T. Barbour*, No. 15-br-11855 (D. Mass. May 9, 2015) (filed), ECF No. 1.
47. In Business Income and Expenses, Barbour claimed a gross business income of \$138,000 per year or \$11,500 per month and business expenses of \$1,275 per month, netting \$10,225 per month. *In re John T. Barbour*, No. 15-br-11855 (D. Mass. Aug. 20, 2015), ECF No. 32 at 24.

48. In Schedule J: Your Expenses, Barbour claimed monthly personal expenses of \$6,416.48 and a monthly net income of \$3,808.52. *In re John T. Barbour*, No. 15-br-11855 (D. Mass. Aug. 20, 2015), ECF No. 32 at 18.
49. On December 16, 2015, the court dismissed the bankruptcy proceeding for failure to file an amended plan and motion to approve the plan on or before December 7, 2015. *In re John T. Barbour*, No. 15-br-11855 (D. Mass. Dec. 16, 2015), ECF No. 56.

IV. BARBOUR IS IN DEFAULT.

A. Barbour Received Notice of this Proceeding.

The APA requires the Commission to provide notice to a person interested in the subject of a hearing.

(b) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. . . . [A]gencies may by rule require responsive pleading. . . .

(c) The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit

5 U.S.C. § 554. The Commission provides notice of the legal authority and jurisdiction under which the hearing is to be held and the matters of fact and law asserted in an enforcement proceeding through the Order of Investigation and Hearing. UPS delivered copies of the Order of Investigation and Hearing in this proceeding to Barbour's home at 146 South St. West, Raynham, MA 02767 and to Barbour's current offices at 735 Pleasant St., Fall River, MA 02723. FF 26-27.³ The Commission has promulgated a rule that requires a respondent to file an answer to an Order of Investigation and Hearing. 46 C.F.R. § 502.63(c). Barbour did not file an answer.

I take official notice of federal district court records demonstrating that this proceeding was described in the district court Complaint and that a copy of the Order of Investigation and Hearing was attached to the district court Complaint. FF 29-31. On June 23, 2015, the United States Marshals Service served the district court Complaint pursuant to Federal Rule of Civil Procedure 4 by leaving the federal Complaint and attached Order of Investigation and Hearing with Barbour's daughter at his residence. FF 32. The July 27, 2015, district court order entered with Barbour's consent extended the time for Barbour to answer or otherwise respond to the district court Complaint until five days after completion of this Commission proceeding. FF 34.

³ FF followed by a number refers to a finding of fact in Section III above.

On October 30, 2015, BOE served and filed its motion for decision on default in this proceeding accompanied by affidavits and shipping documents it contends support the allegations in the Order. FF 38. *See* 46 C.F.R. § 502.63(c)(4) (authorizing decision for default when respondent fails to respond to an order of investigation and hearing). As required by Commission Rule 114, 46 C.F.R. § 114, BOE served the motion on Barbour at his home and at his office by regular mail. (BOE Motion for Default – Certificate of Service.) Commission rules required Barbour to respond to the motion on or before November 16, 2015. *See* 46 C.F.R. § 502.69(g) (motion for initial decision on default is dispositive motion); 46 C.F.R. § 502.70(b) (response to dispositive motion must be filed within 15 days of service of motion). Barbour did not file a response to the motion. FF 44.

On December 8, 2015, a Notice of Default and Order to Show Cause was issued. The Notice and Order and required Barbour: (1) file an answer to the Order of Investigation and Hearing; (2) serve responses to the discovery served on him by the Bureau of Enforcement; (3) file a response to the motion for decision on default; and (4) show cause why a decision on default should not be entered against him. The Notice and Order required a response by May 13, 2014. *Barbour – Possible Violations*, FMC No. 14-02 (ALJ Apr. 22, 2014) (Notice of Default and Order to Show Cause). FF 39. On December 8, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by regular mail to Barbour at all three addresses. FF 40. The copies sent to Raynham and Fall River addresses have not been returned. FF 41. On December 10, 2015, the Office of Administrative Law Judges sent the Notice and Order to Barbour by UPS to all three Barbour addresses. FF 42. UPS records indicate the copy sent to the Fall River address was delivered on December 15, 2015, and that Demelo signed for the delivery. FF 43. Barbour did not respond to the order to show cause. FF 44.

The Supreme Court has stated “that due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Jones v. Flowers*, 547 U.S. 220, 226 (2006), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

There is a presumption that, in the absence of evidence to the contrary, a notice provided by a government agency is deemed to have been placed in the mail on the date shown on the notice and received within a reasonable time thereafter. *See Me. Med. Ctr. v. United States*, 675 F.3d 110, 114 (1st Cir. 2012); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 526 (2d Cir. 1996).

Loubriel v. Fondo del Seguro del Estado, 694 F.3d 139, 143 (1st Cir. 2012).

The Order of Investigation and Hearing contained all of the notice reasonably calculated to apprise Barbour of the pendency of this proceeding and afforded him an opportunity to present his objections. The Secretary sent the Order to Barbour by UPS and UPS delivered the Order to two of Barbour’s addresses. FF 26-27. The district court Complaint referred to this proceeding and a copy of the Order of Investigation and Hearing was attached to the district court Complaint that the United

States Marshals Service served on Barbour pursuant to Rule 4. FF 28-32. The July 27, 2015, district court Order entered with Barbour's assent referred to this proceeding. FF 33-34. BOE served its motion for decision on default on Barbour's home address and current office address. FF 35-36. BOE served its motion for default on Barbour. FF 38. The Office of Administrative Law Judges sent the Notice and Order by regular mail and by UPS to Barbour's three addresses. Only one copy sent by regular mail was returned. FF 40-41. UPS records indicate that UPS delivered the Notice and Order to Barbour's office address. FF 42-43.

Commission Rule 63 gave Barbour an opportunity to present his objections by filing an answer admitting or denying the allegations in the Order of Investigation and Hearing and setting forth any defenses to the Order. 46 C.F.R. § 502.63(c). BOE's motion and the Notice of Default and Order to Show Cause afforded Barbour additional opportunities to present his defenses.

Based on evidence in the record showing UPS delivery of two copies of the Order of Investigation and Hearing sent by the Secretary, the reference to this proceeding in and attachment of the Order to the federal complaint served on Barbour by the United States Marshals Service, the order extending time to answer the federal complaint pending the decision in this proceeding to which Barbour gave his assent, and delivery of the Notice of Default and Order to Show Cause, I find that the Commission provided notice to Barbour that conveyed all of the salient information reasonably calculated, under all the circumstances, to apprise Barbour of the pendency of this proceeding and afford him an opportunity to protect his interests.

B. Barbour Has Defaulted.

Despite having received notice reasonably calculated, under all the circumstances, to apprise Barbour of the pendency of this proceeding, 5 U.S.C. § 554(b), having been afforded an opportunity to protect his interests by submitting facts, arguments, or proposals of adjustment, 5 U.S.C. § 554(c), and afforded an additional opportunity to protect his interests by the Notice of Default and Order to Show Cause, Barbour has failed to answer or otherwise respond to the Order of Investigation and Hearing to contest the allegations. FF 44. I find that Barbour is in default. Under these circumstances, it is customary for the Commission as well as courts to find that a defaulting respondent has admitted the well-pleaded allegations. *Bermuda Container Line Ltd. v. SHG Int'l Sales, Inc., FX Coughlin Co., and Clark Building Systems, Inc.*, 1998 WL 309055 (ALJ Mar. 24, 1998); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 872 (ALJ 1993). See also 46 C.F.R. § 502.62(b)(6)(ii) ("Well pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.").

V. CONCLUSIONS OF LAW.

- A. **Barbour operated as an NVOCC without a license issued by the Commission, without filing evidence of financial responsibility, and without keeping open for public inspection a tariff containing rates, charges, rules, and practices in violation of sections 8 and 19 of the Shipping Act of 1984.**

The Shipping Act requires an entity operating as an NVOCC in the water-borne foreign commerce of the United States to obtain a license issued by the Commission, provide evidence of financial responsibility, and keep open for public inspection a tariff containing rates, charges, rules, and practices. 46 U.S.C. §§ 40501, 40901, 40902. Barbour does not have a license, evidence of financial responsibility, or a public tariff. FF 7-9.

To be operating as an NVOCC, an entity must meet the Act's definition of common carrier; that is, it must hold itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, and use for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6). "Holding out" is often proved by evidence of advertising by the entity.

A person or entity may hold out to the public "by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise." *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961). The FMC has previously found that advertising and solicitations to the public are important factors in determining the issue of "holding out" by an entity. *See Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 6 S.R.R. 483, 489 n.7 (FMC 1965).

Worldwide Relocations, Inc. – Possible Violations of Shipping Act, 32 S.R.R. 495, 503 (FMC 2012). BOE has not submitted evidence of advertising or solicitation. "The absence of solicitation does not determine that a carrier is not a common carrier." *Transp. by Mendez & Co., Inc.*, 2 U.S.M.C. 717, 720 (1944). Holding out can also be demonstrated by a course of conduct. It is sufficient if an entity "held out, by a course of conduct, that they would accept goods from whomever offered to the extent of their ability to carry." *Transp. by Southeastern Terminal & S.S. Co.*, 2 U.S.M.C. 795, 796-797 (1946). Barbour's course of conduct of issuing the seventy-four bills of lading to his customers proves that he held out to members of the general public that he provides transportation of cargo by water between the United States and foreign countries for compensation. The Barbour Shipping bills of lading also prove that Barbour assumed responsibility for the transportation of the cargo, and with the Liberty Global bills of lading, prove that the shipments were transported by water between the United States and a foreign port.

In his meeting with a Commission representative, Barbour “claimed that he was the owner of the vehicle on some shipments, but he admitted that he did not own the vehicles shipped on all shipments and acted as an NVOCC on those shipments [with Liberty Global and Maersk],” (BOE App. B ¶ 16), apparently referring to all of his shipments under the service contracts, not just the seventy-four shipments for which he produced records. “A person whose primary business is the sale of merchandise may forward shipments of the merchandise for its own account without an ocean transportation intermediary’s license.” 46 U.S.C. § 40901(b). If Barbour were shipping his own vehicles, he would not be violating sections 40501, 40901, or 40902.

When a motor vehicle is exported from the United States, the shipper must provide United States Customs with a Certificate of Title. 19 C.F.R. § 192.2. When the Commission asked Barbour to provide shipping documents, it specifically included a request for documentation of ownership for each vehicle. (BOE App. B ¶ 22.) Barbour did not include the certificates of title when he provided the documents. (BOE App. B ¶ 23.)

[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause. Such presumption aids the case of an opposite party having the burden of proof.

Tendler v. Jaffe, 203 F.2d 14, 19 (D.C. Cir. 1952). Accordingly, I draw the inference that the certificates of title for the seventy-four shipments would show that Barbour did not own the vehicles and that he transported them for other persons.

Despite not having the legal authority to do so, the evidence in the record proves by a preponderance of the evidence that on seventy-four shipments between July 19, 2014, and October 24, 2014, Barbour operated as an NVOCC. FF 13-19. Therefore, I conclude that on those seventy-four shipments, Barbour violated sections 40501, 40901, and 40902 of the Shipping Act.

The evidence in the record also proves that on five occasions between March 2009 and April 2013, Barbour filed applications to become licensed as an ocean transportation intermediary. FF 21. Before the seventy-four shipments, the Commission sent Barbour a letter stating that his actions may violate the Shipping Act, FF 23, and Barbour had two meetings with Commission personnel at which he was advised that the Act requires a person operating as an NVOCC to be licensed by the Commission. One of the meetings occurred before the first of the seventy-four shipments and one occurred part way through the period in which the shipments took place. FF 24. I conclude that Barbour’s action of applying for a license and notifications from the Commission prove by a preponderance of the evidence Barbour knew of the Act’s licensing, bonding, and tariff requirements in 2014 when he transported the seventy-four shipments. Therefore, I conclude that Barbour’s violations were willful and knowing.

B. Barbour is Liable to the United States for a Civil Penalty.

1. Controlling authority.

The Act provides that the Commission may assess a civil penalty against a person found in violation of its provisions.

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$9,000] for each violation or, if the violation was willfully and knowingly committed, [\$45,000] for each violation.

46 U.S.C. § 41107(a). The Act originally provided for maximums of \$5,000 and \$25,000. In 2014, the Commission increased these amounts to \$9,000 and \$45,000 for violations committed after July 31, 2009. *See Inflation Adjustment of Civil Monetary Penalties*, 79 Fed. Reg. 37662, 37663 (July 2, 2014) (effective July 11, 2014) (codified at 46 C.F.R. § 506.4(d) (Table) (2014); 46 C.F.R. § 506.5).⁴ Barbour committed the seventy-four violations after July 11, 2014.

The Act sets forth the factors the Commission must consider when determining a civil penalty.

(a) . . . [T]he . . . Commission may, after notice and opportunity for a hearing, assess a civil penalty provided for in this part. The Commission may compromise, modify, or remit, with or without conditions, a civil penalty.

(b) Factors in determining amount. – In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.

46 U.S.C. § 41109.

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. – Possible Violations*

⁴ The table incorrectly states that the civil penalty for a violation that is not knowing and willful is imposed under section 41107(b) of the Act. Section 41107(b) is not relevant to the amount of a civil penalty. Section 41107(a) authorizes a civil penalty for a willful violation and a violation that is not knowing and willful. I find that this recurring typographical error, *see Inflation Adjustment of Civil Monetary Penalties; Correction*, 76 Fed. Reg. 74720-74721 (Dec. 1, 2011), does not render the 2014 increase invalid.

of the Shipping Act of 1984, 29 S.R.R. 665, 681 (FMC 2001); *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. 799, 805 (ALJ 1999).

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986):

. . . in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. (Case citation omitted.) Obviously, “[t]he prescription of fair penalty amounts is not an exact science,” and “[t]here is a relatively broad range within which a reasonable penalty might lie.” (Case citation omitted.)

Universal Logistic Forwarding Co., Ltd., 29 S.R.R. 325, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (FMC 2002). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. at 805-806.

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed. The first question that must be answered in determining a civil penalty is whether the violation was willfully and knowingly committed. *Stallion Cargo – Possible Violations*, 29 S.R.R. at 678. To assess a civil penalty in the higher range, the evidence must establish that the violation was willful and knowing.

Once it has been determined whether the violation was willfully and knowingly committed, the eight factors set forth in section 41109 must be weighed and balanced, bearing in mind the maximum penalty that may be assessed for the violation. *See Universal Logistic Forwarding Co., Ltd.*, 29 S.R.R. at 333 (determining a civil penalty “requires the weighing and balancing of eight factors set forth in law”).

Although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992).

In *Anderson Int'l*, the Commission discussed imposition of a civil penalty in a proceeding in which it determined that an entity had operated as an NVOCC without a license, bond, or tariff, the sections of the Act violated by Barbour.

[Section 41109] . . . provides that in determining the amount of a civil penalty, “the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed . . .” 46 U.S.C. § 41109(b). In this case, the violation is operating as an OTI without a license or bond and without publishing a tariff, in connection with 22 shipments. With regard to shipper harm, the Commission has said that in “Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable.” *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001).

[Section 41109] . . . also requires that the Commission take into account the violator’s “degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b). In this case, Respondents Anderson International transport and Owen Anderson have a high degree of culpability in connection with the violations, as they continued their unlawful operations after being warned to stop and after this investigation was initiated. Based on the record, Respondents do not have a history of prior offenses, and appear to have limited ability to pay.

The approach taken by the ALJ in [*Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 1471 (ALJ 2010)], to set a uniform penalty amount on all shipments handled by a Respondent, is consistent with the primary purpose of civil penalties, which is to deter future violations. *See Stallion Cargo*, 29 S.R.R. at 681. The purpose of penalties assessed in this proceeding is to deter future unlicensed, unbonded, and untariffed NVOCC operations, and a uniform penalty amount for each shipment handled in violation of the Act is consistent with this purpose.

Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, 32 S.R.R. 1678, 1693-1694 (FMC 2013) (*Anderson Int'l* (FMC)) (footnote and citations to record omitted).

2. BOE’s contentions.

BOE contends that for each of the seventy-four knowing and willful violations, the Commission should impose a civil penalty in an amount that exceeds the maximum penalty provided for a violation that is not knowing and willful.

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 from unqualified and potentially unscrupulous service providers). Having committed the violations continuously and repeatedly over an extended period of time with knowledge of the licensing requirements of the Shipping Act, 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 directed by the NYAR during the investigation, and therefore knew that operating as an NVOCC without a license, bond or tariff constituted a violation. 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 (FMC)*], 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 Containers 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. 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 the Respondent is currently the Debtor in a Chapter 13 bankruptcy.

According to documents filed in the bankruptcy proceeding, 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. Accounting for all claimed business and personal expenses, Respondent does not have a deficit.

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. 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.

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* (FMC)], 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* (FMC)], where it weighed such mitigating factors against Respondent’s culpability in continuing its unlawful operations after being warned to stop, the policy of deterrence, and the level of penalties for knowing and willful violation in past proceedings. Application of this analysis fully supports a civil penalty of not less than \$9,001 per violation.

(Motion for Decision on Default at 13-17.)

3. Discussion of civil penalty.

Barbour has been found to have violated the Act knowingly and willfully on seventy-four shipments by operating as an NVOCC without a license or bond and without publishing a tariff. There is no evidence that Barbour failed to complete any shipment or that any customer or other member of the public filed a complaint against Barbour, but in “Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable.” *Stallion Cargo – Possible Violations*, 29 S.R.R. at 678. BOE asks that the Commission impose a civil penalty of at least \$9,001 for each of the seventy-four violations, a total of \$666,074.

Regarding the nature, circumstances, extent, and gravity of the violation committed, Barbour operated as an NVOCC on at least seventy-four shipments despite knowing that the Act requires NVOCCs to be licensed by the Commission. FF 6; FF 21-22. He continued his unlawful operations after Commission representatives advised him that he was operating in violation of the Act. FF 23-25. Therefore, Barbour has a high degree of culpability in connection with the violations. Barbour has not previously been the subject of a formal enforcement proceeding or of a prior enforcement action. FF 44. Therefore, he does not have a history of prior offenses.

The evidence in the record indicates that Barbour has limited ability to pay a significant civil penalty. In his bankruptcy filings, Barbour claimed a net business income of \$10,225.00 per month, monthly personal expenses of \$6,416.48, and a monthly net income of \$3,808.52. FF 45-47. Assuming that these figures are correct,⁵ it would take Barbour nearly five and one-half years if his entire net business income were used and more than fourteen and one-half years if all of his monthly net income were used to pay the \$666,074.00 civil penalty that BOE seeks.

In *Anderson Int’l*, the administrative law judge described a similar financial situation for Anderson in the initial decision on remand.

BOE contends that the maximum civil penalty of \$30,000 should be imposed for each of the twenty-two violations for a total of \$660,000. Assuming Owen Anderson’s “annualized income” is \$40,000, approximately half way between the “\$37,000.00 to \$44,000.00” determined by BOE, if all of Anderson’s annualized income were used to pay the civil penalty BOE seeks, it would take 16.5 years to pay the civil penalty. As stated above, the most recent Chapter 13 Statement of Current Monthly Income submitted in Anderson’s bankruptcy proceeding indicates that as of April 2, 2009, Anderson had a Monthly Disposable Income (including his wife’s income) of \$1,228.96. If all of this disposable income were used to pay the civil penalty BOE seeks, it would take approximately 44.75 years to pay the civil penalty.

⁵ The court dismissed the bankruptcy petition for failure to file an amended plan and motion to approve the plan, FF 48, and Barbour did not respond to BOE’s discovery seeking information about his financial situation.

In either of these situations, none of Anderson's annualized income (or disposable income) would be used to pay the other debtors.

Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, 32 S.R.R. 1279, 1353 (ALJ 2012) (citations to record omitted) (*Anderson Int'l* (ALJ)). Balancing the factors set forth in section 41109(b) (formerly section 13(c)), all of which are quite similar to the factors present in this proceeding, the administrative law judge imposed a civil penalty of \$40,500 for the twenty-two violations. *Id.* at 1356.

BOE filed exceptions to the initial decision, arguing that “the ALJ’s assessment of penalties that are less than the maximum allowed for violations that are not found to be knowing and willful, i.e., \$6,000, ‘negates Congressional intent that the Commission should wield enhanced penalties for knowing and willful violations and effectively writes that distinction out of the statute.’” *Anderson Int'l* (FMC), 32 S.R.R. at 1692. The Commission reviewed some of its civil penalty cases in making its decision.

BOE argues that “Congress . . . intended that the Commission apply 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.” BOE concludes that penalties assessed in this proceeding should be not less than \$6,000 per violation, the maximum penalty for violations that are not knowing and willful, nor more than \$30,000, the maximum penalty amount for knowing and willful violations, at the time these violations occurred.

Although there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6,000 in this case. *See, e.g., EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) (\$22,500 per violation assessed for 120 knowing and willful violations); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1319, 1323 (FMC 2003) (\$22,500 penalty per knowing and willful violation affirmed) (*Green Master II*); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) (\$22,500 per violation assessed for 68 knowing and willful violations) [*Green Master I*]; *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) (\$20,000 per violation assessed for 72 knowing and willful violations); *Stallion Cargo*, 29 S.R.R. at 682 (\$10,000 per

violation assessed for 134 knowing and willful violations). In *Green Master II*, the Commission noted that in enacting section 13(a), Congress established higher penalties for knowing and willful violations of the Act. *Green Master II*, 29 S.R.R. at 1323 (citing H.R. Rep. No. 53, 98th Cong., 1st Sess. Pt. 1, at 19 (1983)).

Anderson Int'l (FMC), 32 S.R.R. at 1693-1694 (footnote and citations to record omitted).

The cases cited by the Commission provide guidance for the consideration to be given to a respondent's ability to pay a civil penalty. In *EuroUSA Shipping – Possible Violations* and *Mateo Shipping Corp. – Possible Violations*, the administrative law judge imposed the maximum civil penalty of \$30,000 per violation. In each of the cases, because the respondents did not respond to BOE discovery seeking financial information, the administrative law judge drew an inference that the respondent had the ability to pay the maximum civil penalty. *EuroUSA Shipping – Possible Violations*, 31 S.R.R. at 1152 (“Based on Container Innovations’ failure to respond to BOE’s discovery seeking financial information, I have drawn the inference that Container Innovations has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed.”); *Mateo Shipping Corp. – Possible Violations*, 31 S.R.R. at 850 (“Respondents have failed to respond to discovery seeking financial information. Relying on the authority granted by Commission Rule 210, I have entered an order drawing ‘the inference that the financial information would demonstrate that Mateo Shipping Corp. and Julio Mateo have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed.’”).

In the other cases cited, information in the record indicated that the respondent did not have the ability to pay a civil penalty at the maximum amount. As a result, the penalty was determined to be something less than the maximum. *Hudson Shipping – Possible Violations*, *Green Master – Possible Violations*, and *Transglobal Forwarding – Possible Violations* are related cases. Hudson Shipping was a licensed NVOCC that had service contracts with Hyundai Merchant Marine Co., Ltd. (Hyundai) and DSR-Senator Lines GmbH (Senator), two vessel-operating common carriers.

According to the documentation collected by [a Commission area representative], Hudson permitted Green Master and Transglobal to illegally access the subject service contracts on one hundred and twenty (120) occasions, eighty-three (83) shipments under the Hudson/Hyundai service contract and thirty-seven (37) shipments under the Hudson/Senator service contract. The Senator and Hyundai bills of lading denoted their service contracts with Hudson and specified that Hudson was the shipper, when in fact either Green Master or Transglobal acted as the shipper in each instance. Attached to each ocean carrier bill of lading was a “house” bill of lading issued by either Green Master or Transglobal.

Hudson Shipping – Possible Violations, 29 S.R.R. at 1383. Hudson, Green Master, and Transglobal were respondents in three separate enforcement proceedings brought by the Commission.

In *Hudson Shipping*, the Order of Investigation and Hearing alleged that Hudson violated section 10(a)(1) of the Act.

No person may – (1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

46 U.S.C. app. § 1709(a) (2002) (repealed 2006).⁶ During the proceeding, the Commission amended the Order to add the allegation that Hudson violated section 19(b) (now section 40902) of the Act by continuing to operate as an NVOCC after its surety bond was cancelled. *Hudson Shipping – Possible Violations*, 29 S.R.R. at 1382. Regarding ability to pay, the administrative law judge stated:

Hudson provided BOE with limited, unverified financial information during discovery. BOE maintains that such information is unreliable and has not relied upon it in analyzing Hudson’s financial condition. Instead, BOE relies on a business information report generated in October 2000, which reflected Hudson’s net worth in 1996. In 1996, Hudson Shipping had a net worth of \$1,383,403. BOE requested an updated business information report, but the preliminary report only indicated that Hudson currently employs approximately thirteen people and has no outstanding debts.

Hudson Shipping – Possible Violations, 29 S.R.R. at 1386. The administrative law judge found that Hudson committed 120 violations of section 10(a)(1) by permitting Green Master and Transglobal to access its service contracts and violated section 19(b) for 208 days by operating as an NVOCC without a bond.

Accordingly, I conclude that Hudson should be ordered to pay a civil penalty of \$7,900,000, or \$22,500 for each of 120 violations of section 10(a)(1) and \$25,000 for each of 208 days . . . that Hudson continued to operate as an OTI/NVOCC without a surety bond in violation of section 19(b)(1) of the 1984 Act.

Hudson Shipping – Possible Violations, 29 S.R.R. at 1386. Therefore, with a net worth of \$1,383,403, Hudson was order to pay a civil penalty of \$7,900,000 for 120 violations of section 10(a)(1) on individual shipments and for operating 208 days without a bond.

⁶ As currently codified, this section reads: “A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.” 46 U.S.C. § 41102(a).

In *Transglobal Forwarding*, the Order of Investigation and Hearing alleged that Transglobal, a licensed NVOCC, violated section 10(a)(1) of the Act on seventy-two shipments by accessing Hudson's service contracts. Regarding ability to pay, the administrative law judge stated:

The limited disclosure provided by Transglobal imparts an incomplete profile of its financial condition. Transglobal employs five people and generated approximately \$2,400,000 in operating income annually in 1999 and 2000. However, Transglobal reported a net loss of \$133,000 in 2000 and a decrease in cash bank reserves from \$357,597.38 in 1999 to \$39,680.74 in 2000. The financial records provided no explanation for the depletion of cash reserves from 1999 to 2000. From 1999 to 2000, Transglobal's net worth decreased from \$224,887.42 to \$87,573.31. As of September 2000, Transglobal reported to the Taiwan government that it had fully paid capital of approximately \$214,000. Effective April 22, 1999, Transglobal maintained a surety bond in the amount of \$50,000, which was increased to \$150,000 on May 1, 1999.

Transglobal Forwarding – Possible Violations, 29 S.R.R. at 819-820. The administrative law judge held:

Having considered the applicable statutory factors, as well as Transglobal's limited participation in this proceeding, the Administrative Law Judge concludes that Transglobal should be ordered to pay a civil penalty of \$1,440,000. The penalty was determined by assessing \$20,000 for each of the 72 violations of the Act, an amount double that assessed for each of the violations found in *Stallion*.

Id. at 821.

In *Green Master*, Green Master, a licensed NVOCC, filed exceptions to a decision of an Administrative law judge finding that Green Master violated section 10(a)(1) of the Act on forty-eight shipments by accessing Hudson's service contracts and violated section 10(b)(1) of the Act on twenty shipments by knowingly and willfully charging, demanding, collecting, or receiving less or different compensation than its published tariff rates.⁷ The Administrative law judge imposed a civil penalty of \$22,500 for each of sixty-eight violations for a total of \$1,530,000. *Green Master – Possible Violations*, 29 S.R.R. 830, 841 (ALJ 2002). In its Report and Order Affirming Initial Decision, the Commission stated:

⁷ "No common carrier, either alone or in conjunction with any other person, directly or indirectly, may – (1) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means." 46 U.S.C. app. § 1709(b) (2002), superseded by 46 U.S.C. § 41104(1).

[The Administrative law judge] stated that the 48 shipments that Green Master had made under the Hudson-Hyundai and Hudson-Senator service contracts over a one-year period found to be in violation of section 10(a)(1) deprived the carriers of \$266,763.53 in freight charges, and, further, that \$55,715.50, the amount Green Master had charged for the twenty shipments found to be in violation of section 10(b)(1), was less than one-fourteenth of the applicable freight charges of \$802,443.84 it should have assessed for the shipments.

Green Master I, 29 S.R.R. at 1306.

Regarding Green Master's ability to pay, the Commission stated:

The evidence pertaining to Green Master's ability to pay includes its balance sheets and Income Tax Settlement and Return Sheets for fiscal years 1998-2000, as well as an affidavit by BOE's witness . . . analyzing Green Master's financial records. The ALJ found that Green Master had "a net operating income in the \$6,000,000-\$7,000,000 range" in the years 1998-2000 and that this period of time coincided with "a period of weakened economic conditions in the shipping industry." The ALJ also found that Green Master's total assets exceeded its total liability and that it has a fully paid capital of \$239,902. In addition, the ALJ found that Green Master employs approximately 50 people; owns and controls three other companies sharing Green Master's office in Taiwan, each having a minimum of 45 employees; and is a medium to large size ocean transportation intermediary in healthy financial condition.

Green Master I, 29 S.R.R. at 1316-1317.

Although civil penalties up to \$27,500 could be imposed for each of the violations, it appears that the ALJ properly weighed all of the requisite factors in formulating his penalty and that the penalty assessed is adequate to serve as a deterrent, but not excessive. In addition, it appears that Green Master is in a healthy financial condition and is able to pay the assessed penalty. Therefore, we affirm the ALJ's determination to impose civil penalties in the amount of \$1,530,000.

Id. at 1317-1318. The Commission denied Green Master's petition for a stay and for reconsideration of the penalty affirmed by *Green Master I*. *Green Master II*, 29 S.R.R. at 1323.

In *Stallion Cargo*, the administrative law judge found that Stallion had committed fifteen knowing and willful violations of section 10(a)(1), 119 knowing and willful violations of section 10(b)(1), and fifteen violations of section 10(b)(1) that were not knowing and willful. *Stallion Cargo – Possible Violations*, 29 S.R.R. at 667-668.

[Stallion] . . . averred that it is a small company of very limited financial means, and that in 1997, 1998, and 1999, it suffered losses amounting to \$87,552, \$138,710, and \$7,267, respectively. To further support its argument regarding financial instability,

[Stallion] contended that it was necessary to obtain the loans from Mr. Croes simply to stay solvent and to fulfill its financial obligations.

Id. at 670 (footnote omitted). The administrative law judge

examined evidence provided by both BOE and [Stallion] and concluded that [Stallion] does have the ability to pay a civil penalty based on [Stallion's] balance sheets, its \$75,000 surety bond, and the probability that Respondent has access to capital based upon evidence that [Stallion] received over \$200,000 in loans from Mr. Croes in the past. . . . He ultimately found it 'probable' that Stallion had access to assets that could satisfy a \$50,000 obligation and ordered that Respondent pay a civil penalty in the amount of \$50,000.

Id. at 671. The Commission vacated the civil penalty and imposed its own.

[Stallion's] maximum civil liability is \$4,592,500. After considering all the section 13(c) factors, a civil penalty in a larger amount is appropriate in this instance. We therefore vacate the ALJ's imposition of a \$50,000 penalty and impose a penalty of \$10,000 for each of the 134 violations that the ALJ found to be knowingly and willfully committed. Despite the presence of aggravating factors here, the \$10,000 figure is substantially less than the maximum authorized by the statute. Respondent is therefore liable to the United States for a civil penalty in the amount of \$1,340,000.

Id. at 681-682 (footnotes omitted).

Based on this precedent, the Commission vacated the civil penalty against Anderson and imposed its own.

In determining a specific penalty amount, we take into consideration the legislative history of section 13(a), which highlights the importance of higher penalties to deter violations found to be knowing and willful; Commission precedent of assessing higher penalties for knowing and willful violations; Respondents' culpability; lack of history of prior offenses; and apparent lack of ability to pay. With regard to culpability, Respondents continued their unlawful operations after being warned to stop and after this investigation was initiated; this factor weighs against Respondents. On the other hand, Respondents' lack of prior Shipping Act violations and inability to pay are mitigating factors. Taking these factors into consideration, in addition to the primary purpose of penalties to deter future violations, and the level of penalties assessed by the Commission for knowing and willful violations in past proceedings, a penalty of \$6,000 per violation is assessed, resulting in a total penalty of \$132,000 for 22 knowing and willful violations.

Anderson Int'l (FMC), 32 S.R.R. at 1693.

In *Anderson Int'l*, the administrative law judge calculated that if all of Anderson's annualized income were used, it would take 16.5 years and if all of his disposable income were used, it would take approximately 44.75 years to pay the civil penalty that BOE sought. *Anderson Int'l* (ALJ), 32 S.R.R. at 1353. The Commission imposed a penalty amount of \$6,000 per violation instead of \$30,000, or 20% of the amount sought by BOE. Therefore, assuming that the evidence regarding Anderson's ability to pay were correct, it would take him 3.3 years to pay using his entire net business income or nearly nine years using all of his disposable income to pay the civil penalty imposed by the Commission. Although the comparable figures for Barbour are somewhat higher than those for Anderson (five and one-half years if his entire net business income were used and more than fourteen and one-half years if all of his monthly net income were used to pay), I conclude that imposing a civil penalty of \$9,001 per violation for a total of \$666,074.00 properly takes into account all of the factors that the Act requires be taken into account, including Barbour's ability to pay, and "does not impose unduly harsh or extreme sanction[.]" *Universal Logistic Forwarding Co., Ltd.*, 29 S.R.R. at 333, under Commission precedent. Therefore, Barbour is ordered to pay a civil penalty of \$666,074.00 for seventy-four knowing and willful violations of the Shipping Act.

C. Entry of a Cease and Desist Order is Appropriate.

BOE seeks entry of an order requiring that Barbour: (1) Cease and desist from holding out or operating as an ocean transportation intermediary in the United States foreign trades until and unless the Commission issues a license permitting him to operate; (2) cease and desist for one year from working as an employee of or in any capacity for any company or entity engaged in providing ocean transportation services in the foreign commerce of the United States; and (3) cease and desist for five 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. (Motion for Default at 18-19.)

The Commission has held that the evidence in the record must justify entry of a cease and desist order.

The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. See *Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) ("a cease and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); and *Portman Square Ltd. – Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998) ("the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities"). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

Maher Terminals, LLC v. Port Authority of New York and New Jersey, 32 S.R.R. 1185, 1190 n.8 (FMC 2013).

The evidence demonstrates that Barbour knew about the licensing requirement imposed by the Shipping Act because on five occasions he had filed an application for a license, BOE sent him a warning letter stating that his operations may be in violation of the Act, and on two occasions in 2014, one of which occurred before the first of the seventy-four shipments at issue and one that occurred before the last of the seventy-four shipments, the Commission's New York Area Representative advised Barbour that business requires a license as an ocean transportation intermediary issued by the Commission. FF 13, 21, 23, 24. Despite this knowledge and the warnings, Barbour continued to operate as an NVOCC. Based on these facts, I conclude that in the past Barbour has persisted in his violations of the Act despite knowledge of their illegality and that absent a cease and desist order, the violations will continue. Therefore, Barbour is ordered cease and desist from violating the Act, either in his own name or under any trade name.

O R D E R

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on seventy-four shipments respondent John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation, Inc., operated as an NVOCC without keeping open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established in violation of section 40501(a), without holding an ocean transportation intermediary's license issued by the Commission in violation of section 40901, and without furnishing a bond, proof of insurance, or other surety in violation of section 40902(a), it is hereby

ORDERED that respondent John T. Barbour t/d/b/a Barbour Auto Group, Barbour Auto Sales, Barbour Shipping, and Barbour Shipping and Transportation Inc., **REMIT** to the United States the sum of \$666,074.00 as a civil penalty for seventy-four willful and knowing violations of the Shipping Act of 1984. It is

FURTHER ORDERED that respondent John T. Barbour: (1) Cease and desist from holding out or operating as an ocean transportation intermediary in the United States foreign trades under his own name or any trade name until and unless the Commission issues a license permitting him to operate; (2) cease and desist for one year from working as an employee of or in any capacity for any company or entity engaged in providing ocean transportation services in the foreign commerce of the United States; and (3) cease and desist for five 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 in a manner inconsistent with this Order. This Order, however, does not enjoin respondents from owning up to five percent of a class of shares of a publicly traded company.



Clay G. Guthridge
Administrative Law Judge