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FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 06-09

PARKS INTERNATIONAL SHIPPING, INC., CARGO EXPRESS INTERNATIONAL SHIPPING, INC., BRONX BARRELS & SHIPPING SUPPLIES SHIPPING CENTER, INC., AND AINSLEY LEWIS a.k.a. JIM PARKS – POSSIBLE VIOLATIONS OF SECTIONS 8(a) AND 19 OF THE SHIPPING ACT OF 1984, AS WELL AS THE COMMISSION’S REGULATIONS AT 46 C.F.R. PARTS 515 AND 520

INITIAL DECISION OF CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE¹

On September 19, 2006, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing to determine whether respondents Parks International Shipping, Inc. (Parks International or Parks), Cargo Express International Shipping, Inc. (Cargo Express), Bronx Barrels & Shipping Supplies Shipping Center, Inc. (Bronx Barrels), and/or Ainsley Lewis a.k.a. Jim Parks (Lewis) violated section 8 of the Shipping Act of 1984 (the Shipping Act or Act) by operating as non-vessel-operating common carriers (NVOCCs) without publishing tariffs showing rates and charges, and whether Respondents violated sections 19(a) and (b) of the Act by operating as ocean transportation intermediaries (OTIs) without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds. *Parks International Shipping, Inc., et al., – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 06-09 (Sept. 19, 2006) (Order of Investigation and Hearing).² The Secretary served the Order of Investigation and Hearing on

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

² On October 14, 2006, after the Commission commenced this proceeding, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 8 of the Act is now codified at 46 U.S.C. § 40501(a) and sections 19(a) and (b) are now codified at 46 U.S.C. §§ 40901 and 40902. The Commission has continued to cite provisions of the Act by their former section references. *See*,

Respondents, but Respondents have not cooperated in the investigation, responded to motions and other papers filed by the Bureau of Enforcement (BOE), responded to discovery despite orders to do so, cooperated in the establishment of a procedural schedule, or filed proposed findings of fact, supporting evidence, or a brief. Therefore, this initial decision is predicated on the evidence and argument presented by BOE. Despite Respondents' failure to participate, "it is the Commission's responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties." *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001).

PRELIMINARY STATEMENT

This proceeding is one of four currently or recently on this Office's docket initiated by the Commission pursuant to 46 U.S.C. § 41302 to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act. See also *Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, FMC No. 06-01 (Jan. 11, 2006) (Order of Investigation and Hearing); *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02 (Mar. 22, 2007) (Order of Investigation and Hearing), see also *Anderson International Transport and Owen Anderson – Possible Violations*, FMC No. 07-02 (ALJ Aug. 28, 2009) (Initial Decision); *Embarque Puerto Plata, Corp., et al. – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (July 21, 2007) (Order of Investigation and Hearing), see also *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision), Notice not to Review served Sept. 29, 2009. The Commission commenced a fifth proceeding to investigate the activities of three OTIs licensed by the Commission as NVOCCs that appeared to have violated the Act in their dealings with allegedly unbonded and untariffed NVOCCs. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing).

As discussed more fully below, the Act recognizes two types of OTIs: NVOCCs and ocean freight forwarders. NVOCCs and ocean freight forwarders are involved in the business of international transportation by water of goods belonging to other persons, although neither operates vessels. In many respects, the services they perform are similar. The critical difference is that NVOCCs are by definition common carriers (*i.e.*, they hold themselves out to the general public to provide transportation by water, assume responsibility for the transportation of the goods, 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)), while ocean freight

e.g., *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu – Possible Violations of Section 10 of the Shipping Act of 1984*, FMC No. 09-07 (Oct. 22, 2009) (Order of Investigation and Hearing). Accordingly, I follow that practice in this decision.

forwarders are not common carriers, but arrange space for shipments with common carriers on behalf of shippers. 46 U.S.C. § 40102(18).

Section 8 of the Act requires an NVOCC to publish a tariff, section 19(a) requires an NVOCC to secure a license from the Commission, and section 19(b) requires an NVOCC to furnish a bond or other surety. Section 19(a) requires an ocean freight forwarder to secure a license from the Commission, and section 19(b) requires an ocean freight forwarder to furnish a bond or other surety. Since an ocean freight forwarder is not a common carrier, the Act does not require it to publish a tariff.

The five proceedings have a common issue: What activities distinguish operating as an NVOCC from operating as an ocean freight forwarder? Each of the unlicensed intermediaries alleged to have operated as OTIs had its own methods of operation. It is necessary to examine the evidence of what the intermediary did to determine whether it operated as an NVOCC or an ocean freight forwarder on a particular shipment, because "an intermediary's conduct, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (1991).

In this proceeding, the evidence presented by BOE establishes by a preponderance of the evidence that Parks International operated as an NVOCC in violation of sections 8 and 19 of the Act on thirty-eight shipments. Twelve of these shipments occurred within the five-year statute of limitations for which a civil penalty may be assessed. 46 U.S.C. § 41109(e). A civil penalty is assessed for each of the twelve violations.

The evidence establishes by a preponderance of the evidence that Cargo Express operated as an NVOCC in knowing and willful violation of sections 8 and 19 of the Act on fourteen shipments and operated as an ocean freight forwarder on two shipments. A civil penalty is assessed for each of the sixteen violations.

The evidence does not establish by a preponderance of the evidence that Bronx Barrels or Ainsley Lewis operated as an ocean transportation intermediary on any shipments. Therefore, the claims against Bronx Barrels and Lewis are dismissed.

BACKGROUND

I. REGULATORY REQUIREMENTS.

The Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of OTIs. "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 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the

documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “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 statutory definitions are echoed in the Commission’s regulations:

Ocean transportation intermediary means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that -

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o)

Common carrier means any person holding 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 that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (2) Utilizes, 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 C.F.R. § 515.2(f). *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 494-495 (D.C. Cir. 2009) (*Landstar*).

Section 8 of the Act requires “[e]ach common carrier and conference [to] 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.” 46 U.S.C. § 40501(a). Since an NVOCC is a common carrier, it must file a tariff. An intermediary violates section 8 if it operates as an NVOCC without having filed the tariff. An ocean freight forwarder is not a common carrier and does not file a tariff. Therefore, an OTI that operates as an ocean freight forwarder without having filed a tariff does not violate section 8.

Section 19(a) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person wanting to operate as an OTI to be licensed by the Commission.

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.

46 U.S.C. § 40901(a). “To be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the Commission that: (1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services.” 46 C.F.R. § 515.11(a). An intermediary violates section 19(a) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without a Commission license.

Section 19(b) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person wanting to operate as an OTI to furnish proof of financial responsibility.

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). An ocean freight forwarder must “furnish evidence of financial responsibility in the amount of \$50,000,” 46 C.F.R. § 515.21(a)(1), and an NVOCC must “furnish evidence of financial responsibility in the amount of \$75,000.” 46 C.F.R. § 515.21(a)(2). An intermediary violates section 19(b) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without proof of financial responsibility.

“[A]n entity can operate as a freight forwarder and as an NVOCC.” (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.) An intermediary that is licensed by the Commission as a freight forwarder and as an NVOCC must obtain separate proofs of financial responsibility for each type of operation. “The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC’s transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services.” (*Id.*) The bond is to be used to satisfy any civil penalty or order of reparations and “may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities.” 46 U.S.C. § 40902(b).

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

- (1) for an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in § 515.2(i), and
- (2) for an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in § 515.2(l).

46 C.F.R. § 515.2(w). As a guide to determine what transportation-related activities are covered by the bond or surety for NVOCCs and ocean freight forwarders, the Commission promulgated regulations providing examples of freight forwarding services and NVOCC services performed by an ocean transportation intermediary that are necessary or customary in the provision of transportation services to a customer.

Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;

- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;
- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) paying lawful compensation to ocean freight forwarders;
- (7) leasing containers; or
- (8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

The Commission has further described the services of ocean freight forwarders and NVOCCs as follows:

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters.

NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

(Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.)

II. ORDER OF INVESTIGATION AND HEARING.

On September 19, 2006, the Commission issued the Order of Investigation and Hearing (Order) that commenced this proceeding. The Order alleges that Respondents violated sections 8 and 19 of the Act. The Order states that:

Based on evidence available to the Commission, it appears that Parks [International] has knowingly and willfully provided transportation services as an NVOCC with respect to shipments during 2001, 2002, 2004, and 2005 without obtaining an OTI license from the Commission and without providing proof of financial responsibility. Moreover, it appears that Parks [International] knowingly and willfully operated as a common carrier without publishing a tariff showing all of its active rates and charges. Cargo Express also appears to have knowingly and willfully provided transportation services as an NVOCC without obtaining an OTI license from the Commission and without providing proof of financial responsibility with respect to shipments commencing in 2004. It further appears that Cargo Express knowingly

and willfully operated as a common carrier without publishing a tariff showing all of its active rates and charges. Bronx Barrels likewise appears to be knowingly and willfully holding itself out to provide transportation services as an NVOCC without obtaining an OTI license from the Commission and without providing proof of financial responsibility in the form of a surety bond. Additionally, Bronx Barrels appears to have been knowingly and willfully operating as a common carrier without publishing a tariff showing all of its active rates and charges. Finally, Ainsley Lewis, individually and through Parks, Cargo Express, and Bronx Barrels, appears to have been providing OTI services in 2001, 2002, 2004, 2005, and 2006 without publishing a tariff, obtaining an OTI license from the Commission, and providing proof of financial responsibility.

Parks International Shipping, Inc., et al. – Possible Violations, FMC No. 06-09, Order at 2-3 (Sept. 19, 2006) (Order of Investigation and Hearing). The Commission instituted the investigation to determine:

(1) whether [Parks International, Cargo Express, Bronx Barrels, and Lewis] violated section 8(a) of the 1984 Act and the Commission's regulations at 46 CFR part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges;

(2) whether [Parks International, Cargo Express, Bronx Barrels, and Lewis] violated section 19 of the 1984 Act and the Commission's regulations at 46 CFR part 515 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility;

(3) whether, in the event violations of sections 8(a) and 19 of the 1984 Act and/or 46 CFR Parts 515 and 520 are found, civil penalties should be assessed against [Parks International, Cargo Express, Bronx Barrels, and Lewis] and, if so, the amount of the penalties to be assessed; and

(4) whether, in the event violations are found, appropriate cease and desist orders should be issued against [Parks International, Cargo Express, Bronx Barrels, and Lewis].

Id. at 4. The Commission designated BOE as a party. *Id.* at 5. The Secretary served the Order on Respondents by certified mail, return receipt requested, and published notice in the Federal Register. 71 Fed. Reg. 56147 (Sept. 26, 2006). BOE commenced the investigation authorized by the Order and served discovery on Respondents.

On November 28, 2006, BOE served a Motion of the Bureau of Enforcement to Compel Discovery from Respondents. On April 9, 2007, I entered an order compelling Respondents to

respond to discovery by May 11, 2007. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Apr. 9, 2007) (Order Compelling Responses to Discovery).

On August 1, 2007, I entered an order requiring the parties to file a joint status report and proposed procedural schedule on or before August 28, 2007. On August 24, 2007, BOE alone filed a Status Report and Proposed Procedural Schedule. BOE summarized the events through the issuance of the order compelling Respondents to respond to discovery and reported that:

Respondents are in default of their duty to timely submit a response to the discovery served upon them, and to comply with the ALJ's Order directing them to respond to discovery. Respondents have not commenced any discovery on their own behalf, and the time within which they must commence such discovery effort has expired.

(Bureau of Enforcement Status Report and Proposed Procedural Schedule at 2.) BOE also reported that it had made several attempts to contact Respondents in an effort to obtain Respondents' participation in the preparation of a joint status report, but had been unable to contact them. (*Id.* at 2-3.) With regard to a proposed procedural schedule, BOE proposed that it would forego further attempts to obtain discovery from Respondents and proceed based on information in the records and materials already in its possession. BOE also stated that it would file a Motion for Sanctions and Summary Judgment along with supporting documents on or before October 19, 2007. Based on BOE's filing, I closed discovery with the exception of the discovery already served by BOE and order BOE to file a motion for summary judgment on or before October 26, 2007. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Sept. 13, 2007) (Procedural Order).

On October 26, 2007, BOE filed a Motion for Sanctions and Summary Judgment. With regard to the motion for sanctions:

BOE . . . request[ed] that sanctions be imposed against all the Respondents by issuing an order prohibiting the Respondents from introducing any evidence which should have been submitted previously in response to BOE's discovery requests. BOE also [sought] an order prohibiting Respondents from contesting any of BOE's claims or evidence regarding those issues. Having failed to cooperate in the discovery process, the Respondents should be barred from attempting to contradict evidence presented by BOE at a later stage in the proceeding. Specifically, BOE request[ed] that Respondents be prohibited from submitting evidence as to whether they knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904. BOE further request[ed] that Respondents be barred from introducing evidence as to whether they have the ability to pay a civil penalty.

(Motion for Sanctions and Summary Judgment at 4.)

With regard to their motion for summary judgment, BOE contended that:

Based upon advertisements, websites, service contracts, shipping documents, and business dealings with at least one ocean common carrier, Respondents have been operating as OTIs/NVOCCs since at least 2001. Throughout this period, Respondents have been aware that they are required to publish tariffs, obtain licenses, and furnish evidence of financial responsibility if they intended to conduct business as OTIs/NVOCCs in the foreign commerce of the United States. This awareness is evidenced by at least two warnings, both written and verbal, given by the Commission's New York Area Representative ("AR") Emanuel James Mingione to Respondents in 2002 and 2005 regarding the licensing and bonding requirements of the 1984 Act. Mingione Statement ¶¶ 10, 18.

(Motion for Sanctions and Summary Judgment at 7.)

Respondents did not reply to BOE's motion.

On October 23, 2009, I issued an Order granting in part and deferring in part BOE's motion for sanctions. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Because Respondents have failed to comply with the Order requiring them to respond to discovery seeking financial information, I draw the inference that the financial information would demonstrate that each Respondent 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 the Respondent is found to have committed. 46 C.F.R. § 502.210(a)(2). The Bureau of Enforcement's prayer that Respondents be barred from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904 is deferred pending the additional briefing required by this Order.

Id. at 29.

I also granted in part and denied in part BOE's motion for summary judgment.

The Bureau of Enforcement has established that:

- The Bureau of Enforcement has proven by a preponderance of the evidence that Parks International Shipping, Inc., Cargo Express International Shipping, Inc., and Bronx Barrels & Shipping Supplies Shipping Center Inc., have not published tariffs pursuant to section 8 of the Act, obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and furnished proof of financial responsibility pursuant to section 19(b) of the Act
- The Bureau of Enforcement has proven by a preponderance of the evidence that on thirty-eight shipments, Parks International Shipping, Inc., violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.2 of this Memorandum and Order;
- The Bureau of Enforcement has proven by a preponderance of the evidence that on fourteen shipments, Cargo Express International Shipping, Inc., violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.3 of this Memorandum and Order; and
- The Bureau of Enforcement has proven by a preponderance of the evidence that on two shipments, Cargo Express International Shipping, Inc., violated the Shipping Act by operating as an ocean freight forwarder that did not have a license as required by section 40901 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act as described in Part II.F.4 of this Memorandum and Order.

Id. at 29-30.

I denied the motion for summary judgment in all other respects. Although I found that BOE had proven that Bronx Barrels had held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation, I found that BOE had:

not designated specific facts and provided the Commission with their location in the record that would support a finding that Bronx Barrels was involved in any shipments by water between the United States and a foreign country. BOE has not proven by

a preponderance of the evidence that Bronx Barrels operated as an NVOCC or an ocean freight forwarder in violation of the Act on any shipment.

Id. at 23. I found that BOE had not proven by a preponderance of the evidence that Ainsley Lewis operated as an NVOCC or an ocean freight forwarder on any shipments. *Id.*

I issued a procedural order requiring the parties to file proposed findings of fact, briefs, and appendices. *Id.* at 26-29. On November 22, 2009, BOE filed the required papers. Respondents have not filed the papers required by the Order. Accordingly, this proceeding is ripe for decision.

DISCUSSION

I. STANDARD OF PROOF.

To prevail in a proceeding brought to enforce the Shipping Act, BOE has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 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; *Sea-Land Service Inc. – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872, 889 (2006); *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-719 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof 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. 91, 102 (1981). “[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 (1994). The Commission then renders the agency decision in the proceeding.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

II. MOTION FOR SANCTIONS.

As noted above, I granted in part BOE's motion for sanctions for failing to respond to discovery about Respondents' financial situations, drawing the inference that each Respondent 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 it is found to have committed. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 4 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment). I deferred ruling on BOE's prayer that Respondents be barred from presenting evidence as to whether they knowingly and willfully accepted cargo from or transported cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act pending the additional briefing required by the Order. *Id.*

Respondents have not sought to present evidence in this proceeding. Therefore, BOE's motion to bar Respondents from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904, is dismissed as moot.

III. THE CLAIMS AGAINST PARKS INTERNATIONAL AND CARGO EXPRESS.

For the convenience of the Commission and the parties, I will repeat the findings from the Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment with regard to each Respondent.

A. Parks International Violated Section 8(a) of the 1984 Act and the Commission's Regulations at 46 CFR Part 520 by Operating as a Common Carrier Without Publishing Tariffs Showing All of Its Active Rates and Charges and Violated Section 19 of the 1984 Act and the Commission's Regulations at 46 CFR Part 515 by Operating as a Non-Vessel-Operating Common Carrier in the U.S. Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility.

- 1. BOE has proven by a preponderance of the evidence that Parks International did not publish a tariff, did not have an OTI license, and did not furnish proof of financial responsibility.**

In his Verified Statement, AR Mingione states that he reviewed the Commission's Registered Persons Index and the Commission's FMC-1 database and determined that Parks International has not published tariffs pursuant to section 8 of the Act, has not obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and has not furnished proof of financial

responsibility pursuant to section 19(b) of the Act. (Mingione Statement ¶ 5.) Therefore, BOE has established these facts by a preponderance of the evidence.

2. BOE has proven by a preponderance of the evidence that Parks International operated as an NVOCC on thirty-eight shipments.

a. BOE has proven by a preponderance of the evidence that Parks International held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.

During his investigation, AR Mingione obtained advertising published by Parks International. (Mingione Statement ¶¶ 8, 9, referring to Attachments D and E.) Parks International advertised on the Internet that customers could “[s]hip by air & sea to Jamaica and all other Caribbean Islands.” (Attachment D.) Parks International stated that it ships automobiles, barrels, boxes, crates, containers, electrical appliances, and household furniture in its containers that “sail every Thursday.” (*Id.*) Parks International stated it “provides top-notch services. Ship and stock barrels, crates, autos, containers, etc. to Jamaica and other [C]aribbean islands along with great customer support – a combination that can’t be beat!” (*Id.*) Parks International placed a similar advertisement in a newspaper. (Attachment E.) This advertising establishes by a preponderance of the evidence that Parks International held out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

b. BOE has proven by a preponderance of the evidence that Parks International assumed responsibility for the transportation by water of shipments from the port or point of receipt to the port or point of destination.

AR Mingione reviewed the Commission’s service contract database and learned that Parks International had entered into three service contracts with Tropical between April 16, 2001 through October 25, 2002. (Mingione Statement ¶ 12.) In each of the service contracts, Parks certified “its status . . . as Cargo Owner (Shp/Cog).” (Attachment G1 ¶ 9; Attachment G2 ¶ 4; Attachment G3 ¶ 4.)

AR Mingione also obtained bills of lading for thirty-eight shipments by water from a United States port to a foreign port on which Tropical identified Parks International as the shipper. (Attachments H1, H2.) Each bill identifies an individual in a foreign country as the consignee. One bill describes the goods being shipped as “2 pcs, 1 fridge, 1 microwave” (Attachment H2, Tropical B/L 01006493) and two bills describe the goods as “2 barrels personal effects.” (Attachment H2, Tropical B/L 01007281; Tropical B/L 01227452.) Each of the remaining thirty-five bills of lading describe the goods as “1 barrel personal effects.” (Attachment H2.) There is no evidence that Tropical issued bills of lading identifying anyone other than Parks International as the shipper on shipments in which Parks International was involved.

AR Mingione also obtained a copy of a letter dated November 18, 2002, from Tropical to Parks International referring to the Commission requirement that a shipper that is party to a service contract certify its status as the owner of the cargo, a shipper's association, an NVOCC, or "other." (Attachment I.) *See* 46 C.F.R. § 530.6 ("The shipper contract party shall sign and certify on the signature page of the service contract its shipper status (e.g., owner of the cargo, shippers' association, NVOCC, or specified other designation), and the status of every affiliate of such contract party or member of a shippers' association entitled to receive service under the contract."). In the letter, Tropical stated that it had reason to believe that Parks International was not the party holding title to the goods as Parks certified in the service contracts. Tropical stated that it would terminate the service contract unless Parks provided proof that it owned the goods being shipped. (Attachment I.) AR Mingione stated that it was his understanding that Parks did not contest termination of the contract. (Mingione Statement ¶ 14.)

There is no direct evidence in the record that proves that the "personal effects" being shipped pursuant to the Tropical bills of lading belonged to anyone other than Parks International. I conclude based on the circumstantial evidence of Parks International's advertising, its operations, and the number of shipments, however, that contrary to its certification in the Tropical service contracts, Parks did not own the personal effects, but received them from the owners at Parks International's place of business or some other location and assumed responsibility for their transportation by water from the United States to a foreign port, and falsely certified to Tropical that Parks International owned the goods. Therefore, BOE has proven by a preponderance of the evidence that on each of the thirty-eight Tropical shipments, Parks International assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

- c. BOE has proven by a preponderance of the evidence that Parks International used, for all or part of that transportation of the shipments, a vessel operating on the high seas between a port in the United States and a port in a foreign country.**

The thirty-eight Tropical bills of lading establish that each shipment was loaded on board a vessel in the United States and discharged in a foreign port. Therefore, BOE has proven by a preponderance of the evidence that Parks International used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).

BOE has proven by a preponderance of the evidence that on thirty-eight shipments, Parks International violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act.

B. Cargo Express Violated Section 8(a) of the 1984 Act and the Commission's Regulations at 46 CFR Part 520 by Operating as a Common Carrier Without Publishing Tariffs Showing All of Its Active Rates and Charges and Violated Section 19 of the 1984 Act and the Commission's Regulations at 46 CFR Part 515 by Operating as a Non-Vessel-Operating Common Carrier in the U.S. Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility.

In his Verified Statement, AR Mingione states that he reviewed the Commission's Registered Persons Index and the Commission's FMC-1 database and determined that Cargo Express has not published tariffs pursuant to section 8 of the Act, has not obtained an OTI license from the Commission pursuant to section 19(a) of the Act, and has not furnished proof of financial responsibility pursuant to section 19(b) of the Act. (Mingione Statement ¶ 6.) Therefore, BOE has established these facts by a preponderance of the evidence.

- 1. BOE has proven by a preponderance of the evidence that Cargo Express operated as an NVOCC on fourteen shipments.**
 - a. BOE has proven by a preponderance of the evidence that Cargo Express held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.**

During his investigation, AR Mingione obtained a photograph of 3010 Eastchester Road, one of the locations used by Parks International and Cargo Express. (Mingione Statement ¶ 17; Attachment J.) The photograph, taken October 29, 2004, shows advertising reading "Cargo Express International Shipping Inc.," "5 days to Kingston, [Jamaica]," "8 days to Mobay, [Jamaica]." (Attachment J.) On June 3, 2005, AR Mingione obtained a photograph of a Cargo Express truck advertising "5 days to Jamaica" and a photograph of the premises at 4755 White Plains Road with advertising reading "Cargo Express International Shipping Inc.," "5 days to Jamaica." (Attachment K.)

AR Mingione also obtained copies of two "Shipper's Invoice Agreements" issued by Cargo Express to Carla Woolery. The "Shipper's Invoice Agreements," which also contain the "5 days to Jamaica" representation, identify Woolery at a New York address as the shipper, Woolery at a Jamaica address as the consignee, New Jersey USA as the port of sailing, Montego Bay, Jamaica, W.I. as the destination, and describe the goods as barrels of personal effects. (Attachment P.)

The advertising and the "Shipper's Invoice Agreements" establish by a preponderance of the evidence that Cargo Express held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

b. BOE has proven by a preponderance of the evidence that Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination.

When AR Mingione photographed the Cargo Express truck on June 3, 2005 (Attachment K), “[t]he truck was backed up to a shipping container and Cargo Express employees appeared to be in the process of loading the container.” (Mingione Statement ¶ 19.) AR Mingione traced the identification number of the container to Zim Container Service and learned that the container was assigned to Simpson’s Shipping Enterprise (Simpson’s Shipping), a licensed OTI. AR Mingione interviewed the head of Simpson’s Shipping who stated that Simpson’s Shipping had booked several containers for Cargo Shipping. Cargo Express loaded the containers and delivered them to ocean common carriers that carried them under the name of Simpson’s Shipping and delivered them to a Parks/Cargo Express agent in Jamaica. (Mingione Statement ¶ 20.) AR Mingione obtained shipping documents for shipments of five containers for which Simpson’s Shipping issued invoices to Cargo Express, then instructed Zim Israel Navigation Company, Ltd., to issue a bill of lading identifying Simpson’s Shipping as the shipper for containers loaded by Cargo Express. (Mingione Statement ¶ 21; Attachments L1- L5.) I conclude based on the direct and circumstantial evidence of Cargo Express’s advertising and its operations that Cargo Express did not own the goods in the containers, but assumed responsibility for their transportation. Therefore, BOE has proven by a preponderance of the evidence that on each of the five Simpson’s Shipping/Zim shipments, Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

AR Mingione also contacted Naimoli, a licensed freight forwarder, and learned that Cargo Express had shipped two or three containers per month in 2004 and early 2005. (Mingione Statement ¶ 22.) AR Mingione obtained shipping documents for shipments of nine containers for which Sea Shipping Line issued bills of lading. (Attachment M1-M9.) On all nine shipments, Naimoli issued an invoice to Cargo Express for freight and other charges. On seven shipments, Sea Shipping Line issued bills of lading identifying Cargo Express as the shipper and Parks Int’l Shipping as the consignee. (Attachments M1, M3, M5-M9.) I conclude based on the direct and circumstantial evidence of Cargo Express’s advertising and its operations that Cargo Express did not own the goods in the containers, but assumed responsibility for their transportation. Therefore, BOE has proven by a preponderance of the evidence that on seven Simpson’s Shipping/Sea Shipping Line shipments, (Attachments M1, M3, M5-M9), Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii). On two shipments, Sea Shipping Line issued bills of lading identifying the owner of the goods as the shipper and the consignee. (Attachments M2, M4.) I find that Cargo Express did not assume responsibility for the transportation of the goods on those two shipments.

The “Shipper’s Invoice Agreements” that Cargo Express used for the Woolery shipments are the equivalent of bills of lading. (Attachment P.) A common carrier does not “lose that status if he uses shipping contracts other than bills of lading.” *Containerships*, 9 F.M.C. at 64, citing

Transportation-U.S. Pacific Coast to Hawaii, 3 U.S.M.C. 190, 196 (1950). The Agreements establish that Cargo Express took possession of the goods in the United States for delivery in a foreign country. Therefore, BOE has proven by a preponderance of the evidence that on the two Woolery shipments, Cargo Express assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

- c. **BOE has proven by a preponderance of the evidence that Cargo Express used, for all or part of that transportation of the shipments, a vessel operating on the high seas between a port in the United States and a port in a foreign country.**

The five Zim Container Service bills of lading, the seven Sea Shipping Line bills of lading, and the two Woolery “Shipper’s Invoice Agreements” establish that each shipment was loaded on board a vessel in the United States and discharged in a foreign port. Therefore, BOE has proven by a preponderance of the evidence that Cargo Express used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).³

BOE has proven by a preponderance of the evidence that on fourteen shipments, Cargo Express violated the Shipping Act by operating as an NVOCC that did not have a tariff as required by section 40501 of the Act, a license as required by section 40901 of the Act, and a bond, insurance, or other surety as required by section 40902 of the Act.

2. **BOE has proven by a preponderance of the evidence that Cargo Express operated as an ocean freight forwarder on two shipments.**

As noted above, on two shipments, Sea Shipping Line issued bills of lading identifying the proprietary owner as the shipper and the consignee. (Attachments M2, M4.) The bills of lading prove that part of the transportation was in a vessel operating on the high seas. Cargo Express performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on these two shipments. 46 U.S.C. § 40102(18). Therefore, BOE has proven by a preponderance of the evidence that on two shipments, Cargo Express violated the Shipping Act by operating as an

³ The record establishes that Woolery received a judgment against Cargo Express and Bronx Barrels in a New York court because the shipments were never delivered in Jamaica. (Mingione Statement ¶¶ 26-27; Attachment Q (*Woolery v. Cargo Express, et al.*, Index No. B3082/06-2 and B 3082/06-102 (Civ. Ct. of the City of New York Nov. 29, 2006) (Notice of Judgment))). While it is not free from doubt, based on Cargo Express’s representation in the “Shipper’s Invoice Agreements” that the barrels would travel by vessel from New Jersey to Jamaica, Fed. R. Evid. 801(d)(2), I find that Cargo Express used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on these shipments.

ocean freight forwarder that did not have a license as required by section 40901 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

C. Civil Penalties are Assessed Against Parks International and Cargo Express.

1. Statutory and regulatory considerations.

As currently codified and worded, *see n.2 supra*, section 13(a) of the Shipping Act provides:

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 [\$6,000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).⁴ As currently codified and worded, section 13(c) of the Act provides “[i]n 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(b). *See also* 46 C.F.R. § 502.603(b) (“In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.”).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (2001); *Refrigerated Container Carriers Pty. Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805 (ALJ 1999, admin. final May 21, 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):

⁴ The Act originally provided for maximums of \$5,000 and \$25,000. In 2000, before Respondents committed these violations, the Commission increased these amounts to \$6,000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table) (2008)).

. . . 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. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 323, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (2002). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd. – Possible Violations*, 28 S.R.R. at 805-806.

The first question that must be answered in determining a civil penalty is whether the “violation was willfully and knowingly committed.” *Stallion Cargo, Inc. – Possible Violations*, 29 S.R.R. at 678. To assess a civil penalty in the higher amount, the evidence must establish that the violation was willful and knowing.

The Shipping Act, 1916, 46 U.S.C.A. §§ 801-842 (1975) (repealed), the predecessor of the Shipping Act of 1984, required ocean freight forwarders to be licensed by the Commission. 46 U.S.C.A. § 841b (1975) (repealed 1984). The 1916 Act provided that “[w]hoever violates . . . section 841b of this title . . . shall be subject to a civil penalty not to exceed \$5,000 for each such violation.” 46 U.S.C.A. § 831(a) (1975) (repealed 1995).

In the Legislative Background section of the House Report accompanying H.R. 1878, the bill that was enacted as the Shipping Act of 1984, it was recognized that:

Experience with the penalties imposed by the 1916 Shipping Act led the Committee to conclude that they provided no apparent deterrent to the commission of prohibited acts. Civil penalties of the type and amount available under the current law could be absorbed as part of the cost of doing business. . . . The Committee included in H.R. 1878 sanctions and penalties designed to deter the commission of prohibited acts.

H.R. Rep. No. 53, (Part. 1), 98th Cong., 1st Sess. 19 (1983), 1984 U.S. Code Cong. and Admin. News 167, 184. See *Martyn Merritt, et al., Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 26 S.R.R. 663, 664 n.4 (1992) (quoting House report). In the section-by-section analysis of the bill, the Report provides an analysis of the bill’s civil penalty provision:

This section provides civil penalties not to exceed \$5,000 for each violation, unless the violation is willful and knowing, in which case the penalty may not exceed

\$25,000 for each violation. The amount of the penalty is to be determined by the Commission. . . .

The section also provides the manner in which a civil penalty will be assessed and the things that must be considered in arriving at the amount of penalty.

H.R. Rep. No. 53, (Part 1), 98th Cong., 1st Sess. 19 (1983), 1984 U.S. Code Cong. and Admin. News 167, 202-203.

As enacted, the Shipping Act stated:

(a) ASSESSMENT OF PENALTY. – Whoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed \$5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed \$25,000 for each violation.

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(c) ASSESSMENT PROCEDURES. . . . In determining the amount of the 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 such other matters as justice may require.

Shipping Act of 1984, Pub. L. 98-237, § 13, 98 Stat. 67, 82-83 (1984). It appears, then, that to deter the commission of prohibited acts, Congress designed the enhanced civil penalty for violations that were willfully and knowingly committed. Section 13(a) is now codified with non-substantive changes in language, *see n.2 supra*, at 46 U.S.C. § 41107(a). Section 13(c), setting forth “the things that must be considered in arriving at the amount of penalty,” is now codified with identical language at 46 U.S.C. § 41109(b).

Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme for violations of the Shipping Act: (1) violations that are not willful and knowing and subject to a maximum civil penalty of \$6,000 at the time Parks International and Cargo Express violated the Act; and (2) violations that are willful and knowing, hence subject to a maximum civil penalty of \$30,000 at the time Parks International and Cargo Express violated the Act. *Compare Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (analyzing “two-tiered liability scheme” for liquidated damages for violations of the Age Discrimination in Employment Act of 1967).

“The word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose construction is often dependent on the context in which it appears.” *Bryan v. United States*, 524 U.S. 184, 191

(1998). “[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.” *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007). In the seminal case on which BOE relies (BOE Opening Brief at 5) addressing the meaning of “knowingly and willfully” in the context of a civil penalty, the Supreme Court analyzed a statute that prohibited railroads from confining cattle in rail cars for longer than 28 hours (36 hours with the owners permission) without unloading them into properly equipped pens for rest, water, and feeding unless prevented by storm or by other accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. The penalty provision provided:

“Any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500 . . .” recoverable by civil action in the name of the United States.

United States v. Illinois Cent. R. Co., 303 U.S. 239, 241 (1938).

The case depends upon the meaning of the phrase “knowingly and willfully,” used in § 3 to characterize the transgressions for which penalties are imposed. The Act is to be construed to give effect to its humanitarian provisions, and as well to the exceptions in favor of the carriers. The penalty is not imposed for unwitting failure to comply with the statute. But in this case, the respondent knew when the permissible period of confinement would expire, brought the car to destination, and within the time allowed, placed it for unloading. By allowing the 36 hours to expire, it “knowingly” failed to comply with the statute.

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown “willfully” to have failed. In statutes denouncing offenses involving turpitude, “willfully” is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394[1933], shows that it often denotes that which is “intentional, or knowing, or voluntary, as distinguished from accidental,” and that it is employed to characterize “conduct marked by careless disregard whether or not one has the right so to act.” The significance of the word “willfully” as used in § 3 now before us, was carefully considered by the circuit court of appeals for the eighth circuit in *St. Louis & S.F.R. Co. v. United States*, 169 F. 69[, 71 (8th Cir. 1909)]. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (page 71): “‘Willfully’ means something not expressed by ‘knowingly,’ else both would not be used conjunctively. . . . But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. . . . So, giving effect to these considerations, we are persuaded that it

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." That statement has been found a useful guide to the meaning of the word "willfully" and to its right application in suits for penalties under § 3.

Id. at 242-243 (citations omitted) (ellipses in original).

In 1985, the Court revisited the meaning of "willful," this time in the context of the Age Discrimination in Employment Act of 1967 (ADEA), § 7(b), as amended, 29 U.S.C.A. § 626(b). *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The damages provision of the ADEA incorporated the damages provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. §§ 201-219. *See* 29 U.S.C.A. § 216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.") Congress limited that remedy under the ADEA, however, providing that "liquidated damages shall be payable only in cases of *willful* violations of this chapter." 29 U.S.C.A. § 626(b) (emphasis added). *See Thurston*, 469 U.S. at 125.

In the Supreme Court, the respondent/employees argued that:

an employer's conduct is willful if he is "cognizant of an appreciable possibility that the employees involved were covered by the [ADEA]." In support of their position, the respondents cite § 6 of the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. § 255(a), which is incorporated in both the ADEA and the FLSA. Section 6 of the PPA provides for a 2-year statute of limitations period unless the violation is willful, in which case the limitations period is extended to three years. 29 U.S.C. § 255(a). Several courts have held that a violation is willful within the meaning of § 6 if the employer knew that the ADEA was "in the picture." *See, e.g., Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (CA5 1971), cert. denied, 409 U.S. 948 (1972); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (CA10 1983). Respondents contend that the term "willful" should be interpreted in a similar manner in applying the liquidated damages provision of the ADEA.

We are unpersuaded by respondents' argument that a violation of the Act is "willful" if the employer simply knew of the potential applicability of the ADEA. Even if the "in the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondents would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme.

We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.

Thurston, 469 U.S. at 127-128 (footnotes omitted).

The Court agreed with the appellate court's articulation of "willful" – "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA,'" *id.* at 128⁵ – but found that the court of appeals had misapplied the standard. "TWA certainly did not 'know' that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in 'reckless disregard' of the Act's requirements." *Id.* at 129. The Court then summarized TWA's efforts to comply with the ADEA and found that TWA's violation was not willful. *Id.* at 129-130.

Three years later, the Court returned to the definition of "willful," this time in the context of a statute of limitations in the Portal-to-Portal Act discussed in *Thurston, supra*. Congress amended the Portal-to-Portal Act in 1966 to provide for a two-tiered statute of limitations.

Because no limitations period was provided in the original 1938 enactment of the FLSA, civil actions brought thereunder were governed by state statutes of limitations. In the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 216, 251-262, however, as part of its response to this Court's expansive reading of the FLSA, Congress enacted the 2-year statute to place a limit on employers' exposure to unanticipated contingent liabilities. As originally enacted, the 2-year limitations period drew no distinction between willful and nonwillful violations.

In 1965, the Secretary proposed a number of amendments to expand the coverage of the FLSA, including a proposal to replace the 2-year statute of limitations with a 3-year statute. The proposal was not adopted, but in 1966, for reasons that are not explained in the legislative history, Congress enacted the 3-year exception for willful violations.

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 131-132 (1988) (footnotes omitted).

In an action brought by the Secretary of Labor under the FLSA, the district court found that employer/respondent Richland Shoe's violations were willful and that the three-year statute of limitations applied.

⁵ Commission proceedings have noted the Court's articulation of the standard in *Thurston. Trans-Pacific Forwarding, Inc – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 409, 412 (ALJ Dec. 12, 1995), FMC notice of finality, Feb. 9, 1996.

In resolving the question of willfulness, the District Court followed Fifth Circuit decisions that had developed the so-called *Jiffy June* standard. The District Court explained:

“The Fifth Circuit has held that an action is willful when ‘there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?’ *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.) [cert. denied, 409 U.S. 948 (1972)].

“This standard requires nothing more than that the employer has an awareness of the possible application of the FLSA. *Id.*; *Castillo v. Givens*, 704 F.2d 181, 193 (5th Cir.)[, cert. denied, 464 U.S. 850 (1983)]. ‘An employer acts willfully and subjects himself to the three year liability if he knows, or has reason to know, that his conduct is governed by the FLSA.’ *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original). *See also Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 196 (5th Cir.)[, cert. denied, 463 U.S. 1207 (1983)].” 623 F. Supp., at 670-671.

On appeal respondent persuaded the Court of Appeals for the Third Circuit “that the *Jiffy June* standard is wrong because it is contrary to the plain meaning of the FLSA.” *Brock v. Richland Shoe Co.*, 799 F.2d 80, 82 (1986). Adopting the same test that we employed in *Trans World Airlines, Inc. v. Thurston*, . . . the Court of Appeals held that respondent had not committed a willful violation unless “it knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA.” 799 F.2d, at 83 (emphasis in original). Accordingly, it vacated the District Court’s judgment and remanded the case for reconsideration under the proper standard.

McLaughlin v. Richland Shoe Co., 486 U.S. at 130-131. The Secretary petitioned for certiorari asking the Court to resolve the post-*Thurston* conflict among the Circuits concerning the meaning of the word “willful” in the FLSA. The Secretary did not endorse the *Jiffy June* standard, but argued for adoption of an intermediate position between *Jiffy June* and *Thurston*. *Id.* at 131.

The Court rejected the *Jiffy June* standard that a willful violation could be found if an employer knew the FLSA was in the picture. *Id.* at 134. It also rejected the intermediate standard proposed by the Secretary. The Secretary argued that the Court:

should announce a two-step standard that would deem an FLSA violation willful “if the employer, recognizing it might be covered by the FLSA, acted without a

reasonable basis for believing that it was complying with the statute.” . . . This proposal differs from *Jiffy June* because it would apparently make the issue in most cases turn on whether the employer sought legal advice concerning its pay practices. It would, however, permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects. We believe the Secretary’s new proposal, like the discredited *Jiffy June* standard, fails to give effect to the plain language of the statute of limitations.

Id. at 134-135 (footnote omitted). The Court stated:

Our decision today should clarify this point: If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either petitioner’s test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner’s test, it should not be so considered under *Thurston* or the identical standard we approve today.

Id. at 135 n.13.

The Commission last summarized the foregoing cases as follows:

In order to prove that a person acted “knowingly and willfully,” it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. [*Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-85 (ALJ 1998), admin. final Mar. 16, 1998; *Ever Freight Int’l - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 329, 333 (I.D.), finalized June 26, 1998)]. The Commission has further held that a person’s “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.” *Id.* at 84 (quoting *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954)); see also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938).

Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd., 29 S.R.R. at 164-165. See also *Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1403 (FMC 2000) (similar language).

Once the first question – whether the “violation was willfully and knowingly committed.” *Stallion Cargo, Inc. – Possible Violations*, 29 S.R.R. at 678 – has been answered, the eight factors set forth in section 13(c) must be weighed and balanced, bearing in mind the maximum penalty that may be assessed for the violation. The manner in which Congress phrased the statute divides the factors into those that related to the violation (in this case, each shipment) itself (“the nature, circumstances, extent, and gravity of the violation committed”) and those that relate to the violator (“with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require”). See *Universal Logistic Forwarding Co., Ltd., supra* (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) (*Merritt*).

2. Policies for deterrence and future compliance.

BOE contends that:

The Commission’s policies for deterrence and future compliance with the 1984 Act and the regulations are substantial factors which must be considered contemporaneously with the other factors in determining the appropriate amount of civil penalties. 46 C.F.R. § 502.603(b). Specifically, in enacting the 1984 Act, “Congress intended to increase the deterrent effect of penalties for violations” so they are not merely written off by companies as a cost [of] doing business. *Stallion Cargo, Inc.*, 29 S.R.R. at 681. See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. at 1191 (“[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress’ efforts to augment the Commission’s authority to assess penalties so as to deter future violations.”) In this case, the deterrent effect on other companies who might be inclined to violate the 1984 Act by operating as OTIs without obtaining licenses from the Commission and providing proof of financial responsibility justifies assessment of the maximum civil penalty.

Additionally, a significant penalty sends a message to the shipping industry that enforcement action cannot be avoided simply by a Respondent’s refusal to participate in a formal proceeding. As was appropriately noted in *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. 799, 805 (ALJ 1999), “[s]hould the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in

section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed 'compromise' discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings." *Id.*

(*Id.* at 15-16.)

BOE's position assumes that only the maximum civil penalty permitted by statute would act as a deterrent. Assuming that only a maximum civil penalty imposed on one respondent would have a deterrent effect on other companies, that deterrent effect would be present in every case. BOE's argument would result in the assessment of the maximum civil penalty for every violation no matter what the particular facts of a violation might be and would nullify the Congressional mandate to determine the amount of the penalty by "tak[ing] 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 such other matters as justice may require" by elevating consideration of the deterrent effect of a penalty (a factor not found in section 13) over the factors that Congress set forth in section 13.

As set forth above, Congress enhanced the penalty for willful and knowing violations in the Shipping Act of 1984. To implement the Act, the Commission promulgated regulations establishing criteria and procedures for handling civil penalty claims. 49 Fed. Reg. 44362 (Nov. 6, 1984) (final rule). In the preamble of the notice of proposed rulemaking, the Commission stated:

Proposed paragraph (b) of § 505.3 . . . uses the specific language of section 13 of the Shipping Act of 1984, in establishing the criteria to be used by the Commission in determining the amount of the penalty to be assessed. When determining the amount of a civil penalty, therefore, the Commission would take into account "the nature, circumstances, extent, and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations." With respect to the person against who[m] the claim is made, the Commission would consider the degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

49 Fed. Reg. 18874 (May 3, 1984) (notice of proposed rulemaking). The proposed rule stated:

Criteria for determining amount of penalty. In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

49 Fed. Reg. 18875-18876. The Commission did not make any changes in the proposed rule when it promulgated the final rule. 49 Fed. Reg. 44362 and 44418 (Nov. 6, 1984) (final rule) (codified at 46 C.F.R. § 505.3(b) (1984)). This unchanged provision is currently codified at 46 C.F.R. § 502.603(b) (2009).

Although the Commission stated that it “use[d] the specific language of section 13 of the Shipping Act of 1984” when it drafted what is now section 502.603(b), the phrase “the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes” that the Commission quoted at 49 Fed. Reg. 18874, *supra*, is not found in section 13 or anywhere else in the Shipping Act. The Commission did not cite a source for the quotation in the preamble to the notice of proposed rulemaking.

It is not clear to me how the Commission intends to take the policies for deterrence and future compliance into account when assessing a civil penalty:

- As a background component when considering the factors set forth in section 13(c), *compare Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018 (the section 13 factors should be balanced “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law”);
- As a factor to be considered after taking into account the section 13(c) factors to increase whatever amount is determined based on those factors as BOE seems to argue;
- In some other manner.

In determining the amount of the civil penalty imposed on Parks International and Cargo Express, I have “tak[en] 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 such other matters as justice may require” while bearing in mind the need “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law.” The Commission may want to consider providing additional guidance on how it intends to take into account the Commission’s policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes in determining the amount of a civil penalty.

3. Burden of persuasion to establish a civil penalty and its amount.

In its motion for summary judgment, BOE relied on *Merritt* to support a contention that “Respondents’ refusal to participate in this proceeding has resulted in [their] failure to meet [their] ultimate ‘burden of persuasion’ in justifying a reduction of the applicable civil penalties.” (Motion

for Summary Judgment at 14.) BOE does not address burden of persuasion in its Opening Brief filed November 20, 2009.

In *Merritt*, the Commission ordered an investigation and hearing to consider claims that respondent Merritt and corporations under his control had committed violations of the Shipping Act. Merritt “assiduously avoided” participating in the proceeding before the ALJ, and refused to produce financial information. After the ALJ closed the record, but before the ALJ issued the initial decision, Merritt submitted a letter claiming a lack of resources and requesting a hearing on his ability to pay any civil penalty that the Commission might assess against him. The ALJ denied Merritt’s request for hearing. The Initial Decision found that Merritt had violated the Act and imposed a civil penalty. The ALJ listed the factors that the Act requires the Commission to consider before imposing a penalty, including ability to pay, but did not set forth any specific findings on Merritt’s ability to pay the penalty assessed. On appeal, the Commission adopted the Initial Decision, finding that the ALJ had adequately considered all the factors that the Act required, including ability to pay. Merritt petitioned for review by the Second Circuit, contending that neither the ALJ nor the Commission considered his individual ability to pay and that this omission constituted a clear error of law. *Merritt*, 960 F.2d at 16-17.

The court agreed with Merritt’s contention that his failure to participate in the proceeding did not relieve the Commission of its burden of going forward with evidence of Merritt’s ability to pay before requiring the ALJ to consider his resources and the effect a fine would have on him. *Id.* at 18. The Second Circuit then set forth the principle on which BOE relied:

The [APA] provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). “[B]urden of proof,” as used in section 556(d), *refers only to the burden of going forward with evidence, not the burden of persuasion. See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403-04 n.7, 103 S. Ct. 2469, 2475-76 n.7, 76 L. Ed. 2d 667 (1983). Thus, absent a statutory burden-shifting provision – which section 13(c) does not contain – an agency must introduce initial evidence on an issue when it proposes a rule or an order.

Id. (emphasis added).

In *Transportation Management*, the National Labor Relations Board (NLRB) alleged that an employer had fired an employee because of his union activities. The employer claimed that it had fired the employee for other reasons. The NLRB imposed the burden on its General Counsel to persuade the Board that anti-union animus contributed to the employer’s decision to fire the employee, a burden that does not shift. Even if the employer failed to meet or neutralize the General Counsel’s showing of anti-union animus, the employer could avoid a finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union. *Transportation Management*, 462 U.S. at 394-395.

The employer argued that placing the burden of persuasion on the employer contravened section 556(d) of the APA. The Court rejected this argument, holding that section 556(d) “determines only the burden of going forward, not the burden of persuasion.” *Transportation Management*, 462 U.S. at 404 n.7. The *Merritt* holding on which BOE relies is based on this holding.

In 1994, two years after the Second Circuit decided *Merritt*, the Supreme Court reconsidered the meaning of “burden of proof” in section 556(d) of the APA. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). The Court engaged in an extensive discussion of how the meaning of burden of proof had evolved. *Id.* at 272-275. The Court concluded that:

We interpret Congress’ use of the term “burden of proof” in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment. These principles lead us to conclude that the drafters of the APA used the term “burden of proof” to mean the burden of persuasion.

Id. at 275-276 (citations omitted).

The Court acknowledged that it had “previously asserted the contrary conclusion as to the meaning of burden of proof in [section 556(d)] of the APA.” *Id.* at 276. The Court discussed and explicitly rejected its holding in *Transportation Management*. *Id.* at 276-278. The dissent noted that *Merritt* was one of several circuit court decisions that understood the Court had established the meaning of “burden of proof” to be “burden of production” in *Transportation Management*. *Id.* at 290-291 (Souter, J., dissenting).

Merritt’s holding that the Shipping Act does not contain a provision shifting the burden to a respondent to persuade the Commission that a civil penalty should be mitigated is still valid. *Merritt*’s holding that under the APA, “burden of proof” refers only to the burden of going forward with evidence, not the burden of persuasion, has been overruled by the Supreme Court in *Greenwich Collieries*. Therefore, 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. Respondents did not “fail[] to meet [their] ultimate ‘burden of persuasion’ in justifying a reduction of the civil penalties” as BOE contends because Respondents do not bear this burden.

4. Assessment of civil penalties against Parks International and Cargo Express.

a. Parks International.

BOE has proven by a preponderance of the evidence that Parks International operated as an NVOCC in violation of the Act on thirty-eight shipments carried for it by Tropical. As BOE

recognizes (BOE Opening Brief at 16), the Act has a five-year statute of limitations for assessment of a civil penalty. *See* 46 U.S.C. § 41109(e) (“A proceeding to assess a civil penalty under this section must be commenced within 5 years after the date of the violation.”). The Commission commenced this proceeding on September 19, 2006. Therefore, the Commission may impose a civil penalty for those shipments that occurred on or after September 19, 2001. Tropical issued twelve of the thirty-eight bills of lading after September 19, 2001. (BOE Opening Brief at 16; BOE Attachment H1; Attachment H2.) Therefore, a civil penalty may be imposed on Parks International for each of twelve violations of the Act. The twelve shipments are:

TABLE 1
PARKS INTERNATIONAL/TROPICAL SHIPMENTS (Attachment H1, H2)

DATE	TROPICAL B/L NO.	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ⁶
11/01/2001	01008952	1 BARREL PERSONAL EFFECTS	US\$105.00
11/22/2001	01009489	1 BARREL PERSONAL EFFECTS	US\$49.50
11/22/2001	01009492	1 BARREL PERSONAL EFFECTS	US\$49.50
12/13/2001	01227448	1 BARREL (WITH YELLOW TAPE) PERSONAL EFFECTS	US\$41.50
12/13/2001	01227449	1 BARREL PERSONAL EFFECTS	US\$51.50
12/13/2001	01227452	2 BARRELS PERSONAL EFFECTS	US\$103.00
12/27/2001	01232334	1 BARREL S.T.C: 1 BARREL (WITH YELLOW TAPE) PERSONAL EFFECTS	US\$51.50
12/27/2001	01232336	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50
12/27/2001	01232337	1 BARREL PERSONAL EFFECTS	US\$46.50
02/07/2002	02000442	1 BARREL S.T.C. PERSONAL EFFECTS	US\$46.50
02/07/2002	02000447	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50
02/21/2002	02000700	1 BARREL S.T.C. PERSONAL EFFECTS	US\$51.50

(BOE Attachment H2.)

⁶ This apparently would have been the charge to Parks International. There is no evidence of the amount Parks International charged the owners/shippers of the goods.

BOE contends that Parks International willfully and knowingly violated the Act and seeks the maximum penalty of \$30,000.00 for each of the twelve shipments that occurred within the limitations period for a total of \$360,000.00. (BOE Opening Brief at 16.)

i. Willfully and knowingly.

The first question on which BOE bears the burden of persuasion is whether Parks International willfully and knowingly committed the violations. *Stallion Cargo, supra*.

BOE contends that:

The uncontested facts, as presented in the Verified Statements of [AR] Mingione and Dorothy H Wade, reflect that Ainsley Lewis . . . is the chief executive officer of Parks [International] PFF 1, 3, 4.¹⁷ At various times subsequent to its incorporation . . . , Parks advertised itself to the general public as an OTI/NVOCC PFF 9. Between April 16, 2001 and October 25, 2002, Parks entered into a series of three service contracts with Tropical PFF 10. With respect to each of its three service contracts with Tropical, Parks certified its status as owner of the cargo. PFF 11. The commodities which were to be transported by Tropical for Parks pursuant to the aforementioned service contracts were household goods and personal effects. PFF 12. On November 18, 2002, Tropical challenged Parks' certification of its status with respect to one of the service contracts by requesting that Parks provide proof of ownership of the cargo in order to avoid immediate termination of the contract. PFF 13. Parks did not contest Tropical[']s termination of the contract. PFF 14. At approximately the same time, by correspondence dated November 13, 2002, Parks and its president . . . were warned by the Commission's New York Area Representative of the consequences of operating as an OTI without a license and evidence of financial responsibility. PFF 16. Despite this explicit warning, Parks continued its unlicensed OTI operations in March 2003 as evidenced by its loading of barrels onto a truck bearing the name of Parks at Parks' business address . . . in [the] Bronx PFF 17.

The evidence amply demonstrates that the violations of sections 8(a) and 19 of the 1984 Act are knowing and willful in light of the fact that Parks signed three (3) service contracts with an ocean common carrier and intentionally falsified its status as the owner of the thirty-eight shipments of household goods and personal effects that were transported pursuant to one of the contracts. As the ALJ recognized in his October 23 Order, the evidence shows that Parks made numerous shipments as shipper of goods obviously owned by third parties from whom Parks regularly solicited business through its advertisements. When requested by the ocean carrier

⁷ "PFF" followed by a number refers to a proposed finding of fact BOE submitted with its Opening Brief.

to verify its ownership of the cargo, Parks was either unable or unwilling to do so. These activities demonstrate a “pattern of indifference” and an intentional disregard to the licensing and bonding requirements of the 1984 Act. Moreover, subsequent to receiving written notice from a Commission representative regarding the consequences of operating outside the OTI licensing and bonding requirements, Parks proceeded to disregard same and continue its OTI operation in a non-compliant manner. At this point, it is evident that Parks’ level of awareness migrated from intentional disregard to purposeful and obstinate behavior which is tantamount to “gross negligence” according to Commission precedent. *See Ever Freight Int’l Ltd., et al.*, 28 S.R.R. at 333.

(BOE Opening Brief at 7-8 (footnote omitted).)

A number of the proposed findings of fact on which BOE relies to prove that Parks International’s violations were willful and knowing have meager support in the record and/or are irrelevant to whether Parks International willfully and knowingly committed the violations:

PFF 13. On November 18, 2002, Tropical issued a letter to Parks challenging the certification of its status as owner of the cargo being shipped pursuant to service contract no. 021675 and requesting that Parks provide proof of ownership of the cargo in order to avoid immediate termination of the contract. Mingione Statement ¶ 14, Attachment I.

PFF 14. Parks did not contest Tropical’s termination of contract no. 021675. Mingione Statement ¶ 14.

(BOE Prop. FF ¶¶ 13, 14.) AR Mingione states:

14. On November 18, 2002, Tropical sent a letter to Parks stating that Tropical had reason to believe that, contrary to its certification, Parks may not be the owner of the cargo being shipped pursuant to service contract no. 021675 which was ongoing at the time of the letter and was scheduled to expire on February 28, 2003. The letter further notified Parks that the service contract would be terminated immediately and all further shipments from Parks would be refused by Tropical unless Parks could provide proof of ownership of the cargo being shipped. It is my understanding that Parks did not contest the termination of the contract. A copy of this letter, which was provided to me by Tropical, is included as Attachment I.

(Mingione Statement ¶ 14.) Attachment I is a letter purportedly from Tropical to Parks International asking for proof that Parks International was the owner of that goods being shipped pursuant to the contract.

BOE does not provide much evidence on which a finding that Parks International received Tropical's letter can be based. "Proof that a letter properly directed was placed in a [United States] post office mail receptacle creates a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed." *United States v. Ekong*, 518 F.3d 285, 287 (5th Cir. 2007) (quoting *Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989)). This presumption does not require the use of certified mail; it simply requires that a letter be properly addressed, stamped, and placed in the care of the United States Postal Service. See *Mulder v. Comm'r of Internal Revenue*, 855 F.2d 208, 212 (5th Cir. 1988); see also *Lyle Cashion Co. v. McKendrick*, 204 F.2d 609, 611 (5th Cir. 1953). The placement of a letter in the mail may be proved by a sworn statement, *Ekong*, 518 F.3d at 287, or by circumstantial evidence such as the sender's customary mailing practice. *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 420 (5th Cir. 2007).

Other than stating "Tropical sent a letter to Parks," AR Mingione does not set forth any facts that would support a finding that Tropical's letter was placed in a United States post office mail receptacle on which a presumption that it reached its destination could be based. Assuming Parks International received the letter from Tropical, Tropical did not send and Parks International did not receive the letter until nearly nine months *after* the last Parks International shipment/violation for which BOE seeks a civil penalty. Therefore, even if received, the Tropical letter does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

PFF 15. By correspondence dated November 13, 2002, New York Area Representative Emanuel James Mingione ("AR Mingione") requested that Parks furnish documentation regarding its operation including, but not limited to, dock receipts, export declarations, and bills of lading. Mingione Statement ¶ 10, Attachment F.

PFF 16. By correspondence dated November 13, 2002, Parks and its president, Ainsley Lewis a.k.a. Jim Parks, were warned of the consequences of operating as an OTI without a license and evidence of financial responsibility. Mingione Statement ¶ 10, Attachment F.

(BOE Prop. FF ¶¶ 15, 16.) AR Mingione states:

10. In an effort to obtain information regarding Parks' shipping practices, I issued a letter on November 13, 2002 requesting that Parks furnish certain documentation regarding its operation including, but not limited to, dock receipts, export declarations, and bills of lading. In the letter, I also warned Parks of the consequences of operating as an OTI without a license and evidence of financial responsibility. This letter is included as Attachment F.

(Mingione Statement ¶ 10.) Attachment F is a letter dated November 13, 2002, from AR Mingione to Jim Parks and Alphanso Jackson of Parks International.

AR Mingione does not set forth any facts in his statement that would support a finding that the letter was placed in a United States post office mail receptacle creating a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed. Attachment F includes a photocopy of a Federal Express Airbill indicating that the AR Mingione sent the letter by Federal Express to "Mr. Jim Parks" at Parks Int'l Shipping, Inc., however. Courts have held that the "presumption [that a letter reached its destination] can arise where the sender uses a private delivery service." *Murray v. TXUCORP.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003), citing *United States v. Wilson*, 322 F.3d 353, 362 (5th Cir. 2003) (invoking the rule where a party claimed to have sent a letter by Federal Express, but finding insufficient evidence to apply the presumption); *Bronia, Inc. v. Seo*, 873 F. Supp. 854, 859 (S.D.N.Y.1995). Given the ease with which a sender can obtain proof of delivery from Federal Express, one might wonder why BOE did not submit proof of delivery of the letter. Nevertheless, drawing the inference that BOE would not have included the photocopy of the FedEx Airbill unless AR Mingione used that FedEx Airbill to ship the letter, I find that Parks International received AR Mingione's letter.

As with the Tropical letter, AR Mingione did not send and Parks International did not receive the letter until nearly nine months *after* the last Parks International shipment for which BOE seeks a civil penalty. Therefore, Mingione's letter does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

PFF 17. On March 11, 2003, AR Mingione witnessed barrels being loaded onto a truck clearly bearing the name of Parks at Parks' business address of 3010 Eastchester Road in Bronx, New York. Mingione Statement ¶ 15.

(BOE Prop. FF ¶¶ 17.) AR Mingione states:

15. On March 11, 2003, I drove to Parks' location at 3010 Eastchester Road in Bronx, New York. I observed barrels being loaded onto a truck clearly bearing the name of Parks. A cargo van with Parks' name was also observed at the premises. Parks' name was printed on an awning over the door, as well as painted on the side of the building.

(Mingione Statement ¶ 15.)

The fact that Parks International was loading barrels onto a truck more than two years after the last Parks International shipment for which BOE seeks a civil penalty does not make it more probable that Parks International willfully and knowingly committed the violations and is irrelevant to this issue. Fed. R. Evid. 401.

BOE indicates that consideration of the events that occurred long after the last violation are necessary to support a finding of knowing and willful violations. (BOE Opening Brief at 8 ("At this point, it is evident that Parks' level of awareness migrated from intentional disregard to purposeful and obstinate behavior which is tantamount to "gross negligence" according to Commission

precedent.”) (quoted *supra*.) The facts in BOE’s brief that occurred before or contemporaneous with the violations are:

- Parks advertised itself to the general public as an OTI/NVOCC;
- Between April 16, 2001 and October 25, 2002, Parks entered into three service contracts with Tropical on which it certified its status as owner of the cargo;
- The commodities which were to be transported by Tropical for Parks pursuant to the aforementioned service contracts were household goods and personal effects.

(See BOE Opening Brief at 7-8, quoted at 26 *supra*.) The fact that Parks International “advertised itself to the general public as an OTI/NVOCC” does not support a finding that Parks International willfully and knowingly transported the goods in violation the Act. The fact that the commodities transported by Tropical were household goods and personal effects does not support a finding that Parks International willfully and knowingly transported the goods in violation the Act. BOE does not identify any facts that would support a finding that Parks International or Lewis Ainsley, its chief executive, knew of the existence of the Shipping Act and its license, bonding, and tariff requirements.

Only one fact identified by BOE could support a finding that Parks International willfully and knowingly violated the Act: The fact that Parks International misrepresented its ownership status on the three service contracts with Tropical. Although this evidence clearly establishes Parks International used deception to secure its contract with Tropical, it does not necessarily support a finding that Parks International knew of the existence of the Act or willfully and knowingly violated the Act by operating as an NVOCC without a tariff, license, or bond, and BOE does not identify any other evidence that Parks International knew of the existence of the Act or the Act’s requirements that an NVOCC have a license, bond, and tariff. Assuming Parks International did not know of the Act, it may have acted unreasonably when it opened its business without sufficient research into legal requirements, but the evidence does not support a finding that it acted recklessly. *Compare McLaughlin v. Richland Shoe Co.*, 486 U.S. at 135 n.13 (“If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner’s test, it should not be so considered under *Thurston* or the identical standard we approve today.”). Even if it is assumed that Parks International knew of the Act, BOE does not identify any evidence on which a finding of recklessness could be based.

BOE has proven by a preponderance of the evidence that Parks International committed thirty-eight violations of the Shipping Act. BOE has not established by a preponderance of the evidence that Parks International willfully and knowingly committed the violations. Therefore, I find that Parks International may be liable for a civil penalty that may not exceed \$6,000 for each violation. 46 U.S.C. § 41107(a).

ii. Section 13 factors.

BOE contends that:

Parks knowingly and willfully provided unlicensed, unbonded NVOCC services with respect to thirty-eight (38) shipments transported pursuant to one of its service contracts with Tropical between May 23, 2001 and February 21, 2002. PFF 10. Subsequent to receiving a written warning of the consequences of operating as an unlicensed OTI . . . , Parks was observed four months later loading barrels onto a truck bearing Parks' name at Parks' business address PFF 16, 17. Parks' unwillingness to cease its unlicensed OTI activities or to come into compliance by obtaining a license is a significant aggravating factor in this proceeding. Moreover, members of the shipping public who tendered their cargo to Parks during the extended time period of Parks' unlicensed operations were left completely unprotected due to Parks' failure to provide proof of financial responsibility, such as a surety bond.

All of this activity coupled with Parks' intentional falsification of its shipper status to Tropical on no less than three occasions all the while knowing that it was not the owner of the cargo it was tendering makes Parks' degree of culpability extremely high. Parks' unwillingness or inability to satisfy Tropical's verification of Parks' shipper status speaks to Parks' failure to cooperate with the ocean carrier. PFF 14. Similarly, Parks remained uncooperative during the entirety of this docketed proceeding. Therefore, all of these factors combined, the nature, extent, gravity of the violations committed by Parks, Parks' degree of culpability, as well as the interests of justice support the imposition of the maximum civil penalty.

(BOE Opening Brief at 14-15 (footnote omitted).)

With regard to Parks International's "history of prior offenses," BOE contends:

Of those factors cited in section 13(c) of the 1984 Act, BOE submits that only the absence of a history of prior offenses appears to present a factual issue supporting mitigation of those civil penalties otherwise appropriate. Parks has no known history of prior offenses.

However, this factor should not be viewed in isolation inasmuch as Parks has been operating unlawfully since at least April 16, 2001 at which time Parks signed its first service contract and falsified its shipper status to Tropical. Therefore, it is reasonable to infer the significant likelihood that the thirty-eight (38) NVOCC shipments comprising the evidentiary record in this proceeding do not form the entire universe of Parks' operations since 2001. Had Parks complied with BOE's Request for Production of Documents No. 9, there is a considerable possibility that the

evidentiary record would have been much more substantial by way of Parks' history of violations.

This approach is not novel to the discussion of a Respondent's history of prior offenses. In a previous matter, the ALJ recognized that an absence of a history of prior offenses only means "that there is no history of any formal Commission proceeding regarding" a Respondent or its principals. *Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1185, 1192 (ALJ 1999). The Commission, however, is allowed "to draw reasonable inferences from the evidence and reach conclusions in the absence of a 'smoking gun'." *Id. See also Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1404 n.11 (FMC 2000) ("The ALJ correctly found, in addition to violations of section 10(b)(1) on 35 shipments in 1997 and 1998, a 'history of prior offenses' dating back to 1993, when Respondent first filed its tariff.") Comparable to the ALJ's conclusion in *Pacific Champion*, it is reasonable to infer that had BOE obtained evidence through discovery of other shipments handled by Parks, they would similarly demonstrate that Parks provided unlicensed OTI services to the shipping public.

(BOE Opening Brief at 13-14 (citation to record omitted).)

Addressing the nature, circumstances, extent, and gravity of the violation committed, in another proceeding brought to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act, I found that the entity operated as an NVOCC. *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision), Notice not to Review served Sept. 29, 2009. In assessing the civil penalty, I found that:

Despite the fact that BOE does not set forth any argument about how the section 13 factors should be balanced "to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law," *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018, the evidence in the record demonstrates that for each of the thirteen proven violations, the shipments of as many as fifty to one hundred shippers were at risk. Therefore, a civil penalty of \$30,000, the maximum civil penalty authorized by the Shipping Act, is appropriate for each of the thirteen violations for a total of \$390,000.

Id. at 27. In this proceeding, by contrast, each of the twelve Parks International violations consisted of a shipment of one barrel (or in one case, two barrels) for one shipper. *See* Table 1, *supra*. The nature and circumstances of a violation involving the goods of dozens of shippers justifies a far greater civil penalty than a violation involving one or two barrels of goods of one shipper. The record does not contain any evidence indicating that there were any problems with the twelve

shipments, that Parks International demanded any additional payments from the shippers beyond the amount originally stated, or that the shipments were not delivered to their destinations.⁸

BOE states that Parks International “has no known history of prior offenses,” (BOE Opening Brief at 13), by which it apparently means that the Commission has not found that Parks International violated the Act in a prior Commission proceeding. The record demonstrates that Parks International operated illegally for several years, however, and BOE presented evidence of twenty-six violations that occurred more than five years before the Commission commenced this proceeding; therefore, the Act’s statute of limitations precludes imposition of a civil penalty in this proceeding. Had the Commission commenced an earlier proceeding, found that Parks International violated the Act on the twenty-six shipments, and imposed a civil penalty, it is clear that the prior proceeding would establish a “history of prior offenses” that should be taken into account in assessing a civil penalty in this proceeding, even though the shipments occurred before the limitations period. It would not be logical to permit consideration of this prior history when assessing a civil penalty when a prior proceeding found the violations and a civil penalty was imposed, but not permit consideration when established in this proceeding. Therefore, I consider the twenty-six shipments for which a civil penalty is barred by the statute limitations as an aggravating “history of prior offenses” in assessing the civil penalty for the twelve violations Parks International committed.

The evidence regarding Parks International’s misrepresentation of its ownership status on the three service contracts with Tropical makes its degree of culpability an aggravating factor. As noted above, I have drawn the inference that Parks International 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 it is found to have committed. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 4 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Balancing the relevant evidence of the section 13(c) factors in light of the obligation to ensure that the penalty be tailored to the particular facts of the case and not imposing unduly harsh or extreme sanctions while at the same time deterring violations and achieving the objectives of the law, I assess a civil penalty in the amount of \$1500 against Parks International for each of twelve violations for a total civil penalty of \$18,000.

⁸ The consignee for each shipment is identified in the bill of lading for the shipment. BOE does not state whether it contacted the consignees to learn of any problems receiving the shipments.

b. Cargo Express.

BOE has proven by a preponderance of the evidence that Cargo Express operated as an NVOCC in violation of the Act on fourteen shipments and as an ocean freight forwarder on two shipments. All sixteen shipments occurred within the limitations period. Therefore, a civil penalty may be imposed on Parks International for each of sixteen violations of the Act.

i. BOE's Contentions.

BOE contends:

Cargo Express knowingly and willfully provided unlicensed, unbonded OTI services with respect to sixteen (16) shipments between February 13, 2005 and July 21, 2006. PFF 22, 23. Ainsley Lewis, president of Cargo Express, was specifically advised on February 14, 2005 by Commission representatives that Cargo Express was required to publish a tariff, obtain a license from the Commission, and furnish evidence of financial responsibility if it intended to provide OTI services in U.S. trades. PFF 7, 20. In blatant disregard of this advice, Cargo Express proceeded to advertise and originate ocean shipments of cargo obviously owned by third parties while utilizing licensed intermediaries to obtain containers and transportation from ocean carriers. PFF 21, 22. Such activity not only amounts to a pattern of indifference but rises to the level of "purposeful and obstinate behavior." Cargo Express' clear unwillingness to cease providing unlicensed OTI services is a significant aggravating factor in this proceeding.

Moreover, members of the shipping public who tendered their cargo to Cargo Express during the extended time period of Cargo Express' unlicensed operation were left completely unprotected due to Cargo Express' failure to provide proof of financial responsibility, such as a surety bond. Indeed, with respect to Cargo Express, there is specific evidence in the record that at least one shipper was harmed as a result of Cargo Express' failure to deliver cargo to its destination and to subsequently compensate the shipper for the transportation costs, as well as the value of the lost goods. PFF 24. Because of Cargo Express' unlicensed status, there was no surety bond for the shipper to rely upon for compensation.

(BOE Opening Brief at 18.) BOE seeks assessment of the maximum civil penalty against Cargo Express. The sixteen shipments are:

TABLE 2
SIMPSON'S SHIPPING/ZIM CONTAINER SERVICE SHIPMENTS (Attachment L)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ON B/L ⁹
04/27/2005	ZIMUORF100088	40' high cube container SLAC: 210 household items and personal effects	US\$1666.00
05/04/2005	ZIMUORF100515	40' high cube container SLAC: 149 household items and personal effects	US\$1666.00
05/23/2005	ZIMUORF102286	40' high cube container SLAC: 141 house hold items and personal effects	US\$1666.00
06/07/2005	ZIMUORF104493	20' std container SLAC: 110 household items and personal effects	US\$1106.00
02/19/2005 ¹⁰	ZIMUORF103969	40' high cube container SLAC: 164 household items and personal effects	US\$1666.00

⁹ This apparently would have been the charge to Cargo Express. There is no evidence of the amount Cargo Express charged the owners/shippers of the goods.

¹⁰ The invoice accompanying this bill of lading is dated 06.09.05 and the master bill of lading is dated 06.03.05. The bill of lading number suggests that the shipment occurred after the other shipments. Whether the shipment occurred in February or June 2005 makes no difference to the outcome of this proceeding.

TABLE 3
SIMPSON'S SHIPPING/SEA SHIPPING LINE SHIPMENTS - NVOCC (Attachment M)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	FREIGHT AND OTHER CHARGES ON B/L ¹¹
02/09/2005	SSL57958	40' high cube container STC 165 pieces of personal effects	US\$1666.00
02/13/2005	SSL58281	40' HC container STC 166 pieces of personal effects	US\$1666.00
02/19/2005	SSL58573	40' HC container STC 170 pieces of personal effects	US\$1666.00
03/01/2005	SSL58689	40' HC container STC 158 pieces of personal effects	US\$1106.00
03/07/2005	SSL59219	40' HC container STC 137 pieces of personal effects	US\$1666.00
03/16/2005	SSL59227	20' STD container STC 149 pieces of personal effects	
03/30/2005	SSL60007	40' HC container STC 145 pieces of personal effects	

TABLE 4
SIMPSON'S SHIPPING/SEA SHIPPING LINE SHIPMENTS - OCEAN FREIGHT FORWARDER (Attachment M)

DATE	B/L NUMBER	QUANTITY AND DESCRIPTION OF GOODS	
02/13/2005	SSL58174	40' HC container STC 307 pieces of personal effects	
02/19/2005	SSL58282	40' HC container STC 131 pieces of personal effects	

¹¹ This apparently would have been the charge to Cargo Express. There is no evidence of the amount Cargo Express charged the owners/shippers of the goods.

TABLE 5
CARLA WOOLERY SHIPMENTS (Attachment P)

DATE	BOOKING NO.	QUANTITY AND DESCRIPTION OF GOODS	
07/14/06	M 5337	2 barrels p/effects	
07/21/06	M6134	1 barrel	

ii. Willfully and knowingly.

The first question on which BOE bears the burden of persuasion is whether the violations were willfully and knowingly committed. *Stallion Cargo, supra*.

BOE contends that:

The uncontested facts, as presented in the Verified Statements of [AR] Mingione and . . . Wade, reflect that Ainsley Lewis . . . is the president of Cargo Express PFF 5, 7, 8. On April 14, 2003, three months prior to the official incorporation of Cargo Express, [AR Mingione] witnessed two trucks bearing the name of Cargo Express at Parks' business address PFF 18. On October 29, 2004, Cargo Express continued to occupy [Parks' business address] and, using storefront signs, advertised its name alongside the same phone number that had been previously advertised by Parks on its website. PFF 19.

On February 14, 2005, in a meeting between Commission representatives and Ainsley Lewis . . ., Erol Lewis, and their attorneys, Respondents and their counsel were advised of the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. PFF 20. Counsel for Respondents indicated their clients' understanding of the situation. PFF 20. Nearly three (3) months following the meeting, on June 3, 2005, [AR Mingione] witnessed a truck with the Cargo Express logo backed up [to] a shipping container and Cargo Express employees were in the process of loading the container outside Cargo Express' premises PFF 21. Further investigation revealed that Cargo Express utilized two licensed OTIs, Simpson's Shipping Enterprise ("Simpson's Shipping") and A. Naimoli Freight Forwarding, Inc. ("Naimoli") to conduct its unlicensed transportation activities with respect to fourteen (14) shipments between February 13, 2005 and June 3, 2005. PFF 22. In at least two instances, on July 14 and July 21, 2006, Cargo Express issued its own bills of lading to a member of the shipping public for ocean shipments of personal effects to Jamaica. PFF 23.

There is an abundance of evidence in the record as presented by BOE that Cargo Express conducted its OTI activities purposefully and obstinately in

contravention to the statutory requirements of the 1984 Act. Ainsley Lewis . . . is the chief executive of Parks and president of Cargo Express. PFF 3, 7. As discussed above, in his capacity as principal of Parks, Ainsley Lewis was placed on notice in 2002 by [AR Mingione] regarding the consequences of operating as an OTI without a license and evidence of financial responsibility. PFF 16. On February 14, 2005, Ainsley Lewis along with his counsel were advised again by Commission representative of the need for Cargo Express and Parks to come into compliance with the Commission's licensing process. PFF 20. Counsel for Ainsley Lewis and his companies confirmed his client's understanding of the situation. PFF 20. As this understanding was being communicated, Cargo Express was already involved in the handling the fourteen (14) shipments the ALJ determined are in violation of sections 8(a) and 19 of the 1984 Act. Rather than terminate its unlicensed activity after February 14, 2005, Ainsley Lewis proceeded to operating Cargo Express in an unlawful manner until at least July 21, 2006. PFF 23.

In conjunction with his determination that Cargo Express violated the 1984 Act, the ALJ appropriately recognized in his October 23 Order that, with respect to fourteen (14) shipments wherein Cargo Express acted as an NVOCC, the evidence shows that Cargo Express was not the owner of the cargo in the containers, but rather assumed responsibility for their transportation. BOE contends that, with respect to all sixteen (16) shipments irrespective of whether it was operating unlawfully as an NVOCC or an ocean freight forwarder, it did so knowingly and willfully.

(BOE Opening Brief at 9-11.)

A number of the proposed findings of fact on which BOE relies to prove that Cargo Express's violations were willful and knowing are irrelevant to whether Cargo Express willfully and knowingly committed the violations:

PFF 21. On June 3, 2005, AR Mingione witnessed a truck with the Cargo Express logo backed up to a shipping container and Cargo Express employees were in the process of loading the container outside Cargo Express' premises at 3010 Eastchester Road in Bronx, New York. Mingione Statement ¶ 19, Attachment K.

PFF 22. Cargo Express utilized two licensed OTIs, Simpson's Shipping Enterprise ("Simpson's Shipping") and A. Naimoli Freight Forwarding, Inc. ("Naimoli") to conduct its unlicensed transportation activities with respect to fourteen (14) shipments between February 13, 2005 and June 3, 2005. Mingione Statement ¶¶ 20-23, Attachments L1-L5 and M1-M9.

PFF 23. In at least two instances, on July 14 and July 21, 2006, Cargo Express issued its own bills of lading to a member of the shipping public for ocean shipments of personal effects to Jamaica. Mingione Statement ¶ 26, Attachment P.

(BOE Prop. FF ¶¶ 21-23.)

The facts that a truck with the Cargo Express logo backed up to a shipping container and Cargo Express employees were in the process of loading the container, that Cargo Express utilized two licensed OTIs to conduct its unlicensed transportation activities, and that Cargo Express issued its own bills of lading to a member of the shipping public do not make it more probable that Cargo Express willfully and knowingly committed the violations and are irrelevant to this issue. Fed. R. Evid. 401.

BOE has provided other evidence that is relevant to this issue.

PFF 20. On February 14, 2005, in a meeting between Commission representatives and Ainsley Lewis a.k.a. Jim Parks, Erol Lewis, and their attorneys, Respondents and their counsel were advised of the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. Counsel for Respondents stated that their clients understood the situation. Mingione Statement ¶ 18.

(BOE Prop. FF ¶ 20.) AR Mingione states:

18. On February 14, 2005, I accompanied the Director of the Bureau of Enforcement to a meeting with Ainsley Lewis . . . , Erol Lewis, and their attorneys from the law firm of Follick & Bessich. During this meeting, we stressed to Respondents and their counsel the necessity for Parks and Cargo Express to cease operating unlawfully and to come into compliance with U.S. shipping laws. Counsel for Respondents stated that their clients understood the situation.

(Mingione Statement ¶ 18.)

BOE has provided evidence proving that on February 14, 2005, Commission representatives provided Ainsley Lewis, the chief executive of Cargo Express, with information regarding the requirements of the Shipping Act and told Lewis that Cargo Express was operating illegally. Despite knowledge of its illegality, Cargo Express continued to operate illegally and provide services as an NVOCC and an ocean freight forwarder. With this evidence alone, BOE has proven by a preponderance of the evidence that Cargo Express willfully and knowingly operated as an NVOCC and/or as an ocean freight forwarder in violation of the Shipping Act on the shipments that occurred after February 14, 2005.

Three of the shipments occurred prior to February 14, 2005; therefore, the information conveyed in the February 14 meeting does not support a finding that Cargo Express willingly and knowingly violated the Act on those three shipments. Prior to the creation of Cargo Express as a corporation, however, Ainsley Lewis learned in his meeting with AR Mingione on November 13,

2002, and in the letter dated November 13, 2002, (Mingione Statement ¶ 10; Attachment F, *supra*), of the consequences of operating as an OTI without a license and evidence of financial responsibility. A corporate officer's knowledge acquired before creation of the corporation may be imputed to the corporation when it is present in the officer's mind while the officer is acting for the corporation. 1 James D. Cox & Thomas Lee Hazen, *Cox & Hazen on Corporations*, § 8.15, at 359 (2d ed. 2003). See also *Bowen v. Mt. Vernon Sav. Bank*, 105 F.2d 796, 798 (D.C. Cir. 1939) (notice to the agent is notice to the principal not only as to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and still in his mind at the time of his acting as such agent, if the agent is at liberty to communicate such knowledge to the principal); Restatement (Second) of Agency § 276.

Lewis and Cargo Express have not participated in this proceeding and there is, of course, no evidence in the record of what was in Lewis's mind prior to February 14, 2005. A claim by Lewis that after learning of the Act's requirements in 2002, he "forgot" what he had learned from AR Mingione in 2002 while he continued to operate Parks International and formed Cargo Express, would strain credulity far beyond the breaking point. Therefore, BOE has proven by a preponderance of the evidence that Cargo Express willfully and knowingly operated as an NVOCC and/or ocean freight forwarder in violation of the Shipping Act on the three shipments that occurred prior to February 14, 2005. The Commission may assess a civil penalty that may not exceed \$30,000 for each violation.

iii. Section 13 factors.

The evidence suggests that Cargo Express was created on January 23, 2003, as a result of Tropical's November 18, 2002, letter questioning Parks International's representations of ownership in its service contracts. Cargo Express apparently operated as an NVOCC in the two-year period between its creation and the first shipments for which BOE has presented the bills of lading as evidence supporting the violations. Therefore, I find that history of prior offenses and degree of culpability are aggravating factors. As noted above, I have drawn the inference that Cargo Express 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 it is found to have committed. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 4 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

Cargo Express's NVOCC operation differed significantly from the operation of Parks International. Parks International assumed responsibility to the proprietary shipper for the transportation of a shipment, then the vessel operator identified Parks International as the shipper on the bill of lading it issued for each individual shipment.

On the two Simpson's Shipping/Sea Shipping Line shipments on which Cargo Express operated as an ocean freight forwarder (Attachments M2 and M4), Sea Shipping Line issued a bill of lading identifying the proprietary shipper as the shipper and the consignee for the container. This

supports a finding that when an individual shipper was shipping enough goods to fill a container, Cargo Express filled the container with that shipper's goods.

The evidence also supports a finding that Cargo Express provided services to shippers of small loads as demonstrated by the Woolery shipments, one of which consisted of two barrels and the other one barrel. (Attachment P.) The five bills of lading that Zim issued identifying Simpson's Shipping as the shipper (Attachment L, *see* Table 2) and the seven bills of lading that Sea Shipping Line issued identifying Cargo Express as the shipper (Attachment M, *see* Table 3) indicate that one twenty-foot container held "110 household items and personal effects" (Zim Container Service B/L ZIMUORF104493) and the other twenty-foot container held "149 pieces of personal effects." (Sea Shipping Line B/L SSL59227.) The ten forty-foot containers held anywhere from 137 items (Sea Shipping Line B/L SSL59219) to 210 items. (Zim Container Service B/L ZIMUORF100088.) *See* Tables 2 and 3. In the *Mateo* proceeding, BOE presented direct evidence that on each of the shipments, Mateo consolidated the shipments of as many as fifty to one hundred shippers into one container. *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision). While there is no similar direct evidence in this proceeding of the number of shippers whose goods Cargo Express loaded into one container, the facts that Cargo Express handled shipments as small as one barrel (Attachment P), that Cargo Express arranged to have the proprietary shipper identified as the shipper on the bill of lading when a shipper was shipping a large number of goods (Attachments M2 and M4), that Cargo Express loaded the containers itself, and that the carrier identified Cargo Express (or Simpson Shipping) as the shipper (Attachments L and M), leads to a conclusion that the shipments of many shippers were at risk on the shipments represented by bills of lading ZIMUORF100088, ZIMUORF100515, ZIMUORF102286, ZIMUORF104493, ZIMUORF103969, SSL57958, SSL58281, SSL58573, SSL58689, SSL59219, SSL59227, and SSL60007.

Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law, I find that a civil penalty in the amount of \$30,000 should be assessed against Cargo Express for each of these twelve violations for a total of \$360,000.

The two Woolery shipments were small, comparable to the Parks International shipments described above. Evidence in the record demonstrates that these shipments were lost in transit, however, a circumstance that warrants a larger civil penalty. Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law, I find that a civil penalty in the amount of \$8000 should be assessed against Cargo Express for each of the two Woolery violations for a total of \$16,000.

On two shipment (Attachments M2, M4), Cargo Express violated the Shipping Act by operating as an ocean freight forwarder that did not have a license as required by section 40901 of

the Act and a bond, insurance, or other surety as required by section 40902 of the Act. There is no evidence in the record indicating that there was any problem with these shipments. Each shipment was large, consisting of one 40' container. Balancing the relevant evidence of the section 13(c) factors set forth in light of the obligation to ensure that the penalty is tailored to the particular facts of the case and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law, I find that a civil penalty in the amount of \$18,000 should be assessed against Cargo Express for each of these two violations for a total of \$36,000.

Therefore, I assess a total civil penalty of \$412,000 against Cargo Express for its sixteen willful and knowing violations of the Shipping Act.

D. Cease and Desist Orders are Issued Against Parks International and Cargo Express.

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, citing *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. “A cease and desist order must be tailored to the needs and facts of the particular case.” *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

BOE contends that a cease and desist order should be entered in this proceeding.

As of November 12, 2009, Parks and Cargo Express continue to be active corporations according to information available online from the New York Department of State. PFF 2, 6. Respondents' knowing and willful disregard for the requirements of the 1984 Act combined with their ability to resume or continue unlawful OTI activities justify the issuance of cease and desist orders by the presiding officer.

(BOE Opening Brief at 20.)

BOE has demonstrated by a preponderance of the evidence that respondents Parks International and Cargo Express have histories of providing ocean transportation services in violation of the Shipping Act. I conclude that there is a reasonable likelihood that Parks International and Cargo Express will continue or resume their unlawful activities. Therefore, entry of a cease and desist order prohibiting respondents Parks International and Cargo Express from operating as an ocean transportation intermediary is appropriate and will be entered.

IV. THE CLAIMS AGAINST BRONX BARRELS AND AINSLEY LEWIS.

A. BOE Has Not Proven by a Preponderance of the Evidence That Bronx Barrels Operated as an NVOCC or an Ocean Freight Forwarder on Any Shipments.

In the Memorandum and Order on BOE's motion for summary judgment, I found that BOE had proven by a preponderance of the evidence that Bronx Barrels¹³ held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation, but that

BOE has not designated specific facts and provided the Commission with their location in the record that would support a finding that Bronx Barrels was involved in any shipments by water between the United States and a foreign country. BOE has not proven by a preponderance of the evidence that Bronx Barrels operated as an NVOCC or an ocean freight forwarder in violation of the Act on any shipment. Therefore, BOE's motion for summary judgment with regard to Bronx Barrels is denied.

Parks International Shipping, Inc. – Possible Violations, FMC No. 06-09, Memorandum and Order at 23 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment).

In its Opening Brief, BOE states:

With respect to Bronx Barrels . . . , at the present stage of this proceeding, in the absence of Respondents' participation and cooperation, there is no documentation in the record which can establish the fact that Bronx Barrels was involved in shipments by water between the United States and a foreign port In particular, the issues of whether Bronx Barrels was involved in any shipments by water between the United States and a foreign port could have been substantively addressed had Respondents answer BOE's Request for Production No. 11. . . . With the exception of drawing adverse inferences regarding Respondents' ability to pay civil penalties, the ALJ deferred ruling on additional sanctions regarding Respondents' lack of cooperation in the discovery process pending the completion of the briefing schedule set out in the October 23 Order.

(BOE Opening Brief at 4-5.) BOE only seeks relief against Parks International and Cargo Express. (*Id.* at 22.) BOE's motion for sanctions has been fully decided.

¹³ The Memorandum and Order states "Cargo Express." This has been corrected. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09 (ALJ Feb. 5, 2010) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment – Erratum).

As BOE states, “there is no documentation in the record which can establish the fact that Bronx Barrels was involved in shipments by water between the United States and a foreign port.” (*Id.* at 4.) Therefore, the claims against Bronx Barrels are dismissed.

B. BOE Has Not Proven by a Preponderance of the Evidence That Ainsley Lewis Operated as an NVOCC or an Ocean Freight Forwarder on Any Shipments.

In the Memorandum and Order on BOE’s motion for summary judgment, I found that

BOE does not designate specific facts and provided the Commission with their location in the record that would support a finding that Lewis as an individual operated as an OTI. Assuming Lewis is the chairman, chief executive officer, or otherwise has a controlling interest in Cargo Express and Bronx Barrels,¹⁴ BOE does not designate specific facts that support a conclusion that the corporate veils of Parks International, Cargo Express, and Bronx Barrels should be pierced and Lewis be found personally liable for their violations of the Shipping Act. *See Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd.*, 29 S.R.R. at 165-171 (factors considered in piercing the corporate veil). Therefore, BOE’s motion for summary judgment with regard to Ainsley Lewis is denied.

In its Opening Brief, BOE states:

With respect to . . . Ainsley Lewis, at the present stage of this proceeding, in the absence of Respondents’ participation and cooperation, there is no documentation in the record which can establish the fact that . . . Ainsley Lewis a.k.a. Jim Parks, in his individual capacity, operated as an OTI on any shipments. . . . [I]ssues regarding the personal liability of Ainsley Lewis a.k.a. Jim Parks likewise could have been substantively addressed had Respondents answered BOE’s Interrogatory nos. 1, 2, 4, 5, 6, 7, and 9, as well as BOE’s Requests for Production of Documents nos. 12 and 13. These discovery requests speak to the issue of Ainsley Lewis’ involvement in the unlicensed OTI activities of the corporate Respondents, as well as those that may have been performed by Ainsley Lewis in his individual capacity. With the exception of drawing adverse inferences regarding Respondents’ ability to pay civil penalties, the ALJ deferred ruling on additional sanctions regarding Respondents’ lack of cooperation in the discovery process pending the completion of the briefing schedule set out in the October 23 Order.

¹⁴ The evidence submitted with BOE’s motion for summary judgment established that Lewis is the chief executive of Parks International. *Parks International Shipping, Inc. – Possible Violations*, FMC No. 06-09, Memorandum and Order at 23 (ALJ Oct. 23, 2009) (Memorandum and Order on Bureau of Enforcement Motion for Sanctions and Summary Judgment). In the Appendix filed with its Opening Brief, BOE included evidence establishing that Ainsley Lewis is the chief executive of Cargo Express. (BOE App. 2.)

(BOE Opening Brief at 4-5.) BOE only seeks relief against Parks International and Cargo Express. (*Id.* at 22.) BOE's motion for sanctions has been fully decided.

As BOE states, "there is no documentation in the record which can establish the fact that . . . Ainsley Lewis a.k.a. Jim Parks, in his individual capacity, operated as an OTI on any shipments." (*Id.* at 4.) Therefore, the claims against Ainsley Lewis a.k.a. Jim Parks are dismissed.

O R D E R

Upon consideration of the Bureau of Enforcement's renewed Motion for Sanctions, the record herein, and for the reasons discussed above, it is hereby

ORDERED that the Bureau of Enforcement's Motion for Sanctions seeking an order barring respondents Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center, Inc., and/or Ainsley Lewis a.k.a. Jim Parks from presenting evidence as to whether Respondents knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without (1) publishing tariffs showing all of their active rates and charges, (2) obtaining licenses for the Commission, and (3) providing proof of financial responsibility as required by section 8(a) and 19 of the 1984 Act, 46 U.S.C. §§ 40501(a) and 40901-40904 be **DISMISSED AS MOOT**.

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on twelve shipments within the statute of limitations period, respondent Parks International Shipping, Inc., violated section 8(a) of the 1984 Act and the Commission's regulations at 46 CFR part 520 by operating as a common carrier without publishing tariffs showing all of its active rates and charges and violated section 19 of the 1984 Act and the Commission's regulations at 46 CFR part 515 by operating as an ocean transportation intermediary in the U.S. trades without obtaining a license from the Commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondent Parks International Shipping, Inc., remit to the United States the sum of \$18,000 as a civil penalty for twelve violations of the Shipping Act of 1984. It is

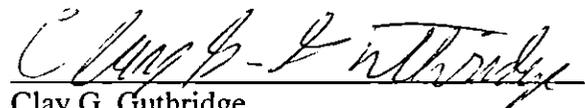
FURTHER ORDERED that Parks International Shipping, Inc., cease and desist from violating sections 8(a) and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501(a) and 40901, by operating as an ocean transportation intermediary in the United States without publishing tariffs, obtaining a license, and providing evidence of financial responsibility.

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on fourteen shipments, respondent Cargo Express International Shipping, Inc., violated section 8(a) of the 1984 Act and the Commission's regulations at 46 CFR part 520 by operating as a common carrier without publishing tariffs showing all of its active rates and charges and on sixteen shipments, violated section 19 of the 1984 Act and the Commission's regulations at 46 CFR part 515 by operating as an ocean transportation intermediary in the U.S. trades without obtaining a license from the Commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondent Cargo Express International Shipping, Inc., remit to the United States the sum of \$412,000 as a civil penalty for sixteen willful and knowing violations of the Shipping Act of 1984. It is

FURTHER ORDERED that Cargo Express International Shipping, Inc., cease and desist from violating sections 8(a) and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501(a) and 40901, by operating as an ocean transportation intermediary in the United States without publishing tariffs, obtaining a license, and providing evidence of financial responsibility.

It is **FURTHER ORDERED** that the claims against Bronx Barrels & Shipping Supplies Shipping Center, Inc., and Ainsley Lewis a.k.a. Jim Parks be **DISMISSED**.


Clay G. Guthridge
Administrative Law Judge