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BEFORE THE
FEDERAL MARITIME COMMISSION

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

)
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)

Docket No.
06-09

**OPENING BRIEF OF
BUREAU OF ENFORCEMENT**

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Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

November 20, 2009

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Docket No.
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**OPENING BRIEF OF
BUREAU OF ENFORCEMENT**

I. INTRODUCTION.

This proceeding was instituted by Order of Investigation (“Order”) served September 19, 2006. The Order was issued by the Commission pursuant to sections 8, 11, 13, and 19 of the 1984 Act, 46 U.S.C. §§ 40501-40503, 41301-41306, 41107-41108, and 40901-40904. The Order directed that the following specific issues be determined:

- 1) whether 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 violated section 8(a) of the 1984 Act and the Commission’s regulations at 46 C.F.R. Part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges;
- 2) whether 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 violated section 19 of the 1984 Act and the Commission’s regulations at 46 C.F.R. Part 515 by operating as a 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 C.F.R. Parts 515 and 520 are found, civil penalties should be assessed against 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 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 Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks.

The Order named Parks International Shipping, Inc. ("Parks"), Cargo Express International Shipping, Inc. ("Cargo Express"), Bronx Barrels & Shipping Supplies Shipping Center Inc. ("Bronx Barrels"), and Ainsley Lewis a.k.a. Jim Parks as Respondents herein. The Commission's Bureau of Enforcement ("BOE") was also named a party to this proceeding.

BOE initiated discovery procedures under Subpart L of the Commission's Rules of Practice and Procedure upon the submission of Interrogatories and Requests for Production of Documents directed to Respondents, served October 19, 2006. Discovery responses were due on or before November 20, 2006.

Because Respondents failed to respond to any of the discovery requests, BOE filed a Motion to Compel Discovery from Respondents on November 28, 2006. Respondents did not file a response to BOE's motion. Recognizing that "BOE has properly served discovery on each respondent and that respondents have failed to respond to that discovery as required by the Commission's Rules of Practice and Procedure", the presiding ALJ granted BOE's motion to compel on April 9, 2007 and ordered Respondents to reply to the discovery requests no later than May 11, 2007. Respondents were further ordered to file a Notice stating compliance with the ALJ's Order. To this date, Respondents have not furnished responses to any of BOE's Interrogatories and Requests for Production of Documents despite the presiding officer's mandate.

On October 26, 2007, BOE filed a Motion for Sanctions and Summary Judgment requesting, *inter alia*, that the presiding ALJ (1) impose sanctions against all of the Respondents for their failure to comply with the ALJ's Order of April 9, 2007, (2) grant summary judgment against the Respondents for violations of sections 8(a) and 19 of the Shipping Act of 1984 ("1984 Act), (3) enter

an order assessing civil penalties against Respondents, and (4) issue cease and desist orders against Respondents. BOE's Motion was accompanied by the Verified Statement of Emanuel James Mingione ("Mingione Statement") along with evidentiary materials comprising Attachments A through Q.

On October 23, 2009, the presiding ALJ issued a Memorandum and Order granting BOE's Motion for Sanctions in part, finding that given Respondents' failure to comply with the ALJ's earlier Order compelling responses to discovery seeking financial information, it is appropriate to draw 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 violations of the 1984 Act. The ALJ deferred ruling on BOE's request that Respondents be barred from presenting evidence as to whether they knowingly and willfully operated as OTIs/NVOCCs in the foreign commerce of the U.S. without publishing tariffs, obtaining licenses from the Commission, and providing proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act.

The ALJ further held that BOE has proven by a preponderance of the evidence that 1) Parks, Cargo Express, and Bronx Barrels have not published tariffs, obtained OTI licenses, and provided proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act, 2) with respect to thirty-eight (38) shipments, Parks violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility, 3) with respect to fourteen (14) shipments, Cargo Express violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility, and 4) with respect to two (2) shipments, Cargo Express violated section 19 by operating as a freight forwarder that did not obtain a license and provide proof of financial responsibility. However, the ALJ held that, *inter alia*, BOE did not prove by a

preponderance of the evidence that 1) Bronx Barrels was involved in any shipments by water between the United States and a foreign port, and 2) Ainsley Lewis a.k.a Jim Parks, in his individual capacity, operated as either an NVOCC or a freight forwarder on any shipments. Given these issues, as well as his determination that imposition of civil penalties was not appropriate at that time, the ALJ established a procedural schedule requiring BOE to submit its proposed findings of fact, supporting evidence, and brief on or before November 20, 2009.¹ The ALJ specifically stated in Part III of his October 23 Order that BOE “need not propose findings of fact reiterating” those findings already made by the ALJ. Therefore, BOE is proposing facts and presenting arguments on the issues of (1) whether Parks and Cargo Express knowingly and willfully violated sections 8(a) and 19 of the 1984 Act with respect to the activity the ALJ already determined has been proven by a preponderance of the evidence, (2) the appropriate amount of civil penalties to be assessed against Parks and Cargo Express, and (3) the issuance of cease and desist orders against Parks and Cargo Express.

With respect to Bronx Barrels and 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 Bronx Barrels was involved in shipments by water between the United States and a foreign port or that Ainsley Lewis a.k.a. Jim Parks, in his individual capacity, operated as an OTI on any shipments. 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 answered BOE’s Request for Production No. 11. Furthermore, issues regarding the personal liability of Ainsley Lewis a.k.a. Jim Parks likewise could

¹ The ALJ noted in Part III of his October 23 Order that BOE need not re-submit the documents which were included as exhibits in its Motion for Sanctions and Summary Judgment.

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.

Respondents have not entered an appearance in this proceeding either directly or through counsel.

II. DISCUSSION.

A. Legal Definition of "Knowingly and Willfully" under the Shipping Act of 1984.

Knowing and willful has been defined by the U.S. Supreme Court as meaning "purposely or obstinately" and is designed to describe the attitude of a person "who, having free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." United States v. Illinois Central Railroad Co., 303 U.S. 239, 242-243 (1938), citing St. Louis & S.F.R. Co. v. United States, 169 F. 69, 71 (8th Cir. 1909). Moreover, "a 'pattern of indifference' to the requirements of regulatory law, a 'persistent failure to inform' oneself, 'intentional disregard,' 'wanton disregard,' and, of course, purposeful and obstinate behavior or something akin to 'gross negligence' have all been held to constitute 'knowing and willful' behavior in violation of regulatory statutes." Ever Freight Int'l Ltd., et al. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329, 333 (ALJ 1998).

The Commission, in its analysis of the definition of “knowingly and willfully” within the context of the 1984 Act and its predecessors has rejected the concept that the phrase entails “actual or constructive knowledge that the requirements of the statute were being disregarded. Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement.” Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., et al., 11 F.M.C. 357, 363-364 (1968). See also Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10th Cir. 1967) (“[T]he term ‘knowingly’ imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited.”).

The Commission has determined that the “term ‘willfully’ means that respondent purposely or obstinately intended to perform the unlawful act not necessarily that it did so with the intent of maliciously breaking the law.” Shipman Int’l (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 C.F.R. Part 514, 28 S.R.R. 100, 109 (ALJ 1998). Moreover, an NVOCC is obligated to “educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” 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, 677 (FMC 2001).

1. Parks Knowingly and Willfully Violated Sections 8(a) and 19 of the Shipping Act of 1984.

In his Order of October 23, 2009, the ALJ determined that BOE has proven by a preponderance of the evidence that Parks did not publish a tariff, obtain an OTI license, and provide proof of financial responsibility pursuant to sections 8(a) and 19 of the 1984 Act. The ALJ further determined that BOE has proven by a preponderance of the evidence that, on thirty-eight (38) shipments, Parks violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain an OTI license, and provide proof of financial responsibility. BOE contends that, with respect to the aforementioned thirty-eight (38) shipments wherein Parks violated sections 8(a) and 19 of the 1984 Act, it did so knowingly and willfully.

The uncontested facts, as presented in the Verified Statements of Emanuel James Mingione and Dorothy H. Wade², reflect that Ainsley Lewis a.k.a. Jim Parks is the chief executive officer of Parks, incorporated in the State of New York on July 28, 1999 and located at 3010 Eastchester Road, Bronx, New York 10469. PFF 1, 3, 4. At various times subsequent to its incorporation on July 28, 1999, Parks advertised itself to the general public as an OTI/NVOCC through at least one newspaper and through its website at www.parkshipping.com. PFF 9. Between April 16, 2001 and October 25, 2002, Parks entered into a series of three service contracts with Tropical Shipping & Construction Co., Ltd. ("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

² BOE submits the Verified Statement of Dorothy H. Wade in the Appendix accompanying BOE's Opening Brief and Proposed Findings of Fact.

proof of ownership of the cargo in order to avoid immediate termination of the contract. PFF 13. Parks did not contest Tropical termination of the contract. PFF 14. At approximately the same time, by correspondence dated November 13, 2002, Parks and its president, Ainsley Lewis a.k.a. Jim Parks, 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 of 3010 Eastchester Road in Bronx, New York. 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 (38) 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 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.

2. Cargo Express Knowingly and Willfully Violated Sections 8(a) and 19 of the Shipping Act of 1984.

In his Order of October 23, 2009, the ALJ determined that BOE has proven by a preponderance of the evidence that Cargo Express did not publish a tariff, obtain an OTI license, and provide proof of financial responsibility pursuant to sections 8(a) and 19 of the 1984 Act. The ALJ further determined that BOE has proven by a preponderance of the evidence that, with respect to fourteen (14) shipments, Cargo Express violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain an OTI license, and provide proof of financial responsibility. Finally, the ALJ determined that, with respect to two (2) shipments, Cargo Express violated section 19 of the 1984 Act by operating as an ocean freight forwarder that did not obtain an OTI license and provide proof of financial responsibility. BOE contends that, with respect to the aforementioned sixteen (16) shipments wherein Cargo Express violated sections 8(a) and 19 of the 1984 Act in its capacity as either an NVOCC or freight forwarder, it did so knowingly and willfully.

The uncontested facts, as presented in the Verified Statements of Emanuel James Mingione and Dorothy H. Wade, reflect that Ainsley Lewis a.k.a. Jim Parks is the president of Cargo Express, incorporated in the State of New York on July 23, 2003 and located at 3010 Eastchester Road, Bronx, New York 10469. PFF 5, 7, 8. On April 14, 2003, three months prior to the official incorporation of Cargo Express, the Commission's New York Area Representative witnessed two trucks bearing the name of Cargo Express at Parks' business address of 3010 Eastchester Road in Bronx, New York. PFF 18. On October 29, 2004, Cargo Express continued to occupy the location at 3010 Eastchester Road in Bronx, New York 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 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 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, the Commission's New York Area Representative witnessed a truck with the Cargo Express logo backed up 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. 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 operation purposefully and obstinately in contravention to the statutory requirements of the 1984 Act. Ainsley Lewis a.k.a. Jim Parks is the chief executive officer 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 the Commission's New York Area Representative 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 representatives 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 clients' understanding of the situation. PFF 20. As this understanding was being communicated, Cargo Express was already involved in 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 operate 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 the 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.

B. Civil Penalties Should be Assessed Against Parks and Cargo Express.

Pursuant to section 13 of the 1984 Act, 46 U.S.C. § 41107(a), a party is subject to a civil penalty of not more than \$30,000³ for each violation knowingly and willfully committed. Each day of a continuing violation constitutes a separate offense.

Section 13(c) of the 1984 Act, 46 U.S.C. § 41109, requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. Merritt v. United States, 960 F.2d 15, 17 (2nd Cir. 1992).

³ This amount reflects an adjustment for inflation pursuant to the Commission's regulations at 46 C.F.R. Part 506.

“In determining a civil penalty, the ability to pay is only one of several factors set forth in the statute and care must be taken not to over-emphasize its importance to the detriment of the other factors, particularly to the detriment of the main Congressional purpose of deterring violations.” Stallion Cargo, Inc., 29 S.R.R. at 681.

In the absence of a specific mathematical formula, there is no right answer to the question of the amount of civil penalty that is justified with respect to a particular Respondent. In fact, as previously explained by the Commission, “the fixing of a particular amount of civil penalty is a most difficult thing to do. The Commission must consider and weigh numerous factors set forth in section 13(a) of the 1984 Act and then quantify them into a precise number. The process is not scientifically accurate and involves judgment that is subject to criticism and second guessing. . . . Nevertheless, the finding is committed to the sound discretion of the agency and must be made.” Alex Parsinia d/b/a Pacific International Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (ALJ 1997). In this case, as discussed in greater detail below, consideration of the factors outlined in section 13 of the 1984 Act supports a conclusion that imposition of the maximum civil penalties on Parks and Cargo Express is necessary and appropriate.

1. Consideration of the Statutory Factors in Assessing Monetary Penalties Against Parks.

- a. Ability to Pay a Civil Penalty.

The ALJ granted BOE’s Motion for Sanctions in part and found that inasmuch as Respondents failed to comply with the ALJ’s earlier Order compelling them to respond to discovery seeking financial information, an inference has been drawn that each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for violations of the 1984 Act. Therefore, Parks has the ability to pay the maximum civil penalty.

b. History of Prior Offenses.

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. PFF 10, 11, 13, 14. 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' operation 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.

c. Nature, Circumstances, Extent and Gravity of Parks' Activities and Degree of Culpability.

Parks knowingly and willfully provided unlicensed, unbonded NVOCC services with respect to thirty-eight (38) shipments⁴ transported pursuant to one of its service contracts with Tropical between May 3, 2001 and February 21, 2002. PFF 10. Subsequent to receiving a written warning of the consequences of operating as an unlicensed OTI pursuant to the 1984 Act, Parks was observed four months later loading barrels onto a truck bearing Parks' name at Parks' business address of 3010 Eastchester Road in Bronx, New York. 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 operation 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,

⁴ These are the same thirty-eight (38) shipments which were the basis for the ALJ's determination in his October 23 Order that Parks violated sections 8(a) and 19 of the 1984 Act by operating without publishing a tariff, obtaining a license, and providing proof of financial responsibility.

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.

d. The Commission's Policies for Deterrence and Future Compliance.

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 that they are not merely written off by companies as a cost 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.

e. Calculation of Penalty Maximum to be Assessed to Parks.

Based on the aforementioned analysis of the statutory factors for the assessment of civil penalties, BOE requests that the maximum of \$30,000 per violation be assessed against Parks. As BOE explained in its Motion for Sanctions and Summary Judgment, twenty-six (26) of Parks’ thirty-eight (38) shipments which the ALJ found in his October 23 Order to be violations sections 8(a) and 19 of the 1984 Act fall beyond the five-year statute of limitations for the purpose of assessing civil penalties against Parks. BOE maintains that all thirty-eight (38) shipments should continue to stand as evidence of Parks’ violations of the 1984 Act. However, for the remaining twelve (12) shipments which occurred between November 1, 2001 and December 21, 2002 thereby falling within the five-year statute of limitations, BOE requests that the ALJ assess the maximum civil penalty of \$30,000 per shipment for a total of \$360,000.

2. Consideration of the Statutory Factors in Assessing Monetary Penalties Against Cargo Express.

a. Ability to Pay a Civil Penalty.

The ALJ granted BOE’s Motion for Sanctions in part and found that inasmuch as Respondents failed to comply with the ALJ’s earlier Order compelling them to respond to discovery seeking financial information, an inference has been drawn that each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for violations of the 1984 Act. Therefore, Cargo Express has the ability to pay the maximum civil penalty.

b. History of Prior Offenses.

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. Cargo Express has no known history of prior offenses.

However, this factor should not be viewed in isolation inasmuch as Cargo Express has been operating unlawfully since at least April 14, 2003 at which time the Commission's New York Area Representative witnessed two trucks bearing the name of Cargo Express at its business address of 3010 Eastchester Road in Bronx, New York. PFF 18. Therefore, it is reasonable to infer the significant likelihood that the sixteen (16) shipments comprising the evidentiary record in this proceeding do not form the entire universe of Cargo Express' operation since 2003. Had Cargo Express complied with BOE's Request for Production of Documents No. 10, there is a considerable possibility that the evidentiary record would have been much more substantial by way of Cargo Express' history of violations.

As already discussed above, in relation to Parks, 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., 28 S.R.R. at 1192. 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., 28 S.R.R. at 1404 n.11 ("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 Cargo Express, they would similarly demonstrate that Cargo Express provided unlicensed OTI services to the shipping public.

c. Nature, Circumstances, Extent and Gravity of Cargo Express' Activities and Degree of Culpability.

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 the 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.

All of this activity amply demonstrates that Cargo Express' degree of culpability with respect to the violations at issue is extremely high. Similar to Parks, Cargo Express has been uncooperative during the entirety of this docketed proceeding. Consequently, the combination of all these factors, as well as the interests of justice support the imposition of the maximum civil penalty with respect to Cargo Express.

d. The Commission's Policies for Deterrence and Future Compliance.

As discussed above with respect to Parks, 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 that they are not merely written off by companies as a cost 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 against Cargo Express 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. at 805, "[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.

e. Calculation of Penalty Maximum to be Assessed to Cargo Express.

Based on the aforementioned analysis of the statutory factors for the assessment of civil penalties, BOE requests that the maximum of \$30,000 per violation be assessed against Cargo Express. In his October 23 Order, the ALJ determined that Cargo Express violated sections 8(a) and 19 of the 1984 Act on fourteen (14) occasions by operating as an NVOCC while violating section 19 of the 1984 Act on two (2) occasions by operating as a freight forwarder for a total of sixteen (16) violations. BOE maintains that, for purposes of assessing a civil penalty against Cargo Express for these sixteen (16) violations, a differentiation is not necessary regarding whether Cargo Express was violating the Act by acting as an NVOCC or a forwarder. Cargo Express was neither licensed nor bonded to perform either service for a member of the shipping public. Consequently, BOE requests that the ALJ assess the maximum civil penalty of \$30,000 per shipment for a total of \$480,000.

C. Orders to Cease and Desist Should be Issued Against Parks and Cargo Express.

As of November 12, 2009, Parks and Cargo Express continue to be active corporations according to information available online from the New York State 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 operations justify the issuance of cease and desist orders by the presiding officer.

Cease and desist orders are appropriate “when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity. . . . One reason to issue such an order is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order, if necessary.” Ever Freight Int’l Ltd., 28 S.R.R. at 336. In this case, alerting the shipping public via an order to cease and desist is of paramount importance given at least one instance wherein a shipper was harmed due to Cargo Express’ failure to deliver her cargo to its destination or to subsequently compensate her for the transportation charges, as well as the value of the lost goods. PFF 25. This particular shipper’s attempts to recover her damages were arguably limited by the fact that Cargo Express lacked a surety bond.

An order to cease and desist was issued in at least one previous case involving similar concerns such as respondent’s blatant disregard for the 1984 Act, failure to participate in the proceeding, and harm to the shipping public. See Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express, 27 S.R.R. at 1342 (“The record shows that for three years respondent disregarded the 1984 Act, harmed shippers, failed to take the instant proceeding seriously, and formed companies under new names controlled by himself to conceal his responsibility. Consequently, there is sufficient reason and basis to protect the shipping public further even though respondent has ceased his transportation businesses.”). In addition to protecting the shipping public, cease and desist orders with respect to Parks and Cargo Express in this proceeding would enable the Commission to pursue injunctions should either one of them engage in future unlawful operations.

III. CONCLUSION.

The Bureau of Enforcement respectfully requests that the ALJ issue an Order sanctioning Respondents for their failure to comply with the ALJ's Order of April 9, 2007 requiring Respondents to reply to BOE's Interrogatories and Requests for Production of Documents. The Bureau of Enforcement respectfully requests the ALJ to (1) assess a civil penalty in the amount of \$360,000 against Parks for knowingly and willfully violating sections 8(a) and 19 of the 1984 Act, (2) assess a civil penalty in the amount of \$480,000 against Cargo Express for knowingly and willfully violating sections 8(a) and 19 of the 1984 Act, and (3) issue orders requiring Parks and Cargo Express to cease and desist from violating sections 8(a) and 19 of the 1984 Act by operating as OTIs in the United States without publishing tariffs, obtaining licenses, and providing evidence of financial responsibility.

Respectfully submitted,



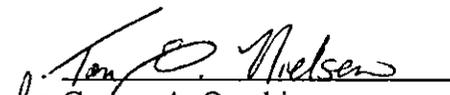
George A. Quadrino, Deputy Director
Julie L. Berestov, Trial Attorney
Bureau of Enforcement
(202) 523-5783

November 20, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document along with the Bureau of Enforcement's Proposed Findings of Fact and Appendix have been served on this date by Federal Express, upon the parties of record.

Signed in Washington, D.C. on November 20, 2009.


for George A. Quadrino
Julie L. Berestov