

ORIGINAL

S E R V E D

August 28, 2009

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 07-07

MATEO SHIPPING CORP. AND JULIO MATEO – 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

INITIAL DECISION OF CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE, ON INVESTIGATION OF MATEO SHIPPING CORP. AND JULIO MATEO¹

On March 22, 2007, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing to determine whether respondents Embarque Puerto Plata, Corp., Embarque Puerto Plata Inc. d/b/a Embarque Shipping, Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp., and Julio Mateo violated section 8 of the Shipping Act of 1984 (the 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. *Embarque Puerto Plata, Corp. and Embarque Puerto Plata Inc. d/b/a Embarque Shipping and Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp. and Julio Mateo – 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, Order at 1-2 (ALJ July 21, 2007) (Order of Investigation and Hearing).² The claims against all respondents

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, 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. As exemplified by the Order of Investigation and

except Mateo Shipping Corp. and Julio Mateo have been dismissed. *Embarque Puerto Plata, Corp., et al., – Possible Violations*, FMC No. 07-07 (ALJ July 31, 2009) (Memorandum and Order Granting Motions to Dismiss Respondents Estebaldo Garcia, Embarque Puerto Plata, Corp., Embarque Puerto Plata Inc. d/b/a Embarque Shipping, Ocean Sea Line, and Maritza Gil); *Embarque Puerto Plata, Corp., et al., – Possible Violations*, FMC No. 07-07 (ALJ Apr. 14, 2007) (Order Granting Motion to Dismiss Respondent Embarque El Millon Corp.). The Order of Investigation and Hearing was served on Mateo Shipping and Mateo, but they 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., et al.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001).

PRELIMINARY STATEMENT

This proceeding is one of four currently 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 ocean transportation intermediaries (OTIs) without a license, bond, and/or tariff as required by the Shipping Act of 1984 (Shipping Act or 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); *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); *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). The Commission commenced a fifth proceeding to investigate the activities of three OTIs licensed 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

Hearing, the Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. I follow that practice in this decision.

vessels. In many respects, the services they perform are quite 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) while ocean freight forwarders are not common carriers. 46 U.S.C. § 40102(6).

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 entities alleged to have operated as OTIs had its own methods of operation. It is necessary to examine the evidence of what the entity 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 supports a finding that respondents Mateo Shipping Corp. and Julio Mateo were not licensed by the Commission either as an ocean freight forwarder or as an NVOCC, did not furnish a bond, insurance, or other form of surety, and did not publish tariffs. Therefore, any shipment on which Mateo Shipping and Mateo operated as an ocean freight forwarder would violate sections 19(a) and (b) the Act, and any shipment on which Mateo Shipping and Mateo operated as an NVOCC would violate sections 8, 19(a), and 19(b) of the Act.

BOE has submitted into the record the shipping documents available to it of twelve individual shipments of goods and thirteen shipments in which Mateo Shipping and Mateo shipped containers of goods with Container Innovations, Inc., an NVOCC licensed by the Commission. On each individual shipment, the owner of goods wanting to ship the goods overseas contacted Mateo Shipping and Mateo.³ For convenience, I will refer to the owners as proprietary shippers, a term borrowed from BOE in a related proceeding. The proprietary shippers who contacted Mateo

³ In one of its submissions in Docket No. 06-06, BOE states, “Most of the individuals hiring entities to ship their household goods to a foreign destination are inexperienced shippers. In a majority of cases, it is the first time they have shipped any property overseas.” *EuroUSA Shipping, Inc.*, FMC No. 06-06, Proposed Findings of Fact and Brief at 26 (May 22, 2009) (filed). That appears to true with the individuals who contacted Mateo Shipping and Mateo.

Shipping and Mateo were individuals shipping household goods to the Dominican Republic. (BOE App. 3-5.)⁴

BOE's Appendix includes bills of lading and related documents issued by Container Innovations for the ocean transportation of thirteen shipments. BOE proves by a preponderance of the evidence that on each shipment with Container Innovations, Mateo Shipping and Mateo consolidated the shipments of as many as fifty to one hundred proprietary shippers into one container. Container Innovations then issued one bill of lading for all of the goods in the container identifying Julio Mateo as the shipper. Each container was then loaded onto a vessel on the high seas for transportation between a port in the United States and a foreign port in the Dominican Republic. (BOE App. 22-52.)

The job of [an NVOCC] is to consolidate cargo from numerous shippers into larger groups for shipment by an ocean carrier. A NVOCC – as opposed to the actual ocean carrier transporting the cargo – issues a bill of lading to each shipper. If anything happens to the goods during the voyage the NVOCC is liable to the shipper because of the bill of lading that it issued.

Prima U.S. Inc. v. Panalpina, Inc., 223 F.3d 126, 129 (2d Cir. 2000). See also *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989) (“NVOCCs consolidate and load small shipments from multiple shippers into a single large reusable metal container obtained from a steamship company, and ship the container by vessel under a single bill of lading in the NVOCC's name.”). Compare 46 C.F.R. § 515.2(l) (“*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.”); 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 (“NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale.”).

The above quotations precisely describe the activities of Mateo Shipping and Mateo on the thirteen shipments that Container Innovations carried for Mateo. Mateo Shipping and Mateo operated as an NVOCC without a tariff, license, or bond on each of these shipments. Therefore, BOE has proven by a preponderance of the evidence that Mateo Shipping and Mateo committed thirteen violations of the Shipping Act.

⁴ “BOE App.” followed by a number refers to a page in the Appendix filed with BOE's Motion for Sanctions Against Mateo Shipping Corp. and Julio Mateo and [BOE] Filing of Proposed Findings of Fact and Conclusions of Law (Motion for Sanctions).

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 entity 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 Federal Maritime 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).

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 Federal Maritime 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).

“[A]n entity can operate as a freight forwarder and as an NVOCC.” (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.finc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.) An entity that is licensed by the Commission as a freight forwarder and as an NVOCC must get 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(D).

The Commission has further explained 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 July 31, 2007, the Commission issued the Order of Investigation and Hearing that commenced this proceeding. The Commission stated:

Mateo Shipping, Corp. ("Mateo Shipping") was incorporated in the State of New York on July 12, 2004. The business office of Mateo Shipping is located at 1441 Ogden Avenue, Bronx, New York 10452. In correspondence with the Commission, Julio Mateo represented himself to be the President of Mateo Shipping, as well as owner of 50% of the capital stock. Based on evidence available to the Commission,

it appears that Mateo Shipping and Julio Mateo have knowingly and willfully provided transportation services as an NVOCC from at least October, 2005 through the present without obtaining an OTI license, without providing proof of financial responsibility and without publishing a tariff showing its rates and charges.

Embarque Puerto Plata, Corp., et al., – Possible Violations, FMC No. 07-07, Order at 2 (July 31, 2007) (Order of Investigation and Hearing). The Commission instituted the investigation to determine:

- 1) whether . . . Mateo Shipping₀₁ and Julio Mateo violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as [an NVOCC] without publishing tariffs showing [its] rates and charges; [and]
- 2) whether . . . Mateo Shipping₀₁ and Julio Mateo violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as [an OTI] in the United States trades without obtaining [a license] from the Commission and without providing proof of financial responsibility.

Id. at 3-4.

III. PROCEDURAL HISTORY.

On August 29, 2007, a process server employed by the Commission visited Mateo Shipping at its last known business address. An individual claimed the business operating at the address was a new business not affiliated with Mateo. The individual also indicated Mateo worked at a store called Meringue Electronics. On September 28, 2007, the process server visited Meringue Electronics and personally served Julio Mateo with two copies of the Order of Investigation and Hearing, one for Julio Mateo and one for Mateo Shipping Corp. (Affidavits of service attached to Bureau of Enforcement's Response to the Administrative Law Judge's Order Dated June 15, 2009.)

On January 24, 2008, Julio Mateo signed for a Federal Express package containing an additional copy of the Order of Investigation and Hearing and the Bureau of Enforcement First Interrogatories and Requests for Production of Documents Directed to Mateo Shipping Corp. and Julio Mateo (BOE's First Discovery Requests). The discovery consists of sixteen interrogatories and seven requests for production of documents. *Inter alia*, BOE sought tax returns, cash flow and profit/loss reports, and other financial records that would provide evidence of the ability of Mateo Shipping and Mateo to pay a civil penalty. ([BOE] First Interrogatories and Requests for Production of Documents Directed to Mateo Shipping Corp. and Julio Mateo, Requests for Production of Documents 1-5.)

On March 7, 2008, BOE filed a Motion to Compel Discovery and Response to Interrogatories Directed to Mateo Shipping Corp. and Julio Mateo (Motion to Compel) as neither Mateo Shipping

nor Julio Mateo had responded to the discovery. BOE stated that it “has attempted in good faith to confer with Respondent[s] in an effort to secure the answers and documents sought without judicial action. To date, Respondent[s] [have] either ignored or refused to respond to attempts to obtain discovery materials in this matter.” (Motion to Compel at 2.) BOE asked that I “issue an order compelling Respondent[s] to respond fully to the interrogatories and to produce all responsive documents sought in BOE’s First Request within ten (10) days of the date of the order.” (*Id.*) Neither Mateo Shipping nor Julio Mateo replied to the motion. I granted BOE’s motion and ordered that “[o]n or before November 21, 2008, respondents Mateo Shipping Corp. and Julio Mateo . . . serve the Bureau of Enforcement with their responses to the Bureau of Enforcement First Interrogatories and Requests for Production of Documents Directed to Mateo Shipping Corp. and Julio Mateo.” *Embarque Puerto Plata, Corp., et al. – Possible Violations*, FMC No. 07-07 (ALJ Nov. 6, 2008) (Memorandum and Order on Motion to Compel Discovery and Response to Interrogatories Directed to Mateo Shipping Corp. and Julio Mateo).

As I had not been advised by BOE whether Respondents complied with the order, on February 26, 2009, I ordered the parties to file a joint status report: (1) Stating whether Respondents had responded to BOE’s discovery; and (2) Setting forth a proposed schedule that would result in the filing, on or before April 30, 2009, of all statements, evidence, and argument necessary for an initial decision in this proceeding. *Embarque Puerto Plata, Corp., et al. – Possible Violations*, FMC No. 07-07 (ALJ Feb. 26, 2009) (February 26, 2009 Procedural Order). I noted that:

In an earlier filing, BOE stated that it “has attempted in good faith to confer with Respondent[s] in an effort to secure the answers and documents sought without judicial action. To date, Respondent[s] [have] either ignored or refused to respond to attempts to obtain discovery materials in this matter.” (Motion to Compel Discovery and Response to Interrogatories Directed to Mateo Shipping Corp. and Julio Mateo at 2.) If Respondents continue to ignore BOE’s efforts to secure cooperation, BOE shall advise me of that fact and file an individual status report with a proposed schedule on or before March 11, 2009. Respondents are advised that failure to respond to discovery and failure to file prehearing statements may result in the imposition of sanctions. 46 C.F.R. § 502.95(c); 46 C.F.R. § 502.210.

Id.

On March 11, 2009, BOE filed a response to the Procedural Order. BOE stated that Mateo Shipping and Mateo had not complied with the November 6, 2008, order compelling them to respond to BOE’s discovery and that they had not responded to BOE’s letter asking them to contact BOE. BOE stated that it intended to file a motion for sanctions and summary judgment. ([BOE] Response to February 26, 2009 Procedural Order.)

On April 24, 2009, BOE filed its Motion for Sanctions. BOE stated that it filed the motion for sanctions “due to Respondents’ failure to comply with the . . . Order dated November 6, 2008,

and Respondents' refusal to participate in this proceeding. Based on their failure to participate . . . , Respondents should be subject to sanctions." (Motion for Sanctions at 2.)

BOE included its proposed findings of fact and conclusions of law with the motion.

[I]n lieu of filing a motion for summary judgment, which if denied, would require further submissions, BOE, in the interest of efficiency, is filing the documents necessary for a decision on the merits of the case. BOE respectfully requests that the Administrative Law Judge issue an initial decision finding that Respondents violated sections 8 and 19 of the Shipping Act. BOE also requests that Administrative Law Judge enter a cease and desist order and an order assessing a substantial civil penalty against Respondents.

(*Id.*)

With regard to their motion for sanctions:

BOE seeks an order sanctioning Respondents for failure to comply with the . . . Order dated November 6, 2008, which ordered a response to BOE's First Request [for discovery] on or before November 21, 2008. Under Rule 210, if a party "refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing", the presiding officer may "make such orders in regard to the refusal as are just" including an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence". To date, Respondents have not responded to BOE's First Request.

Inasmuch as Respondents have not participated in the proceeding or complied with the orders of the presiding judge, nor given any indication of an intention to do so, sanctions for failure to comply with the order to compel discovery answers are appropriate. Having failed to participate in the discovery process, Respondents should be barred from presenting evidence or attempting to refute evidence presented by BOE in the proceeding. BOE seeks an order prohibiting Respondents from introducing any evidence covered by BOE's discovery requests and prohibiting Respondents from contesting any of BOE's claims regarding these issues. In particular, BOE asks that Respondents be barred from contesting whether Respondents violated section 8 of the Shipping Act and the Commission's regulations at 46 C.F.R. Part 520 by operating as an NVOCC without publishing tariffs showing their rates and charges and whether Respondents violated sections 19(a) and (b) of the Shipping Act and the Commission's regulations at 46 C.F.R. Part 515 by operating as an OTI in the United States trades without obtaining a license from the Commission and without providing proof of financial responsibility. BOE

also requests that Respondents be barred from presenting evidence as to whether they have the ability to pay a civil penalty.

(*Id.* at 12-13 (citations omitted) (quoting 46 C.F.R. § 502.210(a).) Respondents have not filed a reply to the motion.

In another Order issued today, I granted the motion for sanctions for Respondents' failure to respond to discovery.

Because Mateo Shipping Corp. and Julio Mateo 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 Mateo Shipping Corp. and Julio Mateo have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed. 46 C.F.R. § 502.210(a)(2).

Mateo Shipping Corp. and Julio Mateo – Possible Violations, FMC No. 07-07 (ALJ Aug. 28, 2009) (Memorandum and Order on Bureau of Enforcement's Motion for Sanctions Against Mateo Shipping Corp. And Julio Mateo). I also granted BOE's unopposed request to predicate an initial decision on its proposed findings of fact and conclusions of law filed April 24, 2009. *Id.*

DISCUSSION

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).

The parties to litigation have the responsibility to submit evidence and argument that supports their claims.

“The efficient management of judicial business mandates that parties submit evidence responsibly.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002). Parties must designate specific facts and provide the court with their location in the record. *Id.* “General references [to evidence] without page or line numbers are not sufficiently specific.” *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003). We will not “paw over the files without assistance from the parties.” *Orr*, 285 F.3d at 775 (quoting *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999)). In order to be considered on a motion for summary judgment, evidence “[m]ust both be in the district court file and set forth in the response.” *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (emphasis in original). It is within our discretion to refuse to consider evidence that the offering party fails to cite with sufficient specificity. *Orr*, 285 F.3d at 775; see also *Forsberg v. Pac. NW. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (“The district judge is not required to comb the record to find some reason to deny a motion for summary judgment.”).

These “‘anti-ferret’ rule[s] aim[] to make the parties organize the evidence rather than leaving the burden upon the district judge.” *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 80 (1st Cir. 2005). They can be enforced in several ways. Provided they do not conflict with Rule 56, procedures designating an efficient means to present evidence to the court may be established by local rule. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988); see also Fed. R. Civ. P. 83(a). Similar procedures may also be established by orders of individual district courts. See *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 931 (1st Cir. 1983); *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 471 (2d Cir. 2002); see also Fed. R. Civ. P. 83(b). In the face of a duly enacted rule, or once being put on actual notice by order of the court, “a party’s failure to comply [with such an ‘anti-ferret rule’] would, [where] appropriate, be grounds for judgment against that party.” *Stepanischen*, 722 F.2d at 931; see also *Nilsson*, 854 F.2d at 1545.

Esteem v. City of Pasadena, No. CV 04-662-GHK (MANx), 2007 WL 4270360, at *3-4 (C.D. Cal. Sept. 11, 2007) (footnote omitted). While the courts in these cases were addressing motions for summary judgment, the requirement that a party identify the specific facts and evidence on which it relies is equally applicable when litigants are submitting proposed findings of fact and evidence for an initial decision.

The Commission issued the Order of Investigation and Hearing to determine whether Respondents operated as an NVOCC without a tariff in violation of section 8 of the Act and whether Respondents operated as an OTI without a license or bond in violation of sections 19(a) and (b) of the Act. To prove Respondents violated section 8 on a particular shipment, BOE must prove by a preponderance of the evidence that Respondents (A) did not publish a tariff; and (B) operated as an NVOCC on that shipment by (1) holding themselves out to the general public to provide transportation by water; (2) assuming responsibility for the transportation of the goods; and (3) using 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. To prove Respondents violated sections 19(a) and (b) on a particular shipment, BOE must prove by a preponderance of the evidence that Respondents (A) did not have an OTI license (NVOCC or ocean freight forwarder) issued by the Commission; (B) did not have a bond, proof of insurance, or other surety; and (C) operated as an ocean freight forwarder (dispatched shipments from the United States via a common carrier) OR operated as an NVOCC. If BOE proves that Respondents violated the Act on a particular shipment, then BOE has the burden of demonstrating what, if any, remedies should be imposed. In this proceeding, BOE seeks assessment of a civil penalty “for proven violations” (Motion for Sanctions at 23) and issuance of a cease and desist order. BOE has the burden of persuasion on what, if any, civil penalty should be assessed for a violation, and what, if any, cease and desist order should be entered. 5 U.S.C. § 556(d); *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. at 276.

I. BOE HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT MATEO SHIPPING CORP. AND JULIO MATEO VIOLATED THE SHIPPING ACT.

A. Mateo Shipping Corp. and Julio Mateo Violated Section 8 of the Act and the Commission’s Regulations at 46 C.F.R. 520 by Operating as an NVOCC Without Publishing Tariffs Showing Its Rates and Charges.

As stated above, “[t]he 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 entity must meet all three parts of 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). *See Landstar*, 569 F.3d at 497 (“a person or entity that provides NVOCC services falls within the ambit of § 19 only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation’”).

As set forth in greater detail in the findings of fact and conclusions of law, the Commission received complaints regarding the loss of cargo suffered by at least six customers of Mateo Shipping between approximately December 2005 and April 2006. As a result of these complaints, in spring 2006, Commission Area Representative Emanuel J. Mingione (“AR Mingione”) began an investigation of Mateo Shipping. AR Mingione prepared an affidavit setting forth the findings of his investigation. (BOE App. 3.) Mateo Shipping and Mateo have not contested the statements in AR Mingione’s affidavit. I find AR Mingione’s statements to be credible as set forth herein.

AR Mingione avows that Mateo Shipping and Mateo never maintained open to public inspection in an automated tariff system, tariffs showing its rates, charges, classifications and practices pursuant to section 8(a) of the Shipping Act. (*Id.*) Therefore, if the evidence supports a finding that Mateo Shipping and Julio Mateo operated as an NVOCC on a shipment, then they violated section 8 of the Act on that shipment.

AR Mingione avows that Respondents shipped cargo for individual shippers wanting transportation to the Dominican Republic. The cargo generally consisted of small shipments of used household goods and appliances, personal effects, and vehicles. Many shipments were individual pieces or boxes being sent to relatives or friends in the Dominican Republic. Mateo Shipping either received the cargo at its place of business in the Bronx or arranged for pick up. (BOE App. 4-5; BOE App. 9-17; BOE App. 56-65.) Mateo Shipping consolidated individual shipments into a maritime container and tendered the container to a licensed NVOCC or ocean common carrier. (*See, e.g.*, BOE App. 22-52.)

AR Mingione photographed a sign at Mateo Shipping’s office advertising its service to the Dominican Republic. The English translation of the sign reads: “Mateo Shipping; Moves*Vehicles*Packages and Documents; Door to door to the Dominican Republic; Sale of Furniture and Appliances; Let us serve you; Free Estimates; We will be your favorite.” (BOE App. 3, 66, 68-69.) AR Mingione also photographed Mateo Shipping’s truck which advertises its service to the Dominican Republic. The English translation of the side of Mateo Shipping’s truck reads: “Mateo Shipping; Transfers door to door to the Dominican Republic; Moves*Vehicles; Parcels*Documents; Let us serve you; We will be your favorite; Free Estimates.” (BOE App. 3, 67, 68-69.) AR Mingione obtained a photocopy of Julio Mateo’s business card describing the transportation services Mateo Shipping provides in the Dominican Republic trade. The English translation of the business card reads: “Mateo Shipping; Shipment of Automobiles, Appliances;

Moves-Packages-Documents-Boxes” and notes a Dominican Republic address. (BOE App. 3, 54-55.) Therefore, I find that BOE has established by a preponderance of the evidence that during the period from October 2005 through June 2007, Mateo Shipping and Julio Mateo held themselves out to the general public to provide transportation by water of cargo between the United States and the Dominican Republic for compensation. 46 U.S.C. § 40102(6)(i).

AR Mingione obtained the shipping documents from twelve proprietary shippers. AR Mingione avers that the pattern was the same for the shipments. The shippers provided their cargo to Mateo Shipping for transportation from the New York area to the Dominican Republic, prepaid Mateo Shipping for the transportation, and received a bill of lading and a cash receipt. The bill of lading provided the details of the shipment and was signed by the shipper and Mateo and/or his warehouseman. The document contained the name and address of the shipper in New York and of the consignee in the Dominican Republic. The bill of lading contained printed shipment terms in both English and Spanish in which Mateo Shipping and Julio Mateo accepted responsibility for transportation of the goods from point of receipt in the United States through to destination in the Dominican Republic. The English version of the shipment terms reads as follows:

1. We are not responsible for merchandise not declared.
2. The sender is responsible for what he or she sends.
3. Check your merchandise upon receiving it, and make whatever claims you have to in front of the acting employee.
4. Absolutely, we do not accept claims 15 days after the merchandise is delivered. All claims must be done at our Dominican Republic office.
5. We are not responsible for broken glass, china, or porcelain; neither for any merchandise packed by the client.
6. If there is a balance, it will be notified at the delivery of the merchandise. After 10 days, of the balance notice, a 10% weekly charge will apply. After 30 days, the client will lose all ownership rights.
7. We are not responsible for damaged or lost merchandise due to nature catastrophes, [sic] such as earth shakes, ship sinkings or any other accident or any other cause rather than our own negligence.
8. We are not responsible for merchandise to be storage [sic] at the piers.
9. If you wish to do so, you can pay for an additional insurance. We will charge 9% of the merchandise declared value, If insured, we will restore 100% of the merchandise value.

(BOE App. 5; BOE App. 9-17; BOE App. 56-65.)

In its investigation of Container Innovations, Inc., a licensed NVOCC, *EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing), the Commission obtained documents demonstrating that Container Innovations transported at least thirteen maritime containers for Mateo Shipping between October 5, 2005, and March 29, 2006. Based on the “description of package and goods” section of each bill of lading, each shipment

consisted of a full container loaded with household goods, personal effects, and “Cargo, NOS” (not otherwise specified). (BOE App. 2, Mingione affidavit, Paragraph 11; BOE App. 5.)

Based on the documents that Respondents issued to the proprietary shippers and the bills of lading Container Innovations issued to Respondents, I conclude that Respondents entered into affreightment agreements with proprietary shippers, issued bills of lading or equivalent documents to those shippers, and assumed responsibility for the transportation of their goods. Respondents purchased transportation services from Container Innovations and resold the services to the proprietary shippers by consolidating the proprietary shippers’ individual shipments into one container for which Container Innovations issued a bill of lading identifying Respondents alone, not the proprietary shippers, as the shipper. Therefore, Respondents operated as an NVOCC on each of these thirteen shipments. 46 U.S.C. § 40102(6)(ii). See 46 C.F.R. § 515.2(I); *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d at 129; *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d at 101.

The thirteen Container Innovations bills of lading establish that each container was loaded on board a vessel in Pennsauken, NJ, and discharged in the Dominican Republic. I find that after assuming responsibility for the transportation of the individual shipments of goods that they consolidated into thirteen shipments, Respondents 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)(iii).

BOE does not state whether it argues each individual shipment by a proprietary shipper is a violation of the Act, meaning it has evidence establishing twelve violations, or each consolidated shipment with Container Innovations is a violation, meaning it has evidence establishing thirteen violations, or the evidence establishes a total of twenty-five violations.⁵ While the proximity of the dates could lead to a conclusion that Respondents loaded a particular shipment by a proprietary shipper into a particular container (*e.g.*, the Villalono shipment for which Respondents issued the documents on December 7, 2005 (BOE App. 10-11) could have been loaded into the Container Innovations shipment on December 10, 2005 (BOE App. 41) or December 14, 2005 (BOE App. 43)), no evidence clearly establishes that any particular individual shipment ever actually left the United States.

The evidence does establish that Mateo Shipping assumed responsibility for the transportation of the goods of as many as fifty to one hundred members of the shipping public and on thirteen occasions loaded the individual shipments into a container that Container Innovations transported by water from the United States to the Dominican Republic for Julio Mateo/Mateo Shipping as shipper. Therefore, I conclude that BOE has established that on the thirteen Container

⁵ BOE does state that “[e]ach day of a continuing violation constitutes a separate violation.” 46 U.S.C. § 41107(a). First, the evidence in the record proves specific, individual violations, not continuing violations. Second, even if the evidence were construed to prove a continuing violation, BOE does not state how many days it contends the violation continued.

Innovations shipments, Mateo Shipping and Mateo operated as an NVOCC without publishing tariffs showing its rates and charges in violation of section 8 of the Act.

B. Mateo Shipping and Julio Mateo Violated Sections 19(a) and (b) of the 1984 Act and the Commission's Regulations at 46 C.F.R. 515 by Operating as an OTI in the United States Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility.

Sandra L. Kusomoto is the Director of the Commission's Bureau of Certification and Licensing (BCL). She prepared an affidavit summarizing the attempt by Mateo Shipping and Mateo to obtain an FMC license as an NVOCC. (BOE App. 1-2.) Mateo Shipping and Mateo have not contested the statements in Kusomoto's affidavit. I find Kusomoto's statements to be credible.

On October 19, 2004, Julio Mateo submitted a Form FMC-18 to the Commission's Bureau of Certification and Licensing ("BCL") requesting a license for Mateo Shipping to operate as an NVOCC. In the FMC-18 application, Mateo represented that he is president of Mateo Shipping as well as owner of 50% of the capital stock and identified Julio Mateo as the proposed Qualifying Individual ("QI"). (BOE App. 1.)

BCL noted several deficiencies in the application including, but not limited to, an absence of the required three references for the purpose of verifying the QI's OTI experience. Despite BCL's written requests to Mateo Shipping to have these deficiencies corrected, the application remained incomplete until March 8, 2005, when it was officially returned to Mateo. As of April 24, 2009, Mateo Shipping had not submitted a new Form FMC-18. While Kusomoto's affidavit does not explicitly state that neither Mateo Shipping nor Mateo has received a license as an NVOCC, I conclude from Kusomoto's statements that: (a) BCL returned the October 19, 2004, Form FMC-18 submitted by Julio Mateo requesting a license for Mateo Shipping; and (b) Mateo Shipping has not submitted a new Form FMC-18, that neither Julio Mateo nor Mateo Shipping has ever been licensed as an OTI (NVOCC) by the Commission. As set forth in Part I.A above, BOE has established that Mateo Shipping and Mateo operated as an NVOCC on at least thirteen shipments. Therefore, BOE has established by a preponderance of the evidence that Mateo Shipping Corp. and Julio Mateo operated as an OTI (NVOCC) in the United States trades without obtaining a license from the Commission in violation of section 19(a) of the Act.⁶

During his investigation, AR Mingione determined that Respondents did not furnish a bond, proof of insurance, or other surety as required by section 19(b) of the Shipping Act, 46 U.S.C. § 40902(a). (BOE App. 3.) As set forth in Part I.A above, BOE has established that Mateo Shipping and Mateo operated as an NVOCC on at least thirteen shipments. Therefore, BOE has established by a preponderance of the evidence that Mateo Shipping Corp. and Julio Mateo operated as an OTI

⁶ Kusomoto does not state whether the Commission ever licensed Mateo Shipping or Mateo as an ocean freight forwarder. Even if they were licensed as an ocean freight forwarder, the license would not permit them to operate as an NVOCC.

(NVOCC) in the United States trades without providing proof of financial responsibility in violation of section 19(b) of the Act.

II. SANCTIONS.

A. Civil Penalty.

Section 13(c) of the 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).⁷ 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). As the proponent of an order assessing a civil penalty, BOE has the burden of proving that a civil penalty should be assessed and the burden of establishing the amount of the civil penalty. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Greenwich Collieries*, 512 U.S. at 276.

“In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(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.”).

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.

⁷ 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)).

Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty., Limited - Possible Violations*, 28 S.R.R. at 805-806.

BOE argues that a civil penalty should be assessed against Respondents.

Pursuant to [the Act], a party is subject to a civil penalty of not more than \$30,000 for each violation knowingly and willfully committed. Section 13(c) of the Shipping Act 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. 46 U.S.C. § 41109. 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 ([2d Cir.] 1992). Respondents continued to operate as an NVOCC despite written warning from Commission representatives and caused harm to the shipping public by failing to complete shipments. Respondents' behavior was knowing and willful as Respondents had previously applied for an NVOCC license and were aware of the requirements of the Shipping Act.

Respondents have failed to respond to BOE's First Request seeking to ascertain the financial status of the company. In certain past cases, the Commission has assessed the statutory maximum in cases where a respondent has defaulted and no evidence on ability to pay and no mitigating evidence has been presented. See *Portman Square Ltd.*, [28 S.R.R. 80 (ALJ 1998)]; *Ever Freight Int'l Ltd., et al.*, 28 S.R.R. 329[, 334-336] (ALJ 1998)]; *Shipman Int'l (Taiwan) Ltd.*, [28 S.R.R. 100; *Comm-Sino Ltd. Possible Violations of Section 10(a)(1) and 10(b)(1)*, 27 S.R.R. 1201 (I.D. 1997); *Trans Ocean-Pacific Forwarding, Inc. [- Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 409, 412?]; *Refrigerated Container Carriers Pty. Limited - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799 (I.D. 1999). Respondents' refusal to participate in this proceeding has resulted in its failure to meet its ultimate "burden of persuasion" in justifying a reduction of the civil penalties otherwise applicable. *Merritt* at 18. Since Respondents have refused to participate in these proceedings, Respondents provided no evidence of mitigation of any of the factors to be considered in assessing a civil penalty for proven violations. Based on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate.

(Motion for Sanctions at 22-23.) BOE does not suggest a dollar figure for the civil penalty it seeks, either an aggregate amount or an amount for each violation. Furthermore, it does not suggest how many violations it contends are subject to a civil penalty, either as individual violations or number of days as "continuing violations."

1. Burden of Persuasion to Establish a Civil Penalty and its Amount.

Relying on *Merritt v. United States, supra*, BOE's contends that Respondents "fail[ed] to meet [their] ultimate 'burden of persuasion' in justifying a reduction of the civil penalties otherwise applicable." *Merritt's* holding on this point is no longer good law.

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 imposed. 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 relies:

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 *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 otherwise applicable” as BOE contends because Respondents do not bear this burden.

2. Determining the Maximum Amount of a Civil Penalty.

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially

requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986):

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

Universal Logistic Forwarding Co., Ltd. – 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).

As set forth above, the evidence establishes that Respondents violated section 8 of the Act by operating as an NVOCC without a tariff, violated section 19(a) of the Act by operating as an OTI (NVOCC) in the United States foreign trades without obtaining a license from the Commission, and violated section 19(b) of the Act by operating as an OTI (NVOCC) without providing proof of financial responsibility in the form of surety bonds. Therefore, Respondents are liable to the United States Government for a civil penalty for each violation. The civil penalty may not exceed \$6,000 for each violation, unless BOE establishes that it was willfully and knowingly committed, in which case the penalty may not exceed \$30,000 for each violation. 46 U.S.C. § 41107(a).

a. “Willfully and Knowingly .”

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.

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. A violation of section 10(b)(1) could be termed “willful” if the carrier knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act.” The Supreme Court cited with approval this “reckless or careless disregard” standard in *Trans World Airlines, Inc. v. Thurston*, 469 US 111, 125-129 (1985).

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), admin. final, Feb. 9, 1996. BOE contends that Mateo Shipping and Mateo “knowingly and willfully” violated the Act on each violation; therefore, it contends Mateo Shipping and Mateo are liable for a civil penalty for each violation at the augmented amount. BOE has the burden of persuasion on this issue.

The evidence establishes by a preponderance of the evidence that on October 19, 2004, Julio Mateo submitted a Form FMC-18 to the Commission’s Bureau of Certification and Licensing (“BCL”) requesting a license for Mateo Shipping to operate as an NVOCC. I conclude from that fact that since at least October 2004, Julio Mateo has known that the Act requires an OTI to have a license, a bond or other surety, and, if it operates as an NVOCC, a tariff. BOE has established by a preponderance of the evidence that despite this knowledge, Mateo Shipping and Mateo have operated as an NVOCC without the required tariff, license, and bond. Accordingly, BOE has established Respondents willfully and knowingly violated section 8 of the Act by operating as an NVOCC without a tariff, willfully and knowingly violated section 19(a) of the Act by operating as an OTI (NVOCC) in the United States foreign trades without obtaining a license from the Commission, and willfully and knowingly violated section 19(b) of the Act by operating as an OTI (NVOCC) without providing proof of financial responsibility in the form of surety bonds violated section 19 of the Shipping Act by operating as an OTI (NVOCC) without a license or surety on each of the thirteen shipments that respondents shipped with Container Innovations. Therefore, Respondents are liable to the United States Government for an enhanced civil penalty that may not exceed \$30,000 for each proven violation. 46 U.S.C. § 41107(a).

b. Balancing the Eight Factors.

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 BOE contends that “[b]ased on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate,” (Motion for Sanctions at 23), BOE does not attempt to define “substantial” or suggest a dollar figure for the civil penalty, either a total amount or an amount for each proven violation. Other than its argument that Respondents willfully and knowingly committed the violations and its contention that Respondents have not met their “ultimate ‘burden of persuasion’ in justifying a reduction of the civil penalties otherwise applicable,” BOE does not propose any specific findings on the section 13 factors or suggest how the factors should be weighed to arrive at an appropriate civil penalty in this proceeding. BOE states that “[i]n certain past cases, the Commission has assessed the statutory maximum in cases where a respondent has defaulted and no evidence on ability to pay and no mitigating evidence has been presented.” (Motion for Sanctions at 22-23.) The cases rely at least in part, however, on the respondents’ failure to

produce “mitigating evidence,” a burden that neither the APA nor the Shipping Act imposes on a respondent. BOE does not state that the maximum penalty should be assessed in this proceeding.

BOE recognizes that the Commission must 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), and “must make specific findings with regard to each factor.” (Motion for Sanctions at 22-23.) Nevertheless, although it has the burden of establishing the appropriate amount of the civil penalty that should be assessed, BOE has not proposed specific findings regarding any of the eight factors. *Orr v. Bank of Am., NT & SA*, 285 F.3d at 775.

“Ability to pay” requires particular attention. In *Merritt*, the Second Circuit held that “the Commission was the proponent of the order imposing fines Section 13(c) makes clear that the Commission may impose a fine *only if it takes into account the ability to pay of the violator.*” 960 F.2d at 17 (emphasis added). BOE has not presented evidence of Respondents’ ability to pay a fine. However, as found in the Order issued today granting BOE’s motion for sanctions for failure to respond to discovery, Respondents have failed to respond to discovery seeking financial information. Relying on the authority granted by Commission Rule 210, I have entered an order drawing “the inference that the financial information would demonstrate that Mateo Shipping Corp. and Julio Mateo have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed.” *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Memorandum and Order on Bureau of Enforcement’s Motion for Sanctions Against Mateo Shipping Corp. and Julio Mateo).

As noted above, BOE has not proposed findings regarding the other section 13 factors. While there is no evidence that Respondents have a history of prior offenses, their culpability is manifest. In the circumstances of this case, the salient “nature, circumstances, extent and gravity of the violations committed” are patently clear. The evidence demonstrates that for each of the thirteen occasions on which Respondents shipped containers of goods with Container Innovations in violation of the Act, Respondents consolidated shipments for as many as fifty to one hundred individual shippers into one container. “The spirit and basic policy that motivated Congress to enact the bonding and licensing provisions of the Shipping Acts of 1916 and 1984, the NVOCC Act, and OSRA were to provide protection to the shipping public from unqualified and potentially unscrupulous service providers.” *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries - Petition for Declaratory Order*, FMC No. 06-08 (Feb. 15, 2008), *citing* H. R. Rep. No. 101-785 (1990); 136 Cong. Rec. E2211 (1990); S. Rep. No. 105-61, at 31-32 (1997). Since each violation committed by Mateo Shipping and Mateo affected the shipments of fifty to one hundred members of the shipping public, assessment of the maximum civil penalty permitted by the Shipping Act is appropriate for each violation of thirteen violations.

3. Conclusion Regarding Civil Penalty.

BOE has met its burden of persuasion and demonstrated that Respondents willfully and knowingly committed thirteen violations of the Shipping Act. Therefore, Respondents are liable to the United States for a civil penalty for each of the thirteen violations. 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 1018,⁸ 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.

B. Cease and Desist Order.

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

A cease and desist order is justified if there is likelihood that offenses will continue. See *Marcella Shipping Co., Ltd.*, 23 SRR 857 (I.D.), FMC notice of finality, June 5, 1986; *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 SRR 1335 (1997). “The general rule is that such orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities...” *Portman Square Ltd.*, 28 SRR at 86. Respondents continued to operate even after written warnings from Commission representatives and Mateo Shipping Corp. is still an active New York corporation. (PFF 1). BOE requests that Respondents be ordered to cease and desist from violating sections 8(a) and 19 of the Shipping Act and asks for the issuance of a cease and desist order 1) directing Respondents to cease and desist from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and Respondents publish a tariff and obtain a bond pursuant to Commission regulations and 2) prohibiting Julio Mateo from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such an entity for a period of years.

(Motion for Sanctions Against Mateo Shipping Corp. and Julio Mateo and Bureau of Enforcement's Filing of Proposed Findings of Fact and Conclusions of Law at 23-24.)

⁸ I note that in *Cari-Cargo*, “Hearing Counsel, on brief, . . . considered the evidence and . . . provided specific recommendations as the amount of penalties to be assessed.” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018.

BOE has demonstrated by a preponderance of the evidence that respondents Mateo Shipping Corp. and Julio Mateo operated as an NVOCC without a license, bond, or tariff despite Julio Mateo's knowledge that the Shipping Act requires an NVOCC to meet those requirements. Mateo Shipping Corp. and Mateo continued their illegal operations despite the Commission's investigation, and refused to cooperate in the investigation by failing to produce promised documents. A representative of Mateo Shipping falsely represented to the Commission's area representative that Mateo Shipping did have an OTI license. (BOE App. 6.) Mateo Shipping Corp. is still an active New York corporation. (BOE App. 1.) I conclude that there is a reasonable likelihood that Mateo Shipping Corp. and Julio Mateo will continue or resume their unlawful activities. Therefore, entry of a cease and desist order prohibiting respondent Mateo Shipping Corp. and/or Julio Mateo from operating as an ocean transportation intermediary is appropriate and will be entered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁹

1. Mateo Shipping Corp. ("Mateo Shipping") was incorporated in the State of New York on July 12, 2004, with business at 1441 Ogden Avenue, Bronx, New York 10452. (BOE App. 1.)
2. As of April 24, 2009, Mateo Shipping was still an active New York corporation. (BOE App. 1.)
3. A person wanting to become an ocean transportation intermediary (either non-vessel-operating common carrier or ocean freight forwarder) must complete and submit a Form FMC-18, Application for a License as an Ocean Transportation Intermediary. (http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10#71, accessed June 15, 2009.)
4. On October 19, 2004, Julio Mateo submitted a Form FMC-18 to the Commission's Bureau of Certification and Licensing ("BCL") requesting a license for Mateo Shipping to operate as an NVOCC. (BOE App. 1.)
5. In the FMC-18 application, Mr. Julio Mateo represented himself to be the president of Mateo Shipping, as well as owner of 50% of the capital stock. (BOE App. 1.)
6. The FMC-18 identified Mr. Julio Mateo as the proposed Qualifying Individual ("QI"). (BOE App. 1.)

⁹ To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

7. BCL noted several deficiencies in the application, including, but not limited to, an absence of the required three references for the purpose of verifying the QI's OTI experience. (BOE App. 1.)
8. Despite BCL's written requests to Mateo Shipping to have these deficiencies corrected, the application remained incomplete until March 8, 2005, when it was officially returned to Mr. Julio Mateo. (BOE App. 1.)
9. As of April 24, 2009, Mateo Shipping had not submitted a new Form FMC-18. (BOE App. 2.)
10. I conclude from the evidence demonstrating that (a) BCL returned the October 19, 2004, Form FMC-18 submitted by Julio Mateo requesting a license for Mateo Shipping and (b) Mateo Shipping has not submitted a new Form FMC-18, that neither respondent Julio Mateo nor respondent Mateo Shipping has ever been licensed by the Commission as an OTI as required by section 19(a) of the Shipping Act, 46 U.S.C. § 40901(a).
11. I conclude from the fact that on October 19, 2004, Julio Mateo submitted a Form FMC-18 to BCL requesting a license for Mateo Shipping to operate as an NVOCC that Julio Mateo has known of the OTI licensing, bonding, and tariff requirements of the Shipping Act since at least October 2004.
12. In spring 2006, as a result of complaints received regarding the loss of cargo suffered by at least six customers of Mateo Shipping Corp. between approximately December 2005 and April 2006, Commission Area Representative Emanuel J. Mingione ("AR Mingione") began an investigation of Mateo Shipping Corp. (BOE App. 3.)
13. During the course of that investigation, AR Mingione interviewed the shippers who had filed complaints, reviewed the documents they had received from Mateo Shipping, visited Mateo Shipping's office, and unsuccessfully sought documents from the Respondents. (BOE App. 3.)
14. AR Mingione advised Respondents that they needed to resolve the shipper complaints and to apply for an OTI license. (BOE App. 3.)
15. Respondents did not furnish a bond, proof of insurance, or other surety as required by section 19(b) of the Shipping Act, 46 U.S.C. § 40902(a). (BOE App. 3.)
16. Respondents never maintained open to public inspection in an automated tariff system, tariffs showing its rates, charges, classifications and practices pursuant to section 8 of the Shipping Act. (BOE App. 3.)

17. AR Mingione photographed a sign at Mateo Shipping's office advertising its service to the Dominican Republic. (BOE App. 3, 66.)
18. The English translation of the sign at Mateo Shipping's office reads: Mateo Shipping; Moves*Vehicles*Packages and Documents; Door to door to the Dominican Republic; Sale of Furniture and Appliances; Let us serve you; Free Estimates; We will be your favorite. (BOE App. 3, 68-69.)
19. AR Mingione photographed Mateo Shipping's truck which also advertises its service to the Dominican Republic. (BOE App. 3, 67.)
20. The English translation of the side of Mateo Shipping's truck reads: Mateo Shipping; Transfers door to door to the Dominican Republic; Moves*Vehicles; Parcels*Documents; Let us serve you; We will be your favorite; Free Estimates. (BOE App. 3, 68-69.)
21. AR Mingione obtained a photocopy of Julio Mateo's business card describing the transportation services Mateo Shipping provides in the Dominican Republic trade. (BOE App. 3, 54-55.)
22. The English translation of the business card reads: Mateo Shipping; Shipment of Automobiles, Appliances; Moves-Packages-Documents-Boxes and notes a Dominican Republic address. (BOE App. 3, 54-55.)
23. BOE has established by a preponderance of the evidence that during the period from October 2005 through June 2007, Mateo Shipping and Julio Mateo held themselves out to the general public to provide transportation by water of cargo between the United States and the Dominican Republic for compensation. 46 U.S.C. § 40102(6)(i).
24. AR Mingione determined that Respondents shipped cargo for individual shippers wanting transportation to the Dominican Republic. The cargo generally consisted of small shipments of used household goods and appliances, personal effects and vehicles such as individual pieces or boxes being sent to relatives or friends in the Dominican Republic. Cargo was either received by Mateo Shipping at its place of business in the Bronx or Mateo Shipping arranged for pick up. (BOE App. 4; BOE App. 9-17; BOE App. 56-65.)
25. Individual packages were consolidated with the cargo of other shippers and tendered to a licensed NVOCC or ocean common carrier. The documents provided by the complaining shippers describe the type of cargoes carried by Mateo. BOE App. 4; BOE App. 9-17; BOE App. 56-65.)
26. Five of the six original complaining shippers faxed to AR Mingione copies of the documentation Mateo Shipping Corp. issued to them. The documents consisted of a receipt issued by Mateo Shipping, which serves as the bill of lading, and a cash receipt confirming

the amount paid by the shipper. The bill of lading provided the details of the shipment and was signed by the shipper and Mateo and/or his warehouseman. The document contained the name and address of the shipper in New York and of the consignee in the Dominican Republic. The document also described the goods to be shipped and the price charged. (BOE App. 4; BOE App. 9-17.)

27. Based on AR Mingione's discussions with the complaining shippers, I find that the pattern was the same for each shipment. The shippers provided their cargo to respondents for transportation from the New York area to the Dominican Republic, prepaid Respondents for the transportation, and received a bill of lading and a cash receipt. (BOE App. 4.)

28. The bill of lading contained printed shipment terms in both English and Spanish in which Mateo Shipping and Julio Mateo accepted responsibility for transportation of the goods from point of receipt in the United States through to destination in the Dominican Republic. The English version of the shipment terms reads as follows:

1. We are not responsible for merchandise not declared.
2. The sender is responsible for what he or she sends.
3. Check your merchandise upon receiving it, and make whatever claims you have to in front of the acting employee.
4. Absolutely, we do not accept claims 15 days after the merchandise is delivered. All claims must be done at our Dominican Republic office.
5. We are not responsible for broken glass, china, or porcelain; neither for any merchandise packed by the client.
6. If there is a balance, it will be notified at the delivery of the merchandise. After 10 days, of the balance notice, a 10% weekly charge will apply. After 30 days, the client will lose all ownership rights.
7. We are not responsible for damaged or lost merchandise due to nature catastrophes, [sic] such as earth shakes, ship sinkings or any other accident or any other cause rather than our own negligence.
8. We are not responsible for merchandise to be storage [sic] at the piers.
9. If you wish to do so, you can pay for an additional insurance. We will charge 9% of the merchandise declared value, If insured, we will restore 100% of the merchandise value.

(BOE App. 5; BOE App. 9-17; BOE App. 56-65.)

29. Respondents issued a cash receipt to the shippers for the amount paid to ship the goods. The cash receipts were on Respondents' letterhead and documented not only the amount of money received, but also a description of the goods shipped. The cash receipts included an entry for a "Fact. #," an abbreviation of the Spanish word factura meaning invoice. That number matched the number in the upper right hand corner of the corresponding cargo receipt or bill of lading. For example, for the Celeste Flores shipment (BOE App. 14-15),

the cargo receipt has the number 6739 and that number is listed as the Fact. # on the receipt. No other documentation is issued. In AR Mingione's experience, this level of documentation is standard for smaller NVOCCs, particularly those serving immigrant communities. There is a holding out by advertising and word-of-mouth, an agreement describing the terms under which the cargo will be transported, and a cash receipt. (BOE App. 5; BOE App. 9-17; BOE App. 56-65.)

30. On June 6, 2006, AR Mingione issued a letter to Mateo Shipping advising its principals to resolve the complaints lodged by some of its shipper customers and to apply for an OTI license with the Commission. Shortly thereafter, a representative of Mateo Shipping, Francisco Rosario, contacted AR Mingione and assured him that Julio Mateo would clear up the complaints, and apply for an OTI license. In the meantime, Rosario indicated the company would confine its business to air freight shipments pending the approval of its application for an OTI license. AR Mingione was also given assurances that Mateo Shipping Corp. would provide documents evidencing resolution of the aforementioned complaints. (BOE App. 5-6; BOE App. 18-21.)
31. On August 18, 2006, when the documents promised by Mateo Shipping were not forthcoming, AR Mingione contacted Mateo Shipping by telephone to inquire whether it was accepting ocean shipments to the Dominican Republic. The individuals answering the telephone responded in the affirmative and indicated that Mateo Shipping did have an OTI license. When asked to provide a corresponding license number, the individuals refused to do so and immediately terminated the telephone call. (BOE App. 6.)

SHIPMENTS WITH CONTAINER INNOVATIONS, INC.

32. In the Commission's investigation of Container Innovations, Inc., a licensed NVOCC, the Commission obtained documents demonstrating that between October 5, 2005, and March 29, 2006, Container Innovations transported thirteen shipments for Mateo Shipping and Julio Mateo.
33. Based on the "description of package and goods" section of each bill of lading, each shipment carried by Container Innovations for Respondents consisted of a full container loaded with household goods, personal effects, and "Cargo, NOS" (not otherwise specified). (BOE App. 6; BOE App. 22-53.)

October 05, 2005, Shipment with Container Innovations, Inc.

34. On October 05, 2005, Container Innovations, Inc., issued bill of lading 5152-37711 for container UESU4800150 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Autopista San Isidro, the vessel as SB Caribbean v 18, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container

SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 25.)

35. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container UESU4800150.
36. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container UESU4800150.
37. Respondents assumed responsibility for the transportation of container UESU4800150 and its contents from the port or point of receipt to the port or point of destination and 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.
38. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the October 5, 2005, shipment of container UESU4800150 in willful and knowing violation of section 8 of the Shipping Act.
39. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the October 5, 2005, shipment of container UESU4800150 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
40. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the October 5, 2005, shipment of container UESU4800150.
41. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the October 5, 2005, shipment of container UESU4800150.

October 12, 2005, Shipment with Container Innovations, Inc.

42. On October 12, 2005, Container Innovations, Inc., issued bill of lading 5188-37742 for container UXXU480971-1 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Autopista San Isidro, the vessel as SB Caribbean v 19, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container

SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00.” (BOE App. 29.)

43. On October 19, 2005, Seaboard Marine, Ltd. issued bill of lading SMLU RHA040A77264 for container UXXU4809711 identifying the shipper as Container Innovations, Inc., Kearny, NJ, the consignee as TACSA, Santo Domingo, Dominican Republic, the vessel as SBD Caribbean 19S, the place of receipt as Kearny, NJ, the port of loading as Philadelphia, the port of discharge as Rio Haina, the place of delivery as Rio Haina, and describing the goods as “45' dry high cube cntr S.L/W/C/ 1 lot of household goods and personal effects.” (BOE App. 31.)
44. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container UXXU480971-1.
45. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container UXXU480971-1.
46. Respondents assumed responsibility for the transportation of container UXXU480971-1 and its contents from the port or point of receipt to the port or point of destination and 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.
47. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission’s regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the October 12, 2005, shipment of container UXXU480971-1 in willful and knowing violation of section 8 of the Shipping Act.
48. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission’s regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the October 12, 2005, shipment of container UXXU480971-1 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
49. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the October 12, 2005, shipment of container UXXU480971-1.
50. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the October 12, 2005, shipment of container UXXU480971-1.

October 26, 2005, Shipment with Container Innovations, Inc.

51. On October 26, 2005, Container Innovations, Inc., issued bill of lading 5200-37750 for container SMLU8455718 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v 17, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 22.)
52. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8455718.
53. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8455718.
54. Respondents assumed responsibility for the transportation of container SMLU8455718 and its contents from the port or point of receipt to the port or point of destination and 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.
55. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the October 26, 2005, shipment of container SMLU8455718 in willful and knowing violation of section 8 of the Shipping Act.
56. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the October 26, 2005, shipment of container SMLU8455718 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
57. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the October 26, 2005, shipment of container SMLU8455718.
58. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the October 26, 2005, shipment of container SMLU8455718.

November 02, 2005, Shipment with Container Innovations, Inc.

59. On November 02, 2005, Container Innovations, Inc., issued bill of lading 5197-37765 for container UXXU480778-7 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Caribbean 20, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 32.)
60. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container UXXU480778-7.
61. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container UXXU480778-7.
62. Respondents assumed responsibility for the transportation of container UXXU480778-7 and its contents from the port or point of receipt to the port or point of destination and 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.
63. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the November 02, 2005, shipment of container UXXU480778-7 in willful and knowing violation of section 8 of the Shipping Act.
64. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the November 02, 2005, shipment of container UXXU480778-7 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
65. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the November 02, 2005, shipment of container UXXU480778-7.
66. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the November 02, 2005, shipment of container UXXU480778-7.

November 16, 2005, Shipment with Container Innovations, Inc.

67. On November 16, 2005, Container Innovations, Inc., issued bill of lading 5214-37780 for container SMLU8501588 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v. 18, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 36.)
68. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8501588.
69. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8501588.
70. Respondents assumed responsibility for the transportation of container SMLU8501588 and its contents from the port or point of receipt to the port or point of destination and 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.
71. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the November 16, 2005, shipment of container SMLU8501588 in willful and knowing violation of section 8 of the Shipping Act.
72. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the November 16, 2005, shipment of container SMLU8501588 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
73. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the November 16, 2005, shipment of container SMLU8501588.
74. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the November 16, 2005, shipment of container SMLU8501588.

November 20, 2005, Shipment with Container Innovations, Inc.

75. On November 30, 2005, Container Innovations, Inc., issued bill of lading 5257-37816 for container SMLU8500036 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Caribbean v 22, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 39.)
76. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8500036.
77. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8500036.
78. Respondents assumed responsibility for the transportation of container SMLU8500036 and its contents from the port or point of receipt to the port or point of destination and 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.
79. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the November 20, 2005, shipment of container SMLU8500036 in willful and knowing violation of section 8 of the Shipping Act.
80. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the November 20, 2005, shipment of container SMLU8500036 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
81. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the November 20, 2005, shipment of container SMLU8500036.
82. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the November 20, 2005, shipment of container SMLU8500036.

December 10, 2005, Shipment with Container Innovations, Inc.

83. On December 10, 2005, Container Innovations, Inc., issued bill of lading 5277-37836 for container SMLU849855-6 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v:20, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 41.)
84. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU849855-6.
85. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU849855-6.
86. Respondents assumed responsibility for the transportation of container SMLU849855-6 and its contents from the port or point of receipt to the port or point of destination and 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.
87. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the December 10, 2005, shipment of container SMLU849855-6 in willful and knowing violation of section 8 of the Shipping Act.
88. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the December 10, 2005, shipment of container SMLU849855-6 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
89. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the December 10, 2005, shipment of container SMLU849855-6.
90. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the December 10, 2005, shipment of container SMLU849855-6.

December 14, 2005, Shipment with Container Innovations, Inc.

91. On December 14, 2005, Container Innovations, Inc., issued bill of lading 5300-37855 for container UESU4831783 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Caribbean v:23, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45' HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 43.)
92. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container UESU4831783.
93. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container UESU4831783.
94. Respondents assumed responsibility for the transportation of container UESU4831783 and its contents from the port or point of receipt to the port or point of destination and 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.
95. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the December 14, 2005, shipment of container UESU4831783 in willful and knowing violation of section 8 of the Shipping Act.
96. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the December 14, 2005, shipment of container UESU4831783 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
97. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the December 14, 2005, shipment of container UESU4831783.
98. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the December 14, 2005, shipment of container UESU4831783.

January 4, 2006, Shipment with Container Innovations, Inc.

99. On January 4, 2006, Container Innovations, Inc., issued bill of lading 5316-37871 for container SMLU8454769 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v:22, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45 HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 45.)
100. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8454769.
101. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8454769.
102. Respondents assumed responsibility for the transportation of container SMLU8454769 and its contents from the port or point of receipt to the port or point of destination and 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.
103. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the January 4, 2006, shipment of container SMLU8454769 in willful and knowing violation of section 8 of the Shipping Act.
104. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the January 4, 2006, shipment of container SMLU8454769 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
105. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the January 4, 2006, shipment of container SMLU8454769.
106. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the January 4, 2006, shipment of container SMLU8454769.

January 18, 2006, Shipment with Container Innovations, Inc.

107. On January 18, 2006, Container Innovations, Inc., issued bill of lading 5350-37906 for container SMLU8498474 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Mateo Shipping Corp Y/O Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v:23, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 47.)
108. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8498474.
109. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8498474.
110. Respondents assumed responsibility for the transportation of container SMLU8498474 and its contents from the port or point of receipt to the port or point of destination and 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.
111. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the January 18, 2006, shipment of container SMLU8498474 in willful and knowing violation of section 8 of the Shipping Act.
112. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the January 18, 2006, shipment of container SMLU8498474 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
113. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the January 18, 2006, shipment of container SMLU8498474.
114. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the January 18, 2006, shipment of container SMLU8498474.

February 15, 2006, Shipment with Container Innovations, Inc.

115. On February 15, 2006, Container Innovations, Inc., issued bill of lading 5386-37938 for container SMLU7815872 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Mateo Shipping Corp Y/O Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v:25, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "40HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 48.)
116. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU7815872.
117. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU7815872.
118. Respondents assumed responsibility for the transportation of container SMLU7815872 and its contents from the port or point of receipt to the port or point of destination and 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.
119. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the February 15, 2006, shipment of container SMLU7815872 in willful and knowing violation of section 8 of the Shipping Act.
120. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the February 15, 2006, shipment of container SMLU7815872 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
121. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the February 15, 2006, shipment of container SMLU7815872.
122. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the February 15, 2006, shipment of container SMLU7815872.

March 9, 2006, Shipment with Container Innovations, Inc.

123. On March 9, 2006, Container Innovations, Inc., issued bill of lading 5431-37973 for container SMLU8495388 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Mateo Shipping Corp Y/O Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Caribbean v:29, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 50.)
124. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8495388.
125. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8495388.
126. Respondents assumed responsibility for the transportation of container SMLU8495388 and its contents from the port or point of receipt to the port or point of destination and 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.
127. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the March 9, 2006, shipment of container SMLU8495388 in willful and knowing violation of section 8 of the Shipping Act.
128. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the March 9, 2006, shipment of container SMLU8495388 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
129. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the March 9, 2006, shipment of container SMLU8495388.
130. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the March 9, 2006, shipment of container SMLU8495388.

March 29, 2006, Shipment with Container Innovations, Inc.

131. On March 29, 2006, Container Innovations, Inc., issued bill of lading 5461-38000 for container SMLU8470100 identifying the shipper as Julio Mateo, Bronx, NY, the consignee as Mateo Shipping Corp Y/O Julio Mateo, Santo Domingo, Dominican Republic, the vessel as SB Rio Haina v:28, the place of receipt as New York, the port of loading as Pennsauken, the port of discharge as Rio Haina, the place of delivery as Dominican Republic, and describing the goods as "45HC container SLAC STC: 1 lot of household goods and personal effects No SED req. value under 2500.00." (BOE App. 52.)
132. Respondents resold transportation services Respondents purchased from Container Innovations, Inc., to proprietary shippers to fill container SMLU8470100.
133. Respondents consolidated the shipments of an unknown number (fifty or more) of proprietary shippers to fill container SMLU8470100.
134. Respondents assumed responsibility for the transportation of container SMLU8470100 and its contents from the port or point of receipt to the port or point of destination and 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.
135. Respondents Julio Mateo and Mateo Shipping violated section 8 of the Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing their rates and charges on the March 29, 2006, shipment of container SMLU8470100 in willful and knowing violation of section 8 of the Shipping Act.
136. Respondents Julio Mateo and Mateo Shipping violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States trades without obtaining licenses from the Commission and without providing proof of financial responsibility on the March 29, 2006, shipment of container SMLU8470100 in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
137. Respondents Julio Mateo and Mateo Shipping are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the March 29, 2006, shipment of container SMLU8470100.
138. Given the number of proprietary shippers whose goods were shipped and taking 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, I find that the maximum civil penalty of \$30,000.00 should be assessed against Respondents Julio Mateo and Mateo Shipping for the March 29, 2006, shipment of container SMLU8470100.

139. During AR Mingione's investigation of Respondents, he continued to receive complaints from customers of Mateo Shipping and Julio Mateo regarding loss of cargo and unrefunded ocean freight charges. In addition to the six complaints received in spring 2006, the New York office received seven additional complaints, all involving shipments to the Dominican Republic during the period from December 2006 through June 2007. Each shipper had paid the respondents to transport their cargo from the New York City area to the Dominican Republic. Each shipper forwarded to the New York field office via fax copies of the documents they received from Respondents. Each shipper received a document identical (except for the shipping details) to the bill of lading document described in paragraph 6-7 of AR Mingione's affidavit and two shippers also provided copies of the receipts they received, which were also the same as the receipts AR Mingione described in paragraph 8 of his affidavit. (BOE App. 6; BOE App. 56-65.)
140. On August 6, 2007, notice of this proceeding was published in the Federal Register. 72 Fed. Reg. 43639 (Aug. 6, 2007). (BOE App. 70-73.)
141. On August 29, 2007, a process server employed by the Commission visited Mateo Shipping Corp. at its last known business address. An individual at that address, Raphael Nunez, claimed the business operating at the address was a new business not affiliated with Mr. Mateo. Mr. Nunez also indicated Mr. Mateo worked at a store called Meringue Electronics. On September 28, 2007, the process server visited Meringue Electronics and personally served Julio Mateo with two copies of the Order of Investigation and Hearing, one for Julio Mateo and one for Mateo Shipping Corp. (Affidavits of service attached to Bureau of Enforcement's Response to the Administrative Law Judge's Order Dated June 15, 2009.)
142. On January 24, 2008, Mr. Mateo was served via Federal Express with a copy of BOE's First Request directed to Mateo Shipping Corp. and Julio Mateo and an additional copy of the Order of Investigation and Hearing. Mr. Mateo signed for the Federal Express package. (BOE App. 11, Federal Express receipt.) To date, no response to the First Request has been submitted.
143. Mateo Shipping Corp. and Julio Mateo operated as an NVOCC without a license, bond, or tariff despite Julio Mateo's knowledge that the Shipping Act requires an NVOCC to meet those requirements.
144. Mateo Shipping Corp. and Mateo continued their illegal operations despite the Commission's investigation, and refused to cooperate in the investigation by failing to produce promised documents.
145. A representative of Mateo Shipping falsely represented to the Commission's area representative that Mateo Shipping did have an OTI license. (BOE App. 6.)

146. Mateo Shipping Corp. is still an active New York corporation. (BOE App. 1.)
147. There is a reasonable likelihood that Mateo Shipping Corp. and Julio Mateo will continue or resume their unlawful activities. Therefore, entry of a cease and desist order prohibiting respondent Mateo Shipping Corp. and/or Julio Mateo from operating as an ocean transportation intermediary is appropriate.

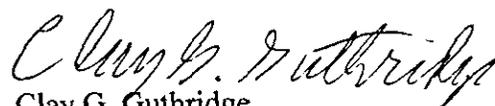
ORDER

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that respondents Mateo Shipping Corp. and Julio Mateo: (1) violated section 8 of the Shipping Act of 1984, 46 U.S.C. § 40501(a), and the Federal Maritime Commission's regulations at 46 C.F.R. 520 by operating as a non-vessel-operating common carrier without publishing tariffs showing its rates and charges; and (2) violated sections 19(a) and (b) of the Act, 46 U.S.C. §§ 40901 and 40902, and the Commission's regulations at 46 C.F.R. 515 by operating as an ocean transportation intermediary (non-vessel-operating common carrier) in the United States trades without obtaining a license from the commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondents Mateo Shipping Corp. and Julio Mateo remit to the United States the sum of \$390,000.00 as a civil penalty for thirteen willful and knowing violations of the Shipping Act of 1984. It is

FURTHER ORDERED that respondents Mateo Shipping Corp. and Julio Mateo cease and desist from holding out or operating as an ocean transportation intermediary in the United States foreign trades unless and until: (1) The Commission issues a license for Mateo Shipping Corp. and Julio Mateo to operate as an ocean transportation intermediary; (2) Mateo Shipping Corp. and Julio Mateo furnish a bond or other surety as required by the Shipping Act of 1984 and the Commission's regulations; and, (3) if licensed as a non-vessel-operating common carrier, Mateo Shipping Corp. and Julio Mateo publish an automated tariff system 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. It is

FURTHER ORDERED that respondent Julio Mateo be prohibited for a period of three years from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such an entity.


Clay G. Guthridge
Administrative Law Judge