

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED APRIL 13, 1999)
(EXCEPTIONS DUE 5-5-99)
(REPLIES TO EXCEPTIONS DUE 5-27-99)

FEDERAL MARITIME COMMISSION

DOCKET NO. 98-20

**REFRIGERATED CONTAINER CARRIERS PTY. LIMITED
POSSIBLE VIOLATIONS OF SECTION 10(a)(1)
OF THE SHIPPING ACT OF 1984**

Respondent Refrigerated Container Carriers Pty. Ltd., formerly a non-vessel operating common carrier (NVOCC) in the U.S. Australia-New Zealand trade, located in Sydney, Australia, found to have obtained ocean transportation at less than the lawfully applicable rates by means of a secret agreement with an ocean common carrier and to have done so knowingly and willfully on hundreds of occasions.

Respondent's conduct found to have violated section 10(a)(1) of the Shipping Act of 1984 and, in the absence of mitigating factors, maximum civil penalties on 50 discrete shipments on which such violations occurred are assessed, amounting to \$1,250,000.

Respondent's decision to disregard this proceeding totally and to impede the Commission's ability to adduce relevant evidence on the question of its ability to pay a civil penalty must not be allowed to frustrate the Commission's ability to enforce the law effectively and to deter future violations by others, as Congress intended.

Vern W. Hill and *Martha C. Smith* for Bureau of Enforcement.

No appearance for respondent.

**INITIAL DECISION' OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE**

By Order served November 18, 1998, the Commission began this proceeding to determine if an NVOCC (non-vessel operating common carrier) known as Refrigerated Container Carriers Pty. Limited (hereinafter sometimes referred to as RCC), located in Sydney, Australia, violated section 10(a)(1) of the Shipping Act of 1984 by knowingly and willfully obtaining ocean transportation at less than the lawfully applicable rates by means of an unjust or unfair device or means. If so, the Commission also wished to determine if RCC's tariff should be canceled or suspended, whether a cease and desist order should be issued, and whether civil penalties should be assessed and, if so, in what amount. The Commission's Bureau of Enforcement (BOE) assembled evidence which was admitted into the record. Such evidence consists of the Verified Statement of Mr. Michael A. Moneck, the Commission's Seattle Area Representative, with supporting documents, together with certain facts deemed admitted for failure of RCC to respond to BOE's requests for admissions, as provided by 46 C.F.R. 502.207(2)(ii) and 502.207(b). Respondent has not participated in the proceeding but service of the Commission's Order and various rulings and pleadings have been served on its registered agent in the United States.²

The overwhelming preponderance of the evidence submitted by BOE, which evidence has not been refuted or challenged by respondent, demonstrates that RCC did in fact knowingly and willfully obtain ocean transportation at less than the lawfully applicable rates filed in the tariff of a

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

²Although respondent has been declining service in Australia, service has been made on its U.S. agent for service of process, namely, The Roanoke Agency, Inc., located in Itasca, Illinois.

vessel-operating carrier known as Ocean Management, Inc. (hereinafter sometimes referred to as OMI). The unjust or unfair device or means used was a so-called "Slot Agreement," which RCC entered into with OMI and operated from February 14, 1994, through September 11, 1996. Pursuant to this "Slot Agreement," RCC made over 500 shipments under unfiled secret rates of which 50 have been studied in detail by witness Moneck. However, RCC is no longer acting as an NVOCC in U.S. trades. Its tariff has been canceled and its affairs are being wound up in Australia where a liquidator has been appointed under Australian law for the benefit of creditors. Thus, the only viable issues remaining are whether a civil penalty should be assessed and, if so, in what amount.

FINDINGS OF FACT

The following findings of fact are derived from BOE's proposed findings of fact which are based on the evidence. Record references are omitted in this decision but can be found in BOE's brief which is thorough, well-argued and well-researched.

A. Facts Regarding Refrigerated Container Carriers Pty. Limited

1. Refrigerated Container Carriers Pty. Limited was a non-vessel-operating common carrier ("NVOCC") that maintained an NVOCC tariff at the Commission from 1991 until February 12, 1999.

2. Refrigerated Container Carriers Pty. Limited furnished an NVOCC bond to the Commission; this bond was in effect between April 15, 1991 and February 10, 1999.

3. According to its NVOCC bond, Refrigerated Container Carriers Pty. Limited was located at Ste 77, 89 Jones Street, Ultimo, Sydney 2007 NSW Australia.

4. John Turner was the chief executive officer and director of Refrigerated Container Carriers Pty. Limited.

5. Refrigerated Container Carriers Pty. Limited, a New South Wales corporation, now is being wound up under the Corporations (New South Wales) Act - Corporations Law.

6. Pursuant to an order by the Supreme Court of New South Wales at Sydney, a liquidator has been appointed for Refrigerated Container Carriers Pty. Limited's corporate assets.

7. Refrigerated Container Carriers Pty. Limited's NVOCC bond was canceled on February 10, 1999.

8. Refrigerated Container Carriers Pty. Limited's NVOCC tariff was canceled on February 12, 1999.

9. Refrigerated Container Carriers Pty. Limited was not an ocean common carrier in the United States between February 14, 1994 and September 11, 1996.

10. Refrigerated Container Carriers, Pty. Limited is no longer in business as an NVOCC in the United States trades.

B. Findings of Fact for Section 10(a)(1) Issue

1. The "Slot Agreement"

11. On February 14, 1994, Refrigerated Container Carriers Pty. Limited and Ocean Management Inc. dba FESCO Australia North America Line ("FANAL") signed a document entitled "Slot Agreement."

12. The "Slot Agreement" contained no provisions regarding the slots to be provided to Refrigerated Container Carriers Pty. Limited.

13. Because Refrigerated Container Carriers Pty. Limited was not an ocean common carrier, it could not enter into a slot agreement in the United States trades.³

14. The first paragraph of the "Slot Agreement" states that it is an agreement for "the hire of container space" by Refrigerated Container Carriers Pty. Limited.

15. The "Slot Agreement" sets forth freight rates for ocean transportation by Ocean Management, Inc. of Refrigerated Container Carriers Pty. Limited's refrigerated and dry cargo in refrigerated containers between the United States and Australia.

16. When Refrigerated Container Carriers Pty. Limited signed the "Slot Agreement," it knew that the "Slot Agreement" set forth freight rates for ocean transportation by Ocean Management, Inc. of Refrigerated Container Carriers Pty. Limited's property in United States trades.

17. Refrigerated Container Carriers Pty. Limited willfully signed the "Slot Agreement."

18. The "Slot Agreement" stated that it would be "valid to 31st March 1996, subject to six months cancellation by either party."

19. The "Slot Agreement" was valid, in fact, until September 11, 1996.

20. The freight rates of the "Slot Agreement" were modified at various times by the parties between February 14, 1994 and September 11, 1996.

21. Refrigerated Container Carriers Pty. Limited agreed to various freight rate modifications to the "Slot Agreement" between February 14, 1994 and September 11, 1996.

22. The "Slot Agreement" did not require Refrigerated Container Carriers Pty. Limited to ship any property pursuant to the "Slot Agreement."

³The particular arrangement between RCC and OMI, which they termed "Slot Agreement," is not to be confused with slot agreements between ocean common carriers which are permitted under section 4 of the Shipping Act of 1984. As discussed later, the subject "Slot Agreement" is a peculiar arrangement that does not appear to be a service contract or a time-volume arrangement. Rather it appears to be a type of contract that sanctions secret rates, something prohibited under the 1984 Act.

23. The "Slot Agreement" did not impose any penalties or liquidated damages upon Refrigerated Container Carriers Pty. Limited if Refrigerated Container Carriers Pty. Limited chose not to ship any property pursuant to the "Slot Agreement."

24. The "Slot Agreement" was not a service contract.

2. The "Slot Agreement" Shipments

25. Refrigerated Container Carriers Pty. Limited shipped fifty (50) shipments pursuant to the "Slot Agreement," which were examined in detail.

26. Refrigerated Container Carriers Pty. Limited provided BOE with copies of the Ocean Management, Inc. bills of lading for these fifty shipments.

27. The shipping documentation furnished by Refrigerated Container Carriers Pty. Limited was reviewed by the Commission's Seattle Area Representative Michael A. Moneck.

28. Mr. Moneck has served in an investigative capacity with the Commission since June 1990 with the exception of three months in 1996.

29. Mr. Moneck reviewed the shipments to determine whether Refrigerated Container Carriers Pty. Limited obtained transportation at less than the applicable rates or charges.

30. The bills of lading identify the amount of ocean freight paid by Refrigerated Container Carriers Pty. Limited.

31. The rates and charges set forth in Ocean Management, Inc.'s tariff were the applicable rates and charges for Refrigerated Container Carriers Pty. Limited's fifty shipments.

a. Shipments from United States to Australia and New Zealand

32. Six shipments of frozen green beans from Seattle, WA to Sydney/Melbourne/Brisbane, Australia were rated by Mr. Moneck under Ocean Management, Inc.'s tariff line item ("TLI") No. 9900-00-3510-0002, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between March 15, 1994 and May 27, 1998 in Ocean Management, Inc.'s Automated Tariff Filing and Information System ("ATFI") Tariff No. 0125 12-001 and was applicable to forty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

33. Six shipments of frozen tortillas from Long Beach/Los Angeles, CA to Brisbane/Melbourne, Australia were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-3510-0005, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between June 24, 1994 and November 30, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 0125 12-001 and was applicable to twenty-foot containers of Mexican Foodstuffs moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

34. Two shipments of frozen corn from Seattle, WA to Sydney, Australia were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-3510-0001, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between May 12, 1995 and June 11, 1995 in Ocean Management, Inc.'s ATFI Tariff No. 012512-001 and was applicable to twenty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

35. One shipment of frozen corn from Seattle, WA to Melbourne, Australia was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-35 1 O-0001, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between June 11, 1995 and May 27, 1998 in Ocean

Management, Inc.'s ATFI Tariff No. 012512-001 and was applicable to twenty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

a 36. Two shipments of frozen squid from Long Beach, CA to Sydney, Australia were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-35 10-0001, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between June 11, 1995 and May 27, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 012512-001 and was applicable to twenty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

37. Two shipments of frozen potatoes from Seattle, WA to Auckland, New Zealand were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 0000-00-1000-0007, "Cargo, N.O.S." According to Mr. Moneck, this rate was effective between March 15, 1994 and October 6, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 0125 12-001 and was applicable to the weight/measure of cargo moving on an Ocean Port/Ocean Port basis from the United States' Pacific Coast Ports to New Zealand Ports.

38. A shipment of frozen green zucchini from Richmond, CA to Auckland, NZ was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-35 10-0034, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between May 15, 1995 and June 28, 1996 in Ocean Management, Inc.'s ATFI Tariff No. 012512-001 and was applicable to twenty-foot containers moving on a CY/CY basis from Richmond, CA to Auckland, NZ.

39. A shipment of frozen orange juice from Los Angeles, CA to Auckland, NZ was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 0000-00-1000-0007, "Cargo, N.O.S." According to Mr. Moneck, this rate was effective between March 15, 1994 and October 6, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 0125 12-00 1 and was applicable to the weight/measure

of cargo moving on an Ocean Port/Ocean Port basis from the United States' Pacific Coast Ports to New Zealand Ports.

40. A shipment of garlic from Los Angeles, CA to Sydney, Australia was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-3510-0001, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between June 11, 1995 and May 27, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 0125 12-001 and was applicable to twenty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

41. A shipment of candy from Seattle, WA to Sydney, Australia was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 9900-00-35 10-0027, "Foodstuffs, N.O.S." According to Mr. Moneck, this rate was effective between March 22, 1995 and November 30, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 012512-001 and was applicable to twenty-foot containers of confectionary moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

42. A shipment of rice from Richmond, CA to Sydney, Australia was rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 1000-00-7100-0003, "Rice, N.O.S." According to Mr. Moneck, this rate was effective between May 19, 1995 and April 17, 1997 in Ocean Management, Inc.'s ATFI Tariff No. 0 125 12-00 1 and was applicable to forty-foot containers moving on a CY/CY basis from the United States' Pacific Coast Ports to Australia Ports.

43. Two shipments of frozen green beans from Woodburn, OR (Door) to Melbourne/Sydney, Australia were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 0000-00-1000-0005, "Cargo, N.O.S." According to Mr. Moneck, this rate was effective between March 15, 1994 and October 6, 1998 in Ocean Management, Inc.'s ATFI Tariff No. 012512-001 and was

applicable to the weight/measure of cargo moving on a Door/Ocean Port basis from the United States' Pacific Coast Ports to Australia Ports.

b. Shipments from Australia to United States

44. Seventeen shipments of frozen beef from Melbourne/Sydney, Australia to Seattle, WA/Long Beach, CA/Los Angeles, CA/Tacoma, WA were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 1600-00-5110-0003, "Meat, Frozen, N.O.S." According to Mr. Moneck, this rate was effective between January 1, 1995 and April 17, 1997 in Ocean Management, Inc.'s ATFI Tariff No. 012512-002 and was applicable to twenty-foot containers moving on a CY/CY basis from Australia Base Ports to the United States' West Coast Ports.

45. Seven shipments of frozen beef from Melbourne, Australia to Tacoma, WA/ Los Angeles, CA were rated by Mr. Moneck under Ocean Management, Inc.'s TLI No. 1600-00-51 10-0002, "Meat, Frozen, N.O.S." According to Mr. Moneck, this rate was effective between October 18, 1994 and December 3 1, 1994 in Ocean Management, Inc.'s ATFI Tariff No. 012512-002 and was applicable to twenty-foot containers moving on a CY/CY basis from Australia Base Ports to the United States' West Coast Ports.

46. For Refrigerated Container Carriers Pty. Limited's "Slot Agreement" shipments, Mr. Moneck checked the Ocean Management, Inc. tariffs generally to confirm that Ocean Management, Inc. published no rates which were lower than those rates applied by Mr. Moneck.

47. Mr. Moneck compiled a table of calculations which reflects, by shipment, both the ocean freight paid by Refrigerated Container Carriers Pty. Limited and the ocean freight that would have been paid if the shipment had been rated in accordance with Ocean Management, Inc.'s tariffs.

48. According to Mr. Moneck's review of the fifty Refrigerated Container Carriers Pty. Limited shipments, Refrigerated Container Carriers Pty. Limited did not pay the ocean freight in accordance with the rates and charges set forth in Ocean Management, Inc.'s ATFI Tariff No. 0125 12-001, "Outbound Aust./New Zealand Tariff," and Ocean Management, Inc.'s ATFI Tariff No. 012512-002, "Northbound Australia/New Zealand Tariff."

49. For the fifty shipments, Refrigerated Container Carriers Pty. Limited paid ocean freight pursuant to the "Slot Agreement" which was less than the rates or charges set forth in Ocean Management, Inc.'s tariffs.

50. Mr. Moneck determined that the total undercharges resulting from Refrigerated Container Carriers Pty. Limited's use of the "Slot Agreement" were \$577,307.57 in U.S. dollars and an additional \$10,925.70 in Australian dollars for the 50 shipments cited.

51. Refrigerated Container Carriers Pty. Limited persistently failed to inform itself for more than two years and for hundreds of shipments as to whether the ocean freight rates that it was paying had been filed at the Commission and had become effective.

52. In utilizing the "Slot Agreement" for more than two years and for hundreds of shipments, Refrigerated Container Carriers Pty. Limited's actions demonstrate a pattern of indifference to the requirements of regulatory law.

53. Refrigerated Container Carriers Pty. Limited's conduct demonstrates a careless disregard for whether or not it had the right to so act under the 1984 Act.

54. Ocean Management, Inc.'s vessel voyage manifests and sample bills of lading demonstrated that the "Slot Agreement" rates were being utilized by Refrigerated Container Carriers Pty. Limited for more than five hundred shipments between February 14, 1994 and September 11, 1996.

55. As an NVOCC, Refrigerated Container Carriers Pty. Limited knows that shippers must pay the ocean freight rates which have been filed at the Commission and have become effective.

DISCUSSION AND CONCLUSIONS

BOE persuasively argues on the basis of the evidence and case law that RCC has violated section 10(a)(1) of the Act by entering into a secret "Slot Agreement" by which it enjoyed special, lower rates that were not made public for over 500 shipments that moved during the period February 14, 1994 to September 11, 1996. Furthermore, the evidence shows that for 50 shipments, which were studied in depth, RCC underpaid the vessel-operating carrier that handled the shipments by \$577,307.57. The evidence presented by BOE shows, moreover, that this "Slot Agreement" does not qualify either as a service contract or as a time-volume arrangement because there is no cargo or service commitment that would make the "Slot Agreement" a service contract within the meaning of section 8(c) of the 1984 Act nor is there any time or volume term or requirement that could make the arrangement a time-volume one under section 8(b) of the Act. Even if the peculiar arrangement were a service contract or a time-volume arrangement, however, it would have had to be filed by the vessel-operating carrier but it was not.⁴ Consequently, the peculiar arrangement which RCC and the vessel-operating carrier called a "Slot Agreement" is nothing more than a type of working arrangement by which RCC would enjoy special lower rates available to no one else and known only to RCC and the vessel-operating carrier. This arrangement certainly did not constitute a true slot agreement by which two ocean carriers, i.e., carriers operating vessels, would agree to share vessel

⁴There is nothing unlawful about a carrier's agreeing with a shipper to charge any particular rates for future shipments. However, the agreed-upon rates must be filed in the carrier's tariff. See *Heavy Lift Practices and Charges*, 21 F.M.C. 637, 647-650 (1979).

space, an agreement not open to an NVOCC like RCC, as BOE correctly argues. The next questions are whether this arrangement constituted the type of “unjust or unfair device or means” that section 1 O(a)(1) forbids and whether RCC’s conduct was “knowing and willful” within the meaning of section 10(a)(l). BOE argues in the affirmative on both questions and I agree.

Section 10(a)(1) of the 1984 Act, 46 U.S.C. app. sec. 1709(a)(l), provides:

(a) No person may-

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

In the instant case the evidence does not show that RCC misdescribed the cargoes it shipped via OMI under the “Slot Agreement.” If so, such conduct would obviously violate the statute. See, e.g., *American President Lines, Ltd. v. Cyprus Mines Corp.*, 26 S.R.R. 1227, 1234 (1994). Rather, the record shows that by means of the special arrangement with OMI, the vessel-operating carrier, RCC was able to conceal from other shippers what rates RCC was actually paying. This element of concealment was long ago established as constituting the essence of an “unjust or unfair device or means” with respect to a vessel-operating carrier’s failure to charge its tiled rates. Thus, in *Prince Line, Ltd. v. American Paper Products, Inc.*, 45 F.2d. 242, affirmed, 55 F.2d 1053 (2d Cir. 1932), the Court, speaking through Judge Learned Hand, held that an arrangement between a carrier and shipper by which the shipper would enjoy rates other than those normally charged by the carrier violated the carrier counterpart to section 1 O(a)(1) of the 1984 Act, namely, section 16 Second of the Shipping Act, 1916, which prohibited carriers from allowing any shipper to obtain ocean transportation at less than the regularly applicable rates by means of an “unjust or unfair device or

means.” Judge Hand had no difficulty in holding that the arrangement was an “unjust or unfair device or means” prohibited by the 1916 Act. In this regard he stated (55 F.2d at 1055):

It is conceded that the billing was to conceal the contents from the company’s [i.e., the shipper’s] competitors, and it thus facilitated the preference which had been conceded. This was an “unfair device or means,” for it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute to maintain.

Judge Hand also pointed out the fact that secret arrangements and concealment of the rates paid by one shipper from other shippers went to the heart of the 1916 Act’s prohibitions against “unfair or unjust devices or means.” In this regard he stated (*Id.*):

The law did not forbid all concessions to a shipper; apparently it assumed that if these were above board, and known or ascertainable by competitors, the resulting jealousies and pressure upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by any concealment, and its command in that event was as absolute as though it had been unconditional.

Since the court’s decision in *Prince Line, Ltd.*, which was issued in 1932, Congress expanded the prohibitions against secret arrangements so as to include shippers as well as carriers as the prohibited parties. Thus, in 1936, Congress extended the prohibitions set forth in section 16 Second so as to cover shippers, enacting section 16, initial paragraph, of the 1916 Act, which later became section 10(a)(1) of the 1984 Act. See discussion in *China Ocean Shipping Co. v. DMV Ridgeview, Inc.*, 26 S.R.R. 50, 53 (ALJ), F.M.C. notice of finality, December 23, 1991, reconsideration denied, 26 S.R.R. 200 (F.M.C. 1992); see also *Equality Plastics, Inc., et al.*, 17 F.M.C. 217, 226 (1973) (legislative purpose behind the 1936 amendment to section 16 of the 1916 Act was to extend coverage of the Act beyond carriers and to any party who participates in the transportation). Furthermore, in 1961, Congress enacted the law that required carriers to file their tariff rates with

the Commission. See P.L. 87-346, 75 Stat. 762, enacting section 18(b) of the 1916 Act, now section S(a) of the 1984 Act.

There is no doubt that the prohibitions against secret deals and secret rates that were first enacted in section 16 Second of the 1916 Act applicable to ocean carriers also apply against shippers, first pursuant to section 16, initial paragraph, of the 1916 Act, and now, section 10(a)(1) of the 1984 Act. *China Ocean Shipping Co. v. DMV Ridgeview, Inc.*, cited above; *Unpaid Freight Charges*, 26 S.R.R. 735 (1993). Section 10(a)(1), like its predecessor, is designed to protect honest shippers and carriers from dishonest, unscrupulous shippers who employ devices to give the shippers advantages over their honest shipper-competitors. Nor does the fact that a carrier might have colluded with the dishonest shipper excuse the shipper's violation. See *Hohenberg Brothers Company v. Federal Maritime Commission*, 316 F.2d 381, 384-385 (D.C. Cir. 1963), cited by BOE; *American President Lines, Ltd. v. Cyprus Mines Corp.*, cited above, 26 S.R.R. at 1233-1234; *United States of America, et al. v. Open Bulk Carriers, et al.*, 727 F.2d 1061, 1065-1066 (11th Cir. 1984) (no violation by shipper found because of lack of concealment); *Pacific Far East Lines-Alleged Rebates*, 11 F.M.C. 357, 365 (1968) (violation even if the shipper did not actively attempt to conceal the arrangement). The next question is whether it can be found that RCC acted "knowingly and willfully" within the meaning of section 1 O(a)(1).

As BOE correctly contends, the term "knowing and willful" has been examined in numerous Commission cases. (Opening Brief of BOE at 20.) In one of these many cases, it was noted that "knowing and willful" behavior has been found because of a respondent's "pattern of indifference" to the requirements of regulatory law, "persistent failure to inform" oneself, "intentional disregard," "wanton disregard," and purposeful and obstinate behavior akin to "gross negligence." See *Ever Freight International Ltd., et al.-Possible Violations of Sections 1 O(a)(1) and 1 O(b)(1) of the*

Shipping Act of 1984, 28 S.R.R. 329,333 (ALJ), administratively final, June 26, 1998. BOE also cites *Shipman International (Taiwan) Ltd.-Possible Violations of Sections 8, 1 O(a)(1) and 1 O(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 100, 109 (ALJ), administratively final, March 30, 1998, in which it was observed that a respondent could act “knowingly and willfully” within the meaning of the statute even if the respondent had no evil motive or malicious intent to break the law. In another of the many cases on the subject, *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), the Commission described a shipper’s conduct that could be held to constitute knowing and willful behavior under the relevant statute and the duty on the part of shippers to make “diligent inquiry.” Thus, the Commission stated:

We believe . . . that the phrase “knowingly and willfully” means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a nersistent failure to inform or even to attemnt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inauriv must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation. (Emphasis added.)

See also *In Re: Rubin, Rubin & Rubin Corp.*, 6 F.M.B. 235,239 (1961).

The Supreme Court has sanctioned similar interpretations of other regulatory statutes. See *United States v. Illinois Central Railroad*, 303 U.S. 239, 243 (1938) (defendant having free will intentionally disregards statute dealing with prompt weighing of transported cattle or is plainly indifferent to its requirements); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-129 (1985) (must show reckless disregard as to whether conduct violated the Age Discrimination in Employment Act (ADEA)); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614-617 (1993) (knowledge or reckless-disregard standard under the ADEA).

BOE argues persuasively that RCC knowingly and willfully obtained transportation under lower rates than those lawfully applicable and that it voluntarily signed the “Slot Agreement” with OMI knowing full well that it was getting vessel space at particular rates and that RCC was not even required to ship via OMI under the “Slot Agreement” but did so anyway for over two years. It is difficult, if not impossible, to find that this persistent conduct by RCC, marked by indifference and disregard of U.S. law and a total lack of any inquiry, much less diligent inquiry, does not add up to a violation of section 10(a)(1) of the 1984 Act. This lack of concern for the requirements of the 1984 Act is especially marked because RCC itself was an NVOCC who had to obtain a bond and file a tariff and did so from 1991 to February 1999. If RCC knew enough to comply with the 1984 Act in its carrier capacity, as it apparently did for almost eight years, what possible excuse can it have for ignoring totally the requirement that it pay only rates tiled in OMI’s tariff! Although not necessary to find intent or knowledge that it was violating the 1984 Act under the reckless-disregard or pattern-of-indifference standards used by the Commission in past cases, such conduct could arguably constitute deliberate and purposeful violation of the 1984 Act, especially when it was in RCC’s obvious business interests to cut its transportation costs by entering into a secret agreement, such as the “Slot Agreement.” Without doubt, therefore, RCC has violated section 10(a)(1) of the Act. However, because RCC has ceased operations in U.S. trades and its tariff has been cancelled, and BOE is not asking for a cease and desist order under these circumstances, the only remaining issues are whether to assess civil penalties and, if so, in what amount.

The Question of Civil Penalties

BOE recognizes that before the Commission determines whether to assess civil penalties and in what amounts, section 13(c) of the 1984 Act mandates certain considerations of an equitable nature. Thus, section 13(c) of the 1984 Act states in pertinent part:

In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed, and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

After considering the various statutory factors set forth above, BOE concludes that a “significant civil penalty should be assessed against Refrigerated Container Carriers Pty. Limited for violating the 1984 Act.” (Opening Brief of BOE at 23.) BOE emphasizes the egregious nature of RCC’s violations because RCC disregarded U.S. law and made over 500 shipments over two years’ time under secret rates, although, as an NVOCC, it knew or should have known that paying unfiled tariff rates constituted violations of the 1984 Act. BOE emphasizes the need for the Commission to deter other NVOCCs from committing similar violations. The only mitigating factors that BOE acknowledges are the lack of any history of prior offenses by RCC. BOE does not disregard the fact that RCC is no longer operating in U.S. trades and is in the hands of a liquidator in Australia, thus affecting its ability to pay any civil penalty. However, BOE argues that ability to pay is only one factor to be considered and need not outweigh all other factors, that BOE has presented such evidence on the question as it was able, considering RCC’s total lack of participation, and that the record at least shows that RCC had a bond amounting to \$50,000 that is available under law to pay a civil penalty. BOE cites a number of relatively recent Commission cases in which

foreign-based or non-participating NVOCCs have been assessed maximum civil penalties allowed by law under the facts of each of the cases, and in which evidence of the respondents' ability to pay was scant because the respondents declined to cooperate with BOE during the course of the proceedings. For the reasons explained below, I conclude that a civil penalty in the maximum allowed by law should be assessed against RCC on the basis of the discrete violations shown by the evidence.

BOE has had to deal with the practical problem of obtaining evidence as required by section 13(c) of the Act when respondents are located overseas, do not cooperate, and, indeed, ignore Commission proceedings altogether. The particular problem that has arisen concerns the fact that the *court* in *Merritt v. United States*, 960 F.2d 15 (2d Cir. 1992) reversed a Commission decision because the Commission had failed to seek out and adduce evidence concerning one of the factors that the statute required the Commission to consider before fixing a civil penalty, namely, a respondent's ability to pay. The practical problem not answered by the *court* in *Merritt* is how the Commission, through BOE, is supposed to obtain and develop such evidence when respondents, particularly overseas respondents, refuse to cooperate and, in effect, boycott Commission proceedings. To find that any respondent who so behaves should be relieved of a meaningful civil penalty because of BOE's inability to obtain better evidence would be to reward such delinquent respondents and also to elevate one factor, respondent's ability to pay, above all the others set forth in the statute. Such a result would be intolerable and would run counter to Congress's attempts to augment the Commission's authority to enforce the Shipping Act by giving the Commission authority, which it had not had previously, to fix civil penalties and to deter violations of the Shipping Act effectively. For a discussion of Congress's attempts to encourage the Commission to enforce the Act effectively, see *Martyn Merritt, AMG Services, Inc., etc.*, 26 S.R.R. 1346, 1350

(I.D.), partially adopted, partially reversed on other grounds, 27 S.R.R. 142 (1995); same case, 26 S.R.R. 663 (1992) (Order on Remand); *Portman Square Ltd.-Possible Violations, Section IO(a)(1), Shipping Act of 1984*, 28 S.R.R. 80, 85-86 (1998).⁵

Another matter that must be considered is the fact that the Commission and BOE are expected to enforce the Act with limited resources and that nothing should be done to discourage enforcement efforts. Pursuant to the Commission's regulations, BOE attempts to avoid having to engage in formal docketed proceedings by making full use of the Commission's "compromise" authority, i.e., the authority to settle cases with respondents suspected of violating the Act by obtaining agreements to make payments in lieu of formal civil penalties that could be ordered at the conclusion of formal docketed proceedings. See 46 C.F.R. 502.601 - .605 (1998). Should the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed "compromise" discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings.

Innumerable formal proceedings involving NVOCCs who have violated the Act or, like RCC in the instant case, have totally disregarded BOE and the formal proceeding, maximum civil

⁵The ability-to-pay factor is only one of several set forth in the statute and care must be taken not to over-emphasize its importance to the detriment of the other factors and, most importantly, to the detriment of the main congressional purpose of deterring future violations. Obviously ability to pay assumes importance when dealing with a well-financed company because a relatively small penalty may have little effect on such a company. On the other hand, a massive penalty assessed against an impecunious or struggling company could drive such company out of U.S. trades. The latter effect is academic in the instant case because RCC has already voluntarily withdrawn from U.S. trades. Incidentally, in one case the Commission assessed maximum penalties well over \$1 million against two defunct companies. See *Arctic Gulf Marine, Inc*, 24 S.R.R. 159 (1987).

penalties have been assessed based upon particular discrete violations shown by the evidence and the *Merritt* problem has been addressed in a sensible manner, with the Commission recognizing that the *Merritt* court did not require the Commission to elevate the one factor, ability to pay, so as to nullify all the others listed by the statute. See discussion in *Ever Freight Int'l Ltd. et al.-Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 329, 334-335 (1998); *Portman Square Ltd.-Possible Violations, Section 1 O(a)(1), Shipping Act of 1984*, cited above, 28 S.R.R. at 85-86, and cases cited therein, especially *Alex Parsinia d/b/a Pacific Int 'I Shipping and Cargo Express*, 27 S.R.R. 1335, 1339-1342 (1997); *Comm-Sino Ltd.-Possible Violations of Sections 1 O(a)(1) and 1 O(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 1210 (I.D.), administratively final, May 21, 1997; *Best Freight International Ltd., et al.-Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 447 (1998); *Ever Freight International Ltd., et al.*, cited above, 28 S.R.R. 329; Docket No. 98-16 - *Eastern Mediterranean Shipping Corp., etc.*, Initial Decision, Feb. 3, 1999, 28 S.R.R. _____, administratively final, March 16, 1999.

As these cases indicate, all that is required is that BOE make reasonable efforts to obtain evidence on the question, that respondents likewise make some good-faith efforts themselves to explain their financial situations, and that the Commission consider all the evidence on the question. Considering RCC's total refusal to participate in the proceeding I find that BOE has acted reasonably in attempting to develop the evidence in the face of this respondent's apparent disdain for and disregard of this proceeding.⁶ Consequently, following precedent established in the cases cited above, I conclude that RCC should be and is assessed the maximum civil penalty allowed by law

⁶As is often the case in these NVOCC cases, the NVOCC has no history of prior offenses, as BOE acknowledges. However this mitigating factor is more than offset by the years of repeated violations by the respondent NVOCC which, as discussed above, were knowing and willful. There are therefore virtually no mitigating factors that I could consider, and thanks to RCC's decision to ignore the proceeding, RCC has offered nothing in its defense.

with regard to the 50 discrete violations shown by the evidence, namely, \$1,250,000 (50 times \$25,000, the maximum allowable for knowing and willful violations occurring before November 7, 1996, as these 50 did).⁷ As provided by section 13(c) of the 1984 Act, quoted above, the Commission is authorized to “compromise, modify, or remit, with or without conditions, any civil penalty.” Accordingly, although RCC has repeatedly declined to acknowledge this proceeding, the Commission’s regulations (46 C.F.R. 502.227) permit RCC to file exceptions to this Initial Decision and RCC will therefore have an opportunity to argue something to the Commission regarding this penalty if, as appears unlikely, RCC wishes to do so.



Norman D. Kline
Administrative Law Judge

Washington, D.C.
April 13, 1999

⁷The 50 violations occurred during the period February 14, 1994 to September 11, 1996, prior to the effective date of the Commission’s regulation raising civil penalties by 10-percent. See *Inflation Adjustment of Civil Monetary Penalties*, 27 S.R.R. 809 (1996).