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**ANDERSON INTERNATIONAL TRANSPORT AND OWEN ANDERSON - POSSIBLE
VIOLATIONS OF SECTIONS 8(A) AND 19 OF THE SHIPPING ACT OF 1984**

ADDITIONAL BRIEFING OF THE BUREAU OF ENFORCEMENT

December 22, 2009

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PROCEDURAL HISTORY

On August 28, 2009, the Administrative Law Judge (“ALJ”) issued an initial decision in this case. Anderson International Transport and Owen Anderson Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, 31 S.R.R. 864 (2009). On September 8, 2009, the Bureau of Enforcement (“BOE”) requested an enlargement of time for filing exceptions to October 21, 2009. The request was granted by the Federal Maritime Commission (“Commission”) on September 9, 2009. On October 8, 2009, BOE filed a petition with the Commission to reopen the proceeding for the purpose of taking further evidence regarding Respondents Owen Anderson and Anderson International Transport’s (“Respondents”) ability to pay.¹ BOE also petitioned the Commission to remand the proceeding to the ALJ and to stay the due date for filing exceptions. BOE also requested that the Commission take official notice of the additional evidence.

On October 19, 2009, the Commission granted BOE’s petition in part, staying the due date for filing exceptions until 20 days after the Commission rules on BOE’s petition or, if the Commission reopens and remands to the ALJ, until 20 days after the ALJ issues an amended or supplemental decision addressing matters presented upon the reopening of the record. (Order granting Petition, in part, to Stay the Due Date for Filing Exceptions, October 19, 2009). On December 4, 2009, the Commission issued an order granting BOE’s petition to reopen the record and remanded the proceeding to the ALJ for the purpose of considering the additional evidence. (Order granting Petition to Reopen the Proceeding and for Remand, December 4, 2009). The

1. The evidence, including additional findings of fact and argument thereon, was contained in a document attached to BOE’s petition entitled “ADDITIONAL PROPOSED FINDINGS OF FACT, BRIEF AND APPENDIX OF THE BUREAU OF ENFORCEMENT”, hereinafter “BOE’s October 9, 2009 pleading”. The evidence consists of excerpts from pleadings filed between October 2008 and April 2009 in Owen Anderson’s bankruptcy proceeding in the United States Bankruptcy Court, Southern District of Texas.

Commission denied BOE's petition to take official notice of the additional evidence, holding that the matter was more appropriately addressed in the first instance by the ALJ. (Order granting Petition to Reopen the Proceeding and for Remand, December 4, 2009, Page 8).

On December 7, 2009, the ALJ issued a memorandum and procedural order on remand for determination of civil penalty, granting BOE's petition for official notice of the records filed in Respondent Owen Anderson's bankruptcy proceeding and included in BOE's October 9, 2009 filing. (Memorandum and Procedural Order on Remand for Determination of Civil Penalty, December 7, 2009). The procedural order also set forth a briefing schedule, ordering BOE to file any proposed facts and additional argument to supplement its October 9, 2009, pleading by December 21, 2009;² ordering Respondents to file any response by January 8, 2010; and giving BOE until January 15, 2010, to file its reply to Respondents' response. BOE files the following additional argument which addresses Respondents' ability to pay and the other factors contained in section 13(c) of the Shipping Act ("the Act") governing imposition of civil penalties.

Argument

1. Imposition of Civil Penalties against Respondents

In his initial decision, the ALJ found that Respondents knowingly and willfully committed twenty-two violations of Section 19(a) and 19(b) of the Act by operating as an ocean freight forwarder without obtaining a license from the Commission and by operating as an ocean transportation intermediary in the United States foreign trades without providing proof of financial responsibility in the form of surety bonds.³ (31 S.R.R. at 919). A person is subject to a

2. In his December 7, 2009, procedural order, the ALJ indicated that he will consider BOE's October 9, 2009 pleading when considering the question of assessing a civil penalty. Due to the weather related closure of the federal government on December 21, 2009, BOE filed its Additional Briefing on December 22, 2009.

3. The ALJ found that, in violating Section 19(a) and (b) of the Act, Respondents were operating as an ocean freight forwarder rather, as argued by BOE, than as a non-vessel-operating common carrier. ("NVOCC"). (31 S.R.R. at 919). BOE believes that, whether Respondents are eventually found to have operated as an NVOCC or as an ocean

civil penalty of up to \$30,000 for each violation knowingly and willfully committed. Section 13(a) of the Act, 46 U.S.C. § 41107(a). Section 13(c) of the 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).⁴ No one statutory factor is to be over-emphasized. Refrigerated Container Carriers Pty. Ltd. – Possible Violations, 28 S.R.R. 799, 805 (I.D. 1999).

2. Establishing the Appropriate Civil Penalty

As noted by the Commission,

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, 1984):

...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 objective 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.)

freight forwarder in violation of Sections 19(a) and (b), its recommendation for the maximum civil penalty, discussed further below, is still appropriate.

4. To the extent that BOE may have stated otherwise in its pleadings filed in this proceeding, BOE acknowledges that under Merritt, it bears the burden of proof in assessing a civil penalty under Section 13(c).

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). The Commission has also stated that:

the fixing of a particular amount of civil penalty is a most difficult thing to do. The Commission must consider and weigh numerous factors set forth in section 13(a) of the 1984 Act and then quantify them into a precise number. The process is not scientifically accurate and involves judgment that is subject to criticism and second guessing....Nevertheless, the finding is committed to the sound discretion of the agency and must be made. Alex Parsinia d/b/a Pacific International Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (ALJ 1997).

The application of the factors set forth in section 13(c) of the Act, as discussed in detail below, to Respondents' conduct, supports a conclusion that imposition of the maximum civil penalty⁵ for each violation is appropriate.

a. Nature, circumstances, extent and gravity of the violations

The ALJ determined that Respondents acted in a manner that was knowing and willful. (31 S.R.R. at 923). This determination was based on the evidence in the record that Mr. Anderson was counseled personally by representatives of the Commission regarding the requirements of the 1984 Act in 1997 and again in 2006 and that Mr. Anderson indicated on several occasions that he was aware of the requirements of the Act. (See BOE PFF 174; PFF 176-180). Respondents knew that their conduct was in violation of the Shipping Act - a fact that makes the violations more egregious.

The shipper customers of Respondents were generally inexperienced and vulnerable.⁶

Not only were Respondents operating in violation of the Shipping Act but they were the subject

5. In its October 9, 2009, pleading, BOE recommended that the maximum civil penalty of \$30,000 per violation be imposed.

6. In the Initial Decision in this case, 31 S.R.R. at 873, and in the Initial Decision in Mateo Shipping Corp. and Julio Mateo-Possible Violations of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520, 31 S.R.R. 830, 836, n.3 (2009), the ALJ referenced BOE's earlier statement that "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," finding that it applied to the facts in both cases.

of multiple complaints. The record shows that three of the shipments which the ALJ found were violations generated complaints to the Commission, the Better Business Bureau and the Texas Attorney General. Vanessa Server, an employee of Two Trees Products Company, filed a complaint with the Better Business Bureau on June 2, 2005, alleging that after paying Respondent Anderson International Transport, Owen Anderson failed to provide the appropriate paperwork to allow the shipment to be released from the port. (FF 48; BOE App. 30).⁷ On February 23, 2005, Dirk Manuel filed a complaint with the Better Business Bureau of Metropolitan Houston, detailing the additional charges he incurred to transport his household goods from Antwerp to his home in Belgium, after already paying Respondents for this service. (BOE PFF 55 citing BOE App. 8, Page 000205, 000206; FF 104; FF 109). Lynn and Alex Watts filed complaints against Respondents with the Consumer Protection Division of the Texas Attorney General and the Better Business Bureau of Houston, Texas, detailing the problems with their shipment. (FF 228; BOE App. 434-464, 467-468). In their complaint with the Texas Attorney General, Alex and Lynn Watts state that respondent Owen Anderson increased the freight charges three days before their goods were to leave the country, their goods incurred additional storage charges in Brisbane because respondent Owen Anderson avoided telephone calls seeking to resolve the situation, and various other actions by Respondents that resulted in an increase of the Watts' costs from the original quote of \$1,650.00 to \$8,800.00 (FF 229; BOE App. 505; BOE App. 463-464). The nature, circumstances, extent and gravity of the violations justify imposition of the maximum civil penalty against Respondents.

7. BOE App. refers to the Appendix submitted with BOE's Proposed Findings of Fact and Conclusions of Law. PFF refers to BOE's Revised Proposed Findings of Fact. FF refers to the Findings of Fact and Conclusions of Law contained in the initial decision. APFF refers to BOE's Additional Proposed Findings of Fact.

b. Degree of Culpability

Respondents have a high degree of culpability. Mr. Anderson was counseled personally by representatives of the Commission regarding the requirements of the 1984 Act in 1997 and again in 2006 and Mr. Anderson indicated on several occasions that he was aware of the requirements of the Act. (BOE PFF 174; PFF 176-180). After the initiation of this proceeding, the Commission received two complaints about Owen Anderson's newly established company, AIT International, LLC. (FF 17-20). Mediterranean Shipping Company complained to the Commission's Bureau of Certification and Licensing about two checks written by AIT International LLC and signed by Owen Anderson for payment of ocean freight which were returned for non-sufficient funds. (FF 375-379; PFF 159; BOE App. 687-706). Owen Anderson, operating AIT International, LLC was also the subject of a complaint by Angela and Jason Temple regarding a move of household goods from Texas to Switzerland. AIT International, LLC did not pay the ocean freight for the shipment of the Temple's household goods and the container was held at Genoa, the destination port. Additionally, Owen Anderson did not make any arrangements for the port to door leg of the shipment from Genoa to Lugano and the Temples paid an additional amount to transport the goods. (FF 380-387; BOE App. 707-733). Owen Anderson, Anderson International Transport and AIT International, LLC were also the subject of a suit in Texas state court alleging that they had failed to properly complete a shipment of household goods from Texas to Aruba, for which the shipper, Monique Wolfe, paid \$30,000.00. The shipper obtained a default judgment against Anderson International Transport and AIT International, LLC. (APFF 7). Owen Anderson, through Anderson International Transport, originated twenty-two ocean export shipments during the period January 5, 2005

through May, 2007. (FF 42, 46, 63, 64, 74, 75, 85, 86, 98, 100, 112, 126, 129, 143, 145, 159, 172, 173, 202, 204, 212, 222, 226, 227, 239, 245, 246, 261, 264, 278, 280, 288, 294, 303, 305, 312, 314). The shippers who entrusted their household goods had no real recourse against Respondents as they provided no bonding protections to any of their customers and, since Respondents were not licensed, Respondents' customers were not protected by the licensing requirements of the Act. (FF 12; FF 13; BOE App. 13). The degree of culpability of Respondents supports imposition of the maximum civil penalty.

c. History of Prior Offenses

Respondents have no history of prior Shipping Act violations.⁸

d. Ability to Pay

As discussed in greater detail in BOE's October 9, 2009 pleading, it is reasonable to conclude that Owen Anderson's annualized income is between \$37,000.00 and \$44,000.00. (APFF 2; 3; 10; 13; 15). Excluding any claim by the Commission and including the suit filed by Monique Wolfe, the bankruptcy filings show that Owen Anderson has claims and debts against him of approximately \$150,000.00 to \$270,000.00, some of which are medical and legal bills. (APFF 2; 6; 8). Monique Wolfe has obtained a default judgment against Anderson International Transport in excess of \$36,000.00 (APFF 6; BOE App. 37). Based on the evidence in the record, it is reasonable to conclude that Respondents have a limited ability to pay a civil penalty.

A lack of ability to pay, however, does not preclude imposition of a civil penalty based on the other factors enumerated in section 13. Ability to pay is only one factor in determining the appropriate amount of a civil penalty. See Portman Square Ltd. – Possible Violations of

8. Although, prior to this proceeding, no violations have been found against Respondents, Respondent Owen Anderson has been counseled previously by representatives of the Commission regarding the requirements of the 1984 Act and his failure to comply with those requirements in 1997 and again in 2006. Owen Anderson indicated on several occasions that he was aware of the requirements of the Act. (See BOE PFF 174; PFF 176-180).

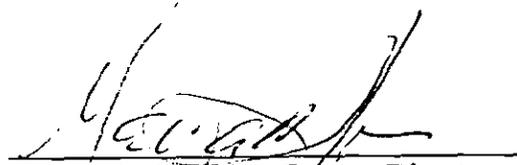
Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 86 (ALJ, 1998); Ever Freight Int'l Ltd. et al., 28 S.R.R. 329, 335 (1998, ALJ); Refrigerated Container Carriers Pty. Limited at 805 (Footnote 5). See also Pacific Champion Express Co., Ltd., 28 S.R.R. 1185, 1191 (1999, ALJ) (“[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress’ efforts to augment the Commission’s authority to assess penalties so as to deter future violations.”)

e. Such Other Matters as Justice May Require

The record in this proceeding does not present any evidence to support mitigating the civil penalty against Respondents. The policies for deterrence and future compliance with the Commission’s regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. 46 C.F.R. § 502.603(b). Indeed, the Commission has held that the main Congressional purpose of imposing civil penalties is to deter future violations of the Act. Stallion Cargo, Inc.---Possible Violations of Section 10(a)(1) and (10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665, 681 (2001). The deterrent effect on both Respondents and others who, as Respondents did, might be inclined to establish a company and operate without obtaining a license and providing proof of financial responsibility justifies assessment of the maximum civil penalty.

3. Conclusion

As discussed above and as previously recommended, Respondents’ actions merit imposition of the maximum civil penalty of \$30,000.00 for each violation. Imposition of the maximum civil penalty will also send a strong message to other common carriers and serve as a deterrent to similar conduct.



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Federal Maritime Commission
December 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2009, a copy of the foregoing document has been served upon all the parties of record by Fedex.


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