

FEDERAL MARITIME COMMISSION

DOCKET NO. 06-06

**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**

**SUPPLEMENTAL BRIEF OF THE
BUREAU OF ENFORCEMENT
ON REMAND ISSUES**

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May 23, 2012

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ARGUMENT

Pursuant to the Order of Chief Administrative Law Judge Clay G. Guthridge (ALJ), served May 15, 2012 (May 15 Order), the Bureau of Enforcement (BOE) files this Supplemental Brief addressing the 3 issues recited in the Order and reproduced below. In the interest of brevity, BOE omits reference to the ALJ's introductory discussions prior to each issue:

1. **PERMISSIVE PRESUMPTION.** For the permissive presumption articulated in *Worldwide Relocations* to apply against Tober, the record must support a finding that Tober's "access or control of facts, evidence, or proof" about the NVOCC/ocean freight forwarder activities or status of the entities alleged to have operated as NVOCCs is superior to BOE's "access or control of facts, evidence, or proof" of those activities or status. *Worldwide Relocations, supra.*

BOE pretermits addressing whether superior access to facts is the only circumstance giving rise to application of the presumption inasmuch as Tober's access or control of the evidence was, in fact, superior to that of BOE. Tober, not BOE, was in privity with the intermediaries with which it transacted business. Tober, not BOE, routinely issued documents to these entities, received information and transmissions from them, and regularly communicated with them with respect to the shipments that they tendered to Tober. (See Brief, pp.11-16).

Significantly, the Commission made explicit in *Worldwide Relocations*,¹ that it is the responsibility of a dual status licensee, such as Tober, to keep and maintain shipping documents in a manner that clearly reflects its status and relationship of all parties to the transaction:

The dual NVOCC-OFF licensed entity has within its own power the ability to insulate itself from this concern by being clear in its shipping documents as to the status and relationship of all parties to the transportation transaction. If any question arises in a Commission proceeding, then the dual licensed NVOCC-OFF will be armed with sufficient re-buttal evidence and the presumption will not apply. Further, the dual NVOCC-OFF licensed entity should be reasonably diligent in its inquiry and investigation of the entities with which it conducts business. *Slip op.* at 18.

¹ *Worldwide Relocations, Inc., et al.-Possible Violations of the Shipping Act*, __ S.R.R. __ (FMC, Mar. 15, 2012).

Thus, the Commission recognized that the dual status licensee, *viz.*, Tober, by reason of its relationships with these entities is in the best position to secure and retain this information. Tober's failure to present evidence to rebut the presumption was a matter in its own control, as was the decision to do business with Worldwide Relocations, Tradewind, and Moving Services in the first instance.

2. RES JUDICATA/COLLATERAL ESTOPPEL. The issue, therefore, is whether legal authority permits the Commission to give "binding collateral effect" to the findings that the entities Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs, adopted by the Commission in *Worldwide Relocations*, in this proceeding against Tober, which was not party to *Worldwide Relocations*.

In framing this issue, the May 15 Order dwells on the doctrines of *res judicata* and collateral estoppel. (Pages 2-6). However, in urging that the findings in *Worldwide Relocations* "should be given binding collateral effect in the instant case", BOE did not rely on *res judicata* or collateral estoppel. BOE Brief, p. 8 (emphasis added). Rather, BOE's argument was premised on the fundamental principle of seeking adherence to the findings and conclusions of a superior tribunal, often labeled the "binding precedent rule" or, more generally, *stare decisis*.

The findings adopted in *Worldwide Relocations* that Worldwide Relocations, Tradewind, and Moving Services acted as NVOCCs with respect to 33 specified shipments constituted a final decision of the Commission. The same 33 shipments are now before the ALJ to ascertain Tober's role and legal responsibility in having accepted such shipments. Therefore, the Commission's conclusions of law are binding on the ALJ. *Cf. Reiser v. Residential Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must

follow decisions of the Supreme Court whether or not we agree with them, . . . so district judges must follow the decisions of this court whether or not they agree.”) (citations omitted); *U.S. v. Jacobs*, 955 F.2d 7, 9 (2nd Cir. 1992) (“The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it.”); and *Strickland v. U. S.*, 423 F.3d 1335, 1338, n.3 (C.A. Fed. 2005) (“ . . . a trial court may not disregard its reviewing court’s precedent.”).

That Tober was not a party to *Worldwide Relocations* is of no consequence, inasmuch as the *Worldwide* decision decided only the legal status of Worldwide Relocations, Tradewind and Moving Services, all of whom were parties properly before the Commission. The determination of the NVOCC status of these 3 entities was based on the identical facts and identical shipments now present in this proceeding. Tober had a full, fair and unrestricted opportunity herein to present facts addressing its own status and whether it knew, or should have known, that it was accepting cargo or transporting cargo for the account of untariffed or unbonded NVOCCs. Tober elected to make no showing thereon. As a result, there is no basis which would authorize departure from the Commission’s conclusions of law.

3. COMMISSION REMEDIES. The issue is what constitutes the “more complete array of Commission remedies” that comes into play when an entity is found to be an NVOCC rather than an ocean freight forwarder.”

The quoted language appears at the end of a paragraph addressing possible concerns over ability of licensed entities to establish the bona fides of their operation. (*Worldwide Relocations*, slip op. at 18). The language reflects the thinking of the majority of the Commission on what appears to be a hypothetical issue. It does not address any contention previously asserted by BOE or advanced in BOE’s Brief on Remand. Inasmuch as any opinion thereon would be pure

conjecture on BOE's part, BOE respectfully declines the ALJ's invitation to engage in such a speculative exercise.

Respectfully submitted,



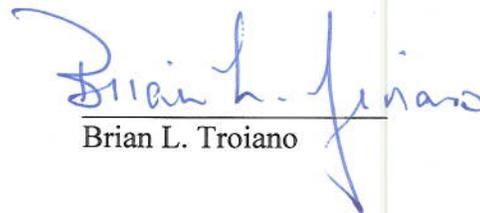
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2012, a copy of the foregoing **Supplemental Brief of the Bureau of Enforcement on Remand Issues** has been served upon all the parties of record listed below by first class mail.


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