

**FEDERAL MARITIME COMMISSION**

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**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**

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**EXCEPTIONS OF THE  
BUREAU OF ENFORCEMENT  
TO INITIAL DECISION ON REMAND**

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## TABLE OF CONTENTS

	<b><u>Page</u></b>
TABLE OF AUTHORITIES	iii
I. PROCEDURAL BACKGROUND	1
II. EXCEPTIONS	3
III. ARGUMENT	
A. Preliminary Statement	4
B. The ALJ erred in finding that the intermediary entities from which Tober accepted cargo were not NVOCCs	7
1. Worldwide Relocations, Tradewind Consulting, Moving Services	10
2. All In One Shipping, Inc. and Around The World Shipping, Inc.	14
3. EOM Shipping, Inc.	16
4. Lehigh Moving and Storage, Inc.	17
5. Infinity Moving and Storage, Inc.	18
6. Sea and Air International, Inc.	20
7. Car-Go-Ship.com	21
8. Access International/AVL Transport	22
C. The ALJ erred in concluding that the intermediaries were ocean freight forwarders	23
D. The ALJ erred in finding that Tober did not violate section 10(b)(11)	25
E. The ALJ erred in finding that most of Tober's violations of section 10(b)(2)(A) were not knowing and willful	28

F. The ALJ erred in failing to assess an adequate civil penalty	32
1. The regulatory structure for Shipping Act violations	33
2. The ALJ’s findings as to penalties are contrary to law	33
3. The ALJ failed to apply the Act’s enhanced penalty provisions	37
4. Penalties for the section 10(b)(11) violations	44
IV. CONCLUSION	45
CERTIFICATE OF SERVICE	46
EXHIBIT NO. 1	

## TABLE OF AUTHORITIES

<b><u>Court Decisions</u></b>	<b><u>Page</u></b>
<u>AgriStor Leasing v. Farrow</u> , 826 F.2d 732 (8th Cir. 1987).....	24
<u>County of Stanislaus v. Pac. Gas &amp; Electric</u> , 114 F.3d 858 (9 <sup>th</sup> Cir. 1997).....	35
<u>Landstar Express America v. Federal Maritime Commission</u> , 569 F.3d 493 (D.C.Cir. 2009).....	24
<u>Maislin v. Primary Steel, Inc.</u> , 497 U.S. 116 (1990).....	35
<u>Merritt v. United States</u> , 960 F.2d 15 (2 <sup>nd</sup> Cir. 1992).....	33
<u>Reiser v. Residential Corp.</u> , 380 F.3d 1027 (7 <sup>th</sup> Cir. 2004).....	12
<u>RSM v. Herbert</u> , 466 F.3d 316 (4 <sup>th</sup> Cir. 2006).....	26
<u>Strickland v. U.S.</u> , 423 F.3d 1335 (C.A. Fed. 2005).....	12
<u>United States v. Bailey</u> , 444 U.S. 394 (1980).....	26
<u>United States v. Illinois Central R. Co.</u> , 303 U.S. 239 (1938).....	25, 26
<u>U. S. v. Jacobs</u> , 955 F.2d 7 (2 <sup>nd</sup> Cir. 1992).....	12
<b><u>Administrative Decisions</u></b>	
<u>American President Lines, Ltd. v. Cyprus Mines Corp.</u> , 26 S.R.R. 969 (ALJ 1993).....	35
<u>Arctic Gulf Marine, Inc. v. Peninsula Shippers Association and Southbound Shippers, Inc.</u> , 24 S.R.R. 159 (1987).....	43
<u>Best Freight International Ltd.-Possible Violations</u> , 28 S.R.R. 447 (ALJ 1998).....	27
<u>Comm-Sino Ltd.-Possible Violations</u> , 27 S.R.R. 1201 (ALJ 1997).....	27
<u>EuroUSA Shipping, Inc., et al. - Possible Violations</u> , 31 S.R.R. 540 (FMC 2008).....	2
<u>EuroUSA Shipping, Inc., et al. - Possible Violations</u> , 31 S.R.R. 967 (ALJ 2009).....	2, 41

<u>EuroUSA Shipping, Inc., et al. - Possible Violations, 31 S.R.R. 1051 (ALJ 2009)</u> .....	2
<u>EuroUSA Shipping, Inc., et al.- Possible Violations, 31 S.R.R. 1131 (ALJ 2010)</u> .....	2, 36, 41
<u>EuroUSA Shipping, Inc., et al. - Possible Violations, 32 S.R.R. 578 (April 12, 2012)</u> .....	<i>passim</i>
<u>Ever Freight International Ltd., et al -- Possible Violations of the Shipping Act of 1984, 28 S.R.R. 329 (1998)</u> .....	27, 43
<u>Green Master International Freight Services, Ltd.- Possible Violations, 29 S.R.R. 1303(2003)</u> .....	40
<u>Hudson Shipping (Hong Kong) Ltd, d/b/a/ Hudson Express Lines - Possible Violations, 29 S.R.R. 1381 (ALJ 2004)</u> .....	40
<u>Kin Bridge Express, Inc. - Possible Violations, 28 S.R.R. 984 (ALJ 1999)</u> .....	43
<u>Martyn Merritt, AMG Services, Inc., 26 S.R.R. 663 (1992)</u> .....	38, 43
<u>Mateo Shipping Corp. - Possible Violations, 31 S.R.R. 830 (ALJ 2009)</u> .....	36, 40
<u>Non-Vessel-Operating Common Carrier Service Arrangements, 30 S.R.R. 557 (FMC 2004)</u> .....	31
<u>Pacific Champion Express Co., Ltd. – Possible Violations of §10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397 (FMC2000)</u> .....	26, 27, 31, 43
<u>Portman Square Ltd. – Possible Violations of the Shipping Act of 1984, 28 S.R.R. 80 (ALJ 1998)</u> .....	26, 42
<u>Revocation of Licenses, Provisional Licenses and Order to Discontinue Operations, 29 S.R.R. 193 (FMC 2001)</u> .....	30
<u>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 (FMC 2006)</u> .....	42, 45
<u>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 (FMC 2001)</u> .....	<i>passim</i>
<u>Trans-Ocean Pacific Forwarding, Inc.-Possible Violations, 27 S.R.R. 409 (ALJ 1995)</u> .....	25, 31, 32
<u>Transglobal Forwarding Co., Ltd.- Possible Violations, 29 S.R.R. 814 (ALJ 2002)</u> .....	40
<u>Universal Logistic Forwarding Co., Inc.-- Possible Violations, 29 S.R.R. 325 (ALJ, 2001), adopted and vacated in part, 29 S.R.R. 474</u> .....	45

Worldwide Relocations, Inc., et al. - Possible Violations, 32 S.R.R. 495 (FMC 2012).....*passim*

Worldwide Relocations, Inc., et al. - Possible Violations, 31 S.R.R. 1471 (ALJ 2010).....10, 19

**Rules and Regulations**

46 C.F.R. 502.160.....12  
46 C.F.R. 502.227.....1  
46 C.F.R. 502.227(a)(6).....7  
46 C.F.R. 502.603(b).....34, 43  
46 C.F.R. 505.3(b).....43  
46 C.F.R. 515.27.....1

**Statutes**

44 U.S.C. 1507.....30  
44 U.S.C. 1508.....30  
46 U.S.C. 40101.....35  
46 U.S.C. 40102(6).....4  
46 U.S.C. 40102(18).....18  
46 U.S.C. 40501.....1  
46 U.S.C. 40902.....1  
46 U.S.C. 41104(2)(A).....1  
46 U.S.C. 41104(11).....1, 7  
46 U.S.C. 41107(a).....33, 37  
46 U.S.C. 41109(a).....33  
46 U.S.C. 41109(b).....34  
Shipping Act, 1916.....35, 38  
Shipping Act of 1984, Section 3(6).....4  
Shipping Act of 1984, Section 8.....1, 25  
Shipping Act of 1984, Section 10(b)(2)(A).....*passim*  
Shipping Act of 1984, Section 10(b)(11).....*passim*  
Shipping Act, Section 13(c).....34, 39  
Shipping Act, Section 19(a) and (b).....1, 25

**Legislation**

H. Rep. No. 98-53, Part 1, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 167.....38

Pub. L. 98-237 (1984).....37

Pub. L. 105-258, Ocean Shipping Reform Act of 1998.....29

Pub. L. 109-304 (Oct. 6, 2006).....1

**Rulemakings**

49 FR 18874 (May 3, 1984).....42

63 FR 70368 (Dec. 21, 1998), Notice of Proposed Rulemaking, Carrier Automated Tariff Systems.....30

63 FR 70710 (Dec. 22, 1998), Notice of Proposed Rulemaking, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries.....29

64 FR 11156 (Mar. 8, 1999), Final Rule, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries.....30

64 FR 11218 (Feb. 26, 1999), Final Rule, Carrier Automated Tariff Systems.....30

65 FR 31130 (May 16, 2000), Advance Notice of Proposed Rulemaking Concerning Public Access to Carrier Automated Tariffs.....30

69 FR 63981 (Nov. 3, 2004), Notice of Proposed Rulemaking, NVOCC Service Arrangements.....31

76 FR 11351 (Mar. 2, 2011), NVOCC Negotiated Rate Arrangements.....36

**Miscellaneous**

Restatement (Third) of Agency, §1.01 (2006).....23, 24

Restatement (Third) of Agency, §§1.03, 3.01.....24

Pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.227, the Bureau of Enforcement (BOE) files its Exceptions to the Initial Decision on Remand served in this proceeding on December 31, 2012.<sup>1</sup> (Initial Decision on Remand or I.D.R.).

## **I. PROCEDURAL BACKGROUND**

This proceeding was instituted by an Order of Investigation and Hearing, served May 11, 2006, to determine: (1) whether respondents EuroUSA, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. (CI) violated section 10(b)(11) of the Shipping Act of 1984, 46 U.S.C. §41104(11), (the Shipping Act) and the Commission's regulations at 46 C.F.R. §515.27, by knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary (OTI) that did not have a tariff and a bond as required by sections 8 and 19 of the Shipping Act<sup>2</sup>, 46 U.S.C. §§40501 and 40902; and (2) whether Tober and other respondents violated section 10(b)(2)(A) of the Shipping Act, 46 U.S.C. §41104(2)(A), by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff. BOE was designated as a party to the proceeding.

Following discovery, Tober filed a motion for partial summary judgment on the section 10(b)(11) issue arguing that BOE could not establish that the OTIs that tendered shipments to Tober were non-vessel-operating-common carriers (NVOCCs) and therefore could not demonstrate that Tober knowingly and willfully accepted cargo in violation of the Shipping Act. BOE opposed the motion. In a Memorandum and Order served June 12, 2008, the ALJ granted

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<sup>1</sup> By Order served January 10, 2013, the date for filing exceptions was extended to March 20, 2013.

<sup>2</sup> The Shipping Act was reenacted as positive law and codified in Title 46 of the U.S. Code in Pub. Law 109-304, Oct. 6, 2006. In accordance with current Commission practice, the former section reference will be used herein.

the motion concluding that the evidence did not support a finding that any of the OTIs with which Tober did business acted as NVOCCs. On appeal by BOE, the Commission held that genuine issues of material fact existed which precluded a grant of summary judgment and remanded the matter with instructions to determine the common carrier status of the OTIs with which Tober did business and whether Tober accepted cargo knowingly and willfully from these entities. EuroUSA Shipping Inc., Tober Group, Inc., and Container Innovations, Inc.- Possible Violations, 31 S.R.R. 540, 542 (FMC 2008).

In an Initial Decision served October 9, 2009 (Tober Initial Decision or Tober ID), the ALJ found that Tober operated as a common carrier on 278 shipments that it accepted from fifteen intermediaries that did not publish tariffs or provide proof of financial responsibility in the form of surety bonds. EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc.- Possible Violations, 31 S.R.R. 967 (ALJ 2009).<sup>3</sup> However, he concluded that those intermediaries did not act as NVOCCs and therefore Tober did not violate section 10(b)(11) of the Shipping Act. The ALJ also found that Tober violated section 10(b)(2)(A) on the same 278 shipments by providing service in the liner trade that was not in accordance with the rates and charges in its published tariff. Notwithstanding these violations, the ALJ did not assess a civil penalty. 31 S.R.R. 1002.

BOE filed Exceptions on December 17, 2009, asserting that the ALJ erred in finding that Tober did not violate section 10(b)(11) of the Shipping Act; that Tober did not knowingly and willfully violate section 10(b)(2)(A); and in not assessing a civil penalty. Tober did not reply to the Exceptions.

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<sup>3</sup> The Tober Initial Decision addressed only respondent Tober inasmuch as the ALJ issued separate decisions with respect to EuroUSA and CI. The EuroUSA decision approved a settlement which provided, among other things, that EuroUSA was an NVOCC. 31 S.R.R. 1131 (ALJ, 2009). The CI decision found that Container Innovations was an NVOCC with respect to certain shipments and assessed the maximum civil penalty. 31 S.R.R. 1051 (ALJ, 2009).

In an Order served April 12, 2012, the Commission vacated the ALJ's finding that Tober did not violate section 10(b)(11), and remanded that issue for reconsideration in light of the Commission's holdings in Worldwide Relocations, Inc. – Possible Violations.<sup>4</sup> EuroUSA Shipping, Inc., et al. – Possible Violations, 32 S.R.R. 578, 582 (FMC, 2012). The Commission also vacated the ALJ's refusal to award civil penalties. It remanded that issue for determination of the proper amount of civil penalties in light of any section 10(b)(11) violations found to exist; a revised analysis of whether the tariff violations were willful and knowing; and consideration of BOE's evidence concerning the nature, circumstances, extent, and gravity of the violations. Id.

By Order served April 19, 2012, the ALJ directed BOE and Tober to file briefs addressing the issues raised by the Commission's remand. BOE filed its Brief on Remand on May 11, 2012. Tober did not file a brief or a reply to BOE. In an Order served May 15, 2012, the ALJ ordered BOE to file a supplemental brief addressing three specified issues and also directed Tober to file responsive briefs. BOE filed its Supplemental Brief on Remand Issues on May 23, 2012. Tober did not file any briefs.

On December 31, 2012, the ALJ issued an Initial Decision on Remand finding, as in his prior decisions, that Tober did not violate section 10(b)(11) of the Shipping Act because the intermediaries from which it accepted cargo were not shown to have acted as common carriers. Consequently, he dismissed those claims. The ALJ also concluded, as in his prior decision, that Tober violated section 10(b)(2)(A) by providing service that was not in accordance with the rates and charges contained in a published tariff, but that these violations were not knowing and willful. In the Initial Decision on Remand, the ALJ reaffirmed this conclusion for all but 77 violations committed after May 11, 2006, which, at the Commission's prodding, were found to

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<sup>4</sup> The Commission's decision in Worldwide Relocations, Inc., et al.-- Possible Violations of the Shipping Act, 32 S.R.R. 495 (Mar. 15, 2012) addressed, as pertinent, the use of presumptions and inferences in proving that an entity acts as an NVOCC, including the subsidiary consideration of assuming responsibility for transportation.

have been knowingly and willfully committed. Whereas no civil penalties were previously imposed, the Initial Decision on Remand assessed \$1,000 for each of the 202 violations committed before May 11, 2006, and \$3,000 for each of the 77 knowing and willful violations committed after that date.<sup>5</sup> BOE now files these Exceptions.

## **II. EXCEPTIONS**

BOE excepts to the ALJ's conclusion that Tober did not violate section 10(b)(11) of the Shipping Act and his subordinate findings that the intermediary entities from which Tober accepted cargo for ocean transportation in foreign commerce did not hold out as common carriers and/or assume responsibility for transportation by water of cargo between the United States and a foreign country for compensation within the meaning of section 3(6) of the Shipping Act, 46 U.S.C. §40102(6).<sup>6</sup> In reaching these conclusions, the ALJ failed to follow the Commission's guidance or apply the evidentiary standards set forth in Worldwide Relocations and simply reaffirmed the conclusions reached previously in his now-vacated Initial Decision.

BOE excepts also to the ALJ's determination that the 202 tariff violations prior to May 11, 2006, were not knowing and willful. In addition, BOE excepts to the amounts of the civil penalties imposed for all the violations found. The nominal penalties assessed fail to reflect the intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Shipping Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at a penalty amount appropriate to the gravity of the violation.

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<sup>5</sup> Although BOE presented evidence on 279 shipments, the prior initial decision discounted one shipment due to the absence of a bill of lading reducing the total to 278. On remand, the ALJ recognized the existence of that shipment returning the total to 279. (I.D.R., p.4, note 5).

<sup>6</sup> BOE submitted evidence addressing the common carrier status of 15 intermediaries. Subsequently, on remand, BOE requested that the evidence with respect to 4 of those entities (accounting for 24 shipments in the record) no longer be considered on the section 10(b)(11) claim, thereby leaving 11 entities for consideration. See BOE Brief on Remand, p. 4. BOE did not withdraw those shipments from consideration of the tariff violations.

### **III. ARGUMENT**

#### **A. Preliminary Statement**

For the third time, the ALJ has refused to find that any of the intermediary entities from which Tober accepted shipments were NVOCCs operating without a bond or tariff. Following two prior Commission decisions remanding the ALJ's rulings on this issue, his latest decision adhering to his prior views reflects an altogether disappointing obduracy to accept the Commission's guidance or follow its directives in the most recent remand. In vacating the ALJ's conclusion that Tober did not violate section 10(b)(11), the Commission instructed the ALJ to reconsider that issue "consistent with the Commission's decision in Worldwide Relocations." 32 S.R.R. at 582. Not only is the Initial Decision on Remand inconsistent therewith, it goes so far as to reject specific determinations reached by the Commission in Worldwide Relocations with respect to three intermediaries whose NVOCC status was addressed on a number of shipments identical to both proceedings.

The Commission in Worldwide Relocations acknowledged the reality that complete sets of shipping documents that provide the so-called "smoking gun" are not often available in an enforcement case. Addressing those documentary gaps, the Commission affirmed acceptable evidentiary standards, through the use of presumptions and inferences, to support findings that an entity acted as an NVOCC notwithstanding the absence of various documents for specific shipments. Importantly, the Commission observed that presumptions and inferences should be applied in a manner consistent with the policy objectives of the Shipping Act:

The Commission has a strong public policy interest in protecting consumers and the shipping public by ensuring that FMC-licensed common carriers, both VOCCs and NVOCCs, only conduct business with either beneficial cargo owners or FMC-licensed or registered OTIs. . . . This permissive presumption supports this objective. 32 S.R.R. at 505.

The Commission's remand thus cannot be read as an invitation to simply reissue the prior decision.

The use of presumptions and inferences expressly approved by the Commission in Worldwide Relocations is particularly appropriate here inasmuch as Tober had the opportunity over the course of this proceeding to present evidence rebutting the substantial evidence submitted by BOE, but elected not to oppose it. That choice should have been at its peril; instead it worked to respondent's advantage. As explained, *infra*, the evidence presented by BOE to demonstrate the common carrier status of the intermediaries included advertisements and shipment documentation issued by the entities, affidavits from NVOCCs that transacted business with Tober, and testimony of Tober officials themselves. This evidence constituted, at minimum, a *prima facie* showing that the entities with which Tober transacted business held themselves out to provide and assumed responsibility for transportation of cargo by water from the United States to a foreign destination. To the extent any documentary gaps exist, the same presumptions and inferences resorted to in Worldwide Relocations supplement the record so as to comprehensively support findings of NVOCC status. In the absence of countervailing evidence by Tober disputing these facts, the ALJ was authorized and instructed to apply the permissive presumptions or inferences discussed by the Commission.

Undeterred, the ALJ embarked on a journey to "cherry pick" parts of the record to support the same foregone conclusions that he has reached throughout the long history of this proceeding. In derogation of the Commission's remand instructions, the ALJ declined to employ the evidentiary tools applied, discussed and affirmed in Worldwide Relocations and failed to explain why those presumptions and inferences were not appropriate in this proceeding. Instead he chose to impose interpretations on documents at odds with customary practices in the industry

and discounted or ignored other evidence, including witness testimony, that could not be reconciled with his conclusions previously discredited when vacated by the Commission eight months earlier. For these reasons, BOE submits that no useful purpose would be served by yet another remand and a fourth bite at the decisionmaking apple. The Commission should exercise its authority under Rule 227(a)(6) of the Commission's Rule of Practice and Procedure, 46 C.F.R. 502.227(a)(6), vacate and reverse the findings and conclusions below and determine the issues *de novo* with respect to the section 10(b)(11) violations and the assessment of civil penalties.

**B. The ALJ erred in finding that the intermediary entities from which Tober accepted cargo were not NVOCCs**

The ALJ's determination that Tober did not violate section 10(b)(11) was grounded in his conclusion that the intermediaries that tendered shipments to it for ocean transportation in foreign commerce did not act as NVOCCs, but rather operated as ocean freight forwarders. (I.D.R., p.64). Though all of the intermediaries were unlicensed, the finding of freight forwarder status was critical to the section 10(b)(11) issue because its prohibition only extends to acceptance of cargo from an OTI that is required to publish a tariff, i.e., an NVOCC. See 46 U.S.C. 41104(11).

In deciding whether each intermediary that tendered cargo to Tober was an NVOCC or a freight forwarder, the ALJ once again opted for the latter choice, one that resulted in no remedial action. Such a determination is at odds with Worldwide Relocations where the Commission stated:

When unlicensed entities enter into the transportation transaction, the consumer public is more justly served where a lawful presumption is used to properly bring the more complete array of Commission remedies into play. 32 S.R.R. at 506.

The ALJ's findings that the intermediaries did not act as NVOCCs were based on formulaic and uncritical findings that Tober assumed responsibility to the proprietary shippers for each shipment in issue. (I.D.R., at 70, 73, 75, 77, 80, 82, 84, 85, 87, 88, 90). Tober's purported assumption of responsibility was based almost exclusively on the ALJ's finding that of the 255 shipments remaining in issue, Tober issued 249 bills identifying the proprietary shipper as the shipper with 213 of those bills identifying the shipper's address and 36 bills designating "c/o" the unlicensed intermediary at the intermediary's address. (I.D.R., p.4).<sup>7</sup> In each case, the ALJ held that these documents constitute a "clear and unambiguous" identification of the proprietary shipper as the shipper in relation to Tober, as the underlying carrier. (I.D.R. at 70, 73, 75, 77, 80, 82, 84, 85, 87, 88, and 90).

Substantial evidence to the contrary was discounted, ignored, or overlooked by the ALJ. That record evidence undermines the ALJ's conclusion, and more accurately and more consistently defines the relationships among Tober, the intermediaries, and the proprietary shippers. Tober uniformly dealt with the intermediaries as its shipper/customer, a fact confirmed by Tober officials and officials of 2 of the involved intermediaries. (See BOE App.5 at 34; App. 6 at 37-38; App.8 at 53-54; App. 9 at 75)<sup>8</sup>. Furthermore, the documentary evidence showed that Tober uniformly invoiced the intermediaries for ocean freight and issued warehouse receipts designating them as the shipper. (See e.g. shipments by EOM (App. 16 at 811, 817, 818, 821, 825, 828, 831); Lehigh Moving & Storage (App. 14 at 627, 631, 635, 636, 642, 683, 686, 760, 768); Infinity Moving & Storage (App. 12 at 80, 84, 86, 89, 91, 94, 214, 218, 311, 316, 524, 527,

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<sup>7</sup> Bills of lading were not submitted for 6 shipments. The ALJ presumed that Tober also issued bills on these shipments in the same manner. (I.D.R. at 5). On the 36 bills reflecting the intermediary's address, the ALJ speculated that the shipper may have already left the country and would no longer have a U.S. address and therefore used the intermediary's address.

<sup>8</sup> References are to the individual appendices and internal Bates numbers submitted with BOE's Proposed Findings of Fact and Brief on May 22, 2009.

590, 594); Worldwide Relocations (App. 31 at 1349, 1351, 1353, 1359, 1360, 1362, 1373, 1395, 1398, 1403); Tradewind Consulting (App. 25 at, 1124, 1127, 1139, 1141, 1145, 1149, 1158, 1160); Moving Services (App. 26, at 1163, 1165, 1167, 1169, 1171, 1173); Sea & Air International (App.18 at 837, 840, 845, 846, 850, 851, 855, 856); Car-Go-Ship (App.21 at 1015, 1017, 1022, 1023, 1025, 1028); Access International/AVL Atlanta (App.23 at 1042, 1044, 1047, 1051, 1053, 1056, 1059, 1062 ); All In One Shipping (App. 33 at 1495, 1497, 1499, 1503, 1509,1515, 1520); and Around The World Shipping (App. 35 at 1596, 1602,1604, 1605, 1607, 1616, 1619, 1632, 1624).

Tober's routine business practices reflected by these documents plainly undermine the ALJ's conclusion that Tober's bills clearly and unambiguously identify the shipper. Other documents in the record flatly refute that conclusion. For example, Worldwide Relocations issued moving contracts and written estimates to proprietary shipper/customers for door-to-door service (BOE App. 31 at 1355, 1361, 1370, 1376, 1377, 1476.); Tradewind Consulting issued estimates for full service to proprietary shippers after obtaining rate quotes from Tober (App. 25 at 1133-1137, 1142, 1152, 1153); AVL Atlanta issued orders for service and inventories to its customers (App. 23 at 1049, 1050, 1070, 1071, 1075-1078, 1096-1102, 1110-1113, ); Infinity Moving & Storage received customer authorization forms from shippers authorizing it to perform certain services on their behalf (App. 12 at 302, 307, 323, 325, 339, 344, 348, 360, 367, 440, 449, 453, 480, 484, 490, 502, 504, 567, 580, 593); Lehigh Moving & Storage issued inventories to its customers and received booking confirmations from Tober as the shipper (App. 14 at 634, 638, 639, 657, 669, 688, 703, 708, 716, 717, 722, 735, 742, 747, 762, 767, 768, 777, 789, 795, 797.<sup>9</sup> This evidence stands uncontradicted by respondent Tober. BOE's evidence

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<sup>9</sup> Given that the intermediaries were not parties to this proceeding, it is not surprising that the documentation is somewhat sparse and mixed as to the type and volume of documents with respect to each entity.

coupled with application of the presumptions and inferences discussed in Worldwide Relocations, would have met the directive of the Commission's remand which, we submit, was a clear repudiation of the prior Tober Initial Decision.

We turn now to the ALJ's findings with respect to the 11 intermediaries serviced by Tober.

**1. Worldwide Relocations, Tradewind Consulting, and Moving Services**

Nowhere is the ALJ's error as to NVOCC status more patent than in his conclusions that Worldwide Relocations, Tradewind Consulting, and Moving Services, companies that tendered shipments to Tober, were not common carriers. These selfsame companies were the named respondents in Worldwide Relocations. Among the shipments in evidence in that proceeding were 33 shipments which Tober accepted from the Worldwide respondents which are identical to those at issue in the instant proceeding. The ALJ in Worldwide Relocations concluded that these companies acted as NVOCCs without a license, bond, or tariff on specifically identified shipments, including the 33 shipments involved in this proceeding. 31 S.R.R. 1471, 1493-1498, 1501-02, and 1505. The Commission adopted these conclusions. 32 S.R.R. at 508.<sup>10</sup>

In remanding the section 10(b)(11) issue for reconsideration, the Commission vacated the ALJ's findings below, and admonished the ALJ to reconcile his determinations with those in Worldwide Relocations:

*The ALJ and the Commission held in Worldwide Relocations that each of those 33 shipments was accepted from a shipper who was operating as an NVOCC without a tariff or bond. 32 S.R.R. at 580.(Emphasis added).*

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<sup>10</sup> In its Brief On Remand, filed May 11, 2012, BOE submitted as its Exhibit No. 1, a list of the 33 shipments, their location in the record, and a cross reference to their location in the initial decision in Worldwide Relocations. For the convenience of the Commission, a copy of the exhibit is appended hereto.

In his Initial Decision on Remand, the ALJ rejected the Commission's invitation to resolve these conflicts, devoting nearly 10 percent of the decision on remand to explaining why he was neither bound nor persuaded by the Commission's conclusions. (I.D.R., pp. 41-53).

Keeping in mind that Tober elected not to present evidence in this proceeding, the ALJ's machinations to avoid giving effect to the Commission's conclusions in Worldwide Relocations are all the more puzzling. Arguing first that the binding precedent rule (or *stare decisis*) applies only to issues of law, the ALJ urges that the Commission's determination of NVOCC status is a finding of fact not a conclusion of law. (I.D.R., p.43). Yet, the ALJ himself treats the terms interchangeably.<sup>11</sup> His conclusions, like those in Worldwide Relocations, specifically include determinations of the OTI status of each intermediary. See ALJ's Findings of Fact and Conclusions of Law Nos. 18, 35, 53, 70, 86, 101, 118, 132, 162, 192, and 213.

Even if considered as findings of fact, the ALJ erred in failing to give the Commission's findings in Worldwide Relocations controlling weight here. Initially, the ALJ attempts to minimize the effect of the Commission's findings with respect to the 3 entities by asserting that those findings were based on relationships with other common carriers, not just Tober, and that the Tober shipments were only a small percentage of all the shipments considered in Worldwide Relocations. (I.D.R., p. 50). The implication is that the ALJ believes no real consideration was given by the Commission to the Tober shipments. Nothing in either decision supports such contention. The shipments were specifically addressed in the ALJ's decision in Worldwide Relocations, embraced in her conclusions, and were explicitly discussed and adopted in the Commission's subsequent decision.

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<sup>11</sup> See Initial Decision on Remand at p.107, note 16:

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.

Worldwide Relocations, Tradewind Consulting, and Moving Services were named respondents in Worldwide Relocations, and their respective OTI status was a specified issue to be addressed at hearing. The Commission's determination in Docket No. 06-01 was a final resolution of that issue and became non-reviewable on May 15, 2012.<sup>12</sup> Its determination of the NVOCC status of these entities with respect to the shipments addressed, including the 33 shipments at issue in this proceeding, is, we submit, binding. While the ALJ arrogates to himself an authority not to be bound thereby, the Commission as the appellate and final authority should now resolve the conflict (as it first proposed the ALJ should do on his own instance) by vacating his earlier determination and deciding these issues *de novo*. Reiser v. Residential Corp., 380 F.3d 1027, 1029 (7<sup>th</sup> 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 (2<sup>nd</sup> Cir. 1992) ("The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it."); 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.").

Turning briefly to the 13 shipments in this proceeding that were not considered in Worldwide Relocations, the Commission's guidance as to the permissible use of inferences is instructive.<sup>13</sup> Although the ALJ found that Worldwide Relocations held itself out as a common carrier, he ruled that neither Tradewind Consulting nor Moving Services met that test. (I.D.R.,

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<sup>12</sup> Although it was not necessary to rely on the record in Worldwide Relocations in order to find that these 3 entities acted as NVOCCs, the Commission's rules allow consideration of the record in other proceedings. 46 C.F.R. §502.160.

<sup>13</sup> The 13 shipments are attributed as follows: Moving Services - 1; Tradewind Consulting - 2; and Worldwide Relocations -10.

p.83 and 85). BOE submits that the evidence of holding out found sufficient by the Commission in Worldwide Relocations is adequate here to support the presumption of holding out as to Tradewinds and Moving Services. As stated therein:

. . . where the ALJ reviews conduct on a number of shipments that satisfies a preponderance of evidence on an element, such as “holding out”, the ALJ may draw reasonable inferences that a person or entity acted similarly in handling another shipment when the evidence is not available on that element for that shipment. 32 S.R.R. 504.

The Commission having found in Worldwide Relocations that Tradewind held itself out to provide service as an NVOCC based on its consistent practice with respect to 37 shipments in evidence in Docket No. 06-01, and likewise finding that Moving Services also held itself out as NVOCC with respect to at least 125 shipments in that same proceeding, it is reasonable to infer that Tradewind and Moving Services also were acting as NVOCCs with respect to those latter shipments not introduced in Worldwide. Despite Tober having its own opportunity to provide countervailing evidence, nothing in this record contradicts the Commission’s findings in Worldwide Relocations that Tradewind or Moving Services held themselves out as common carriers during the relevant time period. By extension, such findings should also be entered in this proceeding.

Similar conclusions are warranted with respect to the ALJ’s findings as to a common carrier’s “assumption of responsibility” for those shipments not addressed in Worldwide Relocations. A similar pattern of documentation exists for these additional shipments. The additional Worldwide shipments are in App.31, at 1414-1417, 1471-1477, 1478-1482, and 1487-1489; for Tradewind, see App. 25, at 1139-1144, and 1162; and for Moving Services, see App. 26, at 1184-1187. Where a pattern of conduct on a number of shipments satisfies a preponderance of evidence as to one element of a violation, the ALJ may draw reasonable

inferences that a person or entity acted similarly in handling other shipments when evidence as to that element is not directly available for that shipment. Worldwide Relocations, id. Consequently, the findings in Docket No. 06-01 as to the 33 shipments common to both proceedings support the inference that Worldwide Relocations, Tradewind, and Moving Services likewise assumed responsibility for transportation of other shipments involved in the instant proceeding that were not addressed in Worldwide Relocations.

We next address those carriers other than Worldwide, Tradewinds and Moving Services who tendered their shipments to Tober.

**2. All In One Shipping, Inc. and Around The World Shipping, Inc.**

We treat both of these entities collectively due to the similarity of evidence addressing their respective operations. Although the ALJ concluded that All In One Shipping, Inc. (AIOS) and Around The World Shipping, Inc. (ATWS) held out as common carriers, he found that they did not assume responsibility for the transportation. Thus he concluded that neither company acted as an NVOCC, but rather as a freight forwarder. (I.D.R., p. 70 and 73). To reach these conclusions, the ALJ relied on bills of lading issued by Tober for the proposition that they provide clear and unambiguous identification of the proprietary shipper as the shipper and therefore Tober, not AIOS or ATWS, assumed responsibility for transportation.

In according controlling weight to the Tober bills, the ALJ discounted the affidavits of corporate officials of AIOS and ATWS, testimony on behalf of Tober, and documents issued by these companies, all contradicting the ALJ's conclusions. In particular, the affidavits of Joshua S. Morales (BOE App. 5) and Daniel E. Cuadrado (BOE App. 6), explained that potential customers made initial contact with their companies to inquire of their rates and service; that AIOS and ATWS obtained rate quotes from other common carriers, including Tober, for ocean

freight and any ancillary services as well as from other sources such as destination agents if destination services were required; AIOS and ATWS would each then set its own all-inclusive rate to the customer reflecting a marked up ocean rate and any other charges; the companies invoiced their customers for their charges and the customer would pay AIOS or ATWS directly; both companies furnished inventory sheets and insurance documents to their customers; the ocean carrier or NVOCC, including Tober, invoiced AIOS or ATWS for its charges and they paid that carrier; customers contracted with and looked to AIOS and ATWS for the transportation of their goods; and that each company assumed responsibility for the transportation of those shipments. Importantly, both affidavits explained that the above description of their company's operations also defined their transactions with Tober. (App. 5, paragraph 6, and App. 6, paragraph 6).<sup>14</sup>

This testimony is further corroborated by documents the intermediaries issued to their customers. The documents submitted by BOE in Appendix 33 include rate quotations issued by All in One Shipping to shippers for international door-to-door service describing the services included in that estimate; requests from AIOS to Tober for rate quotations based on shipment information provided by the shipper to AIOS; Tober rate quotes to AIOS that were lower than the estimates that AIOS furnished to its customer; inventories prepared by AIOS; and Tober invoices to AIOS identifying it as the shipper. (See, e.g., App. 33, at 1501, 1502, 1507, 1514, 1517, 1519, 1522, 1525, 1526, 1528-1533, 1535-1541, 1543-1546, 1562). Similarly, documents in BOE Appendix 35 include ATWS requests to Tober for rate quotes on international shipments based on shipment information provided by the shipper to ATWS; Tober rate quotes to ATWS;

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<sup>14</sup> Testimony on behalf of Tober itself is consistent with that expressed by ATWS and AIOS. According to the President of the company, Tober considered the intermediaries as its customer, not the proprietary shipper, and therefore billed those entities for its charges. (BOE App. 8, at 51, 52). Tober had no relationship with the proprietary shipper. (BOE App. 8, at 53, 54).

estimates from ATWS to shippers for international moves for door to door service higher than the charges contained in Tober quotes to ATWS; Tober invoices to ATWS identifying it as the shipper for its charges on international shipments; and separate invoices to the shipper from ATWS for its charges. (See e.g. App. 35, at 1611-1614, 1617-1618, 1621, 1623, 1627-1630, 1633-1635, 1644-1646).

In rejecting the probative impact of this combined evidence, the ALJ states simply: “BOE does not cite any Commission authority holding (or explain why) an intermediary that obtains a quote from an NVOCC, then marks up the ocean freight and invoices the increased rate in its own name, would be considered an NVOCC,” Initial Decision on Remand, pp. 69-70. To the contrary, the Commission itself observed in Worldwide Relocations that the practice of marking up ocean freight by an intermediary is an indication that it is acting as a carrier rather than an agent, 32 S.R.R. at 506. This appears to be another holding of the Worldwide case that the ALJ refuses to apply.

### **3. EOM Shipping, Inc.**

Although EOM Shipping, Inc. (EOM) was found to have held itself out as a common carrier, the ALJ found that it did not assume responsibility for transportation. As with all of the intermediaries in this proceeding, this finding was based on the ground that the Tober bills of lading “clearly and unambiguously” identified the proprietary shipper, and hence Tober assumed responsibility for any transport to the exclusion of the intermediary. (I.D.R., p.75).

The ALJ once again ignored the teachings of Worldwide Relocations and significant evidence that contradicted his conclusions. As particularly pertinent, the Commission held in Worldwide Relocations that “when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises.” 32

S.R.R. at 505. EOM's holding out, confirmed by the ALJ, therefore supports the presumption or inference that it provides the transportation that it advertises. See EOM website, BOE App. 15 at 803-810.

The documents in the record in fact confirm that inference or presumption. Those documents establish that Tober consistently invoiced EOM for ocean freight for port to door service from the U.S. to various foreign destinations, that Tober consistently issued warehouse receipts to EOM identifying it as the shipper, that EOM routinely issued documents in its name to the proprietary shipper with respect to its upcoming shipment reflecting, for example, the value of the shipment, an inventory of the shipment, and customer authorizations to be signed by the shipper. (BOE App.16, at 811-814, 816-818, 820-822, 824-826, 828, 830-832). The evidence and permissible presumptions and inferences sufficiently establish EOM's status as an NVOCC.

#### **4. Lehigh Moving & Storage, Inc.**

The ALJ found that Lehigh Moving & Storage, Inc. (Lehigh) held itself out as a common carrier but did not assume responsibility for transportation on the same rationale that he used with respect to all of the intermediaries transacting business with Tober, viz., the Tober bills of lading "clearly and unambiguously" identified the proprietary shipper and hence established Tober's assumption of responsibility as carrier to the exclusion of Lehigh. (I.D.R., p.77).

Again, the ALJ ignored Worldwide Relocations as well as evidence that contradicted his conclusions. As in the case of EOM, the presumption that Lehigh did what it held itself out is likewise substantiated by the evidence of record. See Lehigh website, BOE App. 13 at 626. Tober routinely invoiced Lehigh for ocean freight for port to door services to foreign destinations and issued warehouse receipts to Lehigh identifying it as the shipper. In turn, Lehigh requested

rate quotes for ocean freight and booking requests from Tober, prepared shipment inventories for the shipper/customer, obtained shipment valuations from customers, and had customers provide it authorizations to use their passport or social security numbers for export purposes. (See e.g. BOE App. 14, at 628, 632,634, 637, 638, 639, 641, 643, 645, 646, 650, 652, 653, 655, 658, 664, 669, 672, 750, 765, 766, 790, 794).

##### **5. Infinity Moving & Storage**

The ALJ found that Infinity Moving & Storage, Inc. (Infinity) failed to meet either the holding out requirement or the assumption of responsibility. (I.D.R., pp. 79, 80). In refusing to recognize Infinity’s holding out as a common carrier, the ALJ adopted an overly-restrictive and unnatural reading of its website. In his view, Infinity’s partial description of its services as taking “care of all the arrangements for . . . ocean transport and delivery to port of departure” was sufficient to squeeze into the definition of a freight forwarder as one who “arranges” space for shippers. 46 U.S.C. §40102(18)(A). (I.D.R., p.79).

Again, the ALJ ignored or discounted other evidence that would lead him to a more reasoned conclusion. Addressing the holding out issue, BOE relied on the affidavit of New York Area Representative Mingione and evidence as to the content of Infinity’s website. AR Mingione testified that during the relevant time period, Infinity held itself out to provide international moving services. (BOE App. 2, paragraph 11, at 11). Its website proclaimed: “Infinity has a unique system of providing international relocation services that suits all your needs.” (BOE App. 11, at 78) (emphasis added). Infinity also represented on its website that it offered comprehensive moving services for ocean transport, delivery to the port of departure, from destination port to the transferee’s new home, accompanying the process all along the way, and

settling claims itself without involving a third party.<sup>15</sup> In this respect, it is noteworthy that equivalent language was employed on the websites of the respondents in Worldwide, and the ALJ consistently found, as adopted by the Commission, that such representations are an indication of holding out. (Worldwide ID, 31 S.R.R. at 1522, 1524, 1525, 1527, 1529, 1530, 1532).

The ALJ in Worldwide also inferred holding out from a course of conduct in accepting shipments from different individual proprietary shippers by water from the United States to a foreign country. (Worldwide ID, 31 S.R.R. at 1522, 1524, 1525, 1527, 1529, 1530, 1532). The record in this case similarly shows that Infinity accepted no fewer than 126 shipments of cargo from different proprietary shippers for ocean transportation from the United States to foreign countries which Infinity tendered to Tober. (BOE App. 12, at 80 - 625). In addition, the record includes Infinity's acknowledgement to the NY AR that its website offered international ocean shipping services. (App. 10, at 77).

While Tober might have argued that Infinity was offering service only as a freight forwarder, it proffered no such testimony herein. Rather, the ALJ substituted his own fragmentary and overly restrictive view of the record, in effect and in fact losing sight of the overall picture presented by the evidence. Under the approach favored in Worldwide, BOE submits that a natural reading of the language on the website coupled with those services actually provided by Infinity to the public, fully supports the conclusion that Infinity held itself out as a common carrier to provide international transportation by water from the United States. Here again, where Tober was afforded ample opportunity to contest or refute this presumption through

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<sup>15</sup> As pertinent here, the Commission held in Worldwide Relocation that "when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what is advertises." 32 S.R.R. at 505.

contrary evidence, BOE submits that it is not the place of the ALJ to assume the factual case which Respondent failed to provide.

On the issue of assuming responsibility as a carrier, the ALJ did not deviate from the fixed rationale he employed for all of the intermediaries, viz., the Tober bills constituted sufficient proof that Infinity did not assume responsibility and therefore did not act as an NVOCC. (I.D.R., p.81). Tober was named carrier largely by default of the ALJ, rather than by dint of careful analysis of that record and testimony presented by BOE. To the contrary, the presumption under Worldwide is that Infinity provided the services it held itself out to perform. This presumption is also substantiated by the evidence of record. As it did with the other intermediaries, Tober routinely invoiced Infinity for ocean freight for port to door services to foreign destinations and issued warehouse receipts to Infinity identifying it as the shipper. In turn, Infinity invoiced its customer at rates different than it paid Tober, prepared shipment inventories for the shipper/customer, obtained shipment valuations from customers, and had customers provide it authorizations to use their passport or social security numbers for export purposes. (BOE App. 12, at 83, 85, 88, 93, 95, 98, 100, 103, 105, 111, 114, 119, 210, 215, 227, 292, 293, 325, 334, 338, 339, 449, 490, 532, 550-553, 582-584, 593, 599, 601).

**6. Sea and Air International, Inc.**

The ALJ found that Sea and Air International, Inc. (Sea and Air) held itself out as a common carrier but did not assume responsibility for transportation on the well worn rationale that the Tober bills of lading clearly and unambiguously identified the proprietary shipper as the shipper and hence Tober's assumption of responsibility. (I.D.R., p.87).

Again, the ALJ ignored Worldwide Relocations as well as evidence that contradicted his conclusions. The presumption that Sea and Air did what it advertised is confirmed by the

documentary evidence. See Sea and Air website, BOE App. 17 at 834-836. As with all of the other intermediaries, Tober invoiced Sea and Air as the shipper for ocean freight for port to door services from the U.S. to foreign destinations. Thus, for the 27 shipments in issue, Tober issued 27 invoices to Sea and Air as the shipper. Tober also issued warehouse receipts to Sea and Air as the shipper for the 27 shipments. The record also reflects various types of documents that Sea and Air routinely issued in its own name to the shippers with respect to their shipments, including shipment inventories when picking up the customer's shipment, form documents requesting shipper and shipment information, and customer authorization forms allowing Sea and Air to use passport/social security numbers for export purposes. (See, e.g., BOE App. 18, at 839, 841, 842, 844, 879-881, 908, 909, 924, 946, 947, 962, 966, 968, 976-979, 988).

#### **7. Car-Go-Ship.com**

Car-Go-Ship.com (Car-Go) was found to hold itself out as a common carrier, but, like the other intermediaries, the ALJ concluded that it did not assume responsibility for the transportation. (I.D.R., p.88). This conclusion was again based on the rationale that Tober issued a bill of lading on each shipment with a clear and unambiguous identification of the proprietary shipper thereby demonstrating Tober assumed carrier responsibility, to the exclusion of Car-Go.

The flaws in the ALJ's reasoning are again reflected through Car-Go's holding out to provide international port to port and door to door service as well as documents showing a carrier/shipper relationship between Tober and Car-Go. Thus, for the 4 shipments in issue, the record includes the 4 invoices Tober issued to Car-Go as shipper for ocean freight for service to foreign destinations, as well as the warehouse receipts for two of the shipments identifying Car-Go as shipper. The record also includes work orders issued by Car-Go indicating a carrier/shipper relationship between Car-Go and the shipper containing shipper and shipment

information containing passport/social security numbers of the shipper. (See BOE App. 21, at 1018, 1020, 1026, 1027, 1030, 1031).

#### **8. Access International Transport/AVL Transport**

The ALJ correctly found that Access International Transport/AVL Transport (Access International) held themselves out to provide international ocean transport. (I.D.R., p. 89). However, he also held that they did not satisfy the assumption of responsibility requirement on the basis that Tober issued bills of lading on the 12 shipments in issue that “clearly and unambiguously” identified the proprietary shipper, thereby establishing that Tober, not Access International, assumed carrier responsibility to the shippers. (I.D.R., p.90).

Once again, the ALJ failed to rationally address other evidence which conflicted with his conclusions. Commencing with the presumption that the companies performed the service that they advertised, the evidence confirms this intermediary undertook to fulfill its holding out. The record shows that for each of the 12 shipments in issue, Tober invoiced Access International as the shipper for ocean freight for port-to-door or door-to-door services from the U.S. to foreign destinations. On 7 of the shipments, the record also reflects warehouse receipts issued to Access as the shipper. Such evidence plainly indicates a carrier/shipper relationship between Tober and the intermediary rather than a direct relationship between Tober and the proprietary shipper. In addition, Access International/AVL dealt directly with the shippers on these shipments as reflected by the inventories they issued when picking up the shipments. (See e.g., BOE App. 23, at 1045, 1046, 1049, 1050, 1055, 1057, 1061, 1065, 1066, 1068, 1070, 1071, 1075, 1076, 1077, 1078, 1079, 1082, 1084-1086, 1089, 1090, 1093, 1101, 1104, 1105, 1109-1113).

In determining if an entity is a common carrier, the Commission counseled in Worldwide Relocations that all of the factors present should be considered in order to determine their

combined effect. 32 S.R.R. at 503. In contrast, the ALJ has fixated on the Tober bills of lading and other isolated documents to support a conclusion that he reached over 4 years ago when granting summary judgment in favor of Tober. Despite the Commission's instruction to reconsider his findings, he continued to cling to this same mindset in the Initial Decision on Remand. He rejected the approach adopted by the Commission in Worldwide Relocations and failed to examine the record as a whole to consider the combined effect of all the factors. The Tober invoices issued to the intermediaries substantially on a one-to-one basis with the bills of lading essentially undermine the ALJ's conclusions that Tober somehow looked to the cargo owner as his customer. The documents issued by the intermediaries to the proprietary shippers, the affidavits submitted on behalf of AIOS and ATWS, and the testimony on behalf of Tober itself thus support and establish the basis for inferences that the intermediaries assumed responsibility for the transportation to their customers, notwithstanding patent attempts at misidentification on the Tober bills. On their face, the Tober bills of lading cannot overcome this conclusion inasmuch as they reflect the same "pattern of manipulating the identity" of the shippers already condemned by the Commission in Worldwide. Finally, it bears emphasis that all of this evidence and the inferences drawn therefrom are uncontroverted.

**C. The ALJ erred in concluding that the intermediaries were ocean freight forwarders**

Recognizing that the entities transacted business with Tober in some intermediary capacity, the ALJ held that in every instance they acted as ocean freight forwarders. The law does not support such a conclusion. The determination whether an entity acted as a freight forwarder, an agent on behalf of the shipper, first requires evidence that one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control. RESTATEMENT (THIRD) OF

AGENCY, §1.01 (2006), cited in Landstar Express America v. Federal Maritime Commission, 569 F.3d 493, 497 (D.C. Cir. 2009). A manifestation of assent by the principal is an essential requirement to creating agency. RESTATEMENT (THIRD) OF AGENCY, §§1.03, 3.01. See also AgriStor Leasing v. Farrow, 826 F.2d 732, 737 (8th Cir 1987) (determination “of an express or implied agency focuses on communications and contacts between the principal and the agent.”).

The deficiencies in the ALJ’s approach are immediate and obvious: First, the ALJ entered findings of agency on behalf of the cargo owners in the absence of any supporting testimony of the shippers themselves. Agency must be established on the basis of some agreement, whether written or oral, on the part of the purported principals (here, the cargo owners) expressly creating or authorizing another to serve as agent. See e.g. RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006). No such testimony appears in the record. In contrast, the unrebutted witness testimony of two intermediaries and Tober itself established an independent shipper/carrier relationship between Tober and the intermediaries and negates any finding of an agency relationship between those intermediaries and the cargo owners. See BOE App. 5, App 6 and App. 8.

The ALJ also failed to recognize or give evidentiary weight to facts that, under the common law of agency, provide indicia that the intermediaries acted, and intended to act, as a principal in their dealings with their customers. As discussed above, each intermediary through advertisements and actions held out as providers of ocean transportation service in foreign commerce. Documentary evidence likewise shows that the intermediaries dealt directly with the shippers as carriers in their own right, picking up their shipments, issuing inventories, obtaining confidential information from their customers necessary for export. Perhaps most telling in this

respect is that for virtually all shipments involved in this proceeding, Tober issued an invoice for its ocean freight charge to each intermediary as its customer. Where available, the evidence shows that the intermediary would separately and independently price its services to the cargo owner at higher levels than Tober charged to it.<sup>16</sup> (See e.g., BOE App. 31 at 1353, 1354, 1360, 1378, 1379, 1380; App. 33 at 1501, 1522, 1529, 1530, 1533, 1537, 1556, 1557; and App. 35 at 1613, 1614, 1615, 1633, 1634). This is a clear indication that the intermediary was acting as a carrier principal, see Worldwide Relocations, 32 S.R.R. at 506, and not simply passing through the carrier's charges as an agent for the shipper.

**D. The ALJ erred in finding that Tober did not violate section 10(b)(11)**

In order to find a violation of Section 10(b)(11) of the Shipping Act, the acceptance of cargo from or transportation of cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Shipping Act must be done knowingly and willfully. Because the ALJ concluded that the intermediaries were not NVOCCs, he did not reach this issue. In view of BOE's request that the Commission decide this case without a further remand, we address this issue in these exceptions.

The Commission has defined the phrase "knowingly and willfully" to mean "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." Trans-Ocean Pacific Forwarding, Inc. – Possible Violations, 27 S.R.R. 409, 412 (ALJ 1995), citing United States v. Illinois Central R. Co., 303 U.S. 239 (1938). The Commission elaborated

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<sup>16</sup> Documentation issued by the intermediaries is, as earlier noted, mixed and somewhat limited inasmuch as they were not the respondents in this proceeding. As unlicensed entities, information relevant to their activities depended on their voluntary cooperation and the content of Tober's files.

further in Pacific Champion Express Co., Ltd. – Possible Violations, 28 S.R.R. 1397, 1403 (FMC 2000), where it stated:

In determining whether a person has violated the 1984 Act “knowingly and willfully,” the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 SRR 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Shipping Act. Diligent inquiry must be exercised by [persons] 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.” [citation omitted].

Similarly, in Stallion Cargo, Inc.—Possible Violations, 29 S.R.R. 665, 677 (FMC 2001), the Commission reiterated that: “An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” In RSM, Inc. v. Herbert, 466 F.3d 316, 320 (4<sup>th</sup> Cir. 2006), the court said:

...‘willfully’ has been held to denote a mental state of greater culpability than the closely related term, ‘knowingly.’ See Illinois Central R.R., 303 U.S. at 242-43, (explaining that “ ‘[w]illfully’ means something not expressed by ‘knowingly’ ” (citation omitted)). “Knowingly” typically refers only to one's knowledge of the facts that make his conduct unlawful, not to one's knowledge of the law. See Bryan v. United States, 524 U.S. 184, 193, (1995); United States v. Bailey, 444 U.S. 394, 404, (1980) (finding that a prison escapee acted “knowingly” because he “knew his actions would result in his leaving physical confinement”).

As a licensed forwarder since 1996 and an NVOCC since 1999, (See BOE App. 1 at 2-6), Tober is charged to know the licensing, tariff, and bonding requirements of the Shipping Act, the distinctions between forwarders and NVOCCs, and the prohibitions in the statute. Tober admitted that it accepted cargo from these entities to avoid competing directly with them. (BOE App. 8 at 61-65). It likewise revealed that in 2004 and 2005, it never refused a shipment and

then lost business after ceasing to accept shipments from unlicensed entities. (App. 8 at 61-62). In addition, officers of the entities for which it transported shipments attested to the fact that no employee or principal of Tober ever questioned whether they were an NVOCC, freight forwarder, or beneficial cargo owner. (App. 5 at 33 and App. 6 at 37).

Particularly significant is that Tober was specifically advised by BOE in a letter dated September 7, 2005, that it was dealing with unlicensed entities, including several whose shipments are included in this proceeding, *viz.*, Tradewind, AIOS, Worldwide Relocations, ATWS, and Moving Services. (BOE App. 7, at 40-41). Tober freely acknowledged that it accepted business from anyone and did not attempt to determine the status of the entity tendering cargo. (App.8, at 58, and App. 9, at 72). Indeed, it continued to accept shipments from unbonded, untariffed entities after being advised not to do so and after commencement of this proceeding. (App. 2 at 11-12).

At best, Tober was plainly indifferent to the requirements of the statute and the Commission's regulations – at worst, it intentionally disregarded them. In either case, its actions and inactions satisfy the criteria for establishing “knowing and willful” conduct. Comm-Sino Ltd. - Possible Violations, 27 S.R.R. 1201 (ALJ 1997); Ever Freight International Ltd. - Possible Violations, 28 S.R.R. 329 (ALJ 1998); Best Freight International Ltd. - Possible Violations, 28 S.R.R.447 (ALJ, 1998); Pacific Champion Express, supra; and Stallion Cargo, Inc. supra. A preponderance of the evidence establishes that Tober knowingly and willfully accepted the subject shipments from entities that were required by the Shipping Act to have a tariff and evidence of financial responsibility, and thereby violated section 10(b)(11) of the Shipping Act.

**E. The ALJ erred in finding that most of Tober's violations of section 10(b)(2)(A) were not knowing and willful**

On remand, the Commission vacated the ALJ's refusal to assess a civil penalty and directed him to determine whether Tober's tariff violations were knowingly and willfully committed, and should at a minimum take "into account any violations that continued after Tober was inarguably placed on notice by the Order of Investigation and Hearing" served May 11, 2006. 32 S.R.R. at 581. Unable to avoid this instruction, the ALJ concluded that the 77 tariff violations committed subsequent to the issuance of the May 11, 2006 Order were knowing and willful. (I.D.R., pp.102-103).<sup>17</sup>

The ALJ concluded, however, that the 202 tariff violations on shipments prior to the May 11, 2006 Order, were not knowing and willful finding simply that BOE did not establish these factors by a preponderance of the evidence. (I.D.R., p.103). In making this determination, the ALJ gave some weight to Tober's claim that "everybody" was quoting rates in the same manner as Tober and explicitly found that this factor "cut[s] against the argument that Tober was willfully and knowingly violating the Shipping Act." *Id.*

The Commission's remand did not confine consideration of knowing and willful tariff violations only to those shipments transported after May 11, 2006. The Commission specifically referred to the fact that BOE had established that Tober committed 278 violations during a 3 year period commencing in 2004 during which it never charged the rates set forth in its tariff and found that the ALJ erred in dismissing evidence of this "pattern of *hundreds* of violations". (emphasis in original). 32 S.R.R. at 581. The ALJ thus excused Tober's violations upon little more justification than its president's unilateral interpretation of the tariff requirements and his

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<sup>17</sup> In its Brief on Remand, BOE identified 77 shipments that occurred after issuance of the Order, as opposed to the 72 shipments initially believed to be handled after that date.

self-serving claim that he believed Tober was in compliance. The law does not recognize such a subjective and whimsical standard, and neither should have the ALJ.

Tober was not a newcomer to the industry. Initially licensed as an ocean freight forwarder in 1996, it became subject to the Shipping Act's tariff requirements as an NVOCC in 1999. Tober initially complied with its tariff publication obligation in 2004. See Order served May 11, 2006, at 2. At the very least, it became aware of tariff requirements in 2004. Tober's President admitted that he knew what a tariff was and conceded that it never charged its tariff rate. (BOE App. 8, at 46-48 and see also App. 9 at 69-70). Tober elected not to inform itself, nor to act upon its responsibility to adhere to the provisions of its tariff.

Wholly apart from Tober's likely acquisition of information about regulatory tariff requirements disseminated among members in the shipping community, industry-wide publication and distribution of information about various Commission rulemakings and formal proceedings put Tober on notice with respect to the Shipping Act requirements. Tober obtained its license to operate as an NVOCC contemporaneously with passage of the Ocean Shipping Reform Act of 1998 (OSRA), Pub. L. 105-258, and the Commission's various rulemaking proceedings to implement the statutory amendments. The past 15 years have been replete with Commission activities highlighting the statutory and regulatory requirements applicable to ocean transportation intermediaries and those who would propose to operate in the regulated shipping industry. The Commission actively provided guidance to the shipping public by conducting a rulemaking proceeding, Docket No. 98-28, wherein it solicited comments from the industry and outlined the obligations of all OTIs pursuant to OSRA's new licensing, bonding and tariff requirements. See Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, Notice of Proposed Rulemaking, 63 FR 70710 (Dec. 22,

1998); 28 S.R.R. 629 (FMC 1998). Once adopted, the Commission's Final Rule therein was published 64 FR 11156 (Mar. 8, 1999). Consequently, Tober is charged with or presumed to have notice of the statute's requirements. 44 U.S.C. §1507 (filing document in Federal Register as constructive notice) and 44 U.S.C. §1508 (filing and publication of documents required to be published by an Act of Congress is sufficient notice of the contents of the document to persons subject to or affected by it.).

To bring its tariff regulations into alignment with OSRA, the Commission initiated Docket No. 98-29, Carrier Automated Tariff Systems, Notice of Proposed Rulemaking, 63 FR 70368 (Dec. 21, 1998); Interim and Final Rule, 64 FR 11218 (Feb. 26, 1999). In the course of addressing the amendments to its tariff regulations, the Commission specifically refused to exempt NVOCCs from tariff publication requirements in view of the need for flexibility. In Docket No. 00-07, Advance Notice of Proposed Rulemaking Concerning Public Access to Carrier Automated Tariffs, 65 FR 31130 (May 16, 2000), the Commission issued an advance notice of proposed rulemaking based on its concern that carrier access charges may limit the shipping public's ability to access carrier tariff information contrary to the Act's purposes. Rather than adopting a new rule addressing these concerns, the Commission ultimately opted to provide guidance to common carriers by way of a Circular Letter (issued Oct. 6, 2000).

When multiple members of the OTI community failed to come into compliance with new requirements of OSRA, the Commission commenced Docket No. 00-12, Revocation of Licenses, Provisional Licenses and Order to Discontinue Operations in U.S.-Foreign Trades for Failure to Comply with the New Licensing Requirements of the Ocean Shipping Reform Act of 1998, directing named OTIs to show cause why their licenses should not be revoked, and orders to cease and desist issued to enforce the new OSRA requirements including, *inter alia*, the filing of

Form FMC-1 indicating the location of such OTIs electronically published tariff. See Order to Show Cause, 65 FR 77879 (Dec. 13, 2000). In explaining the basis for its actions therein, the Commission explicitly acknowledged the actions of Commission staff “to inform and advise all OTIs of the new requirements and to encourage them to comply with those requirements promptly and voluntarily.” 29 S.R.R. 193 (FMC 2001). Notice of OTI license revocations was published subsequently, 66 FR 27143 (May 16, 2001).

In 2004, the Commission proposed to give NVOCCs rate flexibility in transactions with their customers by exempting NVOCCs from tariff requirements and allowing them to provide service pursuant to NVOCC Service Arrangements. The Notice of Proposed Rulemaking, was issued in Docket No. 04-12, and published in the Federal Register, 69 FR 63981 (Nov. 3, 2004). The Commission adopted its final rule exempting NVOCCs from tariff requirements upon compliance with certain filing and publication conditions and allowing such carriers to agree on a confidential basis with their shipper customers on the terms and conditions of service. Non-Vessel-Operating Common Carrier Service Arrangements, 30 S.R.R. 557 (FMC 2004), published at 69 FR 75850 (Dec. 20, 2004).

Consequently, there can be no serious contention that Tober was unaware of the tariff publication requirements of the Shipping Act, and no basis for the ALJ to unilaterally excuse Tober from complying therewith. The standard for a knowing and willful violation does not require evil intent to violate the law. Intentional avoidance of the statute or plain indifference to its requirements is sufficient. Trans-Ocean Pacific Forwarding, *supra*, 27 S.R.R. at 412. A persistent failure to inform or even attempt to inform oneself by means of normal business resources may likewise meet the standard. Diligent inquiry must be exercised in order to measure up to the standards set by the Shipping Act. Pacific Champion Express, *supra*, 28

S.R.R. at 1403. The repeated failure of an NVOCC to educate itself may provide the basis for finding that it acted willfully and knowingly. Stallion Cargo, *supra*, 29 S.R.R. 677.

Even if it is believed that Tober did not know the requirements of law, it knew that it was not charging the rates contained in its tariff. Consequently, it acted knowingly. It took no steps to inform itself by normal business means such as consulting a lawyer or a tariff publisher or others in the industry to determine the requirements of the statute. Such plain indifference constitutes willfulness. Inasmuch as the evidence of record has not been rebutted by Tober, a preponderance of the evidence establishes that Tober's tariff violations were knowingly and willfully committed. Trans Ocean-Pacific Forwarding, *supra*, 27 S.R.R. at 412. Accordingly, BOE submits that the ALJ erred in failing to find that Tober knowingly and willfully violated section 10(b)(2) of the Shipping Act in the 202 instances that occurred between 2004 and May 11, 2006.

**F. The ALJ erred in failing to assess an adequate civil penalty**

Although he found no violations of section 10(b)(11) of the Shipping Act, the ALJ found that Tober committed 279 violations of section 10(b)(2)(A). Of this number, 77 were deemed to have been knowing and willful violations. The Commission's remand reversed the ALJ's prior refusal to award any civil penalties and directed him to decide the proper amount of penalty in light of: (1) any section 10(b)(11) violations found following the proper application of the standards of Worldwide Relocations; (2) a revised analysis of whether violations were willful and knowing; and (3) BOE's evidence of the nature, circumstances, extent, and gravity of the violations. 32 S.R.R. at 582. Paying little more than lip service to the Commission's instructions, the ALJ assessed a penalty of \$3,000 for each of the 77 knowing and willful

violations, and \$1,000 for each of the 202 violations that were found not to be knowing and willful.

We submit that the nominal penalties assessed are inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Shipping Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate penalty amount appropriate to the gravity of the violations.

### **1. The regulatory structure for Shipping Act violations**

A person who violates the Shipping Act, or regulation or order of the Commission incurs liability for a civil penalty. 46 U.S.C. §41107(a). Liability is not discretionary – it is absolute. Until a matter is referred to the Attorney General, assessment of the amount of the penalty is entrusted to the Commission. 46 U.S.C. §41109(a). The statute contemplates that certain violations are exponentially more serious than others and therefore should be subject to a much higher penalty. Thus a two-tiered range of penalties is provided – up to \$6,000 for each violation or, if knowingly and willfully committed, up to \$30,000 per violation. 46 U.S.C. §41107(a).

The primary Congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, *supra*, 29 S.R.R. at 681. The Commission may in its discretion determine how much weight to place on each factor and must make findings with respect to each factor. Merritt v. United States, 960 F.2d 15, 17 (2nd Cir. 1992).

### **2. The ALJ's findings as to penalties are contrary to law**

In response to the ALJ's Order on Remand, BOE addressed each of the section 13(c) factors. Based on those factors, the fact that Respondents' violations were found to have been willfully and knowingly committed, and that there were no relevant mitigating factors, BOE

argued that a civil penalty of \$6001 - \$30,000 for each violation is appropriate and at a minimum must reflect no less than the lower end of this range, i.e., \$6,001 per violation. (BOE Brief on Remand, p.24). BOE's presentation at the penalty phase was uncontested by the Respondent.

At the outset, the ALJ suggests that the assessment of civil penalties ought to take into consideration, on a shipment by shipment basis, such factors as the size of the shipment, amount of the OTI's charges, and whether the charges exceeded or were lower than the tariff rate. The ALJ correctly observes that BOE did not address such factors. (Initial Decision on Remand, p.105). Suffice it to say that those factors are not relevant in assessing a civil penalty and the ALJ offers nothing to support the proposition that they are.

Section 13(c) directs the Commission to take into account the nature, circumstances, extent, and gravity of the violation committed – as relevant here, failing to adhere to the published tariff and, for the reasons previously addressed, the prohibition against a common carrier from accepting cargo from NVOCCs operating without a tariff and bond. With respect to the violator, the Commission must consider the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C. §41109(b). To these statutorily prescribed factors, the Commission's regulations add the policies of deterrence and future compliance with the law. 46 C.F.R. §502.603(b).

Turning first to the violations found, the ALJ considered the nature, circumstances, extent, and gravity of the violations collectively and relied on the following: (1) Tober's off-tariff rates did not exceed the tariff; (2) there was no evidence that Tober intended to discriminate by charging below tariff rates; and (3) the Commission is taking steps to ease tariff publication requirements. (I.D.R., p. 105-106). This rationale reflects a complete misunderstanding not only

of the nature and purpose of the statute's requirements, but also the role of the ALJ in proceedings such as this.

While the Commission has promoted greater flexibility in service and rate offerings among NVOCCs through use of its statutory exemption authority, tariff adherence remains a fundamental component of the regulatory scheme adopted by the Congress. See, e.g., Maislin v. Primary Steel, Inc., 497 U.S. 116 (1990), County of Stanislaus, v. Pac. Gas & Electric, 114 F.3d 858 (9<sup>th</sup> Cir. 1997). It is likewise integral to the Shipping Act. American President Lines, Ltd. v. Cyprus Mines Corporation, 26 S.R.R. 969, 973 (ALJ 1993) (“primary purpose of both the 1916 Shipping Act and of the 1984 Shipping Act is the assurance of equal treatment among similarly situated shippers.”). Congress prohibited departure from published tariffs as necessary to achieve one of the basic purposes of the Shipping Act expressed in section 2, “to establish a nondiscriminatory regulatory process for the common carriage of goods by water”. 46 U.S.C. 40101(1). Tariff violations undermine these purposes and the gravity of the violation is the same whether the off-tariff rate is greater or less than the tariff. Here, the gravity of the Tober’s violation is compounded by the number of violations continuing over an extended period of time, a factor that the Commission noted in its remand. 32 S.R.R. at 581.

Next, the ALJ's conjecture as to whether Tober intended to discriminate is both unfounded and irrelevant. As the Commission explained in Stallion Cargo, *supra*:

Under Commission precedent, however, whether Stallion’s shipper customers or other shippers were harmed is relevant neither to the issue of whether it committed a violation, nor to that of what penalties should be assessed against it. In Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable. (Emphasis added). 29 S.R.R. at 678-679.

Nor does the Commission's partial exemption of tariff publication requirements for NVOCCs upon compliance with certain conditions provide a valid basis for the ALJ's

assessment of civil penalty.<sup>18</sup> The ALJ's role is to consider the nature and extent of the violations found to have been committed - not to presume or guess the Commission's position on the basis of its actions that do not affect the issues *sub judice*.

Given the factors identified by the ALJ in assessing a civil penalty, it becomes apparent that the nominal amounts reflects the ALJ's grudging compliance with the Commission's earlier reversal of the ALJ's refusal to impose any penalty whatsoever. While the Initial Decision on Remand speaks broadly about the penalty factors that must be applied under the statute, the ALJ provides no calculus or formula by which he ultimately weighed the penalty factors in favor, or against, Respondent. There is no starting point from which the dollar penalties are to calculated, and no elucidation of the weighting applied to each statutory factor. Neither BOE nor, we submit, the Commission that must now review the Initial Decision on Remand are in a position to discern the basis of the ALJ's penalty calculations.

Reference to the prior enforcement decisions by this same Administrative Law Judge serve only to deepen the mystery surrounding this penalty calculus. In two decisions of relatively recent vintage, Mateo Shipping Corp.- Possible Violations, 31 S.R.R. 830 (2009) and the ALJ's separate Initial Decision as to respondent Container Innovations in EuroUSA Shipping Inc et al., supra, 31 S.R.R. 1131, the ALJ in fact imposed penalties at \$30,000 per violation. Those cases share findings of fact common to those here -- the violations were willfully and knowingly committed, culpability of the respective respondents was high, and neither respondent had a prior history of violations.<sup>19</sup> In both decisions, the ALJ entered findings that the

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<sup>18</sup> Final Rule adopted in Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements, 76 FR 11351 (Mar. 2, 2011).

<sup>19</sup> The ALJ also found that there were no "other matters that justice requires be taken into account." See e.g. EuroUSA Shipping, 31 S.R.R. at 1152.

respondent had the ability to pay a substantial monetary penalty, stemming from respondent's prior failure to respond to BOE discovery. See e.g. EuroUSA Shipping, 31 S.R. R. at 1152.

The ALJ's finding in the instant case that Tober has only limited ability to pay a civil penalty thus bears an outsize importance in the ALJ's decision here to assess the penalty for violations found willfully and knowingly committed at \$3,000 per violation and \$1,000 for all other violations. BOE strenuously objects to the notion that Respondent's limited ability to pay, without more, entitles the ALJ to mitigate Tober's civil penalty for willful and knowing violations from \$30,000 down to \$3,000, a reduction of roughly 90%. While the process of assessing a civil penalty is necessarily inexact, it must not be so completely opaque as to defy Commission understanding and oversight, nor stymie any meaningful critique by BOE. The ALJ has left no roadmap adequate to ascertain his decisional process in reaching a penalty amount that can only be described as the "cost of doing business," as discussed below. The Commission should step in, as it did in Stallion Cargo, in order to right the balance when the penalties assessed by the ALJ fail to any longer deter violations and achieve the objectives of the statute, 29 S.R.R. at 681-682 (overturning \$50,000 penalty below, and imposing Commission penalty at \$10,000 per violation).

### **3. The ALJ failed to give effect to the Shipping Act's enhanced penalty provisions**

Turning to the ALJ's consideration of the factors prescribed by the Shipping Act in assessing a civil penalty, the most egregious failure is the refusal to give effect to the proportional relationship between the maximum penalty for a knowing and willful violation of the Shipping Act and the penalty for violations not committed knowingly and willfully provided in 46 U.S.C. §41107(a). The increased penalty for knowing and willful violations of the Shipping Act was first authorized by the Shipping Act of 1984, P.L. 98-237. Its predecessor

statute, the Shipping Act, 1916, authorized a singular maximum civil penalty of \$5,000 for each violation. Congress believed that the penalties imposed under the 1916 Act failed to serve as an effective deterrent to prohibited acts and that violators could simply absorb penalties in these amounts as part of the “cost of doing business.” See H.R. REP. No. 53, Part 1, 98th Cong. 1st Sess., reprinted in 1984 U.S.C.C.A.N. 167, 184. Accordingly, it added a separate penalty provision authorizing a penalty up to \$25,000 for each violation knowingly and willfully committed. Congress thus intended that the Commission apply a two-level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations.

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. Martyn Merritt, AMG Services, 26 S.R.R. 663, 664-665 (1992). To give proper effect to this intent, a logical and natural reading of the statute should result in the imposition of the enhanced penalty for a knowing and willful violation that, at a minimum, exceeds the statutory threshold defining the maximum penalty amount for violations having a lesser requirement of intent or purpose. After following an uncertain calculus of the penalty factors, however, the \$3,000 per knowing and willful violation assessed by the ALJ against Respondent here does not even approach the maximum allowed for those violations that do not require a showing to be “knowingly and willfully” committed. The ALJ’s action plainly negates Congressional intent that the Commission should wield enhanced penalties for knowing and willful violations and effectively writes that distinction out of the statute. At the nominal levels assessed, both Tober and those victimized by it can dismiss the Commission’s penalty as reflecting little more than a “cost of doing business.”

While criticizing at length BOE's reading of the civil penalty statute, the ALJ, in fact, offers no justification for departing from the clear intent of the statute. Neither is this the case that BOE insists that the maximum penalty possible under section 13 be assessed against Respondent, but rather that any such penalty should be not less than \$6000 per violation nor exceed \$30,000 per violation. See BOE's Brief on Remand, May 11, 2012, pp. 23-24.

The ALJ's discussion of the section 13(c) factors, other than his misguided efforts addressed above, never purports to explain why civil penalties in the range of \$6,000 - \$30,000 would not more appropriately address the nature and extent of culpability of the violations committed. In assessing penalties at the level of \$3,000 for violations that were willful and knowing, his assessment of civil penalties against Respondent is indistinguishable from those penalties assessed without need for any findings of culpability. Why, indeed, would BOE even seek to make the additional evidentiary showing that violations were willfully and knowingly committed when those efforts could make no difference in the ultimate penalty assessed? In doing so, the ALJ effectively negates any statutory differences as to knowing and willful violations. Such an approach allows an ALJ to avoid the consequences of the prohibitions and penalties provisions of the Shipping Act by finding the existence of knowing and willful violations but imposing penalties that are not commensurate with the increased levels provided in the statute.

BOE submits that this cannot be the civil penalty regime intended by Congress. In providing substantially enhanced penalties for violations willfully and knowingly committed, Congress plainly expected the new statutory mandate to be implemented – not set aside and ignored by the ALJ as being too strict or too inconvenient to be applied. While the statute certainly can be read to permit willful and knowing violations to be penalized at those lower

levels commensurate to lesser offenses, the ALJ offers no justification in the way of explaining this downward departure<sup>20</sup> from the civil penalty regime otherwise intended by Congress.

Denying that there could be any such intent on the part of the Congress, the ALJ seeks at length to argue that there can be no such policy dividing willful and knowing penalties from those for lesser violations, Initial Decision on Remand at 98-100. The ALJ's arguments however are rife with conjecture. Thus, in his argument to the effect that "BOE does not cite to any Commission or administrative law judge decision in the twenty-eight years since the enactment of the Shipping Act holding or even discussing" the relationship between penalties for willful and knowing violations and those for lesser offenses, *id.* at 99, BOE concurs that this appears as a matter of first impression to this ALJ. Past administrative law judges, acting in numerous dockets, have levied penalties in cases often more complex and/or more bitterly contested by Respondents' counsel, without finding themselves unable to contemplate a penalty better commensurate to the willful and knowing characteristics of the violations committed here. See e.g. Stallion Cargo, supra, 29 S.R.R. at 682 (imposing penalty at \$10,000 per violation found willfully and knowingly committed); Transglobal Forwarding Co Ltd. – Possible Violations, 29 S.R.R. 814 (ALJ, 2002) (imposing penalty at \$20,000 per violation found willfully and knowingly committed); Green Master International Freight Services Ltd. – Possible Violations, 29 S.R.R. 1303, 1317 (FMC 2003) (affirming penalty of \$22,500 per violation found willfully and knowingly committed); Hudson Shipping (Hong Kong) Ltd d/b/a Hudson Express Lines – Possible Violations, 29 S.R.R. 1381, 1386 (ALJ 2004) (affirming penalty of \$22,500 per violation found willfully and knowingly committed); Mateo Shipping, supra, 31 S.R.R. 830 (imposing penalty at \$30,000 per violation found willfully and knowingly committed); EuroUSA

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<sup>20</sup> Downward departure is a term used in criminal law to refer to effecting reductions below the applicable sentencing guideline range.

Shipping, supra, 31 S.R.R. 1131 (as to respondent Container Innovations, imposing penalty at \$30,000 per violation found willfully and knowingly committed). The ALJ's assertion is unavailing because, with the exception of Stallion Cargo above, BOE is unaware of any prior case where the ALJ has imposed a penalty that treated willful and knowing violations at the same level as lesser offenses.

The ALJ next proposes that the Commission's decision in Worldwide Relocations, upholding civil penalties that included \$6,000 per violation for 274 willful and knowing violations stands as precedent that the Commission intends that there be no limits on minimum penalties, even where willful and knowing violations are proven. Here again, for the ALJ to speculate that "I am confident that the Commission would not have adopted the decision imposing civil penalties" without first examining and affirming the relationship between penalties for willful and knowing violations and those for lesser offenses, *id.* at 100, belies a level of confidence not readily divined from the Commission's decision itself. In remanding this proceeding, the Commission describes the ALJ's position below as having "refused to assess a civil penalty because he found that (1) BOE had not proven a 'willful and knowing violation' to justify penalties exceeding \$6000 per violation..." 32 S.R.R. at 580 (emphasis added), citing the Initial Decision therein, 31 S.R.R. 967, 1023-24 (ALJ, 2009). The Commission remanded for consideration whether "BOE provided information sufficient to support its full demand for maximum penalties," including a revised analysis by the ALJ whether the violations were willful and knowing, and BOE's evidence of "the nature, circumstances, extent and gravity" of the violations, 32 S.R.R. at 582.

The ALJ next cites the absence of any exceptions by BOE to the Worldwide Relocations decision, which "presumably BOE would have done," "suggests that BOE has enforced the civil

penalty provision of the Shipping Act for twenty-eight years without believing that the Shipping Act requires the minimum civil penalty to be imposed for a willful and knowing penalty must exceed the maximum civil penalty to be imposed for a violation for a violation that is not willful and knowing.” Id. at 100. Suffice it to say that the reasons why BOE did not file exceptions in the Worldwide Relocations involve a multiplicity of issues, not least of which is BOE’s agreement with other, more substantive portions of the Initial Decision therein. The ALJ’s uninformed conjecture as to the reasons why BOE did not file exceptions in Worldwide Relocations is inappropriate as well as misplaced.

In sum, it appears that the ALJ failed to acknowledge the gravity of the knowing and willful aspect of the violations, while granting disproportionate weight to certain factors he deemed mitigating, i.e. limited ability to pay and the absence of prior offenses. However, the Commission has emphasized that ability to pay must be considered in the context of other factors, in particular, the severity of the violations. In Stallion Cargo, supra, 29 S.R.R. at 682, n.41, it said:

Respondent may very well be unable to pay the penalty imposed by the Commission, but the other factors present – the severity of the violations, Respondent’s continued disregard of the statutory requirements even after the initiation of a formal investigation, and the need to further the Congressional purpose to deter violations by imposing greater civil penalties – militate, on balance, that a substantial, though not the maximum, penalty be imposed.

The Commission has likewise stated that the import of knowing and willful violations cannot be negated or neutralized by other factors, such as the absence of prior offenses. Sea-Land Service, Inc.- Possible Violations, 30 S.R.R. 872, 894 (FMC 2006).

Commission precedent makes clear that the main Congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, supra, 29 S.R.R. at 681, and Portman Square, supra, 28 S.R.R. at 85. Following Congress’ action raising the maximum

penalties for violations from the previous \$5,000 per violation to up to \$25,000 for violations committed knowingly and willfully, the Commission instituted a number of rulemaking proceedings to implement the newly adopted Shipping Act of 1984, including Docket No. 84-20 to revise its rules and establish criteria and procedures for the handling of penalty claims. The language proposed in the Notice of Proposed Rulemaking, 49 F.R. 18874 (May 3, 1984), and adopted in then-46 C.F.R. §505.3(b), was identical to the provision as it appears today in current 46 C.F.R. §502.603 (b), including the requirement that “the policies for deterrence and future compliance with the Commission’s rules and regulations” be taken into account. Since that time, the Commission has been unwavering in addressing the main Congressional purpose of deterrence and compliance when imposing civil penalties. Pacific Champion Express Co., *supra*, 28 S.R.R. at 1404-1405 (the applicable statutory factors include “the need to send an appropriate message of deterrence”); Kin Bridge Express, Inc. – Possible Violations, 28 S.R.R. 984, 994 (ALJ 1999) (“[t]he instant task is to fix civil penalties that will send a message of punishment and deterrence”); Ever Freight International, *supra*, 28 S.R.R. at 335 (to assess less than the maximum would not serve the purpose of deterrence and would send the wrong message); and Martyn Merritt, AMG Services, *supra*, 26 S.R.R. at 664 (“In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to . . . the Congressional purpose to deter violations by imposing greater penalties in the 1984 Act.”). Indeed, in an analogous penalty situation in which all Shipping Act violations were knowingly and willfully committed, the penalty issue was recast by the Commission as requiring the Administrative Law Judge to “address the question of why the maximum potential penalties should not be assessed.” Arctic Gulf Marine Inc., v. Peninsula Shippers Assoc. and Southbound Shippers, Inc., 24 S.R.R. 159,160 (1987).

Certainly, the Commission's policies for deterrence and future compliance in the context of the assessment of civil penalties have been clearly established and well settled for a quarter of a century. The penalty amounts imposed by the ALJ not only depart from this precedent, but ignore the legislative purpose underlying the two-tiered structure providing a maximum penalty, and maximum deterrence, for knowing and willful violations.

#### **4. Penalties for section 10(b)(11) violation**

In view of his finding that Tober did not violate section 10(b)(11), the ALJ did not assess penalties for those violations. BOE submits that it established by a preponderance of the evidence that Tober violated section 10(b)(11) on no less than 255 shipments. Inasmuch as a violation of section 10(b)(11) requires as an element of proof that respondent acted knowingly and willfully, BOE submits that a civil penalty of not more than \$30,000 and not less than \$6,000 is warranted for each of these violations. BOE submits such penalties are consistent with the Commission's observation in Worldwide Relocations that "the dual NVOCC-OFF licensed entity should be reasonably diligent in its inquiry and investigation of the entities with which it conducts business," 32 S.R.R. at 506. As a dual NVOCC-OFF licensed entity that dealt with unlicensed entities, Tober placed the consumer public at substantial and commercially unreasonable risk. The Commission's paramount objective here must be to protect the shipping public; imposing meaningful penalties to achieve both deterrence and compliance are a recognized means to achieve that objective.

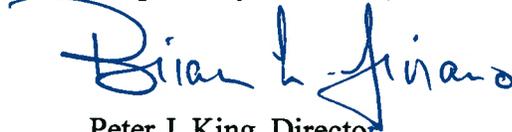
Nevertheless, as BOE acknowledged in its Brief on Remand, application of civil penalties for as many as 255 violations of section 10(b)(11) violations and for the 279 tariff violations of section 10(b)(2) would generate a hefty, and perhaps unrealistic, aggregate penalty. While relatively few enforcement cases require BOE to document hundreds of potential violations,

BOE is mindful that the Commission seeks to avoid penalties that may be deemed excessive in the circumstances. A similar consideration was taken into account in Sea-Land Service, supra, 30 S.R.R. 872. In this case, application of the lowest end of the penalty range for knowing and willful violations, together with a overall penalty ceiling of \$1.5 million for a respondent of this size, will result in a civil penalty that adequately reflects the extensive period of knowing and willful violations, the limited factors of mitigation, the deterrent impact of the penalty, and the objectives of the Shipping Act. BOE submits such a penalty amount is appropriate in the circumstances. Universal Logistic Forwarding Co., Ltd.-Possible Violations of the Shipping Act, 29 S.R.R. 323, 334 (ALJ 2001) adopted in relevant part, 29 S.R.R. 474 (FMC 2002).

#### **IV. CONCLUSION**

For all of the foregoing reasons, BOE respectfully requests that the Commission vacate the ALJ's Initial Decision on Remand, consider the facts and law *de novo*, and issue a decision: (1) finding that Tober violated section 10(b)(11) of the Shipping Act on no less than 255 shipments; (2) finding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Shipping Act on no less than 279 shipments; and (3) assessing a civil penalty against Tober in the amount of \$1.5 million for knowingly and willfully violating the Shipping Act.

Respectfully submitted,



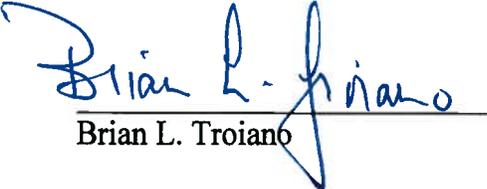
Peter J. King, Director  
Brian L. Troiano, Deputy Director

BUREAU OF ENFORCEMENT  
FEDERAL MARITIME COMMISSION  
800 North Capitol St., N.W.  
Suite 900  
Washington, D.C. 20573  
(202) 523-5783

March 20, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of March, 2013, a copy of the foregoing document has been served upon the following parties of record by first class mail with postage prepaid:

  
Brian L. Troiano

Yonatan Benhaim  
Wenscott Management LLC  
38 Pulaski St.  
Bayonne, NJ 07002

Yonatan Benhaim  
17815 Dalny Road  
Queens, NY 11432

**ENTITIES AND SHIPMENTS ADDRESSED IN DOCKET NO. 06-01****WORLD WIDE RELOCATIONS**

<b><u>Customer Name</u></b>	<b><u>Tober Ref. (B/L) No.</u></b>	<b><u>Bates Nos.</u></b>	<b><u>Cross Ref. to WWR Initial Dec./ Ship. #</u></b>
1. Giulia	41040932	1347-1357	31 SRR 1494, # 83
2. McLean	42040222	1358-1370	31 SRR 1496, #156
3. Jeske	41041955	1371-1393	31 SRR 1495, #113
4. Weizman	41041005	1394-1395	31 SRR 1498, #266
5. Dobkiewicz	41041058	1396-1398	31 SRR 1494, #66
6. Smith	42040315	1399-1403	31 SRR 1497, #239
7. Rooke	41041184	1404-1408	31 SRR 1497, #216
8. Bane	41041123	1409-1413	31 SRR 1493, #19
9. Donovan	41041006	1418-1423	31 SRR 1494, #67
10. Stapleton	41041059	1424-1428	31 SRR 1497, #244
11. McGarvey	42040339	1429-1433	31 SRR 1496, #154
12. Gelpi	41041172-01	1434-1439	31 SRR 1494, #81
13. Shashi	41041958	1440-1444	31 SRR 1497, #232
14. Chawla	42050009	1448-1452	31 SRR 1494, #40
15. Bitton	41050105	1453-1460	31 SRR 1493, #29
16. Zieme	42050050	1461-1466	31 SRR 1498, #276
17. Byrne	42050060	1467-1470	31 SRR 1494, #33
18. Gould	42050054	1478-1482	31 SRR 1494, #88
19. Jarecki	42050095	1483-1484	31 SRR 1495, #111
20. Eisbrich	42050071	1485-1486	31 SRR 1494, #71

**TRADEWIND CONSULTING**

<b><u>Customer Name</u></b>	<b><u>Tober Ref.(B/L) No.</u></b>	<b><u>Bates Nos.</u></b>	<b><u>Cross Ref. to WWR Initial Dec./ Ship. #</u></b>
1. Powell	42050184	1124-1138	31 SRR 1502, #27
2. Kninasat	41051128	1145-1157	31 SRR 1502, #16

**MOVING SERVICES**

<b><u>Customer Name</u></b>	<b><u>Tober Ref.(B/L) No.</u></b>	<b><u>Bates Nos.</u></b>	<b><u>Cross Ref. to WWR Initial Dec./ Ship. #</u></b>
1. Moser	41041013	1163-1164	31 SRR 1505, #115
2. Khamlich	41041118	1165-1166	31 SRR 1505, #116
3. Chew	41041302	1167-1168	31 SRR 1505, #117
4. Hazan	42040348-01	1169-1170	31 SRR 1505, #118
5. Wilkinson	41041392	1171-1172	31 SRR 1506, #119
6. Breckon	41041342	1173-1174	31 SRR 1505, #120
7. Carman	41041475	1175-1176	31 SRR 1505, #121
8. Rochford	41041400-01	1177-1178	31 SRR 1505, #122
9. Sexton	41041400-02	1179	31 SRR 1505, #123
10. Person	41041479	1180-1181	31 SRR 1505, #124
11. Rao	41041162	1182-1183	31 SRR 1505, #125