

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 06-06**

**EUROUSA SHIPPING, INC., TOBER GROUP, INC., AND CONTAINER  
INNOVATIONS, INC. – POSSIBLE VIOLATIONS OF SECTION 10 OF THE  
SHIPPING ACT OF 1984 AND THE COMMISSION’S REGULATIONS  
AT 46 C.F. R. § 515.27**

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**INITIAL DECISION ON REMAND OF INVESTIGATION OF TOBER GROUP, INC. –  
CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE <sup>1</sup>**

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On May 11, 2006, the Commission commenced this proceeding pursuant to 46 U.S.C. § 41302 of the Shipping Act of 1984 (Shipping Act or Act) to investigate the activities of respondents EuroUSA Shipping, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. (Container Innovations), three non-vessel-operating common carriers (NVOCCs) licensed by the Commission that appeared to have violated section 10(b)(11)<sup>2</sup> of the Act and the Commission’s Regulations at 46 C.F.R. § 515.27 in their dealings with ocean transportation intermediaries (OTIs) that did not have bonds and/or tariffs pursuant to requirements of the Act. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F. R. § 515.27*, FMC No. 06-06 (FMC May 11, 2006) (Order of Investigation and Hearing). The Order of Investigation and Hearing states that it also appeared that respondent Tober had violated section

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<sup>1</sup> The initial decision on remand will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

<sup>2</sup> After this proceeding was instituted by the Commission, the Shipping Act was reenacted as positive law through reorganization and restatement of the then-current law. Section 10(b) of the Act is now codified as 46 U.S.C. § 41104. The Commission continues to cite provisions of the Act by their former section references. *See, e.g., OC International Freight, Inc., OMJ International Freight, Inc., and Omar Collado*, FMC No. 12-01 (Apr. 2, 2012) (Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of the Shipping Act of 1984). I follow that practice in this decision.

10(b)(2)(A) of the Act by charging a rate other than that set forth in its published tariff or in a service contract. EuroUSA, Tober, and Container Innovations were three separate, independent, and unaffiliated entities.

The Commission also commenced four proceedings to investigate the activities of a number of individuals and entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Act. *Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, FMC No. 06-01, \_\_ S.R.R. \_\_ (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations* (FMC)); *Parks International Shipping, Inc., et al. – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 06-09 (ALJ Feb. 5, 2010) (Initial Decision), *vacated and remanded* (Apr. 26, 2012); *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02 (ALJ Aug. 28, 2009) (Initial Decision), *vacated and remanded* (Apr. 26, 2012); *Embarque Puerto Plata, Corp. and Embarque Puerto Plata Inc. d/b/a Embarque Shipping and Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp. and Julio Mateo – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo), Notice Not to Review served Sept. 29, 2009.

On October 9, 2009, I served an Initial Decision finding that Tober had not violated section 10(b)(11), but had violated section 10(b)(2)(A). The decision did not impose civil penalties for the violations of section 10(b)(2)(A). *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Oct. 9, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Tober Group, Inc.) (*Tober ID*).<sup>3</sup> Separate decisions addressed the claims against EuroUSA and Container Innovations. *EuroUSA, Tober Group, Container Innovations – Possible Violations*, FMC No. 06-06 (ALJ Dec. 1, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Container Innovations, Inc.), Notice Not to Review (FMC Jan. 7, 2010); *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06 (ALJ Oct. 9, 2009) (Memorandum and Initial Decision on Settlement Agreement and Joint Memorandum in Support of Proposed Settlement Filed by Bureau of Enforcement and EuroUSA Shipping, Inc.), Notice Not to Review (FMC Nov. 12, 2009).

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<sup>3</sup> I “short form” cite to various decisions and orders in FMC No. 06-06 relating only to Tober as *Tober Group – Possible Violations*. I cite to the June 12, 2008, Tober summary judgment decision as *Tober S/J Decision*; the Commission’s December 18, 2008, remand of the summary judgment decision as *Tober S/J Remand*; the October 9, 2009, *Tober* Initial Decision as *Tober ID*; findings of fact in the *Tober ID* as *Tober ID FF*; the Commission’s April 12, 2012, remand of the Initial Decision as *Tober Remand* (FMC); this decision as *Tober Remand ID*; and findings of fact in this decision as *Tober Remand ID FF*.

On August 16, 2010, a Commission administrative law judge issued an Initial Decision in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, 31 S.R.R. 1471 (ALJ Aug. 16, 2010) (*Worldwide Relocations* (ALJ)). On March 15, 2012, the Commission issued an order approving in part, reversing in part, and modifying in part that Initial Decision. *Worldwide Relocations – Possible Violations*, FMC No. 06-01, \_\_\_ S.R.R. \_\_\_ (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations* (FMC)). On April 12, 2012, the Commission vacated the *Tober* Initial Decision’s conclusion that *Tober* did not violate section 10(b)(11) and remanded the proceeding for reconsideration consistent with the Commission’s March 15, 2012, order in *Worldwide Relocations*. The Commission also vacated the denial of civil penalties for the section 10(b)(2)(A) violations and remanded for further proceedings. *Tober Group – Possible Violations*, FMC No. 06-06 (FMC Apr. 12, 2012) (Order Vacating Initial Decision in Part, Reversing in Part, and Remanding for Further Proceedings) (*Tober* ID Remand (FMC)). This Initial Decision on Remand addresses the claims against *Tober*.

As discussed more fully below, in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, the Commission investigated entities alleged to have operated as ocean transportation intermediaries on shipments of household goods, but that did not have an OTI license issued by the Commission and did not keep open a tariff or furnish a bond as required by the Act. These unlicensed entities dealt with members of the shipping public (proprietary shippers)<sup>4</sup> and acted as intermediaries between the proprietary shippers and the downstream common carriers that transported the cargo by water from the United States to a foreign port. Of particular relevance to this proceeding against *Tober* is the Commission’s discussion on how to distinguish when an entity (licensed or unlicensed) involved in a shipment as an ocean transportation intermediary operates as an ocean freight forwarder (sometimes abbreviated OFF) from when an entity operates as an NVOCC, and the use of presumptions and inferences in making that decision.

The Commission held that the person whom the downstream common carrier that transported the cargo (such as *Tober*) identified as the shipper when the downstream carrier issued its bill of lading is critically significant in determining whether the unlicensed entity (Respondents in *Worldwide Relocations*) operated as an NVOCC or an ocean freight forwarder on a shipment.

[F]or a Bill of Lading [issued by the downstream common carrier] and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity [the unlicensed entity being investigated in FMC No. 06-01] did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading [issued by the downstream common carrier] with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no

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<sup>4</sup> BOE used the term “proprietary shipper” to describe a person who contracts to have his or her personal and household goods shipped by water from the United States to a foreign destination. *Tober* S/J Decision at 13 n.4. The Commission also used this term in *Worldwide Relocations*. *Worldwide Relocations* (FMC) at 18.

assumption of responsibility [for transportation] by the respondent entity for the shipment in question.

*Worldwide Relocations (FMC)* at 18-19.

On a Commission investigation of an entity that operated as an OTI without a license, bond, or tariff, it makes little difference whether the unlicensed entity operated as an NVOCC or an ocean freight forwarder on a particular shipment. If the entity operated as an OTI/NVOCC without a license, bond, and/or tariff, it has violated sections 8, 19(a), and/or 19(b) of the Act and is liable for a civil penalty of up to \$6000 for each violation, or up to \$30,000 per violation if the violation was willful and knowing (using the civil penalty amounts in effect when the Tober shipments occurred). If the entity operated as an OTI/OFF without a license and/or bond, it has violated sections 19(a) and/or 19(b) of the Act and is liable for a civil penalty of up to \$6000 for each violation, or up to \$30,000 per violation if the violation was willful and knowing.

The difference between an OTI operating as an NVOCC and an OTI operating as an ocean freight forwarder is critical for an investigation of a common carrier such as Tober that is alleged to have conducted business with an unlicensed OTI, however. If the unlicensed entity operated as an OTI/NVOCC, then the carrier has violated section 10(b)(11) and is liable for a civil penalty of up to \$6000 for each violation, or up to \$30,000 per violation if the violation was willful and knowing. If the unlicensed entity operated as an OTI/OFF, then the carrier has not violated section 10(b)(11). 46 C.F.R. § 515.27(a).

In this proceeding, BOE presented evidence of 279<sup>5</sup> Tober shipments on which BOE based its claim that Tober violated section 10(b)(11). For the Initial Decision on Remand, BOE has withdrawn its claim on twenty-four shipments in which four intermediaries were involved (BOE Brief on Remand at 4), leaving 255 shipments on which BOE now claims Tober violated section 10(b)(11). The record contains bills of lading issued by Tober (the downstream carrier) for 249 of those 255 shipments. On every Tober bill of lading, Tober clearly and unambiguously identified the proprietary shipper, not the unlicensed entity that operated as an OTI, as the shipper. On 213 shipments, the Tober bill of lading identifies the shipper as the proprietary shipper at the proprietary shipper's address without any reference to the unlicensed entity BOE claims operated as an NVOCC. On thirty-six shipments, the Tober bill of lading identifies the shipper as the proprietary shipper c/o the unlicensed entity BOE claims operated as an NVOCC. Most of the shippers concerned household goods. It is understandable that a shipper of household goods from himself or herself in the United States to himself or herself in a foreign country would no longer have a U.S. address of his or her own and would use the intermediary's address on a bill of lading. *See, e.g.,*

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<sup>5</sup> The Initial Decision found that Tober carried 278 shipments. There was no Tober bill of lading for a shipment by Adam Giangreco, a shipment in which unlicensed entity Infinity Moving and Storage, Inc., was involved, and it was not counted among the 278. The record supports a finding that Tober issued a bill of lading for the Giangreco shipment and it should be counted. *See Tober Remand ID FF 49-49A.*

BOE App. p. 82 (Susan St. Louis shipping from herself in the U.S. to herself in the United Kingdom); BOE App. pp. 630 (Amanda Levinson from herself in the U.S. to herself in Ireland).

Based on the documents in the record for the shipments and other Tober shipments in which the entity was involved, considering Tober's operating practices, and using permitted inferences and presumptions, I find that on each of the six shipments for which there is no Tober bill of lading in the record, Tober issued a bill of lading identifying the proprietary shipper as the shipper.

By issuing the bills of lading clearly and unambiguously identifying the proprietary shipper as the shipper, Tober assumed responsibility for the transportation by water of each shipment and responsibility for delivery of the cargo; therefore, Tober acted as a common carrier on every shipment. The proprietary shipper, not the entity BOE claims to have operated as an NVOCC, was the shipper in relation to Tober on each of the 255 shipments. The unlicensed entities operated as ocean freight forwarders when they arranged these shipments. While the financial arrangements among the proprietary shippers, the unlicensed entities, and Tober may have violated Commission regulations, the improper arrangements do not mean that the unlicensed entities assumed responsibility for transportation of the cargo within the meaning of the Act. The unlicensed entities with which Tober conducted business operated as OTIs on the shipments, but did not assume responsibility for transportation of the cargo and were not shippers in relation to Tober. Therefore, the entities did not operate as NVOCCs, and Tober did not violate section 10(b)(11) on the shipments.

Tober's practice of identifying the proprietary shipper as the shipper contrasts with the operations of other common carriers who have conducted business with unlicensed OTIs. As noted above, the other downstream common carriers who conducted business with the unlicensed entities investigated in *Worldwide Relocations* issued bills of lading identifying the unlicensed entity, not the proprietary shipper, as the shipper. See *Worldwide Relocations* (FMC) at 18-19 (quoted above). In another proceeding in which the Commission investigated unlicensed OTIs, downstream common carrier Tropical issued bills of lading identifying unlicensed OTI Parks International as the shipper, and common carrier Sea Shipping Line issued bills of lading identifying unlicensed OTI Cargo Express as the shipper. *Parks International Shipping – Possible Violations*, FMC No. 06-09, Decision at 35 (ALJ Dec. 31, 2012) (Initial Decision on Remand). The unlicensed OTIs in *Worldwide Relocations* and *Parks International* operated as NVOCCs on those shipments. In contrast, Tober's operation has many similarities to the NVOCC-principal/unlicensed agent relationship later found to be lawful by the District of Columbia Circuit in *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 499-500 (D.C. Cir. 2009) (*Landstar*).

The *Tober* ID found that Tober violated section 10(b)(2)(A) on each of 278 shipments by charging a rate other than that set forth in its published tariff, but did not impose a civil penalty. The Commission did not disturb the finding of violations, but remanded for calculation of the civil penalty to be imposed for those violations. On remand, BOE does not withdraw its claim that Tober violated section 10(b)(2)(A) on each of the 279 shipments for which there is evidence in the record. Tober violated section 10(b)(2)(A) on each of the shipments. The civil penalty is revised as set forth below.

This decision is organized into five parts. Part One provides the applicable statutory framework, summarizes the procedural history of this proceeding, and summarizes the Commission's decision in *Worldwide Relocations* (FMC). Part Two discusses the application of *Worldwide Relocations* (FMC) to this proceeding. Part Three sets forth the standard of proof and evidence used in this proceeding. Part Four discusses and applies the controlling law to the facts in the record of this proceeding. Part Five sets forth specific findings of fact and conclusions of law in numbered paragraphs with citations to the record.

## PART ONE – BACKGROUND

### I. STATUTORY FRAMEWORK.

#### A. Ocean Transportation Intermediaries.

The Act defines and regulates a number of different types of entities that are involved in the international shipment of cargo by water, including two kinds of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19).

The term “ocean freight forwarder” means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(18). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC, the intermediary must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The statutory definitions are echoed in the Commission’s regulations.

*Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that –

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

*Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 C.F.R. § 515.2(f).

As summarized by the District of Columbia Circuit:

Both OFFs and NVOCCs are intermediaries between (i) shippers, who seek to export cargo, and (ii) ocean carriers, who physically carry the cargo on their vessels. An Ocean Freight Forwarder is “a person that . . . dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers,” and “processes the documentation or performs related activities incident to those shipments.” In practice, that typically means that the OFF “secures cargo space with a shipping line (books the cargo), coordinates the movement of cargo to shipside, arranges for the payment of ocean freight charges,” and provides other “accessorial services . . . such as arranging insurance, trucking, and warehousing.” OFFs receive compensation from both the shipper and the carrier.

[An NVOCC], meanwhile, is “a common carrier that . . . does not operate the vessels by which the ocean transportation is provided” and “is a shipper in its relationship with [a vessel-operating] common carrier.” Although NVOCCs usually do not own or operate vessels to actually carry the cargo, they lease facilities and services from other firms – making them the “common carrier[s]” responsible for

transportation of the cargo from origin to destination. Most NVOCCs consolidate small parcels from multiple shippers bound for the same destination and arrange for them to be shipped as a single, large, sealed container under one bill of lading. Upon arrival, NVOCCs arrange for the container to be broken down and for each parcel to be distributed to each customer. Thus, unlike an OFF, the NVOCC issues its own bill of lading to each shipper, and the vessel-operating common carrier issues a bill of lading to each NVOCC. Unlike OFFs, NVOCCs receive compensation only from the shipper.

*Landstar*, 569 F.3d at 494-495. A person or entity operates as an NVOCC “only when it “holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation.”” *Landstar* at 497 (emphasis added).

Section 19(a) of the Act requires a person operating as an ocean transportation intermediary (either as an ocean freight forwarder or an NVOCC) to be licensed by the Commission. 46 U.S.C. § 40901; *Landstar* at 495.

Section 8 of the Act requires “[e]ach common carrier . . . [to] keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.” 46 U.S.C. § 40501(a). Since an NVOCC is a common carrier, it must keep open a tariff. An ocean freight forwarder is not a common carrier; therefore, it does not keep open a tariff.

Section 19(b) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person operating as an ocean transportation intermediary to furnish proof of financial responsibility.

A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety – (1) in a form and amount determined by the . . . Commission to insure financial responsibility; and (2) issued by a surety company found acceptable by the Secretary of the Treasury.

46 U.S.C. § 40902(a). An ocean freight forwarder must “furnish evidence of financial responsibility in the amount of \$50,000,” 46 C.F.R. § 515.21(a)(1), and an NVOCC must “furnish evidence of financial responsibility in the amount of \$75,000.” 46 C.F.R. § 515.21(a)(2).

“[A]n entity can operate as a freight forwarder and as an NVOCC . . . .” (Federal Maritime Commission Questions, Answers, and Helpful Information, <http://www.fmc.gov/questions/default.aspx>, last visited December 29, 2012.) An intermediary that is licensed by the Commission as an ocean freight forwarder and as an NVOCC must obtain separate proofs of financial responsibility for each type of operation. “The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC’s transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services.” (*Id.*)

The bond is to be used to satisfy any civil penalty or order of reparations and “may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities.” 46 U.S.C. § 40902(b).

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

- (1) for an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in § 515.2(i), and
- (2) for an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in § 515.2(l).

46 C.F.R. § 515.2(w). As a guide to determine what transportation-related activities are covered by the bond or surety for NVOCCs and ocean freight forwarders, the Commission promulgated regulations providing examples of freight forwarding services and NVOCC services performed by an ocean transportation intermediary that are necessary or customary in the provision of transportation services to a customer.

*Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) coordinating the movement of shipments from origin to vessel; and

(13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

*Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) purchasing transportation services from a VOCC and offering such services for resale to other persons;

(2) payment of port-to-port or multimodal transportation charges;

(3) entering into affreightment agreements with underlying shippers;

(4) issuing bills of lading or equivalent documents;

(5) arranging for inland transportation and paying for inland freight charges on through transportation movements;

(6) paying lawful compensation to ocean freight forwarders;

(7) leasing containers; or

(8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

The Commission has described the services of ocean freight forwarders and NVOCCs as follows:

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of

shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters. NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

(Federal Maritime Commission Questions, Answers, and Helpful Information, <http://www.fmc.gov/questions/default.aspx>, last visited December 29, 2012.)

## **B. Prohibited Activities.**

The Commission licensed Tober as an NVOCC. As a common carrier, Tober is subject to several provisions of the Act that control what it can and cannot do. The Commission issued the Order of Investigation and Hearing to determine whether Tober had violated two of those provisions: Section 10(b)(11), which governs a common carrier's relationship with ocean transportation intermediaries; and section 10(b)(2)(A), which prohibits a common carrier from transporting cargo at rates other than that set forth in its published tariff or in a service contract. If Tober violated one or both of those sections, the Commission may impose a civil penalty for each violation.

### **1. Section 10(b)(11).**

#### **a. Elements.**

Section 10(b)(11) of the Act provides that a common carrier must not “knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 . . . and a bond, insurance, or other surety as required by section 40902 . . . .” 46 U.S.C. § 41104(11). The Commission issued the Order of Investigation and Hearing to determine whether Tober “violated section 10(b)(11) . . . and the Commission’s regulations . . . by knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that did not have a tariff and a bond as required by . . . the Act.” *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 4 (FMC May 11, 2006).

As originally enacted, the Shipping Act defined NVOCC as “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier,” 46 App. U.S.C.A. § 1702(17) (1997) (Westlaw), and ocean freight forwarder as “a person in the United States that – (A) dispatches shipments from the United States

via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 App. U.S.C.A. § 1702(19) (1997) (Westlaw). At that time, what is now referred to as section 10(b)(11) provided:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . (14) knowingly and willfully accept cargo from or transport cargo for the account of a *non-vessel-operating common carrier* that does not have a tariff and a bond, insurance, or other surety as required by [the Act].

46 App. U.S.C.A. § 1709 (1997) (Westlaw) (emphasis added).

In 1998, the President signed into law the Ocean Shipping Reform Act of 1998 (OSRA). Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998) (now codified at 46 U.S.C. §§ 40101-41309). Congress created and defined the new term “ocean transportation intermediary” to include NVOCCs and ocean freight forwarders. OSRA, Sec. 102(10), 112 Stat. at 1903 (now codified at 46 U.S.C. § 40102(19)). OSRA also amended section 10(b)(11) by striking “a non-vessel-operating common carrier” and inserting the newly-defined term “ocean transportation intermediary.” OSRA, Sec. 109(a)(12), 112 Stat. at 1910 (now codified at 46 U.S.C. § 41104). Therefore, as amended, section 10(b)(11) reads:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (11) knowingly and willfully accept cargo from or transport cargo for the account of an *ocean transportation intermediary* that does not have a tariff as required by section 40501 of this title [section 8] and a bond, insurance, or other surety as required by section 40902 of this title [section 19(b)].

46 U.S.C. § 41104 (emphasis added).

When the Commission promulgated its regulations implementing OSRA, however, it did not apply the section 10(b)(11) restriction to all OTIs including ocean freight forwarders, but limited its reach to NVOCCs: “No common carrier may transport cargo for the account of a shipper known by the carrier to be an *NVOCC* unless the carrier has determined that the *NVOCC* has a tariff and financial responsibility as required by sections 8 and 19 of the Act.” 46 C.F.R. § 515.27(a) (emphasis added). The Commission did not explain the reason for this limitation in either the preamble to the proposed rule, *see* Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 63 Fed. Reg. 70710-70715 (Dec. 22, 1998) (Notice of Proposed Rulemaking), or the preamble to the final rule. *See* Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 64 Fed. Reg. 11156-11171 (Mar. 8, 1999) (Final Rule and Interim Final Rule).

At the argument on Tober’s motion for partial summary judgment, BOE and Tober agreed that this difference results from the fact that NVOCCs are required to file tariffs, but ocean freight forwarders are not:

- The statute prohibits transporting cargo for an OTI that does not have a tariff *and* a bond;
- NVOCCs are the only OTIs that are required to have tariffs;
- Therefore, the section 10(b)(11) prohibition only applies to OTIs that are NVOCCs.

*See* Transcript of Argument on Tober Motion for Partial Summary Judgment (11/14/07) (Transcript (11/14/07)) at 11-12, 20. BOE echoed this belief in its 2009 proposed findings of fact.

Since NVOCCs are the sole type of ocean transportation intermediary required to publish a tariff, a violation of Section 10(b)(11) can only occur when a common carrier knowingly and willfully accepts cargo from or transports cargo for the account of an NVOCC that does not have a tariff or a bond.

(BOE Proposed Findings of Fact and Brief (filed May 22, 2009) (BOE Prop. FF (5/22/09)) at 29.) Accordingly, the Commission determined that although Congress amended section 10(b)(11) to prohibit a common carrier from carrying cargo for its newly-defined term “ocean transportation intermediary,” Congress did not intend to apply the coverage of section 10(b)(11) to ocean transportation intermediaries that are ocean freight forwarders. Therefore, if Tober transported cargo on a shipment involving an ocean transportation intermediary that operated as an NVOCC without a tariff as required by section 8 and a bond, insurance, or other surety as required by section 19(b), Tober violated section 10(b)(11). If Tober transported cargo on a shipment involving an ocean transportation intermediary that operated as an ocean freight forwarder without a bond, insurance, or other surety as required by section 19(b), Tober did not violate section 10(b)(11).

**b. Proving the elements.**

To prove that Tober violated section 10(b)(11) on any one shipment, BOE must prove by a preponderance of the evidence that:

1. Tober operated as a common carrier on the shipment; that is, that Tober:
  - held out to the general public that it provided transportation by water of passengers or cargo between the United States and a foreign country for compensation;
  - assumed responsibility for the transportation by water of the shipment from the port or point of receipt to the port or point of destination; and
  - used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

If the evidence proves that Tober operated as a common carrier on the shipment, then BOE must prove by a preponderance of the evidence that:

2. Tober knowingly and willfully accepted the shipment from or transported the shipment for the account of an NVOCC that does not have a tariff and a bond, insurance, or other surety as required by sections 8 and 19(b) of the Shipping Act; that is, that the entity with which Tober conducted business:
  - did not keep open a tariff as required by section 8 of the Act;
  - did not furnish a bond, insurance, or other surety as required by section 19(b) of the Act;
  - operated as an NVOCC on the shipment by:
    - holding out to the general public that it provided transportation by water of passengers or cargo between the United States and a foreign country for compensation;
    - assuming responsibility for the transportation by water of the shipment from the port or point of receipt to the port or point of destination; and
    - using, for all or part of that transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; and
  - Tober knowingly and willfully accepted the shipment from or transported the shipment for the account of the entity.

If there is a failure of proof on any element regarding the shipment, then it is not proven that Tober violated section 10(b)(11) on that shipment.

## **2. Section 10(b)(2)(A).**

The Commission issued the Order of Investigation and Hearing to determine whether Tober “provid[ed] service in the liner trade that was not in accordance with the rates and charges contained in a published tariff.” *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 4 (FMC May 11, 2006). The Act provides:

Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not

required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501(a).

A tariff under subsection (a) shall –

- (1) state the places between which cargo will be carried;
- (2) list each classification of cargo in use;
- (3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;
- (4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;
- (5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and
- (6) include copies of any loyalty contract, omitting the shipper's name.

46 U.S.C. § 40501(b). Section 10(b)(2)(A) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104.

A violation of section 10(b)(2)(A) is demonstrated by evidence showing that the common carrier charged the shipper something other than the applicable tariff or service contract rate.

### **C. Civil Penalty for Violation of the Act.**

The Commission issued the Order of Investigation and Hearing to determine whether, “in the event one or more violations of section 10 of the Act and/or 46 C.F.R. § 515.27 are found, civil penalties should be assessed [against Tober] and, if so, the amount of the penalties to be assessed.” *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 4 (FMC May 11, 2006). Section 13(a) of the Act provides:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$6000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).<sup>6</sup> Section 13(c) of the Act sets forth the factors to be considered in determining the amount of a civil penalty: “In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b).

The penalty provision is equally applicable to NVOCCs and ocean freight forwarders: An NVOCC that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for each violation. An ocean freight forwarder that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for each violation.

## **II. HISTORY OF THE INVESTIGATION INTO TOBER’S ACTIVITIES AND RESULTING ORDER OF INVESTIGATION AND HEARING.**

This case has a long procedural history dating back to 2006 and includes two reviews and remands by the Commission. A full understanding of this history is relevant and necessary and would be helpful to the reader.

### **A. Investigation Prior to Issuance of the Order of Investigation and Hearing.**

Tober was a bonded and tariffed NVOCC (and bonded ocean freight forwarder) licensed by the Commission. In connection with its enforcement responsibilities under the Act, the Commission “may require a common carrier . . . to file with the Commission a periodical or special report, an account, record, rate, or charge, or a memorandum of facts and transactions related to the business of the carrier.” 46 U.S.C. § 40104(a). *See also* 46 C.F.R. § 515.31(g) (“Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its ocean transportation intermediary business, and shall respond promptly to any lawful inquiries by such representative.”).

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<sup>6</sup> The Act originally provided for maximums of \$5000 and \$25,000. In 2000, before Respondents allegedly violated the Act, the Commission increased these amounts to \$6000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table) (2008)). The maximums have since been increased to \$8000 and \$40,000. 74 Fed. Reg. 38114, 38115-38116 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2011)).

By letter dated September 7, 2005, BOE contacted Tober with a request for information regarding ten unlicensed entities the letter stated had done business with Tober. (Tober Group, Inc.'s [Summary Judgment] Statement of Material Facts as to Which There Is No Genuine Issue Exhibit B.) The letter states that the entities had "primarily arrange[d] for overseas shipment of household goods and/or personal vehicles for individual shippers." (*Id.*) The letter identifies the ten entities as: Tradewind Consulting, Inc.; All In One Shipping, Inc.; International Shipping Solutions; Globe Movers; Boston Logistics; Global Direct Shipping; Worldwide Relocations, Inc.; Around the World Shipping, Inc.; Dolphin International Shipping; and Moving Services, Inc. (*Id.*) In response, "Tober provided documentation for five of these companies and informed BOE that it had not handled shipments for the other five companies. It also instructed its staff to cease accepting bookings from any of the 10 companies." (Tober Facts ¶ 11; Bureau of Enforcement's Response to Tober Group Inc.'s Statement of Material Facts (BOE Fact Response) ¶ 11.) According to BOE, it "received a large amount of discovery back." Transcript of S/J Argument at 15. (*See also* BOE App. pp. 7-14 (Affidavit of Area Rep. Mingione); BOE App. pp. 15-25 (Affidavit of Area Rep. Margolis).)

## **B. The Order of Investigation and Hearing.**

On May 11, 2006, the Commission issued the Order of Investigation and Hearing that commenced this proceeding. The Order states:

Tober . . . was incorporated in the State of New York on March 1, 1996. The President and [Qualifying Individual] of Tober is Mr. Yonatan Benhaim. Tober received a license to operate as an ocean freight forwarder ("OFF") on July 17, 1996. In 1999, Tober applied for and received a license to operate as an NVOCC. Tober is presently active as a licensed and tariffed NVOCC and OFF with a principal place of business at 185 Randolph Street, Brooklyn, New York 11237. Tober maintains an NVOCC bond in the amount of \$75,000 and an OFF bond in the amount of \$50,000. Tober publishes its electronic tariff at [www.dpiusa.com](http://www.dpiusa.com). The single commodity covered by this tariff is "Cargo, N.O.S." and the tariff has not been updated since its original issue on January 7, 2004. The tariff rate for Tober's N.O.S. cargo is \$500 per 1,000 kilograms or 1 cubic meter, whichever yields the higher amount.

Based on evidence available to the Commission, it appears that between May 2004 and December 2005, Tober knowingly and willfully accepted cargo from or transported cargo for the account of several OTIs that did not have tariffs and bonds as required by sections 8 and 19 of the Act and the Commission's regulations at 46 C.F.R. § 515.27. Section 10(b)(2)(A) of the Act states that no common carrier may provide service in the liner trade that is not in accordance with the rates and charges contained in a published tariff. 46 App. U.S.C. § 1709(b)(2)(A). It appears that from at least January 2004, Tober has provided liner service to its shippers that was not in accordance with the \$500 Cargo, N.O.S. rate published in its electronic tariff.

*EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 2 (FMC May 11, 2006). The Commission ordered the investigation to determine:

- (1) Whether [Tober] violated section 10(b)(11) of the Shipping Act of 1984 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 OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act;
- (2) Whether Respondent Tober violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff.
- (3) Whether, in the event one or more violations of section 10 of the Act and/or 46 C.F.R. § 515.27 are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed;
- (4) Whether, in the event violations are found, appropriate cease and desist orders should be issued; and
- (5) Whether, in the event violations are found, such violations constitute grounds for the revocation of [Tober's] OTI license pursuant to 46 C.F.R. § 515.16.

*Id.* at 4. The Commission designated BOE as a party to the proceeding. *Id.* at 5. The Secretary served the Order of Investigation and Hearing on Respondents.

### **C. Discovery by the Parties.**

As stated above, before the Commission issued the Order of Investigation and Hearing, Tober provided a large number of shipping documents in response to the demand from BOE. After issuance of the Order, BOE served interrogatories and requests for production of documents on Tober, which at that time was represented by counsel. Tober moved for a protective order that would keep confidential some of its responses, a motion that BOE did not oppose, and a protective order was entered. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Oct. 3, 2006) (Protective Order with Respect to . . . Tober . . .).

On June 6, 2007, Tober served interrogatories and requests for production of documents on BOE. On July 12, 2007, BOE requested a subpoena seeking Tober's corporate federal and state tax returns for 2005 and 2006 and Tober's balance sheet and income statement for 2006. On July 18, 2007, Tober filed a motion seeking an extension of the discovery deadline and postponement of depositions of two employees. Tober also stated that it believed BOE's responses to discovery did not completely respond to the requests and interrogatories.

In a telephone conference to address discovery issues attended by counsel for BOE and counsel for Tober, BOE represented that the facts on which it relies to support its allegations against

Tober were set forth in the documents submitted to Tober in response to Tober's request for production of documents and referred to in BOE's answers to Tober's interrogatories. BOE also stated it would provide transcripts of depositions of the entities it claimed were NVOCCs for which Tober transported cargo. Tober agreed to produce the documents sought by BOE's subpoena. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ July 23, 2007) (Memorandum and Order Regarding July 23, 2007, Conference . . . Subpena).

#### **D. Tober's Motion for Summary Judgment.**

After completion of discovery, Tober filed a motion for summary judgment on the section 10(b)(11) claim. Tober argued that the intermediaries with which it had conducted business had not operated as NVOCCs. BOE opposed the motion, contending that two issues of material fact precluded granting Tober's motion: (1) there is a genuine issue of material fact as to whether the OTIs in question were NVOCCs as defined by the Shipping Act, Regulation and case law; and (2) there is a genuine issue of material fact as to whether Tober knowingly and willfully accepted cargo from the alleged NVOCCs.

After oral argument on the motion, BOE filed the shipping documents for "twenty-four proprietary shippers as representative of what BOE claims are a total of 300 shipments by those seventeen ENTITIES." See *Tober S/J Decision* at 51. Most of the documents were prepared by Tober, not the unlicensed entities alleged to have operated as NVOCCs. Neither BOE nor Tober contested the authenticity of the documents or the historical facts stated in the documents.

The decision reviewed the records of the twenty-four shipments and identified material uncontested historical facts about each shipment supported by the shipping records for that shipment. *Tober S/J Decision* at 52-66. On one shipment (Frederic and Sophie Girot), the documents showed that SeaMates International, Inc., a licensed NVOCC, identified Tober as the forwarding agent on a SeaMates bill of lading and identified IntlMove (a/k/a Tran Logistic Group), one of the entities with which Tober was alleged to have done business, as the shipper. *Tober S/J Decision* at 53-54. It was concluded that there was no evidence that Tober acted as an NVOCC on the Girot shipment; therefore, Tober could not have violated section 10(b)(11) on that shipment. *Id.* at 79.<sup>7</sup>

On the other twenty-three shipments, Tober identified the proprietary shipper at the proprietary shipper's address as the shipper on sixteen bills of lading and the proprietary shipper c/o the unlicensed entity as the shipper on seven bills of lading. The summary judgment decision found that by issuing the bills of lading identifying the proprietary shipper as the shipper at either address, Tober established a contractual relationship with the proprietary shippers, "assume[d] responsibility for the transportation [by water] from the port or point of receipt to the port or point of destination," 46 U.S.C. § 40102(6), and acted as an NVOCC on the shipments. The decision also found that the

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<sup>7</sup> BOE did not include shipping records of the Girot shipment in the supporting evidence filed prior to issuance of the *Tober* Initial Decision.

evidence did not support a finding that the entity alleged to have operated as an NVOCC assumed responsibility for the transportation by water of the shipment. *See, e.g., Tober S/J Decision at 79* (Misa Suzuki shipment). The summary judgment was based on the premise that the uncontested facts derived from these records could support summary judgment. *Zima Corp. v. M.V. Roman Pazinski*, 493 F. Supp. 268, 274 (S.D.N.Y.) (facts derived from shipping documents as to which there is no dispute as to authenticity may support summary judgment), *aff'd*, 633 F.2d 208 (2nd Cir. 1980) (TABLE). *See Tober S/J Decision at 27-28.*

BOE filed exceptions to the grant of summary judgment. On appeal, while it did not identify any historical facts in dispute, the Commission found that “there are genuine issues of material fact: were the entities with which Tober conducted business common carriers and NVOCCs, and did Tober accept cargo knowingly and willfully from these entities? These genuine issues of material fact preclude a grant of summary judgment.” *Tober S/J Remand at 22.* The Commission remanded for further proceedings. *Id.* at 23.

#### **E. October 9, 2009, *Tober* Initial Decision.**

After the remand, an order issued February 5, 2009, set forth a detailed procedure for filing proposed findings of fact, briefs, and supporting evidence. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Feb. 5, 2009) (February 5, 2009, Procedural Order). Tober’s counsel also filed a motion for leave to withdraw as counsel. Leave to withdraw was granted on April 29, 2009. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Apr. 29, 2009) (Order Granting Motion to Withdraw as Counsel for Tober Group, Inc.).

On May 22, 2009, BOE filed its proposed findings of fact, appendix containing the documentary evidence on which it relies for its proposed findings, and brief. Tober did not file a response to BOE’s filings. On September 21, 2009, BOE filed a Motion to Reopen the Proceeding for the Purpose of Receiving Additional Evidence seeking to include evidence to the record regarding Tober’s financial status and to make additional arguments regarding the civil penalty that it sought, a motion granted on October 9, 2009. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Oct. 9, 2009) (Order Granting [BOE] Motion . . . Additional Evidence). Tober did not file a brief or proposed findings. The evidence submitted by BOE consisted of shipping documents for 278 shipments in which Tober was involved. Each shipment involved one of fifteen entities alleged to have operated as an NVOCC without a tariff, license, or proof of surety: EOM Shipping Inc. (EOM); Lehigh Moving and Storage, Inc. (Lehigh); Infinity Moving & Storage, Inc. (Infinity); Worldwide Relocations, Inc. (Worldwide Relocations); All In One Shipping, Inc. (All In One or AIOS); Around the World Shipping, Inc. (Around the World or ATWS); Tradewind Consulting, Inc. (Tradewind); Moving Services, Inc. (Moving Services); Orion Consulting, LLC (Orion); Sea and Air International, Inc. (Sea and Air); Echo Trans World, Inc. (Echo); Car-Go-Ship.com; Access International Transport and AVL Atlanta Transport (Access International/AVL); Tran Logistic Group, Inc. (a/k/a IntlMove, Inc.) (Tran Logistic); and Avi Moving (Avi).

On October 9, 2009, I issued the *Tober* ID. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Oct. 9, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge,

on Investigation of Tober Group, Inc.). Despite Tober's failure to participate in the later stages of this proceeding, "it is the Commission's responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties." *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 163 n.34 (FMC 2001) (*Rose Int'l*). Therefore, the Initial Decision was predicated on the evidence and argument presented by BOE in its proposed findings of fact and evidence that was submitted by Tober and BOE in conjunction with the motion for partial summary judgment. Tober's failure to file briefs does not alter the analysis of the evidence in the record.

**1. Section 10(b)(11) claim.**

**a. Tober.**

The Initial Decision examined the shipping documents for each of 278 shipments in the record to determine whether Tober operated as a common carrier on the shipments. With regard to the first common carrier requirement set out in the Act's definition of common carrier – holding out to the general public to provide transportation by water of cargo between the United States and a foreign country – the Initial Decision held that given Tober's status as an NVOCC licensed by the Commission, Tober held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country. *Tober* ID at 21. Tober held its status as a licensed NVOCC at the time of each of the 278 shipments; therefore, it held itself out as a common carrier on all 278 shipments. *Tober* ID at 21; *Tober* ID FF 2-4.

With regard to the second common carrier requirement – whether Tober assumed responsibility for the transportation of the cargo – the record included documents related to the shipments, including bills of lading issued by Tober for 271 of the 278 shipments. The bills of lading established that Tober assumed responsibility for the transportation of 271 of the 278 shipments.

On 232 bills of lading, Tober identified the proprietary shipper at the proprietary shipper's address as the shipper, and on thirty-nine bills of lading, Tober identified the proprietary shipper c/o the entity as the shipper. Tober did not identify the unlicensed entity as the shipper on any bill of lading.

The record did not include a bill of lading for seven shipments. Based on the documents in the record concerning those seven shipments and other shipments in which the entity was involved, and Tober's operating practices, and using inferences and presumptions similar to those later used by the administrative law judge in *Worldwide Relocations*, see *Worldwide Relocations* (FMC) at 16-17, I found that Tober issued a bill of lading identifying the proprietary shipper as the shipper on each of the seven shipments. *Tober* ID at 22; at *Tober* ID FF 28, 78, 94, 203, 221.<sup>8</sup>

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<sup>8</sup> The Tober decision lists four of the seven shipments in the text (*Tober* ID at 22): All In One – *Tober* ID FF 78 (Somia Azam shipment and Antoine Pierrat/Jacqueline Giotti shipment);

The Initial Decision concluded that by issuing the bills of lading, Tober assumed responsibility for transportation of the cargo from the port or point of receipt to the port or point of destination for each of the 278 shipments. Tober identified the proprietary owner of the as the shipper (either at the proprietary shipper's address or the proprietary shipper c/o the entity) on every bill of lading in the record; therefore, the Initial Decision held on each of the shipments at issue in this proceeding, Tober established a direct relationship with each proprietary shipper and transported the cargo by water for that proprietary shipper. For instance, Infinity was involved in 119 shipments.

When Tober issued the 119 bills of lading on the Infinity shipments identifying the proprietary shipper or the proprietary shipper c/o Infinity as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the 119 Infinity shipments.

*Tober* ID FF 51. Similar findings were made for each of the other fourteen unlicensed entities. See the following *Tober* ID Findings of Fact: 16 (EOM), 33 (Lehigh), 68 (Worldwide Relocations), 84 (All In One), 99 (Around the World), 117 (Tradewind), 130 (Moving Services), 146 (Orion), 160 (Sea and Air), 174 (Echo), 190 (Car-Go-Ship.com), 211 (Access International/AVL), 233 (Tran Logistic), and 244 (Avi).

With regard to the third common carrier requirement – transportation by water between the United States and a foreign port – the Tober bills of lading and other documents demonstrated that each of the 278 shipments was carried by a vessel from a port in the United States to a port in a foreign country. Therefore, BOE had proven by a preponderance of the evidence that Tober operated as a common carrier on each of the 278 shipments. *Tober* ID at 19-23.

#### **b. Unlicensed entities.**

The Initial Decision then analyzed the record to determine whether the unlicensed entities alleged to be NVOCCs for which Tober had transported cargo in violation of section 10(b)(11) had operated as NVOCCs on each of the 278 shipments. Regarding the first common carrier requirement – holding out to the general public to provide transportation by water of cargo between the United States and a foreign country – BOE contended that “each of the entities . . . advertised on the Internet offering origin to destination carrier services.” (BOE Prop. FF at 35.) BOE also

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Around the World – *Tober* ID FF 94 (Karen Inglemeyer shipment); and Tran Logistic – *Tober* ID FF 221 (Jonathan Waage shipment). Similar findings were made for Lehigh – *Tober* ID FF 28 (David Mailman shipment); Access International/AVL – *Tober* ID FF 203 (Catherine Mars shipment), and a second Tran Logistic shipment – *Tober* ID FF 222 (Alan and Rebecca Richardson shipment).

contended that an entity's course of conduct could establish that the entity held itself out as a common carrier.

The Initial Decision examined the Internet advertising in the record and held that the advertising established that eight of the fifteen entities with which Tober conducted business held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country. *Tober* ID Findings of Fact 7-8 (EOM), 21-22 (Lehigh), 56 (Worldwide Relocations), 73-74 (All In One), 89-90 (Around the World), 151-152 (Sea and Air), 179-181 (Car-Go-Ship.com), and 196-200 (Access International/AVL).

BOE submitted Internet advertising for two other entities (Infinity and Tradewind), but the Initial Decision concluded that the language used in the advertising did not establish that the entity was holding out as a common carrier, and BOE had not identified other evidence that would establish that the entity held itself out as a common carrier. The following findings and conclusions were made with regard to Infinity.

38. Infinity advertised on the Internet that it “[took] care of all the arrangements for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee’s new home.” (BOE App. p 78.)
39. Infinity’s Internet advertisement describes a business operating as an ocean freight forwarder as ocean freight forwarders “arrange[] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).
40. Infinity’s Internet advertisement did not hold out to the general public that Infinity provided transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).
41. BOE has not identified evidence that would support a finding that Infinity held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

*Tober* ID at 522.

The following findings and conclusions were made with regard to Tradewind.

104. Tradewind advertised on the Internet that it “is a consulting firm. We are not classified as an international shipping company. Instead, we prefer to think of ourselves as personalized travel consultants. Tradewind Consulting organizes your services, negotiates with vendors and books your move with

licensed moving, shipping and delivery agents worldwide.” (BOE App. p 1116.)

105. By advertising that it organizes services, Tradewind advertised that it “arranges space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).
106. BOE has not identified evidence that would support a finding that Tradewind held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

*Tober* ID at 62.

BOE did not submit Internet advertising for five of the fifteen entities and did not identify other evidence in the record demonstrating a course of conduct that would support a finding that they held out; therefore, the Initial Decision concluded that those five entities had not held out to the general public to provide transportation by water of cargo between the United States and a foreign country. *Tober* ID Findings of Fact 122-123 (Moving Services); 135-136 (Orion); 165-166 (Echo); 216-217 (Tran Logistic); and 238-239 (Avi).<sup>9</sup>

The Initial Decision then examined the record to determine whether the entities had assumed responsibility for transportation by water of the cargo from the port or point of receipt to the port or point of destination. The record did not include a bill of lading issued by any unlicensed entity for any of the 278 shipments. Most significantly, as discussed above, on each of the 271 shipments for which *Tober* bills of lading are in the record, *Tober* identified the actual owner of the cargo (the proprietary shipper) as the shipper. On 232 bills of lading, *Tober* identified the proprietary shipper at his or her own address as the shipper. On thirty-nine bills of lading, *Tober* identified the proprietary shipper c/o the entity as the shipper.

On the seven shipments for the five entities (All In One, Around the World, Tran Logistic, Lehigh, and Access International/AVL) for which the record did not include a *Tober* bill of lading but did include other shipping documents (*see* n.8 above), it was presumed that *Tober* operated as it had on the other seventy-one shipments involving each of those five unlicensed entities. *Tober* identified the proprietary shipper at his or her address or c/o the unlicensed entity on the bill of lading for each of the other seventy-one shipments. Therefore, it was concluded that *Tober* issued bills of lading identifying the proprietary shipper as the shipper on each of the seven shipments.

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<sup>9</sup> BOE has withdrawn from consideration its claim that *Tober* violated section 10(b)(11) on the twenty-four Orion, Echo, Tran Logistic, and Avi shipments. (BOE Brief on Remand at 4.)

Most of the 278 shipments were less than container load (LCL) shipments. *See* BOE App. pp. 9-12 (affidavit stating shipments by EOM, Lehigh, and Infinity were primarily LCL shipments); BOE App. pp. 17-24 (affidavit stating shipments by Worldwide Relocations, All In One, Around the World, Tradewind, Moving Services, Orion, Sea and Air, Echo, Car-Go-Ship.com, Access International/AVL, Tran Logistic, and Avi were primarily LCL or totally LCL shipments).

NVOCCs often consolidate [LCL] shipments “from numerous shippers into larger groups for shipment by an ocean carrier.” BOE does not claim or identify any evidence that would support a finding that any intermediary with which Tober conducted business ever consolidated LCL loads into one shipment and shipped the consolidated load with Tober in its own name.

*Tober* ID at 35 (citations omitted).

The Initial Decision concluded:

BOE has proven by a preponderance of the evidence that Tober operated as a common carrier on 278 shipments for which there is evidence in the form of shipping documents in the record. BOE has not proven by a preponderance of the evidence that the intermediaries involved in the shipments operated as NVOCCs. For some of the intermediaries, BOE has not proven by a preponderance of the evidence that the intermediary held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i). BOE has not proven by a preponderance of the evidence that any intermediary assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(ii). Therefore, BOE has not proven that Tober violated section 10(b)(11) of the Shipping Act by accepting cargo from or transporting cargo for the account of an NVOCC that did not have a tariff and a bond as required by sections 8 and 19 of the Shipping Act.

*Tober* ID at 36.

## **2. Section 10(b)(2)(A) claim.**

The *Tober* ID then addressed the claim that Tober had violated section 10(b)(2)(A). According to the Order of Investigation and Hearing, “[t]he tariff rate for Tober’s N.O.S. cargo is \$500 per 1,000 kilograms or 1 cubic meter, whichever yields the higher amount,” *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 2 (FMC May 11, 2006), and nothing in the record suggested otherwise.

The Initial Decision noted that “[a]lthough Tober did not move for summary judgment on the section 10(b)(2) claim, it included facts about its tariff and actual charges in its statement of material facts as to which it contended there was no genuine issue.” *Tober* ID at 38. “At the

argument on Tober's motion for partial summary judgment, while not 'conceding the point on the record, for a trial,' Tober's former counsel conceded that BOE could put on evidence that would show a violation of section 10(b)(2)(A)." *Id.* at 39. In his deposition, BOE's president testified that his understanding was

it's my rate is up to \$500 everything you can, change it per – so whenever you give a rate, if it's a \$100 per cubic meter, it's covered under the 500 per cubic meter. As long as you don't go over the 500, you didn't have to change the tariff. That was my understanding.

(BOE App. pp. 47-48.) The Initial Decision concluded:

TOBER'S president testified that the tariff rate was never the rate quoted or charged by Tober. Therefore, BOE has proven by a preponderance of the [evidence] that Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff in violation of section 10(b)(2)(A).

*Tober* ID at 39.

### 3. Sanctions.

The Initial Decision then addressed whether BOE, the party with the burden of persuasion on the civil penalty, had proven that Tober willfully and knowingly violated section 10(b)(2)(A). BOE's brief had focused its civil penalty argument the claimed section 10(b)(11) violations. The Decision noted that "BOE contends that 'since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities,'" *Tober* ID at 43, but that in its brief, "BOE does not designate any specific facts and provide their location in the record that BOE contends would support a finding Tober willfully and knowingly violated section 10(b)(2)(A)." *Id.* The Decision concluded that BOE had not established that Tober had willfully and knowingly violated section 10(b)(2)(A). *Tober* ID at 44.

As set forth above, section 13 of the Act establishes eight factors to be considered in determining the amount of a civil penalty (the section 13 factors). The Initial Decision concluded:

With regard to the section 13 factors for which there is evidence in the record, BOE does not set forth any argument about how those factors should be balanced "to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law."

*Tober* ID at 45, quoting *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986).

BOE has not met its burden of persuasion to establish the amount of the civil penalty to be imposed. For the section 13 factors for which there is evidence in the record, BOE has not established how the Commission should take into account to ensure that the penalty is tailored to the particular facts of the case. Therefore, I am unable to assess a civil penalty against Respondents.

*Id.* at 46.

BOE stated that Tober had ceased doing business. The Initial Decision considered whether an order that Tober cease and desist violating section 10(b)(2)(A) of the Act should be entered and concluded that “[t]here is not a reasonable likelihood that Tober will resume its unlawful activities in violation of section 10(b)(2)(A). Accordingly, a cease and desist order is not issued.” *Id.* at 47.

On December 17, 2009, BOE filed exceptions to the *Tober* Initial Decision.

### **III. COMMISSION ORDER IN *WORLDWIDE RELOCATIONS* – *POSSIBLE VIOLATIONS*, FMC NO. 06-01 (FMC Apr. 12, 2012).**

#### **A. Additional Background.**

*Worldwide Relocations* was a “proceeding against several household goods moving companies and related individuals who were the subject of more than 250 consumer complaints to the Commission.” *Worldwide Relocations – Possible Violations*, FMC No. 06-01, Order at 2 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations* (FMC)). The Commission issued the Order of Investigation and Hearing to determine whether respondents in that proceeding operated as OTIs without a license, bond, and/or tariff as required by the Act. The evidence in *Worldwide Relocations* consisted in part of records provided to BOE by Tober.

On August 16, 2010, the Administrative Law Judge issued the Initial Decision in [*Worldwide Relocations*]. In the decision, the ALJ determined that all seven corporate respondents then in the proceeding acted as [NVOCCs], and found that the entities had neither published tariffs nor been licensed and bonded as required by sections 8 and 19 of the Shipping Act . . . . The ALJ also determined that all but one of the individual respondents in the proceeding should be held liable individually and thereby pierced their corporate veils, finding violations by both the corporate entities and the individuals who owned or operated them. The ALJ found a total of 649 violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals. The ALJ also issued an injunction barring the [individual] respondents from “serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation.” No party filed exceptions. The Commission issued a Notice of Commission Review on September 14, 2010.

*Id.* at 2-3 (citations omitted).

With certain exceptions, the Commission affirmed the administrative law judge's Initial Decision on liability and the amount of the civil penalty imposed on each Respondent as a sanction. The Commission modified three issues addressed in the Initial Decision.

First, after reviewing the record, we reverse the denial of [BOE's] request for sanctions against International Shipping Solutions and Dolphin Shipping International because the entities did not respond to the ALJ's Order compelling responses. Second, we note that while the question of whether certain conduct violates the Shipping Act is necessarily a fact-intensive inquiry, a finder of fact may draw reasonable evidentiary inferences and employ permissive presumptions in some circumstances in determining whether an entity operated as an NVOCC. The ALJ appears to have done so in the Initial Decision. Finally, we modify the injunctive aspect of the Initial Decision to future violations of the Shipping Act.

*Id.* at 3. The Commission affirmed the findings of fact "except where inconsistent with findings below." *Id.* at 7.

**B. *Worldwide Relocations (FMC) Holdings.***

**1. *Worldwide Relocations (FMC) Issue One – Request for Sanctions for Failure to Comply with Discovery Obligations.***

In *Worldwide Relocations*, BOE filed a motion asking the administrative law judge to impose sanctions against some respondents, including:

Baruch Karpick, International Shipping Solutions, Dolphin International, Moving Services, Global Direct Shipping, and Sharon Fachler, for failure to respond to three discovery orders entered earlier in the case. Specifically, BOE sought an adverse inference against these parties for failure to answer interrogatories or provide documents, and asked the ALJ to strike any evidence offered on certain claims or defenses, relying on Commission Rule 210 (46 C.F.R. § 502.210) and Commission precedent.

*Worldwide Relocations (FMC)* at 7. The judge entered sanctions against Moving Services, Global Direct Shipping, Sharon Fachler, and Baruch Karpick and the Commission adopted those findings. *Id.* at 8.

The ALJ, however, found that the record did not provide clarity on whether International Shipping Solutions and Dolphin International had complied with discovery orders. . . . Because BOE was the proponent on the issue of sanctions, and because BOE had not explained the discrepancy in accounts between the parties, the

ALJ denied BOE's request for sanctions against International Shipping Solutions and Dolphin International.

*Id.*

The Commission analyzed the record and came to the opposite conclusion.

Because neither Dolphin International nor International Shipping Solutions complied with discovery obligations, we reverse the portion of the ALJ's decision that denied BOE's request for sanctions against Dolphin International and International Shipping Solutions. Had the ALJ imposed sanctions, she would also have drawn an adverse inference against the entities for the documents that they refused to provide or destroyed and for the interrogatories that they would have answered. We therefore reverse that portion of the ALJ's decision, and impose sanctions against Dolphin International and International Shipping Solutions for failure to comply with discovery obligations. We likewise infer that if documents would have been produced, they would be adverse to Dolphin International and International Shipping Solutions.

*Id.* at 10.

**2. *Worldwide Relocations (FMC) Issue Two – Reasonable Evidentiary Inferences and Permissive Presumptions Used to Determine NVOCC Status.***

**a. *The Fact Finder's Inquiry.***

In *Worldwide Relocations (FMC)*, the Commission stated:

In the Initial Decision, the ALJ correctly stated the well-established methodology for determining whether an entity is operating as an NVOCC.

[T]o determine if an entity is a common carrier, it "is important to consider all the factors present in each case and to determine their combined effect." [*Activities, Tariff Filing Practices and Carrier Status of Containerhips [Inc.]*, 9 F.M.C. [56,] at 65 [(F.M.C. 1965)]. The Commission has indicated that it will "look beyond documentary labels." [*Id.*] at 66. For example, "it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status." [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity's conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. [1679,] at 1684 [(F.M.C. 1991)]; see also *Low Cost Shipping*,

*Inc.*, 27 S.R.R. 686, 687 ([F.M.C.] 1996) (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments). This is a fact intensive inquiry.

. . . Resolution of that factual question requires an examination of each entity's conduct on a particular shipment to determine whether it operated as either an NVOCC or an [Ocean Freight Forwarder] on that shipment. Accordingly, after explaining how the evidence was weighed, each shipment alleged will be reviewed individually.

31 S.R.R. at 1519. We expressly affirm the ALJ's articulation of the Commission's approach to determining NVOCC status.

*Worldwide Relocations* (FMC) at 10-11.

**b. "Holding out."**

The Commission addressed the requirement that to be a common carrier within the meaning of the Act, an entity must "hold[] itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." 46 U.S.C. § 40102(6)(A)(i).

In answering the question of whether an entity is operating as an NVOCC, the Commission first determines whether the entity was "holding itself out to the general public to provide transportation by water." 46 C.F.R. § 515.2(f). Among ocean transportation intermediaries, only an NVOCC holds "itself out to the general public to provide transportation by water . . ." An Ocean Freight Forwarder (OFF) does not pass this threshold question.

A person or entity may hold out to the public "by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise." *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961). The FMC has previously found that advertising and solicitations to the public are important factors in determining the issue of "holding out" by an entity. *See Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 6 S.R.R. 483, 489 n.7 (FMC 1965).

*Worldwide Relocations* (FMC) at 11-12.

**c. Inferences or presumptions on "holding out" issue.**

The Commission noted that the administrative law judge

appear[ed] to have made inferences on the question whether an entity “held out” for determining common carrier status for certain shipments. . . . [T]he ALJ did not analyze each shipment . . . for specific evidence of “holding out” [but] simply considered the respondent’s overall activities relating to “holding out” during the relevant period of time, reviewed shipping documents as they related to other elements of NVOCC status, and concluded that the respondent acted as an NVOCC. *Id.*

Applying this type of inference is appropriate when there appears to be uniform evidence on one element for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period. Such an inference is especially appropriate . . . when dealing with an element that necessarily speaks to a course of conduct, such as “holding out.” This approach likewise comports with evidentiary rules pertaining to relevance of practices of an entity in order to prove that a practice is routine. *See Fed. R. Evid. 406* (“Evidence . . . of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”).

*Worldwide Relocations* (FMC) at 12-13.

The Commission endorsed the use of permissive presumptions, or inferences of fact.

Commission cases have previously stated that permissive presumptions, or inferences of fact, may be employed in appropriate circumstances to determine whether an entity operated as an NVOCC as opposed to an OFF. A presumption of fact “is nothing more than a logical or reasonable inference drawn from established facts that may be rebutted by contrary evidence.” *International Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 684 (ALJ 1990). “Presumptions are widely employed in the law in a variety of contexts as an aid to the party having the burden of proof.” *Id.*

Such permissive presumptions may be used in situations where one party has superior access or control of facts, evidence, or proof resulting in an imbalance in the judicial proceeding. A properly applied permissive presumption does not shift the ultimate burden of proof, but it may shift the burden of producing evidence with regard to the presumed fact. *See id.* And of course the adverse party always must be given the opportunity to present rebuttal evidence. If the adverse party does not come forward with evidence to rebut the existence or correctness of the presumed fact, or the adverse party’s proffered evidence fails to rebut the logical inference of the presumption, then the presumed fact may stand as proven. However, in all cases the ultimate burden of proof rests squarely on BOE or the complainant. *See* 46 C.F.R. § 502.155; 5 U.S.C. § 556(d).

*Worldwide Relocations* (FMC) at 12-13. The Commission made clear that

[t]he presumption that we describe is permissive, not mandatory and is consistent with reason and common sense. The permissive presumption would not be applicable when “the suggested conclusion is not one that reason and common sense justify in light of the proven facts.” *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (emphasis added).

*Worldwide Relocations* (FMC) at 15 n.1.

**d. “Assumes responsibility for transportation.”**

The Commission then discussed use of an inference or presumption drawn from the evidence in the proceeding on the question of whether an entity has assumed responsibility for the transportation of the cargo from the port or point of receipt to the port or point of destination and uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. The Commission noted that the “assume responsibility” factor often less clear-cut than “holding out” because many ocean freight forwarder activities and NVOCC activities are similar. The Commission summarized its discussion of the use of inferences in determining whether an entity assumed responsibility for the transportation of a particular shipment as follows:

[T]he party with the ultimate burden of proof and persuasion must present evidence on each shipment concerning the “assumed responsibility” element; however, such party may have the benefit of the above-described permissive presumption. As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility by the respondent entity for the shipment in question. The opposing party may then have the duty to produce credible evidence to rebut the presumption concerning the “assumed responsibility” element on each shipment.

*Worldwide Relocations* (FMC) at 18-19.

**3. *Worldwide Relocations* (FMC) Issue Three – Modification of the Injunction Prohibiting Future Violations of the Shipping Act.**

In *Worldwide Relocations*, the administrative law judge articulated the standard she applied to determine whether a cease and desist order would be appropriate and summarized BOE’s argument as follows:

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd.*, 28 S.R.R. at 86, citing *Alex Parsinia d/b/a Pac. Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997). A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986). The Commission has stated that “[c]ourts have sustained the use of a cease and desist order directed to individuals to prevent avoidance of the legal consequences of the past violations by the creation of new business entities to be used in the same or similar patterns of activity in the future.” *Ariel Mar. Group, Inc.*, 24 S.R.R. at 528.

BOE requests that both corporate and individual respondents be ordered to cease and desist from violating sections 8 and 19 of the Shipping Act and ask[ed] for the issuance of a cease and desist order: (1) directing all respondents to cease and desist from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and respondents publish a tariff and obtain a bond pursuant to Commission regulations, and (2) prohibiting each individual respondent from serving as an investor, owner, shareholder, officer, director, manager, or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such an entity.

*Worldwide Relocations* (ALJ) at 88-89.

The administrative law judge ordered the corporate and individual respondents she found to have violated the Shipping Act to “cease and desist from holding out or operating as ocean transportation intermediaries in the United States foreign trades until and unless receiving licenses by the Commission, publishing tariffs, and obtaining bonds pursuant to the Shipping Act and Commission regulations” and that the individual respondents “cease and desist from serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as *bona fide* employees of such entities . . . .” *Worldwide Relocations* (ALJ), 31 S.R.R. at 1543.

In language similar to that of the administrative law judge, the Commission articulated the standard to be applied.

After a factfinder has determined that a respondent has violated laws, “an injunction is appropriate if the court determines there is a reasonable likelihood that he will violate the laws again in the future.” *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994). The Commission has, in previous cases, enjoined parties from certain behavior, including future violations of the Shipping Act. See *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (F.M.C. 1998) (issuing order enjoining party from violating section 10(a)(1))

of the Shipping Act); *see also Ariel Maritime Group Inc.*, 24 S.R.R. 517, 528 (F.M.C. 1987) (addressing injunctions against “individuals to prevent avoidance of the legal consequences of . . . past violations”).

In evaluating whether a reasonable likelihood of future violation exists, “the court considers ‘whether a defendant’s violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant’s business will present opportunities to violate the law in the future.’” *Bilzerian*, 29 F.3d at 695 (quoting *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). After a court has determined to grant injunctive relief, the injunction must be narrowly crafted to enjoin only the harmful behavior meriting injunctive relief. *See ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990) (“The law requires that courts closely tailor injunctions to the harm that they address.”). *See also Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 640 (D.C. Cir. 1982) (“[T]he scope of an injunction should be determined by balancing [the] harm to the plaintiff, other means of avoiding such harm, and the relative inconvenience to the defendant.”).

*Worldwide Relocations* (FMC) at 21-22.

The Commission affirmed entry of the cease and desist order entered by the administrative law judge with a modification for the individual Respondents subject to the injunction.

Where the Commission finds a proceeding record that is fully adequate to support the presiding officer’s decision to pierce the corporate veil and subject individuals to enforcement remedies, the Commission should not hesitate to enjoin those individuals from violating the Shipping Act. In addition to enjoining violations, the Commission may also enjoin related conduct as part of narrowly tailored prophylactic measures necessary to prevent future violations.

In this case, the individuals acted in numerous ways to justify a Commission decision to disregard the corporate form and look to the individual actors.

The individuals in the instant case acted with sufficient disregard of the Shipping Act and FMC regulations that they should be prohibited from participating in the described maritime industry in any capacity for a year, and from participating in any supervisory or management capacity for a reasonable period of time, in this case five years. We therefore adjust the ALJ’s injunction slightly to enjoin the individual respondents from working for an ocean transportation company, sole proprietorship, or other entity in any way for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years. At that time, they could apply for a license to serve as an OTI or they

could serve as an officer, director, or manager of an OTI. This is a normal restriction in other regulated industries.

On the other hand, we add one narrow exception to the ALJ's injunction *against the individuals acting as owners or shareholders* of ocean transportation companies. We do not foresee any harm flowing from *such individuals* owning shares of a publicly traded company, so long as they do not acquire more than a five percent stake of any class of equities issued by that company. It is highly unlikely that a simple shareholder with a small stake in a large, publicly traded company could exert sufficient control to harm the shipping public. By comparison, the Securities and Exchange Commission has determined that only shareholders exceeding five-percent stakes in companies must file notices of beneficial ownership or "control purpose." See 17 C.F.R. § 240.13d-1. We modify the ALJ's injunction accordingly.

*Worldwide Relocations* (FMC) at 22-24 (footnote omitted) (emphasis added).

#### **4. Civil penalties.**

In *Worldwide Relocations* (ALJ), the administrative law judge found that Respondents had committed "a total of 649 [willful and knowing] violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals." *Worldwide Relocations* (FMC) at 2. The judge imposed a civil penalty of \$4000 per violation for fifty willful and knowing violations, \$3000 per violation for 325 willful and knowing violations, and \$6000 per violation for 274 willful and knowing violations. *Worldwide Relocations* (ALJ) at 89. The Commission affirmed findings in the *Worldwide Relocations* Initial Decision, including the amount imposed by the administrative law judge as a civil penalty on each Respondent. Although the Commission did not discuss the issue of civil penalty in its review of the decision, affirming the civil penalties imposed by the judge is relevant to BOE's claim that the Act establishes a minimum civil penalty of \$6001 for a willful and knowing violation.

#### **IV. APRIL 12, 2012, COMMISSION REMAND OF THE TOBER INITIAL DECISION.**

On April 12, 2012, the Commission served its order vacating Initial Decision in part, reversing in part, and remanding for further proceedings addressing three issues.

First, the Commission addressed the finding in the Initial Decision that Tober did not violate section 10(b)(11), and specifically whether Tober accepted cargo from entities acting as NVOCCs.

Establishing a section 10(b)(11) violation requires a determination that a common carrier has accepted cargo from an untariffed, unbonded entity operating as an NVOCC. Therefore, a central issue in this case is whether the entities from which Tober accepted cargo acted as NVOCCs by holding out to provide and assuming responsibility for ocean transportation.

Recently, the Commission revisited the standard for determining whether an entity acts as an NVOCC by “holding out” and “assuming responsibility” in a related case that turned in part on cargo shipments that Tober accepted from three untariffed, unbonded respondents. See [*Worldwide Relocations* (FMC)]. The Commission’s decision described the circumstances under which inferences or permissible presumptions may be applied to determine whether an entity is operating as an NVOCC, and it affirmed the ALJ’s findings of violations. Among those violations were 33 shipments that Tober accepted from Worldwide Relocations, Tradewind Consulting, and Moving Services. 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.

It appears that those 33 shipments were among the 278 that the ALJ in the case *sub judice* found were accepted by Tober and involved intermediaries. But for each of those shipments, the ALJ in the Initial Decision before us held that the intermediary involved was not operating as an NVOCC. The Initial Decision’s findings and conclusions thus appear to conflict with the Commission’s recent decision in *Worldwide Relocations* for at least some shipments and intermediaries. To resolve this conflict, the Commission vacates and remands the section 10(b)(11) allegations for the 278 shipments to the ALJ for reconsideration in light of the standard and holdings in *Worldwide Relocations*.

*Tober* ID Remand (FMC) at 4-5 (citations and footnotes omitted).

Second, the Commission addressed the finding in the Initial Decision that BOE had not met its burden of demonstrating that Tober’s section 10(b)(2)(A) violations were willful and knowing.

[T]he ALJ rejected BOE’s charge that the violation was “willfully and knowingly committed.” See *id.* at 1001. In support of that finding, the ALJ cited Tober’s claim that it amended its tariff “[u]pon becoming aware of FMC’s concerns.”

BOE’s Exceptions to the Initial Decision point out that the tariff correction the ALJ cited did not take place until February 2007 – nine months after Tober was served with the May 2006 Order of Investigation and Hearing. In its Proposed Findings of Fact and Conclusions of Law, BOE claimed that during those nine months, Tober accepted and transported 72 shipments for Infinity Moving and Storage, Inc. at rates that were not in accordance with its tariff. See BOE Proposed Findings of Fact and Conclusions of Law at 8, 11 (citing BOE Appendix Document #12).

\* \* \*

. . . We vacate [the holding that Tober did not willfully and knowingly violate section 10(b)(2)(A)]; on remand, the determination whether Tober “willfully

and knowingly” violated the Act 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.

*Tober* ID Remand (FMC) at 6-7.

The Commission also disagreed with the decision not to award a civil penalty.

We also disagree with the ALJ’s finding that BOE failed to set forth “any information” about “the nature, circumstances, extent, and gravity of the violation[s] committed.” *See* 31 S.R.R. at 1002. BOE in fact proved Tober committed 278 violations during a 3-year period and pointed to evidence that Tober never charged the rates set forth in its tariffs. Whether or not BOE provided information sufficient to support its full demand for maximum penalties or to persuade the ALJ to weigh heavily against Tober’s limited ability to pay, the ALJ erred in dismissing evidence of a pattern of hundreds of violations on its way to finding a lack of “any information” to help determine the amount of civil penalties.

The ALJ also erred in denying a civil penalty altogether. The Shipping Act states that a person who commits a violation “*is* liable to the United States Government for a civil penalty.” 46 U.S.C. § 41107(a) (emphasis added). The statutory factors in 46 U.S.C. § 41109(b) guide a determination of “the amount of a civil penalty,” not whether to impose one at all. *See [Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665, 678 (FMC 2001)]* (“Having found a violation, the question before the ALJ was not whether to assess a civil penalty but rather, the amount of penalty to assess.”).

Therefore, the ALJ’s refusal to award civil penalties is reversed; on remand, the ALJ should decide the proper amount of civil penalties in light of (1) any section 10(b)(11) violations that are found once the *Worldwide* standard and holding are applied; (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.

*Tober* ID Remand (FMC) at 7-8.

The Commission ordered that:

[O]n remand, the ALJ should decide the proper amount of civil penalties in light of (1) any section 10(b)(11) violations that are found once the *Worldwide* standard and holding are applied; (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.

*Id.* at 8.

## V. BRIEFING AFTER THE *TOBER* REMAND.

On April 19, 2012, the parties were given an opportunity to file briefs addressing the remand issues. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Apr. 19, 2012) (Order to File Briefs on Remand Issues). BOE filed its brief on May 11, 2012. BOE states in that brief that it also relies on its earlier filings, including BOE’s Response to Tober Group Inc.’s Statement of Material Facts (filed October 29, 2007); BOE’s Supplemental Brief in Response to ALJ’s Order for Additional Briefing (filed January 11, 2008); BOE’s Proposed Findings of Fact and Conclusions of Law with Appendix (filed May 22, 2009); and BOE’s Additional Proposed Findings of Fact, Brief and Appendix (filed September 21, 2009). (BOE Brief on Remand at 3-4.)

On May 15, 2012, I ordered BOE to file a supplemental brief and enlarged the time for Tober to file its response to BOE’s brief on remand and response to BOE’s supplemental brief in one filing. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ May 15, 2012) (Order to File Supplemental Brief; Revision of Briefing Schedule on Remand Issues). The Order requested supplemental briefing on three issues. First, the Order addressed the Commission’s discussion of permissive presumptions and statement that “[s]uch permissive presumptions may be used in situations where one party has superior access or control of facts, evidence, or proof resulting in an imbalance in the judicial proceeding.” *Id.* at 2, citing *Worldwide Relocations* (FMC) at 14.

As stated by the Commission, in this case “a central issue . . . is whether the entities from which Tober accepted cargo acted as NVOCCs.” *Tober Group – Possible Violations*, Order Vacating Initial Decision at 4. For the permissive presumption articulated in *Worldwide Relocations* to apply against Tober, the record must support a finding that Tober’s “access or control of facts, evidence, or proof” about the NVOCC/ocean freight forwarder activities or status of the entities alleged to have operated as NVOCCs is superior to BOE’s “access or control of facts, evidence, or proof” of those activities or status. *Worldwide Relocations*, *supra*. BOE is ordered to address this issue in a supplemental brief.

*Id.* at 3.

Second, the Order addressed the Commission’s finding in *Worldwide Relocations*, FMC No. 06-01, that the entities Worldwide Relocations, Tradewind, and Moving Services had been found to have operated as NVOCCs and BOE’s argument that “[t]he Commission’s findings in *Worldwide* that these entities were acting in the capacity as NVOCCs with respect to the same shipments in evidence in this proceeding are administratively final and should be given binding collateral effect in the instant case.” *Tober Group – Possible Violations*, FMC No. 06-06, Order at 4 (ALJ Apr. 19, 2012) (Order to File Briefs on Remand Issues), quoting BOE Remand Brief at 8.

The issue . . . is whether legal authority permits the Commission to give “binding collateral effect” to the findings that the entities Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs, adopted by the Commission in *Worldwide Relocations*, in this proceeding against Tober, which was not a party to

*Worldwide Relocations*. BOE is ordered to address this issue in a supplemental brief.

*Id.* at 6.

Third, the Order noted the Commission's statement that "[w]hen unlicensed entities enter into the transportation transaction, the consumer public is more justly served where a lawful permissive presumption is used to properly bring the more complete array of Commission remedies into play." *Id.*, quoting *Worldwide Relocations* (FMC) at 18. "The issue is what constitutes the 'more complete array of Commission remedies' that comes into play when an entity is found to be an NVOCC rather than an ocean freight forwarder. BOE is ordered to address this issue in a supplemental brief." *Id.*

On May 23, 2012, BOE filed its supplemental brief. Tober did not respond to BOE's brief on remand or BOE's supplemental brief.

## **PART TWO – APPLICATION OF *WORLDWIDE RELOCATIONS* (FMC) TO *TOBER***

### **I. *WORLDWIDE RELOCATIONS* (FMC) ISSUE TWO IS APPLICABLE TO THE *TOBER* PROCEEDING.**

*Worldwide Relocations* (FMC) Issue Two concerns the approach for determining whether an entity has operated as an NVOCC on a particular shipment, analysis of the evidence in the record on the issues of "holding out" and assuming responsibility for transportation of the cargo, and inferences and presumptions that may be used when making those determinations. These issues are relevant to the Tober proceeding.

### **II. *WORLDWIDE RELOCATIONS* (FMC) ISSUES ONE AND THREE ARE NOT APPLICABLE TO THE *TOBER* PROCEEDING.**

#### **A. Applicability of *Worldwide Relocations* (FMC) Issue One to the *Tober* Proceeding.**

In *Worldwide Relocations*, BOE moved for sanctions against several Respondents that failed to respond to discovery. The administrative law judge granted sanctions against most of those Respondents, but found that the record did not support imposition of sanctions against two Respondents. *Worldwide Relocations* (FMC) at 7-10. The Commission reversed the denial of sanctions and concluded "[h]ad the ALJ imposed sanctions, she would also have drawn an adverse inference against the entities for the documents that they refused to provide or destroyed and for the interrogatories that they would have answered." *Id.* at 10. The Commission imposed sanctions against the two Respondents, and inferred that if the requested documents had been produced, the documents would have provided evidence adverse to the two Respondents. *Id.*

In the *Tober* proceeding, Tober provided documents requested by BOE prior to the issuance of the Tober Order of Investigation and Hearing. These are the documents that were used as evidence in *Worldwide Relocations*. (BOE App. pp. 7-14 (Affidavit of Area Rep. Mingione); BOE App. pp. 15-25 (Affidavit of Area Rep. Margolis).) Tober both served and responded to discovery after the Order was issued. On July 12, 2007, BOE filed a Request for Issuance of Subpena addressed to Tober seeking Tober's corporate federal and state tax returns for 2005 and 2006 and Tober's balance sheet and income statement for 2006. On July 18, 2007, Tober filed a Motion to Extend the Discovery Deadline and to Postpone the Depositions of its Employees, stating that it believed BOE's responses to discovery did not completely respond to the requests and interrogatories. During a telephone conference addressing this request, BOE stated that the facts on which it relies to support the allegations that Tober has violated the Act are set forth in the documents submitted to Tober in response to Tober's request for production of documents and referred to in BOE's answers to Tober's interrogatories. I issued an Order on July 23, 2007, dismissing BOE's request "as moot on the condition that Tober . . . produce the documents sought by the subpoena at the deposition of Mr. Schneider on July 31, 2007, or as soon thereafter as possible." *Tober Group – Possible Violations*, FMC No. 06-06, Order at 3 (ALJ July 23, 2007) (Memorandum and Order Regarding July 23, 2007, Conference on Tober Group, Inc.'s Motion to Extend the Discovery Deadline and to Postpone the Depositions of its Employees and Bureau of Enforcement's Request for Issuance of Subpena).

At no point in this proceeding did BOE file a motion seeking sanctions against Tober for failure to comply with the July 23, 2007, Order or any other discovery obligation. BOE did not seek an adverse inference against Tober for failing to comply with any discovery order. Tober complied with the order to produce the tax returns, balance sheet, and income statement sought by the subpoena. Because Tober did not fail to respond to discovery or fail to comply with a discovery order, *Worldwide Relocations* (FMC) Issue One – the Commission's discussion of when sanctions are appropriate against a party that fails to respond to discovery – has no application in this proceeding against Tober.

**B. Applicability of *Worldwide Relocations* (FMC) Issue Three to the *Tober* Proceeding.**

*Worldwide Relocations* (FMC) Issue Three concerns the scope of a cease and desist order against an individual respondent found to have violated the Shipping Act. *See supra* at 32-34. The Commission commenced this proceeding against three unrelated corporate entities, including Tober. It did not name any individual as a respondent. *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06 (FMC May 11, 2006) (Order of Investigation and Hearing). Therefore, *Worldwide Relocations* (FMC) Issue Three – the Commission's discussion of the scope of a cease and desist order entered against an individual determined to have violated the Shipping Act – has no application in this proceeding against Tober, a corporation.

**III. COMMISSION FINDINGS IN *WORLDWIDE RELOCATIONS* – POSSIBLE VIOLATIONS, FMC No. 06-01, DO NOT HAVE “BINDING COLLATERAL EFFECT” IN THIS PROCEEDING AGAINST TOBER.**

In *Tober Remand* (FMC), the Commission noted that in *Worldwide Relocations* (ALJ), the administrative law judge found that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs, and that the Commission affirmed that decision.

Among those violations were 33 shipments that Tober accepted from Worldwide Relocations, Tradewind Consulting, and Moving Services. 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.

It appears that those 33 shipments were among the 278 that the ALJ in the case *sub judice* found were accepted by Tober and involved intermediaries. But for each of those shipments, the ALJ in the Initial Decision before us held that the intermediary involved was not operating as an NVOCC. The Initial Decision’s findings and conclusions thus appear to conflict with the Commission’s recent decision in *Worldwide Relocations* for at least some shipments and intermediaries. To resolve this conflict, the Commission vacates and remands the section 10(b)(11) allegations for the 278 shipments to the ALJ for reconsideration in light of the standard and holdings in *Worldwide Relocations*.

*Tober ID Remand* (FMC) at 5 (citations and footnotes omitted).

The Commission made its decision in *Worldwide Relocations* on a different evidentiary record in a proceeding in which Tober was not a party. BOE now seeks to use those factual findings to preclude an analysis of the record in this proceeding to determine if the record supports a finding that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs on the Tober shipments.

In its brief on remand, BOE contends: “The Commission’s findings in *Worldwide* that these entities were acting in the capacity as NVOCCs with respect to the same shipments in evidence in this proceeding are administratively final and should be given binding collateral effect in the instant case.” (BOE Brief on Remand at 8.) BOE was ordered to file a supplemental brief on the issue of “whether legal authority permits the Commission to give ‘binding collateral effect’ to the findings that the entities Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs, adopted by the Commission in *Worldwide Relocations*, in this proceeding against Tober, which was not a party to *Worldwide Relocations*.” *Tober Group – Possible Violations*, FMC No. 06-06, Order at 6 (ALJ May 15, 2012) (Order to File Supplemental Brief; Revision of Briefing Schedule on Remand Issues).

In its supplemental brief, BOE states that by using of the phrase “binding collateral effect,” it did not mean that it was relying on principles of res judicata or collateral estoppel to preclude a

determination in this proceeding of whether Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs on the Tober shipments. Instead, it meant “binding precedent rule” or “stare decisis,” although BOE did not use either phrase in its brief on remand.

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

The findings adopted in *Worldwide Relocations* that Worldwide Relocations, Tradewind, and Moving Services acted as NVOCCs with respect to 33 specified shipments constituted a final decision of the Commission. The same 33 shipments are now before the ALJ to ascertain Tober’s role and legal responsibility in having accepted such shipments. Therefore, the Commission’s conclusions of law are binding on the ALJ. *Cf. Reiser v. Residential Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005) (“In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, . . . so district judges must follow the decisions of this court whether or not they agree.”) (citations omitted); *U.S. v. Jacobs*, 955 F.2d 7, 9 (2nd Cir. 1992) (“The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it.”); and *Strickland v. U. S.*, 423 F.3d 1335, 1338, n.3 (C.A. Fed. 2005) (“ . . . a trial court may not disregard its reviewing court’s precedent.”).

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

(BOE Supp. Brief on Remand at 2-3.)

### A. Binding Precedent Rule/Stare Decisis.

“The doctrine of stare decisis is a fundamental feature of the American common law system of adjudication. In the United States, the doctrine compels lower courts to follow the decisions of higher courts *on questions of law.*” 18 *Moore’s Federal Practice*, § 134.01[1] (Matthew Bender 3d Ed.) (footnote omitted) (emphasis added). “For stare decision to be applied, an *issue of law* must have been heard and decided.” *Id.*, § 134.04[2] (footnote omitted) (emphasis added).

The doctrine of stare decisis does not apply to the determination of the facts of a case. The facts of a case apply to stare decisis only to the extent that the issues of law arise from the facts in each decision. The facts to which the law is applied are those found by the trial court and supported by evidence or pleaded and taken as true for purposes of the decision. In addition to pure questions of fact, the doctrine of stare decisis has been held not to apply to mixed questions of law and fact.

*Id.*, § 134.05[3] (footnotes omitted).

*Worldwide Relocations* (FMC) states or restates several Commission decisions on questions of law. *See, e.g., Worldwide Relocations* (FMC) at 9 (“Adverse inferences are particularly appropriate when a party fails to produce documents, or when documents have been destroyed.”); at 10-11 (“[T]o determine if an entity is a common carrier, it ‘is important to consider all the factors present in each case and to determine their combined effect.’ . . . To determine whether an entity meets this standard, it is necessary to examine the entity’s conduct on that shipment.”); at 21 (“After a factfinder has determined that a respondent has violated laws, ‘an injunction is appropriate if the court determines there is a reasonable likelihood that he will violate the laws again in the future.’”). The doctrine of stare decisis compels that these decisions on questions of law be applied in this case.

The findings that *Worldwide Relocations*, *Tradewind*, and *Moving Services* operated as NVOCCs are findings of fact, not decisions on questions of law. As the Commission stated in its remand of the *Tober* summary judgment decision, “there are genuine issues of material fact: were the entities with which *Tober* conducted business common carriers and NVOCCs . . .? These genuine issues of material fact preclude a grant of summary judgment.” *Tober S/J Remand* at 22. Therefore, stare decisis (or the binding precedent rule) does not support BOE’s argument that the findings on the record in *Worldwide Relocations* that *Worldwide Relocations*, *Tradewind*, and *Moving Services* operated as NVOCCs are administratively final and preclude contrary findings on the record in this proceeding on the *Tober* shipments.

The three cases cited by BOE in its supplemental brief do not provide support for its argument that stare decisis (or the binding precedent rule) compels a decision on the record in this proceeding that *Worldwide Relocations*, *Tradewind*, and *Moving Services* operated as NVOCCs on the *Tober* shipments.

In *Reiser v. Residential Corp.*, the issue was the controlling effect of a decision by a higher court on a question of law, not a finding of fact affirmed in another case that did not involve the

party against which the fact seeks to control. The *Reiser* complaint was based in part on an Illinois state statute that Defendant argued had been repealed by implication. An earlier Seventh Circuit opinion agreed with Defendant's position. Defendant moved to dismiss the state law claim for failure to state a claim. The district court denied the motion to dismiss, then certified the issue for interlocutory appeal. On appeal, the court held that its earlier opinion (a decision on a question of law, not findings of fact) controlled the case.

[Defendant] contends that the complaint does not state a claim under Illinois law because [the statute on which the complaint was based] was repealed in 1981 by another statute lifting the cap on mortgage interest rates. We agreed with this position in *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1542-43 (7th Cir. 1988), holding that it would be so odd to limit points, when straight interest rates are unlimited, that Illinois must be understood to have repealed the points cap implicitly. Both the Attorney General of Illinois and the agency that regulates banking under Illinois law have issued advisory opinions to the same effect. But in this case the district judge refused to follow *Currie*. The judge wrote that he found two decisions by one of the state's five intermediate appellate courts more persuasive than *Currie* and elected to follow them instead.

By treating *Currie* as having no more than persuasive force, the district court made a fundamental error. 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, see *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989), so district judges must follow the decisions of this court whether or not they agree. See *United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986). A decision by a state's supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our precedent; assuredly they do not themselves liberate district judges from the force of our decisions.

*Reiser v. Residential Corp.*, 380 F.3d at 1029. Although the Seventh Circuit did not use the term "stare decisis" (the Supreme Court did in *State Oil Co. v. Khan*, 522 U.S. at 20, cited in *Reiser*), *Reiser* relies on the principal of stare decisis in holding that the *Currie* decision on a question of law, not a finding of fact, was binding on the district court.

*United States v. Jacobs* concerned the *second* appeal of the sentence imposed on a criminal defendant (Jacobs) who pleaded guilty to conspiracy to distribute cocaine, conspiracy to defraud the United States, and distributing cocaine. The district court based its first sentence of 327 months' imprisonment in part on a finding that the full approximated amount of cocaine distributed by the

conspiracy could be attributed to Jacobs. In the first appeal, “Jacobs appeal[ed] from his sentence of imprisonment. He contend[ed] that, in calculating his offense level, the district court improperly attributed to him the entire quantity of narcotics for which [the director of the cocaine distribution network] was found responsible.” *United States v. Mickens*, 926 F.2d 1323, 1326 (2d Cir. 1991) (*Mickens I*).

The district court’s computation of Jacobs’ offense level followed a two-step analysis in which, (1) the court approximated that the Mickens conspiracy distributed in excess of fifty kilograms of cocaine, based on Mickens’ unexplained income of over \$2,000,000 during the operation of the conspiracy; and, (2) the court attributed the full approximated amount distributed by the conspiracy to Anthony Jacobs. This quantity was added to the 24.4 grams of cocaine that Jacobs admitted to selling, and resulted in an offense level of 36. Matching Jacobs’ Criminal History Category I with this offense level resulted in a sentence range of 262 to 327 months. The court sentenced Jacobs to the high end of that range.

*Id.* at 1331-1332.

In the first appeal, Jacobs contended that attributing the full approximated amount to him unfairly [holds Jacobs] accountable for the narcotics equivalent of four years’ worth of unreported income of another, whose funds may have been accumulated at any prior time, and may have come from any source – including Mickens’ independent, personal transactions in the early 1980’s . . . , or some other narcotics conspiracy in which Mr. Jacobs played no part, or even from some altogether different activity such as gambling.

*Id.* at 1332. The court of appeals vacated the sentence and remanded for resentencing. “Absent reliable evidence connecting Jacobs to the quantity of narcotics extrapolated from Mickens’ unreported income, Jacobs’ 327-month sentence is unsupportable. Moreover, ascribing ‘managerial’ status to Jacobs without conducting a hearing – something which the probation department and prosecution originally agreed was necessary – was erroneous.” *Id.*

On remand, the district court sentenced Jacobs to 235 months and Jacobs appealed for a second time. In the opinion on which BOE relies, the court of appeals stated:

On remand, the district court correctly interpreted our opinion as approving of its procedure for applying the Guidelines in narcotics conspiracy cases. Instead of applying our decision that Jacobs could not be held responsible for the sale of fifty kilograms of cocaine, however, the district court explained the rationale and facts on which Jacobs’ initial sentence was based. Consequently, after deducting the portion of Jacobs’ sentence reflecting the upward adjustment for “managerial status,” the district court sentenced Jacobs to 235 months imprisonment and five years supervised release and ordered him to pay a special assessment of \$200. It is from

this sentence, which again attributes to Jacobs the entire quantity of narcotics that the Mickens conspiracy is approximated to have peddled, that this appeal lies.

*United States v. Jacobs*, 955 F.2d at 9.

The Second Circuit held that:

The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895) (“That court cannot vary . . . or examine [the higher court’s decision] . . . even for apparent error.”) (citations omitted); *Soto-Lopez v. New York City Civil Service Comm’n*, 840 F.2d 162, 167 (2d Cir. 1988) (The law-of-the-case “doctrine imposes a duty on a lower court to follow a ruling made by the reviewing court at an earlier stage of a case, and . . . the lower court has no discretion to disregard that duty.”) (citations omitted).

Our opinion in *Mickens I* clearly stated our belief that “attribution [to Jacobs] of the full approximated amount of cocaine distributed by the Mickens conspiracy was improper.” 926 F.2d at 1332. At resentencing, the district court did not consider new evidence but instead set forth those factors that it believed supported Jacobs’ original sentence.

*Id.*

The *Jacobs* opinion on which BOE relies, then, involved one case with the same parties (the United States and Jacobs) in the same proceeding (a guilty plea in the district court, the first appeal, the remand for resentencing, and the second appeal). The legal principle on which the *Jacobs* court relied was succinctly stated by the Supreme Court in *In re Sanford Fork & Tool Co.*, one of the cases the *Jacobs* court cited: “It must be remembered, however, that no question, once considered and decided by this court, can be re-examined *at any subsequent stage of the same case.*” *In re Sanford Fork & Tool Co.*, 160 U.S. at 259, 16 S. Ct. at 294 (emphasis added), citing *Clark v. Keith*, 106 U.S. 464, 465, 1 S. Ct. 568, 569 (1883); *Sibbald v. United States*, 37 U.S. 488, 492, 12 Pet. 488, 492 (1838); *Texas & Pac. Ry. Co. v. Anderson*, 149 U.S. 237, 242, 13 S. Ct. 843 845 (1893). In this proceeding, BOE seeks to bar reexamination of the findings about Worldwide Relocations, Tradewind, and Moving Services in a *different* case against a party that was *not* involved in the first case. *Jacobs* provides no support for this argument.

In the third case, Strickland had been separated from the Navy with a General Discharge under Honorable Conditions after pleading no contest to a misdemeanor charge. He sought relief from the Board for Corrections of Naval Records (Board). The Board recommended to the Navy Assistant Secretary for Manpower and Reserve Affairs that Strickland’s discharge be set aside as unfair. The Assistant Secretary did not set aside the discharge and Strickland filed a complaint in the United States Court of Federal Claims. The Court of Federal Claims interpreted the controlling statute to provide that the Board, not the Secretary or his designee, was the final authority regarding

requests for military records corrections and nullified the decision of the Assistant Secretary. The Government moved for reconsideration, arguing that two decisions of the predecessor to the Federal Circuit held that the Secretary has discretionary authority under the statute to disagree with the Board. The Court of Federal Claims held that the decisions by the predecessor court conflicted with a decision of the Supreme Court issued before those decisions and disregarded the two precedents. On appeal, the Federal Circuit held that the statutory interpretation of the predecessor court was binding on the Federal Circuit as well as the Court of Federal Claims and reversed. *Strickland v. United States*, 423 F.3d 1335, 1336-1339 (Fed. Cir. 2005). *Strickland* held that statutory construction (a decision on a question of law) established in a prior case is binding in a subsequent case involving another party. *Strickland* did not hold findings of fact in a prior case are binding in a subsequent case involving another party.

The doctrine of stare decisis does not support a holding that the findings in *Worldwide Relocations* that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs should be given binding collateral effect in this proceeding against Tober.

#### **B. Res Judicata and Collateral Estoppel.**

Although BOE seems to have abandoned any claim that res judicata and/or collateral estoppel preclude reexamination of the findings in *Worldwide Relocations*, I affirmatively find that they do not. The Commission has applied the theories of res judicata and collateral estoppel in its proceedings. In *Elinel Corp. v. Sea-Land Service, Inc.*, the Commission stated:

The ALJ summarized the facts and analyzed the doctrines of res judicata and collateral estoppel. He cited *Montana v. United States*, 440 U.S. 147, 153-154 (1979), where the Supreme Court stated:

Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. (Case citations omitted.) To preclude parties from contesting matters *that they have had a full and fair opportunity to litigate* protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Footnote citation omitted.)

*Elinel Corp. v. Sea-Land Service, Inc.*, 26 S.R.R. 1399, 1400 (FMC 1994) (emphasis added).

In *New Orleans Steamship Assoc. v. Plaquemines Port, Harbor and Terminal Dist.*, the Commission stated:

“Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. *Montana v. United States*, 440 U.S., at 153; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.5 (1979). The Restatement

of Judgments speaks of res judicata as ‘claim preclusion’ and of collateral estoppel as ‘issue preclusion.’ Restatement (Second) of Judgments § 27 (1982).

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“Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an *issue the defendant has previously litigated unsuccessfully in another action against the same or a different party*. . . . *Parklane Hosiery*, supra, at 326, n.4.”

*United States v. Mendoza*, 464 U.S. 154, 158-159, n.3, 4 (1984); see also, Davis, Administrative Law Treatise, Res Judicata, §§ 21:5, 21:7 (2d. Ed. 1983).

*New Orleans Steamship Assoc. v. Plaquemines Port*, 23 S.R.R. 1363, 1370 n.14 (FMC 1986) (emphasis added).

The federal courts have held that in certain circumstances, a nonparty to the prior litigation may be bound by collateral estoppel.

Collateral estoppel bars “the *re*-litigation of an issue that has been *actually* litigated and *necessarily* decided.” *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 330 (9th Cir. 1995). Under federal law,

Three factors must be considered before applying collateral estoppel: “(1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.”

[*McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004)] (citations omitted). The doctrine of privity extends collateral estoppel to a non-party where the relationship is one of “substantial identity” between the parties and the non-party had a sufficient interest and participated in the prior action. *U.S. v. ITT Rayonier*, 627 F.2d 996, 1003 (9th Cir. 1980). “Courts have recognized that a non-party may be bound if a party is so closely aligned with its interests as to be its ‘virtual representative.’” *Id.* at 1003.

“A non-party can be bound by the litigation choices made by his virtual representative,” *id.* [, *Irwin v. Mascott*, 370 F.3d 924] at 929 [(9th Cir. 2004)], only if certain criteria are met: “[A] close relationship, substantial participation, and tactical maneuvering all

support a finding of virtual representation; identity of interests and adequate representation are necessary to such a finding.” *Id.* at 930.

*Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1053-1054 (9th Cir. 2005), citing *Irwin v. Mascott*, 370 F.3d 924 (9th Cir. 2004).

*Schoenleber v. Harrah’s Laughlin, Inc.*, 423 F. Supp. 2d 1109, 1112 (D. Nev. 2006) (emphasis in original).

But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a “full and fair opportunity” to litigate that issue in the earlier case. *Montana v. United States*, *supra*, at 153, 99 S. Ct., at 973; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, [402 U.S. 313, 328-329 (1971).]

*Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328 (1971).

The Commission’s decisions and the court decisions are consistent in holding that for collateral estoppel to apply, the party against whom estoppel is sought must have had “a full and fair opportunity to litigate” in the earlier proceeding. *Elinel Corp. v. Sea-Land*, *supra*. It is clear under the Commission and court cases cited above that in a subsequent proceeding, res judicata and/or collateral estoppel would prevent Worldwide Relocations, Tradewind, and Moving Services from contesting the findings that they operated as NVOCCs on the shipments at issue in *Worldwide Relocations* since they meet all three factors cited above.

Tober was not a party in *Worldwide Relocations*, FMC No. 06-01, did not have “a full and fair opportunity to litigate” the issue of whether Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs on the Tober shipments, and “never had a chance to present [its] evidence and arguments on the claim.” BOE has not identified any evidence in the record that would support a finding that there is “substantial identity” between Tober and the entities Worldwide Relocations, Tradewind, and Moving Services. Therefore, neither res judicata nor collateral estoppel supports a holding that the findings in *Worldwide Relocations* that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs should be given binding collateral effect in this proceeding against Tober.

### C. Persuasive Authority.

I have also considered whether the *Worldwide Relocations* factual findings of NVOCC status for Worldwide Relocations, Tradewind, and Moving Services, although not controlling as stare decisis, res judicata, or collateral estoppel, should be persuasive authority in this proceeding. I conclude that they are not.

The APA requires that the exclusive record for decision be “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding . . .” 5 U.S.C. § 556(e). The findings of fact in this proceeding must be tethered to the record in this proceeding, not the record in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, and the findings in *Worldwide Relocations* that BOE seeks to apply in this proceeding were not made on the record in this proceeding. The findings that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs were based on their relationships with many other downstream common carriers, not just Tober, and the Tober shipments were only a small percentage of the Worldwide Relocations, Tradewind, and Moving Services shipments considered in *Worldwide Relocations*.

BOE has recognized that the activities of entities with which Tober did not do business are not relevant to the claims against Tober. Earlier in this proceeding, to support its motion for summary judgment, Tober submitted information about Dolphin International Shipping and International Shipping Solutions, two entities whose activities were addressed in *Worldwide Relocations*, FMC No. 06-01.

BOE did not voice any objection to these exhibits in its written opposition to Tober’s motion. At the argument on the motion [for summary judgment], however, BOE stated that it did not have any evidence that Tober had carried any shipments for Dolphin International Shipping or International Shipping Solutions; therefore, it questioned the relevance of exhibits concerning those ENTITIES. Transcript (11/14/07) at 18-19; BOE Supp. Exhibit 11. BOE’s point is well-taken. Since BOE does not claim that Tober conducted business with Dolphin International Shipping or International Shipping Solutions, their business practices are not material to Tober’s motion.

*Tober S/J Decision* at 29. In the same vein, the manner in which Worldwide Relocations, Tradewind, and Moving Services conducted business with other downstream common carriers is not relevant to how they conducted business with Tober. The Commission’s opinion in *Worldwide Relocations* makes it clear that on most of the shipments, the downstream common carriers issued bills of lading identifying Worldwide Relocations, Tradewind, or Moving Services, not the proprietary shipper, as the shipper. *Worldwide Relocations* (FMC) at 18-19. Tober (a downstream common carrier), by contrast, identified the proprietary shipper as the shipper on every bill of lading.

In *Worldwide Relocations*, the administrative law judge determined that based on the evidence in the record in that proceeding, Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs. The Commission affirmed those findings “despite the occasional listing of

a proprietary shipper as the shipper on a bill of lading.” *Worldwide Relocations* (FMC) at 19. Most of the shipments upon which those findings were based were not carried by Tober, but by other downstream common carriers that usually, if not always, identified Worldwide Relocations, Tradewind, or Moving Services as the shipper on the bills of lading, not the proprietary shipper. In contrast, on its bills of lading, Tober’s routine (in fact, invariable) practice was to identify the proprietary shipper as the shipper, not the unlicensed entity.

The evidentiary record in *Worldwide Relocations* included records of 278 shipments in which the entity Worldwide Relocations was involved. The Worldwide Relocations “Shipment Chart” identifies Tober as one of twelve NVOCCs with which Worldwide Relocations conducted business. Tober was involved in twenty (7.2%) of the 278 Worldwide Relocations shipments. See *Worldwide Relocations* (ALJ) FF 76 (Shipments No. 19, 29, 33, 40, 66, 67, 71, 81, 83, 88, 111, 113, 154, 156, 216, 232, 239, 244, 266, and 276). Apparently, Worldwide Relocations was identified as the shipper on the bills of lading of downstream common carriers other than Tober, because the Commission found it to be significant that there was only “occasional listing of a proprietary shipper as the shipper on a bill of lading.” *Worldwide Relocations* (FMC) at 19. On Tober’s bills of lading, however, Tober identified the proprietary owner of the cargo as the shipper on every shipment in which Worldwide Relocations was involved – the proprietary shipper without mention of Worldwide Relocations on eleven shipments, *Tober Remand ID FF 57*, and the proprietary shipper c/o Worldwide Relocations on nine shipments. *Tober Remand ID FF 58*. On the three Worldwide Relocations shipments not listed on the Worldwide Relocation “Shipment Chart” but for which shipping documents were submitted in the Tober proceeding, Tober identified the proprietary owner of the cargo as the shipper without mention of Worldwide Relocations on two shipments (Vladimir M. Bershader and James Paterson – *Tober Remand ID FF 57*) and the proprietary shipper c/o Worldwide Relocations on one shipment (Venebles Nick). *Tober Remand ID FF 58*. Therefore, although Worldwide Relocations may have been identified as the shipper on as many as 258 bills of lading issued by the other eleven downstream common carriers in FMC No. 06-01, Tober identified the proprietary shipper as the shipper on every shipment involving Worldwide Relocations. This is not the “the occasional listing of a proprietary shipper as the shipper on a bill of lading” that may have been Worldwide Relocations’s practice with the other eleven NVOCCs with which it conducted business on the other 258 Worldwide Relocations shipments before the administrative law judge in *Worldwide Relocations*, FMC No. 06-01, that in its review of the judge’s Initial Decision, the Commission found to be significant. Worldwide Relocations’s operating practices with other NVOCCs are not probative of its practices with Tober.

As an example of a Worldwide Relocations shipment, the Commission singled out Worldwide Relocations Shipment number 8 to support its adoption of the *Worldwide Relocations* Initial Decision. The Worldwide Relocations “Shipment Chart” identifies the proprietary shipper on Shipment number 8 as “Almutawa, Adel,” the NVOCC as “Hual A/S,” and states that the supporting evidence is found at Bates No. 323-329 of the record in *Worldwide Relocations*, FMC No. 06-01, evidence that is not found in the record in FMC No. 06-06. While the Chart identifies the proprietary shipper on this shipment, neither the chart nor the Commission identifies the shipper named on the Hual A/S bill of lading, and the Hual A/S bill of lading is not part of the record in this proceeding against Tober. The Commission’s statement that there was only “occasional listing of

a proprietary shipper as the shipper on a bill of lading” implies that Worldwide Relocations, not “Almutawa, Adel,” was identified as the shipper on the Hual A/S bill of lading.

The evidentiary record in *Worldwide Relocations* included records of thirty-seven shipments in which the entity Tradewind was involved. The Tradewind “Shipment Chart” identifies five NVOCCs with which Tradewind conducted business, including Tober. Tober was involved in only two (5.4%) of the thirty-seven shipments. *Worldwide Relocations* (ALJ) FF 120 (16 and 27). Tober identified the proprietary owner of the cargo as the shipper without mention of Tradewind on the bills of lading for both shipments listed in *Worldwide Relocations* (ALJ) FF 120. *See Tober Remand ID FF 107* (Kerrie Powell and Johannes Khinasat). In this proceeding, BOE presented evidence of two other Tradewind shipments: Daphne Rovart and Moncef Bahri. Tober identified Daphne Rovart and Moncef Bahri as the shippers without mention of Tradewind on both bills of lading. *See Tober Remand ID FF 107*. This is not the “the occasional listing of a proprietary shipper as the shipper on a bill of lading” that may have been the practice with the other four NVOCCs with which Tradewind conducted business on the other thirty-five shipments before the administrative law judge in *Worldwide Relocations*, that the Commission found to be significant in its review of the judge’s Initial Decision.

The evidentiary record in *Worldwide Relocations* included records of 125 shipments in which the entity Moving Services was involved. The Moving Services “Shipment Chart” identifies five NVOCCs with which Moving Services conducted business, including Tober. Tober was involved in eleven (8.8%) of the 125 Infinity shipments. *Worldwide Relocations* (ALJ) FF 140 (Shipments 115-125). Tober identified the proprietary shipper as the shipper without mention of Moving Services on the bill of lading for one shipment identified in *Worldwide Relocations* (ALJ) FF 140. *See Tober Remand ID FF 124* (Leon Hazan). Tober identified the proprietary shipper c/o Moving Services as the shipper on the bills of lading for ten shipments identified in *Worldwide Relocations* (ALJ) FF 140. *See Tober Remand ID FF 125*. This is not the “the occasional listing of a proprietary shipper as the shipper on a bill of lading” that may have been the practice with the other four NVOCCs with which Tradewind conducted business on the other thirty-five shipments before the administrative law judge in *Worldwide Relocations*, FMC No. 06-01, that the Commission found to be significant in its review of the judge’s Initial Decision.

The issue in this proceeding is whether Worldwide Relocations, Tradewind, or Moving Services operated as NVOCCs on the Tober shipments, not on their shipments with other downstream common carriers. Thirty-three (92.5%) of the 440 shipments on which the findings about Worldwide Relocations, Tradewind, or Moving Services in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, were based involved downstream common carriers other than Tober. The findings were made in a different proceeding on a different record. For example, with regard to the issue of whether Moving Services held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country, the administrative law judge found: “Moving Services maintained an Internet website and solicited business through this website and other Internet portal sites. (App. 12 at 1139).” *Worldwide Relocations* (ALJ) FF 133. In this proceeding, BOE did not include any Internet advertising by Moving Services in the record (*see BOE App. pp. 1163-1187*) and the affidavit of the area representative who conducted the

investigation of Moving Services does not describe any Internet advertising by Moving Services. (See BOE App. pp. 20-21.) There is no evidence of how Moving Services advertised its services in the record in this proceeding.

Tober was not a party to *Worldwide Relocations*, FMC No. 06-01, and the findings in *Worldwide Relocations* were made on a different record, most of which involved common carriers other than Tober. Therefore, the findings in *Worldwide Relocations* that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs are not persuasive authority in this proceeding on the issue of whether they operated as NVOCCs on the Tober shipments.

### **PART THREE – STANDARD OF PROOF AND EVIDENCE.**

#### **I. STANDARD OF PROOF.**

To prevail in a proceeding brought to enforce the Shipping Act, BOE has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Worldwide Relocations* (FMC) at 15; *Sea-Land Service Inc. – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872, 889 (FMC 2006); *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-719 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994).

The Commission renders the agency decision in the proceeding. “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . .” 5 U.S.C. § 556(e).

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

## II. EVIDENCE.

BOE and Tober submitted documents in conjunction with the motion for summary judgment and BOE submitted additional documents with its brief filed May 22, 2009, and its supplemental brief filed September 21, 2009. BOE also submitted Exhibits 1 and 2 with its Brief on Remand filed May 11, 2012. All of the documents are admitted as evidence.

The Commission noted that in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, the administrative law judge admitted charts summarizing the evidence. *Tober ID Remand* (FMC) at 5 n.3. It then stated: “On remand, the approach in *Worldwide* of admitting summary charts of the 278 shipments under Federal Rule [of Evidence] 611(a) would likely assist the ALJ as well as the Commission in the event of further review.” *Id.* n.4.

Rule 611(a) demonstrative charts “most typically are used as ‘pedagogical devices’ to ‘clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury.’” *United States v. Milkiewicz*, 470 F.3d 390, 397-398 (1st Cir. 2006) (citations omitted). Each entity with which Tober conducted business was a separate business operation. The relationship of Tober with one entity has no probative value regarding the relationship of Tober with the other entities, and the activities of one entity have no probative value regarding the activities of other entities. Since Tober’s relationship with each entity is unique, if charts were used, a separate chart summarizing the evidence for each entity would be required. The shipping documents for the eleven entities relevant to the section 10(b)(11) comprise 1315 pages of the record. Only Lehigh, Infinity, Worldwide Relocations, and Sea and Air were involved in more than twelve shipments and only Infinity was involved in more than thirty-one shipments. Seven of the entities had fewer than one hundred pages of records and four of them had twenty-five or fewer pages. I note that BOE did not submit charts in this proceeding.

I conclude that the number of shipments and the number of documents related to the shipments are not so great and the information in the shipping documents is not so complex or in need of clarification that summary charts are necessary. The findings of fact for Tober, for each entity, and for each shipment are based on the relevant shipping documents for the shipments and other relevant information, not charts summarizing that evidence.

## PART FOUR – DISCUSSION AND CONCLUSION

### I. **TOBER DID NOT VIOLATE SECTION 10(b)(11) OF THE SHIPPING ACT OF 1984 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 OTI THAT DID NOT HAVE A TARIFF AND A BOND AS REQUIRED BY SECTIONS 8 AND 19 OF THE ACT.**

#### A. **Elements of a Violation of Section 10(b)(11).**

As discussed above, to prove that Tober violated section 10(b)(11) on a shipment, BOE must present evidence demonstrating that Tober operated as a common carrier and that the entity without a tariff and a bond operated as an NVOCC on the shipment. The evidence must show that both Tober and the unlicensed entity held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country, assumed responsibility for the transportation by water of the shipment from the port or point of receipt to the port or point of destination, and used, for all or part of that transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

The evidence clearly demonstrates that Tober operated as a common carrier on each of the 279 shipments. Tober held itself out as a common carrier through its status as an NVOCC licensed by the Commission and through its tariff filed with the Commission, and Tober issued bills of lading assuming responsibility for the transportation of cargo by water from the United States to a foreign country.

The evidence does not demonstrate that the unlicensed entities that BOE claims operated as NVOCCs on the Tober shipments. Evidence in the record supports a finding that most, but not all, of the entities held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country. If the evidence does not support a conclusion that the intermediary held itself out to the general public as a carrier **and** assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination **and** used, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, then the intermediary cannot have been operating as an NVOCC on that shipment. *See Landstar*, 569 F.3d at 497 (“a person or entity that provides NVOCC services falls within the ambit of § 19 only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation’”). To answer the “assumed responsibility” question, it is necessary to examine the intermediary’s conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (1991). *See also Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 (1996) (*Low Cost Shipping*) (intermediary found to be operating as an NVOCC on some shipments and ocean freight forwarder on other shipments).

BOE contends that:

With regard to the requirement that an NVOCC assume responsibility for transportation of cargo in U.S. foreign commerce, the Commission has held that the issuance of a bill of lading is not required in order to find that an entity has assumed responsibility for the transportation and is a common carrier. “[A] common carrier [does not] lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment.” *Containerships* at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950).

(BOE Prop. FF (5/22/09) at 31 (footnote omitted).)<sup>10</sup> Although issuance of a document called a bill of lading may not be required to establish a contract of carriage, it is essential that the evidence establish all three elements of the common carriage definition: holding out, assumption of responsibility for the transportation by water of the goods, and use of a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

BOE argues that it is not necessary to examine the evidence of each shipment to determine whether both Tober and the intermediary operated as NVOCCs on the shipment.

While findings and conclusions are mandated by the APA, the APA does not require detailed findings on every subsidiary evidentiary fact (unlike the Federal Rules of Civil Procedure). *St. Johnsbury Trucking Company, Inc. v. U.S.*,<sup>[1]</sup> 326 F. Supp. 938, 941 (D.C. Vt. 1971). Each and every item of evidence brought before the ALJ does

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<sup>10</sup> It should be noted that in *Containerships*, there was no question that respondent Containerships, Inc., was a carrier. It operated a vessel carrying cargo between New York and Puerto Rico. *Containerships*, 9 F.M.C. at 57. Therefore, it assumed responsibility for the transportation of that cargo and in that decision, the Commission had no need to discuss how to determine whether an entity assumed responsibility for transportation of cargo. The issue was whether Containerships was a contract carrier that did not file a tariff as it claimed, or a common carrier obligated to file a tariff with the Commission. *Id.* at 61. The Commission’s discussion in *Containerships* regarding the importance of “holding out” in the determination of whether a carrier is a common carrier as opposed to a contract carrier and the other factors it mentioned such as variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates, *id.* at 65, should be read in that context. As the District of Columbia Circuit held, when there is a dispute about whether an entity is a common carrier, determining that the entity assumed responsibility for transportation of the cargo is not less important than determining whether the entity held out that it provides transportation by water of cargo between the United States and a foreign country for compensation. See *Landstar*, 569 F.3d at 497 (“a person or entity that provides NVOCC services falls within the ambit of § 19 only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation’” (emphasis added)).

not need to be analyzed in a supported decision. *Union Mechling Corp. v. U.S.*, 390 F. Supp. 411 (W.D. Pa. 1974) (ICC reviewed request for relief based on the failure to complete an item by item analysis and denied relief because the substantial evidence, without an item by item analysis, supported the conclusion.) “There is no requirement that the Commission furnish an analysis of each and every item of evidence brought before the Administrative Law Judge....As long as the Commission’s findings are expressed with sufficient particularity to inform the court and the parties of the basis of its decision, the I.C.C. has fulfilled its statutory purpose. *Id.* at 419-420. To satisfy the APA, the agency must clearly state the factual basis and the conclusions must have a rational basis in those facts.

Consistent with the cases cited above, it is BOE’s position that the requirements of the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach [sic] that is required in all situations. The end result of requiring such documentation to demonstrate unlawful conduct would be to encourage future respondents to operate with limited or no documentation, withhold or destroy compromising documentation and information and refuse to cooperate with Commission investigations, thereby thwarting enforcement actions under the Shipping Act. A finding can properly be made that Tober provided service to unbonded and untariffed NVOCCs and therefore violated Section 10(b)(11) of the Shipping Act without analyzing evidence on a shipment by shipment basis and without developing detailed findings on every subsidiary evidentiary fact. Under the APA, it is appropriate to make a finding that Tober provided service to unbonded, untariffed NVOCCs and note the activities that support that finding.

Agencies may make inferences based on human experience and agency expertise. The direct evidence in this case along with inferences to be drawn, supports a determination that Tober provided service to unbonded, untariffed NVOCCs. Based on the case law cited above, it is appropriate to take available evidence for shipments as well as testimony from Commission staff and two unbonded, untariffed NVOCCs with whom Tober conducted business and infer that Tober generally conducted itself in a similar way.

(BOE Prop. FF (5/22/09) at 27-28 (footnotes omitted).)

To support its contention that requirements of the APA can be satisfied without analyzing each shipment, BOE cites to cases (*St. Johnsbury Trucking Company, Inc.* and *Union Mechling Corp.*) discussing the requirements that an agency decision must meet in order to satisfy APA requirements. These cases are inapposite to the question of whether the elements of a violation must be proven for each shipment alleged to be a violation.

BOE contends that the particular facts about each shipment are “subsidiary” and that “the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach [*sic*] that is *required* in all situations.” (BOE Prop. FF (5/22/09) at 28 (emphasis in original).) “Based on case law cited above, it is appropriate to take available evidence for shipments as well as testimony from Commission staff and two unbonded, untariffed NVOCCs with whom Tober conducted business and infer that Tober generally conducted itself in a similar way.” (*Id.*) BOE does not attempt to reconcile this contention with its contention that “the Commission must evaluate the indicia of common carriage on a case-by-case basis.” (BOE Prop. FF (5/22/09) at 30.)

Although BOE may be correct in its assertion that “utilizing a shipment-by-shipment analysis . . . is not an approach[] that is required in all situations,” it is the function of the presiding officer, not the litigant, to determine the approach to use for the initial decision in a particular case. As discussed above regarding the use of charts, the entities with which Tober conducted business operated separately and how one entity operated is not probative of how the other entities operated. Attempting to extrapolate the operations of all of the entities from the operations of one or two would provide a false picture. Furthermore, there were not so many shipments that examining the documents regarding each shipment is an onerous burden. The APA and Commission precedent cited by BOE clearly demonstrate that utilizing a shipment-by-shipment analysis is appropriate in this proceeding. *See, e.g., Refrigerated Container Carriers Pty. Ltd. – Possible Violation of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 801-802 (ALJ 1999) (finding facts regarding individual alleged violations); *Comm-Sino Ltd. – Possible Violations of Section 10(a)(1) and 10(b)(1)*, 27 S.R.R. 1201, 1205-1206, Appendix A, Appendix B (ALJ 1997) (same).

The need for a shipment-by-shipment analysis is further demonstrated by BOE’s claims regarding the Orion, Echo, Tran Logistic, and Avi shipments. In its filings prior to the *Tober* ID, even with a shipment-by-shipment analysis, BOE argued that Tober violated section 10(b)(11) on twenty-four shipments in which these four entities were involved. (BOE Prop. FF (5/22/09) at 18-19 (Orion); at 20 (Echo); at 21-22 (Tran Logistic and Avi).) The *Tober* ID analyzed the documents in the record for each shipment and found that Tober had not violated section 10(b)(11) on the shipments involving Orion, Echo, Tran Logistic, and Avi. *Tober* ID at 29; *Tober* ID FF 134-149 (Orion); FF 164-177 (Echo); FF 215-236 (Tran Logistic); FF 237-246A (Avi). BOE agrees with these findings, as it has now withdrawn from consideration its claim that Tober violated section 10(b)(11) on the Orion, Echo, Tran Logistic, and Avi shipments. (BOE Brief on Remand at 4.) The probability for mistakes increases when a shipment-by-shipment analysis is not done. I also note that if summary charts had been used, these mistakes might not have been uncovered.

BOE submitted as evidence the shipping documents and other information about 279 separate shipments and claims that Tober violated section 10(b)(11) on each shipment. The elements of proof of a violation of section 10(b)(11) do not change from the first violation to the 279th violation. The fact that Tober operated as a common carrier on one shipment does not mean that it operated as a common carrier on another shipment. While evidence of how Tober operated on some shipments may provide circumstantial evidence of how Tober operated on other shipments,

the evidence for each shipment must prove that Tober assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination, and used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

The intermediaries are separate entities. The operation of each intermediary with which Tober conducted business must be examined separately to determine whether the intermediary operated as an NVOCC. The evidence of how one intermediary conducted its operations has no probative value with regard to how other intermediaries conducted their operations. The Commission cannot base a finding on how one intermediary held itself out to the general public on the evidence of how another intermediary advertised on the Internet. BOE must prove by a preponderance of the evidence that each intermediary held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.

BOE also must prove for each shipment that the intermediary assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination and used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. The manner in which one intermediary operated is not probative of the manner in which any other intermediary operated, and the manner in which an intermediary operated on one shipment is not necessarily probative of how it operated on other shipments. As discussed above, the manner in which an unlicensed entity operated with common carriers other than Tober is not probative of how the entity operated with Tober. BOE must prove by a preponderance of the evidence that each intermediary operated as an NVOCC on each shipment for which BOE claims Tober violated section 10(b)(11).

BOE contends that:

the Commission must evaluate the indicia of common carriage on a case-by-case basis. [*Containerships*.] The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., et al.*, 29 S.R.R. 119, 162 (FMC 2001).

(BOE Prop. FF (5/22/09) at 30, citing *Containerships*.) BOE's brief does not evaluate these indicia for the intermediaries, however, and demonstrate how they support a finding that the intermediaries operated as NVOCCs.

**B. Tober Operated as a Common Carrier on 279 Shipments in Which Unlicensed Intermediaries Were Involved.**

As set forth in greater detail in the findings of fact and conclusions of law, the shipments in which Tober and the unlicensed intermediaries were involved occurred substantially as follows:

- A proprietary shipper wanting to ship goods overseas contacted an unlicensed intermediary.
- The intermediary obtained information from the proprietary shipper regarding the goods to be shipped, time frame for the shipment, and destination.
- The intermediary provided the information about the shipment to Tober.
- Tober provided a quote for its services to the intermediary.
- Tober issued bills of lading with a clear and unambiguous identification of the proprietary shipper or the proprietary shippers c/o the intermediaries as the shipper. By issuing the bills, Tober entered into contractual relationships with the proprietary shippers, “assume[d] responsibility for the transportation [of the proprietary shippers’ goods] from the port or point of receipt to the port or point of destination.” 46 U.S.C. § 40102(6), and operated as a common carrier on the shipments.
- Tober issued invoices for the shipments to the intermediaries. Invoicing the intermediary for the payment does not mean that the intermediary operated as an NVOCC. In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost “was responsible for payment of the ocean freight” was a factor indicating “Respondents acted as ocean freight forwarders.” *Low Cost Shipping*, 27 S.R.R. at 687. See also 46 C.F.R. § 515.2(i)(11) (“freight forwarding services includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments”).
- Tober issued pickup/delivery orders for the goods. In some cases, the pickup/delivery orders were issued directly to the proprietary shippers at their addresses, e.g., BOE App. p. 1456,<sup>11</sup> and on other occasions to the proprietary shipper c/o the intermediary. E.g., BOE App. pp. 1052.
- Tober issued Warehouse Receipts for the goods. In some cases, the Warehouse Receipts were issued directly to the proprietary shippers at their addresses, e.g., BOE

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<sup>11</sup> “BOE App. p.” followed by a number refers to a particular page in BOE’s Appendix filed May 22, 2009.

App. pp. 1456, and on other occasions to the proprietary shipper c/o the intermediary. *E.g.*, BOE App. pp. 1052.

- Tober secured insurance for some shippers.
  1. **Tober held out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.**

The shipments at issue in this proceeding occurred in 2004 through 2007. The Commission licensed Tober as an NVOCC on May 1, 1999. (BOE App. p. 3.) The record suggests that the Commission reissued this license on December 31, 2003. (BOE App. p. 5 (OTI License 12/31/2003).) The Commission revoked Tober's license as an NVOCC on January 15, 2009. (*Id.*, (NVO Revocation 01/15/2009).) During the period in which it was licensed as an NVOCC, Tober held out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation.

Tober also filed a tariff with the Commission. *Tober Remand FF 3A*. “[T]he very publication of such [tariff] Rules . . . constituted an announcement to the shipping world that [Tober] offered [its] services under the restriction imposed by the [tariff] Rules . . .” *International Ass’n of NVOCCs*, 25 S.R.R. at 685.

Therefore, BOE has proven by a preponderance of the evidence that Tober held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation during the period in which the shipments at issue took place. 46 U.S.C. § 40102(6)(A)(i).

2. **Tober assumed responsibility for the transportation by water from the port or point of receipt to the port or point of destination of 255 shipments in which intermediaries were involved and on which BOE alleges Tober violated section 10(b)(11).**

“A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.” *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004). *See also Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000) (“If anything happens to the goods during the voyage the [common carrier] is liable to the shipper because of the bill of lading that it issued.”); *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-456 (S.D.N.Y. 2005) (the bill of lading is the [common carrier’s] contract with the shipper).

The record contains bills of lading or other shipping documents supporting a finding that Tober issued bills of lading for 255 shipments on which BOE alleges Tober violated section 10(b)(11). Each Tober bill of lading in the record clearly and unambiguously identifies the proprietary shipper or the proprietary shipper c/o the intermediary as the shipper. On most of the

bills of lading, the shipper's address appears to be the home address of the proprietary shipper. Each bill of lading identifies a vessel that would carry the goods described in the bill of lading, a port of loading in the United States, and a port of discharge in a foreign country. By issuing a bill of lading identifying the proprietary shipper (at his or her own address or c/o an intermediary) as the shipper, Tober entered into contractual relationships with the proprietary shipper, "assume[d] responsibility for the transportation [of the proprietary shipper's goods] from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(6)(A)(ii). The proprietary shippers, not the unlicensed entities that were involved in the shipments, were shippers in their relationship with Tober, a non-vessel-operating ocean common carrier.

The record does not contain Tober bills of lading for six of the 255 shipments at issue. The record does contain Tober invoices or other documents for these six shipments. The documents indicate that Tober billed ocean freight for shipments that originated in the United States with a destination in a foreign country. I conclude from those invoices, the other documents in the record concerning those shipments, and Tober's operating practices that Tober issued bills of lading identifying the proprietary shipper as the shipper for those shipments, thereby assuming responsibility for the transportation of the shipments by water from the United States to the foreign country. *See Tober* Remand ID FF 28 – Lehigh (David Mailman shipment); Remand ID FF 49 – Infinity (Adam Giangreco shipment); Remand ID FF 78 – All In One (Somia Azam and Antoine Pierrat/Jacqueline Giotti shipments); Remand ID FF 94 – Around the World (Karen Inglemeyer shipment); Remand ID FF 203 – Access International/AVL (Catherine Mars shipment).

BOE relies on the deposition testimony of Yoni Benhaim, Tober's president, and Steven Schneider, Tober's vice president, to support its contention that "Tober did not consider the owner of the cargo to be its customer." (BOE Prop. FF (5/22/09) at 35. *See also* (BOE Prop. FF (5/22/09) ¶ 48 ("Tober considered the entities their customers and only attempted to collect amounts due from the entities, not the owner of the cargo. For example, an email from Tober states 'The only way we can take over the customers is by getting paid directly by each customer.' (emphasis added) (BOE App. 8, Deposition of Yoni Benhaim, P. 51, Line 13 to P. 52, Line 18; BOE App. 9, Deposition of Steve Schneider, P. 45, Line 5 to Line 21; BOE App. 31, P. 001479)) and ¶ 49 ("Tober had no relationship with the actual owner of the cargo. (BOE App. 8, Deposition of Yoni Benhaim, P. 53, Line 19 to P. 54, Line 7)).")

Evidence in the record contradicts their testimony. As the Commission has stated, "[A]n NVOCC's conduct rather than what it calls itself determines its status." *Bonding of Non-Vessel-Operating Common Carriers; Interim Rule*, 56 Fed. Reg. 1493, 1493-1494 (Jan. 15, 1991). *Rose Int'l, Inc.*, 29 S.R.R. at 171 ("[A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations." *Containerships*, 9 F.M.C. at 64 (citing *Bernhard Uhlmann*, 3 F.M.B. at 775)). Despite Tober's claims that the proprietary shippers were not its customers, based on the information provided to it by the unlicensed intermediaries, Tober chose to accept business arranged by the intermediaries, followed the intermediaries' instructions, issued bills of lading identifying the proprietary shippers as the shippers, and ultimately was paid (if paid) by funds that came from the proprietary shippers. Other evidence in the record

further establishes that despite Tober's president's testimony, Tober believed that it had a relationship with the proprietary shippers:

- Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton).
- Tran Logistic issued letters to proprietary shippers identifying Tober as their international carrier. BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady).<sup>12</sup>
- Tran Logistic emails to Tober stating: "The Client [proprietary shipper] is the shipper. TLG is only your Company Broker, accordingly only the Client must be placed on your Bill of Lading as the shipper." BOE App. pp. 1291 (Philip Poettinger); 1297 (Richard Roberts); 1315 (Adrian Stoppe).
- Isabela Figueroa signed a Tober Group Customer Authorization authorizing Tober to use her passport and/or Social Security number for export formalities. BOE App. p. 1084.

Tober assumed responsibility to the proprietary shippers for the transportation of the shipments from the port or point of receipt to the port or point of destination for each of the shipments, and the proprietary shippers, not the unlicensed entities, were shippers in relation to Tober. Although Tober's refusal to deal with the proprietary shippers whom it identified as shippers on its bills of lading may have violated some other provision of the Act and/or the Commission's regulations not charged in the Order of Investigation and Hearing, this refusal does not mean Tober did not have a relationship with the proprietary shippers. Persons who deal with a bill of lading issued by a common carrier and the cargo for which it is issued must be able to rely on the identification of the shipper on that bill and not be concerned that because of unlawful activity by an entity not mentioned on the bill of lading or mentioned only as a way to contact the proprietary shipper, that other entity, not the shipper identified on the bill of lading, is deemed to be the shipper.

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<sup>12</sup> Even though BOE has withdrawn the claim that Tober violated section 10(b)(11) on the Tran Logistic shipments, facts about those shipments provide relevant evidence regarding Tober's operations as a common carrier.

**3. Tober used for all or part of the transportation a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country on 255 shipments in which intermediaries were involved.**

The bills of lading issued by Tober prove by a preponderance of the evidence that each shipment was carried by a vessel from a port in the United States and a port in a foreign country.

BOE has proven by a preponderance of the evidence that Tober operated as a common carrier on each of the 255 shipments.

**4. The intermediaries operated as ocean freight forwarders on the shipments.**

“The term ‘ocean freight forwarder’ means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “*Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier.” 46 C.F.R. § 515.2(i).

BOE contends that “there is no credible evidence in the record that would support a finding that the entities served by Tober were operating as ocean freight forwarders,” (BOE Prop. FF (5/22/09) at 31), and that “[t]he shippers were not aware of Tober’s involvement with their shipment nor did Tober have any involvement with the actual shippers.” (BOE Prop. FF (5/22/09) at 35.) The evidence does not support either of BOE’s contentions.

The bills of lading that Tober issued with clear and unambiguous identification of the proprietary shippers as the shippers constitute the most prominent evidence that the intermediaries operated as ocean freight forwarders. On each of the 255 shipments for which there is evidence in the record, the intermediaries arranged the shipments. Each proprietary shippers contacted an intermediary. The intermediaries contacted Tober and provided the relevant information for the shipments: the identity of the proprietary shipper; the size of the shipment; the location of the goods; the destination. Tober followed the instructions from the intermediaries and issued a bill of lading clearly and unambiguously identifying the proprietary shipper as the shipper.

In *Worldwide Relocations* (FMC), the decision that the Commission ordered to be applied on this remand, the Commission discussed the application of a permissive presumption to the question of whether an entity assumed responsibility for the transportation of a shipment.

As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the [*Worldwide Relocations*] respondent entity did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example,

a Bill of Lading with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility by the [*Worldwide Relocations*] respondent entity for the shipment in question.

*Worldwide Relocations* (FMC) at 19. It is first noted that in this proceeding against Tober, the critical issue is not whether “the respondent entity” (Tober) assumed responsibility for the transportation. As held above, Tober issued its own bill of lading for each shipment and assumed responsibility for the transportation. The critical issue is whether an entity with which Tober conducted business, not a respondent entity in this proceeding, assumed responsibility for the transportation of the cargo.

Tober clearly and unambiguously identified the proprietary owner of the cargo as the shipper on the bill of lading on each of the 255 shipments now included in the section 10(b)(11) claim against Tober. On 213 shipments, the bill of lading in the record demonstrates that Tober identified the proprietary shipper as the shipper at his or her own address. *Tober* Remand ID FF 10 (EOM – four shipments), Remand ID FF 24 (Lehigh – twenty-five shipments), Remand ID FF 43-43A (Infinity – 115 shipments), Remand ID FF 57 (Worldwide Relocations – thirteen shipments), Remand ID FF 75 (All In One – six shipments), Remand ID FF 91 (Around the World – seven shipments), Remand ID FF 107 (Tradewind – four shipments), Remand ID FF 124 (Moving Services – one shipment), Remand ID FF 153 (Sea and Air – twenty-five shipments), Remand ID FF 182 (Car-Go-Ship.com – two shipments), and Remand ID FF 201 (Access International/AVL – eleven shipments). On thirty-six shipments, the bill of lading in the record demonstrates that Tober identified the proprietary shipper c/o the entity as the shipper. *Tober* Remand ID FF 25 (Lehigh – five shipments), Remand ID FF 44-44A (Infinity – four shipments), Remand ID FF 58 (Worldwide Relocations – ten shipments), Remand ID FF 76 (All In One – two shipments), Remand ID FF 125 (Moving Services – eleven shipments), Remand ID FF 153 (Sea and Air – two shipments), and Remand ID FF 183 (Car-Go-Ship.com – two shipments). On six shipments for which there is no bill of lading in the record, other documents in the record and Tober’s operating practices lead to the conclusion that Tober issued bills of lading identifying the proprietary shipper as the shipper. *Tober* Remand ID FF 28 (Lehigh – one shipment); Remand ID FF 49 (Infinity – one shipment); Remand ID FF 78 (All In One – two shipments); Remand ID FF 94 (Around the World – one shipment); and Remand ID FF 203 (Access International/AVL – one shipment). Tober become liable for common carrier obligations to the members of the shipping public whom it identified as shippers on its bills of lading.

BOE contends:

On most of the bills, a proprietary shipper was named, sometimes at its own address, sometimes at the address of the intermediary, and other times “in care of” or “c/o” the intermediary at its address. In contrast to these ambiguous and misleading identifications on the bills of lading, the Tober invoices were consistently issued directly to the intermediary and not the proprietary shipper. Its charges were typically stated as “for door to door service” or “all included”.

(BOE Brief on Remand at 12.) This claim does not accurately reflect the record. First, the proprietary shipper was named on *all*, not most, of the bills of lading. Second, the Tober invoices stated that Tober was providing door to door or all inclusive service, not that the unlicensed entities were providing this service. Third, Tober identified the proprietary shipper at his or her own address as the shipper on 213 bills of lading and the proprietary shipper c/o the entity on thirty-six bills of lading. Most of the shippers concerned household goods. It is understandable that a shipper of household goods from himself or herself in the United States to himself or herself in a foreign country may no longer have a United States address of his or her own and would use the intermediary's address on a bill of lading. *See, e.g.*, BOE App. p. 82 (Susan St. Louis shipping from herself in the U.S. to herself in the United Kingdom); BOE App. p. 630 (Amanda Levinson from herself in the U.S. to herself in Ireland); BOE App. p. 1496 (Nigel Johnson from himself in the U.S. to himself in the United Kingdom).

Evidence in the record also supports a finding that shippers were aware of Tober's involvement with their shipments.

- Proprietary shippers signed Lehigh authorizations for Tober to use passport and/or Social Security numbers for export formalities. BOE App. pp. 739 (Charles Webb); 745 (Philippe Lacquehay); 777 (Antoine de Thoury); 780 (Barbara Hesse); 801 (Jamie L. Hack).
- All In One sent fax sheets to shippers stating "We would also like to inform you that all of our [sic] NVOCC carrier are [sic] licensed by the FMC." BOE App. pp. 1501, 1522, 1537, 1556, 1573. *See also* BOE App. pp. 1529 ("We are proud to inform you that all of our [sic] carriers are licensed by the FMC;")
- Proprietary shipper Jonathan Waage sent an email to Yoram of Tober with information for the shipment. BOE App. p. 1196;
- Tober secured insurance as the agent for the assured proprietary shipper: BOE App. pp. 1195 (Waage); 1208 (Moreton Kim); 1232-1233 (Britton, Jeff); 1246 (Deborah Burgess); 1259-1260 (Alan & Rebecca Richardson); 1311 (Adrian Stoppe);
- Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton);
- Tran Logistic issued a letter to proprietary shippers identifying Tober as the international carrier. BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady).

The intermediaries performed services necessary to dispatch these shipments from the United States via Tober, a common carrier, and booked or otherwise arranged space for each shipment on behalf of the proprietary shipper, and processed the documentation or performed related activities

incident to each shipment. 46 U.S.C. § 40102(18). The intermediaries operated as ocean freight forwarders on the shipments.

**C. BOE Has Not Demonstrated by a Preponderance of the Evidence That the Intermediaries Operated as NVOCCs on the Shipments.**

To prove a violation of section 10(b)(11) on a shipment, BOE has the burden of establishing by a preponderance of the evidence that the intermediary operated as an NVOCC on that shipment. *Tober ID Remand (FMC)* at 4. As part of its burden, BOE must prove that the intermediary operated as a common carrier on each shipment; that is, that each unlicensed entity: held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation; assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination; and used, for all or part of that transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. *See Landstar*, 569 F.3d at 497 (NVOCC must hold out to the general public and assume responsibility for transportation).

As discussed above, each shipment used for all or part of the transportation a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. BOE has proven by a preponderance of the evidence that most, but not all, of the intermediaries advertised in a manner that supports a finding that they held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. BOE has not proven by a preponderance of the evidence that the intermediaries assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination.

BOE contends that “[o]n a substantial number of shipments, Tober identified the entity as the shipper on shipment documents which it issued.” (BOE Prop. FF (5/22/09) at 35.) The Tober bills of lading themselves prove that Tober identified the proprietary shipper at his or her own address as the shipper on 213 bills of lading in the record and the proprietary shipper c/o the unlicensed entity on thirty-six bills of lading in the record. Tober did not identify the unlicensed entity as the shipper on the bill of lading on any bill in the record.

In its Proposed Findings of Fact and Brief filed May 22, 2009, BOE focused on the activities of All In One and Around the World to prove its claim that the unlicensed entities with which Tober conducted business assumed responsibility for the transportation of the cargo. (BOE Prop. FF (5/22/09) at 31-34.) Therefore, the evidence regarding these two entities will be addressed first. I note that between them, All In One and Around the World were involved in only eighteen of the 255 shipments at issue.

**1. All In One Shipping, Inc.**

All In One was involved in ten shipments with Tober.

**a. Holding out.**

BOE contends that intermediary All In One (AIOS) “maintained a website where NVOCC services were advertised and customers were solicited. On the website, AIOS offered to perform ocean transportation service, in particular, full service door to port, door to door and port to port moves of household goods.” (BOE Prop. FF (5/22/09) ¶ 19.) AIOS’s website stated that it was “an international shipping company” that “work[ed] in tandem with reputable international moving companies worldwide in order to provide a smooth move to your final destination” (BOE App. p 1490) and that it provided “full service door to door moves as well as port to port moves.” (BOE App. p 1492.)

AIOS’s advertising supports a finding that AIOS held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

BOE contends:

AIOS operated as an NVOCC from November 2004 to January 2006 with [Josh] Morales as its sole officer. . . . After being contacted by a potential customer, Mr. Morales would obtain quotes from several common carriers, including quotes from destination agents if door service was required, and would provide an all-in quote, including markup, to the customer. If the quote was accepted, AIOS would invoice the customer and the customer would pay AIOS directly. AIOS, in turn, would pay the ocean carrier or NVOCC. AIOS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased. At destination, the cargo would not be released by the ocean carrier or NVOCC until AIOS paid all charges. ([BOE App. pp. 32-33]).

AIOS’s shipments with Tober were conducted in the same manner; that is, AIOS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to AIOS and, in turn, AIOS would make the arrangements with Tober and receive and pay Tober’s invoice. Tober considered AIOS to be its customer and had no relationship with the actual shippers. ([BOE App. pp. 53-54]). Shippers looked to AIOS for the safe delivery of their goods and AIOS assumed responsibility for carriage and delivery of no less than 11 shipments. As Mr. Morales attested:

Our customers contracted with us to transport their goods and looked to us for the safe arrival of their goods. All In One Shipping, Inc. assumed responsibility for delivery of the shipment to the promised destination. ([BOE App. p. 33]).

(BOE Prop. FF (5/22/09) at 32.) BOE relies on the affidavit of Josh Morales, AIOS's principal (BOE App. pp. 32-35), and the deposition testimony of Yonatan Benhaim, the president of Tober (BOE App. pp. 53-54), for these contentions.

“[T]o determine if an entity is a common carrier, it ‘is important to consider all the factors present in each case and to determine their combined effect.’” *Worldwide Relocations* (FMC) at 10, quoting *Worldwide Relocations* (ALJ), 31 S.R.R. at 1519. As BOE recognizes, “an intermediary’s conduct, and not what it labels itself, will be determinative of its status.” *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. at 1684. See *Worldwide Relocations* (FMC) at 11. AIOS issued instructions to Tober, and Tober, following those instructions, issued ten bills of lading clearly and unambiguously identifying the proprietary shippers at the shipper’s address (eight shipments – *Tober Remand ID FF 75 and 78*) or the proprietary shippers c/o AIOS (two shipments – *Tober Remand ID FF 76*) as the shippers. By issuing the bills of lading, Tober established a contract for carriage with the proprietary shippers and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. BOE does not cite any Commission authority holding that identifying the shipper as the proprietary shipper c/o the intermediary means that the intermediary has assumed responsibility for the transportation of the goods. In *Worldwide Relocations* (FMC), the Commission stated that “the occasional listing of a proprietary shipper as the shipper on a bill of lading” did not mean that the entity *Worldwide Relocations* was not acting as a carrier on the 278 *Worldwide Relocations* shipments for which there was evidence in the record of that proceeding. *Worldwide Relocations* (FMC) at 19 (emphasis added). On the record in this proceeding, on every AIOS shipment, Tober identified the proprietary shipper, not AIOS, as the shipper. AIOS dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18).

BOE contends that “AIOS would make the arrangements with Tober.” Ocean freight forwarders “arrange[] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).

BOE contends that “AIOS would invoice the customer and the customer would pay AIOS directly. AIOS, in turn, would pay the ocean carrier or NVOCC.” The definition of “freight forwarding services” includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments.” 46 C.F.R. § 515.2(i)(11). In *Low Cost Shipping*, the Commission found that the fact that respondent *Low Cost* “was responsible for payment of the ocean freight” was a factor indicating “Respondents acted as ocean freight forwarders.” *Low Cost Shipping*, 27 S.R.R. at 687. Therefore, the fact that the proprietary shippers’ payments went through AIOS on the way to Tober does not mean that AIOS operated as an NVOCC. 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. Assuming the Act and Commission regulations do not permit an ocean freight forwarder to mark up the ocean freight and then invoice the increased rate in its own name, BOE does not explain why marking up the ocean freight and then invoicing the increased rate in its own name in violation of the Act means that

the intermediary has assumed responsibility for the transportation by water of the goods within the meaning of the Act.

BOE contends that "AIOS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased." The definition of "freight forwarding services" includes "preparing or processing delivery orders or dock receipts," 46 C.F.R. § 515.2(i)(4), "arranging for cargo insurance," 46 C.F.R. § 515.2(i)(8), and "preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required." 46 C.F.R. § 515.2(i)(10).

BOE contends that "[a]t destination, the cargo would not be released by the ocean carrier or NVOCC until AIOS paid all charges." As stated above, the definition of "freight forwarding services" includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments." 46 C.F.R. § 515.2(i)(11). BOE does not cite any Commission authority holding that if the intermediary mishandles the money advanced by the shipper or delays forwarding the proprietary shipper's payment to the common carrier, the intermediary has assumed responsibility for the transportation by water of the goods.

Relying on the affidavit of the AIOS's principal and the testimony of Tober's president, BOE contends that Tober "had no relationship with the actual [AIOS] shippers." The record contradicts this testimony and demonstrates that, in addition to the bills of lading, Tober did have a relationship with the proprietary shippers on shipments in which AIOS was involved. Tober issued pickup/delivery orders directly to proprietary shippers. *Tober* Remand ID FF 79 – BOE App. pp. 1506 (Fraser Henderson); 1513 (Diane O'Connor); 1518 (Rachel Kupferberg); 1554 (John Burk); 1567 (Christian Scheidler). Tober issued Warehouse Receipts directly to proprietary shippers. *Tober* Remand ID FF 80 – BOE App. pp. 1512 (Diane O'Connor); 1570 (Christian Scheidler). AIOS sent notices to proprietary shippers stating, "We would also like to inform you that all of our [sic] NVOCC carriers are [sic] licensed by the FMC." *Tober* Remand ID FF 82 – BOE App. pp. 1501 (Sam Barbour); 1522 (Rachel Kupferberg); 1537 (Somia Azam); 1556 (John Burk); 1573 (Vanessa Pierrat); *see also* BOE App. pp. 1529 (Diane O'Connor) ("We are proud to inform you that all of our [sic] carriers are licensed by the FMC.").

### **c. Conclusion.**

On every shipment in which AIOS was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. AIOS dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, AIOS operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the AIOS shipments.

## 2. **Around the World Shipping, Inc.**

Around the World was involved in eight shipments with Tober.

### a. **Holding out.**

BOE contends that intermediary Around the World (ATWS) “maintained a website where NVOCC services were advertised and customers were solicited. On the website, ATWS offered to perform ocean transportation service, in particular full service door to port, door to door and port to port moves of household goods.” (BOE Prop. FF (5/22/09) ¶ 26.) ATWS advertised on the Internet that it provided “international and moving’s [*sic*] services for corporate, government, and individuals.” (BOE App. p. 1578.) ATWS held out to provide common carrier service to household goods shippers through a website advertising its NVOCC services, particularly its “full service door to port, door to door and port to port moves of household goods.” ([BOE App. p. 1578]). ATWS also solicited customers “through a lead provider (to whom ATWS paid a fee) who received inquiries from shippers on the Worldwide web searching for international movers.” ([BOE App. p. 36]).

ATWS’s advertising supports a finding that ATWS held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

### b. **Assuming responsibility.**

BOE contends:

The factual situation with respect to ATWS is nearly identical to that of AIOS, based on the affidavit of Daniel E. Cuadrado, the corroborating testimony of [Commission Area Representative] Margolis, and the documents of ATWS and Tober. Mr. Cuadrado was the sole officer of ATWS and was responsible for its operations as an NVOCC from May to September 2005. . . .

After being contacted by a potential customer, Mr. Cuadrado would obtain quotes from several common carriers, including quotes from destination agents if door service was required; would provide an all-in quote to the customer; would invoice the customer, if the quote was accepted; and the customer would pay [ATWS] directly. In turn, ATWS would pay the carrying NVOCC or ocean common carrier. ATWS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased. The cargo would not be released at destination by the ocean carrier or NVOCC until ATWS paid all charges. ([BOE App. p. 37]). ATWS’ shipments with Tober were conducted in the same manner; that is, ATWS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to ATWS and, in turn, ATWS would make the arrangements with Tober and receive and pay Tober’s invoice. ([BOE

App. p. 37-38]). Tober considered ATWS to be their customer and had no relationship with the actual shippers. (([BOE App. pp. 53-54])). The actual shippers looked to ATWS for the carriage and delivery of their goods and ATWS assumed responsibility for the delivery of at least nine shipments. Mr. Cuadrado attested:

Our customers contracted with us to transport their goods and looked to us for the safe arrival of their goods. [Around the World] Shipping, Inc. assumed responsibility for delivery of the shipment to the promised destination. ([BOE App. p. 37]).

(BOE Prop. FF (5/22/09) at 33.) BOE relies on the affidavit of Daniel Cuadrado, ATWS's principal (BOE App. pp. 36-39) (substantially identical to Morales's affidavit), and the deposition testimony of Yonatan Benhaim, the president of Tober (BOE App. pp. 53-54), for these contentions.

As with AIOS, although Tober's president testified that it had no relationship with the actual shippers and ATWS's principal stated that the proprietary shippers contracted with ATWS to transport the goods, the shipping documents tell a different story. Tober, following ATWS's instructions, issued eight bills of lading clearly and unambiguously identifying the proprietary shippers as the shippers. (*Tober* Remand ID FF 91 and 94.) By issuing the bills of lading, Tober established a contract for carriage with the proprietary shippers and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. ATWS dispatched the shipments and booked or otherwise arranged space for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18).

BOE contends that "ATWS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to ATWS and, in turn, ATWS would make the arrangements with Tober and receive and pay Tober's invoice." Ocean freight forwarders "arrange[] space for . . . shipments on behalf of shippers." 46 U.S.C. § 40102(18)(A).

Tober issued invoices to ATWS for all eight shipments in which ATWS was involved. Invoicing ATWS for the payment does not mean that ATWS operated as an NVOCC. In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost "was responsible for payment of the ocean freight" was a factor indicating "Respondents acted as ocean freight forwarders." *Low Cost Shipping*, 27 S.R.R. at 687. See also 46 C.F.R. § 515.2(i)(11) ("freight forwarding services includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments"). Therefore, the fact that the proprietary shippers' payments went through ATWS on the way to Tober does not mean that ATWS operated as an NVOCC. 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. Assuming the Shipping Act does not permit an ocean freight forwarder to mark up the ocean freight and then invoice the increased rate in its own name, BOE does not explain why marking up the ocean freight and then invoicing the increased rate in its own name in violation of the Act means that

the intermediary has assumed responsibility for the transportation of the goods within the meaning of the Act.

BOE contends that “ATWS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased.” The definition of “freight forwarding services includes “preparing or processing delivery orders or dock receipts,” 46 C.F.R. § 515.2(i)(4), “arranging for cargo insurance,” 46 C.F.R. § 515.2(i)(8), and “preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required.” 46 C.F.R. § 515.2(i)(10).

BOE contends that “[t]he cargo would not be released at destination by the ocean carrier or NVOCC until ATWS paid all charges.” As stated above, the definition of “freight forwarding services” includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments.” 46 C.F.R. § 515.2(i)(11). BOE does not cite any Commission authority holding that if the intermediary mishandles the money advanced by the shipper or delays forwarding the proprietary shipper’s payment to the common carrier, the intermediary has assumed responsibility for the transportation by water of the goods.

Relying on the affidavit of the ATWS’s principal and the testimony of Tober’s president, BOE contends that Tober “had no relationship with the actual [ATWS] shippers.” Contrary to this claim, the record demonstrates that, in addition to the bills of lading, Tober did have a relationship with the actual ATWS shippers. Tober issued pickup/delivery orders directly to proprietary shippers. *Tober* Remand ID FF 96 – BOE App. pp. 1610 (Tanja Ruhnke, Manhattan Mini Storage); 1631 (Marcin Przewloka); 1643 (Linda Rogan); 1663 (Molly Acherman & Fred Rohde). Tober issued Warehouse Receipts to proprietary shippers. *Tober* Remand ID FF 97 – BOE App. pp. 1601 (Francesco Nitti); 1609 (Tanja Ruhnke, Manhattan Mini Storage); 1622 (Dvora Geller); 1625 (Marcin Przewloka); 1642 (Linda Rogan); 1652 (Francis Jacob); 1660 (Molly Acherman & Fred Rohde).

**c. Conclusion.**

On every shipment in which ATWS was involved, Tober issued a bill of lading with a “clear and unambiguous identification of the proprietary shipper,” *Worldwide Relocations* (FMC) at 18, as the shipper. ATWS dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, ATWS operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the ATWS shipments.

**3. EOM Shipping, Inc.**

EOM was involved in four shipments with Tober. BOE proposed the following findings of fact regarding EOM.

2. During the course of an investigation, Area Representative . . . Mingione became aware that EOM . . . was providing ocean transportation services. . . . A review of EOM's website in November 2006 showed that EOM advertised its services as international relocation experts and, although they called themselves a moving broker, provided door to door service to its customers, including destination services. (BOE App. 2, ¶ 3; BOE App. 15). A review of EOM's website in June 2007 indicated that EOM was continuing to hold out to provide transportation of personal effects and household goods. (BOE App. 2, ¶ 3; BOE App. 15).

3. . . . [I]n September, 2007, EOM's attorney contacted BOE staff and indicated that EOM intended to become a sales agent for Tober, was going to charge Tober's tariff rates rather than their own rates<sup>13</sup> and had modified its website. . . . EOM never maintained a bond or surety or provided proof of financial responsibility and did not publish a tariff as required by Sections 8 and 19 of the Shipping Act. (BOE App. 2, ¶ 4).

4. A review of documents obtained from Tober shows that Tober provided service to EOM for four shipments during the period February 2006 through April 2006. (BOE App. 2, ¶ 5; BOE App. 16). These shipments were all [LCL] shipments. Three of the four shipment files from Tober contain a copy of Tober's invoice to EOM for port to door service and documentation fees. Each shipment file also contains an information sheet from EOM providing shipment information, an inventory sheet, a warehouse receipt from Tober to EOM as the shipper and a Tober bill of lading issued to the owner of the cargo. (BOE App. 2, ¶ 5; BOE App. 16).

(BOE Prop. FF (5/22/09) at 4-5.)

As it does for all of the entities, BOE states:

The documents issued by [EOM] are further evidence that [it] assumed responsibility for the transportation of the goods. The documents described the goods being shipped, the origin and foreign destination and the amount paid or to be paid for the services. (PFF [4]). No reference was made to Tober or any other carrier.

(BOE Prop. FF (5/22/09) at 35.) Only seven of the twenty-three pages for EOM shipments were clearly issued by EOM. Most of the rest were issued by Tober.

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<sup>13</sup> This proposed finding states an intention by Tober and EOM to operate as principal and agent in the manner later approved by the District of Columbia Circuit. *See Landstar*, 569 F.3d at 499-500 (Commission cannot require licensing of agents providing NVOCC services for licensed NVOCC principals).

**a. Holding out.**

EOM advertised on the Internet that it was “a full-service international moving broker providing door to door service [cut off] East, India, South America, the Caribbean, Africa, Asia and Australia. We use the best companies for deliveries all over the world including ocean transportation [cut off] by the FMC.” (BOE App. p. 803.)<sup>14</sup> Neither the statute nor the Commission’s regulations define the term “moving broker.”

EOM’s advertisement supports a finding that EOM held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober issued four bills of lading clearly and unambiguously identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country and entered into a contract with the proprietary shipper to transport the cargo. *Tober* Remand ID FF 10. Tober issued invoices to EOM for proprietary shippers, pickup/delivery orders to proprietary shippers c/o EOM, Warehouse Receipts to EOM, and a Warehouse Receipt to the proprietary shipper c/o EOM at the proprietary shipper’s address. *Tober* Remand ID FF 11-14. Although Tober and EOM may have violated the Act or Commission regulations with some of these acts, considering all the factors present and determining their combined effect in the light of Tober’s clear and unambiguous identification of the proprietary shipper as the shipper, these improper acts do not demonstrate that EOM assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that EOM issued bills of lading to the proprietary shippers.

EOM operated as an ocean freight forwarder on the thirty-one shipments with Tober.

**c. Conclusion.**

On every shipment in which EOM was involved, Tober issued a bill of lading with a “clear and unambiguous identification of the proprietary shipper,” *Worldwide Relocations* (FMC) at 18, as the shipper. EOM dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, EOM operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the EOM shipments.

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<sup>14</sup> As with several documents in BOE’s Appendix, this document is not complete, as the right side of the page is missing. An unknown number of words are missing between “door to door service” and “East” and between “transportation” and “by the FMC.”

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

BOE proposed the following findings of fact regarding Lehigh.

7. A review of Lehigh Moving's website on November 21, 2006, showed they described the company as "an International and domestic shipping carrier" that provided "international shipping from origin to destination." The home page of their website also contained a link to their international relocation page. (BOE App. 2, ¶ 8; BOE App. 13). . . .

8. A review of documents obtained from Tober shows that Tober provided service to Lehigh Moving for thirty one shipments during the period from June 1, 2004, through January 31, 2006. These shipments were primarily [LCL] shipments. The documentation for each shipment was alike, consisting of Tober's invoice to Lehigh Moving for ocean freight, a booking request from Lehigh Moving's International department, an inventory or packing list generally providing a foreign destination as the final destination of the cargo, a warehouse receipt issued from Tober to Lehigh Moving and a Tober bill of lading issued in the name of the owner of the cargo c/o Lehigh Moving using Lehigh Moving's address or in some cases, issued solely in the name of the owner of the cargo. (BOE App. 14). Due to Lehigh Moving's failure to cooperate, no documents were obtained from Lehigh Moving. (BOE App. 2, ¶ 9).

9. Lehigh Moving's activities were those of an NVOCC. They advertised on the internet as "an International and domestic shipping carrier" that provided "international shipping from origin to destination." Lehigh Moving offered door to door service to their customers, contracted with Tober to provide that service to their customers, and were invoiced by Tober for their services. Lehigh Moving never maintained a bond or surety or provided proof of financial responsibility and did not publish a tariff as required by Sections 8 and 19 of the Shipping Act. (BOE App. 2, ¶ 10).

(BOE Prop. FF (5/22/09) at 6-7.)

##### a. **Holding out.**

Lehigh advertised on the Internet that it was "an international and domestic shipping carrier" and provided "international shipping from origin to destination." *Tober* Remand FF 21-22 (BOE App. p. 626.)

Lehigh's advertisement supports a finding that Lehigh held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried thirty-one shipments in which Lehigh was involved, *Tober* Remand ID FF 32, thirty for which there are bills of lading in the record and one for which other documents in the record support an inference that Tober issued a bill of lading. Lehigh made booking requests for shipments to Tober in the name of the proprietary shipper. *Tober* Remand ID FF 23. Tober identified the proprietary shipper at his or her address as the shipper on twenty-five bills of lading and the proprietary shipper c/o Lehigh on five bills of lading. *Tober* Remand ID FF 24-25, 27-28. At least five proprietary shippers signed a Lehigh authorization for Tober to use passport and/or Social Security numbers for export formalities. *Tober* Remand ID FF 31. Tober issued invoices to Lehigh for proprietary shippers, Warehouse Receipts to the proprietary shipper c/o Lehigh for the shipments of the proprietary shippers, and Warehouse Receipts to Lehigh for the shipments of the proprietary shippers. *Tober* Remand ID FF 26, 29-30. Although Tober and Lehigh may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Lehigh assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Lehigh issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Lehigh assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Lehigh was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. Lehigh dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Lehigh operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Lehigh shipments.

**5. Infinity Moving & Storage, Inc.**

BOE proposed the following findings of fact regarding Infinity.

10. On March 21, 2006, the Commission's Bureau of Certification and Licensing sent Infinity . . . a letter advising them it appeared that they were violating the Shipping Act by doing business as an [OTI] without a license issued by the Commission and without a tariff or proof of the required surety. After receiving no response from Infinity . . ., the investigation of Infinity . . . was assigned to AR Mingione. A review of [Infinity's] website on October 26, 2006, shows that they held themselves out to provide international relocation services and also indicated that all claims would be settled directly with Infinity Moving. (BOE App. 2, & 11; BOE App. 11).

11. On February 1, 2007, AR Mingione sent a letter to Infinity . . . requesting information regarding the common carriers/OTIs with whom Infinity . . . booked cargo during the previous year and copies of bills of lading or freight invoices issued by those common carriers/OTIs. AR Mingione also asked them to cease soliciting ocean cargo, including on their website. In response, AR Mingione received a letter from the General Manager, Ross Sapir, advising that Infinity . . . had removed the references for ocean transportation services from its website and had ceased offering international shipping services. (BOE App. 2, & 12; BOE App. 10). On June 19, 2007, AR Mingione received a response from counsel for Infinity . . . , who advised that during the previous year Infinity . . . completed 152 shipments. All but three of those shipments were shipped via Tober. [Infinity's] counsel provided copies of Tober's invoices to Infinity. A review of the documentation showed that Infinity . . . made at least 126 shipments to a foreign destination with Tober from June 2004 through February 2007. (BOE App. 2, & 12; BOE App. 12). Of those shipments, seventy two shipments were completed after May 11, 2006, the date of the issuance of the Order of Investigation and Hearing in this case. (BOE App. 12).

12. As part of the discovery process, Tober originally provided documentation of forty shipments made by Infinity . . . with Tober during the period from June, 2004, through April, 2006. After a request from [BOE] staff, Tober subsequently provided documentation for an additional 98 shipments for which documentation had already been received from Infinity . . . . The documents show the shipments were primarily [LCL] shipments. The documentation for each shipment generally consisted of Tober's invoice to Infinity . . . for ocean freight, a booking request from [Infinity's] International department, an packing or inventory list prepared by Infinity . . . generally providing a foreign destination as the final destination of the cargo, a warehouse receipt issued from Tober to Infinity . . . and a Tober bill of lading issued in the name of the owner of the cargo c/o Infinity . . . using [Infinity's] address or in some cases, issued solely in the name of the owner of the cargo. (BOE App. 2, & 13; BOE App. 12).

13. [Infinity's] activities were those of an NVOCC. They held themselves out on the internet to provide international relocation services and also indicated that all claims would be settled directly with then [*sic*], assuming responsibility for the cargo. Infinity . . . offered port to door service to their customers, contracted with Tober to provide that service to their customers, and were invoiced by Tober for their services. Infinity . . . never maintained a bond or surety or provided proof of financial responsibility and did not publish a tariff as required by Sections 8 and 19 of the Shipping Act. Infinity . . . has since applied for an NVOCC license. (BOE App. 2, & 14).

(BOE Prop. FF (5/22/09) at 8-9.)

**a. Holding out.**

BOE contends that “[a] review of Infinity Moving’s website on October 26, 2006, shows that they held themselves out to provide international relocation services and also indicated that all claims would be settled directly with Infinity Moving.” (BOE Prop. FF (5/22/09) at 7, relying on BOE App. p. 78.) Infinity advertised on the Internet that it “[took] care of all the *arrangements* for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee’s new home.” (BOE App. p. 78 (emphasis added).) Ocean freight forwarders take care of “arrang[ing] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A). When an intermediary (licensed or unlicensed) advertises that it performs the ocean freight forwarder function of arranging for ocean transportation, it is not holding out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, but that it *arranges* those shipments.

The presumption or inference discussed by the Commission in *Worldwide Relocations* (FMC) does not help establish that Infinity “held out” in its web advertising. As the Commission stated, a presumption of fact “is nothing more than a logical or reasonable inference drawn from established facts that may be rebutted by contrary evidence.” *International Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 684 (ALJ 1990). The facts established by Infinity’s advertising do not indicate common carrier services. BOE also relies on the letter written to the Commission by Infinity’s general manager as an acknowledgment that Infinity’s “website offered international ocean shipping services.” (BOE Remand Brief at 10; see BOE App. 77.) The letter states that Infinity removed the reference cited to international shipping by ocean from its website. The letter does not alter the content of Infinity’s statements in the advertising.

Infinity’s advertising does not support a finding that Infinity held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried 120 shipments in which Infinity was involved. *Tober* Remand ID FF 50. In BOE Exhibit 2 attached to its Brief on Remand, BOE identified seventy-seven shipments in which Infinity was involved that occurred after May 11, 2006, the day the Commission issued the Order of Investigation and Hearing. Prior to May 11, 2006, Tober issued thirty-nine bills of lading for transportation by water identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country and three bills of lading identifying the proprietary shipper c/o Infinity as the shipper. *Tober* Remand ID FF 43, 44. There is no Tober bill of lading in the record for one shipment in January 2006, but other documents in the record indicate that Tober transported the cargo by water from the United States to Norway. I conclude from the other documents in the record concerning this shipment and Tober’s operating practices that Tober issued a bill of lading identifying the proprietary shipper as the shipper for the shipment, thereby

assuming responsibility for the transportation of the shipment by water from the United States to the foreign country. *Tober Remand ID FF 49-49A.*

After May 11, 2006, Tober issued seventy-six bills of lading for transportation by water identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country and one bill of lading identifying the proprietary shipper c/o Infinity as the shipper. *Tober Remand ID FF 43A, 44A.* On October 17, 2006, Tober issued twenty-one bills of lading for shipments loaded in the port of New York on board the vessel YM MILANO for voyage 96E, *Tober Remand ID FF 43B,* and on December 12, 2006, Tober issued seven bills of lading for shipments loaded in the port of New York on board the vessel YM MILANO for voyage 98E. *Tober Remand ID FF 43C.* A standard twenty-foot container has a capacity of 33.18 cubic meters and a standard forty-foot container has a capacity of 67.67 cubic meters. See <http://www.foreign-trade.com/reference/ocean.cfm>, last visited December 29, 2012. The shipments on the MILANO were all LCL shipments with only one being more than 10m<sup>3</sup> (BOE App. p. 517 (21.806m<sup>3</sup>)) and most being between 2m<sup>3</sup> and 5m<sup>3</sup>. (BOE App. pp. 473, 476, 479, 483, 486, 491, 495, 497, 500, 506, 508, 512, 523, 525, 529, 533, 535, 541, 544, 546, 560, 565, 570, 574, 578, 582, and 586.) This suggests that Tober was consolidating these LCL loads into containers with other shipments to be loaded on board the MILANO. *Landstar*, 569 F.3d at 495.

Tober issued invoices to Infinity for shipments by proprietary shippers. *Tober Remand ID FF 45.* Tober issued Warehouse Receipts to Infinity for the shipments of some proprietary shippers. *Tober Remand ID FF 46.* Infinity prepared a Shipping Information form for some proprietary shippers showing the ultimate foreign destination. *Tober Remand ID FF 47.* Some proprietary shippers signed customer authorization forms authorizing Infinity or its NVOCC or OTI to use passport number or Social Security number for filing export formalities. *Tober Remand ID FF 48.* Although Tober and Infinity may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Infinity assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Infinity issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Infinity assumed responsibility for transportation of the cargo.

### **c. Conclusion.**

On every shipment in which Infinity was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. Infinity dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Infinity operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Infinity shipments.

**6. Worldwide Relocations, Inc.**

BOE proposed the following findings of fact regarding Worldwide Relocations.

15. As a result of complaints received by the Commission from shippers, AR Margolis became aware of the activities of Worldwide Relocations, Inc., (“WWR”), a Florida corporation. A review of WWR’s website in November 2004 showed WWR advertised themselves as “an international moving company” offering port to port and door to door services through their “international agents” and touting service from origin to destination”. (BOE App. 3, ¶ 5; BOE App. 30).

16. Tober provided service to WWR for thirty shipments during the period from July 2004 through June 2005. (BOE App. 3, ¶ 5; BOE App. 31). That number includes two shipments where the Commission’s Office of Consumer Affairs and Dispute Resolution Services was contacted by the shippers after WWR did not pay for the shipment and Tober eventually billed the shippers directly. These shipments were primarily [LCL] shipments. (BOE App. 3, ¶ 5; BOE App. 31).

17. The documents obtained from Tober for each WWR shipment include a copy of Tober’s invoice to WWR for either port to door, door to door or port to port service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Worldwide Relocations with WWR’s address or in some cases, issued to the shipper. (BOE App. 3, ¶ 5; BOE App. 31). Copies of documents in WWR’s files for the same shipments show that WWR issued moving contracts to many of their customers promising to provide transportation to a foreign destination and issued invoices charging their customers a different amount than they were charged by Tober. WWR’s shipment files also show WWR contracted for inland transportation when necessary to complete the shipment and provided marine insurance and other services for its customers. (BOE App. 3, ¶ 5; BOE App. 31).

(BOE Prop. FF (5/22/09) at 10-11.)

**a. Holding out.**

Worldwide Relocations advertised on the Internet that it was “an international moving company” that worked “in tandem with our domestic moving agents as well as our international agents . . . to govern your services from origin to destination,” and described “Port to port” and “door to door” moves. (BOE App. p 1336-1339.)

Worldwide Relocations’s advertisement supports a finding that Worldwide Relocations held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried twenty-three shipments in which Worldwide Relocations was involved. *Tober* Remand ID FF 67. Worldwide Relocations sent “agent notifications” to Tober with instructions for the bills of lading and issued shipping instructions to Tober. *Tober* Remand ID FF 62. Tober issued thirteen bills of lading identifying the proprietary shipper at his or her address as the shipper and ten bills of lading identifying the proprietary shipper c/o Worldwide Relocations as the shipper. *Tober* Remand ID FF 57-58. Tober issued invoices to Worldwide Relocations for shipments by proprietary shippers. *Tober* Remand ID FF 59. Worldwide Relocations issued invoices to proprietary shippers and moving contracts to proprietary shippers for their shipments. *Tober* Remand ID FF 60-61. Tober issued pickup/delivery orders and Warehouse Receipts directly to some proprietary shippers. *Tober* Remand ID FF 63-64. Although Tober and Worldwide Relocations may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Worldwide Relocations assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Worldwide Relocations issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober’s issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Worldwide Relocations assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Worldwide Relocations was involved, Tober issued a bill of lading with a “clear and unambiguous identification of the proprietary shipper,” *Worldwide Relocations* (FMC) at 18, as the shipper. Worldwide Relocations dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Worldwide Relocations operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Worldwide Relocations shipments.

**7. Tradewind Consulting, Inc.**

BOE proposed the following findings of fact regarding Tradewind.

As a result of the investigation into other companies operating in South Florida, AR Margolis became aware of the activities of Tradewind Consulting, Inc. a New York corporation. A review of Tradewind Consulting, Inc.’s website in September 2005 shows that they described themselves as a consulting firm rather than an international shipping company. (BOE App. 3, & 8; BOE App. 24). However, the documentation obtained from Tober and Tradewind Consulting, Inc. for the four shipments tendered by Tradewind Consulting, Inc. to Tober between April and September 2005 shows that Tradewind Consulting, Inc. contracted with their shippers to provide full service for LCL shipments for a figure higher than what they were charged by Tober. (BOE

App. 3, ¶ 8; BOE App. 25). For three of the four shipments, the documents include a copy of Tober's invoice to Tradewind Consulting, Inc. for port to door or door to door services, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued to the shipper c/o Tradewind Consulting, Inc. or issued to the shipper. (BOE App. 3, ¶ 8; BOE App. 25). Copies of documents from Tradewind Consulting, Inc.'s shipment files for the same shipments show Tradewind Consulting, Inc. contacted Tober to obtain a quote for a shipment, issued quotes to its customers promising to provide transportation to a foreign destination and issued invoices charging their customers a different amount (generally more) than they were charged by Tober. (BOE App. 3, ¶ 8; BOE App. 25).

(BOE Prop. FF (5/22/09) ¶ 33.)

**a. Holding out.**

BOE acknowledges that “[a] review of Tradewind Consulting, Inc.’s website in September 2005 shows that they described themselves as a consulting firm rather than an international shipping company.” (BOE Prop. FF (5/22/09) at 17, relying on BOE App. p 1116.) Tradewind advertised on the Internet that it “is a consulting firm. We are not classified as an international shipping company. Instead, we prefer to think of ourselves as personalized travel consultants. Tradewind Consulting organizes your services, negotiates with vendors and books your move with licensed moving, shipping and delivery agents worldwide.” *Tober* Remand ID FF 104 (BOE App. p 1116.) Tradewind advertised to potential customers that it did not provide the transportation, but “organize[d] your services.” “Organize” is defined as “to arrange or constitute into a coherent unity in which each part has a special function or relation.” Webster’s Third New International Dictionary (unabridged) 1590 (1993). By advertising that it organizes services, Tradewind advertised that it “arranges space for . . . shipments on behalf of shippers.” *Tober* Remand ID FF 105. See 46 U.S.C. § 40102(18)(A) (definition of ocean freight forwarder).

Tradewind’s advertising does not support a finding that Tradewind held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried four shipments in which Tradewind was involved. *Tober* Remand ID FF 116. Tradewind sent shipping instructions to Tober. *Tober* Remand ID FF 115. Tober issued four bills of lading identifying the proprietary shipper as the shipper and no bills of lading identifying the proprietary shipper c/o Tradewind Consulting as the shipper. *Tober* Remand ID FF 107, 110. Tober issued invoices to Tradewind for shipments by proprietary shippers and Tradewind issued invoices to proprietary shippers. *Tober* Remand ID FF 108-109. Tober issued pickup/delivery orders and Warehouse Receipts directly to proprietary shippers and to proprietary shippers c/o Tradewind. *Tober* Remand ID FF 111-114. Although Tober and Tradewind may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that

Tradewind assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Tradewind issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Tradewind assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Tradewind was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations (FMC)* at 18, as the shipper. Tradewind dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Tradewind operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Tradewind shipments.

**8. Moving Services, Inc.**

BOE proposed the following findings of fact regarding Moving Services.

As a result of the investigation into other companies operating in South Florida as well as complaints received by the Commission, AR Margolis became aware of the activities of Moving Services, Inc., a Florida corporation. A review of documents received from Tober shows that Tober provided service to Moving Services, Inc. for twelve shipments during the period from July 2004 to September 2004. (BOE App. 3, ¶ 9; BOE App. 26). These shipments were primarily LCL shipments. The documents (except for one shipment) include a copy of Tober's invoice to Moving Services, Inc. for port to door service. One invoice also included destination services, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Moving Services, Inc. at Moving Services, Inc.'s address or in one case to the shipper. No documentation was provided by Moving Services, Inc. (BOE App. 3, ¶ 9; BOE App. 26).

(BOE Prop. FF (5/22/09) ¶ 34.)

**a. Holding out.**

Although BOE contends that "each of the entities . . . advertised on the Internet offering origin to destination carrier services" (BOE Prop. FF (5/22/09) at 35), BOE does not include any advertising or designate any specific facts and provide their location in the record that BOE contends would support a finding that Moving Services (BOE Prop. FF (5/22/09) ¶ 34) held itself out to the general public as an NVOCC. BOE submitted an affidavit by the area representative who conducted the investigation of Moving Services. The affidavit states:

As a result of my investigation into other companies operating in South Florida as well as complaints received by the Commission, I became aware of the activities of Moving Services . . . . A review of documents received from Tober shows that Tober provided services to Moving Services, Inc. for twelve shipments during the period from July 2004 to September 2004. (BOE App. 26). These shipments were primarily LCL shipments. The documents (except for one shipment) include a copy of Tober's invoice to Moving Services, Inc. for port to door service. One invoice also included destination services, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Moving Services, Inc. at Moving Services, Inc's address or in one case to the shipper. (BOE App. 26). No documentation was provided by Moving Services, Inc.

(BOE App. pp. 20-21.) The area representative does not claim that Moving Services held itself out as an NVOCC through advertising on the Internet and BOE did not identify any evidence that would support a finding that Moving Services held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. Parties must designate specific facts and provide the court with their location in the record. *See Orr v. Bank of Am., NT & SA*, 285 F.3d at 775.

Therefore, BOE has not established by a preponderance of the evidence that Moving Services held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.

**b. Assuming responsibility.**

Tober carried twelve shipments in which Moving Services was involved. *Tober Remand ID FF 129*. Tober issued one bill of lading identifying the proprietary shipper as the shipper and eleven bills of lading identifying the proprietary shipper c/o Moving Services as the shipper. *Tober Remand ID FF 124-125*. Tober issued invoices and Warehouse Receipts to Moving Services for shipments by proprietary shippers. *Tober Remand ID FF 126-128*. Although Tober and Moving Services may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Moving Services assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Moving Services issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Moving Services assumed responsibility for transportation of the cargo.

**c. Conclusion.**

The evidence in the record does not establish that Moving Services held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. On every shipment in which Moving Services was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the

proprietary shipper,” *Worldwide Relocations* (FMC) at 18, as the shipper. Moving Services dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Moving Services operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Moving Services shipments.

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

BOE proposed the following findings of fact regarding Sea and Air.

Documents received from Tober show that Tober provided service to Sea and Air International, Inc. for twenty seven shipments between October 2004 and March 2006. (BOE App. 3, ¶ 12; BOE App. 18). A review of [Sea and Air’s] website on December 2006 shows that Sea and Air . . . offered “residential and commercial relocation solutions to almost any destination in the world by ship . . .” (BOE App. 17). The shipments tendered to Tober were primarily [LCL] shipments. The documents include a copy of Tober’s invoice to Sea and Air . . . for primarily port to door service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Sea and Air . . . or issued to the shipper. (BOE App. 3, ¶ 12; BOE App. 18). For most shipments, the documentation also includes copies of [Sea and Air’s] inventory sheets providing a foreign destination as the final destination of the cargo. Sea and Air . . . applied for an NVOCC license which became effective on January 18, 2007. No documentation was provided by Sea and Air . . . (BOE App. 3, ¶ 12).

(BOE Prop. FF (5/22/09) ¶ 37.)

**a. Holding out.**

Sea and Air advertised that it “offers residential and commercial relocation solutions to almost any destination in the world by ship, truck, train and airplane” and that its solutions include “[d]oor-to-door home & office relocation” and “[o]ffering all risk insurance.” (BOE App. p. 1396.) Sea and Air’s advertisement supports a finding that Sea and Air held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried twenty-seven shipments in which Sea and Air was involved. *Tober* Remand ID FF 159. Tober issued bills of lading identifying the proprietary shipper as the shipper and bills of lading identifying the proprietary shipper c/o Sea and Air as the shipper. *Tober* Remand ID FF 153-154. Tober issued invoices and Warehouse Receipts to Sea and Air for shipments of the proprietary shippers. *Tober* Remand ID FF 155-156. Sea and Air obtained “overseas information”

needed for customs requirements and customer authorizations from proprietary shippers authorizing the FMC/NVOCC to use the shipper's passport number and/or Social Security number from proprietary shippers. *Tober Remand ID FF 157-158*. Although Tober and Sea and Air may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Sea and Air assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Sea and Air issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Sea and Air assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Sea and Air was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. Sea and Air dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Sea and Air operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Sea and Air shipments.

**10. Car-Go-Ship.com.**

BOE proposed the following findings of fact regarding Car-Go-Ship.com.

Documents received from Tober show that Tober provided service to Car-Go-Ship.com for four shipments between October 2004 and May 2005. A review of Car-Go-Ship.com's website in July 2006 shows that Car Go Ship.com advertised that they provided "international car shipping" and provided port to port and door to door service for "international and overseas transportation". (BOE App. 3, ¶ 14; BOE App. 20). The shipments tendered to Tober were primarily LCL shipments. The documents include a copy of Tober's invoice to Car-Go-Ship.com for ocean freight. The documentation also includes a Tober bill of lading issued to the shipper c/o Car-Go-Ship.com or the shipper and a booking request from Car-Go-Ship.com. (BOE App. 21). No documentation was received from Car Go Ship.com. (BOE App. 3, ¶ 14).

(BOE Prop. FF (5/22/09) ¶ 39.)

**a. Holding out.**

Car-Go-Ship.com advertised that it provided "[s]ervices for Domestic Auto Transport & International Car Shipping. . . . Multiple unit International Car Shipping via Containership & Oversized Vehicle Shipping to all points Worldwide. Let Car-GO-Ship.com be your logistics

solution with unsurpassed rates and service guaranteed.” (BOE App. p. 1011.) Car-Go-Ship.com’s advertisements support a finding that Car-Go-Ship.com held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried four shipments in which Car-Go-Ship.com was involved. *Tober* Remand ID FF 189. Car-Go-Ship.com prepared a booking order for some shipments or a work order for some shipments. *Tober* Remand ID FF 187-188. Tober issued bills of lading identifying the proprietary shipper as the shipper and bills of lading identifying the proprietary shipper c/o Car-Go-Ship.com as the shipper. *Tober* Remand ID FF 182-183. Tober issued invoices to Car-Go-Ship.com for shipments by proprietary shippers. *Tober* Remand ID FF 184. Tober issued pickup/delivery orders directly to at least one proprietary shipper. *Tober* Remand ID FF 185. Tober issued Warehouse Receipts to Car-Go-Ship.com for the shipments of the proprietary shippers. *Tober* Remand ID FF 186. Although Tober and Car-Go-Ship.com may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Car-Go-Ship.com assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence in the record to support a finding that Car-Go-Ship.com issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober’s issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Car-Go-Ship.com assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Car-Go-Ship.com was involved, Tober issued a bill of lading with a “clear and unambiguous identification of the proprietary shipper,” *Worldwide Relocations* (FMC) at 18, as the shipper. Car-Go-Ship.com dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Car-Go-Ship.com operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Car-Go-Ship.com shipments.

**11. Access International Transport/AVL Atlanta Transport.**

BOE proposed the following findings of fact regarding Access International/AVL, contending that Tober was involved in eleven shipments with Access International/AVL.

Documents received from Tober show that Tober provided service to Access International Transport individually for five shipments between August 2005 and January 2006 and provided service for six joint shipments of Access International Transport/AVL Atlanta Transport between August 2005 and May 2006. Access

International Transport is an entity based in New York and AVL Atlanta Transport is based in Georgia. A review of their websites shows that both have identical language and both state they are a “fully licensed and insured global moving” companies that provide “international shipment from origin to destination”. (BOE App. 3, ¶ 15; BOE App. 22). The shipments tendered to Tober were primarily [LCL] shipments. The documents provided by Tober include a copy of Tober’s invoice to Access International Transport for primarily door to door service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued to the shipper. For the six joint shipments, the documentation also includes copies of AVL Atlanta Transport’s inventory sheets providing a foreign destination as the final destination of the cargo. (BOE App. 23). No documentation was provided by Access International Transport/AVL Atlanta Transport. (BOE App. 3, ¶ 15).

(BOE Prop. FF (5/22/09) ¶ 40.)

**a. Holding out.**

Access International Transport and AVL Atlanta Transport each advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service,” (BOE App. p. 1032, 1038), and that it provides “international shipment from origin to destination.” (BOE App. p. 1034, 1040.) Access International Transport and AVL Atlanta Transport’s advertisements support a finding that Access International Transport and AVL Atlanta Transport held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

**b. Assuming responsibility.**

Tober carried twelve shipments in which Access International/AVL were involved. *Tober* Remand ID FF 210. Tober issued bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country. *Tober* Remand ID FF 201. Although there is no bill of lading for one shipment, I find based on the Tober invoice and other documents and Tober’s operating practices that Tober issued a bill of lading identifying the proprietary shipper as the shipper on that shipment. *Tober* Remand ID FF 203. Tober issued invoices to Access International/AVL for shipments by proprietary shippers and issued pickup/delivery orders to proprietary shipper c/o Access Van Lines. *Tober* Remand ID FF 202, 204. Tober issued Warehouse Receipts to the proprietary shipper c/o Access Van Lines and to Access International/AVL for the shipments of the proprietary shippers. *Tober* Remand ID FF 205-206. One shipper signed a Tober Group Customer Authorization authorizing Tober to use her passport and/or Social Security number for export formalities. *Tober* Remand ID FF 207. Although Tober and Access International/AVL may have violated the Act or Commission regulations with some of these acts, these improper acts do not demonstrate that Access International/AVL assumed responsibility for the transportation of the cargo within the meaning of the Act. There is no evidence

in the record to support a finding that Access International/AVL issued bills of lading to the proprietary shippers. The combined effect of all the factors considered in the light of Tober's issuance of bills of lading identifying the proprietary shipper as the shipper overcomes a presumption or inference that Access International/AVL assumed responsibility for transportation of the cargo.

**c. Conclusion.**

On every shipment in which Access International/AVL was involved, Tober issued a bill of lading with a "clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. Access International/AVL dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, Access International/AVL operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the Access International/AVL shipments.

**D. Tober Did Not Accept Cargo from or Transport Cargo for the Account of an NVOCC That Did Not Have a Tariff and a Bond as Required by Sections 8 and 19 of the Act.**

BOE has proven by a preponderance of the evidence that Tober operated as a common carrier on 255 shipments for which there is evidence in the form of shipping documents in the record. BOE has not proven by a preponderance of the evidence that the intermediaries involved in the shipments operated as NVOCCs. For some of the intermediaries, BOE has not proven by a preponderance of the evidence that the intermediary held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i). On each of the shipments, the proprietary shipper, not the unlicensed entity, was a shipper in relation to Tober. BOE has not proven by a preponderance of the evidence that any intermediary assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(ii). Therefore, BOE has not proven that Tober violated section 10(b)(11) of the Shipping Act by accepting cargo from or transporting cargo for the account of an NVOCC that did not have a tariff and a bond as required by sections 8 and 19 of the Shipping Act.

**II. TOBER VIOLATED SECTION 10(b)(2)(A) OF THE ACT BY PROVIDING SERVICE IN THE LINER TRADE THAT WAS NOT IN ACCORDANCE WITH THE RATES AND CHARGES CONTAINED IN A PUBLISHED TARIFF.**

The Commission issued its Order of Investigation and Hearing to determine "violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff." *EuroUSA, Tober Group, and Container Innovations - Possible Violations*, FMC No. 06-06, Order at 4 (FMC May 11, 2006). As set forth above, the Act requires a common carrier to maintain a tariff, 46 U.S.C. § 40501(a), and prohibits

a common carrier from providing service that is not in accordance with the tariff. 46 U.S.C. § 41104.

BOE contends that:

The rate contained in Tober's tariff was \$500 weight/measure. (PFF 55). The president of Tober, Yonatan Benhaim, in deposition testimony, stated that from its inception as an NVOCC in 1999, Tober never charged the rates contained in its tariff. (PFF 55). The vice-president of Tober, Steve Schneider, confirmed in deposition testimony, that the rates contained in Tober's published tariff were not charged. (PFF 55). The \$500 weight/measure was not charged for any of the shipments made by Tober for the unbonded and untariffed NVOCCs. (PFF 56). Based on the admissions of the president and vice-president of Tober that Tober never charged the rates contained in its published tariff and the invoices showing what Tober charged the unbonded and untariffed NVOCCs, it is uncontested that Tober violated Section 10(b)(2)(a) of the Shipping Act, with respect to each shipment presented here.

(BOE Prop. FF (5/22/09) at 39.)

Although Tober did not move for summary judgment on the section 10(b)(2) claim, it included facts about its tariff and actual charges in its statement of material facts as to which it contended there was no genuine issue. BOE responded to Tober's contentions.

26. Prior to receipt of its first communications from BOE, Tober's published tariff provided for a rate of \$500 per cubic meter for all transportation services it provided. *Id.* at ¶ 35. Upon becoming aware of BOE's concerns in regard to its tariff, Tober amended its electronic tariff to show the rates for the individual services Tober was providing.

BOE Response: Prior to February 2007 (approximately nine months after service of the Order of Investigation and Hearing alleging the insufficiency of its tariff), the single commodity covered by Tober's tariff was still "Cargo, N.O.S." and the tariff rate was \$500 per 1,000 kilograms or 1 cubic meter, whichever yielded the higher amount. The tariff had not been updated since its original issue on January 7, 2004. From January, 2004 through February, 2007, Tober provided service for hundreds of shipments at rates not in accordance with their tariff. Benhaim, p. 39, 40, Schneider, p. 28-30, Exhibit 18.

RULING: Tober has not moved for summary judgment on the claim that it violated section 10(b)(2)(A) of the Act. Therefore, the facts stated by

Tober and BOE's response are not material to the issues raised in Tober's motion for summary judgment.

27. Tober had to pay in excess of \$5,000 to make these changes to its electronic tariff. *Id.* at ¶ 36.

BOE Response: ADMITTED

28. From January 1, 2007, to August of 2007, five entities accessed Tober's tariff. *See Website Log Sessions Activity*, attached as Exhibit A-1. One of these entities was the FMC. The other entity was Tober itself.

BOE Response: ADMITTED

29. Of the remaining three entities that accessed Tober's tariff, all of them have limited access to the site because they have not paid Full Access Fees. Accordingly, they cannot actually view Tober's rates. *Schneider Dec.* at ¶ 38; *see also* Exh. A-1.

BOE Response: ADMITTED

30. Despite the fact that Tober has spent \$5000 to upgrade its electronic tariff in order to comply with FMC requirements, *not a single customer or potential customer* has reviewed its tariff rates in the last eight months. *Schneider Dec.* at ¶ 39.

BOE Response: ADMITTED

*Tober S/J Decision* at 46-47. At the argument on Tober's motion for partial summary judgment, while not "conceding the point on the record, for a trial," Transcript (11/14/07) at 8, Tober's former counsel conceded that BOE could put on evidence that would show a violation of section 10(b)(2)(A). *Id.*

In his deposition, BOE's president testified about his understanding of Tober's tariff.

Q Explain to me what that means. What does a \$500 weight measure mean?

A That means it includes – it's my rate is up to \$500 everything you can, change it per – so whenever you give a rate, if it's a \$100 per cubic meter, it's covered under the 500 per cubic meter. As long as you don't go over the 500, you didn't have to change the tariff. That was my understanding.

And I think what the problem was in old days, and this is just I want to add, everybody in the industry was working the same way. So I didn't see

myself anything that I was doing anything different. Because Worldwide and Globe and Global and all those companies worked with everybody in the industry, with Euro, with Troy, with everybody. So everybody had an all-in rate and that's what we were selling. I did exactly the same as everybody else. And so I figure that the \$500 was as long as I don't go over the \$500 for the general cargo, I'm okay. And we never broke it down into, into, you know, continents, countries per meter or cubic feet.

Q But you would agree that the \$500, that was never the rate quoted or charged by Tober Group? Would you agree with that?

A It wasn't, yes.

Q But your testimony is – your understanding was that as long as the rate was under that, that you were okay?

A Right.

Q In terms of the FMC?

A Right.

(BOE App. pp. 47-49.) Tober's president's testimony seems to say that Tober's tariff only provided for rates based on measure (cubic meter), not weight. BOE did not provide a copy of the tariff proving what Tober's tariff actually stated.

In his deposition, Tober's president testified that he believed Tober could lawfully charge a freight rate that was less than or equal to the rate set forth in its tariff without violating the Act. Tober's president also testified that to his knowledge, this practice appeared to be wide-spread in the industry. As found in the *Tober* ID, and as set forth above, whether or not this practice is widespread, it violates section 10(b)(2)(A), which prohibits a carrier from providing service "not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff." BOE has proven by a preponderance that Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff in violation of section 10(b)(2)(A) on 279 occasions.

### **III. A CIVIL PENALTY IS ASSESSED AGAINST TOBER FOR ITS VIOLATIONS OF SECTION 10(b)(2)(A) OF THE ACT AND THE COMMISSION'S REGULATIONS.**

#### **A. Statutory and regulatory considerations.**

The Commission issued the Order of Investigation and Hearing to determine whether "in the event one or more violations of section 10 of the Act and/or 46 C.F.R. § 515.27 are found, civil penalties should be assessed [against Tober] and, if so, the amount of the penalties to be assessed."

*EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 4 (FMC May 11, 2006). Section 13(a) of the Act provides:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$6000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).<sup>15</sup> “BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed.” *Worldwide Relocations* (ALJ) at 76, approved, *Worldwide Relocations* (FMC) at 3. See also *Parks International Shipping – Possible Violations*, FMC No. 06-09, Decision at 30-32 (ALJ Feb. 5, 2010) (Initial Decision of Clay G. Guthridge, Administrative Law Judge) (discussing burden of persuasion), *vacated and remanded on other grounds* (FMC Apr. 26, 2012).

The first question that must be answered in determining a civil penalty is whether the “violation was willfully and knowingly committed.” *Stallion Cargo, Inc. – Possible Violations*, 29 S.R.R. at 678. To assess a civil penalty in the higher amount, the evidence must establish that the violation was willful and knowing. In discussing the willful and knowing requirement, the Commission stated:

In order to prove that a person acted “knowingly and willfully,” it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. [*Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *Ever Freight Int’l Ltd.*, 28 S.R.R. 329, 333 (ALJ 1998)]. The Commission has further held that a person’s “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.” *Id.* at 84 (quoting *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954)); see also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938).

*Rose Int’l, Inc.*, 29 S.R.R. at 164-165. See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. 1397, 1403 (2000) (similar language).

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<sup>15</sup> The Act originally provided for maximums of \$5000 and \$25,000. In 2000, before Respondents allegedly violated the Act, the Commission increased these amounts to \$6000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table) (2008)). The maximums have since been increased to \$8000 and \$40,000. 74 Fed. Reg. 38114, 38115-38116 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2011)).

Section 13(c) of the Act sets forth the factors to be considered in determining the amount of a civil penalty: "In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require." 46 U.S.C. § 41109(b). Once the first question – whether the "violation was willfully and knowingly committed," *Stallion Cargo, Inc.*, 29 S.R.R. at 678 – has been answered, the eight factors set forth in section 13(c) must be weighed and balanced, bearing in mind the maximum penalty that may be assessed for the violation.

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986):

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

*Universal Logistic Forwarding Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 323, 333 (ALJ 2001), adopted in relevant part, 29 S.R.R. 474 (2002). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd. – Possible Violations*, 28 S.R.R. at 805-806.

Although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

*Merritt v. United States*, 960 F.2d 15, 17 (2d Cir. 1992).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (2001); *Refrigerated Container Carriers Pty. Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805 (ALJ 1999, admin. final May 21, 1999). As set forth above, the evidence establishes that Tober violated section 10(b)(2)(A) of the Act by providing service in the liner trade

that was not in accordance with the rates and charges contained in a published tariff. Tober never charged its tariff rate in the period in which the 279 shipments in which the unlicensed intermediaries were involved took place. Therefore, Tober is liable to the United States Government for a civil penalty for each of 279 violations. The civil penalty may not exceed \$6000 for each violation, unless BOE establishes that the violation was willfully and knowingly committed, in which case the penalty may not exceed \$30,000 for each violation. 46 U.S.C. § 41107(a).

**B. BOE Contentions.**

**1. 2009 Brief.**

In its brief filed before the October 9, 2009, Initial Decision, BOE contended that:

Pursuant to section 13 of the Shipping Act, 46 U.S.C. § 41107(a), a party is subject to a civil penalty of not more than \$30,000 for each violation knowingly and willfully committed. Section 13(c) of the Shipping Act requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C. [§] 41109. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. *Merritt v. United States*, 960 F.2d 15, 17 (1992).

Based on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober's behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. The extent of Tober's violations and Tober's degree of culpability merit a substantial civil penalty. A substantial civil penalty also serves as a deterrent to other common carriers from behaving in a similar manner. Though BOE recognizes that Tober has ceased doing business and its license has been revoked, it remains an active New York corporation. BOE, therefore, also requests that a cease and desist order be issued. The order also asked whether, in the event violations are found, such violations constitute grounds for the revocation of any Respondent's OTI license pursuant to 46 C.F.R. § 515.16. Since Tober's licenses have already been revoked, such action is unnecessary.

(BOE Prop. FF (5/22/09) at 39-40.)

On September 21, 2009, BOE filed a Motion to Reopen the Proceeding for the Purpose of Receiving Additional Evidence seeking to include evidence to the record regarding Tober's financial

status and to make additional arguments regarding the civil penalty that its sought. I granted the motion. *Tober Group – Possible Violations*, FMC No. 06-06 (ALJ Oct. 9, 2009) (Order Granting [BOE] Motion . . . Additional Evidence). The additional information set forth in greater detail below concerned tax liens and other claims against Tober.

**2. 2012 Brief on Remand.**

**a. BOE’s new argument.**

In its brief on remand, BOE raises an additional argument that it did not raise in 2009.

BOE submits that the statutory structure contemplates that a knowing and willful violation is subject to a minimum penalty – in this case, \$6,001. Congress’ intent in this regard is clearly expressed in the statute. 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[, 98 Stat. 67 (Mar. 20, 1984)]. 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, et al. – Possible Violations of the Shipping Act*, 26 S.R.R. 663, 664-665 (FMC 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, i.e., not less than \$6001 nor more than \$30,000 per violation.

BOE acknowledges that application of the maximum penalty for both the section 10(b)(11) violations and for the 278 tariff violations might be deemed excessive, particularly in view of the Commission’s present efforts to ease tariff publication requirements for NVOCCs. See, e.g., Docket No. 10-03, Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements, 76 FR 11351 (March 2, 2011). . . . In this case, the number of violations would appear to justify imposition

of a civil penalty at the lower end of the spectrum for knowing and willful violations. Application of the lowest end of the range, \$6,001, to the number of knowing and willful violations, and rounded off to \$1.5 million will result in a civil penalty that 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 law.

(BOE Brief on Remand at 23-24.)

**b. The Shipping Act does not contemplate that a willful and knowing violation is subject to a minimum civil penalty that must exceed the maximum civil penalty for a violation that is not willful and knowing.**

BOE argues that a “logical and natural reading” of the Shipping Act leads to a conclusion that Congress “clearly expressed” an intention to establish a minimum civil penalty for a willful and knowing violation that must exceed the maximum civil penalty for a violation that is not willful and knowing. This argument is not persuasive for several reasons.

First, this is a matter of statutory construction. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004), quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The Act establishes a maximum civil penalty for a violation that is not willful and knowing and a higher maximum civil penalty for a willful and knowing violation, but does not say that the minimum civil penalty for a willful and knowing violation must be greater than the maximum for a violation that is not willful and knowing. While Congress could have easily written a statute imposing a civil penalty for a willful and knowing violation that, at a minimum, must exceed the statutory threshold defining the maximum civil penalty amount for a violation that is not willful and knowing, the Shipping Act does not say that.

Second, to the extent there is any ambiguity in the statute, the legislative history does not say Congress intended a two-level structure in which the minimum civil penalty for a willful and knowing violation must be greater than the maximum civil penalty for a violation that is not willful and knowing. Had that been the intention of the writers of H.R. REP. No. 53, Part 1, 98th Cong. 1st Sess., the House Report cited by BOE, the Report would have said so.

Third, in the twenty-eight years since Congress amended the Act to add the increased maximum civil penalty for a willful and knowing violation, the Commission has never said in its regulations that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. On three occasions immediately after enactment of the Shipping Act of 1984, the Commission published items in the Federal Register concerning changes in the compromise, assessment, mitigation, settlement, and collection of civil penalties under shipping statutes, including changes necessitated by the 1984 Act: (A) Final Rules to Implement the Shipping Act of 1984 and to Correct and Update

Regulations, 49 Fed. Reg. 16994-17001 (Apr. 23, 1984) (codified at 46 C.F.R. Part 505 (1984) (amending 46 C.F.R. Part 505 to change the title to Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties and to add compromise and assessment authority for violations of the Shipping Act of 1984); (B) Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Act, 1933, 49 Fed. Reg. 18874-18877 (May 3, 1984) (proposing revision of rules governing the handling of penalty claims under the Shipping Act and other shipping statutes); (C) Final Rules in Subchapter A; General and Administrative Provision, 49 Fed. Reg. 44362 (Nov. 6, 1984) (promulgating the final rule proposed on May 3, 1984). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing on any of these occasions, nor did it when it redesignated Part 505 as 46 C.F.R. Part 502, Subpart W. Miscellaneous Amendments to Rules of Practice and Procedure, 58 Fed. Reg. 27208 (May 7, 1993).

Fourth, the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) (DCIA), requires the Commission to promulgate rules and adjust for inflation the maximum amount of each statutory civil penalty subject to Commission jurisdiction. A few months later, the Commission promulgated regulations and made its first adjustment under the DCIA. Inflation Adjustments of Civil Monetary Penalties, 61 Fed. Reg. 52704 (Oct. 8, 1996). Neither the preamble nor the Table included in the new regulation states that the minimum civil penalty for a willful and knowing violation of the Act must exceed the maximum civil penalty amount for a violation that is not willful and knowing. *Id.*, 61 Fed. Reg. at 52706 (codified at 46 C.F.R. Part 506) (increasing penalty for a willful and knowing violation to \$27,500 and for a violation not willful and knowing to \$5500). The Commission adjusted the civil penalty levels in 2000, Inflation Adjustment of Civil Monetary Penalties, 65 Fed. Reg. 49741-49742 (Aug. 15, 2000) (increasing penalty for a willful and knowing violation to \$30,000 and for a violation not willful and knowing to \$6000), and again in 2009. Inflation Adjustment of Civil Monetary Penalties, 74 Fed. Reg. 38114-38116 (July 31, 2009) (increasing penalty for a willful and knowing violation to \$40,000 and for a violation not willful and knowing to \$8000). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum to be imposed for a violation that is not willful and knowing.

Fifth, BOE does not cite to any Commission or administrative law judge decision in the twenty-eight years since the enactment of the Shipping Act of 1984 holding or even discussing an argument that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. In the case that BOE cites in its 2009 brief, the Commission gave the judge detailed instructions on factors used in calculating the civil penalty to be imposed in a proceeding remanded for a decision on the civil penalty for willful and knowing violations. *Martyn Merritt – Possible Violations*, 26 S.R.R. at 664-666. The Commission did not state or even suggest that the minimum civil penalty imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing.

Sixth, in *Worldwide Relocations* (ALJ), the administrative law judge found that Respondents had committed “a total of 649 [willful and knowing] violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals.” *Worldwide Relocations* (FMC) at 2. The judge imposed a civil penalty of \$4000 per violation for fifty willful and knowing violations, \$3000 per violation for 325 willful and knowing violations, and \$6000 per violation for 274 willful and knowing violations. *Worldwide Relocations* (ALJ) at 89. I take official notice, 46 C.F.R. § 502.226, that the judge imposed an average civil penalty of slightly less than \$4343.61. The Commission reviewed the judge’s decision on its own motion and, with the exception of three issues not related to civil penalty, substantially adopted the Initial Decision, including the civil penalties imposed by the judge. *Worldwide Relocations* (FMC) at 3; at 24. I am confident that the Commission would not have adopted the decision imposing civil penalties if the maximum civil penalty imposed by the judge for willful and knowing violations were less (and the *average* civil penalty imposed by the judge \$1657.39 less) than the minimum “clearly expressed” civil penalty resulting from a “logical and natural reading” of the Act.

Seventh, BOE had an opportunity to file exceptions to the administrative law judge’s decision in *Worldwide Relocations* if it believed that the civil penalties imposed by the judge were less than the “clearly expressed” statutory requirement resulting from a “logical and natural reading of the statute.” See 46 C.F.R. § 502.227 (“any party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum”). BOE did not file exceptions, see *Worldwide Relocations* (FMC) at 3 (“No party filed exceptions”), which presumably BOE would have done if it believed that the “clearly expressed” statutory requirement resulting from a “logical and natural reading of the statute” requires that the minimum civil penalty imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. This suggests that BOE has enforced the civil penalty provision of the Act for twenty-eight years without believing that the Act requires the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. A “clearly expressed” statutory requirement resulting from a “logical and natural reading of the statute” would not have gone unrecognized for twenty-eight years by the Commission component charged with its enforcement. 46 C.F.R. §§ 501.5(i)(2), 501.28(a), and 502.604(g).

For the foregoing reasons, I find that the Shipping Act does not provide that a willful and knowing violation is subject to a minimum civil penalty that must exceed the maximum civil penalty imposed for a violation that is not willful and knowing.

### **C. Assessment of civil penalties against Tober.**

#### **1. Willfully and knowingly.**

In the *Tober* ID, I noted that BOE’s May 22, 2009, brief did not designate facts that would support a finding that Tober willfully and knowingly violated section 10(b)(2)(A).

BOE does not designate any specific facts and provide their location in the record that BOE contends would support a finding Tober willfully and knowingly violated section 10(b)(2)(A). *Orr v. Bank of Am., NT & SA*, 285 F.3d at 775. The only evidence I find in the record regarding whether Tober willfully and knowingly violated section 10(b)(2)(A) is found in the testimony of Tober's president.

[deposition testimony quoted above at 92 deleted]

“Upon becoming aware of FMC's concerns in regard to its tariff, Tober amended its electronic tariff to break up the costs of the individual services Tober was providing.” (Tober Group, Inc.'s Motion for Summary Judgment, Exhibit A, ¶ 35.) This evidence supports a finding that Tober operated in a manner that it understood complied with the Act. It does not support a finding that Tober intentionally disregarded the statute, was plainly indifferent to its requirements, knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the Act, or was “marked by careless disregard for whether or not one has the right so to act.”

Based on this evidence, although BOE has established that Tober violated section 10(b)(2)(A) of the Act, it has not established that Tober “willfully and knowingly” violated the Act. Therefore, Tober may be liable to the United States Government for a civil penalty that may not exceed \$6,000 for each proven violation. 46 U.S.C. § 41107(a).

*Tober* ID at 43-44.

In its Exceptions to the *Tober* ID filed with the Commission, BOE designated a place in its proposed findings of fact that demonstrate willful and knowing violations.

BOE's Exceptions to the Initial Decision point out that the tariff correction the ALJ cited did not take place until February 2007 – nine months after Tober was served with the May 2006 Order of Investigation and Hearing. In its Proposed Findings of Fact and Conclusions of Law, BOE claimed that during those nine months, Tober accepted and transported 72 shipments for Infinity Moving and Storage, Inc. at rates that were not in accordance with its tariff.

BOE's Proposed Findings of Fact did not cite to any specific record page numbers to support its claim of violations that continued nine months after these proceedings began; nor did it provide a summary table. Rather, it provided a blanket citation to a “document” that consisted of 546 pages of shipment files for Infinity Moving and Storage. Therefore, while we disagree with the Initial Decision's finding that BOE failed to designate any facts to demonstrate a willful and knowing violation, we agree with the finding that BOE failed to “provide their location in the record.”

*Tober* ID Remand at 6-7 (citations omitted). The Commission vacated the finding that Tober had not willfully and knowingly violated section 10(b)(2)(A). “[O]n remand, the determination whether Tober “willfully and knowingly” violated the Act 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.” *Id.* at 7.

The record contains evidence on 279 Tober shipments. BOE attached an exhibit to its Brief on Remand identifying seventy-seven Infinity shipments that occurred after the Commission issued the Order of Investigation and Hearing. (BOE Brief on Remand, Exhibit 2.) In its Brief on Remand, BOE states:

We hasten to add that Tober’s tariff violations extended well after these shipments and started long prior to commencement of this proceeding. The record in this proceeding alone accounts for 278 violations dating between 2004 and 2007. 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. At the very least, it became aware of tariff requirements at that time. Tober’s President admitted that he knew what a tariff was and conceded that it never charged its tariff rate. Tober elected not to inform itself, nor to act upon its responsibility to adhere to the provisions of its tariff. 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. 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. The repeated failure of an NVOCC to educate itself may provide the basis for finding that it acted willfully and knowingly.

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. Accordingly, the ALJ should find that Tober knowingly and willfully violated section 10(b)(2) of the Shipping Act in as many as 278 instances between 2004 and 2007, including (but not limited to) 72 [*sic*] shipments tendered by Infinity to Tober on and after May 11, 2006.

(BOE Brief on Remand at 20-21 (citations omitted).)

Even though the Order of Investigation and Hearing served on May 11, 2006, put Tober on clear notice that it misunderstood the Act, Tober continued to provide service not in accordance with

the rates in its tariff on seventy-seven shipments between May 11, 2006, and January 17, 2007. (*Tober* Remand ID FF 43A, 44A.) Therefore, BOE has proven by a preponderance of the evidence that Tober willfully and knowingly violated section 10(b)(2)(A) on seventy-seven shipments that occurred after the Commission issued the Order of Investigation and Hearing.

The record does not establish that Tober willfully and knowingly violated section 10(b)(2)(A) on the 202 shipments before the Commission issued the Order of Investigation and Hearing. This is not a case in which BOE was stymied by a respondent in its attempts to get information about Tober's operations. Compare *Worldwide Relocations* (FMC) at 7-10. Tober participated in written discovery in this proceeding, initiating its own discovery and responding to BOE's written discovery, and produced its president and vice-president for depositions. Although Tober stopped participating in this proceeding after the close of discovery and after the Commission vacated and remanded the Tober summary judgment decision, BOE had a full and fair opportunity throughout the discovery period, particularly during the depositions of Tober's president and vice-president, to gather information that would demonstrate Tober willfully and knowingly violated section 10(b)(2)(A), but did not do so. Tober's president also testified that by operating that way, Tober was doing "exactly the same as everybody else." BOE does not seem to have questioned the president further about this claim and has not presented evidence rebutting it. While the fact that "everybody" was quoting their rates the same way Tober did does not mean that this practice complies with the Act, it does cut against an argument that Tober was willfully and knowingly violating the Act. I find that BOE has not established by a preponderance of the record that Tober willfully and knowingly violated section 10(b)(2)(A) on the 202 shipments that occurred prior to issuance of the Order of Investigation and Hearing.

## 2. Balancing the Eight Factors.

The manner in which Congress phrased the statute divides the factors into those that related to the violation (in this case, each shipment) itself ("the nature, circumstances, extent, and gravity of the violation committed") and those that relate to the violator ("with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require"). See *Universal Logistic Forwarding Co., Ltd., supra* (determining a civil penalty "requires the weighing and balancing of eight factors set forth in law").

With regard to the section 10(b)(2)(A) violations, for the 202 shipments that occurred prior to May 11, 2006, BOE has not proven by a preponderance of the evidence that Tober willfully and knowingly violated the Act; therefore, any civil penalty imposed for those 202 shipments cannot exceed \$6000 per violation. For the seventy-seven shipments that occurred after May 11, 2006, BOE has proven by a preponderance of the evidence that Tober willfully and knowingly violated the Act; therefore, any civil penalty imposed for those seventy-seven shipments cannot exceed \$30,000 per violation.

In its May 22, 2009, Brief, BOE contended "[b]ased on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate." (BOE Prop. FF (5/22/09) at 40.) In its Additional Proposed Findings, BOE contended that "the record supports imposition of the

maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil penalty against Tober is appropriate.” (Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement at 5-6.) BOE recognized that the Commission must take into account “the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require,” 46 U.S.C. § 41109(b), and “must make specific findings with regard to each factor.” (BOE Revised Proposed Findings of Fact at 45-46.) Since BOE was the party seeking an order assessing a civil penalty, it had the burden of persuasion to demonstrate the amount of the civil penalty to be imposed. The *Tober* ID noted that “although [BOE] has the burden of establishing the appropriate amount of the civil penalty that should be assessed, other than ability to pay addressed in its Additional Proposed Findings, BOE has not proposed how the Commission should weigh and balance those factors.” *Tober* ID at 45.

In its additional proposed finding filed September 21, 2009, BOE added the following additional information and argument regarding the civil penalty that it seeks:

Federal tax liens filed against Tober total close to \$700,000.00. (PFF 62). New York State tax warrants total over \$200,000.00. (PFF 63). Tober’s liabilities for taxes to the federal government and New York State total close to \$900,000.00, a significant liability for a company that is no longer in business. (PFF 62 and 63). Tober also has over \$700,000.00 in outstanding claims for its NVOCC activities. (PFF 66). It is unclear whether the claimants will take other legal action against Tober.

Based on the evidence of federal and state tax liens as well as outstanding claims by shippers and other transportation related entities and admissions by its president that Tober is no longer in business, it is reasonable to conclude that Tober has limited, if any, ability to pay a civil penalty. Ability to pay, however, is only one factor in determining the appropriate amount of a civil penalty. *See Portman Square Ltd.*, 28 SRR 80, 86 (1998, ALJ); *Ever Freight Int’l Ltd. et al.*, 28 SRR 329, 335 (1998, ALJ); *Refrigerated Container Carriers Pty. Limited – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 SRR 799, 805 (Footnote 5) (1999, ALJ). BOE believes the record supports imposition of the maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil penalty against Tober is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober’s behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. Regardless of Tober’s ability or inability to pay, a substantial civil penalty will send a strong message to other common carriers and serve as a deterrent to similar conduct. The policies for deterrence and future compliance with the Commission’s regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty.

46 C.F.R. § 502.603(b). In the circumstances of this case, the deterrent effect on others who might be inclined to violate the law clearly justifies assessment of a significant civil penalty notwithstanding Tober's present status.

(Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement (received Sept. 21, 2009) at 5-6.)

Ability to pay, however, is only one factor in determining the appropriate amount of a civil penalty. BOE believes the record supports imposition of the maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil penalty against Tober is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober's behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. Regardless of Tober's ability or inability to pay, a substantial civil penalty will send a strong message to other common carriers and serve as a deterrent to similar conduct. The policies for deterrence and future compliance with the Commission's regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. 46 C.F.R. § 502.603(b). In the circumstances of this case, the deterrent effect on others who might be inclined to violate the law clearly justifies assessment of a significant civil penalty notwithstanding Tober's present status.

(*Id.* at 5-6 (citations omitted).)

BOE does not elaborate about the "the nature, circumstances, extent, and gravity of the violation[s] committed." Tober filed a tariff, but did not charge rates set forth in the tariff. Did Tober's charges exceed the tariff, or did it charge less than its tariff? Should the civil penalty be the same for a small shipment – *e.g.*, the Shawn Rooke shipment (door to door service, ocean freight, and documentation totaling \$330.00 (BOE App. p. 1406) – as a forty-foot container – *e.g.*, the Somia Azam shipment totaling \$7,215.00 (BOE App. p. 1542)? BOE does not say. I note that a standard forty-foot container has a volume of 67.67 cubic meters. Tober would charge \$33,875 for a forty-foot container at its \$500/m<sup>3</sup> rate. The \$7,215.00 charged for the Azam shipment suggests that Tober charged less, not more, than its tariff rate. BOE does not cite to evidence regarding Tober's history of prior offenses.

I will treat the nature, circumstances, extent, and gravity of the violation committed together. The evidence supports the following analysis. Tober charged its shippers a freight rate other than that set forth in its published tariff based on what its president testified he understood to be a permissible practice used by many other common carriers. BOE has not claimed or cited to any evidence indicating that Tober charged a rate that exceeded its tariff rate, and it is clear that on some shipments, it charged significantly less than its tariff rate. BOE has not claimed or cited to any evidence indicating that Tober charged rates other than that set forth in its published tariff as a

means to discriminate against some shippers or in favor of other shippers, one of the prohibitions of the Act. 46 U.S.C. § 40101(1); 46 U.S.C. § 41104(8).

The Commission initially licensed Tober as an ocean freight forwarder in 1996, then as an NVOCC in 1999. (BOE Brief on Remand at 20-21.) There is no evidence in the record indicating that Tober has a history of Shipping Act offenses prior to what is alleged in this proceeding. Since Tober is a corporation that is no longer in business and owes \$1.6 million in taxes and other claims, its ability to pay is limited. Within the realm of other matters of justice to consider, the Commission is moving to “to ease tariff publication requirements for NVOCCs.” (BOE Brief on Remand at 24, *citing* Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements, 76 Fed. Reg. 11351 (Mar. 2, 2011).)

Balancing the nature, circumstances, extent, and gravity of the violation committed and, with respect to Tober, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require, I find that Tober is liable to the United States for a civil penalty in the amount of \$1000 for each of the 202 violations committed before May 11, 2006, for a total of \$202,000. Balancing the nature, circumstances, extent, and gravity of the violation committed and, with respect to Tober, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require, I find that Tober is liable to the United States for a civil penalty in the amount of \$3000 for each of the seventy-seven violations committed after May 11, 2006, for a total of \$231,000. The total civil penalty imposed is \$433,000.

#### **IV. A CEASE AND DESIST ORDER IS NOT ISSUED AGAINST TOBER.**

BOE’s Brief on Remand is silent on whether BOE seeks a cease and desist order.

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, *citing Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. “A cease and desist order must be tailored to the needs and facts of the particular case.” *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

In its briefing in 2009, although BOE recognized that Tober had ceased doing business and its license had been revoked, it requested that a cease and desist order be issued because Tober remained an active New York corporation. The Tober Initial Decision did not impose a cease and desist order.

Other than mentioning it as a potential remedy, *Tober ID Remand (FMC)* at 2, the Commission did not address the cease and desist order in *Tober Initial Decision Remand*. In its brief on remand, BOE does not provide any additional information about whether Tober remains an active New York corporation and does not ask for entry of a cease and desist order.

The record reflects that Tober cured the section 10(b)(2)(A) violation in 2007. According to BOE, Tober ceased doing business before BOE filed its brief in 2009 and there is no evidence in the record suggesting that Tober has resumed doing business. There is not a reasonable likelihood that Tober will resume its unlawful activities in violation of section 10(b)(2)(A). Therefore, a cease and desist order is not issued.

#### **PART FIVE – FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>16</sup>**

1. Tober was incorporated as a New York corporation on February 16, 1996, and as of May 22, 2009, is an active corporation. Its president is Yonatan Benhaim. (BOE App. p. 1.)
2. In 1996, the Commission issued Tober a license to operate as an ocean freight forwarder. (BOE App. p. 2.)
3. In 1999, the Commission issued Tober a license to operate as an ocean transportation intermediary (ocean freight forwarder and non-vessel-operating common carrier). (BOE App. p. 3.)
- 3A. When the shipments for which there is evidence in the record occurred, Tober's tariff rate on file with the Commission was \$500 per 1,000 kilograms or 1 cubic meter, whichever yielded the higher amount. *EuroUSA, Tober Group, and Container Innovations – Possible Violations*, FMC No. 06-06, Order at 2 (FMC May 11, 2006); BOE App. pp. 46-49 (Deposition of Yoni Benhaim); BOE App. pp. 69-70 (Deposition of Steve Schneider).
4. As a licensed NVOCC and through its maintenance of a tariff, Tober held "itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." 46 U.S.C. § 40102(6)(A)(i).
- 4A. Tober never charged its customers the rates contained in its published tariff. (BOE App. pp. 46-49 (Deposition of Yoni Benhaim); BOE App. pp. 69-70 (Deposition of Steve Schneider).
5. The Commission revoked Tober's ocean freight forwarding and NVOCC licenses on January 15, 2009, for failure to maintain a bond. (BOE App. pp. 5-6).
6. Tober operated as a common carrier on shipments that included the involvement of fifteen intermediaries that did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. pp. 7-25).

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<sup>16</sup> 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.

## **EOM Shipping, Inc.**

7. EOM did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 8-9.)
8. EOM advertised on the Internet that it was full-service international moving broker providing door to door service [cut off] East, India, South America, the Caribbean, Africa, Asia and Australia. We use the best companies for deliveries all over the world including ocean transportation [cut off] by the FMC.” (BOE App. p. 803.)<sup>17</sup>
9. Through its Internet advertisement, EOM held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
10. Tober issued four bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 815 (Pieter van den Berg); 819 (George Kalmar); 823 (Rosela Artiaco); 829 (Keith Wilson).
11. Tober issued two invoices to EOM for proprietary shippers: BOE App. pp. 811 (Pieter van den Berg); 818 (George Kalmar).
12. Tober issued pickup/delivery orders to proprietary shippers c/o EOM: BOE App. pp. 827 (Rosela Artiaco).
13. Tober issued Warehouse Receipts to EOM for the shipments of the proprietary shippers: BOE App. pp. 817 (Pieter van den Berg); 821 (George Kalmar); 831 (Keith Wilson).
14. Tober issued one Warehouse Receipt to the proprietary shipper c/o EOM at the proprietary shipper’s address for the shipment of the proprietary shipper: BOE App. pp. 825 (Rosela Artiaco).
15. Tober carried four shipments in which EOM was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
16. When Tober issued the four bills of lading on the EOM shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to

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<sup>17</sup> See n.13.

the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four EOM shipments.

17. EOM did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, EOM did not operate as an NVOCC on the four EOM shipments.
18. EOM operated as an ocean freight forwarder on the four EOM shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
19. Tober did not violate section 10(b)(11) of the Shipping Act on the four EOM shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Lehigh Moving and Storage, Inc.**

20. Lehigh did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 11.)
21. Lehigh advertised on the Internet that it was “an international and domestic shipping carrier” and provided “international shipping from origin to destination.” (BOE App. p. 626.)
22. Through its Internet advertisement, Lehigh held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
23. Lehigh made booking requests for shipments to Tober in the name of the proprietary shipper. BOE App. pp. 628 (Amanda Levinson); 632 (Jennifer Spong); 637 (Thomas Broderidge); 643 (Caroline Goodridge); 652 (Katherine Brook); 655 (David Mailman); 662 (John Stensland); 672 (Vincent Menna); 674 (William Hill); 684 (Keterina Tsakon & Giorgos Kontrafouris); 690 (Jennyfer Carswell); 695 (Richard Dalzaell); 698 (Richard Schmidt); 705 (Dan O`Dell); 709 (Mark & Margaret Litten); 719 (Agata Schinazi); 725 (Alain Lemehaute); 728 (Tomas Cabarcos); 737 (Charles Webb); 744 (Philippe Lacquehay); 752 (Paul Lyon); 758 (Jennifer Stanley); 764 (Hildegard Jordan); 770 (Duane Thomas); 775 (Antoine de Thoury); 779 (Barbara Hesse); 787 (Michael Bell); 790 (Marianne Nielsen); 794 (Ann Tweedie); 799 (Jamie L. Hack).
24. Tober issued twenty-five bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country. BOE App. pp. 666 (John Stensland); 670 (Vincent Menna); 677 (William Hill); 681 (Keterina Tsakon &

- Giorgos Kontrafouris); 687 (Jennyfer Carswell); 692 (Richard Dalzaell); 699 (Richard Schmidt); 702 (Dan O'Dell); 707 (Mark & Margaret Litten); 712 (Thomas Keys); 714 (Agata Schinazi); 721 (Alain Lemehaute); 730 (Tomas Cabarcos); 734 (Charles Webb); 741 (Philippe Lacquehay); 749 (Paul Lyon); 754 (Jennifer Stanley); 761 (Hildegard Jordan); 766 (Duane Thomas); 772 (Antoine de Thoury); 781 (Barbara Hesse); 784 (Michael Bell); 788 (Marianne Nielsen); 792 (Ann Tweedie & Stephen Meyer); 796 (Jamie L. Hack).
25. Tober issued five bills of lading identifying the proprietary shipper c/o Lehigh as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 630 (Amanda Levinson); 633 (Jennifer Spong); 640 (Thomas Broderidge); 644 (Caroline Goodridge); 649 (Katherine Brook).
  26. Tober issued thirty invoices to Lehigh for proprietary shippers: BOE App. pp. 627 (Amanda Levinson); 631 (Jennifer Spong); 636 (Thomas Broderidge); 642 (Caroline Goodridge); 648 (Katherine Brook); 654 (David Mailman); 661 (John Stensland); 667 (Vincent Menna); 673 (William Hill); 680 (Keterina Tsakon); 686 (Jennyfer Carswell); 691 (Richard Dalzaell); 696 (Richard Schmidt); 701 (Dan O'Dell); 706 (Mark & Margaret Litten); 711 (Thomas Keys); 713 (Agata Schinazi); 724 (Alain Lemehaute); 727 (Tomas Cabarcos); 733 (Charles Webb); 740 (Philippe Lacquehay); 748 (Paul Lyon); 753 (Jennifer Stanley); 760 (Hildegard Jordan); 765 (Duane Thomas); 771 (Antoine de Thoury); 778 (Barbara Hesse); 783 (Michael Bell); 791 (Ann Tweedie); 802 (Jamie L. Hack).
  27. SeaMates Consolidation Service, Inc., issued a bill of lading identifying Tober as the shipper on the David Mailman shipment. BOE App. p. 658.
  28. Although there is no Tober bill of lading in the record for the David Mailman shipment, I find based on the Tober invoice indicating origin in the United States, destination in a foreign country, and ocean freight charges, other documents in the record for this shipment, and Tober's operating practices that Tober issued a bill of lading identifying David Mailman as the shipper for the David Mailman shipment.
  29. Tober issued Warehouse Receipts to the proprietary shipper c/o Lehigh for the shipments of the proprietary shippers: BOE App. pp. 629 (Amanda Levinson).
  30. Tober issued Warehouse Receipts to Lehigh for the shipments of the proprietary shippers: BOE App. pp. 635 (Jennifer Spong); 647 (Caroline Goodridge); 651 (Katherine Brook); 656 (David Mailman); 663 (John Stensland); 668 (Vincent Menna); 675 (William Hill); 683 (Keterina Tsakon); 689 (Jennyfer Carswell); 694 (Richard Dalzaell); 697 (Richard Schmidt); 701 (Dan O'Dell); 708 (Mark & Margaret Litten); 720 (Agata Schinazi); 723 (Alain Lemehaute); 732 (Tomas Cabarcos); 736 (Charles Webb); 743 (Philippe Lacquehay); 751 (Paul Lyon); 757 (Jennifer Stanley); 763 (Hildegard Jordan); 769 (Duane Thomas); 774 (Antoine de Thoury); 786 (Michael Bell); 793 (Ann Tweedie & Stephen Meyer); 798 (Jamie L. Hack).

31. At least five proprietary shippers signed a Lehigh authorization for Tober to use passport and/or Social Security numbers for export formalities. BOE App. p. 739 (Charles Webb); 745 (Philippe Lacquehay); 777 (Antoine de Thoury); 780 (Barbara Hesse); 801 (Jamie L. Hack).
32. Tober carried thirty-one shipments in which Lehigh was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
33. When Tober issued the thirty-one bills of lading on the Lehigh shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Lehigh shipments.
34. Lehigh did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Lehigh did not operate as an NVOCC on the thirty-one Lehigh shipments.
35. Lehigh operated as an ocean freight forwarder on the thirty-one Lehigh shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
36. Tober did not violate section 10(b)(11) of the Shipping Act on the thirty-one Lehigh shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Infinity Moving & Storage, Inc.**

37. Infinity did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 13.)
38. Infinity advertised on the Internet that it “[took] care of all the arrangements for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee’s new home.” (BOE App. p 78.)
39. Infinity’s Internet advertisement describes a business operating as an ocean freight forwarder as ocean freight forwarders “arrange[] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).

40. Infinity's Internet advertisement did not hold out to the general public that Infinity provided transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).
41. BOE has not identified evidence that would support a finding that Infinity held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
42. Infinity was licensed by US DOT, ICCMC, and NY DOT. (BOE App. p 79.)
43. Prior to May 11, 2006, Tober issued thirty-nine bills of lading for transportation by water identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 97 (Sophie Callet); 102 (Peter Petersdorff); 108 (Derek McQuire); 113 (Lena Sabella); 121 (Cornelis Cornelisse); 124 (Victor Cespon); 128 (Alan Fream); 134 (Mark Nankman & Lise Van Bommel); 138 (George Dodd); 144 (Jonathan Green); 150 (Claire O'Donnell); 153 (Simon Green); 158 (Lauen & Jack Rufer); 163 (Peter Brown); 167 (Grace Cini); 172 (Zuoquan Zhao); 177 (Skip Miller & Betsi Beem); 182 (Alison Hunt); 187 (Steve Jordan); 191 (James Craven & Amanda Joyner); 196 (Richard Harris); 200 (Brigitte Scheurer); 206 (Gus Shuhaibar); 211 (Timothy Grein); 216 (Susan Connor); 220 (Jeanne Robbins); 226 (Christoph Koechel); 231 (James Skove); 236 (Sheldon Smith); 240 (Erik Tilley); 246 (Michelle Henley); 250 (Brooke Chilvers); 255 (Konstanze Diener); 264 (Andrea Patzer); 267 (Jason Callme); 272 (Frederik Deneff); 278 (Cyrus Azardoust); 284 (Caroline S. Harris); 289 (Mette Helena Elfving).
- 43A. After May 11, 2006, Tober issued seventy-six bills of lading for transportation by water identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 300 (Evan Wiener); 308 (Brent Perry); 312 (Maria Ludivina Viands); 318 (Ajay Mathur); 327 (Ryan McKay); 329 (Lilach Atar); 333 (Yetunde Akinwale); 337 (Selena Barratt); 341 (Gbenga Oyebode); 346 (Trevor Peterson); 350 (Joseph Weeks); 355 (Jonathan Mueller); 358 (John Smith); 362 (Patrick Nolen); 370 (Paul Cronin); 372 (Una Marie Girongs Llop); 375 (Esteban Alvarez); 384 (Catherine Miller); 388 (Clare Bowen Davis); 394 (Sean Martin); 397 (Ellen Jameson); 401 (Thomas Wunsch); 405 (Arkady Tseytlin); 410 (Stephen Pettit); 415 (Juerg Petersen); 418 (Maria van Tiel); 423 (Silvia Adjamain); 428 (Jose Sebastiao); 432 (Atilla Batar); 437 (Marion Wohlrab); 441 (Isabelle Gamsohn); 446 (Gwenael Cheve); 450 (Amanda Joyner); 454 (Sophie Struweg); 458 (Luis Jimenez Mier); 465 (Winnie Hung); 467 (Stephen Pettit); 473 (Douglas Hyslop); 476 (Ray Blake); 479 (Amber Briggles); 483 (Susanne Freyhan); 486 (Michael Scott); 491 (Adriaan Zuiderweg); 495 (Laura Norton); 497 (Graham Ashton); 500 (Lisanne Valente); 506 (Tara Halliday); 508 (Pamela Rhode); 512 (Philip Walker); 517 (Bruno Averbek); 523 (Anders Lillevik); 525 (John White); 529 (Gerlinde Dollahan); 533 (Leonard Savage); 535 (Michael El Nour); 541 (Yong Seol Kim); 544 (Jennifer Montanez); 546 (Katrien Steenbrugge); 549 (Margarita Zavalia Bunge); 556 (Chris Maxwell); 560 (David Knapik); 565 (Jonathan Dodd); 570 (Debra McMullan); 574 (Stefan Hoppe); 578

- (Jay Michael); 582 (Paul Viita); 586 (Michelle Bridenbaker); 591 (Andrea Ieri); 596 (Beril Gokan); 600 (Erick Larson); 603 (Rick Cady); 607 (Ricardo Ferrer); 613 (Oyvind Roed); 615 (Jerry Beatty); 620 (Tesalonico Pepito); 624 (Friedmann Gensel).
- 43B. On October 17, 2006, Tober issued twenty-one bills of lading for shipments loaded in the port of New York on board the vessel YM MILANO 96E: BOE App. pp. 473 (Douglas Hyslop); 476 (Ray Blake); 479 (Amber Briggie); 483 (Susanne Freyhan); 486 (Michael Scott); 491 (Adriaan Zuiderweg); 495 (Laura Norton); 497 (Graham Ashton); 500 (Lisanne Valente); 506 (Tara Halliday); 508 (Pamela Rhode); 512 (Philip Walker); 517 (Bruno Averbeck); 523 (Anders Lillevik); 525 (John White); 529 (Gerlinde Dollahan); 533 (Leonard Savage); 535 (Michael El Nour); 541 (Yong Seol Kim); 544 (Jennifer Montanez); 546 (Katrien Steenbrugge).
- 44C. On December 12, 2006, Tober issued seven bills of lading for shipments loaded in the port of New York on board the vessel YM MILANO 98E: BOE App. pp. 560 (David Knapik); 565 (Jonathan Dodd); 570 (Debra McMullan); 574 (Stefan Hoppe); 578 (Jay Michael); 582 (Paul Viita); 586 (Michelle Bridenbaker).
44. Prior to May 11, 2006, Tober issued three bills of lading identifying the proprietary shipper c/o Infinity as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 82 (Susan St. Louis); 87 (Chris Avgherinos); 92 (Pamela Lehto & Richard Skellett).
- 44A. After May 11, 2006, Tober issued one bill of lading identifying the proprietary shipper c/o Infinity as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 303 (Ramkumar Gandham).
45. Tober issued 119 invoices to Infinity for shipments by proprietary shippers: BOE App. pp. 80 (Susan St. Louis); 86 (Chris Avgherinos); 91 (Pamela Lehto); 96 (Sophie Callet); 101 (Peter Petersdorff); 107 (Derek McQuire); 112 (Lena Sabella); 117 (Cornelis Cornelisse); 123 (Victor Cespon); 127 (Alan Fream); 132 (Mark Nankman & Lise Van Bommel); 137 (George Dodd); 143 (Jonathan Green); 148 (Claire O'Donnell); 152 (Simon Green); 157 (Lauen & Jack Rufer); 161 (Peter Brown); 166 (Grace Cini); 171 (Zuoquan Zhao); 176 (Skip Miller & Betsi Beem); 181 (Alison Hunt); 186 (Steve Jordan); 190 (James Craven & Amanda Joyner); 194 (Richard Harris); 199 (Brigitte Scheurer); 204 (Gus Shuhaibar); 209 (Timothy Grein); 214 (Susan Connor); 219 (Jeanne Robbins); 224 (Christoph Koechel); 229 (James Skove); 234 (Sheldon Smith); 239 (Erik Tilley); 244 (Michelle Henley); 249 (Brooke Chilvers); 254 (Konstanze Diener); 260 (Andrea Patzer); 266 (Jason Callme); 271 (Frederik Deneff); 277 (Cyrus Aazardoust); 282 (Caroline S. Harris); 287 (Mette Helena Elfving); 296 (Evan Wiener); 301 (Ramkumar Gandham); 306 (Brent Perry); 311 (Maria Ludivina Viands); 317 (Ajay Mathur); 324 (Ryan McKay); 328 (Lilach Atar); 332 (Yetunde Akinwale); 336 (Selena Barratt); 340 (Gbenga Oyeboode); 345 (Trevor Peterson); 349 (Joseph Weeks); 354 (Jonathan Mueller); 357 (John Smith); 361 (Patrick Nolen); 366 (Paul Cronin); 371 (Una Marie Girongs Llop); 374 (Esteban Alvarez); 382 (Catherine Miller); 386

(Clare Bowen Davis); 390 (Sean Martin); 395 (Ellen Jameson); 399 (Thomas Wunsch); 403 (Arkady Tseytlin); 408 (Stephen Pettit); 413 (Juerg Petersen); 417 (Maria van Tiel); 421 (Silvia Adjamain); 426 (Jose Sebastiao); 430 (Atilla Batar); 435 (Marion Wohlrab); 439 (Isabelle Gamsohn); 444 (Gwenael Cheve); 448 (Amanda Joyner); 452 (Sophie Struweg); 457 (Luis Jimenez Mier); 461 (Winnie Hung); 466 (Stephen Pettit); 470 (Douglas Hyslop); 474 (Ray Blake); 478 (Amber Briggie); 481 (Susanne Freyhan); 485 (Michael Scott); 489 (Adriaan Zuiderweg); 493 (Laura Norton); 496 (Graham Ashton); 499 (Lisanne Valente); 503 (Tara Halliday); 507 (Pamela Rhode); 511 (Philip Walker); 515 (Bruno Averbek); 521 (Anders Lillevik); 524 (John White); 527 (Gerlinde Dollahan); 531 (Leonard Savage); 534 (Michael El Nour); 539 (Yong Seol Kim); 542 (Jennifer Montanez); 545 (Katrien Steenbrugge); 548 (Margarita Zavalia Bunge); 554 (Chris Maxwell); 559 (David Knapik); 564 (Jonathan Dodd); 569 (Debra McMullan); 573 (Stefan Hoppe); 577 (Jay Michael); 581 (Paul Viita); 585 (Michelle Bridenbaker); 590 (Andrea Ieri); 594 (Beril Gokan); 598 (Erick Larson); 602 (Rick Cady); 606 (Ricardo Ferrer); 611 (Oyvind Roed); 614 (Jerry Beatty); 618 (Tesalonico Pepito); 623 (Friedmann Gensel).

46. Tober issued Warehouse Receipts to Infinity for the shipments of some proprietary shippers: BOE App. pp. 84 (Susan St. Louis); 89 (Chris Avgherinos); 94 (Pamela Lehto & Richard Skellett); 99 (Sophie Callet); 106 (Peter Petersdorff); 110 (Derek McQuire); 115 (Lena Sabella); 120 (Cornelis Cornelisse); 126 (Victor Cespon); 130 (Alan Fream); 136 (Mark Nankman & Lise Van Bommel); 141 (George Dodd); 146 (Jonathan Green); 149 (Claire O'Donnell); 155 (Simon Green); 160 (Lauen & Jack Ruffer); 165 (Peter Brown); 169 (Grace Cini); 174 (Zuoquan Zhao); 179 (Skip Miller & Betsi Beem); 183 (Alison Hunt); 188 (Steve Jordan); 193 (James Craven & Amanda Joyner); 198 (Richard Harris); 203 (Brigitte Scheurer); 207 (Gus Shuhaibar); 218 (Susan Connor); 233 (James Skove); 238 (Sheldon Smith); 242 (Erik Tilley); 248 (Michelle Henley); 252 (Brooke Chilvers); 257 (Konstanze Diener); 261 (Andrea Patzer); 269 (Jason Callme); 274 (Frederik Deneff); 280 (Cyrus Aazardoust); 286 (Caroline S. Harris); 291 (Mette Helena Elfving); 299 (Evan Wiener); 305 (Ramkumar Gandham); 310 (Brent Perry); 316 (Maria Ludivina Viands); 322 (Ajay Mathur); 326 (Ryan McKay); 331 (Lilach Atar); 368 (Paul Cronin); 381 (Esteban Alvarez); 456 (Sophie Struweg); 460 (Luis Jimenez Mier); 463 (Winnie Hung); 469 (Stephen Pettit); 558 (Chris Maxwell); 621 (Tesalonico Pepito).
47. Infinity prepared a Shipping Information form for some proprietary shippers showing the ultimate foreign destination: BOE App. pp. 85 (Susan St. Louis); 90 (Chris Avgherinos); 95 (Pamela Lehto & Richard Skellett); 100 (Sophie Callet); 105 (Peter Petersdorff); 111 (Derek McQuire); 116 (Lena Sabella); 118 (Cornelis Cornelisse); 131 (Alan Fream); 133 (Mark Nankman & Lise Van Bommel); 142 (George Dodd); 147 (Jonathan Green); 156 (Simon Green); 162 (Peter Brown); 170 (Grace Cini); 175 (Zuoquan Zhao); 180 (Skip Miller & Betsi Beem); 185 (Alison Hunt); 195 (Richard Harris); 201 (Brigitte Scheurer); 205 (Gus Shuhaibar); 210 (Timothy Grein); 215 (Susan Connor); 223 (Jeanne Robbins); 225 (Christoph Koechel); 230 (James Skove); 235 (Sheldon Smith); 243 (Erik Tilley); 245 (Michelle Henley); 253 (Brooke Chilvers); 258 (Konstanze Diener).

48. Some proprietary shippers signed customer authorization forms authorizing Infinity or its NVOCC or OTI to use passport number or Social Security number for filing export formalities: BOE App. pp. 262 (Andrea Patzer); 270 (Jason Callme); 275 (Frederik Deneff); 283 (Caroline S. Harris); 302 (Ramkumar Gandham); 307 (Brent Perry); 323 (Ajay Mathur); 325 (Ryan McKay); 339 (Selena Barratt); 344 (Gbenga Oyebode); 348 (Trevor Peterson); 360 (John Smith); 367 (Paul Cronin); 373 (Una Marie Girongs Llop); 383 (Catherine Miller); 387 (Clare Bowen Davis); 391 (Sean Martin); 396 (Ellen Jameson); 400 (Thomas Wunsch); 414 (Juerg Petersen); 420 (Maria van Tiel); 422 (Silvia Adjamain); 427 (Jose Sebastiao); 431 (Atilla Batar); 436 (Marion Wohlrab); 440 (Isabelle Gamsohn); 445 (Gwenael Cheve); 449 (Amanda Joyner); 453 (Sophie Struweg); 464 (Winnie Hung); 471 (Douglas Hyslop); 475 (Ray Blake); 480 (Amber Briggie); 482 (Susanne Freyhan); 498 (Graham Ashton); 502 (Lisane Valente); 504 (Tara Halliday); 510 (Pamela Rhode); 514 (Philip Walker); 516 (Bruno Averbeck); 522 (Anders Lillevik); 526 (John White); 528 (Gerlinde Dollahan); 532 (Leonard Savage); 537 (Michael El Nour); 540 (Yong Seol Kim); 543 (Jennifer Montanez); 555 (Chris Maxwell); 563 (David Knapik); 567 (Jonathan Dodd); 572 (Debra McMullan); 576 (Stefan Hoppe); 584 (Paul Viita); 589 (Michelle Bridenbaker); 593 (Andrea Ieri); 599 (Erick Larson); 609 (Ricardo Ferrer); 612 (Oyvind Roed); 619 (Tesalonico Pepito).
49. In January 2006, Tober carried a shipment for Dr. Adam Giangreco. There is no Tober bill of lading in the record, but other documents in the record indicate that Tober transported the cargo by water from the United States to Norway. BOE App. pp. 292-295.
- 49A. I conclude from the other documents in the record concerning this shipment and Tober's operating practices that Tober issued a bill of lading identifying Dr. Adam Giangreco as the shipper for the shipment, thereby assuming responsibility for the transportation of the shipment by water from the United States to the foreign country.
50. Tober carried 120 shipments in which Infinity was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
51. When Tober issued the 120 bills of lading on the Infinity shipments identifying the proprietary shipper or the proprietary shipper c/o Infinity as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the 120 Infinity shipments.
52. Infinity did not hold itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Infinity did not operate as an NVOCC on the 119 Infinity shipments.

53. Infinity operated as an ocean freight forwarder on the 120 Infinity shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
54. Tober did not violate section 10(b)(11) of the Shipping Act on the 120 Infinity shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Worldwide Relocations, Inc.**

55. Worldwide Relocations did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
56. Worldwide Relocations advertised on the Internet that it was “an international moving company” that worked “in tandem with [its] domestic moving agents as well as our international agents . . . to govern your services from origin to destination,” and described “Port to port” and “door to door” moves. (BOE App. p 1336-1339.)
57. Tober issued thirteen bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1371 (Valerie Jeske); 1394 (Weizman Daniel); 1396 (Paulina Dobkiewicz); 1415 (Vladimir M. Bershader); 1440 (Shashi Paul); 1448 (Chawla, Neetu); 1454 (Bitton Benjamin); 1461 (Robin Zieme); 1468 (Byrne Ken); 1482 (Robert Gould); 1483 (Carol Jarecki); 1485 (Eisbrich Ines); 1489 (James Paterson). The bills of lading do not refer to Worldwide Relocations.
58. Tober issued ten bills of lading identifying the proprietary shipper c/o Worldwide Relocations as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1347 (Loli Giulia);<sup>18</sup> 1358 (Cristine McLean); 1399 (Heidi Smith); 1404 (Shawn Rooke); 1409 (Diedre Bane); 1418 (Donovan, Andrew); 1424 (Philip Stapleton); 1429 (Joe McGarvey); 1434 (Carol Gelpi); 1471 (Venebles Nick).
59. Tober issued thirteen invoices to Worldwide Relocations for shipments by proprietary shippers: BOE App. pp. 1349 (Loli Giulia); 1359 (Cristine McLean); 1373 (Valerie Jeske);

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<sup>18</sup> In its opposition to Tober’s motion for summary judgment, BOE submitted an ocean bill of lading issued July 21, 2004, by an unidentified entity identifying Giulia Loli and Morgan Craft c/o Worldwide Relocations as the exporter and Tober as the consignee for the shipment of Giulia Loli’s goods. (BOE Exhibit 11, 001303.) That bill of lading is not included with the Loli documents in BOE’s Appendix in support of its proposed findings of fact.

1395 (Weizman Daniel); 1398 (Paulina Dobkiewicz); 1401 (Heidi Smith); 1406 (Shawn Rooke); 1411 (Diedre Bane); 1414 (Vladimir M. Bershader); 1419 (Donovan, Andrew); 1426 (Philip Stapleton); 1431 (Joe McGarvey); 1434 (Carol Gelpi); 1442 (Shashi Paul); 1450 (Chawla, Neetu); 1453 (Bitton Benjamin); 1462 (Robin Zieme); 1467 (Byrne Ken); 1472 (Venebles Nick); 1481 (Robert Gould); 1483 (Carol Jarecki); 1486 (Eisbrich Ines); 1488 (James Paterson).

60. Worldwide Relocations issued invoices to proprietary shippers for their shipments: BOE App. pp. 1353 (Loli Giulia); 1360 (Cristine McLean); 1378 (Valerie Jeske); 1454 (Bitton Benjamin).
61. Worldwide Relocations issued moving contracts to proprietary shippers for their shipments: BOE App. pp. 1355 (Loli Giulia); 1404 (Shawn Rooke); 1454 (Bitton Benjamin).
62. Worldwide Relocations sent "agent notifications" to Tober with instructions for the bills of lading: BOE App. pp. 1363 (Cristine McLean); 1371 (Valerie Jeske); 1404 (Shawn Rooke); 1454 (Bitton Benjamin).
63. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1456 (Bitton Benjamin); 1464 (Robin Zieme c/o WW Relocations); 1477 (Venebles Nick).
64. Tober issued Warehouse Receipts to proprietary shippers: 1416 (Bershader Irena and Vladimir); 1455 (Bitton Benjamin c/o WW Reloc); 1463 (Robin Zieme c/o WW Relocations).
65. Worldwide Relocations issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1417 (Bershader Irena and Vladimir); 1475 (Venebles Nick)
66. Worldwide Relocations issued shipping instructions to Tober: 1364 (Cristine McLean).
67. Tober carried twenty-three shipments in which Worldwide Relocations was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
68. When Tober issued the twenty-three bills of lading on the Worldwide Relocations shipments identifying the proprietary shipper or the proprietary shipper c/o Worldwide Relocations as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twenty-three Worldwide Relocations shipments.
69. Worldwide Relocations did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore,

Worldwide Relocations did not operate as an NVOCC on the twenty-three Worldwide Relocations shipments.

70. Worldwide Relocations operated as an ocean freight forwarder on the twenty-three Worldwide Relocations shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
71. Tober did not violate section 10(b)(11) of the Shipping Act on the twenty-three Worldwide Relocations shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **All In One Shipping, Inc.**

72. AIOS did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
73. AIOS advertised on the Internet that it was “an international shipping company” that “work[ed] in tandem with reputable international moving companies worldwide in order to provide a smooth move to your final destination” (BOE App. p 1490) and that it provided “full service door to door moves as well as port to port moves.” (BOE App. p 1492.)
74. Through its Internet advertisement, AIOS held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
75. Tober issued six bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1498 (Fraser Henderson);<sup>19</sup> 1501 (Sam Barbour); 1510 (Diane O’Connor); 1516 (Rachel Kupferberg); 1548 (John Burk); 1561 (Christian Scheidler)
76. Tober issued two bills of lading identifying the proprietary shipper c/o AIOS as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1496 (Nigel Johnson); 1559 (Silmat Chisti).

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<sup>19</sup> The record also contains a bill of lading issued by Zim Israel Navigation Company, Ltd., identifying Tober as the shipper and Tober as the forwarding agent for the Fraser Henderson shipment. (BOE App. p. 1504.)

77. Tober issued ten invoices to AIOS for shipments by proprietary shippers: BOE App. pp. 1495 (Nigel Johnson); 1497 (Fraser Henderson); 1500 (Sam Barbour); 1509 (Diane O'Connor); 1515 (Rachel Kupferberg); 1542 (Somia Azam); 1547 (John Burk); 1558 (Silmata Chisti); 1560 (Christian Scheidler); 1577 (Antoine Pierrat/Jacqueline Giotti).
78. Although there is no Tober bill of lading in the record for the Somia Azam shipment or the Antoine Pierrat/Jacqueline Giotti shipment, I find based on the Tober invoices indicating origin in the United States, destination in a foreign country, and ocean freight charges, other documents in the record for those shipments, and Tober's operating practices that Tober issued bills of lading identifying the proprietary shippers as the shippers for the Somia Azam and the Antoine Pierrat/Jacqueline Giotti shipments.
79. Tober issued pickup/delivery orders directly to proprietary shipper: 1506 (Fraser Henderson); 1513 (Diane O'Connor); 1518 (Rachel Kupferberg); 1554 (John Burk); 1567 (Christian Scheidler).
80. Tober issued Warehouse Receipts to proprietary shippers: 1512 (Diane O'Connor); 1570 (Christian Scheidler).
81. Tober issued Warehouse Receipts to AIOS for proprietary shippers: BOE App. p. 1553 (John Burk).
82. All In One sent notices to proprietary shippers stating, "We would also like to inform you that all of our [sic] NVOCC carriers are [sic] licensed by the FMC." BOE App. pp. 1501 (Sam Barbour); 1522 (Rachel Kupferberg); 1537 (Somia Azam); 1556 (John Burk); 1573 (Vanessa Pierrat). *See also* BOE App. pp. 1529 (Diane O'Connor) ("We are proud to inform you that all of our [sic] carriers are licensed by the FMC.").
83. Tober carried ten shipments in which AIOS was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
84. When Tober issued the ten bills of lading on the AIOS shipments identifying the proprietary shipper or the proprietary shipper c/o AIOS as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the ten AIOS shipments.
85. AIOS did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, AIOS did not operate as an NVOCC on the ten AIOS shipments.
86. AIOS operated as an ocean freight forwarder on the ten AIOS shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged

space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.

87. Tober did not violate section 10(b)(11) of the Shipping Act on the ten AIOS shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Around the World Shipping, Inc.**

88. ATWS did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
89. ATWS advertised on the Internet that it provided “international and moving’s [*sic*] services for corporate, government, and individuals.” (BOE App. p 1578.)
90. Through its Internet advertisement, ATWS held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
91. Tober issued seven bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1598 (Francesco Nitti);<sup>20</sup> 1606 (Tanja Ruhnke, Manhattan Mini Storage); 1620 (Dvora Geller); 1626 (Marcin Przewloka); 1639 (Linda Rogan); 1650 (Francis Jacob); 1656 (Molly Acherman & Fred Rohde).
92. Tober issued no bills of lading identifying the proprietary shipper c/o Around the World as the shipper.
93. Tober issued eight invoices to ATWS for shipments by proprietary shippers: BOE App. pp. 1596 (Francesco Nitti); 1604 (Tanja Ruhnke, Manhattan Mini Storage); 1619 (Dvora Geller); 1624 (Marcin Przewloka); 1638 (Linda Rogan); 1647 (Francis Jacob); 1655 (Molly Acherman & Fred Rohde); 1664 (Karen Inglemeyer).
94. Although there is no Tober bill of lading in the record for the Karen Inglemeyer shipment, I find based on the Tober invoice and other documents and Tober’s operating practices that Tober issued a bill of lading identifying Karen Inglemeyer as the shipper for the Karen Inglemeyer shipment.

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<sup>20</sup> The record also contains a bill of lading issued by Troy Container Line, Inc., identifying Francesco Nitti as the shipper and Tober as the forwarding agent. (BOE App. p. 1597.)

95. ATWS issued invoices to proprietary shippers: BOE App. pp. 1615 (Tanja Ruhnke); 1620 (Dvora Geller); 1626 (Marcin Przewłoka); 1639 (Linda Rogan); 1650 (Francis Jacob); 1656 (Molly Acherman & Fred Rohde).
96. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1610 (Tanja Ruhnke, Manhattan Mini Storage); 1631 (Marcin Przewłoka); 1643 (Linda Rogan); 1663 (Molly Acherman & Fred Rohde).
97. Tober issued Warehouse Receipts to proprietary shippers: BOE App. pp. 1601 (Francesco Nitti); 1609 (Tanja Ruhnke, Manhattan Mini Storage); 1622 (Dvora Geller); 1625 (Marcin Przewłoka); 1642 (Linda Rogan); 1652 (Francis Jacob); 1660 (Molly Acherman & Fred Rohde).
98. Tober carried eight shipments in which ATWS was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
99. When Tober issued the eight bills of lading on the ATWS shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the eight ATWS shipments.
100. ATWS did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, ATWS did not operate as an NVOCC on the eight ATWS shipments.
101. ATWS operated as an ocean freight forwarder on the eight ATWS shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
102. Tober did not violate section 10(b)(11) of the Shipping Act on the eight ATWS shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Tradewind Consulting, Inc.**

103. Tradewind did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)

104. Tradewind advertised on the Internet that it “is a consulting firm. We are not classified as an international shipping company. Instead, we prefer to think of ourselves as personalized travel consultants. Tradewind organizes your services, negotiates with vendors and books your move with licensed moving, shipping and delivery agents worldwide.” (BOE App. p 1116.)
105. By advertising that it organizes services, Tradewind advertised that it “arranges space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).
106. BOE has not identified evidence that would support a finding that Tradewind held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
107. Tober issued four bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1125 (Kerrie Powell); 1140 (Daphne Rovart); 1146 (Johannes Khinasat); 1159 (Moncef Bahri).
108. Tober issued four invoices to Tradewind for shipments by proprietary shippers: BOE App. pp. 1124 (Kerrie Powell); 1139 (Daphne Rovart); 1145 (Johannes Khinasat); 1158 (Moncef Bahri).
109. Tradewind issued four invoices to proprietary shippers: BOE App. pp. 1138 (Kerrie Powell); 1139 (Daphne Rovart); 1155 (Johannes Khinasat); 1158 (Moncef Bahri).
110. Tober issued no bills of lading identifying the proprietary shipper c/o Tradewind Consulting as the shipper.
111. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1128 (Kerrie Powell); 1144 (Daphne Rovart); 1149 (Johannes Khinasat).
112. Tober issued pickup/delivery orders to proprietary shippers c/o Tradewind: BOE App. pp. 1160 (Moncef Bahri).
113. Tober issued Warehouse Receipts to proprietary shippers: BOE App. pp. 1127 (Kerrie Powell); 1141 (Daphne Rovart).
114. Tober issued Warehouse Receipts to proprietary shippers c/o Tradewind: BOE App. pp. 1160 (Moncef Bahri).
115. Tradewind sent shipping instructions to Tober. BOE App. pp. 1129 (Kerrie Powell); 1150 (Johannes Khinasat).

116. Tober carried four shipments in which Tradewind was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
117. When Tober issued the four bills of lading on the Tradewind shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Tradewind shipments.
118. Tradewind operated as an ocean freight forwarder on the four Tradewind shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
119. Tradewind did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tradewind did not operate as an NVOCC on the four Tradewind shipments.
120. Tober did not violate section 10(b)(11) of the Shipping Act on the four Tradewind shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Moving Services, Inc.**

121. Moving Services did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
122. The record does not contain any Internet advertising by Moving Services.
123. BOE has not identified evidence that would support a finding that Moving Services held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
124. Tober issued one bill of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1170 (Leon Hazan).
125. Tober issued eleven bills of lading identifying the proprietary shipper c/o Moving Services as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1164 (Lisa Moser); 1166 (Tarik Khamliche); 1168 (Deep Ghofh);

- 1172 (Lee Wilkinson); 1174 (Frances Breckon); 1176 (Rebecca Carman); 1178 (Dympa Rochford); 1179 (Dean Sexton); 1181 (Janeen Person); 1183 (Suthindran Rao); 1185 (Pancras Beekankamp).
126. Tober issued ten invoices to Moving Services for shipments by proprietary shippers: BOE App. pp. 1163 (Lisa Moser); 1165 (Tarik Khamliche); 1167 (Deep Ghofh (Martha Chew)); 1169 (Leon Hazan); 1171 (Lee Wilkinson); 1173 (Frances Breckon); 1175 (Rebecca Carman); 1180 (Janeen Person); 1182 (Suthindran Rao); 1184 (Pancras Beekankamp).
  127. Tober issued one invoice (BOE App. p. 1177 (Dympa Rochford & Dean Sexton)) for two bills of lading (BOE App. pp. 1178 and 1179) for two proprietary shippers from the same address to the proprietary shippers at two different addresses using the same bill of lading number, but with separate suffixes. Based on these facts, I find these to be two shipments.
  128. Tober issued Warehouse Receipts to Moving Services for shipments by proprietary shippers: BOE App. pp. 1186 (Pancras Beekankamp).
  129. Tober carried twelve shipments in which Moving Services was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
  130. When Tober issued the twelve bills of lading on the Moving Services shipments identifying the proprietary shipper or the proprietary shipper c/o Moving Services as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twelve Moving Services shipments.
  131. Moving Services did not hold itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Moving Services did not operate as an NVOCC on the twelve Moving Services shipments.
  132. Moving Services operated as an ocean freight forwarder on the twelve Moving Services shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
  133. Tober did not violate section 10(b)(11) of the Shipping Act on the twelve Moving Services shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

## Orion Consulting, LLC

BOE contended that “Tober provided service to Orion Consulting, LLC, for three shipments during July 2005. (BOE Prop. FF (5/22/09) ¶ 28.) On remand, BOE does not contend that Tober violated section 10(b)(11) on the Orion shipments, but does contend that Tober violated section 10(b)(2)(A) on these shipments. (BOE Brief on Remand at 4.)

134. [Intentionally blank]
135. [Intentionally blank]
136. [Intentionally blank]
137. Tober issued three bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1319 (Mark Hayman & Mark Penny); 1325 (Dr. Zubaira Zahid); 1329 (Julie Ramsey).
138. [Intentionally blank]
139. [Intentionally blank]
140. [Intentionally blank]
141. [Intentionally blank]
142. Tober issued pickup/delivery orders directly to a proprietary shipper c/o Orion: BOE App. pp. 1331 (Julie Ramsey).
143. [Intentionally blank]
144. [Intentionally blank]
145. Tober carried three shipments in which Orion was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
146. When Tober issued the three bills of lading on the Orion shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the three Orion shipments.
147. [Intentionally blank]

148. [Intentionally blank]

149. [Intentionally blank]

**Sea and Air International, Inc.**

150. Sea and Air did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)

151. Sea and Air advertised that it “offers residential and commercial relocation solutions to almost any destination in the world by ship, truck, train and airplane” and that its solutions include “[d]oor-to-door home & office relocation” and “[o]ffering all risk insurance.” BOE App. p. 1396.<sup>21</sup>

152. Through its Internet advertisement, Sea and Air held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).

153. Tober issued twenty-five bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 848 (Michael Zwerger); 853 (Leo Mulqueen); 857 (Lysbeth Devlynne Spence); 864 (Frederic Yeterian); 868 (Hanne Falch); 874 (Charles Edward Thomas Roper); 878 (Marinke Karianne van Riet); 884 (Patrick Laroche); 890 (Christopher Brian Hogley); 897 (Catherine Julia Stock); 901 (Paola Helga Magdalena Hjelt); 907 (Peter James Crabb); 914 (Douglas Ross); 921 (Lisa Mephram); 926 (Christina Curci Dagostino); 932 (Sharon Elisabeth Baynham); 938 (Ruby Rosalie Littman); 943 (Talal Al-Muhanna); 949 (Josephine Foo); 955 (Axel Threlfall); 961 (Nigel Teare); 970 (Hedda Wardemann); 975 (Mior Zaharin Mior Ahmad Azim); 984 (Sacha Bielawski); 990 (Thomas Ladislas Sonies).

154. Tober issued two bills of lading identifying the proprietary shipper c/o Sea and Air as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 838 (Lucia & Laurent Jean Dambies); 843 (Judy Beardsall).

155. Tober issued twenty-five invoices to Sea and Air for shipments by proprietary shippers: BOE App. pp. 837 (Lucia & Laurent Jean Dambies); 846 (Michael Zwerger); 851 (Leo Mulqueen); 856 (Lysbeth Devlynne Spence); 861 (Frederic Yeterian); 866 (Hanne Falch); 871 (Charles Edward Thomas Roper); 877 (Marinke Karianne van Riet); 883 (Patrick

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<sup>21</sup> Sea and Air also states that it is a “Joint venture with Viva Shipping.” BOE App. p. 1396. A “Viva Shipping, Inc.” is an OTI licensed by the Commission, Org. No. 018396, License No. 015843. See [http://www2.fmc.gov/OTI/?aspxerrorpath=/oti/nvos\\_listing.aspx](http://www2.fmc.gov/OTI/?aspxerrorpath=/oti/nvos_listing.aspx) last visited September 24, 2012; [http://www2.fmc.gov/oti/nvos\\_listing.aspx](http://www2.fmc.gov/oti/nvos_listing.aspx) last visited September 17, 2009.

- Laroche); 889 (Christopher Brian Hogley); 894 (Catherine Julia Stock); 900 (Paola Helga Magdalena Hjelt); 906 (Peter James Crabb); 913 (Douglas Ross); 920 (Lisa Mephram); 925 (Christina Curci Dagostino); 931 (Sharon Elisabeth Baynham); 937 (Ruby Rosalie Littman); 948 (Josephine Foo); 954 (Axel Threlfall); 960 (Nigel Teare); 967 (Hedda Wardemann); 974 (Mior Zaharin Mior Ahmad Azim); 981 (Sacha Bielawski); 987 (Thomas Ladislas Sonies).
156. Tober issued twenty-seven Warehouse Receipts to Sea and Air for shipments of the proprietary shippers: BOE App. pp. 840 (Lucia & Laurent Jean Dambies); 845 (Judy Beardsall); 850 (Michael Zwerger); 855 (Leo Mulqueen); 859 (Lysbeth Devlynne Spence); 863 (Frederic Yeterian); 870 (Hanne Falch); 876 (Charles Roper); 882 (Marinke Karianne van Riet); 886 (Patrick Laroche); 892 (Christopher Brian Hogley); 899 (Catherine Julia Stock); 903 (Paola Helga Magdalena Hjelt); 910 (Peter Crabb); 917 (Douglas Ross); 922 (Lisa Mephram); 927 (Christina Dagostino); 933 (Sharon Baynham); 940 (Ruby Rosalie Littman); 945 (Talal Al-Muhanna); 951 (Josephine Foo); 959 (Axel Threlfall); 964 (Nigel Teare); 972 (Hedda Wardemann); 980 (Mior Zaharin & Miorahmad Azim); 986 (Sacha Bielawski); 992 (Thomas Ladislas Sonies).
157. Sea and Air obtained "overseas information" needed for customs requirements from proprietary shippers: BOE App. pp. 841 (Lucia & Laurent Jean Dambies); 842 (Judy Beardsall); 847 (Michael Zwerger); 852 (Leo Mulqueen); 867 (Hanne Falch); 872 (Charles Roper); 880 (Marinke Karianne van Riet); 888 (Patrick Laroche); 893 (Christopher Brian Hogley); 895 (Catherine Julia Stock); 904 (Paola Helga Magdalena Hjelt); 911 (Peter Crabb); 918 (Douglas Ross); 923 (Lisa Mephram); 928 (Christina Dagostino); 941 (Ruby Rosalie Littman); 946 (Talal Al-Muhanna); 953 (Josephine Foo); 958 (Axel Threlfall); 965 (Nigel Teare); 968 (Hedda Wardemann); 977 (Mior Zaharin & Miorahmad Azim); 983 (Sacha Bielawski); 989 (Thomas Ladislas Sonies).
158. Sea and Air obtained customer authorizations from proprietary shippers authorizing the FMC/NVOCC to use the shipper's passport number and/or Social Security number: BOE App. pp. 873 (Charles Roper); 887 (Patrick Laroche); 896 (Catherine Stock); 905 (Paola Helga Magdalena Hjelt); 912 (Peter Crabb); 919 (Douglas Ross); 924 (Lisa Mephram); 929 (Christina Dagostino); 935 (Sharon Baynham); 941 (Ruby Rosalie Littman); 947 (Talal Al-Muhanna); 952 (Josephine Foo); 957 (Axel Threlfall); 966 (Nigel Teare); 969 (Hedda Wardemann); 978 (Mior Zaharin & Miorahmad Azim); 982 (Sacha Bielawski); 988 (Thomas Ladislas Sonies).
159. Tober carried twenty-seven shipments in which Sea and Air was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
160. When Tober issued the twenty-seven bills of lading on the Sea and Air shipments identifying the proprietary shipper or the proprietary shipper c/o Sea and Air as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or

place of delivery; therefore, Tober operated as an NVOCC on the twenty-seven Sea and Air shipments.

161. Sea and Air did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Sea and Air did not operate as an NVOCC on the twenty-seven Sea and Air shipments.
162. Sea and Air operated as an ocean freight forwarder on the twenty-seven Sea and Air shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
163. Tober did not violate section 10(b)(11) of the Shipping Act on the twenty-seven Sea and Air shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Echo Trans World, Inc.**

BOE contended that “Tober provided service to Echo Trans World, Inc., for three shipments between June 2005 and August 2005. (BOE Prop. FF (5/22/09) ¶ 38.) On remand, BOE does not contend that Tober violated section 10(b)(11) on the Echo shipments, but does contend that Tober violated section 10(b)(2)(A) on these shipments. (BOE Brief on Remand at 4.)

164. [Intentionally blank]
165. [Intentionally blank]
166. [Intentionally blank]
167. Tober issued three bill of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 995 (Anthony Strong); 1001 (Gunda Felicitas Schwaninger); 1007 (Denis Thibaut).
168. [Intentionally blank]
169. [Intentionally blank]
170. [Intentionally blank]
171. [Intentionally blank]
172. [Intentionally blank]

173. Tober carried three shipments in which Echo was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
174. When Tober issued the three bills of lading on the Echo shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the three Echo shipments.
175. [Intentionally blank]
176. [Intentionally blank]
177. [Intentionally blank]

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

178. Car-Go-Ship.com did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. BOE App. p. 16.
179. Car-Go-Ship.com advertised that it provided “[s]ervices for Domestic Auto Transport & International Car Shipping. . . . Multiple unit International Car Shipping via Containership & Oversized Vehicle Shipping to all points Worldwide. Let Car-GO-Ship.com be your logistics solution with unsurpassed rates and service guaranteed.” BOE App. p. 1011.
180. Car-Go-Ship.com’s advertisement stated “International and Overseas transportation is ordinarily from Port to Port. Door to Door service is also available,” and recommended insurance for ocean transportation.” BOE App. p. 1013.
181. Through its Internet advertisement, Car-Go-Ship.com held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
182. Tober issued two bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1021 (Douglas Infiniti/Jean Luc Dourson); 1024 (GC Cycles).
183. Tober issued two bills of lading identifying the proprietary shipper c/o Car-Go-Ship.com as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1016 (Kevin Wheatcroft); 1029 (Andrea Gilligan)

184. Tober issued invoices to Car-Go-Ship.com for shipments by three proprietary shippers: BOE App. pp. 1015 (Kevin Wheatcroft); 1022 (Douglas Infiniti/Jean Luc Dourson); 1023 (GC Cycles); 1029 (Andrea Gilligan).
185. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 999 (Anthony Strong).
186. Tober issued Warehouse Receipts to Car-Go-Ship.com for the shipments of the proprietary shippers: BOE App. pp. 1017 (Kevin Wheatcroft); 1025 (GC Cycles).
187. Car-Go-Ship.com prepared a booking order for some shipments: BOE App. pp. 1018 (Kevin Wheatcroft).
188. Car-Go-Ship.com prepared a work order for some shipments: BOE App. pp. 1019 (Douglas Infiniti/Jean Luc Dourson); 1026 (GC Cycles).
189. Tober carried four shipments in which Car-Go-Ship.com was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
190. When Tober issued the four bills of lading on the four Car-Go-Ship shipments identifying the proprietary shipper or the proprietary shipper c/o Car-Go-Ship as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Car-Go-Ship shipments.
191. Car-Go-Ship did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Car-Go-Ship did not operate as an NVOCC on the four Car-Go-Ship shipments.
192. Car-Go-Ship operated as an ocean freight forwarder on the four Car-Go-Ship shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
193. Tober did not violate section 10(b)(11) of the Shipping Act on the four Car-Go-Ship shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

## **Access International Transport/AVL Atlanta Transport**

194. Access International did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
195. AVL Atlanta Transport did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
196. Access International advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service.” BOE App. p. 1401.
197. Access International advertised that it provides “international shipment from origin to destination.” BOE App. p. 1403.
198. AVL Atlanta Transport advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service.” BOE App. p. 1407.
199. AVL Atlanta Transport advertised that it provides “international shipment from origin to destination.” BOE App. p. 1409.
200. Through their Internet advertisements, Access International and AVL Atlanta Transport held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
201. Tober issued eleven bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1043 (Maria Courel); 1048 (Konrad Knauss); 1054 (Dennis Peek); 1060 (Gerard Eden); 1069 (Emilio Lozoya, Marielle Eckes); 1074 (Darin Hood); 1083 (Isabela Figueroa);<sup>22</sup> 1088 (Nicole Kunz); 1094 (Cesar Aedo);<sup>23</sup> 1103 (Lia McFarland); 1108 (Chris White).
202. Tober issued twelve invoices to Access International/AVL for shipments by proprietary shippers: BOE App. pp. 1042 (Maria Courel); 1047 (Konrad Knauss); 1053 (Dennis Peek);

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<sup>22</sup> CaroTrans International also issued a bill of lading identifying Isabela Fegueroa as the shipper and Tober as the forwarding agent. BOE App. p. 1081.

<sup>23</sup> SeaMates International, Inc., also issued a bill of lading identifying Cesar Aedo as the shipper and Tober as the forwarding agent. BOE App. p. 1095.

1059 (Gerard Eden); 1064 (Catherine Mars); 1068 (Emilio Lozoya, Marielle Eckes); 1073 (Darin Hood); 1080 (Isabela Figueroa); 1087 (Nicole Kunz); 1092 (Cesar Aedo); 1102 (Lia McFarland); 1107 (Chris White).

203. Although there is no Tober bill of lading in the record for the Catherine Mars shipment, I find based on the Tober invoice and other documents and Tober's operating practices that Tober issued a bill of lading identifying Catherine Mars as the shipper for the Catherine Mars shipment.
204. Tober issued pickup/delivery orders to proprietary shipper c/o Access Van Lines: BOE App. pp. 1052 (Konrad Knauss); 1058 (Dennis Peek); 1063 (Gerard Eden).
205. Tober issued Warehouse Receipts to the proprietary shipper c/o Access Van Lines for the shipments of the proprietary shippers: BOE App. pp. 1051 (Konrad Knauss); 1056 (Dennis Peek); 1062 (Gerard Eden); 1069 (for Emilio Lozoya, Marielle Eckes shipment).
206. Tober issued Warehouse Receipts to Access International/AVL for the shipments of the proprietary shippers: BOE App. pp. 1044 (Maria Courel); 1072 (Emilio Lozoya, Marielle Eckes); 1091 (Nicole Kunz); 1106 (Lia McFarland).
207. Isabela Figueroa signed a Tober Group Customer Authorization authorizing Tober to use her passport and/or Social Security number for export formalities. BOE App. p. 1084.
208. [Intentionally blank]
209. [Intentionally blank]
210. Tober carried twelve shipments in which Access International/AVL were involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
211. When Tober issued the twelve bills of lading on the Access International/AVL shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twelve Access International/AVL.
212. Access International/AVL did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Access International/AVL did not operate as an NVOCC on the twelve Access International/AVL shipments.
213. Access International/AVL operated as an ocean freight forwarder on the twelve Access International/AVL shipments as it dispatched shipments from the United States via a

common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.

214. Tober did not violate section 10(b)(11) of the Shipping Act on the twelve Access International/AVL shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Tran Logistic Group, Inc. (IntlMove, Inc.)**

BOE contended that “Tober provided service to Tran Logistic Group, Inc., also known as Intl Move, for seventeen shipments between December 2004 and August 2004 [*sic*].”(BOE Prop. FF (5/22/09) ¶ 41.) On remand, BOE does not contend that Tober violated section 10(b)(11) on the Tran Logistic shipments, but does contend that Tober violated section 10(b)(2)(A) on these shipments. (BOE Brief on Remand at 4.)

215. [Intentionally blank]

216. [Intentionally blank]

217. [Intentionally blank]

218. Tober issued twelve bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1189 (Potts Patrick); 1200 (Indu Krishnaswamy); 1223 (Dave Mann); 1231 (Jeffrey W. Britton); 1239 (Cathy Rodham); 1266 (Nicole Yu-Heng Hsu); 1273 (Jonathan William O’Grady); 1280 (Andre Riechenstein); 1288 (Philip Poettinger); 1294 (Richard Roberts); 1302 (Silke Roth); 1310 (Adrian Stoppe).

219. Tober issued three bills of lading identifying the proprietary shipper c/o TLG as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1207 (Moreton Kim & Macias Katherine); 1215 (Jertrum Uwe); 1248 (Deborah Burgess).

220. [Intentionally blank]

221. The record contains a Tober invoice to Tran Logistic for the Jonathan Waage shipment, but does not contain a Tober bill of lading for the Jonathan Waage shipment. Tober issued a pickup/delivery order to Waage, Jonathan c/o TLG at what appears to be Waage’s address. Jonathan Waage sent an email from to Yoram of Tober with information for the shipment. (BOE App. pp. 1194-1198.) I find based on the Tober invoice and other documents and Tober’s operating practices that Tober issued a bill of lading identifying Waage as the

shipper for transportation of goods by water from the United States to a foreign country for this shipment.

222. The record contains a Tober invoice to Tran Logistic for the Alan & Rebecca Richardson shipment, but does not contain a Tober bill of lading for the Alan & Rebecca Richardson shipment. SeaMates Consolidation Service, Inc.<sup>24</sup> issued a bill of lading identifying Alan & Rebecca Richardson as the shipper and Tober as the forwarding agent. Tober issued a pickup/delivery order to Alan & Rebecca Richardson c/o TLG and secured insurance as the agent for the Alan & Rebecca Richardson. (BOE App. pp. 1253-1263.) I find based on the Tober invoice and other documents and Tober's operating practices, (*see* BOE App. pp. 1264, 1266, and 1267 (Tober invoice, Tober bill of lading, and SeaMates bill of lading for Hsu shipment)), that Tober issued a bill of lading identifying Alan & Rebecca Richardson as the shipper for transportation of goods by water from the United States to a foreign country for this shipment.
223. [Intentionally blank]
224. [Intentionally blank]
225. [Intentionally blank]
226. [Intentionally blank]
227. Tober secured insurance as the agent for the assured proprietary shipper: BOE App. pp. 1195 (Waage); 1208 (Moreton Kim); 1232-1233 (Britton, Jeff); 1246 (Deborah Burgess); 1259-1260 (Alan & Rebecca Richardson); 1311 (Adrian Stoppe).
228. Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton).
229. Tran Logistic issued a letter/email to proprietary shippers identifying Tober as the international carrier: BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady).
230. [Intentionally blank]

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<sup>24</sup> The name of the carrier is not visible on this photocopy of the bill of lading. Based on the portion of the logo that is visible, the bill of lading appears to have been issued by SeaMates Consolidation Service, Inc. *Compare* BOE App. 1267 (Nicole Yu-Heng Hsu). *See also* BOE App. 1257 (pickup/delivery order for Alan & Rebecca Richardson reference number for delivery to SeaMates c/o World Wide Freight).

231. Tran Logistic email to Tober stating: The Client [proprietary shipper] is the shipper. TLG is only your Company Broker, accordingly only the Client must be placed on your Bill of Lading as the shipper.” BOE App. pp. 1269 (Nicole Yu-Heng Hsu); 1291 (Philip Poettinger); 1297 (Richard Roberts); 1315 (Adrian Stoppe).
232. Tober carried seventeen shipments in which Tran Logistic was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
233. When Tober issued the seventeen bills of lading on the Tran Logistic shipments identifying the proprietary shipper or the proprietary shipper c/o Tran Logistic as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the seventeen Tran Logistic shipments.
234. [Intentionally blank]
235. [Intentionally blank]
236. [Intentionally blank]

#### **Avi Moving**

BOE contended that “Tober provided service to Avi Moving for one shipment in December 2005.” (BOE Prop. FF (5/22/09) ¶ 42.) On remand, BOE does not contend that Tober violated section 10(b)(11) on the Avi shipment, but does contend that Tober violated section 10(b)(2)(A) on the shipment. (BOE Brief on Remand at 4.)

237. [Intentionally blank]
238. [Intentionally blank]
239. [Intentionally blank]
240. [Intentionally blank]
241. Tober issued a bill of lading identifying proprietary shipper Odeo Kobo as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. p. 1334.
242. [Intentionally blank]

243. Tober carried one shipment in which Avi was involved on which Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.
244. When Tober issued the bill of lading on the Avi shipment identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the Avi shipment.
245. [Intentionally blank]
246. [Intentionally blank]
- 246A. [Intentionally blank]

### CONCLUSION

247. Tober transported cargo as a common carrier by water ("assume[d] responsibility for the transportation from the port or point of receipt to the port or point of destination" – 46 U.S.C. § 40102(6)(A)(ii)) on 279 shipments that included the involvement of fifteen intermediaries that did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act.
- 247A. BOE claims that on 255 shipments for eleven entities (EOM Shipping, Inc.; Lehigh Moving and Storage, Inc.; Infinity Moving & Storage, Inc.; Worldwide Relocations, Inc.; All In One Shipping, Inc.; Around the World Shipping, Inc.; Tradewind Consulting, Inc.; Moving Services, Inc.; Sea and Air International, Inc.; Car-Go-Ship.com; and Access International Transport/AVL Atlanta Transport), Tober violated section 10(b)(11) of the Shipping Act by accepting cargo from or transporting cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.
248. Each shipment was dispatched from the United States via a common carrier, 46 U.S.C. § 40102(18), and used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).
249. EOM Shipping, Inc.; Lehigh Moving and Storage, Inc.; Worldwide Relocations, Inc.; All In One Shipping, Inc.; Around the World Shipping, Inc.; Tradewind Consulting, Inc.; Sea and Air International, Inc.; Car-Go-Ship.com; and Access International Transport/AVL Atlanta Transport held themselves out to the general public to provide transportation by

water of passengers or cargo between the United States and a foreign country for compensation.

- 249A. Infinity Moving & Storage, Inc., and Moving Services, Inc., did not hold themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.
- 249A. There is no bill of lading in the record issued by EOM Shipping, Inc.; Lehigh Moving and Storage, Inc.; Infinity Moving & Storage, Inc.; Worldwide Relocations, Inc.; All In One Shipping, Inc.; Around the World Shipping, Inc.; Tradewind Consulting, Inc.; Moving Services, Inc.; Sea and Air International, Inc.; Car-Go-Ship.com; or Access International Transport/AVL Atlanta Transport for any shipment in which Tober was involved.
- 249B. EOM Shipping, Inc.; Lehigh Moving and Storage, Inc.; Infinity Moving & Storage, Inc.; Worldwide Relocations, Inc.; All In One Shipping, Inc.; Around the World Shipping, Inc.; Tradewind Consulting, Inc.; Moving Services, Inc.; Sea and Air International, Inc.; Car-Go-Ship.com; and Access International Transport/AVL Atlanta Transport did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery on the shipments in which they were involved; therefore, they did not operate as NVOCCs on the shipments.
250. Tober did not violate section 10(b)(11) of the Shipping Act on the 255 shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.
251. Tober provided service in the liner trade that was not in accordance with the rates and charges contained in a published tariff on each of 279 shipment in violation of section 10(b)(2)(A) of the Shipping Act.
252. Tober committed 279 violations of section 10(b)(2)(A) of the Shipping Act.
253. BOE has proven by a preponderance of the evidence that Tober violated section 10(b)(2)(A) of the Shipping Act on each of the 202 shipments that took place before the Commission issued the Order of Investigation and hearing on May 11, 2006.
- 253A. Balancing the nature, circumstances, extent, and gravity of the violation committed and, with respect to Tober, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require. I find that Tober is liable to the United States for a civil penalty in the amount of \$1000 for each of the 202 violations for a total of \$202,000.
254. BOE has proven by a preponderance of the evidence that Tober willfully and knowingly violated section 10(b)(2)(A) of the Shipping Act on each of the seventy-seven shipments that

took place after the Commission issued the Order of Investigation and hearing on May 11, 2006.

- 254A. Balancing the nature, circumstances, extent, and gravity of the violation committed and, with respect to Tober, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require, I find that Tober is liable to the United States for a civil penalty in the amount of \$3000 for each of the seventy-seven violations for a total of \$231,000.
255. BOE has not met its burden of persuasion that a cease and desist order should be issued; therefore, no cease and desist order is issued.

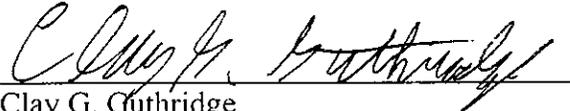
### O R D E R

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that respondent Tober Group, Inc., did not violate section 10(b)(11) of the Shipping Act of 1984, 46 U.S.C. § 41104(11), it is hereby

**ORDERED** that the claim that Tober Group, Inc., violated section 10(b)(11) of the Shipping Act of 1984, 46 U.S.C. § 41104(11), be **DISMISSED**.

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on 279 shipments respondent Tober Group, Inc., violated section 10(b)(2)(A) of the Shipping Act, 46 U.S.C. § 41104(2)(A), it is hereby

**ORDERED** that respondent Tober Group, Inc., **REMIT** to the United States the sum of \$202,000.00 as a civil penalty for 202 violations of the Shipping Act of 1984 and \$231,000.00 as a civil penalty for seventy-seven willful and knowing violations of the Shipping Act for a total civil penalty of \$433,000.00.

  
Clay G. Guthridge  
Administrative Law Judge