

FEDERAL MARITIME COMMISSION

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

Docket No. 06-06

Served: September 10, 2013

BY THE COMMISSION: Mario CORDERO, *Chairman*;
Richard A. LIDINSKY, Jr., Michael A. KHOURI, William P.
DOYLE, *Commissioners*; *Commissioner* DOYLE, concurring,
joined by *Chairman* CORDERO and *Commissioner*
LIDINSKY. Rebecca F. DYE, *Commissioner*, dissenting.

**Order Affirming in Part, Reversing in Part, and Vacating
in Part Initial Decision on Remand**

I. PROCEEDING

The Commission instituted this proceeding by an Order of Investigation and Hearing issued May 11, 2006, to consider whether Respondents EuroUSA Shipping, Inc. (EuroUSA), Tober Group Inc. (Tober), and Container Innovations, Inc. (Container Innovations) violated section 10(b)(11) of the Shipping Act of 1984

(the Act) and 46 C.F.R. § 515.27, by knowingly and willfully accepting cargo from or transporting cargo for the account of an entity acting as an ocean transportation intermediary (OTI) without a tariff and a bond as required by sections 8 and 19 of the Act; 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 rates and charges contained in a published tariff; whether, in the event one or more violations of section 10 of the Act and/or 46 C.F.R. § 515.27 were found, civil penalties should be assessed and, if so, the amount of penalties to be assessed; whether, in the event violations were found, cease and desist orders should be issued; and whether, in the event violations were found, such violations constituted grounds for the revocation of any Respondent's OTI license pursuant to 46 C.F.R. § 515.16.¹ *EuroUSA Shipping, Inc., Tober Group, Inc. – Possible Violations of Shipping Act*, 30 S.R.R. 988 (FMC 2006). The Commission designated EuroUSA, Tober, and Container Innovations as Respondents in the proceeding, and the Bureau of Enforcement (BOE) as a party.² The proceeding was assigned for hearing before an Administrative Law Judge (ALJ).

On June 12, 2008, the ALJ issued a Memorandum and Order granting Tober's Motion for Partial Summary Judgment on

¹ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. Section 10(b)(11) is now codified as 46 U.S.C. § 41104(11), and section 10(b)(2)(A) is now codified as 46 U.S.C. § 41104(2)(A). The Commission continues to cite provisions of the Act by their former section references, and that practice will be followed in this Order.

² This Order concerns Tober Group, Inc., one of three Respondents named in Docket No. 06-06. Commission decisions with respect to the other respondents, EuroUSA Shipping, Inc. and Container Innovations, Inc., are administratively final. The ALJ approved a settlement between BOE and EuroUSA Shipping, Inc. on October 9, 2009. *See EuroUSA Shipping, Tober Group, Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 1051 (ALJ 2009, admin. final November 12, 2009). On December 1, 2009, the ALJ issued an Initial Decision determining that Container Innovations, Inc. violated section 10(b)(11), and was subject to a civil penalty of \$390,000 for 13 knowing and willful violations of the Act. *See EuroUSA Shipping, Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 1131 (ALJ 2009, admin. final January 7, 2010).

the allegation that Tober violated section 10(b)(11). The ALJ struck certain evidence as inadmissible under the Federal Rules of Evidence and concluded that the remaining evidence did not support a finding that any of the entities from which Tober accepted shipments acted as non-vessel-operating common carriers (NVOCCs) in connection with the shipments. BOE appealed the ALJ's decision, and in an order served December 18, 2008, the Commission granted the appeal, reversed the ALJ's evidentiary rulings striking certain evidence, and concluded that genuine issues of material fact existed that precluded a grant of summary judgment. *EuroUSA, Inc., et al. – Possible Violations of Section 10 of the Shipping Act*, 31 S.R.R. 540 (FMC 2008). The Commission remanded the proceeding to the ALJ for determinations as to whether the entities from which Tober accepted shipments acted as common carriers and NVOCCs on the shipments, and whether Tober accepted the shipments knowingly and willfully from these entities. *Id.* at 551.

On October 9, 2009, the ALJ issued an Initial Decision in which he determined: (1) that the entities from which Tober accepted cargo did not act as NVOCCs, and therefore Tober did not violate section 10(b)(11) of the Act; (2) that Tober violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with rates and charges in its tariff; and (3) that a civil penalty for the violations of section 10(b)(2)(A) should not be assessed against Tober on the grounds that BOE failed to meet its burden of persuasion with respect to the penalty amount. *EuroUSA Shipping, Tober Group, Inc. – Possible Violations of the Act*, 31 S.R.R. 967 (ALJ 2009) (*EuroUSA (ALJ 2009)*).

BOE filed Exceptions to the 2009 Initial Decision, arguing that the ALJ erred in: (1) finding that certain entities from which Tober accepted cargo did not hold themselves out to provide transportation by water of cargo between the United States and a foreign country for compensation; (2) finding that none of the entities assumed responsibility for transportation of cargo from the port or point of receipt to the port or point of destination; (3)

concluding that Tober did not violate section 10(b)(11) of the Act; (4) concluding that Tober did not knowingly and willfully violate section 10(b)(2)(A) of the Act; and (5) not assessing a civil penalty against Tober. Tober did not reply to BOE's Exceptions.³

On April 12, 2012, the Commission issued an Order Vacating Initial Decision in Part, Reversing in Part, and Remanding for Further Proceedings. *EuroUSA Shipping, Inc. – Possible Violations of Shipping Act*, 32 S.R.R. 578 (FMC 2012) (*EuroUSA (FMC 2012)*). In its order, the Commission vacated and remanded the ALJ's section 10(b)(11) findings in *EuroUSA (ALJ 2009)* for reconsideration in light of the Commission's decision in *Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 32 S.R.R. 495 (FMC 2012) (*Worldwide Relocations (FMC 2012)*). The Commission also reversed and remanded for reconsideration the ALJ's refusal to award civil penalties in light of: (1) any findings of section 10(b)(11) violations; (2) any findings that violations continued after these proceedings began; and (3) BOE's proof that Tober committed hundreds of violations over a three-year period and never charged the rates published in its tariff. *EuroUSA (FMC 2012)*, 32 S.R.R. at 580.

In *EuroUSA (FMC 2012)*, the Commission stated that because section 10(b)(11) of the Act requires a determination that a common carrier has accepted cargo from an untariffed, unbonded entity operating as an NVOCC, a central issue in this case is whether the entities from which Tober accepted cargo acted as NVOCCs by holding themselves out to provide and assuming responsibility for ocean transportation. The Commission noted that in *Worldwide Relocations (FMC 2012)*, it had revisited the standard for determining whether an entity acts as an NVOCC, and had described circumstances under which inferences or permissible

³ In an order served April 29, 2009, the ALJ granted Tober's counsel's Motion to Withdraw as Counsel, and further ordered that Yonaton Benheim, the president of Tober, be deemed the representative for Tober in this proceeding. Tober has not participated further in this proceeding.

presumptions may be applied to make that determination. The Commission stated that among the shipments identified in *Worldwide Relocations (FMC 2012)*, were 33 shipments that Tober accepted from three of the *Worldwide Relocations* respondents. The Commission held in *Worldwide Relocations (FMC 2012)* that the three respondents operated as NVOCCs on these shipments.

When the Commission remanded this proceeding to the ALJ in *EuroUSA (FMC 2012)*, the Commission stated that the same 33 shipments involving Tober and identified as violations in *Worldwide Relocations*, are included among the 278 shipments involved in this proceeding. The Commission noted that in the 2009 Initial Decision in this proceeding, the ALJ held that for each of these 33 shipments, the intermediary involved was not operating as an NVOCC, and stated that the ALJ's "findings and conclusions thus appear to conflict with the Commission's recent decision in *Worldwide Relocations* for at least some shipments and intermediaries." 32 S.R.R. at 581. The Commission further stated that "[t]o 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*." *Id.*

With regard to the section 10(b)(2)(A) violations found by the ALJ, the Commission stated that while it disagreed with the ALJ's finding that BOE failed to designate any facts to demonstrate a willful and knowing violation, it agreed with his finding that BOE failed to provide the location of such facts in the record. The Commission vacated the ALJ's conclusion that Tober's amendment of its tariff after this proceeding began was evidence that supported a finding that Tober operated in a manner that it understood complied with the Act. The Commission stated that 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." *Id.*

In connection with civil penalties, the Commission also disagreed with the ALJ's finding that BOE failed to set forth any information about the nature, circumstances, extent, and gravity of the violations committed. The Commission stated that "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." *Id.* The Commission further stated that "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." *Id.* (emphasis in original).

The Commission concluded that the ALJ erred in denying a civil penalty altogether, as the Shipping Act provides that a person who commits a violation is liable for a civil penalty. *See* 46 U.S.C. § 41107(a). The Commission stated that "[t]he 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." *Id.* (citing *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001)). The Commission therefore reversed the ALJ's refusal to award civil penalties, and stated that 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 Relocations* 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." 32 S.R.R. at 582.

In response, the ALJ issued an Initial Decision on Remand on December 31, 2012. *EuroUSA Shipping, Inc. – Possible Violations of Shipping Act*, 32 S.R.R. 1433 (ALJ 2012) (*EuroUSA (ALJ 2012)* or *Initial Decision on Remand*). In the *Initial Decision on Remand*, the ALJ determined (1) that the entities from which Tober accepted shipments did not act as NVOCCs in connection with the shipments, and therefore Tober did not violate section 10(b)(11) of the Act, and (2) that Tober violated section 10(b)(2)(A) of the Act in connection with 279 shipments. The ALJ ordered that

Tober remit to the United States the sum of \$202,000 as a civil penalty for 202 violations of the Act, and \$231,000 as a civil penalty for 77 knowing and willful violations of the Act, for a total civil penalty of \$433,000. The ALJ declined to issue a cease and desist order against Tober.

BOE filed Exceptions to the *Initial Decision on Remand* (BOE Exceptions).

II. DISCUSSION

BOE's Exceptions raise issues concerning (1) the ALJ's conclusion that the entities from which Tober accepted shipments operated as ocean freight forwarders on the shipments, rather than as NVOCCs, in light of the Commission's decision in *Worldwide Relocations (FMC 2012)*; (2) the ALJ's determination that the Commission's conclusions in *Worldwide Relocations (FMC 2012)* regarding Worldwide Relocations, Tradewind, and Moving Services do not have "binding collateral effect" in this proceeding; (3) the ALJ's finding that most of Tober's violations of section 10(b)(2)(A) were not knowing and willful; and (4) the adequacy of the civil penalties assessed by the ALJ.

Consistent with the Administrative Procedure Act (APA), the Commission's rules, and Commission precedent, the Commission may review *EuroUSA (ALJ 2012) de novo*. Commission rules provide that "[w]here exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). Accordingly, we review *EuroUSA (ALJ 2012) de novo*.

Applying the methodology for determining NVOCC status adopted by the Commission in *Worldwide Relocations (FMC 2012)*, as applied by the Commission in *Anderson International Transport*, Docket No. 07-02, __ S.R.R. __ (FMC June 25, 2013) (*Anderson*

International Transport (FMC 2013), we affirm the ALJ's findings in *EuroUSA (ALJ 2012)* (1) that eight of the entities held out to provide transportation by water of cargo between the United States and a foreign country for compensation, and (2) that vessels operating on the high seas between the United States and a port in a foreign country were used for part or all of the transportation of the shipments involved. For the reasons set forth below, we reverse the ALJ's conclusion that Infinity, Tradewind, and Moving Services did not hold out to provide ocean transportation within the meaning of the Act, and conclude that these entities did hold out to provide such transportation. Further, we reverse the ALJ's conclusions that the eleven entities did not assume responsibility for shipments they tendered to Tober, and conclude that they did assume responsibility for the shipments and therefore acted as NVOCCs on the shipments.

A. Findings of Fact and Conclusions of Law

The ALJ set out Findings of Fact and Conclusions of Law relating to (1) Respondent Tober, and (2) 15 entities from which Tober accepted shipments. The ALJ linked each finding of fact to a citation in the record. For the reasons set out below, we adopt the ALJ's Findings of Fact, but vacate his Conclusions of Law to the extent that they are inconsistent with the Commission's conclusions in *Worldwide Relocations (FMC 2012)*; the Commission's 2012 Order remanding this proceeding to the ALJ, *EuroUSA (FMC 2012)*; and with this decision.

B. NVOCC Status: Methodology Adopted in *Worldwide Relocations (FMC 2012)*

The Commission vacated and remanded the section 10(b)(11) conclusions in this proceeding to the ALJ for "reconsideration in light of the Commission's recent decision in *Worldwide Relocations [(FMC 2012)]*." *EuroUSA (FMC 2012)*, 32 S.R.R. at 580. The pertinent Commission holding in *Worldwide Relocations (FMC 2012)* concerns the methodology for determining

whether an entity operated as a freight forwarder or NVOCC on identified shipments. To determine whether an entity operated as an NVOCC, a determination necessary to find a violation of section 10(b)(11), the Commission must assess whether the entity's operations meet the three elements of common carriage set out in the Act: (1) holding out to the general public to provide transportation by water between the United States and a foreign country for compensation; (2) assuming responsibility for the transportation from the port or point of receipt to the port or point of destination; and (3) using 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. 46 U.S.C. § 40102(6).

Addressing the element of holding out to provide transportation by water between the United States and a foreign country for compensation, the Commission stated in *Worldwide Relocations (FMC 2012)* that an entity may hold out to the public “by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise.” *Worldwide Relocations (FMC 2012)*, 32 S.R.R. at 503 (citing *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961)). The Commission noted that it “has previously found that advertising and solicitations to the public are important factors in determining the issue of ‘holding out’ by an entity.” *Id.* The Commission stated that in the Initial Decision in *Worldwide Relocations (ALJ 2010)*, the ALJ made inferences on the question of whether an entity “held out” for determining common carrier status for certain shipments. The Commission stated that “the ALJ 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.* at 504. The Commission concluded that applying this type of inference is especially appropriate when “dealing with an element that necessarily speaks to a course of conduct, such as ‘holding out.’” *Id.*

Addressing the issue of whether an entity has assumed responsibility for transportation of a shipment, the Commission stated in *Worldwide Relocations (FMC 2012)* that inferences or permissive presumptions may again be appropriate: “pursuant to Rule 406 of the Federal Rules of Evidence, an entity’s routine practice may be relevant in determining whether the entity assumed responsibility for a shipment.” 32 S.R.R. at 505. The Commission went on to state that “[m]ore generally, when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises,” and noted that “the party adversely affected by the operation of this permissive presumption has full, fair, and unrestricted opportunity to appear and present rebuttal evidence.” *Id.* In *Worldwide Relocations (FMC 2012)*, the Commission summarized the methodology to determine whether an entity has assumed responsibility for a shipment as follows:

[O]nce the presiding officer has made a finding that (1) the entity has “held itself out to the general public”; and (2) that vessels on the high seas or Great Lakes were used for part or all of the transportation, then that finding may apply to any and all shipments during the relevant time period. The opposing party would have the right to offer evidence, for example, that a vessel was not involved in a particular shipment. Second, the 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, then 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 element.

Id. at 506.

After the Commission remanded this proceeding to the ALJ for application of the methodology it adopted in *Worldwide Relocations (FMC 2012)*, the ALJ concluded that (1) eight of the entities from which Tober accepted shipments (AIOS, ATWS, EOM, Lehigh, Worldwide Relocations, Sea and Air, Car-Go-Ship, and Access International) “held out” to provide transportation by water from the United States to a foreign destination for compensation, and (2) three of the entities (Infinity, Tradewind, and Moving Services) did not “hold out.” In addition, the ALJ concluded that none of the entities from which Tober accepted shipments assumed responsibility for the shipments, and that they acted as freight forwarders, rather than NVOCCs, on the shipments. Finally, the ALJ stated that he had previously determined in *EuroUSA (ALJ 2009)* that the Tober bills of lading and other documents demonstrated that each of the involved shipments was carried by a vessel from a port in the United States to a port in a foreign country, thus satisfying the third element of common carriage.

C. Documents Used in *Worldwide Relocations (ALJ 2010)* to Determine NVOCC Status

In the Initial Decision in *Worldwide Relocations (ALJ 2010)*, the ALJ looked at website advertising, communications between entities and shippers, collection of payments by entities from shippers, and whether the respondent entities offered services

in their own names, to determine whether entities held out to provide ocean transportation services. To determine whether the entities assumed responsibility for shipments identified in that proceeding, the ALJ looked at shipping documents such as bills of lading and invoices. For example, in connection with International Shipping Solutions, one of the respondents in *Worldwide Relocations*, the ALJ described how it booked cargo and the shipping documents that were issued in connection with shipments, as follows:

International Shipping Solutions booked the cargo with licensed NVOCCs for either door to door, door to port, or port to port service. . . . These licensed, secondary NVOCCs issued bills of lading to International Shipping Solutions primarily identifying the shipper/exporter as International Shipping Solutions as agent for the proprietary shipper, although bills of lading were also issued identifying International Shipping Solutions c/o the proprietary shipper, and listing the proprietary shipper c/o International Shipping Solutions, but with International Shipping Solutions' address. . . . For two of the International Shipping Solutions shipments, the booking confirmations were addressed to Globe Movers while the invoices and bills of lading are addressed to International Shipping Solutions. . . . International Shipping Solutions collected payments directly from shippers and then paid the secondary NVOCCs for the shipment.

Id.

When the Commission reviewed the ALJ's Initial Decision in *Worldwide Relocations (ALJ 2010)*, it stated that "an entity's routine practice may be relevant in determining whether the entity assumed responsibility for a shipment." *Worldwide Relocations (FMC 2012)*, 32 S.R.R. at 505. The Commission went on to state

that “[m]ore generally, when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises.” *Id.* The Commission also stated that in determining whether an entity “assumed responsibility” for shipments, when the record includes “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.” *Id.* at 506.

We follow the methodology applied by the ALJ in *Worldwide Relocations (ALJ 2010)*, and affirmed by the Commission in *Worldwide Relocations (FMC 2012)*, in which holding out may be shown through advertising and communications with shippers. Similarly, we will evaluate shipping documents such as secondary NVOCC bills of lading and invoices for shipping charges to determine whether respondents assumed responsibility for transportation of the involved shipments. Finally, we will resolve any ambiguity in the identification of party shippers in these documents pursuant to *Worldwide Relocations (FMC 2012)*.⁴

D. Status of Entities from Which Tober Accepted Shipments

In order to find a violation of section 10(b)(11), an entity from which shipments are accepted must be found to have acted as an NVOCC on the shipments.⁵ Therefore, the entities from which

⁴ Because the entities themselves are not parties to this proceeding, there is a scarcity of documents issued by them in the record, as compared with the record in *Worldwide Relocations*, in which “the entities” (including three of the entities from which Tober accepted shipments – *Worldwide Relocations*, *Tradewind*, and *Moving Service*) were named as respondents. As noted by BOE, in this proceeding “information relevant to . . . [the entities’] activities depended on their voluntary cooperation and the content of Tober’s files.” BOE Exceptions at 25 n.16.

⁵ Though section 10(b)(11) also requires a finding that Tober accepted shipments from entities that did not publish a tariff and did not have adequate financial responsibility, the ALJ did not address the issue. A review of the record demonstrates that BOE sufficiently alleged that each entity lacked a tariff,

Tober accepted shipments must be found to have acted as NVOCCs on the shipments, and Tober must be found to have acted knowingly and willfully in accepting the shipments, in order to conclude that Tober violated section 10(b)(11).

1. Status of Worldwide Relocations, Tradewind, and Moving Services: Application of Conclusions in *Worldwide Relocations (FMC 2012)*

Three of the fifteen entities from which Tober accepted shipments at issue in this case – Worldwide Relocations, Tradewind, and Moving Services – were named respondents in *Worldwide Relocations*, and were found by the ALJ and the Commission in that proceeding to have acted as NVOCCs on 33 shipments that are identified in both *Worldwide Relocations* and the current proceeding. We initially consider the NVOCC status of these three entities in this proceeding, in light of findings and conclusions in *Worldwide Relocations (FMC 2012)*.

In *Worldwide Relocations (ALJ 2010)*, the ALJ found that Worldwide Relocations,⁶ Tradewind,⁷ and Moving Services⁸ acted as NVOCCs on the shipments that were identified in that proceeding. Among the shipments handled by these three entities, were 33 shipments involving Tober. Of these 33 shipments involving Tober, Worldwide Relocations handled 20 shipments;⁹ Tradewind handled 2 shipments;¹⁰ and Moving Services handled 11 shipments.¹¹

In *Worldwide Relocations (FMC 2012)*, the Commission

evidence of financial responsibility, or both through the affidavits of Mingione, Margolis, and Murphy. See BOE App. 2; BOE App. 3; BOE App. 4. Tober did not rebut these factual allegations.

⁶ See 31 S.R.R. at 1526-27.

⁷ See 31 S.R.R. at 1530.

⁸ See 31 S.R.R. at 1531.

⁹ See *Worldwide Relocations Shipment Chart*, 31 S.R.R. 1493-98.

¹⁰ See *Tradewind Shipment Chart*, 31 S.R.R. at 1501-2.

¹¹ See *Moving Services Shipment Chart*, 31 S.R.R. at 1503-5.

affirmed the ALJ's conclusion that Worldwide Relocations, Tradewind, and Moving Services, respondents in that proceeding, operated as NVOCCs on the shipments identified in that proceeding, including 33 shipments that are also identified in the current proceeding. Subsequently, in its 2012 Order remanding the current proceeding, the Commission stated as follows: "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." *EuroUSA (FMC 2012)*, 32 S.R.R. at 580. The Commission noted that for each of the 33 shipments, the ALJ in the current proceeding previously held in *EuroUSA (ALJ 2009)* that the intermediaries involved (Worldwide Relocations, Tradewind, and Moving Services) were not operating as NVOCCs on the shipments, contrary to the conclusions reached on the status of these three entities in *Worldwide Relocations (ALJ 2010)* and *Worldwide Relocations (FMC 2012)*. The Commission stated that "[t]he 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." *Id.* at 581. The Commission concluded that "[t]o 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*." *Id.* The Commission thus remanded this proceeding to the ALJ to (1) resolve the conflict involving the 33 shipments involved in both *Worldwide Relocations* and this proceeding, and (2) apply the standard for determining NVOCC status outlined by the Commission in *Worldwide Relocations (FMC 2012)*.

In response to the Commission's remand, the ALJ concluded that Commission findings in *Worldwide Relocations (FMC 2012)* do not have "binding collateral effect" in this proceeding against Tober:

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.

EuroUSA (ALJ 2012), 32 S.R.R. at 1482. In reaching this conclusion, the ALJ stated that the findings in *Worldwide Relocations (ALJ 2010)* and *Worldwide Relocations (FMC 2012)* that Worldwide Relocations, Tradewind, and Moving Services operated as NVOCCs, were “based on their relationships with many other downstream 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*.” *Id.* The ALJ concluded that “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.” *Id.*

When the Commission remanded this proceeding to the ALJ, it believed that the conclusions in *Worldwide Relocations (FMC 2012)* as to the status of Worldwide Relocations, Tradewind, and Moving Services, in connection with shipments Tober accepted from these three entities, were relevant and had precedential value. In the order remanding this proceeding to the ALJ, the Commission specifically referred to the 33 shipments that are involved in both *Worldwide Relocations (FMC 2012)* and in the current proceeding, and noted that while Worldwide Relocations, Tradewind, and Moving Services were found to have acted as NVOCCs on these 33 shipments in *Worldwide Relocations (FMC 2012)*, the ALJ in this proceeding concluded in *EuroUSA (ALJ 2009)* that these same entities did not act as NVOCCs on these same shipments. The Commission stated that the ALJ’s conclusions in this proceeding that Worldwide Relocations, Tradewind, and Moving Services did not act as NVOCCs on these shipments appeared to conflict with the Commission’s decision in *Worldwide Relocations (FMC 2012)*. Accordingly, it instructed the ALJ to reconsider the section 10(b)(11) allegations for the 278 shipments in this proceeding, including the 33 shipments common to both proceedings, in light of

the standard and holdings in *Worldwide Relocations (FMC 2012)*.¹²

The conclusion previously reached in *Worldwide Relocations (ALJ 2010)*, affirmed by the Commission in *Worldwide Relocations (FMC 2012)*, that Worldwide Relocations, Tradewind, and Moving Services acted as NVOCCs on 33 shipments that are also at issue in the current proceeding, is supported in this case based both on (1) principles of *stare decisis*, and (2) the evidence connected with these shipments in the record in this proceeding. The Commission has stated that principles of *stare decisis* may apply in administrative proceedings, and that these principles generally require an agency to explain a departure from precedent: “principles of administrative *stare decisis* require that if an agency departs from precedent, it must provide an opinion or analysis supported by substantial evidence of record.” *Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Ports Authority*, 24 S.R.R. 50, 58 (ALJ 1987) (Initial Decision adopted, 24 S.R.R. 761, 766 (FMC 1988)). The Commission has also stated that agencies must follow their precedents or provide a reasoned explanation for not doing so: “Although agencies are given some leeway in changing their minds in light of experience and changing conditions, the courts are emphatic in requiring agencies to follow their precedents or explain with good reasons why they choose not to do so.” *Harrington & Co., Inc. v. Georgia Ports Authority*, 23 S.R.R. 753, 766 (ALJ 1986).

¹² In *EuroUSA (ALJ 2012)*, the ALJ stated that “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 [31 S.R.R. 727] (D.C. Cir. 2009) (*Landstar*).” 32 S.R.R. at 1456. This analogy is misplaced. In *Landstar*, the NVOCC agent described by the court acted on “behalf of a disclosed NVOCC principal” and held itself out to provide transportation “only in the name of the NVOCC, subject to that NVOCC’s control.” 569 F.3d at 497 (emphasis in original). In contrast, in this proceeding, with few exceptions, the entities did not “disclose” Tober’s role to proprietary shippers in connection with their shipments, and did not hold out to provide transportation in Tober’s name, subject to Tober’s control.

When reviewing agency decision making, courts have said that “[r]easoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent,” and an agency that neglects to do so acts arbitrarily and capriciously.” *Jicarilla Apache Nation v. U.S. Dep’t of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (*Apache Nation*) (quoting *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009)). The court in *Apache Nation* stated that “[w]e ‘permit agency action to stand without elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears.’” *Id.* at 1120. However, the court stated that an agency may not ignore relevant precedent:

[W]e have never approved an agency’s decision to completely ignore relevant precedent. *See LeMoyne-Owen College*, 357 F.3d at 61 (“[W]here . . . a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.”) Like a court, “[n]ormally, an agency must adhere to its precedents in adjudicating cases before it.” *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003). Thus, “[a]n agency’s failure to come to grips with conflicting precedent constitutes ‘an inexcusable departure from the essential requirement of reasoned decision making.’” *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)).

Id. Likewise, “[w]hen an agency does apply *stare decisis*, there must be some underlying similarity of facts or circumstances between the current proceeding and the one relied on for precedent.” Jacob A. Stein, Glenn A. Mitchell, & Basil J. Mezines, *Administrative Law*, Vol. 5, § 340.02.

In the current proceeding, the circumstances with regard to some entities, and some shipments, are the same as those in *Worldwide Relocations*: the same entities (Worldwide Relocations, Tradewind, and Moving Services) are involved in both proceedings, and the same 33 shipments are identified in both proceedings. In *Worldwide Relocations (ALJ 2010)*, the ALJ found that Worldwide Relocations, Tradewind, and Moving Services assumed responsibility for these shipments and acted as NVOCCs on the shipments. The Commission affirmed the ALJ's conclusions in *Worldwide Relocations (FMC 2012)*.

In addition, the evidence of record in this proceeding also supports this conclusion. In *EuroUSA (ALJ 2012)*, the ALJ concluded that (1) Worldwide Relocations held itself out to provide ocean transportation for compensation, but (2) Tradewind and Moving Services did not "hold out" to the public to provide ocean transportation for compensation. The ALJ's conclusion that Tradewind did not hold out turned on the word "organize" used in Tradewind's advertisements. In reaching the conclusion that Tradewind did not hold out to provide ocean transportation services, the ALJ did not reference the other statements in Tradewind's internet advertisement, or the shipping documents related to shipments Tober accepted from Tradewind. Tradewind's internet advertisement stated that Tradewind "specializes in maritime shipments worldwide," and offered the following services: "air and ocean freight shipments," "delivery to your door in almost every country," and "full destination services in the US." BOE App. 24.¹³ While Tradewind stated that it was "not classified as an international shipping company," and preferred "to think of . . . [itself] as personalized travel consultants," Tradewind's characterization of its services is not determinative of its status. The activities described on its website demonstrate that Tradewind advertised provision of ocean transportation services through its consolidation warehouses; provision of pickup services and

¹³ BOE's Appendix was filed May 22, 2009, as an Appendix to its Proposed Findings of Fact and Conclusions of Law.

transportation to its warehouses; provision of transportation to the departure port; and provision of packing, loading, door delivery, and destination services. BOE App. 24. Based on the services described on Tradewind's website, it appears that Tradewind held out to provide ocean transportation for compensation, consistent with the conclusion reached in *Worldwide Relocations (ALJ 2010)*, and affirmed by the Commission in *Worldwide Relocations (FMC 2012)*.

There is no evidence in the record of advertising by Moving Services in this proceeding, just as there was no such evidence in *Worldwide Relocations*. The ALJ in *Worldwide Relocations (ALJ 2010)* noted that because Moving Services did not participate in that proceeding, "[i]ts failure to respond to discovery limited the information available to BOE to present." 32 S.R.R. at 1530. The ALJ nonetheless concluded that Moving Services held out to provide ocean transportation for compensation based on the course of conduct demonstrated in the documents that were in the record. Similarly in this proceeding, documents of record such as Tober invoices for ocean transportation charges issued to Moving Services and Tober bills of lading showing the proprietary shipper "c/o Moving Services," demonstrate that Moving Services held out to provide ocean shipping services in connection with the Tober shipments. The Commission's predecessor, the Federal Maritime Board, stated that in making determinations as to whether an entity is acting as a common carrier, the status of the entity "depends upon the nature of the service offered to the public." *Bernhard Ulmann Co. Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 776-7 (FMB 1952). The Commission has also followed this approach, stating that "an intermediary's conduct . . . will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (FMC 1991). Based on the documents of record in this proceeding showing Moving Service's course of conduct, it appears that Moving Services held out to provide ocean transportation for compensation, consistent with the conclusion reached in *Worldwide Relocations (ALJ 2010)*, and affirmed by the Commission in *Worldwide Relocations (FMC 2012)*.

The ALJ in *EuroUSA (ALJ 2012)* concluded that Worldwide Relocations, Tradewind, and Moving Services did not assume responsibility for transportation of the shipments Tober accepted from them. Documents in the record related to the 33 shipments common to this proceeding and *Worldwide Relocations*, and to 13 additional shipments Tober accepted from these entities, include the following: Tober bills of lading identifying proprietary shippers “c/o” the entities; Tober invoices issued to the entities for ocean freight charges connected with identified proprietary shippers; invoices issued by the entities to proprietary shippers for services including ocean freight charges; checks issued by the entities to Tober, with proprietary shippers identified on the check; checks issued by proprietary shippers to the entities for ocean shipments; estimates issued by the entities to proprietary shippers for international moves; and service orders issued by the entities to proprietary shippers listing services included in international moves, including ocean freight services. Based on these documents, applying the methodology affirmed by the Commission in *Worldwide Relocations (FMC 2012)*, noting ambiguous identification of party shippers in these documents, and the fact that Tober invoiced the entities for ocean freight charges and the entities in turn marked up Tober’s charges and invoiced proprietary shippers, we conclude that Worldwide Relocations, Tradewind, and Moving Services assumed responsibility for, and acted as NVOCCs on, the 33 shipments that are involved in both this proceeding and in *Worldwide Relocations (FMC 2012)*, consistent with the conclusion reached in *Worldwide Relocations (ALJ 2010)*, and affirmed by the Commission in *Worldwide Relocations (FMC 2012)*.

Therefore, we reverse the ALJ’s conclusion in *EuroUSA (ALJ 2012)* that Worldwide Relocations, Tradewind, and Moving Services acted as freight forwarders on these shipments, and find instead that Worldwide Relocations, Tradewind, and Moving Services assumed responsibility for these shipments and acted as NVOCCs, consistent with the Commission’s decision in *Worldwide*

Relocations (FMC 2012), and with the Commission's decision remanding this proceeding to the ALJ in *EuroUSA (FMC 2012)*.¹⁴

In addition to these 33 shipments, Tober accepted 10 additional shipments from Worldwide (in addition to the 20 shipments common to this proceeding and *Worldwide Relocations*); Tober accepted two additional shipments from Tradewind (in addition to the two shipments common to this proceeding and *Worldwide Relocations*); and Tober accepted one additional shipment from Moving Services (in addition to the 11 shipments common to this proceeding and *Worldwide Relocations*). Examining the aforesaid evidence and applying the presumptions adopted by the Commission in *Worldwide Relocations (FMC 2012)*, we find that Worldwide, Tradewind, and Moving Services acted as NVOCCs on the additional 13 shipments that Tober accepted from them. We reach this result in light of the fact that on 33 out of the 46 shipments Tober accepted from these three entities, the Commission has already concluded that the entities acted as NVOCCs in *Worldwide Relocations (FMC 2012)*,

2. Status of Remaining Entities from Which Tober Accepted Shipments: Application of Methodology Affirmed in *Worldwide Relocations (FMC 2012)* and Applied in *Anderson International Transport (FMC June 25, 2013)*

Infinity Moving & Storage Inc.

¹⁴ The conclusion that these entities acted as NVOCCs on the shipments Tober accepted from them appears consistent with the conclusion reached by the ALJ in connection with Container Innovations, one of the three respondents named in this proceeding. See *EuroUSA Shipping, Inc – Possible Violations of Shipping Act*, 31 S.R.R. 1131 (ALJ 2009, admin. final January 7, 2010). In the decision involving Container Innovations, the ALJ concluded that an entity from which Container Innovations accepted shipments acted as an NVOCC, based on advertising, shipping documents, and payment practices that are similar to those in this proceeding.

The record contains evidence relating to 120 shipments that Tober accepted from Infinity. The ALJ concluded that Infinity did not hold out to the general public to provide transportation by water between the U.S. and a foreign country for compensation, based primarily on the word “arrangements” in Infinity’s advertisements. The ALJ stated that Infinity advertised on the Internet that it took care of all “arrangements” for ocean transport, and he determined that this description demonstrated that Infinity operated as an ocean freight forwarder: “[w]hen 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.” *EuroUSA (ALJ 2012)*, 32 S.R.R. at 1503 (emphasis in original). In reaching the conclusion that Infinity was not holding out to provide ocean transportation, the ALJ did not reference the other representations in Infinity’s advertisements (BOE App. 11), or the hundreds of pages of documents relating to shipments accepted by Tober from Infinity (BOE App. 12). Examination of these documents supports a finding that BOE met its burden of establishing that Infinity was holding out to the public to provide ocean transportation.

Infinity’s Internet advertisement stated that Infinity would “take care of all the arrangements for ground, air, and ocean transport and delivery to the port of departure. From port and customs clearance in the destination country, to placement of the goods in the transferee’s new home. We accompany the process all along the way!” BOE App. 11. Infinity offered port-to-door service, contracted with Tober for Tober’s services, and was invoiced by Tober for Tober’s services. As set out in the Commission’s regulations, NVOCC services include payment of port-to-port or multimodal transportation services, and *arranging* for inland transportation and paying for inland freight charges on through transportation movements. 46 C.F.R. § 515.2(1)(2) and (5) (emphasis added).

BOE's evidence of record relating to Infinity is unopposed. Because the respondent did not introduce contrary evidence, BOE's burden is to produce sufficient evidence to establish that Infinity was acting as an NVOCC, in order to prove that Tober violated section 10(b)(11) by knowingly and willfully accepting shipments from the entities identified in this proceeding, including Infinity. Based on BOE's evidence, including Infinity's advertising as a whole, applying the inference affirmed by the Commission in *Worldwide Relocations (FMC 2012)*, it appears that BOE has met its burden of showing by a preponderance of evidence that Infinity held out to provide ocean transportation services.

The ALJ also concluded that Infinity did not assume responsibility for the shipments that Tober accepted from it. Based on the evidence of record as set out in *EuroUSA (ALJ 2012)*, Tober accepted 43 shipments from Infinity before the Commission's Order of Investigation was issued on May 11, 2006, and 77 shipments after the Order of Investigation was issued, for a total of 120 shipments. 32 S.R.R. at 1503-04. Tober bills of lading show the proprietary shipper as the shipper, and occasionally show the proprietary shipper "c/o Infinity." Tober issued 119 invoices to Infinity for shipments by proprietary shippers. *Id.* at 1526. In addition to Tober bills of lading and invoices issued to Infinity, the evidence includes the following documents: descriptive inventories issued by Infinity to proprietary shippers; warehouse receipts showing Infinity as the shipper and the proprietary shipper as consignee; e-mail messages containing shipping information from Infinity to the shippers; an "Order for Service" form showing ocean shipping charges issued by Infinity to shippers; e-mail messages from shippers to Infinity providing destination addresses for shipments; and e-mail messages from Infinity to Tober containing customer information. BOE App. 12.

The bills of lading issued by Tober for the shipments it accepted from Infinity contain shipper identifications that are comparable to those involved in *Worldwide Relocations*, with shippers identified as proprietary shippers or as proprietary shippers

“c/o Infinity.” In addition, Tober issued 119 invoices for ocean shipping charges to Infinity. Applying the methodology affirmed in *Worldwide Relocations (FMC 2012)* for determining whether an entity has assumed responsibility for shipments, we conclude that Infinity assumed responsibility and acted as an NVOCC in connection with the 120 shipments Tober accepted from it.

Lehigh Moving and Storage, Inc.

The record contains evidence related to 31 shipments that Tober accepted from Lehigh. The ALJ concluded that while Lehigh held itself out to the general public to provide ocean transportation for compensation, it did not assume responsibility for the shipments tendered to Tober and therefore did not operate as an NVOCC on the shipments. 32 S.R.R. at 1525. Based on the evidence in the record, the ALJ concluded that Tober issued 30 bills of lading showing either the proprietary shipper as the shipper, or the proprietary shipper “c/o Lehigh” as the shipper. The ALJ also concluded that Tober issued an additional bill of lading that is not in the record, based on an invoice and Tober’s operating practices. The ALJ also found that Tober issued 30 invoices to Lehigh for ocean transportation charges. *Id.* at 1524.

In addition to Tober bills of lading and invoices issued to Lehigh, other documents in the record include warehouse receipts showing Lehigh as the shipper and the proprietary shipper as consignee; booking confirmation issued by Tober showing Lehigh as the shipper; e-mail messages from shippers to Lehigh showing shipping information; and “customer authorization” forms issued by Lehigh on which shippers authorized Tober to use their passport and/or social security numbers as needed for export documents. BOE App. 14.

Applying the methodology adopted in *Worldwide Relocations (FMC 2012)* to the evidence in the record, including bills of lading identifying the proprietary shipper “c/o Lehigh” and invoices issued by Tober to Lehigh for ocean transportation

charges, it may be concluded that Lehigh assumed responsibility for the shipments it tendered to Tober. As Lehigh has been found to have held out to provide ocean transportation for compensation, we find that it acted as an NVOCC in connection with the 31 shipments Tober accepted from it.

Sea and Air International, Inc.

There is evidence in the record related to 27 shipments that Tober accepted from Sea and Air. The ALJ concluded that while Sea and Air held out to provide ocean transportation for compensation, it did not assume responsibility for the shipments tendered to Tober, and therefore did not act as an NVOCC on the shipments. 32 S.R.R. at 1536. Based on the evidence in the record, the ALJ concluded that Tober issued 25 bills of lading showing the proprietary shipper as the shipper, and two bills of lading showing the proprietary shipper “c/o Sea and Air.” *Id.* at 1535. The ALJ also concluded that Tober issued 25 invoices to Sea and Air for ocean transportation charges. *Id.*

In addition to the bills of lading and invoices issued by Tober, other documents in the record include warehouse receipts showing Sea and Air as the shipper; Sea and Air “Overseas Information” form asking shippers to provide shipment information and stating that “Payments must be in full prior to shipping by: cash, personal check, money order or bank transfer;” Sea and Air “customer authorization” form on which shippers authorized “FMC/NVOCC” to use their passport and/or social security numbers solely for the purpose of export formalities; and an e-mail message from Sea and Air to Tober with overseas shipment information. BOE App. 18.

Applying the methodology adopted in *Worldwide Relocations (FMC 2012)* to the evidence in the record, including bills of lading identifying the proprietary shipper “c/o Sea and Air” and invoices issued by Tober to Sea and Air for ocean transportation charges, we conclude that Sea and Air assumed

responsibility for the shipments it tendered to Tober. As Sea and Air has been found to have held out to provide ocean transportation for compensation, we find that it acted as an NVOCC in connection with the 27 shipments Tober accepted from it.

Access International Transport/AVL Atlanta Transport

There is evidence in the record related to 12 shipments that Tober accepted from Access International. The ALJ found that Tober issued 11 bills of lading identifying the proprietary shipper as the shipper. The ALJ also found that Tober issued 12 invoices to Access International for ocean transportation charges. The ALJ concluded that while Access International held out to provide ocean transportation for compensation, it did not assume responsibility for the shipments and therefore did not act as an NVOCC. 32 S.R.R. at 1539.

In addition to Tober bills of lading and invoices, the following documents are in the record: warehouse receipts showing the shipper as the proprietary shipper “c/o Access Van Lines” or Access International Transport as the shipper and the proprietary shipper as consignee; Access International “Master Bill of Lading for Shipment to UK” showing proprietary shipper and shipment information for overseas shipment; Access International e-mail messages to Tober providing pickup information and overseas destination address; Tober “Pickup/Delivery Order” showing the shipper “c/o Access Van Lines;” and AVL “Overseas Information” forms showing shipper and overseas shipment information. BOE App. 23.

As noted above, the ALJ concluded in *EuroUSA (ALJ 2012)* that Access International held out to provide ocean transportation for compensation. Applying the methodology affirmed by the Commission in *Worldwide Relocations (FMC 2012)* to the evidence in the record, including invoices issued by Tober to Access International for ocean transportation, and warehouse receipts showing the proprietary shipper “c/o Access Van Lines,” we

conclude that Access International assumed responsibility for the 12 shipments Tober accepted from it, and therefore acted as an NVOCC on the shipments.

All in One Shipping, Inc.

There is evidence in the record related to 10 shipments that Tober accepted from AIOS. Tober issued bills of lading identifying the proprietary shipper as the shipper or as the proprietary shipper “c/o AIOS.” Tober issued invoices for ocean transportation charges to AIOS. The ALJ concluded that while AIOS held out to provide ocean transportation for compensation, it did not assume responsibility for the shipments and did not act as an NVOCC on the shipments. 32 S.R.R. at 1530, 1531.

In addition to the Tober bills of lading and invoices, the following documents are in the record: an affidavit from Joshua S. Morales, formerly the sole corporate officer of AIOS, stating that “All in One Shipping, Inc. operated as an NVOCC between November 2004 to January 2006.” (BOE App. 5 at 1); quotes provided by AIOS to shippers for ocean transportation; quotes provided by Tober to AIOS for ocean transportation; AIOS bills of lading issued to shippers; and AIOS booking confirmations issued to shippers. BOE App. 33.

Joshua Morales’ statement that AIOS acted as an NVOCC when it tendered shipments to Tober is consistent with AIOS’ admission in a settlement agreement in *Worldwide Relocations*, in which Mr. Morales and AIOS “entered into a settlement agreement with BOE where we admitted violations of Sections 8 and 19(a) and (b) of the Shipping Act” Morales Affidavit, BOE App. 5 at 4. Based on the documents in the record in this proceeding, including Tober bills of lading and Tober invoices for ocean transportation charges submitted to AIOS, we conclude that AIOS acted as an NVOCC on the 10 shipments that Tober accepted from it.

Around the World Shipping, Inc.

The record contains evidence connected with 8 shipments that Tober accepted from ATWS. Tober issued bills of lading identifying the shipper as the proprietary shipper, and issued invoices to ATWS for ocean transportation charges. In its invoices to ATWS, Tober also identified the proprietary shippers named in its bills of lading as “consignee” and/or in a box labeled “Remarks” on the invoice form. The ALJ concluded that while ATWS held out to provide ocean transportation for compensation, it did not assume responsibility for the identified shipments and therefore did not act as an NVOCC. 32 S.R.R. at 1532.

In addition to the Tober bills of lading and invoices issued to ATWS, the following documents are also in the record: shipping estimates from ATWS to the proprietary shipper, an invoice from ATWS to a proprietary shipper, and e-mail messages from ATWS to Tober seeking information regarding shipping charges for specific moves. BOE App. 35. In addition to these documents, Daniel E. Cuadrado, formerly the sole corporate officer of ATWS, submitted an affidavit in which he stated that ATWS acted as an NVOCC between May 2005 and September 2005, offering to perform door-to-port, door-to-door and port-to-port moves of household goods in ocean transportation service. BOE App. 6 at 1. Mr. Cuadrado’s statement that ATWS acted as an NVOCC during the period in which Tober accepted shipments from it is consistent with his statement that as a result of ATWS activities, “both myself and the company were named as Respondents in Docket No. 06-01, *Worldwide Relocations, Inc. et al.*,” and ATWS and he “entered into a settlement agreement with the Bureau of Enforcement where we admitted violations of Sections 8 and 19(a) and (b) of the Shipping Act.” *Id.* at 3. Based on the documents in this proceeding, including Tober invoices issued to ATWS for ocean transportation charges, we conclude that ATWS acted as an NVOCC on the eight shipments that Tober accepted from it.

Car-Go-Ship.com

There is evidence in the record connected with 4 shipments that Tober accepted from Car-Go-Ship. Tober issued bills of lading identifying the shipper as either the proprietary shipper or as the proprietary shipper “c/o Car-Go-Ship.” Tober issued invoices to Car-Go-Ship for ocean transportation charges related to shipments of the proprietary shippers identified in the bills of lading. The ALJ concluded that Car-Go-Ship held out to provide ocean transportation, but did not assume responsibility for the shipments tendered to Tober and therefore did not act as an NVOCC. 32 S.R.R. at 1538.

In addition to the Tober bills of lading and invoices issued to Car-Go-Ship for ocean transportation charges, there are in the record the following documents: warehouse receipts showing Car-Go-Ship as shipper; Car-Go-Ship “Booking Order” and “Working Order” forms showing shipment information including overseas final destinations; and e-mail messages from Car-Go-Ship to Tober stating that Car-Go-Ship had shipments arriving at a Tober facility to be shipped to overseas destinations. BOE App. 21.

Applying the methodology adopted in *Worldwide Relocations (FMC 2012)* to the evidence in the record, including bills of lading identifying the proprietary shipper “c/o Car-Go-Ship” and invoices issued by Tober to Car-Go-Ship for ocean transportation charges, we believe that Car-Go-Ship assumed responsibility for the shipments it tendered to Tober. As Car-Go-Ship has been found to have held out to provide ocean transportation for compensation, we also find that it acted as an NVOCC in connection with the four shipments that Tober accepted from it.

EOM Shipping, Inc.

There is evidence in the record connected with four shipments that Tober accepted from EOM. Tober issued bills of lading identifying the shipper as the proprietary shipper, and invoices to EOM for ocean transportation charges. In addition, there

are in the record warehouse receipts showing EOM as the shipper and the proprietary shipper as the consignee, or the proprietary shipper “c/o EOM” as the shipper. The ALJ concluded that EOM held out to provide ocean transportation services, but did not assume responsibility for the shipments it tendered to Tober and therefore did not act as an NVOCC. 32 S.R.R. at 1523.

Applying the methodology adopted in *Worldwide Relocations (FMC 2012)* and applied in *Anderson International Transport (FMC 2013)*, to the evidence in the record, including invoices issued by Tober to EOM for ocean transportation charges and warehouse receipts showing the proprietary shipper “c/o EOM,” it may be concluded that EOM assumed responsibility for the shipments Tober accepted from it. As EOM has been found to have held out to provide ocean transportation for compensation, we find that it acted as an NVOCC on the four shipments Tober accepted from it.

E. Did Tober Accept Shipments Knowingly and Willfully from Entities found to have Acted as NVOCCs on those Shipments

In order to find that Tober violated section 10(b)(11) of the Act, it must also be found that Tober “knowingly and willfully” accepted shipments from NVOCCs that failed to publish a tariff and lacked financial security pursuant to the Commission’s regulations. The ALJ did not reach this issue, as he concluded that the entities from which Tober accepted shipments did not act as NVOCCs. Based on the discussion above that the evidence supports conclusions that the entities from which Tober accepted shipments did act as NVOCCs on the shipments, it is necessary to consider whether Tober acted knowingly and willfully when it accepted the shipments.

The Commission has said that “[t]he phrase ‘knowingly and willfully’ means purposefully or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to

its requirements.” *Trans Ocean – Pacific Forwarding, Inc. – Possible Violations/1984 Act*, 27 S.R.R. 409, 412 (ALJ 1995) (citing *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938)). Subsequently, the Commission validated this meaning of the phrase “knowingly and willfully” in *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001). In *Stallion Cargo*, the Commission stated that an NVOCC has a responsibility to educate itself regarding statutory responsibilities: “An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” *Id.* at 677 (citing *Rubin, Rubin & Rubin Corp.*, 6 F.M.B. 235, 239-40 (FMB 1961) (1 S.R.R. 281)). The Commission has consistently taken the position that persistent failure to inform oneself of the requirements of the Shipping Act may mean that one is acting knowingly and willfully in violation of the Act. *Pacific Champion Express Co., Ltd. – Possible Violations of the 1984 Act*, 28 S.R.R. 1397, 1403 (FMC 2000) (citing *Portman Square Ltd. – Possible Violations of § 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-5 (ALJ 1998, admin. final March 16, 1998)).

The evidence in this proceeding supports a finding that Tober was indifferent to, and showed reckless disregard for, the requirements of the Act. Despite the prohibition in the Shipping Act and the Commission’s regulations against acceptance of cargo from unlicensed, unbonded OTIs, both the president of Tober, Yonaton Benheim, and the vice president, Steve Schneider, stated in depositions that Tober accepted business from anyone and did not inquire as to the status of the entities that contacted the company. BOE Apps. 8 and 9. Benheim and Schneider stated that in 2004 and 2005, the time period covered by the investigation, the company never refused a shipment. This testimony is corroborated in the affidavits of former officers of two of the entities, AIOS and ATWS, both of whom state that when they tendered shipments to Tober, Tober never questioned whether they were an NVOCC, freight forwarder, or cargo owner. BOE Apps. 5 and 6. In addition, Tober continued to accept shipments from the entities after being

notified by BOE that it was looking into Tober's business activities with unlicensed OTIs, and after the commencement of this proceeding on May 11, 2006, as set out in the affidavit of a Commission Area Representative and the shipment files of Infinity Moving and Storage. BOE Apps. 2, 7, and 12.

Based on the evidence presented by BOE, we believe that Tober chose to disregard or was plainly indifferent to the Shipping Act requirement set out in section 10(b)(11) of the Shipping Act and the Commission's regulations at 46 C.F.R. § 515.27, prohibiting carriers from knowingly and willfully accepting cargo from entities acting as NVOCCs without licenses, bonds, or tariffs. Tober admitted that it accepted shipments from anyone without inquiring as to their status. Shipment files show that this pattern continued after the Commission issued its Order of Investigation into Tober's practices. Consistent with Commission precedent that a carrier's conduct is knowing and willful if it chooses to disregard the statute or is indifferent to its requirements, the evidence supports a finding that Tober knowingly and willfully accepted 255 shipments from entities that acted as NVOCCs without licenses, bonds, or tariffs, in violation of section 10(b)(11) of the Act and the Commission's regulations at 46 C.F.R. § 515.27.

F. Did Tober Knowingly and Willfully Violate Section 10(b)(2)(A) of the Act

Section 10(b)(2)(A) of the Act provides that a common carrier may not provide service in the liner trade that "is not in accordance with the rates, charges, classification, rules, and practices contained in a tariff published . . . under . . . [section 8] of this [title]" 46 U.S.C. § 41104(2)(A). In *EuroUSA (ALJ 2012)*, the ALJ concluded that Tober violated section 10(b)(2)(A) of the Act on 279 shipments accepted from the named entities, by providing service in the liner trade that was not in accordance with the rates and charges in its published tariff. The ALJ further concluded that Tober (1) violated section 10(b)(2)(A) knowingly and willfully on 77 shipments that occurred after the Commission

issued the Order of Investigation and Hearing in this proceeding, but (2) did not violate section 10(b)(2)(A) knowingly and willfully on the 202 shipments that occurred prior to issuance of the Order of Investigation and Hearing.

The ALJ appeared to base his conclusion that the tariff violations that occurred prior to the issuance of the Order of Investigation were not knowing and willful, on testimony of Tober's president in a deposition. In that testimony, Tober's president stated "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." *EuroUSA (ALJ 2012)*, 32 S.R.R. at 1513. Tober's president also testified that to his knowledge, "this practice appeared to be wide-spread in the industry." *Id.* The ALJ concluded that "[w]hile 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 the argument that Tober was willfully and knowingly violating the Act." *Id.* at 1519.

The evidence shows that Tober's freight forwarder license is dated 1996, and its NVOCC license is dated 1999. BOE App. 1. Pursuant to Commission regulations (46 C.F.R. § 502.226(a)), the Commission may take official notice of the fact that at the time Tober's NVOCC license was issued, the Commission sent a form letter to Tober, notifying it that "each OTI NVOCC is required to maintain an active electronically accessible tariff in compliance with 46 C.F.R. Part 520, and to maintain an accurate Form FMC-1, indicating the current location of its tariff." Letter dated February 22, 2000, from the Director, Bureau of Tariffs, Certification and Licensing. The Commission's regulations governing tariff publication state that one of the primary purposes of tariff publication regulations is "to permit: (1) Shippers and other members of the public to obtain reliable and useful information concerning the rates and charges that will be assessed by common carriers and conferences for their transportation services." 46 C.F.R. § 520.1(b)(1). This purpose is consistent with the statutory requirement set out in section 10(b)(2)(A) of the Act, that carriers

provide service that is in accordance with their tariff rates.

As set out above, the Commission has stated that an NVOCC has a responsibility to educate itself regarding statutory requirements. *See Stallion Cargo*, 29 S.R.R. at 677. The Commission has consistently taken the position that persistent failure of an entity regulated by the Commission to inform itself of the requirements of the Shipping Act may lead to the conclusion that it is acting knowingly and willfully. *See Pacific Champion Express*, 28 S.R.R. at 1403; *Portman Square*, 28 S.R.R. at 84-85. In this case, Tober's president and vice president testified that the rate in Tober's tariff was not used to calculate the rates that Tober charged. BOE Apps. 8 and 9. They also testified that charging rates that were not based on tariff rates was a widespread practice in the industry. This assertion does not negate the fact that Tober knew that it was not charging the rates in its tariff, at a time when it was charged with knowing the requirements of the Shipping Act. Based on evidence of Tober's tariff practices, Tober disregarded the statute, was indifferent to its requirements, and showed reckless disregard for whether its conduct was prohibited by the Act. Therefore, its tariff violations are found to be knowing and willful.

G. Civil Penalties

Section 13(c) of the Shipping Act provides that in determining the amount of a 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). In *EuroUSA (ALJ 2012)*, the ALJ assessed penalties only for Tober's violations of 10(b)(2)(A), as he concluded that Tober did not violate section 10(b)(11) of the Act. The ALJ balanced the nature, circumstances, extent, and gravity of the section 10(b)(2)(A) violations, and concluded that Tober was liable for a penalty of \$1,000 for each of the 202 tariff violations committed before May 11, 2006, or \$202,000; and a penalty of \$3,000 for each of the 77 tariff

violations committed after May 11, 2006, or \$231,000; for a total penalty of \$433,000. 32 S.R.R. at 1521. As discussed above, the ALJ concluded that the violations committed before the Order of Investigation was issued on May 11, 2006, were not knowing and willful, while the violations committed after May 11, 2006, were knowing and willful.

1. Number of Violations

BOE has stated that “applications of civil penalties for as many as 255 violations of section 10(b)(11) . . . and for the 279 tariff violations of section 10(b)(2) would generate a hefty, and perhaps unrealistic, aggregate penalty.” BOE Exceptions at 44. BOE concludes that “application of the lowest end of the penalty range for knowing and willful violations, together with a[n] overall penalty ceiling of \$1.5 million for a respondent of this size, will result in a civil penalty that adequately reflects the extensive period of knowing and willful violations, the limited factors of mitigation, the deterrent impact of the penalty, and the objectives of the Shipping Act.” *Id.* at 45. The penalty ceiling of \$1.5 million approximates the application of \$6,000 to 250 violations, close to the 255 shipments Tober accepted from the entities.

2. Level of Penalties

As noted above, section 13(c) of the Shipping Act provides that in determining the amount of a civil penalty, “the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed” 46 U.S.C. § 41109(b). In this case, the violations are (1) knowingly and willfully accepting shipments from entities operating without licenses, bonds, or tariffs, and (2) providing service in the liner trade that was not in accordance with tariff rates. Section 13(c) also requires that the Commission take into account the violator’s “degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” *Id.* Tober has a high degree of culpability in connection with the violations, as it continued its unlawful operations after being

warned to stop and after this investigation was initiated. According to the ALJ, there is no evidence in the record showing that Tober has a history of prior Shipping Act offenses. In addition, the ALJ stated that because Tober is no longer in business, and owes \$1.6 million in taxes and other claims, it appears to have limited ability to pay a penalty. *See EuroUSA (ALJ 2012)*, 32 S.R.R. at 1521.

A \$1.5 million aggregate penalty amount approximates the application of a penalty of \$6,000 to 250 violations, the approximate number of shipments Tober accepted from the entities. Violations of section 10(b)(11) are by definition knowing and willful, and while there is no minimum penalty amount for knowing and willful violations, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6,000. *See, e.g., Anderson International Transport*, Docket No. 07-02, __ S.R.R. __ (FMC June 25, 2013) (\$6,000 penalty per violation assessed for 22 knowing and willful violations); *EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) (\$30,000 penalty per violation assessed for 13 knowing and willful violations);¹⁵ *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) (\$22,500 penalty per violation assessed for 120 knowing and willful violations); *Green Master Int’l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1319, 1323 (FMC 2003) (\$22,500 penalty per knowing and willful violation affirmed)

¹⁵ This penalty was assessed against Container Innovations, one of the three respondents in this proceeding. The ALJ concluded that Container Innovations was liable for a civil penalty of \$30,000 per violation, for 13 violations of section 10(b)(11): “a civil penalty of \$30,000, the maximum civil penalty authorized by the Shipping Act, is appropriate for each of the thirteen violations for a total of \$390,000.” 31 S.R.R. at 1152.

((*Green Master II*); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) (\$22,500 penalty per violation assessed for 68 knowing and willful violations); *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) (\$20,000 penalty per violation assessed for 72 knowing and willful violations); and *Stallion Cargo*, 29 S.R.R. at 682 (FMC 2001) (\$10,000 per violation assessed for 134 knowing and willful violations). In *Green Master II*, the Commission noted that in enacting section 13(a) of the Act, Congress established higher penalties for knowing and willful violations of the Act. *Green Master II*, 29 S.R.R. at 1323 (citing H.R. Rep. No. 53, 98th Cong., 1st Sess. Pt 1, at 19 (1983)).

Based on both the legislative history of section 13(a) highlighting the importance of higher penalties to deter violations, and Commission precedent of assessing higher penalties for knowing and willful violations, we conclude that assessment of a per shipment penalty amount set between \$6,000 and \$30,000 is reasonable. In determining a specific penalty amount, Tober's culpability, lack of history of prior offenses, and apparent lack of ability to pay should also be considered. In this case, Tober continued its unlawful operations after being warned to stop and after this investigation was initiated; this factor weighs against Tober. On the other hand, Tober's lack of prior Shipping Act violations and inability to pay are mitigating factors. Taking these factors into consideration, in addition to the primary purpose of penalties to deter future violations, and the level of penalties assessed by the Commission for knowing and willful violations in past proceedings, we conclude that a penalty of \$6,000 per violation should be assessed in this proceeding, for an aggregate penalty of \$1.5 million. This aggregate penalty equals a penalty of \$6,000 applied to 250 violations, or slightly fewer than the 255 shipments Tober accepted from the entities.

III. CONCLUSION

Upon consideration of the findings and conclusions set forth above, and the determination that Tober violated sections 10(b)(11) and 10(b)(2)(A) (46 U.S.C. §§ 41104(11) and 41104(2)(A)) of the Shipping Act, and the Commission's regulations at 46 C.F.R. § 515.27, by knowingly and willfully accepting cargo from or transporting cargo for the account of an entity acting as an ocean transportation intermediary without a tariff or bond as required by sections 8 and 19 of the Shipping Act, and by providing service in the liner trade that was not in accordance with rates and charges contained in a published tariff, it is hereby

ORDERED, That Respondent Tober Group, Inc. remit to the United States the sum of \$1.5 million as a civil penalty for 255 violations of section 10(b)(11), and 279 knowing and willful violations of section 10(b)(2)(A), of the Shipping Act of 1984, 46 U.S.C. §§ 41104(11) and 41104(2)(A).

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Commissioner DOYLE, concurring, joined by *Chairman* CORDERO and *Commissioner* LIDINSKY:

I concur with the final Decision and Order in *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 Regulation's at 46 C.F.R. 515.27.

I am pleased that this decision and order is final. Indeed, the proceeding in this matter began over seven (7) years ago with an Order of Investigation and Hearing issued on May 11, 2006.

I spent a significant and substantial amount of time wading through the procedural history of this case. There are approximately 125 individual docketed items related to this proceeding. There were two different Administrative Law Judges (ALJs) and a Mediator assigned to this matter throughout its procedural history.

I reviewed the related briefs, motions, orders and memorandums issued by the ALJs, FMC staff and the Commission including but not limited to:

- EuroUSA Shipping Inc., 30 S.R.R. 988 (FMC 2006)
- ALJ Memorandum and Order granting Tober's Motion for Partial Summary Judgment (issued June 12, 2008)
- Bureau of Enforcement's (BOE's) Appeal of Administrative Law Judge's Order Granting Tober Group Inc.'s Motion for Summary Judgment Errata w/attached Corrected Table of Authorities (served July 8, 2008)
- Tober Group, Inc.'s Unopposed Motion for Extension of Time to Respond to Bureau of Enforcement's Appeal of Administrative Law Judge's Order Granting Motion for Summary Judgment (served July 17, 2008)
- The Commission's Unanimous Order granting BOE's appeal of the ALJ's grant of summary judgment which reversed the ALJ's evidentiary rulings striking certain evidence; and concluded that genuine issues of material fact existed (Commission's Unanimous Order served December 18, 2008)

- BOE's Proposed Findings of Fact and Conclusions of Law (served May 22, 2009)
- BOE's Motion to Reopen the Proceeding for the Purposes of Receiving Additional Evidence (served September 29, 2009)
- BOE's Additional Proposed Findings of Fact, Brief and Appendix (served September 29, 2009)
- Initial Decision of ALJ on Investigation of Tober Group, Inc. (served October 9, 2009)
- Memorandum and Initial Decision on Settlement Agreement and Joint Memorandum in Support of Proposed Settlement Filed by BOE and EuroUSA Shipping, Inc. (served October 9, 2009)
- ALJ's Initial Decision on Investigation of Container Innovations (served December 1, 2009)
- Commission's Order vacating the ALJ's Initial Decision in Part, Reversing in Part, and Remanding for Further Proceedings in light of the then recent Worldwide Relocations, Inc. – Possible Violations of the Shipping Act, Docket No. 06-01 (Commission's Order served April 12, 2012)
- BOE's Brief on Remand (served May 11, 2012)
- BOE's Supplemental Brief on Remand Issues (served May 23, 2012)
- ALJ's Initial Decision on Remand (served December 31, 2012)

- BOE's Exceptions to ALJ's Initial Decision on Remand (served May 30, 2013)

In closing, I appreciate the Commission's focus with respect to clearing the backlog of cases that have been lingering in the administrative arena for far too long. I fully subscribe to and will continue to work toward reaching the most expeditious, transparent and fairly balanced decisions on all matters before the Commission.

Commissioner DYE, dissenting:

I would affirm the ALJ's Initial Decision on Remand in this matter, for the reasons stated in my Concurrence and Dissent in Docket 06-01, *Worldwide Relocations, LLC, et al.* and my Dissent in Docket 06-06, *EuroUSA Shipping, Inc., Tober Group, Inc. – Possible Violations of the Shipping Act.*