

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 07-02**

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

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**BRIEF UPON REMAND OF THE  
BUREAU OF ENFORCEMENT**

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

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

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**BRIEF UPON REMAND OF THE  
BUREAU OF ENFORCEMENT**

Pursuant to the presiding officer's Order of May 1, 2012, the Bureau of Enforcement (BOE) files its Brief Upon Remand addressing issues raised in the Commission's Order Vacating Initial Decision and Remanding For Further Proceedings, served April 26, 2012, in Anderson International Transport And Owen Anderson – Possible Violations Of Sections 8(a) and 19 of the Shipping Act Of 1984, \_\_\_ S.R.R. \_\_\_.

**I. RELEVANT PROCEDURAL BACKGROUND**

This proceeding was instituted by an Order of Investigation and Hearing, served March 22, 2007, to determine: 1) whether Owen Anderson and Anderson International Transport<sup>1</sup> (hereinafter collectively referred to as Anderson or Respondents unless context requires otherwise) violated section 8 of the Shipping Act of 1984, 46 U.S.C. §40101, et seq. (the Shipping Act), and the Commission's regulations at 46 C.F.R. Part 520 by operating as a non-vessel-operating common carrier (NVOCC) without publishing a tariff; 2) whether Respondents

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<sup>1</sup> Anderson International Transport was operated as a sole proprietorship by Owen Anderson.

violated sections 19(a) and (b) of the Shipping Act and the Commission's regulations at 46 C.F.R. Part 515 by operating as an ocean transportation intermediary (OTI) in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of a bond or other financial responsibility; 3) whether, in the event one or more violations of the Act or the Commission's regulations are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed; and 4) whether, in the event violations are found, cease and desist orders should be issued.

On August 28, 2009, the ALJ issued his Initial Decision, finding that Respondents knowingly and willfully committed 22 violations with respect to section 19, but not section 8, of the Shipping Act. Anderson International Transport – Possible Violations, 31 S.R.R. 864 (ALJ, 2009). A cease and desist order was issued with respect to Respondents, but the ALJ declined to assess civil penalties thereon. BOE thereafter petitioned the Commission to reopen the proceeding for the purpose of taking additional evidence relevant to the civil penalty issue, and on December 4, 2009, the Commission granted BOE's petition and remanded the proceeding to the ALJ to permit such evidence to be introduced. 31 S.R.R. 1091 (FMC, 2009). On February 23, 2010, the ALJ issued his Memorandum and Order on Remand For Determination of Civil Penalty, assessing civil penalties totaling \$33,950.00 for the twenty-two knowing and willful violations. 31 S.R.R. 1232 (ALJ, 2010).

On March 9, 2010, the Commission issued a Notice to Review stating its intention to review ALJ's decisions herein. On March 15, 2010, BOE filed Exceptions to the August 28, 2009 Initial Decision (Initial Decision) and the Supplemental Decision of February 23, 2010 (Supplemental Decision).

In a two-page decision served April 26, 2012, the Commission vacated the initial and supplemental decisions, and remanded this matter to the ALJ for further proceedings consistent with the Commission's holding in Worldwide Relocations Inc. et al – Possible Violations of the Shipping Act, \_\_\_ S.R.R. \_\_\_ (slip op. issued Mar. 15, 2012) (Worldwide).

By Order served May 1, 2012, the ALJ directed BOE to file a brief addressing the issues raised by the Commission.

## **II. PRELIMINARY MATTERS**

This matter having been remanded to determine anew whether Anderson violated sections 8 and 19 of the Shipping Act, BOE hereby incorporates by reference its substantive filings herein, including but not limited to the Bureau of Enforcement's proposed Findings of Fact as submitted on February 15, April 4 and November 21, 2008; and related briefing materials including BOE's additional briefing submitted December 22, 2009.

In light of the standards announced in Worldwide and the expedited briefing schedule established in the ALJ's Order of April 19, BOE has likewise re-examined the evidence submitted in this proceeding with respect to the ocean transportation transactions of Anderson. In order to facilitate an early and dispositive decision by the ALJ, BOE requests withdrawal of the Fiedel Udense (Like New Auto Salvage) shipment from consideration of possible violations herein. This action affects BOE Appendix 13 and related Bates pages 340-438. BOE also asks the ALJ to take cognizance that BOE Appendix 6 comprises two distinct shipments on behalf of shipper Clifton Watts, rather than a single shipment. The first shipment includes documents at Bates pages 76, 78-81, 83, 86, 89-93, 95-102 and 107-120; the second shipment is memorialized in Bates pages 71-75, 77, 80, and 84-85.

The net effect of these changes is that the total number of alleged violations remains unchanged, at 22 shipments. BOE submits that the evidence as to these 22 shipments sufficiently establishes Anderson's violation of sections 8 and 19 of the Shipping Act under the Worldwide standards.

### III. EVIDENTIARY CONSIDERATIONS UNDER THE WORLDWIDE CASE

The Commission's recent decision in Worldwide addressed acceptable methods of proving that an entity acts as an NVOCC including the subsidiary considerations of holding out as a common carrier and assuming responsibility for transportation. Much as in the instant case, the issues in Worldwide required a determination of the NVOCC status of the respondent companies that were operating without licenses, tariffs, or bonds.

In reviewing the ALJ's Initial Decision in Worldwide<sup>2</sup> finding that the entities acted as NVOCCs, the Commission expressly approved the use of inferences and presumptions as supplementing and fulfilling the evidentiary standard to establish violations by a preponderance of the evidence. Significantly, the Commission recognized the practical difficulties of proof in cases where a party respondent absconds and/or shipment documentation is deemed incomplete or not adequately sponsored by testimony. In such cases, reasonable inferences may be drawn to fill in the blanks. Worldwide, slip op. at 13. The inferences must be reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry. Worldwide, slip op. at 14.

Presumptions are simply logical or reasonable inferences drawn from established facts that may be rebutted by evidence. Id. The Commission held that permissive presumptions may be employed to determine whether an entity operated as an NVOCC or as an ocean freight

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<sup>2</sup> 31 S.R.R. 1471 (ALJ, 2010).

forwarder. Id. Permissive presumptions may be used where one party has superior access to or control of the evidence and that party has the opportunity to come forward and present evidence that would rebut the presumption. When the adverse party does not come forward 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. Id.

Inferences are also appropriate when there appears to be uniform evidence on one element, such as holding out, for a given number of shipments but no evidence on that same element for a different shipment in a given time period. The Commission observed that an inference is especially appropriate when, as here, dealing with violations where an entity's status as a common carrier is at issue and when dealing with an element that speaks to a course of conduct such as holding out. Worldwide, slip op. at 12-13. Reviewing the case before it, the Commission acknowledged that the ALJ need not analyze each shipment independently to determine whether the entity was holding out in each instance, but could look to the respondent's overall activities during the relevant time period as establishing a course of conduct with respect to the question of holding out. This approach corresponds to the use of evidence of an entity's routine practice in Federal court proceedings in order to establish the conduct of that entity on a particular occasion. Worldwide, slip op. at 13, citing Federal Rule of Evidence 406.

Inferences and presumptions also may be used to establish that an entity assumed responsibility for transportation. For example, an entity's routine practice may be relevant in determining that it assumed responsibility for a particular shipment. Worldwide, slip op. at 16. The Commission also held that it is permissible to infer or presume that an entity does what it advertises. Id. Inasmuch as the entity made the decision to advertise to the public, crafted the wording of its advertisements, and arranged to broadcast these representations for all to see, the

Commission found it reasonable and consistent with legal requirements to impute actions to its words, keeping in mind that such entity must be afforded an opportunity to refute the inference or presumption through the introduction of contrary evidence.

The import of the Worldwide decision in establishing common carrier status was summarized by the Commission in the following terms:

. . . once 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 utilized for part or all of that transportation, then that finding may apply to any and all shipments during the relevant time period.

\* \* \* \* \*

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. Worldwide, slip op. at 18.

#### **IV. ARGUMENT**

In the hearings phase of this proceeding, BOE submitted substantial evidence showing that Respondents assumed responsibility to the proprietary shippers to provide the entire transportation, including bills of lading issued by Anderson to shippers covering through service from a U.S. origin to a foreign destination, issuing written rate quotations Anderson gave to shippers for door-to-door service, email exchanges between Respondents and the proprietary shippers concerning their international shipments, shipper affidavits attesting to Respondents’ assumption of responsibility for the transportation of their cargo, and discovery admissions by Respondents confirming that they provided “door-to-port” and “door-to-door” service to their

customers.<sup>3</sup> Despite numerous opportunities and ALJ directives to submit evidence and/or argument, Respondents chose not to submit any response addressing or rebutting the evidence.

In Worldwide, the Commission revisited the standards for determining whether an entity acts as an NVOCC by “holding out” and “assuming responsibility” for the transportation of goods in the U.S. foreign commerce. The Commission’s decision there described the circumstances under which the use of inferences or permissible presumptions as to NVOCC status may be applied in determining whether an entity is operating as an NVOCC, and asserted that “the factual circumstances would be unusual where the permissive presumption, as described above, would not apply when an FMC-licensed entity conducts business with unlicensed entities, coupled with the situation where an entity either simply refuses to participate in the Commission proceedings or declines the opportunity to offer any credible rebuttal evidence,” Worldwide, slip op. at 17. Applying those same inferences herein, BOE submits that findings of NVOCC status may then be applied to “any and all shipments during the relevant time period,” Worldwide, slip op. at 18, subject to the opposing party’s right to offer contrary evidence.

Where, as here, no evidence is offered in opposition to the evidence submitted, a *prima facie* showing satisfies the preponderance of evidence standard. Anderson v. Department of Transportation, 827 F.2d 1564, 1572 (Fed. Cir. 1987), *citing* Hale v. Department of Transportation, 772 F.2d 882, 886 (Fed. Cir. 1985), (“An unrebutted *prima facie* case is necessarily, by definition, a preponderance of the evidence.”). The evidence presented by BOE constituted, at a minimum, a *prima facie* showing that Respondents held themselves out to

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<sup>3</sup> Respondents’ Answer to Request for Admission #7, found at BOE App. #4. Anderson also conceded therein that “our service” includes packing, inland transport, ocean freight, and destination services.

provide and assumed responsibility for transportation of cargo by water from the United States to a foreign destination. There is no countervailing evidence in the record.

**A. Based on the evidence and reasonable inferences therefrom, the ALJ should find that Respondents assumed responsibility for transportation.**

To meet the definition of an NVOCC, an entity must be shown to be a common carrier. 46 U.S.C. §40102 (16). A common carrier 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; assumes responsibility for the transportation 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 on the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102 (6). While Anderson might well be expected to challenge BOE's evidentiary case by arguing that Anderson International Transport did not "assume responsibility" for the transportation of the shipments in issue, Anderson made no such showing.

A determination of the common carrier status of an entity should be made on the bases of the statutory definition and Commission precedent applying that definition. EuroUSA, Inc., et al. - Possible Violations, 31 S.R.R. 540, 551 (FMC, 2008). As an expert agency, the Commission possesses a special familiarity with the industry it regulates and may properly make reasonable inferences based upon circumstantial evidence. Sea-Land Service, Inc. - Possible Violations, 30 S.R.R. 872, 882 (FMC, 2006). Thus, the Commission has stated, "[c]ommon carrier'. . . is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens." Puget Sound Tug and Barge v. Foss Launch and Tug Co., 7 F.M.C. 43, 48 (1962). In considering the common

carrier status of an entity, it remains important to do so in light of the purposes of the statute and the Commission's responsibility for regulation to effectuate the remedies intended by the enactment of the regulatory statute. Tariff Filing Practices, Etc., of Containerships, Inc., 9 F.M.C. 56, 68-69 (1965). Accord, Worldwide, slip op. at 17 ("The Commission has a strong public policy interest in protecting consumers and the shipping public by ensuring that FMC-licensed common carriers, both VOCCs and NVOCCs, only conduct business with either beneficial cargo owners or FMC-licensed or registered OTIs.")

Given the two shipper affidavits submitted by BOE on this issue, the evidence of Anderson's NVOCC status is clear and uncontroverted. Cargo owner Dirk Manuel thus testified, in relevant part:

1. My name is Dirk Manuel. I moved from Katy, Texas to Brussels, Belgium in late 2004. My wife obtained several quotes from moving companies including Anderson International Transport who was listed in the Houston, Texas Yellow Pages under international movers. We dealt exclusively with Owen Anderson, the owner of the company. Mr. Anderson came to our home, surveyed our property and on November 19, 2004, provided a quote of \$5450.00 inclusive of inland freight, ocean freight, packing, documentation and service charges. The quote included delivery to our yet to be determined address in Brussels, Belgium. In late December 2004, Mr. Anderson had a container delivered to our home and packed our belongings in the container. He made arrangements for a truck to pick up the container and deliver it to the port.

2. According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium. Although Mr. Anderson eventually provided me with the name of the vessel transporting my container so I could track its progress, I had no contractual relationship with any transportation entity other than Anderson International Transport and Mr. Anderson. Mr. Anderson never indicated he was a broker or agent for any other company. I never received copies of any documentation from any entity other than Mr. Anderson's bill of lading and inventory sheets.

AFFIDAVIT OF DIRK MANUEL, ¶¶1-2, attached to BOE Record Supplements filed April 10, 2009. Another shipper witness testifying on behalf of BOE gave similar testimony:

1. My name is Lynn Watt. My husband, Alex Watt, and I moved from the Houston, Texas area to Cairns, Australia in 2006. In the course of our research into moving companies, we found Anderson International Transport listed in the Houston, Texas Yellow Pages under international movers and contacted them to obtain a quote. We dealt exclusively with Owen Anderson, the owner of the company. . . . Mr. Anderson then quoted us \$1,650.00 to reflect the smaller shipment. The quote included pickup in Houston, ocean freight, customs clearance and delivery to our home in Cairns, Australia. We accepted his quote. In late May, 2006, Mr. Anderson came to our house and boxed up our belongings and moved them to his warehouse. He provided me with a copy of a straight bill of lading which I signed showing that our goods would be shipped to Cairns, Australia. Shortly before I left the country, Mr. Anderson informed me that the price for the shipment had doubled. We agreed to pay the additional charges.

2. Although we understood that Mr. Anderson and his company did not actually own a vessel, we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport, Inc., to ship our goods. As far as we were concerned, Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. Mr. Anderson never indicated he was a broker or agent of any other company. We never received a copy of Shipco Transport, Inc.'s bill of lading and did not even know of their involvement in our shipment until it was delayed in Brisbane due to Mr. Anderson and Anderson International Transport's failure to pay Shipco Transport Inc. for ocean freight. We had no contractual relationship with Shipco Transport, Inc.

AFFIDAVIT OF LYNN WATT, ¶¶1-2, attached to BOE Record Supplements filed April 10, 2009.

The record shows that the proprietary shippers contacted, communicated, and dealt with Respondents, not the licensed NVOCCs or VOCCs, for the shipment of their goods from an origin point in the United States to a destination in a foreign country. Id. The shippers first came into contact with Respondents through Yellow Page listings that advertised Anderson as an international mover. Id. Direct shipper testimony establishes that Respondents undertook to provide door-to-door service to the proprietary shippers as reflected in through bills of lading issued by Respondents, estimates they provided for all-inclusive service, and invoices they sent to the shippers for such service. Id. The record thus demonstrates that Respondents assumed

responsibility for the transportation of the shippers' goods and that the shippers considered Respondents to be the responsible party for the transportation of their goods.

In addition to other types of transportation documents, Respondents issued its own bills of lading to the proprietary shippers for through transportation from a U.S. origin to a foreign destination in at least 13 instances. See BOE Appendix at 64<sup>4</sup> (Two Trees shipment from warehouse to China); 150 (Repairer of the Breach shipment); 158 (Manuel shipment); 236 (Osule shipment); 287 (Deleon shipment); 478 (Watts shipment); 563 (Zinnah shipment); 578 (Newman shipment); 607 (Dillon shipment); 618 (Huxtable shipment); 653 (Maniotes shipment); 680 (Hughes shipment); 445 (Downie shipment). Witness Lynn Watt described the significance of Anderson's action: "He provided me with a copy of a straight bill of lading which I signed showing that our goods would be shipped to Cairns, Australia." AFFIDAVIT OF LYNN WATT, ¶1, attached to BOE Record Supplements. The sole other shipper witness appearing in this proceeding stated: "According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium. . . . I never received copies of any documentation from any entity other than Mr. Anderson's bill of lading and inventory sheets." AFFIDAVIT OF DIRK MANUEL, ¶2, attached to BOE Record Supplements. As the Commission held in Worldwide, where a pattern of conduct on a number of shipments satisfies a preponderance of evidence as to one element of a violation, the ALJ may draw reasonable inferences that a person or entity acted similarly in handling other shipments when evidence as to that element is not directly available for that shipment. (Worldwide, slip op. at 13). Consequently, the ALJ can properly use the findings on the 13 shipments where Anderson issued its NVOCC bill of lading

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<sup>4</sup> The number references are to the Bates numbers found in the lower right corner of each document in BOE's Appendix.

to support the inference that Anderson likewise assumed responsibility for transportation of other 9 shipments involved in the instant proceeding.

While Anderson had ample opportunity to argue that bills of lading issued by third parties (i.e. carriers other than Anderson) reflect the operative contractual relationship with the proprietary shippers (such as Mr. Manuel and Ms. Watt), Anderson did not make such argument nor submit any evidence thereon. Given the testimony of the shippers above, the 13 bills of lading issued by Anderson directly to the cargo owners stand unrefuted as evidence of Anderson's carrier status. Moreover, the available witness testimony denied any knowledge of other carriers, AFFIDAVIT OF LYNN WATT, ¶2, attached to BOE Record Supplements, ("...we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport, Inc., to ship our goods.); refuted that any other party was made responsible for movement of the freight, Id. at ¶2 ("Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. Mr. Anderson never indicated he was a broker or agent of any other company."), Id.; and denied receiving any documentation to indicate that Anderson was not the NVOCC, AFFIDAVIT OF DIRK MANUEL, ¶2, attached to BOE Record Supplements, ("I never received copies of any documentation from any entity other than Mr. Anderson's bill of lading and inventory sheets.") See also, Two Trees Shipment, complaint of Vanessa Sever at Bates 030 ("We paid Anderson International to move a pallet of product to China for our customer. He insited (*sic*) that we pay in advance, which we did and FedExed our check.")

As BOE's shipper testimony and corresponding documentation of shipments tendered to Anderson for transport are not controverted, evidence of Anderson's bills of lading likewise must be accepted at face value in reflecting a contract for transportation to the foreign destination

shown thereon. While the ALJ sought to provide Respondents fair opportunity to submit evidence of a more-narrow holding out limited to providing transportation in domestic U.S. trades exclusively, see Order for Respondents Anderson International Transport and Owen Anderson to File Document, served March 11, 2009, Respondents likewise repudiated that opportunity by defaulting on the ALJ's Order. Adverse inferences are particularly appropriate when a party fails to produce documents, or when documents have been destroyed. Worldwide, slip op. at 9, citing Community Hospitals of Central California v. NLRB, 335 F.3d 1079, 1086-87 (DC Cir. 2003). Indeed, the written testimony of at least one witness lays to rest any potential claim that Anderson's address, or any other point specified on the Anderson bills of lading, were intended by the cargo owner to constitute an "intervening" point by which Anderson held out, and the cargo owner agreed to purchase, exclusively domestic transport. See AFFIDAVIT OF DIRK MANUEL, at ¶2, ("In late December 2004, Mr. Anderson had a container delivered to our home and packed our belongings in the container. He made arrangements for a truck to pick up the container and deliver it to the port.")

The intended final destination of a shipment is determined by the shipper's intent when the shipment commenced. Project Hope v. M/V IBN Sina, 250 F.3d 67, 74-75 (2<sup>nd</sup> Cir. 2001). The foreign destination identified on each bill issued by Respondents reflects the proprietary shipper's intent when the shipment commenced. The label attached by Respondents to that document, whether described as a "straight bill of lading" or a domestic bill, is unimportant provided the bill of lading unambiguously indicates the final delivery destination. Arkansas Aluminum Alloys, Inc. v. Emerson Electric Co., 2007 WL 4510366 (W.D. Ark. 2007) (despite the label straight bill of lading, "it meets the definition of a through bill as the final delivery destination of the goods is unambiguously indicated on the document."). Whether a particular

document is a through bill is a question of fact, to be determined by examining such factors as whether the final destination is indicated on the document; the conduct of the shipper and the carriers; and whether the carriers were compensated by the payment made to the initial carrier or by separate consideration from the shipper to each. Tokio Marine & Fire Insurance Co. v. Hyundai Merchant Marine Co., 717 F. Supp. 1307, 1309 (N.D. Ill. 1989). The shipper testimony is clear on each of these points; it is equally clear that no countervailing testimony has been received.

In the instant case, the bills of lading issued to the shippers by Anderson identify a domestic origin and a foreign destination where the goods are to be delivered. This undertaking to provide the through service reflected in these bills of lading and assume responsibility for that transportation is also demonstrated by its course of conduct as reflected in other documents it issued, including estimates and/or invoices it provided to shippers for all inclusive door-to-door service (BOE App. at Bates 179, Manuel shipment; 215, Osule; 286, DeLeon; 459, Watts; 525, 560, 566, Zinnah; 587, Newman; 606, Dillon; and 615, Huxtable); Anderson's own admission that it provided door-to-door service (Respondents' Response to BOE's Request for Admission No. 7); booking confirmations transmitted by the carrier or NVOCC to AIT showing AIT alone as the shipper (BOE App. at Bates 252, DeLeon shipment; 558, Zinnah shipment; 651-52, Maniotes shipment); the issuance of invoices by VOCCs/NVOCCs solely to Anderson requesting payment for their services, the corresponding payments of those invoices by Respondents, and the entirely separate billing by Respondents to the proprietary shippers in amounts different than that charged to Anderson. (BOE App. at Bates 442, Downie shipment; 682, Hughes; 650, 665, Maniotes). These are all indicia of a through service. Marine Office of America Corp. v. NYK Lines, 638 F.Supp. 393, 399 (N.D.Ill. 1985); Tokio Marine & Fire,

supra, at 1309; and Arkansas Aluminum, supra, at 1. As un rebutted evidence, this showing sufficiently established that Anderson's bills were issued as through bills.

Neither does Respondents' DOT certificate (found at Bates p. 268) successfully rebut Anderson's assumption of responsibility as an NVOCC operating in international commerce. The Commission may take official notice of the licensing and insurance records maintained by DOT's Federal Motor Carrier Safety Administration on its website. 46 C.F.R. §502.226. That information reveals that Anderson's authority was issued and revoked on various dates and was in effect only for one shipment, *viz.*, Claudette Dillon on September 11, 2006. See [http://li-public.fmcsa.dot.gov/LIVIEW/pkg\\_carrquery.prc\\_carrlist](http://li-public.fmcsa.dot.gov/LIVIEW/pkg_carrquery.prc_carrlist). Inasmuch as Anderson was without lawful authority to operate as a domestic motor carrier of household goods, 49 U.S.C. 13901-902, 13906, Anderson's bill of lading cannot now be read so narrowly as to effectuate a domestic legal status Anderson did not validly maintain before the FMCSA; neither should it be construed to negate his larger responsibility for undertaking transportation of these shippers' possessions from U.S. origin to their foreign destination, inclusive. Anderson made no such claims of a diminished regulatory capacity for himself in this proceeding, and eschewed the ALJ's instruction to submit evidence thereon. *See, e.g. Adair v. Penn-Nordic Lines*, 26 S.R.R. 11, 15 (ALJ Kline, 1991) ("It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so.") *citing Alabama Power Co. v. F.P.C.*, 511 F.2d 383, 391 (DC Cir. 1974); *Worldwide*, slip op. at 10 ("We likewise infer that if documents would have been produced, they would be adverse to [Respondents].")

It bears emphasis that the evidence presented by BOE and the inferences drawn therefrom are uncontroverted. Anderson had the full, fair, and unrestricted opportunity to contest or rebut the evidence, but elected not to.

**B. Based on the Evidence of Record, Anderson International Transport Was Not Operating as a Freight Forwarder.**

Whereas the recent decision in Worldwide stands as explicit authority that 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,” slip op. at 3, any search for contrary evidence necessarily requires examination of the activities of Respondents in their relationship with the proprietary shippers. A key legal distinction between an OTI forwarder and OTI NVOCC is that a freight forwarder acts as the agent of a principal (a shipper or consignee), New York Freight Forwarder Investigation, 3 U.S.M.C. 157, 164 (1949), *citing* U.S. v. American Union Transport, 327 U.S. 437, 443 (1946), whereas the NVOCC is a transportation company (carrier) that is physically responsible for the carriage of goods and acts as its own principal. Companies acting strictly as an ocean freight forwarder do not issue their own contract of carriage (bill of lading) nor, as agents, can they generally be found liable for physical loss or damage to cargo.

Based on the evidence of record in the instant case, Anderson International Transport cannot be found to be operating as a freight forwarder. The determination whether Respondents acted as a freight forwarder, an agent on behalf of the shipper, first requires evidence that one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control. RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006), cited in Landstar Express America v. Federal Maritime Commission,

569 F.3d 493, 497 (D.C. Cir. 2009). A manifestation of assent by the principal is an essential requirement to creating agency. RESTATEMENT (THIRD) OF AGENCY, §§1.03, 3.01. See also AgriStor Leasing v. Farrow, 826 F.2d 732, 737 (8th Cir 1987) (determination “of an express or implied agency focuses on communications and contacts between the principal and the agent.”). In the instant case, no evidence has been presented, and no allegation ever made by Anderson, as to conduct by which any of the named shippers herein expressed an intent to authorize Anderson to serve as forwarder (agent) on behalf of these shippers (principals).

Ultimately, agency must be established on the basis of some agreement, whether written or oral, on the part of the purported principals (here, the cargo owners) expressly creating or authorizing another to serve as agent. RESTATEMENT (THIRD) OF AGENCY, supra at §1.01. In the two explicit instances presented in the record by BOE (with no contrary factual record), the involved cargo owners categorically denied any intention to create a “contractual relationship with any transportation entity other than Anderson International Transport and Mr. Anderson.” AFFIDAVIT OF DIRK MANUEL at ¶2, BOE Record Supplements; and, “According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium.” Id. In the case of affiant Lynn Watt, she states: “. . . we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport Inc. to ship our goods. As far as we were concerned, Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia.” AFFIDAVIT OF LYNN WATT, ¶2, BOE Record Supplements. The un rebutted witness testimony here plainly negates any finding that “establishes one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the

principal's behalf and subject to the principal's control." RESTATEMENT (THIRD) OF AGENCY, supra.

Virtually all shipments in this case are evidenced by, at a minimum, an Anderson "house" bill of lading (13 of 22 shipments), a bill of lading issued by an NVOCC or ocean common carrier to Anderson and an Anderson invoice to the proprietary shipper. Those bills of lading issued by other carriers to Anderson identify the shipper in a variety of ways, none of which, we submit, accurately reflect the true relationship of the parties. On most bills, a proprietary shipper was named, in many instances showing "in care of" or "c/o" Anderson at the latter's business address in Texas. In contrast to these ambiguous and misleading identifications on the bills of lading, the Anderson invoices to his customers were consistently issued directly to the proprietary shipper, while no carrier third party invoices were so issued. Anderson's charges were typically stated as "door to door services" or "all inclusive". Respondents Answer to Request for Admission #7, at Bates p. 013; Clifton Watts shipment, Bates p. 105 (invoice prepared by Anderson identifies "shipping cost Houston to Kingston inclusive of freight, packing and service"); Osule shipment, Bates p. 245 (invoice issued by Anderson to his shipper identifies "shipping cost Houston to Tilbury dock England inclusive of freight, packing and service charge"); Deleon shipment, Bates p. 287 (invoice issued by Anderson to his shipper identifies "shipping cost Houston to Reykjavik Iceland inclusive of pickup[,] linehaul, ocean freight and service charge"); Ray Cooper export shipment, Bates p. 331 (invoice issued by Anderson to his shipper identifies "shipping cost Houston to London"); Watts shipment, Bates p. 459 (invoice issued by Anderson to his shipper identifies "shipping cost inclusive of packing[,] pickup, ocean freight, inland delivery and service charge"), among others. Given that Anderson itself prepared the bill of lading master tendered to the carrier or NVOCC, and that the booking confirmations

initially issued by such carriers to Anderson typically identified Anderson alone as the shipper, it must be concluded that Anderson's own invoices present the more accurate picture of the relationships between the Anderson and his customers, and as between Anderson and the carriers to whom Anderson sub-contracted the carriage.

Instructive of the current record here, the Commission addressed evidentiary problems arising from ambiguous and/or misleading descriptions in those shipping documents presented in Worldwide. For some shipments, an intermediary's invoices were available. Those documents typically indicated that the intermediary was billing its customer at a higher charge than it paid to the downstream NVOCC, a customary practice of an intermediary acting as an NVOCC. On other shipments, however, the invoices were not available and the only documents appearing in the record were the bills of lading issued by the downstream NVOCC, which, as here, were often misleading or ambiguous by identifying the proprietary shipper's name even though it did not directly deal with the shipper. The Commission held in Worldwide that the ALJ could infer from the entity's routine practices on other shipments that the bill of lading was often misleading as to the identity of the shipper, and could conclude that the bills of lading of the downstream NVOCC might not answer whether the proprietary shipper had a relationship with the downstream carrier. Worldwide, slip op at 20. This "pattern of manipulating the identity on the bill of lading" thus provided the basis for inferring that the Respondents routinely misrepresented who the shipper was on shipping documents they prepared, tendered and subsequently corrected. Worldwide, slip op. at 19-20. In light of the NVOCC bills of lading issued by Anderson, but never explained or justified by Respondents at hearing,<sup>5</sup> BOE submits that the ALJ likewise

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<sup>5</sup> See, Order for Respondents Anderson International Transport and Owen Anderson to File Document, served March 11, 2009. Respondents neither complied nor explained their failure to respond to the ALJ's mandate to address the significance of Anderson's straight bill of lading.

should infer that Anderson manipulated the identity on those bills prepared and tendered to carriers subcontracted by Anderson to provide the transportation. Id.

Anderson's manipulation of other carriers' bills of lading was not limited solely to the issue of identifying the correct shipper. Numerous of the transactions initiated by Anderson reflect an intent to evade and defeat U.S. export reporting requirements as mandated by the U.S. Census Bureau. Under 15 C.F.R. 30.2, an Electronic Export Information (EEI) must be filed through the Automated Export System<sup>6</sup> by the exporter or its authorized agent for all exports of physical goods, subject to various exceptions crafted by Census based on value of the goods, certain classes of commodity, potential uses (i.e. commercial or military), and intended destinations. As relevant herein, one such exception, 15 C.F.R. 30.37 (a), provides that filing EEI is not required "where the value of the commodities shipped from one USPPI to one consignee on a single exporting carrier," is \$2,500 or less. Notwithstanding such requirement, Anderson routinely prepared and annotated<sup>7</sup> the other carriers' bills of lading to improperly claim an exemption for value "less than \$2500" in numerous instances. Compare e.g. Clifton Watts shipment #1, Bates p. 086, 091 (bill of lading master with declared value less than \$2500); with Bates p. 099 (customer purchase order as to goods shows value at \$8000); Dirk Manuel shipment, Bates p. 154-155 (Atlanticargo bill of lading annotated "No SED Required - AES - N.E.D.R. Value Less Than \$2500") with Bates p 196, 202-03 (inventory of household goods valued at \$60,000) and Bates p. 166 (insurance certificate procured by Anderson International Transport with valuation of \$60,000); Osule shipment, Bates p. 221, 233 (Anderson documents

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<sup>6</sup> The Automated Export System (AES) is the electronic system for collecting the Shipper's Export Declaration (SED) (or any successor document) information from persons exporting goods from the United States. 15 C.F.R. 30.1.

<sup>7</sup> The exporter or his authorized agent is responsible for annotating the proper proof of filing citation or exemption legend on the first page of the bill of lading, air waybill, export shipping instructions or other commercial loading documents. The exporter or the authorized agent must provide the proof of filing citation or exemption legend to the exporting carrier. 15 C.F.R. 30.7 (b).

prepared for carrier annotated “N.E.D.R. Value Less Than \$2500”) and Bates p. 245 (invoice to cargo owner cites “insurance at \$51,000”), Bates p 222 (Anderson message to procure insurance at \$51000), and Bates p 250-251 (bill of sale for vehicle); Zinnah shipment, Bates p.534, 545-546 (ACL bill of lading annotated by Anderson “No SED Required, Value Less Than \$2500”) and Bates p 532 (information sheet values 2001 Jeep at \$6500). See also Deleon shipment, Bates p 272, 276 (Finn Container bill of lading and bill of lading master prepared by Anderson with declared value less than \$2500) and Bates p. 274 (Dock receipt issued by Anderson to cargo owner omits any mention of declared value). Such false or fraudulent use by Anderson of the AES reporting system is subject to criminal and civil penalties, and could have subjected the owner’s goods to forfeiture, 15 C.F.R. 30.71. Anderson, and Anderson alone, was responsible for determining what information would be included on the bill of lading masters tendered to other ocean carriers.

Finally, in viewing the actions of Anderson as acts of an agent for the cargo owners, the ALJ must consider that a more truthful and accurate claim of NVOCC status by Anderson when booking the cargo with other carriers might have had the effect of frustrating Anderson’s unlawful efforts to contract for transportation in the freight marketplace. As Commission Area Representative Al Kellogg testified “. . . unlicensed NVOCCs often route their cargo through another licensed NVOCC, as Respondents did. This may be because the licensed NVOCC has a service contract with an ocean carrier that provides better rates and/or because the ocean common carriers refuse to provide service directly to these unlicensed entities as they are prohibited from doing so by the Shipping Act of 1984.” (emphasis added.) See Affidavit of Alvin Kellogg at ¶5, BOE Record Supplements. Since Anderson’s unlicensed NVOCC status would bar Shipco, Finn Container, ACL and others from accepting its cargo, 46 U.S.C.

41104(11), Anderson had every motivation to falsely claim forwarder status in his dealings with other carriers. Given a consistent and continuing practice of declaring false or inaccurate information generally to the carriers to which Anderson subcontracted its cargoes, the ALJ should infer that little weight, and little credibility, can be given to the information, claims or descriptions provided by Anderson in those bills of lading or bills of lading masters which it prepared and tendered to other carriers.

### **C. All Violations Were Knowingly and Willfully Committed by Anderson**

In establishing that Anderson violated section 8 and 19 by operating as an ocean transportation intermediary (NVOCC) without the required tariff and bond, BOE also presented evidence and proposed findings that such violations were committed “knowingly and willfully” within the meaning of the Shipping Act.

The Commission has defined the phrase “knowingly and willfully” to mean “purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” Trans-Ocean Pacific Forwarding, Inc. – Possible Violations, 27 S.R.R. 409, 412 (ALJ 1995), citing United States v. Illinois Central R. Co., 303 U.S. 239 (1938). The Commission elaborated further in Pacific Champion Express Co., Ltd. – Possible Violations, 28 S.R.R. 1397, 1403 (FMC 2000), where it stated:

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

violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.” [citation omitted].

Similarly, in Stallion Cargo, Inc.—Possible Violations, 29 S.R.R. 665, 677 (FMC 2001), the Commission reiterated that: “An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” Accord, Rose Intl Inc v. Overseas Moving Network Intl. Ltd., 29 S.R.R. 119, 164-65 (FMC 2001).

BOE contends that all violations herein were committed “knowingly and willfully” inasmuch as Anderson has been shown to be aware of the Shipping Act and its requirements since at least 1997. At that time, BOE opened an investigation into Anderson based on information then available to the Commission. BOE Proposed Findings of Fact (“PFF”) 20, submitted February 15, 2008. The Commission’s erstwhile New Orleans Area Representative, Alvin Kellogg, interviewed Anderson in January 1997 about numerous shipments of household goods and automobiles, and reviewed with Anderson the requirements and obligations of licensed freight forwarders and the tariff and bonding requirements applicable to NVOCCs. BOE PFF 21. In a subsequent visit in November 1997, Anderson was again reminded of the NVOCC requirements, BOE PFF 22; Anderson advised that he preferred to get out of those business activities which required bonding, Id.

Based on explicit warnings and his prior attempt to apply for an OTI license in July 2007, Kellogg Affidavit, BOE App. 27 at Bates pg. 687, Anderson may affirmatively be charged to know the licensing, tariff, and bonding requirements of the Shipping Act, the distinctions between forwarders and NVOCCs, and the prohibitions in the statute. Anderson represented to the New Orleans Area Representative that he would “get out” of the regulated business of

NVOCC activities. PFF 22. Despite this knowledge, Anderson flouted those requirements by conducting additional NVOCC activities during the period of this proceeding. Indeed, it continued to accept shipments as an unbonded, untariffed and unlicensed NVOCC after commencement of this proceeding. Kellogg Affidavit, ¶7 at Bates pg. 687, and BOE App. 24, 25 and 26.

At best, Anderson was plainly indifferent to the requirements of the statute and the Commission's regulations – at worst, Anderson intentionally disregarded them. In either case, Respondents' actions amply satisfy the criteria for establishing “knowing and willful” conduct. Comm-Sino Ltd. - Possible Violations, 27 S.R.R. 1201 (ALJ 1997); Ever Freight International Ltd. - Possible Violations, 28 S.R.R. 329 (ALJ 1998); Best Freight International Ltd. - Possible Violations, 28 S.R.R. 447 (ALJ, 1998); Pacific Champion Express, supra; and Stallion Cargo, Inc., supra.

**D. Civil Penalties Should Be Assessed Commensurate to Anderson's Knowing and Willful Violations of the Shipping Act.**

The Commission also directed the ALJ to decide anew the proper amount of penalties to be assessed against Anderson. Anderson, slip op. at 2. BOE urges that the Shipping Act contemplates that certain violations are exponentially more serious than others and therefore should be subject to a much higher penalty. Thus a two-tiered range of penalties is provided – up to \$6,000 for each violation or, if knowingly and willfully committed, up to \$30,000 per violation.<sup>8</sup>

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<sup>8</sup> Pursuant to statutory authority found at 28 U.S.C. 2461, the Commission periodically adjusts the penalty amounts set forth in 46 U.S.C. 41107. Under the Commission's regulations at 46 C.F.R. Part 506, the Commission adjusted the maximum levels to \$6,000 and \$30,000, effective August 15, 2000. In 2009, the agency increased these amounts to \$8,000 and \$40,000, respectively. See 74 FR 38114-38116 (July 31, 2009). The most recent increases do not apply to this proceeding.

Section 13(c) directs the Commission to take into account the nature, circumstances, extent and gravity of Respondents' unlicensed, unbonded operations – not the circumstances surrounding each shipment. Except as found in the plain language of the statute or the Commission's regulations, the ALJ should decline to embellish upon the prescribed civil penalty factors. Thus, the ALJ need not, and should not as a matter of law consider such extraneous factors as the size of the shipment and whether or not there were problems resulting in harm to the shipper. In Stallion Cargo, *supra*, the Commission previously ruled that other factors, specifically harm to shipper, are not relevant components in the penalty determination:

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

Turning to the ALJ's consideration of the penalty factors to be applied in the instant case, effect must be given to the proportional relationship between the maximum penalty for a knowing and willful violation of the Act and the penalty for those violations not committed knowingly and willfully, as provided in 46 U.S.C. §41107(a). The increased penalty for knowing and willful violations of the Act was first authorized by the Shipping Act of 1984, P.L. 98-237. Its predecessor statute, the Shipping Act, 1916, authorized a singular maximum civil penalty of \$5,000 for each violation. Congress believed that the penalties imposed under the 1916 Act failed to serve as an effective deterrent to prohibited acts and that violators could simply absorb penalties in these amounts as part of the "cost of doing business." See H.R. REP. No. 53, Part 1, 98th Cong. 1st Sess., *reprinted in* 1984 U.S.C.C.A.N. 167, 184. Accordingly, it added a separate penalty provision authorizing a penalty up to \$25,000 for each violation knowingly and willfully committed. Congress thus intended that the Commission apply a two-

level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations.

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. Martyn Merritt, AMG Services, et al. - Possible Violations, 26 S.R.R. 663, 664-665 (FMC, 1992). A logical and natural reading of the statute thus 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.

On the issue of ability to pay, BOE furnished information with respect to Owen Anderson's filings in a bankruptcy proceeding, and concluded that Respondents have a limited ability to pay. Id. Because the record in the bankruptcy proceeding shows that it was dismissed due to Anderson's failure to comply with the Court's directives, however, no substantive disposition was reached upon other issues in that truncated proceeding, such as determining the validity of creditor claims, establishing the availability of assets for payment of claims, or any process by which to verify the disposable income of the debtor. The Commission has, moreover, emphasized that ability to pay must be considered in the context of other factors, in particular, the severity of the violations. In Stallion Cargo, supra, 29 S.R.R. at 682, n.41, it said:

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

The Commission has likewise stated that the import of knowing and willful violations cannot be negated or neutralized by other factors, such as the absence of prior offenses. Sea-Land Service, supra, 30 S.R.R. at 894.

The Commission has been unwavering in addressing the main Congressional purpose of deterrence and compliance when imposing civil penalties. Pacific Champion Express Co., Ltd. - Possible Violations, supra, 28 S.R.R. at 1404-1405 (the applicable statutory factors include “the need to send an appropriate message of deterrence”); Kin Bridge Express, Inc. et al – Possible Violations, 28 S.R.R. 984, 994 (ALJ, 1999) (“[t]he instant task is to fix civil penalties that will send a message of punishment and deterrence”); Ever Freight International Ltd., et al – Possible Violations, 28 S.R.R. 329, 335 (ALJ 1998, admin. final June 26, 1998) (to assess less than the maximum would not serve the purpose of deterrence and would send the wrong message); and Martyn Merritt, AMG Services, et al – Possible Violations, supra, 26 S.R.R. at 664 (“In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to . . . the Congressional purpose to deter violations by imposing greater penalties in the 1984 Act.”); Stallion Cargo, supra, 29 S.R.R. at 681, and Portman Square, supra, 28 S.R.R. at 85. Indeed, in an analogous penalty situation in which all Shipping Act violations were “knowingly and willfully” committed, the penalty issue was recast by the Commission as requiring the ALJ to “address the question of why the maximum potential penalties should not be assessed.” Arctic Gulf Marine Inc., Peninsula Shippers Association Inc and Southbound Shippers Inc., 24 S.R.R. 159, 160 (FMC 1987) (emphasis added.)

The Commission’s clear policies for deterrence and future compliance as established and settled over the past quarter of a century, and the legislative purpose underlying the two-tiered structure providing a maximum penalty, and maximum deterrence, for knowing and willful

violations at levels five times that of other violations of the Act, call for the maximum civil penalty to be assessed here. Indeed, as noted by then-Chief Administrative Law Judge Kline in Refrigerated Containers Carriers Pty. Ltd. – Possible Violations, 28 S.R.R. 799 (ALJ, 1999), there are additional implications of the Commission’s penalty policy which have particular relevance to the absconding Respondents here:

Should the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed "compromise" discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings. 28 S.R.R. at 805.

Accordingly, should the ALJ believe that a civil penalty less than the maximum is warranted here, BOE urges that such penalty should be not less than \$6,000 per violation nor exceed \$30,000 per violation.<sup>9</sup> BOE takes this opportunity also to iterate the need for clear, durable and definitive remedial (“cease and desist”) relief to bar Owen Anderson from continued involvement in OTI activities. Such relief is warranted and would be consistent with relief recently accorded in the Worldwide case. See, e.g., Worldwide Initial Decision, 31 S.R.R. 1471, 1542-43 (ALJ, 2010) and Worldwide, slip op. at 22-24.

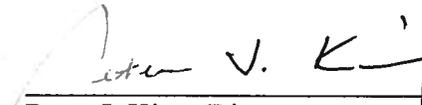
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<sup>9</sup> BOE notes that, even at the statutory maximum, the aggregate penalty herein would total \$660,000. This figure remains well below the penalty proposed by BOE in its remand brief in Docket No 06-06 (Tober), wherein BOE proposed an upper limit so as to avoid any appearance of “unduly harsh or extreme” penalties in addressing more than 200 violations there at issue. See e.g. World Line Shipping Inc. and Saeid B. Marlan (a/k/a Sam Bustani), 29 S.R.R. 808, 812 (FMC, 2002).

## **V. CONCLUSION**

Aided by the Commission's guidance in Worldwide, BOE submits that the ALJ here should find: (1) that Respondents assumed responsibility for transportation of by water of cargo between the United States and a foreign country for compensation within the meaning of the Act, 46 U.S.C. §40102(6), and therefore that their operations were those of an NVOCC; and (2) that Respondents therefore violated sections 8 and 19 of the Shipping Act in 22 instances. BOE respectfully requests that, upon consideration of this brief and the record in this proceeding, the Administrative Law Judge assess the maximum civil penalty authorized for 22 knowing and willful violations. Should the ALJ believe that a civil penalty less than the maximum is warranted here, BOE urges that such penalty should be not less than \$6,001 per violation nor exceed \$30,000 per violation.

Respectfully submitted,



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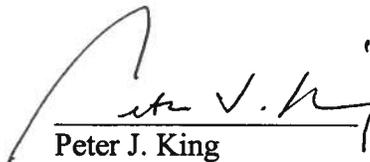
Peter J. King, Director  
Brian L. Troiano, Trial Attorney

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

May 22, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of May, 2012, a copy of the foregoing document has been served upon all the parties of record by first class mail.



Peter J. King

Owen Anderson  
Anderson International Transport  
3015 Richland Spring Lane  
Sugarland, TX 77479

Owen Anderson  
Anderson International Transport  
5354 Prudence Drive  
Houston, TX 77045