

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**

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

Peter J. King, Director
Brian L. Troiano, Deputy Director
BUREAU OF ENFORCEMENT
FEDERAL MARITIME COMMISSION
800 North Capitol Street, N.W.
Suite 900
Washington, D. C. 20573

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Pursuant to Rule 227 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. §502.227, the Bureau of Enforcement (BOE) files its Exceptions to the Initial Decision On Remand, served December 31, 2012 (Initial Decision on Remand or I.D.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 Transport¹(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 Act), and the Commission's regulations at 46 C.F.R. §520 by operating as a non-vessel-operating common carrier (NVOCC) without publishing a tariff; 2) whether Respondents violated sections 19(a) and (b) of the Act and the Commission's regulations at 46 C.F.R. §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

¹Anderson International Transport was operated as a sole proprietorship by Owen Anderson.

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.

BOE filed its Rule 95 statement, Proposed Findings of Fact and Appendix, Revised Proposed Findings of Fact, and Record Supplements responding to certain questions posed by the ALJ. No filings were made by or on behalf of Respondents.

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 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 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 a Memorandum and Order on Remand For Determination of Civil Penalty, assessing civil penalties totaling \$33,950.00 for the twenty-two willful and knowing violations, 31 S.R.R. 1232 (ALJ, 2010) (Supplemental Decision).

On March 9, 2010, the Commission issued a Notice to Review the ALJ's decisions, and on March 15, 2010, BOE filed Exceptions to the Initial and Supplemental Decisions. BOE argued that the ALJ erred in finding that Respondents did not act as a non-vessel-operating-common carrier (NVOCC) and also in failing to assess an adequate civil penalty. Respondents did not file Exceptions or a Reply to BOE's Exceptions.

On April 26, 2012, the Commission vacated the ALJ's Initial and Supplemental decisions and remanded the matter to the ALJ for further proceedings consistent with the Commission's

holdings in Worldwide Relocations, Inc. et al – Possible Violations.² Anderson International Transport -Possible Violations, 32 S.R.R. 568, 569. On May 1, 2012, the ALJ issued an Order directing the parties to submit briefs addressing the issues raised in the Commission's Order. 32 S.R.R. 569. BOE filed its Brief Upon Remand on May 22, 2012. Respondents did not submit briefs in the remand phase of this proceeding.

On December 31, 2012, the ALJ issued his Initial Decision on Remand finding, as in the prior Initial Decision, that Respondents willfully and knowingly violated Section 19, but not Section 8, of the Shipping Act. The ALJ imposed civil penalties totaling \$40,500.00 for the 22 knowing and willful violations. BOE now files these Exceptions to the ALJ's findings.

II. EXCEPTIONS

For the second time in as many opportunities, the ALJ refused to find that Respondents operated as an unlicensed NVOCC and concluded instead that Respondents' operations were those of an unlicensed ocean freight forwarder. Once again, BOE excepts to the ALJ's conclusion that Respondents did not act as a NVOCC and to his subordinate finding that Respondents did not assume responsibility for transportation by water of cargo between the United States and a foreign country for compensation within the meaning of section 3(6) of the Act, 46 U.S.C. §40102(6). In reaching these conclusions, the ALJ failed to follow or apply the evidentiary standards set forth in Worldwide Relocations, and as a result, reached the identical conclusions of his now-vacated Initial Decision. Those findings and conclusions are inconsistent with the Commission's holding in Worldwide Relocations.

² On March 15, 2012, the Commission issued its decision in Worldwide Relocations, Inc., et al., -- Possible Violations, 32 S.R.R. 495, in which it addressed, as pertinent, the use of presumptions and inferences in proving that an entity acts as an NVOCC, including the subsidiary consideration of assuming responsibility for transportation.

BOE excepts also to the ALJ's determination as to the amounts of the civil penalties imposed for 22 violations found to have been willfully and knowingly committed by Respondents. The nominal penalties assessed are inconsistent with the intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at a penalty amount appropriate to the gravity of the violations.

III. ARGUMENT

A. Preliminary Statement

As reflected in the procedural background above, this proceeding has a long and tortuous history, having been considered by the Commission twice before and remanded to the ALJ on both occasions. The Commission's latest Order, following BOE's Exceptions to the prior Initial Decision and Supplemental Decision, and the Commission's *sua sponte* Notice to Review those decisions, was for the purpose of vacating in their entirety the Initial and Supplemental Decisions and remanding the matter with express instructions to conduct further proceedings "consistent with the Commission's holding in Worldwide Relocations," 32 S.R.R. at 569.

In Worldwide Relocations, the Commission recognized the reality that complete sets of shipping documents that would provide the so-called "smoking gun" are not always available in an enforcement case. Addressing those documentary gaps, the Commission affirmed acceptable evidentiary standards, through the use of presumptions and inferences, to support findings that an entity acted as an NVOCC notwithstanding the absence of various documents for various shipments. In approving the use of presumptions and inferences, the Commission acknowledged the opportunity for respondents to submit countervailing proof.

Notwithstanding the length of the Initial Decision on Remand, the decision is little more than a repetition of the views expressed in the since-vacated Initial Decision. The ALJ not only ignored the Commission's instructions in remanding this proceeding, he offered no explanation of his chosen course to avoid the Commission's evidentiary roadmap. For example, to determine if an entity is a common carrier, the Commission stated that all factors present must be considered to determine their "combined effect." Worldwide Relocations, 32 S.R.R. at 503. In contrast, the ALJ has, once again, "cherry picked" selected documents to support his finding, while simultaneously avoiding testimony of shipper witnesses and documentation that would give rise to contrary or ambiguous findings. Likewise, the ALJ's interpretations of otherwise ambiguous documents proves inconsistent with the record as a whole, and equally inconsistent with the Commission's clear instruction to apply the tools made available under Worldwide Relocations.

Reasoning that the Commission entered no express findings of error in the process of vacating his earlier decisions, (I.D.R., at 3, 38), the ALJ apparently believed that he was free to effectively repeat, and reprint, his prior ruling on the NVOCC status of Respondents. BOE submits that the Commission's Order vacating the decisions was clear, as were the instructions to the ALJ. The prior decisions were incorrectly decided under appropriate evidentiary standards, and the remand instructions were a directive that the evidence be considered in a manner consistent with Worldwide Relocations. The analysis and conclusions set forth in the Initial Decision on Remand do nothing of the sort.

BOE's case largely was prosecuted on a default basis inasmuch as Respondents absented themselves following the filing of BOE's initial discovery requests, substantially frustrating

BOE's discovery and possible pre-trial depositions.³ BOE thus was obligated to proceed largely upon documents collected prior to the initiation of the formal proceeding, i.e., through the efforts of BOE rather than through the cooperation of the Respondents. The use of presumptions and inferences countenanced in Worldwide Relocations is particularly appropriate here inasmuch as Respondents, since the inception of this proceeding have consistently had the opportunity to present evidence to the contrary. Their election not do so should have been at their peril; instead it worked to their advantage.

We do not contend that the choices made by a deliberately nonparticipating Respondent should thereafter relieve BOE of the burden of persuasion. BOE's path, however, has not been without obstacles.⁴ In this regard, the Commission has previously observed:

In a formal investigation ordered by the agency, Public Counsel [now BOE] has the duty to insure that the relevant and probative evidence is developed to the fullest possible extent. His primary mission is to get the pertinent information, often from the persons least interested in giving it. In the proper pursuit of this mission it would seem obvious that he should be encouraged, not circumscribed, if the investigative aims are to be achieved. The various demands that were here permitted to be made upon Public Counsel amounted to putting him on trial for the fact that an investigation had been ordered. The statements he was required to furnish interfered with the performance of his duty to develop the evidence . . .

Unapproved Section 15 Agreements – South African Trade, 1 S.R.R. 855, 865 (FMC, 1962). In terms which presage the Commission's explicit instructions to the ALJ herein, the Commission there admonished the presiding officer against taking a "restricted or fragmented approach" to

³ BOE is surprised by the ALJ's statement in bold on page 96 of the decision that Anderson and AIT are not absconding respondents because they provided some discovery. On page 119, the ALJ concedes that "Respondents withdrawal from participation in this proceeding prevents inquiry into these puzzles."

⁴ As one example, in April 2008, BOE filed a motion for an Order to Show Cause against Anderson International Transport and Owen Anderson, requiring Respondents to file a Rule 95 prehearing statement, already overdue, by which BOE would be informed of any previously unknown witnesses or previously unseen documents or written testimony which Anderson proposed to use at trial. Seven months later, on November 4, 2008, the ALJ issued his Memorandum and Order for Respondents Anderson International Transport and Owen Anderson to Show Cause. Respondents did not file an answer to the Order to Show Cause nor did they submit a Rule 95 Statement. Although BOE's original Motion asked that sanctions be taken against Respondents, the ALJ took no further action on BOE's motion, and did nothing to enforce his own November 4, 2008 Order to Show Cause.

the evidence, as defeating the purpose for which the Commission instituted its investigation. Id., 1 S.R.R. at 879.

As explained, *infra*, the record contains 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, written rate quotations it 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. To the extent any documentary gaps exist, the same presumptions and inferences resorted to in Worldwide Relocations supplement the record so as to comprehensively support findings of NVOCC status.

Respondents did not attempt to refute the documented evidence nor challenge those presumptions or inferences properly drawn therefrom. The evidence presented by BOE constituted, at minimum, a *prima facie* showing that Respondents held themselves out to 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 disputing these facts. To paraphrase the ALJ, if the obligation should rest with the parties to organize the evidence, then the ALJ should refrain from seeking to "comb the record to find some reason" to deny judgment herein. (I.D.R. at 15, *citing* Forsberg v. Pac. NW Bell Tel. Co., 840 F.2d 1409 (9th Cir 1988). Cases must be decided on the basis of existing facts and reasonable deductions therefrom, rather than by entertaining speculative possibilities. West Coast Line Inc. v. Grace Line, 3 F.M.B. 586, 595 (1951); Alcoa Steamship Co Inc v. Cia. Anonima Venezolana, 7 F.M.C. 345, 361 (1962);

Rate Agreement Exclusive Patronage System, 11 F.M.C. 513, 523 (1968). As stated in Capitol Transportation Inc. v. United States, 612 F2d 1312, 1319 (1st Cir, 1979):

Without deciding whether the foregoing would constitute substantial evidence of NVOCC status in a contested proceeding, especially one where contrary evidence had been received, see United States v. Bianchi & Co., 373 U.S. 709, 715, 83 S. Ct. 1409, 10 L.Ed.2d 652 (1962), we have little difficulty in finding such evidence more than sufficient in these circumstances where, at the time of hearing, Capitol had not even signaled that it disputed the allegations of its NVOCC status . . .

The Commission also has noted:

The efficient performance of our regulatory functions demands that we find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if, as here, they are made the vehicle for innumerable objections which result in much delay and confusion. Since as indicated the rules are not necessary in the proper conduct of our proceedings, controversy over evidentiary niceties and formalities should not be invited by attempting to apply them. We do not, of course, suggest the substitution of an overly-relaxed approach to acceptable evidence nor anything which lacks essential fairness, having due regard for the nature and purpose of our proceedings. We simply point out that evidence that appears to satisfy the nonrigorous standards of our rule ought to be received promptly and without controversy grounded upon technical exclusionary rules.

Unapproved Section 15 Agreement, *supra*, at 866. Accord, Agreement No. 10294, 19 S.R.R. 318, 321 (ALJ 1979); Banfi Products Corp.—Possible Violations, 26 S.R.R. 951, 957 (FMC 1993); Pacific Champion Express Co. Ltd. - Possible Violations, 28 S.R.R. 1105, 1106 (ALJ 1999). BOE submits that the six year course navigated in this proceeding has ill-served the intent of the Commission and of the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* (APA), to provide for expedition.

The ALJ considered the evidentiary record in derogation of the Commission's remand instructions. He declined to employ the evidentiary tools applied, discussed and affirmed by the Commission in Worldwide Relocations. He failed to explain why those presumptions and

inferences were not appropriate in this proceeding. Instead he chose to impose interpretations on documents at odds with customary practices in the industry and discounted or ignored other evidence that could not be reconciled with his own foregone conclusions, albeit ones previously discredited when vacated by the Commission eight months earlier. For these reasons, BOE submits that no useful purpose would be served by yet another remand. The Commission should exercise its authority under Rule 227 of the Commission's Rule of Practice and Procedure, 46 C.F.R. 502.227, consider the issues *de novo*, and vacate and reverse the findings and conclusions below with respect to the NVOCC status of Respondents and the assessment of civil penalties.

B. The ALJ erred in finding that Respondents did not assume responsibility for transportation

To meet the definition of an NVOCC, the threshold question is whether the entity is 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). The ALJ concluded that Respondents held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation and also found that vessels operating on the high seas were used for all or part of the transportation. (I.D.R., p. 58,59,65,66). However, the ALJ concluded that Respondents did not assume responsibility for the transportation of the shipments in issue as required by the above definition. Consequently, the ALJ determined that Respondents were not shown to be an NVOCC, but rather operated as an ocean freight forwarder. (I.D.R., pp. 84-85).

The Commission held in Worldwide Relocations that where, as here, the elements of holding out and the use of vessels on the high seas have been established, the assumption of responsibility may be established by the use of certain presumptions addressed in that decision. 32 S.R.R. at 506. For example, the Commission stated that where, as here, an entity has advertised to the shipping public, it is permissible to infer that the entity does what it advertises. Id. at 505. Of like effect, routine practices of the entity may be evaluated and support inferences in considering whether it assumed responsibility on shipments it handled. Id. Similarly, when considering whether a respondent assumed responsibility for transportation, but the documents are ambiguous in their identification of the party shippers, it is permissible to rely on presumptions that result in finding of NVOCC status. Id. at 506. In essence, the Commission approved an approach that first examines the activities of the respondent to determine the nature of its operations and affirmed the use of presumptions and inferences to support findings of NVOCC status.

The ALJ took the opposite approach, relying instead on a fragmented view of the evidence and employing a rationale of avoiding any findings of NVOCC status. The ALJ's conclusion that Respondents did not assume responsibility for transportation was premised on the view that downstream carriers (NVOCCs or VOCCs) that sold their services directly to Respondents nonetheless intended to establish carrier relationships with the proprietary shippers, in effect negating any possibility that Respondents assumed responsibility. (I.D.R. at 64). This determination then bootstraps into a convenient reason to discount all other evidence, including unambiguous shipper testimony, that establishes that Respondents assumed responsibility to the shippers for the transportation. Because a preponderance of the evidence demonstrates that

Respondents assumed responsibility to the shippers, the ALJ's approach was incorrect. We start first with the ALJ's erroneous reliance on the bills of lading of the downstream carriers.

1. Downstream Carriers Did Not Establish A Direct Relationship With Proprietary Shippers Or Assume Responsibility For Transportation

For each shipment in issue, the ALJ relied on the bill of lading issued by the downstream carrier (NVOCC or VOCC) as controlling his determination that the downstream carrier, not Respondents, established a direct relationship with the proprietary shipper and assumed responsibility for the transportation. In the ALJ's view, this precluded a determination that Respondents did so. Each bill of lading issued by the downstream carrier contained the names of both the proprietary shipper and Respondents in one of several different configurations joining the two names with such connectors as "care of", "c/o", "agent". In each case, an address of Respondents was recited in the shipper box. Each bill was issued subsequent to dealings between Respondents the proprietary shipper and covered a portion of the service that Respondents had undertaken to provide. For each shipment, Respondents themselves prepared and issued a bill of lading master to the carrier identifying the shipper and itself as the shipper in the same format appearing on the bill of lading. (BOE App. 33, 74, 135, 246, 276, 303, 443, 454, 479, 526, 569, 597, 617, 646, 654, 668, 671, 683).⁵

Despite Respondents' sole responsibility for initiating this practice and drafting the dual party descriptions of the shipper on the bills of lading, the ALJ found this practice provided "a clear and unambiguous identification" of the shipper. (See I.D.R., Findings 68, 77, 91, 106, 132, 151, 165, 178, 207, 216, 231, 254, 270, 283, 297, 307, 317, 330, 341, 353, 368). In contrast, the Commission in Worldwide Relocations expressed a decidedly more penetrating view of this

⁵ The number references are to the Bates numbers found in the lower right corner of each document in BOE's Appendix. References to specific pages of the record are shown as "BOE App. ___"

same pattern or practice by respondents, concluding that they constituted “routinely misrepresenting who the shipper was on shipping documents”, a “pattern of manipulating the identity on the bill of lading,” and “often misleading as to identity of the shipper,” 32 S.R.R. at 506.⁶ Whereas the ALJ here concluded that such descriptions provide “clear and unambiguous identification” of the shipper,⁷ the Commission found to the contrary, stating that such terms in a bill of lading too often are “unclear, polysemic, or ambiguous,” 32 S.R.R. at 505. Thus the very foundation for the ALJ’s finding that downstream carriers had a relationship with the proprietary shippers conflicts directly with the Commission’s holding under similar circumstances.

Nor is the ALJ’s conclusion that the bills of lading issued by the downstream carriers established a contractual relationship with the shippers based on any shipper or carrier testimony. It is a legal conclusion attributed to the nature of the document, a conclusion which the ALJ declined to then apply consistently to those bills of lading issued by Respondents, as addressed *infra*. Critically, the ALJ’s conclusion is contradicted by the direct testimony of proprietary shippers served by Respondents, stating emphatically that they did not deal with the other entities, but rather relied exclusively upon Respondents, who assumed complete responsibility to the shippers for the transportation. The Affidavits of Dirk Manuel and Lynn Watt, submitted with BOE’s Record Supplements on April 10, 2009, could not be more clear on this question. It is noteworthy that the ALJ did not address the substance of these statements and essentially ignored them. In his Initial Decision on Remand, the ALJ devotes but a single sentence (at p. 62)

⁶ Reference to the underlying initial decision in Worldwide Relocations, 31 S.R.R. 1471 (ALJ 2010) discloses that carrier bills of lading there identified the shippers in the same manner as here by combining the names of the proprietary shippers with the unlicensed entities and connecting them by terms such as “care of”, “c/o”, “agent”, as well as sometimes inserting the address of the unlicensed entity. See Id. at 1522, 1524, 1526, 1528, 1529, 1531, 1532.

⁷ In his Initial Decision on Remand, Finding of Fact 297, the ALJ concludes that even the use of “Anderson International Transport Julia Huxtable %” constitutes such clear and unambiguous proof. To the contrary, BOE urges that Anderson’s practice was neither clear nor intelligible.

to the value of the Dirk Manuel and Lynn Watts affidavits, and otherwise leaving entirely unaddressed their substantive content as evidencing a “holding out” by Anderson and AIT. Where, as here, no evidence is offered in opposition to the evidence submitted, BOE’s *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.)

Based on this testimony and the similar documentation and pattern of dealings with respect to the other shipments, the Commission, as the expert agency with special familiarity with this industry, may infer that the other shippers dealt exclusively with Respondents and considered them to have assumed responsibility for the entire transportation. Such an inference is further supported by the Affidavit of Alvin Kellogg, a Commission Area Representative with over 19 years experience, who testified as to the mode of operation of licensed and unlicensed NVOCCs and freight forwarders. See Affidavit of Alvin Kellogg, at ¶¶ 3-6, attached to BOE Record Supplements filed April 10, 2009.

Indeed, various statements in the ALJ's decision in support of finding a direct relationship between the downstream carriers and the proprietary shippers are puzzling. For example, the ALJ states that “[o]ther evidence in the record indicates that proprietary shippers were aware that common carriers (not Anderson/AIT) were transporting their shipments.” (I.D.R., p.62). This is unremarkable as it reflects a typical NVOCC transaction. Most shippers are aware that NVOCCs such as Anderson must employ the services of a vessel operating carrier to complete the transportation. The ALJ also acknowledges that the downstream carriers accepted business from Anderson, followed Anderson's instructions, including those on bill of lading masters issued by Anderson. *Id.* Again, such evidence is more properly indicative of a shipper/carrier

relationship between Anderson and the downstream carrier. Shipper and FMC Area Representative testimony introduced by BOE belie any such direct relationship between the proprietary shipper and the downstream carrier.

As noted, the inclusion of the shippers' names on the bills of lading in combination with Anderson's was the result of Anderson's actions and instructions to the carrier. Whether such carrier bills of lading issued in that manner could establish a contractual relationship with the proprietary shippers who were not even aware of those documents is open to question.⁸ It is hornbook law that an enforceable contract is dependent on each party's agreement on all material terms and upon the parties' intention to be bound by those terms. Novecon, Ltd. v. Bulgarian-American Enterprise Fund, 190 F.3d 556, 564 (D.C. Cir. 1999).

The ALJ posits that BOE's position would leave shippers who use an unlicensed carrier without a remedy against the carrier that issued a bill of lading. (I.D.R., p. 63-64). In the same breath, he acknowledges that the shippers chose to give their business to Respondents, which is simultaneously inconsistent with his conclusion that it was the downstream carriers that established a direct relationship with the shippers. In any event, the ALJ's reasoning concerning the availability of a remedy ignores the fact that the shipper obviously has a remedy against Anderson which issued its bill of lading, whether licensed or not and bonded or not. More importantly, the availability of such remedy does not foreclose the possibility of additional remedies against others in the transportation chain. The ALJ's assumption otherwise is unfounded as a matter of law.

⁸ BOE disagrees with the ALJ's suggestion at page 62 that the shippers were aware of the bills prior to shipment. These post shipment transmissions from Anderson to its customers do not establish that the shippers entered an agreement with these entities or were even aware of them prior to shipment. Nor is the forwarding of these documents enlightening. The carriers sent them to Anderson at its address, not the home address of Anderson's shippers, for payment. The carriers were not demanding payment from the shippers. In fact the Finn Container bill was unrated, and the Saripalli transmission simply stated that a "freight document" being sent.

In sum, the ALJ's reliance on bills of lading of downstream carriers, without more, as establishing a direct relationship with the proprietary shippers and their assumption of responsibility for transportation is inconsistent with the evidence of record as well as the Commission's holding in Worldwide Relocations.

2. The Evidence, Permissible Presumptions, and Inferences of Fact Constitute a Prima Facie Showing That Respondents Assumed Responsibility For Transportation

This proceeding was instituted to determine, *inter alia*, whether Respondents violated the Shipping Act by operating as an NVOCC without publishing tariffs. The starting point for such inquiry should be the activities of the subject respondents in holding out to the public, and in assuming responsibility for transportation of the cargo of their customers. 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 Relocations, 32 S.R.R. at 505 ("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."). Giving appropriate weight to the evidence, the presumptions arising therefrom and the inferences that may be drawn, the preponderance of the evidence sufficiently establishes that Respondents assumed responsibility for the transportation as a NVOCC.

(a) Anderson Had a Direct Relationship With Shippers and Assumed Responsibility For Transportation of Their Cargo

(i) Shipper Testimony

The most direct evidence addressing Anderson's relationship with its customers is found in the two shipper affidavits submitted by BOE. 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.

This testimony is uncontroverted. The ALJ did not find it irrelevant, never ruled that the testimony was not credible, nor find it lacking in any material respect. It is the best evidence of record and should have been given controlling weight. Further, this testimony is consistent with other documentary evidence. 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. The shippers first came into contact with Respondents through Yellow Page listings that advertised Anderson as an international mover. Other documentary evidence includes the bills of lading issued by Respondents, the estimates and invoices they provided for door-to-door service, the patterns of the VOCCs and NVOCCs in invoicing and dealing solely with Respondents rather than the proprietary shippers, communications between Respondents, shippers, and other carriers reflecting Respondents' responsibility for the transportation, and the lodging of complaints by the proprietary shippers against Respondents rather than the other entities. Attached as Appendix 1 is a summary of the various documents in the record that

reflects these relationships between Respondents and AIT's customers and between respondents and downstream carriers. As the Commission held in Worldwide Relocations, where a pattern of conduct on a number of shipments satisfies a preponderance of evidence as to one element of a violation, it is reasonable to infer that the entity acted similarly in handling other shipments when evidence as to that element is not directly available for that shipment, 32 S.R.R. at 504. Consequently, it may be inferred that Respondents likewise handled the other shipments for which no bill of lading is available in the same manner. The Commission recognized in Worldwide Relocations that a complete set of documents may not be available for each shipment in issue, but an entity's NVOCC status may be established by presumptions and inferences, viz., that it does what it advertises, and that routine practices reflected by evidence on some shipments may be considered to reflect its conduct on other shipments where documents are limited. Patterns of misrepresenting the identity of parties likewise may support a finding that the entity assumed responsibility for transportation.

BOE submits that the record, as supplemented by permissible presumptions and inferences discussed in Worldwide Relocations, leads inescapably to the conclusion 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. Indeed, the shipper affiants so testified. There is no evidence to contradict such a conclusion. The ALJ's findings are inconsistent with the record; those finding also are contrary to the Commission's holding in Worldwide Relocations and the Commission's instructions in its Order of April 26, 2012.

(ii) Anderson's Bills of Lading Constitute Through Bills To A Foreign Destination

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 Two Trees, Repairer of the Breach, Manuel, Osule, Deleon, Watts, Zinnah, Newman, Dillon, Huxtable, Maniotes, Hughes, and Downie shipments). See also BOE Appendix 1 hereto. 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 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).

The ALJ took pains to discount the effect of the Anderson bills. Refusing to draw any inferences from these documents supporting a finding that Respondents assumed responsibility for the transportation described thereon, he instead imposed an interpretation on the underlying purpose of the bills of lading that finds no support in the documents themselves, that the bills would be deemed "domestic" bills of lading that reflected a limited undertaking to move the shipments from origin to a U.S. port or warehouse. The ALJ did so without benefit of any testimony or evidence presented by Respondents themselves. We address first the legal deficiency in this reasoning. In the section following, we address how the evidence likewise demonstrates that the ALJ's interpretation is wrong.

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 (2nd 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 labeling as a 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 refutes it.

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 to assume responsibility for that transportation is also demonstrated by Anderson's 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. 179, Manuel shipment; BOE App. 215, Osule; BOE App. 286, Deleon; BOE App. 459, Watts; BOE App. 525, 560, 566, Zinnah; BOE App. 587, Newman; BOE App. 606, Dillon; BOE App. 615, Huxtable); and Anderson's own admission that it

provided door-to-door service (Respondents' Response to BOE's Request for Admission No. 7). Other documentation includes booking confirmations transmitted by the carrier or NVOCC to AIT showing AIT alone as the shipper (BOE App. 252, DeLeon shipment; BOE App. 558, Zinnah shipment; and BOE App. 651-52, Maniotes shipment); invoices issued by VOCCs/NVOCCs solely to Anderson requesting payment for their services; corresponding payments of those invoices by Respondents; and separate billing by Respondents to the proprietary shippers in amounts different than that charged to Anderson. (BOE App., 442, Downie shipment; BOE App. 682, Hughes; and BOE App. 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.

(iii) The ALJ's Interpretation of Anderson's Bills Was Patently Erroneous

Notwithstanding bill of lading information inserted by the parties to the transaction, the ALJ consistently avoids describing Anderson's bills of lading as through bills. His interpretation of those documents is at odds with the terms on the bills themselves and stands uncorroborated by those entities with actual knowledge of the meaning of the terms on the bills. Even his attempt to direct Respondent Anderson to produce a document potentially helpful to Anderson's cause was left unsatisfied. See Order for Respondents Anderson International Transport and Owen Anderson to File Document, served March 11, 2009.

In a lengthy exegesis seeking to explain why Anderson could only be acting a freight forwarder, the Initial Decision on Remand focuses upon house bills issued by Anderson itself. (I.D.R., at 78-81.) Routinely described by the ALJ as Anderson's "domestic" short form bill of

lading, the ALJ construes AIT's house bill of lading as proving that Respondents intended only to "assume responsibility for the domestic portion of the transportation," *Id.* at 78, which "transportation pursuant to the straight bills of lading began and ended in the United States," *Id.* at 81. The ALJ concludes that, in so doing, Respondents were operating as an authorized common carrier of household goods by motor vehicle. *Id.* at 80.

In entering these findings, the ALJ repeatedly and erroneously discounts documents establishing that Anderson did not provide the very service identified by the ALJ, that of performing the motor carriage portion of shipments of household goods by motor vehicle in interstate or foreign commerce. Instead, on 8 of the cited 13 shipments for which its short form bill of lading was used, Anderson International Transport contracted with another motor carrier to perform the actual motor carrier leg of the international transport on Anderson's behalf (Repairer of the Breach, Dirk Manuel, Osule, DeLeon, Udense, Zinnah, Maniotes, and Hughes shipments.)⁹

Neither is the record equivocal as to whether Anderson International Transport was providing motor carrier services in its own right on the other cargo movements for its shippers. While the shipment records obtained in discovery from Anderson remain spotty and incomplete in many respects, at least one shipment (Clifton Watts, BOE App.73-120) likewise demonstrates a practice by Anderson International Transport in contracting with other motor carriers to perform the actual motor carrier leg of the international transport on Anderson's behalf, even in the absence of an AIT short form bill of lading.¹⁰ In no instance, however, does the record

⁹ Underlying motor carrier and corresponding references to the evidentiary record are set forth in Appendix 2 hereto.

¹⁰ See, e.g. BOE App. 080, 097, 100 (Anderson trucking instructions issued to Start Trucking).

reflect Anderson deploying its own vehicles or drivers, nor recording the pickup or delivery of goods using an Anderson-owned or -leased vehicle.¹¹

Both in commercial practice and in effect, Anderson International Transport has been performing as an “NVO” in relation to the underlying motor carrier. (While BOE apologizes for transposing to motor carriage a modal definition more appropriate to ocean movements, including inland through movements, the analogy is readily understandable and remains particularly apt here.)¹² Why, indeed, would Anderson International Transport purport to provide service only as an ocean freight forwarder when its short form bill of lading already evidences that carrier’s intention that the cargo is destined for a foreign destination? Having commenced the inland movement as an NVO of motor carriers, Anderson International Transport should be found to provide that movement continuously as an NVO on the international leg.¹³

BOE’s witnesses, including the shipper-customers who were direct participants in the various oral and e-mail exchanges with Owen Anderson, clearly understood Anderson

¹¹While AIT has no current operating authority, FMCSA records reflect that Anderson has reported operating two (2) straight trucks owned by Anderson, with no leased vehicles. See, FMCSA Analysis and Information Online, at <http://ai.fmcsa.dot.gov/SMS/Data/carrier.aspx?enc=Xy0H0XESAP12yHiYE/YInA> (accessed 1-2-2013). The Commission may take official notice of these records under 46 C.F.R. 502.226.

Trucks or straight trucks are non-articulated self-propelled cargo-carrying commercial motor vehicles. See, http://ops.fhwa.dot.gov/freight/publications/size_regs_final_rpt/index.htm#straight. A “straight truck” thus has the engine and cargo body mounted on the same chassis, while a truck tractor is essentially a power and steering unit for truck trailers such as full trailers or semitrailers. Straight trucks thus may be inappropriate for use in transporting containerized shipments moving in foreign commerce.

¹²In fact, under ICC law, a domestic freight forwarder is the functional equivalent of an NVOCC -- it issues bills of lading, assumes responsibility for transportation, and purchases services from licensed carriers to perform the physical transportation. See Charging Higher Rates Than Tariff, 19 F.M.C. 44, 53 (1975). BOE is reluctant to use the term "domestic forwarder" to describe Anderson's undertaking as it might be confused with an ocean freight forwarder which operates quite differently. In any event, Anderson did not hold a domestic freight forwarder license.

¹³ To accept the ALJ's construction would convert an otherwise continuous movement in foreign commerce to two independent movements, a result plainly contrary to the intent of the shipper, giving rise to significant legal ramifications affecting the parties' respective rights and responsibilities.

International Transport to be acting as carrier. Relying solely upon the ALJ's re-construction of AIT's house bill of lading, wholly unaided by any statement or corroborating testimony from Respondents themselves, the ALJ discounts entirely that substantive shipper testimony. BOE submits that result (finding, as the ALJ did, that Anderson intentionally shifted its regulatory status between the inland movement and the subsequent ocean move) defies common sense, as well as repudiates the Commission's instructions to apply the reasonable inferences drawn from the Commission's review of Worldwide Relocations.

(iv) Bills Issued by Downstream Carriers Do Not Supplant Anderson's Through Bills.

Given the overarching effect of Respondents' through bills of lading on the assumption of responsibility issue, it is appropriate to address whether the otherwise ambiguous bills of lading issued by the downstream carriers somehow supplant Respondents' bills, and the undertaking reflected by those bills, so as to relieve Anderson of its obligations as the originating carrier.

The legal effect of bills of lading issued subsequent to the initiating carrier's bill of lading was considered by the Supreme Court in Missouri, Kansas & Texas Railway Co. v. J.H. Ward, 244 U.S. 383 (1917), involving an action to recover damages for injuries to cattle during the course of an interstate shipment. The originating carrier issued a bill of lading for transportation from an origin in Texas to final destination in Oklahoma. A connecting carrier also issued a bill of lading upon receipt of the shipment at its connecting point which was signed by an agent for the shipper. The connecting carrier's bill contained different terms than the initial bill with respect to the requirements for filing a claim. The cattle arrived at destination in a debilitated condition and a lawsuit followed. The connecting carriers argued that the claim was barred because the shipper failed to comply with the prerequisites for filing a claim prescribed in the

subsequent bill of lading issued by the connecting carrier. The Court held, however, that the second bill issued by the connecting carrier was void. Justice Brandeis explained:

The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As [the connecting carriers] were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void. 244 U.S. at 387.

This rationale was followed in Mexican Light & Power Co. v. Texas Mexican Ry. Co., 331 U.S. 731, 734 (1947), where the Court stated:

No matter what the convenience which a consignee may derive from a bill of lading issued by a connecting carrier on a through shipment, unless the connecting carrier has received a consideration for the bill of lading in addition to that which flowed under the bill of lading issued by the initiating carrier, the Carmack Amendment makes such second bill of lading void.

See also Marine Office, supra, 638 F.Supp. at 398 (a through bill of lading applies to the connecting carriers “regardless of whether the connecting carrier issues a new bill of lading, as the new contract is treated as void for lack of consideration.”); and Toshiba Int’l Corp. v. M/V Sea-Land Express, 841 F.Supp. 123, 128 (S.D.N.Y. 1994) (the “through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract.”)

Although many of these cases were decided under the Carmack Amendment to the Interstate Commerce Act, the issue of whether a carrier assumes responsibility for the shipment over the entire route by issuing a through bill of lading is a contract issue that transcends Carmack. In U.S. v. Mississippi Valley Barge Line Company, 285 F.2d 381, 390 (8th Cir. 1960), (“ . . . the question, wholly independent of Carmack, is whether the carrier has contracted to carry the goods from origin to destination . . .”). There, the factors establishing a through bill included that the actual origin and destination were named on the bill; the recital that the barge line

issuing the bill received the goods; the absence of any connecting carrier named on the bill; that the barge line advanced the connecting railroad's switching charges; that the barge line was billed by the connecting railroad; and that the barge issued a single bill for all charges to the shipper. Id. As the court explained, the initial carrier is the one who first contracts with the shipper to transport the shipment and to which the shipper looks. Id. at 391.

So too here, Anderson undertook responsibility for the shipments over the entire routes as demonstrated by its bills identifying the foreign destination point, reciting that it received the shipment from the proprietary shipper, and making no mention of any connecting carrier. The evidence also showed that Anderson advanced the charges of other carriers and then billed the shippers for the total charges. The bills of lading issued by other common carriers did not supersede or negate Anderson's previously-assumed responsibility to the cargo owners to provide that service. See Seguros Comercial Americas v. American President Lines, 910 F.Supp. 1235, 1239 (S.D. Tex. 1995) ("The test is where the obligation of the carrier as receiving carrier originated."). It follows that "[t]he bill of lading required to be issued by the initial carrier . . . , 'governs the entire transportation,' 'fixes the obligations of all participating carriers,' Galveston Wharf Co. v Galveston, Harrisburg & San Antonio Ry., 285 U.S. 127, 135 (1932) (citations omitted), and 'contain[s] the entire contract upon which the responsibilities of the parties rest[],' St. Louis, Iron Mountain & S. Ry. v. Starbird, 243 U.S. 592, 595, 604 (1917). Whether defined as a cargo liability issue under Carmack, or a regulatory matter under the Shipping Act, the concept of through transportation thus seeks "to create in the initial carrier unity of responsibility for the transportation to destination" by treating the carriers participating in that transportation "as one system" in which all connecting carriers "become in effect mere agents, whose duty is to forward the goods under the terms of the contract made by their

principal, the initial carrier.” J.H. Ward, supra, 244 U.S. at 386-388; accord, Northern Pac. Ry. v. Wall, 241 U.S. 87, 92 (1916). The ALJ's efforts to denigrate the force and effect of Anderson's through bills by subordinating them to subsequently issued ambiguous bills of the downstream carriers are contrary to law and long-established court precedent.

(b) Other Evidence Belies the ALJ's Finding that Anderson Acted As Forwarder and Not An NVOCC

Based on the evidence of record, 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.”).

Ultimately, the ALJ improperly conflates the booking of shipments with certain oncarriers (both VOCCs and NVOCCs) as establishing, de facto, an agency on behalf of the actual owners of the cargo. I.D. at p.,71. The deficiencies in the ALJ's approach are immediate and obvious: First, the ALJ enters findings of agency on behalf of the cargo owners in the absence of any supporting testimony of the shippers themselves. Agency must be established on the basis of some agreement, whether written or oral, on the part of the purported principals

(here, the cargo owners) expressly creating or authorizing another to serve as agent. See e.g. RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006). Second, in the two instances presented in the record (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 Affidavit Of Lynn Watt, ¶2, BOE Record Supplements. The un rebutted witness testimony here plainly negates any such finding of agency by the ALJ.

The ALJ also failed to recognize or give evidentiary weight to numerous record facts that, under the common law of agency, provide compelling indicia that Anderson acted, and intended to act, as a principal in his dealings with both shippers and other carriers. This commercial pattern or practice by Respondents wholly undermines the ALJ’s finding that Anderson sought only to act as an agent (freight forwarder) on behalf of the shipper. The ALJ fails to give heed to the warning signs of this contrary evidence in at least four major respects:

(i) Issuing written rate quotes to Anderson’s customer in advance of soliciting rate quotes from an intermediate NVOCC.

As the ALJ appears to acknowledge at pp. 5-7, a forwarder serves as a dual agent, typically booking or otherwise arranging space for shipments on behalf of the shipper, while securing the cargo and performing related activities incident to the shipment for the account of a particular carrier, citing 46 U.S.C. 40102(19) and 46 C.F.R. 515.2(o). See, e.g. New York Freight Forwarder Investigation, 3 U.S.M.C. 157, 164 (1949). For performing these services, a freight forwarder may be compensated by both the shipper and the carrier, citing Landstar Express America Inc., *supra*, 569 F.3d at 494.

It follows that, in order to validly serve as an agent of the carrier, the forwarder would first have to communicate with the carrier in the matter of quoting rates, as well as in

determining the availability of cargo space, so that it can relay accurate and authorized information on behalf of that carrier principal. Likewise, in properly serving as an agent of the shipper, the forwarder must first determine what rates and cargo space may be had in the marketplace, as the forwarder has an obligation to impart accurate information upon which the shipper can rely. See, 46 C.F.R. 515.32(c) (forwarder's obligation of due diligence in imparting accurate information to its principal).

In the instant case, Anderson is shown to have routinely provided a written rate quote to his customers in advance of soliciting the corresponding rate quote from an intermediate NVOCC or VOCC for the cargo movement.¹⁴ Such activities served neither the carrier (as the carrier's rate quote was not then in existence), nor did they serve the interests of the shipper (who received a rate quote which originated with Anderson alone.) Such records fully support an inference that Anderson was acting as a principal and NVOCC in its own right, rather than as mere agent (forwarder). The ALJ's failure to recognize or give evidentiary weight to Anderson's practice of issuing rate quotes to his customers in advance of soliciting such rate quotes from an intermediate NVOCC is contrary to the Commission's April 26, 2012 Order in this docket instructing the ALJ to consider such evidence and inferences.

(ii) Issuing rate quotes having no relation to the actual charges quoted to Anderson by an intermediate NVOCC.

While the first item addresses the shortcomings of the Initial Decision on Remand in failing to recognize that timing issues precluded Anderson from validly acting as an agent in quoting rates to customers, the second item addresses the substantive divide between the quotes made by Anderson and those rates quoted to Anderson by the intermediate NVOCCs.

¹⁴ The timing of Anderson's rate quotes and corresponding references to the evidentiary record are set forth in Appendix 3 hereto.

As previously noted, a forwarder has an obligation to impart accurate information upon which the shipper can rely. 46 C.F.R. 515.32(c) (forwarder's obligation of due diligence in imparting accurate information to its principal). In this latter regard, a forwarder is said to take on a "fiduciary relationship" to its shipper. See, e.g. Docket No. 98-28, Licensing, Financial Responsibility Requirements and General Duties For Ocean Transportation Intermediaries, 64 FR 11156 (Mar. 8, 1999); Rose International, Inc. v. Overseas Moving Network International, Ltd., et al., 29 S.R.R. 119 (FMC, 2001).

In the instant case, Anderson is shown to have routinely provided written rate quotes to his customers which differed significantly (in real dollar terms) from the rate quote solicited from an intermediate NVOCC or VOCC for the cargo movement. Twelve (12) such instances were evident in the record of Anderson's shipments herein.¹⁵ Such activities served neither the carrier (as the carrier earned only the lower rate he quoted to Anderson), nor did they serve the interests of the shipper (who received, and paid, a higher rate quote which originated with Anderson, and Anderson alone.) Such records fully support an inference that Anderson was acting as a principal and NVOCC in its own right, rather than as mere agent (forwarder). The ALJ's failure to recognize or give evidentiary weight to Anderson's practice of issuing rate quotes to his customers at higher amounts than those quoted by the intermediate carrier accounts for a second shortcoming in the ALJ's findings that Anderson sought only to act as an agent (freight forwarder). On this issue, the ALJ repeats an assertion from his prior Initial Decision that BOE does not cite any Commission authority holding or explaining why marking up common carrier rates and providing a quote in its own name means that the entity has assumed responsibility for the transportation. (I.D.R., p.77). In view of the Commission's decision in

¹⁵ The monetary differences as to Anderson's rate quotes and corresponding references to the evidentiary record are set forth in Appendix 4 hereto.

Worldwide Relocations, which explicitly held that the practice of marking up ocean freight indicates that the entity is acting as a carrier (rather than an agent), 32 S.R.R. at 506, it is surprising that the ALJ would continue with this particular challenge to the record.

(iii) **Revising and increasing invoiced charges to the customer irrespective of changes or increases identified by an intermediate NVOCC.**

Reminiscent of problems identified at the inception of Commission Fact Finding No. 27,¹⁶ Respondents also can be shown to have routinely revised and increased their charges for services to the customer, when neither the invoiced charges from the intermediate carrier nor any correspondence from that carrier provides any evidence of such demand for any increases. Three such instances are reflected in the evidentiary record of Anderson's shipments herein.¹⁷ While these shipment files, produced by Anderson in discovery, have often proven to be haphazard and incomplete, no sign is apparent that the intermediate carrier, or any party other than Anderson, stands to gain from the increases demanded. Such records fully support an inference that Anderson was acting as a principal and NVOCC in its own right, rather than as mere agent (forwarder). Whereas the Commission's April 26, 2012 Order in this docket appears to mandate consideration of such evidence and inferences, the ALJ fails to give evidentiary weight to Anderson's practice of independently revising and increasing the invoiced charges to the customer.

¹⁶ Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades, Order of Investigation, 75 Fed. Reg. 37435-37436 (June 29, 2010); and Final Report, served April 11, 2011, at 1-2.

¹⁷ The pattern of increasing charges assessed by Anderson and corresponding references to the evidentiary record are set forth in Appendix 5 hereto.

(iv) Employing another party as freight forwarder on the same shipment

A final warning sign that Anderson International Transport was not performing as a freight forwarder can be found in the record evidence showing that forwarding services were being provided, and invoiced, by another company altogether. In the Initial Decision on Remand, the ALJ appears to take note of the activities of licensed freight forwarder R.W. Smith & Co. Inc.,¹⁸ to the extent of entering findings of fact that identify the role of R.W. Smith & Co. in no fewer than 5 of the subject shipping transactions (Licrish, Coker, Hughes, and two additional shipments submitted later by BOE: the Shah and Korimov shipments). The ALJ's review however is notably uncritical and superficial, as no significance is accorded to the services provided by one licensed forwarder whose services are contracted by another party (Anderson International Transport), also deemed by the ALJ to be acting as the forwarder.

If R.W. Smith is found by the ALJ to have invoiced for "documents and forwarding services" on the Licrish, Coker and Hughes shipments, FF ¶¶339, 351, 365; to be identified as the forwarder on the master bill of lading for the Coker shipment, FF ¶350; to have "booked" two additional shipments with MSC "at the request of AIT International LLC", and to have been billed by MSC accordingly, ¶¶376, 377, 378, how then does Anderson remain a forwarder on the same shipments? The ALJ does not say. Shipping documentation and billing forms showing another party acting as freight forwarder on the same shipment strongly supports an inference that Anderson was acting as a principal and NVOCC in its own right, rather than as mere agent (forwarder).

BOE submits that the record evidence on these four issues are sufficient to give rise to the reasonable inference that Anderson was acting in the capacity of an NVOCC. BOE believes such inference is also consistent with the Commission's holding in Worldwide Relocations. In

¹⁸ R.W. Smith & Co is an authorized trade name of R. Wilbur Smith & Co. Inc., FMC Org. No. 004200.

instructing the ALJ upon remand for further disposition “consistent with [its] Order” appears to mandate that the ALJ give due consideration to such evidence. 32 S.R.R. at 569. The ALJ determined not to heed that instruction.

3. BOE's Prima Facie Showing Is Unrebutted and the Preponderance of Evidence Standard Has Been Met

The evidence presented by BOE constituted, at minimum, a *prima facie* showing that Respondents held themselves out to provide and assumed responsibility for transportation of cargo by water from the United States to a foreign destination. BOE's *prima facie* showing satisfies the preponderance of evidence standard. Anderson v. Department of Transportation, supra, 827 F.2d 1572 (“An unrebutted *prima facie* case is necessarily, by definition, a preponderance of the evidence.”). BOE's case likewise meets the preponderance of evidence standard of proof required in administrative proceedings. Universal Logistic Forwarding Co Ltd. - Possible Violations, 29 S.R.R. 325, 330 (ALJ, 2001), *adopted in part, vacated in part*, 29 S.R.R. 474 (FMC, 2002), *citing* Portman Square Ltd. - Possible Violations, 28 S.R.R. 80, 84 (ALJ, 1998). See also Kin Bridge Express Inc.—Possible Violations, 28 S.R.R. 984, 985 (1999) (“BOE has more than satisfied its burden of proof in this administrative proceeding, which is that of a preponderance of the evidence.”)

Under the Commission's rules and the Administrative Procedure Act, BOE had the initial burden of production to demonstrate a *prima facie* case of violation by Respondents, and the ultimate burden of persuasion to establish such violations by the greater weight of the evidence, that is, evidence which is more convincing than the evidence offered in opposition to it. As the Commission noted in Petition of South Carolina State Ports Authority, 27 S.R.R. 1137, 1161 (1997), once one party has produced a sufficient case meeting the definition of substantial evidence, *i.e.* established a *prima facie* case, the burden of going forward with the evidence, or

the burden of production, shifts to the other party to produce evidence rebutting that case, citing Stein, Mitchell, Mezines, 4 Administrative Law 24.01. Respondents chose not to present any evidence to refute any part of BOE's case. Where the Respondents have not seen fit to furnish their own rebuttal to BOE's case, we submit that it is not the place of the Administrative Law Judge to act as an advocate for Respondents' cause.

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

In the Initial Decision on Remand, the ALJ found that Respondents committed 22 knowing and willful violations of the Shipping Act. Increasing minimally those amounts found in his now-vacated Supplemental Decision addressing the penalty phase, the ALJ assessed penalties ranging from \$1,000.00 to \$5,000.00 per violation. We submit that the nominal penalties assessed are inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate penalty amount appropriate to the gravity of the violations.

1. The Regulatory Structure For Shipping Act Violations

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

In determining the amount of a civil penalty, the Commission is required to 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 such other matters as justice may require. 46 U.S.C. §41109 (b). To these statutorily prescribed factors, the Commission's regulations add the policies of deterrence and future compliance with the law. 46 C.F.R. §502.603(b).

The primary Congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, Inc. - Possible Violations, 29 S.R.R. 665, 681 (2001). The Commission may in its discretion determine how much weight to place on each factor and must make findings with respect to each factor. Merritt v. United States, 960 F.2d 15, 17 (2nd Cir. 1992).

2. The ALJ's Findings As to Penalties Are Contrary to Law

In response to the ALJ's Order on Remand, BOE addressed each of the section 13(c) factors. Based on those factors, the fact that Respondents' violations were found to have been willfully and knowingly committed, and that there were no relevant mitigating factors, BOE argued that a civil penalty of \$6001 - \$30,000 for each violation is appropriate. BOE Brief on Remand, p. 28. BOE's presentation at the penalty phase was uncontested by the Respondents.

At the outset, the ALJ concludes that the Act requires that penalties be assessed on a shipment-by-shipment basis. Although this is a path paved with good intentions, no statutory language or case precedent requires such detour. See e.g. Arctic Gulf Marine Inc., Peninsula Shippers Association Inc and Southbound Shippers Inc., 24 S.R.R. 159 (FMC 1987)(aggregate penalty of \$1,000,000); Sea-Land Service, Inc. - Possible Violations, 30 S.R.R. 872 (FMC, 2006)(aggregate penalty of \$800,000 assessed). Expanding on that finding, however, the ALJ

finds, as a matter of law, that the Commission must take into account such factors as the size of the shipment and whether there were problems with the shipment resulting in harm to the shipper (Initial Decision on Remand, p.107-08).¹⁹ This finding is contrary both to the plain language of the statute, the Commission's regulations and Commission precedent. Section 13(c) directs the Commission to take into account the nature, circumstances, extent, and gravity of the violation committed – in this case, operating without a license or bond in violation of section 19. Therefore, the statute unambiguously requires the Commission to take into account the nature, circumstances, extent and gravity of Respondents' unlicensed, unbonded operations – not the circumstances surrounding each shipment. The ALJ's unwarranted departure from the explicit penalty criteria set in section 13(c) of the Act thus gives rise to variable and inconsistent penalty amounts calculated on a shipment-by-shipment basis, without clear or meaningful distinctions to be drawn among them. Such a result is untenable.

The Commission has previously ruled that the additional factors considered by the ALJ in assessing a penalty amount for each of the Anderson shipments, specifically harm to shipper, are not relevant components in the penalty determination. In Stallion Cargo, supra, the Commission held erroneous the ALJ's refusal to assess penalties for certain violations in the absence of evidence that the shippers were harmed:

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

¹⁹ The fallacy of using such factors as size or value of the shipment is highlighted in the case of household goods where shipments often consist of personal belongings accumulated over a lifetime, some with substantial sentimental value unmatched by its replacement monetary value. Certainly, the size or value of the shipment have no relation to the breach of trust by the operator to the customer. Neither, we submit, should small shippers be seen as entitled to lesser protections or lesser remedies than their larger counterparts.

Consequently, the ALJ confounded his analysis by considering particular factors and circumstances surrounding each shipment, and then imposing an arbitrary penalty amount on a shipment-by-shipment basis. As amply demonstrated in this proceeding, the result is a unfortunate mishmash lacking any explanation as to how it serves the statutory scheme, and largely defying any attempt to determine its precedential value. 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.

a. The ALJ Failed to Establish that He Applied the Act's Enhanced Penalty Provisions

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

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. Martyn Merritt, AMG Services, 26 S.R.R. 663, 664-665 (1992). To give proper effect to this intent, a logical and natural reading of the statute should result in the imposition of the enhanced penalty for a knowing and willful violation that, at a minimum, exceeds the statutory threshold defining the maximum penalty amount for violations having a lesser requirement of intent or purpose. After following an uncertain calculus of the penalty factors, however, the amounts assessed by the ALJ against Respondents here do not even approach the maximum allowed for those violations that do not require a showing to be “knowingly and willfully” committed. The ALJ’s action plainly negates Congressional intent that the Commission should wield enhanced penalties for knowing and willful violations and effectively writes that distinction out of the statute. At the nominal levels assessed, both the Respondents and victimized shippers alike can dismiss the Commission’s penalty as reflecting little more than a “cost of doing business.”²⁰

While criticizing at length BOE’s reading of the civil penalty statute, the ALJ, in fact, offers no justification for departing from the clear intent of the statute. Neither is this the case that BOE insists that the maximum penalty possible under section 13 be assessed against Respondents, but rather that any such penalty should be not less than \$6000 per violation nor exceed \$30,000 per violation. While the ALJ asserts this is a “new argument,” *id.* at p. 92, it reflects the position taken by BOE in first filing its exceptions in March 2010 (see pp. 32-33); in BOE’s Brief on Remand in May 2012 (see pp. 24-28); and once again in excepting to the Initial Decision on Remand in February 2013. Not to be deflected, the ALJ repeatedly characterizes BOE’s position on penalties as arguing “that the maximum civil penalty of \$30,000 should be

²⁰ This point is clearly demonstrated in the case of shippers Alex and Lynn Watts, where Respondents extracted freight charges on a botched shipment in excess of \$8,800, but the ALJ assesses a penalty of only \$3,000.

imposed,” Initial Decision on Remand at 101; for the “[i]mposition of the maximum civil penalty that BOE seeks,” *id* at 102; and “that BOE seeks the maximum civil penalty of \$30,000 for each violation,” *id* at 106. The ALJ thus discounts, and declines to address further, any option for a penalty commensurate to the far more serious nature of violations willfully and knowingly committed.

The ALJ’s discussion of the section 13(c) factors, in fact, never purports to explain why civil penalties in the range of \$6,000 - \$30,000 would not more appropriately address the nature and extent of culpability of the violations committed. In assessing penalties at the level of \$1,000, his assessment of civil penalties against Respondents is indistinguishable from those penalties assessed without need for findings of culpability. Why, indeed, would BOE even seek to make the additional evidentiary showing that violations were willfully and knowingly committed when those efforts could make no difference in the ultimate penalty assessed? In doing so, the ALJ renders any statutory differences as to knowing and willful violations meaningless. Such an approach allows an ALJ to avoid the consequences of the prohibitions and penalties provisions of the Shipping Act by finding the existence of knowing and willful violations but imposing penalties that are not commensurate with the increased levels provided in the statute.

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

levels commensurate to lesser offenses, the ALJ offers no justification in the way of explaining this downward departure²¹ from the civil penalty regime otherwise intended by Congress.

Denying that there could be any such intent on the part of the Congress, the ALJ seeks at length to argue that there can be no such policy dividing willful and knowing penalties from those for lesser violations, Initial Decision on Remand at 93-96. The ALJ's arguments however are rife with conjecture.²² Thus, in his argument to the effect that "BOE does not cite to any Commission or administrative law judge decision in the twenty-eight years since the enactment of the Shipping Act holding or even discussing" the relationship between penalties for willful and knowing violations and those for lesser offenses, *id.* at 95, BOE concurs that this appears as a matter of first impression to this ALJ. Past administrative law judges, acting in numerous dockets, have levied penalties in cases often more complex and/or more bitterly contested by Respondents' counsel, without finding themselves unable to contemplate a penalty better commensurate to the willful and knowing characteristics of the violations committed here. See e.g. Stallion Cargo Inc., supra., 29 S.R.R. at 682 (imposing penalty at \$10,000 per violation found willfully and knowingly committed); Transglobal Forwarding Co Ltd. – Possible Violations, 29 S.R.R. 814 (ALJ, 2002) (imposing penalty at \$20,000 per violation found willfully and knowingly committed); Green Master International Freight Services Ltd. – Possible Violations, 29 S.R.R. 1303, 1317 (FMC 2003) (affirming penalty of \$22,500 per violation found willfully and knowingly committed); Hudson Shipping (Hong Kong) Ltd d/b/a Hudson Express Lines – Possible Violations, 29 S.R.R. 1381, 1386 (ALJ 2004) (affirming penalty of \$22,500 per

²¹ Downward departure is a term used in criminal law to refer to effecting reductions below the applicable sentencing guideline range.

²² Curiously, in his February 23, 2010 Memorandum and Order on Remand For Determination Of Civil Penalty, the ALJ pleads uncertainly for "guidance on how [the Commission] intends to take into account the Commission's policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes in determining the amount of a civil penalty," at p. 14.

violation found willfully and knowingly committed); Mateo Shipping Corp. – Possible Violations, 31 S.R.R. 830 (ALJ Guthridge, 2009) (imposing penalty at \$30,000 per violation found willfully and knowingly committed); EuroUSA Shipping Inc et al – Possible Violations, 31 S.R.R. 1131 (ALJ Guthridge, 2010) (as to respondent Container Innovations, imposing penalty at \$30,000 per violation found willfully and knowingly committed). The ALJ’s assertion is unavailing because, with the exception of Stallion Cargo above, BOE is unaware of any prior case where the ALJ has imposed a penalty that treated willful and knowing violations at the same level as lesser offenses.

The ALJ next proposes that the Commission’s decision in Worldwide Relocations, upholding civil penalties that included \$6,000 per violation for 274 willful and knowing violations stands as precedent that the Commission intends that there be no limits on minimum penalties, even where willful and knowing violations are proven. Here again, for the ALJ to speculate that “I am confident that the Commission would not have adopted the decision imposing civil penalties” without first examining and affirming the relationship between penalties for willful and knowing violations and those for lesser offenses, *id.* at 95, belies a level of confidence not readily divined from the Commission’s decision itself. See e.g. EuroUSA Shipping Inc, Tober Group Inc and Container Innovations Inc. – Possible Violations, 32 S.R.R. 578, 580 (April 12, 2012), wherein the Commission describes the ALJ’s position below as having “refused to assess a civil penalty because he found that (1) BOE had not proven a ‘willful and knowing violation’ to justify penalties exceeding \$6000 per violation...” (emphasis added), citing the Initial Decision therein, 31 S.R.R. 967, 1023-24 (ALJ, 2009). The Commission remanded for consideration whether “BOE provided information sufficient to support its full demand for maximum penalties,” including a revised analysis by the ALJ whether the violations

were willful and knowing, and BOE's evidence of "the nature, circumstances, extent and gravity" of the violations, 32 S.R.R. at 582.

The ALJ next cites the absence of exceptions to the Worldwide Relocations decision, which "presumably BOE would have done," "suggests that BOE has enforced the civil penalty provision of the Act for twenty-eight years without believing that the Act requires the minimum civil penalty to be imposed for a willful and knowing penalty must exceed the maximum civil penalty to be imposed for a violation for a violation that is not willful and knowing." *Id.* at 95-96. Suffice it to say that the reasons why BOE did not file exceptions in the Worldwide Relocations involve a multiplicity of issues, not least of which is BOE's agreement with other, more substantive portions of the Initial Decision therein. The ALJ's conjecture as to the reasons why BOE did not file exceptions in Worldwide Relocations is inappropriate as well as misplaced.

b. The ALJ Failed to Provide an Adequate Rationale for the Amount of Any Reductions.

While the Initial Decision on Remand speaks broadly about the penalty factors that must be applied under the statute, the ALJ provides no calculus or formula by which he ultimately weighed the penalty factors in favor, or against, Respondents. There is no starting point from which the dollar penalties are to be calculated, and no elucidation of the weighting applied to each statutory factor. Has the ALJ set the penalty for willful and knowing violations at \$1000 per violation, \$2000 or some other figure?²³ What is the value of a mitigating factor, and is it a fixed dollar figure or as a dollar range? Are violations attributed to small (or LCL) shipment considered a mitigating factor, or is the presence of violations on large shipments deemed an

²³ As the ALJ's now-vacated Supplemental Decision appeared to start willful and knowing violations at a value of \$750, BOE assumes some other variable formula is employed by the ALJ. Neither BOE nor, we submit, the Commission that must now review the Initial Decision on Remand are in a position to discern the basis of the ALJ's penalty calculations.

aggravating factor? Without a cogent explanation, it is simply impossible to assess the basic justice of his penalty calculations, or the relative fairness of his penalty calculations across the 22 shipments cited.

Reference to the prior enforcement decisions by this same Administrative Law Judge serve only to deepen the mystery surrounding this penalty calculus. In two decisions of relatively recent vintage, Mateo Shipping Corp. – Possible Violations, supra, 31 S.R.R. at 830 (2009) and the ALJ's separate Initial Decision as to respondent Container Innovations in EuroUSA Shipping Inc et al., supra, 31 S.R.R. 1131, the ALJ in fact imposed penalties at \$30,000 per violation. Those cases share findings of fact common to those here -- the violations were willfully and knowingly committed, culpability of the respective respondents was high, and neither respondent had a prior history of violations.²⁴ In both decisions, the ALJ entered findings that the respondent had the ability to pay a substantial monetary penalty, stemming from respondent's prior failure to respond to BOE discovery. See e.g. EuroUSA Shipping, 31 S.R. R. at 1152.

The ALJ's finding in the instant case that Anderson has only limited ability to pay a civil penalty thus bears an outsize importance in the ALJ's decision here to so drastically reduce the penalty for violations found willfully and knowingly committed into the range of \$1,000 - \$3,000 per violation.²⁵ BOE strenuously objects to the notion that Respondent's limited ability to pay, without more, entitles Anderson to mitigate his civil penalty from \$30,000 down to \$2000, a

²⁴ The ALJ also found that there were no "other matters that justice requires be taken into account." See e.g. EuroUSA Shipping, 31 S.R.R. at 1152.

²⁵ The base penalty amount drawn in Anderson appears to be \$2,000 per violation found willfully and knowingly committed, as this figure was assessed in 12 instances. See slip op. at 108. Other differences mentioned but never quantified by the ALJ as to the "nature, circumstances, extent and gravity" of the violations appear to vary the penalty only in limited dollar amounts, as with the Two Trees (\$1500), Lynn Watts (\$3000) and Dirk Manuel (\$5000) shipments. Id. at 102-107.

reduction of roughly 93%. To paraphrase the ALJ, the Initial Decision on Remand devalued all other statutory factors under section 13 “to the point of irrelevance”. Id. at 102.

While the process of assessing a civil penalty is necessarily inexact, it must not be so completely opaque as to defy Commission understanding and oversight, nor stymie any meaningful critique by BOE. The ALJ has left no roadmap adequate to ascertain his decisional process in reaching a penalty amount that can only be described as the “cost of doing business,” H.R. REP. No. 53, supra at 184. The Commission should step in, as it did in Stallion Cargo, in order to right the balance when the penalties assessed by the ALJ fail to any longer deter violations and achieve the objectives of the statute, 29 S.R.R. at 681-682 (overturning \$50,000 penalty below, and imposing Commission penalty at \$10,000 per violation).

c. The ALJ Erred in Making Other Penalty Findings.

The ALJ also differs with BOE’s characterization of Anderson and Anderson International Transport as “absconding Respondents,” Initial Decision on Remand at 96, for purposes of determining whether Respondents cooperated in the formal proceeding, citing Refrigerated Container Carriers Pty. Ltd – Possible Violations, 28 S.R.R. 799 (ALJ, 1999). The ALJ asserts that, because BOE did not file a motion to compel or seek relief upon a claim that it was unable to obtain evidence, id at 97, the civil penalty implications of Refrigerated Container Carriers were inapplicable. The ALJ’s finding stems from a most narrow and peculiar view of the proceeding. While it is correct that BOE did not file a motion to compel, several items remained outstanding before the ALJ immediately prior to submission of BOE’s case. On March 11, 2009, the ALJ served an Order for Respondents Anderson International Transport and Owen Anderson to File Document, being the text of the purported long-form bill of lading that would delineate the terms, conditions and limitations of any holding out by Anderson International

Transport. The ALJ directed also that Anderson serve a copy of such document upon BOE. Respondents never complied with this standing order of the ALJ; the ALJ, however, took no action to enforce his own order. In addition, on April 2, 2008, BOE filed a Motion for an Order to Show Cause against Anderson International Transport and Owen Anderson, requiring Respondents to file a Rule 95 prehearing statement by which BOE would be informed of any previously unknown witnesses or unprovided documents or testimony which Anderson proposed to use at trial. Seven months later, on November 4, 2008, the ALJ issued his Memorandum and Order for Respondents Anderson International Transport and Owen Anderson to Show Cause. Respondents did not file an answer to the Order to Show Cause, nor did they submit a Rule 95 Statement. Although BOE's April 2008 Motion asked that sanctions be taken against Respondents, the ALJ took no further action on BOE's motion, and did nothing to enforce his own November 4, 2008 Order to Show Cause. Instead, respondents "decided to boycott the formal proceeding," Refrigerated Container Carriers, 28 S.R.R. at 805. The very result predicted by Judge Kline in Refrigerated Container Carriers also has been brought to fruition, the regrettable message to the industry being that "no significant civil penalty" would likely result even though Respondents have worked to actively stymie the administrative hearings. Id. BOE believes the Commission may properly take into consideration the Respondents' failure to comply with existing orders of the Administrative Law judge as directly contravening the Commission's clear policies for deterrence and future compliance.

With respect to statutory factors relevant to the violator, the ALJ appropriately ruled that because Respondents' violations were willful and knowing, their degree of culpability was high. (Initial Decision on Remand, p. 99). He also found that Respondents had no history of prior

violations. (Id. at 100). BOE agrees with these findings, but excepts to the extent that the ALJ fails to make clear the weight accorded to each.

On the issue of ability to pay, the ALJ recited the information furnished by BOE with respect to Owen Anderson's filings in a bankruptcy proceeding, and concluded that Respondents have a limited ability to pay. Id. Related to those findings, the ALJ asserted that a civil penalty assessed by the Commission would be an unsecured priority claim that could "impact recovery of other unsecured priority and nonpriority claims filed in the bankruptcy proceeding." (Initial Decision on Remand, p.107). While this latter finding by the ALJ was largely conjectural when announced in 2010, it holds no contemporary relevance to the circumstances of the Commission's decision in 2013. The Anderson petition was filed in 2008 and, upon dismissal of the Anderson bankruptcy petition without substantive disposition, any claimants were freed to pursue collection of moneys owed them. If not pursued, those claims would have successively been extinguished under Texas' statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.004(a)(3) (contracts in writing – 4 years) and § 16.004(a)(4) (oral contracts – 4 years). No effect could be had today in penalizing Respondents for any amount appropriate under the statute.

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

Respondent may very well be unable to pay the penalty imposed by the Commission, but the other factors present – the severity of the violations,

Respondent's continued disregard of the statutory requirements even after the initiation of a formal investigation, and the need to further the Congressional purpose to deter violations by imposing greater civil penalties – militate, on balance, that a substantial, though not the maximum, penalty be imposed.

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

Commission precedent makes clear that the main congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, supra, 29 S.R.R. at 681, and Portman Square, supra, 28 S.R.R. at 85. Following Congress' action raising the maximum penalties for violations from the previous \$5,000 per violation to up to \$25,000 for violations committed knowingly and willfully, the Commission instituted a number of rulemaking proceedings to implement the newly adopted Shipping Act of 1984, including Docket No. 84-20 to revise its rules and establish criteria and procedures for the handling of penalty claims. The language proposed in the Notice of Proposed Rulemaking, 49 F.R. 18874 (May 3, 1984), and adopted in then-46 C.F.R. §505.3(b), was identical to the provision as it appears today in current 46 C.F.R. §502.603 (b), including the requirement that “the policies for deterrence and future compliance with the Commission’s rules and regulations” be taken into account. Since that time, the Commission has been unwavering in addressing the main Congressional purpose of deterrence and compliance when imposing civil penalties. Pacific Champion Express Co., Ltd. - Possible Violations, 28 S.R.R. 1397, 1404-1405 (FMC 2000) (the applicable statutory factors include “the need to send an appropriate message of deterrence”); Kin Bridge Express, supra, 28 S.R.R. at 994 (“[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

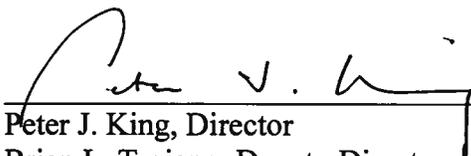
purpose of deterrence and would send the wrong message); and Martyn Merritt, AMG Services, supra, 26 S.R.R. at 664 (“In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to . . . the Congressional purpose to deter violations by imposing greater penalties in the 1984 Act.”). Indeed, in an analogous penalty situation in which all Shipping Act violations were knowingly and willfully committed, the penalty issue was recast by the Commission as requiring the Administrative Law Judge to “address the question of why the maximum potential penalties should not be assessed.” Arctic Gulf Marine Inc., supra, 24 S.R.R. at 160.

Certainly, the Commission’s policies for deterrence and future compliance in the context of the assessment of civil penalties have been clearly established and well settled for a quarter of a century. The penalty amounts imposed by the ALJ not only depart from this precedent, but ignore the legislative purpose underlying the two-tiered structure providing a maximum penalty, and maximum deterrence, for knowing and willful violations. At minimum, the ALJ was obligated to disclose his rationale in exercising a downward departure in the penalty amount to a level equivalent to lesser violations of the Act. Should the Commission 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.

IV. CONCLUSION

For the foregoing reasons, BOE submits that the ALJ erred in: (1) finding that Respondents did not assume 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 not those of an NVOCC; and (2) in failing to assess an appropriate civil penalty against Respondents. Accordingly, it is respectfully requested that after consideration of these Exceptions and the record in this proceeding, the Commission find that Respondents violated sections 8 and 19(a) and 19(b) of the Shipping Act and assess the maximum civil penalty authorized for 22 knowing and willful violations. Should the Commission 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.

Respectfully submitted,



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

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

February 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2013, a copy of the foregoing document has been served upon all the parties of record by first class mail.


Brian L. Troiano

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

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

Owen Anderson
4400 Town Plaza Drive
Suite 109
Houston, TX 77045

APPENDIX 1

DOCUMENTS ISSUED BY OR TO ANDERSON

Description of Document	Shipper (BOE Appendix Bates Number)
Anderson Through Bill of Lading	Two Trees (64); Repairer of the Breach (150); Dirk Manuel (158); Osule (236); DeLeon (287); Downie (445); Lynn Watt (478); Zinnah (563); Richard Neuman (578, 583); Dillon (607); Huxtable (618); Maniotes (653); Hughes (680).
Anderson Rate Quote/Estimate/ or Invoice to Shipper for Charges Including Ocean Freight At A Greater Amount Than Rate Charged to It By Ocean Carrier	Two Trees (23,67); Watts (105); Repairer of the Breach (148); Dirk Manuel (179); Osule (245); DeLeon (286, 277); Ray Cooper (334); Lynn Watt (507, 459, 505); Zinnah (566, 564, 524); Richard Neuman (578); Dillon (607); Huxtable (615); Maniotes (653); Hughes (673)
Anderson Bill of Lading Master to Carrier	Two Trees (33); Watts (74,75); Repairer of the Breach (135); Osule (233,246); DeLeon (276); Ray Cooper (303); Downie (441); Lynn Watt (479); Zinnah (527); Richard Neuman (569); Dillon (597); Huxtable (612); Michel Rose (639); Maniotes (654); Licrish (668); Coker (671); Hughes (683).
Carrier Invoice or Memo Request to Anderson for Payment of Ocean Freight At A Lesser Amount Than Amount Anderson Charged to Shipper	Two Trees (50,51); Watts (109); Repairer of the Breach (122); Dirk Manuel (155); Osule (228); DeLeon (275,266); Downie (439); Sarapalli (454); Lynn Watt (516); Zinnah (518, 541); Richard Neuman(576); Huxtable (610); Michel Rose (631,632); Albalbisi (649); Licrish (667); Coker (670); Hughes (682).
Anderson Payment to Carrier for Ocean Freight	Ray Cooper(297); Richard Neuman (577); Zinnah (521,522); Dillon (591,592)

Carrier Rate Quotes to Anderson and/or Anderson Request For Quote From Carrier	Dirk Manuel (189, 190); DeLeon (285); Zinnah (558,559); Dillon (599); Michael Rose (632)
Shipper Complaint to Better Business Bureau About Anderson	Two Trees (30);Dirk Manuel (205, 206); Lynn Watt (467)
Freight Forwarder Invoice to Anderson For Performance of Freight Forwarder Services	Licrish (669); Coker (672); Hughes (684)
Anderson Dock Receipt	Two Trees (61); Watts (77, 83); Repairer of the Breach (147); Davidson (218); Osule (234); DeLeon (274);
Emails or Fax Transmissions Between Respondents and Proprietary Shipper	Two Trees (16,20,24); Dirk Manuel (180,188); DeLeon (258,259,269); Lynn Watt (457,461,472,473,474,487); Zinnah (524); Newman (587); Hughes (674).

APPENDIX 2

In 8 of the 13 shipments for which its short form bill of lading was used, Anderson International Transport (AIT) contracted with another motor carrier to perform the actual motor carrier leg of the international transport on Anderson's behalf.

AIT Customer/ Cargo Owner	Record Reference to Anderson House Bill of Lading	Actual Motor Carrier Contracted by Anderson	Record Reference to Actual Motor Carrier Used
Repairer of Breach (BOE App 7)	BOE App 150	WW Rowland	BOE App 142, 152-53 (WW Rowland waybill to AIT)
Dirk Manuel (BOE App 8)	BOE App 158-59	American Ocean	BOE App 181, 184 (AIT trucking instructions to American Ocean)
Osule (BOE App 10)	BOE App 235	American Ocean	BOE App 239 (AIT trucking instructions to American Ocean)
DeLeon (BOE App 11)	BOE App 287	M3 Trucking	BOE App 281 (AIT instructions to M3 Trucking)
Udense (BOE App 13)	BOE App 341	Hood Trucking	BOE App 347, 392, 413-14, 417-18 (AIT instructions to Hood; AIT check issued to Hood)
Zinnah (BOE App 17)	BOE App 562-63	Clark Freight	BOE App 547, 550-57 (Clark invoice; AIT trucking instructions to Clark)
Maniotes (BOE App 23)	BOE App 653	East Florida Hauling	BOE App 661-62 (EFH bill of lading to AIT)
Hughes (BOE App 26)	BOE App 676	Southwestern Motor	BOE App 676 (Motor carrier stamp on HBL)

APPENDIX 3

Anderson's practice of issuing rate quotes to his customers in advance of soliciting such rate quotes from an intermediate NVOCC controverts Anderson acting as an agent (forwarder) on behalf of either party. Consistent with the Worldwide Relocations decision, it can be inferred that AIT was operating a principal and NVOCC on these shipments:

Date of Rate Quote by Anderson to Customer/ Cargo Owner	Record Reference to Anderson Rate Quoted to Customer	Date of Rate Quote to Anderson by Intermediate NVOCC	Record Reference to Rate Quote to Anderson
1/12/2005 (AIT Rate Quote for Two Trees shipment)	BOE App 22-23	4/13/2005 (Rate quote issued to AIT at booking)	BOE App 52
1/5/2005 (AIT Rate Quote for Osule shipment)	BOE App 245	1/6/2005 (Rate Quote issued to AIT)	BOE App 225
6/10/2006 (AIT Rate Quote for DeLeon shipment); 6/17/2006 AIT Rated House Bill for DeLeon shipment)	BOE App 286 BOE App 287	7/20/2006 (Rate Quote issued to AIT)	BOE App 285
5/20/2006 (AIT Rate Quote for Lynn Watt shipment)	BOE App 505	7/20/2006 (Rate Quote issued to AIT)	BOE App 460
9/11/2006 (AIT Rated House Bill for Dillon shipment)	BOE App 607	9/18/2006 (Rate Quote issued to AIT)	BOE App 599
1/18/2006 (AIT Rate Quote for Huxable shipment) 2/8/2006 (AIT Rated House Bill for Huxtable shipment)	BOE App 609 BOE App 618	3/7/2006 (Rate quote issued to AIT at booking)	BOE App 620-624

APPENDIX 4

Anderson's practice of issuing rate quotes to his customers which have no relationship to the charges actually quoted by an intermediate NVOCC controverts Anderson acting as an agent (forwarder) on behalf of either. It can be inferred that AIT was operating as principal and NVOCC on these shipments:

Rate Quoted by Anderson to Customer/ Cargo Owner	Record Reference to AIT Rate to Customer	Rate Quoted to Anderson by Intermediate NVOCC	Record Reference to Rate Charged to AIT
\$425 plus \$175 documentation (AIT Rate Quote for Two Trees shipment)	BOE App 22-23	\$299.18 (Actual Rate charged to AIT)	BOE App 55-56
\$3200 (Actual Rate charged by AIT for Clifton Watts #1 shipment)	BOE App 105	\$1980 (Actual Rate charged to AIT)	BOE App 114
\$400 (Actual Rate charged by AIT for Clifton Watts #2 shipment)	BOE App 105	\$290 (Actual Rate charged to AIT)	BOE App 71
\$3190 (Actual Rate charged by AIT for Repairer of Breach shipment)	BOE App 148	\$2233 plus \$250 trucking (Actual Rate charged to AIT)	BOE App 126, 141
\$1250 (Actual Rate charged by AIT for Dirk Manuel shipment)	BOE App 156	\$1061 (Actual Rate charged to AIT)	BOE App 154-55, 165
\$1500 (Actual Rate charged by AIT for Asenkule Osule shipment)	BOE App 245	\$951.76 (Actual Rate charged to AIT)	BOE App 221, 225
\$3960 (AIT Rate Quote for Margaret DeLeon shipment)	BOE App 286, 287	\$3495.50 (Rate Quote to AIT)	BOE App 278, 254
\$2500 (AIT Rate Quote for Ray Cooper shipment)	BOE App 310	\$1245 (Rate Quote to AIT)	BOE App 307, 326
\$1500 (Actual Rate charged by AIT for Dr Saripalli shipment)	BOE App 450	\$787.55 (Actual Rate charged to AIT)	BOE App 452
\$1650 (AIT Rate Quote for Lynn Watt shipment)	BOE App 505	\$1433.89 (Rate Quote to AIT)	BOE App 460, 484, 516
\$900 (Actual Rate charged by AIT for Richard Newman shipment)	BOE App 578	\$491.19 (Actual Rate charged to AIT)	BOE App 577
\$2450 (Actual Rate charged by AIT for Nick Maniotes shipment)	BOE App 653	\$1302 (Rate Quote to AIT)	BOE App 652

APPENDIX 5

Anderson's practice of increasing charges to his customers which have no relationship to any change or increase quoted by an intermediate NVOCC controverts Anderson acting as an agent (forwarder) on behalf of either. It can be inferred that AIT was operating as principal and NVOCC on these shipments:

Initial Rate Quoted by Anderson to Customer/ Cargo Owner	Record Reference to Initial AIT Rate to Customer	Revised Rate Quoted by Anderson to Customer	Record Reference to Revised Rate Charged by AIT
\$425 plus \$175 doc. fee (AIT Rate Quote for Two Trees shipment)	BOE App 22-23	\$519 plus \$250 doc. fees (Revised Rate charged by AIT)	BOE App 015, 067
\$3950 (AIT Rate Quote for Margaret DeLeon shipment)	BOE App 286-87	\$5600 (Revised Rate charged by AIT)	BOE App 277
\$5850 (Initial Rate charged by AIT for David Zinnah shipment)	BOE App 564	\$6078 (Revised Rate charged by AIT) \$7560 (2d Revised Rate charged by AIT)	BOE App 560 BOE App 525