

S E R V E D
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FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 07-02

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

**INITIAL DECISION ON REMAND –
CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE¹**

On March 22, 2007, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing to determine whether respondents Owen Anderson and Anderson International Transport² violated section 8 of the Shipping Act of 1984 (the Shipping Act or Act) by operating as a non-vessel-operating common carrier (NVOCC) without publishing tariffs showing rates and charges, and whether Anderson/AIT violated sections 19(a) and (b) of the Act by operating as an ocean transportation intermediary (OTI) without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds. *Anderson International Transport and Owen Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02, Order at 3 (Mar. 22, 2007) (Order of Investigation and Hearing) (*Anderson/AIT – Possible Violations*).³ The Secretary served the Order of

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

² Owen Anderson operated Anderson International Transport as a sole proprietorship. They are referred to as “Respondents,” “AIT,” “A.I.T.,” “Anderson,” or “Anderson/AIT.”

³ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 8 of the Act is now codified at 46 U.S.C. § 40501(a) and sections 19(a) and (b) are now codified at 46 U.S.C. §§ 40901 and 40902. The Commission continues to cite provisions of the Act by their former section references. *See, e.g., OC International Freight, Inc., OMJ International Freight, Inc., and Omar Collado*, FMC No. 12-01 (Apr. 2, 2012) (Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of

Investigation and Hearing on Respondents. After a period of cooperation with the Commission's Bureau of Enforcement (BOE), Anderson chose not to participate further in this proceeding. Despite Respondents' failure to participate in the latter parts of this proceeding, "it is the Commission's responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties." *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd., et al.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001) (*Rose Int'l*).

This proceeding is one of four that the Commission commenced pursuant to 46 U.S.C. § 41302 to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act. *See also Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, FMC No. 06-01, ___ S.R.R. ___ (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations (FMC)*); *Parks International Shipping, Inc., et al. – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 06-09 (ALJ Feb. 5, 2010) (Initial Decision), vacated and remanded (FMC Apr. 26, 2012); *Embarque Puerto Plata, Corp. and Embarque Puerto Plata Inc. d/b/a Embarque Shipping and Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp. and Julio Mateo – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo), Notice Not to Review served Sept. 29, 2009. The Commission commenced a fifth proceeding to investigate the activities of three OTIs licensed by the Commission as NVOCCs that appeared to have violated the Act in their dealings with allegedly unbonded and untariffed NVOCCs. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing).

On August 28, 2009, I issued an Initial Decision in this proceeding.⁴ The Initial Decision found that Anderson/AIT had operated as an OTI. The evidence presented by BOE established by a preponderance of the evidence that Anderson/AIT operated as an ocean freight forwarder in willful and knowing violation of section 19 of the Act on twenty-two shipments. The Initial Decision found

the Shipping Act of 1984). Accordingly, I follow that practice in this decision.

⁴ Three decisions in this proceeding are cited frequently: *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge) (*Anderson/AIT ID*); *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Feb. 23, 2010) (Memorandum and Order on Remand for Determination of Civil Penalty) (*Anderson/AIT Civil Penalty*); and *Anderson/AIT – Possible Violations*, FMC No. 07-02 (FMC Apr. 26, 2012) (Order Vacating Initial Decision and Remanding for Further Proceedings) (*Anderson/AIT (FMC Remand)*).

that BOE had not submitted any evidence from which a finding on Respondents' ability to pay a civil penalty can be based. Therefore, no civil penalty could be assessed. *Anderson/AIT* ID at 83-84.

BOE filed a petition with the Commission to reopen the proceeding for the purpose of taking further evidence. On December 4, 2009, the Commission granted BOE's petition. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (FMC Dec. 4, 2009) (Order Granting Petition to Reopen the Proceeding and for Remand). On February 23, 2010, I issued an order imposing a total of \$33,950.00 as a civil penalty. *Anderson/AIT Civil Penalty*. On March 9, 2010, the Commission served a notice to review, *Anderson/AIT – Possible Violations*, FMC No. 07-02 (FMC Mar. 9, 2010), and on March 15, 2010, BOE filed exceptions to the initial decision and the decision on a civil penalty.

On August 16, 2010, a Commission administrative law judge issued an Initial Decision in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, 31 S.R.R. 1471 (ALJ Aug. 16, 2010) (*Worldwide Relocations* (ALJ)). On March 15, 2012, the Commission issued an order approving in part, reversing in part, and modifying in part that Initial Decision. *Worldwide Relocations – Possible Violations*, FMC No. 06-01 (FMC Mar. 15, 2012) *Worldwide Relocations* (FMC).

On April 26, 2012, the Commission vacated the Initial Decision and the decision on civil penalties and remanded this proceeding. The Commission did not identify any error in the findings of fact or conclusions of law. "In light of the Commission's recent decision in Docket No. 06-01, *Worldwide Relocations, LLC, et al.*, we now vacate the initial and supplemental decisions, and remand this matter to the ALJ for further proceedings consistent with the Commission's holding in *Worldwide Relocations.*" *Anderson/AIT* (FMC Remand).

As discussed more fully below, in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, the Commission investigated entities alleged to have operated as ocean transportation intermediaries on shipments of household goods, but that did not have an OTI license issued by the Commission and did not keep open a tariff or furnish a bond as required by the Act. These unlicensed entities dealt with members of the shipping public (proprietary shippers)⁵ and acted as intermediaries between the proprietary shippers and the downstream common carriers that transported the cargo by water from the United States to a foreign port. Of particular relevance to this proceeding against *Anderson/AIT* is the Commission's discussion on how to distinguish when an entity (licensed or unlicensed) involved in a shipment as an ocean transportation intermediary operates as an ocean freight forwarder (sometimes abbreviated OFF) from when an entity operates as an NVOCC, and the use of presumptions and inferences in making that decision.

The Commission held that the person whom the downstream common carrier that transported the cargo identified as the shipper when the downstream carrier issued its bill of lading is critically

⁵ The Commission used this term in *Worldwide Relocations, Worldwide Relocations* (FMC) at 18.

significant in determining whether the unlicensed entity (such as Respondents in *Worldwide Relocations* and Anderson/AIT) operated as an NVOCC or an ocean freight forwarder on a shipment.

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

Worldwide Relocations (FMC) at 18-19.

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

On May 1, 2012, I served an order requiring the parties to file briefs on the remand issues. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ May 1, 2012) (Order to File Briefs on Remand Issues). BOE filed its brief on May 22, 2012. Neither Respondent filed a brief.

As set forth in greater detail below, the important discussion in *Worldwide Relocations* (FMC) applicable to this proceeding is the Commission's discussion of the methodology to be used when determining whether an entity operated as an NVOCC or an ocean freight forwarder on a particular shipment. The Commission articulated a permissive presumption or inference that an OTI is operating as an NVOCC, not an ocean freight forwarder. *Worldwide Relocations* (FMC) at 10-21.

In this proceeding, the Initial Decision found that Anderson/AIT operated as an ocean freight forwarder on twenty-two shipments. The *Worldwide Relocations* (FMC) permissive presumption or inference could change the outcome on these shipments.

The Commission vacated the entire decision, which would seem to include the civil penalty imposed on Anderson/AIT. BOE submitted argument on the civil penalty that should be imposed, and *Worldwide Relocations* has holdings that are instructive on the civil penalty to be imposed.

Therefore, this remand decision addresses and decides anew the civil penalty to be imposed on Anderson/AIT.

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

PART ONE – BACKGROUND

I. TARIFF, LICENSING, AND BONDING REQUIREMENTS FOR OCEAN TRANSPORTATION INTERMEDIARIES.

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

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

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

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

46 U.S.C. § 40102(6).

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

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

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

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

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

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

46 C.F.R. § 515.2(o).

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

46 C.F.R. § 515.2(f).

As summarized by the District of Columbia Circuit:

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

[An NVOCC], meanwhile, is “a common carrier that . . . does not operate the vessels by which the ocean transportation is provided” and “is a shipper in its

relationship with [a vessel-operating] common carrier.” Although NVOCCs usually do not own or operate vessels to actually carry the cargo, they lease facilities and services from other firms – making them the “common carrier[s]” responsible for transportation of the cargo from origin to destination. Most NVOCCs consolidate small parcels from multiple shippers bound for the same destination and arrange for them to be shipped as a single, large, sealed container under one bill of lading. Upon arrival, NVOCCs arrange for the container to be broken down and for each parcel to be distributed to each customer. Thus, unlike an OFF, the NVOCC issues its own bill of lading to each shipper, and the vessel-operating common carrier issues a bill of lading to each NVOCC. Unlike OFFs, NVOCCs receive compensation only from the shipper.

Landstar Express America, Inc. v. FMC, 569 F.3d 493, 494-495 (D.C. Cir. 2009) (*Landstar*). A person or entity operates as an NVOCC “only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation.’” *Landstar* at 497 (emphasis added).

Section 8 of the Act requires “[e]ach common carrier . . . [to] keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.” 46 U.S.C. § 40501(a); *Landstar* at 495. Since an NVOCC is a common carrier, it must keep open a tariff. An ocean freight forwarder is not a common carrier; therefore, it does not keep open a tariff.

Section 19(a) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person wanting to operate as an OTI to be licensed by the Commission.

A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the . . . Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

46 U.S.C. § 40901(a). “To be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the Commission that: (1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services.” 46 C.F.R. § 515.11(a). An intermediary violates section 19(a) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without a Commission license.

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

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

46 U.S.C. § 40902(a). An ocean freight forwarder must “furnish evidence of financial responsibility in the amount of \$50,000,” 46 C.F.R. § 515.21(a)(1), and an NVOCC must “furnish evidence of financial responsibility in the amount of \$75,000.” 46 C.F.R. § 515.21(a)(2). An intermediary violates section 19(b) of the Act if it operates as an OTI (either as an ocean freight forwarder or as an NVOCC) without proof of financial responsibility.

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

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

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

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

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

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

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

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

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;

- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) paying lawful compensation to ocean freight forwarders;
- (7) leasing containers; or
- (8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

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

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters. NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

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

II. ORDER OF INVESTIGATION AND HEARING AND PROCEDURAL HISTORY.

A. Order of Investigation and Hearing.

On March 22, 2007, the Commission issued the Order of Investigation and Hearing that commenced this proceeding. The Commission stated:

Based on evidence available to the Commission, it appears that Mr. Anderson and AIT have knowingly and willfully provided transportation services as a non-vessel operating common carrier (“NVOCC”) in the United States without obtaining an ocean transportation intermediary (“OTI”) license from the Commission, without providing proof of financial responsibility and without publishing a tariff showing its rates and charges. It appears that Mr. Anderson and AIT have originated a minimum of fifteen ocean export shipments during the period January 5, 2005 through October 19, 2006.

Anderson/AIT – Possible Violations, FMC No. 07-02, Order at 2 (Mar. 22, 2007) (Order of Investigation and Hearing). The Commission instituted the investigation to determine:

- 1) whether Owen Anderson and Anderson International Transport violated section 8 of the 1984 Act and the Commission’s regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing rates and charges;
- 2) whether Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission’s regulations at 46 C.F.R. 515 by operating as an OTI in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds;
- 3) whether, in the event one or more violations of the 1984 Act or the Commission’s regulations are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed; and
- 4) whether, in the event violations are found, appropriate cease and desist orders should be issued against Owen Anderson and Anderson International Transport;

Id. at 3. The Secretary served the Order on Anderson and AIT. (BOE App. 11-12.)⁶

B. Discovery Served by BOE.

Initially, Anderson cooperated in the investigation. On April 20, 2007, BOE served discovery on Anderson. On August 20, 2007, the parties submitted a joint proposal for a procedural schedule: “Mr. Anderson has participated in this proceeding on an individual basis and on behalf of Anderson International and has responded to discovery and interrogatory requests.” (Joint Status Report and Proposed Discovery Schedule filed August 20, 2007.) This proposal resulted in an order setting forth a deadline for discovery and submission of Rule 95 statements and tentative filing dates

⁶ Unless otherwise noted, “BOE App.” followed by a number refers to a page in the Appendices filed with BOE’s Proposed Findings of Fact, Amended Proposed Findings of Fact, and Revised Proposed Findings of Facts.

for a prehearing conference and submission of written materials and/or commencement of presentation of evidence. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Sept. 6, 2007) (Discovery Schedule and Procedural Order). BOE filed its Rule 95 statement as required by the Order, but neither Respondent filed a Rule 95 statement.

On December 21, 2007, the parties appeared for a telephonic status conference. Anderson stated that he had sought, but had not retained, legal counsel. He stated that he believed he should have counsel and asked for additional time to seek counsel and to submit responses to the requests for admission and the Rule 95 statement. Counsel for BOE stated that BOE did not object to a reasonable extension of time. An order was entered vacating the existing filing dates, giving Anderson an opportunity to seek counsel, requiring Anderson to respond to BOE's discovery, and establishing new filing dates. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Dec. 21, 2007) (Memorandum of December 21, 2007, Telephonic Prehearing Conference). Anderson answered BOE's interrogatories and requests for admission. (BOE App. 10, 13-14.) No attorney entered an appearance for Anderson/AIT.

The December 21, 2007, required that:

[O]n or before February 15, 2008, the Bureau of Enforcement serve and file Proposed Findings of Fact. This document shall set forth proposed findings of fact in numbered paragraphs with a citation to evidence that BOE contends supports the proposed finding of fact. The parties can see an example of the format required for the Proposed Findings of Fact at <http://www.fmc.gov/reading/Dockets.asp> in the proceeding *Clutch Auto, Ltd. v. International Touch Consolidator, Inc.*, FMC No. 1880(F), ("Served October 4, 2007, Procedural Order, Attachment A Administrative Law Judge Tentative Findings of Fact").

Anderson/AIT – Possible Violations, FMC No. 07-02 (ALJ Dec. 21, 2007) (Memorandum of December 21, 2007, Telephonic Prehearing Conference).

C. BOE's Proposed Findings of Fact.

On February 15, 2008, BOE filed Proposed Findings of Fact (BOE Proposed Findings of Fact) and an accompanying Appendix containing the documents on which it based its proposed findings. Apparently, these documents were supplied to BOE by Anderson/AIT.⁷ On April 4, 2008, BOE filed a document entitled Amended Findings of Fact and Motion for an Order to Show Cause against Anderson International Transport and Owen Anderson. This document proposed several additional facts and included additional documents.

⁷ On April 2, 2008, I granted BOE's motion to substitute redacted documents 8, 10, 12, 16, 17, and 18 for documents 8, 10, 12, 16, 17, and 18 in its Appendix. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Apr. 2, 2008) (Order Granting Bureau of Enforcement's Motion to Substitute Exhibits).

D. Order to File Revised Proposed Finding of Fact.

On November 4, 2008, I issued an Order finding that “BOE ha[d] not designated its proposed finding[s] of fact with sufficient specificity and ha[d] not adequately identified the evidence it claim[ed] support[ed] it proposed findings. Therefore, I [ordered] BOE to revise and refile its proposed findings of fact.” *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 5 (ALJ Nov. 4, 2008) (Memorandum and Order Requiring Bureau of Enforcement to Revise and Refile Bureau of Enforcement’s Proposed Findings of Fact and Bureau of Enforcement’s Amended Findings of Fact) (ordering BOE to file Revised Proposed Finding of Fact “designating specific facts supporting its claims and providing the Commission with the location of the evidence supporting each specific fact in the Bureau of Enforcement’s Appendix”). I ordered BOE to file the revised proposed findings by November 21, 2008.

The Order stated several reasons for requiring revised proposed findings. First, I determined that BOE had not designated its proposed finding of fact with sufficient specificity and had not adequately identified the evidence it claims supports it proposed findings. For instance, BOE Proposed Finding of Fact 7 states:

Anderson International Transport’s customers were typically individuals who were relocating from the U.S. to a foreign country and hired Anderson International Transport to ship their household goods, personal effects and vehicles overseas. (BOE App. 5 to App. 26).

(BOE Prop. FF 7).⁸ In BOE’s proposed findings, “BOE App. 5 to App. 26” refers to multi-page Documents 5 through 26 encompassing pages 15 through 685 in BOE’s Appendix. BOE provided no direction regarding where in those 671 pages I would find the evidence it claimed supported BOE Proposed Finding of Fact 7. BOE proposed several other findings citing to “BOE App. 5 to App. 26” with no direction regarding where to find the specific evidence supporting the proposed finding of fact. *See* BOE Prop. FF 9 (“Anderson International Transport booked the cargo directly with an ocean carrier or with one of several licensed non-vessel-operating common carriers (‘NVOCC’), under the name of Anderson International Transport.”); BOE Prop. FF 10 (“Anderson International Transport paid port-to-port or multimodal transportation charges; entered into affreightment agreements with underlying shippers; issued bills of lading or equivalent documents; arranged for inland transportation and paid for inland freight charges on through transportation movements.”); BOE Prop. FF 11 (“Anderson International Transport provided international ocean transportation services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007.”).

⁸ “BOE Prop. FF” followed by a number refers to a proposed finding of fact in BOE’s Proposed Findings of Fact filed February 15, 2008.

Second, I determined that the evidence to which BOE cited did not in all cases support the proposed finding of fact. As set forth above, Proposed Finding of Fact 7 states that Anderson's customers were

- typically individuals
- who were relocating from the U.S. to a foreign country, and
- hired Anderson to ship their household goods, personal effects and vehicles overseas.

Document 5 in BOE's Appendix (BOE App. 15-70), the first document on which BOE relied for this proposed finding of fact, contains the documents for a shipment:

- by Two Trees Products, a company, not an individual (BOE App. 20)
- that was not relocating to a foreign country, and
- that wanted to ship "One Skid lighter Fuel and Saw Dust" (BOE App. 20; BOE App. 54 (describing the goods shipped as 2 cartons of petroleum distillates and 200 lbs. saw dust)), not "household goods, personal effects, or vehicles."

Document 7 in BOE's Appendix (BOE App. 121-153), the third document on which BOE relied for Proposed Finding of Fact No. 7, contains the documents for a shipment:

- by Repairer of the Breach, apparently a relief organization, not an individual (BOE App. 122)
- that was not relocating to a foreign country, and
- that wanted to ship a container filled with 500 cartons of relief supplies (BOE App. 122), not "household goods, personal effects, or vehicles."

I determined that the inconsistency between BOE's proposed findings of fact and the evidence that it cited to support the proposed findings required clarification.

Third, in its Motion for Sanctions and an Order to Show Cause filed with its Amended Findings of Fact, BOE stated that Anderson/AIT "have originated twenty-two ocean export shipments during the period January 5, 2005 through May, 2007." (BOE's Amended Findings of Fact and Motion for an Order to Show Cause against [Respondents] at 5.) "Each shipment is a separate violation." *Anderson/AIT - Possible Violations*, FMC No. 07-02 (ALJ Apr. 2, 2008) (Order of Investigation and Hearing at 3). BOE is seeking a civil penalty of up to \$30,000 for each of the twenty-two alleged violations. (BOE's Amended Findings of Fact and Motion for an Order to Show Cause against [Respondents] at 6-7.) BOE did not identify specific facts for any of the twenty-two shipments that prove Anderson/AIT violated the Shipping Act in their handling of the shipment.

I determined that BOE's general reference to twenty-two sets of documents containing 671 pages did not meet its burden of identifying specific facts demonstrating that Anderson/AIT violated the Shipping Act twenty-two separate times when they allegedly "provided international ocean transportation services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007" as claimed in BOE Proposed Finding of Fact 11. Therefore, I ordered BOE to "file Revised Proposed Finding of Fact designating specific facts supporting its claims and providing the Commission with the location of the evidence supporting each specific fact in [BOE's] Appendix." *Anderson/AIT—Possible Violations*, FMC No. 07-02, Order at 5 (ALJ Nov. 4, 2008) (Memorandum and Order Requiring Bureau of Enforcement to Revise and Refile Bureau of Enforcement's Proposed Findings of Fact and Bureau of Enforcement's Amended Findings of Fact).

I based my Order on the principal that the parties to litigation have the responsibility to submit evidence and argument that supports their claims.

"The efficient management of judicial business mandates that parties submit evidence responsibly." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002). Parties must designate specific facts and provide the court with their location in the record. *Id.* "General references [to evidence] without page or line numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003). We will not "paw over the files without assistance from the parties." *Orr*, 285 F.3d at 775 (quoting *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999)). In order to be considered on a motion for summary judgment, evidence "[m]ust both be in the district court file and set forth in the response." *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (emphasis in original). It is within our discretion to refuse to consider evidence that the offering party fails to cite with sufficient specificity. *Orr*, 285 F.3d at 775; see also *Forsberg v. Pac. NW. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) ("The district judge is not required to comb the record to find some reason to deny a motion for summary judgment.").

These "'anti-ferret' rule[s] aim[] to make the parties organize the evidence rather than leaving the burden upon the district judge." *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 80 (1st Cir. 2005). They can be enforced in several ways. Provided they do not conflict with Rule 56, procedures designating an efficient means to present evidence to the court may be established by local rule. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988); see also Fed. R. Civ. P. 83(a). Similar procedures may also be established by orders of individual district courts. See *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 931 (1st Cir. 1983); *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 471 (2d Cir. 2002); see also Fed. R. Civ. P. 83(b). In the face of a duly enacted rule, or once being put on actual notice by order of the court, "a party's failure to comply [with such an 'anti-ferret rule'] would, [where] appropriate, be grounds for judgment against that party." *Stepanischen*, 722 F.2d at 931; see also *Nilsson*, 854 F.2d at 1545.

Esteem v. City of Pasadena, No. CV 04-662-GHK (MANx), 2007 WL 4270360, at *3-4 (C.D. Cal. Sept. 11, 2007) (footnote omitted). While the courts in these cases were addressing motions for summary judgment, the requirement that a party identify the specific facts and evidence on which it relies is equally applicable when litigants before the Commission are submitting proposed findings of fact and evidence for an initial decision.

On November 4, 2008, I also issued a separate order on BOE's motion for an order to show cause. This order required Anderson/AIT by December 12, 2008, to explain why they had not filed their Rule 95 Statements as required by the orders dated September 6, 2007, and December 21, 2007, and to file their Response to BOE's Revised Proposed Findings of Fact that BOE had been ordered to file on or before November 21, 2008. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Nov. 4, 2008) (Memorandum and Order for Respondents Anderson International Transport and Owen Anderson to Show Cause). Anderson did not respond to this Order.

E. BOE's Revised Proposed Findings of Fact.

On November 21, 2008, BOE filed its Revised Proposed Findings of Fact as required by the November 4 Order. The Revised Proposed Findings of Fact sets forth four proposed findings regarding the procedural history (RPF 1-4),⁹ nine proposed findings regarding Anderson/AIT (RPF 5-13), 145 proposed finding regarding the twenty-two shipments for which BOE is seeking a civil penalty (RPF 14-158), four proposed findings regarding two shipments of goods after issuance of the Order of Investigation and Hearing (offered to support BOE's argument that the Commission should issue a cease and desist order against Owen Anderson) (RPF 159-162), twelve proposed findings regarding one shipment of goods after BOE filed its amended proposed findings (RPF 164-175), and four proposed findings regarding a 1997 informal Commission investigation of Owen Anderson's activities as an NVOCC (RPF 176-179). BOE also submitted an additional eight documents consisting of twenty-seven pages to be considered as part of its Appendix.

I conducted a preliminary review of BOE's revised proposed findings of fact and the evidence cited in support of those findings. I made a preliminary determination that the evidence supported findings that Anderson/AIT have not published tariffs (BOE App. 13 (Admission 5)), have never held a license issued by the Commission (*id.* (Admission 3)), have never provided proof of financial responsibility (*id.* (Admission 4)), and operated as an ocean transportation intermediary dispatching as many as twenty-two shipments of goods by water from the United States to a foreign country. (BOE App. 15-685.) Therefore, I found that the record as then constituted would support a finding that Anderson/AIT "operated as an ocean transportation intermediary without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds in violation of sections 19(a) and (b) of the Act." *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 2 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

⁹ "RPF" followed by a number refers to a revised proposed finding of fact in BOE's November 21, 2008, filing.

I was not persuaded by BOE's evidence and argument that Anderson/AIT operated as an NVOCC on the twenty-two shipments. First, I determined that it was necessary to clarify the evidentiary value of some of the documents on which BOE relied. In its argument accompanying its proposed findings of fact, BOE stated:

Respondents prepared and forwarded a *master bill of lading* to the NVOCC or VOCC. The shipper block contained the shipper's name, the name of Respondent Anderson International Transport and the address of Anderson International Transport. In some cases, Respondents also forwarded the master bill of lading to the shipper.

(BOE Revised Proposed Findings of Fact at 8 (emphasis added). *See also* nearly identical language *id.* at 45.) On each shipment, the document on which BOE relied is a form entitled "*Bill of Lading Master*," not "*master bill of lading*." In its individual proposed findings of fact, BOE proposed findings that Respondents "issued" a "master bill of lading," and in many proposed findings, issued a master bill of lading to the proprietary shipper. (RPF 17, 32, 39, 44, 62 ("issued a master bill of lading to [the proprietary shipper]"), 71, 80 ("issued a master bill of lading to [the proprietary shipper]"), 84 and 85, 96, 105 ("issued a master bill of lading to [the proprietary shipper]"), 116, 123 ("issued a master bill of lading to [the proprietary shipper]"), 134, 138 ("issued a master bill of lading to [the proprietary shipper]"), 144, 146 ("issued a master bill of lading to [the proprietary shipper]"), 149 ("issued a master bill of lading to [the proprietary shipper]"), 155 ("issued a master bill of lading to [the proprietary shipper]"). While BOE seemed to contend that Respondents' "issuance" of the bill of lading masters amounted to the actual issuance of a bill of lading for a shipment, I believed that Respondents' usage of these documents suggested that the bill of lading masters were used as instructions to a downstream common carrier regarding the preparation of a bill of lading by that carrier. Therefore, I ordered the parties to respond to several questions regarding Respondents' use of the Bill of Lading Master form. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 3-5 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

BOE also contended:

Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity. The straight bill of lading listed as the destination the foreign destination. In some cases, the straight bill of lading was also used as an invoice to the shipper.

(BOE Revised Proposed Findings of Fact at 8. *See also* nearly identical language *id.* at 44-45.) Each document to which BOE cites is a preprinted form entitled "*Straight Bill of Lading – Short Form*," includes A.I.T. and its address preprinted on the form, and indicates that "every service to be performed hereunder will be subject to all the terms and conditions of the *Uniform Domestic Straight Bill of Lading* set forth . . . (2) in the applicable motor carrier classification [*sic*] or tariff this [*sic*] is a motor carrier shipment." (*See, e.g.*, BOE App. 158 (emphasis added).)

Evidence in the record demonstrates that on August 09, 2006, the United States Department of Transportation (DOT) issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport “to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce.” (BOE App. 268 (emphasis in original).) On each of the shipments for which BOE included a Straight Bill of Lading – Short Form, the evidence in the record suggested that Respondents issued a straight bill of lading to the owner of the goods and consigned the goods to A.I.T. in Houston or to an NVOCC or vessel-operating common carrier at a location in the United States. A downstream vessel-operating common carrier or an NVOCC then issued a bill of lading for the international (water) portion of the shipment identifying the proprietary shipper c/o Anderson International Transport or AIT International, LLC as the shipper. Therefore, I ordered the parties to respond to several questions regarding the use of domestic straight bills of lading in international shipments of goods by water. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 5-7 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).¹⁰

I stated that there does not appear to be a bright line between operating as an ocean freight forwarder and operating as an NVOCC. Therefore, I ordered BOE to supplement its argument applying the law to the facts demonstrated by the evidence in the record to aid me in determining whether BOE had proven that Respondents operated as an NVOCC on any or all of the shipments. I asked the parties to respond to questions regarding the probative value of evidence that an OTI holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country on the question of whether the OTI is performing the services of an ocean freight forwarder or NVOCC on a particular shipment. I also asked BOE to answer specific questions about the bills of lading issued by NVOCCs and vessel-operating common carriers taking responsibility for the shipments. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 8-27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

I noted that BOE had proposed findings of facts regarding the shipments of twenty-two shippers (BOE RPF 13-157) and argued that the findings support a conclusion that Respondents operated as an NVOCC on each shipment. BOE’s proposed findings of fact and the evidence in BOE’s Appendix demonstrated that Respondents performed different services (in some cases significantly different services) for each shipment. For instance, for the Kathleen Davidson shipment, BOE submitted a one-page document (BOE App. 218) and proposed finding one fact (“Anderson International Transport issued a dock receipt, which was signed for by the master of Zim Mexico 111, Voy. 145W on August 29, 2005, for the Kathleen Davidson shipment of a container

¹⁰ In a separate order, I ordered Respondents to file the terms and conditions applicable to their domestic straight bill of lading. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Mar. 10, 2009) (Order for Respondents Anderson International Transport and Owen Anderson to File Document). Respondents did not file a response to this Order.

containing two vehicles from Houston to Kingston, Jamaica” (BOE RPF 55)).¹¹ In contrast, BOE submitted 109 pages of documents for what BOE described as the Fiedel Udense shipment (BOE App. 340-438) and referred to twenty-three of those pages in support of eleven proposed findings of fact. (BOE RPF 83-93.)¹²

I determined that it was not clear for each shipment which actions by Respondents BOE contends support a conclusion that Respondents held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation and which actions BOE contends support a conclusion that Respondents assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment. I ordered BOE to identify for each shipment:

(1) Which proposed findings of fact support a conclusion 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 for that shipment. 46 U.S.C. § 40102(6)(i).

(2) Which proposed findings of fact support a conclusion that Respondents assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment, including the water portion of that transportation. 46 U.S.C. § 40102(6)(ii).

Anderson/AIT – Possible Violations, FMC No. 07-02, Memorandum at 27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

F. BOE’s Supplementation of Record.

On April 13, 2009, BOE filed the Supplementation of Record required by the March 11, 2009, Order. Before its responses to the questions asked by the Order, BOE stated:

Enforcement proceedings are governed by the [APA], which established practices for “each authority of the Government of the United States,” including the . . . Commission, to conduct its mandate. 5 U.S.C. § 557(c)(3)(A). The language of the APA and Commission Rule 223, governing decision, are virtually identical. 46 C.F.R. § 502.223. Rule 223 states the initial decision will include a “statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues presented on the record, and the appropriate rule, order, sanction,

¹¹ Regarding this shipment, I note that the Commission’s regulations define “[p]reparing or processing . . . dock receipts” as a freight forwarding service. 46 C.F.R. § 515.2(i)(4).

¹² BOE no longer claims that Anderson/AIT violated the Act on the Udense shipment. (BOE Brief on Remand at 3.)

relief or denial thereof. . . . Initial decision should address only those issues necessary to a resolution of the material issues presented on the record.” *Id.*

While findings and conclusions are mandated by the APA, the APA does not require detailed findings on every subsidiary evidentiary fact (unlike the Federal Rules of Civil Procedure). Each and every item of evidence brought before the ALJ does not need to be analyzed in a supported decision. “There is no requirement that the Commission furnish an analysis of each and every item of evidence brought before the Administrative Law Judge. . . . As long as the Commission findings are expressed with sufficient particularity to inform the court and the parties of the basis of its decision, the I.C.C. has fulfilled its statutory purpose.” To satisfy the APA, the agency must clearly state the factual basis and the conclusions must have a rational basis in those facts.

The [March 11, 2009, Memorandum and Order Requiring Supplementation of Record] on page 13 states that “BOE does not evaluate the factors for each of the twenty two shipments and demonstrate how those factors support a conclusion that Respondents operated as an NVOCC” Consistent with the cases cited above, it is BOE’s position that the requirements of the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach that is *required* in all situations. The end result of requiring such documentation to demonstrate unlawful conduct would be to encourage future respondents to operate with limited or no documentation, withhold or destroy compromising documentation and information and refuse to cooperate with Commission investigations, thereby stymieing enforcement actions under the Shipping Act. A finding can properly be made that Respondents operated as an NVOCC (and therefore violated Section 8 of the Shipping Act) without analyzing evidence on a shipment by shipment basis and without developing detailed findings on every subsidiary evidentiary fact. When BOE filed its detailed Revised Proposed Findings of Fact, in an abundance of caution and in order to clarify certain issues raised in the November 4, 2008 Order, BOE submitted Proposed Findings of Fact, chronologically for each shipment, setting out each significant action taken for Respondents, the underlying shippers and other entities involved with the shipment. However, it is not BOE’s position that this method was required by the APA nor that the APA requires a finding for every possible evidentiary fact. Under the APA, it is appropriate to make a finding that Respondent acted as an NVOCC and note the activities that support that finding.

This approach is consistent with the requisite standard of proof in administrative proceedings. The standard of proof in an administrative proceeding is to show by a preponderance of the evidence that something in fact occurred.

(BOE Supplementation of Record at 2-4 (citations and footnotes omitted) (emphasis in original).)

BOE followed this discussion with a discussion of an agency's right to draw inferences from available evidence, including circumstantial evidence.

In many instances, direct evidence is not available and courts or agencies have to rely on inferences. In other words, a "smoking gun" cannot be found in all or most cases. In such instances, reasonable inferences are permitted from circumstantial evidence, and if the finder of fact is an expert agency which is presumed to have special familiarity with the industry in question, the courts will respect the finding of the agency.

(*Id.* at 5) (citing *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 15 (ALJ 1991). BOE contends:

The direct evidence in this case, along with the inferences to be drawn, supports a determination that Respondents operated as an NVOCC. It is appropriate to take available evidence for various shipments as well as testimony from an experience Commission investigator and infer that Respondents generally conducted themselves in a similar way.

(*Id.*)

BOE's statement that it filed its revised proposed findings of fact required by the November 4, 2008, Order "in an abundance of caution," (BOE Supplementation of Record at 4), implies that BOE believes its initial February 15, 2008, submission of proposed findings of fact was sufficient. As discussed above, this submission was couched in conclusory assertions purportedly supported by 671 pages of documents. *See, e.g.*, BOE Prop. FF 11 ("Anderson International Transport provided international ocean transportation services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007."). BOE also declined to identify particular proposed findings of fact that it contends support a conclusion that Respondents held themselves out to the general public to provide transportation by water and particular proposed findings that support a conclusion that Respondents assumed responsibility for the transportation of goods. (BOE Supplementation of Record at 23-24 (responding to the questions asking which proposed findings of fact support a conclusion that Respondents held themselves out to the general public to provide transportation by water and which support a conclusion that Respondents assumed responsibility for the transportation of the goods, "All of the proposed findings of fact support the conclusion 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 that they assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment.").)

First, to support its contention that requirements of the APA can be satisfied without analyzing each shipment, BOE cites to cases discussing the requirements that an agency decision must meet in order to satisfy APA requirements. (*See* BOE Supplementation of Record at 2 n.1)

These cases are inapposite to the burden placed on a litigant to identify the evidence supporting its contentions. The function of any litigant in a Commission APA proceeding (including BOE) is not to prepare an agency decision meeting the requirements of the APA that the administrative law judge presiding over the hearing reviews and accepts if it meets APA requirements. The function of a litigant is to present the evidence and argument that support the order that it seeks. 46 C.F.R. § 501.5(i)(1) (BOE participates as trial counsel in formal Commission proceedings when designated by the Commission). It is the function of the administrative law judge to render an initial decision in accordance with the APA. 5 U.S.C. § 557(b); 46 C.F.R. § 501.5(e); 46 C.F.R. § 502.223. It is then the function of the Commission itself to issue a final decision complying with the APA either by adopting the administrative law judge's initial decision or by preparing its own decision. 5 U.S.C. § 557(c).

To render the initial decision, the presiding officer uses a party's proposed findings of fact as a guide to a party's contentions and the evidence that the party claims supports those contentions. When the Commission issued the Order of Investigation, it stated:

The hearing shall include oral testimony and cross-examination in the discretion of the presiding Administrative Law Judge only . . . upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

Anderson/AIT – Possible Violations, FMC No. 07-02, Order at 3-4 (Mar. 22, 2007) (Order of Investigation and Hearing). The presiding administrative law judge cannot determine whether issues of material fact can be resolved by documentary evidence unless the parties identify those material facts in their proposed findings of fact and cite with sufficient specificity the evidence on which they contend the proposed facts are based. There is nothing unusual about requiring submission proposed findings of fact prior to a hearing. *See, e.g.*, C.D. Cal. LR 52-1 (“In any matter tried to the Court without a jury requiring findings of fact and conclusions of law, counsel for each party shall lodge and serve proposed findings of fact and conclusions of law at least five (5) court days before trial.”); E.D.N.C. LR 52.1 (“In nonjury cases, counsel shall file proposed findings of fact and conclusions of law five (5) business days preceding the session at which a civil action is set for trial.”); M.D. Pa. LR 48.2 (“In a civil action tried without a jury, counsel shall file requests for findings of fact and conclusions of law with the pretrial memorandum.”); N.D. Tex. LR 52.1 (“[A]t least 3 days before trial in all nonjury cases, each party must file with the clerk and serve on opposing parties proposed findings of fact and conclusions of law.”). *See also Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1215 n.4 (3d Cir. 1993) (court has discretion to require filing of proposed findings and conclusions of law from the parties before trial).

The presiding officer reviews the proposed findings and evidence and may or may not agree that the evidence cited by the party supports the party's proposed finding of fact. While it is not necessarily improper for a judge to accept verbatim the findings proposed by a party, *see Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (adoption of proposed findings of fact

submitted after trial), the presiding officer may also go beyond the evidence cited by the party and make findings or decline to accept the proposed finding based on evidence not referenced by that party. This is what has occurred in this proceeding.

For instance, BOE contends that “[a]ll VOCCs and NVOCCs looked to Respondents for payment of the ocean freight.” (BOE Revised Proposed Findings of Fact at 42.) BOE contends that Respondents acted as an NVOCC on the Nick Maniotes shipment. (BOE RPF 141-145.) BOE cites some, but not all, of the Maniotes shipping documents in its Appendix as support for its proposed findings, including the bill of lading issued by Mediterranean Shipping Company S.A., Geneva to “Nick Maniotes c/o AIT Intl LLC.” (BOE RPF 145 citing BOE App. 664.) One finds among the documents *not* cited by BOE the invoice for that bill of lading issued by Mediterranean Shipping. The invoice states: “Bill To: Nick Maniotes c/o AIT Intl LLC.” (BOE App. 665.) This statement supports a finding that Mediterranean “looked to” Nick Maniotes, *not* Respondents, for payment of the ocean freight. Furthermore, Mediterranean Shipping identified Nick Maniote [*sic*] as the shipper and AIT Intl LLC as the forwarder on the fax sheet that accompanied the Maniotes invoice (BOE App. 655), evidence that supports a finding that Mediterranean Shipping understood it was carrying Maniotes’s goods for Maniotes, *not* Respondents’ goods for Respondents and that it looked to Maniotes for payment. Regarding the Richard Newman shipment, Respondents notified Seaboard Marine that Richard Newman would be paying \$491.19 directly to Seaboard Marine “in lieu of our check no. 1069 in the amount of \$491.19. Kindly return check to our address at your earliest. [*sic*]” (BOE App. 573.) I find this evidence relevant to the issues raised by the Order of Investigation and Hearing and by BOE’s contentions and account for it in the initial decision, in particular to BOE’s contention that “[t]he licensed NVOCCs [common carriers] providing service to Respondents invoiced and accepted payment from Respondents directly and considered Respondents to be their customer.” (BOE Supplementation of Record at 22.) BOE does not address the effect of this fact on its contention that “[a]ll VOCCs and NVOCCs looked to Respondents for payment of the ocean freight.” (BOE Revised Proposed Findings of Fact at 42.)

Second, BOE contends that the particular facts about each shipment are “subsidiary” and that “the requirements of the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach that is *required* in all situations.” (BOE Supplementation of Record at 3-4 (emphasis in original).) BOE does not attempt to reconcile this contention with its contention that “the Commission must evaluate the indicia of common carriage on a case-by-case basis.” (BOE Revised Proposed Findings of Fact at 41, *citing Tariff Filing Practices, Etc., of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (1965) (*Containerships*).

Although BOE may be correct in its assertion that “utilizing a shipment-by-shipment analysis . . . is not an approach that is *required* in all situations,” it is the function of the presiding officer, not the litigant, to determine the approach to use for the initial decision in a particular case. The APA and Commission precedent cited by BOE clearly demonstrate that utilizing a shipment-by-shipment analysis is appropriate in this proceeding. *See, e.g., Refrigerated Container Carriers Pty. Ltd., – Possible Violation of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 801-802 (ALJ 1999) (finding facts regarding individual alleged violations); *Comm-Sino Ltd. Possible*

Violations of Section 10(a)(1) and 10(b)(1), 27 S.R.R. 1201, 1205-1206, Appendix A, Appendix B (I.D. 1997) (same).

BOE is seeking imposition of a civil penalty not to exceed \$30,000 for each violation. Therefore, Respondents' activities on a particular shipment must be analyzed in order to determine whether Respondents violated the Act on that shipment.¹³ By analyzing the shipping documents in this proceeding, I determined that what BOE describes as two "sub-shipments" of the "Clifton Watts Shipment" (RPF 27-40) was actually two shipments on two dates from two shippers consigned to Clifton Watts in Jamaica. (See BOE App. 107 (bill of lading issued by a common carrier August 15, 2005, identifying Mike European as the shipper and Clifton Watts as the consignee); BOE App. 71 (bill of lading issued by a common carrier September 23, 2005, identifying Clifton Watts Anderson International Transport as the shipper and Clifton Watts as the consignee).) I also determined that the shipment BOE describes as the "Fiedel Udense shipment" (RPF 83-93) was actually a shipment from Like New Auto Salvage, the party identified as the shipper on the bill of lading masters prepared by Respondents, to two different consignees. (BOE App. 352, 356.) More importantly, I determined that the Like New Auto Salvage shipment was canceled. (See BOE App. 420 (On December 1, 2006, respondent Owen Anderson sent an A.I.T. facsimile transmittal sheet from A.I.T. International LLC to Oceane Marine regarding Booking #851487590 stating: "Please cancel above booking made on our behalf with Maersk Line. We will be responsible for per diem, and freight charges. This will be paid directly to Maersk. Regards Owen.")) BOE does not address the effect of the cancellation on its claim that Respondents violated the Act on the Like New Auto Salvage shipment. Since there is no evidence that these shipments ever left the United States (that is, no evidence that they were ever dispatched "from the United States via a common carrier," 46 U.S.C. § 40102(18)(A), or "us[ed] for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country," 46 U.S.C. § 40102(6)(A)(iii)), the evidence does not support a conclusion that Respondents violated the Act on this shipment.

In its Brief on Remand, BOE states that it is withdrawing the Fiedel Udense (Like New Auto Salvage) shipment from consideration for possible violations and "asks the ALJ to take cognizance that BOE Appendix 6 comprises two distinct shipments on behalf of shipper Clifton Watts, rather than a single shipment." (BOE Brief on Remand at 3.) This belated recognition of the facts by BOE demonstrates why it is necessary for the administrative law judge and ultimately the Commission to review the records for each shipment on a shipment-by-shipment basis rather than rely on a conclusory assertions purportedly supported by 671 pages of documents.

¹³ In another proceeding, BOE acknowledged that it had the burden of showing that the respondent violated the Act on each shipment that BOE alleged was a violation. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. -- Possible Violations*, FMC No. 06-06, Transcript at 50-52 (Nov. 14, 2007) (transcript of argument on Tober Group, Inc's Motion for Summary Judgment). I take official notice of this transcript. 46 C.F.R. § 502.226.

Assuming a violation has been found on a particular shipment, the Shipping Act requires the Commission 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 other matters justice may require.” 46 U.S.C. § 41109(b). *See also* 46 C.F.R. § 502.603(b) (“In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.”). The Commission cannot “take into account the nature, circumstances, extent, and gravity of the violation committed” without analyzing the facts regarding the shipment that violated the Act. The decision then must include the findings and conclusions on these material issues. 5 U.S.C. § 557(c).

To support its contention that it is not necessary to examine each shipment, BOE attempts to distinguish the Commission’s decision in *Low Cost Shipping, Inc., International Student Services, Eugene Rogoway and Marie Arnold*, 27 S.R.R. 686 (1996) (*Low Cost Shipping*). BOE states:

The Commission’s decision in *Low Cost Shipping* . . . is cited several times in the Order for the proposition that a determination of whether an entity is operating as an NVOCC can only be made on a shipment by shipment basis and that dispositive evidence must be introduced for each shipment alleged to be carried by the NVOCC. However, in *Low Cost Shipping*, . . . the Commission did not reach such a conclusion, nor has it done so in any other case decided under the Shipping Act. The procedural posture of *Low Cost Shipping* differed significantly from this proceeding. *Low Cost Shipping* was initiated by an Order to Show Cause that listed thirteen separate shipments and order the Respondents to show cause (1) why they should not be found to have violated Section 8(a) and 23(a) of the Shipping Act . . . by acting as an NVOCC in six instances specified in the Order; and (2) why they should not be found to have violated section 19(a) . . . by acting as an ocean freight forwarder in the seven instances specified. Respondents did not contest the Order to Show Cause’s *prima facie* determination and it may have been appropriate for the Commission to examine each shipment on an individual basis.

(BOE Supplementation of Record at 4 n.4.)

I disagree with BOE: The procedural posture of *Low Cost Shipping* does not differ significantly from this proceeding. In *Low Cost Shipping*, the issue was whether Low Cost had violated the Shipping Act for seven shipments on which it appeared to have acted as an NVOCC and six shipments on which it appeared to have acted as an ocean freight forwarder “without a tariff, license, or the requisite bonds.” *Low Cost Shipping, Inc.*, 27 S.R.R. at 686. The Commission issued the Order in this proceeding because Anderson/AIT appeared to have operated as an OTI without a license, bond, and/or tariff. BOE has investigated Anderson/AIT’s activities and claims that on twenty-two shipments, Anderson and AIT operated as an NVOCC. In *Low Cost Shipping* and in

this proceeding, the intermediary's activities on each shipment must be examined to determine whether it acted as an NVOCC, an ocean freight forwarder, or neither.

In *Low Cost Shipping*, it is clear that the Commission considered the respondents' specific activities on each shipment in reaching its decision, examining Low Cost's conduct on six shipments on which it found that Low Cost acted as an NVOCC and seven shipments on which it found that Low Cost acted as an unlicensed ocean freight forwarder. *Low Cost Shipping, Inc.*, 27 S.R.R. at 687-688. The need is just as clear in this proceeding to examine Respondents' activities to determine whether Anderson and AIT operated as an NVOCC or an ocean freight forwarder in its handling of the shipments on which BOE alleges Respondents violated the Act.

Therefore, the facts of a particular shipment are not "subsidiary," but essential to the determination of whether a respondent committed a violation on any particular shipment, and, if so, the amount of any civil penalty to be assessed. Furthermore, it is the function of the administrative law judge and ultimately the Commission, not BOE or any other litigant, to determine what approach is required in a particular situation.

Third, the conclusory findings that BOE proposed in its original proposed findings of fact are not sufficient to pass APA muster as an agency decision. It is highly unlikely that a court of appeals reviewing a Commission decision would hold that a decision stating "Anderson International Transport provided international ocean transportation services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007," referring to 671 pages of documents, and imposing a civil penalty of \$30,000 for each of those twenty-two violations meets the APA's mandate to provide a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" sufficient to support either a finding that each shipment violated the Shipping Act or warranted imposition of a civil penalty of \$30,000. "We . . . have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. at 572, citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974). It is equally unlikely that the Commission would issue a final decision with so little explanation.

Furthermore, if BOE's proposed finding of fact that "Anderson International Transport paid port-to-port or multimodal transportation charges; entered into affreightment agreements with underlying shippers; issued bills of lading or equivalent documents; arranged for inland transportation and paid for inland freight charges on through transportation movements" and its citation to 671 pages as support were considered to be an adequate designation of specific facts, then a proposed finding by Respondents that "Anderson International Transport did *not* pay port-to-port or multimodal transportation charges; enter into affreightment agreements with underlying shippers; issue bills of lading or equivalent documents; arrange for inland transportation or pay for inland freight charges on through transportation movements" and citation to the 671 pages would be equally adequate. It would then be left to the presiding officer or the Commission itself to "paw

over the files,” *Orr*, 285 F.3d at 775, (in this case, 671 pages) to identify the evidence relevant to the parties’ contentions. This is not a burden properly borne either by the presiding officer or the Commission.

In a Commission proceeding, the burden is properly placed on the litigants to organize the evidence supporting their positions, *Alsina-Ortiz v. Laboy*, 400 F.3d at 80, and to cite that evidence with sufficient specificity to enable the presiding officer to find it. *Orr*, 285 F.3d at 775. When a party claims that another party committed twenty-two violations of the Shipping Act, it is incumbent upon the party alleging the violations (the party with the burden of proof/persuasion, 5 U.S.C. § 556(d)) to demonstrate how the responding party violated the Act on each of those alleged violations. Sweeping claims that the respondent operated in a particular fashion do not meet this burden, particularly when a closer analysis of the evidence indicates that the evidence does not support the claims as stated. It is within the discretion of the presiding officer to require revised submissions and additional submissions the presiding officer deems appropriate.

BOE’s original proposed findings of fact did not adequately organized the evidence and cite to that evidence with sufficient specificity. Therefore, additional submissions were properly required from BOE in this proceeding.

G. August 28, 2009, Initial Decision.

On August 28, 2009, I issued an Initial Decision.

Respondents operated as an ocean transportation intermediary on twenty-two shipments for proprietary shippers for which BOE seeks imposition of a civil penalty. On each shipment, Respondents dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers, and processed the documentation or performed related activities incident to those shipments. Respondents do not have a license to operate as an ocean freight forwarder issued by the Commission and have not provided proof of financial responsibility in the form of surety bonds. Therefore, respondents Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission’s regulations at 46 C.F.R. 515 by operating as an OTI (ocean freight forwarder) in the United States foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds on each of the twenty-two shipments.

On each of the twenty-two shipments, a common carrier issued a bill of lading identifying the proprietary shipper of the goods as the shipper, entered into a contract of carriage with the proprietary shipper, and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. Respondents did not assume responsibility for the transportation by water of the goods and did not operate as an NVOCC without a

tariff on the twenty-two shipments. Therefore, Owen Anderson and Anderson International Transport have not violated section 8 of the 1984 Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing rates and charges.

Anderson/AIT ID at 74-75.

BOE sought imposition of a civil penalty against Anderson/AIT of not more than \$30,000 for each violation. The Initial Decision held that BOE had not met its burden of persuasion establishing a civil penalty because it had not produced any evidence about Anderson/AIT's ability to pay a penalty; therefore, no penalty was assessed. *Id.* at 83-84. Anderson and AIT were ordered to cease and desist from violating the Act and Anderson was ordered to "cease and desist from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such entity for a period of three years." *Id.* at 133. BOE filed exceptions to the Initial Decision.

H. Commission Remand for Determination of Civil Penalty.

BOE filed a petition with the Commission asking it to reopen the proceeding and remand for taking of evidence on Anderson/AIT's ability to pay a civil penalty. The Commission granted the petition. *Anderson/AIT – Possible Violations*, FMC 07-02 (FMC Dec. 4, 2009) (Order Granting Petition to Reopen the Proceeding and for Remand). I admitted the evidence submitted by BOE and ordered briefs. *Anderson/AIT – Possible Violations*, FMC 07-02 (ALJ Dec. 7, 2009) (Memorandum and Procedural Order on Remand for Determination of Civil Penalty).

I. Determination of Civil Penalty.

On February 23, 2010, I issued a decision on civil penalty.

Balancing the relevant evidence of the section 13(c) factors – the nature, circumstances, extent, and gravity of each violation, Respondents' degree of culpability, Respondents' lack of history of prior offenses, Respondents' limited ability to pay a civil penalty, and other matters as justice may require – in light of the obligation to ensure that the penalty be tailored to the particular facts of the case and not imposing unduly harsh or extreme sanctions while at the same time deterring violations and achieving the objectives of the law, I assess a civil penalty against respondents Owen Anderson and Anderson International Transport [totaling \$33,950.00].

Anderson/AIT – Possible Violations, FMC 07-02 (ALJ Feb. 23, 2010) (Memorandum and Order on Remand for Determination of Civil Penalty). On March 9, 2010, the Commission served a notice to review, *Anderson/AIT – Possible Violations*, FMC No. 07-02 (FMC Mar. 9, 2010), and on March 15, 2010, BOE filed exceptions to the initial decision and the decision on civil penalty.

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

A. Additional Background.

Worldwide Relocations was a “proceeding against several household goods moving companies and related individuals who were the subject of more than 250 consumer complaints to the Commission.” *Worldwide Relocations – Possible Violations*, FMC No. 06-01, Order at 2 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part) (*Worldwide Relocations* (FMC)). The Commission issued the Order of Investigation and Hearing to determine whether respondents in that proceeding operated as OTIs without a license, bond, and/or tariff as required by the Act, claims substantially identical to the claims in this proceeding. Compare *World wide Relocations – Possible Violations*, FMC No. 06-01 (FMC Jan. 11, 2006) (“an investigation is instituted to determine: (1) Whether the Respondents violated sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility, [and] without publishing an electronic tariff”) with *Parks International – Possible Violations*, FMC No. 06-09 (FMC Sept. 19, 2006) (“an investigation is instituted to determine: (1) whether [Respondents] violated section 8(a) of the 1984 Act and the Commission’s regulations at 46 CFR part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges; (2) whether [Respondents] violated section 19 of the 1984 Act and the Commission’s regulations at 46 CFR part 515 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility”).

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

(*Worldwide Relocations* (FMC) at 2-3 (citations omitted)).

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

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

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

B. *Worldwide Relocations (FMC) Holdings.*

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

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

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

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

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

Id.

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

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

Id. at 10.

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

a. *The Fact Finder's Inquiry.*

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

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

[T]o determine if an entity is a common carrier, it "is important to consider all the factors present in each case and to determine their combined effect." [*Activities, Tariff Filing Practices and Carrier Status of Containerships [Inc.]*, 9 F.M.C. [56,] at 65 [(F.M.C. 1965)]. The Commission has indicated that it will "look beyond documentary labels." [*Id.*] at 66. For example, "it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status." [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity's conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. [1679,] at 1684 [(F.M.C. 1991)]; see also *Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 [(F.M.C.] 1996) (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments). This is a fact intensive inquiry.

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

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

Worldwide Relocations (FMC) at 10-11.

b. "Holding out."

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

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

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

Worldwide Relocations (FMC) at 11-12.

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

The Commission noted that the administrative law judge

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

elements of NVOCC status, and concluded that the respondent acted as an NVOCC. *Id.*

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

Worldwide Relocations (FMC) at 12-13.

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

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

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

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

[t]he presumption that we describe is permissive, not mandatory and is consistent with reason and common sense. The permissive presumption would not be applicable when “the suggested conclusion is not one that reason and common sense

justify in light of the proven facts.” *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (emphasis added).

Worldwide Relocations (FMC) at 15 n.1.

d. “Assumes responsibility for transportation.”

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

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

Worldwide Relocations (FMC) at 18-19.

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

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

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd.*, 28 S.R.R. at 86, citing *Alex Parsinia d/b/a Pac. Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997). A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co.*

Ltd., 23 S.R.R. 857, 871-872 (ALJ 1986). The Commission has stated that “[c]ourts have sustained the use of a cease and desist order directed to individuals to prevent avoidance of the legal consequences of the past violations by the creation of new business entities to be used in the same or similar patterns of activity in the future.” *Ariel Mar. Group, Inc.*, 24 S.R.R. at 528.

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

Worldwide Relocations (ALJ) at 88-89.

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

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

After a factfinder has determined that a respondent has violated laws, “an injunction is appropriate if the court determines there is a reasonable likelihood that he will violate the laws again in the future.” *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994). The Commission has, in previous cases, enjoined parties from certain behavior, including future violations of the Shipping Act. See *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (F.M.C. 1998) (issuing order enjoining party from violating section 10(a)(1) of the Shipping Act); see also *Ariel Maritime Group Inc.*, 24 S.R.R. 517, 528 (F.M.C. 1987) (addressing injunctions against “individuals to prevent avoidance of the legal consequences of . . . past violations”).

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

Worldwide Relocations (FMC) at 21-22.

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

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

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

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

On the other hand, we add one narrow exception to the ALJ’s injunction *against the individuals acting as owners or shareholders* of ocean transportation

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

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

4. Civil penalties.

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

IV. APRIL 26, 2012, COMMISSION REMAND OF THE *ANDERSON/AIT* INITIAL DECISION.

On April 26, 2012, the Commission vacated the Initial Decision and remanded this proceeding.

On August 28, 2009, the Administrative Law Judge (ALJ) issued an Initial Decision in this matter, finding Respondents violated section 19, but not section 8, of the Shipping Act of 1984 with respect to 22 shipments, and ordering them to cease and desist from operating as an ocean transportation intermediary. On February 23, 2010, the ALJ issued a supplemental initial decision imposing civil penalties against respondents in the amount of \$33,950.

On March 15, 2010, BOE filed exceptions to the ALJ’s initial and supplemental initial decisions. BOE contends that respondents violated section 8 of the Shipping Act of 1984 and that a larger penalty is warranted.

In light of the Commission's recent decision in Docket No. 06-01, *Worldwide Relocations, LLC, et al.*, we now vacate the initial and supplemental decisions, and remand this matter to the ALJ for further proceedings consistent with the Commission's holding in *Worldwide Relocations*.

Anderson/AIT (FMC) at 1-2 (citations omitted). The Commission did not identify any error in the findings of fact or conclusions of law in the Initial Decision.

V. BRIEFING AFTER THE *ANDERSON/AIT* REMAND.

On May 1, 2012, I served an order requiring the parties to file briefs on the remand issues. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ May 1, 2012) (Order to File Briefs on Remand Issues). BOE filed its brief on May 22, 2012. Neither Respondent filed a brief.

In its Brief on Remand, BOE first summarizes the procedural history and Initial Decision. (BOE Brief on Remand at 1-3.) As preliminary matters, BOE incorporates by reference its previous filings. (*Id.* at 3.)

The Initial Decision found that a shipment that BOE identified as the "Fiedel Udense" shipment was actually shipped by Like New Auto Salvage. Examining the evidence in the record, the Initial Decision concluded that

[a]lthough the record supports a finding that Respondents performed ocean freight forwarding services, there is no evidence in the record to support a finding that the shipment was ever carried on a vessel operating on the high seas between a port in the United States and a port in a foreign country. Therefore, this shipment cannot be found to be a violation.

Anderson/AIT ID at 109. In its Brief on Remand, BOE states:

In light of the standards announced in *Worldwide* and the expedited briefing schedule established in the ALJ's Order of April 19, BOE has likewise re-examined the evidence submitted in this proceeding with respect to the ocean transportation [*sic*] transactions of *Anderson*. In order to facilitate an early and dispositive decision by the ALJ, BOE requests withdrawal of the Fiedel Udense (Like New Auto Salvage) shipment from consideration of possible violations herein.

(BOE Brief on Remand at 3.) Since BOE no longer claims that *Anderson/AIT* violated the Act on this shipment, it will not be addressed in this Initial Decision on Remand.

In its submissions prior to the Initial Decision, BOE described two shipments to Clifton Watts, Manchester, Jamaica, as two sub-shipments, one container containing household effects and a 2002 Honda minivan and one crate of batteries. The documents that BOE submitted as evidence showed that these were actually two shipments several weeks apart. The Initial Decision concluded:

BOE does not explain why two shipments several weeks apart from different shippers to the same consignee are “two sub-shipments” of one violation of the Act instead of two shipments and two separate violations of the Act. I will treat them as the evidence indicates they should be treated: as two separate shipments[.]

Anderson/AIT ID at 92. BOE apparently agrees, since in its Brief on Remand, BOE states: “BOE also asks the ALJ to take cognizance that BOE Appendix 6 comprises two distinct shipments on behalf of shipper Clifton Watts, rather than a single shipment.” (BOE Brief on Remand at 3.)

BOE argues that the evidence in the record supports a finding that *Anderson/AIT*, not the proprietary shippers, were shippers in relation to the downstream common carriers on each shipment and that *Anderson/AIT* assumed responsibility for the ocean transportation by water of each shipment. Therefore, BOE contends that *Anderson/AIT* operated as NVOCCs on the shipments.

BOE argues *Anderson/AIT* willfully and knowingly violated the Act; therefore, a civil penalty not to exceed \$30,000 may be imposed. BOE also seeks entry of a cease and desist order.

PART TWO – APPLICATION OF *WORLDWIDE RELOCATIONS* (FMC) TO *ANDERSON/AIT*

I. *WORLDWIDE RELOCATIONS* (FMC) ISSUES TWO AND THREE ARE APPLICABLE TO THE *ANDERSON/AIT* PROCEEDING.

A. Applicability of *Worldwide Relocations* (FMC) Issue Two to the *Anderson/AIT* Proceeding.

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

B. Applicability of *Worldwide Relocations* (FMC) Issue Three to the *Anderson/AIT* Proceeding.

Worldwide Relocations (FMC) Issue Three concerns the scope of a cease and desist order against an individual found to have violated the Shipping Act. This proceeding alleges violations by *Anderson*, an individual. Therefore, *Worldwide Relocations* (FMC) Issue Three – the Commission’s discussion of the scope of a cease and desist order entered against an individual determined to have violated the Act – is applicable in this proceeding.

II. **WORLDWIDE RELOCATIONS (FMC) ISSUE ONE IS NOT APPLICABLE TO THE ANDERSON/AIT PROCEEDING.**

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

In the *Anderson/AIT* proceeding, Anderson responded to BOE’s discovery requests. (*See* Joint Status Report and Proposed Discovery Schedule filed August 20, 2007.) At no point in this proceeding did BOE file a motion seeking sanctions against Anderson or AIT for failure to comply with any other discovery obligation. BOE did not seek an adverse inference against Anderson/AIT for failing to comply with any discovery order. Because Anderson/AIT did not fail to respond to discovery or fail to comply with a discovery order and BOE did not move for sanctions, *Worldwide Relocations* (FMC) Issue One – the Commission’s discussion of when sanctions are appropriate against a party that fails to respond to discovery – has no application in this proceeding against Anderson/AIT.

PART THREE – STANDARD OF PROOF AND EVIDENCE.

I. STANDARD OF PROOF.

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

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

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

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

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

5 U.S.C. § 557(c).

II. EVIDENCE.

On February 15, 2008, BOE filed an Appendix containing shipping documents and other evidence with its Proposed Findings of Fact. On March 27, 2008, BOE filed a motion to substitute redacted documents 8, 10, 12, 16, 17, and 18 for documents 8, 10, 12, 16, 17, and 18 in its Appendix. That motion was granted on April 2, 2008. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Apr. 2, 2008) (Order Granting Bureau of Enforcement’s Motion to Substitute Exhibits). The exhibits and substitute exhibits are admitted as evidence. After the first remand, BOE submitted documents regarding Anderson’s bankruptcy. They are admitted as evidence.

PART FOUR – DISCUSSION AND CONCLUSION

I. ANDERSON/AIT VIOLATED THE SHIPPING ACT BY OPERATING AS AN OCEAN TRANSPORTATION INTERMEDIARY.

The Commission issued the order of investigation and hearing to determine whether Respondents operated as an NVOCC without a tariff in violation of section 8 of the Act and whether Respondents operated as an OTI (either an ocean freight forwarder or an NVOCC) in violation of sections 19(a) and (b) of the Act. The Act has created and the Commission has recognized a system where the same intermediary can operate as an NVOCC and as an ocean freight forwarder. (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, <http://www.fmc.gov/questions/default.aspx>, last visited December 29, 2012.) An intermediary that is licensed by the Commission as an ocean freight forwarder and as an NVOCC must furnish separate proofs of financial responsibility for each type of operation. “The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC’s transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services.” (*Id.*) On any particular shipment, an intermediary (whether

licensed or unlicensed) that is involved in the shipment of goods by water from the United States to a foreign port¹⁴ could be operating either as an ocean freight forwarder or as an NVOCC.

Determining whether an intermediary operated as an ocean freight forwarder or an NVOCC on any particular shipment requires an examination of what it actually does on that shipment, as “an intermediary’s *conduct*, and not what it labels itself, will be determinative of its status.” *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. at 1684 (emphasis added). *Rose Int’l*, 29 S.R.R. 119, 171 (F.M.C. 2001) (“[A] carrier’s status is determined by the nature of its service offered to the public and not upon its own declarations.” *Containerships*, 9 F.M.C. at 64 (citing *Bernhard Uhlmann*, 3 F.M.B. at 775)). “[T]he question whether an entity is a freight forwarder [or an NVOCC on a particular shipment] is a mixed question of law and fact.” *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000). See also *Worldwide Relocations* (FMC) at 10-11.

A. BOE’s Contentions.

1. BOE’s Revised Proposed Findings of Fact.

In its Revised Proposed Findings of Fact, BOE argues that the evidence supports a finding that Anderson/AIT operated as an NVOCC on all the shipments for which BOE submitted documentation in its Appendix; that is, that Anderson/AIT held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation, assumed responsibility for the transportation of each shipment from the port or point of receipt to the port or point of destination, and used, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6).

BOE contends that:

As described in greater detail below for each shipment, Respondents originated twenty-two ocean export shipments during the period January 5, 2005, through May, 2007, with three of those shipments occurring after the issuance of the Order of Investigation and Hearing in this proceeding. A review of Respondents’ shipment files shows each shipment, with the exceptions noted, proceeded in the following manner:

- a) Based on information received from the shipper, Respondents provided a quote.

¹⁴ Ocean freight forwarders licensed by the Commission only “dispatche[] shipments from the United States.” 46 U.S.C. § 40102(18). Therefore, an OTI could not operate as an ocean freight forwarder within the meaning of the Act on a shipment coming into the United States.

- b) Respondents invoiced the shipper for the shipment. The invoice generally was a flat fee for all services and reflected a mark-up by Respondents of the ocean freight charges.
- c) Respondents made arrangements for delivery of the empty container(s), either to the shipper's location or to Respondent's warehouse. Respondents often picked up the shipper's goods themselves and brought them back to their warehouse.
- d) Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity. The straight bill of lading listed as the destination the foreign destination. In some cases, the straight bill of lading was also used as an invoice to the shipper.
- e) Respondents obtained a booking for the shipment from either an NVOCC or a vessel-operating common carrier ("VOCC").
- f) Respondents prepared and forwarded a master bill of lading to the NVOCC or VOCC. The shipper block contained the shipper's name, the name of Respondent Anderson International Transport and the address of Anderson International Transport. In some cases, Respondents also forwarded the master bill of lading to the shipper.
- g) Respondents arranged for and forwarded all required documentation, including customs declarations, automobile title information and hazardous goods documents.
- h) If required, Respondents purchased insurance for the shipment.
- i) Respondents prepared a dock receipt which was generally signed by terminal or ship personnel upon delivery of the cargo.
- j) The NVOCC or VOCC issued copies of the ocean bill of lading to Respondents, showing the individual as shipper c/o AIT International or AIT International as shipper. The rated copy of the bill of lading often served as an invoice to Respondents or a separate invoice was issued. The NVOCC

or VOCC looked to Respondents for payment of the ocean freight and any related charges.

- k) If Respondents contracted to provide door delivery at destination, Respondents made arrangements with the destination agent or other company for delivery.
- l) A number of shipments were not delivered in a timely manner, either because Respondents had not made arrangements for delivery at destination or Respondents had failed to pay the ocean freight and the shipment was held. As noted below, several shippers filed complaints with the Better Business Bureau in the Houston, Texas area.

(BOE Revised Proposed Findings of Fact at 6-8.)

Regarding how it is determined whether an OTI operates as an ocean freight forwarder or an NVOCC, BOE argues that “the consistent theme through the Commission’s cases is that no one factor is controlling in considering common carrier status and that the totality of a carrier’s operations must be reviewed before a determination of its status can be made.” (BOE Revised Proposed Findings of Fact at 40.) BOE cites to and relies on Commission opinions in several proceedings and on other Commission authorities, including *Rose Int’l, supra*; *River Parishes v. Ormet, supra*; *Containerships, supra*; *Puget Sound Tug and Barge v. Foss Launch and Tug Co.*, 7 F.M.C. 43, 48 (1962) (*Puget Sound v. Foss*); and *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950).

The Commission has found that no single factor of an entity’s operation is determinative of its status as a common carrier. *Ormet*, 28 S.R.R. at 763; *Containerships*, 9 F.M.C. at 62-65. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.* The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates.

(BOE Revised Proposed Findings of Fact at 41, quoting *Rose Int’l*, 29 S.R.R. at 162 (emphasis added by BOE).)

BOE continues:

With regard to the requirement that a common carrier assume responsibility for the transportation from the port or point of receipt to the port or point of destination,

Commission cases also recognize that a carrier's responsibility to the cargo is a factor to be considered separate from whether a carrier issued a bill of lading. [*Rose Int'l*, 29 S.R.R. at 162 (FMC 2001); *Containerships*, 9 F.M.C. at 62-65; *Puget Sound v. Foss*, 7 F.M.C. at 48.] A common carrier does not "lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment." *Containerships* at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950).

Based on the evidence detailed in BOE's Proposed Findings of Fact, Respondents held themselves out and provided service to the general public for compensation and also assumed responsibility for transportation of the cargo. Respondents provided quotes to potential shippers for door to door and door to port transportation as well as documentation and invoiced the shipper. The invoice generally was a flat fee for all services and reflected a mark-up by Respondents of the ocean freight charges. Respondents made arrangements for delivery of the container, either to the shipper's location or to Respondent's warehouse. Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity for shipment. The straight bill of lading listed the foreign destination as the final destination. In some cases, the straight bill of lading was also used as an invoice to the shipper. Respondents obtained a booking for the shipment from either an NVOCC or a vessel-operating common carrier ("VOCC"). Respondents prepared and forwarded a master bill of lading to the NVOCC or VOCC and in some cases, also forwarded it to the shipper. The shipper block contained the shipper's name, the name of Anderson International Transport and the address of Anderson International Transport. Respondents arranged for and forwarded all required documentation, including customs declarations, automobile title information and hazardous goods documents and in some cases, purchased insurance for the shipment. Respondents also prepared a dock receipt. The NVOCC or VOCC issued rated and unrated copies of the ocean bill of lading to Respondents, showing the shipper c/o AIT International or AIT International as the shipper. The rated copy of the bill of lading often served as an invoice to Respondents or a separate invoice was issued. All VOCCs and NVOCCs looked to Respondents for payment of the ocean freight. Whether or not a bill of lading was issued by Respondents to their shippers, they were liable to their customers for the transportation of cargo entrusted to them. Respondents contracted with their customers to provide door to door or door to port transportation of cargo to a foreign destination.

(BOE Revised Proposed Findings of Fact at 41-42.)

2. Order for Supplementation and BOE's Supplementation of Record.

As noted above, I conducted a preliminary review of the BOE's revised proposed findings of fact and the evidence cited in support of those findings. I made a preliminary determination that the evidence supported findings that Anderson/AIT have not published tariffs (BOE App. 13 (Admission 5)), have never held a license issued by the Commission (*id.* (Admission 3)), have never provided proof of financial responsibility (*id.* (Admission 4)), and operated as an ocean transportation intermediary dispatching as many as twenty-two shipments of goods by water from the United States to a foreign country. (BOE App. 15-685.)¹⁵ Therefore, I found that the record as then constituted would support a finding that Anderson/AIT "operated as an ocean transportation intermediary without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds in violation of sections 19(a) and (b) of the Act." *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 2 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

The documentary evidence on which BOE stated it relied for its proposed findings of fact did not always support BOE's proposed findings. For eight shipments, BOE proposed findings that Respondent issued a master bill of lading to the proprietary shipper. (See RPF 62 (Asekunle Osule); RPF 80 (Ray Cooper); RPF 105 (Issac [*sic*] Watts); RPF 123 (Richard Newman); RPF 138 (Michael Rose); RPF 146 (Justina Licrish); RPF 149 (Libby Coker); RPF 155 (George Hughes). For ten shipments, BOE proposed findings that Respondents issued a master bill of lading "in the name of" a proprietary shipper or for a shipment. (See RPF 17 (issued for the Two Trees Products shipment); RPF 32 (issued covering household effects); RPF 39 (issued in the name of Clifton Watt); RPF 44 (issued in the name of Repairer of the Breach); RPF 71 (issued in the name of Margret DeLeon); RPF 84 and 85 (issued for containers); RPF 96 (issued in the name of Barbara Downie); RPF 116 (issued in the name of David Zinnah); RPF 134 (issued in the name of Julia Huxtable); RPF 144 (issued for a shipment). BOE seemed to claim that Respondents assumed responsibility for the transportation of the goods when they "issued [the] master bill[s] of lading."

In each case, the document on which BOE relied is a form entitled "*Bill of Lading Master*," not "master bill of lading." As the forms and their usage suggested that Anderson/AIT used a bill of lading master to provide instructions to a downstream common carrier conveying the information to be included in the common carrier's bill of lading, not the issuance of a bill of lading by which

¹⁵ BOE submitted documents related to twenty-two shipments in the Appendix filed with its original proposed findings of fact. On April 4, 2008, it submitted amended findings of fact with documents related to two more shipments. "BOE does not argue that these two shipments are additional violations by Respondents but submits the information to support its argument that a cease and desist order should be issued to Respondent Owen Anderson." (BOE Revised Proposed Findings of Fact at 30.) BOE submitted additional documents regarding one more shipment with its Revised Proposed Findings to support its argument that a cease and desist order should be issued. (*Id.* at 32.)

Anderson/AIT assumed responsibility for the transportation of the goods, I asked the parties to answer several questions regarding the bill of lading masters. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 3-5 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). In response to the questions, BOE stated that “a bill of lading master is used to convey shipment details to a vessel-operating common carrier (“VOCC”) or NVOCC. It may be conveyed by an [ocean freight forwarder] or NVOCC or by the shipper itself.” (BOE Supplementation of Record at 9.) BOE clarified that it does not contend that when Anderson/AIT prepared the bill of lading masters, Anderson/AIT were issuing bills of lading and assuming responsibility to the proprietary shippers for the transportation of the goods by preparing them. (*Id.* at 11.)

In its proposed findings of fact, BOE stated:

Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity. The straight bill of lading listed as the destination the foreign destination. In some cases, the straight bill of lading was also used as an invoice to the shipper.

(BOE Revised Proposed Findings of Fact at 8. *See also* nearly identical language *id.* at 44-45.)

For eleven shipments, BOE proposed findings of fact based on shipping documents that include at least one straight bill of lading prepared by Respondents: Dirk Manuel shipment (RPFF 51 and BOE App. 158); Asekunle Osule shipment (RPFF 58 and BOE App. 235-236); Margret DeLeon shipment (RPFF 67 and BOE App. 287); Barbara Downie shipment (RPFF 96 and BOE App. 445); Alex & Lynn Watt shipment (RPFF 102 and BOE App. 478); David Zinnah shipment (RPFF 112 and BOE App. 563); Richard Neuman shipment (RPFF 122 and BOE App. 578; RPFF 123 and BOE App. 583); Claudette Dillon shipment (RPFF 128 and BOE App. 607); Julia Huxtable shipment (RPFF 133 and BOE App. 618); Nick Maniotes shipment (RPFF 144 and BOE App. 653); George Hughes shipment (RPFF 153 and BOE App. 680; RPFF 154 and BOE App. 676). Each document to which BOE cited is a preprinted form entitled “Straight Bill of Lading – Short Form” and includes A.I.T. and its address preprinted on the form. Each document contains the following language:

It is mutually agreed, as to each carrier of all or any said property over all or any portion of said route to said destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder will be subject to all the terms and conditions of the *Uniform Domestic Straight Bill of Lading* set forth (1) in Official, Southern, Western and Illinois freight classification in affect [*sic*] on the date hereof, if this is a rail-water shipment or (2) in the applicable motor carrierclassification [*sic*] or tariff this [*sic*] is a motor carrier shipment.

(Emphasis added.)¹⁶ Each document also states: “Shipper’s imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.”

Evidence in the record indicates that on August 09, 2006, the United States Department of Transportation (DOT) issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport “to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce.” (BOE App. 268 (emphasis in original).) On each of the shipments for which BOE included a Straight Bill of Lading – Short Form, Respondents issued the straight bill of lading to the owner of the goods and consigned the goods to themselves in Houston or to an NVOCC or vessel-operating common carrier at a location in the United States. A downstream common carrier then issued a bill of lading for the international portion of the shipment with a clear and unambiguous identification of the proprietary shipper c/o Anderson International Transport or c/o AIT International, LLC, as the shipper:

Dirk Manuel	BOE App. 158 (St. B/L); BOE App. 155 (Star Shipping B/L)
Asekunle Osule	BOE App. 236 (St. B/L); BOE App. 228 (Star Shipping B/L)
Margret DeLeon	BOE App. 287 (St. B/L); BOE App. 275 (Finn Cargo B/L)
Barbara Downie	BOE App. 445 (St. B/L); ¹⁷ BOE App. 439 (Shipco Transport B/L)
Alex & Lynn Watt	BOE App. 478 (St. B/L); BOE App. 516 (Shipco B/L (to Issac Watts))
David Zinnah	BOE App. 563 (St. B/L); BOE App. 541, 542 (ACL B/L)
Richard Newman	BOE App. 578, 583 (St. B/L (2)); ¹⁸ BOE App. 576 (Seaboard Marine B/L)
Claudette Dillon	BOE App. 607 (St. B/L); BOE App. 595 (Econocaribe B/L)
Julia Huxtable	BOE App. 618 (St. B/L); BOE App. 614 (Econocaribe B/L)

¹⁶ The line of text “to deliver . . . at any time” is missing on the Huxtable straight bill of lading (BOE App. 618) and the line of text “interested in . . . Western and” is missing on the DeLeon (BOE App. 287) and the Watt (BOE App. 478) straight bills of lading. As these are copies of documents, it is not clear whether this text was intentionally deleted from these individual bills or the text is missing as a result of problems copying the documents. The Terms and Conditions of the straight bills of lading are not part of the record. *See Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Mar. 10, 2009) (Order for Respondents Anderson International Transport and Owen Anderson to File Document) (ordering Respondents to file straight bill of lading terms and conditions). Respondents did not file the terms and conditions.

¹⁷ The Downie straight bill of lading (BOE App. 445) is consigned to Shipco c/o Worldwide, Houston, Texas.

¹⁸ The 7/16/2006 Newman straight bill of lading (BOE App. 578) is from Newman consigned to A.I.T. The 8/21/2006 Newman straight bill of lading (BOE App. 583) is from A.I.T. consigned to Seaboard Marine, Miami, Florida. These bills are for two domestic legs of the same shipment.

Nick Maniotes BOE App. 653 (St. B/L); BOE App. 664 (Mediterranean Shipping B/L)
George Hughes BOE App. 676, 680 (St. B/L (2));¹⁹ BOE App. 685 (CaroTrans Freight Inv.)

Given the facts that AIT held a certificate from DOT authorizing it to transport household goods in interstate or foreign commerce and that the straight bills of lading that it issued were domestic Straight Bill[s] of Lading – Short Form, I asked the parties to answer several questions regarding their use. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 3-5 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). BOE responded to the questions. Respondents did not respond.

QUESTION 2(a): May an ocean freight forwarder that is licensed by DOT “to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce” issue a Straight Bill of Lading – Short Form subject to the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth in the applicable motor carrier classification or tariff for the domestic leg of an international shipment of goods by water without being deemed an NVOCC as defined by the Shipping Act?

BOE Response: The question as written does not relate to the shipments at hand. Respondents did not issue a Straight Bill of Lading for the domestic leg of an international shipment of goods by water. Respondents issued as Straight Bill of Lading to the owner of goods and each straight bill was issued with a foreign port or location as its destination. Each bill of lading was rated on a through rate bases. See narrative preceding BOE’s Response to Question 2(a) above.²⁰

QUESTION 2(b): If so, what is the effect, if any, of identifying a foreign location as the “destination” of the shipment on the Straight Bill of Lading – Short Form?

BOE Response: The effect of identifying a foreign location as the “destination” of the shipment on a Straight Bill of Lading - Short Form brings the movement within the jurisdiction of the Shipping Act. A bill of lading serves as a document of title, evidence of the contract of carriage and a receipt of goods. By issuing a bill of lading with a foreign destination, Respondents have agreed to transport the goods to that destination and have assumed the

¹⁹ The 3/27/2007 Hughes straight bill of lading (BOE App. 680) is from Hughes consigned to AIT. The 4/24/2007 Hughes straight bill of lading (BOE App. 676) is from AIT International consigned to CaroTrans Intl., Charleston, SC. These bills are for two domestic legs of the same shipment.

²⁰ BOE’s responses are found in BOE Supplementation of Record at 14-15.

responsibility for doing so. Issuing bills of lading and assuming responsibility for transportation of cargo in the foreign commerce requires an NVOCC license, a tariff covering the movement, and an appropriate bond.

QUESTION 2(c): What are the terms and conditions of the Straight Bill of Lading – Short Form issued by Respondents?

BOE Response: It is not clear. A Straight Bill of Lading - Short Form is a bill of lading which does not have the full terms and conditions of the contract of carriage printed on its reverse side. Instead, it generally contains a clause with a reference to the carrier's standard conditions. Since there is no specified form for a bill of lading, it is impossible to say what the terms and conditions are of the Straight Bill of Lading - Short Form that Respondents issued.

QUESTION 2(d): Is there any legal or commercial prohibition that would prevent exporting goods on a domestic straight bill of lading such as those issued by Respondents?

BOE Response: No. If a bill of lading is issued, it may be issued in virtually any format.

In its Revised Proposed Findings of Fact, BOE argued that:

The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. *Ormet*, 28 S.R.R. at 763; *Containerships*, 9 F.M.C. at 62-65. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.* The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates.

(BOE Revised Proposed Findings of Fact at 41, *quoting Rose Int'l*, 29 S.R.R. at 162 (emphasis added by BOE).) The underscored language in BOE's quotation had its genesis in cases in which the question before the Commission was whether a carrier that had assumed responsibility for the transportation of goods should be classified as a common carrier or a contract or noncommon carrier. That seemed to me to be directed to the first element of the Shipping Act's three-element definition of common carrier: 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." 46 U.S.C. § 40102(6)(A)(i). I asked the parties to address the issue of whether the fact that an OTI holds itself out as a common carrier has any probative value regarding whether it assumed responsibility for the transportation of a particular shipment. *Anderson/AIT – Possible*

Violations, FMC No. 07-02, Memorandum at 18-19 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

QUESTION 3(a): May an OTI that is licensed as an ocean freight forwarder and as an NVOCC (consequently holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation) nevertheless operate as an ocean freight forwarder on a particular shipment?

BOE Response: Yes. However, if a person was licensed as an NVOCC, or was operating unlawfully as an NVOCC, at the time it provided only freight forwarder services on a particular shipment, it would still be considered an NVOCC at that time, although not on that shipment.²¹

QUESTION 3(b): If so, what is the relevance (*see* Fed. R. Evid. 401) of the fact that the OTI 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 to the question of whether, on a particular shipment, the OTI acted as an ocean freight forwarder or an NVOCC, and, in particular, whether it assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination?

BOE Response: The concept of holding out as a common carrier willing to carry for whoever offers employment defines a common carrier. An OTI that does not hold out to provide transportation serve and assume responsibility for the cargo is not an NVOCC. Similarly, an entity that acts as an NVOCC on one “particular shipment” is not a common carrier and would not qualify for an NVOCC license. [*Ship’s Overseas Service, Inc.*] v. FMC, 670 F.2d 304, 308 ([D.C. Cir.] 1980). Accordingly, holding out services as a common carrier is not only relevant to a carrier proceeding, but is the first indicia of common carriage as the Commission recently confirmed in [*EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06, Order at 22 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment)].

BOE argued that “[b]ased on the evidence detailed in BOE’s Proposed Findings of Fact, Anderson/AIT held themselves out and provided service to the general public for compensation and also assumed responsibility for transportation of the cargo.” It then listed a number of services that it contends Respondents performed that support this conclusion. (BOE Revised Proposed Findings of Fact at 40-42.) To clarify which of those services would be performed by an NVOCC and which could be performed by an ocean freight forwarder, I included questions about those services when

²¹ BOE’s responses are found in BOE Supplementation of Record at 18.

I required the parties to supplement the record. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 19-20 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

QUESTION 4(a): Which of the following services are “freight forwarding services” as defined by 46 C.F.R. § 515.2(i) that can be performed by an ocean freight forwarder?

QUESTION 4(b): Which of the following services are “NVOCC services” as defined by 46 C.F.R. § 515.2(l) that can only be performed by an NVOCC?

BOE responded to those questions when it supplemented the record. BOE stated that many of the services performed by Respondents could be done by either an NVOCC or an ocean freight forwarder. The services are in **bold** and taken from BOE’s responses are found in BOE’s Supplementation of Record at 19-21.

a. Providing a quote to a potential shipper for door to door and door to port transportation.

BOE responded: “An NVOCC may provide a quote of its rates and charges for door-to-door and door-to-port transportation. An OFF may quote the rates of VOCCs and NVOCCs, but may not mark up those rates and provide a quote in its own name for transportation.”

b. Issuing a separate invoice to a shipper.

BOE responded: It is unclear what is meant by a “separate invoice.” Ocean freight forwarders bill forwarding fees and other charges to their shipper customers by invoice. Upon the request of its customer, an OFF “must provide a complete breakout of its charges and a true copy of any underlying document or bill of charges pertaining to the licensed forwarder’s invoice.” 46 C.F.R. 515.32(d). An NVOCC is not under the same obligation to provide supporting documentation. However, NVOCC’s [*sic*] can only invoice the rates that are in their tariffs or NSAs.

c. Issuing an invoice to the shipper for a fee for all services that reflects a mark-up by [*sic*] ocean freight forwarder of the ocean freight charges.

BOE responded: “Neither. If an OFF marks up the ocean freight and then invoices the increased rates in its own name, it would be considered an NVOCC. And an NVOCC can only charge the rates and charges published in its tariff or NVOCC service arrangements without markup.”

d. Making arrangements for delivery of an empty container either to the shipper's location or to the ocean freight forwarder's own warehouse.

BOE responded: Both.

e. Issuing a domestic straight bill of lading.

BOE responded: "Neither, unless licensed to do so by the appropriate authorities, not the FMC."

f. Using a domestic straight bill of lading as an invoice to the shipper.

BOE responded: While there are no regulations covering the form of the invoice of an ocean transportation intermediary ("OTI"), an OTI would have no reason to prepare a bill of lading, issued to a shipper, unless it was operating as an NVOCC. It would also be inconsistent to use the same document as a straight bill of lading for a domestic movement and an invoice for a through international movement.

g. Obtaining a booking for a shipment from an NVOCC or a vessel-operating common carrier.

BOE responded: Both.

h. Arranging for and forwarding all required documentation, including customs declarations, automobile title information and hazardous goods documents.

BOE responded: Both.

i. Arranging for and purchasing insurance for a shipment.

BOE responded: Both.

j. Preparing a dock receipt for a shipment.

BOE responded: Both.

k. Using the rated copy of a bill of lading as an invoice to a shipper.

BOE responded: While there are no regulations covering the form of the invoice of an ocean transportation intermediary ("OTI"), an OTI would have no reason to prepare a bill of lading, issued to a shipper, unless it was operating as an NVOCC. It would also be inconsistent to use the same document as a straight bill of lading for a domestic movement and an invoice for a through international movement.

I. Making arrangements with the destination agent or other company for delivery for delivery at the destination.

BOE responded: "Technically, both. However, it is far more likely that the NVOCC responsible for transportation of the cargo would make the destination arrangements."

QUESTION 5 in the March 11, 2009, Order asked the following three questions about each bill of lading issued by the common carriers:

- A. Does this bill of lading constitute a contract of carriage between [the proprietary shipper] as shipper and [the common carrier] as carrier?
- B. Does this bill of lading constitute a contract of carriage between Anderson International as shipper and [the common carrier] as carrier?
- C. When it issued the bill of lading, did [the common carrier] assume responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination specified in the bill of lading?

Anderson International Transport, FMC No. 07-02, Memorandum at 20-27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). BOE answered the questions as follows:

Questions 5(a) through 5(t) of the Order cover twenty separate shipments. For each shipment, the Order references a bill of lading issued by an NVOCC or VOCC identifying as shipper each underlying shipper care of Anderson International Transport or Anderson International. For each bill of lading, the Order asks three sub-questions. As the three sub-questions are identical save for the name of the underlying shipper and name of the NVOCC or VOCC, BOE was able to provide [*sic*] one answer for each sub-question which have been paraphrased.

A. Does this bill of lading constitute a contract or [*sic*] carriage between the underlying shipper and the NVOCC or VOCC as carrier? No. There is no evidence that any of Respondents' customers were aware of the bills of lading issued by the licensed NVOCCs, much less agreed to be bound by them. From the Manuel and Watt affidavits, we know that these two shippers had no knowledge that such documents existed, and it is reasonable to infer that Respondents' other shippers were similarly unaware. Mr. Kellogg, an experienced Commission investigator, has provided an affidavit attesting that it was standard practice for the actual shippers not to be aware of the bills of lading delivered to operators such as Respondents. The licensed NVOCCs providing service to Respondents invoiced and accepted payment from Respondents directly, and considered Respondents to be their customer. Similarly, Respondents considered the licensed NVOCCs to be providing

service to them, not the underlying shippers. Accordingly, there was no contractual relation between the licensed OTIs and Mr. Manuel, Ms. Watt, and Respondents' other customers.

B. Does this bill of lading constitute a contract of carriage between Respondent Anderson International Transport and the NVOCC or VOCC as carrier? These bills of lading are evidence of a contractual relationship between Anderson International and the licensed NVOCCs providing common carrier service to destination [*sic*]. The bills of lading were prepared from a bill of lading master provided by Respondents; they were issued to and/or delivered to Respondents at Respondents' place of business; and they were retained by Respondents and not provided to Respondents' customers. Respondents were invoice directly by the licensed NVOCCs and were responsible for payment of the invoice amount. The issuing carriers had no relationship with any entity other than Respondents and considered Respondents to be their customer. It is not necessary to issue a bill of lading to establish common carriage.

C. When it issued the bill of lading, did the NVOCC or VOCC assume responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination specified in the bill of lading? Yes. When the licensed NVOCCs issued the bills of lading, they assumed responsibility for the transportation of the goods according to the terms of their bills of lading. The question, however, is to whom did they owe that responsibility. As indicated in the response to A. Above, there was no contractual relationship between these carriers and the underlying shipper-customers of Respondents. The bills of lading were not received by the shippers, did not accord them rights or impose obligations, and were not even known to the shippers or anyone other than the carrier providing service and Respondents.

The other licensed NVOCCs considered Respondents to be their customer and looked to them for payment of the freight and release of the cargo.

(BOE Supplementation of Record at 21-23 (footnotes omitted).)

The March 11, 2009, Ordered stated:

It is not clear for each shipment which actions by Respondents BOE contends support a conclusion that Respondents held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation and which actions BOE contends support a conclusion that Respondents assumed responsibility for the transportation of the goods from the port

or point of receipt to the port or point of destination for that shipment. For each shipment, BOE is ordered to identify:

(1) Which proposed findings of fact support a conclusion 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 for that shipment. 46 U.S.C. § 40102(6)(i).

(2) Which proposed findings of fact support a conclusion that Respondents assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment, including the water portion of that transportation. 46 U.S.C. § 40102(6)(ii).

Anderson/AIT – Possible Violations, FMC No. 07-02, Memorandum at 27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). BOE answered the questions as follows:

All of the proposed findings of fact support the conclusion 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 that they assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment. As discussed at length earlier, under the APA, it is appropriate to make a finding that Respondents acted as an NVOCC and highlight activities that support that finding. Agencies are not required to annotate to each finding the evidence supporting it so long as the required statutory findings are made. Under the substantial evidence standard of the APA, evidence exists in the record 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 Respondents provided a number of services and participated in a number of activities incidental to their assumption of responsibility for the transportation of the shipments in their capacity as an NVOCC, not as an OFF arranging for transportation. Respondents assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment.

(BOE Supplementation of Record at 24-25.)

B. Discussion of Anderson/AIT's OTI Activities.

1. Respondents Owen Anderson and Anderson International Transport Violated Sections 19(a) and (b) of the 1984 Act and the Commission's Regulations at 46 C.F.R. 515 by Operating as an OTI in the United States Foreign Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility in the Form of Surety Bonds.

a. A Preponderance of the Evidence Demonstrates That Respondents Operated as an Ocean Freight Forwarder on Twenty-two Shipments of Cargo by Water.

The second area of investigation set forth by the Commission is by far the easier to answer: Whether Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the United States foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Order at 3 (Mar. 22, 2007) (Order of Investigation and Hearing). Respondents concede that they never held an OTI license issued by the Commission or provided a bond. (BOE App. 13.) If the evidence demonstrates that they operated as an OTI in the United States foreign trades, then they have violated sections 19(a) and (b).

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

BOE has met its burden of proving by a preponderance of the evidence that Respondents operated as an OTI (ocean freight forwarder) in the United States foreign trades. BOE has provided shipping documents for twenty-three shipments of cargo that originated in the United States. As set forth in greater detail in the Findings of Fact and Conclusions of Law, Respondents performed one or more ocean freight forwarding service on each of the twenty-three shipments: 46 C.F.R. § 515.2(i)(1) – ordering cargo to port (*e.g.*, BOE App. 556); 46 C.F.R. § 515.2(i)(2) – preparing and/or processing export declarations (*e.g.*, BOE App. 353, 363-364, 367-373); 46 C.F.R. § 515.2(i)(3) – booking, arranging for or confirming cargo space (*e.g.*, BOE App. 307, 326); 46 C.F.R. § 515.2(i)(4) – preparing or processing delivery orders or dock receipts (*e.g.*, BOE App. 20, 34, 61); 46 C.F.R. § 515.2(i)(5) – preparing and/or processing ocean bills of lading (*e.g.*, BOE App. 21 (providing bill of lading information to common carrier)); 46 C.F.R. § 515.2(i)(7) – arranging for warehouse storage (*e.g.*, BOE App. 239); 46 C.F.R. § 515.2(i)(8) – arranging for cargo insurance (*e.g.*, BOE App. 247-249); 46 C.F.R. § 515.2(i)(9) – clearing shipments in accordance with United States Government export regulations (*e.g.*, BOE App. 237-240); 46 C.F.R.

§ 515.2(i)(11) – handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments (*e.g.*, BOE App. 297); and 46 C.F.R. § 515.2(i)(12) – coordinating the movement of shipments from origin to vessel (*e.g.*, BOE App. 583).

The record supports a finding that twenty-two of the twenty-three shipments were dispatched by water via a common carrier from the United States to a foreign port.²² The record contains ocean bills of lading issued by downstream common carriers following Respondents' instructions (not bills of lading issued by Respondents) for twenty of the twenty-three shipments. Each bill of lading has a clear and unambiguous identification of the proprietary shipper as the shipper. Each bill of lading supports a finding that the common carrier received the cargo at a point in the United States, loaded the goods onto a vessel at a United States port, then discharged the cargo at a foreign port. (*See* BOE App. 51 (Two Trees Products shipment); BOE App. 107 (Clifton Watts shipment No. 1); BOE App. 71 (Clifton Watts shipment No. 2); BOE App. 135 (Repairer of the Breach shipment); BOE App. 154-155 (Dirk Manuel shipment); BOE App. 228 (Asekunle Osule shipment); BOE App. 275 (Margret DeLeon shipment); BOE App. 300 (Ray Cooper shipment No. 2); BOE App. 439 (Barbara Downie shipment); BOE App. 447 (Dr. Saripalli shipment); BOE App. 516 (Alex & Lynn Watt shipment); BOE App. 543-545 (David Zinnah shipment); BOE App. 576 (Richard Newman shipment); BOE App. 595 (Claudette Dillon shipment); BOE App. 614 (Julia Huxtable shipment); BOE App. 628 (Michael Rose shipment); BOE App. 664 (Nick Maniotes shipment); BOE App. 667 (Justina Licrish shipment); BOE App. 670 (Libby Coker shipment); BOE App. 685 (George Hughes shipment). BOE agrees that “[w]hen the licensed NVOCCs issued the bills of lading, they assumed responsibility for the transportation of the cargo according to the terms of their bills of lading.” (BOE Supplementation of Record at 23.)

The record does not include ocean bills of lading for two shipments (Kathleen Davidson and Abdelnasar Albalbisi). The evidence in the record supports a finding that Respondents performed ocean freight forwarding services that resulted in cargo traveling by water from the United States to a foreign port on the Davidson and Albalbisi shipments.

The only document in the record for the Kathleen Davidson shipment is a dock receipt issued by AIT for container HLXU439932-8 identifying Kathleen Davidson % Anderson International as the shipper/exporter, Edna Causell, Kingston, JA as the consignee, Zim Mexico III Voy. 145W as the vessel, Houston as the port of loading, and Kingston, Jamaica as the port of discharge, and identifying the cargo as “40' contr STC household effects, one 2004 Toyt . . . one 2004 Ford” (BOE App. 218.) On August 29, 2005, the master of the vessel signed the dock receipt for container HLXU439932-8, supporting a finding that it was loaded on board the vessel for transportation by water from the United States to a foreign port. (*Id.*) Commission regulations defined ocean freight forwarding services to include issuance of a dock receipt. 46 C.F.R. § 515.2(i)(4). Therefore, the record establishes that Respondents performed ocean freight forwarding services on the Kathleen Davidson shipment.

²² The Udense/Like New that did not leave the country is shipment twenty-three.

The record contains shipping documents indicating that on March 1, 2007, Mediterranean Shipping Company (USA) Inc., transmitted a fax cover sheet and the freight invoice for bill of lading number MSCUHS827635 to Respondents identifying Abdelnasar Albalbisi as the shipper, Anderson Int'l as the forwarder, and the amount due as \$2,833.94. (BOE App. 647.) The invoice identifies Houston as the port of loading and Ad Dammam as the port of discharge. I find, based on the evidence of the invoice and the fax cover sheet, that Mediterranean Shipping Company (USA) Inc., identified Abdelnasar Albalbisi as the shipper on bill of lading number MSCUHS827635 and that the shipment was transported by water from the United States to a foreign port. Therefore, Respondents performed ocean freight forwarding services on this shipment.

The evidence in the record demonstrates that Respondents were involved in twelve full container load (FCL) shipments (Clifton Watts shipment No. 1 (Mike European), Repairer of the Breach shipment, Dirk Manuel shipment, Kathleen Davidson shipment, Asekunle Osude shipment, Margret DeLeon shipment, Raymond Cooper outbound shipment, David Zinnah shipment, Michael Rose shipment, Abdelnasar Albalbisi shipment, Justina Licrish shipment, Ms. Libby Coker shipment) and ten less than container load (LCL) shipments (Two Trees Products shipment, Clifton Watts shipment No. 2 (Clifton Watts), Barbara Downie shipment, Dr. Solomon Saripalli shipment, Alex and Lynn Watt shipment, Richard Newman shipment, Claudette Dillon shipment, Julia Huxtable shipment, Nick Maniotes shipment, George Hughes shipment). On each of the FCL shipments, the downstream common carrier issued a bill of lading for the container with a clear and unambiguous identification of the proprietary shipper as the shipper. On each of the LCL shipments, the downstream common carrier issued a bill of lading for the cargo with a clear and unambiguous identification of the proprietary shipper as the shipper, then presumably consolidated the proprietary shipper's cargo with cargo of other shippers into one container. There is no evidence in the record to suggest that Respondents themselves ever consolidated LCL shipments "from numerous shippers into larger groups for shipment by an ocean carrier." *Prima U.S. v. Panalpina*, 223 F.3d at 129. *See also Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989) ("NVOCCs consolidate and load small shipments from multiple shippers into a single large reusable metal container obtained from a steamship company, and ship the container by vessel under a single bill of lading in the NVOCC's name."). *Compare Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07, Initial Decision at 16 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo), Notice Not to Review served Sept. 29, 2009. The circumstantial evidence supports a finding that the downstream common carrier issuing the bill of lading for an LCL shipment consolidated the shipment with the shipments of other shippers into one container.

On twenty-two shipments, the documents prepared by Anderson/AIT and the bills of lading and other documents issued by the downstream common carrier prove by a preponderance of the evidence that Anderson/AIT performed ocean freight forwarding services that resulted in dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. The evidence supports a finding that the common carriers knew that they were issuing bills of lading for cargo belonging to the proprietary shippers, not Anderson/AIT, and that the proprietary shippers were paying for the transportation.

Anderson/AIT contacted the common carriers as “Anderson International Transport” representing itself as a business involved in the international shipment of cargo. Anderson/AIT instructed to identify the proprietary shippers as the shippers on the bills of lading.

By issuing the bills of lading or as demonstrated by the other evidence in the record, the downstream common carriers entered into contracts of carriage with the proprietary shippers to transport their cargo by water from the United States to a foreign port. As set forth in greater detail in the Findings of Fact and Conclusions of Law, Anderson/AIT performed freight forwarding services that facilitated each of the twenty-two shipments and operated as an OTI without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds. Therefore, Anderson/AIT committed twenty-two violations of sections 19(a), 46 U.S.C. § 40901(a), and 19(b), 46 U.S.C. § 40902(a), of the Shipping Act.

b. BOE’s Contention That the Bills of Lading did not Constitute a Contract of Carriage between the Underlying Shippers and the Downstream Common Carriers is not Supported by the Facts and the Law.

On sixteen shipments for which bills of lading issued by downstream common carriers are in the record, the common carrier also named respondent AIT in the shipper box. On twelve of those shipments, the common carrier identified the shipper as the proprietary shipper “%,” “c/o,” or “C/O” Anderson International or Anderson International Transport. (Mike European (BOE App. 107), Repairer of the Breach (BOE App. 122), Dirk Manuel (BOE App. 154-155), Asekunle Osule (BOE App. 228), Margret DeLeon (BOE App. 275), Raymond Cooper (BOE App. 300), Barbara Downie (BOE App. 439), Dr. Solomon Saripalli (BOE App. 447), Issac [*sic*] Watts (BOE App. 516), David Zinnah (BOE App. 543-545), Richard (BOE App. 576) Claudette Dillon (BOE App. 595).) On one shipment, the common carrier left out “c/o” or its equivalent. (Clifton Watts (BOE App. 71).) The differences and omission are inconsequential. On one shipment, despite instructions on Respondents’ Bill of Lading Master identifying the shipper as “Two Trees Products c/o Anderson International Transport” (BOE App. 33), the common carrier erroneously included AIT Worldwide Logistics as part of the address. (BOE App. 51 (“AIT Worldwide Logistics for Two Trees Products, c/o Anderson International”).) AIT Worldwide Logistics apparently is not affiliated with Respondents and had no connection with this shipment. (BOE RPF 22-24; BOE App. 36.) Therefore, this difference is inconsequential and I find the shipper to be “Two Trees Products, c/o Anderson International.” On one shipment, the common carrier inverted the proprietary shipper and AIT, identifying the shipper as “Anderson International Transport Julia Huxtable %.” (BOE App. 614.)²³ This difference is inconsequential. On one shipment, the common carrier identified the shipper as “Anderson International Transport as agents for Mr. Michael Rose.” (BOE App. 628.) See 46 C.F.R. § 515.42(a) (“The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder’s name may appear with the

²³ The bill of lading master identifies the exporter as “Julia Huxtable % Anderson International Transport.” (BOE App. 612.)

name of the shipper, but the forwarder must be identified as the shipper's agent.”). This clearly indicates that the common carrier considered Michael Rose to be its shipper.

On three shipments, the downstream common carrier issued a bill of lading identifying the shipper as the proprietary shipper “c/o AIT International, LLC” (or “c/o AIT Intl LLC”). (BOE App. 664 (Nick Maniotes shipment); BOE App. 670 (Libby Coker shipment); BOE App. 685 (George Hughes shipment).) On one shipment, the common carrier issued a bill of lading identifying the shipper as “AIT International, LLC, as agents for Justina Licrish.” (BOE App. 667 (Justina Licrish shipment).) As BOE recognizes, on October 23, 2006, Owen Anderson and Nichelle Jones incorporated A.I.T. International, LLC, in Texas. The Commission did not name A.I.T. International, LLC, as a party to this proceeding; therefore, sanctions cannot be entered against it. *See Banfi Products Corp. – Possible Violations of Section 16, Initial Paragraph, Shipping Act 1916, and Section 10(a)(1) of the Shipping Act of 1984*, 24 S.R.R. 1152, 1153 (1988) (Amended Order of Investigation) (“Hearing Counsel alleges that . . . adding these companies as respondents to this proceeding will assist it in obtaining evidence and *permit any ultimate remedial action to be directed against all participants in the arrangement.*” (emphasis added)). BOE does not argue that the corporate veil should be pierced and that the actions of A.I.T. International, LLC, should be attributed to respondent Owen Anderson or respondent Anderson International Transport. Therefore, naming A.I.T. International, LLC, in the shipper box is not proof that Respondents operated as an OTI on these four shipments. Other documents provide proof that Respondents performed ocean freight forwarding services on these four shipments, however. (*See* BOE App. 654 (Anderson International Transport prepared a Bill of Lading Master identifying Nick Maniotes % AIT Intl LLC as the exporter); BOE App. 668 (A.I.T. prepared a Bill of Lading Master identifying Justina Licrish c/o AIT International, LLC, as the exporter); BOE App. 671 (A.I.T. prepared a Bill of Lading Master identifying Ms. Libby Coker c/o AIT International, LLC, as the exporter); BOE App. 683 (A.I.T. prepared a Bill of Lading Master identifying George Hughes ^ AIT International, LLC as the exporter).)²⁴

BOE contends that the downstream common carriers did not establish a contract of carriage with the proprietary shippers when they issued the bills of lading identifying the proprietary shippers as the shippers. As noted above, after reviewing BOE's Revised Findings of Fact, I asked BOE to answer three questions about each bill of lading issued by the common carriers that took responsibility for the shipments. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 20-27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). In its response to the first question (set forth above) BOE contends that

[t]here is no evidence that any of Respondents' customers were aware of the bills of lading issued by the licensed NVOCCs, much less agreed to be bound by them. From the Manuel and Watt affidavits, we know that these two shippers had no

²⁴ While the meaning of the “^” symbol is not entirely clear, I note that the “5%” key is next to the “6^” key on a standard keyboard. Therefore, I infer that this was a typographical error and that Respondents intended to use the “%” symbol that they often used for “c/o.”

knowledge that such documents existed, and it is reasonable to infer that Respondents' other shippers were similarly unaware. Mr. Kellogg, an experienced Commission investigator, has provided an affidavit attesting that it was standard practice for the actual shippers not to be aware of the bills of lading delivered to operators such as Respondents. The licensed NVOCCs providing service to Respondents invoiced and accepted payment from Respondents directly, and considered Respondents to be their customer. Similarly, Respondents considered the licensed NVOCCs to be providing service to them, not the underlying shippers. Accordingly, there was no contractual relation between the licensed OTIs and Mr. Manuel, Ms. Watt, and Respondents' other customers.

(BOE Supplementation of Record at 21-22.)

BOE cites the Manuel and Watt affidavits in which these proprietary shippers state they were not aware of the bills of lading issued by the common carriers for their shipments and extrapolates a claim that there is "no evidence that any of Respondents' customers were aware of the bills of lading issued by the licensed NVOCCs." This claim is contradicted by BOE's Revised Proposed Findings of Fact and the documents on which it relies. (See RPF 74 ("Anderson International Transport forwarded a proof (non-rated) copy of the Finn Container Line bill of lading and made requests for payment to Margret DeLeon." (BOE App. 10, P. 000269-000273, 000259); RPF 99 ("Anderson International Transport forwarded a copy of a bill of lading to Dr. Saripalli. (BOE App. 15, P. 000448)").)²⁵ Other evidence in the record indicates that proprietary shippers were aware that common carriers (not Anderson/AIT) were transporting their shipments. Furthermore, BOE does not cite any Commission authority supporting its claim that a proprietary shipper must "be aware" of a bill of lading issued by a common carrier for the carriage of the shipper's cargo or "agree[] to be bound" by the bill of lading when an intermediary (whether licensed or unlicensed) "arranges space for those shipments on behalf of shippers." 46 U.S.C. § 40102(18). On two bills of lading, the common carrier explicitly stated it was dealing with an intermediary as agent for the proprietary shipper.

The downstream common carriers chose to accept business from Anderson, followed Anderson's instructions, followed instructions on the Bill of Lading Masters and issued bills of lading identifying the proprietary shippers as the shippers, and ultimately were paid (if paid) by funds that came from the proprietary shippers. "A bill of lading records that a carrier has received cargo from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004). See also *Prima U.S. v. Panalpina*, 223 F.3d at 129 ("If anything happens to the goods during the voyage the [common carrier] is liable to the shipper because of the bill of lading that it issued."); *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-456 (S.D.N.Y. 2005) (the bill of lading is the [common carrier's] contract with the shipper). By issuing the bills of lading with a clear and unambiguous

²⁵ BOE App. 448 is an invoice for the Saripalli shipment. The bill of lading issued by the common carrier for the Saripalli shipment is found at BOE App. 452.

identification of the proprietary shipper as the shipper, the downstream common carriers entered into contractual relationships with the proprietary shippers, “assume[d] responsibility for the transportation [of the proprietary shippers’ cargo] from the port or point of receipt to the port or point of destination.” 46 U.S.C. § 40102(6), and acted as common carriers on the shipments. See *Worldwide Relocations* (FMC) at 18-19 (“a Bill of Lading [issued by the downstream common carrier] with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility [for transportation] by the respondent entity for the shipment in question.”).

As BOE recognizes (BOE Supplementation of Record at 8-9), the Shipping Act is a remedial act and “should be broadly construed in order to enable an agency to give effect to the statute’s salutary purposes.” *River Parishes v. Ormet*, 28 S.R.R. at 209. “[I]n determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act. . . . In addition, the court should have in mind the fact that this legislation is remedial and should be liberally construed to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended.” *Containerships*, 9 F.M.C. at 62. “The responsibility of an agency or a court is, wherever possible, to interpret a statute so as to carry out the evident purpose of Congress, and not to ‘construe a statute so as to arrive at absurd or unreasonable results or so as to contravene a Congressional purpose.’” *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Unlicensed Ocean Transportation Intermediaries – Petition for Declaratory Order*, 31 S.R.R. 185, 191 (2008) (citing *United States v. American Trucking Association*, 310 U.S. 534, 542-543 (1940)). Since the Shipping Act is remedial, it should be broadly and liberally construed and not read in a narrow manner to exclude jurisdiction, limit enforcement, or otherwise restrict its scope.

The proprietary shippers had the misfortune to select Anderson/AIT to help them move their cargo to a foreign country. Anderson/AIT contacted the common carriers as “Anderson International Transport” representing itself as an intermediary involved in the international shipment of cargo. Through the use of the Bill of Lading Master form, Anderson/AIT instructed the common carriers to identify the proprietary shippers as the shippers on the bills of lading. Each common carrier that chose to accept business from Anderson/AIT knew (or at least should have known) that Anderson/AIT were not licensed by the Commission and did not have a bond. Each common carrier followed the instructions from Anderson/AIT and issued a bill of lading identifying the proprietary owner in care of Respondents (or A.I.T. International, LLC) as the shipper, and on two occasions identifying the shipper as Respondents (or A.I.T. International, LLC) as agent for the proprietary shipper. Each common carrier that issued a bill of lading is an experienced common carrier. The evidence supports a finding that the common carriers knew that they were issuing bills of lading for cargo belonging to the proprietary shippers, not Anderson/AIT, and that the proprietary shippers were paying for the transportation.

It is unlikely that an unlicensed intermediary such as Anderson/AIT would have any interest in pursuing a common carrier for any Shipping Act violations the common carrier may have committed. The common carriers incurred obligations to the members of the shipping public whom they identified as shippers on their bills of lading. BOE’s position would leave proprietary shippers who have had the misfortune to use an unlicensed intermediary without a remedy against the

common carrier that issued the bill of lading. BOE's contention that the common carriers can avoid their obligations and, equally important, that the bonds secured by the common carriers are not available to satisfy reparations for actual injury suffered by the proprietary shippers because of violations of the Shipping Act committed by the common carriers, arrives at an absurd or unreasonable result and contravenes the Congressional purpose of protecting the shipping public. Therefore, I find that on twenty-two shipments, when the common carrier issued a bill of lading with clear and unambiguous identification of the proprietary shipper as the shipper, the common carrier established a contract of carriage with the proprietary shipper and assumed responsibility for the transportation of the cargo on the high seas between a port in the United States and a port in a foreign country. Anderson/AIT acted as an ocean freight forwarder by performing freight forwarding services that facilitated each of the twenty-two shipments in violation of sections 19(a) and (b) of the Shipping Act.

I conclude that on twenty-two shipments, respondents Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI (ocean freight forwarder) in the United States foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds.²⁶

2. Owen Anderson and Anderson International Transport Have Not Violated Section 8 of the 1984 Act and the Commission's Regulations at 46 C.F.R. 520 by Operating as an NVOCC Without Publishing Tariffs Showing Rates and Charges.

The Commission remanded this proceeding for consideration of whether Anderson/AIT operated as an NVOCC on these shipments in light of the standards in *Worldwide Relocations* (FMC). The short answer is that Anderson/AIT did not operate as an NVOCC on those shipments. On each shipment, a downstream common carrier issued a bill of lading for the ocean transportation of the cargo "with clear and unambiguous identification of the proprietary shipper," *Worldwide Relocations* (FMC) at 18, as the shipper. This results "in a finding of no assumption of responsibility by [Anderson/AIT] for the shipment[s] in question." *Id.* at 18-19. Since Anderson/AIT did not assume responsibility for transportation by water of the cargo, they did not meet the Act's definition of common carrier; therefore, they did not operate as an NVOCC on the shipments.

Anderson/AIT admit that they did not publish tariffs as the Act requires common carriers, including NVOCCs, to do. Therefore, if the evidence supports a finding that they operated as an NVOCC on a shipment, then they have violated section 8 of the Act on that shipment.

As stated above, "[t]he term [NVOCC] means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with

²⁶ If it operated as an NVOCC on these shipments, it also violated sections 19(a) and 19(b).

an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC on a particular shipment, the intermediary must meet all three elements of the Act’s definition of “common carrier.”

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

46 U.S.C. § 40102(6).

If one of the common carrier elements is not met, then the intermediary did not operate as an NVOCC on a particular shipment. For example, an intermediary licensed by the Commission as an NVOCC and as an ocean freight forwarder is always holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. If it acts as an intermediary on a shipment that uses a vessel operating on the high seas between a port in the United States and a port in a foreign country, but only performs freight forwarding services by arranging space for those shipments on behalf of shippers and another common carrier assumes responsibility for the transportation by water of the cargo, it did not act as an NVOCC on that shipment.

As discussed above, the evidence in the record demonstrates that Anderson/AIT were involved in twenty-two shipments that were carried by a downstream common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. Therefore, the third element of section 40102(6) is met on each of those twenty-two shipments.

To support its argument that Anderson/AIT operated as an NVOCC, BOE quotes the Commission’s decision in *Rose Int’l* and emphasizes: “The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry.” (BOE Revised Proposed Findings of Fact at 40-42, *quoting Rose Int’l*, 29 S.R.R. at 162 (emphasis added by BOE).) The line of cases that resulted in the underlined language in *Rose Int’l* concerned situations in which there was no dispute that the entity was a carrier; that is, in each case, the entity had assumed responsibility for the transportation from the port or point of receipt to the port or point of destination. The question to be resolved was whether the carrier operated as a common carrier or a contract (or noncommon) carrier. *See River Parishes v. Ormet*, 28 S.R.R. at 763 (after citing the *Containerships* “holding out” ruling: “the Findings of Fact show that a significant number of vessels which have called and continue to call at Burnside carry cargo for multiple shippers, carry multiple cargo, have multiple ports of call, use bills of lading, have space available on the vessel for additional cargo, and hold out generally for the carriage of cargo”); *Containerships*, 9 F.M.C. at 57 (Containerships operated the vessel *New Yorker* in southbound trade between U.S. North Atlantic ports and Puerto Rico and, “considering itself to be a ‘contract’ carrier exempt from tariff-filing

requirements, operated without reference to a common carrier tariff on file with the Commission”); *Puget Sound v. Foss*, 7 F.M.C. at 48 (Foss towed barges loaded with general cargo gathered from many sources). *But see Puget Sound*, 7 F.M.C. at 49-50 (Commission rejected suggestion of complainant in the case, not Northland, that recent statute changed Northland from an NVOCC in the Alaska trade subject to Commission jurisdiction to a forwarder subject to the jurisdiction of the Interstate Commerce Commission). As the Commission stated in *Containerships*:

The regulatory significance of a carrier’s operation may be determined by considering a variety of factors – the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates. The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. A carrier may be clothed with one or more of the characteristics mentioned and still not be classified a common carrier. It is important to consider all the factors present in each case and to determine their combined effect.

Containerships, 9 F.M.C. at 65. BOE does not suggest how the *Containerships* factors present in this case should be considered or what their combined effect might be.

To support a conclusion that an OTI operated as an NVOCC, there is no question that the Act and Commission precedent require that the evidence demonstrate that the OTI meets the first element of the common carrier definition; that is, that it “[held] itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation,” 46 U.S.C. § 40102(6)(A)(i) (definition of common carrier); *Rose Int’l*, 29 S.R.R. at 162. BOE declined to respond fully to the questions asking it to identify which particular proposed findings of fact support a conclusion that Anderson/AIT held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation for that shipment. *See supra* at 46 and (BOE Supplementation of Record at 24-25.) Anderson and AIT stated that they had a web site (BOE App. 6, 10 (Interrogatory 11)) and advertised in the yellow pages (*id.* (Interrogatory 12)), but I do not find documentary evidence of this advertising or other advertising of Respondents’ services in the record. *Compare Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07, Initial Decision at 30 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo) (findings on Mateo Shipping’s advertisement of its services).

Nevertheless, there is sufficient evidence in the record to support a finding that Anderson/AIT held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. (*See, e.g.*, BOE App.179 (quote described the service as door to door); BOE Supplementation of Record, Affidavit of Dirk Manuel, Affidavit of Lynn Watt (representations made by respondent Anderson).)

No matter how loudly and clearly an OTI holds itself out as an NVOCC, however, it is not necessarily an NVOCC on every shipment in which it is involved. For instance, an intermediary licensed by the Commission as both an NVOCC and an ocean freight forwarder is always holding itself out to accept cargo from whoever offers to the extent of its ability to carry. If the fact that the intermediary was “holding out” as a common carrier is conclusive (or even probative) in determining whether the intermediary assumed responsibility for the transportation of a particular shipment, the intermediary’s status as an NVOCC would swallow its status as an ocean freight forwarder and it would always be acting as an NVOCC. Therefore, as essential as the “holding out” element may be to support a conclusion that an intermediary is an NVOCC on a particular shipment, it is equally essential that the evidence demonstrate that the intermediary assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

In [*Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 250 (1961)], the Federal Maritime Board noted that an entity may be considered a common carrier even if it attempts to disclaim liability because liability may be imposed by operation of law. 6 F.M.B. at 256. However, “[a]ctual liability as a common carrier over the entire journey including the water portion is essential” to determine NVOCC status. *Id.* Although the Commission has not focused on this aspect of common carrier status, favoring the “holding out” analysis, it remains an essential element of the “common carrier” definition in the Shipping Act. 46 U.S.C. § 40102(6)(A)(ii)

In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries – Petition for Declaratory Order, 31 S.R.R. at 199 (Dye, Comm’r, dissenting). If the evidence does not support a conclusion that the intermediary held itself out to the general public as a carrier AND assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination AND used, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, then the intermediary cannot have been operating as an NVOCC on that shipment. See *Landstar*, 569 F.3d at 497 (“a person or entity that provides NVOCC services falls within the ambit of § 19 only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation’”). To answer this question, it is necessary to examine the intermediary’s conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. at 1684. See also *Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 (1996) (intermediary found to be operating as an NVOCC on some shipments and ocean freight forwarder on other shipments).

BOE asserts that “the Commission has held that no one factor is controlling in adjudging common carriage, and that the absence of one or more of the recognized criteria is not critical to a finding of common carriage.” (BOE Supplementation of Record at 17.) To the extent BOE means that absence of one of the *Containerships* factors is not necessarily fatal to common carrier status, I agree. If BOE means that one of the three elements of the common carrier definition – “holding

out,” assumption of responsibility for transportation, or transportation on a vessel on the high seas or Great Lakes – is *not* critical to a finding of NVOCC status, I disagree.²⁷

As discussed *supra*, BOE contends that it is not necessary to examine the subsidiary facts of an intermediary’s conduct to determine whether it is an NVOCC. The concept that an entity’s conduct must be examined to determine whether the entity assumed responsibility for the transportation of a shipment predates the Commission. In *Ulmann v. Porto Rican Express*, the respondent admitted that it was a common carrier for part of its operation, but denied that it was a “common carrier by water” (that is, that it assumed responsibility for the transportation by water) as defined by the Shipping Act of 1916. *Bernhard Ulmann Co. v. Porto Rican Express Co.*, 3 F.M.B. 771, 773 (1952). Porto Rican Express contended that it was not engaged in the transportation by water because it did not own anything that floats and did not carry anything across the water. The Federal Maritime Board, the Commission’s predecessor, examined respondent Porto Rican Express’s conduct as established by the evidence and determined that Porto Rican Express typically engaged in the following activities:

- Porto Rican Express’s “wagon man” picked up the shipment with its truck
- Porto Rican Express’s wagon man filled out shipping papers based on information from the shipper
- Porto Rican Express’s wagon man delivered to shipper the top sheet of shipping papers as the contract of carriage
- Shipments were typically taken to Porto Rican Express’s warehouse
- At the warehouse, shipments were loaded into containers furnished by the ocean carrier
- Containers were delivered to an ocean carrier at the pier
- Ocean carrier issued to Porto Rican Express an ocean bill of lading upon which Porto Rican Express appeared as consignor and consignee
- Porto Rican Express paid the same ocean rate that carrier charged other shippers
- Porto Rican Express’s shipper had no contractual relationship with the ocean carrier

²⁷ In its review of the summary judgment entered for Tober Group, Inc., the Commission stated “[t]he conclusion in the ALJ Memorandum and Order that the element of assuming responsibility for transportation is more significant than the element of holding out in determining common carrier status does not appear to be consistent with Commission precedent or with the statutory definition of a common carrier. 46 U.S.C. § 40102(6)(A).” *EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06, Order at 17 n.5 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment). While I may have erred in characterizing the element of assuming responsibility for transportation as “more significant” than holding out, the element of assuming responsibility for transportation is not *less* significant than holding out. If an intermediary does not assume responsibility for the transportation by water of the cargo, it cannot be an NVOCC on that shipment.

- Porto Rican Express's freight bill to shipper showed total transportation charges, including ocean carrier's freight charges plus Porto Rican Express's fee for pick-up and delivery and insurance charges
- Porto Rican Express took over cargo at port of discharge and delivered cargo locally
- Porto Rican Express's receipt/contract of carriage showed the name of shipper, name and address of consignee, description and weight of shipment
- Porto Rican Express undertook to forward the cargo to the nearest point to the named destination reached by it
- Porto Rican Express claimed the status of a forwarder in its bill of lading

Id. at 773-776. The Board held that Porto Rican Express's "status as a 'common carrier' does not depend on its ownership or control or means of transportation, but, rather, on the nature of its undertaking with the public which it serves." *Id.* at 775.

[W]e deem that [Porto Rican Express's] status depends upon the nature of the service offered to the public and not upon its own declarations. Since it undertakes to transport from door to door it is a common carrier over the entire limits of its route, both the portion over land and the portion over sea.

Id. at 776-777 (citation omitted).

It is true that Anderson and AIT performed some of the activities performed by Porto Rican Express in *Ulmann*; e.g., taking shipments to Respondents' warehouse (*see* BOE App. 158 (40' container of household goods consigned to A.I.T. in Houston); BOE App. 578 (two barrels and 13 ctns personal effects consigned to A.I.T. in Houston)); using freight bills to shipper that included total transportation charges, including ocean carrier's freight charges plus Respondent's fee for pick-up and delivery and insurance charges (*see* BOE App. 67 (invoice included inland freight charge, ocean freight charge, dangerous cargo certificate charge, and documentation and service charge)). The differences are more significant, however. The ocean carriers in *Ulmann* issued an ocean bill of lading upon which Porto Rican Express appeared as consignor and consignee. Nothing in the record indicates that Porto Rican Express identified the proprietary shippers on the bills. The common carriers in this case issued bills of lading identifying the proprietary shippers "c/o" AIT, not Anderson or AIT, as the shipper. Consequently, unlike *Pullman*, in this proceeding, the proprietary shippers had contractual relationships with the common carriers. No downstream common carrier identified Anderson or AIT as the consignee on a bill of lading.

In *Ulmann v. Porto Rican Express*, an entity unsuccessfully sought to avoid being categorized as a common carrier by water. Other Board precedent suggests that responsibility for the transportation of cargo by water is not easily assumed. In *Common Carriers by Water*, certain motor carriers and others sought status as common carriers by water. *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 250 (1961) (the determination "depends on whether motor truck companies, freight forwarders, and express companies that make agreements among themselves fixing through rates for moving personal property overseas should be classified as, and have the status of, 'common carriers by

water”). The Hearing Examiner summarized the Board’s standards controlling this questions as follows:

. . . a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act; assumes responsibility for the safe water transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act . . .

Id. at 252-253.

After discussing the “holding out” requirement, *id.* at 251, the Board examined the entities’ conduct in detail to determine whether the evidence demonstrated that two motor carriers, Weaver Bros., Inc., and Railway Express, would assume responsibility for shipments.

The sworn statement of Weaver’s general traffic manager was that it now (1) “consolidates” freight by picking up parts of whole shipments from suppliers or delivering carriers for assembling into single lots; (2) “containerizes” shipments in “sealed vans”; and (3) moves freight under through bills of lading issued by Weaver Bros. under its published through tariff schedules. By the issue of its own bill of lading, Weaver has arranged in its own name for the performance of transportation obligations in line with the Examiner’s test. According to its affidavit, charges for the entire movement are collected by Weaver and Weaver “assumes sole responsibility to the shipper for the safe water transportation of the shipment as well as land functions at both origin and destination”. Weaver’s agreement with shippers as evidenced by the “terms and conditions” which constitute the contract of carriage shown in the bill of lading which was a part of the affidavit, however, are at variance with the sworn statement. It is agreed in Sec. 3 of the bill of lading that “Carrier shall in no event be liable in any capacity whatsoever for any delay, nondelivery or misdelivery or for any damage or loss occurring while the property is not in its actual custody.” The property is not in Weaver’s custody when it is in the custody of the vessel operator. In Sec. 12 of Weaver’s bill of lading the obligation of the carrier is as follows:

“Any carrier hereunder in making arrangements for any transshipping or forwarding by any vessel or other means of transportation not operated by such carrier shall be considered only as a forwarding agent, acting solely for the convenience of the shipper without any responsibility whatsoever. . . .”

These provisions show that Weaver has not assumed sole responsibility to the shipper for the safe water transportation of shipments. Instead, it is a “forwarding

agent” for the “convenience” of the shipper insofar as the water transportation part of the journey is concerned.

Id. at 253-254 (footnote omitted). To summarize, Weaver claimed that it performed the following services:

- Consolidated freight single lots
- Containerized shipments in “sealed vans”
- Moved freight under through bills of lading issued by Weaver Bros. under its published through tariff schedules
- Used the bill of lading to arrange in Weaver’s own name for the performance of transportation obligations in line with the Examiner’s test
- Collected charges for the entire movement
- Claimed to assume sole responsibility to the shipper for the safe water transportation of the shipment as well as land functions at both origin and destination
- Included a term in its bill of lading that Weaver “shall in no event be liable in any capacity whatsoever for any delay, nondelivery or misdelivery or for any damage or loss occurring while the property is not in its actual custody”
- Included a term in its bill of lading that Weaver “in making arrangements for any transshipping or forwarding by any vessel or other means of transportation not operated by such carrier shall be considered only as a forwarding agent, acting solely for the convenience of the shipper without any responsibility whatsoever. . . .”

The Board concluded that “[b]ecause of the restricted nature of its undertaking with the public as evidenced by its agreement with shippers, we find that Weaver has failed to bring itself within the definition of a common carrier by water.” *Id.* at 254.

Regarding Railway Express, the Board stated:

In view of the unresolved status of Railway Express’ liability to shippers on the over-the-water portion of the transportation which it handles, we are unable to come to any conclusion about the status of Railway Express as a common carrier by water. Until such a conclusion can be clearly reached based on an unequivocal assumption of liability to shippers or a showing of an imposition of liability by the courts, we conclude Railway Express is not a common carrier by water. . . .

As regards the Examiner’s recommended decision, we conclude, however, that *the assumption or attempted assumption of liability should not be the sole test of common carrier by water status*. Rather, the actual existence or imposition of liability is also a significant factor. *Actual liability as a common carrier over the entire journey including the water portion is essential.*

Id. at 256 (emphasis added).

The Commission has recognized that a finding that an intermediary holds itself out as an NVOCC does not mean that the intermediary is an NVOCC on all shipments in which it was involved. In *Low Cost Shipping*, an unlicensed entity²⁸ was found to be an NVOCC for some shipments, but an ocean freight forwarder for other shipments. In other words, the fact that Low Cost held itself out as an NVOCC did not lead to a finding that it operated as an NVOCC on every international shipment by water in which it was involved. The Commission determined this status on a shipment by shipment basis by examining Low Cost's conduct on each shipment. *Low Cost Shipping*, 27 S.R.R. at 687.

With respect to six shipments, the Commission's investigator averred that various attached documents are consistent with NVOCC movements. Low Cost appears on these documents as the shipper and was responsible for the payment of the freight charges on these shipments. In addition, through both telephone book advertisements and fliers, Low Cost held itself out to the public as providing transportation services. Combined with the uncontroverted facts in the Order, we conclude from the foregoing that Respondents indeed acted as NVOCCs without a tariff or bond in violation of sections 8 and 23 of the 1984 Act. . . .

* * *

As is the case with their NVOCC activity, both Rogoway and Arnold admit that, between June 1, 1994 and September 26, 1995, Low Cost operated as an unlicensed ocean freight forwarder. In addition, Commission investigator Kellogg has identified seven shipments on which he contends that Low Cost provided forwarding services. The record further reveals that Low Cost dispatched shipments from the United States by booking the cargo and processing the documentation. For example, Low Cost gave the ocean common carrier master instructions for the preparation of a bill of lading and is identified as the "forwarding agent" on the shipper's export declaration. See also, bills of lading for which Low Cost booked the cargo, processed the documentation and was responsible for payment of the ocean freight. Based on this information, we conclude that Respondents acted as ocean freight forwarders, without the requisite license and bond.

Low Cost Shipping, 27 S.R.R. at 687-688 (citations omitted) (emphasis added).

BOE implies that the Commission's decision in *Low Cost Shipping* should be discounted because it "it has never been cited or relied upon by the Commission for the proposition promulgated in [*Anderson International Transport*, FMC No. 07-02, Memorandum at 20-27 (ALJ Mar. 11, 2009)]." (BOE Supplementation of Record at 15.) It must be noted that until the Commission issued its decision in *Worldwide Relocations* (FMC), *Low Cost Shipping* appeared to

²⁸ At the time of the *Low Cost Shipping* decision, the Act did not require NVOCCs to be licensed.

be the only Commission decision that addresses the question of whether an unlicensed intermediary is operating as an NVOCC or as an ocean freight forwarder on a particular shipment. No case cited by BOE addressed this precise question and my own research did not find one.²⁹

BOE argues that

the Commission does not appear to have distinguished between situations where the respondent claimed to be something other than a carrier and situations where the respondent was recognized as a carrier, but was contesting its status as a common carrier. In *Puget Sound, supra*, . . . Respondent Northland contended that it was a shipper, not a carrier. The Commission disagreed and relied upon *Containerships, Inc.*, and similar cases to find Northland was an NVOCC, not a shipper. Similarly, in *Possible Violations of Section 18(a)*, 19 F.M.C. 44 ([ALJ] 1975), the respondent under investigation claimed to be operating as a shipper's agent, not a carrier. Again, the Commission disagreed and found the respondent to be an NVOCC. In determining the respondent was an NVOCC and not a shipper's agent, the Commission relied on *Containerships, Inc., supra* and *Puget Sound supra*.

(BOE Supplementation of Record at 15-16.)

Foss transported barges as a contract carrier for a number of shippers between ports in the State of Washington and Alaska. On some voyages, Foss carried "filler" cargo for other shippers, including Northland. The agreements between Foss and Northland stated that "Northland is a common carrier by water engaged in the business of transporting cargo and merchandise between ports in the State of Washington and places in Alaska, and has appropriate tariffs on file with the . . . Commission for the movement of such goods." *Puget Sound v. Foss*, 7 F.M.C. at 45 n.1.

On one shipment, the cargo carried by Foss "was not owned by Northland but was covered by an agreement . . . between Foss and Northland under which Northland paid Foss fixed sums of approximately 50% of the sum received from the cargo owners by Northland . . ." *Id.* at 44. On four subsequent shipments, "Foss towed a barge carrying nothing but general cargo gathered from many sources by Northland These barges moved under separate agreements between Northland and Foss." *Id.* at 45. Northland had the exclusive use of those barges. *Id.*

²⁹ While the issue was present in the Commission's review of the summary judgment issued for Tober Group Inc., *EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge's Grant of Summary Judgment), the remand was predicated on the fact that findings of fact on disputed issues were made when deciding a motion for summary judgment. *Id.* at 22. *Possible Violations of Section 18(a)*, 19 F.M.C. 44 (ALJ 1975), presented a closely related issue – whether a tariffed NVOCC was operating as an NVOCC or as a shipper's agent.

The general cargo solicited from the general public and secured by Northland but owned by many individual shippers is received at Foss's wharf; loaded on the Foss barge by Foss at Seattle . . .; covered by bills of lading issued by Northland under the statement "In witness whereof, the master or agent of the ship has signed this bill of lading", and by manifests issued by Northland with copies to Foss.

(8) Northland solicits general cargo from the public for transportation to Alaska by water at rates stated in its tariff on file with the Commission, and its is general cargo so secured that Foss tows in its barges to Alaska under the agreements.

Id. at 46 (emphasis added).

The Commission found that with respect to the cargo carried by Foss pursuant to its agreements with Northland,

Foss is a common carrier by water in interstate commerce . . . and as such, subject to the jurisdiction of this Commissions. . . . Here, in effect, two companies have established a service for all who care to ship general cargo at tariff rates on file with the Commission. One [Northland] solicits and secures the cargo and the other [Foss] furnishes and tows the barges which carry the cargo from port to port, each of the participants receiving 50% of the charge for carrying the cargo.

Id. The Commission was

satisfied that in the circumstance here present, the relation between Foss and Northland is not the same as that between ordinary shipper and carrier. Northland is not like an ordinary shipper which tenders its own goods to a carrier for transportation. Northland merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers that it will undertake to have the same transported to ultimate destinations. Northland has tendered to Foss, and Foss has transported, not traffic belonging to Northland but freight belonging to the general public, which Northland accepted and assembled as the result of the understanding with the shippers thereof that it would undertake to have the same transported. The facts which satisfy the requirement, insofar as Foss is concerned, that to be a common carrier there must be a holding out to transport for the general public are, first, that Northland dealt with the shipping public in general, and did not limit its activities to selected shippers, and second, that Foss transported traffic of the shipping public in general which was assemble by Northland as a result of the latter's undertaking to have the same transported. Under these circumstances, we think Northland must be treated not as an ordinary shipper but as an intermediary agency through which Foss held itself out to the general public to engage in the transportation of property by towed barges.

Id. at 47. The agreements between Foss and Northland were “agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of Section 15 of the Shipping Act, 1916.” *Id.* at 49.

The facts that the Commission found regarding the operations of Foss and Northland in *Puget Sound v. Foss* demonstrate that Northland’s operations were significantly different from those of Anderson and AIT. There is no evidence that Foss issued bills of lading identifying the owners of the cargo as shipper, while the common carriers with whom Anderson did business issued bills of lading identifying the proprietary shippers as shipper. Northland, which had a tariff on file with the Commission, assembled the shipments of many owners of cargo and tendered the assembled cargo to Foss, *compare Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07, Initial Decision at 18 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo) (Respondents consolidated the individual shipments of several proprietary shippers into one container), while Anderson and AIT arranged space with a common carrier for each individual shipment of a proprietary shipper, either as a full container transported by the common carrier for the proprietary shipper or as one of many shipments transported by the common carrier in one container. Northland had the exclusive use of particular barges on which it consolidated the shipments of a number of carriers.

The operations of Hawaii Freight Lines, Inc. (HFL), the respondent in *Possible Violations of Section 18(a)*, 19 F.M.C. 44 (ALJ 1975), also differed significantly from Anderson’s operations. HFL had filed a tariff with the Commission as an NVOCC operating between the West Coast to Hawaii. The tariff contained a provision purporting to limit “HFL’s liability to damage occurring while cargo was in its personal possession and disclaiming liability for losses incurred during ocean transport unless the vessel was owned or demise by HFL.” *Id.* at 45. The Commission initiated an investigation “[s]ince it appeared to the Commission that HFL was holding itself out as an NVOCC, issuing through bills of lading in its own name, appearing on bills of lading issued by water carriers operating under the jurisdiction of the Commission as both shipper and consignee and not as agent.” *Id.* HFL then began charging its customers a higher rate without submitting a revised tariff with the Commission. When the Commission inquired about the increased rates, HFL stated “that it was not a common carrier but rather a shipper’s agent which could freely adjust its rates without filing tariffs.” *Id.* Since it appeared that HFL was holding itself out as an NVOCC, the Commission ordered it to show cause why it should not be found in violation of the Shipping Act, 1916 by charging higher rates than those specified in its tariff. The Commission found HFL to be an NVOCC, finding “without substance” its contention that it was a shipper’s agent. *Id.* at 53.

Inter alia, the investigation determined that HFL “would receive various shipments from shippers, consolidate such shipments into containers, arrange for the ocean transportation and ultimate delivery to the consignee in Hawaii.” *Id.* at 46. HFL also operated a terminal in Hawaii. *Id.* at 49. As did Northland, assembled the shipments of many shippers into one shipment carried by a common carrier. There is no evidence that the common carrier issued bills of lading directly to the proprietary shippers of the cargo handled by HFL.

At two points in its Revised Proposed Findings of Fact, BOE sets forth Respondents' activities that BOE contends support a finding that operated as an NVOCC.

As described in greater detail below for each shipment, Respondents originated twenty-two ocean export shipments during the period January 5, 2005, through May, 2007, with three of those shipments occurring after the issuance of the Order of Investigation and Hearing in this proceeding. A review of Respondents' shipment files shows each shipment, with the exceptions noted, proceeded in the following manner.

(BOE Revised Proposed Findings of Fact at 6.) BOE then listed activities "a" through "l" that it contends prove Respondents operated as an NVOCC. (*Id.* at 6-8.) *See supra* at 32-33. Later in the document, BOE contends that "[b]ased on the evidence detailed in BOE's Proposed Findings of Fact, Respondents held themselves out and provided service to the general public for compensation and also assumed responsibility for transportation of the cargo." (BOE Revised Proposed Findings of Fact at 42.) It then listed in narrative form worded somewhat differently the activities in which it contends Respondents engaged that demonstrate they held themselves out and assumed responsibility for transportation.

As set forth above, I formulated questions about those activities when I asked BOE to supplement the record, asking which activities were NVOCC services and which were freight forwarding services. *Anderson/AIT – Possible Violations*, FMC No. 07-02, Memorandum at 19-20 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). Listed below are the activities BOE listed in its Revised Proposed Findings at 6-8 (preceded by a lower case letter enclosed in parentheses) followed by the similar activity as stated on page 42 of the Revised Proposed Findings of Fact, the service as stated in the March 11, 2009, Order (in **bold**), BOE's response to the March 11 Order from BOE Supplementation of Record, and comments about BOE's response and the activity it listed.

(a) Based on information received from the shipper, Respondents provided a quote. [Respondents provided quotes to potential shippers for door to door and door to port transportation as well as documentation and invoiced the shipper.]

Providing a quote to a potential shipper for door to door and door to port transportation.

BOE responded: "An NVOCC may provide a quote of its rates and charges for door-to-door and door-to-port transportation. An OFF may quote the rates of VOCCs and NVOCCs, but may not mark up those rates and provide a quote in its own name for transportation." (BOE Supplementation of Record at 19, Item a.

BOE does not cite any authority supporting its contention that an ocean freight forwarder "may not mark up [the rates of an VOCC or NVOCC] and provide a quote in its own name for transportation." Assuming an ocean freight forwarder may quote the rates of VOCCs and NVOCCs,

but may *not* mark up those rates and provide a quote in its own name for transportation, BOE does not cite any Commission authority holding or explain why marking up common carrier rates and providing a quote in its own name means that the unlicensed intermediary has assumed responsibility for the transportation of the cargo.

- (b) Respondents invoiced the shipper for the shipment. The invoice generally was a flat fee for all services and reflected a mark-up by Respondents of the ocean freight charges.

[The invoice generally was a flat fee for all services and reflected a mark-up by Respondents of the ocean freight charges.]

Issuing an invoice to the shipper for a fee for all services that reflects a mark-up by [sic] ocean freight forwarder of the ocean freight charges.

BOE responded: "Neither. If an OFF marks up the ocean freight and then invoices the increased rates in its own name, it would be considered an NVOCC. And an NVOCC can only charge the rates and charges published in its tariff or NVOCC service arrangements without markup."

BOE does not cite any Commission authority or explain why an OFF that "marks up the ocean freight and then invoices the increased rates in its own name, it would be considered an NVOCC." Assuming an ocean freight forwarder is not permitted to mark up the ocean freight and then invoice the increased rates in its own name, BOE does not explain why marking up the ocean freight and then invoicing the increased rates in its own name in violation of the Act means that the unlicensed intermediary has assumed responsibility for the transportation of the cargo.

- (c) Respondents made arrangements for delivery of the empty container(s), either to the shipper's location or to Respondent's warehouse. Respondents often picked up the shipper's goods themselves and brought them back to their warehouse.

[Respondents made arrangements for delivery of the container, either to the shipper's location or to Respondent's warehouse.]

Making arrangements for delivery of an empty container either to the shipper's location or to the ocean freight forwarder's own warehouse.

BOE states that either an NVOCC or an ocean freight forwarder may perform this service.

- (d) Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity. The straight bill of lading listed as the destination the foreign destination. In some cases, the straight bill of lading was also used as an invoice to the shipper.

[Respondents issued a straight bill of lading, which was given to the shipper as a receipt for the goods or used as a receipt when delivering the goods to another entity for shipment. The

straight bill of lading listed the foreign destination as the final destination. In some cases, the straight bill of lading was also used as an invoice to the shipper.]

Issuing a domestic straight bill of lading.

BOE responded: “Neither, unless licensed to do so by the appropriate authorities, not the FMC.”

Respondents’ use of the AIT domestic Straight Bill of Lading – Short Form warrants more extensive discussion. Respondents issued domestic short form straight bills of lading in connection with eleven shipments. DOT issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport “to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce.” (BOE App. 268 (emphasis in original).) Therefore, to the extent Respondents issued the straight bills of lading to assume responsibility for the domestic portion of the transportation, they were licensed to carry the cargo.

Respondents issued eleven domestic straight bills of lading to a proprietary shipper. BOE contends that because the bills of lading included the ultimate foreign destination, the bills prove Respondents assumed responsibility for the transportation of the cargo to that foreign destination. “Each of Respondents’ bill of lading names a foreign destination, not an intervening domestic point. Each bill contains through rates from a U.S. point to a foreign port or point.” (BOE Supplementation of Record at 13.)

It is true that each straight bill of lading identifies a foreign country as the destination of the cargo. Each also identifies an intervening domestic point, however, and a consignee in the United States. Transportation of the cargo pursuant to these bills of lading began with a shipper in the United States and ended with a consignee in the United States. On ten shipments, Respondents issued a domestic straight bill of lading to the proprietary shipper identifying AIT as the consignee. The bills include AIT’s Houston address in the caption.³⁰

Dirk Manuel (BOE App. 158)

Asekunle Osule (BOE App. 236)

Margret DeLeon (BOE App. 287)

Alex & Lynn Watt (BOE App. 478)

David Zinnah (BOE App. 563)

³⁰ No evidence in the record suggests that Respondents have a presence in any foreign country.

Richard Newman (BOE App. 578)

Claudette Dillon (BOE App. 607)

Julia Huxtable (BOE App. 618)

Nick Maniotes (BOE App. 653 (St. B/L); BOE App. 664 (Mediterranean Shipping B/L with port of loading Port Everglades, FL))

George Hughes (BOE App. 676 St. B/L from AIT consigned to Carotrans Intl, Charleston, SC, 680 (St. B/L); BOE App. 685 (CaroTrans Freight Inv. B/L with place of receipt by pre-carrier Houston and port of loading Charleston, SC))

On two of these ten shipments, Respondents issued a second domestic straight bill of lading identifying AIT in Houston as the shipper and a common carrier in the United States as the consignee:

Richard Newman (BOE App. 583 (from AIT consigned to Seaboard Marine, Miami, FL))

George Hughes (BOE App. 676 (from AIT consigned to Carotrans Intl, Charleston, SC))

On one shipment, there is no straight bill of lading issued to the proprietary shipper, but Respondents issued a domestic straight bill of lading for transportation from AIT in Houston to a common carrier in Houston:

Barbara Downie (BOE App. 445 (from AIT Houston to Shipco Worldtrade, Houston))

On each of the eleven shipments for which there is an AIT Straight Bill of Lading – Short Form in the record, an ocean common carrier issued a bill of lading for the international portion of the shipment identifying the proprietary owner with one of the “c/o Anderson International Transport” or “AIT International, LLC” variations as the shipper and acknowledging receipt of the cargo in the United States:

Dirk Manuel (BOE App. 155 (Star Shipping A/S (d.b.a. Atlanticargo) bill of lading identifying Dirk Manuel c/o Anderson International as the shipper, Houston, Texas, as the port of loading))

Asekunle Osule (BOE App. 228 (Star Shipping A/S (d.b.a. Atlanticargo) bill of lading identifying Asekunle Osule [*sic*] C/O Anderson International as the exporter, and Houston as the port of loading))

Margret DeLeon (BOE App. 275 (Finn Container Cargo Services, Inc. bill of lading/freight bill identifying Margret DeLeon c/o Anderson International Transport as the shipper and Houston, Texas, as the port of loading.))

Barbara Downie (BOE App. 439 (Shipco Transport, Inc., bill of lading identifying Barbara Downie c/o Anderson International Transport as the exporter, Houston as the place of receipt, and New York as the port of loading,))

Alex & Lynn Watt (BOE App. 516 (Shipco Transport Inc. bill of lading identifying Issac Watts [*sic*] c/o Anderson International Transport as the shipper, Houston as the place of receipt, and Los Angeles, CA as the port of loading))

David Zinnah (BOE App. 563 541-542 (Atlantic Container Line bill of lading identifying David Zinnah c/o Anderson International Transport as the exporter and Houston as the port of loading))

Richard Newman (BOE App. 576 (Seaboard Marine, Ltd. bill of lading identifying Richard Newman c/o Anderson International Transport as the shipper, Dodge Island, FL as the place of receipt, and Miami, FL as the port of loading))

Claudette Dillon (BOE App. 595 (Econocaribe bill of lading identifying Claudette Dillon c/o Anderson International Transport as the shipper, Houston, TX as the place of receipt, and Port Everglades, Fla, as the port of loading))

Julia Huxtable (BOE App. 614 (Econocaribe bill of lading identifying "Anderson International Transport Julia Huxtable %" as the shipper, Houston, TX as the place of receipt, and Miami, FL as the port of loading))

Nick Maniotes (BOE App. 664 (Mediterranean Shipping Company S.A., Geneva bill of lading identifying Nick Maniotes c/o AIT Intl LLC, 9045 Knight Road, Houston, TX as the shipper and Port Everglades, FL as the port of loading))

George Hughes (BOE App. 685 (Carotrans International, Inc., freight invoice/bill of lading identifying George Hughes ^ AIT International, LLC as the shipper, Houston, TX as the place of receipt by pre-carrier, and Charleston, SC as the port of loading))

Three straight bills set forth rates: Margret DeLeon (BOE App. 287); Richard Newman (BOE App. 578); Claudette Dillon (BOE App. 607).

I conclude from the facts that:

(1) Respondents are authorized "to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce" (BOE App. 268 (emphasis in original));

(2) the domestic straight bills of lading issued by Respondents consigned the goods to a consignee located in the United States, and

(3) a common carrier subsequently issued a bill of lading assuming responsibility for the water portion of the transportation and identifying the proprietary owner as the shipper

that Respondents did not assume responsibility for the water portion of the shipments when they issued the domestic straight bills of lading.

In its Brief on Remand, BOE states:

The Commission may take official notice of the licensing and insurance records maintained by DOT's Federal Motor Carrier Safety Administration on its website. 46 C.F.R. § 502.226. That information reveals that Anderson's authority was issued and revoked on various dates and was in effect only for one shipment, *viz.*, Claudette Dillon on September 11, 2006. See http://li-public.fmcsa.dot.gov/LIVIEW/pkg_carrquery.prc_carrlist.

(*Id.* at 15.) BOE did not provide this evidence with its brief.

The revocation or nonrevocation of Anderson/AIT's DOT license has no effect on the provisions on the identification and more importantly the location – in the United States – of the shippers and consignees on the bills of lading. The transportation pursuant to the straight bills of lading began and ended in the United States.

The record does not contain straight bills of lading for the other twelve shipments for which BOE seeks imposition of a civil penalty.

- (e) Respondents obtained a booking for the shipment from either an NVOCC or a vessel-operating common carrier ("VOCC").
[Respondents obtained a booking for the shipment from either an NVOCC or a vessel-operating common carrier ("VOCC").]

Obtaining a booking for a shipment from an NVOCC or a vessel-operating common carrier.

BOE states that either an NVOCC or an ocean freight forwarder may perform this service. (BOE Revised Prop. FF at 7, Item e; BOE Supplementation of Record at 20-21, Item g.)

- (f) Respondents prepared and forwarded a master bill of lading to the NVOCC or VOCC. The shipper block contained the shipper's name, the name of Respondent Anderson International Transport and the address of Anderson International Transport. In some cases, Respondents also forwarded the master bill of lading to the shipper.

As discussed above, BOE states that it does not contend that Respondents issued a bill of lading when they prepared the bill of lading masters for the shipments.

- (g) Respondents arranged for and forwarded all required documentation, including customs declarations, automobile title information and hazardous goods documents. [Respondents arranged for and forwarded all required documentation, including customs declarations, automobile title information and hazardous goods documents and in some cases, purchased insurance for the shipment.]

Arranging for and forwarding all required documentation, including customs declarations, automobile title information and hazardous goods documents.

BOE states that both NVOCCs and ocean freight forwarders may arrange for and forwarding all required documentation, including customs declarations, automobile title information and hazardous goods documents. (BOE Revised Prop. FF at 7, Item g; BOE Supplementation of Record at 21, Item h.)

- (h) If required, Respondents purchased insurance for the shipment. [See (g) above]

Arranging for and purchasing insurance for a shipment.

BOE states that both NVOCCs and ocean freight forwarders may purchase insurance for the shipment.

- (i) Respondents prepared a dock receipt which was generally signed by terminal or ship personnel upon delivery of the cargo. [Respondents also prepared a dock receipt.]

Preparing a dock receipt for a shipment.

BOE states that both NVOCCs and ocean freight forwarders may prepare a dock receipt for a shipment.

- (j) The NVOCC or VOCC issued copies of the ocean bill of lading to Respondents, showing the individual as shipper c/o AIT International or AIT International as shipper. The rated copy of the bill of lading often served as an invoice to Respondents or a separate invoice was issued. The NVOCC or VOCC looked to Respondents for payment of the ocean freight and any related charges. [The NVOCC or VOCC issued rated and unrated copies of the ocean bill of lading to Respondents, showing the shipper c/o AIT International or AIT International as the shipper. The rated copy of the bill of lading often served as an invoice to Respondents or a separate invoice was issued. All VOCCs and NVOCCs looked to Respondents for payment of the ocean freight.]

BOE does not cite any Commission authority holding that when a common carrier issues an ocean bill of lading identifying the proprietary shipper "c/o" an intermediary, the intermediary has assumed responsibility for the transportation of the cargo. Commission regulations provide that "[t]he identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent." 46 C.F.R. § 515.42(a). On the Michael Rose shipment, the common carrier identified "Anderson International Transport as agents for Mr. Michael Rose" as the shipper. (BOE App. 628.) On the Justina Licrish shipment, the common carrier identified "AIT International, LLC, as agents for Justina Licrish" as the shipper. (BOE App. 667.) BOE does not cite any authority holding that failure to identify the forwarder as "the shipper's agent" in violation of section 515.42(a) means the forwarder has assumed responsibility for the transportation of the cargo and become a common carrier for that shipment.

In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost "was responsible for payment of the ocean freight" was a factor indicating "Respondents acted as ocean freight forwarders." *Low Cost Shipping*, 27 S.R.R. at 687. The fact that the common carriers looked to Anderson and AIT "for payment of the ocean freight and any related charges" does not prove Anderson and AIT assumed responsibility for the transportation of the cargo. See also 46 C.F.R. § 515.2(i)(11) ("freight forwarding services includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments").

- (k) If Respondents contracted to provide door delivery at destination, Respondents made arrangements with the destination agent or other company for delivery.
[Respondents contracted with their customers to provide door to door or door to port transportation of cargo to a foreign destination.]

Making arrangements with the destination agent or other company for delivery for delivery at the destination.

BOE responded that "Technically, both. However, it is far more likely that the NVOCC responsible for transportation of the cargo would make the destination arrangements." "Respondents contracted with their customers to provide door to door or door to port transportation of cargo to a foreign destination" is a mixed question of fact and law, not a statement of Respondents' activities.

- (l) A number of shipments were not delivered in a timely manner, either because Respondents had not made arrangements for delivery at destination or Respondents had failed to pay the ocean freight and the shipment was held. As noted below, several shippers filed complaints with the Better Business Bureau in the Houston, Texas area.

Since an ocean freight forwarder may make arrangements for delivery at the destination, its failure to make those arrangements does not mean that it assumed responsibility for the transportation of the cargo and became an NVOCC. Failure of an ocean forwarder to pass on the

ocean freight that the proprietary shipper had given to it does not mean that it assumed responsibility for the transportation of the cargo and became an NVOCC.

In addition to its statement of Respondents' activities, BOE also relies on Respondents' responses to discovery to support its argument that Respondents operated as an NVOCC.

In Respondents' Response to BOE's Request for Admission No. 7, Respondents admit that they: "provided door to port and door to door services to its customers" and that their service "includes packing, inland transport, ocean freight, [and] destination services' Those services, which Respondents provided during 2005 - 2007, are clearly NVOCC services covering the transportation of cargo moving from U.S. origins to foreign destinations. Additionally in Admission 10, Respondent admits to having "move 17 customers from the United States to overseas destinations between Jan 05 and May 07." The term "move" is normally used in connection with carriers, not freight forwarders that merely arrange for the movement of cargo.

(BOE Supplementation of Record at 13.) As noted above, "an intermediary's *conduct*, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. at 1684 (emphasis added). *Rose Int'l, Inc.*, 29 S.R.R. at 171 ("[A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations.' *Containerships*, 9 F.M.C. at 64 (citing *Bernhard Uhlmann*, 3 F.M.B. at 775)"). See also *Prima U.S. v. Panalpina*, 223 F.3d at 129-130 ("Admittedly, Panalpina did state that [the proprietary shipper's] 'shipment [would] receive door to door our close care and supervision' However, because of the well settled legal distinction between forwarders and carriers, that statement – mere puffing – cannot transform Panalpina into a carrier, and bestow liability upon it."). Despite Respondents' own description of its activities, Respondents' conduct and the services they offered resulted in bills of lading issued by a common carrier to each proprietary shipper by which the common carrier assumed responsibility for transportation of the cargo by water. Respondents operated as ocean freight forwarders.

C. Conclusion Regarding Respondents' OTI Activities.

Anderson/AIT operated as an ocean transportation intermediary on twenty-two shipments for proprietary shippers for which BOE seeks imposition of a civil penalty. On each shipment, Anderson/AIT dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers, and processed the documentation or performed related activities incident to those shipments. Anderson/AIT do not have a license to operate as an ocean freight forwarder issued by the Commission and have not provided proof of financial responsibility in the form of surety bonds. Therefore, respondents Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI (ocean freight forwarder) in the United States foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds on each of the twenty-two shipments.

On each of the twenty-two shipments, a downstream common carrier issued a bill of lading with a clear and unambiguous identification of the proprietary shipper of the cargo, not Anderson/AIT, as the shipper, entered into a contract of carriage with the proprietary shipper, and assumed responsibility for the transportation of the cargo on the high seas between a port in the United States and a port in a foreign country. Anderson/AIT did not assume responsibility for the transportation by water of the cargo and did not operate as an NVOCC without a tariff on the twenty-two shipments. Therefore, Owen Anderson and Anderson International Transport have not violated section 8 of the 1984 Act and the Commission's regulations at 46 C.F.R. 520 by operating as a common carrier [NVOCC] without publishing tariffs showing rates and charges.

II. CIVIL PENALTIES ARE ASSESSED AGAINST ANDERSON AND AIT.

A. Statutory and regulatory considerations.

The Commission issued the Order of Investigation and Hearing to determine "whether, in the event one or more violations of the 1984 Act or the Commission's regulations are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed." *Anderson/AIT – Possible Violations*, FMC No. 07-02 (Mar. 22, 2007) (Order of Investigation and Hearing). Section 13(a) of the Act provides:

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

46 U.S.C. § 41107(a).³¹ "BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed." *Worldwide Relocations* (ALJ) at 76, *approved*, *Worldwide Relocations* (FMC) at 3. *See Parks International Shipping – Possible Violations*, FMC No. 06-09, Decision at 30-32 (ALJ Feb. 5, 2010) (Initial Decision of Clay G. Guthridge, Administrative Law Judge) (discussing burden of persuasion), *vacated and remanded on other grounds* (FMC Apr. 26, 2012). (*See also* BOE Additional Briefing (2009) at 3 n.4 ("To the extent that BOE may have stated otherwise in its pleadings filed in this proceeding, BOE acknowledges that under *Merritt*, it bears the burden of proof in assessing a civil penalty under Section 13(c)."))

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

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

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

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

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

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

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

prescription of fair penalty amounts is not an exact science,” and “[t]here is a relatively broad range within which a reasonable penalty might lie.” (Case citation omitted.)

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

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

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

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (2001); *Refrigerated Container Carriers Pty. Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805 (ALJ 1999, admin. final May 21, 1999).

The penalty provision is equally applicable to NVOCCs and ocean freight forwarders. An NVOCC that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for each violation. An ocean freight forwarder that violates the Act is liable for a civil penalty that may not exceed \$6000 for each violation, or if the violation was willfully and knowingly committed, \$30,000 for each violation. A lesser or greater civil penalty is not warranted because an entity operated as an NVOCC rather than an ocean freight forwarder or vice versa.

B. BOE Contentions.

1. Revised Proposed Findings of Fact.

In its Revised Proposed Findings of Fact filed before the Initial Decision, BOE argued that a civil penalty should be assessed against Respondents.

Pursuant to [the Act], a party is subject to a civil penalty of not more than \$30,000 for each violation knowingly and willfully committed. Each shipment is a separate violation. The evidence in this proceeding shows that Respondent [*sic*] violated Sections 8(a) and 19 on twenty-two separate occasions. The possible maximum penalty for Respondent’s [*sic*] unlawful activity is \$660,000.00. A significant civil penalty should be assessed as a result of Respondents’ blatant disregard of the Shipping Act.

Section 13(c) of the Act requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C. § 41109. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. *Merritt v. United States*, 960 F.2d 15, 17 ([2d Cir.] 1992).

In certain past cases, the Commission has assessed the statutory maximum in cases where a respondent has defaulted and no evidence on ability to pay and no mitigating evidence has been presented. See *Portman Square Ltd., cited above; Ever Freight Int'l Ltd. Et al.*, 28 SRR 329 (1998); *Shipman Int'l (Taiwan) Ltd., cited above; Comm-Sino Ltd. Possible Violations of Section 10(a)(1) and 10(b)(1)*, 27 SRR 1201 (I.D. 1997); *Trans Ocean-Pacific Forwarding, Inc., cited above, Refrigerated Container Carriers Pty. Limited – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 SRR 799 (I.D. 1999). Respondents' failure to participate fully in this proceeding has resulted in its failure to meet [their] ultimate "burden of persuasion" in justifying a reduction of the civil penalties otherwise applicable. *Merritt, supra* at 18. Since Respondents have failed to participate meaningfully in these proceedings, Respondents provided no evidence of mitigation of any of the factors to be considered in assessing a civil penalty for proven violations.

Respondents violated the act on twenty-two separate occasions, including three shipments after the issuance of the Order of Investigation and Hearing in this case. Owen Anderson has been the subject of a previous Commission investigation and has been warned on several occasions of the consequences of violating the Shipping Act. Based on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate.

(BOE Revised Proposed Findings of Fact at 45-46 (footnote omitted).)

2. BOE Additional Briefing (2009) on Remand for Civil Penalties.

BOE included additional proposed findings of fact, a brief, and an appendix with its petition for remand. BOE contends that:

The filings made by Owen Anderson during his bankruptcy proceeding are consistent, albeit not identical, with regard to his income or debts. In various filings, Owen Anderson indicated his monthly income was \$2698.00, \$2808.00, \$2914.00, \$3564.00 or \$3717.00. Taking an average, it is reasonable to conclude that Owen Anderson's annualized income is between \$37,000.00 and \$44,000.00. Excluding any claim by the Commission and including the suit filed by Monique Wolfe, the bankruptcy filings show that Owen Anderson has claims and debts against him of

approximately \$150,000.00 to \$270,000.00, some of which are medical and legal bills. Monique Wolfe has obtained a default judgment against Anderson International Transport. It also appears that Owen Anderson's main asset, property at 11835 S. Ridgewood Circle, Houston, Texas, is at best the subject of a foreclosure proceeding and may have already been the subject of a foreclosure sale. It is reasonable to conclude that Respondents have a limited ability to pay a civil penalty.

However, ability to pay is only one factor in determining the amount of a civil penalty. BOE believes the record supports imposition of the maximum civil penalty of \$30,000.00 for each violation. As previously recommended in BOE's Revised Proposed Findings of Fact, assessment of a substantial civil penalty, up to and including the maximum, against Respondents is appropriate. Owen Anderson, through Anderson International Transport, originated twenty-three ocean export shipments during the period January 5, 2005 through May, 2007, with three of those shipments occurring after the issuance of an Order of Investigation and Hearing in this case. Many of his customers suffered delivery delays and monetary losses. With regard to his history of prior offenses, Mr. Anderson was counseled personally by representatives of the Commission regarding the requirements of the 1984 Act in 1997 and again in 2006. Mr. Anderson has indicated on several occasions that he is aware of the requirements of the Shipping Act, yet continues to knowingly and willfully provide ocean transportation services in violation of the Shipping Act. Most recently, Mr. Anderson has participated in ocean transportation activities resulting in substantial harm to the shipping public and other shipping companies. Regardless of Respondents' ability or inability to pay, a substantial civil penalty will send a strong message to other common carriers and serve as a deterrent to similar conduct. The policies for deterrence and future compliance with the Commission's regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. In the circumstances of this case, the deterrent effect on others who might be inclined to violate the law clearly justifies assessment of a significant civil penalty notwithstanding Respondents' present status.

(BOE Additional Proposed Findings of Fact, Brief and Appendix (BOE Additional Proposed Findings) at 7-9 (footnote and citations omitted).)

After the Commission remanded this proceeding, I ordered the parties to submit any additional briefing they believed was necessary. BOE took advantage of this opportunity and submitted additional briefing. BOE contends:

The ALJ determined that Respondents acted in a manner that was knowing and willful. This determination was based on the evidence in the record that Mr. Anderson was counseled personally by representatives of the Commission regarding the requirements of the 1984 Act in 1997 and again in 2006 and that Mr. Anderson indicated on several occasions that he was aware of the requirements of the Act.

Respondents knew that their conduct was in violation of the Shipping Act – a fact that makes the violations more egregious.

The shipper customers of Respondents were generally inexperienced and vulnerable. Not only were Respondents operating in violation of the Shipping Act but they were the subject of multiple complaints. The record shows that three of the shipments which the ALJ found were violations generated complaints to the Commission, the Better Business Bureau and the Texas Attorney General. Vanessa Server, an employee of Two Trees Products Company, filed a complaint with the Better Business Bureau on June 2, 2005, alleging that after paying Respondent Anderson International Transport, Owen Anderson failed to provide the appropriate paperwork to allow the shipment to be released from the port. On February 23, 2005, Dirk Manuel filed a complaint with the Better Business Bureau of Metropolitan Houston, detailing the additional charges he incurred to transport his household goods from Antwerp to his home in Belgium, after already paying Respondents for this service. Lynn and Alex Watts filed complaints against Respondents with the Consumer Protection Division of the Texas Attorney General and the Better Business Bureau of Houston, Texas, detailing the problems with their shipment. In their complaint with the Texas Attorney General, Alex and Lynn Watts state that respondent Owen Anderson increased the freight charges three days before their goods were to leave the country, their goods incurred additional storage charges in Brisbane because respondent Owen Anderson avoided telephone calls seeking to resolve the situation, and various other actions by Respondents that resulted in an increase of the Watts' costs from the original quote of \$1,650.00 to \$8,800.00. The nature, circumstances, extent and gravity of the violations justify imposition of the maximum civil penalty against Respondents.

(BOE Additional Briefing at 4-5 (citations and footnotes omitted).)

BOE contends that “Respondents have a high degree of culpability.” (BOE Additional Briefing at 6.) To support this contention, BOE relies on findings made in the Initial Decision regarding shipments involving Anderson International, LLC – not a respondent in this proceeding, *see Anderson International Transport – Possible Violations* I.D. at 51, 124-125 – that occurred after the last shipment found to be a violation for which BOE seeks a civil penalty. BOE refers to “two complaints about Owen Anderson’s newly established company, AIT International, LLC” filed by Mediterranean Shipping Company (USA) Inc., citing FF 375-379,³² and the complaint against Owen Anderson operating as AIT International, LLC by Angela and Jason Temple, citing FF 380-387. (BOE Additional Briefing at 6.)

³² “FF” followed by a number or numbers refers to findings of fact set forth in the Initial Decision. *Anderson International Transport – Possible Violations* I.D.

BOE also relies on allegations regarding Respondents' handling of a shipment for Monique Wolfe. (*Id.*) BOE did not submit any evidence in this proceeding regarding Monique Wolfe's claim prior to issuance of the Initial Decision. BOE included Wolfe's Texas state court original petition (*Wolfe v. Anderson International Transport, AIT International, and Owen "Andy" Anderson*, Cause No. 2007-69981 (Harris Cty. (Tex.) 269th Jud. Dist. Nov. 13, 2007) (filed)), an index of the matters filed in that case, and Wolfe's Notice of Removal filed in Anderson's bankruptcy proceeding with the petition for remand filed in this proceeding. (BOE1105-BOE1115.) The state court petition alleges that Wolfe contracted with "Anderson International Transport"³³ to ship household items from Texas to Aruba in January 2007. Wolfe alleges that the shipment was delayed, and that when the shipment was delivered, items were missing. She also alleges that Anderson did not purchase insurance for the shipment as he agreed he would do. (BOE1113-BOE1114.) Owen Anderson filed an answer to the state court petition. On August 12, 2008, the Harris County court entered default judgment against Anderson International Transport and AIT International. (BOE1109.)

BOE states that "Respondents have no history of prior Shipping Act violations." (BOE Additional Briefing at 7 (footnote omitted).)

The Commission remanded this proceeding to consider admission of the evidence about Respondents' "ability to pay" attached to BOE's petition for remand and further consideration of a civil penalty. *Anderson International Transport – Possible Violations*, FMC No. 07-02, Order at 7-8 (Dec. 4, 2009) (Order Granting Petition to Reopen the Proceeding and for Remand). BOE summarizes the information about Respondents' financial situation as follows:

As discussed in greater detail in BOE's October 9, 2009 pleading, it is reasonable to conclude that Owen Anderson's annualized income is between \$37,000.00 and \$44,000.00. Excluding any claim by the Commission and including the suit filed by Monique Wolfe, the bankruptcy filings show that Owen Anderson has claims and debts against him of approximately \$150,000.00 to \$270,000.00, some of which are medical and legal bills. Monique Wolfe has obtained a default judgment against Anderson International Transport in excess of \$36,000.00. Based on the evidence in the record, it is reasonable to conclude that Respondents have a limited ability to pay a civil penalty.

A lack of ability to pay, however, does not preclude imposition of a civil penalty based on the other factors enumerated in section 13. Ability to pay is only one factor in determining the appropriate amount of a civil penalty. "[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay

³³ It is not clear that this is the same "Anderson International Transport" as the respondent in this proceeding. Anderson International Transport in this proceeding "has no separate corporate identity and is an assumed name for a sole proprietorship." FF 8. Wolfe alleges that the Anderson International Transport in her case is a corporation. (BOE1111-BOE1112.) Given the lack of relevance of the Wolfe shipment to this proceeding, it is not necessary to resolve this issue.

factor, and recognition must be taken of Congress' efforts to augment the Commission's authority to assess penalties so as to deter future violations."

(BOE Additional Briefing at 7-8 (citations omitted).)

BOE contends that:

The record in this proceeding does not present any evidence to support mitigating the civil penalty against Respondents.³⁴ The policies for deterrence and future compliance with the Commission's regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. Indeed, the Commission has held that the main Congressional purpose of imposing civil penalties is to deter future violations of the Act. The deterrent effect on both Respondents and others who, as Respondents did, might be inclined to establish a company and operate without obtaining a license and providing proof of financial responsibility justifies assessment of the maximum civil penalty.

(*Id.* at 8 (citations omitted).) BOE seeks assessment of the maximum civil penalty of \$30,000 for each of the twenty-two violations – a total civil penalty of \$660,000. *Id.*

3. 2012 Brief on Remand.

i. BOE's new argument.

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

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

³⁴ The evidence on which BOE based its statement that "it is reasonable conclude that Respondents have a limited ability to pay" is "evidence to support mitigating the civil penalty."

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

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. *Martyn Merritt, AMG Services, et al. – Possible Violations*, 26 S.R.R. 663, 664-665 (FMC, 1992). A logical and natural reading of the statute thus should result in the imposition of the enhanced penalty for a knowing and willful violation that, at a minimum, exceeds the statutory threshold defining the maximum penalty amount for violations having a lesser requirement of intent or purpose, i.e. not less than \$6001 nor more than \$30,000 per violation.

(BOE Brief on Remand at 25-26.) BOE notes that “even at the statutory maximum, the aggregate penalty herein [for twenty-two violations] would total \$660,000. This figure remains well below the penalty proposed by BOE in its remand brief in [*EuroUSA Shipping, Inc. – Possible Violations*, FMC No. 06-06 (*Tober* Remand)].” (*Id.* at 28 n.9.) I note that this amount approaches the civil penalty imposed on *Worldwide Relocations* for 278 violations (\$834,000), *Global Direct* for 149 violations (\$894,000), and *Moving Services* for 125 violations (\$750,000), and is more than four times the civil penalty imposed on *International Shipping Solutions* for forty violations (\$160,000). *Worldwide Relocations* (ALJ) at 90, approved, *Worldwide Relocations* (FMC) at 3. The Section 19(a) and 19(b) violations in *Worldwide Relocations* were substantially the same as the violations in this proceeding.

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

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

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

must exceed the statutory threshold defining the maximum civil penalty amount for a violation that is not willful and knowing, the Shipping Act does not say that.

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

Third, in the twenty-eight years since Congress amended the Act to add the increased maximum civil penalty for a willful and knowing violation, the Commission has never said in its regulations that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing. On three occasions immediately after enactment of the Shipping Act of 1984, the Commission published items in the Federal Register concerning changes in the compromise, assessment, mitigation, settlement, and collection of civil penalties under shipping statutes, including changes necessitated by the 1984 Act: (A) Final Rules to Implement the Shipping Act of 1984 and to Correct and Update Regulations, 49 Fed. Reg. 16994-17001 (Apr. 23, 1984) (codified at 46 C.F.R. Part 505 (1984) (amending 46 C.F.R. Part 505 to change the title to Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties and to add compromise and assessment authority for violations of the Shipping Act of 1984); (B) Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Act, 1933, 49 Fed. Reg. 18874-18877 (May 3, 1984) (proposing revision of rules governing the handling of penalty claims under the Shipping Act and other shipping statutes); (C) Final Rules in Subchapter A; General and Administrative Provision, 49 Fed. Reg. 44362 (Nov. 6, 1984) (promulgating the final rule proposed on May 3, 1984). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum civil penalty to be imposed for a violation that is not willful and knowing on any of these occasions, nor did it when it redesignated Part 505 as 46 C.F.R. Part 502, Subpart W. Miscellaneous Amendments to Rules of Practice and Procedure, 58 Fed. Reg. 27208 (May 7, 1993).

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

31, 2009) (increasing penalty for a willful and knowing violation to \$40,000 and for a violation not willful and knowing to \$8000). The Commission did not state that the minimum civil penalty to be imposed for a willful and knowing violation must exceed the maximum to be imposed for a violation that is not willful and knowing.

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

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

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

to be imposed for a violation that is not willful and knowing. A statutory requirement resulting from a “logical and natural reading” of the statute would not have gone unrecognized for twenty-eight years by the Commission component charged with its enforcement. 46 C.F.R. §§ 501.5(i)(2), 501.28(a), and 502.604(g).

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

3. Anderson and AIT are not “absconding respondents.”

In its Brief on Remand, BOE states:

The Commission’s clear policies for deterrence and future compliance as established and settled over the past quarter of a century, and the legislative purpose underlying the two-tiered structure providing a maximum penalty, and maximum deterrence, for knowing and willful violations at levels five times that of other violations of the Act, call for the maximum civil penalty to be assessed here. Indeed, as noted by then-Chief Administrative Law Judge Kline in *Refrigerated Containers Carriers Pty. Ltd. – Possible Violations*, 28 S.R.R. 799 (ALJ, 1999), there are additional implications of the Commission’s penalty policy which have particular relevance to the absconding Respondents here:

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

Accordingly, should the ALJ believe that a civil penalty less than the maximum is warranted here, BOE urges that such penalty should be not less than \$6000 per violation nor exceed \$30,000 per violation.

(BOE Brief on Remand at 27-28.)

As stated in the Joint Status report prepared by BOE, “Mr. Anderson has participated in this proceeding on an individual basis and on behalf of Anderson International and has responded to discovery and interrogatory requests.” (Joint Status Report and Proposed Discovery Schedule filed August 20, 2007.) It also appears that the shipping documents on which BOE’s claims in this

proceeding are based were supplied to BOE by Anderson. BOE did not file a motion to compel discovery responses or seek relief based on a claim that it was unable to obtain evidence. Therefore, this is not a case in which a respondent did not cooperate with BOE, and Judge Kline's observations in *Refrigerated Containers Carriers Pty. Ltd. – Possible Violations* are not applicable to this proceeding.

C. Assessment of civil penalties against Anderson/AIT.

1. Worldwide Relocations.

The February 5, 2010, supplemental decision Initial Decision imposed a civil penalty of \$33,950.00 on Anderson/AIT for twenty-two willful and knowing violations of the Shipping Act of 1984. Although the Commission did not explicitly address imposition of a civil penalty when it reviewed *Worldwide Relocations* (ALJ), its affirmance of the civil penalties imposed by the administrative law judge is instructive.

The orders of investigation and hearing in *Worldwide Relocations – Possible Violations*, FMC No. 06-01, and this proceeding were issued to investigate substantially identical activity by respondents. *Compare World wide Relocations – Possible Violations*, FMC No. 06-01 (FMC Jan. 11, 2006) (“an investigation is instituted to determine: (1) Whether the Respondents violated sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as non-vessel-operating common carriers in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility, [and] without publishing an electronic tariff”) with *Anderson/AIT– Possible Violations*, FMC No. 07-02 (FMC Mar. 22, 2007) (“an investigation is instituted to determine: (1) whether Owen Anderson and Anderson International Transport violated section 8 of the 1984 Act and the Commission’s regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing rates and charges; (2) whether Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission’s regulations at 46 C.F.R. 515 by operating as an OTI in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds”).

The section 19(a) and (b) violations found by the judge in *Worldwide Relocations* and the section 19(a) and (b) violations committed by Anderson/AIT are substantially the same. In *Worldwide Relocations*, the judge imposed determined a civil penalty amount per violation (shipment) for each Respondent. These amounts were \$3000 per violation for Worldwide Relocations, Boston Logistics, and Tradewind, \$4000 per violation for International Shipping Solutions and Dolphin, and \$6000 per violation for Moving Services and Global Direct Shipping. *Worldwide Relocations* (ALJ) at 82. Regarding *Worldwide Relocations*, Boston Logistics, and Tradewind, the judge stated:

Worldwide Relocations was Patrick Costadoni's first attempt at running an international shipping company while Boston Logistics was Lucy Norry's first attempt at running an international shipping company. Patrick Costadoni and Lucy

Norry were forthcoming in their testimony. Moreover, they appeared to fully cooperate with discovery requests. Patrick Costadoni attempted to assist proprietary shippers when Worldwide Relocations went out of business by notifying the shippers and providing releases to carriers. Moreover, they have a limited ability to pay. Accordingly, a civil penalty of \$3000 per violation is assessed against Worldwide Relocations, Boston Logistics, and Tradewind.

Worldwide Relocations (ALJ) at 81, *approved, Worldwide Relocations* (FMC) at 3. Anderson/AIT cooperated in discovery. It has been determined that Anderson and AIT have a limited ability to pay a civil penalty. BOE has not demonstrated that Anderson/AIT have a history of violations.

Although there is no requirement that the Commission impose a civil penalty in the same amount for identical violations, the Commission's affirmance of the civil penalties imposed in *Worldwide Relocations* is factored into the decision below.

2. Application of section 13.

a. "Willfully and knowingly."

The first question that must be answered in determining a civil penalty is whether the "violation was willfully and knowingly committed." *Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. at 678. BOE contends that Respondents "knowingly and willfully" violated the Act on each violation; therefore, they should be held liable for a civil penalty for each violation at the augmented amount. BOE has met its burden of persuasion on this issue.

BOE has established by a preponderance of the evidence that respondent Owen Anderson has been aware of the Shipping Act and its requirements since at least 1997. On January 15, 1997, BOE opened an investigation into respondent Owen Anderson based on information made to the Commission. The Commission's New Orleans Area Representative (NOAR) interviewed Anderson about the shipment of household goods and automobiles by respondent Anderson and International Transport Systems, Inc. ("ITS"), a company owned by Anderson that was alleged to be operating as an NVOCC without a tariff or bond. Apparently, it was determined at some point that ITS's activities were covered by an NVOCC bond issued by American Contractors Company in the amount of \$50,000. The bond was canceled effective November 26, 1997. ITS also maintained a tariff. Its CARGO, N.O.S. tariff was cancelled on December 1, 1997, for failure to maintain a valid surety bond. The NOAR reviewed with Anderson the requirements and obligations of a licensed ocean freight forwarder and the tariff and bond requirements for NVOCC activity. (Kellogg Affidavit.)³⁵

³⁵ BOE submitted the four-page affidavit of Alvin Kellogg signed on February 14, 2008. BOE numbered the first three pages 000686-000688. The fourth page is not numbered. BOE later submitted two other pages numbered 000687 and 000688. (BOE's Appendix to Amended Findings

BOE has established by a preponderance of the evidence that the Commission's NOAR advised respondent Owen Anderson of the licensing and bonding requirements of the Shipping Act in 1997. Despite this knowledge, Anderson ignored those requirements during the period at issue in this proceeding. BOE has established by a preponderance of the evidence that Respondents knowingly and willfully violated section 19 of the Shipping Act by operating as an OTI without a license or surety on twenty-two shipments for which BOE seeks a civil penalty. Therefore, Respondents may be liable to the United States Government for an enhanced civil penalty that may not exceed \$30,000 for each proven violation. 46 U.S.C. § 41107(a).

b. Section 13(c) factors.

Addressing the nature, circumstances, extent, and gravity of the violation committed, in another proceeding brought to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act, I found that the entity operated as an NVOCC. *Embarque Puerto Plata, Corp. and Embarque Puerto Plata Inc. d/b/a Embarque Shipping and Embarque El Millon Corp., Estebaldo Garcia, Ocean Sea Line, Maritza Gil, Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision), Notice Not to Review served Sept. 29, 2009. In assessing the civil penalty, I found that:

Despite the fact that BOE does not set forth any argument about how the section 13 factors should be balanced “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law,” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018, the evidence in the record demonstrates that for each of the thirteen proven violations, the shipments of as many as fifty to one hundred shippers were at risk. Therefore, a civil penalty of \$30,000, the maximum civil penalty authorized by the Shipping Act, is appropriate for each of the thirteen violations for a total of \$390,000.

Id. at 27

i. Degree of Culpability.

To an extent, this factor seems to overlap with the “willful and knowing” consideration. The evidence supports a finding that Commission employees advised respondent Owen Anderson of the Act's requirements on more than one occasion. *Anderson/AIT International Transport – Possible Violations* I.D. at 80. Respondents' degree of culpability can fairly be characterized as high.

of Fact at 687-688.) To minimize confusion, I will cite to this submission as the “Kellogg Affidavit” instead of appendix page number.

BOE's contentions about Mediterranean Shipping Company, Angela and Jason Temple, and Monique Wolfe, (BOE Additional Briefing at 6), are not relevant to this proceeding. As the Commission stated in another proceeding in which BOE wanted the administrative law judge to consider alleged Shipping Act violations that occurred after the violations subject to the proceeding when assessing a civil penalty:

The use of the words "such other matters as justice may require" in section 13(c) of the Shipping Act and 46 C.F.R. § 502.603(b) does not provide authority to the Commission to consider subsequent violations by a respondent – proven or unproven – in determining civil penalties, and we believe that reading such an intent would hinder rather than facilitate the resolution of adjudicative proceedings. . . .

Finally, because section 13(c) only allows for consideration of a respondent's prior, rather than subsequent, history of violations, we agree with the ALJ that the paragraphs BOE seeks to enter into evidence – which represent subsequent violations allegedly committed by Respondents – are irrelevant, since they are of no probative value to the ALJ in assessing penalties. We therefore affirm the ALJ's decision to exclude those paragraphs.

World Line Shipping, Inc. and Saeid B. Maralan (a/k/a Sam Bustani) – Order to Show Cause, 29 S.R.R. 808, 811 (2002). Furthermore, the actions of AIT International, LLC, cannot be attributed to Respondents. *See Anderson International Transport – Possible Violations I.D. at 51, 124-125.* Therefore, I do not consider the allegations of Shipping Act violations regarding the Mediterranean Shipping Company claims and the Temple and Wolfe shipments in assessing the civil penalty.

ii. History of Prior Offenses.

Respondents have no history of prior Shipping Act violations. (*See* BOE Additional Briefing at 7.)

iii. Ability to Pay.

BOE states that the evidence from Anderson's bankruptcy proceeding shows that he has an "annualized income between \$37,000.00 and \$44,000.00," "claims and debts against him of approximately \$150,000.00 to \$270,000.00," and that "Monique Wolfe has obtained a default judgment against Anderson International Transport in excess of \$36,000.00." BOE accurately states that "[b]ased on the evidence [from Anderson's bankruptcy proceeding] in the record, it is reasonable to conclude that Respondents have a limited ability to pay a civil penalty." (BOE Additional Briefing at 7.) BOE accurately states that "[a] lack of ability to pay, however, does not preclude imposition of a civil penalty based on the other factors enumerated in section 13," ability to pay is only "one factor" in determining the appropriate amount of a civil penalty, and that no one fact should be "elevated above any other." (*Id.*)

Anderson's most recent statement of his ability to pay appears to be set forth in the "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income" dated April 2, 2009, submitted in Anderson's bankruptcy proceeding. (BOE1096-BOE1102.)³⁶ The Statement indicates an annualized income (including his wife's income³⁷) for bankruptcy purposes of \$89,230.32. (BOE1097.) After certain deductions are made, the Monthly Disposable Income is \$1,228.96. (BOE1102.) The schedule of creditors and amounts of claims filed in the bankruptcy proceeding February 11, 2009, lists an unsecured priority claim of \$36,238.89 for child support (creditor Texas Attorney General). (BOE1065.) The most significant unsecured nonpriority claims are for debts owed to AT&T Advertising (\$4,100.00), Cintas Corporation (\$4,585.28 for credit card), Direct Container Line (\$3,358.10), Monique Wolfe (\$36,238.69), and Southwestern Bell Yellow Pages, Inc. (\$53,629.95). (BOE1066-BOE1068.) Unsecured nonpriority claims total \$102,133.22. (BOE1068.)

In its Brief on Remand, BOE states:

Because the record in the bankruptcy proceeding shows that it was dismissed due to Anderson's failure to comply with the Court's directives, however, no substantive disposition was reached upon other issues in that truncated proceeding, such as determining the validity of creditor claims, establishing the availability of assets for payment of claims, or any process by which to verify the disposable income of the debtor.

(Brief on Remand at 26.) The burden is on BOE to provide evidence on ability to pay. BOE submitted this evidence. If it now believes the evidence is not reliable, the burden is on it to provide other evidence on Anderson/AIT's ability to pay. At this point, it is the only evidence in the record on this element.

BOE contends that the maximum civil penalty of \$30,000 should be imposed for each of the twenty-two violations for a total of \$660,000. Assuming Owen Anderson's "annualized income" is \$40,000, approximately half way between the "\$37,000.00 to \$44,000.00" determined by BOE, (BOE Additional Briefing at 7), if all of Anderson's annualized income were used to pay the civil penalty BOE seeks, it would take 16.5 years to pay the civil penalty. As stated above, the most recent Chapter 13 Statement of Current Monthly Income submitted in Anderson's bankruptcy proceeding indicates that as of April 2, 2009, Anderson had a Monthly Disposable Income (including his wife's income) of \$1,228.96. (BOE1102.) If all of this disposable income were used to pay the civil penalty BOE seeks, it would take approximately 44.75 years to pay the civil penalty.

³⁶ These documents are attached to BOE's Petition to Reopen the Proceeding.

³⁷ Apparently, Anderson's wife was not a party in the bankruptcy proceeding. (BOE1096.) She is not a party in this proceeding.

In either of these situations, none of Anderson's annualized income (or disposable income) would be used to pay the other debtors.³⁸

While it is true that no one sections 13(c) factor should be elevated above any other, no section 13(c) factor can be devalued to the point of irrelevance. Imposition of the maximum civil penalty that BOE seeks would devalue the statutorily mandated section 13(c) factor of "ability to pay" to the point of irrelevance. I agree with BOE's statement that "[b]ased on the evidence in the record, it is reasonable to conclude that Respondents have a limited ability to pay a civil penalty." (BOE Additional Briefing at 7.) This factor must be taken into account in assessing a civil penalty.

iv. Nature, Circumstances, Extent, and Gravity of the Violations.

Nine of the twenty-two violations involved less than container load shipments, six violations involved twenty-foot full container load shipments, and seven involved forty-foot full container load shipments.

LESS THAN CONTAINER LOAD SHIPMENTS

TWO TREES PRODUCTS SHIPMENT – FF 34-54

The common carrier bill of lading describes the goods as "FAK Pallet SLAC: 2 ctns petroleum distallates [*sic*] NOS NOS UN# 1268, Pkg III 65 Kgs and 200 lbs saw dust" and states ocean freight and other charges totaling \$299.18 for a shipment from Houston, Texas, to China. Anderson charged \$769.00 for inland freight, ocean freight, dangerous cargo certificate, and documentation and service charge. A representative of the shipper filed a complaint with the Better Business Bureau on June 2, 2005, alleging that after paying Anderson International, Anderson failed to provide the appropriate paperwork to allow the shipment to be released from the port.

CLIFTON WATTS SHIPMENT NO. 2 (Clifton Watts) – FF 73-81

The common carrier bill of lading describes the goods as "plywood box with 12 UN 4G fiberboard boxes-total net 336 Kg UN 2794 batteries, wet filled with acid class 8 net qty 28 Kgs each 51.5X43X28" for a shipment from Houston, Texas, to Kingston, Jamaica.

³⁸ On December 30, 2008, the court converted Anderson's bankruptcy proceeding from chapter 7 to chapter 13. (BOE1051.) On April 15, 2009, the court dismissed the bankruptcy proceeding. (BOE1007, docket entry 51.) On this record, it appears that Anderson's creditors have not been satisfied and the debts have not been discharged.

BARBARA DOWNIE SHIPMENT – FF 200-211

The common carrier bill of lading describes the goods as “one crate 2 pieces household effects” and states freight and other charges totaling \$229.17 for a shipment from Houston to Glasgow.

DR. SARIPALLI SHIPMENT – FF 212-220

The common carrier bill of lading describes the goods as “2 pieces 1 crate and 1 skid household effects” and states freight and other charges totaling \$787.55 for a shipment from New York to Mumbai.

ALEX & LYNN WATT SHIPMENT – FF 221-235

The common carrier bill of lading describes the goods as “2 pieces one crate and one skid household effects” and states ocean freight charges totaling \$1,433.89 for a shipment from Houston to Brisbane, Australia.

Lynn and Alex Watt filed complaints against Respondents with the Consumer Protection Division of the Texas Attorney General and the Better Business Bureau of Houston, Texas, detailing the problems with their shipment. In their complaint with the Texas Attorney General, Alex and Lynn Watt state that Anderson increased the freight charges three days before their goods were to leave the country, their goods incurred additional storage charges in Brisbane because Respondents did not pay charges in Brisbane, Anderson avoided telephone calls seeking to resolve the situation, and various other actions by Respondents that resulted in an increase of the Watts’ costs from original quote of \$1,650.00 to \$8,800.00.

RICHARD NEWMAN SHIPMENT – FF 259-275

The common carrier bill of lading describes the goods as “3 pieces household effects (one crate, two cartons)” and states freight and other charges totaling \$491.19 for a shipment from Houston to Montego Bay, Jamaica. Anderson International charged \$900.00 for the shipment.

CLAUDETTE DILLON SHIPMENT – FF 276-287

The common carrier bill of lading describes the goods as “1 drms. S.T.C. (1 barrel) household goods/personal effects” and states freight and other charges totaling \$235.00 for a shipment from Houston to Kingston, Jamaica.

JULIA HUXTABLE SHIPMENT – FF 288-301

The common carrier bill of lading describes the goods as “1 crts S.T.C. used TV (household effects)” and states ocean freight and other charges of \$288.51 for a shipment from Houston, TX to Kingston, Jamaica. Anderson International charged \$400.00 for the shipment.

GEORGE HUGHES SHIPMENT – FF 359-374

The common carrier bill of lading describes the goods as “crate SLAC: 1944 Crushman [sic]” and states ocean freight and other charges totaling \$93.00 for a shipment from Houston, TX to Rotterdam, The Netherlands.

FULL CONTAINER LOAD SHIPMENTS

CLIFTON WATTS SHIPMENT NO. 1 (Mike European) – FF 55-72

The common carrier bill of lading describes the goods as a 40' container carrying an automobile and household effects for a shipment from Houston, Texas, to Manchester, Jamaica. Ocean freight charges were \$2,028.95. Anderson International charged \$3,720.00, including a charge of \$3,200 for freight, packing, and service.

REPAIRER OF THE BREACH SHIPMENT – FF 82-95

The common carrier bill of lading describes the goods as “40' container S.T.C. 500 CTMS [sic] relief supplies” for a shipment from Houston, Texas, to Jamaica. Anderson International Transport issued an invoice to Repairer of the Breach in the amount of \$3,190.00 for the shipment.

DIRK MANUEL SHIPMENT – FF 96-111

The common carrier bill of lading describes the goods as “1x40' container(s) SLAC: 250 pieces household effects” for a shipment from Katy, Texas to Brussels, Belgium. Dirk Manuel filed a complaint with the Better Business Bureau of Metropolitan Houston, stating that he was required to pay \$2,462 plus \$313 in demurrage charges to secure delivery of the container from the port of discharge to its ultimate destination.

KATHLEEN DAVIDSON SHIPMENT – FF 112-118

There is no common carrier bill of lading for this shipment in the record. Anderson International Transport issued a dock receipt for a 40' container describing the cargo as “40' contr STC household effects, one 2004 Toyt . . . one 2004 Ford” for a shipment from Houston to Kingston, Jamaica.

ASEKUNLE OSULE SHIPMENT – FF 119-136

The common carrier bill of lading describes the goods as “20' contr STC one 2005 Lincoln Navigator ID #5LMFU27535LJ11183 and four tires” and states ocean freight and other charges of \$951.76 for a shipment from Houston to Tilbury. Anderson International issued an invoice for a cost totaling \$2,392.50.

MARGRET DELEON SHIPMENT – FF 137-155

The common carrier bill of lading describes the goods as “20' standard container stc 75 pcs ‘household effects’” and states freight and other charges of \$3,495.50 for a shipment from Houston, Texas, to Reykjavik, Iceland. Anderson International issued an invoice in the amount of \$5,600.

RAY COOPER SHIPMENT NO. 2 (Outbound Shipment) – FF 170-182

The common carrier bill of lading describes the goods as “X 20' std container STC 180 packages ‘used household effects’ return cargo” and states freight and other charges of \$1,245.50 for a shipment from Houston to Felixstowe. Anderson invoiced Cooper \$3,350.00 for the shipment.

DAVID ZINNAH SHIPMENT – FF 236-258

The common carrier bill of lading describes the goods as “1 x 40 dry cargo 86 unit(s) SLAC: 40' container - STC contains 85 pieces of household effects 1 used 2001 Jeep Cherokee” and states ocean freight charges of \$5,452.40 for a shipment from Houston, Texas to Monrovia, Liberia. Anderson International issued one invoice in the amount of \$5,850.00 and a second invoice in the amount of \$7,560.00 to Zinnah.

MICHAEL ROSE SHIPMENT – FF 302-311

The common carrier bill of lading describes the goods as “1 X 40' shipper owned std container STC 120 boxes household goods” for a shipment from Houston, Texas to Kingston, Jamaica. The booking confirmation states freight and other charges totaling \$2,500.00.

ABDELNASAR ALBALBISI SHIPMENT – FF 312-321

The common carrier issued an invoice to Anderson International in the amount of \$2,833.94 for a bill of lading describing the goods as “40' contr STC 60 pcs household effects 1 auto” for a shipment from Houston to Ad Dammam.

NICK MANIOTES SHIPMENT – FF 322-334

The common carrier bill of lading describes the goods as “20' contr stc 60 pcs household effects” for a shipment from Houston, TX to Pireaus, Greece. The common carrier invoiced Maniotes for freight and charges totaling \$1,456.00. Anderson International issued a domestic straight bill of lading for shipment of a 20' container with shipping and other charges totaling \$2,913.75.

JUSTINA LICRISH SHIPMENT – FF 335-346

The common carrier bill of lading describes the goods as “20' standard SLAC: 193 pcs of used household goods & personal effects” and states \$1,730.94 in freight and other charges for a shipment from Houston, Texas, to Trinidad.

LIBBY COKER SHIPMENT – FF 347-358

The common carrier bill of lading describes the goods as “67 unit(s) of (pieces) used household goods & personal effects” in a 20' container for shipment from Houston, Texas, to Italy.

Regarding the nature, circumstances, extent, and gravity of the violations, BOE argues that “Respondents were the subject of multiple complaints” and summarizes the evidence in the record demonstrating problems with the Two Trees Products shipment, the Dirk Manuel shipment, and the Alex and Lynn Watt shipment. (BOE Additional Briefing at 4-5.) Information about the problems with the Two Trees Products shipment comes from a complaint Two Trees filed with the Better Business Bureau. BOE obtained affidavits from Dirk Manuel and Lynn Watt describing the problems with their shipments. BOE did not submit affidavits from the shippers or consignees of the other nineteen shipments indicating problems with their shipments. BOE does not state whether it contacted the shippers and consignees for the nineteen shipments and learned that there were no problems or that BOE did not contact the shippers or the consignees to learn of problems. In any event, there is no evidence in the record demonstrating problems with the other nineteen shipments, and problems with the Two Trees, Manuel, and Watt shipments do not provide evidence on which a finding of problems with the other shipments could be based. Therefore, with no evidence to the contrary, it must be assumed that there were no problems with the other nineteen shipments and that they were delivered to the consignees without additional payments.³⁹

BOE seeks the maximum civil penalty of \$30,000 for each violation, whether for a small shipment for which there is no evidence of problems with the shipment (*e.g.*, a used TV shipped for \$288.51 in ocean freight and other charges (Julia Huxtable) or a motor scooter shipped for \$93.00 (George Hughes shipment)), a small shipment for which there is evidence of problems with the shipment (*e.g.*, one pallet where Respondents failed to provide the appropriate paperwork to allow the shipment to be released from the port (Two Trees Products) or one crate and one skid for which Respondents increased the freight charges three days before their goods were to leave the country, then failed to pay charges at the destination (Alex and Lynn Watt)), a large shipment for which there is no evidence of problems with the shipment (*e.g.*, a 40' container of household goods (Michael Rose)), or a large shipment for which there is evidence of problems with the shipment (*e.g.*, a 40'

³⁹ The record suggests that there was a delay in payment for the David Zinnah shipment, but this appears to have been a delay in Zinnah's payment to Respondents, not Respondents' delay in paying the common carrier. FF 236-258. BOE does not claim that Respondents caused any problems with the Zinnah shipment.

container for which the shipper was required to pay extra charges to secure delivery (Dirk Manuel)). I find that these matters – size of the shipment, whether there were problems with the shipment – are evidence of the nature, circumstances, extent, and gravity of the violations that Congress intended for the Commission to take into account in assessing a civil penalty. Assessing the same civil penalty for a small shipment as for a large shipment and for a shipment on which there were no problems as for a shipment on which there were problems would nullify the mandate set forth in section 13(c) that the Commission consider the nature, circumstances, extent, and gravity of the violations when assessing a civil penalty. Therefore, I have taken these factors into account in assessing a civil penalty.

v. Other Matters as Justice May Require.

Anderson's bankruptcy filings indicate that as of April 2, 2009, Anderson owed creditors an unsecured priority claim of \$36,238.89 for child support and unsecured nonpriority claims of \$102,133.22, a total of \$138,372.11. A civil penalty assessed by the Commission would be an unsecured priority claim that could impact recovery of those claims.

c. Balancing the Section 13(c) Factors.

Balancing the relevant evidence of the section 13(c) factors – the nature, circumstances, extent, and gravity of each violation, Respondents' degree of culpability, Respondents' lack of history of prior offenses, Respondents' limited ability to pay a civil penalty, and other matters as justice may require – in light of the obligation to ensure that the penalty be tailored to the particular facts of the case and not imposing unduly harsh or extreme sanctions while at the same time deterring violations and achieving the objectives of the law, I assess a civil penalty against respondents Owen Anderson and Anderson International Transport in the amounts set forth below in the Table of Civil Penalties Assessed:

TABLE OF CIVIL PENALTIES ASSESSED

SHIPMENT	PENALTY
Two Trees Products	\$1,500.00*
Clifton Watts shipment No. 2 (Clifton Watts)	\$1,000.00
Barbara Downie	\$1,000.00
Dr. Saripalli	\$1,000.00
Alex & Lynn Watt	\$3,000.00*
Richard Newman	\$1,000.00
Claudette Dillon	\$1,000.00
Julia Huxtable	\$1,000.00
George Hughes	\$1,000.00
Clifton Watts shipment No. 1 (Mike European)	\$2,000.00
Repairer of the Breach	\$2,000.00
Subtotal	\$15,500.00

SHIPMENT	PENALTY
Subtotal	\$15,500.00
Dirk Manuel	\$5,000.00*
Kathleen Davidson	\$2,000.00
Asekunle Osule	\$2,000.00
Margret DeLeon	\$2,000.00
Ray Cooper shipment No. 2 (Outbound Shipment)	\$2,000.00
David Zinnah	\$2,000.00
Michael Rose	\$2,000.00
Abdelnasar Albalbisi	\$2,000.00
Nick Maniotes	\$2,000.00
Justina Licrish	\$2,000.00
Libby Coker	\$2,000.00
TOTAL	\$40,500.00

* Shipments for which the record contains evidence of problems.

V. CEASE AND DESIST ORDERS ARE ISSUED AGAINST ANDERSON AND AIT.

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

BOE takes this opportunity also to iterate the need for clear, durable and definitive remedial (“cease and desist”) relief to bar Owen Anderson from continued involvement in OTI activities. Such relief is warranted and would be consistent with

relief recently accorded in the *Worldwide* case. See, e.g., *Worldwide Initial Decision*, 31 S.R.R. 1471, 1542-43 (ALJ, 2010) and *Worldwide*, slip op. at 22-24.

(BOE Brief on Remand at 28.)

BOE has demonstrated by a preponderance of the evidence that respondents Anderson and AIT have histories of providing ocean transportation services in violation of the Shipping Act. I conclude that there is a reasonable likelihood that Anderson and AIT will continue or resume their unlawful activities. Therefore, entry of a cease and desist order prohibiting respondents Anderson and AIT from operating as an ocean transportation intermediary is appropriate and is entered.

The *Anderson/AIT* ID imposed the following cease and desist order:

(1) respondents Owen Anderson and Anderson International Transport cease and desist from holding out or operating as an ocean transportation intermediary in the United States foreign trades until and unless a license is issued by the Commission and Respondent publishes a tariff and obtains a bond pursuant to Commission regulations; and (2) respondent Owen Anderson cease and desist from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such entity for a period of three years.

Anderson/AIT ID at 133. This is substantially the same as the cease and desist order entered by the administrative law judge in *Worldwide Relocations*. *Worldwide Relocations* (ALJ) at 90.

When it reviewed the *Worldwide Relocations* decision, the Commission modified the cease and desist order as applied to the individuals.

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

Worldwide Relocations (FMC) at 24. The same exception is made in this proceeding.

In the text of its *Worldwide Relocations* decision, the Commission states that it adjusted the administrative law judge's injunction "to enjoin the individual respondents from working for an

ocean transportation company, sole proprietorship, or other entity in any way for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years.” *Worldwide Relocations (FMC)* at 23. The limitations on years do not appear in the Commission’s Order. *Id.* at 24.

The Commission issued the Order of Investigation and Hearing into Anderson and AIT on March 22, 2007, nearly six years ago. The Initial Decision issued August 28, 2009, entered a cease and desist order that would last three years, a date that has now passed. *Anderson/AIT* ID at 133. To run the cease and desist order for working for an ocean transportation company for another year and on ownership for another five years beyond the date of a final Commission decision seems excessive. Therefore, tailoring the order to the needs and facts of this case, the cease and desist order will terminate on March 22, 2014, seven years after the commencement of this proceeding.

PART FIVE – FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴⁰

1. The Commission issued the Order of Investigation and Hearing on March 22, 2007.
2. The Secretary served a copy of the Order of Investigation and Hearing on Owen Anderson and Anderson International Transport (“Respondents”) via Federal Express on March 23, 2007. (BOE App. 11-12.)
3. On October 18, 2007, BOE served Owen Anderson and Anderson International Transport with a First Set of Requests for Admissions. BOE received a response to its Request for Admissions on January 3, 2008. (BOE App. 13-14.)
4. On December 21, 2007, Respondents were ordered to serve and file their Rule 95 statements by January 18, 2008. *Anderson/AIT – Possible Violations*, FMC No. 07-02 (ALJ Dec. 21, 2007) (Memorandum of December 21, 2007, Telephonic Prehearing Conference).
5. The Secretary has not received a copy of Respondents’ Rule 95 statements. (Official Notice of Commission Records, 46 C.F.R. § 502.226.)
6. On October 26, 2001, Owen Anderson of 11835 S. Ridgewood Circle, Houston, Texas filed an assumed name certificate for Anderson International Transport, with an address of 4939 West Orem Drive, Houston, TX, in Harris County, Texas. (BOE App. 1.)
7. On February 18, 2005, Owen Anderson of 3015 Richland Spring Lane, Sugarland, Texas filed an assumed name certificate for Anderson International Transport, with an address of 4939 West Orem Drive, Houston, TX, in Harris County, Texas. (BOE App. 1.)

⁴⁰ To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

8. Anderson International Transport has no separate corporate identity and is an assumed name for a sole proprietorship. Owen Anderson is the sole officer and owner of Anderson International Transport. (BOE App. 5 (Interrogatories 1 and 2); BOE App. 10 (responses to Interrogatories 1 and 2); BOE App. 13 (response to Request for Admissions 1).)
9. Anderson International Transport is the assumed name for a business owned by Owen Anderson.
10. Respondents never maintained open to public inspection in an automated tariff system, tariffs showing its rates, charges, classifications and practices pursuant to section 8(a) of the Shipping Act of 1984 ("Shipping Act"). (BOE App. 13.)
11. Respondents never notified the Commission, prior to providing transportation services, of the location of tariffs or the publisher used to maintain those tariffs by filing a Form FMC-1. (BOE App. 13.)
12. Neither Respondent held an ocean transportation intermediary license issued by the Commission pursuant to section 19 of the Shipping Act during the period from February 18, 2005 until the present. (BOE App. 13.)
13. Neither Respondent maintained a bond or provided evidence of financial responsibility in the amount of \$75,000 pursuant to section 19 of the Shipping Act and 46 C.F.R. § 515.21. (BOE App. 13.)
14. Respondents did business at the following addresses: 9045 Knight Road, Houston, TX; 4939 West Orem, Suite 4 & 6, Houston, TX; and 14023 South Post Oak Road, Houston, TX. (BOE App. 13.)
15. Owen Anderson also uses the name Andy as his first name. (BOE App. 52, 100, 507.)
16. On August 09, 2006, the United States Department of Transportation (DOT) issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport "to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce." (BOE App. 268 (emphasis in original).)
17. On October 23, 2006, Owen Anderson and Nichelle Jones incorporated A.I.T. International, LLC, in Texas. (Kellogg Affidavit.)
18. Respondent Owen Anderson serves as the President of A.I.T. International, LLC. (Kellogg Affidavit.)

19. On July 23, 2007, A.I.T. International, LLC, filed an application for an ocean freight forwarder license with the Federal Maritime Commission's Bureau of Certification and Licensing. (Kellogg Affidavit.)
20. Owen Anderson is the proposed qualifying individual for A.I.T. International, LLC. (Kellogg Affidavit.)
21. A.I.T. International, LLC, is not a party to this proceeding.
22. In September, 2006, the Commission's New Orleans Area Representative ("NOAR") received a complaint from a licensed NVOCC in Houston, Texas alleging that respondent Anderson, using the name Anderson International Transport, booked three shipments of used household goods and failed to pay the ocean freight in a timely manner. The shipments were being held at destination pending payment of the freight. While the ocean freight for one shipment was subsequently paid, the ocean freight for the two remaining shipments is still unpaid. (Kellogg Affidavit.)
23. The NOAR made an appointment to meet with Anderson at AIT's offices on October 23, 2006, but Anderson failed to attend the meeting. During a phone conversation that day with the NOAR, Anderson indicated that he knew of the requirements of the Shipping Act and would be submitting his application within a week. However, no application was forthcoming. While visiting the AIT office on October 23, 2006, the NOAR obtained copies of shipping records documenting twelve international shipments in which Respondents were involved during the period January 5, 2005 through October 19, 2006. These shipments are in addition to the three shipments shipped with the complaining NVOCC. During discovery, records documenting a total of twenty-two shipments were provided by Anderson.
24. The NOAR contacted Anderson again on December 20, 2006 and was told that an application would be submitted within the week. (Kellogg Affidavit.)
25. On January 15, 1997, BOE opened an investigation into respondent Owen Anderson based on information received from industry sources as well as complaints to the then Office of Informal Inquiries, Complaints and Informal Dockets. (Kellogg Affidavit.)
26. The information indicated that Anderson's company, International Transport Systems, Inc. ("ITS"), located in Rowlett, Texas, was operating as a non-vessel-operating common carrier ("NVOCC") without a tariff or bond. (Kellogg Affidavit.)
27. The nature of the complaints was the failure of ITS to pay two NVOCCs for ocean freight booked in its name. (Kellogg Affidavit.)
28. Alvin Kellogg, the Commission's New Orleans Area Representative, interviewed respondent Owen Anderson on January 15, 1997. During that interview, Anderson indicated ITS's principal ocean activity was the shipment of household goods and automobiles, primarily to

Nigeria. Documents (including bills of lading) examined by the NOAR indicated that ITS made at least fifty shipments between December 1995 and January 1997. (Kellogg Affidavit.)

29. At the close of the meeting, the NOAR reviewed with Anderson the requirements and obligations of a licensed ocean freight forwarder and the tariff and bond requirements for NVOCC activity. Anderson was cautioned to stop his current ocean export activity or face enforcement action. Anderson indicated that he understood the requirements of the Shipping Act. (Kellogg Affidavit.)
30. On November 20, 1997, Alvin Kellogg again visited Anderson in the ITS office. An examination of thirty shipment files dated between May 27, 1997 and November 20, 1997, indicated that ITS continued to handle ocean shipments. Anderson was reminded of the requirements for filing and maintenance of a tariff and bond. Anderson indicated that he understood the requirements and preferred to get out of the business and just do the packing and crating. Anderson indicated that he knew a freight forwarder that would handle his business. (Kellogg Affidavit.)
31. Further investigation showed that from May 1, 1996 to November 26, 1997, ITS' activities were covered by an NVOCC bond issued by American Contractors Company in the amount of \$50,000. The bond was canceled effective November 26, 1997. ITS also maintained a tariff.⁴¹ Its CARGO, N.O.S. tariff was cancelled on December 1, 1997 for failure to maintain a valid surety bond. (Kellogg Affidavit.)
32. On March 22, 1999, the NOAR conducted a third interview with Anderson in the ITS office in Rowlette, Texas. An examination of ITS files showed that ITS was continuing to handle ocean export shipments as an NVOCC and during the period from May, 1997 through January, 1999 handled at least 18 ocean export shipments despite previous warnings and counseling on the requirements of the Commission's regulations. A Report of Investigation dated April 5, 1999 was generated. Further monitoring indicated that no export shipments were made in the name of ITS after March 1999. The informal investigation was closed in February, 2000. (Kellogg Affidavit.)
33. BOE has established by a preponderance of the evidence that respondent Owen Anderson has been aware of the Shipping Act and its requirements since at least 1997.

⁴¹ At this time, there was no requirement that an NVOCC obtain a license.

FINDINGS REGARDING OTI ACTIVITIES OF RESPONDENTS

SHIPMENTS NOT INVOLVING A.I.T. INTERNATIONAL, LLC, FOR WHICH BOE SEEKS A CIVIL PENALTY

TWO TREES PRODUCTS SHIPMENT

BOE App. 5, P. 000015-000070

The sequence of events of this shipment is not entirely clear. For instance, the record indicates that on January 13, 2005, Respondents provided a copy of a bill of lading master to Two Trees Products. (BOE App. 22-25.) The two bill of lading masters in the record are dated February 17, 2005 (BOE App. 63) and March 5, 2005. (BOE App. 33.) BOE does not address this inconsistency. The evidence in the record is sufficient to make the following findings of fact.

34. In January, 2005, Two Trees Products Company contacted Anderson International Transport to move a pallet of petroleum distillates and sawdust from W.W. Wood, Inc. in Pleasanton, Texas to Tianjin, China. (BOE App. 22-25.)
35. Owen Anderson provided a quote of \$600.00 for 1) ocean freight; 2) inland freight from Pleasanton, Texas to the port of Houston, Texas; and 3) documentation to Two Trees Products Company. (BOE App. 22-25.)
36. On January 13, 2005, Anderson International Transport provided a copy of the Two Trees Products Bill of Lading Master to Belinda Henry at W.W. Wood. (BOE App. 19.)
37. Anderson International Transport notified W.W. Wood that the "shipment will be pick [*sic*] up by S.M.T. today." (BOE App. 19.)
38. Owen Anderson issued an invoice for \$769.00 on January 18, 2005 to Two Trees Products, included inland freight charge of \$175.00, ocean freight charge of \$344.00, dangerous cargo certificate charge of \$75.00, and documentation and service charge of \$175.00. (BOE App. 20, 67.)
39. Anderson International Transport sent a dock receipt to Two Trees Products Company for the shipment from Houston/Los Angeles to Tainjin identifying Two Trees Products as the exporter and Shanix Supply & Marketing as the consignee. (BOE App. 20, 34, 61.)
40. Anderson International Transport arranged for special packaging materials, marks and labels and documentation for the shipment and was billed by dangerousgoods.com Incorporated. (BOE App. 44-47.)
41. On February 28, 2005, Owen Anderson provided a Bill of Lading Master and I.M.O. dangerous cargo declaration to Direct Container Line. (BOE App. 21.)

42. On March 5, 2005, Anderson International Transport prepared a Bill of Lading Master identifying Two Trees Products c/o Anderson International Transport as the exporter, Shanix Sopyy [*sic*] & Marketing as the consignee, Houston as the point of origin and port of loading, Tainjin as the port of unloading, and describing the commodities as "2 steel drums over packed in fiberboard boxes Un 1268 petroleum distillates, N.O.S. class 3 pg III net qty 20 liters per drum flash pont 38 deg C." (BOE App. 33).
43. On April 7, 2005, Larry Spelling, Consultant, signed an IMO Dangerous Goods Declaration identifying Two Trees Products as the shipper and identifying the goods as "2 steel drums over packed in fiberboard boxes UN 1268 petroleum distillates, N.O.S. Class 3 PG III net qty 20 liters per drum flash pont 38 deg C." (BOE. App. 31.)
44. On April 8, 2005, Owen Anderson provided a Bill of Lading Master and I.M.O. dangerous cargo declaration to Direct Container Line. (BOE App. 41.)
45. On April 13, 2005, Direct Container Line issued a booking confirmation with a booking number of HOU/XIG/D02911 identifying AIT Worldwide Logistics⁴² as the shipper and Shantou Henkel as the consignee. (BOE App. 52.)
46. On May 5, 2005, Direct Container Line issued bill of lading HOU/XIG/D02911 for shipment No. HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International, 4939 West Orem, Hosuton, [*sic*] TX 77045, as the shipper, Shanix Supply, Taiyuan Shanxi, China, as the consignee, Xi Bo He 73 as the vessel, DCL, Houston as the place of receipt, Los Angeles as the port of loading, Xingang as the port of discharge, and identifying th goods as "FAK Pallet SLAC: 2 ctns petroleum distallates [*sic*] NOS NOS UN# 1268, Pkg III 65 Kgs and 200 lbs saw dust." (BOE App. 51.)
47. Direct Container Line bill of lading HOU/XIG/D02911 lists ocean freight and other charges totaling \$299.18. (BOE App. 51.)
48. Vanessa Sever filed a complaint with the Better Business Bureau on June 2, 2005, alleging that after paying Anderson International, Owen Anderson failed to provide the appropriate paperwork to allow the shipment to be released from the port. (BOE App. 30.)

⁴² At Revised Prop. FF 23, BOE states that "AIT Worldwide Logistics is an ocean transportation intermediary licensed by the Federal Maritime Commission, however AIT Worldwide Logistics stated they had had no knowledge of this shipment. (BOE App. 5, P. 000036)" Appendix page 36 is a copy of a series of emails that does not identify AIT Worldwide Logistics. AIT Worldwide Logistics was not listed on the current Commission list of OTIs, http://www2.fmc.gov/oti/nvos_listing.aspx (accessed May 11, 2009), and BOE does not cite to other evidence regarding its identity or status. There is no explanation why Direct Container issued the booking confirmation to AIT Worldwide Logistics and included AIT Worldwide Logistics on the bill of lading. (BOE App. 51.)

49. When Direct Container Line issued bill of lading HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International as the shipper, it assumed responsibility for transportation of the goods from Houston to Xingang.
50. When Direct Container Line issued bill of lading HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International as the shipper, it established a direct relationship with Two Trees Products, the proprietary shipper.
51. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Two Trees Products shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
52. Respondents did not operate as an NVOCC on the Two Trees Products shipment.
53. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Two Trees Products shipment.
54. A civil penalty in the amount of \$1500 is assessed for this violation.

CLIFTON WATTS SHIPMENTS

BOE App. 6, P. 000071-000120

BOE describes two shipments to Clifton Watts, Manchester, Jamaica, as "two sub-shipments, one container containing household effects and a 2002 Honda minivan (Booking No. 17066569) and one crate of batteries (Booking No. OCE0256837.)" (BOE RPF 28.) The record reflects that on August 15, 2005, Triton Overseas Transport, Inc., issued bill of lading 20059662 for container HLXU4299838. The bill of lading identifies the shipper as Mike European % Anderson International Transport and the consignee as Clifton Watts. The bill of lading identifies the vessel as Zim Houston III 141W and describes the packages and goods as "40' container STC household effects one 2002 Honda minivan VIN#5FNRL18092B041580 personal effects not for resale." (BOE App. 107.) On September 23, 2005, Triton issued bill of lading 20059964 describing the packages and goods as "plywood box with 12 UN 4G fibreboard boxes-total net 336KG UN 2794 batteries, wet filled with acid class 8 net qty 28 kgs each 51.5x43x28". (BOE App. 71.) The bill of lading identifies the shipper as Clifton Watts, the consignee as Clifton Watts, and the vessel as Seaboard Voyager 489. In its 2009 brief submitted prior to the Initial Decision, BOE did not explain why two shipments several weeks apart from different shippers to the same consignee are "two sub-shipments" of one violation of the Act instead of two shipments and two separate violations of the Act. In its Brief on Remand, BOE states: "BOE also asks the ALJ to take cognizance that BOE Appendix 6 comprises two distinct shipments on behalf of shipper Clifton Watts, rather than a single shipment." (BOE Brief on Remand at 3.) I will treat them as the evidence indicates they should be treated: as two separate shipments.

**CLIFTON WATTS SHIPMENT NO. 1
(Mike European)**

**BOE App. 6, P. 76, 78-81, 83, 86, 89-93,
95-102, 107-120**

55. On June 20, 2005, Philco Auto sold the 2002 Honda Odyssey to Ona Neil of Port Maria, St. Mary, W.I., for \$8,000.00. (BOE App. 99.)
56. On July 12, 2005, Texas issued a certificate of title for the Honda to Michael Rose, and on July 24, 2005, Rose assigned the title back to Philco Auto. (BOE App. 95-96.)
57. On an unknown date, an unknown person prepared a Shipper's Export Declaration for the Honda identifying the exporter as Mike European Cars and the consignee as Clifton Watts. The export declaration listed the value as \$9,000.00. (BOE App. 101.)
58. On August 10, 2005, AIT faxed the copy of clear title for the Honda to Triton. (BOE App. 102.)⁴³
59. On an unknown date, Anderson International Transport asked "Start Trucking Co./Jeff" to arrange for delivery of a container from Hapag Lloyd to Anderson International Transport's warehouse at 4939 West Orem, Ste 6, Houston [sic], TX, with a requested delivery date of 7/28/05 or first thing tomorrow." for Booking 17066569. (BOE App. 97.)
60. On August 3, 2005, Anderson International Transport asked "Start Trucking/Roy" to arrange for delivery of a container from Ceres Container to Anderson International Transport's warehouse at 4939 West Orem, Houston, TX, for Booking 17066569. (BOE App. 100.)
61. On August 4, 2005, Respondents issued a dock receipt for container HLXU4299838 and its contents identifying the shipper as Clifton Watts c/o Anderson International Transport, the consignee as Clifton Watt, Manchester, Jamaica, and the vessel as Zim Mexico. (BOE App. 83.)
62. On August 4, 2005, Anderson International Transport issued an invoice for a shipment to Clifton Watts, Manchester, Jamaica, for "one 40' contr STC household effects and auto" for the amount of \$3,720.00, including a charge of \$3,200 for freight, packing and service. (BOE App. 105.)
63. On August 10, 2005, Anderson International Transport prepared a Bill of Lading Master for Booking No. 17066569/container HLXU4299838 identifying Mike European % Anderson International Transport as the exporter, Clifton Watts as the consignee, and identifying the

⁴³ By this time, the only title in the record indicates the title had been assigned to Mikes European Cars to Michael Rose to Philco Auto, (BOE App. 95-96), and all of this occurred after the sale to Ona Neil by Philco Auto. (BOE App. 99.) I do not believe it is necessary to resolve the ownership of the Honda as part of this proceeding.

commodities as "40' container STC household effects one 2002 Honda minivan VIN#5FNRL18092B041580." (BOE App. 6, P. 000086.)

64. On August 15, 2005, Triton Overseas Transport issued bill of lading 20059662 identifying the shipper as Mike European % Anderson International Transport, the consignee as Clifton Watts, the vessel as Zim Houston III 141W, the port of loading as Houston, and the port of discharge as Kingston, and describing the packages and goods as "40' container STC household effects one 2002 Honda minivan VIN#5FNRL18092B041580 personal effects not for resale." (BOE App. 107.)
65. On August 15, 2005, Triton Overseas Transport issued an invoice for bill of lading 20059662 to AIT, 4939 West Orem Dr., Houston, TX for ocean freight in the amount of \$2,028.95. (BOE App. 106.)
66. On August 16, 2005, Anderson International Transport provided a copy of the packing list for Booking No. 17066569 to Triton Overseas Transport. (BOE App.78.)
67. When Triton Overseas Transport issued bill of lading 20059662, it assumed responsibility for transportation of the goods from Houston to Kingston.
68. When Triton Overseas Transport issued bill of lading 20059662 with a clear and unambiguous identification of Mike European % Anderson International Transport as the shipper, it established a direct relationship with Mike European, the proprietary shipper.
69. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Mike European shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
70. Respondents did not operate as an NVOCC on the Mike European shipment.
71. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Mike European shipment.
72. A civil penalty in the amount of \$2000 is assessed for this violation.

**CLIFTON WATTS SHIPMENT NO. 2
(Clifton Watts)**

BOE App. 6, P. 71-75, 77, 80, 84-85

The documents related to Booking No. OCE0256837 engender some confusion regarding whether they concern the same shipment. BOE offers five proposed findings of fact regarding what it describes as the sub-shipment of one crate of batteries (Booking No. OCE0256837).

Anderson International Transport made arrangements for the packing of the crate of batteries and arranged for preparation of the documentation for dangerous goods. (BOE App. 6, P. 000084-000085, 000087)

(RPFF 28.)

Anderson International Transport issued a dock receipt for booking No. OCE0256637. (BOE App. 6, P. 000077)

(RPFF 29.)

Owen Anderson provided a master bill of lading covering one crate of batteries for Booking No. OCE0256837, to Triton Overseas Transport, Inc., an NVOCC, on June 8, 2005. (BOE App. 6, P. 000074).

(RPFF 31.)

Anderson International Transport issued a Master Bill of Lading in the name of Clifton Watt [*sic*] covering Booking No. OCE0256637 and provided it to Triton Overseas on October 1, 2005. (BOE App. 6, P. 000072-000073).

(RPFF 39.)

Triton Overseas issued a bill of lading to Clifton Watts, Anderson International Transport, 4939 West Orem, Ste 4, Houston, TX for Booking No. OCE0256637 on September 23, 2005. (BOE App. 6, P. 000071).

(RPFF 40.)

BOE does not offer an explanation on how the bill of lading master (BOE calls this a "master bill of lading) provided to Triton on June 8, 2005, covering one crate of batteries for Booking No. OCE0256837 (RPFF 29 (BOE App. 74)) and "the Master Bill of Lading [*sic*] in the name of Clifton Watt [*sic*] covering Booking No. OCE0256637 and provided it to Triton Overseas on October 1, 2005" (RPFF 39 (BOE App. 72)) are related (other than by booking number), and how they are related to the Triton Overseas bill of lading for Booking No. OCE0256637 issued on September 23, 2005 (RPFF 40 (BOE App. 71)), before Respondents prepared the Bill of Lading Master. The Bill of Lading Master issued October 1, 2005, identifies the exporting carrier as Amerijet, not Triton Overseas (BOE App. 72), as does the undated dock receipt on which BOE relies. (RPFF 29 (BOE App. 77).) On October 6, 2005, Respondents prepared another Bill of Lading Master for a plywood box of batteries identifying Clifton Watts % Anderson International as the shipper without identifying the exporting carrier. (BOE App. 75.)

Respondents' withdrawal from participation in this proceeding prevents inquiry into these puzzles. As set forth below, the record contains evidence that supports a finding by a preponderance

of the evidence that Respondents performed ocean freight forwarding services and operated as an ocean freight forwarder in the United States foreign trades on the shipment covered by the Triton Overseas bill of lading issued September 23, 2005.

73. On September 15, 2005, dangerousgoods.com Incorporated invoiced Respondents for 12 fiberboard boxes, one overpack box, and a shippers declaration for dangerous goods for a shipment of batteries. (BOE App. 87.)
74. On September 14, 2005, an IMO Dangerous Goods Declaration - 2005 was prepared for a shipment of batteries identifying Clifton Watt - Anderson International as the shipper, Clifton Watt, Manchester, Jamaica as the consignee, and Anderson International Transport as the signatory for Booking No. OCE 0256637. (BOE App. 84.)
75. On September 23, 2005, Triton Overseas issued bill of lading 20059964 for Booking No. OCE 0256637 identifying Clifton Watts Anderson International Transport as the shipper, Clifton Watts, Manchester, Jamaica as the consignee, Houston as the place of receipt, Seaboard Voyager 489 as the vessel, Miami as the port of loading, Kingston as the port of discharge, and describing the goods as "plywood box with 12 UN 4G fiberboard boxes-total net 336 Kg UN 2794 batteries, wet filled with acid class 8 net qty 28 Kgs each 51.5X43X28." (BOE App. 71.)
76. When Triton Overseas Transport issued bill of lading 20059964, it assumed responsibility for transportation of the goods from Houston to Kingston.
77. When Triton Overseas Transport issued bill of lading 20059964 with a clear and unambiguous identification of Clifton Watt - Anderson International as the shipper, it established a direct relationship with Clifton Watts, the proprietary shipper.
78. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Clifton Watts shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
79. Respondents did not operate as an NVOCC on the Clifton Watts shipment.
80. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Clifton Watts shipment.
81. A civil penalty in the amount of \$1000 is assessed for this violation.

The documents related to the Repairer of the Breach shipment engender some confusion. On May 17, 2005, Zim Integrated Shipping Services, Ltd., issued bill of lading ZIMUORF102496 for booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico III 137/W as the vessel, Houston as the port of loading, and Kingston as the port of discharge, and describing the goods as a "40' container S.L.A.C. 500 CTNS relief supplies." (BOE App. 122.)⁴⁴ AIT did not issue the Bill of Lading Master (BOE calls this a master bill of lading) for booking No. ORF78987 on which BOE relies until June 2, 2005. (RPF 44; BOE App. 135.) Anderson International Transport apparently provided this Bill of Lading Master to Zim Container Services on June 2, 2005. (BOE App. 137.) BOE does not offer an explanation of the effect of these dates on the activities involved. Respondents' withdrawal from participation in this proceeding prevents inquiry into these puzzles. As set forth below, the record contains evidence that supports a finding by a preponderance of the evidence that Respondents performed ocean freight forwarding services and operated as an ocean freight forwarder in the United States foreign trades on the shipment covered by the Triton Overseas bill of lading issued September 23, 2005.

82. On May 4, 2005, Anderson International Transport arranged for the transportation and delivery of two empty containers from Ceres Gulf Container Yard to AIT for Booking Nos. ORF78986 and ORF78987. (BOE App. 142.)
83. On May 4, 2005, Anderson International Transport secured a booking confirmation from Zim Container Service, Booking No. ORF78987, identifying Anderson International Transport as the shipper, for a shipment of a 40' dry van container from Houston to Kingston, Jamaica, sailing date May 15, 2005. (BOE App. 144.)
84. On an unknown date, Anderson International Transport issued a dock receipt for Booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico III as the vessel, Houston as the port of loading, and Kingston as the port of discharge, identifying the packages and goods as a "40' container S.T.C. 500 CTMS relief supplies." (BOE App. 147.)
85. On May 17, 2005, Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496 for booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico III 137/W as the vessel, Houston as the port of loading, and Kingston as the port of discharge, and describing the goods as a "40' container S.L.A.C. 500 CTNS relief supplies." (BOE App. 122.)

⁴⁴ This is one of twelve copies of bill of lading ZIMUORF102496, six with pricing information and six without pricing information. (BOE App. 122-133.) See n.4, *supra*.

86. On June 2, 2005, Anderson International Transport prepared a Bill of Lading Master for Booking No. ORF 78987 identifying Repairer of the Breach Anderson International Transport as the shipper, Island Cargo as the consignee, Zim Mexico III as the vessel, Miami as the port of loading, and Kingston as the port of discharge, identifying the packages and goods as a "40' container S.T.C. 500 CTMS [sic] relief supplies." (BOE App. 135.)
87. On June 2, 2005, Anderson International Transport provided the Bill of Lading Master for Booking No. ORF 78987 to Zim Container Services. (BOE App. 137.)
88. On June 3, 2005, Zim American Integrated Shipping Co., Inc. faxed a "proof copy" of the bill of lading for Booking No. ORF78987 to Lulu at the Anderson International fax number. (BOE App. 139.)
89. Anderson International Transport issued an invoice to Repairer of the Breach dated 2/12/1912 [sic]⁴⁵ in the amount of \$3190.00 (less a credit of \$1,200.00 and payment of \$1500.00) for the shipment of a container from Houston to Kingston, Jamaica. (BOE App. 148.)
90. When Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496, it assumed responsibility for transportation of the goods from Houston to Kingston.
91. When Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496 with a clear and unambiguous identification of Repairer of the Breach as the shipper, it established a direct relationship with Repairer of the Breach, the proprietary shipper.
92. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Repairer of the Breach shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
93. Respondents did not operate as an NVOCC on the Repairer of the Breach shipment.
94. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Repairer of the Breach shipment.
95. A civil penalty in the amount of \$2000 is assessed for this violation.

⁴⁵ As this document sets forth an estimated time of departure of May 19, 2005, I assume that AIT issued the invoice prior to that date.

DIRK MANUEL SHIPMENT

BOE App. 8, P. 000150-000217

96. On November 19, 2004, Respondents provided a quote to Ms.[sic] Manuel in the amount of \$5,450.00 for shipment of household goods in a 40' container from Katy, Texas to Brussels, Belgium. The quote described the service as door to door and included insurance. (BOE App.179.)
97. On December 16, 2004, Respondents faxed a request to Martha at American Ocean for collection of a 40' standard container from Star Shipping for delivery to the home of Mr. Manuel in Katy, TX. (BOE App. 8, P. 000181.)
98. On December 16, 2004, Anderson International Transport issued a domestic straight bill of lading to Ms. Manwell [sic] for a 40' container of household goods consigned to A.I.T. with the ultimate destination of Belgium. (BOE App. 158.)
99. On an unknown date, Anderson International Transport issued a dock receipt for container ACXU2023418 identifying Anderson International as the shipper, Dirk Manuel as the consignee, Star Ismene AT501 as the vessel, Houston, Texas, as the port of loading, Antwerp, Belgium, as the port of discharge, and describing the contents as "40' contr STC 250 pcs household effects." (BOE App. 157.)
100. On January 2, 2005, Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 for container ACXU2023418 identifying Dirk Manuel c/o Anderson International as the shipper, Dirk Manuel as the consignee, Star Ismene AT501 as the vessel, Houston, Texas, as the port of loading, Antwerp, Belgium, as the port of discharge, and describing the contents as "1x40' container(s) SLAC: 250 pieces household effects." (BOE App. 154-155.)
101. Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency bill of lading SAXC501HOUANR104 listed ocean freight and other charges totaling \$1061.60. (BOE App. 155.)
102. On January 13, 2005, Strachan Shipping Agency sent a fax memo to Anderson International asking for payment: "DIRK MANUEL ISME AT501 501HOUANR104 01-02-05 \$1061.60." (BOE App. 191.)
103. On January 20 and 25, 2005, and February 1, 2005, Respondents asked for quotes from three companies to transport a 40' container from Antwerp to Dirk Manuel's address in Belgium. (BOE App. 190, 189, 187.)
104. On February 23, 2005, Dirk Manuel filed a complaint with the Better Business Bureau of Metropolitan Houston, stating that he was required to pay \$2,462 plus \$313 in demurrage

charges to secure delivery of container ACXU2023418 from the port of discharge (Antwerp) to its ultimate destination. (BOE App. 205-206.)

105. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104, it assumed responsibility for transportation of the goods from Houston to Antwerp.
106. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 with a clear and unambiguous identification of Dirk Manuel c/o Anderson International as the shipper, it established a direct relationship with Dirk Manuel, the proprietary shipper.
107. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Dirk Manuel shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
108. Respondents did not operate as an NVOCC on the Dirk Manuel shipment.
109. Respondents' failure to arrange for transportation of container ACXU2023418 from the port of discharge (Antwerp) to its ultimate destination resulted in additional cost to Dirk Manuel.
110. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Dirk Manuel shipment.
111. A civil penalty in the amount of \$5000 is assessed for this violation.

KATHLEEN DAVIDSON SHIPMENT

BOE App. 9, P. 000218

The record contains only one document related to a shipment by Kathleen Davidson.

112. Anderson International Transport issued a dock receipt for container HLXU439932-8 identifying Kathleen Davidson % Anderson International as the shipper/exporter, Edna Causell, Kingston, JA as the consignee, Zim Mexico III Voy. 145W as the vessel, Houston as the port of loading, and Kingston, Jamaica as the port of discharge, and identifying the cargo as "40' contr STC household effects, one 2004 Toyt . . . one 2004 Ford . . ." (BOE App. 218.)
113. On August 29, 2005, the master of the vessel signed the dock receipt for container HLXU439932-8. (BOE App. 218.)

114. Commission regulations define “[p]reparing or processing . . . dock receipts” as a freight forwarding service. 46 C.F.R. § 515.2(i)(4).
115. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Kathleen Davidson shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
116. Respondents did not operate as an NVOCC on the Kathleen Davidson shipment.
117. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Kathleen Davidson shipment.
118. A civil penalty in the amount of \$2000 is assessed for this violation.

ASEKUNLE OSULE SHIPMENT

BOE App. 10, P. 000219-000251

119. On January 5, 2005, Anderson International Transport issued an invoice to Mr. Sunday for shipment of a 2005 Lincoln Navigator from Houston, to London, England (Tilbury Docks) and for insurance for a cost totaling \$2,392.50. (BOE App. 245.)
120. On January 5, 2005, Anderson International Transport issued a domestic straight bill of lading to Mr. Sunday for shipment of a 2005 Lincoln Navigator consigned to “A.I.T. Asekunle Osude” with ultimate destination London, England. (BOE App. 235-236.)
121. On January 6, 2005, Anderson International Transport asked Ana at American Ocean to arrange for delivery of a 20' container from Star Shipping to Anderson International Transport’s warehouse for Booking No. CHS032745. (BOE App. 239.)
122. On January 6, 2005, Strachan Shipping Agency provided a booking confirmation for booking No. CHS032745 to Andy of Anderson & Associates [*sic*] for shipment of a 20' container from Houston, TX to Tilbury. (BOE App. 225.)
123. On January 6, 2005, Respondents asked Ramon International to arrange for insurance on a 2005 Lincoln Navigator purchased by Asekunle Osude valued at \$51,000 and a 40' container of household effects valued at \$60,000 and enclosed a check for \$1100.00. (BOE App. 247-249.)
124. On January 10, 2005, AXA Corporate Solutions Assurance UK Branch issued Certificate of Insurance No. 2516630 to Asekunke [*sic*] Sunday Osude for a 2005 Lincoln Navigator identifying Star Hoyanger as the vessel. (BOE App. 231.)

125. On January 10, 2005, Respondents provided customs information regarding Booking No. CHS032745 to A.C.L. for signature. (BOE App. 237-240.)
126. On January 18, 2005, Anderson International Transport prepared a Bill of Lading Master for export reference AIT CHS032745 for 20' container GATU0983270 identifying Asekunle Osule [*sic*] % Anderson International as the exporter, Asekunle Osule [*sic*] as the consignee, Star Hoyanger as the vessel, Houston as the port of loading, and Tilbury as the foreign port of unloading, and describing the commodities as "20' contr STC one 2005 Lincoln Navigator ID #5LMFU27535LJ11183 and four tires." (BOE App. 233.)
127. On January 20, 2005, provided Bill of Lading Master for export reference AIT CHS032745 to Atlantic Cargo. (BOE App. 246.)
128. Anderson International Transport issued a dock receipt for 20' container GATU0983270 that was signed by an unknown person on an unknown date. (BOE App. 234.)
129. On January 24, 2005, Star Shipping A/S (d.b.a. Atlanticargo) as carrier By Strachan Shipping Agency as Agents issued bill of lading SAXC502HOUTIL211 identifying Asekunle Osule [*sic*] C/O Anderson International as the exporter, Asekunle Osule [*sic*] as the consignee, Star Hoyanger as the vessel, Houston as the port of loading, and Tilbury as the foreign port of unloading, and describing the commodities as "20' contr STC one 2005 Lincoln Navigator ID #5LMFU27535LJ11183 and four tires" and indicating ocean freight and other charges of \$951.76. (BOE App. 228.)
130. On February 21, 2005 and on March 3, 2005, Strachan Shipping Agency sent a fax memo to Anderson International asking for payment of \$951.76. (BOE App. 241.)
131. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC502HOUTIL211, it assumed responsibility for transportation of the goods from Houston to Tilbury.
132. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 with a clear and unambiguous identification of Asekunle Osule [*sic*] C/O Anderson International as the shipper, it established a direct relationship with Asekunle Osude, the proprietary shipper.
133. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Asekunle Osude shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
134. Respondents did not operate as an NVOCC on the Asekunle Osude shipment.

135. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Asekunle Osude shipment.

136. A civil penalty in the amount of \$2000 is assessed for this violation.

MARGRET DELEON SHIPMENT

BOE App. 11, P. 000252-000293

137. On June 17, 2006, Anderson International Transport issued a domestic straight bill of lading to Margret Dillion [*sic*] for shipment of 4000 pounds of household effects from Devine, Texas, consigned to AIT with ultimate destination of Reykjavik, Iceland. (BOE App. 287.)

138. The domestic bill of lading quoted shipping costs Houston to Reykjavik, Iceland, of \$3,950.00 inclusive of pickup, linehaul, ocean freight, and service charge. (BOE App. 287.)

139. On July 20, 2006, Anderson International received a rate confirmation of \$3570.50 for ocean freight and other charges from Finn Container Cargo Services to ship a 20' container from Houston, Texas to Reykjavik, Iceland. (BOE App. 285.)

140. On July 28, 2006, Anderson International made arrangements for delivery of a container (Booking No. 14744885) from Ceres for delivery to Anderson International Transport at 14023 S. Post Oak Road, Houston, Texas. (BOE App. 281.)

141. On July 31, 2006, Anderson International Transport issued an invoice to Margret [*sic*] DeLeon in the amount of \$5600 (less a credit of \$4450.00) for shipment of 20' container HLXU323470 from Houston to Reykjavik. (BOE App. 277.)

142. On August 1, 2006, Finn Container Cargo Services, Inc., made an urgent request for a Bill of Lading Master from Respondents for container HLXU3234703. (BOE App. 279.)

143. On August 4, 2006, Anderson International Transport prepared a Bill of Lading Master identifying Margret DeLeon c/o Anderson International Transport as the exporter, "Margret DeLeon %" [*sic*] as the consignee, Houston as the port of loading, Bremerhaven as the foreign port of unloading, and Reykjavik as the place of delivery by on carrier for container HLXU3234703, describing the commodities as "20' Contr stc 75 pcs Household Effects." (BOE App. 276.)

144. Anderson International Transport prepared an undated dock receipt for container HLXU3234703 that was signed for by an unknown person on an unknown date. (BOE App. 274.)

145. On August 10, 2006, Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 for container HLXU3234703 identifying Margret DeLeon c/o Anderson International Transport as the shipper, Margret DeLeon as the consignee, Philadelphia Expr

- V 33E31 as the exporting carrier, Houston, Texas, as the port of loading, Bremerhaven, DE s the port of discharge, and Reykjavik, Iceland as the place of delivery, and describing the packages and goods as "20' standard container stc 75 pcs 'household effects,'" and setting forth freight and other charges totaling \$3,495.50. (BOE App. 275.)
146. Finn Container Cargo Services, Inc., bill of lading/freight bill No. FINN-10102 is stamped "THIS IS YOUR FREIGHT BILL." (BOE App. 275.)
 147. Finn Container Cargo Services, Inc., issued a second copy of bill of lading/freight bill No. FINN-10102 without listing the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 272.)
 148. On August 15, 2006, Anderson International Transport faxed to Margret DeLeon a copy of the Finn Container Cargo Services, Inc., bill of lading/freight bill No. FINN-10102 without the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 271-272.)
 149. Finn Container Line made several requests for payment from Respondents. (BOE App. 266.)
 150. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 for container HLXU3234703, it assumed responsibility for the transportation of container HLXU3234703 from Houston to Bremerhaven and ultimately Reykjavik.
 151. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 with a clear and unambiguous identification of Margret DeLeon c/o Anderson International Transport as the shipper, it established a direct relationship with Margret DeLeon, the proprietary shipper.
 152. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Margret DeLeon shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
 153. Respondents did not operate as an NVOCC on the Margret DeLeon shipment and did not violate section 8 of the Shipping Act.
 154. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Margret DeLeon shipment.
 155. A civil penalty in the amount of \$2000 is assessed for this violation.

RAY COOPER SHIPMENT

BOE App. 12, P. 000294-000339

What BOE refers to as the “Ray Cooper shipment” is actually two shipments, the first from Great Britain to the United States and the second from the United States to Great Britain that occurred after the container was denied entry into the United States as Cooper was being deported to the United Kingdom. (BOE App. 302.)

**RAY COOPER SHIPMENT NO. 1
(Inbound Shipment)**

**BOE App. 12, P. 294-296, 302, 305-306, 308-309,
311-323, 325, 328-339**

The record demonstrates that Ray Cooper lived in Great Britain and wanted to move to Houston. BOE contends that “Respondents arranged for the inbound shipment of Ray Cooper’s household effects from Thamesport, England to Houston, Texas in early February, 2006.” (RPF 76 (citing BOE App. 321-322, 325, 336-338)) and that “Anderson International Transport invoiced Ray Cooper \$1,745.00 for customs documentation, and delivery of his inbound shipment.” (RPF 77 (citing BOE App. 334).)

156. On January 4, 2006,⁴⁶ Uniserve. Limited, of Tilbury, Essex, issued bill of lading SEEEUSJ00000522 for container KLTU1237586 identifying Ray Cooper of Emerson Park, Essex, Great Britain, as the shipper, Ray Cooper, Beaumont, TX USA as the consignee and notify party, CP Yosemite as the vessel, Thamesport as the place of receipt and port of loading, and Houston as the port of discharge, and describing the goods as “1 x20' GP STC 180 packages personal effects.” (BOE App. 305.)
157. The Uniserve bill of lading SEEEUSJ00000522 states “for delivery contact Anderson International Transport.” (BOE App. 305.)
158. Uniserve bill of lading SEEEUSJ00000522 indicates the goods were shipped on board on behalf of Uniserve Limited on January 28, 2006. (BOE App. 305.)
159. On January 28, 2006, “K” Line issued waybill No. KKLUFXT095113 for container KLTU1237586 identifying Uniserve JLTD as the shipper, Anderson International as the consignee and notify party, CP Yosemite V.128W as the vessel, Tilbury Door as the place of receipt, Thamesport as the port of loading, and Houston as the port of discharge and place of delivery, and describing the goods as “1 container(s) (180 packages) 180 packages personal effects.” (BOE App. 306.)⁴⁷

⁴⁶ The bill states “04/01/2006.” Since the same bill sets forth another date as “28/01/2006,” I find that the date is January 4, not April 1.

⁴⁷ I find nowhere in its papers where BOE discusses the Uniserve or the “K” Line bills of lading or their effect on its contention that “Respondents arranged for the inbound shipment of Ray Cooper’s household effects from Thamesport, England to Houston, Texas.”

160. On February 23, 2006, Respondents assigned customs power of attorney to R.W. Smith, Inc., a licensed Customhouse broker, to act as its agent on the Cooper inbound shipment. (BOE App. 336.)
161. On February 14, 2006, Anderson International Transport invoiced Ray Cooper \$1,745.00 for customs documentation and delivery of the inbound shipment. (BOE App. 334.)
162. Ocean freight forwarders “dispatch[] shipments *from* the United States via a common carrier.” 46 U.S.C. § 40102(18) (emphasis added).
163. The Ray Cooper Inbound Shipment was a shipment *into* the United States; therefore, Respondents did not operate as an ocean freight forwarder in the United States foreign trades on the Ray Cooper Inbound Shipment and did not violate sections 19(a) and (b) of the Shipping Act by operating as an ocean freight forwarder without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds.
164. When Uniserve. Limited, issued bill of lading SEEEUSJ00000522, it assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
165. When Uniserve. Limited, issued bill of lading SEEEUSJ00000522 with a clear and unambiguous identification of Ray Cooper as the shipper, it established a direct relationship with Ray Cooper, the proprietary shipper.
166. When “K” Line issued waybill No. KKLUFXTO95113 for container KLTU1237586, it assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
167. When “K” Line issued waybill No. KKLUFXTO95113 with a clear and unambiguous identification of Ray Cooper as the shipper, it established a direct relationship with Ray Cooper. the proprietary shipper.
168. No evidence in the record supports a finding that Respondents assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
169. Respondents did not operate as an NVOCC on the inbound Ray Cooper shipment and did not violate section 8 of the Shipping Act on that shipment.

**RAY COOPER SHIPMENT NO. 2
(Outbound Shipment)**

**BOE App. 12, P. 297-301, 303-304, 307, 310, 324,
326-327**

170. On March 3, 2006, Respondents obtained a booking and rate confirmation of \$1245.50 from Finn Container Cargo Services, Inc., for a shipment of container KLTU1237586 from Houston to Felixstowe. (BOE App. 307, 326.)
171. On March 13, 2006, Anderson International Transport invoiced Ray Cooper \$3,350.00 for the outbound shipment of 5,000 pounds of household effects from Houston to London. (BOE App. 310.)⁴⁸
172. On March 22, 2006, Respondents prepared Bill of Lading Master for container KLTU1237586 identifying Raymond Cooper % Anderson International Transport as the shipper, Raymond Cooper as the consignee, Uniserve Ltd as the notify party, MSC Alesia as the exporting carrier, Houston as the port of loading, and Felixstowe as the foreign port of unloading, and describing the commodities as "20' container STC 180 packages used household effects" and provided a copy of it to Finn Container Cargo Services for issuance of a proof copy. (BOE App. 303-304.)
173. On March 31, 2006, Finn Container Cargo Services, Inc. issued ocean bill of lading number FINN-10049, booking number FINN-10049, for container KLTU1237586 identifying Raymond Cooper c/o Anderson International Transport as the shipper, Raymond Cooper as the consignee, Uniserve Ltd as the notify party, MSC Alesia V. 548E as the exporting carrier, Houston, TX as the port of loading, and Felixstowe as the port of discharge, and describing the goods as "X 20' std container STC 180 packages 'used household effects' return cargo," and setting forth freight and other charges totaling \$1,245.50. (BOE App. 300.)
174. Finn Container Cargo Services, Inc., bill of lading number FINN-10049 is stamped "THIS IS YOUR FREIGHT BILL." (BOE App. 300.)
175. Finn Container Cargo Services, Inc., issued a second copy of bill of lading/freight bill No. FINN-10049 without listing the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 299.)
176. On April 17, 2006, Anderson International Transport issued a check for \$1,245.50 to Finn Container for payment of ocean freight for booking number FINN-10049. (BOE App. 297.)
177. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10049 for container KLTU1237586, it assumed responsibility for the transportation of container HLXU3234703 from Houston to Felixstowe.

⁴⁸ In RPF 79, BOE states this occurred on February 14, 2006, and cites to BOE App. 334.

178. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10049 with a clear and unambiguous identification of Raymond Cooper c/o Anderson International Transport as the shipper, it established a direct relationship with Raymond Cooper, the proprietary shipper.
179. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Raymond Cooper outbound shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
180. Respondents did not operate as an NVOCC on the Raymond Cooper outbound shipment and did not violate section 8 of the Shipping Act.
181. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Raymond Cooper outbound shipment.
182. A civil penalty in the amount of \$2000 is assessed for this violation.

LIKE NEW AUTO SALVAGE SHIPMENT

BOE App. 13, P. 000340-000438

BOE identifies this shipment as the "Fiedel Udense" shipment. In its Brief on Remand, BOE states that it is withdrawing the Fiedel Udense (Like New Auto Salvage) shipment from consideration for possible violations. (BOE Brief on Remand at 3.)

183. [Withdrawn]
184. [Withdrawn]
185. [Withdrawn]
186. [Withdrawn]
187. [Withdrawn]
188. [Withdrawn]
189. [Withdrawn]
190. [Withdrawn]
191. [Withdrawn]

- 192. [Withdrawn]
- 193. [Withdrawn]
- 194. [Withdrawn]
- 195. [Withdrawn]
- 196. [Withdrawn]
- 197. [Withdrawn]
- 198. [Withdrawn]
- 199. [Withdrawn]

BARBARA DOWNIE SHIPMENT

BOE App. 14, P. 000439-000445

- 200. On August 17, 2006, Anderson International obtained confirmation for a less than container load booking, Shipco Booking No. HOUGLA1524247, from Shipco Transport, Inc. for a shipment of 64 cubic feet of household goods from Houston to Glasgow, with ocean freight and other charges totaling \$112.00. (BOE App. 442.)
- 201. Anderson International Transport issued a domestic straight bill of lading for one crate of household effects, Booking No. HOUGLA1524247, consigned to Shipco Transport, Houston, Texas, with a destination of Glasgow England [*sic*]. (BOE App. 445.)
- 202. On August 23, 2006, Anderson International Transport prepared a Bill of Lading Master for Booking No. HOUGLA1524247 identifying Barbara Downie c/o Anderson International Transport as the exporter, Barbara Downie as the consignee, Houston as the port of loading, and Glasgow as the foreign port of unloading, describing the commodities as "one crate 2 pieces household effects." (BOE App. 441.)
- 203. Respondents provided the Bill of Lading Master to Shipco Transport Inc. (BOE App. 443.)
- 204. On September 3, 2006, Shipco Transport, Inc., issued bill of lading number GLA1524247 for Booking No. HOUGLA1524247 identifying Barbara Downie c/o Anderson International Transport as the exporter, Barbara Downie as the consignee, Atlantic Companion 6 as the export carrier, Houston as the place of receipt, New York as the port of loading, and Glasgow as the foreign port of unloading and place of delivery, describing the goods as "one crate 2 pieces household effects," and indicating freight and other charges totaling \$229.17. (BOE App. 439.)

205. On September 3, 2006, Shipco Transport, Inc., issued a second copy of the bill of lading for Booking No. HOUGLA1524247 identical to the first bill of lading except that the freight and other charges are omitted. (BOE App. 440.)
206. When Shipco Transport, Inc., issued bill of lading number GLA1524247 for “one crate 2 pieces household effects,” it assumed responsibility for the transportation of the crate and household effects from Houston to Glasgow.
207. When Shipco Transport, Inc., issued bill of lading number GLA1524247 with a clear and unambiguous identification of Barbara Downie c/o Anderson International Transport as the shipper, it established a direct relationship with Barbara Downie, the proprietary shipper.
208. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Barbara Downie shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
209. Respondents did not operate as an NVOCC on the Barbara Downie shipment and did not violate section 8 of the Shipping Act.
210. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Barbara Downie shipment.
211. A civil penalty in the amount of \$1000 is assessed for this violation.

DR. SARIPALLI SHIPMENT

BOE App. 15, P. 000446-000455

212. On September 17, 2006, Shipco Transport issued bill of lading number MUM1524240 identifying Dr. Solomon Saripalli c/o Anderson International Transport, 9045 Knight Road, Houston, Texas, as the shipper, Dr. Solomon Saripalli as the consignee, APL Alexandrite 270E as the export carrier, Houston as the place of receipt, New York as the port of loading, and Mumbai as the port of discharge and place of delivery, and describing the goods as “2 pieces 1 crate and 1 skid household effects,” and indicating freight and other charges totaling \$787.55. (BOE App. 452.)
213. On September 17, 2006, Shipco Transport issued a second copy of bill of lading number MUM1524240 identical to the first bill of lading except that the freight and other charges are omitted. (BOE App. 453.)
214. On September 21, 2006, Anderson International Transport forwarded a copy of a bill of lading to Dr. Saripalli. (BOE App. 448.)

215. When Shipco Transport, Inc., issued bill of lading number MUM1524240 for "2 pieces 1 crate and 1 skid household effects," it assumed responsibility for the transportation of the crate and skid of household effects from Houston to Mumbai.
216. When Shipco Transport, Inc., issued bill of lading number MUM1524240 with a clear and unambiguous identification of Dr. Solomon Saripalli c/o Anderson International Transport as the shipper, it established a direct relationship with Dr. Solomon Saripalli, the proprietary shipper.
217. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Dr. Solomon Saripalli shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
218. Respondents did not operate as an NVOCC on the Dr. Solomon Saripalli shipment and did not violate section 8 of the Shipping Act.
219. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Dr. Solomon Saripalli shipment.
220. A civil penalty in the amount of \$1000 is assessed for this violation.

ALEX & LYNN WATT SHIPMENT

BOE App. 16, P. 000456-000516

221. Anderson International Transport issued a quote to Alex Watt for shipment of household and personal effects from Houston, Texas to Cairns, Australia. The rate was inclusive of packing, ocean freight, cartage, documentation and service charges. (BOE App. 16, P. 000507.)
222. On May 15, 2006, Anderson International Transport issued a domestic straight bill of lading for a shipment of household effects from Lyn [sic] Watt, Houston, TS, consigned to AIT with ultimate destination Cairns, Australia, with the route indicated "by air." (BOE App. 478.)
223. On May 20, 2005 [sic], Anderson International Transport issued an invoice number 4647 to Alex and Lynn Watt in the amount of \$3,950.00 for pickup, ocean freight, inland delivery, and service charge for shipment of one crate and one skid of household effects from Houston to Brisbane, noting that \$4,700 had already been paid. (BOE App. 459.)
224. On May 20, 2005 [sic], Anderson International Transport issued a second invoice number 4647 to Alex and Lynn Watt in the amount of \$1,650.00 for pickup, ocean freight, inland

- delivery and service charge for shipment of one crate of household effects from Houston to Brisbane. (BOE App. 505.)
225. On July 20, 2006, Anderson International obtained confirmation for a less than container load booking, Shipco Booking No. HOU BRI1518129, from Shipco Transport, Inc., for a shipment of household goods from Houston, Texas to Brisbane, with ocean freight and other charges totaling \$179.00. (BOE App. 460.)
226. On August 4, 2006, Anderson International Transport prepared a Bill of Lading Master for Booking No. HOU BRI1518129 identifying Issac Watts [*sic*] c/o Anderson International Transport as the exporter, Alex and Lynn Watt as the consignee, Houston as the port of loading, and Brisbane as the foreign port of unloading, and describing the commodities as "PCS one crate and one skid household effects." (BOE App. 479.)
227. On August 14, 2006, Shipco Transport Inc., issued bill of lading No. BRI1518129 identifying Issac Watts [*sic*] c/o Anderson International Transport as the shipper, Alex and Lynn Watt as the consignee, Hansa Sonderburg as the vessel, Houston as the place of receipt, Los Angeles, CA as the port of loading, and Brisbane as the foreign port of unloading and place of delivery, describing the commodities as "2 pieces one crate and one skid household effects," and stating ocean freight charges totaling \$1,433.89. (BOE App. 516.)
228. Lynn and Alex Watt filed complaints against Respondents with the Consumer Protection Division of the Texas Attorney General and the Better Business Bureau of Houston, Texas, detailing the problems with their shipment. (BOE App. 463-464, 467-468.)
229. In their complaint with the Texas Attorney General, Alex and Lynn Watt state that respondent Owen Anderson increased the freight charges three days before their goods were to leave the country, their goods incurred additional storage charges in Brisbane because Respondents did not pay charges in Brisbane, respondent Owen Anderson avoided telephone calls seeking to resolve the situation, and various other actions by Respondents that resulted in an increase of the Watts' costs from original quote of \$1,650.00 (BOE App. 505) to \$8,800.00. (BOE App. 463-464.)
230. When Shipco Transport, Inc., issued bill of lading No. BRI1518129 for "2 pieces one crate and one skid household effects," it assumed responsibility for the transportation of the crate and skid of household effects from Houston to Brisbane.
231. When Shipco Transport, Inc., issued bill of lading number MUM1524240 with a clear and unambiguous identification of Issac Watts [*sic*] c/o Anderson International Transport as the shipper, it established a direct relationship with Alex and Lynn Watt, the proprietary shippers.

232. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Alex and Lynn Watt shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
233. Respondents did not operate as an NVOCC on the Alex and Lynn Watt shipment and did not violate section 8 of the Shipping Act.
234. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Alex and Lynn Watt shipment.
235. A civil penalty in the amount of \$3000 is assessed for this violation.

DAVID ZINNAH SHIPMENT

BOE App. 17, P. 000517-000567

236. On a date unknown, Anderson International Transport provided an estimate of \$5,850.00 to David Zinnah and Brenda Davis for the cost of a door to port move of a 40' standard container from Houston, Texas to Monrovia, Liberia. (BOE App. 566.)
237. On August 3, 2006, Atlantic Container Line AB issued booking confirmation No. S1-426192-00 to Anderson International Transport for shipment of a 40' container from the port of Houston to Monrovia Port, Liberia, with basic freight and other charges totaling \$5,200.40. (BOE App. 558.)
238. On August 3, 2006, Anderson International Transport made arrangements with Clark Freight Line for pickup up of a 40' container from Zim for delivery to Anderson International. (BOE App. 552-554.)
239. On August 3, 2006, Anderson International Transport issued a domestic straight bill of lading to David Zinnah/Brenda Davis for shipment of a 40' container from Houston, Texas, consigned to AIT with ultimate destination of Monrovia, Liberia. (BOE App. 563.)
240. The domestic straight bill of lading described the shipment as "1 unit - 40' container - auto and personal effects" and stated a cost of \$5,850.00 inclusive of pickup, line haul, ocean freight and service charge. (BOE App. 563.)
241. On August 3, 2006, Anderson International Transport issued an invoice to David Zinnah/Brenda Davis in the amount of \$5,850.00 for pickup, ocean freight, inland delivery and service charge for shipment of a 40' container from Houston, Texas to Monrovia, Liberia. (BOE App. 564.)

242. On August 8, 2006, Anderson International Transport issued an invoice to David Zinnah/Brenda Davis in the amount of \$7,560.00 less a credit of \$3,000 for shipment of a 40' container from Houston, Texas to Monrovia, Liberia. (BOE App. 525.)
243. On August 11, 2006, Anderson International Transport arranged for Clark Freight Line to pick up of 40' container ACL0215844 [sic], Booking No. S1-426192-00, from a storage facility for delivery to Barbours Cut Terminal. (BOE App. 556.)
244. On August 21, 2006, Anderson International Transport provided an Export Used Vehicle Information Sheet to Atlantic Container Line for signature. (BOE App. 531-532.)
245. On August 23, 2006, Anderson International Transport prepared a Bill of Lading Master for S1-426192-00, container ACLU2158442, identifying David Zinnah c/o Anderson International Transport as the exporter, Brenda Davis, Monrovia, Liberia, as the consignee, Houston as the port of loading, Antwerp as the foreign port of unloading, and Monrovia, Liberia as the place of delivery, describing the commodities as "40' container - STC household effects contains 85 pieces automobile," and on August 25, 2006, provided the Bill of Lading Master and vehicle documentation to Atlantic Container Lines. (BOE App. 526-530.)
246. On August 29, 2006, Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 for Booking No. S1-426192-00, container ACLU2158442, identifying David Zinnah c/o Anderson International Transport as the exporter, Brenda Davis, Monrovia, Liberia, as the consignee, CP Navigator 6B74 as the carrier, Houston as the port of loading, Antwerp as the foreign port of unloading, and Monrovia, Liberia as the place of delivery, and describing the goods as "1 x 40 dry cargo 86 unit(s) SLAC: 40' container - STC contains 85 pieces of household effects 1 used 2001 Jeep Cherokee," with no pricing information. (BOE App. 543-545.)
247. On August 29, 2006, Atlantic Container Line faxed bill of lading number ACLU 6B741426192 to Respondents. (BOE App. 546.)
248. On August 29, 2006, Atlantic Container Line issued a freight invoice to Anderson International Transport for freight and other charges in the amount of \$5,452.40 for Booking No. S1-426192-00. (BOE App. 518-520.)
249. On September 19, 2006, Atlantic Container Line issued a new version of bill of lading number ACLU 6B7S41426192 setting forth information identical to the August 29, 20006, version with the addition of freight and other charges in the amount of \$5,452.40. (BOE App. 541-542.)
250. On September 13, 2006, Respondents sent a letter to David Zinnah regarding Zinnah's non-payment of charges for booking No. S1-426192-00 stating that if payment were not made,

Anderson would “have no choice but to interrupt the passage” of the shipment. (BOE App. 549.)

251. On September 27, 2006, Respondents sent a letter to David Zinnah for booking No. S1-426192-00 stating that the shipment had arrived in Antwerp on September 6, 2006, had been incurring storage fees of \$60.00 per day, and urging Zinnah to remit the sums due pursuant to the revised invoice.⁴⁹ (BOE App. 524.)
252. On October 12, 2006, Anderson International Transport paid \$5,452.40 in freight charges to Atlantic Container Lines for Bill of Lading No. S1-426192-00. (BOE App. 521-522.)
253. When Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 for container ACLU2158442 containing “1 x 40 dry cargo 86 unit(s) SLAC: 40' container - STC contains 85 pieces of household effects 1 used 2001 Jeep Cherokee,” it assumed responsibility for the transportation of the container and its contents from Houston to Monrovia, Liberia.
254. When Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 with a clear and unambiguous identification of David Zinnah c/o Anderson International Transport as the shipper, it established a direct relationship with David Zinnah, the proprietary shipper.
255. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the David Zinnah shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
256. Respondents did not operate as an NVOCC on the David Zinnah shipment and did not violate section 8 of the Shipping Act.
257. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the David Zinnah shipment.
258. A civil penalty in the amount of \$2000 is assessed for this violation.

RICHARD NEWMAN SHIPMENT

BOE App. 18, P. 000568-000587

259. On July 16, 2006, Anderson International Transport issued a domestic straight bill of lading to Richard Newman for File No. 4722 and 4742 for a shipment of “two barrels and 13 ctns

⁴⁹ BOE App. 525 is the second invoice issued for the shipment on August 8, 2006. It is not clear whether this is the invoice included with the September 27, 2006, letter.

- personal effects" from Houston consigned to A.I.T. with ultimate destination of Montego Bay, Jamaica at a cost of \$900.00. (BOE App. 578.)
260. On August 21, 2006, Anderson International Transport issued a domestic straight bill of lading for File No. 4721 describing the shipment as "three pcs household effects (one crate two cartons)" from A.I.T. consigned to Seaboard Marine, Miami, FL with ultimate destination of Montego Bay, Jamaica. (BOE App. 583.)
 261. On August 23, 2006, Anderson International Transport prepared a bill of lading master identifying Anderson International Transport as the exporter, Richard Newman, Montego Bay, Jamaica, as the consignee, Miami, FL as the port of loading, Montego Bay, Jamaica, as the foreign port of unloading, and describing the commodities as "3 pieces household effects (one crate, two cartons)." (BOE App. 569.)
 262. On August 23, 2006, Anderson International Transport prepared a bill of lading master identifying Richard Newman c/o Anderson International Transport as the exporter, Richard Newman/Phillip Heaven, Montego Bay, Jamaica, as the consignee, Miami, FL as the port of loading, Montego Bay, Jamaica, as the foreign port of unloading, and describing the commodities as "3 pieces household effects (one crate, two cartons)." (BOE App. 569.)
 263. On August 23, 2006, Respondents sent a revised Bill of Lading Master to Seaboard Marine. (BOE App. 581.)
 264. On August 25, 2006, Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 identifying Richard Newman c/o Anderson International Transport as the shipper, Richard Newman/Phillip Heaven, Montego Bay, Jamaica, as the consignee, SBD Voyager 537S as the vessel, Dodge Island, FL as the place of receipt, Miami, FL as the port of loading, Montego Bay as the port of discharge and place of delivery, and describing the goods as "3 pieces household effects (one crate, two cartons)," and setting forth freight and other charges totaling \$491.19. (BOE App. 576.)
 265. Seaboard Marine, Ltd., bill of lading number SMLU MBY013A897777 sets forth shipper and consignee information consistent with the Bill of Lading Master at BOE App. 569.
 266. On August 30, 2006, Respondents sent an "amended Master" to Seaboard Marine. (BOE App. 579.)
 267. On August 28, 2006, Anderson International Transport issued check number 1069 in the amount of \$491.19 to Seaboard Marine for SMLU MBY13A8977. (BOE App. 577.)
 268. On August 30, 2006, Respondents notified Seaboard Marine that Richard Newman would be paying \$491.19 directly to Seaboard Marine "in lieu of our check no. 1069 in the amount of \$491.19. Kindly return check to our address at your earliest. [*sic*] (BOE App. 573.)

269. When Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 for "3 pieces household effects (one crate, two cartons)," it assumed responsibility for the transportation of the goods from Dodge Island, FL to Montego Bay, Jamaica.
270. When Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 with a clear and unambiguous identification of Richard Newman c/o Anderson International Transport as the shipper, it established a direct relationship with Richard Newman, the proprietary shipper.
271. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Richard Newman shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
272. Richard Newman paid Seaboard Marine, Ltd., directly for the shipment.
273. Respondents did not operate as an NVOCC on the Richard Newman shipment and did not violate section 8 of the Shipping Act.
274. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Richard Newman shipment.
275. A civil penalty in the amount of \$1000 is assessed for this violation.

CLAUDETTE DILLON SHIPMENT

BOE App. 19, P. 000588-000608

276. On September 11, 2006, Anderson International Transport issued a domestic straight bill of lading for file number 4721 for "one barrel personal effects" from Ms. Claudette Dillon consigned to A.I.T. with ultimate destination Kingston, Jamaica, showing a shipping cost Houston to Kingston of \$183.00 and signed by Claudette Dillon. (BOE App. 607.)
277. On September 18, 2006, Anderson International obtained a less than container load ocean rate quote, quote No. 956666, from Econocaribe Consolidators, Inc., for shipment of 500 pounds of personal effects or household goods from Houston, Texas to Kingston, Jamaica. (BOE App. 599-600.)
278. On September 11, 2006, Anderson International Transport prepared a Bill of Lading Master identifying Claudette Dillon c/o Anderson International Transport as the exporter, Levi Smith, St. Catherine, Jamaica, as the consignee, Miami, Florida, as the port of loading, and

Kingston, Jamaica, as the foreign port of unloading, and describing the commodities as “one barrel with h/hold effects.” (BOE App. 597.)⁵⁰

279. Anderson International Transport issued an undated dock receipt for booking 19-956666 identifying Claudette Dillon c/o Anderson International Transport as the shipper, Levi Smith, St. Catherine, Jamaica, as the consignee, Barbours Cut as the pier terminal, SS Z. Black Sea V. 627 as the vessel, Port Everglades, Florida, as the port of loading, and Kingston, Jamaica, as the port of discharge, describing the commodities as “barrel with household effects.” (BOE App. 602.)
280. On September 26, 2006, Econocaribe issued bill of lading document number 19-956666 identifying Claudette Dillon c/o Anderson International Transport as the shipper, Levi Smith, St. Catherine, Jamaica, as the consignee, Houston, TX as the place of receipt, Stadt Luneburg v. 79 as the vessel, Port Everglades, Fla, as the port of loading, and Kingston, Jamaica, as the port of discharge, describing the goods as “1 drms. S.T.C. (1 barrel) household goods/personal effects,” and setting forth freight and other charges totaling \$235.00. (BOE App. 595.)
281. On October 13, 2006, Respondents sent a check in the amount of \$235.00 to Genesis (Europe/U.K.) Ltd. for Booking No. 19-956666. (BOE App. 591.)
282. When Econocaribe issued bill of lading document number 19-956666 for “1 drms. S.T.C. (1 barrel) household goods/personal effects,” it assumed responsibility for the transportation of the goods from Houston, TX to Kingston, Jamaica.
283. When Econocaribe issued bill of lading document number 19-956666 with a clear and unambiguous identification of Claudette Dillon c/o Anderson International Transport as the shipper. it established a direct relationship with Claudette Dillon, the proprietary shipper.
284. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Claudette Dillon shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
285. Respondents did not operate as an NVOCC on the Claudette Dillon shipment and did not violate section 8 of the Shipping Act.

⁵⁰ BOE describes this bill of lading master as a shipment “to Genesis (Europe/U.K.) Ltd.” (RPF 129.) Genesis (Europe/U.K.) Ltd. is not mentioned on BOE App. 597.

286. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Claudette Dillon shipment.

287. A civil penalty in the amount of \$1000 is assessed for this violation.

JULIA HUXTABLE SHIPMENT

BOE App. 20, P. 000609-000624

288. On February 8, 2006, Anderson International Transport issued a domestic straight bill of lading for shipment of one wide screen television from Julia Huxtable consigned to AIT with ultimate destination Kingston, Jamaica. (BOE App. 618.)

289. On March 7, 2006, Anderson International Transport issued a domestic straight bill of lading for shipment of "one crate TV used" from AIT consigned to World Trade, Houston, with ultimate destination St. Croix. (BOE App. 616.)

290. On March 7, 2006, Anderson International obtained a booking, Booking No. 19-914428, from Econocaribe Consolidators, Inc., for shipment of personal effects to Kingston, Jamaica. (BOE App. 619-621.)

291. On March 10, 2006, Anderson International Transport prepared a Bill of Lading Master for booking number 19-914428 identifying Julia Huxtable % Anderson International Transport as the exporter, Julia Huxtable, Manchester, Jamaica, as the consignee, Sea Gale as the exporting carrier, Port Everglades as the port of loading, Kingston as the foreign port of unloading, and describing the commodities as "crate used TV (household effects)." (BOE App. 612.)

292. On March 13, 2006, Respondents provided the Bill of Lading Master for booking number 19-914428 to Econocaribe Consolidators, Inc. for shipment of personal effects to Kingston. (BOE App. 617.)

293. On March 16, 2005, [*sic*], Anderson International Transport issued an invoice to Julia Huxtable in the amount of \$400.00 for shipment of one used television from Houston via Miami to Kingston, inclusive of pickup, packing, ocean freight, and documents. (BOE App. 615.)

294. On March 30, 2006, Econocaribe printed bill of lading document number 19-914428 identifying "Anderson International Transport Julia Huxtable %" as the shipper, Julia Huxtable, Manchester, Jamaica, as the consignee, Stadt Rendsburg v. 27 as the exporting carrier, Houston, TX as the place of receipt, Miami, FL as the port of loading, Kingston as the port of discharge, describing the goods as "1 crts S.T.C. used TV (household effects)," and setting forth a total of \$288.51 in ocean freight and other charges. (BOE App. 614.)

295. On March 30, 2006, Econocaribe printed freight invoice document number 19-914428 identifying "Anderson International Transport Julia Huxtable %" as the shipper, Julia

Huxtable, Manchester, Jamaica, as the consignee, Stadt Rendsburg v. 27 as the exporting carrier, Houston, TX as the place of receipt, Miami, FL as the port of loading, Kingston as the port of discharge, describing the goods as "1 crts S.T.C. used TV (household effects)," and setting forth a total of \$288.51 in ocean freight and other charges. (BOE App. 610.)

296. When Econocaribe issued bill of lading document number 19-914428 for "1 crts S.T.C. used TV (household effects),)," it assumed responsibility for the transportation of the goods from Houston, TX to Kingston, Jamaica.
297. When Econocaribe issued bill of lading document number 19-914428 with a clear and unambiguous identification of "Anderson International Transport Julia Huxtable %" as the shipper, it established a direct relationship with Julia Huxtable, the proprietary shipper.
298. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Julia Huxtable shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
299. Respondents did not operate as an NVOCC on the Julia Huxtable shipment and did not violate section 8 of the Shipping Act.
300. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Julia Huxtable shipment.
301. A civil penalty in the amount of \$1000 is assessed for this violation.

MICHAEL ROSE SHIPMENT

BOE App. 21, P. 000625-000646

302. On November 2, 2006, Anderson International obtained a booking confirmation from Finn Container Cargo Services, Inc., Booking No. FINN-10136, for shipment of a 40' standard container from Houston, Texas to Kingston, Jamaica with freight and other charges totaling \$2500.00. (BOE App. 632.)
303. On November 2, 2006, Respondents prepared a Bill of Lading Master for booking number ORF145406 for "contr # 99999" identifying Micheal [*sic*] Rose as the exporter, Micheal [*sic*] Rose, Kingston, Jamaica as the consignee, Zim Canada as the exporting carrier, Houston as the port of loading, Kingston as the foreign port of unloading, and describing the commodities as "shipper own contr STC M.V. equipment and personal effect." (BOE App. 639.)
304. On November 2, 2006, Respondents provided a Bill of Lading Master for Finn reference number FINN10136 to Finn Container Cargo Services. (BOE App. 646.)

305. On November 15, 2006, Finn Container Cargo Services, Inc., issued bill of lading number FINN-10136 for container TRIU427726-0 identifying "Anderson International Transport . . . as agents for: Mr. Michael Rose" as the shipper, Mr. Michael Rose, Kingston, Jamaica, as the consignee, Marmara Sea V. 641W as the exporting carrier, Houston, TX as the place of receipt and the port of loading, Kingston, Jamaica, as the port of discharge, and describing the goods as "1 X 40' shipper owned std container STC 120 boxes household goods." (BOE App. 628.)
306. When Finn Container Cargo Services, Inc., issued bill of lading number FINN-10136 for container TRIU427726-0, it assumed responsibility for the transportation of container TRIU427726-0 and its contents from Houston, TX to Kingston, Jamaica.
307. When Finn Container Cargo Services, Inc., issued bill of lading number with a clear and unambiguous identification of "Anderson International Transport . . . as agents for: Mr. Michael Rose" as the shipper, it established a direct relationship with Michael Rose, the proprietary shipper.
308. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Michael Rose shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
309. Respondents did not operate as an NVOCC on the Michael Rose shipment and did not violate section 8 of the Shipping Act.
310. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Michael Rose shipment.
311. A civil penalty in the amount of \$2000 is assessed for this violation.

ABDELNASAR ALBALBISI SHIPMENT

BOE App. 22, P. 000647-000649

312. On March 1, 2007, Mediterranean Shipping Company (USA) Inc., issued an invoice to Anderson International Transport in the amount of \$2,833.94 for Bill of Lading No. MSCHUS827635, covering Abdelnasar Albalbisi's shipment from Houston to Ad Dammam of container TINU4301309, describing the goods as "40' contr STC 60 pcs household effects 1 auto" and giving a sailing date February 6, 2007. (BOE App. 22, P. 000647-000649.)
313. On March 1, 2007, Mediterranean Shipping Company (USA) Inc., transmitted a fax cover sheet and the freight invoice for bill of lading number MSCUHS827635 to Respondents identifying Abdelnasar Albalbisi as the shipper. (BOE App. 647.)

314. On March 1, 2007, Mediterranean Shipping Company (USA) Inc., transmitted a fax cover sheet and the freight invoice for bill of lading number MSCUHS827635 to Respondents identifying Anderson Int'l as the forwarder, and the amount due as \$2,833.94. (BOE App. 647.)
315. I find, based on the evidence of the invoice and the fax cover sheet, that Mediterranean Shipping Company (USA) Inc., identified Abdelnasar Albalbisi as the shipper on bill of lading number MSCUHS827635.
316. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCHUS827635 for container TINU4301309, it assumed responsibility for the transportation of container TINU4301309 and its contents from Houston, TX to Ad Dammam.
317. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCHUS827635 with a clear and unambiguous identification of Abdelnasar Albalbisi as the shipper, it established a direct relationship with Abdelnasar Albalbisi, the proprietary shipper.
318. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Abdelnasar Albalbisi shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
319. Respondents did not operate as an NVOCC on the Abdelnasar Albalbisi shipment and did not violate section 8 of the Shipping Act.
320. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Abdelnasar Albalbisi shipment.
321. A civil penalty in the amount \$2000 is assessed for this violation.

SHIPMENTS INVOLVING A.I.T. INTERNATIONAL, LLC, FOR WHICH BOE SEEKS A CIVIL PENALTY

On four shipments, the common carrier issued a bill of lading identifying the proprietary shipper "c/o AIT International, LLC" (or "c/o AIT Intl LLC") as the shipper. As BOE recognizes, on October 23, 2006, Owen Anderson and Nichelle Jones incorporated A.I.T. International, LLC, in Texas. The Commission did not name A.I.T. International, LLC, as a party to this proceeding; therefore, sanctions cannot be entered against it. *See Banfi Products Corp. – Possible Violations of Section 16, Initial Paragraph, Shipping Act 1916, and Section 10(a)(1) of the Shipping Act of*

1984, 24 S.R.R. 1152, 1153 (1988) (Amended Order of Investigation) (“Hearing Counsel alleges that . . . adding these companies as respondents to this proceeding will assist it in obtaining evidence and *permit any ultimate remedial action to be directed against all participants in the arrangement.*”) (emphasis added). BOE does not argue that the corporate veil should be pierced and that the actions of A.I.T. International, LLC, should be attributed to respondent Owen Anderson or respondent Anderson International Transport for that reason. Therefore, these shipments must be examined for participation by Respondents, not A.I.T. International, LLC.

NICK MANIOTES SHIPMENT

BOE App. 23, P. 000650-000666

322. On January 19, 2007, AIT Trans,⁵¹ 14023 South Post Oak Rd., Houston, Texas obtained booking confirmation No. HOU187192 from Mediterranean Shipping Company (USA) Inc., identifying AIT Trans as the shipper, MSC Lausanne 557R as the vessel, Port Everglades as the port of loading, Piraeus, Greece, as the port of discharge, and listing freight and other charges totaling \$1,302.08 for shipment of a 20' dry van container. (BOE App. 651-652.)
323. On January 23, 2007, AIT International, LLC arranged for East Florida Hauling to pick up a container from MSC for booking HOU187192 to be dropped off in Boynton Beach, Florida. (BOE App. 662.)
324. On January 20, 2007, respondent Anderson International Transport issued a domestic straight bill of lading for shipment of 20' container CRUX1044167 [*sic*] containing household effects from Nick Maniotes, Boynton Beach, Florida, consigned to AIT with ultimate destination Piraeus, Greece, with shipping and other charges totaling \$2,913.75. (BOE App. 653.)
325. On January 25, 2007, respondent Anderson International Transport prepared a Bill of Lading Master for booking HOU187192, container CEXU104416-7 [*sic*], identifying Nick Maniotes % AIT Intl LLC as the exporter, Kyriakos Karras, Athens, Greece, as the consignee, MSC Lausanne 557R as the exporting carrier, Port Everglades as the port of loading, Piraeus as the foreign port of unloading, and describing the commodities as “20' contr stc 60 pcs household effects.” (BOE App. 654.)
326. On January 30, 2007, Mediterranean Shipping Company S.A., Geneva issued bill of lading number MSCUTM505214 for container CRXU1044167 [*sic*] identifying Nick Maniotes c/o AIT Intl LLC, 9045 Knight Road, Houston, TX as the shipper, Kyriakos Karras, Athens, Greece, as the consignee, MSC Gina - 270R as the vessel, Port Everglades, FL as the port of loading, Piraeus, Greece, as the port of discharge, and describing the commodities as “60 unit(s) of (pcs) household effects.” (BOE App. 664.)

⁵¹ The record does not explain what AIT Trans is. It is located at one of the addresses used by Respondents.

327. On February 9, 2007, Mediterranean Shipping Company S.A., issued invoice number MSCUTM505214 for bill of lading number MSCUTM505214, "Bill To: Nick Maniotes c/o AIT Intl LLC," for freight and charges totaling \$1456.00. (BOE App. 665.)
328. On February 9, 2007, Mediterranean Shipping Company S.A., faxed invoice number MSCUTM505214 for bill of lading number MSCUTM505214 to AIT Intl LLC identifying Nick Maniote [*sic*] as the shipper and AIT Intl LLC as the forwarder. (BOE App. 655.)
329. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCUTM505214 for container CRXU1044167, it assumed responsibility for the transportation of container TINU4301309 and its contents from Houston, TX to Pireaus, Greece.
330. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCUTM505214 with a clear and unambiguous identification of Nick Maniotes c/o AIT Intl LLC as the shipper, it established a direct relationship with Nick Maniotes, the proprietary shipper.
331. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Nick Maniotes shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
332. Respondents did not operate as an NVOCC on the Nick Maniotes shipment and did not violate section 8 of the Shipping Act.
333. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Nick Maniotes shipment.
334. A civil penalty in the amount of \$2000 is assessed for this violation.

JUSTINA LICRISH SHIPMENT

BOE App. 24, P. 000667-000669

335. On an unknown date, A.I.T., 9045 Knight Road, Houston, Texas, prepared a Bill of Lading Master for booking number CLE 2481/AIT 4769, for container ZIMU22443-3, identifying Justina Licrish c/o AIT International, LLC, 11835 So. Ridgewood Cir, Houston, Texas, as the exporter, Justina Licrish % Shirley Wilson, Briston, Trinidad, as the consignee, Houston as the port of loading, Port of Spain as the foreign port of unloading, describing the commodities as "20' container stc 193 household effects." (BOE App. 668.)
336. I find that "A.I.T., 9045 Knight Road" is respondent Anderson International Transport.

337. On May 16, 2007, Zim Container Service issued bill of lading number ZIMUORF199750 for booking number CLE 2481/AIT4769, container ZIMU22443-3, identifying "AIT International, LLC, as agents for Justina Licrish" as the shipper, Justina Licrish % Shirley Wilson, Briston, Trinidad, as the consignee, Zim Texas 714/W as the vessel, Houston, Texas, as the port of loading, Port of Spain as the port of destination, and describing the commodities as "20' standard SLAC: 193 pcs of used household goods & personal effects," and setting forth a total of \$1730.94 in freight and other charges. (BOE App. 667.)
338. Zim Container Service stamped "credit hold" on bill of lading number ZIMUORF199750. (BOE App. 667.)
339. On June 5, 2007, R.W. Smith, a customs broker/freight forwarder, issued an invoice to Anderson International Transport, 9045 Knight Road, Houston, Texas, \$165.00 for AIT4769 for documents and forwarding services performed on May 8, 2007, for Justina Licrish's shipment from Houston, Texas, to Port of Spain. (BOE App. 669.)
340. When Zim Container Service issued bill of lading number ZIMUORF199750 for container ZIMU22443-3, it assumed responsibility for the transportation of container ZIMU22443-3 and its contents from Houston, TX to Port of Spain.
341. When Zim Container Service issued bill of lading number ZIMUORF199750 with a clear and unambiguous identification of "AIT International, LLC, as agents for Justina Licrish" as the shipper, it established a direct relationship with Justina Licrish, the proprietary shipper.
342. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Justina Licrish shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
343. Respondents did not operate as an NVOCC on the Justina Licrish shipment and did not violate section 8 of the Shipping Act.
344. Respondents performed their services on the Justina Licrish shipment after they were served with the Order of Investigation and Hearing in this proceeding.
345. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Justina Licrish shipment.
346. A civil penalty in the amount of \$2000 is assessed for this violation.

347. On an unknown date, A.I.T., 9045 Knight Road, Houston, Texas, prepared a Bill of Lading Master for booking number HOU 212301/AIT4834, container MSCU 3857246, identifying Ms. Libby Coker c/o AIT International, LLC, 11835 So. Ridgewood Cir, Houston, Texas, as the shipper, Libby Coker % FFSC, NAS Sigonella, Italy as the consignee, MSC as the exporting carrier, Houston as the port of loading, Catania, Italy, as the foreign port of unloading, and identifying the commodities as "20' contr stc 67 pcs household effects." (BOE App. 671.)
348. I find that "A.I.T., 9045 Knight Road" is respondent Anderson International Transport.
349. On May 11, 2007, Mediterranean Shipping Company S.A., Geneva issued bill of lading MSCUHS929159 for container MSCU 3857246 identifying Ms. Libby Coker c/o AIT International LLC, 11835 So. Ridgewood Cir., Houston, Texas, as the shipper, Libby Coker % FFSC, NAS Sigonella, Italy as the consignee, MSC Malaysia - 02R as the vessel, Houston, TX as the port of loading, Palermo, Italy, as the port of discharge, Catania, Italy as the place of delivery, and describing the cargo as "67 unit(s) of (pieces) used household goods & personal effects." (BOE App. 670.)
350. Mediterranean Shipping Company S.A., Geneva identified R.W. Smith & Co., Inc., as the forwarding agent on bill of lading MSCUHS929159. (BOE App. 670.)
351. On June 5, 2007, R.W. Smith & Co., Inc., a customs broker/freight forwarder, billed respondent Anderson International Transport, 9045 Knight Road, Houston, Texas, \$165.00 for documents and forwarding services performed on May 9, 2007, for Libby Coker's shipment from Houston, Texas to Catania, Italy. (BOE App. 672.)
352. When Mediterranean Shipping Company S.A., Geneva issued bill of lading MSCUHS929159 for container MSCU 3857246, it assumed responsibility for the transportation of container MSCU 3857246 and its contents from Houston, TX to Catania, Italy.
353. When Mediterranean Shipping Company S.A., Geneva issued bill of lading MSCUHS929159 with a clear and unambiguous identification of Ms. Libby Coker c/o AIT International LLC as the shipper, it established a direct relationship with Ms. Libby Coker, the proprietary shipper.
354. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Ms. Libby Coker shipment, thereby operating as an ocean freight forwarder in the United States foreign trades shipment in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

355. Respondents did not operate as an NVOCC on the Ms. Libby Coker shipment and did not violate section 8 of the Shipping Act.
356. Respondents performed their services on the Ms. Libby Coker shipment after they were served with the Order of Investigation and Hearing in this proceeding.
357. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the Ms. Libby Coker shipment.
358. A civil penalty in the amount of \$2000 is assessed for this violation.

GEORGE HUGHES SHIPMENT

BOE App. 26, P. 000673-000685

359. On March 27, 2007, A.I.T., 9045 Knight Road, Houston, Texas issued a domestic straight bill of lading for shipment of a “crushman [*sic*] scooter” from George Hughes, Natalia, Texas consigned to AIT with ultimate destination of Belgium. (BOE App. 680.)
360. On April 24, 2007, A.I.T., 9045 Knight Road, Houston, Texas issued a domestic straight bill of lading for “one crate scooter” from AIT International, Houston, TX to Carotrans Int’l, Charleston, SC with ultimate destination Rotterdam under Booking No. CSCRD0718001. (BOE App. 676.)
361. The April 24, 2007, domestic straight bill of lading is stamped “Southwestern Motor Transport.” (BOE App. 676.)
362. On an unknown date, A.I.T. asked Wilson Trucking to amend the bill of lading “to read prepaid covering shipment sent to Charleston SC.” (BOE App. 675.)
363. On May 1, 2007, A.I.T. prepared a Bill of Lading Master for booking No. CSCRD0718001 identifying George Hughes ^ AIT International, LLC as the exporter, Art Huizer, Vlaardingen, the Netherlands as the consignee, APL Jade as the exporting carrier, Charleston as the port of loading, and Rotterdam as the foreign port of unloading, and describing the commodities as “Crate motor scooter 1944 Crushman [*sic*].” (BOE App. 683.)
364. I find that “A.I.T., 9045 Knight Road” is respondent Anderson International Transport.
365. R.W. Smith, a customs broker/freight forwarder, billed respondent Anderson International Transport \$165.00 for documentation and forwarding services performed on May 8, 2007, for George Hughes’s shipment from Charleston, South Carolina to Rotterdam, Netherlands. (BOE App. 26, P. 000684.)

366. On an unknown date, Carotrans International, Inc., issued freight invoice/bill of lading number CSCRDM0718001 identifying George Hughes ^ AIT International, LLC as the shipper, Art Huizer, Vlaardingen, the Netherlands as the consignee, MOL Elbe/028ET as the vessel, Houston, TX as the place of receipt by pre-carrier, Charleston, SC as the port of loading, and Rotterdam as the port of discharge, describing the goods as “crate SLAC: 1944 Crushman [*sic*],” and setting forth ocean freight and other charges totaling \$93.00. (BOE App. 685.)
367. When Carotrans International, Inc., issued bill of lading CSCRDM0718001 for “crate SLAC: 1944 Crushman [*sic*],” it assumed responsibility for the transportation of the goods from Houston, TX to Rotterdam.
368. When Carotrans International, Inc., issued bill of lading CSCRDM0718001 with a clear and unambiguous identification of George Hughes ^ AIT International, LLC, as the shipper, it established a direct relationship with George Hughes, the proprietary shipper.
369. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the George Hughes shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
370. Respondents did not operate as an NVOCC on the George Hughes shipment and did not violate section 8 of the Shipping Act.
371. Respondents performed their services on the George Hughes shipment after they were served with the Order of Investigation and Hearing in this proceeding.
372. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000 for the George Hughes shipment.
373. A civil penalty in the amount of \$1000 is assessed for this violation.
374. Respondents operated as an ocean freight forwarder on three of the twenty-two shipments for which BOE seeks a civil penalty after the issuance of the Order of Investigation and Hearing. (Kellogg Affidavit.)

SHIPMENTS FOR WHICH BOE DOES NOT SEEK A CIVIL PENALTY

375. On March 11, 2008, a staff member of the Commission’s Bureau of Certification and Licensing received a phone call from Juan Wilson, the Manager of the New York credit department of Mediterranean Shipping Company (USA) Inc. (“MSC”), a VOCC, regarding two checks written by A.I.T. International, LLC and signed by Respondent Owen Anderson

as payment for ocean freight charges.⁵² Both checks were returned to MSC due to non-sufficient funds. In response to inquiries from BOE, Mr. Wilson provided copies of the checks and copies of MSC's documentation for the two shipments. (BOE App. 687-697.)⁵³

376. The two shipments were booked (at the request of A.I.T. International, LLC) with MSC by a company that operates as a freight forwarder under the name R.W. Smith.⁵⁴ According to R.W. Smith, both Anderson International Transport and A.I.T. International, LLC were listed in their customer database, albeit with different customer numbers. Although R.W. Smith no longer accepted any bookings from Anderson International Transport, Respondent Owen Anderson, through A.I.T. International, LLC, was able to make bookings with R.W. Smith. (BOE App. 698-701.)
377. The first shipment was booked on July 31, 2007, and sailed on October 16, 2007, from Houston, Texas to Mombasa, Kenya. The shipment was booked with MSC by Sea-Smith and billed to Mr. Sandip Shah. However, according to Mr. Shah, Mr. Shah paid A.I.T. International, LLC directly approximately \$6000 for pick-up of the goods and shipment of the goods from Houston, TX to Mombasa, Kenya. Mr. Shah found A.I.T. International, LLC in the phone book. In exchange for payment in full, Mr. Anderson made the arrangements to move the goods to Mombasa, Kenya, picked up the goods and provided a packing list. (BOE App. 702-704.)
378. The second shipment, consisting of two containers, was booked on September 11, 2007, from Denver, Colorado to Thessaloniki, Greece and sailed on December 6, 2007, from Houston, Texas to Thessaloniki, Greece. MSC billed R.W. Smith for this shipment. (BOE App. 692-697.)
379. A.I.T. International, LLC did not pay R.W. Smith for either of the shipments and MSC did not issue the original bills of lading. (BOE App. 702-704.) In order to obtain the release of the shipments and prevent any further delay in delivery of the shipments, A.I.T.

⁵² As detailed in Proposed Finding of Fact 13, A.I.T. International LLC was incorporated in Texas on October 23, 2006. A.I.T. International LLC is jointly owned by Owen Anderson, a respondent in this proceeding, and Nichelle Jones. Owen Anderson serves as the President and is the proposed qualifying individual for A.I.T. International.

⁵³ These include BOE App. 687 and 688 attached to BOE's Appendix to Amended Findings of Fact. *See* n.29, *supra*.

⁵⁴ The Licrish, Coker and Hughes shipments, detailed earlier, (all of which were made by Anderson International Transport after the issuance of the Order of Investigation and Hearing in this case), were also booked with ocean carriers or NVOCCs by R.W. Smith. In addition to operating as a freight forwarder, R.W. Smith also operates as an NVOCC under the name Sea-Smith. One of these two most recent shipments was booked with MSC under the name Sea-Smith. Booking the shipment under the name of Sea-Smith (rather than R.W. Smith) was a clerical error. No Sea-Smith house bill of lading was issued. R.W. Smith listed itself as freight forwarder for both shipments.

International, LLC issued two checks directly to MSC. After the receipt of the checks and prior to notification that the checks had been returned for non-sufficient funds, MSC released the cargo to the consignees. (BOE App. 705-706.)

Angela and Jason Temple Shipment

BOE App. 707-733.

380. On January 24, 2008, after being contacted by Angela and Jason Temple regarding a move from Austin, Texas to Lugano, Switzerland, AIT International, LLC provided a quote to the Temples for door to door service from Austin, Texas to Lugano, Switzerland. (BOE App. 707, 714-729.)
381. On April 24, 2008, respondent Anderson International Transport invoiced the Temples \$12,790.00 which included charges for shipping their household goods and vehicle door to door as well as fuel surcharges and insurance. (BOE App. 708.)
382. The Temples paid AIT International, LLC in full on May 9, 2008. (BOE App. 709.)
383. Anderson booked the Temple's household goods with Finn Container Lines, a licensed NVOCC. Finn Container Lines looked to AIT International, LLC for payment. (BOE App. 730-732.)
384. On June 25, 2008, Finn Container Cargo Services, Inc., issued bill of lading number FINN-10377 for container TRLU 587276-5 identifying Angela and Jason Temple as the shipper, Angela and Jason Temple, Lugano, Switzerland, as the consignee, APL England v. 170 as the exporting carrier, Houston TX as the port of loading, Genoa, Italy, as the port of discharge, and identifying the goods as "40' HC container STC: '220 pcs of used household goods and personal effects, not for resale.'" (BOE App. 710.)
- 384A. When Finn Container Cargo Services, Inc., issued bill of lading number FINN-10377 with a clear and unambiguous identification of Angela and Jason Temple as the shipper and Angela and Jason Temple, Lugano, Switzerland, as the consignee, it established a direct relationship with Angela and Jason Temple, the proprietary shippers.
385. When the container arrived in Genoa, the ocean freight had not been paid and therefore the container was held until payment was made by Anderson. (BOE App. 730-732.)
386. Additionally, Anderson did not make any arrangements for the port to door leg from Genoa to Lugano and the Temples paid an additional amount to transport their goods. (BOE App. 723-725, 733.)
387. Although he had been paid in full by the Temples in May, 2008, Anderson did not begin making arrangements to ship the Temple's vehicle until the end of July, 2008. The Temples chose not to have the car shipped. (BOE App. 727-729, 733.)

388. BOE has demonstrated by a preponderance of the evidence that respondent Owen Anderson has a long history of providing ocean transportation services in violation of the Shipping Act. More recently, the evidence suggests that Anderson incorporated A.I.T. International, LLC, as a means of securing business with ocean transportation intermediaries that would no longer do business with Anderson International Transport. (BOE App. 698-701.)
389. I conclude that there is a reasonable likelihood that Owen Anderson will continue or resume his unlawful activities. Therefore, entry of a cease and desist order prohibiting respondent Owen Anderson from operating as an ocean transportation intermediary is appropriate and will be entered.

O R D E R

Upon consideration of the foregoing findings of fact and conclusions of law, and the determination that on twenty-two shipments Respondents Owen Anderson and Anderson International Transport violated section 19 of the Act, 46 U.S.C. §§ 40901-40902, and the Commission's regulations at 46 C.F.R. part 515 by operating as an ocean transportation intermediary in the United States trades without obtaining a license from the Commission and without providing proof of financial responsibility, it is hereby

ORDERED that respondents Owen Anderson and Anderson International Transport remit to the United States the sum of \$40,500.00 as a civil penalty for twenty-two willful and knowing violations of the Act. It is

FURTHER ORDERED that respondents Owen Anderson and Anderson International Transport be enjoined from holding out or operating as an Ocean Transportation Intermediary in the United States foreign trades until and unless a license is issued by the Commission and respondents obtain a bond pursuant to Commission regulations. It is

FURTHER ORDERED that respondent Owen Anderson be enjoined from working for, as an employee or in any other capacity, any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this Order until March 22, 2014. It is

FURTHER ORDERED that respondent Owen Anderson be enjoined from controlling in any way or serving as an investor, owner, shareholder, officer, director, manager, or administrator in any company or other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this Order until March 22, 2014. This Order, however, does not enjoin Owen Anderson from owning up to five percent of a class of shares of a publicly traded company.


Clay G. Guthridge
Administrative Law Judge