

FEDERAL MARITIME COMMISSION

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

Docket No. 07-02

Served: June 25, 2013

BY THE COMMISSION: Mario Cordero, *Chairman*;
Richard A. Lidinsky, Jr., Michael A. Khouri, William P.
Doyle, *Commissioners*. Rebecca F. Dye, *Commissioner*,
dissenting.

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

I. PROCEEDING

This proceeding was instituted by an Order of Investigation and Hearing, served March 22, 2007, to determine (1) whether Owen Anderson and Anderson International Transport (AIT) (Respondents) violated section 8(a) of the Shipping Act of 1984 (the Act) and the Commission's regulations at 46 C.F.R. § 520, by

operating as a non-vessel-operating common carrier (NVOCC) without publishing tariffs showing rates; (2) whether Owen Anderson and AIT violated sections 19(a) and (b) of the Act and the Commission's regulations at 46 C.F.R. § 515, by operating as an ocean transportation intermediary (OTI) in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds;¹ (3) whether, in the event one or more violations of the 1984 Act or the Commission's regulations were found, civil penalties should be assessed, and if so, the amount of the penalties to be assessed; and (4) whether, in the event violations were found, appropriate cease and desist orders should be issued against Owen Anderson and AIT. *Anderson Int'l Transport – Possible Violations of Shipping Act of 1984*, 30 S.R.R. 1349, 1350 (FMC 2007). In the Order of Investigation and Hearing, the Commission designated Owen Anderson and AIT as Respondents, and the Bureau of Enforcement (BOE) as a party. The proceeding was assigned for hearing before an Administrative Law Judge (ALJ).

On August 28, 2009, the ALJ issued an Initial Decision in which he found that Anderson/AIT operated as an ocean freight forwarder on 22 shipments, in knowing and willful violation of section 19 of the Act. *Anderson Int'l Transport – Possible Violations of Shipping Act of 1984*, 31 S.R.R. 864, 956-57 (ALJ 2009) (ID-2009). The ALJ did not assess a civil penalty, based on his conclusion that BOE had not produced any evidence from which a finding on Respondents' ability to pay could be based.

¹ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The purpose of the bill 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, and that practice will be followed in this Order.

BOE filed a petition with the Commission to reopen the proceeding so that it could file further evidence, and on December 4, 2009, the Commission granted the petition. *Anderson Int'l Transport – Possible Violations of the Shipping Act of 1984*, 31 S.R.R. 1091, 1094 (FMC 2009). BOE filed further evidence, and on February 23, 2010, the ALJ issued a Memorandum and Order on Remand for Determination of Civil Penalty, in which he imposed a civil penalty of \$33,950 for 22 willful and knowing violations of the Act. *Anderson Int'l Transport – Possible Violations of Shipping Act of 1984*, 31 S.R.R. 1232, 1247 (ALJ 2010). On March 9, 2010, the Commission gave notice that it intended to review the ALJ's Memorandum and Order on Remand for Determination of Civil Penalty, and on March 15, 2010, BOE filed exceptions to ID-2009 and the order imposing civil penalties.

On April 26, 2012, the Commission vacated ID-2009 and the decision on civil penalties, and remanded the proceeding with the following instruction: “[i]n 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 Int'l Transport – Possible Violations of Shipping Act*, 32 S.R.R. 568, 569 (FMC 2012) (*Anderson Int'l Transport* (FMC 2012)).

The ALJ issued an Initial Decision on Remand on December 31, 2012. *Anderson Int'l Transport – Possible Violations of the Shipping Act*, 32 S.R.R. 1279 (ALJ 2012) (ID-2012). In ID-2012, the ALJ determined that on 22 shipments, Respondents 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 OTI, ocean freight forwarder, in the U.S. trades without obtaining a license from the Commission and without providing proof of financial responsibility. *Id.* at 1387. The ALJ ordered that Respondents remit to the United States the sum of \$40,500 as a civil penalty for 22 willful and knowing violations of the Act; that Respondents be enjoined from holding out or operating as an OTI

until and unless a license is issued by the Commission and Respondents obtain a bond pursuant to Commission regulations; 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 ID-2012 until March 22, 2014; and 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 ID-2012 until March 22, 2014. The ALJ did not enjoin Owen Anderson from owning up to five percent of a class of shares of a publicly traded company. *Id.*

BOE filed Exceptions to the Initial Decision on Remand (BOE Exceptions), in which it argues that the ALJ erred in (1) finding that Respondents did not assume responsibility for transportation by water of cargo between the United States and a foreign country for compensation within the meaning of the Act, 46 U.S.C. § 40102(6), and in concluding that their operations were therefore not those of an NVOCC; and (2) in failing to assess an appropriate civil penalty against Respondents. BOE requests that upon consideration of its Exceptions and the record in this proceeding, the Commission find that Respondents violated sections 8, 19(a) and 19(b) of the Act, and assess the maximum civil penalty authorized for 22 willful and knowing violations. Should the Commission believe that a civil penalty less than the maximum is warranted, BOE urges that such penalty should be between \$6,000 and \$30,000 per violation.

For the reasons stated below, we affirm in part, reverse in part, and vacate in part the Initial Decision on Remand. We affirm the conclusions in ID-2012 (1) that Respondents held out to the public to provide transportation by water of cargo between the United States and a foreign country for compensation, (2) that all of the 22 shipments were carried by a secondary or downstream carrier

using for all or part of the transportation a vessel operating on the high seas between a port in the United States and a port in a foreign country, and (3) that violations of the Shipping Act committed by Respondents were knowing and willful. We reverse the conclusion in ID-2012 that Respondents did not assume responsibility for transportation of the involved shipments and acted as a freight forwarder on the shipments. We conclude that Respondents assumed responsibility for transportation of 22 shipments, and acted as an NVOCC on the shipments, in violation of sections 8 and 19 of the Act, consistent with the methodology for determining NVOCC status affirmed by the Commission in *Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 32 S.R.R. 495 (FMC 2012) (*Worldwide Relocations* (FMC 2012)). We also reverse the assessment of penalties based on characteristics of and circumstances related to each individual shipment, and instead assess a uniform penalty amount of \$6,000 for shipments found to constitute violations of the Act. We vacate Conclusions of Law in ID-2012 to the extent that they are inconsistent with the Commission’s conclusions in *Worldwide Relocations* (FMC 2012) and in this decision. Finally, we extend the time frame of the cease and desist order relating to Owen Anderson’s participation in a supervisory or management capacity in the maritime industry to five years, consistent with a similar cease and desist order imposed in *Worldwide Relocations* (FMC 2012), 32 S.R.R. at 507.

II. INITIAL DECISION ON REMAND (ID-2012)

In ID-2012, the ALJ noted that “the important discussion in *Worldwide Relocations* (FMC 2012) 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.” 32 S.R.R. at 1288. The ALJ stated that in *Worldwide Relocations* (FMC 2012), the Commission “articulated a permissive presumption or inference that an OTI is operating as an NVOCC, not an ocean freight forwarder,” and noted that because he had originally concluded that Respondents in this proceeding acted as an ocean freight forwarder

on 22 shipments, “the permissive presumption or inference could change the outcome on these shipments.” *Id.* at 1288-89. The ALJ also noted that the Commission had vacated the entire decision in this proceeding, “which would seem to include the civil penalty on Anderson/AIT,” and therefore he “address[ed] and decide[d] anew the civil penalty to be imposed on Anderson/AIT.” *Id.* at 1289.

The ALJ applied the definition of common carrier set out in 46 U.S.C. § 40102(6),² to determine whether Respondents acted as NVOCCs or ocean freight forwarders on the involved shipments. He concluded that Respondents held out to the public to provide transportation by water between the United States and a foreign country for compensation, and used for all or part of the transportation a vessel operating on the high seas between a port in the United States and a port in a foreign country. However, the ALJ concluded that “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.” 32 S.R.R. at 1342. Based on a determination that downstream common carriers involved with the Anderson/AIT shipments issued bills of lading “with clear and unambiguous identification of the proprietary shipper as the shipper,” the ALJ concluded that these downstream carriers assumed responsibility for the involved shipments. The ALJ summarized his conclusion that Respondents did not assume responsibility for the involved shipments as follows:

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 2012). The short answer is that Anderson/AIT did not

² A common carrier is defined as 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).

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 2012) 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.

Id. at 1328.

While the ALJ found that the Respondents did not act as NVOCCs on the shipments, he concluded that they did act as freight forwarders. Because 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, the ALJ concluded that Respondents 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 ocean freight forwarder on each of the 22 shipments. *Id.* at 1342. In addition, the ALJ concluded that Respondents’ violations of section 19 were knowing and willful. *Id.* at 1351.

In addressing civil penalties, the ALJ stated that the section 19(a) and (b) violations found by the ALJ in *Worldwide Relocations* and the section 19(a) and (b) violations committed by Anderson/AIT are substantially the same, and he noted that in *Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 1471 (ALJ 2010) (*Worldwide Relocations* (ALJ 2010)), the ALJ imposed different penalties on the different respondents in that proceeding, based on each respondent’s history of violations and ability to pay. He determined that Anderson and AIT have

limited ability to pay a civil penalty, and it was not demonstrated that Anderson/AIT have a history of violations. *Id.* The ALJ stated that the Commission's affirmance of the civil penalties imposed in *Worldwide Relocations* was factored into the penalties he imposed, which range from \$1,000 to \$5,000 for the various shipments involved. 32 S.R.R. at 1356.

Finally, the ALJ issued entered cease and desist orders against Respondents, noting "[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," *Id.* at 1357 (quoting *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 March 16, 1998) (internal editorial marks omitted)). The ALJ stated that the cease and desist order he had entered against Respondents earlier in ID-2009 in this proceeding was substantially the same as the cease and desist ordered entered by the ALJ in *Worldwide Relocations* (ALJ 2010). He also noted that the Commission modified the cease and desist order in *Worldwide Relocations* (FMC 2012) as it applied to individuals, so that individuals were not prohibited from owning up to five percent of a class of shares of a publicly traded company. The ALJ stated that he would make the same exception in this proceeding. 32 S.R.R. at 1357. Finally, the ALJ determined that "the cease and desist order will terminate on March 22, 2014, seven years after the commencement of this proceeding." *Id.* at 1358.

III. BOE'S EXCEPTIONS TO INITIAL DECISION ON REMAND

In its Exceptions, BOE argues that the ALJ erred in finding that Respondents did not assume responsibility for transportation of the involved shipments, and acted as an ocean freight forwarder rather than an NVOCC on the shipments. BOE also argues that the

ALJ failed to assess an adequate civil penalty. BOE states that no useful purpose would be served by again remanding this proceeding to the ALJ, and argues that the Commission should exercise its authority under Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.227; consider the issues *de novo*; and vacate and reverse the ALJ's findings and conclusions with respect to Respondents' NVOCC status and the assessment of civil penalties.

BOE avers that in *Worldwide Relocations* (FMC 2012), the Commission held that the assumption of responsibility for transportation may be established by the use of certain presumptions:

[T]he Commission stated that where, as here, an entity has advertised to the shipping public, it is permissible to infer that the entity does what it advertises. [32 S.R.R.] at 505. Of like effect, routine practices of the entity may be evaluated and support inferences in considering whether it assumed responsibility on shipments it handled. *Id.* Similarly, when considering whether a respondent assumed responsibility for transportation, but the documents are ambiguous in their identification of the party shippers, it is permissible to rely on presumptions that result in finding of NVOCC status. *Id.* at 506.

BOE Exceptions at 10.

BOE next argues that the ALJ erroneously relied on the bills of lading of downstream carriers to establish that those carriers assumed responsibility for the transportation. BOE notes that each bill of lading issued by a downstream carrier contained the names of both the proprietary shipper and Respondents in one of several configurations joining the two names, such as "care of," "c/o," or "agent," and each bill of lading contained the address of Respondents. BOE states that in *Worldwide Relocations* (ALJ

2010), carrier bills of lading identified the shippers in the same configurations as in this proceeding, by combining the names of the proprietary shippers with the unlicensed entities and connecting them with terms such as “care of,” “c/o,” or “agent,” as well as sometimes including the address of the unlicensed entity. *Id.* at 12 n. 6.

BOE states that the evidence, permissible presumptions, and inferences of fact constitute a *prima facie* showing that Respondents assumed responsibility for transportation of the involved shipments. Respondents had a direct relationship with the proprietary shippers, according to BOE, and assumed responsibility for their shipments, as demonstrated by two shipper affidavits submitted by BOE as evidence of this fact. BOE notes that in the affidavit of cargo owner Dirk Manuel, he testified that

I had no contractual relationship with any transportation entity other than Anderson International Transport and Mr. Anderson. Mr. Anderson never indicated he was a broker or agent for any other company. I never received copies of any documentation from any entity other than Mr. Anderson’s bill of lading and inventory sheets.

Id. at 16. BOE also quotes from the affidavit of another shipper, Lynn Watt, as follows:

Although we understood that Mr. Anderson and his company did not actually own a vessel, we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport, Inc., to ship our goods. As far as we were concerned, Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. . . . We never received a copy of Shipco Transport, Inc.’s bill of lading and did not even know of their

involvement in our shipment until it was delayed in Brisbane due to Mr. Anderson and Anderson International Transport's failure to pay Shipco Transport Inc. for ocean freight. We had no contractual relationship with Shipco Transport, Inc.

Id. at 17. BOE states that this shipper testimony is uncontroverted and consistent with other documentary evidence in the record. BOE argues that the record, as supplemented by permissible presumptions and inferences affirmed by the Commission in *Worldwide Relocations* (FMC 2012), leads to the conclusion that Respondents assumed responsibility for transportation of the proprietary shippers' goods, and that the shippers considered Respondents to be responsible for such transportation. BOE notes that there is no evidence to contradict this conclusion, and argues that the ALJ's findings are inconsistent with the record, and contrary to the Commission's holding in *Worldwide Relocations* (FMC 2012) and its instructions in the order remanding this proceeding to the ALJ. *Id.* at 18.

BOE also alleges that the ALJ erred in concluding that Respondents operated as a freight forwarder on the shipments. BOE states that Anderson acted as principal, rather than as agent, in relation to the proprietary shippers, citing the facts that Anderson issued written rate quotes to his customers in advance of soliciting rates from an intermediate NVOCC,³ and Anderson's issued rate quotes were higher than those quoted by downstream NVOCCs.⁴ *Id.* at 29-31. In addition, BOE points out that Anderson employed another party, R.W. Smith & Co. (Smith), as freight forwarder for at least five of the involved shipments, and argues that the fact that Smith acted as freight forwarder on the shipments strongly supports

³ In Appendix 3 to its Exceptions, BOE provides a table showing that Anderson quoted rates to its customers prior to receiving rate quotes from intermediate NVOCCS.

⁴ In Appendix 4 to its Exceptions, BOE provides a table showing monetary differences between Anderson's rate quotes to its customers, and rates quoted to Anderson by downstream NVOCCs.

an inference that Anderson was acting as principal and NVOCC, rather than as agent. *Id.* at 32.

BOE claims that the evidence it presented in this proceeding constitutes, at a minimum, a *prima facie* showing that Respondents held themselves out to provide, and assumed responsibility for, transportation of the involved shipments. BOE states that this *prima facie* showing satisfies the preponderance of evidence standard. BOE notes that under the Commission's rules and the Administrative Procedure Act (APA), it "had the initial burden of production to demonstrate a *prima facie* case of violation by Respondents, and the ultimate burden of persuasion to establish such violations by the greater weight of the evidence, that is, evidence which is more convincing than the evidence offered in opposition to it." *Id.* at 33. BOE notes that Respondents chose not to present any evidence to refute any part of BOE's case.

BOE next addresses the penalties assessed by the ALJ, and argues that the nominal penalties assessed by the ALJ are "inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate penalty amount appropriate to the gravity of the violation." *Id.* BOE notes that the ALJ concluded that penalties are required to be assessed on a shipment-by-shipment basis, and found that "the Commission must take into account such factors as the size of the shipment and whether there were problems with the shipment resulting in harm to the shipper." *Id.* at 36. BOE argues that this finding is contrary to the plain language of the statute, the Commission's regulations, and Commission precedent. According to BOE, section 13(c) of the statute "unambiguously requires the Commission to take into account the nature, circumstances, extent and gravity of Respondents' unlicensed, unbonded operations – not the circumstances surrounding each shipment." *Id.*

BOE argues that the ALJ's most egregious failure

concerning penalties is “the refusal to give effect to the proportional relationship between the maximum penalty for a knowing and willful violation of the Act and the penalty for violations not committed knowingly and willfully” *Id.* at 37. BOE states that Congress intended that “the Commission apply a two-level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations.” *Id.* BOE argues that “the Commission should step in, as it did in Stallion Cargo, in order to right the balance when the penalties assessed by the ALJ fail to any longer deter violations and achieve the objectives of the statute” *Id.* at 44. Finally, BOE states that if the Commission believes that a civil penalty less than the maximum is warranted, the penalty should be between \$6,000 and \$30,000 per violation. *Id.* at 48.

IV. DISCUSSION

BOE’s Exceptions raise issues concerning (1) the ALJ’s conclusion that Respondents did not assume responsibility for transportation and therefore acted as freight forwarders, rather than NVOCCs, on the involved shipments, and (2) the amount of the civil penalties assessed by the ALJ. Pursuant to the Commission’s Rules of Practice and Procedure, when exceptions are filed to, or the Commission reviews, an initial decision, “the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.” 46 C.F.R. § 502.227(a)(6). Accordingly, we review the decision *de novo*.

A. Findings of Fact and Conclusions of Law

In ID-2012, the ALJ set out Findings of Fact and Conclusions of Law relating to the following: (1) Respondents Owen Anderson and Anderson International Transport; (2) BOE’s investigation into the activities of Owen Anderson; (3) the 22 shipments involved in this proceeding; and (4) the likelihood that

Owen Anderson will continue or resume his unlawful activities. 32 S.R.R. at 1358-87. For the reasons set out below, we adopt the Findings of Fact in ID-2012, but vacate the Conclusions of Law to the extent that they are inconsistent with the Commission's conclusions in *Worldwide Relocations* (FMC 2012), and with this decision.

B. NVOCC Status: Methodology Applied in *Worldwide Relocations*

When the Commission vacated the ALJ's 2009 Initial Decision and remanded this proceeding, it did so "for further proceedings consistent with the Commission's holding in *Worldwide Relocations*." *Anderson Int'l Transport* (FMC 2012), 32 S.R.R. at 569. The pertinent Commission holding in *Worldwide Relocations* concerns the methodology for determining whether an entity operated as an ocean freight forwarder or NVOCC on identified shipments. To determine whether an entity is operating as an NVOCC, the Commission must assess whether the entity's operations meet the three elements of common carriage set out in the Act: (1) holding out to the general public to provide transportation by water between the United States and a foreign country for compensation; (2) assuming responsibility for the transportation from the port or point of receipt to the port or point of destination; and (3) using for all or part of the transportation a vessel operating on the high seas or the Great Lakes, between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6).

Addressing the issue of whether an entity has assumed responsibility for transportation of a shipment, the Commission stated in *Worldwide Relocations* (FMC 2012) that inferences or permissive presumptions may be appropriate: "pursuant to Rule 406 of the Federal Rules of Evidence, an entity's routine practice may be relevant in determining whether the entity assumed responsibility for a shipment." 32 S.R.R. at 505. The Commission went on to state that "[m]ore generally, when it is proven an entity

has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises,” and noted that “the party adversely affected by the operation of this permissive presumption has full, fair, and unrestricted opportunity to appear and present rebuttal evidence.” *Id.* In *Worldwide Relocations* (FMC 2012), the Commission summarized the methodology to determine NVOCC status as follows:

[O]nce the presiding officer has made a finding that (1) the entity has “held itself out to the general public”; and (2) that vessels on the high seas or Great Lakes were used for part or all of the transportation, then that finding may apply to any and all shipments during the relevant time period. The opposing party would have the right to offer evidence, for example, that a vessel was not involved in a particular shipment. Second, the party with the ultimate burden of proof and persuasion must present evidence on each shipment concerning the “assumed responsibility” element; however, such party may have the benefit of the above-described permissive presumption. As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity did assume responsibility for the transportation, 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.

Id. at 506.

After the Commission remanded this proceeding to the ALJ for application of the methodology it adopted in *Worldwide Relocations* (2012), the ALJ concluded that there was sufficient evidence in the record to support a finding that Respondents held out to provide transportation by water of cargo between the United States and a foreign country for compensation. The ALJ also concluded that all of the 22 shipments involved in this proceeding were carried by a downstream carrier using for all or part of the transportation a vessel operating on the high seas between a port in the United States and a port in a foreign country. On the final element, however, the ALJ concluded that Respondents did not assume responsibility for transportation of the shipments, and they therefore acted as freight forwarders, rather than NVOCCs, on the shipments.

Applying the methodology for determining NVOCC status adopted by the Commission in *Worldwide Relocations* (2012), we affirm the findings in ID-2012 (1) that Respondents held out to provide transportation by water of cargo between the United States and a foreign country for compensation, and (2) that vessels operating on the high seas between the United States and a port in a foreign country were used for part or all of the transportation of the 22 shipments involved. We reverse the conclusion in ID-2012 that Respondents did not assume responsibility for the shipments involved, and conclude that Respondents assumed responsibility for the shipments and therefore acted as an NVOCC.

C. Documents used in *Worldwide Relocations* to Determine Assumption of Responsibility for Transportation of Shipments

In the Initial Decision in *Worldwide Relocations*, the ALJ looked at “[s]hipping documents such as bills of lading and invoices” to determine that the various respondents in that proceeding assumed responsibility for identified shipments. *Worldwide Relocations* (ALJ 2010), 31 S.R.R. at 1522. For

example, in connection with International Shipping Solutions, one of the respondents in *Worldwide Relocations*, the ALJ described how it booked cargo and the shipping documents that were issued in connection with shipments, as follows:

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

Id.

When the Commission reviewed the ALJ's Initial Decision in *Worldwide Relocations*, it stated that "an entity's routine practice may be relevant in determining whether the entity assumed responsibility for a shipment." *Worldwide Relocations* (FMC 2012), 32 S.R.R. at 505. The Commission went on to state that "[m]ore generally, when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises." *Id.* The Commission also stated that with regard to the "assumed responsibility" element, "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.” *Id.* at 506.

Following the methodology used by the ALJ in *Worldwide Relocations* (ALJ 2010), affirmed by the Commission in *Worldwide Relocations* (FMC 2012), in which (1) shipping documents such as downstream carrier bills of lading and invoices for shipping charges were used to determine whether respondents assumed responsibility for transportation of the involved shipments, and (2) ambiguous identification of party shippers in these documents may lead to a finding of NVOCC status, evidence in this proceeding relating to the “assuming responsibility” element of NVOCC status is set out below for each shipment, along with the Bates numbered pages associated with each shipment.⁵

D. Documents in this Proceeding Relating to the Assumption of Responsibility for Transportation of Shipments

1. *Two Trees Shipment* (Bates Nos. 15-70)

Direct Container Line issued a bill of lading dated 05-05-05 for a shipment from Los Angeles to Xingang, China, showing the shipper as “AIT Worldwide Logistics for Two Trees Products % Anderson International,” and total charges of \$299.18. Bates No. 51. Anderson International Transport issued an Invoice on 01-18-05 to Two Trees for \$769, including ocean freight charges of \$344. Bates No. 67. In a complaint filed with the BBB of Metropolitan Houston, Vanessa Sever of Two Trees Products stated that “[w]e paid Anderson International [on 01-18-05] to move a pallet of product to China for our customer,” and that the product arrived on 05-22-05. Bates No. 30.

⁵ The Bates numbered evidence appears in Bureau of Enforcement’s Appendix to Proposed Findings of Fact, filed February 15, 2008.

2. *Clifton Watts Shipments* (Bates Nos. 71-120)

Mr. Watts' shipments consisted of one shipment of household goods and a 2002 Honda minivan, and another shipment of a box of batteries. ID-2012, 32 S.R.R. at 1362. Triton Overseas Transport, Inc. issued a bill of lading dated 8-15-05 for a shipment of household effects and a 2002 Honda minivan from Houston to Kingston, showing the shipper as "Mike European % Anderson International Transport," and the consignee as "Clifton Watts." Bates No. 107. Triton Overseas Transport, Inc. issued a bill of lading dated 9-23-05 for a shipment of batteries from Miami to Kingston, Jamaica, showing the shipper as "Clifton Watts Anderson International Transport." Bates No. 71. On 8-04-05, Triton Overseas Transport issued an Invoice to "AIT" for a shipment of "personal effects" from Houston to Kingston showing ocean freight charges of \$1,980 and total charges of \$2,028.95. Bates No. 106. On 8-04-05, Anderson International Transport issued an invoice for the Clifton Watts shipments showing ocean freight charges of \$3,200. Bates No. 105.

3. *Repairer of the Breach Shipment* (Bates Nos. 121-149)

Zim Container Service issued a bill of lading dated 5-17-05 for a shipment of relief supplies from Houston to Kingston, showing the shipper as "Repairer of the Breach Anderson International Transport," ocean freight of \$1,975, and total charges of \$2,233. Bates No. 122. Anderson International Transport issued an invoice dated 2-12-1912 [sic] for \$1,990 (shipping charges of \$2,900, gas charges of \$290, less a credit of \$1,200) to Repairer of the Breach for a shipment of relief supplies from Houston to Kingston. Bates No. 148.

4. *Dirk Manuel Shipment* (Bates Nos. 150-217)

Star Shipping A/S (d.b.a. Atlanticargo), as carrier, by Strachan Shipping Agency as Agents, issued a bill of lading dated

1-2-05 for a shipment of household effects from Houston to Antwerp, Belgium, showing the shipper as “Dirk Manuel c/o Anderson International,” ocean freight of \$800, and total charges of \$1,061.60. Bates No. 154. Strachan Shipping agency issued an invoice via Fax Memo dated 1-13-05, to Anderson International for the Dirk Manuel shipment. Bates 191. On 1-26-05, Dirk Manuel sent an email to Gert Vandaele of Durot Shipping, stating that “[m]y overall shipment is being handled by Owen (Andy) Anderson of Anderson International Transport (AIT). The service is ‘door-to-door,’ so Mr. Anderson should have already arranged for someone to take care of the delivery from Antwerpen to Tervuren.” Bates Nos. 192 and 203. Anderson International Transport confirmed to Ms. Manuel on 11-19-04, a shipment from Katy, Texas to Brussels, Belgium, for a total cost of \$5,450, including ocean freight. Bates No. 179. Dirk Manuel made a statement to BBB of Metropolitan Houston, case opened 2-23-05, which included the following: “I recently moved from Houston to Brussels in Belgium. I contracted Anderson to provide a ‘Door-to-Door’ shipping service. I have signed a contract to this effect.” Bates No. 205.

5. *Kathleen Davidson Shipment* (Bates No. 218)

Anderson International Transport issued a Dock Receipt dated 8-29-05, showing “Kathleen Davidson % Anderson International” as shipper, for a shipment of household effects and two vehicles, from Houston to Kingston, Jamaica, on Zim Vessel Mexico 111. Bates No. 218.

6. *Asekunle Osule Shipment* (Bates Nos. 219-251)

On 1-24-05, Star Shipping A/S (d.b.a. Atlanticargo) as carrier, by Strachan Shipping Agency as Agents, issued a bill of lading/due bill for the shipment of a Lincoln Navigator vehicle, from Houston to Tilbury, showing the shipper as “Asekunle Osule c/o Anderson International,” ocean freight charges of \$670, and total charges of \$951.76 due. Bates No. 224. On 2-21-05, and 3-3-05, Strachan Shipping Agency sent a Fax Memo to Anderson

International seeking payment of \$951.76 for the “Asekunle Osu” shipment. Bates No. 241. On 1-5-05, Anderson International Transport issued an Invoice to Mr. Sunday for the shipment of a Lincoln Navigator from Houston to Tilbury Dock, for shipping costs of \$1,500, and insurance costs of \$892.50. Bates No. 245.

7. *Margaret DeLeon Shipment* (Bates Nos. 252-293)

Finn Container Cargo Services, Inc. issued a bill of lading/freight bill dated 8-10-06, for a shipment of household effects from Houston to Reykjavik, Iceland, showing “Margaret DeLeon c/o Anderson International” as shipper, and total charges of \$3,495.50. Bates No. 275. On 7-31-06, Anderson International issued an Invoice to “Margret [sic] DeLeon” showing total charges of \$5,600 for a shipment from Houston to Reykjavik. Bates No. 277. Finn Container Line made several requests to Respondents for payment of shipping charges on the shipment. Bates No. 266.

8. *Ray Cooper Shipment*⁶ (Bates Nos. 294-339)

Finn Container Cargo Services, Inc. issued a bill of lading dated 3-31-06, for a shipment of household effects from Houston to Felixstowe, showing “Raymond Cooper c/o Anderson International Transport” as shipper. Bates No. 299. Finn Container Cargo Services, Inc. issued a bill of lading/freight bill for freight charges of \$1,150, and total charges of \$1,245.50, showing “Raymond Cooper c/o Anderson International Transport” as the shipper for a shipment from Houston to Felixstowe. Bates No. 300. Anderson International Transport issued an Invoice dated 3-13-06, to Ray Cooper for a shipment of household effects from Houston to

⁶ The ALJ states that this 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.” ID-2012, 32 S.R.R. at 1370. For the purpose of determining NVOCC status and whether a violation has occurred, only documents related to the movement from Houston to Felixstowe will be considered.

London, showing shipping charges of \$2,500 and total charges of \$3,350. Bates No. 310. Anderson International Transport issued a check dated 4-17-06 to Finn Container, for \$1,245.50 for ocean freight. Bates No. 297.

9. *Fiedel Udense Shipment* (Bates Nos. 340-438)

This shipment was withdrawn by BOE.

10. *Barbara Downie Shipment* (Bates Nos. 439-445)

Shipco Transport issued a bill of lading dated 9-3-06 for a shipment of household effects from Houston to Glasgow, showing "Barbara Downie c/o Anderson International Transport" as shipper, ocean freight charges of \$100, and total charges of \$229.17. Bates No. 439. Anderson International Transport issued a bill of lading master dated 8-23-06, for a shipment of household effects from Houston to Glasgow, showing "Barbara Downie c/o Anderson International Transport" as the exporter. Bates No. 441.

11. *Dr. Saripalli Shipment* (Bates Nos. 446-455)

Shipco Transport Inc. issued a bill of lading dated 9-17-06 for a shipment of household effects from Houston to Mumbai, India, showing "Dr. Solomon Saripalli c/o Anderson International Transport" as shipper; ocean freight charges of \$721.50; and total charges of \$787.55. Bates No. 452. Shipco Transport Inc. issued an Invoice for \$787.55 dated 9-17-06, for a shipment of household effects from Houston to Mumbai, showing "Dr. Solomon Saripalli c/o Anderson International Transport" as shipper. Bates No. 454. Anderson International Transport issued a document titled "Used Household Goods and Personal Effects" dated 7-14-06, showing the shipper as "Dr. Soloman," and estimated "Door to Port" charges of \$1,500. Bates No. 450.

12. *Alex and Lynn Watts Shipment* (Bates Nos. 456-516)

Shipco Transport Inc. issued a bill of lading dated 8-14-06 for a shipment of household effects from Houston to Brisbane, Australia, showing the shipper as "Issac Watts % Anderston [sic] International Transport, and ocean freight charges of \$1,305.71. Bates No. 484. Shipco Transport Inc. issued a bill of lading stamped "Invoice," dated 8-14-06, showing the shipper as "Issac Watts % Anderston [sic] International Transport," and total charges of \$1,433.89. Bates No. 516. Anderson International Transport issued an Invoice dated 5-20-0[6] to Alex and Lynn Watts, for pickup, ocean freight, inland delivery and service charge for a shipment from Houston to Brisbane, showing charges of \$3,950, with \$4,700 already paid and a credit of \$750. Bates No. 459. Anderson International Transport issued an Invoice dated 5-20-0[6] to Alex and Lynn Watts for pick up, ocean freight, customs clearance, and door delivery in Cairns associated with a shipment from Houston to Brisbane, showing charges of \$1,650. Bates No. 505. Anderson issued a check dated 9-200 (year not shown) to Shipco Transport for \$1,305.71. Bates No. 480. In a complaint filed with BBB of Metropolitan Houston by Mrs. Lynn Diane Watts, case opened 10-13-06, Mrs. Watts stated as follows: "Anderson Transport was responsible for doing a move from Houston Texas to Cairns Australia. When the goods got to Australia they could not be released to customs because Anderson Transport had failed to pay for the third party carrier and had failed to pay for the final move from Brisbane to Cairns (the door delivery). We had already paid Anderson in full for the entire move." Bates No. 470.

13. *David Zinnah Shipment* (Bates Nos. 517-567)

Atlantic Container Line AB issued a bill of lading dated 9-19-06, for a shipment of household effects and a used vehicle from Houston to Monrovia Port LR, showing the shipper as "David Zinnah c/o Anderson International Transport." Bates No. 541. Atlantic Container Line AB issued a Freight Invoice dated 8-29-06, for \$5,452.40, to Anderson International Transport to transport a shipment from Houston to Monrovia Port LR. Bates No. 518. Anderson International Transport issued an Invoice for \$5,850

dated 8-16-06, to David Zinnah/Brenda Davis for a shipment from Houston to Monrovia, Liberia. Bates No. 564. Anderson International Transport issued a check dated 10-12-06, to Atlantic Container Line for \$5,452.40. Bates No. 522.

14. *Richard Newman Shipment* (Bates Nos. 568-587)

Seaboard Marine, Ltd. issued a bill of lading dated 8-25-06, for a shipment of household effects from Miami to Montego Bay, showing the shipper as "Richard Newman c/o Anderson Int'l Transport," and freight charges of \$491.19. Bates No. 576. Anderson International Transport issued check number 1069, dated 8-28-06, to Seaboard Marine for \$491.19. Bates No. 577. In a message to Seaboard Marine Ltd., dated 8-30-06, Anderson International Transport agreed to Richard Newman's making payment in lieu of Anderson International Transport's payment: "We hereby agree to the consignee Richard Newman making the payments herein in lieu of our check no. 1069 in the amount of \$419.19." Bates No. 573.

15. *Claudette Dillon Shipment* (Bates Nos. 588-608)

Econocaribe issued a bill of lading dated 9-29-06, for a shipment of household goods from Houston to Kingston, Jamaica, showing the shipper as "Claudette Dillon Anderson International Transport," and total charges of \$235.00. Bates No. 595. Anderson issued an Invoice dated 9-11-06, to Claudette Dillon for a shipment from Houston to Kingston, Jamaica, with no amount shown. Bates No. 606. Anderson International Transport issued a check dated 10-13-06, to Econocaribe for \$235, showing Booking Number 19-956666, the Booking Number for the Claudette Dillon shipment. Bates No. 596.

16. *Julia Huxtable Shipment* (Bates Nos. 609-634)

Econocaribe issued a bill of lading dated 3-17-06, for a shipment of household effects from Houston to Kingston, Jamaica,

showing the shipper as “Anderson International Transport Julia Huxtable %,” and total charges of \$288.51. Bates No. 614. Econocaribe issued a Freight Invoice, dated 3-17-06, for a shipment of household effects from Houston to Kingston, Jamaica, showing the shipper as “Anderson International Transport Julia Huxtable %,” and charges of \$288.51. Bates No. 610. Anderson International Transport issued an Invoice dated 3-16-0[6] to Julia Huxtable for \$400, covering a shipment from Houston to Kingston, Jamaica. Bates No. 615.

17. Michael Rose Shipment (Bates Nos. 625-646)

Finn Container Cargo Services, Inc. issued a bill of lading dated 11-15-06, for a shipment of household goods from Houston to Kingston, Jamaica, showing the shipper as “Anderson International Transport . . . as Agents for Mr. Michael Rose,” and total charges of \$2,595.50. Bates No. 631. Finn Container Cargo Services, Inc. issued a Booking Confirmation dated 11-2-06, to Anderson International, setting out freight charges from Houston to Kingston, Jamaica in the amount of \$2,500. Bates No. 632.

18. Abdelnasar Albabisi Shipment (Bates Nos. 647-649)

Mediterranean Shipping Company S.A. (MSC) issued a Freight Invoice to Anderson International Transport for a shipment of household effects from Houston to Ad Dammam, showing a bill of lading number MSCUHS827635, a sailing date of 2-6-07, and total charges of \$2,833.94. Bates No. 649. MSC transmitted the Freight Invoice with a cover memo dated March 1, 2007, which shows Abdelnasar Albabisi as the shipper, Anderson Intl. as forwarder, and the same bill of lading number and charges shown on the MSC Freight Invoice issued to Anderson International Transport. Bates 647.

19. Nick Maniotes Shipment (Bates Nos. 650-666)

Mediterranean Shipping Company S.A. issued a bill of

lading dated 1-30-07, for a shipment of household effects from Port Everglades to Piraeus, Greece, showing the shipper as “Nick Maniotes % AIT Intl LLC.” Bates No. 664. Mediterranean Shipping Company (USA) issued a Freight Invoice to “Nick Maniotes % AIT Intl LLC” for a shipment sailing on 1-31-07 from Port Everglades to Piraeus, showing total charges of \$1,456. Bates No. 665. Owen W. Anderson issued a check dated 3-6-07 to Mediterranean Shipping Company in the amount of \$1,400. Bates No. 650.

20. *Justina Licrish Shipment* (Bates Nos. 667-669)

Zim Container Service issued a bill of lading dated 5-16-07, for a shipment of household goods from Houston to Port of Spain, Trinidad, showing the shipper as “AIT International LLC as Agents for Justina Licrish,” and total charges of \$1,730.94. Bates No. 667. Smith & Co., Customs Brokers – Freight Forwarders, issued an Invoice dated 6-5-07, for \$165 to Anderson International Transport, for “Docs & Forwarding” on a shipment of used household goods for Justina Licrish from Houston to Port of Spain, Trinidad. Bates No. 669. This shipment was completed after the Order of Investigation and Hearing in this proceeding was issued on March 22, 2007. BOE’s Revised Proposed Findings of Fact at 30.

21. *Libby Coker Shipment* (Bates Nos. 670-672)

Mediterranean Shipping Company S.A. issued a bill of lading dated 5-11-07, for a shipment of household goods from Houston to Catania, Italy, showing the shipper as “Ms Libby Coker c/o AIT International LLC.” Bates No. 670. Smith & Co., Inc., Customs Brokers – Freight Forwarders, issued an Invoice dated 6-5-07, to Anderson International Transport for “Docs & Forwarding” on a shipment of used household goods for Libby Coker from Houston to Catania, Italy. Bates No. 672. This shipment was completed after the Order of Investigation and Hearing in this proceeding was issued on March 22, 2007. BOE’s Revised Proposed Findings of Fact at 30.

22. *George Hughes Shipment* (Bates Nos. 673-685)

Caro Trans issued a Freight Invoice/bill of lading dated 5-9-07, for the shipment of a motor scooter from Houston to Rotterdam, showing the shipper as George Hughes c/o AIT International,” and total charges due of \$93. Bates No. 678. Smith & Co., Inc., Customs Brokers – Freight Forwarders, issued an Invoice dated 5-5-07, for \$165 to Anderson International Transport for “Docs & Forwarding” related to the shipment of a motor scooter for George Hughes from Charleston, South Carolina, to Rotterdam, Netherlands. Bates No. 684. This shipment was completed after the Order of Investigation and Hearing in this proceeding was issued on March 22, 2007. BOE’s Revised Proposed Findings of Fact at 30.

E. Application of Methodology Approved by the Commission in *Worldwide Relocations* (FMC 2012) to Determine NVOCC Status in this Proceeding

As set out above, and as affirmed by the Commission, the ALJ in *Worldwide Relocations* (ALJ 2010) looked at bills of lading issued by downstream carriers and invoices to determine whether the various respondents in that proceeding had assumed responsibility for identified shipments. In *Worldwide Relocations* (ALJ 2010), downstream carriers issued bills of lading to respondents identifying the shipper in one of the following ways: (1) as the respondent, with the words “as agent for” the proprietary shipper; (2) as the respondent c/o the proprietary shipper; or (3) as the proprietary shipper c/o the respondent, with the respondent’s address. Based on downstream carrier bills of lading containing such shipper descriptions, as well as evidence showing that respondents collected payment from proprietary shippers and paid downstream carriers, the ALJ in *Worldwide Relocations* (ALJ 2010) determined that respondents in that proceeding assumed responsibility for shipments for which such documents were in the record.

In the current proceeding, bills of lading issued by downstream carriers contain shipper identifications which are essentially the same as those involved in *Worldwide Relocations* (ALJ 2010), as shown in the shipment descriptions above. The bills of lading identify the shipper in the following ways: as the proprietary shipper c/o Respondents; as both the proprietary shipper and Respondents listed together, without the “c/o” reference; or as Respondents “as agent for” the proprietary shipper. In adopting the ALJ’s methodology in *Worldwide Relocations* for determining whether an entity assumed responsibility for transportation of a shipment, the Commission stated that when bills of lading and invoices contain ambiguous identification of the party shippers, with one interpretation being that an entity did assume responsibility for the transportation, it may be presumed that the entity operated as an NVOCC. *Worldwide Relocations* (FMC 2012), 32 S.R.R. at 506. In this proceeding, as in *Worldwide Relocations*, the bills of lading contain ambiguous identification of party shippers.

With regard to invoices and other documents issued in connection with payment for the shipments involved in this proceeding, there are in the record the following documents: invoices issued by downstream carriers to Respondents for shipping charges; invoices issued by Respondents to proprietary shippers; documentation of requests by downstream carriers to Respondents for payment of freight charges; checks issued by Respondents to downstream carriers for amounts corresponding to freight charges shown on other documents; and invoices issued to Respondents by a freight forwarder for charges relating to services described as “Docs & Forwarding.” In addition, Owen Anderson stated in his answer to Request for Admission that “Anderson International paid all common carriers for the work they carried out on our behalf.” Admission 11, Bates No. 14. These documents show that Respondents in this proceeding collected payment from proprietary shippers and paid downstream carriers, as was the case in *Worldwide Relocations*.

Among the 22 shipments involved in this proceeding, there are two shipments for which there are no downstream carrier bills of lading in the record, but for which there are other shipping documents: the Kathleen Davidson shipment (Bates No. 218), and the Abdelnasar Albabisi shipment (Bates Nos. 647-649). In the case of the Kathleen Davidson shipment, BOE provided a Dock Receipt dated 8-29-05, issued by Anderson International Transport, showing “Kathleen Davidson % Anderson International” as shipper, for a shipment of household effects and two vehicles, from Houston to Kingston, Jamaica, on Zim Vessel Mexico 111. For the Abdelnasar Albabisi shipment, BOE provided a Freight Invoice issued by Mediterranean Shipping Company S.A. to Anderson International Transport for a shipment of household effects from Houston to Ad Dammam, showing a bill of lading number of MSCUHS827635, a sailing date of 2-6-07, and total charges of \$2,833.94. Mediterranean Shipping Company transmitted the Freight Invoice with a fax cover that shows Abdelnasar Albabisi as the shipper, “Anderson Intl.” as forwarder,⁷ and the same bill of lading number shown on the Freight Invoice.

In *Worldwide Relocations* (FMC 2012), the Commission addressed situations in which there are relatively few shipping documents in the record for specific shipments, stating that “while there may be comparatively few documents for some shipments, the ALJ may use the routine practices of an entity in evaluating whether an entity assumed responsibility on shipments that it handled.” 32 S.R.R. at 506-07. The Commission further stated that inferences or permissive presumptions may be used to determine whether an

⁷ The Mediterranean Shipping Company (USA) Inc. fax cover appears to be a printed form which uses the terms “shipper” and “forwarder” to identify parties involved with a shipment. The term “non-vessel-operating common carrier” does not appear on the form. To determine whether an entity is a common carrier, “[t]he Commission has indicated it will look beyond documentary labels.” *Worldwide Relocations* (ALJ 2010), 31 S.R.R. at 1519. Therefore, the forwarder label associated with Anderson International Transport on the Mediterranean Shipping Company fax cover is not determinative of whether Respondents acted as a forwarder or NVOCC on the identified shipments.

entity has assumed responsibility for a shipment, stating that “pursuant to Rule 406 of the Federal Rules of Evidence, an entity’s routine practice may be relevant in determining whether the entity assumed responsibility for a shipment.” *Id.* at 505.⁸ The Commission also concluded that “[m]ore generally, when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises.” *Id.*

In this case, the record demonstrates that Anderson International Transport advertised to the general public and held out to provide ocean transportation services. In addition, the shipping documents issued by Anderson and by downstream carriers establish routine practices in handling shipments. Using the presumptions approved by the Commission in *Worldwide Relocations* (FMC 2012), we conclude that the documents in the record connected with the Kathleen Davidson and Abdelnasar Albabisi shipments contain sufficient evidence to determine that Anderson International Transport assumed responsibility for transportation of these two shipments. In connection with the Kathleen Davidson shipment, the Dock Receipt contains the same type of ambiguous shipper identification found in bills of lading in *Worldwide Relocations* and in this proceeding. In connection with the Abdelnasar Albabisi shipment, the Freight Invoice issued by

⁸ Pursuant to Rule 406, “[e]vidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.” FED. R. EVID. 406. Commission Rule 156 provides that “[i]n any proceeding under the rules in this part . . . [u]nless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence . . . will also be applicable.” 46 C.F.R. § 502.156. In a recent decision, the Tenth Circuit Court of Appeals stated, in connection with Rule 406, that “[b]ecause business organizations have a ‘profit-driven need for regularity,’ evidence of their routine practice is ‘particularly persuasive.’ 2-406 Weinstein’s Federal Evidence § 406.03; *see also* Fed.R.Evid. 406 advisory committee’s note (‘Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion’) . . .” *Hancock v. American Tel. and Tel. Co., Inc.*, 701 F.3d 1248, 1262 (10th Cir. 2012).

Mediterranean Shipping Company to Anderson International Transport for ocean freight charges reflects the pattern for payment of ocean freight charges present in both *Worldwide Relocations* and this proceeding, with the downstream carrier billing the entity for ocean shipping charges.

Based on the facts that (1) shipping documents in the current proceeding identify shippers in essentially the same form as shown on documents in *Worldwide Relocations*, and establish the same billing practices for ocean freight charges as found in that proceeding; (2) in *Worldwide Relocations* (FMC 2012), the Commission found that respondents in that proceeding assumed responsibility for shipments based on those documents; (3) and Respondents in this proceeding have not produced any evidence or argument to rebut the evidence introduced by BOE, we conclude that BOE has met its burden of proof and demonstrated by a preponderance of the evidence that Respondents Anderson/AIT assumed responsibility for the 22 identified shipments, and acted as an NVOCC on the shipments.

F. Civil Penalties

Section 13(c) of the Shipping Act provides that in determining the amount of a penalty, the Commission “shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b). In ID-2012, the ALJ stated that 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.” ID-2012, 32 S.R.R. 1350. He noted that the ALJ in *Worldwide Relocations* (ALJ 2010) imposed different penalty levels on the various respondents in that proceeding, based on respondents’ history of violations and ability to pay. In this proceeding, the ALJ stated that “[i]t has been determined that Anderson and AIT have limited ability to pay a civil penalty,” and “BOE has not

demonstrated that Anderson/AIT have a history of violations.” *Id.* The ALJ concluded that 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 determination of penalty amounts on the shipments involved in this proceeding].” *Id.* at 1350-51. The ALJ in this proceeding balanced the evidence relating to section 13(c) factors, and assessed civil penalties ranging from \$1,000 to \$5,000 for the various shipments involved, resulting in a total penalty of \$40,500 for 22 knowing and willful violations of the Act. *Id.* at 1387.

We affirm the conclusion in ID-2012 that violations committed in this case are knowing and willful, and therefore, the maximum civil penalty assessed may not exceed \$30,000 for each violation.⁹ The maximum penalty for violations that are not knowing and willful was \$6,000 per violation at the time the violations in this proceeding occurred.¹⁰ BOE argues that penalties assessed against Respondents should be “not less than \$6000 per violation nor exceed \$30,000 per violation,” based on the fact that the violations have been found to be knowing and willful. BOE Exceptions at 38. BOE argues that the ALJ’s assessment of penalties that are less than the maximum allowed for violations that are not found to be knowing and willful, i.e., \$6,000, “negates Congressional intent that the Commission should wield enhanced penalties for knowing and willful violations and effectively writes that distinction out of the statute.” *Id.*

1. *Penalties Assessed in Docket No. 06-01, Worldwide Relocations (ALJ 2010)*

⁹ The civil penalty for a knowing and willful violation is currently set at a maximum of \$40,000 per violation. 46 C.F.R. 506.4(d)

¹⁰ The current civil penalty for violations that are not knowing and willful is set at a maximum of \$8,000 per violation. *Id.*

In *Worldwide Relocations* (ALJ 2010), the ALJ assessed penalties ranging from \$3,000 to \$6,000 per violation against respondents in that proceeding, taking into consideration respondents' cooperation with discovery requests, attempts to assist proprietary shippers, history of prior violations, and ability to pay. 31 S.R.R. at 1538. Once the ALJ determined a penalty amount for each respondent, that amount was assessed for all shipments handled by that respondent; the ALJ did not examine the particular circumstances of each shipment. In *Worldwide Relocations* (FMC 2012), the Commission did not address the penalties assessed by the ALJ, so those amounts remained in effect.

2. *Consideration of the ALJ's Penalty Assessments in ID-2012*

In ID-2012, the ALJ observed that deterrence of future violations is the primary purpose of assessing penalties for violations of the Act, and assessed penalties ranging from \$1,000 to \$5,000 on the 22 shipments found to constitute knowing and willful violations. In determining the amount to be assessed for each shipment, the ALJ took into consideration the size of the shipment and whether there were problems with the shipment, which he considered "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." 32 S.R.R. at 1356. The ALJ also considered "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 . . . ," in determining the varying penalties assessed on the different shipments. *Id.*

3. *Commission Precedent in Penalty Assessments*

Section 13(c) of the Shipping Act provides that in determining the amount of a civil penalty, “the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed . . .” 46 U.S.C. § 41109(b). In this case, the violation is operating as an OTI without a license or bond and without publishing a tariff, in connection with 22 shipments. With regard to shipper harm, the Commission has said that in “Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable.” *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001).

Section 13(c) of the Act also requires that the Commission take into account the violator’s “degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b). In this case, Respondents Anderson International Transport and Owen Anderson have a high degree of culpability in connection with the violations, as they continued their unlawful operations after being warned to stop and after this investigation was initiated. Based on the record, Respondents do not have a history of prior offenses, and appear to have limited ability to pay. ID-2012, 32 S.R.R. at 1352-53.

The approach taken by the ALJ in *Worldwide Relocations* (ALJ 2010), to set a uniform penalty amount on all shipments handled by a Respondent, is consistent with the primary purpose of civil penalties, which is to deter future violations. *See Stallion Cargo*, 29 S.R.R. at 681. The purpose of penalties assessed in this proceeding is to deter future unlicensed, unbonded, and untariffed NVOCC operations, and a uniform penalty amount for each

shipment handled in violation of the Act is consistent with this purpose.¹¹

BOE argues that “Congress . . . intended that the Commission apply a two-level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations.” BOE Exceptions at 37. BOE concludes that penalties assessed in this proceeding should be not less than \$6,000 per violation, the maximum penalty for violations that are not knowing and willful, nor more than \$30,000, the maximum penalty amount for knowing and willful violations, at the time these violations occurred. *Id.* at 38.

Although there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6,000 in this case. *See, e.g., EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) (\$30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) (\$22,500 per violation assessed for 120 knowing and willful violations); *Green Master Int’l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29

¹¹ Because violations of sections 8 and 19 of the Act are related to the same conduct, penalties for violations of these sections have previously been assessed according to the number of shipments involved, rather than according to the number of sections of the Act violated. *See, e.g., Worldwide Relocations, Inc. – Possible Violations of Shipping Act* (ALJ 2010), 31 S.R.R. 1471, 1543; and *Parks Int’l Shipping, et al. – Possible Violations of Act and Regulations*, 31 S.R.R. 1166, 1205 (ALJ 2010).

S.R.R. 1319, 1323 (FMC 2003) (\$22,500 penalty per knowing and willful violation affirmed) (*Green Master II*); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) (\$22,500 per violation assessed for 68 knowing and willful violations); *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) (\$20,000 per violation assessed for 72 knowing and willful violations); *Stallion Cargo*, 29 S.R.R. at 682 (\$10,000 per violation assessed for 134 knowing and willful violations). In *Green Master II*, the Commission noted that in enacting section 13(a), Congress established higher penalties for knowing and willful violations of the Act. *Green Master II*, 29 S.R.R. at 1323 (citing H.R. Rep. No. 53, 98th Cong., 1st Sess. Pt. 1, at 19 (1983)).

In determining a specific penalty amount, we take into consideration the legislative history of section 13(a), which highlights the importance of higher penalties to deter violations found to be knowing and willful; Commission precedent of assessing higher penalties for knowing and willful violations; Respondents' culpability; lack of history of prior offenses; and apparent lack of ability to pay. With regard to culpability, Respondents continued their unlawful operations after being warned to stop and after this investigation was initiated; this factor weighs against Respondents. On the other hand, Respondents' lack of prior Shipping Act violations and inability to pay are mitigating factors. Taking these factors into consideration, in addition to the primary purpose of penalties to deter future violations, and the level of penalties assessed by the Commission for knowing and willful violations in past proceedings, a penalty of \$6,000 per violation is assessed, resulting in a total penalty of \$132,000 for 22 knowing and willful violations.

G. Cease and Desist Orders

In ID-2012, the ALJ 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.” 32 S.R.R. at 1387. The ALJ also 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.” *Id.* Consistent with *Worldwide Relocations* (FMC 2012), the ALJ added that the order “does not enjoin Owen Anderson from owning up to five percent of a class of shares of a publicly traded company.” *Id.* The ALJ stated that he was “tailoring the order to the needs and facts of this case,” and he provided that the order “will terminate on March 22, 2014, seven years after the commencement of this proceeding.” *Id.* at 1358. BOE does not object to the terms of the ALJ’s cease and desist orders.

In *Worldwide Relocations* (FMC 2012), the Commission enjoined respondents in that proceeding from participating in any supervisory or management capacity in the maritime industry for a period of five years. 32 S.R.R. at 507. Consistent with *Worldwide Relocations* (FMC 2012), Owen Anderson is ordered to cease and desist from participating in a supervisory or management capacity in the maritime industry for a period of five years from the date of this Order.

V. CONCLUSION

Upon consideration of the findings and conclusions set forth above, and the determination that Respondents Owen Anderson and Anderson International Transport violated sections 8 and 19 of the Shipping Act (46 U.S.C. §§ 40501, 40901, and 40902) and the Commission’s regulations at 46 C.F.R. §§ 515.3, 515.21 and 520.3, by operating as an ocean transportation intermediary in the United States trades without obtaining a license from the Commission,

without providing proof of financial responsibility, and without publishing tariffs, it is hereby

ORDERED, That Respondents Owen Anderson and Anderson International Transport remit to the United States the sum of \$132,000 as a civil penalty for 22 knowing and willful violations of sections 8 and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501, 40901, and 40902.

IT IS FURTHER ORDERED, That 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 they publish a tariff and obtain a bond pursuant to Commission regulations;

IT IS FURTHER ORDERED, That Respondent Owen Anderson cease and desist 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 for a period of one year from the date of this Order;

IT IS FURTHER ORDERED, That Respondent Owen Anderson cease and desist 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, for a period of five years from the date of this Order. Respondent Owen Anderson is not enjoined from owning up to five percent of a class of shares of a publicly traded company.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary