

S E R V E D
April 17, 2012
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 11-13

ATLANTIC SHIPPING COMPANY, INC.

v.

DI NOS SHIPPING, INC.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CLAY G. GUTHRIDGE¹

I. INTRODUCTION.

On August 8, 2011, the Secretary received a Complaint filed pursuant to 46 U.S.C. § 41301 by complainant Atlantic Shipping Company, Inc. (Atlantic Shipping), a vessel-operating common carrier registered with the Commission. The Complaint alleged that Di Nos Shipping, Inc. (Di Nos), is violating the Shipping Act of 1984 by operating as a “freight forwarder” without a license from the Commission as required by 46 U.S.C. § 40901(a) and without a bond, proof of insurance, or other surety as required by 46 U.S.C. § 40902(a). (Complaint ¶¶ 5-7.)

Atlantic Shipping also claimed that Di Nos used a dock receipt form originally developed by Atlantic Shipping as a “dock receipt and bill of lading.” (Complaint ¶ 8.) Atlantic Shipping contended that the “DI Nos form was copied from Atlantic’s form as to typography, layout and content, with the intent of confusing potential customers.” (Complaint ¶ 12.)

As relief, Atlantic Shipping sought an order requiring Di Nos to cease operating as ocean transportation intermediary (OTI) without appropriate licensing and bonding and to cease using its dock receipt that referenced Atlantic Shipping. (Complaint at 3.)

On August 15, 2011, the Secretary of the Commission sent a copy of the Complaint to Di Nos by UPS, overnight delivery. 46 C.F.R. § 502.113(a). UPS records indicated that the package

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

was delivered to Di Nos, but Di Nos did not answer or otherwise respond to the Complaint. Therefore, I issued an order for Di Nos to show cause why default judgment should not be entered against it. In the same order, I required Atlantic Shipping to file an Amended Complaint stating its case in greater detail. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Sept. 22, 2011) (Order for Respondent Di Nos Shipping, Inc., to Show Cause Why Default Judgment Should not be Entered; and Order for Complainant to File Amended Complaint).

Atlantic Shipping served and filed its Amended Complaint. Di Nos responded to the order to show cause and filed an answer to the Amended Complaint. On October 14, 2011, I issued an order discharging the order to show cause and ordered the parties to propose a schedule that would control the litigation. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Oct. 14, 2011) (Order to File Proposed Litigation Schedule). The parties filed a proposed schedule, and I entered a schedule. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Nov. 2, 2011) (November 2, 2011, Procedural Order).

On February 8, 2012, counsel for Di Nos filed an emergency motion for leave to withdraw as counsel. Since the motion did not reflect that it had been served on Di Nos itself, I ordered counsel to indicate whether that service had been made. I also ordered counsel to supplement the motion. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Feb. 8, 2012) (Order to Supplement Motion to Withdraw as Counsel for Di Nos Shipping, Inc.). Counsel amended the certificate of service to reflect service on Di Nos and filed the supplement to the motion. Atlantic Shipping filed a response to the withdrawal motion objecting to any extension of the time for discovery. Then on February 29, 2012, Atlantic Shipping filed a motion for summary judgment with supporting materials.

I scheduled a telephone conference to discuss the motion to withdraw as counsel filed by Di Nos's counsel, the motion for summary judgment filed by Atlantic Shipping, and the shipping activities of Di Nos. In addition to counsel, I required a representative of Di Nos to appear. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Mar. 7, 2012) (Order Scheduling Telephone Conference).

The parties appeared for the telephone conference on March 8, 2011. The conference was recorded and the court reporter prepared and filed a transcript of the conference.

Counsel for Di Nos withdrew her motion for leave to withdraw as counsel and stated that she would continue to represent Di Nos. Orlando Spencer, the treasurer of Di Nos, appeared for Di Nos. Spencer was placed under oath and provided evidence about Di Nos's shipping activities. Atlantic Shipping's motion for summary judgment was converted to a brief on the merits, Di Nos was granted time to file a response, and Atlantic Shipping was granted leave to reply. *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, FMC No. 11-13 (ALJ Mar. 19, 2012) (March 19, 2012, Procedural Order). The parties have filed their briefs and other materials and the proceeding is ripe for an initial decision.

Based on the evidence presented by the parties, including the testimony of Spencer, I conclude that Di Nos has illegally operated as a non-vessel-operating common carrier (NVOCC) without a Commission license and the bond, proof of insurance, or other surety required by the Shipping Act. Accordingly, I enter an order requiring Di Nos to cease and desist its operations in violation of the Act.

II. REGULATORY FRAMEWORK.

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including ocean common carriers and two types of ocean transportation intermediaries.

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 term ‘ocean common carrier’ means a vessel-operating common carrier.” 46 U.S.C. § 40102(17).

“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, an ocean transportation intermediary must meet the Act’s definition of “common carrier.”

The statutory definitions are echoed in the Commission’s regulations. *See* 46 C.F.R. § 515.2(f) (common carrier); 46 C.F.R. § 515.2(m) (ocean common carrier); 46 C.F.R. § 515.2(o)

(ocean transportation intermediary, ocean freight forwarder, and non-vessel-operating common carrier).

Section 19(a) of the Act, applicable to NVOCCs and ocean freight forwarders (OFFs), requires a person² wanting to operate as an ocean transportation intermediary 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 entity violates section 19(a) of the Act if it operates as an ocean transportation intermediary (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 wanting to operate 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 intermediary violates section 19(b) of the Act if it operates as an ocean transportation intermediary (either as an ocean freight forwarder or as an NVOCC) without proof of financial responsibility.

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). *See also* 46 C.F.R. § 520.3(a) ("[A]ll common carriers

² "In determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Atlantic Shipping and Di Nos are persons within the meaning of the Shipping Act.

. . . shall keep open for public inspection, in automated tariff systems, tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established.”). A common carrier must notify the Commission’s Bureau of Trade Analysis of the location of its tariffs, and when it notifies the Commission of the location of its tariff, the Commission provides the common carrier with “a unique organization number.” 46 C.F.R. § 520.3(d). An ocean transportation intermediary violates section 8 if it operates as an NVOCC without having filed the tariff. An ocean freight forwarder is not a common carrier, so it does not file a tariff.

III. ATLANTIC SHIPPING’S AMENDED COMPLAINT.

The Amended Complaint alleges that Di Nos is violating the Shipping Act by “acting as a freight forwarder and or Non Vessel Operating Common Carrier” and “is not licensed by the . . . Commission [as] required by 46 U.S.C. § 40901(a) and without a bond, proof of insurance, or other surety as required by 46 U.S.C. § 40902(a). (Amended Complaint ¶¶ 5-7.)

Atlantic Shipping also claims that Di Nos uses a dock receipt form originally developed by Atlantic Shipping as a “dock receipt and bill of lading.” Atlantic Shipping contends that the “DI Nos form was copied from Atlantic’s form as to typography, layout and content, with the intent of confusing potential customers.” (Amended Complaint ¶¶ 8-12.)

As relief, Atlantic Shipping seeks:

1. An order enjoining [Di Nos], temporarily, preliminarily and permanently from operating as an ocean transportation intermediary without appropriate licensing and bonding;
2. An order enjoining [Di Nos], temporarily, preliminarily and permanently from operating using its current form of dock receipt and bill of lading.

(Amended Complaint at 3.)

IV. THE EVIDENTIARY RECORD AND THE BURDEN OF PERSUASION.

For the convenience of the parties and of the Commission for review, I have prepared an appendix to this decision containing the evidence (including the Verified Amended Complaint and Di Nos’s Verified Answer) submitted by the parties on which this decision is based. The findings of fact refer to the page in the appendix where the exhibit is found (App. #). All of the documents submitted by the parties are hereby admitted into evidence. This Initial Decision is based on the Verified Amended Complaint, Di Nos’s Answer, evidence, briefs and replies, proposed findings of fact and conclusions of law, and supplemental briefs and replies filed by the parties, and the sworn testimony of Orlando Spencer taken in the March 8, 2012, telephone conference. The transcript of

that conference is not included in the appendix. All of the documents in evidence were considered, even if they are not cited in this Initial Decision.

This Initial Decision addresses only material issues of fact and law. Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 98 (1981). Any proposed findings of fact not included in this Initial Decision were rejected either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the claim or the defenses thereto. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-194 (1959).

A complainant alleging a violation of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). See 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. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] 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. at 102. “[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).

V. FINDINGS OF FACT.³

1. Complainant Atlantic Shipping Company, Inc. (Atlantic Shipping), is a Massachusetts corporation with a principal place of business in Fall River, Massachusetts. (Amended Complaint ¶ 3 (App. 1); Atlantic Shipping Statement of Agreed Facts ¶ 1 (App. 5).)
2. Atlantic Shipping is an ocean common carrier (vessel-operating common carrier). (Atlantic Shipping Amended Complaint ¶ 4 (App. 1).)

³ To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. Similarly, to the extent any conclusion of law may be deemed a finding of fact, it should be considered a finding of fact.

3. Atlantic Shipping has notified the Commission of the location of its tariffs and the Commission has designated it FMC Org. No. 014150. (Official Notice pursuant to 46 C.F.R. § 502.226 of FMC of Vessel Operating Common Carriers, <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc>, last visited Apr. 2, 2012.)
4. Victor DePina is the president of Atlantic Shipping. (DePina Affidavit ¶ 1 (App. 7).)
5. Atlantic Shipping is in the business of shipping goods from Fall River to Cape Verde. (Atlantic Shipping Statement of Agreed Facts ¶ 21 (App. 6); DePina Affidavit ¶ 5 (App. 8) (“Atlantic, [*sic*] is in the business of carrying goods by sea, particularly between Massachusetts and Cape Verde.”).)
6. Respondent Di Nos Shipping, Inc. (Di Nos) is a Massachusetts corporation having a principal place of business in Brockton, Massachusetts. (Amended Complaint ¶ 5 (App. 1); Answer ¶ 5 (App. 5).)
7. Orlando Spencer (Spencer) is an officer and founder of Di Nos. (Spencer Affidavit ¶ 1 (App. 13).)
8. Di Nos, which means “ours” in Cape Verdean Creole, was formed by Anabel Lopes and Spencer to serve a need that they observed in their immigrant community of Cape Verdeans to send household goods – such as rice, used clothing, and shoes – to Cape Verde. (Spencer Affidavit ¶ 2 (App. 13).)
9. Di Nos is not licensed and has never been licensed by the Commission as an ocean transportation intermediary, either as a non-vessel-operating common carrier or as an ocean freight forwarder. (Transcript of Teleconference March 8, 2012 at 22.)
10. Di Nos does not operate ocean vessels. (Spencer Affidavit ¶ 8 (App. 14).)
11. Di Nos has solicited customers using an advertising brochure written in Cape Verdean Creole. (DePina Affidavit ¶ 2 (App. 7); Di Nos Shipping Corp brochure (App. 21).)
12. The translated text of the advertising brochure states “Di Nos Shipping Corp.; Drum \$60; Special on Container; Car; Crate” and lists Di Nos’s telephone numbers and address. (Di Nos Shipping Corp brochure translation (App. 22-23).)
13. Di No has advertised on radio and television that a shipper could ship goods to Cape Verde less expensively with Di Nos than with Atlantic Shipping. (DePina Affidavit ¶¶ 3, 4 (App. 8).)

14. Proprietary shippers, primarily Cape Verdeans living in and around Brockton, Massachusetts, bring barrels full of household goods to Di Nos for shipment to Cape Verde. (Spencer Affidavit ¶ 3 (App. 13).)
15. Di Nos charges a fee to provide services to customers seeking to transport goods to foreign ports, including those in Cape Verde. (Atlantic Shipping Statement of Agreed Facts ¶ 18 (App. 6).)
16. As found below, Di Nos has provided proprietary shippers with three versions of documents acknowledging receipt of the cargo.
17. At the time Atlantic Shipping commenced this proceeding, Di Nos provided shippers with Di Nos Dock Receipt Version 1. (Spencer Affidavit ¶ 3 (App. 13); Di Nos Dock Receipt Version 1 (App. 24).)
18. Di Nos Dock Receipt Version 1 has places for entry of the shipper's name and address, the receiver's name and address, identification and description of the cargo, indication of whether cargo insurance has been purchased, charges and fees, and date of arrival. (Di Nos Dock Receipt Version 1 (App. 24).)
19. Di Nos Dock Receipt Version 1 is substantially identical to the dock receipt used by Atlantic Shipping. (Atlantic Shipping Company Inc. Dock Receipt (App. 25).)
20. Di Nos Dock Receipt Version 1 states as Conditions of Contract:

By giving us shipment, you agree, regardless of where you sign the front of this dock receipt, for yourself or as an agent for and on behalf of any person having interest in this shipment, to all terms on this DOCK-RECEIPT, and as appropriate to all terms in the BILL OF LADING and any Di Nos shipping corp. agreement between you and Atlantic Shipping covering this shipment. Copies of Bill of lading are available upon request.

1. The SHIPPER is responsible for any **false statement** concerning the contents of packages.
2. The Shipper is responsible for insurance of cargo. The CARRIER is not responsible for any damage which, in case of accident, would be covered by an insurance company.
3. The handling of cargo outside the ship is at SHIPPER's risk and expenses.
4. The CARRIER is not responsible for any downgrading or damage of merchandises.
5. Paid freight charges are **not refundable**.
6. The CARRIER is not responsible for any risk or damage to cargo transported on deck.

CLAIMS - All claims for damages or losses must be sent to us in writing within 90 days from the date of your shipment arrival at port of destination. Please send all claims to Di Nos shipping corp. or our office address above. We will not be obligated to act on any claim from those charges.

(Di Nos Dock Receipt Version 1 (App. 24) (syntax as in original).)

21. Atlantic Shipping never entered into a contract with Di Nos and did not give permission for Di Nos to use Atlantic Shipping's name on Di Nos Dock Receipt Version 1. (DePina Affidavit ¶ 6 (App. 8).)
22. After Di Nos was contacted by Atlantic Shipping regarding identification of Atlantic Shipping in the Conditions of Contract, Di Nos stopped using Di Nos Dock Receipt Version 1 and began to provide shippers with Di Nos Dock Receipt Version 2. (Spencer Affidavit ¶ 3 (App. 13); Spencer Affidavit Exhibit 2 (Di Nos Dock Receipt Version 2) (App. 18).)
23. The places for entry of the shipper's name and address, the receiver's name and address, identification and description of the cargo, indication of whether cargo insurance has been purchased, charges and fees, and date of arrival on Di Nos Dock Receipt Version 2 are substantially identical to Di Nos Dock Receipt Version 1. (Di Nos Dock Receipt Version 2 (App. 18).)
24. Di Nos Dock Receipt Version 2 Conditions of Contract reads:

By giving us shipment, you agree, regardless of where you sign the front of this package no., for yourself or as an agent for and on behalf of any person having interest in this shipment, to all terms on this package no., and as appropriate to all terms in the bill of lading and any Di No's shipping corp. agreement between you and Di No's shipping covering this shipment. Copies of bill of lading are available upon request.

(Di Nos Dock Receipt Version 2 (App. 18) (syntax as in original).)

25. Di Nos currently provides shippers with a document called Di Nos Warehouse Receipt. (Spencer Affidavit ¶ 3 (App. 13); Spencer Affidavit Exhibit 1 (Di Nos Warehouse Receipt) (App. 17).)
26. The places for entry of the shipper's name and address, the receiver's name and address, identification and description of the cargo, indication of whether cargo insurance has been purchased, charges and fees, and date of arrival on Di Nos Warehouse Receipt are

substantially identical to Di Nos Dock Receipt Version 1. (Di Nos Warehouse Receipt (App. 17).)

27. Di Nos Warehouse Receipt states that Di Nos operates “as agent for III Star Freight Services, Inc.” (Di Nos Warehouse Receipt (App. 17).)
28. Di Nos Warehouse Receipt Conditions of Contract states:

By giving us shipment, you agree, regardless of where you sign the front of this warehouse receipt, for yourself or as an agent for and on behalf of any person having interest in this shipment, to all terms on this WAREHOUSE RECEIPT, and as appropriate to all terms in the BILL OF LADING and any Di No’s Corp. as Agent for III Star Freight Services, Inc. agreement between you and Di No’s Corp. as Agent for III Star Freight Services, Inc. covering this shipment. Copies of Bill of lading are available upon request.

1. The SHIPPER is responsible for any **false statement** concerning the contents of packages. 2. The Shipper is responsible for insurance of cargo. The CARRIER is not responsible for any damage which, in case of accident, would be covered by an insurance company. 3. The handling of cargo outside the ship is at SHIPPER’s risk and expenses. 4. The CARRIER is not responsible for any downgrading or damage of merchandises. 5. Paid freight charges are not refundable. 6. The CARRIER is not responsible for any risk or damage to cargo transported on deck.

CLAIMS - All claims for damages or losses must be sent to us in writing within 90 days from the date of your shipment arrival at port of destination. Please send all claims to Di No’s Corp. as Agent for III Star Freight Services, Inc. or our office address above. We won’t be obligated to act on any claim from those charges.

(Di Nos Warehouse Receipt (App. 17) (syntax as in original).)

29. Di Nos stores individual barrels of cargo received from proprietary shippers until Di Nos has enough barrels to fill a container. Di Nos then calls an entity named III Star Freight Services, Inc. (III Star). (Spencer Affidavit ¶ 4 (App. 14).)
30. III Star, FMC Organization Number 015112, is licensed by the Commission as a non-vessel-operating common carrier and as an ocean freight forwarder, FMC License Number 004416. (Official Notice pursuant to 46 C.F.R. § 502.226 of FMC NVOCC List,

http://www2.fmc.gov/oti/OTIList_NVO_TradeNames.aspx, last visited Apr. 2, 2012;
http://www2.fmc.gov/oti/OTIList_FF_TradeNames.aspx, last visited Apr. 2, 2012.)

31. III Star delivers an empty maritime container to Di Nos, Di Nos loads the individual barrels into the container, and III Star transports the container to the Port of Boston to be loaded on a vessel for transportation by water to Cape Verde. (Spencer Affidavit ¶ 4 (App. 14); Spencer Affidavit ¶ 11 (App. 15).)
32. III Star issues a bill of lading that identifies Di Nos as the shipper/exporter of the container, ANAV Shipping, Praia, Cape Verde, as the consignee, and the container by container number. (Spencer Affidavit ¶ 5 (App. 14); Spencer Affidavit Exhibit 3 (III Star bill of lading) (App. 19).)
33. III Star issues a dock receipt identifying Di Nos as the shipper of the container and ANAV Shipping as the consignee. (Spencer Affidavit ¶ 6 (App. 14); Spencer Affidavit Exhibit 4 (III Star dock receipt) (App. 20).)
34. There is no evidence that III Star issues a bill of lading or dock receipt identifying the proprietary shippers as the shipper.
35. When a container arrives in Cape Verde, the barrels are removed from the container and released to the consignees identified on the Di Nos dock receipt or warehouse receipt. (Spencer Affidavit ¶ 7 (App. 14).)

VI. CONCLUSIONS OF LAW.

A. Atlantic Shipping is a Vessel-Operating Common Carrier.

Atlantic Shipping alleges in its Amended Complaint that it is a vessel-operating common carrier (FF 2) and Commission records indicate that it has notified the Commission where to find its tariff and it has been assigned Commission organization number 014150. (FF 3.) Victor DePina is the president of Atlantic Shipping. DePina states: “Atlantic, [*sic*] is in the business of carrying goods by sea, particularly between Massachusetts and Cape Verde.” (FF 5.)

In its brief, Atlantic Shipping states: “Atlantic Shipping . . . is in the business of shipping waterborne cargo from the Port of Fall River, Massachusetts. It is a *licensed freight forwarder, regulated and inspected by the federal government*, including the Federal Maritime Commission and the Department of Homeland Security.” (Atlantic Shipping Brief at 1 (emphasis added).) Di Nos responds:

Atlantic comes to this tribunal with unclean hands and for an improper purpose, i.e. the elimination of competition. Petitioner asserts that Atlantic Shipping Company, Inc. is a licensed freight forwarder. *See* Memorandum of Law in Support of

Petitioner's Motion for Summary Judgment at 1. . . . However, no company by that name is listed on the FMC's licensed Ocean Transportation Intermediary or NVOCC list. See Exhibit iii. Thus, Atlantic is engaged in the very same unlicensed activities as Di Nos.

Atlantic asserts that "[It] is entitled to have its competition limited to entities that comply with the law." See Memorandum of Law at 5. This statement is the crux of the current proceedings pending before the FMC. Indeed this is a case about the desire to eliminate competition and not to ensure idealistic social and national security goals, as professed by Atlantic.

(Di Nos Brief at 6.) Di Nos provides a printout of Commission records indicating that Atlantic Shipping is not a freight forwarder licensed by the Commission.

Atlantic Shipping's statement that it is a "licensed freight forwarder" is puzzling. As Di Nos states, Atlantic Shipping is not licensed by the Commission as a freight forwarder or as an NVOCC. Atlantic Shipping is not in the business of forwarding cargo to a vessel-operating common carrier, however, but provides the ocean transportation itself. It has filed the proper form with the Commission indicating where its tariffs may be found and the Commission has assigned it a unique organization number. Since it is an ocean common carrier, it is not required to be licensed by the Commission as an ocean transportation intermediary.

I conclude that Atlantic Shipping is an ocean common carrier as defined by the Act and that Atlantic Shipping has properly notified the Commission of the location of its tariffs, and been provided with a unique organization number. The fact that it is not licensed by the Commission as an OTI is irrelevant.

B. Di Nos has operated as a non-vessel-operating common carrier.

In its Amended Complaint, Atlantic Shipping alleges that Di Nos violated the Shipping Act by "acting as a freight forwarder and or Non Vessel Operating Common Carrier" and that Di Nos is not licensed by the Commission and does not have a bond, proof of insurance, or other surety as required by the Act. (Amended Complaint ¶¶ 5-7.) Di Nos argues that:

[N]o license is necessary where Di Nos simply consolidates and loads individual barrels into a container, and all of the substantive transportation services are provided by a licensed ocean transportation intermediary, which according to its bill of lading, will provide compensation in the case of loss or damage in the amount of \$500 per barrel.

(Di Nos Brief at 1.) Di Nos also contends that it is not an ocean freight forwarder as defined by the Act and the Commission's regulations.

I agree with Di Nos that it does not operate as an ocean freight forwarder within the meaning of the Act. 46 U.S.C. § 40102(18). The findings of fact set forth above support a conclusion that Di Nos has been operating as a non-vessel-operating common carrier as defined by 46 U.S.C. § 40103(16).

First, Di Nos has held itself out to the general public as a common carrier. 46 U.S.C. § 40102(6)(A)(i). As set forth above, Di Nos has advertised in flyers, on radio, and on television that it provides shipping services. (FF 9-11.) Therefore, it has held itself out to the public as a common carrier.

Second, Di Nos assumed responsibility for the transportation of cargo from the point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii). Di Nos Dock Receipt Version 1, Di Nos Dock Receipt Version 2, and the Di Nos Warehouse Receipt are the functional equivalents of bills of lading. They identify the owner of the goods as the shipper in the United States, identify a consignee in Cape Verde, identify and describe the cargo, state whether cargo insurance has been purchased, indicate the charges and fees, and indicate the date of arrival. (FF 16-17, 19, 21-27.) It is reasonable to conclude that Di Nos is the “carrier” to which Di Nos Dock Receipt versions 1 and 2 and Di Nos Warehouse Receipt refer. Di Nos then is identified as the shipper on the III Star bill of lading. (FF 31.)

Third, the III Star bill of lading (*see* FF 31 and Spencer Affidavit Exhibit 3) establishes that Di Nos used 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. Di Nos is operating as an NVOCC when it handles shipments for its customers and is a shipper in relationship to III Star.

Di Nos argues that it does not perform the NVOCC services set forth in the Commission’s regulations. (Di Nos Brief at 4-5.)

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 evidence in the record proves by a preponderance of the evidence that Di Nos performs most of these services. It purchases transportation services and leases containers from III Star (FF 28-30), enters into affreightment agreements with underlying shippers (FF 16-17, 19, 21-27), issues bills of lading or equivalent documents (FF 16-17, 19, 21-27), arranges for inland transportation from Brockton to Boston (FF 30), and has an arrangement with ANAV, a destination agent (FF 31-32).

The District of Columbia Circuit described the operation of an NVOCC as follows:

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 [ocean freight forwarder], 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.

Landstar Express America, Inc. v. FMC, 569 F.3d 493, 495 (D.C. Cir. 2009) (*Landstar*) (citations omitted).

Di Nos fits precisely within the description articulated in *Landstar*:

- Di Nos does “not own or operate vessels to actually carry the cargo” (FF 9);
- Di Nos leases services from III Star (FF 30-32);
- Di Nos “consolidate[s] small parcels from multiple shippers bound for the same destination and arrange[s] for them to be shipped as a single, large, sealed container under one bill of lading” (FF 30);
- “Upon arrival, [Di Nos arranges] for the container to be broken down and for each parcel to be distributed to each customer” (FF 33);
- Di Nos “issues its own bill of lading to each shipper” (FF 16-17, 19, 21-27);
- III Star, a non-vessel-operating common carrier, issues a bill of lading to Di Nos (FF 31).

Di Nos argues that its activities do not come within the purpose of the Act.

The purpose of the Shipping Act, as it pertains to controlled carriers and ocean transportation intermediaries is to (1) establish non-discriminatory regulatory process for common carriage of goods by water in foreign commerce with a *minimum of government intervention*; (2) provide efficient and economically sound and efficient liner fleet of vessels capable of meeting national security needs; (3) encourage the development of US exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace. 46 U.S.C. § 40101 (emphasis added). Di Nos's activities do not contravene, or even implicate, these policies. Di Nos does not operate vessels, so its activities do not impact national security. Di Nos handles low-value household goods for a small immigrant community; as such its activities do not pertain to US competitiveness relating to exports.

(Di Nos Brief at 2-3 (emphasis in original) (footnote omitted).) In the omitted footnote regarding "small immigrant community," Di Nos states: "According to the 2010 census, Cape Verdeans make up only .3% of the population in the Commonwealth of Massachusetts. In the City of Brockton, which has one of the largest Cape Verdean populations in the country, there are only 6,868 Cape Verdeans." (*Id.* at 3 n.2.)

To protect the shipping public, the Act requires that NVOCCs be licensed by the Commission, have a bond, and file a tariff. There is no exception to this requirement for NVOCCs that handle barrel-size shipments for small immigrant communities.

The Di Nos Warehouse Receipt states that Di Nos operates "as agent for III Star Freight Services, Inc." (FF 26, 27.) In *Landstar*, the court held that an agent for a licensed non-vessel-operating common carrier need not be licensed by the Commission. "Agents providing NVOCC services for licensed NVOCC principals are not NVOCCs (or OFFs) solely by virtue of being agents of NVOCCs. They therefore fall outside the coverage of the statute's licensing requirement. The Commission lacks authority to compel those agents to obtain licenses." *Landstar*, 569 F.3d at 500.

In its brief on the merits, Di Nos does not cite *Landstar*, does not claim to be III Star's agent, or argue that it need not be licensed because it was operating as III Star's agent, not as an NVOCC. If it did, the argument would fail for at least two reasons.

First, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Although Di Nos describes itself as III Star's agent on its Warehouse Receipt, there is no evidence in the record that III Star manifested assent that Di Nos act as its agent.

Second, Di Nos did not function as an agent for III Star in its dealings with the shippers; that is, it did not act on behalf of III Star to create a contract of shipment between III Star and the proprietary shippers. "[A]n NVOCC agent that is authorized to form contracts on behalf of its

principal is not a party to those contracts if the NVOCC principal is disclosed.” *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. 185, 200 (2008) (Dye, Comm’r, dissenting). Di Nos and III Star are the parties on the III Star bill of lading with Di Nos as the shipper and III Star as the carrier. Di Nos, not III Star, entered into contracts with the proprietary shippers. The proprietary shippers do not have contracts with III Star. Therefore, Di Nos is not operating as III Star’s agent as contemplated by *Landstar*.

The Commission recently established a permissive presumption that may be used to establish whether an entity (licensed or unlicensed) involved in ocean transportation is operating as an NVOCC or as an ocean freight forwarder. This permissive presumption may also be used on the questions of whether an entity has held itself out as a common carrier and/or assumed responsibility for the transportation of a shipment. *Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 as well as the Commission’s Regulations at 46 C.F.R. 515.13, 515.21, and 520.3*, FMC No. 06-01, Order at 11-19 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part). In a subsequent decision, the Commission remanded another proceeding for reconsideration in light of the newly-established permissive presumption. *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, Order at 5 (FMC Apr. 12, 2012) (Order Vacating Initial Decision in Part, Reversing in Part, and Remanding for Further Proceedings).

In this proceeding, the evidence in the record firmly establishes that Di Nos operated as an NVOCC. Therefore, this decision has been reached without the use of the permissive presumption established in *Worldwide Relocations*.

Di Nos has operated as an NVOCC, but does not have a Commission license and does not have a bond. Therefore, I conclude that Di Nos has operated as an NVOCC without a license from the Commission as required by 46 U.S.C. § 40901(a) and without a bond, proof of insurance, or other surety as required by 46 U.S.C. § 40902(a).⁴

VII. SANCTIONS.

“[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,

⁴ As noted above, section 8 of the Act requires a non-vessel-operating common carrier to keep an automated tariff system open to public inspection. 46 U.S.C. § 40501(a). There is no evidence in the record that Di Nos filed a tariff. Since the Complaint did not allege that Di Nos failed to file a tariff, however, I do not make any findings or conclusions regarding the requirement to file a tariff.

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.

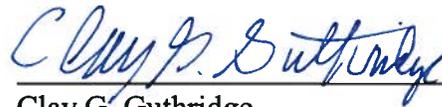
Di Nos has been operating illegally as an NVOCC. There is a reasonable likelihood that it will continue to do so if not ordered to cease and desist. Therefore, entry of a cease and desist order is appropriate.

Atlantic Shipping also seeks an order enjoining Di Nos using Di Nos Dock Receipt Version 1. The record supports a finding that it is no longer using this dock receipt. Furthermore, the order that it cease operating entirely subsumes an order that it stop using this dock receipt. Therefore, there is not a reasonable likelihood that it will continue this activity and no specific cease and desist order is necessary. Atlantic Shipping does not seek a reparation award.

ORDER

Upon consideration of the record herein, the arguments of the parties, the conclusion that respondent Di Nos Shipping, Inc., violated section 19(a) of the Shipping Act of 1984, 46 U.S.C. § 40901(a), by operating as a non-vessel-operating common carrier without holding an ocean transportation intermediary’s license issued by the Commission, and violated section 19(b) of the Act, 46 U.S.C. § 40902(a), by operating as a non-vessel-operating common carrier without a bond, proof of insurance, or other surety, it is hereby

ORDERED that Di Nos Shipping, Inc., cease and desist from violating sections 19(a) and 19(b) of the Shipping Act of 1984, 46 U.S.C. §§ 40901(a) and 40902(a), by operating as an ocean transportation intermediary in the United States without first obtaining an ocean transportation intermediary license from the Commission and providing evidence of financial responsibility.



Clay G. Guthridge
Administrative Law Judge