

ORIGINAL

S E R V E D
August 28, 2009
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 07-02

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

INITIAL DECISION OF CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE¹

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

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

² Owen Anderson operated Anderson International Transport as a sole proprietorship. I refer to Respondents as "Respondents," "AIT," "A.I.T.," or "Anderson."

³ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Section 8 of the Act is now codified at 46 U.S.C. § 40501(a) and sections 19(a) and (b) are now codified at 46 U.S.C. §§ 40901 and 40902. As exemplified by the Order of Investigation and

Commission's Bureau of Enforcement (BOE), Anderson chose not to participate further in this proceeding. BOE has submitted proposed findings of fact, supporting evidence, and a brief. Anderson has not filed responses to these filings and has not filed proposed findings, evidence, and argument. Therefore, this initial decision is predicated on the evidence and argument presented by BOE. Despite Respondents' failure to participate, "it is the Commission's responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties." *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd., et al.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001) (*Rose Int'l*).

PRELIMINARY STATEMENT

This proceeding is one of four currently on this Office's docket initiated by the Commission pursuant to 46 U.S.C. § 41302 to investigate the activities of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act. *See also Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, FMC No. 06-01 (Jan. 11, 2006) (Order of Investigation and Hearing); *Parks International Shipping, Inc., et al., – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 06-09 (Sept. 19, 2006) (Order of Investigation and Hearing); *Embarque Puerto Plata, Corp., et al., – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (ALJ July 21, 2007) (Order of Investigation and Hearing). The Commission commenced a fifth proceeding to investigate the activities of three OTIs licensed by the Commission as NVOCCs that appeared to have violated the Act in their dealings with allegedly unbonded and untariffed NVOCCs. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing).

As discussed more fully below, the Act recognizes two types of OTIs: NVOCCs and ocean freight forwarders. NVOCCs and ocean freight forwarders are involved in the business of international transportation by water of goods belonging to other persons, although neither operates vessels. In many respects, the services they perform are similar. The critical difference is that NVOCCs are by definition common carriers (*i.e.*, they hold themselves out to the general public to provide transportation by water, assume responsibility for the transportation of the goods, and use, 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)), while ocean freight

Hearing, the Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. I follow that practice in this decision.

forwarders are not common carriers, but arrange space for shipments with common carriers on behalf of shippers.

Section 8 of the Act requires an NVOCC to publish a tariff, section 19(a) requires an NVOCC to secure a license from the Commission, and section 19(b) requires an NVOCC to furnish a bond or other surety. Section 19(a) requires an ocean freight forwarder to secure a license from the Commission, and section 19(b) requires an ocean freight forwarder to furnish a bond or other surety. Since an ocean freight forwarder is not a common carrier, the Act does not require it to publish a tariff.

The five proceedings have a common issue: What activities distinguish operating as an NVOCC from operating as an ocean freight forwarder? Each of the unlicensed intermediaries alleged to have operated as OTIs had its own methods of operation. It is necessary to examine the evidence of what the intermediary did to determine whether it operated as an NVOCC or an ocean freight forwarder on a particular shipment, because "an intermediary's conduct, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (1991).

In this proceeding, the evidence presented by BOE supports a finding that respondents Anderson and AIT were not licensed by the Commission either as an ocean freight forwarder or as an NVOCC, did not furnish a bond, insurance, or other form of surety, and did not publish tariffs. Therefore, any shipment on which Respondents operated as an ocean freight forwarder would violate sections 19(a) and 19(b) the Act, and any shipment on which Respondents operated as an NVOCC would violate sections 8, 19(a) and 19(b) of the Act.

BOE has submitted into the record the shipping documents available to it of twenty-three individual shipments of goods.⁴ On each shipment, the owner of goods wanting to ship the goods overseas contacted Respondents. For convenience, I will refer to the owners of goods as proprietary shippers, a term borrowed from BOE in a related proceeding. Most proprietary shippers that contacted Anderson were individuals shipping new or used household goods or automobiles, although several were businesses shipping merchandise. In one of its submissions in Docket No. 06-06, BOE states, "Most of the individuals hiring entities to ship their household goods to a foreign destination are inexperienced shippers. In a majority of cases, it is the first time they have shipped any property overseas." *EuroUSA Shipping, Inc.*, FMC No. 06-06, Proposed Findings of Fact and Brief at 26 (May 22, 2009) (filed). That appears to be true with the individuals who contacted Anderson and AIT.

⁴ BOE argues that Anderson violated the Shipping Act on twenty-two shipments. The evidence shows that two transactions that BOE identifies as the "Clifton Watts shipment" are actually two shipments on different dates from different shippers to Clifton Watts in Jamaica. I treat these as two shipments.

BOE's evidence includes bills of lading issued by common carriers for the ocean transportation of twenty of the twenty-three shipments. On all twenty bills, a common carrier (not Anderson or AIT), following instructions sent to it by Anderson, identified the proprietary shipper as the shipper of goods being transported by water from the United States to a foreign port. On fifteen bills, the common carrier identified the shipper as the proprietary shipper "c/o" AIT at Respondents' address. On one bill, the common carrier identified the shipper as "Anderson International Transport as agents for" the proprietary shipper. On three bills, the common carrier identified the proprietary shipper "c/o AIT International, LLC" (or "c/o AIT Intl LLC") as the shipper. On one bill, the common carrier identified the shipper as "AIT International, LLC, as agents for [the proprietary shipper]." The bills of lading prove that each of the twenty shipments was transported by water from the United States to another country.

For two of the shipments for which bills of lading are not in the record, other documents support a finding that Respondents performed ocean freight forwarding services that resulted in common carrier transporting goods by water from the United States to a foreign port and that the common carrier issued bills of lading identifying the proprietary shipper as the shipper. On one shipment (Like New Auto Salvage), although Respondents performed ocean freight forwarding services, there is no evidence in the record to support a finding that the goods were ever transported by water from the United States to a foreign port. Therefore, Respondents are not found to have violated the Act on the Like New Auto Salvage shipment.

One issue stands out among the many present in this proceeding. BOE argues that there was no contractual relationship between the common carriers that issued the bills of lading (and carried the goods) and the proprietary shippers that the common carriers identified as shippers on the bills. (BOE Supplementation of Record at 22.) I disagree. The common carriers chose to accept business from Anderson, followed Anderson's instructions, issued bills of lading identifying the proprietary shippers as the shippers, and ultimately were paid (if paid) by funds that came from the proprietary shippers. "A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004).

By issuing the bills of lading identifying the proprietary shipper as the shipper, the common carriers entered into contractual relationships with the proprietary shippers, "assume[d] responsibility for the transportation [of the proprietary shippers' goods] from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(6), and acted as common carriers by water on the shipments. The Shipping Act is a remedial act and "should be broadly construed in order to enable an agency to give effect to the statute's salutary purposes." *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 209 (ALJ 1998) (*River Parishes v. Ormet*). It would be contrary to the Act's "salutary purposes" to permit a common carrier that issued a bill of lading to a proprietary shipper to avoid the responsibilities to the proprietary shipper set forth in the bill of lading and bar actions against it for reparations under the Shipping Act or damages in some other available forum because the unlicensed intermediary with which the common carrier chose to do business violated the Shipping Act. Since the Shipping Act is remedial, it should be liberally

construed and not read in a narrow manner to exclude jurisdiction, limit enforcement or otherwise restrict its scope.

For the reasons set forth below, I find that on twenty-three shipments in which Respondents were involved and for which BOE seeks a civil penalty, Respondents' services resulted in issuance of a bill of lading by a common carrier (not Anderson) identifying the proprietary owner of the goods being shipped as the shipper. The common carrier assumed responsibility directly to the proprietary shipper for the transportation by water of the goods, and Anderson performed the services that resulted in "dispatch[ing] shipments from the United States via [the] common carrier." 46 U.S.C. § 40102(18). Therefore, Respondents violated sections 19(a) and (b) of the Act by operating as an OTI (ocean freight forwarder) on twenty-two shipments. While some of Anderson's activities may have not be properly performed by an ocean freight forwarder, Anderson did not "provi[de] . . . transportation by water of cargo between the United States and a foreign country." 46 C.F.R. § 515.2(*l*). Therefore, Anderson did not violate section 8 of the Act by operating as an NVOCC without filing tariffs with the Commission.

The Act provides that a respondent is liable to the United States for a civil penalty for each violation of section 19. The maximum penalty is increased if the respondent willfully and knowingly violated the Act. Although BOE has proven that Anderson and AIT willfully and knowingly violated the Act on twenty-two shipments, BOE has not met its burden of persuasion to establish the amount of a civil penalty to be assessed. Therefore, no civil penalty is assessed. A cease and desist order preventing Anderson or AIT from operating as a OTI is appropriate and is issued as part of this decision.

This proceeding also presents a procedural issue regarding the requirements imposed on a party in a Commission proceeding for production and presentation of evidence and argument. This issue, applicable to all Commission proceedings governed by the Administrative Procedure Act (APA), is discussed more fully below.

BACKGROUND

I. REGULATORY REQUIREMENTS.

The Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of OTIs. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(19). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18). "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its

relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC, the intermediary must meet the Act’s definition of “common carrier.”

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

46 U.S.C. § 40102(6).

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

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

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

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

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

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

46 C.F.R. § 515.2(o)

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

46 C.F.R. § 515.2(f). *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 494-495 (D.C. Cir. 2009) (*Landstar*).

Section 8 of the Act requires “[e]ach common carrier and conference [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). Since an NVOCC is a common carrier, it must file a tariff. An intermediary violates section 8 if it operates as an NVOCC without having filed the tariff. An ocean freight forwarder is not a common carrier and does not file a tariff. Therefore, an OTI that operates as an ocean freight forwarder without having filed a tariff does not violate section 8.

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

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

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

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

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

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

“[A]n entity can operate as a freight forwarder and as an NVOCC.” (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.) An

intermediary that is licensed by the Commission as a freight forwarder and as an NVOCC must obtain separate proofs of financial responsibility for each type of operation. "The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC's transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services." (*Id.*) The bond is to be used to satisfy any civil penalty or order of reparations and "may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities." 46 U.S.C. § 40902(b).

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

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

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

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

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;

- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

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

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;
- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) paying lawful compensation to ocean freight forwarders;
- (7) leasing containers; or
- (8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

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

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters.

NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

(Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.)

II. ORDER OF INVESTIGATION AND HEARING.

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

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

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

1) whether Owen Anderson and Anderson International Transport violated section 8 of the 1984 Act and the Commission's regulations at 46 C.F.R. 520 by operating as an NVOCC without publishing tariffs showing rates and charges;

2) whether Owen Anderson and Anderson International Transport violated sections 19(a) and (b) of the 1984 Act and the Commission's regulations at 46 C.F.R. 515 by operating as an OTI in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds;

3) whether, in the event one or more violations of the 1984 Act or the Commission's regulations are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed; and

4) whether, in the event violations are found, appropriate cease and desist orders should be issued against Owen Anderson and Anderson International Transport;

Id. at 3. The Secretary served the Order on Anderson and AIT. (BOE App. 11-12.)⁵

III. PROCEDURAL HISTORY.

Initially, Anderson initially cooperated in the investigation. On August 20, 2007, the parties submitted a joint proposal for a procedural schedule. This proposal resulted in an order setting forth a deadline for discovery and submission of Rule 95 statements and tentative filing dates for a prehearing conference and submission of written materials and/or commencement of presentation of evidence. *Anderson International Transport*, FMC No. 07-02 (ALJ Sept. 6, 2007) (Discovery Schedule and Procedural Order). BOE filed its Rule 95 statement as required by the Order, but neither Respondent filed a Rule 95 statement.

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

⁵ Unless otherwise noted, "BOE App." followed by a number refers to a page in the Appendices filed with BOE's Proposed Findings of Fact, Amended Proposed Findings of Fact, and Revised Proposed Findings of Facts.

does not reflect whether Anderson responded to BOE's requests for production of documents. No attorney has entered an appearance for Respondents.

On February 15, 2008, BOE filed Proposed Findings of Fact and an accompanying Appendix containing the documents on which it based its proposed findings. On April 4, 2008, BOE filed a document entitled Amended Findings of Fact and Motion for an Order to Show Cause against Anderson International Transport and Owen Anderson and attached supplemental documents for the appendix. On November 4, 2008, I issued an Order finding that "BOE ha[d] not designated its proposed finding[s] of fact with sufficient specificity and ha[d] not adequately identified the evidence it claim[ed] support[ed] it proposed findings. Therefore, I [ordered] BOE to revise and refile its proposed findings of fact." *Anderson International Transport*, FMC No. 07-02, Memorandum at 5 (ALJ Nov. 4, 2008) (Memorandum and Order Requiring Bureau of Enforcement to Revise and Refile Bureau of Enforcement's Proposed Findings of Fact and Bureau of Enforcement's Amended Findings of Fact) (ordering BOE to file Revised Proposed Finding of Fact "designating specific facts supporting its claims and providing the Commission with the location of the evidence supporting each specific fact in the Bureau of Enforcement's Appendix"). I ordered BOE to file the revised proposed findings by November 21, 2008.

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

On November 21, 2008, BOE filed its Revised Proposed Finding of Fact designating specific facts supporting its contentions and providing the Commission with the location of the evidence supporting each specific fact in BOE's Appendix. In a preliminary review of the revised findings, I determined that BOE would need to clarify some of its claims and how they were supported by the evidence in the record. Therefore, I issued an order requiring the parties, and BOE in particular, to respond to a number of questions about the evidence. *Anderson International Transport*, FMC No. 07-02 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). That same day, I issued an order requiring Respondents to file the terms and conditions of the domestic Straight Bill of Lading – Short Form that Respondents had used in their business. *Anderson International Transport*, FMC No. 07-02 (ALJ Mar. 11, 2009) (Order for Respondents Anderson International Transport and Owen Anderson to File Document). On April 13, 2009, BOE filed its supplement. Respondents have not responded to either March 11 Order.

DISCUSSION

INTRODUCTION

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

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

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

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

5 U.S.C. § 557(c).

The Commission issued the Order of Investigation and Hearing to determine whether Respondents operated as an NVOCC without a tariff in violation of section 8 of the Act and whether Respondents operated as an OTI without a license or bond in violation of sections 19(a) and (b) of the Act. To prove a violation of section 8 of the Act (that is, that Respondents violated section 8 on a particular shipment), BOE must prove by a preponderance of the evidence that Respondents: (A) did not publish a tariff; and (B) operated as an NVOCC on that shipment by (1) holding themselves out to the general public to provide transportation by water; (2) assuming responsibility for the transportation of the goods; and (3) using 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. To prove a violation of sections 19(a) and (b) of the Act (that is, that Respondents

violated sections 19(a) and 19(b) on a particular shipment), BOE must prove by a preponderance of the evidence that Respondents: (A) did not have an OTI license (NVOCC or ocean freight forwarder) issued by the Commission; (B) did not have a bond, proof of insurance, or other surety; and (C) dispatched shipments from the United States via a common carrier OR operated as an NVOCC. If BOE proves that Respondents violated the Act on a particular shipment, then BOE has the burden of demonstrating what, if any, sanctions should be imposed. BOE seeks assessment of a civil penalty for each violation and issuance of a cease and desist order. BOE has the burden of persuasion to establish what, if any, civil penalty should be assessed for a violation, and what, if any, cease and desist order should be entered. 5 U.S.C. § 556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. at 276.

As set forth with greater particularity in the memorandum and findings of fact and conclusions of law below, the evidence in the record, including the documents prepared by Respondents and the bills of lading and other documents issued by the common carriers, proves by a preponderance of the evidence that Respondents were involved in the shipment of goods in the United States foreign trades and that all or part of the transportation of twenty-two shipments occurred on a vessel operating on the high seas between a port in the United States and a port in a foreign country. On each shipment, the proprietary shipper wanting to ship goods to a foreign destination contacted Respondents. Respondents performed the services necessary to arrange that transportation. A common carrier issued a bill of lading for the shipment identifying the proprietary shipper as the shipper, thereby establishing a contractual relationship with the shipper for the transportation of the goods by water from the United States to a foreign port. This is the essence of what ocean freight forwarders do: dispatch shipments on behalf of others to facilitate shipments by common carriers. As BOE states:

an ocean freight forwarder's services center on the 'dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier . . .' In fact by definition, an ocean freight forwarder only performs its intermediary services by arranging the transportation of cargoes outbound from the United States. Andrew D. Kehagiaras, NVOCC: Secret Agent?, 17 U.S.F. Mar. L.J. 207, 213 (2004-2005).

(BOE Supplementation of Record at 19.)

Respondents' own statements prove by a preponderance of the evidence that the Commission did not issue them a license to operate as an OTI (either as an NVOCC or as an ocean freight forwarder) and that they did not furnish a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility issued by a surety company found acceptable by the Secretary of the Treasury. Therefore, BOE has demonstrated by a preponderance of the evidence that respondents Owen Anderson and Anderson International Transport violated section 19(a) and 19(b) of the Shipping Act.

Respondents' own statements prove by a preponderance of the evidence that they did not 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 had been established. The answer to the question whether Respondents operated as an NVOCC on some or all of the shipments and were *required* to publish tariffs is more difficult. Although Respondents may have operated in violation of the Shipping Act and in ways that ocean freight forwarders are not permitted to operate, this does not necessarily mean that they “assumed responsibility for the transportation of the goods.” I find that BOE has not proven by a preponderance of the evidence that Respondents operated as an NVOCC on the shipments. Therefore, BOE has not proven that Respondents violated section 8 of the Shipping Act.

PROCEDURAL ISSUE – THE RESPONSIBILITY OF A LITIGANT IN A PROCEEDING BEFORE THE COMMISSION TO PRODUCE AND IDENTIFY EVIDENCE.

The responsibility of a party to produce and identify evidence that supports its contentions transcends the substantive issues in this particular proceeding and is applicable to any proceeding before the Commission subject to the provisions of the APA. Because of its general applicability and BOE’s contentions about its responsibility to produce and identify evidence, this issue warrants further discussion.

BOE contends that Respondents violated the Shipping Act by operating as an unlicensed OTI (NVOCC) and seeks imposition of a civil penalty in the amount of \$30,000 for each of twenty-two shipments of goods in which Respondents were involved. After I reviewed BOE’s initial proposed findings of fact, I ordered it to file revised proposed findings of fact “designating specific facts supporting its claims and providing the Commission with the location of the evidence supporting each specific fact in the Bureau of Enforcement’s Appendix.” *Anderson International Transport*, FMC No. 07-02, Memorandum at 5 (ALJ Nov. 4, 2008) (Memorandum and Order Requiring Bureau of Enforcement to Revise and Refile Bureau of Enforcement’s Proposed Findings of Fact and Bureau of Enforcement’s Amended Findings of Fact). In a preliminary review of BOE’s revised findings, I determined that BOE would need to clarify some of its claims and how they were supported by the evidence in the record. Therefore, I issued an order requiring BOE to respond to a number of questions about the evidence. *Anderson International Transport*, FMC No. 07-02 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

In its response to the March 11, 2009, Order, BOE argues that in this proceeding, a decision that meets the requirements of the APA can be made

without analyzing evidence on a shipment by shipment basis and without developing detailed findings on every subsidiary evidentiary fact. When BOE filed its detailed Revised Proposed Findings of Fact, in an abundance of caution and in order to clarify certain issues raised in the November 4, 2008 Order, BOE submitted Proposed Findings of Fact, chronologically for each shipment, setting out each significant action taken by Respondents, the underlying shippers and other entities involved with

the shipment. However, it is not BOE's position that this method was required by the APA nor that the APA requires a finding for every possible evidentiary fact. Under the APA, it is appropriate to make a finding that Respondents acted as an NVOCC and note the activities that support the finding.

(BOE Supplementation of Record at 4). I fundamentally disagree with BOE's contention.

BOE contends that Respondents committed twenty-two separate violations of the Act and seeks assessment of a civil penalty for each violation. The Shipping Act and section 7(c) of the APA (5 U.S.C. § 556(d)) place the burden on BOE to establish by a preponderance of the evidence that Respondents violated the Shipping Act on each shipment for which BOE seeks imposition of a civil penalty, the amount of a civil penalty to be assessed if a violation is found, and any other sanctions to be imposed. A party does not meet this burden by proposing a conclusory finding that it contends is supported by a mass of undifferentiated evidence. I also disagree with the contention implicit in BOE's Supplementation that a party in a Commission proceeding should not (or cannot) be required to set forth in detail the facts and the evidence upon which it relying to prove its case.

I. PRIOR ORDERS AND SUBMISSIONS FROM BOE.

A. Administrative Procedure Act and Shipping Act Requirements.

BOE does not dispute that the APA governs a Commission enforcement proceeding. (BOE Supplementation of Record at 2.) BOE claims that Respondents violated the Shipping Act on twenty-two shipments. Therefore, BOE has the burden of proving that Respondents violated the Act on each shipment. 5 U.S.C. § 556(d). If the evidence does not establish that Respondents violated the Act on a shipment, no further consideration is necessary. BOE seeks imposition of a civil penalty for each violation it alleges. Section 13 of the Shipping Act provides that "[i]n determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require." 46 U.S.C. § 41109(b). Therefore, if a violation of the Shipping Act is found for a particular shipment, BOE has the burden of establishing the amount that should be assessed as a penalty for that violation, taking into consideration the factors set forth in section 13 of the Act.

B. BOE's Proposed Findings of Fact and Amended Findings of Fact.

On December 21, 2007, I issued an Order requiring that:

[O]n or before February 15, 2008, the Bureau of Enforcement serve and file Proposed Findings of Fact. This document shall set forth proposed findings of fact in numbered paragraphs with a citation to evidence that BOE contends supports the proposed finding of fact. The parties can see an example of the format required for

the Proposed Findings of Fact at <http://www.fmc.gov/reading/Dockets.asp> in the proceeding *Clutch Auto, Ltd. v. International Touch Consolidator, Inc.*, FMC No. 1880(F), (“Served October 4, 2007, Procedural Order, Attachment A Administrative Law Judge Tentative Findings of Fact”).

Anderson International Transport, FMC No. 07-02 (ALJ Dec. 21, 2007) (Memorandum of December 21, 2007, Telephonic Prehearing Conference). On February 15, 2008, BOE filed Proposed Findings of Fact (BOE Proposed Findings of Fact) and an accompanying Appendix containing the documents on which it based its proposed findings.⁶ On April 4, 2008, BOE filed a document entitled Amended Findings of Fact and Motion for an Order to Show Cause against Anderson International Transport and Owen Anderson. This document proposed several additional facts and included additional documents.

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

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

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

⁶ On April 2, 2008, I granted BOE’s motion to substitute redacted documents 8, 10, 12, 16, 17, and 18 for documents 8, 10, 12, 16, 17, and 18 in its Appendix. *Anderson International Transport*, FMC No. 07-02 (ALJ Apr. 2, 2008) (Order Granting Bureau of Enforcement’s Motion to Substitute Exhibits).

⁷ “BOE Prop. FF” followed by a number refers to a proposed finding of fact in BOE’s Proposed Findings of Fact filed February 15, 2008.

services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007.”).

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

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

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

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

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

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

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

Third, in its Motion for Sanctions and an Order to Show Cause filed with its Amended Findings of Fact, BOE stated that Respondents “have originated twenty-two ocean export shipments during the period January 5, 2005 through May, 2007.” (BOE’s Amended Findings of Fact and Motion for an Order to Show Cause against [Respondents] at 5.) “Each shipment is a separate violation.” *Anderson International Transport*, FMC No. 07-02 (ALJ Apr. 2, 2008) (Notice of

Investigation and Hearing at 3). BOE is seeking a civil penalty of up to \$30,000 for each of the twenty-two alleged violations. (BOE's Amended Findings of Fact and Motion for an Order to Show Cause against [Respondents] at 6-7.) BOE did not identify specific facts for any of the twenty-two shipments that prove Respondents violated the Shipping Act in their handling of the shipment. I determined that BOE's general reference to twenty-two sets of documents containing 671 pages did not meet its burden of identifying specific facts demonstrating that Respondents violated the Shipping Act twenty-two separate times when they allegedly "provided international ocean transportation services as an ocean transportation intermediary for at least twenty-two shipments of household goods from the United States to foreign countries between January, 2005 and May, 2007" as claimed in BOE Proposed Finding of Fact 11. Therefore, I ordered BOE to "file Revised Proposed Finding of Fact designating specific facts supporting its claims and providing the Commission with the location of the evidence supporting each specific fact in [BOE's] Appendix." *Anderson International Transport*, FMC No. 07-02, Order at 5 (ALJ Nov. 4, 2008) (Memorandum and Order Requiring Bureau of Enforcement to Revise and Refile Bureau of Enforcement's Proposed Findings of Fact and Bureau of Enforcement's Amended Findings of Fact).

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

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

These "'anti-ferret' rule[s] aim[] to make the parties organize the evidence rather than leaving the burden upon the district judge." *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 80 (1st Cir. 2005). They can be enforced in several ways. Provided they do not conflict with Rule 56, procedures designating an efficient means to present evidence to the court may be established by local rule. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988); see also Fed. R. Civ. P. 83(a). Similar procedures may also be established by orders of individual district courts. See *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 931 (1st Cir. 1983); *Amnesty Am. v. Town of W. Hartford*, 288 F.3d

467, 471 (2d Cir. 2002); *see also* Fed. R. Civ. P. 83(b). In the face of a duly enacted rule, or once being put on actual notice by order of the court, “a party’s failure to comply [with such an ‘anti-ferret rule’] would, [where] appropriate, be grounds for judgment against that party.” *Stepanischen*, 722 F.2d at 931; *see also Nilsson*, 854 F.2d at 1545.

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

C. BOE’s Revised Proposed Findings of Fact.

On November 21, 2008, BOE filed its Revised Proposed Findings of Fact as required by the November 4 Order. The Revised Proposed Findings of Fact sets forth four proposed findings regarding the procedural history (RPFF 1-4),⁸ nine proposed findings regarding Respondents (RPFF 5-13), 145 proposed finding regarding the twenty-two shipments for which BOE is seeking a civil penalty (RPFF 14-158), four proposed findings regarding two shipments of goods after issuance of the Order of Investigation and Hearing (offered to support BOE’s argument that the Commission should issue a cease and desist order against Owen Anderson) (RPFF 159-162), twelve proposed findings regarding one shipment of goods after BOE filed its amended proposed findings (RPFF 164-175), and four proposed findings regarding a 1997 informal Commission investigation of Owen Anderson’s activities as an NVOCC (RPFF 176-179). BOE also submitted an additional eight documents consisting of twenty-seven pages to be considered as part of its Appendix.

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

⁸ “RPFF” followed by a number refers to a revised proposed finding of fact in BOE’s November 21, 2008, filing.

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

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

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

BOE also contended:

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

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

Evidence in the record demonstrates that on August 09, 2006, the United States Department of Transportation (DOT) issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport “to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce.” (BOE App. 268 (emphasis in original).) On each of the shipments for which BOE included a Straight Bill of Lading – Short Form, the evidence in the record suggested that Respondents issued a straight bill of lading to the owner of the goods and consigned the goods to A.I.T. in Houston or to an NVOCC or vessel-operating common carrier at a location in the United States. A vessel-operating common carrier or a non-vessel-operating common carrier then issued a bill of lading for the international (water) portion of the shipment identifying the proprietary shipper c/o Anderson International Transport or AIT International, LLC as the shipper. Therefore, I ordered the parties to respond to several questions regarding the use of domestic straight bills of lading in international shipments of goods by water. *Anderson International Transport*, FMC No. 07-02, Memorandum at 5-7 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).⁹

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

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

⁹ In a separate order, I ordered Respondents to file the terms and conditions applicable to their domestic straight bill of lading. *Anderson International Transport*, FMC No. 07-02 (ALJ Mar. 10, 2009) (Order for Respondents Anderson International Transport and Owen Anderson to File Document). Respondents did not file a response to this Order.

containing two vehicles from Houston to Kingston, Jamaica” (BOE RPF 55)).¹⁰ In contrast, BOE submitted 109 pages of documents for what BOE described as the Fiedel Udense shipment (BOE App. 340-438) and referred to twenty-three of those pages in support of eleven proposed findings of fact. (BOE RPF 83-93.)

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

(1) Which proposed findings of fact support a conclusion that Respondents held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation for that shipment. 46 U.S.C. § 40102(6)(i).

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

Anderson International Transport, FMC No. 07-02, Memorandum at 27 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

D. BOE’s Supplementation of Record.

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

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

¹⁰ With regard to this shipment, I note that the Commission’s regulations define “[p]reparing or processing . . . dock receipts” as a freight forwarding service. 46 C.F.R. § 515.2(i)(4).

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

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

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

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

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

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

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

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

(*Id.*)

II. DISCUSSION REGARDING PRODUCTION AND IDENTIFICATION OF EVIDENCE.

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

transportation of the goods from the port or point of receipt to the port or point of destination for that shipment.”.)

First, to support its contention that requirements of the APA can be satisfied without analyzing each shipment, BOE cites to cases discussing the requirements that an agency decision must meet in order to satisfy APA requirements. (See BOE Supplementation of Record at 2 n.1) These cases are inapposite to the burden placed on a litigant to identify the evidence supporting its contentions. The function of any litigant in a Commission APA proceeding (including BOE) is not to prepare an agency decision meeting the requirements of the APA that the administrative law judge presiding over the hearing reviews and accepts if it meets APA requirements. The function of a litigant is to present the evidence and argument that support the order that it seeks. 46 C.F.R. § 501.5(i)(1) (BOE participates as trial counsel in formal Commission proceedings when designated by the Commission). It is the function of the administrative law judge to render an initial decision in accordance with the APA. 5 U.S.C. § 557(b); 46 C.F.R. § 501.5(e); 46 C.F.R. § 502.223. It is then the function of the Commission itself to issue a final decision complying with the APA either by adopting the administrative law judge’s initial decision or by preparing its own decision. 5 U.S.C. § 557(c).

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

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

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

Tonolli Corp., 4 F.3d 1209, 1215 n.4 (3d Cir. 1993) (court has discretion to require filing of proposed findings and conclusions of law from the parties before trial).

The presiding officer reviews the proposed findings and evidence and may or may not agree that the evidence cited by the party supports the party's proposed finding of fact. While it is not necessarily improper for a judge to accept verbatim the findings proposed by a party, *see Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (adoption of proposed findings of fact submitted after trial), the presiding officer may also go beyond the evidence cited by the party and make findings or decline to accept the proposed finding based on evidence not referenced by that party. This is what has occurred in this proceeding.

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

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

Although BOE may be correct in its assertion that “utilizing a shipment-by-shipment analysis . . . is not an approach that is *required* in all situations,” it is the function of the presiding officer, not the litigant, to determine the approach to use for the initial decision in a particular case. The APA and Commission precedent cited by BOE clearly demonstrate that utilizing a shipment-by-shipment analysis is appropriate in this proceeding. *See, e.g., Refrigerated Container Carriers Pty. Ltd., – Possible Violation of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 801-802 (ALJ 1999) (finding facts regarding individual alleged violations); *Comm-Sino Ltd. Possible Violations of Section 10(a)(1) and 10(b)(1)*, 27 S.R.R. 1201, 1205-1206, Appendix A, Appendix B (I.D. 1997) (same).

BOE is seeking imposition of a civil penalty not to exceed \$30,000 for each violation. Therefore, Respondents’ activities on a particular shipment must be analyzed in order to determine whether Respondents violated the Act on that shipment.¹¹ By analyzing the shipping documents in this proceeding, I determined that what BOE describes as two “sub-shipments” of the “Clifton Watts Shipment” (RPF 27-40) was actually two shipments on two dates from two shippers consigned to Clifton Watts in Jamaica. (*See* BOE App. 107 (bill of lading issued by a common carrier August 15, 2005, identifying Mike European as the shipper and Clifton Watts as the consignee); BOE App. 71 (bill of lading issued by a common carrier September 23, 2005, identifying Clifton Watts Anderson International Transport as the shipper and Clifton Watts as the consignee).) I also determined that the shipment BOE describes as the “Fiedel Udense shipment” (RPF 83-93) was actually a shipment from Like New Auto Salvage, the party identified as the shipper on the bill of lading masters prepared by Respondents, to two different consignees. (BOE App. 352, 356.) More importantly, I determined that the Like New Auto Salvage shipment was canceled. (*See* BOE App. 420 (On December 1, 2006, respondent Owen Anderson sent an A.I.T. facsimile transmittal sheet from A.I.T. International LLC to Oceane Marine regarding Booking #851487590 stating: “Please cancel above booking made on our behalf with Maersk Line. We will be responsible for per diem, and freight charges. This will be paid directly to Maersk. Regards Owen.”).) BOE does not address the effect of the cancellation on its claim that Respondents violated the Act on the Like New Auto Salvage shipment. Since there is no evidence that these shipments ever left the United States (that is, no evidence that they were ever dispatched “from the United States via a common carrier,” 46 U.S.C. § 40102(18)(A), or “us[ed] for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country,” 46 U.S.C. § 40102(6)(A)(iii)), the evidence does not support a conclusion that Respondents violated the Act on this shipment.

Assuming a violation has been found on a particular shipment, the Shipping Act requires the Commission to “take into account the nature, circumstances, extent, and gravity of the violation

¹¹ In another proceeding, BOE acknowledged that it had the burden of showing that the respondent violated the Act on each shipment that BOE alleged was a violation. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations*, FMC No. 06-06, Transcript at 50-52 (Nov. 14, 2007) (transcript of argument on Tober Group, Inc.’s Motion for Summary Judgment). I take official notice of this transcript. 46 C.F.R. § 502.226.

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

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

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

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

I disagree with BOE: The procedural posture of *Low Cost Shipping* does not differ significantly from this proceeding. In *Low Cost Shipping*, the issue was whether Low Cost had violated the Shipping Act for seven shipments on which it appeared to have acted as an NVOCC and six shipments on which it appeared to have acted as an ocean freight forwarder “without a tariff, license, or the requisite bonds.” *Low Cost Shipping, Inc.*, 27 S.R.R. at 686. The Commission issued the Order in this proceeding because Anderson and AIT appeared to have operated as OTIs without a license, bond, and/or tariff. BOE has investigated Anderson and AIT’s activities and claim that on twenty-two shipments, Anderson and AIT operated as an NVOCC. In *Low Cost Shipping* and in this proceeding, the intermediary’s activities on each shipment must be examined to determine whether it acted as an NVOCC, an ocean freight forwarder, or neither.

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

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

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

Furthermore, if BOE's proposed finding of fact that "Anderson International Transport paid port-to-port or multimodal transportation charges; entered into affreightment agreements with underlying shippers; issued bills of lading or equivalent documents; arranged for inland transportation and paid for inland freight charges on through transportation movements" and its citation to 671 pages as support were considered to be an adequate designation of specific facts, then a proposed finding by Respondents that "Anderson International Transport did *not* pay port-to-port or multimodal transportation charges; enter into affreightment agreements with underlying shippers; issue bills of lading or equivalent documents; arrange for inland transportation or pay for inland freight charges on through transportation movements" and citation to the 671 pages would be equally adequate. It would then be left to the presiding officer or the Commission itself to "paw over the files," *Orr*, 285 F.3d at 775, (in this case, 671 pages) to identify the evidence relevant to the parties' contentions. This is not a burden properly borne either by the presiding officer or the Commission.

III. CONCLUSION REGARDING THE RESPONSIBILITY OF A LITIGANT IN A PROCEEDING BEFORE THE COMMISSION TO PRODUCE AND IDENTIFY EVIDENCE.

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

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

SUBSTANTIVE ISSUES

I. RESPONDENTS VIOLATED THE SHIPPING ACT BY OPERATING AS AN OTI.

The Commission issued the order of investigation and hearing to determine whether Respondents operated as an NVOCC without a tariff in violation of section 8 of the Act and whether Respondents operated as an OTI (either an ocean freight forwarder or an NVOCC) in violation of sections 19(a) and (b) of the Act. The Act has created and the Commission has recognized a system where the same intermediary can operate as an NVOCC and as an ocean freight forwarder. (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10, accessed July 27, 2009.) An intermediary that is licensed by the Commission as an ocean freight forwarder and as an NVOCC must furnish separate proofs of financial responsibility for each type of operation. "The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC's transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services." (*Id.*) On any particular shipment, an intermediary (whether licensed or unlicensed) that is involved in the shipment of goods by water from the United States to a foreign port¹² could be operating either as an ocean freight forwarder or as an NVOCC.

¹² Ocean freight forwarders licensed by the Commission only "dispatche[] shipments from the United States." 46 U.S.C. § 40102(18). Therefore, an OTI could not operate as an

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

A. BOE’s Contentions.

1. BOE’s Revised Proposed Findings of Fact.

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

BOE contends that:

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

- a) Based on information received from the shipper, Respondents provided a quote.
- b) Respondents invoiced the shipper for the shipment. The invoice generally was a flat fee for all services and reflected a mark-up by Respondents of the ocean freight charges.

ocean freight forwarder within the meaning of the Act on a shipment coming into the United States.

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

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

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

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

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

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

BOE continues:

With regard to the requirement that a common carrier assume responsibility for the transportation from the port or point of receipt to the port or point of destination, Commission cases also recognize that a carrier’s responsibility to the cargo is a factor to be considered separate from whether a carrier issued a bill of lading. [*Rose Int’l*,

29 S.R.R. at 162 (FMC 2001); *Containerships*, 9 F.M.C. at 62-65; *Puget Sound v. Foss*, 7 F.M.C. at 48.] A common carrier does not “lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment.” *Containerships* at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950).

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

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

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

I conducted a preliminary review of the BOE’s revised proposed findings of fact and the evidence cited in support of those findings. I made a preliminary determination that the evidence

supported findings that Respondents have not published tariffs (BOE App. 13 (Admission 5)), have never held a license issued by the Commission (*id.* (Admission 3)), have never provided proof of financial responsibility (*id.* (Admission 4)), and operated as an ocean transportation intermediary dispatching as many as twenty-two shipments of goods by water from the United States to a foreign country. (BOE App. 15-685.)¹³ Therefore, I found that the record as then constituted would support a finding that Respondents “operated as an ocean transportation intermediary without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds in violation of sections 19(a) and (b) of the Act.” *Anderson International Transport*, FMC No. 07-02, Memorandum at 2 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

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

In each case, the document on which BOE relied is a form entitled “*Bill of Lading Master*,” not “master bill of lading.” As the forms and their usage suggested that Respondents used a bill of lading master to provide instructions to a common carrier conveying the information to be included in the common carrier’s bill of lading, not the issuance of a bill of lading by which Respondents assumed responsibility for the transportation of the goods, I asked the parties to answer several questions regarding the bill of lading masters. *Anderson International Transport*, FMC No. 07-02, Memorandum at 3-5 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record). In response to the questions, BOE stated that “a bill of lading master is used to convey

¹³ BOE submitted documents related to twenty-two shipments in the Appendix filed with its original proposed findings of fact. On April 4, 2008, it submitted amended findings of fact with documents related to two more shipments. “BOE does not argue that these two shipments are additional violations by Respondents but submits the information to support its argument that a cease and desist order should be issued to Respondent Owen Anderson.” (BOE Revised Proposed Findings of Fact at 30.) BOE submitted additional documents regarding one more shipment with its Revised Proposed Findings to support its argument that a cease and desist order should be issued. (*Id.* at 32.)

shipment details to a vessel-operating common carrier (“VOCC”) or NVOCC. It may be conveyed by an [ocean freight forwarder] or NVOCC or by the shipper itself.” (BOE Supplementation of Record at 9.) BOE clarified that it does not contend that when Respondents prepared the bill of lading masters, Respondents were issuing bills of lading and assuming responsibility to the proprietary shippers for the transportation of the goods by preparing them. (*Id.* at 11.)

In its proposed findings of fact, BOE stated:

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

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

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

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

(Emphasis added.)¹⁴ Each document also states: “Shipper’s imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.”

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

Dirk Manuel	BOE App. 158 (St. B/L); BOE App. 155 (Star Shipping B/L)
Asekunle Osule	BOE App. 236 (St. B/L); BOE App. 228 (Star Shipping B/L)
Margret DeLeon	BOE App. 287 (St. B/L); BOE App. 275 (Finn Cargo B/L)
Barbara Downie	BOE App. 445 (St. B/L); ¹⁵ BOE App. 439 (Shipco Transport B/L)
Alex & Lynn Watts	BOE App. 478 (St. B/L); BOE App. 516 (Shipco B/L (to Issac Watts))
David Zinnah	BOE App. 563 (St. B/L); BOE App. 541, 542 (ACL B/L)
Richard Newman	BOE App. 578, 583 (St. B/L (2)); ¹⁶ BOE App. 576 (Seaboard Marine B/L)

¹⁴ The line of text “to deliver . . . at any time” is missing on the Huxtable straight bill of lading (BOE App. 618) and the line of text “interested in . . . Western and” is missing on the DeLeon (BOE App. 287) and the Watts (BOE App. 478) straight bills of lading. As these are copies of documents, it is not clear whether this text was intentionally deleted from these individual bills or the text is missing as a result of problems copying the documents. The Terms and Conditions of the straight bills of lading are not part of the record. *See Anderson International Transport and Owen Anderson - Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02 3 (ALJ Mar. 10, 2009) (Order for Respondents Anderson International Transport and Owen Anderson to File Document) (ordering Respondents to file straight bill of lading terms and conditions). Respondents did not file the terms and conditions.

¹⁵ The Downie straight bill of lading (BOE App. 445) is consigned to Shipco c/o Worldwide, Houston, Texas.

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

Claudette Dillon BOE App. 607 (St. B/L); BOE App. 595 (Econocaribe B/L)
Julia Huxtable BOE App. 618 (St. B/L); BOE App. 614 (Econocaribe B/L)
Nick Maniotes BOE App. 653 (St. B/L); BOE App. 664 (Mediterranean Shipping B/L)
George Hughes BOE App. 676, 680 (St. B/L (2));¹⁷ BOE App. 685 (CaroTrans Freight Inv.)

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

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

BOE Response: The question as written does not relate to the shipments at hand. Respondents did not issue a Straight Bill of Lading for the domestic leg of an international shipment of goods by water. Respondents issued as Straight Bill of Lading to the owner of goods and each straight bill was issued with a foreign port or location as its destination. Each bill of lading was rated on a through rate bases. See narrative preceding BOE’s Response to Question 2(a) above.¹⁸

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

BOE Response: The effect of identifying a foreign location as the “destination” of the shipment on a Straight Bill of Lading - Short Form brings the movement within the jurisdiction of the Shipping Act. A bill of lading serves as a

¹⁷ The 3/27/2007 Hughes straight bill of lading (BOE App. 680) is from Hughes consigned to AIT. The 4/24/2007 Hughes straight bill of lading (BOE App. 676) is from AIT International consigned to CaroTrans Intl., Charleston, SC. These bills are for two domestic legs of the same shipment.

¹⁸ BOE’s responses are found in BOE Supplementation of Record at 14-15.

document of title, evidence of the contract of carriage and a receipt of goods. By issuing a bill of lading with a foreign destination, Respondents have agreed to transport the goods to that destination and have assumed the responsibility for doing so. Issuing bills of lading and assuming responsibility for transportation of cargo in the foreign commerce requires an NVOCC license, a tariff covering the movement, and an appropriate bond.

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

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

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

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

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

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

(BOE Revised Proposed Findings of Fact at 41, *quoting Rose Int'l*, 29 S.R.R. at 162 (emphasis added by BOE).) The underscored language in BOE's quotation had its genesis in cases in which the question before the Commission was whether a carrier that had assumed responsibility for the transportation of goods should be classified as a common carrier or a contract or noncommon carrier. That seemed to me to be directed to the first element of the Shipping Act's three-element definition of common carrier: a common carrier "holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation."

46 U.S.C. § 40102(6)(A)(i). I asked the parties to address the issue of whether the fact that an OTI holds itself out as a common carrier has any probative value regarding whether it assumed responsibility for the transportation of a particular shipment. *Anderson International Transport*, FMC No. 07-02, Memorandum at 18-19 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

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

BOE Response: Yes. However, if a person was licensed as an NVOCC, or was operating unlawfully as an NVOCC, at the time it provided only freight forwarder services on a particular shipment, it would still be considered an NVOCC at that time, although not on that shipment.¹⁹

QUESTION 3(b): If so, what is the relevance (*see* Fed. R. Evid. 401) of the fact that the OTI holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation to the question of whether, on a particular shipment, the OTI acted as an ocean freight forwarder or an NVOCC, and, in particular, whether it assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination?

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

BOE argued that “[b]ased on the evidence detailed in BOE’s Proposed Findings of Fact, Respondents held themselves out and provided service to the general public for compensation and also assumed responsibility for transportation of the cargo.” It then listed a number of services that

¹⁹ BOE’s responses are found in BOE Supplementation of Record at 18.

it contends Respondents performed that support this conclusion. (BOE Revised Proposed Findings of Fact at 40-42.) To clarify which of those services would be performed by an NVOCC and which could be performed by an ocean freight forwarder, I included questions about those services when I required the parties to supplement the record. *Anderson International Transport*, FMC No. 07-02, Memorandum at 19-20 (ALJ Mar. 11, 2009) (Memorandum and Order Requiring Supplementation of Record).

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

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

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

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

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

b. Issuing a separate invoice to a shipper.

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

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

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

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

BOE responded: Both.

e. Issuing a domestic straight bill of lading.

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

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

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

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

BOE responded: Both.

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

BOE responded: Both.

i. Arranging for and purchasing insurance for a shipment.

BOE responded: Both.

j. Preparing a dock receipt for a shipment.

BOE responded: Both.

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

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

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

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

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

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

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

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

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

Respondents directly, and considered Respondents to be their customer. Similarly, Respondents considered the licensed NVOCCs to be providing service to them, not the underlying shippers. Accordingly, there was no contractual relation between the licensed OTIs and Mr. Manuel, Ms. Watt, and Respondents' other customers.

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

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

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

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

The March 11, 2009, Ordered stated:

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

compensation and which actions BOE contends support a conclusion that Respondents assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment. For each shipment, BOE is ordered to identify:

(1) Which proposed findings of fact support a conclusion that Respondents held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation for that shipment. 46 U.S.C. § 40102(6)(i).

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

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

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

(BOE Supplementation of Record at 24-25.)

B. Discussion of Respondents' OTI Activities.

- 1. Respondents Owen Anderson and Anderson International Transport Violated Sections 19(a) and (b) of the 1984 Act and the Commission's Regulations at 46 C.F.R. 515 by Operating as an OTI in the United States Foreign Trades Without Obtaining a License from the Commission and Without Providing Proof of Financial Responsibility in the Form of Surety Bonds.**
 - a. A Preponderance of the Evidence Demonstrates That Respondents Operated as an Ocean Freight Forwarder on Twenty-two Shipments of Goods by Water.**

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

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

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

States Government export regulations (*e.g.*, BOE App. 237-240); 46 C.F.R. § 515.2(i)(11) - handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments (*e.g.*, BOE App. 297); and 46 C.F.R. § 515.2(i)(12) - coordinating the movement of shipments from origin to vessel (*e.g.*, BOE App. 583).

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

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

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

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

The record contains separate bill of lading masters prepared by Respondents for each of two containers being shipped by Like New Auto Salvage. Respondents identified Like New Auto Salvage without a reference to Respondents as the exporter on each bill of lading master. (BOE App. 352, 356.) The record supports a finding that Respondents performed ocean freight forwarding services on the Like New Auto Salvage shipment. On December 1, 2006, however, respondent Owen Anderson sent an A.I.T. facsimile transmittal sheet from A.I.T. International LLC to Oceane Marine regarding the Like New Auto Salvage shipment stating: "Please cancel above booking made on our behalf with Maersk Line. We will be responsible for per diem, and freight charges. This will be paid directly to Maersk. Regards Owen." (BOE App. 420.) There is no evidence in the record on which to base a finding that the shipment was dispatched from the United States via a common carrier. 46 C.F.R. § 515.2(o)(1)(i).²⁰ Therefore, the record does not establish by a preponderance of the evidence that Respondents violated the Shipping Act on the Like New Auto Salvage shipment.

The evidence in the record demonstrates that Respondents were involved in twelve full container load (FCL) shipments (Clifton Watts shipment No. 1 (Mike European), Repairer of the Breach shipment, Dirk Manuel shipment, Kathleen Davidson shipment, Asekunle Osude shipment, Margret DeLeon shipment, Raymond Cooper outbound shipment, David Zinnah shipment, Michael Rose shipment, Abdelnasar Albalbisi shipment, Justina Licrish shipment, Ms. Libby Coker shipment) and ten less than container load (LCL) shipments (Two Trees Products shipment, Clifton Watts shipment No. 2 (Clifton Watts), Barbara Downie shipment, Dr. Solomon Saripalli shipment, Alex and Lynn Watts shipment, Richard Newman shipment, Claudette Dillon shipment, Julia Huxtable shipment, Nick Maniotes shipment, George Hughes shipment). On each of the FCL shipments, the common carrier issued a bill of lading for the container identifying the proprietary owner as the shipper. On each of the LCL shipments, the common carrier issued a bill of lading for the goods identifying the proprietary owner as the shipper, then presumably consolidated the proprietary shipper's goods with goods of other shippers into one container. There is no evidence in the record to suggest that Respondents themselves ever consolidated LCL shipments "from numerous shippers into larger groups for shipment by an ocean carrier." *Prima U.S. v. Panalpina*, 223 F.3d at 129. See also *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*,

²⁰ Likewise, there is no evidence in the record on which to base a finding that the shipment used a vessel operating on the high seas between the United States and a foreign country. 46 U.S.C. § 40102(6).

883 F.2d 93, 101 (D.C. Cir. 1989) (“NVOCCs consolidate and load small shipments from multiple shippers into a single large reusable metal container obtained from a steamship company, and ship the container by vessel under a single bill of lading in the NVOCC’s name.”). *Compare Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07, Initial Decision at 16 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo). The circumstantial evidence supports a finding that the common carrier issuing the bill of lading for an LCL shipment consolidated the shipment with the shipments of other shippers into one container.

On twenty-two shipments (not including Like New Auto Salvage), the documents prepared by Respondents and the bills of lading and other documents issued by the common carrier prove by a preponderance of the evidence that Respondents performed ocean freight forwarding services that resulted in dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. The evidence supports a finding that the common carriers knew that they were issuing bills of lading for goods belonging to the proprietary shippers, not Respondents, and that the proprietary shippers were paying for the transportation. Respondents contacted the common carriers as “Anderson International Transport” representing itself as a business involved in the international shipment of goods. Respondents instructed to identify the proprietary shippers as the shippers on the bills of lading.

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

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

On sixteen shipments for which bills of lading issued by common carriers are in the record, the common carrier also named respondent AIT in the shipper box. On twelve of those shipments, the common carrier identified the shipper as the proprietary shipper “%,” “c/o,” or “C/O” Anderson International or Anderson International Transport. (Mike European (BOE App. 107), Repairer of the Breach (BOE App. 122), Dirk Manuel (BOE App. 154-155), Asekunle Osule (BOE App. 228), Margret DeLeon (BOE App. 275), Raymond Cooper (BOE App. 300), Barbara Downie (BOE App. 439), Dr. Solomon Saripalli (BOE App. 447), Issac [sic] Watts (BOE App. 516), David Zinnah (BOE App. 543-545), Richard (BOE App. 576) Claudette Dillon (BOE App. 595).) On one shipment, the common carrier left out “c/o” or its equivalent. (Clifton Watts (BOE App. 71).) The

differences and omission are inconsequential. On one shipment, despite instructions on Respondents' Bill of Lading Master identifying the shipper as "Two Trees Products c/o Anderson International Transport" (BOE App. 33), the common carrier erroneously included AIT Worldwide Logistics as part of the address. (BOE App. 51 ("AIT Worldwide Logistics for Two Trees Products, c/o Anderson International").) AIT Worldwide Logistics apparently is not affiliated with Respondents and had no connection with this shipment. (BOE RPF 22-24; BOE App. 36.) Therefore, this difference is inconsequential and I find the shipper to be "Two Trees Products, c/o Anderson International." On one shipment, the common carrier inverted the proprietary shipper and AIT, identifying the shipper as "Anderson International Transport Julia Huxtable %." (BOE App. 614.)²¹ This difference is inconsequential. On one shipment, the common carrier identified the shipper as "Anderson International Transport as agents for Mr. Michael Rose." (BOE App. 628.) See 46 C.F.R. § 515.42(a) ("The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent."). This clearly indicates that the common carrier considered Michael Rose to be its shipper.

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

²¹ The bill of lading master identifies the exporter as "Julia Huxtable % Anderson International Transport." (BOE App. 612.)

c/o AIT International, LLC, as the exporter); BOE App. 683 (A.I.T. prepared a Bill of Lading Master identifying George Hughes ^ AIT International, LLC as the exporter).²²

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

[t]here is no evidence that any of Respondents' customers were aware of the bills of lading issued by the licensed NVOCCs, much less agreed to be bound by them. From the Manuel and Watt affidavits, we know that these two shippers had no knowledge that such documents existed, and it is reasonable to infer that Respondents' other shippers were similarly unaware. Mr. Kellogg, an experienced Commission investigator, has provided an affidavit attesting that it was standard practice for the actual shippers not to be aware of the bills of lading delivered to operators such as Respondents. The licensed NVOCCs providing service to Respondents invoiced and accepted payment from Respondents directly, and considered Respondents to be their customer. Similarly, Respondents considered the licensed NVOCCs to be providing service to them, not the underlying shippers. Accordingly, there was no contractual relation between the licensed OTIs and Mr. Manuel, Ms. Watt, and Respondents' other customers.

(BOE Supplementation of Record at 21-22.)

BOE cites the Manuel and Watt affidavits in which these proprietary shippers state they were not aware of the bills of lading issued by the common carriers for their shipments and extrapolates a claim that there is "no evidence that any of Respondents' customers were aware of the bills of lading issued by the licensed NVOCCs." This claim is contradicted by BOE's Revised Proposed Findings of Fact and the documents on which it relies. (See RPF 74 ("Anderson International Transport forwarded a proof (non-rated) copy of the Finn Container Line bill of lading and made requests for payment to Margret DeLeon." (BOE App. 10, P. 000269-000273, 000259); RPF 99 ("Anderson International Transport forwarded a copy of a bill of lading to Dr. Saripalli. (BOE App. 15, P. 000448)").²³ Other evidence in the record indicates that proprietary shippers were aware that

²² While the meaning of the "^^" symbol is not entirely clear, I note that the "5%" key is next to the "6^^" key on a standard keyboard. Therefore, I infer that this was a typographical error and that Respondents intended to use the "%" symbol that they often used for "c/o."

²³ BOE App. 448 is an invoice for the Saripalli shipment. The bill of lading issued by the common carrier for the Saripalli shipment is found at BOE App. 452.

common carriers (not Respondents) were transporting their shipments. Furthermore, BOE does not cite any Commission authority supporting its claim that a proprietary shipper must “be aware” of a bill of lading issued by a common carrier for the carriage of the shipper’s goods or “agree[] to be bound” by the bill of lading when an intermediary (whether licensed or unlicensed) “arranges space for those shipments on behalf of shippers.” 46 U.S.C. § 40102(18). On two bills of lading, the common carrier explicitly stated it was dealing with an intermediary as agent for the proprietary shipper.

The common carriers chose to accept business from Anderson, followed Anderson’s instructions, issued bills of lading identifying the proprietary shippers as the shippers, and ultimately were paid (if paid) by funds that came from the proprietary shippers. “A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.” *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004). See also *Prima U.S. v. Panalpina*, 223 F.3d at 129 (“If anything happens to the goods during the voyage the [common carrier] is liable to the shipper because of the bill of lading that it issued.”); *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-456 (S.D.N.Y. 2005) (the bill of lading is the [common carrier’s] contract with the shipper). By issuing the bills of lading identifying the proprietary shipper as the shipper, the common carriers entered into contractual relationships with the proprietary shippers, “assume[d] responsibility for the transportation [of the proprietary shippers’ goods] from the port or point of receipt to the port or point of destination.” 46 U.S.C. § 40102(6), and acted as common carriers on the shipments.

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

The proprietary shippers had the misfortune to select Respondents to help them move their goods to a foreign country. Respondents contacted the common carriers as “Anderson International Transport” representing itself as an intermediary involved in the international shipment of goods. Respondents instructed the common carriers to identify the proprietary shippers as the shippers on the bills of lading. Each common carrier that chose to accept business from Respondents knew (or

at least should have known) that Respondents were not licensed by the Commission and did not have a bond. Each common carrier followed the instructions from Respondents and issued a bill of lading identifying the proprietary owner in care of Respondents (or A.I.T. International, LLC) as the shipper, and on two occasions identifying the shipper as Respondents (or A.I.T. International, LLC) as agent for the proprietary shipper. Each common carrier that issued a bill of lading is an experienced common carrier. The evidence supports a finding that the common carriers knew that they were issuing bills of lading for goods belonging to the proprietary shippers, not Respondents, and that the proprietary shippers were paying for the transportation.

It is unlikely that an unlicensed intermediary such as Respondents would have any interest in pursuing a common carrier for any Shipping Act violations the common carrier may have committed. The common carriers incurred obligations to the members of the shipping public whom they identified as shippers on their bills of lading. BOE's position would leave proprietary shippers who have had the misfortune to use an unlicensed intermediary without a remedy against the common carrier that issued the bill of lading. BOE's contention that the common carriers can avoid their obligations and, equally important, that the bonds secured by the common carriers are not available to satisfy reparations for actual injury suffered by the proprietary shippers because of violations of the Shipping Act committed by the common carriers, arrives at an absurd or unreasonable result and contravenes the Congressional purpose of protecting the shipping public. Therefore, I find that on twenty-two shipments, when the common carrier issued a bill of lading identifying the proprietary shipper as the shipper, the common carrier established a contract of carriage with the proprietary shipper and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. Respondents acted as an ocean freight forwarder by performing freight forwarding services that facilitated each of the twenty-two shipments in violation of sections 19(a) and (b) of the Shipping Act.

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

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

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

As stated above, "[t]he term '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 on a particular shipment, the intermediary must meet all three elements of the Act’s definition of “common carrier.”

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

46 U.S.C. § 40102(6).

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

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

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

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

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

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

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

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

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

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

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

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

out,” assumption of responsibility for transportation, or transportation on a vessel on the high seas or Great Lakes – is *not* critical to a finding of NVOCC status, I disagree.²⁴

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

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

²⁴ In its review of the summary judgment entered for Tober Group, Inc., the Commission stated “[t]he conclusion in the ALJ Memorandum and Order that the element of assuming responsibility for transportation is more significant than the element of holding out in determining common carrier status does not appear to be consistent with Commission precedent or with the statutory definition of a common carrier. 46 U.S.C. § 40102(6)(A).” *EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06, Order at 17 n.5 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment). While I may have erred in characterizing the element of assuming responsibility for transportation as “more significant” than holding out, the element of assuming responsibility for transportation is not *less* significant than holding out. If an intermediary does not assume responsibility for the transportation by water of the goods, it cannot be an NVOCC on that shipment.

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

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

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

Id. at 776-777 (citation omitted).

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

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

property overseas should be classified as, and have the status of, 'common carriers by water'). The Hearing Examiner summarized the Board's standards controlling this questions as follows:

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

Id. at 252-253.

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

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

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

These provisions show that Weaver has not assumed sole responsibility to the shipper for the safe water transportation of shipments. Instead, it is a “forwarding agent” for the “convenience” of the shipper insofar as the water transportation part of the journey is concerned.

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

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

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

With regard to Railway Express, the Board stated:

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

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

Id. at 256 (emphasis added).

The Commission has recognized that a finding that an intermediary holds itself out as an NVOCC does not mean that the intermediary is an NVOCC on all shipments in which it was involved. In *Low Cost Shipping*, an unlicensed entity²⁵ was found to be an NVOCC for some shipments, but an ocean freight forwarder for other shipments. In other words, the fact that Low Cost held itself out as an NVOCC did not lead to a finding that it operated as an NVOCC on every international shipment by water in which it was involved. The Commission determined this status on a shipment by shipment basis by examining Low Cost's conduct on each shipment. *Low Cost Shipping*, 27 S.R.R. at 687.

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

*

*

*

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

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

BOE implies that the Commission's decision in *Low Cost Shipping* should be discounted because it "it has never been cited or relied upon by the Commission for the proposition promulgated in [*Anderson International Transport*, FMC No. 07-02, Memorandum at 20-27 (ALJ Mar. 11,

²⁵ At the time of the *Low Cost Shipping* decision, the Act did not require NVOCCs to be licensed.

2009)].” (BOE Supplementation of Record at 15.) It must be noted that *Low Cost Shipping* appears to be the only Commission decision that addresses the question of whether an unlicensed intermediary is operating as an NVOCC or as an ocean freight forwarder on a particular shipment. No case cited by BOE addresses this precise question and my own research has not found one.²⁶

BOE argues that

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

(BOE Supplementation of Record at 15-16.)

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

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

²⁶ While the issue was present in the Commission’s review of the summary judgment issued for Tober Group Inc., *EuroUSA Shipping, Inc., et al. – Possible Violations*, FMC No. 06-06 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment), the remand was predicated on the fact that findings of fact on disputed issues were made when deciding a motion for summary judgment. *Id.* at 22. *Possible Violations of Section 18(a)*, 19 F.M.C. 44 (ALJ 1975), presented a closely related issue – whether a tariffed NVOCC was operating as an NVOCC or as a shipper’s agent.

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

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

Id. at 46 (emphasis added).

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

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

Id. The Commission was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issuing a domestic straight bill of lading.

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

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

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

It is true that each straight bill of lading identifies a foreign country as the destination of the goods. Each also identifies an intervening domestic point, however. On ten shipments, Respondents issued a domestic straight bill of lading to the proprietary shipper identifying consigning AIT as the consignee. The bills include AIT’s Houston address in the caption.²⁷

Dirk Manuel (BOE App. 158)

Asekunle Osule (BOE App. 236)

Margret DeLeon (BOE App. 287)

Alex & Lynn Watts (BOE App. 478)

David Zinnah (BOE App. 563)

²⁷ No evidence in the record suggests that Respondents have a presence in any foreign country.

Richard Newman (BOE App. 578)

Claudette Dillon (BOE App. 607)

Julia Huxtable (BOE App. 618)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I conclude from the facts that:

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

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

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

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

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

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

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

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

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

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

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

(g) Respondents arranged for and forwarded all required documentation, including customs declarations, automobile title information and hazardous goods documents.

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

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

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

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

Arranging for and purchasing insurance for a shipment.

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

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

Preparing a dock receipt for a shipment.

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

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

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

Michael Rose” as the shipper. (BOE App. 628.) On the Justina Licrish shipment, the common carrier identified “AIT International, LLC, as agents for Justina Licrish” as the shipper. (BOE App. 667.) BOE does not cite any authority holding that failure to identify the forwarder as “the shipper’s agent” in violation of section 515.42(a) means the forwarder has assumed responsibility for the transportation of the goods and become a common carrier for that shipment.

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

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

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

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

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

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

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

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

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

C. Conclusion Regarding Respondents' OTI Activities.

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

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

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

II. SANCTIONS.

As sanctions for Respondents' violations of the Act, BOE seeks assessment of a civil penalty and entry of a cease and desist order. BOE has not met its burden to establish that a civil penalty should be assessed. BOE has established that entry of a cease and desist order is appropriate.

A. Civil Penalties Are Not Assessed Against Respondents for Their Violations of the 1984 Act and the Commission's Regulations.

Section 13(c) of the Act provides:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$6,000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).²⁸ Civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (2001); *Refrigerated Container Carriers Pty., Limited - Possible Violations*, 28 S.R.R. at 805. As the proponent of an order assessing a civil penalty, BOE has the burden of proving that a civil penalty should be assessed and the burden of establishing the amount of the civil penalty. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155.

"In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require." 46 U.S.C. § 41109(b). *See also* 46 C.F.R. § 502.603(b) ("In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.").

²⁸ The Act originally provided for maximums of \$5,000 and \$25,000. In 2000, before Respondents committed these violations, the Commission increased these amounts to \$6,000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table)).

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

Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805-806 (ALJ 1999, admin. final May 21, 1999).

BOE argues that a civil penalty should be assessed against Respondents.

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

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

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

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

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

1. Burden of Persuasion to Establish a Civil Penalty and its Amount.

Relying on *Merritt v. United States, supra*, BOE's contends that Respondents "fail[ed] to meet [their] ultimate 'burden of persuasion' in justifying a reduction of the civil penalties otherwise applicable." *Merritt's* holding on this point is no longer good law.

In *Merritt*, the Commission ordered an investigation and hearing to consider claims that respondent Merritt and corporations under his control had committed violations of the Shipping Act. Merritt "assiduously avoided" participating in the proceeding before the ALJ, and refused to produce financial information. After the ALJ closed the record, but before the ALJ issued the initial decision, Merritt submitted a letter claiming a lack of resources and requesting a hearing on his ability to pay any civil penalty that the Commission might assess against him. The ALJ denied Merritt's request for hearing. The Initial Decision found that Merritt had violated the Act and imposed a civil penalty. The ALJ listed the factors that the Act requires the Commission to consider before imposing a penalty, including ability to pay, but did not set forth any specific findings on Merritt's ability to pay the penalty assessed. On appeal, the Commission adopted the Initial Decision, finding that the ALJ had adequately considered all the factors that the Act required, including ability to pay. Merritt petitioned for review by the Second Circuit, contending that neither the ALJ nor the Commission considered his individual ability to pay and that this omission constituted a clear error of law. *Merritt*, 960 F.2d at 16-17.

The court agreed with Merritt's contention that his failure to participate in the proceeding did not relieve the Commission of its burden of going forward with evidence of Merritt's ability to pay before requiring the ALJ to consider his resources and the effect a fine would have on him. *Id.* at 18. The Second Circuit then set forth the principle on which BOE relies:

The [APA] provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). "[B]urden of proof," as used in section 556(d), *refers only to the burden of going forward with evidence, not the burden of persuasion.* See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403-04 n.7, 103 S. Ct. 2469, 2475-76 n.7, 76 L. Ed. 2d 667 (1983). Thus, absent a statutory burden-shifting provision – which section 13(c) does not contain – an agency must introduce initial evidence on an issue when it proposes a rule or an order.

Id. (emphasis added).

In *Transportation Management*, the National Labor Relations Board (NLRB) alleged that an employer had fired an employee because of his union activities. The employer claimed that it had fired the employee for other reasons. The NLRB imposed the burden on its General Counsel to persuade the Board that anti-union animus contributed to the employer's decision to fire the employee, a burden that does not shift. Even if the employer failed to meet or neutralize the General Counsel's showing of anti-union animus, the employer could avoid a finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union. *Transportation Management*, 462 U.S. at 394-395.

The employer argued that placing the burden of persuasion on the employer contravened section 556(d) of the APA. The Court rejected this argument, holding that section 556(d) "determines only the burden of going forward, not the burden of persuasion." *Transportation Management*, 462 U.S. at 404 n.7. The *Merritt* holding on which BOE relies is based on this holding.

In 1994, two years after the Second Circuit decided *Merritt*, the Supreme Court reconsidered the meaning of "burden of proof" in section 556(d) of the APA. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). The Court engaged in an extensive discussion of how the meaning of burden of proof had evolved. *Id.* at 272-275. The Court concluded that:

We interpret Congress' use of the term "burden of proof" in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment. These principles lead us to conclude that the drafters of the APA used the term "burden of proof" to mean the burden of persuasion.

Id. at 275-276 (citations omitted).

The Court acknowledged that it had "previously asserted the contrary conclusion as to the meaning of burden of proof in [section 556(d)] of the APA." *Id.* at 276. The Court discussed and explicitly rejected its holding *Transportation Management*. *Id.* at 276-278. The dissent noted that *Merritt* was one of several circuit court decisions that understood the Court had established the meaning of "burden of proof" to be "burden of production" in *Transportation Management*. *Id.* at 290-291 (Souter, J., dissenting).

Merritt's holding that the Shipping Act does not contain a provision shifting the burden to a respondent to persuade the Commission that a civil penalty should be mitigated is still valid. *Merritt's* holding that under the APA, "burden of proof" refers only to the burden of going forward with evidence, not the burden of persuasion, has been overruled by the Supreme Court in *Greenwich Collieries*. Therefore, BOE has the burden of establishing that a civil penalty should be imposed,

and if so, the amount of the civil penalty that should be assessed. Respondents did not “fail[] to meet [their] ultimate ‘burden of persuasion’ in justifying a reduction of the civil penalties otherwise applicable” as BOE contends because Respondents do not bear this burden.

2. Determining the Amount of a Civil Penalty.

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

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

Universal Logistic Forwarding Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 323, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (2002).

As set forth above, the evidence establishes that Respondents violated section 19(a) of the Act by operating as an OTI in the United States foreign trades without obtaining a license from the Commission and violated section 19(b) of the Act by operating as an OTI without providing proof of financial responsibility in the form of surety bonds. Therefore, Respondents are liable to the United States Government for a civil penalty for each violation. The civil penalty may not exceed \$6,000 for each violation, unless BOE establishes that it was willfully and knowingly committed, in which case the penalty may not exceed \$30,000 for each violation. 46 U.S.C. § 41107(a).

a. “Willfully and Knowingly.”

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

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. A violation of section 10(b)(1) could be termed “willful” if the carrier knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act.” The Supreme Court cited with approval this “reckless or careless disregard” standard in *Trans World Airlines, Inc. v. Thurston*, 469 US 111, 125-129 (1985).

Trans-Pacific Forwarding, Inc – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 S.R.R. 409, 412 (ALJ Dec. 12, 1995), FMC notice of finality, Feb. 9, 1996.

BOE contends that Respondents “knowingly and willfully” violated the Act on each violation; therefore, Respondents are liable for a civil penalty for each violation at the augmented amount. BOE has the burden of persuasion on this issue. BOE has established by a preponderance of the evidence that respondent Owen Anderson has been aware of the Shipping Act and its requirements since at least 1997. On January 15, 1997, BOE opened an investigation into respondent Owen Anderson based on information made to the Commission. The Commission’s New Orleans Area Representative (NOAR) interviewed Anderson about the shipment of household goods and automobiles by respondent Anderson and International Transport Systems, Inc. (“ITS”), a company owned by Anderson that was alleged to be operating as an NVOCC without a tariff or bond. Apparently, it was determined at some point that ITS’ activities were covered by an NVOCC bond issued by American Contractors Company in the amount of \$50,000. The bond was canceled effective November 26, 1997. ITS also maintained a tariff. Its CARGO, N.O.S. tariff was cancelled on December 1, 1997, for failure to maintain a valid surety bond. The NOAR reviewed with Anderson the requirements and obligations of a licensed ocean freight forwarder and the tariff and bond requirements for NVOCC activity. (Kellogg Affidavit.)²⁹

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

²⁹ BOE submitted the four-page affidavit of Alvin Kellogg signed on February 14, 2008. BOE numbered the first three pages 000686-000688. The fourth page is not numbered. BOE later submitted two other pages numbered 000687 and 000688. (BOE’s Appendix to Amended Findings of Fact at 687-688.) To minimize confusion, I will cite to this submission as the “Kellogg Affidavit” instead of appendix page number.

b. Balancing the Eight Factors.

The manner in which Congress phrased the statute divides the factors into those that related to the violation (in this case, each shipment) itself (“the nature, circumstances, extent, and gravity of the violation committed”) and those that relate to the violator (“with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require”). See *Universal Logistic Forwarding Co., Ltd., supra* (determining a civil penalty “requires the weighing and balancing of eight factors set forth in law”)

Although BOE contends that a “significant” (BOE Revised Proposed Findings of Fact at 45) or “substantial” (*id.* at 46) civil penalty is appropriate, it does not attempt to define “significant” or “substantial” or suggest a dollar figure for the civil penalty, either a total amount or an amount for each violation. Other than its argument that Respondents willfully and knowingly committed the violations and its contention that Respondents have not met their “ultimate ‘burden of persuasion’ in justifying a reduction of the civil penalties otherwise applicable,” BOE does not propose any specific findings on the section 13 factors or suggest how the factors should be weighed to arrive at an appropriate civil penalty in this proceeding. Although it does not say that the maximum penalty should be assessed in this proceeding, BOE states “[i]n certain past cases, the Commission has assessed the statutory maximum in cases where a respondent has defaulted and no evidence on ability to pay and no mitigating evidence has been presented.” (BOE Revised Proposed Findings of Fact at 46.) These cases rely at least in part, however, on the respondents’ failure to produce “mitigating evidence,” a burden that neither the APA nor the Shipping Act imposes on a respondent.

BOE recognizes that the Commission must 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), and “must make specific findings with regard to each factor.” (BOE Revised Proposed Findings of Fact at 45-46.) Nevertheless, although it has the burden of establishing the appropriate amount of the civil penalty that should be assessed, BOE has not proposed how the Commission should take those factors into account.

“Ability to pay” requires particular attention. In *Merritt*, the Second Circuit held that “the Commission was the proponent of the order imposing fines Section 13(c) makes clear that the Commission may impose a fine *only if it takes into account the ability to pay of the violator.*” 960 F.2d at 17 (emphasis added). BOE did not present evidence of Anderson and AIT’s ability to pay in this proceeding.

On April 20, 2007, BOE served interrogatories and requests for production of documents on Respondents. (BOE App. 2-9) The requests for production of documents sought tax returns, cash flow and profit/loss reports, and other financial records that would provide evidence of the ability of Owen Anderson and Anderson International Transport to pay a civil penalty. (BOE App. 7-8 (BOE First Interrogatories and Requests for Production of Documents Directed to Owen Anderson and Anderson International Transport, Requests for Production of Documents 1-5).) Respondents

eventually answered the interrogatories. (BOE App. 10.) At some point, BOE served requests for admission on Respondents that they answered. (BOE App. 13-14.) BOE does not state whether Respondents ever responded to the request for production of documents.

Commission rules provide a remedy to BOE when a respondent does not respond to discovery. BOE took advantage of that remedy in another proceeding for which an initial decision is entered today. *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo).

In that proceeding, BOE served discovery on Mateo Shipping and Mateo that is substantially identical to that served on Owen Anderson and Anderson International Transport. As with Owen Anderson and Anderson International Transport, respondents Mateo Shipping and Mateo failed to respond. BOE filed a motion to compel responses to the discovery and I ordered Mateo Shipping Corp. and Julio Mateo to respond. *Embarque Puerto Plata, Corp., et al. – Possible Violations*, FMC No. 07-07 (ALJ Nov. 6, 2008) (Memorandum and Order on Motion to Compel Discovery and Response to Interrogatories Directed to Mateo Shipping Corp. and Julio Mateo). When Mateo Shipping and Mateo still failed to respond to the discovery, BOE filed a motion for sanctions based on Commission Rule 210. *See* 46 C.F.R. § 502.210(a)(2) (as a sanction for violation of a discovery order, the presiding officer can enter “an order that with respect to matters regarding which the order was made or any other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order.”). Relying on that authority, I entered an order drawing “the inference that the financial information would demonstrate that Mateo Shipping Corp. and Julio Mateo have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed.” *Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07 (ALJ Aug. 28, 2009) (Memorandum and Order on Bureau of Enforcement’s Motion for Sanctions Against Mateo Shipping Corp. and Julio Mateo).

BOE did not take advantage of this process in this proceeding. While the record indicates that Respondents Owen Anderson and Anderson International Transport answered the interrogatories and requests for admission, BOE does not state whether Respondents produced the requested documents, and the record does not contain any indication whether Respondents produced the requested documents. If they did not produce the requested documents, BOE had the option of moving to compel production as it did in FMC No. 07-07. It did not do so.

In *Merritt*, the Second Circuit held that

Section 13(c) makes clear that the Commission may impose a fine only if it takes into account the ability to pay of the violator. . . . [T]he Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

Merritt v. United States, 960 F.2d at 17. In *Dazzio v. F.D.I.C.*, the Board of Directors, FDIC, applied a civil penalty provision similar to the civil penalty provision in the Shipping Act. *Dazzio v. F.D.I.C.*, 970 F.2d 71, 78 (5th Cir. 1992). “[T]he Board . . . essentially relied on Dazzio’s refusal to construct a detailed financial statement in concluding that he must have sufficient assets to be able to pay a substantial penalty.” *Id.* at 77-78. Applying the Second Circuit’s reasoning in *Merritt*, the court found that “[t]he FDIC in no way satisfied its burden of production of evidence.” *Id.* at 78.

We do not hold that in weighing the evidence the Board may not employ the recognized principle that a party’s failure to produce evidence under his control may, in an appropriate instance, give rise to a permissive inference that the evidence would be unfavorable to that party. But this does not justify changing the statutory burden of production, which is precisely what the Board did here, as the Second Board Order states that “the Board placed on him [Dazzio] the burden of producing evidence to establish his financial condition.” Moreover, the record does not reflect, and neither the Board nor the Second ALJ ever found, that Dazzio had failed to produce any record or document called for by the Board’s December 1989 order that was then or at any time thereafter in existence and subject to Dazzio’s control or that Dazzio ever destroyed any relevant documents or the like. Indeed, nothing in the Board’s December 1989 order fairly put Dazzio on notice that the FDIC was to be relieved of its burden of producing evidence.

Id. The court reversed the assessment of the civil penalty. *Id.* at 82.

BOE, the party with the burden of production of evidence and the burden of persuasion, does not propose how the Commission should take into account the section 13 factors to arrive at an appropriate civil penalty in this proceeding. BOE has not submitted any evidence from which a finding on Respondents’ ability to pay a civil penalty can be based. While Commission Rule 210 provides a process by which an adverse inference may be drawn against a respondent who does not produce information sought in discovery, BOE has not taken advantage of this process.

Although BOE has established that Respondents willfully and knowingly violated the Act on twenty-two shipments, BOE has not met its burden of production of evidence regarding Respondents’ ability to pay a penalty and has not met its burden of persuasion regarding the amount of civil penalty to be assessed. Therefore, no civil penalty can be assessed.

3. Conclusion Regarding Civil Penalty.

BOE seeks the assessment of a civil penalty; therefore, it has the burden of persuasion to demonstrate by a preponderance of the evidence that Respondents violated the Shipping Act and are liable to the United States for a civil penalty. As set forth above and in the findings of fact and conclusions of law below, BOE has met its burden of persuasion and demonstrated that Respondents committed twenty-two violations of the Shipping Act. Therefore, Respondents may be liable to the United States for a civil penalty for each of the twenty-two violations. Furthermore, in order for

Respondents to be liable for a civil penalty not to exceed \$30,000, BOE has burden of persuasion to demonstrate by a preponderance of the evidence that Respondents willfully and knowingly committed the violations. BOE has met its burden of persuasion and demonstrated that Respondents willfully and knowingly committed each violation; therefore, the amount of the penalty may not exceed \$30,000 for each violation.

Since BOE is the party seeking an order assessing of a civil penalty, it has the burden of persuasion to demonstrate the amount of the civil penalty to be imposed. With regard to the section 13 factors for which there is evidence in the record, BOE does not set forth any argument about how those factors should be balanced “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law.” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018.³⁰ With regard to Respondents’ ability to pay a civil penalty, BOE has neither provided evidence nor taken advantage of the Commission’s rules to obtain an inference based on Respondents’ failure to respond to discovery seeking this information. Therefore, even if BOE had provided argument regarding the other factors, the Second Circuit’s decision in *Merritt* would preclude entry of a civil penalty.

I find that respondents Owen Anderson and Anderson International Transport have committed twenty-two violations of the Shipping Act. Respondents willfully and knowingly committed each violation; therefore, assessment of a civil penalty that may not exceed \$30,000 is appropriate for each violation. BOE has not met its burden of persuasion to establish the amount of the civil penalty to be imposed. For the section 13 factors for which there is evidence in the record, BOE has not established how the Commission should take into account to ensure that the penalty is tailored to the particular facts of the case. There is no evidence in the record regarding Respondents’ ability to pay a civil penalty. Since I am not able to “take[] into account the [Respondents] ability to pay,” I cannot make a “specific finding[] with respect to each of the factors set forth in section 13(c).” *Merritt v. United States*, 960 F.2d at 17. Therefore, I am unable to assess a civil penalty against Respondents.

B. Cease and Desist Orders Are Issued Against Owen Anderson and Anderson International Transport.

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

³⁰ I note that in *Cari-Cargo*, “Hearing Counsel, on brief, . . . considered the evidence and . . . provided specific recommendations as the amount of penalties to be assessed.” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018.

BOE contends that a cease and desist order should be entered in this proceeding.

A cease and desist order is necessary since Respondent Owen Anderson continues to operate despite numerous warnings and investigations. Owen Anderson, through Anderson International Transport and subsequently, A.I.T. International, LLC, originated twenty-two ocean export shipments during the period January 5, 2005 through May, 2007, with three of those shipments occurring after the issuance of an Order of Investigation and Hearing in this case. Mr. Anderson was counseled personally by representatives of the Commission regarding the requirements of the 1984 Act in 1997 and again in 2006. Mr. Anderson has indicated on several occasions that he is aware of the requirements of the Shipping Act, yet continues to provide ocean transportation services. Most recently, Mr. Anderson has participated in ocean transportation activities resulting in harm to the shipping public and other shipping companies. Based on Respondent Owen Anderson's previous and very recent behavior, BOE requests that Respondent Owen Anderson be ordered to cease and desist from violating sections 8(a) and 19 of the Shipping Act and asks for the issuance of a cease and desist order 1) directing him to cease and desist from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and Respondent publishes a tariff and obtains a bond pursuant to Commission regulations and 2) prohibiting him from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such an entity for a period of years.

(BOE Revised Proposed Findings at 47-48.)

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW³¹

1. The Commission issued the Order of Investigation and Hearing on March 22, 2007.
2. The Secretary served a copy of the Order of Investigation and Hearing on Owen Anderson and Anderson International Transport (“Respondents”) via Federal Express on March 23, 2007. (BOE App. 11-12.)
3. On October 18, 2007, BOE served Owen Anderson and Anderson International Transport with a First Set of Requests for Admissions. BOE received a response to its Request for Admissions on January 3, 2008. (BOE App. 13-14.)
4. On December 21, 2007, Respondents were ordered to serve and file their Rule 95 statements by January 18, 2008. *Anderson International Transport*, FMC No. 07-02 (ALJ Dec. 21, 2007) (Memorandum of December 21, 2007, Telephonic Prehearing Conference).
5. The Secretary has not received a copy of Respondents’ Rule 95 statements. (Official Notice of Commission Records, 46 C.F.R. § 502.226.)
6. On October 26, 2001, Owen Anderson of 11835 S. Ridgewood Circle, Houston, Texas filed an assumed name certificate for Anderson International Transport, with an address of 4939 West Orem Drive, Houston, TX, in Harris County, Texas. (BOE App. 1.)
7. On February 18, 2005, Owen Anderson of 3015 Richland Spring Lane, Sugarland, Texas filed an assumed name certificate for Anderson International Transport, with an address of 4939 West Orem Drive, Houston, TX, in Harris County, Texas. (BOE App. 1.)
8. Anderson International Transport has no separate corporate identity and is an assumed name for a sole proprietorship. Owen Anderson is the sole officer and owner of Anderson International Transport. (BOE App. 5 (Interrogatories 1 and 2); BOE App. 10 (responses to Interrogatories 1 and 2); BOE App. 13 (response to Request for Admissions 1).)
9. Anderson International Transport is the assumed name for a business owned by Owen Anderson.
10. Respondents never maintained open to public inspection in an automated tariff system, tariffs showing its rates, charges, classifications and practices pursuant to section 8(a) of the Shipping Act of 1984 (“Shipping Act”). (BOE App. 13.)

³¹ To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

11. Respondents never notified the Commission, prior to providing transportation services, of the location of tariffs or the publisher used to maintain those tariffs by filing a Form FMC-1. (BOE App. 13.)
12. Neither Respondent held an ocean transportation intermediary license issued by the Commission pursuant to section 19 of the Shipping Act during the period from February 18, 2005 until the present. (BOE App. 13.)
13. Neither Respondent maintained a bond or provided evidence of financial responsibility in the amount of \$75,000 pursuant to section 19 of the Shipping Act and 46 C.F.R. § 515.21. (BOE App. 13.)
14. Respondents did business at the following addresses: 9045 Knight Road, Houston, TX; 4939 West Orem, Suite 4 & 6, Houston, TX; and 14023 South Post Oak Road, Houston, TX. (BOE App. 13.)
15. Owen Anderson also uses the name Andy as his first name. (BOE App. 52, 100, 507.)
16. On August 09, 2006, the United States Department of Transportation (DOT) issued Certificate MC-570816-C as evidence of the authority of Owen Anderson d/b/a Anderson International Transport "to engage in transportation as a **common carrier of household goods** by motor vehicle in interstate or foreign commerce." (BOE App. 268 (emphasis in original).)
17. On October 23, 2006, Owen Anderson and Nichelle Jones incorporated A.I.T. International, LLC, in Texas. (Kellogg Affidavit.)
18. Respondent Owen Anderson serves as the President of A.I.T. International, LLC. (Kellogg Affidavit.)
19. On July 23, 2007, A.I.T. International, LLC, filed an application for an ocean freight forwarder license with the Federal Maritime Commission's Bureau of Certification and Licensing. (Kellogg Affidavit.)
20. Owen Anderson is the proposed qualifying individual for A.I.T. International, LLC. (Kellogg Affidavit.)
21. A.I.T. International, LLC, is not a party to this proceeding.
22. In September, 2006, the Commission's New Orleans Area Representative ("NOAR") received a complaint from a licensed NVOCC in Houston, Texas alleging that respondent Anderson, using the name Anderson International Transport, booked three shipments of used household goods and failed to pay the ocean freight in a timely manner. The shipments were

being held at destination pending payment of the freight. While the ocean freight for one shipment was subsequently paid, the ocean freight for the two remaining shipments is still unpaid. (Kellogg Affidavit.)

23. The NOAR made an appointment to meet with Anderson at AIT's offices on October 23, 2006, but Anderson failed to attend the meeting. During a phone conversation that day with the NOAR, Anderson indicated that he knew of the requirements of the Shipping Act and would be submitting his application within a week. However, no application was forthcoming. While visiting the AIT office on October 23, 2006, the NOAR obtained copies of shipping records documenting twelve international shipments in which Respondents were involved during the period January 5, 2005 through October 19, 2006. These shipments are in addition to the three shipments shipped with the complaining NVOCC. During discovery, records documenting a total of twenty-two shipments were provided by Anderson.
24. The NOAR contacted Anderson again on December 20, 2006 and was told that an application would be submitted within the week. (Kellogg Affidavit.)
25. On January 15, 1997, BOE opened an investigation into respondent Owen Anderson based on information received from industry sources as well as complaints to the then Office of Informal Inquiries, Complaints and Informal Dockets. (Kellogg Affidavit.)
26. The information indicated that Anderson's company, International Transport Systems, Inc. ("ITS"), located in Rowlett, Texas, was operating as a non-vessel-operating common carrier ("NVOCC") without a tariff or bond. (Kellogg Affidavit.)
27. The nature of the complaints was the failure of ITS to pay two NVOCCs for ocean freight booked in its name. (Kellogg Affidavit.)
28. Alvin Kellogg, the Commission's New Orleans Area Representative, interviewed respondent Owen Anderson on January 15, 1997. During that interview, Anderson indicated ITS's principal ocean activity was the shipment of household goods and automobiles, primarily to Nigeria. Documents (including bills of lading) examined by the NOAR indicated that ITS made at least fifty shipments between December 1995 and January 1997. (Kellogg Affidavit.)
29. At the close of the meeting, the NOAR reviewed with Anderson the requirements and obligations of a licensed ocean freight forwarder and the tariff and bond requirements for NVOCC activity. Anderson was cautioned to stop his current ocean export activity or face enforcement action. Anderson indicated that he understood the requirements of the Shipping Act. (Kellogg Affidavit.)
30. On November 20, 1997, Alvin Kellogg again visited Anderson in the ITS office. An examination of thirty shipment files dated between May 27, 1997 and November 20, 1997,

indicated that ITS continued to handle ocean shipments. Anderson was reminded of the requirements for filing and maintenance of a tariff and bond. Anderson indicated that he understood the requirements and preferred to get out of the business and just do the packing and crating. Anderson indicated that he knew a freight forwarder that would handle his business. (Kellogg Affidavit.)

31. Further investigation showed that from May 1, 1996 to November 26, 1997, ITS' activities were covered by an NVOCC bond issued by American Contractors Company in the amount of \$50,000. The bond was canceled effective November 26, 1997. ITS also maintained a tariff.³² Its CARGO, N.O.S. tariff was cancelled on December 1, 1997 for failure to maintain a valid surety bond. (Kellogg Affidavit.)
32. On March 22, 1999, the NOAR conducted a third interview with Anderson in the ITS office in Rowlette, Texas. An examination of ITS files showed that ITS was continuing to handle ocean export shipments as an NVOCC and during the period from May, 1997 through January, 1999 handled at least 18 ocean export shipments despite previous warnings and counseling on the requirements of the Commission's regulations. A Report of Investigation dated April 5, 1999 was generated. Further monitoring indicated that no export shipments were made in the name of ITS after March 1999. The informal investigation was closed in February, 2000. (Kellogg Affidavit.)
33. BOE has established by a preponderance of the evidence that respondent Owen Anderson has been aware of the Shipping Act and its requirements since at least 1997.

FINDINGS REGARDING OTI ACTIVITIES OF RESPONDENTS

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

TWO TREES PRODUCTS SHIPMENT

BOE App. 5, P. 000015-000070

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

34. In January, 2005, Two Trees Products Company contacted Anderson International Transport to move a pallet of petroleum distillates and sawdust from W.W. Wood, Inc. in Pleasanton, Texas to Tianjin, China. (BOE App. 22-25.)

³² At this time, there was no requirement that an NVOCC obtain a license.

35. Owen Anderson provided a quote of \$600.00 for 1) ocean freight; 2) inland freight from Pleasanton, Texas to the port of Houston, Texas; and 3) documentation to Two Trees Products Company. (BOE App. 22-25.)
36. On January 13, 2005, Anderson International Transport provided a copy of the Two Trees Products Bill of Lading Master to Belinda Henry at W.W. Wood. (BOE App. 19.)
37. Anderson International Transport notified W.W. Wood that the “shipment will be pick [*sic*] up by S.M.T. today.” (BOE App. 19.)
38. Owen Anderson issued an invoice for \$769.00 on January 18, 2005 to Two Trees Products, included inland freight charge of \$175.00, ocean freight charge of \$344.00, dangerous cargo certificate charge of \$75.00, and documentation and service charge of \$175.00. (BOE App. 20, 67.)
39. Anderson International Transport sent a dock receipt to Two Trees Products Company for the shipment from Houston/Los Angeles to Tainjin identifying Two Trees Products as the exporter and Shanix Supply & Marketing as the consignee. (BOE App. 20, 34, 61.)
40. Anderson International Transport arranged for special packaging materials, marks and labels and documentation for the shipment and was billed by dangerousgoods.com Incorporated. (BOE App. 44-47.)
41. On February 28, 2005, Owen Anderson provided a Bill of Lading Master and I.M.O. dangerous cargo declaration to Direct Container Line. (BOE App. 21.)
42. On March 5, 2005, Anderson International Transport prepared a Bill of Lading Master identifying Two Trees Products c/o Anderson International Transport as the exporter, Shanix Sopy [*sic*] & Marketing as the consignee, Houston as the point of origin and port of loading, Tainjin as the port of unloading, and describing the commodities as “2 steel drums over packed in fiberboard boxes Un 1268 petroleum distillates, N.O.S. class 3 pg III net qty 20 liters per drum flash pont 38 deg C.” (BOE App. 33).
43. On April 7, 2005, Larry Spelling, Consultant, signed an IMO Dangerous Goods Declaration identifying Two Trees Products as the shipper and identifying the goods as “2 steel drums over packed in fiberboard boxes UN 1268 petroleum distillates, N.O.S. Class 3 PG III net qty 20 liters per drum flash pont 38 deg C.” (BOE. App. 31.)
44. On April 8, 2005, Owen Anderson provided a Bill of Lading Master and I.M.O. dangerous cargo declaration to Direct Container Line. (BOE App. 41.)

45. On April 13, 2005, Direct Container Line issued a booking confirmation with a booking number of HOU/XIG/D02911 identifying AIT Worldwide Logistics³³ as the shipper and Shantou Henkel as the consignee. (BOE App. 52.)
46. On May 5, 2005, Direct Container Line issued bill of lading HOU/XIG/D02911 for shipment No. HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International, 4939 West Orem, Houston, [sic] TX 77045, as the shipper, Shanix Supply, Taiyuan Shanxi, China, as the consignee, Xi Bo He 73 as the vessel, DCL, Houston as the place of receipt, Los Angeles as the port of loading, Xingang as the port of discharge, and identifying the goods as "FAK Pallet SLAC: 2 ctns petroleum distillates [sic] NOS NOS UN# 1268, Pkg III 65 Kgs and 200 lbs saw dust." (BOE App. 51.)
47. Direct Container Line bill of lading HOU/XIG/D02911 lists ocean freight and other charges totaling \$299.18. (BOE App. 51.)
48. Vanessa Sever filed a complaint with the Better Business Bureau on June 2, 2005, alleging that after paying Anderson International, Owen Anderson failed to provide the appropriate paperwork to allow the shipment to be released from the port. (BOE App. 30.)
49. When Direct Container Line issued bill of lading HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International as the shipper, it assumed responsibility for transportation of the goods from Houston to Xingang.
50. When Direct Container Line issued bill of lading HOU/XIG/D02911 identifying AIT Worldwide Logistics for Two Trees Products, c/o Anderson International as the shipper, it established a direct relationship with Two Trees Products, the proprietary shipper.
51. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Two Trees Products shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

³³ At Revised Prop. FF 23, BOE states that "AIT Worldwide Logistics is an ocean transportation intermediary licensed by the Federal Maritime Commission, however AIT Worldwide Logistics stated they had had no knowledge of this shipment. (BOE App. 5, P. 000036)" Appendix page 36 is a copy of a series of emails that does not identify AIT Worldwide Logistics. AIT Worldwide Logistics is not listed on the current Commission list of OTIs, http://www2.fmc.gov/oti/nvos_listing.aspx (accessed May 11, 2009), and BOE does not cite to other evidence regarding its identity or status. There is no explanation why Direct Container issued the booking confirmation to AIT Worldwide Logistics and included AIT Worldwide Logistics on the bill of lading. (BOE App. 51.)

52. Respondents did not operate as an NVOCC on the Two Trees Products shipment.
53. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Two Trees Products shipment.
54. BOE has not met its burden of persuasion of regarding the amount of civil penalty to be assessed for this violation.

CLIFTON WATTS SHIPMENTS

BOE App. 6, P. 000071-000120

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

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

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

55. On June 20, 2005, Philco Auto sold the 2002 Honda Odyssey to Ona Neil of Port Maria, St. Mary, W.I., for \$8,000.00. (BOE App. 99.)
56. On July 12, 2005, Texas issued a certificate of title for the Honda to Michael Rose, and on July 24, 2005, Rose assigned the title back to Philco Auto. (BOE App. 95-96.)
57. On an unknown date, an unknown person prepared a Shipper’s Export Declaration for the Honda identifying the exporter as Mike European Cars and the consignee as Clifton Watts. The export declaration listed the value as \$9,000.00. (BOE App. 101.)

58. On August 10, 2005, AIT faxed the copy of clear title for the Honda to Triton. (BOE App. 102.)³⁴
59. On an unknown date, Anderson International Transport asked "Start Trucking Co./Jeff" to arrange for delivery of a container from Hapag Lloyd to Anderson International Transport's warehouse at 4939 West Orem, Ste 6, Houston [sic], TX, with a requested delivery date of 7/28/05 or first thing tomorrow," for Booking 17066569. (BOE App. 97.)
60. On August 3, 2005, Anderson International Transport asked "Start Trucking/Roy" to arrange for delivery of a container from Ceres Container to Anderson International Transport's warehouse at 4939 West Orem, Houston, TX, for Booking 17066569. (BOE App. 100.)
61. On August 4, 2005, Respondents issued a dock receipt for container HLXU4299838 and its contents identifying the shipper as Clifton Watts c/o Anderson International Transport, the consignee as Clifton Watt, Manchester, Jamaica, and the vessel as Zim Mexico. (BOE App. 83.)
62. On August 4, 2005, Anderson International Transport issued an invoice for a shipment to Clifton Watts, Manchester, Jamaica, for "one 40' contr STC household effects and auto" for the amount of \$3,720.00, including a charge of \$3,200 for freight, packing and service. (BOE App. 105.)
63. On August 10, 2005, Anderson International Transport prepared a Bill of Lading Master for Booking No. 17066569/container HLXU4299838 identifying Mike European % Anderson International Transport as the exporter, Clifton Watts as the consignee, and identifying the commodities as "40' container STC household effects one 2002 Honda minivan VIN#5FNRL18092B041580." (BOE App. 6, P. 000086.)
64. On August 15, 2005, Triton Overseas Transport issued bill of lading 20059662 identifying the shipper as Mike European % Anderson International Transport, the consignee as Clifton Watts, the vessel as Zim Houston III 141 W, the port of loading as Houston, and the port of discharge as Kingston, and describing the packages and goods as "40' container STC household effects one 2002 Honda minivan VIN#5FNRL18092B041580 personal effects not for resale." (BOE App. 107.)
65. On August 15, 2005, Triton Overseas Transport issued an invoice for bill of lading 20059662 to AIT, 4939 West Orem Dr., Houston, TX for ocean freight in the amount of \$2,028.95. (BOE App. 106.)

³⁴ By this time, the only title in the record indicates the title had been assigned to Mikes European Cars to Michael Rose to Philco Auto, (BOE App. 95-96), and all of this occurred after the sale to Ona Neil by Philco Auto. (BOE App. 99.) I do not believe it is necessary to resolve the ownership of the Honda as part of this proceeding.

66. On August 16, 2005, Anderson International Transport provided a copy of the packing list for Booking No. 17066569 to Triton Overseas Transport. (BOE App.78.)
67. When Triton Overseas Transport issued bill of lading 20059662, it assumed responsibility for transportation of the goods from Houston to Kingston.
68. When Triton Overseas Transport issued bill of lading 20059662 identifying the shipper as Mike European % Anderson International Transport, it established a direct relationship with Mike European, the proprietary shipper.
69. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Mike European shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
70. Respondents did not operate as an NVOCC on the Mike European shipment.
71. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Mike European shipment.
72. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

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

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

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

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

(RPF 28.)

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

(RPF 29.)

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

(RPFF 31.)

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

(RPFF 39.)

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

(RPFF 40.)

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

Respondents' withdrawal from participation in this proceeding prevents inquiry into these puzzles. As set forth below, the record contains evidence that supports a finding by a preponderance of the evidence that Respondents performed ocean freight forwarding services and operated as an ocean freight forwarder in the United States foreign trades on the shipment covered by the Triton Overseas bill of lading issued September 23, 2005.

73. On September 15, 2005, dangerousgoods.com Incorporated invoiced Respondents for 12 fiberboard boxes, one overpack box, and a shippers declaration for dangerous goods for a shipment of batteries. (BOE App. 87.)
74. On September 14, 2005, an IMO Dangerous Goods Declaration - 2005 was prepared for a shipment of batteries identifying Clifton Watt - Anderson International as the shipper, Clifton

Watt, Manchester, Jamaica as the consignee, and Anderson International Transport as the signatory for Booking No. OCE 0256637. (BOE App. 84.)

75. On September 23, 2005, Triton Overseas issued bill of lading 20059964 for Booking No. OCE 0256637 identifying Clifton Watts Anderson International Transport as the shipper, Clifton Watts, Manchester, Jamaica as the consignee, Houston as the place of receipt, Seaboard Voyager 489 as the vessel, Miami as the port of loading, Kingston as the port of discharge, and describing the goods as "plywood box with 12 UN 4G fiberboard boxes-total net 336 Kg UN 2794 batteries, wet filled with acid class 8 net qty 28 Kgs each 51.5X43X28." (BOE App. 71.)
76. When Triton Overseas Transport issued bill of lading 20059964, it assumed responsibility for transportation of the goods from Houston to Kingston.
77. When Triton Overseas Transport issued bill of lading 20059964 identifying the shipper as Clifton Watt - Anderson International, it established a direct relationship with Clifton Watts, the proprietary shipper.
78. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Clifton Watts shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
79. Respondents did not operate as an NVOCC on the Clifton Watts shipment.
80. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Clifton Watts shipment.
81. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

REPAIRER OF THE BREACH SHIPMENT

BOE App. 7, P. 000121-000149

The documents related to the Repairer of the Breach shipment engender some confusion. On May 17, 2005, Zim Integrated Shipping Services, Ltd., issued bill of lading ZIMUORF102496 for booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico III 137/W as the vessel, Houston as the port of loading, and Kingston as the port of discharge, and describing the goods as a "40' container S.L.A.C.

500 CTNS relief supplies.” (BOE App. 122.)³⁵ AIT did not issue the Bill of Lading Master (BOE calls this a master bill of lading) for booking No. ORF78987 on which BOE relies until June 2, 2005. (RPF 44; BOE App. 135.) Anderson International Transport apparently provided this Bill of Lading Master to Zim Container Services on June 2, 2005. (BOE App. 137.) BOE does not offer an explanation of the effect of these dates on the activities involved. Respondents’ withdrawal from participation in this proceeding prevents inquiry into these puzzles. As set forth below, the record contains evidence that supports a finding by a preponderance of the evidence that Respondents performed ocean freight forwarding services and operated as an ocean freight forwarder in the United States foreign trades on the shipment covered by the Triton Overseas bill of lading issued September 23, 2005.

82. On May 4, 2005, Anderson International Transport arranged for the transportation and delivery of two empty containers from Ceres Gulf Container Yard to AIT for Booking Nos. ORF78986 and ORF78987. (BOE App. 142.)
83. On May 4, 2005, Anderson International Transport secured a booking confirmation from Zim Container Service, Booking No. ORF78987, identifying Anderson International Transport as the shipper, for a shipment of a 40’ dry van container from Houston to Kingston, Jamaica, sailing date May 15, 2005. (BOE App. 144.)
84. On an unknown date, Anderson International Transport issued a dock receipt for Booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico 111 as the vessel, Houston as the port of loading, and Kingston as the port of discharge, identifying the packages and goods as a “40’ container S.T.C. 500 CTMS relief supplies.” (BOE App. 147.)
85. On May 17, 2005, Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496 for booking No. ORF78987 identifying Repairer of the Breach % Anderson International as the shipper, Major Milburn Oats as the consignee, Zim Mexico III 137/W as the vessel, Houston as the port of loading, and Kingston as the port of discharge, and describing the goods as a “40’ container S.L.A.C. 500 CTNS relief supplies.” (BOE App. 122.)
86. On June 2, 2005, Anderson International Transport prepared a Bill of Lading Master for Booking No. ORF 78987 identifying Repairer of the Breach Anderson International Transport as the shipper, Island Cargo as the consignee, Zim Mexico III as the vessel, Miami as the port of loading, and Kingston as the port of discharge, identifying the packages and goods as a “40’ container S.T.C. 500 CTMS [*sic*] relief supplies.” (BOE App. 135.)

³⁵ This is one of twelve copies of bill of lading ZIMUORF102496, six with pricing information and six without pricing information. (BOE App. 122-133.) *See* n.4, *supra*.

87. On June 2, 2005, Anderson International Transport provided the Bill of Lading Master for Booking No. ORF 78987 to Zim Container Services. (BOE App. 137.)
88. On June 3, 2005, Zim American Integrated Shipping Co., Inc. faxed a "proof copy" of the bill of lading for Booking No. ORF78987 to Lulu at the Anderson International fax number. (BOE App. 139.)
89. Anderson International Transport issued an invoice to Repairer of the Breach dated 2/12/1912 [*sic*]³⁶ in the amount of \$3190.00 (less a credit of \$1,200.00 and payment of \$1500.00) for the shipment of a container from Houston to Kingston, Jamaica. (BOE App. 148.)
90. When Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496, it assumed responsibility for transportation of the goods from Houston to Kingston.
91. When Zim Integrated Shipping Services, Ltd., Zim Container Service, issued bill of lading ZIMUORF102496 identifying the shipper as Repairer of the Breach, it established a direct relationship with Repairer of the Breach, the proprietary shipper.
92. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Repairer of the Breach shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
93. Respondents did not operate as an NVOCC on the Repairer of the Breach shipment.
94. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Repairer of the Breach shipment.
95. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

DIRK MANUEL SHIPMENT

BOE App. 8, P. 000150-000217

96. On November 19, 2004, Respondents provided a quote to Ms.[*sic*] Manuel in the amount of \$5,450.00 for shipment of household goods in a 40' container from Katy, Texas to Brussels,

³⁶ As this document sets forth an estimated time of departure of May 19, 2005, I assume that AIT issued the invoice prior to that date.

Belgium. The quote described the service as door to door and included insurance. (BOE App.179.)

97. On December 16, 2004, Respondents faxed a request to Martha at American Ocean for collection of a 40' standard container from Star Shipping for delivery to the home of Mr. Manuel in Katy, TX. (BOE App. 8, P. 000181.)
98. On December 16, 2004, Anderson International Transport issued a domestic straight bill of lading to Ms. Manwell [*sic*] for a 40' container of household goods consigned to A.I.T. with the ultimate destination of Belgium. (BOE App. 158.)
99. On an unknown date, Anderson International Transport issued a dock receipt for container ACXU2023418 identifying Anderson International as the shipper, Dirk Manuel as the consignee, Star Ismene AT501 as the vessel, Houston, Texas, as the port of loading, Antwerp, Belgium, as the port of discharge, and describing the contents as "40' contr STC 250 pcs household effects." (BOE App. 157.)
100. On January 2, 2005, Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 for container ACXU2023418 identifying Dirk Manuel c/o Anderson International as the shipper, Dirk Manuel as the consignee, Star Ismene AT501 as the vessel, Houston, Texas, as the port of loading, Antwerp, Belgium, as the port of discharge, and describing the contents as "1x40' container(s) SLAC: 250 pieces household effects." (BOE App. 154-155.)
101. Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency bill of lading SAXC501HOUANR104 listed ocean freight and other charges totaling \$1061.60. (BOE App. 155.)
102. On January 13, 2005, Strachan Shipping Agency sent a fax memo to Anderson International asking for payment: "DIRK MANUEL ISME AT501 501HOUANR104 01-02-05 \$1061.60." (BOE App. 191.)
103. On January 20 and 25, 2005, and February 1, 2005, Respondents asked for quotes from three companies to transport a 40' container from Antwerp to Dirk Manuel's address in Belgium. (BOE App. 190, 189, 187.)
104. On February 23, 2005, Dirk Manuel filed a complaint with the Better Business Bureau of Metropolitan Houston, stating that he was required to pay \$2,462 plus \$313 in demurrage charges to secure delivery of container ACXU2023418 from the port of discharge (Antwerp) to its ultimate destination. (BOE App. 205-206.)

105. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104, it assumed responsibility for transportation of the goods from Houston to Antwerp.
106. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 identifying the shipper as Dirk Manuel c/o Anderson International, it established a direct relationship with Dirk Manuel, the proprietary shipper.
107. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Dirk Manuel shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
108. Respondents did not operate as an NVOCC on the Dirk Manuel shipment.
109. Respondents' failure to arrange for transportation of container ACXU2023418 from the port of discharge (Antwerp) to its ultimate destination resulted in additional cost to Dirk Manuel.
110. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Dirk Manuel shipment.
111. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

KATHLEEN DAVIDSON SHIPMENT

BOE App. 9, P. 000218

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

112. Anderson International Transport issued a dock receipt for container HLXU439932-8 identifying Kathleen Davidson % Anderson International as the shipper/exporter, Edna Causell, Kingston, JA as the consignee, Zim Mexico III Voy. 145W as the vessel, Houston as the port of loading, and Kingston, Jamaica as the port of discharge, and identifying the cargo as "40' contr STC household effects, one 2004 Toyt . . . one 2004 Ford" (BOE App. 218.)
113. On August 29, 2005, the master of the vessel signed the dock receipt for container HLXU439932-8. (BOE App. 218.)
114. Commission regulations define "[p]reparing or processing . . . dock receipts" as a freight forwarding service. 46 C.F.R. § 515.2(i)(4).

115. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Kathleen Davidson shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
116. Respondents did not operate as an NVOCC on the Kathleen Davidson shipment.
117. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Kathleen Davidson shipment.
118. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

ASEKUNLE OSULE SHIPMENT

BOE App. 10, P. 000219-000251

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

125. On January 10, 2005, Respondents provided customs information regarding Booking No. CHS032745 to A.C.L. for signature. (BOE App. 237-240.)
126. On January 18, 2005, Anderson International Transport prepared a Bill of Lading Master for export reference AIT CHS032745 for 20' container GATU0983270 identifying Asekunle Osule [sic] % Anderson International as the exporter, Asekunle Osule [sic] as the consignee, Star Hoyanger as the vessel, Houston as the port of loading, and Tilbury as the foreign port of unloading, and describing the commodities as "20' contr STC one 2005 Lincoln Navigator ID #5LMFU27535LJ11183 and four tires." (BOE App. 233.)
127. On January 20, 2005, provided Bill of Lading Master for export reference AIT CHS032745 to Atlantic Cargo. (BOE App. 246.)
128. Anderson International Transport issued a dock receipt for 20' container GATU0983270 that was signed by an unknown person on an unknown date. (BOE App. 234.)
129. On January 24, 2005, Star Shipping A/S (d.b.a. Atlanticargo) as carrier By Strachan Shipping Agency as Agents issued bill of lading SAXC502HOUTIL211 identifying Asekunle Osule [sic] C/O Anderson International as the exporter, Asekunle Osule [sic] as the consignee, Star Hoyanger as the vessel, Houston as the port of loading, and Tilbury as the foreign port of unloading, and describing the commodities as "20' contr STC one 2005 Lincoln Navigator ID #5LMFU27535LJ11183 and four tires" and indicating ocean freight and other charges of \$951.76. (BOE App. 228.)
130. On February 21, 2005 and on March 3, 2005, Strachan Shipping Agency sent a fax memo to Anderson International asking for payment of \$951.76. (BOE App. 241.)
131. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC502HOUTIL211, it assumed responsibility for transportation of the goods from Houston to Tilbury.
132. When Star Shipping A/S (d.b.a. Atlanticargo) by Strachan Shipping Agency as Agents issued bill of lading SAXC501HOUANR104 identifying the shipper as Asekunle Osule [sic] C/O Anderson International, it established a direct relationship with Asekunle Osude, the proprietary shipper.
133. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Asekunle Osude shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

134. Respondents did not operate as an NVOCC on the Asekunle Osude shipment.
135. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Asekunle Osude shipment.
136. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

MARGRET DELEON SHIPMENT

BOE App. 11, P. 000252-000293

137. On June 17, 2006, Anderson International Transport issued a domestic straight bill of lading to Margret Dillion [*sic*] for shipment of 4000 pounds of household effects from Devine, Texas, consigned to AIT with ultimate destination of Reykjavík, Iceland. (BOE App. 287.)
138. The domestic bill of lading quoted shipping costs Houston to Reykjavik, Iceland, of \$3,950.00 inclusive of pickup, linehaul, ocean freight, and service charge. (BOE App. 287.)
139. On July 20, 2006, Anderson International received a rate confirmation of \$3570.50 for ocean freight and other charges from Finn Container Cargo Services to ship a 20' container from Houston, Texas to Reykjavik, Iceland. (BOE App. 285.)
140. On July 28, 2006, Anderson International made arrangements for delivery of a container (Booking No. 14744885) from Ceres for delivery to Anderson International Transport at 14023 S. Post Oak Road, Houston, Texas. (BOE App. 281.)
141. On July 31, 2006, Anderson International Transport issued an invoice to Margret [*sic*] DeLeon in the amount of \$5600 (less a credit of \$4450.00) for shipment of 20' container HLXU323470 from Houston to Reykjavik. (BOE App. 277.)
142. On August 1, 2006, Finn Container Cargo Services, Inc., made an urgent request for a Bill of Lading Master from Respondents for container HLXU3234703. (BOE App. 279.)
143. On August 4, 2006, Anderson International Transport prepared a Bill of Lading Master identifying Margret DeLeon c/o Anderson International Transport as the exporter, "Margret DeLeon %" [*sic*] as the consignee, Houston as the port of loading, Bremerhaven as the foreign port of unloading, and Reykjavík as the place of delivery by on carrier for container HLXU3234703, describing the commodities as "20' Contr stc 75 pcs Household Effects." (BOE App. 276.)
144. Anderson International Transport prepared an undated dock receipt for container HLXU3234703 that was signed for by an unknown person on an unknown date. (BOE App. 274.)

145. On August 10, 2006, Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 for container HLXU3234703 identifying Margret DeLeon c/o Anderson International Transport as the shipper, Margret DeLeon as the consignee, Philadelphia Expr V 33E31 as the exporting carrier, Houston, Texas, as the port of loading, Bremerhaven, DE s the port of discharge, and Reykjavik, Iceland as the place of delivery, and describing the packages and goods as "20' standard container stc 75 pcs 'household effects,'" and setting forth freight and other charges totaling \$3,495.50. (BOE App. 275.)
146. Finn Container Cargo Services, Inc., bill of lading/freight bill No. FINN-10102 is stamped "THIS IS YOUR FREIGHT BILL." (BOE App. 275.)
147. Finn Container Cargo Services, Inc., issued a second copy of bill of lading/freight bill No. FINN-10102 without listing the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 272.)
148. On August 15, 2006, Anderson International Transport faxed to Margret DeLeon a copy of the Finn Container Cargo Services, Inc., bill of lading/freight bill No. FINN-10102 without the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 271-272.)
149. Finn Container Line made several requests for payment from Respondents. (BOE App. 266.)
150. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 for container HLXU3234703, it assumed responsibility for the transportation of container HLXU3234703 from Houston to Bremerhaven and ultimately Reykjavik.
151. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10102 identifying the shipper as Margret DeLeon c/o Anderson International Transport, it established a direct relationship with Margret DeLeon, the proprietary shipper.
152. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Margret DeLeon shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
153. Respondents did not operate as an NVOCC on the Margret DeLeon shipment and did not violate section 8 of the Shipping Act.
154. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Margret DeLeon shipment.

155. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

RAY COOPER SHIPMENT

BOE App. 12, P. 000294-000339

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

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

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

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

156. On January 4, 2006,³⁷ Uniserve. Limited, of Tilbury, Essex, issued bill of lading SEEEUSJ00000522 for container KLTU1237586 identifying Ray Cooper of Emerson Park, Essex, Great Britain, as the shipper, Ray Cooper, Beaumont, TX USA as the consignee and notify party, CP Yosemite as the vessel, Thamesport as the place of receipt and port of loading, and Houston as the port of discharge, and describing the goods as “1 x20' GP STC 180 packages personal effects.” (BOE App. 305.)
157. The Uniserve bill of lading SEEEUSJ00000522 states “for delivery contact Anderson International Transport.” (BOE App. 305.)
158. Uniserve bill of lading SEEEUSJ00000522 indicates the goods were shipped on board on behalf of Uniserve Limited on January 28, 2006. (BOE App. 305.)
159. On January 28, 2006, “K” Line issued waybill No. KKLUFXT095113 for container KLTU1237586 identifying Uniserve JLTD as the shipper, Anderson International as the consignee and notify party, CP Yosemite V.128W as the vessel, Tilbury Door as the place of receipt, Thamesport as the port of loading, and Houston as the port of discharge and place

³⁷ The bill states “04/01/2006.” Since the same bill sets forth another date as “28/01/2006,” I find that the date is January 4, not April 1.

of delivery, and describing the goods as “1 container(s) (180 packages) 180 packages personal effects.” (BOE App. 306.)³⁸

160. On February 23, 2006, Respondents assigned customs power of attorney to R. W. Smith, Inc., a licensed Customhouse broker, to act as its agent on the Cooper inbound shipment. (BOE App. 336.)
161. On February 14, 2006, Anderson International Transport invoiced Ray Cooper \$1,745.00 for customs documentation and delivery of the inbound shipment. (BOE App. 334.)
162. Ocean freight forwarders “dispatch[] shipments *from* the United States via a common carrier.” 46 U.S.C. § 40102(18) (emphasis added).
163. The Ray Cooper Inbound Shipment was a shipment *into* the United States; therefore, Respondents did not operate as an ocean freight forwarder in the United States foreign trades on the Ray Cooper Inbound Shipment and did not violate sections 19(a) and (b) of the Shipping Act by operating as an ocean freight forwarder without obtaining a license from the Commission and without providing proof of financial responsibility in the form of surety bonds.
164. When Uniserve. Limited, issued bill of lading SEEEUSJ00000522, it assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
165. When Uniserve. Limited, issued bill of lading SEEEUSJ00000522 identifying the shipper as Ray Cooper, it established a direct relationship with Ray Cooper, the proprietary shipper.
166. When “K” Line issued waybill No. KKLUFXT095113 for container KLTU1237586, it assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
167. When “K” Line issued waybill No. KKLUFXT095113 identifying the shipper as Ray Cooper, it established a direct relationship with Ray Cooper, the proprietary shipper.
168. No evidence in the record supports a finding that Respondents assumed responsibility for the transportation of container KLTU1237586 from Thamesport to Houston.
169. Respondents did not operate as an NVOCC on the inbound Ray Cooper shipment and did not violate section 8 of the Shipping Act on that shipment.

³⁸ I find nowhere in its papers where BOE discusses the Uniserve or the “K” Line bills of lading or their effect on its contention that “Respondents arranged for the inbound shipment of Ray Cooper’s household effects from Thamesport, England to Houston, Texas.”

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

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

170. On March 3, 2006, Respondents obtained a booking and rate confirmation of \$1245.50 from Finn Container Cargo Services, Inc., for a shipment of container KLTU1237586 from Houston to Felixstowe. (BOE App. 307, 326.)
171. On March 13, 2006, Anderson International Transport invoiced Ray Cooper \$3,350.00 for the outbound shipment of 5,000 pounds of household effects from Houston to London. (BOE App. 310.)³⁹
172. On March 22, 2006, Respondents prepared Bill of Lading Master for container KLTU1237586 identifying Raymond Cooper % Anderson International Transport as the shipper, Raymond Cooper as the consignee, Uniserve Ltd as the notify party, MSC Alesia as the exporting carrier, Houston as the port of loading, and Felixstowe as the foreign port of unloading, and describing the commodities as "20' container STC 180 packages used household effects" and provided a copy of it to Finn Container Cargo Services for issuance of a proof copy. (BOE App. 303-304.)
173. On March 31, 2006, Finn Container Cargo Services, Inc. issued ocean bill of lading number FINN-10049, booking number FINN-10049, for container KLTU1237586 identifying Raymond Cooper c/o Anderson International Transport as the shipper, Raymond Cooper as the consignee, Uniserve Ltd as the notify party, MSC Alesia V. 548E as the exporting carrier, Houston, TX as the port of loading, and Felixstowe as the port of discharge, and describing the goods as "X 20' std container STC 180 packages 'used household effects' return cargo," and setting forth freight and other charges totaling \$1,245.50. (BOE App. 300.)
174. Finn Container Cargo Services, Inc., bill of lading number FINN-10049 is stamped "THIS IS YOUR FREIGHT BILL." (BOE App. 300.)
175. Finn Container Cargo Services, Inc., issued a second copy of bill of lading/freight bill No. FINN-10049 without listing the freight charges and without the "THIS IS YOUR FREIGHT BILL" stamp. (BOE App. 299.)
176. On April 17, 2006, Anderson International Transport issued a check for \$1,245.50 to Finn Container for payment of ocean freight for booking number FINN-10049. (BOE App. 297.)
177. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10049 for container KLTU1237586, it assumed responsibility for the transportation of container HLXU3234703 from Houston to Felixstowe.

³⁹ In RPF 79, BOE states this occurred on February 14, 2006, and cites to BOE App. 334.

178. When Finn Container Cargo Services, Inc., issued bill of lading/freight bill No. FINN-10049 identifying the shipper as Raymond Cooper c/o Anderson International Transport , it established a direct relationship with Raymond Cooper, the proprietary shipper.
179. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Raymond Cooper outbound shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
180. Respondents did not operate as an NVOCC on the Raymond Cooper outbound shipment and did not violate section 8 of the Shipping Act.
181. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Raymond Cooper outbound shipment.
182. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

LIKE NEW AUTO SALVAGE SHIPMENT

BOE App. 13, P. 000340-000438

BOE identifies this shipment as the "Fiedel Udense" shipment. The documents in the record indicate that Respondents were involved in the shipment of four containers containing automobiles from Houston to Lagos, Nigeria. (BOE App. 348.) The bill of lading masters for only two of those containers (GESU4495284 and MSKU8392591) are included in the record. (BOE App. 352, 356.) Both containers were part of Booking #851487590. (*Id.*) The record does not contain ocean bills of lading issued for those containers. The bill of lading masters that Respondents prepared and sent to Oceane Marine for Oceane Marine to use to prepare the bills of lading identify the exporter (principal or seller) as Like New Auto Salvage, 3416 East Jefferson Blvd., Grand Prairie [*sic*], Houston, Texas 75051. There is no reference to Respondents in the exporter box. (BOE App. 352, 356.) Therefore, I find that Like New Auto Salvage was intended to be the shipper.

The bill of lading masters indicate that the two containers were from Like New Auto Salvage and to be carried on the same vessel to the same port. BOE treats these as one shipment/alleged violation, and I find, based on the evidence in the record, that they were intended to be one shipment and treat them as one alleged violation.

On December 1, 2006, respondent Owen Anderson sent an A.I.T. facsimile transmittal sheet from A.I.T. International LLC to Oceane Marine regarding Booking #851487590 stating: "Please cancel above booking made on our behalf with Maersk Line. We will be responsible for per diem, and freight charges. This will be paid directly to Maersk. Regards Owen." (BOE App. 420.)

Although the record supports a finding that Respondents performed ocean freight forwarding services, there is no evidence in the record to support a finding that the shipment was ever carried on a vessel operating on the high seas between a port in the United States and a port in a foreign country. Therefore, this shipment cannot be found to be a violation.⁴⁰

183. On October 13, 2006, Anderson International Transport issued an invoice in the amount of \$25,700 for ocean freight and other charges to Fidel Udense for shipment of four [sic] 40' containers to Lagos, Nigeria. (BOE App. 348.)
184. On July 18, 2006, Anderson International Transport prepared a Bill of Lading Master for booking #851487590/AIT 4764 identifying Like New Auto Salvage as the shipper, Gokul Development, Enugu, Nigeria, as the consignee, Sealand Value as the exporting carrier, Houston as the port of loading, and Lagos as the foreign port of unloading, and describing the commodities as "contr #GESU4495284 40' contr STC four autos." (BOE App. 352.)
185. On July 18, 2006, Anderson International Transport prepared a Bill of Lading Master for booking #851487590/AIT 4764 identifying Like New Auto Salvage as the shipper, Kemol Venture Ltd., Fairfax, Nigeria, as the consignee, Sealand Value as the exporting carrier, Houston as the port of loading, and Lagos as the foreign port of unloading, and describing the commodities as "40' container #MSKU8392591 STC four autos." (BOE App. 356.)
186. On October 12, 2006, Anderson International Transport obtained a booking confirmation from Oceane Marine Shipping, Inc., a licensed NVOCC, Oceane Marine reference number 260985, for shipment of a 40' container containing cars, identifying SL Quality V. 615 as the vessel, Houston as the port of loading, an Lagos as the port of destination. (BOE App. 351.)
187. On October 17, 2006, Anderson International Transport obtained a booking confirmation from Oceane Marine Shipping, Inc., a licensed NVOCC, Oceane Marine reference number 261005, for shipment of a 40' container containing cars, identifying SL Quality V. 615 as the vessel, Houston as the port of loading, an Lagos as the port of destination. (BOE App. 411.)
188. Anderson International Transport issued an undated dock receipt (signed October 23, 2006) for booking #851487590 identifying Fidel Udense c/o Anderson International Transport as the shipper, Fidel Udense, Lagos, Nigeria, and the consignee, Houston as the port of loading, Lagos, Nigeria, as the port of discharge, for container #MSKU8392599, describing the goods as "40^[1] HQ container with 4 autos." (BOE App. 398.)

⁴⁰ The record includes a domestic straight bill of lading issued by Respondents on February 1, 2004, two and one-half years before Respondents prepared the bill of lading masters in the record, for a shipment of two automobiles from Respondents' address in Houston to Like New Auto Parts in Oklahoma City. (BOE App. 341.) BOE does not explain the significance of this document.

189. Anderson International Transport issued an undated dock receipt for booking #851487590 identifying Fidel Udense c/o Anderson International Transport as the shipper, Fidel Udense, Lagos, Nigeria, and the consignee, Houston as the port of loading, Lagos, Nigeria, as the port of discharge, for container #GESU4495284, describing the goods as "40^{ft} HQ container with 4 autos." (BOE App. 422.)
190. On November 14, 2006, Anderson International Transport provided copies of custom cleared automobile titles to Oceane Marine for booking # 851487590. (BOE App. 353, 363-364, 367-373.)
191. On November 6, 2006, Anderson International Transport provided copies of customs export documents to Oceane Marine. (BOE App. 388.)
192. Anderson International Transport provided drain and disconnect letters for containers MSKU8392599 and GESU4495284. (BOE App. 379-380, 343.)
193. Anderson International Transport provided written authorization to Oceane Marine Shipping, Inc. to file the AES on its behalf for container MSKU8392599 and container GESU4495284 on November 27, 2006. (BOE App. 342, 357.)
194. On December 1, 2006, respondent Owen Anderson sent an A.I.T. facsimile transmittal sheet from A.I.T. International LLC to Oceane Marine regarding Booking #851487590 stating: "Please cancel above booking made on our behalf with Maersk Line. We will be responsible for per diem, and freight charges. This will be paid directly to Maersk. Regards Owen." (BOE App. 420.)
195. Respondents performed ocean freight forwarding services on the Like New Auto Salvage shipment.
196. There is no evidence in the record to support a finding that the Like New Auto Salvage shipment was ever placed aboard a vessel.
197. There is no evidence in the record to support a finding that the shipment was dispatched by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Like New Auto Salvage shipment.
198. Respondents did not violate sections 19(a) and (b) of the Shipping Act on the Like New Auto Salvage shipment.
199. Respondents did not operate as an NVOCC on the Like New Auto Salvage shipment and did not violate section 8 of the Shipping Act.

200. On August 17, 2006, Anderson International obtained confirmation for a less than container load booking, Shipco Booking No. HOUGLA1524247, from Shipco Transport, Inc. for a shipment of 64 cubic feet of household goods from Houston to Glasgow, with ocean freight and other charges totaling \$112.00. (BOE App. 442.)
201. Anderson International Transport issued a domestic straight bill of lading for one crate of household effects, Booking No. HOUGLA1524247, consigned to Shipco Transport, Houston, Texas, with a destination of Glasgow England [*sic*]. (BOE App. 445.)
202. On August 23, 2006, Anderson International Transport prepared a Bill of Lading Master for Booking No. HOUGLA1524247 identifying Barbara Downie c/o Anderson International Transport as the exporter, Barbara Downie as the consignee, Houston as the port of loading, and Glasgow as the foreign port of unloading, describing the commodities as "one crate 2 pieces household effects." (BOE App. 441.)
203. Respondents provided the Bill of Lading Master to Shipco Transport Inc. (BOE App. 443.)
204. On September 3, 2006, Shipco Transport, Inc., issued bill of lading number GLA1524247 for Booking No. HOUGLA1524247 identifying Barbara Downie c/o Anderson International Transport as the exporter, Barbara Downie as the consignee, Atlantic Companion 6 as the export carrier, Houston as the place of receipt, New York as the port of loading, and Glasgow as the foreign port of unloading and place of delivery, describing the goods as "one crate 2 pieces household effects," and indicating freight and other charges totaling \$229.17. (BOE App. 439.)
205. On September 3, 2006, Shipco Transport, Inc., issued a second copy of the bill of lading for Booking No. HOUGLA1524247 identical to the first bill of lading except that the freight and other charges are omitted. (BOE App. 440.)
206. When Shipco Transport, Inc., issued bill of lading number GLA1524247 for "one crate 2 pieces household effects," it assumed responsibility for the transportation of the crate and household effects from Houston to Glasgow.
207. When Shipco Transport, Inc., issued bill of lading number GLA1524247 identifying the shipper as Barbara Downie c/o Anderson International Transport, it established a direct relationship with Barbara Downie, the proprietary shipper.
208. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Barbara Downie shipment, thereby operating as an

ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

209. Respondents did not operate as an NVOCC on the Barbara Downie shipment and did not violate section 8 of the Shipping Act.
210. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Barbara Downie shipment.
211. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

DR. SARIPALLI SHIPMENT

BOE App. 15, P. 000446-000455

212. On September 17, 2006, Shipco Transport issued bill of lading number MUM1524240 identifying Dr. Solomon Saripalli c/o Anderson International Transport, 9045 Knight Road, Houston, Texas, as the shipper, Dr. Solomon Saripalli as the consignee, APL Alexandrite 270E as the export carrier, Houston as the place of receipt, New York as the port of loading, and Mumbai as the port of discharge and place of delivery, and describing the goods as "2 pieces 1 crate and 1 skid household effects," and indicating freight and other charges totaling \$787.55. (BOE App. 452.)
213. On September 17, 2006, Shipco Transport issued a second copy of bill of lading number MUM1524240 identical to the first bill of lading except that the freight and other charges are omitted. (BOE App. 453.)
214. On September 21, 2006, Anderson International Transport forwarded a copy of a bill of lading to Dr. Saripalli. (BOE App. 448.)
215. When Shipco Transport, Inc., issued bill of lading number MUM1524240 for "2 pieces 1 crate and 1 skid household effects," it assumed responsibility for the transportation of the crate and skid of household effects from Houston to Mumbai.
216. When Shipco Transport, Inc., issued bill of lading number MUM1524240 identifying the shipper as Dr. Solomon Saripalli c/o Anderson International Transport, it established a direct relationship with Dr. Solomon Saripalli, the proprietary shipper.
217. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Dr. Solomon Saripalli shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

218. Respondents did not operate as an NVOCC on the Dr. Solomon Saripalli shipment and did not violate section 8 of the Shipping Act.
219. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Dr. Solomon Saripalli shipment.
220. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

ALEX & LYNN WATTS SHIPMENT

BOE App. 16, P. 000456-000516

221. Anderson International Transport issued a quote to Alex Watts for shipment of household and personal effects from Houston, Texas to Cairns, Australia. The rate was inclusive of packing, ocean freight, cartage, documentation and service charges. (BOE App. 16, P. 000507.)
222. On May 15, 2006, Anderson International Transport issued a domestic straight bill of lading for a shipment of household effects from Lyn [sic] Watts, Houston, TS, consigned to AIT with ultimate destination Cairns, Australia, with the route indicated "by air." (BOE App. 478.)
223. On May 20, 2005 [sic], Anderson International Transport issued an invoice number 4647 to Alex and Lynn Watts in the amount of \$3,950.00 for pickup, ocean freight, inland delivery, and service charge for shipment of one crate and one skid of household effects from Houston to Brisbane, noting that \$4,700 had already been paid. (BOE App. 459.)
224. On May 20, 2005 [sic], Anderson International Transport issued a second invoice number 4647 to Alex and Lynn Watts in the amount of \$1,650.00 for pickup, ocean freight, inland delivery and service charge for shipment of one crate of household effects from Houston to Brisbane. (BOE App. 505.)
225. On July 20, 2006, Anderson International obtained confirmation for a less than container load booking, Shipco Booking No. HOU BRI1518129, from Shipco Transport, Inc., for a shipment of household goods from Houston, Texas to Brisbane, with ocean freight and other charges totaling \$179.00. (BOE App. 460.)
226. On August 4, 2006, Anderson International Transport prepared a Bill of Lading Master for Booking No. HOU BRI1518129 identifying Issac [sic] Watts c/o Anderson International Transport as the exporter, Alex and Lynn Watts as the consignee, Houston as the port of loading, and Brisbane as the foreign port of unloading, and describing the commodities as "PCS one crate and one skid household effects." (BOE App. 479.)

227. On August 14, 2006, Shipco Transport Inc., issued bill of lading No. BRI1518129 identifying Issac [*sic*] Watts c/o Anderson International Transport as the shipper, Alex and Lynn Watts as the consignee, Hansa Sonderburg as the vessel, Houston as the place of receipt, Los Angeles, CA as the port of loading, and Brisbane as the foreign port of unloading and place of delivery, describing the commodities as “2 pieces one crate and one skid household effects,” and stating ocean freight charges totaling \$1,433.89. (BOE App. 516.)
228. Lynn and Alex Watts filed complaints against Respondents with the Consumer Protection Division of the Texas Attorney General and the Better Business Bureau of Houston, Texas, detailing the problems with their shipment. (BOE App. 463-464, 467-468.)
229. In their complaint with the Texas Attorney General, Alex and Lynn Watts state that respondent Owen Anderson increased the freight charges three days before their goods were to leave the country, their goods incurred additional storage charges in Brisbane because Respondents did not pay charges in Brisbane, respondent Owen Anderson avoided telephone calls seeking to resolve the situation, and various other actions by Respondents that resulted in an increase of the Watts’s costs from original quote of \$1,650.00 (BOE App. 505) to \$8,800.00. (BOE App. 463-464.)
230. When Shipco Transport, Inc., issued bill of lading No. BRI1518129 for “2 pieces one crate and one skid household effects,” it assumed responsibility for the transportation of the crate and skid of household effects from Houston to Brisbane.
231. When Shipco Transport, Inc., issued bill of lading number MUM1524240 identifying the shipper as Issac [*sic*] Watts c/o Anderson International Transport, it established a direct relationship with Alex and Lynn Watts, the proprietary shippers.
232. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Alex and Lynn Watts shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
233. Respondents did not operate as an NVOCC on the Alex and Lynn Watts shipment and did not violate section 8 of the Shipping Act.
234. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Alex and Lynn Watts shipment.
235. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

DAVID ZINNAH SHIPMENT

BOE App. 17, P. 000517-000567

236. On a date unknown, Anderson International Transport provided an estimate of \$5,850.00 to David Zinnah and Brenda Davis for the cost of a door to port move of a 40' standard container from Houston, Texas to Monrovia, Liberia. (BOE App. 566.)
237. On August 3, 2006, Atlantic Container Line AB issued booking confirmation No. S1-426192-00 to Anderson International Transport for shipment of a 40' container from the port of Houston to Monrovia Port, Liberia, with basic freight and other charges totaling \$5,200.40. (BOE App. 558.)
238. On August 3, 2006, Anderson International Transport made arrangements with Clark Freight Line for pickup up of a 40' container from Zim for delivery to Anderson International. (BOE App. 552-554.)
239. On August 3, 2006, Anderson International Transport issued a domestic straight bill of lading to David Zinnah/Brenda Davis for shipment of a 40' container from Houston, Texas, consigned to AIT with ultimate destination of Monrovia, Liberia. (BOE App. 563.)
240. The domestic straight bill of lading described the shipment as "1 unit - 40' container - auto and personal effects" and stated a cost of \$5,850.00 inclusive of pickup, line haul, ocean freight and service charge. (BOE App. 563.)
241. On August 3, 2006, Anderson International Transport issued an invoice to David Zinnah/Brenda Davis in the amount of \$5,850.00 for pickup, ocean freight, inland delivery and service charge for shipment of a 40' container from Houston, Texas to Monrovia, Liberia. (BOE App. 564.)
242. On August 8, 2006, Anderson International Transport issued an invoice to David Zinnah/Brenda Davis in the amount of \$7,560.00 less a credit of \$3,000 for shipment of a 40' container from Houston, Texas to Monrovia, Liberia. (BOE App. 525.)
243. On August 11, 2006, Anderson International Transport arranged for Clark Freight Line to pick up of 40' container ACL0215844 [sic], Booking No. S1-426192-00, from a storage facility for delivery to Barbours Cut Terminal. (BOE App. 556.)
244. On August 21, 2006, Anderson International Transport provided an Export Used Vehicle Information Sheet to Atlantic Container Line for signature. (BOE App. 531-532.)
245. On August 23, 2006, Anderson International Transport prepared a Bill of Lading Master for S1-426192-00, container ACLU2158442, identifying David Zinnah c/o Anderson International Transport as the exporter, Brenda Davis, Monrovia, Liberia, as the consignee, Houston as the port of loading, Antwerp as the foreign port of unloading, and Monrovia,

Liberia as the place of delivery, describing the commodities as "40' container - STC household effects contains 85 pieces automobile," and on August 25, 2006, provided the Bill of Lading Master and vehicle documentation to Atlantic Container Lines. (BOE App. 526-530.)

246. On August 29, 2006, Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 for Booking No. S1-426192-00, container ACLU2158442, identifying David Zinnah c/o Anderson International Transport as the exporter, Brenda Davis, Monrovia, Liberia, as the consignee, CP Navigator 6B74 as the carrier, Houston as the port of loading, Antwerp as the foreign port of unloading, and Monrovia, Liberia as the place of delivery, and describing the goods as "1 x 40 dry cargo 86 unit(s) SLAC: 40' container - STC contains 85 pieces of household effects 1 used 2001 Jeep Cherokee," with no pricing information. (BOE App. 543-545.)
247. On August 29, 2006, Atlantic Container Line faxed bill of lading number ACLU 6B741426192 to Respondents. (BOE App. 546.)
248. On August 29, 2006, Atlantic Container Line issued a freight invoice to Anderson International Transport for freight and other charges in the amount of \$5,452.40 for Booking No. S1-426192-00. (BOE App. 518-520.)
249. On September 19, 2006, Atlantic Container Line issued a new version of bill of lading number ACLU 6B7S41426192 setting forth information identical to the August 29, 2006, version with the addition of freight and other charges in the amount of \$5,452.40. (BOE App. 541-542.)
250. On September 13, 2006, Respondents sent a letter to David Zinnah regarding Zinnah's non-payment of charges for booking No. S1-426192-00 stating that if payment were not made, Anderson would "have no choice but to interrupt the passage" of the shipment. (BOE App. 549.)
251. On September 27, 2006, Respondents sent a letter to David Zinnah for booking No. S1-426192-00 stating that the shipment had arrived in Antwerp on September 6, 2006, had been incurring storage fees of \$60.00 per day, and urging Zinnah to remit the sums due pursuant to the revised invoice.⁴¹ (BOE App. 524.)
252. On October 12, 2006, Anderson International Transport paid \$5,452.40 in freight charges to Atlantic Container Lines for Bill of Lading No. S1-426192-00. (BOE App. 521-522.)

⁴¹ BOE App. 525 is the second invoice issued for the shipment on August 8, 2006. It is not clear whether this is the invoice included with the September 27, 2006, letter.

253. When Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 for container ACLU2158442 containing "1 x 40 dry cargo 86 unit(s) SLAC: 40' container - STC contains 85 pieces of household effects 1 used 2001 Jeep Cherokee," it assumed responsibility for the transportation of the container and its contents from Houston to Monrovia, Liberia.
254. When Atlantic Container Line issued bill of lading number ACLU 6B74S1426192 identifying the shipper as David Zinnah c/o Anderson International Transport, it established a direct relationship with David Zinnah, the proprietary shipper.
255. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the David Zinnah shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
256. Respondents did not operate as an NVOCC on the David Zinnah shipment and did not violate section 8 of the Shipping Act.
257. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the David Zinnah shipment.
258. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

RICHARD NEWMAN SHIPMENT

BOE App. 18, P. 000568-000587

259. On July 16, 2006, Anderson International Transport issued a domestic straight bill of lading to Richard Newman for File No. 4722 and 4742 for a shipment of "two barrels and 13 ctns personal effects" from Houston consigned to A.I.T. with ultimate destination of Montego Bay, Jamaica at a cost of \$900.00. (BOE App. 578.)
260. On August 21, 2006, Anderson International Transport issued a domestic straight bill of lading for File No. 4721 describing the shipment as "three pcs household effects (one crate two cartons)" from A.I.T. consigned to Seaboard Marine, Miami, FL with ultimate destination of Montego Bay, Jamaica. (BOE App. 583.)
261. On August 23, 2006, Anderson International Transport prepared a bill of lading master identifying Anderson International Transport as the exporter, Richard Newman, Montego Bay, Jamaica, as the consignee, Miami, FL as the port of loading, Montego Bay, Jamaica, as the foreign port of unloading, and describing the commodities as "3 pieces household effects (one crate, two cartons)." (BOE App. 569.)

262. On August 23, 2006, Anderson International Transport prepared a bill of lading master identifying Richard Newman c/o Anderson International Transport as the exporter, Richard Newman/Phillip Heaven, Montego Bay, Jamaica, as the consignee, Miami, FL as the port of loading, Montego Bay, Jamaica, as the foreign port of unloading, and describing the commodities as "3 pieces household effects (one crate, two cartons)." (BOE App. 569.)
263. On August 23, 2006, Respondents sent a revised Bill of Lading Master to Seaboard Marine. (BOE App. 581.)
264. On August 25, 2006, Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 identifying Richard Newman c/o Anderson International Transport as the shipper, Richard Newman/Phillip Heaven, Montego Bay, Jamaica, as the consignee, SBD Voyager 537S as the vessel, Dodge Island, FL as the place of receipt, Miami, FL as the port of loading, Montego Bay as the port of discharge and place of delivery, and describing the goods as "3 pieces household effects (one crate, two cartons)," and setting forth freight and other charges totaling \$491.19. (BOE App. 576.)
265. Seaboard Marine, Ltd., bill of lading number SMLU MBY013A897777 sets forth shipper and consignee information consistent with the Bill of Lading Master at BOE App. 569.
266. On August 30, 2006, Respondents sent an "amended Master" to Seaboard Marine. (BOE App. 579.)
267. On August 28, 2006, Anderson International Transport issued check number 1069 in the amount of \$491.19 to Seaboard Marine for SMLU MBY13A8977. (BOE App. 577.)
268. On August 30, 2006, Respondents notified Seaboard Marine that Richard Newman would be paying \$491.19 directly to Seaboard Marine "in lieu of our check no. 1069 in the amount of \$491.19. Kindly return check to our address at your earliest. [sic] (BOE App. 573.)
269. When Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 for "3 pieces household effects (one crate, two cartons)," it assumed responsibility for the transportation of the goods from Dodge Island, FL to Montego Bay, Jamaica.
270. When Seaboard Marine, Ltd., issued bill of lading number SMLU MBY013A897777 identifying the shipper as Richard Newman c/o Anderson International Transport, it established a direct relationship with Richard Newman, the proprietary shipper.
271. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Richard Newman shipment, thereby operating as an

ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.

- 272. Richard Newman paid Seaboard Marine, Ltd., directly for the shipment.
- 273. Respondents did not operate as an NVOCC on the Richard Newman shipment and did not violate section 8 of the Shipping Act.
- 274. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Richard Newman shipment.
- 275. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

CLAUDETTE DILLON SHIPMENT

BOE App. 19, P. 000588-000608

- 276. On September 11, 2006, Anderson International Transport issued a domestic straight bill of lading for file number 4721 for "one barrel personal effects" from Ms. Claudette Dillon consigned to A.I.T. with ultimate destination Kingston, Jamaica, showing a shipping cost Houston to Kingston of \$183.00 and signed by Claudette Dillon. (BOE App. 607.)
- 277. On September 18, 2006, Anderson International obtained a less than container load ocean rate quote, quote No. 956666, from Econocaribe Consolidators, Inc., for shipment of 500 pounds of personal effects or household goods from Houston, Texas to Kingston, Jamaica. (BOE App. 599-600.)
- 278. On September 11, 2006, Anderson International Transport prepared a Bill of Lading Master identifying Claudette Dillon c/o Anderson International Transport as the exporter, Levi Smith, St. Catherine, Jamaica, as the consignee, Miami, Florida, as the port of loading, and Kingston, Jamaica, as the foreign port of unloading, and describing the commodities as "one barrel with h/hold effects." (BOE App. 597.)⁴²
- 279. Anderson International Transport issued an undated dock receipt for booking 19-956666 identifying Claudette Dillon c/o Anderson International Transport as the shipper, Levi Smith, St. Catherine, Jamaica, as the consignee, Barbours Cut as the pier terminal, SS Z. Black Sea V. 627 as the vessel, Port Everglades, Florida, as the port of loading, and Kingston, Jamaica, as the port of discharge, describing the commodities as "barrel with household effects." (BOE App. 602.)

⁴² BOE describes this bill of lading master as a shipment "to Genesis (Europe/U.K.) Ltd." (RPF 129.) Genesis (Europe/U.K.) Ltd. is not mentioned on BOE App. 597.

280. On September 26, 2006, Econocaribe issued bill of lading document number 19-956666 identifying Claudette Dillon c/o Anderson International Transport as the shipper, Levi Smith, St. Catherine, Jamaica, as the consignee, Houston, TX as the place of receipt, Stadt Luneburg v. 79 as the vessel, Port Everglades, Fla, as the port of loading, and Kingston, Jamaica, as the port of discharge, describing the goods as "1 drms. S.T.C. (1 barrel) household goods/personal effects," and setting forth freight and other charges totaling \$235.00. (BOE App. 595.)
281. On October 13, 2006, Respondents sent a check in the amount of \$235.00 to Genesis (Europe/U.K.) Ltd. for Booking No. 19-956666. (BOE App. 591.)
282. When Econocaribe issued bill of lading document number 19-956666 for "1 drms. S.T.C. (1 barrel) household goods/personal effects)," it assumed responsibility for the transportation of the goods from Houston, TX to Kingston, Jamaica.
283. When Econocaribe issued bill of lading document number 19-956666 identifying the shipper as Claudette Dillon c/o Anderson International Transport, it established a direct relationship with Claudette Dillon, the proprietary shipper.
284. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Claudette Dillon shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
285. Respondents did not operate as an NVOCC on the Claudette Dillon shipment and did not violate section 8 of the Shipping Act.
286. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Claudette Dillon shipment.
287. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

JULIA HUXTABLE SHIPMENT

BOE App. 20, P. 000609-000624

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

289. On March 7, 2006, Anderson International Transport issued a domestic straight bill of lading for shipment of "one crate TV used" from AIT consigned to World Trade, Houston, with ultimate destination St. Croix. (BOE App. 616.)
290. On March 7, 2006, Anderson International obtained a booking, Booking No. 19-914428, from Econocaribe Consolidators, Inc., for shipment of personal effects to Kingston, Jamaica. (BOE App. 619-621.)
291. On March 10, 2006, Anderson International Transport prepared a Bill of Lading Master for booking number 19-914428 identifying Julia Huxtable % Anderson International Transport as the exporter, Julia Huxtable, Manchester, Jamaica, as the consignee, Sea Gale as the exporting carrier, Port Everglades as the port of loading, Kingston as the foreign port of unloading, and describing the commodities as "crate used TV (household effects)." (BOE App. 612.)
292. On March 13, 2006, Respondents provided the Bill of Lading Master for booking number 19-914428 to Econocaribe Consolidators, Inc. for shipment of personal effects to Kingston. (BOE App. 617.)
293. On March 16, 2005, [sic], Anderson International Transport issued an invoice to Julia Huxtable in the amount of \$400.00 for shipment of one used television from Houston via Miami to Kingston, inclusive of pickup, packing, ocean freight, and documents. (BOE App. 615.)
294. On March 30, 2006, Econocaribe printed bill of lading document number 19-914428 identifying "Anderson International Transport Julia Huxtable %" as the shipper, Julia Huxtable, Manchester, Jamaica, as the consignee, Stadt Rendsburg v. 27 as the exporting carrier, Houston, TX as the place of receipt, Miami, FL as the port of loading, Kingston as the port of discharge, describing the goods as "1 crts S.T.C. used TV (household effects)," and setting forth a total of \$288.51 in ocean freight and other charges. (BOE App. 614.)
295. On March 30, 2006, Econocaribe printed freight invoice document number 19-914428 identifying "Anderson International Transport Julia Huxtable %" as the shipper, Julia Huxtable, Manchester, Jamaica, as the consignee, Stadt Rendsburg v. 27 as the exporting carrier, Houston, TX as the place of receipt, Miami, FL as the port of loading, Kingston as the port of discharge, describing the goods as "1 crts S.T.C. used TV (household effects)," and setting forth a total of \$288.51 in ocean freight and other charges. (BOE App. 610.)
296. When Econocaribe issued bill of lading document number 19-914428 for "1 crts S.T.C. used TV (household effects),)" it assumed responsibility for the transportation of the goods from Houston, TX to Kingston, Jamaica.

297. When Econocaribe issued bill of lading document number 19-914428 identifying the shipper as "Anderson International Transport Julia Huxtable %," it established a direct relationship with Julia Huxtable, the proprietary shipper.
298. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Julia Huxtable shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
299. Respondents did not operate as an NVOCC on the Julia Huxtable shipment and did not violate section 8 of the Shipping Act.
300. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Julia Huxtable shipment.
301. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

MICHAEL ROSE SHIPMENT

BOE App. 21, P. 000625-000646

302. On November 2, 2006, Anderson International obtained a booking confirmation from Finn Container Cargo Services, Inc., Booking No. FINN-10136, for shipment of a 40' standard container from Houston, Texas to Kingston, Jamaica with freight and other charges totaling \$2500.00. (BOE App. 632.)
303. On November 2, 2006, Respondents prepared a Bill of Lading Master for booking number ORF145406 for "contr # 99999" identifying Micheal [*sic*] Rose as the exporter, Micheal [*sic*] Rose, Kingston, Jamaica as the consignee, Zim Canada as the exporting carrier, Houston as the port of loading, Kingston as the foreign port of unloading, and describing the commodities as "shipper own contr STC M.V. equipment and personal effect." (BOE App. 639.)
304. On November 2, 2006, Respondents provided a Bill of Lading Master for Finn reference number FINN10136 to Finn Container Cargo Services. (BOE App. 646.)
305. On November 15, 2006, Finn Container Cargo Services, Inc., issued bill of lading number FINN-10136 for container TRIU427726-0 identifying "Anderson International Transport . . . as agents for: Mr. Michael Rose" as the shipper, Mr. Michael Rose, Kingston, Jamaica, as the consignee, Marmara Sea V. 641W as the exporting carrier, Houston, TX as the place of receipt and the port of loading, Kingston, Jamaica, as the port of discharge, and describing

the goods as “1 X 40’ shipper owned std container STC 120 boxes household goods.” (BOE App. 628.)

306. When Finn Container Cargo Services, Inc., issued bill of lading number FINN-10136 for container TRIU427726-0, it assumed responsibility for the transportation of container TRIU427726-0 and its contents from Houston, TX to Kingston, Jamaica.
307. When Finn Container Cargo Services, Inc., issued bill of lading number FINN-10136 identifying the shipper as “Anderson International Transport . . . as agents for: Mr. Michael Rose,” it established a direct relationship with Michael Rose, the proprietary shipper.
308. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Michael Rose shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
309. Respondents did not operate as an NVOCC on the Michael Rose shipment and did not violate section 8 of the Shipping Act.
310. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Michael Rose shipment.
311. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

ABDELNASAR ALBALBISI SHIPMENT

BOE App. 22, P. 000647-000649

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

315. I find, based on the evidence of the invoice and the fax cover sheet, that Mediterranean Shipping Company (USA) Inc., identified Abdelnasar Albalbisi as the shipper on bill of lading number MSCUHS827635.
316. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCHUS827635 for container TINU4301309, it assumed responsibility for the transportation of container TINU4301309 and its contents from Houston, TX to Ad Dammam.
317. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCHUS827635 identifying the shipper as Abdelnasar Albalbisi, it established a direct relationship with Abdelnasar Albalbisi, the proprietary shipper.
318. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Abdelnasar Albalbisi shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
319. Respondents did not operate as an NVOCC on the Abdelnasar Albalbisi shipment and did not violate section 8 of the Shipping Act.
320. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Abdelnasar Albalbisi shipment.
321. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

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

On four shipments, the common carrier issued a bill of lading identifying the proprietary shipper "c/o AIT International, LLC" (or "c/o AIT Intl LLC") as the shipper. As BOE recognizes, on October 23, 2006, Owen Anderson and Nichelle Jones incorporated A.I.T. International, LLC, in Texas. The Commission did not name A.I.T. International, LLC, as a party to this proceeding; therefore, sanctions cannot be entered against it. *See Banfi Products Corp. – Possible Violations of Section 16, Initial Paragraph, Shipping Act 1916, and Section 10(a)(1) of the Shipping Act of 1984, 24 S.R.R. 1152, 1153 (1988) (Amended Order of Investigation) ("Hearing Counsel alleges that . . . adding these companies as respondents to this proceeding will assist it in obtaining evidence and permit any ultimate remedial action to be directed against all participants in the arrangement.") (emphasis added).* BOE does not argue that the corporate veil should be pierced and that the actions

of A.I.T. International, LLC, should be attributed to respondent Owen Anderson or respondent Anderson International Transport for that reason. Therefore, these shipments must be examined for participation by Respondents, not A.I.T. International, LLC.

NICK MANIOTES SHIPMENT

BOE App. 23, P. 000650-000666

322. On January 19, 2007, AIT Trans,⁴³ 14023 South Post Oak Rd., Houston, Texas obtained booking confirmation No. HOU187192 from Mediterranean Shipping Company (USA) Inc., identifying AIT Trans as the shipper, MSC Lausanne 557R as the vessel, Port Everglades as the port of loading, Piraeus, Greece, as the port of discharge, and listing freight and other charges totaling \$1,302.08 for shipment of a 20' dry van container. (BOE App. 651-652.)
323. On January 23, 2007, AIT International, LLC arranged for East Florida Hauling to pick up a container from MSC for booking HOU187192 to be dropped off in Boynton Beach, Florida. (BOE App. 662.)
324. On January 20, 2007, respondent Anderson International Transport issued a domestic straight bill of lading for shipment of 20' container CRUX1044167 [*sic*] containing household effects from Nick Maniotes, Boynton Beach, Florida, consigned to AIT with ultimate destination Piraeus, Greece, with shipping and other charges totaling \$2,913.75. (BOE App. 653.)
325. On January 25, 2007, respondent Anderson International Transport prepared a Bill of Lading Master for booking HOU187192, container CEXU104416-7 [*sic*], identifying Nick Maniotes % AIT Intl LLC as the exporter, Kyriakos Karras, Athens, Greece, as the consignee, MSC Lausanne 557R as the exporting carrier, Port Everglades as the port of loading, Piraeus as the foreign port of unloading, and describing the commodities as "20' contr stc 60 pcs household effects." (BOE App. 654.)
326. On January 30, 2007, Mediterranean Shipping Company S.A., Geneva issued bill of lading number MSCUTM505214 for container CRXU1044167 [*sic*] identifying Nick Maniotes c/o AIT Intl LLC, 9045 Knight Road, Houston, TX as the shipper, Kyriakos Karras, Athens, Greece, as the consignee, MSC Gina - 270R as the vessel, Port Everglades, FL as the port of loading, Piraeus, Greece, as the port of discharge, and describing the commodities as "60 unit(s) of (pcs) household effects." (BOE App. 664.)
327. On February 9, 2007, Mediterranean Shipping Company S.A., issued invoice number MSCUTM505214 for bill of lading number MSCUTM505214, "Bill To: Nick Maniotes c/o AIT Intl LLC," for freight and charges totaling \$1456.00. (BOE App. 665.)

⁴³ The record does not explain what AIT Trans is. It is located at one of the addresses used by Respondents.

328. On February 9, 2007, Mediterranean Shipping Company S.A., faxed invoice number MSCUTM505214 for bill of lading number MSCUTM505214 to AIT Intl LLC identifying Nick Maniote [*sic*] as the shipper and AIT Intl LLC as the forwarder. (BOE App. 655.)
329. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCUTM505214 for container CRXU1044167, it assumed responsibility for the transportation of container TINU4301309 and its contents from Houston, TX to Pireaus, Greece.
330. When Mediterranean Shipping Company (USA) Inc., issued bill of lading number MSCUTM505214 identifying the shipper as Nick Maniotes c/o AIT Intl LLC, it established a direct relationship with Nick Maniotes, the proprietary shipper.
331. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Nick Maniotes shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
332. Respondents did not operate as an NVOCC on the Nick Maniotes shipment and did not violate section 8 of the Shipping Act.
333. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Nick Maniotes shipment.
334. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

JUSTINA LICRISH SHIPMENT

BOE App. 24, P. 000667-000669

335. On an unknown date, A.I.T., 9045 Knight Road, Houston, Texas, prepared a Bill of Lading Master for booking number CLE 2481/AIT 4769, for container ZIMU22443-3, identifying Justina Licrish c/o AIT International, LLC, 11835 So. Ridgewood Cir, Houston, Texas, as the exporter, Justina Licrish % Shirley Wilson, Briston, Trinidad, as the consignee, Houston as the port of loading, Port of Spain as the foreign port of unloading, describing the commodities as "20' container stc 193 household effects."(BOE App. 668.)
336. I find that "A.I.T., 9045 Knight Road" is respondent Anderson International Transport.
337. On May 16, 2007, Zim Container Service issued bill of lading number ZIMUORF199750 for booking number CLE 2481/AIT4769, container ZIMU22443-3, identifying "AIT International, LLC, as agents for Justina Licrish" as the shipper, Justina Licrish % Shirley

Wilson, Briston, Trinidad, as the consignee, Zim Texas 714/W as the vessel, Houston, Texas, as the port of loading, Port of Spain as the port of destination, and describing the commodities as "20' standard SLAC: 193 pcs of used household goods & personal effects," and setting forth a total of \$1730.94 in freight and other charges. (BOE App. 667.)

338. Zim Container Service stamped "credit hold" on bill of lading number ZIMUORF199750. (BOE App. 667.)
339. On June 5, 2007, R.W. Smith, a customs broker/freight forwarder, issued an invoice to Anderson International Transport, 9045 Knight Road, Houston, Texas, \$165.00 for AIT4769 for documents and forwarding services performed on May 8, 2007, for Justina Licrish's shipment from Houston, Texas, to Port of Spain. (BOE App. 669.)
340. When Zim Container Service issued bill of lading number ZIMUORF199750 for container ZIMU22443-3, it assumed responsibility for the transportation of container ZIMU22443-3 and its contents from Houston, TX to Port of Spain.
341. When Zim Container Service issued bill of lading number ZIMUORF199750 identifying the shipper as "AIT International, LLC, as agents for Justina Licrish," it established a direct relationship with Justina Licrish, the proprietary shipper.
342. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the Justina Licrish shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
343. Respondents did not operate as an NVOCC on the Justina Licrish shipment and did not violate section 8 of the Shipping Act.
344. Respondents performed their services on the Justina Licrish shipment after they were served with the Order of Investigation and Hearing in this proceeding.
345. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Justina Licrish shipment.
346. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

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

355. Respondents did not operate as an NVOCC on the Ms. Libby Coker shipment and did not violate section 8 of the Shipping Act.
356. Respondents performed their services on the Ms. Libby Coker shipment after they were served with the Order of Investigation and Hearing in this proceeding.
357. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the Ms. Libby Coker shipment.
358. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.

GEORGE HUGHES SHIPMENT

BOE App. 26, P. 000673-000685

359. On March 27, 2007, A.I.T., 9045 Knight Road, Houston, Texas issued a domestic straight bill of lading for shipment of a “crushman [sic] scooter” from George Hughes, Natalia, Texas consigned to AIT with ultimate destination of Belgium. (BOE App. 680.)
360. On April 24, 2007, A.I.T., 9045 Knight Road, Houston, Texas issued a domestic straight bill of lading for “one crate scooter” from AIT International, Houston, TX to Carotrans Int’l, Charleston, SC with ultimate destination Rotterdam under Booking No. CSCRDM0718001. (BOE App. 676.)
361. The April 24, 2007, domestic straight bill of lading is stamped “Southwestern Motor Transport.” (BOE App. 676.)
362. On an unknown date, A.I.T. asked Wilson Trucking to amend the bill of lading “to read prepaid covering shipment sent to Charleston SC.” (BOE App. 675.)
363. On May 1, 2007, A.I.T. prepared a Bill of Lading Master for booking No. CSCRDM0718001 identifying George Hughes ^ AIT International, LLC as the exporter, Art Huizer, Vlaardingen, the Netherlands as the consignee, APL Jade as the exporting carrier, Charleston as the port of loading, and Rotterdam as the foreign port of unloading, and describing the commodities as “Crate motor scooter 1944 Crushman [sic].” (BOE App. 683.)
364. I find that “A.I.T., 9045 Knight Road” is respondent Anderson International Transport.
365. R.W. Smith, a customs broker/freight forwarder, billed respondent Anderson International Transport \$165.00 for documentation and forwarding services performed on May 8, 2007, for George Hughes’s shipment from Charleston, South Carolina to Rotterdam, Netherlands. (BOE App. 26, P. 000684.)

366. On an unknown date, Carotrans International, Inc., issued freight invoice/bill of lading number CSCRDM0718001 identifying George Hughes ^ AIT International, LLC as the shipper, Art Huizer, Vlaardingen, the Netherlands as the consignee, MOL Elbe/028ET as the vessel, Houston, TX as the place of receipt by pre-carrier, Charleston, SC as the port of loading, and Rotterdam as the port of discharge, describing the goods as “crate SLAC: 1944 Crushman [*sic*],” and setting forth ocean freight and other charges totaling \$93.00. (BOE App. 685.)
367. When Carotrans International, Inc., issued bill of lading CSCRDM0718001 for “crate SLAC: 1944 Crushman [*sic*],” it assumed responsibility for the transportation of the goods from Houston, TX to Rotterdam.
368. When Carotrans International, Inc., issued bill of lading CSCRDM0718001 identifying the shipper as George Hughes ^ AIT International, LLC, it established a direct relationship with George Hughes, the proprietary shipper.
369. Respondents performed ocean freight forwarding services and dispatched shipments on behalf of others in order to facilitate shipment by a common carrier using, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country on the George Hughes shipment, thereby operating as an ocean freight forwarder in the United States foreign trades in willful and knowing violation of sections 19(a) and (b) of the Shipping Act.
370. Respondents did not operate as an NVOCC on the George Hughes shipment and did not violate section 8 of the Shipping Act.
371. Respondents performed their services on the George Hughes shipment after they were served with the Order of Investigation and Hearing in this proceeding.
372. Respondents are liable to the United States Government for a civil penalty that may not exceed \$30,000.00 for the George Hughes shipment.
373. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for this violation.
374. Respondents operated as an ocean freight forwarder on three of the twenty-two shipments for which BOE seeks a civil penalty after the issuance of the Order of Investigation and Hearing. (Kellogg Affidavit.)

SHIPMENTS FOR WHICH BOE DOES NOT SEEK A CIVIL PENALTY

375. On March 11, 2008, a staff member of the Commission’s Bureau of Certification and Licensing received a phone call from Juan Wilson, the Manager of the New York credit

department of Mediterranean Shipping Company (USA) Inc. ("MSC"), a VOCC, regarding two checks written by A.I.T. International, LLC and signed by Respondent Owen Anderson as payment for ocean freight charges.⁴⁴ Both checks were returned to MSC due to non-sufficient funds. In response to inquiries from BOE, Mr. Wilson provided copies of the checks and copies of MSC's documentation for the two shipments. (BOE App. 687-697.)⁴⁵

376. The two shipments were booked (at the request of A.I.T. International, LLC) with MSC by a company that operates as a freight forwarder under the name R.W. Smith.⁴⁶ According to R.W. Smith, both Anderson International Transport and A.I.T. International, LLC were listed in their customer database, albeit with different customer numbers. Although R.W. Smith no longer accepted any bookings from Anderson International Transport, Respondent Owen Anderson, through A.I.T. International, LLC, was able to make bookings with R.W. Smith. (BOE App. 698-701.)
377. The first shipment was booked on July 31, 2007, and sailed on October 16, 2007, from Houston, Texas to Mombasa, Kenya. The shipment was booked with MSC by Sea-Smith and billed to Mr. Sandip Shah. However, according to Mr. Shah, Mr. Shah paid A.I.T. International, LLC directly approximately \$6,000 for pick-up of the goods and shipment of the goods from Houston, TX to Mombasa, Kenya. Mr. Shah found A.I.T. International, LLC in the phone book. In exchange for payment in full, Mr. Anderson made the arrangements to move the goods to Mombasa, Kenya, picked up the goods and provided a packing list. (BOE App. 702-704.)
378. The second shipment, consisting of two containers, was booked on September 11, 2007, from Denver, Colorado to Thessaloniki, Greece and sailed on December 6, 2007, from

⁴⁴ As detailed in Proposed Finding of Fact 13, A.I.T. International LLC was incorporated in Texas on October 23, 2006. A.I.T. International LLC is jointly owned by Owen Anderson, a respondent in this proceeding, and Nichelle Jones. Owen Anderson serves as the President and is the proposed qualifying individual for A.I.T. International.

⁴⁵ These include BOE App. 687 and 688 attached to BOE's Appendix to Amended Findings of Fact. See n.29, *supra*.

⁴⁶ The Licrish, Coker and Hughes shipments, detailed earlier, (all of which were made by Anderson International Transport after the issuance of the Order of Investigation and Hearing in this case), were also booked with ocean carriers or non-vessel-operating common carriers by R.W. Smith. In addition to operating as a freight forwarder, R.W. Smith also operates as a non-vessel-operating common carrier under the name Sea-Smith. One of these two most recent shipments was booked with MSC under the name Sea-Smith. Booking the shipment under the name of Sea-Smith (rather than R.W. Smith) was a clerical error. No Sea-Smith house bill of lading was issued. R.W. Smith listed itself as freight forwarder for both shipments.

Houston, Texas to Thessaloniki, Greece. MSC billed R.W. Smith for this shipment. (BOE App. 692-697.)

379. A.I.T. International, LLC did not pay R.W. Smith for either of the shipments and MSC did not issue the original bills of lading. (BOE App. 702-704.) In order to obtain the release of the shipments and prevent any further delay in delivery of the shipments, A.I.T. International, LLC issued two checks directly to MSC. After the receipt of the checks and prior to notification that the checks had been returned for non-sufficient funds, MSC released the cargo to the consignees. (BOE App. 705-706.)

Angela and Jason Temple Shipment

BOE App. 707-733.

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

387. Although he had been paid in full by the Temples in May, 2008, Anderson did not begin making arrangements to ship the Temple's vehicle until the end of July, 2008. The Temples chose not to have the car shipped. (BOE App. 727-729, 733.)
388. BOE has demonstrated by a preponderance of the evidence that respondent Owen Anderson has a long history of providing ocean transportation services in violation of the Shipping Act. More recently, the evidence suggests that Anderson incorporated A.I.T. International, LLC, as a means of securing business with ocean transportation intermediaries that would no longer do business with Anderson International Transport. (BOE App. 698-701.)
389. I conclude that there is a reasonable likelihood that Owen Anderson will continue or resume his unlawful activities. Therefore, entry of a cease and desist order prohibiting respondent Owen Anderson from operating as an ocean transportation intermediary is appropriate and will be entered.

ORDER

The evidence proves that Respondents Owen Anderson and Anderson International Transport violated section 19(a) of the Shipping Act of 1984 and the Commission's regulations at 46 C.F.R. 515 by operating as an ocean transportation intermediary in the United States foreign trades without obtaining a license from the Commission and violated section 19(b) of the Shipping Act and the Commission's regulations at 46 C.F.R. 515 by operating as an ocean transportation intermediary in the United States foreign trades without providing proof of financial responsibility in the form of surety bonds. Therefore, it is hereby

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



Clay G. Guthridge
Administrative Law Judge