

FEDERAL MARITIME COMMISSION

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

Docket No. 06-06

Served: December 18, 2008

Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment

I. PROCEEDING

This proceeding was instituted by an Order of Investigation and Hearing, served May 11, 2006, to determine whether respondents EuroUSA, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. (CI) violated section 10(b)(11) of the Shipping Act of 1984¹ (the Act) and the Commission’s regulations at 46 C.F.R. § 515.27, by knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary (OTI) that did not have a tariff

¹ After this proceeding was instituted by the Commission, the Shipping Act was reenacted as positive law, through reorganization and restatement of the then current law. Section 10(b)(11) of the Act is now codified as 46 U.S.C. § 41104(11). Because the parties and ALJ have primarily referred to section 10(b)(11) in this proceeding, the former section reference will be used in this Order.

and a bond as required by sections 8 and 19 of the Act.

The Commission's Bureau of Enforcement (BOE) and EuroUSA entered into a settlement agreement on October 1, 2007, and that agreement is pending before the Administrative Law Judge (ALJ). BOE filed a Motion for Sanctions and Summary Judgment against CI, and that motion also remains pending before the ALJ.

Tober filed a Motion for Summary Judgment asserting that BOE could not establish that the OTIs in question were in fact non-vessel-operating common carriers (NVOCCs), and/or that Tober knowingly and willfully accepted cargo from them with knowledge of their status as NVOCCs. After a hearing on the Motion for Summary Judgment, the ALJ issued an Order for Additional Briefing, directing the parties to submit supplemental briefs addressing several issues pertaining to the definition of an NVOCC. BOE filed a Supplemental Brief accompanied by 13 exhibits, and Tober filed a Supplemental Brief which included a motion to strike BOE Supplemental Exhibits 8, 12, and 13.

On June 12, 2008, the ALJ issued a Memorandum and Order granting Tober's Motion for Summary Judgment. The ALJ stated that BOE contended that two issues of material fact precluded granting Tober's Motion for Summary Judgment: 1) whether the OTIs in question were NVOCCs as defined by the Shipping Act, regulation and case law; and 2) whether Tober knowingly and willfully accepted cargo from the alleged NVOCCs. The ALJ concluded, however, that these facts were "...ultimate facts to be determined by applying the law to the material facts as to which there is no genuine issue regarding Tober's operations and the operations of the ENTITIES² that BOE argues are NVOCCs." ALJ Memorandum and Order at 67.

² The ALJ used the term "ENTITY" or "ENTITIES" when referring to one or more of the 17 companies identified by BOE as alleged unbonded and untariffed NVOCCs from which Tober accepted cargo or for which Tober transported cargo.

The ALJ went on to state that many, if not most, of the shipping documents on which BOE relied were issued by Tober, not by the entities that BOE contended were NVOCCs, and that, therefore, these documents were proof of Tober's conduct, not the conduct of an entity with which Tober did business. The ALJ further stated that, to the extent that the documents created by Tober proved conduct by the entities, the documents showed conduct "as consistent" with performance of ocean freight forwarder (OFF) services as with NVOCC services.

The ALJ granted Tober's motion to strike BOE Supplemental Exhibits 8 and 12.³ With regard to BOE Supplemental Exhibit 8, an affidavit describing operations of NVOCCs and OFFs, the ALJ concluded that the affidavit should be struck, because to admit it would allow BOE to present a witness not identified until long after discovery closed, and whom Tober had not had an opportunity to depose. With regard to BOE Supplemental Exhibit 12, printouts of the websites of some of the entities with which Tober did business, the ALJ ruled that web pages must be properly authenticated to be admissible. BOE had not authenticated the web pages, and the ALJ therefore struck them from the record.⁴ Finally, the ALJ concluded that BOE Exhibit 17, which consisted of e-mail messages between an FMC staff member and a shipper of household goods who did business with one of the entities, was hearsay to the extent that it was offered to prove the truth of the matter asserted, and therefore would not be considered.

The ALJ concluded that the remaining evidence of record did not support a finding that any of the specified entities with which Tober conducted business acted as a common carrier or NVOCC on any of the specified 23 shipments identified by BOE.

³ The ALJ concluded that BOE Supplemental Exhibit 13, which consisted of representative shipments from each of the entities, was relevant to the issue of whether the entities with which Tober did business were NVOCCs, and he therefore denied Tober's motion to strike this exhibit.

⁴ The ALJ also struck Tober Exhibit E, a web page for one of the entities, on the same ground.

Based on his finding that none of the specified entities acted as NVOCCs, the ALJ concluded that there was no evidence to support a finding that Tober had violated section 10(b)(11) of the Act.

BOE filed an appeal of the ALJ's Memorandum and Order granting Tober's Motion for Summary Judgment, and Tober filed a reply in opposition to BOE's appeal.

II. POSITIONS OF THE PARTIES

In its appeal, BOE seeks review of the ALJ's conclusions on the issues set out in the Commission's Order of Investigation, specifically whether the entities to which Tober provided service were operating as NVOCCs, and whether Tober's actions in serving such entities were knowing and willful within the meaning of section 10(b)(11) of the Act. BOE also seeks review of the ALJ's application of the standard for considering motions for summary judgment, as well as the striking of certain exhibits from BOE's filings in opposition to Tober's motion.

In its appeal, BOE makes five major arguments. First, BOE argues that the ALJ misapplied the standard for considering motions for summary judgment. BOE states that a motion for summary judgment may be granted only if, after giving the benefit of all reasonable doubts and inferences to the nonmoving party (BOE), it is determined that there is no genuine issue as to any material fact and the moving party (Tober) is entitled to judgment as a matter of law. BOE argues that based on the evidence presented, there are genuine issues of material fact and Tober's motion for summary judgment should not have been granted.

BOE's second argument is that the ALJ ignored controlling Commission precedent that an essential factor to be considered in determining common carrier status is whether a carrier holds itself out to accept cargo from whoever offers it to the extent of its ability to carry. BOE notes that holding out to the public is a statutory

requirement of common carriage.

Third, BOE argues that the ALJ erred in striking BOE's Supplemental Exhibits 8 and 12, and Exhibit 17. BOE submits that the ALJ'S evidentiary rulings excluding these exhibits were erroneous under the Administrative Procedure Act (APA), 5 U.S.C. § 556, and the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.156.

Fourth, BOE argues that the ALJ erred in holding there was no evidence of a genuine issue of material fact as to whether the entities involved were NVOCCs, and it was error for the ALJ to hold that Tober's issuance of bills of lading foreclosed the possibility that the entities were responsible for the transportation. BOE asserts that its evidence shows the following facts: Tober did not consider the proprietary shipper its customer; Tober did not consider the shipper responsible for the payment of the ocean freight and never made any attempt to collect the ocean freight from the proprietary shipper; proprietary shippers contracted with the entities, not with Tober; on a substantial number of shipments, Tober identified the intermediary entity as the shipper on shipment documents issued by Tober; in some cases, Tober's bills of lading show the proprietary shipper "care of" the entity; and in most cases, the proprietary shipper never received a copy of Tober's bill of lading.

Finally, BOE argues that the ALJ erred in holding that there was no material issue of fact as to whether Tober knowingly and willfully accepted cargo from the entities. BOE states that it produced evidence supporting its argument that Tober acted knowingly and willfully, including evidence that Tober accepted shipments from the entities even after the commencement of this proceeding.

In its opposition to the BOE's appeal of the Order granting summary judgment, Tober makes five arguments. Tober first argues that under Rule 56 of the Federal Rules of Civil Procedure (FRCP),

BOE must come forward with evidence establishing a genuine issue of material fact. According to Tober, BOE offered no sworn testimony or any other type of evidence to support its allegation that the entities furnished services typically provided by NVOCCs. Second, Tober states that BOE was on notice that Rule 56 governs this proceeding, and was aware that the ALJ expressly required that admissible evidence be cited to controvert any statement of material fact.

Tober's third argument is that the ALJ properly excluded certain exhibits submitted by BOE, and discovery rulings are reviewed under an abuse of discretion standard. Fourth, Tober argues that the ALJ properly determined that there was no evidence presented that the entities assumed responsibility for the transportation, and the Shipping Act explicitly provides that in order to be a common carrier, an entity must assume responsibility for the transportation of cargo. Tober asserts that to the extent that BOE argues that the holding out requirement supersedes the requirement that the entity assume responsibility for the transportation, its position is contrary to the language of the Shipping Act and is not the law.

Finally, Tober argues that BOE cannot establish that Tober knew that the entities in question were NVOCCs. Tober states that given the undisputed evidence that the entities did not issue bills of lading, did not have contracts with vessel-operating common carriers (VOCCs), or exhibit any other indicia of acting as NVOCCs, there is no evidence from which the Commission could conclude that Tober had reason to believe that it was carrying cargo for NVOCCs.

III. DISCUSSION

The appeal filed by BOE raises issues concerning standards governing consideration of a motion for summary judgment, standards governing the admissibility of evidence in administrative proceedings, and standards for determining common carrier status.

Consideration of these issues follows:

A. Standards for Consideration of a Motion for Summary Judgment

Judicial precedent provides that a grant of summary judgment is reviewed *de novo*, taking into consideration "...all of the evidence and the inferences it may yield in the light most favorable to the nonmoving party." *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005). *See also, Oltman v. Holland America Line, Inc.* 538 F.3d 1271, 1276 (9th Cir. 2008); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

Motions for summary judgment are considered under Rule 56 of the Federal Rules of Civil Procedure (FRCP), which provides that such motions may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has described material facts as those that might affect the outcome of the case: "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). With regard to whether there is a genuine issue of material fact, the Court has said that a dispute about a material fact is genuine "...if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

At the summary judgment stage, the burden on BOE is not to prove that the entities are NVOCCs. The burden on the nonmoving party is "...not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727, p. 490 (3d ed. 1998). The burden on BOE is to introduce evidence from which a reasonable jury could conclude that the entities are

NVOCCs, thereby justifying a hearing: “[m]aterials offered in opposition to summary judgment...are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial.” Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 130 (2006).

At the summary judgment stage, the role of the judge “...is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 249. The party seeking summary judgment (Tober) has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); Wright, Miller & Kane, *supra* at 455.

While the nonmoving party is to show facts that present a genuine issue worthy of trial, the nonmoving party does not have to prove its case to the same standard that it would at trial or hearing. The Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), stated that “[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment....Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(e) except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing [required in Rule 56(e)]....” *Id.* at 324. Moreover, the nonmoving party receives the benefit of all reasonable doubts and inferences to be drawn from the facts. *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 255; *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Jeffreys v. The City of New York*, 426 F.3d 549, 553 (2d Cir. 2005); *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d 171, 175 (2d Cir. 2003); *Cole v. Cole*, 633 F.2d 1083, 1089 (4th Cir. 1980).

Motions for summary judgment before the Commission are

considered pursuant to the standards set out above. In *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk, Inc.*, 27 S.R.R. 1045 (ALJ 1997), the ALJ set out some basic principles applied by the courts and the Commission as follows:

...there are a number of basic principles that the courts and the Commission have followed, for example, that summary judgments are not favored by the courts, that the test before granting summary judgment for defendants is whether plaintiffs are entitled to go forward with evidence into trials, that summary judgment should be rarely granted in complex cases requiring more fully developed records or cases involving novel statutes or question [sic] of motive or intent, and that plaintiffs seeking to overcome defendants' motion for summary judgment must proffer something more than merely the allegations in their complaints.

McKenna Trucking Co., Inc., 27 S.R.R. at 1051. The ALJ went on to note that the use of summary judgment procedure has grown in recent years, following three Supreme Court decisions issued in 1986: *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Celotex Corp. v. Catrett*, 477 U.S. 317. The ALJ summarized the effect of these Supreme Court decisions as follows:

According to the trilogy of 1986 Supreme Court decisions, a nonmovant...must proffer some type of substantial evidence showing support for each essential element of its claim under substantive law and its claim must be based upon a plausible legal theory in order to withstand respondents' motion for summary judgment when...respondents' motion is supported by affidavits and has a plausible basis. Furthermore, even if there is some factual dispute, the dispute must involve genuine disputes of material

fact in order to survive a motion for summary judgment and to proceed into further litigation.

McKenna Trucking Co., Inc., 27 S.R.R. at 1052.

The standards for considering motions for summary judgment in Commission proceedings have been applied so as to ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible. In *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999), the ALJ determined that he could not issue summary judgment because "...the record is too thin to decide the important and complex issues involved, because there are genuine disputes of material fact, and because...I am required to construe any doubts in favor of the non-moving party..." *Id.* at 1014. The decision in *NPR* is consistent with Commission precedent recognizing that "...summary judgments are not appropriate in cases involving complex factual matters or cases having widespread importance that need a more fully developed record." *Int'l Frt. Fwdrs. & Custom Bkrs. Assn of New Orleans v. LASSA*, 27 S.R.R. 392, 395-96 (ALJ 1995).

Motions for summary judgment at the Commission have been denied even when the nonmovant has not submitted any evidence, as well as when evidence has been deemed to be incomplete. In *Kin Bridge Express, Inc. – Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 604 (ALJ 1998), the ALJ denied BOE's motion for summary judgment, despite the fact that respondents had failed to respond to BOE's requests for admissions or to engage in discovery to challenge or rebut BOE's evidence. The ALJ concluded that the principles of fairness and due process entitled respondents to at least present evidence in their defense. *Id.* at 608.

In *A.P. Moller-Maersk Line, P&O Nedlloyd, Ltd. and Sea-Land Service, Inc.*, 28 S.R.R. 389 (ALJ 1998), the ALJ concluded that if he were to grant summary judgment, he "...would be doing

so in the absence of a complete record which BOE is still in the process of assembling. To do so would, in my opinion, be premature and improvident.” *Id.* at 393. The ALJ noted that when considering motions for summary judgment, courts “...are especially careful to ensure that the party having the burden of proof is given a fair opportunity to obtain the evidence for its case before suffering summary judgment against it.” *Id.* In this case, BOE has not been given that opportunity.

B. Standards Governing the Admissibility of Evidence in Administrative Proceedings

The APA provides that in administrative hearings, “[a]ny oral or documentary evidence may be received, but the agency as matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d). In addition, Commission Rule 156 provides that, to the extent consistent with the requirements of the APA and the Commission’s Rules, the Federal Rules of Evidence (FRE) will apply:

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, Public Law 93-595, effective July 1, 1975, will also be applicable.

46 C.F.R. § 502.156.

Consistent with guidelines set out in the APA and Commission rules governing the admission of evidence, “[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong presumption in favor of admitting questionable or challenged evidence.” Ernest Gellhorn & Ronald M. Levin, *Administrative Law*

and Process 255 (4th ed. 1997). In administrative proceedings, “[a]n agency Administrative Law Judge (ALJ) should admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence when...[he] writes...[his] findings of fact.” Kenneth Culp Davis & Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 10.1, p.117 (3d ed. 1994).

The courts have long recognized the difference between the evidentiary systems used in court trials and administrative proceedings. The Supreme Court has stated that “...it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials [the Federal Rules of Evidence] do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.” *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 155 (1941). The courts have recognized that “...administrative proceedings are governed by the APA, not the Federal Rules of Evidence.” *Anderson v. U.S.*, 799 F. Supp. 1198, 1202 (CIT 1992).

The rationale for the difference in evidentiary systems has been explained as follows: “Section 556(d) of the [Administrative Procedure] Act recognizes the reality that rigorous exclusionary rules for the admission of evidence make little sense in hearings before an administrative agency where the ALJ acts as both judge and factfinder. Where the judge is also factfinder, he is equally exposed to evidence whether he admits it or excludes it.” *U.S. Steel Min. v. Dir., Office of Workers’ Comp.*, 187 F.3d 384, 388 (4th Cir. 1999). In *U.S. Steel*, the court went on to conclude that section 556(d) of the APA “...empowers the ALJ to admit and consider ‘all relevant evidence, erring on the side of inclusion.’...Thus, the exclusionary rule applicable to an agency proceeding is essentially limited to relevance.” *Id.* at 388.

With regard to hearsay evidence, the APA provides that hearsay need not be excluded unless irrelevant, immaterial, or unduly repetitious. In the administrative context, “...it makes sense

to save the time and effort that would be spent on ruling on questions of admissibility, and let the decisionmakers take account of the lesser probative value of hearsay or other questionable evidence in making their findings. In other words, the fact that a particular bit of evidence is hearsay should go to its weight, but not to its admissibility, in a formal agency adjudication.” Gellhorn & Levin, *supra* at 257. The admissibility of hearsay evidence in administrative proceedings has been acknowledged by the courts: “If hearsay evidence satisfies the APA standard, agencies may consider it...” *Anderson v. U.S.*, 799 F. Supp. at 1202. Agencies thus consider hearsay evidence in light of its “truthfulness, reasonableness, and credibility.” *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987) (quoting *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980)).

The Commission has recognized the liberal standards of admissibility of evidence in administrative proceedings, and has repeatedly “...identified the need for considerable relaxation of the rules of evidence followed by the federal courts in proceedings before the Commission.” *Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1102, 1105-06 (ALJ 1999), citing *Matson Navigation Co. Inc. – Proposed Rate Increase*, 25 S.R.R. 943, 944 (ALJ 1990). The Commission has stated that the “...Federal Rules of Evidence only apply to Commission proceedings to the extent they do not conflict with the Commission’s Rules of Practice or the Administrative Procedure Act.” *Envirex, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 813, 818 n.7 (FMC 1993). The Commission has long recognized that a basic rationale for the inapplicability of technical evidentiary requirements to administrative proceedings is that “...administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence.” *Unapproved Section 15 Agreements – South African Trade*, 7 F.M.C. 159, 167 (1962).

C. Standards for Determining Common Carrier Status

The Shipping Act defines a “common carrier” as a person that: 1) 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; 2) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and 3) 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 Commission has said that in determining whether an entity is operating as a common carrier, no single factor is determinative, although “holding out” is an essential factor. *Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd., et al.*, 29 S.R.R. 119 (FMC 2001). In *Rose*, the Commission made the following statement about determinations of common carrier status:

[T]he Commission must evaluate the indicia of common carriage on a case-by-case basis....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 method of establishing and charging rates.

Id. at 162 (citing *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC 1999), and *Tariff Filing Practices, Etc., of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC 1965)).

In addition, the Commission has said that factors such as solicitation and advertising are relevant to a determination whether an entity is holding out to the public as a provider of transportation services. *Tariff Filing Practices, Etc., of Containerships, Inc.*, 9 F.M.C. at 62 n.7. The Commission also clarified that a common carrier does not lose common carrier status if it uses shipping contracts other than bills of lading. *Id.* at 64.

D. Application of Standards

As set out above, the Commission considers motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and relevant case law. Rule 56 provides that a motion for summary judgment may be granted if the evidence submitted shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In *Anderson v. Liberty Lobby, Inc.* the Supreme Court described material facts as those that might affect the outcome of the case, while an issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

In its appeal of the grant of summary judgment, BOE contends that there are two issues of material fact that preclude granting Tober's motion for summary judgment: 1) there is a genuine issue of material fact as to whether the entities with which Tober did business are NVOCCs as defined by the Shipping Act, regulation, and case law, which requires an analysis of whether the entities are common carriers; and 2) there is a genuine issue of material fact as to whether Tober knowingly and willfully accepted cargo from the entities.

These facts – whether the entities acted as common carriers and NVOCCs, and whether Tober knowingly and willfully accepted cargo from them – are essential to a finding of violations of section 10(b)(11). They are therefore material facts, as they affect the outcome of the case: if the entities did not act as common carriers

and NVOCCs, and if Tober did not knowingly and willfully accept cargo from them, there is no basis for a finding that Tober violated section 10(b)(11).

Having determined that these are material facts in this case, it must be determined whether there is a genuine issue as to these facts. If the evidence is such that a reasonable jury could return a verdict for BOE as the nonmoving party, there is a genuine issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. As noted above, the evidentiary burden on BOE at the summary judgment stage is not a heavy one; as the nonmoving party, it is "...required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Wright, Miller & Kane, *supra* at 490.

At the summary judgment stage, the role of the judge "...is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 249. While the nonmoving party is to show facts that present a genuine issue worthy of trial, the nonmoving party at the summary judgment stage is not required to produce evidence in a form that would be admissible at trial. *Celotex*, 477 U.S. at 324. In addition, the inferences to be drawn from the facts are to be viewed in the light most favorable to the party opposing summary judgment. *Matsushita*, 475 U.S. at 587.

Turning first to the issue of whether the entities with which Tober did business were common carriers and NVOCCs, BOE's evidence in opposition to the Motion for Summary Judgment included representative shipping documents from each of the named entities with which Tober did business, printouts of websites of some of these entities, an affidavit responsive to issues raised by the ALJ, and e-mail correspondence between a former Commission employee and a customer of one of the entities with which Tober did business. The ALJ struck the exhibit containing the website printouts (BOE Supplemental Exhibit 12); the exhibit consisting of the affidavit (BOE Supplemental Exhibit 8); and the exhibit

consisting of the e-mail communication (BOE Exhibit 17). The ALJ also struck Tober's Exhibit E, consisting of a web page for one of the entities with which Tober did business.

Based on the standards for admitting evidence in administrative proceedings set out above, it appears that these exhibits are admissible. The website printouts were struck on the grounds that they had not been authenticated by a webmaster or other person with personal knowledge of the website, consistent with Rule 901 of the Federal Rules of Evidence (FRE). The technical requirements of Rule 901 appear to be inconsistent with the standards of the APA and the Commission's Rule 156, which govern administrative proceedings. The APA provides that any oral or documentary evidence may be received so long as it is not irrelevant, immaterial, or unduly repetitious. 5 U.S.C. § 556(d). Commission Rule 156 provides that all evidence that is relevant, material, reliable, and probative and not unduly repetitious or cumulative, is admissible. 46 C.F.R. § 502.156. To the extent that the Commission's rules and the APA diverge from the FRE, the FRE are not controlling and the Commission is not bound by their requirements. The website printouts appear to be relevant, material, and probative, as they constitute evidence of the entities' operations and the services that they held out to the public.⁵

BOE's Supplemental Exhibit 8, an affidavit submitted in response to the ALJ's Order of November 20, 2007, requesting that the parties address whether services performed by OFFs and

⁵ In connection with services held out to the public, the Commission has said that in determining whether an entity is operating as a common carrier, while no single factor is determinative, "holding out" is the most essential factor. *Rose Int'l, Inc.*, 29 S.R.R. at 162. The Commission has also said that factors such as solicitation and advertising are relevant to a determination of whether an entity is "holding out." *Tariff Filing Practices, Etc., of Containerships, Inc.*, 9 F.M.C. at 62 n.7. The 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).

NVOCCs are substantially the same, was struck on the grounds that it would allow BOE to present a witness not identified until long after discovery closed, and whom Tober had not had an opportunity to depose. Under Commission rules, witnesses are not required to be identified until Rule 95 prehearing statements are submitted, which has not yet occurred in this proceeding. 46 C.F.R. § 502.95. FRCP 56 specifically contemplates the submission of affidavits, and the submitted affidavit addresses the differences between the business practices of OFFs and NVOCCs, which appears directly responsive to a question posed in the ALJ's November 20, 2007 Order. The affidavit, therefore, appears relevant to a determination whether the entities with which Tober did business acted as OFFs or NVOCCs.

While Rule 56(e) provides that affidavits may be opposed by deposition, answers to interrogatories, or further affidavits at the summary judgment stage, in this case Tober has apparently not yet had an opportunity to depose the affiant. However, as the affidavit appears relevant, material, and not unduly repetitious, it may be considered admissible, taking into consideration the standards of the APA, the Commission Rules, and judicial precedent. *See U.S. Steel Min.*, 187 F.3d at 388. Further proceedings will provide an opportunity for Tober to depose the affiant, at which point the weight to be given the affidavit may be considered. This is the approach favored by the Federal Rules of Civil Procedure, e.g., FRCP 56(e)(1), and is consistent with standards for admissibility of evidence in agency proceedings and with Commission precedent.

In *Sea Land Service, Inc. – Possible Violations of Sections 10(b)(1), 19(b)(4) and 19(d) of the Shipping Act of 1984*, 29 S.R.R. 269 (ALJ 2001), the ALJ denied a motion to strike testimony of a witness, based on his conclusion that affording the opposing party an opportunity to question the witness was the better course: “Granting the motion to strike...[the witness’s] testimony is not the proper solution in this investigation at this time....[The opposing party] will be given an opportunity to further question...[the witness] at a further oral hearing.” *Id.* at 274.

Finally, BOE's Exhibit 17, consisting of e-mail exchanges between a former Commission staff member and a shipper served by one of the entities with whom Tober did business, was struck on the grounds that it was hearsay and would not be considered pursuant to Rule 801 of the FRE. If hearsay evidence satisfies the APA standard, agencies may consider it. *Anderson v. U.S.*, 799 F. Supp. 1202. In *Anderson*, the court discussed the Supreme Court's decision in *Richardson v. Perales*, 402 U.S. 389 (1971), and noted that *Richardson* stands for the principle that "...admissibility of hearsay evidence in an administrative proceeding is determined by an inquiry into its reliability and probativeness, and not by strict adherence to a specific test or rule. The Supreme Court expressly found that under the APA, hearsay evidence is admissible 'up to the point of relevancy.'" *Anderson v. U. S.*, 799 F. Supp. at 1202.

The Commission has admitted hearsay evidence consistent with the APA and Commission Rule 156. In *Envirex, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 813, the Commission stated that a party's contention:

...that hearsay is not admissible in Commission proceedings is clearly wrong. Both the Administrative Procedure Act...and the Commission's Rules of Practice and Procedure...permit the admission of hearsay evidence so long as it is relevant, material, reliable and probative and not unduly repetitious or cumulative. See *Unapproved Section 15 Agreements - South African Trade*, 7 F.M.C. 159 (1962) and *Brazil/U.S. Trade, Malpractices*, 15 F.M.C. 55 (1971).

Id. at 818 n.7.

It appears that the e-mail exchanges provide information about the relationship between a shipper and one of the entities with whom Tober did business, as well as between Tober and the entity.

This information may be relevant to understanding the relationship of the entity to the shipper and to Tober, and based on its relevance, may be considered admissible.

Taking BOE's evidence into consideration, including the exhibits that were previously struck, it appears that BOE has shown specific facts relating to whether the entities with which Tober did business acted as common carriers and NVOCCs. Based on the specific facts introduced by BOE, and according BOE the benefit of all reasonable doubts and inferences to be drawn from the facts,⁶ it would appear that a reasonable jury could return a verdict for BOE on the issue of whether the entities with which Tober did business acted as common carriers and NVOCCs. Therefore, there is a genuine issue of material fact as to whether the entities acted as common carriers and NVOCCs, which precludes a grant of summary judgment.

We next turn to the second issue of material fact: did Tober knowingly and willfully accepted cargo from the entities? The ALJ concluded that since BOE had not shown that any entity acted as an NVOCC, the evidence in the record could not support a finding that Tober knowingly and willfully accepted cargo from or transported cargo for the account of an OTI that did not have a tariff or bond.

The Commission has said that "[a] carrier 'willfully and knowingly' violates the statute if, of its own free will or choice, it intentionally disregards the statute or is plainly indifferent to its requirements." *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001). The

⁶ To the extent that the ALJ concluded that BOE's case must fail because its evidence showed conduct that is "as consistent" with freight forwarding services as with NVOCC services, the ALJ failed to construe any inferences in favor of BOE as the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio*, 475 U.S. at 587; *Jeffreys v. The City of New York*, 426 F.3d at 553; *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d at 175; *Cole v. Cole*, 633 F.2d at 1089; *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. at 1015.

Commission has also said that persistent failure to inform oneself of the requirements of the Shipping Act may mean that one is acting knowingly and willfully in violation of the Act. *Pacific Champion Express Co., Ltd. – Possible Violations of the 1984 Act*, 28 S.R.R. 1397, 1403 (FMC 2000), citing *Portman Square Ltd. – Possible Violations of § 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998.

While the ALJ's determination on the issue of whether the entities were NVOCCs largely foreclosed consideration of whether Tober acted knowingly and willfully, BOE submitted evidence intended to show that Tober acted knowingly and willfully, including the following: Tober accepted cargo from anyone and never performed any investigation of the entities to determine their status or whether they were tariffed or bonded; Tober took shipments from the entities after receiving correspondence from BOE regarding some of the entities, warning Tober of the consequences of violating section 10(b)(11); Tober accepted shipments from entities after commencement of this proceeding; based on the number of shipments Tober accepted from the entities and names of the entities, an inference can be drawn that Tober knew that it was accepting and transporting cargo for an entity that was not the proprietary shipper or owner of the household goods.

Affording BOE the benefit of all reasonable doubts and inferences to be drawn from the facts it presented, BOE's evidence would appear to establish a genuine issue as to whether Tober acted knowingly and willfully, based on prior Commission decisions. Therefore, it appears that BOE has met its burden of presenting evidence from which a fact finder might return a verdict in its favor, thereby establishing that there is a genuine issue of material fact that requires a trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257.

E. Conclusion

Taking into consideration the standards applied by the courts and the Commission in considering motions for summary judgment, we conclude that based on the facts presented by nonmovant BOE, and according BOE the benefit of all reasonable doubts and inferences to be drawn from these facts, there are genuine issues of material fact: were the entities with which Tober did business common carriers and NVOCCs, and did Tober accept cargo knowingly and willfully from these entities? These genuine issues of material fact preclude a grant of summary judgment.

With regard to the question of whether the entities acted as common carriers, a determination of common carrier status should be made on the bases of the statutory definition of a common carrier, as well as on Commission precedent applying this definition. As previously discussed, the Commission has considered the element of holding out to the public to provide transportation services to be an important factor in determining common carrier status.

In reaching a decision on the issues of material fact set out above, the exhibits previously struck may be considered admissible for the purposes of further proceedings. Consistent with the Administrative Procedure Act and Commission Rule 156, BOE Supplemental Exhibits 8 and 12, BOE Exhibit 17, and Tober Exhibit E, may be considered admissible. The relative probative value of this evidence may be determined by the ALJ in the course of reaching a decision on the merits of the case.

THEREFORE, IT IS ORDERED, That BOE's appeal of the Memorandum and Order served June 12, 2008, is granted;

IT IS FURTHER ORDERED, That the rulings striking certain exhibits of the parties are reversed; and

FINALLY, IT IS ORDERED, That this case is remanded to the ALJ for further proceedings consistent with this Order.

By the Commission.


Karen V. Gregory
Secretary