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**DOCKET NO. 06-06**

**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**

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**EXCEPTIONS OF THE  
BUREAU OF ENFORCEMENT  
TO INITIAL DECISION**

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Pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.227, the Bureau of Enforcement (BOE) files its Exceptions to the Initial Decision served in this proceeding on October 9, 2009.<sup>1</sup>

### **I. RELEVANT BACKGROUND**

This proceeding was instituted by an Order of Investigation and Hearing, served May 11, 2006, to determine: (1) whether respondents EuroUSA, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. (CI) violated section 10(b)(11) of the Shipping Act of 1984, 46 U.S.C. §41104(11), (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 and a bond as required by sections 8 and 19 of the Act<sup>2</sup>, 46 U.S.C §§40501 and 40902; and (2) whether Tober violated section 10(b)(2)(A) of the Act, 46 U.S.C. §41104(2)(A), by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff. BOE was designated as a party to the proceeding.

Following completion of discovery, Tober filed a motion for partial summary judgment on the section 10(b)(11) issue. It argued that BOE could not establish that the OTIs that tendered shipments to Tober were non-vessel operating common carriers (NVOCCs) and therefore could not demonstrate that Tober knowing and willfully accepted cargo in violation of the Act. BOE opposed the motion. After argument and additional briefing, the Administrative Law Judge (ALJ) issued a Memorandum and Order on June 12, 2008, granting Tober's motion. He struck

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<sup>1</sup> By Order served October 28, 2009, the date for filing exceptions was extended to December 17, 2009.

<sup>2</sup> The Shipping Act was reenacted as positive law and codified in Title 46 of the U.S. Code in Pub.Law 109-304, Oct. 6, 2006. In accordance with current Commission practice, the former section reference will be used herein.

certain evidence as inadmissible under the Federal Rules of Evidence and concluded that the remaining evidence did not support a finding that any of the OTIs with which Tober did business acted as NVOCCs.

BOE appealed the ALJ's decision. In an Order served December 18, 2008, the Commission granted the appeal, reversed the ALJ's evidentiary rulings striking exhibits, and concluded that genuine issues of material fact existed which precluded a grant of summary judgment. EuroUSA, Inc., et al.- Possible Violations of Section 10 of the Shipping Act, 31 S.R.R. 540 (FMC 2008). The Commission remanded the matter to the ALJ with instructions to determine the common carrier status of the OTIs with which Tober did business and whether Tober accepted cargo knowingly and willfully from these entities. Id. at 542.

Following the remand, a new procedural schedule was established. On April 29, 2009, the ALJ permitted Tober's counsel to withdraw his representation. On May 22, 2009, BOE filed its proposed findings of fact, supporting evidence, and brief. Tober did not respond to those filings, or file proposed findings of fact, evidence, or a brief, and has not otherwise participated in this proceeding since the withdrawal of its counsel. On September 21, 2009, BOE filed a motion to reopen the proceeding for the purpose of submitting evidence addressing Tober's financial status and additional argument with respect to the civil penalty sought to be imposed. By Order served October 9, 2009, the ALJ granted the motion and allowed the filing of the additional evidence and argument.

## **II. THE INITIAL DECISION**

In his Initial Decision (I.D.), the ALJ found that Tober was a licensed NVOCC and operated as a common carrier on 278 shipments that involved fifteen intermediaries that did not publish tariffs or provide proof of financial responsibility in the form of surety bonds. However,

he concluded that the fifteen intermediaries from which Tober accepted cargo did not act as NVOCCs and therefore Tober did not violate section 10(b)(11) of the Act. The ALJ also found that Tober violated section 10(b)(2)(A) of the Act on the same 278 shipments by providing service in the liner trade that was not in accordance with the rates and charges in its published tariff.<sup>3</sup> Notwithstanding these violations, the ALJ did not assess a civil penalty on the ground that BOE failed to meet its burden of persuasion with respect to the amount of a civil penalty. As more specifically set forth below, BOE excepts to the ALJ's determination that Tober did not violate section 10(b)(11) of the Act; the ALJ's determination not to assess a civil penalty; and certain subsidiary findings and conclusions in connection therewith.

### **III. EXCEPTIONS**

BOE takes exception to the following rulings and conclusions in the initial decision:

- A. The ALJ erred in finding that certain OTIs from which Tober accepted cargo did not hold themselves out to provide transportation by water of cargo between the United States and a foreign country for compensation within the meaning of section 3(6) of the Act, 46 U.S.C. §40102(6).
- B. The ALJ erred in finding that the unlicensed OTIs did not assume responsibility to their shipper customers for the transportation of their cargo from the port or point of receipt to the port or point of destination.
- C. The ALJ erred in finding that Tober did not violate section 10(b)(11) of the Act.
- D. The ALJ erred in not finding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Act.
- E. The ALJ erred in not assessing a civil penalty against Tober.

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<sup>3</sup> The initial decision addressed only respondent Tober inasmuch as the ALJ simultaneously issued separate decisions with respect to EuroUSA and CI. The EuroUSA decision approved a settlement which provided, among other things that EuroUSA was an NVOCC. The CI decision addressed BOE's motion for summary judgment and required additional briefing. On December 1, 2009, the ALJ issued an Initial Decision on the investigation of CI, finding that it was an NVOCC with respect to certain shipments and assessing the maximum civil penalty.

#### IV. ARGUMENT

##### Preliminary Statement

The ALJ ultimately concluded that Tober did not violate section 10(b)(11) of the Act because the unlicensed entities from which it accepted cargo were not shown to be NVOCCs. This finding in turn was bottomed on the conclusion that none of those entities met the statutory definition of a common carrier because: (1) in some cases, the entity did not hold itself out to the public to provide transportation of cargo by water between the U.S. and a foreign country, and (2) in all cases, the entity did not assume responsibility for the transportation of the shipments tendered to Tober.

For the reasons discussed, *infra*, BOE submits that the ALJ erred on both counts. As a preliminary matter, however, it is necessary to address the ALJ's application of the evidentiary standard governing this proceeding. While the ALJ acknowledged that the appropriate evidentiary standard governing this proceeding is a preponderance of the evidence, it appears that a more demanding standard of proof was applied in considering the evidentiary presentation. The Commission has consistently applied the preponderance of evidence standard in its decisions. See Petition of South Carolina State Ports Authority for Declaratory Order, 27 S.R.R. 1137, 1161 (FMC 1997), *citing* Sea Island Broadcasting Corp. v. F.C.C., 627 F.2d 240 (D.C. Cir.), *cert. denied*, 448 U.S. 834 (1980); Adair v. Penn-Nordic Lines Inc., 26 S.R.R. 11, 15 (I.D. 1991); Sanrio Co. Ltd v. Maersk Line, 19 S.R.R. 1627, 1632 (I.D.) *adopted* 20 S.R.R. 21 (FMC 1980); Port Authority of New York v. New York Shipping Ass'n, 22 S.R.R. 1329, 1353 (I.D. 1984) *adopted* 23 S.R.R. 21 (FMC 1985). The courts have described "preponderance of the evidence" as the least demanding of the three standards of proof. Steadman v. S.E.C., 450 U.S. 91, 101-102 (1981), *reh. denied*, 451 U.S. 933 (1981). Preponderance means the greater weight

of the evidence, evidence which is more convincing than the evidence offered in opposition to it. Hale v. Department of Transportation, 772 F.2d 882, 885 (Fed. Cir.1985). See also Concrete Pipe & Products of Cal. Inc v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622 (1993). (“The burden of showing something by a preponderance of the evidence...simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade...”). In holding that the Administrative Procedure Act, 5 U.S.C. §551, et seq., explicitly authorized the “preponderance of the evidence” test in administrative agency proceedings, the Supreme Court found that Congress had considered and excluded a more burdensome standard. Steadman at 102.

Where, as here, no evidence is offered in opposition to the evidence submitted, a *prima facie* showing satisfies the preponderance of evidence standard. Anderson v. Department of Transportation, 827 F.2d 1564, 1572 (Fed. Cir. 1987) citing Hale v. Department of Transportation, supra, 772 F.2d at 886 (“An un rebutted prima facie case is necessarily, by definition, a preponderance of the evidence.”). In this case, BOE submitted numerous shipping documents supporting its position, in addition to sworn deposition testimony of Tober representatives and affidavits of the corporate officers of two of the unlicensed entities addressing the relationships between the unlicensed entities, their customers, and Tober. At a minimum, this evidence made a *prima facie* case that these two entities held themselves out and operated as NVOCCs with respect to their customers and with respect to Tober. The evidence was un rebutted and met the preponderance of evidence standard. We now turn to the specific claims of error.

**A. The ALJ erred in finding that certain OTIs from which Tober accepted cargo did not hold themselves out to provide transportation by water of cargo between the United States and a foreign country for compensation within the meaning of section 3(6) of the Act.**

In its prior ruling in this proceeding, the Commission addressed the standards for determining common carrier status of the unlicensed entities and stated that “no single factor is determinative, although ‘holding out’ is the most essential factor.” 31 S.R.R. 540, 549, note 5. The ALJ concluded that nine of the entities held themselves out to the general public as NVOCCs on the basis of representations in their respective websites.<sup>4</sup> However, the ALJ found that the evidence did not support a finding that Infinity Moving & Storage, Inc. (Infinity), Tradewind Consulting, Inc. (Tradewind), Moving Services, Inc. (Moving Services), Orion Consulting, LLC (Orion), Echo Trans World, Inc. (Echo), Tran Logistic Group, Inc. (Tran Logistic), or Avi Moving (Avi), held themselves out to the general public as NVOCCs. (I.D. at 29). With respect to Infinity and Tradewind, the ALJ based his conclusion on an interpretation of certain language on their websites. Concerning the others, he found that BOE had not pointed to any evidence that would support a finding of holding out.

Holding out is often reflected by advertisements. However, the way in which a company holds itself out is not limited to its advertisements. Holding out is measured by the nature of the undertaking by the one hiring himself out. Bernhard Ulmann Co., Inc. v. Porto Rican Express Co., 3 F.M.B. 771, 775 (1952). It is demonstrated by a course of conduct. Tariff Filing Practices of Containerships, Inc., 9 F.M.C. 56, 62 (1965). The absence of solicitation does not determine that a carrier is not a common carrier. It is sufficient that the entity is generally known throughout the trade to be ready and willing to transport for all. Transp. By Mendez & Co., Inc.,

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<sup>4</sup> All in One Shipping, Inc., Around the World Shipping, Inc., EOM Shipping, Inc., Lehigh Moving & Storage, Inc., Worldwide Relocations, Inc., Sea and Air International, Inc., Car-Go-Ship.com, Access International Transport, AVL Atlanta Transport.

Between U.S. And Puerto Rico, 2 U.S.M.C. 717, 720 (1944). The carrier's course of conduct in holding itself out may also be demonstrated by the service it actually rendered to shippers. Transportation By Southeastern Terminal & S.S. Co., 2 U.S.M.C. 795, 796-797 (1946). See also Charging Higher Rates Than Tariff, 19 F.M.C. 44, 53 (1975) (respondent's provision of transportation service for an indefinite multitude of shippers utilizing the underlying services of water carriers was an indication of common carrier status).

We turn now to the ALJ's determination that the following entities did not hold themselves out to provide transportation by water between the United States and a foreign country.

**1. Infinity Moving & Storage, Inc.**

In finding that Infinity did not hold itself out as an NVOCC, the ALJ relied solely on a single word in one sentence on its website. Thus, he referred to the statement on the company's website that it "[took] care of all *arrangements* for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee's new home." (I.D. at 27, italics in original). Observing that the statutory definition of an ocean freight forwarder employs the term "arranges" in defining its functions, the ALJ concluded that when an entity advertises that it arranges ocean transportation, it is not holding out to the public to provide transportation. Id.

We submit that the ALJ not only gave undue and incorrect emphasis to the term "arrange", but he also erred in ignoring other representations on the website which describe Infinity's service. The term "arrange" does not necessarily distinguish forwarder from common carrier functions. Indeed, it is used in the Commission's regulations to describe NVOCC services as well. See 46 C.F.R. §515.2(l)(5) and (8) ("arranging for inland transportation" and

“entering into arrangements with origin or destination agents”). Consequently, the use of this term by Infinity does not necessarily distinguish freight forwarder service from NVOCC functions. In fact, when consideration is given to the entire phrase on Infinity’s website referenced by the ALJ, Infinity’s holding out fits more closely with the Commission’s regulation describing NVOCC services. The website states that Infinity “takes care of all the arrangements for ground, air and ocean transport.” (BOE App. 11)<sup>5</sup>. Certainly, arrangements for ground transportation in connection with an international move can be read to mean “arranging for inland transportation” at origin and destination which, under the Commission’s regulations, are NVOCC services. Id.

Beyond this, the website shows a much more extensive offering to provide services to the public. The first paragraph proclaims: “Infinity has a unique system of providing international relocation services that suits all your needs. Whilst these services are almost nowhere to be found in other moving companies, Infinity has the expertise necessary for especially this purpose.” (emphasis added). The website touts “the care and expert handling that we afford to the customer’s prized possessions”, and states that all claims are settled directly with Infinity, eliminating the need to deal with an indifferent third party. It also states that the company provides dismantling and reassembly, crating, storage, and preparation of inventories. (emphasis added). (BOE App. 11).

The record also shows that Infinity conceded that its website had offered international shipping services. In response to the Commission’s New York Area Representative’s written communication, Infinity’s General Manager wrote back advising that Infinity had modified its

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<sup>5</sup> BOE App. refers to the Appendix submitted with BOE’s Proposed Findings of Fact and Conclusions of Law.

website to remove references for ocean transportation services and had ceased offering international shipping services. (See BOE PFF 11)<sup>6</sup>.

The evidence further establishes that Infinity received at least 126 shipments of cargo belonging to others that it shipped to foreign destinations. (BOE App. 12). It was regularly dealing with Tober as reflected in Tober's bills of lading identifying Infinity as the shipper. (BOE App. 12). It was also regularly dealing directly with the shippers as reflected by documents such as inventories that it prepared in its name. (BOE App. 12). Considered as a whole, the evidence amply supports a finding that Infinity held itself out to the public as a common carrier to provide international relocation services.

## **2. Tradewind Consulting, Inc.**

The ALJ concluded that Tradewind's website did not demonstrate that it held out to provide transportation because Tradewind referred to itself as a "consulting firm" and not a shipping company. The ALJ also found that the description that Tradewind "organizes your services", is the equivalent of "arranging space for shipments on behalf of shippers" and concluded that the website reflected the statutory definition of an ocean freight forwarder and not an NVOCC. (I.D. at 27).

As in the case of Infinity, supra, the ALJ gave undue emphasis to certain selected language on the website, ignored other pertinent provisions, and failed to consider the website as a whole in determining the nature and extent of Tradewind's holding out. First, the website description of Tradewind as a consulting firm and not a shipping company is not determinative of its status. Whether a transportation agency is a common carrier depends not upon its own declaration, but upon what it does. U.S. v. California, 297 U.S. 175, 181 (1936); Bernhard

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<sup>6</sup> BOE PFF refers to specific proposed findings of fact contained in BOE's Proposed Findings of Fact and Conclusions of Law.

Ulmann, supra, 3 F.M.B. at 776-777; and Bonding of Non-Vessel Operating Common Carriers, 25 S.R.R. at 1684. The services described on Tradewind's website are more than simply consulting. According to the website, Tradewind maintains several consolidation warehouses throughout the United States; provides pickup services at the home and transportation to its warehouse for consolidation; provides transportation to the departure port; handles ocean freight shipments; provides packing and loading, door delivery, storage, and destination services. (BOE App. 24). The website describes an extensive role in providing, not simply arranging, international transportation services and supports a finding that Tradewind was holding out to the public to provide common carrier service.

The record also establishes that Tradewind dealt directly with the shipping public in accepting shipments for transportation to foreign destinations. It routinely issued rate quotations to its customers identifying the services it would provide from origin to foreign destination described as door-to-door service, and included packing, loading, pickup, ocean transportation, delivery at destination, unloading and unpacking. (BOE App. 25). It issued invoices for its services directly to its customers. In its communications with customers and others in the trade, Tradewind described itself as an international moving company. (BOE App. 25, PFF 33). Its holding out as a common carrier is demonstrated by a course of conduct in rendering services to shipper customers, as well as by its dealings with members in the trade. Transportation By Southeastern Terminal & S.S. Co., supra, and Charging Higher Rates Than Tariff, supra. The record therefore establishes that Tradewind held itself out and provided services as a common carrier.

**3. Moving Services, Inc., Orion Consulting, LLC, Echo Trans World, Inc., Tran Logistic Group, Inc., Avi Moving**

The ALJ addressed Moving Services, Orion, Echo, Tran Logistic, and Avi collectively in finding that BOE did not include any advertising or designate any facts in the record to support a finding that they held themselves out as NVOCCs. (I.D. at 29). At the outset, it must be borne in mind that none of these entities furnished any documents to BOE which made difficult the task of presenting relevant evidence. (See BOE PFF 34, 35, 38, 41, and 42). Nevertheless, there is evidence in the record from which inferences of holding out may be drawn. Documents provided by Tober establish that each of these entities accepted shipments from the shipping public for transportation from the United States to foreign destinations in port-to-door or door-to-door service. Tober accepted the shipments and invoiced each of these intermediaries identifying them as the shipper. The unlicensed entities dealt directly with the proprietary shippers and by their course of conduct were known in the industry to be ready and willing to accept shipments by all. (BOE App. 19, 26, 27, 28, and 29). Further, the affidavit of Area Representative Margolis (BOE App. 3) recounted his investigation of these and other companies and corroborated the international moving services that they provided to shippers.

As an expert agency, the Commission possesses a special familiarity with the industry it regulates and may properly make reasonable inferences based upon circumstantial evidence. Sea-Land Service, Inc. – Possible Violations of the Shipping Act, 30 S.R.R. 872, 882 (2006). The services actually provided by these entities permit a reasonable inference that they were holding themselves out as common carriers to provide international moving services. The Commission has emphasized that “ ‘common carrier’ . . . is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common

carriers' burdens." Puget Sound Tug and Barge v. Foss Launch and Tug Co., 7 F.M.C. 43, 48 (1962). In considering the common carrier status of an entity, the Commission has stated that it is important to do so in light of the purposes of the statute and the Commission's responsibility for regulation to effectuate the remedies intended by the enactment of the regulatory statute. Containerships, supra, pp. 68, 69. The evidence demonstrates a course of conduct of accepting shipments from proprietary shippers for transportation by water to foreign destinations and tendering such shipments to other members in the maritime industry and are therefore generally known throughout the trade to be ready and willing to transport for all.

Given the remedial purposes of the Act and the Commission's responsibility to protect the shipping public, the ALJ erred in not finding that these entities were holding out as common carriers subject to the requirements of the Act.

**B. The ALJ erred in finding that the unlicensed OTIs did not assume responsibility to their shipper customers for the transportation of their cargo from the port or point of receipt to the port or point of destination.**

Notwithstanding mixed findings with respect to holding out, the ALJ found that none of the unlicensed entities assumed responsibility for the transportation of the proprietary shippers' cargo from the port or point of receipt to the port or point of destination and therefore, none met the statutory definition of a common carrier. Consequently, the ALJ found that Tober did not violate section 10(b)(11) of the Act. (I.D. 36).

In reaching this conclusion, the ALJ found in each instance that Tober had established a direct relationship with the proprietary shipper. Implicit in this finding was a determination that Tober's actions effectively precluded a finding that the unlicensed entities assumed responsibility. The ALJ erred in considering Tober's documentation exclusively rather than the interactions between the unlicensed entities and their customers and improperly discounted the

most relevant evidence of record addressing the unlicensed entities' assumption of responsibility for the transportation.

### **1. Tober's Bills of Lading Are Not Determinative Of The Relevant Issue**

The Commission's earlier ruling in this proceeding stated:

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. 31 S.R.R. at 551.

Section 3(6) of the statute requires that the entity assume responsibility for the transportation. In addressing whether any unlicensed entity assumed responsibility for transportation, the ALJ relied extensively on bills of lading issued by Tober identifying the proprietary shipper or the proprietary shipper c/o the unlicensed entity as the shipper and on that basis found that Tober established a direct relationship with each entity's customer, i.e., the proprietary shipper, and thus assumed responsibility for the transportation of shipments tendered to it by the unlicensed entities. He also found in each case that the unlicensed entity did not assume responsibility for the transportation. Implicit in these parallel findings is the conclusion that Tober's documentation precluded a finding that the unlicensed intermediary assumed responsibility.

In determining whether the unlicensed entities acted as common carriers, it is necessary to address whether they assumed responsibility for the transportation of their customers' shipments to destination. Whether or not Tober assumed responsibility for transportation is a question that need not be answered because it does not address that issue. As the ALJ found, the evidence establishes that the unlicensed entities were the contact point for the proprietary shipper; that they secured all of the pertinent shipment information from the shipper and then

communicated with Tober to obtain a rate quotation based on that information. (I.D. at 20). The entity then provided the shipper an estimate of its total charges and itemized the services to be included in that estimate. Tober's subsequent actions, whatever their intent or effect, could not undo the undertaking of the unlicensed entities in their dealings with their customers, the proprietary shippers. Consequently, the ALJ's conclusion that Tober assumed responsibility, even if correct, was not determinative of the controlling issue.

## **2. Indicia of Assuming Responsibility for Transportation**

As noted, the Commission's earlier ruling in this proceeding stated that a determination of common carrier status should be made on the bases of the statutory definition and Commission precedent. Case law clarifies that assuming responsibility means not only the assumption or attempted assumption of liability, but also the imposition of liability by law. In Determination of Common Carrier Status, 6 F.M.B. 245, 256 (1961), the Commission's predecessor stated:

. . . 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.

The imposition of responsibility often arose in cases where the entity disavowed common carrier responsibility on the ground that it had not expressly assumed it. The Supreme Court discussed the underpinning of the imposition of liability in Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Acme Fast Freight, Inc., 336 U. S. 465 (1949), in the context of surface freight forwarders, which, as the Commission has noted, are "the most closely analogous" to NVOCCs under the Shipping Act. See Charging Higher Rates Than Tariff, *supra*, 19 F.M.C. at 53. The Court explained that prior to regulation under the Interstate Commerce Act, there existed two very different kinds of forwarders – one, like the ocean freight forwarder, who simply procured

transportation by carrier and charged a fee for its service in addition to the carrier's freight charges. The other type of forwarder operated like an NVOCC:

This forwarder picked up the less than carload shipment at the shipper's place of business and engaged to deliver it safely at its ultimate destination. The freight forwarder charged a rate covering the entire transportation and made its profit by consolidating the shipment with others in carload quantities to take advantage of the spread between carload and l.c.l. rates. It held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee. The shipper seldom if ever knew which carrier would be utilized in the carriage of his shipment. 336 U.S. at 484-485.

The Court explained that the forwarder's undertaking was to deliver the shipment safely at destination and the imposition of common carrier liability by law was the penalty for failure to do so. *Id.* In short, having undertaken to provide the service, the carrier will be held to have assumed responsibility for its undertaking. The Freight Forwarder Act amended the Interstate Commerce Act and encompassed only the second type of forwarder discussed above. The statute's definition of a freight forwarder, like the Shipping Act's definition of a common carrier, included the assumption of responsibility requirement, *viz.*, any person which holds itself out to the general public to transport or provide transportation of property . . . and which (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for performance of break-bulk and distributing operations, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes for the whole or any part of the transportation the services of a carrier subject to other parts of the statute. 336 U.S. at 485-486.

As noted, the Shipping Act and the Interstate Commerce Act ("IC Act"), 49 U.S.C. §10101, *et seq.*, both contain the phrase, "assumes responsibility for transportation". Compare section 3(6) of the Shipping Act with 49 U.S.C. §13102(8). In interpreting this language, it is

appropriate to examine precedent interpreting the IC Act in view of the Supreme Court's statement that Congress intended that both statutes, each in its own field, should have like interpretation, application and effect and that settled construction of the IC Act must be applied to the Shipping Act. United States Navigation Co., Inc. v. Cunard S.S. Co., 284 U. S. 474 (1932). On various occasions, the Interstate Commerce Commission ("ICC") addressed whether an entity assumed responsibility for transportation where it had provided forwarder services but disavowed freight forwarder status and had not issued a bill of lading or other document expressly assuming responsibility. The ICC adopted the approach discussed by the Court in Acme Fast Freight, supra, that where the party holds out and performs the services identified in the statute, he will be held to have assumed the burdens incident thereto, among which is responsibility to the shipper for the safe transportation of property. Judson-Sheldon Corp. Application, 260 I.C.C. 473 (1945); Universal Transcontinental Corp. Freight Forwarder Application, 260 I.C.C. 521 (1945); Vendors Consolidating Co., Inc. Freight Forwarder Application, 265 I.C.C. 719 (1950).

Certainly, an entity that provides the services that would otherwise require compliance with the statute should not be permitted to disclaim responsibility for the transportation that it undertakes to provide. Rather, the law will hold him to have assumed that responsibility. The same reasoning was adopted by the Commission in Charging Higher Rates Than Tariff, supra, 19 F.M.C. 53-54, citing with approval the above-referenced ICC decisions and Yankee Shippers Agent, Inc., Investigation, 326 I.C.C. 328 (1966); Barre Granite Assn., Inc. Freight Forwarder Application, 265 I.C.C. 637 (1949); Hopke Freight Forwarder Application, 285 I.C.C. 61 (1951); R.T.C. Term.Corp. Freight Forwarder Application, 265 I.C.C. 641 (1949); and Modern Intermodal Traf. Corp. – Investigation, 344 I.C.C. 557 (1973).

This rationale reflects a fundamental characteristic of common carriage, i.e., one who undertakes to perform as a common carrier will be held to the responsibility of a common carrier. Thus, a determination of common carrier status is not dependent on a rigid and unyielding dictionary definition, but is a regulatory concept that is sufficiently flexible to accommodate itself to efforts to secure the benefits of such status while remaining free to operate without such burdens. Containerships, supra, at 65. In determining the true nature of their status, it is necessary to consider the evidence of their activities. Id.

Based on their activities as evidenced in the record and described below, each entity assumed responsibility for the transportation of their customers' shipments. The available evidence differs with respect to the subject entities and they have been grouped according to common characteristics.

**(a) All In One Shipping, Inc. and Around The World Shipping, Inc.**

All In One Shipping, Inc. (AIOS) and Around The World Shipping, Inc. (ATWS) submitted sworn affidavits of their respective corporate officers explaining each company's holding out, how they operated, the nature and extent of the relationships with their customers, and the nature and extent of their relationships with Tober. (BOE App. 5, Affidavit of Joshua S. Morales and BOE App. 6, Affidavit of Daniel E. Cuadrado). The ALJ discounted their affidavits on the ground that an intermediary's conduct, not what it labels itself, is determinative of its status. (I.D., at 30). In this case, however, both affidavits go well beyond simply labeling their respective companies and provide detailed descriptions of the companies' conduct and operations. Potential customers made initial contact with AIOS and ATWS to inquire of their rates and service; both companies obtained rate quotes from other common carriers, including Tober, for ocean freight and any ancillary services as well as from other sources such as

destination agents if destination services were required; AIOS and ATWS would then set their own all-inclusive rate to the customer reflecting a marked up ocean rate and any other charges; the companies invoiced their customers for their charges and the customer would pay AIOS or ATWS directly; both companies furnished inventory sheets and insurance documents to their customers; the ocean carrier or NVOCC, including Tober, invoiced AIOS or ATWS for its charges and they paid that carrier; customers contracted with and looked to AIOS and ATWS for the transportation of their goods and each company assumed responsibility for the transportation of those shipments. Importantly, both Mr. Morales and Mr. Cuadrado explain that the above description of their company's operations also applied with respect to its transactions involving Tober. (See BOE App. 5, paragraph 6, and BOE App. 6, paragraph 6).

Their testimony is substantiated by documents the companies issued to their customers. Documents contained in BOE Appendix 33 include rate quotations issued by AIOS to shippers for international door-to-door service describing the services included in that estimate; requests from AIOS to Tober for rate quotations based on shipment information provided by the shipper to AIOS; Tober rate quotes to AIOS that were lower than the estimates that AIOS furnished to its customer; and Tober invoices to AIOS identifying it as the shipper. Similarly, documents in BOE Appendix 35 include ATWS requests to Tober for rate quotes on international shipments based on shipment information provided by the shipper to ATWS; Tober rate quotes to ATWS; estimates from ATWS to shippers for international moves for door to door service higher than the charges contained in Tober quotes to ATWS; Tober invoices to ATWS identifying it as the shipper for its charges on international shipments; and separate invoices to the shipper from ATWS for its charges.

This uncontradicted testimony on behalf of AIOS and ATWS, as confirmed by the documentation, establishes the assumption of responsibility by these entities to the proprietary shippers. Nonetheless, the ALJ largely ignored this evidence and instead chose to draw inferences and conclusions that are inconsistent with the evidence. For instance, the ALJ relied on bills of lading issued by Tober with the proprietary shipper's name (and in some cases, also the name of AIOS or ATWS) for the proposition that Tober established a direct relationship with and assumed responsibility to the proprietary shipper. However, for the reasons previously discussed, the documents issued by Tober are not determinative of whether AIOS and ATWS held out and assumed responsibility to their customers. Further, the sworn testimony of Tober's officials contradict the ALJ's conclusions. Tober's president stated in his deposition testimony that Tober had no relationship with the actual owner of the cargo. (BOE App. 8, Page 53, Deposition of Yoni Benhaim, Line 19 to Page 54, Line 7). Tober considered the unlicensed entities as its customers, not the owners of the cargo. Consequently, it invoiced the entities, not the proprietary shippers. (BOE App. 8, Deposition of Yoni Benhaim, Page. 51, Line 13 to Page 52, Line 18; and BOE App. 9, Deposition of Steve Schneider, Page 45, Line 5 to Line 21). AIOS and ATWS paid Tober's charges and separately billed their charges to the shippers who paid those companies directly.

Relying on the Commission's decision in Low Cost Shipping, Inc., 27 S.R.R. 686 (1996), the ALJ concluded that responsibility for payment of ocean freight is a factor indicating the action of a freight forwarder. (I.D. at 31). We submit that the ALJ's conclusion is based on a misinterpretation of Low Cost. Addressing the evidence of freight forwarder operations in Low Cost, the Commission recited: "BOE notes that Low Cost's name appeared on behalf of the proprietary shippers and that it was responsible for payment of the freight on behalf of the

shippers.” (emphasis added). 27 S.R.R. at 687. In this case, however, according to AIOS, ATWS, they were not passing on payments to Tober on behalf of the proprietary shippers – they were paying Tober’s charges invoiced to them. AIOS and ATWS, in turn, invoiced their own, different charges to the proprietary shippers. Low Cost is therefore inapposite to the facts here. According to the parties to the transactions, AIOS and ATWS purchased transportation services from Tober and resold those services to their customers and paid the suppliers of those services their charges. These are NVOCC services. 46 C.F.R. §515.2(l)(1) and (2).

In sum, the evidence supporting BOE’s position that AIOS and ATWS assumed responsibility as common carriers for transportation includes the testimony of 3 different witnesses, as substantiated by documentary exhibits. This evidence is unrebutted. We submit that the preponderance of the evidence weighs in favor of BOE’s position.

**(b) EOM, Inc., Infinity Moving & Storage, Inc., Lehigh Moving & Storage, Inc., Tradewind Consulting, Inc., and Worldwide Relocations, Inc.**

This category consists of the unlicensed entities for which the evidence contains documents issued directly by the entity to the proprietary shipper as their customer. The group consists of EOM, Inc. (EOM), Infinity Moving & Storage, Inc. (Infinity), Lehigh Moving & Storage, Inc. (Lehigh), Tradewind Consulting, Inc. (Tradewind), and Worldwide Relocations, Inc. (WWR). In each case, the ALJ found that the entity did not assume responsibility for the transportation and that Tober’s documentation established that it assumed responsibility for the transportation. (I.D. at 34-35; 49 at FF 17; 56 at FF 52; 51 at FF 34; 63 at FF 119; and 58 at FF 69).<sup>7</sup> As previously discussed, the documents issued by Tober were not determinative of whether the unlicensed entities assumed responsibility as common carriers for transportation in their dealings with the proprietary shippers. The evidence establishes that each of these entities

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<sup>7</sup> FF refers to the Findings of Fact and Conclusions of Law at pp. 47-80 of the initial decision.

dealt directly with its customer shippers and issued documents in its own name that reflected its undertaking to provide transportation from the United States to a foreign country.

Documents contained in BOE App. 16 confirm EOM's relationship with its customers. Tober, in turn, dealt with EOM as its customer. As discussed above, this relationship was confirmed by the sworn testimony of Tober officials that its undertaking was to the intermediaries only and not the proprietary shipper. To illustrate, we point to documents in BOE Appendix 16 with respect to a shipment for Pieter van den Berg from West Chicago, IL to the Netherlands. (BOE App. 16, Bates pages 000811-000817). EOM issued its own separate documents to the proprietary shipper identifying the domestic origin at West Chicago, IL and a foreign destination in the Netherlands; stating the number of items to be shipped; declaring the value of the shipment; and providing an inventory of the items in the shipment. Although Tober issued a bill of lading identifying the proprietary shipper, it also issued its invoice to EOM identifying it as the shipper and requesting payment of its charges.

The evidence likewise establishes that Infinity dealt directly with its customers by issuing documents in its own name that reflected its undertaking of transportation for its customers from the United States to a foreign country. (BOE App. 12). Tober, in turn, dealt only with Infinity as its customer as reflected by its invoices to Infinity identified as the shipper. This relationship was confirmed by the sworn testimony of Tober officials that their undertaking was to the intermediaries only and not the proprietary shipper. Documents obtained from Tober readily confirm such dealings. The documents contained in Appendix 12 reflect a pattern whereby Infinity routinely secured shipment information directly from the shipper showing actual origin and destination, number of items in the shipment and valuation; it picked up the shipment and prepared the inventory at origin; and it exchanged a customer authorization with the proprietary

shipper authorized the use of its passport or social security number for customs purposes. Tober invoiced Infinity as the shipper at Infinity's address for charges for port to door services.

Similarly, the evidence establishes that Lehigh dealt with the proprietary shippers as its customers and issued documents in its own name that reflected its undertaking of transportation for its customers from the United States to a foreign country. (BOE App. 14). Tober, in turn, dealt only with Lehigh as its customer as reflected by its invoices to it as the shipper. This relationship was confirmed by the sworn testimony of Tober officials that its undertaking was to the intermediaries only and not the proprietary shipper. To illustrate, we point to documents in BOE Appendix 14 with respect to a shipment for Jennifer Spong from Minneapolis, MN to London, UK. (BOE App. 14, Bates pages 000631-000635). Lehigh picked up the shipment and prepared the inventory at origin in Minneapolis. Tober's bill of lading identified the origin point as Lehigh's address in the Bronx, NY. Tober invoiced Lehigh as the shipper requesting payment of its charges.

The evidence establishes that Tradewind dealt directly with the proprietary shippers as its customers by issuing documents in its own name reflecting its undertaking to provide transportation from the United States to a foreign country. (BOE App. 25). Tober, in turn, dealt only with Tradewind as its customer as reflected by its invoices to it as the shipper. This relationship was confirmed by the sworn testimony of Tober officials that their undertaking was to the intermediaries only and not the proprietary shipper.

To illustrate, we point to BOE Appendix 25 with respect to the Kerrie Powell shipment from Brooklyn, NY to Emworth, UK. (BOE App. 25, Bates pages 001124-001138). After initial communications from the shipper for rate and service information, Tradewind requested and obtained a rate quote from Tober. Subsequently, Tradewind provided a rate quote and a service

order to the shipper for a shipment from Brooklyn, NY to the UK and identifying its services to include packing and loading, packing material, inventory list, pickup at residence and delivery to port, ocean freight, delivery to destination, tolls, customs clearance, document fees, port charges, broker fees, unloading and furniture setup at destination, and \$20,000 insurance coverage. Thereafter, Tober invoiced Tradewind as the shipper for its charges amounting to \$1,113.50. Tradewind, in turn, invoiced Ms. Powell, the proprietary shipper for its charges totaling \$1,913.00. Similarly, with respect to a shipment for Johannes Khinast from Highland Park, NJ, to Graz, Austria, also documented in Appendix 25, Tradewind was contacted by the shipper for rate and service information. (BOE App. 25, Bates pages 001145-001157). It obtained a rate quote from Tober and in turn provided the shipper an estimate. Subsequently, Tober billed Tradewind as the shipper for its charges totaling \$4,915.00 which Tradewind paid directly to Tober. Tradewind then invoiced the shipper for its charges amounting to \$7,031.00. The shipper issued a check to Tradewind in payment of Tradewind's charges.

WWR likewise dealt directly with the proprietary shippers and issued documents in its name that reflected its undertaking to provide transportation for its customers from the United States to a foreign country. (BOE App. 31). Tober, in turn, dealt only with WWR as its customer as reflected by its invoices to WWR as the shipper. This relationship was confirmed by the sworn testimony of Tober officials that their undertaking was to the intermediaries only and not the proprietary shipper.

The documentation substantiates the assumption of responsibility by WWR. To illustrate, we point to Appendix 31 with respect to the Giulia Loli shipment from Brooklyn, NY to Italy. (BOE App. 31, Bates pages 001347-001357). WWR issued to the proprietary shipper a document titled "Moving Contract" and another titled "Moving Estimate" both of which

provided an estimated total charge for door-to-door service from Brooklyn, NY to Castellazzara, Italy. WWR's estimate included its charges for line haul, door pickup, loading, door delivery, unloading, reassembly, inventory list, tolls, customs clearance, port charges, arrival notification, and \$30,000 insurance coverage. Subsequently, Tober invoiced WWR as the shipper for its charges on the shipment amounting to \$3,216.65. WWR, in turn, invoiced the proprietary shipper for its charges totaling \$4,944.22. WWR's invoice stated separate charges for door-to-door service (\$4,416.72), packing materials (\$267.50), palletizing service (\$200), documentation fee (\$30), insurance coverage (\$0), and insurance processing fee (\$30). The documents also show that the proprietary shipper paid WWR's charges directly to it. The ALJ acknowledged the same type of documentation with respect to other shipments. (I.D. at 57, FF 60, 61), but concluded that WWR did not assume responsibility for the transportation that it undertook to provide to the proprietary shipper, billed the shipper, and was paid by the shipper.

The evidence addressing this group of unlicensed entities establishes the same pattern and course of conduct described by Tober, AIOS, and ATWS, in which Tober accepted cargo from the intermediaries and not the proprietary shipper. This evidence warranted a finding that each of these entities assumed the burdens incident to their undertakings, among which is the responsibility to the shipper for the transportation of these shipments. Determination of Common Carrier Status, *supra*, 6 F.M.B. at 256, and Charging Higher Rates Than Tariff, *supra*, 19 F.M.C. at 53-54.

**(c) Moving Services, Inc., Orion Consulting, Inc., Sea and Air International, Inc., Echo Trans World, Inc., Car-Go-Ship.com, Access International Transport/AVL Atlanta Transport, Tran Logistic Group, Inc., and Avi Moving.**

The evidence addressing this category of unlicensed entities is not as extensive as the preceding categories, but nevertheless exhibits the same pattern and course of conduct described

above between the unlicensed entities, their customer/proprietary shippers, and Tober. This group includes Moving Services, Inc. (Moving Services), Orion Consulting, Inc. (Orion), Sea and Air International, Inc. (Sea and Air), Echo Trans World, Inc. (Echo Trans), Car-Go-Ship.com (Car-Go), Access International Transport/AVL Atlanta Transport, Tran Logistic Group, Inc. (Tran Logistic), and Avi Moving (Avi). In each case, the ALJ found that the entity did not assume responsibility for the transportation and that Tober's documentation established that it assumed responsibility for the transportation. (I.D. at 34-35; 65 at FF 13; 66 at FF 147; 69 at FF 161; 70 at FF 175; 72 at FF 191; 75 at FF 212; 78 at FF 234; and 79 at FF 245). As previously discussed, the documents issued by Tober were not determinative of whether the unlicensed entities assumed responsibility in their dealings with the proprietary shippers. The evidence establishes that each of these entities dealt directly with its customer shippers and that Tober transacted business with each unlicensed entity as its customer.

The primary difference between this group of entities and those discussed above is in the number and variety of documents available for inclusion in the record. The documents establish the same billing pattern described above whereby each unlicensed entity directly with the proprietary shippers in connection with undertaking to provide transportation for an international move. Each entity invoiced its customer for its charges. Tober dealt only with the unlicensed intermediary as its customer and in each case invoiced that entity as the shipper. (See BOE App. 26 (Moving Services); App. 28 (Orion); App.18 (Sea and Air); App. 19 (Echo Trans); App. 21 (Car-Go); App. 23 (Access International); App. 27 (Tran Logistic); and App. 29 (Avi)). This relationship was confirmed by the sworn testimony of Tober officials that its undertaking was to the intermediaries only and not the proprietary shipper.

Again, the uncontradicted evidence reflects a pattern and course of conduct described by Tober, AIOS, and ATWS, in which Tober accepted cargo from the intermediaries and not the proprietary shipper. We submit that the evidence warrants a finding that each of these entities assumed the burdens incident to their undertakings, among which is the responsibility to the shipper. Determination of Common Carrier Status, *supra*, 6 F.M.B. at 256, and Charging Higher Rates Than Tariff, *supra*, 19 F.M.C. at 53-54.

Significantly, the record also showed that the Commission's Office of Consumer Affairs and Dispute Resolution (CADRS) fielded 227 complaints, almost all from shippers, against 13 of the 15 unlicensed entities identified in this proceeding as more fully described in the affidavit of Ronald D. Murphy, Director of CADRS. (See BOE App. 4, p.2, ¶ 3). That the proprietary shippers directed their complaints at the unlicensed entities is further evidence that they looked to that entity as the party who assumed responsibility for the transportation of their shipments.

The evidence addressing all of the unlicensed entities is admittedly cumulative since a violation of section 10(b)(11) can be established without addressing every shipment in the record. In any case, the evidence of record establishes that the entities with which Tober conducted business and from which it accepted cargo assumed responsibility as common carriers for the transportation. We submit that the ALJ erred not so finding.

**C. The ALJ erred in finding that Tober did not violate Section 10(b)(11) of the Act.**

A violation of section 10(b)(11) in this case required a showing that Tober knowingly and willfully accepted cargo from or transported cargo for a common carrier that does not have a tariff, bond, insurance or other surety. The preceding sections establish that the unlicensed entities (1) held themselves out as common carriers, and (2) assumed responsibility for transportation as common carriers, and therefore operated as common carriers as defined in

section 3(6) of the Act. Because the ALJ concluded that the unlicensed entities from which Tober accepted cargo were not common carriers, he found that there was no violation of section 10(b)(11). (I.D. at 36). Consequently, he did not reach the question whether Tober “knowingly and willfully” accepted cargo from these entities.

The Commission can properly consider this issue on exceptions and we submit that it should do so. 46 C.F.R. §502.227(a)(6). BOE addressed that issue with respect to the section 10(b)(11) violations at pages 36 through 39 of its Proposed Findings of Fact and Conclusions of Law and we therefore specifically incorporate that argument herein by reference. As BOE argued there, the facts show that Tober was plainly indifferent to and showed reckless disregard for the requirements of the Act. Tober admitted that it accepted cargo from these entities to avoid dealing directly with the proprietary shippers and avoid competing directly with the unlicensed entities. (BOE App. 8, 9, and PFF 46). It stated that it accepted business from anyone and did not attempt to determine the status of the entity tendering cargo. (BOE PFF 47). It also admitted that in 2004 and 2005, it never refused a shipment and then lost business after ceasing to accept shipments from unlicensed entities. (BOE App. 8, 9, and PFF 54). In addition, two company officers of the entities for which it transported shipments stated by affidavit that no employee or principal of Tober ever questioned whether they were an NVOCC, freight forwarder, or beneficial cargo owner. (BOE App. 5, 6, and PFF 22, 29). Moreover, Tober continued to take shipments from unlicensed intermediaries after being advised not to do so and even continued to accept shipments from unbonded, untariffed entities after commencement of this proceeding. (BOE PFF 11). In sum, there is ample evidence showing that Tober acted knowingly and willfully in accepting cargo from these unlicensed entities in violation of the Act.

**D. The ALJ erred in not concluding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Act.**

The ALJ found BOE proved by a preponderance of the evidence that Tober violated section 10(b)(2)(A) by providing service in the liner trade that was not in accordance with the rates and charges contained in its published tariff.<sup>8</sup> (I.D. at 39). The ALJ held that Tober “never charged its tariff rate in the period in which the 278 shipments in which the intermediaries were involved took place” and noted that, in accordance with 46 U.S.C. § 41107(a), the civil penalty for each violation may not exceed \$6,000 unless BOE establishes that the violations were committed in a knowing or willful manner, in which case the civil penalty for each violation may not exceed \$30,000. (I.D. at 43). The ALJ found that BOE had not established that the violations were committed in a knowing or willful manner. The ALJ erred in not concluding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Act as the evidence in the record supports such a finding.

The Commission has defined the phrase “knowingly and willfully” to mean “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.” Trans-Pacific Forwarding, Inc. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 SRR 409, 412 (1995), *citing* United States v. Illinois Central R. Co., 303 U.S. 239 (1938).<sup>9</sup>

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<sup>8</sup> Section 10(b)(2)(a) of the Act prohibits a common carrier from providing service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a published tariff. 46 U.S.C. § 41104(2)(A).

<sup>9</sup> Knowingly and willfully have two different meanings. “Knowingly” typically refers only to one’s knowledge of the facts that make his conduct unlawful, not to one’s knowledge of the law. See Bryan v. United States, 524 U.S. 184, 193, (1995); United States v. Bailey, 444 U.S. 394, 404, (1980) (finding that a prison escapee acted “knowingly” because he “knew his actions would result in his leaving physical confinement”). Willfully was discussed in U.S. v. Ill. Cent. R.R. Co. 303 U.S. 239 (1938), where the court quoted from St. Louis & S.F.R. Co. v. United States, 169 F. 69, 71(8<sup>th</sup> Cir. 1909), a case where cattle were kept in railroad cars beyond the regulated period: “‘Willfully’ means something not expressed by ‘knowingly,’ else both would not be used conjunctively. \* \* \* But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. \* \* \* So, giving effect to these considerations, we

The Commission went on to say:

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 U.S. 111, 125-129 (1985). Id. at 412.

The Commission elaborated further in Pacific Champion Express Co., Ltd. – Possible Violations of §10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397 (FMC 2000), stating that :

In determining whether a person has violated the 1984 Act “knowingly and willfully,” the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 SRR 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.” Id. at 84 (quoting Misclassification of Tissue Paper as Newsprint Paper, 4 FMB 483, 486 (1954)); Pacific Champion at 1403.

In the case of Stallion Cargo, Inc.—Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665, 677 (2001), the Commission reiterated the requirement that: “An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.”

The evidence in the record supports a finding that Tober knowingly and willfully violated section 10(b)(2)(A). Tober was not a newly formed ocean transportation intermediary. It received its ocean freight forwarder license in 1996 and subsequently received its NVOCC license in 1999. (BOE PFF 1). It operated as both an ocean freight forwarder and an NVOCC. (BOE PFF 1). Tober published its tariff in 2004, indicating an awareness of the tariff

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are persuaded that it 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.”

requirements of the Act. Mr. Benhaim indicated he knew what a tariff was. (BOE App. 8, Deposition of Yoni Benhaim, Page 39, Lines 11-12). Mr. Schneider indicated that Tober did not use its tariff to calculate a rate. (BOE App. 9, Deposition of Steve Schneider, Page 29, Lines 8-10; See also BOE PFF 55 and BOE PFF 56). Even after being put on notice of its tariff problems via the Order of Investigation and Hearing in this proceeding, served on May 11, 2006, Tober continued to violate the Act by accepting and transporting seventy-two shipments for Infinity Moving and Storage, Inc. at other than tariff rates. (BOE PFF 11).

The ALJ did not acknowledge this evidence in the record, focusing instead on a declaration of Tober's vice-president, made in support of Tober's motion for summary judgment<sup>10</sup> (refuted by other evidence in the record) and the deposition testimony of Tober's president. (See I.D. at 43). The ALJ found that these statements supported a finding that "Tober operated in a manner that it understood complied with the Act". (I.D. at 44). The ALJ cited the declaration of Steve Schneider, the vice-president of Tober, who stated in a declaration supporting Tober's motion for summary judgment, that "[u]pon becoming aware of FMC's concerns in regard to its tariff, Tober amended its electronic tariff to break up the costs of the individual services Tober was providing." (Tober Group, Inc. Motion for Summary Judgment, Exhibit A, Declaration of Steve Schneider, ¶ 35).

BOE refuted this statement in its response to Tober's motion for summary judgment (quoted by the ALJ in the initial decision at 38), stating:

"Prior to February 2007, (approximately nine months after service of the Order of Investigation and Hearing alleging the insufficiency of its tariff), the single commodity covered by Tober's tariff was still 'Cargo, N.O.S.' and the tariff rate was \$500 per 1,000 kilograms or 1 cubic meter, whichever yielded the higher amount. The tariff had not been updated since its original issue on January 7, 2004. From January, 2004 through

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<sup>10</sup>As discussed on page 5, BOE notes that Tober submitted no evidence in opposition to the evidence submitted by BOE in its Appendix.

February, 2007, Tober provided service for hundreds of shipments at rates not in accordance with their tariff. Benhaim, p. 39, 40; Schneider, p. 28-30, Exhibit 18.”

(See also BOE’s PFF 55 and 56). Tober did not correct its tariff upon becoming aware of the Commission’s concerns. Instead, it took over nine months for Tober to take action.

The ALJ also cited the deposition testimony of Tober’s president, Yoram Benhaim, who stated that the rate published in Tober’s tariff was never charged but that as long as the rates Tober charged were under the published rate, he felt Tober was in compliance with the Act. (I.D. at 44). No credence should be given to this self-serving statement given Mr. Benhaim’s experience as the president of Tober, a long-standing licensed NVOCC. This is in fact the type of behavior or attitude which the Commission has found to constitute knowing and willful behavior in violation of the Act.

As discussed above, an entity or individual need not have knowledge of the law to be found to be acting “knowingly” but must have knowledge of the facts of the violation. The record shows that Tober in fact had knowledge of both the law and the facts. Tober had published a tariff, indicating an awareness of the tariff requirements of the Act, and Mr. Benhaim indicated he knew what a tariff was. Both Mr. Benhaim and Mr. Schneider indicated they knew Tober was not charging the rates contained in its tariff. The record in this proceeding supports a finding that Tober acted knowingly and the ALJ erred in not so holding.

Under the “knowingly and willfully” standard followed by the Commission, an entity or individual can be held to be acting “willfully” if their conduct is marked by reckless or careless disregard for the matter of whether their conduct is prohibited, they act with plain indifference, they do not use diligent inquiry or they persistently fail to inform themselves by means of normal business resources as to whether their conduct is a violation of the Act. The record in this proceeding supports a finding that Tober’s behavior was willful. Despite publishing a tariff in

2004, Tober never updated its tariff and never followed its tariff, showing plain indifference to the requirements of the Act. During the nine months following service of the Commission's Order of Investigation and Hearing, Tober accepted at least seventy-two shipments and charged rates other than the rates contained in its tariff for those shipments, showing a reckless or careless disregard for the matter of whether its actions were prohibited. Tober (even after being served with the Commission's Order of Investigation and Hearing) persistently failed to inform itself by means of normal business resources as to whether its failure to update and follow its tariff was a violation of the Act. The record in this proceeding supports a finding that Tober acted willfully and the ALJ erred in not so holding.

Tober's actions were committed in a knowing and willful manner. The ALJ erred in not concluding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Act. As discussed further below, the maximum penalty amount of \$30,000 would apply to such violations.

**E. The ALJ erred in not assessing a civil penalty against Tober.**

Although the ALJ found that Tober committed 278 violations of the Act, he did not assess a civil penalty because: (1) BOE did not meet its burden of persuasion to establish the amount of civil penalty to be imposed; and (2) BOE has not established how the Commission should weigh and balance the factors enumerated in section 13(c) of the Act, 46 U.S.C. §41109(b). (I.D. at 45). Inasmuch as the ALJ found no violation of section 10(b)(11), his conclusions with respect to assessment of a civil penalty were limited to the tariff violations. BOE addressed both types of violation on the same shipments and sought imposition of the

maximum civil penalty for 278 knowing and willful violations.<sup>11</sup> We submit that the record supports a finding that assessment of the maximum penalty for either violation on the 278 shipments is justified and that the ALJ erred in not assessing a civil penalty.

Section 13(a) of the Act, 46 U.S.C. §41107, imposes liability for a civil penalty on whoever violates a provision of the Act, regulation thereunder, or a Commission order. Section 13(c) authorizes the Commission to assess a civil penalty and directs it to take into account the nature, circumstances, extent, and gravity of the violation committed, and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission's regulations add to these factors the policies of deterrence and future compliance with the law. 46 C.F.R. §502.603(b). The factors to be addressed under section 13(c) are the same for tariff violations and section 10(b)(11) violations, although the facts being considered may differ. The main congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, Inc.- Possible Violations of Section 10(a)(1) and 10(b)(1), 29 S.R.R. 665, 681 (2001), and Refrigerated Container Carriers Pty.Ltd. – Possible Violations of Section 10(a)(1), 28 S.R.R. 799, 805 (ALJ 1999, admin. final May 21, 1999). The Commission may in its discretion determine how much weight to place on each factor and must make findings with respect to each factor. Merritt v. United States, 960 F.2d 15, 17 (2<sup>nd</sup> Cir. 1992). No one factor is to be weighed more heavily than any other. Refrigerated Container Carriers, supra.

BOE argued that based on the section 13(c) factors, the maximum civil penalty of \$30,000 for each violation is appropriate. (BOE Additional Proposed Findings of Fact, Brief and Appendix, p. 6). With respect to the nature, circumstances, extent, and gravity of the violations,

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<sup>11</sup> A violation of section 10(b)(11) requires as an element of proof that respondent acted knowingly and willfully whereas in the case of section 10(b)(A)(2) violations, the "knowing and willful" element is a factor considered in assessing a civil penalty after a violation is established.

as well as Tober's degree of culpability, BOE pointed out that Tober was licensed by the Commission as an NVOCC for 10 years; that since it became a licensed NVOCC, Tober never charged the rates in its tariff; that between 2004 and 2007, Tober knowingly and willfully accepted over 250 shipments of cargo from 15 unlicensed entities for transportation by water; that it exhibited a consistent and persistent disregard for its statutory responsibilities; and that it continued its activities even after this proceeding was commenced. Based on these considerations, BOE argued that "the extent of Tober's violations and Tober's degree of culpability merit a substantial civil penalty." (BOE Proposed Findings of Fact, p. 40). BOE also addressed the Commission's policies of deterrence and future compliance, 46 C.F.R. §502.603(b)(3), and argued that the requested maximum civil penalty would have a deterrent effect on others who might be inclined to violate the law. (*Id.*, and BOE Additional Proposed Findings, p. 6). Finally, BOE submitted evidence addressing the ability to pay factor. (BOE Additional Proposed Findings, pp.3-6). Based on the number and amount of outstanding federal and state tax liens and claims of shippers and transportation entities against Tober, BOE conceded that it is reasonable to conclude that Tober has limited, if any, ability to pay a civil penalty. Nevertheless, BOE argued that the ability to pay is but one factor to be considered in determining the appropriate amount of a civil penalty. (*Id.*).

BOE addressed the section 13(c) factors. Its statements were based on record evidence. The Commission ordinarily addresses these factors generally and to some extent, collectively, after it considers the details and circumstances surrounding the violations giving rise to the assessment of penalties. See, e.g., Sea Land, *supra*, at 893; and Mateo Shipping Corp.- Possible Violations of 1984 Act, 31 S.R.R. 830, 850 (ALJ 2009, admin. final Sept. 29, 2009). See also the separate initial decision addressing the investigation of Tober's companion respondent in this

docket, Initial Decision On Investigation of Container Innovations, Inc., served December 1, 2009.

BOE addressed the section 13(c) factors in the same manner in Mateo Shipping Corp., supra, where the ALJ, as here, observed that BOE did not suggest a dollar figure for the civil penalty or propose specific findings or suggest how the section 13 factors should be weighed. Nevertheless, the ALJ drew his conclusions from the record, finding that respondents' "culpability is manifest" and "the salient nature, circumstances, extent and gravity of the violations committed are patently clear." 31 S.R.R. at 850. Finding that the spirit and basic policy of the licensing and bonding provisions of the Act are to protect the shipping public from unqualified and unscrupulous service providers, the ALJ concluded that the respondent's violations affected numerous members of the shipping public and therefore warranted assessment of the maximum civil penalty permitted by the Shipping Act. 31 S.R.R. at 850-851.

The record in this proceeding likewise provides ample evidence for consideration of the section 13 factors with respect to violations of section 10(b)(A)(2) and violations of section 10(b)(11) so as to merit imposition of the maximum civil penalty. With respect to the tariff violations found by the ALJ, Tober was licensed by the Commission as an NVOCC for 10 years and must be charged with knowledge of its statutory responsibilities; it published a tariff and knew what a tariff was; since it became a licensed NVOCC, Tober never charged the rates in its tariff; between 2004 and 2007, it transported 278 shipments and charged rates other than rates contained in its tariff; after being advised that it was not charging for transportation in accordance with its tariff, it did not take corrective measures for 9 months; and after receiving notice of the commencement of this investigation including the tariff issue, it accepted at least 72 shipments and charged rates other than those in its tariff.

With respect to the section 10(b)(11) violations, the record shows that between 2004 and 2007, it accepted 278 shipments of cargo from 15 unlicensed entities for transportation by water from the United States to foreign destinations knowing that the cargo did not belong to the entities but rather to named individuals; Tober admitted that it had no relationship with the actual owners of the cargo; it considered the unlicensed entities as its customers and only attempted to collect amounts due from them; Tober admitted it made no attempt to determine whether the unlicensed entities were freight forwarders, NVOCCs, or beneficial cargo owners; it never declined to take a booking between 2004 and 2006; it continued its activities in accepting cargo from unlicensed entities after being advised to stop and even after this proceeding was commenced; most of the individuals hiring entities to ship their household goods to a foreign destination are inexperienced shippers and in a majority of cases it is the first time they have shipped property overseas; the Commission received numerous complaints from shippers about the unlicensed entities with which Tober transacted business and for whom Tober provided transportation services; and Tober handled hundreds of shipments of household goods for these entities thereby putting numerous members of the public at risk. These facts establish that assessment of the maximum civil penalty for 278 violations is appropriate.

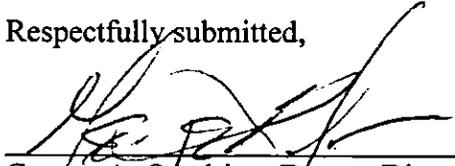
Assessing a civil penalty is not an exact science, is ultimately subjective, and embraces a broad range within which a reasonable penalty might lie. Universal Logistic Forwarding Co., Ltd.- Possible Violations of Sections 10(a)(1) and 10(b)(1), 29 S.R.R. 323, 333 (ALJ 2001), adopted in relevant part, 29 S.R.R. 474 (2002). Nevertheless, the Commission must consider and weigh numerous factors set forth in the statute and quantify them into a number, a determination which is committed to the sound discretion of the agency. Alex Parsinia d/b/a Pacific International Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (ALJ 1997). BOE addressed

the section 13 (c) factors in this proceeding, and the record contains sufficient evidence to support assessment of the maximum penalty for each violation. Accordingly, we submit that the ALJ erred in not assessing a civil penalty.

#### V. CONCLUSION

For all of the foregoing reasons, BOE submits that the ALJ erred in finding that Tober did not violate section 10(b)(11) of the Act; in not finding that Tober knowingly and willfully violated section 10(b)(2)(A) of the Act; and in not assessing a civil penalty against Tober. Accordingly, it is respectfully requested that after consideration of these Exceptions and the record in this proceeding, the Commission find that Tober violated section 10(b)(11) of the Shipping Act and knowingly and willfully violated section 10(b)(A)(2) of the Shipping Act and assess the maximum civil penalty permitted by the Shipping Act for 278 violations.

Respectfully submitted,



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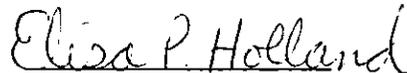
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December 17, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of December, 2009 a copy of the foregoing document has been served upon all the parties of record by first class mail.

  
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