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FEDERAL MARITIME COMMISSION

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

**EXCEPTIONS OF THE
BUREAU OF ENFORCEMENT**

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March 15, 2010

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

EXCEPTIONS OF THE BUREAU OF ENFORCEMENT

Pursuant to Rule 227 of the Federal Maritime 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 August 28, 2009 (Initial Decision), as supplemented by the Memorandum and Order on Remand For Determination of Civil Penalty served on February 23, 2010 (Supplemental Decision).¹ On March 9, 2010, the Commission issued a Notice to Review stating that it will review the February 23 decision.

I. RELEVANT PROCEDURAL BACKGROUND

This proceeding was instituted by an Order of Investigation and Hearing, served March 22, 2007, to determine: 1) whether Owen Anderson and Anderson International Transport² (hereinafter collectively referred to as Anderson or Respondents unless context requires otherwise) violated section 8 of the Shipping Act of 1984, 46 U.S.C. §40101, et seq. (the Act), and the Commission's regulations at 46 C.F.R. §520 by operating as a non-vessel-operating

¹ The August, 2009 Initial Decision is reported at 31 S.R.R. 864 (2009). Reference herein to the initial and supplemental decisions is to their respective slip opinion forms, i.e., "I.D., p. __" and "S.D., p. __".

² Anderson International Transport was operated as a sole proprietorship by Owen Anderson.

common carrier (NVOCC) without publishing a tariff; 2) whether Respondents violated sections 19(a) and (b) of the Act and the Commission's regulations at 46 C.F.R. §515 by operating as an ocean transportation intermediary (OTI) in the U.S. foreign trades without obtaining a license from the Commission and without providing proof of a bond or other financial responsibility; 3) whether, in the event one or more violations of the Act or the Commission's regulations are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed; and 4) whether, in the event violations are found, cease and desist orders should be issued.

Pursuant to the Discovery Schedule and Procedural Order issued by Administrative Law Judge Clay G. Guthridge (ALJ), BOE filed its Rule 95 statement and its Proposed Findings of Fact and Appendix. Subsequently, at the ALJ's request, BOE filed revised proposed findings of fact on November 21, 2008. Respondents did not file a Rule 95 statement or respond to BOE's revised proposed findings of fact notwithstanding the ALJ's order to show cause requiring an explanation of Respondents' failure to comply with these procedural requirements. On April 10, 2009, BOE filed its Supplementation of Record (Record Supplements) responding to certain questions posed by the ALJ. No filings were made by or on behalf of Respondents in response to the ALJ's directive.

On August 28, 2009, the ALJ issued his Initial Decision finding that Respondents knowingly and willfully committed 22 violations of the Act and entered a cease and desist order. (I.D., pp. 84-85). The ALJ found that Respondents held themselves out to the general public to provide transportation by water of cargo between the U.S. and a foreign country for compensation and therefore met the holding out portion of the statutory definition of a common carrier. (I.D., p. 56). However, the ALJ concluded that BOE failed to establish that Respondents assumed responsibility for transportation as required of a common carrier. (I.D., pp. 74-75).

Nonetheless, he found that Respondents operated as a freight forwarder without a license or bond in violation of Sections 19(a) and (b) of the Act on twenty two separate occasions. In so finding, the ALJ rejected BOE's arguments that Anderson be found to be operating as an untariffed, unlicensed, and unbonded NVOCC. Id.

On the question of penalties, the ALJ found that BOE established that the violations were knowing and willful. (I.D., p.80). Although BOE argued that the maximum \$30,000 penalty was appropriate for each violation, the ALJ concluded that BOE had not met its burden to establish the amount of civil penalty to be assessed and also that he could not independently assess a civil penalty against Respondents. (I.D., p. 84). Finding that BOE met its burden for the issuance of a cease and desist order, the ALJ issued an order: 1) prohibiting Respondents from holding out or operating as an ocean transportation intermediary in the United States foreign trades until and unless they obtain a license from the Commission, publish a tariff, and secure a bond pursuant to Commission regulations; and 2) prohibiting Owen Anderson from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as a bona fide employee of such entity for a period of three years. (I.D., p. 133).

In view of the ALJ's conclusion that he could not assess a civil penalty because there was no evidence in the record addressing Respondents' ability to pay, on October 9, 2009, BOE petitioned the Commission to reopen the proceeding for the purpose of taking further evidence addressing the ability to pay issue.³ By Order served December 4, 2009, the Commission

3. The additional evidence was tendered with BOE's petition and entitled "ADDITIONAL PROPOSED FINDINGS OF FACT, BRIEF AND APPENDIX OF THE BUREAU OF ENFORCEMENT" (hereinafter Additional PFF). The evidence consists of excerpts from pleadings filed between October 2008 and April 2009 in Owen Anderson's bankruptcy proceeding in the United States Bankruptcy Court, Southern District of Texas.

reopened the record and remanded the proceeding to the ALJ for the purpose of considering the additional evidence tendered by BOE.

On December 7, 2009, the ALJ issued a Memorandum and Procedural Order on Remand granting BOE's request to take official notice, and setting forth a schedule for the parties to submit additional proposed facts and argument addressing the ability to pay factor. BOE filed its Additional Briefing on December 22, 2009. Again, Respondents made no filing. On February 23, 2010, the ALJ issued his Supplemental Decision.⁴ The ALJ assessed a civil penalty totaling \$33,950.00 for twenty two knowing and willful violations, ranging on a per violation basis from a low of \$750.00 to a high of \$4,000.00. (S.D., p. 22).

BOE hereby appeals the Initial and Supplemental Decisions in Docket No. 07-02.

II. EXCEPTIONS

Although the ALJ found that Respondents knowingly and willfully operated as an unlicensed ocean freight forwarder and imposed a cease and desist order appropriate for those violations, BOE takes exception to the ALJ's conclusions that Respondents did not operate as an unlicensed NVOCC. The ALJ erred in finding that Respondents did not assume responsibility for transportation by water of cargo between the United States and a foreign country for compensation within the meaning of section 3(6) of the Act, 46 U.S.C. §40102(6).

BOE excepts also to the ALJ's determination as to the amounts of the civil penalties imposed for 22 violations found to have been "willfully and knowingly" committed by Respondents. The nominal penalties assessed are inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the

⁴ In view of the separate treatment of the liability and penalty issues, we generally describe the Initial Decision as addressing the liability phase, and the Supplemental Decision as dealing with the penalty phase.

Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate penalty amount appropriate to the gravity of the violations.

III. ARGUMENT

Preliminary Statement

Although BOE's case largely was prosecuted on a default basis, this proceeding has nonetheless proven both complex and exceptionally lengthy. Respondents were properly served at the commencement of this proceeding, but absented themselves sometime following the filing of BOE's initial discovery requests, substantially frustrating BOE's discovery, requests for production and possible pre-trial depositions. BOE thus was obligated to proceed largely upon documents collected prior to the initiation of the formal proceeding, i.e., through the efforts of BOE and third parties rather than through the cooperation of the Respondents.

We do not contend herein that the choices made by a deliberately nonparticipating Respondent should thereafter relieve BOE of the burden of persuasion. BOE's path, however, has not been without other obstacles. In this regard, the Commission has previously observed:

In a formal investigation ordered by the agency, Public Counsel [now BOE] has the duty to insure that the relevant and probative evidence is developed to the fullest possible extent. His primary mission is to get the pertinent information, often from the persons least interested in giving it. In the proper pursuit of this mission it would seem obvious that he should be encouraged, not circumscribed, if the investigative aims are to be achieved. The various demands that were here permitted to be made upon Public Counsel amounted to putting him on trial for the fact that an investigation had been ordered. The statements he was required to furnish interfered with the performance of his duty to develop the evidence . . .

Unapproved Section 15 Agreements – South African Trade, 1 S.R.R. 855, 865 (FMC, 1962).

The Commission there admonished the presiding officer against taking a "restricted or

fragmented approach” to the evidence, as defeating the purpose for which the Commission instituted its investigation. Id., 1 S.R.R. at 879. The Commission further noted:

The efficient performance of our regulatory functions demands that we find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if, as here, they are made the vehicle for innumerable objections which result in much delay and confusion. Since as indicated the rules are not necessary in the proper conduct of our proceedings, controversy over evidentiary niceties and formalities should not be invited by attempting to apply them. We do not, of course, suggest the substitution of an overly-relaxed approach to acceptable evidence nor anything which lacks essential fairness, having due regard for the nature and purpose of our proceedings. We simply point out that evidence that appears to satisfy the nonrigorous standards of our rule ought to be received promptly and without controversy grounded upon technical exclusionary rules.

Id., at 866. Accord, Agreement No. 10294, 19 S.R.R. 318, 321 (ALJ 1979); Banfi Products Corp.—Possible Violations, 26 S.R.R. 951, 957 (FMC 1993); Pacific Champion Express Co. Ltd. - Possible Violations, 28 S.R.R. 1105, 1106 (ALJ 1999). BOE submits that the three year course navigated in this proceeding has ill-served the intent of the Commission and of the Administrative Procedure Act, 5 U.S.C. §551, et seq. (APA), to provide for expedition.

Of particular concern is the ALJ’s application of the evidentiary standard in this proceeding. The appropriate evidentiary standard of proof, as acknowledged by the ALJ, is a “preponderance of the evidence.” In fact, the ALJ found that BOE satisfied this standard with respect to certain issues, *viz.*, that Respondents held out to general public as a common carrier, that they engaged in unlicensed and unbonded operations, that they knowingly and willfully violated the Act, and that a cease and desist order is warranted. However, he found that BOE failed to meet this standard with respect whether Respondents assumed responsibility for transportation and operated as an NVOCC. In the face of documentary evidence and affidavits submitted by BOE, uncontested by the Respondents, it appears that a different, and considerably

more demanding, standard of proof was applied in considering BOE's evidentiary presentation on this issue.

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); Sanrio Co. Ltd v. Maersk Line, 19 S.R.R. 1627, 1632 (I.D.), *adopted* 20 S.R.R. 375 (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).⁵ The "preponderance of the evidence" is the least demanding of the three standards of proof. Adair v. Penn-Nordic Lines Inc., 26 S.R.R. 11, 15 (I.D. 1991). Preponderance means only 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

⁵ In Petition of South Carolina State Ports Authority, *supra* 27 S.R.R. at 1161, the Commission had occasion to elaborate upon the burden of proof issue, as follows:

The "burden of proof" has long been used to encompass two concepts: the burden of persuasion, which remains fixed throughout a proceeding on the proponent, in this instance SCSPA, and the burden of production. The burden of persuasion is sometimes stated as what the proponent must establish in order to persuade the trier of facts of the validity of his claim. Stein, Mitchell, Mezines, 4 Administrative Law 24.01. As used in 5 U.S.C. 556(d), burden of proof means the burden of persuasion. Greenwich Collieries, 512 U.S. at 275.

Although the burden of proof is sometimes said to shift from one party to another in the course of a proceeding, what is actually meant by this statement is that the burden of going forward with the evidence, or the burden of production, shifts when one party has produced sufficient evidence to meet the definition of substantial evidence quoted above, also frequently characterized as a prima facie case, to the other party to produce evidence rebutting that case. See, e.g. Stein, Mitchell, Mezines, 4 Administrative Law 24.01.

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 part who has the burden to persuade...”). In holding that the APA explicitly authorized the “preponderance of the evidence” test in administrative agency proceedings, the Supreme Court found that Congress had considered and excluded any more burdensome standard. Steadman v. S.E.C., 450 U.S. 91, 102 (1981), *reh. denied*, 451 U.S. 933 (1981).

BOE submitted substantial evidence showing that Respondents assumed responsibility to the proprietary shippers to provide the entire transportation, including bills of lading issued by Anderson to shippers covering through service from a U.S. origin to a foreign destination, written rate quotations it gave to shippers for door-to-door service, email exchanges between Respondents and the proprietary shippers concerning their international shipments, shipper affidavits attesting to Respondents’ assumption of responsibility for the transportation of their cargo, and discovery admissions by Respondents confirming that they provided “door-to-port” and “door-to-door” service to their customers. Despite numerous opportunities and ALJ directives to submit evidence and/or argument, Respondents chose not to submit any response addressing or rebutting the evidence.

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*, (“An unrebutted *prima facie* case is necessarily, by definition, a preponderance of the evidence.”). The evidence presented by BOE constituted, at a minimum, a *prima facie* showing that Respondents held themselves out to provide and assumed responsibility

for transportation of cargo by water from the United States to a foreign destination. There is no countervailing evidence in the record disputing these facts. To paraphrase the ALJ, if the obligation should rest with the parties to organize the evidence, then the ALJ should refrain from seeking to “comb the record to find some reason” to deny judgment herein. (I.D. at 19, *citing Forsberg v. Pac. NW Bell Tel. Co.*, 840 F.2d 1409 (9th Cir 1988). Cases must be decided on the basis of existing facts and reasonable deductions therefrom, rather than by entertaining speculative possibilities. West Coast Line Inc. v. Grace Line, 3 F.M.B. 586, 595 (1951); Alcoa Steamship Co Inc v. Cia. Anonima Venezolana, 7 F.M.C. 345, 361 (1962); Rate Agreement Exclusive Patronage System, 11 F.M.C. 513, 523 (1968). As stated in Capitol Transportation Inc. v. United States, 612 F2d 1312, 1319 (1st Cir, 1979):

Without deciding whether the foregoing would constitute substantial evidence of NVOCC status in a contested proceeding, especially one where contrary evidence had been received, see United States v. Bianchi & Co., 373 U.S. 709, 715, 83 S. Ct. 1409, 10 L.Ed.2d 652 (1962), we have little difficulty in finding such evidence more than sufficient in these circumstances where, at the time of hearing, Capitol had not even signalled that it disputed the allegations of its NVOCC status . . .

We now turn to the specific claims of error.

A. The ALJ erred in finding that Respondents did not assume responsibility for transportation

To meet the definition of an NVOCC, an entity must be shown to be a common carrier. 46 U.S.C. §40102(16). A common carrier holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and uses for all or part of that transportation, a vessel

operating on the high seas or on the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6). The ALJ concluded that although Respondents held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation, they did not assume responsibility for the transportation of the shipments in issue as required by the above definition. Consequently, the ALJ determined that Respondents were not shown to be an NVOCC, but rather operated as an ocean freight forwarder. (I.D., p. 56).

A determination of the common carrier status of an entity should be made on the bases of the statutory definition and Commission precedent applying that definition. EuroUSA, Inc., et al. - Possible Violations, 31 S.R.R. 540, 551 (FMC, 2008). 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 30 S.R.R. 872, 882 (2006). Thus, the Commission has stated, “[c]ommon 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, it remains 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. Tariff Filing Practices, Etc., of Containerships, Inc., 9 F.M.C. 56, 68-69 (1965).

Whether Respondents assumed responsibility to the shippers for the transportation requires examination of the activities of Respondents in their relationship with the proprietary

shippers. Likewise, determining whether Respondents acted as a freight forwarder, an agent on behalf of the shipper, first requires a determination that one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control. RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006), cited in Landstar Express America v. Federal Maritime Commission, 569 F.3d 493, 497 (D.C. Cir. 2009). Given the two shipper affidavits submitted by BOE on this issue, the evidence of Anderson’s NVOCC status is clear and uncontroverted. Cargo owner Dirk Manuel thus testified, in relevant part:

1. My name is Dirk Manuel. I moved from Katy, Texas to Brussels, Belgium in late 2004. My wife obtained several quotes from moving companies including Anderson International Transport who was listed in the Houston, Texas Yellow Pages under international movers. We dealt exclusively with Owen Anderson, the owner of the company. Mr. Anderson came to our home, surveyed our property and on November 19, 2004, provided a quote of \$5450.00 inclusive of inland freight, ocean freight, packing, documentation and service charges. The quote included delivery to our yet to be determined address in Brussels, Belgium. In late December 2004, Mr. Anderson had a container delivered to our home and packed our belongings in the container. He made arrangements for a truck to pick up the container and deliver it to the port.

2. According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium. Although Mr. Anderson eventually provided me with the name of the vessel transporting my container so I could track its progress, I had no contractual relationship with any transportation entity other than Anderson International Transport and Mr. Anderson. Mr. Anderson never indicated he was a broker or agent for any other company. I never received copies of any documentation from any entity other than Mr. Anderson’s bill of lading and inventory sheets.

AFFIDAVIT OF DIRK MANUEL, ¶¶1-2, attached to BOE Record Supplements filed April 10,

2009. Another shipper witness testifying on behalf of BOE gave similar testimony:

1. My name is Lynn Watt. My husband, Alex Watt, and I moved from the Houston, Texas area to Cairns, Australia in 2006. In the course of our research into moving companies, we found Anderson International Transport listed in the Houston, Texas Yellow Pages under international movers and contacted them to obtain a quote. We dealt exclusively with Owen Anderson, the owner of the

company. . . . Mr. Anderson then quoted us \$1,650.00 to reflect the smaller shipment. The quote included pickup in Houston, ocean freight, customs clearance and delivery to our home in Cairns, Australia. We accepted his quote. In late May, 2006, Mr. Anderson came to our house and boxed up our belongings and moved them to his warehouse. He provided me with a copy of a straight bill of lading which I signed showing that our goods would be shipped to Cairns, Australia. Shortly before I left the country, Mr. Anderson informed me that the price for the shipment had doubled. We agreed to pay the additional charges.

2. Although we understood that Mr. Anderson and his company did not actually own a vessel, we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport, Inc., to ship our goods. As far as we were concerned, Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. Mr. Anderson never indicated he was a broker or agent of any other company. We never received a copy of Shipco Transport, Inc.'s bill of lading and did not even know of their involvement in our shipment until it was delayed in Brisbane due to Mr. Anderson and Anderson International Transport's failure to pay Shipco Transport Inc. for ocean freight. We had no contractual relationship with Shipco Transport, Inc.

AFFIDAVIT OF LYNN WATT, ¶¶1-2, attached to BOE Record Supplements filed April 10, 2009.

The record shows that the proprietary shippers contacted, communicated, and dealt with Respondents, not the licensed NVOCCs or VOCCs, for the shipment of their goods from an origin point in the United States to a destination in a foreign country. *Id.* The shippers first came into contact with Respondents through Yellow Page listings that advertised Anderson as an international mover. *Id.* Direct shipper testimony establishes that Respondents undertook to provide door-to-door service to the proprietary shippers as reflected in through bills of lading issued by Respondents, estimates they provided for all-inclusive service, and invoices they sent to the shippers for such service. *Id.* Indeed, as the ALJ himself acknowledged, “[t]he proprietary shippers had the misfortune to select Respondents to help them move their goods to a foreign country.” (I.D., p. 53). The record thus demonstrates that Respondents assumed

responsibility for the transportation of the shippers' goods and that the shippers considered Respondents to be the responsible party for the transportation of their goods.

Rather than credit unrebutted testimony from these witnesses, the ALJ took a different – and we submit erroneous – approach by focusing on the relationship between VOCCs or other NVOCCs who were employed (and paid directly) by Respondents. Having assumed a contractual relationship between these other carriers and the shippers, the ALJ reasoned that such carriers' relationship to the cargo precluded Respondents from assuming responsibility for the transportation, giving rise to the ALJ's conclusion that Anderson must be a freight forwarder acting as agent on behalf of the cargo owners. Given unrefuted evidence in the form of testimony submitted by BOE denying such contractual relationships with the underlying carriers, a finding of forwarder status for Respondents falls solely into the category of "speculative possibilities." West Coast Line Inc., supra, 3 F.M.B. 595. There is no basis in law or fact for such conclusion.

1. Respondents Assumed Responsibility For Through Transportation

In addition to other types of transportation documents, Respondents issued its own bills of lading to the proprietary shippers for through transportation from a U.S. origin to a foreign destination in at least 13 instances. See BOE Appendix at 64⁶ (Two Trees shipment from warehouse to China); 150 (Repairer of the Breach shipment); 158 (Manuel shipment); 236 (Osule shipment); 287 (Deleon shipment); 478 (Watts shipment); 563 (Zinnah shipment); 578 (Newman shipment); 607 (Dillon shipment); 618 (Huxtable shipment); 653 (Maniotes shipment); 680 (Hughes shipment); 445 (Downie shipment). Witness Lynn Watt described the significance of Anderson's action: "He provided me with a copy of a straight bill of lading which I signed

⁶ The number references are to the Bates numbers found in the lower right corner of each document in BOE's Appendix.

showing that our goods would be shipped to Cairns, Australia.” AFFIDAVIT OF LYNN WATT, ¶1, attached to BOE Record Supplements. The sole other shipper witness appearing in this proceeding stated: “According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium. . . . I never received copies of any documentation from any entity other than Mr. Anderson’s bill of lading and inventory sheets.” AFFIDAVIT OF DIRK MANUEL, ¶2, attached to BOE Record Supplements.

In referring to bills of lading issued by carriers other than Anderson, the ALJ described the significance of such bills of lading as follows:

By issuing the bills of lading identifying the proprietary shipper as the shipper, the common carriers entered into contractual relationships with the proprietary shippers, ‘assume[d] responsibility for the transportation [of the proprietary shippers’ goods] from the port or point of receipt to the port or point of destination, 46 U.S.C. §40102(6), and acted as common carriers on the shipments. (I.D., p.53).

Given the unrefuted testimony of the shippers above, the 13 bills of lading issued by Anderson directly to the cargo owners cannot be distinguished from the ALJ’s conclusions as to carrier status above. Moreover, the available witness testimony denied any knowledge of other carriers, AFFIDAVIT OF LYNN WATT, ¶2, attached to BOE Record Supplements, (“...we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport, Inc., to ship our goods.); refuted that any other party was made responsible for movement of the freight, *Id.* at ¶2 (“Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. Mr. Anderson never indicated he was a broker or agent of any other company.”), *Id.*; and denied receiving any documentation to indicate that Anderson was not the NVOCC, AFFIDAVIT OF DIRK MANUEL, ¶2, attached to BOE Record Supplements, (“I never received copies of any documentation from any entity other than Mr. Anderson’s bill of lading and inventory sheets.”)

The ALJ, however, did not apply his conclusion concerning the effect of a bill of lading to Respondents.⁷ Rather than addressing Respondents' bills of lading at face value, the ALJ imposed an interpretation on them that finds no support in the record. Setting the tone for his discussion, the ALJ gratuitously inserts the word "domestic" into the document labeled "Straight Bill of Lading-Short Form".⁸ (I.D., p. 68). While the ALJ acknowledges that each bill in fact identifies a foreign destination point, he finds that each bill also purportedly identifies "an intervening domestic point." *Id.* It may be surmised that the point referenced by the ALJ is Anderson's preprinted address in the heading on each bill of lading, however, the I.D. contains no explicit finding as to such intervening domestic point for these thirteen shipments. See ALJ Findings of Fact 34-54 (Two Trees shipment from warehouse to China); Findings of Fact 82-95 (Repairer of the Breach shipment); Findings of Fact 96-111 (Manuel shipment); Findings of Fact 119-136 (Osule shipment); Findings of Fact 137-155 (Deleon shipment); Findings of Fact 200-211 (Downie shipment); Findings of Fact 221-234 (Watts shipment); Findings of Fact 236-258 (Zinnah shipment); Findings of Fact 259-275 (Newman shipment); Findings of Fact 276-287 (Dillon shipment); Findings of Fact 288-301 (Huxtable shipment); Findings of Fact 322-334 (Maniotes shipment); and Findings of Fact 359-374 (Hughes shipment). The written testimony of at least one witness contradicts any claim that Anderson's address, or any other point, was intended by the shipper to be an "intervening" point in terms of a domestic destination. See

⁷ In an effort to contradict BOE's argument that the shippers were not aware of the bills of lading, the ALJ pointed to 2 shipments on which a copy of the carrier's bill of lading was forwarded to the shipper. (I.D., p. 52). These post-shipment transmissions from Anderson to its customers do not establish that the shippers entered an agreement with these entities or were even aware of them prior to shipment. Nor is the forwarding of these documents remarkable. The carriers sent them to Anderson at its address, not the shippers, for payment. The carriers were not demanding payment from the shippers. In fact the Finn Container bill was unrated, and the Saripalli transmission simply stated that "a freight document" was being sent.

⁸ The word "domestic" in fact appears only once in the body of the document, in reference to an entirely different document, the Uniform Domestic Straight Bill of Lading. By Order served March 11, 2009, the ALJ directed Respondents to furnish information addressing the terms in its bills. No response was filed.

AFFIDAVIT OF DIRK MANUEL, ¶2, attached to BOE Record Supplements, (“In late December 2004, Mr. Anderson had a container delivered to our home and packed our belongings in the container. He made arrangements for a truck to pick up the container and deliver it to the port.”)

The intended final destination of a shipment is determined by the shipper’s intent when the shipment commenced. Project Hope v. M/V IBN Sina, 250 F.3d 67, 74-75 (2nd Cir. 2001). The foreign destination identified on each bill issued by Respondents reflects the proprietary shipper’s intent when the shipment commenced. Notwithstanding the ALJ’s mislabeling them as “domestic”, or his emphasis on calling them “straight bills of lading”, the label of the document is unimportant where it unambiguously indicates the final delivery destination. Arkansas Aluminum Alloys, Inc. v. Emerson Electric Co., 2007 WL 4510366 (W.D. Ark. 2007) (despite the label straight bill of lading, “it meets the definition of a through bill as the final delivery destination of the goods is unambiguously indicated on the document.”). Whether a particular document is a through bill is a question of fact, to be determined by examining such factors as whether the final destination is indicated on the document; the conduct of the shipper and the carriers; and whether the carriers were compensated by the payment made to the initial carrier or by separate consideration from the shipper to each. Tokio Marine & Fire Insurance Co. v. Hyundai Merchant Marine Co., 717 F. Supp. 1307, 1309 (N.D. Ill. 1989).

In the instant case, the bills of lading issued to the shippers by Anderson identify a domestic origin and a foreign destination where the goods are to be delivered. This undertaking to provide the through service reflected in these bills of lading and assume responsibility for that transportation is also demonstrated by its course of conduct as reflected in other documents it issued, including estimates and/or invoices it provided to shippers for all inclusive door-to-door

service (BOE App., 179, Manuel; 215, Osule; 286, Deleon; 459, Watts; 525, 560, 566, Zinnah; 587, Newman; 606, Dillon; and 615, Huxtable); its statement that it provided door-to-door service (I.D., p. 74); the issuance of invoices by VOCCs/NVOCCs to Anderson requesting payment for their services, the corresponding payments of those invoices by Respondents, and the separate billing by Respondents in different amounts to the proprietary shippers. (BOE App., 442, Downie; 682, Hughes; 650, 665, Maniotes). These are all indicia of a through service. Marine Office of America Corp. v. NYK Lines, 638 F.Supp. 393, 399 (N.D.Ill. 1985); Tokio Marine & Fire, *supra*, at 1309; and Arkansas Aluminum, *supra*, at 1. As unrebutted evidence, this showing sufficiently established that Anderson's bills were issued as through bills.

Notwithstanding BOE's evidence to the contrary, the ALJ, relying solely on Anderson's DOT certificate, concluded that since Respondents were authorized to provide the motor carrier transportation on these shipments, they assumed responsibility only for the domestic portion of the movements. (I.D., p.68).⁹ Respondents' DOT certificate does not constitute evidence addressing their assumption of responsibility. As the ALJ reasoned in the decision, an entity's license may establish holding out, but not assumption of responsibility. (I.D., p. 55). It is simply evidence of authority to perform certain transportation. The fact that Respondents held authority by another agency to perform highway transportation is not relevant to whether they were holding out and assuming responsibility to provide the transportation that is subject to this Commission's jurisdiction.

Again paraphrasing the words of the ALJ, "by issuing the bills of lading identifying the proprietary shipper as the shipper, Respondents entered into contractual relationships with the

⁹ The ALJ's statement concerning Respondents' DOT authority is incorrect. The Commission may take official notice of the licensing and insurance records maintained by DOT's Federal Motor Carrier Safety Administration on its website. 46 C.F.R. §502.226. That information reveals that Anderson's authority was issued and revoked on various dates and was in effect only for one shipment, *viz.*, Claudette Dillon on September 11, 2006. See http://li-public.fmcsa.dot.gov/LIVIEW/pkg_carrquery.prc_carrlist.

proprietary shippers, assumed responsibility for the transportation from the port or point of receipt to the port or point of destination, and acted as common carriers on the shipments. (I.D., p.53). BOE has established by a preponderance of the evidence that Respondents assumed responsibility for the transportation.

2. Bills Issued By Other Entities Do Not Negate Respondents' Assumption of Responsibility

The ALJ discounted Anderson's role in these transactions by focusing on the bills of lading issued by the VOCCs and other NVOCCs from which Respondents purchased transportation service. (I.D., pp. 69-70). Each of these other bills of lading was issued subsequent to the bills of lading issued by Respondents to the shipper, covered a portion of the service that Respondents had undertaken to provide, and identified the proprietary shipper in care of Respondents as the shipper at Respondents' address. Id. On the basis of these documents, the ALJ concluded that these entities and not Respondents assumed responsibility for the transportation. Id.

The ALJ attached particular significance to the fact that the bills issued by these entities identified the original cargo owner as the shipper and thereby established a contractual relationship, an issue that is addressed below. However, it should be noted at the outset that this description of the bills is less than complete because they also identify Anderson and its address in the same shipper box as the proprietary shipper. While the ALJ holds that this designation establishes the contractual relationship between the proprietary shippers and the other entities, it could equally reflect the same relationship between Anderson and the other carriers. In fact, the parties' course of dealings more accurately suggest the latter conclusion. Hale v. Department of Transportation, supra. In any event, the bills of lading issued by the other carriers are not determinative of Anderson's undertaking to the proprietary shippers.

The ALJ's conclusion that the bills of lading issued by the VOCCs and other NVOCCs established a contractual relationship with the shippers is not based on any shipper or carrier testimony. It is a legal conclusion attributed to the nature of the document, a conclusion not applied to the same document issued by Respondents. In fact, the evidence submitted by BOE preponderates in favor of finding that Respondents assumed responsibility for the subject transportation, and militates against the conclusion reached by the ALJ. As previously discussed, that evidence includes the bills of lading issued by Respondents, the estimates and invoices they provided for door-to-door service, the patterns of the VOCCs and NVOCCs in invoicing and dealing solely with Respondents rather than the proprietary shippers, communications between Respondents, shippers, and other carriers reflecting Respondents' responsibility for the transportation, and the lodging of complaints by the proprietary shippers against Respondents rather than the other entities.

Critically, the documentary evidence is substantiated by the direct testimony of proprietary shippers served by Respondents, stating emphatically that they did not deal with the other entities, but rather dealt exclusively with Respondents who assumed complete responsibility for the transportation. See Affidavits of Dirk Manuel and Lynn Watt submitted with BOE's Record Supplements on April 10, 2009. Based on this testimony and the similar documentation and pattern of dealings with respect to the other shipments, the Commission, as the expert agency with special familiarity with this industry, may infer that the other shippers dealt exclusively with Respondents and considered them to have assumed responsibility for the entire transportation. Such an inference is supported by the Affidavit of Alvin Kellogg, a Commission Area Representative with over 19 years experience with the mode of operation of

licensed and unlicensed NVOCCs and freight forwarders. AFFIDAVIT OF ALVIN KELLOGG attached to BOE Record Supplements filed April 10, 2009..

Beyond this, we submit that the ALJ erred in giving overriding effect to the subsequently-issued bills of lading of the VOCCs and other NVOCCs *vis-a-vis* those responsibilities and obligations to the shippers previously assumed by Respondents. First, whether those bills of lading could establish a contractual relationship with the proprietary shippers who were not even aware of those documents is open to question.¹⁰ It is hornbook law that an enforceable contract is dependent on agreement on all material terms and upon the parties' intention to be bound by those terms. Novecon, Ltd. v. Bulgarian-American Enterprise Fund, 190 F.3d 556, 564 (D.C. Cir. 1999). Thus, while these carriers may have had a contractual relationship with Respondents, we disagree that they had such a relationship with the proprietary shippers. Of greater relevance is that the available shipper testimony likewise disagrees with the ALJ's analysis. AFFIDAVIT OF LYNN WATT, ¶2, attached to BOE's Record Supplements, ("Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia. Mr. Anderson never indicated he was a broker or agent of any other company.")

The ALJ posits that BOE's position would leave shippers who use an unlicensed carrier without a remedy against the carrier that issued a bill of lading. (I.D., p. 54). This reasoning is flawed as it ignores the fact that the shipper obviously has a remedy against the carrier which issued the bill of lading to it (i.e., Anderson), whether licensed or not and bonded or not. More importantly, the availability of such remedy does not foreclose the possibility of additional

¹⁰ BOE disagrees with the ALJ's suggestion that the shippers were aware of the bills prior to shipment. See footnote 7, supra.

remedies against others in the transportation chain. The ALJ's assumption otherwise is unfounded as a matter of law.

Assuming, *arguendo*, that some privity existed between the shippers and the other carriers, it does not follow that their bills supplanted Respondents' undertaking or relieved Anderson of its obligations to the shippers. The effect of bills of lading issued subsequent to the initiating carrier's bill of lading was considered by the Supreme Court in Missouri, Kansas & Texas Railway Co. v. J.H. Ward, 244 U.S. 383 (1917), involving an action to recover damages for injuries to cattle during the course of an interstate shipment. The cattle were tendered to the Houston & Texas Railroad which issued a bill of lading for transportation from an origin in Texas, over two connecting lines, to final destination in Oklahoma. The first connecting carrier also issued a bill of lading when it received the shipment at its connecting point which was signed by an agent for the shipper. The connecting carrier's bill contained different terms than the initial bill with respect to the requirements for filing a claim. The cattle arrived at destination in a debilitated condition and the lawsuit followed.

The connecting carriers asserted that the shipper failed to comply with the prerequisites for filing a claim prescribed in the subsequent bill of lading issued by the connecting carrier and argued that the claim was barred. The Court held, however, that the second bill issued by the connecting carrier was void. Justice Brandeis explained:

The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As [the connecting carriers] were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void. 244 U.S. at 387.

This rationale was followed in Mexican Light & Power Co. v. Texas Mexican Ry.Co., 331 U.S. 731, 734 (1947) where the Court stated:

No matter what the convenience which a consignee may derive from a bill of lading issued by a connecting carrier on a through shipment, unless the connecting carrier has received a consideration for the bill of lading in addition to that which flowed under the bill of lading issued by the initiating carrier, the Carmack Amendment makes such second bill of lading void.

See also Marine Office, *supra*, 638 F.Supp. at 398 (a through bill of lading applies to the connecting carriers “regardless of whether the connecting carrier issues a new bill of lading, as the new contract is treated as void for lack of consideration.”) In Toshiba Int’l Corp. v. M/V Sea-Land Express, 841 F.Supp. 123, 128 (S.D.N.Y. 1994), Judge Leval explained that a “through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract.”

Although many of these cases were decided under the Carmack Amendment to the Interstate Commerce Act, the issue of whether a carrier assumes responsibility for the shipment over the entire route by issuing a through bill of lading is a contract issue that transcends Carmack. In U.S. v. Mississippi Valley Barge Line Company, 285 F.2d 381, 390 (8th Cir. 1960), then-judge Blackmun stated:

“. . . the question, wholly independent of Carmack, is whether the carrier has contracted to carry the goods from origin to destination or, on the other hand, has agreed only to carry the shipment safely over its own line and then to deliver it to the next carrier as the agent of the shipper.”

In that case, the carrier barge line issued a bill of lading identifying the origin and destination and undertook responsibility for the shipment over the entire route to the exclusion of other documents issued by the connecting railroad that provided a portion of the journey. The factors relied upon by the court as establishing a through bill included that the actual off-river origin and destination were named on the bill; the recital that the barge line received the goods; the absence of any connecting carrier named on the bills; that the barge line advanced the railroad’s

switching charges; that the barge line was billed by the railroad; and that the barge issued a single bill for all charges to the government as the shipper. Id., 390. The bill of lading executed by the barge line constituted the sole contract between the parties and “overrode any inconsistent aspects, actual or apparent” of the barge line’s bill of lading published in its tariff. Id., 391. As the court explained, the initial carrier is the one who first contracts with the shipper to transport the shipment and to which to shipper looks. Id.

So too here, Anderson undertook responsibility for the shipments over the entire routes as demonstrated by its bills identifying the foreign destination point; reciting that it received the shipment from the proprietary shipper; and making no mention of any connecting carrier. The evidence also showed that Anderson advanced the charges of other carriers and then billed the shippers for the total charges. The bills of lading issued by other common carriers did not supersede or negate Anderson’s previously-assumed responsibility to the cargo owners to provide that service. See also Seguros Comercial Americas v. American President Lines, 910 F.Supp. 1235, 1239 (S.D. Tex. 1995)(“The test is where the obligation of the carrier as receiving carrier originated.”). It follows that “[t]he bill of lading required to be issued by the initial carrier . . . , ‘governs the entire transportation,’” “fixes the obligations of all participating carriers,” Galveston Wharf Co. v Galveston, Harrisburg & San Antonio Ry., 285 U.S. 127, 135 (1932) (citations omitted), and “contain[s] the entire contract upon which the responsibilities of the parties rest[].” St. Louis, Iron Mountain & S. Ry. v. Starbird, 243 U.S. 592, 595, 604 (1917). Whether defined as a cargo liability issue under Carmack, or a regulatory matter under the Shipping Act, the concept of through transportation thus seeks “to create in the initial carrier unity of responsibility for the transportation to destination” by treating the carriers participating in that transportation “as one system” in which all connecting carriers “become in effect mere

agents, whose duty is to forward the goods under the terms of the contract made by their principal, the initial carrier.” J.H. Ward, *supra*, 244 U.S. at 386-388; accord, Northern Pac. Ry. v. Wall, 241 U.S. 87, 92 (1916). Anderson’s bill of lading must be construed as a through bill, not only because it preserves that “unity of responsibility,” but because that construction is the only one supported by the testimony of the affected shippers. Conversely, the ALJ’s conclusions that the bills of lading issued by other entities effectively nullified Respondents’ assumption of responsibility to Anderson’s shippers would disregard advances in through transport and intermodalism, and are otherwise unsupported in the documentary record and the shipper testimony.

As a final note, in concluding that Respondents’ operations were those of a freight forwarder and not an NVOCC, the ALJ attempted to categorize all such OTI activities as either freight forwarder or NVOCC services. Notwithstanding uncontested evidence establishing that Respondents held out and assumed responsibility as a common carrier, the ALJ held that Respondents operated as a freight forwarder because the evidence showed that Respondents performed one or more freight forwarding services as described in the Commission’s regulations on each of the shipments in issue. (I.D., pp. 47-48). This approach ignores the realities of the industry. In National Customs Brokers & Forwarders Assoc. v. U.S., 883 F.2d 93 (D.C. Cir. 1989), the court addressed NCBFAA’s challenge that the Commission’s licensing regulation unlawfully “allows NVOCCs to offer the full gamut of forwarding services, including preparing and processing export declarations, sight drafts, insurance documentation, and letter-of-credit documents, on cargoes carried under their own bills of lading.” Turning back NCBFAA’s challenge, the court determined that while NVOCCs may perform certain functions designated as

forwarder services, “. . . a carrier does not become a forwarder merely by furnishing services to its own customers that a forwarder may provide.” 883 F.2d at 102.

In response to certain questions formally posed by the ALJ, BOE explained that particular activities may be provided either by freight forwarders or NVOCCs, e.g., arranging delivery of empty container to shipper, obtaining booking from common carriers, arranging and forwarding documentation such as customs declarations, auto title information and hazardous goods documents, purchasing insurance, preparing dock receipts, and making delivery arrangements. (I.D., pp. 66-73, and BOE Record Supplements, pp. 18-21). That such services meet the definition of a forwarder service under 46 C.F.R. §515.2, however, is not conclusive as to forwarder status alone, as the D.C. Circuit so clearly held in National Customs Brokers & Forwarders Assoc., 883 F.2d at 102.

It is noteworthy that on the shipments cited by the ALJ to support his conclusion, supra, Anderson also performed NVOCC services. On the Two Trees shipment, it issued a bill of lading to the proprietary shipper, assumed responsibility for transportation to China, issued a dock receipt, arranged and paid for dangerous cargo documentation (BOE App. 30, 34, 45, 46, 64); on the Osule shipment, it issued a bill of lading to the shipper for through transportation, issued a dock receipt, separately billed shipper for its all inclusive charges (BOE App. 234, 235, 245, 247); on the Cooper shipment, Anderson invoiced the shipper separately for its all inclusive charges and separately paid ocean carrier its charges (BOE App. 297, 310); on the Zinnah shipment, Respondents issued a bill of lading to the shipper for through transportation, provided estimate for door-to-door service, separately invoiced the shipper for all inclusive charges, and separately paid the ocean carrier its charges (BOE App. 522, 561, 562, 563, 566); and on the Newman shipment, Respondents issued a through bill to Jamaica to the shipper, provided an

estimate for door to door service, and made separate payment to ocean carrier for its charges (BOE App. 577, 578, 583, 587).

Ultimately, the ALJ improperly conflates the booking of shipments with certain oncarriers (both VOCCs and NVOCCs) as establishing, de facto, an agency on behalf of the actual owners of the cargo. I.D. at p.,71. The deficiencies in the ALJ's approach are immediate and obvious: First, the ALJ enters findings of agency on behalf of the cargo owners in the absence of any supporting testimony of the shippers themselves. Agency must be established on the basis of some agreement, whether written or oral, on the part of the purported principals (here, the cargo owners) expressly creating or authorizing another to serve as agent. See e.g. RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006). Second, in the two instances presented in the record (with no contrary factual record), the involved cargo owners categorically denied any intention to create a "contractual relationship with any transportation entity other than Anderson International Transport and Mr. Anderson." AFFIDAVIT OF DIRK MANUEL at ¶2, BOE Record Supplements; and, "According to Mr. Anderson, I was paying him to take care of everything and deliver our goods to our door in Belgium." Id. In the case of affiant Lynn Watt, she states: ". . . we had no knowledge that Mr. Anderson would be contracting with another entity, Shipco Transport Inc. to ship our goods. As far as we were concerned, Mr. Anderson and Anderson International Transport were solely responsible for transporting our goods from our home in Texas to our home in Australia." AFFIDAVIT OF LYNN WATT, ¶2, BOE Record Supplements. The un rebutted witness testimony¹¹ here plainly negates any finding by the ALJ that "establishes one person (a 'principal') manifests assent to another person (an 'agent') that the

¹¹ The ALJ's findings that Anderson was acting as agent for the cargo owners were material to his conclusion that Anderson was acting as a freight forwarder. See e.g. ALJ Findings 96-111 (Manuel shipment), and 221-235 Watt shipment). The failure to even address in his findings such contrary evidence in the form of the Manuel and Watt affidavits constitutes plain error. See APA, 5 U.S.C. §557 (c), requiring "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record."

agent shall act on the principal's behalf and subject to the principal's control." RESTATEMENT (THIRD) OF AGENCY, supra.

Finally, in viewing the actions of Anderson as acts of an agent for the cargo owners, the ALJ failed to consider that a more truthful and accurate claim of NVOCC status by Anderson when booking the cargo with other carriers might have had the effect of barring such transport. As Commission Area Representative Al Kellogg testified ". . . unlicensed NVOCCs often route their cargo through another licensed NVOCC, as Respondents did. This may be because the licensed NVOCC has a service contract with an ocean carrier that provides better rates and/or because the ocean common carriers refuse to provide service directly to these unlicensed entities as they are prohibited from doing so by the Shipping Act of 1984." (emphasis added.) See Affidavit of Alvin Kellogg at ¶5, BOE Record Supplements. Since Anderson's unlicensed NVOCC status would bar Shipco and others from accepting its cargo, 46 U.S.C. 41104(11), Anderson had every motivation to falsely claim forwarder status in his dealings with other carriers.

Recognizing that Anderson issued a through bill of lading on 13 of the 22 cited shipments and that BOE's affidavits address but two shipments by Respondents, the evidentiary value of BOE's case should not be limited to those fewer shipments alone, but must be weighed in light of the entire record. Unapproved Section 15 Agreements - Spanish / Portuguese Trade, 8 F.M.C. 596, 612 (FMC, 1965). Taken alone, any given document may not be of sufficient weight to sustain a finding. However, documentary evidence may be supported by other related evidence which, taken together and in context, form the basis for rational and dependable conclusions. Id. In this case, the testimony of the shipper witnesses, together with the testimony of Area Representative Alvin Kellogg, amply corroborate and explain the documentary evidence. BOE's

case herein “easily meets the standard of proof required in administrative proceedings, namely, a preponderance of the evidence.” Universal Logistic Forwarding Co Ltd. - Possible Violations, 29 S.R.R. 325, 330 (ALJ, 2001), *adopted in part, vacated in part*, 29 S.R.R. 474 (FMC, 2002), *citing* Portman Square Ltd. - Possible Violations, 28 S.R.R. 80, 84 (ALJ, 1998). See also Kin Bridge Express Inc.—Possible Violations of the Shipping Act of 1984, 28 S.R.R. 984, 985 (1999) (“BOE has more than satisfied its burden of proof in this administrative proceeding, which is that of a preponderance of the evidence.”).

Under the Commission’s rules and the Administrative Procedure Act, BOE had the initial burden of production to demonstrate a prima facie case of violation by Respondents, and the ultimate burden of persuasion to establish such violations by the “greater weight of the evidence,” that is, evidence which is more convincing than the evidence offered in opposition to it. Hale v. Department of Transportation, *supra*, 772 F2d at 885. As the Commission noted in Petition of South Carolina State Ports Authority, *supra* at 1161, once one party has produced a sufficient case meeting the definition of substantial evidence, *i.e.* established a prima facie case, the burden of going forward with the evidence, or the burden of production, shifts to the other party to produce evidence rebutting that case, citing Stein, Mitchell, Mezines, 4 Administrative Law 24.01. Where the Respondents have not seen fit to furnish their own rebuttal to BOE’s case, we submit that it is not the place of the Administrative Law Judge to act as an advocate for Respondents’ cause.

B. The ALJ erred in failing to assess an adequate civil penalty.

In the Initial Decision addressing the liability phase of this proceeding, the ALJ found that Respondents committed 22 knowing and willful violations of the Act. In the Supplemental

Decision addressing the penalty phase, the ALJ assessed penalties ranging from \$750.00 to \$4,000.00 per violation. BOE excepts.¹² We submit that the nominal penalties assessed are inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate penalty amount appropriate to the gravity of the violations.

1. The Regulatory Structure For Shipping Act Violations

A person who violates the Act, or regulation or order of the Commission incurs liability for a civil penalty. 46 U.S.C. §41107 (a). Liability is not discretionary – it is absolute. Until a matter is referred to the Attorney General, assessment of the amount of the penalty is entrusted to the Commission. 46 U.S.C. §41109 (a). The statute contemplates that certain violations are exponentially more serious than others and therefore should be subject to a much higher penalty. Thus a two-tiered range of penalties is provided – up to \$6,000 for each violation or, if knowingly and willfully committed, up to \$30,000 per violation.¹³ 46 U.S.C. §41107 (a).

In determining the amount of a civil penalty, the Commission is required 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. 46 U.S.C. §41109 (b). To these statutorily prescribed

¹² The 22 knowing and willful violations were for operating as an ocean freight forwarder without a license or bond in violation of Sections 19(a) and (b) of the Act. Since Respondents did not have a license or bond as an NVOCC, a finding by the Commission that Respondents operated as an NVOCC, a violation of same provisions of Sections 19(a) and (b), would not affect the argument in this section addressing the civil penalty phase. BOE did not seek separate, additional penalties for the Section 8 violation. See BOE's Revised Proposed Findings of Fact, p.45.

¹³ Pursuant to statutory authority found at 28 U.S.C. §2461, the Commission periodically adjusts the penalty amounts set forth in 46 U.S.C. 41107. Under the Commission's regulations at 46 C.F.R. Part 506, the Commission adjusted the maximum levels to \$6,000 and \$30,000, effective August 15, 2000. In 2009, the agency increased these amounts to \$8,000 and \$40,000, respectively. See 74 FR 38114-38116 (July 31, 2009). The most recent increases do not apply to this proceeding.

factors, the Commission's regulations add the policies of deterrence and future compliance with the law. 46 C.F.R. §502.603(b).

The primary Congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, Inc. - Possible Violations, 29 S.R.R. 665, 681 (2001). 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 (2nd Cir. 1992).

2. The ALJ's Findings As to Penalties Are Contrary to Law

In response to the ALJ's Order on Remand, BOE addressed each of the section 13(c) factors. Based on those factors, the fact that Respondents' violations were found to have been knowingly and willfully committed, and that there were no relevant mitigating factors, BOE argued that the maximum civil penalty of \$30,000 for each violation is appropriate. BOE Additional Briefing, p. 4. BOE's presentation at the penalty phase was uncontested by the Respondents.

In his February 23 Supplemental Decision, the ALJ considered each shipment separately and assessed a penalty on each of the 22 shipments, ranging from \$750.00 to \$4,000.00. The ALJ largely ascribed any differences in penalties to the size of the shipments, i.e., "less than container load," "twenty-foot container load" or "forty-foot full container load" (S.D. p. 16), the amount of freight charges (S.D. pp.16-20) and whether any complaints were lodged. At the base level, it appears that the ALJ determined that a single violation thus garners a penalty of only \$750, subject to other upward adjustments that the ALJ perceived to be relevant on each shipment. (S.D. pp. 16, 17, 22). Those amounts do not reflect a meaningful penalty for multiple

knowing and willful violations, as they do not even approach the maximum penalty level set for violations which are not knowingly and willfully committed.

At the outset, the ALJ concludes that the Act requires that penalties be assessed on a shipment-by-shipment basis. Although this is a path paved with good intentions, no statutory language or case precedent requires such detour. Expanding on that finding, however, the ALJ finds, as a matter of law, that the Commission must take into account such factors as the size of the shipment and whether there were problems with the shipment resulting in harm to the shipper (S.D., p.21). We submit that this finding is contrary both to the plain language of the statute, the Commission's regulations and Commission precedent. Section 13(c) directs the Commission to take into account the nature, circumstances, extent, and gravity of the violation committed – in this case, operating without a license or bond in violation of section 19. Therefore, the statute unambiguously requires the Commission to take into account the nature, circumstances, extent and gravity of Respondents' unlicensed, unbonded operations – not the circumstances surrounding each shipment. The ALJ's unwarranted departure from the explicit penalty criteria set in section 13(c) of the Act thus gives rise to variable and inconsistent penalty amounts calculated on a shipment-by-shipment basis, without clear or meaningful distinctions to be drawn among them. Such a result is untenable.

The Commission has previously ruled that the other factors considered by the ALJ in assessing a penalty amount for each of the Anderson shipments, specifically harm to shipper, are not relevant components in the penalty determination. In Stallion Cargo, supra, the Commission held erroneous the ALJ's refusal to assess penalties for certain violations in the absence of evidence that the shippers were harmed:

Under Commission precedent, however, whether Stallion's shipper customers or other shippers were harmed is relevant neither to the issue of whether it

committed a violation, nor to that of what penalties should be assessed against it. In Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable. (emphasis added). 29 S.R.R. at 678-679.

Consequently, the ALJ not only erred in assessing a penalty on a shipment-by-shipment basis, he also erred in considering particular factors on each shipment. Except as found in the plain language of the statute or the Commission's regulations, the ALJ should decline to embellish upon the prescribed civil penalty factors.

Turning to the ALJ's consideration of the factors prescribed by the Act in assessing a civil penalty, the most egregious error is the failure to give effect to the proportional relationship between the maximum penalty for a knowing and willful violation of the Act and the penalty for violations not committed knowingly and willfully provided in 46 U.S.C. §41107(a). The increased penalty for knowing and willful violations of the Act was first authorized by the Shipping Act of 1984, P.L. 98-237. Its predecessor statute, the Shipping Act, 1916, authorized a singular maximum civil penalty of \$5,000 for each violation. Congress believed that the penalties imposed under the 1916 Act failed to serve as an effective deterrent to prohibited acts and that violators could simply absorb penalties in these amounts as part of the "cost of doing business." See H.R. REP. No. 53, Part 1, 98th Cong. 1st Sess., *reprinted in* 1984 U.S.C.C.A.N. 167, 184. Accordingly, it added a separate penalty provision authorizing a penalty up to \$25,000 for each violation knowingly and willfully committed. Congress thus intended that the Commission apply a two-level structure establishing maximum penalties – one level for violations not shown to be knowing and willful and a substantially enhanced level of 5 times that amount for knowing and willful violations.

This five-to-one ratio evinces a stern Congressional intent to enhance the deterrent effects of those civil penalties assessed for the most serious violations. Martyn Merritt, AMG Services,

26 S.R.R. 663, 664-665 (1992). To give proper effect to this intent, a logical and natural reading of the statute should result in the imposition of the enhanced penalty for a knowing and willful violation that, at a minimum, exceeds the statutory threshold defining the maximum penalty amount for violations having a lesser requirement of intent or purpose. After following an uncertain calculus of the penalty factors, however, the amounts assessed against Respondents here do not even approach the maximum allowed for those violations that do not require a showing to be “knowingly and willfully” committed. The ALJ’s action plainly negates Congressional intent that the Commission wield enhanced penalties for knowing and willful violations. At the nominal levels assessed, both the Respondents and victimized shippers alike can dismiss the Commission’s penalty as reflecting little more than a “cost of doing business.”

The ALJ, in fact, offers no justification for departing from the clear intent of the statute. Nor does his discussion of the section 13(c) factors satisfactorily explain the nominal penalties imposed. With respect to statutory factors relevant to the violator, the ALJ appropriately ruled that because Respondents’ violations were knowing and willful, their degree of culpability was high. (S.D., p. 14). He also found that Respondents had no history of prior violations. (S.D., p.15). BOE agrees with these findings, but not the weight accorded to each by the ALJ.

On the issue of ability to pay, the ALJ recited the information furnished by BOE with respect to Owen Anderson’s bankruptcy filings in a bankruptcy proceeding, and concluded that Respondents have a limited ability to pay. *Id.* Related to those findings, the ALJ asserted that a civil penalty assessed by the Commission would be an unsecured priority claim that could impact recovery of other unsecured priority and nonpriority claims filed in the bankruptcy proceeding. (S.D., p.21).

With respect to the ability to pay, the ALJ acknowledged that financial ability is only one factor to consider, but criticized BOE's position as devaluing financial ability to the "point of irrelevance." (S.D., p.16). The ALJ does not explain, however, how he balanced Anderson's bankruptcy against other factors. The conclusions he has drawn from the Anderson bankruptcy proceeding, moreover, are built wholly upon conjecture. Because the record in the bankruptcy proceeding shows that it was dismissed due to Anderson's failure to comply with the Court's directives, no substantive disposition was reached upon any issues in that truncated proceeding, such as determining the validity of creditor claims, establishing the availability of assets for payment of claims, or any process by which to verify the disposable income of the debtor. Inasmuch as the April 2009 dismissal of Anderson's bankruptcy would remove any stay upon any and all collection proceedings by Anderson's creditors, the ALJ's statements as to the impact a penalty might have on Anderson's ability to pay its creditors (S.D. p.21) constitute gross speculation.¹⁴

It appears that the ALJ gave little more than lip service to the knowing and willful aspect of the violations, while granting disproportionate weight to certain factors he deemed mitigating, i.e. limited ability to pay and the absence of prior offenses. However, the Commission has emphasized that ability to pay must be considered in the context of other factors, in particular, the severity of the violations. In Stallion Cargo, *supra*, 29 S.R.R. at 682, n.41, it said:

Respondent may very well be unable to pay the penalty imposed by the Commission, but the other factors present – the severity of the violations, Respondent's continued disregard of the statutory requirements even after the initiation of a formal investigation, and the need to further the Congressional purpose to deter violations by imposing greater civil penalties – militate, on balance, that a substantial, though not the maximum, penalty be imposed.

¹⁴ Equally speculative is the ALJ's hypothesis that if the maximum civil penalty of \$660,000 was imposed, it could take Mr. Anderson from 16.5 years up to 44.75 years to pay the penalty. S.D. at 15. In any event, the ALJ's action in issuing a nominal penalty as to Anderson rendered any such concerns moot.

The Commission has likewise stated that the import of knowing and willful violations cannot be negated or neutralized by other factors, such as the absence of prior offenses. Sea-Land Service, supra, 30 S.R.R. at 894.

Commission precedent makes clear that the main congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, supra, 29 S.R.R. at 681, and Portman Square, supra, 28 S.R.R. at 85. While the ALJ expressed puzzlement as to the role of the policies for deterrence and future compliance and seeks guidance from the Commission (S.D., pp. 13-14), we submit that the Commission has provided ample guidance over the course of 25 years in its application of those policies.

Following Congress' action raising the maximum penalties for violations from the previous \$5,000 per violation to up to \$25,000 for violations committed knowingly and willfully, the Commission instituted a number of rulemaking proceedings to implement the newly adopted Shipping Act of 1984, including Docket No. 84-20 to revise its rules and establish criteria and procedures for the handling of penalty claims. The language proposed in the Notice of Proposed Rulemaking, 49 F.R. 18874 (May 3, 1984), and adopted in then 46 C.F.R. §505.3(b), was identical to the provision as it appears today in current 46 C.F.R. §502.603 (b), including the requirement that "the policies for deterrence and future compliance with the Commission's rules and regulations" be taken into account.¹⁵ Contrary to the ALJ's statement (S.D. p.13), the Notice of Proposed Rulemaking cited section 13 of the 1984 Act as a source of its authority. The rule was subject to notice and comment and adopted as a final rule without negative comment. See 49 F.R. 44362 (Nov. 6, 1984.)

¹⁵ In an earlier rulemaking implementing section 13 of the 1984 Act, the Commission incorporated the criteria set forth in the joint regulations of the Comptroller General and Attorney General, 4 C.F.R. Parts 101- 105, governing compromise of penalty claims. See 49 F.R. 16994, 17001 (April 23, 1984). Included in the criteria was agency enforcement policy in terms of deterrence and compliance. This language was removed in view of the language proposed in section 505.3(b).

The ALJ also observes that the phrasing relative to deterrence in the Commission's regulation does not appear as an explicit factor in the statute. (S.D., p. 13). Of course, the legislative history of H.R. 1878, which became the law, expressly demonstrates the Committee's objective in enhancing the penalties in section 13, i.e. ". . . sanctions and penalties designed to deter the commission of prohibited acts." H.Rep. No. 98-53 (Part 1), supra. (Emphasis added). The statute also authorizes the consideration of any "other matters justice may require," which we take to include the policies of deterrence and compliance emphasized in the legislative history.

Since that time, the Commission has been unwavering in addressing the main Congressional purpose of deterrence and compliance when imposing civil penalties. Pacific Champion Express Co., Ltd. - Possible Violations, 28 S.R.R. 1397, 1404-1405 (FMC 2000) (the applicable statutory factors include "the need to send an appropriate message of deterrence"); Kin Bridge Express, supra, 28 S.R.R. at 994 ("[t]he instant task is to fix civil penalties that will send a message of punishment and deterrence"); Ever Freight International Ltd., et al - Possible Violations, 28 S.R.R. 329, 335 (ALJ 1998, admin. final June 26, 1998) (to assess less than the maximum would not serve the purpose of deterrence and would send the wrong message); and Martyn Merritt, AMG Services, supra, 26 S.R.R. at 664 ("In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to . . . the Congressional purpose to deter violations by imposing greater penalties in the 1984 Act."). Indeed, in an analogous penalty situation in which all Shipping Act violations were "knowingly and wilfully" committed, the penalty issue was recast by the Commission as requiring the Administrative Law Judge to "address the question of why the maximum potential penalties should not be assessed." Arctic

Gulf Marine Inc., Peninsula Shippers Association Inc and Southbound Shippers Inc., 24 S.R.R. 159, 160 (FMC 1987) (emphasis added.)

Certainly, the Commission's policies for deterrence and future compliance in the context of the assessment of civil penalties have been clearly established and well settled for a quarter of a century. The penalty amounts imposed by the ALJ not only depart from this precedent, but ignore the legislative purpose underlying the two-tiered structure providing a maximum penalty, and maximum deterrence, for knowing and willful violations at levels five times that of other violations of the Act.¹⁶ Should the Commission believe that a civil penalty less than the maximum is warranted here, BOE urges that such penalty should be not less than \$6,000 per violation nor exceed \$30,000 per violation.

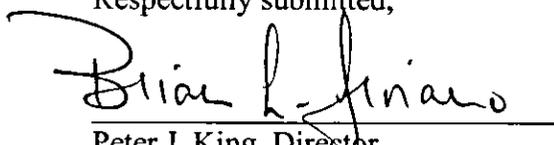
¹⁶ In Refrigerated Containers Carriers Pty. Ltd., 28 S.R.R. 799, 805 (1999), then-Chief Administrative Law Judge Kline distilled additional implications of the Commission's penalty policy having particular relevance to the absconding Respondents here:

Should the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed "compromise" discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings.

IV. CONCLUSION

For the foregoing reasons, BOE submits that the ALJ erred in: (1) finding that Respondents did not assume responsibility for transportation of by water of cargo between the United States and a foreign country for compensation within the meaning of the Act, 46 U.S.C. §40102(6), and therefore that their operations were not those of an NVOCC; and (2) in failing to assess an appropriate civil penalty against Respondents. Accordingly, it is respectfully requested that after consideration of these Exceptions and the record in this proceeding, the Commission find that Respondents violated sections 8 and 19(a) and 19(b) of the Shipping Act and assess the maximum civil penalty authorized for 22 knowing and willful violations. Should the Commission believe that a civil penalty less than the maximum is warranted here, BOE urges that such penalty should be not less than \$6,000 per violation nor exceed \$30,000 per violation.

Respectfully submitted,



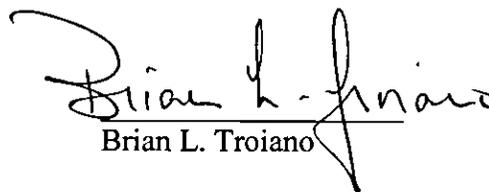
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March 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this **15th** day of March, 2010, a copy of the foregoing document has been served upon all the parties of record by first class mail.


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