

FEDERAL MARITIME COMMISSION

WORLDWIDE RELOCATIONS, INC.;
MOVING SERVICES, LLC.;
INTERNATIONAL SHIPPING SOLUTIONS,
INC.; DOLPHIN INTERNATIONAL
SHIPPING INC.; BOSTON LOGISTICS
CORP.; TRADEWIND CONSULTING,
INC.; GLOBAL DIRECT SHIPPING;
MEGAN K. KARPICK (A/K/A
CATHERINE KAISER, KATHRYN
KAISER, CATHERINE KERPICK, MEGAN
KAISER, AND ALEXANDRIA HUDSON);
MARTIN J. MCKENZIE; PATRICK JOHN
COSTADONI; LUCY NORRY; BARUCH
KARPICK; AND SHARON FACHLER-
POSSIBLE VIOLATIONS OF SECTIONS 8,
10, AND 19 OF THE SHIPPING ACT OF
1984 AS WELL AS THE COMMISSION'S
REGULATIONS AT 46 C.F.R. 515.13,
515.21, AND 520.3.

Docket No. 06-01

Served: March 15, 2012

BY THE COMMISSION: Richard A. Lidinsky, Jr.,
Chairman; Joseph E. Brennan, Rebecca F. Dye, Michael A.
Khouri, and Mario Cordero, *Commissioners*. *Commissioner*
Brennan filed an opinion concurring in part and dissenting in
part. *Commissioner* Dye filed an opinion concurring in part
and dissenting in part.

Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part

This is a proceeding against several household goods moving companies and related individuals who were the subject of more than 250 consumer complaints to the Commission. The Commission substantially adopts the Initial Decision with modifications described below on the issues of sanctions for failure to respond to Commission orders, permissible inferences or presumptions, and scope of injunctive relief granted.

On August 16, 2010, the Administrative Law Judge issued the Initial Decision in this proceeding. 31 S.R.R. 1471. In the decision, the ALJ determined that all seven corporate respondents then in the proceeding acted as non-vessel-operating common carriers (NVOCCs), and found that the entities had neither published tariffs nor been licensed and bonded as required by sections 8 and 19 of the Shipping Act (46 U.S.C. §§ 40501, 40901-40902), respectively. The ALJ also determined that all but one of the individual respondents in the proceeding should be held liable individually and thereby pierced their corporate veils, finding violations by both the corporate entities and the individuals who owned or operated them. The ALJ found a total of 649 violations and imposed civil penalties ranging from \$30,000 to \$894,000 per respondent, for an aggregate assessed fine of \$2,819,000 across all respondent entities and individuals. The ALJ also issued an injunction barring the respondents from “serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean

transportation.” 31 S.R.R. at 1543. No party filed exceptions. The Commission issued a Notice of Commission Review on September 14, 2010.

After a review of the ALJ’s well-reasoned Initial Decision, we substantially adopt the Initial Decision, but modify three issues addressed in the Initial Decision. First, after reviewing the record, we reverse the denial of the Bureau of Enforcement’s (BOE’s) request for sanctions against International Shipping Solutions and Dolphin Shipping International because the entities did not respond to the ALJ’s Order compelling responses. Second, we note that while the question of whether certain conduct violates the Shipping Act is necessarily a fact-intensive inquiry, a finder of fact may draw reasonable evidentiary inferences and employ permissive presumptions in some circumstances in determining whether an entity operated as an NVOCC. The ALJ appears to have done so in the Initial Decision. Finally, we modify the injunctive aspect of the Initial Decision to future violations of the Shipping Act.

I. PROCEEDING

On January 11, 2006, the Commission instituted this proceeding by an Order of Investigation and Hearing. 30 S.R.R. 902. The investigation commenced in order to determine whether the named respondents violated sections 8, 10, and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501, 41104, and 40901-40902, and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as NVOCCs without licenses, without proof of financial responsibility, and without publishing a tariff, and by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering

property. 30 S.R.R. at 904-05.

The respondents named in the Order included the following entities and individuals: Moving Services, L.L.C.; Worldwide Relocations, Inc.; International Shipping Solutions, Inc.; Dolphin International Shipping, Inc.; All-in-One Shipping, Inc.; Boston Logistics Corp.; Around the World Shipping, Inc.; Tradewind Consulting, Inc.; Global Direct Shipping; Sharon Fachler; Oren Fachler; Lucy Norry; Patrick J. Costadoni; Steve Kuller; Megan K. Karpick (a.k.a. Cathryn Kaiser, Kathryn Kaiser, Catherine Kerpick, Megan Kaiser and Alexandria Hudson); Barbara Deane (a.k.a. Barbara Fajardo); Baruch Karpick; Martin J. McKenzie; Joshua S. Morales; Elizabeth F. Hudson; Daniel E. Cuadrado (a.k.a. Daniel Edward); Ronald Eaden; and Robert Bachs (collectively “Respondents”). *Id.* at 902-04.

In the Order of Investigation, the Commission noted that it had received over 250 complaints from shippers involving movements of household goods from the U.S. to foreign locations undertaken by the seemingly-affiliated respondent entities. *See id.* at 902. The complaints alleged that the respondent entities: (1) failed to deliver cargo and refused to return pre-paid ocean freight; (2) lost cargo; (3) charged for marine insurance but never actually obtained coverage; (4) misled the shipper regarding the location of cargo; (5) charged the shipper a substantially inflated rate after cargo was tendered and subsequently threatened to withhold the cargo unless the increased freight was paid; and (6) failed to pay the common carrier hired as an intermediary. *See id.* at 903.

After issuing the Order of Investigation, the Commission also sought injunctive relief in federal court against some, but not all, of the entities and individuals named in this proceeding. *See Federal Maritime Commission v. All-in-One Shipping, Inc., et al.*, Case No. 06-CV-60054 (S. D. Fla., complaint filed Jan. 12, 2006) (naming as defendants All-in-One Shipping, Inc., Around the World Shipping, Inc., Boston Logistics Corp., Global Direct Shipping, Daniel Cuadrado, Elizabeth F. Hudson, and Joshua Morales). The District Court granted the Commission's Motion for Preliminary Injunction and enjoined the companies and individuals from acting as NVOCCs without filing tariffs, obtaining licenses or providing proof of financial responsibility. *See id.* (preliminary injunction granted Jan. 17, 2006). The court later closed the case administratively until the termination of the Commission's internal action. *See id.* (order issued Aug. 31, 2006).

BOE reached settlement agreements in this administrative action with four parties (All-in-One, Joshua Morales, Around the World, and Daniel Cuadrado), which the ALJ approved. *See ALJ Order Approving Settlement*, 30 S.R.R. 1004, 1004-05 (May 23, 2006). The Commission reviewed the ALJ's order approving the settlement, and – owing to the large number of consumer complaints received by the Commission – vacated the settlement approval and remanded to the ALJ with “instructions to explain whether and to what extent the shippers' complaints have been resolved.” *Comm'n Ord. Reversing ALJ's Approval of Settlement*, 30 S.R.R. 1208, 1212 (Nov. 29, 2006). After considering additional proof and briefing, the ALJ once again approved the parties' settlement agreements, *see ALJ Order Approving Settlement*, 30 S.R.R. 1354 (Mar. 13, 2007), which the Commission did not review, *see Notice Not to Review* (Apr.

26, 2007). After conducting additional discovery, BOE moved to dismiss several individual respondents, some of whom were lower-level employees (Oren Fachler, Barbara Dean (née Fajardo), Steve Kuller and Elizabeth Hudson), and some of whom appeared to be fictitious names of other respondents (Ronald Eaden and Robert Bachs). The ALJ granted BOE's motions to dismiss those named entities, *see* Order Dismissing Respondents Oren Fachler *et al.* (June 20, 2007) and Order Dismissing Respondent Elizabeth Hudson (Sept. 26, 2007), and those orders became administratively final on July 24, 2007 and October 31, 2007, respectively.

After the ALJ granted several extensions to the parties, and after the ALJ sought several extensions from the Commission, the remaining parties filed their proposed findings and responses for the ALJ's initial decision on the merits of the purported violations of the Shipping Act and the Commission's regulations. On August 16, 2010, the ALJ issued the Initial Decision. *See* 31 S.R.R. 1471.

II. DISCUSSION

A. *Findings of Fact*

The ALJ exhaustively reviewed the factual offerings by the parties. *See* 31 S.R.R. at 1487-1511. She found facts related to each entity, and if relevant, the individuals affiliated with a given entity. For example, the ALJ made factual determinations about International Shipping Solutions, including citations to the record for each determination. *See id.* at 1488-90. Similarly, the ALJ included a chart detailing shipments for which there were sufficient documents to support a finding that a shipment occurred and the status of the entity or person who acted as an OTI for the shipment. *See id.*

at 1489-90. Each respondent's actions were discussed separately: International Shipping Solutions, Baruch Karpick, Megan Karpick (31 S.R.R. at 1488-90), Dolphin International Shipping, Megan Karpick and McKenzie (31 S.R.R. at 1490-91), Worldwide Relocations and Patrick Costadoni (31 S.R.R. at 1491-98), Boston Logistics and Lucy Norry (31 S.R.R. at 1498-1500), Tradewind Consulting and Lucy Norry (31 S.R.R. at 1500-1502), Moving Services and Sharon Fachler (31 S.R.R. at 1502-06), Global Direct Shipping and Sharon Fachler (31 S.R.R. at 1506-1511).

The ALJ tethered each finding of fact to a citation in the record, and a review of the findings indicates that they are supported by the record. We therefore adopt in full the ALJ's thorough findings of fact, except where inconsistent with findings below.

B. Request for Sanctions

BOE requested that the ALJ impose sanctions on Baruch Karpick, International Shipping Solutions, Dolphin International, Moving Services, Global Direct Shipping, and Sharon Fachler, for failure to respond to three discovery orders entered earlier in the case. Specifically, BOE sought an adverse inference against these parties for failure to answer interrogatories or provide documents, and asked the ALJ to strike any evidence offered on certain claims or defenses, relying on Commission Rule 210 (46 C.F.R. § 502.210) and Commission precedent.

Because Moving Services, Global Direct Shipping, Sharon Fachler, and Baruch Karpick failed to respond to the ALJ's order mandating responses and a certificate of compliance, the ALJ granted BOE's request for sanctions against those four parties. As a result, the ALJ prohibited those respondents from contesting their ability to pay a civil penalty and drew adverse inferences as to what documents would have shown had they been produced. Because no party filed exceptions to the ruling as it relates to these parties, and because the rulings are reasonable in light of the record, we adopt the ALJ's imposition of sanctions on Moving Services, Global Direct Shipping, Sharon Fachler, and Baruch Karpick.

The ALJ, however, found that the record did not provide clarity on whether International Shipping Solutions and Dolphin International had complied with discovery orders. BOE moved to compel responses from both International Shipping Solutions and Dolphin International, and the ALJ required responses from both entities. Megan Karpick McKenzie filed a certificate of compliance that indicated that Ms. McKenzie certified that "*her* [r]esponses . . . are complete to date, subject to the limitations of access to Dolphin and ISS corporate documents as set forth" in earlier responses of Ms. McKenzie. Cert. Compl. at 1 (Nov. 9, 2010) (emphasis added). Because BOE was the proponent on the issue of sanctions, and because BOE had not explained the discrepancy in accounts between the parties, the ALJ denied BOE's request for sanctions against International Shipping Solutions and Dolphin International.

Although the discovery documents are not pellucid on some other matters, we believe the documents indicate that Ms. McKenzie only certified that her individual responses were complete, and that she made no representations about

International Shipping Solutions or Dolphin International. As her certification notes, she “certifies that *her* [r]esponses” are complete. *Id.* (emphasis added). Further, she notes that her certification is “subject to the limitations of access to Dolphin and ISS corporate documents.” *Id.* Ms. McKenzie acknowledged that she did not have access to documents sought by BOE that belonged to International Shipping Solutions and Dolphin International. Ms. McKenzie therefore appears to have complied with her discovery obligations, but the same cannot be said of either Dolphin International or International Shipping Solutions. To the contrary, Ms. McKenzie has affirmatively indicated that there are documents from Dolphin Shipping and International Shipping Solutions that are in existence that were not produced, or have since been destroyed.

While Ms. McKenzie may have been an officer in both entities, and can bind the corporate respondent by testimony and admissions based on agency principles, because Ms. McKenzie and the entities were named separately as respondents, the corporate respondents had separate responsibilities to answer interrogatories and produce documents. Neither Dolphin International nor International Shipping Solutions appears to have done so, even after being ordered by the ALJ to do so. *See* BOE Reply Brief, 10-12. Adverse inferences are particularly appropriate when a party fails to produce documents, or when documents have been destroyed. *See Community Hospitals of Central California v. N.L.R.B.*, 335 F.3d 1079, 1086-87 (D.C. Cir. 2003) (upholding adverse inference imposed by ALJ for documents not produced).

Because neither Dolphin International nor International Shipping Solutions complied with discovery obligations, we

reverse the portion of the ALJ's decision that denied BOE's request for sanctions against Dolphin International and International Shipping Solutions. Had the ALJ imposed sanctions, she would also have drawn an adverse inference against the entities for the documents that they refused to provide or destroyed and for the interrogatories that they would have answered. We therefore reverse that portion of the ALJ's decision, and impose sanctions against Dolphin International and International Shipping Solutions for failure to comply with discovery obligations. We likewise infer that if documents would have been produced, they would be adverse to Dolphin International and International Shipping Solutions.

C. *NVOCC Status*

1. *The Fact Finder's Inquiry*: In the Initial Decision, the ALJ correctly stated the well-established methodology for determining whether an entity is operating as an NVOCC:

[T]o determine if an entity is a common carrier, it "is important to consider all the factors present in each case and to determine their combined effect." [*Activities, Tariff Filing Practices and Carrier Status of Containerships [Inc.]*, 9 F.M.C. [56,] at 65 [(F.M.C. 1965)]. The Commission has indicated that it will "look beyond documentary labels." [*Id.*] at 66. For example, "it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status." [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity's conduct on that shipment. *Bonding of*

Non-Vessel-Operating Common Carriers, 25 S.R.R. [1679,] at 1684 [(F.M.C. 1991)]; *see also Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 [(F.M.C.) 1996] (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments). This is a fact intensive inquiry.

. . . Resolution of that factual question requires an examination of each entity's conduct on a particular shipment to determine whether it operated as either an NVOCC or an [Ocean Freight Forwarder] on that shipment. Accordingly, after explaining how the evidence was weighed, each shipment alleged will be reviewed individually.

31 S.R.R. at 1519. We expressly affirm the ALJ's articulation of the Commission's approach to determining NVOCC status.

2. "*Holding out*": In answering the question of whether an entity is operating as an NVOCC, the Commission first determines whether the entity was "holding itself out to the general public to provide transportation by water." 46 C.F.R. §515.2(f). Among ocean transportation intermediaries, only an NVOCC holds "itself out to the general public to provide transportation by water" An Ocean Freight Forwarder (OFF) does not pass this threshold question.

A person or entity may hold out to the public “by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise.” *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961). The FMC has previously found that advertising and solicitations to the public are important factors in determining the issue of “holding out” by an entity. *See Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 6 S.R.R. 483, 489 n.7 (FMC 1965).

3. Inferences or presumptions on “holding out” issue: The ALJ appears to have made inferences on the question whether an entity “held out” for determining common carrier status for certain shipments. For example, in the discussion relating to respondent International Shipping Solutions, the ALJ did not analyze each shipment alleged by BOE and listed in the summary chart for specific evidence of “holding out” for each shipment. 31 S.R.R. at 1521-22. Instead, the ALJ simply considered the respondent’s overall activities relating to “holding out” during the relevant period of time, reviewed shipping documents as they related to other elements of NVOCC status, and concluded that the respondent acted as an NVOCC. *Id.*

Applying this type of inference is appropriate when there appears to be uniform evidence on one element for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period. Such an inference is especially appropriate when dealing with violations where an entity’s status as common carrier is at issue, such as sections 8 and 19, and when dealing with an element that necessarily speaks to a course of conduct, such as “holding out.” This approach likewise comports with

evidentiary rules pertaining to relevance of practices of an entity in order to prove that a practice is routine. *See* Fed. R. Evid. 406 (“Evidence . . . of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”).

A party in a Shipping Act case has several different methods of proving violations of the Act. In some cases, such as the case here, where the ALJ reviews conduct on a number of shipments that satisfies a preponderance of evidence on an element, such as “holding out,” the ALJ may draw reasonable inferences that a person or entity acted similarly in handling another shipment when the evidence is not available on that element for that shipment. This type of inference may be negated or rebutted when an entity provides countervailing evidence.

The Commission has previously determined that such inferences are permissible. *See Containerships*, 9 F.M.C. at 62 (“The most frequently mentioned characteristic is that a common carrier *by course of conduct* holds himself out to accept goods from whomever offered to the extent of his ability to carry.” (emphasis added, citations omitted)). Federal Rule of Evidence 406 provides for such methods of proof.¹ Similarly, the Supreme Court has indicated that reasonable

¹ “Although a precise formula cannot be proposed for determining when the behavior may become so consistent as to rise to the level of habit, adequacy of sampling and uniformity of response are controlling considerations.” *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985) (citing *Reyes v. Missouri Railroad Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (internal citations and quotations omitted)). *See also Williams v. Security National Bank of Sioux City*, 358 F. Supp. 2d 782, 811-15 (N. D. Iowa 2005) (finding routine behavior present when person acted consistently on eight occasions, and extrapolating that behavior to ten other occasions where proof was missing).

evidentiary inferences may be appropriate under some circumstances. See *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 249 (1968) (“Having correctly noted that positive proof on various aspects of the case was simply not available one way or the other, the Commission was fully entitled to draw inferences on these points from the incomplete evidence that was available. ‘Conjecture’ of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission’s special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts.”).

Similarly, Commission cases have previously stated that permissive presumptions, or inferences of fact, may be employed in appropriate circumstances to determine whether an entity operated as an NVOCC as opposed to an OFF. A presumption of fact “is nothing more than a logical or reasonable inference drawn from established facts that may be rebutted by contrary evidence.” *International Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 684 (ALJ 1990). “Presumptions are widely employed in the law in a variety of contexts as an aid to the party having the burden of proof.” *Id.*

Such permissive presumptions may be used in situations where one party has superior access or control of facts, evidence, or proof resulting in an imbalance in the judicial proceeding. A properly applied permissive presumption does not shift the ultimate burden of proof, but it may shift the burden of producing evidence with regard to the presumed fact. See *id.* And of course the adverse party always must be given the opportunity to present rebuttal

evidence. If the adverse party does not come forward with evidence to rebut the existence or correctness of the presumed fact, or the adverse party's proffered evidence fails to rebut the logical inference of the presumption, then the presumed fact may stand as proven. However, in all cases the ultimate burden of proof rests squarely on BOE or the complainant. *See* 46 C.F.R. § 502.155; 5 U.S.C. § 556(d).²

These inferences or permissive presumptions are not unique to the Shipping Act, and the Commission and its ALJs will be guided by the existing body of law that applies to permissible inferences and presumptions. Parties to actions will therefore be guided, for example, by the legal standards that currently exist for determining relevance of routine business practices.

4. "*Assumes responsibility for transportation*": In addition to requiring "holding out," the Shipping Act adds two subsidiary factual findings to complete the finding of common carrier status. First, the entity must also "assume responsibility for the transportation," and second, the transportation must use a vessel on the high seas or Great Lakes for all or a portion of the cargo movement. 46 U.S.C. § 40102(6)(A)(ii) & (iii). This second element is generally straightforward and seldom in question.

The "assume responsibility" factor, however, is often less clear-cut, as we see in the instant case. There are several activities that appear similar, but are performed by either an NVOCC or an OFF. For example, the Commission's

² The presumption that we describe is permissive, not mandatory and is consistent with reason and common sense. The permissive presumption would not be applicable when "the suggested conclusion is not one that reason and common sense justify in light of the proven facts." *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (emphasis added).

regulations state that freight forwarding services include “preparing and/or processing ocean bills of lading,” 46 C.F.R. § 515.2(i)(5). NVOCC services include “issuing bills of lading or equivalent documents.” 46 C.F.R. § 515.2(l)(4). The wording used in a Bill of Lading and invoices, such as terms that refer to the “customer/shipper/consignee/agent,” is all too often unclear, polysemic, or ambiguous.

Inferences or permissive presumptions may also be appropriate on this “assumes responsibility” element of NVOCC status under certain circumstances, and as provided in existing law. For example, pursuant to Rule 406 of the Federal Rules of Evidence, an entity’s routine practice may be relevant in determining whether the entity assumed responsibility for a shipment.

More generally, when it is proven an entity has advertised something to the shipping public, it is permissible to infer or presume that the entity does what it advertises. The entity crafted the wording of their public advertisements and solicitations and paid money to websites or other public media companies to broadcast those words to the general public.

In analogous circumstances, a presiding officer observed that

the very publication of such [tariff] Rules . . . constituted an announcement to the shipping world that the carriers offered their services under the restriction imposed by the [tariff] Rules. . . . Accordingly, it will be presumed that carriers who published the [tariff] Rules . . . did in fact carry out the Rules.

International Ass'n of NVOCCs, 25 S.R.R. at 685.

In a proceeding before the Commission, the party adversely affected by the operation of this permissive presumption has full, fair, and unrestricted opportunity to appear and present rebuttal evidence. Conversely, the factual circumstances would be unusual where the permissive presumption, as described above, would not apply when an FMC-licensed entity conducts business with unlicensed entities, coupled with the situation where an entity either simply refuses to participate in the Commission proceedings or declines the opportunity to offer any credible rebuttal evidence. The Commission has a strong public policy interest in protecting consumers and the shipping public by ensuring that FMC-licensed common carriers, both VOCCs and NVOCCs, only conduct business with either beneficial cargo owners or FMC-licensed or registered OTIs. *See, e.g.*, 46 U.S.C. § 41104(11), (12); 46 C.F.R. § 515.31(d); 46 C.F.R. § 530.6(b); 46 C.F.R. § 531.6(d)(4). This permissive presumption supports this objective.

Admittedly, such an approach could raise concerns that an entity licensed as both an NVOCC and OFF may end up being deemed to be operating in NVOCC status in all transactions and thus the operation of the presumption would “swallow” any legitimate OFF activity. The answer to this concern is simple and straightforward. The dual NVOCC-OFF licensed entity has within its own power the ability to insulate itself from this concern by being clear in its shipping documents as to the status and relationship of all parties to the transportation transaction. If any question arises in a Commission proceeding, then the dual licensed NVOCC-OFF will be armed with sufficient rebuttal evidence and the presumption would not apply. Further, the dual NVOCC-OFF

licensed entity should be reasonably diligent in its inquiry and investigation of the entities with which it conducts business. When unlicensed entities enter into the transportation transaction, the consumer public is more justly served where a lawful permissive presumption is used to properly bring the more complete array of Commission remedies into play.

In summary, once the presiding officer has made a finding that (1) the entity has “held itself out to the general public”; and (2) that vessels on the high seas or Great Lakes were utilized for part or all of the transportation, then that finding may apply to any and all shipments during the relevant time period. The opposing party would have the right to offer evidence, for example, that a vessel was not involved in a particular shipment. Second, the party with the ultimate burden of proof and persuasion must present evidence on each shipment concerning the “assumed responsibility” element; however, such party may have the benefit of the above-described permissive presumption. As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility by the respondent entity for the shipment in question. The opposing party may then have the duty to produce credible evidence to rebut the presumption concerning the “assumed responsibility” element on each shipment.

In the case at hand, the ALJ appears to have drawn on appropriate inferences or permissive presumptions in evaluating some entities’ practices. The ALJ had, for

example, a nearly complete set of documents for Worldwide Shipping on several shipments, including shipment number 8 listed in the Initial Decision. 31 S.R.R. at 1493. For that shipment, the invoice submitted by Worldwide Shipping to the proprietary shipper charged a separate, higher freight rate than the downstream NVOCC charged. BOE Appx. 10, 323-328. The charge appears as an ocean freight charge, not as a “fee” that an agent (or Ocean Freight Forwarder) would charge. Pursuant to Commission regulations and caselaw,³ this indicates that Worldwide Shipping was acting as a carrier rather than an agent, despite the occasional listing of a proprietary shipper as the shipper on a bill of lading. BOE Appx. 10, 323-328.

For some other shipments handled by Worldwide Shipping, the invoices are simply not available, and the only documents available are the bills of lading of downstream NVOCCs. The ALJ could infer from Worldwide Shipping’s routine practices on other shipments,⁴ however, that the bill of lading was often misleading as to identity of the shipper, and what Worldwide Shipping was actually charging the shipper. The ALJ was thus able to conclude that, despite having bills of lading that – in a vacuum – might not answer whether the proprietary shipper had a relationship with the downstream

³ Compare 46 C.F.R. § 515.2(o)(11) (“Freight forwarding services . . . may include . . . [h]andling freight or other monies advanced by shippers”) with 46 C.F.R. § 515.2(i)(3) (“[NVOCC] services . . . may include . . . [e]ntering into affreightment agreements with underlying shippers,” which includes charging a freight rate different than what the VOCC charges). OFFs pass along, or “handle” freight charges imposed by carriers, whereas NVOCCs (and VOCCs) determine what those freight charges are.

⁴ Employees of Worldwide Shipping also indicated that Worldwide was the carrier in relation to its customers, and was the shipper in relation to the downstream NVOCCs. BOE Appx. 5, 208-09.

carrier and whether the respondent acted as an Ocean Freight Forwarder, here there was evidence that the respondent was routinely misrepresenting who the shipper was on shipping documents, while charging its own higher freight rate for shipments. This pattern of manipulating the identity on the bill of lading while actually charging a separate, higher ocean freight rate appears across all respondents.⁵

Thus, while there may be comparatively few documents for some shipments, the ALJ may use the routine practices of an entity in evaluating whether an entity assumed responsibility on shipments that it handled. For these reasons, we affirm the permissibility of the inferences used by the ALJ, and affirm the ALJ's findings of violations for each entity.⁶ While inferences are not appropriate in every case, we believe that the documents in the record support the limited inferences that the ALJ made in this case.

Because these inferences and presumptions are permissible, we endorse the Initial Decision in this important respect.

D. Injunctive Relief

After a factfinder has determined that a respondent has violated laws, “an injunction is appropriate if the court

⁵ Indeed, when one individual respondent was deposed, he conceded that the entities acted as carriers in relation to customer, but that the entities acted as shippers in relation to downstream NVOCCs. See 31 S.R.R. at 1493, ¶¶ 71-72 (citing BOE Appx. 5, 207-09). This presents classic NVOCC behavior. See 46 U.S.C. § 40102(16) (“The term ‘non-vessel-operating common carrier’ means a common carrier that— (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.”).

⁶ A review of the record indicates that the ALJ appears to have used the inference outlined in Fed. R. Ev. 406 in this case.

determines there is a reasonable likelihood that he will violate the laws again in the future.” *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994). The Commission has, in previous cases, enjoined parties from certain behavior, including future violations of the Shipping Act. *See Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (F.M.C. 1998) (issuing order enjoining party from violating section 10(a)(1) of the Shipping Act); *see also Ariel Maritime Group Inc.*, 24 S.R.R. 517, 528 (F.M.C. 1987) (addressing injunctions against “individuals to prevent avoidance of the legal consequences of . . . past violations”).

In evaluating whether a reasonable likelihood of future violation exists, “the court considers ‘whether a defendant’s violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant’s business will present opportunities to violate the law in the future.’” *Bilzerian*, 29 F.3d at 695 (quoting *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). After a court has determined to grant injunctive relief, the injunction must be narrowly crafted to enjoin only the harmful behavior meriting injunctive relief. *See ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990) (“The law requires that courts closely tailor injunctions to the harm that they address.”). *See also Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 640 (D.C. Cir. 1982) (“[T]he scope of an injunction should be determined by balancing [the] harm to the plaintiff, other means of avoiding such harm, and the relative inconvenience to the defendant.”).

In the Initial Decision, the ALJ enjoined the respondents from violating the Shipping Act and from

“serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as *bona fide* employees of such entities[.]” 31 S.R.R. at 1543. The ALJ also held that there is a reasonable likelihood that the respondents will violate the Shipping Act in the future (specifically, that they will operate as NVOCCs and will do so without license, bond or tariff). *Id.*

We affirm the ALJ’s injunction with only slight modification. Where the Commission finds a proceeding record that is fully adequate to support the presiding officer’s decision to pierce the corporate veil and subject individuals to enforcement remedies, the Commission should not hesitate to enjoin those individuals from violating the Shipping Act. In addition to enjoining violations, the Commission may also enjoin related conduct as part of narrowly tailored prophylactic measures necessary to prevent future violations.

In this case, the individuals acted in numerous ways to justify a Commission decision to disregard the corporate form and look to the individual actors.⁷

The individuals in the instant case acted with sufficient disregard of the Shipping Act and FMC regulations that they should be prohibited from participating in the described maritime industry in any capacity for a year, and from participating in any supervisory or management capacity for a reasonable period of time, in this case five years. We therefore adjust the ALJ’s injunction slightly to enjoin the individual respondents from working for an ocean

⁷ See *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R 119, for a list of elements to consider in piercing the corporate veil.

transportation company, sole proprietorship, or other entity in any way for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years. At that time, they could apply for a license to serve as an OTI or they could serve as an officer, director, or manager of an OTI. This is a normal restriction in other regulated industries.

On the other hand, we add one narrow exception to the ALJ's injunction against the individuals acting as owners or shareholders of ocean transportation companies. We do not foresee any harm flowing from such individuals owning shares of a publicly traded company, so long as they do not acquire more than a five percent stake of any class of equities issued by that company. It is highly unlikely that a simple shareholder with a small stake in a large, publicly traded company could exert sufficient control to harm the shipping public. By comparison, the Securities and Exchange Commission has determined that only shareholders exceeding

five-percent stakes in companies must file notices of beneficial ownership or “control purpose.” *See* 17 C.F.R. § 240.13d-1. We modify the ALJ’s injunction accordingly.

III. CONCLUSION

As stated, we substantially adopt the Initial Decision in part, reverse in part, and modify in part.

THEREFORE, IT IS ORDERED, That the Commission substantially adopts the Initial Decision, except as noted;

IT IS FURTHER ORDERED, That the respondents International Shipping Solutions, Dolphin International Shipping, Worldwide Relocations, Boston Logistics, Tradewind Consulting, Moving Services, Global Direct Shipping, Baruch Karpick, Megan Karpick, Patrick Costadoni, Lucy Norry, and Sharon Fachler are enjoined from holding out or operating as an Ocean Transportation Intermediary in the United States foreign trades until and unless a license is issued by the Commission and respondents publish a tariff and obtain a bond pursuant to Commission regulations;

IT IS FURTHER ORDERED, That the respondents Baruch Karpick, Megan Karpick, Patrick Costadoni, Lucy Norry, and Sharon Fachler are enjoined from working for, as an employee or in any other capacity, any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this Order.

IT IS FURTHER ORDERED, That the respondents International Shipping Solutions, Dolphin International Shipping, Worldwide Relocations, Boston Logistics,

Tradewind Consulting, Moving Services, Global Direct Shipping, Baruch Karpick, Megan Karpick, Patrick Costadoni, Lucy Norry, and Sharon Fachler are enjoined from controlling in any way or serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company or other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this Order. This Order, however, does not enjoin respondents from owning up to five percent of a class of shares of a publicly traded company.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Comissioner Brennan, concurring in part and dissenting in part:

I respectfully dissent from the Commission's Order with respect to the scope of the Order's injunction against the individual respondents.

While the Order purports to limit the injunction of the ALJ's Initial Decision to future violations of the Shipping Act and to behavior narrowly related to such violations, the Commission ultimately makes the same mistake that the ALJ

did. The Commission enjoins actions that go beyond a Shipping Act violation.

The Commission's injunction prohibits two activities that are legal under the Shipping Act: 1) working as an employee, or in any other capacity, for any entity providing ocean transportation services in the foreign commerce of the United States and 2) owning more than five percent of a class of shares of a publicly traded company providing ocean transportation services in the foreign commerce of the United States. Not only are these activities legal, it is not clear how they would be potentially harmful.⁸ By its injunction, the Commission apparently goes so far as to prohibit the individual respondents from even sweeping the floor of any OTI's office for one year.

Under the Administrative Procedure Act, all sanctions and orders of an agency must be "**within [the] jurisdiction delegated to the agency and as authorized by law.**"⁹ As broad as it is, the injunction appears to be in the nature of a sanction not authorized by statute. The Federal Maritime Commission exceeds its authority where, as here, Congress has given the agency no authority to establish sanctions other than those specified by statute.¹⁰

While otherwise concurring in the Commission's Order in this case, I would limit the injunction of the ALJ's Initial Decision to future violations of the Shipping Act.

Commissioner Dye, concurring in part and dissenting in part:

For the reasons discussed below, I concur with the

⁸ While the Order uses the somewhat ambiguous phrase "in a manner inconsistent with this Order," I take the injunction to apply broadly as described and not merely to Shipping Act violations.

⁹ 5 U.S.C. § 558(b) (emphasis added).

¹⁰ See, *American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000).

majority of the Commission to uphold the Administrative Law Judge's (ALJ's) decision, but I do not concur with the new "permissive presumption" adopted by the majority. I dissent from the majority's opinion on the scope of the injunctive relief granted.

Concurrence

In this proceeding, as the majority order explains, the ALJ exhaustively reviewed the factual offerings by the parties. *See* 31 S.R.R. at 1487-1511. She found facts related to each entity, and if relevant, the individuals affiliated with a given entity. She organized the evidence regarding shipments for which there were sufficient documents in the record to support findings that a shipment occurred and the status of the person or entity who acted as an ocean transportation intermediary (OTI) for the shipment. *See id.* at 1489-1490. The ALJ linked each finding of fact to evidence in the record.

I agree with the majority that in the Initial Decision, the ALJ correctly employed a well-established evidentiary methodology, similar to Rule 406 of the Federal Rules of Evidence, for determining a factual basis to support a finding that an OTI in this proceeding is operating as a non-vessel-operating common carrier (NVOCC) rather than an ocean freight forwarder (OFF). *See* 46 U.S.C. §§ 40102(16), (18).

I do not agree with the majority that it is necessary to consider a new "permissive presumption" to determine the status of an OTI as a NVOCC or OFF in this proceeding or any other proceeding before the Commission. Although the majority emphasizes that the presumption described in the majority's order is permissive, not mandatory, it is discussed in language suggesting that it may actually operate as a mandatory presumption. Although the permissive presumption described by the majority was not briefed by the parties and is

not applied to the facts of this case, and is therefore not controlling in this or any future proceeding, I am concerned that it could be applied in a future proceeding with troubling results.

Finally, I do not believe there is a statutory or policy basis for a presumption of any type that dictates a finding that an OTI is a NVOCC rather than an OFF in a Commission civil penalty proceeding. I share the majority's concern about the harm caused by unscrupulous independent household goods movers, but this decision, and the new rule it envisions, is not limited to proceedings involving household goods movers.

Presumption Distinguished From Inference

Legal scholars consider the distinction between an evidentiary inference and a presumption to rest on the requirement to make a factual assumption based on a proved fact. "A presumption is a procedural rule affecting the finder of fact. Under this rule, if a basic fact (Fact A) is established, then the fact-finder must accept that the presumed fact (Fact B) is established, unless the presumption is rebutted." 1 Weinstein's Fed. Evidence §301.02[1] (2d ed. 2004). "An inference is distinguished from a presumption in that in an inference, the existence of Fact B *may be deduced* from Fact A by the ordinary rules of reasoning and logic whereas in a presumption, the existence of Fact B *must be assumed* because of a rule of law." *Id.* §301.02[1] (second emphasis added).

To survive constitutional scrutiny, a civil presumption must have "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Id.* §301.03[1]. Other Constitutional interests may further limit civil presumptions. *See id.* §301-04.

Although certain statutory presumptions have been evaluated under a relaxed rational connection test, “administrative agencies’ presumptions do not enjoy similar protection.” *Id.* §301.03[3]; *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (“However, an administrative agency’s presumptions do not enjoy a similar protection: such an agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found.”) (citing *Atchison, T&S.F.Ry.Co. v. ICC*, 580 F.2d 623,629 (D.C.Cir.1978)).

Inference Under Rule 406 of the Federal Rules of Evidence

The ALJ drew inferences of fact that supported the determination that an OTI attained common carrier status for certain shipments. Although the ALJ is not strictly bound by the Federal Rules of Evidence, the ALJ’s approach in this regard comports with evidentiary rules addressing the relevance of evidence of routine practice of an organization to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

The ALJ’s approach to this determination is comparable to the operation of Rule 406 of the Federal Rules of Evidence: “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” Fed. R. Evid. 406 (2011); *See also* 2 Mueller and Kirkpatrick, FEDERAL EVIDENCE § 4:45 (3d ed. 2007). In order to support an inference that the commercial conduct of a business on a particular occasion was in conformity with the customary behavior of the organization, “there must be enough

instances to permit the finding of a habit, the circumstances under which the habit or custom is followed must be present, and, as always, there are the limitations for cumulativeness, remoteness, unnecessary inflammatory quality, and so on.” 1 McCormick on Evidence § 195 (6th ed.2006).

Rule 406 of the Federal Rules of Evidence provides that a particular kind of evidence—habit or routine practice—is relevant to prove conduct on a particular occasion, leaving the question of admissibility or relevance to be resolved under Rules 402 and 403 of the Federal Rules of Evidence. *See* 2 Mueller and Kirkpatrick, FEDERAL EVIDENCE § 4:45. When offered to prove that something was done on a certain occasion, evidence of business practice may be excluded if the number of known instances do not support the desired inference. *See id.* § 4:48.

Majority Order Creates Neither an Inference Nor a Presumption

The majority order describes an inference or permissive presumption that may be applied to determine when an entity is acting as a NVOCC for purposes of Commission civil penalty proceedings. *See* Majority Order, Slip Op. 11-19. Based upon the fact that if an entity, licensed or unlicensed, advertises to the public, then the majority would allow an ALJ to infer or presume that the entity “does what it advertises.” Slip Op. 16. This presumption, unless rebutted, would support the legal conclusion that an entity is a NVOCC and liable for “a complete array” of violations under the Shipping Act of 1984. *See id.*, Slip Op. 17-18.

Although the majority emphasizes that this evidentiary device is permissive, the description of the “permissive presumption” includes language that is compatible only with the application of a mandatory presumption.

For example, the majority discusses:

- (1) situations where one party has superior access or control of facts, evidence, or proof resulting in an imbalance in the judicial proceeding; *See id.*, Slip Op. 14.
- (2) that the permissive presumption does not shift the burden of proof but it may shift the burden of producing evidence in descriptions concerning permissive presumptions; *See id.*, and
- (3) that the adverse party must be allowed to present rebuttal evidence, and if the adverse party does not come forward with evidence to rebut the existence or correctness of the presumed fact, or the adverse party's proffered evidence fails to rebut the logical inference of the presumption, then the presumed fact may stand. *See id.*

The majority cites Rulings and Motions For Summary Judgment, Dismissal and Related Rulings on Governing Principles of Law in *International Association of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 684 (ALJ 1990) to support the proposition that the order's "permissive presumption" is interchangeable with an inference or a presumption of fact.

In *Atlantic Container Line*, in order to resolve certain issues and motions in that proceeding, the ALJ employed a mandatory presumption that "any carrier publishing the Rules in its tariff was obliged by law to carry them out and can therefore be presumed to have done so for purposes of this proceeding." *Id.* at 683. To support the use of the presumption in that proceeding, the ALJ, discussed the evidentiary use of

presumptions generally, including the close nature of presumptions of fact and inferences. He also discussed the certain limitations to the use of presumptions, mainly the “rational basis” requirement that requires a rational relationship between proven facts and presumed facts and that the effect of a presumption is “to shift the burden of producing evidence with regard to the presumed fact and not to shift the burden of proof.” *Id.* at 684.

I do not agree with the majority that the Atlantic Container Ruling is an “analogous” proceeding because the ALJ in that proceeding did not rely on advertising to support his presumption of fact, but rather on the entirely separate statutory requirement for ocean common carriers to follow rules contained in filed tariffs.

Furthermore, the ALJ in *Atlantic Container Line* employed, for purposes of resolving certain issues in the proceeding before him, the evidentiary device best described as a mandatory rebuttable presumption. Of course, an internal inference is necessary for the operation of a rebuttable presumption. But the main difference between an inference and a presumption is that the factual inference that is necessary to the operation of a presumption is mandatory, not permissive.

It is also unclear from the majority order what language contained in an ocean transportation intermediary advertisement or solicitation would trigger a finding of NVOCC status. Several advertisements are in the record of this proceeding, but the majority does not analyze those solicitations in their order. Furthermore, the cases cited by the majority do not hold that advertising alone is sufficient to support a determination of “holding out” or “taking responsibility” for purposes of common carrier status. *See* Majority Order, Slip Op. 10-12. It is also unclear why the majority order included a discussion of facts and policy,

unrelated to this proceeding, concerning the application of this permissive presumption to an “FMC-licensed” entity doing business with an unlicensed entity. *See id.*, Slip Op. 17.

No Legal or Policy Justification for Presumption of NVOCC Status

Under paragraph (19) of section 40102 of title 46, United States Code, the term “ocean transportation intermediary” is defined as an ocean freight forwarder or a non-vessel-operating common carrier.

Under chapter 409 of title 46, United States Code, a person in the United States may not act as an ocean transportation intermediary unless the person holds an OTI license and furnishes a bond or other evidence of financial responsibility to pay penalties, claims and damages arising from transportation-related activities. The only affirmative statutory responsibility of a NVOCC that is not required of an OFF is the responsibility to publish and adhere to tariffs.

There is no statutory basis for the majority’s policy for presuming NVOCC status in this or any proceeding. The Shipping Act of 1984, as amended, provides no support for the presumption that an OTI that advertises or solicits is a NVOCC. The Commission’s shipment-by-shipment analysis of all relevant evidence to determine whether an OTI is an OFF or a NVOCC is a reasonable evidentiary approach to support the determination required by the Shipping Act of 1984. In this proceeding, the ALJ found that all seven corporate respondents acted as NVOCCs without using or needing a presumption of the type described by the majority. The ALJ found that the entities had not published tariffs nor been licensed or bonded as required by the Shipping Act of 1984. *See* 46 U.S.C. §§ 40501, 40901-40920.

The approach by the majority ignores the business

realities in the OTI industry. OTIs mix and match services based upon the needs of their customers. They act as OFFs or NVOCCs based upon their assessment of risk regarding cargo liability which is reflected in their contractual relationships with their customers.

Tariffs are irrelevant in today's international commercial environment. The majority's approach would reinforce tariff enforcement and distract from the Commission's goal of protecting the public from unlicensed and unbonded entities engaged in international household goods transportation. The result of a presumption of the type described by the majority would elevate tariff enforcement and increase uncollected civil penalty liability without increasing consumer protection.

Dissent

In her initial decision in this proceeding, the ALJ enjoined the respondents from violating the Shipping Act and from "serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States except as *bona fide* employees of such entities." 31 S.R.R. at 1543. The ALJ also found that there is a reasonable likelihood that those respondents will violate the Shipping Act in the future, specifically, that they will operate as NVOCCs and will do so without license, bond or tariff. *See id.*

The majority modifies the injunctive aspect of the Initial Decision, citing cases in which the D.C. Circuit United States Court of Appeals discussed the need to narrowly craft the scope of injunctive relief to enjoin only the harmful behavior meriting injunctive relief: *See ALPO Petfoods, Inc. v Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990) ("The

law requires that courts closely tailor injunctions to the harm that they address.”); *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir 1985); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 640 (D.C. Cir. 1982) (“The scope of an injunction should be determined by balancing [the] harm to the plaintiff, other means of avoiding such harm, and the relative inconvenience to the defendant.”). *See* Majority Order, p. 21-22.

Rather than narrowly crafting the scope of injunctive relief in regard to the harmful behavior in this proceeding, the majority has expanded the scope of the injunctive relief provided by the ALJ in her initial decision. The majority’s order prevents the respondents in this case from participating in the maritime industry in any capacity for a year, and from participating in any supervisory or management capacity for a reasonable period of time, in this case five years. *See id.*, Slip Op. 22.

I believe the majority failed to narrowly craft injunctive relief that reflects the harm in this case. *See* 46 U.S.C. 40501,

40901-40902. I would enjoin the corporate and individual respondents found liable for violations under the Shipping Act of 1984 in this proceeding from behavior that violates the Shipping Act, namely, acting as an NVOCC without obtaining a license, furnishing a bond, or publishing a tariff.