

FEDERAL MARITIME COMMISSION

EUROUSA SHIPPING, INC.,
TOBER GROUP, INC., AND
CONTAINER INNOVATIONS,
INC. – POSSIBLE VIOLATIONS
OF SECTION 10 OF THE
SHIPPING ACT OF 1984 AND
THE COMMISSION'S
REGULATIONS AT 46 C.F.R. §
515.27

Docket No. 06-06

Served: April 12, 2012

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

**Order Vacating Initial Decision in Part,
Reversing in Part, and Remanding for Further
Proceedings**

I. PROCEEDING

This proceeding was instituted by an Order of Investigation and Hearing, served May 11, 2006, to determine whether EuroUSA Shipping, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. violated section

10(b)(11) of the Shipping Act of 1984 (46 U.S.C. § 41104(11)) and 46 C.F.R. § 515.27, by knowingly and willfully accepting cargo from or transporting cargo for the account of an entity acting as a Non-Vessel-Operating Common Carrier (NVOCC) without a tariff and a bond as required by sections 8 and 19 of the Act (46 U.S.C. §§ 40501, 40902). *See EuroUSA Shipping, Inc., Tober Group, Inc. – Possible Violations of Shipping Act*, 30 S.R.R. 988 (FMC 2006). In addition, the proceeding included an investigation into whether Tober violated section 10(b)(2)(A) of the Shipping Act (46 U.S.C. § 41104(2)(A)) by providing service in the liner trade that was not in accordance with the rates and charges in its published tariff.

Where one or more violations of section 10 of the Shipping Act and 46 C.F.R. § 515.27 are found, it then must be determined (1) whether civil penalties should be assessed and if so, the amount of such penalties; (2) whether appropriate cease and desist orders should be issued; and (3) whether such violations constitute grounds for the revocation of any respondent's OTI license pursuant to 46 C.F.R. § 515.16.

The ALJ issued an Initial Decision with respect to Tober on October 9, 2009.¹ In the Initial Decision, the ALJ determined that the entities from which Tober accepted cargo did not act as NVOCCs, and he therefore found that Tober had not violated section 10(b)(11) of the Act. The ALJ then found

¹ *See EuroUSA Shipping, Tober Group, Inc. – Possible Violations of Shipping Act*, 31 S.R.R. 967 (ALJ 2009). The ALJ issued separate Initial Decisions with respect to respondents EuroUSA and Container Innovations, Inc., and those decisions are administratively final. *See* 31 S.R.R. 1051 (ALJ 2009) (administratively final November 12, 2009), and 31 S.R.R. 1131 (ALJ 2009) (administratively final January 7, 2010).

that Tober violated section 10(b)(2)(A) by providing service that was not in accordance with the rates and charges in its tariff. But the ALJ then refused to assess a civil penalty because he found that: (1) BOE had not proven a “willful and knowing” violation to justify penalties exceeding \$6,000 per violation; and (2) BOE had failed to establish how the Commission should “take into account” the factors in 46 U.S.C. § 41109(b) for determining the penalty amount. *See id.* at 1023-24.

BOE filed Exceptions to the Initial Decision, arguing that the ALJ erred (1) in finding that certain entities from which Tober accepted cargo did not hold themselves out to provide transportation by water of cargo between the United States and a foreign country for compensation; (2) in finding that none of the entities assumed responsibility for the transportation of cargo from the port or point of receipt to the port or point of destination; (3) in finding that Tober did not violate section 10(b)(11) of the Act; (4) in finding that Tober did not knowingly and willfully violate section 10(b)(2)(A) of the Act; and (5) in not assessing a civil penalty against Tober. Tober did not reply to BOE’s Exceptions.² After BOE’s Exceptions were filed, Elisa P. Holland, counsel for BOE, filed a Motion to Withdraw as Counsel in this proceeding. That Motion is pending before the Commission.

For the reasons stated below, we vacate and remand the section 10(b)(11) findings to the ALJ for reconsideration in light of the Commission’s recent decision in *Worldwide Relocations, Inc. – Possible Violations of the Shipping Act*,

² In an order served April 29, 2009, the ALJ granted Tober’s counsel’s Motion to Withdraw as Counsel and further ordered that Yonaton Benheim, the president of Tober, be deemed the representative for Tober in this proceeding.

Docket No. 06-01, ___ S.R.R. ___ (F.M.C. Mar. 15, 2012). We also reverse and remand the refusal to award civil penalties for reconsideration in light of: (1) any findings of 10(b)(11) violations; (2) any findings that violations continued after these proceedings began; and (3) BOE's proof that Tober committed hundreds of violations over a three-year period and never charged the rates published in its tariff. Additionally, we grant the Motion to Withdraw as Counsel.

II. DISCUSSION

A. *Section 10(b)(11) allegations: whether Tober accepted cargo from entities acting as NVOCCs*

Establishing a section 10(b)(11) violation requires a determination that a common carrier has accepted cargo from an untariffed, unbonded entity operating as an NVOCC. Therefore, a central issue in this case is whether the entities from which Tober accepted cargo acted as NVOCCs by holding out to provide and assuming responsibility for ocean transportation. *See* 46 U.S.C. 40102(6) (definition of common carrier).

Recently, the Commission revisited the standard for determining whether an entity acts as an NVOCC by "holding out" and "assuming responsibility" in a related case that turned in part on cargo shipments that Tober accepted from three untariffed, unbonded respondents. *See Worldwide Relocations, Inc. – Possible Violations of the Shipping Act*, Docket No. 06-01, ___ S.R.R. ___ (F.M.C. Mar. 15, 2012). The Commission's decision described the circumstances under which inferences or permissible presumptions may be applied to determine whether an entity is operating as an NVOCC, and it affirmed the ALJ's findings of violations. *See id.* at ___

(expressly affirming “the ALJ’s findings of violations for each entity”). Among those violations were 33 shipments that Tober accepted from Worldwide Relocations, Tradewind Consulting, and Moving Services.³ The ALJ and the Commission held in *Worldwide Relocations* that each of those 33 shipments was accepted from a shipper who was operating as an NVOCC without a tariff or bond. *See id.*

It appears that those 33 shipments were among the 278 that the ALJ in the case *sub judice* found were accepted by Tober and involved intermediaries. But for each of those shipments, the ALJ in the Initial Decision before us held that the intermediary involved was not operating as an NVOCC. *See* 31 S.R.R. at 1010 (“Worldwide Relocations did not operate as an NVOCC on the . . . shipments.”); *id.* at 1013 (“Tradewind did not operate as an NVOCC on the . . . shipments.”); *id.* at 1014 (“Moving Services did not operate as an NVOCC on the . . . shipments.”). The Initial Decision’s findings and conclusions thus appear to conflict with the Commission’s recent decision in *Worldwide Relocations* for at least some shipments and intermediaries. To resolve this conflict, the Commission vacates and remands the section 10(b)(11) allegations for the 278 shipments to the ALJ for reconsideration in light of the standard and holdings in *Worldwide Relocations*.⁴

³ *See Worldwide Relocations*, 31 S.R.R. 1471, 1493-98, 1501-02, 1505 (ALJ 2010) (listing Tober as the NVOCC for a total of 33 shipments handled by Worldwide Relocations, Tradewind Consulting, and Moving Services). Because the case involved a large number of shipments and parties, the ALJ admitted, pursuant to Federal Rule of Evidence 611(a), charts listing the proprietary shipper, bill of lading date, origin/destination, secondary NVOCC, bill of lading number, and supporting evidence Bates numbers for each shipment. She then incorporated the charts into her Initial Decision. *See id.*

⁴ On remand, the approach in *Worldwide* of admitting summary

B. Whether the 10(b)(2)(A) violations were willful and knowing

Based on an admission by Tober's president that Tober "never" quoted or charged the rate in its tariff, the ALJ found that "Tober provided service in the liner trade that was not in accordance with the rates and charges contained in its published tariff in violation of section 10(b)(2)(A)." 31 S.R.R. at 998. But the ALJ rejected BOE's charge that the violation was "willfully and knowingly committed." *See id.* at 1001. In support of that finding, the ALJ cited Tober's claim that it amended its tariff "[u]pon becoming aware of FMC's concerns."

BOE's Exceptions to the Initial Decision point out that the tariff correction the ALJ cited did not take place until February 2007 — nine months after Tober was served with the May 2006 Order of Investigation and Hearing. In its Proposed Findings of Fact and Conclusions of Law, BOE claimed that during those nine months, Tober accepted and transported 72 shipments for Infinity Moving and Storage, Inc. at rates that were not in accordance with its tariff. *See* BOE Proposed Findings of Fact and Conclusions of Law at 8, ¶ 11 (citing BOE Appendix Document #12).

BOE's Proposed Findings of Fact did not cite to any specific record page numbers to support its claim of violations that continued nine months after these proceedings began; nor did it provide a summary table. Rather, it provided a blanket citation to a "document" that consisted of 546 pages of

charts of the 278 shipments under Federal Rule 611(a) would likely assist the ALJ as well as the Commission in the event of further review. *Cf.* 46 C.F.R. § 502.94 ("The presiding officer may require . . . exchange of exhibits and other material which may expedite the hearing.").

shipment files for Infinity Moving and Storage. *See id.* Therefore, while we disagree with the Initial Decision's finding that BOE failed to designate any facts to demonstrate a willful and knowing violation, we agree with the finding that BOE failed to "provide their location in the record." 31 S.R.R. at 1000.

Such citation deficiencies, however, do not allow us to agree with the Initial Decision's conclusion that Tober's amendment of its tariff, nine months after these proceedings began, is evidence that "supports a finding that Tober operated in a manner that it understood complied with the Act." *See* 31 S.R.R. at 1001. We vacate that holding; on remand, the determination whether Tober "willfully and knowingly" violated the Act should, at a minimum, take into account any violations that continued after Tober was inarguably placed on notice by the Order of Investigation and Hearing. *See, e.g., Stallion Cargo, Inc. — Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 678 (FMC 2001) (resting a finding of "willful and knowing" conduct in part on the fact that "Respondent continued to perform the prescribed activities even after being informed by Commission staff that its actions constituted a violation").

C. Denial of civil penalties

We also disagree with the ALJ's finding that BOE failed to set forth "any information" about "the nature, circumstances, extent, and gravity of the violation[s] committed." *See* 31 S.R.R. at 1002. BOE in fact proved Tober committed 278 violations during a 3-year period and pointed to evidence that Tober never charged the rates set forth in its tariffs. Whether or not BOE provided information sufficient to support its full demand for maximum penalties or to persuade the ALJ to weigh heavily against Tober's limited

ability to pay, the ALJ erred in dismissing evidence of a pattern of *hundreds* of violations on its way to finding a lack of “any information” to help determine the amount of civil penalties.

The ALJ also erred in denying a civil penalty altogether. The Shipping Act states that a person who commits a violation “*is* liable to the United States Government for a civil penalty.” 46 U.S.C. § 41107(a) (emphasis added). The statutory factors in 46 U.S.C. § 41109(b) guide a determination of “the amount of a civil penalty,” not whether to impose one at all. *See Stallion Cargo*, 29 S.R.R. at 678 (“Having found a violation, the question before the ALJ was not whether to assess a civil penalty but rather, the amount of penalty to assess.”).

Therefore, the ALJ’s refusal to award civil penalties is reversed; on remand, the ALJ should decide the proper amount of civil penalties in light of (1) any section 10(b)(11) violations that are found once the *Worldwide* standard and holding are applied; (2) a revised analysis of whether violations were willful and knowing; and (3) BOE’s evidence of “the nature, circumstances, extent, and gravity” of the violations.

D. Motion to Withdraw as Counsel

With regard to the Motion to Withdraw as Counsel, good cause has been shown to grant the Motion, as Ms. Holland is no longer assigned to BOE.

III. CONCLUSION

As stated, we vacate the Initial Decision in part, reverse in part, and remand the proceedings.

THEREFORE, IT IS ORDERED, That the Initial Decision's conclusions that Tober did not violate section 10(b)(11) of the Shipping Act are vacated and remanded to the ALJ for reconsideration consistent with the Commission's decision in *Worldwide Relocations, Inc. – Possible Violations of the Shipping Act*, Docket No. 06-01, __ S.R.R. __ (F.M.C. Mar. 15, 2012);

IT IS FURTHER ORDERED, That the Initial Decision's denial of civil penalties is reversed and remanded for reconsideration consistent with this Order; and

IT IS FINALLY ORDERED, That the Motion to Withdraw As Counsel in this proceeding, filed by Elisa P. Holland, is granted.

By the Commission.

Karen V. Gregory
Secretary

Commissioner Dye, Dissenting:

For the reasons discussed below, I dissent from the majority's decision to vacate and remand the Initial Decision that Tober Group, Inc., did not violate section 41104(11) of title 46, United States Code; I also dissent from the majority's decision to reverse and remand the ALJ's Initial Decision to deny civil penalties.

Decisions in FMC Docket No. 06-06FMC Order of Investigation No. 06-06

The Commission initiated this proceeding to investigate whether three licensed Ocean Transportation Intermediaries (OTIs) violated section 41104(11) of title 46, United States Code, by knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that did not have a tariff and a bond as required by §40505 and §40902 of title 46. The Commission also required an investigation into whether Respondent Tober Group, Inc., violated §41104(2)(A) by providing service in the liner trade that was not in accordance with the rates and charges contained in a public tariff. *Order of Inv. And Hrg., EuroUSA Shipping, Inc., Tober Group, Inc. and Container Innovations, Inc.-Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §515.27, FMC No. 06-06 (Tober Group, Inc., Proceeding) 30 S.R.R. 988, at 989-9 (May 11, 2006)*. Respondents EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., were bonded and tariffed OTIs licensed by the Commission. *See id.*

The Commission commenced four additional proceedings to investigate the activities of a number of entities that appeared to have operated as OTIs without a license, bond, and/or tariff as required by the Shipping Act of 1984. See *Worldwide Relocations, Inc. et al. FMC No. 06-01, 30 S.R.R. 902 (January 11, 2006)* (Order of Investigation and Hearing); *Parks International Shipping, Inc., et al. FMC No. 06-09, 30 S.R.R. 1099 (September 19, 2006)* (Order of Investigation and Hearing); *Anderson International Transport and Owen Anderson, FMC No. 07-02, 30 S.R.R. 1349 (March 22, 2007)* (Order of Investigation and Hearing); and *Embarque*

Puerta Plata, Corp, et. al., FMC No. 07-07,31 S.R.R. (July 31, 2007) (Order of Investigation and Hearing).

EuroUSA Shipping, Inc.

On October 9, 2009, the ALJ issued an Initial Decision approving the settlement agreement between EuroUSA Shipping, Inc., and the Bureau of Enforcement resolving the claims against EuroUSA Shipping, Inc. 31 S.R.R. 967. Under that agreement, EuroUSA Shipping, Inc., agreed to pay a civil penalty of \$120,000, but did not admit to any violations alleged in FMC Docket No. 06-06 concerning § 41104 of title 46. The settlement agreement was not reviewed by the Commission and became administratively final on November 12, 2009. *Id.*

Container Innovations, Inc.

On December 1, 2009, the ALJ issued an Initial Decision addressing the claims against Container Innovations, Inc. 31 S.R.R. 1131. In that decision, the ALJ determined that on thirteen shipments, respondent Container Innovations, Inc., violated § 41104(11) of title 46, by knowingly and willingly accepting cargo from or transporting cargo for the account of a non-vessel-operating common carrier (NVOCC) that did not have a tariff as required by §40501 of title 46, and a bond, insurance, or other surety as required by § 40902 of title 46. 31 S.R.R. at 1151-1165.

In its motion for summary judgment, the Bureau of Enforcement argued that Container Innovations operated as a common carrier and transported forty-two shipments for nineteen untariffed and unbonded NVOCCs. *Id.* at 1145-50. However, the ALJ determined that only Mateo/Mateo

Shipping had acted as an NVOCC on the thirteen shipments in which it had been involved. *Id.* The ALJ also determined that the other eighteen entities had not operated as NVOCCs on the shipments in which they were involved. *Id.* at 1144-45. The Bureau of Enforcement determined not to go forward against Container Innovations with regard to the shipments of the entities other than Mateo/Mateo Shipping. *Id.*

Container Innovations did not participate in this proceeding. However, the ALJ noted that “it is the Commission’s responsibility to consider and apply pertinent case law regardless of whether it is presented or how it is characterized by the parties.” *Id.* at 1134 (citing *Rose Int’l, Inc. v. Overseas Moving Network Int’l Ltd., et al.*, 29 S.R.R. 119, 163 n.34 (F.M.C. 2001)).

The ALJ granted in part the Bureau of Enforcement’s motion for sanctions against Container Innovations for failing to respond to discovery about its financial situation, inferring that Container Innovations had the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act of 1984 that they were found to have committed. 31 S.R.R. at 1150-51. The ALJ ordered Container Innovations, Inc., to remit to the United States a civil penalty of \$390,000 for thirteen willful and knowing violations of § 41104(11) of title 46. *Id.* at 1165.

The ALJ arrived at the result regarding Container Innovations, Inc., by employing a comprehensive statutory and regulatory framework within which he analyzed the evidence presented by the Bureau of Enforcement. This framework included a lengthy explanation of the elements necessary to prove a violation of §41104(11) of title 46, and a

complete analysis of what activities distinguish an entity operating as an NVOCC from an ocean freight forwarder on a particular shipment.

The Bureau of Enforcement did not file Exceptions to the ALJ's Initial Decision. The Commission did not review the ALJ's Initial Decision in *Container Innovations, Inc.*, and that decision became administratively final on January 7, 2010, 31 S.R.R. 1131.

Tober Group, Inc.

On October 9, 2009, the ALJ issued an Initial Decision concluding that Tober Group, Inc., provided service in the liner trade that was not in accordance with the rates and charges contained in a published tariff on 278 shipments in violation of §41104(2)(A) of title 46. 31 S.R.R.967. The ALJ also concluded, however, that the Bureau of Enforcement had not designated specific facts and provided their location in the record to support its contention that Tober Group, Inc., willfully and knowingly violated §41104(2)(A) of title 46. *Id.* at 993.

The ALJ also found that BOE had not met its burden of persuasion regarding the amount of civil penalty to be assessed for the violations of §41104(2)(A), and therefore, no civil penalty would be assessed. *Id.* at 1000-1002.

The ALJ concluded that Tober Group, Inc., did not violate § 41104(11) of title 46 on the 278 shipments, because Tober Group, Inc., did not accept cargo from or transport cargo for the account of an NVOCC that did not have a tariff as required by § 40501 of title 46, and a bond, insurance, or other surety as required by § 40902 of title 46. *Id.* at 1023-

1024. The intermediaries operated as ocean freight forwarders, not NVOCCs, on these shipments. *Id.* at 975-76.

The ALJ arrived at the result in his Initial Decision regarding Tober Group, Inc., by employing the same comprehensive statutory and regulatory framework within which he analyzed the evidence in his Initial Decision regarding Container Innovations, Inc. This framework included a lengthy explanation of the elements necessary to prove a violation of § 41104(11) of title 46, and a complete analysis of what activities distinguish intermediaries operating as an NVOCC or as an ocean freight forwarder on a particular shipment.

The Bureau of Enforcement filed Exceptions to the Initial Decision in Tober Group, Inc., on December 17, 2009.

Majority Order

Worldwide Inference

The majority vacates and remands the ALJ's findings regarding §41104(11) of title 46 to the ALJ for reconsideration in light of the Commission's recent decision in *Worldwide Relocations, Inc.-Possible Violations of the Shipping Act*, Docket No. 06-01, _S.R.R._ (F.M.C. Mar. 15, 2012). The majority also reverses and remands the refusal to assess civil penalties for reconsideration in light of: (1) any findings of violations of §41104(11) of title 46; (2) any findings that violations continued after these proceedings began; and (3) the Bureau of Enforcement's proof that Tober committed hundreds of violations over a three-year period and never charged the rates published in its tariff. *See* Majority Order at 3.

There are 33 shipments from three unlicensed intermediaries that were determined to be operating as NVOCCs in the *Worldwide Relocations* proceeding and as freight forwarders in the Initial Decision in Tober Group, Inc. See March 15, 2012 Order at 4. The majority appears to assume that the Commission's "standard" in *Worldwide Relocations* would require a finding of NVOCC status for these three intermediaries. See *Id.* at 4-5. In my concurrence on *Worldwide Relocations*, I explained my objections to the majority's new inference in *Worldwide Relocations*, including my objections to the broad, unlimited nature of the inference of NVOCC status. *Id.* at 27-36.

The inference in *Worldwide Relocations* was not applied to the facts of that case, and the majority gives no guidance on how it should be applied by the ALJ to the evidence in this proceeding. An even more serious problem with the majority approach on remand is that the evidence on the 33 common shipments with *Worldwide Relocations* is not the same evidence analyzed by the ALJ in this decision.

The ALJ arrived at the result in his Initial Decision regarding Tober Group, Inc., by employing the same comprehensive statutory and regulatory framework within which he analyzed the evidence in his Initial Decision on *Container Innovations, Inc.* This framework included a lengthy explanation of the elements necessary to prove a violation of section 41104(11) of title 46, and a complete analysis of what activities distinguish entities operating as an NVOCC or an ocean freight forwarder on a particular shipment.

No Exceptions were filed to the Initial Decision in *Container Innovations* which found that Container Innovations

had violated §41104(11) of title 46 on 13 shipments. The Commission did not review the ALJ's decision. The different treatment by the Commission of the ALJ's two decisions raises concerns that the Commission's new inference in *Worldwide Relocations* is not based on the need to change the legal analysis employed by the ALJ in the decisions in this proceeding, but rather on the desire to produce a particular outcome regarding NVOCC status in Tober Group, Inc., and future proceedings.

Civil Penalties

The majority order states that the ALJ erred in denying a civil penalty in this case. *See* Majority Order at 6. However, the Order of Investigation for this proceeding states, in part, "(3) Whether, in the event one or more violations of section 10 of the Act and/or 46 C.F.R. §515.27 are found, civil penalties should be assessed and, if so, the amount of the penalties to be assessed;" *See* 30 S.R.R. 988-90. Clearly the Order of Investigation for this proceeding assumes that the determination of whether civil penalties should be assessed is a prerequisite for a determination of the amount of a penalty to be assessed. *Id.*

The majority cites no Commission or statutory authority to support the assertion that a penalty must be assessed for every violation of the Shipping Act of 1984, regardless of the evidence in the record concerning the factors that are required to be considered by the Commission under 41109(b) of title 46. The majority relies on the Commission's decision in *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665 (FMC 2001) (*Stallion Cargo*), to support its position that civil penalties must be assessed for violations of the Shipping Act of 1984, regardless

of the evidence in the record regarding the factors under §41109(b) of title 46.

The Commission Order of Investigation concerning possible violations of the Shipping Act of 1984 committed by Stallion Cargo, Inc., 28 S.R.R. 1110, is similar to the Order of Investigation in this proceeding by requiring separate determinations on whether civil penalties should be assessed and in what amount. The *Stallion Cargo* Order of Investigation stated that “The Order further directed the presiding officer, in the event violations were found, to determine: whether civil penalties should be assessed against Respondent and in what amount...” See *Stallion Cargo* at 29 S.R.R. 667.

In that regard, the Commission determined in *Stallion Cargo* to impose a civil penalty in the amount of \$1,340,000 for 134 violations that the ALJ found to be knowingly and willfully committed. *Id.* at 682. However, In view of the size of that penalty, the Commission found it unnecessary to impose penalties for the remaining 33 shipments at issue in *Stallion Cargo*. *Id.* at 682.

Conclusion

As I stated in my concurrence in *Worldwide Relocations*, there is no statutory basis for the majority’s policy inferring NVOCC status in this or any other proceeding. See *Final Worldwide Relocations Order* at 28. In that concurrence I also explained that the *Worldwide Relocations* inference is not controlling in future Commission proceedings, because it was not briefed by the parties nor was it applied to the facts of that case. I also stated in my concurrence that I was concerned that the *Worldwide*

Relocations discussion could be applied in a future proceeding with troubling results.

The majority's requirement that the ALJ reevaluate the conclusions regarding OTI status in this case in light of the decision in *Worldwide Relocations* injects into Commission precedent a results-oriented approach favoring a finding of NVOCC status. If the Commission desires to change the legal analysis of common carriage and NVOCC status within existing statutory framework, we should choose a case in which a respondent fully participates and from which we have the benefit of briefs and issue development.

Finally, I believe that reinforcing outdated common carriage concepts distracts from the Commission's goal of protecting the public from unlicensed and unbonded entities engaged in household goods transportation. The approach by the majority ignores the business realities in the OTI industry. OTI's tailor their services to the needs of their customers, and act as freight forwarders or NVOCC's based upon their assessment of risk regarding cargo liability. The result of the Commission's approach in this proceeding would increase uncollected civil penalties without increasing consumer protection.

For the reasons stated above, I would affirm the Initial Decision of the ALJ in this proceeding.