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FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 06-06**

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

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**INITIAL DECISION OF CLAY G. GUTHRIDGE, ADMINISTRATIVE LAW JUDGE,  
ON INVESTIGATION OF TOBER GROUP, INC.<sup>1</sup>**

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By Order of Investigation and Hearing dated May 11, 2006, the Commission commenced an investigation into the activities of respondents EuroUSA Shipping, Inc. (EuroUSA), Tober Group, Inc. (Tober), and Container Innovations, Inc. (Container Innovations) for possible violations of section 10 of the Shipping Act of 1984 (Shipping Act or Act)<sup>2</sup> and the Commission's Regulations at 46 C.F.R. § 515.27. *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, Order at 4 (May 11, 2006) (Order of Investigation and Hearing). EuroUSA, Tober, and Container Innovations are or were bonded and tariffed ocean transportation intermediaries (OTIs) licensed by the Commission. The Commission issued the notice

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<sup>1</sup> The initial decision will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

<sup>2</sup> After this proceeding was instituted by the Commission, the Shipping Act was reenacted as positive law through reorganization and restatement of the then current law. Section 10(b) of the Act is now codified as 46 U.S.C. § 41104. The Commission has continued to cite provisions of the Act by their former section references. *See, e.g., City of Los Angeles, California, et al. -- Possible Violations of Sections 10(b)(10), 10(d)(1) and 10(d)(4) of the Shipping Act of 1984*, FMC No. 08-05 (Sept. 24, 2008) (Order of Investigation and Hearing). Accordingly, I follow that practice in this decision.

to investigate whether the three intermediaries violated section 10(b)(11) of the Act 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 sections 8 and 19 of the Act,” and whether Tober “violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff.” *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06, Order at 4 (May 11, 2006). This Initial Decision addresses the claims against Tober. Separate decisions address the claims against EuroUSA and Container Innovations.

Earlier in this proceeding, Tober was represented by counsel. Through counsel, Tober served and responded to discovery and filed a motion for partial summary judgment on the section 10(b)(11) claim. I granted the motion for partial summary judgment. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06 (ALJ June 12, 2008) (Memorandum and Order on Tober Group, Inc.’s Motion to Summary Judgment). The Commission reversed and remanded. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge’s Grant of Summary Judgment).

After the remand, Tober’s counsel filed a motion for leave to withdraw as counsel. On April 29, 2009, I granted Tober’s counsels’ motion. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06 (ALJ Apr. 29, 2009) (Order Granting Motion to Withdraw as Counsel for Tober Group, Inc.). BOE has submitted proposed findings of fact, supporting evidence, and a brief. Tober has not filed responses to these filings and has not filed proposed findings, evidence, and argument. Therefore, this initial decision is predicated on the evidence and argument presented by BOE in its proposed findings of fact and evidence that was submitted in conjunction with the motion for partial summary judgment. Despite Tober’s failure to participate in the later stages of this proceeding, “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.” *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) (*Rose Int’l*).

## PRELIMINARY STATEMENT

The Commission commenced this proceeding pursuant to 46 U.S.C. § 41302 to investigate the activities of three licensed non-vessel-operating common carriers (NVOCCs) that appeared to have violated section 10(b)(11) of Shipping Act in their dealings with OTIs that did not have bonds and/or tariffs pursuant to requirements of the Act. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations*, FMC No. 06-06 (May 11, 2006) (Order of Investigation and Hearing). The Commission also commenced four 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 Act. See *Worldwide Relocations, Inc., et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R.*

§§ 515.3, 515.21, and 520.3, FMC No. 06-01 (Jan. 11, 2006) (Order of Investigation and Hearing); *Parks International Shipping, Inc., et al., – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, as well as the Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 06-09 (Sept. 19, 2006) (Order of Investigation and Hearing); *Anderson International Transport and Owen Anderson - Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02 (Mar. 22, 2007) (Order of Investigation and Hearing); *Embarque Puerto Plata, Corp, et al., – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, FMC No. 07-07 (ALJ July 31, 2007) (Order of Investigation and Hearing).

As explained more fully below, the Act recognizes two types of OTIs: NVOCCs and ocean freight forwarders. Ocean freight forwarders and NVOCCs are involved in the business of international transportation by water of goods belonging to other persons, although neither operates vessels. In many respects, the services they perform are quite similar. The critical difference for these five proceedings is that NVOCCs are by definition common carriers (*i.e.*, they hold themselves out to the general public to provide transportation by water to and from foreign ports and assume responsibility for that transportation of the goods) while ocean freight forwarders are not common carriers.

Section 19(b) of the Act requires all OTIs (NVOCCs and ocean freight forwarders) to furnish a bond, insurance, or other form of surety to compensate shippers whose goods may be lost or damaged as a result of a violation of the Act by the OTI. Section 8 of the Act requires all common carriers to file tariffs with the Commission. Since an NVOCC is a common carrier, it must file a tariff, but since an ocean freight forwarder is not a common carrier, it does not file a tariff. Section 10(b)(11) of the Act, one of the sections that the Commission determined Tober appeared to have violated, states that a common carrier such as Tober may not “knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by [section 8] and a bond, insurance, or other surety as required by [section 19].” 46 U.S.C. § 41104.

These five proceedings have in common the issue of what activities distinguish operating as an NVOCC from operating as an ocean freight forwarder. In the proceedings against the unlicensed entities, the Commission determined that the respondents appeared to have operated as OTIs without a tariff, license, or surety. Resolution of that question requires an examination of each respondent’s conduct on a particular shipment to determine whether it operated as an OTI, either an NVOCC or an ocean freight forwarder, on that shipment.

In this proceeding, Tober is alleged to have operated as a common carrier and transported cargo for untariffed and unbonded OTIs. The evidence presented in this proceeding establishes that Tober operated as a common carrier. The evidence also establishes that each of the entities with which Tober conducted business operated as an OTI. Therefore, if the statute were the sole authority to apply, the evidence would establish that Tober violated section 10(b)(11) on those shipments on which Tober operated as an NVOCC.

The statute is not the only authority that applies, however. When the Commission promulgated its regulations under the Shipping Act, it interpreted the statute as an intent by Congress to apply section 10(b)(11) only to NVOCCs: “No common carrier may transport cargo for the account of a shipper known by the carrier to be an *NVOCC* unless the carrier has determined that the *NVOCC* has a tariff and financial responsibility as required by sections 8 and 19 of the Act.” 46 C.F.R. § 515.27(a) (emphasis added). Therefore, if the intermediary with which Tober did business operated as an ocean freight forwarder, not an NVOCC, on a particular shipment, Tober did not violate section 10(b)(11) on that shipment even though the intermediary did not have a bond. It is necessary to examine the evidence of the intermediary’s operations to determine whether an intermediary operated as an NVOCC or an ocean freight forwarder on a particular shipment, because “an intermediary’s conduct, and not what it labels itself, will be determinative of its status.” *Bonding of Non-Vessel-Operating Common Carriers*, 56 Fed. Reg. 51,987, 51,991 (Oct. 17, 1991).

The evidence establishes that Tober entered into contracts for carriage with the owners of the goods being shipped, not the intermediaries. The intermediaries dispatched the shipments via a common carrier and booked or otherwise arranged space for the shipments on behalf of the shippers and processed the documentation or performed related activities incident to those shipments. The intermediaries operated as ocean freight forwarders, not NVOCCs, on the shipments. Therefore, Tober did not violate section 10(b)(11) on the shipments.

The Order also states that Tober appeared to have violated section 10(b)(2) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff. The evidence establishes that Tober published a tariff, but charged its customers at a different rate. Therefore, Tober violated section 10(b)(2) on the shipments.

## **BACKGROUND**

### **I. STATUTORY FRAMEWORK.**

The Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of OTIs. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19). “The term ‘ocean freight forwarder’ means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “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.” 46 U.S.C. § 40102(16). To be an NVOCC, the intermediary must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) 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; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.”

46 U.S.C. § 40102(6).

The statutory definitions are echoed in the Commission’s regulations:

*Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that -

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

*Common carrier* means any person holding 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 that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 C.F.R. § 515.2(f). See *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 494-495 (D.C. Cir. 2009) (*Landstar*).

Section 8 of the Act requires “[e]ach common carrier and conference [to] keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route

that has been established.” 46 U.S.C. § 40501(a). Since an NVOCC is a common carrier, it must file a tariff. An ocean freight forwarder is not a common carrier; therefore, it does not file a tariff.

Section 19(b) of the Act, applicable to NVOCCs and ocean freight forwarders, requires a person wanting to operate as an OTI to furnish proof of financial responsibility.

A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety – (1) in a form and amount determined by the . . . Commission to insure financial responsibility; and (2) issued by a surety company found acceptable by the Secretary of the Treasury.

46 U.S.C. § 40902(a). An ocean freight forwarder must “furnish evidence of financial responsibility in the amount of \$50,000,” 46 C.F.R. § 515.21(a)(1), and an NVOCC must “furnish evidence of financial responsibility in the amount of \$75,000.” 46 C.F.R. § 515.21(a)(2).

“[A]n entity can operate as a freight forwarder and as an NVOCC.” (Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, [http://www.fmc.gov/home/faq/index.asp?F\\_CATEGORY\\_ID=10](http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10), accessed July 27, 2009.) An intermediary that is licensed by the Commission as a freight forwarder and as an NVOCC must obtain separate proofs of financial responsibility for each type of operation. “The NVOCC proof of financial responsibility will only cover claims arising from the NVOCC’s transportation-related activities and the freight forwarder proof of financial responsibility will only cover claims arising from its freight forwarder services.” (*Id.*) The bond is to be used to satisfy any civil penalty or order of reparations and “may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities.” 46 U.S.C. § 40902(b).

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

- (1) for an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in § 515.2(i), and
- (2) for an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in § 515.2(l).

46 C.F.R. § 515.2(w). As a guide to determine what transportation-related activities are covered by the bond or surety for NVOCCs and ocean freight forwarders, the Commission promulgated regulations providing examples of freight forwarding services and NVOCC services performed by

an ocean transportation intermediary that are necessary or customary in the provision of transportation services to a customer.

*Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

*Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;
- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) paying lawful compensation to ocean freight forwarders;
- (7) leasing containers; or
- (8) entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

The Commission has further described the services of ocean freight forwarders and NVOCCs as follows:

Freight Forwarding OTI services refer to the dispatching of shipments on behalf of others to facilitate shipments by common carriers, including ordering cargo to port; preparing or processing export declarations, bills of lading and other export documentation; booking or confirming cargo space; arranging for warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notice of shipments to banks, shippers, and consignees; handling freight monies on behalf of shippers; coordinating the movement of shipments from origin to the vessel; and giving expert advice to exporters.

NVOCC OTI services refers to the provision of transportation by water of cargo between the United States and a foreign country (whether import or export) for compensation without operating the vessels by which the transportation is provided. NVOCC OTI services may include purchasing transportation services from vessel-operating common carriers for resale; payment of port-to-port or multi-modal transportation charges; entering into affreightment agreements with underlying shippers; issuing bills of lading or equivalent documents; arranging and paying for inland transportation on through transportation movements; paying lawful compensation to ocean freight forwarders; leasing containers; and entering into arrangements with origin or destination agents.

(Federal Maritime Commission Frequently Asked Questions, Ocean Transportation Intermediaries, [http://www.fmc.gov/home/faq/index.asp?F\\_CATEGORY\\_ID=10](http://www.fmc.gov/home/faq/index.asp?F_CATEGORY_ID=10), accessed July 27, 2009.)

As originally enacted, the Shipping Act defined NVOCC as “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier,” 46 App. U.S.C.A. § 1702(17) (1997) (Westlaw), and ocean freight forwarder as “a person in the United States that – (A) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 App. U.S.C.A. § 1702(19) (1997) (Westlaw). Section 10(b)(11) provided:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . (14) knowingly and willfully accept cargo from or transport cargo for the account of a *non-vessel-operating common carrier* that does not have a tariff and a bond, insurance, or other surety as required by sections 1707 and 1721 of this title.

46 App. U.S.C.A. § 1709 (1997) (Westlaw) (emphasis added).

In 1998, the President signed the Ocean Shipping Reform Act of 1998 (“OSRA”) into law. Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998) (now codified at 46 U.S.C. § 40101-41309). Congress created a new term “ocean transportation intermediary” to include NVOCCs and ocean freight forwarders. OSRA, Sec. 102(10), 112 Stat. at 1903 (now codified at 46 U.S.C. § 40102(19)). OSRA also amended section 10(b)(11) by striking “a non-vessel-operating common carrier” and inserting the newly-defined term “ocean transportation intermediary.” OSRA, Sec. 109(a)(12), 112 Stat. at 1910 (now codified at 46 U.S.C. § 41104). Therefore, as amended, section 10(b)(11) reads:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (11) knowingly and willfully accept cargo from or transport cargo for the account of an *ocean transportation intermediary* that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title.

46 U.S.C. § 41104 (emphasis added).

When the Commission promulgated its regulations implementing OSRA, it did not apply the section 10(b)(11) restriction to all OTIs including ocean freight forwarders, but limited its reach to NVOCCs: “No common carrier may transport cargo for the account of a shipper known by the carrier to be an *NVOCC* unless the carrier has determined that the *NVOCC* has a tariff and financial responsibility as required by sections 8 and 19 of the Act.” 46 C.F.R. § 515.27(a) (emphasis added). The Commission did not explain the reason for this limitation in either the preamble to the proposed rule, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 63 Fed. Reg. 70710-70715 (Dec. 22, 1998) (Notice of Proposed Rulemaking), or the preamble to the final rule. Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 64 Fed. Reg. 11156-11171 (Mar. 8, 1999) (Final Rule and

Interim Final Rule). At the argument on Tober's motion for partial summary judgment, the parties agreed that this difference results from the fact that NVOCCs are required to file tariffs, but ocean freight forwarders are not:

- The statute prohibits transporting cargo for an OTI that does not have a tariff *and* a bond;
- NVOCCs are the only OTIs that are required to have tariffs;
- Therefore, the section 10(b)(11) prohibition only applies to OTIs that are NVOCCs.

*See* Transcript of Argument on Tober Motion for Partial Summary Judgment (11/14/07) (Transcript (11/14/07)) at 11-12, 20. BOE echoed this belief in its proposed findings of fact.

Since NVOCCs are the sole type of ocean transportation intermediary required to publish a tariff, a violation of Section 10(b)(11) can only occur when a common carrier knowingly and willfully accepts cargo from or transports cargo for the account of an NVOCC that does not have a tariff or a bond.

(BOE Proposed Findings of Fact, Supporting Evidence and Brief (BOE Proposed Findings of Fact) at 29.) Accordingly, the Commission has determined that although Congress amended section 10(b)(11) to prohibit a common carrier from carrying cargo for its newly-defined term "ocean transportation intermediary," Congress did not intend to expand the coverage of section 10(b)(11) to include ocean transportation intermediaries that are ocean freight forwarders. Therefore, if the intermediary with which Tober did business operated as an NVOCC, Tober violated section 10(b)(11). If the intermediary with Tober did business operated as an ocean freight forwarder, Tober did not violate section 10(b)(11).

## **II. HISTORY OF THE INVESTIGATION INTO TOBER'S ACTIVITIES AND RESULTING ORDER OF INVESTIGATION AND HEARING.**

In connection with its enforcement responsibilities under the Act, the Commission "may require a common carrier . . . to file with the Commission a periodical or special report, an account, record, rate, or charge, or a memorandum of facts and transactions related to the business of the carrier." 46 U.S.C. § 40104(a). *See also* 46 C.F.R. § 515.31(g) ("Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its ocean transportation intermediary business, and shall respond promptly to any lawful inquiries by such representative."). By letter dated September 7, 2005, the Commission's Bureau of Enforcement (BOE) contacted Tober with a request for information in regard to ten unlicensed entities the letter stated had done business with Tober. (Tober Group, Inc.'s [Summary Judgment] Statement of Material Facts as to Which There is no Genuine Issue Exhibit B.) The letter stated that the entities had "primarily

arrange[d] for overseas shipment of household goods and/or personal vehicles for individual shippers.” (*Id.*) In response, “Tober provided documentation for five of these companies and informed BOE that it had not handled shipments for the other five companies. It also instructed its staff to cease accepting bookings from any of the 10 companies.” (Tober [Summary Judgment] Facts ¶ 11; Bureau of Enforcement’s Response to Tober Group Inc.’s [Summary Judgment] Statement of Material Facts ¶ 11.)

On May 11, 2006, the Commission issued the Order of Investigation and Hearing (Order) that commenced this proceeding. The Order alleges that Tober violated section 10(b) of the Act. The Order states that Tober:

was incorporated in the State of New York on March 1, 1996. The President and [Qualifying Individual] of Tober is Mr. Yonatan Benhaim. Tober received a license to operate as an ocean freight forwarder (“OFF”) on July 17, 1996. In 1999, Tober applied for and received a license to operate as an NVOCC. Tober is presently active as a licensed and tariffed NVOCC and OFF with a principal place of business at 185 Randolph Street, Brooklyn, New York 11237. Tober maintains an NVOCC bond in the amount of \$75,000 and an OFF bond in the amount of \$50,000. Tober publishes its electronic tariff at [www.dpiusa.com](http://www.dpiusa.com). The single commodity covered by this tariff is “Cargo, N.O.S.” and the tariff has not been updated since its original issue on January 7, 2004. The tariff rate for Tober’s N.O.S. cargo is \$500 per 1,000 kilograms or 1 cubic meter, whichever yields the higher amount.

Based on evidence available to the Commission, it appears that between May 2004 and December 2005, Tober knowingly and willfully accepted cargo from or transported cargo for the account of several OTIs that did not have tariffs and bonds as required by sections 8 and 19 of the Act and the Commission’s regulations at 46 C.F.R. § 515.27. Section 10(b)(2)(A) of the Act states that no common carrier may provide service in the liner trade that is not in accordance with the rates and charges contained in a published tariff. 46 App. U.S.C. § 1709(b)(2)(A). It appears that from at least January 2004, Tober has provided liner service to its shippers that was not in accordance with the \$500 Cargo, N.O.S. rate published in its electronic tariff.

*EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06, Order at 2 (May 11, 2006). The Commission ordered the investigation to determine:

(1) Whether [Tober] violated section 10(b)(11) of the Shipping Act of 1984 and the Commission’s regulations at 46 C.F.R. § 515.27 by knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act;

(2) Whether Respondent Tober violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff.

(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;

(4) Whether, in the event violations are found, appropriate cease and desist orders should be issued; and

(5) Whether, in the event violations are found, such violations constitute grounds for the revocation of [Tober's] OTI license pursuant to 46 C.F.R. § 515.16.

*Id.* at 4. The Commission designated BOE as a party to the proceeding. *Id.* at 5. The Secretary served the Order of Investigation and Hearing on Respondents by certified mail, return receipt requested, and BOE commenced the investigation authorized by the Order and served discovery on Tober.

After completion of discovery, Tober filed a motion for summary judgment on the section 10(b)(11) claim. Tober argued that the intermediaries with which it had done business had not operated as NVOCCs. BOE opposed the motion, contending that two issues of material fact that preclude granting Tober's motion: (1) there is a genuine issue of material fact as to whether the OTIs in question were NVOCCs as defined by the Shipping Act, Regulation and case law; and (2) there is a genuine issue of material fact as to whether Tober knowingly and willfully accepted cargo from the alleged NVOCCs. I granted Tober's motion on the 10(b)(11) claim. *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06 (ALJ June 12, 2008) (Memorandum and Order on Tober Group, Inc.'s Motion to Summary Judgment). On appeal, the Commission found that "there are genuine issues of material fact: were the entities with which Tober did business common carriers and NVOCCs, and did Tober accept cargo knowingly and willfully from these entities? These genuine issues of material fact preclude a grant of summary judgment." *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06, Order at 22 (Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge's Grant of Summary Judgment). The Commission remanded for further proceedings. *Id.* at 23.

On May 22, 2009, BOE filed its Proposed Findings of Fact, Appendix containing the documentary evidence on which it relies for its proposed findings, and Brief. Tober did not file a response to BOE's filings. On September 21, 2009, BOE filed a Motion to Reopen the Proceeding for the Purpose of Receiving Additional Evidence seeking to add evidence regarding Tober's financial status and to make additional arguments regarding the civil penalty that it seeks. Tober has not filed a response to the motion. I granted the motion in a separate order issued today. This proceeding is ripe for decision.

## DISCUSSION

### I. STANDARD OF PROOF.

To prevail in a proceeding brought to enforce the Shipping Act, BOE has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Sea-Land Service Inc. – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872, 889 (2006); *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-719 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994). The Commission then renders the agency decision in the proceeding.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

**II. TOBER DID NOT VIOLATE SECTION 10(b)(11) OF THE SHIPPING ACT OF 1984 AND THE COMMISSION'S REGULATIONS AT 46 C.F.R. § 515.27 BY KNOWINGLY AND WILLFULLY ACCEPTING CARGO FROM OR TRANSPORTING CARGO FOR THE ACCOUNT OF AN OTI THAT DID NOT HAVE A TARIFF AND A BOND AS REQUIRED BY SECTIONS 8 AND 19 OF THE ACT.**

**A. Elements of a Violation of Section 10(b)(11).**

The Commission issued the Order of Investigation and Hearing to determine:

Whether [Tober] violated section 10(b)(11) of the Shipping Act of 1984 and the Commission's regulations at 46 C.F.R. § 515.27 by knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act.

*EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations, FMC No. 06-06, Order at 2-3 (May 11, 2006).* To prove a violation of section 10(b)(11) on one shipment, BOE must prove by a preponderance of the evidence that:

1. Tober operated as a common carrier on the shipment; that is, that Tober:
  - held out to the general public that it provided transportation by water of passengers or cargo between the United States and a foreign country for compensation;
  - assumed responsibility for the transportation by water of the shipment from the port or point of receipt to the port or point of destination; and
  - used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

If the evidence proves that Tober operated as a common carrier on the shipment, then BOE must prove by a preponderance of the evidence that:

2. That Tober knowingly and willfully accepted the shipment from or transported the shipment for the account of an NVOCC that does not have a tariff and a bond, insurance, or other surety as required by sections 8 and 19 of the Shipping Act; that is, that the entity with which Tober did business:
  - did not have a tariff and a bond, insurance, or other surety pursuant to sections 8 and 19 of the Shipping Act;

- operated as an NVOCC on the shipment by:
  - holding out to the general public that it provided transportation by water of passengers or cargo between the United States and a foreign country for compensation;
  - assuming responsibility for the transportation by water of the shipment from the port or point of receipt to the port or point of destination; and
  - using, for all or part of that transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; and
- Tober knowingly and willfully accepted the shipment from or transported the shipment for the account of the entity.

If there is a failure of proof on any element regarding the shipment, then Tober did not violate section 10(b)(11) on that shipment.

BOE contends that

[t]he Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (1999); *Tariff Filing Practices, Etc., of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (1965) (*Containerships*)]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.* The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., et al.*, 29 S.R.R. 119, 162 (FMC 2001).

(BOE Proposed Findings of Fact at 30.)

To support a conclusion that an entity operated as an NVOCC, the Act and Commission precedent require that the evidence demonstrate that the OTI meets the first element of the common carrier definition; that is, that it “[held] 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,”

46 U.S.C. § 40102(6)(A)(i) (definition of common carrier); *Rose Int'l*, 29 S.R.R. at 162. *See Landstar*, 569 F.3d at 497. (NVOCC must assume responsibility for transportation).

No matter how loudly and clearly an OTI holds itself out as an NVOCC, however, it is not necessarily an NVOCC on every shipment in which it is involved. For instance, an intermediary licensed by the Commission as both an NVOCC and an ocean freight forwarder is always holding itself out to accept cargo from whoever offers to the extent of its ability to carry. If the fact that the intermediary was “holding out” as a common carrier is conclusive (or even probative) in determining whether the intermediary assumed responsibility for the transportation of a particular shipment, the intermediary’s status as an NVOCC would swallow its status as an ocean freight forwarder and it would always be acting as an NVOCC. Therefore, as essential as the “holding out” element may be to support a conclusion that an intermediary is an NVOCC on a particular shipment, it is equally essential for the evidence to demonstrate that the intermediary assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination. 46 U.S.C. § 40102(6)(A)(ii).

In [*Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 250 (1961)], the Federal Maritime Board noted that an entity may be considered a common carrier even if it attempts to disclaim liability because liability may be imposed by operation of law. 6 F.M.B. at 256. However, “[a]ctual liability as a common carrier over the entire journey including the water portion is essential” to determine NVOCC status. *Id.* Although the Commission has not focused on this aspect of common carrier status, favoring the “holding out” analysis, it remains an essential element of the “common carrier” definition in the Shipping Act. 46 U.S.C. § 40102(6)(A)(ii)

*In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries - Petition for Declaratory Order*, 31 S.R.R. 185, 199 (2008) (Dye, Comm’r, dissenting). If the evidence does not support a conclusion that the intermediary held itself out to the general public as a carrier AND assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination AND used, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, then the intermediary cannot have been operating as an NVOCC on that shipment. *See Landstar*, 569 F.3d at 497 (“a person or entity that provides NVOCC services falls within the ambit of § 19 only when it ‘holds itself out to the general public to provide transportation’ and ‘assumes responsibility for the transportation’”). To answer this question, it is necessary to examine the intermediary’s conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (1991). *See also Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 (1996) (*Low Cost Shipping*) (intermediary found to be operating as an NVOCC on some shipments and ocean freight forwarder on other shipments).

BOE contends that:

With regard to the requirement that an NVOCC assume responsibility for transportation of cargo in U.S. foreign commerce, the Commission has held that the issuance of a bill of lading is not required in order to find that an entity has assumed responsibility for the transportation and is a common carrier. “[A] common carrier [does not] lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment.” *Containerships* at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950).

(BOE Proposed Findings of Fact at 31 (footnote omitted).) Although issuance of a document called a bill of lading may not be required to establish a contract of carriage, it is essential that the evidence establish all three elements of the common carriage definition: holding out, assumption of responsibility for the transportation by water of the goods, and use of a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

BOE argues that it is not necessary to examine the evidence of each shipment to determine whether both Tober and the intermediary operated as NVOCCs on the shipment.

While findings and conclusions are mandated by the APA, the APA does not require detailed findings on every subsidiary evidentiary fact (unlike the Federal Rules of Civil Procedure). *St. Johnsbury Trucking Company, Inc. v. U.S.*,<sup>[1]</sup> 326 F. Supp. 938, 941 (D.C. Vt. 1971). Each and every item of evidence brought before the ALJ does not need to be analyzed in a supported decision. *Union Mechling Corp. v. U.S.*, 390 F. Supp. 411 (W.D. Pa. 1974) (ICC reviewed request for relief based on the failure to complete an item by item analysis and denied relief because the substantial evidence, without an item by item analysis, supported the conclusion.) “There is no requirement that the Commission furnish an analysis of each and every item of evidence brought before the Administrative Law Judge....As long as the Commission’s findings are expressed with sufficient particularity to inform the court and the parties of the basis of its decision, the I.C.C. has fulfilled its statutory purpose. *Id.* at 419-420. To satisfy the APA, the agency must clearly state the factual basis and the conclusions must have a rational basis in those facts.

Consistent with the cases cited above, it is BOE’s position that the requirements of the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach [*sic*] that is required in all situations. The end result of requiring such documentation to demonstrate unlawful conduct would be to encourage future respondents to operate with limited or no documentation, withhold or destroy compromising documentation and information and refuse to cooperate with Commission investigations, thereby thwarting enforcement actions under the Shipping Act. A finding can properly be made that Tober provided service to

unbonded and untariffed NVOCCs and therefore violated Section 10(b)(11) of the Shipping Act without analyzing evidence on a shipment by shipment basis and without developing detailed findings on every subsidiary evidentiary fact. Under the APA, it is appropriate to make a finding that Tober provided service to unbonded, untariffed NVOCCs and note the activities that support that finding.

Agencies may make inferences based on human experience and agency expertise. The direct evidence in this case along with inferences to be drawn, supports a determination that Tober provided service to unbonded, untariffed NVOCCs. Based on the case law cited above, it is appropriate to take available evidence for shipments as well as testimony from Commission staff and two unbonded, untariffed NVOCCs with whom Tober did business and infer that Tober generally conducted itself in a similar way.

(BOE Proposed Findings of Fact at 27-28 (footnotes omitted).)

To support its contention that requirements of the APA can be satisfied without analyzing each shipment, BOE cites to cases (*St. Johnsbury Trucking Company, Inc.* and *Union Mechling Corp.*) discussing the requirements that an agency decision must meet in order to satisfy APA requirements. These cases are inapposite to the question of whether the elements of a violation must be proven for each shipment alleged to be a violation.

BOE contends that the particular facts about each shipment are “subsidiary” and that “the APA can be satisfied without analyzing each shipment and annotating to each finding the evidence supporting that finding. While utilizing a shipment-by-shipment analysis may be appropriate in a particular situation, it is not an approach [*sic*] that is *required* in all situations.” BOE Proposed Findings of Fact at 28 (emphasis in original.) “Based on case law cited above, it is appropriate to take available evidence for shipments as well as testimony from Commission staff and two unbonded, untariffed NVOCCs with whom Tober did business and infer that Tober generally conducted itself in a similar way.” (*Id.*) BOE does not attempt to reconcile this contention with its contention that “the Commission must evaluate the indicia of common carriage on a case-by-case basis.” (BOE Proposed Findings of Fact at 30.)

Although BOE may be correct in its assertion that “utilizing a shipment-by-shipment analysis . . . is not an approach[] that is required in all situations,” it is the function of the presiding officer, not the litigant, to determine the approach to use for the initial decision in a particular case. The APA and Commission precedent cited by BOE clearly demonstrate that utilizing a shipment-by-shipment analysis is appropriate in this proceeding. *See, e.g., Refrigerated Container Carriers Pty. Ltd., – Possible Violation of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 801-802 (ALJ 1999) (finding facts regarding individual alleged violations); *Comm-Sino Ltd. Possible Violations of Section 10(a)(1) and 10(b)(1)*, 27 S.R.R. 1201, 1205-1206, Appendix A, Appendix B (I.D. 1997) (same).

BOE submitted as evidence the shipping documents and other information about 278 separate shipments and claims that Tober violated section 10(b)(11) on each shipment. The elements of proof of a violation of section 10(b)(11) do not change from the first violation to the 278th violation. The fact that Tober operated as a common carrier on one shipment does not mean that it operated as a common carrier on another shipment. While evidence of how Tober operated on some shipments may provide circumstantial evidence of how Tober operated on other shipments, the evidence for each shipment must prove that Tober assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination, and used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

The intermediaries are separate entities. The operation of each intermediary with which Tober conducted business must be examined separately to determine whether the intermediary operated as an NVOCC. The evidence of how one intermediary conducted its operations has no probative value with regard to how other intermediaries conducted their operations. The Commission cannot base a finding on how one intermediary held itself out to the general public on the evidence of how another intermediary advertised on the Internet. BOE must prove by a preponderance of the evidence that each intermediary held 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.

BOE also must prove for each shipment that the intermediary assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination and used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. The manner in which one intermediary operated is not probative of the manner in which any other intermediary operated, and the manner in which an intermediary operated on one shipment is not necessarily probative of how it operated on other shipments. BOE must prove by a preponderance of the evidence that each intermediary operated as an NVOCC on each shipment for which BOE claims Tober violated section 10(b)(11).

BOE contends that:

the Commission must evaluate the indicia of common carriage on a case-by-case basis. [*Containerships*.] The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., et al.*, 29 S.R.R. 119, 162 (FMC 2001).

(BOE Proposed Findings of Fact at 30, citing *Containerships*.) BOE does not evaluate these indicia for the intermediaries, however, and demonstrate how they support a finding that the intermediaries operated as NVOCCs.

**B. Tober Operated as a Common Carrier on 278 Shipments in Which Intermediaries Were Involved.**

As set forth in greater detail in the findings of fact and conclusions of law, the shipments in which Tober and the intermediaries were involved proceeded substantially as follows:

- A proprietary shipper wanting to ship goods overseas contacted an intermediary.
- The intermediary obtained information from the proprietary shipper regarding amount of goods to be shipped, time frame for the shipment, and destination.
- The intermediary provided the information about the shipment to Tober.
- Tober provided a quote for its services to the intermediary.
- Tober issued bills of lading identifying the proprietary shippers or the proprietary shippers c/o the intermediaries as the shipper. By issuing the bills, Tober 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 operated as a common carrier on the shipments.
- Tober issued invoices for the shipments to the intermediaries. Invoicing the intermediary for the payment does not mean that the intermediary operated as an NVOCC. In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost “was responsible for payment of the ocean freight” was a factor indicating “Respondents acted as ocean freight forwarders.” *Low Cost Shipping*, 27 S.R.R. at 687. See also 46 C.F.R. § 515.2(i)(11) (“freight forwarding services includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments”).
- Tober issued pickup/delivery orders for the goods. In some cases, the pickup/delivery orders were issued directly to the proprietary shippers at their addresses, e.g., BOE App. pp. 1456,<sup>3</sup> and on other occasions to the proprietary shipper c/o the intermediary. E.g., BOE App. pp. 1052.

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<sup>3</sup> “BOE App. p.” followed by a number refers to a particular page in BOE’s Appendix filed May 22, 2009.

- Tober issued Warehouse Receipts for the goods. In some cases, the Warehouse Receipts were issued directly to the proprietary shippers at their addresses, *e.g.*, BOE App. pp. 1456, and on other occasions to the proprietary shipper c/o the intermediary. *E.g.*, BOE App. pp. 1052.
  - Tober secured insurance for some shippers.
1. **Tober held out to the general public that it provided transportation by water of passengers or cargo between the United States and a foreign country for compensation.**

The Commission licensed Tober as an NVOCC on May 1, 1999. (BOE App. p. 3.) The record suggests that the Commission reissued this license on December 31, 2003. (BOE App. p. 5 (OTI License 12/31/2003).) The Commission revoked Tober's license as an NVOCC on January 15, 2009. (*Id.*, (NVO Revocation 01/15/2009).) During the period in which it was licensed as an NVOCC, Tober held out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation. The shipments at issue in this proceeding occurred in 2004 through 2007. Therefore, BOE has proven by a preponderance of the evidence that Tober held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation during the period in which the shipments at issue took place. 46 U.S.C. § 40102(6)(A)(i).

2. **Tober assumed responsibility for the transportation by water from the port or point of receipt to the port or point of destination of 278 shipments in which intermediaries were involved.**

“A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.” *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004). *See also Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000) (“If anything happens to the goods during the voyage the [common carrier] is liable to the shipper because of the bill of lading that it issued.”); *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-456 (S.D.N.Y. 2005) (the bill of lading is the [common carrier's] contract with the shipper).

The record contains bills of lading or other shipping documents supporting a finding that Tober issued bills of lading for 278 shipments. Each bill of lading identifies the proprietary shipper or the proprietary shipper c/o the intermediary as the shipper. On most of the bills of lading, the shipper's address appears to be the home address of the proprietary shipper. Each bill of lading identifies a vessel that would carry the goods described in the bill of lading, a port of loading in the United States, and a port of discharge in a foreign country. By issuing the bills of lading identifying the proprietary shippers or the proprietary shippers c/o the intermediaries as the shipper, Tober 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)(A)(ii).

The record does not contain Tober bills of lading for four shipments but does contain Tober invoices for those shipments. The invoices indicate that Tober billed ocean freight for shipments that originated in the United States with a destination in a foreign country. I conclude from those invoices, the other documents in the record concerning those shipments, and Tober's operating practices that Tober issued bills of lading for those shipment, thereby assuming responsibility for the transportation of the shipments from the United States to the foreign country. (*See All in One Shipping* (Somia Azam and Antoine Pierrat/Jacqueline Giotti shipments); *Around the World Shipping* (Karen Inglemeyer shipment); *Tran Logistic Group* (Jonathan Waage shipment).)

BOE relies on the deposition testimony of Tober's president that "Tober did not consider the owner of the cargo to be its customer" to support its contention that Tober did not have a relationship with the proprietary shippers (BOE Proposed Findings of Fact at 35. *See also* BOE Proposed Findings of Fact ¶ 48 ("Tober considered the entities their customers and only attempted to collect amounts due from the entities, not the owner of the cargo. For example, an e-mail from Tober states "The only way we can take over the customers is by getting paid directly by each customer." (emphasis added) (BOE App. 8, Deposition of Yoni Benhaim, P. 51, Line 13 to P. 52, Line 18; BOE App. 9, Deposition of Steve Schneider, P. 45, Line 5 to Line 21; BOE App. 31, P. 001479)) and ¶ 49 ("Tober had no relationship with the actual owner of the cargo. (BOE App. 8, Deposition of Yoni Benhaim, P. 53, Line 19 to P. 54, Line 7)).")

"[A]n NVOCC's conduct rather than what it calls itself determines its status." *Bonding of Non-Vessel-Operating Common Carriers; Interim Rule*, 56 Fed. Reg. 1493, 1493-94 (Jan. 15, 1991). *Rose Int'l, Inc.*, 29 S.R.R. at 171 ("[A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations." *Containerships*, 9 F.M.C. at 64 (citing *Bernhard Uhlmann*, 3 F.M.B. at 775)). Despite Tober's claims that the proprietary shippers were not its customers, based on the information provided to it by the intermediaries, Tober chose to accept business from the intermediaries, followed the intermediaries' instructions, issued bills of lading identifying the proprietary shippers as the shippers, and ultimately was paid (if paid) by funds that came from the proprietary shippers. Other evidence in the record further establishes that despite Tober's president's testimony, Tober had a relationship with the proprietary shippers:

- Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton).
- Tran Logistic Group issued letters to proprietary shippers identifying Tober as their his international carrier. BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady).

- Tran Logistic Group email to Tober stating: “The Client [proprietary shipper] is the shipper. TLG is only your Company Broker, accordingly only the Client must be placed on your Bill of Lading as the shipper.” BOE App. pp. 1291 (Philip Poettinger); 1297 (Richard Roberts); 1315 (Adrian Stoppe).

Tober assumed responsibility to the proprietary shippers for the transportation of the shipments from the port or point of receipt to the port or point of destination for each of the shipments.

**3. Tober used for all or part of the transportation a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country on 278 shipments in which intermediaries were involved.**

The bills of lading issued by Tober prove by a preponderance of the evidence that each shipment was carried by a vessel from a port in the United States and a port in a foreign country.

BOE has proven by a preponderance of the evidence that Tober operated as a common carrier on each of the 278 shipments.

**4. The intermediaries operated as ocean freight forwarders on the shipments.**

“The term ‘ocean freight forwarder’ means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “*Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier.” 46 C.F.R. § 515.2(i).

BOE contends that “there is no credible evidence in the record that would support a finding that the entities served by Tober were operating as ocean freight forwarders,” (BOE Proposed Findings of Fact at 31), and that “[t]he shippers were not aware of Tober’s involvement with their shipment nor did Tober have any involvement with the actual shippers.” BOE Proposed Findings of Fact at 35.) The evidence does not support either of BOE’s contentions.

The bills of lading that Tober issued to the proprietary shippers constitute the most prominent evidence that the intermediaries operated as ocean freight forwarders. On each of the 278 shipments for which there is evidence in the record, the intermediaries operated as ocean freight forwarders. Each proprietary shippers contacted an intermediary. The intermediaries contacted Tober and provided the relevant information for the shipments: the identity of the proprietary shipper; the size of the shipment; the location of the goods; the destination. Tober followed the instructions from the intermediaries and issued a bill of lading identifying the proprietary shipper as the shipper. The

evidence supports a finding that Tober knew that it was issuing bills of lading for goods belonging to the proprietary shippers, not the intermediaries, and that the proprietary shippers were paying for the transportation.

Tober incurred obligations to the members of the shipping public whom they identified as shippers on their bills of lading. BOE's position that despite these bills of lading, "Tober had no relationship with the actual owner of the cargo" would leave proprietary shippers who have had the misfortune to use an intermediary that did not have a bond without a remedy against the common carrier that issued the bill of lading and assumed responsibility for the transportation by water of the goods. BOE contends that because the intermediaries operated in violation of the Shipping Act and Tober can avoid its obligations and, equally important, that Tober's bond would not be available to satisfy reparations for actual injury suffered by the proprietary shippers because of violations of the Shipping Act committed by Tober. This contention arrives at an absurd or unreasonable result and contravenes the Congressional purpose of protecting the shipping public. *See In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Unlicensed Ocean Transportation Intermediaries – Petition for Declaratory Order*, 31 S.R.R. at 191 (quoting *United States v. American Trucking Association*, 310 U.S. 534, 542-543 (1940)).

Evidence in the record also supports a finding that shippers were aware of Tober's involvement with their shipments.

- Proprietary shippers signed Lehigh authorizations for Tober to use passport and/or Social Security numbers for export formalities. BOE App. pp. 739 (Charles Webb); 745 (Philippe Lacquehay); 777 (Antoine de Thoury); 780 (Barbara Hesse); 801 (Jamie L. Hack).
- All In One Shipping sent fax sheets to shippers stating "We would also like to inform you that all of our [sic] NVOCC carriers are [sic] licensed by the FMC." BOE App. pp. 1501, 1522, 1537, 1556, 1573 *See also* BOE App. pp. 1529 ("We are proud to inform you that all of our [sic] carriers are licensed by the FMC.")
- Proprietary shipper Jonathan Waage sent an email to Yoram of Tober with information for the shipment. BOE App. p. 1196
- Tober secured insurance as the agent for the assured proprietary shipper: BOE App. pp. 1195 (Waage); 1208 (Moreton Kim); 1232, 1233 (Britton, Jeff); 1246 (Deborah Burgess); 1259-1260 (Alan & Rebecca Richardson); 1311 (Adrian Stoppe);
- Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton);

- Tran Logistic Group issued a letter to proprietary shippers identifying Tober as the international carrier. BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady)

The intermediaries performed all of the services necessary to dispatch these shipments from the United States via Tober, a common carrier, and booked or otherwise arranged space for each shipment on behalf of proprietary shipper, and processed the documentation or performed related activities incident to each shipment. 46 U.S.C. § 40102(18). The intermediaries operated as ocean freight forwarders on the shipments.

**C. BOE has not Demonstrated by a Preponderance of the Evidence that the Intermediaries Operated as NVOCCs on the Shipments.**

To prove a violation of section 10(b)(11) on a shipment, BOE has the burden of establishing by a preponderance of the evidence that the intermediary operated as an NVOCC on that shipment. Therefore, BOE must prove that the intermediary: held itself out to the general public that it provided transportation by water of cargo between the United States and a foreign country for compensation; assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination; and used, for all or part of that transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. *See Landstar*, 569 F.3d at 497. (NVOCC must hold out to the general public and assume responsibility for transportation). As discussed above, each shipment used for all or part of the transportation a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. BOE has proven by a preponderance of the evidence that some, but not all, of the intermediaries advertised in a manner that supports a finding that they held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. BOE has not proven by a preponderance of the evidence that the intermediaries assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination.

**1. Some, but not all, of the intermediaries held themselves out to the general public that they provided transportation by water of cargo between the United States and a foreign country for compensation.**

BOE contends that:

The ability to solicit business via the internet appears to have contributed to an increase in the number of unlicensed, unbonded and untariffed companies offering non-vessel-operating common carrier (“NVOCC”) services. These NVOCCs primarily solicit business from individual consumers by means of sophisticated websites advertising themselves as international moving companies and describing the services they provide.

(BOE Proposed Findings of Fact at 24.) BOE states that “each of the entities . . . advertised on the Internet offering origin to destination carrier services.” (BOE Proposed Findings of Fact at 35.) BOE contends that “[w]ith regard to the ‘holding out’ portion of the definition of NVOCC, it has long been recognized that ‘a common carrier by a *course of conduct* holds himself out to accept goods from whomever offered to the extent of his ability to carry...’ (emphasis added). *Containerships, Inc.* at 62.” (BOE Proposed Findings of Fact at 30.) Other than the Internet advertising described below, BOE does not identify any specific facts and provide their location in the record that BOE contends would support a finding that through their course of conduct, the intermediaries held themselves out to the general public as NVOCCs. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) (parties must designate specific facts and provide the court with their location in the record).

While most of the intermediaries may have advertised on the Internet, the content of the advertisements for the intermediaries that is in the record differed greatly. BOE did not submit as evidence web site pages setting forth the advertising for five intermediaries.

BOE contends that intermediary All in One Shipping (AIOS) “maintained a website where NVOCC services were advertised and customers were solicited. On the website, AIOS offered to perform ocean transportation service, in particular, full service door to port, door to door and port to port moves of household goods.” (BOE Proposed Findings of Fact ¶ 19.) AIOS’s website stated that it was “an international shipping company” that “work[ed] in tandem with reputable international moving companies worldwide in order to provide a smooth move to your final destination” (BOE App. p 1490) and that it provided “full service door to door moves as well as port to port moves.” (BOE App. p 1492.) AIOS’s advertising would support a finding that AIOS held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).

BOE contends that intermediary Around the World Shipping (ATWS) “maintained a website where NVOCC services were advertised and customers were solicited. On the website, ATWS offered to perform ocean transportation service, in particular full service door to port, door to door and port to port moves of household goods.” (BOE Proposed Findings of Fact ¶ 26.) ATWS advertised on the Internet that it provided “international and moving’s [*sic*] services for corporate, government, and individuals.” (BOE App. p. 1578.) ATWS held out to provide common carrier service to household goods shippers through a website advertising its NVOCC services, particularly its “full service door to port, door to door and port to port moves of household goods.” ([BOE App. p. 1578]). ATWS also solicited customers “through a lead provider (to whom ATWS paid a fee) who received inquiries from shippers on the Worldwide web searching for international movers.” ([BOE App. p. 36]). ATWS’s advertising would support a finding that ATWS held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).

BOE contends that “[a] review of Infinity Moving’s website on October 26, 2006, shows that they held themselves out to provide international relocation services and also indicated that all claims would be settled directly with Infinity Moving.” (BOE Proposed Findings of Fact at 7, relying on BOE App. p. 78.) Infinity advertised on the Internet that it “[took] care of all the *arrangements* for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee’s new home.” (BOE App. p. 78 (emphasis added).) Ocean freight forwarders take care of “arrange[ing] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A). When an intermediary (licensed or unlicensed) advertises that it performs the ocean freight forwarder function of arranging for ocean transportation, it is not holding out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, but that it *arranges* those shipments. Infinity’s advertising does not support a finding that Infinity held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).

BOE contends that “[a] review of Tradewind Consulting, Inc.’s website in September 2005 shows that they described themselves as a consulting firm rather than an international shipping company.” (BOE Proposed Findings of Fact at 17, relying on BOE App. p 1116.) Tradewind advertised on the Internet that it “is a consulting firm. We are not classified as an international shipping company. Instead, we prefer to think of ourselves as personalized travel consultants. Tradewind Consulting organizes your services, negotiates with vendors and books your move with licensed moving, shipping and delivery agents worldwide.” (BOE App. p 1116.) Tradewind advertised to potential customers that it did not provide the transportation, but “organize[d] your services.” “Organize” is defined as “to arrange or constitute into a coherent unity in which each part has a special function or relation.” Webster’s Third New International Dictionary (unabridged) 1590 (1993). By advertising that it organizes services, Tradewind advertised that it “arranges space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A). Tradewind’s advertising does not support a finding that Tradewind held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).

BOE contends that “[a] review of EOM[ Shipping Inc.’s] website in November 2006 showed that EOM advertised its services as international relocation experts and, although they called themselves a moving broker, provided door to door service to its customers, including destination services. . . . A review of EOM’s website in June 2007 indicated that EOM was continuing to hold out to provide transportation of personal effects and household goods.” (BOE Proposed Findings of Fact at 4, relying on BOE App. p. 803.) (BOE App. 2, ¶ 3; BOE App. 15). EOM advertised on the Internet that it was “a full-service international moving broker providing door to door service ? ? ? . We use the best companies for deliveries all over the world including ocean transportation

?? ? by the FMC.” (BOE App. p. 803.)<sup>4</sup> Neither the statute nor the Commission’s regulations define the term “moving broker.” EOM’s advertisement supports a finding that EOM held 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. 46 U.S.C. § 40102(6)(A)(i).

BOE contends that Lehigh Moving and Storage, Inc., advertised on the Internet that it was “an international and domestic shipping carrier” and provided “international shipping from origin to destination,” (BOE App. p. 626.) Lehigh’s advertisement supports a finding that Lehigh held 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. 46 U.S.C. § 40102(6)(A)(i).

Worldwide Relocations advertised on the Internet that it was “an international moving company” that worked “in tandem with our domestic moving agents as well as our international agents . . . to govern your services from origin to destination,” and described “Port to port” and “door to door” moves. (BOE App. p 1336-1339.) Worldwide Relocations’s advertisement supports a finding that Worldwide Relocations held 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. 46 U.S.C. § 40102(6)(A)(i).

Sea and Air International, Inc., advertised that it “offers residential and commercial relocation solutions to almost any destination in the world by ship, truck, train and airplane” and that its solutions include “[d]oor-to-door home & office relocation” and “[o]ffering all risk insurance.” BOE App. p. 1396. Sea and Air’s advertisement supports a finding that Sea and Air held 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. 46 U.S.C. § 40102(6)(A)(i).

Car-Go-Ship.com advertised that it provided “[s]ervices for Domestic Auto Transport & International Car Shipping. . . . Multiple unit International Car Shipping via Containership & Oversized Vehicle Shipping to all points Worldwide. Let Car-GO-Ship.com be your logistics solution with unsurpassed rates and service guaranteed.” BOE App. p. 1011.) Car-Go-Ship.com’s advertisements support a finding that Car-Go-Ship.com held 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. 46 U.S.C. § 40102(6)(A)(i).

Access International Transport and AVL Atlanta Transport each advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service,” (BOE App. p. 1032, 1038), and that it provides “international shipment from origin to destination.” (BOE App. p. 1034, 1040.) Access International Transport and AVL Atlanta Transport’s

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<sup>4</sup> As with several documents in BOE’s Appendix printed from the Internet, this document is not complete, as the right side of the page is missing. An unknown number of words are missing after “door to door service” and between “transportation” and “by the FMC.”

advertisements support a finding that Access International Transport and AVL Atlanta Transport held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

Although BOE contends that “each of the entities . . . advertised on the Internet offering origin to destination carrier services,” (BOE Proposed Findings of Fact at 35), BOE does not include any advertising or designate any specific facts and provide their location in the record that BOE contends would support a finding that Moving Services, Inc. (BOE Proposed Findings of Fact ¶ 34), Orion Consulting, LLC (BOE Proposed Findings of Fact ¶ 35), Echo Trans World, Inc. (BOE Proposed Findings of Fact ¶ 38), Tran Logistic Group, Inc. (IntlMove, Inc.) (BOE Proposed Findings of Fact ¶ 41), or Avi Moving (BOE Proposed Findings of Fact ¶ 42) held themselves out to the general public as NVOCCs. The investigators who conducted the investigations do not set forth any evidence that would support a finding that they claims of allegations of how BOE contends that these five intermediaries held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. (BOE App. pp. 7-25.) Parties must designate specific facts and provide the court with their location in the record. *See Orr v. Bank of Am., NT & SA*, 285 F.3d at 775. Therefore, BOE has not established by a preponderance of the evidence that Moving Services, Inc., Orion Consulting, LLC, Echo Trans World, Inc., Tran Logistic Group, Inc. (IntlMove, Inc.), or Avi Moving held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.

BOE has proven by a preponderance of the evidence that intermediaries All in One Shipping, Around the World Shipping, EOM Shipping Inc., Lehigh Moving and Storage, Inc., Worldwide Relocations, Sea and Air International, Inc., Car-Go-Ship.com, and Access International Transport and AVL Atlanta Transport advertised in a manner that supports a finding that they held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i). BOE has not proven by a preponderance of the evidence that intermediaries Infinity Moving, Tradewind Consulting, Inc., Moving Services, Inc., Orion Consulting, LLC, Echo Trans World, Inc., Tran Logistic Group, Inc. (IntlMove, Inc.), or Avi Moving held themselves out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).

2. **BOE has not established by a preponderance of the evidence that the unlicensed intermediaries assumed responsibility for the transportation by water of the shipments from the port or point of receipt to the port or point of destination.**

BOE contends that the intermediaries “assumed responsibility for the transportation of the goods from the port or point of receipt to the port or point of destination for that shipment.” (BOE Proposed Findings of Fact at 31.) In its brief, BOE focuses first on the activities of two intermediaries with which Tober was involved, All in One Shipping and Around the World

Shipping. In addition to the shipping document in the record, BOE includes affidavits by the principals of AIOS and ATWS purporting to describe the activities of their respective companies.

With regard to AIOS, BOE contends:

AIOS operated as an NVOCC from November 2004 to January 2006 with [Josh] Morales as its sole officer. . . . After being contacted by a potential customer, Mr. Morales would obtain quotes from several common carriers, including quotes from destination agents if door service was required, and would provide an all-in quote, including markup, to the customer. If the quote was accepted, AIOS would invoice the customer and the customer would pay AIOS directly. AIOS, in turn, would pay the ocean carrier or NVOCC. AIOS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased. At destination, the cargo would not be released by the ocean carrier or NVOCC until AIOS paid all charges. ([BOE App. pp. 32-33]).

AIOS's shipments with Tober were conducted in the same manner; that is, AIOS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to AIOS and, in turn, AIOS would make the arrangements with Tober and receive and pay Tober's invoice. Tober considered AIOS to be its customer and had no relationship with the actual shippers. ([BOE App. pp. 53-54]). Shippers looked to AIOS for the safe delivery of their goods and AIOS assumed responsibility for carriage and delivery of no less than 11 shipments. As Mr. Morales attested:

Our customers contracted with us to transport their goods and looked to us for the safe arrival of their goods. All In One Shipping, Inc. assumed responsibility for delivery of the shipment to the promised destination. ([BOE App. p. 33]).

(BOE Proposed Findings of Fact at 32.) BOE relies on the affidavit of Josh Morales, AIOS's principal (BOE App. pp. 32-35), and the deposition testimony of Yonatan Benhaim, the president of Tober (BOE App. pp. 53-54), for these contentions.

As BOE recognizes, "an intermediary's conduct, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. at 1684. Tober, following AIOS's instructions, issued ten bills of lading identifying the proprietary shippers or the proprietary shippers c/o AIOS as the shippers. By issuing the bills of lading, Tober established a contract for carriage with the proprietary shippers and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. BOE does not cite any Commission authority holding that identifying the shipper as the proprietary shipper c/o the intermediary means that the intermediary has assumed responsibility for the transportation of the goods. AIOS dispatched the shipments and booked or

otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18).

BOE contends that "AIOS would make the arrangements with Tober." Ocean freight forwarders "arrange[] space for . . . shipments on behalf of shippers." 46 U.S.C. § 40102(18)(A).

BOE contends that "AIOS would invoice the customer and the customer would pay AIOS directly. AIOS, in turn, would pay the ocean carrier or NVOCC." The definition of "freight forwarding services" includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments." 46 C.F.R. § 515.2(i)(11). In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost "was responsible for payment of the ocean freight" was a factor indicating "Respondents acted as ocean freight forwarders." *Low Cost Shipping*, 27 S.R.R. at 687. Therefore, the fact that the proprietary shippers' payments went through AIOS on the way to Tober does not mean that AIOS operated as an NVOCC. BOE does not cite any Commission authority holding (or explain why) an intermediary that obtains a quote from an NVOCC, then marks up the ocean freight and invoices the increased rate in its own name would be considered an NVOCC. Assuming the Shipping Act does not permit an ocean freight forwarder to mark up the ocean freight and then invoice the increased rate in its own name, BOE does not explain why marking up the ocean freight and then invoicing the increased rate in its own name in violation of the Act means that the intermediary has assumed responsibility for the transportation by water of the goods.

BOE contends that "AIOS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased." The definition of "freight forwarding services" includes "preparing or processing delivery orders or dock receipts," 46 C.F.R. § 515.2(i)(4), "arranging for cargo insurance," 46 C.F.R. § 515.2(i)(8), and "preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required." 46 C.F.R. § 515.2(i)(10).

BOE contends that "[a]t destination, the cargo would not be released by the ocean carrier or NVOCC until AIOS paid all charges." As stated above, the definition of "freight forwarding services" includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments." 46 C.F.R. § 515.2(i)(11). BOE does not cite any Commission authority holding that if the intermediary mishandles the money advanced by the shipper or delays forwarding the proprietary shipper's payment to the common carrier, the intermediary has assumed responsibility for the transportation by water of the goods.

In addition to the bills of lading, Tober had other direct contacts with the proprietary shippers on the shipments in which AIOS was involved. Tober issued pickup/delivery orders directly to proprietary shippers. (BOE App. pp. 1506 (Fraser Henderson); 1513 (Diane O'Connor); 1518 (Rachel Kupferberg); 1554 (John Burk); 1567 (Christian Scheidler).) Tober issued Warehouse Receipts directly to proprietary shippers. (BOE App. pp. 1512 (Diane O'Connor); 1570 (Christian

Scheidler.) AIOS sent notices to proprietary shippers stating, "We would also like to inform you that all of our [sic] NVOCC carriers are [sic] licensed by the FMC." (BOE App. pp. 1501 (Sam Barbour); 1522 (Rachel Kupferberg); 1537 (Somia Azam); 1556 (John Burk); 1573 (Vanessa Pierrat). See also BOE App. pp. 1529 (Diane O'Connor) ("We are proud to inform you that all of our [sic] carriers are licensed by the FMC.").)

AIOS dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, AIOS operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the AIOS shipments.

With regard to ATWS, BOE contends:

The factual situation with respect to ATWS is nearly identical to that of AIOS, based on the affidavit of Daniel E. Cuadrado, the corroborating testimony of [Commission Area Representative] Margolis, and the documents of ATWS and Tober. Mr. Cuadrado was the sole officer of ATWS and was responsible for its operations as an NVOCC from May to September 2005. . . .

After being contacted by a potential customer, Mr. Cuadrado would obtain quotes from several common carriers, including quotes from destination agents if door service was required; would provide an all-in quote to the customer; would invoice the customer, if the quote was accepted; and the customer would pay [ATWS] directly. In turn, ATWS would pay the carrying NVOCC or ocean common carrier. ATWS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased. The cargo would not be released at destination by the ocean carrier or NVOCC until ATWS paid all charges. ([BOE App. p. 37]). ATWS' shipments with Tober were conducted in the same manner; that is, ATWS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to ATWS and, in turn, ATWS would make the arrangements with Tober and receive and pay Tober's invoice. ([BOE App. p. 37-38]). Tober considered ATWS to be their customer and had no relationship with the actual shippers. ([BOE App. pp. 53-54]). The actual shippers looked to ATWS for the carriage and delivery of their goods and ATWS assumed responsibility for the delivery of at least nine shipments. Mr. Cuadrado attested:

Our customers contracted with us to transport their goods and looked to us for the safe arrival of their goods. [Around the World] Shipping, Inc. assumed responsibility for delivery of the shipment to the promised destination. ([BOE App. p. 37]).

(BOE Proposed Findings of Fact at 33.) BOE relies on the affidavit of Daniel Cuadrado, ATWS's principal (BOE App. pp. 36-39) (substantially identical to Morales's affidavit), and the deposition testimony of Yonatan Benhaim, the president of Tober (BOE App. pp. 53-54), for these contentions.

As with AIOS, although Tober's president testified that it had no relationship with the actual shippers and ATWS's principal stated that the proprietary shippers contracted with ATWS to transport the goods, the shipping documents tell a different story. Tober, following ATWS's instructions, issued eight bills of lading identifying the proprietary shippers as the shippers. By issuing the bills of lading, Tober established a contract for carriage with the proprietary shippers and assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. ATWS dispatched the shipments and booked or otherwise arranged space for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18).

BOE contends that "ATWS would obtain a quote from Tober; if the quote, after markup, was acceptable, the shipper would make payment to ATWS and, in turn, ATWS would make the arrangements with Tober and receive and pay Tober's invoice." Ocean freight forwarders "arrange[] space for . . . shipments on behalf of shippers." 46 U.S.C. § 40102(18)(A).

Tober issued invoices to ATWS for all eight shipments in which ATWS was involved. Invoicing ATWS for the payment does not mean that ATWS operated as an NVOCC. In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost "was responsible for payment of the ocean freight" was a factor indicating "Respondents acted as ocean freight forwarders." *Low Cost Shipping*, 27 S.R.R. at 687. See also 46 C.F.R. § 515.2(i)(11) ("freight forwarding services includes "handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments"). Therefore, the fact that the proprietary shippers' payments went through ATWS on the way to Tober does not mean that ATWS operated as an NVOCC. BOE does not cite any Commission authority holding (or explain why) an intermediary that obtains a quote from an NVOCC, then marks up the ocean freight and invoices the increased rate in its own name, would be considered an NVOCC. Assuming the Shipping Act does not permit an ocean freight forwarder to mark up the ocean freight and then invoice the increased rate in its own name, BOE does not explain why marking up the ocean freight and then invoicing the increased rate in its own name in violation of the Act means that the intermediary has assumed responsibility for the transportation of the goods.

BOE contends that "ATWS would also provide the customer with proof of payment, inventory sheets and insurance documentation, if purchased." The definition of "freight forwarding services includes "preparing or processing delivery orders or dock receipts," 46 C.F.R. § 515.2(i)(4), "arranging for cargo insurance," 46 C.F.R. § 515.2(i)(8), and "preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required." 46 C.F.R. § 515.2(i)(10).

BOE contends that “[t]he cargo would not be released at destination by the ocean carrier or NVOCC until ATWS paid all charges.” As stated above, the definition of “freight forwarding services” includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments.” 46 C.F.R. § 515.2(i)(11). BOE does not cite any Commission authority holding that if the intermediary mishandles the money advanced by the shipper or delays forwarding the proprietary shipper’s payment to the common carrier, the intermediary has assumed responsibility for the transportation by water of the goods.

In addition to the bills of lading, Tober had other direct contacts with the proprietary shippers on the shipments in which ATWS was involved. Tober issued pickup/delivery orders directly to proprietary shippers. (BOE App. pp. 1610 (Tanja Ruhnke, Manhattan Mini Storage); 1631 (Marcin Przewloka); 1643 (Linda Rogan); 1663 (Molly Acherman & Fred Rohde).) Tober issued Warehouse Receipts to proprietary shippers. ( BOE App. pp. 1601 (Francesco Nitti); 1609 (Tanja Ruhnke, Manhattan Mini Storage); 1622 (Dvora Geller); 1625 (Marcin Przewloka); 1642 (Linda Rogan); 1652 (Francis Jacob); 1660 (Molly Acherman & Fred Rohde).)

ATWS dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, ATWS operated as an ocean freight forwarder (in violation of the Shipping Act), not an NVOCC, on the shipments with Tober. Tober did not violate section 10(b)(11) on the ATWS shipments.

As BOE claims and as stated above, the evidence shows that Tober operated in a similar fashion with each of the intermediaries. As set forth in greater detail in the findings of fact and conclusions of law;

- Based on information provided by the intermediary, Tober issued a bill of lading identifying the proprietary shippers or the proprietary shipper c/o the entity as the shipper, thereby entering into a contract for carriage with the proprietary shipper, “assum[ing] 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 operating as a common carrier on the shipments.
- The name of the intermediary does not appear on the bills of lading issued to the proprietary shipper that did not identify the proprietary shipper “c/o” the intermediary.
- Tober issued invoices for the shipments to the intermediaries. Invoicing the intermediary for the payment does not mean that the intermediary operated as an NVOCC. In *Low Cost Shipping*, the Commission found that the fact that respondent Low Cost “was responsible for payment of the ocean freight” was a factor indicating “Respondents acted as ocean freight forwarders.” *Low Cost Shipping*, 27 S.R.R. at

687. *See also* 46 C.F.R. § 515.2(i)(11) (“freight forwarding services includes “handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments”).

- Tober issued pickup/delivery orders for the goods. In some cases, the pickup/delivery orders were issued directly to the proprietary shippers at their addresses, *e.g.*, BOE App. pp. 1456, and on other occasions to the proprietary shipper c/o the intermediary. *E.g.*, BOE App. pp. 1052. BOE does not cite any Commission authority holding that when a common carrier issues a pickup/delivery order c/o an intermediary, the intermediary has assumed responsibility for the transportation by water of the goods.
- Tober issued Warehouse Receipts for the goods. In some cases, the Warehouse Receipts were issued directly to the proprietary shippers at their addresses, *e.g.*, BOE App. pp. 1456, and on other occasions to the proprietary shipper c/o the intermediary. *E.g.*, BOE App. pp. 1052. BOE does not cite any Commission authority holding that when a common carrier issues a Warehouse Receipts c/o an intermediary, the intermediary has assumed responsibility for the transportation by water of the goods.
- Tober secured insurance for some shippers.

The intermediaries operated as ocean freight forwarders on the shipments as they dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Tober did not violate section 10(b)(11) on the shipments.

NVOCCs often consolidate less than container load (LCL) shipments “from numerous shippers into larger groups for shipment by an ocean carrier.” *Prima U.S. v. Panalpina*, 223 F.3d at 129. *See also Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989) (“NVOCCs consolidate and load small shipments from multiple shippers into a single large reusable metal container obtained from a steamship company, and ship the container by vessel under a single bill of lading in the NVOCC’s name.”). *Compare Mateo Shipping Corp. and Julio Mateo – Possible Violations*, FMC No. 07-07, Initial Decision at 16 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge, on Investigation of Mateo Shipping Corp. and Julio Mateo). BOE does not claim or identify any evidence that would support a finding that any intermediary with which Tober conducted business ever consolidated LCL loads into one shipment and shipped the consolidated load with Tober in its own name.

For the reasons stated for AIOS and ATWS, the intermediaries dispatched the shipments and booked or otherwise arranged space with Tober for those shipments on behalf of shippers and processed the documentation or performed related activities incident to those shipments. 46 U.S.C. § 40102(18). Therefore, the intermediaries operated as ocean freight forwarders (in violation of the

Shipping Act), not NVOCCs, on the shipments with Tober. Tober did not violate section 10(b)(11) on the shipments.

**D. Tober Did Not Accept Cargo from or Transport Cargo for the Account of an NVOCC That Did Not Have a Tariff and a Bond as Required by Sections 8 and 19 of the Act.**

BOE has proven by a preponderance of the evidence that Tober operated as a common carrier on 278 shipments for which there is evidence in the form of shipping documents in the record. BOE has not proven by a preponderance of the evidence that the intermediaries involved in the shipments operated as NVOCCs. For some of the intermediaries, BOE has not proven by a preponderance of the evidence that the intermediary held itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i). BOE has not proven by a preponderance of the evidence that any intermediary assumed responsibility for the transportation of the goods on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(ii). Therefore, BOE has not proven that Tober violated section 10(b)(11) of the Shipping Act by accepting cargo from or transporting cargo for the account of an NVOCC that did not have a tariff and a bond as required by sections 8 and 19 of the Shipping Act.

**III. TOBER VIOLATED SECTION 10(b)(2)(A) OF THE ACT BY PROVIDING SERVICE IN THE LINER TRADE THAT WAS NOT IN ACCORDANCE WITH THE RATES AND CHARGES CONTAINED IN A PUBLISHED TARIFF.**

The Commission issued its Notice of Investigation and Hearing to determine “violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff.” *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06, Order at 4 (May 11, 2006).

The Shipping Act provides:

Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501(a).

A tariff under subsection (a) shall—

- (1) state the places between which cargo will be carried;
- (2) list each classification of cargo in use;
- (3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;
- (4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;
- (5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and
- (6) include copies of any loyalty contract, omitting the shipper's name.

46 U.S.C. § 40501(b). Section 10(b)(2)(A) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104.

BOE contends that:

The rate contained in Tober's tariff was \$500 weight/measure. (PFF 55). The president of Tober, Yonatan Benhaim, in deposition testimony, stated that from its inception as an NVOCC in 1999, Tober never charged the rates contained in its tariff. (PFF 55). The vice-president of Tober, Steve Schneider, confirmed in deposition testimony, that the rates contained in Tober's published tariff were not charged. (PFF 55). The \$500 weight/measure was not charged for any of the shipments made by Tober for the unbonded and untariffed NVOCCs. (PFF 56). Based on the admissions of the president and vice-president of Tober that Tober never charged the rates contained in its published tariff and the invoices showing what Tober charged the unbonded and untariffed NVOCCs, it is uncontested that Tober violated Section 10(b)(2)(a) of the Shipping Act, with respect to each shipment presented here.

(BOE Proposed Findings of Fact at 39.)

Although Tober did not move for summary judgment on the section 10(b)(2) claim, it included facts about its tariff and actual charges in its statement of material facts as to which it contended there was no genuine issue. BOE responded to Tober's contentions.

26. Prior to receipt of its first communications from BOE, Tober's published tariff provided for a rate of \$500 per cubic meter for all transportation services it provided. *Id.* at ¶ 35. Upon becoming aware of BOE's concerns in regard to its tariff, Tober amended its electronic tariff to show the rates for the individual services Tober was providing.

BOE Response: Prior to February 2007 (approximately nine months after service of the Order of Investigation and Hearing alleging the insufficiency of its tariff), the single commodity covered by Tober's tariff was still "Cargo, N.O.S." and the tariff rate was \$500 per 1,000 kilograms or 1 cubic meter, whichever yielded the higher amount. The tariff had not been updated since its original issue on January 7, 2004. From January, 2004 through February, 2007, Tober provided service for hundreds of shipments at rates not in accordance with their tariff. Benhaim, p. 39, 40, Schneider, p. 28-30, Exhibit 18.

RULING: Tober has not moved for summary judgment on the claim that it violated section 10(b)(2)(A) of the Act. Therefore, the facts stated by Tober and BOE's response are not material to the issues raised in Tober's motion for summary judgment.

27. Tober had to pay in excess of \$5,000 to make these changes to its electronic tariff. *Id.* at ¶ 36.

BOE Response: ADMITTED

28. From January 1, 2007, to August of 2007, five entities accessed Tober's tariff. *See* Website Log Sessions Activity, attached as Exhibit A-1. One of these entities was the FMC. The other entity was Tober itself.

BOE Response: ADMITTED

29. Of the remaining three entities that accessed Tober's tariff, all of them have limited access to the site because they have not paid Full Access Fees. Accordingly, they cannot actually view Tober's rates. Schneider Dec. at ¶ 38; *see also* Exh. A-1.

BOE Response: ADMITTED

30. Despite the fact that Tober has spent \$5000 to upgrade its electronic tariff in order to comply with FMC requirements, *not a single customer or potential customer* has reviewed its tariff rates in the last eight months. Schneider Dec. at ¶ 39.

BOE Response: ADMITTED

*EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations*, FMC No. 06-06, Memorandum at 46-47 (ALJ June 12, 2008) (Memorandum and Order on Tober Group, Inc.’s Motion to Summary Judgment). At the argument on Tober’s motion for partial summary judgment, while not “conceding the point on the record, for a trial,” Transcript (11/14/07) at 8, Tober’s former counsel conceded that BOE could put on evidence that would show a violation of section 10(b)(2)(A). *Id.*

In its statement of material facts as to which it contended there was no genuine issue in support of its motion for summary judgment, Tober stated that “Tober’s published tariff provided for a rate of \$500 per cubic meter for all transportation services it provided.” BOE responded that “the tariff rate was \$500 per 1,000 kilograms or 1 cubic meter, whichever yielded the higher amount.” In his deposition, BOE’s president testified that his understanding was

it’s my rate is up to \$500 everything you can, change it per – so whenever you give a rate, if it’s a \$100 per cubic meter, it’s covered under the 500 per cubic meter. As long as you don’t go over the 500, you didn’t have to change the tariff. That was my understanding.

(BOE App. pp. 47-48.) Tober’s president’s testimony seems to say that Tober’s tariff only provided for rates based on measure (cubic meter), not weight. BOE does not provide a copy of the tariff proving what Tober’s tariff actually stated.

Nevertheless, Tober’s president testified that the tariff rate was never the rate quoted or charged by Tober. (BOE App. p. 48.) Therefore, BOE has proven by a preponderance of the 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).

#### **IV. SANCTIONS.**

As sanctions for Tober’s violations of the Act, BOE seeks assessment of a civil penalty and entry of a cease and desist order. BOE has not met its burden to establish that a civil penalty should be assessed. BOE has not established that entry of a cease and desist order is appropriate.

##### **A. Civil Penalties Are Not Assessed Against Respondents for Their Violations of the 1984 Act and the Commission’s Regulations.**

Section 13(c) of the Act provides:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$6,000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a).<sup>5</sup> Civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the 1984 Act. *Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 681 (2001); *Refrigerated Container Carriers Pty., Limited - Possible Violations*, 28 S.R.R. at 805. As the proponent of an order assessing a civil penalty, BOE has the burden of proving that a civil penalty should be assessed and the burden of establishing the amount of the civil penalty. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Anderson International Transport and Owen Anderson - Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, FMC No. 07-02, Initial Decision at 77-79 (ALJ Aug. 28, 2009) (Initial Decision of Clay G. Guthridge, Administrative Law Judge).

“In determining the amount of a civil penalty, the Commission shall 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 other matters justice may require.” 46 U.S.C. § 41109(b). *See also* 46 C.F.R. § 502.603(b) (“In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.”).

Although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

*Merritt v. United States*, 960 F.2d 15, 17 (2d Cir. 1992). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799, 805-806 (ALJ 1999, admin. final May 21, 1999).

BOE contends that:

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<sup>5</sup> The Act originally provided for maximums of \$5,000 and \$25,000. In 2000, before Respondents committed these violations, the Commission increased these amounts to \$6,000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table)).

Pursuant to section 13 of the Shipping Act, 46 U.S.C. § 41107(a), a party is subject to a civil penalty of not more than \$30,000 for each violation knowingly and willfully committed. Section 13(c) of the Shipping Act requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C.[§] 41109. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. *Merritt v. United States*, 960 F.2d 15, 17 (1992).

Based on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober's behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. The extent of Tober's violations and Tober's degree of culpability merit a substantial civil penalty. A substantial civil penalty also serves as a deterrent to other common carriers from behaving in a similar manner. Though BOE recognizes that Tober has ceased doing business and its license has been revoked, it remains an active New York corporation. BOE, therefore, also requests that a cease and desist order be issued. The order also asked whether, in the event violations are found, such violations constitute grounds for the revocation of any Respondent's OTI license pursuant to 46 C.F.R. § 515.16. Since Tober's licenses have already been revoked, such action is unnecessary.

(BOE Proposed Findings of Fact at 40.)

On September 21, 2009, BOE filed a Motion to Reopen the Proceeding for the Purpose of Receiving Additional Evidence seeking to include evidence to the record regarding Tober's financial status and to make additional arguments regarding the civil penalty that it seeks. I granted the motion in a separate order issued today.

BOE adds the following additional information and argument regarding the civil penalty that it seeks:

Federal tax liens filed against Tober total close to \$700,000.00. (PFF 62). New York State tax warrants total over \$200,000.00. (PFF 63). Tober's liabilities for taxes to the federal government and New York State total close to \$900,000.00, a significant liability for a company that is no longer in business. (PFF 62 and 63). Tober also has over \$700,000.00 in outstanding claims for its NVOCC activities. (PFF 66). It is unclear whether the claimants will take other legal action against Tober.

Based on the evidence of federal and state tax liens as well as outstanding claims by shippers and other transportation related entities and admissions by its president that Tober is no longer in business, it is reasonable to conclude that Tober has limited, if any, ability to pay a civil penalty. Ability to pay, however, is only one factor in determining the appropriate amount of a civil penalty. See *Portman Square Ltd.*, 28 SRR 80, 86 (1998, ALJ); *Ever Freight Int'l Ltd. et al.*, 28 SRR 329, 335 (1998, ALJ); *Refrigerated Container Carriers Pty. Limited – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 SRR 799, 805 (Footnote 5) (1999, ALJ). BOE believes the record supports imposition of the maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil penalty against Tober is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober's behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. Regardless of Tober's ability or inability to pay, a substantial civil penalty will send a strong message to other common carriers and serve as a deterrent to similar conduct. The policies for deterrence and future compliance with the Commission's regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. 46 C.F.R. § 502.603(b). In the circumstances of this case, the deterrent effect on others who might be inclined to violate the law clearly justifies assessment of a significant civil penalty notwithstanding Tober's present status.

(Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement at 5-6.)

### **1. Determining the Amount of a Civil Penalty.**

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1986):

... in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. (Case citation omitted.) Obviously, "[t]he prescription of fair penalty amounts is not an exact science," and "[t]here is a relatively broad range within which a reasonable penalty might lie." (Case citation omitted.)

*Universal Logistic Forwarding Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 323, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (2002).

As set forth above, the evidence establishes that Tober violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff. Tober never charged its tariff rate in the period in which the 278 shipments in which the intermediaries were involved took place. Therefore, Tober is liable to the United States Government for a civil penalty for each violation of 278 violations. The civil penalty may not exceed \$6,000 for each violation, unless BOE establishes that it was willfully and knowingly committed, in which case the penalty may not exceed \$30,000 for each violation. 46 U.S.C. § 41107(a).

**a. “Willfully and Knowingly.”**

The first question that must be answered in determining a civil penalty is whether the “violation was willfully and knowingly committed.” *Stallion Cargo, Inc. - Possible Violations*, 29 S.R.R. at 678. With regard to the section 10(b)(2)(A) violation, BOE contends that “since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities.” (Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement at 5-6.)

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. A violation of section 10(b)(1) could be termed “willful” if the carrier knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act.” The Supreme Court cited with approval this “reckless or careless disregard” standard in *Trans World Airlines, Inc. v. Thurston*, 469 US 111, 125-129 (1985).

*Trans-Pacific Forwarding, Inc – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 409, 412 (ALJ Dec. 12, 1995), FMC notice of finality, Feb. 9, 1996.

BOE does not designate any specific facts and provide their location in the record that BOE contends would support a finding Tober willfully and knowingly violated section 10(b)(2)(A). *Orr v. Bank of Am., NT & SA*, 285 F.3d at 775. The only evidence I find in the record regarding whether Tober willfully and knowingly violated section 10(b)(2)(A) is found in the testimony of Tober’s president. When deposed by BOE, the following colloquy took place:

Q Explain to me what that means. What does a \$500 weight measure mean?

A That means it includes – it’s my rate is up to \$500 everything you can, change it per – so whenever you give a rate, if it’s a \$100 per cubic meter, it’s covered under the 500 per cubic meter. As long as you don’t go over the 500, you didn’t have to change the tariff. That was my understanding.

And I think what the problem was in old days, and this is just I want to add, everybody in the industry was working the same way. So I didn’t see myself anything that I was doing anything different. Because Worldwide and Globe and Global and all those companies worked with everybody in the industry, with Euro, with Troy, with everybody. So everybody had an all-in rate and that’s what we were selling. I did exactly the same as everybody else. And so I figure that the \$500 was as long as I don’t go over the \$500 for the general cargo, I’m okay. And we never broke it down into, into, you know, continents, countries per meter or cubic feet.

Q But you would agree that the \$500, that was never the rate quoted or charged by Tober Group? Would you agree with that?

A It wasn’t, yes.

Q But your testimony is – your understanding was that as long as the rate was under that, that you were okay?

A Right.

Q In terms of the FMC?

A Right.

(BOE App. pp. 47-49.) “Upon becoming aware of FMC’s concerns in regard to its tariff, Tober amended its electronic tariff to break up the costs of the individual services Tober was providing.” (Tober Group, Inc.’s Motion for Summary Judgment, Exhibit A, ¶ 35.) This evidence supports a finding that Tober operated in a manner that it understood complied with the Act. It does not support a finding that Tober intentionally disregarded the statute, was plainly indifferent to its requirements, knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the Act, or was “marked by careless disregard for whether or not one has the right so to act.”

Based on this evidence, although BOE has established that Tober violated section 10(b)(2)(A) of the Act, it has not established that Tober “willfully and knowingly” violated the Act. Therefore, Tober may be liable to the United States Government for a civil penalty that may not exceed \$6,000 for each proven violation. 46 U.S.C. § 41107(a).

**b. Balancing the Eight Factors.**

The manner in which Congress phrased the statute divides the factors into those that related to the violation (in this case, each shipment) itself (“the nature, circumstances, extent, and gravity of the violation committed”) and those that relate to the violator (“with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require”). See *Universal Logistic Forwarding Co., Ltd., supra* (determining a civil penalty “requires the weighing and balancing of eight factors set forth in law”)

BOE contends “[b]ased on the factors enumerated in Section 13 of the Shipping Act, a substantial civil penalty is appropriate.” (BOE Proposed Findings of Fact at 40.) In its Additional Proposed Findings, BOE contends that “the record supports imposition of the maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil penalty against Tober is appropriate.” (Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement at 5-6.)

BOE recognizes that the Commission must 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 other matters justice may require,” 46 U.S.C. § 41109(b), and “must make specific findings with regard to each factor.” (BOE Revised Proposed Findings of Fact at 45-46.) Since BOE is the party seeking an order assessing a civil penalty, it has the burden of persuasion to demonstrate the amount of the civil penalty to be imposed. Nevertheless, although it has the burden of establishing the appropriate amount of the civil penalty that should be assessed, other than ability to pay addressed in its Additional Proposed Findings, BOE has not proposed how the Commission should weigh and balance those factors.

With regard to the section 13 factors for which there is evidence in the record, BOE does not set forth any argument about how those factors should be balanced “to ensure that the penalty is tailored to the particular facts of the case . . . and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law.” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018.<sup>6</sup> In its Proposed Additional Findings, BOE states that the federal government and the State of New York have filed tax liens against Tober totaling close to \$900,000.00. Tober also has over \$700,000.00 in outstanding claims for its NVOCC activities. BOE concedes that “it is reasonable to conclude that Tober has limited, if any, ability to pay civil penalty.” (Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement at 5.)

BOE argues that:

Ability to pay, however, is only one factor in determining the appropriate amount of a civil penalty. BOE believes the record supports imposition of the maximum civil penalty of \$30,000 for each violation; accordingly, assessment of a substantial civil

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<sup>6</sup> I note that in *Cari-Cargo*, “Hearing Counsel, on brief, . . . considered the evidence and . . . provided specific recommendations as the amount of penalties to be assessed.” *Cari-Cargo, Int., Inc.*, 23 S.R.R. at 1018.

penalty against Tober is appropriate. Tober knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007. Tober's behavior continued even after the initiation of this proceeding. Additionally, since its licensing as an NVOCC close to ten years ago, Tober never charged the rates contained in its published tariff, a consistent and persistent disregard for its statutory responsibilities. Regardless of Tober's ability or inability to pay, a substantial civil penalty will send a strong message to other common carriers and serve as a deterrent to similar conduct. The policies for deterrence and future compliance with the Commission's regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. 46 C.F.R. § 502.603(b). In the circumstances of this case, the deterrent effect on others who might be inclined to violate the law clearly justifies assessment of a significant civil penalty notwithstanding Tober's present status.

(*Id.* at 5-6 (citations omitted).)

BOE's argument is based on an assumption that Tober would be found to have violated sections 10(b)(11) and 10(b)(2)(A). As set forth above, BOE has not proven by a preponderance of the evidence that Tober violated section 10(b)(11) by "knowingly and willfully provided service on more than 250 shipments to fifteen unbonded and untariffed entities from 2004 to 2007." Therefore, this cannot be considered in determining a civil penalty.

With regard to the section 10(b)(2)(A) violation, BOE has not proven by a preponderance of the evidence that Tober willfully and knowingly violated the Act; therefore, any civil penalty imposed cannot exceed \$6,000.00 per violation. BOE does not set forth any information about the "the nature, circumstances, extent, and gravity of the violation[s] committed." Tober filed a tariff, but did not charge rates set forth in the tariff. Did Tober's charges exceed the tariff, or did it charge less than its tariff? Should the civil penalty be the same for a small shipment – *e.g.*, the Shawn Rooke shipment (door to door service, ocean freight, and documentation totaling \$330.00 (BOE App. p. 1406) – as a forty-foot container – *e.g.*, the Somia Azam shipment totaling \$7,215.00 (BOE App. p. 1542)? BOE does not say. It does not cite to evidence regarding Tober's history of prior offenses.

I find that Tober has committed 278 of section 10(b)(2) of the Shipping Act. Tober did not willfully and knowingly committed each violation; therefore, assessment of a civil penalty that may not exceed \$6,000 is appropriate for each violation. BOE has not met its burden of persuasion to establish the amount of the civil penalty to be imposed. For the section 13 factors for which there is evidence in the record, BOE has not established how the Commission should take into account to ensure that the penalty is tailored to the particular facts of the case. Therefore, I am unable to assess a civil penalty against Respondents.

**B. A Cease and Desist Order is not Issued Against Tober.**

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, citing *Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. “A cease and desist order must be tailored to the needs and facts of the particular case.” *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

Although BOE recognizes that Tober has ceased doing business and its license has been revoked, it requests that a cease and desist order be issued because Tober remains an active New York corporation. The record reflects that Tober cured the section 10(b)(2)(A) violation shortly after BOE contacted it. There is not a reasonable likelihood that Tober will resume its unlawful activities in violation of section 10(b)(2)(A). Accordingly, a cease and desist order is not issued.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>7</sup>

1. Tober was incorporated as a New York corporation on February 16, 1996, and as of May 22, 2009, is an active corporation. Its president is Yonatan Benhaim. (BOE App. p. 1.)
2. In 1996, the Commission issued Tober a license to operate as an ocean freight forwarder. (BOE App. p. 2.)
3. In 1999, the Commission issued Tober a license to operate as an ocean transportation intermediary (ocean freight forwarder and non-vessel-operating common carrier (NVOCC)). (BOE App. p. 3.)
4. As a licensed NVOCC, Tober held “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.” 46 U.S.C. § 40102(6)(A)(i).
5. The Commission revoked Tober’s ocean freight forwarding and NVOCC licenses on January 15, 2009, for failure to maintain a bond. (BOE App. pp. 5-6).
6. Tober operated as a common carrier on shipments that included the involvement of fifteen intermediaries that did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act.

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<sup>7</sup> To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

## **EOM Shipping, Inc.**

BOE contends that “Tober provided service to EOM for four shipments during the period February 2006 through April 2006.” (BOE Prop. FF ¶ 2.) BOE argues that “EOM’s activities were those of an NVOCC. They advertised on the internet as a relocation expert, offered door to door service to their customers, contracted with Tober to provide that service to their customers, and were invoiced by Tober for their services.” (BOE Prop. FF ¶ 5.)

7. EOM did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 8-9.)
8. EOM advertised on the Internet that it was “a full-service international moving broker providing door to door service ? ? ? . We use the best companies for deliveries all over the world including ocean transportation ? ? ? by the FMC.” (BOE App. p. 803.)<sup>8</sup>
9. Through its Internet advertisement, EOM held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
10. Tober issued four bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 815 (Pieter van den Berg); 819 (George Kalmar); 823 (Rosela Artiaco); 829 (Keith Wilson).
11. Tober issued two invoices to EOM for proprietary shippers: BOE App. pp. 811 (Pieter van den Berg); 818 (George Kalmar).
12. Tober issued pickup/delivery orders to proprietary shippers c/o EOM: BOE App. pp. 827 (Rosela Artiaco).
13. Tober issued Warehouse Receipts to EOM for the shipments of the proprietary shippers: BOE App. pp. 817 (Pieter van den Berg); 821 (George Kalmar); 831 (Keith Wilson).
14. Tober issued one Warehouse Receipt to the proprietary shipper c/o EOM for the shipments of the proprietary shippers: BOE App. pp. 825 (Rosela Artiaco).
15. Tober carried four shipments in which EOM was involved.

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<sup>8</sup> As with several documents in BOE’s Appendix printed from the Internet, this document is not complete, as the right side of the page is missing. An unknown number of words are missing after “door to door service” and between “transportation” and “by the FMC.”

16. When Tober issued the four bills of lading on the EOM shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four EOM shipments.
17. EOM did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, EOM did not operate as an NVOCC on the four EOM shipments.
18. EOM operated as an ocean freight forwarder on the four EOM shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
19. Tober did not violate section 10(b)(11) of the Shipping Act on the four EOM shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Lehigh Moving and Storage, Inc.**

BOE contends that "Tober provided service to Lehigh Moving for thirty-one shipments during the period from June 1, 2004, through January 31, 2006." (BOE Prop. FF ¶ 8.) BOE argues that:

Lehigh Moving's activities were those of an NVOCC. They advertised on the internet as "an International and domestic shipping carrier" that provided "international shipping from origin to destination." Lehigh Moving offered door to door service to their customers, contracted with Tober to provide that service to their customers, and were invoiced by Tober for their services. Lehigh Moving never maintained a bond or surety or provided proof of financial responsibility and did not publish a tariff as required by Sections 8 and 19 of the Shipping Act.

(BOE Prop. FF ¶ 9.)

20. Lehigh did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 11.)
21. Lehigh advertised on the Internet that it was "an international and domestic shipping carrier" and provided "international shipping from origin to destination." (BOE App. p. 626.)

22. Through its Internet advertisement, Lehigh held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
23. Lehigh made booking requests for shipments to Tober in the name of the proprietary shipper. BOE App. pp. 628 (Amanda Levinson); 632 (Jennifer Spong); 637 (Thomas Broderidge); 643 (Caroline Goodridge); 652 (Katherine Brook); 655 (David Mailman); 662 (John Stensland); 672 (Vincent Menna); 674 (William Hill); 684 (Keterina Tsakon & Giorgos Kontrafouris); 690 (Jennyfer Carswell); 695 (Richard Dalzaell); 698 (Richard Schmidt); 705 (Dan O'Dell); 709 (Mark & Margaret Litten); 719 (Agata Schinazi); 725 (Alain Lemehaute); 728 (Tomas Cabarcos); 737 (Charles Webb); 744 (Philippe Lacquehay); 752 (Paul Lyon); 758 (Jennifer Stanley); 764 (Hildegard Jordan); 770 (Duane Thomas); 775 (Antoine de Thoury); 779 (Barbara Hesse); 787 (Michael Bell); 790 (Marianne Nielsen); 794 (Ann Tweedie); 799 (Jamie L. Hack). [not for Thomas Keys]
24. Tober issued twenty-five bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 666 (John Stensland); 670 (Vincent Menna); 677 (William Hill); 681 (Keterina Tsakon & Giorgos Kontrafouris); 687 (Jennyfer Carswell); 692 (Richard Dalzaell); 699 (Richard Schmidt); 702 (Dan O'Dell); 707 (Mark & Margaret Litten); 712 (Thomas Keys); 714 (Agata Schinazi); 721 (Alain Lemehaute); 730 (Tomas Cabarcos); 734 (Charles Webb); 741 (Philippe Lacquehay); 749 (Paul Lyon); 754 (Jennifer Stanley); 761 (Hildegard Jordan); 766 (Duane Thomas); 772 (Antoine de Thoury); 781 (Barbara Hesse); 784 (Michael Bell); 788 (Marianne Nielsen); 792 (Ann Tweedie & Stephen Meyer); 796 (Jamie L. Hack).
25. Tober issued five bills of lading identifying the proprietary shipper c/o Lehigh as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 630 (Amanda Levinson); 633 (Jennifer Spong); 640 (Thomas Broderidge); 644 (Caroline Goodridge); 649 (Katherine Brook).
26. Tober issued thirty invoices to Lehigh for proprietary shippers: BOE App. pp. 627 (Amanda Levinson); 631 (Jennifer Spong); 636 (Thomas Broderidge); 642 (Caroline Goodridge); 648 (Katherine Brook); 654 (David Mailman); 661 (John Stensland); 667 (Vincent Menna); 673 (William Hill); 680 (Keterina Tsakon); 686 (Jennyfer Carswell); 691 (Richard Dalzaell); 696 (Richard Schmidt); 701 (Dan O'Dell); 706 (Mark & Margaret Litten); 711 (Thomas Keys); 713 (Agata Schinazi); 724 (Alain Lemehaute); 727 (Tomas Cabarcos); 733 (Charles Webb); 740 (Philippe Lacquehay); 748 (Paul Lyon); 753 (Jennifer Stanley); 760 (Hildegard Jordan); 765 (Duane Thomas); 771 (Antoine de Thoury); 778 (Barbara Hesse); 783 (Michael Bell); 791 (Ann Tweedie); 802 (Jamie L. Hack).
27. SeaMates Consolidation Service, Inc., issued a bill of lading identifying Tober as the shipper on the David Mailman shipment. BOE App. p. 658.

28. Although there is no Tober bill of lading in the record for the David Mailman shipment, I find based on the Tober invoice indicating origin in the United States, destination in a foreign country, and ocean freight charges, other documents in the record for this shipment, and Tober's operating practices that Tober issued a bill of lading identifying David Mailman as the shipper for the David Mailman shipment.
29. Tober issued Warehouse Receipts to the proprietary shipper c/o Lehigh for the shipments of the proprietary shippers: BOE App. pp. 629 (Amanda Levinson).
30. Tober issued Warehouse Receipts to Lehigh for the shipments of the proprietary shippers: BOE App. pp. 635 (Jennifer Spong); 647 (Caroline Goodridge); 651 (Katherine Brook); 656 (David Mailman); 663 (John Stensland); 668 (Vincent Menna); 675 (William Hill); 683 (Keterina Tsakon); 689 (Jennyfer Carswell); 694 (Richard Dalzaell); 697 (Richard Schmidt); 701 (Dan O'Dell); 708 (Mark & Margaret Litten); 720 (Agata Schinazi); 723 (Alain Lemehaute); 732 (Tomas Cabarcos); 736 (Charles Webb); 743 (Philippe Lacquehay); 751 (Paul Lyon); 757 (Jennifer Stanley); 763 (Hildegard Jordan); 769 (Duane Thomas); 774 (Antoine de Thoury); 786 (Michael Bell); 793 (Ann Tweedie & Stephen Meyer); 798 (Jamie L. Hack).
31. Proprietary shippers signed a Lehigh authorization for Tober to use passport and/or Social Security numbers for export formalities. BOE App. p. 739 (Charles Webb); 745 (Philippe Lacquehay); 777 (Antoine de Thoury); 780 (Barbara Hesse); 801 (Jamie L. Hack).
32. Tober carried thirty-one shipments in which Lehigh was involved.
33. When Tober issued the thirty-one bills of lading on the Lehigh shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Lehigh shipments.
34. Lehigh did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Lehigh did not operate as an NVOCC on the thirty-one Lehigh shipments.
35. Lehigh operated as an ocean freight forwarder on the thirty-one Lehigh shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
36. Tober did not violate section 10(b)(11) of the Shipping Act on the thirty-one Lehigh shipments as it did not accept cargo from or transport cargo for the account of an NVOCC

that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Infinity Moving & Storage, Inc.**

BOE contends that “Infinity Moving made at least 126 shipments to a foreign destination with Tober from June 2004 through February 2007.” (BOE Prop. FF ¶ 11.) BOE argues that:

Infinity Shipping’s activities were those of an NVOCC. They held themselves out on the internet to provide international relocation services and also indicated that all claims would be settled directly with them, assuming responsibility for the cargo. Infinity Shipping offered port to door service to their customers, contracted with Tober to provide that service to their customers, and were invoiced by Tober for their services. Infinity Moving never maintained a bond or surety or provided proof of financial responsibility and did not publish a tariff as required by Sections 8 and 19 of the Shipping Act. Infinity Moving has since applied for an NVOCC license.

(BOE Prop. FF ¶ 13.).

37. Infinity did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 13.)
38. Infinity advertised on the Internet that it “[took] care of all the arrangements for . . . ocean transport and delivery to the port of departure. From port and customs clearance to the destination country, to placement of the goods in the transferee’s new home.” (BOE App. p 78.)
39. Infinity’s Internet advertisement describes a business operating as an ocean freight forwarder as ocean freight forwarders “arrange[] space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).
40. Infinity’s Internet advertisement did not hold out to the general public that Infinity provided transportation by water of passengers or cargo between the United States and a foreign country for compensation. 46 U.S.C. § 40102(6)(A)(i).
41. BOE has not identified evidence that would support a finding that Infinity held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
42. Infinity was licensed by US DOT, ICCMC, and NY DOT. (BOE App. p 79.)

43. Tober issued 115 bills of lading for transportation by water identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 97 (Sophie Callet); 102 (Peter Petersdorff); 108 (Derek McQuire); 113 (Lena Sabella); 121 (Cornelis Cornelisse); 124 (Victor Cespon); 128 (Alan Fream); 134 (Mark Nankman & Lise Van Bommel); 138 (George Dodd); 144 (Jonathan Green); 150 (Claire O'Donnell); 153 (Simon Green); 158 (Lauen & Jack Rufer); 163 (Peter Brown); 167 (Grace Cini); 172 (Zuoquan Zhao); 177 (Skip Miller & Betsi Beem); 182 (Alison Hunt); 187 (Steve Jordan); 191 (James Craven & Amanda Joyner); 196 (Richard Harris); 200 (Brigitte Scheurer); 206 (Gus Shuhaibar); 211 (Timothy Grein); 216 (Susan Connor); 220 (Jeanne Robbins); 226 (Christoph Koechel); 231 (James Skove); 236 (Sheldon Smith); 240 (Erik Tilley); 246 (Michelle Henley); 250 (Brooke Chilvers); 255 (Konstanze Diener); 264 (Andrea Patzer); 267 (Jason Callme); 272 (Frederik Denef); 278 (Cyrus Azardoust); 284 (Caroline S. Harris); 289 (Mette Helena Elfving); 300 (Evan Wiener); 308 (Brent Perry); 312 (Maria Ludivina Viands); 318 (Ajay Mathur); 327 (Ryan McKay); 328 (Lilach Atar); 333 (Yetunde Akinwale); 337 (Selena Barratt); 341 (Gbenga Oyebode); 346 (Trevor Peterson); 350 (Joseph Weeks); 355 (Jonathan Mueller); 358 (John Smith); 362 (Patrick Nolen); 370 (Paul Cronin); 372 (Una Marie Girongs Llop); 375 (Esteban Alvarez); 384 (Catherine Miller); 388 (Clare Bowen Davis); 394 (Sean Martin); 397 (Ellen Jameson); 401 (Thomas Wunsch); 405 (Arkady Tseytlin); 410 (Stephen Pettit); 415 (Juerg Petersen); 418 (Maria van Tiel); 423 (Silvia Adjamain); 428 (Jose Sebastiao); 432 (Atilla Batar); 437 (Marion Wohlrab); 441 (Isabelle Gamsohn); 446 (Gwenael Cheve); 450 (Amanda Joyner); 454 (Sophie Struweg); 458 (Luis Jimenez Mier); 465 (Winnie Hung); 467 (Stephen Pettit); 473 (Douglas Hyslop); 474 (Ray Blake); 479 (Amber Briggie); 483 (Susanne Freyhan); 486 (Michael Scott); 491 (Adriaan Zuiderweg); 495 (Laura Norton); 497 (Graham Ashton); 500 (Lisanne Valente); 506 (Tara Halliday); 508 (Pamela Rhode); 512 (Philip Walker); 517 (Bruno Averbek); 523 (Anders Lillevik); 525 (John White); 529 (Gerlinde Dollahan); 533 (Leonard Savage); 535 (Michael El Nour); 541 (Yong Seol Kim); 544 (Jennifer Montanez); 546 (Katrien Steenbrugge); 549 (Margarita Zavalia Bunge); 556 (Chris Maxwell); 560 (David Knapik); 565 (Jonathan Dodd); 570 (Debra McMullan); 574 (Stefan Hoppe); 578 (Jay Michael); 582 (Paul Viita); 586 (Michelle Bridenbaker); 591 (Andrea Ieri); 596 (Beril Gokan); 600 (Erick Larson); 603 (Rick Cady); 607 (Ricardo Ferrer); 613 (Oyvind Roed); 615 (Jerry Beatty); 620 (Tesalonico Pepito); 624 (Friedmann Gensel).
44. Tober issued four bills of lading identifying the proprietary shipper c/o Infinity as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 82 (Susan St. Louis); 87 (Chris Avgherinos); 92 (Pamela Lehto & Richard Skellett); 303 (Ramkumar Gandham).
45. Tober issued 119 invoices to Infinity for shipments by proprietary shippers: BOE App. pp. 80 (Susan St. Louis); 86 (Chris Avgherinos); 91 (Pamela Lehto); 96 (Sophie Callet); 101 (Peter Petersdorff); 107 (Derek McQuire); 112 (Lena Sabella); 117 (Cornelis Cornelisse); 123 (Victor Cespon); 127 (Alan Fream); 132 (Mark Nankman & Lise Van Bommel); 137 (George Dodd); 143 (Jonathan Green); 148 (Claire O'Donnell); 152 (Simon Green); 157

(Lauen & Jack Rufer); 161 (Peter Brown); 166 (Grace Cini); 171 (Zuoquan Zhao); 176 (Skip Miller & Betsi Beem); 181 (Alison Hunt); 186 (Steve Jordan); 190 (James Craven & Amanda Joyner); 194 (Richard Harris); 199 (Brigitte Scheurer); 204 (Gus Shuhaibar); 209 (Timothy Grein); 214 (Susan Connor); 219 (Jeanne Robbins); 224 (Christoph Koechel); 229 (James Skove); 234 (Sheldon Smith); 239 (Erik Tilley); 244 (Michelle Henley); 249 (Brooke Chilvers); 254 (Konstanze Diener); 260 (Andrea Patzer); 266 (Jason Callme); 271 (Frederik Deneff); 277 (Cyrus Azardoust); 282 (Caroline S. Harris); 287 (Mette Helena Elfving); 296 (Evan Wiener); 301 (Ramkumar Gandham); 306 (Brent Perry); 311 (Maria Ludivina Viands); 317 (Ajay Mathur); 324 (Ryan McKay); 328 (Lilach Atar); 332 (Yetunde Akinwale); 336 (Selena Barratt); 340 (Gbenga Oyebo); 345 (Trevor Peterson); 349 (Joseph Weeks); 354 (Jonathan Mueller); 357 (John Smith); 361 (Patrick Nolen); 366 (Paul Cronin); 371 (Una Marie Girongs Llop); 374 (Esteban Alvarez); 382 (Catherine Miller); 386 (Clare Bowen Davis); 390 (Sean Martin); 395 (Ellen Jameson); 399 (Thomas Wunsch); 403 (Arkady Tseytlin); 408 (Stephen Pettit); 413 (Juerg Petersen); 417 (Maria van Tiel); 421 (Silvia Adjmain); 426 (Jose Sebastiao); 430 (Atilla Batar); 435 (Marion Wohlrab); 439 (Isabelle Gamsohn); 444 (Gwenael Cheve); 448 (Amanda Joyner); 452 (Sophie Struweg); 457 (Luis Jimenez Mier); 461 (Winnie Hung); 466 (Stephen Pettit); 470 (Douglas Hyslop); 474 (Ray Blake); 478 (Amber Briggie); 481 (Susanne Freyhan); 485 (Michael Scott); 489 (Adriaan Zuiderweg); 493 (Laura Norton); 496 (Graham Ashton); 499 (Lisanne Valente); 503 (Tara Halliday); 507 (Pamela Rhode); 511 (Philip Walker); 515 (Bruno Averbek); 521 (Anders Lillevik); 524 (John White); 527 (Gerlinde Dollahan); 531 (Leonard Savage); 534 (Michael El Nour); 539 (Yong Seol Kim); 542 (Jennifer Montanez); 545 (Katrien Steenbrugge); 548 (Margarita Zavalia Bunge); 554 (Chris Maxwell); 559 (David Knapik); 564 (Jonathan Dodd); 569 (Debra McMullan); 573 (Stefan Hoppe); 577 (Jay Michael); 581 (Paul Viita); 585 (Michelle Bridenbaker); 590 (Andrea Ieri); 594 (Beril Gokan); 598 (Erick Larson); 602 (Rick Cady); 606 (Ricardo Ferrer); 611 (Oyvind Roed); 614 (Jerry Beatty); 618 (Tesalonico Pepito); 623 (Friedmann Gensel).

46. Tober issued Warehouse Receipts to Infinity for the shipments of some proprietary shippers: BOE App. pp. 84 (Susan St. Louis); 89 (Chris Avgherinos); 94 (Pamela Lehto & Richard Skellett); 99 (Sophie Callet); 106 (Peter Petersdorff); 110 (Derek McQuire); 115 (Lena Sabella); 120 (Cornelis Cornelisse); 126 (Victor Cespon); 130 (Alan Fream); 136 (Mark Nankman & Lise Van Bommel); 141 (George Dodd); 146 (Jonathan Green); 149 (Claire O'Donnell); 155 (Simon Green); 160 (Lauen & Jack Rufer); 165 (Peter Brown); 169 (Grace Cini); 174 (Zuoquan Zhao); 179 (Skip Miller & Betsi Beem); 183 (Alison Hunt); 188 (Steve Jordan); 193 (James Craven & Amanda Joyner); 198 (Richard Harris); 203 (Brigitte Scheurer); 207 (Gus Shuhaibar); 218 (Susan Connor); 233 (James Skove); 238 (Sheldon Smith); 242 (Erik Tilley); 248 (Michelle Henley); 252 (Brooke Chilvers); 257 (Konstanze Diener); 261 (Andrea Patzer); 269 (Jason Callme); 274 (Frederik Deneff); 280 (Cyrus Azardoust); 286 (Caroline S. Harris); 291 (Mette Helena Elfving); 299 (Evan Wiener); 305 (Ramkumar Gandham); 310 (Brent Perry); 316 (Maria Ludivina Viands); 322 (Ajay Mathur); 326 (Ryan McKay); 331 (Lilach Atar); 368 (Paul Cronin); 381 (Esteban Alvarez); 456

(Sophie Struweg); 460 (Luis Jimenez Mier); 463 (Winnie Hung); 469 (Stephen Pettit); 558 (Chris Maxwell); 621 (Tesalonico Pepito).

47. Infinity prepared a Shipping Information form for some proprietary shippers showing the ultimate foreign destination: BOE App. pp. 85 (Susan St. Louis); 90 (Chris Avgherinos); 95 (Pamela Lehto & Richard Skelllett); 100 (Sophie Callet); 105 (Peter Petersdorff); 111 (Derek McQuire); 116 (Lena Sabella); 118 (Cornelis Cornelisse); 131 (Alan Fream); 133 (Mark Nankman & Lise Van Bommel); 142 (George Dodd); 147 (Jonathan Green); 156 (Simon Green); 162 (Peter Brown); 170 (Grace Cini); 175 (Zuoquan Zhao); 180 (Skip Miller & Betsi Beem); 185 (Alison Hunt); 195 (Richard Harris); 201 (Brigitte Scheurer); 205 (Gus Shuhaibar); 210 (Timothy Grein); 215 (Susan Connor); 223 (Jeanne Robbins); 225 (Christoph Koechel); 230 (James Skove); 235 (Sheldon Smith); 243 (Erik Tilley); 245 (Michelle Henley); 253 (Brooke Chilvers); 258 (Konstanze Diener);
48. Some proprietary shippers signed customer authorization forms authorizing Infinity or its NVOCC or OTI to use passport number or Social Security number for filing export formalities: BOE App. pp. 262 (Andrea Patzer); 270 (Jason Callme); 275 (Frederik Denef); 283 (Caroline S. Harris); 302 (Ramkumar Gandham); 307 (Brent Perry); 323 (Ajay Mathur); 325 (Ryan McKay); 339 (Selena Barratt); 344 (Gbenga Oyeboode); 348 (Trevor Peterson); 360 (John Smith); 367 (Paul Cronin); 373 (Una Marie Girongs Llop); 383 (Catherine Miller); 387 (Clare Bowen Davis); 391 (Sean Martin); 396 (Ellen Jameson); 400 (Thomas Wunsch); 414 (Juerg Petersen); 420 (Maria van Tiel); 422 (Silvia Adjmain); 427 (Jose Sebastiao); 431 (Atilla Batar); 436 (Marion Wohlrab); 440 (Isabelle Gamsohn); 445 (Gwenael Cheve); 449 (Amanda Joyner); 453 (Sophie Struweg); 464 (Winnie Hung); 471 (Douglas Hyslop); 475 (Ray Blake); 480 (Amber Briggie); 482 (Susanne Freyhan); 498 (Graham Ashton); 502 (Lisane Valente); 504 (Tara Halliday); 510 (Pamela Rhode); 514 (Philip Walker); 516 (Bruno Averbek); 522 (Anders Lillevik); 526 (John White); 528 (Gerlinde Dollahan); 532 (Leonard Savage); 537 (Michael El Nour); 540 (Yong Seol Kim); 543 (Jennifer Montanez); 555 (Chris Maxwell); 563 (David Knapik); 567 (Jonathan Dodd); 572 (Debra McMullan); 576 (Stefan Hoppe); 584 (Paul Viita); 589 (Michelle Bridenbaker); 593 (Andrea Ieri); 599 (Erick Larson); 609 (Ricardo Ferrer); 612 (Oyvind Roed); 619 (Tesalonico Pepito).
49. Dr. Ada, Giangreco shipment, BOE App. pp. 292-295: Letter to Steve Schneider from Giangreco stating Tober will accept full payment for shipment; Infinity order for service.
50. Tober carried 119 shipments in which Infinity was involved.
51. When Tober issued the 119 bills of lading on the Infinity shipments identifying the proprietary shipper or the proprietary shipper c/o Infinity as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the 119 Infinity shipments.

52. Infinity did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Infinity did not operate as an NVOCC on the 119 Infinity shipments.
53. Infinity operated as an ocean freight forwarder on the 119 Infinity shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
54. Tober did not violate section 10(b)(11) of the Shipping Act on the 119 Infinity shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

### **Worldwide Relocations, Inc.**

BOE contends that “Tober provided service to WWR for thirty shipments during the period from July 2004 through June 2005.” (BOE Prop. FF ¶ 16.) BOE argues that:

Copies of documents in WWR’s files for the same shipments show that WWR issued moving contracts to many of their customers promising to provide transportation to a foreign destination and issued invoices charging their customers a *different amount* than they were charged by Tober. WWR’s shipment files also show WWR contracted for inland transportation when necessary to complete the shipment and provided marine insurance and other services for its customers.

(BOE Prop. FF ¶ 17.)

55. Worldwide Relocations did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
56. Worldwide Relocations advertised on the Internet that it was “an international moving company” that worked “in tandem with [its] domestic moving agents as well as our international agents . . . to govern your services from origin to destination,” and described “Port to port” and “door to door” moves. (BOE App. p 1336-1339.)
57. Tober issued thirteen bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1371 (Valerie Jeske); 1394 (Weizman Daniel); 1396 (Paulina Dobkiewicz); 1415 (Vladimir M. Bershader); 1440 (Shashi Paul); 1448 (Chawla, Neetu); 1454 (Bitton Benjamin); 1461

(Robin Zieme); 1468 (Byrne Ken); 1482 (Robert Gould); 1483 (Carol Jarecki); 1485 (Eisbrich Ines); 1489 (James Paterson). The bills of lading do not refer to Worldwide Relocations.

58. Tober issued ten bills of lading identifying the proprietary shipper c/o Worldwide Relocations as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1347 (Loli Giulia);<sup>9</sup> 1358 (Cristine McLean); 1399 (Heidi Smith); 1404 (Shawn Rooke); 1409 (Diedre Bane); 1418 (Donovan, Andrew); 1424 (Philip Stapleton); 1429 (Joe McGarvey); 1434 (Carol Gelpi); 1471 (Venebles Nick).
59. Tober issued thirteen invoices to Worldwide Relocations for shipments by proprietary shippers: BOE App. pp. 1349 (Loli Giulia); 1359 (Cristine McLean); 1373 (Valerie Jeske); 1395 (Weizman Daniel); 1398 (Paulina Dobkiewicz); 1401 (Heidi Smith); 1406 (Shawn Rooke); 1411 (Diedre Bane); 1414 (Vladimir M. Bershader); 1419 (Donovan, Andrew); 1426 (Philip Stapleton); 1431 (Joe McGarvey); 1434 (Carol Gelpi); 1442 (Shashi Paul); 1450 (Chawla, Neetu); 1453 (Bitton Benjamin); 1462 (Robin Zieme); 1467 (Byrne Ken); 1472 (Venebles Nick); 1481 (Robert Gould); 1483 (Carol Jarecki); 1486 (Eisbrich Ines); 1488 (James Paterson).
60. Worldwide Relocations issued invoices to proprietary shippers for their shipments: BOE App. pp. 1353 (Loli Giulia); 1360 (Cristine McLean); 1378 (Valerie Jeske); 1454 (Bitton Benjamin).
61. Worldwide Relocations issued moving contracts to proprietary shippers for their shipments: BOE App. pp. 1355 (Loli Giulia); 1404 (Shawn Rooke); 1454 (Bitton Benjamin).
62. Worldwide Relocations sent "agent notifications" to Tober with instructions for the bills of lading: BOE App. pp. 1363 (Cristine McLean); 1371 (Valerie Jeske); 1404 (Shawn Rooke); 1454 (Bitton Benjamin).
63. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1456 (Bitton Benjamin); 1464 (Robin Zieme c/o WW Relocations); 1477 (Venebles Nick).
64. Tober issued Warehouse Receipts to proprietary shippers: 1416 (Bershader Irena and Vladimir); 1455 (Bitton Benjamin c/o WW Reloc); 1463 (Robin Zieme c/o WW Relocations);

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<sup>9</sup> In its opposition to Tober's motion for summary judgment, BOE submitted an ocean bill of lading issued July 21, 2004, by an unidentified entity identifying Giulia Loli and Morgan Craft c/o Worldwide Relocations as the exporter and Tober as the consignee for the shipment of Giulia Loli's goods. (BOE Exhibit 11, 001303.) That bill of lading is not included with the Loli documents in BOE's Appendix in support of its proposed findings of fact.

65. Worldwide Relocations issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1417 (Bershader Irena and Vladimir); 1475 (Venebles Nick)
66. Worldwide Relocations issued shipping instructions to Tober: 1364 (Cristine McLean);
67. Tober carried twenty-three shipments in which Worldwide Relocations was involved.
68. When Tober issued the twenty-three bills of lading on the Worldwide Relocations shipments identifying the proprietary shipper or the proprietary shipper c/o Worldwide Relocations as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twenty-three Worldwide Relocations shipments.
69. Worldwide Relocations did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Worldwide Relocations did not operate as an NVOCC on the twenty-three Worldwide Relocations shipments.
70. Worldwide Relocations operated as an ocean freight forwarder on the twenty-three Worldwide Relocations shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
71. Tober did not violate section 10(b)(11) of the Shipping Act on the twenty-three Worldwide Relocations shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **All In One Shipping, Inc.**

BOE contends that "Tober provided service to AIOS for eleven shipments during the period from May 2005 through October 2005." (BOE Prop. FF ¶ 25.)

72. AIOS did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
73. AIOS advertised on the Internet that it was "an international shipping company" that "work[ed] in tandem with reputable international moving companies worldwide in order to provide a smooth move to your final destination" (BOE App. p 1490) and that it provided "full service door to door moves as well as port to port moves." (BOE App. p 1492.)

74. Through its Internet advertisement, AIOS held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
75. Tober issued six bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1498 (Fraser Henderson);<sup>10</sup> 1501 (Sam Barbour); 1510 (Diane O'Connor); 1516 (Rachel Kupferberg); 1548 (John Burk); 1561 (Christian Scheidler)
76. Tober issued two bills of lading identifying the proprietary shipper c/o AIOS as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1496 (Nigel Johnson); 1559 (Silmat Chisti).
77. Tober issued ten invoices to AIOS for shipments by proprietary shippers: BOE App. pp. 1495 (Nigel Johnson); 1497 (Fraser Henderson); 1500 (Sam Barbour); 1509 (Diane O'Connor); 1515 (Rachel Kupferberg); 1542 (Somia Azam); 1547 (John Burk); 1558 (Silmat Chisti); 1560 (Christian Scheidler); 1577 (Antoine Pierrat/Jacqueline Giotti).
78. Although there is no Tober bill of lading in the record for the Somia Azam shipment or the Antoine Pierrat/Jacqueline Giotti shipment, I find based on the Tober invoices indicating origin in the United States, destination in a foreign country, and ocean freight charges, other documents in the record for those shipments, and Tober's operating practices that Tober issued bills of lading identifying the proprietary shippers as the shippers for the Somia Azam and the Antoine Pierrat/Jacqueline Giotti shipments.
79. Tober issued pickup/delivery orders directly to proprietary shipper: 1506 (Fraser Henderson); 1513 (Diane O'Connor); 1518 (Rachel Kupferberg); 1554 (John Burk); 1567 (Christian Scheidler).
80. Tober issued Warehouse Receipts to proprietary shippers: 1512 (Diane O'Connor); 1570 (Christian Scheidler).
81. Tober issued Warehouse Receipts to AIOS for proprietary shippers: BOE App. p. 1553 (John Burk).
82. All In One Shipping sent notices to proprietary shippers stating, "We would also like to inform you that all of our [sic] NVOCC carrier are [sic] licensed by the FMC." BOE App. pp. 1501 (Sam Barbour); 1522 (Rachel Kupferberg); 1537 (Somia Azam); 1556 (John Burk);

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<sup>10</sup> The record also contains a bill of lading issued by Zim Israel Navigation Company, Ltd., identifying Tober as the shipper and Tober as the forwarding agent for the Fraser Henderson shipment. (BOE App. p. 1504.)

1573 (Vanessa Pierrat). *See also* BOE App. pp. 1529 (Diane O'Connor) (“We are proud to inform you that all of are [*sic*] carriers are licensed by the FMC.”).

83. Tober carried ten shipments in which AIOS was involved.
84. When Tober issued the ten bills of lading on the AIOS shipments identifying the proprietary shipper or the proprietary shipper c/o AIOS as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the ten AIOS shipments.
85. AIOS did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, AIOS did not operate as an NVOCC on the ten AIOS shipments.
86. AIOS operated as an ocean freight forwarder on the ten AIOS shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
87. Tober did not violate section 10(b)(11) of the Shipping Act on the ten AIOS shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Around the World Shipping, Inc.**

BOE contends that “Tober provided service to ATWS for nine shipments during the period from May 2005 through August 2005.” (BOE Prop. FF ¶ 32.)

88. ATWS did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
89. ATWS advertised on the Internet that it provided “international and moving’s [*sic*] services for corporate, government, and individuals.” (BOE App. p 1578.)
90. Through its Internet advertisement, ATWS held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
91. Tober issued seven bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp.

1598 (Francesco Nitti);<sup>11</sup> 1606 (Tanja Ruhnke, Manhattan Mini Storage); 1620 (Dvora Geller); 1626 (Marcin Przewloka); 1639 (Linda Rogan); 1650 (Francis Jacob); 1656 (Molly Acherman & Fred Rohde);

92. Tober issued no bills of lading identifying the proprietary shipper c/o Around the World Shipping as the shipper.
93. Tober issued eight invoices to ATWS for shipments by proprietary shippers: BOE App. pp. 1596 (Francesco Nitti); 1604 (Tanja Ruhnke, Manhattan Mini Storage); 1619 (Dvora Geller); 1624 (Marcin Przewloka); 1638 (Linda Rogan); 1647 (Francis Jacob); 1655 (Molly Acherman & Fred Rohde); 1664 (Karen Inglemeyer).
94. Although there is no Tober bill of lading in the record for the Karen Inglemeyer shipment, I find based on the Tober invoice and other documents and Tober's operating practices that Tober issued a bill of lading identifying Karen Inglemeyer as the shipper for the Karen Inglemeyer shipment.
95. ATWS issued invoices to proprietary shippers: BOE App. pp. 1615 (Tanja Ruhnke); 1620 (Dvora Geller); 1626 (Marcin Przewloka); 1639 (Linda Rogan); 1650 (Francis Jacob); 1656 (Molly Acherman & Fred Rohde).
96. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1610 (Tanja Ruhnke, Manhattan Mini Storage); 1631 (Marcin Przewloka); 1643 (Linda Rogan); 1663 (Molly Acherman & Fred Rohde).
97. Tober issued Warehouse Receipts to proprietary shippers: BOE App. pp. 1601 (Francesco Nitti); 1609 (Tanja Ruhnke, Manhattan Mini Storage); 1622 (Dvora Geller); 1625 (Marcin Przewloka); 1642 (Linda Rogan); 1652 (Francis Jacob); 1660 (Molly Acherman & Fred Rohde).
98. Tober carried eight shipments in which ATWS was involved.
99. When Tober issued the eight bills of lading on the ATWS shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the eight ATWS shipments.

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<sup>11</sup> The record also contains a bill of lading issued by Troy Container Line, Inc., identifying Francesco Nitti as the shipper and Tober as the forwarding agent. (BOE App. p. 1597.)

100. ATWS did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, ATWS did not operate as an NVOCC on the eight ATWS shipments.
101. ATWS operated as an ocean freight forwarder on the eight ATWS shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
102. Tober did not violate section 10(b)(11) of the Shipping Act on the eight ATWS shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

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

BOE contends that Tober was involved in four shipments with Tradewind Consulting. (BOE Prop. FF ¶ 33.)

103. Tradewind did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
104. Tradewind advertised on the Internet that it “is a consulting firm. We are not classified as an international shipping company. Instead, we prefer to think of ourselves as personalized travel consultants. Tradewind Consulting organizes your services, negotiates with vendors and books your move with licensed moving, shipping and delivery agents worldwide.” (BOE App. p 1116.)
105. By advertising that it organizes services, Tradewind advertised that it “arranges space for . . . shipments on behalf of shippers.” 46 U.S.C. § 40102(18)(A).
106. BOE has not identified evidence that would support a finding that Tradewind held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
107. Tober issued four bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1125 (Kerrie Powell); 1140 (Daphne Rovart); 1146 (Johannes Khinasat); 1159 (Moncef Bahri).

108. Tober issued four invoices to Tradewind for shipments by proprietary shippers: BOE App. pp. 1124 (Kerrie Powell); 1139 (Daphne Rovart); 1145 (Johannes Khinasat); 1158 (Moncef Bahri).
109. Tradewind issued four invoices to proprietary shippers: BOE App. pp. 1138 (Kerrie Powell); 1139 (Daphne Rovart); 1155 (Johannes Khinasat); 1158 (Moncef Bahri).
110. Tober issued no bills of lading identifying the proprietary shipper c/o Tradewind Consulting as the shipper.
111. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1128 (Kerrie Powell); 1144 (Daphne Rovart); 1149 (Johannes Khinasat);
112. Tober issued pickup/delivery orders to proprietary shippers c/o Tradewind: BOE App. pp. 1160 (Moncef Bahri).
113. Tober issued Warehouse Receipts to proprietary shippers: BOE App. pp. 1127 (Kerrie Powell); 1141 (Daphne Rovart).
114. Tober issued Warehouse Receipts to proprietary shippers c/o Tradewind: BOE App. pp. 1160 (Moncef Bahri).
115. Tradewind sent shipping instructions to Tober. BOE App. pp. 1129 (Kerrie Powell); 1150 (Johannes Khinasat).
116. Tober carried four shipments in which Tradewind was involved.
117. When Tober issued the four bills of lading on the Tradewind shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Tradewind shipments.
118. Tradewind operated as an ocean freight forwarder on the four Tradewind shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
119. Tradewind did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tradewind did not operate as an NVOCC on the four Tradewind shipments.

120. Tober did not violate section 10(b)(11) of the Shipping Act on the four Tradewind shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

### **Moving Services, Inc.**

BOE contends that "Tober provided service to Moving Services, Inc., for twelve shipments during the period from July 2004 through September 2004." (BOE Prop. FF ¶ 32.)

121. Moving Services did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
122. The record does not contain any Internet advertising by Moving Services.
123. BOE has not identified evidence that would support a finding that Moving Services held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
124. Tober issued one bill of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1170 (Leon Hazan).
125. Tober issued eleven bills of lading identifying the proprietary shipper c/o Moving Services as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1164 (Lisa Moser); 1166 (Tarik Khamliche); 1168 (Deep Ghofh); 1172 (Lee Wilkinson); 1174 (Frances Breckon); 1176 (Rebecca Carman); 1178 (Dympa Rochford); 1179 (Dean Sexton); 1181 (Janeen Person); 1183 (Suthindran Rao); 1185 (Pancras Beekankamp).
126. Tober issued ten invoices to Moving Services for shipments by proprietary shippers: BOE App. pp. 1163 (Lisa Moser); 1165 (Tarik Khamliche); 1167 (Deep Ghofh (Martha Chew)); 1169 (Leon Hazan); 1171 (Lee Wilkinson); 1173 (Frances Breckon); 1175 (Rebecca Carman); 1180 (Janeen Person); 1182 (Suthindran Rao); 1184 (Pancras Beekankamp).
127. Tober issued one invoice (BOE App. p. 1177 (Dympa Rochford & Dean Sexton)) for two bills of lading (BOE App. pp. 1178 and 1179) for two proprietary shippers from the same address to the proprietary shippers at two different addresses using the same bill of lading number, but with separate suffixes. Based on these facts, I find these to be two shipments.

128. Tober issued Warehouse Receipts to Moving Services for shipments by proprietary shippers: BOE App. pp. 1186 (Pancras Beekankamp).
129. Tober carried twelve shipments in which Moving Services was involved.
130. When Tober issued the twelve bills of lading on the Moving Services shipments identifying the proprietary shipper or the proprietary shipper c/o Moving Services as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twelve Moving Services shipments.
131. Moving Services did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Moving Services did not operate as an NVOCC on the twelve Moving Services shipments.
132. Moving Services operated as an ocean freight forwarder on the twelve Moving Services shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
133. Tober did not violate section 10(b)(11) of the Shipping Act on the twelve Moving Services shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Orion Consulting, LLC**

BOE contends that "Tober provided service to Orion Consulting, LLC, for three shipments during July 2005. (BOE Prop. FF ¶ 28.)

134. Orion did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
135. The record does not contain any Internet advertising by Orion.
136. BOE has not identified evidence that would support a finding that Orion held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).

137. Tober issued three bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1319 (Mark Hayman & Mark Penny); 1325 (Dr. Zubaira Zahid); 1329 (Julie Ramsey).
138. Zim Container Service issued a bill of lading for the Mark Hayman & Mark Penny shipment identifying Tober as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1322.
139. Tober issued no bills of lading identifying the proprietary shipper c/o Orion as the shipper.
140. Tober issued three invoices to Orion for shipments by proprietary shippers: BOE App. pp. 1318 (Mark Hayman & Mark Penny); 1324 (Dr. Zubaira Zahid); 1328 (Julie Ramsey).
141. Tober issued pickup/delivery orders directly to a proprietary shipper: BOE App. pp. 1320 (Mark Penny).
142. Tober issued pickup/delivery orders directly to a proprietary shipper c/o Orion Consulting: BOE App. pp. 1331 (Julie Ramsey).
143. Tober issued a Warehouse Receipts to a proprietary shipper c/o Orion: BOE App. pp. 1330 (Julia Ramsey).
144. Tober issued a Warehouse Receipts to Orion Consulting for the shipment of the proprietary shippers: BOE App. pp. 1327 (Dr. Zubaira Zahid).
145. Tober carried three shipments in which Orion was involved.
146. When Tober issued the three bills of lading on the Orion shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the three Orion shipments.
147. Orion did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Orion did not operate as an NVOCC on the three Orion shipments.
148. Orion operated as an ocean freight forwarder on the three Orion shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged

space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.

149. Tober did not violate section 10(b)(11) of the Shipping Act on the three Orion shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Sea and Air International, Inc.**

BOE contends that “Tober provided service to Sea and Air International, Inc., for twenty-seven shipments between October 2004 and March 2006.” (BOE Prop. FF ¶ 37.)

150. Sea and Air did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
151. Sea and Air advertised that it “offers residential and commercial relocation solutions to almost any destination in the world by ship, truck, train and airplane” and that its solutions include “[d]oor-to-door home & office relocation” and “[o]ffering all risk insurance.” BOE App. p. 1396.<sup>12</sup>
152. Through its Internet advertisement, Sea and Air held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
153. Tober issued twenty-five bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 848 (Michael Zwerger); 853 (Leo Mulqueen); 857 (Lysbeth Devlynne Spence); 864 (Frederic Yeterian); 868 (Hanne Falch); 874 (Charles Edward Thomas Roper); 878 (Marinke Karianne van Riet); 884 (Patrick Laroche); 890 (Christopher Brian Hogley); 897 (Catherine Julia Stock); 901 (Paola Helga Magdalena Hjelt); 907 (Peter James Crabb); 914 (Douglas Ross); 921 (Lisa Mephram); 926 (Christina Curci Dagostino); 932 (Sharon Elisabeth Baynham); 938 (Ruby Rosalie Littman); 943 (Talal Al-Muhanna); 949 (Josephine Foo); 955 (Axel Threlfall); 961 (Nigel Teare); 970 (Hedda Wardemann); 975 (Mior Zaharin Mior Ahmad Azim); 984 (Sacha Bielawski); 990 (Thomas Ladislas Sonies).

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<sup>12</sup> Sea and Air also states that it is a “Joint venture with Viva Shipping.” BOE App. p. 1396. A “Viva Shipping, Inc.” is an OTI licensed by the Commission, Org. No. 018396, License No. 015843. [http://www2.fmc.gov/oti/nvos\\_listing.aspx](http://www2.fmc.gov/oti/nvos_listing.aspx) accessed September 17, 2009.

154. Tober issued two bills of lading identifying the proprietary shipper c/o Sea and Air as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 838 (Lucia & Laurent Jean Dambies); 843 (Judy Beardsall).
155. Tober issued twenty-five invoices to Sea and Air for shipments by proprietary shippers: BOE App. pp. 837 (Lucia & Laurent Jean Dambies); 846 (Michael Zwerger); 851 (Leo Mulqueen); 856 (Lysbeth Devlynne Spence); 861 (Frederic Yeterian); 866 (Hanne Falch); 871 (Charles Edward Thomas Roper); 877 (Marinke Karianne van Riet); 883 (Patrick Laroche); 889 (Christopher Brian Hogley); 894 (Catherine Julia Stock); 900 (Paola Helga Magdalena Hjelt); 906 (Peter James Crabb); 913 (Douglas Ross); 920 (Lisa Mephram); 925 (Christina Curci Dagostino); 931 (Sharon Elisabeth Baynham); 937 (Ruby Rosalie Littman); 948 (Josephine Foo); 954 (Axel Threlfall); 960 (Nigel Teare); 967 (Hedda Wardemann); 974 (Mior Zaharin Mior Ahmad Azim); 981 (Sacha Bielawski); 987 (Thomas Ladislas Sonies).
156. Tober issued twenty-seven Warehouse Receipts to Sea and Air International for shipments of the proprietary shippers: BOE App. pp. 840 (Lucia & Laurent Jean Dambies); 845 (Judy Beardsall); 850 (Michael Zwerger); 855 (Leo Mulqueen); 859 (Lysbeth Devlynne Spence); 863 (Frederic Yeterian); 870 (Hanne Falch); 876 (Charles Roper); 882 (Marinke Karianne van Riet); 886 (Patrick Laroche); 892 (Christopher Brian Hogley); 899 (Catherine Julia Stock); 903 (Paola Helga Magdalena Hjelt); 910 (Peter Crabb); 917 (Douglas Ross); 922 (Lisa Mephram); 927 (Christina Dagostino); 933 (Sharon Baynham); 940 (Ruby Rosalie Littman); 945 (Talal Al-Muhanna); 951 (Josephine Foo); 959 (Axel Threlfall); 964 (Nigel Teare); 972 (Hedda Wardemann); 980 (Mior Zaharin & Miorahmad Azim); 986 (Sacha Bielawski); 992 (Thomas Ladislas Sonies).
157. Sea and Air obtained "overseas information" needed for customs requirements from proprietary shippers: BOE App. pp. 841 (Lucia & Laurent Jean Dambies); 842 (Judy Beardsall); 847 (Michael Zwerger); 852 (Leo Mulqueen); 867 (Hanne Falch); 872 (Charles Roper); 880 (Marinke Karianne van Riet); 888 (Patrick Laroche); 893 (Christopher Brian Hogley); 895 (Catherine Julia Stock); 904 (Paola Helga Magdalena Hjelt); 911 (Peter Crabb); 918 (Douglas Ross); 923 (Lisa Mephram); 928 (Christina Dagostino); 941 (Ruby Rosalie Littman); 946 (Talal Al-Muhanna); 953 (Josephine Foo); 958 (Axel Threlfall); 965 (Nigel Teare); 968 (Hedda Wardemann); 977 (Mior Zaharin & Miorahmad Azim); 983 (Sacha Bielawski); 989 (Thomas Ladislas Sonies).
158. Sea and Air obtained customer authorizations from proprietary shippers authorizing the FMC/NVOCC to use the shipper's passport number and/or Social Security number: BOE App. pp. 873 (Charles Roper); 887 (Patrick Laroche); 896 (Catherine Stock); 905 (Paola Helga Magdalena Hjelt); 912 (Peter Crabb); 919 (Douglas Ross); 924 (Lisa Mephram); 929 (Christina Dagostino); 935 (Sharon Baynham); 941 (Ruby Rosalie Littman); 947 (Talal Al-Muhanna); 952 (Josephine Foo); 957 (Axel Threlfall); 966 (Nigel Teare); 969 (Hedda Wardemann); 978 (Mior Zaharin & Miorahmad Azim); 982 (Sacha Bielawski); 988 (Thomas Ladislas Sonies).

159. Tober carried twenty-seven shipments in which Sea and Air was involved.
160. When Tober issued the twenty-seven bills of lading on the Sea and Air shipments identifying the proprietary shipper or the proprietary shipper c/o Sea and Air as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the twenty-seven Sea and Air shipments.
161. Sea and Air did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Sea and Air did not operate as an NVOCC on the twenty-seven Sea and Air shipments.
162. Sea and Air operated as an ocean freight forwarder on the twenty-seven Sea and Air shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
163. Tober did not violate section 10(b)(11) of the Shipping Act on the twenty-seven Sea and Air shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Echo Trans World, Inc.**

BOE contends that "Tober provided service to Echo Trans World, Inc., for three shipments between June 2005 and August 2005. (BOE Prop. FF ¶ 38.)

164. Echo Trans World did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
165. The record does not contain any Internet advertising by Echo Trans World.
166. BOE has not identified evidence that would support a finding that Echo Trans World held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
167. Tober issued three bill of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 995 (Anthony Strong); 1001 (Gunda Felicitas Schwaninger); 1007 (Denis Thibaut).

168. Tober issued no bills of lading identifying the proprietary shipper c/o Echo Trans World, Inc., as the shipper.
169. Tober issued invoices to Echo Trans World for shipments by three proprietary shippers: BOE App. pp. 993, 994 (Anthony Strong); 1000 (Gunda Felicitas Schwaninger); 1006 (Denis Thibaut).
170. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 999 (Anthony Strong).
171. Tober issued three Warehouse Receipts to Echo Trans World, Inc., for the shipments of the proprietary shippers: BOE App. pp. 997 (Anthony Strong); 1004 (Gunda Felicitas Schwaninger); 1009 (Denis Thibaut).
172. Echo Trans World sent booking requests to Tober for proprietary customers: BOE App. pp. 998 (Anthony Strong); 1005 (Gunda Felicitas Schwaninger); 1010 (Denis Thibaut).
173. Tober carried three shipments in which Echo Trans World was involved.
174. When Tober issued the three bills of lading on the Echo Trans World shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the three Echo Trans World shipments.
175. Echo Trans World did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Echo Trans World did not operate as an NVOCC on the three Echo Trans World shipments.
176. Echo Trans World operated as an ocean freight forwarder on the three Echo Trans World shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
177. Tober did not violate section 10(b)(11) of the Shipping Act on the three Echo Trans World shipments as it did not accept cargo from or transport cargo for the account of an NVOCC

that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

### **Car-Go-Ship.com**

BOE contends that “Tober provided service to Car-Go-Ship.com for four shipments between October 2004 and May 2005.” (BOE Prop. FF ¶ 39.)

178. Car-Go-Ship.com did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. BOE App. p. 16.
179. Car-Go-Ship.com advertised that it provided “[s]ervices for Domestic Auto Transport & International Car Shipping. . . . Multiple unit International Car Shipping via Containership & Oversized Vehicle Shipping to all points Worldwide. Let Car-GO-Ship.com be your logistics solution with unsurpassed rates and service guaranteed.” BOE App. p. 1011.
180. Car-Go-Ship.com’s advertisement stated “International and Overseas transportation is ordinarily from Port to Port. Door to Door service is also available,” and recommended insurance for ocean transportation.” BOE App. p. 1013.
181. Through its Internet advertisement, Car-GO-Ship.com held 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 within the meaning of 46 U.S.C. § 40102(6)(A)(i).
182. Tober issued two bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1021 (Douglas Infiniti/Jean Luc Dourson); 1024 (GC Cycles).
183. Tober issued two bills of lading identifying the proprietary shipper c/o Car-Go-Ship.com as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1016 (Kevin Wheatcroft); 1029 (Andrea Gilligan)
184. Tober issued invoices to Car-Go-Ship.com for shipments by three proprietary shippers: BOE App. pp. 1015 (Kevin Wheatcroft); 1022 (Douglas Infiniti/Jean Luc Dourson); 1023 (GC Cycles); 1029 (Andrea Gilligan).
185. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 999 (Anthony Strong).

186. Tober issued Warehouse Receipts to Car-Go-Ship.com for the shipments of the proprietary shippers: BOE App. pp. 1017 (Kevin Wheatcroft); 1025 (GC Cycles).
187. Car-Go-Ship.com prepared a booking order for some shipments: BOE App. pp. 1018 (Kevin Wheatcroft).
188. Car-Go-Ship.com prepared a work order for some shipments: BOE App. pp. 1019 (Douglas Infiniti/Jean Luc Dourson); 1026 (GC Cycles).
189. Tober carried four shipments in which Car-Go-Ship.com was involved.
190. When Tober issued the four bills of lading on the four Car-Go-Ship shipments identifying the proprietary shipper or the proprietary shipper c/o Car-Go-Ship as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the four Car-Go-Ship shipments.
191. Car-Go-Ship did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Car-Go-Ship did not operate as an NVOCC on the four Car-Go-Ship shipments.
192. Car-Go-Ship operated as an ocean freight forwarder on the four Car-Go-Ship shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
193. Tober did not violate section 10(b)(11) of the Shipping Act on the four Car-Go-Ship shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

#### **Access International Transport/AVL Atlanta Transport**

BOE contends that “Tober provided service to Access International Transport individually for five shipments between August 2005 and January 2006 and provided service for six joint shipments of Access International Transport/AVL Atlanta Transport between August 2005 and May 2006.” (BOE Prop. FF ¶ 40.)

194. Access International Transport did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
195. AVL Atlanta Transport did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
196. Access International Transport advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service.” BOE App. p. 1401.
197. Access International Transport advertised that it provides “international shipment from origin to destination.” BOE App. p. 1403.
198. AVL Atlanta Transport advertised that it “is a fully licensed and insured global moving company that can fulfill all of your moving needs. Whether you are moving across town or around the world, we offer competitive prices and world class service.” BOE App. p. 1407.
199. AVL Atlanta Transport advertised that it provides “international shipment from origin to destination.” BOE App. p. 1409.
200. Through their Internet advertisements, Access International Transport and AVL Atlanta Transport held themselves out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation within the meaning of 46 U.S.C. § 40102(6)(A)(i).
201. Tober issued eleven bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1043 (Maria Courel); 1048 (Konrad Knauss); 1054 (Dennis Peek); 1060 (Gerard Eden); 1069 (Emilio Lozoya, Marielle Eckes); 1074 (Darin Hood); 1083 (Isabela Figueroa);<sup>13</sup> 1088 (Nicole Kunz); 1094 (Cesar Aedo);<sup>14</sup> 1103 (Lia McFarland); 1108 (Chris White).

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<sup>13</sup> CaroTrans International also issued a bill of lading identifying Isabela Fegueroa as the shipper and Tober as the forwarding agent. BOE App. p. 1081.

<sup>14</sup> SeaMates International, Inc., also issued a bill of lading identifying Cesar Aedo as the shipper and Tober as the forwarding agent. BOE App. p. 1095.

202. Tober issued twelve invoices to Access International Transport for shipments by proprietary shippers: BOE App. pp. 1042 (Maria Courel); 1047 (Konrad Knauss); 1053 (Dennis Peek); 1059 (Gerard Eden); 1064 (Catherine Mars); 1068 (Emilio Lozoya, Marielle Eckes); 1073 (Darin Hood); 1080 (Isabela Figueroa); 1087 (Nicole Kunz); 1092 (Cesar Aedo); 1102 (Lia McFarland); 1107 (Chris White).
203. Although there is no Tober bill of lading in the record for the Catherine Mars shipment, I find based on the Tober invoice and other documents and Tober's operating practices that Tober issued a bill of lading identifying Catherine Mars as the shipper for the Catherine Mars shipment.
204. Tober issued pickup/delivery orders to proprietary shipper c/o Access Van Lines: BOE App. pp. 1052 (Konrad Knauss); 1058 (Dennis Peek); 1063 (Gerard Eden);
205. Tober issued Warehouse Receipts to the proprietary shipper c/o Access Van Lines for the shipments of the proprietary shippers: BOE App. pp. 1051 (Konrad Knauss); 1056 (Dennis Peek); 1062 (Gerard Eden); 1069 (for Emilio Lozoya, Marielle Eckes shipment);
206. Tober issued Warehouse Receipts to Access International Transport for the shipments of the proprietary shippers: BOE App. pp. 1044 (Maria Courel); 1072 (Emilio Lozoya, Marielle Eckes); 1091 (Nicole Kunz); 1106 (Chris White).
207. Isabela Figueroa signed a Tober Group Customer Authorization authorizing Tober to use her passport and/or Social Security number for export formalities. BOE App. p. 1084.
208. BOE App. pp. 1106 – Tober Warehouse Receipt Access International Transport as the shipper, Max Michael Webster as consignee, and Tober as forwarder. Only document.
209. BOE App. pp. 1107 – Tober invoice with Access International Transport as the shipper, Dijkshoorn Euromovers as consignee. For Chris White shipment?
210. Tober carried twelve shipments in which Access International Transport/AVL Atlanta Transport were involved.
211. When Tober issued the twelve bills of lading on the Access International Transport/AVL Atlanta Transport shipments identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place

of delivery; therefore, Tober operated as an NVOCC on the twelve Access International Transport/AVL Atlanta Transport shipments.

212. Access International Transport/AVL Atlanta Transport did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Access International Transport/AVL Atlanta Transport did not operate as an NVOCC on the twelve Access International Transport/AVL Atlanta Transport shipments.
213. Access International Transport/AVL Atlanta Transport operated as an ocean freight forwarder on the twelve Access International Transport/AVL Atlanta Transport shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
214. Tober did not violate section 10(b)(11) of the Shipping Act on the twelve Access International Transport/AVL Atlanta Transport shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

**Tran Logistic Group, Inc. (IntlMove, Inc.)**

BOE contends that “Tober provided service to Tran Logistic Group, Inc., also known as Intl Move, for seventeen shipments between December 2004 and August 2004 [sic].”(BOE Prop. FF ¶ 41.)

215. Tran Logistic Group did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
216. The record does not contain any Internet advertising by Tran Logistic Group.
217. BOE has not established by a preponderance of the evidence that Tran Logistic Group, Inc. (IntlMove, Inc.) held 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.
218. Tober issued twelve bills of lading identifying the proprietary shipper as the shipper for transportation of goods by water from the United States to a foreign country; BOE App. pp. 1189 (Potts Patrick); 1200 (Indu Krishnaswamy); 1223 (Dave Mann); 1231 (Jeffrey W.

Britton); 1239 (Cathy Rodham); 1266 (Nicole Yu-Heng Hsu); 1273 (Jonathan William O'Grady); 1280 (Andre Riechenstein); 1288 (Philip Poettinger); 1294 (Richard Roberts); 1302 (Silke Roth); 1310 (Adrian Stoppe).

219. Tober issued three bills of lading identifying the proprietary shipper c/o TLG as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. pp. 1207 (Moreton Kim & Macias Katherine); 1215 (Jertrum Uwe); 1248 (Deborah Burgess).
220. Tober issued seventeen invoices to Tran Logistic Group for proprietary shippers: BOE App. pp. 1188 (Potts Patrick); 1194 (Jonathan Waage); 1199 (Indu Krishnaswamy); 1206 (Moreton Kim & Macias Katherine); 1214 (Jertrum Uwe); 1222 (David Mann); 1230 (Jeff Britton); 1238 (Cathy Rodham); 1245 (Deborah Burgess); 1253 (Alan & Rebecca Richardson); 1264 (Nicole Yu-Heng Hsu); 1272 (Jonathan William O'Grady); 1279 (Andre Riechenstein); 1287 (Philip Poettinger); 1293 (Richard Roberts); 1301 (Silke Roth); 1309 (Adrian Stoppe).
221. The record contains a Tober invoice to Tran Logistic Group for the Jonathan Waage shipment, but does not contain a Tober bill of lading for the Jonathan Waage shipment. Tober issued a pickup/delivery order to Waage, Jonathan c/o TLG at what appears to be Waage's address. Jonathan Waage sent an email from to Yoram of Tober with information for the shipment. (BOE App. pp. 1194-1198.) I find based on the Tober invoice and other documents and Tober's operating practices that Tober issued a bill of lading identifying Waage as the shipper for transportation of goods by water from the United States to a foreign country for this shipment.
222. The record contains a Tober invoice to Tran Logistic Group for the Alan & Rebecca Richardson shipment, but does not contain a Tober bill of lading for the Alan & Rebecca Richardson shipment. SeaMates Consolidation Service, Inc.<sup>15</sup> issued a bill of lading identifying Alan & Rebecca Richardson as the shipper and Tober as the forwarding agent. Tober issued a pickup/delivery order to Alan & Rebecca Richardson c/o TLG and secured insurance as the agent for the Alan & Rebecca Richardson. (BOE App. pp. 1253-1263.) I find based on the Tober invoice and other documents and Tober's operating practices, (*see*

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<sup>15</sup> The name of the carrier is not visible on this photocopy of the bill of lading. Based on the portion of the logo that is visible, the bill of lading appears to have been issued by SeaMates Consolidation Service, Inc. *Compare* BOE App. 1267 (Nicole Yu-Heng Hsu). *See also* BOE App. 1257 (pickup/delivery order for Alan & Rebecca Richardson reference number for delivery to SeaMates c/o World Wide Freight).

BOE App. pp. 1264, 1266, and 1267 (Tober invoice, Tober bill of lading, and SeaMates bill of lading for Hsu shipment)), that Tober issued a bill of lading identifying Alan & Rebecca Richardson as the shipper for transportation of goods by water from the United States to a foreign country for this shipment.

223. Tober issued pickup/delivery orders directly to proprietary shipper: BOE App. pp. 1191 (Potts Patrick); 1203 (Indu Krishnaswamy); 1241 (Cathy Rodham); 1278 (Jonathan William O'Grady); 1283 (Andre Riechenstein); 1292 (Philip Poettinger).
224. Tober issued pickup/delivery orders to proprietary shippers c/o TLG: BOE App. pp. 1211 (Moreton Kim & Macias Katherine); 1219 (Jertrum Uwe); 1250 (Deborah Burgess); 1257 (Alan & Rebecca Richardson); 1300 (Richard Roberts); 1304 (Silke Roth).
225. Tober issued Warehouse Receipts to proprietary shippers: BOE App. pp. 1202 (Indu Krishnaswamy); (Moreton Kim & Macias Katherine); 1240 (Cathy Rodham); 1275 (Jonathan William O'Grady); 1282 (Andre Riechenstein); 1290 (Philip Poettinger); 1303 (Silke Roth).
226. Tober issued Warehouse Receipts to proprietary shippers c/o TLG: BOE App. pp. 1210 (Moreton Kim & Macias Katherine); 1217 (Jertrum Uwe); 1227 (Dave Mann); 1249 (Deborah Burgess); 1296 (Richard Roberts); 1314 (Adrian Stoppe).
227. Tober secured insurance as the agent for the assured proprietary shipper: BOE App. pp. 1195 (Waage); 1208 (Moreton Kim); 1232-1233 (Britton, Jeff); 1246 (Deborah Burgess); 1259-1260 (Alan & Rebecca Richardson); 1311 (Adrian Stoppe).
228. Tober issued a Shipping Information form stating "Thank you for choosing Tober Group Inc. for your upcoming overseas relocation." BOE App. pp. 1218 (Jertrum Uwe); 1235 (Jeff Britton).
229. Tran Logistic Group issued a letter/email to proprietary shippers identifying Tober as the international carrier: BOE App. pp. 1220 (Jertrum Uwe); 1228 (David Mann); 1242 (Cathy Rodham); 1276 (Jonathan William O'Grady).
230. BOE App. pp. 1286, 1308 - IntlMove states "carrier to carrier agreement." Could be a carrier, but not a carrier by water, hence not an NVOCC.
231. Tran Logistic Group email to Tober stating: The Client [proprietary shipper] is the shipper. TLG is only your Company Broker, accordingly only the Client must be place on your Bill of Lading as the shipper." BOE App. pp. 1269 (Nicole Yu-Heng Hsu); 1291 (Philip Poettinger); 1297 (Richard Roberts); 1315 (Adrian Stoppe).

232. Tober carried seventeen shipments in which Tran Logistic Group was involved.
233. When Tober issued the seventeen bills of lading on the Tran Logistic Group shipments identifying the proprietary shipper or the proprietary shipper c/o Tran Logistic Group as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the seventeen Tran Logistic Group shipments.
234. Tran Logistic Group did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tran Logistic Group did not operate as an NVOCC on the seventeen Tran Logistic Group shipments.
235. Tran Logistic Group operated as an ocean freight forwarder on the seventeen Tran Logistic Group shipments as it dispatched shipments from the United States via a common carrier and booked or otherwise arranged space for those shipments on behalf of shippers and/or processed the documentation or performed related activities incident to those shipments.
236. Tober did not violate section 10(b)(11) of the Shipping Act on the seventeen Tran Logistic Group shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

### **Avi Moving**

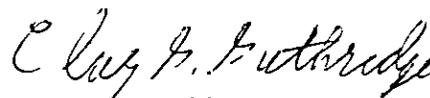
BOE contends that "Tober provided service to Avi Moving for one shipment in December 2005." (BOE Prop. FF ¶ 42.)

237. Avi Moving did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act. (BOE App. p. 16.)
238. The record does not contain any Internet advertising by Avi Moving.
239. BOE has not established by a preponderance of the evidence that Avi Moving held 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.

240. Tober issued an invoice to Avi Moving for the Odeo Kobo shipment. BOE App. p. 1333.
241. Tober issued a bill of lading identifying proprietary shipper Odeo Kobo as the shipper for transportation of goods by water from the United States to a foreign country: BOE App. p. 1334.
242. Tober issued a Warehouse Receipt to Avi Moving for the Odeo Kobo shipment. BOE App. p. 1335.
243. Tober carried one shipment in which Avi Moving was involved.
244. When Tober issued the bill of lading on the Avi Moving shipment identifying the proprietary shipper as the shipper, it established a direct relationship with the proprietary shipper and assumed responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Tober operated as an NVOCC on the Avi Moving shipment.
245. Avi Moving did not hold 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 or assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery; therefore, Avi Moving did not operate as an NVOCC on the Avi Moving shipment.
246. Avi Moving operated as an ocean freight forwarder on the Avi Moving shipment as it dispatched a shipment from the United States via a common carrier and booked or otherwise arranged space for the shipment on behalf of the shipper and/or processed the documentation or performed related activities incident to those shipment.
- 246A. Tober did not violate section 10(b)(11) of the Shipping Act on the Avi Moving shipment as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.

## CONCLUSION

247. Tober transported cargo as a common carrier by water (“assume[d] responsibility for the transportation from the port or point of receipt to the port or point of destination” – 46 U.S.C. § 40102(6)(A)(ii)) on 278 shipments that included the involvement of fifteen intermediaries that did not publish a tariff showing rates and charges pursuant to section 8 of the Shipping Act or provide proof of financial responsibility in the form of surety bonds pursuant to section 19(b) of the Shipping Act.
248. Each shipment was dispatched from the United States via a common carrier, 46 U.S.C. § 40102(18), and used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6)(A)(iii).
249. The fifteen intermediaries did not assume responsibility for transportation by water of the goods from the place of receipt to the port of discharge or place of delivery on the shipments in which they were involved; therefore, they did not operate as NVOCCs on the shipments.
250. Tober did not violate section 10(b)(11) of the Shipping Act on the 278 shipments as it did not accept cargo from or transport cargo for the account of an NVOCC that does not have a tariff as required by section 40501 of the Act and a bond, insurance, or other surety as required by section 40902 of the Act.
251. Tober provided service in the liner trade that was not in accordance with the rates and charges contained in a published tariff on each shipment in violation of section 10(b)(2)(A) of the Shipping Act.
252. Tober committed 278 violations of section 10(b)(2)(A) of the Shipping Act.
253. BOE does not designate any specific facts and provide their location in the record that BOE contends would support a finding Tober willfully and knowingly violated section 10(b)(2)(A) of the Shipping Act.
254. BOE has not met its burden of persuasion regarding the amount of civil penalty to be assessed for Tober’s violations of section 10(b)(2)(A) of the Act; therefore, no civil penalty is assessed.
255. BOE has not met its burden of persuasion that a cease and desist order should be issued; therefore, no cease and desist order is issued.



Clay G. Guthridge  
Administrative Law Judge