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DOCKET NO. 06 – 06

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

BUREAU OF ENFORCEMENT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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BUREAU OF ENFORCEMENT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Pursuant to the Administrative Law Judge's order dated February 5, 2009, as modified by an order dated May 11, 2009, the Bureau of Enforcement ("BOE") hereby files its Proposed Findings of Fact, Supporting Evidence and Brief.

A. PROCEDURAL HISTORY

On May 11, 2006, the Federal Maritime Commission ("Commission") issued the Order of Investigation and Hearing ("Order") in this matter. The Order directed that the following specific issues be determined:

a) whether the Respondents violated Section 10(b)(11) of the Shipping Act, 46 U.S.C. § 41104(2)(A), and the Commission's regulations at 46 C.F.R. § 515.27 by knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary ("OTI") that did not have a tariff and a bond as required by sections 8 and 19 of the Act;

b) whether Respondent Tober Group, Inc. ("Tober") violated sections 10(b)(2)(A) of the Shipping Act, 46 U.S.C. § 41104(11), by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff;

c) whether, in the event one or more violations of Section 10 of the Shipping 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;

d) whether, in the event violations are found, appropriate cease and desist orders should be issued against Respondents; and

e) 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.

The Order named EuroUSA Shipping, Inc., Tober Group, Inc. and Container Innovations, Inc. as Respondents.[1] BOE was also named a party to this proceeding.

On October 1, 2007, Tober filed a motion for summary judgment and, on October 29, 2007, BOE filed its response. On November 14, 2007, the Administrative Law Judge ("ALJ") heard argument and by order dated November 20, 2007, directed BOE to file a supplemental brief by December 21, 2007, later extended by order dated December 11, 2007, to January 11, 2008. The date for submission of Tober's supplemental brief was extended to February 15, 2008. On February 14, 2008, Tober filed its supplemental brief, including a motion to strike exhibits attached to BOE's supplemental brief. On February 28, 2008, BOE filed a response to Tober's motion to strike. On June 12, 2008, the ALJ issued a Memorandum and Order granting Tober's motion for summary judgment and motion to strike certain exhibits. On July 8, 2008, BOE filed its appeal of the ALJ's order granting Tober's motion to strike certain exhibits and its motion for summary judgment. BOE's appeal was granted on December 18, 2008, and the case was remanded to the ALJ for further proceedings. On January 15, 2009, Tober's ocean freight forwarding and NVOCC license was revoked for failure to maintain a bond. Tober has ceased doing business. On February 5, 2009, the ALJ issued a procedural order setting forth a schedule for the filing of proposed findings of fact, briefs and evidence. On February 27, 2009, Tober's counsel filed a motion to withdraw which was granted on April 29, 2009.

B. PROPOSED FINDINGS OF FACT

TOBER GROUP, INC.

1. Tober was incorporated as a New York corporation on February 16, 1996, and as of the date of this filing, is an active corporation. Its president is Yonatan Benhaim. (BOE App.

1. A settlement agreement between BOE and EuroUSA Shipping, Inc. was filed on October 1, 2007, and awaits approval by the Administrative Law Judge. A Memorandum and Order to Show Cause granting the Bureau of Enforcement's Motion for Sanctions and Summary Judgment against Container Innovations, Inc. was served on April 3, 2007. Container Innovations, Inc. never responded to the Order to Show Cause.

1, P. 000001). Tober received an ocean freight forwarding license from the Commission in 1996 and subsequently received a non-vessel-operating common carrier ("NVOCC") license in 1999. (BOE App. 1, P. 000001-000002). In 2003, when its license was reissued by the Bureau of Certification of Licensing, the corporate information provided showed that Yonatan Benhaim served as president, Steven Schneider served as vice-president and Yoram Benhaim served as the treasurer of Tober. (BOE App. 1, P. 000004). Tober operated as both an ocean freight forwarder and an NVOCC. (BOE App. 8, Deposition of Yoni Benhaim, P. 18, Lines 2-16). Tober's ocean freight forwarding and NVOCC license were revoked on January 15, 2009 for failure to maintain a bond. (BOE App. 1, P. 000005-000006).

ENTITIES[2]

EOM Shipping, Inc.

2. During the course of an investigation, Area Representative ("AR") Emanuel J. Mingione became aware that EOM Shipping, Inc. ("EOM") was providing ocean transportation services. EOM was contacted by Bureau of Enforcement ("BOE") staff and advised of the requirements of the Shipping Act and Commission regulations. On April 3, 2006, EOM submitted an application for an OTI license. On July 25, 2006, EOM withdrew its OTI application because the references provided by EOM's proposed qualified individual, Shay Harpaz, would not confirm the requisite experience. A review of EOM'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. (BOE App. 2, ¶ 3; BOE App. 15). A review of EOM's website in June 2007 indicated that EOM was

2. The term "entity" or "entities" refers to one or more of the companies BOE alleges are unbonded and untariffed NVOCCs from whom Tober accepted cargo or for whom Tober transported cargo in violation of Section 10(b)(11).

continuing to hold out to provide transportation of personal effects and household goods. (BOE App. 2, ¶ 3; BOE App. 15).

3. After additional contact between AR Mingione and EOM's attorney, in September, 2007, EOM's attorney contacted BOE staff and indicated that EOM intended to become a sales agent for Tober, was going to charge Tober's tariff rates rather than their own rates and had modified its website. Although AR Mingione requested copies of documentation regarding EOM's activities, the documentation was never provided. EOM 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 App. 2, ¶ 4).
4. A review of documents obtained from Tober shows that Tober provided service to EOM for four shipments during the period February 2006 through April 2006. (BOE App. 2, ¶ 5; BOE App. 16). These shipments were all less than container load ("LCL") shipments. Three of the four shipment files from Tober contain a copy of Tober's invoice to EOM for port to door service and documentation fees. Each shipment file also contains an information sheet from EOM providing shipment information, an inventory sheet, a warehouse receipt from Tober to EOM as the shipper and a Tober bill of lading issued to the owner of the cargo. (BOE App. 2, ¶ 5; BOE App.16).
5. 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 App. 2, ¶ 6).

Lehigh Moving and Storage, Inc.

6. On March 12, 2004, AR Mingione sent a letter to Lehigh Moving and Storage, Inc. ("Lehigh Moving") advising them they appeared to be operating as an OTI unlawfully.

In that letter, he advised them of the penalties for knowing and willful violations. Lehigh Moving did not respond to the letter and did not respond to telephone calls. On February 15, 2005, the Bureau of Certification and Licensing sent Lehigh Moving a letter advising them to apply for an OTI license and warned them of the consequences of operating without a license. The Director of BOE sent another letter to Lehigh Moving on October 16, 2006. Lehigh Moving did not respond to the BOE letter and the matter was subsequently referred to AR Mingione for further investigation. (BOE App. 2, ¶7).

7. A review of Lehigh Moving's website on November 21, 2006, showed they described the company as "an International and domestic shipping carrier" that provided "international shipping from origin to destination." The home page of their website also contained a link to their international relocation page. (BOE App. 2, ¶8; BOE App. 13). On February 2, 2007, AR Mingione sent Lehigh Moving another letter indicating that the information regarding their activities would be submitted to headquarters. No response was received from Lehigh Moving. (BOE App. 2, ¶8).

8. A review of documents obtained from Tober shows that Tober provided service to Lehigh Moving for thirty-one shipments during the period from June 1, 2004, through January 31, 2006. These shipments were primarily less than container load ("LCL") shipments. The documentation for each shipment was alike, consisting of Tober's invoice to Lehigh Moving for ocean freight, a booking request from Lehigh Moving's International department, an inventory or packing list generally providing a foreign destination as the final destination of the cargo, a warehouse receipt issued from Tober to Lehigh Moving and a Tober bill of lading issued in the name of the owner of the cargo c/o Lehigh Moving using Lehigh Moving's address or in some cases, issued solely in the

name of the owner of the cargo. (BOE App. 14). Due to Lehigh Moving's failure to cooperate, no documents were obtained from Lehigh Moving. (BOE App. 2, ¶ 9).

9. 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 App. 2, ¶ 10).

Infinity Moving & Storage, Inc.

10. On March 21, 2006, the Commission's Bureau of Certification and Licensing sent Infinity Moving and Storage, Inc. ("Infinity Moving") a letter advising them it appeared that they were violating the Shipping Act by doing business as an ocean transportation intermediary ("OTI") without a license issued by the Commission and without a tariff or proof of the required surety. After receiving no response from Infinity Moving, the investigation of Infinity Moving was assigned to AR Mingione. 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 App. 2, ¶ 11; BOE App. 11).

11. On February 1, 2007, AR Mingione sent a letter to Infinity Moving requesting information regarding the common carriers/OTIs with whom Infinity Moving booked cargo during the previous year and copies of bills of lading or freight invoices issued by those common carriers/OTIs. AR Mingione also asked them to cease soliciting ocean cargo, including on their website. In response, AR Mingione received a letter from the

General Manager, Ross Sapir, advising that Infinity Moving had removed the references for ocean transportation services from its website and had ceased offering international shipping services. (BOE App. 2, ¶ 12; BOE App. 10). On June 19, 2007, AR Mingione received a response from counsel for Infinity Moving, who advised that during the previous year Infinity Moving completed 152 shipments. All but three of those shipments were shipped via Tober. Infinity Moving's counsel provided copies of Tober's invoices to Infinity. A review of the documentation showed that Infinity Moving made at least 126 shipments to a foreign destination with Tober from June 2004 through February 2007. (BOE App. 2, ¶ 12; BOE App. 12). Of those shipments, seventy-two shipments were completed after May 11, 2006, the date of the issuance of the Order of Investigation and Hearing in this case. (BOE App. 12).

12. As part of the discovery process, Tober originally provided documentation of forty shipments made by Infinity Moving with Tober during the period from June, 2004, through April, 2006. After a request from Bureau of Enforcement staff, Tober subsequently provided documentation for an additional 98 shipments for which documentation had already been received from Infinity Moving. The documents show the shipments were primarily less than container load ("LCL") shipments. The documentation for each shipment generally consisted of Tober's invoice to Infinity Moving for ocean freight, a booking request from Infinity Shipping's International department, an packing or inventory list prepared by Infinity Moving generally providing a foreign destination as the final destination of the cargo, a warehouse receipt issued from Tober to Infinity Shipping and a Tober bill of lading issued in the name of the owner of the cargo c/o Infinity Shipping using Infinity Shipping's address or in some cases, issued solely in the name of the owner of the cargo. (BOE App. 2, ¶ 13; BOE App. 12).

13. 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 then, 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 App. 2, ¶ 14).

14. Beginning in late 2003, the Commission began receiving complaints from shippers stating they had hired household goods moving companies to transport their personal effects and vehicles from various locations in the United States to foreign destinations. A number of these companies were located in the South Florida area and the South Florida office began investigating the activities of these companies. As part of his duties, AR Andrew Margolis investigated six companies operating as unlicensed, unbonded and untariffed NVOCCs in the South Florida area, who contracted with Tober, along with other common carriers, to move their shipments. Among the companies under investigation between 2004 and 2006 were Moving Services, L.L.C., Worldwide Relocations, Inc., All in One Shipping, Inc., Around the World Shipping, Inc., Tradewind Consulting, Inc. and Orion Consulting, Inc. With the exception of Orion Consulting, Inc., all of the companies were later named as respondents in the Commission's Docket 06-01. The information obtained during the investigation shows that Tober accepted shipments from these companies. None of these companies ever maintained a bond or surety or provided proof of financial responsibility and none of these companies

published a tariff as required by Sections 8 and 19 of the Shipping Act. (BOE App. 3, ¶ 4).

Worldwide Relocations, Inc.

15. As a result of complaints received by the Commission from shippers, AR Margolis became aware of the activities of Worldwide Relocations, Inc., ("WWR"), a Florida corporation. A review of WWR's website in November 2004 showed WWR advertised themselves as "an international moving company" offering port to port and door to door services through their "international agents" and touting service from origin to destination". (BOE App. 3, ¶ 5; BOE App. 30).

16. Tober provided service to WWR for thirty shipments during the period from July 2004 through June 2005. (BOE App. 3, ¶ 5; BOE App. 31). That number includes two shipments where the Commission's Office of Consumer Affairs and Dispute Resolution Services was contacted by the shippers after WWR did not pay for the shipment and Tober eventually billed the shippers directly. These shipments were primarily less than container load ("LCL") shipments. (BOE App. 3, ¶ 5; BOE App. 31).

17. The documents obtained from Tober for each WWR shipment include a copy of Tober' s invoice to WWR for either port to door, door to door or port to port service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Worldwide Relocations with WWR's address or in some cases, issued to the shipper. (BOE App. 3, ¶ 5; BOE App. 31). 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 App. 3, ¶ 5; BOE App. 31).

All In One Shipping, Inc.

18. Joshua S. Morales was the sole corporate officer of All In One Shipping, Inc., a Florida corporation incorporated on November 16, 2004. (BOE App. 5, ¶ 1).

19. All In One Shipping, Inc. ("AIOS") operated as an NVOCC from November 2004 to January 2006. 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 App. 19). AIOS' target customers were individuals moving overseas. Most shipments were less than full container load ("LCL") although some were full container load ("FCL"). (BOE App. 5, ¶ 2).

20. After being contacted by a potential customer, the staff of AIOS would obtain a quote or quotes from another common carrier for transportation of the cargo in order to determine how much to charge the customer. If door service was required on either end of the voyage, AIOS would also obtain quotes for that service and provide the customer a quote which included all services and reflected a mark-up of the ocean freight and other charges. In no case did AIOS merely pass the ocean freight and other charges on to the customer. If the customer agreed to contract with AIOS for shipment of their cargo, AIOS would invoice the customer and the customer would pay AIOS directly. AIOS would provide its customers with proof of payment, inventory sheets and insurance documentation if purchased. The ocean common carrier or NVOCC would bill AIOS directly for the charges. The cargo would not be released at destination by the ocean common carrier or NVOCC until AIOS paid all the charges. (BOE App. 5, ¶ 3).

21. AIOS would provide to the ocean common carrier or NVOCC the details regarding the shipment including the shipper's information, the pick-up and destination information, and any necessary customs and insurance information. AIOS' customers contracted with them to transport their goods and looked to them for the safe arrival of their goods. AIOS assumed responsibility for the delivery of the shipment to the promised destination. (BOE App. 5, ¶ 4).

22. AIOS tendered cargo to several NVOCCs including Tober. Mr. Morales was aware of Tober because a previous employer of his did business with them. Mr. Morales worked primarily with Yoram Benhaim, the brother of the president of Tober, Yonatan Benhaim. At no time did any principal or employee of Tober inquire as to whether AIOS had a Federal Maritime Commission license, published a tariff or maintained a bond as required for NVOCCs by the Shipping Act. No principal or employee of Tober ever inquired whether AIOS was a freight forwarder, an NVOCC or a beneficial cargo owner. AIOS tendered eleven shipments to Tober. (BOE App. 5, ¶ 5; BOE App. 33).

23. After receiving an inquiry from a potential customer, AIOS would contact Tober to determine the cost of a particular shipment and the availability of pick-up services. After receiving that information from Tober, AIOS would calculate its charges and convey those charges to the potential shipper. AIOS did not just pass through Tober's charges to the shipper. If the shipper agreed to contract with AIOS, the shipper would make payment to AIOS and AIOS would make the booking with Tober and provide all required information to complete the shipment. Tober would issue a bill of lading, generally in the name of the shipper, but in some cases c/o AIOS. Tober would provide the bill of lading to AIOS. Tober always invoiced AIOS for the costs of the shipment, never the customer. Shippers contracted with AIOS to transport their goods, not Tober, and looked

to AIOS for the safe arrival of their goods. AIOS assumed responsibility for the delivery of the shipment to the promised destination. (BOE App. 5, ¶ 6; BOE App. 33).

24. At no time during this period did AIOS publish an automated tariff, possess a Federal Maritime Commission license to operate as an NVOCC or obtain any evidence of financial responsibility prior to engaging in NVOCC operations. As a result of the activities of AIOS, both Mr. Morales and the company were named as Respondents in Docket 06-01, *Worldwide Relocations, Inc. et al.* AIOS and Mr. Morales entered into a settlement agreement with the Commission admitting violations of Sections 8 and 19(a) and (b) of the Shipping Act. (BOE App. 5, ¶ 6).

25. As a result of the investigation into WWR, AR Margolis became aware of the activities of AIOS. The sole officer of AIOS, Joshua S. Morales, was a former employee of WWR. A review of AIOS' website in March 2005 and in September 2005 showed that they described themselves as an international shipping company. Additional pages on their website showed they offered door to port, full service door to door and port to port services. (BOE App. 3, ¶ 6; BOE App. 32). A review of documents received from Tober shows that Tober provided service to AIOS for eleven shipments during the period from May 2005 through October 2005. (BOE App. 3, ¶ 6; BOE App. 33). These shipments were primarily less than container load ("LCL") shipments. The documents include a copy of Tober's invoice to AIOS for either port to door, door to door or port to port service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o AIOS or in some cases, issued to the shipper. (BOE App. 3, ¶ 6; BOE App. 33). Copies of documents from AIOS' shipment files for the same shipments show AIOS contacted Tober to obtain a quote for a shipment, provided quotes to its customers promising to provide transportation to a

foreign destination, issued invoices charging their customers a different amount than they were charged by Tober, contracted for inland transportation when necessary to complete the shipment, and provided marine insurance and other services for its customers. (BOE App. 3, ¶ 6; BOE App. 33).

Around the World Shipping, Inc.

26. Daniel E. Cuadrado was the sole corporate officer of Around the World Shipping, Inc., a Florida corporation incorporated on April 14, 2005. Around the World Shipping, Inc. ("ATWS") operated as an NVOCC between May 2005 and September 2005. 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 App. 6, ¶ 1, 2; BOE App. 34). ATWS' target customers were individuals moving overseas. Most shipments were less than full container load ("LCL"). ATWS' customers found them on the Worldwide web through their website or through a lead provider (to whom Around the World Shipping, Inc. paid a fee) who received inquiries from shippers on the Worldwide web searching for international movers. (BOE App. 6, ¶ 2).

27. After being contacted by a potential customer, the staff of ATWS would obtain a quote or quotes from another common carrier for transportation of the cargo in order to determine how much to charge our customer. If door service was required on either end of the voyage, ATWS would also obtain quotes for that service. ATWS would then provide the potential customer a quote which included all services and reflected a mark-up of the ocean freight and other charges. In no case did ATWS merely pass the ocean freight and other charges on to the customer. If the customer agreed to contact with ATWS for

shipment of their cargo, ATWS would invoice the customer and the customer would pay ATWS directly. ATWS would provide its customers with proof of payment, inventory sheets and insurance documentation if purchased. The ocean common carrier or NVOCC would bill ATWS directly for the charges. The cargo would not be released at destination by the ocean common carrier or NVOCC until ATWS paid all the charges. (BOE App. 6, ¶ 3).

28. ATWS would provide the ocean common carrier or NVOCC the details regarding the shipment including the shipper's information, the pick-up and destination information, and the necessary customs information. ATWS' customers contracted with them to transport their goods and looked to ATWS for the safe arrival of their goods. ATWS assumed responsibility for the delivery of the shipment to the promised destination. (BOE App. 6, ¶ 4).

29. ATWS tendered cargo to several NVOCCs including Tober Group, Inc. ("Tober"). All of the shipments tendered to Tober were LCL. Mr. Cuadrado was aware of Tober because a previous employer of his did business with Tober. At no time did any principal or employee of Tober inquire as to whether ATWS had a Federal Maritime Commission license, published a tariff or maintained a bond as required for NVOCCs by the Shipping Act. No principal or employee of Tober ever inquired whether ATWS was a freight forwarder, an NVOCC or a beneficial cargo owner. ATWS tendered 9 shipments to Tober. (BOE App. 6, ¶5; BOE App. 35).

30. After receiving an inquiry from a potential customer, ATWS would contact Tober to determine the costs of a particular shipment and the availability of pick-up services. After receiving that information from Tober, ATWS would calculate its charges and convey those charges to the potential shipper. ATSW did not just pass through Tober's

charges to the shipper. If the shipper agreed to contract with ATWS, the shipper would make payment to ATWS and ATWS would make the booking and provide all required information to complete the shipment. Tober would issue a bill of lading in the name of the shipper and provide it to ATWS. Tober always invoiced ATWS for the costs of the shipment, never the customer. Shippers contracted with ATWS to transport their goods, not Tober, and looked to ATWS for the safe arrival of their goods. ATWS assumed responsibility for the delivery of the shipment to the promised destination. (BOE App. 6, ¶6).

31. At no time during this period did ATWS publish an automated tariff, possess a Federal Maritime Commission license to operate as an NVOCC or obtain any evidence of financial responsibility prior to engaging in NVOCC operations. As a result of the activities of Around the World Shipping, Inc., Mr. Cuadrado and ATWS were named as Respondents in Docket 06-01, *Worldwide Relocations, Inc. et al.* Mr. Cuadrado and ATWS entered into a settlement agreement with the Commission admitting violations of Sections 8 and 19(a) and (b) of the Shipping Act. (BOE App. 6, ¶ 7).

32. As a result of the investigation into WWR, AR Margolis became aware of the activities of ATWS, a Florida corporation. The sole officer of ATWS, Daniel E. Cuadrado, was a former employee of WWR. A review of ATWS' website in September 2005 shows that they "provide[d] international shipping and moving service's [sic] for corporate, government and individuals....A.T.W. Shipping, Inc. handle's [sic] freight from small to large shipping containers as well as LCL's (Less Container Load's) [sic] and airfreight." Additional pages on their website showed they offered door to port, full service door to door and port to port services. (BOE App. 3, ¶ 7; BOE App. 34). A review of documents received shows that Tober provided service to ATWS for nine shipments during the

period from May 2005 through August 2005. (BOE App. 3, ¶ 7; BOE App. 35). These shipments were primarily less than container load ("LCL") shipments. The documents include a copy of Tober's invoice to ATWS for either port to door, door to door or port to port service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o ATWS or in some cases, issued to the shipper. (BOE App. 3, ¶ 7; BOE App. 35). Copies of documents from ATWS' shipment files for the same shipments show ATWS contacted Tober to obtain a quote for a shipment, issued quotes to its customers promising to provide transportation to a foreign destination, issued invoices charging their customers a different amount than they were charged by Tober, contracted for inland transportation when necessary to complete the shipment, and provided marine insurance and other services for its customers. (BOE App. 3, ¶ 7; BOE App. 35).

Tradewind Consulting, Inc.

33. As a result of the investigation into other companies operating in South Florida, AR Margolis became aware of the activities of Tradewind Consulting, Inc. a New York corporation. 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 App. 3, ¶ 8; BOE App. 24). However, the documentation obtained from Tober and Tradewind Consulting, Inc. for the four shipments tendered by Tradewind Consulting, Inc. to Tober between April and September 2005 shows that Tradewind Consulting, Inc. contracted with their shippers to provide full service for LCL shipments for a figure higher than what they were charged by Tober. (BOE App. 3, ¶ 8; BOE App. 25). For three of the four shipments, the documents include a copy of Tober' s invoice to Tradewind Consulting, Inc. for port to door or door to door services, documentation fees

and other miscellaneous fees. The documents also include a Tober bill of lading issued to the shipper c/o Tradewind Consulting, Inc. or issued to the shipper. (BOE App. 3, ¶ 8; BOE App. 25). Copies of documents from Tradewind Consulting, Inc.'s shipment files for the same shipments show Tradewind Consulting, Inc. contacted Tober to obtain a quote for a shipment, issued quotes to its customers promising to provide transportation to a foreign destination and issued invoices charging their customers a different amount (generally more) than they were charged by Tober. (BOE App. 3, ¶ 8; BOE App. 25).

Moving Services, Inc.

34. As a result of the investigation into other companies operating in South Florida as well as complaints received by the Commission, AR Margolis became aware of the activities of Moving Services, Inc., a Florida corporation. A review of documents received from Tober shows that Tober provided service to Moving Services, Inc. for twelve shipments during the period from July 2004 to September 2004. (BOE App. 3, ¶ 9; BOE App. 26). These shipments were primarily LCL shipments. The documents (except for one shipment) include a copy of Tober's invoice to Moving Services, Inc. for port to door service. One invoice also included destination services, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Moving Services, Inc. at Moving Services, Inc.'s address or in one case to the shipper. No documentation was provided by Moving Services, Inc. (BOE App. 3, ¶ 9; BOE App. 26).

Orion Consulting, LLC

35. As a result of the investigation into other companies operating in South Florida, AR Margolis became aware of the activities of Orion Consulting, LLC, an Illinois corporation. A review of documents received from Tober shows that Tober provided

service to Orion Consulting, LLC for three shipments during July 2005. (BOE App. 3, ¶ 9; BOE App. 28). Two of the shipments were LCL shipments. The documents include a copy of Tober' s invoice to Orion Consulting, LLC for door to door service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued to the shipper. The documentation also includes e-mails from the staff of Orion Consulting, LLC providing Tober instructions regarding the shipments. No documentation was provided by Orion Consulting, LLC. (BOE App. 3, ¶ 9; BOE App. 28).

36. Documents provided by Tober show that, in addition to the entities investigated by AR Margolis, Tober provided NVOCC services to six additional unbonded and untariffed NVOCCs. (BOE App. 3, ¶ 11).

Sea and Air International, Inc.

37. Documents received from Tober show that Tober provided service to Sea and Air International, Inc. for twenty-seven shipments between October 2004 and March 2006. (BOE App. 3, ¶ 12; BOE App. 18). A review of Sea and Air International, Inc's website on December 2006 shows that Sea and Air International, Inc. offered "residential and commercial relocation solutions to almost any destination in the world by ship...." (BOE App. 17). The shipments tendered to Tober were primarily less than container load ("LCL") shipments. The documents include a copy of Tober' s invoice to Sea and Air International, Inc. for primarily port to door service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued either to the shipper c/o Sea and Air International, Inc. or issued to the shipper. (BOE App. 3, ¶ 12; BOE App. 18). For most shipments, the documentation also includes copies of Sea and Air International, Inc.'s inventory sheets providing a foreign destination as the final

destination of the cargo. Sea and Air International, Inc. applied for an NVOCC license which became effective on January 18, 2007. No documentation was provided by Sea and Air International, Inc. (BOE App. 3, ¶ 12).

Echo Trans World, Inc.

38. Documents received from Tober show that Tober provided service to Echo Trans World, Inc. for three shipments between June 2005 and August 2005. (BOE App. 3, ¶ 13; BOE App. 19). These shipments were LCL shipments. The documents include a copy of Tober' s invoice to Echo Trans World, Inc. for port to door service or door to door service, documentation fees and other miscellaneous fees. The documentation also includes a Tober bill of lading issued to the shipper as well as a warehouse receipt issued to Echo Trans World, Inc. as shipper and a booking request from Echo Trans World, Inc. No documentation was provided by Echo Trans World, Inc. (BOE App. 3, ¶ 13; BOE App. 19).

Car-Go-Ship.com

39. Documents received from Tober show that Tober provided service to Car-Go-Ship.com for four shipments between October 2004 and May 2005. A review of Car-Go-Ship.com's website in July 2006 shows that Car-Go-Ship.com advertised that they provided "international car shipping" and provided port to port and door to door service for "international and overseas transportation". (BOE App. 3, ¶ 14; BOE App. 20). The shipments tendered to Tober were primarily LCL shipments. The documents include a copy of Tober's invoice to Car-Go-Ship.com for ocean freight. The documentation also includes a Tober bill of lading issued to the shipper c/o Car-Go-Ship.com or the shipper and a booking request from Car-Go-Ship.com. (BOE App. 21). No documentation was received from Car-Go-Ship.com. (BOE App. 3, ¶ 14).

Access International Transport/AVL Atlanta Transport

40. Documents received from Tober show 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. Access International Transport is an entity based in New York and AVL Atlanta Transport is based in Georgia. A review of their websites shows that both have identical language and both state they are a "fully licensed and insured global moving" companies that provide "international shipment from origin to destination". (BOE App. 3, ¶ 15; BOE App. 22). The shipments tendered to Tober were primarily less than container load ("LCL") shipments. The documents provided by Tober include a copy of Tober' s invoice to Access International Transport for primarily door to door service, documentation fees and other miscellaneous fees. The documents also include a Tober bill of lading issued to the shipper. For the six joint shipments, the documentation also includes copies of AVL Atlanta Transport's inventory sheets providing a foreign destination as the final destination of the cargo. (BOE App. 23). No documentation was provided by Access International Transport/AVL Atlanta Transport. (BOE App. 3, ¶ 15).

Tran Logistics Group, Inc. (Intl Move, Inc.)

41. Documents received from Tober shows that Tober provided service to Tran Logistics Group, Inc., also known as Intl Move, for seventeen shipments between December 2004 and August 2004. (BOE App. 3, ¶ 16; BOE App. 27). These shipments were primarily LCL shipments. The documents include a copy of Tober's invoice to Tran Logistic (Intl Move) for port to door service or door to door service, documentation fees and other miscellaneous fees. The documentation also includes a Tober bill of lading issued to the

shipper as well as a number of e-mails between Tober and Tran Logistics Group, Inc. (BOE App 27). No documentation was provided by Tran Logistics Group, Inc. In 2006, Intl Move, Inc. applied for an NVOCC license. (BOE App. 3, ¶ 16).

Avi Moving

42. A review of documents received from Tober shows that Tober provided service to Avi Moving for one shipment in December 2005. (BOE App. 3, ¶ 17; BOE App. 29). The shipment was an LCL shipment. The documents include a copy of Tober's invoice to Avi Moving for port to door service and documentation fees. The documentation also includes a Tober bill of lading issued to the shipper as well as a warehouse receipt issued to Avi Moving as shipper. (BOE App. 29). No documentation was provided by Avi Moving. (BOE App. 3, ¶ 17).

43. On September 7, 2005, the Director of the Bureau of Enforcement, Vern Hill, sent a letter to Yoram Benhaim, the treasurer of Tober Group. That letter noted the complaints received by the Commission against various unlicensed companies that did business with Tober Group; referenced Yoram Benhaim's previous conversation with Eric Roper of BOE and requested documents involving ten entities. (BOE App. 7).

44. Beginning in 2000, in part because of the development of the Internet, a large number of entities began offering international moving services, taking business away from Tober. (BOE App. 8, Deposition of Yoni Benhaim, P. 16, Line 11 to P. 17, Line 10; BOE App. 9, Deposition of Steve Schneider, P. 98, Line 10 to P. 99, Line 7).

45. In 2004 and 2005, Tober never declined to take a booking. (BOE App. 8, Deposition of Yoni Benhaim, P. 134, Line 17 to P. 135, Line 12; P. 179, Line 11 to Line 18).

46. Tober saved themselves the trouble of competing with the entities by accepting shipments from them. (BOE App. 8, Deposition of Yoni Benhaim, P. 136, Line 11 to P. 137, Line 11).

47. Prior to 2007, Tober made no attempt to determine the status of the entities to whom it was providing service to determine their status or whether they were bonded or tariffed. (BOE App. 8, Deposition of Yoni Benhaim, P. 131, Line 1 to P. 132; BOE App. 9, Deposition of Steve Schneider, P. 53, Line 4 to Line 20; P. 86, Line 16 to P. 89, Line 16).

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).

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).

50. If Tober acted as an ocean freight forwarder on a particular shipment, Tober would never issue a bill of lading. (BOE App. 8, Deposition of Yoni Benhaim, P. 91, Line 1 to Line 13).

51. Tober's name appeared in the freight forwarder block of its bill of lading because of Customs filing requirements. (BOE App. 8, Deposition of Yoni Benhaim, P. 122, Line 2 to Line 18).

52. In June 2006, Steve Schneider had a conversation with Vern Hill, the Director of the Bureau of Enforcement, during which he was told that it was unlawful for an entity to

"sell international unless they are licensed". (BOE App. 9, Deposition of Steve Schneider, P. 69, Line 8 to Line 18).

53. As of July 2007, if an entity could not prove they were FMC licensed, Tober would only accept the shipment if the entity acted as a sales agent and Tober adopted the owner of the cargo as their own customer, dealt directly with the owner of the cargo and billed the owner of the cargo. (BOE App. 8, Deposition of Yoni Benhaim, P. 131, Line 19 to P. 134, Line 6).

54. Tober lost a great deal of business after refusing to accept shipments from unlicensed entities. (BOE App. 8, Deposition of Yoni Benhaim, P. 167, Line 21 to P. 168, Line 1; BOE App. 9, Deposition of Steve Schneider, P. 71, Line 9 to Line 18).

55. From 1999 until the beginning of 2007, Tober did not charge the rates contained in its tariff. The rate contained in Tober's tariff was $500 weight/measure. (BOE App. 8, Deposition of Yoni Benhaim, P. 38, Line 1 to P. 41, Line 10, BOE App. 9, Deposition of Steve Schneider, P. 28, Line 11 to P. 30, Line 7).

56. A $500 weight/measure rate was not charged by Tober for any of the shipments contained in BOE's Appendix. (BOE App. 12, 14, 16, 18, 19, 21, 23, 25, 26, 27, 28, 29, 31, 33, 35).

57. 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 App. 4, ¶ 5).

58. Most of the individuals hiring entities to ship their household goods to a foreign destination are inexperienced shippers. In a majority of cases, it is the first time they have shipped any property overseas. These shippers are unaware of what documentation exists with regard to the shipment. The majority of them are satisfied by receiving proof of the amount they paid for the shipment and some sort of documentation showing the goods shipped (usually an inventory list) and the final destination. They are usually not aware of the involvement of another NVOCC in the transaction and do not ask for copies of the documentation issued by the other NVOCC. (BOE App. 4, ¶ 7).

C. RESPONDENT TOBER VIOLATED THE SHIPPING ACT BY KNOWINGLY AND WILLFULLY PROVIDING SERVICE TO UNBONDED AND UNTARIFFED NVOCCS

1. Standard of proof and inferences in administrative proceedings

Enforcement proceedings are governed by the Administrative Procedure Act ("APA") which establishes practices for "each authority of the Government of the United States," including the Federal Maritime Commission, to conduct its mandate. 5 U.S.C. § 557(c)(3)(A). The standard of proof in an administrative proceeding is to show by a preponderance of the evidence that something in fact occurred. Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 SRR 80, 84 (1998). "The preponderance of the evidence standard, which is also the usual standard applying in civil cases before courts, is a qualitative, not merely a quantitative standard, and means that the evidence makes the existence of a fact more probable than not." William R. Adair v. Penn-Nordic Lines, Inc., 26 SRR 11, 15 (I.D. 1991). Findings of fact which are supported by "substantial evidence on the entire record" are sufficient. Capital Transit Co. v. U.S., 97 F. Supp. 614, 621 (D.C. 1951) (the ICC's determination should be upheld if the Commission's finding of facts are supported by substantial evidence on the record.) "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate

to support a conclusion." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966); Richardson v. Perales, 402 U.S. 389, (1971); United States v. Federal Maritime Commission, 655 F2d 247 (DC Cir 1980).[3] The case law also recognizes that in a proceeding there may not be direct evidence on all points and that an agency is entitled to draw inferences based on the evidence available.[4] As discussed in the Adair case,

> In many instances, direct evidence is not available and courts or agencies have to rely on inferences. In other words, a 'smoking gun' cannot be found in all or most cases. In such instances, reasonable inferences are permitted from circumstantial evidence, and if the finder of fact is an expert agency which is presumed to have special familiarity with the industry in question, the courts will respect the finding of the agency. Adair at 15.

Among the cases cited by the Commission in Adair, supra, was FMC v. Svenska, 390 US 238 (1968), wherein the Supreme Court held, upholding a decision by this Commission:

> Having correctly noted that positive proof on many aspects of the case was simply not available one way or the other, the Commission was fully entitled to draw

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3. Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Kent Freight Lines, Inc., 341 F.Supp 787,789 (D.C.Md. 1972), citing Consolo at 620.

4. The purpose of this enforcement proceeding before the Commission is to determine whether Tober has violated the Shipping Act. In doing so, it should be kept in mind that the Shipping Act is a remedial act and as such "should be broadly construed in order to enable an agency to give effect to the statute's salutary purposes." River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 188, 209 (I.D. 1998). In that case, the Administrative Law Judge went on to note that the "Commission has held that the Shipping Act is remedial and accordingly should be liberally construed when persons seek to avoid Commission jurisdiction", citing Containerships, Inc., at 65. *Id.* In the Containerships case, the Commission stated that: "[I]n determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act. . . .In addition, the court should have in mind the fact that this legislation is remedial and should be liberally construed to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended." Containerships, Inc. at 62. *See also* International Association of NVOCCs v. Atlantic Container Line, 25 SRR 734, 744 (1990) ("liberal purpose-driven readings of the Shipping Acts are justified and desirable where a particular provision is broadly written, thus signifying an intention by Congress that Commission jurisdiction should not be narrowly construed."); United States v. American Union Transport, Inc., 327 US 427, 433 (1946); ("This conclusion is required...to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme...."). Most recently, in the Commission's case titled In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Unlicensed Ocean Transportation Intermediaries – Petition for Declaratory Order, 31 SRR 185 (2008), the Commission reinforced its commitment to apply the Shipping Act in the manner intended by Congress, stating: The responsibility of an agency or a court is, wherever possible, to interpret a statute so as to carry out the evident purpose of Congress, and not to 'construe a statute so as to arrive at absurd or unreasonable results or so as to contravene a Congressional purpose.' Id. at 191, *citing* U.S. v. American Trucking Association, 310 U.S. 534, 542-43 (1940). Since the Shipping Act is remedial, it should be liberally construed and not read in a narrow manner to exclude jurisdiction, limit enforcement or otherwise restrict its scope.

> inferences on these points from the incomplete evidence that was available. Conjecture of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts. Id. at 249. See also, DeWitt v. Department of the Navy, 747 F.2d 1442, 1444 (Fed. Cir. 1984).

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).[5] St. Johnsbury Trucking Company, Inc. v. U.S. 326 F.Supp. 938, 941 (D.C. Vt. 1971).[6] 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.

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5. Formal and precise findings of fact similar to those required by Equity Rule 701/2 (later codified in Federal Rules of Civil Procedure ("FRCP) Rule 52[a]) were not required under the Interstate Commerce Act, which declares that the report "shall state the conclusions of the Commission together with its decision." U.S. v. Baltimore & O.R. Co., 293 U.S. 454, 462 (1935). Later courts applied the APA to decisions of the Interstate Commerce Commission: 'By the express terms of 8(b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material'. Minneapolis & St. Louis Ry. Co. v. U.S., 361 U.S. 173, 193 (1959).

6. Significantly, Rule 52(a) of the Federal Rules of Civil Procedure, governing findings, has been held specifically inapplicable to administrative agency decisions. Additionally, agencies are not compelled to annotate to each finding the evidence supporting it so long as the required statutory findings are made. St. Johnsbury Trucking Company, Inc. at 941, Kent Freight Lines, Inc. v. U.S., 341 F.Supp.787, 789 (D.C. Md. 1972) (citing to U.S. v. Pierce Auto Freight Lines, 327 U.S. 515, 529 (1946)) See Public Utilities Commission v. Fed Power Comm'n, 205 F.2d 116 (3d Cir. 1953) finding that the Federal Power Commission is "not compelled to annotate to each finding the evidence supporting such finding."

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 approache 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.

2. **Section 10 (b)(11) of the Shipping Act**

Section 10(b)(11) prohibits a common carrier from knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary that does not have a tariff as required by Section 8(a) of the Shipping Act, and a bond, insurance, or other surety as required by Section 19(b)(1) of the Shipping Act. 46 U.S.C. § 41104(2)(A). Section

8(a) of the Shipping Act, 46 U.S.C. §40501, requires an NVOCC to maintain open to public inspection in an automated tariff system, tariffs showing its "rates, charges, classifications, rule, and practices." Section 19(b)(1) of the Shipping Act further requires all persons acting as ocean transportation intermediaries to furnish a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility. 46 U.S.C. § 40902. 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.

3. **Definition of an NVOCC**

An NVOCC is a "non-vessel-operating common carrier," as defined in 46 U.S.C. § 40102(6), and, as such, holds itself out to the general public to provide transportation of cargo by water between the United States and a foreign country and assumes responsibility for the transportation from port or point of receipt to the port or point of destination, but does not own or operate the vessel on which the cargo is carried. While the Commission has held that a carrier's entire operation must be considered in determining its status as a common carrier and that no one factor is controlling, holding out to the public and assuming responsibility for the transportation are statutory requirements of any common carrier. *See* Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., et al., 29 S.R.R. 119, 162 (FMC 2001); Tariff Filing Practices, Etc., of Container Ships, Inc., 9 FMC 56, 65 (1965); Puget Sound Tug and Barge v. Foss Launch and Tug Co., 7 FMC 43, 48 (1962).

The Commission's decision in the Rose case highlighted an NVOCC's role as a common carrier and the Commission's reluctance to strictly limit the criteria to be used when determining an entity is an NVOCC.

> The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. *Ormet*, 28 SRR at 763; *Containerships*, 9 FMC at 62-65. 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).

With 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. The Commission has refused to adopt a checklist approach in determining whether an entity was a common carrier and NVOCC, stating:

> [t]he determination of common-carrier status can be made by reference to a number of indicia, e.g., variety of cargo carried, number of shippers, type of solicitation, regularity of service, port coverage, responsibility toward the cargo, issuance of bills of lading, etc. It is not necessary, however, that a carrier's operations encompass every one of these factors. As the Commission stated: "The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. Id. at 65.

In the Interim Rule proposing the bonding of NVOCCs, the Commission stated: "As common carriers, NVOCCs hold themselves out to the public to provide transportation by water between the United States and foreign countries, utilizing vessels operating on the high seas. NVOCCs normally enter into affreightment agreements with their underlying shippers, issue bills of lading or equivalent documents, and assume full responsibility for the shipments they

handle, from point of origin to point of destination. Ultimately, an 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).

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.[7] "[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).

4. **Substantial evidence supports a finding that the entities to whom Tober provided service were NVOCCs**

The substantial evidence in this case supports a conclusion that entities to whom Tober provided service were NVOCCs, that is, 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 and 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. By contrast 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.

The Affidavits of Josh Morales, president of AIOS and Daniel Cuadrado, president of ATWS, describing the operations of their respective companies, as corroborated by documentary

7. Neither the Carriage of Goods by Sea Act, 46 U.S.C. §30701 et seq., nor the Federal Bill of Lading Act, better known as the Pomerene Act, 49 U.S.C. § 80102 et seq., require issuance of a bill of lading unless requested to do so by the shipper. Where a bill of lading is, in fact, issued, there is no specific form that must be followed, nor is there a need for the document to be titled "bill of lading."

evidence and the affidavit of AR Andrew Margolis, establish that Tober, on at least 20 occasions, provided common carrier service to untariffed and unbonded entities operating as NVOCCs.

AIOS operated as an NVOCC from November 2004 to January 2006 with Mr. Morales as its sole officer. AIOS maintained a website where it advertised its willingness to "perform ocean transportation service, in particular, full service door to port, door to door and port to port moves of household goods." 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. (PFF 20).

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. (PFF49). 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. 5, ¶ 4; PFF 21).

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 Mr. Margolis, and the

documents of ATWS and Tober.[8] Mr. Cuadrado was the sole officer of ATWS and was responsible for its operations as an NVOCC from May to September 2005. 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." (PFF 26). 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." (PFF 26).

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 AWS 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. (PFF 27). 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. (PFF 29). Tober considered ATWS to be their customer and had no relationship with the actual shippers. (PFF 49). 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. All In One Shipping, Inc. assumed responsibility for delivery of the shipment to the promised destination. (BOE App. 6, ¶ 4; PFF 28).

8. Mr. Morales and Mr. Cuadrado worked together at Worldwide Relocations, Inc., a similar unlicensed, unbonded, and untariffed NVOCC discussed, infra.

The information provided by Mr. Morales and Mr. Cuadrado was corroborated by the Affidavit of Andrew Margolis, a Commission Area Representative assigned to the South Florida field office. Mr. Margolis, an experienced investigator, was actively involved in the Commission's investigation of unlicensed NVOCCs allegedly providing service to household goods shippers in Commission Docket No. 06-01. In the course of that investigation, Mr. Margolis reviewed documents provided by Tober and by AIOS and ATWS. His testimony closely parallels that of Mr. Morales and Mr. Cuadrado and he similarly concluded that both companies were operating as NVOCCs when they tendered their customers' cargo to Tober for shipment to international destinations.

Accordingly, there is substantial evidence from the Morales and Cuadrado affidavits and the documents of AIOS/ATWS and Tober, corroborated by the affidavit of Mr. Margolis, that (1) AIOS and ATWS operated as untariffed and unbonded NVOCCs and (2) that Tober provided common carrier service to AIOS and ATWS from U.S. origins to foreign destination. In contrast, there is no reliable or substantial evidence that AIOS or ATWS operated as a freight forwarder within the meaning of that term in the Shipping Act. The mere possibility that an event may have occurred is not sufficient under the preponderance of the evidence standard.

AIOS and ATWS' status as NVOCCs results from their method of operations. If an entity holds out to provide common carrier service to its customers and assumes responsibility for the safe transportation of cargo from origin to destination, as it has been shown AIOS and ATWS did, the entity is a common carrier, whether or not it issued a document entitled "bill of lading." *Containerships* at 64, citing *Transportation-U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950). The record evidence shows that Tober provided service to AIOS and ATWS on at least eleven and nine shipments, respectively, on which the entities acted as unbonded, untariffed NVOCCs.

In addition to the operations of AIOS and ATWS, each of the entities described in PFF 2 through 42 advertised on the Internet offering origin to destination carrier services. (PFF 7, 10, 15, 19, 25, 26, 32, 33, 37 39, 40, 56). Proprietary shippers contracted with the entities, not with Tober, for the shipment of their goods and looked only to them to provide safe transportation of their goods to destination. The shippers were not aware of Tober's involvement with their shipment nor did Tober have any involvement with the actual shippers. (PFF 4, 5, 8, 9, 12, 13, 16, 17, 20, 21, 27, 28, 33, 34, 35, 37, 38, 39, 40, 41, 42, 57). Tober readily admitted on deposition that it did not consider the proprietary shippers responsible for payment of the ocean freight, never made any attempt to collect the ocean freight from the proprietary shippers and only invoiced the entity. (PFF 4, 8, 12, 17, 23, 25, 30, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 48). A freight forwarder is not responsible for payment of the freight to the carrier. Only an NVOCC, which is the shipper to the carrier, is responsible for payment of the freight.

The owner of the cargo paid the entities a marked up figure greater than the actual ocean freight charged by Tober in its invoices. (PFF 3, 17, 20, 25, 27, 30, 33, 58). Again, only an NVOCC is entitled to mark up the freight over the amount charged by the carrier.

The documents issued by these entities are further evidence that they assumed responsibility for the transportation of the goods. The documents described the goods being shipped, the origin and foreign destination and the amount paid or to be paid for the services. (PFF 4, 8, 12, 17, 25, 32, 33, 37, 40). No reference was made to Tober or any other carrier. Given the lack of experience of many of their customers with international shipping, such documentation was accepted as sufficient to bind these entities and make them responsible for the transportation of the goods. (PFF 57). The deposition of Tober's president also shows that Tober did not consider the owner of the cargo to be its customer. (PFF 48, 49). On a substantial number of shipments, Tober identified the entity as the shipper on shipment documents which it

issued. (PFF 4, 8, 12, 17, 25, 32, 33, 34, 37, 38, 39, 40, 41, 42). The evidence presented by BOE supports a finding that the entities to whom Tober provided service were NVOCCs.

5. Respondent Tober's conduct was knowingly and willfully and therefore Tober violated Section 10(b)(11) of the Shipping Act

In order to find a violation of Section 10(b)(11) of the Shipping Act, the acceptance of cargo from or transportation of 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 must be done knowingly and willfully. The Commission has defined the phrase "knowingly and willfully" to mean "purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Trans-Pacific Forwarding, Inc. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 SRR 409, 412 (1995), *citing* United States v. Illinois Central R. Co., 303 U.S. 239 (1938). The Commission addressed the meaning of "knowingly and willfully" in Pacific Champion Express Co., Ltd. – Possible Violations of §10(b)(1) of the Shipping Act of 1984, 28 SRR 1397, (FMC 2000). In that case, the Commission stated:

> In determining whether a person has violated the 1984 Act "knowingly and willfully," the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 SRR 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that "persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.'" Id. at 84 (quoting Misclassification of Tissue Paper as Newsprint Paper, 4 FMB 483, 486 (1954));[9] Pacific Champion at 1403.

9. In the case of U.S. v. Ill. Cent. R.R. Co., the court held: "Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown 'willfully' to have failed. In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' The significance of the word 'willfully' as used in section 3, 45 U.S.C.A. s 73, now before us, was carefully considered by the Circuit Court of Appeals for the Eighth

Similarly, in the case of Stallion Cargo, Inc.—Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 SRR 665 (2001), the Commission stated, "An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting 'willfully and knowingly' within the meaning of the statute." 29 SRR at 677. In Trans-Pacific Forwarding, Inc, the Commission stated:

> The phrase "knowingly and willfully" means purposely or obstinately and is designed to describe the attitude of a carrier, who having free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. (Case citations omitted.) 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). *Id.* at 412.

In the case of RSM, Inc. v. Herbert, 466 F.2d 316 (4th Cir. 2006), the court stated;

...'willfully' has been held to denote a mental state of greater culpability than the closely related term, 'knowingly.' See Illinois Central R.R., 303 U.S. at 242-43, (explaining that " '[w]illfully' means something not expressed by 'knowingly' " (citation omitted)). "Knowingly" typically refers only to one's knowledge of the facts that make his conduct unlawful, not to one's knowledge of the law. See Bryan v. United States, 524 U.S. 184, 193, (1995); United States v.

Circuit in St. Louis & S.F.R. Co. v. United States, 169 F. 69. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (page 71): "Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively. * * * But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. * * * So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' That statement has been found a useful guide to the meaning of the word 'willfully' and to its right application in suits for penalties under section 3. United States v. Stockyards Terminal Ry. Co., *supra*, 178 F. 19, 23; St. Joseph Stockyards Co. v. United States, *supra*, 187 F. 104, 105; Oregon-Washington R. & Nav. Co. v. United States, 9th Cir., 205 F. 337, 339; St. Louis Merchants' Bridge T. Ry. Co. v. United States, 7 Cir., 209 F. 600. *See, also*, Chicago, B. & Q.R. Co. v. United States, 8 Cir., 194 F. 342, 346; United States v. Kansas City Southern Ry. Co., 8 Cir., 202 F. 828, 833." 303 U.S. 239 (1938).

Bailey, 444 U.S. 394, 404, (1980) (finding that a prison escapee acted "knowingly" because he "knew his actions would result in his leaving physical confinement"). Id at 320.

Tober violated Section 10(b)(11) of the Shipping Act as it was plainly indifferent and showed reckless and careless disregard to the requirements of the Shipping Act. Clearly, Tober knew it was accepting and transporting cargo for entities that were not the proprietary shipper or owner of the household goods. Tober did business with these entities because doing so avoided the time and expense of dealing directly with the proprietary shipper and avoided competing directly with the unlicensed entities. (PFF 46). Tober admitted on deposition that it accepted business from anyone and did not attempt to determine the status of its customers. (PFF 47). During 2004 and 2005, Tober never refused a shipment. (PFF 45). Tober lost business after they stopped accepting shipments from unlicensed entities. (PFF 54). The principals of two of the entities to whom Tober provided service, All in One Shipping, Inc. and Around the World Shipping, Inc., stated that no employee or principal of Tober ever questioned whether their company was an NVOCC, freight forwarder or beneficial cargo owner. (PFF 22, PFF 29). The evidence supports a finding that Tober did not use normal business resources to determine the status of the entities.

The evidence also supports a finding that Tober showed at a minimum, reckless disregard and, in fact, showed plain indifference to the requirements of the Shipping Act. Tober continued to take shipments from unlicensed intermediaries even after being advised by BOE not to do so. (PFF 11, 43, 52). In fact, Tober continued to accept shipments from unbonded and untariffed entities even *after* the commencement of this proceeding. (PFF 11). With regard to Tober's willfulness, BOE presented evidence that Tober accepted business from anyone and never reviewed the websites or performed any other investigation of the entities to determine their status or whether they were bonded or tariffed. (PFF 47). The evidence presented by BOE

supports a finding that Tober acted knowingly and willfully when accepting cargo from or transporting cargo for the entities.

D. RESPONDENT TOBER VIOLATED THE SHIPPING ACT BY FAILING TO FOLLOW ITS TARIFF

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

E. A CIVIL PENALTY SHOULD BE ASSESSED AGAINST RESPONDENTS.

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.

F. CONCLUSION

BOE respectfully requests that the Administrative Law Judge: 1) issue an initial decision finding that the Respondent violated Sections 10(b)(11) and Section 10(b)(2)(a) of the Shipping Act; 2) assess an appropriate civil penalty against Respondents and 3) issue a cease and desist order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2009, a copy of the foregoing **BUREAU OF ENFORCEMENT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** has been served upon all the parties of record by first class mail and with regard to Yonatan Benhaim by Fedex at the addresses listed below.

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