FEDERAL MARITIME COMMISSION

SEA-LAND SERVICE INC. - POSSIBLE VIOLATIONS OF SECTIONS 10(b)(1), 10(b)(4) AND 19(d) OF THE SHIPPING ACT OF 1984	Docket No. 98-06

Served: February 8, 2006

BY THE COMMISSION: Steven R. BLUST, *Chairman,* Harold J. CREEL, Jr., Rebecca F. DYE, A. Paul ANDERSON, *Commissioners*, with respect to discussion and results relating to sections 10(b)(1) and 10(b)(4); Chairman BLUST and Commissioner DYE concurring with respect to discussion and results relating to section 19(d); Commissioners CREEL and ANDERSON concurring with respect to discussion and results relating to section 19(d); Commissioner Joseph BRENNAN, dissenting and concurring.

ORDER AFFIRMING INITIAL DECISION IN PART AND ASSESSING PENALTIES FOR VIOLATIONS OF SECTION 10(b)(4) OF THE SHIPPING ACT OF 1984

INTRODUCTION

On April 24, 1998, the Federal Maritime Commission ("Commission") issued an Order of Investigation and Hearing

("Order") to determine whether Sea-Land Service, Inc. ("Sea-Land" or "Respondent"), a vessel-operating common carrier, violated the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§1701-19, by substituting larger containers for smaller ones for certain non-vessel-operating common carriers ("NVOCCs") and charging those NVOCCs rates lower than what should have been charged based on the amount of cargo actually loaded into the larger containers.

This practice was alleged to be contrary to the provisions of the Transpacific Westbound Rate Agreement ("TWRA") equipment substitution rule applicable to those shipments: the TWRA rule required the rates applicable to the larger containers to be charged where the NVOCCs loaded more cargo than would have fit in the smaller containers. The Order also alleged that Sea-Land paid forwarder compensation to certain freight forwarders who did not perform forwarding services (or did not provide any certification claiming entitlement to compensation), were otherwise known to be related to the shipper NVOCC, or whose licenses had been revoked. Sea-Land's practices were alleged to violate sections 10(b)(1), 10(b)(4), and 19(d) of the Shipping Act, 46 U.S.C. app. §§1709(b)(1), 1709(b)(4) and 1718(d). The Order named the Commission's Bureau of Enforcement ("BOE") as a party. The proceeding was assigned to Administrative Law Judge Frederick Dolan ("ALJ").

On January 25, 2001, the ALJ bifurcated the proceeding: Phase I to address liability (i.e., whether Sea-Land had committed the alleged violations), and Phase II to address what penalties, if any, should be assessed. The ALJ completed Phase I with the issuance of a Preliminary Ruling Determining the Question of Liability of Respondent Regarding the Issues Raised in the Order of Investigation; Further Procedures

Ordered, on March 5, 2002, finding that Sea-Land had violated sections 10(b)(1), 10(b)(4), 19(d)(1), and 19(d)(4) of the Shipping Act. 29 SRR 492 (ALJ 2002) ("Liability Order").

During Phase II, the ALJ granted the motion of the National Customs Brokers and Forwarders Association of America ("NCBFAA") to file an amicus curiae brief for the limited purpose of addressing the applicable regulatory requirements and industry practices governing the payment of compensation by ocean carriers to freight forwarders. The ALJ ruled on Phase II in an order dated January 30, 2003. 29 SRR 1109 (ALJ 2003) (hereafter referred to as "Penalty Order").[1] In the Penalty Order, the ALJ imposed a civil penalty of $4,082,500 against Sea-Land for the section 10(b)(4) violations. The ALJ did not assess penalties for violations of sections 10(b)(1) or 19(d). The two orders together comprise the ALJ's Initial Decision in this proceeding.

Exceptions to the Initial Decision were submitted by Sea-Land and BOE. In addition to the parties' briefs on exceptions, amicus curiae briefs were submitted by the NCBFAA, Transportation Intermediaries Association ("TIA"), National Industrial Transportation League ("NITL") and the NVOCC-Government Affairs Conference. On April 23, 2003, the Commission granted these four non-parties permission to file amicus curiae briefs addressing the penalty amounts for the subject violations. 29 SRR 1326 (2003).

For the reasons set forth below, the Commission affirms the ALJ's rulings that Sea-Land violated sections 10(b)(1) and 10(b)(4) of the Act. Chairman Blust and

[1] The Liability Order and the Penalty Order are hereafter collectively referred to as "Initial Decision" or "I.D."

Commissioner Dye have determined that the ALJ overturned his earlier rulings that Sea-Land violated sections 19(d)(1) and 19(d)(4). Commissioners Creel, Anderson, and Brennan have determined that the ALJ ruled that Sea-Land violated sections 19(d)(1) and 19(d)(4). Commissioners Creel and Anderson have further decided to vacate his findings and rulings that Sea-Land violated those sections. In addition, the Commission vacates the penalty amount assessed by the ALJ and imposes instead a civil penalty that reflects consideration of the impact of the passage of the Ocean Shipping Reform Act of 1998, Pub. L. No. 105-228, 112 Stat. 1902 ("OSRA"), which authorized confidential service contracts.

BACKGROUND

The allegations in this case center on whether Sea-Land improperly charged 20-foot container rates for 40-foot container shipments, in violation of the TWRA tariff rules. As Sea-Land was a member of TWRA from 1996-1998, the TWRA Rules Tariff ("Rule 2 G5") applied to Sea-Land's shipments, both tariff and service contract, during that period. Rule 2 G5 provided that a carrier member could, at its option, substitute a larger container than that specified by the shipper when the cargo was booked and charge the rate for the smaller container, provided further, however, the cargo actually loaded into the larger container was below the rule's applicable maximum measurement and weight. For example, where a 40-foot container was substituted for a 20-foot container, the carrier could charge the rates applicable to the 20-foot container provided the cargo did not exceed 25 cubic meters ("CBM") and 18 Kilo Tons ("KT").

Additionally at issue is whether Sea-Land unlawfully paid freight forwarder compensation to forwarders who had

not performed forwarding services for the shipments at issue; had not provided proper certification claiming entitlement to compensation; possessed a beneficial interest in the shipments; or, did not have a valid freight forwarder's license.

A. THE ALJ'S LIABILITY ORDER

1. Section 10(b)(1) violations

The Order of Investigation alleged that Sea-Land had violated section 10(b)(1) of the Shipping Act by charging 20-foot container rates on 40-foot container shipments. At the time the alleged violations occurred, section 10(b)(1) provided that:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -
>
> (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts.

46 U.S.C. app. § 1709(b)(1) (1994). The ALJ ruled that section 10(b)(1) "sets a strict adherence standard," explaining that under its provisions a violation automatically occurs when any rate other than that filed in a carrier's tariff is charged, collected, demanded or received. Penalty Order, 29 SRR at 1180. See also Liability Order, 29 SRR at 577.

The ALJ found that BOE's rate analyst, Mr. Tom Gravitt, had accurately reviewed documents pertaining to 149

Sea-Land shipments to the Far East in order to determine whether Sea-Land charged the correct rates for those shipments in accordance with the TWRA equipment substitution rule. The ALJ concluded that Sea-Land illegally charged the NVOCCs rates lower than provided in the applicable tariff or service contract. Id. at 577-586.

The ALJ found that the 18 specific shipments, out of 149, that Sea-Land had argued satisfied the TWRA equipment substitution rule did not qualify for the lower rates. Sea-Land proffered Shipper Export Declarations ("SEDs") submitted to it by the NVOCCs and its bills of lading as evidence that it charged the proper rates, while BOE proffered the NVOCCs' house bills of lading, container manifests, and "RCV tickets" (which were generated by Sea-Land at its gates after each container is weighed at Sea-Land's scales in Long Beach) as evidence that Sea-Land had not charged the appropriate rates. The ALJ found BOE's evidence more convincing, and concluded that the preponderance of the evidence showed that Sea-Land had violated section 10(b)(1) on 149 shipments. Liability Order, 29 SRR at 586.

2. Section 10(b)(4) violations

The Order of Investigation also alleged that Sea-Land violated section 10(b)(4) of the Shipping Act by allowing the transportation of property at less than the applicable rates through an unjust or unfair device or means. At the time the alleged violations occurred, section 10(b)(4) provided that:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may-

> * * * *
>
> (4) allow any person to obtain ocean transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means.

46 U.S.C. app. § 1709(b)(4) (1994). The ALJ stated that, in order to establish section 10(b)(4) violations, the proponent must show "the employment of any unjust or unfair device or means to convey a concession to a shipper." Liability Order, 29 SRR at 570.

Discussing Sea-Land's prior conduct, the ALJ observed that Sea-Land had entered into a compromise settlement with the Commission as to allegations that it and other carriers in the Transpacific trades violated sections 10(a) and 10(b) of the Shipping Act. Id. at 571. As part of this settlement, the carriers paid a penalty of $1,000,000 (of which Sea-Land's share was $250,000 (Sea-Land's Exceptions at 42 n.37)), and agreed to engage the services of a "neutral body" to ensure that the members complied with the rate provisions and rules in TWRA's tariffs. The neutral body was authorized to assess penalties against the carriers for any violations.

The ALJ further explained that the neutral body subsequently conducted three different investigations, each time concluding that Sea-Land had violated the TWRA equipment substitution rules. Sea-Land accepted these findings and paid the fines imposed by the neutral body. The ALJ stated, however, that Sea-Land did not modify its behavior in response to these fines, and that Sea-Land's

employees, in particular Sea-Land salesman Richard Favor and his supervisors, continued to engage in the equipment substitution abuses. Id. at 571-575.

The ALJ concluded that in allowing the misdescriptions to occur, Sea-Land had "failed to exercise that reasonable diligence which the law expects on the part of the carrier." Id. at 575. The ALJ noted that "one charged with a duty who purposely keeps himself in ignorance in order to deny actual knowledge is estopped to deny knowledge of what he could learn by his exercise of reasonable diligence." Id. (citing Rates from Japan to the United States, 2 U.S.M.C. 426, 434-435 (1940)). The ALJ found that Sea-Land charged inapplicable rates to important NVOCC customers in order to capture cargo. The ALJ further held that by concealing the true weight and measurement of the shipments in order to escape detection, Sea-Land utilized an "unfair device or means," in violation of section 10(b)(4) of the Shipping Act, on 149 shipments. Liability Order, 29 SRR at 577.

The ALJ also found that Sea-Land used its agents and employees to produce the unfair or unjust device or means to obtain transportation at rates lower than those provided in applicable service contracts or tariffs. He noted that the Commission imposes a standard of strict liability on principals for the acts of their agents. Id. Accordingly, the ALJ concluded that Sea-Land had knowingly and willfully violated section 10(b)(4). Id.

3. Section 19(d)(1) and 19(d)(4) violations

The Order of Investigation further alleged that Sea-Land violated sections 19(d)(1) and 19(d)(4) by compensating certain freight forwarders on many of the same NVOCC

shipments in instances where: the ocean freight forwarder's license had been revoked; Sea-Land did not obtain a certification claiming entitlement to forwarder compensation; the designated freight forwarder services were not performed by the forwarder; or a beneficial relationship existed between the forwarder and the NVOCC shipper. At the time of the alleged violations, section 19(d)(1) provided that:

> (1) A common carrier may compensate an ocean freight forwarder in connection with a shipment dispatched on behalf of others only when the ocean freight forwarder has certified in writing that it holds a valid license and has performed the following services:
>
> (A) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space.
>
> (B) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

46 U.S.C. app. § 1718(d)(1) (1994). [2]

In addition, section 19(d)(4) provided that:

> * * * *
>
> (4) No ocean freight forwarder may receive compensation from a common carrier with respect to a shipment in which the forwarder has

[2] OSRA redesignated this section as section 19(e)(1) without substantive change. 46 U.S.C. app. § 1718(e)(1).

> a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on that shipment.

46 U.S.C. app. § 1718(d)(4) (1994). [3]

The ALJ found 435 violations of section 19(d)(1) and 170 violations of section 19(d)(4) by Sea-Land.

B. THE ALJ'S PENALTY ORDER

In the penalty phase of this proceeding, the ALJ assessed a civil penalty in the amount of $4,082,500 against Sea-Land for its violations of section 10(b)(4). Chairman Blust and Commissioner Dye find that he declined to impose penalties against Sea-Land for violations of sections 10(b)(1) and reversed his findings of violations of sections 19(d)(1) and 19(d)(4). Commissioners Creel, Anderson, and Brennan find that he did not reverse his findings of violations for section 19 but that he declined to impose penalties against Sea-Land for violations of sections 10(b)(1), 19(d)(1) and 19(d)(4). Penalty Order, 29 SRR at 1175, 1182.

1. Section 13(c) factors for penalty assessment

BOE and Sea-Land had submitted briefs addressing the proper assessment of penalties. The briefs were focused on section 13(c) of the Shipping Act, which provides that:

> the Commission may, after notice and an opportunity for hearing, assess each civil penalty

[3] This section was redesignated as section 19(e)(3) pursuant to OSRA. 46 U.S.C. app. § 1718(e)(3).

> provided for in this Act. In determining the amount of the 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 such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

46 U.S.C. app. § 1712(c) (2000). [4]

a. Sea-Land's arguments

Sea-Land argued that the forwarder compensation violations do not merit a penalty because the payments were "extremely small, of no commercial or regulatory significance," were in accordance with the "usual practices" in the industry, and a penalty could cause carriers to cease making forwarder payments. While Sea-Land conceded that the equipment substitution violations (section 10(b)(1) and 10(b)(4) violations) would merit a penalty (Respondent's Supplemental Filing on Penalty Issues at 2), it urged the ALJ to consider mitigating factors, namely that: it made substantial efforts to remedy the equipment substitution problem; an "excessive penalty" would not serve the policy of deterrence and future compliance because it no longer operated in the U.S. foreign trades; it had no history of prior offenses; and the NVOCCs that participated in the violations were not penalized. Sea-Land suggested that a more appropriate penalty would be in the "$500,000 -$600,000 range." See

[4] This section was not amended by OSRA.

Penalty Order, 29 SRR at 1158.

b. BOE's arguments

BOE argued that the amount of civil penalties should not be reduced because there were no mitigating factors favoring Sea-Land. BOE asserted that Sea-Land has the ability to pay a significant penalty. In addition, BOE argued that Sea-Land is not entitled to mitigation because it has a history of settling prior violations with the Commission and the neutral body.

BOE also argued that Sea-Land is not entitled to mitigation of penalties because it committed the violations in order to increase its income and repeatedly committed these violations despite paying multiple penalties to the neutral body. BOE stated that the Commission should impose significant penalties to punish Sea-Land and deter future violations even though Sea-Land has sold its assets and no longer operates in U.S.-foreign trades.

2. Penalty assessment for section 10(b)(4) violations

The ALJ applied the maximum penalty of $25,000 per violation to six Sea-Land shipments that were made before November 7, 1996. As to the 143 Sea-Land shipments made on and after November 7, 1996, the maximum penalty increased to $27,500 per violation as a result of a periodic statutory inflation adjustment made to the penalties assessable by the Commission. See Inflation Adjustment of Civil Monetary Penalties, 27 SRR 809. (1996) See also 46 C.F.R. Part 506. Thus, the ALJ concluded that a penalty of $150,000 should be applied for the six shipments ($25,000 x 6) and

$3,932,500 for the remaining 143 shipments ($27,500 x 143). Consequently, the ALJ assessed a penalty in the amount of $4,082,500 for the 149 section 10(b)(4) violations. Penalty Order, 29 SRR at 1181.

3. Penalty assessment for the section 10(b)(1) violations

The ALJ did not impose penalties for any of the section 10(b)(1) violations. Id. at 1182. However, the ALJ stated that further consideration could be given to assessment of a penalty "as long as the total penalties for the 10(b)(4) and 10(b)(1) violations do not exceed the maximum penalty set forth in section 13." Id. at 1182 n.55.

4. Section 19(d)(1) and 19(d)(4) violations

In the Phase II order, Chairman Blust and Commissioner Dye find that the ALJ reversed certain substantive conclusions he had made in Phase I with respect to sections 19(d)(1) and 19(d)(4) violations. Chairman Blust and Commissioner Dye specifically find that the ALJ reversed his own findings that Sea-Land committed knowing and willful violations by paying forwarding compensation on shipments where: forwarding services had not been performed; completed and signed certifications that such services had been performed had not been obtained; the forwarder's license had been revoked; or, where a forwarder possessed a beneficial interest in the cargo shipped. The ALJ found instead that Sea-Land reasonably relied upon the forwarder's deposits of Sea-Land checks containing the certification stamps on the back of each. Such certifications are authorized by the Commission's regulations and those regulations allow carriers to rely upon such certifications unless the carrier

"knows" the certification is incorrect. Id. at 1164; see also 46 C.F.R. § 510.23(b) (1998).

Commissioners Creel, Anderson, and Brennan find that, in the Phase II order, the ALJ declined to impose penalties for the violations of sections 19(d)(1) and 19(d)(4). Commissioners Creel, Anderson, and Brennan find specifically that the ALJ concluded that Sea-Land should not be penalized for forwarder compensation on shipments where: forwarding services had not been performed; completed and signed certifications that such services had been performed had not been obtained; the forwarder's license had been revoked; or, where a forwarder possessed a beneficial interest in the cargo shipped. Commissioners Creel, Anderson, and Brennan further find that the ALJ found that Sea-Land reasonably relied upon the forwarder's deposits of Sea-Land checks containing the certification stamps on the back of each. Such certifications are authorized by the Commission's regulations and those regulations allow carriers to rely upon such certifications unless the carrier "knows" the certification is incorrect. Id. at 1164; see also 46 C.F.R. § 510.23(b) (1998).

The ALJ found that the provision in the Commission's freight forwarder compensation regulations permitting carrier reliance on "check-back" certifications (i.e., a written endorsement on the back of the check) unless the carrier "knows" it to be incorrect, created a "safe harbor" for carriers. Penalty Order, 29 SRR at 1165. Further, the ALJ found that the regulations did not require carriers to conduct an investigation before such check-back certifications could be relied upon. Id.

The ALJ found persuasive NCBFAA's arguments that, over the years, the industry practice with respect to forwarder certifications on checks had developed in a way which gave effect to the Commission's regulations and promoted efficiency in processing payments. NCBFAA asserted that the forwarding industry neither manually endorses checks containing certifications (but rather stamps them "for deposit only") nor inserts their license numbers on check certifications (as those numbers are most frequently entered on the bills of lading). NCBFAA further asserted that carriers do not investigate behind certifications to ascertain that the forwarder has no beneficial ownership interest in shipments on which compensation is received. Id. at 1165.

In view of the conflicting interpretations of the Commission's compensation regulations by BOE and the forwarder industry and the absence of any clear prior guidance by the Commission supporting BOE's interpretation of those regulations relative to certifications, the ALJ concluded that Sea-Land should not be penalized for not following BOE's interpretation. Id. at 1165. The ALJ ruled that penalizing Sea-Land here for violations of the Commission's forwarder compensation regulations would deny Sea-Land the due process requirement that it be given "fair notice" of what acts constitute a violation before being penalized for them. Id. at 1166-1172.

Moreover, the ALJ found that imposing a penalty for violating the forwarder compensation rules would not promote compliance by ocean carriers. Id. at 1172. The ALJ reasoned that "because the compensation payments are so small and do not promote the carriers' interest," imposing a penalty would cause carriers to terminate forwarder payments. Penalty Order, 29 SRR at 1166. The ALJ also concluded that a penalty

assessment would "jeopardize the intent of Congress and the purpose of the 1984 revisions to 46 C.F.R. § 510.23(c)." Id.

DISCUSSION

Generally, Sea-Land excepts to the ALJ's findings of violations of sections 10(b)(1) and (4) and to the penalties assessed for violations of section 10(b)(4). Sea-Land asks the Commission to vacate the penalties ordered by the ALJ, and to eliminate them entirely or to greatly reduce them. BOE excepts to the ALJ's decision not to assess penalties for violations of sections 10(b)(1), 19(d)(1) and 19(d)(4), and urges the Commission to assess penalties for these violations.

A. Standard of proof

The evidence in an administrative proceeding, such as this one, must demonstrate by a "preponderance of the evidence" that the existence of a fact is more probable than not. In the absence of direct evidence, the Commission may rely on reasonable inferences based upon circumstantial evidence. Petition of S. Carolina State Ports Auth. for Declaratory Order, 27 SRR 1137, 1161 (1997) (citing Sea-Island Broadcasting Corp. v. Federal Communications Comm'n, 627 F.2d 240 (D.C. Cir.), cert. denied, 449 U.S. 8334 (1980)); Adair v. Penn-Nordic Lines, Inc., 26 SRR 11, 15 (I.D. 1991) (administratively final, October 24, 1991); Sanrio Co. Ltd. v Maersk Line, 19 SRR 1627, 1632 (I.D.), adopted 20 SRR 375 (1980); Port Auth. of New York v. New York Shipping Ass'n, 22 SRR 1329, 1353 (I.D. 1984), adopted 23 SRR 21 (1985).

"Preponderance of the evidence" means evidence that is more convincing than the evidence that is offered in

opposition to it. Hale v. Department of Transp., 772 F.2d 882, 885 (Fed. Cir. 1985). Further, this standard requires "the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade." Concrete Pipe & Products of Cal. Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993). As an expert agency, the Commission is presumed to have a "special familiarity" with the industry it regulates and its factual findings will be given deference by the courts. Federal Maritime Comm'n v. Svenska, 390 U.S. 238, 249 (1968).

B. Section 10(b)(4)

At all times relevant to the alleged violations of section 10(b)(4), this section provided:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -
>
> * * * *
>
> (4) allow any person to obtain ocean transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means.

46 U.S.C. app. § 1709(b)(4) (1994).[5]

[5] OSRA moved section 10(b)(4) to its current placement at section 10(b)(1), 46 U.S.C. app. §1709(b)(1), without substantive change.

Referring to section 16 Second of the Shipping Act, 1916 ("1916 Act") (46 U.S.C. § 815 Second), the predecessor to section 10(b)(4), the Commission ruled that an "essential element" for proving a violation of section 16 Second is "the unfair device or means" and that such proof requires a showing that "one did something or attempted to do something which he knew or should have known was unlawful." (Emphasis added).[6] Philippine Merchants Steamship Co., Inc. v. Cargill, Inc., 9 FMC 155, 165 (1965), citing Hohenberg Brothers Co. v. Federal Maritime Commission, 316 F.2d 381 (D.C. Cir 1963).

In Hohenberg, the court upheld the Commission's finding that the shipper violated section 16 by means of an "unfair device or means" as the shipper knew or should have known that the basis of the rebate was false. Id. at 385. Though the weight per cubic foot of each cotton bale shipped did not meet the "minimum" weight required for the lower rate, the shipper obtained rates lower than provided for in the carrier's tariff (in the form of a rebate). The carrier paid the rebate to the shipper at the shipper's demand even though the freight conference's cargo inspectors had discovered the under-declared weights of the bales at dock side and required the carrier to re-bill the shipper at the proper rate.

Also, referring to section 16 Second of the 1916 Act, the U.S. Court of Appeals for the Second Circuit has ruled that although all concessions were not forbidden by the Shipping Act, "it did forbid the carrier to grant such favors when accompanied by any concealment, and its command in that

[6] For clarity, unless otherwise specified in the particular section 10 prohibited act, whether a violation of the Shipping Act is "knowing and willful" is a standard applicable to the amount of the penalty that the Commission may impose. 46 U.S.C. § 1712(a) (2000).

event was as absolute as though it had been unconditional." Prince Line Ltd. v. American Exports Inc., 55 F.2d 1053, 1055 (2nd Cir. 1932). The court found that the undisclosed concession "was an 'unfair device or means,' for it destroyed that equality of treatment between shippers, which it [sic] was the primary purpose of the section, and for that matter of the whole statute, to maintain." Id.

The ALJ found, generally, that Sea-Land personnel intentionally promoted an equipment substitution scheme to certain NVOCCs. More specifically, in addition to Mr. Richard Favor's direct promotion of the scheme, the ALJ found that Mr. Favor's immediate supervisor, Mr. David Wing, directly contributed to it and that Mr. Glen Spargo, Sea-Land's general manager for marketing in the Western Region, also knew and approved of the scheme. Additionally, Sea-Land's rate audit and booking departments played a role in fostering the equipment substitution scheme.

1. Section 10(b)(4) violations – Sea-Land's exceptions

Sea-Land contends that Mr. Favor, the Sea-Land sales representative who testified to a Sea-Land scheme to abuse equipment substitution, was the only person at Sea-Land involved in allowing certain NVOCCs to substitute larger containers while paying the rates for the smaller containers though the cargo actually loaded exceeded the maximum under TWRA's equipment substitution rule. Sea-Land Exceptions at 7. Sea-Land further contends that the ALJ wrongly implicates Mr. Wing, Mr. Favor's immediate supervisor, with knowledge of equipment substitution abuse. Sea-Land similarly asserts that, contrary to the ALJ's findings, Mr. Spargo, who was responsible for Sea-Land's Westbound

marketing strategy, was shown to have no knowledge of a scheme to permit abuse of equipment substitution. Id. at 9.

Sea-Land further excepts to the finding that Sea-Land's rate audit and booking departments had knowledge of equipment substitution abuse. Sea-Land avers that the shipment examples cited by the ALJ all show that the shipments fell within the capacity and volume restrictions of the equipment substitution rule. Id. at 10.

Sea-Land avers that statements made by NVOCC witnesses should not be given credence because they are too general to support a finding that Sea-Land acted knowingly and willfully. Sea-Land contends that it processed "8,000 to 10,000 shipments per week" and that not finding "the needle in the proverbial haystack" does not mean that Sea-Land did not care about finding equipment substitution abuse. Id. at 12.

Sea-Land avers that although Mr. Favor "undoubtedly" had some involvement in the equipment substitution by NVOCCs identified in this proceeding and "probably had some level of understanding" that NVOCCs were abusing equipment substitution, "it is not clear to what extent he actually tolerated or encouraged" such abuse. Id. at 13. Sea-Land also asserts that, based upon Mr. Favor's deposition, which he later recanted, he denied having discussed equipment substitution with the NVOCCs involved in this case. Id. at 15.

2. Section 10(b)(4) violations – BOE's reply to Sea-Land's exceptions

BOE replies that there is adequate evidence for the ALJ to have found the requisite knowledge of the equipment substitution practice. Specifically, BOE avers that, in addition

to Mr. Favor, the record ties Mr. Wing directly to the equipment substitution abuse scheme. BOE Reply to Exceptions at 15. BOE avers that Mr. Spargo also had knowledge of the scheme and that Mr. Spargo's testimony that he did not is not credible in light of the testimony of Messrs. Favor and Wing which contradicts that of Mr. Spargo. Id. at 12.

BOE avers that Mr. Spargo was personally responsible for the performance of Sea-Land's Western region, was personally familiar with the NVOCC accounts in this proceeding and was known to personally intervene to handle matters on behalf of NVOCC accounts. Id. at 16. BOE further contends that Mr. Spargo was aware of equipment substitution abuse no later than May, 1997, when the neutral body launched its first investigation of Sea-Land's equipment substitution practices based upon written complaints by other carriers. Id. at 16-17 n.16.

BOE maintains that, no later than January 15, 1997, there was an ongoing awareness by Sea-Land's rate audit department that Sea-Land's sales representatives, including Mr. Favor, were revising booking instructions to permit shipments to be rated under the equipment substitution rule. Id. at 17.

3. Section 10(b)(4) violations – Discussion

At the outset, we note that the record in this proceeding includes numerous written statements, along with many attached exhibits which were introduced into evidence and oral testimony obtained during 22 days of hearings (which produced approximately 3,000 pages of transcripts). Witnesses testifying at the hearings were extensively cross-

examined by counsel for Sea-Land or BOE.

In addition to applying the "preponderance of the evidence" standard discussed above, the Commission must weigh evidence in light of the entire record in the proceeding. Unapproved Section 15 Agreements – Spanish/Portuguese Trade, 8 F.M.C. 596, 612 (1965). Further, documentary evidence along with other evidence, including oral testimony, when taken together may provide the basis for rational and reliable conclusions as the evidentiary weight of a lone document may not be of sufficient weight to support a finding. Id.

We find persuasive BOE's assertions that Mr. Wing directly contributed to Sea-Land's equipment substitution scheme. BOE is also correct that Mr. Spargo's testimony denying any knowledge of the equipment substitution scheme lacked credibility when measured against the testimony of fellow Sea-Land employees, Mr. Favor, the NVOCCs which testified in this proceeding, and objective facts.

a. Mr. Wing's knowledge

Sea-Land objects to the ALJ's dismissal of Mr. Wing's explanation that he told Pan Pacific that equipment substitution would be made available only in accordance with the terms of the TWRA rule. Sea-Land states that the ALJ's dismissal of Mr. Wing's explanation is contained in the following passage of the Liability Order:

> The record is clear that it soon became common knowledge that an NVO requesting "40' container-equipment substitution" or similar phrases was a code for misdeclaring cargo and

> abusing the equipment substitution rule which led to its termination on July 18, 1997, except that TWRA and Sea-Land continued to allow 45' substitution at 40' container rates after that date.

Liability Order, 29 SRR at 573. Sea-Land contends that there are no record cites or rationale why this passage is ascribed to Mr. Wing. Sea-Land Exceptions at 8.

It is clear that the passage amounts to a broad conclusion by the ALJ and is not directed solely to Mr. Wing's role, but incorporates several findings described earlier in the Liability Order where he found code words were used by NVOCCs in shipment documents as part of Sea-Land's scheme that enabled the shipments to be given the preferred rates. Liability Order, 29 SRR at 504, Finding of Fact ("FF") 64 and 505, FF 74E. Hence, contrary to Sea-Land's view, the broader evidentiary record clearly demonstrates that Mr. Wing's offer to "protect" Pan Pacific's use of equipment substitution was itself another instance of code words.

If, as Mr. Wing acknowledged, equipment substitution implemented in strict compliance with the tariff rule provided no advantage to an NVOCC shipping Freight All Kinds cargo ("FAK cargo"), there was nothing for Sea-Land to protect as there would be no benefit to Pan Pacific. Id. at 507, FF 97. Mr. Wing's code words allowed Pan Pacific to ascertain that it was in agreement with Sea-Land that the equipment substitution abuse would go unchallenged in practice. Therefore, the record supports our assessment that Mr. Wing's oral testimony that he lacked knowledge of the scheme is unconvincing.

b. Mr. Spargo's knowledge

Sea-Land contends that there was nothing in the record to show that Mr. Spargo knew anything about equipment substitution abuse. Sea-Land complains that a "cryptic conclusion" by the ALJ contains no citation to the record and there is no basis for such a conclusion in the record. Sea-Land Exceptions at 9 n.11. The "cryptic conclusion" is underscored in the following paragraph, quoted here in its entirety:

> Mr. Wing testified that he reported to Mr. Spargo about equipment substitution. (FF 42, 98) It was evident that there would be no economic advantage to NVO shippers to use 40' containers as equipment substitutes for 20' containers unless through misdeclaration more cargo could be placed in the 40' container than the governing tariff permitted. (FF 97) Thus, in answer to the question of what did he know and when did he know it, the record shows that Mr. Spargo was aware that to meet the sales quotas the sales representatives had taught the NVOs how to misdeclare the cargo and get 40' containers at 20' container rates. This is also confirmed by the results of the Neutral Body investigation of which Mr. Spargo was aware, and in which Sea-Land was found guilty of abuse of the equipment substitution rule and paid a penalty. (FF 183, 194).

Liability Order, 29 SRR at 573 (passage underscored is that portion quoted by Sea-Land in its exceptions, Sea-Land Exceptions at 9 n.11). Sea-Land also objected to the last sentence of this paragraph. Id.

It is apparent that the ALJ did not find Mr. Spargo's denials to be credible even though, as BOE acknowledges, there is less direct evidence that Mr. Spargo knew of the equipment substitution abuse early during the relevant period. However, the ALJ was able to personally observe each of the witnesses at the hearings, including Mr. Spargo, and assess their demeanor during examination. Hence, the ALJ was able to assess which witnesses he found credible when responding to questions.

In the case of Mr. Spargo, not only did the ALJ accept oral testimony that contradicted Mr. Spargo on the issue of what he knew about equipment substitution abuse and when he knew it, the ALJ also accepted such testimony contradicting Mr. Spargo's testimony relative to his view of Mr. Favor's job performance. Mr. Spargo testified that Mr. Favor was a poor performer and that he advised Mr. Favor that he would be put on a performance improvement plan. Mr. Wing's testimony sharply contradicted that of Mr. Spargo. Liability Order, 29 SRR at 528, FF 55. Mr. Wing testified that he gave Mr. Favor a favorable performance review for calendar year 1996 and was recommending him for a bonus. Id. Mr. Wing also testified that Mr. Spargo did not overrule his appraisal of Mr. Favor and Mr. Wing did not recommend a performance plan for Mr. Favor. Id. In addition, Mr. Wing denied having participated in any meeting where Mr. Spargo informed Mr. Favor about a performance plan and denied that Mr. Spargo talked to him (Mr. Wing) about Mr. Favor's work performance. Id. In other words, Mr. Wing's testimony not only contradicted Mr. Spargo's, it also corroborated Mr. Favor's testimony.

We find that the record leads to only one reasonable conclusion: that Mr. Spargo knew about the equipment substitution scheme. The contradictory testimony of Mr. Wing corroborated the testimony of the one participant in the scheme, Mr. Favor, that Mr. Wing otherwise attacked. In addition, Mr. Spargo is separately shown, as discussed below, to have been kept promptly informed about the neutral body's findings of equipment substitution abuse. In other words, as might be expected of a manager responsible for the sales performance of the Western Region, Mr. Spargo was in the decision and information loop on the scheme to garner more cargo by enabling certain NVOCCs to obtain lower rates not available to those paying the applicable rates.

We also find that, as a result of the three neutral body investigations finding violations of TWRA Rule 2 G5, Mr. Spargo knew about Sea-Land's equipment substitution abuse no later than May, 1997, and that Sea-Land's equipment substitution abuse continued until at least March, 1998. Mr. Spargo knew, or should have known, of equipment substitution abuse while it was taking place, based on the following: (1) on March 11, 1997, Sea-Land's Mr. Chris Dianora, Director of Pricing, Agreements and Regulatory Affairs, attended a meeting of the Trans-Pacific Policing Agreement where the neutral body advised the member carriers that it would be commencing increased enforcement in the area of equipment substitution (29 SRR at 514, FF 171); (2) the neutral body sent a letter dated May 1, 1997, to Sea-Land advising it was commencing an investigation into alleged Sea-Land equipment substitution abuses (29 SRR at 514, FF 173); (3) Mr. Wing advised Mr. Spargo of the first investigation (29 SRR at 514, FF 174); (4) Mr. Chris Lytle, the supervisor of Sea-Land's operations manager, Mr. John Ohle, spoke several times with Mr. Spargo regarding the

neutral body investigation, after which Mr. Lytle advised Mr. Ohle that the investigation was a "potentially serious" matter for Sea-Land (29 SRR at 514, FF 178); and (5) Mr. Lytle instructed Mr. Ohle that any requests for substitution initiated by anyone outside of Sea-Land's Operations Department should be referred "back to sales," or, in other words, back to Mr. Spargo's domain (29 SRR at 514, FF 179).

In addition, the neutral body's August 2, 1997 report following the first investigation concluded that "[i]f the information above is correct [referring to documents relied upon by the neutral body], the application of a smaller size container rate to larger containers into which cargo has been loaded in excess of the limits stated in . . . TWRA Rule 2 G5 constitutes improper equipment substitution and confirms the written complaints which prompted this investigation." Liability Order, 29 SRR at 515, FF 181 (quoting from the neutral body's report). Further, eight separate complaints had been filed with the neutral body stating that Sea-Land was involved in rate malpractices. Id.

Two subsequent neutral body investigations made similar findings. The second neutral body investigation resulted from complaints by Direct Container Line ("DCL") to TWRA members between August 3 and September 2, 1997, and by Orient Overseas Container Line ("OOCL") on continuing rumors that Sea-Land was still offering equipment substitution on FAK cargo. 29 SRR at 515, FF 188. On October 15 and 29, 1997, Mr. Spargo met with a neutral body representative regarding equipment substitution malpractices that the neutral body was investigating. Id. at 515, FF 189. By letter dated December 13, 1997, the neutral body reported the additional equipment substitution malpractices. Id. at 515, FF 191. Sea-Land accepted the neutral body's conclusions and

paid a reduced fine of $15,000 on a single shipment where the neutral body found TWRA's equipment substitution rule had been violated. Id. at 515, FF 192, 190.

In the third investigation, the neutral body concluded that Sea-Land had engaged in equipment substitution malpractices on 24 shipments by three NVOCCs involved in this proceeding. Liability Order, 29 SRR at 516, FF 200. The neutral body stated in its March 27, 1998 report that it viewed "these violations as especially serious because they represent a repetition of the same violations described in previous Investigation Reports." Id. Sea-Land was assessed a fine, reduced by fifty percent, of $27,500 for an average of approximately $1,145 per shipment. Finally, Sea-Land failed to establish written procedures applicable to its sales and marketing staffs or its operations staff regarding abuses of equipment substitution by NVOCCs after any of the neutral body investigations. Liability Order, 29 SRR at 515, FF 182 (no new written procedures in response to the first investigation), and 516, FF 203 (no new controls in response to any of the three investigations).

In view of the foregoing, we find that Mr. Spargo knew of the equipment substitution scheme and that Sea-Land's assertions to the contrary are belied by the record evidence. Moreover, the record shows that Sea-Land's equipment substitution abuses continued after Mr. Favor left Sea-Land in May, 1997 until February, 1998, and that Mr. Spargo knew of the results of the investigations. Mr. Spargo's denial of any knowledge subsequent to being advised of the neutral body's first investigation (Spargo II Tr. 275 ln23 – 276 ln 16) is not credible in the face of the level of detail in the neutral body's initial (and subsequent) reports and in the face of other Sea-Land employees' testimony (e.g., Mr. Ohle, Sea-Land's

operations manager, and Mr. Wing) that Mr. Spargo was informed of the abuses within the company. Liability Order, 29 SRR at 514, FF 174, 178-179. In summary, we agree with the ALJ that the record fully supports the finding that Mr. Spargo had knowledge of the scheme and that his testimony lacked credibility.

c. General allegations of knowledge

Sea-Land further objects that the allegations that Sea-Land was not concerned with or ignored equipment substitution abuse are far too general to support findings of knowing and willful violations. Sea-Land asserts that if, in processing 8,000 to 10,000 shipments per week, its staff did not uncover equipment substitution abuse that was not apparent on the face of the documents, then it would only mean that they "did not find the needle in the proverbial haystack." Sea-Land Exceptions at 12.

It should be noted, however, that on the nine shipments the rate audit staff did review after the neutral body's report of its first investigation, the documents contained information which should have triggered a close review. With respect to the 149 shipments at issue here, it should also be noted that the neutral body expected Sea-Land to find those needles in the haystack. In fact, in the second investigation, the neutral body found malpractices and fined Sea-Land with respect to a single shipment, and in the third investigation it fined Sea-Land for 24 shipments that did not qualify for equipment substitution.

Contrary to Sea-Land's view, to ensure against violation of the tariff rule, Sea-Land only needed to scrutinize those shipments for which equipment substitution was requested, not every shipment. Sea-Land could have detected

the shipments which did not merit equipment substitution treatment if it had instituted appropriate internal controls.

d. Mr. Favor's knowledge

Sea-Land also argues that the extent of Mr. Favor's involvement in equipment substitution abuse is unclear and that whatever his understanding or role, "NVOs 'schemed' among themselves to abuse equipment substitution." Sea-Land Exceptions at 13. Sea-Land avers that it was only in his third statement that he said he participated in equipment substitution abuse and that his supervisors were involved. Id. at 16.

Early in BOE's investigation, Mr. Favor gave a statement to Commission investigators and deposition testimony regarding his role in equipment substitution that was contradictory to his final statement and his testimony at the hearings before the ALJ. Nonetheless, the ALJ found Mr. Favor's final statement and testimony were more persuasive and credible. The ALJ explained that "[t]he oral testimony of Mr. Favor, Sea-Land's sales representative, after he recanted his earlier deposition, gave proof of the veracity of the admissions of the NVOs that they followed the lure of Sea-Land." Liability Order, 29 SRR at 572 (emphasis added).

We find that the ALJ had ample evidence to conclude that Mr. Favor's later written and oral testimony was more persuasive than that of Sea-Land's witnesses. Moreover, Sea-Land's silence with respect to Mr. Favor's later written statement and hearing testimony can be taken as its recognition that its primary contention (that there is no record evidence to support findings of knowing and willful violations by Sea-Land) collapses upon a finding that Mr. Favor's later

testimony is more credible than that presented by Sea-Land. Mr. Favor's role in promoting equipment substitution abuse was not "unclear" as Sea-Land contends, but central. Mr. Favor did not merely explain to the NVOCCs how to accurately apply TWRA's equipment substitution rule, but rather he approached the NVOCCs to explain how they could work around the rule to obtain a lower rate. Moreover, Mr. Favor's testimony was corroborated by the testimony of NVOCC witnesses in this proceeding. Sea-Land's position was contradicted by Mr. Favor's and the NVOCC witnesses.

The evidence demonstrates that Sea-Land had the requisite knowledge of the equipment substitution scheme at the sales representative level (e.g., Mr. Favor) and at the export sales manager and regional general manager levels (e.g., Messrs. Wing and Spargo, respectively). In addition, Sea-Land's rate auditing and booking departments contributed, directly and indirectly, to the scheme. Accordingly, the Commission affirms the ALJ's finding that Sea-Land violated section 10(b)(4) of the Shipping Act of 1984 with respect to 149 shipments and that these violations were knowing and willful. These violations were achieved by unjust and unfair means: Sea-Land knowingly permitted certain NVOCCs to obtain lower rates through concealment of the fact that, for each shipment, more cargo was loaded than permitted under the weight/measure maximums for substituted equipment under TWRA Tariff Rule 2 G5.

e. The rate audit and booking departments' role

The ALJ found that both the rate audit and booking departments were "aware of the scheme" that Sea-Land sales representatives were educating NVOCCs on how to revise

documentation to get 20 foot container rates on cargo that violated TWRA's equipment substitution rule. Liability Order, 29 SRR at 573. Sea-Land disputes this finding, arguing that the record evidence shows the rate audit department charged the correct rates because those rates were corroborated by NVOCC internal documents. Sea-Land contends that the documents the ALJ pointed to in finding that nine shipments demonstrated violations instead demonstrate that the rate audit staff applied the correct rates. Sea-Land Exceptions at 10.

Sea-Land's assertions are not persuasive. Sea-Land had no written policy or procedures requiring equipment availability to be confirmed with the operations department (29 SRR at 510, FF 129); Sea-Land failed to tell its sales representatives that they were not allowed to participate in approving equipment substitution at the shipper's request (Id. at 510, FF 130); and the system Sea-Land used for customers to book empty containers promoted carrier manipulation and abuse.

Because there were no procedures to assure equipment substitution would be implemented pursuant to the tariff rule, nothing in Sea-Land's normal handling of the documents and the container(s) caused anyone in Sea-Land to challenge such shipper initiated requests for substitution. Sea-Land's booking department would assign a "substituted" larger container based upon the NVOCC's booking instruction, or, after the booking (often, after the vessel had sailed), the booking staff would revise the booking instructions requested by Sea-Land sales representatives to bring the paperwork into accord with the maximum weight and/or cubic measure in the equipment substitution rule. 29 SRR at 511, FF 140, 141. Similarly, the rate audit staff would reduce the weight or cubic measure in their records to fall within the TWRA equipment substitution

rule maximums. Id. at 146-148

The rate audit department would also sometimes contact an NVOCC to ascertain whether the cubic measure and/or weight was correct – thereby permitting the NVOCC to revise its documents to display the lower measure and/or weight figures and the rate for the smaller sized container. Id. at 511, FF 145. Further, neither the booking department nor the rate audit department was required to contact the operations department to assign substitute equipment when requested by an NVOCC. Id. at 129, 141.

It is clear that equipment substitution at Sea-Land was driven by its sales and marketing arm as a tool to obtain more FAK cargo in the export trade to the Far East and not by Sea-Land's operational needs to facilitate the repositioning of equipment to the Far East. Liability Order, 29 SRR at 514, FF 125, 127, 179. Sea-Land's sales and marketing undermined the equipment substitution rule's requirement that the equipment substitution be the carrier's operational decision and that the larger equipment was to be substituted for the smaller equipment originally booked or ordered by the shipper. Instead, Sea-Land solicited certain NVOCCs to include a request for equipment substitution when they booked their cargo.

Sea-Land's "mapped booking" system, which had the laudatory purpose of eliminating the re-typing of repetitive information, also played a role in creating a process that diminished the likelihood that someone in booking would challenge a shipper's or a Sea-Land sales representative's equipment substitution request to revise booking instructions, bills of lading and, of course, the rate. In addition to carrying over truly repetitive information from previous shipments,

such as address and telephone information, mapped bookings also carried over the authorization for equipment substitution. Hence, when equipment substitution was authorized, it remained authorized thereafter, eliminating the need for booking personnel to pause and consider whether equipment substitution was appropriate for the shipment that was being booked. 29 SRR at 510, FF 131-134.

Sea-Land argues that the rate audit department rated nine shipments which occurred between March 10, 1997 and December 8, 1997 correctly because, in its view, the documents in those shipment files contained instructions/requests for "correction" of the cargo weight and/or measure. We agree with the ALJ that the documentation reflects violations of the equipment substitution rule because the original booking instructions/bill of lading information were later altered from the actual weights/measures so that the cargo, in Sea-Land's records, fell within the equipment substitution rule limits even though the shipments did not qualify. Moreover, six of the nine shipments were made after the neutral body's August 2, 1997 letter reporting the results of the first investigation when the rate audit staff should have kept a critical eye on equipment substitutions. The rate audit staff, however, nonetheless failed to review the shipments for compliance. 29 SRR at 512, FF 150.

C. Whether the section 10(b)(1) violations were adequately proven

The ALJ found that Sea-Land violated section 10(b)(1) by intentionally allowing certain NVOCCs to misuse the equipment substitution rule and thereby obtain lower rates than other shippers because these rates were not filed in Sea-

Land's tariffs or service contracts.

At the time the alleged section 10(b)(1) violations occurred, that section provided:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -
>
> (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts.

46 U.S.C. app. § 1709(b)(1) (1994).[7]

Courts and the Commission have long held that statutes such as the Shipping Act establish a strict adherence standard whereby a violation occurs any time a rate other than the rate published in a carrier's tariff is charged. Maislin Industries

[7] With the enactment of the OSRA, section 10(b)(1) was replaced by section 10(b)(2)(A), which provides:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may-
>
> (2) provide service in the liner trade that-
>
> (A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 8(a)(1) or 16 of this Act.

46 U.S.C. app. § 1709(b)(2)(A). This OSRA revision did not apply at any time relevant to this proceeding.

U.S. Inc. v. Primary Steel Inc., 497 U.S. 116 (1990); American President Lines Ltd. v Cyprus Mines Corp., 26 SRR 969 (ALJ 1993), aff'd, 26 SRR 1227 (FMC 1994); Marcella Shipping Co. Ltd., 23 SRR 857, 862-863 (ALJ 1986); Sanrio Co. Ltd. v. Maersk Line, 19 SRR 1627 (ALJ 1980), aff'd, 20 SRR 375, 377-378 (FMC 1980).

1. Section 10(b)(1) violations – Sea-Land's exceptions

Sea-Land excepts to the ALJ's finding of violations of section 10(b)(1), even though the ALJ did not assess penalties on these violations. Sea-Land contends that BOE failed to meet its burden of proving the contents of a sealed container, arguing that proving the contents of a container after shipment is made is a "heavy burden." Sea-Land Exceptions at 18 (citing Pan American Health Org. v. Moore-McCormack Lines, Inc., 19 SRR 762, 764 (1979)).

Sea-Land avers that the NVOCCs involved in this case have testified that they misdeclared the weight or cubic measure on the 149 shipments at issue. Id. Sea-Land further avers that the ALJ erroneously relied solely on documents provided by BOE and did not accord sufficient weight to the Sea-Land bills of lading and SEDs submitted by Sea-Land for 90 of the 149 shipments. Id. at 19. Sea-Land contends that the information on the Sea-Land bills of lading and the corresponding SEDs match for most of the 90 shipments. Id. Sea-Land avers that witnesses testified that the information on SEDs is generally reliable. Id. at 20.

2. Section 10(b)(1) violations – BOE's reply to Sea-Land's exceptions

BOE counters that Sea-Land's reference to "a heavy burden of proof" does not alter the applicable "preponderance of the evidence" burden and that it has proven the section 10(b)(1) violations by a preponderance of the evidence via Mr. Gravitt's detailed analysis of relevant NVOCC documents (such as the NVOCC house bills of lading, shipment manifests, and Sea-Land RCV tickets). BOE avers that the SEDs produced by Sea-Land are not the best evidence because Sea-Land presented no expert witness to testify as to the reliability of matching the Sea-Land master bill with its corresponding SED.

3. Section 10(b)(1) violations – Discussion

a. Heavy burden of proof

Contrary to Sea-Land's contention that BOE bears an especially heavy burden of proof, the "preponderance of the evidence" standard is that which the courts and the Commission have applied consistently over the years. BOE is correct that the "heavy burden of proof" referred to in Pan American Health, supra, was clarified by the Commission in Sanrio Co. Ltd. v. Maersk Line, supra. In Sanrio, the ALJ explained that the phrase "heavy burden of proof" has been used by the Commission to refer to the difficulty a claimant faces in proving what was in a container long after the shipment was made. The ALJ, however, pointed out that, notwithstanding this difficulty, the "usual standard of preponderance of the evidence is to be followed." 19 SRR at 1632.

The ALJ in Sanrio also observed that "commercial invoices, packing lists, export declarations, sales literature, dictionary definition, letters, actual samples, as well as oral

testimony" have all been accepted as types of evidence sufficient to prove, by a preponderance of the evidence, the contents of a container. Id. at 1635. Hence, under Commission precedent, the documents relied upon by Mr. Gravitt in making his analysis are acceptable evidence and were properly admitted into the record. In addition, this argument is a "red herring" inasmuch as the burden of proof for violations of section 10(b)(1) is identical to that applied with respect to the section 10(b)(4) violations – preponderance of the evidence.

b. Weight accorded to SEDs produced by Sea-Land

Sea-Land contends that the best evidence presented in this case is the information relevant to equipment substitution (e.g., weight and cubic measure) appearing on many of the SEDs it introduced, which matches similar information on the Sea-Land master bills of ladings. Sea-Land avers that the SEDs are more reliable because falsification of SEDs may result in substantial civil or criminal penalties. Sea-Land Exceptions at 19. Sea-Land argues that the ALJ relied solely on BOE's documentary evidence, although a Sea-Land witness and some of the NVOCCs involved in this proceeding testified that SEDs are accurate.

The Commission agrees with the ALJ that Mr. Gravitt's testimony, relying on NVOCC testimony, NVOCC and other documentation, and Sea-Land RCV tickets, is the best evidence demonstrating the weights and cubic measures of the shipments at issue. Sea-Land's "matching theory" arguments have no probative value as Sea-Land provided no expert rate witness to substantiate its arguments or to rebut the testimony of Mr. Gravitt relative to the documents he relied upon in

giving his expert opinion. Further, Sea-Land witness Donna Smith testified that she would trust the weight contained in Sea-Land's RCV ticket over that stated in an SED where there is a conflict over the weight. 29 SRR at 512, FF 157.

Sea-Land also objects to BOE's refusal to allow Mr. Gravitt to analyze the SEDs submitted by Sea-Land, even though Mr. Gravitt had already completed his written testimony. Sea-Land Exceptions at 20 n.24. This argument is without merit. BOE was under no obligation to allow Sea-Land to introduce documents via BOE's own expert witness, which would, in effect, make Mr. Gravitt Sea-Land's witness. Sea-Land is the only party responsible for failing to put forth an expert rate witness or produce the SEDs earlier in the hearing, and we are not persuaded otherwise.

We agree with the ALJ's finding that Sea-Land violated section 10(b)(1) on each of the 149 shipments at issue here by charging a rate other than the rate published in its tariff. BOE's expert witness provided detailed testimony analyzing documents provided by NVOCCs that demonstrate that the NVOCCs had obtained lower rates because they were able to load more cargo, by weight and/or cubic measure, in the substituted containers than permitted by TWRA's equipment substitution rule. Mr. Gravitt's testimony on those shipments corroborated testimony of Mr. Favor and that of the NVOCCs as to how the scheme worked. Additionally, Sea-Land provided no expert rate witness testimony to challenge Mr. Gravitt's expert opinion on the reliability of NVOCC documents or the correctness of his conclusions.

Similarly, Sea-Land provided no expert testimony to support its contention that matching weight or cubic measure entries on NVOCCs' SEDs and on Sea-Land master bills of

lading corresponding to those SEDs was a reliable method of determining what was in each container. Also, the documents relied upon by Mr. Gravitt and the ALJ are of the type which the Commission has accepted as reliable evidence over the years. We therefore affirm the ALJ's findings of violations of section 10(b)(1). However, the Commission has determined not to assess penalties for the section 10(b)(1) violations. Instead, we have focused on the more egregious violations: those of section 10(b)(4).

D. Sections 19 (d) (1) and 19 (d)(4)

1. Sections 19 (d) (1) and 19(d)(4)

Reviewing the ALJ's disposition of the section 19 issues, Chairman Blust and Commissioner Dye concluded that he found that Sea-Land did not violate either section 19(d)(1) or section 19(d)(4). Chairman Blust and Commissioner Dye view the ALJ's decision in the Penalty Order as overturning his earlier findings of section 19 violations, because the Commission had not provided fair notice of how it interpreted its freight forwarder certification regulations in section 510.23(b).[8]

Commissioners Creel, Anderson, and Brennan have concluded that the ALJ did not overturn his earlier findings of violations of section 19, but that he declined to impose penalties on Sea-Land for the section 19(d)(1) and section 19(d)(4) violations. Commissioners Creel, Anderson, and Brennan view the ALJ's decision as one not to impose penalties for violations of section 19 because he concluded that the Commission had not provided fair notice of how it

[8] This provision is now set forth in section 515.42(b) of the Commission's regulations. 46 C.F.R. § 515.42(b).

interpreted its freight forwarder certification regulations in section 510.23(b).

Further relying on NCBFAA's amicus filing, the ALJ found that the industry had reasonably interpreted those regulations. In contrast, the ALJ held that adopting BOE's interpretation of the certification regulations and penalizing Sea-Land in this proceeding would be a violation of due process because Sea-Land would not have had fair notice of how the Commission intended to interpret the regulations.

At the time relevant to the allegations in this proceeding, section 19(d)(1) provided:

> (1) A common carrier may compensate an ocean freight forwarder in connection with a shipment dispatched on behalf of others only when the ocean freight forwarder has certified in writing that it holds a valid license and has performed the following services:
>
> (A) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space
>
> (B) Prepared and processed the ocean bill of
>
> lading, dock receipt, or other similar document with respect to the shipment.

46 U.S.C. app. § 1718(d)(1).

Section 19(d)(4) provided during the time relevant to

this proceeding:

* * * *

> (4) No ocean freight forwarder may receive compensation from a common carrier with respect to a shipment in which the forwarder has a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on that shipment.

46 U.S.C. app. § 1718(d)(4) (1994).

2. Sections 19 (d) (1) and 19(d)(4) - Exceptions

BOE objects to the ALJ's decision not to assess penalties against Sea-Land after having found violations of sections 19(d)(1) and 19(d)(4). BOE Exceptions at 2. BOE also avers that the ALJ should exclude information on "industry practice." Id. BOE excepts to the procedure the ALJ utilized in the penalty phase that permitted additional information to be developed by the parties as to whether there was an industry practice with respect to freight forwarder certifications. Id. at 4. Sea-Land excepts to any findings in the Liability Order that it violated section 19. However, Sea-Land does not address such findings in its exceptions to the Penalty Order, because it believes that such violations were "largely reconsidered" and because the ALJ assessed no penalties for them. Sea-Land Exceptions at 2 n.4.

3. Sections 19 (d)(1) and 19(d)(4) - Discussion

In his Liability Order, the ALJ found Sea-Land had knowingly and willfully violated sections 19(d)(1) and 19(d)(4) with respect to 605 shipments. During the penalty phase of this proceeding, the ALJ granted the NCBFAA's motion for leave

to file an amicus curiae brief to discuss industry practice with respect to payment and collection of freight forwarder compensation.

Chairman Blust and Commissioner Dye have concluded that, in the Penalty Order, the ALJ reversed his earlier findings of violations of sections 19(d)(1) and 19(d)(4), ruling that Sea-Land could not be penalized where it had no notice as to how the Commission would interpret the requirements of its forwarder certification regulations. Chairman Blust and Commissioner Dye note that, in Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986), the D.C. Circuit explained that due process forbids the court from giving deference to an agency interpretation "validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." Id. (Emphasis added). Similarly, in General Electric Co. v. U.S. E.P.A., 53 F.3d 1324 (D.C. Cir. 1995), the D.C. Circuit established that when a regulated entity has not been provided sufficient notice of an agency's interpretation of its regulations, the fair notice doctrine precludes an agency from finding violations of law, as well as assessing penalties. In GE, the EPA had ruled that General Electric violated a regulation, and imposed a penalty for that violation. The court reversed the EPA, holding that the regulations were not ascertainably clear and that GE's interpretation of them was reasonable. Accordingly, GE was not on notice of the agency's interpretation of the regulations, and the EPA could "not hold GE responsible in any way either financially or in future enforcement proceedings for the actions charged in this case." Id. at 1334. (emphasis added). The court noted that the "EPA's interpretation of those regulations is permissible [for application in the future], but because the regulations did not provide GE with fair warning of the agency's interpretation, we vacate the finding of liability

and set aside the fine." Id. at 1325 (emphasis added). Accordingly, Chairman Blust and Commissioner Dye view the ALJ's reliance on the fair notice doctrine as necessarily overturning both the findings of violations and assessment of penalties.

Further, Chairman Blust and Commissioner Dye considered the final Ordering paragraph of the Penalty Order, which indicates that violations of section 19(d)(1) and 19(d)(4) were found by the ALJ. Chairman Blust and Commissioner Dye conclude that the paragraph is in error as the "fair notice" doctrine as applied by the courts, and as applied by the ALJ in this proceeding, requires that there can be no findings of violations where a regulated person has no ability to discern what conduct may violate that regulation.

Commissioners Creel, Anderson and Brennan have concluded that, in the Penalty Order, the ALJ determined that Sea-Land could not be penalized where it had no notice as to how the Commission would interpret the requirements of its forwarder certification regulations. The ALJ concluded that because Sea-Land did not have fair notice of the Commission's interpretation, the assessment of penalties in this proceeding would deprive Sea-Land of due process. See, e.g., Gates supra at 156. Commissioners Creel, Anderson, and Brennan have determined that the ALJ did not overturn his earlier findings of numerous violations of section 19 of the Shipping Act, but assessed no penalties for those violations because he concluded that Sea-Land was not on notice regarding how the Commission had chosen to interpret those regulations.

Commissioners Creel and Anderson note that the ALJ's disposition of section 19 violations is consistent with the "fair

notice" doctrine as applied in *Gates*, in which the D.C. Circuit stated that while courts must give deference to an agency's interpretation of its own regulations, "*[w]here the imposition of penal sanctions is at issue*…the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Id.* At 156 (emphasis added). The court went on to say that it expressed no opinion as to whether in a *non-penal* context, the agency's interpretation of its regulation might be permissible, thus highlighting the focus of the "fair notice" doctrine on the imposition of sanctions or penalties. *Id.* at 156.

The majority agrees that the ALJ found that the Shipping Act of 1984 liberalized the certification requirements in section 19(d)(1) by eliminating the advance certification requirement that had applied under the 1916 Act. As a result of the statutory change in 1984, the Commission promulgated regulations that permitted forwarders to satisfy the certification requirement in four ways, by inserting it: on a copy of the bill of lading; in a summary statement; in an invoice for compensation; or as an endorsement on the back of a check. Penalty Order, 29 SRR at 1163. The ALJ concluded that BOE's interpretation would run sharply counter to the Commission's regulations and to the industry practice which has developed over a twenty year period.

We find that the Commission's forwarder certification rule does not specify in detail how the requirements are to be met. The practice which has arisen within the industry is that checks are typically stamped by the carrier with the certification language contained in the current regulation and endorsed by the forwarder by stamping "for deposit only" on the back of each check. Id. In addition, under the industry's interpretation of the regulations, forwarders are not required

to, and they do not, insert their license number on the back of the check.

We conclude that the industry practice is a reasonable interpretation of the Commission's forwarder certification regulations. Interpretation of forwarder certification regulations to, among other things, require manual endorsements of certifications would not be in keeping with the legislative changes made by the Shipping Act of 1984 or the Commission's implementing regulations. Chairman Blust and Commissioner Dye would affirm the ALJ's determination to reverse his earlier findings of section 19 violations. Commissioners Creel and Anderson would vacate the ALJ's earlier findings of section 19 violations, and affirm his decision not to impose penalties against Sea-Land. Accordingly, the majority will decline to find any violations of section 19(d).

E. Penalties

1. Sea-Land's exceptions

Sea-Land excepts to the ALJ's assessment of $4,082,500 in penalties for violations of section 10(b)(4), contending that it is arbitrary and capricious and not in accordance with law. Sea-Land Exceptions at 23. More specifically, Sea-Land avers that the ALJ failed to consider the effect of the enactment of OSRA on carriers' tariffs (Id. at 25-30), that the penalty is the highest in the history of the Shipping Act since 1916 (Id. at 31-39), that the ALJ was not factually correct in relying on certain aggravating factors (Id. at 40-45), and that the Commission should use this case as an opportunity to revise and clarify its tariff enforcement program (Id. at 45-48).

2. BOE's exceptions

BOE contends that the Commission should not allow arguments urging changes in the Commission's enforcement policy to excuse Sea-Land's knowing and willful violations of the Shipping Act. BOE also argues that the $4,082,000 penalty assessed by the ALJ is not too harsh and that it should be increased to account for all knowing and willful violations (e.g., for violations of section 10(b)(1)).

3. Amicus Curiae briefs

Each of the amici argues that the level of the penalty assessed by the ALJ is excessive and that the Commission should review its penalty assessment policies, especially in light of the "massive penalties assessed by the Commission in formal enforcement proceedings [which] have set a precedent that has had a negative effect on [the] informal settlement process." TIA Brief at 5. They point to the fact that unlawful conduct such as present in this case is not prohibited in confidential service contracts now authorized under OSRA. Under OSRA, a carrier may give a lower rate to any shipper for any reason in a filed confidential service contract and OSRA eliminated discrimination as a prohibited act with respect to service contracts. See, e.g., NITL Brief at 4-9. The amici also argue that because OSRA made such conduct lawful imposing a penalty to deter illegal behavior in the future is not valid here. Id. at 9-11.

4. Discussion

As indicated above, the Commission has decided to assess a penalty with respect to the section 10(b)(4) violations

only, as those violations reflect Sea-Land's implementation of an "unfair device or means," in concert with certain NVOCC customers, knowing that the scheme was unlawful and, as a result, are viewed as especially egregious violations. Accordingly, the discussion below is limited to the 10(b)(4) violations in addressing the factors which section 13(c) of the Shipping Act requires the Commission to consider when assessing a penalty.

Section 13(c) of the Shipping Act requires that the Commission consider "the nature, circumstances, extent, and gravity of the violation" as well as the respondent's "culpability, history of prior offenses, ability to pay, and such other matters as justice may require." 46 U.S.C. app. § 1712(c).

The amount of a penalty is largely within the agency's discretion where a violation has been found because "the relation of remedy to policy is peculiarly a matter for administrative competence." American Power Co. v. Securities and Exchange Commission, 329 U.S. 90, 146 (1946). The Second Circuit Court of Appeals, however, has clarified that, with respect to the assessment of penalties, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), even though it has discretion as to the weight given to each of the factors. Merritt v. United States, 960 F.2d 15, 17-18 (2nd Cir. 1992).

a. Nature, circumstances, extent and gravity of violations

Sea-Land intentionally implemented a scheme concealed from public view to favor certain of its customers with lower rates than those filed in its public tariffs and service

contracts. The testamentary and documentary evidence adduced in this proceeding proves that Sea-Land secured certain NVOCCs' business by allowing them to load extra cargo into the larger containers while paying the lower rates. This practice contravened the TWRA equipment substitution rule that applied to those shipments. At the time of the violations, the Shipping Act did not provide for such confidential deals to customers in service contracts or via tariffs. Instead, ocean common carriers were required to publicly file the essential terms of their contracts and make those terms available to similarly situated shippers. Carriers were similarly required to adhere to the rates, charges and rules filed in their public tariffs.

Sea-Land knew its equipment substitution scheme was unlawful when it was implemented because its success depended on Sea-Land and the NVOCCs operating in secret. Moreover, in three separate investigations, the neutral body had already made it clear to Sea-Land that the abuse of the equipment substitution rule violated the TWRA tariff. Yet, Sea-Land did nothing to change its internal processes to assure that the equipment substitution rule was applied correctly. Rather, Sea-Land's response to the investigations was to continue the practice.

Sea-Land's violations of section 10(b)(4) were knowing and willful. A carrier "knowingly and willfully" violates the Shipping Act where it "having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Shipman International (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 CFR Part 514, 28 SRR 100, 108 (I.D. 1998) (citing United States v. Illinois Central R. Co., 303 U.S. 239 (1938)). Sea-Land easily exceeded this standard by

its own conduct. Sea-Land intentionally commenced and promoted its equipment substitution scheme without regard for its duty to assure the TWRA equipment substitution rule was followed.

b. The degree of Sea-Land's culpability

Unlike section 10(b)(1) of the Shipping Act which establishes a strict adherence standard for which "the motivations and intentions of a carrier who fails to charge its tariff rate are irrelevant" (Trans Ocean-Pacific Forwarding, Inc. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 SRR 409, 412 (I.D. 1995), administratively final February 9, 1996), such intentions and motivations are relevant in considering section 10(b)(4). Sea-Land's conduct demonstrates that it wanted to attract the higher value FAK cargo of certain NVOCC shippers to increase its revenues in the outbound Far East trades and methodically set about garnering that cargo by soliciting and entering into secret deals via the equipment substitution scheme. Hence, as Sea-Land concocted a fraudulent scheme to intentionally violate the Shipping Act, the Commission finds that Sea-Land is fully culpable for its conduct.

c. History of prior offenses

Sea-Land has no history of prior offenses.[9] The

[9] Sea-Land and BOE argue that two settlement agreements between Sea-Land and the Commission (one in 1977 and one in 1992) are either aggravating or mitigating factors in assessing penalties. The agreements cannot be aggravating factors as they do not represent a full litigation of the merits of the

absence of a history of prior offenses would normally tend to serve as a mitigating factor in our consideration of a penalty assessment. However, in this case this factor is neutralized by the utter disregard Sea-Land exhibited in pursuing its ends through means that it knew violated the Shipping Act. Sea-Land's prior record cannot serve to negate the seriousness of its knowing and willful violations.

d. Sea-Land's ability to pay

Prior to the issuance of the Penalty Order, Sea-Land voluntarily waived any argument that might call into question its ability to pay a penalty assessed by the Commission in this proceeding. Also, Sea-Land filed no exceptions that would contradict its voluntary waiver. Accordingly, we conclude that further consideration of Sea-Land's ability to pay the penalty assessed by the Commission is not required.

e. Other matters as justice may require

In addition to the foregoing factors, the Commission finds it necessary and prudent to balance the gravity of Sea-Land's violations of the pre-OSRA Shipping Act against the impact of OSRA in changing the legal landscape relative to conduct such as that of Sea-Land if engaged in today. In other words, under OSRA, Sea-Land's conduct would now be lawful if undertaken pursuant to properly executed and filed service contracts.

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alleged violations. By the same token, if the agreements cannot be considered evidence of prior offenses, they cannot serve as mitigating factors. Settlement agreements reflect the parties' decisions that further litigation is not in their interests.

With the enactment of OSRA, all ocean common carriers are, with few restraints, able to target the cargo of any shipper(s), including NVOCC shippers of FAK cargo to the Far East, by simply entering into confidential service contracts with such shippers. The carriers may reduce the rates or provide other incentives to attract the cargo, all via arrangements which the parties may keep secret from the public, albeit filed with the Commission. Hence, under OSRA, Sea-Land's scheme and others like it are now largely obsolete.

Therefore, there is a sharply reduced need for the Commission to impose a penalty here for the purpose of deterring conduct similar to that of Sea-Land. The Commission's long-established resolve to specifically deter future violations by a respondent or, more broadly, to deter such conduct by other carriers is appropriate where the unlawful conduct remains a real concern. After enactment of OSRA, however, there is a greatly reduced likelihood that conduct like Sea-Land's will result in Shipping Act violations inasmuch as a preponderant portion of all cargo now moves under filed confidential service contracts.

The Commission has also taken into consideration the views of the four amici, who all consider the penalty assessed by the ALJ to be excessive. The shippers represented by NITL, the brokers and forwarders represented by NCBFAA, and the ocean transportation intermediaries represented by the TIA and by the NVOCC-Government Affairs Conference, are not natural allies of Sea-Land. Nonetheless, they urge the Commission to mitigate penalties against a carrier – thereby underscoring their lack of interest in the Commission penalizing conduct which is now lawful.

The Commission has previously acknowledged that statutory changes have altered the regulatory landscape in ways that substantially affect the outcome of proceedings commenced prior to those statutory changes. Upon the enactment of the Shipping Act of 1984, the Commission dismissed a proceeding against Contract Marine Carriers, Inc. ("CMC") even though the ALJ had already issued an initial decision finding Commission jurisdiction over CMC's contract operations and that such operations violated the 1916 Act. Contract Marine Carriers, Inc., 22 SRR 1091 (1984). The Commission there found that, although civil penalties were not involved, there was no doubt that CMC's contract practices fell squarely within the requirements of the new Shipping Act of 1984 and did not require further litigation of that issue. Id. at 1093. Similarly, here, there is no doubt that unlawful conduct, such as Sea-Land's, would be obviated by confidential contracts authorized by OSRA and will result in very few, if any, future claims of discrimination under carriers' tariffs.

More recently, the Commission has held that, due in part to the enactment of OSRA, no penalties should be assessed for conduct by a conference and its members that occurred before the enactment of OSRA. ANERA and Its Members – Opting Out of Service Contracts, 28 SRR 1215, 1231 (1999).

Without consideration of mitigating factors, the Commission has before it facts which support imposition of a substantial penalty against Sea-Land. The penalty amount that is statutorily supportable for 149 knowing and willful violations of section 10(b)(4) would amount to a maximum of $4,082,500 (the amount assessed by the ALJ). In contrast,

Sea-Land has argued that a reasonable penalty would be within the range of $500,000 to $600,000.

In view of the seriousness of Sea-Land's 149 knowing and willful violations of section 10(b)(4), the Commission considers that a substantial penalty is warranted, although the $4,082,500 penalty proposed by the ALJ is higher than Commission finds suitable for these violations. OSRA now enables carriers to lawfully engage in confidential service contracts. As a result, the Commission finds that the penalty here does not have to provide the same level of deterrence as would be needed if the Shipping Act had not been amended in such a way by OSRA and that the penalty should be reduced to reflect the diminished need for deterrence. Accordingly, the Commission assesses a penalty in the amount of $820,000. This amount is sufficient to punish Sea-Land's conduct violating section 10(b)(4) of the Shipping Act and provide notice to others that the Commission takes seriously its obligation to enforce the Shipping Act.

We note our concern that, despite the findings in three separate neutral body investigations that Sea-Land had violated the TWRA equipment substitution rules, it nonetheless continued the same behavior and failed to implement any internal processes or procedures to detect and eradicate this egregious conduct. Sea-Land's blatant disregard of its statutory and regulatory requirements is disturbing, and we take this opportunity to remind Sea-Land and all common carriers engaged in U.S. trade of their obligations.

In view of today's business environment, which requires safe and secure operations, we strongly suggest that common carriers establish, implement, and maintain policies and practices to ensure compliance with the laws governing

ocean transportation in U.S. commerce.

F. Miscellaneous Matters

1. Oral Argument

Sea-Land has requested oral argument in view of the significant issues raised in this proceeding. The parties have been provided ample opportunity to present their cases in great detail and the resolution of the issues does not require any further elucidation. Oral argument would not provide the Commission further information or assistance. Sea-Land's request is denied.

2. Sea-Land's Petition to Strike

Sea-Land filed a petition to strike portions of BOE's reply to exceptions which it contends contains factual material and argument that goes outside of the record. Specifically, Sea-Land objects to BOE's citation to numerous Commission press releases regarding settlements with other entities, a BOE chart summarizing those settlements, and BOE's arguments characterizing the settled cases as involving knowing and willful conduct, what service contract parties do under service contracts, and how the settled cases originated. Sea-Land avers that it has had no opportunity to respond and any consideration of this material would violate due process.

BOE opposes the petition, responding that Sea-Land submitted its own chart summarizing the Commission's penalty collection over a ten year period, and that BOE merely responded to Sea-Land's arguments on exceptions albeit relying on press releases announcing compromise agreements for the years 1999 through 2002. BOE also asserts that the

Commission's Annual Report for fiscal year 2002 includes a description that most cases handled by BOE result from complaints by members of the industry and other government agencies. BOE further contends that amicus NVOCC–Government Affairs Conference in its brief specifically referred to recent Commission press releases and that Sea-Land, in its Reply to Exceptions, favorably referred to that analysis by the Conference.

The Commission finds that BOE's chart is not prejudicial to Sea-Land and will not be stricken. BOE's tally of the number of compromise agreements that involved service contract related issues as a percentage of the total number of compromise agreements (as reflected in the Commission press releases identified in the chart) may be easily calculated from those publicly available documents.

Similarly, BOE's assertions relative to the origin of cases handled by BOE is contained in the Commission's own Annual Report of which it takes official notice. Accordingly, the petition is denied with respect to such arguments.

With respect to BOE's assertion that the compromise agreements involved knowing and willful conduct, there is no evidence in the proceeding to support this contention, and as such agreements involve no Commission findings of knowing and willful conduct, those arguments are stricken. To the extent that there remain any other bases for the petition not addressed above, they are denied.

CONCLUSION

THEREFORE, IT IS ORDERED, That the Commission affirms the ALJ's Initial Decision in part and reverses it in part, as clarified and modified herein;

IT IS FURTHER ORDERED, That Sea-Land's exceptions and arguments are denied, unless otherwise indicated;

IT IS FURTHER ORDERED, That BOE's exceptions are denied;

IT IS FURTHER ORDERED, That Sea-Land's request for oral argument is denied;

IT IS FURTHER ORDERED, That Sea-Land's petition to strike certain portions of BOE's Reply to Exceptions is granted in part and denied in part;

IT IS FURTHER ORDERED, That Sea-Land pay a penalty in the amount of $820,000; and

FINALLY, IT IS ORDERED, That this proceeding be discontinued upon payment in full of the foregoing penalty.

By the Commission.

Bryant L. VanBrakle
Secretary

Commissioner Joseph Brennan, dissenting and concurring.

First, I would grant the request of the Respondent, Sea-Land Service Inc., for oral argument on the issue of the penalty amount. A party facing the highest fine in the history of the Shipping Act should have an opportunity to present its best arguments to the entire Commission in a public forum and to rebut the arguments put forth by the agency's Bureau of Enforcement. In my view, granting Sea-Land's procedural request is only fair and reasonable under the circumstances.

In this proceeding, the parties disagree as to essentially every factor that would determine the amount of a civil penalty. The exceptions filed by both parties show significant disagreement as to the nature of the violations, aggravating and mitigating factors, the deterrence value of a penalty, prior offenses, and other issues that bear on what the penalty should be. Furthermore, the parties are arguing for penalties ranging widely from a low range of $500,000 - $600,000 (Sea-Land) to a high of $11,900,000 - $18,000,000 (Bureau of Enforcement). Despite such vast disagreement, the Commission majority adopts the position that oral argument "would not provide the Commission further information or assistance."[1] I respectfully and strongly disagree.

I believe that, on the contrary, the entire Commission would benefit from a full airing of the factual, legal, and policy issues bearing on the penalty to be assessed in this case. To say that further elucidation by the parties would serve no purpose runs counter to the approach of every appellate court in the nation, which routinely hears oral argument and considers it essential to decision-making. Oral argument

[1] Majority Opinion 55.

before the ultimate decision-maker is not an excessive request, but rather an integral part of adjudication before an agency or appellate court. Supreme Court Justice Antonin Scalia, in an interview, made the following observation about the usefulness of oral argument before the United States Supreme Court:

> It isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking. I use it . . . to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'[2]

If oral argument is not appropriate in this proceeding, with millions of dollars at stake and nearly every aspect of the case in dispute, when *is* it appropriate? As a quasi-judicial body, the Federal Maritime Commission must be more open to giving parties a voice and to lending its ear. Here, a party facing a record assessment of civil penalties in a highly contested proceeding has merely requested an hour of the Commission's time. The request should be granted.

Second, I vote to affirm the decision of Administrative Law Judge Frederick M. Dolan, Jr. with regard to all violations found and the penalty assessed. Judge Dolan assessed a penalty of $4,082,500, the maximum penalty for the 149 violations of §10(b)(4). The ALJ declined to assess

[2] Hon. Joseph W. Hatchett and Robert J. Telfer, III, The Importance of Appellate Oral Argument, 33 Stetson Law Review 142 (2003).

penalties for the 149 violations of §10(b)(1), the 435 violations of §19(d)(1), and the 170 violations of §19(d)(4). Because the record overwhelmingly supports the result reached by Judge Dolan, the Commission should affirm.

As the majority opinion notes, Judge Dolan determined that the Respondent, Sea-Land Service, Inc., knowingly and willfully used a fraudulent scheme to illegally transport cargo at non-tariff rates. When certain non-vessel-operating ("NVO") shippers acted upon Sea-Land's solicitation to request "equipment substitution," Sea-Land would furnish a 40-foot container that the NVO could load beyond the 20-foot container limit. Sea-Land would then purposely conceal the actual weight or measure of the cargo loaded into the 40-foot container.

It must be emphasized that this was a scheme instituted by Sea-Land's managers *with full knowledge of its illegality* and for the purpose of giving Sea-Land an unfair business advantage. Judge Dolan found that "such egregious behavior and concealment of the true weight and measurements of these shipments, initiated and sponsored by Sea-Land as its chosen method of capturing cargo and allowing lower rates for Sea-Land's NVO shipper accounts, clearly constituted an 'unfair device or means'. . . ."[3]

Judge Dolan determined that Sea-Land was "plainly indifferent to the requirements of the statute and disregard[ed] its strict requirements."[4] He also found convincing evidence

[3] Preliminary Ruling Determining the Question of Liability of Respondent Regarding the Issues Raised in the Order of Investigation; Further Procedures Ordered, 29 SRR 492, 575 (2002).

[4] Sea-Land Service, Inc.-- Possible Violations of §10(b)(1), §10(b)(4) and §19(d) of the Shipping Act of 1984, 29 SRR 1109, 1180 (2003).

that "the NVOCCs sought out Sea-Land because they knew that, unlike other carriers, Sea-Land was an active participant in the illegality and would close its eyes to questionable paperwork whereas other carriers would not."[5]

In arriving at an appropriate penalty amount, Judge Dolan took into account the willful nature of the conduct, as well as other relevant penalty factors.[6] Judge Dolan had the fullest opportunity to evaluate the evidence of a voluminous record that included 22 days of oral testimony, including cross-examination, and transcripts of some 3,000 pages. The Commission majority does not take issue with the ALJ as to any factual finding he made regarding the violations of §10(b)1) and §10(b)(4). These violations, the majority concurs, were indeed willful. Sea-Land "concocted a fraudulent scheme,"[7] showed "utter disregard" for the law,[8] engaged in "egregious conduct,"[9] and demonstrated "blatant disregard of its statutory and regulatory requirements."[10] Sea-Land, in other words, was essentially thumbing its nose at the Commission and the federal laws under which the Commission operates.

[5] Id. at 1181.

[6] For example, the ALJ cited, as an aggravating factor, Sea-Land's failure to respond appropriately to discovery, thereby denying BOE's access to numerous shipping records to which it was entitled. Id.

[7] Majority Opinion 50.

[8] Id. at 51.

[9] Id. at 54.

[10] Id.

Yet the Commission majority, while agreeing with Judge Dolan in every respect as to the egregiousness of these violations, and also concurring that Sea-Land waived any ability-to-pay argument,[11] has decided to reduce the penalty assessed by the ALJ by approximately 80 percent. The majority opinion bases this drastic reduction of the penalty mainly on a supposed diminished need for deterrence. "Sea-Land's scheme and others like it," it is said, "are now largely obsolete,"[12] because the Ocean Shipping Reform Act (OSRA) has allowed confidential service contracts since May 1999.

I believe that the Commission's reduction of the penalty to $820,000 gives far too little consideration to the concept of general deterrence. It is important, as Judge Dolan noted, "to send a strong signal to the industry."[13] The Commission needs to show that real consequences will follow from intentional and knowing violations of the Shipping Act of 1984, which the majority agrees did occur in this case.

Judge Dolan was aware that "the penalty amount . . . must not be seen as so low as to be written off as a mere cost of doing business."[14] Today's order, which fines Sea-Land a mere $220,000 more than Sea-Land's suggested maximum fine of $500,000 - $600,000, will likely represent just that: a mere cost of doing business. Sea-Land Service, Inc. (now called SL Service, Inc.), is a substantial company that, by its own admission, controls assets in the hundreds of millions of dollars.

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[11] Id. at 51.

[12] Id. at 52.

[13] 29 SRR 1180 (2003).

[14] Id. at 1181.

The Federal Maritime Commission exists, in part, for the purpose of monitoring how ocean common carriers use their antitrust immunity. The law gives ocean carriers an extraordinary exemption from the normal conduct of business in the United States: the ability to discuss and fix the rates they charge their customers. The Commission has limited means to investigate possible abuses of this legal privilege,[15] and for that reason the Commission must deal stringently with *knowing and willful* statutory violations by ocean common carriers, irrespective of whether the violations concern antitrust immunity itself.

In short, I would like to see more deference paid to the discretion and judgment of Judge Dolan, an administrative law judge with years of experience in maritime and transportation law.[16] The Commission should not disturb the result reached below, unless there is a very compelling reason for doing so. It is true that the Commission, when undertaking review, has all the powers that it would have had in making the initial decision. As a practical matter, however, sweeping aside the judgment of an experienced ALJ requires a strong justification. There is no such justification in this case. Judge Dolan convincingly drew upon the record in formulating his 418-page Initial Decision.[17] He exercised great care "to tailor

[15] For example, the Commission employs only six persons outside Washington, D.C. The ports of Los Angeles and Long Beach, which together handled over 13 million TEUs in 2004, are monitored by only one on-site FMC employee.

[16] Prior to his arrival at the FMC in 1992, Judge Dolan served for 20 years as an administrative law judge at the Interstate Commerce Commission, where his services were also lent to agencies such as the Office of Thrift Supervision, the Federal Reserve, and the Internal Revenue Service.

[17] The Initial Decision of January 30, 2003 and the Preliminary Ruling

the penalty to the violations committed and to arrive at a penalty intended to deter future violations while achieving the stated objectives of the Act."[18]

As for §19(d), I uphold the ALJ as to his findings of violations and the non-assessment of penalties. Judge Dolan correctly determined in his order of March 5, 2002 that Sea-Land violated §19(d)(1) on 435 shipments by compensating a forwarder having a revoked forwarder license, by compensating forwarders that performed no forwarding services, and by paying forwarders without obtaining adequate certifications.[19]

He also correctly found that Sea-Land violated §19(d)(4) on 170 shipments by knowingly paying forwarder compensation to a forwarder that had a beneficial interest in the cargo.[20] Like Judge Dolan, I would also assign no penalties for these §19(d) violations. I do so, however, not because of the "fair notice" doctrine,[21] but because the total

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Determining the Question of Liability of Respondent Regarding the Issues Raised in the Order of Investigation; Further Procedures Ordered of March 5, 2002 comprise the entire Initial Decision. 29 SRR 1110 (2003).

[18] Id. at 1180.

[19] 29 SRR 594 (2002).

[20] Id.

[21] The "fair notice" doctrine of General Elec. Co. v. U.S. E.P.A., 53 F.3d 1324 (D.C. Cir. 1995), does not apply, because 46 C.F.R. §510.23(c), requiring the forwarder to convey to the carrier "a *signed* certification" (emphasis added), is not unconstitutionally ambiguous. If changes to the FMC's forwarder certification regulations are needed, the Commission should issue a notice of inquiry and proceed with rulemaking, possibly in the context of the Commission's overall requirements for the licensing and bonding of ocean transportation intermediaries.

compensation that Sea-Land wrongly paid to forwarders was "so small"[22] ($6,681), and because the $4,082,500 assessed for the more serious §10(b)(4) violations is a sufficient general deterrent.

I vote to affirm the ALJ's findings of violations of §10(b)1), §10(b)(4), §19(d)(1), and §19(d)(4). In light of the willful nature of the conduct at issue and all other relevant penalty considerations, I also affirm as to the penalty amount of $4,082,500.

[22] 29 SRR 1166 (2003).