

FEDERAL MARITIME COMMISSION

**WORLD LINE SHIPPING, INC. AND SAEID
B. MARALAN (AKA SAM BUSTANI) -
ORDER TO SHOW CAUSE**

Docket No. 00 - 05

Served: January 24, 2002

When determining civil penalties, the use of the words “such other matters as justice may require” in section 13(c) of the Shipping Act and 46 C.F.R. § 502.603(b) does not provide authority to consider subsequent violations by a respondent.

Section 13(c) of the Shipping Act only allows for consideration of a respondent’s prior history of violations; thus any evidence of subsequent violations committed by a respondent is irrelevant for purposes of assessing penalties.

46 C.F.R §502.147 empowers ALJs to clarify Commission orders to ensure that proceedings are just, efficient and consistent with the Commission’s objectives; thus an ALJ may clarify the Commission’s orders to prevent an overlap in the imposition of penalty.

BY THE COMMISSION: Harold J. CREEL, Jr., *Chairman*;
Joseph E. BRENNAN, John A. MORAN, and Delrnond J.H.
WON, Commissioners.

COUNSEL: *Vern W. Hill* and *Heather M. Burns* for the BUREAU

OF ENFORCEMENT. *Sam Bustani*, for himself and World Line Shipping, Inc.

ORDER

The Commission initiated this proceeding on April 20, 2000, by issuing an Order to Show Cause against Respondents World Line Shipping, Inc. ("World Line") and Saeid B. Maralan (AKA Sam Bustani) ("Bustani"). The Order directed Respondents to show cause why they should not be found to have violated sections 8, 19(a), and 19(b) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1707, 1718(a) and 1718(b).¹ Further, it directed Respondents to show cause why they should not be found to have violated several cease and desist orders issued by the Commission in Docket No. 98-19, Saeid B. Maralan (AKA Sam Bustani). World Line Shipping, Inc. et al. - Possible Violations of Sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984, 28 S.R.R. 1244 (1999).² In addition, the Order directed Respondents to show cause why they should not be ordered to cease and desist from providing, or holding themselves out to provide transportation as an ocean transportation intermediary ("OTI") within the United States foreign commerce. Finally, the Order directed that a determination be made whether civil penalties should be assessed

¹Sections 8, 19(a), and 19(b) prohibit persons from providing non-vessel-operating common carrier ("NVOCC") services without a published tariff, license, and proof of financial responsibility.

²The cease and desist orders prohibit Bustani from acting as an NVOCC without publishing a tariff and providing proof of financial responsibility to the Commission. They also prohibit him from using any name other than World Line Shipping, Inc. when operating as an **NVOCC** unless he first registers that name in the World Line Shipping tariff and with the State of California.

and cease and desist orders issued against Respondents in the event they were found to have committed the violations.

World Line is a California corporation located in Rancho Dominguez, California. Bustani, the president and owner, controls and manages its operations on a day-to-day basis. World Line, which was provisionally licensed as an OTI on May 1, 1999, maintained a publicly available tariff and a surety bond in the amount of \$75,000 until both were cancelled effective October 21, 1999. The Commission also revoked World Line's OTI licence for failure to maintain adequate proof of financial responsibility. 65 Fed. Reg. 3239 (1999).

BACKGROUND

The Commission issued a Report and Order on January 8, 2001, finding that between October 21, 1999 and April 9, 2000, Respondents committed 32 violations of the Shipping Act, including 7 violations of the cease and desist orders issued in Docket No. 98-19. The Commission then directed the Office of Administrative Law Judges to determine what civil penalties should be assessed for the violations. The Order designated the Commission's Bureau of Enforcement ("BOE") as a party to the proceeding and directed it to file reply affidavits of fact and memoranda of law. The Order also informed Respondents that they could submit rebuttal affidavits of fact and memoranda of law in their defense. Fourteen days after pleadings were due, Respondents filed a request for an extension of time which was denied by the Commission's Secretary on the grounds that they had not provided a basis for the request and had exceeded the time period during which to file such requests. Respondents did not file any other documents in this proceeding.

On June 19, 2001, Administrative Law Judge Paul B. Lang

(“ALJ”) issued an Initial Decision (“I.D.”) in which he assessed a civil penalty against each Respondent in the amount of \$687,500.

This proceeding is now before the Commission on exceptions filed by BOE. For the reasons enumerated below, we affirm the ALJ’s decision.

INITIAL DECISION

The ALJ began by partially granting BOE’s Petition to Reconsider an earlier order he had issued on May 30, 2001, excluding as irrelevant all but paragraphs 31, 32, and 33 of an affidavit submitted by BOE’s witness, FMC Area Representative Oliver E. Clark (“Clark affidavit”). I.D. at 1, 7-8. The XLJ stated that he had reconsidered his earlier decision and determined to also admit paragraph 1 of the Clark affidavit because he found it to be relevant to the issue of proof of Respondents’ business address. See Order Partially Granting: Motion of Bureau of Enforcement to Admit Direct Case Into the Evidence (“ALJ’s Order”) at 1, 4. He agreed with BOE that paragraph 1 is a predicate for admitting any other portion of the affidavit, since there Clark identifies himself and states his position and tenure with the Commission. I.D. at 7. The XLJ, however, maintained his earlier decision to exclude the remaining paragraphs of the Clark affidavit. I.D. at 1, 7-8. He ruled that since a determination had already been made to impose maximum penalties on Respondents without recourse to the Clark affidavit, BOE’s request for reconsideration of evidence relating to other violations did not need to be addressed in detail.³ Id. at 7.

³In addition, the ALJ reiterated his earlier reasons for excluding the remaining portions of the Clark affidavit, namely that: the Commission had referred this proceeding to him for the sole purpose

The XLJ next imposed maximum civil penalties on each Respondent in the amount of \$27,500 per violation, for 25 of the 32 violations, bringing their respective liabilities to \$687,500. Id. at 2, 7, 22-23. He found that Respondents had knowingly and willfully committed the violations, stating that both the number and the nature of the violations found by the Commission in this proceeding, as well as the period over which they occurred, justified his finding. Id. at 19. However, he declined to assess civil penalties for the seven cease and desist order violations, finding that they arose out of the same incidents as the section 19(b) violations and as a result, assessing civil penalties for them would amount to a double penalty and a circumvention of the statutory limits for civil penalties. Id. at 22.

EXCEPTIONS

BOE filed two exceptions to the ALJ's Initial Decision. BOE first excepts to the ALJ's decision to include only paragraphs 1, 31, 32, and 33 of the Clark affidavit. BOE's Exceptions at 3-5. It urges the Commission to overturn this decision, admit the entire affidavit into the record, and base its finding of the proper civil penalty on Information derived from the affidavit. Id. at 5. BOE avers that the ALJ erred because under section 13(c) of the Shipping Act, 46 U.S.C. app. §1712(c), as well as the Commission's regulations at 46 C.F.R. § 502.603(b), an administrative law judge is given the flexibility to consider matters not specifically enumerated in section 13(c), in the interest

of determining the civil penalty amount and therefore he had no authority to consider any evidence supporting or opposing findings of the violations cited by the Commission, and, that violations which the Clark affidavit suggests may have occurred have not been proven and thus cannot be considered in assessing civil penalties. **ALJ's** Order at **4**, I.D. at 7.

of justice. Id. at 6. BOE also argues that Merritt v. United States, 960 F.2d 15 (2d Cir. 1992), requires it to submit evidence pertaining to the section 13(c) factors at the time civil penalties are determined. BOE maintains that the ALJ's refusal to admit the paragraphs "precludes the analysis required under section 13(c) as established in the Merritt decision," and prevents it from fulfilling its duty to present a complete evidentiary record. Id. at 7.

BOE next excepts to the ALJ's decision to assess penalties for only 25 of the 32 violations found by the Commission. Id. at 18. It states that even if cease and desist order violations arise from violations of the Shipping Act it is appropriate to assess civil penalties for them. BOE further argues that the ALJ's assessment amends the Commission's ruling sua sponte, and improperly eases Respondents' legal and financial obligations to the Commission. Id. at 19. BOE therefore requests that the Commission overrule the ALJ's decision with regard to the civil penalty, and impose penalties for the seven excluded violations, thus increasing each Respondent's total liability to \$880,000. Id. at 22.

DISCUSSION

The first issue before the Commission is whether, in determining what civil penalty to impose, an ALJ may consider evidence of alleged violations not referred for consideration by the Commission, and not part of the evidence of record litigated by the parties during the initial stage of the proceeding. The ALJ refused to admit the excluded evidence on the grounds that: allowing it into the record would deprive Respondents of their rights to due process; section 13(c) of the Shipping Act, 46 U.S.C. app. § 1712(c), only allows for consideration of a respondent's history of offenses committed prior to the proceeding; and, the excluded evidence is irrelevant to the issue of civil penalties and thus inadmissible under Rule 156 of the Commission's Rules of

Practice and Procedure, 46 C.F.R. §502.156.’ See ALJ’s Order at 4-5, I.D. at 7. BOE, on the other hand, argues that a civil penalty proceeding is broader in scope than the initial proceeding because section 13(c) allows for “considerations of other matters as justice may require,” when assessing penalties. BOE suggests that, as a result, it is permissible for the ALJ to admit and consider evidence that has not been litigated by the parties. BOE’s Exceptions at 5-8.

We agree with the ALJ’s decision to exclude the aforementioned paragraphs, and his observation that consideration of the additional evidence would be outside the scope of this proceeding. Under the Commission’s Rules of Practice and Procedure, ALJs may not expand the scope of the Commission’s orders of investigation beyond the issues authorized by the Commission.⁵ In addition, admitting the excluded paragraphs would violate Respondents’ due process rights since they were not afforded the opportunity to dispute the new allegations.

The Commission has held in the past that respondents

⁴ Rule 502.156 states in pertinent part that all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible, and all other evidence shall be excluded.

⁵ See 46 C.F.R. § 502.147(a). See also Ever Freight Int’l. Ltd., Sigma Express Inc., and Mario F. Chavarria dba Transcargo Int’l - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329,333 (I.D.), administratively final June 26, 1998 (“Ever Freight”) (stating that the Commission amended 46 C.F.R. § 502.147(a) to authorize presiding judges to amend, modify, clarify, or interpret Commission Orders of Investigation but not to add new issues to them) (citing Rules of Practice and Procedure, 16 S.R.R. 1387, 1388 (1976)).

must be made aware of the particular charges leveled against them and be allowed to contest those charges, so that no prejudice or violation of due process principles result.' Further, in Southwest Sunsites, Inc. v. Federal Trade Comm'n, 785 F.2d 1431 (9th Cir. 1986)) (citing Golden Grain Macaroni Co. v. Federal Trade Comm'n, 472 F.2d 882,885 (9th Cir. 1972)), the court held that in order to comport with the Administrative Procedure Act, and avoid a violation of due process, the party proceeded against must have "understood the issue" and "[have been] afforded full opportunity" to justify his conduct. In addition, the Commission has found that lack of notice to a respondent bars the Commission from imposing a penalty on that respondent.⁷

We do not agree that Respondents' "due process rights have been protected" because "[a]lthough they refused to participate [in this proceeding], [they] have had the opportunity at every turn in this proceeding to refute or rebut BOE's evidence." BOE's Exceptions at 8-9. Respondents were not provided any notice of the new allegations; therefore, there is no question that they were not given the opportunity to refute or rebut them. Admitting these new allegations into the record would thus violate

⁶ See, e.g., Possible Unfiled Agreements Among: A.P. Moller-Maersk Lme. P&O Nedllovd Ltd., and Sea-Land Serv., Inc., 28 S.R.R. 322, 324 (I.D.), administratively final May 13, 1998 ("Possible Unfiled Agreements"), where the Commission held that in order to be fair, the Commission must give respondents a fair opportunity to present their evidence and arguments against BOE's evidence and arguments, not against the Commission's order, which, according to the Commission, has little or no evidentiary value.

⁷ See California Shipping Line, Inc. v. Yangming Marine Transport Corp., 25 S.R.R. 1213, 1231 (1990) ("California Shipping"), where the administrative law judge was prevented from imposing a penalty partly due to lack of notice to the respondent of the issue.

principles of fairness and due process.

Further, even if the alleged violations were proven to have occurred, there would still be no basis to take them into account for the purposes of assessing penalties in this proceeding.⁸ Section 13(c), states in pertinent part that:

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 any such other matters as justice may require.

46 U.S.C. app. § 1712(c). (emphasis added). The use of the words “such other matters as justice may require” in section 13(c) of the Shipping Act and 46 C.F.R. § 502.603(b) does not provide authority to the Commission to consider subsequent violations by a respondent -- proven or unproven -- in determining civil penalties, and we believe that reading such an intent would hinder rather than facilitate the resolution of adjudicative proceedings. In addition, none of the cases cited by BOE leads us to the conclusion that the Commission has sanctioned such a practice in the past.”

⁸BOE may, however, institute a new proceeding based on evidence of these new violations.

⁹ See, e.g., Ever Freight, 28 S.R.R. at 333 n.3 (stating that the principles of due process and lack of notice to the respondent preclude it from making findings under sections not specified by the

Finally, because section 13(c) only allows for consideration of a respondent's prior, rather than subsequent, history of violations, we agree with the XLJ that the paragraphs BOE seeks to enter into evidence -- which represent subsequent violations allegedly committed by Respondents -- are irrelevant, since they are of no probative value to the XLJ in assessing penalties. We therefore affirm the ALJ's decision to exclude those paragraphs.

The next issue before the Commission is whether the ALJ erred when he declined to assess penalties for the seven cease and desist order violations. He determined that it would not be proper to assess monetary penalties for them because they arose out of the section 19(b) violations for which he had already assessed monetary penalties. I.D. at 22. He found that the more appropriate remedy would be to enforce the order by filing "an appropriate injunction or other process . . ." with a federal district court. Id. (citing Precious Metals Assoc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 912 (1st Cir. 1980)).

BOE argues that the XLJ erred because the Commission

Commission's Order of Investigation and Hearing even though it seemed likely the respondents violated those sections); Possible Unfiled Agreements, 28 S.R.R. at 324 (stating that courts and the Commission have observed in the past that the concept of "fair hearing" means that the party must have an opportunity to address all facts presented by BOE which adversely affect its interests); Marcella Shipping Co., Ltd., 23 S.R.R. 857, 867 (I.D.), administratively final March 26, 1986, ("Marcella") (declining to consider evidence of additional violations committed by respondents occurring outside the five-year period when the Commission served its Order of Investigation and Hearing). Accord California Shipping, 25 S.R.R. at 1231 (stating that the Administrative Procedure Act, 5 U.S.C § 554(b), section 13(a), and the Commission's Rules at 46 C.F.R § 505.3(a), all require proper notice before the Commission can assess a civil penalty).

neither discussed in its decision any concern that some of the violations arose from the same illegal activities nor instructed the ALJ to assess penalties for only 25 penalties. BOE's Exceptions at 19. BOE further avers that the violation of a cease and desist order should be considered separately because section 13(a) of the Shipping Act mandates the imposition of a civil penalty for a violation of the Act, a regulation, or a Commission order, and does not exclude cease and desist order violations from this definition. BOE also contends that the statute does not prevent the assessment of separate penalties for violations arising out of a single transaction. Id.

By referring proceedings to ALJs, the Commission grants them authority to amend, modify, clarify or interpret proceedings instituted by Commission orders, subject to limitations imposed by the Shipping Act or the Commission's rules and regulations." Since an ALJ is empowered to clarify the Commission's orders so that proceedings are just, efficient, and consistent with the Commission's objectives, the ALJ in this proceeding was within his authority when he clarified the Commission's order to prevent an overlap in the imposition of civil penalties. We believe that imposing a monetary penalty for violation of a Commission order when a civil penalty has already been imposed for the underlying violation could be considered overreaching. Moreover, the resulting penalty amount would exceed the statutory penalty amount as it would effectively double the penalty for each section 19(b) violation.

¹⁰ See 46 C.F.R. § 502.147. See also Rules of Practice and Procedure, 16 S.R.R. 1387, 1388 (1976) where the Commission stated that it was amending 46 C.F.R. § 502.147(a) to authorize administrative law judges to make definitive rulings as to the scope of Commission orders of investigation, subject to due process requirements.

Although Congress sought to deter future violations by giving the Commission the authority to increase penalty amounts, the Commission has held that this power comes with the obligation to impose penalties which deter violations and achieve the objectives of the Act, but which are not unduly harsh or extreme.” In addition, pursuant to section 14(c) of the Shipping Act, the Attorney General, at the Commission’s request, may enforce the agency’s orders in a United States district court in the event a violator fails to comply.¹² We therefore uphold the ALJ’s

¹¹ See, e.g., Marcella, 23 S.R.R. at 871 (“[a]n administrative agency is supposed to exercise care in fashioning a sanction which fits the nature of the offense and not to impose unduly harsh or extreme sanctions.”) (citing Gilbertville Trucking Co. v. United States, 371 U.S. 115, 130 (1962); Can-Cargo Int’l. Inc.. Jorge Villena and Sea Trade Shipping, 23 S.R.R. 1007, 1018 (I.D.), administratively final April 24, 1986. Accord Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (I.D.), administratively final December 4, 1997.

“That section states:

In case of violation of an order of the Commission, or for failure to comply with a Commission subpoena, the Attorney General, at the request of the Commission, or any party injured by the violation, may seek enforcement by a United States district court having jurisdiction over the parties. If, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

46 App. U.S.C. § 1713(c). Compare Precious Metals Assocs.. Inc.. v.

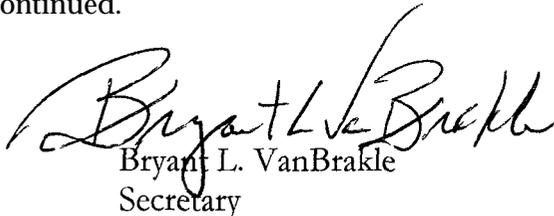
decision declining to assess civil penalties for the seven cease and desist order violations.

This does not mean that the Commission cannot impose a monetary penalty for a violation of a cease and desist order, but simply that in this case it appears to be unwarranted and would in effect amount to a dual penalty.

CONCLUSION

We affirm the ALJ's decision excluding all but paragraphs 1, 31, 32, and 33 of the Clark affidavit. We also affirm the ALJ's decision not to impose civil penalties for the seven cease and desist order violations. Therefore, BOE's exceptions are denied, and this proceeding is discontinued.

By the Commission.


Bryant L. VanBrakle
Secretary

Commodity Futures Trading Comm'n, 620 F.2d 900,912 (1st Cir. 1980)
(statmg that a nonreparation order may be enforced by a United States district court through an appropriate injunction or other process).