Before the
U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

IN THE MATTER OF:	)	
	)	
Alaska Airlines, Inc.	)	Docket No. 15-TSA-0050
Respondent	)	
	)	

FINAL DECISION AND ORDER

Alaska Airlines, Inc., (Respondent) appeals the Initial Decision and Order (Initial Decision) issued by the Honorable Dean C. Metry, Administrative Law Judge (ALJ) on May 22, 2018. In that Initial Decision, the ALJ affirmed the Transportation Security Administration's (TSA's) finding that Respondent violated the security regulations codified at 49 C.F.R. Part 1544 and in its Aircraft Operator Standard Security Program (AOSSP) on six occasions by accepting and transporting cargo on passenger flights from persons that were not known shippers. The ALJ imposed a civil penalty in the amount of $30,000. For the reasons set forth below, the Initial Decision is upheld in part and reversed in part.

Regulatory Background

Respondent is an aircraft operator subject to the federal transportation security regulations at 49 C.F.R. Part 1544 – Aircraft Operator Security: Air carriers and Commercial Operators.[1]

As an aircraft operator with scheduled passenger operations with an aircraft having a passenger seating configuration of 61 or more seats, Respondent is required to adopt and carry out an AOSSP under 49 C.F.R. 1544.101(a).

[1] *See* Initial Decision at 4.

Respondent is required by 49 C.F.R. 1544.205(a) to use the procedures described in its AOSSP to prevent or deter the carriage of "unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft."

Respondent is required by 49 C.F.R. 1544.205(e) to accept cargo to be loaded in the United States for air transportation only from the shipper or an entity regulated by TSA.[2] With respect to acceptance of cargo from shippers, Respondent is required by 49 C.F.R. 1544.239(a) to "have and carry out a known shipper program in accordance with its security program."[3]

Under Respondent's security program, known as the AOSSP, TSA has established requirements for a Known Shipper Program.[4] The AOSSP defines a shipper as the "individual or entity originating and tendering cargo for air transportation, excluding IACs [(Indirect Air Carriers)]." [5]

With some exceptions not relevant here, an aircraft operator must ensure that it accepts cargo only from shippers that are "known."[6] One of the methods approved under the AOSSP to make a shipper known is the use of the Known Shipper Management System (KSMS), a database operated by TSA. The use of KSMS to make a shipper known is mandatory where the shipper is an entity that has an address within the United States.[7] Therefore, before transporting cargo from a shipper with an address in the United States, Respondent must make the shipper known through KSMS.[8] To make a shipper "known" in KSMS, Respondent must, among other things, enter "the name and physical address of each facility from where the cargo originates."[9]

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[2] These entities include: aircraft operators, foreign air carriers, indirect air carriers, and certified cargo screening facilities. *See* 49 C.F.R. § 1544.205(e).
[3] 49 C.F.R. 1544.239(a).
[4] *See* AOSSP Sec. 8.1.2 *et seq.*
[5] *See id*. Sec. 1.6.
[6] *See id.* Sec. 8.2.1.A(15).
[7] *See id.* Sec. 8.1.2.1.A.
[8] *S*ee id. Sec. 8.1.2.1.C.
[9] *Id.* Sec. 8.1.2.1.D(2).

Synopsis of the Facts and Procedural History

On or about August 4, 6, 19, 21, and 26, 2014, Respondent accepted cargo shipments at George Bush Intercontinental Airport (IAH) in Houston, Texas, for transport on six of its passenger flights. Respondent documented each shipment on separate air waybills (AWBs) as follows:

On AWB 027-1166-4074, the shipper was listed as Peninsula Memorial Chapel in Kenai, Alaska.

On AWB 027-7818-4293, the shipper was listed as PQ Products, Inc., in Spokane, Washington.

On AWB 027-7818-4304, the shipper was listed as Far North Supply in Anchorage, Alaska.

On AWB 027-1266-4175 the shipper was listed as Gripall LLC in Fairbanks, Alaska.

On AWB 027-1267-2240 the shipper was listed as Kiewit Pacifica Company in Portland, Oregon.

On AWB 027-1266-4385, the shipper was listed as ZA Trading Corporation in Seattle, Washington.

Each of these companies had arranged for the cargo to be delivered to Respondent at IAH and flown to their locations in the Pacific Northwest and Alaska.

Prior to transporting the six shipments in question, Respondent followed the procedures in its AOSSP to make the six entities listed above "known" in KSMS. TSA subsequently found, however, that these six entities did not meet the definition of "shipper" under the AOSSP, because they did not originate the cargo for air transportation. In TSA's view, the shippers were

the entities that tendered the cargo to Respondent in Houston (the Houston companies), prior to transport on Respondent's aircraft. Because Respondent did not follow the procedures in the AOSSP to make the Houston companies known, TSA found that Respondent had accepted and transported cargo from unknown shippers, in violation of its AOSSP and overlying regulatory requirements. TSA issued a civil money penalty of $18,000 per violation, totaling $108,000.

Respondent requested a formal hearing before an ALJ on the matter, which took place on September 20 – 23, 2016. On May 22, 2018, the ALJ issued the Initial Decision finding that Respondent violated 49 C.F.R. §§ 1544.101(a), 1544.205(e), and 1544.239(a). The ALJ found that TSA failed to prove Respondent violated 49 C.F.R. § 1544.205(a). The ALJ's ruling is based on his view that for purposes of the AOSSP, the "shipper" is the entity that prepares cargo for shipment.[10] Although the ALJ found insufficient evidence in the record to determine what entities constituted the shippers in this case,[11] he found that the entities that Respondent had made known in KSMS were not the shippers, because those entities did not prepare the cargo for shipment.[12] Therefore, the ALJ ruled that Respondent violated TSA regulations and the AOSSP by transporting cargo from unknown shippers.[13]

On May 31, 2018, Respondent filed a Notice of Appeal.

The Initial Decision

The ALJ identified the relevant issues in the case as: 1) who the shipper was for each of the six shipments at issue; and 2) whether Respondent made the shippers known.[14]

[10] *See* Initial Decision at 23.
[11] *See id*.
[12] *See id*. at 24.
[13] *See id.* at 24-26.
[14] *See id.* at 11-12

The AOSSP defines "shipper" as "[t]he individual or entity originating and tendering cargo for air transportation, excluding IACs." Neither the term "originating" nor "tendering" is defined in the AOSSP. In analyzing the definition of shipper, the ALJ and the parties focused almost entirely on the meaning of the term "originating."[15]

At hearing, the parties put forward different interpretations of the term "originating," neither of which was adopted by the ALJ. TSA argued that "originating" means producing or creating something.[16] Respondent argued that "originating" refers to the entity that decides to ship the cargo and controls the process.[17] The ALJ found that "originating" means preparing cargo for shipment.[18] Although he found that the record did not contain sufficient evidence to identify the shippers in the case, the ALJ found that the entities listed as the shippers on Respondent's AWBs were not the shippers under the AOSSP, because they did not prepare the cargo for shipment. Therefore, the ALJ held that Respondent did not follow the requirement in its security program to making the shippers "known" in KSMS before accepting and transporting the cargo on the six flights.[19]

The ALJ found that TSA failed to prove that Respondent violated 49 C.F.R. § 1544.205(a), which states:

> (a) *Preventing or deterring the carriage of any explosive or incendiary.* Each aircraft operator operating under a full program . . . must use the procedures, facilities, and equipment described in its security program to prevent or deter the carriage of any unauthorized persons, and any unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft.

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[15] The parties appear to agree that the Houston companies tendered the cargo. Respondent states in its Appeal Brief that the Houston companies tendered the cargo as the agents of the six companies listed as the shippers on the AWBs. *See* Respondent's Appeal Brief at 2. TSA does not directly state its position that the Houston companies tendered the cargo to Respondent, but TSA states that Respondent accepted the cargo from those companies, presumably contemporaneous with the tendering of that cargo. *See* TSA Reply Brief at 4. TSA further states that only the term "originating" is in dispute in the case. *See id.* at 7.
[16] *See* Initial Decision at 12.
[17] *See* id. at 14.
[18] *See* id. at 21.
[19] *Id.* at 24.

The ALJ stated that TSA failed to show that the shippers in this case had knowledge of Respondent's failure to make them known. Therefore, he could not determine whether they were deterred.[20]

Finally, the ALJ rejected on various grounds Respondent's argument that it did not have fair notice of TSA's interpretation of the term "originating" and, therefore, the definition of "shipper." The ALJ stated that the definition of originate was clear on its face. He also stated that: there was no evidence TSA had made public statements regarding its interpretation; there was insufficient evidence of a common understanding and commercial practice regarding the term originate in this context; and respondent had notice from previous enforcement cases.[21]

The ALJ mitigated the sanction imposed by TSA to $5,000 per violation, or $30,000, based on his analysis of the mitigating factors and his finding of no aggravating factors.[22]

Respondent's Appeal

Respondent's position throughout the hearing and on appeal is that under the AOSSP, the shipper is "the entity that makes the decision to ship cargo – i.e., the decision to place the cargo in the air cargo system."[23] This is based on Respondent's view that the entity "originating" cargo is the entity that initiates the shipping process, thereby bringing the cargo into existence or causing its beginning.[24] According to Respondent, it and the airline industry "have for years understood the term 'originating' in the AOSSP to mean the one who decides to ship and controls the shipping process" or who "decides to ship cargo by air."[25] Respondent rejects the

[20] *Id.* at 26.
[21] *Id.* at 27-34.
[22] *Id.* at 39. Neither party addresses the amount of the civil penalty on appeal.
[23] Respondent's Appeal Brief at 3.
[24] *Id.* at 4, 27.
[25] *Id.* at 8, 18.

notion that the meaning of "originating" as used in the AOSSP relates to any physical location of the cargo prior to transport; The term "does not come with a locational element."[26] Respondent argues that even if the concept of originating cargo incorporated a physical location, there is no basis to conclude that the location is where the cargo is prepared for shipment. According to Respondent, this interpretation of originate would require an aircraft operator to determine the physical address where cargo was prepared for shipment, and who prepared it, for each shipment by air.[27] Only then would the aircraft operator know which entity needed to be verified as "known" in KSMS in order to allow it to accept the cargo.

In the instant case, Respondent states that the six companies that contracted with Respondent to transport the cargo by air are the shippers, as evidenced by the relevant AWBs that list them as shippers.[28] The Houston companies that tendered the cargo to Respondent were, according to Respondent, agents of the shippers, as evidenced by the fact that they signed the AWBs over the designation "Signature of Shipper or his agent."

Airlines for America (A4A)[29] filed an amicus brief in this appeal. A4A states that the term "originating" means "the person or entity that initiates the shipment and controls the shipping process" [30] That person or entity is the one with whom the aircraft operator maintains a business relationship and is therefore designated as the shipper on the AWB.[31] According to A4A, "it has been the custom and practice of the air transportation industry to make the air waybill shipper the shipper known in KSMS." [32]

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[26] *Id.* at 27.
[27] *Id.* at 34.
[28] *Id.* at 13, 15.
[29] A4A is a trade association representing the interests of U.S. passenger and all-cargo aircraft operators, including Respondent.
[30] A4A Brief at 12.
[31] *Id.* at 12, 34.
[32] *Id.* at 10.

In its reply, TSA agrees with the ALJ's view that "originate" refers to the physical location where cargo comes from. TSA argues that the alternative would turn the Known Shipper Program on its head in the instant case by having TSA evaluate the security threat of the person receiving the cargo after it flies, not the entity putting it into the air transportation system.[33] According to TSA, the Known Shipper Program vets the entity where the cargo is physically coming from, because that is where a person could potentially place an explosive in the cargo.[34]

Standard of Review

The regulations governing appeals of an initial ALJ decision provide that a party may appeal only the following issues: (1) whether each finding of fact is supported by a preponderance of the evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the ALJ committed any prejudicial errors during the hearing that support the appeal.[35]

Respondent argues that the Initial Decision should be reversed, because: 1) the ALJ's interpretation of the relevant regulation is not reasonable; and 2) even if it is upheld, Respondent did not have fair notice of the interpretation adopted by the ALJ.

Discussion of the Alleged Regulatory Violations

With regard to Respondent's first basis for appeal, I interpret Respondent's argument to be that in adopting his interpretation, the ALJ made an error in his application of the law. On that issue, I agree with Respondent.

[33] TSA Brief at 21.
[34] TSA's Second Reply Brief at 3.
[35] 49 C.F.R. § 1503.657(b).

The ALJ erred in finding that the meaning of the term "originating" is clear and unambiguous, and he failed to apply the appropriate legal analysis in evaluating TSA's interpretation of that term. The ALJ correctly noted that courts may not look beyond the plain meaning of legislative language unless there are at least two reasonably susceptible meanings.[36] It is a fundamental rule of statutory construction that when a statute's language is plain, the courts must enforce it according to its terms,[37] and the duty of interpretation does not arise.[38]

The ALJ found no ambiguity in the regulatory language in this case. He noted that neither party argued that the term "originate" is susceptible to two meanings. He then rejected both parties' interpretations and adopted the one he found was "clear within the context of the AOSSP" -- that originate "refers to the location where cargo is prepared for shipment."[39] In reaching this result, the ALJ analyzed the use of the term originate in the context of other provisions of the AOSSP where it appears, and he looked to the purpose of the AOSSP and its underlying statute.

It is evident, however, from the multiple plausible interpretations put forth by Respondent, TSA, A4A, and the ALJ that the term "originating" is susceptible to more than one reasonable interpretation. Respondent and TSA have two fundamentally different views of how to interpret "originating," based on whether the term relates to a physical thing or to a process.[40] Respondent starts its analysis by noting that the word "originate" has transitive and intransitive meanings.[41] Respondent espouses a transitive meaning – to initiate – and argues that cargo can

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[36] Initial Decision at 19-20.
[37] *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004).
[38] *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (citing *Rubin v. United States,* 449 U.S. 424, 430 (1981).
[39] Initial Decision at 21.
[40] *See* Respondent's Appeal Brief at 5, 45.
[41] *See id.* at 27.

be originated without reference to a particular location.[42] A4A takes this a step further by deeming the shipper to be the party that has the business relationship with the aircraft operator. [43] TSA interprets "originating" to mean producing something or shipping it from a specific location.[44] Even where there is agreement that the term relates to a physical thing at a specific location, there is reasonable disagreement as to how "originating" applies to a piece of cargo. TSA asserts that it means producing the cargo or shipping the cargo from its physical location. The ALJ holds that "originating" refers to preparing cargo for shipment at a location.[45]

Where an agency's regulation is ambiguous, courts defer to the agency's interpretation unless it is "plainly erroneous or inconsistent with the regulation."[46] Federal courts have recognized TSA non-public regulations, such as the AOSSP, as agency regulations for purposes of this analysis.[47] In assessing an agency's construction of its own regulation, courts accord substantial deference to the agency's interpretation, so long as it is reasonable.[48] An agency's interpretation need not be the only possible reading of a regulation--or even the best one--to prevail.[49]

The ALJ took the position that the TSA's interpretation of the AOSSP is not entitled to deference, because it is merely the view of TSA's enforcement arm.[50] The ALJ based his position on the decision of an ALJ in an FAA administrative proceeding.[51] That decision, however, is non-precedential and is at odds with Federal case law on the matter. Agency

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[42] *See* Respondent's Additional Appeal Brief at 4.
[43] *See* A4A Brief at 12, 34.
[44] *See* TSA's Reply Brief at 7.
[45] This, in turn, raises the issue as to what constitutes "preparing" cargo for shipment, creating another layer of ambiguity in the definition of shipper.
[46] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted).
[47] *See Suburban Air Freight v. TSA*, 716 F.3d 679 (D.C. Cir. 2013).
[48] *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150. (*citations omitted*)
[49] *Decker v. Northwest Envtl. Def. Ctr.,* 568 U.S. 597, 613 (2013)
[50] *See* Initial Decision at 17.
[51] *See id.* at 18 (*citing* Darby Aviation, Inc., 2010 WL 2287029 (2010).

litigation positions in proceedings before an administrative adjudicator are not in the same category as *post hoc* rationalizations asserted for the first time in a reviewing court.[52] TSA may use an administrative adjudication as a forum to advance its regulatory interpretation.[53]

Section 1.6 of the AOSSP defines "shipper" as the "individual or entity originating and tendering cargo for air transportation, excluding IACs."[54] TSA interprets the term "originating" to mean "producing or creating something," so that "the shipper is the entity that produced the cargo or that shipped the cargo from its physical location."[55] According to TSA, the Known Shipper Program vets the entity where the cargo is physically coming from, because that is where a person could potentially place an explosive in the cargo.[56]

TSA made clear its interpretation of "originating" as early as 2006, when the agency published a Final Rule on Air Cargo Security Requirements. That rulemaking first discussed the mandatory use of a TSA-operated known shipper database, the precursor to KSMS.[57] The preamble to the Final Rule states:

> TSA believes that the use of the known shipper database will expedite the process of shipper verification, while providing the Government the necessary tools to vet shippers adequately before the transportation of cargo on a passenger aircraft. [58]

In a response to one of the public comments on the Final Rule, TSA made clear that the entity to be verified is the one associated with the physical address the cargo comes from before it is flown:

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[52] *Martin,* 499 U.S. at 156-57 (*stating,* "The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, is agency action, not a post hoc rationalization of it.")
[53] *Garvey v. National Transp. Safety Bd., 190 F.3d 571, 577* (1999) ("The FAA is not required to promulgate interpretations through regulations or the issuance of policy guidelines, but may instead do so through litigation before the NTSB.")
[54] *See* AOSSP Sec. 1.6.
[55] TSA Reply Brief at 7.
[56] TSA's Second Reply Brief at 3.
[57] 71 *Fed. Reg.* 30477, 30487 (May 26, 2006).
[58] *Id.* at 30489.

> *Comment*: NCBFAA . . . asks if known shipper status applies to all office branches of a qualified shipper.
> *TSA response*: Regulated entities must separately list each location for a known shipper. [59]

The text of the AOSSP reflects this requirement. To make a shipper "known" in KSMS, the aircraft operator must "[e]nter into KSMS the name and physical address of each facility from where the cargo originates."[60] The use of the term "facility" indicates that the relevant physical address is a place where cargo is physically located.

The ALJ accepted the argument that cargo originates from a physical location prior to air transport, but he narrowed the meaning of "originating" to refer to the location where the cargo is prepared for shipment.[61] From a security perspective, the ALJ states, the facility where cargo is prepared is the location of the security threat.[62]

The ALJ, however, cannot substitute his interpretation of "originating" for the agency's where the agency's interpretation reflects its fair and considered judgment on the matter in question and is not plainly erroneous.[63] The interpretation advanced by TSA in the instant case is in accord with the regulatory history and the language of the AOSSP: the entity "originating" cargo is the one producing it or shipping it from the entity's location. While this entity may in some cases be the one preparing the cargo in some manner for shipment, in other cases it may not be, depending on what constitutes preparation for shipment. "Preparing" cargo is not the unambiguous equivalent of "originating" cargo, and it is reasonable to interpret "originating" more broadly to encompass the location where the cargo is produced or shipped from. The ALJ erred in failing to defer to TSA's interpretation of "originating."

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[59] *Id.* at 30489 (May 26, 2006).
[60] *See* AOSSP Sec. 8.1.2.1.D(2).
[61] *See* Initial Decision at 22.
[62] *See id.* at 22.
[63] *See Auer*, 519 U.S. at 461.

Respondent argues that TSA's interpretation is contrary to the AOSSP in that "originating" cargo "does not come with a locational element."[64] Respondent's position is that "originating" relates to a shipping process, not the physical origin of the cargo. According to Respondent, the one who decides to ship cargo by air originates the shipping process.[65] In practice, this means that the "shipper" is the entity that enters into and is bound by the shipping contract with the aircraft operator.[66] This entity also is listed on the aircraft operator's AWB as the shipper.[67] Similarly, A4A states that the shipper is whichever entity has the established business relationship with the aircraft operator, *i.e.*, the entity that purchases the space on the aircraft for transport of the cargo by air.[68] Therefore, Respondent argues, the only address required to be listed in KSMS is the address of the entity listed as the shipper on its AWB.[69]

Respondent's interpretation subverts one of the fundamental bases of TSA's regulatory scheme for air cargo security: the distinction between shippers and IACs. IACs are intermediaries that play a major role in the movement of air cargo by contracting with aircraft operators for the transport of cargo from shippers. In its current regulatory framework, TSA imposes security requirements on IACs, but not on shippers.[70] To establish a clear distinction between regulated IACs and unregulated shippers, TSA defines them as mutually exclusive. An IAC is a person or entity "that undertakes to engage indirectly in air transportation of property and uses for all or any part of such transportation the services of an air carrier . . . ."[71] A

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[64] Respondent's Appeal Brief at 27.
[65] *Id.* at 15-16.
[66] *Id.*
[67] *Id.*
[68] A4A Brief at 23.
[69] Respondent's Appeal Brief at 5, 16, 45.
[70] *See* 49 C.F.R. Part 1548.
[71] *See* AOSSP Sec. 1.6 (definition of "Indirect Air Carrier").

"shipper" is the "individual or entity originating and tendering cargo for air transportation, *excluding IACs*."[72] Similarly, an IAC cannot be a known shipper.[73]

If, as Respondent argues, the entity bound by the shipping contract with the aircraft operator is the shipper, then whenever an IAC enters into a contract for carriage of cargo with an aircraft operator, the IAC is the shipper for purposes of the AOSSP. Under this reading, various provisions of the AOSSP either become unworkable or are rendered a nullity. For instance, the AOSSP has separate requirements governing an aircraft operator's acceptance of cargo from IACs versus shippers.[74] The AOSSP defines "Master Air Waybill (MAWB)" as "the air waybill issued by an aircraft operator or foreign air carrier *to one shipper or to a cargo shipping agent, such as an IAC or freight forwarder.*"[75] The cited provisions referencing IACs cease to be operative if IACs are considered shippers when they tender cargo to an aircraft operator.

Under Respondent's reading, various provisions in the AOSSP that refer to interactions between IACs and shippers no longer make sense. For instance, the AOSSP defines "Shipment" to include cargo tendered by a shipper to an IAC.[76] Section 8.2.3.4.A(1) requires an IAC to certify that cargo was accepted from a shipper or another regulated entity when tendering the cargo to an aircraft operator.[77] The AOSSP defines "House Air Waybill (HAWB)" as "[t]he air waybill issued by a cargo shipping agent, such as an Indirect Air Carrier (IAC) or freight forwarder, to a shipper for the transportation of goods."[78] If these provisions are to make sense,

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[72] *See id.* (definition of "Shipper," emphasis added).
[73] *See id*. (definition of "Known Shipper").
[74] *See id*. Secs. 8.2.3.2, 8.2.3.4.
[75] *See id.* Sec. 1.6 (emphasis added).
[76] *See id.* (definition of "Shipment".)
[77] *Id.* Sec. 8.2.3.4.A(1).
[78] *See id.* Sec. 1.6.

the IAC and the shipper cannot be the same entity. The IAC cannot tender cargo to itself, accept cargo from itself, or issue itself a HAWB.

A4A argues in opposition to the ALJ's interpretation that nothing in TSA's regulations or regulatory history imposes a duty on aircraft operators to inquire as to where an air cargo shipment was prepared for transportation or to query the person or entity tendering cargo as to where the shipment originated.[79] This argument applies equally to Respondent's interpretation. Nothing in the AOSSP requires an aircraft operator to inquire as to who in the supply chain made the decision that a piece of cargo would be shipped by air. Investigating and substantiating an entity's state of mind is unworkable, and there is no evidence that Respondent does so in its own operations. Respondent attempts to skirt this issue by assuming in all cases that the entity with whom it contracts to ship cargo is the entity that made the decision the cargo would move by air. Certainly this cannot be the case. Businesses that arrange for delivery of their products through intermediaries, such as IACs, make the decision as to whether the products will ship by air, sea, or ground, depending on factors such as time and cost. These decisions can be made well before the IAC contracts with the aircraft operator and an AWB is created for that cargo.

Respondent argues that "[f]rom a security perspective, it makes much more sense [to] vet the entity that decides to ship the cargo as opposed to the entity located where the cargo was prepared for shipment."[80] This assertion appears to be based on the premise that the entity best placed to put a destructive device into cargo is *not* necessarily the entity that has physical access to the cargo. This premise is simply counterintuitive and unsupported by any evidence.

Respondent argues that because TSA does not require the vetting of all the entities that handle cargo before it is transported on an aircraft, vetting the facility where the cargo comes

[79] Respondent's Appeal Brief at 18.
[80] Respondent's Additional Reply Brief at 9, 10; Respondent's Brief at 45.

from makes no sense.[81] The fact that TSA does not regulate every person or entity with access to cargo prior to transport on a passenger flight does not preclude the agency from requiring aircraft operators to accept cargo that comes from only designated physical locations. The regulation of security is not subject to an all-or-nothing standard. TSA may choose to impose requirements on some parts of the supply chain, but not others, as long as its decisions are within the scope of its authority and are reasonable.[82]

In sum, Respondent's interpretation of "originating" conflicts with the language of various provisions of the AOSSP and eliminates the distinction between a shipper and an IAC. It would be plainly erroneous and inconsistent with the AOSSP for TSA to adopt Respondent's interpretation of "originating." In contrast, TSA's interpretation of the AOSSP is entirely consistent with the view the agency articulated in its 2006 rulemaking, and is not plainly erroneous or inconsistent with regulatory text.

I agree with the ALJ's finding that there is insufficient evidence in the record to determine whether the Houston companies were the shippers in this case. Nonetheless, it is clear that the six companies Respondent designated as the shippers in its AWBs were not shippers within the meaning of the AOSSP, because they did not produce the cargo or ship the cargo from their physical locations.[83] Therefore, Respondent did not comply with its obligation under the AOSSP to verify that the cargo transported under those AWBs was from entities listed in KSMS, in violation of 49 C.F.R. §§§ 1544.101(a), 1544.205(e) and1544.239(a).

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[81] Respondent's Brief at 46.
[82] 5 U.S.C. § 706(2)(A), (C).
[83] The companies Respondent listed in this case acted as IACs with regard to the cargo, because they "under[took] to engage indirectly in air transportation of property and use[d] for all or any part of such transportation the services of an air carrier . . . ." *See* AOSSP Sec. 1.6.

The ALJ found that TSA failed to prove that Respondent violated 49 C.F.R. § 1544.205(a), which states:

> (a) *Preventing or deterring the carriage of any explosive or incendiary.* Each aircraft operator operating under a full program . . . must use the procedures, facilities, and equipment described in its security program to prevent or deter the carriage of any unauthorized persons, and any unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft.

The ALJ stated that TSA failed to show that the shippers in this case had knowledge of Respondent's failure to make them known. Therefore, he could not determine whether they were deterred.[84] The ALJ appears to have misread the regulation. Compliance does not turn on whether an aircraft operator actually prevents or deters a bomb from being carried on its aircraft. The aircraft operator accomplishes compliance if it follows the procedures in its security program aimed at such prevention and deterrence. Respondent's failure to follow the requirements of it's the Known Shipper Program, as set forth in its AOSSP, constitutes a failure to use the procedures described in its security program to prevent or deter the carriage of any unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard its aircraft. Consequently, Respondent violated 49 C.F.R. § 1544.205(a) on six occasions.

Discussion of Respondent's Defense

Respondent's second basis of appeal is that the ALJ erred in his analysis of the law regarding fair notice. Respondent argues that even if the ALJ's interpretation of the AOSSP is correct, Respondent should not be found in violation, because it did not have fair notice of the interpretation adopted by the ALJ when the conduct at issue occurred.[85] Because I have rejected the ALJ's interpretation, the issue as to Respondent's fair notice of that interpretation is moot.

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[84] Initial Decision at 26.
[85] Respondent's Appeal Brief at 9.

Even if Respondent did not have fair notice of the ALJ's interpretation, I find that Respondent had fair notice that its own interpretation was inconsistent with the AOSSP.

An agency must provide a party fair notice of its interpretation of a regulatory provision in order to find the party liable for violation of that provision.[86] In addition to the language of a regulation, an agency's pre-enforcement efforts to bring about compliance may provide a party with adequate notice.[87] If a party has pre-enforcement notice, courts will enforce a finding of liability as long as the agency's interpretation is permissible.[88]

Respondent received both fair notice from the text of the AOSSP and actual notice from TSA's pre-enforcement actions. A reading of only the definitions section the AOSSP gives a regulated party fair notice that an entity cannot be simultaneously an IAC and a shipper. Therefore, any interpretation that leads to such a result is unreasonable. A "shipper" is defined as the "individual or entity originating and tendering cargo for air transportation, *excluding IACs*."[89] The definition of "Known Shipper" is, "[a] shipper meeting the criteria set forth in this AOSSP. *An IAC cannot be a known shipper*."[90] The definition of "Master Air Waybill" distinguishes between cargo "accepted from a cargo shipping agent" and cargo "accepted from a shipper."[91] For the reasons previously discussed, Respondent's interpretation of "originating" results in an IAC being considered a shipper when the IAC enters into a contract with an aircraft operator for transport of cargo. Therefore, Respondent's interpretation is in obvious conflict with the language of the AOSSP and its regulatory framework.

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[86] *See General Electric Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995).
[87] *See id*. at 1329.
[88] *See id*.
[89] *See* AOSSP Sec. 1.6 (definition of "Shipper," emphasis added).
[90] *See id.* (definition of "Known Shipper").
[91] *Id.*

With regard to the issue of TSA's pre-enforcement efforts to provide notice of its interpretation of "originating," the agency cites inspections in 2013 and 2014 that involved explicit communications of TSA's interpretation to Respondent.[92] In response to these communications, Respondent changed it practice to conform to the agency's interpretation.[93] These two cases, therefore, provided Respondent actual notice of TSA's interpretation of the AOSSP.

Nonetheless, Respondent cites other instances in the record where the agency earlier failed to take enforcement action against aircraft operators, including Respondent, when the aircraft operator listed the same entity as both the shipper and the consignee.[94] These instances, however, do not negate the two times Respondent received actual notice in the 12 months immediately preceding the shipments at issue here. Respondent cannot choose to follow prior agency interpretations over current ones when it suits Respondent's needs. Yet, the record shows this was Respondent's approach. At hearing, Respondent's Supervisor of Aviation Security, Dan Weber, testified that he and his second line supervisor, Director of Aviation Security, Ben Reed, were aware of the position TSA took in the 2013 and 2014 inspections cited above.[95] When asked why Respondent conformed its practice to TSA's view in those two cases, Mr. Weber stated:

> And we, sometimes we will do that, my general rule is not to fight TSA. This is, this – typically we are working cooperatively with the inspectors, looking at the situation and our operation, and the regulation in coming up with something that's compliant. Sometimes we look at something, and even if we feel like we may not be strictly required to do it. We may go along with their recommendation in order to, essentially, resolve that, maintain a relationship. If it is not something that is going to impact our business significantly.[96]

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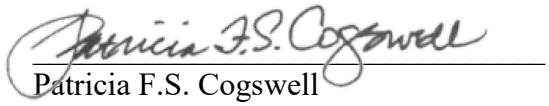
[92] *See* TSA Reply Brief at 28.
[93] *See id.* at 29.
[94] *See* Respondent's Appeal Brief at 19-23.
[95] *See* Tr. Vol. 4 at 146.
[96] *Id.*

Mr. Weber's testimony demonstrates that at the corporate level, Respondent was aware of TSA's interpretation of the AOSSP and made a decision to follow it in order to resolve the 2013 and 2014 cases. Respondent's subsequent actions, therefore, were made with actual notice that they were contrary to the agency's interpretation.

Final Decision and Order

Based on the forgoing, Respondent's appeal is rejected. The ALJ's finding that Respondent violated 49 C.F.R. §§ 1544.101(a), 1544.205(e) and1544.239(a) is upheld. The ALJ's finding that the agency failed to prove Respondent violated 49 C.F.R. § 1544.205(a) is reversed.

Under TSA's rules of practice, either party may petition the TSA Decision Maker to reconsider or modify a Final Decision and Order. The rules of practice for filing a Petition for Reconsideration are described at 49 C.F.R. § 1503.659. A party must file the petition with the TSA Enforcement Docket Clerk not later than 30 days after service of the TSA Decision Maker's Final Decision and Order and serve a copy of the petition on all parties. A party may seek judicial review of the Final Decision and Order as provided in 49 U.S.C. § 46110.



Patricia F.S. Cogswell
TSA Decision Maker

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true copy of the foregoing Final Decision and Order to be served as indicated on the following:

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Dated: May 22, 2020

Christine Beyer

Christine Beyer, Legal Advisor to
TSA Decision Maker