

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED APRIL 11, 2001)
(EXCEPTIONS DUE 5-3-01)
(REPLIES TO EXCEPTIONS DUE 5-25-01)

FEDERAL MARITIME COMMISSION

DOCKET NO. 00-10

UNIVERSAL LOGISTIC FORWARDING CO., LTD.-POSSIBLE
VIOLATIONS OF SECTIONS 10(a)(1) AND 10(b)(1)
OF THE SHIPPING ACT OF 1984

Respondent Universal Logistic Forwarding Co., Ltd. (Universal), a non-vessel operating common carrier located in Taiwan, found to have violated sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 on 22 and 23 discrete occasions in 1998 by improperly using another's service contract and by failing to charge its filed tariff rates.

Respondent found to have committed the violations knowingly and willfully and likely to have committed more than the 45 shown by the evidence. Respondent's tariff is ordered to be suspended and a cease and desist order is issued.

In view of respondent's total disregard of this proceeding and utter lack of mitigating factors, the maximum penalty permitted by law is assessed, namely, \$1,237,500, as has been done in previous cases involving defaulting respondents.

Vern W. Hill and *Heather M. Burns* for the Bureau of Enforcement.
No appearance for respondent.

INITIAL DECISION OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

By Order served August 10, 2000, the Commission instituted this proceeding to determine whether a tariffed and bonded NVOCC (non-vessel operating common carrier) known as Universal Logistic Forwarding Co., Ltd. (Universal), located in Taiwan, violated sections 1 O(a)(1) and 1 O(b)(1) of the Shipping Act of 1984 in connection with some 45 shipments that Universal handled in May and June 1998. More specifically, the Commission had information that Universal might have accessed a service contract to which it was not a signatory on 22 of the shipments and to have failed to adhere to its tariff rates on 23 shipments, in violation of sections 1 O(a)(1) and 1 O(b)(1) of the Act, respectively. If it is found that Universal did in fact violate the specified laws, then the Commission also wished to determine whether its tariff should be suspended, an appropriate cease and desist order should be issued, whether civil penalties should be assessed and, if so, in what amount. Thus, as the Commission's Order states, the Commission wishes to know:

- 1) whether Universal Logistic Forwarding Co., Ltd. violated section 1 O(a)(1) of the 1984 Act by knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means, obtained or attempted to obtain ocean transportation for property at less than the rates or charges that would otherwise have been applicable;
- 2) whether Universal Logistic Forwarding Co., Ltd. violated section 1 O(b)(1) of the 1984 Act by charging, demanding, collecting or receiving less or different compensation for the transportation of property than the rates and charges shown in its NVOCC tariff;

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502 227).

- 3) whether, in the event violations of sections 10(a)(1) or 10(b)(1) of the 1984 Shipping Act are found, civil penalties should be assessed against Universal Logistic Forwarding Co., Ltd. and, if so, the amount of penalties to be assessed;
- 4) whether, in the event violations of section 10(b)(1) of the 1984 Shipping Act are found, the tariff of Universal Logistic Forwarding Co., Ltd. should be suspended; and
- 5) whether, in the event violations are found, an appropriate cease and desist order should be issued.

As this proceeding progressed it became obvious that Universal was not going to respond to any inquiries, motions or orders and, in effect, that Universal would default. Thus, BOE served discovery requests (interrogatories and requests for production of documents) on Universal on September 8, 2000, to which Universal did not respond. On October 19, 2000 BOE filed a motion to compel responses but Universal did not reply to the motion. Because BOE's discovery requests involved persons or documents located overseas, the ruling could not become final until the Commission reviewed the ruling either on appeal by Universal or on the Commission's own motion. See 46 C.F.R. 502.210(c). Again, for the third time, Universal did nothing. Thereafter, BOE filed and served a pleading requesting adoption of a procedural schedule that would allow BOE to submit its evidence and for Universal to submit its own evidence in defense plus request cross-examination of BOE's witnesses. Again Universal remained silent. Finally, on March 23, 2001, BOE filed and served a motion for summary judgment together with supporting evidentiary materials. By ruling served February 20, 2001, and under the Commission's rules, Universal was given the opportunity to reply to BOE's motion within 15 days (i.e., by April 9, 2001, April 7 being a Saturday). (See Procedural Ruling, February 20, 2001.) However, for the fifth time Universal failed to reply.

BOE's Motion for Summary Judgment is Appropriate

BOE argues correctly that under the circumstances described above summary judgment against Universal would be appropriate and timely. As BOE contends, the Supreme Court has encouraged the use of summary judgment as a means to eliminate unnecessary trials and to decrease litigation costs. BOE cites a trio of well-known decisions that the Supreme Court rendered in 1986, namely, *Anderson v. Liberty Lobby*, 477 U.S. 242; *Celotex Corp. v. Catrett*, 477 U.S. 317; and *Matsushita Elect. Indust. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Commission follows the federal rules of civil procedure absent a specific Commission rule and “to the extent that they are consistent with sound administrative practice.” 46 C.F.R. 502.12. Therefore, the Supreme Court’s endorsement of summary judgment is very pertinent to Commission proceedings. As regards the federal rule pertaining to summary judgments (Rule 56), the Court in *Celotex* stated (477 U.S. at 327):

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.” Fed. Rule Civ. Proc. 1; (citation omitted).

Elsewhere the Court noted (477 U.S. at 322):

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.

After quoting the above language of the Supreme Court, BOE argues that “[i]n the present case summary judgment will meet the goal of a speedy and just determination of the issues presented in the Commission’s Order of Investigation.” (BOE’s Motion at 3-4.) BOE also argues correctly that its witness, Mr. Michael A. Moneck, the Commission’s Seattle Area Representative, has presented evidence that has not been rebutted or even contested by Universal, which has remained silent despite opportunities to contest BOE’s evidence. Furthermore, because of its failure to comply with an order to reply to BOE’s discovery requests pertaining to Universal’s ability to pay a civil penalty, as BOE correctly notes, Universal has been sanctioned by an order precluding it from presenting evidence on the subject that it should have furnished in response to BOE’s original requests.

There can be no doubt but that a motion for summary judgment is appropriate in this proceeding. The three Supreme Court decisions, cited above, fully support its use under the circumstances of the instant case. Moreover, summary-judgment procedure has been found to be eminently useful in other Commission proceedings where the same three Supreme Court decisions have been cited and followed. See discussion in *McKenna Trucking Co. Inc. v. A. P. Moller Maersk Line and Maersk, Inc.*, 27 S.R.R. 1045, 1050 *et seq.* (1997); *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1517 (2000); same case, 28 S.R.R. 1011, 1015 (ALJ 1999). In a summary-judgment procedure, the moving party is supposed to show that there is no genuine issue of material fact that would justify a trial. BOE has shown that here. Furthermore, to defeat a motion for summary judgment, the non-moving party, Universal, must submit something to show that there is a genuine issue for trial and that the non-moving party has substantial evidence under applicable law that would raise such an issue for trial. See *McKenna*

Trucking, cited above, and Federal Rule 56(e) (non-movant must set forth specific facts showing that there is a genuine issue for trial). In the instant case not only has Universal been given ample opportunity to present its defenses and evidence but it has been specifically warned that “[i]f respondent files no reply [to BOE’s motion for summary judgment], an initial decision in the nature of summary judgment may issue against it based upon BOE’s evidence and arguments.” (Procedural Ruling, February 20, 2001, at 3.) Consequently, I am issuing this Initial Decision based on BOE’s motion for summary judgment and the evidence it has presented in support thereof.²

FINDINGS OF FACT

The evidence that BOE has submitted in support of its motion consists of the verified statement of Mr. Michael A. Moneck, the Commission’s Seattle Area Representative, and numerous attachments (designated as Attachments A-1 through D). These attachments consist of shipping documents (bills of lading, invoices) plus tariff information and tables summarizing Mr. Moneck’s findings (Attachments B and D). As explained earlier, Universal has done nothing to contest or rebut Mr. Moneck’s testimony. Accordingly, I am adopting his statement in the form it was submitted, as follows:

VERIFIED STATEMENT OF MICHAEL A. MONECK

1. My name is Michael A. Moneck. I am the Seattle Area Representative with the Federal Maritime Commission, and have served in an investigative capacity with the Commission

²One court has provided a good summary of what it calls “The ‘New Era’ in Summary Judgments” based upon the three 1986 Supreme Court decisions. See *Street v. J.C Bradford & Co*, 886 F.2d 1473, 1476-1481 (6th Cir. 1989)

since 1990. As the Seattle Area Representative, I conducted the investigation regarding Universal Logistic Forwarding Co., Ltd. and its operations. I therefore have personal knowledge of the facts and proceedings with respect to this investigation and could and would competently testify thereto.

2. Universal Logistic Forwarding Co., Ltd. ("Universal") is a Taiwan corporation located at 13/F, No. 85, Sec. 2, Chien-Kuo N. Rd., Taipei, Taiwan 104 R.O.C.
3. In June, 1998, U.S. Customs (Seattle) identified two containers in which it appeared the commodities were misdeclared. The Shipper identified in the manifest was Translink Shipping, Inc. ("Translink"). U.S. Customs referred the case to the Commission for further investigation.
4. I subsequently contacted Sam Chen, the president of Translink, a licensed Ocean Transportation Intermediary located in Seattle, Washington. Chen indicated that the containers in question did not belong to Translink. Chen also informed me that he suspected that an unauthorized party may have accessed Translink's Service Contract with DSR Senator Line ("Senator"), number FEEB 98-388.
5. Translink and Senator signed Service Contract number FEEB 98-388 on April 29, 1998.
6. Translink was the only NVOCC authorized to tender shipments under the Senator/Translink Service Contract No. FEEB 98-388. Under the terms of the service contract, Translink was not allowed to assign the contract to a third party and co-loading by other NVOCCs was not allowed. There were no named affiliates or subsidiaries for the service contract.
7. I next contacted the Consignee for one of the two misdescribed shipments, Ultimate Freight Management, and obtained the underlying ocean bill of lading for the shipment. The documentation confirmed that the shipment in question was not made by Translink.
8. In order to determine the magnitude of any violations which may have occurred, a limited Service Contract audit was performed for the Senator/Translink Service Contract No. FEEB 98-388. Upon request, Senator provided a recap of all shipments tendered under the service contract to the Commission.
9. I provided a copy of the recap information to Chen of Translink, who identified a number of shipments attributed to Translink but for which he did not have knowledge of their ever being made.
10. I contacted Senator and requested the ocean bills of lading and dock receipts correlating to the shipments identified by Chen as having not been made by Translink. Upon review of this documentation, Chen identified 242 shipments originating in Taiwan which did not belong to Translink.

11. I contacted Jack Cheng, President of Direct Service, Inc., the consignee for twenty-three (23) shipments made between May 9, and July 3, 1998, and identified by Chen as not belonging to Translink. Cheng provided me with documentation for these shipments, which indicated that the shipments moved under Universal's ocean bills of lading. Cheng indicated to me that he believed Universal paid a "co-load fee" directly to Senator's agent in Taiwan for access to the Senator/Translink service contract in the amount of \$50.00 per FEU.
12. Attachments A-1 through A-23, are the shipment documentation for the 23 shipments tendered by Universal to Senator. For each shipment, the Senator bill of lading, in the "description of goods" section, indicates that the shipment was rated under service contract FEED 98-388.
13. In each instance, the Senator ocean bill of lading indicates Translink Shipping Inc. as the shipper and Direct Service, Inc. as the consignee and notify party. Each shipment also includes a Universal NVOCC or "house" bill of lading, which indicates the actual shipper in the shipper box. There is also an arrival notice issued by Direct Service, Inc and a profit-sharing invoice issued by Universal to Direct Service, Inc. No documentation from Translink exists for any of the 23 shipments.
14. In order to determine the extent to which Universal obtained transportation at less than the rates and charges otherwise applicable, I ascertained the rates which would have been applied under the correct tariff rate in Senator's published tariff. From my review of the relevant shipping documentation, the applicable rates appear to be those in Senator Tariff DSR-130.
15. Attachment B is a schedule of the 23 shipments referenced in Attachments A- 1 through A-23 and reflects, by shipment, both the rate charged by Senator under the service contract and the rate applicable under Senator's tariff. The schedule also sets forth the difference by which Universal obtained transportation charges different from those that were otherwise applicable. Included with Attachment B are work papers from the Commission's Automated Tariff Filing and Information system ("ATFI") indicating the applicable tariff rates.
16. Attachment B indicates that twenty-two (22) of the 23 shipments were under-affieighted, resulting in Universal paying to Senator a total of \$23,071.38 less than the applicable freight. One shipment was over-affieighted, resulting in Universal paying Senator \$665.27 more than the applicable freight. Included with this schedule are the screen prints from Senator's tariff, used as the basis for identifying the applicable tariff rates for the commodities shipped at the time the shipments were tendered. These rate screen prints are referenced in the schedule column labeled "Tariff Rate Note #".
17. Effective May 24, 1996, Universal maintained a tariff with the Commission in ATFI, number 014139-01.

18. Universal's tariff contained only three Cargo N.O.S. rates: \$500 W/M (Regular Service); \$600 W/M (Premium Service); and \$700 W/M (Superior Service).
19. In order to determine the extent to which Universal may have charged or collected less compensation for the transportation of property than the rates and charges otherwise applicable, I sought to ascertain those rates which should have been applied under Universal's tariff for the 23 shipments
20. Under Universal's tariff, Rule 2-A, when no specific type of service is requested, the applicable rate is Regular Service.
21. Applying the commodity rate for Regular Service of \$500 W/M from Universal's tariff, it is apparent that Universal failed to charge its tariff rates for all 23 shipments. Attachment C-1 through C-23 contains the work papers obtained from the ATFI system in calculating the applicable tariff rates for each of the shipments referenced in Attachment A.
22. Included as Attachment D is a compilation of these calculations which reflects, by shipment, both the rate assessed by Universal and the rate applicable under its NVOCC tariff as rated in accordance with the \$500 W/M Cargo N.O.S. tariff. The table also sets forth the difference, or amount of undercharge, by which Universal failed to charge or collect the applicable transportation rates set forth in its tariff. In all, the resulting undercharges aggregate \$711,231.00 for the 23 shipments cited.
23. Based on this information, I have concluded that Universal, acting as an NVOCC in relation to shippers of cargo in the inbound trade from the Far East to the United States, knew of and willingly engaged in charging, collecting or receiving less or different compensation for the transportation of property than the rates or charges set forth in its NVOCC tariff.
24. In the ordinary course of conducting investigations of regulated entities, the Bureau of Enforcement generally requests and utilizes reports from reputable commercial credit reporting services as an initial means of confirming corporate status, identifying principals and ascertaining facts of official record with respect to corporate parties.
25. In the case of Universal, I examined a Business Information Report which reflects a review conducted in March 2000. This report indicated that Universal is a Private Company, incorporated in Taiwan on January 17, 1996 by Hsiao Wei Yu.
26. Ms. Hsiao Wei Yu owns 100% of the corporate stock and she is President of the company. Solomon Li, Ms. Yu's husband, is the General Manager of Universal.
27. According to the Business Information Report, Universal employs thirteen (13) people.

28. As of March 2, 2000, Universal reported to Taiwan authorities that it had fully paid up capital of NT\$7,500,000 (roughly US\$232,500.00 at current exchange rates).
29. Universal maintained a bond, number 8941411, effective May 13, 1996 with Washington International Insurance Company in the amount of \$50,000. At the request of the bonding company, this bond was canceled effective July 13, 1999.
30. Since May 1, 1999, Universal has maintained an automated tariff, number 0 14 139-001, with Ocean Tariff Bureau, accessible at <http://www.otbusa.com>.
31. Universal's tariff currently contains only three Cargo N.O.S. rates for the inbound trade from Asian countries to the United States: \$500W/M (Regular Service); \$600W/M (Premium Service); \$700W/M (Superior Service).
32. Based on review of trade data available in the *Journal of Commerce* PEIRS database, Universal has acted as an ocean common carrier on at least 435 shipments to the United States during the one-year period January through December 2000, accounting for at least 780 TEUs of cargo.
33. Universal currently maintains a bond, number 8941694, effective December 1, 2000, with Washington International Insurance Company in the amount of \$150,000.

DISCUSSION AND CONCLUSIONS

BOE argues persuasively that, based upon the unrebutted and unchallenged evidence it has submitted, Universal must be found to have violated section 1 O(a)(1) of the 1984 Act on 22 discrete occasions and section IO(b)(1) of the Act on 23 such occasions during May and June 1998. Section 1 O(a)(1) of the Act provides:

(a) IN GENERAL.-No person may-

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation at less than the rates or charges that would otherwise be applicable;

....

BOE argues and I find that the evidence showing Universal's violations easily meets the standard of proof required in administrative proceedings, namely, a preponderance of the evidence. See *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84 (I.D., administratively final, 1998). I agree furthermore that the evidence shows that Universal carried on an unfair or unjust device or means to obtain transportation at less than the rates that would otherwise be applicable by accessing the service contract of another NVOCC, thereby deceiving Senator into charging Universal lower rates that only the other NVOCC was entitled to enjoy. The fact that Universal carried on this device over a period of time supports BOE's contention that Universal committed these violations knowingly and willfully. As BOE notes, the Commission has defined the statutory words "knowingly and willfully" to mean "purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." See *Trans Ocean-Pacific Forwarding, Inc.-Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 27 S.R.R. 409,412 (I.D., administratively final, 1996), citing *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938). I find this case similar to that of *Portman Square*, where another NVOCC over a period of time obtained access to another's service contract by deceiving the vessel, in violation of section 10(a)(1). As Mr. Moneck testified, in this case Universal substituted the name of another NVOCC, Translink Shipping, Inc., on the relevant bills of lading in order to enjoy lower rates that Senator would charge under Translink's service contract. As Mr. Moneck's testimony shows, by this device, Universal deprived Senator Line of \$23,071.38 in lawfully earned freight in connection

with 22 shipments.³ Thus, Universal has committed the same type of violation of section 10(a)(1) as did the respondent *NVOCC* in *Portman Square*. Furthermore, as I explain later, like respondent in *Portman Square*, Universal has totally ignored the instant proceeding.

Section 10(b)(1) of the Shipping Act of 1984 provides:⁴

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

BOE correctly points out that section 10(b)(1) (like its successor, section 10(b)(2)(A)) is an absolute-liability statute. That means that the only rates that a carrier can legally charge are those in its tariffs (or service contracts) and that the carrier's intentions, no matter how noble or beneficial, are irrelevant. BOE cites *Marcella Shipping Co., Ltd.*, 23 S.R.R. 857, 862 (I.D., administratively

³Interestingly, on one shipment out of the 23, Universal actually had to pay more to the vessel under Translmk's service contract than it would have had to pay under Senator's regular tariff. See Finding of Fact No. 16. Apparently Universal was so entranced by its intention to access Translmk's service contract that it failed to notice that for one shipment it would have been better off paying the legally applicable tariff rate.

⁴Section 10(b)(1) has been rewritten and re-enacted as section 10(b)(2)(A) of the 1984 Act, effective May 1, 1999, pursuant to the Ocean Shipping Reform Act of 1998, P L 105-258, 112 Stat 1902 (OSRA). There was no substantive change in the law, which now reads.

(b) no common carrier . . . 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 . . . under section 8 of this Act.

The discrete violations committed by Universal occurred prior to May 1, 1999.

final, 1986), and several other cases establishing this principle.⁵ In this case, as the evidence shows, Universal filed and later published what is known as a “shell” tariff, i.e., one with only one or a few meaningless rates that are essentially not designed for actual use by shippers. Thus, Universal first filed its tariff effective in May of 1996, which tariff contained only three Cargo, N.O.S. rates, \$500 W/M, \$600 W/M, and \$700 W/M, for “Regular Service,” “Premium Service,” and “Superior Service,” respectively. As the Commission has recognized in numerous cases, such tariffs and rates are generally not legitimate or proper because they do not reflect transportation conditions pertaining to each commodity usually reflected in a range of tariff rates. General cargo, N.O.S. rates are rather used as devices by carriers to enable them to file or publish particular commodity rates on short notice. They are rarely used by shippers because they are fixed at unrealistically high levels, being essentially tariff devices. See *Trans Ocean-Pacific Forwarding, Inc.*, cited above, 27 S.R.R. at 413; *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, 28 S.R.R. 45, 65 n. 15 (I.D., adopted, 28 S.R.R. 534 (1998), affirmed without opinion as *Worldlink Logistics v. F.M. C.*, 203 F.3d 54 (D.C. Cir. 1999) (a general cargo N.O.S. rate is really not a legitimate rate that any shipper would have to pay but is only a device to allow carriers to file lower rates without advance notice); *Best Freight Int’l Ltd.-Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 447, 451 n. 3 (1998) (same). As Mr. Moneck has testified, Universal still maintains a “shell” tariff with the same three general cargo N.O.S. rates that it first filed in May of 1996. Consequently, because such rates are not commercially attractive Universal had to charge lower commodity rates to survive in

⁵The other cases cited by BOE are. *Ever Freight Int’l Ltd et al.*, 28 S.R.R. 329, 333 (I.D., administratively final, 1998); *F & D Loadline Corp.*, 27 S.R.R. 764, 767 (I.D., administratively final, 1996); *Trans Ocean-Pacific Forwarding Inc*, 27 S.R.R. 409,412 (I.D., administratively final, 1996).

business and, as I explain below, Universal is still under pressure to deviate from its “shell” tariff. As to the 23 discrete shipments in which Mr. Moneck found that Universal did deviate from its tariff in violation of section 10(b)(1) of the Act, Universal undercharged its shipper customers by \$7 11,231, in the aggregate.

I conclude that the evidence shows that Universal committed 45 discrete violations of law in May and June of 1998, 22 violations of section 10(a)(1) and 23 violations of section 10(b)(1) of the 1984 Act.

**Suspension of Universal’s Tariff
and an Appropriate Cease and Desist Order**

The fourth and fifth issues framed by the Commission’s Order concern whether Universal’s tariff should be suspended and whether an appropriate cease and desist order should issue. BOE argues that both actions should be taken. Because Universal still publishes a “shell” tariff with only three virtually meaningless N.O.S. rates, the same conditions motivating Universal to ignore the tariff exist today as they did in 1998. Moreover, the tariff serves only as a “sham,” as BOE characterizes it, and it should be suspended and Universal ordered to cease and desist from employing such a tariff and from violating the Act as it has in the past until it has published a properly populated tariff. There is no question but that the continued maintenance of such a “sham” tariff must come to an end and that a cease and desist order to prohibit use of such a tariff and the type of unlawful practices carried on by Universal is proper. See *Marcella Shzppang Co., Ltd.*, cited above, 23 S.R.R. at 871 (cease and desist order is justified if there is likelihood the offenses will continue). Accordingly, it is hereby ordered that the “shell” tariff currently published by Universal

is suspended and Universal is ordered to cease and desist from acting as an NVOCC until it has published a proper tariff containing realistic commodity rates. Furthermore, Universal is ordered to cease and desist from obtaining or attempting to obtain lower rates than would be properly applicable through the device of accessing Translink's or any other person's service contract. Furthermore, Universal is ordered to cease and desist from charging rates other than those published in its tariff.

The Question of Civil Penalties

The third issue framed by the Commission's Order is whether a civil penalty should be assessed against Universal and, if so, in what amount. BOE argues that a "significant" civil penalty should be assessed that would send a clear message "that a company wishing to provide shipping services to the United States must educate itself in the shipping laws of the United States and insure that it abides by those laws." (BOE's Motion for Summary Judgment at 11.) Moreover, BOE points out that Universal has not participated in this proceeding and has provided no evidence of mitigating factors that would be relevant to the determination of the amount of such penalty.

Section 13(c) of the 1984 Act requires the Commission to consider some eight factors when determining amounts of civil penalties to assess. In pertinent part the statute states:

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's regulation implementing section 13(c) is 46 C.F.R. 502.603(b), Criteria *for determining amount of penalty*. This regulation tracks the criteria in section 13(c) and adds one more, namely, "the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes."

As to the nature, circumstances, extent and gravity of Universal's activities and the degree of its culpability, BOE argues that Universal has shown its disregard for the 1984 Act by improperly accessing someone else's service contract and has disregarded its tariff, which it has not modified since it was first filed in 1996 and which remains as a "shell" tariff. Despite being given ample opportunity to explain its conduct or to present defenses or evidence in mitigation, Universal has snubbed its nose at the proceeding. Moreover, as noted earlier, there is a reasonable likelihood that Universal has committed more than the 45 discrete violations and there is evidence that in the year 2000 Universal was acting as an ocean common carrier and handled at least 435 shipments to the United States. The record does not show whether Universal has converted totally from an NVOCC to a vessel-operating carrier. However, because Universal has maintained a "shell" tariff and has been active since 1998, and because the same pressures to violate the Act exist, it is reasonable to infer that the 45 discrete violations shown on the record that occurred for two months in 1998 do not represent all the instances of Universal's misconduct. In some cases it is not necessary to prove violations by showing a "smoking gun" and reasonable inferences may suffice. *See Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1339 n. 2 (I.D., administratively final, 1997), where it was stated in pertinent part:

Furthermore, it is not necessary to find a "smoking gun" before finding violations in administrative proceedings. Administrative agencies are presumed to have

specialized knowledge of the industries they regulate. Consequently, they are permitted to draw reasonable inferences based on their familiarity with the industries they regulate even absent direct evidence. *See, e.g., F.M.C. v. Svenska*, 390U.S. 238,249 (1968); *United States v F.M.C* , 655 F.2d 247, 253-254 (D.C. Cir. 1980).

In *Alex Parsinia*, although the record showed only 18 discrete instances of violations of law, it was noted that it was probable that respondent, which had been operating over a three-year period, had committed many more violations. *Alex Parsinia*, 27 S.R.R. at 1339. For a similar finding, see *Ever Freight Int'l Ltd.*, cited above, 28 S.R.R. at 336 (it is reasonable to infer that respondent committed more than 12 discrete violations when respondent handled over 1100 shipments).

As to degree of culpability, while it could be argued that Universal benefited its shipper customers by declining to assess them its unrealistically high N.O.S. rates, the record also shows that Universal cheated Senator Line by some \$23,071.38 in freight lawfully owed to Senator, deceived Senator, and trespassed on another party's service contract, thereby eliminating any advantage the other party had been able to obtain through its own initiative in negotiating a service contract. Such behavior is more inexcusable because Universal could have negotiated its own service contract with Senator. Thus, Universal is as culpable as was the *NVOCC* in *Portman Square*, which was assessed the maximum civil penalty.

I next consider the factor of ability to pay as required by section 13(c) of the 1984 Act. BOE points out that Universal has frustrated BOE's ability to obtain relevant evidence as to Universal's financial situation by refusing to answer BOE's discovery requests and defying orders of the presiding judge and the Commission to answer its requests. Accordingly, as noted earlier, Universal was sanctioned by a preclusionary order. However, BOE states that BOE was able to gather information about Universal's financial situation from other sources available to it. Thus, BOE

states that a commercial credit report shows that Universal has fully paid up capital amounting to \$232,500, had a bond of \$50,000 during the time of the 45 discrete violations, and now has a bond amounting to \$150,000. BOE argues that ability to pay must be considered but “is not controlling in the use of [the Commission’s discretion in assessing civil penalties].” (BOE’s Motion for Summary Judgment at 12.)

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

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

The principle that the Commission is supposed to fashion remedies and sanctions to fit the needs of the articular case has been repeatedly recognized in a number of cases since *Can-Cargo*. See *F & D Loadline Corp.—Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 27 S.R.R. 764,768 (I.D., administratively final, 1996); see also the cases cited in Docket No. 99-18 - *Stallion Cargo, Inc.—Possible Violations of Sections 1 O(a)(1) and 1 O(b)(1) of the Shipping Act of 1984*, Initial Decision, served March 15, 2001, at 33, pending Commission decision on exceptions.

The Supreme Court has commented on this duty of regulatory agencies in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962), where it is stated:

The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described.

The Supreme Court has held that courts should defer to the judgment of a regulatory agency that fixes penalties and should not overturn the agencies merely because the sanctions imposed are not uniform. See *Butz v. Glover Livestock Commzsszon Co.*, 411 U.S. 182 (1973). Nevertheless, various Courts of Appeals have overturned agency decisions if they are excessive or arbitrary or are not reasonably related to the violation so as to constitute an abuse of discretion or are unwarranted in law or unjustified in fact. See *Monieson v. Commodities Futures Trading Commission*, 996 F.2d 852, 858, 862 (7th Cir. 1993); *AmericanPower Co. v. S.E.C.*, 329U.S. 90,112-1 13 (1946); and cases cited in Docket No. 99-18 - *Stallion Cargo, Inc.*, cited above, at 34.

When respondents participate in Commission proceedings and submit evidence showing mitigating factors, a presiding judge must weigh and balance such factors before determining a specific civil penalty. In the instant case, however, Universal has in effect totally defaulted. Consequently, there are virtually no mitigating factors for me to consider.⁶

⁶The only possible statutory mitigating factor that I would have to consider is the fact that there is no history of prior offenses by Universal. BOE acknowledges this fact but points out correctly that such fact is more than offset by the probability that Universal, which has been operating with a “shell” tariff for over three years, has committed many more violations than the 45 shown on this record for the limited period of May and June 1998. Had there been a history of prior violations, this would have constituted an aggravatmg factor. However, its absence proves nothing in this case. More importantly, Universal has Ignored this proceeding and has shown utterly no indication that it appreciates the **seriousness** of its offenses or that it will take any steps to reform.

Because of the lack of mitigating factors and Universal's decision to disregard this proceeding and U.S. law, the decision to assess maximum civil penalties allowed by law is made somewhat easier. As BOE correctly points out, there is precedent for the assessment of the statutory maximum when respondents default and offer no evidence in mitigation. Furthermore, when BOE makes an effort to adduce evidence on the ability-to-pay factor, which, while not to be ignored, is only one of eight factors to consider, and is able to produce some evidence but is frustrated by an overseas respondent's default, the result is that maximum civil penalties allowed by law have been imposed.' In other words the Commission has exercised its discretion to impose the maximum that the law allows when discrete violations have been proven in such cases. See *Portman Square Ltd.*, cited above, 28 S.R.R. 80; *Ever Freight Int'l Ltd. et al.*, cited above, 28 S.R.R. 329; *Shipman Int'l (Taiwan) Ltd.-Possible Violations of 1984 Act*, 28 S.R.R. 100 (I.D., administratively final, 1998); *Comm-Sino Ltd.-Possible Violations of Sections IO(a)(I) and IO(b)(I)*, 27 S.R.R. 1201 (I.D., administratively final, 1997); *Trans Ocean-Pacific Forwarding, Inc , etc .* cited above, 27 S.R.R. 409; *Best Freight Int'l Ltd.-Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 447 (I.D.,

⁷In *Merritt v United States*, 960 F.2d 15 (2d Cir.1992), the Court reversed a Commission decision because the Commission arguably had failed to adduce evidence on respondent's ability to pay and had expected respondent to furnish evidence proving its inability to pay as a sort of affirmative defense. The court allowed the Commission to determine how much weight the Commission would give to the ability-to-pay factor and did not rule out the other factors that must be considered, but expected the Commission to seek out relevant evidence and consider it. Other courts have allowed agencies to draw adverse inferences against respondents who are ordered to produce relevant information but refuse. See the discussion in *Royal Venture Cruise Line, Inc*, 27 S.R.R. 1069, 1076-1078 (I.D., administratively final, 1997), and the court cases cited therein, namely, *Stanley v Board of Governors*, 940 F.2d 267,274 (7th Cir. 1991); *Dazio v. FDIC*, 970 F.2d 71, 78 (5th Cir. 1992); and *Diehl v Franklin*, 826 F. Supp. 874,882 (D. N.J. 1993). In the instant case BOE has obtained some evidence and has attempted to obtain additional evidence on the factor but has been frustrated by respondent's refusal. It has also been observed that the *Merritt* court could not have intended to reward disobedient respondents for their refusals to comply with lawful orders to produce nor to frustrate Congress's intent to enable the Commission to deter violations by assessing meaningful civil penalties. See the discussions in *Eastern Mediterranean Shipping Corp.*, cited above, 28 S.R.R. at 797; *Reorganized Contazner Carriers Pty. Ltd.*, cited above, 28 S.R.R. at 805; *Portman Square Ltd.*, cited above, 28 S.R.R. at 86.

administratively final, 1998); *Refrigerated Contazner Carriers Pty. Limited-Possible Violations of Section IO(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 799 (I.D., administratively final, 1999).

In the instant case Universal was put on notice that it might suffer judgment against it based upon BOE's evidence and arguments if it did not reply to BOE's Motion for Summary Judgment. See Procedural Ruling, February 20, 2001, at 3. Moreover, BOE calculated the maximum penalty amount to be \$1,237,500 and cited Commission decisions in cases involving overseas respondents who had also defaulted and had been assessed the maximum civil penalties allowed by law. See BOE's Motion for Summary Judgment at 9-10. Nevertheless, Universal has not responded. Accordingly, I follow precedent by assessing the maximum penalty allowed by law against Universal, namely, \$1,235,500, and Universal is ordered to pay this sum in such manner as the Commission may determine on review of this decision.⁸


Norman D. Kline
Administrative Law Judge

Washington, D.C.
April 11, 2001

⁸This amount of civil penalty is not the highest that has been assessed on defaulting respondents. For example, respondent in *Trans Ocean-Pacific Forwarding, etc*, cited above, 27 S.R.R. 409, was assessed \$1,450,000; and respondent in *Shipman Int 'I*, cited above, 28 S.R.R. 100, was assessed \$1,425,000. The civil penalty in *Trans Ocean-Pa@ Forwarding* was suspended to the extent it exceeded respondent's \$50,000 bond. I have not ordered a similar suspension in the instant case because it would undermine the message of deterrence that should be sent to NVOCCs and others who choose to benefit by participating in a US trade but treat with disdain U S laws and Commission proceedings to enforce them. See 46 C.F.R 502 603(b), which as noted above, requires me to consider "the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes."