

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-01

UNITED LOGISTICS (LAX) INC. – POSSIBLE VIOLATIONS OF
SECTIONS 10(a)(1) AND 10(b)(2)(A) OF THE SHIPPING ACT OF 1984

INITIAL DECISION

I. INTRODUCTION

A. Overview and Summary of Decision

On January 25, 2013, the Commission commenced this proceeding by issuing an Order of Investigation and Hearing against respondent United Logistics (LAX) Inc. (“United Logistics”). The Commission named the Bureau of Enforcement (“BOE”) as a party to the proceeding. The Order of Investigation and Hearing alleges that United Logistics violated sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. §§ 41102(a) and 41104(2)(A).

No answer has been filed to date and United Logistics is currently in default. On April 3, 2013, a Notice of Default and Order to Show Cause was issued requiring United Logistics to respond to the proceeding and to show cause why a decision should not be entered against it. The due date for United Logistics to file such a response was April 30, 2013, and no response has been received.

On May 17, 2013, the Bureau of Enforcement filed a motion for summary judgment (“Motion”) requesting (1) summary judgment finding United Logistics in violation of sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act, (2) appropriate civil penalties against United Logistics, (3) revocation of United Logistics’ Ocean Transportation Intermediary (“OTI”) license pursuant to section 19 of the Shipping Act, (4) suspension of United Logistics’ tariff pursuant to section 13 of the Shipping Act, and (5) an appropriate order requiring United Logistics to cease and desist from violating the Shipping Act. Motion at 1. No opposition to the Motion was received.

As discussed more fully below, BOE has established that United Logistics violated the Shipping Act. Accordingly, a civil penalty, OTI license revocation, tariff suspension, and cease and desist order are imposed.

B. Procedural History

The Order of Investigation and Hearing initiating this proceeding was issued by the Commission pursuant to sections 11 and 14 of the Shipping Act, 46 U.S.C. §§ 41302 and 41304, and directed that the following specific issues be determined:

- 1) whether United Logistics (LAX) Inc. violated section 10(a)(1) of the Shipping Act, 46 U.S.C. § 41102(a) by knowingly and willfully, directly or indirectly, obtaining transportation at less than the rates and charges otherwise applicable by the device or means of unlawfully accessing service contracts to which it was neither a signatory nor an affiliate;
- 2) whether United Logistics (LAX) Inc. violated section 10(b)(2)(A) of the Shipping Act, 46 U.S.C. § 41104(2)(A), by providing transportation in the liner trade that was not in accordance with the rates, charges, classifications, rules, and practices contained in its published tariff;
- 3) whether, in the event violations of section 10 of the Shipping Act are found, civil penalties should be assessed against United Logistics (LAX) Inc. and, if so, the amount of the penalties to be assessed;
- 4) whether, in the event violations of section 10(b)(2)(A) of the Shipping Act are found, the tariff of United Logistics (LAX) Inc. should be suspended pursuant to section 13 of the Shipping Act, 46 U.S.C. § 41108(a);
- 5) whether the Ocean Transportation Intermediary license of United Logistics (LAX) Inc. should be suspended or revoked pursuant to section 19 of the Shipping Act, 46 U.S.C. § 40903; and
- 6) whether, in the event violations are found, an appropriate cease and desist order should be issued as authorized by section 14 of the Shipping Act, 46 U.S.C. § 41304.

Order of Investigation and Hearing at 11-12.

The Order of Investigation and Hearing required United Logistics to file an answer to the allegations within 25 days pursuant to the Commission's regulations set forth at 46 C.F.R. § 502.63(c). Order of Investigation and Hearing at 12. According to the Verified Statement of Karen V. Gregory, the Secretary of the Commission, service of the Commission's Order of Investigation and Hearing was effectuated upon United Logistics via United Parcel Service (UPS). Motion at Exhibit 1.

United Logistics did not enter an appearance or file an answer.

On February 14, 2013, BOE initiated discovery procedures pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.207, by issuing requests for admissions directed to United Logistics. The requests specifically advised United Logistics that "[t]he matter set forth in each request for admission . . . will be admitted within thirty (30) days of service unless the Respondent serves written answers or objections addressed to the matter set forth in each request." Motion at Exhibit 2 at 1. This 30-day time period expired on March 18, 2013.

On April 3, 2013, a Notice of Default and Order to Show Cause was issued requiring United Logistics to show cause why judgment should not be entered against it. The due date for United Logistics to file such a response was April 30, 2013. No response from United Logistics was received.

On May 17, 2013, BOE filed a motion for summary judgment, so that issues not addressed in the Order of Investigation and Hearing, such as the amount of civil penalties, would be reached. Motion at 4. BOE submits relevant evidence, including requests for admission, shipping records, and verified statements. BOE contends that the motion for summary judgment is the most efficient method of addressing and resolving all the outstanding legal issues as to the violations, civil penalties, and other relief appropriate in this otherwise uncontested proceeding. Motion at 4.

C. Default and MSJ Standards

Although BOE filed a motion for summary decision, the proceeding may also be resolved under the Commission's new rule regarding decisions on default. United Logistics had notice of the possibility of a decision on default based upon the order to show cause served upon it. As explained below, under the facts of this particular case, the result is the same regardless of which procedure is utilized.

1. Decision on Default

The Commission's new rule regarding decisions on default states that:

(b) When a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint or Order of Investigation and Hearing.

(c) The presiding officer may require additional information or clarification when needed to issue a decision on default, including determination of the amount of reparations or civil penalties where applicable.

46 C.F.R. § 502.65.

"The Commission's regulations provide that well-pleaded factual allegations in a complaint will be deemed to be admitted when a respondent fails to answer a complaint within the time

provided.” *Century Metal Recycling Pvt. Ltd. v. Dacon Logistics, LLC*, Dkt. 12-09 (FMC Nov. 12, 2013) (Order Affirming Initial Decision on Default); *see also* 46 C.F.R. § 502.62(c)(4). Because United Logistics has defaulted, the finder of fact accepts as true all well-pleaded facts in the order. 10A Wright & Miller § 2688, pp. 58-61; *Finkel v. Romanowicz*, 577 F.3d 79, 83-84 (2d Cir. 2009); *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981).

The Commission’s default rule specifically permits consideration of the record, which would include evidence submitted with the motion for default decision. Accordingly, the whole record, including evidence submitted with the motion for default, may be considered in deciding a decision on default.

As a default decision most clearly corresponds to the procedural posture of the case, it forms the basis for decision. Alternatively, the proceeding is analyzed, under the summary judgement standards.

2. Summary Decision

The Commission has emphasized that:

At the summary judgment stage, the role of the judge “. . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact.

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., 31 S.R.R. 540, 545 (FMC 2008) (citations omitted). Because of the limitation on resolving factual issues, summary decision may not be the most efficient means of resolving cases where a party has defaulted.

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

D. Evidence

Under the Administrative Procedures Act, an Administrative Law Judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.”

5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98 (1981). This initial decision is based on the pleadings, exhibits, testimony, status reports, and motions filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact implicit in the motion and not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

All of the exhibits submitted by BOE are hereby admitted and were considered. This initial decision provides an analysis of legal and factual issues and the Order.

II. ANALYSIS

A. Section 10(a)(1), 46 U.S.C. § 41102(a)

1. Allegations

BOE asserts that United Logistics accessed two service contracts: (1) for 24 shipments, service contract number 16033 between Kawasaki Kisen Kaisha (“K Line”) and Zhejiang Peace Industry and Trading Co., Ltd. (“Zhejiang Peace”), a beneficial cargo owner and (2) for 29 shipments, service contract number 41979 between K Line and ATE Logistics Co., Ltd. (“ATE Logistics”), an unrelated non-vessel-operating common carrier (“NVOCC”). BOE asserts that for these 53 shipments, United Logistics obtained transportation for property for less than the rates that would otherwise apply by accessing the service contracts. Motion at 7-9. BOE relies on the verified statement of Michael Carley, the Commission’s Director of Field Investigations (“DFI”) as well as the requests for admissions. Motion at Exhibit 3.

2. Facts

There is no dispute of material facts. The uncontested facts reflect that United Logistics is a licensed OTI operating as an NVOCC in the trades between the United States and Asia. Carley Statement ¶ 3. United Logistics has had a tariff since August 1, 2005, which is currently published by Paramount Tariff Services, Inc. (“Paramount”) at www.paramounttariff.com. Carley Statement ¶ 3; United Logistics Requests for Admissions ¶ 2. United Logistics likewise maintains an NVOCC bond, No. JGINVOCC2376, in the amount of \$75,000 with Ullico Casualty Company. Carley Statement ¶ 5; United Logistics Requests for Admissions ¶ 3. From 2009 through 2011, United Logistics operated through several agents in the People’s Republic of China (“PRC”), including but

not limited to: U.S. United Logistics (Ningbo) Inc.; Shanghai Wing-Ocean International Logistics Co., Ltd.; and Charter Logistics Shanghai Limited. Carley Statement ¶ 9; United Logistics Requests for Admissions ¶ 4.

The evidence demonstrates that between March 2009 and April 2011, United Logistics obtained ocean transportation from K Line at rates that were lower than would otherwise be applicable on shipments from the PRC to the United States by accessing two service contracts to which neither United Logistics nor its agents were lawful signatories or affiliates. Specifically, with respect to at least 24 shipments transported between March 29, 2009, and May 12, 2009, United Logistics obtained such transportation at rates contained in service contract number 16033 between K Line and Zhejiang Peace, a beneficial cargo owner. Carley Statement ¶¶ 10, 11; United Logistics Requests for Admissions ¶ 5. No affiliates were specified in the contract. Carley Statement ¶ 10. In each of these 24 instances, the shipping documentation, such as the United Logistics bills of lading and arrival notices, confirms that the shipped cargo belongs to United Logistics and its shipper customers rather than Zhejiang Peace, the lawful contract signatory. Carley Statement ¶¶ 11, 12; United Logistics Requests for Admissions ¶ 7. Moreover, either United Logistics or its PRC agent, U.S. United Logistics (Ningbo) Inc., paid all or some portion of the freight charges for each of these 24 shipments to K Line. Carley Statement ¶ 14; United Logistics Requests for Admissions ¶ 9. Because K Line rated these shipments pursuant to service contract number 16033 rather than its tariff, United Logistics received a sizable freight benefit from the otherwise applicable rates due to K Line, as the carrier. Carley Statement ¶ 15; United Logistics Requests for Admissions ¶ 8.

In addition, the evidence shows that, between June 24, 2010, and April 14, 2011, United Logistics obtained transportation for at least 29 additional shipments from K Line by accessing service contract number 41979 between K Line and ATE Logistics, an unrelated OTI/NVOCC. Carley Statement ¶ 17; United Logistics Requests for Admissions ¶ 15. Neither United Logistics nor its agents were lawful signatories or affiliates to the ATE Logistics service contract. Carley Statement ¶ 20; United Logistics Requests for Admissions ¶ 16. In each of these 29 instances, the shipping documentation, such as the United Logistics bills of lading and arrival notices, confirms the fact that the shipped cargo belongs to United Logistics and its shipper customers rather than ATE Logistics, the lawful contract signatory. Carley Statement ¶¶ 18, 20, 21; United Logistics Requests for Admissions ¶ 17. Moreover, inasmuch as the rate structure in service contract number 41979 is based on commodities that are linked to specific named accounts, United Logistics obtained access to the rates in the contract based upon misdeclaring both the shipper account and the corresponding commodity description. Carley Statement ¶¶ 19, 20. The documentation provided by United Logistics reflects the fact that United Logistics or its PRC agent paid all or some portion of the freight charges for each of the 29 shipments to K Line. Carley Statement ¶ 20; United Logistics Requests for Admissions ¶ 19. Because K Line rated these shipments pursuant to service contract number 41979 rather than its tariff, United Logistics received a substantial freight benefit. Carley Statement ¶ 22; United Logistics Requests for Admissions ¶ 18.

3. Legal Framework

Section 10(a)(1) of the Shipping Act states:

Obtaining Transportation at Less Than Applicable Rates.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a).

To prove a violation of Section 10(a)(1), it must be shown that respondents utilized an unjust or unfair device or means, obtained transportation at less than the otherwise applicable rates, and acted knowingly and willfully. *In re: OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, 32 S.R.R. 1783, 1788 (FMC 2013). Each element will be addressed in turn.

4. Analysis

a. Unjust or unfair device

The evidence demonstrates that United Logistics violated Section 10(a)(1) by knowingly and willfully, by an unfair or unjust device or means, obtaining transportation for property at less than the rates or charges applicable from the ocean common carrier furnishing the transportation for 53 shipments. Carley Statement ¶¶ 12, 22. Moreover, inasmuch as the rate structure in service contract number 41979 with ATE Logistics is based on commodities that are linked to specific named accounts, United Logistics obtained access to the rates in the contract based upon misdeclaring both the shipper account and the corresponding commodity description. Carley Statement ¶¶ 19, 20. While the evidence on this element is limited, for this proceeding where United Logistics has defaulted, the evidence is sufficient to find that the lower rates were obtained by an unfair or unjust means.

b. Obtaining transportation at lower rates

United Logistics benefitted directly from the consequences of accessing service contract numbers 16033 with Zhejiang Peace and 41979 with ATE Logistics through the payment of substantially lower freight charges, especially given the fact that United Logistics did not have its own service contracts with K Line during the time of this activity. Carley Statement ¶¶ 15, 16, 22, 23; United Logistics Requests for Admissions ¶¶ 10, 11, 12, 20, 21, 22. The evidence supports a finding that United Logistics directly benefitted from obtaining transportation at reduced rates.

c. Knowingly and willfully

The evidence is sufficient to find that United Logistics committed the 53 violations of section 10(a)(1) of the Shipping Act in a knowing and willful manner. United Logistics' agents in the PRC originated these 53 shipments on behalf of United Logistics, and United Logistics received copies of the K Line bills of lading in all instances, so that United Logistics knew or should have known that its cargo was being transported pursuant to service contracts to which neither United Logistics nor its agents were lawful signatories or affiliates. United Logistics Requests for Admissions ¶ 65. Accordingly, United Logistics knowingly and willfully obtained ocean transportation for property at less than the applicable rates through the device or means of unlawfully accessing service contracts to which it was neither a signatory nor an affiliate, in violation of section 10(a)(1) of the Shipping Act, for 53 shipments.

These 53 violations are established by United Logistic's default and the evidence in the record. In addition, there is no dispute of material facts and BOE is entitled to judgment as a matter of law, so that summary decision would also be appropriate.

B. Section 10(b)(2)(A), 46 U.S.C. § 41104(2)(A)

1. Allegations

BOE asserts that United Logistics violated section 10(b)(2)(A) for nearly 4 years, from August 1, 2005, when the tariff of United Logistics became effective through July 7, 2009, asserting that United Logistics had little more than a shell tariff containing only rates for Cargo, N.O.S., intended in form and manner to minimally meet the Commission's tariff filing requirements. Motion at 10-12.

2. Facts

During his investigation, DFI Carley reviewed the tariff of United Logistics and compared the rates in the tariff with those assessed by United Logistics to its shipper customers on 24 shipments transported between March 10 and May 12, 2009. Carley Statement ¶¶ 25, 27. In each of these 24 shipments, the rates assessed by United Logistics on its NVOCC bills of lading do not correspond to the Cargo, N.O.S. rates in its tariff thereby resulting in an undercharge in excess of \$10,000 per shipment. Carley Statement ¶ 27, United Logistics Requests for Admissions ¶¶ 31, 32.

On July 7, 2009, United Logistics filed rates for 13 commodities in its tariff. Carley Statement ¶ 25; United Logistics Requests for Admissions ¶ 35. By correspondence dated July 15, 2009, United Logistics was advised by BOE of its obligation to follow the rates and charges in its published tariff. Carley Statement ¶ 26. A comparison of these newly filed rates with the charges assessed by United Logistics with respect to 31 shipments transported between June 24, 2010, and December 11, 2010, demonstrates that, on 27 of these shipments, the only applicable tariff rate was that of Cargo, N.O.S., whereby United Logistics undercharged its customers in excess of \$10,000

per shipment. Carley Statement ¶¶ 28, 30, 31; United Logistics Requests for Admissions ¶¶ 37-44. With regard to the remaining four shipments consisting of various types of garments wherein an applicable rate of Garments, N.O.S. is listed in the tariff, United Logistics nevertheless failed to apply this rate resulting in greater or different compensation, with a total overcharge to its customers in the amount of \$12,850. Carley Statement ¶ 29; United Logistics Requests for Admissions ¶¶ 45-50. Since July 10, 2009, United Logistics has not taken measures to update its tariff by filing any additional rates and charges. Carley Statement ¶ 32; United Logistics Requests for Admissions ¶ 36.

3. Legal Framework

Section 10(b)(2)(A) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104.

4. Analysis

The evidence is sufficient to find that on 24 and then 31 shipments, for a total of 55 shipments, United Logistics provided service that was not in accordance with the rates contained in its tariff in violation of section 10(b)(2)(A) of the Shipping Act. The requests for admission specifically address the knowing and willful nature of United Logistics' violations of the Shipping Act with regard to the 55 shipments. United Logistics Requests for Admissions ¶ 33, 43, 51, 66. Therefore, BOE has presented sufficient evidence to establish the violations.

These 55 violations are established by United Logistic's default and the evidence in the record. In addition, there is no dispute of material facts and BOE is entitled to judgment as a matter of law, so that summary decision would also be appropriate.

C. Remedy

BOE requests that a civil penalty be imposed, United Logistics' OTI license and tariff be suspended or revoked, and a cease and desist order issued. Motion at 12-20.

1. Civil Penalty

Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act, stating:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed [\$6,000] for each violation or, if the violation was willfully and knowingly committed, [\$30,000] for each violation.

46 U.S.C. § 41107(a). The Act originally provided for maximums of \$5,000 and \$25,000. In 2000, before respondents committed these violations, the Commission increased these amounts to \$6,000 and \$30,000. 65 Fed. Reg. 49741, 49742 (Aug. 15, 2000) (codified at 46 C.F.R. § 506.4(d) (Table) (2006)). As of July 31, 2009, the amounts have been increased to \$8,000 and \$40,000. 74 Fed. Reg. 38114, 38115 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2009)). Violations were committed by United Logistics both before and after July 31, 2009.

Section 13(c) of the Act provides that in “determining the amount of a civil 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 other matters justice may require.” 46 U.S.C. § 41109(b). These factors have been codified in the regulations which state:

In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

46 C.F.R. § 502.603(b).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc.*, 29 S.R.R. 665, 681 (FMC 2001); *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. 799, 805 (ALJ 1999).

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 *Cari-Cargo, Int., Inc.*, 23 SRR 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.)

Universal Logistic Forwarding Co., Ltd., 29 S.R.R. 325, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (2002). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. at 805-806.

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed. The first question that must be answered in determining a civil penalty is whether the violation was willfully and knowingly committed. *Stallion Cargo, Inc.*, 29 S.R.R. at 678. To assess a civil penalty in the higher range, the evidence must establish that the violation was willful and knowing.

Once the first question – whether the “violation was willfully and knowingly committed,” *Stallion Cargo, Inc.*, 29 S.R.R. at 678 – has been answered, the eight factors set forth in section 13(c) must be weighed and balanced, bearing in mind the maximum penalty that may be assessed for the violation. *See Universal Logistic Forwarding Co., Ltd.*, 29 S.R.R. at 333 (determining a civil penalty “requires the weighing and balancing of eight factors set forth in law”).

Although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c), regardless of whether the party on whom a fine will be imposed has participated in the hearings against him.

Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992).

BOE addresses the civil penalty factors in detail, stating:

In this case, consideration of the factors outlined in section 13 of the Shipping Act supports a conclusion that imposition of substantial civil penalties on United Logistics is necessary and appropriate given the significant quantity of section 10(a)(1) violations involving two service contracts over a period of at least two years as evidenced by the documentation accompanying DFI Carley’s Statement. The 53 shipments at issue are merely a representative sample of a universe of at least 100 shipments wherein United Logistics knowingly and willfully accessed rates in K Line service contracts. Carley Statement 24; United Logistics Requests for Admissions 13, 14, 23, 24. Consequently, the extent of the violations is much greater than the 53 shipments documented in this proceeding. More importantly, service contract rates are solely for the benefit of the parties who negotiated them and executed the contract on the basis of such negotiations including adding any lawful affiliates. By accessing

service contract nos. 16033 and 41979, United Logistics not only trespassed on the competitive advantage otherwise gained by Zhejiang Peace and ATE Logistics as lawful signatories but likewise deceived and cheated K Line by a total sum of \$146,918 in freight monies for the 53 shipments at issue. Rather than negotiating its own service contract with K Line, United Logistics opted to intentionally and repeatedly disregard the Shipping Act. Therefore, United Logistics should be found to have a high degree of culpability.

Furthermore, as the evidentiary record amply demonstrates, United Logistics has failed to adhere to the rates and charges in its published tariff with respect to at least 55 shipments. After four years of having nothing more than a shell tariff containing only Cargo, N.O.S. rates, United Logistics filed 13 additional rates subsequent to a BOE audit. Respondent promptly proceeded to disregard any such rates when dealing with its shipper customers.

This situation is further aggravated by the fact that Respondent has failed to cooperate in this proceeding and to respond to the allegations in the Commission's Order of Investigation, BOE's Requests for Admissions, as well as the presiding ALJ's April 3 Order granting Respondent further time and opportunity to participate. Respondent has ignored this proceeding at every turn. Therefore, all these factors combined, the nature, extent, and gravity of the violations committed by United Logistics, United Logistics' degree of culpability, as well as the interests of justice support the imposition of a substantial civil penalty.

Motion at 13-14.

United Logistics has no known history of prior offenses. Of those factors cited in section 13(c) of the 1984 Act, BOE submits that only the absence of a history of prior offenses appears to present a factual issue supporting mitigation of those civil penalties otherwise appropriate.

BOE's evidence regarding ability to pay, from its requests for admissions, demonstrates that United Logistics is operating as a profitable business and has sufficient funds to pay a civil penalty of up to \$30,000 per violation in this proceeding. United Logistics Requests for Admissions ¶¶ 57, 61, 62.

United Logistics failed to respond to this proceeding and has decided not to present any evidence in its defense. United Logistics violated multiple sections of the Shipping Act over a period of years. In addition, BOE has established an ability to pay up to \$30,000 per violation and BOE seeks a \$30,000 penalty for each of the 108 violations. Motion at 17-18. The lack of prior offences is a mitigating factor. Based on the knowing and willful violations of Section 10(a)(1) on 53 shipments and Section 10(b)(2)(A) on 55 shipments, a civil penalty of \$25,000 per shipment will be imposed for a total civil penalty of \$2,700,000.

2. OTI License and Tariff

The evidence demonstrates that United Logistics is presently holding out and continuing to operate as an NVOCC as evidenced by the fact that it maintains an active bond in the amount of \$75,000, that it is publishing a tariff holding out to provide NVOCC services, and by its receipt of a license to operate as an OTI pursuant to the requirements of the Shipping Act. Carley Statement ¶¶ 3, 5.

BOE contends that:

Due to the nature and extent of the violations in this case, it is appropriate for the presiding ALJ to revoke the OTI license of United Logistics. The Commission grants an OTI license to an applicant on the basis of, among other things, the continuing good character of the company and its qualifying individual. 46 C.F.R. § 515.11(a). Allowing United Logistics to maintain its current OTI license while continuing to commit violations of the Shipping Act would be misleading to the shipping public and potentially harmful to the Commission's standing as a regulator inasmuch as one of the qualifications for United Logistics' possession of the license is "necessary character to render ocean transportation intermediary services." *Id.* As long as United Logistics continues to disregard its responsibilities under the Shipping Act and commits the violations forming the basis of this proceeding, it does not have the requisite character to qualify for the Commission's endorsement of its activities via the OTI license. *See Stallion Cargo, Inc.*, 29 S.R.R. at 684. ("The ability to demonstrate the necessary character to obtain and possess a license is one that should not be taken lightly. Moreover, revoking Respondent's license sends a message to the shipping industry that such conduct will not be tolerated or casually dismissed. . . .").

Motion at 18-19.

BOE asserts that alternatively, Section 13(b)(1) of the Shipping Act permits the suspension of a common carrier's tariff for up to 12 months for violations of section 10(b)(2)(A), although, should Respondents' OTI license be revoked this issue would appear moot. Motion at 19.

The Commission has found on numerous occasions that revoking or suspending an OTI license and suspending a tariff should be limited to the most egregious circumstances, such as OTIs violating the Shipping Act or Commission regulations, committing other federal offenses, or materially misrepresenting information regarding their qualifications. *In re Ocean Transportation Intermediary License in the Name of Apparel Logistics, Inc.*, 30 S.R.R. 567, 570 (FMC 2004), citing *Stallion Cargo, Inc.*, 29 S.R.R. at 683-684; *AAA NordStar Line Inc.*, 29 S.R.R. 663, 663-664 (FMC 2002); *Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt and Mary Anne Merritt*, 29 S.R.R. 1408, 1414 (FMC 2003).

Given United Logistics' violations of the Shipping Act, as well as its failure to participate in these proceedings, revocation of its OTI license and suspension of its tariff are warranted.

3. Cease and Desist Order

BOE also requests that United Logistics be directed to cease and desist from violating sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act. As the evidence in this proceeding demonstrates, United Logistics has intentionally and repeatedly failed to comply with the aforementioned provisions of the Act. These circumstances warrant the issuance of a cease and desist order against United Logistics. *See Marcella Shipping Co., Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986) (explaining that a cease and desist order is justified if there is a likelihood that the offenses will continue).

BOE asserts that:

As an additional matter, if the ALJ revokes the OTI license of United Logistics, the ALJ should also direct United Logistics to cease and desist from violating sections 8(a) and 19 of the Shipping Act by operating as an unlicensed OTI in the United States. United Logistics continues to be an active corporation in California and, therefore, has the ability to continue operating even in the absence of a Commission-issued license. Carley Statement ¶ 33. Cease and desist orders are appropriate "when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity. . . . One reason to issue such an order is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order, if necessary." *Ever Freight Int'l Ltd.*, 28 S.R.R. at 336.

Motion at 19-20.

Orders to cease and desist have been issued in cases involving violations of the Shipping Act, failure to participate in the proceeding, and harm to the shipping public. *Stallion Cargo, Inc.*, 29 S.R.R. at 684; *see also Alex Parsinia dba Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997). Accordingly, a cease and desist order will be imposed.

III. ORDER

Upon consideration of the whole record, the conclusion that United Logistics knowingly and willfully violated sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act, 46 U.S.C. §§ 41102(a) and 41104(2)(A), and for the reasons stated above, it is hereby

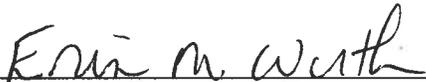
ORDERED that United Logistics be found in violation of sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act. It is

FURTHER ORDERED that United Logistics be ordered to pay civil penalties in the amount of \$2,700,000. It is

FURTHER ORDERED that United Logistics' license to operate as an Ocean Transportation Intermediary be revoked. It is

FURTHER ORDERED that United Logistics' tariff be suspended. It is

FURTHER ORDERED that United Logistics cease and desist from operating in the United States as an Ocean Transportation Intermediary.



Erin M. Wirth
Administrative Law Judge