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Before the
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMM

UNITED LOGISTICS (LAX) INC. - POSSIBLE VIOLATIONS OF SECTIONS 10(a)(1) AND 10(b)(2)(A) OF THE SHIPPING ACT OF 1984	)	Docket No. 13-01

BUREAU OF ENFORCEMENT
MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 69 of the Federal Maritime Commission's ("Commission") Rules of Practice and Procedure, 46 C.F.R. § 502.69, the Bureau of Enforcement ("BOE") files this Motion requesting:

1) The presiding ALJ to grant summary judgment against Respondent on basis that Respondent violated sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act of 1984;

2) The presiding ALJ to enter an order assessing a substantial civil penalty against Respondent;

3) The presiding ALJ to suspend Respondent's tariff pursuant to section 13 of the Shipping Act of 1984;

4) The presiding ALJ to suspend or revoke Respondent's Ocean Transportation Intermediary license pursuant to section 19 of the Shipping Act of 1984; and

5) The presiding ALJ to issue the appropriate order directing Respondent to cease and desist from violating the Shipping Act of 1984.

I. INTRODUCTION.

This proceeding was instituted by Order of Investigation (Order) served January 25, 2013. The Order 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.

The Order named United Logistics (LAX) Inc. as Respondent herein. The Commission's Bureau of Enforcement (BOE) was also named a party to the proceeding. The Order further required United Logistics to file an Answer to the Order's enumerated allegations within 25 days pursuant to the Commission's regulations at 46 C.F.R. § 502.63(c).

United Logistics has not entered an appearance either directly or through counsel. United Logistics is in default of its duty to timely submit an Answer to the allegations in the Commission's Order.[1]

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[1] Service of the Commission's Order was effectuated via United Parcel Service (UPS) upon United Logistics by the Commission's Office of the Secretary and is evidenced by the Verified Statement of Karen V. Gregory, attached as Exhibit 1 herein.

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." This 30-day time period expired on March 18, 2013. A copy of the Requests for Admissions is attached to this Motion as Exhibit 2. Inasmuch as United Logistics failed to respond to the Requests for Admissions, all such matters are deemed conclusively established. See 46 C.F.R. § 502.207 and Fed. R. Civ. P. 36(a). See also Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 81 n.3 (ALJ 1998) ("A party who fails to respond to a request for admission is held to have admitted the fact even if the request was objectionable or the party had valid reason for not answering. . . .").

On April 3, 2013, the presiding ALJ issued a Notice of Default and Order to Show Cause granting United Logistics additional time to respond to the proceeding and 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. Given the fact that no response has been forthcoming, United Logistics is likewise in default of the ALJ's April 3 Order.

The ALJ's Order of April 3 invited BOE to file a motion seeking a decision on default. Such decision would ordinarily be entered solely on the allegations contained in the Order of Investigation. See 46 C.F.R. § 502.65. See also Shipco Transport Inc v. Jem Logistics Inc., Docket No. 12-06, slip op. at 8-9 (ALJ March 26, 2013) ("It is customary for the Commission as well as courts to find that a defaulting respondent has admitted the well-pleaded allegations both as to the specific violations

of law alleged and as to the specific money damages alleged.")

Because United Logistics has defaulted, the finder of fact accepts as true all well-pleaded facts in the order. See 10A Wright & Miller § 2688, pp. 58-61; Finkel v. Romanowicz, 577 F.3d 79, 83-84 (2d Cir. 2009); Au Bon Pain Corp. v. Artect Inc, 653 F.2d 61, 65 (2d Cir. 1981). Under default procedure, however, issues not addressed in the Order, e.g., the amount of civil penalties or other penalty considerations required to be addressed under section 13 of the Shipping Act, would not be reached. See e.g., United States v. Inner Beauty Intl (USA) Ltd, 2011 WL 6009239 *2 (CIT, Dec. 2, 2011) ("If the well-pled facts in the complaint, taken as true, establish Inner Beauty's liability for a civil penalty, it is left to the court to decide, de novo, the amount of the civil penalty to be awarded.")

In light of Respondent's failure to respond to the ALJ's Notice of Default and Order to Show Cause, BOE seeks an opportunity also to submit other relevant evidence, in the form of Requests for Admission, shipping records and direct testimony supporting findings of violations and the basis for any relief awarded. See Transatlantic Marine Claims Agency Inc v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997) (stating that, on default, court need not hold a hearing but "should take the necessary steps to establish damages with reasonable certainty.") BOE respectfully contends that the instant 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. See also 46 C.F.R. § 502.1 (Commission rules should be construed to "secure the just, speedy and inexpensive determination of every proceeding.")

II. SUMMARY JUDGMENT IS APPROPRIATE AND TIMELY.

In the wake of a trio of Supreme Court decisions, Anderson v. Liberty Lobby, 477 U.S. 242 (1986), Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Matsushita Elect. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Federal courts and the Commission have adopted a more favorable approach to summary judgment practice. See e.g., Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989); and Rose Int'l. Inc. v. Overseas Moving Network Intl., 27 S.R.R. 1182, 1190, 1197 (ALJ 1997), citing Steven Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 194 ("The recent Supreme Court decisions likely require that summary judgment be more readily granted, and at least they encourage it in certain circumstances.") As summarized by the Court in Celotex:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions of 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).

477 U.S. at 327.

Although summary judgment procedure is no longer novel to the Commission's administrative process, it only recently gained official recognition in the Commission's revised Rules of Practice and Procedure which now provide for "motion for summary decision or partial summary decision" as a form of dispositive motion pursuant to Rule 69(g), with specific procedures for such a motion outlined in Rule 70. See 46 C.F.R. §§ 502.69(g), 502.70. In discussing the importance of determining whether genuine issues of material fact exist that would preclude summary judgment,

the Commission has stated that "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., *et al.* – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008) (citations omitted). It is within these parameters that motions for summary judgment are considered before the Commission "so as to ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible." Id.

BOE submits that, in the absence of any challenge as to genuine issues of material fact, the grant of summary judgment against the Respondent is both timely and appropriate. The issues of fact relevant to Respondent's violations of the Shipping Act are reflected in Exhibit 3 containing the Verified Statement of Michael F. Carley (Carley Statement), the Commission's Director of Field Investigations (DFI). The facts also must be deemed uncontested by reason of Respondent's failure to respond to well-pleaded allegations in the Commission's Order of Investigation, and further buttressed by numerous admissions of fact "conclusively established" as to the Respondent under 46 C.F.R. § 502.207(b), as well as Respondent's recent failure to respond to the ALJ's Order of April 3, 2013. If unopposed by Respondent, granting this motion will eliminate the need for additional submissions of evidence and briefs.

A. United Logistics violated Section 10(a)(1) of the Shipping Act.

Section 10(a)(1) of the Shipping Act, 46 U.S.C. § 41102(a), prohibits a person from "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 for property at less than the rates or charges that would otherwise be applicable." The standard of proof in an administrative proceeding is to demonstrate "by a preponderance of the evidence that something in fact occurred." Portman Square Ltd., 28 S.R.R. at 84.

The uncontested facts reflect that United Logistics is a licensed ocean transportation intermediary (OTI) operating as a non-vessel-operating common carrier (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.

At various times between March 2009 and April 2011, United Logistics obtained ocean transportation from Kawasaki Kisen Kaisha (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 no. 16033 between K Line and Zhejiang Peace Industry and Trading Co., Ltd. (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 the fact that the shipped cargo belongs to United Logistics and its shipper customers rather than Zhejiang Peace, the lawful contact 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 no. 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 investigation by DFI Carley revealed 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 no. 41979 between K Line and ATE Logistics Co., Ltd. (ATE Logistics), an unrelated OTI/NVOCC. Carley Statement ¶ 17; United Logistics Requests for Admissions ¶ 15. As with the Zhejiang Peace contract, 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 no. 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 no. 41979 rather than its tariff, United Logistics received a substantial freight benefit. Carley Statement ¶ 22; United Logistics Requests for Admissions ¶ 18.

The evidence amply demonstrates that United Logistics committed the 53 aforementioned violations of section 10(a)(1) of the Shipping Act in a knowing and willful manner. The documentation forming the basis of DFI Carley's Verified Statement originated from the files of United Logistics. The NVOCC bills of lading, *inter alia*, for each shipment were issued in the name of United Logistics. Carley Statement ¶ 11. Given the fact that United Logistics' agents in the PRC originated these 53 shipments on behalf of United Logistics, and United Logistics clearly received copies of the K Line bills of lading in all instances, 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. United Logistics benefitted directly from the consequences of accessing service contract nos. 16033

and 41979 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. Based on these uncontested facts, the presiding ALJ should determine as a matter of law that, on 53 occasions, United Logistics knowingly and willfully obtained ocean transportation for property at less than the applicable rates though 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.

B. United Logistics violated Section 10(b)(2)(A) of the Shipping Act.

Section 10(b)(2)(A) of the Shipping Act, 46 U.S.C. § 41104(2)(A), prohibits a common carrier from providing transportation in the liner trade that is not in accordance with the rates and charges set forth in its published tariff. Since the Supreme Court handed down its decision in Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), the rates filed by common carriers in their tariffs have constituted the only lawful rates a common carrier can charge its customers. Congress followed the Maxwell principle when enacting both the Shipping Act of 1916 and the Shipping Act of 1984, and the Commission has remained constant in enforcing this principle.[2]

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[2] See F&D Loadline Corporation, 27 S.R.R.764 (ALJ 1996); Trans Ocean-Pacific Forwarding Inc., 27 S.R.R. 409, 412 (ALJ 1996); Marcella Shipping Co. Ltd., 23 S.R.R. 857, 862 (ALJ 1986); Cari-Cargo Int'l, Inc., 23 S.R.R. 1007, 1016 (ALJ 1986); Comm-Sino Ltd., 27 S.R.R. 1201 (ALJ 1997); Ever Freight International Ltd., 28 S.R.R. 329 (ALJ 1998); Best Freight International Ltd., 28 S.R.R. 447 (ALJ 1998).

For nearly 4 years, from August 1, 2005, when the tariff of United Logistics became effective through July 7, 2009, 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. 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 instances, 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 significantly 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 4 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 an overcharge to its customers in the amount of $12,850. Carley

Statement ¶ 29; United Logistics Requests for Admissions ¶¶ 45-50.[3]

Section 10(b)(2)(A) of the Shipping Act establishes a strict adherence standard. A violation occurs when any rate other than the rate filed in the carrier's tariff is charged, collected, demanded or received. Marcella Shipping Co. Ltd., 23 S.R.R. at 862. Based on BOE's Motion, DFI Carley's Verified Statement and the attached documents, the presiding ALJ should find that on 55 occasions, United Logistics deviated from its tariff in violation of section 10(b)(2)(A) of the Shipping Act. Inasmuch as United Logistics had specific notice of the requirements of section 10(b)(2)(A), the subsequent conduct of United Logistics violating the Shipping Act with regard to the 55 shipments that occurred following that date should be found to constitute knowing and willful violations. United Logistics Requests for Admissions ¶ 33, 43, 51, 66.

C. A Civil Penalty Should be Assessed Against United Logistics.

Pursuant to Section 13 of the Shipping Act, 46 U.S.C. § 41107(a), a party is subject to a civil penalty of not more than $30,000[4] for each violation knowingly and willfully committed. Each day of a continuing violation constitutes a separate offense.

Section 13(c) of the Shipping Act, 46 U.S.C. § 41109, requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other

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[3] 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.

[4] This amount reflects an adjustment for inflation pursuant to the Commission's regulations at 46 C.F.R. Part 506. For shipments that occurred after July 31, 2009, the maximum penalty amount is $40,000 for each knowing and willful violation.

matters as justice may require. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. Merritt v. United States, 960 F.2d 15, 17 (2nd Cir. 1992). "In determining a civil penalty, the ability to pay is only one of several factors set forth in the statute and care must be taken not to over-emphasize its importance to the detriment of the other factors, particularly to the detriment of the main Congressional purpose of deterring violations." Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665, 681 (FMC 2001).

In the absence of a specific mathematical formula, there is no right answer to the question of the amount of civil penalty that is justified with respect to a particular Respondent. In fact, as previously explained by the Commission, "the fixing of a particular amount of civil penalty is a most difficult thing to do. The Commission must consider and weigh numerous factors set forth in section 13(a) of the 1984 Act and then quantify them into a precise number. The process is not scientifically accurate and involves judgment that is subject to criticism and second guessing. . . . Nevertheless, the finding is committed to the sound discretion of the agency and must be made." Alex Parsinia *dba* Pacific International Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (ALJ 1997).

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 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.

The Commission's policies for deterrence and future compliance with the Shipping Act and the regulations are important factors which must be considered contemporaneously with the other factors in determining the appropriate amount of civil penalties. 46 C.F.R. § 502.603(b). Specifically, in enacting the Shipping Act, "Congress intended to increase the deterrent effect of penalties for violations" so that they are not merely written off by companies as a cost of doing business. Stallion Cargo Inc., 29 S.R.R. at 681. See also Pacific Champion Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1185, 1191 (ALJ 1999). ("[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress' efforts to augment the Commission's authority to assess penalties so as to deter future violations.") In this case, the deterrent effect on other OTIs who might be inclined to violate the Shipping Act by accessing their competitors' or proprietary shippers' service contracts while, at the same time, failing to publish and adhere to the rates in their own tariffs justify the assessment of a substantial civil penalty.

Moreover, a significant penalty sends a message to the shipping industry that enforcement action cannot be avoided simply by a Respondent's refusal to participate in a formal proceeding. As was appropriately noted in Refrigerated Container Carriers Pty Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 799, 805 (ALJ 1999), "[s]hould the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed 'compromise' discussions because no

significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings." Id.

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. United Logistics has no known history of prior offenses. However, this factor should not be viewed in isolation given the fact that, as noted above, the 53 shipments at issue are representative of a universe of at least 100 shipments wherein United Logistics accessed the service contracts of third parties from 2009 through 2011. Furthermore, United Logistics had a shell tariff consisting of only a Cargo, N.O.S. rate for 4 years while it was actively doing business in the trade between the U.S. and the PRC. Therefore, there is significant likelihood that the 55 NVOCC shipments comprising the evidentiary record in this proceeding do not form the entire universe of United Logistics' operation since 2005.

This approach is not novel to the discussion of a Respondent's history of prior offenses. In a previous matter, the ALJ recognized that an absence of a history of prior offenses only means "that there is no history of any formal Commission proceeding regarding" a Respondent or its principals. Pacific Champion Express Co., Ltd., 28 S.R.R. at 1192. The Commission, however, is allowed "to draw reasonable inferences from the evidence and reach conclusions in the absence of a 'smoking gun'." Id. See also Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397, 1404 n.11 (FMC 2000) ("The ALJ correctly found, in addition to violations of section 10(b)(1) on 35 shipments in 1997 and 1998, a 'history of prior offenses' dating back to 1993, when Respondent first filed its tariff.")

As for ability to pay, 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. There is no countervailing evidence contradicting that which has been admitted. Moreover, United Logistics maintains a $75,000 bond with the Commission. Carley Statement ¶ 5. Section 19(b)(2)(A) of the Shipping Act provides that bonds shall be available to pay, among other things, "any penalty assessed pursuant to section 13 of this Act." Consequently, should United Logistics fail to pay an assessment, the Commission will be able to seek recovery of any deficit from United Logistics' bond.

Statutory maximums have been assessed in previous cases where a Respondent had defaulted and neither evidence of ability to pay nor mitigation had been presented. See Ever-Freight Int'l Ltd., 28 S.R.R. at 335 ("When, as in the instant case, BOE has attempted to elicit the relevant evidence but has been rebuffed, penalties including the maximum allowed by law, have been assessed."); see also Portman Square Ltd., 28 S.R.R. at 86; Comm-Sino Ltd. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 27 S.R.R. 1201 (ALJ 1997); Refrigerated Container Carriers PTY Ltd., 28 S.R.R. at 805-806 ("[A]ll that is required is that BOE make reasonable efforts to obtain evidence on the question, that respondents likewise make some good faith efforts themselves to explain their financial situations, and that the Commission consider all the evidence on the question."). Respondent's refusal to participate in this proceeding has resulted in its failure to meet its ultimate "burden of persuasion" in justifying a reduction of the applicable civil penalties. Merritt v. United States, 960 F.2d at 18. Respondent has not provided any evidence in this proceeding of mitigating factors to be considered in assessing a civil penalty for proven violations. Consideration of all the factors listed in section 13 of the 1984 Act, warrants imposition

of a substantial civil penalty. Each proven violation was committed knowingly and willfully. BOE submits that in order to properly reflect the intent of Congress for violations committed knowingly and willfully, an appropriate penalty must be no less than $6,001 and no greater than $30,000 per violation for these violations.

D. Other relief against United Logistics is warranted.

The Order in this proceeding directed that a determination by made as to whether United Logistics' tariff should be suspended, whether the OTI license of United Logistics should be suspended or revoked, and whether a cease and desist order should be issued. 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 through Paramount 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.

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. . . .")

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). Should Respondent's OTI license be revoked, this issue would appear moot. Otherwise, such suspension is warranted given Respondent's blatant disregard for the rates in its tariff since its publication in 2005 as evidenced by the 55 aforementioned shipments.

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. United Logistics' violations with respect to its tariff in all likelihood, are ongoing especially given the fact that United Logistics has failed to update its tariff with any new rates since July 10, 2009. Carley Statement ¶ 32; United Logistics Requests for Admissions ¶¶ 53, 54. These circumstances warrant the issuance of a cease and desist order against United Logistics. See Marcella Shipping Co., Ltd., 23 S.R.R. at 857 (explaining that a cease and desist order is justified if there is a likelihood that the offenses will continue).

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.

Orders to cease and desist have been issued in cases involving similar concerns present here such as respondent's blatant disregard for the Shipping Act, failure to participate in the proceeding, and harm to the shipping public. In Stallion Cargo, Inc., upon revoking respondent's OTI license on the basis of numerous sections 10(a)(1) and 10(b)(1) violations, the Commission modified the ALJ's cease and desist order to preclude Respondent from operating as an OTI. 29 S.R.R. at 684. See also Alex Parsinia *dba* Pacific Int'l Shipping and Cargo Express, 27 S.R.R. at 1342 ("The record shows that for three years respondent disregarded the 1984 Act, harmed shippers, failed to take the instant proceeding seriously, and formed companies under new names controlled by himself to conceal his responsibility. Consequently, there is sufficient reason and basis to protect the shipping public further even though respondent has ceased his transportation businesses."). In addition to protecting the shipping public, a cease and desist order with respect to the Respondent in this proceeding would enable the Commission to pursue further relief should United Logistics engage in future unlawful operations.

III. CONCLUSION.

The Bureau of Enforcement respectfully requests the ALJ to (1) grant summary judgment finding Respondent to be in violation of sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act, (2) assess appropriate civil penalties against Respondent, (3) revoke Respondent's OTI license pursuant to section 19 of the Shipping Act, (4) suspend Respondent's tariff pursuant to section 13 of the Shipping Act, and (5) issue an appropriate order requiring Respondent to cease and desist from violating the Shipping Act.

Respectfully submitted,

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May 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this date, via first class mail, upon the parties of record.

Julie L. Berestov

5/17/13
Date