

( **FEDERAL MARITIME COMMISSION** )  
( **SERVED SEPTEMBER 24, 1996** )  
( **EXCEPTIONS DUE 10-16-96** )  
( **REPLIES TO EXCEPTIONS DUE 11-7-96** )

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 96-11**

**HAEWOO AIR & SHIPPING CO., LTD.  
d/b/a HAEWOO SHIPPING CO., LTD.  
POSSIBLE VIOLATIONS OF SECTION 10(b)(1)  
OF THE SHIPPING ACT OF 1984**

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Respondent Haewoo Air & Shipping Co., Ltd. found to have violated section 10(b)(1) of the 1984 Shipping Act by charging rates other than those specified in its tariff on 25 occasions between May 1994 and January 1995. Respondent's tariff and surety bond have been cancelled and it has ceased operations. Its only known assets are its \$50,000 bond. Accordingly, a penalty in that amount is assessed.

*Vern W. Hill* and *Joseph B. Slunt* for the Bureau of Enforcement.  
No appearance for respondent.

**INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE**

This is another case involving a foreign-based non-vessel-operating common carrier (NVOCC) which has ignored its filed tariff and has charged rates other than those filed in

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<sup>1</sup>This 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 CFR 502.227).

those tariffs, in violation of law. In recent months the Commission has initiated formal investigations in comparable situations.<sup>2</sup>

This instant case was begun by the Commission's Order of Investigation, served May 20, 1996. The Commission named an NVOCC, located in Korea, known as Haewoo Air & Shipping Co., Ltd., doing business as Haewoo Shipping Co., Ltd. (Haewoo) as respondent. The Order notified Haewoo that it appeared that Haewoo had violated law by not charging the rates specified in its filed tariff on at least 36 occasions between June 1994 and January 1995. The Commission instituted the proceeding to determine whether Haewoo had in fact committed the violations and, if so, what action should be taken, including possible suspension of Haewoo's tariff, a cease and desist order, and assessment of penalties. More specifically, the Commission framed the issues as follows:

1. Whether Haewoo violated section 10(b)(1) of the 1984 Act by charging, demanding, collecting, or receiving greater, lesser, 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;

2. Whether, in the event Haewoo violated the 1984 Act, civil penalties should be assessed against Haewoo and, if so, the amount of such penalties;

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<sup>2</sup>Three recent formal proceedings of this type involving NVOCCs were: Docket No. 96-10, *Seair Cargo Agency, Inc.*, Initial Decision, served September 20, 1996; Docket No. 96-03, *F&D Loadline Corporation*, Initial Decision, served May 28, 1996, F.M.C. notices of finality, June 28, 1996, 27 SRR \_\_\_\_; and *Trans Ocean-Pacific Forwarding, Inc. (TOP)*, 27 SRR 409 (I.D., F.M.C. notices of finality, June 28, 1996). In *TOP*, because of the particularly deceptive, non-cooperative and willful behavior of respondent, a maximum penalty under law of over \$1 million was found warranted. However, because respondent TOP lacked assets in the United States, the amount over the \$50,000 which was available under TOP's bond was suspended.

3. Whether, in the event violations are found, an appropriate cease and desist order should be issued; and

4. Whether, in the event violations are found, Haewoo's tariff should be suspended for a period of time not to exceed 12 months.

By a series of rulings following service of the Commission's Order of Investigation, a procedure was established to permit the Commission's bureau of Enforcement (BOE) to submit its evidentiary case and arguments in its legal brief and to allow respondent Haewoo to participate in the proceeding by tendering its evidence and arguments in its defense. However, respondent has declined to participate in the proceeding. Accordingly, this decision is based upon the evidence and arguments submitted by BOE. This evidence consists of affidavits of Mr. Norman W. Littlejohn, the Commission's Deputy Director of BOE, and of Mr. Ernest Estes, an expert tariff specialist with the Commission's Office of Tariffs, together with various shipping documents pertaining to 25 shipments handled by Haewoo between May 1994 and January 1995, obtained from Haewoo's California agent. This type of evidence, which Haewoo has declined to oppose, has been used in previous cases of this type, as cited above, and is reliable and probative under applicable law. See Administrative Procedure Act, 5 U.S.C. sec. 556(d); 46 CFR 501.154; *Unapproved Sect. 15 Agreements--S. African Trade*, 7 F.M.C. 159, 169, 182 (1962). The evidence supports the following findings of fact, which were proposed by BOE.

#### **FINDINGS OF FACT**

1. Haewoo had an NVOCC bond and tariff on file at the Commission.

2. Haewoo's Automated Tariff Filing and Information System ("ATFI") tariff was effective September 4, 1993.

3. Initially, Haewoo's ATFI tariff contained only Cargo, N.O.S. rates. A rate for Album & Luggage Raw Material (including manila paper, bopp film, book cover, vinyl paper, PVC ring) was added effective September 23, 1993.

4. Additional commodity rates were filed in Haewoo's tariff effective February 3, 1995.

5. From May 20, 1994 to January 19, 1995, Haewoo accepted for transportation at least 25 shipments of 17 different commodities: soup mugs, circuit boards, taekwondo shoes, leather mitts, karate uniforms, ladies sweaters, vinyl paper, bopp film, cameras, quad sets, CCD products, shawls, book covers, vinyl paper, PVC rings, leaflets, and counter mats.

6. Haewoo's ATFI tariff, bills of lading, and arrival notices/invoices for shipments from May 20, 1994 to January 19, 1995, were analyzed by Mr. Estes, a Commission transportation specialist. Mr. Estes computed Haewoo's applicable ocean freight charge for each bill of lading, in accordance with the rates set forth in Haewoo's tariff, by using the measurements stated on Haewoo bills of lading.

7. Mr. Estes compared the applicable tariff charge to the freight amount actually charged by Haewoo.

8. Mr. Estes found that 25 Haewoo shipments had been charged freight rates lower than the rates published in Haewoo's tariff. Each of the shipments is identified in a table prepared by Mr. Estes which shows the commodity shipped, the tariff rate, the rate charged, and the amount of the undercharge.

9. The total amount of undercharges in connection with the 25 Haewoo bills of lading totals \$114,183.55.

10. Haewoo's tariff was canceled March 10, 1996, for failure to maintain an NVOCC bond.

11. The following table, compiled by Mr. Estes, shows detailed information pertaining to the subject 25 shipments:

EX NO.	B/L NO.	COMMODITY	TARIFF RATE	FREIGHT CHARGED	UNDER-CHARGE
1	HS9405021	SOUP MUGS	\$25,840.00	\$3,625.00	\$22,215.00
2	HS9405087	CIRCUIT BOARDS	500.00	75.00	425.00
3	HS9407003	TAEKWONDO SHOES & LEATHER MITTS	3,060.00	947.75	2,112.25
4	HS9407153	KARATE UNIFORMS	1,930.00	328.10	1,601.90
5	HS9408165	LADIES SWEATERS	10,150.00	1,450.00	8,700.00
6	HS9408166	LADIES SWEATERS	47,365.00	4,200.00	43,165.00
7	HS9409085	VINYL PAPER	1,950.00	1,350.00	600.00
8	HS9409125	BOPP FILM	1,950.00	1,800.00	150.00
9	HS9410050	CAMERAS	2,975.00	476.00	2,499.00
10	HS9410077	CALENDARS	6,850.00	1,500.00	5,350.00
11	HS9410079	CAMERAS	6,340.00	1,138.40	5,201.60
12	HS9410081	QUAD SETS	10,000.00	3,150.00	6,850.00
13	HS9410161	CCD PRODUCTS	3,945.00	631.20	3,313.80
14	HS9410162	CCD PRODUCTS	3,110.00	497.60	2,612.40
15	HS9411003	SHAWLS	3,195.00	511.20	2,683.80
16	HS9411011	BOOK COVERS	1,950.00	1,800.00	150.00
17	HS9411024	BOPP FILM	1,950.00	1,800.00	150.00
18	HS9411045	BOOK COVERS	1,950.00	1,800.00	150.00
19	HS9411176	VINYL PAPER & PVC RINGS	1,950.00	1,800.00	150.00
20	HS9411177	BOOK COVERS	1,950.00	1,800.00	150.00
21	HS9501001	CCD PRODUCTS	4,164.00	611.20	3,552.80
22	HS9501002	CCD PRODUCTS	1,425.00	284.00	1,141.00
23	HS9501003	LEAFLETS	500.00	80.00	420.00
24	HS9501043	CAMERAS	500.00	80.00	420.00
25	HS9501045	BROCHURES & COUNTERMATS	500.00	80.00	420.00
TOTALS			\$145,999.00	\$31,815.45	\$114,183.55

## DISCUSSION AND CONCLUSIONS

Section 10(b)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(b)(1)) states that:

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 . . . .

It has been firmly established that an NVOCC is a carrier that is subject to section 10(b)(1) of the Act. See Docket No. 96-03, *F&D Loadline*, cited above, slip opinion at 9, and *TOP*, cited therein. As also discussed in *F&D Loadline*, the Commission has consistently enforced strict adherence to tariffs under the so-called "filed-rate" doctrine, which was enunciated by the Supreme Court as long ago as 1915. Under this doctrine even a carrier's good intentions do not excuse deviations from filed tariffs, although such intentions may mitigate penalties. *Id.* at 9-10. Moreover, the Commission has emphasized the importance of tariff enforcement in order to prevent discrimination. (*Id.* at 10.) Indeed, in this regard the Commission has stated (*Id.*):

The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates.

As was the case in *F&D Loadline*, cited above, there is no question but that the record developed by BOE and the Commission's investigators shows that Haewoo deviated

from its tariff by charging lower, unfiled rates on 25 shipments it handled between May 1994 and January 1995. (See the table in para. 11 of the findings of fact shown above.) As shown by the table, the aggregate amount of the undercharges for these shipments was \$114,183.55. Whether Haewoo's shipping customers were pleased with these illegal discounts is not relevant to the question whether Haewoo violated law nor to the question of what penalties should be assessed. See *F&D Loadline*, cited above at 10. Therefore, the answer to the first question posed by the Commission, namely, did respondent Haewoo violate section 10(b)(1) of the 1984 Act by transporting shipments at rates other than those filed in its tariff is clearly affirmative.

The answers to issues Nos. 3 and 4 posed by the Commission are also rather clear. These issues concerned the question whether a cease and desist order should be issued against Haewoo and whether Haewoo's tariff should be suspended because of the violations. BOE does not recommend either action because Haewoo's tariff has been canceled following cancellation of its bond. There is also no evidence that Haewoo will continue operations in the United States. Under these circumstances neither order would be warranted. See *F&D Loadline*, cited above, at 11; *Marcella Shipping Co., Ltd.*, 23 SRR 857, 871-872 (I.D., F.M.C. notice of finality, March 26, 1986); *Interstate Commerce Commission v. B & T Transportation Co.*, 613 F.2d 1182, 1184 (1st Cir. 1980) (court properly denied injunctive relief when no reasonable expectation the violations would recur; orders should be molded to the necessities of the particular case).

The remaining issue is No. 2, the question whether penalties should be assessed against Haewoo, and if so, in what amount. As BOE points out, the governing law

concerning assessment of penalties, section 13(c) of the 1984 Act, requires the Commission to take into account various factors when fixing the amount of penalties, including "such other matters as justice may require." Specifically, section 13(c) (46 U.S.C. app. sec. 1712(c)) provides as follows:

**ASSESSMENT PROCEDURE.--[T]he Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation 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.**

BOE argues that considering the nature of Haewoo's unlawful activities, the surrounding circumstances, the extent and gravity of the violations, etc., as the law requires, a penalty should be assessed against Haewoo. I agree. As the record shows, and BOE contends, initially Haewoo filed only a Cargo, N.O.S. rate in its tariff, but later added a specific commodity rate for Album & Luggage Raw Material. However, between May 1994 and January 1995, Haewoo accepted for transportation 25 shipments of 27 different commodities, some of which would have taken the specific commodity rate, the others, the Cargo, N.O.S. rates. However, Haewoo failed to charge any of the 25 shipments the filed, applicable rate. Haewoo thus completely disregarded its obligations under the 1984 Act.

As in previous cases of this type, when respondent NVOCCs have no assets in the United States, it is not necessary to linger over the question whether the penalty should be assessed at the maximum levels permitted by law (either \$125,000 or \$625,000, depending

on whether the violations were committed "knowingly and wilfully").<sup>3</sup> That is because, as BOE notes, the law mandates that Haewoo's surety bond, which had been in effect during the time of the violations, will be available to satisfy any penalties assessed under the 1984 Act. See section 23(b) of the 1984 Act, 46 U.S.C. sec. 1721(b); *TOP*, cited above, 27 SRR at 413, 414, notes 10 and 11. Indeed, the surety bond which Haewoo had filed contains language recognizing that the bond is attachable for payment of civil penalties. See BOE's Opening Brief at 6, with record reference. As in previous cases of this type, therefore, such as *F&D Loadline*, and the others cited above, the only basis in the record for fixing the amount of penalty is the \$50,000 available under Haewoo's surety bond. It is therefore ordered that Haewoo pay a penalty in that amount.



Norman D. Kline  
Administrative Law Judge

Washington, D.C.  
September 24, 1996

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<sup>3</sup>As provided by section 13(a) of the Act, the maximum penalty that could normally be assessed against Haewoo on account of its 25 separate violations would be \$125,000 (25 times \$5,000 for each violation). If the violations were found to have been committed "knowingly and wilfully," the maximum penalty could be \$625,000 (25 times \$25,000). See section 13(a), 46 U.S.C. app. sec. 1712(a).