

(**FEDERAL MARITIME COMMISSION**)
(**SERVED DECEMBER 12, 1995**)
(**EXCEPTIONS DUE 1-3-96**)
(**REPLIES TO EXCEPTIONS DUE 1-25-96**)

FEDERAL MARITIME COMMISSION

DOCKET NO. 94-11

**TRANS OCEAN-PACIFIC FORWARDING, INC.
POSSIBLE VIOLATIONS OF SECTION 10(b)(1)
OF THE SHIPPING ACT OF 1984**

Respondent NVOCC found to have knowingly and wilfully violated 46 U.S.C. app. § 1709(b)(1) by transporting at least 58 shipments generally at rates other than those filed in its tariff from April 21, 1991 to October 26, 1991. Show cause order issued as to why a civil penalty of \$1,450,000 should not be imposed pursuant to 46 U.S.C. app. § 1712(a) with all but \$50,000 suspended because the only known asset of the respondent NVOCC is a bond of that amount.

Vern W. Hill and *Carolyn Hill Grigg* for the Bureau of Enforcement.
No appearance for Respondent.

**INITIAL DECISION¹ OF FREDERICK M. DOLAN, JR.,
ADMINISTRATIVE LAW JUDGE**

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

INTRODUCTION

Trans Ocean-Pacific Forwarding, Inc. ("TOP" or "respondent") is a non-vessel operating common carrier ("NVOCC") which had a tariff on file at the Federal Maritime Commission ("Commission"). TOP transported property between United States Atlantic and Pacific Coast ports and ports in the Far East, Southeast and Southwest Asia, Europe, the Mediterranean, Australia, New Zealand and Oceania. Section 10(b)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1709(b)(1), provides that no common carrier may "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 that are shown in its tariffs or service contracts."

The Order of Investigation ("Order"), served June 9, 1994, instituting this proceeding, was issued pursuant to sections 10, 11, and 13 of the 1984 Act, 46 U.S.C. app. §§ 1709, 1710 and 1712, to determine whether TOP violated section 10(b)(1) of the 1984 Act by transporting shipments at rates less than the applicable rates filed in its tariff from September 30, 1990, to the present. The Order directed that the following specific issues be determined:

1. Whether TOP violated section 10(b)(1) of the 1984 Act by transporting shipments in connection with which it charged rates less than those filed in its tariff; and
2. Whether, in the event TOP violated section 10(b)(1) of the 1984 Act, civil penalties should be assessed against TOP and, if so, the amount of such penalties; whether a cease and desist order should be issued, or whether TOP's tariff should be suspended.

The Order named TOP as respondent and named the Commission's Bureau of Hearing Counsel (now BOE)² as a party to the proceeding.

BOE has now submitted affidavits from six witnesses which, when combined with the tariffs and service contracts cited in the simultaneously submitted opening brief of BOE, constitute the evidence supporting its case-in-chief against TOP. The affidavits relate to copies of 58 TOP bills of lading, the rates charged, the applicable rates and other relevant facts and circumstances. BOE alleges that its evidence establishes that TOP knowingly and willfully violated section 10(b)(1) of the 1984 Act in at least 58 instances from April 21, 1991, to October 26, 1991, by charging rates less than its Cargo N.O.S. (Not Otherwise Specified) rate of \$500 W/M (per weight or measure, whichever yields the greater revenue), in TOP tariff FMC No. 1. This allegedly resulted in total charges of about \$447,000 less than required by TOP's tariff. BOE avers that during the investigation by BOE prior to the institution of this proceeding a representative of TOP stated that he knew he should charge the tariff rate but made a business decision not to do so. BOE points out that TOP's sales of ocean freight transportation grew from about \$15 million for the year ending June 30, 1990, to about \$28 million for the year ended June 30, 1993. (The record contains no audited profit and loss or any other audited financial statement of TOP.)

BOE states that TOP has stopped doing business, cannot be located, and issuance of a cease and desist order against that entity is not required. BOE also states that TOP's tariff has been cancelled, and that no order suspending TOP's tariff is necessary. Thus, the only action sought by BOE at this time is the imposition of civil penalties. BOE notes that

²Effective October 20, 1995, the Bureaus of Hearing Counsel and Investigations were combined to form the Bureau of Enforcement ("BOE").

during the period when the alleged violations occurred from April 21, 1991, to October 26, 1991, a \$50,000 bond issued by Consolidated Surety Insurance Company, Inc., was in effect. BOE also emphasizes that section 13(a) of the 1984 Act, 46 U.S.C. app. § 1712(a), provides that in assessing civil penalties, persons who knowingly and willfully violate the statute may be assessed a penalty not to exceed "\$25,000 for each violation." BOE also alleges that its evidence would support findings with respect to the factors set forth in section 13(c) of the 1984 Act, 46 U.S.C. app. § 1712(c), required to be considered in assessing a civil penalty.

No appearance was entered for respondent. However, respondent has been notified of this investigation and given an opportunity for a hearing pursuant to 49 CFR § 583.5(b) by which the Secretary of the Commission accepted service of the Order instituting this investigation since TOP disappeared, *infra*.

The evidence, including the detailed findings of fact supporting the allegations of BOE adopted in the Appendix hereto, shows that TOP charged other than the applicable rate on at least 58 occasions. A typical shipment consisted of knitted piece goods and textile accessories from Singapore to San Francisco for which the applicable Cargo N.O.S. rate of \$500 per weight or measure, whichever is greater ("W/M") would result in total charges of \$12,400 for the shipment which measured 24.80 cubic meters metric ("CBM"). However, TOP charged a container rate of \$2750 but no such rate was contained in the tariff. The undercharges on that shipment are thus \$9,650. The undercharges per bill of lading range from \$25 to \$29,450 on the other bills of lading and the total undercharges are, as noted, about \$447,000. (One shipment was overcharged \$1,797.50 and no lawful rate was shown for a shipment from Malaysia.)

SUMMARY OF FACTS

The detailed findings of fact are contained in the Appendix hereto. TOP established itself as an NVOCC exporting cargo to the United States by filing a tariff with the Commission, effective August 21, 1988. It had an office in Taipei, Taiwan. (FF No. 1.) Between 1988 and July 19, 1994, TOP established U.S. offices in Oakland and Long Beach, CA, Seattle, WA, Chicago, IL, New York, NY, and Atlanta, GA. (FF No. 3.) In addition, entities of TOP's network had offices in Taichung and Kaohsiung, Taiwan, as well as Bangkok, Thailand; Seoul and Busan, Korea; Singapore; Penang, Malaysia; Jakarta, Indonesia; Rotterdam, Netherlands; Antwerp, Belgium; Sydney, Australia; and Hong Kong. (FF No. 2.)

All of the U.S. offices were controlled by Jeff Sun from Taiwan. (FF No. 5.) TOP's sales of ocean freight transportation grew from more than \$15 million for the fiscal year ending June 30, 1990, to about \$28 million by June 30, 1993. (FF Nos. 43, 44, and 45.)

On August 13, 1991, Investigator Michael Moneck of the Commission's San Francisco Regional Office met Eddie Ng ("Ng"), the manager of TOP's Oakland Office and a vice president of TOP, at which time Ng produced a list of 14 service contracts TOP had entered into with various vessel-operating ocean common carriers and carrier conferences. (FF Nos. 18, 19 and 21.) The service contracts revealed that a wide variety of rates were being charged by ocean common carriers or conferences to transport the same commodities between the same points or ports. Ng stated that the differences in the rates TOP was charging its shippers depended on which of the service contracts TOP used to obtain transportation from the ocean common carriers or conferences. (FF Nos. 20, 21, 22, 23, 24,

25, 26, 27 and 29.) When questioned further about whether the rates were filed in TOP's tariff, Ng acknowledged he knew that the lawful rate to be charged was the applicable rate filed in TOP's tariff. (FF No. 20.) NG indicated that TOP routinely charged rates other than those published in its tariff. Moneck asked to examine Ng's shipping files but was told that they were not available in San Francisco. (FF No. 27.)

Moneck obtained copies of 58 TOP bills of lading from the U.S. Customs Service in San Francisco, CA. These bills of lading reflect shipments moving from the Far East to the U.S. during the period April 21 through October 26, 1991. (FF Nos. 27 and 28.) On one shipment, the shipper was overcharged \$1,797.50 more than the charges applicable from the Cargo N.O.S. rate of \$500 W/M in TOP's tariff, FMC No. 1, and 13 shipments were undercharged a total of \$127,547.41 less than that resulting from the Cargo, N.O.S. rate of \$500 W/M. (FF No. 28 and Ex. No. 2.) No lawful rate existed for one bill of lading since the port of loading was not within the scope of TOP's tariff, FMC No. 1.³ (FF No. 29.) The remaining 42 shipments also were charged rates other than the Cargo N.O.S. rate of \$500 W/M. These shippers were undercharged \$318,075.03. The inapplicable charges on the 57 shipments total \$447,419.94. (FF Nos. 22-29.)

Thirty-one shipments at issue originated from Hong Kong prior to July 24, 1991. But no rates other than the \$500 W/M Cargo, N.O.S. rate were filed in TOP's tariff applicable to Hong Kong shipments until July 24, 1991. (FF Nos. 23, 24 and 25.) Moreover, for the

³The shipment originated from Penang, Malaysia. Since failure to charge the applicable rate in a carrier's tariff violates section 10(b)(1) *a priori* not to have any rate in the tariff applicable to the movement also violates section 10(b)(1). *Marsella Shipping Co., Ltd.*, 23 SRR 857 (1986), March 26, 1986.

10-month period September 30, 1990, through July 24, 1991, the only filing made to TOP's tariff was the addition of Rule No. 24, confirming that TOP had acquired a \$50,000 surety bond. (FF No. 24.) Thus, although TOP was selling millions of dollars worth of ocean transportation, it was not establishing rates applicable to the variety of cargo handled, but rather a single "paper" Cargo N.O.S. rate and concomitantly generally charging even lower unfiled rates contrary to its tariff. (FF Nos. 22, 23, 24, 25, 26, 43, 44 and 45.)

Bond documents filed by TOP indicate that two bonds were in effect for its account in 1991. The initial bond, No. 1042, issued by Consolidated Surety Insurance Company, Inc., Los Angeles, CA, went into effect as of February 14, 1991, and was canceled effective March 7, 1992. (FF No. 38.) TOP filed another bond, No. NVOC0345 issued by American Motorists Insurance Company, New York, NY, in the amount of \$50,000. (FF No. 39.) It was in effect from November 5, 1991, to June 30, 1994. (FF No. 39.)

After the Commission issued its Order on June 9, 1994, District Investigator Alvin N. Kellogg ("Kellogg") attempted to serve the Order on TOP at its office at 444 W. Ocean Blvd., Long Beach, CA, on June 14, 1994. (FF No. 30.) Finding the office locked, Kellogg went to the building property manager's office and learned that TOP had moved out of the building on the weekend of June 3, 1994. (FF No. 30.) Kellogg was told that no one from TOP had returned to the building since the space had been abandoned. (FF No. 30.) Pursuant to a Commission subpoena served on the building manager June 27, 1994, Kellogg and Senior Investigator Oliver Clark ("Clark"), also from the Commission's Los Angeles office, entered TOP's abandoned offices. (FF Nos. 31 and 32.) They found shipping

records, business records, canceled checks, faxes and other papers strewn over the office rooms, and approximately 150 boxes of documents. (FF No. 31.)

As noted, on June 29, 1994, the Secretary of the Commission accepted service of a copy of the Order in this proceeding as agent for TOP, pursuant to the Commission's rules and regulations, 46 CFR § 583.5(b).

Subsequently it was learned that TOP had changed its name to Modern Line Service, Inc. ("Modern Line") and moved to a new address. A subpoena, issued for Modern Line documents, was served November 1, 1994. (FF No. 36.) Robin Hwang, the Controller of Modern Line, accepted service, and told Kellogg to come back to her office three days later on November 4, 1994, and she would give him documents pursuant to the subpoena. (FF No. 36.) Kellogg returned on November 4 and discovered that Modern Line's offices also had been abandoned. All efforts to locate Modern Line have proved fruitless.

DISCUSSION

Section 10(b)(1) of the 1984 Act, 46 U.S.C. app. § 1709 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. . . .

Pursuant to sections 3(6) and 3(17) of the 1984 Act, 46 U.S.C. app. §§ 1702(3) and 1702(17), a non-vessel operating common carrier is subject to section 10(b)(1). *Cari-Cargo Int'l, Inc.*, 23 SRR 1007 (I.D. 1986) (Notice of Finality June 5, 1986).

Under the heading "PROHIBITED ACTS," section 10(b)(1) of the 1984 Act thus prohibits a non-vessel operating common carrier from charging, demanding, collecting or receiving greater, less, or different compensation for transportation of property than the rates published in the carrier's tariff. The doctrine of strict tariff adherence from which this provision emanates is well established in transportation law and predates enactment of the Shipping Acts. The Supreme Court enunciated this doctrine in *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), and Congress incorporated the filed rate doctrine into the 1984 Act.⁴ *Maxwell* held:

[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Similarly, the Federal Maritime Commission has not deviated from this standard in implementing the 1984 Act.⁵

⁴Section 8 of the 1984 Act, 46 U.S.C. app. § 1707.

⁵See *Marcella Shipping Co., Ltd.*, 23 SRR 857, 862 (1986) (quoting *Maxwell* and noting that the Commission consistently followed the *Maxwell* principles when applying the Shipping Acts; *Cari-Cargo Int'l, Inc.*, *supra*, (quoting from *Ghiselli Bros. v. Micronesia Intercocean Line, Inc.*, 13 F.M.C. 179, 181-182 (1968) ("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."), and *Martyn Merritt, Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 25 SRR 1295 (I.D. 1990, adopted in part and rev'd in part, ___ F.M.C. ___, 27 SRR 142 (1995)) (quoting from *Kraft Foods*, 17 F.M.C. 320, 323 (1974), "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the carrier's filed tariff." (Citations omitted.))

Section 10(b)(1) establishes a strict adherence standard. The motivations and intentions of a carrier who fails to charge its tariff rate are irrelevant. A violation of section 10(b)(1) occurs when any rate other than that filed in a carrier's tariff is charged, collected, demanded or received. *Marcella*, 23 SRR at 862. Any attempt to justify TOP's failure to charge its tariff rates is irrelevant to the issue of whether section 10(b)(1) was violated.⁶ The evidence presented thus establishes that TOP charged rates other than the rates filed in TOP tariff FMC No. 1 in connection with at least 58 shipments in violation of section 10(b)(1) of the 1984 Act.

Section 13(a) of the 1984 Act provides that in assessing civil penalties, persons who knowingly and willfully violate the statute may be assessed a penalty not to exceed \$25,000 per violation.⁷ The phrase "knowingly and wilfully" means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938). A violation of section 10(b)(1) could be termed "willful" if the carrier knew or showed "reckless disregard" for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as wilful if it was "marked by careless disregard for whether or not one has the right so to act."

⁶*Ocean Freight Consultants, Inc. v. The Bank Line, Ltd.*, 9 F.M.C. 211, 214, 215 (1966); *Sun Co. v. Lykes Bros.*, 20 F.M.C. 68, 70, n. 8 (1977); and *Sanrio Co. Ltd. v. Maersk Line*, 19 SRR 1627, 1655-1656 (I.D. 1980), adopted by the Comm., 20 SRR 375 (1980).

⁷Penalties for violations of the 1984 Act may not exceed \$5,000 per violation, unless the violation was knowingly and willfully committed, in which case the civil penalty may not exceed \$25,000 per violation. Each day of a continuing violation constitutes a separate offense.

United States v. Murdoch, 290 U.S. 389 (1933). The Supreme Court cited with approval these "reckless or careless disregard" standards in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-129 (1985).

The evidence in the present proceeding establishes that TOP's vice president knew TOP was required, pursuant to the 1984 Act, to charge the applicable Cargo N.O.S. \$500 W/M rate in its tariff and that it was the only lawful rate, but made a business decision routinely not to charge it. Clearly this is a case of careless and reckless disregard for the statutory requirements and of the carrier's intentional decision to charge other than the applicable rate in its tariff. Its business policy not to apply the lawful rate in its tariff was a choice routinely made and exhibits a total disregard for the congressionally mandated requirement to adhere to the carrier's correct and applicable tariff rate. The Administrative Law Judge concludes that respondent Trans Ocean-Pacific Forwarding, Inc. knowingly and wilfully violated section 10(b)(1) of the 1984 Act, 46 U.S.C. app. § 1709(b)(1), in the failure to charge the rates applicable in filed tariffs, and in one case not to have any rate at all applicable to one shipment. The maximum penalty which may be imposed for a single wilful violation of section 10(b)(1) is \$25,000, and for the 58 shipments it would be \$1,450,000. Docket No. 89-27, *Martyn Merritt, et al.*, Order, March 31, 1995 (mimeo. p. 16).

Section 13(c) of the 1984 Act, 46 U.S.C. app. § 1712(c), requires that in assessing a civil penalty the Commission take into account the nature, circumstances, extent, and gravity of the violation, as well as the violator's degree of culpability, history of prior offenses, and ability to pay. In taking the foregoing into account, the Second Circuit explained in *Merritt v. United States*, 960 F.2d 15, 17 (2nd Cir. 1992), that "the Commission must make specific

findings with respect to each of the factors set forth in section 13(c)." An evaluation of the factors set out in section 13(c) leads to the conclusion that a civil penalty must be assessed against TOP for knowingly and willfully violating section 10(b)(1) of the 1984 Act.

Adherence to filed tariffs is one of the most significant requirements of the 1984 Act.⁸ Section 10(b)(1) is a strict liability provision, dependent solely on proof that a rate other than the tariff rate was applied. The seriousness of charging rates other than those set forth in applicable tariffs is evidenced by the many related requirements and prohibitions of sections 8 and 10 of the 1984 Act, 46 U.S.C. app. §§ 1707 and 1709.

The 58 bills of lading at issue in this proceeding cover a six-month period between April 21 through October 26, 1991. Despite maintaining a large and active transportation business, Commission records show that no new or amended rates had been filed in TOP's tariff for 22 months between September 30, 1990, and July 24, 1992. (FF No. 24.) Moreover, the only rate filed was a Cargo N.O.S. rate, which by definition and as demonstrated in this proceeding, is not intended for application to the majority of commodity shipments. It is a "catchall" or "paper" rate and does not reflect the

⁸In its Report on the bill which led to the enactment of the 1984 Act, the House Committee on Merchant Marine and Fisheries stated:

Since [1961], the filing and enforcement of tariffs has become highly institutionalized and is the lynchpin for several other regulatory schemes which the Congress has enacted; both the antirebating and controlled carrier laws depend to great measure on the existence of a lawfully filed tariff.

* * *

Carriers and shippers alike support retention of statutory requirements for tariff filing and enforcement at the FMC A clear objective of H.R. 1878 is to enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient and competitive manner within a fair trade environment in which malpractices can be found and punished. Shippers support that need and emphasize their own need for knowledge of all available ocean rates in planning their cargo movements.

H.R. Rep. 98-53, 98th Cong., 1st Sess., 18-19 (1983).

transportation circumstances and conditions pertaining to each commodity usually reflected in a range of tariff rates. The routine pattern of failing to adhere to the filed rate doctrine is clearly evident. The fact that TOP moved several million dollars worth of cargo, but that the rates TOP charged were not found in any tariff, lead to the conclusion that the violations are evidence of a pattern of reckless disregard followed by TOP.

TOP chose deliberately and repeatedly to charge rates not filed in its tariff. In section 13(a)⁹ of the 1984 Act, 46 U.S.C. app. § 1912(a), Congress provided a penalty premium demonstrating its intent that persons who knowingly and willfully violate the Act are subject to penalties up to 5 times greater than the penalties imposed otherwise. The 1916 Act contained maximum penalties of \$1,000 per day for each day a violation continued for violations of section 18(b)(3), the section analogous to section 10(b)(1) of the 1984 Act. These penalties were increased in the 1984 Act, to \$5,000 for each violation of section 10(b)(1), with the proviso that the maximum penalty for each violation was \$25,000 if the violation "was willfully and knowingly committed." 46 U.S.C. app. § 1712(a). The House Report on the bill that became the 1984 Act stated:

Experience with the penalties imposed by the 1916 Shipping Act led the Committee to conclude that they provided no apparent deterrent to the commission of prohibited acts. Civil penalties of the type and amount available under the current law could be absorbed as part of the cost of doing business The Committee included in H.R. 1878 sanctions and penalties designed to deter the commission of prohibited acts.

⁹ SEC. 13. PENALTIES.

(a) ASSESSMENT OF PENALTY.--Whoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed \$5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed \$25,000 for each violation. Each day of a continuing violation constitutes a separate offense.

H.R. Rep. No. 53 (Part. 1), 98th Cong., 1st Sess. 19 (1983), 1984 U.S. Code Cong. and Admin. News 167, 184. The evidence previously discussed supports the finding that TOP was a knowing and willful violator of section 10(b)(1) of the 1984 Act, 46 U.S.C. app. § 1709(b)(1).

BOE searched Commission records to determine whether a history of prior offenses exists with respect to TOP and found that, prior to the institution of this proceeding, no offenses by TOP were brought to the attention of or uncovered by the Commission. There is no history of TOP's prior offenses.

The evidence indicates that TOP's sales for three fiscal years ending in 1993 totaled more than \$62,000,000. TOP has no known assets located in the United States, other than the NVOCC bonds required by section 23 of the 1984 Act. One NVOCC bond guaranteeing payment for judgments of up to \$50,000 is available for satisfaction of a penalty. Section 23 of the 1984 Act provides that NVOCC bonds shall be available to pay, among other things, "any penalty assessed against a non-vessel-operating carrier pursuant to section 13 of the Act." It is well settled that the bonds issued in accordance with a statutory requirement are interpreted as having incorporated the statute, itself.¹⁰ Indeed, the NVOCC bond instruments filed by TOP contain language specifically acknowledging an obligation to pay any penalty assessed under section 13 of the 1984 Act. In this instance, TOP had two bonds in effect during the period of its tariff effectiveness. The first, issued by Consolidated Surety Insurance Company, Inc., was effective from February 14, 1991 to

¹⁰"[I]f statutory law gives to the contract a certain legal effect, that law is as much a part of the contract as if incorporated in it, and the surety is bound according to such law. The liability on statutory undertakings is measured by the terms of the statute rather than by the wording of the instrument, for the sureties engage with eyes open to such statute." 74 *Am. Jur. 2d* sec. 28, p. 30 (citations omitted). See also 11 C.I.S. sec. 40(e), p. 420.

March 7, 1992. All of the violations in evidence herein occurred during the period April 21, 1991 to October 26, 1991, while this first bond was in effect. (The second bond, issued by American Motorists Insurance Company, was effective from November 5, 1991 to June 30, 1994. Inasmuch as the violations alleged in this proceeding occurred before November 5, 1991, this bond is not available to satisfy a civil penalty in this proceeding.) Thus, at this time and on this record only one \$50,000 bond is available to satisfy a civil penalty assessed against TOP under the 1984 Act.¹¹

Section 13(c) of the 1984 Act also enjoins the Commission to consider "such other matters as justice may require." Under the facts presented here, TOP's lack of full cooperation with the Commission's investigation and its disappearance and failure to appear here are factors which must be considered in determining the amount of the penalty to be assessed. During the initial contacts between TOP and Commission investigators, a TOP

¹¹Cf. *American Casualty Co., of Reading, Pa. v. Irvin*, 426 F.2d 647 (5th Cir. 1970), wherein the Court examined the issue whether the liability of a surety under a statutory bond written pursuant to the Packers and Stockyards Act, 1919, and the regulations thereunder, terminates upon the effective date of another bond written by a different surety. In *Irvin*, at issue was whether, after part of a civil penalty had been collected from one bonding company, a second bond also was subject to attachment. A demand was made upon one bonding company for the full amount based on actions occurring between August 21 and December 29, 1969. That demand was not met. At the same time a demand was made of the other bonding company, Aetna, for the full amount of its bond for actions occurring during the same time period. The full demand of that bond, \$55,000, was paid by Aetna. However, this amounted to less than half the amount of total claims against the principal. This trial involved nonpayment by the first bonding company. The Court of Appeals for the 5th Circuit held that both bonds were available to satisfy the judgment at issue: "Although it was probably contemplated by the framers of the regulations that there would be but a single bond in force at any one time, the regulations do not preclude a surety from writing a bond which in its coverage may overlap that of another bond written by another surety." *Id.* at 425. See also *Old Republic Ins. Co. v. United States*, 645 F.Supp. 943, 953 (Ct. Int'l Trade 1986); *Research Equity Fund v. The Ins. Co. of North America*, 602 F.2d 200, 204 (9th Cir. 1979), *cert. denied*, 445 U.S. 945 (1980) (citing to *Irvin* for the general rule which reads provisions of the statute and regulations under which a bond is established into the bond itself); *Index Fund, Inc. v. Ins. Co. of North America*, 580 F.2d 1158, 1162 (2d Cir. 1978), *cert. denied* 440 U.S. 912 (1979) (citing *Irvin* for the proposition that consideration must be given to the statute and regulations and the purpose for which the bond is given); *United States v. Fulton Distillery, Inc., et al.*, 571 F.2d 923, 928 (5th Cir. 1978) ("surety agreements may be conditioned and affected generally by federal regulations . . . statutes were broadly read so as to find liability"); and *Avant v. Submersible Rig Peter Duncan #6*, 447 F.2d 478, 479 (5th Cir. 1971) (citing to *Irvin* for the principle that the bond at issue would be construed in light of its statutory background).

vice president indicated that TOP was unable to produce either a tariff or shipping records. Copies of TOP bills of lading had to be obtained from U.S. Customs by the Commission's investigator. After TOP was alerted to the possibility of exposure to civil penalties by unsuccessful efforts to resolve these matters informally pursuant to 46 CFR § 502.604, TOP abandoned its offices and informed the shipping public that it was changing its name to Modern Line. Shipping records and other documents abandoned by TOP and related companies were obtained under subpoena from the property manager at the abandoned premises in Los Angeles. Service of another Commission subpoena upon an official of Modern Line at the new address was met with a promise to produce the subpoenaed documents three days later. When the Commission investigator returned to Modern Line's offices three days later, that office, too, had been abandoned. Clearly, TOP demonstrated an unwillingness to cooperate with the Commission's investigation, which is the subject of this proceeding.

SUMMARY AND CONCLUSIONS

The facts presented in this case clearly show that in at least 58 instances, TOP knowingly and willfully violated section 10(b)(1) of the 1984 Act. TOP's violations resulted from a policy decision generally to charge rates other than the rate set forth in its tariff, a decision made with the knowledge that the tariff rate was the only lawful rate that should be charged. This Administrative Law Judge, therefore, finds that Trans Ocean-Pacific Forwarding, Inc. knowingly and willfully violated section 10(b)(1) of the 1984 Act. On the basis of that finding, this Administrative Law Judge will impose a civil penalty of \$1,450,000

with all but \$50,000 suspended. In regard to the amount of the penalty, the facts in this proceeding concern a respondent who failed to charge the tariff rate in 58 instances in a six-month period, engaged in a pattern of routine and reckless disregard for the statute, did not fully cooperate in the investigation phase, and wilfully and knowingly violated the statute. These findings would clearly support the maximum fine of \$1,450,000 since section 13(a) of the 1984 Act, 46 U.S.C. app. § 1712(a), provides an increased penalty of \$25,000 per day for each violation of section 10(b)(1) which, as here, was "knowingly and wilfully" committed. However, since there are no other known assets of TOP the penalty will be limited to \$50,000, the amount of the bond, and the remaining penalty of \$1,400,000 will be suspended.

The Order in this proceeding also directed that a determination be made whether a cease and desist order should be issued, or whether TOP's tariff should be suspended. Inasmuch as this record indicates that TOP has stopped doing business, issuance of a cease and desist order is not required. And, since TOP's tariff has been cancelled, no further action in regard to its tariff is required at this time. The record in this proceeding will be available in case it is determined later that TOP or Modern Line are doing business here under a different name.

Respondent has not participated in this proceeding and did not file an answer to the Order of Investigation. There may be some valid reason why respondent has not done so and it may have a valid defense. In the circumstances respondent will be given 10 days to show cause why the civil penalty discussed in the Initial Decision should not be imposed.

IT IS ORDERED:

Respondent Trans Ocean-Pacific Forwarding, Inc. must show cause on or before December 22, 1996, why a civil penalty of \$1,450,000 should not be imposed with all except \$50,000 suspended at this time because there are no known assets of respondent and \$50,000 is the amount of the bond issued by Consolidated Surety Insurance Company, Inc.


Frederick M. Dolan, Jr.
Administrative Law Judge

Washington, D.C.
December 12, 1995

APPENDIX

FINDINGS OF FACT

1. TOP was an NVOCC which had a tariff on file at the Commission from August 21, 1988 to July 19, 1994, at which time the tariff was canceled for failure to maintain an NVOCC bond. During the period 1988-1994, respondent TOP was a Taiwan-registered business, with its main office located at Room 620, 6F, No. 575 Lin Sen North Road, Taipei, Taiwan. (Ex. No. 3, Attach. B-2, D-1 thru 4; Ex. No. 4, Attach. F-2, TOP tariff FMC No. 1, ATFI Organization No. 008056.)

2. In 1994, TOP had a network of other offices located in Taichung and Kaohsiung, Taiwan; Bangkok, Thailand; Seoul and Busan, Korea; Singapore; Penang, Malaysia; Jakarta, Indonesia; Rotterdam, Netherlands; Antwerp, Belgium; Sydney, Australia; and Hong Kong. (Ex. No. 4, Attach. H-1 thru H-7.)

3. In the U.S., TOP also maintained offices in Long Beach and Oakland, CA, Seattle, WA, Chicago, IL, New York, NY, and Atlanta, GA. (Ex. No. 4, Attach. A-1, B-1 thru 2, H-2; Ex. No. 6, Attach. E-6 thru 7.)

4. TOP's office in Long Beach was located at 444 W. Ocean Blvd., Long Beach, CA, until on or about June 3, 1994. (Ex. No. 4, pp. 1-5, Attach. K, M.)

5. The President and person who directed the activities of TOP in the United States is Jeff Sun, a resident of Taiwan. (Ex. No. 3, Attach. B-7; Ex. No. 4, Attach. A-1, B-1 thru 2, C-1, D-1, E-1, F-2.)

6. Jeff Sun also exercised control, through ownership and executive positions, over two other NVOCCs doing business in the United States. Those NVOCCs are California

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Dispatch, Inc. ("California Dispatch"), and Taiwan Dispatch Forwarding, Inc. ("Taiwan Dispatch"). (Ex. No. 4, Attach. A-1, B-1 thru 2, B-13 thru 26, I-1 thru 2.)

7. Jeff Sun also was the sole director and executive officer of TOP Intermodal, Inc. ("TOP Intermodal"), a California corporation established in May 1992. TOP Intermodal arranged inland transportation. TOP Intermodal's name was changed to Modern Line Service, Inc. ("Modern Line") on May 10, 1994 (Ex. No. 4, Attach I-1 thru 2, J-1, K-1, L-1, M-1.)

8. Modern Line filed an NVOCC tariff at the Commission effective June 10, 1994. The tariff was canceled May 24, 1995, for failure to maintain an NVOCC bond. (Ex. No. 3, Attach. E.)

9. California Dispatch, incorporated in California on November 10, 1992, filed an NVOCC tariff with the Commission effective March 25, 1993. That tariff was canceled effective September 21, 1994, for failure to maintain an NVOCC bond. (Ex. No. 3, Attach F-1 thru 10; Ex. No. 4, Attach. B-11.)

10. The principal owners of California Dispatch's stock were TOP, which owned 3600 shares, Taiwan Dispatch, which owned 3600 shares, and Jeff Sun, who owned 1680 shares. The total number of shares issued was 10,000. Jeff Sun controlled at least 8,880 shares through direct ownership and ownership by other corporations he owned and controlled. (Ex. No. 4. Attach. B-13 thru 26.)

11. Taiwan Dispatch filed a tariff with the Commission on November 5, 1991. The tariff was canceled July 2, 1995, for failure to maintain an NVOCC bond. (Ex. No. 3, Attach. G-1 thru 15.)

12. Taiwan Dispatch's main office was located at Room 620, 6F, No. 575 Ling Sen Road, Taipei, Taiwan, which was the same address as that of TOP's main office. (Ex. No. 3, Attach. G-1 thru G-15.)

13. Taiwan Dispatch's President was Martin Lee. (Ex. No. 3, Attach G-1.)

14. Martin Lee was also an employee of TOP. (Ex. No. 4, Attach F-2.)

15. Taiwan Dispatch's resident agent for service of process was California Dispatch. (Ex. No. 3, Attach. G-2.)

16. TOP, TOP Intermodal, and California Dispatch operated out of TOP's office at 444 W. Ocean Blvd., Long Beach, CA. (Ex. No. 4, pp. 3-5, Attach. A-1, B-1 thru 2, I-1 thru 2.)

17. Martin Na was manager of TOP, TOP Intermodal and California Dispatch at 444 W. Ocean Blvd., Long Beach, CA. (Ex. No. 4, p. 4, Attach. A-1, B-1 thru 2, I-1 thru 2; Ex. No. 6, Attach. H-12 thru 13, J-1, K.)

18. The manager of TOP's Oakland office was Eddie Ng, who also was a vice president of TOP. (Ex. No. 1, p. 1; Ex. No. 4, Attach. B-1 thru 2, C-1, D, E.)

19. On August 13, 1991, Michael Moneck ("Moneck"), an Investigator in the Commission's former Bureau of Investigations ("BOI"), interviewed Eddie Ng about the rates TOP charged in connection with shipments it transported. (Ex. No. 1.)

20. Ng acknowledged to Moneck that Ng knew that the lawful freight rate, pursuant to the 1984 Act, was the applicable freight rate filed in TOP's tariff and that it was the rate that should be charged to shippers for transporting cargo, but routinely other rates were

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charged. Ng also stated to Moneck that no copy of TOP's tariff was available at TOP's Oakland office. (Ex. No. 1.)

21. Ng gave Moneck a copy of a list which identified 14 service contracts TOP had entered into as an NVOCC shipper with vessel operating common carriers ("VOCCs") and conferences. The 14 service contracts applied to cargo moving inbound from the Far East to the U.S. and Mexico, and were effective during the time period July 17, 1990 through May 31, 1992. Most of the 14 contracts ran concurrently during that period and each charged different rates applicable to identical commodities transported between the same origins and destinations. The minimum number of 40-foot containers TOP was required to transport to meet the service contracts requirements totals more than 8,800 containers. (Ex. No. 1; Service Contracts on file at the Commission's Bureau of Tariffs, Certifications and Licensing ("BTCI"), Nos. ANERA 2662/91, Hyundai 91-854, Hanjin AEF1850, Cho Yang SEL107, Cho Yang SEL134, Senator FEEB583, Transportacion Maritime Mexicana ("TMM") 637E, TMM 724A, Nat'l Shipping Co. of Philippines 9129, EAC 1026, EAC 1027, COSCO 815, COSCO 824, COSCO 929.)

22. Prior to September 30, 1990, TOP's tariff FMC No. 1 did contain some rates applicable to specifically identified commodities. However, those rates applied only to shipments transported from Taiwan to the U.S. (TOP tariff FMC No. 1; Ex. No. 3, pp. 4-6.)

23. Until July 24, 1991, TOP's tariff contained only one rate applicable to commodities transported from ports and places other than Taiwan. That rate was a Cargo N.O.S. (Not Otherwise Specified) rate of \$500 W/M (per weight or measure, whichever yields the greater revenue). (TOP tariff FMC No. 1; Ex. No. 3, pp. 4-6.)

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24. During the time period September 30, 1990 through July 24, 1991, no new or amended rates were filed in TOP tariff FMC No. 1. (TOP tariff FMC No. 1, Ex. No. 3, pp. 4-6.)

25. Thirteen of the 14 service contracts TOP had entered into as an NVOCC shipper specifically included commodities originating from Hong Kong. TOP did not file rates applicable to specifically identified commodities originating from Hong Kong until after July 24, 1991. (BTCL Service Contract Files. See FF No. 22 and TOP tariff FMC No. 1.)

26. Thirty-one of the bills of lading introduced into evidence in this proceeding reflect shipments originating from Hong Kong prior to July 24, 1991. (Ex. No. 1; Ex. No. 2; Ex. No. 3.)

27. TOP did not maintain shipping records in its Oakland office. Investigator Moneck received copies of bills of lading issued by TOP from the U.S. Customs Service, San Francisco Manifest Review Unit ("Customs"). Moneck sent the bills of lading, along with a report of his meeting with Ng to BOI's main office in Washington, D.C. (Ex. No. 1.)

28. The bills of lading received from Customs were examined by Commission transportation specialists experienced in identifying applicable tariff rates. A total number of 58 bills were examined by Commission transportation specialists. Fifty-seven (57) of the bills, reflecting shipments moving inbound from the Far East to the U.S. during the period April 21 through October 26, 1991, contain freight charges different than the amount which should have been charged in accordance with the applicable Cargo N.O.S. rate of \$500 W/M. Of those 57 bills of lading, 56 contained freight charges based on rates lower than the applicable tariff rate of \$500 W/M Cargo N.O.S., and one bill of lading contained a

freight charge based on a freight rate higher than the applicable Cargo N.O.S. rate. (Ex. Nos. 2 and 3.)

29. One bill of lading originated from Penang, Malaysia, which is outside the scope of TOP tariff FMC No. 1. No rate was found to apply to that shipment in any tariff. (Ex. No. 3, p. 2.)

30. On June 14, 1994, District Investigator Alvin N. Kellogg ("Kellogg") went to TOP's office at 444 W. Ocean Blvd. for the purpose of serving TOP with a copy of the Commission's Order in this proceeding. The office was locked. TOP had abandoned its office at 444 W. Ocean Blvd., Long Beach, CA, the weekend of June 3, 1994. (Ex. No. 4, p. 1.)

31. The abandoned office space at 444 W. Ocean Blvd., Long Beach, CA, contained TOP bills of lading, unused bill of lading forms, file copies of TOP invoices, shipping files, canceled checks, and utility bills, all spread throughout the office, and approximately 150 file boxes of shipping records, business records and faxes. (Ex. No. 4, All Attachments.)

32. On June 27, 1994, pursuant to subpoena, Commission investigators removed documents from the office TOP had abandoned. (Ex. No. 4, pp. 2-5, All Attachments.)

33. On June 29, 1994, in accordance with § 583.5(b) of the Commission's rules and regulations, a copy of the Commission's Order was served on the Commission's Secretary who accepted service on behalf of TOP. On the same date, a copy of the Order was sent, [via] Federal Express, to TOP, Room 620, 6F, No. 575 Lin Sen North Road, Taipei, Taiwan. (Ex. No. 5.)

34. TOP announced that it would move to a new address at 555 E. Ocean Blvd., Suite 468, Long Beach, CA, and that the company name would change to Modern Line. (Ex. No. 4, Attach. H-8 thru 9, M.)

35. After abandoning its office at 444 W. Ocean Blvd., TOP leased new office space at 555 E. Ocean Blvd., Long Beach, CA. At that location, TOP commenced doing business under the name, Modern Line. (Ex. No. 4, Attach. M; Ex. No. 6, All Attachments. See FF Nos. 7 and 8.)

36. On November 1, 1994, a Commission subpoena, issued in connection with this proceeding was served on Modern Line. The subpoena was accepted by Robin Hwang, Controller of Modern Line. By November 4, 1994, Modern Line had abandoned the office at 555 E. Ocean Blvd., Long Beach, CA. (Ex. No. 4, pp. 4-5.)

37. The office space at 555 E. Ocean Blvd., Suite 468, Long Beach, CA, was leased in the name of TOP. checks submitted in payment for rent of the 555 E. Ocean Blvd. office were written on a California Dispatch checking account. (Ex. No. 6, Attach. F, G, H-2, H-12 thru 13, K.)

38. On February 14, 1991, TOP's NVOCC bond No. 1042 for \$50,000, issued by American Motorists Insurance Company, went into effect. That bond was canceled effective March 7, 1992. (Ex. No. 3, Attach. B.)

39. On November 5, 1991, TOP's NVOCC bond No. 0345 for \$50,000, issued by American Motorists Insurance Company, went into effect. That bond was canceled effective June 30, 1994. (Ex. No. 3, Attach. B.)

40. On June 10, 1994, Modern Line's NVOCC bond No. 8941225 in the amount of \$50,000, issued by Washington International Insurance Company, went into effect. That bond was canceled effective September 6, 1995. (Ex. No. 3, Attach. E.)

41. On February 19, 1993, California Dispatch, Inc.'s NVOCC bond No. 8941077 for \$50,000, issued by Washington International Insurance Company, went into effect. That bond was canceled effective September 21, 1994. (Ex. No. 3, Attach. F.)

42. On May 26, 1993, Taiwan Dispatch's NVOCC bond No. NV0346 for \$50,000, issued by American Motorists Insurance Company, went into effect. That bond was canceled effective July 2, 1995. (Ex. No. 3, Attach. G.)

43. TOP's total sales of ocean freight transportation for year ending June 20, 1990, were \$15,358,072. (Ex. No. 4, Attach. B-5.)

44. TOP's total sales of ocean freight transportation for year ending June 30, 1991, were \$20,611,927. (Ex. No. 4, Attach. B-7.)

45. TOP's total sales of ocean freight transportation for year ending June 30, 1993, were \$27,907,991. (Ex. No. 6, Attach. A-1 thru E-7.)