

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED MAY 10, 2002)
(EXCEPTIONS DUE 6-3-02)
(REPLIES TO EXCEPTIONS DUE 6-25-02)

FEDERAL MARITIME COMMISSION

DOCKET NO. 01-09

TRANSGLOBAL FORWARDING CO., LTD.-POSSIBLE VIOLATIONS OF SECTION 10(a)(1) OF THE SHIPPING ACT OF 1984

Respondent, Transglobal Forwarding Co., Ltd., a Taiwan-based non-vessel operating common carrier, found to have violated sections 10(a)(1) of the Shipping Act of 1984, 46 U.S.C. app. 1709(a)(1), on seventy-two occasions in 1998 and 1999 by knowingly and willfully obtaining ocean transportation at less than the applicable rates by accessing service contracts to which it was neither a signatory nor affiliate.

Respondent did not fully participate in this proceeding and the evidence does not indicate the existence of mitigating factors with respect to the application of sanctions and penalties.

A cease and desist order is issued and a civil penalty of \$1,440,000 is assessed.

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

**INITIAL DECISION' OF MICHAEL A. ROSAS,
ADMINISTRATIVE LAW JUDGE**

Procedural History

By Order, served July 30, 2000, the Commission initiated this proceeding to determine whether a non-vessel operating common carrier (NVOCC) violated section 1 O(a)(1) of the Shipping Act of 1984 (the Act), as amended by the Ocean Shipping Reform Act of 1998, P.L. 105-258, 112 Stat. 1902 (OSRA). Based on extensive shipping documentation obtained by Emanuel J. Mingione, the Commission's New York Area Representative, from Transglobal's destination agents in the United States, it appeared that Transglobal may have violated the aforementioned law on numerous occasions from May 9, 1998 through March 28, 1999. The Commission ordered that an investigation be instituted to determine:

(1) whether Transglobal violated section 10(a)(1) of the Act by knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means, obtaining or attempting to obtain ocean transportation for property at less than the rates or charges that would otherwise have been applicable;

(2) whether, in the event violations of section 1 O(a)(1) of the Act are found, civil penalties should be assessed against Transglobal and, if so, the amount of penalties to be assessed; and

(3) whether, in the event violations are found, a cease and desist order should be issued.

During the discovery phase of this proceeding, the Bureau of Enforcement (BOE) served Transglobal with interrogatories, a request for the production of documents and a request for admissions. Transglobal did not respond to BOE's discovery requests and BOE tiled a motion to

'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 C.F.R. 502.227).

compel on September 26, 2001. On October 2, 2001, Transglobal provided incomplete responses to BOE's discovery requests, prompting BOE to request, on October 11, 2001, an order directing Transglobal to respond to outstanding discovery requests. By Order, served October 12, 2001, Administrative Law Judge Paul B. Lang, who was then presiding, directed that Transglobal provide outstanding discovery, which it failed to do. On October 26, 2001, BOE filed a motion seeking sanctions against Transglobal, as well as a request for admissions, to which Transglobal failed to respond. Transglobal finally provided additional information in response to BOE's discovery requests, but these responses were not complete and, on November 13, 2001, Judge Lang granted BOE's motion for sanctions. The Order precluded Transglobal from presenting either testimonial or documentary evidence in its defense which fell within the scope of outstanding discovery.

After unsuccessfully attempting to get Transglobal's input, BOE proposed a schedule for the filing of evidence and legal briefs on December 7, 2001. BOE's proposal was adopted by Judge Lang, with modifications. BOE developed the evidentiary record by submitting written evidence in various stages. An opportunity was given to each side to request cross-examination or submit rebuttal evidence. BOE's direct case was offered and admitted, but Transglobal did not offer any evidence. Thereafter, the evidentiary record was closed and an opening brief was filed by BOE. Again, Transglobal did not respond.

BOE's evidentiary case consists of two exhibits. Exhibit 1 includes the verified statement of Mingione, with Attachments A through K consisting of various bills of lading, tables and shipping documents. Attachment H is divided into sixty separate subcategories. Attachment J is divided into twelve subcategories. Exhibit 2 is the verified statement of James F. Carey, the Commission's Washington, D.C. Area Representative, with Attachments A and B, which consist of Transglobal's financial statements for 1999 and 2000. The evidence was admitted into the record by Order of the presiding Administrative Law Judge, served February 11, 2002.

FINDINGS OF FACT

The following findings of fact are based essentially upon the proposed findings of fact set forth in BOE's opening brief at pp. 3-8 and are supported by BOE's references to the record.

Findings with Respect to Transglobal's Background

1. Transglobal is a non-vessel operating common carrier operating under a tariff, is bonded and is licensed by the Commission to operate under FMC No. 012655-001.
2. Transglobal's office is located at 6F, No. 399, Section 5, Nan King East Road, Taipei, Taiwan.
3. In compliance with the Ocean Shipping Reform Act (OSRA), Transglobal filed an application for a license to operate as an ocean transportation intermediary (OTI) on May 24, 1994.
4. Transglobal is currently operating pursuant an OTI license issued by the Commission's Bureau of Consumer Complaints and Licensing.
5. Chia Yang Lu is the President and Managing Director of Transglobal.
6. Transglobal was a regular shipper in the trade from various ports in Taiwan to the Ports of New York City, Norfolk, Virginia and Baltimore, Maryland.

Findings with Respect to Section 1 O(a)(1) Issues

7. In or around August 1999, Emanuel J. Mingione, New York Area Representative of the Commission, conducted an investigation of Transglobal and its operations. During his investigation, Mingione suspected that Transglobal might be procuring transportation from vessel-operating common carriers (VOCC) pursuant to service contracts to which it was neither a signatory nor affiliate. Mingione contacted the destination agents utilized in the United States by Transglobal and obtained documentary evidence of shipments made by Transglobal to ports in the United States.

8. The documents included two service contracts entered into between another NVOCC, Hudson Shipping (Hong Kong) Ltd., d/b/a Hudson Express Lines (Hudson), and two VOCC's, Hyundai Merchant Marine Co., Ltd. (Hundai), no. 98-6224, and DSR-Senator Lines GmbH ("Senator"), no. FEED 98-065. Both agreements were effective during the period of May 1, 1998 to April 30, 1999.

9. Hudson was the only NVOCC authorized to offer shipments under the Hudson-Hyundai and Hudson-Senator service contracts. Under the terms of both service contracts, Hudson was prohibited from assigning either contract to a third party or allow co-loading of containers with shipments from other NVOCC's. Each service contract also stated that there were no affiliates or subsidiaries of Hudson covered by the contract.

10. Transglobal was not authorized to utilize either the Hudson-Hyundai or Hudson-Senator service contracts because it was not a signatory to either contract.

11. Sixty (60) shipments were made by Transglobal under the Hudson-Hyundai service contract from May 18, 1998 through March 28, 1999, and twelve (12) shipments were made by Transglobal under the Hudson-Senator service contract from May 9, 1998 through November 6, 1998.

12. Transglobal arranged with Hudson to make the shipments based on the Hudson-Hyundai and Hudson-Senator service contracts for a charge of \$20.00 per container.

13. Hudson appeared in the shipper block and Transglobal appeared in the freight forwarder block on the carrier bills of lading for each of the seventy-two (72) shipments. In addition, either the Hudson-Hyundai or Hudson-Senator service was annotated on each carrier bill of lading.

14. Transglobal issued its own (house) bill of lading for each of the shipments. Each house bill of lading contained information with respect to the shipper, consignee and intermediate consignee. Hudson was not listed as shipper on any of the 72 house bills of lading.

15. Transglobal was listed as forwarding agent on the carrier bills of lading for the 60 shipments transported under the Hudson/Hyundai service contract. The 12 shipments transported under the Hudson/Senator service contract did not contain information about a forwarding agent. Hudson was listed as the shipper and NVOCC on the 72 carrier bills of lading, but did not perform services as an NVOCC in connection with any of the shipments.

16. The rates which would have applied to the shipments under the tariffs published by Hyundai and Senator were substantially in excess of the rates paid by Transglobal under the Hudson-Hyundai and Hudson-Senator service contracts.

17. According to the terms of the Hudson/Hyundai service contract, any shipments carried in violation of the service contract were to be re-rated at the applicable rates and charges set forth in Hyundai's published tariff. According to the terms of the Hudson/Senator service contract, any shipments tendered in violation of the service contract were to be re-rated at twice the applicable rates and charges set forth in Senator's published tariff.

18. By accessing the Hudson/Hyundai service contract for 60 shipments, Transglobal paid \$370,027.00² less than it would have paid had it been charged Hyundai's published tariff rate.

19. By accessing the Hudson/Senator service contract for 12 shipments, Transglobal paid \$40,414.98.00 less than it would have paid had it been charged Senator's tariff rate.

20. As a result of improperly shipping under the Hudson-Hyundai and Hudson-Senator service contracts, Transglobal obtained ocean transportation for the shipments at \$410,441.98 less than the rates that would otherwise be applicable.

² All monetary amounts refer to United States dollars.

*Proposed Findings with Respect to
Respondent's Ability to Pay a Civil Penalty*

21. During 1999 and 2000, Transglobal generated approximately \$2,400,000 in operating income each year. An increase in the cost of goods sold from \$1,864,661.02 in 1999 to \$2,019,751.30 in 2000 resulted in Transglobal reporting a net loss in 2000 of \$133,000.

22. Transglobal's cash bank reserves decreased from \$357,597.38 in 1999 to \$39,680.74 in 2000. Transglobal reported liabilities of \$203,142.18 in 1999 to \$95,093.41 in 2000. However, Transglobal's financial records provide no explanation for the depletion of cash reserves from 1999 to 2000.

23. From 1999 to 2000, Transglobal's net worth decreased from \$224,887.42 to \$87,573.31. This decrease approximates the total increase in the cost of goods sold (\$155,000) experienced by Transglobal from 1999 to 2000.

24. Transglobal failed to provide additional financial information.

25. Other than the increase in the cost of goods sold from 1999 to 2000, resulting in an apparent net loss for 2000, Transglobal's financial situation remained basically the same.

26. Transglobal employs five (5) people.

27. As of September 2000, Transglobal reported to the Taiwan government that it had fully paid capital of approximately \$214,000.

28. Effective April 22, 1999, Transglobal maintained a surety bond in the amount of \$50,000, which was increased to \$150,000 on May 1, 1999.

DISCUSSION AND CONCLUSIONS

The Section 1 O(a)(1) Violations

The only liability issue in this proceeding is whether Transglobal violated section 1 O(a)(1) of the Act. Section IO(a)(1) prohibits any person from “knowingly and willfully” obtaining or attempting to obtain ocean transportation of property by various false activities, including “false classification” or by “any unjust or unfair device or means.” BOE contends that Transglobal participated in a conspiracy with Hudson to deprive two VOCC’s, Hyundai and Senator, of the compensation to which they were entitled for transporting goods based on applicable tariff rates. Pursuant to this scheme, Transglobal allegedly violated section 10(a)(1) on 72 occasions between May 1998 and March 1999, and underpaid the VOCC’s by \$410,441.98.

The evidence includes copies of pertinent portions of the Hudson-Senator and Hudson-Hyundai service contracts, 72 house bills of lading, 72 master or carrier bills of lading, affidavits from two Commission Area Representatives, tables of calculations demonstrating the undercharges by which Transglobal obtained water transportation pursuant to its improper use of the service contracts, and the April 28, 1998 letter sent by Hudson to Transglobal confirming Hudson’s agreement to allow Transglobal to access the service contracts for an administrative fee of \$20 per container.

The evidence demonstrates that Transglobal used unfair or unjust means to obtain transportation at less than the filed tariff rates by improperly accessing Hudson’s service contracts with Senator and Hyundai. The fact that Transglobal carried out this method on at least 72 occasions indicates that Transglobal committed these violations of section 1 O(a)(1) “knowingly and willfully.”

Universal Logistic Forwarding Co., Ltd. - Possible Violations, 29 S.R.R. 325 (I.D.), modified on

other grounds, 29 S.R.R. __ (2002);² *Portman Square Ltd. - Possible Violations*, 28 S.R.R. 80 (I.D.), administratively final, March 16, 1998.

A person is considered to have “knowingly and willfully” violated the Act if the person had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference or purposeful, obstinate behavior akin to gross negligence. *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 21 S.R.R. 119 (2001); *Portman Square*, 28 S.R.R. at 84-85 (I.D.); *Ever Freight Int'l - Possible Violations*, 28 S.R.R. 329, 333 (I.D.), administratively final, June 26, 1998. There is no doubt that Transglobal, as a tariff and bonded NVOCC, was familiar with the requirements of the Act and Commission regulations that common carriers pay and charge for water transportation pursuant to rates on file with the Commission.

Assessment of a Civil Penalty

Having found violations of Section 10(a)(1), the Administrative Law Judge is required to assess a civil penalty. *Stallion Cargo, Inc. - Possible Violations*, 29 S.R.R. __ (2002).³ Section 13(a) of the Act imposes a liability of up to \$27,500 for each violation committed willfully and knowingly during the period alleged. 46 U.S.C. app. §§ 1712(a).⁴ However, Section 13(c) requires that the Administrative Law Judge consider the following factors in determining the amount of the penalty: “the nature, circumstances, extent, and gravity of the violation committed and, with respect

² FMC Docket No. 00-10, Report and Order, served January 18, 2002.

³ FMC Docket No. 99-18, Report and Order, served October 18, 2001.

⁴ In conformity with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §§ 2461, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, April 26, 1996, the \$25,000 penalty was increased to \$27,500, effective November 7, 1996. See *Inflation Adjustment of Civil Monetary Penalties*, 27 S.R.R. 809 (1996).

to the violator, the degree of culpability, history of prior offenses, ability to pay, and any such other matters as justice may require.” 46 U.S.C. app. §§ 1712(c).

Nature, Cwcumstances, Extent and Gravity of the Violations

The nature and circumstances of the violations are clear. Transglobal violated section 1 O(a)(1) of the Act by improperly accessing service contracts between Hudson, another NVOCC, and two VOCC’s, Hyundai and Senator. The agreement enabled Transglobal to obtain ocean transportation from Hyundai and Senator by falsely stating on the carrier bills of lading that Hudson was the NVOCC or shipper, when in fact Transglobal acted as the NVOCC or shipper. The extent and gravity of the violations were substantial. Transglobal committed 72 violations of section 10(a)(1) over a ten and one-half month period of time and deprived Senator and Hyundai of \$410,441.98 in compensation.

Culpability

Transglobal knowingly and willingly participated in an organized scheme to assume the identity of another NVOCC in order to cheat VOCC’s of their rightful compensation. Transglobal paid Hudson \$20 for each container that it was able to ship under the cloak of a carrier bill of lading issued by Hudson. Transglobal was operating under it’s tariff and, therefore, was chargeable with knowledge of the requirements of the Act and Commission regulations that it pay the published tariff rates of VOCC’s, but deliberately ignored its requirements in order to save, and thus deprive VOCC’s of, an average of approximately \$5,7000 per container ($\$410,441.98 \div 72$).

History of Prior Offenses

BOE concedes that Transglobal does not have a prior history of violations with the Commission, but suggests that the letter from Hudson to Transglobal and other NVOCC's identifies several other service contracts which Transglobal could have utilized and, therefore, it is reasonable to infer that Transglobal has improperly accessed these other service contracts in violation of the Act. BOE further concedes that "this activity has not been evidenced by shipping documentation," but "requests that this information be used as an aggravating factor when establishing the appropriate civil penalty amount." BOE Opening Brief at 14.

It has long been recognized that "the Commission may draw inferences from certain facts when direct evidence is not available because of the Commission's particular knowledge and expertise and even on the basis of inferences that any reasonable person would draw from the facts." *Port Authority of New York v. New York Shipping Association*, 22 S.R.R. 1329, 1353 (I.D.), modified on other grounds, 23 S.R.R. 21(1985). However, such inferences may not be drawn where they would amount to "speculative possibilities." *Alcoa S.S. Co. Inc. v. CIA. Anonima Venezolana*, 7 F.M.C. 345,361 (1962); *West Coast Line, Inc. et al. v. Grace Line, Inc. et al.*, 3 F.M.B. 586,595 (1951). Furthermore, to the extent that Transglobal improperly obtained access to other service contracts subsequent to the 72 violations shown here, they are irrelevant and of no probative value in assessing penalties in this proceeding. *World Line Shipping, Inc. and Saeid B. Maralan (AKA Sam Bustani)*, 29 S.R.R. __ (2002).⁵

The April 28, 1998 letter sent by Hudson to Transglobal and other NVOCC's supports an inference that Hudson had other service contracts with ocean carriers and was offering to make them

⁵ FMC Docket No. 00-05; Order, served January 24, 2002.

available to other NVOCC's for a charge of \$20 per container. However, the letter does not provide any indication that Transglobal obtained or attempted to obtain access to other service contracts,

The cases cited by BOE in support of this proposition are distinguishable. In each case, BOE demonstrated that the violations shown were only a sampling of a much larger scheme or practice. In *Alex Parsinia d/b/a Pacific Int 'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1339, n. 2 (I.D.), administratively final, December 4, 1997, an NVOCC's eighteen shipments in violation of the Act "constituted only a sampling of respondent's business activities" and the Commission found it probable that "respondent acted unlawfully on many more occasions during the approximately three-year period of its business existence." In *Ever Freight Int 'l Ltd. - Possible Violations*, 28 S.R.R. 329, 336 (I.D.), administratively final, June 26, 1998, an NVOCC's twelve shipments in violation of the Act were apparently only the tip of the iceberg" and were "only a sampling of respondent's activities over the subject time period." BOE further demonstrated that, during the relevant time period, the respondent "acted as shipper on over 1100 inbound shipments, accounting for nearly 2600 TEUs of cargo. . . In addition, it appears that Ever Freight acted as the shipper on more than 170 shipments which originated during the months of March - June 1996, at a time when Ever Freight did not yet have any tariff rates effective for its NVOCC services."

There is no indication in the affidavit submitted by the Commission's Area Representative, Emanuel J. Mingione, that his investigation was anything less than thorough. Mingione's investigation identified three local destination agents involved with Transglobal's import shipments. The destination agents provided Mingione with shipping documentation, which revealed that Transglobal improperly accessed the two service contracts at issue in this proceeding. Mingione concluded that Transglobal knowingly and willingly obtained or attempted to obtain ocean

transportation by improperly accessing the Hudson-Hyundai and Hudson-Senator service contracts. He did not indicate that the two service contracts were a sampling of a much larger pool of likely illicit activity on the part of Transglobal, that they were the “tip of the iceberg” or that there was a basis to believe that Transglobal improperly accessed other service contracts.

The Ability to Pay the Penalty

The proponent of an order imposing a fine must present evidence of the violator’s ability to pay the fine. 46 App. U.S.C. § 1712; *Merritt v. United States*, 960 F.2d 15, 17 (2d Cir. 1992). However, Transglobal has not entered an appearance in this proceeding and only partially responded to BOE’s discovery requests. In his Order issuing *Sanctions for Failure to Supplement Responses to Discovery Requests*, served November 13, 2001, Judge Lang found that Transglobal failed to respond to BOE’s discovery requests for, among other things, information regarding its bank accounts, financial records for 1998 and certified Chinese language financial records for 2000. Accordingly, he ruled that Transglobal was precluded from presenting either testimonial or documentary evidence on such issues and that adverse inferences may be drawn from Transglobal’s failure to produce such information.

Even in the absence of Judge Lang’s order, by declining to participate in the proceeding, Transglobal failed to take advantage of an opportunity to introduce evidence as to its ability to pay a fine and, therefore, an inference may be drawn that Transglobal has the capacity to pay a substantial fine. *Best Freight International Ltd., et al. -Possible Violations*, 28 S.R.R. 447 (I.D.), administratively final, August 31, 1998; *Comm-Sino Ltd. - Possible Violations*, 27 S.R.R. 1210 (I.D.), administratively final, May 21, 1997.

The limited disclosure provided by Transglobal imparts an incomplete profile of its financial condition. Transglobal employs five people and generated approximately \$2,400,000 in operating income annually in 1999 and 2000. However, Transglobal reported a net loss of \$133,000 in 2000 and a decrease in cash bank reserves from \$357,597.38 in 1999 to \$39,680.74 in 2000. The financial records provided no explanation for the depletion of cash reserves from 1999 to 2000. From 1999 to 2000, Transglobal's net worth decreased from \$224,887.42 to \$87,573.31. As of September 2000, Transglobal reported to the Taiwan government that it had fully paid capital of approximately \$214,000. Effective April 22, 1999, Transglobal maintained a surety bond in the amount of \$50,000, which was increased to \$150,000 on May 1, 1999.

In applying a civil penalty, we are not circumscribed in making an assessment based solely upon Transglobal's operating revenue. Civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. - Possible Violations, supra; Refrigerated Container Carriers Pty. Limited - Possible Violations*, 28 S.R.R. 799,805 (I.D.), administratively final, May 21, 1999. The maximum possible civil penalties under the Act are warranted where an NVOCC willfully obtains transportation at less than filed rates through a surreptitious agreement. *Universal Logistic Forwarding Co., Ltd., - Possible Violations*, 29 S.R.R. 325 (I.D.), modified on other grounds 29 S.R.R. 474 (2002) (\$1,237,500 maximum assessed for forty-five violations); *Refrigerated Container Carriers Pty. Limited - Possible Violations*, 28 S.R.R. at 806 (\$1,250,000 maximum assessed for fifty violations). Moreover, maximum penalties have been consistently assessed where the respondents have failed to participate in the proceeding. *Best Freight International Ltd., et al. - Possible Violations*, 28 S.R.R. 447 (I.D.), administratively final, August 31, 1998 (\$1,072,000

maximum assessed for 39 violations); *Trans Ocean-Pacific Forwarding, Inc. -Possible Violations*, 27 S.R.R. 409 (I. D.), administratively final, February 1, 1996 (\$1,450,000 maximum assessed for 58 violations); *Comm-Sino Ltd. - Possible Violations*, 27 S.R.R. 1210 (administratively final, May 21, 1997 (\$650,000 maximum assessed for 26 violations); *Shipman International (Taiwan) Ltd. - Possible Violations*, 28 S.R.R. 100 (I.D.), administratively final, March 30, 1998 (\$1,425,000 maximum assessed for 57 violations); *Portman Square*, 28 S.R.R. at 86 (\$797,500 maximum assessed for 29 violations).

Such Other Matters As Justice May Require

Notwithstanding its penchant for assessing the maximum penalty in similar situations, the Commission has chosen, in certain instances, to assess less than the maximum penalty where the amount assessed was significant. In *Stallion Cargo, Inc. - Possible Violations, supra*, an NVOCC was found to have knowingly and willfully violated sections 1 O(a)(1) and 1 O(b)(1) at various times over a three-year period by misdescribing cargoes tendered to VOCC's on fifteen occasions and failing to charge its applicable tariff rates on one hundred and fifty-two occasions. The Commission chose not to assess the maximum penalty of \$4,592,500, but rather, a penalty of \$10,000 for each of one hundred and thirty-four violations, for a total penalty of \$1,340,000.

As is the case here, the Commission in *Stallion* concluded that there were no mitigating factors with respect to the application of sanctions and penalties. However, the respondent in *Stallion* was represented by counsel and fully participated in the proceeding. Transglobal was not represented by counsel and participated to a limited extent in this proceeding. On the other hand, the transgressions in *Stallion* occurred over a three year period, while Transglobal's malfeasance occurred over a ten and one-half month period.

BOE urges that a clear message be sent to Transglobal and the shipping industry through the imposition of maximum civil penalties. BOE Opening Brief at 13. The Administrative Law Judge agrees that the fine assessed should be significant enough to deter future violations of the Act by Transglobal and other NVOCC's. Transglobal was apparently part of a larger group of NVOCC's who encroached upon the statutory and contractual rights of Hyundai and Senator to be compensated at the applicable published tariff rates. The facts also demonstrate that Transglobal has the capacity to pay a significant civil penalty. It generated approximately \$2,400,000 in operating income annually in 1999 and 2000, had a cash bank reserve of \$357,597.38 in 1999 and maintained a surety bond in the amount of \$150,000. Transglobal's financial statement for 2000 reported a net loss of \$133,000 and a decrease in cash bank reserves to \$39,680.74. However, Transglobal failed to provide financial records for 1998 and bank records. This failure by Transglobal prevented BOE from investigating whether Transglobal made a profit in 1998 and substantiating whether the depletion of its cash reserves was due to legitimate operating expenses.

Based on the selective nature of Transglobal's disclosure and law of the case,⁶ the Administrative Law Judge infers that cash reserves were drawn by Transglobal's principals for personal and not legitimate operating expenses. *McMahan & Co. v. PO Folks, Inc.*, 206 F.3d 627, 632 (6th Cir. 2000), citing *Weeks v. ARA Services*, 869 F. Supp. 194, 195 (general rule is that "[w]here relevant information is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it."); *Alabama Power Company v. Federal Power Commission*, 511 F.2d 383,391 (D.C. Cir. 1974),

⁶See Judge Lang's Order issuing *Sanctions for Failure to Supplement Responses to Discovery Requests*, *supra*.

citing McCormick, *Evidence* § 337 at 787 (2d Ed. 1972) (“It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so”); *Commonwealth of Puerto Rico v. FMC*, 468 F.2d 872,880 (D.C. Cir. 1972) (“In regulatory proceedings, placing such a burden on the regulated firm, where the relevant information concerns its operations and management, has become part of the ‘common lore’ or regulations.”).

Having considered the applicable statutory factors, as well as Transglobal’s limited participation in this proceeding, the Administrative Law Judge concludes that Transglobal should be ordered to pay a civil penalty of \$1,440,000. The penalty was determined by assessing \$20,000 for each of the 72 violations of the Act, an amount double that assessed for each of the violations found in *Stallion*.

Cease and Desist Order

The Order of Investigation in this proceeding also directed that it be determined whether a cease and desist order should be issued. A respondent may be ordered to cease and desist from committing specific violations and engaging in specific conduct if there is a likelihood the offenses will continue. *Marcella Shipping Co., Ltd.*, 23 S.R.R. 857, 871 (I.D.), administratively final, March 26, 1986.

There is no evidence that Transglobal has discontinued NVOCC operations to the United States. It participated to a limited extent in this proceeding and had an opportunity to produce evidence as to whether it has ceased operations. Based on Transglobal’s knowing and willful disregard for the Act and Commission regulations, Transglobal is ordered to cease and desist from violations of section IO(a)(1) of the Act, to wit, obtaining or attempting to obtain lower rates than

would be properly applicable through the device of accessing any other person's service contract.

IT IS ORDERED, that respondent, Transglobal Forwarding Co., Ltd. is found to have violated section IO(a)(1) of the Shipping Act in 1998 and 1999; and

IT IS FURTHER ORDERED, that Transglobal Forwarding Co., Ltd. is ordered to pay a civil penalty in the amount of \$1,440,000; and

IT IS FURTHER ORDERED, that Transglobal Forwarding Co., Ltd. is to cease and desist from knowingly and willfully, directly or indirectly, by an unjust or unfair device or means, obtaining ocean transportation for property at less than the rates or charges that would otherwise be applicable, and from receiving unlawful carrier compensation in violation of the Shipping Act.



Michael A. Rosas
Administrative Law Judge

Washington, D.C.

May 10, 2002