

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-1
TRANSEUROPE SHIPPING, INC.

Held:

1. Where the Respondent, Transeurope Shipping, Inc., was in the business of freight forwarding, and where overcharges occurred regarding eight outbound shipments in 1979-1980, such overcharges were the responsibility of Transeurope for which it might be held liable and subject to penalty under the provisions of the Shipping Act, 1916, as amended, and the provisions of the Federal Maritime Commission's General Order 4 (46 CFR 510.1 et seq.).
2. Where Transeurope contended the wrongdoing was the fault of disloyal and dishonest former employees, and Hearing Counsel asserted it was engaged in at the behest of Transeurope's owner, the trial hazard related to a determination of the factual discrepancy as well as other surrounding circumstances justifies a settlement setting a penalty of \$5,000.00. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others, and which will secure compliance with the law and the Commission's rules and policies.
3. Where the Respondent as well as its affiliates, owner and directors surrenders its freight forwarder license and agrees not to reapply for such license for a period of three years, the issue regarding revocation of the respondent's freight forwarder license raised in the Commission's Order of Investigation becomes moot.

R. Frederic Fisher, Charles L. Coleman and Laurence N. Minch for respondent,
Transeurope Shipping, Inc.

Joseph B. Slunt, James S. Oneto and John Robert Ewers, Hearing Counsel.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Finalized June 15, 1984

PRELIMINARY MATTERS

By Order of Investigation and Hearing served on January 14, 1983, the Commission ordered that pursuant to sections 22, 32, and 44 of the Shipping Act, 1916, as amended (46 U.S.C. 821, 831 and 841(b)), a proceeding be instituted to determine:

1. Whether Transeurope Shipping, Inc. violated the Commission's General Order 4 (46 CFR 510 (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j),

¹ 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).

invoices; section 510.23(k), records required to be kept; and/or section 510.23(1), failure to make records available;

2. Whether civil penalties should be assessed against Transeurope Shipping, Inc., pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and
3. Whether the license of Transeurope Shipping, Inc. to act as an independent ocean freight forwarder should be revoked or suspended pursuant to Section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 CFR 510.17 (1981)) for:
 - a. willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 CFR 510 (1980)); or
 - b. conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding.

As a result of the above Order the parties initially began discovery and then asked for time to settle the issues involved. The settlement negotiations were protracted and involved several proposals, none of which were acceptable to the undersigned. Ultimately, the matter was set for trial at which time the parties submitted the joint settlement proposal which is attached.

Findings of Fact

The parties in this proceeding never submitted a stipulation of facts. Instead, in making their settlement proposal they did submit what they termed "Proposed Stipulations and Statements of Position," which, together with other documentary evidence contained in the record, serves as a basis for the following findings of fact:

1. By letter dated April 23, 1980, the Federal Maritime Commission (the "Commission") was informed by the former New Jersey Office traffic manager of Transeurope Shipping, Inc. (Transeurope), that he "was fired because I complained constantly of the unfair practice of over-charging on Ocean Freight." The letter enclosed "photostats given to me by the former Traffic Manager . . . "who had also been fired because of the same reasons."

2. By letter dated May 2, 1980, the Commission was informed by a former employee of Transeurope that he left the Carson, California, Office of the company because:

In order to keep my job with this Company, I was forced to continuously increase the measurements billed to our customers,

even though Transworld Shipping, GMBH in Hamburg had increased the measurements already up to 13 CBM.

Due to this fact, more and more customers complained, or discontinued our service. The general practice was to declare minimum measurements to the shipping lines and to charge out maximum rates to our customers. It also was common practice to charge conference rates while shipping with non-conference vessels.

Since this business practice came to this extent, I saw no other way but to leave this Company in order not to destroy my own reputation, which I built up in the last few years.

3. The receipt of the above letters was predated by a routine postlicensing compliance check commenced by the Commission's Los Angeles Office in February of 1980. The check related to the freight forwarder operations of Transeurope, License Number 2064, which was issued on April 3, 1978. The check involved the interview of Transeurope's Vice-President who sent the letter referred to in paragraph (2) above. No questionable practices were noted during the compliance check.

4. On June 2, 1980, Commission investigators interviewed Transeurope's Vice-President referred to in paragraph 3 above. At the interview Mr.

_____ :²

* * * explained that on inbound shipments, Transworld would instruct Transeurope how much to collect from consignees on its behalf. The amount to be collected would sometimes be inflated by increasing the cubic measurement of the freight shipped more than that declared to the ocean carrier. Transworld would send Transeurope a handwritten worksheet indicating the true cube shipped as well as the amount of the increased cube. Transeurope would also increase the freight charges to be collected from the consignees in order to further overcharge the consignees. Mr.

_____ stated that the increase to the consignee on the part of Transeurope was not a set amount of percentage, but just what he thought the traffic would bear. Mr.

_____ also stated that Mr. _____, the owner of Transeurope and Transworld, had instructed him to also start increasing the costs on Transeurope's outbound shipments sometime in June or July of 1979. He ignored this instruction until late 1979, when Mr. _____ demanded that he start increasing the charges on outbound shipments. He increased the amount of ocean freight, bunker surcharges and currency adjustment factor charges in fear of being fired by Mr.

_____. He stated that to the best of his knowledge there were approximately eight or ten outbound shipments where the ocean freight charges' were increased from a total of twenty-five outbound shipments handled by Transeurope. Since the compliance check of February, 1980 had shown no discrepancies in

² Specific names of the parties involved are being deleted herein since they are not necessary to the decision.

Transeurope's records regarding the increase in ocean freight, Mr. _____ was asked to explain the reason these increases did not appear in Transeurope's records. Mr. _____ stated that false invoices and false ledger sheets were provided to the Commission investigator during the compliance check. The true invoices were kept in a notebook marked "TWS". Mr. _____ informed the investigators of the location of the notebook within Transeurope's office.

5. The allegations noted in paragraph (4) above were investigated by the Commission staff, which found that in eight instances Transeurope had billed its forwarding clients inflated ocean freight charges, bunker surcharges and currency adjustment factor charges. Hearing Counsel was prepared to present evidence to show that the records for six of the eight shipments supported the statement regarding the two sets of invoices on outbound shipments, and that Transeurope would also sometimes increase the cube itself. Hearing Counsel alleges that the evidence would show that Transworld (apparently a subsidiary of Transeurope, or in some way a related foreign company), also misdescribed the goods being shipped to ocean carriers in order to obtain lower freight charges. Hearing Counsel further alleges that Transeurope purged its files in an attempt to cover up the above practice.

6. On December 1, 1981, Commission investigators interviewed the new Qualifying Officer for Transeurope. Ten current outbound shipments were reviewed with no violations noted. Copies of Transeurope's balance sheet as of 10/31/81 were also obtained. It indicated current assets of \$141,180.92 and liabilities of \$127,620.74.

7. Transeurope alleges it did not commit the violations alleged by Hearing Counsel except for the eight instances occurring in 1979 and January of 1980, which it believed were "technical" violations. It alleges the violations were committed by a disloyal, dishonest former employee without the company's or its owner's knowledge. Further, it alleges two of its employees (the authors of the letters referred to in paragraphs (1) and (2) above) were secretly involved in the unauthorized diversion of the respondent's assets to a business or businesses of their own, which included the setting-up of a competing concern aimed at respondent's customers.

8. Transeurope admits that the letters referred to in paragraphs (1) and (2) above were written by its former employees. It alleges that before the letters were written both employees had been fired and that criminal complaints had been filed against them for the unlawful diversion of company assets. It asserts that except for the eight export shipment violations, none of the violations alleged by Hearing Counsel occurred, and in any event the alleged violations were part of its employees own mismanagement of the business, not known or condoned by its owner.

9. The respondent alleges that one of its former employees admitted the improper use of its funds and entered into a promise to repay the respondent on which promise he defaulted.

10. The respondent denies that there was an "increase in cube" or any misdescription to ocean carriers, and points out that there is no such showing after its employee was fired. It also denies any "purging" of documents.

11. The respondent alleges that in inbound trades, it is not acting as a freight forwarder and has not acted in any trades as an NVOCC, and further, that all actions of Transeurope and its affiliates in inbound trades were at all times lawful and proper.

12. The respondent notes that its files have always been available to the Commission, except for the 1979 and 1980 shipments handled by its fired, former employee. It asserts it is involved in freight forwarding on a very small scale, that it lost \$14,761.00 in 1982, and \$15,686.00 in the first seven months of 1983, and was in a negative working capital posture.

13. The respondent alleges that in 1979-80, its owner spent substantial time outside of the United States and left the day-to-day management of Transeurope to its former employee, who was responsible for any wrongdoing that may have occurred.

14. During the pendency of this proceeding several joint settlement proposals were offered by the parties. In those proposals a sum of \$1,000.00 was offered in settlement of the penalty provisions of the Shipping Act, 1916. The proposed settlements were justified in part by citing the financial statements of the respondent and its inability to pay any more than the \$1,000.00. The proposed settlements were rejected by the Administrative Law Judge and subsequently the respondent's financial statement was reviewed by the Commission's staff which concluded:

We have reviewed the financial data on the subject company accompanying your memorandum to the Chief, Office of Financial Analysis dated November 3, 1983. This review was conducted with a view towards determining Transeurope's ability to pay a penalty in excess of \$1,000.

Although the financial information submitted was not prepared by independent auditors and does not constitute financial statements in conformance with generally accepted accounting principles, we were able to reach certain conclusions regarding the company's operations. According to data submitted, Transeurope had cash in the bank in excess of \$20,000 on August 31, 1983. Its working capital (current assets less current liabilities) was almost \$3,000 on that date. This calculation was made excluding a loan to one of the owners which, in our opinion, cannot be properly classified as a current liability. The company's net worth (total assets less total liabilities) was approximately (\$700) on

August 31, 1983. It is also notable that the company has no long-term debt other than the loan from the owner.

Included in the information furnished your Bureau was a summary of income (losses) for the twelve months ending August 31, 1983. This summary showed that operations during the period resulted in a net loss of more than \$17,000. However, an income statement covering seven months ending on that date showed legal expense of more than \$13,000. It is our understanding that this expense is directly related to the matter before the Commission, and should not be considered an expense incurred in the ordinary course of business.

Taking into account all of the foregoing, it is our opinion that Transeurope has the ability to pay a fine in excess of \$1,000. A penalty of \$5,000 would not be unreasonable. We do not feel that an on-site review of Transeurope's accounting records would serve a useful purpose.

15. When this proceeding was called for hearing the parties presented an offer in settlement wherein the respondent agreed to pay \$5,000.00 on the installment basis in settlement of the pertinent penalty provisions of the Shipping Act, 1916.³ In return the Commission among other things released the respondent from any claims, penalties or liability for any penalties or sanctions under the Shipping Act, 1916, or any other pertinent statute, in connection with any of the activities described in the Order of Investigation and Hearing occurring prior to December 31, 1981.

Ultimate Facts

16. The eight violations which occurred in 1979-1980 were not merely technical in nature but were material violations of the Shipping Act, 1916, for which the respondent was responsible and might be held liable and subject to penalty.

17. The record in this proceeding justifies a settlement whereby the respondent pays \$5,000.00 to the Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others, and which will secure compliance with the law and the Commission's rules and policies.

Discussion and Conclusions

1. *Settlement of Civil Penalties*

³ The settlement agreement also contains a provision that "neither Transeurope, nor its affiliates, owners or directors shall apply to the Commission for an ocean freight forwarder's license within three years after this agreement becomes final." This provision is in furtherance of revocation of the respondent's license to which it agreed thereby making the fitness issue raised in the Order of Investigation and Hearing moot.

It is well settled that the law generally, as well as the Federal Maritime Commission, encourages settlements and that there is a presumption that settlements are fair, correct and valid. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

The agency shall give all interested parties opportunity for—

- (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,⁴ referred to the above provision “as being of the ‘greatest importance’ to the functioning of the administrative process” and stated:

The whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

Further, the Commission has by rule encouraged settlement⁵ and has often favorably looked upon them as a matter of policy.⁶

⁴ Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *Supra*, at 24.

⁵ Rule 91 of the Commission’s Rules of Practice and Procedure, 46 CFR 502.91, provides in pertinent part: “Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . .”

See also Rule 505, 46 CFR 505, where in General Order 30 the Commission provides for: “compromise, assessment, settlement and collection of civil penalties under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933”; and the criterion contained in the government-wide “Standards for the Compromise of Claims” where in section 103.5 under the heading “Enforcement Policy” (4 CFR 103.5) it is stated that:

Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency’s enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon.

⁶ See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 75-51, served June 21, 1979, Administratively Finalized, July 27, 1979; 22 F.M.C. 31 *Del Monte Corp. v. Matson Navigation Co. (Approval of Settlement)*, FMC Docket No. 79-11, served

As to the propriety of the settlement itself in this case, there is no question that at least eight violations were involved respecting overcharges in outbound shipments. We do not believe those overcharges were merely "technical" in nature. This is especially so since the facts in the record established that they were serious enough that Hearing Counsel alleges former employees quit Transeurope because they were forced to engage in the wrongdoing, and the respondent argues they were part of a scheme by the former employees to enrich themselves. Under either premise the violations can hardly be termed "technical." Further, there are allegations of a cover-up by way of maintaining a set of duplicate records.

It is clear from the record in this case that the single most important aspect of it is the discrepancy in facts. There is a direct conflict between Hearing Counsel's position that the wrongdoing was ordered by and known to Transeurope's President, and the respondent's position that its former employees engaged in the wrongful acts and that Transeurope's owner neither asked them to commit the wrongs nor even knew of them. At first the trial hazard described above was not really addressed in terms of settlement. Instead \$1,000.00 was offered on the basis of inability to pay. This was rejected when the Commission's staff reviewed the respondent's financial statements and called into question the conclusions made from those statements. However, the present offer of \$5,000.00 represents a substantial increase over the original offer, and given the trial hazard previously described is a fair and reasonable figure, considering further the cost of trial and the likelihood of a judgment for a higher monetary figure.

Therefore, it is held that the settlement of the civil penalties proposed by the parties is fair and equitable and in light of the facts and circumstances involved, is in the public interest and is approved. A copy of the settlement agreement is attached.

2. *Fitness*

The respondent has surrendered its freight forwarder license. It has agreed not to reapply for at least three years, as have its affiliates, officers and directors. The respondent's actions make moot the fitness issue raised in the Commission's Order of Investigation and therefore, no decision relating to such issue is warranted here.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-1
TRANSEUROPE SHIPPING, INC.

PROPOSED SETTLEMENT

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel, Federal Maritime Commission, and Respondent, Transeurope Shipping, Inc., an ocean freight forwarder. It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 503.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served January 14, 1983, the Federal Maritime Commission instituted the present proceeding to determine whether "Transeurope Shipping, Inc. (Respondent), violated the Commission's general Order 4 (46 C.F.R. 510. (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j), invoices; section 510.23(k), records required to be kept; and/or section 510.23(l), failure to make records available," and whether "civil penalties should be assessed against the Respondent, pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty;" and whether "the license of the Respondent to act as an independent ocean freight forwarder should be revoked or suspended pursuant to section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 C.F.R. 510.17) (1981)), for willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 C.F.R. 510 (1980)), or conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding;" and

WHEREAS, Hearing Counsel have identified eight shipments in U.S. outbound trades and nine shipments in U.S. inbound trades during 1979 and early 1980, which Hearing Counsel allege involve violations of Commission regulations; and

WHEREAS, the Respondent denies such allegations but is unwilling to expend the sum necessary to continue with discovery proceedings and the cost of litigating its defenses; and

WHEREAS, Hearing Counsel and the Respondent, in order to avoid the delays and expense which would be occasioned by litigation of the issues specified in the Order of Investigation and Hearing, are desirous

of settling expeditiously the issues of violations and the appropriate amount to be paid by the Respondent in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, (46 U.S.C. § 831(e)), authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916.

NOW THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil claims set forth herein, the parties agree as a condition of this settlement to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions, and terms of settlement contained herein.

1. Within fifteen (15) days of the date this Agreement becomes final by final Commission Order in this proceeding, Transeurope Shipping, Inc. will voluntarily surrender to the Commission its freight forwarder's license No. 2064 and pay the sum of one thousand dollars (\$1,000.00) to the Commission and tender to the Commission a duly executed promissory note in the amount of four thousand dollars (\$4,000) plus simple interest at 12 percent per annum, payable to the Commission in two installments of two thousand dollars (\$2,000) on July 1, 1984 and two thousand dollars (\$2,000) on December 31, 1984.

2. Neither Transeurope Shipping, Inc. nor its affiliates, owners or directors, shall apply to the Commission for an ocean freight forwarder's license within three years after this Agreement becomes final.

3. Upon satisfaction of the undertakings in paragraph 1, Transeurope Shipping, Inc., is released from any claims, penalties or liability for sanctions or penalties of any kind under the Shipping Act, 1916, or any other statute administered by the Commission, in connection with any of the activities or subject matter described in the Commission's Order of Investigation and Hearing instituting this (Docket No. 83-1) which occurred prior to December 31, 1981 or as to which evidence had, as of the date of the settlement agreement, been brought to the Commission's attention in the course of its administrative investigation herein.

4. This Agreement shall not constitute an admission by Transeurope Shipping, Inc., or any affiliate, owner, officer, director, or employee of Transeurope Shipping, Inc., that any of the allegations set forth in the Order of Investigation and Hearing are true. Except as provided in paragraph 3, it is understood by the Respondent that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or by any other department or agency of the United States Government for conduct engaged in by the Respondent. However, based on information available to the Commission as of September 20, 1983, the Commission has no evidence of violations of the Shipping Act, 1916, by Respondent that are not released under paragraph 3 and no intentions as to further enforcement actions as to Respondent.

Respondent acknowledges that it has voluntarily entered into this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

In the event of changes of law or other circumstances at any time during the term of this Agreement that the Respondent believes warrants modification or mitigation of any of the requirements imposed on it by this Agreement, the Commission agrees, as an inherent part of this Agreement, to the Respondent's right to petition the Commission to this end.

5. This Agreement becomes final on the service date of the Order in which the Commission declines to review the order of the Presiding Administrative Law Judge approving the Agreement or on the service date of the final Order of the Commission, whichever is later. If for any reason this Agreement is not approved as provided above, it shall be of no force and effect, and may not be used by any person for any purpose.

Transeurope Shipping, Inc.

Federal Maritime Commission

By: _____
Peter K. Laser, President

Joseph B. Slunt, Hearing Counsel

Date: January 19, 1984

James S. Oneto, for Hearing Counsel

R. Frederic Fisher
Lillick McHose & Charles
Counsel for Respondent

John Robert Ewers, Director,
Bureau of Hearing Counsel

Date: January 17, 1984