

ORIGINALDecision No. 59216

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of WINANS
BROTHERS TRUCKING CO., a corpora-
tion.

Case No. 6107

Marvin Handler, for respondent.
Edward G. Fraser, for the
Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates and practices of Winans Brothers Trucking Co., a corporation.

Duly noticed public hearings were held in this matter before Examiner Donald B. Jarvis on December 4, 5 and 30, 1958.

The purpose of this investigation is to determine, with respect to certain specified transportation, whether respondent:

1. Has violated or is violating Section 494 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of property as a highway common carrier than the applicable and effective rates and charges set forth in its tariffs filed with the Commission.
2. Has violated Sections 3664 and 3667 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of property than the applicable rates prescribed by Minimum Rate Tariff No. 2, Minimum Rate Tariff No. 5, and supplements thereto.

3. Has violated Sections 3664 and 3667 of the Public Utilities Code by failing to adhere to other provisions and requirements of Minimum Rate Tariff No. 2, Minimum Rate Tariff No. 5, and supplements thereto.

Respondent concedes that violations occurred. The points at issue are the nature and extent of these violations and, with respect to the penalty to be assessed, whether or not they were wilful.

Many of the shipments here involved originated at the U. S. Plywood plant located near Anderson, California and were hauled by respondent under its highway common carrier operating authority. One matter of controversy is the proper rate applicable at the U. S. Plywood plant. Anderson is an incorporated city. The U. S. Plywood plant is located outside the city limits. It is undisputed, and the Commission finds as a fact, that said plant is located on a spur track of the Southern Pacific railroad approximately two miles north of the railroad station at Anderson.

To determine the proper rate applicable at the U. S. Plywood plant with respect to the shipments here involved it is necessary to refer to respondent's highway common carrier tariff - California Motor Tariff Bureau Local Freight Tariff No. 2. The pertinent items at the time the transportation here involved took place were as follows:

Item 35:

- "(a) Except as otherwise specifically limited or indicated in this tariff, the pickup and delivery service included in the rates published herein will be confined to the corporate limits of the city or town of the origin or destination station.

- "(b) Except as otherwise specifically provided, in unincorporated territory pickup and delivery service will be confined to locations within a radius of one mile from an established railroad depot, or, if there be no such depot, then within a radius of one mile from a post office, or, if there be no post office, then within a radius of one mile from the center of the community."

Items 282 and 283 set forth specific commodity rates from points in northern California, including Anderson and points in southern California. Both of these items have as part thereof a Note No. 1 which provides that:

"Rates apply from and to points named only and are subject to Item No. 220 - Application of Railhead Rates. Issued under authority of the Public Utilities Commission of the State of California, No. 460-639 of December 7, 1954."

Item 220:

- "(b) ...rates named in Items Nos. 281, 282 and 283 apply from and to railhead (see Item No. 5) on the lines of the rail carriers designated by the suffix letters in connection with each point named. The rail carriers thus designated are as follows: ... Southern Pacific Company (Pacific Lines)..."

Item 5:

- "(f) Railhead means a point at which facilities are maintained for the loading of property into or upon, or the unloading of property from, rail cars or vessels. It also includes truck loading facilities of plants or industries located at such rail or vessel loading or unloading point."

Respondent takes the position that the proper rate applicable at the U. S. Plywood plant should be determined in the following manner: Tariff Item 35(b) is applicable "except as otherwise specifically provided." Items 282 and 283 constitute specific exceptions to Item 35. Anderson (SP) is listed as a point of origin in Items 282 and 283. Note No. 1 to Items 282 and 283

makes Item 220 applicable. Item 220 provides that the rates named in Items 282 and 283 apply from and to railhead on the lines of the rail carriers designated by the suffix letters in connection with each point named. Item 220 further identifies the suffix letters (SP) as Southern Pacific Company (Pacific Lines). Therefore, when Items 282 and 283 refer to Anderson (SP) they refer to the switching limits of Anderson as defined by Southern Pacific in its tariffs. Item 5330 of Southern Pacific Terminal Tariff 230-K defines the switching limits of Anderson so as to include the U. S. Plywood plant. Therefore, the proper rate applicable at the U. S. Plywood plant is the Anderson rate set forth in Items 282 and 283.

The Commission staff takes the position that to determine the proper rate applicable at the U. S. Plywood plant respondent may not go beyond the face of its tariff; that respondent is not a party to any Southern Pacific tariff and respondent's tariff does not refer to any Southern Pacific tariff; that when Items 282, 283 and 220 of respondent's tariff refer to railheads on the lines of Southern Pacific at Anderson it must be construed to mean Anderson as defined in Item 35 of respondent's tariff; that the U. S. Plywood plant is outside the corporate limits of Anderson and that shipments from the U. S. Plywood plant must be treated as originating in unincorporated area north of Anderson.

While a radial highway common carrier may look to the tariffs of common carriers to determine a lowest lawful rate (Public Utilities Code Section 3663; Minimum Rate Tariff No. 2, Item 200), a certificated highway common carrier may not go beyond the face of its tariff to determine a rate (Public Utilities Code Sections 493, 494, 495). It is a well-settled proposition that a shipper is not required to look beyond the face of the tariffs

published by a certificated highway common carrier. (S.S. Pierce Co. v. Boston & A. R., 186 ICC 583, 586; Warner Stove Co. v. Director General, 68 ICC 395, 397; Interstate Remedy Co. v. American Express Co., 16 ICC 436, 438-39.) The Commission concludes that under respondent's tariff, as it existed at the time the transportation here involved took place, the proper rate applicable at the U. S. Plywood plant was a rate based upon the fact that the plant was in unincorporated area outside the corporate limits of Anderson. The Anderson rate was not applicable.

The Commission is of the opinion, however, that under the peculiar facts and circumstances of this case, respondent should not be ordered to collect any undercharges with respect to shipments originating from the U. S. Plywood plant at a rate higher than the rate applied to Anderson. Respondent could have, by proper provisions in its tariff, published the rate to Anderson as a lawful rate at the U. S. Plywood plant and included that plant in the tariff-defined limits of Anderson. As indicated, respondent did not do so. The record discloses that the U. S. Plywood plant is located north of Anderson between Anderson and Redding. Items 282 and 283 of respondent's tariff were authorized by Commission Order 460-639 dated December 7, 1954. This order resulted from a Special Docket Application for long and short haul relief under Public Utilities Code Section 460 filed by respondent's tariff publisher. The Special Docket Application averred that certain railroads had reduced their surcharges on carload rail rates to various points; that because of this reduction in rail rates respondent's published rail-head rates to these points would exceed its distance commodity rates; that competitive conditions created by the railroads required that respondent be permitted to adopt rates competitive with the rail

lines; and that authority to publish specified railhead rates be granted. Under Items 282 and 283 the railhead rate applicable at Anderson and the next northerly incorporated city, Redding, is the same. As indicated, the U. S. Plywood plant is on a spur track between Anderson and Redding. The rate under respondent's tariff applicable at the U. S. Plywood plant, heretofore discussed, is greater than the railhead rate in respondent's tariff applicable to the more northerly point of Redding. Therefore, in considering the undercharges which respondent will be ordered to collect, the Anderson-Redding railhead rate will be applied to shipments originating at the U. S. Plywood plant because of the circumstances, including similar competition, and conditions surrounding the transportation from the U. S. Plywood plant.

There is a situation similar to the one involving the U. S. Plywood plant which concerns shipments originating at the Nettleton Forest Products plant which is located on a Southern Pacific rail spur track between Anderson and Redding. For the reasons above stated, in determining the undercharges respecting these shipments which respondent will be hereinafter ordered to collect, the rate applied at the Nettleton Forest Products plant will be the Redding-Anderson rate.

There is also controversy concerning the proper rate to be applied at the points of destination in connection with the transportation involved in the following freight bills: 1986, 3069, 4790. In each instance the destination of the shipment was not a named point in the commodity rate tables of respondent's tariff. Respondent rated these shipments by applying a commodity rate to a nearby point named in its commodity rate tables and using a constructive mileage rate to the point of destination. The vice of this procedure

is that it does not follow the applicable provisions in respondent's tariff with respect to the computation of rates. Item 205(e) of respondent's tariff provides that:

"(e) When it becomes necessary to determine the distance to a point not named in Section 2 that is not otherwise provided for in paragraph (d) and such point is authorized to be served by a carrier party hereto, the distance to such point from the last point passed through which is named in Section 2 shall be;

- (1) 150 per cent of the actual mileage on concrete or asphalt paved roads; or
- (2) 200 per cent of the actual mileage on gravel or dirt road."

None of the points upon which respondent's calculations of constructive mileage was based is named in the distance tables contained in Section 2 of its tariff. Therefore, to properly rate these shipments it is necessary to base the constructive mileage on the nearest points named to the distance tables in Section 2 of respondent's tariff.

The shipments represented by freight bills Nos. 3058, 3050 and 1049 involved diversion at the point of destination. Respondent has no provision in its highway common carrier tariff dealing with diversion of shipments. Therefore, proper rating of these shipments involves treating the diversion portion as having been hauled by respondent under its radial highway common carrier operating rights and applying rates applicable under Minimum Rate Tariff No. 2.

There is not sufficient evidence in the record to establish any actionable violations with respect to freight bills Nos. 3581, 2874, 2875, 3154 and 3155 and they will not be further considered.

Intent is not an element in the violations here involved. However, in admeasuring the penalty to be imposed for the violations

here involved the basic question of whether or not these were wilful violations is a determination that necessarily affects the stringency of the penalty to be assessed.

The Commission staff produced evidence which it claims indicates that the violations here under consideration were wilful. A staff associate transportation representative testified to certain alleged admissions, made in 1957 by Grant Winans, a principal stockholder and manager of respondent, which would indicate that respondent knowingly permitted some of the violations herein considered. Cross-examination cast considerable doubt on this testimony. Respondent produced affirmative evidence which tended to show that the alleged admissions were never made. Aside from these alleged admissions, there is no other evidence in the record which would show wilfulness. The Commission finds that there is not sufficient evidence in the record to establish that any of the violations herein considered were wilful.

Based upon the evidence of record in this matter, the Commission makes the following additional findings and conclusions:

1. At all times herein mentioned respondent held, and respondent now holds, a certificate of public convenience and necessity to operate as a highway common carrier granted by Decision No. 53025 in Application No. 37866 and the following permits issued by this Commission: Radial Highway Common Carrier Permit No. 1-2928 and Contract Carrier Permit No. 45-819.

2. At all times here involved, respondent had been served with the Commission's Minimum Rate Tariff No. 2 and all supplements thereto as well as the Commission's Distance Table No. 4 and all supplements thereto.

3. At all times herein mentioned respondent had on file with this Commission a highway common carrier tariff, to wit, California

Motor Tariff Bureau, Local Freight Tariff No. 2. Respondent was not a party to nor did it have on file with this Commission any other highway common carrier tariff.

4. During the year 1957, respondent transported under one or more of the operating authorities heretofore enumerated certain shipments of lumber between various points in the State of California. Improper charges were assessed on said shipments. A list of said shipments including the charges actually assessed as well as the charges the Commission finds should have been assessed as required by law, is as follows:

<u>Frt. Bill No.</u>	<u>Date of Shipment</u>	<u>Place at which Consignor Located</u>	<u>Weight</u>	<u>City in which Consignee Located</u>	<u>Charges Assessed by Respondent</u>	<u>Correct Charge</u>	<u>Amt. of Undercharge</u>
5865	6/ 4/57	U.S.Plywood*	45,500	San Diego	\$273.00	\$273.00	\$ 00.00
3953	2/20/57	U.S.Plywood*	47,200	Norwalk	283.20	319.82	36.62
1986	3/29/57	Redding	47,900	Hawthorne	287.40	368.13	80.73
3069	4/ 1/57	U.S.Plywood*	44,600	Carlsbad	267.60	386.91	119.31
4334	4/16/57	U.S.Plywood*	46,400	Camarillo	278.40	314.39	35.99
3810	4/ 5/57	U.S.Plywood*	43,600	W.Sacramento	95.92	129.74	33.82
4790	4/15/57	U.S.Plywood*	44,900	Gardena	269.40	310.24	40.84
3195	5/ 8/57	U.S.Plywood*	39,000	Montebello	240.00	240.00	00.00
1075	5/ 3/57	U.S.Plywood*	46,740	Norwalk	280.44	316.70	36.26
5782	5/23/57	U.S.Plywood*	42,200	Gardena	253.20	285.94	32.74
5182	5/13/57	U.S.Plywood*	46,200	Culver City	277.20	313.05	35.85
5185	5/29/57	Anderson	39,100	SF&Vicinity	164.49	208.63	44.14
3211	6/ 7/57	Anderson	44,400	Lancaster	266.40	328.56	62.16
6748	6/11/57	Yreka	44,900	Banning	287.36	370.23	82.87
823	2/ 4/57	Nettleton Forest Prod.	46,800	Los Angeles	280.80	317.11	36.31
3412	1/11/57	U.S.Plywood*	46,960	Apple Valley	281.76	318.19	36.43
31000	1/ 9/57	U.S.Plywood*	48,080	Santa Monica	288.48	325.78	37.30
3583	1/10/57	Hilt	46,720	Culver City	280.32	389.04	108.72
3584	1/10/57	Hilt	46,840	San Pedro	281.04	396.31	115.27
1149	1/14/57	Nettleton Forest Prod.	47,500	Altadena	285.00	321.85	36.85
1044 ^c							
1045 ^c	1/16/57	Hayfork	50,900	Inglewood	397.02	436.50	39.48
2638 ^c			40,600 ^c				
2639 ^c	2/ 1/57	Hayfork	46,800	Gardena	353.88	390.19	36.31
1221 ^c							
1222 ^c	2/ 1/57	Hayfork	51,300	Orange	364.74	401.06	36.32
2376 ^c							
2377 ^c	4/ 8/57	Hayfork	48,800	Pomona	380.64	435.47	54.83
4581 ^c							
4582 ^c	4/ 8/57	Hayfork	45,400	Pomona	354.12	405.13	54.83
1049	2/ 4/57	U.S.Plywood*	41,600	Bloomington	249.60	314.14	64.54
3050	1/24/57	Nettleton Forest Prod.	44,800	Pedley	268.80	372.46	103.46

* The rate at point of origin used in connection with this shipment is the Anderson-Redding rate. This rate has been used for the reasons heretofore set forth in this opinion.

5. Respondent violated Section 494 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of lumber than the rates prescribed in its highway common carrier tariff for transportation rendered by it as a highway common carrier.

6. Respondent violated Sections 3664 and 3667 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of lumber as a radial highway common carrier than the minimum charges prescribed in the Commission's Minimum Rate Tariff No. 2.

7. All of respondent's operating authority should be suspended for a period of five days and it will be ordered to collect the undercharges hereinabove found. Respondent will also be ordered to examine its records from January 1, 1959 to the present time for the purpose of ascertaining whether additional undercharges exist.

8. Respondent should be ordered to take steps to provide that the distance commodity rates set forth in its tariff, promulgated by virtue of long and short haul relief authority, shall not discriminate against shippers located on railheads at points intermediate between named points.

O R D E R

A public hearing having been held and based upon the evidence therein adduced,

IT IS ORDERED that:

1. The certificate of public convenience and necessity granted to Winans Brothers Trucking Co., a corporation, in Decision No. 53025, dated May 8, 1956, in Application No. 37866; Radial Highway Common Carrier Permit No. 1-2928 and Highway Contract Carrier Permit No.

45-819 issued to respondent are hereby suspended for five consecutive days starting at 12:01 a.m. on the second Monday following the effective date of this order.

2. Winans Brothers Trucking Co., a corporation, shall post at its terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that its certificate of public convenience and necessity, radial highway common carrier permit and highway contract carrier permit have been suspended by the Commission for a period of five days; that within five days after such posting respondent shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

3. Winans Brothers Trucking Co., a corporation, shall examine its records for the period from January 1, 1959 to the present time for the purpose of ascertaining if any additional undercharges have occurred other than those mentioned in this decision.

4. Within ninety days after the effective date of this decision, Winans Brothers Trucking Co., a corporation, shall file with the Commission a report setting forth all undercharges found pursuant to the examination hereinabove required by paragraph 3.

5. Winans Brothers Trucking Co., a corporation, is hereby directed to take such action as may be necessary to collect the amounts of undercharges set forth in the preceding opinion, together with any additional undercharges found after the examination required by paragraph 3 of this order, and to notify the Commission in writing upon the consummation of such collections.

6. In the event charges to be collected as provided in paragraph 5 of this order, or any part thereof, remain uncollected

one hundred twenty days after the effective date of this order, Winans Brothers Trucking Co., a corporation, shall submit to the Commission, on the first Monday of each month, a report of the undercharges remaining to be collected and specifying the action taken to collect such charges and the result of such, until such charges have been collected in full or until further order of this Commission.

7. Respondent is ordered to take all steps necessary to provide that the distance commodity rates set forth in its tariff, promulgated by virtue of long and short haul relief authority, shall not discriminate against shippers located on railheads at points intermediate between named points.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Winans Brothers Trucking Co., a corporation, and this order shall be effective twenty days after the completion of such service upon the respondent.

Dated at Los Angeles, California, this 3rd day of November, 1959.

Ernest W. Ray
President

W. E. [unclear]

Matthew [unclear]

E. [unclear]

Theodore [unclear]
Commissioners