GH

Decision No. 71155

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of LANDIS MORGAN, an individual, doing business as LANDIS MORGAN TRANSPORTATION.	)	Case No. 8060 (Filed November 10, 1964)

E. H. Griffiths and Hugh N. Orr, for Landis Morgan, respondent.

B. A. Peeters and E. E. Cahoon, for the Commission staff.

O P I N I O N

The Commission, on November 10, 1964, instituted this investigation into the operations of Landis Morgan, holding Radial Highway Common Carrier Permit No. 23-1285 issued December 12, 1955 and with headquarters at Ukiah, to determine whether the carrier had violated Sections 3664, 3667 and 3737 of the Public Utilities Code by having charged, demanded and collected for the transportation of property rates and charges less than the prescribed minima established by Minimum Rate Tariff No. 2. Appropriate penalties and remedies are sought.

The case was submitted on May 14, 1965, after two days of public hearings held at Ukiah before Examiner Gregory.

The questioned transportation, comprising 33 movements of lumber and plywood from Northern California mills to Northern, Central and Southern California destinations, occurred during a six-month period from October, 1963 through March, 1964.

The record shows that a Commission staff representative interviewed the carrier at his terminal in Ukiah during May and June, 1964, and examined some 1500 freight bills and related documents of

which 36 were selected for rate analysis. Three of these, determined not to indicate violations, were deleted from the staff's shipping document and rate analysis exhibits (Parts 15, 16 and 17, Exhibits 1 and 2). Certain documents in other parts of Exhibit 1 also were either deleted or corrected as a result of the analysis. The staff exhibits, as so modified, thus contain shipping documents and related rate analyses for 33 shipments on which total undercharges of $2,106.48 are alleged to have occurred as a result of improper application of minimum rates and rules in one or more of the following categories: (a) failure to assess off-rail rates at destination (29); (b) improper documentation for shipments rated by carrier as multiple-lot single shipments (5); (c) improper rating on reshipment of a part lot over a private spur to a point off spur (4); (d) illegal consolidation of shipments (2).

Counsel for the staff and for the respondent stipulated that the carrier held Radial Highway Common Carrier Permit No. 23-1285, issued December 12, 1955, as amended November 22, 1960 and August 27, 1963, and that he had been served with applicable rate orders, corrections and supplementary material issued by the Commission. The alleged violations are summarized below.

Failure to Assess Off-Rail Charges at Destination

Item 210 of Minimum Rate Tariff No. 2 (MRT2) provides, in substance, that when a point of origin or destination of a shipment is beyond railhead the rate provided by MRT 2 may be assessed in combination with the common carrier rate between the points to which the common carrier rate used applies when lower aggregate charges result.

The carrier's documents selected for rate analysis indicate rail facilities at both origin and destination of the shipments. Subsequent field checks by the staff representative at the various destinations shown on the shipping documents disclosed that, in every

instance, the destinations, i.e., actual delivery points, of the shipments in question were not served by rail facilities. In each instance of this kind the transportation charges, as shown on the documentation, did not include the additional off-rail factor required by Item 210, thus producing an undercharge for the shipment to that extent. Twenty-nine instances of the carrier's failure to assess the proper off-rail rate are developed in the staff's rate analysis.[1/]

Respondent described his methods for determining whether origins and destinations of shipments were served by rail facilities. These included: questioning truck drivers when they returned from making pickups or deliveries; periodic written or telephonic inquiries to shippers and receivers concerning availability of rail spurs at origins and destinations; maintenance of an alphabetical file, revised from time to time, listing whether patrons' yards were on- or off-rail; directing inquiries to the Ukiah office of Northwestern Pacific Railroad, or requesting a shipper to make the inquiry, to determine whether a particular location was served by rail facilities. These practices, as well as occasional inspections by respondent of a consignor's or consignee's premises, constituted, according to respondent's testimony, the basis for information upon which he acted in concluding whether a shipment might qualify for alternative application of a lower rail rate pursuant to MRT 2.

A striking illustration of the difficulty, from an evidentiary standpoint, of determining in a given instance whether a shipment would qualify for alternative application of rail rates is presented by seven shipments of lumber, rated separately in the analysis, from Fortuna Wood Products, at Fortuna, to Dickinson Lumber Company, at Cloverdale, between December 30, 1963 and March 4, 1964 (Exhibit 2, Parts 6-12).

1/ Exhibit 2 - Parts 1 through 14; 18 through 28; 33 through 36.

The carrier's documents for these shipments (Exhibit 1, Parts 6-12) show the consignor located "off-rail" and indicate assessment of the origin off-rail rate of 4-1/2 cents per 100 pounds. The documents show Dickinson Lumber Company, the consignee, as "on-rail" and the total freight charges were assessed on that basis.

The evidence relating to the existence of rail facilities at the consignee's premises is conflicting. In substance, the staff investigator testified that: he examined the Dickinson Lumber Company premises on his return from Ukiah to San Francisco following his first check (in May, 1964) of the carrier's operations and records, and determined that no rail spur was available; he had a conversation with respondent during his second office visit (in June, 1964), in which he informed respondent that the Dickinson plant was off-rail and respondent replied he knew it was off-rail; he subsequently questioned the Northwestern Pacific's Cloverdale agent and was advised that there had been no rail service to Dickinson Lumber Company for at least four years prior to July, 1964. His testimony on this point is that "the tracks were terminated and pulled up between the spur, and my examination confirmed this, and the main line going past." (Tr. p. 272.)

Respondent Morgan, on cross-examination directed to the above conversation relative to the Dickinson Lumber shipments, stated: "I told him [the staff representative] to my knowledge that they were on-rail. That's what we had listed in our file, that the Dickinson Lumber Company was on-rail." (Tr. p. 224.) Further, "I remember that we talked about the Dickinson Lumber Company, but I don't remember that he told me that the spur had been removed four years, or whatever it was." (Tr. p. 232.) Respondent, on direct examination, testified that Dickinson Lumber Company had been "on-rail for quite a few years", and that "the first time we knew that their spur was disconnected was when Mr. Hjelt (the staff representative) checked

it and we got this order from the Commission." (Tr. p. 186.) Respondent testified he then telephoned the lumber company several times to try to find out when the spur had been discontinued but was unable to get the information; that the lumber company was under new ownership and the new owner was out of town when he telephoned; that "It's our understanding that the track wasn't removed but it was discontinued"; that he had seen the rail spur there at one time (unspecified) himself. (Tr. pp. 186, 187.)

The task of determining whether the Dickinson Lumber Company shipments, or shipments under similar circumstances, would qualify for alternative application of rail rates at the time the movements occurred is a formidable one if resolution of the issue is to be sought from the foregoing type of testimony. It is doubtless because of the practical difficulty of establishing the relevant facts concerning availability of rail facilities at the time of shipment that the Commission, in such cases, has charged the carrier with responsibility for properly rating shipments claimed by it to be entitled to alternative use of the lower rail rates. Indeed, the statutes themselves declare it to be unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate established or approved by the Commission, or to remit any portion of the rates or charges so specified; and require the carrier to observe any tariff, decision, or order applicable to it after service thereof. (Pub. Util. Code, Secs. 3664, 3667 3737.)

The Commission, in similar circumstances, has invariably held that the trucker uses the alternative rail rate provisions of a minimum rate tariff at his own risk; that the burden is upon the trucker to find, compute and assess a rail rate which is appropriate and current for the freight handled between the points involved, and

that he cannot be relieved of this burden by relying on information supplied by shippers and others, including his own employees, connected with the transportation in question. A number of these decisions are excerpted in a publication authorized by the Commission, entitled "Rulings Manual", prepared by the Commission's Transportation Division and distributed periodically to carriers and tariff subscribers for their information and guidance. Respondent admitted that he had received the Rulings Manual published October 28, 1964 and that he also was aware, in 1963 and earlier in 1964, of the ruling excerpted therein referring to use of alternative rail rates at the carrier's risk. (Decision No. 57923, January 27, 1959, Case No. 6165.)

While the Commission is mindful of the difficulty that may be encountered in a given case in determining whether a shipper or receiver of freight is on- or off-rail, we hold that such determination, under existing statutes, is the ultimate responsibility of the carrier involved. Respondent failed to meet the burden cast upon him by statute and by the Commission's Minimum Rate Tariff. Moreover, evidence by the carrier of his general practice in obtaining on- or off-rail information or other data utilized in rating shipments, which does not also show with precision the documentation or other justification for applying a particular tariff rate or rule to a particular shipment, does not justify a claim by the carrier that he has met the statutory mandate for observance of the Commission's minimum rate orders. While this may be a heavy burden to lay on a busy transportation company, like respondent, we see no alternative to its enforcement except through remedial legislative action.

Lack of justification by the carrier for asserted improper assessment of rates and charges accorded the questioned off-rail shipments would, in itself, support a finding that the minimum rate tariff had been violated. The record, however, additionally contains unrefuted evidence by the staff, mentioned earlier, which, speaking to relatively early post-shipment rail conditions at the various destinations, is persuasive, especially in connection with the Dickinson Lumber Company shipments, that no operating rail facilities were available at those points so as to permit application of alternative rail rates at the time the shipments moved.

Rating and Billing of Multiple-Lot and Other Types of Shipments

We now turn to a discussion of the evidence concerning other violations charged in the investigation order.

Five movements of lumber, transported between December, 1963 and March, 1964, each involving more than one truck-trailer load combined and rated by the carrier according to total weights of the combined loads as single, multiple-lot shipments, were found on analysis of the documentation to require rating as separate shipments pursuant to Item 60, MRT 2. The documentation, in the staff's view, did not support the multiple-lot treatment accorded by the carrier. (Three of these movements - Exhibit 2, Parts 5, 24, 25 - also involved off-rail deliveries, discussed earlier.)

Item 85 of MRT 2 permits pickup of shipments at more than one time and combining them as a multiple-lot shipment, if certain conditions, specified in the item, are present and are complied with by the shipper and carrier. Those conditions, in substance, are: (1) the entire shipment must be available for immediate transportation at the time of the first pickup; (2) preparation by the shipper of a single multiple-lot document for execution by the shipper and carrier prior to or at the time of initial pickup; (3) issuance by the carrier

to the consignor, at or prior to the time of the initial pickup, of a single multiple-lot document for the entire shipment, containing required information and a shipping document for each pickup, including the initial pickup, also containing required information and reference to the single multiple-lot document; (4) the entire shipment must be picked up by the carrier within a period of two days, computed from 12:01 a.m. of the date on which the initial pickup commences, excluding Saturdays, Sundays and legal holidays; (5) the composite shipment, picked up in accordance with the foregoing provisions, will be subject to the rates provided by MRT 2 in effect on the date of the first pickup for transportation of a single shipment of like kind and quantity of property picked up or transported on a single vehicle or connected train of vehicles; (6) if any of the property described in the single multiple-lot document is picked up without complying with the foregoing provisions, each such pickup shall be rated as a separate shipment under other provisions of MRT 2 (see Item 60, MRT 2).

In discussing the evidence relating to these questioned multiple-lot shipments we again are faced with a record woven from intermingled threads of fact and conjecture. The staff rate expert testified that she relied on two sources of information for the preparation of the entire rate analysis (Exhibit 2): (a) the documents comprising the field investigator's report (Exhibit 1); and (b) supplemental verbal information from the field investigator concerning his investigation of the carrier's transportation activities.

As an example, in rating as separate shipments the transportation by respondent of two truck and trailer loads of plywood weighing 103,900 pounds shipped by Oregon Moulding and Lumber Company, of Portland, Oregon from Fortuna Veneer Company, at Fortuna, California to Greater Western Homes, at Morton Air Force Base, Blythe, California (Exhibits 1 and 2, Part 5), the following documents,

appearing in Part 5 of Exhibit 1, were used by the expert in preparing the rate analysis in Part 5 of Exhibit 2:

Document	Date
Shipping Order and Freight Bill No. 12394	Feb. 26, 1964
Master Bill of Lading (2 lots)	Feb. 27, 1964
Mill Tag (Fortuna Veneer Co. - Lot 1)	Feb. 26, 1964
Weight Certificate (49,900 lbs. net - Lot 1)	Feb. 26, 1964
Delivery Receipt (Lot 1)	Feb. 28, 1964
Mill Tag (Lot 2)	Feb. 27, 1964
Weight Certificate (54,000 lbs. net - Lot 2)	Feb. 27, 1964
Delivery Receipt (Lot 2)	Mar. 2, 1963(sic)
Voucher (Oregon Moulding & Lumber Co.)	Recd. by carrier Mar. 12, 1964

The rate expert testified that she rated the above-described transportation as two separate shipments, pursuant to Item 60, MRT 2, rather than as a single multiple-lot shipment pursuant to Item 85, MRT 2, because the master bill of lading was dated February 27, 1964, "which was the second day of the pickup...." (Tr. p. 125.) Both the field investigator and the rate expert testified that they used the dates appearing on the weight certificates for these - and similar - shipments to determine the pickup dates of the components of such purported multiple-lot single shipments.

It seems clear that, except for failure to include off-rail charges at destination, the documentation for the five multiple-lot shipments would not have been questioned had the dates on the master bills of lading been prior to, or concurrent with, the dates shown on the mill tags and weight certificates related to the first component part of each of such shipments, or had the mill tags or weight certificates indicated multiple pickups during the two-day period specified in Item 85, MRT 2.

Respondent's defense to this phase of the investigation, as in the case of his response to the allegations of failure to assess off-rail charges at destination, rested primarily on the assertion that his office procedures, equipment operation practices and personal contacts with shippers and receivers were adequate to develop required information for rating shipments and billing charges therefor. Occasional errors or seeming discrepancies in documentation, he urged, were the result either of mistakes by his or a shipper's employees, or of failure of the staff investigator and expert to give effect to what he described as a common practice in lumber trucking.

That practice, concerning which the staff investigator disclaimed knowledge, consisted in dispatching double sets of trailers to pick up multiple-lot shipments the component parts of which, after having been loaded within the required 48-hour period, would be separately moved to destination or to the Ukiah terminal for unloading and reloading and dispatching on different equipment, in accordance with availability of power units and trailers at any particular time. The purpose of such a practice, according to respondent, was to secure maximum utilization of available equipment. In connection with terminal unloading and reloading of a component for later dispatch on another unit of revenue equipment, an additional weight certificate would be secured at some point en route between the terminal and final destination. This was one of the reasons, respondent asserted, that he did not use the dates of weight certificates as an indication of the dates of pickup, but regarded the dates appearing on the mill tags, signed by a consignor's employee, as the date upon which a component part was actually loaded. Respondent, moreover, categorically denied having admitted to the field investigator that he used dates on weight certificates to

indicate pickup dates, as such dates, he asserted, had no significance for the purpose of establishing actual pickup dates.

On this phase of the investigation, as in the case of the carrier's failure to assess off-rail charges at destinations, we are again confronted with the mandates of the statutes, cited above, and of the applicable minimum rate tariff, which place the obligation of proper rating and documentation of shipments on the carrier, regardless of the source or accuracy of the information he uses for those purposes. (See Re Gem Freight Lines (1963) 61 Cal. P.U.C. 411.)

In addition to instances of respondent's failure to assess off-rail charges at destinations and improper consolidation of component parts of shipments, discussed above, the evidence shows that respondent failed to apply an appropriate mileage rate factor to the total charge on a few shipments. Examples of this type are found in the rates assessed on four shipments of lumber (one with split deliveries) from Covelo Lumber Co., Inc., conceded to be off-rail at Covelo, to various destinations near Los Angeles, between November 12, 1963 and February 8, 1964 (Exhibits 1 and 2, Parts 13, 14, 21, 22). The carrier's charges for these shipments, besides failing to include an off-rail factor at destinations, show an erroneous off-rail rate of 9-3/4 cents per 100 pounds at Covelo.

The field investigator testified that on November 24, 1964, he drove to the Covelo Lumber Company mill, which he found to be located within a mile radius of the M. C. Hert Ranch, which, in turn, is located at the intersection of coordinates C & C-1 of Distance Table No. 4 at a distance of 3.5 constructive miles northeast of the Covelo basing point. By adding the 3.5 constructive miles to the 22.5 constructive miles shown on the map of Distance Table No. 4 as the constructive mileage between the Dos Rios team track and Covelo, the investigator computed a total of 26 constructive

miles for the purpose of determining the off-rail rate at the point of pickup of these shipments.

The rate expert applied an 11-cent rate from the point of pickup of the foregoing shipments to the Dos Rios team track under authority of Item 690 of MRT 2, which then provided such a rate for shipments of lumber over 25 but not over 30 constructive miles. The expert stated, in answer to a question by the examiner as to where respondent might have obtained the 9-3/4-cent rate: "I don't know, but obviously he determined that the mileage was between 20 and 25 miles." (Tr. p. 127.)

Other instances of improper rating are shown in connection with three shipments of plywood from Arcata and Fortuna to various Bay Area and Southern California destinations, tendered by the shipper to the carrier as split-delivery shipments (Exhibits 1 and 2, Parts 26, 29, 30). Here the carrier, instead of following the shipper's instructions, rerated the shipments beyond the points of first deliveries as separate - or new - shipments, and did not assess the required split-delivery charges. The rate expert, in determining the undercharges on these shipments, considered that the instructions given the carrier entitled the shipments to split-delivery treatment and rated them accordingly. Had the shipper's instructions not complied with Item 170, it would have been necessary, according to the expert, to rate each load as a separate shipment, which would have produced still greater undercharges.

General Remarks Concerning Respondent's Operations and Staff Recommendations

The record discloses that: respondent has been engaged in the lumber transportation business in California for about 20 years; in 1963 he had 22 trucks, in 1964 23, and an unknown number of trailers; in 1965 he had 30 trucks and 56 trailers; his Ukiah terminal, which occupies about two and one-half blocks in the central

part of the city, includes an office with three clerks, a yard, a shop and an 18,000-pound Gerlinger forklift, the latter used to load and unload lumber for temporary yard storage; he issues about 2,500 freight bills annually; his gross revenue for 1964 amounted to $743,099.

On November 15, 1960, the Commission, in a letter to respondent, directed him to audit his books and collect undercharges of $255.40; respondent reported collections of $3,285.84 after audit. Respondent, pursuant to a similar letter, dated December 27, 1962, directing an audit and collection of $244.95 undercharges, reported collections of $770.70 (File No. T-26593-12 (N).) No formal proceedings were taken against respondent until institution of the present investigation, which is based on transportation during the latter part of 1963 and the first quarter of 1964.

Staff counsel, in his summation, recommended that a fine equal to the amount of the undercharges ($2,106.48) be levied against respondent, pursuant to Section 3800 of the Public Utilities Code, and that disciplinary action be taken against respondent by imposing a penalty of $1,000 pursuant to Section 3774 of the Code.

Respondent's counsel urged that the relatively few errors developed by the staff from its study of some 1,500 freight bills were of a character that would be likely to occur in any transportation activity like that of respondent's; moreover, the imposition of fines and penalties, in addition to a requirement to collect undercharges, would have what he described as "a very strong impact on many of these shippers and people in the areas", since, as the record reveals, many shippers and some receivers of lumber in Mendocino and Humboldt Counties, as well as respondent, suffered considerable economic loss due to the storms in those areas in the winter of 1964-1965.

Summary, Findings and Conclusions

The statutory law requires strict adherence to established minimum rate tariffs. This makes accurate documentation of shipments a necessity, in order that a precise basis may be established for determination, usually long after transportation movements have occurred, of whether or not the carrier has violated the law.

We recognize - and in prior decisions have commented - that although the burden cast on a carrier by law and tariff provisions is not light, one who conducts a freight transportation service subject to this Commission's regulation is bound to observe strictly the rates and rules that apply to such activity.

The order to follow will require respondent to collect the undercharges resulting from the questioned transportation and will also impose a fine equal to the amount of such undercharges, as provided by Public Utilities Code, Section 3800 as well as a punitive fine of $750 under Section 3774 of said code.

We find that respondent, Landis Morgan, in transporting the lumber shipments described in Exhibits 1 and 2 herein, charged and collected rates less than the minimum rates established by Commission Minimum Rate Tariff No. 2 (MRT 2) and that the undercharges resulting therefrom amounted to $2,106.48.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that either respondent or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the

purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of $2,856.48 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, and shall notify the Commission in writing upon the consummation of such collections.

3. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges, and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

4. Respondent shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective

date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 16th day of AUGUST, 1966.

President

Commissioners

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.