

ORIGINAL

Decision No. 75893

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of B.B.D. Transportation Co., Inc., a California corporation; Bethlehem Steel Corp., a Delaware corporation; United States Steel Corporation, a Delaware corporation; and George D. Widman, Inc., a California corporation.

Case No. 8861
(Filed November 13, 1968)

Betram S. Silver, for B.B.D. Transportation Co., Inc. and Harold Summerfield, for Bethlehem Steel Corporation, respondents.
G. J. Brown, for U. S. Steel Corporation, interested party.
William J. McNertney, Counsel, and E. H. Hjelt, for Commission staff.

O P I N I O N

By its order dated November 13, 1968, the Commission instituted an investigation into the operations, rates and practices of B.B.D. Transportation Co., Inc., a California corporation, to determine whether respondent has violated Sections 3664, 3667 and 3737 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of property over the public highways of this State as a result of not having assessed an off-rail rate factor at origin and/or destination, where applicable, as required by Item 210 of Minimum Rate Tariff No. 2, and to ascertain whether penalties or fines should be imposed pursuant to Sections 3774 and 3800 of the Public Utilities Code.

A public hearing was held in Los Angeles on January 16 and 17, 1969, before Examiner DeWolf, and the matter was submitted on the latter date.

At all times concerned in this proceeding respondent held, and presently conducts operations pursuant to, Radial Highway Common Carrier Permit No. 19-46950 and Contract Carrier Permit No. 19-46951, issued July 3, 1953. Respondent has been duly served with copies of Minimum Rate Tariffs Nos. 2 and 8; Nos. 5, 1-A and 2-A; Nos. 13 and 14 and Distance Table No. 6; and has received all current supplements of these tariffs.

Respondent owns and operates some forty power units, eighty trailers, three terminals at Downey, San Jose and Antioch, and employs about forty drivers and helpers and twenty to twenty-five other employees. For the year ending with the third quarter of 1968 the respondent's gross revenue was \$2,674,123.00.

A Commission field section representative audited various records of the respondent on dates between July 23 and August 7, 1968, and made copies of certain documents which were introduced in evidence in Exhibit No. 1; other documents and records were introduced in evidence through Exhibit No. 29. Exhibit No. 24 taken from the records of respondent is a Summary of Shipping Data of transportation performed for Bethlehem, is in two parts and represents claimed undercharges of \$373.08; Exhibit No. 25 is a Summary of Shipping Data concerning United States Steel, is in nine parts which set forth claimed undercharges of \$1,481.20. Exhibit No. 26 is a Summary of Shipping Data of Widman, and contains one part which represents claimed undercharges of \$83.20. Counsel for

respondent stipulated that the premises of the consignee involved in the three shipments described in Exhibits Nos. 24 and 26 were in fact off-rail. The staff rate expert testified that the shipments involved in Exhibit No. 25 made to the premises of consignee Straza Industries in El Cajon are off-rail because the consignee is located at two receiving areas, which make two separate points of destination, private property separating the loading area and destination. The spur track on adjoining property belonging to T-Chem is not contiguous to Straza and it is not feasible for Straza to use the spur as a practical matter, on account of the steep grade. Straza has no lease or right to use the land between its property and the spur track. The rate expert accepted the opinion of the transportation representative who advised him that this consignee is off-rail. Neither witness had the benefit of staff Exhibits Nos. 2 through 9 in reaching this conclusion. Exhibit No. 2 is a photo copy of page 12 book 487 Assessor's Map, San Diego County, El Cajon Heights; Exhibit No. 3 is a tracing from official San Diego County, Assessor's Map; Exhibit No. 4 is a copy of an agreement for use of industry track by third party, dated May 3, 1967; Exhibit No. 5 is a plat of the spur track. The agreement (Exhibit No. 4) is between the Railroad, Pelton Steel, and Thurmond Chemicals, Inc., the third party, and refers to an agreement dated October 28, 1963, between the Railroad and Pelton Steel, for

construction of a spur track 725 feet in length at El Cajon. Exhibit No. 6 is a copy of a railway internal letter dated March 11, 1968; Exhibit No. 7 is a cover letter dated December 11, 1968, for Exhibit No. 8 - Right of Use agreement dated December 15, 1968, for consideration of annual payment of \$50.00; Exhibits Nos. 9 and 10 are copies of vouchers showing payment of \$50.00 each, December 15, 1967 and December 13, 1968, for Right of Use agreement. Exhibits Nos. 11 through 23 are photographs of the spur track and the various properties involved. Exhibit No. 27 is a copy of portions of M.R.T. No. 2, Rules and Regulations. Exhibit No. 28 is a copy of Right of Use agreement dated December 15, 1967. Exhibit No. 29 is a copy of a letter from Railroad to Straza, dated January 3, 1968, which acknowledges receipt of Right of Use agreement and issuance of instructions for use as an industrial spot. A staff witness testified that he contacted a representative of the landlord, Industrial Products, by long distance telephone at San Diego, was told that the lease to Straza did not contain any written permission to use the spur, Straza was not given any oral right to use the intervening land, and that Straza in fact did not have the right to use it. The staff witness testified that Straza is off-rail and that it is not feasible for Straza to use the spur, on account of a steep bank.

Respondent introduced into evidence Exhibits Nos. 30 through 36. Exhibit No. 30 is a notice of Bill of Lading Correction dated February 13, 1968; Exhibits Nos. 31 and 32 are Public Utilities Commission letters dated June 25, 1959 and October 25, 1963, showing that previous rates assessed by the respondent in other cases were correct and proper. Exhibit No. 33 is a copy of a letter from the Commission dated September 14, 1967, concerning billing and subsequent tariff revisions. Exhibits Nos. 34, 35 and 36, are pictures of bundles of steel sheets which are stated to be similar to those which were being shipped under the bills in evidence. The controller, the president, a rate expert and a traffic consultant for respondent all testified. Respondent's witnesses testified that the undercharges outlined in Exhibits Nos. 24 and 26 were both rebilled and paid prior to and independent of the service of the order herein and receipt of the staff exhibits in this case, and the undercharges in Exhibit No. 24 were said to have been paid in August 1968. The undercharges alleged in Exhibit No. 26 are said to be incorrect and the witnesses testified that they rebilled twice as neither origin nor destination was on rail, and that the staff exhibit is incorrect regarding one of the off-rail terminals. The respondent witnesses testified that they investigated the premises at Straza, and they and U.S. Steel all represented that Straza had the right to use the spur and had access thereto, and to use the intervening land for parking, turning and loading customers' trucks and equipment.

The staff witnesses apparently base their opinion as to the off-rail position of the Straza property on a long distance telephone call made by the transportation representative to an

official of Industrial Projects at San Diego, who said that the tenant Straza did not have the right to use the open area around the plant to reach the spur. All of the other evidence, including pictures, writings and documents, points to the opposite conclusion. The staff rate expert admitted that it is not necessary to have a written lease of intervening land or to prove actual use of the railhead.

Exhibit No. 2 shows the block in question with the location of Parcels Nos. 2 through 10 and Parcel No. 36, but does not show any spur track. Exhibit No. 3 shows the same area with the spur track marked in. According to the exhibits, the spur is built on the lots owned by Industrial Products, Inc., which gave an easement for that purpose, and in 1963 made an agreement for construction of the spur. According to the plats and the testimony of all witnesses Straza is located on Parcels Nos. 4 and 36, T-Chem on Parcel No. 5, and they reach their premises over private roadways which are not defined and also by rights of ingress and egress over the intervening land owned by the landlord, which is also used for loading, parking and other purposes, and for use of invitees. Exhibit No. 4 shows a picture of Straza with four large trucks on this area. On Exhibit No. 21 at least nine or ten vehicles can be counted. The Straza plant is the plant nearest the spur, is the only plant located on Parcel No. 4 on which the spur crosses, and is covered by the easement. The pictures show that there is no fence between the Straza gates and the spur and that this area is being used by tenants of Industrial Products for

parking, turning and other purposes, and that this respondent does have access to it. There is substantial evidence to show that Straza is equipped to unload the steel being received at this point by use of its equipment maintained at this plant, has access to the spur, loading and unloading is feasible, this spur is on Parcel No. 4 and is a railhead within the meaning of M.R.T. No. 2.

Decision No. 56647 dated May 6, 1958, in Case No. 6022, has decided the same point involved here. The Lumber Company leased land from the Railroad for its yard, but used adjoining land for which it has no lease for unloading from the team track. The test is not whether there is a written or oral lease of the property but whether the property is being used. Exhibits Nos. 4 and 8 provided respondent with all of the written authority needed to use the spur from the T-Chem plant and respondent may have other access also, which if put to use would qualify for rail shipments. Straza Industries and possibly previous tenants have received shipments at this spur track. The commodities now moved to Straza Industries can be handled from the rail spur.

There is no evidence that this respondent has been previously required to collect undercharges, and the evidence in this case as to Exhibits Nos. 24 and 26 shows that these undercharges were inadvertent errors and were corrected and the rebilling paid before service of this order. The order of investigation should be dismissed.

After consideration of the evidence the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 19-46950 and Contract Carrier Permit No. 19-46951.
2. Respondent has rebilled and collected the undercharges set forth in Exhibits Nos. 24 and 26, and these undercharges were due to inadvertent clerical errors and not due to any willful intent on the part of respondent to charge less than the lawfully prescribed minimum rates.
3. Straza Industries at El Cajon is located on portions of Parcels Nos. 4 and 36 leased from Industrial Projects, Inc. The Railroad spur track crosses a portion of Parcel No. 4 at the rear of the Straza plant and 200 feet from its fence. There is a fence and gate separating the leased property from the spur track. The intervening premises on Parcel No. 4 are not leased or used by any other tenant, but are open to and being used by Straza, for loading and unloading trucks, parking, ingress and egress, and constitute a single point of delivery.
4. Straza Industries has used the spur track for delivery of freight, and has written agreements for its use with T-Chem, all over the private property of Industrial Products, which owns all of the access to adjoining public streets, from these properties.
5. Straza Industries, owns, maintains and operates forklifts, cranes and all necessary equipment for loading and unloading Railroad cars spotted on the spur track located on the property used by it adjacent to its leased premises, all of which are part of Parcel No. 4 owned by Industrial Projects, Inc.

6. All of the items of undercharge described in Exhibit No. 25, which are assessed on the basis that the point of destination is not located on railhead are not substantiated, and the use of rail rates for these items was proper.

The order instituting investigation should be discontinued and the case dismissed.

O R D E R

IT IS ORDERED that:

The order instituting investigation in the above entitled matter is hereby discontinued and Case No. 8861 is dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 8th day of JULY, 1969.

William Symons, Jr.
President

Richard P. Monahan
Richard P. Monahan
Richard P. Monahan
Commissioners