

CORRECTION

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ORIGINALDecision No. 76148

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own
 motion into the operations, rates,
 charges, and practices of EDWARD E.
 WILLIAMS, and of the shipping practices
 and operations of FLOYD MULLEN LUMBER
 COMPANY, a corporation, and MARQUART-
 WOLFE LUMBER COMPANY, a corporation.

Case No. 8741
 (Filed January 3, 1968)

Handler, Baker & Greene, by Marvin Handler, for
 Edward E. Williams, respondent.
 Graham & James, by Boris Lakusta, for Marquart-
 Wolfe Lumber Company and Floyd Mullen Lumber
 Company, respondents.
Hugh N. Orr, for Reliable Traffic Service, inter-
 ested party.
John C. Gilman, Counsel, and J. B. Hammigan, for
 the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the rates, operations and practices of Edward E. Williams, an individual (Williams), and of the shipping practices and operations of Floyd Mullen Lumber Company, a corporation (Mullen), and Marquart-Wolfe Lumber Company, a corporation (M-W), for the purpose of determining whether Williams violated Sections 3664, 3667, 3668 or 3737 of the Public Utilities Code by charging and collecting for transportation performed for Williams and M-W less than the minimum rates and charges provided in Minimum Rate Tariff No. 2, and whether either or both of said respondent shippers violated Section 3669 of the Code by seeking to obtain or obtaining by a device or other means, transportation of property by highway permit carrier at less than minimum rates.

Public hearing was held before Examiner Mooney in San Francisco on March 21 and 22 and May 9, 1968. The matter was submitted subject to the filing of concurrent briefs due on or before July 22, 1968. Briefs were filed on behalf of Williams and on behalf of Mullen and M-W. The Commission staff did not file a brief. A Petition for a Proposed Report was jointly filed by the three respondents on March 22, 1968.

Counsel for the two respondent shippers stated at the outset of the hearing that he did not believe the Commission has jurisdiction to name shippers as respondents but nonetheless his clients would appear on a voluntary basis as real parties in interest since they are involved in the alleged undercharges claimed against the respondent carrier. In this connection, the Commission has heretofore held that it does have jurisdiction to name shippers as respondents for the purpose of affording them an opportunity to be heard with respect to the question of whether the evidence does establish undercharges.^{1/} We will consider the respondent shippers' participation in this proceeding and the evidence presented by the staff regarding them for this purpose only. No determination will be made herein as to whether said respondents did or did not violate Section 3669 of the Public Utilities Code.

Williams operates pursuant to a radial highway common carrier permit.^{2/} He personally manages his business and is the

1/ Investigation of Ragus Trucking, Inc., Decision No. 73789 dated February 27, 1968, in Case No. 8694; see also Pellandini, et al. v. Pacific Limestone Products, Inc., 245 C.A. 2d 774 (1966).

2/ Williams' operating authority was temporarily suspended on February 6, 1968, for failure to report his gross operating revenue to the Commission for the Third Quarter of 1967 and pay the applicable fees thereon. Williams testified that he was not aware prior to the hearing that he had failed to file said report and pay the required fees; that immediately upon becoming aware of this the report was filed and the fees were paid; and that he was informed by the Commission staff that his permit was in good standing.

dispatcher. He currently employs five drivers and has three power units, two semitrailers and three pull trailers. He does not have a terminal. His equipment is parked at a truck service station. His gross operating revenue for the year ending June 30, 1967 was \$240,227. Copies of the appropriate minimum rate tariffs and distance tables were served upon Williams.

On various days during May and June 1967, a representative of the Commission's Transportation Division visited the residence of Williams and examined his transportation records for the period January 9 through March 31, 1967. During the review period, Williams transported 118 shipments of lumber. All of said transportation was for the two respondent shippers, and 90 percent thereof was performed by subhaulers engaged by Williams. The representative testified that the billing for the 118 shipments had been reviewed by a traffic consultant firm in Los Angeles; that the traffic consultant firm had discovered certain undercharges; and that at the time of his investigation, Williams had not rebilled any of said undercharges. Williams also subhailed for another carrier during the review period. His subhaul activity for the other carrier is not involved in the investigation.

The representative testified that he prepared true and correct photocopies of the underlying documents relating to 13 shipments transported for Mullen and 40 shipments transported for M-W. Said photocopies were received in evidence as Exhibits 6 and 7, respectively. The witness and a second staff representative each testified that he had personally observed certain of the origins and destinations of said shipments to determine whether they were served by rail facilities and had checked off-rail mileages. The results of their 33 observations are set forth in Exhibits 1 and 5.

A rate expert for the Commission staff testified that he took the sets of documents in Exhibits 6 and 7, together with the information in Exhibits 1 and 5, and formulated Exhibits 3 (Mullen) and 4 (M-W), which show the rate and charge assessed by respondent, the rate and charge computed by the witness and the amount of alleged undercharge for the transportation covered by Exhibits 6 and 7, respectively. The amount of asserted undercharges shown in Exhibit 3 (Mullen) is \$723.92 and in Exhibit 4 (M-W) is \$2,519.94, and the total of the asserted undercharges shown in both exhibits is \$3,243.86. The staff alleged that the undercharges resulted from the following rating errors by Williams: incorrectly assessing rail charges; assessing incorrect off-rail charges; failing to assess off-rail charges; basing charges for an off-rail component of a multiple delivery shipment rated under alternative rail rates on the actual weight of said component rather than on the total weight of the shipment in instances where rerating instructions had not been issued by the shipper to rate the component as a separate shipment beyond railhead. The staff pointed out that there are differences in the amount of undercharges determined by the traffic consultant firm in Los Angeles and those shown in the staff's rate studies.

The president of a traffic consultant firm in San Francisco presented testimony and exhibits on behalf of the two shipper respondents. He agreed with the staff rating and alleged undercharges shown in 5 of the 13 parts of Exhibit 3 (Mullen) and 19 of the 40 parts of Exhibit 4 (M-W) and disagreed with the remainder. The ratings by the traffic consultant of the 29 parts of said exhibits on which he disagreed are set forth in Exhibits 8 and 12 (Mullen) and 9 and 13 (M-W). The staff pointed out that upon review of the traffic

consultant's exhibits, it agreed with him that the correct undercharge for the transportation covered by Part 24 of its Exhibit 4 (M-W) should be \$143.00 rather than the \$217.07 shown therein. The areas of disagreement between the witness and the staff on the remaining 28 parts in dispute are discussed hereinbelow.

Respondent Williams testified as follows: He has operated his own trucking business since the latter part of 1965; between 1952 or 1953 and 1965, he had been employed by various carriers as a dispatcher and was employed as a driver prior thereto; he has had little rating experience; although he is knowledgeable of the level of the rail rates on lumber from northern California to the major market areas in the State, he is not familiar with the application of the rail tariffs and does not have copies of them; the two respondent shippers are the only shippers he serves as a prime carrier; he hauls lumber southbound for them, and they account for 80 to 90 percent of his business; he knew both shippers while he was employed by other carriers; when he commenced his own operation, he solicited their business; he agreed with both shippers that he would haul for them at the lowest lawful minimum rates; he also hauls some glass northbound as a subhauler; in 1966, he used the service of a traffic consultant firm in Fresno for a time but ceased using it when they could not agree on a fee for the service; prior to the staff investigation, he sent his bills to the Los Angeles traffic consultant firm for review; he had commenced preparing balance due bills but was interrupted by the staff investigation and withheld sending them out pending the results of the Commission audit of his records; he does all of the office work; he has never intentionally charged less than minimum rates; any rating errors that may have occurred were

inadvertent mistakes; neither of the respondent shippers has ever requested him to perform transportation at rates below the minimum level; in order to assure that rating errors will not occur in the future, he has retained the Los Angeles consultant firm on a permanent basis to audit all of his billing; his profit for the year 1967 was very meager; any monetary penalty imposed on him would seriously jeopardize his ability to meet his obligations and continue in business.

Testimony on behalf of the two shipper respondents was presented by the president of Mullen and the vice president of M-W. Their testimony was substantially similar. Following is a summary of their testimony: Both are in the wholesale lumber business; they each buy from sawmills and sell to industrial users and retail outlets; generally they own the lumber while it is in transit; both use other highway carriers and railroads in addition to Williams; both have found Williams to be reliable and satisfactory; all freight bills are prepared by Williams; neither has ever asked Williams for any rate concessions nor were they aware of any rate errors prior to the investigation herein; neither hire rate personnel; both will require Williams to have his bills audited by a traffic consultant firm in the future to assure that errors do not occur and are willing to pay any deficiencies between undercharges and overcharges found by the traffic consultant; they have a verbal agreement with Williams that he will haul for them at the lowest lawful minimum charge; each has paid undercharges to other carriers who have hauled for them in the past when it had been established that said undercharges did in fact exist. In addition, the president of Mullen testified that he had in the past operated as a for-hire carrier for approximately two years.

Discussion

As hereinabove pointed out, the staff rate expert and the traffic consultant representing the two respondent shippers do not agree on the method of rating 28 of the 53 shipments in issue. Respondent carrier stated in his brief that he concurs with the traffic consultant's ratings. The two main areas of conflict between the staff and the consultant involve a disagreement as to (1) the proper method to be used in computing the off-rail charge for a part-lot component of a shipment rated under a combination of alternative rail and highway carrier rates, and (2) the computation of certain off-rail mileages.

The first area of conflict is involved in 20 of the 28 ratings in dispute. The 20 ratings are set forth in Parts 3,4,6, 7, 10, 11, 12 and 13 of the rate expert's Exhibit 3 and the traffic consultant's Exhibits 8 and 12, which relate to transportation for Mullen, and in Parts 2, 4, 6, 7, 11, 12, 15, 17, 18, 19, 21 and 23 of the rate expert's Exhibit 4 and the traffic consultant's Exhibits 9 and 13, which relate to transportation for M-W. Based on a careful review of the pertinent exhibits, the testimony of the rate expert and the traffic consultant and the brief filed on behalf of the respondent shippers regarding the aforementioned parts, we are of the opinion that the record does not establish with certainty the proper method to be used in rating said parts. In the circumstances, no determination will be made herein as to whether undercharges do or do not exist in connection therewith.

With respect to the remaining eight ratings in dispute all of which involve transportation performed for M-W (Exhibit 4), we concur with the staff that the Aborigine Lumber Co. is located

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4.7 actual miles south of Fort Bragg (origin in Parts 3, 8, 13, 14, 22, 28 and 34); that the Sun Lumber Co. jobsite at Westlake Village is located at 101 Freeway and Decker Road, Thousand Oaks and is within one actual mile of Tiunfo (destination in Parts 13 and 22); that the Humbolt Fir Co. is located two actual miles northeast of Hoopa (origin in Part 25); and that none of said locations are served by rail facilities. We likewise agree with the staff that off-rail charges for shipments picked up at the Aborigine Lumber Co. and the Humbolt Fir Co. should be based on the applicable rates in Item 690 of MRT 2 for 5 to 10 and for 70 to 80 constructive miles, respectively, and that the off-rail charge for shipments delivered to the Sun Lumber Co. jobsite at Westlake should be based on the applicable rate in Item 710 of MRT 2 for 15 to 20 constructive miles. It is noted that the traffic consultant apparently based the off-rail charge at origin for the shipment originating at the Humbolt Fir Co. on the distance to Blue Lake which is served by rail but does not have a public team track. In this connection, Item 210 of MRT 2 authorizes the combination of truck-rail rates over public team tracks only, and as pointed out by the staff, the nearest public team track is located at Arcata.

Based on a review of the evidence we are of the opinion that respondent Williams should be directed to collect the undercharges found herein and that a fine in the amount of said undercharges and a punitive fine in the amount of \$500 should be imposed on Williams.

Findings and Conclusions

The Commission finds that:

1. During the period covered by the staff investigation (January 9 through March 31, 1967), Williams operated pursuant to a radial highway common carrier permit.

2. Williams was served with all applicable minimum rate tariffs and distance tables, together with all supplements and additions thereto.

3. The record does not establish with certainty the proper method for rating the transportation covered by Parts 3, 4, 6, 7, 10, 11, 12 and 13 of Exhibit 3 (Mullen) and by Parts 2, 4, 6, 7, 11, 12, 15, 17, 18, 19, 21 and 23 of Exhibit 4 (M-W). In the circumstances, no finding will be made herein as to whether undercharges exist in connection with said parts.

4. The location of the Aborigine Lumber Co. shown in Parts 3, 8, 13, 14, 22, 28 and 34 of Exhibit 4 (M-W), the location of the Sun Lumber Co. jobsite at Westlake Village shown in Parts 13 and 22 of said exhibit and the location of the Humbolt Fir Co. shown in Part 25 of the same exhibit are not served by rail facilities, and the off-rail charges assessed by the staff in connection therewith are correct.

5. The correct undercharge for the transportation covered by Part 24 of Exhibit 4 (M-W) is \$143.00.

6. Except for the parts of Exhibit 3 listed in Finding 3, Williams charged less than the lawfully prescribed minimum rates for transportation performed for Mullen in the instances set forth in Exhibit 3, resulting in undercharges in the total amount of \$225.93 for said transportation.

7. Except for the parts of Exhibit 4 listed in Finding 3 and as revised to reflect the amount of the undercharge in Finding 5 for Part 24 thereof, Williams charged less than the lawfully prescribed minimum rates for transportation performed for M-W in the instances set forth in Exhibit 4, resulting in undercharges in the total amount of \$1,278.80 for said transportation.

8. A proposed report is not warranted in this proceeding.

The Commission concludes that:

1. Williams violated Sections 3664, 3667 and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$1,504.73, and in addition thereto Williams should pay a fine pursuant to Section 3774 of said code in the amount of \$500.

2. It has not been shown herein that Williams violated Section 3668 of the Public Utilities Code.

3. As hereinabove pointed out, no determination will be made herein regarding the question of whether either Mullen or M-W or both violated Section 3669 of the Public Utilities Code.

4. The petition for a proposed report filed by respondents should be denied.

The Commission expects that Williams 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 Williams and the results thereof. If there is reason to believe that Williams or his attorney have not been diligent, or have not taken all reasonable measures to collect all undercharges, or have 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. Edward E. Williams shall pay a fine of \$2,004.73 to this Commission on or before the fortieth day after the effective date of this order.

2. Edward E. Williams 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. Edward E. Williams 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, Edward E. Williams 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, 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. Edward E. Williams 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.

5. The petition for a proposed report filed by respondents is denied.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondents. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 10th day of SEPTEMBER, 1969.

William J. ...
President
J. ...
...
Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.