

Decision No. 80155

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
into the rates, rules, regulations,
charges, allowances, and practices
of all highway carriers relating to
the transportation of any and all
commodities between and within all
points and places in the State of
California (including, but not
limited to, transportation for
which rates are provided in Minimum
Rate Tariff 2).

Case No. 5432
Petition for Modification
No. 672
(Filed October 15, 1971)

Milton A. Walker, Eugene G. Ingalls, and Patrick W.
Pollock, for Fibreboard Corporation, petitioner.
Richard W. Smith and A. D. Poe, Attorneys at Law,
and H. F. Kollmyer, for California Trucking
Association, protestant.
L. G. Hallett, for Georgia-Pacific Corporation,
Interested party.
Everest A. Benton, for the Commission staff.

O P I N I O N

This petition was heard January 4, 1972 before Examiner Thompson at San Francisco and was submitted on briefs which have been received. By its petition Fibreboard Corporation (Fibreboard) seeks the exemption of wood chips, in bulk, from application of rates in Minimum Rate Tariff 2 when originating in the Counties of Amador, Butte, Calaveras, El Dorado, Fresno, Madera, Mariposa, Nevada, Placer, Plumas, Shasta, Sierra, Tehama, Tulare, Tuolumne or Yuba.

Petitioner is engaged in the manufacture of pulpboard, packaging and related commodities. It has a plant in Antioch where it utilizes wood chips in the production of pulp for its manufactures. It purchases wood chips from sawmills and lumber mills in the aforementioned counties. The thrust of the petition is Fibreboard's belief

that it is placed at a serious and unfair disadvantage in competing for the purchase of wood chips by the minimum rates which have been established by the Commission. Until sometime after World War II sawmill refuse was considered a waste product of the lumber and timber industries in California. Fibreboard asserts that it and Masonite Corporation pioneered the use of this former waste product in manufacturing processes. Until at least 1961 those two companies were the only major users of wood chips in California. Subsequent thereto, other manufacturers commenced utilizing large volumes of wood chips in California and wood chips were also purchased for export to Japan. Wood chips were no longer a waste material but became a saleable commodity in which the demand exceeded the supply. By Decision No. 77798, dated October 6, 1970, in Case No. 5432, the Commission established minimum rates for the transportation of wood chips between points in California, including between points and places in the aforementioned counties and Fibreboard's plant at Antioch. Fibreboard was a participant in the said proceeding and the evidence it offered therein is described in the Proposed Report of Examiner John W. Mallory, a portion of which is set forth below,

"Three witnesses testified on behalf of Fibreboard. The first, the manager of Fibreboard's wood and chips operations, testified concerning Fibreboard's handling of wood chips. The witness stated that movements of wood chips are made by truck direct to Antioch and also by truck to reload stations, for subsequent movement to Antioch by rail. Other wood chip movements are entirely by rail. The witness testified that at the time the present temporary exemption on wood chips was authorized on March 4, 1961 by Decision No. 61338 there were but two major users of wood chips in California, Fibreboard and Masonite. In 1961, Fibreboard's annual use of wood chips was 290,000 units and Masonite's was 150,000 units. The witness estimated that the current annual usage of wood chips within California exceeds 1,450,000 units per year, an increase of 330 percent. The witness also pointed out that there is an export movement of wood chips through the Port of Sacramento to Japan of an estimated annual volume of 180,000 units. The witness

testified that of such amount, 80,000 units formerly moved to Antioch, and that such wood chips do not now move to Antioch because suppliers received a higher mill price (origin price) than by selling to Fibreboard. The witness testified that the export movement resulted in competition for the purchase of wood chips and has caused Fibreboard to accede to suppliers' request to use their trucking equipment for delivery of wood chips to Antioch in order that said suppliers may attempt to earn a profit on the transportation service. This witness believes that the publication of minimum rates on wood chips will increase the amount of proprietary trucking by suppliers, since suppliers are now hauling 10 out of the 15 present truck movements to Fibreboard's Antioch mill. The witness also testified that Fibreboard is now securing difficulty in obtaining wood chips, causing Fibreboard to haul logs to Antioch for processing into wood chips. The witness stated Fibreboard plans to enlarge the size of its facility at Antioch, and two new particle-board plants are also in the planning stage, thus further increasing the demand for wood chips. The witness concluded that the establishment of minimum rates would 'hand-tie' him in making our operating procedures, including transportation arrangements, that would permit Fibreboard to compete against purchasers of wood chips for export.

"The second witness for Fibreboard was the supervisor of its distribution services. He testified that lack of minimum rates was helpful in getting suppliers to install efficient loading facilities, in that he could ensure that the suppliers' net price for wood chips would be greater if they did so.

"The third witness for Fibreboard was its manager of transportation and distribution research. He presented Exhibit 17, a comparison of freight rates to the Port of Sacramento and minimum rates proposed by the Commission staff. Said comparison showed that the interstate rates to the port are generally lower than the proposed minimum rates, and that distance has a lesser effect on the interstate rates than on the proposed minimum rates."

The evidence presented by petitioner herein describes the same circumstances as recited above except: (1) Transportation by suppliers in their own equipment has increased, (2) the export movement of wood chips through the Port of Sacramento has increased.

substantially, four suppliers with whom petitioner had contracts have given notice of cancellation of their contracts, and (3) whereas at the time of the hearings which led to the establishment of minimum rates on wood chips it was Fibreboard's information and belief that the transportation from origins to the Port of Sacramento was performed under rate schedules regulated by the Interstate Commerce Commission; it has now determined that said transportation is not subject to any rate regulation whatsoever.

Petitioner presented in evidence letters from the District Supervisor and from the Regional Director of the Bureau of Operations of the Interstate Commerce Commission asserting that it is their informal opinion that the transportation of wood chips in bulk by motor carrier wholly within the State of California for subsequent and continuous movement in foreign commerce where the wood chips in bulk are shipped without mark or count in vessels is not subject to economic regulation by the Interstate Commerce Commission. It also presented in evidence Informal Ruling No. 203 of the Director of Transportation of the Public Utilities Commission and correspondence from the Secretary of the Commission asserting that it is the informal opinion of the staff of the Commission that the transportation by highway carrier of wood chips in bulk from a point in California to a port in California for transshipment by water vessel to points in foreign countries where there is an original and continuing intent to move the wood chips in foreign commerce and the only interruptions at the port are those incident to transferring the cargo from the truck to the vessel is not transportation subject to the regulation by the Public Utilities Commission.^{1/}

^{1/} The foregoing are termed "informal opinions". This Commission and the I.C.C. do not make declaratory judgments, formal decisions by the agencies themselves can be made only in proceedings brought before it. In the proceeding before us here petitioner does not contend that the Commission should undertake any action with respect to the transportation to the Port of Sacramento. We therefore are not required to consider any question of jurisdiction in that regard.

From the evidence presented it appears that petitioner's knowledge of the movement of wood chips to the Port of Sacramento is limited to the following facts: The movement has approximately trebled in the past four years; suppliers that formerly sold wood chips to petitioner are now selling them to brokers for export to Japan through the Port of Sacramento; Devine and Son Trucking Co., and Boyd Trucking Company have participated in the transportation of wood chips to the Port of Sacramento; equipment utilized by suppliers in proprietary operations has been used to transport wood chips to the Port of Sacramento; and Devine and Son and Boyd publish rates for the transportation of wood chips in interstate or foreign commerce from various points in the counties involved herein to the Port of Sacramento.^{2/} Petitioner is apparently not fully informed of the terms under which the brokers at Sacramento purchase the wood chips from the suppliers or the charges paid to for-hire carriers for the transportation of the wood chips to the Port of Sacramento; indeed the latter is one of the reasons why petitioner considers that it is placed at an unfair disadvantage.

The record is not entirely clear regarding the practice of petitioner in the purchase of wood chips from suppliers. From the evidence it appears that Fibreboard undertakes to contract with suppliers for the purchase of wood chips over a specified period of time. A price per unit F.O.B. supplier is determined and the minimum rate for transportation is added to establish a price F.O.B. plant at Antioch, the supplier having the privilege of selling either F.O.B. its mill or F.O.B. Antioch.

^{2/} We take official notice of Western Motor Tariff Bureau Tariff No. 107 which in Item 4160 sets forth commodity rates on wood chips in interstate or foreign commerce to the Port of Sacramento maintained by Devine and Son Trucking Co., and of California Motor Tariff No. 2 which in Item No. 269 sets forth commodity rates on wood chips in interstate or foreign commerce to the Port of Sacramento transported by Boyd Trucking Company.

Fibreboard's position is clearly stated in the conclusion to its closing brief which we set forth below:

"The only evidence in this proceeding was presented by Fibreboard Corporation and clearly demonstrates the existence of a 'dual standard of rates' for the movement of Wood Chips in bulk to Antioch, California and to the Port of Sacramento from the sixteen listed central Sierra counties, which coupled with the publication of rates to Antioch and the existence of lower published or unknown rates to the Port of Sacramento, has resulted in the substantial loss of Wood Chip sources and monetary losses to Fibreboard Corporation. It is both within the Commission's authority and duty to remove minimum rates when shown to be not in the public interest. The evidence shows that the establishment of minimum rates has so altered the competitive forces at work in the pricing mechanism and procurement of Wood Chips as to impair the profitability of an important segment of California industry. The evidence shows that the movement of Wood Chips in bulk is highly specialized and involves only a limited number of specialized carriers so that there is no need to maintain minimum rates 'to stabilize the industry', and that the Commission would be able to take appropriate action if the removal of minimum rates adversely affected the revenues of the specialized carriers involved."

Petitioner also states in its brief that it is able and willing to match its competitors' F.O.B. origin price for wood chips, that it is willing and able to pay additional freight costs to offset its geographical disadvantage in relationship to the Port of Sacramento when such geographical disadvantage exists, but that Fibreboard cannot overcome the condition of having to pay freight charges at a higher scale of charges than applies on shipments of the same product from the same origins by the same carriers to the Port of Sacramento. It asserts that the discrimination goes beyond the mere difference in rates in that Fibreboard must pay a minimum rate rather than being able to negotiate transportation costs which reflect loading methods and equipment schedules as is done by their exporting competitors, who thus attain lower transportation costs.

With respect to its contention that the movement of wood chips in bulk is specialized and involves only a few carriers so that there is no need for minimum rates to "stabilize the industry", said facts were before the Commission and the same argument was made by Fibreboard in the proceeding that led to Decision No. 77798. The only "new" facts not considered in the aforesaid decision are that for-hire carriers transporting wood chips from suppliers to the Port of Sacramento are not being subjected to rate regulation, and that additional suppliers that formerly sold wood chips to Fibreboard are now selling to brokers for export through the Port of Sacramento to the former's detriment. Those additional facts warrant further consideration of whether the minimum rates place Fibreboard at an unjust disadvantage, i.e., whether the minimum rates are unduly discriminatory.

California Trucking Association in its brief argued that there can be no discrimination because Fibreboard is a buyer rather than a seller of wood chips. Said argument is without merit. Section 3662 of the Public Utilities Code empowers the Commission to establish or approve "just, reasonable, and nondiscriminatory minimum rates". When minimum rates are shown to be unjust, unreasonable or discriminatory the Commission has exceeded its power conferred by statute in establishing or approving them and they should therefore be rescinded. We are unaware of any provision of law which provides a condition precedent that the commodity to which the rate applies be sold, as against bought or merely transferred without sale, in finding a rate to be unjust, unreasonable or discriminatory.

California Trucking Association also argues that petitioner has not formally requested the Interstate Commerce Commission to assert economic regulatory jurisdiction over the transportation of wood chips to the Port of Sacramento for export, nor has it requested this Commission to assert jurisdiction over the movement. It argues, inter alia, that Fibreboard is without standing in this proceeding because it has not fully exhausted its other administrative remedies.

It is the "informal opinion" of the staffs of the Interstate Commerce Commission and this Commission that the movement of wood chips by motor vehicle within California to the Port of Sacramento for export in foreign commerce is not subject to regulation by their respective agencies. Petitioner does not disagree with said opinions. It is not incumbent upon petitioner to initiate formal proceedings before one or both of the Commissions to challenge the informal opinions with which it does not take issue. The informal opinions, while not binding in any way, are ordinarily given credence and are accorded some standing by the business community. For the purposes of this proceeding it is not necessary for petitioner to go beyond said informal opinions.

From the evidence presented by petitioner it is apparent that Fibreboard and only Fibreboard is affected by the diversion of wood chips to the Port of Sacramento allegedly because of lower rates on interstate and foreign commerce, so that any discrimination resulting from the establishment of the minimum rates involves only Fibreboard. Strictly from the standpoint of the law, Fibreboard does not have a cause of action with respect to the alleged discrimination. A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by a carrier for interstate traffic. Woodside v. Tonopah & G. R.R. Co., 184 Fed. 358, 360; Southern Pac. Co. v. Railroad Commission, 193 Fed. 699, 708.

The Commission having established said rates, however, we believe it to be only just and proper to examine the evidence to determine whether the establishment of the minimum rates on wood chips has placed petitioner at a seriously unfair disadvantage, and if so, determine whether such circumstance so outweighs other considerations in the establishment of said rates as to justify granting the relief sought.

Petitioner alleges that the suppliers are receiving greater net proceeds from the sale of wood chips for export than from the sale to Fibreboard and that such circumstance results from the export rates being lower than the minimum rates. The evidence presented by petitioner conflicts with that allegation. Wood chips move to the Port of Sacramento in proprietary carriage as well as for-hire carriage. Suppliers that formerly sold to Fibreboard and are now selling for export had utilized proprietary equipment in moving wood chips to Antioch. Seaboard Transportation Company is the only carrier now transporting wood chips in bulk at minimum rates for Fibreboard, and now hauls to the reload stations and from three origins to Antioch. Fibreboard receives wood chips at Antioch by truck from eight other origins and those movements are in the proprietary equipment of supplier, or arranged for by the suppliers. Those are matters testified to by witnesses of petitioner and are recited in petitioner's brief. If, as asserted by petitioner, it is meeting the F.O.B. origin price of wood chips of its competitors, and if, as asserted by petitioner, the rates for transportation to the Port of Sacramento are lower on a mileage basis than the minimum rates to Antioch, it would appear that suppliers engaged in proprietary carriage would receive greater net proceeds from the sale of wood chips to Fibreboard F.O.B. Antioch than from selling F.O.B. Port of Sacramento. A more reasonable interpretation of the evidence is that net proceeds from the sale of wood chips is not a decisive factor or reason for the suppliers preferring to sell for export, or that Fibreboard, in fact, is not meeting the F.O.B. price at origin bid by its competitors. In either case the establishment of the minimum rates would not be a cause of the untowards circumstance represented by petitioner. The record as a whole indicates that what has occurred is that for many years Fibreboard was practically the only market for wood chips produced in the central Sierra region and that it established prices which it considered fair

and reasonable for what it considered to be a waste product. Buyers of wood chips for export to Japan were willing to pay a higher price than had been paid by Fibreboard and the latter, having geared its production facilities and prices to the continued availability of wood chips under the former conditions, now finds itself at a disadvantage. The problem appears to be one of foreign buyers raising the price of domestic raw materials to the detriment of domestic manufacture. While such situation is not the norm for domestic raw materials, it is not singular to the case of wood chips. Newspaper articles and trade journals report similar situations in connection with logs and hides. Relief from such situation is strictly within the purview of the Congress of the United States.

It also appears from the evidence that the cancellation of the minimum rates could alleviate Fibreboard's problem only if transportation to the plant at Antioch were undertaken at rates which could be so low as to be noncompensatory. Such could be injurious to the people of this state and particularly those connected with the production of wood chips or manufactures therefrom in other portions of the state where minimum rates would continue to be in force.

With respect to petitioner's allegation Fibreboard is unfairly disadvantaged by having to pay a minimum rate rather than being able to negotiate transportation costs which reflect loading methods and equipment schedules as is done by their exporting competitors who thus attain lower transportation costs, there is no evidence that Fibreboard's competitors have "negotiated transportation costs" in the manner stated, or that tender of shipments at origin and delivery at the Port of Sacramento in the case of the export movement are any different from tender and delivery on movements to Antioch.

While petitioner has not met its burden of proof by showing that the relief sought is justified, the evidence herein indicates inconsistencies and anomalies in regulation by the Commission which raise questions as to whether actions or omissions in regulation by the Commission are consistent with the general regulatory scheme or are in the public interest. From Western Motor Tariff Bureau Tariff

No. 107 it appears that Devine and Son Trucking Co. holds itself out as a common carrier in interstate commerce of forest products including wood chips, and for that transportation charges or assesses rates which are lower than the minimum rates for transportation of wood chips in intrastate commerce between the same points. With respect to intrastate commerce, Devine and Son Trucking Co. holds a certificate of public convenience and necessity authorizing it to operate as a highway common carrier of lumber and forest products except wood chips and logs. From Decision No. 62103 in Application No. 42833 and Decision No. 74822 in Application No. 50357 in which the certificates to Devine and Son Trucking Co. were granted, it appears that the exclusion of wood chips was self imposed and that the carrier does not hold itself out to the public as a common carrier of wood chips. In Devine & Son Trucking Co., 67 Cal. P.U.C. 441, it is stated that this carrier transports wood chips in bulk in intrastate commerce as a highway contract carrier. As such it is subject to the minimum rates established in Decision No. 77798. Facts concerning the actual operations of Devine and Son Trucking Co. and whether its interstate rates are compensatory are not of record herein; however, it is reasonable to assume for the purposes here that like many other carriers it utilizes all of its facilities to the optimum in all phases of its operations. The foregoing presents the following questions:

1. Is it in the public interest and consistent with good regulation to permit a carrier to exclude a commodity from its holding out as a common carrier in intrastate commerce between points it serves as a common carrier of related commodities when it transports that same commodity as a common carrier in interstate commerce between said points and also undertakes to transport that same commodity as a private (contract) carrier in intrastate commerce?
2. Where a carrier undertakes to transport a particular commodity within California in both intrastate and interstate commerce and it maintains rates on the interstate traffic which are compensatory, is it in the public

interest and consistent with the exercise of powers under Section 3662 of the Public Utilities Code for the Commission to establish minimum rates for intrastate traffic moving under similar conditions higher than those the carrier charges for interstate traffic?

3. Where a common carrier which is a public utility as defined in Section 216 of the Public Utilities Code also engages in transportation between points in California in interstate commerce, is it in the public interest to permit said carrier to engage in such transportation in interstate commerce at rates which are not compensatory and thereby deplete its revenues?

While we have singled out Devine and Son Trucking Co., the same circumstances pertain to Boyd Trucking Company in the case of wood chips and possibly a number of common carriers in the transportation of other commodities. We are concerned with the above questions as they pertain to regulation generally and present them to our staff for analysis. If the answers to said questions are in the negative we desire the advice of the staff concerning the actions that can be taken in connection therewith.

The foregoing is not material to the issue presented in this petition of whether wood chips should be exempted from the application of the minimum rates when originating in counties in the central Sierra region. We have set it forth in this opinion so as to notify Fibreboard and the public that the Commission is cognizant of the matters that have been made apparent in this proceeding, that it is concerned, and is taking action in connection therewith.

We find that:

1. Following proceedings in Case No. 5432 in which Fibreboard was an active participant, the Commission by order in its Decision No. 77798, dated October 6, 1970, established and prescribed minimum rates to be observed by all highway carriers in the transportation of wood chips between points in California, which order has become final.

2. By Petition for Modification No. 672 filed October 15, 1971, Fibreboard seeks the exemption of wood chips, in bulk, from application of said minimum rates when originating in certain named counties in the central Sierra region.

3. The only changes in conditions of the transportation of wood chips from the conditions considered in the prior proceeding and described in Decision No. 77798 are:

- (a) The movement of wood chips from producers in the central Sierra region to the Port of Sacramento for export by vessel to Japan has increased.
- (b) Four producers of wood chips in the central Sierra region that had contracts for the sale of wood chips to Fibreboard have notified Fibreboard that it will not renew said contracts and intend to sell wood chips for export through the Port of Sacramento.
- (c) The transportation of wood chips from points in the central Sierra region to the Port of Sacramento for further movement by vessel to foreign ports is not being subjected to economic regulation.

4. Petitioner has not shown that the minimum rates established in Decision No. 77798 are not the just, reasonable and non-discriminatory minimum rates for the transportation of wood chips originating in the central Sierra region.

5. Although the rates and charges being assessed by carriers for the transportation of wood chips to the Port of Sacramento may be on a lower scale per mile than the minimum rates established in Decision No. 77798 for the transportation of wood chips to Antioch, the establishment of said minimum rates have not unfairly disadvantaged Fibreboard.

6. It has not been shown that Fibreboard's competitors have negotiated with producers to provide conditions of tender or delivery of wood chips for export any different from the conditions of tender and delivery of wood chips for Fibreboard.

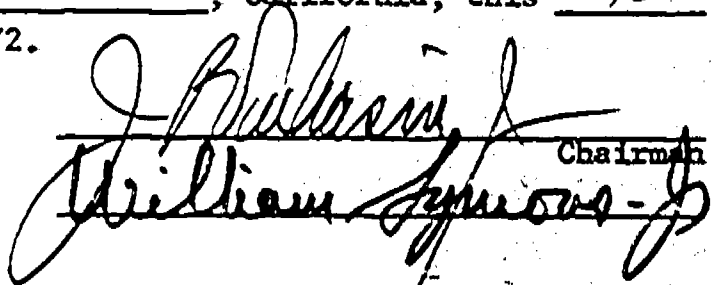
We conclude that the minimum rates on wood chips to Antioch being just and reasonable are not discriminatory or unlawful because they might conflict with rates charged and assessed by carriers for the transportation of wood chips in foreign commerce to the Port of Sacramento. We further conclude that petitioner is not entitled to the relief sought and its petition should be denied.

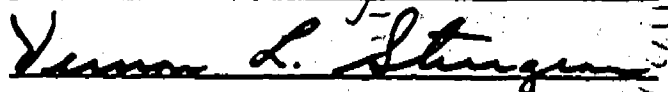
O R D E R

IT IS ORDERED that Petition for Modification No. 672 of Fibreboard Corporation is denied.

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

Dated at San Francisco, California, this 13th day of JUNE, 1972.


Chairman




Commissioners

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