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Decision No. 83032

ORIGINAL

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 ALTON O. HATLEY, an individual, dba Western Distributors; and B&W Distributing Company, a partnership; Ferrari Bros. Distributing Company; Hanford Bottling Company, a California corporation; H&M Distributing Company; and Rex Distributing Company.	Case No. 9621 (Filed October 10, 1973)

William H. Kessler, Attorney at Law, for Ferrari Bros. Distributing Company, Inc., H&M Distributing Company, and B&W Distributing Company; David G. Ferrari, Attorney at Law, for Ferrari Bros. Distributing Company, Inc.; and Alton O. Hatley, for himself; respondents.
Peter Arth, Jr., Attorney at Law, and E. H. Hjelt, 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, charges, and practices of Alton O. Hatley (Hatley), an individual doing business as Western Distributors, for the purpose of determining whether Hatley charged less than minimum rates in connection with transportation performed for B&W Distributing Company (B&W), a partnership, Ferrari Bros. Distributing Company (Ferrari), a corporation, H&M Distributing Company (H&M), Hanford Bottling Company (Hanford), a corporation, and Rex Distributing Company (Rex).

Public hearing was held before Examiner Mooney in Fresno on March 13 and 14, 1974. The matter was submitted upon receipt of late-filed Exhibits 12 and 13 on March 27, 1974.

Hatley operates pursuant to a highway contract carrier permit. During the period covered by the staff investigation referred to below, Hatley had a yard and office in Visalia, operated four tractors and eight van semitrailers, employed two drivers and a mechanic, and had been served with all applicable minimum rate tariffs and distance tables. Hatley's wife rates the freight bills and maintains the business records. His gross operating revenue for the year 1973 was $186,862.

On various days during December 1972 and February 1973 a representative of the Commission's staff visited Hatley's place of business and examined his records covering the transportation of beer for the five respondent shippers during the period May 1 through October 30, 1972. The representative testified that he made true and correct photocopies of various freight bills and underlying documents relating to transportation performed for the respondent shippers and that they are included in Exhibits 3-A and 3-B. Most of the shipments originated at Miller Brewing Company (Miller), Azusa, or Anheuser-Busch, Inc. (Busch), Van Nuys. He stated that Hatley was cooperative during the investigation and furnished all documents and information requested, and that other than the beer shipments herein, the investigation disclosed no errors in connection with other transportation performed by Hatley.

The representative stated that a number of the master documents prepared by Miller for multiple lot shipments in the files of Hatley had handwritten changes on them. The changes included strikeouts and the addition of extra loads on the documents. The representative testified that he visited Miller and made photocopies

of the copies of the identical documents in the brewery's files and that the photocopies are included in Exhibit 4. The master documents in Exhibit 4 do not include the strikeouts or the additional loads shown on the carrier's copy of the documents. According to Exhibits 3-A and 3-B and Exhibit 4, there is one instance in connection with transportation performed for H&M, 12 instances in connection with transportation performed for Ferrari, and one instance in connection with transportation performed for B&W wherein the carrier's copy of the Miller master bill of lading shows more load or loads than the copy of the document in the brewery's files. The witness also testified that there were three instances in connection with transportation performed for B&W and six instances in connection with transportation performed for Ferrari wherein there were no copies of a multiple lot document in either Hatley's or Miller's files and that in each instance the respondent carrier had combined separate shipments as a multiple lot shipment. Exhibit 5 lists these asserted violations.

The representative testified that supporting documents for two of the multiple lot shipments transported by Hatley for Ferrari showed that a component part of each of the shipments was delivered to a location other than that shown on the freight bills. In each instance, the charges for the component were computed to San Jose; whereas, the component was in fact delivered to Hollister.

The representative testified that he was informed by the district traffic manager of Busch and by the warehousing and shipping manager of Miller that, with the exception of draft beer at Miller, all beer shipments were loaded on Hatley's equipment in the following manner: The beer was loaded from street level; brewery personnel placed the beer on the rear of the truck with forklift equipment; and the carrier's driver moved it from there to the forward part of the truck with a hand pallet jack. As to the shipments of draft beer from Miller, the witness stated that Miller had informed him that it

had a single dock which could accommodate one truck and that all draft beer was power loaded at this location with no assistance from the carrier's employee. He asserted that he was informed by Busch that all of its shipments of draft beer were iced with from one to three blocks of ice, each weighing 300 pounds.

The district traffic manager of Busch was subpoenaed as a witness by the staff. He confirmed the testimony of the representative regarding the Busch shipping documents in the staff exhibits. He had no additional comments to add regarding the representative's testimony concerning the method of loading beer at his plant. The warehousing and shipping manager of Miller was also subpoenaed as a witness by the staff. The latter witness testified regarding documentation and loading procedures at his plant. His testimony did not vary that of the representative regarding the documentation. He stated that the beer shipments are generally loaded in the manner described by the representative. However, he asserted that some of the shipments of bottled and canned beer are entirely power loaded by his personnel; that approximately 90 percent are loaded in the manner described by the representative; and that he could not state with any degree of certainty as to which of the shipments in issue were entirely power loaded by his personnel.

The representative testified that he contacted the five respondent shippers to determine whether or not they were served by rail facilities and the unloading practices at their plants. He stated that the warehouse foreman of Hanford during the review period covered by his investigation informed him that all shipments delivered by Hatley were moved to the rear of the truck by the carrier's driver with a hand pallet jack and were taken off from there by Hanford's employee with a lift truck. The warehouseman foreman was subpoenaed as a witness by the staff and confirmed the representative's description of the unloading procedure at Hanford. The representative

stated that he was informed by an employee of B&W that beer deliveries by Hatley at his plant were unloaded in the same manner. He stated that the owner of H&M and an officer of Ferrari informed him that all unloading of beer shipments by Hatley at their respective plants was performed entirely by their own employees with power equipment. The representative stated that each of the aforementioned respondent shippers is served by rail facilities. He testified that Rex is not served by rail facilities and that since truck rates were used for shipments to this location rather than alternative rail rates, the method of unloading shipments at its plant was irrelevant.

A rate expert for the Commission staff testified that he took the sets of documents in the staff exhibits, together with the supplemental information testified to by the representative, and formulated Exhibits 6 (B&W), 7 (Ferrari), 8 (H&M), 9 (Hanford), and 10 (Rex), which show the rates and charges assessed by Hatley, the rates and charges computed by the staff, and the alleged undercharges for the transportation in issue. He stated that the undercharges resulted from failure to assess a loading and/or unloading charge in numerous instances when a rail alternative rate had been assessed and the carrier assisted in performing the services; rating separate shipments as multiple lot shipments without the required master documentation; failure to pick up multiple lot shipments within the time allowed; illegally adding separate shipments to multiple lot shipments which had been properly documented; failure to assess off-rail charges where applicable; assessing incorrect rates; falsifying freight bills for two multiple lot shipments by showing thereon that all components were delivered to one location when in fact one component of each was delivered to a separate destination; and failure to charge for ice used on two shipments. With respect to the loading and unloading charges, the witness pointed out that paragraph 2(b) of Item 240 of Minimum Rate Tariff 2 (MRT 2) provides

that when an alternative rail rate which does not include accessorial services is assessed, the shipment is placed onto or removed from the carrier's equipment by use of power equipment furnished by the consignor and/or the consignee, and the loaded pallets are positioned in the truck by the carrier's employee by use of a hand pallet jack, the accessorial charge in the paragraph for loading and/or unloading shall be added to the transportation charges, and that Item 241 of the tariff provides that if two commodities are loaded and one requires the assistance of the carrier's employee the loading charge is based on the entire weight of the shipment. As to multiple lot shipments, the rate expert explained that Item 85 of MRT 2 requires that a single multiple lot document for the entire shipment be prepared prior to or at the time of the initial pickup; that paragraph 4.b(2) of the item provides that when rail alternative rates are applied and the carrier's trailer equipment is not left for loading by the consignor without the presence of carrier personnel or motive equipment, the entire shipment shall be picked up by the carrier within a 24-hour period computed from 12:01 a.m. of the date on which the initial pickup commences; and that there are no provisions in the item which authorize the consolidation of additional components to a multiple lot shipment after the multiple lot document has been issued. The rate expert testified that the amount of undercharges shown in each of the rate exhibits is as follows: Exhibit 6 (B&W) $1,204.82, Exhibit 7 (Ferrari) $6,818.64, Exhibit 8 (H&M) $414.63, Exhibit 9 (Hanford) $198.32, and Exhibit 10 (Rex) $540.10. The total amount of undercharges shown in the five rate exhibits is $9,176.51.

Hatley testified on his own behalf as follows: He has been in business for nine years and has had 15 years experience in the trucking industry; he altered the master documents that had changes on them; this was done with the full knowledge of the respondent

shippers involved that they were changed; the reasons for the alterations were failure of the carrier's equipment to pick up loads on the dates specified, failure of the brewery to have beer ready on the dates ordered, and requests from distributors for loads prior to the pickup dates shown on the master documentation; not more than 10 percent of the loads picked up from Miller during the review period were entirely power loaded by the brewery; for the past three or four weeks, after subpoenas had been issued by the Commission, Miller has been paying loading charges to Hatley; Miller had told the distributors that all shipments were entirely loaded by its employees; for this reason, the shipper respondents do not want to pay any additional charges for loading at Miller; he is not familiar with MRT 2 and obtains the rates for the transportation he performs from an outside transportation consultant firm; he no longer does business with the consultant he used during the review period; all necessary steps are being taken to assure that no rate errors occur in the future; the undercharges shown in the staff's rate Exhibits 9 (Hanford) and 10 (Rex) have been collected, and those shown in the other staff rate exhibits have been billed; and during the period covered by the investigation, his driver assisted in unloading shipments at Ferrari.

The attorney for Ferrari, H&M, and B&W raised several issues during his cross-examination of the staff witnesses, in his opening and closing statements, and in his letter of April 2, 1974 to the Commission, which has been made a part of the record in this proceeding. He argued that paragraph 4.b(2) of Item 85 of MRT 2 which provides that all components of a multiple lot shipment rated under alternative rail rates must be picked up within a 24-hour period violates Section 3663 of the Public Utilities Code. This section provides that minimum rates shall not exceed those of common carriers by land subject to Part I of Division I for the transportation of the same kind of property between the same points. In this

connection, he asserted that provisions in various rail tariffs allow more time for loading than that specified in paragraph 4.b(2). This argument has no merit. As stated in our decision In Re MRT 2 (1972) 73 CPUC 309, when the highway carrier's personnel and motive equipment are present at the time of loading or unloading, the highway carrier is furnishing a substantially greater service than that available under rail carload rates. Other provisions of Item 85 provide for a two-day period for loading or unloading when the carrier's trailer equipment is left without the presence of carrier personnel or motive equipment as would be the situation with a rail car which has been spotted for loading or unloading. In all instances covered by the investigation herein, the carrier's personnel and motive equipment were present during the loading and unloading.

The attorney for the three respondent shippers pointed out that the loading charges assessed by the staff in its various rate exhibits were taken from paragraph 2(d) of Item 240 of MRT 2; that this paragraph became effective May 13, 1972; that since the shipments covered by Parts 1, 2, and 3 of Exhibit 7 (Ferrari) were transported prior to the effective date, the paragraph 2(d) loading charges shown in the staff ratings of these parts were not applicable. If we were to accept the attorney's argument, which may be technically correct, the higher unloading charges in paragraph 3 of Item 241 of the tariff would have to be applied. (See Decision No. 79871 dated April 4, 1972 in Petition for Modification No. 674 in Case No. 5432.) We will, for the purposes of this proceeding, accept the lower loading charges computed by the staff for the three aforementioned parts.

The attorney also pointed out that the effective date of the rule in paragraph 4.b(2) of Item 85 of the tariff which requires that components of a multiple lot shipment be picked up within a 24-hour period was May 20, 1972. In this regard, he argued that all components of the transportation covered by Parts 1, 3, and 4 of the

aforementioned Exhibit 7 were picked up within a period of two days and were transported prior to the May 20, 1972 effective date, and that since a two-day rule was in effect at that time, all of the transportation covered by each of the three parts should have been transported as a single multiple lot shipment. However, in reviewing the documentation for the three parts, it is noted that no master bill was issued for the transportation covered by Part 1, and that although master bills were issued for both Parts 3 and 4, an additional load was added to each of the master documents after the transportation had moved. We agree with the staff that in the circumstances, the two components in Part 1 must be rated as separate shipments and that the components that were added to the master documents for Parts 3 and 4 at a later date must also be rated as separate shipments.

The attorney argued that any undercharges that may have accrued because of deviations from the provisions of Items 85 and 240 of MRT 2 in connection with transportation performed for his clients were the result of Hatley's disregard of shipping instructions issued to him by the clients and were in violation of his contract of carriage with them. This is not an issue in this proceeding. We are here concerned with the question of whether undercharges do or do not exist. In the event undercharges are found in connection with the attorney's clients, he may pursue this argument, should he so desire, in a court of competent jurisdiction.

With respect to the unloading at Ferrari, there is a conflict in the evidence as to whether this was performed entirely by Ferrari's employees with power equipment or whether there was driver assistance. According to the information developed by the staff and the evidence presented by it, there was no driver assistance. According to the testimony of Hatley, there was driver assistance. We will not require the imposition of any unloading charge for shipments delivered to Ferrari.

As to the loading at Miller, there is again a conflict in the evidence. The staff representative testified that he was informed by Miller that Hatley's driver assisted in all loading. For this reason, it is the staff's position that the loading charge in paragraph 2(d) of Item 240 of MRT 2 should be applied to all shipments from Miller rated under alternative rail rates. On the other hand, it is the testimony of both Hatley and the warehousing shipping manager of Miller that 10 percent were loaded by Miller's employees with power equipment. We will accept the testimony of the shipper and carrier witnesses on this issue. We have, therefore, a situation where 90 percent of the shipments originating at Miller were subject to the loading charge specified in paragraph 2(d). Hatley is required by Section 3664 of the Public Utilities Code to assess and collect the minimum charge for this service. The staff's late-filed Exhibit 12 lists and summarizes all of the loading charges at Miller shown in its Exhibits 6 (B&W), 7 (Ferrari), 8 (H&M), and 9 (Hanford). There were no loading charges shown in the staff's Exhibit 10 (Rex). According to Exhibit 12, the number of parts in each of the four staff rate exhibits which include loading charges, the amount of the charges, and the totals thereof are as follows:

Exhibit No.	Shipper	No. of Parts	Amount of Loading Charges
6	B&W	7	$ 340.59
7	Ferrari	43	2,578.65
8	H&M	4	288.93
9	Hanford	2	68.34
	Totals	56	$3,276.51

We recognize that, according to the evidence, there is no way to determine with certainty which of the transportation covered by the various parts in issue was entirely loaded by Miller with power equipment and which was loaded with driver assistance. However, we do know that 90 percent of the transportation covered by the 56 parts,

or a total of 50, were subject to the loading charge, and that the transportation covered by six of the parts was not. We will, therefore, eliminate the loading charge shown in the six parts of each of the four exhibits which include the highest such charges. This will give each of the four shippers the full benefit of the 10 percent of all of the 56 parts. By so doing, the loading charge for the remaining one of the seven parts in Exhibit 6 (B&W) including such charges is $43.21; the total of the loading charges in the remaining 37 of the 43 parts in Exhibit 7 (Ferrari) including such charges is $2,119.63; and the loading charges in Exhibits 8 (H&M) and 9 (Hanford) would be entirely eliminated since less than six parts in each of the two exhibits include loading charges. With these adjustments, the amount of the undercharges shown in each of the four rate exhibits is as follows: Exhibit 6 (B&W) $907.44, Exhibit 7 (Ferrari) $6,359.62, Exhibit 8 (H&M) $125.70, and Exhibit 9 (Hanford) $129.98. The adjusted total amount of the undercharges in the five staff rate exhibits, including the $540.10 in undercharges in Exhibit 10 (Rex) which has not been changed, is $8,062.84.

The last issue remaining for discussion is the penalty, if any, that should be imposed on Hatley. We are of the opinion that Hatley should be directed to collect the undercharges found herein from the respondent shippers and that a fine in the amount of the undercharges plus a punitive fine of $1,000 should be imposed on him. In arriving at the punitive fine, we have taken into account the assertions by Hatley that many of the undercharges were the result of circumstances beyond his control; that he is not familiar with MRT 2; and that during the period involved herein, he obtained all of his ratings from an outside rate service which he no longer uses. However, such mitigation does not exonerate a carrier from its responsibility

to comply with minimum rate regulations and tariffs. It is a well settled principle that a carrier has the duty to ascertain the applicable rates to be assessed and to collect the resulting charges and that lack of knowledge on the carrier's part or reliance on the shipper or anyone else for this is not an acceptable excuse. Furthermore, Hatley has admitted that he knowingly altered some of the master documents by adding additional components to them.

Each of the shipper respondents are placed on notice that if there is any culpability on its part in violating any of the Commission's rates, rules, and regulations, it may be in violation of Sections 3669 and 3670 of the Public Utilities Code and could be subject to the penalties specified in Sections 3802 and 3804 of the Code.

Findings

1. Hatley operates pursuant to a highway contract carrier permit.

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

3. We will not require that an unloading charge be collected for the transportation covered by Exhibit 7 (Ferrari).

4. Ninety percent of the beer shipments originating at Miller which were rated by the staff under alternative rail rates in its Exhibits 6 (B&W), 7 (Ferrari), 8 (H&M), and 9 (Hanford) were loaded onto the back end of Hatley's equipment by Miller personnel with power equipment and were positioned on the equipment by Hatley's driver with a hand pallet jack.

5. The applicable minimum charge for the loading service described in Finding 4 is set forth in paragraph 2(d) of Item 240 of MRT 2. This is the charge applied by the staff in its rate exhibits.

6. The staff applied the loading charge referred to in Finding 5 to all beer shipments originating at Miller which it rated under alternative rail rates in its Exhibits 6, 7, 8, and 9. In calculating undercharges, each of the shipper respondents involved should be given the full benefit of the 10 percent of this transportation which was entirely loaded by Miller with power equipment.

7. Except as provided in Finding 6, the rates and charges computed by the staff in its Exhibits 6, 7, 8, 9, and 10 (Rex) are correct.

8. Hatley charged less than the lawfully prescribed minimum rates in the instances set forth in the exhibits and in the amounts shown below:

Exhibit No.	Shipper	Amount of Undercharges
6	B&W	$ 907.44
7	Ferrari	6,359.62
8	H&M	125.70
9	Hanford	129.98
10	Rex	540.10
	Total for five exhibits	$8,062.84

9. Hatley was cooperative at all times with the staff during the investigation.

10. An undercharge letter dated April 2, 1968 was issued to Hatley by the Commission staff.

Conclusions

1. Hatley violated Sections 3664, 3668, and 3737 of the Public Utilities Code.

2. Hatley should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $8,062.84 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of $1,000.

3. Hatley should be directed to cease and desist from violating the rates and rules of the Commission.

The Commission expects that Hatley 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 such measures. If there is reason to believe that Hatley 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 determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Alton O. Hatley, an individual, doing business as Western Distributors, shall pay a fine of $1,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Alton O. Hatley shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. Alton O. Hatley shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of $8,062.84 on or before the fortieth day after the effective date of this order.

3. Alton O. Hatley shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 8, and shall notify the Commission in writing upon collection.

4. Alton O. Hatley shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 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 the 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. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of Alton O. Hatley's operating authority until the report is filed.

5. Alton O. Hatley 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 Alton O. Hatley and to cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 25th day of JUNE, 1974.

President

Commissioners