

Decision No. 84196**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 McANALLY TRANSPORTATION, INC., a California corporation; OH BOY! CORPORATION, a California corporation; POPPY FOOD COMPANY, a California corporation; ZACKY AND SONS POULTRY COMPANY, a California corporation; GOLDEN WHITE, INC., a California corporation; VERDA POULTRY COMPANY, a California corporation; and McANALLY ENTERPRISES, INC., a California corporation.

Case No. 9748
(Filed May 29, 1974)

Stephen W. Edwards, Attorney at Law, for McAnally Transportation, Inc.; James Barnato, for Verda Poultry Company; Saul Brand, for Zacky and Sons Poultry Company; and Richard W. Engelhorn, for Poppy Food Company; respondents.
Ira R. Alderson, Jr., Attorney at Law, and Edwin 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 McAnally Transportation, Inc. (McAnally) for the purpose of determining whether McAnally charged less than applicable minimum rates in connection with transportation performed for Oh Boy! Corporation (Oh Boy), Poppy Food Company (Poppy), a corporation, Zacky and Sons Poultry Company (Zacky), a corporation, Golden White, Inc. (Golden), and Verda Poultry Company (Verda), a corporation, and whether McAnally should be directed to pay other carriers engaged by it to perform transportation for McAnally Enterprises, Inc. the difference between the amounts paid these carriers and the applicable minimum rates and charges for such transportation.

Public hearing was held before Examiner Arthur M. Mooney in San Bernardino on January 14, 1975, on which date the matter was submitted.

Findings

1. McAnally operates pursuant to a radial highway common carrier permit. It also has a dump truck carrier permit which is not involved in this investigation.

2. During 1973, a staff representative conducted an investigation of McAnally's operations for the period September 1972 through March 1973.

3. The staff investigation disclosed rate errors in connection with the transportation of frozen prepared foods for Oh Boy; frozen poultry for Zacky, Poppy, and Verda; and frozen eggs, egg yolks, and egg whites for Golden. The rate errors resulted from improperly consolidating separate shipments as split shipments without complying with applicable documentation requirements, failure to comply with the unit of measurement rule by applying flat charges, failure to assess refrigeration charges, and the assessment of incorrect rates.

4. The rate errors referred to in Finding 3 are summarized in Exhibits 10 (Oh Boy), 11 (Zacky), 12 (Poppy), 13 (Verda), and 14 (Golden). The minimum rates and charges computed by the staff in the five exhibits are correct.

5. McAnally charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibits 10 (Oh Boy), 11 (Zacky), 12 (Poppy), 13 (Verda), and 14 (Golden) in the amounts of \$10,201.79, \$2,460.15, \$3,151.78, \$1,669.12, and \$1,537.62, respectively. The total of the undercharges in the five exhibits is \$19,020.46.

6. An alter ego relationship exists between McAnally, McAnally Enterprises, Inc., and McAnally Egg Enterprises, Inc.

7. Exhibit 15 summarizes certain transportation performed by McAnally for McAnally Egg Enterprises, Inc. and McAnally Enterprises, Inc. McAnally engaged other carriers as ostensible subhaulers to perform the transportation in Exhibit 15 and paid such other carriers less than the applicable minimum rates and charges for such transportation. Because of the alter ego relationship between the carrier and the party for whom the transportation was performed, the ostensible subhaulers were in fact prime carriers and should have been paid the full applicable minimum rates and charges.

8. The minimum rates and charges computed by the staff for the transportation summarized in Exhibit 15 are correct.

9. McAnally paid the ostensible subhaulers \$773.25 less than the applicable minimum rates for the transportation summarized in Exhibit 15.

10. At the time of the staff investigation, McAnally had a terminal in Yucaipa; operated two tractors and three trailers; had three employees; and had all applicable minimum rate tariffs and distance tables. Its gross operating revenue for the years 1973 and 1974 were \$489,248 and \$247,857, respectively. It had no gross operating revenue for the fourth quarter of 1974.

11. McAnally was cooperative at all times with the staff during the investigation and furnished all documents and information requested.

Discussion

The only matters requiring discussion are the penalty, if any, that should be imposed on McAnally and the position of the representatives of Zacky, Poppy, and Verda that their respective companies should not be required to pay any undercharges found herein regarding transportation performed for them.

The staff recommended that McAnally be directed to collect the undercharges found herein; that it be fined in the amount of such undercharges plus a punitive fine of \$750; and that it be directed to pay other carriers engaged by it to perform transportation for its affiliated companies the difference between the amounts paid such other carriers and the applicable minimum rates and charges. Counsel for McAnally argued that the facts and circumstances herein do not warrant the imposition of a punitive fine. He asserted that there was no intentional disregard of regulations by his client; that many of the rate errors were technical violations; that his client's trucking business is merely an adjunct of its farm operations; and that the hearing herein has already resulted in substantial expense for his client. McAnally's counsel did not take exception to the other staff recommendations.

We agree with the staff recommendation that McAnally be fined in the amount of the undercharges and be required to pay the other carriers the difference between the amount already paid to them and the applicable minimum rates for the transportation performed for the affiliated companies. As to the punitive fine, we are of the opinion that such a fine in the amount of \$500 should be imposed on the respondent carrier. In arriving at the punitive fine, we have taken into account the testimony of the general manager of McAnally that instructions had been given to its billing clerks regarding documentation requirements for split shipments; that they had telephoned the shippers and informed them of such requirements; that when he became aware that the instructions were not being followed, he immediately took steps to correct the situation; that the necessary documentation is now being prepared for all split shipments; that McAnally is now primarily engaged in the transportation of its own property; and that it no longer actively solicits business from others

and performs for-hire transportation only when its equipment would otherwise return empty from an outbound shipment of its own products. Such mitigation, however, 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 for any and all ratable transportation performed and that lack of knowledge on the part of shippers or anyone else regarding the preparation of required documentation is not an acceptable excuse.

As to the undercharges in connection with the transportation performed for Zacky, Poppy, and Verda, their representatives asserted that their companies do not have traffic departments and have no employees who are familiar with minimum rates or documentation requirements; that they relied on McAnally for determining correct rates and charges and paid the amounts assessed; that such charges were included in the selling price of their products to their customers; that if they are now required to pay undercharges, there is no way they could pass these additional charges on to their customers; and that they would be severely penalized if they were required to pay such additional charges. Section 3800 of the Public Utilities Code provides in part that whenever the Commission, after hearing, finds that a highway permit carrier has charged less than the minimum rates and charges for the transportation of property, the Commission shall require such carrier to collect the undercharges involved.

Conclusions

1. McAnally violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code.

2. McAnally should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$19,020.46 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$500.

3. McAnally should be directed to pay the other carriers engaged by it to perform transportation for its affiliated companies the \$773.25 less than the applicable minimum rates paid to them for such transportation.

4. McAnally should be directed to cease and desist from violating the rates and rules of the Commission and from paying less than applicable minimum rates to other carriers engaged by it to perform transportation for its affiliated companies.

The Commission expects that McAnally will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges and to pay its subhaulers the amounts found due them in Finding 5. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that McAnally or its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges and to pay its subhaulers that which is due them, 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. McAnally Transportation, Inc. shall pay a fine of \$500 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. McAnally Transportation, Inc. 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. McAnally Transportation, Inc. shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$19,020.46 on or before the fortieth day after the effective date of this order.

3. McAnally Transportation, Inc. shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 5, and shall pay its subhaulers the amounts set forth in Finding 9, and shall notify the Commission in writing upon collection and payment.

4. McAnally Transportation, Inc. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges and to pay its subhaulers. In the event the undercharges or payments ordered to be collected and paid by paragraph 3 of this order, or any part of such undercharges or payments, remain uncollected or unpaid 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 or the payments remaining to be made, specifying the action taken to collect such undercharges or make such payments and the result of such action, until such undercharges have been collected in full or until the total payments have been made or until further order of the Commission.

5. McAnally Transportation, Inc. 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 rates and charges prescribed by this Commission.

6. McAnally Transportation, Inc. shall cease and desist from paying to subhaulers amounts less than the minimum payments prescribed by this Commission in connection with transportation for affiliated companies.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent McAnally Transportation, Inc. 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 18th
day of MARCH, 1975.

William L. Sturgeon
President
William L. Sturgeon
William L. Sturgeon
Leonard Ross
Commissioners