

ORIGINAL

Decision No. 84422

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of EDWARD E. WILLIAMS; MARQUART WOLFE LUMBER CO., INC., a California corporation; HODGES BUILDING MATERIAL CO., INC., a California corporation; and GREAT WESTERN CHEMICAL COMPANY and/or McCALL OIL AND CHEMICAL CORPORATION, Washington corporations.

Case No. 9736
(Filed May 15, 1974)

Edward E. Williams, for Williams Trucking;
Sergius M. Boikan, Attorney at Law, for
Great Western Chemical Co.; and Jonathan W.
Wolfe, for Marquart Wolfe Lumber Co.;
respondents.
Ira R. Alderson, Jr., Attorney at Law, and
E. E. Cahoon, for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's own motion to determine whether or not Edward E. Williams (Williams), an individual who holds a radial highway common carrier permit, violated Sections 3664, 3667, and 3737 of the Public Utilities Code in transporting property for Marquart Wolfe Lumber Co., Inc. (Wolfe), a corporation, Hodges Building Material Co., Inc. (Hodges), a corporation, and either Great Western Chemical Company or McCall Oil and Chemical Corporation (Western), a corporation, by failing to collect from them the applicable minimum rates and in failing to retain certain transportation records. A hearing on the matter was held before Examiner Pilling on July 24, 1974 and November 26, 1974, and the case was submitted on March 10, 1975 upon the filing of briefs.

The evidence shows that Williams possesses a radial highway common carrier permit issued by this Commission; that he subscribed to, was served with, and received, prior to the transportation of the shipments concerned herein, Minimum Rate Tariffs 2 and 14-A, Exception Ratings Tariff 1, Distance Table 7, and supplements thereto; and that he employs 6 drivers and operates various pieces of trucking equipment.

A witness for the Commission's staff introduced into evidence copies of freight bills and shipping documents obtained from Williams, and freight bills, shipping documents, and invoices obtained from the other respondents covering moves performed by and the rates assessed by Williams during the year 1972 on 157 shipments of lumber transported for Wolfe (Exhibit 3), 33 shipments of building materials for Hodges (Exhibit 1), and 79 shipments of assorted dry chemicals and lime for Western (Exhibits 2 and 4). The staff audited the rates charged as shown in Exhibits 1 through 4 and the staff member who made the audit submitted into evidence the results of that audit: Exhibits 7 and 8 covering the Western shipments, Exhibit 9 the Hodges shipments, and Exhibit 10 the Wolfe shipments. Exhibits 7, 8, 9, and 10 contain abstracts of the documents, including the rates charged, contained in Exhibits 1 through 4 together with a statement of what were, in the rate expert's opinion, the minimum rates and charges applicable to each of the shipments and gave tariff references to substantiate his opinion. In summary, Exhibits 7, 8, 9, and 10 show that Western was undercharged \$17,692.42, Hodges \$3,053.48, and Wolfe \$3,686.04. The rate expert testified that the undercharges on the Western shipments resulted from Williams' various failures to assess the applicable class rates and surcharges, and the applicable minimum rail general commodity tariff rates, to comply with documentation requirements for shipment split delivery service, and to observe the Units of Measurement Rule. On the Hodges shipments the rate expert testified that Williams failed to assess the applicable class rates and surcharges or to assess the applicable minimum rail commodity tariff rate, as the case may be. In the case of the shipments

handled for Wolfe the rate expert testified that Williams failed variously to assess the applicable surcharge, the applicable commodity rate, the applicable rail commodity rate and surcharge, and the applicable part charge for split delivery shipments.

The staff witness who, in December 1972, visited Williams and who obtained the documents evidenced by Exhibits 1 through 4, testified that Williams told the staff witness that he did not have in his possession shipping order copies of the bills of lading covering the moves, that the shipping order copies were given to the consignee of the shipments. Williams also told the witness that while he had received all of the tariff changes and supplements, he had not kept his tariffs up to date by filing the supplements and changes. The staff contends that Williams' failure to keep copies of the bills of lading violated Minimum Rate Tariff 2, Item 256, which requires a carrier to keep the documents for three years.

With one exception, none of the respondents took issue or attempted to refute the staff's contentions relative to the undercharges or lack of record keeping. The one exception deals with 3 truckloads of lime, each truckload weighing over 40,000 pounds, and each hauled for Western from Stauffer Chemical Co. to the Oro Loma Sanitary District (Sanitary District) at San Lorenzo for a flat charge per load of \$200. The staff alleges that Western was undercharged \$1,471.25 on these shipments. Western contends that the lime is exempt from minimum rate regulation and hence it may be handled by a trucker at any agreed rate while the staff contends that the lime is rateable and that \$200 per load is less than the applicable minimum rate. The lime was identified by a witness as hydrated lime which is chemically composed of 90 percent usable calcium hydroxide and 10 percent magnesium hydroxide, silicon, and limestone, and sells for \$35 per ton. The Sanitary District uses the hydrated lime in its sewage treatment plant in the dewatering process to condition sludge so that the sludge will leave the filter belt, after which the sludge is placed on land for

further air drying. The sludge is given free to anyone who will haul it away. A major seller of topsoil in the area testified that he uses a considerable amount of the Sanitary District's sludge and mixes it into the topsoil he sells as a soil conditioner to neutralize acid soil. Western contends that hydrated lime comes within the term "Fertilizer, viz.: Lime Refuse" found in Item 560 of Exception Ratings Tariff 1, and since Item 40, paragraph 2 of Minimum Rate Tariff 2 exempts from minimum rate regulation "Fertilizers as described in Items 540, 560, and 580 of the Exception Ratings Tariff", the 8 shipments of hydrated lime are exempt from minimum rate regulation. In support of its contention Western points to Decision No. 73542 dated December 27, 1967 (67 CPUC 756, unreported) in the Shropshire case. That case, in part, dealt with the transportation of hydrated lime which consisted of 90 percent calcium hydroxide and 10 percent inert ingredients. That decision recites that "The lime transported by respondent is described in Item 560 (lime refuse) of Exception Ratings Tariff 1" and is "exempt from minimum rate regulation under Item 40 of Minimum Rate Tariff No. 2". The finding in that case in respect to lime stated "Low grade lime used only for agriculture as described in Informal Ruling No. 167...[is]...exempted from minimum rate regulation."^{1/}

^{1/} Informal Ruling No. 167 issued December 28, 1965 reads as follows:

"Lime refuse or urea, a fertilizer, is exempt from the Commission's minimum rates prescribed in Minimum Rate Tariff No. 2. (See Items Nos. 560 and 580 of Exception Ratings Tariff No. 1.) Questions have been asked whether lime refuse or urea, advertised and sold as an agricultural liming material or fertilizer supplement respectively, is exempt from the rates in Minimum Rate Tariff No. 2 when used for non-fertilizer purposes.

"Lime refuse or urea, packaged, labeled and sold as an agricultural liming material or fertilizer supplement respectively, is exempt from the rates in Minimum Rate Tariff No. 2."

Western also points to the fact that calcium is a secondary plant-food element and is therefore a fertilizer. The staff, in support of its contention that hydrated lime is rateable, refers to Item 1030 of Exception Ratings Tariff 1 which prescribes a Class 35.2 truck-load rate, minimum weight 40,000 pounds, on the commodity described in Item 42160 of the Governing Classification, namely, "Common lime, including Magnesium lime, hydrated or hydraulic, quick or slaked", found in the cement group. The staff also refers us to the Food and Agricultural Code, Section 14506 which defines commercial fertilizer to mean any substance intended to be used for promoting plant growth which contains 5 percent or more of nitrogen, available phosphorous pentoxide, or soluble potassium oxide, singly, collectively, or in combination. The staff reasons that because hydrated lime contains neither nitrogen, phosphorous, or potassium hydrated lime is not a fertilizer. The staff presented an agriculturist who testified that hydrated lime is used primarily to increase the alkalinity of acid soil. A witness from the staff researched the origin of the term "lime refuse" as used in the tariff and found that the term first appeared in a western tariff in the Pacific Rate Bureau railroad tariff in 1917. Further research disclosed that lime refuse was one of two waste products given off in the manufacture of beet sugar, the other waste product being Steffen waste; that both waste products contained generally the same ingredients but in varying proportions; that during World War I Steffen waste was used to produce potash then in short supply and lime refuse was used as a fertilizer. The relation between the two waste products is highlighted, the staff contends, in Item 560 of Exception Ratings Tariff 1 (the item which includes lime refuse) which reads: "Fertilizer, viz.: Beet Sugar Refinery Waste, concentrated, mixed or not mixed with Lime Refuse". The factory manager for Spreckels Sugar Company at Mendota testified that his factory produces sugar from sugar beets and that in the process a waste product called "lime

refuse" or "sugar beet waste lime" results. The lime refuse is mostly calcium carbonate with some magnesium carbonate and inorganic chemicals. It sells for 50 cents a ton.

Discussion

The controlling factor in the evidence concerning the 8 shipments of hydrated lime is that at the time the 8 shipments moved there was a specified rate for hydrated lime in the minimum rate tariffs. Item 1030 of Exception Ratings Tariff 1 prescribes a Class 35.2 truckload rate, minimum weight 40,000 pounds on hydrated lime. Hydrated lime is therefore a rateable item regardless of its use as a fertilizer, liming agent, cement additive, plaster base, sludge conditioner, or other use, and we reaffirm the principle that the rating, or the exemption from rates, for a single commodity in a single form is predicated upon the identity of the commodity as described in the tariff rather than the commodity's ultimate or intended use. At the time of the Shropshire case, hydrated lime was a rateable article (as it is today) but this salient fact was not brought before us in that case. Had it been brought before us we would have ruled differently in the Shropshire case and for that reason we will not in the future deem Shropshire controlling on the question of whether or not hydrated lime is included in the term, "lime refuse", or vice versa.

Findings

1. During the year 1972 Williams operated as a radial highway common carrier under a permit issued by the Commission and had been served with appropriate tariffs and the distance table.
2. In the conduct of its operations Williams transported 79 shipments for Western, 33 shipments for Hodges, and 157 shipments for Wolfe, each of which shipment was subject to the Commission's minimum rate regulation.
3. The applicable tariff provisions and minimum rates and charges for the movements described in Finding 2 are set forth in Exhibits 7, 8, 9, and 10, respectively.

4. Williams assessed and collected less than the applicable minimum rates authorized in the Commission's minimum rate tariffs in transporting each of the shipments described in Finding 2 to the extent of undercharging Western \$17,692.42, Hodges \$3,053.48, and Wolfe \$3,686.04.

5. Hydrated lime is a rateable commodity under Item 1030 of Exception Ratings Tariff 1 regardless of its ultimate or intended use.

6. The term "lime refuse" refers to a particular waste product incurred in the production of sugar from sugar beets and is composed principally of calcium carbonate and contains some magnesium carbonate and other inorganic chemicals.

7. Decision No. 73542 on the Shropshire Trucking case heretofore rendered the term "lime refuse" ambiguous and susceptible to the interpretation that the term included hydrated lime when in fact lime refuse and hydrated lime are two different articles and any ambiguity in this respect should be resolved in favor of the shipper on such shipments handled prior to this decision.

8. Williams should be ordered to collect undercharges in the amount of \$3,053.48 from Hodges and \$3,686.04 from Wolfe.

9. Western should not be required to pay alleged undercharges of \$1,471.25 pertaining to the 8 shipments of lime because of the ambiguity caused by Decision No. 73542.

10. Williams should be ordered to collect \$16,221.17 from Western.

11. Williams failed to retain copies of shipping documents which he is required to issue, receive, or obtain for transportation pursuant to Minimum Rate Tariff 2, Item 256.

Conclusions

1. Williams violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging, demanding, collecting, and receiving a lesser compensation for the transportation of property

for respondents Western, Hodges, and Wolfe than the rates and charges contained in the applicable minimum rate tariffs.

2. Williams failed to retain copies of shipping documents which he, as a carrier, is required to issue, receive, or obtain for transportation pursuant to Minimum Rate Tariff 2, Item 256.

3. Williams should be ordered to collect from the other respondents the difference between the charges billed and collected and the charges due under the applicable minimum rate tariffs, the difference being \$16,221.17 from Western, \$3,053.48 from Hodges, and \$3,686.04 from Wolfe.

4. A fine in the amount of the undercharges set out in Conclusion 3 should be imposed on Williams pursuant to Section 3800 of the Public Utilities Code.

5. Williams should be fined in the amount of \$750 pursuant to Section 3774 of the Public Utilities Code.

6. Williams should be ordered to cease and desist from any and all unlawful operations and practices as a carrier.

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 such measures. If there is reason to believe that Williams 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. Edward E. Williams (Williams) shall pay a fine of \$750 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order.

Williams 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. Williams shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$22,960.69 on or before the fortieth day after the effective date of this order.

3. Williams shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Conclusion 3 and shall notify the Commission in writing upon collection. ✓

4. Williams 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, Williams 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 Williams' operating authority until the report is filed.

5. Williams shall cease and desist (a) 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 and (b) from failing to retain and preserve copies of shipping documents which support the rates and charges assessed and which he is required to issue, receive, or obtain for transportation pursuant to tariff rule.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent Williams 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.

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

Dated at San Francisco, California, this 13th
day of MAY, 1975.

I dissent.
Robert Patterson
Commissioner

Vernon L. Johnson
President
William Synnott Jr.
[Signature]
[Signature]
Commissioners