

ORIGINAL

Decision No. 84939

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation of the Commission's own motion into the operations, rates and practices of Vincent Ganduglia, Inc., a California corporation; Vincent Ganduglia Trucking, a sole proprietorship; Phillips Plywood Company; United Wholesale Lumber Company, a California corporation; Bethune Lumber Sales; F.M. Corporation, Niagara Chemical Division, a California corporation; Los Angeles Chemical Company, a California corporation; and A.R. Zacher Company, a California corporation.

Case No. 9803  
(Filed October 1, 1974)

Irwin & Thuesen, by William P. Irwin, Attorney at Law, for Vincent Ganduglia Trucking and Vincent Ganduglia, Inc.; and Reliable Traffic Service, by Marshall A. Smith, Jr., for FMC Corporation; respondents.  
Patrick J. Power, Attorney at Law, and Edward 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 Vincent Ganduglia, Inc. (Ganduglia), and Vincent Ganduglia Trucking (Trucking), a sole proprietorship, for the purpose of determining whether less than minimum rates and charges were assessed by Ganduglia in connection with transportation performed for United Wholesale Lumber Company (United), a corporation, Bethune Lumber Sales (Bethune), and Phillips Plywood Company (Phillips) and by Trucking in connection with

transportation performed for FMC Corporation, Agricultural Chemical Division (FMC), a corporation,<sup>1/</sup> Los Angeles Chemical Company (LAC), a corporation, and A.R. Zacher Company (Zacher), a corporation.

Public hearing was held before Examiner Arthur Mooney in Fresno on January 29, 1975, and the matter was continued to a date to be set. One of the issues in the investigation is whether the transportation of hydrated lime is subject to minimum rates. Since this same issue was already before the Commission in the Investigation of Edward E. Williams, et al. in Case No. 9736 which was under submission, it was agreed by all parties that no evidence would be taken on this issue until the decision was rendered in that case. By Decision No. 84422 dated May 13, 1975 in Case No. 9736, the Commission found that hydrated lime is a ratable commodity but that since there was confusion created by an earlier decision regarding this, the carrier would not be required to collect minimum rates and charges for the transportation of hydrated lime performed prior to this decision. We will follow the same ruling in the Williams decision here. Since no undercharges will be found in connection with the hydrated lime shipments and evidence has been taken on all other issues, further hearing is not necessary, and the matter is now ready for decision.

Ganduglia operates pursuant to a radial highway common carrier permit. It has a terminal in Fresno, employs one driver and a part-time clerical employee, and has one tractor and a set of flatbed trailers. Prior to the period covered by the investigation it had all applicable minimum rate tariffs, distance tables, and exceptions tariffs. Its gross operating revenues for the years 1973 and 1974 were \$29,058 and \$12,218, respectively.

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<sup>1/</sup> FMC is shown in the order instituting investigation in this proceeding and in various staff exhibits as F.M. Corporation, Niagara Chemical Division, a corporation. The representative of FMC has informed the Commission that the name of his client has been changed to FMC Corporation, Agricultural Chemical Division, a corporation.

Trucking operates pursuant to radial highway common carrier and highway contract carrier permits. He also has other operating authority not involved herein. He shares terminal facilities with Ganduglia in Fresno. He employs 36 drivers plus seasonal help, four mechanics, and five clerical employees. He has 23 tractors, 6 tank trucks, and numerous tank, flatbed, and pneumatic hopper trailers. He also leases additional equipment. At the time covered by the investigation he had all applicable minimum rate tariffs, distance tables, and exceptions tariffs. His gross operating revenues for the years 1973 and 1974 were \$1,790,875 and \$1,278,879, respectively.

A staff representative visited the place of business of Ganduglia and Trucking on various days during June, July, and August 1973 and reviewed their records for the period June 1, 1972 to June 15, 1973. The representative testified that he prepared Exhibits 3 and 4 which include true and correct photostatic copies of various invoices and supporting documents issued during the review period by Ganduglia for the transportation of lumber and related commodities for United, Bethune, and Phillips and by Trucking for the transportation of hydrated lime, chiofite, and aluminum sulphate for FMC, IAC, and Zacher. He stated that on January 23, 1975, he visited respondent Phillips' place of business which is located at 11721 Sherman Way, North Hollywood, and personally observed that it is not served by rail facilities; that he was informed by the company's manager that it receives truck shipments at its facility and rail shipments at the yard of Watts Lumber Company at 7100 Redford Street in North Hollywood; and that the distance between the two companies is 6/10 of a mile.

A rate expert for the Commission staff testified that he took the sets of document in Exhibits 3 and 4, together with the supplemental information testified to by the representative and formulated Exhibits 5 (United), 6 (Bethune), 7 (Phillips), 8 (FMC), 9 (IAC), and 10 (Zacher), which show the rates and charges assessed by the respondent carriers, the rates and charges computed by the staff, and the alleged undercharges for the transportation in issue. He pointed out that Parts 1 through 8 and 10 of the 48 parts in Exhibit 8 (FMC) and all of Exhibit 10 (Zacher) relate to the transportation of hydrated lime which has been excluded for consideration in this hearing. He asserted that the rate errors in the other 39 parts of Exhibit 8 (FMC) and in Exhibits 5 (United), 6 (Bethune), 7 (Phillips), and 9 (IAC) resulted from the assessment of incorrect classification ratings and rates, failure to assess off-rail charges, failure to comply with split shipment rules, and, in one instance, failure to charge for a reshipment. The witness explained that the transportation summarized in Exhibit 7 (Phillips) originated at Ford Products Co. in San Jose; that on January 14, 1975, he contacted the Roseberg Lumber Company in Roseberg, Oregon and was informed by it that the Ford Products Co. was a subsidiary of it during the staff-review period and that the commodity shipped from this plant was vinyl-surfaced flakeboard; and that this commodity is subject to the ratings set forth in Item 24490 of National Motor Freight Classification A-12 (NMFC A-12). The amount of the undercharges shown in Exhibit 5 (United) is \$722.85, in Exhibit 6 (Bethune) is \$97.08, in Exhibit 7 (Phillips) is \$5,816.36, in Exhibit 8 (FMC), excluding the hydrated lime shipments, is \$2,789.42, and in Exhibit 9 (IAC) is \$424.58, and the total thereof relating to the transportation performed by Ganduglia is \$6,636.29 and relating to the transportation performed by Trucking is \$3,214.

The rate clerk for Trucking testified as follows: He has been with Trucking for three years. He was cooperative with the staff representative during his investigation and gave him all documents he requested and answered all questions for him. With respect to the commodity chicoite in Parts 11 through 48 of the staff's Exhibit 8 (FMC), he was of the opinion at the time the transportation moved that this commodity was a fertilizer and not subject to rate regulation. He asked the staff representative during the investigation if his understanding was correct and was informed by the representative that the chicoite might be subject to minimum rates but not to do anything about it until he heard from the Commission and also that he could contact the Commission's San Francisco office regarding this. Although he did not personally contact the San Francisco office, he thought the Commission would advise him on this matter which it did not. He called FMC and informed it that they should consider the chicoite ratable. FMC agreed to pay minimum rates for the transportation of this commodity with the understanding that if it were found not to be ratable in this proceeding, an appropriate refund would be made. On December 26, 1973, he sent balance due bills in the amount of \$2,685.25 to FMC for undercharges based on the application of minimum rates to all of the transportation of chicoite for it for the year 1973. FMC paid the undercharges two days later. As to the aluminum sulphate in the staff's Exhibit 9 (IAC), he had incorrectly thought that this was exempt from rate regulation. Any rate errors that were made were honest errors. The rating of the transportation included in Exhibits 5 (United), 6 (Bethune), and 7 (Phillips) was performed by a former employee of Ganduglia in Los Angeles. In April or May of 1973, he took over these rating duties and has applied correct rates to such transportation since that time. As a result, Ganduglia lost the 7 or 8 lumber accounts it had.

Mr. Vincent Ganduglia testified as follows: He owns both Ganduglia and Trucking. Ganduglia is the successor to Bourne & Son, a Los Angeles truck company, which he purchased in 1965. He retained the personnel of Bourne & Son, including its manager, to operate Ganduglia. The manager did all of the rating for Ganduglia, including all or most of the shipments listed in the staff's Exhibits 5 (United), 6 (Bethune), and 7 (Phillips), until his death in September 1972. After the manager's death, Trucking's rate clerk in Fresno took over the rating duties for Ganduglia and has applied correct tariff charges to all shipments subsequent thereto. He instructed his personnel to cooperate fully with the staff representative during the investigation.

The staff representative was recalled by the staff and testified that he made a preliminary survey of the operations of both respondent carriers in December 1972 and made a list of representative shipments, including chicoite, and sent the list to the San Francisco office for rating; that the ratings were returned to him in May 1973, and based on this, he performed the complete investigation of operations referred to above; that during the investigation in mid-1973, he told respondent carriers' rate clerk that chicoite was ratable and nothing more other than he could contact the Commission's San Francisco office if he had any question regarding this; and that some months later the rate clerk called and informed him that he re-billed the chicoite shipments on the basis of the minimum rates and would apply tariff rates to such shipments in the future. ✓

Staff counsel, in his closing statement, recommended that both Ganduglia and Trucking be directed to collect the undercharges relating to each; that each be fined in the amount of such undercharges; and that a punitive fine in the amount of \$500 be imposed

on each carrier. As to the undercharges on the chicoite shipments in Exhibit 8 (FMC), he argued that although they were collected before the investigation order herein was issued, they should, nonetheless, be included in the amount of the undercharge fine imposed on Trucking

In his closing statement, the attorney for Ganduglia and Trucking asserted that his clients are willing to rely upon the Commission staff for the proper ratings of the shipments in issue; that although prompted by the investigation, Trucking did, on his own volition, collect the undercharges on the chicoite shipments prior to the investigation order; that his clients did cooperate fully with the staff investigator; that many of the rating errors were by personnel of the company Ganduglia took over, and this has been corrected; that it is his clients' intent to rate all shipments according to law; and that the facts and circumstances herein do not warrant the imposition of any fines on his clients.

As stated above, although hydrated lime is subject to minimum rates, we will not require Trucking to collect undercharges for the shipments of this commodity listed in Parts 1 through 8 and 10 of Exhibit 8 (FMC) and in Exhibit 10 (Zacher) because of the confusion that existed regarding this at the time the shipments moved. Also, the record is not entirely clear regarding the method in which the transportation summarized in Exhibit 6 (Bethune) was handled, and for this reason, we will not find any undercharges in connection with this exhibit. As to the proper classification rating for the commodity transported in the shipments summarized in Exhibit 7 (Phillips), it is apparent from the sample of the commodity in Exhibit 11 that it is vinyl-surfaced flakeboard and subject to the ratings in Item 24490 of NMFC A-12 as asserted by the staff. We agree with the minimum rates and charges and resulting undercharges computed by the staff in Parts 9 and 11 through 48 of Exhibit 8 (FMC) and in Exhibits 5 (United), 7 (Phillips), and 9 (IAC).

With the exception of the amount of the undercharges in Exhibit 6 (Bethune), we concur with the staff recommendations and will include the undercharges on the chicoite shipments in Exhibit 8 (FMC) in the undercharge fine imposed on Trucking. The fact that the chicoite undercharges were collected by Trucking in December 1973 and the investigation order was not issued until October 1, 1974 is irrelevant. These undercharges were not collected until after the preliminary investigation in December 1972 and the full-scale investigation in mid-1973. It is obvious, therefore, that Trucking would not have taken this action were it not for the investigations. To hold otherwise would seriously jeopardize the Commission's enforcement policy. Such an interpretation could encourage shippers and carriers to engage in destructive rate-cutting practices. If a staff investigation were to disclose such action, the carrier could immediately collect the correct rate prior to the issuance of the investigation order with no fear of any penalty. Furthermore, Section 3800 of the Public Utilities Code makes no distinction between undercharges that were billed and collected prior to the issuance of a formal Commission order of investigation and those that were not. The only conditions precedent therein to the assessment of such a fine are that a hearing be held and that a finding be made that a carrier has charged and collected a lesser compensation than that provided in the applicable minimum rate tariff. Here, a hearing has been held and the record supports the finding of undercharges.



With respect to the argument presented on behalf of Ganduglia and Trucking that the facts and circumstances herein do not warrant the imposition of any fine, it is a well-settled principle that a carrier has a duty to ascertain the applicable rate to be assessed and collected for any and all ratable transportation it performs and that lack of knowledge on the part of the carrier regarding proper rating procedures is not an acceptable excuse.

One final matter requiring comment is the motion by the representative of FMC to dismiss his client as a respondent because of the uncertainty regarding the hydrated lime issue in Parts 1 through 8 and 10 of Exhibit 8 (FMC) and the fact that his client has paid all undercharges in connection with Parts 11 through 48 of the exhibit. As stated above, the undercharges were not paid until after the staff had investigated Trucking. Also, there is an undercharge of \$104.17 in connection with the shipment of 1,000 bags of clay summarized in Part 9 of Exhibit 8 (FMC), and this undercharge has not been paid. The motion will be denied.

Findings

1. Ganduglia operates pursuant to a radial highway common carrier permit.
2. Trucking operates pursuant to radial highway common carrier and highway contract carrier permits and has other operating authority not involved herein.
3. At the time of the investigation both Ganduglia and Trucking had all applicable minimum rate tariffs, distance tables, and exceptions tariffs.
4. Mr. Vincent Ganduglia owns both Ganduglia and Trucking, and both companies share the same office and terminal facilities in Fresno.

5. The commodity transported in the shipments summarized in Exhibit 7 (Phillips) was vinyl-surfaced flakeboard which is subject to the ratings in Item 24490 of NMFC A-12.

6. Although hydrated lime is a ratable commodity, we will not require the collection of undercharges in connection with the shipments of this commodity summarized in Parts 1 through 8 and 10 of Exhibit 8 (FMC) and in Exhibit 10 (Zacher) because of the confusion regarding this prior to the issuance of the Williams decision, supra.

7. It is not entirely clear on this record as to how the transportation summarized in Exhibit 6 (Bethune) was handled. For this reason, no undercharges will be found in connection with Exhibit 6.

8. The undercharges for the chicoite shipments summarized in Parts 11 through 48 of Exhibit 8 (FMC) were billed and collected by Trucking in December 1973 which was prior to the issuance of the investigation order on October 1, 1974. This does not insulate these undercharges from the penalty provisions in Section 3800 of the Public Utilities Code which state in part that whenever the Commission, after hearing, finds that undercharges exist, it may impose a fine upon the carrier equal to the amount of such undercharges. The shipments were transported during the period November 1972 through April 1974, and it is apparent from the facts that Trucking would not have taken this action had it not been for the staff investigation in mid-1973.

9. The minimum rates and charges computed by the staff in Parts 9 and 11 through 48 of its Exhibit 8 (FMC) and in its Exhibits 5 (United), 7 (Phillips), and 9 (IAC) are correct.

10. Ganduglia charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibits 5 (United) and 7 (Phillips)

in the amounts of \$722.85 and \$5,816.36, respectively, and the total of the undercharges in both exhibits is \$6,539.21.

11. Trucking charged less than the lawfully prescribed minimum rates in the instances set forth in Parts 10 and 11 through 48 of Exhibit 8 (FMC) and in Exhibit 9 (IAC) in the amounts of \$2,789.42 and \$424.58, respectively, and the total amount of the undercharges in both exhibits is \$3,214.

12. The motion by the representative of FMC to dismiss his client as a respondent should be denied.

#### Conclusions

1. Ganduglia and Trucking both violated Sections 3664 and 3774 of the Public Utilities Code.

2. Ganduglia should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$6,539.21 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$500.

3. Trucking should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$3,214 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$500.

4. Ganduglia and Trucking should both be directed to cease and desist from violating the rates and rules of the Commission.

5. The motion by FMC to be dismissed as a respondent should be denied.

The Commission expects that Ganduglia and Trucking will each 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 taken by each respondent. If there is reason to believe that Ganduglia or Trucking or the attorney of either 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 on either or both of the respondent carriers.

O R D E R

IT IS ORDERED that:

1. Vincent Ganduglia, 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. Vincent Ganduglia, 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. Vincent Ganduglia, Inc. shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$6,539.21 on or before the fortieth day after the effective date of this order.
3. Vincent Ganduglia, Inc. shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 10 and shall notify the Commission in writing upon collection.
4. Vincent Ganduglia Trucking, a sole proprietorship, 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. Vincent Ganduglia Trucking 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.
5. Vincent Ganduglia Trucking shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$3,214 on or before the fortieth day after the effective date of this order.

6. Vincent Ganduglia Trucking shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 11 and shall notify the Commission in writing upon collection.


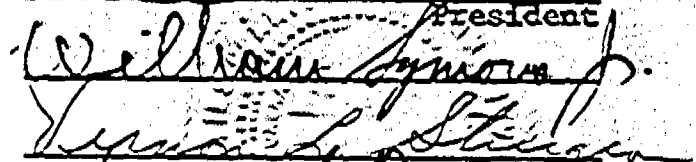
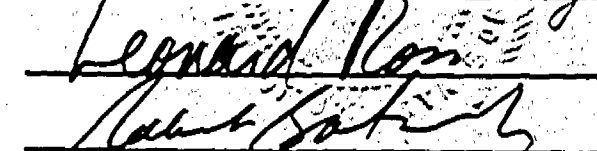
7. Vincent Ganduglia, Inc. and Vincent Ganduglia Trucking shall each proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by either or both of the respondents by paragraphs 3 and 6 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, such respondent or both 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 this Commission. Failure by either respondent to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of that respondent's operating authority until the report is filed.

8. Vincent Ganduglia, Inc. and Vincent Ganduglia Trucking shall each 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.

9. The motion by FMC Corporation, Agricultural Chemical Division, a corporation, to be dismissed as a respondent is denied.

10. The Secretary of the Commission is directed to cause personal service of this order to be made upon respondents Vincent Ganduglia, Inc. and Vincent Ganduglia Trucking 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 30th  
day of SEPTEMBER, 1975.

  
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President  
  
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Leonard R. Stinger  
  
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Commissioners