

ORIGINAL

Decision No. 86021

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

Wiener, Newman, Chrisman & Baldonado, by Arthur Baldonado, Attorney at Law, for Oh Boy! Corporation; and Stephen W. Edwards, Attorney at Law, for McAnally Transportation, Inc.; respondents.
Mary Carlos, Attorney at Law, and Edwin H. Hjelt for the Commission staff.

OPINION ON REHEARING

Decision No. 84196 dated March 18, 1975 directed McAnally Transportation, Inc. (McAnally), among other things, to collect \$10,201.79 in undercharges from Oh Boy! Corporation (Oh Boy) and to pay a fine in the amount of these undercharges to the Commission. By Decision No. 84534 dated June 10, 1975, as amended by Decision No. 84567 dated June 17, 1975, a petition for rehearing of Decision No. 84196 filed by Oh Boy was granted for the limited purpose of receiving further evidence with respect to whether McAnally charged less than the applicable minimum rates in connection with the

transportation it performed for Oh Boy. The transportation in issue is summarized in Exhibit 10, which was received in evidence at the initial hearing in this matter on January 14, 1975.

Public hearing on the Petition for Rehearing was held before Examiner Arthur M. Mooney in Los Angeles on September 22 and 23 and October 31, 1975. The matter was submitted upon the filing of concurrent briefs on December 22, 1975.

Background

The transportation with which we are here concerned is summarized in Exhibit 10 and was performed by McAnally for Oh Boy during the period September 1972 through March 1973. The commodities transported were frozen prepared foods. All of the transportation was from Oh Boy's plant in San Fernando. Some of the transportation was to the northern part of the state, some was to the San Diego area, and the balance was to the Los Angeles area. Each load shipped had multiple deliveries, ranging 2 to 10. According to evidence presented by the Commission staff and stipulations between the staff and McAnally's attorney at the January 14, 1975 hearing, Oh Boy had not complied with the documentation requirements for split delivery shipments in paragraph 2 of Item 172 of Minimum Rate Tariff 2 (MRT 2), and for this reason, the individual deliveries in each load were rated as separate shipments as shown in Exhibit 10, resulting in undercharges in the amount of \$10,201.79. Based on this evidence and the stipulations, the Commission found that the undercharges did in fact exist and directed McAnally to collect the undercharges and pay a fine in the amount thereof. A copy of the order instituting investigation in this proceeding was mailed to Oh Boy by registered mail on June 26, 1974, and a notice of the January 14, 1975 hearing was likewise mailed to it by registered mail on November 7, 1974. Oh Boy was not represented at this hearing. In its Petition for Rehearing, it asserted that its failure to attend the hearing was due in part to a misconception of its responsibility to incur any

liability for undercharges; that it did comply with the documentation requirements for split delivery shipments; and that for this reason, there are no undercharges.

Paragraph 2 of Item 172 of MRT 2 provides as follows:

"The carrier shall not transport a split delivery shipment unless at the time of or prior to the initial pickup of any portion of the shipment, an appropriate written document is issued by the consignor for each component part, said document containing all of the information required to prepare a bill of lading in compliance with provisions of Item 360 of the Governing Classification. In addition, the consignor shall provide the carrier with a single document containing written information setting forth in summary, the total numbers and kind of packages, description of articles, and total weight of all commodities described on the bills of lading for each component part. Said document shall also reflect total
- number of pieces and total weight of all commodities in the shipment and must make reference, by number or other individual identity, to each bill of lading issued for a component part."

Paragraph 4 of Item 172 provides in part that:

"...if written information does not conform with the requirements of paragraph 2...each component part of the split delivery shipment shall be rated as a separate shipment under other provisions of this tariff."

According to the evidence and stipulations referred to above, Oh Boy did issue a written document for each component part in conformity with the first sentence of paragraph 2 of Item 172, but did not issue the single document containing the summary of the individual component documents as required by the second sentence, and, therefore, as provided in paragraph 4, all component deliveries had to be rated as separate shipments.

Issue

The sole issue for our determination in the rehearing is whether Oh Boy issued the single summary document for each load summarized in Exhibit 10 in conformity with the requirement in the second sentence of paragraph 2 of Item 172. If the answer is in the affirmative, undercharges will be substantially, if not entirely, eliminated. However, if the answer is in the negative the undercharges as shown in Exhibit 10 are correct.

The evidence and argument presented by Oh Boy and the staff are summarized below under separate headings followed by our discussion thereof.

Oh Boy

Following is a summary of the evidence presented on behalf of Oh Boy by its president, its traffic manager in charge of shipping and her assistant, and its controller: Oh Boy manufactures and sells frozen foods. Its annual volume of sales is approximately \$6 million. It ships to all parts of the United States. Due to the present condition of the economy, it is attempting to borrow money to improve its financial condition. Most of its shipments outside of California are via the Southern Pacific Railroad. It uses various common carriers and has also been using McAnally since approximately 1970 for its intrastate shipments. The traffic department accumulates orders and ships to various parts of the state once a week to take advantage of volume rates. For example, orders for the northern part of the state are received up until Monday of each week at which time the traffic manager totals the cases and weights of the individual orders for that area; she then calls and places an order for pickup on Tuesday with one of the highway common carriers or McAnally and informs it of the number of cases and weights to go to each customer; in addition, she

prepares individual bills of lading in sets of five copies for each delivery; the bills of lading are then given to the shipping office of Oh Boy; when the freight is loaded on Tuesday, the driver signs the bill of lading for each delivery and retains one copy, and the other four copies are returned to the traffic office where they are checked by the traffic manager who makes any necessary corrections on them; generally, if there are any corrections, they would be caused by discrepancies between quantities ordered by a customer and the amount actually shipped; this could be caused by insufficient quantities on hand of the items ordered or lack of available space in the truck to accommodate the entire order; the traffic manager then prepares a master bill of lading which is also in a set of five copies and shows the total numbers of cases and weight of all of the individual components, the number of each individual bill of lading, and other necessary information; Exhibit 2-A is a blank set of the five copy bill of lading used by Oh Boy; the number one copy of the master document is placed in an envelope and mailed to the carrier, two copies are sent to the freight billing department to match up with the freight bills as they come in, one copy is retained as a file copy, and the fifth copy is an extra; the master document is prepared after the truck has been loaded and has left Oh Boy's plant; if the loading is completed and the component documents returned to the traffic manager before 5:00 p.m., the master document is prepared the same day, but if the component documents are returned after this time, the master document is not prepared until the next morning. In all instances, the master documents are prepared as soon as is reasonably possible. Because of the corrections that are made on the component documents, there is no practical way that this could be done any sooner. Neither McAnally nor a traffic consultant firm engaged by Oh Boy to check its transportation bills has ever informed it that there is anything wrong with this procedure. This documentation

procedure was set up around 1969 and has been followed by Oh Boy since that time. Oh Boy has located the master documentation for the transportation summarized in 22 of the 39 parts in Exhibit 10, and true and correct photostatic copies of them are included in Exhibit 1-A. Those that could not be located were either misplaced or could have been used for corrected billing to customers.

An employee of McAnally during 1969 and 1970 testified on behalf of Oh Boy that she became familiar with the Oh Boy account while working for another carrier; that she set up McAnally's filing system; that she received a master document and separate component bills prepared by Oh Boy for all loads hauled for it by McAnally; that the individual bills were brought to her by the drivers; that generally the master bills were mailed to her by Oh Boy and received the day after the freight was transported although sometimes this document was brought to her by the driver; that when she left McAnally, she and her husband opened their own trucking business and did some hauling for Oh Boy; and that the same documentation procedure was used by Oh Boy with her company.

Following is a summary of the arguments set forth in Oh Boy's brief: The language in paragraph 2 of Item 172 of MRT 2 (quoted above), is a classic case of ambiguity when attempting to determine when the single document referred to in the second sentence must be issued by the consignor to the carrier. The first sentence specifically states that the written document for each component part must be issued to the carrier at the time of or prior to the initial pickup. However, the second sentence which requires the consignor to issue the single consolidating document contains no specific time requirement. It would seem reasonable that if it were the intent of the drafters of the rule to require the issuance of the single consolidating document contemporaneous with the individual documents

that such would have been stated in clear and unambiguous language in the second sentence. The apparent intent of the rule is that the consolidating document can be provided in the fashion followed by Oh Boy. So long as this was done within one calendar day there was at the very least substantial compliance. In any event, this ambiguity must be resolved in favor of Oh Boy. Furthermore, the evidence shows that it was not practical to prepare the consolidating document until after the truck had been loaded. Although the staff investigator did not find copies of Oh Boy's consolidating document in McAnally's files, a copy was, according to testimony presented on behalf of Oh Boy, mailed to the carrier. In this connection, Evidence Code Section 641 provides that a letter correctly addressed and properly mailed is presumed to have been received. Additionally, Oh Boy did all in its power to comply with the requirements of paragraph 2. The Commission's finding regarding undercharges as to Oh Boy and its requirement that such undercharges be collected by McAnally from Oh Boy in its prior decision should be vacated.

Staff

A former employee of McAnally subpoenaed by the staff testified as follows: She was employed by McAnally from May 1972 to the middle of April 1974 which included the period February through August 1973 covered by the staff investigation. Her duties included answering the telephone, helping dispatch drivers, taking orders and billing. She handled the Oh Boy account during her employment. For northbound shipments, the traffic manager of Oh Boy would call her on Mondays and give her the address of each delivery with the total number of cases and weight for each and would also inform her whether one or more trucks were required. The trucks were dispatched for pickup on Tuesdays. If all of the freight for a load were not available, the driver would call the witness and she would make the necessary changes on her records. Although she did at times

receive master documents for freight transported to the San Diego area from Oh Boy, she never received any for any of the other areas or for any of the transportation summarized in Exhibit 10, including the San Diego shipments therein. She received all incoming mail, and if any Oh Boy master documents had been misdirected to another office of the carrier, they would have been forwarded to her. She prepared master documents for the Oh Boy shipments a week after the transportation moved and would send these master documents together with the individual component documents which were prepared by Oh Boy and given to her by the drivers to a traffic consultant for rating. During the time of the staff investigation, she was told by an official of McAnally not to prepare any more master documents and to call Oh Boy and inform it that it must prepare a master document for all shipments. She was informed by Oh Boy that it would do this, but it did not. All other customers of McAnally did furnish the drivers with master documents for split delivery shipments.

The staff representative who conducted the investigation of McAnally's operations testified that during June 1975, he visited the office of McAnally's attorney and reviewed all documents in his possession and also visited the office of the carrier and searched its records, and that during this further investigation he found no master documents prepared by Oh Boy at either location.

A senior rate expert of the Commission staff testified that although there is no reference in the second sentence of paragraph 2 of Item 172 of MRT 2 as to when the consolidating document must be issued, it is his opinion that from reading the entire paragraph it is apparent that it must be issued prior to or at the time of the initial pickup as is required for the component documents.

In its brief, the staff asserted that although witnesses for Oh Boy testified that a master document for each split delivery shipment was mailed to McAnally after the shipment moved, a search

of the carrier's records by the staff investigator failed to disclose any such documents, and the employee of McAnally responsible for the Oh Boy account during the review period testified that she neither received any such documents by mail nor were any such documents ever given to her; that this lends strong credence to the inference that the shipper did not prepare any consolidating documentation whatsoever for these shipments; that even if the procedure described by Oh Boy for preparing and mailing master documents to McAnally were followed, this does not comply with the tariff rule which requires that such document be furnished to the carrier at the time of or prior to the initial pickup of any portion of the shipment; that Oh Boy's argument that the first sentence of paragraph 2 of Item 172 requiring individual component documentation prior to shipment is severable from the second sentence which requires consolidating documentation is a tortured construction of the entire paragraph; that the Commission has heretofore held in its decision in the Investigation of George Bassi, et al. (Decision No. 76807 in Case No. 8903 dated February 17, 1970, unreported) that the split delivery rule requires that the consignor issue the written instructions for the entire shipment prior to or at the time of the first pickup and that verbal instructions are not a satisfactory substitute for the required written instructions; that in its decision in the Investigation of Gem Freight Lines ((1963) 61 CPUC 411), the Commission held that the documentation requirements, which would include the written instructions from the consignor, were promulgated to guard against abuses of this special privilege; that in People v David F. Ryerson and James S. Phillips ((1966) 241 CA 2d 115), the court in interpreting the multiple lot rule in MRT 2 held that shipping documents cannot be reformed at a later date to show that they were issued under a single document; that the same rationale applies to split delivery documentation; and that the suspension of Ordering Paragraph 3 of

Decision No. 84196 should be lifted, and McAnally should be directed to proceed with the collection of the \$10,201.79 in undercharges from Oh Boy.

Discussion

The first question for our determination is whether Oh Boy ever issued master documents to McAnally for the various shipments summarized in Exhibit 10. According to the evidence presented by Oh Boy, the consolidating document was prepared for each of the shipments shortly after the truck had been loaded and left its plant or, at the very latest, the next morning, and a copy of this document was mailed to the carrier immediately after it had been prepared. The staff evidence would lead to a contrary conclusion. The employee of the carrier responsible for the Oh Boy account testified that she never received any such documents for the Exhibit 10 shipments, and the staff investigator testified that a complete and thorough search of the carrier's records failed to disclose any such documents. Even if we were to disregard the testimony of the former employee of McAnally, we are left with the testimony that Oh Boy mailed 39 master documents to McAnally over a period of six months, none of which were found in McAnally's files, and, therefore, all of which must have been lost in the mail or by McAnally. To state this proposition is to refute it. We cannot accept the testimony on behalf of Oh Boy on this point. It is to be noted that we are not concerned with whether Oh Boy prepared consolidating documents. This fact by itself is irrelevant. The crucial question is whether it furnished such documents to McAnally, which the weight of the evidence does not support.

Having determined that Oh Boy did not provide McAnally with single consolidating documents for the transportation summarized in Exhibit 10, it follows that there was a failure to comply with this requirement in the second sentence of paragraph 2 of Item 172 of MRT 2, and, in the circumstances, no further discussion of the meaning or intent of this rule is necessary.

We are of the opinion that the suspension of Ordering Paragraph 3 of Decision No. 84196 should be vacated, and McAnally should be directed to proceed with the collection of the \$10,201.79 in undercharges shown in Exhibit 10 from Oh Boy.

Findings

1. Oh Boy did not furnish McAnally with single consolidating documents for the transportation summarized in Exhibit 10 as required by the second sentence of paragraph 2 of Item 172 of MRT 2, and as provided in paragraph 4 of the item, the component deliveries shown in the various parts of Exhibit 10 must be rated as separate shipments.

2. The staff ratings and the resulting undercharges shown in Exhibit 10 are correct.

3. McAnally charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 10 resulting in undercharges in the total amount of \$10,201.79.

Conclusions

1. The suspension of Ordering Paragraph 3 of Decision No. 84196 as it relates to Oh Boy by Decision No. 84534, as amended by Decision No. 84567, should be vacated.

2. McAnally should be directed to immediately proceed with the collection of the undercharges referred to in Finding 3 from Oh Boy.

O R D E R

IT IS ORDERED that:

1. The suspension of Ordering Paragraph 3 of Decision No. 84196 as it relates to Oh Boy! Corporation by Decision No. 84534, as amended by Decision No. 84567, is vacated.

2. McAnally Transportation, Inc. shall immediately proceed with the collection of the undercharges referred to in Finding 3 from Oh Boy! Corporation.

3. Decision No. 84196 shall remain in full force and effect.

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

Dated at San Francisco, California, this 29th
day of JUNE, 1976.

William S. Squire President
Vernon L. Sturgeon
Robert Bell Commissioners

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.