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ORIGINAL

Decision No. 90384 JUN 5 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own)
 motion into the operations, rates, and)
 practices of Kenneth C. Butin and Michael)
 K. Butin, dba M-K Trucking and Capital)
 Lumber Company, a corporation, Charleys)
 Fence Company, a corporation, Marquart-)
 Wolfe Lumber Co., a corporation, Products)
 Sales Inc., aka Fleetwood Western Inc., a)
 corporation, Ransom Lumber Sales, a)
 corporation, Shaw Lumber Company, a corpo-)
 ration, South Bay Redwood, Co., a corpo-)
 ration, T & R Lumber Co., a corporation,)
 respondents.)

OII No. 3
(Filed November 8, 1977)

Sergius M. Boikan, Attorney at Law, for Kenneth C.
 and Michael K. Butin, doing business as M-K
 Trucking, respondents.
William C. Bricca, 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 Kenneth C. and Michael K. Butin (Butins), doing business as M-K Trucking, for the purpose of determining whether the Butins failed to bill and collect the applicable minimum rates and charges for various lumber shipments transported for Capital Lumber Company (Capital), Charleys Fence Company (Charleys), Marquart-Wolfe Lumber Company (M-Wolfe), Pacific-Madison Lumber Company (Pacific), Products Sales Inc., aka Fleetwood Western Inc. (Products), Ransom Lumber Sales (Ransom), Shaw Lumber Company (Shaw), South Bay Redwood Company (South Bay), and T & R Lumber Company (T&R), all of which are corporations.

Public hearing was held before Administrative Law Judge Arthur M. Mooney on various days in January and April 1978 in Willits and Santa Rosa. The matter was submitted on May 11, 1978.

At the time of the staff investigation referred to hereinafter, the Butins operated pursuant to a radial highway common carrier permit, had a terminal in Willits, employed various personnel, and had been served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs. Their gross operating revenue for the year 1976 was \$766,451.

Staff

A representative of the Commission staff testified that commencing in November 1976, he conducted an investigation of the Butins' operations for the period June through November 1976 and that two other staff representatives participated in various parts of the investigation. The witness stated that all contacts by himself and the other representatives with the respondent carrier during the investigation were with Kenneth C. Butin (Mr. KCB) or the carrier's attorney and that Michael K. Butin, the other partner, was never present. The representative asserted that the respondent carrier was not cooperative. In this regard, he testified that (1) at the first meeting, Mr. KCB would not allow him to examine any records but agreed to furnish him with copies of records for the review period at a later time; (2) a week or so later Mr. KCB came to his office and gave him copies of 62 revenue bills for the M-Wolfe account only, and 12 of these appeared to have been altered; (3) he again asked for all records for the review period, and the other representatives made similar requests, all to no avail; (4) a demand letter was sent to the respondent carrier in January 1977; (5) at a subsequent meeting, Mr. KCB gave him some additional records for the M-Wolfe account and told him that no additional records would be made available until the ones already given him had been returned; (6) all of these records were returned within several days thereafter; (7) he was then given some subhaul agreements and subhaul accounts payable ledger sheets; (8) further requests for all documents and records were made;

(9) on February 23, 1977, accounts receivable ledger sheets for the nine respondent shippers, subhaul accounts payable ledger sheets, some bank deposit slips, and several months' canceled checks were furnished to him by Mr. KCB's attorney, and they were returned to the attorney on March 31, 1977; (10) from a review of these records, it was apparent that over 300 checks and over 400 revenue bills had not been made available for review; (11) further requests were made to Mr. KCB's attorney for all other documents and records for the review period; (12) on April 12, 1977, the attorney informed him that his client had refused to make any further records available; and (13) true and correct photocopies of the accounts receivable ledger sheets and subhaul accounts payable ledger sheets are included in Exhibit 3.

The representative testified that because it appeared obvious that the records furnished by Mr. KCB were incomplete, he and a second representative, either individually or together, contacted each of the 48 subhaulers listed in the subhauler accounts payable ledger sheets Mr. KCB had furnished to determine if any of them had subhauled shipments for the Butins that were not shown on these ledger sheets or on the accounts receivable ledger sheets. According to the testimony of the two representatives, this phase of the investigation disclosed that (1) there were subhaul agreements and other documents in the files of 24 of the subhaulers for 156 lumber shipments for the nine respondent shippers that were subhauled by them for the Butins and not listed in the Butins' accounts receivable, subhaul accounts, or other records furnished to the staff; (2) it was apparent that the Butins did not bill or collect transportation charges for the 156 shipments and that this transportation was, therefore, provided free of charge for the shippers; (3) all of the subhaulers were paid by the Butins for their subhaul services in connection with this transportation; and (4) each of the 156 shipments was a full load weighing at least 50,000 pounds. None of the subhaulers appeared as witnesses. However, the original documents for the shipments in issue were mailed to the Commission in response to subpoenas duces tecum in accordance with Section 1560 of the Evidence Code, and there was no objection to the receipt in evidence of the photocopies made by the representatives and which are included in Exhibit 2.

According to the staff, payment was received by the Butins for 12 of the 18 alleged free loads for M-Wolfe after the staff investigation was underway. The initial staff witness testified that (1) the 12 shipments were transported during the period July through October 1976; (2) M-Wolfe's Checks Nos. 8650, 8682, 8723, and 8793 for these 12 loads were dated August 2 and 30, September 24, and October 20, 1976, respectively; (3) other M-Wolfe checks issued at later dates had lower check numbers; (4) this evidences that the checks were predated; (5) the Butins bank deposit slips show that the checks were deposited on December 10, 1976; and (6) from this it is apparent that payment for the 12 loads was not made until after the staff investigation was commenced in November 1976, and for this reason, these shipments were included in the 156 alleged free loads. The witness pointed out that the applicable tariff rules require that transportation charges be billed and collected promptly which was not done here, and he asserted that it appears no payment would have been made for the 12 shipments had it not been for the investigation.

The initial staff witness stated that (1) he made recap lists of the shipments shown in the accounts receivable records he had received from Mr. KCB for each of the nine respondent shippers; (2) he and a second representative visited each of the shippers and requested it to review the list pertaining to it and advise if there were any additions or deletions that should be made in it; (3) this was done to give them an opportunity to explain the 156 shipments not shown on the lists; and (4) all stated the lists were correct and made no mention of the 156 shipments.

Additional evidence regarding the possibility of other free loads during the review period was presented by a witness subpoenaed by the staff and the representatives. This evidence was concerned with a list of apparent freight bills that was in the possession of the subpoenaed witness, who was a former employee of the Butins. However, there was no further evidence regarding this.

The third representative testified that (1) he had conducted an earlier investigation of Butins' operations in November 1975 which disclosed undercharges in the amount of \$2,134.61; (2) an undercharge citation with a recap of the alleged undercharges attached was served on the Butins on July 16, 1976 directing them to either pay a fine in the amount of the undercharges or file an answer denying the undercharges by August 15, 1976; (3) when he served the citation, he was informed that the undercharges were already collected; and (4) to date, the undercharge fine has not been paid. A copy of the citation is in Exhibit 7.

A staff rate expert testified that he took the sets of documents in Exhibit 2, together with the pertinent supplemental information testified to by the representatives, and formulated a separate rate exhibit for each of the respondent shippers which shows the minimum rate and charge computed by the staff and the alleged undercharge for each of the 156 shipments in issue that was transported for that particular shipper. With the exception of the transportation summarized in Parts 7 through 18 of Exhibit 10 which relates to M-Wolfe, the witness pointed out that since no charge was assessed or collected for this transportation, the minimum charge and the alleged undercharge for each of the shipments is identical. He stated that since the charges collected by the Butins for the shipments summarized in the aforementioned 12 parts of Exhibit 10 were not collected until substantially later than the time period for presenting freight bills and collecting charges specified in the applicable tariff rule and not until after the investigation had commenced, he agreed with the representative that these shipments should be considered free loads and has shown the applicable minimum charge as an undercharge in each of the 12 parts.^{1/}

^{1/} The applicable Collection of Charges rule is set forth in Item 250 of Minimum Rate Tariff 2 and provides in essence that freight bills shall be presented to the debtor within seven days of delivery of the freight and payment shall be collected within a credit period of seven days, excluding Sundays and legal holidays, following such presentation.

The rate expert explained that for the shipments for which no weight was shown on the documents in Exhibit 2, he used the 50,000-pound weight which was given to the representative by the subhaulers for such shipments. The amount of the undercharges shown in each of the nine rate exhibits and the total amount thereof are as follows:

<u>Exhibit No.</u>	<u>Shipper</u>	<u>Amount of Undercharges</u>
8	Capital	\$ 3,538.70
9	Charleys	5,264.56
10	M-Wolfe	8,915.66
11	Pacific	3,415.78
12	Products	23,694.50
13	Ransom	3,188.52
14	Shaw	1,529.55
15	South Bay	23,224.55
16	T & R	<u>6,248.19</u>
	Total	\$79,020.01

The staff recommended that the Butins be directed to collect the undercharges shown in Exhibits 8 through 16 less the undercharges in Exhibit 10 already collected from M-Wolfe and pay a fine in the amount thereof including those in Exhibit 10 already collected from M-Wolfe and the undercharges shown in the undercharge citation in Exhibit 7 and that a punitive fine in the amount of \$5,000 be imposed on them. In addition, the staff recommended that the Butins be directed to make all of their records available for inspection by its representatives when requested to do so and that if they did not comply with such requests, their operating authority be suspended until they so complied.

Respondents

Testimony on behalf of the Butins was presented by Mr. KCB. He testified that (1) he is responsible for the operation of the business; (2) the other partner is his son who draws a salary, and the profit from the business is split between him and his son at the end of the year; (3) they have held operating authority for 11 or 12 years; (4) he did receive the undercharge citation in Exhibit 7 and has collected the \$2,134.61; (5) he did not realize he was required to pay this money to the Commission, but now having been informed that this is a requirement, he is willing to do so; (6) his business has been audited several times in the past, and other than the undercharge citation, there have been no other undercharge letters issued to the company or formal proceedings in which it has been involved; (7) he tried to give the staff representative all the records he requested and refused such requests only when they were made at closing time; (8) he now understands that he must retain copies of all required records and make them available to Commission representatives for review, and he will do this in the future; (9) it was his decision to transport the 156 shipments in the staff rate exhibits without charge to the shippers; (10) he does not recall what the arrangements were with the shippers regarding this transportation; (11) he has no recollection of any other free loads; (12) he has a separate business in which he buys and sells lumber but has not been very active in this business for the past several years; and (13) he will comply with all directives of the Commission.

Each of the nine respondent shippers was furnished with a copy of the order of investigation, notice of hearing, and the staff rate exhibit pertaining to it.^{2/} None appeared or was represented at the

^{2/} The nine companies for whom the transportation in issue was performed are referred to as shippers herein. Technically they are debtors as defined in Item 10 of Minimum Rate Tariff 2 which states that the term debtor "means the person obligated to pay freight charges to the carrier, whether consignor, consignee or other party."

hearing. It is noted that although Pacific is not named in the caption of the order of investigation, it is named in the order itself, and the shipments that were transported for it are listed therein.

In his closing statement, the attorney for the Butins stated that his clients were not aware of all Commission rules and regulations but will in the future abide by all such rules and regulations and with the decision in this proceeding.

Discussion

We agree with the staff ratings and undercharges shown in Exhibits 8 through 16 for the 156 free loads which the Butins admit. As the evidence establishes, the \$6,185.55 in undercharges shown in Parts 7 through 18 of Exhibit 10 which relates to transportation for M-Wolfe has already been collected, and the \$2,730.11 in undercharges shown in Parts 1 through 6 of the exhibit has not been collected. We also concur with the staff that the Butins should be directed to collect the \$72,834.46 in unpaid undercharges shown in the nine exhibits and to pay a fine in the total amount of the \$79,020.01 in undercharges shown in the exhibit plus the \$2,134.61 in undercharges listed in the citation in Exhibit 7 which the Butins have collected but have not paid as a fine as required by the citation. As to the M-Wolfe undercharges in Parts 7 through 18 of Exhibit 10, the staff has correctly stated our holding in a prior proceeding that when undercharges are collected from a shipper a substantial period of time after the transportation has moved and subsequent to the commencement of an investigation by the staff, it is apparent that they would not have been collected had it not been for the investigation, and such undercharges should be included in any undercharge fine that might be imposed on the carrier (In re Doudell Trucking Co., Inc., et al., Decision No. 85880 dated June 2, 1976 in Case No. 9580, unreported).

We likewise agree with the staff that a punitive fine in the amount of \$5,000 should be imposed on the Butins. In arriving at the amount of the punitive fine we have taken into account that (1) the respondent carrier was uncooperative in making records available to the staff representatives; (2) the records it finally did furnish were

incomplete; (3) because of this, it was necessary for the representatives to obtain documents from subhaulers to substantiate the 156 loads that were transported for the respondent shippers free of charge; and (4) the admission by one of the partners that it was his decision to transport the 156 shipments free. This shows a complete disregard of the Commission's rules and regulations as well as applicable provisions of the Public Utilities Code. Such behavior on the part of any carrier subject to our jurisdiction will not be tolerated. In the circumstances, the maximum punitive fine of \$5,000 specified in Section 3774 of the Public Utilities Code is appropriate. It is to be noted that this section also authorizes the Commission to cancel, revoke, or suspend a carrier's operating authority, and the punitive fine is an alternative to such action by the Commission. The Butins are placed on notice that they are required by Sections 3705 and 3706 of the Code to make available to authorized Commission representatives for their inspection all documents and records kept or required to be kept by highway permit carriers and that any failure to do so in the future could result in the revocation of their operating authority. (See In re F. D. Morgan, Decision No. 75891 dated July 8, 1969 in Case No. 8791.) The Butins are further placed on notice that the continual failure by them to comply with the Commission's minimum rates and regulations, including those governing the preparation and retention of shipping documents and records, and the use of any device to provide free transportation in the future could also result in the revocation of their operating authority. The assertion that the Butins were not familiar with applicable rules and regulations is not an acceptable excuse. It is the duty and obligation of a highway carrier to have the necessary knowledge of such matters. Furthermore, according to the testimony of one of the partners, the Butins have held their operating authority for over 10 years, and from this, it is reasonable to presume that they are experienced in the transportation field.

Since the respondent carrier has admitted that the 156 loads were transported free of charge, has agreed to pay the undercharge fine specified in the citation in Exhibit 7, and did not state any objection to the recommended fines herein, the order which follows will be made effective on the date it is signed.

Findings of Fact

1. The Butins operate pursuant to a radial highway common carrier permit.
2. The Butins were served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs.
3. During the staff investigation herein, the only partner of the Butins who was available for the staff to contact was Mr. KCB. He did not cooperate with the staff, and the documents, ledgers, and other business records of the Butins that were requested by the staff for review were furnished to it on a piecemeal basis and were incomplete. Because of this, it was necessary for the staff to contact the subhaulers used by the Butins to determine if they had subhauled any shipments for the Butins that were not included in these records.
4. Documents and records of the subhaulers disclosed that they had subhauled 156 lumber shipments for the Butins during the period reviewed by the staff that were not included in the business records of the Butins that were furnished to the staff.
5. The 156 shipments referred to in Finding 4 were handled by the Butins for the nine respondent shippers free of charge. The Butins were the prime carrier, and the subhaulers physically transported the shipments. The Butins paid the subhaulers for the service they performed.
6. The minimum rates and charges computed by the staff for the transportation for the nine respondent shippers summarized in Exhibits 8 through 16 are correct.
7. The Butins have not collected the lawfully prescribed minimum rates in the instances set forth in the exhibit for each of the nine respondent shippers, resulting in the undercharges shown in the following tabulation:

<u>Exhibit No.</u>	<u>Shipper</u>	<u>Amount of Undercharges</u>
8	Capital	\$ 3,538.70
9	Charleys	5,264.56
10	M-Wolfe	2,730.11*
11	Pacific	3,415.78
12	Products	23,694.50
13	Ransom	3,188.52
14	Shaw	1,529.55
15	South Bay	23,224.55
16	T & R	<u>6,248.19</u>
	Total	\$72,834.46

* Does not include the undercharges in Parts 7 through 18 of Exhibit 10.

8. Although the Butins have collected from M-Wolfe the \$6,185.55 in undercharges in Parts 7 through 18 of Exhibit 10, the collection was not made until substantially after the transportation was performed and subsequent to the commencement of the investigation herein. From this it is apparent that these undercharges would not have been collected had it not been for the investigation, and they should be included in the undercharge fine imposed on the Butins herein.

9. The Butins have collected the \$2,134.61 in undercharges listed in the undercharge citation in Exhibit 7 but have not paid the fine in the amount thereof as required by the citation. The \$2,134.61 should be included in the undercharge fine imposed on the Butins herein.

Conclusions of Law

1. The Butins violated Sections 3664, 3667, 3668, 3705, and 3737 of the Public Utilities Code.

2. The Butins should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$81,154.62 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$5,000.

3. The Butins should be directed to cease and desist from violating Sections 3705 and 3706 of the Public Utilities Code which require a carrier to make records available for inspection by Commission representatives and from violating the rates and rules of the Commission.

The Commission expects that the Butins will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges including, if necessary, the timely filing of complaints pursuant to Section 3671 of the Public Utilities Code. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that the Butins or their attorney have not been diligent, or have not taken all reasonable measures to collect all undercharges, or have 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. Kenneth C. Butin and Michael K. Butin (Butins), doing business as M-K Trucking, shall pay a fine of \$5,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. The Butins 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. The Butins shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$81,154.62 on or before the fortieth day after the effective date of this order.
3. The Butins shall take such action, including legal action instituted within the time prescribed by Section 3671 of the Public Utilities Code, as may be necessary to collect the undercharges set forth in Finding 7 and shall notify the Commission in writing upon collection.
4. The Butins 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, respondents 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 the Butins' operating authority until the report is filed.

5. The Butins 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 and from violating Sections 3705 and 3706 of the Public Utilities Code which require a carrier to make records available for inspection by Commission representatives.

The Acting Executive Director of the Commission shall cause personal service of this order to be made upon respondents Butins and cause service by mail of this order to be made upon all other respondents.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 5th day of JUNE, 1979.

John E. Gurnon
President

Gregory L. Sturgeon

Richard D. Howell

Philip T. Debyl

Donald H. Smith
Commissioners