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ORIGINAL

Decision No. 91506 APR 2 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of Allen Kincade, an individual, doing business as Kincade Transportation and F. F. Smith and Company, Inc., a California corporation.	OII No. 15 (Filed May 2, 1978)

Allen Kincade, for himself, and Robert H. Beekman, Jr., and John B. Osorno, for F. F. Smith and Company, Inc., respondents.
Elmer Sjostrom, Attorney at Law, and E. 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 Allen Kincade (Kincade), an individual, doing business as Kincade Transportation, for the purpose of determining whether Kincade charged less than applicable minimum rates in connection with the transportation of peat moss and bark for F. F. Smith and Company, Inc. (Smith).

Public hearing was held before Administrative Law Judge Arthur M. Mooney in Yuba City on August 2, 1978, on which date the matter was submitted.

Kincade operates pursuant to radial highway common carrier and dump truck carrier permits. He has a terminal in Yuba City, employs seven to 12 drivers, one shop employee, and four office employees; and operates 12 tractors and 20 trailers. He has been

served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs. For the year 1977, his gross operating revenue was $475,196, of which $274,892 was earned from California intrastate operations.

Staff

A representative of the Commission staff testified that he visited Kincade's place of business on various days, commencing with August 9, 1977, and reviewed his transportation records for the period March through June 1977. He explained that his investigation disclosed that during the review period, Kincade transported for Smith numerous shipments of peat moss in bales and bags from Radel, Inc. (Radel) at Likely to Smith's facility in Sacramento and to its customers in Yreka, Ukiah, Redding, and Manteca and also several shipments of garden bark from Sierra Pacific Mills (Sierra) at Susanville to Smith's Sacramento facility. The witness stated that the customers in Yreka, Ukiah, and Redding were not served by rail facilities and that all other origins and destinations were served by spur tracks of the Southern Pacific Transportation Company (SP). He testified that he made true and correct photocopies of freight bills and supporting documents covering the aforementioned transportation and that the photocopies are all included in Exhibit 2. The representative pointed out that according to the statement signed by Kincade in Exhibit 2, the route of travel used by his trucks for the peat moss shipments from Likely was via US Highway 395 to Susanville, thence via State Highways 36, 89, and 72 to Yuba City, and thence to destination. A similar route was used for the garden bark shipments from Susanville. The witness asserted that Kincade had informed him that: (1) no bills of lading were prepared for any of the shipments in issue, (2) the peat moss was not shipped at a released valuation, (3) he was furnished the 59¢ per 100 pounds rate he applied to the Likely to Sacramento peat moss shipments by the shipper, and (4) the weight of the 1½ cubic foot sacks of peat moss was 30 pounds each. The witness pointed out that the weight of the bales of peat moss was, as shown on the shipping documents, 70 pounds each.

A rate expert for the Commission staff testified that he took the set of documents in Exhibit 2, together with the supplemental information testified to by the representative and the additional data included in Exhibit 2, and formulated Exhibit 3, which shows the rates and charges assessed by Kincade, the minimum rates and charges computed by the staff, and the resulting undercharges alleged by the staff for the transportation in issue. He stated that the total amount of the undercharges shown in the rate exhibit is $12,467.92.

The rate expert testified as follows regarding the Likely to Sacramento peat moss shipments which accounted for the majority of the transportation summarized in Exhibit 3: (1) The 59 cents per 100 pounds rate Kincade had applied to these shipments had been increased in January 1977, which was prior to the transportation; (2) in any event, this rate could not be used; (3) in this regard, the only route specified in the rail tariff for the rate was an interstate route from Likely to Nevada and thence to Sacramento; (4) since the definition of common carrier rate in MRT 2 includes intrastate rates of common carriers only and the rail rate is an interstate rate, it could not, therefore, be applied under the alternate application provisions of MRT 2 (see In re MRT 2 (1972) 73 CPUC 309); (5) because there is no specific rating in the applicable National Motor Freight Classifications 100-C and 100-D (NMFC) for peat moss, he applied the Class 35, minimum weight 36,000 pounds, truckload rating for peat, NOI, ground or not ground, named in Item 154900 of the NMFC to the commodity in issue; and (6) there are no intrastate common carrier rates that are lower than the MRT 2 Class 35 rates shown in his exhibit for this transportation.

The rate expert pointed out that there is an exception rating of Class 35.4, minimum weight 45,000 pounds, in Item 370 of MRT 2 for Gardening or Landscaping Products and Litter, including bark and peat, NOI. He explained, however, that this rating is subject to various conditions, including the condition in Note 3 of the item which provides that unless the shipper enters a statement on the bill of lading that the agreed or declared value of the property is one-half of actual value or 50 cents per POUND PER article, which-ever is less, the provisions of this item will not apply. The witness

pointed out that since there were no bills of lading or other similar documents with the required released valuation on them for any of the shipments under investigation, Note 3 was not complied with, and for this reason the exception rating could not be used. He stated that had this condition been met and the exception rating applied, the amount of the undercharges in Exhibit 3 would have been reduced by $8,490.19 to a total of $3,977.73.

The staff recommended that Kincade be required to collect the undercharges set forth in Exhibit 3 and that he be fined in the amount of the undercharges plus a punitive fine of $2,000.

Respondents

The president and the general manager of Smith testified that: (1) Smith is in the garden supply business and handles primarily organic fertilizers and seeds; (2) it is a small business with 10 employees and does not have the financial resources to retain a transportation attorney or rate consultant; (3) for this reason, it must rely on carriers and those from whom it buys its supplies for transportation rates; and (4) it operates three trucks and handles most of its own deliveries.

The witnesses asserted that Smith has always acted in good faith and taken all the steps that it could to assure that the Likely to Sacramento rail rate could be applied to the peat moss shipments to it. In this connection, they stated that: (1) Smith moved from its prior location on North 16th Street in Sacramento to its present location in the industrial section in the port area of Sacramento in 1965; (2) although both locations are served by rail facilities, it checked with SP prior to signing the lease for the new location and verified that the Likely peat moss rate applied to it; (3) several months before moving, it received a letter from a highway common carrier stating that it would meet the then applicable rail rate of 55 cents per 100 pounds, minimum weight 100,000 pounds, in Item 1790 of Pacific Southcoast Freight Bureau (PSFB) Tariff 259 on shipments of peat moss from Likely to Sacramento, and there was no mention in the letter regarding any particular routing for such shipments; (4) Smith was informed by SP in June 1976 (approximately nine months before the shipments in issue were transported) that the Likely to

Sacramento rail rate for peat moss was 59 cents per 100 pounds, and they are of the opinion that Kincade was correct in assessing this rate; and (5) Smith did not contact SP again until quite a while after the transportation had been completed and was informed by it at that time and on subsequent occasions that there had been recent increases in the peat moss rail rate.

Following is a summary of the testimony by the two witnesses regarding the procedure for handling the Likely to Sacramento shipments: (1) Radel prefers motor transportation and is using Kincade for its transportation needs; (2) each purchase order Smith sends to Radel is for two truckloads to meet the rail minimum weight; (3) the terms of sale are f.o.b. Radel's plant; (4) Radel does all of the transportation paperwork and issues instructions to Kincade, informing the carrier when the two loads are to be picked up; (5) Kincade will then notify Smith as to when delivery will be made; and (6) when the freight has been received, Smith pays Kincade the charges shown on the freight bill and remits the invoice amount for the merchandise to Radel. It is the position of the witnesses that, based on this procedure, it is the responsibility of Radel and/or Kincade for any necessary documentation for the transportation, including the insertion of any required released valuation thereon, and that if there were any rate errors, with which they do not agree, they were the result of technical errors on the part of Radel and/or Kincade over which Smith had no control.

As to the peat moss shipments delivered direct to Smith's customers from Radel and the one delivered from its own facility, the witnesses asserted that: (1) Smith has paid Kincade the amount billed to it for this transportation; (2) the freight charges were added to the price of the material sold to the customers, and this amount was paid by them; and (3) should Smith be required to pay Kincade additional charges for this transportation, there is no conceivable way it could now bill its customers to recover this.

According to the two witnesses, (1) the Likely peat moss is dredged from bogs between May and August and is spread out to dry for about a year, (2) it is then brought to Radel's plant where

it is run through a grinder and packaged either in 70-pound compressed bales or loose in 1½ cubic foot bags, and (3) it is then shipped out by truck, primarily to Smith in California and to Oregon and Washington. They pointed out that the Likely peat moss competes with peat moss from Canada. In this connection, they explained that: (1) the Canadian peat moss is sphagnum moss which is rotted prehistoric trees and shrubs; (2) the Likely moss is hypnum moss which is rotted prehistoric ferns; (3) the Canadian moss has one-half the water content of the Likely moss and, therefore, weighs approximately 50 percent less; and (4) for this reason, it is essential that the lower rail rate be applied to the Likely to Sacramento transportation, otherwise, the Likely moss cannot compete with the Canadian moss. The witnesses stated that Smith's profit on the bales and bags of peat moss it purchases from Radel is very nominal. They asserted that: (1) peat and peat moss are in fact separate commodities, (2) peat moss is not the same as peat and should not be rated as such as contended by the staff, and (3) peat moss is exempt from regulation by the Interstate Commerce Commission (ICC). Based on this, it is their opinion that there are actually no truck rates for the transportation of peat moss within California.

In their closing statements, Smith's president and general manager both argued that, based on the evidence they presented, it would be unjust to require Smith to pay any additional charges for any of the transportation in issue.

No evidence was presented by Kincade. However, he argued in his closing statement that: (1) he was of the opinion that he was assessing the correct rate for the transportation under investigation; (2) if there were any errors as alleged by the staff, they were technical in nature and he was not aware of them; and (3) the facts and circumstances herein do not warrant the imposition of any fines whatsoever on him. He asserted that Decision No. 78089 dated December 15, 1970 in Case No. 9085, which was also an investigation of his operations, was likewise based on technicalities and imposed a fine on him.

Discussion

The first question for our determination is whether the rail rate in issue could, as contended by respondents, be applied to the Likely to Sacramento peat moss shipments which accounted for the substantial majority of the transportation under investigation. Our answer is no. The staff correctly pointed out that since the rail rate in question applied only via an interstate route through Nevada, it was an interstate rate and, therefore, based on the definition of common carrier rate in MRT 2 which includes intrastate rates only, it could not be alternatively applied to this transportation. As pointed out by the staff, not only was it incorrect to apply the rail rate, but the rail rate that was used had been increased prior to the transportation.

The second question for our consideration is whether there is merit to the assertion by Smith that there are no intrastate truck rates for any of the peat moss shipments herein. We do not agree. Smith's position is apparently based on the fact that peat moss is not named in the NMFC or MRT 2. However, Item 40 of MRT 2 states that the rates named in the tariff apply to the transportation of all commodities except those specifically excluded, and peat moss is not so excluded. Also, the NMFC provides ratings for all commodities whether they are or are not named therein. The procedure for determining the classification ratings applicable to a particular commodity is as follows: First. if it is specifically named or described in an item in the classification, the ratings shown for that item are applicable; second, if it is not specifically named or described but is embraced in a general NOI item, the ratings for the NOI item would be applicable; and third, if it cannot be rated in accordance with steps one or two, the ratings applicable to the classification description that most closely describes the commodity would apply. (See Items 420 and 421 of the NMFC.) The latter method is known as rating by analogy. Since the commodity peat moss is not listed by name in the classification, it must, therefore, be rated under a general NOI item that would embrace it, or if there is no such general NOI item, then by analogy. There are ratings for dry sphagnum moss, moss,

NOI and peat, NOI named in Items 138400, 138440, and 154900, respectively, of the classification. The truckload ratings and minimum weights for the dry sphagnum moss and moss, NOI range between Class 55 and 100 and between 10,000 and 24,000 pounds, respectively, and based on the weight of the shipments herein, they would all produce higher transportation charges than the NMFC Class 35 truckload rating, minimum weight 36,000 pounds, for peat, NOI which was used by the staff. As pointed out by Smith, dry sphagnum moss is a particular type of peat moss imported from Canada which differs substantially from the hypnum moss from Likely in the material from which it is formed and weight. Because of these differences, it would not be appropriate to rate the Likely peat moss by analogy as sphagnum moss. The remaining two classification descriptions to consider are moss, NOI and peat, NOI. The dictionary defines peat moss as "a moss of which peat is largely composed"; it defines moss as a type of plant and also as "decaying wood, rocks, etc."; and it defines peat as "a substance consisting of partially carbonized vegetable material, chiefly mosses, found usually in bogs". (Standard College Dictionary, Funk & Wagnalls, 1968 Ed.) Smith stated that the Likely peat moss is dredged from bogs. It is apparent that from a classification standpoint, peat moss is more akin to peat, NOI than to moss, NOI and that the proper truckload rating for the peat moss shipments is, therefore, the Class 35 rating for peat, NOI in Item 154900 advocated by the staff.

The fact that the ICC makes a distinction between peat and peat moss and exempts peat moss but not peat from rate regulation as pointed out by Smith is irrelevant. No such distinction or rate exemption has been promulgated by this Commission.

We come next to the question of whether the lower Class 35.4, 45,000-pound minimum weight, truckload exception rating in Item 370 of MRT 2 could be applied to the shipments under investigation. It is apparently Smith's position that if rail rates cannot be applied to any of the shipments and they are subject to truck rates, with which it does not agree, this transportation should be rated under the Class 35.4 exception rating. As the evidence establishes, bills of lading with the released valuation

noted thereon as required by Item 370 were not prepared for any of these shipments. The basic reason, therefore, that the Class 35.4 rating cannot be used is a documentation failure. In this regard, the witnesses for Smith asserted that all transportation arrangements and documentation were handled in their entirety by Radel and that since it assumed no control of the transportation, it was the responsibility of Radel and/or Kincade to prepare the shipping documents, including bills of lading with any necessary notations thereon. Although all references by both witnesses were to the peat moss shipments from Radel, it is apparent that their position is the same for the one peat moss shipment from their Sacramento location and the two bark shipments from Sierra in Susanville.

From a strict tariff interpretation, the released valuation requirement is a condition precedent to applying the Class 35.4 rating, and it is irrelevant who prepares the documents. However, we will accept the explanation by Smith's witnesses that neither they nor anyone else in their company had any knowledge regarding the documentation that was prepared or any requirements in connection therewith. In the interest of justice, we will, for the purpose of this proceeding, hold that any undercharges on the shipments in issue exceeding those accruing under the exception rating in Item 370 should be waived. Having so determined, the total amount of the remaining undercharges in Exhibit 3 is $3,977.73. As is apparent, the purpose of a released valuation is to limit the amount of liability for which a carrier would otherwise be responsible. In this connection, the commodities peat moss and bark have a relatively low value and loss risk, and a released value for these commodities certainly does not have the same significance that it would have for more valuable and fragile freight. Our holding herein is based upon the particular facts and circumstances developed on the record before us and is not to be considered a precedent for the future. It is expected that Smith will take the necessary steps to familiarize itself with applicable rates and the rules and regulations applying in connection therewith.

We will direct Kincade to: (1) collect the undercharges found herein and pay a fine in the amount thereof, (2) pay a fine

of $2,000, and (3) cease and desist from future violations of the Commission's rates, rules, and regulations. It is noted that, as pointed out by Kincade, his trucking operations have heretofore been formally investigated by the Commission and that Decision No. 78089, supra, issued in the matter imposed penalties on him. His assertion that the violations in that proceeding and any that might be found herein were the result of mere technicalities is without merit. It is his duty and obligation as a permitted carrier to be knowledgeable of and abide by the rates, rules, and regulations established by the Commission for all intrastate for-hire transportation he performs. Kincade is placed on notice that future rate violations will not be tolerated and could result in substantial penalties or the revocation of his operating authority as provided in Section 3774 of the Public Utilities Code.

Findings of Fact

1. Kincade operates pursuant to radial highway common carrier and dump truck carrier permits.

2. Kincade was served with all applicable minimum rate tariffs, exception ratings tariffs, and distance tables.

3. All of the transportation in issue was performed by Kincade over routes entirely within California.

4. The route provided in PSFB Tariff 259 for the rail rate on peat moss from Likely to Sacramento in Item 1790 of the tariff is via Nevada, and this rate is, therefore, an interstate rate and could not be used under the alternative application provisions of MRT 2 for any of the peat moss shipments in issue.

5. Although the transportation of peat moss may be exempt from rate regulation by the ICC, the intrastate transportation of this commodity is not so exempt by this Commission and is subject to the minimum rates.

6. Under the procedure set forth in the NMFC, the commodity peat moss is ratable as peat, NOI.

7. The commodity rate for peat, NOI and bark in Item 370 of MRT 2 is subject to the condition that the shipper enter a released valuation statement on the bill of lading. No bills of lading were

prepared for the transportation in issue and no released valuation was so annotated on any other shipping documents for the transportation in issue.

8. Although the peat moss was sold to Smith f.o.b. Radel's plant at Likely and it was responsible for paying the freight charges, Radel made all transportation arrangements with Kincade, and all shipping documents were prepared by Radel and/or Kincade. Smith took no part in this and had no knowledge of the method used to prepare the documents or any requirements in connection therewith.

9. The staff rating of the transportation summarized in Exhibit 3 is correct.

10. Respondent charged less than the lawfully prescribed rates in MRT 2 in the instances set forth in Exhibit 3 in the total amount of $12,467.92; however, based on the unique facts and circumstances herein, including those stated in Finding 8, the addition of any undercharge amount over $3,977.73, which is based on the exception rating in Item 370 of MRT 2, to the charges already collected from Smith would result in excessive and unreasonable charges for the transportation in issue.

11. For the purposes of this proceeding, the total amount of the undercharges for the transportation in issue should be $3,977.73.

Conclusions of Law

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

2. Kincade should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $3,977.73 and, in addition, should pay a fine pursuant to Section 3774 in the amount of $2,000.

3. Charges on the shipments in issue in excess of those accruing under the exception rating of Class 35.4, minimum weight 45,000 pounds, should be waived.

4. Kincade should be directed to cease and desist from violating the minimum rates, rules, and regulations of the Commission.

The Commission expects that Kincade 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 Kincade 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. Allen Kincade, doing business as Kincade Transportation, shall pay a fine of $2,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Allen Kincade 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. Allen Kincade shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of $3,977.73 on or before the fortieth day after the effective date of this order.

3. Allen Kincade 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 11 and shall notify the Commission in writing upon collection.

4. Allen Kincade 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, 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, 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 Allen Kincade's operating authority until the report is filed.

5. Allen Kincade 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.

The Executive Director of the Commission shall cause personal service of this order to be made upon respondent Allen Kincade and 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 thirty days after completion of service on that respondent.

Dated APR 2 1980, at San Francisco, California.

President

Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.