

ORIGINAL

Decision No. 92255 SEP 16 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own
 motion into the operations, rates,
 charges, and practices of MARK A. WOODS,
 a sole proprietorship; GEORGIA PACIFIC
 CORPORATION, a Georgia corporation;
 L & A JUICE CO., a California
 corporation; FORD WHOLESALE CO., INC.
 OF SAN JOSE, a California corporation;
 and FORD WHOLESALE CO., INC., a
 California corporation.

Case No. 10030
(Filed July 18, 1978)

Robert H. Oliver, Attorney At Law, for
 Mark A. Woods, respondent.
Steven Weissman, Attorney At Law, and
Ed Hfelt, for the Commission staff.

OPINION ON SECOND REOPENING FOR FURTHER HEARING

Decision No. 86053 dated July 7, 1976 directed Mark A. Woods (Woods), who operates pursuant to a radial highway common carrier permit, to: (1) collect undercharges from Georgia Pacific Corporation (Georgia), L & A Juice Co. (L&A), a corporation, Ford Wholesale Co., Inc. of San Jose (Ford San Jose), and Ford Wholesale Co., Inc. (Ford) in the amounts of \$4,172.22, \$5,905.46, \$10,176.34, and \$17,047.23, respectively; (2) take such action, including legal action, that may be necessary to collect the undercharges; (3) pay a fine in the amount of the undercharges plus a punitive fine of \$2,000; and (4) file monthly status reports of the action taken to collect the undercharges. The fines were due on September 11, 1976. As of June 29, 1977, (1) the punitive fine had been paid; (2) Woods had collected the \$4,172.22 in undercharges from Georgia and had

applied this amount toward the undercharge fine; and (3) the remainder of the undercharges in the amount of \$33,129.03 had not been collected and the balance of the undercharge fine in the amount thereof had not been paid. As a result, the proceeding was reopened on June 29, 1977 for further hearing to receive evidence regarding the extent to which Woods and/or his attorney had complied with the directives in Decision No. 86053 to collect all undercharges and pay the entire fine in the amount thereof and to consider whether additional sanctions should be imposed on Woods.

Decision No. 87980 dated October 12, 1977 in the reopened matter found that on July 19, 1977, Woods' attorney filed the following complaints in the Superior Court of Fresno County on behalf of his client for the remaining undercharges in issue: Case No. 217951-3 against Ford, Case No. 217952-1 against Ford San Jose, and Case No. 217953-9 against L&A, and the decision imposed an additional fine of \$2,000 upon Woods with \$1,500 of the fine suspended on the conditions that: (1) Woods and his attorney promptly, diligently, and in good faith pursue and conclude the three lawsuits, and (2) pay the outstanding balance of the undercharge fine. The \$500 of the additional punitive fine that was not subject to the suspension provision has been paid by Woods. His attorney advised that he had experienced problems with the three lawsuits and requested that the proceeding again be reopened for further hearing, and the staff likewise requested that the matter be again reopened to receive evidence as to whether Woods and his attorney had failed to exercise due diligence in pursuing the collection of the undercharges in issue. The matter was again reopened on July 18, 1978 to receive evidence on these issues and and to consider whether any additional sanctions should be imposed on Woods.

Hearing on the second reopening was held before Administrative Law Judge Arthur M. Mooney in Fresno on July 26, 1978 and was submitted upon the filing of a brief by Woods' attorney on September 29, 1978. At the hearing, (1) the attorney for Woods and staff counsel each stated his position; (2) Woods' attorney also stated that he was going to use another approach in handling the cases he had filed against the three respondent shippers; and (3) other than two late-filed exhibits by Woods' attorney, which included copies of various pleadings in the aforementioned civil actions, no evidence was presented. The Georgia undercharges having been collected and the fine in the amount thereof having been paid, this issue has been resolved and need not be further considered.

Background

The record in this proceeding establishes the following timetable of events which we find to be facts:

1. The transportation in issue was performed by Woods for: (1) Ford between October 23, 1973 and May 13, 1974, (2) Ford San Jose between October 1, 1973 and April 15, 1974, and (3) L&A between October 7, 1973 and May 9, 1974.

2. On December 30, 1975, the investigation order in this matter was issued.

3. On March 24, 1976, the original hearing in this matter was held, and Woods appeared at the hearing on his own behalf without counsel.

4. On July 7, 1976, the initial decision in this matter, Decision No. 86053, was issued, and it became effective as to Woods on August 22, 1976.

5. On November 1, 1976, Woods obtained counsel to assist in the collection of the undercharges.

6. On December 29, 1976, Woods' attorney sent demand letters for payment of undercharges to Ford, Ford San Jose, and L&A.

7. On January 4, 1977, the president of Ford sent a letter to Woods' attorney denying that any undercharge amounts were due and owing by Ford or Ford San Jose to Woods.

8. No written denial to the demand letter to it for undercharges was issued by L&A.

9. On June 29, 1977, the proceeding was reopened because of Woods' failure to comply with the directives in Decision No. 86053 to collect the undercharges from the three respondent shippers and to pay a fine in the amount thereof.

10. On July 19, 1977, Woods' attorney filed the aforementioned civil actions against the three respondent shippers for the undercharges in question.

11. On October 12, 1977, Decision No. 87980 was issued in the reopened matter, which imposed the additional punitive fine on Woods with part suspended if the remaining undercharges were collected and the fine in the amount thereof was paid in full.

12. On May 19, 1978, after various petitions, demurrers, amendments, and hearings in the Ford and Ford San Jose civil actions, they were dismissed by the court on the grounds that the Statute of Limitations had run.

13. On July 18, 1978, the matter was again reopened for further hearing on July 26, 1978 because of continued failure by Woods and/or his attorney to fully comply with the two earlier decisions. Woods' attorney advised at the hearing that further attempts would be made to collect the undercharges.

14. In late 1979, after various pleadings and hearings in the Superior and Appellate Courts regarding a petition by defendant for a change of venue and a demurrer by it, a court-approved

settlement of \$1,954.40 in the L&A complaint was entered and this amount was paid toward the undercharge fine.

15. No further progress has been made in the attempts by Woods' attorney to collect any of the Ford or Ford San Jose undercharges.

Issues

Following are the issues remaining for our consideration in this matter: (1) whether the undercharges Woods was directed by Decision No. 86053 to collect from Ford and Ford San Jose cannot be collected because of the Statute of Limitations; (2) if this is so, the extent of the culpability of Woods and/or his attorney in failing to prevent the running of the statute, and the disposition to be made of the amount of the undercharge fine based on the Ford and Ford San Jose undercharges; (3) whether the compromise settlement of the L&A civil action and the payment of this amount toward the undercharge fine should discharge Woods from his obligation to comply with the directives to collect all undercharges from L&A found in Decision No. 86053 and to pay an amount equal to this in the undercharge fine; and (4) whether any further sanctions should be imposed on Woods.

Discussion

As to the first issue, the court ruled that the Statute of Limitations had run on all of the Ford and Ford San Jose undercharges prior to the filing of the complaints by Woods' attorney against these two respondent shippers and is a bar to any legal remedy to enforce collection of the undercharges in question from either of them.

The time limitations within which complaints for the collections of undercharges may be filed by radial highway common

carriers is set forth in Section 3671 of Division 2 of the Public Utilities Code. This section reads as follows:

"All complaints for the collection of lawful charges, or any part thereof, of highway permit carriers may be filed in any court of competent jurisdiction within three years from the time the cause of action accrues, and not thereafter; except that if a highway permit carrier presents its claim or demand in writing to the person from whom the lawful charges, or any part therefrom [sic; thereof], are alleged to be due within such period of three years, that period shall be extended to include six months from the date notice in writing is given to the highway permit carrier by such person of refusal to pay the demand, or any part thereof, specified in the notice of refusal." (Emphasis added.)

Inasmuch as Woods operated as a radial highway common carrier and not as a public utility in furnishing the transportation at issue, we conclude that Section 3671 is the applicable Statute of Limitations rather than Section 738 of the Code. That latter section applies to collection of lawful charges of any public utility, applying generally to electric, gas, telephone, and heat corporations as well as all common carriers, but not to radial highway common carriers such as Woods.

Whether Woods is barred by Section 3671 from collecting the undercharges from Ford and Ford San Jose turns on the "time the action accrues". We do not find Section 738 of the Code to be determinative of this question. That section provides in part that,

"[F]or purposes of Sections 734 to 737 inclusive, the cause of action shall accrue upon the delivery or tender of delivery of the shipment or the performance of the service or the furnishing of the commodity or product with respect to which complaint is filed or claim made..."

Section 738, by its terms, applies only to causes of action brought under Sections 734 to 737 inclusive, none of which are in question here.

We conclude that the Legislature did not intend the cause of action under Section 3671 to accrue "upon delivery or tender of delivery any shipment with respect to which complaint is filed" as it does in Section 738. The legislative history of Section 3671 shows that this very language was deleted from the bill by amendment in the Assembly Committee on Public Utilities and Corporations. It is clear that the absence of such language in the bill as passed by the Legislature and signed by the Governor was no oversight. It was intentional.

We conclude that the cause of action under Section 3671 accrues as of the effective date of our order establishing the fact that an undercharge exists and its amount. Prior to that time any such undercharges and the amounts thereof are, at the very least, in dispute and uncertain.

Furthermore, the determination of undercharges is a matter within our jurisdiction, not that of a trial court. That being so, there is no reason why the Statute of Limitations should begin to run prior to the date of our order.

In view of the above, we cannot logically hold that Woods was barred by the Statute of Limitations from pursuing the suits filed against Ford and Ford San Jose on July 19, 1977. That date was less than 12 months after the effective date of Decision No. 86053 which established the undercharges in question.

We realize that the Superior Court has apparently concluded otherwise. However, it is not reasonable to impute that error to Woods or to his attorney, who agrees with our interpretation of the law. Under these circumstances the second issue, that of culpability, does not arise.

With respect to the third issue, as stated above, the L&A complaint was settled for \$1,954.40 and Woods has applied this toward the undercharge fine. Although no Statute of Limitations had tolled within respect to any of the undercharges for this shipper, the record clearly establishes that a substantial effort has been made to collect them and we will accept this payment in full settlement of the L&A undercharges and the portions of the undercharge fine in the amount thereof.

In view of our conclusions above, we are of the opinion that the question of any additional sanctions, Issue 4, must be settled in favor of Woods and his attorney. Although, in hindsight, it is apparent that more prompt action in filing suits to collect the undercharges would probably have resulted in Woods' recovery of more of those undercharges, neither Woods nor his attorney can be faulted for believing, correctly in our opinion, that the Statute of Limitations had not run when they filed.

Findings of Fact

In addition to the above 15 findings of fact under the heading "Background", we further find that:

16. Based on the particular circumstances herein, it would not be appropriate to hold Woods accountable for the collection of the undercharge amounts stated in Finding 16 from Ford, Ford San Jose, and L&A or the payment of the amount of the fine specified in Ordering Paragraph 2 of Decision No. 86053 that was based on these undercharges. ✓

17. L&A has never denied in writing the December 29, 1976 written demand by Woods' attorney to it for payment of undercharges, and, therefore, the Statute of Limitations was tolled and has never run on the \$3,444.96 in undercharges for the L&A transportation in issue that was delivered or tendered for delivery on and after December 29, 1973. ✓

18. The court in the civil action filed by Woods' attorney against L&A for the undercharges involving this shipper approved, apparently because of proof problems, a compromise settlement of the claim in the amount of \$1,954.40, which amount was collected by Woods and paid by him in late 1979 toward the undercharge fine.

19. For the purposes of this proceeding, the amount of undercharges referred to in Finding 18 that were collected by Woods and applied toward the undercharge fine should be accepted in full settlement of the L&A undercharges and the portion of the undercharge fine in the amount thereof.

Conclusions of Law

1. The Statute of Limitations applicable to Woods' efforts to collect undercharges as ordered is Section 3671 of the Public Utilities Code.

2. The time the cause of action accrued in Section 3671 was the effective date of our order establishing the amount of undercharges, August 7, 1976. Therefore, at the time Woods filed civil actions against the named shippers, the Statute had not run and Woods was not barred thereby from bringing these actions. The ruling of the Superior Court to the contrary was erroneous.

3. No sanctions should be assessed against Woods or his attorney for relying on what we have concluded is the correct interpretation of Section 3671.

4. The remaining balance of the fines imposed by Ordering Paragraph 2 of Decision No. 86053 pursuant to Section 3800 of the Public Utilities Code and by Decision No. 87980 should be excused.

5. Because Woods is unable and no longer has any viable legal remedy to collect any of the undercharges ordered to be collected by Decisions Nos. 86053 and 87980 that have not heretofore been collected, the directives in the two decisions to collect these undercharges should be rescinded.

O R D E R

IT IS ORDERED that:

1. Since Mark A. Woods has been unable and has no viable legal remedy to collect any of the remaining uncollected undercharges he was directed to collect by Decisions Nos. 86053 and 87980, the directives in those decisions to do so are rescinded.

2. The remaining balance of the unpaid fines imposed by Ordering Paragraph 2 of Decision No. 86053 pursuant to Section 3800 of the Public Utilities Code and by Decision No. 87980 are excused.

3. In all other respects, Decisions Nos. 86053 and 87980 shall remain in full force and effect.

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

Dated SEP 16 1980, at San Francisco, California.

John E. Byron
President

Deborah L. Peterson

Michael W. Hovatta

Charles J. DePue

Donald W. Jones
Commissioners