Service Date: August 24, 1993

DEPARTMENT OF PUBLIC SERVICE REGULATION
MONTANA PUBLIC SERVICE COMMISSION
1701 Prospect Avenue, P.O. Box 202601
Helena, Montana 59620-2601

IN THE MATTER of the Complaint of John M. Campbell, Helena, Montana	)	TRANSPORTATION DIVISION
Complainant,	)	
-vs-	)	DOCKET NO. T-93.10.COM
Dick Irvin, Inc., Shelby, Montana	)	ORDER NO. 6239
Defendant.	)	

FINAL ORDER

I. BACKGROUND.

1. On January 19, 1993 Complainant John M. Campbell (Complainant or Campbell) filed a complaint with the Montana Public Service Commission (Commission) against Defendant Dick Irvin, Inc. (Defendant or DII). This complaint alleged inappropriate charges assessed by DII on the following shipments carried by Campbell:

Bill of Lading Agent's No. 521-5403A	Dated 11/07/92
Bill of Lading Agent's No. 521-5403B	Dated 11/09/92
Bill of Lading Agent's No. 312-6265	Dated 11/20/92
Bill of Lading Agent's No. 321-6416A	Dated 11/24/92
Bill of Lading Agent's No. 321-7358	Dated 12/16/92
Bill of Lading Agent's No. 512-1323	Dated 02/05/92

2. On January 29, 1993 the Commission issued a notice of

complaint to DII. On February 25, 1993 DII filed an answer to the notice of complaint. The Commission subsequently set the matter for hearing and on April 27, 1993 a public hearing was held to determine whether DII had violated any of the ratemaking requirements set forth in Title 69 of the Montana Code Annotated and/or the Administrative Rules of Montana.

II. DISCUSSION.

3. John Campbell is an owner-operator trucker leased to DII, a motor carrier with Commission-approved operating authority. Pursuant to a lease agreement, Campbell receives a percentage of the revenues derived from his operations on behalf of DII. Campbell has alleged that DII failed to charge tariffed demurrage charges to certain shippers and, as a result, did not receive a percentage of the revenues that would have been owed to him under the lease agreement.

4. As a preliminary matter, the Commission notes that it lacks jurisdiction to adjudicate that portion of Campbell's complaint concerning amounts owing under the lease agreement. For relief of this type, Campbell must seek redress with the courts. However, the Commission does have the requisite jurisdiction to address the alleged failure of DII to properly charge tariffed

rates.

5. The controlling statute in this matter is Section 69-12-502, MCA, which provides: "It shall be unlawful for any Class A or B motor carrier to charge, demand, receive, or collect any greater or less rate, charge, or fare than that fixed by the commission for the transportation service provided." Though the failure to charge and collect a tariffed rate often carries the implication of unlawful discrimination in favor of the preferred shipper, a separate violation of Section 69-12-503, MCA, there was no evidence or argument presented on this issue. In this regard, claims of unlawful discrimination should be supported by proof of an actual or potential competitive injury. Cf. Dresser Industries, Inc. v. Interstate Commerce Commission, 714 F.2d 588, 598 (5th Cir. 1983) (complainant bears burden of proving injury to sustain unlawful discrimination claim under 49 U.S.C. 10741(b)). Since there was no suggestion or evidence that shippers were injured by any failure of DII to charge and collect the tariffed rate, the Commission limits its inquiry to possible violations of Section 69-12-502, MCA.

6. Demurrage is a charge imposed by rail and motor carriers upon shippers and receivers for the detention of equipment beyond a certain allotted free time period for loading and un-

loading. Because of the numerous factors that can result in detention of equipment, DII argues that carriers need greater latitude in deciding when to charge for demurrage. Presumably, DII is requesting the authority to assess demurrage based on its own determination of when such tariffed charges are appropriate. As a matter of law DII cannot be empowered with such authority. No change, modification, alteration, increase, or decrease in any rate or charge may be made without the approval of the Commission. Section 69-12-501, MCA. Additionally, as discussed above, Section 69-12-502, MCA, prohibits deviations from the tariffed rate. This means DII has no discretion in imposing the tariffed demurrage charge.

7. With that said, the Commission does recognize that instances may arise when it is unreasonable to impose a tariffed demurrage charge. As a rule, shippers are strictly liable for demurrage and liability attaches even if they have not caused the delay themselves. See Port Terminal Railroad Assn. v. Connell, Rice & Sugar Co., 387 F.2d 355, 357 (5th Cir. 1967). However, on equitable grounds it may be necessary to waive a reasonable charge when it becomes unreasonable in application. See Chrysler Corp. v. New York Central Railroad Co., 234 I.C.C. 755, 761

(1939).

8. It is important though to distinguish between waivers granted by the Commission and those granted by the carrier. While the above-cited authorities indicate that the Commission may permit a waiver under the appropriate circumstances, waivers by a carrier are clearly forbidden by Sections 69-12-501 and 69-12-502, MCA. This distinction is critical in this case since the issue before the Commission is not whether a waiver should be granted, but rather whether DII waived or reduced tariffed charges without Commission approval. As such, the reasonableness or unreasonableness of requiring a shipper to pay demurrage is irrelevant. On this basis the Commission will simply determine on a case-by-case basis whether DII charged the tariffed demurrage charge.

Bills of Lading 521-5403A and 521-5403B

9. Bills of Lading 521-5403A and 521-5403B cover shipments of cement carried by Campbell from the Ash Grove facility in Montana City to Beall Mountain in Anaconda on November 7, 1992. When Campbell was unable to unload the cement at Beall Mountain, the shipments were diverted to S&N Cement in Anaconda. There is no dispute that diversion and mileage charges for the shipment to S&N Cement were owed to Campbell under applicable tariffs. In fact, DII paid Campbell for the amounts owing after the instant complaint was filed. However, there is no evidence indicating that DII actually billed S&N Cement for the diversion and mileage charges.

10. As discussed above, Section 69-12-502, MCA, clearly provides that it shall be unlawful for a carrier to charge or receive a lesser rate than that fixed by the Commission. While Campbell may have been reimbursed under his contract, DII has failed to charge or receive the tariffed rate from S&N Cement. Therefore, DII has violated Section 69-12-502, MCA.

Bill of Lading 321-6265

11. Bill of Lading 321-6265 covers a shipment carried by Campbell from the Ash Grove to Itex Enterprises in Anaconda.

Though the shipment was to be delivered on November 20, 1992, weather conditions forced the Itex plant to shut down operations until 4 a.m. on November 22, 1992. Campbell was forced to wait 31 hours before unloading, providing the basis for a claim of $930 in demurrage charges ($15.50 per half hour on delays over 1 hour). DII subsequently paid $436.96 to Campbell as the result of a settlement between DII and Itex. Therefore, at issue are the charges constituting the remaining $493.04.

12. DII does not dispute that Campbell waited 31 hours or that demurrage is properly owing. However, DII does attempt to defend its actions based on an accommodation:

> Irvin had several trucks attempting to unload at the Itex plant on that date and was attempting to get as much payment as possible for the demurrage time, while bearing in mind that Itex was a new operation, still working the bugs out, and that if they did not succeed as an operation, Irvin and its truckers could also suffer.

DII Post-Hearing Brief, p. 5 (transcript citations omitted). This defense is misdirected. As discussed above, the reasonableness of the reduced charge is not at issue here. While the weather may have been relevant in a proceeding seeking a waiver, it cannot excuse a carrier's failure to charge the tariffed rate. If DII believed circumstances warranted a waiver of the charge,

it was incumbent on DII to request Commission approval for a deviation from the tariffed rate.

13. In the absence of a Commission-approved waiver, DII's failure to bill and collect the full amount of demurrage constitutes a violation of Section 69-12-502, MCA.

Bills of Lading 321-6416A and 321-6416B

14. Bills of Lading 321-6416A and 321-6416B cover shipments of cement carried by Campbell from Ash Grove to Itex on November 24, 1992. However, the cement was not unloaded at Itex and Campbell was instructed by DII to return to his personal residence in Helena and await further instructions. He was dispatched 57 hours later to a Huetterite colony at Dupuyer. DII paid Campbell for approximately half of the wait time at Itex and for his return trip to Helena. Campbell maintains that he is owed for his entire wait time, including the 57 hours spent at his home (and minus 1 hour credit afforded by the tariff), and mileage. The alleged failure to bill and collect therefore concerns the outstanding amounts of $212.64 (wait time at Itex), $5.45 (mileage) and $1,767.00 (wait time at home).

15. DII argues that Itex's responsibility for the load ended with its return to Helena. Defendant's Post-Hearing Brief at

6. The Commission agrees. Though Irvin requested that Campbell retain control over the load while in Helena for Thanksgiving, it appears Campbell had the option of returning the load to Ash Grove. The decision to hold onto the load until it could be re-assigned was reached between Campbell and DII, not at the direction of the shipper. Demurrage and mileage were therefore properly owing only for any wait time at Itex and the return trip to Helena.

16. The testimony indicates that the money received by Campbell was from a settlement between Itex and DII, and was less than the amount actually owed for the wait time and mileage. While a settlement may be appropriate in cases where a shipper disputes the charges or is in bankruptcy, DII never sought Commission approval of the settlement nor was evidence introduced indicating that DII ever attempted to bill and collect the full amount owing. The failure of DII to initially bill for the full amount is a violation of Section 69-12-502, MCA.

Bill of Lading 321-7358

17. Bill of Lading 321-7358 covers a shipment of quick lime by Campbell from Continental Lime in Townsend to Zortman Landusky Mine (ZLM) in Zortman on December 16, 1992. Campbell seeks

$771.75 for 24 1/2 hours of demurrage time spent waiting to unload at the mine. DII takes the position that ZLM did not order the load and nothing is owed to Irvin for the demurrage. Defendant's Post-Hearing Brief at 7.

18. If ZLM did not request shipment of the quick lime, and subsequently refused delivery, Dick Irvin's failure to bill for the shipment and demurrage would be excused. However, while there is conflicting testimony and evidence concerning the circumstances under which Campbell was dispatched, it is undisputed that Campbell was dispatched and eventually delivered a load of quick lime. If Campbell independently decided to proceed with the shipment, he did so only because DII and ZLM failed to exercise proper control over the shipment. In relation to DII, such a failure to exercise full control over the lessor constitutes a violation of Rule 38.3.2005(e), Administrative Rules of Montana. In relation to ZLM, the failure bars any claim to a waiver of demurrage charges. See Ormet Corp. v. Illinois Central Railroad, 341 I.C.C. 647 (1972) (ICC has consistently denied relief where detention resulted from shipper's lack of due diligence).

19. In any event, the issue of whether the obligation to pay demurrage should be waived is not before the Commission. Rather, the issue is whether DII properly billed and collected

the tariffed rates. The evidence shows that DII failed to bill or collect the appropriate charges and, therefore, violated Section 69-12-502, MCA.

Bill of Lading 512-1323

20. Bill of Lading 512-1323 covers a shipment of lime by Campbell from Continental Lime to Stone Container in Missoula on February 2, 1992. At hearing Campbell contended that he should be compensated for an alleged 8-hour wait outside the Stone Container gate. DII apparently did bill and collect for a 4-hour wait inside the Stone Container facility, but was not aware until hearing that Campbell had waited 8 hours outside the gate.

21. Since Campbell failed to report the 8-hour wait, it would be unreasonable to expect Dick Irvin to bill and collect for this demurrage. Therefore, no violation occurred.

III. CONCLUSION.

22. Based on the foregoing, DII is found to have engaged in four separate violations of Section 69-12-502, MCA. Though DII's failure to properly bill and collect tariffed rates is disturbing, especially for such an experienced carrier, the Commission cannot find that the violations represent a willful or intentional disregard for the motor carrier laws. Therefore, the Commission imposes the minimum fine allowable under 69-12-108, MCA. DII is therefore ordered to pay $100. DII is also ordered to immediately conform its activities to the motor carrier laws covering rates and ratemaking, as well as the Commission's rules on lease arrangements.

Done and Dated this 12th day of August, 1993 by a vote of 2-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Commissioner

_____
NANCY MCCAFFREE, Commissioner

_____
DANNY OBERG, Commissioner
(Voting to Dissent - attached)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

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DISSENT OF COMMISSIONER DANNY OBERG

"Sometimes its difficult to see the
forest because of the trees"
anonymous

I must part company from the majority in this docket in their conclusion that Dick Irvin, Inc. violated motor carrier law. Justice is best served when the law and rules of this Commission are carefully applied to weigh such factors such as intent, harm and other mitigating circumstances. In this decision I believe the law was incorrectly applied in that it finds the carrier guilty without considering the special circumstances. Reasonable men would conclude that strict adherence to the law results in a conclusion contrary to the intent of the law.

This Commissioner is well aware of the importance of filed

tariffs and the Commission's responsibility to enforce them. The primary reason for filed tariffs and Section 69-12-502, MCA, is for shipper protection, prices, carrier protection and to promote common carrier transportation. It is my belief Dick Irvin, Inc. did not violate the intent of the law and should not be held in violation of the statute. There is no evidence Irvin engaged in anti-competitive behavior and the carrier's action was in the best interest of the affected customer.

While I sympathize with complainant John Campbell's desire to be adequately compensated I believe Section 69-12-502, MCA, is being used as his vehicle in a most inappropriate manner. Rather than providing consumer and shipper protection, the Commission's ruling will result in shippers receiving substantial demurrage bills. This surely flies in the face of the law's intent. Such billing would only be appropriate if the Commission found DII had willfully violated the law to enhance its own competitive position.

In its decision the Commission has applied a very narrow interpretation of the law. It leaves no room for the consideration of the specific mitigating circumstances in which the alleged violations took place. Such "black and white" thinking is not appropriate for the gray world in which the motor carrier

industry operates. Shippers can be difficult and demanding and weather and geographic hurdles can be substantial requiring some flexibility.

In this decision the Commission serves notice to DII and the motor carrier industry of a new approach for future handling of tariff waivers by the Commission. While I approve of the intent it almost seems a Commission admission that its decision in this instance results in an unreasonable conclusion. I fully expect had DII had the opportunity in these instances, the Commission would have agreed that waivers of tariffs would have been approved because of the mitigating circumstances.

Because the record is long and speaks for itself, I will not attempt to refute the majority opinion on each disputed bill of lading. Rather I will highlight why certain findings of violation result in a miscarriage of justice by becoming unreasonable in application.

1) Bill of Lading 521-5403A and 521-5403B. There is absolutely no evidence in the record that DII failed to charge to intentionally harm another carrier or John Campbell. Rather they responded to the needs of the shipper and made every attempt to expedite a diversion for the owner/operator. Customer Beall Mountain will now be billed and pay for the penalty. It is also

important to note that this was a pre load made prior to the weekend for the convenience of the carrier and driver. Customers like Beall Mountain may insist on tighter ordering procedures and driver dispatch. The harm then will be to future carriers and owner operators.

2) Bill of Lading 321-6265

It should be no surprise to Commissioners that November in Montana can present severe weather challenges. The evidence indicates to me that DII was attempting to work with its customer on a fair settlement given the weather and no intentional violation of statute should be found.

3) Bill of Lading 321-6416A and 321-6416B.

In this instance the Commission's decision is a turkey appropriate for the Thanksgiving Day weekend the alleged violations occurred. Given the shipper's problems, the holiday and the carrier's good faith effort to divert the load a violation finding is mean spirited. Pity the next owner operator who wants to spend a holiday at home under similar circumstances because a carrier will not risk such a penalty to the carrier or the shipper.

4) Bill of Lading 321-7358.

While DII clearly has given its owner operators too much

independence, it seems patently unfair to me to have Zortman Landusky Mine pay for this lax business arrangement by incurring additional demurrage charges. Again, the application of this statute results in an unreasonable conclusion.

As an act of contrition I must admit I may have failed to develop an adequate record by denying defendant DII's attempt to develop a defense of his choosing. In my ruling to deny his introduction of certain issues as carrier history with the Commission I made a mistake. In retrospect I believe I erred as it would have given the Commission a broader context within which to judge these violations.

The Commission's fines in this case are appropriately light. I think it is important to note that it is not the fine but a finding of violation in itself which can have grave financial consequences on a carrier. Future PCN applications or protests by the carrier may be affected by these violations.

In conclusion I believe the majority focused on too narrow of a view in judging these alleged violations. By examining the big picture I believe a contrary decision must be rendered. Given the special circumstances of each complaint I believe the carrier DII acted responsibly and served the intent of the law,

if not the letter.

Conspicuously absent from the record is any indication that as a matter of its normal business operations DII violated Section 69-12-503, MCA. Justice and fairness cry for a finding of no violation.

Respectfully submitted,

_____

DANNY OBERG, Commissioner