BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. BOOTS, INC., d/b/a BROOKS A & A MOVING, Respondent.	DOCKET NO. TV-060855 RESPONSE OF COMMISSION STAFF TO RESPONDENT'S PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 02

1 Commission Staff submits this Response to Respondent's Petition for Administrative Review (Petition) pursuant to the Notice of Commission Intention to Exercise Discretionary Review; Modification of Deadlines for Post-Initial Order Process issued September 14, 2006.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

2 In its Petition, Boots, Inc., d/b/a Brooks A & A Moving (Brooks), challenges the findings of the initial order regarding sales tax charges,[1] the company's bill of lading form,[2] and the company's completion of bills of lading.[3] Staff contends that Judge Moss' findings of fact and conclusions of law in the initial order of August 30, 2006, with respect to each of these three issues are well founded.

[1] Respondent's Petition for Administrative Review of Order 02 at pages 1–3.
[2] *Id.* at pages 3–4.
[3] *Id.* at pages 4–5.

A. The Initial Order's Findings and Conclusions With Respect to the Sales Tax Charge Violations are Correct.

3 At Finding of Fact (3), Judge Moss found, "During the period August 2004 through August 2005 Brooks assessed charges for sales tax…on six hundred and fifty-six occasions."[4] Staff reviewed the company's bills of lading for this period and itemized the sales tax charges by month and by bill of lading in Exhibit Number 19.[5] Thus, the record demonstrates that Brooks charged sales tax 656 times for moving services between August 2004 and August 2005.[6]

4 Finding of Fact (3) further states, "Brooks was on notice from the Commission during this period that such charges were not allowed under the governing tariff, Commission Tariff 15-A."[7] The record demonstrates that this finding is correct. After Brooks received provisional authority to operate as a household goods carrier,[8] Leon Macomber, an investigator with the motor carrier safety section of the Commission, made two technical assistance visits to Brooks, one on August 5, 2004, and another on October 14, 2004.[9] On both occasions Mr. Macomber informed the company that it could not charge sales tax on moving services.[10] On March 25, 2005, the Commission sent Brooks a letter informing the company that the tariff does not authorize sales tax charges and that the company is not allowed to charge sales tax.[11] Finally, Consumer Affairs Staff emailed Brooks on April 28, 2005, stating definitively that household goods carriers cannot add sales

---

[4] Order 02 at ¶ 65.
[5] Compilation of sales tax charges June 2004 through August 2005, pages 3–29 (Hughes). In addition, Exh. No. 29, Staff Response to Bench Request 2, includes a list of the monthly totals of bills of lading containing sales tax charges, showing a sum total of 656.
[6] *See* Exh. No. 19 at pages 3–29.
[7] Order 02 at ¶ 65.
[8] June 21, 2004 (Exh. No. 8, *Staff Audit Report of the Business Practices of Boots, Inc. d/b/a Brooks A & A Moving*, November 2005, at page 10).
[9] TR 101:1–102:9 (Macomber).
[10] *See id. See also Exh. No. 22 and Exh. No. 24 (Macomber).*
[11] Exh. No. 5 (Hughes).

tax onto their moving rates.[12] As Judge Moss found, Brooks was on notice that it was not allowed to charge sales tax for moving services.

5 The conclusion of law, that "Brooks willfully violated Tariff 15-A on six hundred and fifty-six occasions during the period August 2004 through August 2005 by charging customers for sales tax, charges the Commission informed Brooks were not lawful charges," is justified.[13] A violation is willful when a company either knew or showed reckless disregard for the matter of whether its conduct was prohibited. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125–129, 105 S.Ct. 613, 623-26, (1985). The record indicates that Mr. Macomber, during his technical assistance visit on August 5, 2004, informed Brooks that household goods carriers cannot charge sales tax on moving services. Furthermore, Richard Brooks admitted that he became aware that household goods carriers were prohibited from charging sales when "Mr. Macomber, the field staff agent, came out to our place."[14] Because the company should have known by August 2004, and because it received multiple subsequent communications from the Commission stating that the sales tax charges were not allowed, yet persisted in charging sales tax until August 2005,[15] Brooks either knew or showed reckless disregard for the fact that charging sales tax on moving services is prohibited.

6 Judge Moss' subsequent conclusion of law, that "Brooks is subject to penalties of $65,600 under RCW 81.04.405 for thee violations" is also well founded.[16] Brooks argues that it "seems unfair and inappropriate to assess the maximum penalty…for improperly collecting sales tax and again re-fine them a maximum amount for the form used which

[12] *See* Exh. No. 17, Consumer Complaint, at page 12 (Hughes).
[13] *See* Order 02 at ¶ 70.
[14] *See* TR 147:8–22 (Richard Brooks).
[15] *See* TR 129:2–6 (Michelle Brooks) (testifying that company has not charged sales tax since August 1, 2005).
[16] *See* Order 02 at ¶ 70.

itemized the tax."[17] This penalty is appropriate, given that the penalty statute cited in the initial order provides: "Every public service company who violates this title or any order, rule, regulation or decision of the commission. . .shall incur a penalty of one hundred dollars for every such violation." RCW 81.04.405. Because it is undisputed that Brooks charged sales tax 656 times, the penalty of $65,600 is appropriate. The penalty is also fair because the basis for the bill of lading form violations rested on far more than just the presence of the filed for the sales tax charge.[18] Furthermore, collecting money from consumers for a charge the company was not allowed to collect, and at least should have known it was not allowed to collect, is a serious violation and justifies a substantial penalty.

B. The Initial Order's Findings and Conclusions With Respect to the Bill of Lading Form Violations are Correct.

7 The initial order sets forth the following finding of fact: During the period April 2005 through July 2005 Brooks used a deficient bill of lading form…on two hundred and twenty-one occasions."[19] The record is clear that the bill of lading form used during the period of April through July 2005 did not comply with Tariff 15-A.[20] Staff's mark-up of a sample June bill of lading illustrate the form's deficiencies.[21]

8 The conclusion of law, that "Brooks willfully violated the Commission's rules that set forth the required contents for bills of lading…during the period April 2005 through July 2005 on two hundred and twenty-one occasions" is supported by the evidence.[22] Because the company represented to the Commission that the company was using a corrected bill of

[17] Respondent's Petition at pages 4–5.
[18] *See* TR 42:19–49:22 (Hughes) (identification of each violation present on the bill of lading form, both front and back).
[19] Order 02 at ¶ 66.
[20] *See* Exh. No. 4 , All bills of lading from June 2005; Exh. No. 10, Bills of Lading from January, February, March and April 2005; Staff Response to Bench Request 1 (includes bills of lading from May 2005 and July 2005).
[21] *See* Exh. No. 4.
[22] *See* Order 02 at ¶ 71.

lading, which Michelle Brooks sent to the Commission on April 2, 2005,[23] when in fact the company continued to use its old forms, this discrepancy supports the conclusion that Brooks knew its forms were not in compliance. Consequently, Judge Moss' conclusion of law that the violations during this period were willful is well founded.

9 Again, it is important to note that the sales tax field was not the only problem with the bill of lading form. Furthermore, the Commission brought additional bill of lading form violations to the company's attention before the April to July 2005 moves.[24] Brooks argues that the sample bill of lading form in the tariff "has the same or similar minor violations contained in Respondent's Bill of Lading forms" and that "[t]herfore the penalty of $22,100 should be reversed."[25] Household goods carriers are, however, required to comply with both the sample bill of lading and Item 95 of the tariff. While the tariff's sample bill of lading does not incorporate all of the requirements of Item 95, the Brooks bill of lading form contained violations that went far beyond the discrepancies between the tariff sample and Item 95.[26] Thus, the penalty was properly assessed on the basis of the variety of violations present on the Brooks' bill of lading form.

C. The Initial Order's Findings and Conclusions With Respect to the Bill of Lading Completion Violations are Warranted.

10 The finding of fact, "On forty-eight occasions during the month of June 2005 Brooks failed to complete the bill of lading form required for each of the household goods moves it performed in Washington," is sufficient.[27] While it is not clear to Staff exactly how Judge

---

[23] *See* Exh. No. 15 at pages 2–3.
[24] *See* Exh. No. 5 at page 1 (estimate declaration language), pages 2–3 (valuation language), and at page 3 (credit processing fee).
[25] Respondent's Petition at page 4.
[26] *See* TR 42:19–49:22 (Hughes) (identification of each violation present on the bill of lading form, both front and back).
[27] *See* Order 02 at ¶ 67.

Moss arrived at the number 48,[28] Staff does not seek to challenge this finding and agrees that the company failed at least 48 times to properly complete the bill of lading.

11 Staff's Exhibit Number 18, consisting of a chart listing the various bill of lading completion violations, similarly substantiates Judge Moss' conclusion of law, "Brooks violated the Commission's rules by failing to complete the bill of lading form…on forty-eight occasions during the month of June 2005."[29] Broods' discussion in its Petition of the proposed mitigating factor posed by tired movers is, at the end of the day, scarcely relevant.[30] Regardless of when household goods movers perform a move ad how tired they may be, all household goods carriers still are required to comply with Commission rules and the tariff. Given that 48 of the 70 bills of lading, that is, more than half, contained one or more completion violations, the penalty of $4,800 is justified.

II. SANCTIONS

12 Staff does not seek to challenge the sanctions set forth in the initial order in this docket.[31] It is Staff's position that the penalties ordered, totaling $92,500, represent a substantial and adequate sanction.

13 Regarding the specifics of the penalties, the $65,600 portion of the penalty ordered for the sales tax violations[32] is sufficient to penalize the company for the practice of illegally charging sales tax.[33] Staff had recommended at the evidentiary hearing that the sales tax charges, in the amount of some $30,000, be refunded to the customers who had paid sales

---

[28] *See* Exh. No. 18, Bill of lading completion chart. Possibly the confusion results from a failure by staff counsel to accurately count "Xes" contained in this exhibit.
[29] Order 02 at ¶ 72.
[30] *See* Respondent's Petition at pages 4–5.
[31] *See* Order 02, *Initial Order Assessing Penalties for Violations of Commission Rules and Tariff 15-A,* August 30, 2006, ¶¶ 74–78. See WAC 480-07-825(4)(c) ("A party who did not file a petition for administrative review of an initial order may challenge the order or portions of the order in its answer to the petition of another party.").
[32] *See id.* at ¶ 74.
[33] *See id.* at ¶ 65.

tax.[34] Additionally, Staff had recommended a suspension of the company's operations for up to 90 days.[35] Given that the penalty amount for the sales tax violations is double the amount Staff requested the company pay in refunds, and in light of the fact that the company ended the practice of charging sales tax approximately one year ago, Staff does not challenge the sales tax sanction. Staff also is satisfied with the remainder of the penalty, $26,900,[36] which is larger than the sum of $25,500 recommended by Staff at hearing[37] and requested in the Commission's complaint.

III. CONCLUSION

14 In conclusion, the findings of fact and conclusions of law set out in the initial order are supported by the evidence, and Respondent's Petition should be denied. Furthermore, while the sanctions ordered do not reflect exactly the remedies that Staff requested, they are reasonable and should not subject Judge Moss' decision to review.

DATED this 13th day of October, 2006.

ROB McKENNA
Attorney General

_____
Jennifer Cameron-Rulkowski
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission

[34] TR 74:22–75:2 (Hughes).
[35] TR 75:17–19 (Hughes).
[36] *See* Order 02 at ¶¶ 75–76.
[37] *See* TR 36:17–22 (cargo insurance); TR 50:2–7 (bill of lading form); TR 62:16–21 (bill of lading completion); and TR 64:15–20 (credit card processing fee) (Hughes).