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Decision No. 29081

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Investigation of the rates, charges, classifications, rules, regulations, contracts, and practices, or any thereof, of PAUL ENTREMONT and W. H. PITZER, Respondents.	Case No. 4113.

Albert E. Sheets, for Respondents.
C. C. Carleton and Frank B. Durkee, for Department of Public Works of the State of California, Intervener on behalf of Respondents.
E. M. Berol, for Truck Owners Association of California, Intervener.
J. C. Bowden, for Dump Truck Association, Intervener.

WHITSELL, COMMISSIONER:

O P I N I O N

This investigation was instituted on the Commission's own motion into the rates, charges, classifications, rules, regulations, contracts, and practices of Paul Entremont and W. H. Pitzer, each of whom holds a permit as a radial highway common carrier, for the purpose of determining whether or not either of said respondents has violated any of the provisions of Decision No. 28274 in Case 4076, prescribing minimum rates, pursuant to the Highway Carriers' Act (Chap. 223, Statutes of 1935), for the transportation of sand, rock, gravel, excavated material, and road building material. Public hearing was held at Sacramento on March 19, 1936, at which time both respondents appeared and were represented by counsel. The Department of Public Works of the State of California, formally requested and

was granted leave to intervene on behalf of respondents, and other appearances were made at the hearing as above indicated.

The evidence shows that on or about the 11th day of February, 1936, a contract was entered into between respondent Entremont and the Division of Highways of the Department of Public Works by which respondent Entremont agreed "to furnish the service or rental" of three trucks with "dump truck" bodies of 3½ cubic yards capacity, "to be used for hauling gravel, slide material, etc., and for other miscellaneous hauling jobs as required anywhere in District I," for 500 hours each, at $2.50 per hour, the trucks to be operated by employees of Entremont and at his expense. The minimum rate established by Decision No. 28274 for the transportation of such commodities in dump trucks of 3½ cubic yards capacity in Northern California (in which part of the State said District I is located), and in effect during the period here involved, was $2.59 per hour, being the sum of $1.91 plus 68 cents, the general prevailing rate per hour for driver's wages for work of a similar character in that locality.

Pursuant to that agreement, respondent Entremont supplied three such trucks operated by his employees, which performed hauling of the nature described, commencing on February 17th, 1936, and continuing up to and including the day of the hearing.

Two of the trucks belonged to respondent Entremont and bore Railroad Commission license plates issued to him. The third truck was operated by respondent Pitzer and bore Railroad Commission plates issued to him pursuant to the declaration in his application for a permit that he was the owner of it. Both respondents testified, however, that after the filing of Pitzer's application Entremont had acquired ownership of this truck and that Pitzer operated it in performing the

hauling in question as Entremont's employee. The evidence as to the relationship between Entremont and Pitzer is far from clear but we are unable to find that they are not employer and employee, respectively, as they claim. The remainder of this opinion, therefore, will be concerned only with respondent Entremont. However, application should be made by both respondents to the Commission for re-registration of Pitzer's truck in the name of Entremont, and for the issuance of the license plates to the latter.

The service was performed over a section of the State highway between the Sonoma-Mendocino County line and the town of Hopland, eleven miles to the north. The movement consisted of the transportation of gravel, used to fill and surface portions of the finished roadway of the state highway known as "U.S. 101" which had slipped out or "failed," from nearby stocks to the point of use on the highway; and the transportation of material which had slid on to the road from the banks above, or which had been excavated from the roadway surface or banks, from the slide or point of excavation to a place for disposal of the material. The trucks were loaded by power shovel or other machinery and unloaded by mechanically tilting the bodies and dumping the contents. Some of the gravel was hauled from pits located at varying distances, not exceeding 700 feet, from the highway; but a part of every movement occurred over the traveled portion of the public highway open at the time to public travel, and not within the limits of any incorporated city. The hauls varied in length from 11 miles to a few hundred feet.

The three trucks together engaged in this hauling a total of 251 hours between the 17th and 29th days of February, 1936, inclusive. For the service the evidence shows Entremont was paid by and received from the Department of Public Works the sum of $624.36,

being compensation at the rate of $2.50 per hour less one-half of one per cent discount for cash payment.

Respondent and intervener Department of Public Works contend that the operations described do not constitute the transportation of property for compensation or hire over any public highway by motor vehicles within the meaning of the Highway Carriers' Act, and, consequently, that no violation of that act or of Decision No. 28274 was committed. Specifically, they contend that the transaction is controlled, not by the Highway Carriers' Act, but by Sections 136 and 136.5 of the Streets and Highways Code (Chapter 514, Statutes of 1935); that the Highway Carriers' Act does not, in any event, apply to hauling performed for the State; and, lastly, that as the trucks were contributing to the maintenance of the public highways, they were not being operated over the public highways within the meaning of the Highway Carriers' Act. None of these contentions appear to be well founded.

It is elaborately argued that the transaction is a leasing or renting of trucks within the meaning of Sections 136 and 136.5 of the Streets and Highways Code, requiring competitive bidding for the "leasing or renting of tools or equipment for State highway purposes" by the Department of Public Works. These sections, it is claimed, are in some manner inconsistent and in conflict with the Highway Carriers' Act, and being enacted later, though at the same session, must be regarded as a "legislative interpretation" or a "partial repeal" of the Highway Carriers' Act.

But there is no inconsistency whatever between the two

enactments.[1] Sections 136 and 136.5 govern the Department of Public Works in the leasing or renting of tools or equipment. The Highway Carriers' Act regulates the use of the public highways for the transportation of property by motor vehicle for compensation or hire as a business. The leasing of motor vehicles is something quite

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(1) For purpose of contrast, Sections 136 and 136.5 of the Streets and Highways Code, and Sections 1 (f) and 2 of the Highway Carriers' Act are given here.

Sections 136 and 136.5 of the Streets and Highways Code read as follows:

> "136. The department (of Public Works) may enter into contracts for the leasing or renting of tools or equipment for State Highway purposes.
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> 136.5. The contracts referred to in sections 135 and 136 are not subject to the provisions of the State Contract Act. Whenever the total consideration of such a contract exceeds five hundred dollars, it shall be awarded to the lowest, responsible bidder, after competitive bidding on such reasonable notice as the department may prescribe. Posting of notice for five days in a public place in the district office of the Division of Highways within which the work is to be done, or the equipment used, is sufficient."

Sections 1 (f) and 2 of the Highway Carriers' Act provide:

> "1 (f). The term 'highway carrier' when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle or motor vehicles. However, it does not include carriers operating exclusively within the limits of a single incorporated city or city and county, nor does it include persons rendering casual transportation services as an accommodation, and not in the usual or ordinary course of business of such person, nor does it include persons hauling their own products.
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> Sec. 2. No highway carrier other than a highway common carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in this State, except in accordance with the provisions of this act, which the Legislature hereby declares to be enacted under the power of the State to regulate the use of public highways."

distinct and apart from the transportation of property by motor vehicle.[2] A transaction may be one or the other kind of undertaking but not both. It may be subject either to the Streets and Highways Code provisions or to the Highway Carriers' Act, but not to both. The acts, therefore, do not conflict.

The service agreement here in question is a contract for the transportation of property by motor vehicle, and not a renting or leasing of tools or equipment.[3] Pursuant to its terms, the trucks

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(2) The distinction is clearly recognized by authorities holding that enactments regulating the transportation of property by motor vehicle do not affect persons engaged in the renting and leasing of motor vehicles (Roeske v. Lamb (N.M.) 41 P (2d) 522; Burlington v. Unterkircher (Iowa) 68 N.W. 795; State v. Dabney (Ark) 5 S.W. (2d) 304, and other cases). It is equally true, conversely, that regulations relating to the leasing of motor vehicles do not affect persons engaged in transporting persons or property by motor vehicle.

(3) Although the contract twice uses the word "rental," it also refers to respondent Entremont as the "vendor." Obviously, neither term is used in a literal sense. The contract provides:

> " * * the vendor hereby agrees to furnish the service or rental as hereinafter set forth to the Department of Public Works, Division of Highways, and agrees to receive and accept as full compensation therefor the prices named in the following memorandum:
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> > For the rental of three only three and one-half yard dump trucks for 500 hours each at $2.50 each per hour, including operation.
> > The trucks are to be used principally under power shovels for hauling gravel, slide material, etc. and for other miscellaneous hauling jobs as required anywhere in District I."

The contract then sets forth specifications respecting the type and equipment of the trucks, and stipulates that the equipment is to be operated by the "vendor," who is to furnish competent operators, all gasoline, oil, and other operating supplies, and to make all repairs necessary to keep the equipment in efficient running order; that the "vendor" is to replace the operators at his own expense if they do not prove satisfactory, to carry compensation insurance on the operators, to assume all responsibility for repairs to the equipment, for damage to the equipment from any cause, and for damage to other property or injury to persons caused by the operation of the trucks. Further, "It is expressly agreed that all persons engaged in this work are employees of Vendor and that none are employees of the Department of Public Works of the State of California." The evidence shows that these provisions of the contract were fulfilled.

were operated by employees of respondent and, through them, the trucks and their contents were in his custody and possession and subject to his control throughout the performance of the hauling. Directions given the operators by the foreman of the Division of Highways were only such as a carrier would normally receive from one for whom he is transporting property. The transaction thus lacks that element of a transfer of use and possession of property to the hirer which is essential to the existence of a leasing or hiring.(4) As the contract is not one for the "leasing or renting of tools or equipment," it is not governed by Sections 136 and 136.5 of the Streets and Highways Code.(5)

In actual fact, the contract is one for the performance of certain services by respondent, namely, "hauling gravel, slide material, etc. and for other miscellaneous hauling jobs as required anywhere in District I." Respondent himself conceived the nature of the transaction to be the transportation of property, as appears from the fact that he included the revenue therefrom in his return to the State Board of Equalization filed pursuant to the Motor Vehicle License Tax Act (Chapter 339, Statutes of 1933, as amended by Chapter

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(4) See:
Civil Code, Div. 3, Pt. 4, Tit. 5;
Holmes v. Railroad Commission, 197 Cal. 627, at p. 631;
Reavley v. State (Tex. Cr. App.) 63 S.W. (2d), 709;
Anderson Clayton v. State (Tex. Cr. App.) 68 S.W. (2d) 544;
Haddad v. Griffin (Mass), 142 N.E. 74.

(5) The evidence shows that there is no foundation for the fear expressed by intervener that the existence of minimum rates will stifle competition for service contracts. Of the 16 bids made for the instant contract, only one, respondent's, was below the minimum rate, and only one was just equal to the minimum rate. The other 14 bids were all from 6 to 25 per cent higher than the minimum rate.

780, Statutes of 1935). That act imposes a tax only upon the gross receipts from operation of motor vehicles upon public highway in the transportation of persons or property for hire or compensation; no tax is imposed upon revenue from the rental of motor vehicles. The record in general, the possession by respondent of a permit as a highway carrier, and evidence of respondent's performance of other hauling, all combine to indicate that the transportation of property here in question was performed in the course of respondent's business.

The operation thus being the transportation of property for compensation by motor vehicle over the public highways as a business, it appears to fall squarely within the provisions of the Highway Carriers' Act and to be subject to the provisions of Decision No. 28274 unless, as respondent and intervener contend, the situation is altered by reason of the fact that the hauling was performed for the State. They urge that it is the policy of this State as evidenced by Sections 17(a) 4 and 17.5 of the Public Utilities Act, and Section 2171 of the Civil Code, to exempt transportation for the State from regulation, or to favor preferences in rates to the State free from any control by this Commission, and that the Highway Carriers' Act should accordingly be construed as inapplicable to hauling performed for the State. Otherwise, they claim, the act will be rendered operative against the State contrary to the principle of statutory construction removing the sovereign, when not otherwise expressly mentioned, from the operation of its own statutes.

These contentions are untenable. The State, as the owner of property being transported, is affected by the act as are all shippers, but it is not thereby rendered subject to the act in the

sense of the rule of interpretation referred to. The act does not undertake to regulate shippers, but only highway carriers in the use of the public highways for profit. The effect on the shippers is only indirect. Nothing appearing on the face of the act or to be implied therefrom discloses any intention to exempt from its provisions carriers hauling for the State. Its general purpose, as set forth in the preamble, seems to contemplate and require the same control of such carriers as of any others. Insurance or other protection for the benefit of persons injured through the operation of trucks is just as essential while the trucks are serving the State as any other shipper. Performance of transportation for the State is fully within the language of Section 10, directing the approval or establishment of rates for the transportation of property by highway carriers and prohibiting the carriers from charging or collecting any other rates. Reading that section in connection with Section 11,(6) which permits transportation at less than minimum rates on authority granted by the Commission, the intention is plain to require the carriers to charge the State no less than the minimum rates unless authority to do so under Section 11 is obtained.

The analogy of Section 17(a) 4 of the Public Utilities Act and 2171 of the Civil Code supports this conclusion rather than the contrary. The arguments of respondent and intervener built around these sections are based upon the misconception that their effect is to exempt service for the State from regulation and to authorize any

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(6) Section 11, in full, provides:

"If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of section 10 hereof."

degree of preference to the State without power in the Commission to interfere. But these provisions must be read in the light of accompanying provisions which prohibit unjust and unreasonable discriminations. The cited sections are essentially declarations that preferences to the classes of shippers and travelers named therein are not necessarily unjust or unreasonable. They expressly recognize the common law right of common carriers to allow preferences for which there are reasonable bases; but they do not extend that common law right so as to sanction unjust or unreasonable preferences. Nor do they remove any of such preferences from the jurisdiction of the Railroad Commission which, as in all cases, has the power to order them removed to the extend they may be found to be unjust or unreasonable. United States v. Tennessee, 262 U.S. 318; 43 S. Ct. 583; 67 L. Ed. 999; (7) Hillsboro v. Public Service Comm. (Ore), 192 Pac. 390).

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(7) Section 22 of the Interstate Commerce Act (49 U.S.C.A. 22) provides, in part, in language similar to that used in Section 17 (a) 4 and 17.5 of the Public Utilities Act:

> "Nothing in this chapter shall prevent the carriage, storage, or hauling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; .."

In United States v. Tennessee (supra) the Supreme Court sustained an order of the Interstate Commerce Commission removing a preferential intrastate rate on stone and gravel when for use in building public highways and consigned to federal, state, county and municipal authorities, on the ground that the preference constituted an undue discrimination against other persons and traffic and against interstate commerce. The court in affirming the power of the Commission to do this, said of section 22,

> "...The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited, is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier, theretofore enjoyed of granting, in its discretion, preferential

Through the proviso in Section 17 (b) of the Public Utilities Act and General Order No. 45 of this Commission, similar power is exercised over other public utilities.(8)

The Highway Carriers' Act, through Sections 10 and 11, is in complete harmony with the common law respecting preferences carried into the Public Utilities Act, as above described. Section 10 requires the rates established or approved to be "just, reasonable and nondiscriminatory." Section 11 expressly sanctions reasonable

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(7) - Continued -

"treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right on any shipper or traveler. Nor does it confer any new right upon the carrier."

(8)

This Commission has repeatedly fixed the rates of utilities other than common carriers for service to the State and its subdivisions to prevent unjust and unreasonable preferences, and has insisted that no undue burden shall be cast upon other consumers.

San Anselmo v. Marin Water & Power Co. (1916), 10 C.R.C. 726, at 739;

Application of Western States Gas & Electric Co. (1919), 16 C.R.C. 562, at 569;

Investigation of People's Water Co. (1918), 15 C.R.C. 911, at 918;

Application of East Bay Water Co. (1919), 17 C.R.C. 357, at 359;

Application of East Bay Water Co. (1919), 17 C.R.C. 496, at 497; (Affirmed, San Leandro v. Railroad Commission, 183 Cal. 229);

Application of Port Costa Water Co. (1921), 20 C.R.C. 278, at 279;

Berkeley v. East Bay Water Company (1923), 23 C.R.C. 868, at 871.

reduced or preferential rates. The close parallel between it and Section 17 (b) of the Public Utilities Act is at once apparent. The language of both is general, and Section 11 may be deemed to contemplate, whatever if anything else it may mean, all those reasonable preferences permissible at common law and under the Public Utilities Act. As applied to preferential rates proposed for State hauling, it is clearly to be interpreted as requiring the proposed rates to be found "reasonable," under the circumstances, and authority to charge them to be granted, if they will not create any unjust or unreasonable discrimination against other shippers or traffic.

True, prior authority for the granting of certain preferences mentioned in Section 17 is not required under the Public Utilities Act; but this additional restraint under the Highway Carriers' Act is inherent in the system of rate-making provided for thereby, which is quite different from that set up by the Public Utilities Act. The added stringency of the Highway Carriers' Act over preferential rates is of just the same kind and degree as that encountered thereunder with respect to all other rates. Carriers subject to the Public Utilities Act are permitted to establish their rates of charges themselves by the filing of tariffs with the Commission, rates so published being subject to the power of the Commission to alter them when found to be unlawful. It is consistent with this system of rate-making that the carriers should also be permitted to fix preferential rates themselves, subject to the same control as the Commission exercises over the other rates, except that publication of certain rates is not required. Under the Highway Carriers' Act, however, no rates may be fixed by the carriers but all must be established or approved in the first

instance by the Commission. It is fully consistent with this system of rate-making that any variation, by way of preference, from the just, reasonable, and nondiscriminatory rates so established should first be found to be reasonable and authorized by the Commission. Only in that way could a system of Commission-made rates be successfully maintained.

The propriety of the method of regulating preferential rates set forth in the Highway Carriers' Act is apparent when thus considered in the light of the general system of rate-making adopted thereby. The allowance of preferences clearly should not be left uncontrolled any more than it was at common law or is under the Public Utilities Act; and yet it would obviously be impossible for the Commission, at the time of establishing rates of general application, to foresee in advance all the multitude of facts and circumstances justifying variations from such rates, and to fix the proper level for each such preference. The procedure adopted in Section 11 constitutes the practical solution of the problem.

These considerations make it plain, furthermore, that the provisions in Section 10 that the minimum rates for radial and contract carriers "shall not exceed the current rates of common carriers for the transportation of the same kind of property between the same points," does not refer to such preferential rates of common carriers. The quoted clause can refer only to the rates of common carriers published in tariffs on file with the Commission and lawfully applicable to service performed for the general public. Only such published tariff rates, and not unpublished and fluctuating preferential rates, can be deemed to be the "current rates of common carriers." Any other interpretation, because of the uncertain nature and unknown amounts of the common carriers' preferential

rates, would render it impossible to establish any minimum rate for radial or contract carriers applicable to any one of a class for which there is reasonable basis for a preference. As just observed, however, it was to meet this very situation, and to provide a system of rates which would be flexible as well as stable, that Section 11 was placed in the Act. With Section 11 administered in sympathy with the spirit of the quoted clause in Section 10, and intelligently utilized by the carriers, the necessity for obtaining prior authority for the allowance of preferences will no more handicap radial and contract carriers in competition with others than will the requirement of the rest of Section 10 for the establishment or approval by the Commission of any other rate such carriers may wish to charge.

The conclusion therefore follows that the Highway Carriers' Act is fully applicable to highway carriers engaged in transportation of property for the State. In so far as rates are concerned, the act appears to have been designed intentionally to embrace such services and to do so in a manner not only compatible with the common law, the policy of the State, and the practice of carriers respecting preferences to the State and others, but also appropriate to the method of rate-making contemplated by the act. But the forms and procedure incident to that method of rate-making must be observed. A highway carrier wishing to charge less than the minimum rate must first obtain authority to do so pursuant to Section 11. In the absence of such authority, nothing less than the minimum rate may be charged. Respondent here neither obtained nor applied for such authority in connection with this transportation, and the rate established by Decision No. 28274 was thus the minimum lawful rate unless intervener's last

contention, now to be discussed, is sound.

This final contention that, because the transportation here in question had to do with the maintenance of a public highway, it was not performed upon or over any public highway within the meaning of Section 1 (f) of the Highway Carriers' Act, is evidently founded upon a misinterpretation of the authorities relied upon to sustain it. Oswald v. Johnson, 210 Cal. 321, followed Allen v. Jones, 47 S.D. 603, 201 N.W. 353, as did the other cases cited by intervener. In both of these cases it distinctly appeared as a basis for the decisions that the operations were not conducted over any highway open to public travel. In both cases, furthermore, it was observed that where, as in this case, road-building material was transported over highways to or from the site of construction, the vehicles were in "operation upon" the highways within the meaning of the gasoline tax statutes there in question. (9)

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(9)

In Allen v. Jones (supra) it was said (201 N.W. at p. 354):

> "On the other hand, a tractor or truck in which gasoline is being used as fuel, used for hauling (transporting) gravel for surfacing or repairing a highway, or a truck or tractor traveling on a highway to and from a filling station, is being 'operated' on a highway within the meaning of the statute and is included in the exception. On gasoline used in this manner the two-cent tax should not be refunded."

In Oswald v. Johnson (supra) it was said (210 Cal. at p. 323):

> "It is pertinently observed in that case (Allen v. Jones, supra), however, that motor fuel used in propelling tractors or trucks in the transportation of road-building material or motor fuel to or from the site of construction, is used in 'operation upon' the highways and is not purchased subject to refund."

The facts and conclusions above set forth, therefore, lead to the finding that the minimum rate which respondent might lawfully have charged for the transportation herein described, pursuant to said Decision 28274 then in effect, was the sum of $2.59 per hour or the total sum of $650.09; that the charge made and collected by respondent for the 251 hours of transportation was assessed at the rate of $2.50 per hour, less 1/2 of 1% discount, amounting to the sum of $624.36; that said sum charged and collected by respondent, as aforesaid, is $25.72 less than the minimum lawful charge for said transportation, and that in charging and collecting said sum respondent was and is in violation of said Decision 28274 and of Section 14 of the Highway Carriers' Act.

Respondent Entremont should be required to collect the difference between the sum of $624.36, charged and collected as above stated, and the amount of the charges based on the minimum lawful rates established by Decision 28274, to-wit, $650.09. He should also be required to cease and desist from future violations of this nature. The proceeding should be dismissed as against respondent Pitzer. I recommend the following form of order:

O R D E R

This case having been heard and submitted, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and conclusions contained in the foregoing opinion:

IT IS HEREBY ORDERED that respondent Paul Entremont forthwith proceed, within forty (40) days from the date hereof, to collect the amount of the undercharge, to-wit, $25.72, found to

exist in the preceding opinion, and to report to the Commission under oath when this has been accomplished.

IT IS HEREBY FURTHER ORDERED that respondent Paul Entremont hereafter abstain from charging and collecting for the transportation as a highway carrier, other than a highway common carrier, of gravel, excavated material, or road-building material between points in California, rates less than the minimum lawful rates for such transportation by said respondent established by order of this Commission.

IT IS HEREBY FURTHER ORDERED that this investigation into the rates, charges, classifications, rules, regulations, contracts, and practices of respondent W. H. Pitzer be and the same is hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 31st day of August, 1936.

Commissioners.