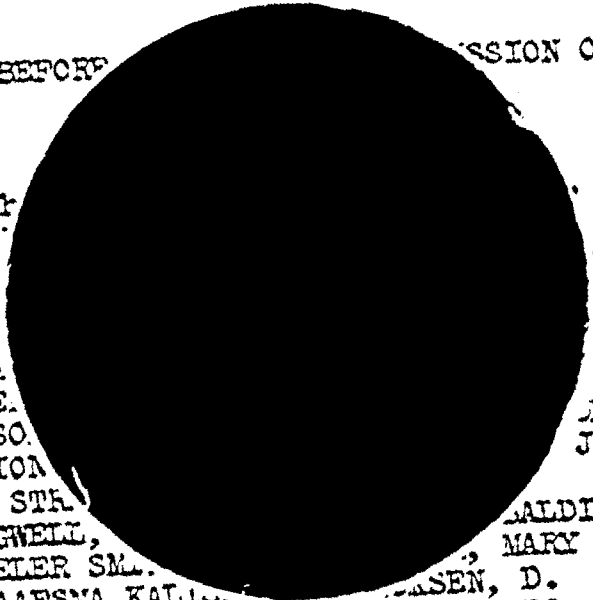


Division No. 30271

BEFORE COMMISSION OF THE STATE OF CALIFORNIA

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LONGWELL,
WHEELER SM.
SCHAAFSMA KALISH
LEWIS, AL GUASPARI, BRUCE & JONES, a
copartnership, LEONARD F. MADERA,
WILBERT MADERA, BARNEY POLLAK, R. L.
MANNING, ELMER GRANGER, FRANK WELCH,
and SAN BRUNO AVENUE FEED & FUEL CO.,
a copartnership.



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Case No. 4237.

Roy Thompson, Edward M. Berol and M.
for Truck Owners Ass'n. of Calif.

Edward M. Berol and Marvin Hand
for George Kalish and Mary
Al Guaspari, C. J. Newman
F. Madera;

Wm. B. Hornblower, for Meyer
Thomas O'Brien;

Geo. T. Davis, for W. N. G.

A. J. Bin, for San Bruno Avenue

L. N. Giorgi, in propria persona.

Homer G. High, in propria persona,

Allan Wilson, in propria persona.

Harold Gridley, in propria persona.

Marion L. Titcher, in propria persona.

Richard Squires, in propria persona.

Decision No. 30271

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Investigation,
on the Commission's own motion,
into the operations, rates, charges,
contracts, and practices, or any
thereof, of CARL NEWMAN, L. N. GIORGI,
HOMER G. HIGH, SAM ARMSTRONG, MEYER
ROSENBERG, THOMAS O'ERIEN, ALLAN
WILSON, JOHN DOE PATTO, HAROLD GRIDLEY,
MARION L. TOICH, RICHARD SQUIRES, JOHN
DOE STREET, BEN ROSENBERG, S. R.
LONGWELL, A. C. MEADE, F. GARIBALDI,
WHEELER SMITE, GEORGE KALISH, MARY
SCHAAPFMA KALISH, F. ERICKSEN, D.
LEWIS, AL GUASPARI, BRUCE & JONES, a
copartnership, LEONARD F. MADERA,
WILBERT MADERA, BARNEY POLLAK, R. L.
MANNING, ELMER GRANGER, FRANK WELCH,
and SAN BRUNO AVENUE FEED & FUEL CO.,
a copartnership.

Case No. 4237..

Roy Thompson, Edward M. Berol and Marvin Handler,
for Truck Owners Ass'n. of California;

Edward M. Berol and Marvin Handler,
for George Kalish and Mary Schaaafsma Kalish,
Al Guaspari, C. J. Newman, and Leonard
F. Madera;

Wm. B. Hornblower, for Meyer Rosenberg and
Thomas O'Erien;

Geo. T. Davis, for W. N. Gentle and A. C. Mead;

A. J. Bin, for San Bruno Avenue Feed & Fuel Co.;

L. N. Giorgi, in propria persona,

Homer G. High, in propria persona,

Allan Wilson, in propria persona,

Harold Gridley, in propria persona,

Marion L. Toich, in propria persona,

Richard Squires, in propria persona,

A. E. Fuller, for National Surety Corp.,
F. Garibaldi, in propria persona,
Wheeler Smith, in propria persona,
Ben Rosenberg, in propria persona,
F. Ericksen, in propria persona,
Barney Pollak, in propria persona,
Frank Welch, in propria persona.

BY THE COMMISSION:

O P I N I O N

After having received numerous complaints that the Commission's rate order in Case 4087, Decision No. 28836, was being violated by the respondents above named, the Commission instituted, upon its own motion, an investigation for the purpose of determining whether such violations existed. The investigation was directed toward the transportation by dump trucks loaded under power shovel with excavated material, and transported from Hill 57 in South San Francisco to the San Francisco Airport at Mills Field.

A public hearing was had before Examiner Hunter at San Francisco on August 31st, September 1st, and September 2nd, when evidence was offered, the matter submitted, and it is now ready for decision. Certain respondents were not served, and others, so the record indicated, were shown to have no interest in the proceeding.

Respondents John Doe Ratto and F. Garibaldi were employed merely as drivers of the vehicles owned by other respondents. The respondent Sam Armstrong was not shown to have been connected with

any of the operations investigated.

Service of the order instituting this proceeding could not be obtained upon the respondents Wilbert Madera, ~~Alvin Bringer~~, and Bruce & Jones, a copartnership. This proceeding, therefore, will be dismissed as to these respondents.

Following the institution of this proceeding, respondent John Doe Street sold and transferred his truck to W. N. Gentle, and at the hearing the order instituting investigation was amended, without objection, to substitute Gentle as a respondent for respondent Street. Gentle appeared at the hearing and participated in the proceeding.

The evidence adduced at the hearing showed that the City and County of San Francisco had entered into a contract with one Thomas O'Brien for the excavation and transportation of a large quantity of rock, dirt, and clay from Hill 57 to the San Francisco Airport. In performing this contract, certain highway carriers were employed by the contractor to effect the transportation of the excavated material. A bond naming Thomas O'Brien as principal and the National Surety Company as surety was filed to guarantee faithful performance of the contract, and payment for labor and materials.

During the course of the investigation it became apparent that respondent O'Brien, while nominally the contractor and the person named in the bond, had little or nothing to do with the actual performance of the contract. Every respondent called by the Commission testified that he was employed and paid by respondent Meyer Rosenberg. All bookkeeping was done by Rosenberg's bookkeeper,

all checks in payment of labor and materials were signed by Meyer Rosenberg, and all orders given to respondents on the job were given by respondent Meyer Rosenberg.

Rosenberg described himself at the hearing as O'Brien's superintendent on the "airport job," but we note that his duties far exceeded those of the average superintendent. However, without too closely scrutinizing the incidents of the association between the two, Rosenberg was, at the very least, O'Brien's agent in all of the matters involved in this proceeding and discussed in this decision.

Robert J. Gearhart, Secretary of the Building Material Drivers' Union (Local No. 216) was called by the Commission to establish the prevailing wage scale for truck drivers. He testified that the prevailing wage scale for a driver of a truck having a capacity of from $2\frac{1}{2}$ to $3\frac{1}{2}$ cubic yards was \$6.50 per day or \$1.08- $\frac{1}{3}$ per hour; from $3\frac{1}{2}$ to $4\frac{1}{2}$ cubic yards was \$7.00 per day or \$1.16- $\frac{2}{3}$ per hour; from $4\frac{1}{2}$ to $5\frac{1}{2}$ cubic yards, \$7.00 per day or \$1.16- $\frac{2}{3}$ per hour. He testified that the drivers' wages were fixed by the actual cubic capacity of the truck, including sideboards, and not by the quantity of material hauled. The Commission's minimum rate, according to Decision No. 28836, Case 4087, provided that dump trucks loaded under power shovel took the following rates in Northern California:

From $2\frac{1}{2}$ to $3\frac{1}{2}$ cubic yards, \$1.75 plus prevailing wage scale for drivers, which in this instance was \$1.08- $\frac{1}{3}$, making a total of

\$2.83-1/3 per hour; from 3½ to 4½ cubic yards, \$2.15 per hour plus the prevailing wage scale, which in this instance was \$1.16-2/3 per hour, or a total of \$3.31-2/3 per hour; from 4½ to 5½ cubic yards, \$2.45 per hour plus prevailing wage scale, which in this instance was \$1.16-2/3 per hour, or a total of \$3.61-2/3 per hour.

The engineer in charge of construction during the performance of the contract testified that he caused a daily report to be made to him, showing the number of hours worked by the trucks, the number of loads hauled, and that he directed his assistant to measure the cubic capacity of each truck. These records were introduced in evidence and marked "Exhibit 1." The engineer further testified that the records were not kept for the purpose of computing the wages due to the truck operators or drivers, but were merely his records kept for the purpose of checking the progress of the work. From the testimony of respondent Guaspari, who was the foreman on the job, it is obvious that the truck operators were not credited with all of the time to which they were entitled, and that subdivision (D) of Rule 1, and Rule 2, of Decision 28836 in Case 4087, were not observed in computing the time due to the truck operators. However, a comparison of the time kept by the engineer and that kept by those carriers who had such records reveals little loss, and for the purpose of this decision we will accept the Engineer's Work Production Report as accurate in this respect.

The Commission believes that the evidence introduced relative to the cubic capacity of the dump trucks, water level measurement, is insufficient upon which to base a finding that any truck was improperly classified for the purpose of computing the rate due the operator thereof.

Respondent Carl Newman testified that he operated two of the dump trucks on the job, and that at the commencement of the job he understood that he was to receive \$2.83-1/3 per hour, which is the minimum rate for dump trucks measuring up to but not including 3 1/2 cubic yards. He testified that at the end of the first month, however, he received only \$2.25 per hour. He further testified that he was handed a check at the rate of \$2.84 per hour, which he was requested to endorse and hand back to Rosenberg; that he was thereupon handed a check at the rate of \$2.25 per hour, which he was permitted to keep. He stated that at no time was he ever paid more than \$2.25 per hour. He was shown several cancelled checks bearing his endorsement, one of which, check No. 605 (Exhibit 31) for \$208.92, bears an indecipherable name of a second endorser. He testified that he could not read the name, did not recognize the signature, and did not know who endorsed the check. He further testified that he had not cashed the check which was, according to an attached statement, at the rate of \$2.84 per hour. Exhibit No. 32 is a statement showing payment to Newman of \$216.75 at the rate of \$2.84 per hour. Newman denied receiving such a check, although he admitted signing the receipt for it at the foot of the statement. No cancelled check for the amount was submitted by respondent Rosenberg.

Respondent George Kalish testified that he had one truck on the airport job, and that at the end of the first month he presented a bill at the Railroad Commission's rate for a truck of from 2 1/2 to 3 1/2 cubic yards capacity, or \$2.83 1/2 per hour. He further testified that he had signed checks for \$2.84 but that "he turned them right back to Mr. Rosenberg." He stated that he was paid at the rate of \$2.25 for the first month. He further testified that when he presented his bill for the second month, he was told that the rate was reduced to 22 cents per yard, and was credited with

a three-yard truck. Thus he received 66 cents a load for the second month. He testified that for the third month he received 70 cents a load.

The record is silent with respect to the dates on which the changes from one rate to another occurred. Although Kalish testified that the truck was registered in the name of Mary Schaaftma, his wife's maiden name, it was evident that he was the operator thereof.

Respondent Allan Wilson, the operator of Truck No. 7, testified that he, like respondents Newman and Kalish, received a check for \$2.84 from Mr. Rosenberg, which he thereupon was required to endorse and return, in exchange for which he received a check at the rate of \$2.25 per hour.

Respondent Leonard Madera was the operator of four trucks on the job, numbers 58, 62, 64, and 66. He testified that he received \$2.00 per hour, and that he likewise endorsed checks for \$2.84 per hour and returned them to Mr. Rosenberg. His testimony is borne out by that of Inspector R. B. Tracy of the Oakland Police Department, an obviously disinterested witness, who testified that in a conversation held in his office, in his presence and in the presence of Inspector Schofield, respondent Madera accused respondent Meyer Rosenberg of paying Madera only \$2.00 per hour for his work on the Mills Field job, and that Rosenberg corrected him, saying that he had paid Madera \$2.10 per hour.

Respondent Meyer Rosenberg voluntarily took the stand as his own witness. He testified that he had never received any rebates from any of the dump truck owners on Mills Field Airport job. He denied categorically the testimony, in this respect, of respondents Newman, Kalish, Madera, and Wilson. He did not explain or attempt to explain his own admission, made in the presence of Inspector Tracy, that he had paid Leonard Madera \$2.10 per hour instead of the minimum rate due him. He merely "did not recall the conversation." The Commission cannot but believe that rebates were

granted to Rosenberg in the manner in which respondents Madera, Kalish, Newman and Wilson testified. The cancelled checks submitted by respondent Rosenberg show payment to those respondents at the rate of \$2.84 per hour, yet by Rosenberg's own admission he paid Madera only \$2.10 per hour.

Counsel for respondent Rosenberg lays great stress upon the fact that respondents Newman, Wilson, Kalish and Madera signed receipts for the services of their trucks at the rate of \$2.84 per hour in refutation of their testimony that they received much lesser sums. Respondent Leonard F. Madera, in addition to signing such statements, also wrote two letters, Exhibits Nos. 21 and 23, and a release, Exhibit No. 22, the gist of which is that he had received the full minimum rates for his trucks and that he had no claim against T. O'Brien or his surety. Madera and the other respondents explained these writings by testifying that Rosenberg required them to sign them in order to submit the receipts to the surety company which would then authorize the City and County of San Francisco to make progressive payments to the contractor. In addition, they testified that Rosenberg promised them that when the money should be released, they would then receive their money. Respondent Madera testified that Rosenberg told him that unless he, Madera, signed such statements, he was "through."

The Commission cannot too vigorously condemn the acquiescence of these respondents in signing statements which they later testified, under oath, to be false, and in accepting any sum less than the minimum rate provided in the Commission's rate order. In doing so, all respondents who accepted a lesser rate were as guilty as the contractor who received from such carriers the consideration

afforded him by the retention of the difference between the legal rate and a lesser rate.

The Commission would ordinarily institute proceedings against Newman, Kalish, Wilson, and Madera to collect penalties for their violations of the Highway Carriers' Act. However, in order to obtain any evidence in its investigations of the malodorous situation prevailing on the so-called "airport job," it was necessary that the Commission call said respondents as its witnesses, thus granting to them immunity from prosecution, punishment, or penalty provided by Section 20½ of the Act.

Passing now to a consideration of the testimony of the other witnesses, Inspector E. E. Griffiths, of the Commission's staff, testified that respondent A. C. Mead, in discussing rate violations on the Airport project, had told him and Scott Elder, also of the Commission's staff, that he, Mead, would not testify against Meyer Rosenberg because Rosenberg would keep Mead's trucks busy during the winter. Although Mead denied having made the statement, his counsel stipulated that Mr. Elder would, if called, testify to the same effect as Mr. Griffiths.

Mead and all of the other respondents who were called as witnesses testified that they had received the minimum rates applicable to dump trucks according to the cubic capacity at which they were classified by the contractor, and there is no conflict between their oral testimony and such documentary evidence as was introduced by respondent Rosenberg in this respect.

However, since the Commission is convinced that respondent Meyer Rosenberg wilfully testified falsely as to rebates granted to him by respondent Madera, it cannot accord any weight to his testimony denying the receipt of rebates from respondents Kalish, Newman, and Wilson.

O R D E R

A public hearing having been hold, evidence having been received, the matter submitted, and the Commission being now fully advised -

IT IS HEREBY ORDERED that respondents Carl Newman, George Kalish, Leonard Madera, and Allan Wilson be and they are, and each of them is, hereby directed and required, within ten (10) days after the effective date of this order, to undertake and thereafter diligently proceed with the collection from respondents Thomas O'Brien and Meyer Rosenberg, and each of them, of the difference between the charges actually collected and received by said respondents Newman, Kalish, Madera and Wilson, respectively, and paid to them by said respondents O'Brien and Rosenberg, or either of them, for the transportation over the public highways of excavated material loaded under power shovel from Hill No. 57 in South San Francisco to San Francisco Airport at Mills Field, by dump trucks having a cubic capacity of over $2\frac{1}{2}$ cubic yards and less than $3\frac{1}{2}$ cubic yards each, and the hourly rates prescribed and established by ^{the Commission's} Decision No. 28836 in Case No. 4087 applicable to such transportation, for the number of hours during which said dump trucks were engaged in the performance of such transportation; that said respondents Newman, Kalish, Madera, and Wilson make a report in writing, under oath, to this Commission, thirty (30) days from and after the effective date of this order, of the progress of their efforts at such collection, such reports to continue every ninety (90) days thereafter until the further order of this Commission; that the undercharges which said respondents Newman, Madera, and Wilson, respectively, are required to collect from said respondents O'Brien and Rosenberg, or either of them, are more specifically shown in the schedule attached hereto, marked "Exhibit A," and made a part hereof, upon which schedule appears the number of hours during which the dump trucks of each of said respondents

transported such excavated material, the amount due each at the rate established by said Decision No. 28836, viz., \$2.84 per hour, the amount actually paid each, and the difference between said amounts.

IT IS HEREBY FURTHER ORDERED that this proceeding be and it is hereby dismissed as to respondents L. N. Giorgi, Homer G. High, Sam Armstrong, John Doe Ratto, Harold Gridley, Marion L. Toich, Richard Squires, W. N. Gentle, Ben Rosenberg, S. R. Longwell, A. C. Meade, F. Garibaldi, Wheeler Smith, Mary Schaafsma Kalish, F. Ericksen, D. Lewis, Al Guaspari, Bruce & Jones, a copartnership, Wilbert Madera, Barney Pollak, R. L. Manning, Elmer Granger, Frank Welch, and San Bruno Feed & Fuel Co., a copartnership.

IT IS HEREBY FURTHER ORDERED that this order is made wholly without prejudice to the right of any respondent to recover from respondents O'Brien and Rosenberg, or either of them, any additional sum or sums which may be due said respondents, or any of them, for the transportation of any excavated material from Hill No. 57 in South San Francisco to San Francisco Airport at Mills Field by any dump truck or trucks having a cubic capacity of over $3\frac{1}{2}$ cubic yards and less than $4\frac{1}{2}$ cubic yards.

IT IS HEREBY FURTHER ORDERED that said respondents Carl Newman, George Kalish, Leonard Madera, and Allan Wilson be and they are, and each of them is, hereby required to cease, desist, and refrain from offering, remitting, or giving to any shipper or consignee, his agent, servant, or employee, directly or indirectly, any commission or other consideration to induce such person to deliver to such highway carrier property to be transported.

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

Dated at San Francisco, California, this 25th day of Oct., 1937.

Walter H. ...
Leon ...
Frank ...
Robert ...
W. & C. ...

Commissioners.

EXHIBIT "A"

CARL NEWMAN:

826 hours at \$2.84	\$2,345.84
LESS amount actually received, 826 hours at \$2.25 per hour	<u>1,858.50</u>
Balance due:	<u>\$ 487.34</u>

LEONARD MADERA:

744 hours at \$2.84	\$2,112.96
LESS amount actually received, 744 hours at \$2.00 per hour	<u>1,488.00</u>
Balance due:	<u>\$ 624.96</u>

ALLAN WILSON:

67-1/2 hours at \$2.84	\$ 191.70
LESS amount actually received, 67-1/2 hours at \$2.25 per hour..	<u>151.88</u>
Balance due:	<u>\$ 39.82</u>

(EXHIBIT "A").