MM

Decision No. 53006

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations, rates and practices of FORTIER TRANSPORTATION COMPANY, a corporation.	Case No. 5658

OPINION AND ORDER ON PETITION FOR REHEARING

Fortier Transportation Company, a corporation (hereinafter called "Fortier") has filed its petition herein for rehearing, reconsideration, or in the alternative for oral argument en banc of Decision No. 52510. It takes no exception to any of the ordering paragraphs in said decision other than ordering paragraph 6 which requires Fortier to collect undercharges totalling $11,630.11 from Better Buy Wholesale Grocery Company of Fresno or from Market Grocery Company of Los Angeles. The facts are not in dispute. By Decision No. 42405, 48 Cal. P.U.C. 375, Fortier was granted a certificate to operate as a highway common carrier between the San Francisco Bay area and Fresno, the points involved in this proceeding. At the time it applied for its highway common carrier certificate, Fortier requested a restriction on its operating authority whereby it could not accept a shipment weighing less than 5,000 pounds unless transportation charges were computed on a basis of 5,000 pounds. On page 376 of said decision we find:

> "The reason for the 5,000 pound limitation, as explained by this witness [Fortier's general manager] is because of the fact that applicant has no desire to extend the proposed service into the less than carload field, which is now adequately covered by other carriers."

The restriction was granted over protestants' contention that the 5,000 pound restriction would take only the most desirable part

of the tonnage (p. 379). Fortier has a tariff of rates and charges on file with the Commission containing its rules and regulations, which it concedes and the Commission found that it violated with regard to split pickup shipments. Fortier Transportation Company Local Freight Tariff No. 1, Cal. P.U.C. No. 1, defines a split pickup shipment as "one consisting of several component parts tendered at one time and received during one day and transported under one shipping document from more than one consignor at more than one point of origin . . . the composite shipment weighing (or transportation charges computed upon a weight of) not less than 5,000 pounds, said shipment being consigned and delivered to one consignee at one point of destination and charges thereon being paid by the consignee when there is more than one consignor." The same tariff provides on Sixth Revised page 21, Rule No. 260-F, that "(b) For each split pickup shipment a single bill of lading or other shipping document shall be issued and at the time of or prior to the initial pickup the carrier shall be furnished with written instructions showing the name of the consignor, point or points of origin, and the destination and weight of the property in each component part of such shipment." Rule (c) provides that " . . . if shipping instructions do not conform with the requirement of paragraph (b) hereof, each component part of the split pickup shipment shall be rated as a separate shipment under other provisions of this tariff."

It appears without contradiction that shipments were tendered on different days and picked up on different days. No detailed written instructions were supplied by the shipper to the carrier at or prior to the initial pickup. Despite this, the shipments were treated by Fortier as component parts of a single shipment and so rated by it. The Commission found that since the shipments did not fall within Fortier's split pickup rule, each was an individual

shipment and rated each as such according to the rates published by Fortier in its tariff lawfully on file and in effect at the time of the shipments, subject to Fortier's self-imposed weight limitation of 5,000 pounds.

The Commission further found in Decision No. 52510 that since the tariff was not followed, Section 494 of the Public Utilities Code was violated. Fortier, although conceding that it violated its tariff rates, asserts for the first time in its petition for rehearing that since it also has a radial highway common carrier permit, it may operate both as a highway common carrier and as a radial highway common carrier carrying the same commodities between the same points. The necessary consequence of such an assertion would be that although it is obliged by law to charge neither more nor less than its tariff rates (Sec. 494 Public Utilities Code), it might properly choose to charge the minimum rates prescribed by the Commission for permitted carriers, which in the instant situation happen to be lower because charges on shipments weighing less than 5,000 pounds were computed on the basis of 5,000 pounds in accordance with tariff provisions.

In connection with Fortier's assertion, it is interesting to note the following from Decision No. 42405, 48 Cal. P.U.C. 375, 376, supra:

> "Applicant's General Manager testified that he had received numerous requests from shippers throughout the Valley [San Joaquin Valley] who used his service but desired a certificated service as being more responsive to their needs. He stated that wherever in this application authority is requested to provide a common carrier service, there will be no utilization of any other type of service, i.e., under contract or radial permits."

Even if applicant, through its general manager, had not so testified, Fortier would be precluded by law from operating both as a certificated carrier and as a radial highway common carrier of the

same commodities between the same points. In applying for and obtaining a certificate as a highway common carrier, Fortier unequivocally dedicated its service as a public utility to the public use between the points specified in its certificate. A radial highway common carrier is not a public utility. It is a common carrier other than a highway common carrier. (Sec. 3516 Public Utilities Code.)

Fortier contends that while Section 3542 of the Public Utilities Code prohibits the operation of a carrier both as a common and as a contract carrier of the same commodities between the same points, there is no such prohibition as to operations as a highway common carrier and as a radial highway common carrier. In enacting this section, the Legislature doubtless had in mind the fact that a highway common carrier operates between fixed termini or over a regular route (Sec. 213 Public Utilities Code) and that a bona fide highway contract carrier may also do so. It was to forestall the possibility of discrimination between a carrier's public and private service that the section was enacted. Doubtless, also, the Legislature saw no need of enacting a similar prohibition as to the operations of a radial highway common carrier, which cannot perform a transportation service between fixed termini or over a regular route and hence does not present the possibility of discrimination.

Fortier, being admittedly a highway common carrier of groceries between the San Francisco Bay Area and Fresno, must charge its filed tariff rates for such transportation--neither more nor less. This is a maxim of transportation.

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike." Pennsylvania Railroad Co. vs. International Coal Min. Co., 230 U.S. 184, 33 S. Ct. 893, 57 L. ed. 1446.

"It is a maxim of transportation that filed tariffs must in the first instance be strictly adhered to. They have the force of a statute and may be deviated from only upon the express authority of the Commission charged with the regulation of the carriers' rates." Investigation of Pacific Motor Tariff Bureau, 39 C.R.C. 551, 558.

In Louisville & N.R. Co. vs. Maxwell, 237 U.S. 95, 97; 59 L. ed. 853, 855, the United States Supreme Court, construing a provision of the Interstate Commerce Act very similar to Sections 494 and 532 of our Public Utilities Code, said:

"Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers . . . are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable." (Emp. sup.)

In the recent case of Alves vs. Public Utilities Commission, 41 C. 2d 344, 350, the Supreme Court, after reviewing the definitions of various types of carriers, considered the difference between radial and highway common carriage and stated: "The difference between two possible types of common carriage is dependent upon whether it is performed between fixed termini or over a regular route." The shipments in question were transported between the fixed termini and over the regular routes specified in Fortier's certificate. Hence, it could not, as a matter of law, have been the operation of a radial highway common carrier. One cannot at one and the same time operate between fixed termini and over a regular route (highway common carrier) and between unfixed termini and over an irregular route (radial highway common carrier) over the same route and between the same points. The two are mutually exclusive.

In Rampone vs. Leonardini, 39 C.R.C. 562, 569, the Commission, referring to highway common carriers, radial highway common carriers and highway contract carriers, said:

> "It is not unusual for a truck operator to engage in more than one of the above three types of trucking, nor is it unlawful so long as such operator does not transport the same commodities between the same points in more than one of said three types of truck operations."

Any other construction would lead to the possibility of a highway common carrier maintaining a different level of rates in its filed tariff than the rates prescribed by the Commission as minima for permitted carriers. If Fortier's contention were tenable, it might in the transportation of the same commodities between the same points pick and choose which rate it would accord a favored shipper. This concept would violate every provision of law against discrimination.

Fortier further urges that Decision No. 52510 be modified on equitable grounds. It states that the Commission has found the rates prescribed by it in Minimum Rate Tariff No. 2 to be just and reasonable as minima for highway carriers; that the Public Utilities Code (Sec. 451) provides that all charges demanded by any public utility shall be just and reasonable and that every unjust or unreasonable charge is unlawful. It points out that it is the purpose of the Highway Carriers' Act (Sec. 3502) to secure just and reasonable transportation rates to the people. It asserts that the shipper ought not be obliged to pay $14,515.34 for the transportation involved, the charges being computed by rating each shipment singly in the absence of compliance with split pickup rules, and subject to Fortier's weight limitation of 5,000 pounds, as provided in its tariff. It assigns as a reason for the assertion that the shipper could have obtained transportation of the commodities for $5,017.74 from other carriers without Fortier's

weight restriction, treating each component part of the shipments which improperly moved under a master freight bill as a single shipment and applying the rates found to be just and reasonable as minima under Minimum Rate Tariff No. 2. It states that if the requirements of the split pickup rule had been observed, Fortier could have properly charged $2,885.23, the amount it actually collected. It contends that if Decision No. 52510 is not modified, and if it must proceed to institute an action to collect $11,630.11 in undercharges from Better Buy, the latter in turn, should Fortier prevail in such action, might invoke Section 734 of the Public Utilities Code for the collection of reparations for the difference between $5,017.74, the charges under rates provided in Minimum Rate Tariff No. 2, and $14,515.34, the charges under the applicable rates and rules in Fortier's tariff.

It further contends that to compel Fortier "to charge Better Buy almost three times those rates for the same service is, of course, discriminatory."

The rates prescribed by the Commission under Minimum Rate Tariff No. 2 are minimum reasonable rates. Permitted carriers may, and often do, charge more. Highway common carriers are authorized to publish such rates in their tariffs as will not be lower in volume or effect than such minima. There is no prohibition against their publishing higher rates, nor against their voluntarily restricting their operations to certain weight limitations, as did Fortier. As stated hereinbefore, the tariff has the force of a statute, and binds shipper and carrier alike. Pennsylvania Railroad Co. vs. International Coal Min. Co., 230 U.S. 184, 33 S. Ct. 893, 57 L. ed. 1446.

However, certain circumstances in this case impel the equitable consideration of the Commission.

The record does not disclose that the shipper had actual knowledge of the weight restriction in Fortier's Tariff. Further, there is a great difference in charges which would result from rating each component part in the master freight bills as a single shipment, subject to the 5,000 pound weight restriction. While at law the shipper is as equally bound to pay as the carrier is to collect the applicable tariff rates, under the circumstances here disclosed, and considering but not passing upon the plea that the shipper might appropriately sue for reparations, thus resulting in a multiplicity of actions, the Commission concludes and finds that the ends of justice in this matter will have been subserved if Decision No. 52510 is modified to order Fortier to collect undercharges of $2,132.51, the difference between the $2,885.23 already paid Fortier and the charge of $5,017.74 which would have resulted from applying Fortier's own tariff rates without the 5,000 pound limitation. It is not our desire in this case to enrich a carrier which has violated its own tariff at the expense of a possibly innocent shipper. Further, by Decision No. 52877, dated April 10, 1956, the Commission has found that public convenience and necessity require the removal of the weight restriction in Fortier's tariff.

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that Decision No. 52510 be modified to provide that Fortier Transportation Company, within twenty days after the effective date hereof, shall institute and diligently prosecute proceedings to collect the amounts indicated upon Appendix A attached hereto from Better Buy Wholesale Grocery Company of Fresno, California, and from Market Wholesale Grocery Company of Los Angeles,

MM C-5658
D-52510

California, or from either of them.

This order shall become effective twenty (20) days from the date hereof.

Dated at San Francisco, California, this 1st day of May, 1956.

President

Commissioners.

APPENDIX "A"

Shipments Grouped Under Master Freight Bill No.	Charges Resulting From Rating Each Component Part as a Single Shipment Under Provisions of Minimum Rate Tariff No. 2	Amount Actually Collected Under Master Freight Bill	Amount to be Collected
198158	$ 579.37	$ 350.75	$ 228.62
198837	303.23	187.08	116.15
198581	345.02	198.71	146.31
198765	421.20	251.30	169.90
199428	443.15	234.11	209.04
200080	375.33	203.32	172.01
203288	325.80	190.80	135.00
202727	528.13	290.89	237.24
203178	366.39	200.61	165.78
204422	348.71	196.23	152.48
204517	600.09	374.94	225.15
205090	381.32	206.49	174.83
Totals	$5,017.74	$2,885.23	$2,132.51

Transportation taxes omitted from the above figures. Proper amounts for such taxes shall be calculated and collected by Fortier Transportation Company.