

ORIGINAL

Decision No. 54286

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the rates, operations,
practices and methods of HAYDEN W.
CHURCH.

Case No. 5700

Cyril M. Saroyan, Commission staff attorney.

Stephen Moneleone, for respondent.

E. O. Blackman; for California Dump Truck Owners
Association, interested party.

INTERIM OPINION

The Order Instituting Investigation herein, served on the respondent Hayden W. Church on December 1, 1955, recites that respondent is the holder of Radial Highway Common Carrier Permit No. 19-41578 and City Carrier Permit No. 19-41579; that it appears that respondent may have violated, or may be violating, the provisions of Item 94 of Minimum Rate Tariff No. 7, or other provisions of said tariff, in that during the year 1953 and thereafter said respondent, while acting in the capacity of an overlying carrier, may have employed underlying carriers (sub-haulers) at hourly rates to transport materials in dump trucks, while assessing the shipper zone rates (on weight basis) for such transportation, and may have made payment to said underlying carriers (subhaulers) in less than 95% of the applicable charges as provided for in Item 94 as aforesaid, and may thus

have been in violation of said tariff and of the provisions of the Public Utilities Code; that it further appears that respondent, while acting as an overlying carrier, may have paid the underlying carriers (subhaulers) less than 95% of the applicable rates as provided in Item 94 of Minimum Rate Tariff No. 7 for the transportation of materials in dump trucks by withholding from such underlying carriers six cents per ton on the basis of so-called "skiploader rental agreements," in violation of Minimum Rate Tariff No. 7; and that it further appears that respondent, while acting as a shipper, may have secured and may be securing dump truck transportation from carriers at less than the applicable minimum rates as provided in Minimum Rate Tariff No. 7, in violation of said tariff and of the provisions of the Public Utilities Code. On the foregoing allegations the Commission instituted an investigation into the rates, operations, practices and methods of respondent to determine:

- (1) Whether respondent has violated, or is violating any of the provisions of Minimum Rate Tariff No. 7, and more specifically Item 94 of said tariff, in that said respondent may have paid and may be paying the underlying carriers less than 95% of the applicable charges.
- (2) Whether respondent, as shipper, has obtained transportation at less than the minimum rates as provided in Minimum Rate Tariff No. 7, and in violation of the provisions of the Public Utilities Code.
- (3) Whether said respondent should be ordered to comply with the rules and regulations regarding payment to underlying carriers contained in Minimum Rate Tariff No. 7.

- (4) Whether respondent should be ordered to cease and desist from any or all unlawful operations and practices.
- (5) Whether any or all of the operating authority of respondent should be cancelled, revoked or suspended.
- (6) Whether to issue any other order or orders that may be lawful in the premises.

A public hearing on this matter was held in Los Angeles before Commissioner Rex Hardy and Examiner Kent C. Rogers on August 8, 1956. At the opening of the hearing a stipulation was entered into between the parties, upon which the matter was submitted subject to the filing by the parties of points and authorities in support of their respective positions. The last of these points and authorities was filed by the staff attorney on October 10, 1956. All points and authorities have been considered and the matter is ready for decision.

The records of this Commission show that respondent holds Radial Highway Common Carrier Permit No. 19-41578, first issued on May 15, 1950, and City Carrier Permit No. 19-41579, first issued on June 27, 1950.

At the hearing the parties introduced by stipulation a rate exhibit as Exhibit No. 1. The stipulation entered into is as follows:

"It is desired by all parties that the Commission rule on the legality of an overlying carrier assessing and collecting zone rates and paying subhaulers 95 percent of the hourly rate as established in Minimum Rate Tariff No. 7.

"It is stipulated that respondent did in fact pursue

this practice with respect to those carriers as shown in Exhibit No. 1, Part I.

"It is desired by all the parties that the Commission rule on the legality of an overlying carrier deducting a six cents per ton charge in addition to the normal five percent deduction authorized by Item 94 of Minimum Rate Tariff No. 7 as rental for the services of a skiploader furnished by an overlying carrier which was made available to the subhaulers for the purpose of reloading the stockpiled material for the alleged convenience of the subhaulers.

"Whether or not respondent had a right to deduct from subhaulers in addition to five percent deduction authorized in Item 94 of Minimum Rate Tariff No. 7 for rental of a skiploader for their alleged convenience in dumping at the job site is the question that the parties desire resolved.

"This practice is exemplified by Part II of Exhibit No. 1.

"It is stipulated in reference to Part III of Exhibit No. 1 (i.e., the Anza Street paving job) that the respondent accepts the statement of under-payments therein specified as correct and will pay to the respective carriers involved the said under-payments within thirty days from this date.

"Respondent will promptly furnish the Commission record proof of such remittances.

"It is agreed that the rate exhibit filed herein as Exhibit No. 1 correctly sets forth the alleged under-payments and that respondent will pay same when and in the event the

Commission orders payment thereof, subject to the reservation hereinafter set forth.

"It is further stipulated that this exhibit is not intended to constitute any other under-payments, if any, other than those stated therein but that a determination of other violations, if any, must be based upon the Commission's finding relative to tariff violations, if any, and after completion of an audit by respondent of his transportation operations subsequent to July 31, 1953.

"It is agreed that in the event the Commission finds the practices described herein are in violation of the Commission's Minimum Rate Tariff No. 7, respondent will diligently commence an audit of his transportation operations subsequent to July 31, 1953 and within 30 days commence monthly progress reports to the Secretary of the Commission regarding that audit.

"It is agreed that in the foregoing stipulation respondent reserves any and all legal rights of any nature whatsoever, including the right of appeal, if any, except as to evidentiary matter contained in Exhibit No. 1."

Respondent as shipper obtaining transportation at less than the Minimum rates as provided in Minimum Rate Tariff No. 7, and in violation of the provisions of the Public Utilities Code.

Part 3 of Exhibit No. 1 herein shows that during the period from May 1, 1954, to June 14, 1954, both days inclusive, respondent as shipper had shipments transported for which he paid \$1,342.04 less than the minimum charges prescribed by this Commission. The respondent stipulated, as hereinbefore set forth,

that this statement of undercharges is correct and that he will pay the respective carriers named in the exhibit the undercharges within thirty days after August 8, 1956. An order will be made in conformance with this portion of the stipulation.

Paying underlying carriers of 95% of the hourly rates and assessing and collecting zone rates from the shippers.

The parties stipulated that respondent, as overlying carrier, has been assessing and collecting zone rates and paying subhaulers 95% of the hourly rates as established in Minimum Rate Tariff No. 7. Part 1 of Exhibit No. 1 shows that for the month of July 1953 payments to subhaulers at the hourly rates totaled \$745.56 less than the payments would have been if they had been paid at the zone rates.

Item 94 Series of Minimum Rate Tariff No. 7, in effect in July 1953, and subsequently, provides as follows:

"Charges paid by an overlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall not be less than 95 percent of the charges applicable under the minimum rates prescribed by this tariff."

(Note: Since July 10, 1956, the gross revenue taxes applicable and required to be paid by the overlying carrier are deducted prior to the payment to the underlying carrier - Item 94-B).

Section No. 2 of Minimum Rate Tariff No. 7 sets forth distance rates. Both the Original Page 6 in effect in July, 1953, and First Revised Page 6, presently in effect, provide as follows:

"Rates in this section will not apply to trans-

portation of commodities from Production Areas to Delivery Zones for which rates are specifically provided in Section No. 3.

"Rates in this section will not apply where notice is given to the carrier of the shipper's intention to ship under the hourly rates shown in Section No. 4."

Section No. 3 of Minimum Rate Tariff No. 7 sets forth rates from production areas to delivery zones, i. e. zone rates. Both the Original Page 10 in effect in July 1953, and First Revised Page 10 presently in effect provide as follows:

"Rates in Section No. 2 will not apply to transportation of commodities from Production Areas to Delivery Zones for which rates are specifically provided in this section.

"Rates in this section will not apply where notice is given to the carrier of the shipper's intention to ship under the hourly rates shown in Section No. 4."

(Note: No question concerning the giving of notice as above stated is involved herein).

Section No. 4 of Minimum Rate Tariff No. 7 sets forth hourly rates. The First Revised Page 39 in effect in July 1953, provided as follows:

"Rates in this section for transportation within Southern Territory will apply only when notice is given to the carrier, before the transportation commences, of the shippers' intention to ship under such rates. When such notice is given, rates in Sections Nos. 2 and 3 will not apply."

(Note: Third revised page 39 presently in effect specifies a "notice in writing.")

It is obvious from the plain language of Minimum Rate Tariff No. 7 that the carrier does not have his choice of rates.

If, as in the instant case, the shipment is in the Southern Territory and is between a production area and a

delivery zone, the carrier, in the absence of a notice by the shipper of his intention to ship under hourly rates, must assess the zone rates. He has no choice in the matter and the Section 3 rates are the charges applicable to the movement.

Item 94 Series of the tariff provides that the overlying carrier must pay the underlying carrier "95% of the charges applicable under the minimum rates prescribed by this tariff." This is plain language. It means that the overlying carrier must pay the underlying carrier 95% of the minimum charges the overlying carrier collects pursuant to the applicable portion of the tariff. If this were not so the word "applicable" would have no meaning, and each word of the tariff provision must be considered in determining the effect thereof.

We find and conclude that the respondent as an overlying carrier may not, pursuant to Minimum Rate Tariff No. 7, assess and collect zone rates from the shipper and pay his sub-haulers 95% of the hourly rate, and that such practice is a violation of Item 94 Series of said tariff. Respondent will be required to reimburse the subhaulers listed in Part I of Exhibit No. 1 in the amounts set forth in Appendix A herein.

May the respondent deduct from subhaulers in addition to the five percent deduction authorized by Item 94 Series of Minimum Rate Tariff No. 7, a charge of six cents per ton for rental of a skip loader for their alleged convenience in dumping at the job site?

Part 2 of Exhibit No. 1 shows that respondent, during the months of May and June 1954, deducted from the amounts he paid five subhaulers a total of \$822.81 for the rental of a

skiploader. From the wording of the heretofore referred to stipulation it appears that these deductions arose from the fact that the respondent made available to the subhaulers a skiploader for the purpose of reloading stockpiled material, charged them six cents per ton for this service, and deducted the amount due under this arrangement when paying the subhaulers the 95% of the minimum rates due them.

In his "points and authorities" respondent asks the Commission to make three assumptions: (1) that the charge of six cents per ton was a reasonable charge for the skiploader; (2) that the said amount was agreed upon by the overlying carrier and subhaulers; and (3) that it was furnished to the subhaulers for their convenience. These facts, if they are facts, are not before the Commission. We are only concerned with the question of whether or not the respondent may offset the amounts he must pay to subhaulers with amounts the subhaulers owe him.

Item 47-B of Minimum Rate Tariff No. 7 provides as follows:

"Rates or accessorial charges shall not be quoted or assessed by carriers based upon a unit of measurement different from that in which the minimum rates and charges in this tariff are stated."

All rates and charges in Minimum Rate Tariff No. 7 are set forth in cents per ton (Sections 2 and 3) or cents per hour (Section 4).

Item 94 Series of Minimum Rate Tariff No. 7 provides that charges paid by any overlying carrier to an underlying carrier and collected by the latter carrier from the former for

the service of said underlying carrier shall be not less than 95% of the charges applicable under the minimum rates prescribed in this tariff.

It is thus apparent that all payments by a shipper to the carrier must be in cash, and the payment to the underlying carrier must also be in cash. If the respondent is to be permitted to offset the required cash payment by a debt over which this Commission has no control it is obvious that the respondent is thus enabled to defeat the purpose of the tariff in requiring the payment of 95% of the rates to the underlying carrier. The alleged offset here involved is not within our jurisdiction. We find and conclude that the respondent may not deduct from payments due to subhaulers under Item 94 Series of Minimum Rate Tariff No. 7 debts allegedly due to the respondent from its subhaulers for services performed by the respondent for the subhauler and that such deductions are in violation of said Item 94 Series of Minimum Rate Tariff No. 7. If there are any such offsets, such must be handled in a separate transaction. In this connection respondent's attention is directed to the provisions of Article 10 of Chapter 1 of Division 2 of the Public Utilities Code. Respondent will be required to reimburse the subhaulers listed in Part 2 of Exhibit No. 1 in the amounts set forth in Appendix A herein. Also he will be required to audit his transportation operations and make similar payments to all other subhaulers who performed subhauling for him. The Commission will retain jurisdiction of this proceeding to see that these directions are carried out and to make such further order or orders as may appear necessary.

INTERIM ORDER

A public hearing having been held in the above-entitled matter and it having been submitted for decision, the Commission

being fully advised and basing its order upon the findings and conclusions contained in the foregoing opinion,

IT IS ORDERED:

(1) That within thirty days after the effective date hereof respondent Hayden W. Church shall pay to the carriers and sub-haulers listed on Appendix A, attached hereto, the amounts set forth in said Appendix following their respective names, and within ten days after said thirty-day period shall present proof of such payment to the Secretary of this Commission.

(2) That respondent Hayden W. Church shall forthwith commence an audit of his transportation operations subsequent to July 31, 1953, and, within thirty days after the completion of said audit, but not later than ninety days after the effective date of this order, shall pay to all subhaulers who performed subhauling for respondent, and to all carriers who performed services for respondent, all undercharges shown to have occurred between July 31, 1953, and the effective date of this order, and shall submit to the Commission a full report of all payments made.

(3) That from and after the effective date of this order all payments made by respondent to subhaulers or carriers pursuant to Minimum Rate Tariff No. 7 shall be in strict conformance with the terms of said tariff as interpreted by this Commission in the opinion herein.

(4) That this proceeding remain open for such further order or orders as the Commission may deem appropriate in the exercise of its jurisdiction.

The Secretary is hereby directed to cause service of a certified copy of the decision to be made upon Hayden W. Church.

This decision shall become effective on the 20th day after the date of such service.

Dated at San Francisco, California, this 18th day of December, 1956.

[Signature]
President

[Signature]

[Signature]

[Signature]

[Signature]
Commissioners

APPENDIX A

<u>Name</u>	<u>Exhibit No. 1</u>	<u>Amount due from Hayden W. Church</u>
Guy Badger	Part 1	\$ 361.66
R. M. Tait	" "	154.03
Pauline Burgess	" "	229.87
E. A. Lipp	Part 2	335.74
Dwight D. Duteau	" "	77.05
J. K. Harrison	" "	138.20
Mrs. A. M. Kerr	" "	200.64
Pauline Burgess	" "	71.18
Marion G. Floyd	Part 3	84.91
John Preuss	" "	282.20
Pauline Burgess	" "	169.55
Howard G. Lewis	" "	2.87
A. M. Kerr	" "	398.49
Donald V. Powell	" "	48.45
E. A. Lipp	" "	263.76
J. K. Harrison	" "	36.22
Lester F. Foshee	" "	2.55
LeRoy Christiana	" "	53.04