ET

Decision No. 57597

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of CULY TRANSPORTATION CO., INC., a California corporation.	)))))	Case No. 6062

Harold F. Culy, George K. Haas, and Berol & Silver, by Bertram S. Silver, for respondent.
Hugh N. Orr and G. B. Dill, for the Commission staff.

O P I N I O N

On February 25, 1958 this Commission issued an order of investigation into the operations, rates and practices of Culy Transportation Co., Inc., a California corporation, which is engaged in the business of transporting property over the public highways as a highway common carrier, radial highway common carrier and as a highway contract carrier. The purpose of this investigation is to determine whether the respondent has acted in violation of Sections 494 and 3667 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser compensation for the transportation of property than the applicable charges prescribed by its own common carrier tariff and the Commission's Minimum Rate Tariff No. 2.

Public hearings were held in San Francisco on May 21, 27 and June 6, 1958, before Examiner James F. Mastoris.

Staff's Contentions

The Commission's staff contends and offered evidence in support thereof that this carrier did, subsequent to its receipt of a certificate of public convenience and necessity in March 1957, rate certain multiple lot shipments carried by it as split pickup shipments when such shipments should have been rated as separate shipments. The evidence adduced shows that the respondent

participates in California Carrier Motor Freight Local and Joint Tariff No. 1, Cal. PUC No. 1, issued by Interstate Freight Carrier Conference, Inc., which, among other things, contains a definition of a split pickup shipment,[1] rules and regulations applicable to separate shipments[2] and to split pickup shipments.[3] The Commission's Minimum Rate Tariff No. 2 consists of identical language in its definition of split pickup and its rules and regulations regarding separate and split pickup shipments.[4]

1/ Item 5(I).
2/ Item 940.
3/ Item 944.
4/ Item 11 - "SPLIT PICKUP SHIPMENT means a shipment consisting of several component parts, tendered at one time and received during one day and transported under one shipping document from (a) one consignor at more than one point of origin, or (b) more than one consignor at one or more points of origin, the composite shipment weighing (or transportation charges computed upon a weight of) not less than 4,000 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."

Item 60 - "Each shipment shall be rated separately. Shipments shall not be consolidated or combined by the carrier. (Component parts of split pickup or split delivery shipments, as defined in Item No. 11 may be combined under the provisions of Items Nos. 160, 170, 220 and 230.)"

Item 160 - "The rate for the transportation of a split pickup shipment shall be determined and applied as follows,....

"(a) Distance rates shall be determined by the distance to point of destination from that point of origin which produces the shortest distance via the other point or points of origin.

"(b) Point-to-point rates shall be applied only when point of destination and all points of origin are within the territories between which the point-to-point rates apply, or are located between said territories on a single authorized route.

"(c) Point-to-point rates determined under paragraph (b) may be combined with distance rates provided in paragraph (a) where lower charges result. The applicable distance rate factor shall be determined by use of one-half the shortest distance from the territory or authorized route and return thereto via the off-route point or points of origin and destination.

"(d) 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, the point or points of origin and the description and weight of property in each component part of such shipment.

"(e) If split delivery is performed on a split pickup shipment or a component part thereof, or if shipping instructions do not conform with the requirements of paragraph (d) hereof, each component part of the split pickup shipment shall be rated as a separate shipment under other provisions of this tariff."

Five shipments which were transported by the respondent for Safeway Stores, Inc., from San Francisco Bay Area points to Los Angeles in August, September and October 1957 are the particular shipments assailed by the staff. Shipping documents involving this transportation and received into evidence disclosed that a Master Bill of Lading was prepared which contained what appeared to be a description of multiple lots of commodities transported by the respondent on the day listed on the face of said Bill of Lading. Supporting shipping orders affixed to said Bill of Lading indicate, however, that many of the shipments supposedly picked up on the day mentioned on the Bill of Lading were in fact picked up on days varying from one day to as many as seven days from said date.[5/] On many of the various shipping orders no pickup date appears anywhere on the face thereof. On many there appears to be no signature indicating that a truck driver of the respondent picked up or receipted for the delivery of the goods to him. There were, however, sufficient orders in each separate instance to show the different pickup dates.

Because said documents indicate that portions of a purported split pickup shipment were in fact picked up on different days it is alleged that said carrier violated the regulations of Item 60 of the Minimum Rate Tariff No. 2 with respect to its permitted carriage and said Item 940 of its own tariff when it rated these five shipments as split pickup shipments. As a result Culy assessed Safeway and collected charges therefor for an amount less than the amounts required by the above-mentioned applicable tariffs effective for a separate shipment at the times the shipments were transported. Undercharges allegedly totaled $648.25.

5/ Exhibits Nos. 1-5.

Position of Respondent

The respondent's position is basically fourfold. First it alleges there were no violations at all because the aforementioned tariff rules and regulations are susceptible of interpretations other than the one advanced by the staff. Secondly, assuming there were violations the staff has not proved them by the evidence. In this respect it is argued that the staff has the burden of proving that the alternative rail rate provisions of the Item 200 Series of Minimum Rate Tariff No. 2 cannot be utilized as to the assailed permitted shipments. It is alleged that such burden has not been met with the evidence offered. Moreover, it is further contended that the evidence indicating that the carrier was served with the pertinent additions and supplements to Minimum Rate Tariff No. 2 was deficient in that it does not show service of the particular changes to the sections of the tariff in issue.

The respondent's fourth contention is more in the nature of an argument in mitigation of the alleged violations rather than an attack upon the staff's proof. Assuming, but not conceding, that violations occurred and that they were proved by the evidence produced, Culy declares that suspension of its operative rights for either a 3 or 5 day period would result in irreparable harm to it and to its employees. In this connection substantial documentary evidence was presented by the respondent indicating the severe, and perhaps disabling, hardship that would occur if such suspension were ordered by the Commission. It is alleged that the tariffs in question are exceptionally technical in character and as a result extremely difficult to apply. Most truck operators, without the services of rate experts, have a difficult time understanding the

tariff, much less attempting to apply the correct rates. However, even with this limitation the vast majority of this carrier's shipments during the period in question were correctly rated; in fact the violations charged by the staff amounted to one-fourth of one percent of the total shipments carried by the respondent in August and September 1957.[6] Such indicates that the respondent's record of close observance of the tariffs is good and that the misratings in question were probably caused by understandable errors in applying the rules.

Because the respondent is a large trucker with over 350 shippers, qualifying as a Class I motor carrier with revenues totaling over a million dollars a year, a single day's suspension amounts to substantial economic loss. At present its financial condition is weak and even five days' suspension could force it out of business. Each year its operating ratio has been increasing; as of April 30, 1958 it was suffering a net loss of $23,937.[7] In 1957 it lost over $6,000 while in 1956 its net loss amounted to $40,771. Further evidence was produced disclosing that five days' suspension would cause a probable loss of $4,800 in fixed expenses[8] and an anticipated loss of approximately $14,000 in revenue. It is also alleged that no accurate prediction can be made as to the potential loss of customers who may be forced to use other carriers during the period of suspension and who would not return to Culy after the said suspension has terminated. In addition such suspension would result in a loss of earnings to 60 employees amounting to approximately $6,042.[9] The cost of defending this action before the Commission amounts to approximately $2,500.

6/ Exhibit No. 11
7/ Exhibit No. 10
8/ Exhibit No. 14
9/ Exhibit No. 15

Furthermore, it is argued that the evidence shows that there was no intent by Culy to violate the law or to misrate any shipments. If such a design were evident the pattern of shipments on any given day during the period in question would be conducive to many unlawful combinations of multiple lot shipments resulting in lower than minimum rates.[10/]

Findings and Conclusions

Sections 3664 and 3667 of the Public Utilities Code declare that permitted carriers shall not charge or collect rates or charges "less than the minimum rates" established by the Commission. In view of the provisions of the Item 200 Series in Minimum Rate Tariff No. 2 the "minimum rate" may, under the circumstances specified therein, be the appropriate common carrier rate. Thus, the burden of proving that the alternative application of these common carrier rates would not apply is upon the staff and not the respondent. The Highway Carriers Act does not provide that said alternative application is an exception which places the burden on the respondent. However, the record indicates that the staff's witness declared that said alternative application was considered but rejected. Such testimony establishes at least a prima facie case on this portion of the staff's general burden of proof and shifts the burden of going forward with contradictory evidence to the respondent. But its evidence on this point was lacking. It offered no evidence that the Item 200 Series could or did apply to the rating of these shipments. Mr. Culy on the witness stand said in effect that he believed the alternative application of common carrier rates could apply but nothing to support this statement was offered. Accordingly, we find that the staff's evidence on this contention is legally sufficient.

10/ Exhibit No. 13

However, Culy's contention that there was a failure to show service of tariff changes upon the respondent has considerable merit. Section 3733 of the Public Utilities Code reads:

> "Service of all process and orders, decisions and orders, orders and notices in all such proceedings, investigations, complaints and hearings may be made personally or by the deposit in the United States mail of a sealed envelope with postage prepaid, containing a true copy of the paper to be served and addressed to the person to be served at his last known address as shown by the records of the Commission."

Section 3734 provides:

> "Service by personal delivery is complete upon delivery to the person to be served of a true copy of the paper to be served. Service by mail is complete upon the expiration of four days after the deposit of the notice."

Section 3735 states:

> "Proof of service may be made by the certificate of any officer or employee of the commission or the affidavit of any person over the age of 18 years, naming the person served and specifying the time,place, and manner of service."

Section 3737 provides:

> "Upon the issuance by the commission of any decision or order made applicable to a particular class or group of carriers, or to particular commodities transported or areas served, the commission shall serve a copy of the decision or order without charge upon each affected. Upon the issuance of a permit to operate as a highway carrier, the commission shall serve without charge upon the carrier a copy of each tariff, decision, or order previously issued that is then applicable to the class or classes of transportation service the carrier intends to perform. Each carrier shall observe any tariff, decision, or order applicable to it after service thereof."

In People v Alves, 1954, 123 CA(2) 735 the District Court of Appeal declared that the above Code provisions require that there be proof of service of copies of decisions or orders the carrier is charged with violating and that Section 3735 requires that such proof be made by the certificate referred to in that section along with a certified copy of the Commission records showing the mailing

of the appropriate decisions. It was stated that the certified copy of the record was necessary in order that the documents qualify as official documents under Section 1918 (6) of the Civil Code of Procedure. The entries would be prima facie evidence of the facts stated (CCP 1920 and 1926).[11/]

Exhibit No. 6 introduced by the staff consists of two documents physically attached to each other. The first is titled "Certificate of Service" and declares that copies of certain decisions were deposited in the mail addressed to the respondent. The second page is titled "Tariff Record" and contains what purports to be a list of tariffs, and additions and supplements to tariffs supposedly served upon Culy Transportation Company. However, the record is not certified as required by the Alves decision nor does the particular addition and supplements to Minimum Rate Tariff No. 2, referring to changes in Split Pickup definition, separate shipments and Split Pickup rules, appear to have been served upon this carrier. The respondent may have been in fact served with these changes but the record does not show it.

Accordingly, Exhibit No. 6 is defective. We do not believe that even with the taking of official notice along with a liberal interpretation of the aforementioned sections in conjunction with the presumptions of Civil Code of Procedure Section 1963 could it be presumed that this particular carrier was served the controlling changes. Moreover, a presumption of service based upon such Code sections was dispelled when the staff in whose favor it operated introduced evidence (Exhibit No. 6) which in effect was contrary to the fact presumed. (Mar Shee v Maryland Assur. Corp. (1922)

11/ See also: Peo v Hadley (1924) 66 CA 370,379
In re Bray, 125 CA 363
34 Cal Jur (2) p. 578

190 Cal 1; Chakmakjian v Lowe (1949) 33 Cal(2) 308) However, it is our opinion the error is not fatal to the staff's case. It is difficult to believe that the respondent was materially prejudiced by this evidence because the definition and rules on separate and split pickup shipments were not changed in substance from the provisions in the original tariffs received by the carrier. Moreover, respondent's objection to this evidence was upon grounds other than the above-mentioned defects.[12/]

Culy's position that the rules and regulations regarding separate and split pickup shipments are susceptible to different interpretations has particular significance in view of the character of this proceeding. Such rules and regulations of the Commission have the effect and force of law[13/] and it is reasonable that the usual and ordinary rules of statutory interpretation should apply to them. Proceedings instituted on the Commission's own motion, such as this case, are basically disciplinary in nature because the penalties that might flow from the Commission's decision may result in suspension or revocation of operative rights granted by the State. The burden of proof is upon the staff to prove the charges made.

The "one-day" provision of the split pickup and split delivery has been with the trucking industry as far back as 1931 when Valley Express provided for split deliveries in its tariff.[14/]

12/ Peo v Alves, supra, p 739
Ford v Civil Service Comm. (1958) 161 ACA 754, 758

13/ Langazo v San Joaquin L&P (1939) 32 CA(2) 678,683
Morris v Sierra Power Co. 57 CA 281
Art XII, Cal Const. Sec.2223
41 Cal Jur(2) p 270
2 Cal Jur(2) pp 47, 107,109

14/ Valley Express Company Local Express Tariff No. 1-C, C.R.C. No. 5). See also: Valley Express v Carley & Hamilton (1938) 41 CRC, 327, 339.

In one of the earliest cases establishing minimum rates for permitted carriers (39 C.R.C. 703, Decision No. 28761, dated April 27, 1936 in case No. 4088, Part "A") the Commission considered the elements of split pickup and deliveries but it appears did not require the "one-day" feature (pages 15, 20, 24, 26, 27) in its definition (pages 24, 27) or emphasize it in its list of conditions. Eventually the requirement that the shipments be received in one day found its way into the basic definition when the Highway Carriers' Tariff No. 2 became effective on August 7, 1939. The history of Item 60 shows no change in its provisions while the controlling section of Item 160 came into the tariff in September 1954.

The staff's construction of the split pickup provisions is, and has been, in this type of proceedings traditionally uniform and basically simple in application. If the alleged multiple lot movements do not qualify as a split pickup shipment as defined in Item 11 then Section 60 applies and all component parts are rated as separate shipments regardless of when they are picked up. Item 160 is not applicable because this section sets forth rules and regulations governing conceded split pickup shipments. As the shipments do not qualify as split pickups because one element of the definition ("received during one day") is missing they cannot come under such provisions. This is a logical and entirely reasonable interpretation which this Commission has universally followed in the past.

However, respondent placed a different, and not unreasonable, interpretation on the meaning of these three sections. Under this construction only those parts of the alleged split pickup shipment which fall on separate days are rated separately under Item 60; all those components picked up in one day are given split pickup treatment. In other words, all the components are severable

and not indivisible. For example, in a seven part purported split pickup shipment those parts picked up in one day could enjoy the split pickup privileges, while single shipments picked up on other days would be rated as separate shipments.

Many possible reasons can be advanced for the emergence of such an interpretation. They may vary from what rules of statutory construction are to be applied to the language of the consequences for failure to qualify as a split pickup as contrasted with the consequences for failure to comply with the requirements of Item 160, to what weight should be given to the historical development and the aforementioned background of these sections. Regardless of how it is to be legally justified or explained the fact remains that it is another interpretation that cannot be disregarded.

It apparently developed because of the business necessities and practices of the shippers. Split pickup and delivery privileges with the resultant lower rates are basically designed for the benefit of the shippers; the carriers would gladly handle freight with the higher rates of separate shipments. Therefore it is argued that when the shipper does all that is possible in arranging the component parts for a split pickup he should not be penalized if for some reason, other than his own, the shipments are not all picked up in one day. In many cases the shippers have the freight on the loading platforms at the various pickup points all ready to be loaded into the trucks in one day. However, because of truck breakdowns on the road, delay in arrival, miscalculation by the carriers' dispatchers of weight, volume or tonnage capacity all of the shipments cannot be received on the carrier's vehicles in one day. In addition the freight sometimes cannot be picked up in one day because of the physical impossibility as a result of the distance involved. There

are frequently mistakes by the drivers in leaving part of the shipments on the dock or misjudging the space available. If the balance of the shipments that were picked up without incident are disqualified because one or two shipments could not be received in one day as a result of one of the above reasons, then innocent shippers are being punished with higher rates for reasons beyond their control.

The evidence in this case clearly indicates that the foregoing interpretation of Items 11, 60 and 160 is a reasonable one. The staff's own expert witness declared in cross-examination that he would rate a purported split pickup shipment in the manner described. Although he later went back on the witness stand and changed his opinion we cannot disregard the substantial conflict in the evidence. Moreover, other staff experts came to the same conclusion. Exhibit No. 8 is a rate statement of these shipments, prepared by other rate experts of the staff, which was not introduced by the staff but by the respondent. Such clearly shows that those parts of the aggregate shipments picked up in one day are given the split pickup charges while the balance is not. (See Exhibit No. 8 page 2 of each summary of each document in question.) Furthermore, shipper witnesses testified in complete support of such an interpretation.

Such evidence creates a substantial doubt in our minds that there is only one reasonable interpretation. The evidence of the staff is far from clear and convincing. It is our opinion that where the language of the rules and regulations of this Commission is susceptible of two constructions that construction which is more favorable to the shipper should be adopted. Accordingly, under the particular facts of this case we cannot accept the staff's contentions as to the alleged violations.

Our conclusion, however, affects only the amount of undercharges; the multiple lots of each purported split pickup could not be treated as one single shipment as was done by the respondent. The following table, therefore, sets forth our conclusions concerning the correct charges that should have been assessed and the resulting undercharges and overcharges:

Frt. Bill No.	Date	Point or Origin	Point of Destination	Wt. in Pounds	Charge Assessed by Respondent	Correct Minimum Charge	Undercharge
01452	8/ 2/57	Various	Los Angeles	46,125	$262.13	$325.97	$ 63.84
01573	8/ 9/57	Various	Los Angeles	42,030	218.38	233.97	15.59
02321	9/26/57	Various	Los Angeles	31,652	169.46	264.10	94.64
02218	9/18/57	Various	Los Angeles	38,230	213.43	282.91	69.48
02367	9/30/57	Various	Los Angeles	32,325	181.06	281.99	100.93

Said undercharges amount to $344.48.

Rate violations, regardless of whether they are deliberate or caused by negligence, have a disturbing economic impact upon the trucking industry. This is so even when the percentage of violations is small as compared to the total freight moved. The burden is upon the carrier to rate correctly. Therefore, in view of all the circumstances, including respondent's exhaustive evidence as to its present financial condition and the economic consequences of suspension, respondent's operating rights will be partially suspended. It would not be in the public interest to suspend all the operating authority of this carrier. Accordingly, the highway common carrier, the radial highway common carrier and the highway contract carrier operating authority of Culy Transportation Co., Inc., will be suspended to the extent that said respondent will be prohibited from serving the shipper involved in this matter, Safeway Stores Inc., for a period of 15 days. In addition, it will be ordered to collect the undercharges hereinbefore found and will also be instructed to examine its records from April 1957 to the present time in order to determine if any additional undercharges have occurred and to file with the Commission a report setting forth the additional undercharges, if any, it has found. Respondent will also be directed to collect any such additional undercharges.

Our finding in this case must be understood in light of the foregoing opinion and the particular evidence controlling this proceeding. Future purported split pickup shipments shall be rated in the manner contended for by the staff in this case unless and until the sections in issue are revised and clarified.

O R D E R

Public hearings having been held in the above-entitled matter and the Commission being fully informed therein, now, therefore,

IT IS ORDERED that:

(1) Commencing at 12:01 a.m. on the third Monday following the effective date hereof, Culy Transportation Co., Inc., whether operating as a highway common carrier, radial highway common carrier or as a highway contract carrier, shall not serve Safeway Stores, Inc., or its successors or agents, either as consignees or consignors for a period of fifteen days. This prohibition shall be considered as a partial suspension of this respondent's certificate of public convenience and necessity to operate as a highway common carrier and its permits to operate as a radial highway common carrier and as a highway contract carrier.

(2) At least ten days before the suspension period commences Culy Transportation Co., Inc., shall send written notice to Safeway Stores, Inc., notifying this shipper of its suspensions and the period thereof and shall post at its terminals and station facilities used for receiving property from the public for transportation a notice to the public stating that its highway common carrier,

radial highway common carrier and highway contract carrier operating authority have been suspended as set forth in paragraph (1) hereof.

(3) Culy Transportation Co., Inc., shall examine his records for the period from April 1, 1957, to the present time for the purpose of ascertaining if any additional undercharges have occurred other than those mentioned in this decision.

(4) Within ninety days after the effective date of this decision, Culy Transportation Co., Inc., shall file with the Commission a report setting forth all undercharges found pursuant to the examination hereinabove required by paragraph (3).

(5) Culy Transportation Co., Inc., is hereby directed to take such action as may be necessary to collect the amounts of undercharges set forth in the preceding opinion, together with any additional undercharges found after the examination required by paragraph (3) of this order, and to notify the Commission in writing upon the consummation of such collections.

(6) That in the event charges to be collected as provided in paragraph (5) of this order, or any part thereof, remain uncollected one hundred twenty days after the effective date of this order, Culy Transportation Co., Inc., shall submit to the Commission, on the first Monday of each month a report of the undercharges remaining to be collected and specifying the action taken to collect such charges and the result of such action, until such charges have been collected in full or until further order of this Commission.

(7) The Secretary of the Commission is directed to cause personal service of this order to be made upon Culy Transportation Co., Inc., and this order shall be effective twenty days after the completion of such service upon the respondent.

Dated at San Francisco, California, this 10th day of November, 1958.

President

Commissioners