

Decision No. 62291

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations,)
 rates, charges and practices of)
 C. G. WESTLUND, an individual,)
 doing business as WESTLUND TRUCKING.)

Case No. 7071

C. G. Westlund, for himself, respondent.

Paul M. Hogan, for the Commission staff.

O P I N I O N

On March 7, 1961, the Commission issued its order of investigation herein into the operations, rates, charges and practices of C. G. Westlund, respondent, an individual doing business as Westlund Trucking, to determine:

1. Whether respondent, as a highway permit carrier, may have charged and collected a lesser rate than the minimum rate established by the Commission by Minimum Rate Tariff No. 2 in violation of Section 3664 of the Public Utilities Code, and may have charged and collected compensation for the transportation of property based on a unit of measurement prohibited by Item No. 257 contained in Minimum Rate Tariff No. 2.

2. Whether respondent may have, by the device of a so-called leasing arrangement, permitted Hopper Machine Works, Inc., to obtain transportation for property between points within the State of California, at less than the minimum rates then established or approved by this Commission by Minimum Rate Tariff No. 2, in violation of Section 3668 of the Public Utilities Code.

3. What action should be taken by this Commission if respondent has violated either Section 3664 or Section 3668 of the Public Utilities Code, or both of said sections.

Public hearing in this matter was held before Examiner Wilson E. Cline in San Francisco on May 11, 1961. At the close of the hearing the matter was taken under submission.

It was stipulated that at all times concerned in this proceeding the respondent held Radial Highway Common Carrier Permit No. 15-5172 and Highway Contract Carrier Permit No. 15-6034; that on November 16, 1959, at the request of respondent both permits were suspended for a period of one year and they have not been reinstated; and that respondent was served with a copy of Minimum Rate Tariff No. 2 and Distance Table No. 4 and supplements thereto.

The Commission staff transportation representative testified that in 1958 he became generally acquainted with respondent's operations under his carrier permits. At that time respondent operated two tractors, three flatbed semitrailers and one pole dolly. Ninety-five percent of his operations were for Hopper Machine Works. Most of the shipments which consisted of steel, steel products, wiping rags, and aluminum products originated in the Los Angeles area and were destined for delivery at Hopper Machine Works plant in Bakersfield.

The trucking equipment was owned by respondent who generally operated and managed his trucking business. The trucks were kept at the Hopper Machine Works yard in Bakersfield.

On April 3, 1954, respondent was issued an undercharge letter which showed undercharges of \$33.14. As a result of an admonishment conference conducted July 30, 1957, Westlund collected \$1,543.25 in undercharges from Hopper Machine Works.

Thereafter, respondent leased his equipment to Hopper Machine Works under a written lease agreement executed June 16, 1959. A copy of this lease was mailed to Mr. R. B. Hayes of the Commission

Transportation Division by letter dated August 7, 1959. A revised lease dated November 30, 1959, incorporating certain suggestions of the Commission staff was transmitted to Mr. R. B. Hayes by letter dated December 14, 1959. Both leases were prepared by attorneys for Hopper Machine Works. According to the testimony of respondent, Mr. Hayes told him he would be advised if any provisions of the lease agreement were not satisfactory, but respondent received no suggestions for further revision of the lease agreement. After the lease agreements were executed no shipments were handled on respondent's trucks for anyone other than Hopper Machine Works.

The principal issue before the Commission is whether the lease of trucking equipment involved herein is a device used by the carrier unlawfully to evade regulation. In resolving the question, it is necessary to examine both the provisions of the lease and the conduct of the parties with respect thereto.

Provisions of the Lease

The lease dated June 16, 1959, is for a term of one year commencing on December 1, 1959, and ending on November 30, 1960. The lease is automatically renewable for four successive years; provided that if either party does not desire that the lease be renewed he may so notify the other party in writing thirty days prior to the renewal date. The trucking equipment of respondent covered by the lease includes two diesel trucks, four trailers and one pole dolly.

The rental for the trucking equipment is computed on a use basis at the rate of \$12.75 per hour for each truck and trailer combination (or truck and pole dolly combination). Time spent in operating the equipment empty to accomplish the transportation of lessee's goods and merchandise in accordance with lessee's

instructions is considered as time operated to transport lessee's goods and merchandise.

Breakdown time in excess of one-half hour for each breakdown and waiting time in excess of two hours at any stop where lessee's goods and merchandise are picked up and delivered are not treated as time that the equipment is used to transport lessee's goods and merchandise. There is a minimum monthly rental of \$3,000 for the trucking equipment covered by the lease.

The agreement provides that respondent shall furnish the drivers without further consideration. If any driver furnished by respondent is not satisfactory to lessee, the respondent upon written demand is required to replace such driver. If the respondent fails to furnish adequate drivers they may be furnished by lessee and the cost shall be deducted from the rental payments. All drivers, whether hired and paid by respondent or by lessee, are required to follow directions of respondent only with respect to maintenance of the equipment. With respect to all other matters, and particularly with respect to the operation of the equipment, the drivers are under the exclusive control and supervision of lessee.

The lessee, at its expense, provides for the gasoline, oil and other supplies necessary to operate the equipment.

The respondent is required at his expense, to maintain the equipment in good condition and repair at all times. The control of the equipment is exercised exclusively by the lessee except that respondent has control over the equipment during its maintenance and repair.

Respondent is responsible for any loss or damage to the equipment and is required to carry adequate insurance against loss

or damage to said equipment by reason of fire, theft or collision. The lessee is responsible for any loss or damage to cargo transported on the equipment and may at its option carry cargo insurance.

The lessee is required to carry, for the benefit of itself and the respondent, public liability and property damage insurance. The respondent is required to carry workmen's compensation insurance covering his employees operating the equipment.

The lessee is free to transport any of its goods or merchandise on other equipment or by any other means.

The lease may be terminated upon default of either party and is automatically terminated upon the death of the respondent or in the event of his mental incapacity. In the event the lease is assigned by either party, either voluntarily or by operation of law, the other party may immediately terminate the lease.

Actual Operations under the Lease

Respondent testified that Mr. McNarin, an employee of Hopper Machine Works, spends 25% of his time dispatching the trucks. Drivers make phone calls and all calls are paid by Hopper Machine Works, which does all the dispatching and has full control of the trucks.

According to the testimony introduced by the Commission staff one new tractor was added to the equipment leased by respondent to Hopper Machine Works, Inc. The new tractor is marked Hopper Machine Works and the other two tractors bear the name of Westlund.

Respondent conducts the repair and maintenance of the leased equipment which is garaged at the yard of Hopper Machine Works. Personnel of Hopper Machine Works move the trucks around within the yard.

The staff witness further testified that respondent dispatches the trucks. He calls the drivers and tells them where pickups are to be made. After being furnished with a list of pickups by respondent, the drivers use their own judgment as to where to go first. Respondent occasionally drives the trucks himself. He employs three full time drivers whose salaries he pays and from whom he withholds payroll taxes. The drivers are represented by the Teamsters Union, and respondent makes payments to the teamsters pension fund.

The tachograph charts which are made during the operation of the trucks are submitted by the drivers to respondent. A report regarding the one minor accident in which respondent's equipment was involved was submitted to respondent. The freight bills are partially prepared by the drivers.

Respondent pays the fees and taxes and he carries the fire, theft and collision insurance on the equipment. The other insurance is carried by Hopper Machine Works.

During the year 1960 respondent filed no report of gross revenue with this Commission. However, he paid taxes to the Board of Equalization for the period January to March, 1960.

The number of hours for which charges were to be made for each shipment were shown on shipping orders and freight bills. Statements were rendered by respondent to Hopper Machine Works, Inc., for hauling for the months of January and February 1960, showing the total number of hours for each month @ \$12.75 per hour less an amount for fuel. No explanation appears in the record why the amounts were deducted for fuel when the lease agreement provides that lessee, at its expense, shall provide for fuel.

The Commission staff witness testified that 76 freight bills for shipments during January and February 1960 were reviewed and from these, 15 representative freight bills were selected for submission to the Commission's Rate Analysis Section.

The witness from the rate analysis section testified that his analysis of the freight bills showed charges for shipments less than Minimum Rate Tariff No. 2 (Exhibit No. 5) as follows:

<u>No. of Freight Bill</u>	<u>Date of Freight Bill</u>	<u>Amount of Undercharges</u>
4546	1/ 4/60	\$ 16.50
4797	1/11/60	13.34
4551	1/12/60	44.94
4961	1/26/60	22.70
4966	1/30/60	44.66
4573	2/ 1/60	10.52
4970	2/ 3/60	75.27
4971	2/ 4/60	69.60
4579	2/ 5/60	31.40
4972	2/ 5/60	67.98
4973	2/ 6/60	12.61
4975	2/ 9/60	52.20
4982	2/18/60	29.70
4589	2/19/60	17.83
4983	2/24/60	<u>107.29</u>

Total Undercharges \$616.54

Findings and Conclusions

In support of the Commission staff's contention that the lease involved in this proceeding is a device to evade regulation by this Commission, the counsel for the staff relies upon Entremont v. Whitsell, (1939) 13 C. (2d) 290, and Service Tank Line v. Johnson, (1943), 61 C.A. (2d) 67.

The evidence herein is sufficiently similar to that which was considered in the aforementioned cases to persuade toward the same conclusion. Based upon the evidence herein, therefore, we find and conclude that the operation and control of respondent's trucking equipment was actually under the control and direction of the respondent. Specifically, the following evidence supports such finding and conclusion.

1. The respondent himself to a substantial extent dispatched the trucks and on occasion drove himself.
2. The drivers were employees of respondent and not of lessee.
3. The respondent maintained the equipment.
4. The respondent and not the lessee was responsible for loss or damage to the equipment.
5. The respondent carried the workmen's compensation insurance.
6. The tachograph charts which were made during the operation of the trucks were submitted to respondent.
7. The freight bills were partially prepared by respondent's drivers.
8. Respondent paid taxes to the Board of Equalization for the period January to March, 1960.
9. The lease provides that it shall automatically terminate upon the death of respondent or in the event of his mental incapacity.
10. Despite the provisions of the lease the respondent reimbursed lessee for the cost of fuel.

We further find and conclude that:

- (1) Respondent, in violation of Section 3571 of the Public Utilities Code, has operated as a highway contract

carrier within the meaning of Section 3517 of said Code while his Highway Contract Carrier Permit No. 15-6034 has been suspended.

(2) Respondent has charged and collected lesser rates than the minimum rates established by the Commission by Minimum Rate Tariff No. 2 in violation of Section 3664 of the Public Utilities Code which resulted in undercharges in the amount of \$616.54 as set forth in Exhibit No. 5 and hereinabove in this opinion.

(3) Respondent has charged and collected compensation for the transportation of property based on a unit of measurement prohibited by Item No. 257 in Minimum Rate Tariff No. 2.

(4) Respondent has, by the device of a so-called leasing arrangement, permitted Hopper Machine Works, Inc., to obtain transportation for property between points within the State of California, at less than the minimum rates then established and approved by this Commission by Minimum Rate Tariff No. 2, in violation of Section 3668 of the Public Utilities Code.

The Commission having found the facts as hereinabove set forth and concluding that respondent has violated Sections 3571, 3664 and 3668 of the Public Utilities Code makes its order as follows.

O R D E R

A public hearing having been held, evidence therein adduced, and findings and conclusions having been made,

IT IS ORDERED:

1. That respondent C. G. Westlund shall cease and desist from operating as a highway contract carrier until such time as his Highway Contract Carrier Permit No. 15-6034 has been reinstated.

2. That respondent shall examine his records for the period from June 16, 1959, to the present time for the purpose of ascertaining if any additional undercharges have occurred other than those mentioned in this decision.

3. That within ninety days after the effective date of this decision, respondent shall complete the examination of his records hereinabove required by paragraph 2 and file with the Commission a report setting forth all undercharges found pursuant to that examination.

4. That respondent is hereby directed to take such action, including legal 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 2 of this order, and to notify the Commission in writing upon the consummation of such collections.

5. That, in the event charges to be collected as provided in paragraph 4 of this order, or any part thereof, remain uncollected one hundred twenty days after the effective date of this order, respondent shall institute legal proceedings to effect collection and 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, until such charges have been collected in full or until further order of this Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon C. G. Westlund and this order shall be effective twenty days after the completion of such service upon respondent.

Dated at San Francisco, California, this 14th day of July, 1961.

Gerard W. Rupp
President
John E. Dwyer
John E. Dwyer
George G. Grover
Fredrick B. Holcomb
Commissioners