

**ORIGINAL**

Decision No. 63799

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the operations,  
rates and practices of VINCENT  
SIMONI, doing business as SIMONI  
TRUCKING CO.

Case No. 7098

E. H. Griffiths, for respondent.  
Elinore Charles, for the Commission staff.

O P I N I O N

Order of Investigation

On April 18, 1961, the Commission instituted its order of investigation into the operations, rates and practices of Vincent Simoni, doing business as Simoni Trucking Co., a radial highway common carrier and a highway contract carrier, for the purpose of determining:

1. Whether respondent has violated Section 3664 of the Public Utilities Code by charging and collecting a lesser compensation for the transportation of property as a highway permit carrier than the applicable charges prescribed in Commission Minimum Rate Tariff No. 2 and supplements thereto.

2. Whether respondent has violated Section 3575 of the Public Utilities Code and General Order No. 102-A by engaging the services of a subhauler without having filed a bond to insure payment of said subhauler.

3. The order which should be issued by this Commission in the event it be found that any of the alleged violations have occurred.

Public Hearing

Pursuant to the order of investigation, a public hearing was held in San Francisco before Examiner Edward G. Fraser on October 5, 1961.

Stipulations

It was stipulated that Vincent Simoni is operating under Radial Highway Common Carrier Permit No. 7-2880 and Highway Contract Carrier Permit No. 7-2881; that respondent has received copies of Minimum Rate Tariff No. 2, Distance Table No. 4, and all supplements and amendments thereto; and that the "Statement of Applicable Minimum Rates" (Exhibit 3) introduced by the Commission staff is true and correct.

Evidence Presented by the Staff

A representative of the Commission's Transportation Division testified that he reviewed approximately 200 of respondent's freight bills on transportation performed during July and October of 1960 and selected 14 of these as representative of respondent's operation; that he reviewed the freight bills and other records of respondent on November 2, 1960 at respondent's home in Martinez; that he returned on January 19 and 20, 1961 to make photostats of the 14 freight bills, which were then forwarded to the Rate Analysis Unit of the Transportation Division for analysis; and that he incorporated these photostats into Exhibit 1 along with copies of documents which show that payment was made for the transportation performed. Respondent stipulated that the documents in Exhibit 1 were true and correct copies of the originals in his records.

Exhibits 2 and 2A were received into evidence without objection after the staff representative testified that Freight Bills 03108, 02029 and 00697 (Exhibit 2A) revealed that respondent was employing subhaulers when it was unlawful because of his failure to file a subhauler bond (Exhibit 2).

The staff representative testified that he asked respondent in November of 1960 about the rates charged for transportation performed on the 14 counts wherein undercharges are now alleged; that respondent stated his hauling was performed under the terms of a lease he had with his shipper, the Martinez Food Cannery, Ltd.; and that he (the staff witness) asked for the written lease, but none was ever presented to him. Martinez Food Cannery, Ltd., was the shipper or consignee on all counts except Part 11 (Freight Bill 00027).

A Commission rate expert testified that after analyzing the documents in Exhibit 1 he prepared a rate statement (Exhibit 3). The statement was admitted into evidence, and Parts 1 through 14 thereof indicate that transportation performed by respondent was for less than the minimum rates prescribed in Minimum Rate Tariff No. 2. On cross examination the rate witness stated that minimum rate provisions would not apply to transportation performed by the shipper himself under a bona fide lease of equipment.

Position of the Respondent

Respondent testified that he had been in business ten years operating as a permitted carrier; that he serves only the Martinez Food Cannery, Ltd., hauling canned goods and also hauling fruit from the fields to the cannery; that the fruit transportation is not subject to the minimum rate tariffs; and that he uses his subhaulers to carry fruit, not the canned goods.

He also testified that he was and is under the impression that all transportation in question herein was performed under a valid lease with Martinez Food Cannery, Ltd.; that this lease was a verbal one for ten years; and that it was put into writing in January 1961, after he was advised that an oral lease was not

acceptable to this Commission. He admitted that he hires subhaulers; that he reports his gross income and pays quarterly fees as a prime carrier; and that his trucks were licensed during 1960 as "for hire" equipment. He testified that he did not realize these facts would affect his lease, because he thought the lease applied only to shipments subject to the minimum rates and did not apply to his trucks when they were carrying exempt commodities. Respondent introduced Exhibits 4 and 5 to show an effort was made to determine the form of lease approved by this Commission.

Exhibits 6 and 7 deal with the alleged undercharges and show that Martinez Food Cannery, Ltd., shortly before the hearing, paid Simoni Trucking Co. \$546.16, which is the amount of the undercharges involved in the transactions specifically mentioned in the order instituting this investigation.

Respondent admitted operating without a subhaul bond. His bond was cancelled on April 14, 1960; the date of the cancellation acknowledgment was March 15, 1960 (Exhibit 2). He testified that \$1,000 cash was filed when the bond was issued; that this cash was drawn to make an income tax payment in April of 1960 and the surety company cancelled the bond; that his subhaulers are always paid promptly and in full on every Friday; that he has never failed to pay in the past; and that the three concerned herein were paid on schedule for the work they performed.

Respondent testified that he has lost all of the Martinez Food Cannery, Ltd., canned goods business as a result of this investigation. He also testified that Commission investigators have frequently checked his records during the past five years; that nothing was said to indicate that his operation was illegal; and that because of this, he supposed that his oral lease was adequate and that his hauling was not subject to the minimum rate tariffs.

Discussion

It is true that under appropriate circumstances a lease may be executed pursuant to which a shipper in fact operates equipment owned by another, the nature of the carriage being proprietary rather than for-hire; but such is not the case here. Both this Commission and the Supreme Court of the United States have held that purported lease arrangements are not controlling when the lessee is not in reality acting as a proprietary hauler. (See Investigation of Westlund, Cal. P.U.C. Decision No. 62291, Case No. 7071; U. S. v. Drum, 82 S. Ct. 408.) The most that may be said for the alleged lease now before us is that it is a contract of carriage. Indeed, the written agreement expressly provides, among other things:

"That the parties intend and desire by this Agreement that SIMONI will perform said trucking and transportation on a contractual basis only and that the driver be the agent and employee of SIMONI only and not an employee, agent or servant of MARTINEZ.

\* \* \*

- "(3) MARTINEZ agrees to pay to SIMONI a sum equal to twelve and one-half cents per hundredweight for all goods and materials transported and delivered. ...
- "(4) SIMONI agrees to conform to and abide by all laws, rules and regulations of the City, County, State or any subdivision thereof in trucking MARTINEZ' goods and products."

The record clearly shows that respondent engaged subhaulers after his subhaul bond had been cancelled. The bonding requirements of Public Utilities Code §3575 and General Order No. 102-A are applicable even though the Commission may not have established minimum rates for the particular commodity being transported. Moreover, a carrier does not satisfy those bonding requirements merely by paying the subhaulers what is due them.

Findings

The Commission hereby finds that:

1. Respondent is engaged in the transportation of property over the public highways for compensation as a radial highway common carrier pursuant to Radial Highway Common Carrier Permit No. 7-2880 and as a highway contract carrier pursuant to Highway Contract Carrier Permit No. 7-2881.

2. Neither the written agreement between respondent and Martinez Food Cannery, Ltd., (Exhibit 5) nor the prior oral understanding between said parties constituted a valid lease of equipment. The transportation performed pursuant to said agreement and understanding was for-hire transportation by respondent for Martinez Food Cannery, Ltd.

3. The transportation enumerated in the order instituting investigation herein was performed subject to the minimum rate provisions of the Commission's Minimum Rate Tariff No. 2.

4. Respondent has violated Section 3664 of the Public Utilities Code by assessing and collecting charges less than the applicable charges established by this Commission in Minimum Rate Tariff No. 2 including charges based on common carrier rates under the alternative common carrier rate provisions of Minimum Rate Tariff No. 2. Said violations resulted in the following undercharges:

<u>Part No.</u> <u>in</u> <u>Exhibit 3</u>	<u>Freight</u> <u>Bill No.</u>	<u>Date</u>	<u>Amt. Assessed</u> <u>and Collected</u> <u>by Respondent</u>	<u>Correct</u> <u>Minimum</u> <u>Charge</u>	<u>Amount</u> <u>of</u> <u>Undercharge</u>
1	B-2562	7/7/60	\$ 11.91	\$ 33.90	\$ 21.99
2	B-2549	7/6/60	29.68	59.20	29.52
3	B-2553	7/6/60	6.30	27.60	21.30
4	(B-2727 (B-2726	8/5/60	8.47	50.67	42.20
5	B-2573	7/13/60	.56	5.63	5.07
6	(B-2787 (B-2863 (B-2788 (B-2869	9/20/60	38.19	112.23	74.04
7	B-2897	9/20/60	4.55	26.10	21.55
8	(B-2861 (B-2949 (B-2869 (B-2928	9/28/60	32.20	127.57	95.37
9	(B-3031 (B-3059 (B-3030 (B-3060	10/24/60	30.00	80.80	50.80
10	B-3083	10/31/60	15.63	51.50	35.87
11	00027	7/5/60	40.00	92.30	52.30
12	01424	8/19/60	40.00	94.00	54.00
13	00898	8/25/60	63.45	80.00	16.55
14	03151	9/26/60	25.20	50.80	25.60
Total					\$ 546.16

5. Respondent has violated Section 3575 of the Public Utilities Code and General Order No. 102-A of this Commission by engaging the services of subhaulers without having a bond on file to insure the payment of said subhaulers. The following transportation illustrates this violation:

<u>Freight Bill</u>	<u>Date</u>
03108	10/1/60
02029	9/26/60
00697	9/29/60

6. Respondent's permits should be suspended for a period of five days.

O R D E R

A public hearing having been held,

IT IS ORDERED that:

1. Radial Highway Common Carrier Permit No. 7-2880 and Highway Contract Carrier Permit No. 7-2881 issued to Vincent Simoni are hereby suspended for a period of five consecutive days commencing at 12:01 a.m. on the second Monday following the effective date of this order.

2. Respondent shall not lease the equipment or other facilities used in operations under said permits for the period of the suspension, or directly or indirectly allow such equipment or facilities to be used to circumvent the suspension; respondent shall post at his terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that his radial highway common carrier permit and highway contract carrier permit have been suspended by the Commission for a period of five days; within five days after such posting he shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

3. Respondent shall examine his records for the period from July 1, 1960 to the present time, for the purpose of ascertaining if any undercharges have occurred other than those mentioned in Finding 4 of this decision.

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



5. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges found after the examination required by paragraph 3 of this order, and shall notify the Commission in writing upon the consummation of such collections.

6. 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, respondent shall institute legal proceedings and shall file with 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 Vincent Simoni. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 12<sup>th</sup> day of JUNE, 1962.

*Charles W. Payne*  
President

*J. E. Mitchell*

*E. Leo Fox*

*George G. Hoover*

*Frederick B. Hallock*  
Commissioners