

ORIGINALDecision No. 64093

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of North Coast
Transport, Inc., a corporation.

Case No. 6368

Ray E. Summers and Sapper and Buzza, by
Joseph J. Buzza, for respondent.
Elmer J. Sjostrom, for the Commission staff.

O P I N I O N

This proceeding was originally commenced to determine whether Ray Summers and Earl Summers, copartners, doing business as North Coast Transport, had violated provisions of the Public Utilities Code by demanding, collecting or receiving a lesser compensation for the transportation of property than the applicable rates prescribed in the Commission's Minimum Rate Tariff No. 2. On August 2, 1960, the Commission entered Decision No. 60492 which found that the respondents had violated Section 3664 of the Public Utilities Code. Respondents' operating rights were suspended for eight days and they were ordered to examine their records for the period from July 1, 1959, until August 2, 1960, to ascertain if any additional undercharges had occurred in that period, and, if any undercharges were found, to take appropriate action to collect them. On January 4, 1961, the respondents informed the Commission that they had examined their records for the period in question and found no additional undercharges. On October 10, 1961, the Commission ordered the proceeding reopened to determine whether respondents had complied with Decision No. 60492. While the reopened proceeding was pending,

Ray Summers and Earl Summers decided, for business reasons, to change their mode of doing business from a partnership to a corporation. They filed Application No. 44109, which sought authority to transfer their radial highway common carrier permit to a corporation known as North Coast Transport, Inc. As part of Application No. 44109 the corporation filed with the Commission a certified copy of a resolution by its board of directors which takes note of this proceeding and binds the corporation to accept any penalty which may be assessed in this proceeding based upon the conduct of the partnership prior to incorporation. In Decision No. 63154, issued on January 23, 1962, the Commission ordered the permit transferred to North Coast Transport, Inc., and it was substituted as the respondent herein.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis at Eureka on January 11, 1962, and at San Francisco on March 1 and May 15, 1962. The matter was submitted subject to the filing of briefs. The last of the briefs was filed on June 13, 1962, and the matter is now ready for decision.

Ordering paragraphs 3, 4, 5 and 6 of Decision No. 60492 provided as follows:

"3. Respondents shall examine their records for the period from July 1, 1959 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, respondents shall complete the examination of their records hereinabove required by paragraph 3 and file with the Commission a report setting forth all undercharges found pursuant to that examination.

"5. Respondents are 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 3 of this order, and to notify the Commission in writing of 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, respondents 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."

On January 4, 1961, Ray Summers filed with the Commission a document which in part stated: "In reference with paragraph 3, I have checked all of the North Coast Transport bills and to the best of my ability I did not find any undercharges or any irregular rates."

At the hearing the Commission staff introduced evidence to show that members of the staff had examined the freight bills of North Coast Transport for the period from July 1, 1959, until August 2, 1960, and found 22 instances of undercharges which occurred during that period. Twelve of these instances involved the same shipper, consignee, point of origin and point of destination as shipments found to be improperly rated in Decision No. 60492.

The Commission finds that between July 1, 1959, and August 2, 1960, North Coast transported, under authority of its radial highway common carrier permit, shipments between various points in the State of California upon which improper charges were assessed. A list of said shipments, including the charges actually assessed and the charges the Commission finds should have been assessed as required by law, is as follows:

<u>Frt. Bill No.</u>	<u>Date of Shipment</u>	<u>Weight</u>	<u>Charge Assessed by Respondents</u>	<u>Correct Charge</u>	<u>Amt. of Undercharge</u>
6136	7/ 2/59	48,000	\$120.00	\$134.40	\$ 14.40
6151	7/ 7/59	51,700	191.29	196.46	5.17
6153	7/ 8/59	54,400	73.44	84.32	10.88
6154	7/ 8/59	51,250	128.12	133.25	5.13
6156	7/10/59	49,920	124.80	139.78	14.98
6215	7/25/59	53,400	72.09	82.77	10.68
6221	7/27/59	55,360	40.14	45.67	5.53
6250	8/ 7/59	54,400	73.44	84.32	10.88
6470	10/ 8/59	45,590	118.53	127.65	9.12
6526	10/12/59	47,560	78.47	97.50	19.03
6492	10/15/59	43,080	81.74	98.56	16.82
6524	10/24/59	50,160	82.76	102.83	20.07
6623	11/27/59	55,680	75.17	86.30	11.13
6536	11/27/59	51,680	69.77	80.10	10.33
6862	2/ 2/60	43,200	129.60	185.76	56.16
6875	2/26/60	44,320	132.96	190.58	57.62
6876	2/26/60	43,000	129.00	184.90	55.90
6896	3/ 4/60	105,080	322.84	390.59	67.75
6976	3/23/60	156,000	477.75	593.73	115.98
6972	3/22/60	38,800	172.72	184.60	11.88
7109	4/21/60	90,500	578.01	733.05	155.04
7135	4/27/60	53,760	44.35	53.76	9.41
Total Undercharges					\$693.89

The foregoing list does not include the undercharges mentioned in Decision No. 60492.

North Coast does not dispute the undercharges uncovered by the staff. At the hearing Ray Summers testified that "We did go through our records. We didn't go through each and every bill." He further testified that the reason he didn't find the freight bills with the undercharges discovered by the staff was that those freight bills "are just some that happened to be in between the ones that was skipped through"

The Commission finds that North Coast Transport, Inc., has failed to comply with ordering paragraphs 3, 4, 5 and 6 of Decision No. 60492, in violation of Section 3774 of the Public Utilities Code.

The Legislature amended Section 3774 subsequent to the violation here in question to provide that as an alternative to the cancellation, revocation or suspension of a permit the Commission may impose a fine of not to exceed \$5,000. At the hearing the Presiding Examiner raised the question of the applicability of the amended statute to the case at bar. Counsel for North Coast indicated that if a penalty were to be assessed, respondent preferred a monetary one. The matter was submitted subject to briefs on this point. The staff filed a brief which indicates that the amendment to Section 3774 is not retroactive (Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal. 2d 388) but that a fine could be imposed if requested by the respondent under the doctrine of waiver (People v. Ventura Refining Co., 204 Cal. 236). Respondent thereupon filed a memorandum waiving any constitutional prohibition against ex post facto laws and again requested that if a penalty be imposed it should be a monetary one.

In the circumstances, the Commission finds that respondent's radial highway common carrier permit should be suspended for seven days or in the alternative a fine of \$3,000 should be imposed, and that respondent should be ordered to collect the undercharges hereinabove found. ✓

O R D E R

A public hearing having been held and based upon the evidence therein adduced,

IT IS ORDERED that:

1. If, on or before the fortieth day after personal service of this order upon respondent, respondent has not paid the fine

referred to in paragraph 3 of this order, then Radial Highway Common Carrier Permit No. 12-2396 issued to North Coast Transport, Inc., a corporation, shall be suspended for seven consecutive days starting at 12:01 a.m. on the second Monday following the fortieth day after such personal service.

2. In the event of such suspension, respondent shall not, by leasing the equipment or other facilities used in operations under said permit for the period of suspension, or by any other device, directly or indirectly allow such equipment or facilities to be used to circumvent the suspension; respondent shall post at its 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 its radial highway common carrier permit has been suspended by the Commission for a period of seven days; within five days after such posting it shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

3. As an alternative to the suspension of operating rights imposed by paragraph 1 of this order, respondent may pay a fine of \$3,000 to this Commission on or before the fortieth day after personal service of this order upon respondent.

4. Respondent is hereby directed to take such action, including legal action, as may be necessary to collect the amount of undercharges set forth in the preceding opinion and to notify the Commission in writing upon the consummation of such collections.

5. In the event undercharges ordered to be collected by paragraph 4 of this order, or any part of such undercharges, remain

uncollected one hundred twenty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges and the result of such action until such undercharges have been collected in full or until further order of the Commission.

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

Dated at San Francisco, California, this 7th day of AUGUST, 1962.

George L. Crowder
President
Robert L. ...
Ernest W. ...

Commissioners

Commissioner C. Lyn Fox, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.