

CONFIDENTIAL

Decision No. 65249

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of CURTIS W. LINT, doing business as CURT LINT TRUCK TRANSPORTATION, ERNEST N. HOWARD, KENNETH HARTNETT, E. W. McEACHERN, MAX THOMPSON, and DAVID V. GALE.

Case No. 7134

Joseph T. Enright, for Ernest N. Howard, Kenneta Hartnett, E. W. McEachern, Max Thompson and David V. Gale, respondents.
Curtis W. Lint, respondent, in propria persona.
E. O. Blackman and Merrill K. Albert, for California Dump Truck Owners Association, interested party.
Donald B. Day, for the Commission staff.

HOLOBOFF, Commissioner

O P I N I O N

The Commission issued its order, as amended, instituting investigation into the operations, rates and practices of Curtis W. Lint, doing business as Curt Lint Truck Transportation, Ernest N. Howard, Kenneth Hartnett, E. W. McEachern, Max Thompson, and David V. Gale, for the purpose of determining whether respondents, as highway permit carriers, have violated Section 3668 of the Public Utilities Code by charging, demanding, collecting or receiving a lesser sum for the transportation of property than the applicable charges prescribed by Minimum Rate Tariff No. 7 and supplements thereto.

Public hearings were held on August 28 and 29, November 9 and 10, 1961, and on January 9, 10 and 11, February 28 and March 1,

1962, before Examiner DeWolf at Los Angeles. The matter was submitted on March 1, 1962, subject to a request for an examiner's proposed report. In the event of denial of such request, the matter would be deemed submitted upon filing of briefs by the staff and intervenor with a reply brief by respondents. The Commission denied the request for a proposed report on April 3, 1962, and briefs of all parties have been filed. The respondents' motions to dismiss are denied.

During the period covered by the Commission staff investigation, the respondents held radial highway common carrier permits as follows:

Curtis W. Lint	Permit No. 19-49302	Dated July 1, 1955
Ernest N. Howard	Permit No. 19-49600	Dated September 19, 1955
Kenneth Hartnett	Permit No. 19-25582	Dated June 10, 1946
E. W. McEachern	Permit No. 19-46608	Dated March 4, 1953
Max Thompson	Permit No. 19-52077	Dated December 30, 1958
Davis V. Gale	Permit No. 19-51884	Dated October 8, 1958

City carrier permits were held as follows:

Curtis W. Lint	Permit No. 19-49303	Dated July 1, 1955
Ernest N. Howard	Permit No. 19-52433	Dated May 12, 1959
Max Thompson	Permit No. 19-52382	Dated April 28, 1959

All permits issued to Max Thompson were cancelled on June 7, 1962.

Minimum Rate Tariff No. 7, together with all amendments and supplements, was duly served upon respondents.

Evidence Introduced by the Commission Staff

The Commission staff presented evidence based upon a review of respondents' documents covering the months of March and April of 1960. Numerous transactions were examined and thirty-eight selected as representing undercharges for transportation of property by respondents under carrier permits and by use of a device

by means of which respondents assisted, suffered, or permitted Mountain Rock Products Company to obtain transportation of property between points within this State at rates less than the minimum rates established by this Commission in Minimum Rate Tariff No. 7.

Exhibit No. 1 contains 50 parts consisting of photocopies of respondents' shipping documents, invoices, and statements.

Photostatic copies of sales tickets of Mountain Rock Products Company to respondents are contained in Exhibit No. 1. Each has a serial number, blanks for entry of the date, the respondent "Sold to," the "Job Address," the type of material, weight, and description, and spaces for signature of driver, purchaser and agent of Mountain Rock Products Company. Parts 1 through 9 of Exhibit No. 1, are copies of sales tickets and Parts 10 and 11 are copies of statements and invoices concerning operations of respondent Curtis W. Lint. Parts 12 through 18 are copies of sales tickets and Parts 19 and 20 are statements and invoices concerning operations of respondent Ernest N. Howard. Parts 21 through 26 are copies of sales tickets and Parts 27 and 28 are copies of statements and invoices of respondent Kenneth Hartnett. Parts 29 through 34 are copies of sales tickets and Parts 35 and 36 are statements and invoices of respondent E. W. McEachern. Parts 37 through 42 are copies of sales tickets and Parts 43 and 44 are copies of statements and invoices of respondent Max Thompson. Parts 45 through 48 are copies of sales tickets and Parts 49 and 50 are copies of statements and invoices of respondent David V. Gale.

Exhibits Nos. 2, 10 and 11, introduced in evidence by respondents, are letters to and from respondent Curtis W. Lint regarding price of materials.

Exhibits Nos. 3 through 8, introduced in evidence by the Commission staff, contain rate analyses of the shipping documents of the respondents.

Exhibits Nos. 12 through 16, introduced in evidence by the Commission staff, are photostats from the Commissioner of Corporations and the County Recorder's Office of Orange County showing the corporate and individual status and relationship of the parties with whom the respondents do business.

Exhibits Nos. 18 through 25, 27 through 41, 45, 46, and 51, introduced in evidence by respondents, contain copies of sales tax sellers' permits of respondents issued by the State Board of Equalization, business cards, bills and statements, and statistical information.

Exhibits Nos. 43, 44, 48, 49, and 50, introduced in evidence by the Commission staff, refer to accounts of respondent E. W. McEachern and business cards of Lawrence Bartlett, Manuel J. Homen and Ernest N. Howard.

Exhibits Nos. 3, 4, 5, 6, 7, and 8 contain a summary of shipping data concerning Parts Nos. 1 through 50 of Exhibit No. 1, and were introduced into evidence and testified to by a Commission staff rate expert. They show differences between respondents' purported sales price and purchase price in each of the transactions, and show that respondents assessed and collected charges less than the applicable minimum charges prescribed in Minimum Rate Tariff No. 7 which indicate undercharges as follows:

Parts 1 through 9 of Exhibit 3:

Curt Lint Truck Transportation

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 17622	4- 8-60	\$ 17.21	\$ 31.51	\$ 14.30
A 17707	4-11-60	17.71	32.43	14.72
A 17764	4-12-60	16.74	30.63	13.89
A 17935	4-13-60	11.80	20.95	9.15
A 18044	4-14-60	13.09	23.25	10.16
A 18162	4-15-60	12.47	22.15	9.68
A 18300	4-19-60	25.22	39.09	13.87
A 18462	4-20-60	25.98	40.27	14.29
A 18689	4-23-60	27.60	42.78	15.18

Total \$115.24

Parts 1 through 7 of Exhibit 4:

Ernest N. Howard

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 14611	3- 4-60	\$ 19.24	\$ 29.82	\$ 10.58
A 14905	3- 8-60	19.19	29.74	10.55
A 15548	3-15-60	19.30	29.92	10.62
A 16047	3-21-60	19.12	29.64	10.52
A 16477	3-24-60	18.51	28.69	10.18
A 14505	3- 4-60	12.74	23.32	10.58
A 15314	3-14-60	12.49	22.86	10.37

Total \$ 73.40

Parts 1 through 6 of Exhibit 5:

Kenneth Hartnett

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 14344	3- 1-60	\$ 26.23	\$ 40.66	\$ 14.43
A 14370	3- 2-60	26.46	41.01	14.55
A 14496	3- 4-60	27.33	42.36	15.03
A 14638	3- 5-60	26.35	40.84	14.49
A 14796	3- 8-60	27.00	41.85	14.85
A 14969	3- 9-60	26.54	41.14	14.60

Total \$ 87.95

Parts 1 through 6 of Exhibit 6:

E. W. McEachern

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 14363	3- 1-60	\$ 23.75	\$ 34.50	\$ 10.75
A 14420	3- 2-60	24.51	35.60	11.09
A 14483	3- 3-60	24.40	35.44	11.04
A 14502	3- 4-60	24.16	35.09	10.93
A 14730	3- 7-60	24.75	35.96	11.21
A 14835	3- 8-60	25.15	36.54	11.39
Total				\$ 66.41

Parts 1 through 6 of Exhibit 7:

Max Thompson

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 14510	3- 4-60	\$ 11.96	\$ 21.91	\$ 9.95
A 14657	3- 7-60	12.35	22.62	10.27
A 14802	3- 8-60	11.91	21.80	9.89
A 14916	3- 9-60	12.71	23.25	10.54
A 15062	3-10-60	12.45	22.80	10.35
A 15215	3-11-60	12.54	22.96	10.42
Total				\$ 61.42

Parts 1 through 4 of Exhibit 8:

David V. Gale

<u>Mountain Rock Products No.</u>	<u>Date</u>	<u>Net from transportation</u>	<u>M.R.T. No. 7</u>	<u>Under-charge</u>
A 17969	4-14-60	\$ 25.62	\$ 39.71	\$ 14.09
A 18076	4-15-60	25.63	39.73	14.10
A 18314	4-19-60	25.89	40.13	14.24
A 18668	4-22-60	25.42	39.40	13.98
Total				\$ 56.41

All of the thirty-eight transactions represent full loads of gravel hauled by respondents from Mountain Rock Products Company, Upland, California, to one of the following: Freeman Ready-Mix, Inc., Mountain Ready-Mix, Contractors Readymix, and Foster Sand & Gravel Company, and are claimed by the Commission staff to be fictitious "buy and sell" transactions or arrangements, aggregating,

according to the Commission's expert witness, undercharges in the amounts heretofore set forth.

A staff witness further testified that Curtis W. Lint explained to him his method of operation but the other respondents did not give him any information other than the shipping documents which he copied and offered in Exhibit No. 1. According to the staff witness, the Lint operation was conducted as follows: When respondent Lint first began hauling under the "buy and sell" arrangement, as distinguished from permit hauling, the dispatcher for the rock producer explained to him the billing procedure, the figuring of the rates for the hauling, and that Lint would buy and then sell the material. Lint was not given any choice as to the type of haul, the price or type of material, nor any voice in negotiating the margin of difference in the prices, and he did not contact the purchasers in regard to prices or type of material. The haul was initiated by the rock producer who would call and ask Lint how many trucks he had available and would then order the trucks. Lint was not informed in advance of the type of material to be hauled or its destination; he found out these matters only at the time he arrived at the rock plant. There was no contract between Lint and the rock producers, and no stock pile at his place of business. He was paid by checks drawn by the ready-mix plants to whom he delivered the material. He had to pick up the checks at the offices of Mountain Rock Products and then received them only when he had delivered to Mountain Rock Products his own checks for the aggregates received from the producer. The staff witness further testified that Lint informed him that he saw other carriers picking up and handling the material and paying for it in the same manner.

The staff witness further testified that in checking the Los Angeles Classified Directory issued August, 1961, page 490,

under Concrete Aggregates, he was not able to discover any listing by respondents under Sand and Gravel. He testified that respondents have no storage facilities and the gravel remains on their equipment from the time it is picked up until it is delivered. The staff witness testified that he inspected the equipment of respondents and traveled over the routes which were traveled in delivery of the gravel and measured the mileage of said trips for the purpose of calculating the minimum rate as set forth in the exhibits.

Respondent Curtis W. Lint, called by staff counsel as an adverse witness, testified that he has discontinued the hauling and transportation of gravel; that his operating authority has been voluntarily suspended; that he has filed a petition in bankruptcy and is presently unemployed; that he had been engaged in buying and selling aggregates from the Mountain Rock Products Company and furnished the trucks and drivers; that the type of gravel required and the destination of the load was determined by the Mountain Rock Products Company; that he was given no voice in fixing either the purchase or selling prices of the commodity; that he had no stock pile of the commodities and no other business except transportation; that he paid for the materials by check at the same time he received payment; and that the other haulers at Mountain Rock Products Company were hauling in the same way.

In support of their contention that they were engaged in bona fide purchase and sale of aggregates, respondents presented Exhibit No. 13 which listed some 65 "trucker-dealers", including respondents herein. Said exhibit purports to demonstrate that

the persons listed thereon were customers of Mountain Rock Products and that the purported purchases by them represented about 75 percent of total sales by Mountain Rock Products. Moreover, it is the apparent thrust of this exhibit that approximately 400 trucker-dealers, including the parties listed on Exhibit No. 18, buy and sell aggregates and related materials in the Los Angeles area in the "same manner" as respondents did in the transactions at issue.

In rebuttal, the staff called three of the persons, other than respondents, whose names appear on said exhibit as well as one witness whose name did not appear on the exhibit but who had dealings with Mountain Rock Products. The testimony of these witnesses was to the effect that a transaction would be initiated by a call from the dispatcher for Mountain Rock Products who would explain that a haul was available upon condition that the witness have or secure a "buy and sell" license; that the dispatcher would specify the type and quantity of the haul as well as the consignee; that the witness would receive instructions as to whom to bill and how much, usually the price of the commodity plus a specified amount for transportation; that the witness had no voice in the determination of the price which he was required to pay nor the price for which the consignee was billed; that the witnesses were paid at the offices of Mountain Rock Products by checks drawn by the various consignees when the witnesses delivered to Mountain Rock Products their own checks for the goods; that in all instances the compensation to the witnesses was less than what they would have received pursuant to minimum rates; that all of said witnesses hauled aggregates for other producers on a for-hire basis and that in no other case did they engage in similar buy and sell arrangements.

The evidence herein also shows that there is considerable interrelationship between Mountain Rock Products and the various consignees involved in the transactions here in issue. The following relationships, though not exhaustive, are illustrative:

The person who is president and a director of Mountain Rock Products is also president and director of Mountain Ready-Mix and is also secretary-treasurer, director and one-third shareholder of Contractors Readymix. The person who is vice president, secretary, director and a shareholder of Mountain Rock Products holds the same positions in Mountain Ready-Mix. He is also a shareholder and director of Freeman Ready-Mix. The person who is treasurer, a shareholder and a director of Mountain Rock Products is also a partner in Foster Sand & Gravel. Two of the shareholders in Mountain Rock Products own a total of 450 out of 550 outstanding shares of Freeman Ready-Mix. One-third of the shares of Mountain Rock Products are held by Contractors Readymix.

The evidence further shows that Mountain Rock Products was formed for the purpose of providing a source of supply of rock and sand for Contractors Readymix, Freeman Ready-Mix, and Foster Sand & Gravel as well as for other customers it might obtain; and materials have been sold directly. Mountain Rock Products and the several ready-mix plants are connected by a short-wave radio system.

Evidence of Respondents

The respondents Ernest N. Howard, Kenneth Hartnett, E. W. McEachern and David V. Gale testified that they have been engaged in the buying and selling of aggregates of various types for several

years; that in these transactions they are liable for the purchase price of these commodities and make payments to the vendor; that they have seller's permits issued by the State Board of Equalization and, when a tax is applicable, they collect the tax from the purchaser.

Except as to details, the testimony of all of the respondents except Curtis W. Lint is substantially similar. Respondents, except Curtis W. Lint, called several witnesses employed by Mountain Rock Products Company and the ready-mix and concrete-block plants who purchased the gravel. These witnesses testified to the manner in which the transactions in question are handled in an effort to show that the respondents are independent itinerant merchants engaged in proprietary handling of their own property. This testimony discloses that the concrete-block and ready-mix plants control the time, place, and frequency of delivery of the loads of gravel to their establishments.

The respondents, except Curtis W. Lint, testified that their method of operation as material dealers enabled them to give better service and keep busy all of the time. The respondents' trucks are dump trucks constructed for the purpose of hauling aggregates and are used for one-way hauls only. Respondent E. W. McEachern testified that he cannot make a profit on two loads a day when the rest of the day is spent waiting for a load, but does profit when five or more loads a day are handled. The respondents, except Curtis W. Lint, also testified that they negotiate the price of the aggregates with the purchasers who are the concrete-block and ready-mix plants.

Discussion

Respondents lean heavily upon the exemption from regulation provided for in Section 3511(c) of the Public Utilities Code. They urge that "the sole question involved herein is whether...these respondents were transporting property which they 'owned'." According to them, if they did own such property, then the proceeding should be dismissed. Ancillary to this contention is the argument that once a determination is made that title to the materials here in question vested in respondents, the Commission is precluded from finding that such arrangements constituted a "device" under Section 3668 of the Public Utilities Code, i.e., that the provisions are mutually exclusive.

In considering respondents' contentions as set forth above, it must be observed that when the Legislature included "device" in Section 3668, as a prohibited means of evading minimum rates, it must not have intended that ostensible or merely technical compliance with Section 3511(c) would be sufficient to exempt from regulation. In short, the Legislature must have intended that there be bona fide ownership of property as contemplated by Section 3511(c). The question is, therefore, whether the transactions here resulted in such ownership of the property by respondents?

Respondents urge that the test of ownership should be simple, to wit, whether title has passed. In addition to certain legal tests (Respondents' Memo dated November 9, 1961), respondents contend that the evidence shows such ownership.

Having considered these contentions, we find under the circumstances of this case that there was no vesting of ownership such as is contemplated by Section 3511(c) of the Public Utilities Code; that the claimed ownership of the property here in issue was not bona fide but was merely ostensible; that the arrangements which are claimed to have resulted in such ownership were effected for purposes of accommodation only and for the purpose of evading the minimum rates established by this Commission in Minimum Rate Tariff No. 7.

The evidence does not support respondents' contention that they and each of them were in fact "itinerant merchants" or "trucker-dealers". On the contrary, the evidence shows that each of the respondents was engaged entirely in the transportation of property for hire so far as the transactions here in issue are concerned. There are not present, in any case, any of the usual incidences of a risk-taking, profit-making enterprise. None of them has facilities for accumulating, handling, manufacturing, producing or storing, nor does any of them manufacture or otherwise process rock, sand or aggregate products. None of the respondents maintains a sales staff. None of the respondents assumed the risks of ownership such as credit and casualty losses or inventory build-up due to fluctuating demand, nor was any respondent required to exercise judgment as to type or quality of product required by the consignee thereof.

All of the transactions under investigation, except two isolated instances, resulted in compensation received by respondents which was less than that which would be applicable under the minimum tariff rate for transportation of such products. The operation of each transaction was identical to a completed transportation transaction, and the claim of title in the "buy and sell"

agreement of respondents was identical with the period of possession during transportation, followed immediately by delivery to the consignee. It is significant to note that none of the respondents had exclusive right to control the property while it was in his possession. Each of the respondents received payment for his transportation services in a substantially identical manner, in that the ready-mix and concrete block plants would send a check for payment of the aggregates to the rock producer, who would deliver said check to respondent only when the rock producer had been paid by respondent.

While the evidence is conflicting on the issue as to whether respondents, or any of them, had a voice in negotiating any of the prices, we find, in view of all the evidence, that neither the prices paid by respondents to Mountain Rock Products nor the prices paid by the consignees to the respondents were negotiated, as between the respective parties and respondents, at arms-length, in a free, open and public market; such prices were in fact negotiated between Mountain Rock Products and the consignees in question. Respondents did not even have a voice in determining the amount attributable to the transportation charge; this amount was prescribed by the shipper, Mountain Rock Products. In these circumstances, the only significant function performed by the respondents was transportation. The claim that title to the products in issue vested in respondents, even if technically correct, when viewed from the standpoint of the need to enforce minimum rates, becomes inconsequential and must be disregarded. Any arrangement, no matter how technically meticulous, cannot be sustained, if in substance it amounts to a device which aids or suffers the transportation of property at rates less than minimum established by the Commission.

Findings

Upon consideration of the evidence the Commission finds that:

1. All applicable rate orders were served upon respondents prior to the undercharges above set forth.

2. The arrangements of respondents for the alleged purchase of aggregate material from the rock producers did not vest the title and ownership of the material in the respondents as owners thereof during the period of transportation, within the meaning of Section 3511(c) of the Public Utilities Code.

3. Said purported "buy and sell" transactions were not, in truth and in fact, bona fide sales but were mere shams and devices employed by respondents to circumvent and violate the law, and such transactions constituted for-hire carriage within the regulatory jurisdiction of this Commission.

4. Respondents have violated Section 3668 of the Public Utilities Code by assisting and permitting certain corporations or persons to obtain transportation of property between points within this State at rates less than the minimum rates and applicable charges prescribed in Minimum Rate Tariff No. 7, by means of the device of fictitious "buy and sell" transactions.

5. The violations heretofore found resulted in undercharges as follows:

Curt Lint Transportation	\$115.24
Ernest N. Howard	73.40
Kenneth Hartnett	87.95
E. W. McEachern	66.41
Max Thompson	61.42
David V. Gale	56.41

The operating authority of each of the aforesaid respondents except Curt Lint Transportation and Max Thompson

should be suspended for a period of five days or in the alternative each of said respondents should pay a fine in the sum of \$2,000.

6. The permits held by Curtis W. Lint were revoked on July 17, 1962, at the request of the permittee and the permits held by Max Thompson were cancelled on June 7, 1962, for nonexercise. Respondents Curtis W. Lint and Max Thompson are placed on notice that no highway carrier permits will be issued to them unless and until evidence is presented to this Commission that all provisions of the following order have been fully complied with.

I recommend the following form of order. ✓

O R D E R

IT IS ORDERED that:

1. Respondents shall cease and desist from all future violations of the Commission's Minimum Rate Tariff No. 7.
2. If, on or before the twentieth day after the effective date of this order, respondents have not paid the fine referred to in paragraph 2 of this order, then all operating authority of Ernest N. Howard, Kenneth Hartnett, E. W. McEachern and David V. Gale, issued to them by this Commission as set forth in Page 2 above, shall be suspended for a period of five consecutive days starting at 12:01 a.m. on the second Monday following the twentieth day after the effective date of this order. Respondents, shall not, by leasing the equipment or other facilities used in operations under these permits for the period of the suspension, or by any other device, directly or indirectly allow such equipment or facilities to be used to circumvent the suspension.

3. Respondents Ernest N. Howard, Kenneth Hartnett, E. W. McEachern and David V. Gale shall post at their 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 their city and radial highway common carrier permits have been suspended by the Commission for a period of five days. Within five days after such posting said respondents shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

4. Respondents Curtis W. Lint, Ernest N. Howard, Kenneth Hartnett, E. W. McEachern, Max Thompson, and David V. Gale shall examine their records for the period from March 1, 1960, to the present time, for the purpose of ascertaining all undercharges that have occurred.

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

6. Respondents shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 4 of this order, and shall notify the Commission in writing upon the consummation of such collections.

7. In the event undercharges ordered to be collected by paragraph 6 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondents shall institute legal proceedings to effect collection and 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.

3. As an alternative to the suspension of operating rights imposed by paragraph 2 of this order, each respondent named in said paragraph may pay a fine of \$2,000 to this Commission on or before the twentieth day after the effective date of this order.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Public Utilities Commission of the State of California.

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

Dated at San Francisco, California, this 19th day of April, 1963.

George A. Hoover
President

Everett A. Page

Fredrick B. Halbluff

William W. Merrill
Commissioners