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ORIGINAL

Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into the operations,)
practices, rates, charges, and)
contracts of J. PROCTOR WADLEIGH.)

Case No. 7390

Kenneth C. Nagel, for respondent.

John T. Murphy, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, practices, rates, charges and contracts of J. Proctor Wadleigh, an individual who holds permits as a radial highway common carrier and highway contract carrier.

A duly noticed public hearing was held before Examiner Power at San Francisco on January 24, 1963. At the conclusion of the hearing the matter was submitted. The purpose of this investigation is to determine, with respect to certain specified transportation, whether respondent has violated Section 3668 of the Public Utilities Code by means of known false billing or any other device or means of permitting a shipper to obtain transportation of property at less than the minimum rates prescribed by Minimum Rate Tariff No. 2.

Respondent's normal operating equipment consists of 9 tractors and 25 trailers. He employs a bookkeeper, 10 drivers and a mechanic. It was stipulated that he was served with Minimum Rate Tariff No. 2 on May 11, 1948 and with all supplements thereof since that date up to the time of the inquiry herein, and that he was served with Distance Table No. 4. His wife assists him in the

business. Respondent's gross revenue for the latest available four quarters amounted to approximately \$447,445.

Two witnesses, one a rate expert, testified for the staff. Respondent and his wife testified in respondent's behalf. Four exhibits were presented. The issues presented by the evidence in this case involved certain transactions, the nature of which is in dispute.

It appears that respondent and the shipper entered into six purported sales of almond hulls or almond hull meal, a constituent in stock feeds. The commodity is described in various ways in the documents involved in this case but only one commodity was hauled and that commodity was ground almond hulls. These purported sales led to many truckloads of almond hull meal being transported, of which 17 were analyzed by the Commission rate witness. The staff contends that the purported sales were merely a device by which respondent provided transportation to the Taylor-Walcott Company of San Francisco at less than the minimum rates established by the Commission.

The evidence on behalf of Commission staff indicates that the loads of ground almond hulls originated at either Winters or Tracy in northern California, and were delivered at various points in Imperial County in the extreme southern part of the State.

Taylor-Walcott Company as "seller" and J. P. Wadleigh as "buyer" entered into a purported sale of 175 tons of almond hulls for a price of \$26 per ton on a basis of FOB trucks, Tracy, California. At approximately the same time, J. P. Wadleigh as "seller" and Taylor-Walcott Company as "buyer" entered into a purported sale of eight-capacity truckloads of ground almond hull meal for a price of \$34 per ton on a basis of FOB trucks, Brawley,

California. Both of these sales were evidenced by written memoranda accepted by J. P. Wadleigh on July 22, 1961, and thus became effective on the same day. The commodity in both agreements was the same although differently described. The weights variously described are approximately equal.

Taylor-Walcott Company as "seller" and J. P. Wadleigh as "buyer" entered into a purported sale of 46 truckloads of almond hulls for a price of \$25.50 per ton on a basis of FOB trucks, Winters, California. At about the same time, J. P. Wadleigh as "seller" and Taylor-Walcott Company as "buyer" entered into a purported sale of approximately 1,100 tons of ground almond hull meal for a price of \$34 per ton on a basis of FOB trucks, Brawley, California. Both of these sales were evidenced by written memoranda accepted by J. P. Wadleigh on July 25, 1961, and thus became effective on the same day. The commodity in both agreements was the same although differently described. The weights though variously described are approximately equal.

Taylor-Walcott Company as "seller" and J. P. Wadleigh as "buyer" entered into a purported sale of approximately 190 tons of almond hull meal for a price of \$29.50 per ton on a basis of FOB trucks, Tracy, California. At about the same time, J. P. Wadleigh as "seller" and Taylor-Walcott Company as "buyer" entered into a purported sale of 8-capacity truckloads of ground almond hull meal at a price of \$37.50 per ton on a basis of FOB trucks, Westmoreland, California. Both of these sales were evidenced by written memoranda accepted by J. P. Wadleigh on September 18, 1961, and thus became effective on the same day. The commodity in both of the agreements above was the same, although differently described. The weights variously described are approximately equal.

The contention of respondent is that he is a dealer in the commodity in question and that these transactions were bona fide sales. Respondent had obtained a license from the State to act as a produce dealer, posted a bond, and maintained a separate bank account for the feed business. He obtained separate check and invoice forms for use in the produce dealing business.

When respondent started the produce business, he financed it through a loan from himself as a highway carrier to himself as a feed dealer. This was subsequently repaid. It is clear from the evidence that the principal occupation or calling of respondent was that of a for-hire carrier. Ninety percent of the profits of the produce business was paid to the carrier for transportation expense, the rest being retained in the feed business account. Wadleigh conceded that he had never solicited sales from anyone other than Taylor-Walcott and that he made no effort to discover sources of supply.

The evidence shows that the consignees were feed yards. Wadleigh testified that his reason for reselling in southern California to Taylor-Walcott rather than to the feed yards themselves was financial. The yards, he stated, were used to receiving credit terms of 30 to 60 days. This would tie up substantial sums of money, and he did not want to have that much money tied up. He conceded that he had no facilities for storing the commodity in question.

The defense offered does not overcome the inferences resulting from the practices of respondent and Taylor-Walcott. Among these are the simultaneous execution of the sales memoranda in pairs, each pair consisting of one Taylor-Walcott to Wadleigh sale and one Wadleigh to Taylor-Walcott sale. Wadleigh failed to set up an organization to seek out potential buyers or sellers of the merchandise. He was unwilling to accept the credit practices prevalent in

the trade. The mere fact that respondent had a license to trade does not prove that he, in fact, traded.

Our disposition of the question of whether these transactions were sales or transportation disposes of a second issue presented by the order instituting investigation herein. Since we find that the transactions here under scrutiny involved transportation rather than sales, it follows that the fees imposed by Section 5003 of the Public Utilities Code should have been paid.

The Commission finds that:

1. The purported "buy and sell" transactions were not, in truth and in fact bona fide sales.
2. Respondent charged less than the lawfully prescribed minimum rates, in the instances, and in the manner set forth below:

<u>Freight Bill No.</u>	<u>Minimum Rate</u>	<u>Contract Difference</u>	<u>Under- charge</u>
3466 & 3468	\$734.58	\$392.62	\$ 341.96
3022 & 3023	584.41	377.04	207.37
3469	321.95	188.00	133.95
1757	353.93	189.21	164.72
3024	384.14	205.36	178.78
3471	373.81	200.60	173.21
3470	364.11	194.65	169.46
3472	299.21	193.04	106.17
1758 & 3065	555.76	358.56	197.20
3474	363.16	194.14	169.02
3473	334.28	195.20	139.08
1760 & 3066	752.87	402.47	350.40
3476	<u>293.18</u>	<u>171.20</u>	<u>121.98</u>
Totals	\$5,715.39	\$3,262.09	\$2,453.30

3. The paired sales were a device to assist, suffer or permit Taylor-Walcott Company to obtain transportation of property at rates less than those prescribed as minimum by this Commission.

4. The Transportation Rate Fund Fees imposed by Section 5003 of the Public Utilities Code relating to the transportation tabulated in Finding 2 have not been paid, nor has any part thereof been paid.

The Commission concludes, based upon the foregoing findings of fact, that:

1. The purported "buy and sell" transactions were shams and devices employed by respondent to circumvent and violate the law, and such transactions constituted for-hire carriage within the regulatory jurisdiction of this Commission.

2. J. P. Wadleigh is indebted to the Commission for the fees prescribed by Section 5003 of the Public Utilities Code and should be directed to make payment thereof in the manner set forth in the ensuing order.

3. J. P. Wadleigh has violated Sections 3662 and 5003 of the Public Utilities Code and should be ordered to pay a fine as set forth in the order which follows.

ORDER

IT IS ORDERED that:

1. On or before one hundred twenty days after the effective date of this order, respondent shall pay a fine to the Commission in the sum of \$5,000.

2. If respondent has not complied with this order by paying said fine within the time designated, the Commission shall institute appropriate action against respondent to collect said fine.

3. Respondent shall examine his records for the period from June 1, 1961 to the present time, for the purpose of ascertaining all undercharges that have occurred, including undercharges based on pseudo buy and sell transactions.

4. Within ninety days after the effective date of this order, respondent shall complete the examination of his records 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 set forth herein, together with those 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 undercharges ordered to be collected by paragraph 5 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent 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.

7. Respondent shall include in the report required by paragraph 6 of this order, a statement of revenue subject to the fees imposed by Section 5003 of the Public Utilities Code and shall accompany such report with payment of all fees due under said Section 5003 together with any penalties incurred by virtue of the provisions of Section 5007 of said Code.

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 2nd day of July, 1963.

George B. Grover
President
John H. Ditchett
Charles W. Long
Frederick B. Hallock
William Lee Brund
Commissioners