

ORIGINALDecision No. 65985

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
 own Motion into the operations and
 practices of TOM LALLY, dba VISALIA
 FEED SERVICE, relating to the trans-
 portation of property over the high-
 ways of the State of California.

Case No. 7434

Erling H. Kloster, of Maddox,
 Abercrombie, Kloster & Jacobus,
 for respondent.
Hugh N. Orr, for the Commission staff.

O P I N I O N

On November 20, 1962, the Commission instituted its investigation into the operations and practices of Tom Lally, doing business as Visalia Feed Service. Pursuant to the order instituting investigation, public hearing was held before Examiner Porter on February 20, 1963, at Fresno, on which date the matter was submitted, subject to the filing of concurrent briefs. The briefs having been filed the matter is now ready for decision.

The purpose of this investigation is to determine:

1. Whether respondent, in violation of Public Utilities Code Section 3571, has engaged in the business of transporting property for compensation by motor vehicle on the public highways between points within this State without first having obtained from this Commission proper authorization for such transportation.
2. Whether respondent has violated Sections 3664 and 3667 of the Public Utilities Code by charging, demanding, collecting or

receiving a lesser compensation for the transportation of property over the public highways of this State than the applicable rates and charges prescribed by Minimum Rate Tariff No. 2.

3. Whether respondent has participated in any device to provide transportation of property by motor vehicle on public highways of this State for any shipper at less than the minimum rates or charges established or approved by this Commission in violation of Section 3668 of the Public Utilities Code.

The material facts in the case are not in dispute.

The respondent is engaged in the business of milling animal and poultry feed for sale and distribution to customers. He buys most of his raw materials in Northern California. He endeavors to avoid empty back-hauls by using his trucking equipment to deliver cottonseed meal, barley, corn, pea-cake, alfalfa meal, meat scraps, rice, bran, or milo which he has purchased and which he sells.

Respondent takes future positions of long or short with respect to the market for basic animal feeds. Following his determination that the market is going up or down he enters into sizeable written long-term contracts to buy or sell for cash or futures. He sells to producers, dealers and ultimate customers. If he estimates that the market will go down he enters into contracts to sell grains which he does not own planning to purchase same at a lower price for delivery when obligated to deliver by contract.

Staff analyzed fifteen written contracts whereby respondent bought and sold animal food and used some of it for his mill. Staff compared the difference between respondent's purchase price and selling price with minimum tariff rates and on that basis found in each instance an "undercharge". The average undercharge on this

basis was \$87.49. However, on several of these transactions the evidence indicated that respondent was short when he should have been long and his gross losses thereby in three transactions totaled \$586.13.

On rebuttal respondent testified that in his buy and sell operations, in addition to providing transportation, he provided credit for his customers, prompt service and a market for his producers. On occasion when in a long position with deliveries he also provided storage. He has 3,000 tons capacity of general storage and 4,000 tons of uncovered storage. He carries cargo insurance on the materials he transports. He has collected insurance on cargo losses and was required to resupply the purchaser on these occasions. In the case of cottonseed meal he usually buys for delivery at the end of the year and stores for the next seven months during which he sells the excess over the needs of his mill. His trucking equipment enables him to compete favorably in his dealing operations with prompt deliveries and a careful regulation of the flow of materials to his mill.

At present, as to his market he is long on cottonseed meal and milo and short on barley. If he finds himself in trouble on the long side, he can sell it back to the mill from which he purchased. From October, 1961, through April, 1962, he was short on cottonseed meal at least 500 tons, or one million pounds. The market went up, not down, and he lost money but he was able to cover his losses money-wise.

Of the transactions of respondent which occurred during the test period and were not selected by staff for analysis there were transactions with a spread of from \$3 to \$4 per ton between the

buy and sell price. Among his higher profits during this period were sales of cottonseed meal \$8 to \$10 per ton over cost. For example high gains were realized in a sale to J. Burns of San Francisco for \$64 a ton, purchased at \$54 a ton. These two shipments consisted of 25,860 and 22,500 pounds, respectively. This was topped by a sale to Taylor-Walcott of San Francisco at \$75 a ton which yielded a differential of \$16 per ton. There were seven such examples of high profit during the test period.

Counsel for respondent moved for dismissal of the investigation on the ground that respondent was not a highway carrier within the meaning of Section 3511 in that he is subject to Subsection (c) which excludes "Persons or corporations hauling their own property". The examiner properly ruled that the motion should be brought to the attention of the Commission.

Upon consideration of the evidence we find that:

1. There is here present substantial evidence of bona fide buy and sell incidents and characteristics. The success of respondent's business depends upon market conditions, his knowledge of animal and poultry feeds, his awareness, based upon experience, of his customers' probable needs and his ability to satisfy such needs. He assumes all of the risks of a person engaged in selling commodities, including the possibility of loss due to inability to secure profitable sales and to maintain sound credit.

2. Respondent is engaged as a dealer in bona fide buy and sell transactions and such transactions do not constitute a device to evade regulation by this Commission.

3. Respondent transports his own property and not the property of others.

In accordance with the foregoing findings we conclude that respondent has not violated Sections 3571, 3664, 3667 and 3668 of the Public Utilities Code or either or any thereof and the motion to dismiss should be granted.

O R D E R

IT IS ORDERED that the motion for dismissal of the investigation, herein, is granted and said investigation is hereby dismissed.

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 completion of such service.

Dated at San Francisco, California, this 10th day of September, 1963.

William B. Brundell
President
John R. ...
...
George H. Trover
Fredrick B. ...
Commissioners