

ORIGINAL

Decision No. 66235

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's) own motion into the operations,) rates and practices of GEORGE F.) PEARCE, an individual. }

Case No. 7432

George F. Pearce, in propria persona.

Elinore Charles, for the Commission staff.

O P I N I O N

This investigation was heard on a consolidated record with Application No. 44783 of the Charles Sill Co., Inc., on November 15 and 16, 1962, at Bakersfield before Examiner Power and was then submitted. Application No. 44783 was granted conditionally by Decision No. 66020, issued September 17, 1963.

The purpose of this inquiry is to determine whether respondent Pearce had undercharged on certain shipments of potatoes and whether he had rebated to Sill on traffic hauled for that company. ^{1/}

The Commission staff presented two witnesses and documentary evidence contained in five exhibits. Respondent testified in his own behalf.

The staff's contentions were summed up in its Exhibit No. 3, the material part of which is shown as follows:

1/ The Sill application was for a radial highway common carrier permit and the two proceedings were consolidated because of that company's involvement in Case No. 7432.

<u>Date of Statement</u>	<u>Charges Assessed</u>	<u>Alleged Undercharges</u>	<u>Payments to Shipper</u>
Aug. 18, 1961	\$ 3,352.32	\$ -	\$ 469.99
Sept. 2, 1961	5,651.97	-	782.40
Sept. 8, 1961	4,180.85	72.87	581.77
Sept. 16, 1961	4,707.58	-	661.99
Sept. 23, 1961	7,307.00	117.71	1,027.54
Sept. 29, 1961	4,933.44	-	693.76
Oct. 6, 1961	3,847.35	136.31	
Oct. 13, 1961	4,102.27		1,115.80
Oct. 20, 1961	4,408.38	-	619.92
Oct. 31, 1961	4,757.37	212.52	651.10
Nov. 17, 1961	<u>2,625.24</u>	<u>410.82</u>	<u>502.26</u>
Total	\$49,873.77	\$950.23	\$7,106.53

The undercharges which the staff alleges are those listed in the third column above. The rebates alleged are listed in Column 4 labeled "Payments to Shipper". The Commission will address itself first to the alleged undercharges. The first four of these arise on traffic originating in the Guadalupe area and delivered to the shed of Charles Sill Co., Inc., in Shafter (parts 1 through 4 of Exhibit No. 5). Item No. 336 of Minimum Rate Tariff No. 8 contains a special point-to-point rate subject to a minimum weight of 40,000 pounds applicable to the hauling of bulk potatoes from Guadalupe and points within 10 miles thereof to Shafter and points within one mile of Shafter. This rate applies only when the potatoes are loaded by consignor and unloaded by gravity.

The staff applied such rate on the theory that every load of potatoes hauled constituted a separate shipment. When for any reason there was a load less than 40,000 pounds, the staff rated it at the higher rates (46 cents per 100 pounds in some cases and 49 cents per 100 pounds in others) applicable to the quantity transported in the load or at the 32 cent rate on a minimum weight of 40,000

pounds, whichever produces the lower charge. In this way it arrived at the first four of the undercharges listed in Column 3 above.

Part 1 of the Commission's rate statement (Exhibit No. 5) can be taken as an example for parts 1 through 4. The staff rated freight bills Nos. 158 and 159 separately. The weights on these loads were 26,420 and 25,620 pounds, respectively. Both moved on September 5, 1961. The total movement from three ranches in the Guadalupe district on that day was eight loads totalling 364,580 pounds for an average of 45,572.5 pounds per load.

Respondent billed these with 18 other loads as follows: "1,292,840 lbs. @ \$.32 per cwt. \$4,137.03"^{2/} (Part 1 of Exhibit No. 2). All of these loads moved from four ranches in the Guadalupe area, three of which were apparently owned or leased by Sill. There are three short loads, one of which appears to have been the subject of a deficiency billing.

Item No. 185 (Shipments Transported In Multiple Lots) of the tariff provides that when a carrier is unable to pickup an entire shipment at one time, or when more than one vehicle or connected train of vehicles is used to transport the multiple lot shipment, any property separately picked up shall constitute a separate shipment, unless prior to or at the time of initial pickup:

1. Written information has been received from the consignor describing the kind and quantity of property which shall constitute the multiple lot shipment, and

2. The carrier shall issue to the consignor a single master document for the entire shipment.

^{2/} This amount should have been \$4,180.86. Pearce subsequently issued a deficiency billing for a deficit weight of 13,630 pounds.

The documentation required in order to make the several loads in parts 1 through 4 of Exhibit No. 5 into single multiple lot shipments was not issued. Therefore, under the tariff rule, each load must be rated as a separate shipment at the rates applicable to the quantity transported. The rating of the shipments as set forth in parts 1 through 4 of the staff's Exhibit No. 5 is correct, resulting in undercharges of \$539.41.

Part 5 of the staff exhibit deals with potatoes moved from Cuyama to Shafter for the same shipper. Since Cuyama is too far away from Guadalupe for the Item 336 rate to apply, the shipment should have been rated under the mileage rates (Item 300 Series) of Minimum Rate Tariff No. 8. The staff correctly determined that the rate was 27 cents per 100 pounds. Respondent used a rate of 23 cents per 100 pounds through failure to properly determine the constructive mileage in accordance with the provisions of Distance Table No. 4, causing a resultant undercharge of \$410.82.

We turn now to allegations of the staff that the payments from respondent to Sill, as shown in Column 4 of the tabulation on page 2, are unlawful rebates. The documentary evidence submitted by the staff established that the payments actually were made and therefore on this phase of the matter the question to be determined is whether these payments actually were rebates or not. The payments from Pearce to Sill were uniformly $4\frac{1}{2}$ cents per 100 pounds based on the total weight of the potatoes transported by Pearce for Sill during each billing period. Respondent's records show that the payments cover "equipment rental". The staff witness stated that four services were performed by Sill for respondent: (1) pulling trucks loose from where they were stuck in the fields; (2) pulling and replacing outside dual tires for field operation;

(3) placing tarps over the trucks; and (4) sometimes furnishing pickup trucks for Pearce's drivers to go into Guadalupe to eat or for coffee.

Respondent testified that it is customary for the trucker involved in hauling potatoes from the field to a processor to pay for men and equipment, either directly or indirectly, to tow the carrier's trailers through the field while loading and to tow his trucks out of the mud and sand when required. It is necessary to break lanes into the fields when new fields are being started. The men and equipment for this have been furnished by the shipper. When a new field is prepared for loading, the dual wheels must be removed from trailers before they are pulled through the fields. The fields are plowed in rows and between each row of potatoes there is a depression. If the dual wheels are left on trailers the width of the tires will overlap and will knock down the rows of potatoes.

The potato picking machine empties directly into the truck and trailer therefore a trailer must be along side when the machine is actually harvesting. These trailers were pulled by tractors furnished by the shipper and operated by personnel employed by him. At times trucks and trailers belonging to Pearce would become mired in the mud or sand and would have to be pulled out.

Pearce pointed out in his testimony that, if he had to furnish the necessary services himself by sending his own men and equipment to the field, a considerable distance from his home base, it would be necessary for him to pay the men and keep the equipment away from home base for long periods of time, during which these men and such equipment would be idle. Pearce testified that in his opinion it would cost at least as much as, if not more, to furnish his own men and equipment as to pay the sums charged by Sill.

Pearce, however, kept no record of when or how frequently, the services in question were performed. The cost of providing these services by respondent is not a matter of record.

The respondent's position is that his payments to Sill are reasonable for the services performed for him by Sill. This is not established on the record. In any event, whether the payments are reasonable has no bearing on the question whether such payments are unlawful rebates or remissions in violation of Section 3667 of the Public Utilities Code. Under this section, unless authorized by the Commission, any refund or remittance from the transportation charges assessed by a highway permit carrier which results in rates or charges less than those prescribed as minimum by the Commission is unlawful. Pearce has not secured authority from the Commission for the payments to Sill; nor does Minimum Rate Tariff No. 3 provide for or authorize such payments.

In construing the application of Minimum Rate Tariff No. 2, the Commission found that the difference between the minimum rate and an agreed flat rate deducted from the shipper's bill as a dispatch service was an unlawful rebate inasmuch as there is no provision in Minimum Rate Tariff No. 2 for dispatch service.^{3/} The Commission has stated that in construing Public Utilities Code, Section 3667, it should be interpreted to give the minimum rate structure the broadest possible protection against refund or remittance; hence payments by a carrier to a consignee for unloading services were found to constitute a refund or remittance prohibited by that section.

^{3/} Decision No. 62958, dated December 19, 1961, in Case No. 7141, Investigation of Richard L. Eggleton (Eggleton Trucking), unreported.

The Commission finds that:

1. At all the times referred to herein respondent had been served with, and was in possession of, Minimum Rate Tariff No. 8, Distance Table No. 4, with supplements of said tariff, distance table and each of them, up to date.

2. Respondent transported potatoes in bulk from the vicinity of Guadalupe and from the vicinity of Cuyama to Shafter at less than the lawful minimum rates set forth in Items Nos. 300 and 336 of Minimum Rate Tariff No. 8 in effect at time of shipment by failing to assess the rates applicable to the quantity transported in each load. The amount of said undercharges is \$950.23.

3. Respondent calculated mileages on a basis other than that contained in Distance Table No. 4 of this Commission upon traffic moved between Cuyama and Shafter in November, 1961.

4. Respondent, by means of remitting to the shipper a portion of the transportation charges authorized by the Commission, has collected and received a lesser compensation for the transportation of property than the applicable minimum rates and charges established by this Commission. The amount of said undercharges is \$7,106.53.

The Commission concludes that: (1) Respondent has violated Sections 3664 and 3737 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 Minimum Rate Tariff No. 8 and supplements thereto; (2) Respondent has violated Section 3667 of the Public Utilities Code by remitting to the shipper, Charles Sill Co., a portion of the charges prescribed by the Minimum Rate Tariff No. 8 and received from said shipper, without being authorized to do so by the Commission; and (3) The sum of \$3,000 is a reasonable penalty for the violations set forth above.

O R D E R

IT IS ORDERED that:

1. Within twenty days after the effective date of this order George F. Pearce shall pay to this Commission a fine of \$3,000.

2. Respondent shall examine his records for the period from August 13, 1961 to the present time, for the purpose of ascertaining all undercharges that have occurred.

3. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 2 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.

4. 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 2 of this order, and shall 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 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.

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 29th day of October, 1963.

William W. Dwyer
President

George L. Hoover
Friedrich B. Holoboff
Commissioners

I will file a
description
of the
sub E. H. Hill

McKEAGE, Commissioner, concurring:

I concur in the order of the majority decision, but desire to explain in some detail the reason for such concurrence.

In a situation of the kind here presented, the burden, necessarily, must rest upon the carrier and the shipper to prove the bona fides of the alleged agreement whereby the carrier is required to pay compensation to the shipper in connection with the transportation which is the subject matter of the controversy. Were this not true, regulatory authority would find itself at the complete mercy of the connivance between the carrier and the shipper. Such a rule does not infringe the constitutional rights of either the shipper or the carrier. Requiring the carrier to collect the full minimum rate does not infringe in any way his rights. So far as the shipper is concerned, in a situation of the kind here presented, he has his action at law against the carrier if the carrier's conduct has in any way injured him as a result of regulatory authority insisting upon the enforcement of minimum rates. In other words, if the carrier and the shipper have entered into a lawful contract which is frustrated by the enforcement of regulatory authority, the shipper has recourse against the carrier for any injury which the shipper may have sustained as the result of the operation of regulatory law. The fact that cross-payments are made by carrier and shipper does not avoid the fact of rebate.


McKEAGE

I dissent.

There are several basic shortcomings which dominate this decision and necessarily pre-empt my acquiescence thereto. I would direct my comments to those issues of primary interest insofar as they deal with public policy.

A careful review of the proceedings in light of the majority decision, now raises considerable doubt that the legal rights of the respondent were adequately protected at the hearing. The respondent appeared in propria personam in a penalty action brought by this Commission. He was not advised on the record as to the nature of the proceedings, the conduct thereof, and his right of defense. There were stipulations entered; departures from evidentiary rules; the respondent conducted no cross-examination; he was excluded from the opportunity of opening argument (although staff counsel made one); and off the record discussions of critical matters. All tend to make suspect any decision adverse to the respondent. Of further vitality to the infringement of rights was the reluctance of the respondent to testify.^{1/} The cumulative effect of these procedures, in my opinion, is not consonant with procedural due process and requires a hearing de novo.

The decision in passing upon payments by a carrier to a shipper has created a new standard of conduct through the method of ad hoc adjudication or what I have labeled "unrevealed regulation". Section 3665 of the Public Utilities Code provides

^{1/} Section 3741 P.U.C. Code

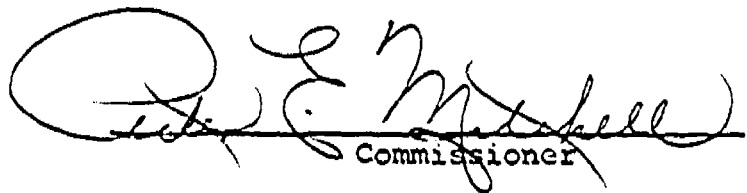
that the Commission shall establish whatever rules are necessary for the application and enforcement of minimum rates by highway carriers. Case 5330, et seq^{2/} was instituted by the Commission in 1961 for the very purpose of receiving evidence on the practice of carriers in payments and allowances to shippers for services and establishment of rules in the Commission's minimum rate tariff with respect thereto. It was submitted in 1962 for Commission decision. This is the vehicle for further protection of minimum rates, if such be needed in this area. Within the confines of that proceeding is contained the testimony of manifold authorities in the field of minimum rates. To attempt to pronounce by virtue of one enforcement case what should be incorporated in a rule is unessential, unadvised, unfounded and at the least retroactive law-making. Reliance on law is replaced by ex post facto administrative action. The unfairness to the respondent is obvious. There is no rule of the Commission that he can consult for guidance. He must proceed at his own peril. In this instance such procedure (even though bona fide) was his downfall.

The findings and conclusions of the decision are not supported by the evidence. Indeed in its newly-found enthusiasm for ad hoc adjudication the majority has adopted a formula for determining whether there is a rebate of a portion of the minimum rate. Suspicion + Investigation = Substantial Evidence +

^{2/} Cases Nos. 5330, 5432, 5433, 5435, 5436, 5437, 5438, 5439, 5440, 5441, 5603, 5604, and 6008 (OSH 5/16/61).

It is correct that the respondent in moving potatoes from Cuyama to Shafter did fail to determine the constructive mileage in accordance with the provisions of Distance Table No. 4. Therefore, I would agree only as to the finding on undercharges of \$410.82.

This Commission employs numerous experts in the field of transportation and law. Through the efforts of these skilled and experienced personnel we should be able to 1) evolve suitable rules for the information and instruction of the transportation industry under our jurisdiction, 2) present substantial evidence to show wherein any violation of our rules has occurred, 3) adopt our tariffs to meet the ever-changing conditions in the field of transportation.


Commissioner