

ORIGINALDecision No. 66414

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations,)
 rates, charges and practices of)
 NUNNEMAKER TRANSPORTATION CO., a)
 corporation.)

Case No. 7430

Marvin J. Colangelo, for respondent.Timothy E. Treacy, for the Commission
staff.O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges and practices of Nunnemaker Transportation Co.

The purpose of this investigation is to determine, with respect to certain specified transportation, whether respondent:

1. Violated Sections 3664 and 3667 of the Public Utilities Code by charging, demanding, collecting and receiving a lesser compensation for the transportation of property than the applicable charges prescribed in Item 210-J of Minimum Rate Tariff No. 2, and supplements thereto.
2. Violated Sections 3664, 3667 and 3737 of the Public Utilities Code by failing to prepare proper shipping documents for split pickup and split delivery shipments as required by Items 160-R and 170-R of Minimum Rate Tariff No. 2, and supplements thereto.
3. Failed to execute a proper subhaul agreement in compliance with General Order No. 102-A.

A duly noticed public hearing was held in this matter before Examiner Jarvis on February 6 and 7, 1963, at San Francisco.

No evidence was presented respecting any subhaul agreements in connection with respondent, and the question of whether respondent complied with General Order No. 102-A will not be further considered.

This proceeding, in the main, involves the resolution of questions of fact upon which detailed findings will hereinafter be made. One point, however, requires discussion. The Commission staff contends that the charges assessed in Freight Bills Nos. 18460, 18758 (rebilled as 18770) and 18943 were improperly calculated because they involved split pickups and did not have the documentation required by Item 160 of Minimum Rate Tariff No. 2. The staff's position is that if the proper documentation existed, the rates assessed would be lower than those advocated by the staff; however, since there was improper documentation, each portion of the alleged split pickups must be rated as a single shipment, thereby resulting in higher charges. The respondent contends that the shipments were properly rated or that if undercharges exist the amounts are less than the staff contends; that Item 160 does not apply to the freight bills in question; that Item 360 of Pacific Southcoast Freight Bureau Tariff 194-S controlled the documentation involved; and that it complied with these provisions.

The Commission holds that, under the particular facts of this case, the provisions of Tariff 194-S are controlling.¹ Public Utilities Code Section 3663 provides that: "In the event the commission establishes minimum rates for transportation by highway

¹ Tariff 194-S has been superseded by Tariff 194-T.

permit carriers, the rates shall not exceed the rates of common carriers by land ... for the transportation of the same kind of property between the same points." Section 3665 provides that: "The commission shall make such rules as are necessary to the application and enforcement of the rates established or approved pursuant to this chapter." Thus, the Commission can under its rule making power prescribe documentation requirements which are different than the common carriers by land whose rates may be used under Section 3663; provided these documentation rules do not change the rate authorized by the statute. The documentation rules of Item 160 apply to "split pickup" shipments. A "split pickup" is defined in Item 11(1) of Minimum Rate Tariff No. 2 as follows: "Split Pickup Shipment" means a shipment consisting of two or more component parts picked up by a carrier during one calendar day from one consignor at more than one point of origin, the composite shipment weighing (or transportation charges computed upon a weight of) not less than 4,000 pounds, said shipment being consigned to one consignee at one point of destination." Railroads are common carriers by land and their rates, if applicable, may be used by highway permit carriers pursuant to Section 3663. The term "split pickup" is not used in railroad tariff terminology. Railroad tariffs talk about "stopping in transit". Pacific Southcoast Freight Bureau Tariff 194-S was a rail tariff entitled "Stopping in Transit to Complete Loading or Unloading". The stopping in transit permitted by Tariff 194-S differs from the split pickup provisions of Minimum Rate Tariff No. 2. For example, a split pickup must be made in one calendar day whereas a stopping in transit to complete loading, under Tariff 194-S, need not be accomplished in one calendar day. Other differences exist but need not be detailed.

All points of pickup involved in Freight Bills Nos. 18460, 18758 (rebilled as 18770), and 18943 were on rail. The point of destination in Freight Bill No. 18943 was on rail and that shipment could have been handled entirely by rail. The application of the highway carrier rules of "split pickup" to the movements in question would be more restrictive than the rail rules respecting "stopping in transit", and thus would deprive the respondent of its right under Section 3663 of utilizing the rail rates for the transportation involved. While the Commission can promulgate documentation rules to assist in the enforcement of established rates, it has made no rules with respect to the situation here under consideration. At the time of the movement of the three shipments here involved Item 860 of Tariff 194-S provided that: "Except as otherwise provided in Item 970 [which deals with requests for stop-off privileges while cars are in transit], bills of lading and waybills must show the stop-off points and the parties who are to complete loading or to partly unload. No notation is to be made on bills of lading as to the portion of shipment to be loaded or unloaded at stop-off points, except when shown for information only."

The record discloses that bills of lading were prepared by the shipper in advance of each of the three shipments. In two instances, the bills of lading were signed by the driver at the time of the first pickup and a copy given him. In the third instance the copy of the bill of lading was mailed directly to respondent on the same day the first pickup was made.

It should be noted that the three bills of lading were not furnished to the staff at the time of its investigation, and were first produced at the hearing in this matter. Although respondent, at the hearing, satisfactorily explained that after receipt of

certain bills of lading it forwards them after a period of time, to another party to permit a cross-check of a credit arrangement, this is not in accordance with Section 3701 of the Public Utilities Code. Section 3701 provides in part that: "Each highway permit carrier maintaining an office or place of business within this State and offering intrastate service shall keep therein all books, accounts, papers and records required by the Commission to be kept within this State." (Emphasis added.) No violation of Section 3701 was charged in this investigation and no action will be taken thereon. However, respondent is admonished to keep all of its records at its office in accordance with law.

The Commission makes the following findings of fact and conclusions of law.

Findings of Fact

1. At all times herein-mentioned respondent held, and respondent now holds, Radial Highway Common Carrier Permit No. 12-1542 and Highway Contract Carrier Permit No. 12-2922.
2. At all times here involved respondent had been served with the Commission's Minimum Rate Tariffs Nos. 2 and 10 and all corrections and supplements thereto and Distance Table No. 4 and all corrections and supplements thereto.
3. The charges assessed by respondent in Freight Bills Nos. 18336, 18435, 18588, 18700, 18915, 18944, 18963, 18460, 18758 rebilled as 18770 were computed by respondent as though both the consignor and consignee were on rail. In each instance the consignee was not on rail. The lowest lawful combination of rail

and off-rail rates, was, in each instance higher than the rates assessed, and are as follows:

<u>Freight Bill</u>	<u>Respondent's Charge</u>	<u>Correct Charge</u>	<u>Undercharge</u>
18336	\$301.22	\$343.19	\$41.97
18435	266.85	268.70	1.85
18588	287.86	327.97	40.11
18700	141.40	161.11	19.71
18915	151.22	173.77	22.55
18944	201.00	216.13	15.13
18963	255.90	260.58	4.68
18460	213.47	222.37	8.90
(18758	320.00	341.13	21.13
(18770			

4. The charges assessed by respondent in Freight Bills Nos. 18470 and 18943 were computed by applying rates which were not applicable to the transportation involved. The lowest lawful rates applicable to these shipments produce charges which are higher than the charges billed by respondent, and are as follows:

<u>Freight Bill</u>	<u>Respondent's Charge</u>	<u>Correct Charge</u>	<u>Undercharge</u>
18740	\$227.43	\$250.00	\$22.57
18943	177.95	179.35	1.40

5. The charges assessed by respondent in Freight Bills Nos. 18737 and 18740 were lawful, and no violations occurred with respect to the transportation involved.

6. The charges originally assessed by respondent in Freight Bill No. 14867 were computed by respondent as though both the consignor and consignee were on rail. The consignee was not on rail. Respondent subsequently rebilled the shipper at the correct rate but has not collected the difference between the rebilled amount and the original billing. The correct charge and undercharge remaining is as follows:

Amount billed	\$396.85	
Amount collected	310.38	
Minimum Charge	392.89	
Undercharge		\$82.51

Conclusions of Law

1. Applicant violated Sections 3664 and 3667 of the Public Utilities Code by charging, demanding, collecting and receiving a lesser compensation for the transportation of property than the charges prescribed in the Commission's Minimum Rate Tariff No. 2.

At the hearing the staff and respondent introduced evidence dealing with the question of what type of fine or suspension should be imposed on respondent, if any. The staff indicated that respondent's predecessor (a partnership which was changed to the present corporate entity) had previously been found to have violated provisions of Minimum Rate Tariff No. 10 (Decision No. 56039 in Case No. 5925), and that prior to the present proceeding certain alleged violations were called to respondent's attention. Respondent contends that Decision No. 56039 was issued five years ago, deals with a different tariff, different commodities and has no bearing on this matter; that when alleged undercharges were called to its attention by the staff, it attempted to collect them and did collect all but one; that in this investigation the staff reviewed approximately 800 freight bills, selected only 18 as alleged apparent violations, reduced this number to 14; that two of these were shown not to be violations and that some of the other violations were not as severe as alleged by the staff; that the violations were not willful; and that the staff expert in this proceeding made errors in rating various shipments involved, which demonstrates that honest errors occur in rating shipments. In the circumstances, the Commission is of the opinion that respondent is not as culpable as the staff contends nor as innocent as it would have us believe, and that a moderate fine should be imposed on respondent. Since some of the violations occurred before the effective date of the 1961 amendment to Public Utilities Code Section 3774, an alternate suspension provision will be included in the order.

The Commission further concludes that:

2. Respondent should be fined or have its operating rights suspended as hereinafter provided in the order. ✓

O R D E R

IT IS ORDERED that:

1. If, on or before the twentieth day after the effective date of this order, respondent has not paid the fine referred to in paragraph 7 of this order, then Radial Highway Common Carrier Permit No. 12-1542 and Highway Contract Carrier Permit No. 12-2922 issued to Nunnemaker Transportation Co. shall be suspended for five consecutive days, starting at 12:01 a.m., on the second Monday following the twentieth day after said effective date.

Respondent shall not, by leasing the equipment or other facilities used in operations under these permits 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.

2. In the event the suspension as provided in paragraph 1 hereof becomes effective, respondent shall post at his 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 his radial highway common carrier permit and highway contract carrier permit have been suspended by the Commission for a period of five days. Within five days after such posting respondent shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

3. Respondent shall examine his records for the period from December 1, 1962, to the present time, for the purpose of ascertaining all undercharges that have occurred.

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. As an alternative to the suspension of operating rights imposed by paragraph 1 of this order, respondent may pay a fine of \$1,500 to this Commission on or before the twentieth day after the effective date of this order.

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 3rd day of DECEMBER, 1963.

William B. Burnett
President
John E. Hildebrand
Walter H. Hildebrand
George E. Hoover
Fredrick C. Hildebrand
Commissioners