

ORIGINAL

Decision No. 66924

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, charges, and practices of
ROY V. DAVIS, an individual, doing
business as DAVIS & SON TRUCKING.

Case No. 7769

Lewis A. Plourd, for respondent.

Robert C. Marks and Charles P.
Barrett, for the Commission
staff.

O P I N I O N

By its order dated November 5, 1963, the Commission instituted an investigation into the operations, rates, charges and practices of Roy V. Davis, an individual, doing business as Davis & Son Trucking.

A public hearing in this investigation was held before Examiner Gravelle on January 14, 1964 at Imperial.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 13-3319 dated April 7, 1959 and Highway Contract Carrier Permit No. 13-3277 dated April 22, 1958. Respondent has a terminal in Imperial, California. He owns and operates five pieces of equipment. His total gross revenue for the year ending September 30, 1963 was \$86,205. Copies of appropriate tariffs and the distance table were served upon respondent.

Respondent has been issued undercharge letters by this Commission on June 9, 1959 and March 20, 1961. (Exhibits Nos. 7 and 8.)

On July 10, 1962, October 18, 1962 and again on January 16, 1963, a representative of the Commission's Field Section visited respondent's place of business and checked his records for the period from July through October of 1962, inclusive.

The underlying documents relating to nine shipments were taken from respondent's files and submitted to the License and Compliance Branch of the Commission's Transportation Division. They are included in Exhibit No. 1.

Based upon the data taken from said shipping documents a rate study was prepared and introduced in evidence as Exhibit No. 6. Said exhibit reflects undercharges in the amount of \$309.88.

It was stipulated that respondent held the operating authority previously mentioned, that he had been served with appropriate tariffs and the distance table and that he held a Dealer's Permit No. D-50908 issued by the Department of Agriculture of the State of California dated February 25, 1963 and valid from February 4, 1963 to February 3, 1964. (Exhibit No. 4.)

Counsel for the staff contended that respondent was engaged in a "buy and sell" device by which he was allowing shippers to receive transportation of cottonseed hulls at rates less than those provided in Minimum Rate Tariff No. 2.

The key issue presented is whether the activities of respondent in picking up cottonseed hulls in Fresno, transporting them to the Holtville area and making delivery there was for-hire transportation or proprietary transportation of his own property. If the activity constituted for-hire transportation, then respondent has undercharged as shown in Exhibit No. 6. If the

activities were proprietary transportation, then such transportation was not subject to the jurisdiction of this Commission.

The staff witness, a Field Section representative, testified that respondent had entered into a contract with Ranchers Cotton Oil of Fresno which provided, in effect, that he was to purchase 600 tons of bulk cottonseed hulls at \$9.50 per ton F.O.B. Fresno. The terms were "Net Cash on Receipt of Invoice". Shipment was to be made "June through September 1962" to buyer's order and on buyer's truck. This agreement bore the date June 22, 1962. (Exhibit No. 3.) Respondent also entered into a contract with James E. Baker, Inc. of Los Angeles, by which the latter purchased 600 tons of bulk cottonseed hulls from respondent at \$18.50 per ton delivered at Holtville, California. The terms were "Net Cash Upon Receipt of Invoice." Shipment was to be made "July/August & September, 1962". Delivery was to be at Foster Feed Lot, Holtville, California. This agreement also bore the date June 22, 1962. (Exhibit No. 2.)

The staff witness's testimony disclosed that respondent maintained no storage facilities at his terminal or elsewhere, had no dealer's license in effect at the times involved in the period covered by Exhibits Nos. 1 and 6, did no advertising as a buyer or seller of cottonseed hulls or any other commodity, and had no telephone listing other than his trucking operation. All respondent's business operations, both trucking and alleged "buy and sell", were carried in the same bank account. Respondent did not increase or alter his normal insurance with respect to the transaction under question. Respondent received payment from his buyer before he made payment to his seller. Respondent paid both

the 1½% Board of Equalization Tax and 1/3 of 1% Public Utilities Commission Transportation Rate Fund Fees on the net proceeds of this transaction, and issued freight bills for each truckload transported, showing a rate of .45 per hundred pounds (\$9 per ton). The witness further stated that parts 7, 8 and 9 of Exhibit No. 1 reflected transportation between Ranchers Cotton Oil and Foster Feed Lot during October of 1962, at a time not covered by either the contract of purchase or of sale (Exhibits Nos. 2 and 3), and that part 8 of Exhibit No. 1 indicated delivery to Roberson Feed Lot in Heber, California rather than Foster Feed Lot as provided by Exhibit No. 2.

Cross-examination of the staff witness showed that he had not inquired and did not know of any direct relationship or transactions between Ranchers Cotton Oil and James E. Baker, Inc.; that although parts 7, 8 and 9 of Exhibit No. 1 reflected time periods outside the contracts of purchase and sale, the tonnage represented thereby was within the 600 tons specified in said contracts, and that respondent had told him he had issued freight bills for his own accounting purposes only. In answer to a question of respondent's counsel the witness stated that respondent had informed him that James E. Baker, Inc. was a trucking customer of respondent's of long standing and had referred respondent to Ranchers Cotton Oil.

Respondent testified in his own behalf and stated that he had contacted Ranchers Cotton Oil on his own in order to provide himself with a backhaul from the Fresno area where he was delivering gypsum as a subhauler for Aust Trucking Co., that Ranchers had offered to sell him the cottonseed hulls and that since he knew

from past experience that James E. Baker, Inc. was a buyer of this commodity, he contacted Baker and offered to sell these hulls to the latter, that he hauled and sold all 600 tons, that the delivery to Heber (part 8 of Exhibit No. 1) was directed by Foster Feed Lot as an accommodation to the Roberson Feed Lot, and that he issued freight bills because he wanted a record of the tonnage hauled for purposes of paying his drivers and because he had been told by the staff representative he should retain all his freight bills. He stated he paid the Board of Equalization tax and Rate Fund fee on these transactions as an extra precaution so that he would be on the safe side.

Respondent's counsel contended that the transactions involved were not subject to regulation because they came within the purview of Section 3511(c) of the Public Utilities Code (persons or corporations hauling their own property), and he further argued that ownership is the key, and title is the measure of such ownership; that the word "device" as used in Section 3668 of the Public Utilities Code means conspiracy and that there was no conspiring herein because respondent would certainly not have issued freight bills had he been involved in a conspiracy.

Staff counsel pointed out that the word "device" in Section 3668 of the Public Utilities Code has been given a broad interpretation and that under the theories expressed by the Commission in Pellandini Trucking Co., 58 Cal. P.U.C. 470, and Bill Taylor Trucking, 59 Cal. P.U.C. 343, the evidence herein discloses just such a buy and sell device. He recommended a fine of \$2,000 or, in the alternative, a suspension of eight days should the Commission find the respondent had committed the alleged violations.

The record herein indicates that the only transaction of this nature in which respondent has been involved is the one disclosed herein. That transaction was completed in October of 1962. Respondent has not made a continuing practice of engaging in such transactions.

The total undercharges disclosed by Exhibit No. 6 involved the transportation of approximately one-fourth of the 600 tons of cottonseed hulls ostensibly purchased by respondent. ✓

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 13-3319 and Highway Contract Carrier Permit No. 13-3277.
2. Respondent was served with appropriate tariffs and the distance table.
3. The alleged "buy and sell" transactions hereinabove referred to were in fact transportation of property for compensation on the public highways.
4. Such transactions constituted a device whereby respondent assisted and permitted shippers to receive transportation at rates and charges less than the minimum prescribed by this Commission.
5. Respondent charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit No. 6 in the total amount of \$309.88. ✓

Based upon the foregoing findings, the Commission concludes that respondent violated Sections 3664, 3667 and 3668 of the Public Utilities Code.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since July 1, 1962 in addition to those set forth herein. The Commission expects that when undercharges have been ascertained, respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that respondent, or his attorney, has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall examine his records for the period from July 1, 1962 to the present time, for the purpose of ascertaining all undercharges that have occurred.
2. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 1 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.
3. 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 1 of this order, and shall notify the Commission in writing upon the consummation of such collections.

4. In the event undercharges ordered to be collected by paragraph 3 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.

5. Respondent shall pay a fine of \$1,000 to this Commission on or before the twentieth day after the effective date of this order.

6. Respondent shall cease and desist from using fictitious "buy and sell" transactions such as those disclosed herein as a device for evading the minimum rate orders of this 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 10th day of MARCH, 1964.

Hallam C. Bennett
President
George T. Grover

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioners

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.