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Decision No. 67152

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the rates, charges, operations and practices of READYMIX CONCRETE COMPANY, LTD., a California corporation, doing business as READYMIX TRUCKING.	))))))	Case No. 7657

Brobeck, Phleger & Harrison, by John E. Sparks and Stuart R. Dole, for respondent.
E. O. Blackman, for California Dump Truck Owners Association, interested party.
Timothy E. Treacy, for the Commission staff.

O P I N I O N

The Commission, on July 2, 1963, instituted this investigation into the operations of respondent for the purpose of determining whether certain transportation of rock and sand was performed by Readymix Trucking for less than the applicable rates prescribed by Minimum Rate Tariff No. 7.

Public hearings were held before Examiner Rowe in San Francisco on October 30 and December 23, 1963, and the matter was submitted on the latter date, subject to the filing of concurrent briefs thirty days after receipt of the December 23rd transcript. These briefs were filed by the staff and by respondent on February 10, 1964.

It was stipulated at the hearing that at all times referred to respondent held the following operative authority: Radial Highway Common Carrier Permit No. 38-7293; City Carrier Permit No. 38-7294; and Petroleum Contract Carrier Permit No. 38-7420. It was further stipulated that respondent had been duly served with a copy of Minimum Rate Tariff No. 7, Distance Table No. 4 and all supplements.

The staff witness testified that respondent has 53 tractors, two van-type trucks, 17 trucks that are transit-mix type equipment, 37 trailers that are bottom-dump type, three trailers of the tank type, and 23 trailers used as cement hoppers. Respondent operates from Carolina Street in San Francisco and also maintains terminals in Mountain View and has approximately sixty employees.

Official notice was taken of respondent's annual reports for the years 1960, 1961 and 1962. One witness testified that respondent's revenues for the third and fourth quarters of 1962 were $339,807 and $306,486, respectively, and for the first and second quarters of 1963 were $110,648 and $194,788, respectively. The gross for all four quarters amounted to $951,729.

The transportation involved herein, which occurred during the months of August, September, October and November, 1962, concerns the movement of sand and gravel from the plant of Rhodes and Jamieson in Centerville to a point located on the property of San Mateo College. The undisputed evidence introduced at the hearing shows that the delivery point was a batching plant located within a fenced area where the College of San Mateo was under construction, and that the plant was used solely for the purpose of providing material for the construction of the college.

The respondent charged and collected from Consumers Rock and Cement Company, the shipper, a rate of 95¢ per ton for the transportation performed. Item No. 148, M.R.T. No. 7, in effect at that time provided an interplant rate of 95¢ for the movement of sand and gravel for a distance between 27 miles and 28 miles. Item No. 142(c), however, provides that the above rate "does not apply to any location at which grading, excavating, paving or construction activity is in progress."

The principal issue in this proceeding, therefore, involves the determination of whether the point of destination was a location

at which construction activity was in progress so that the distance rate of $1.19 per ton in Item 130-K, M.R.T. No. 7 applied rather than the rate of 95¢ per ton charged by the respondent purportedly as an interplant rate under Item 148, supra.

The respondent argues that the interplant rate was applicable because the batch plant was some distance from the actual construction activity and did not interfere with the operation of the batch plant.

The Commission finds that the batch plant was at a location at which construction activity was in progress. It is immaterial that the distance between the batch plant and the construction site is 1400 feet inasmuch as the batch plant is on a property which is directly associated with the construction activity and was so located for the purpose of providing material for the construction. The Commission in Decision No. 52952 in Case No. 5437 had under consideration the characteristics of the interplant movements in promulgating a rate lower than the distance rate. The factors justifying such a lower rate were considered at length in that decision and will not be discussed here. However, the evidence indicates that those factors are not present for the transportation involved in this proceeding.

The respondent's traffic manager asserted that he confirmed the interplant rate of 95¢ per ton that his company was assessing with a representative of the Commission in June, 1961. The record is not clear as to whether the Commission representative confirmed the use of that rate or whether he merely agreed that if the interplant rate was applied the rate of 95¢ would be applicable for a distance between 27 miles and 28 miles. It should be pointed out that it is a well established principle of administrative law that interpretation of laws and regulations by employees of such agency cannot be used to preclude the agency from taking lawful action. However,

there is uncontradicted testimony by a staff witness that he told the respondent's traffic manager in August, 1962 that the interplant rate did not apply when the destination was a batch plant located within the confines of an area where construction was taking place.

The secondary issue in this proceeding involves the distance between the points of origin and destination on the shipments herein under consideration. Two staff witnesses who independently measured the distance by automobile testified that the actual mileage was between 28 and 29 miles. The respondent's witness testified that he also measured the distance and found it to be between 27 and 28 miles. One of the witnesses from the staff and the witness for the respondent both testified that the odometer readings on their automobiles were accurate.

The Commission finds that the distance between the two points involved was between 28 and 29 miles.

Based upon the evidence, we hereby further find that:

1. Respondent is engaged in the transportation of property over the public highways for compensation as a radial highway common carrier under Permit No. 38-7293.

2. Respondent was served with copy of M.R.T. No. 7 and all of the pertinent amendments and supplements thereto, prior to the dates on which the transportation alleged herein was performed.

3. The point of destination of the material transported was a location at which construction activity was in progress within the meaning of Item 130-K, M.R.T. No. 7.

4. Respondent assessed and collected charges less than the applicable charges established by this Commission in M.R.T. No. 7 in the amount of $1,004.06 as set forth in Exhibit 3.

Based upon the foregoing findings we conclude that respondent violated Sections 3664 and 3737 of the Public Utilities Code by

charging and collecting a compensation less than the minimum established by this Commission in M.R.T. No. 7.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since August 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 the respondent, or its 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 pay a fine of $1,500 to this Commission on or before the one hundred twentieth day after the effective date of this order.

2. Respondent shall examine its records for the period from August 1, 1962 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 its 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 28th day of April, 1964.

President

Commissioner