WF

ORIGINAL

Decision No. 68236

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 and William H. Kessler, for respondent.
Karl K. Roos, for Charles Sill Company, interested party.
Elinore Charles, for the Commission staff.

OPINION ON REHEARING

This opinion follows rehearing of Decision No. 66235 granted by an Order Granting Rehearing dated April 14, 1964. Two additional days of public hearing were held before Examiner Gravelle at Bakersfield on June 10 and 11, 1964. The matter was submitted subject to the filing of concurrent briefs. Said briefs were filed on July 16, 1964.

The first issue which must be disposed of stems from a motion made by counsel for respondent, and joined in by counsel for the interested party who was the shipper involved herein. The motion was for dismissal on the grounds that the staff offered no new evidence at the rehearing, and since the Commission had granted rehearing, it must have believed that its burden of proof had not been sustained, that there was insufficient evidence in the record to support a finding of violation of the Public Utilities Code, and that respondent is entitled to a trial de novo and is not bound by the testimony and evidence in the "prior proceeding".

Respondent and the shipper misconstrue the nature of an order granting rehearing. Such an order is not a reversal or

vacation of the prior order. Unless suspended by the Commission, an order remains in effect even though rehearing may have been granted. (Public Utilities Code, Sec. 1734.) The rehearing is merely a continuation of the same proceeding for the receipt of any additional evidence or argument that may be offered by any party or for further consideration by the Commission. No party is bound to introduce such evidence; rather the choice rests in each party's discretion. An examination of Section 1736 of the Public Utilities Code makes clear that the Commission, in granting rehearing, is not reversing itself but only opening the door for the receipt of new or additional evidence or argument which it may consider, in addition to the record theretofore made, in determining whether or not the original order or decision should be abrogated, changed, or modified. The motion to dismiss is denied.

Evidence was adduced at the rehearing through cross-examination of the staff witnesses and through the testimony of respondent and Charles L. Hay, an employee of the shipper and the person responsible for the suspension of the potato harvest operations in the Guadalupe area in 1961. Respondent attempted to show through his own testimony and that of his witness that his payment of $7,257.42[1/] to the shipper was not only a reasonable sum for the services but was actually a bargain price. Respondent also presented testimony to describe in detail the process of planting, growing, harvesting and marketing potatoes. The harvesting process which is described in Decision No. 66235 need not be repeated here nor the "services" which the shipper "supplied" to respondent. The key to the problem is the answer to the question, who was obligated to supply

1/ This sum is admitted by respondent to be the actual amount paid to Charles Sill Company rather than the sum of $7,106.53 as found in Decision No. 66235.

the "services" that were performed? Those services had to be a part of one of the three following functions: (1) Harvesting, (2) Loading, or (3) Transportation.

No one contends that the services were a part of the harvesting process and the Commission finds that they were not a part of such harvesting process. Staff counsel contends that the services were a part of the loading process, and respondent and the shipper apparently contend that they are a part of the transportation provided by respondent. The potatoes moved pursuant to the rate in Item No. 336 of Minimum Rate Tariff No. 8. That item is as follows:

> POTATOES, in bulk loaded by the consignor and unloaded by gravity, Minimum Weights 40,000 pounds

From	To	RATE
Guadalupe and all points and places within ten air miles of the City of Guadalupe.	Shafter and all points and places within one air mile of Shafter.	32

Item No. 336 is a special rate in that it provides for loading by the consignor. The other rates in Minimum Rate Tariff No. 8 generally contemplate loading by the carrier. Those other rates, however, are higher than the Item 336 rate and are further increased by accessorial charges for the employment of helpers or payment for delays in loading, such additional charges being borne by the consignor.

Respondent and the shipper contend that indeed it is the duty of the consignor to load the vehicle, but it is the duty of the carrier to get the vehicle to the spot where it is to be loaded and hence the "services" supplied herein were the carrier's obligation. With the exception of the supplying of a pickup truck for

respondent's drivers (concerning which respondent testified that he was present at the harvest area with his own automobile every day of the harvest and hence was certainly in a position to provide such transportation for his employees) every "service" performed in this case was performed either for the benefit of, or because of a condition caused by, the shipper. Such "services" consisted of removal of wheels because of the distance between rows of potatoes and the danger of crushing them, pulling of tractors because of muddy or sandy soil, pulling of trailers in order to keep abreast of the harvester, and tarping the trucks and trailer during the loading process. To say that these "services" were not a portion of the loading process would lead to absurd results not only here but in other instances. Thus, where the loading obligation is a carrier's burden not listed as an accessorial service, a shipper could deliberately make loading as difficult as possible while standing by with a solution to the problem for a price. The shipper here cannot be allowed to create an obstacle course over which the carrier must run and then charge him for doing so.

Respondent and the shipper cite the recent Clawson and Plywood decisions of the Commission, 62 Cal. P.U.C. 106 and 62 Cal. P.U.C. 153 respectively in support of their argument. Those cases are clearly distinguishable on their facts since payment therein of the alleged rebates was to an employee of the shipper whereas in the instant case payment was directly to the shipper. In any event it is unnecessary for the Commission to compare those cases inasmuch as we find the respondent and shipper to be in error when they state on the facts in this case that "... it is the obligation of the carrier to make his equipment available in the field at the point of loading."

Based on the evidence adduced at both the original hearing and at the rehearing the Commission finds that the services supplied by Charles Sill Company to respondent were services that consisted of a portion of the function of loading respondent's equipment, that said function of loading was the duty and obligation of the consignor Charles Sill Company under Item 336 of Minimum Rate Tariff No. 8, said item and rate having been employed by Charles Sill Company and respondent for the transportation involved, and that any payment by respondent to Charles Sill Company for such service was a refund or rebate in violation of Public Utilities Code Section 3667. These findings are consistent with the action of the Commission in Decision No. 67572, dated July 21, 1964 in Case No. 5438 (Petition for Modification No. 44).

Respondent and the shipper next contend that the undercharges alleged by the staff were technical or inadvertent and hence that respondent should not be penalized. This argument is no defense to the violations and can only be treated as a prayer in mitigation. In support of the argument respondent and the shipper claim that the staff has placed a strained interpretation on the definition in Item No. 10[2/] of Minimum Rate Tariff No. 8 by requiring any pickup outside a radius of 100 yards from a single point in a single field to be treated as a split pickup. This theory completely misconstrues the record. The staff rate expert clearly stated that although such an argument could be made, she had not calculated the minimum rates and charges in such a manner. Respondent and the shipper next attempt to

2/ "(g) POINT OF ORIGIN means the precise location at which property is physically delivered by the consignor or his agent into the custody of the carrier for transportation; except that all locations on or along a single packing or shipping shed, and all locations within a radius of 100 yards from a single point, within a single field will be considered as one point of origin."

interpret the use of the word "field" in Item 10 to include the entire Guadalupe area in which Charles Sill Company had an interest in the potato crop. It is interesting to note that counsel for the shipper asked that very question of Mr. Hay, the shipper's representative, but could not get an affirmative answer from his own witness. The best that he could elicit from the witness was that supervision of the growing was under his direction. It is respondent, not the staff, who places the strained interpretation on the Item No. 10 definition.

The evidence in this proceeding shows that for the transportation in question, respondent combined shipments from different fields and hence the staff interpretation and application of Item No. 10 was correct.

The last contention of respondent and the shipper concerns Item No. 185 of Minimum Rate Tariff No. 8, which is known as the multiple lot rule. The argument is advanced that the freight bills reflecting the transportation in Parts 1-4 of Exhibit No. 5, the staff rate exhibit, are cross-referenced to each other and thereby constitute a single shipping document, hence Item No. 185 is satisfied and Item No. 336, which contains a 40,000 pound minimum weight, would be "protected" even though each staff rating was on a weight less than 40,000 pounds.

Respondent introduced Exhibit No. 8, which is a number of photostatic copies of the above-mentioned freight bills. Those bills do not show "cross referencing". They do show in some instances that the loads in question were a truck and trailer load, but there is no notation on one bill to "see" the other, or reference to the number of the other bill. There is no testimony as to when the words "truck" and "trailer" were entered on the bills or who made such entries.

In any event respondent overlooks the important fact that even if the Commission were to consider said bills to be "one document" there would still be no compliance with Item No. 185. There were no written instructions issued to the carrier by the shipper as required by Item No. 185; Exhibit No. 8 shows that each truck and trailer load involved in Parts 1-4 of Exhibit No. 5 was picked up at a different field; and Item No. 185 expressly excludes split pickup shipment or property separately picked up.

After rehearing the Commission finds that:

1. The amount of undercharges referred to in finding No. 4 of Decision No. 66235 should be changed from $7,106.53 to $7,257.42.

2. No evidence was presented on rehearing which would justify abrogating, changing or modifying Decision No. 66235 other than as contained in finding No. 1 above.

The Commission concludes that the operative effect of Decision No. 66235, which was stayed by the Order Granting Rehearing (Decision No. 67081), should be stayed no longer.

ORDER ON REHEARING

IT IS ORDERED that Decision No. 66235 is modified as indicated in finding No. 1 above, and as so modified is affirmed.

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 and of Decision No. 66235, as modified herein, shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 17th day of NOVEMBER, 1964.

Frederick B. Holoboff
President

I will file a dissent
Peter E. Mitchell

George G. Grover

Commissioners

apl

Investigation on the Commission's own motion into the operations, rates and practices of GEORGE F. PEARCE, an individual	)	Case No. 7432 Decision No. 68236
Investigation on the Commission's own motion into the operations, rates and practices of GRANT F. WHITFORD	)	Case No. 7623 Decision No. 68237

COMMISSIONER PETER E. MITCHELL DISSENTING:

There has been no correction of any of the shortcomings enumerated in my original dissent (Decision No. 66235, Case No. 7432). The deprivation of due process to George F. Pearce still remains. Indeed, it has become more agonized by the action of the Commission in the Grant F. Whitford case (Decision No. 68237). This involved a disciplinary hearing similar to the Pearce case and rehearing was granted in both cases by the Commission in orders verbatim et literatim. Nonetheless, while the second Whitford decision states: "Rehearing was held before Examiner Fraser at Los Angeles on August 18, 1964, and the matter was submitted after a hearing de novo", respondent Pearce was not even offered a de novo trial. He was adjudged on the basis of the illegal evidence presented at the first hearing. This, even though my dissenting opinion to the first decision (Decision No. 66235) called for "a hearing de novo".

Again, we are still awaiting a decision in Case No. 5330. The primary charge against Pearce is unlawful rebates. Case No. 5330 was instituted for the purpose of receiving evidence on the practice of carriers in payments and allowances to shippers. That was in 1961.

apl

Case No. 7432 - D 68236
Case No. 7623 - D 68237

As I recommended in my dissent to Decision No. 66235, the Commission 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, and (3) adopt our tariff to meet the ever-changing conditions in the field of transportation.

Where the Commission has failed in this, George F. Pearce has failed. If George F. Pearce is guilty....

Peter E. Mitchell, Commissioner

January 13, 1965
San Francisco, California