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Decision No. 68237

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of GRANT F. WHITFORD.	)	Case No. 7623

Knapp, Gill, Hibbert and Stevens, by Karl K. Roos, for respondent.
Lawrence Garcia and Charles P. Barrett, for the Commission staff.

OPINION ON REHEARING

On May 14, 1963, the Commission instituted an investigation into the operations, rates and practices of respondent. Respondent is a livestock carrier with headquarters near Buellton, Santa Barbara County. It is alleged that the respondent violated Sections 3664 and 3667 of the Public Utilities Code, as well as the provisions of Items Nos. 60, 130, 140, 150, 170, 180, 250 and 251 of Minimum Rate Tariff No. 3-A. The specifications in the order instituting the investigation are:

1. Failure to observe minimum weight requirements.
2. Unauthorized consolidation of shipments in violation of Item No. 60.
3. Failure to conform to the requirements of Item No. 180 with respect to split deliveries.
4. Failure to obtain public weighmaster's certificates, or to use provided weights, as required by Items Nos. 130, 140 and 150.
5. Failure to show precise points of delivery, as required by Item No. 180.
6. Failure to comply with the requirements of Items Nos. 250 and 251 with respect to the issuance of shipping documents.

A public hearing was held in Santa Barbara on July 16, 1963 and the matter was submitted. The Commission issued Decision No. 66780 on February 11, 1964 and the respondent filed a petition for rehearing on February 28, 1964. Rehearing was granted on May 5, 1964 and the effective date of Decision No. 66780 was stayed pending further order. Rehearing was held before Examiner Fraser at Los Angeles on August 18, 1964 and the matter was submitted after a hearing de novo.

It was stipulated at the rehearing that respondent was operating at the time of the alleged violations under Radial Highway Common Carrier Permit No. 42-1113, which he still holds, and that he was served with a copy of Minimum Rate Tariff No. 3-A and Distance Table No. 4, together with the corrections and additions that have been made to those documents; also, that the copies of freight bills and other documents from the files of the respondent included in Exhibit No. 1 are true and correct copies of the originals.

A representative from the Field Section of the Commission's Transportation Division testified as follows: He first called on the respondent on May 22, 1962 and requested all shipping documents on transportation performed during the period from January through April of 1962; the witness continued his investigation with intermittent visits during the months of June and July, 1962, and the records for the month of May were added to the study; a total of 460 freight bills were analyzed, 44 of which were interstate and 3 on items other than livestock; out of this total, which covered all transportation performed by the respondent during the selected period, the witness made photostatic copies of documents

which pertain to 18 shipments and these copies were combined in Exhibit No. 1 along with several handwritten copies of checks from shippers, which show payment was made; the witness interviewed the respondent and was advised that orders are taken from customers by telephone and that written instructions from shippers are never received by the respondent; also, that he was advised by the respondent that the latter frequently combined small shipments of cattle with larger shipments so a lower rate (truckload) could be charged; the staff witness testified that he personally checked out all origins and destinations on the 18 parts of Exhibit No. 1 and that each of the 18 parts has either origin or destination, or both, improperly stated; usually a general term such as Los Angeles is used for the "precise point of origin or destination" entry on the freight bills when the precise points are actually in Artesia, Vernon, or at some other point which can be precisely identified. The staff witness further testified that he found no certified public weighmaster certificates as required by Item No. 130 of Minimum Rate Tariff No. 3-A on Parts Nos. 1, 2, 4, 5, 6, 7, 10, 12, 13, 14 and 16 of Exhibit No. 1 and the weights did not appear to have been estimated as required by Items Nos. 140 and 150 of the tariff; on Parts Nos. 11, 15 and 17 he found proper weight certificates on a portion of the load in each count and on Part No. 12 there were weight certificates, but they were not certified; Parts Nos. 1, 2, 3, 10, 12, 15, 16, 17 and 18 were rated as split delivery shipments by the respondent, but the "written delivery instructions" from the carrier to the shipper required by Item No. 180 (of Minimum Rate Tariff No. 3-A) were not in respondent's records; in addition, Parts Nos. 3, 10, 12, 15, 17 and 18 all were

shipments with more than one consignee, which is a situation where Item No. 11-A(t) of the tariff requires the consignor to make payment; on the five parts noted, however, payment was made by the consignees.

The staff witness further testified that the respondent had seven cattle trucks and trailers at the time of the first hearing on May 14, 1963; he has since obtained an additional cattle trailer; respondent employs seven drivers and a bookkeeper; his gross income for the last four quarters (last two in 1963 and first two in 1964) was $96,500.

According to Commission records respondent was sent an undercharge letter (Exhibit No. 2) on August 15, 1960, alleging a single undercharge which was collected and respondent was also admonished on January 3, 1962 by a Commission representative (Exhibit No. 3) regarding possible violations of Items Nos. 130, 250 and 251 of Minimum Rate Tariff No. 3-A.

A rate expert from the Commission staff testified that he took the set of documents contained in Exhibit No. 1, along with other information presented by the prior witness, and formulated Exhibit No. 5, which gives the rate charged by respondent and the rate computed by the Commission staff on each of the 18 parts included in Exhibit No. 1. He stated the rates assessed, charged and collected by respondent on the 18 parts in Exhibit No. 1 are lower than the lawful minimum rates allowed by Minimum Rate Tariff No. 3-A. The undercharges in Exhibit No. 5 total $874.48.

The respondent testified as follows: He obtained certified weight certificates whenever it was possible; on other occasions he used the weight estimate of the sales yard, which is

accurate, or had the cattle weighed at the nearest convenient scale; Item No. 130 of the tariff provides that a certified weight certificate need not be obtained if the nearest certified weighmaster is farther away than a distance equal to five or more constructive miles greater than the distance from origin to destination; he receives orders by telephone from his shippers which are immediately typed on the "Agreement For Carriage" form (Exhibit No. 4), which is in turn presented to and signed by the shipper and a representative of the carrier at the time of pickup; this form is in writing and includes all of the instructions from the shipper and he thought it was sufficient to satisfy the "manifest or written delivery instructions" required by Item No. 180-A; in the cattle business the buyer (consignee) who receives the cattle is expected to pay; respondent received payment from the consignees according to the requirements of the livestock business; it would have been difficult as a practical matter to return all payment checks to the consignees and insist that the consignor satisfy the tariff requirement; he always bills the consignors for the transportation, however, as required by the tariff; the cattle on Parts Nos. 4, 5 and 6 were feeder cattle and the description "feeders" should have been on Freight Bills Nos. 10934, 10935 and 10936 with a weight of 650 pounds per animal, rather than "steers","cattle" and "heifers", which are rated at a much higher weight in the tariff; in addition, the consignors on Parts Nos. 4, 5, 6, 10 and 12 were actually the consignees, since they had each purchased a small herd from the feed yard and all of the cattle purchased were carried as a single load to obtain a lower rate, with the sales yard listed as consignor,

whereas the consignees were the actual owners of the cattle before they left the feed lot; he no longer hauls these combined shipments, but he thought it was legal and permissible to do so back in 1962; Goldring Packing Co. of Los Angeles and Garden Grove Farms Feed Lot (Part No. 2) are jointly owned so this was rated by the respondent as a single split delivery shipment (the Commission staff rated the part as two separate shipments). On Part No. 16 a load of cattle directed to four consignees was unloaded at the Antelope Valley Feeders Feed Lot, then two of the consignees (Robert Logue and Desert Cattle Co.) came over in their own trucks to pick up their cattle; the staff rated this part as though the respondent's trucks made the deliveries to Logue and the Desert Cattle Co.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 42-1113.

2. Respondent was served with appropriate tariffs and distance tables.

3. Respondent failed to observe the minimum weight requirements of the applicable tariff.

4. Respondent improperly consolidated shipments by failing to comply with Items Nos. 60, 170 and 180 of Minimum Rate Tariff No. 3-A.

5. Respondent failed to conform to the requirements of split delivery shipments as set out in Item No. 180 of Minimum Rate Tariff No. 3-A.

6. Respondent failed to obtain the certified weight certificates required by Item No. 130 and to use the alternate weights (for cattle) provided by Items Nos. 140 and 150 of Minimum Rate Tariff No. 3-A.

7. Respondent failed to show the correct or precise points of origin and destination as required by Items Nos. 250 and 251 of Minimum Rate Tariff No. 3-A.

8. Respondent failed to properly issue shipping documents.

9. Under the provisions of Item No. 180 of Minimum Rate Tariff No. 3-A, the carrier is required to provide an agreement of carriage and the shipper is required to furnish the written instructions. The agreement is a document produced by the carrier and the instructions are on a separate document from the shipper.

10. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 5 except that Freight Bill No. 11155 (Part No. 16) assessed a charge greater than the established minimum charge. The seventeen undercharges total $742.46.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Items Nos. 60, 130, 140, 150, 170, 180, 250 and 251 of Minimum Rate Tariff No. 3-A, along with Sections 3664 and 3667 of the Public Utilities Code.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since January 6, 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 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 on respondent.

ORDER ON REHEARING

IT IS ORDERED that:

1. On or before the twentieth day after the effective date of this order Grant F. Whitford shall pay to this Commission a fine of $2,000.

2. Respondent shall examine his records for the period from January 6, 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 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.

6. Decision No. 66780 is hereby rescinded.

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 ~~NOVEMBER~~ San Francisco, California, this 17th day of _____, 1964.

Frederick B. Holoboff
President

Everett C. Levy

William M. Bennett

Commissioners

I will file a concurring and dissenting opinion.

George G. Grover

I will file a dissent

Peter E. Mitchell

Decision No. 68237

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of GRANT F. WHITFORD.	)))))	Case No. 7623

CONCURRING AND DISSENTING OPINION

OF COMMISSIONER GEORGE G. GROVER

I agree that respondent has been guilty of numerous tariff violations, that a fine should be imposed, and that collection of undercharges should be ordered. I cannot agree, however, that the opinion and order of the Commission adequately, or even lawfully, explain the basis of the Commission's decision. (Public Utilities Code §1705; California Motor Transport v. Public Utilities Commission, 59 Cal.2d 270 [1963]).

In this proceeding the Commission staff followed the usual procedure of presenting, as an exhibit, a collection of applicable shipping documents, divided into numbered "Parts", each Part relating to a separate transaction or series of transactions. A corresponding rate exhibit was also introduced, showing, as to each Part, the charges made by respondent and the higher charges which the staff believes to be appropriate under the controlling minimum rate tariff (in this case MRT 3-A). In addition (also in accordance with our usual practice) staff witnesses testified in explanation of the individual Parts and the applicable undercharge theories.

In many similar minimum rate tariff enforcement cases, the only defense offered has been the claim that the tariff violations have been inadvertent or that they had resulted from errors made by employees relied upon by the carrier in the good faith belief that the tariff was being obeyed; sometimes violations have even been admitted outright, the carrier claiming only that he will adhere to the tariff in the future. In such cases, no detailed recitation of the undercharges is called for, and a simple finding that the staff exhibits are correct (together with appropriate handling of the issue of mitigation) is sufficient. I have signed many such decisions.

But that is not this case. Wrong though he may be, respondent

in this proceeding raised several specific and substantial defenses. A defense is a defense. It raises an issue. The lawful way to dispose of an issue is by a finding - a finding which addresses itself to the essential elements of the charge and the defense. The need to articulate the determination of an issue is not even eliminated by the fact of guilt; absent proper findings by the trier of fact, guilt simply does not exist.

The Commission has failed to explain how the issues in this case were resolved. The alleged undercharge on Part 16 (as to which respondent is exonerated by the decision) was $132.02, which is exactly the difference between the undercharges found in Finding 10 and the total undercharges alleged by the staff for all 18 Parts. It would appear, therefore, that the Commission has determined, as to each of the other 17 Parts, that respondent undercharged as alleged. (Even this much is not actually stated in the decision.) However, neither in the findings nor in the discussion which precedes them, is any explanation given of the reasoning behind several of the undercharges. Without detailed transcript references, the full extent of this defect cannot be set forth, but the following examples will indicate the inadequacy of the decision:

1. There is no reference in the decision to any rate violation on Parts 8 or 9, yet undercharges thereon are apparently included in the total in Finding 10.

2. One of the principal charges against respondent (Parts 3, 10, 12, 15, 17 and 18) is that on several shipments the consignees paid the transportation charges, whereas the tariff required that the consignors pay them (Item 11 A(t)); but that violation is not mentioned in the findings.

3. On Part 2, the defense was offered that the consignor and the consignee were wholly owned affiliates so that it made no difference which of them paid; the decision contains no discussion of this defense.

4. On Parts 10 and 12, the violation charged was payment by the consignee rather than the consignor, but the testimony indicated that they were the same persons; the real violation may have been improper consolidation. The decision is silent on the theory of undercharges properly applicable to these transactions. The distinction might

be especially important in determining what other undercharges are to be reported when the carrier makes the review of his records ordered by the decision.

5. On certain shipments the tariff required that written instructions be given by the shipper at or before the time of tender; a contention of respondent in these instances was that at the time of pick-up the shippers involved signed copies of equivalent documents prepared by respondent from oral instructions of the shippers. From the decision it is not possible to determine whether such documents do not comply with Item 180-A or whether respondent simply failed to prove that such documentation existed. One is left with the impression that a shipper's signing documents prepared by the carrier would not constitute tariff compliance, but no such ruling is specifically made.

Even if the decision were to find only that the staff is right and the respondent wrong (except for Part 16), it would be more logical than as now worded. Presently we can only assume that that is what is intended. The testimony of the staff witnesses is recited but it is not adopted or approved. It is not possible from the decision to determine the nature of the specific violation as to each individual Part, and in the case of multiple theories of violation, we can be even less sure what the basis of the decision is.

George G. Grover

Commissioner.

November 30, 1964

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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.

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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