

ORIGINALDecision No. 68432

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of W. Q. WARD,
an individual.

Case No. 7950

Oran W. Palmer, of Baker, Palmer & Wall,
for respondent.
Elmer Sjostrom, for the Commission staff.

O P I N I O N

By its order dated July 21, 1964, the Commission instituted an investigation into the operations, rates and practices of W. O. Ward, an individual.

A public hearing was held before Examiner Gravelle on September 30, 1964, at Bakersfield.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 15-2665 dated April 24, 1946 and Highway Contract Carrier Permit No. 15-6111 dated November 5, 1956. Respondent maintains a terminal at his home in McFarland, California. He owns and operates five tractors and four flatbed sets of doubles. He employs four drivers. His gross transportation income for the year ending June 30, 1964, was \$54,045. Copies of appropriate tariffs and the distance table were served upon respondent.

On October 31, 1963, November 1, 1963 and again on December 30, 1963, a representative of the Commission's Field Section visited respondent's home and checked his records for the period from April 1, 1963 through September 30, 1963, inclusive. Only respondent's "buy and sell" transactions were checked.

During the period investigated 103 movements of hay took place; of these, 14 were selected by the Commission representative and copies of the freight bills, check vouchers covering receipt of payment and statements covering purchases by respondent were made. They are contained in Exhibits Nos. 1, 2, and 3, respectively. From the documents and supplemental information supplied by the representative, a Commission staff Rate Expert prepared a rate statement which was introduced in evidence as Exhibit No. 4 and which reflects claimed undercharges of \$486.37.

The basic question in this proceeding is whether the transactions in question involve the transportation by respondent of his own property under a legitimate "buy and sell" arrangement, or whether they constitute an unlawful "buy and sell" device that results in an evasion of Minimum Rate Tariff No. 14.

The evidence shows that one H. A. DeWeese purchases hay from farmers in the general area of McFarland, that respondent purportedly buys such hay from DeWeese, transports it to the United Hay Company facilities at Bellflower or Chino, receives instructions for delivery from United Hay Company and delivers the hay to various dairies in the Los Angeles Artesia Territory.

The dairies make payment to United Hay Company. Respondent receives payment from United Hay Company and in turn pays DeWeese.

Respondent receives the difference between the purchase price paid the farmer by DeWeese and the sales price to the dairy by United Hay Company, less \$.50 per ton to DeWeese and \$1.50 per ton to United Hay Company. Respondent does not negotiate any price with either DeWeese or United Hay Company and in fact does not know how much he will be paid for the hay until he receives the check from United Hay Company. Respondent does not know how much he must pay

DeWeese for the hay until he receives a statement from DeWeese. Respondent has no knowledge of the actual price paid the farmer or of the actual price paid by the dairy. He stores no hay, does not advertise as a hay dealer, utilizes the same bank account for both his for-hire and "buy and sell" income, uses the same equipment, and the same personnel in each operation. Reduced to its simplest terms, respondent does nothing more than provide transportation of hay between the farmer and the dairy for a fee which he does not know and cannot control.

Respondent and his wife testified that separate accounts are kept on respondent's books for "buy and sell" transactions, transportation of exempt commodities, and regular for-hire income; that respondent has a mechanical hay loader for use in connection with his "buy and sell" business; that his freight bills show no rates in "buy and sell" transactions but do in for-hire transportation; and that respondent has a license to deal in hay issued by the Department of Agriculture as well as a license issued by the Board of Equalization. Respondent presented Exhibit No. 6 which is a compilation of total purchases and sales of hay during 1963 to show he had bought and sold hay from and to others than DeWeese and United Hay Company. As to these other purchases and sales he testified that he dealt directly with the farmer and the consumer.

The Commission must decide only the nature of the transactions presented at the hearing. They involve the 14 parts of Exhibits Nos. 1 and 4 and, as to them, we find that the arrangement by which respondent bought hay from DeWeese and sold it to United Hay Company constituted an unlawful "buy and sell" device to evade Minimum Rate Tariff No. 14.

Staff counsel pointed out that respondent had been warned in 1961 by members of the staff that in their opinion this very type

of arrangement with the same parties was unlawful, and that respondent had received an undercharge letter in 1958. He recommended a fine of \$5,000 in the event the Commission found respondent to be in violation of the Public Utilities Code.

Counsel for respondent pointed out that respondent operated in this manner only to keep his crew together and employed, that he should be commended for doing so, that all the purchases and sales were based on market prices and asked that the Commission find these transactions to be legitimate "buy and sell" dealings. He cited Rhodes & Jamieson, Ltd. v. California State Board of Equalization, (201 C. A. 2d 343, 20 Cal. Rptr. 218) and Antoine DeSutter, 60 Cal. P.U.C. 242 in support of his plea. The Rhodes case deals only with a tax to be applied to transportation when a specific charge is made and therefore does not concern itself with whether or not a particular set of circumstances is or is not transportation. DeSutter, in which the respondent was found to be engaged in a legitimate "buy and sell" operation, is not even remotely similar to the instant case on its facts. There the for-hire operation was an incident to the hay business; here respondent freely admitted that he was in the trucking business. It was only after his counsel carefully led him that he stated he was also a hay dealer.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 15-2665 and Highway Contract Carrier Permit No. 15-6111.
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 as set forth in Exhibit 4, resulting in undercharges in the amount of \$486.37.

Based upon the foregoing findings of fact, the Commission concludes that the respondent violated Section 3668 of the Public Utilities Code and should pay a fine in the amount of \$4,000.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since April 1, 1963 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 the undercharges. 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 pay a fine of \$4,000 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent shall examine his records for the period from April 1, 1963 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. 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 5th day of JANUARY, 1965.
No.

Friedrich B. Hallock
President

John C. Mitchell

George H. Hoover

William B. Bernard

Commissioners