

**ORIGINAL**

Decision No. 68854

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the Operations,  
Rates and Practices of CURTIS W.  
LINT, doing business as CURT LINT  
TRUCK TRANSPORTATION, ERNEST N.  
HOWARD, KENNETH HARTNETT, E. W.  
McEACHERN, MAX THOMPSON, and  
DAVID V. GALE.

Case No. 7134

Enright, Elliott & Betz, by Joseph T. Enright,  
and Michael J. Fitzpatrick, for respondents  
Ernest N. Howard, Kenneth Hartnett, E. W.  
McEachern and David V. Gale.  
Donald Day and Frank O'Leary, for the Commission staff.

O P I N I O N

By its order dated March 3, 1964, the Commission reopened Case No. 7134 for further hearings to determine whether respondents, or any of them, have failed to comply with the ordering paragraphs 1, as amended, 2, 5 and 7 of Decision No. 65249, or whether respondents have violated or failed to comply with any order or provision of Decision No. 65249 or Decision No. 65624, and to determine whether any or all of the operating authority of any of the respondents should be canceled, revoked, or suspended, or a fine or fines imposed, and whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

Public hearings were held on August 11 and 12, 1964, before Examiner DeWolf at Los Angeles. The matter was submitted

on August 12, 1964, subject to the filing of concurrent briefs. The staff brief was filed September 11, 1964, and counsel for respondents filed two letters, dated September 10th and 14th, containing arguments of the issues.

Respondents' request for a proposed report and their motion to dismiss are denied.

Respondents Kenneth Hartnett, David V. Gale and E. W. McEachern appeared and testified at the hearing as to their operations.

Exhibits 54 FH through 73FH are copies of correspondence from these respondents to the Commission and from the Secretary of the Commission to them, some of which contain lists of undercharges and invoices. Exhibit 74FH consists of copies of numerous invoices and statements of seven aggregate producers to respondent McEachern. Exhibit 75FH consists of copies of numerous invoices and statements, being the sales documents of respondent McEachern. Exhibit 76FH is a copy of a notice of Mountain Rock Products Co., dated August 1, 1963, to "Our Truck Dealers Customers." Exhibit 77FH is a summary of shipping data contained in the records of respondent McEachern and is in five parts which compares the claimed buy and sell operations of respondent McEachern to the same operation with the minimum rates of Tariff No. 7.

A brief summary of the rate charges and the differences in the buy and sell transactions in Exhibit 77FH is as follows:

E. W. McEACHERN BUY-AND-SELL TRANSACTIONS  
AUGUST 1963

Part 1

<u>Sale Price</u>	<u>Purchase Price</u>	<u>Net to McEachern</u>	<u>MRT 7 Rate Chg.</u>	<u>Dif-ference Minus</u>	<u>Plus</u>
\$2,128.02	\$ 964.52	\$1,163.50	\$1,249.74 (sand)	\$ 86.24	

Part 2

\$2,788.82	1,362.35	1,426.47	1,352.72 (sand and gravel)		\$73.75
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Part 3

\$3,781.57	1,942.94	1,838.63	2,655.86 (gravel)	817.23	
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Part 4

\$9,444.78	5,600.34	3,844.44	4,222.85 (sand and gravel)	378.41	
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Part 5

\$1,964.22	1,110.53	853.69	1,034.24 (sand and gravel)	<u>180.55</u>	
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Parts 1, 3, 4, 5 -- Undercharges . . . \$1,462.43

Three witnesses, two transportation representatives and a rate expert, testified extensively on behalf of the Commission staff and in regard to their examination, investigation and inspection of the respondents' operations both as permitted carriers of aggregate and as merchants buying and selling their own property. This testimony

and the exhibits admitted in evidence, including correspondence of the respondents and their attorney, show that respondent E. W. McEachern is continuing his business and operations in substantially the same manner as he did before the previous hearing and Decision No. 65249.

Respondents' Exhibit 52FH is a notice of suspension of operating rights of respondent David V. Gale and Exhibit 53FH is a picture of a truck and a caterpillar tractor described as located in the yard of one of the respondent's competitors with a stockpile of sand, and Exhibit 78FH is a photograph of respondent McEachern's truck yard, and Exhibits 79FH through 86FH are copies of letters of respondents' attorney to the Commission and the Commission's replies thereto.

Respondents Gale, Hartnett and McEachern each appeared and testified in his own behalf, and each testified that he complied with the order of the Commission as to suspension of operations and posting of notice. The respondents did not controvert or deny the evidence offered by the Commission staff, and consequently there is no real conflict in the evidence in this case except as to the "bona fides" of the papers upon which the claim of ownership of the respondents to the aggregates hauled is based, and this question was decided in Decision No. 65249, dated April 19, 1963.

Counsel for respondents cited Decision No. 67439, dated June 23, 1964, in Case No. 7808, and argued that the operations

of respondent Pickurel in that case are similar to the operations of these respondents. We do not agree with counsel that the operations are similar, and, therefore, our decision in that case is not persuasive or determinative as to our findings in the instant case.

The evidence in this hearing and the previous hearings points to the conclusion that these respondents could not lawfully conduct their operations without a permit from this Commission as none of these respondents have any primary business with which the buy and sell operations could be connected.

The evidence shows that none of the respondents filed the reports required by ordering paragraphs Nos. 5 and 7 of Decision No. 65249 within the ninety-day period specified by the decision. Kenneth E. Hartnett and David V. Gale filed reports of undercharges on October 31, 1963, and no other reports have been filed to comply with the order.

Respondents Gale and Hartnett attempted to comply with the suspension requirements of the decision and respondent E. W. McEachern posted a notice of suspension at his place of business as required by ordering paragraph No. 3 of Decision No. 65249, but he refused to comply in any other respect with the decision. McEachern contends that he conducted an examination of his records to ascertain the existence of undercharges. He admits that in conducting such examination he looked only at those transactions which he considered to be for hire transportation, working on the assumption that he was not required to review those transactions which he had classified as buy and sell operations, including those transactions during March, 1960, which

the Commission expressly found were fictitious "buy and sell" transactions employed as devices to evade the minimum rates (Exhibit 63FH); therefore, no attempts were made to collect the undercharges on these or any other transactions, and no adequate reports were filed. In short, respondent McEachern sought to ignore completely the Commission's finding that the transactions in question were for-hire transportation and the Commission's order that undercharges should be reported and collected.

Respondent McEachern also continued to conduct buy and sell operations in substantially the same manner as he had conducted them previously, thus violating both the cease and desist order and the five-day suspension imposed by paragraph No. 2 of Decision No. 65249.

That respondent McEachern's buy and sell operations are in substance for-hire transportation is demonstrated by the Consolidated Rock-Pomona Block transactions represented by the documents in Part 2 of Exhibit 75FH. Respondent McEachern testified that there was essentially no physical difference between the operation when conducted on a buy and sell basis and when conducted on a for hire basis.

Respondents rely entirely upon the bills which they prepare to claim title to the aggregate and also claim the right to determine whether the aggregate should be hauled under their permit or as their own property for amounts less than minimum rates.

Respondents assume no responsibility for the quality of the product and claim no losses resulting from lack of quality in the buying and selling of aggregate.

Findings:

Upon consideration of the evidence the Commission finds that:

1. Respondent McEachern failed to comply with ordering paragraph 1 of Decision No. 65249, as amended by Decision No. 65624, by continuing to violate the provisions of Minimum Rate Tariff No. 7. The subsequent violations disclosed result in undercharges totaling \$1,462.43.

2. Respondent McEachern did not suspend operations as required by ordering paragraph 2 of Decision No. 65249, as amended by Decision No. 65624, nor did he pay the alternative \$2,000 fine provided in ordering paragraph 8 of Decision No. 65249.

3. Respondents Curtis W. Lint, Ernest N. Howard, E. W. McEachern, and Max Thompson did not file the report required by ordering paragraph 5 of Decision No. 65249.

4. Respondents herein have not collected nor filed any legal action to collect the undercharges as required by ordering paragraph 6 of Decision No. 65249.

5. Respondents herein have not filed the report required by ordering paragraph 7 of Decision No. 65249.

6. The permits held by Curtis W. Lint were revoked on July 17, 1962, at the request of the permittee; the permits held by Max Thompson were canceled on June 7, 1962; the permits of David V. Gale were canceled on June 23, 1964, for nonexercise; and the permits of Ernest N. Howard were suspended on April 13, 1963. Respondents Curtis W. Lint, Max Thompson, and David V. Gale are placed on notice that no highway carrier permits will be issued to them unless and until evidence is presented to this Commission that all provisions of the following order have been fully complied with.

Based upon the findings herein we conclude that each of the respondents herein has violated the order in Decision No. 65249,

as amended by Decision No. 65624, and that fines should be assessed against the respondents as set forth in the ensuing order.

O R D E R

IT IS ORDERED that:

1. On or before the twentieth day after the effective date of this order, Kenneth Hartnett shall pay a fine of \$500; Ernest N. Howard shall pay a fine of \$500; and E. W. McEachern shall pay a fine of \$5,000.

2. Respondents Ernest N. Howard, Kenneth Hartnett, David V. Gale and E. W. McEachern shall examine their records for the period from March 1, 1963, to the present time, for the purpose of ascertaining all undercharges that have occurred, and within ninety days after the effective date of this decision shall file with the Commission a report setting forth all undercharges found pursuant to such examination.

3. Respondents herein 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.

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, respondents herein 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 respondents. As to each respondent, the effective date of this order shall be twenty days after the completion of such service upon such respondent.

Dated at San Francisco, California, this 6<sup>th</sup> day of APRIL, 1965.

Frederick B. Holdhoff  
 President

George H. Dwyer

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Commissioners

I would revoke the  
 authenticity -

*William L. Burnett*

COMMISSIONER PETER E. MITCHELL DISSENTING:

The Commission has an obligation to protect the certificates and permits of those carriers who operate within the framework of the Public Utilities Code. Their continued existence in business is predicated upon lawful competition in the performance of transportation services.

The decision admits that the respondents have failed to comply with orders of this Commission, which resulted from an investigation into the operations of the respondents (Case No. 7134). To allow the respondents to exercise their permits while in violation of an order of this Commission, abuses the rights of all carriers.

I would suspend or revoke the permits of those respondents who have not complied with our orders (Decisions Nos. 65249 and 65624).

  
Peter E. Mitchell, Commissioner