

ORIGINALDecision No. 69045

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations,)
 rates and practices of)
S. P. KENNEDY, an individual.)

Case No. 7925
 (Filed June 16, 1964)

S. P. Kennedy, in propria persona, respondent.

Elinore Charles and George T. Kataoka, for the
 Commission staff.

O P I N I O N

By its order dated June 16, 1964, the Commission instituted an investigation into the operations, rates and practices of S. P. Kennedy, an individual (hereinafter referred to as respondent), for the purpose of determining whether respondent violated Sections 3664 and 3737 of the Public Utilities Code by charging and collecting a lesser sum for transportation than the applicable charges prescribed in Minimum Rate Tariff No. 14, and whether respondent violated Section 3668 of the Public Utilities Code by means of an alleged "buy and sell" device whereby respondent assisted or permitted United Hay Co. (hereinafter referred to as United) to obtain transportation of property at rates less than the applicable rates prescribed in Minimum Rate Tariff No. 14.

A public hearing was held before Examiner Mooney at Los Angeles on August 25, 1964, on which date the matter was submitted.

It was stipulated that respondent was issued Radial Highway Common Carrier Permit No. 54-3513 and that he was served with Minimum Rate Tariff No. 14 and Distance Table No. 4 and all supplements and corrections thereto.

Respondent's terminal is located at his home in Upland, California. He operates four tractors, one truck and 11 trailers. He employs four drivers. Respondent reported to the Commission a gross transportation income of \$28,268 for the last three quarters of 1963 and the first quarter of 1964. This does not include the revenue from the "buy and sell" operation hereinafter discussed.

A representative of the Commission staff testified that he visited respondent's home on July 29 and 30, 1963 and on August 15, 1963 and checked his records for the months of May and June 1963. He stated that he made true and correct photostatic copies of shipping documents and statements covering 13 shipments of hay and also of records and documents covering 12 "buy and sell" transactions alleged by the staff to be for-hire transportation and that they are all included in Exhibit 1.

The representative testified that ten of the 13 hay shipments in Exhibit 1 were delivered to the yard of the Cruz Hay Company at Chino (Parts 1 through 10) and that the remaining three were delivered to the yard of Joe Abatti, also at Chino (Parts 11 through 13). With respect to each of the hay shipments delivered to Cruz, the witness stated that respondent left his loaded trailer at the yard; Cruz delivered the hay to the ultimate destination and returned the empty trailer to the yard; Cruz informed respondent when the empty trailer had been returned, and respondent's driver picked it up; on each shipment handled in this manner, Cruz deducted \$22 for two unloaders and three dollars for moving respondent's trailer from the transportation charge shown on the statement prepared by Cruz. As to the shipments delivered to Abatti, the representative explained that they were handled in the same manner as the Cruz shipments except that respondent left both the power equipment and

trailer at Abatti's lot, and Abatti deducted \$22 for two unloaders from the transportation charges he computed for each shipment. The witness stated that he personally observed the precise location of the farm from which each of the 13 shipments was picked up and determined the actual mileage from each origin to the nearest mileage basing point shown in Distance Table No. 4.

The representative testified as follows regarding respondent's "buy and sell" operations (Parts 14 through 25 of Exhibit 1): Respondent stated that he was in the hay "buy and sell" business with United Hay Company which is located at Bellflower; when respondent had a shipment to the Bakersfield area and wanted a return load of hay, he would contact United, and United would give him the name of several hay brokers from whom respondent could obtain hay; respondent would not be furnished with the names if he did not agree to sell the hay to United; respondent and the broker would agree on the purchase price paid by respondent; respondent and United would agree on the price respondent would charge United; respondent paid the brokers directly every Friday, and United paid respondent each week and deducted \$1.50 per load as a commission; respondent commenced the "buy and sell" business in the latter part of May 1963 and terminated it in the Fall of 1963. The witness stated that he did not know whether the sales price was agreed upon by respondent and United at the time the hay arrived at United's yard or some time prior thereto.

The representative further testified that respondent had no warehouse facilities to store hay and did not advertise his hay business. He stated that respondent was not licensed by the Department of Agriculture to buy and sell hay at the time the transactions in issue took place, although he was subsequently issued a

license. He testified that he personally verified the location of the farm at which respondent picked up the hay covered by each "buy and sell" transaction in Exhibit 1. As shown in Exhibit 1, respondent used the same shipping document form for both for-hire shipments and for "buy and sell" transactions and did not show any transportation or other charges on those documents.

A Commission staff rate expert testified that he took the documents in Exhibit 1 and formulated Exhibit 2, which shows for each of the 13 for-hire shipments (Parts 1 through 13) the charge collected by respondent, the minimum charge computed by the staff and the resulting undercharge, and for each of the 12 "buy and sell" transactions (Parts 14 through 25) the difference between the sale price received by respondent and the purchase price paid by respondent, the minimum charge computed by the staff for the transportation performed by respondent and the resulting undercharge. The witness pointed out, in connection with each shipment in Parts 1 through 13, that the transportation charge computed by the consignee was less than the applicable minimum charge and that Minimum Rate Tariff No. 14 does not provide for or authorize deductions from the minimum transportation charge for the furnishing of unloaders or the moving of a carrier's equipment by a consignee. He testified that the aggregate of the undercharges shown in all 25 parts of Exhibit 2 is \$1,804.76.

Respondent testified as follows regarding his "buy and sell" operations: United informed him that it would sell any hay he brought to its lot; United furnished him with the names of hay brokers in certain areas, but he was also acquainted with a number of additional brokers with whom he also did business; he purchased the hay covered by Parts 14, 15, 17 and 20 through 25 of the staff

exhibits from brokers suggested by United, but the hay covered by Parts 16, 13 and 19 was purchased from other brokers he personally knew; the purchase of the hay was left to the discretion of respondent's driver, who was experienced in judging the grade and value of hay; United did not exert any influence on the price paid by respondent; the driver would inspect the hay and would not purchase it if a fair price could not be agreed upon; United would tell him the price it could obtain for the hay, and the hay would be sold to the highest bidder; he also sold hay to other lots in the Chino area besides United, although during July 1963, which is the month the transactions covered by Parts 14 through 25 of the staff exhibits took place, he sold all the hay he purchased to United; he terminated his "buy and sell" operation in August 1963 and commenced it again in May 1964; he revised his method of conducting this business when he started again in 1964.

Respondent stated that his "buy and sell" operations were in fact and in honesty a legitimate business venture and not an illegal device to avoid regulation. He testified that he was issued a dealer's license to engage in this business by the Department of Agriculture of the State of California in July 1963 and a renewal license in July 1964. He stated that he increased his property insurance coverage to protect the risk of loss he assumed when he purchased and took title to the hay; that his profit or loss was dependent upon the purchase price he could negotiate and the sale price which fluctuated with market conditions; that although he does not store hay, there is ample space at his terminal, which covers two and one-half acres, should the need arise; and that none of the hay dealers in the Chino area, such as himself, store hay.

With respect to Parts 1 through 13 of the staff exhibits which covered the shipments transported for Cruz and for Abatti, respondent stated that it was common practice for consignees in the hay business in the Chino area to make deductions of the type here involved from transportation charges paid to carriers. Respondent stated that he will take the necessary steps to correct this practice. He also pointed out that he had reported this problem to the Commission in 1962 but had not been advised regarding it.

Discussion

The discussion which follows is limited to respondent's "buy and sell" operations during the year 1963.

An analysis of the 12 "buy and sell" transactions in Parts 14 through 25 of Exhibit 2 discloses that, with one exception, the difference between the purchase price paid by respondent and the sale price received from United was greater on hay purchased at a more distant point than on hay purchased closer to Chino.

It is evident that the distance a particular load of hay was transported was a factor considered in arriving at the sale price for the load. Furthermore, the evidence points out that respondent prepared the same type of shipping document for both for-hire transportation and "buy and sell" transactions, did not stock any hay on his premises and did not advertise his hay business.

The record also establishes that the decision to purchase a particular lot of hay was made by respondent or his employee and was based on their knowledge of the various grades of hay and current market conditions in the hay industry. United in no way influenced this decision. Furthermore, respondent took title to the hay he purchased, and he alone assumed the responsibility for making payment to the seller. United's only contact with the "buying end" of the transactions was to furnish respondent with the names of some of the brokers from whom respondent purchased hay. As to the "selling end" of the transactions, the evidence does show that all hay handled by respondent during July 1963 was delivered to United which sold the hay to the ultimate consumer. Respondent testified, however, that he also sold hay to other buyers when he could obtain a better price.

Based on a review of the entire record regarding the "buy and sell" operations during 1963, it appears that respondent did contribute more than transportation in connection with each of the "buy and sell" transactions in issue. The evidence is not convincing that respondent's "buy and sell" operation during this period was a sham or device to avoid minimum rate regulation.

As to respondent's current "buy and sell" activities which commenced in May 1964, respondent testified that they differ from his 1963 operations. No evidence was presented to show how they differ. The staff evidence concerned only the operations which terminated in August 1963. In the circumstances, no determination can be made on this record as to the legality of respondent's current operations.

Findings and Conclusions

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 54-3513.
2. Respondent was served with appropriate tariffs and distance tables.
3. There is no provision in Minimum Rate Tariff No. 14 which authorizes or provides for deductions from minimum transportation charges for the service of unloaders furnished by a consignee to unload a carrier's equipment or for the movement of a carrier's equipment by employees of a consignee.
4. The staff ratings shown on Parts 1 through 13 of Exhibit 2 are correct.
5. Respondent charged less than the minimum rates prescribed in Minimum Rate Tariff No. 14 in the instances set forth in Parts 1 through 13 of Exhibit 2, resulting in undercharges in the amount of \$873.17.

6. With respect to respondent's "buy and sell" operations during 1963, there is here present evidence of bona fide "buy and sell" incidents and characteristics. The success of respondent's trading business, as distinguished from his for-hire transportation operations, depended upon respondent's and his employees' knowledge of the various types and grades of hay and their experience in the hay industry. Respondent assumed all of the risks of a person engaged in selling commodities, including the possibility of loss due to inability to secure profitable sales.

7. Respondent was engaged as a dealer in bona fide "buy and sell" transactions during 1963, and said transactions did not constitute a device to evade regulation by this Commission.

8. The transactions summarized in Parts 14 through 25 of Exhibit 2 were in fact bona fide "buy and sell" transactions and not for-hire transportation.

9. There is not sufficient evidence in the record on which to base a determination as to the legality of respondent's current "buy and sell" operations which commenced in May 1964.

Based upon the foregoing findings of fact, the Commission concludes that:

1. Respondent violated Sections 3664 and 3737 of the Public Utilities Code and should pay a fine of \$1,000.
2. The evidence fails to establish that respondent's "buy and sell" operations during 1963 violated Section 3668 of the Public Utilities Code.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since May 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. S. P. Kennedy shall pay a fine of \$1,000 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 May 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.

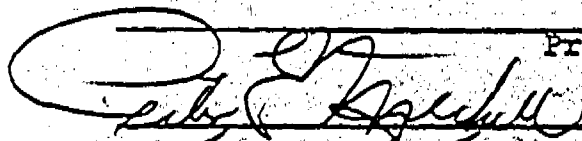
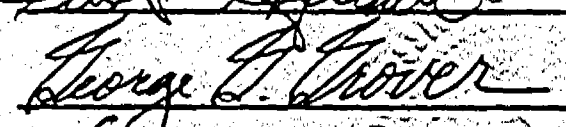
4. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 2 of this order, and shall notify the Commission in writing upon the consummation of such collections.


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

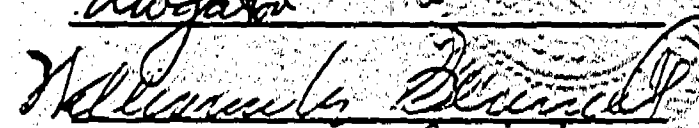
each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges, and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

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 11th day of May, 1965.


 _____ President






 Commissioners

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.