

**ORIGINAL**Decision No. 69103

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's )  
 own motion into the operations, )  
 rates and practices of MOUNTAIN )  
 ROCK PRODUCTS, a corporation, and )  
 the following individuals: Fred E. )  
 Topper, doing business as F. E. )  
 Topper Trucking, Dennie W. Reed, )  
 Sr., Vincent L. Oddo, Merlyn K. )  
 Mason, Lowell C. Robinson, and )  
 Melvin M. Wilson. / )

Case No. 7827  
 Filed January 28, 1964

Joseph T. Enright, for Mountain Rock Products; and  
Ben T. Kayashima, for Fred E. Topper, respondents.  
Melvin M. Wilson, Merlyn K. Mason, Lowell C.  
Robinson, Vincent L. Oddo, and Dennie W. Reed, Sr.,  
 in propria personae, respondents.  
B. A. Peeters, for the Commission staff.

O P I N I O N

By its order dated January 28, 1964, the Commission instituted an investigation into the operations, rates and practices of the above-named respondents.

Public hearings were held before Examiner Daly on September 23, 24 and December 3, 1964, at Los Angeles, with the matter being submitted on the latter date upon the receipt of briefs since filed and considered.

The record indicates that Mountain Rock Products (hereinafter referred to as Mountain) is a California corporation, whose principal place of business is 921 South Harbor Boulevard, Fullerton. It possesses a radial highway common carrier permit containing the following restrictions:

"Whenever permittee engages other carriers for the transportation of property of Mountain Rock Products or the customers of Mountain Rock

Products, permittee shall not pay such carriers less than 100 percent of the minimum charges established by the Commission for the transportation actually performed by the other carrier.

Following the period of investigation Mountain was granted a cement carrier certificate by Resolution No. 13823, Sub. 38, issued June 23, 1964, containing the same restriction.

Respondents Topper, Reed, Oddo, Mason, Robinson and Wilson are owner-drivers of tractors, possessing permitted authority duly issued by this Commission. Said permits are specifically restricted to operations as independent subhaulers. The permit held by Wilson, however, was issued subsequent to the period covered by the staff's investigation although he was operating during said time.

It was stipulated that Minimum Rate Tariffs Nos. 7 and 10 and Distance Table No. 4, together with all corrections and supplements thereto, were served upon Mountain.

During the week of May 20, 1963, and the week of June 3, 1963, a representative of the Commission's Field Section visited Mountain's place of business and checked its records for the months of January, February and March 1963. The underlying documents relating to 36 shipments were taken from respondents' files and submitted to the License and Compliance Branch of the Commission's Transportation Division. Twenty-four shipments relate to the transportation of cement, three relate to the transportation of gypsum and nine relate to the transportation of clay. Based upon the data taken from said shipping documents rate studies were prepared and introduced in evidence as Exhibits Nos. 8 and 9.

Exhibit 8 covers the twenty-four shipments of cement which were transported under the provisions of Minimum Rate Tariff No. 10,

and if the staff's position is correct it reflects violations in the amount of \$921.71. Mountain engages the services of respondents Topper, Robinson, Oddo, Reed, Mason and Wilson under purported leases, which the staff believes are in effect subhaul agreements. Under the agreements Mountain pays approximately 50 percent of the applicable minimum rates. The staff contends that paying these subhaulers less than 100 percent of the minimum rate collected constitutes a violation of Section 3668 of the Public Utilities Code and the restriction in Mountain's permit for the following reasons: Mountain is assertedly the alter ego of Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix and Foster Sand and Gravel, a partnership. Said companies are consignees of many shipments transported by Mountain. As a matter of business practice the transportation cost of cement is included in the purchase price of the cement, whereby the consignees ultimately pay the freight charges. Because of the alleged alter ego relationship the cement becomes the property of Mountain. When Mountain pays the subhaulers less than 100 percent of the minimum rate collected for the transportation of its own property, the staff argues, Mountain is in violation of Section 3668 and its permit.

Exhibit 9 covers three shipments of gypsum and nine shipments of clay and indicates that Mountain collected less than the applicable minimum rates as prescribed by Minimum Rate Tariff No. 7 in the amount of \$132.18. Additional violations result if the service performed by respondents Topper, Robinson, Oddo, Reed, Mason and Wilson are those of subhaulers. Minimum Rate Tariff No. 7 specifically provides that subhaulers must be paid not less than 95 percent of its applicable minimum rate. The difference between that paid under the so-called lease agreements and that which the staff believes should have been paid amounts to \$519.59.

The record indicates that Mountain was incorporated in 1956 for the purpose of establishing and operating a rock crushing plant near Ontario, California. The primary purpose of the plant apparently is to furnish a supply of crushed rock to certain stockholders of Mountain, who are engaged in various ready-mix concrete businesses within the Los Angeles area. In 1959, Mountain decided to enter the transportation field. Glenn E. Walker was sold 10 percent of Mountain's stock and was placed in charge of Mountain's transportation operations. Mr. Walker is long experienced in the field of cement transportation, being the major stockholder in Glenn E. Walker Corporation and the sole stockholder in Bulk Transportation, both of which are permitted carriers. Assertedly because of the expense of financing equipment, it was decided that Mountain would lease all of its equipment, both tractors and trailers with drivers, from Glenn E. Walker Corporation. Shortly thereafter Glenn E. Walker Corporation experienced labor difficulties with the Teamsters' Union and, as a result, all of the tractors were sold. The majority were sold to the drivers of Glenn E. Walker Corporation, including respondents Topper, Reed, Oddo, Mason, Robinson and Wilson, who thereupon executed agreements with Mountain. The agreements are identical in form and cover a period of two years. Under the provisions of the agreements Mountain is granted exclusive use and control of the tractors. The tractor owners may operate the equipment themselves or hire other drivers, but they must pay all costs of operating and maintaining the tractors, including wages, Workmen's Compensation Insurance, fuel, lubricants and parts. In

consideration thereof Mountain pays 23½ cents per mile traveled in its business, with a minimum monthly payment of \$800. Mountain pays for the insurance covering the tractors; however, the agreements originally provided for a mileage rate of 25 cents, but this was subsequently decreased to 23½ cents to offset the insurance cost to Mountain.

The first quarterly reports of gross operating revenues for the year 1963, filed by respondents Topper, Robinson, Oddo, Reed and Mason reported their earnings as being derived from subhauling for Glenn E. Walker Corporation, Bulk Transportation and Mountain. The first quarterly report of 1963 filed by Mountain, however, indicated that no revenues were paid out to subhaulers.

The following tabulation from Exhibit 6 sets forth the related stock interests between the officers and stockholders of Mountain and the officers and stockholders of the consignee ready-mix companies, which, the staff believes, establishes an alter ego relationship.

<u>Shareholders</u>	<u>Mtn. Rock Products</u>	<u>Glenn E. Walker</u>	<u>Mountain Ready-Mix</u>	<u>Con- tractors Ready-Mix</u>	<u>Freeman Ready-Mix</u>	<u>Foster Sand &amp; Gravel</u>
Glenn E. Walker	75 shs.	150 (Secty.)				
G. L. Werner	75 (Treas.)	50 (Treas.)	16 (Treas.)			Partner
K. C. Foster	75	50	17			Partner
E. W. Foster	75	50	17			Partner
W. A. Morrison	36	24	10		50 (V.P.)	
A. E. Freeman	77 (Secty.)	51 (V.P.)	15 (Secty.)		150 (Sec.- Treas.)	
Ben Hughes	76	51	15		150 (Pres.)	
B. K. Carter	36	24	10		150 (V.P.)	
Contractors Ready-Mix	225		50			
J. K. Skochdople	(Pres.)	75 (Pres.)	(Pres.)	535 (Pres.)		
James E. Brown				535 (Secty.)		
George Skochdople				535 (V.P.)		
Charles Dickerson					50	
<b>TOTAL SHARES</b>	<u>750</u>	<u>600</u>	<u>150</u>	<u>1,605</u>	<u>550</u>	

A. E. Freeman, who is secretary of Mountain as well as secretary-treasurer of Freeman Ready-Mix, testified that although his ready-mix company uses the service of Mountain in most cases, the use is not exclusive and other cement carriers are occasionally used.

Exhibit 9 relates to the shipment of gypsum and clay which were transported under the provisions of Minimum Rate Tariff No. 7. Part 1 of said exhibit covers three loads of gypsum which moved, within a 3-day period, from the Kaiser Gypsum Co. at Long Beach to the Permanente Cement Co. at Lucerne Valley. Mountain combined the loads into a single shipment and applied an alternate rail rate based upon a minimum weight of 80,000 pounds. Because the staff could find no master bill of lading affecting these shipments, it rated each load as a separate shipment. The resulting undercharges amount to \$128.71. Respondent introduced Exhibit 20, which contains three separate bills covering said shipments and one document that was intended as a master bill of lading. The documents were prepared by Permanente Cement Company. According to the traffic manager for Kaiser Cement & Gypsum Corporation (formerly Permanente Cement Company) the purported master bill of lading was improperly prepared by his company in that it did not contain a date, or a signature, and the separate loads were not specifically set forth and totaled. It was his opinion, under the circumstances, that the staff was correct in rating the shipments separately. He testified that his company assumes the responsibility for improperly preparing the master bill.

Part 2 of Exhibit 9 relates to nine loads of clay which were also governed by Minimum Rate Tariff No. 7, and transported from Gladding, McBean & Co. at Alberhill to Permanente Cement Company at Lucerne Valley. The actual undercharge amounts to only \$3.47;

however, the staff included an accessorial loading and unloading charge of 12 cents a ton on not only these movements but also the shipments of gypsum. Mountain contends that it neither loaded nor unloaded any of these shipments inasmuch as the loading was performed by the consignors and the unloading was performed by merely releasing the binders on the bottom hopper trailers and gravity accomplished the rest.

The staff recommended that a fine of \$500 be imposed upon Wilson for having operated without a permit during the period covered by the investigation and that a fine of \$3,500 be imposed upon Mountain.

After consideration the Commission finds that:

1. Respondent Mountain operates pursuant to a restricted radial highway common carrier permit.
2. Respondents Topper, Robinson, Oddo, Reed, Mason and Wilson possess permitted authority duly issued by this Commission, limited to operations as subhaulers. During the period covered by the staff's investigation respondent Wilson engaged in the business of transporting property over the public highways between points within the State without first having obtained a permit from this Commission to do so.
3. Respondent Mountain was served with Minimum Rate Tariffs Nos. 7 and 10 and Distance Table No. 4.
4. Mountain was incorporated in 1956, for the purpose of operating a crushing plant to process rock and in 1959 it entered the field of transportation as a permitted carrier. It owns no equipment. It leases trailers from Glenn E. Walker Corporation. Glenn E. Walker is affiliated with three permitted transportation companies, including Mountain. He is a stockholder in Mountain and is engaged as its director of transportation. The tractors used by Mountain are owned and operated by former drivers of Glenn E. Walker Corporation. Pursuant to the agreements with the tractor owners



Mountain pays approximately 50 percent of what is required by Minimum Rate Tariff No. 7 to be paid to subhaulers. Although the agreements provide for exclusive use and control by Mountain, said agreements are merely a device by which Mountain seeks to pay subhaulers less than 95 percent of the applicable minimum rates as required by Minimum Rate Tariff No. 7. The shipments of clay and gypsum are governed by the provisions of Minimum Rate Tariff No. 7 and insofar as Mountain paid the subhaulers less than the prescribed amount there resulted a violation of said tariff.

5. Mountain performs a transportation service for Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix and Foster Sand and Gravel. Although the stockholders of Mountain have an inter-related stock interest in said companies, that alone does not establish an alter ego situation. In the absence of any other proof relating to control and management, it cannot be said that when Mountain was hauling cement for these companies it was, in effect, hauling its own property in violation of Section 3668 and its permit. Inasmuch as the 24 shipments of cement were transported under Minimum Rate Tariff No. 10, which, unlike Minimum Rate Tariff No. 7, does not at present specify the minimum amount to be paid to subhaulers, no violations result.

6. In Decision No. 63227, dated February 6, 1962, in Case No. 6567, the Commission held as follows: "From the standpoint of enforcing minimum rates it is not necessary, in our judgment, that it be shown that a particular transaction has resulted in that which the statute condemns but only that the transaction be reasonably susceptible of resulting in the evil sought to be avoided. Accordingly, in issuing operating permits, where it appears that there is an affiliation between carrier and shipper by reason of common ownership, management or control, it has been the Commission's policy to specify in such permits that not less than the applicable minimum rates shall be

paid by such carrier to subhaulers engaged to carry the property of the affiliated shipper."

In the circumstances regulatory objectives will be achieved by substituting the following restriction for the restriction presently contained in the radial highway common carrier permit and cement carrier certificate of Mountain Rock Products: "Whenever Mountain Rock Products engages other carriers for the transportation of property of Mountain Rock Products, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel or customers or suppliers of said individuals, partnerships or corporations, carriers shall not pay such other carriers less than one hundred percent of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

7. The shipments of gypsum were improperly rated as a multiple lot shipment in that the documentation failed to include a single bill of lading containing all of the necessary information relating to each of the loads transported. In the absence thereof each load should have been rated as a separate shipment.

8. Item 90-B of Minimum Rate Tariff No. 7 provides that a carrier, when applying an alternate rail rate, must charge 12 cents a ton for loading and unloading when such service is performed by the carrier and the common carrier rate does not include an accessorial charge for such service. On the shipments of clay and gypsum Mountain did not load and unload the trailers. The record does not show that the carrier performed any accessorial services. The 12 cents a ton charge for loading and unloading said shipments was not applicable.

Based upon the foregoing findings of fact, the Commission concludes that respondent Mountain violated Sections 3664 and 3667 of

the Public Utilities Code by assessing and collecting less than the minimum rates established in Minimum Rate Tariff No. 7 and that it violated Section 3737 of the Public Utilities Code by having paid subhaulers less than 95 percent of the minimum rates contrary to the provisions of Minimum Rate Tariff No. 7. The Commission also concludes that respondent Wilson violated Sections 3541 and 3571 of the Public Utilities Code by engaging in the business of transporting property over the public highways between points within the State for compensation without first having obtained a permit from this Commission to do so. The Commission further concludes that respondent Wilson should pay a fine in the amount of \$500 and that respondent Mountain should pay a fine in the amount of \$2,500.

The order which follows will direct respondent Mountain to cease and desist from any unlawful operations and practices and to review its records to ascertain all undercharges that have occurred since January 1, 1963, in addition to those set forth herein. Respondent Mountain will also be ordered to pay the difference between the amounts paid to the subhaulers and 95 percent of the minimum rates governed by Minimum Rate Tariff No. 7 for the transportation performed since January 1, 1963. The Commission expects that when undercharges have been ascertained, respondent Mountain 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 Mountain and the results thereof. If there is reason to believe that respondent Mountain, or its attorney, has not been diligent, or has not taken all reasonable measures to collect all undercharges and pay the subhaulers the differences above mentioned, 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.

During the course of hearing Mountain filed a petition requesting an examiner's proposed report. The petition will be denied. On April 8, 1965, Mountain filed to dismiss or discontinue the proceeding. The motion will be denied.

O R D E R

IT IS ORDERED that:

1. On or before the twentieth day after the effective date of this order respondent Mountain Rock Products, a corporation, shall pay to this Commission a fine of \$2,500 and respondent Melvin M. Wilson shall pay to the Commission a fine of \$500.
2. Respondent Mountain Rock Products shall cease and desist from the practice of paying subhaulers less than 95 percent of the rates prescribed by Minimum Rate Tariff No. 7.
3. Respondent Mountain Rock Products shall examine its records for the period from January 1, 1963 to the present time, for the purpose of ascertaining all instances where subhaulers were paid less than that required by Minimum Rate Tariff No. 7 and all undercharges that have resulted in violation of said tariff.
4. Within ninety days after the effective date of this order, respondent Mountain Rock Products shall complete the examination of its records required by paragraph 3 of this order and shall file with the Commission a report setting forth all underpayments and undercharges found pursuant to that examination.
5. Within thirty days after the filing of the report pursuant to ordering paragraph 4 hereof respondent Mountain Rock Products shall correct all underpayments by paying to the subhaulers.

the difference between the amount actually paid and 95 percent of the applicable minimum rate prescribed by Minimum Rate Tariff No. 7.

6. Respondent Mountain Rock Products 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 3 of this order, and shall notify the Commission in writing upon the consummation of such collections.

7. In the event undercharges ordered to be collected by paragraph 6 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent Mountain Rock Products 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.

8. On the effective date of this decision, as to respondent Mountain Rock Products, the Secretary of the Commission is directed to cause the following restriction to be substituted for the restrictions presently contained in Radial Highway Common Carrier Permit No. 30-3483 and Cement Carrier Certificate issued to Mountain Rock Products by Resolution No. 13823, Sub. 38:

"Whenever Mountain Rock Products engages other carriers for the transportation of property of Mountain Rock Products, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers less than one hundred percent of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

9. Respondent Mountain Rock Products' petition for an examiner's proposed report and its motion to dismiss or discontinue are hereby denied.

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 20th day of May, 1965.

Friedrich B. Halchoff  
President

Arthur E. [unclear]

George E. Grover

[unclear]

[unclear]  
Commissioners