

Decision No. 69237**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the operations, rates  
and practices of TRACEY L. AUST, an  
individual, doing business as AUST  
TRUCKING.

Case No. 8037

William H. Kessler, for respondent.Elmer Sjostrom, for the Commission staff.O P I N I O N

By its order dated October 13, 1964, the Commission instituted an investigation into the operations, rates and practices of Tracey L. Aust, doing business as Aust Trucking.

Public hearings were held before Examiner Gravelle on December 3, 1964 and February 16, 1965, at Fresno. The matter was submitted subject to the filing of concurrent memoranda of points and authorities on or before March 22, 1965. The memoranda have been filed.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 10-8789 issued July 22, 1958 and amended May 7, 1963. Respondent has a terminal in Fresno, California. He owns and operates three to five pieces of equipment and employs three to five drivers plus a dispatcher accountant. His gross operating revenue for the calendar year of 1963 was \$180,880 and for the first quarter of 1964 was \$51,758. Copies of the appropriate tariff and distance table were served upon respondent.

On June 29 and 30, 1964, and again on July 1 and 2, 1964, a representative of the Commission's field section visited respondent's place of business and checked his records for the period January 1, 1964 through May 31, 1964. The representative checked documents

relating to 693 shipments during that period, they purported to be all such shipments made by respondent. The underlying documents relating to 84 such shipments were photocopied from respondent's files and the copies were submitted to the License and Compliance Branch of the Commission's Transportation Division. They were received in evidence as Exhibit No. 1. Based upon the data taken from said copies and supplemental information supplied by staff investigators, a rate study was prepared and introduced in evidence as Exhibit No. 2. Said exhibit reflects purported undercharges in the total amount of \$2,583.85.

Counsel for respondent made several motions at the hearings. Initially, he moved for a trial by jury inasmuch as the provisions for fine pursuant to Sections 3774 and 3800 of the Public Utilities Code are so great that the punishment which the Commission might mete upon respondent is equivalent to or greater than most felony punishments. He claimed the instant proceeding was quasijudicial and criminal in nature and since the Commission is granted the same power and is under the same limitations as courts of record the right to a jury trial should follow.

Thereafter, at the completion of direct testimony by the staff investigator, respondent's counsel inquired of the witness whether or not he had advised respondent at the beginning of his investigation that respondent had a right to remain silent and a right to be represented by counsel. When these questions were answered in the negative, counsel moved for dismissal of the action and moved to strike all the testimony of the investigator based upon statements made to him by respondent. He also moved for the delivery to respondent of a free copy of the transcript in this proceeding. These latter motions were based upon the recent cases, People v. Dorado, 61 AC 392, 40 Cal. Rptr. 264, Massiah v. U.S., 377 U.S. 201, 12 L. Ed 2d 246, and Escobedo v. Illinois, 12 L. Ed 2d 977.

The motions made by respondent's counsel were the subject of memoranda of points and authorities filed by counsel for respondent and staff counsel.

The basis for the validity of each of the motions made by respondent's counsel is that the instant proceeding and any of like character are at the least quasijudicial and criminal in nature. He cites in support of his argument Section 3812 of the Public Utilities Code which provides:

"Every person or corporation who, or which, violates any provision of this article is guilty of a misdemeanor, and is punishable by a fine of not more than five hundred dollars (\$500), or by imprisonment in the county jail for not more than three months, or both. (Added 1963, Ch. 1768.)"

What counsel overlooks is that the above section relates only to "Article 10. Fines and Penalties," it does not relate to Section 3667, "Article 6. Rates" which is the section respondent has been charged with violating. There is no question that a proceeding pursuant to Section 3812 would be criminal, but it would not be pursued before the Commission, it would be taken before the Superior Court as provided in Public Utilities Code Section 3807, (which specifically excepts fines levied by the Commission under Section 3800).

Staff counsel correctly states the law, in that administrative disciplinary actions before an administrative tribunal while they may be judicial proceedings are not criminal, even though the licensee may be subject to penalties. Davis, Administrative Law Treatise, Vol. 1, p. 594; Helvering v. Mitchell, 82 L. Ed 917; Cox v. United States, 92 L. Ed 59; Webster v. Board of Dental Examiners, 17 Cal. 2d 534; Orlinoff v. Campbell, 91 Cal. App. 2d 389. The motions made by counsel for respondent are denied.

As to the purported undercharges shown by Exhibits Nos. 1 and 2 the defense offered by respondent concerned itself for the most part with an interpretation of Item 85 of Minimum Rate Tariff No. 2. Respondent introduced certain documents into evidence in an effort to show that he had complied with said Item 85 and hence the rates he had applied were correct. The staff rate expert testified that in the main had the documentation required by Item 85 been met, there would have been no undercharges. The staff investigator found no such documentation at the time of his investigation; this was explained by respondent by way of his practice of sending all documents back to the shipper, except for a copy of the freight bill, when the shipper was billed for payment. Respondent offered the testimony of certain of his shippers to show that they had contracted with other parties for the sale of large quantities of cottonseed hulls which were to be transported by respondent. Exhibit No. 4 is a contract of sale between Producers Cotton Oil Company and Janss Cattle Industries involving 1050 tons of cottonseed hulls. It identifies the consignor, the consignee, the commodity, the point of origin and the point of destination. It is dated January 15, 1964 and provides that 10 to 12 loads will be delivered per week. It also states that respondent is to receive \$7.10 per ton for delivering the hulls. Exhibit No. 5 consists of three invoices issued by Producers to Janss. They refer by number to the contract of January 15, 1964 and under the heading "route" appears the name of respondent. Each of these invoices is dated January 16, 1964. The parts of Exhibits Nos. 1 and 2 to which the contract has reference are Parts 8 through 18 and 21 through 58.

Exhibit No. 6 is a contract between Ranchers Cotton Oil and James E. Baker, Inc. involving an unspecified quantity of cottonseed hulls. Under the heading "Price" it specified "\$21.30 per ton, . . . via rail, less 50¢ brokerage." It specifies the consignor, the consignee, the commodity, the point of origin and the point of destination. It is dated January 20, 1964. As to the manner of shipment, under the heading, "How" appears the letters, "SP." Exhibit No. 7 contains copies of three handtags issued by Ranchers to Baker. They refer by number to the contract of January 20, 1964 and under the heading, "Routing" appears the name of respondent. These handtags are dated February 13, 20 and 23, 1964, respectively. The parts of Exhibits Nos. 1 and 2 to which this contract and a second similar one not introduced in evidence have reference are Parts 59 through 72.

Part 19 of Exhibit No. 1 contains a delivery order issued by Balfour, Guthrie & Co., Limited, to Producers Cotton Oil Company directing Producers to deliver two truckloads of "Bulk Cottonseed Hulls" to respondent for delivery to Beechinor Cattle Feeding Co. in Bakersfield. There is a notation on this order which states: "Note: Haul on min. rate 48,000# within 48 hours on continuous basis until complete." Respondent testified that this document was intended to cover Parts 19 and 20.

Exhibit No. 8 consists of shipping directions issued by The Pillsbury Company to respondent directing the movement, "Within 48 Hours Week of 1/12," of 50 tons of bulk cottonseed meal. The document is dated January 7, 1964 and bears no signatures. This exhibit has reference to Parts 75 through 78 of Exhibits Nos. 1 and 2.

Exhibit No. 9 consists of two bills of lading issued by Johns-Manville Products Corporation to respondent and apparently signed by respondent's drivers. They each direct a movement of

"shingles or siding, asphalt" to Pretzer Roofing Company in Fresno. One bill is dated February 3, 1964 and has on its face the typewritten words, "Part Lot." The other is dated February 4, 1964 and has on its face the typewritten words, "This completes this order." Exhibit No. 9 has reference to Parts 73 and 74 of Exhibits Nos. 1 and 2.

Respondent claimed that Parts 1 through 6, Part 7, and Part 82 of Exhibits Nos. 1 and 2 moved pursuant to master bills of lading and were correctly rated although no documentary evidence was offered in support of such claim.

Respondent admitted the undercharges shown in Parts 79, 80 and 81. He testified that the movements in Parts 83 and 84 were accomplished in side-dump equipment. In light of this latter information the staff rate expert testified that the rates shown to be the minimum in Exhibit No. 2 for Parts 83 and 84 were not correct. The Commission finds that no undercharges exist with respect to Parts 83 and 84 of Exhibit No. 2.

Item 85 of Minimum Rate Tariff No. 2 is commonly known as "the multiple lot rule." The purpose of the rule is to allow a shipper and carrier to take advantage of the use of higher minimum weights and correspondingly lower minimum rates when certain specified conditions are met. To paraphrase the language of Item 85 the following requirements must be met:

1. Entire shipment available at time of first pickup.
2. Entire shipment picked up by the carrier within a 48-hour period.
3. Written information to the carrier from the shipper describing the kind and quantity of property to constitute the multiple lot shipment.

4. Issuance by the carrier of a single multiple lot document for the entire shipment at time of or prior to the first pickup showing name of consignor, point of origin, date of initial pickup, name of consignee, point of destination, and kind and quantity of property. In addition, a single shipping document must be issued for each pickup referring to the multiple lot document.

None of the exhibits offered by respondent as multiple lot documents fulfill the requirements of Item 85 of Minimum Rate Tariff No. 2.

No written information was issued by the consignor to the respondent identifying any particular so-called multiple lot shipment, with particular reference to the kind and quantity to be picked up.

No single multiple lot document was issued by respondent for any so-called multiple lot shipment. In fact respondent by his freight bills in Exhibit No. 1 treated each load as a separate shipment.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 10-8789.
2. Respondent was served with the appropriate tariff and distance table.
3. Respondent and his shippers did not comply with the requirements of Item 85 of Minimum Rate Tariff No. 2 in the instances set forth in Parts 1 through 6, Part 7, Parts 8 through 18, Parts 19 and 20, Parts 21 through 58, Parts 59 through 72, Parts 73 and 74, Parts 75 through 78, and Part 82 of Exhibit No. 2.
4. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Parts 1 through 82 of Exhibit No. 2 resulting in undercharges in the amount of \$2,423.83.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Section 3667 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$2,423.83, and in addition thereto respondent should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$250. The Commission expects that 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 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 \$2,673.83 to this Commission on or before the twentieth day after the effective date of this order.
2. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein and shall notify the Commission in writing upon the consummation of such collections.
3. In the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them; respondent shall file



with the Commission on the first Monday of each month after the end of said sixty days, 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 15<sup>th</sup> day of JUNE, 1965.

Frederick B. Holdoff  
President

John E. Mitchell

George D. Hoover

Augusta

William W. Bennett  
Commissioners