

Decision No. 69399**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 HENRY
ROBERTS.

Case No. 7958
(Filed July 28, 1964)

Henry Roberts, in propria persona and
George A. Schroeder, of Schroeder &
Campbell, for respondent.
Franklin G. Campbell and Elmer Siostrom,
for the Commission staff.

O P I N I O N

By its order dated July 28, 1964, the Commission instituted an investigation into the operations, rates and practices of Henry Roberts, an individual.

Public hearings were held before Examiner Gravelle on September 29, 1964 and June 3, 1965, at Fresno.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 15-5510. Respondent has a terminal in Delano, California. He owns and operates four trucks and four trailers. He employs four drivers. His total gross revenue for the year ending June 30, 1964 was \$58,669.00. This does not include the revenue from the "buy and sell" operation hereinafter discussed. Copies of the appropriate tariff and distance table were served upon respondent.

On April 6 through April 10, 1964, a representative of the Commission's field section visited respondent's place of business and checked his records for the period from March 23, 1963 through July 29, 1963, inclusive. During said period respondent

transported 213 shipments of hay. The underlying documents relating to 50 shipments were taken from respondent's files and photocopied. Said photocopies were submitted to the Rate Analysis Unit of the Commission's Transportation Division. Based upon the data taken from said photocopies and supplemental information supplied by the representative a rate study was prepared and introduced in evidence as Exhibit No. 2. Said exhibit reflects purported undercharges in the amount of \$2,737.53.

This is one of the matters most commonly referred to as a "buy and sell case", in which the basic issue that must be decided is whether or not the activity of the respondent constituted for-hire transportation, on the one hand, or the legitimate buying and selling of property, on the other hand. If said activity was the former it becomes a device to evade minimum rate regulation and the undercharges as reflected by Exhibit No. 2 would result. If said activity was the latter, then respondent was merely transporting his own property and such transportation would be exempt from rate regulation pursuant to Section 3511(c) of the Public Utilities Code.

The evidence presented at the hearings in this matter indicates that the movements of hay reflected by Exhibits Nos. 1 and 2 took place in the following manner: Respondent purchased hay from one Harold Austin DeWeese, Jr., who purports to be a hay dealer and broker of some repute in the Delano-Fresno area. DeWeese dealt directly with the grower or producer of hay and made his purchases in the field from such grower or producer. Respondent paid DeWeese fifty cents per ton above the price DeWeese paid the grower, loaded the hay in his trucks and transported it to the United Hay Company at Bellflower or Chino. Someone at United Hay

Company would direct respondent's drivers to a dairy in the Los Angeles-Artesia area where the hay would be unloaded. Respondent would then receive payment from United Hay Company and pay DeWeese who billed him on a weekly basis. Respondent testified that generally he knew the price DeWeese paid the producer for the hay because he often accompanied him to the field. Sometimes, however, he would be informed of the place of pickup and the price paid by DeWeese in telephone conversations. On these occasions his trust in the honesty of DeWeese was his only assurance of the accuracy of the price paid by DeWeese. DeWeese testified that a "Delivery Order" was issued by him for every purchase and sale he made. Exhibit No. 5 is a book containing a green carbon copy of such delivery orders for the period June 17, 1963 through May 23, 1964. It bears the title, "H. A. DeWeese Hay Dealer and Broker", contains a place for the insertion of the date and the word "To" followed by a line for the insertion of the name of the buyer from DeWeese. There were four copies of these delivery orders, a white copy which went to the grower or producer, a yellow copy which was attached to the weight tag when the hay was weighed and subsequently returned to DeWeese, the green copy retained by DeWeese, and a pink copy which went to the dairy as the ultimate buyer and consumer of the hay.

Respondent testified that he did not know the price he would receive for the hay from United Hay Company although he had a general idea of what such hay would bring by way of daily newspaper information. DeWeese checked sales prices with the various governmental market headquarters in the Fresno daily, and subscribed to "Hay Market News" published jointly by the United

States Department of Agriculture and the California Department of Agriculture. Both DeWeese and respondent claimed to be hay dealers licensed by the State of California. Respondent's counsel argued that respondent was merely carrying on two legitimate business enterprises, one as a for-hire carrier and one as a hay dealer.

Staff counsel cited Section 1261(f) of the Agricultural Code which provides:

"(f) The term "dealer" means any person other than a cash buyer who solicits, or obtains from the producer thereof title, possession, control, or delivery of any farm product for the purpose of resale or who buys or agrees to buy any farm product from the producer thereof; provided, however, that no dealer shall obtain title, possession, control, or delivery of any farm product except by contract of purchase and sale, or by contract agreement to purchase, wherein the price to be paid by the dealer to the producer is designated in the contract."

It is clear from the facts of this case as focused by the above section of the Agricultural Code that respondent was not acting as a "dealer" in his hay transactions. A review of the other portions of Section 1261 reveals that respondent was not only not a "dealer", he was not a "commission merchant", "broker", "cash buyer", or "agent". In fact his activity as described by his testimony, that of DeWeese and that of the field section representative does not come within the purview of the Agricultural Code. His function in the movement of hay from the producer to the consumer through DeWeese, himself and United Hay Company, was merely to provide transportation. DeWeese acted as a "dealer" and United Hay Company as an intermediary of the consumer.

DeWeese testified that he receives no compensation from United Hay Company with regard to the respondent's transactions, but admitted that he did represent them with regard to a storage yard near Delano owned by United Hay Company and on which his name

appears on the barn and wherein he had storage privileges. He said he receives remuneration by way of "bonuses" for such representation.

Respondent does not advertise, store hay, negotiate with the grower, purchase by particular grade or otherwise perform functions of a legitimate buyer of hay. 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.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 15-5510.
2. Respondent was served with the appropriate tariff 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 No. 2, resulting in undercharges in the amount of \$2,737.53.

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 \$5,000.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since

March 23, 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 \$5,000 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 March 23, 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 13th day of JULY, 1965.

Fredrick B. Holcomb
President

George L. Hoover

Augusta

William G. Bennett
Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.