

ORIGINAL

Decision No. 69781

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of ACME TRUCK COMPANY,)
 a corporation, for retroactive)
 authority to have charged less)
 than the minimum rates for trans-)
 portation of dirt.)

Application No. 46487
 Filed April 8, 1964

Dooley & Dooley, by David M. Dooley and
Matthew J. Dooley, and Higgs, Fletcher &
 Mack, by Ferdinand T. Fletcher, for
 applicant.
 Fredman, Karpinski, Silverberg & Shenan, by
Charles H. Karpinski and Lewis Silverberg
 for E. C. Young, interested party.
E. O. Blackman, for California Dump Truck
 Owners Association, and W. A. Dillon,
 J. C. Kaspar and Arlo D. Poe, by W. A.
Dillon, for California Trucking Associa-
 tion, protestants.
Donald Day, John Specht and C. R. L'Ecluse, for
 for the Commission staff.

O P I N I O N

Application

By this application filed April 8, 1964, Acme Truck Com-
 pany, a corporation, hereinafter referred to as Acme, requests the
 Commission to establish a less than minimum rate for the transporta-
 tion of approximately 1.4 million tons of dirt in dump truck equip-
 ment from Centre Street, La Mesa, to the parking lot of San Diego
 State College, San Diego, a distance of 3½ miles. Acme holds per-
 mits from the Commission to operate as a radial highway common
 carrier, a highway contract carrier and a city carrier. The applica-
 tion states that the transportation was performed for E. C. Young, a
 general contractor, hereinafter referred to as Young, during the
 period November 1960 to February 1962, at a contract rate of 20 cents

per ton; that in August 1961, a Commission representative informed the then president of Acme of his right to file for a deviation from the minimum rates for this transportation; that on September 26, 1961, a "Notice of Undercharges" was issued to Acme by the Commission staff which directed Acme to review its records, report its findings to the Commission and collect any undercharges disclosed thereby; that in compliance with the aforementioned directive, Acme rendered revised bills to Young based on the minimum rate of 39 cents per ton,¹ which Young refused to pay; that on April 3, 1962, Acme filed a civil suit in the Superior Court of San Diego County against Young to recover the undercharges; that on March 5, 1964, the Commission records on the 1961 staff investigation of Acme were released to the court in response to a subpoena duces tecum requested by Young; and that after reviewing the staff file, Acme decided to request retroactive minimum rate relief and was granted a continuance by the court so that it might make application to the Commission for rate relief. Revised Exhibit A to the application shows that Acme collected \$286,436.04 from Young for the transportation involved herein, based on the contract rate of 20 cents per ton, and purports to show that Acme lost \$56,123 on the transportation. The application also requests that the shipper be authorized to make any presentation in this proceeding on his own behalf that he might consider appropriate.

Shipper's Petition

A pleading which is identified as "Shipper's Petition Seeking Relief from Minimum Rate Tariff No. 7" was filed by Young on April 20, 1964. The petition points out that the amount of undercharges, based on the 39 cents per ton rate, sought by Acme in its lawsuit is \$272,114.24. The petition alleges that Young has

¹ The rate of 39 cents per ton is the distance tonnage rate for 3.5 miles named in the effective issues of Item 130 of Minimum Rate Tariff No. 7 during the period covered by the transportation.

documentary evidence that will conclusively prove that the charges assessed for the transportation exceeded the minimum hourly rate provided in Section 4 of Minimum Rate Tariff No. 7 and requests the Commission to waive the requirement of a prior written notice of intention to ship at the hourly rate² and find that hourly rates could be applied. A financial statement filed by Young purports to show that Acme earned a profit of \$24,059.32 on the job at the contract rate.

Notice of Motion

A "Notice of Motion and Motion by the Staff for Order Dismissing Application, and Points and Authorities" was filed in this proceeding by the Commission staff on July 20, 1964. The notice stated that staff counsel would appear at the public hearing in this matter and move the Commission for an order dismissing Acme's application and Young's petition. The ground stated for the motion was that the Commission is not empowered to grant the requested relief, and, alternatively, that neither pleading states facts sufficient to justify the relief sought.

Public Hearing

A public hearing in this matter was held before Examiner Mooney at San Diego on July 30, 1964.

At the outset of the hearing, counsel for the Commission staff moved the Commission for an order dismissing the proceeding on the two alternative grounds indicated in the staff "Notice of Motion and Motion." All parties were afforded an opportunity to present their views on the motion. The motion was taken under submission and referred to the Commission.³ All parties were given an

² Third Revised Page 39 of Minimum Rate Tariff No. 7 provides that hourly rates for transportation in Southern Territory (within which the transportation in issue was performed) apply only when notice in writing is given to the carrier, before the transportation commences, of the shipper's intent to ship under such rates.

³ Rule 54 of the Commission's Rules of Practice and Procedure (51 Cal. P.U.C. 651) provides that the presiding officer at a hearing may not rule on a motion which involves final determination of the proceeding. Such motions are referred to the Commission for ruling.

opportunity to file a memorandum of position and points and authorities in support thereof regarding the staff motion.

Since the staff motion, if granted by the Commission, would result in a termination of the proceeding, no evidence was received and the hearing was adjourned. All parties were in accord with this procedure.

Discussion

Memoranda of position and points and authorities regarding the motion to dismiss have been filed by the staff, Acme and Young. Each of the pleadings has been considered.

The fundamental ground for the staff motion is that the statutory scheme and the framework of the minimum rate structure will not allow the Commission to change the minimum rate applicable to a particular transportation transaction retroactively.

The Commission's jurisdiction to grant minimum rate relief to highway permit carriers is stated in Section 3666 of the Public Utilities Code. The section provides as follows:

"If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate." (Emphasis added.)

It is apparent that the words "desires to perform" in Section 3666 contemplate only prospective transportation. Had the Legislature intended that the Commission be empowered to approve deviations from the minimum rates retroactively, it would have so provided in express terms. The Commission has declined for lack of statutory authority to establish retroactive rates under the Highway Carriers' Act.⁴

In several decisions, the Commission has waived directives by its staff to highway contract carriers to collect

⁴ Breneiser Well No. 2, Ltd., 44 C.R.C. 846 (1943). See also C & R Transfer Co., 40 C.R.C. 623 (1937); J. A. Clark Draying Co., 40 C.R.C. 97 (1936); Brown Trucking Co., 41 C.R.C. 176 (1938) and Seaboard Transportation Co., Inc., Decision No. 31653, dated January 1, 1939, in Application No. 22226 (unreported).

undercharges.⁵ The Commission pointed out in each decision that it is empowered by Section 3667 of the Public Utilities Code to grant such relief when special circumstances are found to exist. In each of the decisions, the Commission found that both the carrier and the shipper were of the opinion that the rates assessed for the transportation involved were the applicable rates and that all parties had acted in good faith.

The pertinent provisions of Section 3667 are as follows:

"No highway permit carrier shall ... directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the (minimum) rates or charges except upon authority of the commission."

It is to be noted that the Commission in the exercise of its authority under Section 3667 has the obligation and duty to maintain the integrity of the established minimum rates and must give that the utmost consideration. The allegation that permission to remit a portion of the minimum rates will convenience both the carrier and the shipper and will not directly be adverse to the interests of other carriers or shippers is not enough to warrant the granting of that authority.⁶

It is not possible to determine from the pleadings herein whether sufficient justification exists to warrant the Commission exercising its authority under Section 3667 in this proceeding. As stated above, the Commission's first concern is to maintain the integrity of the minimum rate structure, and it will invoke its authority under Section 3667 only when compelled to do so in the

⁵ I. Lewin (Spee-Dee Delivery Service), Decision No. 59760 dated March 8, 1960, in Case No. 5432 (Pets.154, et al.) (unreported), and J.L.Talkington, Decision No.62071 dated May 31, 1961, in Application No.43231 (headnote only reported at 58 Cal.P.U.C. 720).

⁶ Crown By-Products Co. (Crown Transportation), 61 Cal. P.U.C. 691 (1963).

public interest. The extent, if any, to which the Commission should exercise its authority under Section 3667 cannot be resolved until a full record has been developed at further public hearings in this proceeding. Allegations have been made by both Acme and Young in support of the relief which each seeks. They should be given an opportunity to present evidence in support of their allegations.

Based upon the record herein, we find that:

1. The relief requested by Young is in effect a request that the Commission waive the staff directive to Acme to collect undercharges, and Section 3667 of the Code empowers the Commission to consider and determine the merits of such requests.

2. The fact that Acme requested minimum rate relief under Section 3666 is not a bar to its requesting the Commission in this proceeding to waive or partially waive, under the provisions of Section 3667 of the Code, the staff directive to collect undercharges.

3. Without a complete record developed at further public hearing in this proceeding, the Commission cannot determine whether the facts and circumstances surrounding the transportation would justify a waiver or partial waiver of the staff directive to Acme to collect undercharges.

We conclude that:

1. Further public hearing should be held in this proceeding to afford the parties an opportunity to present evidence in support of the allegations in their pleadings and any additional evidence deemed appropriate.

2. The motion by the Commission staff to dismiss should be denied. ✓

O R D E R

IT IS ORDERED that:

1. The submission on the pleadings is hereby vacated and set aside.
2. The motion by the staff of the Commission for an order dismissing the proceeding is denied.
3. The parties are hereby authorized to file within thirty days any additional or amended pleadings herein that may be deemed necessary in view of the findings and conclusions herein.
4. Further public hearing in the above matter shall be held at such time and place as may be hereafter designated.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 13th day of OCTOBER, 1965.

Frederick B. Hallock
President

George T. Brown

Augusta

Stallman Bennett

Commissioners

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