

**ORIGINAL**Decision No. 69944

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the operations,  
rates and practices of JACK MATHENY,  
an individual, doing business as  
MATHENY TRUCKING COMPANY.

Case No. 8141

William H. Kessler, for respondent.B. A. Peeters and J. B. Hannigan, for the Commission  
staff.O P I N I O N

By its order dated March 9, 1965, the Commission instituted an investigation into the operations, rates and practices of Jack Matheny, an individual, doing business as Matheny Trucking Company.

A public hearing was held before Examiner Gravelle at Fresno on May 4, 1965 and again on July 22, 1965. The matter was submitted on the latter date.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 50-4404 and Highway Contract Carrier Permit No. 50-3922. He has a terminal, office, shop and parking area at 317 Kansas Avenue, Modesto, California. He owns and operates nine tractors, thirty trailers and eight converters, and employs a dispatcher, a bookkeeper, a serviceman and nine drivers. His gross revenue for the year 1964 was \$266,928. Copies of the appropriate tariff and distance table were served upon respondent.

On December 7 through 11, 1964, a representative of the Commission's Field Section conducted an investigation of respondent's records at his place of business in Modesto. Records for the period from January 1, 1964 through November 30, 1964 inclusive were

inspected. During said period respondent transported approximately 2,400 shipments. The underlying documents relating to 21 shipments were taken from respondent's files and photocopied. Said photocopies were submitted to the Rate Analysis Unit of the Commission's Transportation Division. They were introduced in evidence as Exhibit No. 1, and constituted all the instances in which the staff investigator suspected violations of minimum rates. Based upon the data taken from said photocopies, and supplemental information supplied by the staff investigator, a rate study was prepared and introduced as Exhibit No. 2. Said exhibit reflects purported undercharges in the amount of \$1,102.46.

Counsel for respondent made two motions on constitutional grounds at the hearings, each of which was taken under submission. The first motion was for a jury trial on the basis that the instant proceeding is criminal or quasi-criminal in nature and hence respondent is guaranteed a right to trial by jury. The second motion was to strike all the testimony of both staff witnesses and dismiss the matter because the investigator did not inform respondent of his right to remain silent or his right to be represented by counsel at the time that he began his investigation at respondent's place of business. Counsel conceded the Commission had authority to investigate and order the collection of undercharges within its administrative jurisdiction but contended the authority to punish by fine or revocation imposed criminal sanctions and hence included the constitutional guarantees which were the subject of his motions.

These same motions made by the same counsel were presented to the Commission in another recent proceeding, In Re Tracey L. Aust, Decision No. 69237 in Case No. 8037, dated June 15, 1965. In that case the motions were the subject of memoranda of points and authorities

and the Commission concluded that administrative disciplinary proceedings before an administrative tribunal while they might be judicial, were not criminal even though the licensee be subject to penalties. For the reasons stated therein, the motions in this proceeding made by respondent's counsel are denied.

Respondent's counsel also moved to strike Exhibit No. 2 on the basis that errors had been shown in that exhibit and that it is a rule of evidence that an error in a portion of an exhibit tends to cast doubt upon the accuracy of the entire exhibit. Counsel did not cite the alleged "error" in Exhibit No. 2 specifically. He may have reference to the fact that the staff rate expert admitted on cross-examination that certain of his ratings in said exhibit were in error, but only so in light of additional documentary evidence produced by counsel for respondent not available or considered by the rate expert at the time the exhibit was prepared. In any event, such an error, had it existed, would at the most affect only the weight to be given the exhibit and is hardly a basis for questioning its admissibility. The motion to strike Exhibit No. 2 is denied.

Basically, the Commission staff attempted to show that respondent had violated Public Utilities Code Sections 3664, 3667 and 3737 by charging rates less than minimum, by consolidating shipments without proper written instructions, by failing to assess off-rail charges and by employing an improper classification.

Respondent introduced Exhibits Nos. 3 through 7 in evidence in an effort to either disprove certain parts of Exhibits Nos. 1 and 2 or indicate a ground of mitigation for parts contained therein.

Exhibit No. 3 has reference to Parts 6 and 8 of Exhibits Nos. 1 and 2. It contains photocopies of three "Truck Order and Multiple Lot Shipping Documents" issued by Kaiser Steel Corporation,

Kaiser, California and indicates that said Parts 6 and 8 were actually master-billed and transported on March 13 and 14, 1964. On the basis of these documents and the testimony of a witness for respondent the staff rate expert changed his rating of Parts 6 and 8. He recalculated the rate and charge and determined that the undercharge of \$149.91 for those two parts should be reduced to an undercharge of \$27.96.

Exhibit No. 4 consists of photocopies of documents already contained in Part 14 of Exhibit No. 1. They are invoices or shipping notices issued by Mineral Wool Insulations. A witness for respondent testified that the shipments reflected in Part 14 and in Exhibit No. 4 actually were transported on November 18 and 19, 1964 and that all arrangements had been made prior thereto and the documents given to the first driver to make a pickup. The staff rate expert testified that if the shipments in Part 14 had actually moved on November 18 and 19, 1964 there would have been no undercharge as shown in his Exhibit No. 2.

Parts 19, 20 and 21 of Exhibits Nos. 1 and 2 are concerned with what is described on respondent's freight bills and a shipping order issued by The Heil Co. as "1, 8-10 Yard Body," (Part 19); "1, Body, Dump Body," (Part 20); and "1, Heil, Alum Dump Body" or "1 Aluminum Dump Body - 7' x 13'," (Part 21). The staff rate expert in Exhibit No. 2 has applied the commodity description in each part as "Aluminum dump truck body," (Emphasis added). The question as to these three parts concerns itself with what the commodity actually was and hence what classification should have been properly employed.

The staff rate expert made his classification under National Motor Freight Classification No. A-7, Item No. 18060. The generic heading is "Automobile Group," the specific item is "bodies, freight not otherwise indexed." Said item carries a double first class rating.

The witness who did the actual rating for respondent made her classification under Item No. 191230 of the same classification. The generic heading is "Vehicles, Vehicle Parts," the specific item is "dump wagon bodies." Said item carries a first class rating.

In explaining his selection the staff rate expert said: "The reason I didn't use this part, although I did consider it at the time of rating was because to me it was more properly classifiable under the heading of automobile parts or accessories because it was a part of an automobile which is, of course, an automobile is commonly thought of as a passenger type automobile, but a truck is also an automobile, is a self-moving vehicle." (Emphasis added.)

Respondent's witness, who had the benefit of seeing the commodity at the time of movement, considered all the same items that the staff expert did. She described it as follows: "This was strictly a shell. Only a shell. It had nothing else with it whatsoever. It was a shell. . . . this was definitely not a complete vehicle. It was as far from it as you can get without being a flat piece of steel, or aluminum, whatever you want to call it."

The error made by the staff rate expert in his rating was his addition of the word "truck" to the commodity description. That word does not appear in any of the documents utilized in the shipments. It appears only in the staff rate exhibit. The staff rate expert had no reason to assume that the commodity was a part of a self-propelled vehicle, which was the basis of his rating. He admitted it could have just as easily been a part of a trailer or non-self-propelled vehicle. He further admitted that based upon the documents in Exhibit No. 1 alone he would be unable to rate the commodity. Respondent's witness had the benefit of knowledge that the staff expert did not; she actually saw the commodity. Where, as here, there

are conflicting items the shipper should receive the benefit of the lower charge which the carrier assessed. Further, on the facts developed at the hearing the carrier's classification appears to be correct.

Exhibit No. 5 consists of a letter from respondent's counsel to the shipper in Part 15 and the reply thereto. It was offered to show the difficulty respondent has in doing business with scrap metal dealers who issue a minimum of written information in the conduct of their business.

Exhibits Nos. 6 and 7 refer to Parts 17 and 18, respectively, and were offered as evidence of written instructions for split pickup and split delivery shipments. The documents contained in those exhibits do not state with the particularity required by Items Nos. 160 and 170 of Minimum Rate Tariff No. 2 the information necessary to allow movements as split pickup or split delivery.

Respondent's witness testified that the shipment in Part 10 was arranged by one of respondent's drivers while he was on the road and away from the terminal. Respondent and the witness had no knowledge of the movement until the driver returned to the terminal and handed the shipping documents to his superior. The driver thought he was doing respondent a favor by arranging and accomplishing this movement. The witness stated that she verbally "took the driver to task" for his misdirected effort and that such activity has not since occurred.

All in all, the testimony of respondent and his witness indicates that the operation conducted by respondent has grown rather rapidly from a one truck operation to a rather sizeable business, that respondent has sincerely made every effort to comply with the Public Utilities Code and the rules of this Commission but some errors have

been made. The staff investigator expressed the opinion that what errors had been made by respondent were not deliberate but were inadvertent.

Respondent was sent undercharge letters on January 14, 1960 and July 11, 1961 but none of the commodities involved therein can be found in Exhibits Nos. 1 and 2.

The record in this proceeding adequately reflects that respondent is fully aware of his responsibility to charge the proper rates in the conduct of his business and of the fact that failure to do so will result in disciplinary action against him.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 50-4404 and Highway Contract Carrier Permit No. 50-3922.
2. Respondent was served with the appropriate tariff and distance table.
3. Respondent's charges for Parts 14, 19, 20, and 21 of Exhibit No. 2 were correct and resulted in no undercharges.
4. The proper charge for Parts 6 and 8 of Exhibit No. 2 is \$581.99 resulting in a total undercharge for those two parts of \$27.96.
5. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Parts 1 through 5, Part 7, Parts 9 through 13, and Parts 15 through 18 of Exhibit No. 2 resulting in undercharges in the amount of \$775.09.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3664, 3667 and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$803.05, 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 \$1,053.05 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 9th day of November, 1965.

Frederick B. Hallock  
President

George J. Hoover

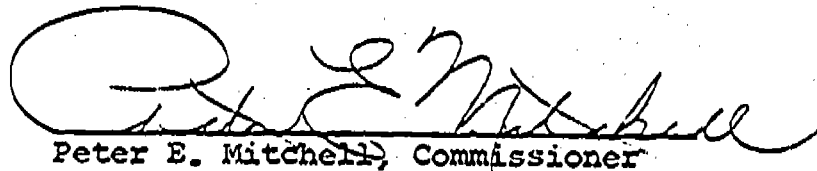
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William B. Bennett  
Commissioners

COMMISSIONER PETER E. MITCHELL DISSENTING:

The ultra-effusive language in the decision at pages 6 and 7: "..... that respondent has sincerely made every effort to comply with the Public Utilities Code....." qualifies the respondent for a good conduct award not a financial reprimand.

I cannot support a punitive fine of \$250.

  
Peter E. Mitchell, Commissioner