ds

ORIGINAL

Decision No. 70905

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, charges, rates and practices of M. SAM BROWNE.	Case No. 8328 (Filed January 11, 1966)

Adolph Moskovitz, for respondent.
Downey, Brand, Seymour & Rohwer, by Claude D. Rohwer, for Heringer Pelleting and Dehydrating Company, interested party.
David R. Larrouy and Jerome B. Hannigan, for the Commission staff.

O P I N I O N

A duly noticed public hearing was held before Examiner Power at Sacramento on March 22, 1966 and the matter was submitted. The order instituting investigation alleged violations of Minimum Rate Tariffs Nos. 2 and 14-A by a lease device.

Prior to and during the period covered by the evidence Heringer Pelleting and Dehydrating Company owned a plant at Courtland. A staff witness describes it as being 2.7 actual miles northeast of Vorden in terms of Distance Table No. 5. At this plant alfalfa, barley and other grains were processed into pellets, used for livestock feeding.

Respondent, a highway permit carrier, was employed by Heringer as a salesman. He was then the owner of two road sets of equipment. One of these sets, a truck and trailer, became the subject of a written lease from Browne to Heringer (Exhibit No. 1). The clauses of this lease as paraphrased are set out seriatim.

1. The term was from November 1, 1961 until canceled in writing by one of the parties.

2. Vehicles were to be used solely for transporting Heringer's merchandise from the Courtland mill to purchasers in and near Petaluma. Lessor's written consent was needed for any other use.

3. Rental was to be $45 per round trip for the truck-trailer unit, payable monthly on or before the tenth day of the month following the transportation. These trips, it will be noted, were supposed to be from Courtland to Petaluma and return.

4. This paragraph obligated lessee to provide operators who would be solely the employees of lessee, paid by lessee and subject to the direction and orders of lessee.

5. Lessee promises here to maintain the vehicles and pay all operating expenses, including fuel, oil and grease. Lessor was bound, however, to pay the excess, if any, over $500 on any single repair job. Lessor could not repossess the equipment for repairs or preventive maintenance without written consent of lessee. Lessor was bound to pay for tires.

6. To lessor was assigned the responsibility for providing personal liability and property damage insurance. He was to name lessee as co-insured on the policy and lessee was required to compensate lessor for this. Lessor was obligated to provide fire and collision insurance at his own expense.

Early in 1965 a member of the Commission staff made an extensive investigation of this carrier. Subsequently, a member of the Rate Analysis Unit of the Commission's Transportation Division developed what appeared to be rate violations. The Commission later commenced the present investigation.

At the hearing respondent and Heringer both indicated that they would not dispute the staff ratings electing, rather, to defend on the written lease.

The staff rate expert presented an exhibit which rated 264 shipments. By far the greater part of these were rated under Minimum Rate Tariff No. 14-A. A few small shipments were rated under the class rates in Minimum Rate Tariff No. 2. These were so rated because these class rates produce a lower charge. The smallest minimum weight in Tariff No. 14-A is 10,000 pounds and in many small shipments this weight produces a higher charge than the Tariff No. 2 class rates.

The lease in question here is governed by the provisions of Section 3548 of the Public Utilities Code. The first part of that section reads as follows:

> "3548. The leasing of motor vehicles for the transportation of property to any person or corporation other than to a highway carrier, is prohibited as a device or arrangement which constitutes an evasion of this chapter, unless the parties to such lease conduct their operation according to the terms of the lease agreement, which shall be in writing, ..." (Emphasis added.)

Transportation law has a pronounced tendency to be rigid in its application. The Legislature, when it added Section 3548 to the Code, must have been aware of this. The strict construction rule has been too long established and too often reiterated for any other presumption to be indulged. It is obvious from the wording

of Section 3548 that the Legislature intended that it should be strictly adhered to.

The record shows, however, that Browne and Heringer, by an oral arrangement, substantially modified their written lease.

For example, the hauling was not between Courtland and Petaluma. Browne told a staff witness at an interview that his service area was bounded roughly by Healdsburg, Marysville, Auburn and Merced.

For another example, the method of calculating the consideration was drastically altered. The per trip price was discarded and a per ton basis substituted. The tonnage rate varied from $3.00 to $5.00 per ton.

For a third example, the provisions of the fourth and fifth paragraphs of the lease were drastically revised. Drivers were "compensated by lessee for their services" as the written lease provided, but their wages were then deducted from amounts due Browne. The same procedure was followed on fuel purchases. The provisions relating to tires and repairs were also modified in practice.

It is clear that the written lease was not adhered to in any important particular. It follows from this conclusion that the oral lease is a device or arrangement violative of the established minimum rates.

The Commission is therefore constrained to find that the ratings set forth in Exhibit No. 4 are correct and that the undercharges indicated therein are also correct.

The Commission finds that:

1. M. Sam Browne is a highway permit carrier subject to the jurisdiction of this Commission.

2. On or about November 1, 1961, M. Sam Browne and Heringer Pelleting and Dehydrating Company entered into a written lease of motor transport equipment, in said lease described, for a term running from November 1, 1961 until canceled in writing by either of said parties.

3. The parties to said lease failed to conduct their operations according to the terms of such lease, departing therefrom in substantial particulars and thereby establishing a device or arrangement constituting an evasion of Chapter 1 of Division 2 of the Public Utilities Code.

4. The 264 shipments referred to in Finding No. 5 were subject to the rates set forth in Minimum Rate Tariffs Nos. 2 and 14-A, whichever of said tariffs will provide the lowest rate and charge for a particular shipment.

5. The ratings for the 264 shipments set forth in Exhibit No. 4 represent the correct minimum rates and charges under Minimum Rate Tariffs Nos. 2 and 14-A for the shipments rated and each individual rating has employed the lowest rate or charge applicable to it under either of such Minimum Rate Tariffs.

6. The sum of the undercharges rated in Exhibit No. 4 is $5,360.21, which respondent failed to collect.

The Commission concludes that:

1. M. Sam Browne has violated Sections 3548, 3664 and 3668 of the Public Utilities Code.

2. An appropriate disciplinary penalty for the violations shown in Case No. 8328 is a punitive fine of $500 under Section 3774 added to a fine equal to the undercharges shown under Section 3800 of the Public Utilities Code.

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 into the measures taken by respondent and the results thereof. If there is reason to believe that either 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 $5,860.21 to this Commission on or before the fortieth 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. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and 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 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.

4. Respondent shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by 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 28th day of June, 1966.

President

Commissioners

We concur in the order

Frederick B. Holoboff

George G. Grover