

ORIGINALDecision No. 71739

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own)
 motion into the operations, rates,)
 charges and practices of Frank Pounds,) Case No. 8115
 an individual, doing business as)
Central Valley Transport Company.)

Howard E. Meyers, for respondent.
James D. Paul, for California Potato Growers,
 an interested party.
Robert C. Marks and Frank J. O'Leary, for the
 Commission staff.

O P I N I O N

By its order dated January 22, 1965 the Commission instituted an investigation into the operations, rates, charges and practices of Frank Pounds, doing business as Central Valley Transport Company (hereinafter called respondent), who operates under radial highway common carrier and highway contract carrier permits, for the purpose of determining whether respondent has violated the provisions of Sections 3664, 3667, and 3737 of the Public Utilities Code by charging and collecting a lesser compensation for the transportation of property than the applicable rates and charges established in Minimum Rate Tariff No. 8; whether respondent has violated Section 3668 of the Public Utilities Code by remitting or refunding trailer rental, tarping, pulling and loading charges to a shipper who thereby obtained transportation of property for less than the applicable rates in Minimum Rate Tariff No. 8; and whether respondent has violated Item 250A of Minimum Rate Tariff No. 2 by failing to collect minimum rates and charges within the prescribed credit period.

A public hearing was held before Examiner Fraser on April 21 and 22, 1965 at Bakersfield.

It was stipulated that respondent holds Radial Highway Common Carrier Permit No. 15-3823, issued on May 25, 1948, and Highway Contract Carrier Permit No. 15-6525, issued on April 28, 1964. It was further stipulated that respondent received a copy of Minimum Rate Tariff No. 2, Minimum Rate Tariff No. 8 and Distance Table No. 4, along with their supplements, prior to the transportation described herein.

Respondent operates out of a single terminal at Bakersfield with 14 trucks, 19 trailers and six tractors. His operation is seasonal and when fully employed he hires 15 drivers, one office manager-rate clerk and two part-time bookkeepers. His gross revenue in 1964 was \$2,453 for the first quarter, \$50,309 for the second quarter, \$87,482 for the third quarter, and \$134,575 for the fourth quarter. The total for the year was \$274,819.

Staff Investigation

A member of the Commission staff testified that he visited respondent's terminal during the period August 4 through 14, 1964 and checked respondent's records for the period October 1 through December 31, 1963, for the transportation of potatoes, and from May 1 through July 31, 1964, when the carrier was transporting other commodities. A set of underlying documents from respondent's files was photocopied. The photocopies were submitted to the Rate Analysis Unit of the Commission's Transportation Division. Based upon the data taken from said photocopies a rate study was prepared by a staff rate expert and was introduced as Exhibit 2. Exhibit 2 is divided into eight parts, as follows:

Part 1 shows that respondent charged and collected at the correct rate, but the shipper billed and collected for trailer rental and trailer pulling on separate vouchers submitted on the same transportation, which is classified in the staff exhibits as a rebate of \$1,224.08.

Part 2 shows an alleged undercharge of \$1,238.19, with \$464.32 resulting from the staff's using a higher rate than respondent and \$773.87 being a loading charge deducted by the shipper from the bill presented by respondent for transportation performed from November 7 through 13, 1963. Part 2 also lists alleged rebates of \$392.70 for trailer rental and \$91.20 for trailer pulling; the two rebates total \$483.90.

Part 3 shows a total claimed undercharge of \$732.49, with \$228.83 representing the difference between the rates applied by the staff and respondent, and \$503.66 being the amount deducted by the shipper as a loading charge on the transportation of potatoes in bulk from November 11 through 19, 1963. Part 3 also lists a claimed rebate of \$254.10 for trailer rental in addition to the undercharge.

Part 4 shows an undercharge of \$1,444.87, of which \$412.82 is due to the staff's applying a higher rate than respondent and \$1,032.05 is the amount deducted by the shipper as a loading charge on the transportation of potatoes in bulk from November 25 through 27, 1963. A rebate of \$809.95 is also listed, of which \$554.40 is for trailer rental and \$255.55 for trailer pulling.

Part 5 shows an alleged undercharge of \$1,584.77, resulting from the deduction of \$1,117.74 by the shipper of loading charges on transportation performed from November 27, 1963 through December 4, 1963 and a difference of \$467.03 between the staff and the respondent as to the correct rate. A rebate of \$697.55 is also claimed in Part 5; it includes \$576.42 for trailer rental and \$121.13 for trailer pulling.

Part 6 is similar to Part 1. There is no undercharge, but a rebate of \$340.28 has been alleged. It consists of \$290.40 for trailer rental and \$49.88 for trailer pulling, for a total undercharge of \$340.28.

Parts 1 through 6 all involve transportation of potatoes under Minimum Rate Tariff No. 8 in the period beginning October 1 and ending December 31, 1963.

Parts 7 and 8 both pertain to transportation covered by Minimum Rate Tariff No. 2 and performed in June of 1964. No payment therefor had been received by respondent up to the date of the staff investigation. The amounts uncollected were \$129.00 for Part 7 and \$120.00 for Part 8.

Respondent's Evidence

The accountant for respondent presented testimony and Exhibit 3 to the effect that it would require a capital outlay of \$51,771.20 to purchase ten potato trailers, the minimum number required for the job. The annual operating cost was estimated to be \$1,285 per unit, or a total of \$12,850, which is claimed to be prohibitive since the trailers can be used only to haul potatoes. The accountant testified that respondent paid a total of \$8,258.63 for trailer rental during 1963. The shipper maintained the trailers without charge and the rental was set at twenty-five percent of the revenue earned by each trailer. This system was stated to be most suitable since rental was due only on trailers actually being used by respondent and the monthly payment was based on the amount of use. The witness stated that renting the trailers was an economic necessity and not an attempt to transport potatoes for less than the lawful minimum rate.

Respondent presented the following testimony: He has been in the business of hauling potatoes from the field to the packing shed for 23 years. The potato season extends from May to mid-December but potatoes

are handled for only five months of this period. He uses only a truck for most potato hauling because trailers are not used on hauls less than ten miles. This is one of the reasons why he has not purchased potato trailers. The actual potato loading cycle is instituted when a mechanical potato digger (pulled by a tractor) pulls the potatoes out of the ground. Field pickers then pick up the potatoes and place them in large burlap sacks, which are filled and left standing upright, with the individual sacks and rows six to ten feet apart. The truck on which the potatoes are to be loaded is disconnected from its trailer and driver to a position facing the end of the first row of potato sacks. A potato loader is clamped to the left side of the truck and as the truck moves along parallel to the sacks the loader is positioned so the sacks are in line with the base of an incline ramp on the loader. A man sits on a metal seat on the left front of the loader at the foot of the ramp. He grasps each sack and pulls it on the ramp. The sack then moves to the top of the ramp where a second worker (standing on a platform to the left of the top of the ramp) grasps the bottom of each sack at the corner and raises it to spill the individual potatoes down a chute into the body of the truck. The driver of the truck is responsible for "tarping" the load. A heavy tarpaulin is securely fastened to the top front of the body of the truck, behind the cab. The driver unfolds the tarpaulin toward the rear of the truck along the top of the bin as it is being filled with potatoes. This protects the loaded potatoes from sun and dust. When the truck is loaded the driver fastens the spread tarpaulin along the top of the bin and the job is completed. Trailers are disconnected before the loader is attached to the truck. The truck cannot pull the trailer through the field due to the wear on the engine and the fact there is no room to turn the truck with a trailer attached. A loader is attached to the left front of the trailer and it is towed down a separate row of potato sacks by a Caterpillar tractor. It is loaded in the same manner as the truck. A third man, called a "tarp" man,

rides on the trailer. He unrolls a tarpaulin to protect the trailer load. (The driver performs the same function on his truck.) The "tarp" man also hitches the trailer to the truck when the vehicles are loaded. The loaded truck and trailer proceed to the packing shed where the truck parks to the right of and parallel to the end of a water-filled pit. Lines from the ceiling attach to the lower right edge of the potato bin on the truck and pull it into the air. The left side remains on the truck and the potatoes slide out of a door extending along the base of the left side of the bin. The door is hinged at the bottom and acts as a ramp to direct the potatoes into the water-filled pit. When the truck is empty the right side of the bin is lowered to the truck body and locked. The door in the left side of the bin is closed and the truck moves ahead far enough to pull the trailer next to the pit. The trailer is then unloaded in the same manner as the truck. The shipper provides the mechanical loaders with a two-man crew and the trailer tarp man without charge to the carrier. The latter is charged for the towing at an hourly rate. Due to their length and size, potato trailers were not available from trailer equipment rental agencies.

A witness called by the shipper testified that the hourly rate charged for the tractor is \$4.75; the driver receives \$1.50 per hour as wages and \$3.25 per hour is collected for the use of the tractor; the shipper owns and operates the tractors and pays the drivers on a regular payroll. The witness stated that the hourly charge for the tractor is maintained only to reimburse the shipper for the cost of operating the tractor. The towing charge is assessed and collected on all transportation even though most of the hauling performed by respondent is not subject to minimum rates.

Respondent introduced Exhibit 7, which revealed that two tractor rental companies rendered quotations of \$9 and \$10 an hour as the charges for towing trucks and trailers in and out of the potato fields. These estimates were based on a minimum eight-hour day and forty-hour week.

They do not include the additional charge for hauling the tractors to and from the job site. Respondent further testified that the shipper provided a tractor to pull trucks out of the mud without charge and also did not charge for doing all the dispatching. The shipper also provided free transportation and expenses for respondent's drivers when they had to remain overnight at the loading point.

Respondent testified that five cents per hundred pounds is a reasonable charge for loading a truck or trailers in potato hauling, and that he thought the sum was actually owing to the shipper for work performed; he did not learn that the loading charge was erroneous until 1964.

With respect to the incorrect rates used in Parts 2 through 5, respondent testified that he inadvertently used the wrong column of the tariff.

It was emphasized that respondent has no prior violations and that practically all of his present hauling is exempt from minimum rates due to changes in Minimum Rate Tariff No. 8. At the hearing the staff did not question respondent's good faith.

Discussion

Parts 1 through 6 of Exhibit 2 raise three issues which involve credits or payments to the shipper for furnishing certain equipment or services to the carrier: (1) on Parts 2 through 5, undercharges are alleged because respondent credited the shipper for loading services performed by the shipper; (2) on Parts 1, 2, 4, 5 and 6, rebates are alleged because respondent paid the shipper for pulling trailers through the fields by tractor as the potatoes were being loaded into them; (3) on Parts 1 through 6, rebates are alleged because respondent paid rentals to the shipper for the use of trailers owned by the shipper.

Loading: In his testimony, respondent conceded that the shipper's charge of five cents per hundred pounds for loading was in error.

He emphasized, however, that he did not learn of the error until after the period covered by this investigation and that he had been allowing the deduction in good faith since 1955. Respondent's honest belief that the shipper's charge was reasonable and lawful may be considered in mitigation, but, of course, the fact of the undercharges remains.

Trailer Pulling: In the Pearce case (Decision No. 68236, dated November 17, 1964, on rehearing in Case No. 7432, 63 Cal.P.U.C. 587, 588-590), the Commission rejected the contention, now advanced by respondent, that a carrier may pay his shipper for the latter's pulling of trailers through the fields in connection with the loading of potatoes. We there held that under Item 336 of the tariff (applicable to Parts 1 and 6 herein) loading is the responsibility of the shipper, and the pulling of trailers is a part of that responsibility. We also pointed out (63 Cal.P.U.C. 590) that even where loading is the carrier's responsibility (as in the case of Parts 2 through 5 herein), the shipper cannot be allowed to impose unusual added burdens upon the carrier. Here, as in the Pearce case, the pulling of trailers through the fields went beyond the ordinary loading services contemplated in Items 140 and 300 of Minimum Rate Tariff No. 8. A carrier performing such additional work would be required to charge for it as an accessorial service (cf. 39 C.R.C. 636, 643-644), and, correspondingly, it was not proper to pay the shipper for performing it. The Pearce decision also held that the findings there made were consistent with Decision No. 67572, dated July 21, 1964, in Case No. 5438, which has been cited by respondent here in defense of his interpretation of Item 336. We find that the evidence as to trailer pulling herein is substantially the same as in the Pearce case, and we adhere to the determinations there made.

Trailer Rental: It can be argued that any payment by a carrier to a shipper is unlawful. In connection with trailer pulling payments, for example, the original decision in the Pearce case (Decision No. 66235,

dated October 29, 1963, in Case No. 7432 (61 Cal.P.U.C. 618))^{1/} held that such payments to the shipper were unlawful rebates - whether or not reasonable. On the rehearing, however, that question was not reached, for it was found that trailer pulling was not the carrier's responsibility in any event. Neither do we reach that question in connection with trailer rentals in the present case; the issue might have been raised, but both staff counsel and the staff rate expert took the position that the propriety of the rentals depended upon the reasonableness of the amounts paid. The case must be decided as it was tried; we therefore expressly refrain from any determination as to whether the trailer rental payments were unlawful simply because made by a carrier to a shipper.^{2/}

The evidence of respondent and the shipper included a cost and depreciation analysis and is persuasive that the trailer rentals were reasonable. Respondent's potato hauling is seasonal, and during part of the year he does not need the trailers; the trailers are of a special construction; rental of trailers from a commercial equipment agency in the area would have been at a much higher cost; the shipper fully maintained the trailers; and the rental formula (25% of gross revenue) had the effect of charging respondent only in proportion to the use he made of them. The staff did not attempt to establish a reasonable rental, and instead emphasized the great suspicion which naturally results when any payment is made by a carrier to a shipper. We agree that all such transactions are suspect and should be carefully investigated. (See Clawson Trucking Co., 62 Cal.P.U.C. 105, 107; Plywood Trucking Co., 62 Cal.P.U.C. 153, 155.)^{3/}

1/ The Pearce decision earlier cited herein (Decision No. 68236, 63 Cal.P.U.C. 587) was issued after rehearing.

2/ Of course, the Commission could vacate submission and order the case tried on a different basis. The interests of justice, however, do not warrant such action here.

3/ As pointed out in the Pearce case, the Clawson and Plywood cases involved payments to the shipper's employees rather than to the shippers themselves. (See 63 Cal.P.U.C. 590.)

Certainly we are not to be understood as deciding that 25% of revenue is a reasonable rental in all cases; indeed, any formula based upon a percentage of the transportation charges will be subjected to special scrutiny. We do hold, however, that the particular rental payments shown on this record were reasonable under all the circumstances.

Subsequent Exemption from Minimum Rates: It was established that a portion of the transportation in Part 3 and all of the transportation in Parts 4 and 5 of Exhibit 2 were exempted from minimum rates by Decision No. 66615, dated January 14, 1964, in Case No. 5438, Petitions 39 and 40 (62 Cal.P.U.C. 191), which amended Item 40 of Minimum Rate Tariff No. 8, effective February 22, 1964. Decision No. 66615 was based on evidence to the effect that the transportation of potatoes from fields to packing sheds over a distance of less than 75 miles should not be subject to minimum rates because the costs involved are different from costs in ordinary transportation. (62 Cal.P.U.C. 192.) That decision, however, was prospective only; it was not applicable to the transportation described in Parts 3, 4 and 5, which was performed prior to the effective date of the decision. Carriers and shippers are not at liberty to disregard the minimum rates on the theory that there have been changes in costs or in the other factors on which those rates were based. Such changes are constantly taking place; the rates fixed by the Commission would have no meaning at all if the parties were permitted to arrange their charges in accordance with their views of the underlying evidence rather than in accordance with the rates themselves. We hold that the transportation referred to in Parts 3, 4 and 5 was not exempt from Minimum Rate Tariff No. 8 at the time said transportation took place and that it must be judged accordingly.

Incorrect Rates: As to Parts 2 through 5, respondent testified that he inadvertently used the wrong column of the applicable tariff and billed at a rate of 26¢ instead of the correct rate of 29¢. We find that

undercharges thereby resulted, as set forth in Exhibit 2. In the nature of things, we simply cannot know whether those undercharges were inadvertent or deliberate.

Late Collections: Parts 7 and 8 of Exhibit 2 indicate that certain charges were not collected by respondent within the time required by Minimum Rate Tariff No. 2. The evidence shows, however, that collection was made in August and September of 1964, following the staff investigation but before the hearing. It does not appear that respondent has made a habit of failing to collect on time.

Findings and Conclusions

After consideration, the Commission further finds that:

1. Respondent presently holds radial highway common carrier and highway contract carrier permits duly issued by this Commission and has been served with a copy of Minimum Rate Tariff No. 2, Minimum Rate Tariff No. 8, Distance Table No. 4, and applicable supplements thereto.
2. Respondent charged less than the lawful minimum rates as follows:
 - (a) By reason of loading allowances, as shown in Parts 2, 3, 4 and 5 of Exhibit 2, in the total amount of \$3,427.32.
 - (b) By reason of assessing incorrect rates, as shown in Parts 2, 3, 4 and 5 of Exhibit 2, in the total amount of \$1,573.00.
3. Respondent has unlawfully refunded and remitted to his shipper, by way of trailer pulling payments, as shown in Parts 1, 2, 4, 5 and 6 of Exhibit 2, the total sum of \$707.29.
4. The total of the aforesaid undercharges, refunds and remittances is \$5,707.61.
5. Respondent failed to collect the transportation charges due on Parts 7 and 8 of Exhibit 2 within the credit period specified in Item 250A of Minimum Rate Tariff No. 2.
6. The trailer rental payments shown in Parts 1 through 6 of Exhibit 2 were reasonable.

The Commission concludes that respondent violated Sections 3664, 3667 and 3737 of the Public Utilities Code. Respondent should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$5,707.61 and in addition should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$500.00.

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 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 re-open this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

ORDER

IT IS ORDERED that:

1. Respondent shall pay a fine of \$6,207.61 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. 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 21st day of DECEMBER, 1966.

 President
George G. Grover

Friedrich B. Halbach

Augustine

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

*I dissent,
 Peter L. Mitchell*