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**ORIGINAL**

Decision No. 72069

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 July 15, 1966)

Adolph Moskovitz, for respondent.  
Claude D. Rohwer, for Heringer Pelleting  
and Dehydrating Company, interested party.  
Cyril M. Saroyan and J. B. Hannigan, for the  
Commission staff.

O P I N I O N

By Decision No. 70905 dated June 28, 1966, the Commission found that M. Sam Browne leased a truck-trailer unit to Heringer Pelleting and Dehydrating Company at a rental of \$45 per round trip. Because the parties deviated from the terms of the written agreement the Commission found that said lease constituted a device by which the applicable minimum rates were violated by undercharges in the amount of \$5,360.21. Respondent was ordered to collect said undercharges and to pay to the Commission the amount thereof and also a punitive fine in the amount of \$500.00.

On July 15, 1966, respondent filed a petition for rehearing alleging that the Commission in determining the amount of undercharges had failed to take into account certain operating and maintenance costs that had been paid by Heringer Pelleting and Dehydrating Company and which would be used as a set-off in any legal action that respondent might bring to collect.

By its order dated October 11, 1966, the Commission granted rehearing, which was held before Examiner Daly on November 29, 1966, at Sacramento.

Upon rehearing evidence was introduced to show that during the six months period from September 1, 1964 to and including February 28, 1965, Heringer Pelleting and Dehydrating Company contributed the following towards the use and operation of the equipment owned by respondent.

Social Security	\$ 152.41
Unemployment Insurance	147.16
Workmen's Compensation	174.49
Health & Welfare	79.50
Garage Rental	90.00
Maintenance of Truck	2,082.49
Bookkeeping & Dispatching	900.00
Fuel	270.00
Oil	<u>90.00</u>
Total	\$3,986.05

The shipper argued that a counterclaim in the amount of \$3,986.05 would be filed in any proceeding brought by respondent. Both the shipper and respondent agreed that it would serve no useful purpose to spend the time and money that would be required to have the matter determined in court and they therefore request this Commission make the necessary adjustment in the total undercharges to be collected.

Respondent's attorney also argued that the \$500 punitive penalty was not justified because the record shows that respondent acted unknowingly in violation of the provisions of Section 3548 of the Public Utilities Code by failing to strictly comply with the terms of the written lease. According to his attorney, respondent was completely unaware of the provisions of Section 3548 until shortly before the hearing. He also argued that the record demonstrates that respondent was fully cooperative and disclosed all information requested by the Commission investigator.

In opposition the staff attorney argued that it is not possible for the staff to determine the matter of set-off without making a rather detailed study. He was of the opinion that a shipper's defensive claim should be considered only in a court of law. With respect to the punitive penalty he argued that "... a carrier need not be found to be in violation because of wilfulness, deliberate motives to violate or contumacious conduct as such in order to be penalized. Unless there is some sanction such as these fines there is no deterrence".

It is true that the theory of set-off or counterclaim has for all practical purposes been limited to courts of law, but in matters relating to the enforcement of minimum rates and undercharges resulting from the violation thereof this Commission is the forum that should make complete determinations including items of set-off. By following such procedure the Commission cannot only expedite these matters, but can negate the need for additional legal expenses and in many cases it can prevent the subsequent filing of collusive legal actions.

Items such as social security, unemployment insurance, workmen's compensation and health and welfare are definite amounts and expenses directly related to the operation of respondent's truck and may properly be considered.

According to the shipper witness, the amounts listed for truck maintenance, bookkeeping and dispatching are estimated amounts. The cost of maintaining the truck was estimated on the basis of being operated 10,000 miles a month at the rate of 5 cents a mile. Although this would amount to \$3,000.00, the sum of \$905.51 was deducted because respondent assertedly paid said amount for

maintenance performed by outside garages. According to the agreement between the parties, the shipper was responsible for maintenance of the truck, but respondent was liable for all repairs in excess of \$500.00 at any one time. The witness admitted that company records could indicate the actual amounts spent on respondent's truck, however; no supporting documents were introduced in evidence and full reliance was placed upon the estimated average cost of 5 cents per mile. The bookkeeping and dispatching costs were determined by dividing the total cost by four, which represents the number of units operated during said period. In view of the fact that company records are available to show the actual direct expenses incurred in the operation and maintenance of respondent's truck these estimates are no more acceptable to the Commission than they would be to a court of law.

The \$90.00 rental item and the \$90.00 cost for oil are acceptable. The \$270.00 for fuel assertedly represents a saving that respondent would have had to pay if said item had not been purchased through the shipper at a discount. This is not a proper matter for set-off and will not be allowed.

As for the \$500.00 punitive fine, the record does not indicate a conspiracy to charge less than the applicable minimum rates. Had the provisions of the lease been strictly complied with, as required by Section 3548, this would have represented a valid lease arrangement. In varying from the provisions of the lease the evidence is that respondent acted in good faith and in ignorance of Section 3548. The punitive penalty will be set aside.

After consideration the Commission finds that the total undercharges should be reduced from \$5,360.21 to \$4,626.65 and the fine reduced from \$5,860.21 to \$4,626.65.

O R D E R

IT IS ORDERED that:

1. Ordering paragraph 1 of Decision No. 70905 dated June 28, 1966 is hereby amended to read as follows:

"1. Respondent shall pay a fine of \$4,626.65 on or before the fortieth day after the effective date of the order."

2. In all other respects Decision No. 70905 shall remain the same.

The Secretary of the Commission is directed to cause personal service of this order upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 28<sup>th</sup> day of FEBRUARY, 1967.

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President  
*William J. Bennett*

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*William J. Bennett*  
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*Shed P. Morrison*  
Commissioners

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

Commissioner A. W. Gotov, being necessarily absent, did not participate in the disposition of this proceeding.