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ORIGINAL

Decision No. 72391

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of SAME DAY
DELIVERY SERVICE, a corporation.

Case No. 8588

Murchison & Stebbins, by Donald Murchison,
for respondent.
David R. Larrouy and J. B. Hannigan, for
the Commission staff.

O P I N I O N

By its order dated January 31, 1967, the Commission instituted an investigation into the operations, rates and practices of Same Day Delivery Service, a corporation.

A public hearing was held before Examiner Gravelle on March 7, 1967 at Los Angeles.

Respondent presently conducts operations pursuant to a certificate of public convenience and necessity as a highway common carrier issued by this Commission in Decision No. 63813, in Application No. 43402. Respondent also holds Radial Highway Common Carrier Permit No. 19-28398, Highway Contract Carrier Permit No. 19-35644 and City Carrier Permit No. 19-39731. Respondent's terminal and principal place of business are located at Montebello, California. It operates 5 tractors, 30 trucks and 6 semitrailers and employs 51 persons. Its gross revenue for the year ending with the third quarter of 1966 was \$770,392 and its net income for the calendar year 1966 was approximately \$6,500.

On February 14 through 18 and March 2 through 4, 1966, a representative of the Commission's Field Section visited respondent's place of business and examined its records for the period August 1965

through January 1966. Within that period the Commission representative picked at random the shipments made during the weeks November 8 through 12, 1965, December 13 through 17, 1965, and January 20 through 24, 1966. Some of the underlying documents for shipments transported during these latter periods were photocopied and submitted to the Rate Analysis Unit of the Commission's Transportation Division. The underlying documents were received in evidence as Exhibits Nos. 2 through 2E, 4, 6 and 8. Based upon the data taken from said photocopies, rate studies were prepared and introduced in evidence as Exhibits Nos. 1, 1A, 3, 5 and 7. Said exhibits reflect purported undercharges of \$4,458.88 and purported overcharges of \$69.46.

All of the transportation involved in this proceeding was provided under respondent's certificated authority and concerns Western Motor Tariff Bureau Freight Tariff No. 111, to which respondent is a party. There are four shippers involved, Certified American Industries, Wagner Electric Corporation, The Lander Company and A. E. Peterson Mfg. Co., Inc.

Respondent, through counsel, stipulated to the correctness of Exhibits Nos. 1, 1A, 3, 5 and 7, the rate exhibits.

Cecil Wilson is the president of respondent, a director and its sole shareholder. Mr. Wilson, on behalf of the corporation, dealt with a William Sosnowski who agreed to supply respondent with shipping accounts for a percentage of the gross business supplied by such accounts. Mr. Sosnowski, in turn, solicited three of the shippers involved herein, namely Certified American Industries (Certified), Wagner Electric Corporation (Wagner) and A. E. Peterson Mfg. Co., Inc. (Peterson). Certified was solicited by Mr. Sosnowski on the representation that he would see to it that

Certified would receive the benefit of split-delivery rates when applicable and that he, Sosnowski, would see to it that the proper documentation for split-delivery shipments would be provided. Mr. Sosnowski, in turn, secured the services of a George Windfelder, the traffic manager of respondent, to do the physical task of preparing split-delivery documentation, on his own time, for \$40 per month. The provision of this latter service and the grounds for solicitation of Certified were not known to Mr. Wilson. Mr. Sosnowski has no interest in or relationship to respondent other than the percentage arrangement above described. Mr. Windfelder was never authorized by Mr. Wilson, or any other officer, or director of the corporation or by respondent, to engage in the activity he undertook with Mr. Sosnowski. The documents in Exhibits 2 through 2E, 4 and 6 which constituted the split-delivery shipping instructions were at no time prepared by Mr. Windfelder at the time of pickup as provided by the tariff; they were always prepared after delivery to respondent's terminal and, in some cases, after delivery to the consignee.

There is no question, on the facts of this case, that respondent has charged the four shippers involved rates different than those provided for in its tariff and has therefore violated Section 494 of the Public Utilities Code. There is a question relative to the alleged violation of Sections 453 and 458 of the Public Utilities Code based upon whether or not the acts of Mr. Sosnowski and Mr. Windfelder were the acts of the corporation or were done knowingly to permit or obtain transportation at rates less than published.

Both Mr. Sosnowski and Mr. Windfelder testified at the hearing and the candor and substance of their testimony leads us to

believe that they were neither acting for the respondent or in an effort to charge less than tariff rates when they provided the split-delivery documentation service. It was testified that as soon as Mr. Wilson became aware of their activity he immediately ordered its cessation on threat of termination of their services, yet even at the hearing both witnesses felt that what they were doing was lawful and within the tariff. While we do not find respondent in violation of Sections 453 and 458, we point out that the entire operation, as conducted by Mr. Sosnowski and Mr. Windfelder, was improper. The service of soliciting business for respondent, which was performed by Mr. Sosnowski, is the precise type of service envisioned by Sections 4801 through 4880 of the Public Utilities Code dealing with Motor Transportation Brokers. Mr. Sosnowski operates without benefit of the license required by Section 4832; furthermore, the knowledge required by Section 458 of the Public Utilities Code could be imputed to both Mr. Sosnowski and Mr. Windfelder, regardless of their state of mind. Neither man is a respondent here and they are not presently amenable to an order to cease and desist; however, they are both hereby placed on notice that they should terminate any further unlawful activity.

This matter was submitted subject to the filing of a brief by the Commission staff and a reply brief by respondent. We have been advised by a letter, dated March 15, 1967, from staff counsel, however, that no briefs will be filed and that respondent's counsel is agreeable to this procedure. Said letter further notes that respondent had intended to move for dismissal in its brief and requests that the Commission consider such a motion made as if on the record. By letter dated March 21, 1967, respondent's counsel states his objection to the levy of any punitive fine upon respondent and states the grounds upon which his motion to dismiss is based.

The motion is denied. Staff counsel recommends, among other things, that respondent be assessed a punitive fine of \$500. Considering the facts of this matter, as above set forth, we will not impose a punitive fine upon respondent.

After consideration the Commission finds that:

1. Respondent operates, pursuant to a certificate of public convenience and necessity, as a highway common carrier issued by this Commission. Respondent also holds permit authority issued by this Commission.

2. Respondent is a party to Western Motor Tariff Bureau Freight Tariff No. 111.

3. The shipments reflected in Exhibits Nos. 1, 1A, 3 and 5 were not entitled to benefit of split-delivery rates because of lack of written instructions from the shipper to the carrier.

4. Respondent charged rates different than the lawfully prescribed tariff rates as set forth in Exhibits Nos. 1, 1A, 3, 5 and 7, resulting in undercharges of \$4,458.88 and overcharges of \$69.46.

5. Mr. William Sosnowski is performing the function of a motor transportation broker without benefit of the license therefor as required by Section 4832 of the Public Utilities Code.

6. The documents prepared by Mr. William Sosnowski and Mr. George Windfelder which were purported written instructions for split-delivery rating as required by Item 650 of Western Motor Tariff Bureau Freight Tariff No. 111 were prepared subsequent to the pickup of the shipments transported.

Based upon the foregoing findings of fact, the testimony and the evidence, the Commission concludes that respondent violated Section 494 of the Public Utilities Code and should pay a fine

pursuant to Section 1070 of the Public Utilities Code in the amount of \$4,458.88 and be ordered to make repayment of the overcharges of \$69.46.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges and to repay the overcharges. 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 its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges and to repay all overcharges, 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 purposes of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of \$4,458.88 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 and to repay the overcharges set forth herein, and shall notify the Commission in writing upon the consummation of such collections and payments.
3. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and to repay the overcharges, and in the event undercharges ordered

to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected or overcharges unpaid 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, or overcharges remaining to be paid, specifying the action taken to collect such undercharges or pay such overcharges and the result of such action, until such undercharges have been collected in full and overcharges repaid 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 different amount than set forth in its tariff.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent and Mr. William Sosnowski.

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 MAY, 1967.

[Signature]
President

[Signature]

William Sosnowski, Jr.

[Signature]
Commissioners

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