

ORIGINAL

Decision No. 72802

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of ACME TRUCK COMPANY,)
a corporation, for retroactive)
authority to have charged less)
than the minimum rates for trans-)
portation of dirt.)

Application No. 46487
(Amended January 7, 1966)

Dooley & Dooley, by David M. Dooley and Matthew J. Dooley, and Higgs, Fletcher & Mack, by Ferdinand T. Fletcher, for applicant.
Fredman, Karpinski, Silverberg & Shenas, by Charles H. Karpinski and Lewis Silverberg for E. C. Young, interested party.
E. O. Blackman, for California Dump Truck Owners Association, and W. A. Dillon, J. C. Kaspar and Arlo D. Poe, by W. A. Dillon, for California Trucking Association, protestants.
Richard W. Smith and H. F. Kollmeyer, for California Trucking Association, protestant.
Donald Day, Counsel, John Specht, C. R. L'Ecluse and Joseph C. Matson, for the Commission staff.

OPINION ON FURTHER HEARING

By this application, Acme Truck Company, a corporation (Acme), having charged less than the applicable minimum rates for the transportation of approximately 1.4 million tons of dirt in dump truck equipment within San Diego County for E. C. Young (Young), seeks retroactive authority for so doing. Acme had been directed by the Commission staff to collect the undercharges for said transportation.

Decision No. 69781, dated October 13, 1965, denied a motion by the staff to dismiss the application. (65 Cal.P.U.C. 20 (1965).) The various pleadings, arguments and positions of the parties are set out in detail in said decision. The decision held that the Commission is not empowered under Section 3666 of the Public Utilities Code to grant retroactive rate relief for transportation already performed but may, when special circumstances

exist, grant relief under Section 3667 of the Code from a staff directive to collect undercharges. It concluded that further public hearing should be held to afford all parties an opportunity to present evidence in support of the allegations in their pleadings and any other evidence deemed appropriate. It also gave the parties thirty days within which to file any additional or amended pleadings should they wish to do so. The time within which to file said additional or amended pleadings was extended to January 7, 1966.

"Carrier's Amendment to Application" was filed on January 7, 1966, by Acme and joined in by Young. By the amendment, Acme requested authority under Section 3667 of the Code to collect \$25,000 from Young and to have the Commission waive the staff directive to collect any amounts in excess thereof. (The total amount of undercharges alleged is \$272,114.24.) It was alleged in the amendment that Acme and Young had entered the contract for carriage in good faith; that both had honestly believed that the contract rate assessed for the transportation met the applicable minimum rate; and that since the service was rendered in connection with a Federal Aid Highway, there was a public interest in constructing said highway at the lowest possible cost. Several informal requests in writing were also made by Acme for approval of the \$25,000 compromise settlement. On September 20, 1966, Acme filed a "Request for Dismissal of the Application" wherein it stated that it was its understanding that the Commission would not consider approving the compromise settlement until the application was dismissed. "A Request for Withdrawal of Dismissal and for Setting for Hearing" was filed by Acme on October 13, 1966. Acme stated therein that it was informed by the Commission that the proposed compromise would not be approved.

Further public hearing was held before Examiner Mooney at San Diego on February 7, 1967, on which date the matter was submitted.

The president of Acme during the period of time covered by the transportation in issue (November 1960 through February 1962) testified in support of applicant's pleadings. He testified as follows regarding the contract of carriage: The contract covered the transportation of excavated dirt for Young from a freeway project at Center Street, La Mesa, to the parking lot of San Diego State College; the transportation was over public roadways from Center Street via U. S. Highway 80 to destination; he measured the distance from origin to destination prior to bidding on the job and determined it to be approximately three and one-half miles; he quoted a rate of 42½ cents per cubic yard to Young for the job; he was informed by Young that this figure was used in the bid to the State of California for the construction project; Young informed him that a Los Angeles carrier would perform the transportation at 20 cents per ton and that if Acme wanted the job it would have to meet this rate; he explained that a cubic yard of dirt weighs approximately 2,600 pounds;^{1/} he told Young that Acme could not accept the job at the 20 cent per ton rate and asked Young to agree to an hourly basis of rates; Young refused because he did not wish to supply supervisors and timekeepers which are furnished by the shipper when hourly rates are used; since Acme did not have work at the time, it agreed to the 20 cents per ton rate and signed a

^{1/} Based on the president's testimony that a cubic yard of dirt weighs 2,600 pounds, the rate of 42½ cents per cubic yard quoted by Acme would, when converted to a tonnage basis, equal 32.7 cents per ton. The minimum tonnage rate in effect during the period of time in question was 39 cents per ton (Item 130, Minimum Rate Tariff No. 7).

"Sub-Contract Agreement" dated October 19, 1960, which stated it would perform the work at said rate (Exhibit 1);^{2/} the transportation was performed Monday through Friday; a total of approximately 40 days were lost due to rain and work stoppages; in August 1961, a representative of the Commission reviewed Acme's records regarding the Young account, and in September 1961, a "Notice of Undercharges" was issued to Acme by the Commission staff directing it to collect the difference between the agreed rate of 20 cents per ton and the applicable minimum tonnage rate of 39 cents per ton (Exhibit 2); in January 1962, Acme sent to Young revised bills showing the difference between the assessed charges and the applicable minimum charges for the transportation that had been performed; Young refused to pay and suit for collection of the undercharges was filed in The San Diego County Superior Court; said suit is now pending.

The president asserted that he was not aware that the agreed rate was improper prior to the staff investigation. He testified that after the staff investigation, he again approached Young regarding the use of hourly rates and that Young stated the Commission did not have jurisdiction over the transportation and again refused. The witness stated that at no time did Young furnish Acme with a written request to use hourly rates and that, for this

^{2/} In addition, the "Sub-Contract Agreement" provided that Acme would haul and furnish approximately 18,000 tons of structural backfill, approximately 152,000 tons of Class #2 aggregate and approximately 13,000 tons of Class #3 aggregate at 78 cents per ton, plus sales tax, and that Young would rent from Acme a Kolman Screening Plant fully operated and maintained for a rental price of \$18.00 per hour. We are not concerned with the material furnished or the rental of the screening plant in this proceeding.

reason, Acme did not keep hourly records.^{3/} He testified that only a few subhaulers were used at the very beginning of the job. The president testified that all efforts were made to perform the job as efficiently as possible, but, nonetheless, Acme could not make a profit at the agreed 20 cent rate and in fact lost money on the job.

All parties stipulated that if a competent witness were called by counsel for Young, he would testify as to the following information set forth in the "Shipper's Petition Seeking Relief from Minimum Rate Tariff No. 7": In September 1960, Young was preparing a bid for the Federal Aid Highway construction project in issue; the bid included the hauling of approximately 760,000 cubic yards of surplus excavation from the jobsite to be dumped at the site of the San Diego State College campus; Young was low bidder and was awarded the contract; after the contract was signed, the resident engineer on the job requested that the method of shipment be changed from cubic yards to tons so that the material could be weighed and the rate of payment more easily computed; a "change order" to this effect was accepted by the contracting parties on October 14, 1960; Acme and Young entered into a subcontract on October 19, 1960 (Exhibit 1); the haul was commenced in October 1960; Young loaded Acme's equipment; approximately 1.4 million tons of dirt were moved; Young paid Acme a

^{3/} During the period of time the transportation in issue moved, Third Revised Page 39 of Minimum Rate Tariff No. 7 provided that hourly rates for transportation in Southern Territory (within which the transportation in issue was performed) apply only when notice in writing is given to the carrier, before the transportation commences, of the shipper's intent to ship under such rates. This rule was revised, effective October 16, 1965, to provide that hourly rates will apply, subject to certain exceptions not involved herein, when a distance rate notice has not been executed (Fifth Revised Page 39).

total of \$286,436.36 for the transportation; prior to entering the contract, Young and Acme held extended negotiations and discussions regarding rates and methods of payment, Young investigated the feasibility of purchasing its own equipment to do the hauling, and Young and Acme ran a "cruise" of the job to determine the approximate distance to be traversed and the approximate amount of time required to transport the material; throughout the job Acme billed Young on a monthly basis and was always paid its monthly billing.

Counsel for Young stated that the amount paid by Young to Acme was in fact equal to the amount that would have been paid had the applicable hourly rate in Minimum Rate Tariff No. 7 been assessed. He stated that he could present oral and documentary evidence to prove this fact and estimated that it would require three or four days to present this evidence. Both Acme and The California Dump Truck Owners Association objected to the receipt of such evidence on the grounds that the required writing to use hourly rates had never been executed by Young and Young had consistently refused to use hourly rates because of the increased costs of supervision. Counsel for Young stated that because of the probability this evidence would not be received, he would not take the time of the Commission and the parties to offer it.

No further evidence was offered by any of the parties.

Counsel for Acme stated in closing that the Commission has made it clear in Decision No. 69781, supra, that it is not empowered to grant retroactive relief from minimum rates; that the Commission has made a decision on the equities and has apparently decided there are none by its consistent denial of the informal requests of the parties to settle the matter on what they considered equitable grounds; that the parties should be directed to return to Superior Court and

there to have the matter litigated; and that Acme be allowed to return to the Commission if it should develop that other relief is necessary.

In closing, counsel for Young asserted that there was never any intent on the part of the shipper to violate any minimum rate tariff and that payments to Acme equaled the minimum hourly charges. He stated that in his opinion, the equities in this case substantially support the proposed settlement and that he had hoped the compromise settlement would have been approved but the Commission has heretofore indicated that it would not. He agreed that the parties should now return to the court action and requested that no findings be made herein which would in any way be binding on the court action.

Closing statements opposing the granting of any relief were made on behalf of the California Trucking Association, The California Dump Truck Owners Association and the Commission staff.

The Commission finds that:

1. The parties have heretofore informally requested in writing that the Commission approve a compromise settlement of \$25,000. Said informal requests were denied.

2. Neither Acme nor Young have established on this record that any relief from the staff directive to collect undercharges (Exhibit 2) is warranted under Section 3667 of the Public Utilities Code.

3. Both Acme and Young are in agreement that they should return to the Superior Court of San Diego County and continue with their litigation of the civil suit filed with said court.

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4. In the absence of authority from the Commission, Acme is required to collect undercharges based on the applicable minimum rate for all transportation it has performed for Young.

The Commission concludes that Application No. 46487 should be denied.

O R D E R

IT IS ORDERED that Application No. 46487 is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 25th day of JULY, 1967.

[Signature]
President

[Signature]
[Signature]
[Signature]
Commissioners

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