

BEM

ORIGINAL

Decision No. 72858

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of EARTH
COMMODITIES TRANSPORT, INC., a
corporation.

Case No. 8592

Dryden, Harrington & Swartz by Eli B. Dubrow,
for Kay Kinoshita and respondent.
Grant & Popovich by Eugene Shapiro and Donald
Murchison, for Kirst Construction Company,
Interested party.
Elinore C. Morgan, Counsel, and E. E. Cahoon,
for the Commission staff.

O P I N I O N

By its order dated February 15, 1967, the Commission instituted an investigation into the operations, rates and practices of Earth Commodities Transport, Inc. (ECT).

A public hearing was held before Examiner Gravelle at Los Angeles on June 14, 1967.

Respondent is not presently conducting any operations but holds Radial Highway Common Carrier Permit No. 19-58914 and City Carrier Permit No. 19-58915, each of which was issued October 5, 1965.

On various days in February, March, April, September and October of 1966, a representative of the Commission's Field Section visited respondent's place of business in Sun Valley for the purpose of checking its records and investigating its operations. Respondent delivered certain of its documents to the staff representative who made photocopies thereof. The period of review of documents covered the period August 1965 through February 1966. At the time of the

investigation respondent had one terminal on Bradley Road in Sun Valley, employed 7 persons and utilized 23 sets of bottom dump hoppers, but no power equipment, and all its operations were conducted through the use of subhaulers. Its gross revenue for the year ending March 31, 1967 was \$773,611. Copies of the appropriate tariffs were served upon respondent.

The documents which the staff representative photocopied were introduced in evidence as Exhibit No. 1. These photocopied documents, together with other information garnered during the course of his investigation, were transmitted to the Rate Analysis Unit of the Commission's Transportation Division. A rate expert from said unit prepared two rate statements, based upon the photocopies and supplemental information which were admitted in evidence as Exhibits Nos. 8 and 9. Exhibit No. 8 reflects a purported undercharge of \$12,950.13 on shipments for Kirst Construction Company (Kirst); this exhibit corresponds to Part 21 of Exhibit No. 1. Exhibit No. 9 reflects purported undercharges from Kirst to ECT in the amount of \$352.76 and underpayments to various subhaulers employed by ECT in January 1966 in the amount of \$328.96.

This proceeding deals with three distinct, but inter-related situations. The first is the lack of proper completion by ECT of its shipping documents. Parts 1 through 20 of Exhibit No. 1, and Exhibit No. 2, which is a summary of items that should have been included on those documents but were not, adequately reflect respondent's failure in this regard.

The second situation concerns ECT and Kirst and their use of an hourly rate rather than a tonnage rate. Part 21 of Exhibit No. 1 and Exhibit No. 8 cover this problem.

The third situation concerns both undercharges to Kirst and underpayment by ECT to its subhaulers. Parts 22 through 27 of Exhibit No. 1 and Exhibit No. 9 set forth that problem.

With regard to the first and third situations above alluded to, neither respondent nor Kirst offered any explanation, defense or objection. As to the second situation, however, which involves ECT and Kirst, there was evidence, and certain stipulations were presented to clarify what had actually taken place.

Kirst was a successful bidder on the construction of a freeway job for the State of California. The job involved, among other things, a large movement of base material. A permitted carrier referred to as Jules Oakley, doing business as O & S Trucking (O & S), dealt with Kirst concerning the movement of base material for the freeway job. On May 26, 1965 Kirst and O & S entered into an agreement which provided generally that O & S would move base materials from Little Rock to the jobsite at a tonnage rate. On June 10, 1965, Kirst and O & S entered into a second agreement which superseded the May 26, 1965 document and which provided generally that O & S would provide the same service as contemplated by the earlier agreement, but at an hourly rate of \$12.61 or at the applicable "P. U. C. hourly truck rental rate." Copies of these documents are Exhibits Nos. 5 and 6, respectively. On September 1, 1965 O & S and ECT entered into a conditional sales contract which provided for the sale of all the trailer equipment of O & S to ECT. Article 12 of this contract provided that ECT would assume the contract of May 26, 1965 between Kirst and O & S. A copy of the conditional sales contract is Exhibit No. 7. Thereafter, ECT did provide the services contemplated by the Kirst-O & S agreements and received payment for said services from

Kirst. We note here that service by ECT commenced in September 1965, but that it did not receive its permits until October 5, 1965. The permit of O & S was suspended as of September 28, 1965.

It was stipulated that if the September 1, 1965 conditional sales contract was considered by the Commission to constitute a valid assignment of the previous agreements between Kirst and O & S that the undercharges in Part 21 of Exhibit No. 1 and Exhibit No. 8 would be substantially reduced. The reason for this reduction is that a written agreement providing for an hourly rate would then be in effect from September 1, 1965 up to October 16, 1965, the effective date of Decision No. 69567 in Case No. 5437, which revised Minimum Rate Tariff No. 7 to the extent it no longer authorized the use of an hourly rate. The staff rate expert testified that undercharges in Exhibit No. 8 from October 16, 1965 to the end of the review period would, in such event, amount to \$6,191.09.

Counsel for Kirst challenged the Commission's right to impair the contract between Kirst and ECT by modifying the applicable rate during the period of performance of the contract. It has long been settled that action by a regulatory body in fixing rates which may change the terms of a previously entered into contract is not an impairment thereof. Moreover, Article 1 of the June 10, 1965 agreement provides for adjustment in the hourly rate to conform to Commission action and the possible discontinuance of such an hourly rate must have been contemplated by the parties within the terms of said article.

Staff counsel recommended that no punitive fine be imposed upon respondent and that it not be fined in the amount of the undercharges due to its financial condition which was stipulated

to be a state of insolvency. Respondent owes in excess of \$17,500 in taxes to the State of California and in excess of \$4,500 in taxes to the Federal Government. The failure to impose any fine upon respondent was strongly objected to by counsel for Kirst on the basis that it set a bad precedent and would be a substantial departure from Commission policy. We note that in the past we have on occasion reduced or rescinded fines imposed upon carriers where it was evident that the carrier was unable to pay such a fine and the imposition thereof constituted a futile act. Here, instead of a fine, we will revoke respondent's operating authority.

After consideration the Commission finds that:

1. Respondent operated pursuant to Radial Highway Common Carrier Permit No. 19-58914 and City Carrier Permit No. 19-58915.
2. Respondent was served with the appropriate tariff and distance table.
3. Respondent operated between the period September 1, 1965 and October 5, 1965 without authority from this Commission.
4. Respondent failed to properly execute its shipping documents in the instances set forth in Parts 1 through 20 of Exhibit No. 1, as set forth in Exhibit No. 2.
5. Respondent charged less than the lawfully prescribed minimum rate on movements for Kirst Construction Company after October 16, 1965, resulting in undercharges in the amount of \$6,191.09.
6. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 9, resulting in undercharges in the amount of \$352.76.

7. Respondent paid less than 95 percent of the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 9, resulting in total underpayments to subhaulers in the amount of \$323.96.

8. The contract of September 1, 1965 constituted a valid assignment of the previous agreements between Kirst Construction Company and O & S Trucking.

9. Respondent is now insolvent.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3664, 3704 and 3737 of the Public Utilities Code, that its permits should be revoked and it be ordered to collect all undercharges found herein and make payment to the subhaulers in conformance with the above findings.

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 its 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's permits are hereby revoked.

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. 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 proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them; 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, upon collection of the undercharges set forth in paragraph 2 hereof, make payment to the following subhaulers in the amounts set forth:

Lester Trucking (Dan Mendez)	\$126.84
Elmer Meier	36.51
James McWhorter	54.09
Robert E. Lee	50.26
L. D. Smith	61.26

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 8th day of AUGUST 1, 1967.

William L. Russell President
August
William Sproule Jr.
John P. Moussey Commissioners

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