

ORIGINAL

Decision No. 73475

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, operations, and practices of O. D. HANSEN, JR. and FRED RECUPIDO, doing business as O L TRUCKING.

Case No. 8584
(Filed January 24, 1967)

Wien and Thorpe, by Spencer R. Thorpe, for Fred ReCupido and O. D. Hansen, Jr., doing business as O L Trucking, respondents.
Berol, Loughran & Geernaert, by Bruce R. Geernaert and Marshall G. Berol, for Miles and Sons Construction Division, interested party.
Timothy E. Treacy, Counsel, for the Commission staff.

INTERIM OPINION

On January 24, 1967, the Commission instituted an investigation on its own motion into the rates, operations, and practices of O. D. Hansen, Jr. and Fred ReCupido, doing business as O L Trucking (hereinafter referred to as either respondents or O L). Said investigation was for the purpose of determining whether respondents have violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging less than the applicable hourly minimum rates on transportation in accordance with Items 300, 365, and 366 of Minimum Rate Tariff No. 7 (MRT 7) and supplements thereto, and also whether respondents have violated Sections 3704

and 3737 of the Public Utilities Code by failing to properly complete, execute, and retain shipping documents as required by Item 93.1 of MRT 7.^{1/} The order of investigation covered the period between February and August, 1966.

Public hearings were held before Examiner Robert Barnett in El Centro on March 1, 2, and 3, 1967; and in Los Angeles on August 16 and 17, 1967, after which the matter was submitted. Miles and Sons Construction Division (Miles) was permitted to appear as an interested party.

Pursuant to Contract No. 11-038024 between the State of California Division of Highways and Miles, Miles agreed to construct a portion of Interstate Highway No. 8 near El Centro. This case is concerned with some of the work performed between February 1966 and August 1966, which involved the transportation of dirt fill from dirt pits to the construction site. To perform this transportation Miles hired permitted carriers. Some of these carriers, in turn, engaged other permitted carriers to assist in this transportation, thus creating a prime carrier-subhauler relationship. Respondents were prime carriers.

Minimum Rate Tariff No. 7 provides rates to be charged for the transportation of dirt in the El Centro area, which charges are stated either as hourly rates or as distance rates depending on the agreement of the parties. The hourly rate varies in relation to the carrying capacity of the truck.

1/

The staff, during the hearings, stated that they did not intend to proceed on any documentation error violations; that part of this case will be dismissed.

Contract No. 11-038024 provides, in part, that "trucks used to haul material being paid for by weight shall be weighed empty daily" As between the Division of Highways and Miles the dirt hauled under this contract was paid for by weight. Scales and a scale house were placed near the job site so that the trucks could be weighed. As between Miles and respondents the dirt hauled was paid for according to hourly rates.^{2/}

The staff sought to prove that respondents charged Miles less than the hourly rates set forth in MRT 7. Respondents admitted the violations, but Miles, the party that would ultimately bear the burden of paying any undercharges, asserts that the rates that it paid to respondents were the lawful rates prescribed by MRT 7, with, perhaps, some exceptions.

STAFF EVIDENCE

Associate Transportation Representative Switzer testified that he is in charge of the El Centro district office of the Commission. On May 23, 1966 some 40 truck drivers appeared at his office and complained that they were being paid less than the rates prescribed in MRT 7 for work on the Interstate Highway No. 8 job. As a result of this complaint the Commission staff set up a field survey which took place on May 25, 26, and 27, 1966 at the job site. Three assistant transportation representatives were each assigned to ride a specific truck for each of the three days. They were instructed to observe the operation and record the time

^{2/}

At least after March 21, 1966. Respondents did not charge Miles pursuant to hourly rates prior to March 21, 1966, so this case will be limited to rates charged between March 21, 1966 and August 24, 1966, the date respondents left the job.

factors required by Item 93.1 of MRT 7. Mr. Switzer stationed himself at the job site scale house where he recorded the time that each truck weighed in light in the morning (tare weight) and where he could see the trucks coming over the scale to weigh each load throughout the day. He made a record of the truck equipment numbers and the license plate numbers of each tractor and each trailer. A State weighmaster recorded the tare weight of each truck and the loaded weight of each truck as it came across the scales.

The scale house was located about 1/8 to 1/4 of a mile from the job site. The pit where the trucks were loaded with dirt was located 8.28 miles from the scale house, via the route through the community of Heber, or 10.83 miles through Calexico. The running time on each route was approximately the same because traffic conditions through Calexico permitted faster movement. Mr. Switzer's records show that the usual running time from the pit to the job site and return was between 38 and 43 minutes.

At the end of each of the three days Mr. Switzer and the representatives who rode the trucks would meet and correlate their information as to the truck operations that they observed. From this information they determined which times should appear on the freight bill prepared by the carrier.^{3/}

3/

The time factors needed to obtain the net chargeable time are:

1. Time driver reported to work.
2. Time completed last loading.
3. Time arrived to dump last load.
4. Time finished last dump.
5. Allowable deductions.

Respondents' freight bills had spaces to insert the above five time factors and, in addition, had a space to insert the "net time for computation of charges." (See discussion, infra, and footnotes 7 and 8.)

Mr. Switzer determined that the time the driver reported for work was the time the driver obtained his tare weight in the morning. This determination was based on the observation that an employee of Miles would come into the scale house each afternoon and give instructions as to when the scale should open the next morning. Another employee would then write the time down on a piece of cardboard and put the cardboard outside by the scale so that the drivers could see the sign as they drove up to weigh their last load of the day.

On July 13 and 14, 1966 Mr. Switzer visited the office of respondents and examined their records for the month of May 1966. He determined that respondents conducted operations on the Interstate Highway No. 8 job between February 8, 1966 and August 24, 1966. He photocopied the three freight bills (Exhibit No. 1) of respondents which reflected the activity of the trucks of respondents that staff representatives rode during the May survey. These photocopies, and the information gathered by the staff representatives who rode the trucks, were sent to a staff rate expert to determine the nature and extent of tariff violations, if any.

Assistant Transportation Representative Nyulassy testified that on May 25, 1966 he participated in the investigation of the construction of Interstate Highway No. 8 near El Centro by riding a truck and recording its operation in order to compute the transportation charges in accordance with MRT 7. He rode respondents' truck No. 23. His record of some of the time notations required by MRT 7 is:

| | |
|--------------------------------|------------|
| Time reported for work | 0558 AM |
| Time completed last loading | 1625 PM |
| Time arrived to dump last load | 1645 PM |
| Time finished last dump | 1646 PM |
| Allowable deductions | 29 minutes |

He testified that the truck made 16 round trips on May 25, 1966 and the average time for each round trip was 40 minutes. It took approximately 15 minutes to drive from the scale house to the loading pit, and about another five-minute wait before the truck was loaded.

Assistant Transportation Representative Cox testified that on May 25, 1966 he participated in the investigation of the construction of Interstate Highway No. 8 near El Centro by riding a truck and recording its operation in order to compute the transportation charges in accordance with MRT 7. He rode respondents' truck No. 18. His record of some of the time notations required by MRT 7 is:

| | |
|--------------------------------|------------|
| Time reported for work | 0525 AM |
| Time completed last loading | 1635 PM |
| Time arrived to dump last load | 1655 PM |
| Time finished last dump | 1656 PM |
| Allowable deductions | 15 minutes |

He testified that the truck made 16 round trips on May 25, 1966 and the average time for each round trip was 43 minutes. It took approximately 15 minutes to drive from the scale house to the loading pit and another 20-minute wait before the truck was loaded.

Assistant Transportation Representative McMurphy testified that on May 27, 1966 he participated in the investigation of the construction of Interstate Highway No. 8 near El Centro by riding a truck and recording its operation in order to compute the transportation charges in accordance with MRT 7. He rode respondents' truck No. 11. His record of some of the time notations required by MRT 7 is:

| | |
|--------------------------------|------------|
| Time reported for work | 0535 AM |
| Time completed last loading | 1611 PM |
| Time arrived to dump last load | 1632 PM |
| Time finished last dump | 1637 PM |
| Allowable deductions | 20 minutes |

He testified that the truck made 15 round trips on May 27, 1966 and the time for each round trip varied between 38 to 43 minutes. It took approximately ten minutes to drive from the scale house to the loading pit and another 25 minutes of waiting before the truck was loaded.

Associate Transportation Rate Expert Peterson testified that he prepared Exhibit No. 3, which shows the rates and charges assessed by respondents and compares them to the rates and charges that the witness considers are the applicable minimum rates and charges for the transportation that took place. He prepared his exhibit using information supplied by Witness Switzer which was the information taken from respondents' records and from the staff personnel who rode respondents' trucks. A summary of Exhibit No. 3 shows:

| <u>TRUCK NO. 23</u> | <u>HOURS</u> | <u>CHARGE</u> |
|----------------------|--------------|---------------|
| Staff Evidence | 10-37/60 | \$ 152.83 |
| Respondents' records | 9-3/4 | <u>136.50</u> |
| | Undercharge | \$ 16.33 |

| <u>TRUCK NO. 18</u> | <u>HOURS</u> | <u>CHARGE</u> |
|----------------------|--------------|---------------|
| Staff Evidence | 11-36/60 | \$ 169.07 |
| Respondents' records | 10 | <u>140.00</u> |
| | Undercharge | \$ 29.07 |

| <u>TRUCK NO. 11</u> | <u>HOURS</u> | <u>CHARGE</u> |
|----------------------|--------------|---------------|
| Staff Evidence | 11-3/60 | \$ 165.95 |
| Respondents' records | 9 | <u>126.00</u> |
| | Undercharge | \$ 39.95 |

Mr. Peterson determined the time and location the driver reported for work from information given to him by Mr. Switzer. The information was that Miles ordered the carriers to weigh light each morning. This time of weighing light was, in Mr. Peterson's opinion, the time of reporting to work.

Respondents' Evidence

Fred ReCupido, a partner in O L Trucking testified that his company rendered trucking services on the El Centro job. O L has about 20 sets of bottom-dump trailers which are leased to drivers who have power units (tractors). The company also obtains jobs for the drivers. O L owns two tractors itself and employs two drivers to operate them.

O L started to work on the El Centro project on February 8, 1966 under a payment plan other than hourly rates. On March 21, 1966 O L made an hourly rate agreement with Miles. At the time this agreement was made Miles specified that there would be no overtime rate; Miles agreed to pay a flat \$14 per hour. However, this rate was not paid. Actual payment was based on the number of loads carried each day. The system operated as follows:

Miles had a checker stationed in the scale house. As each truck would cross the scale with a full load the checker would note this on a form. At the end of each day all of O L's drivers would assemble at the truck parking area and turn in their freight bills to Mr. ReCupido, or his representative, with the actual running time noted, except the "net time for computation of charges" space was left blank. These bills were brought to Miles' office the next day where Miles had a chart that showed the amount of hours that they would pay for the number of loads carried.^{4/} This chart was called a "guideline" or "conversion sheet." The record that the checker kept for each truck showed the number of loads the truck hauled. The guidelines showed the number of hours that would be paid for the loads hauled. Regardless of what the driver showed on his freight bill for actual time worked, the guideline hours had to be inserted in the "net time" space of the freight bill before Miles' agent would approve the bill for payment. O L then

^{4/} For instance, Exhibit No. 20 shows, among other items, that for 20 round trips from the Dogwood pit Miles would pay for ten hours of work, and for 20 round trips from the 4th Street pit Miles would pay for 8-1/2 hours of work.

took the freight bills, totaled them, and, at the end of each month, billed Miles for the previous month's work on the basis of \$14 per "net time" hour. The load-hour ratio varied depending upon the particular run between dirt pit and dump site. The closer the pit to the site the more loads had to be carried per hour. Also, the guidelines were changed frequently because of pressure from the truck drivers who complained about the low pay and who twice went out on strike. The guidelines were given to Mr. ReCupido by Mr. Mason, Miles' truck foreman, Mr. Rutherford, Miles' project engineer, and Mr. Giguere, Miles' office manager, so that the drivers could govern their speed and know what they were earning at the end of each shift.

Because of dissatisfaction with the guideline pay formula a group of truck drivers complained to the Commission which then initiated the May 1966 field survey. Nevertheless, even after the survey, Miles continued to use the guidelines to determine hours worked. Mr. ReCupido, in addition to his complaints to the Commission, also expressed his dissatisfaction to Miles' employee, Mason, and Mr. Buttles, the vice-president in charge of Miles and Sons Construction Division. He was told that if he did not like the method of payment other people were available to work. Prior to the staff survey in May 1966 the drivers would leave the "net time" portion of the freight bill blank, to be filled in according to the guidelines. After the survey the drivers computed their net time based on actual hours worked, but Miles continued to use the guidelines and change the net time figure if it varied from the guideline.

On the issue of starting time, Mr. ReCupido testified that he did not instruct his drivers when to report to work as this was done by Miles' employees. Mr. Mason required all trucks

to obtain their tare weight before reporting to the loading pit and he gave notice by placing a sign outside the scale house each afternoon which showed the next morning weigh-in time.

Interested Party Evidence

The vice-president in charge of the construction division of Miles testified that he was familiar with the El Centro job. He said it was the job of the truckers to transport fill dirt from a pit location to various dump locations. Miles specified the time they wanted the truckers to arrive at the pit locations. They would require a certain number of trucks to arrive at the pit at five- or ten-minute intervals. Miles was using about 60 trucks a day which could be loaded only two or three a minute. Rather than have some trucks waiting for 30 minutes to obtain their load Miles staggered the starting times. The men were told to report to work under the loading belt at the pit. The time was approximately 6:00 a.m., but sometimes a little earlier or later depending upon the time of sunrise. The witness did not know specifically when O L was told to have its equipment report to work on May 25 and 26, 1966. The pit location was the same throughout the job but the dump sites varied as portions of the freeway were completed. The distance from pit to various dump sites varied from 5-1/2 miles to 9-1/2 miles.

The witness testified that the truck foreman on the job actually scheduled the trucks for arrival at the pit. The truck foreman was told to have the truckers report to work at the loading pit, but the witness was not present to hear if his orders were

carried out. Nor did the witness know whether the truck foreman issued any orders concerning weighing light each day. The loop time, from pit to dump site, varied from 22 minutes for the 5-1/2 mile distances, to 43 minutes for the 9-1/2 mile distance.

The witness said he was physically at the job site only six days a month. He did not know whether other employees of Miles required the truckers to obtain tare weight before going under the belt for the first time. At times the scales were located at the pit and at other times they were at the dump site. The witness did not remember the starting times when the scales were located at the dump. At no time while the witness was at the job site did he hear orders being given as to the time the drivers were to report to work. He assumed his orders were carried out because he heard nothing to the contrary.

The manager of Miles' construction division office at Merced, a certified public accountant, testified that it was his job to supervise the payment of bills rendered by the truckers on the El Centro job. Generally, the bills, after having been approved by Miles' personnel on the job at El Centro, were submitted within the first five days of the month and related to the previous calendar month. The accounting staff at Merced would re-check the bills and pay them. The principal computation checked was that the total charges equaled the hours charged times \$14.

The witness testified that he reviewed all freight bills of respondents for the period from April 1, 1966 through August 28, 1966 to determine if there would be any difference between the hourly figure shown for net time for computation of charges and the total time figure that could be computed by reviewing the other time

entries on the freight bill. He determined that for the period April 1, through May 23 there was no difference between the net time figure and the figure computed from the other entries on the freight bill. For the period May 24 through August 28 the figures were the same in only one-third of the freight bills.

On cross-examination the witness said that the total hours for net time charged were 700 hours less than that shown when the hours were computed from other entries on the freight bills. However, the witness did not bring in his work papers to verify his computations. The witness admitted that for the period April 1 through May 23, when he said in all cases there was no difference between the net time charged figure and the time computed from the other entries on the freight bill, in most cases there were no figures at all on the freight bill other than the net time figure. If there were no figures at the top of the freight bill he assumed that the figures at the bottom were correct. After May 24 the witness stated that there were figures on the freight bill from which the net time for charges could be computed.

Discussion

The central question to be decided is, where did the truck drivers report to work? If they were to report to work underneath the loading belt at the pit, as testified to by Miles' witness, then the net time for computation of charges would be approximately fifteen minutes less than if they reported to work at the scale house, as testified to by staff witnesses. Two approaches may be taken to resolve this question. The first, and

simplest, requires no more than to determine which testimony on the subject has the most probative value. The second approach is concerned with whether the activity in question, obtaining tare weight, was "work" within the meaning of the tariff.

Analyzing the evidence on the basis of the first approach it is manifest that the time the driver reported to work was no later than the time he weighed light at the scale house each morning.^{5/} The staff testimony was not refuted that each afternoon an employee of Miles would come into the scale house and give instructions as to when the scale should open the next morning; that another employee of Miles would then write the time down on a piece of cardboard and place the cardboard outside by the scale for the drivers to see; and that the drivers actually did come to the scale house the next morning at the time stated on the cardboard. The testimony of Miles' witness on the subject is not persuasive. He was not on the job site very often, and he never mentioned being at the scale house at all. The witness admitted that he didn't know if his instruction that the drivers report to work at the pits was carried out.

An analysis of the evidence from the point of view of whether reporting at the scales to obtain tare weight was work within the meaning of the tariff, leads us to the conclusion that it was. The tariff does not define the phrase "time and location driver reported for work"^{6/} nor the word "work." Yet it is clear

^{5/} None of the parties has requested that we include in time reported for work the waiting time at the scale house prior to weighing light. Therefore, we will not consider this waiting time; nor have we considered waiting time at the pits.

^{6/} See MRT 7, Item 93.1(c) (13).

that the purpose of these words in the tariff is to guarantee either regular or overtime compensation for all actual work and waiting time. Work in this sense, and as commonly used, means physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business. (Tennessee C.I. & R. Co. v Muscoda Local 122 (1944) 321 US 590, 598, 88 L ed 949, 956.)

Driving a truck to the scale house in order to obtain tare weight is certainly physical exertion. It was required by Miles, as all trucks had to be weighed light in accordance with the contract between Miles and the Division of Highways; and, because of this same contract, the work was pursued necessarily and primarily for the benefit of the employer and his business. Obviously, weighing light is not for the convenience of the drivers, they weren't getting paid according to the weight of their load; and passing over the scales bears no relation whatever to the needs of the drivers, or to the distance between their homes and the loading pit.

Respondents presented no evidence in opposition to the staff's position, and, in fact, support the staff. Miles argues that obtaining tare weight is in the same category as fueling the truck before reporting to work. We think the analogy is inapposite under the facts of this case. Filling up with fuel can be done at any time by the drivers; it is as much for the convenience of the drivers as for Miles; it was not required by Miles; and, most importantly, fuel is needed on all trucking jobs, but weighing light in the morning was a special requirement of this job.

The staff witnesses' testimony regarding the remaining time factors which are needed to determine the chargeable time for the three trucks under observation is the most accurate in the record and we find their time factors to be true. Based on our finding that the time the drivers reported to work was the time they weighed light each morning, plus the testimony of the staff witnesses who rode trucks Nos. 11, 18, and 23, and the analysis of the rate expert, we find that respondents charged less than the rates prescribed in MRT 7 for work performed on May 25, 26, and 27, 1966 on the El Centro job.

In this case it is not enough to determine the undercharges for three trucks for one day each. The construction job went on for months and respondents' testimony shows that, even if the evidence concerning the time the drivers reported to work is disregarded, at no time was transportation work paid for in accordance with the tariff.

The testimony of Mr. ReCupido concerning the conversion tables, which was substantiated by the introduction into evidence of some of the actual conversion tables used, shows a deliberate attempt by Miles to evade the minimum rates. Miles did not refute this testimony. All payments for dirt hauling on this job, at least as far as respondents are involved, were made pursuant to the conversion tables. No specific instance was shown wherein payment according to the conversion tables was equal to, or more than, the minimum rates. Not only were respondents underpaid for their work, but respondents' subhaulers were also underpaid. The freight bills prepared by respondents' drivers that were introduced into evidence do not show enough time factors to compute accurately

the chargeable time. There is no reason to believe that other freight bills from this job, which were not introduced into evidence, will be more accurate. But the men are entitled to their earnings. Respondents and their drivers have been shown to have performed work and have not been paid in accordance with the tariff. Their damage is certain. Only the amount of undercharges arising from the tariff violation by the employer is uncertain. As a matter of just and reasonable inference, there is sufficient evidence in this record to show the extent of the work performed by those truck drivers improperly compensated, and the earnings due them. (See Anderson v Mt. Clemens Pottery Co. (1946) 328 US 680, 688, 90 L ed 1515, 1523; Zinn v Ex-Cell-O Corp. (1944) 24 Cal 2d 290, 297-8.) This evidence includes the testimony of the staff witnesses, the freight bills, the weighmaster's records, and respondents' testimony.

To accurately determine the proper chargeable time^{7/} the following time factors are required: (1) time reported to work, (2) start of last trip, (3) time arrived to dump last load, (4) time finished last dump,^{8/} and (5) deductible time (lunch, truck breakdown).

The dump truck freight bill used by respondents and their drivers on this job has spaces to show the following time factors, among others:

^{7/} Chargeable time is the over-all time less deductible time.

^{8/} Over-all time is computed from the time reported for work to the start of the last trip plus double the running time of the last trip plus the unloading time of the last load. (Item 300 MRT 7.)

Time driver reported for work.
Time completed last loading.
Time arrived to dump last load.
Time finished last dump.
Allowance for completion of last trip.^{9/}
Authorized deductions.
Net time for computation of charges.

These freight bills were filled in with varying degrees of completeness ranging from no time factors shown except net time for computation of charges, to all time factors shown.

We find that, with few exceptions, no freight bill introduced into evidence for work done by respondents or their subhaulers accurately reflects the time reported to work. We further find, based on the testimony of staff witnesses, that it took fifteen minutes to travel from the scale house to the loading pit. We recognize that this fifteen minute figure is an estimate but we find it to be reasonable since some trips took longer and some shorter, depending upon the location of the scale house in relation to the loading pit.

We find that in all cases the hours shown in net time for computation of charges, i.e. chargeable time, is a false figure and should be disregarded. We find that in almost all cases the time shown for time driver reported for work is erroneous and should show, on average, a reporting time fifteen minutes earlier than shown. To the extent that there are other time factors on the

^{9/} This allowance is equivalent to the driving time of the last trip, which results in double running time for the last trip.

freight bill we find that those time factors are reasonably accurate.

In determining undercharges the time factors on the freight bills shall be utilized wherever possible, except that net time for computation of charges shall be disregarded in all cases, and time driver reported to work shall be computed as fifteen minutes earlier than shown, except when the freight bill has the words "scales" or "pit scales" inserted in the space provided for 'location at which driver reported for work.'

We further find that the average time of a round trip was 40 minutes and that 20 minutes was the average running time of the last load and, therefore, that 40 minutes is double the running time of the last load. We find that one-half hour is reasonable for allowable deductions and that the difference between time arrived to dump last load and time finished last dump averages one minute, is de minimis, and shall be disregarded. The average times set forth in this paragraph shall be utilized only if these times cannot be determined from the face of the freight bill.

If chargeable time cannot be determined from the time factors on the face of the freight bill plus utilizing the average time set forth above then the following method of computation shall be used: the number of round trips each truck made each day shall be determined from the weighmaster's time sheets; forty minutes shall be allowed for each round trip; fifteen minutes shall be added to allow for the time between reporting to work and obtaining the first load, and twenty minutes shall be added to allow for double the running time of the last load.

Our holding that the time factors (except net time for computation of charges) shown on the freight bills should be used whenever possible to determine undercharges is further supported by an analysis of certain freight bills admitted in evidence. Exhibits Nos. 35 through 43 consist of nine freight bills, all dated August 19, 1966. These bills were analysed by a Commission rate expert and his analysis (Exhibit No. 47) is before us. He made his analysis to show what the chargeable time would be utilizing the time factors shown on the face of the freight bills, except the net time for computation of charges entry. His analysis is compared with the net time for computation of charges entry shown in the freight bill, as follows:

| Exh. No. | Staff analy- sis of charge- able time from time factors on face of Frt. bill | | Net time for computation of charges as shown on the frt. bill | | Difference plus fifteen minute re- porting time 10/ |
|----------|--|---------|---|---------|--|
| | Hours | Minutes | Hours | Minutes | |
| 35 | 10 | 07 | 9 | 15 | 67 |
| 36 | 10 | 05 | 9 | 45 | 35 |
| 37 | 6 | 25 | 5 | 45 | 55 |
| 38 | 9 | 45 | 9 | 45 | 15 |
| 39 | 10 | 11 | 9 | 30 | 41 |
| 40 | 10 | 00 | 10 | 00 | 15 |
| 41 | 10 | 32 | 9 | 15 | 92 |
| 42 | 10 | 55 | 9 | 45 | 85 |
| 43 | 10 | 00 | 9 | 30 | 45 |

10/

Fifteen minutes should be added to each total to provide for reporting to work at the scale house, except for No. 39 which shows "pit scale" as the location of reporting to work.

The inference that we draw from this table is that when the drivers did insert time factors, except time reported for work, they tried to be as accurate as possible under the circumstances. The difference in net time is significant enough to show that there was no collusion between the drivers and Miles to falsify time factors. Of course, the drivers did not insert the net time for computation of charges figure, and that figure is to be disregarded in all cases.

Not all freight bills are as complete as Exhibits Nos. 35 to 43, and those less complete should be rated as hereinbefore discussed.

Of the multitudinous number of objections to the introduction of evidence only three require discussion. Miles objected to the introduction of Exhibits Nos. 17 through 23, as applied to Miles, on the ground that they covered a period from June 6, 1966 to June 30, 1966 and, therefore, were beyond the period of time covered by the staff testimony. The evidence was admitted subject to "a motion to restrict the effect of this so that it has no bearing or no effect or no binding upon Miles and Sons." Miles also objected to the introduction of Exhibits Nos. 27 through 43 "on the grounds that it is beyond the scope of the case presented by the staff." This evidence was admitted subject to a motion to strike. The motions of Miles to exclude and to strike, as to it, Exhibits Nos. 17 through 23 and 27 through 43 are denied. The scope of the investigation covered all minimum rate violations between February and August, 1966. Exhibits Nos. 17 through 23 and 27 through 43 refer to activities within that period and are admissible for all purposes against all parties.

The staff objected to the testimony of the accountant who testified for Miles. The accountant testified that he reviewed all of respondents' freight bills and computed 700 hours as being the difference between the total net time for computation of charges figure on all freight bills and the figure determined by a review of

the other time factors on the face of the freight bills. On cross-examination by the staff he admitted that he did not have his work sheets with him to substantiate his 700-hour figure. For this reason, on motion of the staff, the examiner struck the testimony of the accountant as to the 700-hour figure and his review. We reverse the examiner on this ruling and admit all of the accountant's testimony. We have considered this testimony in our determination of this case.

The final matter to be discussed is the fine to be imposed. There are two respondents in this case, Mr. ReCupido and Mr. Hansen, the partners in O L Trucking. But we cannot fine Mr. ReCupido. He has been granted immunity pursuant to California Penal Code Section 1324^{11/} from being "prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence." This order of immunity was granted

11/

In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

27

by the Superior Court of Imperial County in connection with a felony complaint Case No. 2438 pending in the Justice Court of the El Centro Judicial District, County of Imperial, State of California, entitled People v Miles and Sons Trucking Service, Inc. The statement by the District Attorney of Imperial County in support of the order states that Mr. ReCupido refused to answer questions concerning the El Centro freeway job and the ownership and use of equipment on the job, on the ground that the answers would tend to incriminate him. Based on the District Attorney's statement, the Superior Court on September 26, 1966 issued its order granting immunity. Pursuant to that order Mr. ReCupido did testify in the Justice Court concerning some of the facts that form the basis of this hearing. We are of the opinion that that order and Mr. ReCupido's subsequent testimony prohibits us from imposing a fine on Mr. ReCupido (See, In Re Critchlow (1938) 11 Cal 2d 751, People v Schwarz (1926) 78 CA 561) but since only he was granted immunity and since a partnership may not claim the privilege against self-incrimination, we are not precluded from imposing a fine on Mr. Hansen, the other member of the partnership.

Findings of Fact

1. Pursuant to Contract No. 11-038024 between the State of California Division of Highways and Miles, Miles agreed to construct a portion of Interstate Highway No. 8 near El Centro. One part of said contract provides that "trucks used to haul material being paid for by weight shall be weighed empty daily." Dirt hauled under this contract was paid for by weight.

2. To haul dirt required in the construction of Interstate Highway No. 8 Miles employed, among others, respondents. Respondents, in turn, employed subhaulers. As between Miles and respondents, between March 21, 1966 and August 24, 1966 the dirt hauled was paid for according to hourly rates. Respondents operate pursuant to radial highway common and city carrier permits and were served with the appropriate tariff.

3. In response to complaints, members of the Transportation Division of the Commission staff made a field survey of the dirt hauling being performed on the job. The field survey took place on May 25, 26, and 27, 1966 and consisted of three staff men each riding a truck of respondents' and recording the time factors required by Item 93.1 of MRT 7, and one staff man stationed at a scale house on the job recording the time that each truck weighed light in the morning. A State weighmaster at the scale house recorded the tare weight of each truck every morning, and the loaded weight of each truck as it came across the scales during the day.

4. An employee of Miles would come into the scale house each afternoon and give instructions as to when the scale should open the next morning. Another employee would then write the time down on a piece of cardboard and put the cardboard outside by the scale

so that the drivers could see the sign as they drove up to weigh their last load of the day. The time the drivers reported for work was the time that they weighed light at the scale house each morning.

5. On May 25, 1966 respondents' truck No. 23 made 16 round trips hauling dirt; the average time for each round trip was forty minutes, it took approximately fifteen minutes to drive from the scale house to the loading pit; the net chargeable time that this truck worked on May 25, 1966 was 10-37/60 hours; the lawful tariff charge is \$152.83; the amount charged by respondents was \$136.50; the undercharge is \$16.33.

6. On May 25, 1966 respondents' truck No. 18 made 16 round trips hauling dirt; the average time for each round trip was forty-three minutes; it took approximately fifteen minutes to drive from the scale house to the loading pit; the net chargeable time that this truck worked on May 25, 1966 was 11-36/60 hours; the lawful tariff charge is \$169.07, the amount charged by respondents was \$140; the undercharge is \$29.07.

7. On May 27, 1966 respondents' truck No. 11 made 15 round trips hauling dirt; the average time for each round trip was approximately forty minutes, it took approximately ten minutes to drive from the scale house to the loading pit; the net chargeable time that this truck worked on May 27, 1966 was 11-3/60 hours; the lawful tariff charge is \$165.95; the amount charged by respondents was \$126.00; the undercharge is \$39.95.

8. On March 21, 1966 respondents made an hourly rate agreement with Miles. At the time this agreement was made Miles specified that there would be no overtime rate; Miles agreed to pay a flat \$14 per hour. However, this rate was not paid. Actual payment was based on the number of loads carried each day. The system operated as follows: Miles had a checker stationed in the scale house. As each truck would cross the scale with a full load the checker would note this on a form. At the end of each day all of respondents' drivers would turn in their freight bills to Mr. ReCupido, or his representative. These bills were brought to Miles' office where Miles had a chart that showed the amount of hours that they would pay for the number of loads carried. This chart was called a "guideline" or "conversion sheet." The record that the checker kept for each truck showed the number of loads the truck hauled. The guidelines showed the number of hours that would be paid for the loads hauled. Regardless of what the driver showed on his freight bill for actual time worked, the guideline hours had to be inserted in the "net time" space of the freight bill before Miles' agent would approve the bill for payment. Respondents then took the freight bills, totaled them, and, at the end of each month, billed Miles for the previous month's work on the basis of \$14 per "net time" hour. The load-hour ratio varied depending upon the particular run between dirt pit and dump site. The closer the pit to the site the more loads had to be carried per hour. Also, the guidelines were changed frequently because of pressure from the truck drivers who complained about the low

pay and who twice went out on strike. The guidelines were given to Mr. ReCupido by Mr. Mason, Miles' truck foreman, Mr. Rutherford, Miles' project engineer, and Mr. Giguere, Miles' office manager, so that the drivers could govern their speed and know what they were earning at the end of each shift.

Mr. ReCupido, in addition to his complaints to the Commission, also expressed his dissatisfaction to Miles' employees, Mason and Buttles. He was told that if he did not like the method of payment other people were available to work. Prior to the staff field survey in May 1966 the drivers would leave the "net time" portion of the freight bill blank, to be filled in according to the guidelines. After the survey the drivers often computed their net time based on actual hours worked, but Miles continued to use the guidelines and change the net time figure if it varied from the guideline.

9. All payments for dirt hauling on this job, at least as far as respondents are involved, were made pursuant to the conversion tables. No specific instance was shown wherein payment according to the conversion tables was equal to, or more than, the minimum rates.

10. With few exceptions, the freight bills prepared by respondents' drivers that were introduced into evidence do not show enough accurate time factors to compute, without more, the chargeable time. These freight bills were filled in with varying degrees of completeness ranging from no time factors shown except net time for computation of charges, to all time factors shown.

11. With few exceptions no freight bill introduced into evidence for work done by respondents or their subhaulers accurately reflects the time reported to work, which was at the scale house. On those freight bills where the drivers did put in a time figure for "time driver reported for work", except on those freight bills which have the words "scales" or "pit scales" inserted in the space provided for "location at which driver reported for work," the time figure reflects reporting to work at the loading pit; this is incorrect. It took fifteen minutes to travel from the scale house to the loading pit. This fifteen-minute figure is an estimate but it is reasonable since some trips took longer and some shorter, depending upon the location of the scale house in relation to the loading pit.

12. On all freight bills the hours shown in net time for computation of charges, i.e. chargeable time, are false figures and should be disregarded. On all freight bills, except on those freight bills which have the words "scales" or "pit scales" inserted in the space provided for "location at which driver reported for work," the time shown for "time driver reported for work" is erroneous and should show, on average, a reporting time fifteen minutes earlier than shown. To the extent that there are other time factors on the freight bill those time factors are reasonably accurate.

13. In determining undercharges, except those found in Findings Nos. 5, 6, and 7, the time factors on the freight bills shall be utilized wherever possible, except that net time for computation of charges shall be disregarded in all cases, and time driver reported to work shall be computed as fifteen minutes earlier than shown, unless it comes within the exception of Finding No. 12.

14. The average time of a round trip was forty minutes, twenty minutes was the average running time of the last load and, therefore, forty minutes was double the running time of the last load. One-half hour is reasonable for allowable deductions; but the difference between time arrived to dump last load and time finished last dump averages one minute, is de minimis, and shall be disregarded. The average times set forth in this paragraph shall be utilized only if these times cannot be determined from the face of the freight bill.

15. If chargeable time cannot be determined from the time factors on the face of the freight bill plus utilizing the average times set forth above then the following method of computation shall be used: the number of round trips each truck made each day shall be determined from the weighmaster's time sheets, forty minutes shall be allowed for each round trip; fifteen minutes shall be added to allow for the time between reporting to work

and obtaining the first load, and twenty minutes shall be added to allow for double the running time of the last load.

16. Except for determining the undercharges found in Findings Nos. 5, 6, and 7, cubic capacity of the trailers shall be that shown on the freight bills. If no cubic capacity is shown then it is reasonable to use a capacity of 19/20 cubic yards.

17. Respondents and their subhaulers performed work for Miles and have not been paid in accordance with the applicable tariff. Their damage is certain.

Conclusion of Law

The Commission concludes that respondents violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging less than the applicable hourly minimum rates for transportation in accordance with MRT 7.

INTERIM ORDER

IT IS ORDERED that:

1. O. D. Hansen, Jr. shall pay a fine of \$5,000 to this Commission on or before the twentieth day after the effective date of this order. ✓

2. The Commission staff is directed to review respondents' records to ascertain all undercharges that have occurred between March 21, 1966 and August 24, 1966 for work done by respondents

for Miles and Sons Construction Division on the El Centro Interstate Highway No. 8 job, in addition to those set forth herein. When undercharges have been ascertained, this proceeding shall be reopened to take additional evidence to determine the extent of the undercharges found, if any. All parties in this proceeding shall be permitted to participate in the reopened proceeding.

3. The Commission staff shall use the methods and time factors set forth in Findings of Fact Nos. 11, 12, 13, 14, 15, and 16 in determining additional undercharges.

4. Respondents shall file, prior to January 12, 1968, a legal action to collect the amounts of undercharges set forth in Findings of Fact Nos. 5, 6, and 7, together with those that may be found after the examination and hearing required by paragraph 2 of this order, and shall notify the Commission in writing upon the filing of such action.

5. Within sixty days after the effective date of this order, respondents shall review their records from March 21, 1966 to and including August 24, 1966 and shall file with the Commission a report setting forth the names of the subhaulers used on the Interstate Highway No. 8 job during this period, the amount originally paid to each, and any amount subsequently paid to each. Respondents shall remit to each of the subhaulers additional amounts collected in accordance with further order of the Commission.

6. Respondents 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.

7. That part of the Order of Investigation alleging violations of Item 93.1 of Minimum Rate Tariff No. 7 is dismissed.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each respondent. The effective date of paragraph 1 of this order shall be twenty days after the completion of such service; the effective date of the remainder of this order shall be the date hereof. The Secretary is directed to cause service by mail of this order upon all carriers known to the Secretary to have worked for respondents on the Interstate Highway No. 8 construction job at El Centro between March and August, 1966.

Dated at San Francisco, California, this 12th day of DECEMBER, 1967.

[Signature]
President

[Signature]
[Signature]
[Signature]
Commissioners

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