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ORIGINAL

Decision No. 73523

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, operations, charges and practices of VAN DYKE'S RICE DRYER, INC.	Case No. 8574 (Filed January 4, 1967)

James C. Van Dyke, for respondent.
David R. Larrouy, Counsel, and E. E. Cahoon, for the Commission staff.

O P I N I O N

By its order dated January 4, 1967, the Commission instituted an investigation into the rates, operations, charges and practices of Van Dyke's Rice Dryer, Inc.

A public hearing was held before Examiner O'Leary at Sacramento on April 25, 1967, with the matter being submitted on briefs since filed and considered.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 51-793 issued February 28, 1956. The permit contains the following condition: "Whenever permittee engages other carriers for the transportation of property of Van Dyke's Rice Dryer, Inc. or customers or suppliers of said corporation, permittee shall not pay such carriers less than 100% of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

The Staff Case

Respondent's office and terminal are located at Pleasant Grove, Sutter County. It operates four or five trucks and employs four or five drivers in its transportation operations. Its gross revenue from transportation, reported to the Commission for the year 1966, was $119,513. Copies of the appropriate tariffs and distance table were served upon respondent.

During the period June 8 to 11, 1966, a representative of the Commission's Field Section visited respondent's place of business and examined its transportation records for the period October, 1965, to May, 1966, inclusive. The underlying documents relating to seventy shipments were taken from respondent's files and photocopied. The photocopies were submitted to the Rate Analysis Unit of the Commission's Transportation Division. Based upon the data taken from said photocopies, rate studies were prepared and introduced in evidence as Exhibits 1 to 7, inclusive.

Exhibit 1 pertains to three shipments of baling wire transported from South San Francisco to Sacramento County Farm Supply, located at Florin near the City of Sacramento. The exhibit reflects purported undercharges of $253.86 which result from respondent's utilization of alleged improper rates.

Exhibit 2 pertains to six shipments of burlap transported from San Francisco to Sacramento Bag Mfg. Co., located at Sacramento. The exhibit reflects purported undercharges of $38.82 which result from respondent's utilization of alleged improper rates.

Exhibit 3 to 6, inclusive, pertain to 56 shipments of rice transported from various growers to Van Dyke's Rice Dryer, Inc., at Pleasant Grove, where the rice was dried and stored. Because of a practice apparently peculiar to the rice business, the respondent assessed freight charges only on the weight of a certain percentage

of the moisture content of each shipment rather than on its gross weight.[1/] The exhibits reflect purported undercharges of $2,463.26 for the transportation of rice to the dryer based upon tariff and ignoring the trade practice. The staff also alleges with respect to the shipments of rice that respondent failed to issue freight bills within the time required by Items 250 and 251 of Minimum Rate Tariff No. 14-A and extended credit beyond the time limit prescribed in Item 240 of Minimum Rate Tariff No. 14-A. Photocopies of the underlying documents pertaining to the shipments involved in Exhibits 3 to 6 were introduced in evidence as Exhibits 3A to 6A.

Exhibits 7 and 7A pertain to five shipments of rice seed wherein subhaulers were employed by respondent to perform the transportation. The subhaulers were paid less than the minimum rates. The staff alleges that the subhaulers should have been paid 100 percent of the minimum rate in accordance with the condition contained in respondent's permit, as quoted on page one, supra. Exhibit 7 reflects a purported amount due subhaulers of $92.91.

For the Respondent

Counsel for respondent made a delayed opening statement. He took the position in his statement, and as developed in the course of testimony, that none of the transportation performed by respondent was subject to regulation by this Commission for several reasons:

1. The hauling all pertained to the primary business of the corporation, hence is exempt from Commission regulation under Section 3549[2/] of the Public Utilities Code. The primary business

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1/ This allowance theoretically amounts to rice purchased from the farmer "FOB Farm - Moisture content not to exceed 14%". This is achieved by freight assessment to farmer for weight at moisture in excess of tolerance for the haul from farm to dryer.

2/ Section 3549 - (Final clause) - "Unless such transportation is within the scope and in furtherance of a primary business enterprise, other than transportation, in which such person or corporation is engaged." (Added 1963, Ch. 1576)

of respondent's Corporation is rice drying and storage, and the storage and sale of agricultural products and by-products, fertilizers, herbicides, insecticides and animal feed.

2. Rice is not a merchantable commodity until it has been both dried and milled, hence is not a subject of tariffs and Federal law provides for immunity for it from regulation. All of this is equally true of seed rice.

3. The State of California has no jurisdiction over the rice transported as it is a subject of Interstate and Foreign Commerce. Ninety-eight percent of it goes directly into interstate or foreign commerce and only 2 percent of it is consumed in California.

4. The hauling was proprietary as hereafter indicated by respondent's president.

Respondent's vice-president testified that the gross income of the corporation from all of its operations during the period July 1, 1965 to June 30, 1966 was one million four hundred thousand dollars, and that approximately five or six percent of said income was derived from the transportation operation. Approxilately 95 percent of all of the transportation income is derived from transportation in connection with the rice drying and sales functions of the corporation. The remaining 5 percent of the transportation income is derived from transportation which is not connected with the other functions of the corporation, but is performed for entities with whom respondent conducts business in its rice drying and sales functions. The shipments involved in Exhibits 1 and 2 are transportation which falls within the "5 percent", unrelated to the primary business, category. With respect to the transportation involved in Exhibits 3 to 6, inclusive, the vice-president testified that the rice that is picked up from the field has a moisture content of between 22 to 30 percent; the rice must be dried so that the moisture content is no more than

14 percent before it can be milled or used for any other purpose; the farmers call respondent and request that the rice be transported to the dryer and dried; the respondent bills the farmers for the transportation separate and apart from the drying function. For transportation to the dryer, respondent charges only for the transportation of the weight of moisture in excess of 14 percent.

The president of the corporation testified that the farmers are members of the Rice Growers Association and that all of the rice is sold by the farmers to the Rice Growers Association at time of and at point of harvest. After the rice is hauled to the dryer and dried, it is held at the dryer until orders are received from the owner (Rice Growers Association) to deliver it to a mill. After the rice is milled, 98 percent moves in interstate or foreign commerce and 2 percent moves in intrastate commerce. The president also testified that in Sacramento the Rice Growers Association operates a dryer which competes with respondent. Farmers who have their rice dryed by the Rice Growers Association and who employ for-hire carriers, pay transportation charges based on the gross wet weight of the shipments. Rice Growers Association reimburses the farmer for that portion of the transportation charges applicable to the dry weight only. To be competitive with the Rice Growers Association dryer, respondent's president stated it is necessary that respondent assess charges to the farmer based upon the weight of the excess moisture content only, which, in effect, is what the farmer pays for transportation when the material is shipped to the Rice Growers Association dryer. (See Footnote 1.) The president also testified that the shipments covered by Parts 1, 3 and 5 of Exhibit 7 and 7A were transported for him as an individual as a rice farmer rather than for the corporation.

Respondent contends that, with the exceptions of Parts 1, 3 and 5 of Exhibit 7, the transportation involved in this proceeding is not subject to rate regulation by the Public Utilities Commission on the ground that the primary business of the corporation is rice drying and the sale of agricultural products and agricultural by-products and that the transportation is in furtherance and within the scope of said primary business.

With respect to the transportation covered by Exhibits 3 to 6, respondent also contends: (1) that the rice transported was unprocessed green rice and not subject to the minimum rates in Minimum Rate Tariff No. 14-A; (2) the movement of the rice from the farmers to the dryer was in interstate commerce since the ultimate destination of 98 percent of the rice after milling is to points outside of California, and that the Federal Government by declaring the transportation of rice to be exempt from economic regulation has obviated regulation by California.

With respect to Parts 1, 3 and 5 of Exhibit 7, respondent contends that since the transportation was performed for an individual who happened to be the president of the corporation, the subhauler was the primary hauler and any undercharges which may have occurred are the responsibility of the "subhauler". Respondent also contends that the commodity transported in Parts 2 and 4 of Exhibits 7 and 7A was seed which is exempt from minimum rate regulation.

Discussion

This is a case of first impression before this Commission in which the defense of Section 3549 of the Public Utilities Code

has been invoked against the minimum rate tariffs. The Section provides:

> "Any person or corporation engaged in any business or enterprise other than the transportation of persons or property who also transports property by motor vehicle for compensation shall be deemed to be a highway carrier for hire through a device or arrangement in violation of this chapter unless such transportation is within the scope and in furtherance of a primary business enterprise, other than transportation, in which such person or corporation is engaged." (Added 1963, Ch. 1576.) 3/

This section means to us that when a person or entity engages in a business other than pure transportation which includes transportation of the product or products or when the transportation performed is incidental to his or its primary business such transportation is not regulated by this Commission.

This section does not mean that one primarily concerned with the profit from transportation per se may avoid transportation regulation from this Commission by adopting a device which might make it appear that he is primarily engaged in some other business, as hereinafter illustrated in cases cited.

With respect to the transportation which is involved in Exhibits 1 and 2 (the backhaul transportation of baling wire and burlap from the San Francisco area to the Sacramento area), the record clearly establishes that the only service required and performed by respondent was transportation. When transportation is

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3/ Section 3549 has been mentioned in 49 A.G. 23, headnote: "Subject: Highway Carrier - A contractor who performs all of a logger's task in preparing trees for a lumber mill and only then hauls the logs is not a highway carrier within the definition of P. U. Code Sec. 3549. Otherwise, whether a particular contractor is to be deemed a highway carrier is a question of fact to be resolved as each particular situation arises."

the only service performed, it is not in furtherance of a primary business enterprise other than transportation and therefore does not fall within the exemption provided in Section 3549 of the Public Utilities Code. (See Red Ball Motor Freight, Inc., et al. v. Emma Shannon, et al., etc. (No. 406), 12 Led. 2d 341, 377 U.S. 311, 84 S.Ct. 1260 (decided June 1, 1964).) Because the shipments were backhauls or were transported for trade customers of respondent does not put them in the special category of "related to the primary business" of respondent here under consideration.

With respect to the transportation involved in Exhibits 3 to 6, inclusive, the evidence shows that respondent transported the rice to its dryer and performed a drying service. The staff contends that even though respondent's primary business is rice drying, respondent is also engaged in a secondary, in dollar volume, business of for-hire transportation, that the transportation of rice by respondent from the farmer to the dryer is not "incidental" or "necessary" to the drying business. The facts show that the purpose of the transportation of rice to the dryer is to dry the rice.

Respondent's contention that the transportation covered by Parts 1, 3 and 5 of Exhibits 7 and 7A was performed for the president of the corporation in his individual capacity would not overcome the force of staff argument that the "subhaulers" are entitled to the prescribed minimum rates. If they hauled as subhaulers of respondent, they were so entitled by the condition in the permit (Supra, p.1.). If they did not haul as subhaulers, they hauled as prime carriers and the minimum rate tariff is applicable. This logic is equally applicable to parts 2 and 4 of Exhibit 7.

Section 3549 of the Public Utilities Code appears to be a State enactment comparable to Section 203(c) of Part II of the Interstate Commerce Act.[4/]

A collection of cases clarifying the cited section of the Interstate Commerce Act may be found in Federal Carriers Reporter (CCH) ¶46 (p. 2111) through ¶46.04 (p. 2116). In Federal determinations, the distinction has been described as the difference between a regulated carrier (common and contract carriers), on the one hand and a private carrier or transportation incidental to a primary business purpose, other than transportation, on the other hand.

One of the two leading cases relating to this distinction is L. A. Woitishek, Common Carrier Application No. M.C. 101683 (¶30,591 Federal Carriers Cases - ICC). The holding in this case constitutes a guideline for unregulated transportation, as part of a primary business.

This Commission believes the State rule is substantially the Federal rule, but reserves the right to disagree with specific Federal determinations.[5/]

4/ "Except as provided in Section 202(c), Section 203(b), in the exception in Section 203(a)(14), and in the second proviso in Section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

5/ See, also, ¶31,697 Federal CarriersCases (ICC) - Lenoir Chair Company, Contract Carrier Application No. MC 96541. In Woitishek, ICC v. Clayton 127 F2d 967, a case like Woitishek is contrasted to A. W. Stickle Company v. ICC, 128 F2d 155 where the same 3-judge court that decided Clayton found Stickle not to be ancilary transportation to a primary business but rather a device to avoid transportation regulation.

After consideration, the Commission finds that:

1. Respondent occasionally operates in pure transportation for profit unrelated to its primary business pursuant to Radial Highway Common Carrier Permit No. 51-793.

2. Respondent was served with the appropriate tariff and distance table.

3. The primary business of respondent is rice drying and storage and the sale and storage of agricultural products and by-products, including fertilizers, herbicides, insecticides and animal feed.

4. The transportation covered by Exhibits 3, 4, 5 and 6 was within the scope and in furtherance of respondent's primary business as a storer and dryer of rice and consequently, under Section 3549 of the Public Utilities Code, exempt from minimum rate regulation.

5. Because of the finding in 4 above, most of the other contentions of respondent for failure to comply with MRT 14-A become moot. The following findings would be made, if necessary:

(a) None of this transportation was within interstate or foreign commerce and this Commission has jurisdiction over all of this transportation.

(b) None of this transportation was established as proprietary hauling for the Rice Growers Association.

(c) The record fails to establish that the rice or rice seed (found here to be rice) transported, even though unprocessed and not merchantable, is not within MRT 14-A and exempt under Federal law.

6. Respondent charged less than the lawfully prescribed minimum rates for the transportation covered by Exhibits 1 and 2, resulting in undercharges in the amount of $292.68.

7. The transportation covered by Exhibits 7 and 7A (Rice Seed - 3 parts for the president's personal seed and two other parts) was performed by other carriers for respondent at respondent's request and such other carriers are entitled to the prescribed minimum rates, which were underpaid by $92.91. Either said carriers were subhaulers and therefore so entitled by the condition in respondent's permit, or they hauled as prime-haulers and the minimum rate tariffs apply. In this latter event, both respondent and the carriers would be responsible for collecting the underpayments. As only the respondent is before us, it will be ordered to collect these underpayments as the regulated carrier which put the transaction together.

8. The transportation covered by Exhibits 1 and 2, although for customers of respondent's primary business as a rice dryer, does not fall within the primary business exemption because the items transported were not connected with respondent's primary business.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3664, 3668, and 3737 of the Public Utilities Code, should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $292.68, and should remit to the alleged subhaulers who performed the transportation covered by Exhibits 7 and 7A the $92.91 difference between the amount paid to each of the alleged subhaulers and the minimum charge.

The Commission expects that respondent will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. The Commission also expects that respondent will promptly pay the subhaulers the difference above-mentioned in Finding 6. 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 and pay the alleged subhaulers the difference, or has not acted in good faith, the Commission may reopen this proceeding for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of $292.68 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 undercharges set forth herein and shall notify the Commission in writing upon the consummation of such collections.

3. Within thirty days after the effective date of this order, respondent shall remit to each of the alleged subhaulers the difference between the amount paid to each for transportation and the minimum charge set forth herein, and shall notify the Commission in writing within ten days after the payment of such sums.

4. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event the 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 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, 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.

5. Respondent shall cease and desist from charging and collecting compensation for the regulated transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

6. Respondent shall cease and desist from paying carriers engaged by it to transport its property or the property of its customers or suppliers less than the minimum rates and charges established by this Commission.

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 19th day of DECEMBER, 1967.

President

Commissioners