

ORIGINALDecision No. 73747

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers, and city carriers relating to the transportation of any and all commodities between and within all points and places in the State of California (including, but not limited to, transportation for which rates are provided in Minimum Rate Tariff No. 2).

Case No. 5432
(Order Setting Hearing dated May 2, 1967)

In the Matter of the Investigation for the purpose of considering and determining revisions in or reissues of Minimum Rate Tariff No. 14-A.

Case No. 7857
(Order Setting Hearing dated May 2, 1967)

A. W. Hays, for A. W. Hays Trucking, respondent.
Frank Loughran, for Anderson Clayton Co., San Joaquin Cotton Oil Company, Kingsburg Cotton Oil Company, J. G. Boswell Company, Producers Cotton Oil Company, Ranchers Cotton Oil Company and Pacific Vegetable Oil Corporation; Carter Sanders, for Producers Cotton Oil Company; James D. Reardon, for Kingsburg Cotton Oil Company of California; and Richard E. Lloyd, for Pacific Vegetable Oil Corporation, protestants.
Arlo D. Poe, R. C. Broberg, J. C. Kaspar and H. F. Kollmyer, for California Trucking Association; and Ralph Hubbard, for California Farm Bureau Federation, interested parties.
R. J. Carberry and John R. Laurie, for the Commission staff.

OPINION AND ORDER ON PETITION TO DIVULGE
SHIPPER AND CARRIER DATA IN RESPONSE TO CROSS-EXAMINATION

This proceeding was initiated by the Commission to receive evidence concerning the initial establishment of minimum rates for transportation of oilseeds by highway permit carriers.^{1/}

1/ Oilseeds include cottonseed, safflower seed and flaxseed. The transportation of such seeds is now exempt from the application of minimum rates.

Hearings were held before Examiner Mallory in San Francisco on August 2 and 3, 1967. Exhibits were introduced by a transportation engineer and a transportation rate expert of the Commission's staff. During cross-examination of the staff engineer by counsel for protestants, objection was made by a Commission staff representative to questions relating to services performed by individual carriers from whom information was gathered in the course of the engineer's cost study. The objection was made on the ground that the information sought was confidential and should not be furnished, pursuant to General Order No. 66-B and Section 3709 of the Public Utilities Code.^{2/} Counsel for protestants then indicated that he desired to explore in depth the background of staff studies by developing various types of information relating to the operations of individual carriers. In order that the full nature of these cross-examination questions would be known, and so that separate rulings on objections to the furnishing of information in answer to such questions would not be required to be made, protestants were authorized to file a written motion setting forth the particular information desired from each staff witness and requesting that the Examiner be directed to order that such information be furnished. Thereupon, the matter was temporarily removed from the calendar.

Protestants filed, on August 30, 1967, a pleading entitled "Petition for an Order Directing Examiner to Permit Cross-Examination of Commission Witnesses F. O. Haymond Jr. and Francis J. Spellman", and a separate pleading entitled "Memorandum in Support of Petition

2/ Section 3709 reads as follows:

"3709. Any employee of the commission who divulges any fact or information which comes to his knowledge during the course of the examination of the accounts, records, and memoranda of highway carriers, except as he is authorized or directed by the Commission or by a court of competent jurisdiction or judge thereof, is guilty of a misdemeanor and is punishable by a fine of not more than five hundred dollars (\$500) or by imprisonment in the county jail for not more than three (3) months, or both."

Requesting the Commission to Direct Its Examiner to Permit Protestants to Cross-Examine Commission Witnesses". California Manufacturers Association filed, on September 5, 1967, a statement concurring in the petition and argument filed by protestants. The Commission staff, on September 20, 1967, and the California Trucking Association, on September 21, 1967, filed replies to the petition.

Protestants' Petition and Argument

Protestants' petition seeks the right to inspect certain documents and work papers, to have other data prepared or collected, and to cross-examine the staff cost and rate witnesses on such information. The specific requests in the petition are set forth in Appendix A.

Protestants allege that the specified cross-examination of the cost witness and inspection of his records is desired so that the accuracy of the computations made by the witness can be determined, so that it can be determined whether or not the figures employed to arrive at the stated conclusions are sufficient to justify them, and for the purpose of determining whether or not the underlying data used has been developed from the operations of carriers who haul an amount of oilseed sufficient to permit them to be characterized as carriers whose costs would represent those of a reasonably efficient oilseed operation.

Protestants allege that the detail of the staff rate expert's exhibit is desired so that the accuracy of the witness's conclusions can be tested and so that the actual present rates and the character of actual present service can be determined and also so that the conclusions of the witness may be properly related to the operations of carriers who haul a sufficient volume of oilseed to permit the determination that their service is that of a reasonably efficient hauler of oilseed.

Protestants state that the description of the type of information which they seek to develop through cross-examination (Appendix A) is not intended to be exhaustive but rather is intended to indicate the character and type of information which protestants will seek to develop and the kinds and types of records which they will request permission to inspect. Protestants aver that as the cross-examination proceeds and, dependent upon the character of the information developed, additional areas of inquiry and additional requests for authority to inspect documents may develop. Protestants request that they be permitted wide latitude in their cross-examination so that all of the facts serving as a base for the conclusions of these witnesses may be determined and tested.

It is the position of protestants that unless they are permitted to inquire into the facts upon which the conclusions of the Commission's witnesses are predicated, they are effectually foreclosed from a fair opportunity to cross-examine and are arbitrarily forced to accept these conclusions without any knowledge of the facts supporting them or any opportunity to test the sufficiency of such supporting facts. Protestants allege that if they are not permitted to explore on cross-examination the facts developed in the staff investigations, they will in effect be deprived of any right of cross-examination and they will be required to accept without question the arbitrary conclusions of the witnesses based upon their investigations. Assertedly, this would deprive protestants of their right to due process of law.^{3/}

^{3/} Citing Ohio Bell Telephone v. Pub. Util. Com., 301 US 292, 81 L.ed. 1093, and William v. F.C.C., 170 F.2d. 793.

California Manufacturers Association (CMA) was granted leave to file a pleading with respect to protestants' petition subsequent to the removal of this matter from the calendar. CMA joins in the petition and concurs in the argument filed by protestants.

CTA's Argument

CTA opposes the issuance of a broad general directive to the Examiner as requested by petitioners.

CTA states that it is mindful of the need for protecting the right of cross-examination of staff witnesses in minimum rate proceedings, and that it is also mindful of the need for protecting carriers and shippers from unnecessary disclosure of information obtained by Commission employees in confidence. CTA states that these two principles must be accommodated in the public interest.

CTA asserts that the petition is general and very broad. CTA argues that petitioners request carte blanche to require the disclosure of any information and the inspection of any documents and records relating to the subject of the proceeding that the witnesses may have acquired in confidence.

CTA states that no one who believes in our constitutional system of fact finding and adjudication would deny that the right of cross-examination is an essential element in due process. It argues, however, that the correlation and accommodation of the right of cross-examination and the rule against disclosure of confidential information by a Commission employee is not a novel problem.^{4/} Throughout the past 25 years Commission staff witnesses have presented cost and economic studies and given testimony in minimum rate proceedings, and they have been cross-examined thoroughly. CTA alleges that at no time has the Commission found it necessary to consider any such unlimited release of confidential information as here requested.

^{4/} Citing Sections 15(11) and 222(e) and (f) of the Interstate Commerce Act.

CIA argues that the problem is to determine what, if any, disclosure of confidential information is necessary to permit reasonably purposeful cross-examination. It states that the purpose of cross-examining an expert witness, such as involved here, is not to disclose the identity of a specific carrier as the source of a specific item of information. It states that cross-examination may probe the factual basis of the expert's conclusions and judgment quite deeply without calling for any disclosure and the need for disclosure should be established before the release of confidential information is ordered. That need can be developed only with respect to specific facts. CIA urges that disclosure of confidential information is a subject that must be treated with great care and with the widest consideration of its potential ramifications.

Commission staff Argument

The Commission staff argument is summarized in the following statements:

Petitioners seek more than reasonable and necessary cross-examination of staff witnesses. They seek disclosure of specific data of carriers and shippers revealing their individual business practices and transactions. There can be no objection to reasonable and necessary cross-examination. The witnesses are prevented from divulging much of the requested data by Sections 583 and 3709 of the Public Utilities Code and the provisions of General Order No. 66-B. The Commission has the authority to override the requirements of the Code sections but this should be done only under compelling reasons which require such action to protect the overall public interest. Petitioner has not demonstrated any such compelling reasons and much of the data sought is irrelevant to the issues. The "areas of specific information" sought by petitioner would have access to all confidential business information gathered

by the staff in the course of its studies. This confidential information would relate to the business practices of both shippers and carriers. No useful purpose will be served by revealing the identities of the individual shippers and carriers as related to specific tonnages, revenues, expenses, performance observations, volume of movement, points of movement, commodities, production and negotiated contracts. The witness's conclusions can be fully tested without disclosure of specific identities. These conclusions were based on the factual information and expertise of the witnesses and their validity can be thoroughly tested without revealing the specific identity of the source material. The revelation of background data which lays bare the operations of individual carriers and shippers could result in serious dislocations of production, marketing and transportation. It may also result in refusal of carriers and shippers to give information to the staff in any of its future studies. Lack of cooperation from shippers and carriers in this regard would effectively frustrate staff attempts to develop meaningful data and studies.

The staff urges that the issues concerning disclosure of information in Commission proceedings is a matter which requires a positive statement of policy for future proceedings as well as in the instant matter. The staff urges the Commission to protect the public interest by directing that any information to be disclosed be prepared or presented in a code form. The staff argues that this procedure would provide petitioners with the underlying factors considered by the staff witnesses in reaching their conclusions limited sufficiently to insure against the danger of disclosing confidential trade practices.

The staff requests the Commission to deny petitioner's request or in the alternative to grant it only to the extent of disclosing underlying data relied upon as a basis for conclusions

and coded in such a manner as to fully protect the identity of the carrier and shipper identities as related to tonnages, revenues, expenses, performance observations, volume of movement, points of movement, commodities, production and negotiated contracts.

Discussion and Conclusions

The Commission affirms the action of the examiner in refusing to rule separately on requests for background information relating to staff studies in light of the delays and misunderstandings encountered in recent proceedings in which the requests for background data were made on a piecemeal approach.^{5/} It appears that an intelligent and fair ruling on the question can be made only when the entire scope of the material sought is known, rather than attempting to rule separately on requests for each bit of information sought. Inconsistent or conflicting rulings may well result from the latter practice.

We agree with the staff that a Commission policy is required, inasmuch as the release of study background material has been resisted in other proceedings and no consistent practice has resulted therefrom.^{6/}

It is noted that Section 3709 and General Order No. 66-B prohibit the release of information gathered by the Commission staff in the course of its studies except as such information may be released upon order of the Commission or by direction of the Examiner in the course of a hearing.^{7/} CTA and the Commission staff do not contend that the information cannot be released; they question the propriety of such release of information.

^{5/} Case No. 5432, Order Setting Hearing dated August 31, 1965 and Case No. 7858, Order Setting Hearing dated October 5, 1965; also Case No. 5437, Order Setting Hearing dated March 22, 1966.

^{6/} See Footnote 5, supra.

^{7/} General Order No. 66-B.

The questions presented here are whether, as a matter of policy, the Commission staff should be directed, on cross-examination, to divulge the data gathered from individual highway carriers in the course of the staff studies; and, if so, whether this information should be fully identified as to its source, or should be coded. In ruling on these questions we must weigh the rights of parties to a full and fair hearing against the statutory mandate to avoid unnecessary disclosure of information concerning the operations of individual carriers or shippers.^{8/}

Parties to Commission proceedings are entitled to sufficient information on the record to test the accuracy of the facts and conclusions set forth in the staff reports.^{9/} Otherwise, the Commission may find itself restricted to two alternatives, i.e., to accept the end result presented by the witness without question, or refuse to receive the report in evidence.^{10/}

^{8/} See FCC v. Schreiber, 381 U.S. 279, 14 L.ed.2d 383, 85 S.Ct. 1459.

^{9/} The following is a general description of the procedure in preparing a staff report. The staff member is assigned the task of developing factual data concerning the transportation of a particular commodity and to prepare his recommendations thereon. To gather such data, he calls upon a cross-section of carriers and shippers involved in the transportation. Various types of facts are obtained. The information from a particular source may be included, partially used, or excluded from the final report, depending upon the judgment of the person preparing the report. The selected data are collated. The facts pertaining to a particular portion of the study are analyzed by the staff member; he may use the facts directly in his report or may exercise his judgment based on such facts. In some minor factual situations, sufficient data may not be readily available in his field study; in such case his report reflects only the staff member's judgment. The staff reports contain only summarizations of the cost factors essential to the final result. Areas in which facts are interpreted or judgment used are not identified. Staff exhibits generally contain appendices listing the names of carriers, shippers and other parties contacted in the course of a study. The listings do not identify the nature of data obtained from each source; nor show whether the data obtained was used in the study.

^{10/} See F.C.C. v. Schreiber, supra.

We conclude, therefore, that information from the background data of staff reports entered in evidence in minimum rate proceedings should be made available by the assigned commissioner or examiner in the course of a hearing, upon proper showing of a compelling need for the information. Such information should be limited to that set forth in the particular request, after the relevancy and pertinency of the request have been determined. The Commission staff should have all data prepared in such form that they may be furnished expeditiously.

It appears that certain of the data requested in protestants' petition is either not pertinent in this proceeding or stated so broadly that it is not practical for the staff to furnish it in the form requested. The staff will be directed to prepare in exhibit form the data subsequently enumerated under the specific headings "Exhibits 1 and 2 (Witness Haymond)" and "Exhibit 3 (Witness Spellman)".

CTA urges that background information can be furnished without requiring the witness to disclose the identity of a specific carrier as the source of a specific item of information. The staff requests that background data be identified by code rather than by the name of the carrier or shipper from which they were obtained. We believe that to the extent possible, the method suggested by the staff should be adopted. However, the staff and other parties are reminded that should such procedure foreclose interested parties from obtaining material essential to the record, the Commission, a commissioner or the examiner may direct that information be furnished even though the source of such material must be identified. In so doing, however, the spirit and intent of Sections 583 and 3709 of the Public Utilities Code should be kept in mind.

We conclude that the Commission's Transportation Division should furnish in exhibit form to appearances of record in this proceeding and to the California Manufacturers Association, ten days or more prior to the next scheduled hearing in this matter, such information gathered as to background to the staff studies in such manner that the data cannot be identified as to individual shippers or carriers.

Exhibits 1 and 2 (Witness Haymond)

- (1) Tonnage of oilseeds hauled by carrier, for carriers contributing substantially to the composition of the cost study (coded).
- (2) Carriers used in the cost study who pay drivers upon the basis of gross revenue earned, and carriers who pay drivers on an hourly wage basis (coded).
- (3) Description of equipment units included in the cost development, identified as to carrier operating such units (coded).
- (4) Description of the specific carrier costs from which the running costs in Exhibit 1 were developed and the names of carriers from whom this information was developed (coded).
- (5) Description of the specific loading and unloading observations upon which average loading and unloading figures were developed (coded).

Exhibit 3 (Witness Spellman)

(1) Identification by name of each entity listed in Appendix C of Exhibit 3 broken down as follows:

- (a) Haulers of cottonseed.
- (b) Haulers of safflower.
- (c) Entities employing for-hire carriers and who are responsible for freight charges.
- (d) Producers of oilseed and/or ginning of cotton.
- (e) Growers of cotton and/or safflower.

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(2) A description of the specific types of information obtained from each entity listed in Appendix C and a statement as to whether such information was recorded.

(3) The names of carriers from which shipping documents were obtained or whose shipping documents were abstracted.

(4) With respect to each carrier listed in 1(a) and (b) above (coded):

- (a) A statement of the tonnage of oilseed transported by each carrier listed and the average weight of shipment for each carrier.
- (b) Identification as a prime or overlying carrier or as a subhauler.
- (c) Whether balance sheets and/or profit and loss statements were obtained.
- (d) Number of units and types of equipment used in the transportation of oilseeds.
- (e) The carrier's service area.

We also conclude that the following information from original field notes in coded form or by generic grouping to preserve the identities of all entities, relative to the following areas of information, be made available for examination by parties of record.

Exhibits 1 and 2 (Witness Haymond)

- (1) Performance trip sheets.
- (2) Profit and loss statements.
- (3) Abstracts or copies of labor contracts.
- (4) Analyses of equipment costs.
- (5) Analyses of running expenses.
- (6) Shipping documents or abstracts thereof.

Exhibit 3 (Witness Spellman)

(1) All origins and destinations between which oilseeds were transported.

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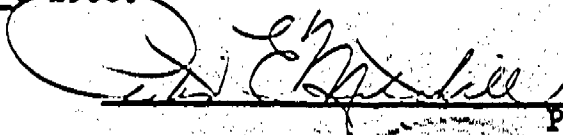
- (2) Types of loading and unloading facilities.
- (3) A list of carriers by name and by revenue grouping.
- (4) A list of gross and net weights abstracted from shipper or carrier records.
- (5) Level of rates being assessed by carriers of cottonseed and safflower seed.

We further conclude that other information sought in the petition is not justified and the request therefor should be denied.


IT IS ORDERED that the Commission's Transportation Division staff shall furnish such information and in such form to interested parties as set forth in the conclusions as specifically identified under the headings "Exhibits 1 and 2 (Witness Haymond)" and "Exhibit 3 (Witness Spellman)"; and that to the extent the petition filed on August 30, 1967, by Anderson Clayton Co., et al. (protestants) is not granted herein, said petition is denied.

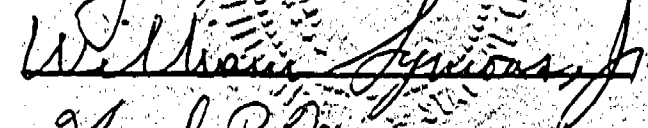
The effective date of this order is the date hereof.

Dated at San Francisco, California, this 20th day of FEBRUARY, 1968.



President





Commissioners

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

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Protestants' petition requests the following with respect to Exhibits 1 and 2 presented by the staff cost witness:

- (a) Tonnage hauled by each carrier who contributed substantially to the composition of the cost study.
- (b) Where copies of balance sheets and profit and loss statements of the carriers involved in the study were obtained or made and information therefrom was employed in the construction of the cost study, protestants desire to examine these documents and determine from the witness which figures or information were used by him.
- (c) Examination of the records of interviews with carriers, where these interviews formed a material part of the information upon which the cost conclusions expressed in Exhibits 1 and 2 are predicated.
- (d) Inspection of and cross-examination concerning all record data involving figures obtained from any carrier, which figures were employed or used in the development of the cost conclusions presented by the witness.
- (e) Inspection of all of the documents recording loading and unloading observations made by the witness and the members of his staff when such recorded data was used for the purpose of developing the ultimate conclusion of average loading and unloading time developed in the witness' cost exhibit; detailed cross-examination in reference to these records will be undertaken.
- (f) The names of the carriers used in the study who pay drivers upon the basis of 25 percent of the gross revenue earned and the names of those carriers who pay hourly wages to drivers only with respect to those carriers used in the study for the purpose of determining the average wage rate, together with a statement of the volume of oilseed traffic handled by each such carrier.

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- (g) Inspection of records underlying the 917 trips upon which drivers' compensation is computed, including the names of the carriers involved in each such trip and also inspection of any special study prepared by the Commission witness and used by him to determine the average driver compensation developed in his exhibits.
- (h) Description of specific units included in the development of equipment cost, including identification of the units with the names of the specific carriers employing such units and a physical examination of all underlying records covering the development of the equipment cost.
- (i) Description of the specific carrier costs from which the witness developed his conclusions concerning running costs, including the identification of the specific carriers to which each cost item relates.
- (j) Description of the specific loading observations upon which average loading and unloading figures were developed, including a physical examination of any special study made to arrive at the average figures used by the witness and also an inspection of the record made by the staff of each load included in the development of the average load factor presented by the exhibit.
- (k) Description of the specific figures related to specific carriers used by the witness in the development of his revenue use hours, including a physical examination of all recorded underlying data taken from carrier records for this purpose and a physical examination of any special study used by the staff for the purpose of developing the figures ultimately used.
- (l) The underlying figures used to develop the indirect costs and identification of such figures with the carriers from which they were obtained and also including an inspection of any special study made by the staff witness to develop the ultimate indirect cost figures employed in his study and of all recorded data taken from carrier records and employed for this purpose.

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Protestants' petition also requests the following information from the staff rate witness with respect to his Exhibit 3:

- (a) Identification of each carrier entity named on Exhibit C as a hauler of cottonseed, safflower seed or both cottonseed and safflower seed.
- (b) Identification of each entity on Exhibit C which is a hauler in the sense that it used the services of a carrier to haul oilseed and pays the freight charges.
- (c) Identification of each entity included on Exhibit C engaged in producing oil from oilseed and ginning cotton.
- (d) Identification of each entity on Exhibit C engaged in growing cottonseed or safflower seed.
- (e) Description of specific information used in the study and obtained from each separate group of entities listed on Exhibit C and, provided this information is recorded, an inspection of the underlying records is requested.
- (f) The name of each carrier on Exhibit C from which shipping documents were obtained or whose shipping documents were abstracted and an inspection of all such shipping documents and abstracts is requested.
- (g) A statement of the relative tonnage of oilseed transported by each of the carriers included on Exhibit C and, provided such information has been recorded by the witness, an inspection of the record is requested.
- (h) Identification of the carriers on Exhibit C performing primary hauling and those providing subhauling service.

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- (i) The names of the carriers listed on Exhibit C from which balance sheet or profit and loss statements were obtained and which were considered by the witness in arriving at his conclusions. Provided copies of such balance sheets or financial statements are in the possession of the witness or if an abstract was made, then physical examination of these documents is requested.
- (j) Specific identification of the carriers using the various classes of equipment described by the witness as the type of equipment used in the transportation of oilseed and a physical examination of the underlying documents recording such information is requested.
- (k) Specific details concerning individual contracts negotiated for oilseed transportation, upon which the witness predicates his conclusions relating to existing practices and rates, including the names of the parties to such contracts and their terms and, when copies of such documents are available, a physical examination thereof.
- (l) Specific details in support of the conclusions of the witness concerning average weight of loads transported by oilseed haulers, including a physical examination of the recorded data upon which these conclusions of the witness are predicated.
- (m) The identification of carriers who consistently transport heavy loads and those who consistently transport lighter loads.
- (n) Identification of the service area of each carrier named on Exhibit C will be sought.
- (o) Inspection of each recorded carrier interview forming a basis for any conclusions expressed by the witness is requested.