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Decision No. 73769

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of SIERRA DISTRIBUTING, LTD., a California Corporation, and into the operations, rates and practices of JAMES M. SOARES, dba SACRAMENTO CEMENT TRANSPORT.

Case No. 8480
(Filed July 19, 1966)

Frank Loughran and James M. Soares, for the respondents.
Harold F. Culy and Donald O. Culy as interested parties.
John C. Gilman, Counsel, and E. E. Cahoon, for the Commission staff.

O P I N I O N

By its order dated July 19, 1966, the Commission instituted an investigation into the operations, rates, charges and practices of Sierra Distributing, Ltd., a California Corporation, hereinafter called Sierra, and James M. Soares, doing business as Sacramento Cement Transport, hereinafter called Soares.

A public hearing was held before Examiner Fraser on October 11, 20 and 26, 1967, in San Francisco and the matter was submitted in November after the receipt of several late filed exhibits.

It was stipulated that Sierra holds permits as a radial highway common carrier, a highway contract carrier and a city carrier. All three permits specifically provide that Sierra will not transport "substantially capacity loads of Portland and similar cements", and have other restrictions which are not pertinent to this proceeding. Sierra applied on August 2, 1963 to purchase a highway common carrier certificate which was suspended. The suspension was continued by

Commission order until consummation of the transfer, which was finally accomplished on September 26, 1966, after six requests to extend the time were granted. Sierra is now (November 1967) insolvent and is in the process of transferring these operating rights to another carrier. Soares holds radial and contract carrier permits. He also has a certificate of public convenience and necessity as a cement carrier.

It was further stipulated that Sierra acquired the business, good will, accounts receivable, business name and operating equipment of Soares on or about January 1, 1965. Soares, in payment therefore, received 18,000 shares in Sierra and was appointed its manager of bulk commodities. Soares was a stockholder and employee of Sierra at the time of the transportation referred to herein. Sierra formerly operated out of terminals in Sacramento, Richmond, Long Beach and San Diego, with 85 employees; 24 tractors, 18 flat bed trailers, 119 van trailers, 40 dollies, 44 bottom dump trailers and one pneumatic hopper trailer. All of this equipment is held by the federal government to insure the payment of tax liens. The gross operating revenue of Sierra for the year 1965 was \$2,547,743.

A representative of the Commission's Field Section testified that he reviewed Sierra's records of transportation performed from February 1, 1965 through July 1, 1965; that some of these records were copied and are the basis for the present investigation. The facts are not contested and all exhibits were placed in evidence by stipulation. The evidence developed five issues which briefly are stated as follows:

1. That Soares applied to the Commission and received authority in his own name as a cement carrier on June 23, 1964. He permitted Sierra to haul cement under his authority by an ostensible

partnership agreement with Sierra supposedly executed in 1963. This agreement was not revealed in his application and the Commission was not advised that Sierra was to do the actual hauling. Soares advised that the cement hauling performed by Sierra during 1965 was under his operating authority and the partnership agreement. Soares had the cement certificate amended on July 19, 1966 to eliminate the fictitious name of Sacramento Cement Transport. He discontinued as an employee of Sierra in September of 1966 and then commenced hauling cement as an individual without notice to the Commission or applying to have the authority reissued.

2. That Sierra transported bulk cement in equipment loaded substantially to capacity for A. Teichert and Son without the required authority from the Commission.

3. That Sierra failed to assess and collect the full minimum rate from Gordon H. Ball, Inc. for transportation of highway base material from a gravel pit near Winters to a stretch of U. S. Highway 40 between the intersection of the prolongation of Winters Road with U. S. 40, and the intersection of U.S. 40 with Midway Road (the rate is based on the distance (in actual miles) from the place of pickup to the exact point where the load is left).

4. That Sierra failed to collect full minimum rates from A. Teichert and Son for transportation of plant mix at the Tracy Airport job.

5. That Sierra failed to pay subhaulers their required percentage of minimum rates in connection with transportation performed by subhaulers for Sierra on each of the jobs described in paragraphs 3 and 4.

The first two issues are interrelated and will be considered together. Respondents admitted that Sierra hauled cement under Soares' operating authority as alleged by the staff. Respondents stated that

only a permit was needed when Sierra and Soares started operating and it could have been put in both their names by a simple application and payment of a minimal fee. This was not done due to the advice of the attorney who handled the partnership affairs. He formed the partnership and having little knowledge of Commission regulations he suggested they operate under the Soares permit. When Soares obtained a cement certificate he was still being advised by the partnership attorney. Respondents did not realize their error until after Sierra was ready to discontinue its operation. It was then too late for an application to include Sierra in the authority.

Respondents emphasized that the illegal operation resulted from their following erroneous legal advice. Good service was provided at the legal rates and no one suffered from the discrepancy. The staff vigorously contended that the cement certificate was obtained by a fraudulent representation that only Soares would use it; that the authority was transferred from Soares to Sierra and back without the required authorization from the Commission and that the authority should be revoked. Under the circumstances, revoking the Soares' authority would be too severe a penalty. There is no evidence that anyone was defrauded or prejudiced by the way the certificate was used. Also, there was no showing that Sierra could not have been a participant in the ownership of the cement certificate had proper application been made.

The third issue involves the Gordon H. Ball job. Sierra moved highway base material in dump trucks from a gravel pit near Winters to a highway construction project on Highway 40. The trucks moved from the pit to the construction job using three entry points to the jobsite. The rate to be charged is based on the distance each load is hauled. A witness for Sierra testified it was advised by

Gordon Ball the maximum distance to the job was less than 10 miles and at the start the rating was on this basis. He further testified that he later measured the distance in a pickup truck and noted that distances up to -- but not exceeding -- 11 miles were involved. He stated the rate was immediately increased to reflect the additional mile and then increased again when the subhaulers insisted that they be paid on an hourly basis; this raised the rate to 59 1/2 cents a ton.

A staff witness testified that he drove the distance on two occasions in different cars. Both of the cars had corrected and calibrated odometers. He stated both of the cars he used indicated on their odometers that the distance from the gravel pit to each of the three job entry points was greater than 11 miles (11.6 and 11.5 miles). The staff then argued that as soon as the distance from pickup to delivery exceeds 11 miles the rate is increased to 60 cents per ton and since the respondents charged only 59 1/2 cents or less there are undercharges on all of respondent Sierra's loads. A representative of the respondent testified that he also drove the routes in two cars - a Cadillac and a Lincoln - each equipped with a separate odometer later found to be accurate and measured the distances from point of pickup to the three job entry points as 10.6, 10.7 and 10.6 miles. Sierra's measurements show practically no undercharges from pickup to job site entry, since the routes are all less than 11 miles. It was stipulated that the records of the California State Highway Department are sufficient to indicate that transportation beyond these three entry points and along the highway where the loads were dumped involved distances up to .7 of a mile, which would require an undetermined number of loads to be hauled over 11 miles, thereby establishing a minimum rate of 60 cents a ton in such instances.

The staff recommended a \$1,000 fine for Sierra on the Gordon Ball transportation, plus another \$1500 for unauthorized use of the Soares operating authority. It was further recommended that Sierra be ordered to collect undercharges and to pass on to the subhauler 95 percent of whatever amount is collected.

The respondent's measurement of the distance from pickup to the job entry points will be accepted. The evidence illustrates how odometers can differ even though all are certified as accurate. Even maps are frequently inadequate or out-of-date. We cannot determine how many loads were hauled more than 11 miles. This information is in the records of the Division of Highways which can be reviewed by Sierra without serious difficulty. Sierra will be ordered to determine the amount of undercharges and to collect them. The record does not justify the imposition of a punitive fine against Sierra. The undercharges are not yet known, but any fine will probably never be paid due to a \$60,000 lien for unpaid taxes. It is not practical to order an act to be done which cannot be accomplished unless existing liens are released.

The transportation on the fourth transaction - for A. Teichert and Son - concerns undercharges which have already been paid to Sierra. The latter discovered an error in rating on the Teichert job shortly after the transportation was performed and the shipper was immediately billed for the undercharge. A delay in payment resulted while Teichert investigated and no payments had been received at the time of the staff investigation. The full payment was received before the hearing however and Sierra is ready to pay the additional sums due to subhaulers if the Internal Revenue Service will release the lien it holds against all of Sierra's assets. Sierra will be ordered to make the required payments

to its subhauliers. If the lien is not released the Commission can be so advised. The Soares operating authority will not be revoked, but the record justifies the imposition of a \$500 fine. Soares has operated under Commission authority since 1954. His experience should have provided sufficient insight to prompt his advising the Commission of the plan to lend his operating authority to Sierra. The loan or rental of a carrier's operating authority is illegal and without effect, even though prompted by an honest mistake or the advice of an inexperienced attorney.

The Commission finds that:

1. Respondent Soares operates pursuant to radial highway common carrier and highway contract carrier permits and also under a certificate of public convenience and necessity as a cement carrier.
2. Respondent Sierra operated under radial highway common carrier, city carrier and highway contract carrier permits and under a certificate of public convenience and necessity as a general commodity carrier. Sierra is now insolvent and was recently authorized (Decision 72591, June 9, 1967, in Application No. 49015) to transfer its certificate to another carrier.
3. Respondents were served with the appropriate tariffs and distance tables.
4. Respondent Sierra purchased Soares' business and operating equipment in January of 1965 and the latter became a large shareholder in the former, with both respondents operating under a partnership agreement.
5. Sierra hauled cement without authority during 1965, as alleged. Soares contention that he authorized Sierra to operate under his operating authority is without merit. The legal requirements

for utilizing operating authorities cannot be voided or circumvented by the terms of a partnership agreement.

6. The distance from the point of pickup to the three job entry points on the Gordon E. Ball job is less than eleven miles on each of the three routes, as contended by respondent Sierra. The records of the Division of Highways show the exact point on the job where each load was deposited. Some of the hauls were more than eleven miles and undercharges resulted on these. Sierra should review the records and report all loads hauled over eleven miles, to the Commission, including the involved undercharges, the subhaulers and the amounts due each such carrier.

7. All undercharges have been collected by Sierra on the Truckee Airport job, where the hauling was done for Teichert and Son. Due to Sierra's receivership the subhaulers have not as yet received the 95 percent of the money collected to which they are entitled.

8. No fine should be imposed on respondent Sierra.

9. Soares should be required to pay a fine of \$500.

Based upon the foregoing findings of fact, the Commission concludes that respondent Sierra has violated Sections 1063, 1067, 3664, and 3667 of the Public Utilities Code and that respondent Soares has violated Section 1063 of the Public Utilities Code.

The Commission expects that when undercharges have been ascertained, respondent Sierra will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them and to pay subhaulers. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent Sierra and the result thereof. If there is reason to believe that

respondent Sierra, or its attorney, has not been diligent, or has not taken all reasonable measures to collect all undercharges and pay subhaulers, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent Sierra shall examine the records of the State Division of Highways pertaining to the transportation Sierra performed for the Gordon H. Ball Construction Co. as described previously herein for the purpose of ascertaining the number of loads hauled over eleven miles and the undercharges resulting therefrom.
2. Within ninety days after the effective date of this order, respondent Sierra shall complete the examination of records required by paragraph 1 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.
3. Respondent Sierra shall take such action, including legal action, as may be necessary to collect the undercharges found after the examination required by paragraph 1 of this order, and shall notify the Commission in writing upon the consummation of such collections.
4. In the event undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent Sierra shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of

each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges, and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

5. Respondent Sierra shall review its records on the transportation performed for the Gordon H. Ball Construction Co. and for A. Teichert and Son as described previously herein, and where Sierra employed other carriers to perform the transportation shall pay to such other carriers the difference between what was previously paid to them and 95 percent of the lawful minimum rate. Within one hundred twenty days after the effective date of this order respondent Sierra shall file with the Commission a report setting forth the subhaulers by name and the amount originally paid to each and the further amount found due to each and the action taken to make payment to the said subhaulers.

6. Respondent Soares shall pay a fine of \$500 to this Commission on or before the twentieth day after the effective date of this order.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondents. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 27th day of February, 1968.

[Signature]
President
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Commissioners