

BEM

Decision No. 73772

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into the rates,)
operations and practices of)
W. I. LOYD.)

Case No. 8699
(Filed October 10, 1967)

Morris Michelson, for respondent.
Elmer J. Sjostrom, Counsel, and
J. B. Hannigan, for the Commission
staff.

O P I N I O N

This matter is an investigation on the Commission's own motion into the rates, operations and practices of W. I. Loyd.

Public hearing was held before Examiner Mooney, in Fresno, on November 28, 1967.

Respondent conducts operations pursuant to Radial Highway Common Carrier Permit No. 10-9195. Respondent's office and terminal are located at his home in Clovis. As of January 1967, he operated two dump trucks and 13 trailers and employed one driver and a book-keeper. His gross operating revenue for the year 1966 was \$225,846.48. A copy of Minimum Rate Tariff No. 7, together with all supplements and additions thereto, was served upon respondent.

On January 30 and 31, 1967, a representative of the Commission's Field Section visited respondent's place of business and checked his records for the period November and December 1966. The representative testified that he made true and correct photo-static copies of Distance Rate Notice No. 124-630, invoices, recap sheets and freight bills covering the transportation of sand and gravel for Pacific Cement & Aggregates from Rockfield Plant 124, Rockfield, to Hydro Conduit Corporation, 4150 North Brawley, Fresno,

and that all of the copies are included in Exhibit 1. He pointed out that the charges shown on the documents for all of the transportation in issue were based on an hourly rate of \$14.79 per hour. According to Exhibit 1, all of the transportation was performed by subhaulers. The witness stated that respondent had informed him that an hourly rate was assessed for ease of billing and that the subhaulers were paid 95 percent of said hourly rate computed on the basis of 1 hour and five minutes for each round trip. He asserted that since Distance Rate Notice No. 124-630, which covers the transportation herein, was executed by both the shipper and respondent prior to the commencement of the transportation, distance rather than hourly rates must be applied.

The representative testified that respondent informed him that all of the shipments were transported via the following described route: From Rockfield Plant 124 at Rockfield south along Friant Road to Willow Avenue, south along Willow Avenue to Herndon Avenue, west along Herndon Avenue to Brawley Avenue, south along Brawley Avenue to Hydro Conduit Corporation at 4150 Brawley Avenue. The witness testified that he measured the distance from the scale house at origin to the entrance gate to Hydro Conduit Corporation in a state car via said route and found it to be 17.1 actual miles. He stated that he again checked the distance in another state car on which the odometer had been calibrated and found it to be 17.2 miles.

A rate expert for the Commission staff testified that he took the set of documents in Exhibit 1, together with the supplemental information testified to by the representative, and formulated Exhibit 2, which shows the rate and charge assessed by respondent, the minimum rate and charge computed by the staff and

the amount of alleged undercharges for the transportation covered by the documents in Exhibit 1. He pointed out that Exhibit 2 is divided into 18 parts and that each part relates to the transportation performed by a particular subhauler during a 1-month period. He applied the applicable distance rate of 81 cents per ton in Section 2 of Minimum Rate Tariff No. 7 for 17.2 actual miles to all of the transportation in issue. The witness asserted that because of the distance rate notice, hourly rates were inapplicable. In this connection, he stated that Tariff No. 7 provides, on page 39, that the hourly rates in Section 4 "will not apply when a distance rate notice as specified in Item No. 93 has been executed", and that said tariff also provides, on page 6, that the distance rates in Section 2 "will apply only when a distance rate notice as specified in Item No. 93 has been executed". It is noted that the distance rate notice in Exhibit 1 includes all of the information required to be shown thereon by said Item 93 and covered the entire time period during which the transportation under investigation moved. The rate expert stated that the total amount of the undercharges alleged in Exhibit 2 is \$2,107.29.

Respondent was represented by a public accountant. The accountant stated that respondent is in poor health and had been advised by his physician not to participate in this proceeding. He explained that other than a statement he would make as an appearance in this matter, nothing further would be presented on behalf of respondent.

The statement by the accountant was as follows: Although a distance rate notice had been executed, this was done as a matter of routine and there was no intent by either party that it be used; said notice was, therefore, mutually rescinded by the shipper and

respondent prior to the commencement of the transportation herein; in the circumstances, there was no distance rate notice in effect when the transportation moved, and hourly rates applied; this is evidenced by the fact that an hourly rate and not a distance rate was assessed and collected; the route referred to by the staff, while it does have less turns, is not the shortest and fastest route between origin and destination; the most direct route, which has only three stop signs, is via Friant Road from origin to Blackstone Avenue, thence to Herndon Avenue, thence to Shaw Avenue, thence to destination at 4150 Brawley Avenue; he measured the distance along said route in two automobiles; the odometer on one registered slightly over 15.8 miles, and the odometer on the other registered slightly under 15.8 miles; he personally checked the accuracy of both odometers between measured mile markers on the highway and is of the opinion that they are correct; the elapsed time for each round trip, including loading and unloading time, for the equipment that performed the transportation would have been approximately 55 minutes; the shipper paid on the basis of one hour and five minutes per load, and had any delays occurred, the shipper would have paid for the additional time; the amount paid by the shipper was not below the minimum hourly charge; the subhaulers were paid 95 percent of the amount received by respondent; it was to the advantage of the subhaulers to use the more direct route because they could then make an additional trip per day; even assuming that the distance rate was applicable, the undercharges, based on the direct route, would have been substantially less than that alleged by the staff; the hourly rate was applicable and no undercharges exist.

In closing, counsel for the Commission staff pointed out that the invoices in Exhibit 1 show respondent had assessed distance rates in connection with transportation for the same shipper to other consignees; that the distance rate notice in Exhibit 1 covered the period beginning February 1, 1966, and ending December 31, 1966; and that a new distance rate notice covering the identical transportation involved herein was executed by the same shipper and respondent on January 3, 1967, and covers the period beginning January 3, 1967, and ending December 31, 1967 (Exhibit 3). The staff recommended that in addition to requiring respondent to collect the undercharges shown in Exhibit 2 and paying 95 percent thereof to the subhaulers who performed the transportation, a punitive fine of \$500 be imposed on respondent.

The representative of respondent argued that the facts do not establish that the charges assessed by respondent were incorrect; that to the best of his knowledge, the drivers were instructed to use the route he described; that both the shipper and respondent acted in good faith; that there was no intent by respondent to violate any rate or regulation of the Commission; and that no fine, penalty or other sanction is warranted.

Discussion

We concur with the staff that the transportation in issue was subject to the distance rates in Section 2 of Tariff No. 7 and not the hourly rates in Section 4 of the tariff, as urged by the accountant representing respondent. The evidence presented by the staff clearly establishes that a distance rate notice covering the transportation herein was executed by the shipper and respondent prior to the commencement of said transportation and, by its terms, did not expire until after the completion thereof (Exhibit 1), and

that on the first working day following the expiration date stated in said notice, a new distance rate notice covering the identical transportation was executed by the parties (Exhibit 3). The record further points out that the rules on pages 6 and 39 of Tariff No. 7 specifically provide that when a distance rate notice has been executed by the shipper and carrier, distance rates and not hourly rates will apply.

As hereinbefore pointed out, the statements by the accountant were not made under oath and were in the nature of argument. The unsworn statement by the accountant that neither the shipper nor respondent intended to use or be bound by the distance rate notice is not sufficient to overcome the documentary evidence presented by the staff, which shows that a distance rate notice was in existence during the time the transportation moved. Furthermore, the fact that a new distance rate notice was executed immediately following the expiration date shown in the one with which we are concerned evidences an intent by the parties to be bound by Section 2 distance rates.

Because of the lack of any evidence whatsoever to support the contention of the accountant regarding the distance rate notice, we need not consider on this record the question of whether the parties may, by mutual parol agreement, terminate a distance rate notice prior to the effective date stated therein. However, assuming arguendo that evidence had been presented on this point, our conclusion that distance rates were applicable would not have been altered. The tariff provides the shipper and carrier with an option to select either distance or hourly rates and specifically sets out the procedure to be followed in exercising their selection. If distance rates are to be applied, a distance rate notice is

required. In the absence of such notice, hourly rates are to apply. The parties herein exercised their option by executing the distance rate notice. While Tariff No. 7 does not specifically state whether or not a distance rate notice may be terminated by mutual agreement of the parties prior to the expiration date stated therein, the only logical interpretation of the aforementioned rules is that this may not be done by a parol agreement. The purpose of the referenced tariff rules is clear. It is to make definite and certain the particular rates that are to apply. To allow the parties to rescind a distance rate notice by mutual oral agreement would negate the purpose of the tariff rules in issue and seriously impair uniform enforcement of the tariff.

Having determined that the transportation in issue is subject to distance rates, the next question for our consideration is the distance involved. Item 40 of Tariff No. 7 provides that the distance rates shall be the actual mileage traversed. The accountant and the staff representative did not agree on the route traversed and the resulting actual miles. Here again, the unsworn statement of the accountant on this issue is not sufficient to overcome the testimony of the staff representative which was under oath and subject to cross-examination. In this connection, evidence is defined in Section 140 of the Evidence Code as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact", and Sections 710 and 711 of said code require every witness, before testifying, to take an oath or make an affirmation and be heard in the presence of and subject to cross-examination by all parties involved in the proceeding, if they choose to attend and examine. An unsworn statement is not evidence and is not given the same weight as testimony.

There remains for our determination the question of the amount of penalty, if any, that should be imposed. Based on our holding that a distance rate should have been applied and that the distance involved was 17.2 actual miles, the total amount of undercharges would be \$2,107.29. Having found that undercharges exist, the Commission is required by Section 3800 of the Public Utilities Code to direct respondent to collect said undercharges. We will, therefore, require respondent to collect the undercharges found herein and direct him to pay 95 percent of the amount collected to the subhauliers who performed the actual transportation. In addition, pursuant to Section 3774 of the Code, a fine of \$250 will be imposed on respondent.

Findings and Conclusions

The Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 10-9195.
2. Respondent was served with Minimum Rate Tariff No. 7, together with all supplements and additions thereto.
3. Respondent and the shipper involved executed a distance rate notice for the transportation covered by Exhibit 2 prior to the commencement thereof. Said distance rate notice, by its terms, did not expire until after the completion of the transportation in issue.
4. An executory distance rate notice may not be canceled by mutual oral agreement of the carrier and shipper involved.
5. The transportation covered by Exhibit 2 was subject to the distance rates in Section 2 of Minimum Rate Tariff No. 7.
6. The distance between origin and destination via the route over which the shipments covered by Exhibit 2 were transported was 17.2 actual miles.

7. Respondent charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 2, resulting in undercharges in the amount of \$2,107.29.

8. Respondent paid the subhaulers engaged by him to perform the transportation summarized in Exhibit 2 less than 95 percent of the applicable minimum rates, excluding authorized deductions, as required by Item 94 of Minimum Rate Tariff No. 7.

The Commission concludes that respondent violated Sections 3667 and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$250.

The Commission expects that respondent will promptly pay to the subhaulers engaged to perform the transportation covered by Exhibit 2 the difference between the amounts already paid and 95 percent of the applicable minimum rates, excluding authorized deductions, for said transportation, and that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges shown in Exhibit 2. 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 all underpayments to subhaulers have not been made or that either respondent or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of 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 shall pay a fine of \$250 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent shall pay to the subhaulers engaged to perform the transportation covered by Exhibit 2 the difference between the amounts already paid and 95 percent of the applicable minimum charges, excluding authorized deductions, for said transportation and shall notify the Commission in writing when said payments have been made in full.

3. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein (Exhibit 2) and shall notify the Commission in writing upon the consummation of such collections.

4. Respondent shall promptly pay the underpayments and shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event underpayments ordered to be paid by paragraph 2 or undercharges ordered to be collected by paragraph 3 of this order, or any part of such underpayments or undercharges, remain unpaid or 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 underpayments remaining to be paid and the undercharges remaining to be collected, specifying the action taken to pay such underpayments and to collect such undercharges and the result of such action, until such underpayments have been paid in full and such undercharges have been collected in full or until further order of the Commission.

5. Respondent shall cease and desist from violating any rules established by the Commission and 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.

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 27th day of FEBRUARY, 1968.

[Signature]
President

[Signature]

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Commissioners