

ORIGINAL

Decision No. 74003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the rates, opera-  
tions and practices of HITCHCOCK  
TRANSPORTATION COMPANY, a corpo-  
ration. )

Case No. 8745  
Filed January 9, 1968

William J. Willis, for respondent.  
Elmer Sjostrom, staff counsel.  
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 Hitchcock Transportation Company, a corporation, for the purpose of determining whether respondent, in the operation of its transportation business, violated Sections 3667 and 3737 of the Public Utilities Code by charging and collecting less than applicable minimum rates provided in Minimum Rate Tariff No. 7; by failing to pay subhaulers 95 percent of the applicable minimum charge, less authorized deductions, as required by Item 94 of Tariff No. 7; and by failing to execute a distance rate notice and issue hourly service freight bills as required by Items 93 and 93.1, respectively, of said tariff.

Public hearing was held before Examiner Mooney in Fresno on February 20, 1968, on which date the matter was submitted.

Respondent operates pursuant to Radial Highway Common Carrier Permit No. 16-14, Highway Contract Carrier Permit No. 16-91, City Carrier Permit No. 16-1585, a highway common carrier certificate authorizing the transportation of petroleum products and a petroleum

irregular route carrier certificate. Respondent has a terminal, office and shops in Hanford and will establish temporary terminals at or near the location of jobs it obtains in connection with its dump truck operations. It also has a tank truck terminal in Bakersfield. The investigation herein is limited to respondent's dump truck operations. During the latter part of 1966, the period covered by the investigation, respondent operated 22 tank trucks, 23 full tank trailers and 53 sets of bottom dump trailers and employed 10 office personnel, two salesmen, eight shopmen and 18 drivers. All dump truck transportation is performed by subhaulers who furnish the power units and use respondent's trailer equipment. Respondent's gross operating revenue for the years ending with the third quarters of 1966 and 1967 were \$1,373,108 and \$1,334,400, respectively. For the first three quarters of 1966, respondent's dump truck operations accounted for approximately three fourths of its gross operating revenue. It was served with Minimum Rate Tariffs Nos. 7 and 17 and Distance Table No. 5, together with all supplements and additions to each.

On November 28, 29 and 30, 1966, a representative of the Commission's Field Section visited respondent's place of business and checked its records covering its for-hire dump truck operations for the months of August, September and October 1966. The representative testified that during this period, respondent worked on four different dump truck jobs; that approximately 2,500 freight bills were issued in connection therewith; that all of the transportation was performed for Fresno Paving Company; that no distance rate

notice was executed for any of the transportation;<sup>1</sup> that agreed tonnage rates were orally negotiated by Fresno Paving Company and respondent; and that the hours and hourly charges shown on invoices were the result of converting the agreed tonnage charges to hourly charges by using spurious hours. The staff representative stated that respondent was cooperative and made all records available to him, including records showing the conversion of the agreed tonnage rates to hourly rates.

The representative testified that because of the considerable volume of records covering the 3-month review period, he selected from this period for detailed analysis the records for two days for one job involving the transportation of sand or crushed rock from Pacific Cement and Aggregates, Lemon Cove, to Cement Treated Base Plant, Highway 198, Hanford, the records for one day for another job involving the transportation of crushed rock from Volpa Brothers, Fresno, to a jobsite between Shaw Avenue and Station 1331, and the records for one day for a third job involving the transportation of asphaltic concrete (hot stuff) from Stewart and Nuss, Plant No. 3, Pinedale, to a jobsite at King's Canyon Road and Clovis Avenue. He stated that it was not possible to determine whether charges no lower than applicable hourly charges had been assessed on over 50 percent of the shipments included in the detailed analysis because of lack of information on the shipping documents and in respondent's records covering said shipments. He stated that he made true and correct photostatic copies of 34 freight

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<sup>1</sup> The rules on pages 6 and 39 of Tariff No. 7 provide that distance rates apply only when a distance rate notice has been executed by the carrier and shipper. Since no distance rate notices were executed for the transportation herein, the hourly rates in Section 4 of Tariff No. 7 were applicable.

bills and supporting documents that did include sufficient information to rate and that said documents are all included in Exhibit 1. The 34 freight bills represent 194 separate loads. The witness pointed out that except for the information shown in a blocked space in the upper right hand portion of the freight bills, all of the information on the freight bills, including time data, was recorded by the subhauler who performed the transportation. He testified that respondent recorded the spurious conversion hours and amount charged the shipper and paid the subhauler in the blocked space. It is noted that the subhaulers recorded both time data and weight for each load on the freight bills.

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 for each of the freight bills the converted net time, rate and charge calculated by respondent and the amount paid the subhauler; the actual net chargeable time, rate and charge computed by the staff and the correct amount that should have been paid to the subhauler; and the resulting undercharge and the underpayment to the subhauler. The total amount of the alleged undercharges and underpayments shown in Exhibit 2 are \$344.29 and \$376.61, respectively.

The vice president of respondent testified as follows: Agreed tonnage rates were used and were converted to an hourly basis; no attempt was made to hide this from the staff investigator and he was voluntarily shown all records pertaining thereto; the time data recorded by the subhaulers for each load on the freight bills in Exhibit 1 was inaccurate and in many instances was entirely incorrect; subhaulers are now required to have tachometers on their

equipment and turn in the time chart with each freight bill to verify the time shown thereon; he is of the opinion, based on his understanding of the correct time that should have been shown on the freight bills, that for most of the shipments, the assessed charges were not lower than the applicable minimum hourly charges and the subhaulers were not paid less than Tariff No. 7 requires; in this connection, he requested the staff investigator to accompany him in an unmarked car and follow one of the trucks without the driver's knowledge on the job from Pacific Cement and Aggregates, Lemon Cove, to Cement Treated Base Plant at Highway 198, Hanford, to check the round-trip time; together they clocked the round-trip time to be one hour and 42 minutes, and no illegal operations were observed by the truck during said trip (this was confirmed by the staff representative while he was being cross-examined by the vice president); most of the round-trip times shown for the individual loads on the freight bills in Exhibit 1 for this job substantially exceed this time; in most instances, the subhaulers showed a starting time on the freight bills earlier than the time they were dispatched to report for work; the subhaulers were instructed to take a lunch break of one-half hour from 11:30 a.m. to noon and on some of the freight bills in Exhibit 1 which cover a full day, no deduction is shown for lunch; there is no incentive for subhaulers to produce when payment is on an hourly basis; respondent no longer hauls for Fresno Paving Company; the correct tariff basis for assessing charges is now being used; because of this respondent has lost practically all of its dump truck business and is selling its dump truck equipment; respondent's gross operating revenue from its dump truck operations for February 1968 will be approximately \$200; during the period covered by the investigation,

respondent hired a manager for its dump truck operations who did not come up to expectations and is no longer with the company; the dump truck tariffs have not kept pace with the industry.

Respondent's witness introduced Exhibit 3 in evidence. Said exhibit includes a photostatic copy of each of the freight bills involved herein, together with separate tabulations of the time factors recorded by the subhaulers on the documents and statements of the witness' opinion of what he considered to be obvious errors by subhaulers in recording time on certain of the documents and what he estimates the correct hours to be. The witness' statements in Exhibit 3 admit undercharges in connection with nine of the 34 freight bills included in the staff exhibits and underpayments to subhaulers in connection with 19 of said documents. Except for two of the undercharges, respondent does not agree with the amounts alleged by the staff.

#### Discussion

The record clearly establishes that charges for the transportation under investigation should have been based on the applicable hourly rates in Section 4 of Tariff No. 7 and that the subhaulers who performed the transportation should have been paid 95 percent of the applicable hourly charge, less authorized deductions. In this connection, Item 300 of Tariff No. 7 provides in part that the overall time to be used in computing hourly charges shall be "from time reporting for work to start of last trip plus double the running time of last trip plus unloading time of last load" and shall include "waiting for standby time at origin or destination" but shall not include "delays caused by failure of carrier's equipment or time taken out for meals." The staff rate expert based his computations of the net chargeable time, minimum charge, undercharge and amount

due subhauler shown in Exhibit 2 for the transportation covered by the documents in Exhibit 1 on this formula.

We have carefully reviewed the remarks in Exhibit 3 by respondent's vice president alleging that the time factors recorded by the subhaulers on many of the freight bills in Exhibit 1 were not accurate and that in a number of instances they were obviously wrong. We agree that there is a substantial variance in the loading, unloading and running times shown on certain documents for shipments between the same origin and destination. However, with the exception of Freight Bills 2001 and 12326 (which are grouped together), 6956, 6904 and 0045, we have no factual evidence to support the opinion testimony and statements in Exhibit 3 by the vice president that any of the time data is incorrect or that any of the subhaulers actually took time out for meals without deducting said time, failed to record delays caused by their equipment or showed starting times prior to the time they reported for work. Since no time data was maintained by respondent, the only basis available to us from which a determination can be made as to the net chargeable time is the time factors shown on the documents by the subhaulers. The basic reason for the investigation before us is respondent's failure to maintain required hourly records and predicate its charges thereon. The allegations by the vice president based on his opinion only are not sufficient to refute the documentary evidence presented by the staff to establish net chargeable time for all of the freight bills in issue with the exception of the five listed above.

With respect to Freight Bills 2001 and 12326 (pages 3 and 4 of Exhibit 3 and Part A of Exhibits 1 and 2) which cover transportation by the same truck and driver between the same points on the same day, it is noted that loaded elapsed running time between

origin and destination shown on the documents for the first three loads is exactly 48 minutes each; whereas, the running time shown for the last load is two hours and five minutes. As hereinbefore pointed out, in determining chargeable time, the running time of the last load, which in this case approximately triples the time required for each of the other loads, is doubled. It appears patently obvious that there has been some error in recording running times on this document. Because of the apparent inaccuracy, we will exclude from Part A of Exhibit 2 the amount of undercharge and amount due subhaulers shown in connection with Freight Bills 2001 and 12326.

As to Freight Bills 6956, 6904 and 0045 (pages 30, 31 and 32 of Exhibit 3 and Part D of Exhibits 1 and 2), we concur with respondent's witness that the time data shown thereon is inaccurate. On both Freight Bills 6956 and 6904 the entry covering one load and the time factors shown in connection therewith have been scratched out. The witness explained that in each instance said load was shown on a separate document. Freight Bill 7022 on page 30A of Exhibit 3 includes the load scratched out on Freight Bill 6956. The document on which the load scratched out on Freight Bill 6904 was included was not available. The staff included the scratched out loads in its time calculations in Exhibit 2 for both freight bills. Freight Bill 0045 covering the transportation of "hot mix" shows a starting time of 3:15; whereas, Freight Bill 0044 on page 32A of Exhibit 3 covers the transportation of "base rock" by the same truck and driver earlier on the same day and shows completion of the last unloading at 3:26, 11 minutes after the purported starting time shown on Freight Bill 0045. We will likewise exclude from Part D



of Exhibit 2 the amount of undercharge and amount due subhauler shown in connection with Freight Bills 6956, 6904 and 0045.

There remains for discussion the sanctions, if any, that should be imposed on respondent. The type of violation herein is the so-called rate conversion in which a carrier observes rates other than tariff rates and falsifies its shipping documents to show that minimum hourly rates were assessed. This problem was considered by the Commission in Decision No. 69567, dated August 17, 1965, in Case No. 5437 (64 Cal. P.U.C. 689) wherein it stated that documentation falsification is a serious violation and should be punished by the imposition of heavy fines or suspensions. As to the allegation by the vice president that the matter here under investigation resulted from the actions of respondent's former manager of dump truck operations who is no longer with respondent, it is a well-settled rule of agency that the actions of an employee within the scope of his employment are imputed to his employer.

We will direct respondent to collect the undercharges and pay the amount due subhaulers shown by the staff in Exhibit 2 for all freight bills listed therein except Freight Bills 2001, 12326, 6956, 6904 and 0045. In addition, respondent will be directed to review its records for all other transportation performed for Fresno Paving Company during the period August, September and October 1966, to determine the applicable minimum hourly charge for all of the transportation for which sufficient time data is available to make such determination, and to collect all undercharges and pay the amounts due subhaulers disclosed by said review. Furthermore, we will impose a punitive fine of \$500 on respondent.

Findings and Conclusions

The Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 16-14, Highway Contract Carrier Permit No. 16-91, City Carrier Permit No. 16-1585, a highway common carrier certificate authorizing the transportation of petroleum products and a petroleum irregular route certificate.

2. Respondent was served with Minimum Rate Tariffs Nos. 7 and 17 and Distance Table No. 5, together with all supplements and additions to each.

3. During the period of the investigation herein (August, September and October 1966), respondent engaged subhaulers to perform the actual hauling in connection with all of its dump truck business.

4. For the transportation covered by Exhibit 2, respondent collected charges from the shipper and paid subhaulers on the basis of an agreed tonnage rate between respondent and the shipper.

5. No distance rate notice was executed by respondent and the shipper for the transportation covered by Exhibit 2, and in the absence of said notice, charges billed to the shipper and payments to subhaulers should have been based on the applicable minimum hourly rates set forth in Section 4 of Tariff No. 7.

6. Respondent did not maintain sufficient hourly records from which a determination could be made as to whether charges no lower than the applicable minimum hourly charges were assessed on many of the shipments transported for Fresno Paving Company during the review period or whether the subhaulers who performed the transportation were paid no lower than the amount required by Item 94 of Tariff No. 7.

7. Because of the apparent inaccuracies in the time data recorded by the subhaulers on Freight Bills 2001, 12326, 6956, 6904 and 0045, it is not possible to determine with certainty the amount of undercharges or underpayments to subhaulers, if any, that exist in connection with said documents.

8. With the exception of the freight bills listed in Finding 7, respondent charged less than the lawfully prescribed minimum rates for the transportation covered by the freight bills listed in Exhibit 2, resulting in undercharges in the amount of \$264.79.

9. With the exception of the freight bills listed in Finding 7, respondent paid the subhaulers engaged by it to perform the transportation covered by the freight bills listed in Exhibit 2 less than 95 percent of the applicable minimum charges, excluding authorized deductions, as required by Item 94 of Tariff No. 7, resulting in underpayments to said subhaulers in the amount of \$312.19.

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 \$500.

The order which follows will direct respondent to review its records for all transportation performed for Fresno Paving Company during the months of August, September and October 1966 to ascertain all undercharges and underpayments to subhaulers for the transportation for which sufficient records are available to make such a determination. The Commission expects that when undercharges and underpayments to subhaulers have been ascertained, respondent will proceed promptly, diligently and in good faith to collect the undercharges, including those found herein, and will promptly pay

the underpayments, including those found herein, to the involved subhaulers. 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 respondent or its attorney has not been diligent, or has not taken all reasonable measures to collect the 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 \$500 to this Commission on or before the fortieth day after the effective date of this order.
2. Respondent shall examine its records for all transportation performed for Fresno Paving Company during the months of August, September and October 1966, for the purpose of ascertaining all undercharges and underpayments to subhaulers for the transportation for which sufficient records are available to make such determination.
3. Within forty days after the effective date of this order, respondent shall complete the examination of its records required by paragraph 2 of this order and shall file with the Commission a report setting forth all undercharges and underpayments found pursuant to said examination and shall include therewith a statement indicating the volume of transportation for which sufficient information was not available to determine whether undercharges or underpayments to subhaulers exist and the reasons therefor.

4. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges found herein, together with those found after the examination required by paragraph 2 of this order, and shall notify the Commission in writing upon consummation of such collection.

5. Respondent shall pay the underpayments to subhaulers found herein, together with those found after the examination required by paragraph 2 of this order, and shall notify the Commission in writing when said underpayments have been paid in full.

6. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges and shall promptly pay the underpayments, and in the event undercharges ordered to be collected by paragraph 4 or underpayments ordered to be paid by paragraph 5 of this order, or any part of such undercharges or underpayments, remain uncollected or unpaid sixty days after the effective date of this order, respondent shall forthwith institute legal proceedings to effect collection of the undercharges and shall file with the Commission, on the first Monday of each month after said sixty days, a report of the undercharges remaining to be collected and the underpayments remaining to be paid, specifying the action taken to collect such undercharges and to pay such underpayments and the results thereof, until such undercharges have been collected in full and such underpayments have been paid in full or until further order of this Commission.

7. 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 16<sup>th</sup>  
day of APRIL, 1968.

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President

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*Augustas*  
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*William J. Lyons Jr.*  
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*The J. P. Morrison*  
Commissioners

Commissioner Peter E. Mitchell

Present but not participating.

C. 8745

WILLIAM M. BENNETT, COMMISSIONER, DISSENTING OPINION

One can only judge the correctness of individual decisions as here by noting all decisions of like nature in the transportation field and the disparate treatment accorded. Other cases before us today were not signed out for a variety of reasons. I would not oppose a punitive fine simply because this respondent is being accorded different treatment and not equal treatment.

/s/ WILLIAM M. BENNETT

William M. Bennett  
WILLIAM M. BENNETT  
Commissioner

Dated: San Francisco, California  
April 16, 1968