

Decision No. 74034**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 MIKE
CONROTTO, dba Mike Conrotto Truck-
ing, and EMSEE TRANSPORTATION
COMPANY.

Case No. 8542

Marvin Handler and Norman R. Moon, for
the respondents.
Richard E. Stewart, for Kean Distrib-
uting Company, interested party.
John C. Gilman, Counsel, and J. B.
Hannigan, for the Commission staff.

O P I N I O N

By its order dated October 11, 1966, the Commission insti-
tuted an investigation into the operations, rates and practices of
Mike Conrotto, doing business as Mike Conrotto Trucking, and Emsee
Transportation Company.

A public hearing was held before Examiner Fraser and the
matter was submitted after oral argument by the parties.

Respondent Mike Conrotto, hereinafter called Conrotto,
operates pursuant to a certificate of public convenience and
necessity granted by Decision No. 58996 dated September 15, 1959,
in Application No. 36005, and also under radial, contract, and city
carrier permits. Respondent Emsee Transportation Company, a corpora-
tion, hereinafter called Emsee, operates only under a highway
contract carrier permit. Both respondents operate out of the
Conrotto terminals in Gilroy and Los Angeles. Conrotto operates
with four tractors, one van truck, one van trailer, and three
refrigerated trailers; Emsee has six tractors, two trucks, two van
trailers and four refrigerated trailers. There are 11 drivers, three

dispatchers, two maintenance men and three office workers who are all employed by Conrotto and also work for Emsee. One mechanic is employed by Emsee along with occasional temporary employees needed by the respondents. Operating expenses are prorated between the two respondents. During the four quarters ending with the third quarter of 1966, Conrotto reported a gross income of \$94,324 and Emsee a gross of \$810,866.

It was stipulated by the parties that Mike Conrotto is the president and major shareholder of Emsee and controls the latter; it was further stipulated that all appropriate minimum rate tariffs were served on respondents; also that the staff exhibits could be accepted in evidence without objection; respondents noted that the staff rates were based upon erroneous facts; upon an incorrect interpretation of the law, or on an inoperable theory. The staff stipulated that the permits under which the respondents operate have never been amended to preclude either respondent from operating in the territory or transporting the commodities of the other.

The staff presented evidence on the transportation performed for three shippers. Each shipper was treated separately during the presentation of evidence and will be so considered herein.

Kean Distributing Company

A staff representative visited Emsee's terminal in Gilroy during a four-day period from February 14 to 18, 1966. The records were checked on all transportation performed from July 1, 1965 through February 11, 1966. Hauling was performed for Kean Distributing Company, hereinafter called Kean, from September through January. All freight bills on the shipments transported for Kean were withdrawn, photostated and combined as 19 counts or parts (Exhibit 1, 1-A). It was stipulated that the freight bills

were in order and the correct rates were assessed and collected. Each shipment consisted of produce, which was picked up at several scattered points in the Salinas area by a single truck during the afternoon and delivered by the same truck at the Los Angeles Produce Market early on the following morning. Each pickup is shown by a single freight bill and each shipment by a set of freight bills. Kean has a claim, in respondent's records, attached to the shipping documents on every load transported. These claims are dated from several days to several weeks after the shipment to which they refer and simply identify the freight bills in the shipment and list after each freight bill a sum of money which is totaled at the bottom of the page. The explanation provided is an entry, in ink, which is the same on all of the claims; it reads, with very minor variations, as follows: claim due to damage, shortage and late delivery. The smallest claims total \$18, \$54 and \$78; the largest \$262, \$246, and \$194; the remainder are all for more than \$100 with a few totaling almost \$200. The staff witness testified that he found no correspondence on the Kean claims and no evidence that the loads were returned to the shipper, delivered late, damaged or sold by the respondent. He stated that an employee of the respondent informed him there were no other records and Conrotto told him that "he had to buy these loads and sell them himself." The witness stated that he interrogated several of respondent's drivers who advised him they were usually "on time" in arriving at the Los Angeles Market. The witness testified that Kean paid a total of \$38,939.82 for the transportation of produce and received \$2,985.10 from the respondent on the claims filed. He noted that he found correspondence in respondent's files on claims from other shippers amounting to \$3,744.47. The Kean claims did not even note on the freight bills

that the loads were delivered damaged, short or nonusable. The witness stated that the shipping documents show each load was delivered and paid for in full; then a few days later a separate damage or loss claim was filed by the consignee and paid by the respondent. The witness testified that it appeared to him the claims were an unlawful rebate of a portion of the transportation charge.

Kean testified as follows for the respondent: he had an oral contract with (Conrotto) Emsee wherein it was agreed that Emsee would pick up vegetables and produce from farms in the Salinas area and deliver to the Los Angeles Market by 4:00 a.m. the following morning; the local Los Angeles buyers purchase by the truckload and deliver to their customers before 6:00 a.m.; the buyers have left by the time a late load arrives; if the load is on time the driver parks his truck at the market and leaves; the truck is then handled and unloaded by local men called "swampers"; the regular drivers are frequently gone before the buyer inspects the load and decides whether he wants it; if the load was rejected by the buyer it was usually stored and sold the next day at a discount by Kean; the claim is the difference between the regular sale price and the discounted price; if the Emsee representative (in Los Angeles) was present or accessible, the rejected loads were sometimes turned over to him for sale; normally Kean or Emsee employees were not present when a load arrived, if it wasn't sold Kean was notified and gave his instructions; if a load was delivered substantially after 4:00 a.m. it was not unloaded, as a rule, and the driver had to call the Emsee office in Los Angeles for instructions; these loads were handled by the respondent; it was not practical to make notes on a freight bill or fill out forms when a load was rejected

or if the driver left before the buyer arrived; if the latter did not purchase the load it was some time before Conrotto or Kean heard about it and a day or more before the load could be sold and the amount of loss determined.

Conrotto testified as follows: Emsee agreed to carry produce from Salinas and El Centro to the Los Angeles Produce Market for Kean; the trucks were to leave in the afternoon and deliver by 4:00 a.m. the following morning; the few loads hauled from El Centro arrived on schedule but the Salinas operation produced nothing but trouble; the trucks never left Salinas on schedule; it was necessary to pick up at several farms and no one could be hurried; thus the trucks left Salinas too late to be in Los Angeles by 4:00 a.m.; Kean sold almost all the rejected shipments and charged Emsee on a claim for the difference between the market price and the sale price; a few loads, completely destroyed by water, were returned to Emsee and sold by the latter as salvage; this money was retained by Conrotto but no profit was made on these sales; Kean jobbers had no storage or office space at the Los Angeles Produce Terminal and late or rejected loads were left until Kean or the Emsee man in Los Angeles was notified; loads were rejected if the produce was discolored or too damp, also if there were shortages, i.e., fewer boxes of produce than ordered; this was difficult to detect, even by the driver and unknown to Conrotto who was not present when the trucks were loaded or unloaded; the witness (in Gilroy) and Kean (in Los Angeles) conversed several times a day by phone; the witness was notified of claims in the afternoon over the long distance telephone line; the Emsee representative in Los Angeles always supported Kean and authenticated the claims; Conrotto was in no position to refute the acceptance by the

local representative, who was discharged after the Commission representative started his investigation. The witness testified that Emsee transported produce five and a half months for Kean; all of the 86 hauls are in Exhibit 1. He stated he believed from day to day that the situation would improve, but in spite of meetings and discussions of what needed to be done, supervision was not adequate and the same mistakes were repeated every day. The correct rates were assessed and collected. The claims were accepted and paid because they had already been approved by his representative in Los Angeles and the respondent could not refute them. The witness further testified that he stopped hauling produce for Kean in January of 1966 because he was losing money on every load carried. He stated he is convinced that most or all of the damage was correctly totaled and presented to him and that there is no way now that the claims can be lessened or canceled and the money paid on them returned to respondent.

Discussion: The Conrotto-Emsee Transportation complex earned just under one million dollars during the year prior to the staff investigation. It is evident the business is established, experienced and profit-oriented. We are now advised Conrotto-Emsee hauled 86 loads of produce for the same shipper over a 5-1/2-month period and paid claims for loss or damage on every one. The claims were paid after respondent Conrotto was advised of the supposed damage or loss by a daily telephone call from Los Angeles. The freight bills indicate that each load was delivered and that payment was made. There is no indication on the shipping documents that the produce was damaged, short, or discolored. No evidence of these claims was found in the carrier's claims register or correspondence files. This is particularly relevant since claims from other shippers were noted amounting to \$3,744.47.

Respondent's explanation of how the damage occurred was logical, but these factors are overwhelmed by the lack of written evidence and the number of shipments involved. It is evident that a consignee who is purchasing produce to sell would not tolerate damaged or short loads over a period of almost six months. He would be forced to get another carrier or go out of business. We are also aware of the close margin of profit under which truckers operate and it seems that a carrier involved in the situation pictured here would have ceased hauling in a few weeks. We are, therefore, convinced that the money returned to the shipper constitutes an unlawful rebate and that the carrier should be ordered to collect the amount of the rebate from the shipper and pay a fine to this Commission in the amount of the rebate collected plus a \$500 punitive fine.

Purity Stores

Paragraph 3A of the Order Instituting Investigation, as amended, concerns respondent Mike Conrotto, doing business as Mike Conrotto Trucking, hereinafter called Conrotto, and shipments hauled under his Local Freight Tariff No. 1, for Purity Stores, hereinafter called Purity. The staff alleges that certain shipments were rated as split pickups by Conrotto when each pickup should be a separate shipment, due to the required documents not being prepared until after the hauls were made.

A representative of the Commission's Field Section visited the respondent during the week of February 14 through 18, 1965 and checked the records on the transportation Conrotto performed for Purity. Documents covering 12 shipments performed during July to November 1965 were copied and placed in evidence as Exhibit 4. Purity of Burlingame was consignee on all 12 shipments selected.

The staff representative testified as follows: he interviewed Conrotto and three of the latter's employees in Gilroy; the rate man for the respondent advised him that Purity of Burlingame phones Conrotto in Gilroy on Monday through Friday to advise what they need and want picked up; written instructions to confirm and supplement the phone orders are mailed on Friday night and received at the Conrotto office in Gilroy on Monday of the following week; the Gilroy office mails the information to the Conrotto office in Los Angeles on Monday evening and the latter schedules equipment on Wednesday for pickups to be made on Thursday; the pickups are made on a shipping memo or order prepared by the consignor, with a copy to the driver; the loads picked up are loaded on line-haul equipment and the Conrotto representative in Los Angeles types a part-lot document which consolidates all of the pickups loaded on the line-haul truck; the driver receives several copies and the load is hauled north with no documents other than the paper described; the trucks proceed from Los Angeles to Gilroy where there is a change of drivers; the new driver takes the load to Purity in Burlingame, where it arrives on Friday, the day after the load is picked up in Los Angeles; master freight bills appear to be completely and properly made out and dated but the staff witness stated that his continuing investigation developed the fact that the master bills were actually not received by the respondent until after the shipments are received; the staff witness stated he questioned the Conrotto rate clerk and was advised that Purity does not make up the master bills until two to four days after the loads are hauled (thereby violating the provisions of Items 85 and 160 of MRT No. 2 and Item 170 of MRT No. 8); this statement to the staff witness was confirmed, or at least not denied, by two other employees and

Conrotto, who were present; the staff witness further testified that the Conrotto rate clerk also stated that he knew the shipments should have been rated with each pickup a separate shipment. The staff rate expert placed Exhibit 5 in evidence, which rates each pickup as an individual shipment based upon the testimony of the prior witness and the documents in Exhibit 4. The staff rate expert agreed that if the master bills were prepared as dated the respondent's rates are correct and there are no undercharges.

Respondent produced five witnesses. The transportation manager of the Purity Store in Burlingame testified as follows: The store receives large shipments of fruit, vegetables, groceries, and canned goods; the staff testimony seems to describe the Purity handling of fruits and vegetables, not canned goods and groceries; Purity phones Conrotto daily on fruit and vegetables, which are delivered the following week on a daily basis; all the shipments in Exhibits 4 and 5 are in the canned goods, grocery category, and are handled in a different manner as follows: the Purity Transportation Division receives a phone call from the Purity buyer on every Wednesday; an itemized list of groceries is transmitted for pickup a week later on Thursday; the Purity Transportation Division then prepares the master bills on Thursday or Friday and mails them to Conrotto's Gilroy office; a Purity employee phones Conrotto in Gilroy every Friday to advise of the size and type of shipment to be picked up the next week; this is necessary to be sure the carrier will have sufficient vehicles on hand to do the job; if the master bills have not been mailed by Friday evening they are picked up by a Conrotto driver hauling produce, on either Monday or Tuesday; thus the master bills are in the carrier's possession on Tuesday, at the latest, for pickups scheduled two days later, on Thursday;

the date on the master bill is the date of pickup, which is every Thursday and the weight noted for each item comes from the buying department which has received the information from the seller; grocery orders leaving Purity on Friday are received the following Friday; the testimony of the staff witness that grocery orders from Monday through Friday are called in for delivery on Friday of the second week is in error; if Purity operated this way they would sell out of numerous items several days before the next delivery arrived. Conrotto and the three employees who were present during the staff investigation testified. They corroborated the statements of the Purity witness and denied making any statements to the staff witness that the Conrotto grocery shipments were improperly rated.

Discussion: The master bills were prepared by Purity a week before the shipments moved and were delivered to the respondent before the pickups were made. The respondent's evidence and arguments are most persuasive. This record does not permit the inference that this large shipper would deliberately and continuously violate a tariff provision which is easier and more practical to observe.

Santa Clara Packing Company

Paragraphs 1 and 2 of the Order Instituting Investigation allege that respondent Emsee is a contract carrier and is wholly owned and controlled by Mike Conrotto who holds a highway common carrier certificate; that certain transportation was performed by Emsee within the scope and area of the certificate held by Conrotto under rates different than those listed in Conrotto's published tariff, thereby granting to Santa Clara Packing Company, hereinafter called Santa, the advantage of having its goods hauled at the lesser contract rate, when said hauling should have been performed by Conrotto at the higher rates in the Conrotto Local Freight Tariff No. 1.

It was stipulated that the loads were hauled by Emsee and that the transportation was performed within an area for which Conrotto possessed a certificate of public convenience and necessity pursuant to which he had filed a tariff with this Commission. The staff placed Exhibits 2 and 3 in evidence by stipulation. Exhibit 2 consists of the freight bills and shipping documents on nine shipments hauled by Emsee during the period June to November 1965. Santa was the shipper on the loads, which were destined to various consignees in Los Angeles, Riverside and El Monte; Exhibit 3 is the Rate Statement on the nine shipments referred to in Exhibit 2. Exhibit 3 shows that Emsee hauled all nine loads at a contract rate of 39-1/2 cents per 100 pounds. The applicable rates set forth in the Mike Conrotto Local Freight Tariff No. 1 (included in Exhibit 3) range from a low of 53 to a high of 87 cents per 100 pounds. It was conceded by the staff that if Emsee is considered a separate entity the contract rates charged are proper and that the rates would have been proper for Conrotto if they were published in the Conrotto tariff.

Conrotto testified that he started operating about February 11, 1949 under unrestricted radial highway common carrier and highway contract carrier permits, which were in his own name. He acquired a certificate of public convenience and necessity in 1955 which was amended in 1956 and includes points from Sacramento and San Francisco south to the Mexican border. It is registered with the Interstate Commerce Commission as MC-99614, Sub 1. The witness testified that the certificate was also in his name and he was hauling goods interstate under its authority. He stated that the Interstate Commerce Commission regulations in effect at the time limited drivers to 10 hours of driving and his hauls out of

Los Angeles were requiring 11 or 12 hours of running time. He stated the 10-hour rule caused him concern because the regulation provided that a driver had to operate under the 10-hour maximum for 30 days after each interstate haul, regardless of how the subsequent hauls were classified. He stated all of his drivers hauled under all of his operating authorities and were therefore unable to drive more than 10 hours at a stretch. He decided to form a new entity with only P.U.C. permits to avoid the effect of the 10-hour rules. Emsee was incorporated for this purpose and started operating on June 4, 1956 as a highway contract carrier (Exhibit 6). Emsee's original permit was issued on June 4, 1956 and the Commission subsequently amended the permit on January 19, 1965, February 9, 1965 and March 17, 1965 by its ex parte action. The amendments (Exhibit 6) excluded therefrom operations wholly within certain counties.

Conrotto testified that he called the San Jose office of the Commission in December 1965 and requested that his records and operation be reviewed. A Commission representative phoned him in January of 1966 and advised a man would be sent out as soon as someone became available. Nothing further was heard until an investigator came from San Francisco to institute the present action. He stated the San Jose office advised they did not send anyone and did not even realize that an investigation was to be made until after it had been started. Conrotto's testimony in this respect was corroborated by the Commission representative in charge of the San Jose office who was present and testified. The San Jose representative also testified that his office had examined the Conrotto records in the mid 1950's; that he had known Conrotto for 12 years and Conrotto had always been cooperative.

Respondents' counsel referred to the previous investigation instituted against the respondents herein on December 28, 1960, by Case No. 7041. A hearing was held and briefs were filed by the parties. The joint ownership and management of respondents was made an issue and was known to the Commission. He further advised that the 1960 investigation of the respondents was dismissed by Decision No. 67521, dated July 14, 1964, and Conrotto thereupon was convinced that his entire operation was legal and acceptable to the Commission.

Respondents' counsel also advised that he actively participated in the Pozas (Application No. 44129 of Emile and Florencio Pozas, dba Pozas Brothers) proceeding wherein the following specific restriction was included by Commission order (Decision No. 67338, dated June 3, 1964) in the Pozas radial permit.

"Said carrier shall not engage in the transportation of property over the public highways under this permit when such transportation is covered by the highway common carrier operative authority of Pozas Bros. Trucking Company, a corporation."

Counsel emphasized that the Pozas decision was signed a month prior to the decision which dismissed Case No. 7041. The latter decision neither ordered nor suggested that the Emsee permits be amended although other carriers operating as separate entities under permits and certificates had the Pozas restriction added to their permits by ex parte order. Counsel insisted that Conrotto was thereby given a false impression that his and Emsee's operations were lawful and that he had no reason to believe otherwise until the present proceeding. Counsel stated that the minimum rates have not been compromised since the rate applied was not less than the minimum; it was a legal rate for Emsee and would have been a proper rate for Conrotto had the latter placed it in his

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tariff before applying it. He noted that the shipper involved is an innocent victim and respondents will lose a valued customer if the staff's position is sustained. Staff counsel recommended a punitive fine of \$500 on each of the three types of offense alleged, in addition to a fine in the amount of the alleged undercharges. It was further recommended that the respondent Conrotto collect the alleged rebates from Kean and that a cease and desist order be issued.

Discussion: Emsee performed the transportation at the correct minimum rate. Emsee was operating in an area served by Conrotto as a certificated carrier. Emsee and Conrotto are considered the same entity and the staff therefore alleges that the Conrotto tariff rate must be applied since the law requires that any hauling within the area Conrotto serves as a certificated carrier must be at rates Conrotto is authorized to use as a certificated carrier. The rate charged by Emsee, although not unlawful itself, was less than the rate published in the Conrotto tariff and therefore not available to Conrotto or Emsee. It was stipulated that Conrotto could have published the rate Emsee used and had he done so there would have been no violation. Thus it appears that the most that can be said is that Conrotto inadvertently omitted a technical requirement.^{1/} This differs from the usual undercharge offense where an unlawful, or erroneous, rate is applied and charged. Conrotto's failure to publish the rate does not warrant a severe fine and punitive order directing the collection of substantial undercharges from an innocent shipper.

^{1/} Decision No. 72716, dated July 1, 1967, in Case No. 8471;
Decision No. 73231, dated October 24, 1967, in Case No. 8634.

Respondents may have been misled by the omission of a specific provision in each of the permits held by Emsee providing that the permittee shall not engage in the transportation of property over the public highways under its permits when such transportation is covered by the highway common carrier operative authority of Conrotto. Future doubt will be eliminated by amending the Emsee permits to include such a restriction.

Findings and Conclusions

The Commission finds that:

1. Conrotto operates pursuant to a certificate of public convenience and necessity and radial highway common carrier, highway contract carrier and city carrier permits.
2. Emsee operates pursuant to a highway contract carrier permit.
3. Respondents were served with appropriate tariffs and distance tables.
4. Conrotto is the president and major shareholder in Emsee and the latter is managed and controlled by the former; they may therefore be considered as a single identity.
5. With respect to the transportation performed for Kean Distributing Company, as illustrated in Exhibits 1 and 1-A, the correct rates were assessed and collected and the freight bills correctly made out.
6. The sum of \$2,985.10 in claims was paid by Conrotto to Kean but the evidence fails to justify such payment.
7. The master freight bills concerning transportation performed for Purity Stores and referred to in Exhibit 4 were completed and delivered to Conrotto no later than two days prior

to the day on which the loads were picked up. The dates on the master freight bills are the date of pickup. There are no undercharges on the transportation included in Exhibit 4 and performed by Conrotto for Purity Stores.

8. Respondent Emsee charged less than the lawfully prescribed rates in Mike Conrotto Trucking Local Freight Tariff No. 1 in the instances set forth in Exhibit 3, resulting in undercharges in the total amount of \$1,449.68; but the addition of this sum to the charge already assessed and collected for the transportation of canned goods for Santa Clara Packing Company would be an excessive and unreasonable charge.

Based upon the foregoing findings of fact, the Commission concludes that the Highway Contract Carrier Permit held by Emsee should be amended and that respondent Emsee violated the Public Utilities Code and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$2,985.10, and in addition thereto respondent Emsee should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$500.

O R D E R

IT IS ORDERED that:

1. Emsee Transportation Company shall pay a fine of \$3,485.10 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent Emsee Transportation Company shall take such action, including legal action, as may be necessary to collect the amounts of rebates set forth herein, and shall notify the Commission in writing upon the consummation of such collections.

3. Respondent Emsee Transportation Company shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the rebates; and, in the event rebates ordered to be collected by paragraph 2 of this order, or any part of such rebates remain uncollected sixty days after the effective date of this order, respondent Emsee Transportation Company shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the rebates remaining to be collected, specifying the action taken to collect such rebates and the result of such action, until such rebates have been collected in full or until further order of the Commission.

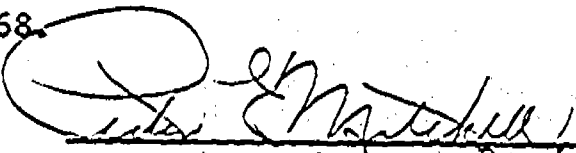
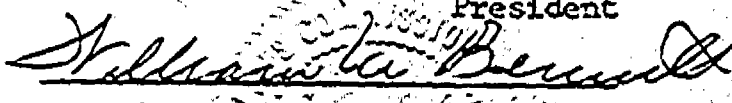
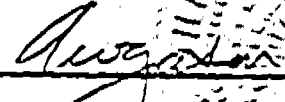
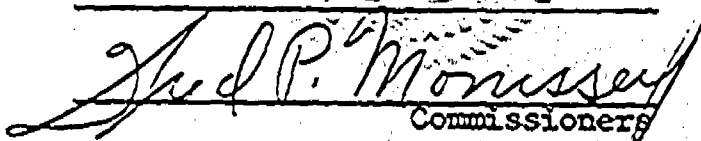
4. Respondent Emsee Transportation Company shall cease and desist from paying, directly or indirectly, any rebates or allowances to any shippers for whom it performs transportation services.

5. On the effective date of this decision, the Secretary of the Commission is directed to cause to be amended Highway Contract Carrier Permit No. 43-4692 issued to Emsee Transportation Company by inserting therein the following restriction:

"Permittee shall not engage in the transportation of property over the public highways under this permit when such transportation is covered by the highway common carrier operative authority of Mike Conrotto, doing business as Mike Conrotto Trucking."

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 30th day of APRIL, 1968.


President



Commissioners

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