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ORIGINAL

Decision No. 74112

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the Commission's own motion into the operations, rates, and practices of WILLIAM H. MARBACH, a sole proprietorship. | ) ) ) ) | Case No. 8648 Filed July 10, 1967 |

William H. Marbach, for respondent.
Allan R. Woodard, for Central Supply Company, interested party.
Sergius Boikan, Counsel, and E. H. Hjelt, for the Commission staff.

## O P I N I O N

By its order dated June 20, 1967, the Commission instituted an investigation into the operations, rates and practices of William H. Marbach, hereinafter referred to as respondent.

A public hearing was held before Examiner Porter on August 3, 1967, in Salinas, and the matter was submitted.

Respondent presently conducts operations pursuant to radial highway common carrier permit. As of August 1966, respondent owned and operated six tractors, six bottom semitrailers and six trailers. On the average respondent employs five drivers. The operating revenue for the last two quarters of 1966 and the first two quarters of 1967 amounted to $85,873. A copy of the appropriate tariff was served upon respondent.

The issue presented in this case concerns the payment of $100 per month per truck unit (tractor and two trailers) for parking on or operating from premises allegedly leased from the Central Supply Company. The lease document refers to an unidentified area of "approximately one acre, as designated by the lessor" and an office building in the shipper's "Building Material Yard at Alisal Street and Work Street, Salinas."

The staff's contention is that the so-called lease agreement constitutes a device whereby the respondent is refunding or remitting a portion of the rates or charges for shipments. In support of this contention, the staff produced evidence that respondent actually utilized approximately one-fourth acre in the yard of Central Supply Company for the parking of his truck units, the balance of the space being occupied or utilized by that company. A real estate appraiser produced by the staff testified that, after study, the fair rental value of the one-fourth acre, used by respondent, would be $100 per month. The value of one acre, if sold, would be approximately $38,000. Respondent had started with monthly payments of $500 per month (5 truck units) which, with the addition of equipment, had increased to $600 per month. The total payments by respondent August 1, 1965 through February 27, 1967 amounted to $6,900.

The respondent presented no evidence.

Central Supply Company (lessor and shipper) presented evidence, through officials of the company, that they had dealt at arms length with the respondent in negotiating the lease, that employees of respondent parked their private cars upon Central Supply Company's premises. It is a convenience to the carrier to be able to park the trucks at the point of departure of shipments. It was the policy of Central Supply Company to attempt to lease nonproductive land held by the company. They attempted to make a return of approximately 12 percent on the rental or leasing of land and they considered the lease rental fair and reasonable.

When carriers and shippers engage in business relationships other than transportation in which payments flow from the carrier to the shipper, the Commission must regard such transactions as suspect and subject to careful investigation. (See Clawson

Trucking Co., 62 Cal. P.U.C. 105, 107; Plywood Trucking Co., 62 Cal. P.U.C. 153, 155).

In Central Valley Transport Co., Decision No. 71739, Case No. 8155 (December 1966), mimeographed pages 9 and 10, the Commission upheld trailer rental payments from the carrier to the shipper as reasonable. On the record in the instant proceeding, however, the Commission cannot so find. The respondent and shipper have the obligation to establish the reasonableness of the transaction and the payments. In this instance, while the rental by the carrier of parking space from the shipper may be reasonable, the record is clear that the rental payment was unreasonable.

Since the unrebutted fact is that the carrier utilized only one-fourth of an acre for the parking of his trucks; and since the testimony of a real estate appraiser is entitled to more weight as to the question of fair rental value, the record justifies the conclusion that the carrier paid more than the reasonable rental value for the leased premises. Of particular significance is the fact that respondent carrier presented no evidence that he in fact uses more of the leased property than the Commission staff observed being utilized.

When the carrier and shipper fail to sustain the obligation of showing the reasonableness of the transaction, we consider the entire transaction as a device to remit or rebate a portion of the transportation charges. To do otherwise would be to sanction a fraud.

The evidence shows that although respondent was paying $500 or $600 monthly for the premises on which his truck units were parked, the reasonable value thereof was only $100. The lease

agreement was nothing more than a device by which respondent remitted to Central Supply Company a portion of its transportation charges. Had the rental price been no more than the reasonable value, the arrangement would have been lawful and this investigation unnecessary.

Findings

1. Respondent made payments of $500 to $600 monthly to Central Supply Company for use of real property, the reasonable rental value of which was $100 monthly.

2. Although the lease agreement contemplated the use of approximately one unidentified acre, respondent in fact utilized only one-quarter acre while the purported lessor retained control and use of the remainder of its real property.

The Commission concludes that the lease arrangement between respondent and Central Supply Company constituted an unlawful device to rebate a portion of the transportation charges paid by Central Supply Company and that respondent has therefore violated Sections 3667 and 3737 of the Public Utilities Code.

## O R D E R

IT IS ORDERED that respondent shall cease and desist 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.

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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 14th day of MAY, 1968.

Peter E. Mitchell
President

William M. Bennett

William Symons Jr.

Commissioners

I dissent - will file a statement
Fred P. Morrissey

I dissent and will file a statement.
Vaughan

MM

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DISSENTING OPINION OF COMMISSIONER GATOV

I am dissenting to the decision of the majority in this case because it violates Section 3800 of the Public Utilities Code and is, therefore, illegal.

I urge the majority to issue a legal decision in this case.

Commissioner

San Francisco, California,
May 20, 1968.

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COMMISSIONER FRED P. MORRISSEY DISSENTING:

I dissent to the decision of the majority in this case and concur with Commissioner Gatov that that decision is illegal.

Although we find the case in question to be a device which violates the minimum rate program, we nevertheless sanction the endeavor with impunity. Our "don't do it again" attitude makes a mockery of our enforcement of the minimum rate tariffs. In the light of this order, carriers and shippers are given the green light to engage in devices which have the effect of circumventing duly established minimum rates.

In my opinion, when a carrier and a shipper engage in transactions, other than transportation, in which the carriers pays the shipper, the carrier (and, if necessary, the shipper) has the duty to establish the reasonableness and validity of those transactions. In this connection, I urge that our policy should be to place the burden of showing the reasonableness and validity of any contract upon the carrier and shipper where minimum rate tariffs are utilized.
A similar policy was aptly stated by Commissioner McKeage in his concurring opinion in the Pearce case, 61 Cal PUR 618. That case involved a similar situation where the carrier paid the shipper on an alleged contract, described as an "equipment rental" contract. Commissioner McKeage said:

> ". . . . In a situation of the kind here presented, the burden, necessarily, must rest upon the carrier and the shipper to prove the bona fides of the alleged agreement whereby the carrier is required to pay compensation to the shipper in connection with the transportation which is the subject matter of the controversy. Were this not true, regulatory authority would find itself at the complete mercy of the connivance between the carrier and the shipper. . . ." Supra at 623.

The burden of establishing the reasonableness and validity of a contract must be met by the parties when the question of the propriety of the contract is brought to the attention of this Commission. Failure to meet this burden of proof should require us to treat the agreement as a device to rebate a portion of the transportation charges, and to impose a fine for the amount of the rebate. To take any other action invites wholesale avoidance of the minimum rate tariff.

Fred P. Morrissey, Commissioner

San Francisco, California
May 20, 1968