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ORIGINAL

Decision No. 74113

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of WILFRED J. FLEURY TRUCKING CO., INC., a California corporation.	)	Case No. 8642

Everett C. McKeage and Roger L. Maino, for respondent.
William C. Bricca, Counsel, and E. E. Cahoon, for the Commission staff.

O P I N I O N

By its order dated June 6, 1967, the Commission instituted an investigation into the operations, rates and practices of Wilfred J. Fleury Trucking Co., Inc. (hereinafter referred to as respondent or carrier), for the purpose of determining whether respondent has violated the provisions of Sections 3664 and 3667 of the Public Utilities Code by refunding or remitting a portion of the minimum rate by the payment of rent pursuant to a lease with the shipper, San Jose Transit-Mix Co. (hereinafter referred to as Transit-Mix or shipper).

A public hearing was held before Examiner Porter on September 8 and 11, 1967, at San Francisco, and the matter was submitted subject to the filing of concurrent briefs. The briefs having been received, the matter is now ready for decision.

It was stipulated that respondent holds operating authority as a radial highway common carrier, a city carrier, and as a cement carrier. It was further stipulated that the operation of respondent which is the subject of this proceeding is regulated by Minimum Rate Tariff No. 7 (Sand, Rock and Gravel), that respondent received the

service of the applicable tariffs, and that the appropriate minimum rate applicable to the transportation provided by respondent is $1.01 per ton.

Respondent engages one full-time driver, one office employee and one mechanic at its terminal in Fremont. Its equipment consists of two tractors and seventeen sets of bottom-dump trailers. Its revenue was $401,851 for the reported four-quarter period ending April 30, 1967. The transportation involved consists of hauling aggregates from a production plant near Pleasanton, California, to San Jose, California.

This transportation consists of hauling by the carrier of rock, sand and gravel to the batching plant in San Jose. This material is used by the shipper to manufacture concrete. Trucks arrive at the batching plant, drive over hoppers (these are pits covered with gratings at ground level) and drop the material which is then hauled by conveyor belts to the batching silo where it is mixed with cement and delivered to concrete hauling trucks. If the pits are full, then the trucks drop the material in the area of the pits (called windrowing) and later the material is pushed into the pits by a skip-loader.

The contract between respondent and Transit-Mix for the above described transportation is oral. In addition, however, there is a written lease between the two parties, renewed from time to time, covering the period from March 1960 to date. The leases provide for the rental of a portion of the shipper's premises and the use of an unspecified dump truck of lessor to be used by lessee in the conduct of respondent's operation. There was testimony that the shipper's skip-loader was used by respondent; however, the skip-loader is not expressly provided for in any of the leases even though they were renewed several times between 1960 and 1966. The rent is $833.33 per month, which was and still is paid by respondent to the

shipper, except for a two-year period, February 1964 to February 1966, during which period the rent was, by oral agreement, reduced to $416.16.

Staff Investigation

The Commission staff contends that this rental payment constitutes a device to circumvent Section 3667 of the Public Utilities Code and that it is incumbent upon respondent to clearly establish that the Commission's approval of the lease payments would pose no reasonable possibility that by so doing it would sanction an unlawful device.

A member of the Commission staff testified that he made an investigation of respondent's operations and records during the period January 4 through 12, 1967. The investigation covered the entire year of 1966 and the first month of 1967. It included about 40 hours in or around the shipper's premises in San Jose. In addition, three days were utilized later during 1967 at the carrier's terminal in Fremont.

With regard to the leases between respondent and shipper the staff investigation revealed that they are printed real estate form leases, each about four pages long; that in the first paragraph they describe certain premises constituting office, storage and garage space for truck terminal parking and the storage of parts and for truck repairs; that an added typewritten paragraph (paragraph 26, page 4) provided for the use of the shipper's dump trucks by the carrier in and about the shipper's premises.

Staff's investigation brought out that the rented office space consisted of a passageway or corridor in the shipper's office building and that while it is occupied by a desk and chair it is not staffed by the carrier. (Tr. 21, 86-7, 111) The storage and garage space was seldom used by the carrier or his subhaulers to park any equipment. (Tr. 25) The garage and maintenance facilities were used only in emergencies and not at all by the subhaulers, who

were responsible for their own maintenance. (Tr. 97) The telephone was not used, and the carrier did not carry a listing in any of the classified sections of the local telephone books indicating that it had a telephone or branch office at the shipper's premises in San Jose. (Tr. 26-8) If the carrier's employees or subhaulers had to telephone from the shipper's premises to the carrier's terminal in Fremont, collect calls were made. (Tr. 26) No records were kept by either party as to the amount of repair service provided by the shipper to the carrier, or as to the number of telephone calls made by the carrier from the shipper's premises, or as to the amount of time the carrier utilized the leased space or equipment. (Tr. 174) One staff witness testified that two truck drivers he interviewed said that they had never used any of the space, equipment or the telephone at the shipper's premises, and that they did not know about the rented office space. (Tr. 33) The staff investigation indicated that while the lease did not mention windrowing as such, some windrowing was conducted by the carrier and subsequently a skip-loader operated by the shipper's personnel would push the windrowed materials into the hopper.

Respondent's Evidence

Respondent presented testimony that under the terms of the oral agreement for transportation he was obligated to keep the hopper filled with sand and gravel and that the lease was agreed to upon the respondent's request to hurry up the unloading and because both parties could use a skip-loader part time. (Tr. 130-1) It was stated that the space for windrowing and the service of the skip-loader are utilized by the carrier about 3-1/2 hours per day, and that this service provided by the shipper saved respondent approximately 6-1/2 hours per day of truck equipment since its loaded trucks would not have to wait before unloading.

The carrier testified that in order to gain a maximum use of its trucks, it was necessary that waiting periods for the trucks to unload be eliminated. The windrowing of the hauled material and the use of the skip-loader eliminate the waiting periods, so that the carrier's trucks were in constant operation and the shipper's hoppers were kept full of material, as required by the transportation agreement between the carrier and shipper.

Both the shipper and carrier testified that the alleged facilities and services furnished by the shipper to the carrier were reasonably worth at least what the carrier paid for them. The carrier presented a witness experienced in the trucking and transportation business who testified that it was important for a carrier to utilize transportation economically, and by the operation employed by the carrier to overcome waiting periods the carrier could save from $40 to $100 a day, and that the reasonable rental value of the skip-loader alone was $600 per month, excluding the cost of the operator. Respondent and shipper's witnesses testified that only occasionally are services provided by the shipper's shop or its mechanics, (Tr. 81, 157), and that occasionally one of the carrier's trucks will be parked overnight on the shipper's premises. (Tr. 89) Respondent stated that the amount of the rent under the lease was originally arrived at from the volume of business involved and what it was worth to the carrier to hurry unloading. (Tr. 93)

Respondent and shipper also introduced numerous photographs which illustrated the lease premises as well as the windrowing and unloading operations on the shipper's premises.

Discussion

The Commission staff contends that the lease between respondent and the shipper constitutes an unlawful device to refund a portion of the minimum rate to the shipper. The record is clear

that little or no use is made of the office, garage or parking facilities provided for in the lease. The primary purpose of the lease lies in making available to the carrier, at its expense, both the space for windrowing materials and the services of the skip-loader to push the windrowed materials into the hopper when it is ready to receive them.

Respondent asserts that the lease is a proper separate and independent agreement, unprohibited by law, by which the carrier pays for legitimate services provided by the shipper. This position assumes that it is the carrier's obligation to provide a skip-loader or some other means to accomplish the windrowing function necessary when the shipper's hoppers are full. The staff maintains that windrowing essentially constitutes stockpiling, which is included as unloading in Item 205 of Minimum Rate Tariff No. 7. Therefore, staff asserts that the tariff provides a rate which contemplates the dumping of material by gravity in the hopper; if the hopper is full because of the shipper's operation of its plant so that windrowing is necessary, it becomes the shipper's obligation to provide the means to accomplish that function.

It can be argued that any payment by a carrier to a shipper is unlawful. We agree that all such transactions are suspect and should be carefully investigated. (See Clawson Trucking Co., 62 Cal. P.U.C. 105,107; Plywood Trucking Co., 62 Cal. P.U.C. 153,155, which involved payments to the shipper's employees). In the Pearce case (Decision No. 68236, dated November 17, 1964, on rehearing in Case No. 7432, 63 Cal. P.U.C. 587, 588-590), the Commission held that an unlawful rebate or refund occurred when the carrier made equipment rental payments to the shipper as compensation for the loading function which was performed by the shipper. The Commission

determined that under Minimum Rate Tariff No. 8 the loading function was the responsibility of the shipper, and therefore the rental payments by the carrier to the shipper were unlawful. (See also Central Valley Transport Co., Decision No. 71739, Case No. 8115, December 1966). In the instant proceeding, Item 205b (3) of M.R.T. No. 7 provides as follows:

> "Unloading shall be effected by dumping into a stock pile, a fixed receiving hopper or a railroad car."

The narrow issue raised in this proceeding is whether windrowing materials constitutes stockpiling; i.e., unloading into a stockpile, thereby completing the transportation function of the carrier.

The Commission is not persuaded by respondent's argument. In a bottom dump truck operation, as present here, it is impossible for the trucks to deposit loads other than in a windrow or a hopper. In order for a carrier to stockpile, a skip-loader would be required to push or lift the materials onto a stockpile because these trucks can dump materials only from below. They cannot unload materials into or onto a stockpile in the same manner as trucks which unload by lifting the truck bed so that the materials slide out the rear. Therefore, unloading by windrowing does constitute stockpiling, and the carrier's transportation function under Item 205, M.R.T. No. 7, ends when the materials are dumped on the ground next to the hopper.

Moreover, photographs introduced into evidence show that the shipper's stockpiles are next to the hopper and that when materials are windrowed they lie within inches of both the stockpile and the hopper. (See Exhibit 7, photographs 6, 7 and 8 in the series; see also Tr. 146). Finally, the shipper, testifying for respondent, explained that the windrowing takes place in front of the kind of stockpiled materials the carrier drops. (Tr. 138,151) Under these circumstances, acceptance of respondent's argument would result in the creation of a legal fiction; namely that windrowed materials

dumped on the ground, but not placed in or on the stockpile, are not unloaded within the meaning of the tariff, but rather are considered to be only temporarily at rest and legally still in transit to the hopper. Under such a theory, regulatory authority would find itself at the complete mercy of connivance between the carrier and the shipper.

Based on the evidence the Commission finds that: (1) the tariff provides a rate which contemplates the dumping of material by gravity in the hopper; if the hopper is full because of the shipper's operation of its plant so that windrowing is necessary, it becomes the shipper's obligation to provide the means to accomplish that function; (2) the leases were a device whereby a portion of the rate for transportation was refunded or remitted to the shipper resulting in a rebate in the amount of $11,249.95; (3) respondent presently holds a radial highway common carrier permit, a city carrier permit and a cement carrier certificate and appropriate tariffs were served upon respondent.

The Commission concludes that respondent violated Section 3667 of the Public Utilities Code. The Commission also concludes, however, that no fine should be imposed in this case because respondent may have been lulled into a false sense of security as to the lawfulness of this lease arrangement. The record demonstrates that the staff had investigated respondent's operations prior to the investigation which resulted in the present proceeding, and that no action was taken by the staff. (Tr. 53-55; 60-61) It was also stipulated that this proceeding is the first time respondent has been before the Commission in formal proceedings. (Tr. 4-5) In view of these facts in mitigation, and the fact that this decision involves the initial interpretation of the term "unloading" in the tariff, no fine will be levied herein. The motion for dismissal of the action is denied.

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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.

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.

President

Commissioners

I dissent and will file a statement

Fred P. Morrissey.

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.

The majority in this opinion went to great lengths to disclose the subtle device which the carrier employed to circumvent established minimum rates. In the same breath, however, they point out that such a device should be overlooked because the Commission staff has conducted prior investigations without action on this contract. Should this Commission be curtailed from effectively enforcing the minimum rate program just because a clever device was not uncovered in past reviews? I think not. I would impose a fine in the amount requested by the staff. Otherwise our effective enforcement of the minimum rate tariff is drastically curtailed.

Fred P. Morrissey

Fred P. Morrissey, Commissioner

San Francisco, California
May 20, 1968