

**ORIGINAL**

Decision No. 74603

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, operations and practices of FRATIANNIO TRUCKING CO., INC.

Case No. 8583  
(Filed January 24, 1967)

Investigation on the Commission's own motion into the rates, operations and practices of O. D. HANSEN, JR. and FRED RECUPIDO, doing business as O L TRUCKING.

Case No. 8584  
(Filed January 24, 1967)

Investigation on the Commission's own motion into the rates, operations, and practices of WESTERN DUMP TRUCK SERVICE, a corporation.

Case No. 8585  
(Filed January 24, 1967)

Investigation on the Commission's own motion into the rates, operations and practices of WM. E. SCARPO, doing business as D & D TRUCKING CO.

Case No. 8586  
(Filed January 24, 1967)

Wien, Thorpe and Sutherland, by  
Lowell F. Sutherland, for Fred  
ReCupido and O. D. Hansen, Jr.,  
doing business as O L Trucking;  
Dooley & Dooley, by David M. Dooley,  
for Western Dump Truck Service;  
James Fratianno, for Fratianno  
Trucking Co., Inc.; and  
William E. Scarpo, for D & D  
Trucking Co.; respondents.  
Berol, Loughran & Geernaert by  
Bruce R. Geernaert and Marshall G.  
Berol, for Miles & Sons Construction  
Division; G. Ralph Grago, for  
Associated Independent Owner-  
Operators, Inc.; interested parties.  
Timothy E. Treacy, Counsel, for the  
Commission staff.

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### O P I N I O N

On December 12, 1967, the Commission found that the above-named respondents had violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging less than the applicable hourly minimum rates for transportation of dirt in dump trucks in accordance with MRT 7. (Decision No. 73475 in Case No. 8584; Decision No. 73476 in Case No. 8585; and Decision No. 73477 in Cases Nos. 8583 and 8586.) The transportation was performed between February 1966 and August 1966 for Miles and Sons Construction Division (Miles) on a portion of the Interstate Highway No. 8 construction job near El Centro. For a more detailed account of this job and background for these cases see the above decisions.

Those decisions directed the Commission staff to review each respondent's records to ascertain all undercharges that occurred on the job. When the undercharges had been ascertained the proceedings were to be reopened to take additional evidence to determine the extent of the undercharges found. Because of the large number of freight bills issued during the period under review (over 5,000) and because the Commission found that the freight bills, in almost all instances, were inaccurately filled out, the Commission set forth a formula to be applied to each freight bill to determine, with reasonable accuracy, the undercharges. The formula is as follows:

"On all freight bills, except on those freight bills which have the words "scales" or "pit scales" inserted in a space provided to show the location at which the driver reported for work, the time for reporting for work shall be computed by adding fifteen minutes to the starting time shown to allow for the driving time from the scales to the pit. To the extent that there are other time factors on the freight bill those time factors shall be used, except that net time for computation of charges shown on the freight bill shall be disregarded in all cases.

"Average times shall be utilized to the extent that accurate time factors cannot be determined from the face of the freight bill. The average time of a round trip was forty minutes, twenty minutes was the average running time of the last load and, therefore, forty minutes was double the running time of the last load. One-half hour is reasonable for allowable deductions; the difference between time arrived to dump last load and time finished last dump is de minimus, and shall be disregarded.

"If chargeable time cannot be determined from the time factors on the face of the freight bill plus utilizing the average times set forth above then the following method of computation shall be used: the number of round trips each truck made each day shall be determined from the weighmaster's time sheets; forty minutes shall be allowed for each round trip; fifteen minutes shall be added to allow for the time between reporting to work and obtaining the first load; and twenty minutes shall be added to allow for double the running time of the last load.

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"Cubic capacity of the trailers shall be that shown on the freight bills. If cubic capacity is not shown then a capacity of 19/20 cubic yards shall be used."

Pursuant to those instructions the Commission staff audited respondents' freight bills for the period in question, ascertained additional undercharges, and requested the cases be set for further hearing. After due notice, further hearings were held in Case No. 8584 in San Francisco on February 29, March 1 and April 8, 1968. By Decision No. 74110 dated May 14, 1968, the submission of Case No. 8584 was set aside and further hearings were held in that proceeding as well as in Cases Nos. 8583, 8585 and 8586 on May 27, 28, 29 and 31, 1968 before Examiner Robert Barnett, after which the cases were submitted. Miles appeared as an interested party.

#### Staff Evidence

At the reopened hearings the staff presented one witness, a rate expert. He testified that five men working under his direct supervision reviewed all records pertaining to respondents' work between February 1966 and August 1966 on the Interstate Highway No. 8 job. The review encompassed over 5,000 freight bills, plus explanatory data, and took over three weeks to complete. The basis of the review was the formula referred to above. As a result of said review it was his opinion that there were undercharges totaling \$77,830.90 itemized as follows: O L Trucking - \$38,775.18; Fratianno Trucking - \$29,183.83;<sup>1/</sup> Western Dump Truck - \$6,143.29;<sup>2/</sup> and D & D Trucking - \$3,728.60.

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<sup>1/</sup> This figure includes \$732.65 in undercharges per Exh. No. 20 less Miles's records of payment.

<sup>2/</sup> This figure is the total of undercharges shown in Exh. Nos. 63 and 64.

On cross-examination, which was limited to the accuracy of the application of the formula to the transportation records, it was brought out that some deductions noted on the freight bills were not allowed. The witness explained that only time for meals and equipment breakdown were deductible items under MRT 7; if a purported deduction did not fall into one of these two categories it was disallowed; judgment had to be applied in determining this matter and some inconsistencies occurred.

Respondents' Evidence

Respondents did not present any evidence in this phase of the proceedings.

Miles's Evidence

A witness for Miles presented undercharge exhibits which made certain adjustments to the staff undercharge exhibits. These adjustments reduced the staff estimate of undercharges by \$22,925.76.

Miles explained its adjustments as follows:

- I. The staff exhibit adds fifteen minutes for travel time from the scale to the loading pit. This adjustment deletes the fifteen minutes in two types of situations as follows:
  - A. Instances when the scale was located at the pit. Decision No. 73475 Finding of Fact No. 12 acknowledges that when the freight bill indicated the scale at the pit by using the words "scales" or "pit scales" the fifteen minute additive is not appropriate. This adjustment removes the additive in those instances when the scale was at the pit (and where this is demonstrable from other evidence).

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- B. Instances when the scale was not at the pit but when the freight bills show that the fifteen minutes for travel time from the scale to the loading pit was provided for by the freight bill itself. This adjustment removes from the staff exhibit the double allowance of the fifteen minute additive.
- II. The staff exhibit in effect adds twenty minutes to the time shown on the freight bills for the completion of the work day. This adjustment removes the twenty minutes where the added time would duplicate time provided for in preparing the document itself and where the twenty minutes added would duplicate the time allowed for at the commencement of the work day as follows:
- A. Instances when the freight bill allows for completion of last trip and the staff exhibit added an additional twenty minute allowance.
  - B. Instances when the scale was at the dump site (jobsite - Dogwood or Highway 111) and the time for commencement of work in the morning commenced at the dump site; thus the allowance of an additional twenty minutes to return from the dump site to the loading pit duplicates time allowed in the morning.
- III. The staff exhibit applies the formula of forty minutes per round trip in those instances where the commencement and terminating times can not be ascertained from the freight bills. This adjustment utilizes the actual starting and terminating times from the scale sheets.
- IV. This adjustment allows for additional down time shown on the freight bills but not allowed by the staff exhibit.
- V. This adjustment reduces the excess time (overtime) charges on those freight bills on which total hours worked have been reduced under categories I through IV above.

Miles's total adjustment in each category for all carriers is as follows:

Carrier	I. 15-Minutes Morning		II. 20-Minutes Evening		III.	IV.	V.	TOTAL ADJUSTMENTS
	I-A	I-B	II-A	II-B	Recalculation	Additional	Excess	
	Pit Scale	Dup.Allow.	Dup.Allow.	Jobsite Scale	Adj.Incompl.Frt.Bills	Downtime	Time	
O L Trucking	\$2,716.61	\$ 325.63	\$ 4.57	\$ 5,018.86	\$ 2,962.03	\$ 316.77	\$1,789.62	\$13,114.09 <sup>3/</sup>
Fratianne	1,586.11			3,222.78	1,491.76		966.81	7,267.46
Western Dump	322.72			1,009.97 <sup>4/</sup>	332.94 <sup>5/</sup>		257.32	1,922.95
D&D Trucking				511.84			79.42	591.26
TOTALS	\$4,625.44	\$ 325.63	\$ 4.57	\$9,763.45	\$4,786.73	\$ 316.77	\$3,093.17	\$22,925.76

<sup>3/</sup> Miles's Ex. No. 60 shows \$13,015.80 as total adjustment; an audit of the individual totals of Ex. No. 60 shows this figure should be \$13,144.09.

<sup>4/</sup> Miles's Ex. No. 65 shows \$877.44 total for this adjustment; an audit of the individual pages of Ex. No. 65 shows this figure should be \$1,009.97.

<sup>5/</sup> Miles's Ex. No. 65 shows \$465.47 total for this adjustment; an audit of the individual pages of Ex. No. 65 shows this figure should be \$332.94.

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In support of its adjustments Miles introduced evidence of the location of the scales on each day of the job. The witness who testified to the location of the scales also testified that over half of the drivers would weigh light in the morning before the loading belt started. It took approximately 20 to 25 seconds to weigh a truck. The scalemaster was told when the belt would begin to operate and he came 15 to 20 minutes before that time in order to give the drivers their tare weight. Not all drivers obtained tare weight prior to their first load. Some waited for the second or third load. Also, the witness testified that it took 30 to 40 seconds to load a truck.

#### Discussion

These reopened proceedings have two purposes: 1) to determine if there are additional undercharges on the El Centro job by applying the formula set forth in the prior decisions in this matter to the underlying freight records; and 2) to determine if the formula, by itself or with modifications, leads to a reasonably accurate result, that is, freight charges which reasonably approximate the proper application of the provisions of MRT No. 7 to the work performed.

We conclude that the formula announced in Decisions Nos. 73475, 73476, and 73477 should be modified to the extent set forth below. The framework of our discussion will be the categories of adjustments suggested by Miles.



I-A. This adjustment of \$4,625.44 will not be allowed. The adjustment is based upon language in the formula wherein we said that "On all freight bills, except on those freight bills which have the words "scales" or "pit scales" inserted in a space provided to show the location at which the driver reported for work, the time for reporting for work shall be computed by adding fifteen minutes to the starting time shown to allow for the driving time from the scales to the pit." Also, we said that we have not "considered waiting time at the pits." (Decision No. 73475, sheet 14.) This language rests upon the record of the prior hearings in these cases where the evidence relating to the location of the scales showed them to be at a place other than at the pits. (See Findings of Fact Nos. 5, 6, & 7 of Decision No. 73475; sheets 5 and 6 of Decision No. 73476; and sheet 6 of Decision No. 73477.)

Relying on the formula Miles sought to show the location of the scales on each day of the job. On those days when the scale was actually located at the pit Miles, by its I-A adjustment, seeks to eliminate the fifteen minute additive which allows for driving time from the scales to the pit. However, the witness for Miles who testified to the location of the scales also testified that the scales were opened at least fifteen minutes prior to the start of the loading belt, and that over 50 percent of the men obtained their tare weight prior to the start of the loading belt. Since time for reporting to work commenced when the trucks weighed light in the morning (Finding of Fact No. 4, Decision No. 73475), the waiting period at the pit between weighing light and beginning to load should be considered.

In those cases where a truck did not weigh light before obtaining its first load that truck also had a waiting period between the time it reported for work and the time it obtained its first load. Such a truck would have to wait for all the earlier arrivals to obtain their loads. With the loading process taking at least 30 seconds per truck and with about 50 trucks on the job, such a wait could be as much as twenty-five to thirty minutes. The trucks had not been ordered to come to work at staggered time intervals. Also, if no trucks weighed light prior to the first load there would still be a waiting period of about thirty minutes between the time the first truck was loaded and the last truck. It is reasonable to include a fifteen-minute time factor to allow for this waiting time between reporting to work and obtaining the first load. When this factor is included Miles's I-A adjustment disappears.

This result is consistent with the treatment we accorded those shipments for which chargeable time could not be determined from the freight bills, where we included a fifteen-minute time factor "to allow for the time between reporting to work and obtaining the first load."

However, we will not require the parties to search the freight bills for those which have the words "scales" or "pit scales" on them in order to add an additional fifteen minutes for waiting time because the number of such bills are small and the expense of the search would be great.

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I-B. This adjustment of \$335.63 will be allowed as it eliminates a duplication for the time between weighing light and obtaining the first load.

II-A. This adjustment of \$4.57 will be allowed.

II-B. This adjustment of \$9,763.45 will not be allowed. The adjustment would remove the twenty-minute travel time allowance which was used to meet the "double the running time of last trip" requirement of Item 300 of MRT 7.<sup>6/</sup> The staff, pursuant to the formula, added twenty minutes in certain cases where the freight bills did not so provide. Miles claims this twenty-minute additive is improper in those cases where the scale was located at the dump site. It argues: the intent and purpose of the tariff provision is to allow the carrier to return to the point from which it commenced work in the morning; in those instances where the work day commenced at the scale and the scale was at the dump site where the carrier made its last dump the carrier was at the point from which it commenced work, therefore there is no reason to add the twenty minutes.

Miles's argument is without merit. Not only was no evidence presented as to the intent of the tariff item but irrespective of the intent of the item the tariff is clear and unambiguous. If the language used is unambiguous, the tariff

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Item 300 states that overall time 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." Freight bills considered in this adjustment only showed ending time of last load not time of start of last trip so a twenty-minute estimate was used to compensate for doubling the running time of the last trip.

provision must be applied in accordance with the literal meaning of the words used. (Chas. Brown & Sons v. Valley Express Co. (1941) 43 CRC 724, 728.) Since this entire adjustment is based on a negation of the plain words of the tariff, it will be disallowed.

III. This adjustment of \$4,786.73 will be modified, and as modified, allowed. The adjustment concerns those freight bills which could not be rated by using information set out on their face. In such situations the staff was instructed to determine chargeable time by using a formula which provided for ascertaining from the weighmaster's time sheets the number of round trips each truck made each day; allowing forty minutes for each round trip; adding fifteen minutes to allow for the time between reporting to work and obtaining first load; and adding twenty minutes to allow for double the running time of the last load. This formula as applied to individual freight bills produced anomalous results. Many freight bills were rated on the basis of from 14 to 18 hour work days, obviously inconsistent with the time actually worked. This result came about because many round trips were less than forty minutes. The length of the trips varied as the distance from pit to dump site varied. The shorter the distance, the more round trips.

Miles rated these freight bills by utilizing the scale sheets which showed the times when the truck crossed the scale with a full load. The number of hours between the time each truck first crossed loaded and the time it last crossed loaded was determined (elapsed time). One-half hour was subtracted for lunch

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and the balance was divided by the number of round trips recorded on the scale sheets (one less than the number of times the truck weighed full across the scale); the result, the average time of a round trip, was then added to the elapsed time to obtain the total time worked. In those instances when Miles's analysis showed that a particular truck was out of service for some time during the day this out-of-service time would be deducted from the elapsed time. No analysis was made of the reasons for the truck being out of service.

Miles's adjustment has obvious deficiencies. It doesn't provide for the time interval between reporting for work and obtaining the first load; without an analysis of the out-of-service time there can be no determination of whether the deduction was authorized by the tariff; and it applied a II-B type of adjustment in those instances where the scales were located at the dump site, thereby depriving drivers on those days of time equivalent to one-half of an average round trip.

However, a fifteen-minute additive to provide for the time interval between reporting to work and weighing the first load should cure the most obvious deficiency in Miles's adjustment. The out-of-service deficiency is minimal, and the deficiency created by the II-B type of adjustment should be absorbed, in part by the fifteen-minute additive and in part by the general averaging process used to obtain the final result. Our modification results in a reduction by \$938.57 of Miles's adjustment, distributed as follows:

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O L Trucking \$756.93; Western Dump Truck \$30.83; and  
Fratianne Trucking \$150.81.

Miles's adjustment will be allowed in the amount of \$3,848.16,  
distributed as follows:

O L Trucking \$2,205.10; Western Dump Truck \$302.11; and  
Fratianne Trucking \$1,340.95.

IV. This adjustment of \$316.77 will not be allowed. The staff, when applying the formula, allowed only those deductions authorized by MRT 7 as shown by the freight bills (lunch and failure of equipment), and disallowed all other deductions. Miles asserts that the formula does not limit deductions to those authorized by MRT 7 and, therefore, all deductions shown on the freight bills should be allowed. The staff method is correct as it more closely approaches the result which would have been reached had MRT 7 been applied correctly in the first instance.

V. The adjustments discussed above were calculated on the basis of regular time for an eight-hour day. However, some of Miles's adjustments were made on freight bills for which the staff had allowed excess time (overtime). Clearly, if the total hours worked are adjusted downward excess time payments must also be adjusted downward. Miles asserts that after analyzing each freight bill on which it made its original adjustment there should be an additional total excess time adjustment of \$3,093.17. We have rerated those freight bills on which we are allowing adjustments and find that an additional amount of \$783.62 should be deducted from the staff undercharge estimate as a reduction in excess time, distributed as follows:

O L Trucking \$470.55; Western Dump Truck \$60.80; and  
Fratianne Trucking \$252.27.

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A summation of the total undercharges is as follows:

<u>Carrier</u>	<u>Staff Undercharges Claimed</u>	<u>Miles's Adjustments Allowed</u>	<u>Total Undercharges Found</u>
O L Trucking	\$38,775.18	\$ 3,015.85	\$35,759.33
Fratianne Trucking	29,183.83	1,593.22	27,590.61
Western Dump Truck	6,143.29	362.91	5,780.38
D & D Trucking	<u>3,728.60</u>	<u>-</u>	<u>3,728.60</u>
Total	\$77,830.90	\$ 4,971.98	\$72,858.92

We wish to emphasize that the Commission formula set forth in the prior decisions as modified by the staff, Miles, and this decision is an attempt to reasonably approximate the charges that should have been made had MRT 7 been correctly applied in the first instance. Perfection was not, and with the evidence available, could not be the goal. Errors have been found in both the staff analysis and Miles's analysis but the time, money, and effort required to correct all errors and refine the analytical procedures to assure greater accuracy are far out of proportion to any results that might be achieved. Under the facts adduced at these hearings we consider the result to be reasonable.

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Some evidentiary matters should be discussed. The staff objected to Miles's Exhibits No. 23 (Fratianne Trucking adjustments), No. 24 (D & D Trucking adjustments), and No. 65 (Western Dump Truck adjustments) on the grounds that Miles had not served the exhibits 10 days prior to the hearing as Miles's attorney had promised, that Miles's attorney did not inform any parties of the exhibits prior to offering them, that the attorney waited until other parties had absented themselves from the hearing before introducing the exhibits, and that the exhibits were prejudicial to the rights of other parties. The evidence was admitted subject to a motion to strike. The motion to strike is denied. These exhibits are similar to that introduced to support adjustments on the O L Trucking freight bills. Miles added nothing new or different to its basic theory of the case. The only party that might have suffered actual prejudice by the late production of these exhibits is Fratianne Trucking but our review of the record shows this to be unlikely. On this record, we will not reject the exhibits merely because they were produced late. There appears no reason to penalize Miles for the acts of its attorney.

The staff also moved to strike evidence concerning the location of the scales for each day of the job on the ground that such evidence should have been introduced during the original hearings in 1967. This motion will be denied. The proffered evidence went to the reasonableness of the formula, a fact in issue in these reopened proceedings.



Miles objected to staff Exhibits Nos. 19 and 20 on the ground that the underlying freight bills were not available so as to test the accuracy of the exhibits. The underlying documents for Exhibit Nos. 19 and 20 were in evidence in a Superior Court case in Imperial County where staff representatives analyzed them. Miles had copies of all of the bills covered by this exhibit. The underlying documents for Exhibit No. 20 were the weighmaster's scale sheets and Miles's records, to all of which Miles had access. Miles's objections are without merit. Miles had access to all the records the staff used, had ample notice of the staff exhibits, did its own analysis of the staff exhibits, and did not request additional time to prepare.

Findings of Fact

1. An average of 50 trucks worked each day on the El Centro job. It took approximately 20 to 25 seconds to weigh a truck. The weighmaster opened the scales at least fifteen minutes prior to the time the loading belt would begin operating. It took thirty to forty seconds to load a truck.

2. Waiting time prior to obtaining the first load should be considered in determining "time reporting for work" as required by Item 300 of MRT 7; fifteen minutes is reasonable to allow for this factor.

3. Freight bills which cannot be rated by using information set out on their face shall be rated in accordance with Miles's proposal by determining from the scale sheets the time each such truck worked each day, plus adding fifteen minutes to provide for the time interval between reporting to work and weighing the first load.

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4. Only those deductions authorized by MRT 7, lunch and failure of equipment, should be allowed.

5. Decisions Nos. 73475, 73476, and 73477 are modified to the extent set forth in Findings of Fact 1, 2, 3, and 4.

6. Based on the formula set forth in Decisions Nos. 73475, 73476, and 73477 as modified by Findings of Fact 1, 2, 3, and 4 herein, the total undercharges for each carrier are:

O L Trucking	\$35,759.33
Fратиanno Trucking	27,590.61
Western Dump Truck	5,780.38
D & D Trucking	<u>3,728.60</u>
Total	\$72,858.92

The Commission concludes that respondents should take such action, including legal action, as may be necessary to collect the \$72,858.92 in undercharges found herein, together with those undercharges previously found in Decisions Nos. 73475, 73476, and 73477, and shall remit to each of the subhaulers used on the El Centro job during the period under investigation 95% of the amounts of such undercharges collected.

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O R D E R

IT IS ORDERED THAT:

1. Each respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges due it or him set forth in Finding of Fact No. 6, plus amounts due it or him pursuant to Decisions Nos. 73475, 73476, and 73477, and shall notify the Commission in writing upon collection.

2. In the event undercharges ordered to be collected by paragraph 1 of this order, or any part of such undercharges, remain uncollected 30 days after the effective date of this order, each respondent who has not collected its full amount shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges, and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

3. Each respondent shall remit to each of the subhaulers it or he used on the El Centro job during the period March, 1966 through August, 1966 on a pro rata share basis, 95 percent of the amounts of undercharges collected pursuant to ordering paragraph 1 of this order.

4. In the event any payments to be made, as provided in paragraph 3 of this order, remain unpaid 30 days after the undercharges referred to in paragraph 1 of this order have been collected, each respondent shall file with the Commission on the first Monday of each month thereafter a report setting forth the action taken to pay the subhaulers and the result of each action until payments have been made in full or until further order of the Commission.

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The Secretary of the Commission is directed to cause service by mail of this order upon respondents, interested parties and all carriers known to the Secretary to have worked for respondents on the Interstate Highway No. 8 construction job at El Centro between March and August, 1966.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 27<sup>th</sup> day of AUGUST, 1968.

William Symons  
President  
Robert E. Mitchell  
Augustus  
Richard P. Monessey  
Commissioners

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