

hjh

ORIGINAL

Decision No. 74955

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of EDGAR L. KELLY, SR., an individual, doing business as CONTINENTAL CARGO CARRIERS, and PLYWOOD LOS ANGELES, INC.

Case No. 8838
(Filed August 27, 1968)

Ed Kelley, in propria persona, respondent.
William David Figg-Hoblyn, staff counsel,
and E. H. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the rates and practices of Edgar L. Kelley, Sr., ^{1/} an individual, doing business as Continental Cargo Carriers (Kelley) and Plywood Los Angeles, Inc. (Plywood), for the purpose of determining whether Kelley in the operation of his transportation business may have violated Sections 3664, 3667 and 3737 of the Public Utilities Code by charging less than applicable minimum rates for the transportation of property performed for Plywood and whether Plywood paid less than applicable minimum rates for said transportation.

Public hearing was held before Examiner Mooney at Stockton on October 9, 1968, on which date the matter was submitted.

During the first 10 months of 1967, the period covered by the investigation herein, Kelley operated pursuant to Radial Highway Common Carrier Permit No. 50-4596 and had a subhaul bond on file with the Commission. During said period, he had a terminal

^{1/} This is the correct spelling of said respondent's name.

at Escalon, hired an office employee part of the time and had two tractors and two sets of trailers. His permit was placed in voluntary suspension for one year on August 29, 1968. Kelley was served with appropriate minimum rate tariffs, distance tables and supplements thereto. His gross operating revenue for the year 1967 was \$43,920.

On various days between April and May 1968, a representative of the Commission's Compliance Section visited Kelley's place of business and examined his records for the period January through October 1967. The representative testified that Kelley was cooperative and made all documents available to him. Kelley hauled approximately 50 shipments as a prime carrier during the review period. Photocopies of the underlying documents and billing statements for 18 of the shipments which were transported for Plywood were received in evidence as Exhibits 1 and 2. The 18 shipments covered the transportation of plywood, ground wood sheets, lumber, asphalt, roofing paper, wire and steel posts and clips. The representative testified that he had determined through personal observation that certain of the origins and destinations of the 18 shipments were not served by rail facilities. A second staff representative testified that he had likewise determined through personal observation that the origin of one of the shipments was not served by rail facilities. A copy of the public weighmaster's certificate issued for the shipment covered by Freight Bill 640 (Part 18 of Exhibit 1) was introduced in evidence by the staff to establish the date of said shipment.

A rate expert for the Commission staff testified that he took the sets of documents and billing statements in Exhibits 1 and 2, together with the supplemental information testified to by the two representatives, and formulated Exhibit 5, which shows the rate and charge assessed by respondent, the rate and charge computed by the staff and the amount of alleged undercharges for the transportation covered by Exhibit 1. The staff alleged that the rate errors shown in Exhibit 5 resulted from assessing incorrect highway carrier and alternative rail rates, assessing flat charges, failure to assess a switching charge, failure to assess off-rail charges and incorrect application of the multiple lot rule. The rate expert testified that the total amount of the undercharges shown in Exhibit 5 is \$1,717.21.

Kelley testified as follows: He has operated his own business since 1963; during the period covered by the investigation, he had a female employee in his office part of the time; she prepared all of the billing and after she left his wife prepared the billing; his wife had no experience in rating; during said period, he was engaged exclusively in driving and was not in the office; he has had no employees for the past year; all of the shipments included in the staff exhibits were transported by subhaulers; he relied on Plywood for rates and on the subhaulers for information as to whether a location was or was not served by rail facilities; many of the shipments in issue herein were backhauls given to his subhaulers by Plywood; Plywood refused to pay the subhaulers direct for said backhauls and in lieu thereof would send the payments to the witness who would remit the entire amount received to the subhaulers; he was informed by Plywood that it would not appear at the hearing

and that it was willing to pay any undercharges that might be disclosed; most of the hauling he performed involved the transportation of commodities not subject to rate regulation; the alleged rate errors were unintentional mistakes on his part, and he is of the opinion that Plywood was not aware that they existed; the hauling he is now performing is not over public highways and is not subject to regulation; in the event he should in the future perform transportation subject to rate regulation, he will obtain the assistance of a traffic consultant to assure that rate errors do not occur in his billing.

Staff counsel recommended a fine in the amount of the undercharges found herein and in addition a punitive fine in the amount of \$500. In reply thereto, Kelley argued that his financial position is in an extremely precarious condition; that he is financially unable to pay any fine whatsoever; and that if he is directed to collect any undercharges from Plywood, he should be allowed to retain the amount collected.

We concur with the ratings and undercharges shown by the staff rate expert in Exhibit 5. We will direct Kelley to collect said undercharges from Plywood and will impose a fine in the amount of the undercharges on Kelley. Based on a review of the entire record, a punitive fine will not be imposed.

Findings and Conclusions

The Commission finds that:

1. During the period covered by the staff investigation (January through October 1967), Kelley operated pursuant to Radial Highway Common Carrier Permit No. 50-4596. Said permit was placed in voluntary suspension by Kelley on August 29, 1968.
2. Kelley was served with all applicable minimum rate tariffs and distance tables, together with all supplements and additions thereto.

3. Kelley charged less than the lawfully prescribed minimum rates for transportation performed for Plywood in the instances set forth in Exhibit 5, resulting in undercharges in the total amount of \$1,717.21.

The Commission concludes that Kelley violated Sections 3664, 3667 and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of said code in the amount of \$1,717.21.

The Commission expects that Kelley will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by Kelley and the results thereof. If there is reason to believe that Kelley or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally 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. Edgar L. Kelley, Sr., shall pay a fine of \$1,717.21 to this Commission on or before the fortieth day after the effective date of this order.

2. Edgar L. Kelley, Sr., shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, and shall notify the Commission in writing upon the consummation of such collections.

3. Edgar L. Kelley, Sr., shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, Kelley shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the undercharges remaining to be collected, 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.

4. Edgar L. Kelley, Sr., 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 respondents Edgar L. Kelley, Sr. and Plywood Los Angeles, Inc. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 19th
day of NOVEMBER, 1968.

William J. Lyons, Jr.
President
William A. Burnett

Augustin
W. P. Morrissey
Commissioners