

ORIGINAL

Decision No. 75175

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
Trucking, and EMSEE TRANSPORTATION
COMPANY. }

Case No. 8542
Filed April 30, 1968

Marvin Handler, for respondents.
William McNertney, Counsel, for
the Commission staff.

INTERIM OPINION ON REHEARING

By Decision No. 74353, dated July 2, 1968, the Commission granted rehearing in the above matter. Rehearing was held before Examiner Daly on November 18, 1968, at San Francisco, and the matter was taken under submission.

By Decision No. 74034, dated April 30, 1968, the Commission found that the sum of \$2,985.10 paid by Emsee Transportation Company (hereinafter referred to as Emsee) to Kean Distributing Company (hereinafter referred to as Kean) for loss and damage claims on shipments transported by Emsee for Kean constituted an unlawful rebate because Emsee failed to keep and produce evidence of said payments. The decision also required Emsee to take whatever action was necessary, including legal action, to collect said amount from Kean. Emsee was also ordered to pay a punitive fine in the amount of \$500.

The original hearings in this matter were held on February 15 and 16, 1967 and March 15, 1967. The time between submission and decision covered a period of approximately 13 months.

On September 13, 1968 respondents filed a complaint against Kean in the Superior Court of the State of California, in and for the County of Santa Clara. An answer to the complaint has raised the statute of limitations as a defense. Respondents allege that because the transportation in question was performed over two, but less than three years, and because it is not clear whether the two-year limitation period of Section 339 of the Code of Civil Procedure, or the four year limitation period of Section 337 of the Code of Civil Procedure, applies, there is a substantial probability that Emsee may be unsuccessful in obtaining any part of the sum ordered to be collected; the order applies to the highway contract carrier (Emsee) as to which either a two-year or four-year statute is applicable depending on whether a contract or contracts in writing can be proved; Emsee is not now able to determine whether such contracts can be shown to have existed, and a detailed review of the records is necessary which will take at least 60 days to complete.

Respondents therefore request the following:

1. An order postponing the effective date of Decision No. 74034 until the Commission has considered a further report to be made by Emsee within 60 days from the date of the new order.
2. Emsee be ordered, within said 60-day period, to submit a report disclosing the facts with respect to the documents issued and executed pertaining to transportation by Emsee for Kean so that it may be determined whether or not the statute of limitations now bars any action against Kean.
3. In the event the statute of limitations does bar such action, the Commission order a remission of the entire fine against Emsee and the requirement that it recover from Kean.

4. In the event the statute of limitations does not appear to bar the action, the Commission remit 50 percent of the fine based on the amount alleged to be owing from Kean in order to assist Emsee in bearing the costs of the action against Kean.

5. The fine of \$500 be canceled.

Mike Conrotto is an individual doing business as Mike Conrotto Trucking. He is also the president and major shareholder of Emsee, a permitted carrier.

It was argued that both companies are having financial difficulties and that the legal costs to date relating to the instant proceeding are in excess of \$4,000. It was also argued that the cost of defending the action plus the loss of business should be punishment enough considering that the total proceeding involves shipments for three shippers (Kean, Purity Stores and Santa Clara Packing Company) and the only violations found by the Commission were those which related to the failure of Emsee to maintain proper records for the small Kean account. In mitigation it was further argued that respondent Conrotto has over the years been diligent in his attempt to cooperate with the Commission's staff in observing the Commission's rules and regulations. This is, assertedly, best exemplified by the fact that he personally called the San Jose office of the Commission in December 1965 and requested that his records and operations be reviewed and although a Commission representative phoned him in January 1966 and advised him that a man would be sent out as soon as someone became available, nothing more was done until a Commission representative from the San Francisco office appeared for the purpose of conducting investigations which ultimately led to the present proceeding.

To avoid any possible conflict it is the intention of Emsee to surrender its permitted authority after December 31, 1968.

It is difficult to see what purpose can be served by studying the report which respondents propose to prepare. If the statute of limitations can be raised as a valid defense, such determination must be made by the court wherein the complaint has been filed.

After consideration the Commission finds that the effective date of Decision No. 74034 should be stayed pending a determination of Complaint No. 211693 filed in the Superior Court in and for the County of Santa Clara. Respondents shall advise the Commission monthly as to the status of said action and within 10 days after determination thereof a copy of the Court's decision shall be filed with this Commission. Upon the filing of a copy of said judgment, further hearing in this matter will be held to determine to what extent, if any, Decision No. 74034 should be modified.

INTERIM ORDER ON REHEARING

IT IS ORDERED that:

1. The effective date of Decision No. 74034 is hereby stayed pending further order of the Commission.
2. Respondents shall duly and diligently prosecute Complaint No. 211693 filed with the Superior Court in and for the County of Santa Clara and shall file with this Commission monthly reports on the status of said proceeding.
3. Within ten days after a decision has been issued in Complaint No. 211693 a certified copy of the judgment shall be filed with this Commission.

4. Submission on rehearing in Case No. 8542 is hereby set aside and further hearing will be held following the filing of a copy of the judgment as required in ordering paragraph 3 hereof.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 7th
day of JANUARY, 196⁹.

William J. ...
President
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Commissioners