

ORIGINAL

Decision No. 75801

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
 own motion into the operations,
 rates, charges and practices of
 JACK ROBERTSON, doing business as
 BOYD TRANSPORTATION; S. ROTH COMPANY;
 MICRACELL CORPORATION, a corporation;
 and LAKE SALES SUPPLY.

Case No. 8896
(Filed February 25, 1969)

Jack Robertson, for Boyd Transportation, respondent.
Gary Hall, Counsel, and E. E. Cahoon, for the
 Commission staff.

O P I N I O N

The Commission by its order of February 25, 1969, instituted an investigation of Jack Robertson, doing business as Boyd Transportation Co. (hereinafter referred to as respondent Robertson); S. Roth Company, Micracell Corporation and Lake Sales Supply (hereinafter referred to collectively as "shipper respondents") were also made respondents.

The purpose of naming shippers as respondents is to allow such persons full notice and opportunity to be heard before the issuance of a Commission decision which could determine the amount of undercharges, if any, incurred on transportation which is the subject matter of the investigation. (Pratt v. Coast Trucking 228 Cal. App. 2d 139, 39 Cal. Rptr. 332; Ryerson v. Riverside Cement Company 266 ACA 866, 72 Cal. Rptr. 595.)

A public hearing was held at San Francisco before Examiner Gilman on March 28, 1969. Respondent Robertson appeared on his own behalf; none of shipper respondents appeared.

Respondent Robertson conducts operations under a radial highway common carrier permit. Respondent Robertson has a terminal in San Leandro; he has two employees and operates two tractors, one van-type semitrailer and two flat bed trailers. Gross revenue in the first two quarters of 1968 was \$30,579.

Respondent Robertson was originally served with the appropriate tariffs and distance tables on September 22, 1967. Because of lapse of insurance coverage, respondent Robertson's permit was revoked effective March 19, 1968. Subsequently, a new permit was issued April 16, 1968; appropriate tariffs were again served on respondent Robertson on April 19, 1968.

A representative of the Commission's Compliance Section called on respondent Robertson on September 17, 1968 and again on October 2, and November 6, 1968. The period of review covered transportation occurring between April 4, 1968 and July 17, 1968. With permission of respondent Robertson, copies of certain freight bills and other shipping documents were made by the representative and forwarded to the Compliance and Enforcement Branch for analysis. On certain shipments supplementary information concerning weights, destination, and commodities shipped was obtained by admission from respondent, since the documents relating to those shipments were incomplete. At hearing, copies of the shipping documents were introduced in evidence, together with testimony by the staff investigator as to the supplementary information.

Analyses of the applicable minimum rates were made by a staff rate expert and introduced into evidence as exhibits. According to Exhibit 2 (relating to Roth Company) the following rating errors

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were made in each of the eight shipments - too low a rate for the commodities carried, failure to assess the Central Coastal Territory surcharge (Supplement 66; after April 27, 1968, Supplement 74) and failure to assess the split delivery charge (Item 171). The undercharges were calculated by the staff witness to be \$907.59 for the Roth shipments.

Shipments consigned by the Micracell Corporation were analyzed in staff's Exhibit 3. Parts 1, 3, 4, 5, 6, and 7 were assertedly improperly rated by carrier as single shipments; the staff expert rated each component of these parts as separate shipments either because of failure to comply with the documentation requirements of Item 170(b) and (c) or because the components were not picked up on a single day as required by Item 170(d). Further, on parts 1-8 the carrier failed to assess the Central Coastal Territory surcharge; on all 9 parts a wrong rate was assessed. By correcting these defects in the rating, the rate expert concluded that the undercharges on transportation for the Micracell Corporation amounted to \$1,680.49.

As to the transportation described in part 4 of Exhibit 3, each of the component shipments was diverted from its originally designated destination, one shipment from Lake Sales, San Jose to Lake Sales, Berkeley, and the other to a firm in San Francisco without extra charge. Staff contended that, since diversion instructions came from Lake Sales, the charges for this portion of the movement should be paid by Lake Sales rather than Micracell, the original consignee. The charges for these movements were calculated by the staff expert to amount to \$135.90.

We conclude it is not appropriate on this record to determine whether Lake Sales or Micracell is responsible for the charges

for the diversions. The Order Instituting Investigation gave no notice to Lake Sales that it might be held responsible for any component movement of Freight Bill No. 570 (part 4, Exhibit 3), and neither Lake Sales nor Micracell appeared at hearing. Consequently, we will find that an undercharge has occurred but refrain from deciding which shipper respondent is responsible for payment.

Exhibit 4 covers two multicomponent shipments for Lake Sales. The staff expert rated the components of both as separate shipments, either because of failure to pick up on a single day or because of documentation inadequacies; in addition, carrier failed to assess an off-rail charge, Central Coastal surcharges and assessed wrong rates. The total undercharges in this exhibit amount to \$108.49.

Respondent Robertson has no past history.

Staff counsel recommended a Section 3800 fine of \$2,237.20 excluding the undercharges incurred between April 4 and April 19, the date of the second tariff service. Staff recommended that the undercharges to be collected should, however, include the amounts incurred prior to the second tariff service under the authority of Webster H. Tennis 63 Cal. P.U.C. 665 and Keller v. Thornton Canning Co. 66 C. 2d 963.

The staff's recommendation for fines indicates some doubt as to whether the initial service of tariffs was somehow rendered ineffective by revocation of respondent's permit, and thus whether consistent with Section 3737, a Section 3800 fine could be imposed for undercharges occurring after that date and before the second tariff service. We conclude that there has been no lapse or hiatus in the obligation created by the initial service of tariffs on respondent. The notice, and therefore the obligation to comply

created by such notice, persisted during both the period when respondent had no operating authority and the period after respondent had reacquired operating authority but had not been re-served with tariffs. There is nothing in either Section 3800 or Section 3737 to indicate that a revocation of operating authority should operate to relieve a carrier of its obligation to comply with the tariffs, once served. Such a holding would be contrary to the purpose of Section 3800 fines - to prevent windfalls to undercharging carriers. Consequently, we will assess a Section 3800 fine in the amount of all of the found undercharges.

Staff also requested a punitive fine in the amount of \$250.

No punitive fine will be imposed based on the following considerations:

- (1) The Section 3800 fine has been increased over the amount requested by the staff.
- (2) There is no indication that the undercharges were willful, or intended to undercut other potential competitors for this traffic. Further, there was no attempt at concealment and respondent cooperated fully with the staff investigation.
- (3) Carrier's gross revenue is comparatively small.

The Commission finds:

1. That respondent Robertson is a highway permit carrier, and since April 16, 1968 has held a permit as a radial highway common carrier.
2. That respondent Robertson was served with appropriate tariffs prior to all of the transportation which is the subject matter of this proceeding.
3. Respondent Robertson charged and shipper respondents paid, less than the lawfully prescribed minimum rates in the instances set forth in Exhibits 2, 3 and 4, resulting in undercharges totaling

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\$2,832.52. The undercharges are a liability of respondent shippers in the following amounts:

S. Roth Company	\$ 907.59
Micracell Corporation	1,680.49
Lake Sales Supply	108.49

4. The Commission finds an additional \$135.95 of undercharges, which is a liability of either Micracell or Lake Sales.

Based on the foregoing findings, the Commission concludes that respondent carrier violated Sections 3664, 3667 and 3737 of the Public Utilities Code, should be ordered to collect undercharges in the amount of \$2,832.52 and should pay a fine pursuant to Section 3800 in the amount of \$2,832.52.

The Commission expects that respondent Robertson 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 respondent Robertson and the results thereof. If there is reason to believe that respondent Robertson or his attorney have not been diligent, or have not taken all reasonable measures to collect all undercharges, or have 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.

ORDER

IT IS ORDERED that:

1. Respondent Robertson shall pay a fine of \$2,832.52 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent Robertson 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. Respondent Robertson 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, respondent Robertson 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.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondents. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 17th day of JUNE, 1969.

William J. ... President
Augusta ...
Shed P. ...
...
... Commissioners