

ORIGINAL

Decision No. 76799

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations, rates
and practices of ORLO M. HOBBS,
CHARLES W. HOBBS, and MILES P. NESBITT,
dba HOBBS TRUCKING COMPANY, and HURST
CONCRETE PRODUCTS.

Case No. 8960
(Filed September 3, 1969)

Russell & Schureman by R. Y. Schureman,
for Orlo M. Hobbs, Charles W. Hobbs,
and Miles P. Nesbitt dba Hobbs
Trucking Company; Knapp, Gill,
Hibbert & Stevens by Karl K. Roos,
for Hurst Concrete Products Inc.,
respondents.
Sergius M. Boikan, Counsel, and
E. H. Hjelt, for the Commission staff.

O P I N I O N

On September 3, 1969 the Commission instituted an investigation on its own motion against Orlo M. Hobbs, Charles W. Hobbs, and Miles P. Nesbitt, dba Hobbs Trucking Company (Hobbs), and Hurst Concrete Products (Hurst). Hobbs was charged with violating the Public Utilities Code by charging, demanding, collecting, or receiving a lesser compensation for the transportation of property than the applicable charges prescribed by the Commission, or by engaging in the device of extending credit to Hurst in violation of Item 250-A of MRT No. 2. Public hearing was held before Examiner Robert Barnett at Los Angeles on October 15, 1969. On that date the matter was submitted subject to the filing of briefs, which have been received.

Staff Evidence

A Commission staff transportation representative testified as follows: He was assigned to examine the records of Hobbs for all of the transportation performed during a particular period of time. During his examination of those records he discovered that there was a substantial amount of money unpaid for transportation by Hobbs for Hurst. He mentioned this matter to Mr. Nesbitt, a partner in Hobbs, who told him that shortly after Hobbs had begun serving Hurst in early 1967 the Hurst account became delinquent. Hobbs then set up a special accounting procedure to keep track of the transportation performed for Hurst, and the delinquent charges. Mr. Nesbitt stated that he was aware of the fact that Item 250-A of MRT No. 2^{1/} prohibited carrying delinquent accounts, but to retain the business it was necessary to continue in this manner. Mr. Nesbitt told him that each operating week Monday through Friday Hobbs would accumulate those freight bills that represented the transportation performed for Hurst, bind them together, total them up and bill Hurst on the following Monday. The witness testified that he correlated

1/ Item 250-A states, in part: "... carriers ... may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days, excluding Sundays and legal holidays other than Saturday half-holidays.... When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill."

checks received from Hurst in payment of Hobbs's billing and found that there was an average of a sixty day lapse between billing and payment. At the time of the investigation there was approximately \$22,000 outstanding in delinquent billing.

The witness testified that as part of his investigation he went to the offices of Hurst in Santa Barbara. At those offices he spoke to William M. Hurst the president of the company. The witness asked for, and received, permission to inspect the books and records of Hurst as they related to the transportation in this matter. From that inspection the witness prepared Exhibit No. 10, a list of all payments by Hurst to Hobbs. The witness testified that during the course of his investigation Mr. Hurst told him that one of the conditions established for granting this account, not only to Hobbs but anybody else that wanted it, would be that they would have to participate in credit arrangements such as this.

The witness testified that during his investigation he discovered that on certain occasions two checks were written for payment of transportation services that were rendered during one period of time. He discussed this matter with Mr. Hurst and he testified that Mr. Hurst told him that there were actually two different corporations involved, but that he (Mr. Hurst) would prefer to treat them as one, just Hurst Concrete Products. The two corporations are Sierra Western Corporation doing business as Hurst Concrete Products of Ventura (operating near Oxnard) and Hurst Concrete Products, Inc. (operating from Santa Barbara). All records for both companies were in Santa Barbara.

The witness testified that he examined all of the bills of lading involved in the transportation and found that none of the transportation moved on government bills of lading nor did the government pay any charges involved in the transportation herein.

Another staff witness testified that he made interest calculations on balances due from Hurst for periods beyond the period authorized by Item 250-A of MRT No. 2. He based his computation on the following premises:

1. Basic interest is applicable to balances August 1, 1967 through February 28, 1969.
2. Weighted average outstanding balances were used as a basis for computing basic interest.
3. The rate of 7 percent as prescribed by Deering's General Laws Act 3757 Section 1 was used.
4. A reduction of the interest applicable was made to give consideration to the requirement of payment of all transportation charges within seven days of presentation of the bill. Nine days was used as the appropriate grace period in this computation to conform with the tariff item, and to consider the effect of Saturdays and Sundays as an additional effective grace period for the payment of charges. Because of their small number and calendar irregularity, other holidays were not considered.

Using the premise that the date of the check was the date of payment, the witness stated that the total interest applicable to the delinquent payments would be \$2,484.

Hobbs's Evidence

Mr. Nesbitt, a partner in Hobbs, testified that he was very familiar with the Hurst account and that he continually made efforts to collect the past due charges. As part of these efforts he contacted an attorney in order to determine the feasibility of filing legal action to collect the past due charges. Mr. Nesbitt said that the attorney advised him that by filing legal action probably not more than 50 percent of the charges could be recovered and there was a possibility of forcing Hurst into bankruptcy. After obtaining this advice Mr. Nesbitt testified that he took no further action toward collecting the account until the staff began its investigations. After the staff investigation began Mr. Nesbitt was successful in obtaining four promissory notes signed by Hurst Concrete Products, Inc.,^{2/} covering the past due accounts, all of which have been paid. Also, he told Hurst that the account must be kept current or it would be put on a cash basis. At present the account is current. Mr. Nesbitt testified that prior to this case Hobbs had not violated the Public Utilities Code nor had he received warnings from the Commission since its inception in business in 1947. He said that the commodity transported for Hurst was storm drain pipe which was carried to public works projects.

^{2/} Each note was in the amount of \$5,484.08 at 3 percent interest and dated February 21, 1969. The notes were payable 60, 90, 120, and 150 days from date, respectively.

Hurst's Testimony

William M. Hurst, the president of both Hurst Concrete Products, Inc., and Sierra Western Corporation, testified as follows: The commodity transported on the freight bills subject to this investigation was concrete storm drain pipe. This commodity was delivered primarily to public works projects and occasionally to subdivisions. Public works projects were subject to bids. The public entity would call for construction bids and the prime contractor who obtained the bid would, in turn, look for materialmen. Hurst would bid for a contract with the prime contractor to supply concrete pipe for drainage. Occasionally Hurst would bid to supply a subcontractor with that item. Prompt payment for material delivered to public works projects is a problem. The practice of the State of California on public works projects is to pay all bills accrued as of the twentieth of a given month. Payment would actually be made to the prime contractors from 15 to 30 days after the twentieth of the preceding month. The prime contractors then paid the materialmen a few days later. If delivery to a public works project was not made until after the twentieth of a month, payment for that material would not be included in the state's remittance until the twentieth of the next month. Therefore, Hurst was late in collecting its bills. The reason that Hurst is now able to pay its transportation bills without delay is because of the favorable termination of litigation (not with Hobbs) which improved Hurst's financial position. At present Sierra Western Corporation is a wholly-owned subsidiary of Hurst Concrete Products, Inc. At the time of the transportation involved herein Sierra Western Corporation was solely owned by the witness, who at that time, and at present, was the major shareholder in Hurst Concrete Products, Inc.

Discussion

In its brief Hurst admits that the underlying facts in this case are not in dispute. But, Hurst asserts that there are three issues in this case, the resolution of any one in Hurst's favor would negate the staff's case. We will discuss these issues separately.

A. Hurst argues that Circle Reference No. 1 in Item No. 250-A exempts the transportation services under consideration from the credit rule. This reference states that the credit rule "will not apply to the transportation of property for the United States, state, county or municipal governments." Hurst argues that the circle reference should be interpreted in the light of Item No. 41 of MRT No. 2 which exempts the transportation of property of the United States from the rates established in MRT No. 2. Hurst argues that transportation of property of the government must have a meaning different from transportation of property for the government. That is, property of the government (including federal, state, or local) clearly means property belonging to the government, but transportation for the government (again, federal, state, or local) clearly has a broader meaning and should include property transported to government works projects. The distinction argued for by Hurst is not persuasive. In our opinion the phrase "transportation of property for the United States, state, county or municipal governments" refers to property either owned or under the control of a governmental agency or property which moves under an agreement whereby a governmental agency is responsible for the transportation charges or

contracts for the carrier's services. None of these situations is present in this case. To accede to the interpretation of Hurst would make enforcement of the credit rule in tariffs containing a provision similar to the circle reference unduly difficult. Governmental bodies, federal, state and local, purchase immense quantities of goods and services of practically all types. Where the governmental entity is a shipper, owner of the property being transported, or a debtor, a field examination of a carrier's shipping documents, receivable register, and payable register would normally reveal the government presence. But where that information is not in the carrier's documents, the carrier itself might not know if any public agencies are involved. Hence, in cases of suspected credit rule violations, it might well be necessary in nearly all instances to check with the shipper and/or consignee; and neither might have the necessary information. Further, in certain types of transportation such as transportation performed by dump trucks, the preponderance of property transported is destined for public works projects. The credit rule in those tariffs (Nos. 7 and 17, Items 45 and 200 respectively) has provisions identical to the circle reference at issue in this case. If the interpretation contended for by Hurst is accepted it may very well be that the credit rule in MRT Nos. 7 and 17 will be swallowed by the exceptions.

B. Hurst asserts that interest, if any, which accumulated on the transportation charges has been paid. It bases this assertion on the fact that the four notes executed by Hurst in favor of Hobbs and accepted by Hobbs in payment of the past due transportation charges specify that interest shall accumulate at the rate of 3 percent per annum. These notes have been paid by Hurst according to their tenor. Hurst asserts that the legal rate of 7 percent applies only when there is no provision in the contract for interest.

Hurst's argument misses the point. If the failure to collect transportation charges promptly is a device to evade the minimum rates then the means of remedying the situation is to place the carrier in the position he would be in had the violation not occurred. Obviously, the carrier and the shipper cannot by agreement preclude the Commission from making that determination. Such a result would permit the carrier and the shipper to settle their claims for less than the minimum rates. If there was a device to avoid minimum rates and if the remedy for such a device is to charge interest at 7 percent then it follows that interest at 3 percent is not adequate. In any case, the violations ran from 1967 to February 28, 1969. The 3 percent notes were dated February 21, 1969. Almost no part of the period of violation was included in the interest coverage.

The duty of a carrier to collect the transportation charges within the time limits prescribed by the various minimum rate tariffs is an effective way of preserving the minimum rate schedule. The shipper must not be allowed to gain any advantage, including the advantage that he would gain from the free use of the carrier's money, as a result of the shipper withholding prompt payment. To remedy this situation interest must be allowed on the amounts delinquent. (See West v Holstrom (1968) 261 Cal App 2d 89, 97.) If no interest were allowed then the only penalty for credit violation would be against the carrier. This does not effectively prevent the shipper from using its economic power to force illegal credit extensions. There must be deterrence for the shipper, and allowing interest on delinquent accounts provides it.

C. Hurst asserts that the Commission has no jurisdiction to determine damages arising out of a contract to pay money. That argument is irrelevant in the context of this case. We are not determining damages arising out of a contract to pay money, we are determining if there was a violation of the minimum rate structure and, if so, what is the proper method of rectifying that violation.

At the hearing Hurst Concrete Products, Inc. argued that Sierra Western Corporation could not be bound by this hearing because it was not named in the order instituting investigation and did not appear. This issue was not pursued in Hurst's brief but we deem it of enough importance to discuss it. Hobbs billed

Hurst Concrete Products in Santa Barbara for all transportation performed. Hurst Concrete Products paid the bill by checks drawn on two accounts; for shipments originating from the Oxnard plant by a check drawn on Sierra Western Corporation dba Hurst Concrete Products of Ventura and for shipments originating from the Santa Barbara plant by a check drawn on Hurst Concrete Products, Inc. The order instituting investigation names Hurst Concrete Products as a respondent; the appearance was made by Hurst Concrete Products, Inc.

We need not determine if Sierra Western Corporation is properly before the Commission. In our opinion, even if Hobbs transported commodities for two separate corporations, Hurst Concrete Products, Inc. undertook to pay the shipping charges incurred. This is borne out by the evidence that Hobbs did business with Hurst Concrete Products; Hobbs only billed Hurst Concrete Products at Santa Barbara; Hobbs had no separate account for Sierra Western Corporation or Hurst Concrete Products of Ventura; Mr. Hurst preferred to treat the two corporations as one, just Hurst Concrete Products; at the time of the transportation in question Sierra Western Corporation was wholly owned by Mr. Hurst and Mr. Hurst was the major stockholder in Hurst Concrete Products, Inc.; and, most significantly, the past due account was finally settled by the issuance of four notes all signed by Hurst Concrete Products, Inc. covering the shipments made from the Oxnard plant and the Santa Barbara plant. From this evidence we conclude that

from the inception of the Hobbs-Hurst shipping transactions Hurst Concrete Products, Inc. undertook to pay all shipping charges, and was delinquent in its undertaking. Therefore, it should bear the burden of such delinquency.

Findings of Fact

1. Hobbs operates pursuant to a radial highway common carrier permit, a highway contract carrier permit, and a certificate of public convenience and necessity. Hobbs has been served with MRT No. 2 and Distance Table 6.

2. Hobbs has been performing transportation services for Hurst since early 1967. Soon after the relationship was entered into the Hurst account became delinquent. Hobbs then set up a special accounting procedure to keep track of the transportation performed for Hurst, and the delinquent charges. There was an average of a 60 days' lapse between billing of charges and the payment thereof during the period from August 1, 1967 through February 28, 1969. Hurst's outstanding indebtedness never fell below \$16,000 and one period was as high as \$37,000. Applying a rate of 7 percent on the weighted average outstanding balances, after allowing for the appropriate grace period permitted by the tariff, and using the premise that the date of Hurst's check was the date of payment, the total interest applicable to delinquent balances for the period of August 1, 1967 through February 28, 1969 is \$2,484.

3. Circle Reference No. 1 in Item No. 250-A states that the credit rule "will not apply to the transportation of property for the United States, state, county, or municipal governments." This exemption does not apply to the transportation involved in this case.

4. Payment of the shipping charges for all transportation involved in this case was undertaken by Hurst Concrete Products, Inc.

5. The failure to collect the lawful tariff charges within the period prescribed by law is a device which permits persons to obtain transportation for property between points within this state at rates less than the minimum rates established by this Commission.

Conclusions of Law

1. Hobbs has violated the provisions of Item No. 250-A of MRT No. 2, Sections 3667, 3668, and 3737 of the Public Utilities Code.

2. Hobbs should be ordered to collect from Hurst Concrete Products, Inc. the sum of \$2,484 which is the interest on credit extended to Hurst Concrete Products, Inc. in violation of Item No. 250-A of MRT No. 2.

3. Hobbs should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$1,000.

4. Hobbs should pay a fine equal to the interest on credit extended to Hurst Concrete Products, Inc., pursuant to Section 3800 of the Public Utilities Code, in the amount of \$2,484.

ORDER

IT IS ORDERED that:

1. Orlo M. Hobbs, Charles W. Hobbs, and Miles P. Nesbitt, dba Hobbs Trucking Company pay a fine of \$1,000 on or before the fortieth day after the effective date of this order.

2. Orlo M. Hobbs, Charles W. Hobbs, and Miles P. Nesbitt, dba Hobbs Trucking Company shall take action, including legal action, to collect the interest on credit extended to Hurst Concrete Products, Inc., in violation of Item No. 250-A of MRT No. 2 in the amount of \$2,484, and shall notify the Commission in writing upon consummation of such collection.

3. Orlo M. Hobbs, Charles W. Hobbs, and Miles P. Nesbitt, dba Hobbs Trucking Company shall pay a fine of \$2,484 as provided by Section 3800 of the Public Utilities Code upon collection of said amount from Hurst Concrete Products, Inc.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each respondent.

The effective date of this order as to each respondent shall be twenty days after the completion of service on the respondent so served.

Dated at San Francisco, California, this 17th day of FEBRUARY, 1970.

William J. Johnson, Jr.
President

August

J. P. Johnson

John P. Johnson

Vernon L. Johnson
Commissioners