

ORIGINAL

Decision No. 77670

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
KELLY TRUCKING COMPANY, a corpora-
tion; and MATICH CORPORATION.

Case No. 8958
(Filed September 3, 1969)

Eric T. Lodge and C. Douglas Alford,
for Kelly Trucking Company,
respondent; no appearance for
Matich Corporation;
William J. McNertney, Counsel, and J. B.
Hannigan, for the Commission staff.

O P I N I O N

This investigation is to determine whether respondent Kelly Trucking Company (Kelly) has violated Section 3737 of the Public Utilities Code in not observing Items 45 and 94 of Minimum Rate Tariff No. 7 by (1) failing to pay subhaulers 95 percent of the applicable minimum rates; (2) failing to pay subhaulers within the required period; (3) exceeding the 5 percent allowable deduction from subhaulers by requiring subhaulers to buy fuel from Kelly at an excessive markup; (4) charging and collecting a lesser compensation for the transportation of property than the charges prescribed by MRT 7; and (5) failing to collect transportation charges within the prescribed credit period. The investigation is also to determine whether Matich Corporation (Matich) paid less than the applicable rates and charges for transportation performed by Kelly. Public hearing was held before Examiner Robert Barnett at San Diego on April 29 and 30, 1970.

Background

This case involves fill hauling in dump trucks during the construction of a portion of Interstate Highway No. 8 between El Centro and Yuma. This particular stretch started about 15 miles east of El Centro and extended easterly for 19.6 miles. Matich was the general contractor for this work and Kelly was the prime contractor for hauling fill. Kelly employed 18 subhaulers plus nine of his own tractors. Kelly worked on this job from November 25, 1968 until May 8, 1969. The alleged undercharges occurred on December 10, 11, and 12, 1968.

The subhaulers picked up fill used in the highway construction at the Ogilby pit, a point which was located 12 miles north of Interstate No. 8 and approximately 22 miles from Winterhaven toward the east and 60 miles from El Centro toward the west. At Ogilby pit Kelly had installed a ten thousand gallon fuel tank plus auxiliary equipment from which truckers obtained their diesel fuel. Kelly charged 30¢ a gallon for this fuel.

Staff Evidence

David Grimes testified that from the period November 25, 1968 through December 20, 1968 he was a subhauler for Kelly on the Interstate No. 8 job; he was told by Forest Webb, Kelly's truck foreman, that he would have to purchase his fuel at the Ogilby pit; he worked for four to five weeks before he found out that he was to pay 30¢ a gallon for the fuel; he has been in the trucking business since 1959 and said it was standard practice to

purchase fuel from the prime contractor; he worked for Kelly for one week in 1967 and at that time he bought fuel from Kelly; on other jobs he usually purchased his fuel requirements from the Richfield bulk plant in El Centro; during the time in question that plant was charging 25.4¢ a gallon for the same fuel that Kelly was selling for 30¢ a gallon; he had a special key to unlock the pump at the Richfield plant at any time of the day or night so that he could obtain fuel; fuel at Winterhaven cost 27¢ a gallon. He testified that it was convenient to have fuel at the job site and all of the truckers obtained their fuel at the job site. Most drivers left their tractors at the pit overnight but those who needed their tractors for transportation at night took their tractors home. He said that it was not worthwhile driving into Winterhaven to obtain fuel but it would have been convenient to drive to El Centro, where he lived, to obtain fuel. Usually, he parked his truck at the pit overnight and drove to El Centro in an automobile with other truck drivers.

Paul Schaefer testified that he was a subhauler for Kelly on this job. He owned his own bulk storage at Calexico. In November 1968 Standard Oil was charging 27¢ a gallon for fuel at Calexico and in June of 1969 Richfield was charging 26.1¢ a gallon. He fueled at the Ogilby pit four days a week and, since he took his tractor home on the weekends, he fueled at home one day a week. He testified that it was not convenient to go elsewhere from Ogilby to fuel. The only close place would have been the service station at Winterhaven but he would have had to pay as much as Kelly charged. He was not told that he was required to buy fuel at the pit.

Darrell Dugger testified that he was a subhauler for Kelly on this job. He purchased his fuel at the Ogilby pit and paid 30¢ a gallon. He didn't know until he was on the job for sixty days that the payment was 30¢ a gallon. At the time he could have purchased fuel from Richfield for 25.9¢ a gallon. He testified Forest Webb had told him that he had to buy his fuel at Ogilby. He would have liked to have bought his fuel at El Centro where he lived and thereby save money on the fuel and travel time. He would have taken his tractor home if he was not required to buy fuel at Ogilby. His tractor got about six miles to the gallon. In the industry it was usual for the prime contractor to charge 2¢ a gallon premium for providing fuel at the job site.

Bob Marshall testified that he was a subhauler for Kelly on this job. He purchased his gas at the Ogilby pit and paid 30¢ a gallon. He first knew of the price when he obtained his first paycheck in January 1969. At this time fuel at the Richfield bulk plant was 25.4¢ a gallon and was increased during the period of the job to 25.8¢ a gallon. He was warned by the Richfield bulk plant operator at El Centro that Kelly wanted all sub haulers to buy fuel at the Ogilby pit. He parked at the pit every night except Friday when he drove his tractor home. Usually, he was about 25 miles from home when he made his last dump. Often he had to refuel during the day. It was not convenient to buy fuel at El Centro when he had to refuel during the working day. He got about seven miles a gallon in his tractor. He had a key for the pump at the Richfield bulk station.

A Commission associate transportation representative testified that he headed a nine-man team which investigated the Interstate 8 job during December 10, 11, and 12, 1968. Part of his investigation was to determine if there were any undercharges. To facilitate this determination he set up six stations along the dump route from the Ogilby pit to the place of dump and return. At each of these stations he had one or more men timing the trucks as they moved through the stations. At the end of the day the staff would get together, collate their times, and determine what the proper charges should have been for the time worked by the drivers. Each morning his staff had a meeting where they synchronized their watches to assure the accuracy of their time checks. During this three-day period Kelly had 18 trucks on the job, all subhaulers.

As part of his investigation he checked Kelly's records for billings and collections. He determined that after the twentieth of each month Kelly would compute all charges since the twentieth of the preceding month and bill Matich. Matich in turn would bill the California Department of Public Works. Matich usually received its funds from the Department by the fifth of the month following the billing. Matich then processed those funds and sent them out to its prime carriers. This was usually done by the fifteenth of the month. The prime carriers then paid the subhaulers. This procedure was followed in this case and as a result all work done between November 25, 1968 and December 20, 1968 was billed for on December 30, 1968. Payment for those

bills was received by Kelly on January 17, 1969, at which time Kelly mailed out checks to all of its subhaulers for their share. At that time Kelly had billed Matich \$28,244. Kelly deducted from the subhaulers' shares trailer rentals, when appropriate, taxes, costs of fuel, and 5 percent of the gross as its service fee.

The witness testified that he then checked out cost of fuel to Kelly and comparable costs in the area. He determined that the fuel Kelly sold at the Ogilby pit cost Kelly 24.55¢ per gallon. The witness went to the Richfield plant at Ontario and was told that Kelly had made arrangements for a ten thousand gallon fuel tank and pump to be installed at the Ogilby pit. Richfield did not charge Kelly for installing the tank and pump. The witness then talked to the Richfield bulk plant manager at El Centro who told him that he would sell fuel for 25.4¢ a gallon. He then went to a Mobil Oil station at Winterhaven where the owner of the station said that he was selling fuel to truckers for 26.9¢ a gallon but in order to get the business on the Interstate No. 8 job he would sell fuel for 26¢ a gallon. The witness then discussed the matter with Mr. Kelly, the president of Kelly Trucking, who said that no pressure was brought to bear on subhaulers to purchase fuel at the Ogilby pit, the subhaulers purchased the fuel voluntarily.

A commission rate expert testified that he had examined the freight bills involved in this case and the time schedules prepared by the staff on the job site. His analysis of these documents led him to the conclusion that for the three-day period December 10, 11, and 12 there were undercharges of \$306.71.

Kelly's Evidence

Mr. John Lorimer a sales representative of the Atlantic Richfield Company testified that he serviced Kelly's request for a ten thousand gallon fuel tank and pump to be installed at the Ogilby pit. There was no charge for the installation or removal of this equipment. Fuel was delivered to this installation by tank truck from Colton. The witness described the bulk plant at El Centro. He said that this plant did not sell to the general public or to all truckers. Only trucks who had made prior arrangements could obtain fuel at the bulk plant. The bulk plant had a special pump which had twenty-two keys. A trucker who was serviced at the plant would be given a key which could be used at any time of the day or night to open the pump and obtain fuel. There was a gauge which showed how much fuel was taken. The bulk plant was one of two in the Imperial Valley, the other being at Brawley. The plant was owned by Richfield, prices were set by Richfield, and policy of operation was set by Richfield.

William Kelly, president of Kelly Trucking, testified that he has been in business since 1953. His only employee on the job during the time in question was Forest Webb his truck foreman. There were eighteen subhaulers on this job. He testified that his billing procedure was as follows: each day all the subhaulers would submit their trip tickets to Mr. Webb who would then send them to the company office. On the twentieth of each month the bills would be totaled and sent to Matich who in turn would bill the Department of Public Works. Matich would get paid about the fifth of the following month and in turn would pay Kelly, who would then distribute the subhaulers' shares. If Kelly were to pay the subhaulers within the time limits provided by Item 94 of MRT 7 he would have had to borrow, at times, as much as \$50,000.

He testified that he did not instruct any of the subhaulers that they had to purchase their fuel requirements at the Ogilby pit, nor did he instruct his truck foreman to instruct the subhaulers. He had to pay a 5 percent sales tax on the difference between 24.55¢ a gallon and 30¢ a gallon. This raised his out-of-pocket costs of supplying fuel to 24.82¢ a gallon. He stated that he had maintenance on the pump on a daily basis and that he had overhead connected with supplying the fuel. He could not break down into specific figures the cost of maintaining the pump or the overhead to supply the fuel. He started charging 30¢ a gallon for fuel in March or April of 1968. Prior to that he was selling fuel at 28¢ a gallon but he decided to change to Richfield fuel, which cost one cent more than the fuel he had been using,

and he added an additional one cent a gallon to cover the general rise in prices. He testified that he never told the manager of the Richfield bulk plant at El Centro to warn the subhaulers against purchasing fuel from the bulk plant, nor did he authorize anyone to make such a statement. In regard to overhead his records show that 614 gallons of fuel was unaccounted for on the job. He introduced bills from subhaulers which showed that they purchased fuel at the Ogilby pit four days out of five.

Discussion

A. Kelly is accused of violating the Public Utilities Code by charging and collecting a lesser compensation for the transportation of property than the charges prescribed by the applicable minimum rate tariff and by failing to pay subhaulers 95 percent of the applicable minimum rates. The staff found undercharges of \$306.71. Matich has already paid this amount and Kelly has agreed to distribute 95 percent of it to the subhaulers.

B. Kelly is charged with violating the Public Utilities Code by failing to collect transportation charges within the prescribed credit period as required by Item 45 of MRT 7 and by failing to pay subhaulers within the period prescribed by Item 94. The applicable sections provide:

Item 45: "(b) Upon taking precautions deemed by them to be sufficient to assure payment of charges within the credit period herein specified, carriers may relinquish possession of the freight in advance of payment of the charges thereon and may extend credit in the amount of such charges to debtors for a period not to exceed the fifteenth day following the last day of the calendar month in which the transportation was performed."

Item 94: "... The underlying carrier may extend credit to the overlying carrier for a period not to exceed twenty days following the last day of the calendar month in which the transportation was performed, and payment to the underlying carrier must be made within that time..."

The manner of billing, collecting, and paying amounts due for transportation on this job is not in dispute. Shortly after the twentieth of each month Kelly would bill Matich for all work done by Kelly since the twentieth of the preceding month. Matich would then bill the entity responsible for payment, in this case the Department of Public Works of the State of California, and would be paid on or about the fifth of the month following billing. Matich would then send each prime carrier its share of the amount received and the prime carrier would then pay the subhaulers. For example, in this case Exhibit 1, Attachment A, shows that Kelly billed Matich in the amount of \$28,244.84. The bill is dated December 30, 1968 and includes twelve working days between November 25, 1968 and December 20, 1968. Mr. Kelly testified that he received payment of this bill January 17, 1969. Exhibit 1, Attachment F, shows that Kelly issued checks to its subhaulers on January 17, 1969 for work performed during the time November 25, 1968 through December 20, 1968. It was testified that the method of billing set forth above is standard practice on highway construction paid for by the Department of Public Works.

For Kelly to have complied with Item 94 it would have had to advance some \$1,800 to subhaulers to pay for work done between November 20 and December 1. In our opinion it is not fair to require Kelly to finance an obligation of the Department of Public Works.^{1/} Nor should Kelly be required to collect these charges from Matich within the period set forth in Item 45, as Matich's position is the same as Kelly's. We conclude that there was a technical violation of Items 45 and 94 but that no penalty should be assessed.

^{1/} Although Matich hired Kelly and Kelly hired the subhaulers, the evidence shows that Matich, Kelly, and the subhaulers looked to the Department of Public Works for their compensation. Their billing was geared to the policies of the Department and the timing of their payments was dependent upon receipt of funds from the Department. All parties relied on the Department as the ultimate source of funds and we cannot close our eyes to the realities of the situation.

C. Kelly is charged with violating Item 94 of MRT 7 by failing to pay subhaulers 95 percent of the applicable minimum rates in that Kelly exceeded the 5 percent allowable deduction from subhaulers by requiring subhaulers to buy fuel from Kelly at an excessive markup. The staff argument is that the cost of fuel to Kelly was 24.55¢ a gallon; that Kelly sold the fuel to the subhaulers for 30¢ a gallon; that Kelly should have sold the fuel to the subhaulers at 24.55¢ a gallon (with no allowance for overhead); and, therefore, that Kelly obtained a rebate from the subhaulers in the amount of 5½¢ a gallon. In order for the staff to prevail the staff must show that Kelly required the subhaulers to buy fuel from it, and that Kelly charged an excessive markup.

(1) The evidence that Kelly required its subhaulers to purchase fuel exclusively from Kelly is that two subhaulers testified that Kelly's foreman told them that they would have to purchase their fuel at the Ogilby pit, and that one subhauler testified that he was told by the manager of the Richfield bulk plant in El Centro that Kelly expected all subhaulers to purchase their fuel at the Ogilby pit. The evidence contra is that one subhauler testified that he was never told that he was required to buy fuel at the Ogilby pit; the president of Kelly testified that he never told any subhauler that he was required to buy fuel at the Ogilby pit nor did he authorize any person employed by him, or speaking on his behalf, to make such a statement; bills from subhaulers who worked on the job showed that they purchased fuel at the Ogilby pit only four days out of five; and there was no evidence that reprisals were taken against any subhaulers who failed to purchase all their fuel at the Ogilby pit.

We find that the subhaulers were not required to buy all their fuel requirements at the Ogilby pit. Bills submitted by the subhaulers to Kelly show that, for those subhaulers submitting bills, at least twenty percent of their fuel requirements were purchased elsewhere than the Ogilby pit. There was testimony that some subhaulers took their tractors home each evening. There is no testimony as to where they purchased their fuel. One subhauler testified he was never told that he must purchase fuel at the Ogilby pit; and one said he was told of the requirement by the manager of the Richfield bulk plant, certainly a roundabout method of coercion. Kelly knew within one week of the start of the job that the subhaulers were not purchasing fuel each day at the Ogilby pit. Yet there is no evidence that any subhauler was penalized in any way for failing to purchase fuel at the Ogilby pit.

(2) A strong factor in determining whether subhaulers were required to purchase fuel from Kelly is the price at which Kelly sold fuel. If the record showed that subhaulers were paying excessive rates for fuel then we could infer that they were being coerced into paying those excessive rates. However, if the rates were not excessive, not only would this be evidence of lack of coercion, but it would also show a failure of proof of the material allegation in the Order Instituting Investigation that there was an "excessive markup," and would be strong evidence that there was no rebate. The purchase of a necessary commodity by a subhauler from a prime carrier at a reasonable price is not usually considered a rebate. (Re Clawson Trucking (1963) 62 CPUC 105, 106.) Our analysis of the evidence leads us to conclude that Kelly's rate of 30¢ a gallon was not excessive.

Whether Kelly's rate is excessive depends not so much upon Kelly's costs but upon the cost of alternate fuel available to the subhaulers. Subhaulers are required to be ready to work at the beginning of the work day. This means that their truck must be fueled. Subhaulers must also obtain fuel, as needed, during the working day. There was testimony that fuel could be purchased for 25.4¢ a gallon at the Richfield bulk plant at El Centro. Two subhaulers testified that they had keys to operate the pump at this bulk plant and could have obtained fuel at the 25.4¢ price. There was also testimony that only 22 keys were available at the bulk plant, that the bulk plant did not sell to any trucker who requested service, and that a trucker had to establish credit in advance before being served. There was no evidence that all of Kelly's subhaulers had keys to the bulk plant pump. One subhauler testified that he had his own storage in Calexico. It would be coincidence if all 18 subhaulers involved in this case were among the 22 who had keys to operate the bulk plant pump. Other evidence of comparable prices was that fuel could have been purchased at Winterhaven at 26.9¢ a gallon and that a Standard Oil station in Calexico sold fuel for 27¢ a gallon. In addition, one subhauler testified that it was worth a 2¢ a gallon premium to have fuel available at the pit.

But the most important evidence is the cost of driving a tractor to obtain the cheaper fuel. The closest point of this freeway job to El Centro was about 15 miles; the furthest point was about 35 miles. For a driver to take his truck to El Centro to obtain fuel would require driving an additional 30 to 70 miles. The drivers testified that their trucks got about five to seven miles a gallon. Using the seven mile figure it took anywhere from four to ten gallons of fuel just to drive into El Centro to buy cheaper fuel. At an average price of 26¢ a gallon the drivers were paying from \$1.04 to \$2.60 just to purchase fuel. The drivers used an average of 70 gallons a day on this job. (Which would be increased if they drove to El Centro to buy fuel.) So, depending on the distance from their last dump to El Centro, the cost of fuel to drive into El Centro would add from 1½¢ to 3½¢ a gallon to their fuel bill. This, of course, does not take into consideration any wear-and-tear on the tractor which is entailed in driving the extra 30 to 70 miles a day. When we add this average extra cost of gas of 1½ to 3½¢ to the cost of fuel in El Centro (assuming a 26¢ average price) and we consider the cost of wear-and-tear on the tractors to drive this additional 30 to 70 miles a day, it is our opinion that, as far as the subhaulers are concerned, the 30¢ price for a gallon of fuel at the Ogilby pit was not excessive.

Looking at this from a slightly different viewpoint we can analyze the evidence in the following manner: Atlantic Richfield sold fuel in El Centro at 25.4¢ a gallon; Kelly a small operator, cannot be expected to meet Atlantic Richfield's price and, therefore, would have to sell fuel at a higher price. Kelly was financing the subhaulers' fuel requirements for about 30 to 60 days. Other stations in the area were selling fuel at approximately 27¢ a gallon; consequently, if Kelly were to sell fuel in El Centro, a price of 27¢ a gallon would be fair. There was testimony by subhaulers that the convenience of having fuel at the pit was worth at least 2¢ a gallon. If 29¢ a gallon for fuel sold at the Ogilby pit would undoubtedly be a fair price we cannot say that an additional 1¢ a gallon is so great an increase as to persuade us that the 30¢ charge is excessive.

Findings of Fact

1. On transportation performed for Matich Corp. on December 10, 11, and 12, 1968 the staff asserts that Kelly charged less than the applicable minimum rates in the amount of \$306.71. Matich has already paid this amount and Kelly has agreed to distribute 95 percent of this amount to its subhaulers.

2. Transportation charges were billed and collected as follows: Shortly after the twentieth of each month Kelly would bill Matich for all work done by Kelly since the twentieth of the preceding month. Matich would then bill the Department of Public Works of the State of California, the entity responsible for payment, and would receive payment on or about the fifth of the month following billing. Matich would then send Kelly its share of the amount received and Kelly would then pay its subhaulers. This method of collection is standard practice on highway construction paid for by the Department of Public Works. Kelly or Matich would have had to advance some \$1,800 to subhaulers for work done in November 1968 in order to have complied with the minimum rate tariff item on collection of charges. It is unrealistic to require Kelly or Matich to assume such an obligation.

3. Kelly sold fuel to subhaulers at the Ogilby pit for 30¢ a gallon. Fuel could be purchased in El Centro at the Richfield bulk plant for 24.5¢ a gallon, at Winterhaven for 26.9¢ a gallon, and at a Standard station in Calexico for 27¢ a gallon.

4. Kelly did not require its subhaulers to purchase fuel exclusively from Kelly at the Ogilby pit. At least twenty percent of the subhaulers' fuel requirements were purchased elsewhere than the Ogilby pit. Some subhaulers took their tractors home each evening. Kelly knew within one week of the start of the job that the subhaulers were not purchasing fuel each day at the Ogilby pit. No subhauler was penalized in any way for failing to purchase fuel at the Ogilby pit.

5. Kelly's charge of 30¢ a gallon for fuel was not excessive. Kelly's out-of-pocket cost of fuel was 24.55¢ a gallon. To this must be added the cost of Kelly's overhead, such as repairing the pump at the fuel tank, allowance for lost and evaporated fuel, cost of giving credit of 30 to 60 days to subhaulers, cost of office expense of billing and collecting for fuel, and an allowance for reasonable profit.

6. The subhaulers would have had to pay a total cost of approximately 30¢ a gallon for fuel if they obtained fuel at a place other than the Ogilby pit. This 30¢ is derived as follows: fuel costs in the El Centro area varied from 25.4¢ a gallon to 27¢ a gallon during the period in question; the drive to El Centro to obtain this fuel would add an additional 30 to 70 miles each day; the tractors got about 7 miles to the gallon; and this additional mileage caused general wear and tear to the tractor. The drivers used an average of 70 gallons a day on the freeway job. The average reasonable cost of all of these expenses to obtain fuel in the El Centro area is approximately three cents a gallon which, when added to the pump price of the fuel in the El Centro area increases the true cost of fuel in the El Centro area to subhaulers to approximately 30¢ a gallon. The subhaulers would not have driven to Winterhaven to obtain fuel.

The Commission concludes that:

1. Kelly violated Items 45 and 94 of Minimum Rate Tariff No. 7 by failing to collect and pay transportation charges within the prescribed credit period, but such violations were technical in nature and were induced by the payment policy of the Department of Public Works. No penalty should be assessed;

2. Kelly did not require subhauliers to buy fuel at an excessive markup;

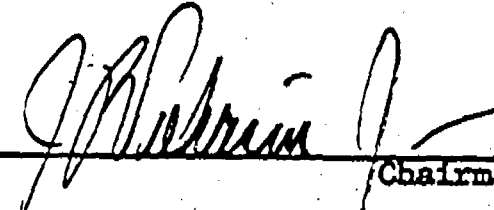
3. The investigation should be discontinued.

O R D E R

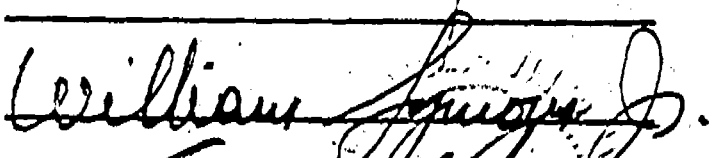
IT IS ORDERED that the investigation is discontinued.

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

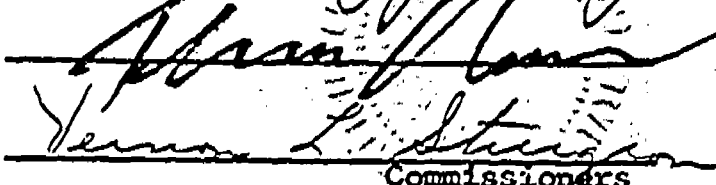
Dated at San Francisco, California, this 2nd day
of AUGUST, 1970.



Chairman



Commissioner



Commissioner

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.