

ORIGINAL

Decision No. 77790

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
JOE ALVES, an individual doing
business as JOE ALVES ORCHARDS;
NATIONAL GYPSUM COMPANY, a
Delaware corporation; and BORCHERS
BROS., a California corporation.

Case No. 9049
(Filed April 14, 1970)

Albert Alves, for Joe Alves, respondent.
Loren D. Olsen, for Kaiser Gypsum Co., Inc.;
and Lester G. Sachs, for Borchers Bros.,
interested parties.
William J. McNertney, Counsel, and E. H.
Hjelt, for the Commission staff.

O P I N I O N

By its order dated April 14, 1970, the Commission instituted an investigation into the operations, rates and practices of Joe Alves, doing business as Joe Alves Orchards; National Gypsum Company, a Delaware corporation, and Borchers Bros., a California corporation, were named as shipper respondents.

A public hearing was held before Examiner Gilman on June 23, 1970, at San Jose.

Respondent Alves presently conducts operations pursuant to a radial highway common carrier permit. He has a terminal in San Jose, California. He owns and operates 7 tractors, 12 trailers and employs 9 persons. His total gross revenue for the year 1969 was \$200,192. Copies of appropriate tariff and distance tables were served upon respondent carrier.

At the hearing, the appearance by Borchers Bros. counsel was characterized as a special appearance. The staff presented the

testimony of two investigators who sponsored exhibits consisting of shipping documents for the transportation in question and supplementary information and the testimony of a rate expert who rated the shipments. The matter was submitted upon receipt of proposed findings and conclusions on June 29, 1970.

Discussion

The attempt of respondent Borchers to limit its appearance to a "special" appearance was unavailing. Under Pellandini v. Pacific Limestone, 245 Cal. App. 2d 774, 54 Cal. Rptr. 290, a shipper, even if not named as a party, who attends the hearing is bound by the Commission's determination of the amount of undercharges. A fortiori a shipper, who under our recent adopted procedure is named as a respondent and who attends by counsel, is likewise bound.

The staff recommended an order to collect undercharges and a fine in the amount of the undercharges pursuant to Section 3800 of the Public Utilities Code.

The staff also sought a punitive fine in the amount of \$1,500. Staff argued that such fine was justified in the light of the blatant nature of the rebating device proven. However, the record indicates that the rebate scheme was devised and unilaterally imposed by the shipper and that carrier's involvement was limited to a failure to take effective steps to collect the full minimum rates.

While we have chosen to adopt a lesser fine than that recommended by staff, such action should not be interpreted as excusing respondent Alves' inaction in the face of the shipper-imposed device. Such conduct is ultimately as dangerous to the minimum rate structure as active cooperation. In setting the fine we have also considered respondent carrier's failure to retain the shipping documents for the earlier Borchers shipments.

Respondent Borchers is hereby placed on notice that the statutes provide for sanctions against shippers who knowingly and wilfully violate the provisions of the Highway Carriers' Act, or who procure, aid or abet any highway carrier in its violation of the provisions of the act.

We find that:

1. Respondent Alves at all times performed transportation of property for compensation on the public highways of this state and held a radial highway common carrier permit.
2. Respondent Alves was served with all appropriate minimum rate tariffs and distance tables and supplements and additions thereto.
3. On ten shipments described in Exhibit 3 performed for respondent Gypsum, respondent Alves charged and received a total \$201.20 less than the applicable minimum charges.
4. On forty-six shipments of brick and building materials described in Section A of Exhibit 4, performed for respondent Borchers, respondent Alves charged rates stated on a per 1,000 brick basis.
5. Respondent Alves failed to place on the shipping documents issued in connection with certain of the shipments referred to in Finding 4, the information required by Item 255 of Minimum Rate Tariff No. 2 and failed to retain the documents relating to all of said shipments in violation of that same item.
6. Respondent Alves charged and received a total of \$1,835.96 less than the applicable minimum rates on the shipments referred to in Finding 4.
7. Respondent Alves transported 27 shipments of brick and building material described in Section B of Exhibit 4 for respondent

Borchers and billed on the proper unit of measurement at rates equal to or greater than the lawful minimum rates.

8. Respondent Borchers deducted certain sums from the bills for said 27 shipments as offsets for yard and equipment use and materials purchased.

9. No consideration of any kind passed from respondent Borchers to respondent Alves in exchange for such offsets.

10. The offsets were intended to be equivalent in amount to the difference between the rates charged on the shipments referred to in Finding 4 and the lawful minimum rates.

11. As a result of said deductions respondent Alves received \$889.23 less for said shipments than the lawful minimum charges.

12. Respondent Alves made no protest of the deductions and took no steps to collect the full minimum charges for said shipments.

We conclude that:

1. Respondent Alves by the conduct referred to in Finding 3 violated Sections 3664, 3667 and 3737 of the Public Utilities Code.

2. Respondent Alves by the conduct referred to in Finding 4 violated Item 257 of Minimum Rate Tariff No. 2 and violated Section 3737 of the Public Utilities Code.

3. Respondent Alves by the conduct referred to in Finding 5 violated Item 255 of Minimum Rate Tariff No. 2 and violated Section 3737 of the Public Utilities Code.

4. Respondent Alves by the conduct described in Finding 6 violated Sections 3664, 3667 and 3737 of the Public Utilities Code.

5. Respondent Alves by the conduct described in Findings 8 through 13 violated Sections 3667 and 3668 of the Public Utilities Code.

6. Respondent Alves should be, pursuant to Section 3800 of the Public Utilities Code, ordered to collect the sum of \$2,725.19

from respondent Borchers and \$201.20 from respondent Gypsum and fined in the amount of \$2,926.39 pursuant to said Section and in addition should be assessed a fine in the amount of \$1,000 pursuant to Section 3774.

The Commission expects that respondent Alves 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 Alves and the results thereof. If there is reason to believe that respondent Alves 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. Respondent shall pay a fine of \$3,926.39 to this Commission on or before the fortieth day after the effective date of this order.
2. Respondent 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 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 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. Respondent 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 Joe Alves. The effective date of this order, as to this respondent, shall be twenty days after completion of personal service. The Secretary is further directed to cause service by mail of this order to be made upon all other respondents. The effective date of this order, as to these respondents, shall be twenty days after completion of service by mail.

Dated at San Francisco, California, this 6th
day of OCTOBER, 1970.

[Signature]
Chairman
[Signature]
William J. Jones Jr.
[Signature]
Vernon L. Stenger
Commissioners