

ORIGINAL

Decision No. 78637

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
FRED M. WERT, an individual doing
business as F. M. WERT TRUCKING;
and GREENE'S READY-MIXED CONCRETE
CO., a California corporation.

Case No. 9038

(Filed March 24, 1970)

Donald Murchison, Attorney at Law,
for F. M. Wert Trucking; and
Edward Greene, for Greene's
Ready-Mixed Concrete Co.,
respondents.

E. O. Blackman, for California
Dump Truck Owners Association,
interested party.

William J. McNertney, Attorney at Law,
and Edwin H. Eject, for the
Commission staff.

O P I N I O N

This investigation is to determine whether respondent Fred M. Wert, an individual doing business as F. M. Wert Trucking (Wert) has violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by rebating to respondent Greene's Ready-Mixed Concrete Co. (Greene) a portion of the applicable minimum rates and charges required by Minimum Rate Tariff 17 by paying an unreasonably high rental charge to Greene for the possession and use of certain trailing equipment obtained from Greene and used in Wert's transportation service for Greene. The investigation is also to determine whether Greene has paid less than the applicable rates and charges for transportation service performed

by Wert. The investigation was limited to transportation performed in the calendar year 1969. Public hearings were held before Examiner Robert Barnett at Los Angeles on May 19 and 20, and July 22 and 23, 1970.

Staff Evidence

An associate transportation representative testified that he investigated Wert's operations for the year 1969. His investigation showed that Wert began working for Greene in November 1967 and has worked exclusively for Greene since then. Wert is in the business of hauling rock, sand, and aggregates for Greene. Wert charges the rates prescribed in MRT 17. Wert owns two tractors which pull two sets of bottom-dump trailers. The trailers are leased by Wert from Greene pursuant to an oral lease whereby Wert is responsible for the maintenance of the trailers. As part of the agreement Wert promised to pay 38 percent of the gross revenue earned by the use of the trailers. This agreement was in force all during 1969 until November 1, 1969 when the payment was reduced to 30.5 percent of the gross revenues. In 1969 Wert's gross revenues were \$128,082 and Wert's payment to Greene for trailer rental \$47,862.

A senior transportation engineer presented evidence concerning the cost of trailing equipment leased by Greene to Wert. The witness developed a table showing Greene's investment in the two sets of trailers. The table, modified, follows:

Cost of Trailing Equipment Leased by
Greene's Ready-Mixed Concrete Company
to F. M. Wert Trucking of Gardena

:Line: :No. :	Item	1963	1955
		Superior Semi Trailer and Full Trailer:	Trailmobile Semi Trailer and Full Trailer:
1	<u>Date Purchased</u>	6/27/67	11/14/68
2	<u>Investment</u>		
3	Purchase Cost, Less Financing	\$5,048	\$2,235
4	Cost to Place in Service	<u>1,500</u>	<u>1,000</u>
5	Total Cost	\$6,548	\$3,235
6	Salvage Value @ 20%	<u>1,310</u>	<u>647</u>
	Service Value	\$5,238	\$2,588
7	<u>Useful Life</u>	5 yr.	3 yr.
8	<u>Annual Insurance Expense</u>	\$ 250	\$ 250

The purchase cost, cost to place in service, and annual insurance expense were derived from records of Greene. The salvage value and the useful life estimates were based upon the expert judgment of the witness.

An associate transportation rate expert testified that based upon the figures developed by the senior transportation engineer it was his opinion that a reasonable monthly rental for the 1963 Superior trailers would be \$135 and a reasonable monthly rental for the 1955 Trailmobile trailers would be \$110. He presented his evidence in the form of a table as follows:

Recommended Monthly Rental Charges
F. M. Wert Trucking
1963 Superior and 1955 Trailmobile
Hopper Bottom Trailing Equipment

1963 Superiors (cost to Greene)	\$5,698.00 ^{1/}
Repairs (to put in service)	1,500.00
Insurance (\$250 x 5 yr. service life)	<u>1,250.00</u>
	\$8,448.00
Less Salvage Value	<u>1,310.00</u>
	\$7,138.00
Cost per month $\$7,138 \div 60$ (5 yrs.)	\$ 118.97
Reasonable Monthly Rental	<u><u>\$ 135.00</u></u>
1955 Trailmobiles (cost to Greene)	\$2,400.00 ^{1/}
Repairs (to put in service)	1,000.00
Insurance (\$250 x 3 yr. service life)	<u>750.00</u>
	\$4,150.00
Less Salvage Value	<u>647.00</u>
	\$3,503.00
Cost per month $\$3,503 \div 36$ (3 yrs.)	\$ 97.30
Reasonable Monthly Rental	<u><u>\$ 110.00</u></u>

^{1/} Purchase cost including financing.

On cross-examination he stated that his table shows that for an out-of-pocket cost of \$6,798 for the 1963 Superior trailers the investor would earn a return of \$192 a year before taxes; and that no reasonable person would invest \$6,798 to obtain a \$192 return a year.

The figures \$6,798 and \$192 are derived as follows:

Purchase cost	\$5,048.00
Cost to place in service	1,500.00
Annual insurance expense	<u>250.00</u>
Total	\$6,798.00
Reasonable monthly rental	\$ 135.00
Cost per month	<u>118.97</u>
	\$ 16.03
	<u>x12</u>
Total	\$ 192.36

The comparable figures for the 1955 Trailmobiles are:

Purchase cost	\$2,235.00
Cost to place in service	1,000.00
Annual insurance expense	<u>250.00</u>
Total	\$3,485.00
Reasonable monthly rental	\$ 110.00
Cost per month	<u>97.30</u>
	\$ 12.10
	<u>x12</u>
Total	\$ 152.40

The witness stated that no reasonable person would invest \$10,283 in trailers for a yearly profit of \$344.76.

Wert's Testimony

Mr. Wert testified that he started in the trucking business in 1950 as a driver. He bought a tractor in 1964 and did subhauling for various prime carriers, renting trailers from those carriers for 25 percent of the gross revenue plus a five percent bookkeeping fee. He started to work for Greene in 1967. When he started to work for Greene he owned one tractor, had no credit, had no supplies, and no place of business. Since working for Greene he now owns two tractors, employs one full-time driver and five part-time drivers, now owns his own home, has income property, and estimates a net worth of \$50,000. He is quite happy with his trailer rental arrangement with Greene.

He stated that his trailer rental agreement was oral and that the original rental of 38 percent of gross revenue was not all for trailer rental. Twenty-five percent was for trailer rental and 13 percent was for overheads. The overheads consisted of use of Greene's yard for parking the trailers; use of Greene's tools and mechanics; the ability to purchase supplies on Greene's credit; the ability to purchase fuel at an average price of seven cents a gallon cheaper from Greene than in retail gas stations; the use of Greene's mechanic to make repairs on the trailer and tractors; dispatching services; and first call on all of Greene's business. In the witness' opinion 25 percent was reasonable for trailer rental.

Before entering into the trailer rental agreement with Greene the witness said that he had attempted to rent a yard for trailer storage and found that he would have to pay approximately \$350 a month rental plus \$50 for utilities. He would also need approximately \$300 for tools for his shop in order to repair his equipment. In 1969 Greene's mechanic worked approximately 15 hours on Wert's trailers.

Other Testimony

The general manager of the California Dump Truck Owners Association testified that he had over thirty years' experience in the field of dump truck regulation and has appeared in numerous hearings before this Commission. He testified that it is the dominant practice in the dump truck industry to charge a 25 percent-of-revenue rental when a carrier leases trailing equipment from a shipper. Respondent Greene did not testify.

Upon request of the examiner, the staff and respondents attempted to ascertain the rent for a set of bottom-dump double trailing equipment from independent truck rental companies. Respondents submitted letters from ten rental companies which stated that they do not rent bottom-dump doubles. Included among those companies were Avis Rent-A-Car, AAA Truck Rental Company, Hertz Equipment Rental Corporation, Ryder Truck Rental, Inc., Fruehauf Division, Consolidated Leasing, and Universal Leaseway System, Inc.

The staff presented evidence as to the cost of renting a bottom-dump set of doubles from independent truck leasing companies. Five companies submitted cost analyses: Avis, Coast Leasing Co., AAA Truck Rental Company, Challenge-Cook Bros., and Fruehauf Corporation. All of these companies rent trucks and trailers on a regular basis, however, none of these companies rent bottom-dump doubles. The representatives of the companies stated that if they were to rent bottom-dump trailing equipment, they would apply the same standards to arrive at a rental price for the bottom-dumps as they do to arrive at a rental price for the trailers they do rent. Their testimony was essentially similar and can be summarized as follows: They would only rent to responsible parties; they would maintain the trailers themselves (except, perhaps, for tires); the lease would be for the estimated life of the trailer; they would probably only deal in new trailers and lease them for from five to eight years; and their rental would be on a fixed cost per month plus cents per mile. The cents per mile would range from two cents a mile upward, depending upon the use to which the trailers would be put. For instance, if the trailers were to be used going from two points connected by freeways, then the cents per mile would probably be about two cents. However, on a highway job where the trailers travel considerable distance over unpaved roads, the cents per mile could go very high. Each job would have to be estimated separately.

All of the rental agencies computed their basic rate (excluding mileage rate) using essentially the same method although their rates differed because of folding in different profit and interest margins. For our purpose, the Avis method is typical and will be set out:

Avis Standard Truck Rate Estimate Sheet

<u>Capitalization</u>	<u>\$3,400 Trailer</u>	<u>\$7,198 Trailer</u>
Chassis	\$3,400	\$7,198
Sales Tax	170	360
Avis Local Service	<u>50</u>	<u>50</u>
Total Chassis	\$3,620	\$7,608
Less Residual (10%)	<u>360</u>	<u>758 (sic)</u>
Net Capitalized Cost	\$3,260	\$6,850

Fixed Cost

Depreciation	\$1,086 (3 yrs.)	\$1,370 (5 yrs.)
Profit, 10% of Total Cost	360	761
Interest ^{1/}	<u>193</u>	<u>406</u>
Total Annual Expense	\$1,639	\$2,537
Monthly Rate	\$ 136.59	\$ 211.42

^{1/} Avis determines interest by the formula:

$$\frac{\text{Total Chassis Cost } (\$3,620) + \text{Residual } (\$360)}{2} \times .097\%$$

Discussion

In 1969 Wert performed transportation service for Greene by hauling rock, sand, and aggregates, and was paid \$128,082. From this amount Greene deducted \$47,862 for trailer rental and various services performed by Greene for Wert. The staff asserts that only \$2,940 of the \$47,862 was a fair rental for the trailers and that the balance of \$44,922 was a rebate. The staff requests Wert be ordered to collect the \$44,922 rebate and pay that amount to the Commission by way of a fine pursuant to Public Utilities Code Section 3800. Wert and Greene assert that the payments to Greene were reasonable. They assert that \$32,000 of the \$47,862 was for trailer rental, based upon a rental agreement of 25 percent of the gross revenues earned from the use of the equipment, and that the balance was a reasonable charge for the services rendered by Greene to Wert.

Commission precedent in the field of rebates offers guidelines only in broad perspective. In Re MacDonald & Dorsa Transportation Co. (1965) 64 CPUC 340, the Commission found that a lease of trailers by a prime carrier to a subhauler for a rental equal to 33-1/3 percent of the gross revenue derived from the use of said equipment was excessive and unreasonable and constituted a device to evade the minimum rates. The Commission made no finding as to what a reasonable rental for the trailers would be and consequently made no order requiring collection of the rebate. For the violation the Commission fined the prime carrier \$2,500. In Re F. Pounds (Central Valley Transport Co.) (1966) 66 CPUC 592, the Commission found that a shipper's lease

of trailing equipment to a carrier at a rental of 25 percent of gross revenue to haul the shipper's potatoes in the field was reasonable on the grounds that the potato hauling was seasonal; the trailers were of a special construction; rental of trailers from a commercial equipment agency in the area would have been at a much higher cost; the shipper fully maintained the trailers; and the rental formula had the effect of charging respondent only in proportion to the use he made of them. The Commission went on to state that "certainly we are not to be understood as deciding that 25 percent of revenue is a reasonable rental in all cases; indeed, any formula based upon a percentage of the transportation charges will be subject to special scrutiny. We do hold, however, that the particular rental payments shown on this record were reasonable under all the circumstances."

(66 CPUC at 598). In cases where, for asserted services rendered, a shipper paid an employee of a carrier, or a carrier paid an employee of a shipper, the Commission held that the question of whether such payment was a rebate depended upon the reasonableness of the payment under all the circumstances of the case. (See Re Clawson Trucking Co., Inc. (1963) 62 CPUC 105; Re Plywood Trucking Co., Inc. (1964) 62 CPUC 153; and Re Jim Greene's Trucking Co. (1964) 63 CPUC 425.)

To determine the reasonableness of the payment from Wert to Greene, we must consider the circumstances surrounding the work performed by Wert for Greene, the work performed by Greene for Wert, the practices in the industry, and the alternate sources of trailing equipment available to Wert. Before analyzing

these factors in detail, we will consider the payment in two parts: payment for trailer rentals, and payment for work performed by Greene for Wert. We will consider this case in the manner advocated by Wert and Greene: that part of the moneys paid by Wert to Greene was for trailer rentals and the other part was for services performed by Greene for Wert; and rental was to be 25 percent of gross revenue, with the balance attributable to the work Greene performed for Wert. This method allocates approximately \$32,000 for trailer rental and approximately \$15,860 for services performed by Greene for Wert.

We find that the \$15,860 paid for services rendered by Greene to Wert was a rebate in violation of the Public Utilities Code and an attempt to evade the minimum rates. The services performed by Greene were so insignificant in comparison to the large amount of money paid for them as to constitute those services nothing more than a sham and a device to evade the minimum rates. The services consisted of the use of Greene's yard for parking the trailers; use of Greene's tools and mechanics; the ability to purchase supplies on Greene's credit; the ability to purchase fuel at an average price of 7 cents a gallon cheaper from Greene than in retail gas stations; the use of Greene's mechanic to make repairs on the trailer and tractor; dispatching services; and first call on all of Greene's business. Under no stretch of the imagination can these services be of the value of \$15,860. We do not believe Wert's testimony that it would cost him \$350 a month to park his trailers; nor do we believe that the 15 hours or so that Greene's mechanic worked on Wert's

trailers in 1969 is worth much more than \$300, if that. There were no dispatching services rendered other than Greene telling Wert where to pick up and deliver Greene's shipments, something that any shipper would have to tell a carrier. There is no evidence in this record for us to form an opinion as to how much Wert saved by purchasing because of Greene's credit, but obviously it cannot be a significant amount. The record being devoid of believable evidence as to the value of the services allegedly rendered by Greene to Wert, it is clear to us that the \$15,860 was paid for first call on all of Greene's business, which is a rebate.

The more difficult question in this case concerns whether any part of the 25 percent of gross revenue payment for trailer rentals is a rebate. This question can be answered only after an analysis of practices in the industry, the facts surrounding the particular transportation, and alternate sources of trailer equipment. The staff evidence that \$2,940 a year would be a fair rental, yielding a yearly profit of \$344.76, is not persuasive. The staff's own expert stated that no reasonable person would make an investment of over \$10,000 in trailers for such rental and such profit.

The evidence of the independent rental agencies shows that for trailers of a value of about \$10,500 a reasonable rental would be approximately \$4,200 a year, of which about \$1,750 would be profit and interest. These figures would fluctuate depending upon which rental agency was involved and its method of computing profit and interest. However, the independent rental agencies' requirements concerning financial responsibility of the lessee (good credit) and length of lease (the life of the equipment) would have precluded Wert from renting trailers from these

companies. Further, these companies did not rent the kind of trailer useful in Greene's business. At the time Wert entered into his relationship with Greene, Wert had no credit and could not possibly lease trailers for the life of the trailer.

The remaining evidence concerning trailer rentals is that it is the custom in the industry to rent trailers for 25 percent of gross revenues. However, that rental prevails, in the usual case, when the trailers are rented by the job; whether the job be one day or a number of months, and where road conditions are often primitive. In such situations there is risk to the lessor that his trailer would not be fully utilized over the year, and would be subject to extraordinary wear and tear. There was no such risk in the relationship between Greene and Wert. Greene knew his yearly demands and knew just how much he could utilize Wert's services and, therefore, utilize the services of the trailers. And this was all known prior to the time the relationship started and certainly at the beginning of 1969, after the relationship had been in effect for over a year. Under these circumstances there was little risk of nonutilization of trailer equipment. In addition, all hauling was done over freeways and good roads. Therefore, rates predicated upon a high risk of nonutilization of trailer equipment and poor working conditions should not be the same where the risks are low. In our opinion, where a lessor can reasonably expect his trailer to be in use for a substantial period of time, over good roads, a rate of 20 percent of gross revenues is adequate. In this case, considering all the circumstances, we find that a rate of 20 percent of gross revenues is adequate, and that payments in excess of 20 percent are rebates and evasions of the minimum rates.

Findings of Fact

1. In 1969, Wert performed transportation service for Greene and was paid \$128,082 for such service. From this amount Greene deducted \$47,862. Greene and Wert assert that \$32,000 of the \$47,862 was for trailer rental and \$15,862 was for services performed by Greene for Wert.

2. The \$15,862 payment was a rebate and an attempt to evade the minimum rates. The services performed by Greene were so insignificant in comparison to the larger amount of money paid for them as to constitute those services nothing more than a sham and a device to evade the minimum rates. The asserted services were: the use of Greene's yard for parking the trailers; use of Greene's tools and mechanics; the ability to purchase supplies on Greene's credit; the ability to purchase fuel at an average price of 7 cents a gallon cheaper from Greene than in retail gas stations; the use of Greene's mechanic to make repairs on the trailer and tractor; dispatching services; and first call on all of Greene's business. Under no stretch of the imagination can these services be of the value of \$15,862. We do not believe Wert's testimony that it would cost him \$350 a month to park his trailers; nor do we believe that the 15 hours or so that Greene's mechanic worked on Wert's trailers in 1969 is worth much more than \$300, if that. There were no dispatching services rendered other than Greene telling Wert where to pick up and deliver Greene's shipments, something that any shipper would have to tell a carrier. There is no evidence in this record for us to form an opinion as to how much Wert saved by purchasing because of Greene's credit, but obviously it cannot be a

significant amount. The record being devoid of believable evidence as to the value of the services allegedly rendered by Greene to Wert, it is clear to us that the \$15,862 was paid for first call on all of Greene's business, which is a rebate. This \$15,862, not being paid for services by Greene for Wert, was actually part of the trailer rental.

3. Wert did not have the financial credit to lease bottom-dump trailers from independent truck leasing agencies. The prevalent custom in the industry is to lease trailers for 25 percent of gross revenues. But this 25 percent rental prevails, in the usual case, when the trailers are rented by the job; whether the job be one day or a number of months, and when road conditions are often primitive. In such situations there is risk to the lessor that his trailer would not be fully utilized over the year, and would be subject to extraordinary wear and tear. There was no such risk in the relationship between Greene and Wert. Greene knew his yearly demands and knew just how much he could utilize Wert's services and, therefore, utilize the services of the trailers. And this was all known prior to the time the relationship started and certainly at the beginning of 1969, after the relationship had been in effect for over a year. Under these circumstances there was little risk of nonutilization of trailer equipment. In addition, all hauling was done over freeways and good roads. Therefore, rates predicated upon a high risk of nonutilization of trailer equipment and poor working conditions should not be the same where the risks are low.

4. Under the facts of this case a trailer rental of 20 percent of gross revenues is reasonable. Payments in excess of 20 percent are rebates and evasions of the minimum rates. Of the \$32,000 assertedly paid for trailer rental, \$25,600 was reasonable and \$6,400 was unreasonable and a rebate and evasion of the minimum rates.

Conclusions of Law

1. Wert has violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by having performed transportation services for Greene for less than the applicable minimum rates and charges required by MRT 17.

2. Wert should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$2,000.

3. Wert should be ordered to collect from Greene's Ready-Mixed Concrete Co. the \$22,262 rebate and upon collection to pay a fine of that amount pursuant to Section 3800 of the Public Utilities Code.

O R D E R

IT IS ORDERED that:

1. Fred M. Wert, an individual doing business as F. M. Wert Trucking, shall pay a fine of \$2,000 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent Wert shall take such action, including legal action, as may be necessary to collect the \$22,262 rebate due him from Greene's Ready-Mixed Concrete Co., and shall notify the Commission in writing upon collection.

3. In addition to the fine provided in ordering paragraph 1, respondent Wert shall pay a fine of \$22,262 as provided by Section 3800 of the Public Utilities Code upon collection of that amount from Greene's Ready-Mixed Concrete Co.

4. Respondent Wert 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 3 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.

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 upon the respondent so served.

Dated at San Francisco, California, this 4th
day of MAY, 1971.

[Signature]
Chairman
William J. Brown
[Signature]
Vernon L. Sturgeon
[Signature]
Commissioners