

ORIGINALDecision No. 79608

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 HAMMON TRUCKING, INC., a California corporation; LEE B. HAMMON, an individual, doing business as HAMMON'S BEAR TRUCK SERVICE; ROBERT H. O'Hair, an individual, doing business as W. H. O'HAIR COMPANY; O'HAIR CONSTRUCTION COMPANY, a California corporation; JACK L. BROWN, an individual, doing business as BROWN TRUCKING; SIERRA TRUCKING CO., INC., a California corporation; BILLY W. DOLLINS, an individual; EUGENE H. HARNSBERGER, an individual, doing business as G & F TRANSPORTATION; CLIFFORD E. LAW and ROBERT C. LAW, co-partners, doing business as LAW TRUCKING; J. G. MASSEY, an individual; DAVID E. WIPF, an individual; ROBERT WORLEY, an individual, doing business as C & B TRANSPORTATION; R. W. GASTON, an individual, doing business as R. W. GASTON TRUCKING; WILLIAM GEIGLE, an individual; DONALD R. GRANT, an individual; BILL HUHN, an individual; IRVING LOUVIERE, an individual, doing business as I. L. TRUCKING; LEO KOTHE, an individual; LOTTIE WEST, an individual, doing business as L & S TRUCKING; MANUEL MELLO, an individual, doing business as MAC TRUCKING; MERLE D. MAYFIELD, an individual; CLAY MIRANDA, an individual; M. STEWART, an individual; JACK SULLIVAN, an individual; MEL TUPPER, an individual; CHARLES SHULTS, an individual, doing business as WAYNE & SON TRUCKING; W. F. WOODBURY, an individual; WILLIAM F. WOODS, an individual, doing business as WOODS TRKNG. CO.; RON YESKE, an individual; PERRY BLEVINS, an individual; AXEL KARLSHOLJ, an individual, doing business as AXEL'S TRUCKING; PHILLIP COSSUTO, JR., an

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individual, doing business as COSSUTO TRUCKING CO.; M. J. GRIFFITH, an individual, doing business as J. G. CATTLE CO.; M. G. HAYDON, an individual; GARRY R. OLIVER, an individual; PETE DiSALVO, an individual, doing business as P & R TRUCKING; V. PINKSTON, an individual, doing business as V. PINKSTON TRUCKING; HARLOW D. SHAW, an individual, doing business as SHAW TRUCKING CO.; JOSEPH SKOFF, an individual; CHARLES H. THOMPSON, an individual, doing business as C. H. THOMPSON TRUCKING; and KEN BUNYARD, an individual.

Lee B. Hammon, for Hammon Trucking, Inc., and Hammon Bear Truck Service; Charles H. Schults, Ron Yeske, William F. Woods and Clifford E. Law, in propriae personae; respondents. Elinore C. Morgan, Attorney at Law, and E. E. Cahoon, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion to determine whether Hammon Trucking, Inc., a California corporation (Trucking, Inc.), violated Sections 3737, 3667 and 3668 of the Public Utilities Code by hiring other carriers as purported subhaulers to perform dump truck transportation for O'Hair Construction Company, a California corporation (Construction Co.), through Lee B. Hammon, an individual doing business as Hammon's Bear Truck Service (Bear), its alleged affiliate, and by failing to pay said purported subhaulers 100 percent of the applicable minimum rates and charges as required by a restriction in its operating authority; whether Trucking, Inc., violated Section 3668 of said Code in failing to disclose the alleged affiliation with Bear when it applied for its permits; and whether the other carriers named in the above caption violated Section 3664 of said Code by charging less than applicable minimum rates for the aforementioned transportation.

Public hearing was held before Examiner Mooney in Redding on October 19, 1971, on which date the matter was submitted.

Both Trucking, Inc., and Bear operate pursuant to radial highway common carrier and dump truck carrier permits. The two permits held by Trucking, Inc., both contain the following restriction:

"Whenever permittee engages other carriers for the transportation of property of Lee B. Hammon and/or Robert H. O'Hair or W. H. O'Hair Company or O'Hair Construction Company or Hammon Trucking, Incorporated, or customers or suppliers of said individuals, company or corporation, permittee shall not pay such carriers less than 100% of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

There is no similar restriction in either of the permits held by Bear.

Trucking, Inc., and Bear have the same terminal in Redding. At the time of the staff investigation referred to hereinafter, Trucking, Inc., employed 18 drivers, two supervisors and a bookkeeper and had 18 tractors and 20 sets of bottom dump trailers; Bear employed two mechanics and a part-time bookkeeper and had one set of bottom dump trailers. Each of said respondents was served with Minimum Rate Tariff 7, together with all supplements and additions thereto. For the year ending June 30, 1971, Trucking, Inc., and Bear had gross operating revenues of \$874,127 and \$127,281, respectively.

A motion to strike Ken Bunyard, an individual, as a respondent herein was granted. It was shown that said individual was paid above the applicable minimum rate level, and there are no violations in connection with transportation performed by him.

On various days during October 1970, a representative of the Commission staff visited the place of business of Trucking, Inc., and Bear and reviewed their records for the months of July and August 1970 relating to the transportation of sand and aggregates in dump truck equipment for Construction Co. from the Foulke Pit and the Maxwell Pit at Gazelle, both commercial producing plants, to the Vickery Batch Plant at Yreka, a batching plant. The representative

testified that 75 percent of the hauling performed by Trucking, Inc., is for Construction Co. He stated that during the review period, part of the aforementioned transportation for said shipper was performed by Trucking, Inc., with its own equipment, and Bear engaged the other respondent carriers as purported subhaulers to perform the balance of said transportation. The witness explained that Construction Co. paid Trucking, Inc., 82 cents per ton for all transportation performed for it during said period; that he had personally determined that the distance from the Foulke Pit and from the Maxwell Pit to the Vickery Batch Plant was between 16 and 17 miles and between 17 and 18 miles, respectively; that based on said distances, the minimum rates named in Minimum Rate Tariff 7 for the Foulke and Maxwell hauls were 77 and 81 cents per ton, respectively; that Trucking, Inc., paid Bear 75 cents per ton for the transportation performed by the other carriers; that with the exception of Ken Bunyard referred to hereinabove, Bear paid each of the other respondent carriers for the transportation they performed as purported subhaulers, 75 cents per ton less a five percent commission; and that Bear issued no billing statements to either Trucking, Inc., or Construction Co. for any of the transportation in issue. The representative testified that except for Ken Bunyard he made true and correct photostatic copies of subhaul statements and other supporting documents relating to the transportation by said other respondent carriers and that said photocopies are included in Exhibits 1 through 4.

The representative testified as follows regarding the relationship between Construction Co., Trucking, Inc., and Bear: Robert H. O'Hair owns 100 percent of the stock of Construction Co.; Robert H. O'Hair and Lee B. Hammon each own 50 percent of the stock of Trucking, Inc.; Lee B. Hammon is the president of Trucking, Inc., and the sole owner of Bear, a proprietorship; either Lee B. Hammon or Robert H. O'Hair is authorized to sign and issue checks for Trucking, Inc., and Lee B. Hammon has sole authority to sign and issue checks for Bear. The witness stated that both respondent

trucking companies have the same office and keep their records at said location; that Lee B. Hammon owns the property and is paid rent by Trucking, Inc.; that the two companies use the same freight bill and subhaul agreement forms, and both names are shown on said documents; that all billing statements for any business handled by either company are issued by Trucking, Inc.; that when other carriers are engaged by the corporation, Bear pays said other carriers when the transportation is for the O'Hair account, and the corporation pays them when the transportation is for other accounts; that Mrs. Lee B. Hammon takes care of the bookkeeping for Bear with occasional assistance from the bookkeeper for Trucking, Inc., and both answer the telephone for both carriers.

The representative testified that Bear was issued a radial highway common carrier permit in 1961, and Trucking, Inc., was issued a similar permit in 1968. He stated that the application filed by Trucking, Inc., was signed by its president, Lee B. Hammon; that paragraph 16 thereof requested the names of any carriers or shippers with whom applicant had any affiliation; that in answer thereto, the various O'Hair companies were listed, but no mention was made of Bear; and that had this latter information been disclosed as it should have been, the Bear permit would have been amended to also include the aforementioned restriction in the Trucking, Inc., permit, which requires payment of 100 percent of the applicable minimum rates to other carriers engaged to transport property for the O'Hair companies. The affiliation between the two trucking companies was likewise not disclosed in connection with the dump truck carrier permits issued to them in 1970.

The representative asserted that because of the relationship between Trucking, Inc., and Bear, the other respondent carriers engaged to actually perform the transportation of the property of Construction Co. listed in Exhibits 1 through 4 should have been paid the full applicable minimum rate for such transportation except in several instances where one of said carriers operated as a

subhauler for another of said carriers. He explained that all of the other carriers hired directly by Bear were prime carriers and that any carriers they engaged were subhaulers. In this connection, he pointed out that Jack L. Brown, doing business as Brown Trucking, was the only one of said other carriers Bear hired who used subhaulers; that Sierra Trucking Co., Inc., one of said subhaulers, engaged sub-subhaulers; and that except for deductions for any liquidated amounts due from the underlying carriers they engaged, Brown Trucking and Sierra Trucking paid said underlying carriers the full amount they received.

A rate expert of the Commission staff testified that he took the sets of documents in Exhibits 1 through 4, together with the supplemental information testified to by the representative, and formulated Exhibits 8 and 9 which show the rate and resulting charge, less the five percent commission, paid by Bear to the other respondent carriers he employed, the minimum rate and charge computed by the staff and the amount of undercharge alleged by the staff for the transportation performed by each of said other respondent carriers during July and August 1970, respectively. He stated that the total of said undercharges for July and August 1970 was \$787.59 and \$5,155.31, respectively. For the two months, the total of the undercharges was \$5,942.90. The witness explained that the balance due the underlying carriers engaged by Brown Trucking and Sierra Trucking are also shown in Exhibits 8 and 9. According to said exhibits, the balance due the subhaulers engaged by Brown Trucking, including Sierra Trucking, is \$839.36, and the balance due the sub-subhaulers engaged by Sierra Trucking is \$92.55. In this regard, Item 94 of Minimum Rate Tariff 7 provides in part that dump truck subhaulers shall be paid not less than 95 percent of the applicable minimum rates less the deductions authorized therein.

Lee B. Hammon testified as follows: Trucking, Inc., entered into a contract with Construction Co. in March 1969 to move 100,000 tons of concrete aggregate for the aforementioned job and commenced the haul

in July 1969; 44,000 tons were moved during the initial phase of the contract which was completed in August 1969; no rate violations occurred during this phase; when the final phase of the hauling commenced in July 1970, the destination plant was moved and part of the transportation was from a different plant; he did not realize that this increased the distances involved and that higher minimum distance tonnage rates were applicable; he agrees that the distances and minimum rates computed by the staff are correct; however, he is of the opinion that the other carriers were, in fact, subhaulers and that Bear is entitled to a five percent commission on all transportation they performed; he pointed out that there is no restriction in Bear's permit prohibiting this, and he sees no reason why there should be; the five percent was retained by Bear and did not go to or benefit in any manner either Trucking, Inc., or Construction Co.; at all times, the amounts earned by the other carriers were in excess of what they would have received had hourly rates been applied. With respect to the last contention, the transportation under review was, according to the record herein, subject to the distance tonnage rates shown in Exhibits 8 and 9 and not hourly rates.

Discussion

The record herein clearly establishes a substantial degree of common ownership, management and control between Construction Co. and Trucking, Inc., on the one hand, and between Trucking, Inc., and Bear, on the other hand. Robert H. O'Hair owns 100 percent of the stock of Construction Co. and is the vice-president and owner of 50 percent of the stock of Trucking, Inc. Lee B. Hammon is the sole owner of Bear and the president and owner of 50 percent of the stock of Trucking, Inc. Each of said individuals is in a position to exert substantial influence on the management of Trucking, Inc., and to receive the benefits of any actual or potential earnings or savings of said company.

According to the evidence, the contract of carriage for all of the transportation covered by the staff rate exhibits was between

Construction Co. and Trucking, Inc. All billing to the shipper was by said carrier, and all payment by the shipper was to said carrier. Because of the restriction in its permit, said carrier was required to pay any other carriers it engaged to perform any of the transportation herein 100 percent of the applicable minimum rates. This it attempted to avoid by having its affiliate carrier, Bear, engage and pay the other carriers. However, because of the common ownership, management and control, an alter ego relationship exists between Trucking, Inc., and Bear, and their separate identities will be disregarded, and they will be considered one and the same for the purposes of the transportation in issue. Having so determined, it follows that whenever Trucking, Inc., is engaged by Construction Co. to perform transportation for it and utilizes Bear to obtain the services of other carriers as ostensible subhaulers to perform the actual transportation or any part thereof, said other carriers must be paid 100 percent of the applicable charges as required by the aforementioned permit restriction for all such transportation they perform. In the circumstances, the other carriers engaged by Bear should have been paid the applicable minimum rates and charges shown in the staff rate exhibits for the transportation in issue.

As to the allegation by Lee B. Hammon that the five percent commission withheld by Bear from the amounts paid the other carriers was retained by said respondent and none of said five percent was paid to or otherwise benefited Trucking, Inc., this is irrelevant. As pointed out above, the restriction in the permit authority of Trucking, Inc., prohibiting this in connection with the transportation in issue, is imputed to Bear.

The evidence establishes that Lee B. Hammon did not disclose that he held permit authority in his own name to do business as Bear when he applied for operating authority for Trucking, Inc. A letter was sent to Trucking, Inc., by the staff on October 24, 1969 directing it to collect certain undercharges. Said respondent complied with the directive.

We concur with the recommendation by the staff that the facts herein show a device to obtain transportation at less than applicable minimum rates and charges and that punitive fines of \$750 each should be imposed on both Trucking, Inc., and Bear. We likewise concur with the staff that Trucking, Inc., should be directed to pay Bear the difference between the amount already paid said respondent and the applicable minimum charges for the transportation set forth in Exhibits 8 and 9, the staff rate exhibits. However, we do not agree with the staff recommendation that Bear should be directed to pay a fine in the amount of the undercharges shown in the two exhibits rather than requiring said respondent to pay the undercharges to the other carriers listed therein. The staff argued that this would prevent the other carriers from being unjustly enriched and would simplify the complicated bookkeeping and enforcement procedure that would result if Bear were required to pay the undercharges to each of the other carriers and individual fines were assessed against them. From a review of the record before us, we are of the opinion that the imposition of any fines against the other carriers is not warranted. It has not been shown with any degree of certainty that there had been any culpability or complicity on the part of any of the other carriers in any of the transactions involved herein. To the contrary, it appears that the other carriers were victimized and taken advantage of by the device herein and that by recouping the undercharges will receive nothing more than they were entitled to initially. The order which follows will direct Bear to pay to the other carriers hired by him the amount of undercharges shown in Exhibits 8 and 9, and will direct said other carriers to pay from the amounts they collect any amounts that may be due any subhaulers or sub-subhaulers they engaged.

There remains for our consideration the staff recommendation that the same restriction that is in the permits of Trucking, Inc., be inserted in the permits of Bear. While we do concur that a restriction should be placed in Bear's permits, we do not agree that it

should be identical to the one in the corporation's permits. The record herein would not support a finding that an affiliation exists between Construction Co. and Bear by reason of common ownership, control or management. It is clearly established that the two companies are independent. Although we might look with suspicion upon any transportation Construction Co. has directly hired Bear to perform if subhaulers are involved because of the relationship both companies have with Trucking, Inc., we might not find it to be a device if it were in fact an arm's length transaction. The restriction we will insert in Bear's permits will require the payment of 100 percent of the applicable minimum rates to other carriers engaged by said respondent to transport the property of Hammon Trucking, Inc., or to transport the property of Robert H. O'Hair or W. H. O'Hair Company or O'Hair Construction Company, Inc., when Bear has been engaged or otherwise utilized by Trucking, Inc., to perform or arrange for the transportation.

Findings

The Commission finds that:

1. Trucking, Inc., and Bear each hold radial highway common carrier and dump truck carrier permits and each has been served with Minimum Rate Tariff 7, together with all supplements and additions thereto.
2. Robert H. O'Hair owns 100 percent of the stock of Construction Co. and is the vice-president and owner of 50 percent of the stock of Trucking, Inc., and by reason of this, a sufficient degree of common ownership, management and control exists between the two companies to establish an alter ego relationship between them for the purposes of this proceeding.
3. Because of the relationship referred to in Finding 2, a restriction was inserted in the permits issued to Trucking, Inc., which provides in part that said respondent shall pay 100 percent of the applicable minimum rates and charges to other carriers engaged by it to perform transportation of property of Robert H. O'Hair or

Construction Co. (Said restriction also covers other companies not involved herein.)

4. Lee B. Hammon is the sole owner of Bear, a proprietorship, and is the president and owner of 50 percent of the stock of Trucking, Inc., and by reason of this, a sufficient degree of common ownership, management and control exists between the two trucking companies to establish an alter ego relationship between them for the purposes of this proceeding.

5. Lee B. Hammon, the president of Trucking, Inc., did not disclose the fact that he held permit authority in his own name to do business as Bear when he filed applications for the permits issued to the corporation. Said applications required that this information be disclosed.

6. Trucking, Inc., was engaged by Construction Co. and was paid above the minimum rate level to perform all of the transportation covered by Exhibits 8 and 9, the staff rate exhibits. Trucking, Inc., issued all billing to the shipper and received all payments from the shipper for said transportation.

7. Trucking, Inc., engaged or otherwise utilized Bear to obtain the services of other carriers as purported subhaulers to actually perform the transportation covered by Exhibits 8 and 9.

8. Bear did not have the equipment necessary to perform the transportation referred to in Finding 7.

9. Trucking, Inc., paid Hammon Bear \$3,717.15 less than the lawfully prescribed minimum rates and charges for the transportation covered by Exhibits 8 and 9.

10. Bear paid the other carriers referred to in Finding 7 the amount said respondent received from Trucking, Inc., less a service charge of five percent, for the transportation covered by Exhibits 8 and 9. The resulting charges paid by Bear to said other carriers were \$5,942.90 less than the lawfully prescribed minimum rates and charges for said transportation.

11. Because of the alter ego relationships referred to in Findings 2 and 4 and the permit restriction referred to in Finding 3, the arrangement described herein whereby Trucking, Inc., engaged or otherwise utilized Bear to obtain the services of other carriers as purported subhaulers to transport property of Construction Co. was a device to obtain transportation at less than the lawfully prescribed minimum rates and charges. Said other carriers hired by Bear were, in fact, prime carriers.

12. It has not been shown on this record that there was any collusion on the part of the other carriers engaged by Bear in the device referred to in Finding 11.

13. Jack L. Brown, doing business as Brown Trucking, one of the other carriers engaged by Bear, hired subhaulers, including Sierra Trucking Co., Inc., to perform part of the transportation he was engaged to perform and underpaid said subhaulers \$839.36 for said transportation as shown in Part 1 of Exhibit 8 and Part 2 of Exhibit 9.

14. Subhauler Sierra Trucking Co., Inc., referred to in Finding 13, hired sub-subhaulers and underpaid them \$92.55 as shown in Part 1 of Exhibit 8 and Part 2 of Exhibit 9.

15. Bear's permits should be amended by inserting therein restrictions which would specifically prohibit the type of arrangement and device referred to in Finding 11.

16. Ken Bunyard, an individual, has been paid above the minimum rate level for the transportation he performed and should be dismissed as a respondent herein.

Conclusions

The Commission concludes that:

1. Trucking, Inc., violated Sections 3667 and 3668 of the Public Utilities Code.
2. Bear violated Sections 3664 and 3668 of the Public Utilities Code.
3. The motion by the staff to dismiss Ken Bunyard, an individual, as a respondent herein should be granted.

4. All of the other carrier respondents not named in Conclusions 1, 2 and 3 did not receive the applicable charges for the transportation they performed as required by Section 3664 of the Public Utilities Code.

5. Trucking, Inc., and Bear should each pay a fine, pursuant to Section 3774 of the Public Utilities Code, in the amount of \$750.

6. All respondent carriers who have been found herein to have paid less than lawful minimum charges to other respondent carriers should be directed to pay the amounts due said other carriers.

7. Each of the permits held by Bear should be amended to specifically prohibit the type of arrangement and device found herein.

8. With the exception of Ken Bunyard, all of the carrier respondents herein should be reminded of their obligation to obey the statutes, regulations and tariffs governing their operations and any restrictions in their permits.

The staff of the Commission will make a subsequent field investigation into the measures taken by respondents to comply with the directives herein and the results thereof. If there is reason to believe that any respondent or respondents have not been diligent or have not taken all reasonable measures to comply with said directives or have not acted in good faith, the Commission will reopen this proceeding as to said respondent or respondents for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed against said respondent or respondents.

O R D E R

IT IS ORDERED that:

1. Hammon Trucking, Inc., shall pay a fine of \$750 to this Commission on or before the fortieth day after the effective date of this order.

2. Lee B. Hammon, doing business as Hammon's Bear Truck Service, shall pay a fine of \$750 to this Commission on or before the fortieth day after the effective date of this order.

3. Hammon Trucking, Inc., shall pay the undercharges found herein to be due and payable to Lee B. Hammon, doing business as Hammon's Bear Truck Service, and shall notify the Commission in writing when said payment has been completed.

4. Lee B. Hammon, doing business as Hammon's Bear Truck Service, shall pay to the other respondent carriers the amount of undercharges found herein as due said other respondent carriers and shall notify the Commission in writing when said payments have been completed.

5. Upon collection of the undercharges referred to in ordering paragraph 4, Jack L. Brown, doing business as Brown Trucking, shall pay to the other respondent carriers he engaged as subhaulers, including Sierra Trucking Co., Inc., the amounts due said subhaulers found herein and shall notify the Commission in writing when said payments have been completed.

6. Upon collection of the amounts due referred to in ordering paragraph 5, Sierra Trucking Co., Inc., shall pay to the other respondent carriers it engaged as sub-subhaulers the amounts due said sub-subhaulers and shall notify the Commission in writing when said payments have been completed.

7. In the event any payments to be made, as provided in paragraphs 3, 4, 5 and 6 of this order, remain unpaid sixty days after the effective date of this order, the respondent or respondents who have failed to make such payments shall file with the Commission on the first Monday of each month thereafter a report setting forth the action taken to pay the actual furnishers of the transportation and the result of such action until payments have been made in full or until further order of the Commission.

8. Ken Bunyard, an individual, is hereby dismissed as a respondent herein.

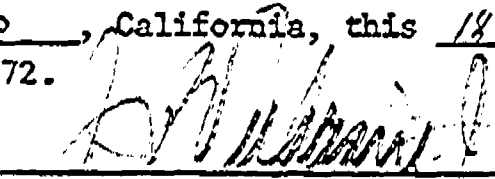
9. On the effective date of this decision the Secretary of the Commission is directed to cause to be amended the radial highway common carrier and dump truck carrier permits issued to Lee B. Hammon

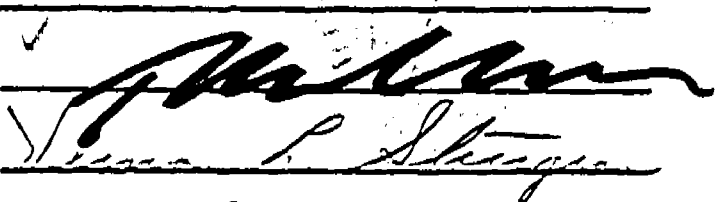
by providing in each that said respondent is prohibited, whenever he is engaged, either directly or indirectly, to transport the property of Hammon Trucking, Inc., or to transport for Hammon Trucking, Inc., the property of Robert H. O'Hair, W. H. O'Hair Company or O'Hair Construction Company, Inc., or their customers or suppliers, from paying such other carriers less than the applicable minimum rates established by the Commission.


10. All of the carrier respondents herein shall obey the statutes, regulations and tariffs governing their operations and any restrictions in their permits. ✓

The Secretary of the Commission is directed to make personal service of this order on Lee B. Hammon, Robert H. O'Hair, Hammon Trucking, Inc., Jack L. Brown, doing business as Brown Trucking, and Sierra Trucking Co., Inc. The effective date of this order as to those respondents 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 18th day of JANUARY, 1972.



Chairman




Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.