

ORIGINAL

Decision No. 80225

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  
PHILLIP ABOUMRAD, dba PHIL'S TRUCK-  
ING & PRODUCE SERVICE and DAILY  
DIET PET FOOD COMPANY, a corporation.)

Case No. 9233  
(Filed June 15, 1971)

Haradon M. Dillon, Attorney at Law, for Phil's  
Trucking & Produce Service; and Marvin Handler,  
Attorney at Law, for Daily Diet Pet Food  
Company; respondents.  
G. R. Dougherty, Attorney at Law, and Eugene Cahoon,  
for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the rates, operations and practices of Phillip Aboumrad, doing business as Phil's Trucking & Produce Service (Phil's Trucking), for the purpose of determining whether said respondent violated Sections 3664, 3667, 3668 and 3737 of the Public Utilities Code by failing to collect charges for the transportation of canned dog food from Daily Diet Pet Food Company, a corporation (Daily Diet), within the credit period specified in Item 250-A of Minimum Rate Tariff 2 (MRT 2), by failing to assess and collect applicable minimum rates and charges for said transportation and by failing to pay subhaulers within the time period specified in paragraph 4 of General Order No. 102-C.

Following is a summary of the provisions of the "Collection of Charges" rule in Item 250-A of MRT 2 which are pertinent herein: Freight bills for all transportation and accessorial services must be presented or mailed by the carrier to the shipper within seven calendar days from the first 12 o'clock midnight following delivery

of the freight; freight bills shall be paid by the shipper within seven days, excluding Sundays and legal holidays, from the first 12 o'clock midnight following the presentation or mailing thereof by the carrier; in the event the freight bill is presented before the date of delivery, the seven day credit period shall run from the first 12 o'clock midnight following delivery.

Paragraph 4 of General Order No. 102-C provides that a prime carrier shall pay subhaulers the charges specified in the written subhaul agreement on or before the twentieth day of the calendar month following the completion of the transportation agreed to be performed. In the event the contract of subhauling contemplates services over a period greater than one calendar month, the subhauler shall be entitled to payment for his services on a monthly basis.

Public hearing was held before Examiner Mooney in San Francisco on November 23 and December 2 and 22, 1971. The matter was submitted on the latter date subject to the filing of points and authorities by Phil's Trucking and the Commission staff, which have been received.

#### Stipulations

A written stipulation setting forth the background of the transportation in issue and the amount of transportation charges owed by Daily Diet to Phil's Trucking was received in evidence as Exhibit 1. Said stipulation was signed by the attorneys for Phil's Trucking, Daily Diet and the Commission staff. According to the stipulation, Phil's Trucking was served with applicable minimum rate tariffs and distance tables, together with supplements and additions to each; Daily Diet has not paid Phil's Trucking for 173 of the 615 loads he transported for said shipper during the period January 30, 1967 through September 4, 1970; the total amount of the unpaid transportation charges for said loads is \$35,647.64; Daily Diet ceased

using the services of Phil's Trucking on September 4, 1970; said respondent carrier's permits were voluntarily suspended at his request on November 20, 1970, and he has not operated subsequent to said date; on or about November 12, 1970, investigators of the Commission staff questioned Phil's Trucking about his assessment and collection of transportation charges for hauling canned pet food for Daily Diet; on December 7, 1970, Phil's Trucking filed suit (Complaint No. 407374) against Daily Diet in the Superior Court of Alameda County for the unpaid transportation charges; Daily Diet and Phil's Trucking have filed a stipulation in the aforementioned suit wherein they agree to the entry of judgement in favor of Phil's Trucking in the amount of the unpaid charges; said stipulation provides for payment to be made to the County Clerk of Alameda County with \$17,000 in cash due 20 days after the Commission's decision herein and the balance to be paid in monthly installments of \$1,000 each plus seven percent interest on the unpaid balance until paid in full, and for the disbursement thereof by the county clerk to Phil's Trucking or such other persons as the court may deem are entitled thereto.

A second written stipulation setting forth the amount of money owed by Phil's Trucking to subhaulers for transportation services was received in evidence as Exhibit 2. Said stipulation was signed by the attorneys for Phil's Trucking and the Commission staff. According to this stipulation, Phil's Trucking had a subhaul bond on file with the Commission during the period the transportation in issue was performed and had been served with the Commission's General Order No. 102-C (Subhaul Bonding Requirements); on July 3, 1970, the Commission staff commenced an investigation of said respondent to determine the total amount of delinquent money owed subhaulers; said investigation disclosed that Phil's Trucking owes 40 subhaulers \$12,073.55 and three additional subhaulers a disputed amount which could exceed \$1,000 for services performed between December 13, 1968 and June 4, 1970.

Staff Position

It was the staff's position that there had been an arrangement between Daily Diet and Phil's Trucking whereby the shipper was to pay the carrier less than minimum rates and charges for the services performed and the \$35,647.64 in unpaid transportation charges was a result of this deal. The two staff representatives who conducted the investigation of respondent carrier and a former employee of said respondent testified in support of said position.

According to the testimony of the two staff representatives, Mr. Aboumrad had met with them in the Commission's Los Angeles office on November 12, 1970, and furnished them with the following information regarding the transportation in issue: He was told by the party who had been hauling for Daily Diet that it was looking for a new carrier; said party had just been employed by Daily Diet as a salesman and informed him that if he were interested, he would have to make a deal with the shipper to get the account; he agreed with the shipper on a charge of 19 cents per case and obtained the haul; he hauled each month from Los Angeles eight to ten loads to the Fresno and four or five loads to the Bay Area or Sacramento; he billed the shipper for all loads transported at applicable rates and charges; however, the shipper set aside every month enough freight bills which were not paid so that the total payments approximated 19 cents per case for all the transportation performed; the dog food shipments were a backhaul for other transportation; he used subhaulers under this arrangement and made approximately \$58 per round trip; at the time of said meeting, his trucking business was dormant, and he had leased his tractor to another carrier; the free hauling amounted to approximately \$40,000, and he owed subhaulers approximately \$18,000; his total debts, including the amount owed subhaulers, approximated \$41,000 to \$47,000; he was relieved that the arrangement was now out in the open; he had attempted to collect for the unpaid transportation from Daily Diet, but it refused to pay.

Testimony corroborating that of the staff representatives regarding the information furnished to them by Mr. Aboumrad concerning the arrangement with Daily Diet was presented by the aforementioned former employee of respondent carrier. She stated that she was employed by Phil's Trucking between 1968 and September, 1970; that she was familiar with the Daily Diet account; that she was instructed by Mr. Aboumrad that freight bills with an "X" marked on them were not to be included in the total amount to be collected from Daily Diet; that these equalled approximately 15 percent of the transportation charges due from said account; and that respondent carrier owed her money.

Staff counsel recommended that a punitive fine of \$5,000 be imposed on Phil's Trucking pursuant to Section 3774 of the Public Utilities Code; that he be directed to pay the subhaulers the amounts owed to them; that pursuant to Section 3800 of the Code, an additional fine be imposed on said respondent in the amount remaining, if any, from the \$35,647.64 after payment of the amounts owed subhaulers and all lawful debts arising out of his business which are approved by the Court in the aforementioned complaint; and that said respondent be ordered to cease and desist from further violations of the rules and regulations of the Commission.

Respondent Carrier's Position

It was the position of Phil's Trucking that there was never any device, scheme or arrangement of any sort between the carrier and shipper whereby the shipper was to receive any free transportation or transportation at less than applicable minimum rates; that he had attempted to collect applicable charges for all transportation performed; and that he cannot pay the subhaulers until Daily Diet pays him the stipulated amount due and owing to him.

In support of this position, Mr. Aboumrad testified as follows: He is not in business at the present; he did not inform the staff representatives that he had an agreement with Daily Diet to base the remuneration he was to receive on a flat charge of 19 cents per case or to allow the shipper to withhold part of the applicable transportation charges or to haul any free loads; he contacted an attorney in October, 1970 regarding the collection of the unpaid charges from Daily Diet; he prepared a list of all shipments transported for Daily Diet and took them to a traffic consultant who prepared a summary statement of all unpaid charges from the list; the statement was presented to Daily Diet in latter October, 1970, and it refused to pay; he cannot pay the subhaulers until he receives payment from Daily Diet; any "X" that might be marked on any of the freight bills had nothing to do with whether it was to be paid or not; other than an interest in his home and auto, he has no other assets; his debts are substantial and are those he had told the staff representatives and which they testified to herein.

The attorney for Phil's Trucking argued that the facts and circumstances herein do not warrant either a punitive fine or any other fine based on the amount owed by Daily Diet to the carrier. In addition to commenting on the testimony of Mr. Aboumrad, he asserted that Daily Diet was not in a good financial position; that uncollected freight bills and not undercharges are involved herein; and that any violations that may exist are technical in nature and result from his client's inability to collect from the shipper.

Discussion

The facts herein have been stipulated to by the parties concerned, and no comments on our part are necessary. The only issue requiring discussion is the penalties, if any, that should be imposed on Phil's Trucking.

Based on a review of the entire record, we are of the opinion, and concur with the staff, that a punitive fine of \$5,000, pursuant to Section 3774 of the Public Utilities Code, should be imposed on Phil's Trucking. The undisputed evidence establishes that the respondent carrier did not collect applicable minimum charges for all transportation services performed for Daily Diet while said shipper was a customer; that this was primarily the result of the shipper's failure to pay and the carrier's failure to collect transportation charges for all shipments; and that Phil's Trucking made no real effort to collect the unpaid charges until after he ceased hauling for the shipper. While there is a conflict in the record as to whether respondent carrier had actually agreed with the shipper to accept 19 cents per case and thereby perform the transportation in issue at less than minimum rates, the list of shipments attached to the stipulation in Exhibit 1 clearly shows that for the year 1970 certain of the shipments transported each month were not paid for by the shipper. The listings therein for prior years show a like pattern. In the circumstances, even if there had not been a mutual agreement or understanding between the carrier and shipper, the lack of direct action by Phil's Trucking to collect for the unpaid transportation shows acquiescence on his part to this illegal practice during the period he handled the account. There were clearly violations of both the "Collection of Charges" rule in Item 250-A of MRT 2 and the rule in paragraph 4 of General Order No. 102-C governing payment to subhaulers. The fact that Phil's Trucking had not collected all transportation charges

due and owing to him from Daily Diet does not excuse him from the duty imposed on him by said paragraph 4 to pay subhaulers he engages within the time period specified therein. The subhaul contract is between the prime carrier and the subhauler. It is separate and apart from the contract of carriage between the prime carrier and shipper. Payment by the shipper to the prime carrier is not a condition precedent to the prime carrier's obligation to pay the subhauler for services rendered.

We do not agree with the staff that an additional fine, based on Section 3800 of the Public Utilities Code, in the amount remaining from the \$35,647.64 after the payment of the subhaulers and other debts, should be imposed on Phil's Trucking. According to the record, the punitive fine and debts of said respondent at least equal the stipulated amount to be collected, and his additional assets are very limited. Both the respondent carrier and the staff presented argument and points and authorities regarding the effect, if any, the statute of limitations would have on any fine imposed pursuant to Section 3800 of the Public Utilities Code. However, since it has been determined that no such additional fine will be levied against Phil's Trucking, we need not consider this issue herein.

We will also direct Phil's Trucking to collect the amount stipulated to in Exhibit 1 from Daily Diet and to pay the subhaulers listed in Exhibit 2 the amounts owed to them. Additionally, we will direct the respondent carrier to cease and desist violating the Commission's rules and regulations.

Decision No. 74533, dated August 13, 1968, in Case No. 8972, involved a prior investigation of Phil's Trucking. The issues therein were not similar to those in the instant proceeding.

Findings

The Commission finds that:

1. Phil's Trucking operated pursuant to radial highway common carrier and highway contract carrier permits during the period covered by the investigation herein, January 30, 1967 through September 4, 1970. Said operating authority was voluntarily suspended on November 20, 1970, and he has not operated since said date.

2. Phil's Trucking was served with all applicable minimum rate tariffs and distance tables, together with all supplements and additions to each.

3. Phil's Trucking transported 615 shipments for Daily Diet during the period January 30, 1967 through September 4, 1970, and transportation charges were not paid by the shipper for certain of the shipments transported each month during said period.

4. The total number of the shipments referred to in Finding 3 for which transportation charges were not paid was 173, and the total of the applicable minimum transportation charges for said unpaid shipments was \$35,647.64.

5. Phil's Trucking has not performed any transportation services for Daily Diet since September 4, 1970.

6. Phil's Trucking has not collected the applicable minimum transportation charges for the 173 shipments referred to in Finding 4 within the time period specified in Item 250-A of MRT 2 and made no real effort to collect any of said unpaid charges until after he ceased handling the Daily Diet account and filed suit on December 7, 1970 against the shipper.

8. Phil's Trucking engaged subhaulers to perform part of the transportation referred to in Finding 3.

9. Phil's Trucking has not paid the subhaulers listed in Exhibit 2 the amounts shown therein for some of the subhaul services referred to in Finding 8, and the total amount owed by said respondent to said subhaulers exceeds \$12,000.

10. The amount due subhaulers referred to in Finding 9 has not been paid by Phil's Trucking within the time period specified in paragraph 4 of General Order No. 102-C.

Conclusions

The Commission concludes that:

1. Phil's Trucking violated Sections 3664, 3667, 3668 and 3737 of the Public Utilities Code.

2. Phil's Trucking should be directed to pay a fine of \$5,000 pursuant to Section 3774 of the Public Utilities Code.

3. Phil's Trucking should be directed to collect the \$35,647.64 in unpaid transportation charges from Daily Diet stipulated to in Exhibit 1; to pay each of the subhaulers listed in Exhibit 2 the amount owed to each; and to cease and desist violating the Commission's rules and regulations, including Item 250-A of MRT 2 and paragraph 4 of General Order No. 102-C.

The Commission expects that Phil's Trucking will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the transportation charges and pay the subhaulers. The staff of the Commission will make a subsequent field investigation into the measures taken by said respondent and the results thereof. If there is reason to believe that either said respondent or his attorney has not been diligent, or has not taken all reasonable measures to collect the transportation charges and pay the subhaulers, 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. Phillip Aboumrad, doing business as Phil's Trucking & Produce Service, shall pay a fine of \$5,000 to this Commission on or before the fortieth day after the effective date of this order.

2. Said respondent shall diligently pursue the legal action referred to hereinabove to collect the amount of the unpaid transportation charges set forth herein.

3. Collection of the unpaid transportation charges referred to in ordering paragraph 2 may be made in accordance with the collection schedule set forth in Exhibit 1 which provides that the shipper will pay \$17,000 in cash to the County Clerk of Alameda County within twenty days after the date the order herein is issued, plus installment payments of \$1,000 per month, plus seven percent interest on the unpaid balance until the balance of said transportation charges have been paid in full.

4. Said respondent shall promptly pay to each of the subhaulers shown in Exhibit 2 the amount due and payable to each.

5. Said respondent shall file with the Commission, on the first Monday of each month commencing with the second month after the effective date hereof, a written report showing the status of the action taken to collect the unpaid transportation charges referred to in ordering paragraph 2 and to make the payments to subhaulers referred to in ordering paragraph 4, until such collections and payments have been completed or until further order of the Commission.

6. Said respondent shall cease and desist violating the rules and regulations of the Commission, including Item 250-A of Minimum Rate Tariff 2 and paragraph 4 of General Order No. 102-C.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Phillip Aboumrad, doing business as Phil's Trucking & Produce Service. 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 Daily Diet Pet Food Company, a corporation. The effective date of this order, as to the latter respondent, shall be twenty days after completion of service by mail.

Dated at San Francisco, California, this 11th day of JULY, 1972.

William Sturgeon President  
William Sturgeon  
William Sturgeon  
William Sturgeon  
William Sturgeon Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.