

Decision No. 80570

ORIGINAL

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 MIKE CONROTTO TRUCKING, a California corporation; CASTRO AND SONS, INC., a California corporation; GEORGE DE PAOLI DISTRIBUTING CO., a California corporation; and LUCKY STRIKE BROKERAGE CO., a California corporation.

Case No. 9369
(Filed May 2, 1972)

Robert K. Lancefield, Attorney at Law, for Conrotto Trucking; Paul R. Malone, Attorney at Law, for Lucky Strike Brokerage Co.; respondents.
James J. Cherry, Attorney at Law, and E. H. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges and practices of Mike Conrotto Trucking, a California corporation (Conrotto), for the purpose of determining whether said respondent violated Sections 453, 494 and 532 of the Public Utilities Code by charging and collecting other than applicable tariff rates in connection with for-hire transportation performed for Castro and Sons, Inc. (Castro), George De Paoli Distributing Co. (De Paoli) and Lucky Strike Brokerage Co. (Lucky Strike), all California corporations, and by falsifying shipping documents so as to show a lesser number of points of origin and/or destination than were actually involved in connection with certain shipments transported for De Paoli and Lucky Strike.

Public hearing was held before Examiner Mooney in Gilroy and San Francisco on June 21 and 22, 1972, respectively. The matter was submitted on the latter date.

Conrotto operates pursuant to a certificate of public convenience and necessity and radial highway common carrier, highway contract carrier and dump truck carrier permits. Only its certificated operations are involved in the investigation herein. It has terminals in Gilroy and El Centro. During the staff investigation referred to hereinafter, it employed two supervisors, five drivers and eight office and other personnel; it operated four tractors and 20 van trailers; and it had all applicable tariffs and distance tables. Conrotto's gross operating revenue for the year 1971 was \$1,357,135 and for the first quarter of 1972 was \$394,731.

On various days during July, August and September 1971, a representative of the Commission staff visited Conrotto's office in Gilroy and examined its records for the period from April 14 to the end of June 1971. The representative testified that he made true and correct photostatic copies of invoices and supporting documents in Conrotto's files for various produce shipments transported by said respondent for the respondent shippers during the review period and that the photocopies are included in Exhibits 2 (Castro), 3 (De Paoli) and 4 (Lucky Strike). He also stated that he visited the place of business of Edward Richardson, a permit carrier who had subhailed the transportation covered by Part 3 of Exhibit 3 (De Paoli) and all parts of Exhibit 4 (Lucky Strike) for Conrotto; that he made true and correct copies of additional documents in Richardson's files relating to said transportations; and that the copies obtained from Conrotto are included in the A portions of said parts of said exhibits, and the copies obtained from Richardson are included in the B portions thereof.

The representative pointed out, and Conrotto stipulated, that the transportation covered by Exhibit 2 (Castro) and all parts of Exhibit 3 (De Paoli) except Part 3 thereof had been incorrectly rated as Produce Service Shipments. In this regard, the applicable tariff provisions provide that a Produce Service Shipment must be transported in one unit of equipment; whereas, in each instance, more than one unit of equipment was used.

The representative testified that the supporting documents in Part 3 of Exhibit 3 (De Paoli) and the 11 parts of Exhibit 4 (Lucky Strike) obtained from subhauler Richardson show that in each instance more pickups and/or deliveries were accorded than shown on the documents obtained from Conrotto; that the bills of lading issued at the cooler in Salinas from which the lettuce shipments covered by Parts 2, 3, 5 through 8 and 10 of Exhibit 4 (Lucky Strike) were picked up show that refrigeration service was requested for said transportation; and that the freight bills for said seven lettuce shipments do not include a charge for said service. Richardson was called as a witness by the staff to corroborate the testimony of the representative regarding the additional pickups and/or deliveries. Additionally, Richardson testified that he was told by Conrotto to refrigerate most of the shipments he transported; that said instructions included the shipments in Exhibit 4 (Lucky Strike) with the possible exception of perhaps two; and that he was never instructed by Lucky Strike to refrigerate any shipments.

A rate expert for the Commission staff testified that he took the sets of documents in Exhibits 2, 3 and 4 and formulated the rate statements in Exhibits 5, 6 and 7. Each of the rate exhibits shows the rate and charge assessed by Conrotto, the rate and charge computed by the staff and, with the exception of Part 5 of Exhibit 5 (Castro), the alleged resulting undercharge for the transportation summarized therein. With respect to Part 5 of Exhibit 5, the rate expert explained that by rating the transportation covered by said part as two separate shipments, lower charges resulted and that the overcharge is \$29.04. He testified that the undercharges shown in the three rate exhibits resulted from the incorrect application of the Produce Service Shipment tariff provisions referred to hereinabove, failure to charge for all pickups and/or deliveries actually made, use of incorrect rates and failure to charge for refrigeration service. As to the seven shipments in Exhibit 4 (Lucky Strike) for which refrigeration service was purportedly accorded but no charge

was assessed, the witness pointed out that Item 334½ of Conrotto's Local Freight Tariff No. 1 states in part that if mechanical refrigeration is provided at the request of the shipper or his agent the refrigeration charges provided therein shall be assessed for said service; that the request for said service was evidenced by the refrigeration instructions on the bills of lading; and that for this reason, he included the applicable charges in Item 334½ in his ratings of said transportation. The amount of the undercharges shown in Exhibit 5 (Castro) is \$1,302.70, in Exhibit 6 (De Paoli) is \$787.11 and in Exhibit 7 (Lucky Strike) is \$607.74, and the total of the undercharges in the three exhibits is \$2,697.55.

The traffic manager, the office manager, the vice-president and secretary and a dispatcher for Conrotto testified on behalf of said respondent. Following is a summary of their testimony regarding the additional deliveries in Part 3 of Exhibit 3 (De Paoli) and all parts of Exhibit 4 (Lucky Strike) for which no charges were made: Instructions regarding deliveries are received by the dispatcher from the two shippers involved in the afternoon; said information is furnished to the traffic manager who prepares the freight bills and inserts the rates and charges thereon prior to leaving around 5:00 p.m.; at the time the transportation in issue moved, no system had been set up to inform the traffic manager of any changes in delivery instructions received after he left; the additional deliveries in issue were requested after 5:00 p.m. and this is the reason no charges were made for them; a new procedure has been established whereby any changes in instructions received after 5:00 p.m. are recorded in a dispatch book; the traffic manager now checks the book in the morning and makes any necessary rating revisions on the freight bills.

The witnesses for Conrotto testified as follows regarding the refrigeration issue involved in the seven parts of Exhibit 4 (Lucky Strike): All subhaulers were instructed that no shipment was to be refrigerated unless they were specifically directed to furnish such service; Richardson was never instructed to refrigerate the shipments in issue by either Conrotto or Lucky Strike, a produce broker located

in San Francisco; freight charges were paid by Lucky Strike, and all of Conrotto's dealings were with said company; it had no dealings whatsoever with either the parties who sold the lettuce to Lucky Strike or the coolers in Salinas from whom the shipments were picked up; the lettuce is cooled prior to pickup and because of the short distance from Salinas to the Bay Area refrigeration in transit is unnecessary; the coolers automatically put refrigeration instructions on the bills of lading because they do not know where the destination is, whether it is the Bay Area or out of state; Lucky Strike has informed the growers and coolers that it does not wish its shipments refrigerated and some continue to include refrigeration instructions on the bills of lading; Lucky Strike was the shipper in each instance and not having requested refrigeration service should not be charged for it.

The witnesses for Conrotto also stated that it was never the intent of Conrotto to falsify any billing; that it has obtained new electronic equipment and several additional office employees to help assure that rating errors do not occur in the future; and that Mr. Richardson has been paid for all subhaul services he performed for Conrotto.

An affidavit by the president of Lucky Strike was received in evidence. Said affidavit states generally the same information regarding deliveries and refrigeration included in the evidence presented by Conrotto.

In his closing statement, staff counsel pointed out that Conrotto has heretofore been fined for improperly rating transportation as Produce Service Shipments by Decision No. 78188 dated January 19, 1971 in Case No. 9099. He recommended that Conrotto be directed to collect the undercharges and pay the overcharge shown in the staff rate exhibits and to cease and desist from further violations of the Public Utilities Code. Additionally, he recommended that Conrotto be fined in the amount of said undercharges and that, in addition thereto, a punitive fine of \$5,000 be imposed on said respondent.

Counsel for Conrotto argued that his client should not be required to charge Lucky Strike for the alleged refrigeration service; that any rating errors that did occur were unintentional; that steps have been taken to assure that they do not reoccur; and that the facts and circumstances herein do not warrant the imposition of any punitive fine whatsoever.

The attorney for Lucky Strike asserted that his client had done all in its power to assure that refrigeration service would not be performed and should not be held liable for any refrigeration charges. As to the additional deliveries for which charges were not assessed, he alleged that there was never any intent on the part of his client to pay less than applicable tariff rates and charges.

With the exception of the charges for refrigeration in the aforementioned seven parts of Exhibit 7 (Lucky Strike), we agree with the staff ratings shown in the three rate exhibits. As to the refrigeration, there are conflicts in the evidence regarding this. The bills of lading show refrigeration was requested. Richardson asserted he was instructed by Conrotto to furnish said service for all shipments although he admitted it is possible he did not refrigerate some of the shipments in issue. Both Conrotto and Lucky Strike allege that both Richardson and the coolers in Salinas were specifically instructed that the shipments were not to be refrigerated. While it is generally held that the instructions on the bill of lading are controlling, the conflicting nature of the evidence regarding the refrigeration issue does not warrant such a conclusion herein. In the circumstances, we will not, for the purposes of this proceeding, require Conrotto to collect said refrigeration charges. However, Conrotto is placed on notice that it is its responsibility to take the necessary steps to assure that any confusion or misunderstandings regarding refrigeration service do not occur in the future. By eliminating said charges, the total of the undercharges in Exhibit 7 is \$420.10, and the resulting total for the three rate exhibits is \$2,509.91.

We concur with the recommendations by the staff that Conrotto should be directed to collect the undercharges found herein, to pay a fine in the amount of said undercharges and to cease and desist from further violations. As to a punitive fine, we are of the opinion, based on a review of the entire record, that such an additional fine in the amount of \$3,000 should be imposed on said respondent. In arriving at the punitive fine, we have taken into account the fact that the majority of the undercharges herein result from the misapplication by Conrotto of the Produce Service Shipment provisions of its tariff which were the subject matter of Decision No. 78188, supra, issued less than two years ago, wherein it was directed, among other things, to cease and desist from violating applicable tariff rules. We have likewise taken into consideration the fact that Conrotto has obtained new data processing equipment and has set up new procedures in its organization to assure that rating errors do not occur in the future. However, Conrotto is cautioned that the continued disregard of the Commission's directives cannot and will not be tolerated.

The Commission finds that:

1. Conrotto operates pursuant to a certificate of public convenience and necessity and radial highway common carrier, highway contract carrier and dump truck carrier permits.
2. Conrotto participated in and had copies of appropriate common carrier tariffs and distance tables during the period of time covered by the investigation herein.
3. The record is not persuasive that charges should have been assessed for refrigeration service in connection with the transportation covered by Parts 2, 3, 5 through 8 and 10 of Exhibit 7 (Lucky Strike).
4. Except for the refrigeration charges referred to in Finding 3, the rates and charges computed by the staff in Exhibits 5 (Castro), 6 (De Paoli) and 7 (Lucky Strike) are correct.

5. With the modification referred to in Finding 4, Conrotto charged less than lawfully prescribed tariff rates in the instances set forth in Exhibits 5 (Castro), 6 (De Paoli) and 7 (Lucky Strike) resulting in undercharges in the amount of \$1,302.70, \$787.11 and \$420.10, respectively. The total amount of the undercharges in said three exhibits is \$2,509.91.

6. Conrotto charged more than the lawfully prescribed tariff charge in the instance set forth in Part 5 of Exhibit 5 (Castro) resulting in an overcharge of \$29.04.

The Commission concludes that:

1. Conrotto violated Sections 453, 494 and 532 of the Public Utilities Code.

2. Said respondent should pay a fine pursuant to Section 2100 of said code in the amount of \$2,509.91, and in addition thereto, should pay a fine pursuant to Section 1070 thereof in the amount of \$3,000.

3. Said respondent should be directed to cease and desist from violating the Produce Service Shipment provisions of its tariff and from charging and collecting other than applicable tariff rates and charges.

4. Said respondent should be directed to take the necessary steps to assure that no confusion exists regarding refrigeration service.

The Commission expects that Conrotto will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges and repay the overcharge. 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 its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges and repay the overcharge, 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. Mike Conrotto Trucking, a California corporation, shall pay a fine of \$5,509.91 to this Commission on or before the fortieth day after the effective date of this order.
2. Said 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. Said respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges and repay the overcharge, and in the event undercharges ordered to be collected by paragraph 2 of this order or said overcharge, or any part thereof, remain uncollected or unpaid sixty days after the effective date of this order, said 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 or overcharge remaining to be collected or paid, specifying the action taken to collect and pay such undercharges and overcharge and the result of such action, until such undercharges and overcharge have been collected and paid in full or until further order of the Commission.
4. Said respondent shall cease and desist from violating applicable tariff rules, including those relating to Produce Service Shipments, and from charging and collecting compensation for the transportation of property or for any service in connection therewith in a different amount than the applicable highway common carrier tariff rates and charges.
5. Said respondent shall take the necessary steps to assure that no confusion exists regarding refrigeration service in connection with any transportation services it performs.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Mike Conrotto Trucking. 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 3rd day of OCTOBER, 1972.

James L. Steger
President
William J. ...
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Commissioners