

ORIGINAL

Decision No. 80898

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of A. W. HAYS TRUCKING, INC., a California corporation; ROOFER, INC., a corporation; WESTERBEKE ENTERPRISES, INC., a corporation doing business as CONSOLIDATED MILLING CO.; PACIFIC MOLASSES, a corporation, successor by merger to BERGER AND PLATE, a corporation; and WARREN'S TURF NURSERY, a corporation.

Case No. 9347
(Filed March 14, 1972)

Frank Loughran, Attorney at Law, for A. W. Hays Trucking, Inc., respondent.
Walter H. Kessenick, Jr., Attorney at Law, and
E. E. Cahoon, for the Commission staff.

OPINION AND ORDER

By its order dated March 14, 1972, the Commission instituted an investigation into the operations, rates and practices of A. W. Hays Trucking, Inc. and of certain shippers involved in the operations in question. The order was personally served on A. W. Hays Trucking, Inc., and notice was provided to each of the above-named shipper respondents. A public hearing was held before Examiner Gilman on August 15, 1972, at San Francisco.

Respondent Hays presently conducts operations pursuant to radial highway common carrier, highway contract carrier, and dump truck permits. Respondent Hays also holds a cement^{1/} and a petroleum irregular route certificate. Copies of the appropriate minimum rate

^{1/} Respondent Hays was recently authorized to transfer this certificate to another carrier by Decision No. 80652 in Application No. 53569.

tariffs were served on respondent Hays. Respondent Hays' total gross revenue for the year ending March 31, 1972 was \$1,804,213. Respondent Hays has terminals at Woodland, Stockton, and Bakersfield; it employs 31 drivers and 15 other personnel and operates 22 tractors and 324 trailers.

On September 10, 1971, representatives of the Commission visited respondent's place of business and checked its records for the period from March 1 to August 31, 1971. The underlying documents relating to a certain group of shipments were taken from respondent's files and photocopied. The photocopies together with supplemental data were submitted to the Rate Analysis Unit of the Commission's Transportation Division. Based on the photocopies and supplemental data, a group of rate studies was prepared and introduced in evidence as Exhibits 3 through 6. The rate expert who testified in support of these exhibits made one minor correction to the rate exhibits in his oral testimony. As modified, the evidence presented in regard to the applicable minimum rates and tariffs indicates that the transportation performed for the below listed shippers resulted in the undercharges as shown:^{2/}

Roofer	\$ 110.00
Berger	1,222.67
Consolidated	207.93
Turf	<u>2,767.47</u>
	\$4,302.07

Defendant called its vice-president and supervisor of operations to present evidence in mitigation. He testified that the rating errors reflected in Exhibits 3 through 6 had been caused by an ex-employee. The witness indicated that that employee had been replaced and that respondent now employs a specialist in transportation rating to check samples of each monthly bill.

^{2/} In most instances, the violations apparently resulted from a selection of the wrong rate; in other instances, combination of shipments for rating in a manner not permitted by tariff was either by itself or in combination with use of a wrong rate, the cause of the undercharges.

The staff recommended an order to collect the undercharges from the shippers and a fine pursuant to Section 3800, Public Utilities Code, in the amount of said undercharges. It also recommended an order to cease and desist and an additional fine pursuant to Section 3774, Public Utilities Code, of \$500.

Respondent contested imposition of a fine under Section 3774 on the basis that the element of intent was lacking and that the undercharges arose from mistakes in complicated rates.

Discussion

On the shipment for Roofer Inc., 50,000 pounds of pitch was transported from Fontana to Sacramento; the rate used was 65 cents. The staff rate expert testified that the lowest lawful rate was an alternative rail rate at 61 cents from an on-rail origin to the nearest team track in Sacramento, plus an additional 26 cents for a constructive highway movement to the actual destination. No plausible explanation was given for respondent's selection of a 65 cent rate.

In another example, a shipment of oats by Berger and Plate from Richvale to Corcoran, the staff expert concluded that MRT 14-A provided the lowest lawful rate, 43.25 cents. A 38.50 cent rate was actually used. While there were also other possibly explicable errors on some other moves for this shipper, each of the shipments at issue used the wrong rate; respondent offered no plausible explanation or source for any of the rates actually used on the Berger transportation.

The same general pattern is typical of the undercharges which occurred on shipments for Warren's Turf Nursery and Consolidated Milling. Respondent again offered no plausible explanation for the use of erroneous rates. We cannot conclude that such a pattern of errors is consistent with a good faith effort to comply with the applicable tariffs and no weight will be given to respondent's testimony in determining the fines to be assessed.

Findings

1. Respondent operates under permits as a radial highway common carrier and a highway contract carrier.
2. Respondent was served with the appropriate tariffs and distance tables.
3. Respondent charged less than the lawfully prescribed minimum rates as set forth below:

Roofer	\$ 110.00
Berger	1,222.67
Consolidated	207.93
Turf	<u>2,767.47</u>
	\$4,308.07

Conclusion

Based on the foregoing findings of fact, the Commission concludes that respondent violated Sections 3664 and 3737 of the Public Utilities Code and should collect the undercharges, should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$4,308.07, and in addition thereto should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$500.

The Commission expects that respondent will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that either respondent or its attorney has not been diligent, 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. A. W. Hays Trucking, Inc. shall pay a fine of \$4,808.07 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent Hays 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 completion of such collections.

3. Respondent Hays shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

4. Respondent Hays shall cease and desist from charging and collecting compensation for the transportation of property or for

any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

The Secretary of the Commission is directed to cause personal service of this order upon respondent Hays. 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 JANUARY, 1973. ✓

James L. Sturgeon
President

Mark W. ...
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Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.