

Decision No. 81145

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of Tempco Transportation, Inc., a California corporation, and Shedd Bartush Foods, Inc., a California corporation.

Case No. 9335  
(Filed February 23, 1972)

J. Fred Davis and William P. Bording, for Tempco Transportation, Inc., and C. J. Van Duker and Norman D. Sullivan, for Shedd Bartush Foods, Inc., respondents.  
Elmer Sjostrom, Attorney at Law, and E. Cahoon, 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, and practices of Tempco Transportation, Inc. (Tempco), for the purpose of determining whether Tempco violated Sections 3664, 3667, and 3737 of the Public Utilities Code in performing transportation for the shipper Shedd Bartush Foods, Inc. (Shedd) by assessing rates and charges less than the applicable minimum rates prescribed in Minimum Rate Tariff 2 through failure (1) to properly increase the assessed rates and charges with tariff-provided increments when chilled temperature control service was performed by Tempco for the commodity hauled, and (2) to comply with the requirements of the shipment multiple lot and split delivery rules, Items 85 and 170-Series of Minimum Rate Tariff 2.

Public hearing was held before Examiner Fraser in San Francisco on April 13 and 14, 1972. The matter was submitted on the latter date and briefs were filed.

Tempco operates pursuant to a radial highway common carrier and a highway contract carrier permit. During the period referred to herein it had a terminal in San Jose and employed 13 drivers, a dispatcher, and 4 office employees. Its operating equipment consisted of 6 tractors, 3 van trucks, 2 flatbed semitrailers, and 10 van-type semitrailers, 3 of which are refrigerated. Tempco's gross operating revenue for the calendar year 1971 was \$500,476.

On various days during June and August of 1971, a representative of the Commission staff visited the Tempco office in San Jose and examined its records on transportation performed during the months of April, May, June, and July 1971. The representative testified that he made true and correct copies of all documents concerned in the transportation of 17 shipments of margarine, salad products, and shoestring potatoes, billed to Shedd and transported in refrigerated trailers. Margarine transported under Parts 3, 6, 7, 8, and 9 was under "chilled temperature control". The surcharge assessed for this service was billed to and paid by Shedd. The staff representative testified that the surcharge was not applied to any of the other shipments transported under Parts 1 through 17, inclusive, although he was advised by Tempco's manager that Shedd requests temperature control service on everything shipped to the Los Angeles area. He further testified that the carrier's manager told him Tempco should be paid for the chill service provided on all of the shipments listed under Parts 1 through 17, inclusive. The staff representative testified that he asked Tempco's office staff about master bills and was advised that the master bills are not received until after the goods are delivered. He stated that Tempco's manager informed him Shedd telephones Tempco for transportation and provides the weight of the shipment and the name and location of the consignee. This information is recorded on a dispatch sheet which is given to the driver; the date on the dispatch sheet is the date the truck is loaded; bills of lading are handed the driver by Shedd during the loading process and are

dated and stamped; Tempco prepares the freight bills from the bill of lading; delivery tags are made up by the Tempco dispatcher from information on the bill of lading after it is returned by the driver. The representative further testified that he never contacted or visited Shedd to ask how the shipper operated; he obtained his information solely from the carrier's employees and documents. He admitted on cross-examination that approximately 500 freight bills for various shippers were reviewed and only 17 relating to Shedd were selected for presentation to the Commission's rating unit.

A Commission rate expert testified he took the documents in Exhibits 1 and 2, supplemented by the information obtained from Tempco office personnel by the staff representative, and formulated the rate statement on Parts 1 through 17, introduced in evidence as Exhibit 3. He said that respondent did not charge for temperature control on certain shipments of margarine, coconut oil (Part 11), and peanut butter and jelly (Part 16), which were transported under each of the 17 parts investigated in this proceeding. The witness testified that he added the surcharge provided for in Item 185 of Minimum Rate Tariff 2 for "chilled temperature control" to the rates charged by respondent for transporting the items identified above after the staff representative advised him of the statements made by the Tempco employees. The surcharge was applied to all 17 parts listed in Exhibits 1, 2, and 3.

The witness further testified that on Parts 1 through 9 the respondent combined a series of components as a single split delivery shipment. The staff witness rated each of the components which was picked up prior to the issuance of the "written document" as separate shipments because of the documentation requirements of Items 85 and 170-Series of MRT 2 (paragraph 5 of Item 256 requires shipment documentation to be retained in carrier's records for at least 3 years) and, in addition thereto, because of an illegal tender of portions of a shipment over a period of several days. Item 85(a) 1, 4 requires that the entire shipment be available at the time of the first pickup and that the entire shipment be picked up within two days. Shipping documents on Parts 4, 6, 7, and 8 indicate that

the shipments were still being combined on the second day of movement. The witness advised that undercharges on the 17 parts total \$2,909.27.

Shedd's traffic manager testified as follows: Orders are received by telephone, telegram, or teletype. The order is then verified through the credit department and either scheduled for manufacture or taken from inventory. Documents are prepared in the latter case and the shipment is divided into truckloads. Tempco shipments are mostly on Monday or Tuesday. Tempco is contacted on Thursday or Friday regarding the loads to be hauled the following week. The merchandise is ready to be picked up when the carrier is called. A telephone call to Tempco informs the carrier of the size of the shipment, location of the consignees, and type of shipment, so necessary equipment can be reserved in advance. A spread sheet is prepared before the driver arrives to pick up the first load. It lists the date, carrier, type, and total weight of shipment, number of loads, bill of lading number, along with the name and address of shipper and consignee. The Shedd dispatcher shows the spread sheet to each driver and advises him of the load he is to haul. The master bills are made up from the spread sheets, which contain all necessary information. The spread sheets are kept by Shedd as a permanent record. During the period from January 1 through July 31 of 1971, Shedd issued 672 master bills. Tempco hauled to the Los Angeles area under 69 master bills in 1971. Individual shipments were too numerous to consider as separate loads. Margarine is not always refrigerated, depending on the type of margarine, the customer, and several other factors. Occasionally margarine is stored at a low temperature and transported without refrigeration because it is still frozen solid when delivered to the consignee. No refrigeration was ordered or provided on any of the 17 parts except for 12, 14, and 15. On Parts 12 and 15 Shedd maintains

the undercharges of \$27 on each part were paid and the \$29.10 owed on Part 14 was paid after the hearing. Coconut oil and peanut butter and jelly are each involved in a single part. Neither product is transported under temperature control

Tempco's manager testified that master bills are ready on the date of first pickup, along with the complete shipment, but pickups have extended over two days when Tempco was short of equipment; the delay in picking up after the first load was always for the convenience of the carrier; the spread sheets are retained by the shipper but instructions were given to the drivers when they picked up and in his opinion the tariff requirements were satisfied; refrigerated equipment is frequently used to haul non-refrigerated loads, with the temperature control equipment turned off; he did not recall telling the staff representative that all Shedd shipments require refrigeration; the staff representative interviewed his wife who is employed in the Tempco office and classified here as the Tempco bookkeeper; she is actually employed as a clerk and is not familiar with Tempco's financial transactions. The Tempco dispatcher testified that he copied down the instructions which Shedd gave over the phone prior to the first pickup; these notes were kept in his records; he occasionally had to pick up late when he had nothing to send out at the time scheduled; hand tags are not considered reliable enough to show the weight of shipment or date of pickup, since they are filled in by drivers, helpers, dispatchers, and others; they are not used for rating purposes by either Tempco or Shedd. He also testified that refrigerated trailers or vans would be used to haul non-refrigerated loads if all other equipment is in use elsewhere.

There is conflict in the testimony regarding the loads hauled under hand tags Nos. 8657 and 8658 of Part 9. The margarine was delivered to Alpha Beta Acme Market in La Habra and refused by the consignee because the temperature on arrival was 52°. The two loads were then transported to the Federal Cold Storage Warehouse in Vernon.

The staff emphasized there is no record of payment for the transportation from La Habra to Vernon and increased the undercharge on Part 9 by \$71.86. Shedd's witness testified that Tempco has no record of the hauls from La Habra to Vernon because another carrier transported the goods under a separate contract. The transportation involved in hand tags Nos. 7953 and 7958 dated May 11, 1971, Part 11, concerns two shipments totaling 1,575 pounds consigned to San Diego out of a total shipment of over 55,000 pounds directed to various consignees, mostly located in the Los Angeles area. There is testimony from Shedd that Tempco hauled the loads to Los Angeles where they were picked up by another carrier, who completed the shipment. The staff rated the shipment according to the shipping documents which all show the San Diego consignees.

Respondent Shedd placed a statement (Exhibit 4) in evidence and argued that it ships in excess of seventy million pounds of freight annually, approximately 85 percent of which moves within California. Shedd has used a professional traffic and rating service since 1968 to avoid undercharges and other violations. All freight bills are audited before payment to check for errors but some may slip through and then are paid when undercharges are detected. Shedd has found no undercharges on the present 17 parts, although conflicts could have been resolved without the expense of a public hearing.

The staff recommended that Tempco be ordered to pay a punitive fine of \$1,000 in addition to a fine under Section 3800 of the Public Utilities Code equal to the amount of the undercharges.

#### Discussion

The undercharges alleged by the staff in Exhibit 3 total \$2,909.27. Respondents argue that no undercharges are due on any part of the transportation covered in the staff exhibits.

The staff contends that Tempco should have assessed and collected a temperature control surcharge on each of the 17 parts rated herein. This position is based on a three-fold argument;

first, that all shipments were transported in refrigerated equipment and therefore logically should have been under temperature control; second, that Parts 12, 14, and 15 were admittedly under temperature control along with the margarine transported under Parts 3, 6, 7, 8, and 9, thereby giving rise to a presumption that all of the shipments were so controlled; and third, that two shipments to Alpha Beta Market were rejected by the consignee because of a load temperature of 52°, which indicates the truck should have been refrigerated to provide a lower temperature. Tempco employees testified that refrigerated equipment was used to haul non-refrigerated loads when other vehicles were not available; and that temperature controlled loads were occasionally provided for customers who demanded the service; a Shedd witness stated that alleged temperature control surcharges on Parts 12, 14, and 15 were paid by Shedd because certain freight bills were stamped "temperature control" in error; the service was never provided but charges were paid as a moral obligation. The witness further testified that Alpha Beta shipments were refrigerated prior to loading but were not under temperature control while in transit. The load was usually partially frozen when it arrived at its destination.

The staff argued that each component of the carrier billed split delivery shipments in Parts 1 through 9, picked up prior to the issuance of "written information" from the shipper as provided by Items 85 and 170-Series, MRT 2, must be rated as separate shipments in their own right since Tempco's "spread sheets" were never received and retained by the carrier; moreover, numerous component shipping orders of the shipper were not even made up for tender of the freight to the carrier until the second day of movement. A Tempco witness testified that certain records were retained, although none were found, and further testified that Tempco occasionally extended pickups over more than two days where the carrier was short of equipment. It was emphasized that the shipments were always ready prior to the first pickup and any delay in transporting loads was the fault of the carrier.

On hand tags Nos. 7953 and 7958 in Part II the consignee was identified at a San Diego address. Each hand tag had the

notation in ink "reship from L. A.". The staff rated each load to San Diego on the basis that no Los Angeles consignee was identified. Respondent Shedd argued the destination was Los Angeles, where a second carrier was employed to transport the goods to San Diego.

The temperature control surcharge should have been assessed and collected by Tempco on all 17 parts rated in Exhibit 3. If the evidence is interpreted most favorably to respondents, it is still obvious that many loads were temperature controlled; that the goods transported may require occasional refrigeration; that some consignees requested temperature control; that Tempco employees were under the impression all loads transported to Southern California for Shedd were under temperature control; that all loads were transported in vehicles equipped to provide temperature control; and that the tariff provides the shipper should provide specific instructions (Item 185, MRT 2) on whether cooling is required where the necessity of providing the service is in doubt.

The staff position on the multiple lot violations in Parts 1 through 9 is correct. The written instructions were not in the carrier's records as required by the tariff and there is nothing in the record to indicate they were ever provided. Respondents admitted that certain shipments were made up of pickups extending beyond two days for the convenience of the carrier, thus implying that the shipper (Shedd) was not at fault and should not be required to pay undercharges. Failure of a carrier to pick up within the proper time period is no defense to the collection of proper tariff charges (Morrison Trucking Co. (1963) 61 CPUC 234, 235). The staff rated several individual shipments to the addresses noted on the shipping documents as required by the applicable tariff provisions. Shipments must be rated to the San Diego address of the consignee noted on the freight bill. A notation in ink on two freight bills to "reship from L. A.", without other entries, is no reason to disregard all other information on the shipping documents. The staff



imposed an additional undercharge of \$71.86 on page 3 of Part 9 of Exhibit 3. It was computed on the theory that Tempco hauled the two loads (band tags Nos. 8657 and 8658) refused by Alpha Beta Acme Market, from La Habra, where Alpha Beta is located, to the Federal Cold Storage Warehouse in Vernon. Testimony is in variance and there are no shipping documents to indicate that Tempco performed the transportation. This alleged undercharge is not proved.

The circumstances do not justify the imposition of a \$1,000 punitive fine. The carrier has no prior record of violations and most of the freight bills reviewed by the staff were correctly rated. A fine of \$100 is more appropriate and will be imposed.

#### Findings

1. Tempco operates pursuant to radial highway common carrier and highway contract carrier permits.
2. Tempco was served with a copy of Minimum Rate Tariff 2 and all supplements and additions thereto.
3. The rates and charges computed by the staff in Exhibit 3 are correct with the exception noted in Finding 4 herein.
4. The undercharge of \$71.86 noted on page 3 of Part 9, Exhibit 3, is not proved.
5. Tempco charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit 3, except as found in Finding 4, resulting in undercharges in the amount of \$2,837.41.

#### Conclusions

1. Tempco violated Sections 3664, 3667, and 3737 of the Public Utilities Code.
2. Tempco should pay a fine pursuant to Section 3800 of the Code in the amount of \$2,837.41, and in addition thereto, should pay a fine pursuant to Section 3774 thereof in the amount of \$100.

The Commission expects that respondents 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 respondents and the results thereof. If there is reason to believe that respondents or their attorney have not been diligent,

or have not taken all reasonable measures to collect all undercharges or have 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. Respondents shall pay a fine of \$2,937.41 to this Commission on or before the fortieth day after the effective date of this order.
2. Respondents 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. Respondents 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, respondents 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. Respondents 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 to be made upon respondents. The effective date of this order as to each respondent shall be twenty days after the completion of such service on such respondent.

Dated at San Francisco, California, this 15th day of MARCH, 1973.

Vernon L. Stinson  
President  
William Symons Jr.  
Michael R.  
Thomas Moran  
Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.