

ORIGINAL

Decision No. 81467

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
LLOYD CANNON, an individual, doing
business as LLOYD CANNON TRUCKING;
CERTIFIED GROCERS OF CALIFORNIA, LTD.,
and GARDEN STATE PAPER COMPANY, INC.

Case No. 9363
(Filed April 11, 1972)

William H. Kessler, Attorney at Law, for
Lloyd Cannon Trucking, respondent.
Elmer Sjoström, 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 into the operations, rates, and practices of Lloyd Cannon, an individual doing business as Lloyd Cannon Trucking (Cannon), for the purpose of determining whether he violated General Order No. 102-C and Sections 3575, 3664, and 3737 of the Public Utilities Code by engaging subhaulers without having the required subhaul bond on file with the Commission and by charging and collecting less than applicable minimum rates in connection with transportation performed for Certified Grocers of California, Ltd. (Certified) and Garden State Paper Co. (Garden State).

Public hearing was held before Examiner Mooney in Fresno on June 27 and 28, 1972. The matter was submitted upon the filing of a brief by Garden State on October 3, 1972.

Cannon operates pursuant to a radial highway common carrier permit. He has terminals in San Leandro, Montebello, and Fresno. During the period covered by the staff investigation referred to

hereinafter, he employed 17 drivers, 1 mechanic, 1 maintenance man, and 5 office personnel; operated 18 tractors, 34 semitrailers, and 16 dollies; and had been served with all applicable minimum rate tariffs and distance tables, together with all supplements and additions to each. His gross operating revenue for the year ending March 31, 1972 was \$779,708.

On various days during August and September 1971, a representative of the Commission staff visited Cannon's place of business in Fresno and examined his records for the period January through July 1971. The representative testified that he made true and correct photostatic copies of freight bills and supporting documents covering the transportation of sugar and canned goods for Certified and scrap or waste paper for Garden State during the review period and that the copies are included in Exhibits 1 and 2, respectively. He stated that all billing was done at Cannon's Fresno office; that the Fresno office obtained any necessary information regarding rates from a traffic consultant or from the manager of the Montebello terminal; that a sales order type of document was issued by Certified for sugar shipments prior to pickup; that the sales order documents for the sugar shipments in Exhibit 1 were at the carrier's Montebello facility which he did not visit; and that copies of all other documents that had been issued in connection with the transportation covered by the two exhibits were filed in the Fresno office. The witness testified that the majority of the transportation covered by Exhibits 1 and 2 had been rated by Cannon as multiple lot or split pickup shipments; that the necessary instructions from the shipper and the master documentation for rating shipments in this manner were either lacking or had not been issued in accordance with the applicable rules in Minimum Rate Tariff 2 (MRT 2); and that for this reason, this method of rating was incorrect. In this connection, he explained that although he did not see Certified's sales order documents for the sugar shipments in Exhibit 1, he was shown some for an earlier period which he was informed were similar in form and content; that the sales

orders were for substantially larger volumes of sugar than were tendered to Cannon; that Certified also used its own equipment for transporting sugar; that the applicable multiple lot and split pickup rules require that the origins and destinations and the kind and quantity of freight to be shipped be shown on the master documentation; and that this information was not included on the sugar sales orders.

With respect to the transportation covered by Parts 1 through 18 of Exhibit 2, the witness stated that all of the transportation was delivered to Garden State's facility at 2205 West Mt. Vernon, Pomona, which is served by the Southern Pacific Transportation Company (SP); that the transportation covered by Parts 1 through 6 was picked up at 3035 E. Butler, Fresno, which is served by The Atchison, Topeka and Santa Fe Railway (AT&SF); and that the transportation covered by Parts 7 through 18 was picked up at 1916 20th Street, Sacramento, which is served by the Western Pacific Railroad (WP).

The representative testified that Cannon did not have a subhaul bond on file with the Commission between latter 1967 and June 4, 1971; that subhaulers were used to transport the shipments covered by 15 of the 44 parts of Exhibit 2; that this transportation was performed prior to June 4, 1971; and that Cannon had also utilized subhaulers to perform other transportation during the period he did not have the required bond on file.

A rate expert for the Commission staff testified that he took the sets of documents in Exhibits 1 and 2, together with the supplemental information testified to by the representative, and formulated the rate statements in Exhibits 3 and 4 which relate to the transportation for Certified and Garden City, respectively. Each of the rate exhibits shows the rates and charges assessed by Cannon, the rates and charges computed by the staff, and the amount of the undercharges alleged by the staff for the transportation in issue. The rate expert stated that the rate errors were the result

of assessing incorrect alternative rail rates, assessing charges on actual rather than higher minimum weights, consolidating separate shipments as multiple lot and split pickup shipments without complying with applicable documentation requirements, and failure to assess applicable switching charges in connection with alternatively applied rail rates. With respect to the switching charges, the witness testified that alternative rail rates were applied to the transportation covered by Parts 1 through 18 of Exhibit 4 (Garden City); that the origins in Fresno and Sacramento and the destination in Pomona of this transportation were served by different railroads; and that, in his opinion, the switching charge would not be absorbed by the line-haul rail carrier, and, therefore, must be assessed. The amount of the alleged undercharges shown in Exhibits 3 (Certified) and 4 (Garden City) are \$666.48 and \$7,118.06, and the total thereof is \$7,784.54.

Evidence on behalf of respondent carrier was presented by Mrs. Cannon. She testified that she is the office manager; that Cannon handles many thousands of shipments per year; and that the shipments included in the staff rate studies account for only a minute fraction of this total. As to the staff's exhibits relating to Certified, she stated that the shipper had agreed to pay MRT 2 truck rates for the sugar shipments but that alternative rail rates were mistakenly applied to the four sugar shipments in the exhibits; that purchase orders were sent to the Montebello terminal by Certified for all of the canned goods shipments; that after the transportation moved, the purchase orders were forwarded to the Fresno office; that she was unable to locate Certified's purchase orders for the several canned goods shipments in issue; and that each canned goods load was part of a larger order. With respect to the staff's exhibits relating to Garden City, Mrs. Cannon testified that Garden City furnished Cannon with rate sheets from time to time which show rates and minimum weights applying in connection therewith from various locations to Pomona; that she considered this to

be notice in writing from the shipper that the weights shown thereon were to be picked up; that she was informed by Garden City that it has master documentation for all of the scrap paper shipments under investigation herein but that copies have never been furnished to her; and that Garden City always ordered two or three trucks. Mrs. Cannon stated that she had paid an insurance agent for a subhaul bond; that the agent had told her that the bond was taken care of when in fact it was not; that Cannon had no knowledge of this until the agent's books were audited; that Cannon now has a new agent and subhaul bond; and that subhaulers are seldom used by Cannon and only in emergency situations.

Late-filed Exhibit 7 filed by Cannon asserts that the switching charge applied by the staff in Parts 1 through 18 of Exhibit 4 (Garden State) is not applicable. Copies of SP's freight bills for shipments between the same points in Fresno and Pomona covered by Parts 1 through 6 and between the same points in Sacramento and Pomona covered by Parts 7 through 18 were attached to Exhibit 7. None of the railroad's freight bills included a switching charge.

The brief filed on behalf of Garden State asserts as follows: Garden State was the consignee of all of the transportation in Exhibit 4; the shipments were collect, and it paid the freight charges; it places orders with the shipper for 4,200 tons of paper at a time to be released in the amount of 1,400 tons each month to take advantage of the lower rates computed under the multiple lot rule in MRT 2; the documentation required to rate transportation in this manner is the responsibility of the shipper and carrier and not the consignee; the carrier rated the transportation as though these requirements were met, and Garden State in paying the charges had no knowledge of any deficiencies that might have existed in the documentation; it should not be damaged by the assessment of undercharges against it for any failure of the carrier over which it had no control; such an assessment would be void, discriminatory, and a taking

of property without due process in violation of the United States and California Constitutions; likewise, the propriety of applying switching charges was a matter of tariff interpretation over which it had no control.

Discussion

With the exception of the switching charges in Parts 1 through 18 of Exhibit 4 (Garden State), we agree with the staff ratings and undercharges shown in Exhibits 3 and 4. The origin and destination of the transportation covered by Parts 1 through 18 of Exhibit 4 have private spur track facilities. The origin of Parts 1 through 6 is in Fresno and is served by the AT&SF. The origin of Parts 7 through 18 is in Sacramento and is served by the WP. The destination of the 18 parts is in Pomona and is served by the SP. Routings available from Fresno are SP direct or AT&SF direct. Routings available from Sacramento are SP direct or WP-AT&SF. Since the origins and the destination are served by different railroads, it is necessary to have a switch at either origin or destination. Also, since the railroads serving the industrial spurs at origin or destination either have direct routes or participate in routes serving the points, this would generally be considered competitive traffic and the switching charge would be absorbed by the line haul carrier or carriers.^{1/} However, according to the staff, the AT&SF Pomona station and the SP Pomona station serve different areas approximately 2.4 miles apart, and there are no physical connections between the two lines serving their respective Pomona stations. These two "Pomona" stations are indexed separately in the governing tariff under different index numbers. Where two or more railroads serve the same station they are shown together in a common listing. For this reason, it is the staff's contention that this cannot be considered competitive traffic and the switching charges cannot be absorbed. However, it is noted from the copies of the

^{1/} Competitive traffic is defined in Item 10 of SP Freight Tariff No. 230-K as traffic, which at the time of shipment, may be handled at equal rates (exclusive of switching charges) from the same point of origin to the same point of destination via other carriers, one of which performs the switching service.

freight bills issued by SP for transportation performed in the past by it between the points involved that it has not assessed any switching charges (Exhibit 7). It is apparent that SP considers this to be competitive traffic and absorbs the switching charges. It would be patently unjust to penalize Cannon, in applying alternative rail rates, for not collecting switching charges when the rail carrier, in interpreting its own tariff, has not assessed them. We have here a unique situation involving tariff interpretations. If the staff is of the opinion that this matter should be pursued further, it should do so with SP and have clarified any tariff ambiguities or interpretation problems that may exist. By eliminating the switching charges in Parts 1 through 18, the total of the undercharges in Exhibit 4 is \$6,527.42.

As to the purchase orders of Certified as described herein and the rate sheets furnished to Cannon by Garden City, they cannot be considered written instructions for multiple lot or split pickup shipments. The applicable tariff rules require, among other things, that the written instructions be furnished to the carrier by the consignor prior to or at the time of the first pickup and that the instructions specify the kind and quantity of property to be shipped. While the purchase orders and rate sheets may have been furnished to the carrier prior to the first pickup, they did not specify the quantity to be included in the shipments which had been consolidated for rating purposes by Cannon and, therefore, did not meet the latter requirement. According to the testimony of the staff representative, the purchase orders he reviewed were for larger amounts than shipped by Cannon and did not show the origins or destinations. The rate sheets, a sample of which is included in Exhibit 6, show alternative rail rates from various origins to Pomona for various weights and relate to no particular shipment. No documentary or other evidence was presented to support the statement by Mrs. Cannon that she had been informed by Garden City that it had master documentation for all of the paper shipments. Furthermore, the brief filed by Garden State

made no reference to the existence of any such documentation. In the circumstances, no weight has been given to this statement.

The record clearly establishes that Cannon engaged sub-haulers during a period when it did not have a subhaul bond on file with the Commission as required by Section 3575 of the Public Utilities Code and General Order No. 102-C. The fact that Cannon was mistakenly of the opinion that an agent to whom it had paid premiums had obtained a bond and placed it on file when this had not been done is not an excuse for non-compliance with these requirements. It is the responsibility of the carrier to ascertain whether the bond is in fact on file with the Commission before it engages subhaulers. Any reliance placed upon the statements of an agent regarding this is done at the carrier's risk.

The assertions by Garden State in its brief that any undercharges involving transportation for it were due to failures of the carrier over which it had no control and that the assessment of any undercharges against it for this transportation would violate the due process clauses of the Federal and State Constitutions are without merit. If, as a result of the default of a carrier, a shipper has been damaged, the shipper has his action at law against the carrier, but the shipper must, nevertheless, pay the proper tariff charges, Investigation of H. A. Morrison Trucking Co. (1963) 61 CPUC 234, 237. This rule applies to the debtor who is obligated to pay the freight charges, irrespective of whether he is the consignor, consignee, or other party.

Cannon was a respondent in Cases Nos. 7099, 7673, and 8610. In each of the three proceedings penalties were imposed for various violations.

Based on a review of the evidence, we are of the opinion that Cannon should be directed to collect the undercharges found herein, to cease and desist violating the minimum rate tariffs and engaging subhaulers when he does not have the required bond on file, and to pay a fine in the amount of the undercharges plus a punitive fine of \$1,000.

Findings

1. Cannon operates pursuant to a radial highway common carrier permit.
2. Cannon was served with the applicable minimum rate tariffs and distance tables, together with all supplements and additions to each.
3. The purchase orders issued by Certified, the rate sheets issued by Garden State, and other documents issued by either shipper respondent did not comply with the applicable tariff provisions governing multiple lot and split shipments.
4. For the reasons specified in the body of this opinion, Cannon will not be required to collect switching charges for the transportation covered by Parts 1 through 18 of Exhibit 4 (Garden State).
5. Except to the extent Exhibit 4 is modified by Finding 4, Cannon charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibits 3 (Certified) and 4 (Garden State) resulting in undercharges in the amounts of \$666.48 and \$6,527.42, respectively. The total of the undercharges is \$7,193.90. ✓
6. The requirement that Cannon collect the amount of undercharges in Exhibit 4 referred to in Finding 5 does not result in a denial of due process to Garden State.
7. Cannon engaged subhaulers without having a subhaul bond on file with the Commission in violation of Section 3575 of the Public Utilities Code and General Order No. 102-C.

Conclusions

1. Cannon violated Sections 3575, 3664, and 3737 of the Public Utilities Code and General Order No. 102-C.
2. Cannon should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$7,193.90, and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$1,000.
3. Cannon should be directed to cease and desist violating the minimum rates and rules established by the Commission and General Order No. 102-Series.

4. Garden State is not denied due process by the requirement that Cannon collect from it the amount of undercharges in Exhibit 4 referred to in Finding 5.

The Commission expects that Cannon 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 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, 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. Lloyd Cannon, an individual doing business as Lloyd Cannon Trucking, shall pay a fine of \$8,193.90 to this Commission on or before the fortieth day after the effective date of this order.

2. Lloyd Cannon 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. Lloyd Cannon 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. Lloyd Cannon 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.

5. Lloyd Cannon shall cease and desist from engaging sub-haulers when he does not have the required subhaul bond on file with the Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Lloyd Cannon. 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 12th
day of JUNE, 1973.

William L. S. [Signature]
President
William [Signature]
[Signature]
[Signature]
Commissioners

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