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Decision No. 81562

**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 ALLAN L. WENGER, an individual; BAY CITIES BUILDING MATERIALS CO., INC., a corporation, doing business as MILLBRAE MATERIALS CO. and B.C.B.M. TRUCKING COMPANY, INC., a corporation.

Case No. 9498  
(Filed January 23, 1973)

Howard M. Wexler, Attorney at Law, for  
Allan L. Wenger, and Frank L. Magnani,  
Attorney at Law, for Bay Cities  
Building Materials Co., Inc., respondents.  
R. D. Gravelle, 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 Allan L. Wenger, (Wenger) for the purpose of determining whether he charged less than applicable rates in connection with transportation performed for Bay Cities Building Materials Co., Inc., doing business as Millbrae Materials Co., and B.C.B.M. Trucking Co., Inc.

Public hearing was held before Examiner Mooney on May 8, 1973. The staff and Wenger entered a written stipulation at the hearing which resolved all issues. Counsel for respondent shippers stated that he had not heretofore seen the stipulation. The matter was set for further hearing on May 15, 1973 to give him an opportunity to review the stipulation and present any evidence he might deem appropriate in connection therewith. He informed the

Commission on May 11, 1973 that he would not present any evidence and required no further hearing. In the circumstances, the matter was taken off the hearing calendar and submitted on May 11, 1973.

Findings

The following undisputed facts are established by the evidence and the aforementioned written stipulation, and we find them to be such:

1. In April and May 1972, a representative of the Commission staff conducted an investigation of Wenger's records for the period June through November 1971. The investigation disclosed rate errors in connection with the transportation of cement in shipper-owned trailers for the shipper respondents during the period reviewed.

2. Wenger was authorized by Decision No. 78403 dated March 9, 1971 in Application No. 51839 to acquire a cement carrier certificate by transfer from another carrier. The bill of sale consummating the transfer was not executed until February 24, 1972. He became a party to Pacific Motor Tariff Bureau Tariff 14 on the same date. In the circumstances, he had no effective cement carrier certificate during the period covered by the staff investigation. Also, he has never held a cement contract carrier permit.

3. In performing the service referred to in Finding 1, Wenger was operating as a highway carrier of cement. Although he held no authority from the Commission to so operate, the Commission is not precluded from ordering him to comply with the minimum rates, rules, and regulations applying in connection therewith or from imposing appropriate sanctions for violations thereof. (In re Webster H. Tennis, et al. (1964) 63 CPUC 665; Keller v Thornton Canning Co. (1967) 66 C 2d 963.)

4. Wenger is presently reorganizing his business and has had his cement carrier certificate placed in voluntary suspension from

December 12, 1972 to December 1, 1973. Other operating authority held by him, which is not involved herein, has either been sold or placed in voluntary suspension.

5. At the time of the staff investigation Wenger had no employees, his terminal was at his home in San Mateo, and he had one tractor which was used in the hauling of cement and one set of dump trailers which were used for other transportation. Wenger reported gross operating revenue of \$15,512 and \$6,391 for 1971 and 1972, respectively. The reported revenue was from subhauling only.

6. The rate errors referred to in Finding 1 are summarized in the staff's Exhibit 2. They resulted primarily from shipper deductions for trailer rentals in excess of nine percent of the minimum transportation charges in violation of Item 165 of Minimum Rate Tariff 10. To a lesser extent, they resulted from shipper deductions from minimum transportation charges for gross wages paid Wenger as an employee by the shipper respondents in excess of the amount actually paid.

7. The minimum rates and charges computed by the staff in Exhibit 2 are correct.

8. Wenger charged less than the lawfully prescribed minimum rates and charges in the instances set forth in Exhibit 2 in the amount of \$8,948.54.

9. There is no evidence that Wenger has engaged in any unlawful operations or practices since December 1971.

10. Wenger has agreed that if he does not make a good faith effort to collect the undercharges referred to in Finding 7, he shall be personally liable for any fine that might be assessed in connection with the undercharges.

Conclusions

1. Wenger violated Sections 458, 494, 1063, 3621, 3664, 3667, and 3668 of the Public Utilities Code and the leasing regulations in General Order No. 130.

2. Wenger should pay a fine pursuant to Sections 2100 and 3800 of the Public Utilities Code in the amount of \$8,948.54, and, in addition thereto, should pay a fine pursuant to Sections 1070 and 3774 in the amount of \$500.

3. Wenger should be directed to cease and desist from violating the rates and rules of the Commission, including any rules regulating deductions against applicable transportation charges.

The Commission expects that Wenger 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 respondent or his 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.

The stipulation referred to above provided for the payment of any Sections 2100 and 3800 fine within ten days after the collection of the undercharges on which it is based. The order will so provide. Also, Wenger's attorney has informed the Commission that his client waives personal service of this order.

O R D E R

IT IS ORDERED that:

1. Allan L. Wenger, an individual, shall pay a fine of \$9,448.54 to this Commission. \$500 of the fine shall be due and payable on or before the fortieth day after the effective date of this order. The balance of the fine shall be due and payable within ten days after the undercharges set forth in Finding 8 have been collected.

2. Allan L. Wenger shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth in Finding 8, and shall notify the Commission in writing upon the consummation of such collections.

3. Allan L. Wenger 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. Allan L. Wenger shall cease and desist from any unlawful operations and practices, including the deduction from transportation charges of any unauthorized allowances to shippers.

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The Secretary is directed to cause service by mail of this order to be made upon all respondents. The effective date of this order shall be twenty days after completion of service by mail.

Dated at San Francisco, California, this 3rd day of JULY, 1973.

Vernon L. Steenson  
President  
William J. Steenson  
J. P. Steenson Jr.  
J. P. Steenson  
Commissioners