

ORIGINAL

Decision No. 81648

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
JACK NAKANO, an individual, dba
DARREN KENT TRUCKING CO., and
BRIDGFORD FOODS CORPORATION,
a corporation.

Case No. 9528
(Filed April 13, 1973)

William E. Wiley, Jr., Attorney at Law,
for Bridgford Foods Corporation, and
Jack Nakano, for himself, respondents.
Bernard Peeters, Attorney at Law, and
Edward Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion to determine:

1. Whether respondent, Jack Nakano (Nakano), who is engaged in the business of transporting property over the public highways of this State for compensation pursuant to a radial highway common carrier permit has, by means of any device, induced, assisted, suffered, or permitted respondent Bridgford Foods Corporation, (Bridgford) to obtain transportation services for shipments of frozen bread dough at less than the minimum rates and charges prescribed in the applicable tariffs, in that Nakano purported to carry for Bridgford, pursuant to the terms of written leases which are in conflict with the requirements of Section 3548 and in violation of Sections 3548, 3664, 3668, and 3737,^{1/} and General Order No. 130 of this Commission.

^{1/} All code sections herein involved are of the California Public Utilities Code.

2. Whether Nakano, by means of any device, has induced, assisted, suffered, or permitted Bridgford to obtain transportation services for shipments of frozen bread dough at less than the prescribed minimum rates, in that respondents did not comply with the terms and requirements of the above-mentioned leases in violation of Section 3548, and in violation of Sections 3664, 3668, and 3737.

3. Whether Nakano has entered into lease arrangements with Bridgford and permitted Bridgford to obtain transportation of property between points in this State at less than the minimum rates prescribed by the Commission, in violation of Sections 3548, 3664, 3668, and 3737; and whether or not the terms of the leases and the actual operations connected therewith may have been in violation of Section 3542 as well as General Order No. 130 of this Commission; and failed to file said lease or leases with this Commission, in violation of General Order No. 130.

4. Whether, in the event rates less than the applicable minimum rates were charged, collected, or received, a fine in the amount of such undercharges should be imposed upon Nakano pursuant to Section 3800.

5. Whether Nakano should be ordered to collect from Bridgford the difference between the charges actually received and charges applicable and due under the minimum rate tariff hereinabove mentioned.

6. Whether any of the operating authority of Nakano should be canceled, revoked, or suspended, or whether fines should be imposed pursuant to Section 3774.

7. Whether Nakano should be ordered to cease and desist from any unlawful operations and practices.

8. Whether any other order or orders that may be found to be appropriate should be issued in the lawful exercise of the Commission's jurisdiction.

After due notice a public hearing on the matter was held before Examiner Rogers in Los Angeles on June 6, 1973 and the

matter was submitted. Respondent Nakano appeared without counsel after being fully advised by staff legal counsel of the seriousness of the matter and the possible penalty or penalties the Commission might impose. He stated he desired to represent himself. Bridgford appeared through legal counsel, who was also an officer of the corporation. Neither respondent offered any defense except to plead lack of knowledge and intent to violate the law. Each asked for leniency.

Nakano operates pursuant to a radial highway common carrier permit issued on May 14, 1970. He has one terminal in the city of Los Angeles. His equipment consists of four tractors and four 40-foot refrigerated vans. Ordinarily he employs four drivers at any one time. His gross operating revenue for 1972 was \$118,694.^{2/}

The investigation concerned all shipments carried by Nakano for Bridgford during the period of March 1 to August 31, 1972, inclusive.^{3/} During that period, Nakano carried approximately 235 split delivery shipments^{4/} of frozen dough from Anaheim to 44 stores or markets (including in several instances branches of the same store or market in different cities or in the same city) in central or northern California (e.g. Sacramento, Fresno, Modesto, Stockton, or Oakland).

An associate transportation representative testified that on August 8, 1972 he was assigned to investigate Nakano; that Nakano subscribes to Minimum Rate Tariffs 2, 1-B, 8, 9-B, Distance Table 7, and Exceptions Rating Tariff 1; that he examined Nakano's

^{2/} Exhibit No. 2.

^{3/} Exhibit No. 1.

^{4/} The staff rate expert rated the loads as split deliveries although there was no proper documentation. The rate expert said that if the shipments had not been so rated by him the lawful charges would have been over double the amounts due as hereinafter stated.

records and Exhibit No. 1 was prepared from Nakano's records and Bridgford's records; and that Exhibit No. 1 includes 36 equipment leases plus, relative to each lease, payment memoranda, invoices, and shipping orders. The witness further testified the equipment leases are individual trip leases^{5/} and that on September 27, 1972 he talked to Nakano about the leases. He said that Nakano informed him that the equipment used was maintained by him, the tires were purchased by him, he made the repairs and serviced the vehicles, the fuel and oil were purchased by him, the equipment was kept at his terminal, and he paid the insurance. Nakano told the witness he had not filed the leases with the Public Utilities Commission; that he had not deleted the equipment used for Bridgford from his equipment list on file with the Commission because they were trip leases; and that his "T"^{6/} number was on each power unit. Nakano also told the witness that he paid all the drivers but later the same day told the witness that since August 17, 1972 the drivers had been paid by Bridgford. The staff witness said that approximately 11 drivers were involved in the hauling represented by Exhibit No. 1; that in some instances a deduction from the trip contract charges was made ostensibly to pay the driver (see, e.g., part 28, Exhibit 1) who was represented to be on Bridgford's payroll; and that in some of those instances where Bridgford purportedly paid the driver, Nakano was the one who paid the driver.

The credit manager for Bridgford testified that as such he arranged for transportation; that he became credit manager on March 1, 1972; that at that time Bridgford was leasing trucks from

^{5/} All of the leases are identical except Number 15, (Exhibit No. 1)

^{6/} An identifying number issued by the Commission and required to be on each power unit.

Nakano and the witness did not change the lease format; that he was not then familiar with Section 3548 or General Order No. 130; that when the investigation started (August 1972) he learned about the section and the general order; and that as a result of the investigation Bridgford now leases from an Arizona company.

A Commission associate transportation rate expert testified that, from the documentation furnished to him by the Commission's associate transportation representative relative to the transportation by Nakano, he determined the applicable tariff rates and the charges that should be assessed; that he prepared Exhibit 3 herein; that Exhibit 3 summarizes the information contained in Exhibit 1 and specifies the resulting rates and charges which are in accordance with the minimum rate tariffs published by this Commission; that in preparing Exhibit 3 he was not able to head the parts with the freight bill numbers, which is usual, because the carrier did not present the freight bills to the shipper; that a document showing payment, called a payment memorandum, was issued by the shipper to the carrier; and that the exhibit shows only the date of shipment, the name of the consignor, the point of origin, and the various destinations of each shipment. He said the commodity, weight, rate, charge assessed, proper charge, and undercharge were secured or calculated from the information in Exhibit 1. He said that the total amount of undercharges for all 36 parts (Exhibit 1) is \$10,104.55; that the shipments were rated under the provisions of the split delivery rule of Minimum Rate Tariff 2 as this results in lower total charges than if each load in each part were rated as a separate shipment, which would be the technically correct way as there was not sufficient documentation for split deliveries, but the staff is assessing the lower charge as it is only claiming that the carriage was performed pursuant to leases not complying with Section 3542 and General Order No. 130.

Nakano testified that he is the sole owner of Darren Kent Trucking Co.; that the office is in Los Angeles; that the information in Exhibit 2 is correct; that Bridgford sent him the leases contained in Exhibit 1; that a man named Martindale (then but not now employed by Bridgford) arranged for him to haul for Bridgford; that he did not solicit the business; that he never carried for others under lease arrangements; that when he carried for Bridgford he was not familiar with General Order. No. 130 but he now is; that when the Commission staff contacted him was the first time he was aware that the leases would cause problems; that when he learned there might be a question of the legality of the leases he decided maybe he had better stop hauling for Bridgford; that after the staff contact, Bridgford started making payroll checks out to Nakano's drivers; and that somebody said it was legal that way. The witness testified that evidence that the payroll records indicated that the drivers purportedly paid by Bridgford were also being paid by Nakano occurred only when he advanced the driver some money; and that he no longer hauls for Bridgford. Nakano said he understood the seriousness of the charges against him, and that they could result in a punitive fine.

Nakano further testified that the Bridgford transactions comprised his first leasing experience; that during the period he was hauling for Bridgford he was not leasing trucks to anyone else; that he has a large turnover of drivers; that he just finds available drivers by calling around; and that when a driver makes a trip he is treated as an employee with all the usual deductions.

Nakano further testified that at the time of the staff's investigation (March through August 1972) he had just one regular driver; and that some of the casual drivers go on consecutive trips.

Bridgford's secretary (also an attorney and the one who represented it herein) testified that Bridgford has very little

conflict with the Commission's evidence; that the form of lease (Exhibit 1) was an old form used in 1962 which he thought had been destroyed; that Bridgford now has a new form substantially different; that the fact that the old form of lease was used was a mystery to Bridgford and to the witness as its counsel; that the man who signed the latest leases for Bridgford is a young man who continued the leasing practices started by an ex-employee; that Nakano is not sophisticated in this sort of thing; that Nakano has no intention to violate the law; that Bridgford is responsible for the acts of its agent; that having drawn a lease form different than those in evidence he assumed it was being used; and that he could not understand why the form was not used. He said that Bridgford paid rental for the equipment; that the insurance carriers will indicate that Bridgford had responsibility as a lessee during this period in connection with incidents involving these trucks; and that the relation between Nakano and Bridgford was lessor and lessee. He said, in summation, that the two respondents were innocent parties and that the complained of practices have been discontinued.

Staff counsel stated that the staff has proven its case; that it has demonstrated by the facts adduced that the purported leases were not in compliance with Section 3548; that in the majority of the cases the drivers were employees of Nakano; that Nakano maintained full control of the trucks; that he performed all of the maintenance; that he gassed and oiled them; and retained all the incidents of ownership. Staff counsel also pointed out that Nakano did not file copies of the leases with the Commission as required by General Order No. 130. He urged that Nakano be required to collect the undercharges as reflected on Exhibit 3 from Bridgford, pay the sum collected to the Commission and pay a fine in addition. He urged leniency for Nakano.

Findings

1. Jack Nakano is an individual doing business as Darren Kent Trucking Co.

2. Nakano operates pursuant to a radial highway common carrier permit issued by this Commission.

3. Nakano has the appropriate minimum rate tariffs, distance table, and exceptions rating tariff.

4. During the period between March 1 and August 31, 1972, inclusive, Nakano on 36 separate occasions permitted his refrigerated trucks to be used for the transportation of frozen dough for Bridgford. In each instance the use was pursuant to a document designated as an equipment lease. These leases failed in each instance to comply with the requirements of General Order No. 130 in that:

- (a) The leases do not provide for the exclusive possession, use, supervision, direction, and control of the equipment by Bridgford.
- (b) The leases do not provide that the vehicle shall be operated by the lessee or an employee thereof.

5. Each of the 36 truck movements included in Exhibit 1 was a split delivery shipment on Nakano's equipment pursuant to Nakano's radial highway common carrier authority with Nakano's employees driving.

6. In each instance, if the shipment had been properly rated as a split delivery shipment the correct charge is the charge shown on Exhibit 3.

7. For the transportation covered by the documents in Exhibits 1 and 3, Nakano charged Bridgford less than the lawfully prescribed minimum rates resulting in undercharges in the total amount of \$10,104.55.

8. The undercharges were made deliberately by Nakano and Bridgford in an attempt to secure transportation of property at less than the prescribed minimum rates.

Conclusions

1. Nakano violated Sections 3548 3664, 3668, and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of said Code in the amount of \$10,104.55.

2. Nakano should pay a fine in the amount of \$500 pursuant to Section 3774 of said Code. ✓

The Commission expects that Nakano 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 Nakano and the results thereof. If there is reason to believe that Nakano 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. Jack Nakano shall pay a fine in the amount of \$10,104.55 pursuant to Section 3800 of the Public Utilities Code of California and a fine of \$500 pursuant to Section 3774 of the Public Utilities Code of California on or before thirty days after the effective date of this order.

2. Jack Nakano shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 7, and shall notify the Commission in writing of the completion of such collections.

3. Jack Nakano 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, Jack Nakano shall file with this Commission on the first Monday of each month after the end of said sixty days a report of the amount 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 this Commission.

4. Jack Nakano shall cease and desist from 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 each respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 31st day of JULY, 1973.

William L. Sturgeon, Jr. President
[Signature]
[Signature] Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

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