

Decision No. 83086**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 VINCENT BELLOUMINI, IRA W. HUNT, and J. B. CANTRELL, doing business as BARNETT VACUUM TRUCK SERVICE, and ARGO PETROLEUM CORPORATION, a Delaware Corporation.

Case No. 9522
(Filed March 20, 1973)

Harry T. Straitiff, Attorney at Law, for Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell, doing business as Barnett Vacuum Truck Service; and Patrick E. Ryan, Attorney at Law, for Argo Petroleum Corporation; respondents.
Lionel B. Wilson, Attorney at Law, and E. E. Cahoon, for the Commission staff.

O P I N I O N

On March 20, 1973 the Commission instituted an investigation on its own motion against Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell, doing business as Barnett Vacuum Truck Service, (Barnett), and Argo Petroleum Corporation (Argo). Barnett was charged with violating the Public Utilities Code by granting a preference to Argo through the device of failing to bill within the required period and by extending credit to Argo in violation of Items 250 and 250-A of Minimum Rate Tariff 2 (MRT 2) and Item 130 of Pacific Coast Tariff Bureau Tariff No. 13 (PCT 13). The transportation was performed under the authority of a radial highway common carrier permit and a petroleum irregular route carrier certificate. Public hearing was held before Examiner Fraser at Los Angeles on September 19 and 20, 1973. The matter was submitted subject to the filing of briefs, which were received on December 12, 1973.

Staff Evidence

A Commission staff representative testified as follows: He was assigned to examine the records of Barnett for all transportation performed during a particular period of time. He started his investigation on July 13, 1972 and reviewed transportation performed by Barnett for Argo from January 1, 1972 through July 13, 1972. The period under investigation was gradually extended from July 1, 1971 to October 1, 1972. The records reviewed showed the carrier was failing to bill Argo within seven days of shipment and to collect within seven days of billing as required by the applicable tariff rules. Billing delinquency on the 20 parts of Exhibits 9 and 9A ranged from 5 to 63 days, with an average of 25 days. Collections were from 83 to 357 days delinquent, with an average of 227 days. During the first 10 months of 1972, Barnett provided Argo with \$56,870.90 worth of hauling on public highways and \$32,962.52 on private property, for a total of \$93,057.76. The witness testified that \$18,910.45 was paid during the first nine months of 1972 on the transportation recorded in the freight bills, checks, vouchers, and ledger entries studied. The sum of \$112,388.73 was owed by Argo in July 1972, when the investigation was started. By October 1, 1972 the sum owing was reduced to \$20,705.59 and has since been paid in full. The witness noted on cross-examination that Barnett billed Argo for \$152,000 worth of service from July 1, 1971 through December 31, 1972 and that \$150,000 was paid by Argo during the same period. He advised at least \$38,200 was owing for transportation performed prior to July 1, 1971. He further advised that it became evident from his investigation that Barnett vouchers were not paid in either chronological or numerical order, which made it difficult to identify when payment was received on each freight bill. Shipments were classified

as on private property or over the public highway according to the information recorded on each freight bill. The witness included shipments which were exclusively on private property and not regulated by this Commission, since the extension of unlimited credit on all transportation performed seemed to constitute a trick and device to grant a preference to a single shipper, in violation of the provisions of the applicable tariffs and the Public Utilities Code. The witness testified that he did not determine Argo's financial status or ability to pay since he considered it beyond the scope of his investigation. An accountant from the Commission staff introduced Exhibit 12 which computed interest at 7 percent (after a 9-day grace period) on each monthly balance owed, during the period from July 27, 1971 through September 20, 1972. The interest was added to the principal owed on delinquent accounts as is customary in business practice. The monthly totals concern bills issued from July 27, 1971 to September 20, 1972. The exhibit includes a table which shows Argo owes \$4,597 if both on-highway and off-highway transportation is included and a second table which totals interest from transportation performed exclusively over the public highways at \$2,652. The witness testified that he considered the date of each check as the date payment was received.

Shipper Evidence

The respondent carrier provided neither exhibits nor testimony. The secretary-treasurer of Argo, who is also a director of the corporation, testified that Argo owed as much as \$1,200,000 during the period from April 1971 through October 1972. He stated some accounts were not paid for seven or eight months, but no complaints were received. He testified that Barnett occasionally requested that sums owing on long-past-due invoices be paid. They were then advised that Argo was paying its bills as rapidly as

permitted by cash available. He noted that the carrier's records reveal Argo paid \$150,000 to Barnett during the period covered in the staff investigation. He further testified that he was unaware the services provided by Barnett were under the jurisdiction of the Public Utilities Commission. He admitted that Barnett extended credit to Argo, as alleged, but denied there was any agreement to either extend credit or to violate the provisions of the applicable tariffs. He testified that the production and distribution of oil and its products require all who participate to provide extensive credit. The process of selecting a drilling site is expensive, and enormous sums are contributed to those who drill wells without any guarantee on the investment. The nature of the business requires the drillers, suppliers, haulers, and contractors to wait for payment until the project has been completed and is producing salable quantities of oil. The first cash received is invariably diverted to convert the oil into a salable product and to establish a market. When this is accomplished the bills are paid. He testified that Barnett was only one of the creditors who were expected to wait until each well produced before receiving payment.

Respondent Barnett operates pursuant to a radial highway common carrier permit issued on October 8, 1968 and a petroleum irregular route carrier certificate granted on December 10, 1968. Barnett has a single terminal in Fillmore, California, and employs seven drivers, a bookkeeper, and a mechanic, in addition to two roustabouts on oil lease hauling. Operating equipment includes 1 flatbed truck, 4 tractors, 7 flatbed semitrailers, 3 tank trailers, 3 pickup trucks, 5 tank trucks, 3 A-frame trucks, and 1 dolly. Copies of the appropriate tariffs were served upon respondent Barnett.

The applicable tariff provisions are included in MRT 2 and PCT 13. The credit rule of Item 250-A of MRT 2 and Item 130 of PCT 13 provide that carriers may, "upon taking precautions deemed by them sufficient to assure payment of charges within the credit period herein specified," extend credit for seven days; excluding Saturdays, Sundays, and legal holidays, from the date of billing the shipper. The billing, in turn, must take place within seven days of delivery of the property.

Discussion

No briefs were filed by Argo. The Barnett brief admits the underlying facts are not in dispute, then presents three separate arguments which we will answer in the order received.

1. Barnett argues there is no proof of an express contract wherein the carrier agreed to extend credit to the shipper beyond the stipulated period, which is required before the carrier can be ordered to collect interest from a shipper for late payment of shipping charges. It was further argued that testimony reveals the shipper paid all bills as soon as it was financially able and that there were never any undercharges. These arguments are not persuasive. If credit is granted beyond the stipulated period a violation has occurred. If we adopted the carrier's point of view the credit rule would be unenforceable where an agreement was denied. This would provide an exception to eliminate the original rule and establish a precedent to undermine other tariff provisions. It is also obvious that an agreement is implied by the action of the parties over a 15-month period. The credit rule should discourage a carrier from favoring a slow-paying shipper by granting unlimited credit. The purpose of the rule is to require a carrier to stop hauling for a shipper which does not pay on time. The fact that a shipper cannot pay for transportation performed is the reason for the rule rather than an argument against it.

2. Barnett argues that the statute of limitations on hauling as a certificated carrier, or off-highway, should be 2 years. It was conceded that California Public Utilities Code Section 3671, adopted in 1969, provides a 3- or 3-1/2-year limitation (depending on the procedure used by the carrier in the collection process) on filing complaints for the collection of lawful charges of highway permit carriers. Section 737 of the Code extends the same 3- or 3-1/2-year statute of limitations to complaints filed by public utilities for the collection of lawful tariff charges. The statute of limitations is an affirmative defense to be considered at the time suit is filed. It would be premature to discuss it in this proceeding.

3. The final issue is whether the Commission can require the carrier to collect interest from the shipper on sums owing for extended periods for transportation performed exclusively on the shipper's private property. Barnett argues that the Commission has no jurisdiction over transportation performed on private property.

Commission and court decisions favor the rule that the integrity of the transportation rates must be preserved (Cascade Refrigerated Lines, Inc. (1963) 62 CPUC 42) and the word "device" in Section 3668 of the Public Utilities Code is to be "interpreted so as to give the broadest possible protection to the minimum rate structure" (Premier Transport (1964) 63 CPUC 743). The Commission has authority to nullify unlawful rebates or unfair dealing between shippers and carriers in respect to transportation, where a lease of noncarrier property is involved (Com. Inv. of Albany Naval Station Vets V.A.T. and S.F. Rwy. Co. (1948) 48 CPUC 160), and to order a carrier to collect the reasonable value of free interstate shipments, when the free transportation was found to be "a device to evade minimum rates on intrastate shipments" (Allan Arthur Transportation, Inc. (1963) 61 CPUC 360). The Commission has ruled that carriers and shippers may

have to justify payments or benefits furnished in business relations other than transportation "to preclude a finding that the transaction was a device to remit or rebate a portion of the transportation charges" (William H. Marbach (1968) 68 CPUC 290). The federal courts apply the same rule to interstate transportation. A single citation will illustrate the federal viewpoint. A city and a railroad were enjoined from completing a project where the railroad purchased municipal bonds to provide financing for the city to purchase land along the railroad right-of-way. The city then offered low rental and other inducements to encourage shippers to move to the purchased land. The U. S. Supreme Court held the entire transaction was illegal, since certain shippers were receiving rewards to become customers of the railroad (Union Pacific R.R. Co. v U.S. (1941) 313 US 450, 85 L ed 1455). The Court said: "The concessions are none the less illegal, if made for non-transportation services as long as they result in lowering directly or indirectly transportation charges to a shipper" (313 US at 464, 85 L ed at 1465).

The decisions emphasize that the minimum rates must be enforced and any effort to circumvent their effect must be nullified, whether or not it concerns transportation. In the current proceeding Argo was provided with free use of all money owing to Barnett on both on- and off-highway transportation. The shipper had the option of deciding when and how much to pay. The Commission has already held that:

"The duty of a carrier to collect the transportation charges within the time limits prescribed by the various minimum rate tariffs is an effective way of preserving the minimum rate schedule. The shipper must not be allowed to gain any advantage, including the advantage that he would gain from the free use of the carrier's money, as a result of the shipper withholding prompt payment. To remedy this situation interest must be allowed on the amounts delinquent. (See West v. Holstrom (1968) 261 Cal. App. 2d 89, 97) If no interest were allowed then the only penalty for credit violation would be against the carrier. This does not effectively prevent the shipper from using its economic power to force illegal credit extensions. There must be deterrence for the shipper, and allowing interest on delinquent accounts provides it." (Orlo M. Hobbs, et al. (1970) 70 CPUC 699, 704.)

This Commission has jurisdiction to determine that the failure to collect for off-highway transportation, within the period provided in the credit rule, is a device to grant an unlawful advantage or preference to a shipper.

Findings of Fact

1. Barnett operates pursuant to a radial highway common carrier permit and a petroleum irregular route carrier certificate. Barnett has been served with copies of the appropriate tariffs.

2. Barnett performed transportation service for Argo during the period from July 1, 1971 to October 1, 1972. The service was billed 25 days late and payment was received 227 days late as an average. Argo's outstanding indebtedness never fell below \$8,116 and at one period was over \$91,000. Applying a rate of 7 percent on the weighted average outstanding balances, after allowing for the appropriate grace period permitted by the tariff, and using the premise that the date of Argo's check was the date of payment, the total interest applicable to delinquent balances for both on- and off-highway transportation during the period from July 1, 1971 to October 1, 1972 is \$4,597.

3. An intent to evade the credit rule may be inferred from the actions of shipper and carrier over a period of 15 months.

4. Financial inability to pay does not excuse application of the tariff credit rule.

5. The failure to collect the lawful tariff charges on both on- and off-highway transportation within the period prescribed by law is a device which permits persons to obtain transportation for property between points within this State at rates less than the minimum rates established by this Commission.

Conclusions of Law

1. Barnett has violated the provisions of Items 250 and 250-A of MRT 2, Item 130 of PCT 13, and Sections 451, 453, 458, 494, 3667, 3668, and 3737 of the Public Utilities Code.

2. Barnett should be ordered to collect from Argo the sum of \$4,597, which is the interest on credit extended to Argo in violation of Items 250 and 250-A of MRT 2 and Item 130 of PCT 13.

3. Barnett should pay a fine pursuant to Sections 1070 and 3774 of the Public Utilities Code in the amount of \$1,500.

4. Barnett should pay a fine equal to the interest on credit extended to Argo, pursuant to Sections 2100 and 3800 of the Public Utilities Code in the amount of \$4,597.

5. Section 737 of the Public Utilities Code specifies that period within which public utilities must file to collect lawful tariff charges. Section 3671 of the Code extends the rule to highway permit carriers.

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 such measures. If there is reason to believe that respondents or their attorneys 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 determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell, doing business as Barnett Vacuum Truck Service, shall pay a fine of \$1,500 to this Commission pursuant to Public Utilities Code Sections 1070 and 3774 on or before the fortieth day after the effective date of this order. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.
2. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell shall pay a fine to this Commission pursuant to Public Utilities Code Sections 2100 and 3800 of \$4,597 on or before the fortieth day after the effective date of this order.
3. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 2 and shall notify the Commission in writing upon collection.
4. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 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 the 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. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of the operating authority of Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell until the report is filed.

5. Vincent Belloumini, Ira W. Hunt, and J. B. Cantrell 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 each respondent. The effective date of this order as to each respondent shall be twenty days after the completion of service on the respondent so served.

Dated at San Francisco, California, this 2nd day of JULY, 1974.

William L. Stevenson
President
William Synson, Jr.
Arthur H. H. H.
Ed. D. D.
Commissioners

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