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Decision No. 83972

ORIGINAL

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 James A. Ortloff, an individual doing business as EAGER BEAVER TRUCKING.	Case No. 9515 (Filed February 23, 1973)
In the Matter of the Application of JAMES A. ORTLOFF, an individual doing business as EAGER BEAVER TRUCKING, for authority to depart from the minimum rates, rules and regulations of Minimum Rate Tariff No. 2, pursuant to the provisions of Section 3666 of the Public Utilities Code.	Application No. 54098 (Filed June 8, 1973)

Handler, Baker & Greene, by Daniel Baker, Attorney at Law, for applicant.
Arlo D. Poe, Attorney at Law, J. C. Kaspar, and H. Hughes, for California Trucking Association, interested party.
Walter Kessenick, Attorney at Law, and E. H. Hjelt, for the Commission staff.

O P I N I O N

The Order Instituting Investigation herein, filed on February 23, 1973, was issued to determine whether respondent-applicant violated Sections 3667 and 3737 of the Public Utilities Code by failing to collect charges for transportation furnished within the maximum time specified by Item 250 of Minimum Rate Tariff 2, commonly referred to

as the credit rule. Nineteen shippers were referred to in the Order Instituting Investigation, but none of them was made a respondent in the proceeding. The application sought authority pursuant to Section 3666 of the Public Utilities Code to depart from the credit rule by extending credit for 30 rather than 7 days after billing. The application alleged that the credit rule did not afford the shippers being served by respondent-applicant an adequate period of time to receive, process, verify, and pay such charges. The application also referred to portions of Decision No. 80088 issued in OSH 601, Case No. 5432 and related matters, on May 18, 1972.[1/]

Subsequently, respondent-applicant proposed an amendment to the deviation proposal under which it would be authorized to extend 30-day credit to specified shippers. It also proposed to acquire a contract carrier permit in order to enter into such contracts (as of the date of the hearing, respondent-applicant was authorized to operate only as a radial highway common carrier).

1/ The following findings from that decision were quoted in full in the application:

> "2. An investigation of carrier records reveals that they are maintaining a high level of outstanding delinquent freight accounts in violation of credit rules set forth in the Commission's various governing minimum rate orders.
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> "6. The evidence implies need for updating the established tariff rules for the collection of freight charges set forth in the Commission's several minimum rate tariffs.
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> "7. The tariff proposals deemed necessary to resolve the issue set forth in Finding 6 hereof should be developed by the Commission's Transportation Division staff and presented to the Commission for its consideration."

Respondent-applicant does not propose to charge any interest or service fees for extending additional credit.

Over the protests of staff and CTA, combined hearings were held in these matters on November 8 and 9, 1973 before Examiner Gilman in San Francisco. These matters were taken under submission on December 31, 1973 on the filing of briefs by all the parties.

James Ortloff holds a radial common carrier permit, subject to the usual exclusions. He has one terminal in Hayward and employs 12 to 15 drivers, a mechanic, and 3 persons in his office. Annual gross revenue in 1971 was $854,000; in 1972, $940,000; and in the first half of 1973, approximately $502,000.

On June 19, 1971 respondent-applicant paid a fine in response to a citation forfeiture proceeding after being charged with violation of the credit rule.

The evidence shows that respondent-applicant has been consistently unable to collect the charges for transportation within the period prescribed by the tariff. The evidence also shows that respondent-applicant attempted to enforce the public policy underlying the Commission's credit rule by bringing a civil action against one of his shippers. That shipper responded by transferring his traffic to another carrier. Since that time respondent-applicant has not taken any other steps to enlist the aid of the courts in enforcing his shippers' responsibilities under the tariffs, nor, according to the record, has respondent-applicant ever utilized against any of his shippers the remedy provided in paragraph (a) of the rule; i.e., to accept possession of a shipper's goods and then refuse to relinquish them until the charges are paid.[2/] According to the staff study,

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2/ In Decision No. 80088 we decided, on the recommendation of our staff, not to require carriers to refuse credit to delinquent shippers.

respondent-applicant had $20,373.41 of bills 50 or more days overdue, $35,280.58 overdue between 30 and 49 days, $37,856.01 of bills overdue between 20 and 29 days, and $86,419.99 overdue between 10 and 19 days.

Respondent-applicant called a witness who was continuing to operate a transportation company after the death of her husband and attempting to collect the company's accounts receivable. She described many problems encountered in collecting overdue freight charges, including the difficulty in obtaining any response from delinquent shippers, particularly those located in the eastern and midwestern sections of the United States, and in reaching the proper person within the shipper organization who was actually responsible for payment of the charges; in addition some payments were delayed because of a dispute over the charges that were assessed; finally, some shippers simply failed to pay charges. When asked for her opinion concerning the 7-day credit rule based upon her experience, she said it was unrealistic.

Mr. Ortloff testified that in dealing with a new shipper he sizes up the plant facilities and operations and the person with whom he would deal, and if they appear satisfactory, extends credit. Respondent-applicant issues its freight bills within the time prescribed by the tariff, and if payment is not received, the office manager telephones the shipper requesting payment. If payment is not received, the bills are given to Mr. Ortloff and he personally calls on the delinquent account and attempts to effect collection. In Mr. Ortloff's opinion there are many reasons why collections cannot be made within the 7-day period prescribed in Minimum Rate Tariff 2. One of the primary reasons is the difficulties with mail service. It takes two to five days for mail to be delivered to points in the San Francisco Bay Area and longer periods if it is sent to a customer in Los Angeles or in the eastern or midwestern sections of the United States.

He testified that one of his shippers requires the bills to be sent to its local plant where a rate clerk reviews the shipping documents and freight bills to determine if the charges are correct. If the charges are disputed, the bills are returned to respondent-applicant and correct bills must be prepared and returned to the shipper. When finally approved at the local plant, they are mailed to that company's New York office where they are again reviewed and payment by the local bank is approved. The bank issues a draft which is sent to respondent-applicant. He indicated that each one of these document transfers increased the possibility of delays caused by the mail service.

Many of his customers accumulate and pay their transportation bills once each month. Respondent-applicant contacted one of its major customers who follows such a procedure and asked him to pay his bills when they are received rather than accumulate them. The customer absolutely refused and indicated that if the carrier objected to this procedure the traffic would be given to another carrier. He also testified that others of his shippers, which include several national corporations, have internal control procedures which would make it impossible for them to furnish payments to him within the 7-day rule.

Mr. Ortloff was asked if there were not some practical way a carrier could put pressure upon shippers to force them to pay their freight bills within the 7-day credit period. He responded that there is no effective way to pressure shippers unless a carrier is willing to give up that shipper's traffic. He contended that if any of the shippers were put on a cash basis that the shipper would simply transfer his business to another carrier who was less concerned about enforcing public policy. He claimed that carrier-initiated court

action is not an effective method to protect the public policy. He testified that his suit against a delinquent shipper resulted in a judgment for only one-half of the amount of the delinquent charges. From this amount it was necessary to deduct 25 percent of the amount collected for attorney's fees. The substantial amount of time that respondent-applicant's employees spent in preparing for and appearing at the court trial was, of course, an additional cost item. He claimed that another carrier is now serving the same shipper and is likewise unable to make timely collection. His efforts to pressure two other shippers resulted in the loss of that traffic to other carriers who are experiencing the same difficulties in collecting their freight charges.

Respondent-applicant introduced comparisons intended to show that the bill-paying behavior of his shippers was not more dilatory than that described by the Commission as existing when Decision No. 80088, supra, was announced. The staff and CTA challenged that view, and the staff introduced evidence to show the effectiveness of its enforcement program.

Respondent-applicant also introduced evidence to show that the carrier business was in extraordinarily sound fiscal condition and would have sufficient working cash to supply credit to his shippers.

Position of the Parties

CTA supports the accelerated credit rule enforcement program (instituted by Decision No. 80088) of which this investigation is a part. CTA opposes the relief sought by the application. It contends that the basic theory of the application is that "...everybody else is doing it". It claims that if "anybody else is doing it, they certainly aren't doing it as flagrantly as applicant". They specifically request that the decision herein contain a warning to each shipper that "continued noncompliance with the Commission's credit rule...will place him in jeopardy of Commission action for willful violation of the Commission's regulations".

Staff recommends that the deviation be denied as being competitively unfair to other carriers and as rewarding shippers who have disregarded Commission rules. It claims that the allegations of shipper hardship are to be discounted since no shippers appeared in support of the claims and that no deviation should be allowed merely for shipper convenience.

Staff has apparently taken the position that a carrier who has overdue bills is thereby in violation of a Commission order contained in Item 250, Minimum Rate Tariff 2, which states:

"MRT 2 - Item 250: Collection of Charges

"(a) Except as otherwise provided...charges shall be collected by the carrier prior to relinquishing physical possession of shipments...

"(b) Upon taking precautions deemed by them to be sufficient...to assure payment of charges within the credit period herein specified, carriers may relinquish possession of freight in advance of the payment of the charges... and may extend credit in the amount of said charges...for a period of seven days, excluding Sundays and legal holidays other than Saturday half-holidays." (Emphasis added.)

It has not taken any position on the meaning or application of the "precautions" clause in the tariff. It seeks a cease and desist order and a $2,000 fine.

Respondent-applicant claims that the rule is unrealistic and needs updating. It claims that it will not receive any competitive advantage from the deviation. It argues that it has no real power over the bill-paying behavior of its shippers. It further contended that respondent-carrier's collection practices are no worse than that of other carriers. It claims that it cannot be punished for the omissions of others or for failing to accomplish something over which it has no control.

Discussion

The wording of the credit rule, which has been basically unchanged for several decades, states that the carrier may extend credit for seven days, but does not address failure to collect on time. The purpose of the Interstate Commerce Commission rule, from which the California rule derived, was to prevent discrimination among shippers in the extension of credit. No federal case holds that mere inability to collect is a violation. It seems clear that a rule of "strict liability" is within this Commission's powers under Public Utilities Code Sections 3665 and 3667, and at least one nonenforcement decision expressly so holds. (Decision No. 81718 in Case No. 8088, Pet. 20.) Decision No. 83449 in Case No. 9500 (Inv. of Semper) holds that precautions apparently satisfactory to that carrier were nevertheless not a defense to credit rule violations and implicitly supports a strict liability interpretation.

In other credit rule enforcement proceedings, violations have been found when carriers continued to extend credit to a shipper who had not paid previous bills on time. Decision No. 83086 in Case No. 9522 (Inv. of Belluomini) is an example of such cases.

We do not think it logically necessary to select one or either of these theories in order to find that respondent-applicant has committed an offense under the Public Utilities Code; whichever theory were adopted, respondent-applicant's precautions to ensure timely payment would be insufficient.

We do not think it appropriate to issue warnings to shippers, as requested by CTA. While we have a responsibility to enforce the credit rule, we do not think we should put ourselves in the position of using the threat of penal action to collect carriers' bills (Decision No. 80088, supra).

The deviation proposal requires scant discussion. Whatever its other merits, it would afford the selected shippers free credit and would thus be against public policy. (West v Holstrom (1968) 261 CA 2d 89, 97.)

We find that:

1. Each of the shippers named in the Order Instituting Investigation regularly and continually failed to pay respondent-applicant's freight bills within the lawful time period.

2. If respondent-applicant's deviation proposal were granted, the named shippers would be afforded free credit for regulated transportation.

We conclude that:

1. Respondent-applicant violated Item 250 of Minimum Rate Tariff 2.

2. A fine in the amount of $2,000 should be imposed on respondent-applicant under Section 3774, Public Utilities Code.

3. The proposed deviation is contrary to public policy and should not be authorized.

4. Respondent-applicant should be ordered to cease and desist violating Item 250.

O R D E R

IT IS ORDERED that:

1. The relief requested in Application No. 54098 is denied.

2. Respondent-applicant shall cease and desist from violating Item 250 of Minimum Rate Tariff 2.

3. Within forty days after the effective date of this order respondent shall pay a fine of $2,000 to the Commission pursuant to Section 3774 of the Public Utilities Code. If such payment is not made at the time specified, interest shall accrue at the rate of 7 percent per annum.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 7th day of JANUARY, 1975.

Vernon L. Sturgeon
President
William Symons Jr.

Commissioners