

ORIGINAL

Decision No. 84265

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 SAND
 TRANSPORTATION SERVICE, INC., -a
 California corporation, HILLSDALE ROCK
 COMPANY, INC., a California corporation;
 EULALIO GONZALES, an individual doing
 business as AL GONZALES CONCRETE;
 ZICOVICH ASSOCIATES, INC., a California
 corporation, doing business as CONCRETE
 SERVICE CO.; WILLIAM D. SMITH, INC., a
 California corporation; and PELLEGRINI
 PAVING COMPANY, INC., a California
 corporation.

Case No. 9577
(Filed July 3, 1973)

Roger L. Maino, Attorney at Law, for Sand Transportation
 Inc.; Anthony J. Mercant, Attorney at Law, for Hillsdale
 Rock Company, Inc.; Gene Johnson, for William D. Smith,
 Inc.; and Earl Pellegrini, for Pellegrini Paving
 Company, respondents.
Lionel B. Wilson, Attorney at Law, and E. E. Cahoon,
 for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's
 own motion into the operations, rates, charges, and practices of
 Sand Transportation Service, Inc. (STS), a California corporation;
 Hillsdale Rock Company, Inc. (Hillsdale), a California corporation;
 Eulalio Gonzales (Gonzales), an individual, doing business as Al
 Gonzales Concrete; Zicovich Associates, Inc. (Zicovich), a California
 corporation, doing business as Concrete Service Co.; William D. Smith
 Inc. (Smith), a California corporation; and Pellegrini Paving Company,
 Inc. (Pellegrini), a California corporation. A hearing was held on
 the case during four days ending on April 15, 1974. The major
 alleged violations are grouped into three general categories: (1)
 the use of a "buy and sell" arrangement as a device to evade the

applicable minimum rates, (2) the improper assessment of rates resulting in undercharges, (3) the giving of excessive extensions of credit by STS.

STS holds a dump truck carrier permit and a radial highway common carrier permit issued by this Commission. Commission records show that Minimum Rate Tariffs (MRT) 1-B, 2, 7, 9-B, 17, 19, ERT 1, and Directory Distance Table 7 were served upon STS.

A witness for the Commission's staff testified that STS owns 54 dump trailers and no tractors or trucks. Its operations are predominantly conducted through subhaulers to whom STS leases trailers for 29 percent of the revenue generated by the trailers. STS's principal terminal is located in San Jose to which STS's subhaulers come each morning to lease empty trailers from STS to be used in subhauling for STS and to which the subhaulers come back each night to return the leased trailers. The staff witness testified that the president of STS told the witness that to give its subhaulers "fuel" money to defray deadheading expenses back to San Jose, STS allegedly bought truckloads of sand from Hillsdale at Hollister and San Juan Bautista for immediate "resale" and delivery to Gonzales (98 loads) and Zicovich (49 loads) in the San Jose area (Exhibit 5, Parts I and II). STS paid the subhaulers an agreed rate for hauling the sand. In the case of each of the Zicovich loads the difference between the sale price and the purchase price of the material was less than the amount paid the subhaulers by STS resulting in a loss to STS on each transaction. In the case of the 98 loads that went to Gonzales STS had a gross profit of \$3,450 out of which it paid the haulers \$3,034 leaving STS with a net profit of \$416 or an average profit of \$4.24 per load. Three of the loads resulted in a net loss (Exhibit 10, F/R 56372, 57463, 57466). STS billed Gonzales and Gonzales paid for the sand on invoices which designated "Trucking" as the activity for which the bills were rendered (Exhibit 6). STS submitted two invoices

to Zicovich covering each load or series of loads, one invoice with the word "Trucking" on it to designate the activity for which the invoice was submitted and the other invoice with the words "material resale" typed on it (Exhibit 7).

The staff contends that the alleged buy and sell transactions were devices to evade the charging and payment of the applicable minimum rates in that the primary service performed by STS was a transportation service considering the short buy-sell position taken by STS, that the president of STS told the witness STS did not advertise as one who buys and sells sand, that STS did not stockpile sand nor have facilities to stockpile sand, and that the primary purpose of engaging in the transactions was to give STS's subhaulers "fuel" money to defray their otherwise empty return to San Jose. The staff calculates the undercharges to be the difference between STS's gross profit or loss and the applicable minimum rate which in the case of Gonzales amounts to \$1,938.82 and of Zicovich amounts to \$1,553.73. As a further reason in support of their contention that the alleged buy and sell transactions were devices to evade the payment of minimum rates, the staff argues that if STS had been the actual shipper of the sand then its subhaulers became the prime carriers and STS as a shipper should have paid the haulers the applicable minimum rate when in fact STS paid the haulers an agreed charge which was less than the applicable minimum rate. STS paid some of its subhaulers a flat \$1.00 per ton when the applicable minimum tonnage rates ranged between \$1.38 and \$2.03 per ton and STS paid the remainder of the haulers an hourly charge which aggregated a third of what they would have been paid if STS had paid them the applicable minimum hourly charge. STS contends that the buy and sell transactions were a legitimate means of making money for its subhaulers and for itself, that all parties to the transaction were satisfied with the transaction, and that STS reported and paid taxes on the transactions to the State Board of Equalization based on the transactions being sales.

Part III of Exhibit 5, introduced by the staff, are reproduced copies of STS freight bills covering 50 shipments hauled for Hillsdale in the STS for-hire operation which the staff contends were incorrectly rated principally because STS used an incorrect number of hours when multiplying the hours worked by the hourly rate to arrive at the total charges and because STS did not charge the 5½ percent surcharge then in effect (MRT 7, Supplement 33). MRT 7, Item 300, paragraph 3(a) reads: "In determining chargeable time, the overall time shall be: From time reporting for work to start of last trip plus double the running time of last trip plus unloading time of last load." Most of the freight bills were bills for single trips and the remainder covered multiple trips. In each instance the chargeable time used to compute the total charge was the actual running time. The staff contends STS should have doubled the running time on single trips; on multiple trips STS should have used double the running time of the last trip in arriving at the total hours worked. Based on the staff's contention STS undercharged Hillsdale a total of \$857.23 (Exhibit 11). Hillsdale contends that doubling the running time in any instance results in an unreasonably high rate.

MRT 7, Item 45(a) requires a carrier to collect its transportation charges in cash, valid checks, drafts, or money orders before the carrier relinquishes possession of property entrusted to it for transportation. Paragraph (b) of the same tariff item states that "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 the freight in advance of payment of the charges there-on and may extend credit in the amount of such charges to debtors for a period not to exceed the fifteenth day following the last day of the calendar month in which the transportation was performed." Paragraph (d) of the same tariff item requires that freight bills for all transportation charges shall be presented to the

debtors within 5 days after the last calendar day of the month in which transportation was performed. During the period of January 1971 through April 1973 STS made various purchases of material from Hillsdale for agreed-to sums which totaled \$182,000 for the period, and during the same period STS performed for-hire transportation for Hillsdale resulting in charges to Hillsdale of \$266,659 (Exhibit 14). It was the practice of Hillsdale from time to time to offset the amounts STS owed Hillsdale for the purchases against the transportation charges Hillsdale owed STS (Exhibit 14). Conversely, STS from time to time on its books gave Hillsdale credit for the sums representing its purchases from Hillsdale against transportation charges Hillsdale owed to STS (Exhibit 5, Part I). The offsetting entries made by Hillsdale on its books did not coincide either in time or amounts with the credit entries made by STS on its books.

A staff witness testified that she had checked the general ledger sheets of STS covering the accounts of Hillsdale, Smith, and Pellegrini for the years 1971 through April 1973 (Exhibit 9) and concluded from a study of them that extensions of credit beyond the period allowed by MRT 7, Item 45(b), supra, had been given by STS to three companies in connection with for-hire hauls performed by STS for them. The staff requests that the Commission require STS to collect from those companies interest at the rate of 7 percent on the charges on which excessive extension of credit was granted which amounts to \$6,694 from Hillsdale, \$2,031 from Smith, and \$803 from Pellegrini (Exhibit 13). Hillsdale, Smith, and Pellegrini argue that they are contractors, that the hauls were made in connection with construction jobs, and that any late payments of STS's charges were caused by the fact that as contractors they are paid for their work on a periodic basis, which periods, much of the time, are in excess of the tariff credit rule period, and since it would be a criminal offense (made so by regulation of the State Contractors License Board) to use construction funds received from one project to pay the bills connected

with another project, complying with the tariff credit rule by paying freight bills with money from other projects would put them in criminal violation of that Board's regulation. Hillsdale also takes exception to the use of STS's books as a basis for determining the age of Hillsdale's unpaid transportation charges as the credit entries on STS's books allegedly did not coincide in date or amount with the offset and payment entries on Hillsdale's books. Additionally, Hillsdale claims the right to offset unpaid moneys allegedly owed to the president of Hillsdale by STS as rental for a piece of property owned by the president of Hillsdale and leased to an alleged associate of STS. Hillsdale also takes exception to the first-in-first-out method used by the staff in determining the age of Hillsdale's unpaid charges and to certain preliminary assumptions made by the staff witness in arriving at that age. The staff witness testified that she used the first-in-first-out method of determining the amount of charges on which excessive extension of credit had been given as reflected on the ledger sheets of STS covering the three accounts (Exhibit 9). The objected to assumption is that the staff witness assessed interest for January 1971 against the entire Hillsdale balance of December 31, 1970 (11 days interest against part of the balance and 30 days interest against the remainder) as though the entire amount had been due and owing as of December 31, 1970. However, the Hillsdale witness introduced Exhibit 14 which was an alleged month-to-month summary for January 1971 through April 1973 compiled from Hillsdale's books showing the monthly balances resulting in transactions between Hillsdale and STS. The monthly balances differed from those on STS's ledger account for Hillsdale. Based on Exhibit 14 interest at the rate of 7 percent on the balances alleged on the Exhibit 14 to have been due and owing over 45 days (excluding the claimed offset of \$350 per month rental) would amount to \$4,555 as compared to the \$6,694 on the staff's Exhibit 13. The Hillsdale witness presented no

canceled checks or books and records underlying Exhibit 14 for inspection at the hearing but agreed to let the staff check Hillsdale's accounts with a view to coming to an agreement about the balances and times involved in the excessive extension of credit. No such agreement was reached.

As part of the Order Instituting Investigation the charge was made that STS has been operating since about September 1972 without having a subhaul bond on file with the Commission as required by the Commission's General Order No. 102-D. During the hearing of this case on January 25, 1974 the president of STS delivered a subhaul bond dated October 25, 1973 to a staff witness for filing with the Commission.

During the course of the hearing counsel for STS moved that all books, records, and documents as well as information prepared therefrom obtained by the staff from STS be refused admittance into evidence because, as testified to by the staff member who obtained the material, the staff member did not advise any one at STS of STS's constitutional rights against self-incrimination before STS turned over the documents to the staff member. Counsel also moved that all charges against STS having reference to the credit rule violation be stricken because the credit regulation is not uniformly enforced against all truckers by the Commission (the staff witness testified that of the 50 audits he performed the previous year he found a few minor credit rule violations where no formal investigations were instituted).

Findings

1. STS holds a dump truck carrier permit and a radial highway common carrier permit issued by this Commission.
2. STS was served with MRT's 1-B, 2, 7, 9-B, 17, 19, ERT 1, and Directory Distance Table 7.
3. STS conducts its for-hire operation principally through the use of subhaulers who lease trailers at San Jose from STS for subhauling in the STS for-hire operation and who return the leased trailers to STS at San Jose at the end of the hauling day.

4. During the period July through October 1972 STS arranged for some of its subhaulers when returning to the San Jose area from subhauling jobs for STS to move 98 loads of sand from Hillsdale at Hollister and San Juan Bautista to Gonzales at Alviso and 49 loads of sand from the same origins to Zicovich at San Jose and Santa Clara.

5. STS paid Hillsdale a specified amount of money per ton for the sand.

6. In connection with the Gonzales loads STS billed Gonzales and Gonzales paid STS on invoices which designated "Trucking" as the activity for which the billings were rendered.

7. In connection with the Zicovich loads STS billed Zicovich and Zicovich paid STS on two separate invoices for each load or series of loads, the one invoice designated "Trucking" as the activity for which the invoice was rendered and the companion invoice designated "material resale" as the activity for which that was rendered.

8. The gross profit to STS on the purported sale of each of the loads of sand to Zicovich was less than STS paid its subhaulers to move the loads resulting in an out-of-pocket loss to STS on each transaction with Zicovich.

9. The average net profit to STS on the purported sale of sand to Gonzales was \$4.24 per load, three of which loads resulted in an out-of-pocket loss to STS.

10. The primary purpose of arranging the movements to Gonzales and Zicovich was to obtain "fuel" money for the subhaulers to defray their expenses in returning leased trailers to STS's parking lot in San Jose.

11. STS paid the haulers less than the applicable minimum rates for the moves to Gonzales and Zicovich.

12. The applicable minimum rates and charges covering the movements to Gonzales and Zicovich are set forth in Exhibits 10 and 12, respectively.

13. The purported "buy and sell" transactions were not bona fide sales but were mere shams and devices employed by respondent to violate the law, and such transactions constituted for-hire carriage within the regulatory jurisdiction of this Commission.

14. STS performed a highway carrier service for Gonzales and Zicovich for which STS should have charged them the applicable minimum rates as found in MRT 7.

15. MRT 7, Item 300 Paragraph 3(a) requires that in the application of hourly rates the time for running the loaded mileage be doubled when computing the overall time for charges on an hourly basis for the transportation of a single shipment and that double the loaded running time of the last trip be used when computing the overall time for the assessment of charges for the transportation of two or more shipments while an individual vehicle is in the continuous service of a single shipper.

16. Exhibit 11 correctly reflects the chargeable time, hourly rate, and charges covering shipments described therein as well as the actual charges paid by Hillsdale to STS and the resultant undercharges \$857.23 owing by Hillsdale to STS.

17. During the period of approximately September 1972 to January 25, 1974 STS engaged in for-hire operations using subhaulers without having a subhaul bond on file with the Commission contrary to the requirements of Commission General Orders Nos. 102-D and 102-E and Section 3575 of the Public Utilities Code.

18. MRT 7, Item 45 is the tariff provision applicable to the collection of transportation charges by STS from Hillsdale.

19. MRT 7, Item 45 requires that transportation charges be collected "in cash or in the form of valid checks, drafts or money orders."

20. STS violated the provisions of MRT 7, Item 45 in accepting an amount of money less than the applicable charges for hauls performed for Hillsdale in permitting Hillsdale to offset the agreed to value of materials purchased by STS from Hillsdale as part payment for transportation charges.

21. The practice of a carrier allowing a shipper to offset the agreed to value of material purchased by a carrier from the shipper against transportation charges owed by the shipper to the carrier allows for a wide latitude of mischief between carrier and shipper and seriously impedes the Commission's enforcement of minimum rate regulation.

22. STS's ledger account on Hillsdale (Exhibit 9, Part I) reflects with sufficient accuracy the myriad transactions and their dates of occurrences between STS and Hillsdale.

23. The failure of Hillsdale to make available at the hearing for inspection any records or canceled checks underlying summarizations on Exhibit 14 accords that exhibit little evidentiary weight for determining the age of amounts owed to STS by Hillsdale.

24. The initial assumptions made by the staff witness and the first-in-first-out method used by her in determining the age of Hillsdale's unpaid transportation charges owing to STS are reasonable.

25. STS granted Hillsdale, Smith, and Pellegrini excessive extensions of credit contrary to the provisions of MRT 7, Item 45(b) and STS should be ordered to collect interest at the rate of 7 percent from Hillsdale, Smith, and Pelegrini on such excessive extensions as set out in Exhibit 13 in the amount of \$6,694 from Hillsdale, \$2,031 from Smith, and \$803 from Pellegrini.

26. The set-off of \$350 per month as the alleged rental owing to an individual from STS should be disallowed in any event as the former is not the party for whom the transportation service was performed by STS.

27. The accounting records of STS, copies of which were submitted into evidence by the staff witness, are records which the Commission required STS to keep, maintain, and produce pursuant to Section 3701 of the Public Utilities Code; Items Nos. 93, 93.1, and 93.2 of MRT 7; and Decision No. 74165 or 75031, as the case may be.

28. Failure of the Commission to institute formal investigations on a few minor violations of the credit regulations does not justify the finding that the Commission's credit regulations are not uniformly enforced as the matters could have been taken care of informally.

29. The tariff credit rule contains no exception which permits a carrier to lawfully extend credit or which permits a shipper to lawfully take credit beyond the credit period allowed by the rule.

Conclusions

1. Respondent STS violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging, demanding, collecting, and receiving a lesser compensation for the transportation of property for respondents Hillsdale and Gonzales than the applicable rates and charges prescribed in MRT 7 and Supplements thereto, by failing to compute transportation charges on the basis of the required elements provided in Paragraph 3, Item 300 and Item 360 of said tariff.

2. Respondent STS has violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging, demanding, collecting, and receiving a lesser compensation for the transportation of sand for respondent Zicovich than the applicable rates and charges prescribed in MRT 7 and Supplements thereto, by failure to assess correct distance tonnage rates as provided in Items 148 and 148.1 of said tariff.

3. Respondent STS violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code in charging, demanding, collecting, and receiving a lesser compensation for the transportation of sand and

base rock by engaging in the device of extending credit to respondents Hillsdale, Smith, and Pellegrini in violation of Item 45 of MRT 7 and Supplements thereto.

4. Respondent STS has by means of a buy and sell device assisted, suffered, and permitted respondents Gonzales and Zicovich to obtain transportation at a rate less than the minimum rate then in force and effect as shown by MRT 7 and Supplements thereto, in violation of Public Utilities Code Section 3668.

5. Respondents Hillsdale, Gonzales, Zicovich, Smith, and Pellegrini have paid less than the applicable rates and charges for the transportation performed by respondent STS.

6. Respondent STS should be ordered to collect from respondents Hillsdale, Gonzales, and Zicovich the difference between the charges billed or collected and the charges due under MRT 7, the difference being, respectively, \$857.23, \$1,938.82, and \$1,553.73.

7. A fine in the amount of such undercharges should be imposed upon respondent STS pursuant to Section 3800 of the Public Utilities Code.

8. Respondent STS should be ordered to collect from respondents Hillsdale, Smith, and Pellegrini for violations of Sections 3667, 3668, and 3737, or any of these sections, the amounts of \$6,694, \$2,031, and \$803, respectively.

9. Respondent STS should pay a fine equal to interest at the legal rate, as set out in Conclusion 8, on credit extended to respondents Hillsdale, Smith, and Pellegrini in violation of Item 45 of MRT 7 and Supplements thereto, pursuant to Section 3800 of the Public Utilities Code.

10. Respondent STS should be ordered to examine its records to determine if additional interest-free credit has been extended to respondents Hillsdale, Smith, and Pellegrini beyond the tariff limits of Item 45 of MRT 7, file a report on the results of such examination, and collect interest at the legal rate for the amounts so determined.

11. Respondent STS violated Section 3575 of the Public Utilities Code and General Orders Nos. 102-D and 102-E by failing to have on file with the Commission the required subhaul bond.

12. Respondent STS should be ordered to cease and desist from any and all unlawful operations.

13. A fine of \$3,000 should be imposed upon respondent STS pursuant to Section 3774 of the Public Utilities Code.

14. Copies of the records of STS were properly introduced into evidence by the staff witness as the constitutional right against self-incrimination does not extend to the production of books and records which a statute or a valid regulation require be kept as in the case of those records.

The Commission expects that STS 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 STS 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 determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Sand Transportation Service, Inc. shall pay a fine of \$3,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Sand Transportation Service, Inc. 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. Sand Transportation Service, Inc. shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$13,877.78 on or before the fortieth day after the effective date of this order.

3. Sand Transportation Service, Inc. shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Findings 12, 16, and 25 and shall notify the Commission in writing upon collection.

4. Sand Transportation Service, Inc. 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 Sand Transportation Service, Inc's. operating authority until the report is filed.

5. Sand Transportation Service, Inc. shall examine its records to determine if additional interest-free credit has been extended to respondents Hillsdale, Smith, and Pellegrini beyond the tariff limits of Item 45 of Minimum Rate Tariff 7, file a report on the results of such examination on or before the sixtieth day after the effective date of this order, and collect interest at the legal rate for the amounts so determined.

6. Sand Transportation Service, Inc. shall cease and desist (a) 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 and (b) from violating Section 3575 of the Public Utilities Code and General Order 102 Series by engaging subhaul carriers without having 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 respondent Sand Transportation Service, Inc. and to cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 1st day of APRIL, 1975.

Thomas L. Steyer
President

William S. Quinn Jr.

Leonard Ross

Commissioners

Commissioner ROBERT BATINOVICH

Present but not participating.