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ORIGINAL

Decision No. 84581

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 HAROLD E. SMITH, an individual, and HEALTH ENTERPRISES CORPORATION, a New York corporation, doing business as LASSEN FOODS, INC.1/	Case No. 9756 (Filed June 18, 1974)

Harold Eugene Smith, for himself; and Ralph A. Sceales and Rifkind & Sterling, Incorporated, by Sherman L. Stacey, Attorney-at-Law, for Lassen Foods, Inc.; respondents.
Ira R. Alderson, Jr., 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, charges, and practices of Harold E. Smith (Smith), for the purpose of determining whether Smith charged less than the applicable minimum rates and failed to observe certain documentation and other rules in Minimum Rate Tariff 2 (MRT 2) in connection with transportation performed for Health Enterprises Corporation, doing business as Lassen Foods, Inc. (Lassen).

Public hearing was held before Examiner Arthur M. Mooney in Chico on October 1 and 2, 1974, and the matter was submitted on the latter date. By Decision No. 83807 dated December 10, 1974, submission was set aside, and the matter was set for further hearing at the request of respondents. At the further hearing held

1/ The caption was amended at the hearing to show that Lassen is a part of Health Enterprises Corporation, and that they are not separate, independent corporations.

in San Francisco on December 17, 1974, no additional evidence was presented, and the matter was again submitted subject to the filing of concurrent briefs on or before January 24, 1975, which have been received.

At the time of the investigation by the Commission staff referred to hereinafter, Smith operated pursuant to a radial highway common carrier permit from his home in Gridley, he had three tractors and two vans and a flat semitrailer, he employed two drivers, and he had all applicable minimum rate tariffs and distance tables. His gross operating revenue for the year ending June 30, 1974 was $77,048.

Staff's Evidence

A staff representative testified that he visited Smith's place of business on various days during March, May, and June 1973 and reviewed his records relating to transportation performed for Lassen during the period July 1 through December 31, 1972. He stated that all of the transportation in issue was either from or to Lassen's plant in Chico; that the plant is not served by rail facilities; that Lassen manufactures Granola products at the plant; that the outbound shipments consisted of various types of Granola products in cases; that the inbound shipments consisted of raw materials and ingredients used in the manufacturing and processing of these products; and that all freight charges were paid by Lassen.

The representative testified that the freight bills issued by Smith for the transportation in question were in the form of a weekly manifest type of billing invoice; that he had no supporting documents in his possession for the individual shipments listed on each invoice; that most of the invoices were for either inbound or for outbound shipments only, and the balance were for both; that Smith did not have several of the invoices, and it was necessary to obtain them from Lassen; that the invoices did not include the date, destination, weight, or commodity description for the various shipments listed thereon; and that because of these deficiencies,

it was not possible to determine the applicable rates for any of the transportation from the other information on the invoices. He pointed out that Smith calculated the charges for the outbound shipments on a per case basis and for the inbound shipments on a per case, per drum, or similar flat charge bases. The witness explained that Smith, at his request, obtained copies of the supporting bills of lading for most outbound shipments and the sales invoices and purchase orders for many inbound shipments from Lassen and made them available for his review; that he made true and correct photocopies of these documents and the weekly invoices; and that the photocopies are included in Exhibits 1 and 2. The representative testified that he was informed by the plant manager of Lassen that the Granola cereals it produces are rolled oats with various combinations of nuts, fruit, raisins, and coconut; that they are cracked, ground, and rolled but not granulated; and that they can be used without further cooking or preparation with boiling water with the exception of the following four varieties which must be cooked: 14 Grains and Seeds Cereal, Old Fashioned Rolled Oats, Sunflower Seeds, and Wheat Germ. He stated that with this additional information, the underlying documents from the shipper, and the description of certain inbound commodities furnished by Smith, it was then possible to rate all of the shipments in Exhibits 1 and 2.

The representative stated that Smith had informed him that Lassen had issued no split pickup or delivery or multiple load instructions for any of the transportation; that the only record Smith had of his accounts receivables was his bank deposit book; that the payment of only a few of the invoices could be verified from this; and that the payment of the balance of the invoices had to be verified from the payment records of Lassen. He asserted that Smith had informed him that he was new in the transportation business and not experienced with Commission tariffs and that the method of billing he used was easier than the one specified in the

tariff which he did not understand. The witness stated that late in 1973, Lassen was merged into Enterprises.

A rate expert for the Commission staff testified that he took the sets of documents in Exhibits 1 and 2, together with the supplemental information testified to by the representative, and formulated Exhibit 4 which shows the rate and charge assessed by Smith for the inbound shipments and the total amount of his invoices for the outbound shipments, the minimum rate and charge computed by the staff for each of the inbound and outbound shipments, and the resulting undercharges alleged by the staff. According to Exhibit 4, the amount of the undercharges for the inbound shipments was $1,336.72 and for the outbound shipments was $14,248.86, and the total of the undercharges for both was $15,585.58.

The rate witness testified that since there were no written instructions from the shipper to combine any of the separate outbound shipments as multiple lot or split delivery shipments as required by Items 85 and 172, respectively, of MRT 2, it was necessary to rate each individual shipment separately. He stated that Smith did not issue bills of lading for any of the inbound shipments as required by Item 50 of MRT 2 and Item 360 of National Motor Freight Classification A-12 (NMFC A-12); that because of the lack of sufficient information on the billing invoices issued by Smith for the outbound shipments they did not comply with the provisions of paragraph 2 of Item 255 of MRT 2 which require the carrier to issue freight bills with sufficient information thereon from which a determination of the applicable minimum rates and charges can be made; that the billing invoices for the inbound shipments more closely complied with the freight bill requirements; that Smith did not retain in his possession copies of bills of lading and certain other documents, subject to the Commission's inspection, for a period of at least three years as required by paragraph 5 of Item 256 of the tariff; and that in his opinion, the fact that Lassen had copies of the bills of lading for the outbound shipments

was irrelevant since they were not under Smith's control, and it was necessary for him to ask permission to obtain them. He also pointed out that Smith had not based his charges on the cents per 100 pounds unit of measurement stated in MRT 2 for the commodities transported as required by Item 257 of the tariff.

The rate expert testified that the products transported in substantially all of the outbound shipments were Granola, Vita Grain, Honey Almond Crunch, and Frumola, none of which require cooking or further preparation with boiling water; that these commodities are subject to the Class 100 less-than-truckload and Class 70, minimum weight 16,000 pounds, truckload ratings provided in Item 42315 of NMFC A-12 for "CEREALS, NOI, in barrels, boxes, Packages 193 or 1119; also TL in Package 240";2/ that the lower classification ratings in Item 42310 could not be used because the item is restricted to such cereals which require cooking or further preparation with boiling water; that since the products are not granulated, the lower classification ratings for cooked, granulated cereals in Item 42390 could, likewise, not be applied; and that in the several instances where other cereals were included in outbound shipments, he used the applicable classification ratings for them in his rate calculations. Late-filed Exhibit 5 of the staff includes a copy of a transmittal letter from CTA to the staff, dated July 30, 1974, and three letters attached thereto. Two of the attachments are copies of letters of the National Classification Board (NCB) regarding the classification of a ready to eat Granola-type cereal apparently similar to the four cereals named above. One of the NCB letters is dated May 1, 1972 and the other is dated April 9, 1973, just before and after the staff review period, respectively. Neither

2/ The abbreviation NOI as used in the classification refers to "not more specifically described herein."

involved California shippers nor were copies sent to any of the respondents. Both stated that the NCB is of the opinion that this type of cereal is subject to the ratings in Item 42315 of the NMFC, which are the ones applied by the staff.

The rate expert pointed out that reduced ratings for cooked, ready to eat, Granola-type cereals were added to NMF 100A in new Item 42380 in Supplement 4 thereto, which became effective June 21, 1974; that the new ratings are Class 65 less-than-truckload and Class 45, minimum weight 30,000 pounds, truckload; and that although there are lower ratings for these products today, they cannot be applied retroactively to the staff review period. He asserted that even if the lower classification ratings in Item 42310 could have been applied to the transportation in issue or if proper master documents for split deliveries had been issued, there still would have been undercharges.

Respondents' Evidence

Smith testified that prior to mid 1970, he had been in the business of buying and selling various commodities for a number of years and drove his own truck to transport his own merchandise; that in mid 1970, he was requested by the former owner of Lassen, who was a friend of his, to haul Granola; that he agreed and obtained the necessary permit from the Commission; that prior to this time, he had not been an employee of Lassen but has been subsequent thereto; that his duties as an employee of Lassen were separate and apart from his trucking services for it and included purchasing , seeing that his trucks were loaded, and scheduling and routing shipments; that he is compensated for these services; that the payment he receives from Lassen is very small, but he does obtain family group insurance through it, which he pays for himself; that he does not perform any dispatching or other duties for Lassen in connection with any transportation performed for it by other carriers; that during the staff review period he had a desk at Lassen which he shared with the plant manager and has had an office

there since; that during 1972, he hauled for Lassen only; that although his permit is issued to him as an individual, he calls his business Gene's Trucking; and that he now operates two trucks, one of which is driven by his brother-in-law and the other by himself.

Smith stated that he did not completely understand the tariffs that were furnished to him by the Commission; that Lassen and he agreed on prices which he thought were fair to both and at the level of the applicable minimum rates; that he was not aware that his rating methods were in error; that the staff representative during the investigation instructed him in the proper method of rating shipments; that since that time, Lassen has been furnishing him with the necessary master documentation for split deliveries and multiple lot shipments, and he has been rating them correctly; and that had the proper master documentation been issued during the review period, the charges assessed would have been very close to the applicable minimum rates. As to the bills of lading and other records that were not at his home, he asserted that he did have the current ones; that he returned them to Lassen when he was finished with them; that he had no difficulty in obtaining them from Lassen for the staff investigator; and that he now keeps them at his home.

The General Manager of Plant Operations of Lassen testified that in 1972, Lassen was acquired by Marketing Resources and Application, Inc., which later changed its name to Simera Corp.; that in November 1973, Lassen was merged into and is now a fictitious name of Health Enterprises Corporation, another subsidiary of Simera Corp.; and that he has been with Lassen since February 1973. He stated that the ready to eat Granola cereals produced by Lassen are concentrated and packaged in one-pound containers approximately 7-1/4 by 4-1/4 by 1-1/2 inches in size, 12 to a shipping case; that most other ready to eat cereals, such as Wheaties, are light and bulky and packaged in containers approximately 2-1/2 times larger and weighing about the same as the Granola packages; and that

the higher ratings in Item 42315 of NMFC A-12, which the staff applied, are subject to a minimum truck load weight of 16,000 pounds and were designed for the light and bulky cereals, whereas, the ready to eat Granola cereals are more closely analogous to the commodities described in Item 42310 which are heavier and denser, have substantially lower ratings, and are subject to a 40,000-pound minimum truck load weight.

The witness for Lassen testified that in 1972, Granola was a new type of cereal and had not been shipped or classified before; that during the review period, Lassen primarily used three carriers for its transportation needs, Smith for most of its intrastate freight and Pacific Motor Trucking (PMT) and Consolidated Freightways (Consolidated) mainly for interstate shipments; that there was confusion at this time by carriers and shippers as to the proper classification of the ready-to-eat Granola; that both PMT and Consolidated applied the lower classification ratings in Item 42310 of the classification to such shipments; that after the commencement of the staff investigation in early 1973, he wrote CTA, at the suggestion of PMT and Consolidated, regarding this problem and was referred by it to the NCB. The witness' late-filed Exhibit 6 includes copies of his classification request and proposed classification change, both dated June 29, 1973, for the ready-to-eat Granola cereals to the NCB, its letter of July 17, 1973 to him concerning proposed changes, and the NCB's letter of January 31, 1974 stating that a new item providing Class 65 less-than-truckload and Class 45, minimum weight 30,000 pounds, truckload ratings would be added to the classification. The witness asserted that there was never any intention on anyone's part to apply incorrect rates to any of the transportation in issue and that there was always an honest effort to comply with all regulations.

Position of Parties

Briefs were filed by Lassen and the staff. None was filed by Smith.

In its brief, Lassen, in addition to reviewing the evidence, asserted that Granola is a generic name for cereals made from rolled oats and other natural grains; that all of the Granola shipments should have been accorded split delivery rating privileges; that the ready to eat Granola shipments should have been accorded the lower classification ratings in Item 42310 of NMFC A-12; that by so doing, the undercharges alleged by the staff would be substantially reduced, if not eliminated; and that the new owners of Lassen should not be held accountable for any undercharges that might exist. It argued that with the exception of the requirement in paragraph 2 of Item 172 of MRT 2 which requires the consignor to issue to the carrier at the time of or prior to the initial pickup a single document summarizing the component parts, all other documentation requirements for a split delivery shipment were complied with; that all bills of lading for a shipment were prepared by Lassen and picked up by Smith at one time and issued by his signature; that the bills of lading together contained all of the information which is required to be shown on the single document; that providing Smith with a separate single sheet would have served no useful purpose; that the violations were technical, inadvertent errors and were due entirely to a lack of knowledge and understanding of the applicable tariff rule by both Lassen and Smith; and that the only equitable method of rebilling the shipments would be to allow split delivery billing. It asserted that even assuming shipments of ready-to-eat Granola were subject to the higher ratings in Item 42315 of the classification during the staff review period, with which it does not agree, it would be unjust to now require Smith to rebill on this higher basis for such past transportation when other carriers in hauling interstate shipments for it and performing transportation services for its competitors during the same period applied the lower ratings in Item 42310 to such shipments.

The staff, in its brief, argued that it had proven by the evidence it presented that Smith had not complied with certain

documentation rules in MRT 2; that none of the transportation in issue could be rated as split deliveries; that the classification ratings it applied to the ready-to-eat Granola shipments were the applicable ratings for these products during the 1972 review period; and that the rates it computed and the resulting undercharges are correct. It pointed out that Item 42380 which provides lower ratings for the ready-to-eat Granola was not added to NMF 100A until 1974 and that it is an established principle of transportation law that rates are not deemed unreasonable because they are subsequently adjusted. (See Manden Creamery & Produce Co. v N.P.Ry. (1938) 226 ICC 179, John Nix & Co. v Railway Express Agency, Inc. (1940) 238 ICC 60, and Stimson v A&R R.R. (1945) 262 ICC 125.) The staff recommended that Smith be fined in the amount of the undercharges plus a punitive fine of $500.

Discussion

We agree with the ratings and resulting undercharges calculated by the staff rate expert.

Smith has completely disregarded the requirements of MRT 2. Not only were the charges he assessed below the minimum rate level, they were not stated in the per-100-pounds unit of measurement specified in the tariff for the commodities transported as required by Item 257. He did not issue bills of lading or freight bills with all the necessary information for many of the shipments as required by Item 50 and paragraph 2 of Item 255, respectively. Since there is some question as to whether Lassen's office should be considered a place of business for Smith since he had a desk there, it is possible that the documents at this location might be considered in his possession. While it could be technically argued that Smith nonetheless violated paragraph 5 of Item 256 by not having copies of those documents he failed to issue in his possession for the Commission's inspection, we will not for the purpose of this proceeding find a violation of this tariff provision.

The assertion by Lassen that individual outbound loads to which Smith had applied flat per case charges should now be consolidated as split delivery shipments under the provisions of MRT 2 is without merit. As pointed out by the staff, paragraph 2 of Item 172 requires that the consignor furnish the carrier with a single document setting forth in summary the total numbers and kinds of packages, description of articles, and total weight of all commodities described in the bills of lading for each component part, and in addition, the single document must reflect the total number of pieces and total weight of all commodities in the shipment and must make reference, by number or other individual identity, to each bill of lading issued for a component part. Such a document was not issued. The individual bills of lading are not a substitute for it. The documentation requirements for split delivery shipments were adopted after extensive public hearings and have been found by the Commission to be reasonable. Although the bills of lading would comply with the provision of the rule that requires the consignor to issue a written document to the carrier for each component part, they do not, when considered together, constitute colorable compliance with the single document requirement. Each does show information for the component it covers; however, none show the total number of pieces, the total weight of the shipment, or make reference to all other bills of lading as required for the single document. Furthermore, paragraph 4 of Item 172 specifically provides that each component must be rated as a separate shipment if the written information does not conform with the requirements of paragraph 2.

As to the classification of the ready-to-eat Granola, the fact that other carriers performing interstate transportation of these cereals for Lassen during the review period may have applied the lower ratings in Item 42310 of NMFC A-12 to the shipments is irrelevant. This item is specifically restricted to cereals requiring cooking or further preparation with boiling water. The Granola cereals in question require no cooking or further preparation and, therefore, cannot be

rated under this item. The procedure for determining the classification ratings applicable to a particular commodity is as follows: First, if it is specifically named or described in an item in the classification, the ratings shown for that item are applicable; second, if it is not specifically named or described but is embraced in a general NOI item, the ratings for the NOI item would be applicable; and third, if it cannot be rated in accordance with steps one or two, the ratings applicable to the classification description that most closely describes the commodity would apply. (See Item 421 of NMFC A-12.) The latter method is known as rating by analogy, and is apparently the method Lassen advocates. However, since there is the general description "Cereals, NOI,..." in Item 42315, the higher ratings for this item must be applied. As pointed out by the staff, Item 42380, which includes lower ratings for Granola, was not added to the classification until more than a year after the transportation moved; the item cannot be applied retroactively; and the fact that the ratings on the ready-to-eat Granola were reduced does not in itself mean that the ratings applicable prior thereto were unreasonable. We are not persuaded by this record that the ratings applied by the staff were unreasonable. Additionally, it is to be noted that the transportation charges assessed by Smith and paid by Lassen were based on a flat charge per case and had no relationship whatsoever to any ratings in the classification.

The assertion by Smith and Lassen that at the time the transportation moved, neither was familiar with or intentionally violated the provisions of MRT 2 is not an acceptable excuse. We have consistently held that a lawful duty rests upon permitted carriers to observe minimum rates and that although the rating of shipments, in many instances, may be difficult and require technical proficiency, the law is settled that neither negligence, inexperience, nor inadvertence constitutes a defense to a failure to collect the proper tariff charges. (Investigation of H. A. Morrison Trucking Co. (1963) 61 CPUC 234.)

One further matter for our discussion is the argument in Lassen's brief that the new ownership of Lassen would be unjustly penalized if we were to direct Smith to collect any undercharges from it. We do not agree. Even accepting its assertion that any errors that might have existed were the result of procedures set up by the management of the prior owners which was retained until February 1973 to ensure a smooth transition of ownership and management, the fact remains that the new ownership did acquire Lassen immediately prior to the review period. The transportation was performed for it. Section 3664 of the Public Utilities Code provides that it is unlawful for any permit carrier to charge or collect less than the minimum rates, and Section 3800 provides that whenever the Commission, after hearing, finds that undercharges exist, it shall require the carrier to collect the undercharges. Here, hearing has been had, undercharges have been found, the transportation was performed for the new ownership, and we are directed by Legislative mandate to require the collection.

We concur with the staff recommendations that a fine in the amount of the undercharges plus a punitive fine of $500 should be imposed on Smith.

Findings

1. Smith operates pursuant to a radial highway common carrier permit.

2. Smith was served with copies of all applicable minimum rate tariffs and distance tables.

3. The classification ratings applicable to the ready-to-eat Granola cereals included in the shipments summarized in Exhibit 4 were the Class 100 less-than-truckload and Class 70, minimum weight 16,000 pounds, truckload ratings named in Item 42315 of NMFC A-12 for Cereals, NOI.

4. The documentation requirements in paragraph 2 of Item 172 of MRT 2for split delivery shipments were not complied with for any of the transportation summarized in Exhibit 4.

5. Smith did not issue bills of lading or completed freight bills for every shipment summarized in Exhibit 4 as required by Item 50 and paragraph 2 of Item 255, respectively, of MRT 2.

6. Smith did not base his charges for the shipments summarized in Exhibit 4 on the per-100-pound unit of measurement specified in MRT 2 as required by Item 257 of the tariff.

7. Marketing Resources and Applications, Inc., which later merged into Simera Corp., acquired Lassen immediately prior to the commencement of the transportation summarized in Exhibit 4, and in November 1973, Lassen was merged into and is now a fictitious name of Health Enterprises Corporation, a subsidiary of Simera Corp.

8. The minimum rates and charges and resulting undercharges computed by the staff in Exhibit 4 are correct.

9. Smith charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 4 resulting in undercharges in the total amount of $15,585.58.

Conclusions

1. Smith violated Sections 3664, 3667, and 3737 of the Public Utilities Code.

2. Smith should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $15,585.58 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of $500.

3. Smith should be directed to cease and desist from violating the rates and rules of the Commission.

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

O R D E R

IT IS ORDERED that:

1. Harold E. Smith shall pay a fine of $500 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Harold E. Smith 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. Harold E. Smith shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of $15,585.58 on or before the fortieth day after the effective date of this order.

3. Harold E. Smith shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 9 and shall notify the Commission in writing upon collection.

4. Harold E. Smith 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 this Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of Harold E. Smith's operating authority until the report is filed.

5. Harold E. Smith 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 respondent Harold E.Smith 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 24th day of JUNE, 1975.

We have filed a written concurrence

Commissioners

Vernon L. Sturgeon
President

Leonard Ross

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

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COMMISSIONERS ROSS AND BATINOVICH, CONCURRING.

We concur in the result and in the conclusion that Smith should be directed to "cease and desist from violating the rates and rules of the Commission." We believe that whatever rates and rules are in effect must be vigorously enforced. But we must question the circumstances that underlie the decision. This small carrier incurred undercharges exceeding $15,000 for a single shipper in a six month review period. These facts suggest that the applicable minimum rates may be unreasonably high and that the carrier can earn a fair return applying a lower rate.

Dated: June 24, 1975
San Francisco, California

Respectfully submitted,

Leonard Ross, Commissioner

Robert Batinovich, Commissioner