

Decision No. 85355

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 OILFIELDS TRUCKING COMPANY, a corporation, and San Joaquin Oil Company, a California corporation doing business as San Joaquin Refining Co.

Case No. 9785  
(Filed August 27, 1974)

Russell & Schureman, by R. Y. Schureman, Attorney at Law, for Oilfields Trucking Company; and Kenneth E. Fait, Attorney at Law, for San Joaquin Oil Company, respondents.

Frederick H. Kranz, Jr., Attorney at Law, for Los Angeles Department of Water and Power, interested party.

Walter H. Kessenick, Attorney at Law, and Edward H. Hjelt, for the Commission staff.

O P I N I O N

The Commission instituted this investigation on its own motion into the operations, rates, charges, and practices of respondents Oilfields Trucking Company (OTC) and San Joaquin Oil Company (OIL) for the purpose of determining whether OTC violated

Section 494 of the Public Utilities Code<sup>1/</sup> by having performed transportation services for OIL at less than the applicable rates and charges published in OTC's tariff, Western Motor Tariff Bureau, Tariff No. 18, CPUC No. 24, and whether OIL has paid less than the applicable rates and charges for transportation by OTC.

Hearing was held in Los Angeles on November 7 and 8, 1974 before Examiner Bernard A. Peeters. The matter was submitted on the latter date subject to the filing of concurrent opening and closing briefs due February 14, 1975. At the request of the parties, extensions of time for filing briefs were granted. Opening briefs were filed by all parties. Only OTC filed a closing brief.

The factual situation giving rise to this investigation is as follows: During the period July 1973 to June 1974 OTC transported residual fuel oil for OIL to various destinations in the Los Angeles area. OIL had contracted with the Los Angeles Department of Water and Power (DWP) to provide fuel oil during the energy crisis in 1973.

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1/ All references are to the Public Utilities Code, unless otherwise stated.

"494. No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons."

OTC quoted and assessed a rate, under Section 531,<sup>2/</sup> different than its published tariff rates to OIL.

The Staff's Evidence

The Commission staff presented two witnesses and three exhibits. Exhibits 1-A and 1-B were sponsored by a transportation representative. They contain copies of the underlying shipping documents and freight bills for the six-month period July 1 through December 31, 1973. The parties stipulated to the authenticity of the documents. Exhibit 2 was sponsored by a transportation rate expert. It contains a summary of the shipping data provided in Exhibits 1-A and 1-B along with the rates and charges alleged to be applicable to the transportation involved here. It shows undercharges in the amount of \$34,256.26 based on the use of the higher point-to-point rates. The volume tender rates were not considered. The rate expert stated that he was of the opinion that Section 531 was not applicable in this situation. Exhibit 3 was offered by staff counsel. It provides information pertaining to OTC's operating authorities and economic data. OTC operates under a certificate of public convenience and necessity as a petroleum irregular route carrier. It also has permits as a radial highway common carrier and a contract carrier. The staff recommends that OTC be ordered to collect the undercharges and pay a fine in the amount of the undercharges plus \$5,000.

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<sup>2/</sup> "531. Every common carrier subject to the provisions of this part may transport free or at reduced rates contractors and their employees engaged in carrying out contracts with the United States, this State, or any county or municipal government, or other governmental agency in this State, and materials or supplies for use in carrying out such contracts, in each case to the extent only that such free or reduced rate transportation is provided for in the specifications upon which the contract is based and in the contract itself."

OTC's Evidence

OTC presented two witnesses, its president and vice president, Traffic and Operations. The latter officer has been employed by OTC for 18 years and has had 10 years experience in traffic and transportation matters, including the classification and rating of shipments in accordance with applicable tariffs. He testified that OIL requested a rate for the transportation of a large quantity of residual fuel oil (2,400,000 barrels, Exhibit 6) from OIL's Bakersfield refinery to DWP's storage facilities in the Los Angeles area. A rate in cents per barrel, different than the published tariff rates, was quoted under the authority of Section 531. A copy of Section 531 was mailed to alert OIL that the contract with DWP must be based upon the quoted rate. The quoted rate was based upon the published volume tender rates, but did not include the exclusive use of equipment restriction applicable to such rates. It was felt that under Section 531 more efficient use of equipment and fuel could be made since there was an energy crisis at the time, and it was difficult to obtain diesel fuel. Also, because of the intense demand for oil by utilities and the resultant need for all the transportation available, the nonexclusive use of equipment would permit revenue backhauls thus meeting the demand more efficiently. Approximately 20 percent of the return movements were revenue hauls. The vice president was not aware whether the contract between OIL and DWP had been executed at the time the rate quotation was made, nor did he check the contract to see if it complied with the statutory requirement since he believed it to be privileged material and not available to him.

Exhibit 4 was introduced through OTC's vice president. It is a comparison of the charges, by month, that would have resulted under the tariff point-to-point and volume tender rates with the reduced rate charged for the transportation of 238,897.77 barrels of

oil actually transported between July 1973 through June 1974. Transportation to DWP was stopped in June 1974 because DWP had no more storage space available for this oil. The exhibit shows the total charges under the various rates to be: \$298,680.82 under the point-to-point rates; \$229,968.30 under the volume tender rates; and \$231,159.37 under the Section 531 rate. It was pointed out that under the volume tender rate, the total charges would have been \$2,091.07 less than the charges actually assessed.

OTC's general practice is to quote and assess volume tender rates on large shipments. Here, however, since there was a municipality involved and the request was for a rate per barrel, it was believed that a quotation under Section 531 was proper. OTC has had limited experience in hauling for government agencies. It did transport fuel for the United States Air Force, but the quantity was not sufficient to warrant the use of volume tender rates and no consideration was given to the use of Section 531. However, quotations have been made under Section 531, but no business resulted therefrom.

OTC's president, who has been employed by OTC for over 24 years, the last 10 having been as president, testified that during the period in question there was a heavy demand on the tank truck industry because of the energy crisis. There was a shortage of equipment and the use factor of its tank trucks was 90 percent on a 24-hour basis. OTC was called upon to transport fuels not only in California but also into Arizona and Nevada. All the utilities were scrambling for oil. On February 27, 1974 after the hauling had commenced to DWP, and after a visit by a member of the Commission staff in connection with this investigation, a letter was written to the Commission seeking information as to what is required of a carrier with respect to a Section 531 rate quotation to assure itself that the contract between a shipper and a governmental agency contains the information required

by the statute. The reply, dated March 28, 1974, stated that the carrier must insure that the contract clearly specify the reduced rate and make reference to Section 531. The president had not seen the contract between OIL and DWP until just shortly before the hearing.

OIL's Evidence

The president and the vice president/general manager testified on behalf of OIL. The general manager's testimony had been reduced to writing and was received as Exhibit 5. His testimony relates to the facts concerning the employment of OTC. In early June 1973, the president informed him that he, the president, was meeting with DWP to discuss a two-year fuel oil sales contract. Since the volume of the fuel oil movement would be 100,000 barrels per month for a period of two years, it was decided that, rather than following the usual practice of selling on an f.o.b.-refinery basis, the sale would be made on a delivered basis, thus making the refinery responsible for the freight charges. On this basis, OIL's superintendent of transportation was requested to obtain the lowest rate possible on a per barrel basis. It was assumed that the rate would be based upon a monthly volume tender rate since this would be a continuous haul. OTC informed the superintendent that since this sale was to a municipality, the haul could be made under Section 531 and a rate of 80 cents per barrel was quoted and accepted. Subsequent revisions of the rate were made due to increased labor costs and destination changes. The rate was twice reduced due to changes in destination and increased once due to labor and fuel increases. The reduced rates were from 80 cents to 78.96 cents and 76 cents. The increased rate was \$1.0265. Hauling commenced in the early part of July 1973. On February 2, 1974 a Commission staff representative presented himself at OIL's office and requested permission to audit the records pertaining to the shipments to DWP by OTC.

Under cross-examination it was brought out that the superintendent had been requested to obtain as low a rate as possible for this transportation because it was important to the sale to DWP. The rate obtained was given to OIL's president for use in his negotiations with DWP. The general manager had been told that the rate quoted was under the authority of Section 531. The superintendent did not show the general manager the copy of Section 531. OIL had contacted other carriers in connection with the DWP contract. One of the successful carriers was Don E. Keith,<sup>3/</sup> whose quotation was almost identical to OTC's and was quoted under Section 531. It was very important to OIL to obtain the contract with DWP since it was having a difficult time establishing itself as a seller of residual fuel oil. The transportation rate was critical to the execution of the contract. OIL had previously sold to DWP in 1971 and a reduced rate was used for that transportation under Section 531; however, the general manager stated he was not employed by OIL at that time and relied on others for this information.

OIL's president sponsored Exhibit 5, a copy of the contract with DWP. He testified that it was important to the company to obtain this contract since it was in dire need of money. A contract with DWP would be a financeable contract, one on which it could borrow. The idea of a reduced rate was introduced by the representative of DWP negotiating the contract, who also drafted the contract. The president relied upon DWP's representation that a reduced rate under Section 531 would be a lawful rate. Negotiations on the contract generally covered the period from July 15, 1973 to the date it was signed, July 28, 1973. The contract price for the fuel oil included

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3/ This transportation is under investigation in Case No. 9784.

80 cents per barrel for transportation costs. Generally, the provisions of the contract with respect to points of delivery were at the discretion of DWP. While the transportation rate varied, as indicated heretofore, OIL was unable to pass the increases on to DWP and therefore had to absorb them, except where there were increases in the minimum rates, as provided for in Article V of the contract. No evidence was adduced to show whether the benefit of the reductions in the rate was claimed or passed on to DWP.

The Issues

1. Did OTC provide transportation services for OIL at rates other than those contained in its filed and published tariff?
2. If the answer to the above is yes, were the rates assessed and charges collected exempt from the provisions of Section 494 by virtue of Section 531?
3. If the answer to Issue 2 is no, should a fine and penalty be imposed upon OTC as recommended by the staff, and, if so, in what amount?
4. Should respondents be granted relief from collecting undercharges, if such are found to exist, as requested by OTC?
5. Did the contract for the transportation meet the requirements of Section 531?
6. Should guidelines be prescribed with respect to the application of Section 531?

Discussion

There is no conflict in the evidence with respect to the rates charged by OTC. It is admitted that a rate different than that contained in OTC's tariff was charged by it under the belief that Section 531 authorized such reduced rate. Thus, the answer to the first issue is yes.



Whether Section 531 exempts a common carrier from the provisions of Section 494 in this instance depends upon the interpretation of the words "contractors and their employees engaged in carrying out contracts...and materials or supplies for use in carrying out such contracts..." as used in Section 531.

The parties indicate that they could not find any cases interpreting Section 531, nor was our research fruitful. We are, therefore, presented with a case of first impression with respect to the meaning and application of this section of the statute.

We have been referred to the following legislative history of Section 531:

The Statutes of 1935, Chapter 322, Section 1, added Section 17.5 (now Section 531). Section 2 of Chapter 322 indicated the basic reasons for declaring the matter to be an emergency measure as follows:

"SEC. 2. This act is hereby declared to be an urgency measure, necessary for the immediate preservation of the public peace, health, and safety within the meaning of section 1 of Article IV of the Constitution, and shall therefore take effect immediately. The facts constituting such necessity are as follows:

"Under the terms of an act of Congress, many millions of dollars will be available within a very short time for the construction and improvement of highways and the elimination of grade crossings, for the purpose of relieving unemployment. This State will receive a considerable sum as its share of the Federal appropriations. The materials will have to be transported for the purpose of doing such work and in many cases the common carriers of this State are willing to transport such materials free or at reduced rates but under the present law are prohibited from doing so. It is imperative that as much

of the money allocated to this State by the Federal government be used for the employment of citizens as possible, and this act will permit additional sums thereof to be made available for the relief of unemployment. It is therefore imperative that this act take effect immediately."

Although respondent OTC seems to believe that the legislative history of Section 531 is of limited value in ascertaining the construction intended by the Legislature, we disagree. The whole purpose of enacting Section 531, as shown by its history, was to enable common carriers to provide free transportation or reduced rates to contractors for the transportation of materials required to construct or improve highways and eliminate grade crossings to the end that unemployment would be relieved. To construe Section 531 as applying to other than construction contracts would be contrary to the legislative intent and purpose.

The legislative intent is derived not only from the history of the act, but it is also gathered from the whole act rather than from isolated parts or words, and the statute must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers (45 Cal Jur2d 625-626).

Sections 521 through 533 deal with free transportation and reduced rates by common carriers under various circumstances. The Legislature has set forth a comprehensive set of rules under which common carriers may provide transportation of persons and property free or at reduced rates. It is clear from reading these sections that the Legislature had very specific persons and property in mind when it enacted the statute. To declare that Section 531 has a broad application would not logically follow in view of the Legislature's apparent purpose to be very specific and restrictive in this area.

In addition to the above, we must also look to the words of the section itself in determining its meaning. Every word, phrase, or provision is presumed to have a meaning and perform a useful function (Read v Rahm (1884) 65 C 343). It cannot be presumed that the Legislature used inconsistent provisions as to the same subject in the immediate context of the statute (In re Haines (1925) 195 C 605, 613), and once a particular legislative intent has been ascertained, it must be given effect (Friends of Mammoth v Board of Supervisors (1972) 8 C 3d 247, 259).

Section 530(c) contains the words "Contractors and their employees, materials or supplies for use or engaged in carrying out their contracts..." Section 530 goes on with "...for construction, operation, or maintenance work or work incidental thereto..." Here, the Legislature has not only limited the kind of contract, but also spelled out that it is a construction or maintenance contract, thus, in short, a public works contract. Section 773<sup>4/</sup> reinforces the interpretation that the contracts referred to are for construction or mechanical work.

Section 531 uses almost identical language as in Section 530(c): "...contractors and their employees engaged in carrying out contracts, ...and materials and supplies for use in carrying out such contracts, ..." To be consistent with Section 530(c) it necessarily

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"Section 4200 of the Government Code shall not apply to a public utility under the jurisdiction of the Public Utilities Commission of the State of California.

"[NOTE: Government Code Sec. 4200 requires filing of a bond by every person awarded a contract involving over \$1,000 for improvement or construction of any building, road, structure, bridge, excavating or other mechanical work for the State or any political subdivision or agency of the State.]"

follows that the Legislature was referring to the same kind of contract in Section 531 as it defined in Section 530(c). To place any other construction on the section would result in redundancy, since the words "...and their employees..., and materials and supplies for use in carrying out such contracts, ..." would no longer be necessary.

The phrase "public works" is not defined in the Public Utilities Act itself, but it is defined in Section 4002 of the Government Code as:

"...the construction of any bridge, road, street, highway, ditch, canal, dam, tunnel, excavation, building or structure within the State by day's labor or force account."

Webster's Third International Dictionary is in harmony with the above definition. It defines "public works" as:

"fixed works (as schools, highways, docks) constructed for public use or enjoyment, especially when financed and owned by the government."

The legislative history, the statute as a whole, and the specific words and phrases, all clearly show that the Legislature intended Section 531 to apply to public works contracts only. To interpret the section in any other way, the logical consequence would be to conclude that any commodity could be transported at free or reduced rates under Section 531 if the transportation was being performed for a governmental entity. We do not believe this was the legislative intent. The staff's argument in its brief reaches the same conclusion.

Respondent OTC requests that we overlook the technicality that the contract did not make reference to Section 531, nor contain the quoted rate. In this connection we admitted parol evidence to show that it was the intent of the parties in their negotiations to obtain transportation under the provisions of Section 531, thus the technical violation could be overlooked. However, in view of the obvious legislative intent, we cannot construe a contract for the

sale of fuel oil as a public works contract, even though the sale was to a municipality. To broaden the statute beyond the obvious purpose is a matter for the Legislature, not this Commission. As an alternative, OTC requests that equitable relief be granted under Section 494.

OTC has not brought to our attention any cases wherein equitable relief was granted under Section 494. Our research indicates that the Commission not only may grant, but has granted, relief under Section 3667 from the statutory requirement of Section 3800 that undercharges shall be collected when they are found, under limited and special circumstances.<sup>5/</sup> Section 3667 is patterned after

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5/ "3667. No highway permit carrier shall charge, demand, collect, or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the commission."

"3800. Whenever the commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges applicable to such transportation established or approved by the commission, or has directly or indirectly refunded or remitted in any manner or by any device any portion of such minimum rates or charges, or has paid a commission, without an order of the commission so authorizing, the commission shall require such carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges. . . ."

The Commission may, upon a finding of mitigating circumstances, dispense with a requirement of collection of undercharges under provisions of Sec. 3800 and Sec. 3667; Pet. of Lucky Stores (1971) 72 CPUC 264; Signal Trucking Service (1970) 71 CPUC 380 (headnote only reported); Acme Truck Co. (1965) 65 CPUC 20; J. L. Talkington (1961) 58 CPUC 729 (headnote only reported); I. Lewin dba Spec-Dee Delivery Service (1960) 57 CPUC 569 (headnote only reported).

Section 494 and the language is almost identical. Both sections were brought forward intact from the 1951 codification. Sections 3800 and 2100 were both added to the Code in 1963, Chapter 1877 of the statutes.

If the Commission has the power to remit undercharges under one part of the Code, it logically follows that it must also have the same power under another part of the Code dealing with a separate classification of carriers under the same circumstances. Therefore, under the special circumstances of this case, where the parties bargained in good faith, a governmental agency received the benefit of the transportation rate, there was an energy crisis and the fact that no guidelines have been established for the application of Section 531, it would be inequitable to require the collection of undercharges in this case, and our authority under Section 494 should be exercised.

Turning now to the question of fines and penalties, should we impose a \$5,000 penalty on OTC as recommended by the staff? It is clear that OTC violated Section 494 by charging other than its published tariff rates, although under the mistaken belief that Section 531 authorized it to do so. OTC's officers involved in quoting the reduced rate have had many years of transportation experience. Presumably, they were aware of the provisions and application of Section 530, where guidelines have been established and there is case law interpreting the section. No effort was made to secure advice in advance, nor even to follow up, after furnishing a copy of Section 531 to OIL, to see that the contract complied with the requirements of the statute. OTC's excuse is that it felt the contract was a private matter between the contracting parties and therefore could not be inspected. On the other hand, a common carrier is required by Section 494 to observe, without deviation, the rates and rules set forth in its published and filed tariff, except upon order of the Commission.

(Corn Products v Merchants Express of Cal. (1962) 59 CPUC 565, 568.) Thus, where the statute provides a common carrier an exemption from the above requirement under specified conditions, it follows that it is the carrier's duty to see that the conditions are complied with before the transportation can be lawfully performed. Common carriers cannot excuse themselves from this duty.

Although OTC has had no prior violations, and it believed Section 531 was applicable to the transportation involved, it did receive benefits beyond its published rates (Exhibit 4) and gained additional revenue through the backhaul movements, we are of the opinion that a penalty, under Section 1070, in the amount of \$2,000 should be imposed for failing to carry out its statutory duty.

The issue of the adequacy of the contract need not be disposed of here, since we have concluded that the transportation in question is not that contemplated by Section 531.

With respect to the establishment of guidelines, this is not the appropriate proceeding to promulgate guidelines affecting the entire common carrier industry.

#### Findings of Fact

1. OTC is engaged in the business of transporting property over the public highways of this State for compensation and has been issued a petroleum irregular route certificate of public convenience and necessity.

2. OTC did assess, charge, and collect a rate different than its published tariff rates for the transportation of residual fuel oil for OIL.

3. OIL entered into a contract with DWP for the sale of 2,400,000 barrels of residual fuel oil on a delivered basis.

4. Exhibit 4 shows that only 238,897.77 barrels of oil were transported between June 1973 and June 1974.

5. The charges for the oil transported during the period in Finding 4, if transported under point-to-point rates, would have been \$298,680.82; if transported under the volume tender rates would have been \$229,068.30; and under the reduced rates are \$231,159.37.

6. Charges under the volume tender rates are \$2,091.07 less than the reduced rate charges.

7. Exhibit 3 shows that 121,839.22 barrels of oil were transported between July 1973 and January 1974. The difference between charges under the point-to-point rates and the reduced rate is \$34,256.26, constituting an undercharge.

8. The volume tender rates were used in the computation of the reduced rate assessed.

9. The volume tender rates are applicable to the transportation performed when transported under the exclusive use of equipment provision.

10. OTC did not provide exclusive use of its equipment because of the exemption in Section 531 and the need to make more efficient use of its equipment and fuel during the energy crisis.

11. OIL relied upon the assertions of DWP that a reduced rate for the transportation was lawful.

12. There is a conflict in the evidence whether OTC or OIL initiated a reduced rate under Section 531.

13. OIL was provided with a copy of Section 531 by OTC.

14. Section 531 does not apply to the transportation performed.

15. There was an energy crisis existing at the time the transportation was performed.

16. The parties acted in good faith in negotiating the contract and in assessing the reduced rate.



17. The Commission has remitted the collection of undercharges in the past. Under the special circumstances of this case, the Commission should not require the collection of undercharges.

18. OTC should be penalized in the amount of \$2,000 under the provisions of Section 1070.

Conclusions of Law

1. OTC violated Section 494 by assessing and collecting charges other than its filed tariff rates and charges.

2. Section 531 is applicable only to transportation involving contractors engaged in public works construction for governmental agencies.

3. The Commission has the authority, under Section 494, to remit undercharges.

O R D E R

IT IS ORDERED that:

1. Oilfields Trucking Company (OTC) shall pay a fine of \$2,000 to this Commission pursuant to Public Utilities Code Section 1070 on or before the thirtieth day after the effective date of this order. OTC shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day payment of the fine is delinquent.



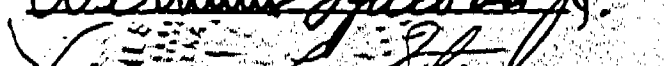


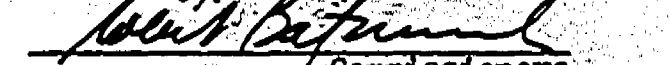

2. OTC shall cease and desist from transporting property free or at reduced rates under Section 531 other than public works contractors.

3. OTC is not required to collect, nor is San Joaquin Oil Company required to pay, \$34,256.26 in undercharges.

4. The Executive Director is directed to cause personal service of this order to be made upon respondent OTC, and to cause service by mail of this order to be made on all other respondents.

The effective date of this order as to each respondent shall be twenty days after completion of service upon that respondent. The effective date of this order for all other purposes shall be twenty days after the date hereof.

Dated at San Francisco, California, this 20<sup>th</sup>  
day of JANUARY, 1976.

  
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Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.