

Decision No. 85833

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 CONESTOGA CARGO COMPANY, a California corporation; Walter H. Wilson and Glendora M. Wilson doing business as WALT WILSON TRUCKING, Lavern E. Wilson, an individual, doing business as VERN WILSON TRUCKING, Frank Smith, an individual, doing business as Frank Smith Trucking and F. B. Winkel, Richard Winkel, Charles Williams and Steven Peterson, co-partners, doing business as BEAVER LUMBER COMPANY.

Case No. 9925
(Filed June 3, 1975)

Chas. B. Lawton, for Conestoga Cargo Company, and
Richard Winkel, for Beaver Lumber Company,
respondents.

Mary Carlos, 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 Conestoga Cargo Company (Conestoga), a corporation, for the purpose of determining whether Conestoga charged less than applicable minimum rates in connection with the transportation of lumber for F. B. Winkel, Richard Winkel, Charles Williams, and Steven Peterson, co-partners, doing business as Beaver Lumber Company (Beaver), and whether Conestoga should be directed to pay other carriers engaged by it to transport steel bars for Conestoga, Vulcan Forge, or Vulcan Forge and Die or the customers or suppliers of them the difference between the amounts paid to such other carriers and the applicable minimum rates and charges for such transportation.

Public hearing was held before Examiner Arthur M. Mooney in San Jose on October 1, 1975. The matter was submitted on October 14, 1975 to allow Conestoga time to file a late-filed exhibit.

All substantive issues were stipulated to in writing by Conestoga and the Commission staff. No one took exception to the stipulation. It was received in evidence as Exhibit 1.

Findings

1. Conestoga operates pursuant to a radial highway common carrier permit which includes the following restriction in paragraph 9-A thereof:

"Whenever permittee engages other carriers for the transportation of property of Conestoga Cargo Company or Comstock Mfg. Co, Inc. or Vulcan Forge or Vulcan Forge and Die or customers or suppliers of said corporations or companies, permittee shall not pay such carriers less than 100% of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

Conestoga has a terminal and shares common facilities at 1784 and 1789 Smith Avenue, San Jose, with Vulcan Forge and Vulcan Forge and Die. It employs two drivers and operates one flat-bed truck and trailer and one tractor and a set of flat-bed trailers. It has been served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs. Its gross operating revenue for the year ended June 30, 1974 was \$112,860.

2. During August and November 1974, a staff representative conducted an investigation of Conestoga's operations for the period January through August 1974.

3. The staff investigation disclosed rate errors in connection with the transportation of lumber for Beaver. The rate errors resulted from failure to comply with the unit of measurement rule by applying flat charges for the transportation. The rate errors are

summarized in Section A (Beaver) of Appendix 3 to Exhibit 1, and the minimum rates and charges computed by the staff and shown therein for this transportation are correct.

4. Conestoga charged less than the lawfully prescribed minimum rates in the instances set forth in Section A (Beaver) of Appendix 3 to Exhibit 1 resulting in undercharges in the total amount of \$618.34.

5. Charles R. Lawton and George A. Cornwell are the principal officers and sole stockholders of Conestoga, Vulcan Forge, and Vulcan Forge and Die. Because of this common ownership, management, and control, an alter ego relationship exists between the three companies.

6. Sections B, C, and D of Appendix 3 to Exhibit 1 summarize various shipments of steel bars transported by Conestoga for Kisco,

Inc., Proto Tool Company, or Thorsen Tool Company Div. of Hydro Metals, Inc., which are all customers and/or suppliers of Vulcan Forge or Vulcan Forge and Die. Conestoga engaged Walter H. Wilson and Glendora M. Wilson, doing business as Walt Wilson Trucking (Walt Wilson), Lavern E. Wilson, doing business as Vern Wilson Trucking (Vern Wilson), and Frank Smith, doing business as Frank Smith Trucking (Smith) as ostensible subhaulers to perform the transportation listed in Sections B, C, and D, respectively. Although there were some minor exceptions, the total of the charges collected by Conestoga from each of the debtors equaled the minimum charges for the transportation performed for it. Conestoga paid the three other carriers less than the applicable minimum rates and charges for the transportation they performed as ostensible subhaulers. Because of the alter ego relationship between Conestoga, Vulcan Forge, and Vulcan Forge and Die and the restriction in paragraph 9-A of Conestoga's permit referred to in Finding 1 above, the ostensible subhaulers were in fact prime carriers and should have been paid the full applicable minimum rates and charges for this transportation.

7. Conestoga failed to observe the directive of the Commission set forth in paragraph 9-A of its permit regarding the payment of 100 percent of the applicable minimum rates to other carriers engaged by it to transport property for the customers or suppliers of Vulcan Forge or Vulcan Forge and Die.

8. The minimum rates and charges computed by the staff for the transportation summarized in Sections B (Walt Wilson), C (Vern Wilson), and D (Smith) of Appendix 3 to Exhibit 1 are correct.

9. Conestoga paid the three ostensible subhaulers less than the lawfully prescribed minimum rates in the instances set forth in Sections B (Walt Wilson), C (Vern Wilson), and D (Smith) of Appendix 3 to Exhibit 1 in the amounts of \$5,278.04, \$317.24, and \$1,081.86, respectively.

Discussion

As stated above, all substantive issues have been stipulated to in writing by Conestoga and the staff. The only matters requiring discussion are the comments by the representative of Conestoga in his closing statement questioning the restriction in paragraph 9-A of the carrier's permit and the amount of fine, if any, that should be imposed on Conestoga.

With respect to the alter ego restriction in paragraph 9-A of Conestoga's permit, there is no basis for raising an objection to this on any constitutional grounds. The restriction was inserted in the permit when it was first issued to the carrier on November 1, 1967 and was based on information furnished by Conestoga when it applied for the permit. Conestoga has not heretofore questioned this restriction. There is obviously no violation of due process. There is likewise no reasonable basis for arguing that the restriction could in any manner be considered a restraint of trade. To the contrary, the very purpose of the restriction regarding transportation for the customers or suppliers of Vulcan Forge and/or Vulcan Forge and Die by other carriers engaged by Conestoga is to

prevent any unfair competitive advantage from accruing to the alter ego combine. While it is true that there may be no economic advantage to any customer or supplier if it pays the applicable minimum rates to Conestoga; nonetheless, by the use of the other carriers and paying them less than minimum rates, the affiliated companies, because of this rate advantage, are in a position to both undersell their competitors in dealing with customers and to obtain materials from suppliers at a lower total cost than others. In this connection, we have consistently held that from the standpoint of enforcing minimum rates, it is not necessary to show that a particular transaction has resulted in that which a statute condemns but only that the transaction be reasonably susceptible of resulting in the evil sought to be avoided.

Based on a review of the entire record, we are of the opinion that Conestoga should be directed to collect the \$618.34 in undercharges from Beaver, to pay a fine in the amount of the undercharges, to pay the ostensible subhaulers the amounts shown in Finding 9, and to pay a punitive fine of \$1,000. Conestoga is placed on notice that any further violation of the restriction in paragraph 9-A of its permit will not be tolerated.

Additional Findings

10. The restriction in paragraph 9-A of Conestoga's permit does not violate any provisions of the state or federal constitutions and is not a restraint of trade.

Conclusions

1. Conestoga violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code.

2. Conestoga should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$618.34 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$1,000.

3. Conestoga should be directed to pay the other carriers engaged by it to perform transportation for the customers and/or suppliers of its affiliated companies the amounts listed in Finding 9.

4. Conestoga should be directed to cease and desist from violating the rates and rules of the Commission, including the restriction included in paragraph 9-A of its permit.

The Commission expects that Conestoga will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges and to pay its ostensible subhaulers the amounts found due them in Finding 9. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that Conestoga or its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges and to pay its ostensible subhaulers that which is due them, 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. Conestoga Cargo Company, a corporation, shall pay a fine of \$1,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Respondent carrier 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. Respondent carrier shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$618.34 on or before the fortieth day after the effective date of this order.

3. Respondent carrier shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 4, and shall pay its ostensible subhaulers the amounts set forth in Finding 9, and shall notify the Commission in writing upon the collection and payment thereof.

4. Respondent carrier shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges and to pay its ostensible subhaulers. In the event the undercharges or payments ordered to be collected and paid by paragraph 3 of this order, or any part of such undercharges or payments, remain uncollected or unpaid sixty days after the effective date of this order, respondent carrier 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 and the payments remaining to be made, specifying the action taken to collect such undercharges or make such payments and the result of such action, until such undercharges have been collected in full and the total payments have been made or until further order of the Commission.

5. Respondent carrier 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 rates and charges prescribed by this Commission.

6. Respondent carrier shall cease and desist from paying to ostensible subhaulers amounts less than the minimum payments prescribed by this Commission.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon respondent Conestoga Cargo Company, a corporation, 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 17th
day of MAY, 1976.

[Signature] President
William J. Lyons, Jr.
[Signature]
[Signature]
Robert Bateman
Commissioners