

(Mailed 3/24/88)

Decision ~~88-03-047~~ MAR 23 1988

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  
BRENT DISTRIBUTING COMPANY, a  
California Corporation, and Big  
Bear Super Market No. 3, a  
California Corporation.

**ORIGINAL**

I.87-07-003  
(Filed July 8, 1987)

Donald Murchison, Attorney at Law, and Roy  
Adams, for Brent Distributing Company,  
respondent.

Catherine A. Johnson, Attorney at Law, for the  
Transportation Division.

OPINION

This proceeding was instituted to investigate the operations, rates, charges and practices of Brent Distributing Company (Brent), a California corporation, and Big Bear Super Market No. 3 (Big Bear), a California corporation, for the purpose of determining:

"1. Whether respondent BRENT, in transporting shipments of supermarket commodities for respondent Big Bear, violated Sections 3664 and 3667 of the Public Utilities Code by failing to assess the applicable rates and charges as set forth in Transition Tariff 15.

"2. Whether respondent Big Bear, or persons liable therefor, have paid less than the applicable rates and charges for transportation performed by respondent BRENT.

"3. Whether, in the event sums less than said applicable rates and charges are found to have been charged, collected or

received, a fine in the amount of such undercharges should be imposed upon respondent BRENT pursuant to Section 3800 of the Public Utilities Code.

"4. Whether respondent BRENT should be ordered to collect from the aforementioned respondent Big Bear the difference between the charges actually received and the applicable rates and charges.

"5. Whether respondent BRENT violated Section 3737 of the Public Utilities Code by failing to maintain copies of and observe applicable tariffs, decisions and orders.

"6. Whether respondent BRENT violated General Order 147 and Section 3737 of the Public Utilities Code by performing services for respondent Big Bear without having a contract on file and in effect with the Commission.

"7. Whether any or all of respondent's operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine imposed, pursuant to Section 3774 of the Public Utilities Code.

"8. Whether respondent BRENT should be ordered to cease and desist from any unlawful operations or practices.

"9. Whether any other orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction."

A duly noticed public hearing was held before Administrative Law Judge Orville I. Wright in San Diego on August 24, 1987. The investigation was submitted for decision upon the availability of the transcript on September 20, 1987.

#### Admissions

Brent admits to the charges of the Transportation Division staff (staff) that (1) it violated General Order 147 and Section 3737 of the Public Utilities (PU) Code by performing services for respondent Big Bear without having a contract on file and in effect with the Commission, and (2) it violated Sections 3664 and 3667 of the PU Code by failing to assess the applicable

rates and charges as set forth in Transition Tariff 15 in the total amount of \$16,604.83.

**Issue**

Staff recommends a punitive fine of \$2,500 pursuant to Section 3774 of the PU Code and a further fine in the amount of the admitted undercharges of \$16,604.83 pursuant to Section 3800 of the PU Code.

Brent contends that the proposed fines are excessive.

The issue before us is the amount of the fine to be imposed based upon the facts in this case.

**Facts**

Brent is a California corporation wholly owned by its president, Roy Adams, who appeared and testified in this proceeding.

Brent received its operating authority (T-138,150) as a highway contract carrier on June 21, 1982 at which time it also received transition tariff (TT) 15 on which to base its rates.

Its carrier profile, as presented by staff, shows 25 drivers, 8 mechanics, and 75 other employees: warehousemen, administration, and security. Brent operates 20 tractors, 3 trucks, 15 insulated van trailers, and 5 dry van trailers. Reported revenue for calendar year 1986 is \$3,344,339.

Brent's entire business is as the contract carrier for a single shipper, Big Bear, which operates a supermarket chain in Southern California.

According to Brent, Big Bear instructed the carrier to issue its billings at rates slightly in excess of TT-15 in order to be on the safe side of Commission regulations. Even though this policy resulted in Brent receiving about \$6,000 per month over minimum rates, the carrier has been only marginally profitable, reporting net profits of \$1,000 to \$2,000 per year.

Brent's president has been the person responsible for meeting regulatory requirements since the corporation's inception.

He testified that he sent the Big Bear contract to the Commission in 1982 and believed it had been approved and filed. Staff's search, after its audit, disclosed no record of the contract, and staff notes that the contract contains deficiencies which would have precluded its approval in any case.

The undercharges were the result of Brent's not having effected a 10% increase in TT-15 rates directed by D.86-04-045 until staff's visit on August 12, 1986. Brent testified that it had no knowledge of the relevant decision even though the record shows that both Brent and Big Bear were correctly listed on the Commission's mailing records which were used to send out three different notices of the provision of D.86-04-045 that TT-15 rates were to be increased by 10 % as of July 1, 1985.

Brent fully cooperated during the staff audit and billed and collected the indicated undercharges for the months of July and August, 1986 in time to include them in its third quarter report. Brent collected the June 1986 undercharges in March 1987.

Brent's objection to the penalties recommended by staff are succinctly stated at pages 52 to 54 of the transcript.

"Q. Now, you say the fine was excessive. Would you please explain yourself there, please.

"A. Well, I guess the easiest way to say it is in June of '82, when I received my--filed my application for a permit to operate with Mr. Olson, he told me at that time that I had to have a copy of the contract with PUC on file. I did that. I mailed it to the PUC in San Francisco.

"They state they didn't get it; therefore, I'm wrong, and I'm fined.

"My basis is this: Now, the PUC tells me that they sent me the GO 147-A rate increase in the mail, and I say I didn't get it, and the PUC says that's fine, you're wrong again.

"I find that to be a conflict.

"I realize now that it is my obligation to know everything that the PUC does that relates to me whether I get it in the mail or I don't get it in the mail, and I've taken steps to do that. But the point is that--that we've complied with two audits, every record is made available, all cooperation is given, facilities are given to them to work at while they're there, all our records are accurate. We don't have any reason to hide anything. I have no reason not to take a rate increase if it's issued. I only deal with one account, and if I get an increase, I pass it on to the account and I deal with it, because the account understands that.

"So the whole point is there is absolutely no basis for me not to take the rate increase, if I know about it, and that's why I'm here. And so when you look at me and I'm making \$1,000 or \$2,000 a year over five years, and you're going to fine me up to \$30,000, and then it comes to \$16,000, to me that's incredibly excessive, and you're facing a position of literally costing me my job, and that's the reason I'm here.

"Was I guilty? Yeah. But why, with all of the cooperation, does the fine have to be that degree of money?

"When we went out, we recollected the money. The PUC got what they had--what they got coming. They were not lost any income.

"In addition, the four years prior to this audit we were collecting money approximately \$6,000 a month in excess of TT-15, so for four years we collected \$72,000 more than the rate required and the PUC made more money off this. So then for two months we screw up and miss an increase and then you come back and fine me \$16,000 when actually, from start to finish, the PUC has more money from us than they would

have ever had had we followed TT-15 to the letter.

"And so I just don't think it's fair. And that's the whole purpose of today."

### Discussion

There are two distinct penalties involved in freight undercharge cases such as this instant proceeding.

Section 3800 of the PU Code provides that whenever the Commission, after a hearing, finds that a carrier has charged less than applicable rates, it "shall require the carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of the undercharges."

Section 3774 of the PU Code provides that when tariff violations are found the Commission, as an alternative to the cancellation, revocation, or suspension of an operating permit, "may impose upon the holder of the permit a fine not exceeding twenty thousand dollars."

While both Section 3800 and Section 3774 fines rest in the discretion of the Commission, Brent has offered no citation of authority in support of its articulate argument that no Section 3800 fine should be imposed. Nor has our own research revealed any decision where anything less than the total amount of collected undercharges have been ordered to be remitted to the Commission.

On the other hand, there is precedent for the Commission's exercise of discretion in imposing Section 3774 fines.

In *George Lange Trucking, D.85795, C.10005, May 11, 1976*, the case cited by Brent, we stated:

"In measuring a penalty to be imposed, the Commission will always consider the question of willfulness in the conduct being penalized, and where there is no indication that the undercharges were wilful or for the purposes of undercutting competition, there was no attempt at concealment, and the carrier cooperated in the investigation, a punitive fine need not be imposed."

More recently, in Dolphin Transportation Inc., D.92328, OII No. 38, A.59667, October 22, 1980 we stated that while intent is not an element in determining whether noncompliance with Commission decisions or with tariff provisions has resulted in a violation of the Code, in measuring the penalty to be imposed where there has been a violation, the Commission does consider the question of willfulness with respect to the stringency of the penalty to be assessed.

Both of the foregoing decisions involved Commission consideration of Section 3774 fines. Both ordered full payment to the Commission of undercharges collected pursuant to Section 3800.

It has been judicially stated that the reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. Instances of individual hardship cannot change policies adopted to secure uniformity in charges for transportation. (See Transmix Corp. v. Southern Pacific Company (1960) 187 CA 2d 257, 265.)

While we acknowledge that the full payment of undercharges to the Commission under Section 3800 may work a hardship on Brent, we also note that Brent would in effect, receive a financial gain to the extent that it is allowed to itself retain the undercharges it collected from Big Bear.

A fair assessment of the facts of this case is that the audit of Brent by Commission representatives caused Brent to learn of its undercharges to Big Bear and to collect those undercharges. If Brent is now allowed to keep some or all of the undercharge amounts, we will have converted the staff investigation into the vehicle of a financial gain to Brent that it otherwise would not have enjoyed.

We conclude that reduction of the Section 3800 fine would not be in the public interest of maintaining uniform enforcement of the PU Code.

With respect to the Section 3774 fine, we think that the evidence of record shows no willfulness or scienter present in Brent's conduct - only carelessness or negligence. Accordingly, we impose a fine of \$500 rather than the \$2,500 recommended by staff.

Comments

Pursuant to the Commission's Rules of Practice and Procedure, the proposed decision of the assigned administrative law judge for this proceeding was filed with the Commission and distributed to the parties on February 19, 1988. Comments were filed by staff on March 10, 1988.

Our review of the filed comments does not persuade us that any change in the proposed decision is appropriate.

Findings of Fact

1. Brent holds a Highway Contract Carrier Permit issued June 21, 1982.
2. Brent's rates are prescribed in transition Tariff 15.
3. D.86-04-045 required Brent to increase TT-15 rates by 10% effective July 1, 1985.
4. In August 1986, an audit by Commission staff disclosed that Brent had not increased its rates as required by Commission decision, and had undercharged its customer/shipper in the amount of \$16,604.83. The audit also revealed that Brent did not have a contract on file with the Commission.
5. Brent admits the violations, and collected the undercharges from its shipper, Big Bear.
6. Brent was cooperative with the staff at all times during the investigation and the hearing.



Conclusions of Law

1. Brent violated Sections 3664 and 3667 of the PU Code by failing to assess the applicable rates and charges as set forth in Transition Tariff 15.

2. Brent violated General Order 147 and Section 3737 of the PU Code by performing services for Big Bear without having a contract on file and in effect with the Commission.

3. Brent should be fined in the amount of the collected undercharges of \$16,604.83 pursuant to Section 3800 of the PU Code.

4. Brent should be required to pay a punitive fine pursuant to the provisions of Section 3774 of the PU Code in the amount of \$500.

5. Brent should be ordered to cease and desist from future violations.

6. This investigation should be discontinued.

ORDER

IT IS ORDERED that:

1. Brent Distributing Company (Brent), shall pay to this Commission a fine of \$16,604.83 pursuant to Public Utilities Code Section 3800 and a fine of \$500 pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Brent shall pay interest on the \$500 fine at the rate of seven percent per annum; such interest is to commence upon the day the payment of the fine is delinquent.

2. Brent shall cease and desist from future violations of the PU Code and Commission rules and regulations.

3. I.87-07-003 is discontinued.

4. The Executive Director of the Commission shall cause personal service of this order to be made upon Brent Distributing Company, and shall cause service by mail to be made upon Big Bear Super Market No. 3.

The effective date of this order shall be 30 days after completion of service on respondent Brent.

Dated MAR 23 1988, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. O'HANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Victor Weissert*  
Victor Weissert, Executive Director

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Dated \_\_\_\_\_, at San Francisco, California.