

Decision 89-01-006 January 11, 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of Robert L.
Qualls, an individual, and Reliance
Sheet and Strip Co., a California
Corporation.

I.88-03-045
(Filed March 23, 1988)

D. G. Redlingshafer, for Robert L. Qualls; and
Armour, St. John, Wilcox, Goodin & Schlotz, by
Thomas J. MacBride, Attorney at Law, and
Roger W. Abendroth, for Reliance Sheet
and Strip Co.; respondents.
Lawrence O. Garcia, Attorney at Law, and Paul
Wuerstle, for the Transportation Division.

O P I N I O N

Robert L. Qualls of El Sobrante transports property over the public highways for compensation under a highway contract carrier permit issued in 1985. A field investigation by Transportation Division staff (staff) showed that Qualls had rendered transportation services to Reliance Sheet and Strip Co., a California corporation (Reliance), and that in doing so he may have violated Public Utilities (PU) Code §§ 3664, 3667, and 3737 and General Order (GO) 147.

On March 23, 1988, the Commission issued its investigative order in this proceeding to determine:

1. Whether Qualls in transporting steel coils for Reliance, violated PU Code §§ 3664, 3667, and 3737, by failing to assess the applicable rates as set forth in Transition Tariff (TT) 2, as amended by Decision (D.) 86-04-045.
2. Whether Qualls has violated GO 147, Rule 7 and Appendix A, by failing to have a contract on file and in effect for Reliance.

3. Whether Qualls has violated TT 2, Items 255 and 256, by failing to maintain proper documentation of shipments.
4. If sums less than the applicable rates and charges were charged, collected, or received, whether a fine in the amount of such undercharges should be imposed upon Qualls under PU Code § 3800.
5. Whether Qualls should be ordered to collect from Reliance the difference between the charges actually received and the applicable rates and charges.
6. Whether any or all of Qualls' operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine imposed under PU Code § 3774.
7. Whether Qualls should be ordered to cease and desist from any unlawful operation or practice.

A copy of the OII was duly served upon Qualls.

Thereafter, a prehearing conference was held, during which Qualls and the staff met informally to discuss the possibility of settlement. However, no settlement could be reached and the matter was set for hearing before Administrative Law Judge Robert T. Baer on August 4, 1988 in San Francisco. The matter came on regularly for hearing on that date and evidence was sponsored on behalf of the staff, Qualls, and Reliance and the matter was submitted.

Staff Evidence

The facts about the transportation performed during the review period (June 23 through October 8, 1986) are not in dispute. Qualls carried 31 shipments of steel from USS-POSCO Industries in Pittsburg to Reliance in Alameda. Qualls also carried 11 shipments of steel from Pinole Point Steel Company in Richmond to Reliance in Alameda. During the review period there was no contract in existence between Qualls and Reliance.

The only documents evidencing the transportation in question were invoices and lists of shipments prepared by Qualls on his letterhead, showing the date of the transportation, the bill of lading number, the origin, the load number, the weight of the shipment, and the charges assessed. Three such lists dated July 28, September 2, and October 14, 1986 are in staff Exhibit 2 and encompass all of the shipments that the staff has called into question.

Each of the 42 shipments is also represented by an invoice, hand tag, or delivery tag that the investigator copied and included in his report. These invoices include much of the information that appears on the lists previously mentioned. For instance, they include the date of the shipment, the bill of lading number or customer's order number, the load number, and the weight. Each of the shipments represented in the staff study can be identified on one of the three lists and on an individual invoice. The invoices, issued by Qualls, were obtained from Mrs. Qualls by the staff. ✓

Qualls did not have in his possession, nor could he supply to the staff, any other documents evidencing the transportation in question, such as the bills of lading.

Another staff witness, a Transportation Rate Expert, sponsored Exhibit 4, an analysis of the rates properly chargeable on the 42 shipments described above. Exhibit 4 shows that undercharges of \$6,642.22 are attributable to the 31 shipments from USS-POSCO Industries in Pittsburg; that undercharges of \$2,457.65 are attributable to the 11 shipments from Pinole Point Steel Company in Richmond; and that total undercharges for the 42 shipments are \$9,099.87.

Qualls' Evidence

Qualls does not dispute that the transportation described in the staff exhibits occurred as indicated. He does, however, take exception to the staff's undercharge evidence. Qualls'

transportation consultant testified that the 31 shipments from U.S. Steel (USS-POSCO Industries) in Pittsburg to Reliance resulted in undercharges of \$74.34 and that the 11 shipments from Pinole Point Steel in Richmond to Reliance resulted in undercharges of \$253.66.¹ Qualls' transportation consultant derived his rates, and thus his undercharges, from the Iron or Steel Tariff No. 1 of Conti Trucking, Inc. The staff, on the other hand, used the rates in TT 2 to calculate the charges for the subject transportation and thus the undercharges due. The choice of tariff depends in turn upon the legal theory adopted by the staff or Qualls.

Discussion

The OII in paragraph 1 asks whether Qualls violated PU Code §§ 3664, 3667, and 3737 by failing to assess the applicable rates as set forth in TT 2, as amended by D.86-04-045. The sole contested issue in this proceeding involves this charge. Specifically, the issue is: What is the legal basis for the tariff selected to develop the charges and undercharges applicable to the transportation? Is it § 3663, as Qualls argues? Or is it GO 147, as the staff argues?

The staff believes that the choice of tariff is required by the provisions of GO 147. In Rule 7 of GO 147 the Commission has provided regulations for contract filings by contract carriers. Rule 7 provides, in part, as follows:

- "A. The provisions of this rule apply to contract carriers engaged in transportation governed by the transition tariffs.
- "B. No contract carrier shall commence to perform any transportation or accessorial service until it has on file and in effect

1 Of the 31 shipments from Pittsburg, 27 resulted in overcharges totaling \$480.29. The undercharges on the other four shipments were \$19.82, \$5.40, \$30.35, and \$18.77, or a total of \$74.34.

with the Commission three copies of an executed binding contract for such service.

- "C. No contract carrier shall provide any transportation or accessorial service except in accordance with its contract or contracts as filed and in effect with the Commission. Contract carriers shall strictly observe, as their exact rates, the rates and provisions of their contracts."

It is undisputed that between June 23 and October 8, 1986, the period when Qualls transported the 42 subject shipments to Reliance, there was no contract on file between Reliance and Qualls. The staff witness further testified that a contract carrier without a contract on file is governed by TT 2.

Roger W. Abendroth, appearing and testifying for Reliance, contended that other contract carriers have approved contracts on file with the Commission that include rates comparable to those assessed by Qualls to Reliance for the same kind of transportation, of the same commodities, between the same points. He further stated that the rates Reliance paid and the rates of other contract carriers with approved contracts on file are about one-half the rate provided in TT 2. He believes that Reliance should not be required to pay TT 2 rates when the market rates are obviously those assessed by Qualls and other contract carriers with approved contracts on file.

The staff witness, on the other hand, testified that merely because other contract carriers have approved contracts on file showing rates similar to Qualls' rates for the same commodity, over the same distance, and between the same points, those other contract rates could not be applied in this instance absent a contract.

Qualls' transportation consultant testified that he used the rates of Conti Trucking, Inc., to calculate the charges and undercharges applicable to the subject transportation. He stated

that he derived his authority for using Conti Trucking, Inc. rates from PU Code § 3663, which provides:

"In the event the Commission establishes minimum rates for transportation services by highway permit carriers, the rates shall not exceed the current rates of common carriers by land subject to Part 1 (commencing with § 201) of Division 1 for the transportation of the same kind of property between the same points. . . ."

Based on PU Code § 3663, the witness felt that common carrier rates by land should apply to the subject transportation. He therefore computed the appropriate charges and undercharges based on the common carrier rates of Conti Trucking, Inc. ✓

The Commission has held:

"While it is true that MRT-2 was cancelled effective April 30, 1980, D.90663 also provided that rates named in TT's would function as a threshold for purposes of contract carrier rate justification requirements, and that rates filed by contract carriers below the transition rates must be accompanied by a statement of justification. Justification must consist either of (1) reference to another motor carrier's rate, or (2) operational and cost data showing that a proposed rate will contribute to carrier profitability. It follows that without one of these two means of justification, TT-2 rates are the applicable rates for transportation performed for these shippers. The title page to TT-2 states that it applies to transportation performed by highway contract carriers and to highway common carriers.

"We find that where a written contract for transportation covered by TT-2 has not been executed by a carrier and shipper, and approved by the Commission, specifying rates different from those named in TT-2, rates applicable to transportation performed are those contained in TT-2. Further, these rates in TT-2 are, in effect, minimum rates within the meaning of PU Code §§ 3664, 3667, and 3800." (California American Trucking, Inc., D.84-02-070 in OII 82-09-01, p. 18.)

However, as pointed out in our discussion of § 311 comments, below, § 3663 controls over contrary decisions or regulations. We will, therefore, find undercharges in a lesser amount than the staff proposes.

The OII in paragraph 2 also asks whether Qualls has violated GO 147, Rule 7 and Appendix A, by failing to have a contract on file and in effect for the Reliance account.

GO 147(7)(B) provides:

"No contract carrier shall commence to perform any transportation or accessorial service until it has on file and in effect with the Commission three copies of an executed binding contract for such service."

GO 147, Appendix A, paragraph 5 provides:

"All contract carriers, except carriers engaged in rate-exempt transportation, must file written contracts with the Commission. Such contracts shall be available for inspection by the public. Contract carriers may provide service only under written contracts which shall bind both carrier and shipper to good faith performance for a specific term."

It is undisputed that Qualls did not enter into a contract to provide transportation services for Reliance until after the services identified in the OII were performed. Accordingly, Qualls violated GO 147, Rule 7(B) and Appendix A, paragraph 5, when he provided such services to Reliance, and we will so find.

In paragraph 3 the OII asks whether Qualls has violated TT 2, Items 255 and 256, by failing to maintain proper documentation of shipments. Item 255, paragraph 2, provides:

"ISSUANCE OF FREIGHT BILL. A freight bill shall be issued by the carrier for each shipment transported... The freight bill shall show the following information:

"(a) The carrier's name, current address, ZIP code, telephone number, and area code.

- "(b) Date of freight bill.
- "(c) Date of shipment.
- "(d) Names of consignor and consignee.
- "(e) Points of origin and destination.
- "(f) Description of shipment (...as provided in this tariff).
- "(g) Weight of the shipment...
- "(h) Rate and charge assessed.
- "(i) Such other information as may be necessary to make an accurate determination of the applicable minimum rate and charge."

Qualls' freight bills, covering the 42 shipments at issue here, fail to comply with Item 255, paragraph 2, in the following particulars:

1. Only 3 freight bills were issued by Qualls for the subject transportation, instead of one freight bill for each shipment.
2. The carrier's telephone area code is not included.
3. The points of destination are not included; and the points of origin are included by names only. ✓
4. The shipments are not described as provided in TT 2. ✓
5. The rates are not specified.
6. The contract is not identified.

It is clear that Qualls has violated Item 255, and we will so find.

TT 2, Item 256, paragraph 5, provides:

"A copy of each bill of lading, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request or any other written document which supports the rates and charges

assessed and which the carrier is required to issue, receive or obtain by this tariff for any transportation...service shall be retained and preserved by the carrier, at a location within the State of California, subject to the Commission's inspection, for a period of not less than three years from the date of issue."

Beyond the three freight bills mentioned above and the invoices Qualls retained no other documents in his office evidencing or supporting the rates and charges assessed. He retained no bills of lading (Item 255(1)), weighmaster's certificates, written agreements, or other documents pertaining to the subject transportation.

It is uncontested that Qualls violated Item 256 in connection with the subject transportation, and we will so find.

In paragraph 4 the OII asks whether a fine in the amount of the undercharges should be imposed on Qualls under PU Code § 3800. Under § 3800 we "may impose upon the carrier a fine equal to the amount of the undercharges." That is, we have our discretion under § 3800 to impose a fine in the amount of the undercharges, some lesser amount, or none at all. Since § 3800 also states that the "commission shall require the carrier to collect the undercharges involved," we have a statutory duty to order their collection. In view of this requirement our failure to impose a fine on Qualls in the amount of the undercharges would allow him to benefit from his violations of the statutes and rules cited. We will, therefore, impose a fine upon Qualls in the amount of the undercharges.

In paragraph 5 the OII asks whether Qualls should be ordered to collect the undercharges from Reliance. Section 3800 provides in part:

"Whenever the commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, ..., rates or charges less than the minimum rates and charges applicable to the transportation established or approved by the

commission, ..., the commission shall require the carrier to collect the undercharges involved..."

We have found after a hearing that Qualls charged less than the applicable rates for the transportation provided to Reliance. Accordingly, § 3800 requires us to order Qualls to collect the undercharges from Reliance. The following order will so provide.

In paragraph 6 the OII asks whether any or all of Qualls' operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine imposed under PU Code § 3774. Section 3774 provides:

- "The commission may cancel, revoke, or suspend the operating permit...of any highway carrier upon any of the following grounds:
- "(a) Any illegally conducted highway carrier operations.
 - "(b) The violation of any of the provisions of this chapter, or of the operating permit issued thereunder.
 - "(c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter."

* * *

"As an alternative to the cancellation, revocation, or suspension of an operating permit..., the commission may impose upon the holder of the permit...a fine of not exceeding...(\$20,000)."

Under § 3774 we have authority to cancel, revoke, or suspend Qualls' operating authority, or, in the alternative, to impose a fine of up to \$20,000. The staff has suggested that a punitive fine of \$750 be imposed on Qualls for his violations of

the statutes and rules cited. This fine would be in addition to the fine imposed under § 3800. Section 3800 provides in part that:

"The remedy and penalty provided by this section are cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this chapter, or to the exercise by the commission of its power to punish for contempt."

There is no question of our authority to impose an additional fine upon Qualls; and it is appropriate in this case. Without an additional punitive fine Qualls would suffer no out-of-pocket penalty for his violations, since the undercharge fine will come from Reliance. We will adopt the staff's recommended punitive fine.

Comments Under PU Code § 311

The ALJ's proposed decision was mailed to the parties on November 30, 1988. On December 20, 1988, Qualls, through his representative D. G. Redlingshafer, filed comments under PU Code § 311 and Rules 77.1 - 77.5. Reliance, although it had not been represented by counsel during hearing, retained counsel and filed comments on December 20, 1988. The staff did not file replies to comments under Rule 77.5.

Comments of Qualls

Qualls contends that the statement of facts at page 3, paragraph 2, last sentence, is inaccurate, because it does not reflect the staff witness' testimony that he obtained certain invoices from Mrs. Qualls, as opposed to Mr. Qualls. We will make this correction, although Qualls has not argued, and we do not believe, that this fact has any legal significance.

Qualls also contends that the staff witness admitted on cross-examination that he did not ask or seek approval from the permittee, Robert L. Qualls, before obtaining documents from Mrs. Qualls. This contention is not supported by the evidence.

Qualls further contends that the staff witness admitted that he made no effort to seek additional documentation that might be available from Reliance, nor did he ask if Mrs. Qualls could retrieve the shipping documents (bills of lading) given to Reliance with the manifest billings. Qualls asked the staff witness the following questions and received the indicated answers:

"Q And you specifically requested copies of the bills of lading?

"A Yes, I did.

"Q Did you request the Qualls to obtain the copies of bills of lading and forward them to you for your consideration?

"A I did, sir. They were not available."
(Tr. 13)

Qualls' contentions mischaracterize the evidence. There is no testimony cited, nor have we found any, to support the purported staff admissions. If Qualls wanted information about staff efforts to obtain documents from Reliance, he should have asked specific questions to elicit that information. However, it is the duty of the carrier to have on hand in its office copies of all documents it issues in connection with transportation it performs. If bills of lading were issued in connection with the subject transportation, it was Qualls' duty to provide them. Qualls could have been submitted them at any time to the staff but did not. Neither of the Qualls testified.

Qualls observes that the proposed decision does not include his evidence that the rates he charged on 27 of the 31 shipments from Pittsburg resulted in charges totalling \$480.29 more than Conti's rates; and that the undercharges on the other four shipments were: \$19.82, \$5.40, \$30.35, and \$18.77. We will add these facts to the decision.

In the balance of Qualls' comments he articulates his theory of the case in detail for the first time. He agrees that

the primary issue in the case is the legal basis for the tariff that is properly applicable to the transportation. He also agrees that GO 147 provides regulation of contract filing by contract carriers. He emphasizes, however, that "there is no provision in GO 147 that is comparable to Rule 13 of GO 147-A" and that "therefore, provisions of the PU Code must be applied."

GO 147-A was adopted in D.86-12-102, dated December 22, 1986, in C.10368, et al. It was effective March 1, 1987. Rule 13 of GO 147-A provides:

"RULE 13--ENFORCEMENT AND PENALTIES

"The lowest generally applicable common carrier rate is hereby established as a just and reasonable charge the carrier is required to assess when the transportation of property is provided in absence of a schedule of filed tariff rates, charges, classification, or contract on file in compliance with this General Order."

Thus, if the transportation that is the subject of this investigation had been performed on or after March 1, 1987, instead of between June 23 and October 8, 1986 (6 to 9 months earlier) the undercharges would have been measured by the "lowest generally applicable common carrier rate", rather than by TT2.

As Qualls points out, GO 147 contains no comparable rule or regulation governing the enforcement of its other rules for contract carriers. Specifically, GO 147 does not provide that:

"The rates in Transition Tariff 2 are hereby established as the just and reasonable rates and charges the carrier is required to assess when the transportation of property is provided in absence of a...contract on file in compliance with this General Order."

The only mention of transition tariffs is in GO 147, Rule 7(A), which provides:

"RULE 7--CONTRACT FILINGS BY CONTRACT CARRIERS

"A. The provisions of this rule apply to contract carriers engaged in transportation governed by transition tariffs."

Rule 7(A) merely states to whom Rule 7 applies. It does not specify how violations of Rule 7, involving contract filings by contract carriers, are to be enforced. No other provision of GO 147 supplies that deficiency.

Qualls further contends that research into the origins of PU Code §§ 3662-3665 shows that these sections were parts of § 10 of the Highway Carriers Act (Act). (Stats. 1935, ch. 223) When the Act was codified, § 10 became §§ 3662-3665, with only minor changes resulting from changing the Commission's name. The paragraphs of § 10 of the Act are in the same order as §§ 3662-3665 of the Code, and the contents are virtually identical. Qualls argues that the history of the codification of the Act requires that the present sections of the PU Code must be considered in sequence, § 3662 to § 3665, and that none of them apply out of the context that the Legislature intended when they were established. Qualls further argues that §§ 3663-3665 "come into being and effect only when the authorizing Section 3662 is activated upon the action of the Commission by establishing or approving a minimum rate." (Qualls' Comments, p. 4.) Finally, Qualls concludes that staff is incorrect to apply TT 2 rates in the absence of an approved contract, and that this error is obvious when the sections of the PU Code are considered in the sequence in which they were enacted.

Stated in its simplest terms, Qualls' argument is that the staff may not pick out of §§ 3662-3665 a section that it wishes to apply (§ 3664) while ignoring another related section (§ 3663). If TT 2 is in effect a set of minimum rates, as we have previously held (D.84-02-070, above), then the establishment of that tariff under § 3662 activates §§ 3663-3665. No part of those sections may be read out of the Code or be ignored or avoided merely because of

changes in Commission or staff policy. Statutory law, as it is embodied in the PU Code, controls over conflicting or contrary Commission regulations or decisions. Accordingly, we conclude that our holding in D.84-02-070 should not be applied in this case. Rather, undercharges in connection with the subject transportation should be calculated using "the current rates of common carriers by land." (§ 3663.) The only evidence of such common carrier rates is in Qualls' rate exhibit (Exhibit 7) and in Conti Trucking, Inc., rates. (Exhibit 8.)

Using Conti's rates as a measure of the undercharges, we find that Qualls should be ordered to collect from Reliance \$74.34 in undercharges for transportation originating in Pittsburg and \$253.66 in undercharges for transportation originating in Richmond. Although Qualls points to overcharges of \$480.29 on 27 of 31 shipments from Richmond, we will not regard this sum as a set off against the undercharges.

This disposition of the charge that Qualls has violated § 3664 is not likely to have a broad impact on our enforcement program. We have already observed that GO 147-A contains an enforcement provision. This decision should, therefore, affect only transportation performed by highway contract carriers in the period between the effective date of TT 2 and the effective date of GO 147-A.

Qualls also critiques the ALJ's proposed decision in the discussion of the alleged violations of TT 2, Item 255. (Proposed decision, pp. 8-9.) Only one of Qualls' points is well taken. We will delete sentence No. 3 on page 9 and renumber.

Since we have reached the result sought by Reliance through its comments, it is not necessary to address its arguments in detail. Suffice it to say that Reliance offered convincing argument that the result we have reached is the equitable outcome.

The above discussion of Qualls' and Reliance's comments makes necessary the modification of the findings of fact, conclusions of law, and ordering paragraphs set forth in the ALJ's proposed decision.

Findings of Fact

1. Qualls is now and has been since 1985 a highway contract carrier.
2. Between June 23 and October 8, 1986, Qualls transported 42 shipments of steel for Reliance. During that period, no contract covering the subject transportation existed between Qualls and Reliance.
3. By applying the "current rates of common carriers by land", specifically, the rates of Conti Trucking, Inc., the subject transportation resulted in overcharges of \$480.29 and undercharges of \$328.
4. Qualls neither issued nor maintained proper documents in connection with the subject transportation.

Conclusions of Law

1. When no contract exists between a highway contract carrier and a shipper, the rates applicable to transportation provided by the carrier for the shipper are those specified in TT 2, provided that such rates shall not exceed the current rates of common carriers by land.
2. The transition tariffs are, in effect, minimum rates.
3. By failing to assess or collect the applicable current rates of common carriers by land for the subject transportation, Qualls has violated PU Code §§ 3664, 3667, and 3737.
4. By failing to issue and retain proper shipping documents Qualls has violated Items 255 and 256 of TT 2.
5. By failing to have a contract on file and in effect for the Reliance account, Qualls has violated GO 147, Rule 7 and Appendix A.

6. Qualls should be ordered to collect from Reliance undercharges of \$328.

7. Qualls should be fined \$328 under § 3800.

8. Qualls should be fined \$750 under § 3774.

9. Qualls should be ordered to cease and desist from any further violations of PU Code §§ 3664, 3667, and 3737, of GO 147, and of Items 255 and 256 of TT 2, or their successors.

Qualls should promptly take all reasonable actions to collect the undercharges. If necessary, he should file timely complaints under PU Code § 3671. The staff will investigate Qualls' compliance. If it believes that Qualls or his attorney has not acted in good faith, the Commission will reopen this proceeding to determine whether to impose sanctions.

ORDER

IT IS ORDERED that Robert L. Qualls shall:

1. Pay a fine of \$750 to this Commission under PU Code § 3774 on or before the 40th day after the effective date of this order.
2. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
3. Pay a fine to this Commission under PU Code § 3800 of \$328 on or before the 40th day after the effective date of this order. ✓
4. Take such action, as may be necessary, to collect the undercharges set forth in Finding 3, including timely legal action under PU Code § 3671.
5. Notify the Commission in writing upon collection.
6. Promptly take all reasonable steps to collect the undercharges.
7. File with the Commission on the first Monday of each month a report of any

undercharges remaining uncollected 60 days after the effective date of this order, specifying the action taken to collect them and the result of such action, until they have been collected in full, or until further order of the Commission. Failure to file any such monthly report within 15 days after the due date shall result in the automatic suspension of the operating authority until the report is filed.

8. Not charge or collect less than lawful rates approved by the Commission.
9. Cease and desist from further violations of PU Code §§ 3664, 3667, and 3737, of GO 147, and of Items 255 and 256 of TT 2, or their successors.

The Executive Director shall have this order personally served upon Robert L. Qualls and served by mail upon Reliance Sheet and Strip Co.

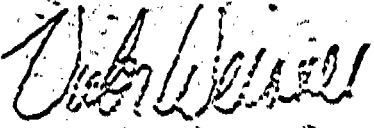
This order becomes effective 30 days from today.

Dated JAN 11 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
JOHN B. OGANIAN
Commissioners

Commissioner Stanley W. Hulett
being necessarily absent, did
not participate.

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


Victor Weisler, Executive Director

Item CA-3
Agenda 1/11/89

Decision PROPOSED DECISION OF ALJ BAER (Mailed 11/30/88)

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1. Whether Qualls in transporting steel coils for Reliance, violated PU Code §§ 3664, 3667, and 3737, by failing to assess the applicable rates as set forth in Transition Tariff (TT) 2, as amended by Decision (D.) 86-04-045.
2. Whether Qualls has violated GO 147, Rule 7 and Appendix A, by failing to have a contract on file and in effect for Reliance.

3. Whether Qualls has violated TT 2, Items 255 and 256, by failing to maintain proper documentation of shipments.
4. If sums less than the applicable rates and charges were charged, collected, or received, whether a fine in the amount of such undercharges should be imposed upon Qualls under PU Code § 3800.
5. Whether Qualls should be ordered to collect from Reliance the difference between the charges actually received and the applicable rates and charges.
6. Whether any or all of Qualls' operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine imposed under PU Code § 3774.
7. Whether Qualls should be ordered to cease and desist from any unlawful operation or practice.

A copy of the OII was duly served upon Qualls.

Thereafter, a prehearing conference was held, during which Qualls and the staff met informally to discuss the possibility of settlement. However, no settlement could be reached and the matter was set for hearing before Administrative Law Judge Robert T. Baer on August 4, 1988 in San Francisco. The matter came on regularly for hearing on that date and evidence was sponsored on behalf of the staff, Qualls, and Reliance and the matter was submitted.

Staff Evidence

The facts about the transportation performed during the review period (June 23 through October 8, 1986) are not in dispute. Qualls carried 31 shipments of steel from USS-POSCO Industries in Pittsburg to Reliance in Alameda. Qualls also carried 11 shipments of steel from Pinole Point Steel Company in Richmond to Reliance in Alameda. During the review period there was no contract in existence between Qualls and Reliance.

The only documents evidencing the transportation in question were invoices and lists of shipments prepared by Qualls on his letterhead, showing the date of the transportation, the bill of lading number, the origin, the load number, the weight of the shipment, and the charges assessed. Three such lists dated July 28, September 2, and October 14, 1986 are in staff Exhibit 2 and encompass all of the shipments that the staff has called into question.

Each of the 42 shipments is also represented by an invoice, hand tag, or delivery tag that the investigator copied and included in his report. These invoices include much of the information that appears on the lists previously mentioned. For instance, they include the date of the shipment, the bill of lading number or customer's order number, the load number, and the weight. Each of the shipments represented in the staff study can be identified on one of the three lists and on an individual invoice. The invoices, issued by Qualls, were obtained from Qualls by the staff.

Qualls did not have in his possession, nor could he supply to the staff, any other documents evidencing the transportation in question, such as the bills of lading.

Another staff witness, a Transportation Rate Expert, sponsored Exhibit 4, an analysis of the rates properly chargeable on the 42 shipments described above. Exhibit 4 shows that undercharges of \$6,642.22 are attributable to the 31 shipments from USS-POSCO Industries in Pittsburg; that undercharges of \$2,457.65 are attributable to the 11 shipments from Pinole Point Steel Company in Richmond; and that total undercharges for the 42 shipments are \$9,099.87.

Qualls' Evidence

Qualls does not dispute that the transportation described in the staff exhibits occurred as indicated. He does, however, take exception to the staff's undercharge evidence. Qualls'

transportation consultant testified that the 31 shipments from U.S. Steel (USS-POSCO Industries) in Pittsburg to Reliance resulted in undercharges of \$74.34 and that the 11 shipments from Pinole Point Steel in Richmond to Reliance resulted in undercharges of \$253.66. Qualls' transportation consultant derived his rates, and thus his undercharges, from the Iron or Steel Tariff No. 1 of Conti Trucking, Inc. The staff, on the other hand, used the rates in TT 2 to calculate the charges for the subject transportation and thus the undercharges due. The choice of tariff depends in turn upon the legal theory adopted by the staff or Qualls.

Discussion

The sole contested issue in this proceeding is the legal basis for the tariff selected to develop the charges and undercharges applicable to the transportation. The staff believes that the choice of tariff is required by the provisions of GO 147. In Rule 7 of GO 147 the Commission has provided regulations for contract filings by contract carriers. Rule 7 provides, in part, as follows:

- "A. The provisions of this rule apply to contract carriers engaged in transportation governed by the transition tariffs.
- "B. No contract carrier shall commence to perform any transportation or accessorial service until it has on file and in effect with the Commission three copies of an executed binding contract for such service.
- "C. No contract carrier shall provide any transportation or accessorial service except in accordance with its contract or contracts as filed and in effect with the Commission. Contract carriers shall strictly observe, as their exact rates, the rates and provisions of their contracts."

It is undisputed that between June 23 and October 8, 1986, the period when Qualls transported the 42 subject shipments to Reliance, there was no contract on file between Reliance and

Qualls. The staff witness further testified that a contract carrier without a contract on file is governed by TT 2.

Roger W. Abendroth, appearing and testifying for Reliance, contended that other contract carriers have approved contracts on file with the Commission that include rates comparable to those assessed by Qualls to Reliance for the same kind of transportation, of the same commodities, between the same points. He further stated that the rates Reliance paid and the rates of other contract carriers with approved contracts on file are about one-half the rate provided in TT 2. He believes that Reliance should not be required to pay TT 2 rates when the market rates are obviously those assessed by Qualls and other contract carriers with approved contracts on file.

The staff witness, on the other hand, testified that merely because other contract carriers have approved contracts on file showing rates similar to Qualls' rates for the same commodity, over the same distance, and between the same points, those other contract rates could not be applied in this instance absent a contract.

Qualls' transportation consultant testified that he used the rates of Conti Trucking, Inc., to calculate the charges and undercharges applicable to the subject transportation. He stated that he derived his authority for using Conti Trucking, Inc. rates from PU Code § 3663, which provides:

"In the event the Commission establishes minimum rates for transportation services by highway permit carriers, the rates shall not exceed the current rates of common carriers by land subject to Part 1 (commencing with § 201) of Division 1 for the transportation of the same kind of property between the same points. . . ."

Based on PU Code § 3663, the witness felt that common carrier rates by land should apply to the subject transportation. He therefore computed the appropriate charges and undercharges based on the common carrier rates of Conti Trucking, Inc.

We cannot agree with Qualls' position. As the staff persuasively argued, § 3663 is not self-executing. Section 3665 provides:

"The Commission shall make such rules as are necessary to the application and enforcement of the rates established or approved pursuant to this chapter."

The Commission has enacted rules in GO 147 that it deems necessary to the application and enforcement of the rates it has established in its transition tariffs. These rules clearly require that all transportation by contract carriers be performed pursuant to contracts on file with and approved by the Commission. Moreover, the Commission has held:

"While it is true that MRT-2 was cancelled effective April 30, 1980, D.90663 also provided that rates named in TT's would function as a threshold for purposes of contract carrier rate justification requirements, and that rates filed by contract carriers below the transition rates must be accompanied by a statement of justification. Justification must consist either of (1) reference to another motor carrier's rate, or (2) operational and cost data showing that a proposed rate will contribute to carrier profitability. It follows that without one of these two means of justification, TT-2 rates are the applicable rates for transportation performed for these shippers. The title page to TT-2 states that it applies to transportation performed by highway contract carriers and to highway common carriers.

"We find that where a written contract for transportation covered by TT-2 has not been executed by a carrier and shipper, and approved by the Commission, specifying rates different from those named in TT-2, rates applicable to transportation performed are those contained in TT-2. Further, these rates in TT-2 are, in effect, minimum rates within the meaning of PU Code §§ 3664, 3667, and 3800." (California American Trucking, Inc., D.84-02-070 in OII 82-09-01, p. 18.)

It is indeed unfortunate that Qualls, a highway contract carrier permit holder since 1985, did not require of Reliance a contract covering the proposed transportation before that transportation actually occurred. Qualls' failure to comply with the provisions of GO 147(7) has caused the rates in TT 2 to come into play. Since Qualls and Reliance did not enter into a contract specifying the rates for the subject transportation, the only other applicable rates are those in TT 2. Qualls' argument that § 3663 applies to the subject transportation fails, because § 3663 is not self-executing. According to § 3665, the Commission may make rules that it deems necessary to the application and enforcement of the rates it establishes. It has done so in GO 147 for highway contract carriers. These rules allow highway contract carriers to assess rates that do not "exceed the current rates of common carriers by land" if such rates are embodied in contracts filed with and approved by the Commission. However, in this case Qualls did not enter into any such contract nor did he assess the rates of a common carrier by land.¹ Accordingly, he may not claim protection under § 3663, because he has not complied with the rules that govern the application of the rates established under that statute, rules that § 3665 explicitly states the Commission has authority to enact.

By failing to assess the applicable rates in TT 2, as amended by D.86-04-045, Qualls has violated PU Code §§ 3664, 3667, and 3737, and we will so find.

¹ Qualls attempts to use the rates of Conti Trucking, Inc. to measure the extent of the undercharges in this case, but Conti's rates are not the rates he charged to Reliance. Rather, Conti's rates are an afterthought to hold the undercharges at what Qualls feels is a reasonable level.

The OII in paragraph 2 also asks whether Qualls has violated GO 147, Rule 7 and Appendix A, by failing to have a contract on file and in effect for the Reliance account.

GO 147(7)(B) provides:

"No contract carrier shall commence to perform any transportation or accessorial service until it has on file and in effect with the Commission three copies of an executed binding contract for such service."

GO 147, Appendix A, paragraph 5 provides:

"All contract carriers, except carriers engaged in rate-exempt transportation, must file written contracts with the Commission. Such contracts shall be available for inspection by the public. Contract carriers may provide service only under written contracts which shall bind both carrier and shipper to good faith performance for a specific term."

It is undisputed that Qualls did not enter into a contract to provide transportation services for Reliance until after the services identified in the OII were performed. Accordingly, Qualls violated GO 147, Rule 7(B) and Appendix A, paragraph 5, when he provided such services to Reliance, and we will so find.

In paragraph 3 the OII asks whether Qualls has violated TT 2, Items 255 and 256, by failing to maintain proper documentation of shipments. Item 255, paragraph 2, provides:

"ISSUANCE OF FREIGHT BILL. A freight bill shall be issued by the carrier for each shipment transported... The freight bill shall show the following information:

- "(a) The carrier's name, current address, ZIP code, telephone number, and area code.
- "(b) Date of freight bill.
- "(c) Date of shipment.
- "(d) Names of consignor and consignee.

- "(e) Points of origin and destination.
- "(f) Description of shipment (...as provided in this tariff).
- "(g) Weight of the shipment...
- "(h) Rate and charge assessed.
- "(i) Such other information as may be necessary to make an accurate determination of the applicable minimum rate and charge."

Qualls' freight bills, covering the 42 shipments at issue here, fail to comply with Item 255, paragraph 2, in the following particulars:

1. Only 3 freight bills were issued by Qualls for the subject transportation, instead of one freight bill for each shipment.
2. The carrier's telephone area code is not included.
3. The names of the various consignees are not included.
4. The points of destination are not included; and the points of origin are included by names only.
5. The shipments are not described as provided in TT 2.
6. The rates are not specified.
7. The contract is not identified.

It is clear that Qualls has violated Item 255, and we will so find.

TT 2, Item 256, paragraph 5, provides:

"A copy of each bill of lading, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request or any other written document which supports the rates and charges assessed and which the carrier is required to issue, receive or obtain by this tariff for any transportation...service shall be retained and

preserved by the carrier, at a location within the State of California, subject to the Commission's inspection, for a period of not less than three years from the date of issue."

Beyond the three freight bills mentioned above and the invoices Qualls retained no other documents in his office evidencing or supporting the rates and charges assessed. He retained no bills of lading (Item 255(1)), weighmaster's certificates, written agreements, or other documents pertaining to the subject transportation.

It is uncontested that Qualls violated Item 256 in connection with the subject transportation, and we will so find.

In paragraph 4 the OII asks whether a fine in the amount of the undercharges should be imposed on Qualls under PU Code § 3800. We have determined that the applicable rates for the subject transportation, in absence of a valid contract, are the rates provided in TT 2. Using TT 2 rates as a measure, the staff has calculated the undercharges at \$9,099.87. Under § 3800 we "may impose upon the carrier a fine equal to the amount of the undercharges." That is, we have our discretion under § 3800 to impose a fine of \$9,099.87, or some lesser amount, or none at all. Since § 3800 also states that the "commission shall require the carrier to collect the undercharges involved," we have a statutory duty to order their collection. In view of this requirement our failure to impose a fine on Qualls in the amount of the undercharges would allow him to benefit from his violations of the statutes and rules cited. We will, therefore, impose a fine upon Qualls of \$9,099.87.

In paragraph 5 the OII asks whether Qualls should be ordered to collect the undercharges from Reliance. Section 3800 provides in part:

"Whenever the commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, ..., rates or charges less than

the minimum rates and charges applicable to the transportation established or approved by the commission, ..., the commission shall require the carrier to collect the undercharges involved..."

As we held in D.84-02-070, supra, the rates in TT 2 are, in effect, minimum rates. We have found after a hearing that Qualls charged less than the rates in TT 2 for the transportation provided to Reliance. Accordingly, § 3800 requires us to order Qualls to collect the undercharges from Reliance. The following order will so provide.

In paragraph 6 the OII asks whether any or all of Qualls' operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine imposed under PU Code § 3774. Section 3774 provides:

"The commission may cancel, revoke, or suspend the operating permit...of any highway carrier upon any of the following grounds:

- "(a) Any illegally conducted highway carrier operations.
- "(b) The violation of any of the provisions of this chapter, or of the operating permit issued thereunder.
- "(c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter."

* * *

"As an alternative to the cancellation, revocation, or suspension of an operating permit..., the commission may impose upon the holder of the permit...a fine of not exceeding...(\$20,000)."

Under § 3774 we have authority to cancel, revoke, or suspend Qualls, operating authority or, in the alternative, to

impose a fine of up to \$20,000. The staff has suggested that a punitive fine of \$750 be imposed on Qualls for his violations of the statutes and rules cited. This fine would be in addition to the fine imposed under § 3800. Section 3800 provides in part that:

"The remedy and penalty provided by this section are cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this chapter, or to the exercise by the commission of its power to punish for contempt."

There is no question of our authority to impose an additional fine upon Qualls; and it is appropriate in this case. Without an additional punitive fine Qualls would suffer no out-of-pocket penalty for his violations, since the undercharge fine will come from Reliance. We will adopt the staff's recommended punitive fine.

Findings of Fact

1. Qualls is now and has been since 1985 a highway contract carrier.
2. Between June 23 and October 8, 1986, Qualls transported 42 shipments of steel for Reliance. During that period, no contract covering the subject transportation existed between Qualls and Reliance.
3. Qualls did not assess or collect for the subject transportation the rates provided in TT 2.
4. The undercharges applicable to the subject transportation are \$9,099.87.
5. Qualls neither issued nor maintained proper documents in connection with the subject transportation.

Conclusions of Law

1. When no contract exists between a highway contract carrier and a shipper, the rates applicable to transportation provided by the carrier for the shipper are those specified in TT 2.

2. Under § 3665 the Commission has authority to enact rules necessary to the application and enforcement of the rates it establishes.

3. In order to claim the protection of § 3663, a highway contract carrier must comply with the applicable provisions of GO 147, containing rules enacted by the Commission under § 3665.

4. The transition tariffs are, in effect, minimum rates.

5. By failing to assess or collect the applicable rates in TT 2 for the subject transportation, Qualls has violated PU Code §§ 3664, 3667, and 3737.²

6. By failing to have a contract on file and in effect for the Reliance account, Qualls has violated GO 147, Rule 7 and Appendix A.

7. By failing to issue and retain proper shipping documents Qualls has violated Items 255 and 256 of TT 2.

² Section 3664 provides in part: "It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate...established by the commission under this article."

Section 3667 provides in part: "No highway permit carrier shall charge, demand, collect, or receive for the transportation of property, ..., rates or charges less than the minimum rates and charges...applicable to such transportation established or approved by the commission; ...".

Section 3737 provides in part: "Upon the issuance of a permit to operate as a highway carrier, the carrier...shall observe any tariff, decision, or order applicable to it."

8. Qualls should be ordered to collect from Reliance undercharges of \$9,099.87.

9. Qualls should be fined \$9,099.87 under § 3800.

10. Qualls should be fined \$750 under § 3774.

11. Qualls should be ordered to cease and desist from any further violations of PU Code §§ 3664, 3667, and 3737, of GO 147, and of Items 255 and 256 TT 2, or their successors.

Qualls should promptly take all reasonable actions to collect the undercharges. If necessary, he should file timely complaints under PU Code § 3671. The staff will investigate Qualls' compliance. If it believes that Qualls or his attorney has not acted in good faith, the Commission will reopen this proceeding to determine whether to impose sanctions.

ORDER

IT IS ORDERED that Robert L. Qualls shall:

1. Pay a fine of \$750 to this Commission under PU Code § 3774 on or before the 40th day after the effective date of this order.
2. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
3. Pay a fine to this Commission under PU Code § 3800 of \$9,099.87 on or before the 40th day after the effective date of this order.
4. Take such action, as may be necessary, to collect the undercharges set forth in Finding 3, including timely legal action under PU Code § 3671.
5. Notify the Commission in writing upon collection.
6. Promptly take all reasonable steps to collect the undercharges.
7. File with the Commission on the first Monday of each month a report of any

undercharges remaining uncollected 60 days after the effective date of this order, specifying the action taken to collect them and the result of such action, until they have been collected in full, or until further order of the Commission. Failure to file any such monthly report within 15 days after the due date shall result in the automatic suspension of the operating authority until the report is filed.

8. Not charge or collect less than lawful rates approved by the Commission.
9. Cease and desist from further violations of PU Code §§ 3664, 3667, and 3737, of GO 147, and of Items 255 and 256 of TT 2, or their successors.

The Executive Director shall have this order personally served upon Robert L. Qualls and served by mail upon Reliance Sheet and Strip Co.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.