

Decision 90 07 048 JUL 18 1990

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of Frank C. Alegre Trucking, Inc. and Kaiser Cement Corporation, Lone Star Industries, Calmat Co., Calaveras Cement, Granite Construction, Nevada Cement Company, and Blue Circle West Cement, and order to show cause.

I.88-04-065  
(Filed April 27, 1988)

OPINION MODIFYING DECISION 90-02-041

Respondent's Request

On April 9, 1990, respondent, Frank C. Alegre Trucking, Inc. (Alegre), filed a petition for modification (petition) of Decision (D.) 90-02-041. Alegre, in its petition, seeks modification of Ordering Paragraph 1 of D.90-02-041 to reduce the amount of undercharges to be billed to Calaveras Cement Company (Calaveras) from \$4,817.41 to \$665.10.

Alegre asserts that, "notwithstanding the failure of Alegre to bill all shipments during this period at the full tariff Item 205 rates, Calaveras Cement Company paid Alegre \$4,152.31 in excess of billings during this period [of undercharges from January 1, through May 11, 1988] and it concludes that \$665.10, which is the differential between \$4,817.41 and \$4,152.31 is the full and correct amount of undercharges."

Alegre then argues that, "Calaveras should only be required to pay as undercharges only that amount that it underpaid," and Alegre would be unable to collect any additional amount. Alegre asserts that it holds, in the possession of its counsel, documentation of the accumulated payments of Calaveras to

support its position that all but \$665.10 in ordered undercharges were paid at the time the subject cement transportation was performed.

Transportation Division's Response

On May 9, 1990, the Compliance and Enforcement Branch of the Commission's Transportation Division (Transportation Division) filed a response to Alegre's petition. In its response the Transportation Division cited and emphasized certain language from D.90-02-041 which it deemed applicable in this instance as follows:

"The claim of Alegre's counsel that the respondent shippers had deposited (banked) amounts in excess of billings with Alegre is clearly not 'evidence' in this matter. Alegre's counsel states this fact as well, at page 10 of his brief.

"In addition, the mere existence of any deposits by respondent shippers with Alegre, in excess of billings to them, raises more questions and issues than are answered or resolved. Alegre and the respondent shippers had ample opportunity to advance evidence and arguments concerning the intended use of such deposits during the hearings, but did not do so. It is enough to say that what is important is the amount of Alegre's bills for the respondent shippers for the period in question. Therefore, there is no good reason to consider the existence of any such excess funds at this time. (Emphasis added)" (Original cite from D.90-02-041 pp. 10 and 11.)

Transportation Division asserts that D.90-02-041 ordered Alegre to collect specific undercharge amounts from six respondent shippers including Calaveras totaling \$66,598.63 and that amount had earlier been verified by an audit performed at the direction of the assigned administrative law judge. Also according to Finding of Fact 13, Calaveras had been undercharged \$4,817.41 by Alegre. According to the Transportation Division, it is not sufficient that Calaveras may have had additional sums of money on deposit with Alegre in excess of Alegre's billing, what is important here is the amount of Alegre's undercharges for the period.

Transportation Division argues that: "Because Alegre billed a lesser amount, and therefore did undercharge, it must pay the fine. To permit Alegre to retain these collections, as requested in the petition, rewards the carrier for unlawful rating practices." In addition, if in fact Calaveras had additional funds on deposit with Alegre, in the amount of \$4,152.31, when that amount is remitted to the Commission together with other amounts due as set forth in Ordering Paragraphs 1 and 2 of D.90-02-041, and after the Transportation Division has verified collection by Alegre of all the undercharges from the respondent shippers, then according to the Transportation Division this matter may be concluded.

Transportation Division then further stated in its response to Alegre that:

"Alegre has remitted a check in the amount of \$665.10 related to these undercharges. Alegre has [also] remitted all of the amounts set forth in Ordering Paragraphs 1 and 2 of the decision, with the exception of the remaining balance of \$4,152.31 for the Calaveras shipments.

"The Commission may in its discretion relieve the shipper (upon receipt of documentation) from paying amounts twice. Alegre should however pay the undercharge amounts addressed in the decision."

#### Discussion

We concur with the position of the Transportation Division, that what is important is not the amount of funds on deposit with Alegre by Calaveras, but what undercharges were made to Calaveras by Alegre. Further, if Calaveras had \$4,152.31 in excess funds on deposit with Alegre, then Alegre will not have to collect that amount in order to comply with D.90-02-041. Nonetheless, Alegre will be required to remit that amount to the Commission and advise Calaveras that it has done so.

We will clarify D.90-02-041 to state that Alegre will not be required to collect twice from Calaveras, if Alegre can provide documentation that Calaveras did deposit \$4,152.31 in excess of Alegre's billings for the period of January 1 through May 11, 1988.

Findings of Fact

1. Alegre avers that Calaveras has deposited with Alegre \$4,152.31 in excess of its billings from Alegre during the period of January 1 through May 11, 1988 and Alegre can provide documentation of this fact.

2. It is not necessary for Alegre to collect twice from Calaveras for undercharges pursuant to D.90-02-041. Therefore, if Alegre can document payment by Calaveras of \$4,152.31 in excess of booked undercharges in the amount of \$4,817.41, then it will be sufficient that Alegre bill Calaveras the full \$4,817.41 and credit the overpayment amount of \$4,152.31 leaving an amount due of \$665.10 as currently billed and paid by Calaveras.

3. The \$4,152.31 amount on deposit with Alegre in excess of Alegre's billings to Calaveras continues to represent an undercharge by Alegre and remains due and payable to the Commission.

Conclusions of Law

1. Alegre should only be required to collect the booked undercharges set forth in D.90-02-041 once from the respondent shippers.

2. With documentation that Calaveras has placed on deposit with Alegre \$4,152.31 in excess of Alegre's bills for the period of January 1 through May 11, 1988, that amount should not be billed again and D.90-02-041 should be clarified accordingly.

3. Alegre should, irrespective of Conclusion of Law 1 above, pay the full amount of undercharges and penalties set forth in D.90-02-041.

ORDER

IT IS ORDERED that:

1. Decision (D.) 90-02-041 is modified by the addition of a new Ordering Paragraph 2 as follows:

"2. In the event that any respondent shipper has prepaid amounts in excess of those billed by Alegre, during the period of January 1 through May 11, 1988, and Alegre has documented proof of such excess prepayments available for Transportation Division staff review, then such shipper shall not be required to remit the excess amounts again. This clarification does not change, in any way, the requirement of Ordering Paragraph 1 whereby Alegre is directed to remit to this Commission the total undercharges amount of \$66,598.63. This amount is due and payable now, and if not received in full within 10 days Alegre will be in violation of this order."

2. The ordering paragraphs and other requirements of D.90-02-041 dated February 23, 1990, except as expressly modified here, continue to apply to Frank C. Alegre Trucking, Inc. after the effective date of this order. Appendix A to this order restates the currently applicable ordering paragraphs of D.90-02-041 as modified by this order.

This order is effective today.

Dated JUL 18 1990, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUDA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

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

APPENDIX A  
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DECISION 90-02-041 ORDERING PARAGRAPHS  
AS REVISED PURSUANT TO D.90-07-048

O R D E R

IT IS ORDERED that:

1. Frank C. Alegre Trucking, Inc. (Alegre) shall collect undercharges totaling \$66,598.63 from respondent shippers in the amounts set forth as follows and remit such amounts to the Commission as a fine within 10 days after the effective date of this order:

Kaiser Cement Corporation	\$33,932.07
Lone Star Industries	\$23,550.14
Calaveras Cement Company	\$ 4,817.41
Blue Circle West Cement	\$ 166.12
Nevada Cement Company	\$ 1,728.38
Granite Construction	\$ 2,404.51

2. In the event that any respondent shipper has prepaid amounts in excess of those billed by Alegre, during the period of January 1 through May 11, 1988, and Alegre has documented proof of such excess prepayments available for Transportation Division staff review, then such shipper shall not be required to remit the excess amounts again. This clarification does not change, in any way, the requirement of Ordering Paragraph 1 whereby Alegre is directed to remit to this Commission the total undercharges amount of \$66,598.63. This amount is due and payable now, and if not received in full within 10 days Alegre will be in violation of this order.<sup>1</sup>

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<sup>1</sup> This ordering paragraph was added in accordance with D.90-07-048 effective July 18, 1990.

APPENDIX A

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3. Alegre shall pay a punitive fine of \$5,000.00 to the Commission within 10 days after the effective date of this order.

4. Alegre is hereby directed to cancel and remove Rate Reduction 1305, Item 250 from its Tariff No. 1, Cal. PUC 1 within 10 days after the effective date of this order.

5. Alegre shall hereafter cease and desist from violating the Public Utilities Code and the Commission's rules and regulations.

6. This investigation shall be terminated when Alegre has fully complied with Ordering Paragraphs 1, 2, and 3 above. Counsel for Alegre is hereby directed to notify the Director of the Commission's Transportation Division of Alegre's full compliance with Ordering Paragraphs 1, 2, and 3 of this order and thereby request termination of this investigation as set forth herein.

This order becomes effective 30 days from today.

Dated February 23, 1990, at San Francisco, California.

(END OF APPENDIX A)