

Decision 90 07 054 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 Tucker  
Transport, Inc., an Oregon  
corporation, and Pacific Coast  
Building Products, Inc., dba  
Pacific Supply-Redding, a  
California corporation.

I.87-04-039  
(Petition for Modification  
filed March 26, 1990)

O P I N I O N

History of Proceeding

Tucker Transport, Inc., (Tucker) is an Oregon corporation with its principal place of business in Medford, Oregon. From June 1984 through January 1985, Tucker, operating under a highway contract carrier permit issued by this Commission, provided intrastate transportation services for Pacific Coast Building Products, Inc., (shipper) a California corporation, with its primary place of business in Sacramento.

In January 1985, the Transportation Division began an investigation of the rates being charged for this hauling. Based on the outcome of Division's records review, this Order Instituting Investigation was issued. On April 22, 1987, the Commission held a formal hearing. Based on the evidence received at the hearing, the Commission issued Decision (D.) 88-10-058, which found undercharges for the transportation of building materials and cement from June 1984 through January 1985 totalling \$52,995.09. The decision ordered Tucker to take such action as might be necessary to collect the undercharges, including timely legal action under Public Utilities Code § 3671. The decision imposed a fine on Tucker equal to the amount of undercharges, plus a \$750 punitive fine.

Tucker was a small, family-run business. At the time the undercharges were incurred, the company was managed by Mr. John Tucker, the founder of the corporation. In November 1985, Mr. Tucker divorced his wife, Anna Tucker, and left her with the corporation. The corporation's California operating authority was voluntarily revoked in January 1989, and it no longer conducts any business in California. Mrs. Tucker has leased out the remaining truck and no longer transports property for hire.

Mrs. Tucker appeared for the corporation herself at the PUC hearing. She testified that her ex-husband made all of the decisions for the company, and that as bookkeeper for the corporation, she followed his instructions. Mrs. Tucker testified that she believed in good faith that the rates being charged were proper. The Commission decision noted that since the managing husband was absent, to impose a substantial punitive fine would unduly punish the wife. (It should be noted that the \$750 punitive fine has been paid.)

The Commission's decision became effective December 9, 1988. Mrs. Tucker stated she was unable to hire an attorney to pursue collection of the undercharges until February 1989, due to financial constraints. On February 6, 1989, Mrs. Tucker, on behalf of Tucker, made a formal written demand to shipper for payment of the undercharges. Shipper replied to the demand by denying any liability for payment of the undercharges. On August 3, 1989, Tucker filed a civil complaint against shipper in Sacramento County Superior Court for collection of the undercharges.

According to Tucker, the civil action has thus far involved cross-complaints and several motions, including a demurrer and motion to quash service of summons. The parties are now engaged in discovery and the mounting costs of continued litigation are imposing a personal financial hardship on Mrs. Tucker.

Shipper and Tucker have reached a proposed settlement agreement, contingent on Commission approval of the settlement and this Petition for Modification.

Proposed Settlement

It is requested that Tucker be authorized, under Public Utilities Code § 3663, to settle its civil complaint with shipper for \$25,000, and that the undercharge fine imposed against the carrier by D.88-10-058 be reduced accordingly.

It is further requested that the amount of \$7,626.36 for attorneys' fees and costs reasonably incurred in this matter be deducted from the fine imposed against Tucker, and that payment by carrier of the balance of \$17,373.64 be accepted as full satisfaction of its remaining obligation to the State of California in this matter. ✓

Tucker's Unique Situation

As noted in the Commission's previous decision, the husband who managed the company when the undercharges were incurred is absent. The surviving wife, the only remaining principal of the corporation, Mrs. Anna Tucker, is leasing out the remaining truck and no longer transports property for hire. The corporation suffered a net loss in 1989 of \$15,000. In an effort to comply with the order, Tucker states it incurred substantial legal fees and other expenses to litigate this matter, including the hiring of a rate expert.

In light of these circumstances, to require Mrs. Tucker to absorb the legitimate cost of litigation would effectively add many thousands of dollars to the punitive fine assessed and paid. In our previous decision in this matter we said: "[t]he husband who managed the company when the undercharges were incurred is long gone and a substantial punitive fine would punish the surviving wife." (D.88-10-058, mimeo. at 14.7.) Accordingly, we will permit Mrs. Tucker to retain enough of the undercharges collected to compensate her attorneys and rate expert.

Character of the Undercharges

These shipments were rated under Transition Tariff (TT) No. 2., because Tucker had failed to file the documentation (a copy of the contract) needed to charge competitive, market-based rates. All of the other carriers engaged by this shipper for the movements in question apparently had made the filings and were free to charge the shipper rates similar to those charged by Tucker.

In a recent decision, Inv. of Qualls, D.89-01-006, in I.88-03-045 the Commission held that Public Utilities Code § 3663 limited the amount of undercharges which should be assessed by a contract carrier who failed to file its contract as required by G.O. 147. Under the Qualls holding,<sup>1</sup> there would be no undercharge unless the actual charge was lower than either TT-2 or the filed rates of any "common carrier by land" for the transportation of the same kind of property between the same points. Tucker's rate expert, relying on this holding, rerated the shipments using Item 4300 of Western Motor Tariff Bureau (WMT) 273. In his opinion, the amount of undercharges figured pursuant to Qualls should have been \$28,603, rather than the \$52,995 previously found by the Commission, prior to Qualls. He did not pursue other issues which he believed might have reduced the amount of undercharges still further.

It, therefore, appears that D.88-10-058 assessed undercharges significantly greater than we would now find. In view of this and the additional costs of continued litigation, we find the settlement reasonable. Continued litigation would do little to promote the policies underlying the Commission's minimum rate enforcement program or the rate structure itself.

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<sup>1</sup> This holding applies only to TT-2 transportation provided during the effectiveness of General Order (GO) 147; GO 147 was superceded by GO 147-A on March 1, 1987.

Staff Response

The attorney for the Transportation Division responded by letter that the Division had no objection to the proposed settlement.

Findings of Fact

1. Petitioner has diligently attempted to collect undercharges found to exist in D.88-10-058.
2. Petitioner has negotiated a potential settlement of the undercharge claim in the amount of \$25,000.
3. In light of our D.89-01-006 (Qualls) and the costs of continued litigation, a settlement in the amount of \$25,000 is reasonable.
4. Tucker's actions in litigating and arranging the settlement have adequately protected the integrity of the minimum rate structure.
5. Mrs. Tucker, now the only remaining shareholder in the Tucker corporation, has expended personal funds to pay for litigation. The corporation is no longer engaged in jurisdictional freight transportation.
6. To require Mrs. Tucker to absorb the legitimate cost of litigation would effectively add many thousands of dollars to the punitive fine assessed and paid.
7. We previously stated that, in light of the particular circumstances here, we did not want to punish Mrs. Tucker with a substantial punitive fine.
8. This order should be effective today to permit speedy payment of the net collection to the General Fund and rapid resolution of litigation.

Conclusions of Law

1. Tucker should be authorized to enter into the settlement proposed and execution of the settlement should be accepted as full satisfaction of its collection obligations under D.88-10-058.
2. Mrs. Tucker should be permitted to recoup attorney and rate expert fees from the settlement recovery.
3. Tucker should be required to pay the sum of \$17,373.64 to the Commission on account of the General Fund; such payment should be accepted as full satisfaction of the fines imposed by D.88-10-058.
4. The petition should be granted.

ORDER

IT IS ORDERED that:

1. Tucker is authorized to enter into the proposed settlement.
2. When Tucker pays the sum of \$17,373.64 to this Commission, its obligations under Ordering Paragraphs 1 through 7 of D.88-10-058 are fully satisfied. ✓
3. The petition is granted and this proceeding is closed. This order is effective today.

Dated JUL 18 1990, at San Francisco, California.

G. MITCHELL WALK  
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

*Neal J. Sulman*  
NEAL J. SULMAN, Executive Director  
RB