

Decision 90 09 058 SEP 12 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of All Counties Express, Inc., a California corporation; and Cascade Steel Rolling Mills, Inc., an Oregon corporation; Gary Metals, Inc., a California corporation; and Pitcal, Inc. and Posco-West Corp., Delaware corporations, doing business jointly as USS-Posco Industries.

ORIGINAL

I.88-08-047  
(Filed August 24, 1988)

- D. G. Redlingshafer, for All Counties Express, Inc.; Armour, St. John, Wilcox, Goodin and Schlotz, by John L. Clark, Attorney at Law, for Cascade Steel Rolling Mills, Inc.;
- Christopher A. Conkling, Attorney at Law, for Pitcal, Inc. and Posco-West Corporation; respondents.
- Gerhard H. Demut, interested party.
- Ida Passamonti, Attorney at Law, and William Waldorf, for the Transportation Division.

O P I N I O N

This proceeding was instituted on the Commission's own motion to investigate the operations, rates, charges, and practices of All Counties Express, Inc. (ACE), a California corporation, Cascade Steel Rolling Metals, Inc., an Oregon corporation, Gary Metals, Inc., a California corporation, and Pitcal, Inc. and Posco-West Corporation, Delaware corporations, doing business as USS-Posco Industries, for the purpose of determining:

- \*1. Whether respondent ACE has violated Section 3737 of the Public Utilities Code by

performing transportation services for respondent shippers without having contracts on file and in effect with the Commission as required by Rule 6.1 of General Order 147-A.

- \*2. Whether Local Freight Tariff No. 100 of the West Coast Tariff Bureau, Inc., adopted by the Commission pursuant to Section 3663 of the Public Utilities Code is applicable to transportation services performed by ACE for the respondent shippers as the minimum and maximum rates a highway contract carrier may charge, demand, collect, or receive for transportation service.
- \*3. Whether respondent ACE has violated Sections 3664, 3667, and 3737 of the Public Utilities Code, or any of these sections, by failing to charge respondent shippers the rates set forth in Local Freight Tariff No. 100 as the minimum rates a highway contract carrier may charge and collect.
- \*4. Whether in the event that sums less than those set forth in Local Freight Tariff No. 100 are found to have been charged, collected or received, a fine in the amount of the undercharges should be imposed upon respondent ACE pursuant to Sections 3800 of the Public Utilities Code.
- \*5. Whether respondent ACE should be ordered to collect from each of the respondent shippers the difference between the payments actually received and the applicable rates and charges pursuant to Section 3800 of the Public Utilities Code.
- \*6. Whether any or all of respondent ACE'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.
- \*7. Whether respondent ACE should be ordered to cease and desist from any and all unlawful operations and practices.

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

A duly noticed evidentiary public hearing before Administrative Law Judge Orville I. Wright was held in San Francisco on September 19 and 20, 1989, and the matter was submitted upon the filing of closing briefs on February 26, 1990.

Showing of Transportation Division

Transportation Division (TD) produced evidence showing that respondent ACE transported steel over California's public highways for the named respondent shippers for compensation during the months of April, May, and June 1987, when ACE did not possess a highway common carrier certificate. The respondent's certificate to operate as a common carrier was revoked effective January 28, 1987 for failure to file a tariff for the company and was reinstated from revocation effective June 24, 1987 upon ACE's making the required tariff filing.

During the time of the shipments - second quarter of 1987 - ACE held a highway contract carrier permit to perform transportation of steel commodities, but it did not have on file and in effect with the Commission copies of an executed binding contract for such service as required by Rule 6 of General Order (GO) 147-A. ACE, therefore, lacked contract carrier authority to perform the steel carriage services which are enumerated and described in the attachments to the order instituting investigation at the rates paid by the shippers.

As ACE could only have transported the steel legally as a highway contract carrier, TD examined Commission records to determine the lowest generally applicable common carrier rate which ACE was required to assess in the absence of a schedule of filed tariff rates, charges, classification, or contract on file (Rule 13 GO 147-A).

The lowest generally applicable common carrier rates were found in West Coast Freight Tariff Bureau No. 100, Cal. P.U.C. No. 3, and Pacific Coast Tariff Bureau Local Freight Tariff PCT 204, Cal. P.U.C. No. 2 (Bureau Tariffs). Applying these rates to the shipments under discussion resulted in apparont undercharges as follows:

Cascade Steel Rolling Mills, Inc.	\$23,659.77
Gary Metals, Inc.	1,448.53
USS - Posco Industries	<u>31,289.77</u>
Total	\$56,398.07

TD and ACE presented a stipulation at the hearing wherein these parties agreed, as an alternative to the cancellation, revocation, or suspension of ACE's operating permit or permits on the Commission's finding that ACE had violated any order, decision, rule, regulation, or requirement established by the Commission that a fine in the amount of \$1,500 be recommended as an adequate penalty.

TD recommends, as a result of this investigation, that:

1. ACE pay a punitive fine of \$1,500 pursuant to Public Utilities (PU) Code § 3774 for violation of Rule 6.1 of GO 147-A, and PU Code §§ 3667 and 3737.
2. ACE collect from the three respondent shippers identified below, the sum of \$56,398.07 as undercharges for the subject shipments, and that this sum be assessed as a fine against ACE pursuant to PU Code § 3800.

#### Cost-Justified Rates Excluded

Respondents admit that ACE carried steel as set forth in the order instituting investigation, during the second quarter of 1987 when its common carrier certificate was revoked and when its highway contract carrier permit was unsupported by executed binding contracts on file and in effect with the Commission as required by Rule 6 of GO 147-A.

Respondents contend, however, that no undercharges resulted from subject shipments because ACE did not charge less than the minimum rates and charges applicable to the transportation established or approved by the Commission (PU Code § 3800). ACE did not charge less than minimum approved rates, according to respondents, because common carriers (Conti Trucking, Inc., for example) had in effect, during the period of time in question, rates that were as low or lower than the rates actually charged by ACE. However, Conti's rates were "cost justified" rates.

GO 147-A contains the following provisions:

**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.

3.12 "Generally Applicable Common Carrier Rate" means any common carrier base rate on file after the effective date of this General Order, except a base rate which has been cost-justified pursuant to Rule 7.1 of this General Order or Rule 9 of General Order 147, or a base rate which has been rejustified pursuant to the rejustification program ordered by the Commission in D.86-04-045.

Thus, GO 147-A directs the Commission to use "generally applicable common carrier rates" and specifically excludes cost-justified rates from consideration, when the commission is seeking an enforcement rate for contract carriers that operate without authorized contracts.

In an attempt to overcome this point, shipper-respondents argue that GO 147-A is unlawful. More specifically, they contend that under PU Code § 3663 the Commission cannot exclude cost-justified rates when calculating undercharges.

We have considered respondents arguments, but concur with TD staff that the GO does not violate the underlying statutes. PU Code § 3663 only applies "(i)n the event the commission establishes minimum rates for . . . highway permit carriers" (emphasis added). Under GO 147-A's rate program the Commission did not "establish" minimum rates for permit carriers, but only "approved" minimum rates developed and filed by carriers, as authorized by PU Code § 3662. (Section 3662 authorizes the Commission to "establish or approve" minimum rates (emphasis added).)

Furthermore, PU Code § 1709 provides that in "all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." Here, GO 147-A adopted by D.86-12-102 (December 22, 1986) has long since been final.

Generally Applicable Common Carrier Rates

Respondents sought to present evidence of generally applicable common carrier rates which are lower than the rates utilized by TD in deriving the amount of undercharges using GO 147-A.

Shippers testified that they contracted for steel carriage on the basis of spread sheets depicting rates available from various companies. However, as TD explains, the rates on the shippers' charts, assuming them to be accurate, could have been approved rates that had been individually cost-justified by the carriers pursuant to Rule 7.1 of GO 147-A, or Rule 9 of GO 147, or pursuant to the rejustification program ordered by the Commission in Decision (D.) 86-04-045. These three types of rates are expressly excluded in the determination of generally applicable common carrier rates which must be applied when a carrier does not, in fact, have such justified rates on file, as in the case of ACE (Rule 3.12 or GO 147-A).

ACE attempted without success to demonstrate that the rates utilized by TD were higher than other generally applicable

common carrier rates. We concur with TD that appropriate and rational analysis of the terms of the GO makes apparent that TD has properly applied the pertinent rules of the GO in calculating the undercharges.

Equity Argument

Respondents earnestly contend that the generally applicable common carrier rates utilized by TD exceed the rate levels that the traffic can bear in California, and that their forced imposition would be contrary to the basic purposes of the Highway Carriers' Act which is to secure to the people just and reasonable rates (PU Code § 3502).

TD's proposed rates would, according to the evidence, have increased one respondent's prices to a level \$10 to \$12 per ton above its competitors, making that respondent's product uncompetitive. Such rates, if imposed, would be neither reasonable nor consistent with the needs of commerce, according to the shippers' brief.

TD argues in its brief that public policy requires enforcement of GO 147-A according to its terms. We quote:

"The Commission's policy is consistent with the holdings of the California courts on the necessity for evenhanded enforcement of rate regulation. In Keller v Thornton Canning Co. (1967) 66 Cal 2d, 963, the California Supreme Court held that the most effective deterrent to the destructive effect of undercharging on carrier regulation is exaction of the legal rates from the profiting shipper. (At p. 967.)

"The principle of uniform, rigorous enforcement is the underpinning of fair and reasonable regulation. Recently, the California Appellate Court adopted the reasoning of Keller in its ruling that the shipper was to pay undercharges to the carrier. (South Bay Transportation Co. v Gordon Sand Co. (1989) 206 Cal App 3d 650.) The court stated that it was necessary to discourage shippers from colluding with carriers and pressuring them for illegally low rates. It further noted that undercharges must

be collected from shippers even when the carrier is at fault:

'...public policy requires enforcement of the carrier's claim [to collect undercharges] regardless of the carrier's blameworthiness.'" (206 Cal App 3d, at p. 657.)

We conclude that TD's recommendations fully comport with the record of this proceeding and should be adopted.

Respondents' motion to dismiss, presented orally at pre-trial conferences, is denied.

We accept the parties' stipulation as to a \$1,500 punitive fine.

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 June 5, 1990.

Comments were filed by respondent Cascade Steel Rolling Mills, Inc. and by the TD which also filed a reply to respondent's comments.

Respondent's comments argue that the undercharges assessed are inconsistent with underlying statutes. We have added some language above explaining why we reject this argument.

TD recommends modifications to three of the conclusions of law in order to reflect the specific legal and factual circumstances of this case. As these modifications accord with the discussion and findings of fact in the proposed decision, we will adopt them.

Findings of Fact

1. Respondent ACE transported steel over California's public highways for respondent shippers for compensation during the months of April, May, and June 1987.



2. During the second quarter of 1987, ACE did not possess a highway common carrier certificate.

3. During the second quarter of 1987, ACE held a highway contract carrier permit to perform transportation of steel commodities, but it did not have on file and in effect with the Commission copies of an executed binding contract for such service as required by Rule 6 of GO 147-A.

4. TD audited the records of ACE, discovered the second quarter of 1987 steel shipments by respondents, and applied the lowest generally applicable common carrier rates to the shipments.

5. The lowest generally applicable common carrier rates found were those in West Coast Freight Tariff Bureau No. 100, Cal. P.U.C. No. 3, and Pacific Coast Tariff Bureau Local Freight Tariff PCT 204, Cal. P.U.C. No. 2 (Bureau Tariffs).

6. Applying the lowest generally applicable common carrier rates found to the shipments of respondents, and deducting the actual charges made for those shipments by ACE, results in undercharges as follows:

Cascade Steel Rolling Mills, Inc.	\$23,659.77
Gary Metals, Inc.	1,448.53
USS - Posco Industries	<u>31,289.77</u>
Total	\$56,398.07

#### Conclusions of Law

1. Respondent ACE has violated PU Code § 3737 by performing transportation services for respondent shippers without having contracts on file and in effect with the Commission as required by Rule 6.1 of GO 147-A.

2. Pursuant to Rule 13 of GO 147-A, the generally applicable common carrier rate, as defined in Rule 3.12 of GO 147-A, is the rate to be applied to the transportation services performed by ACE for the respondent shippers as a highway contract carrier. As stated in Finding of Fact 6, the generally applicable common carrier rate is the lowest rate found in Local Freight Tariff

No. 100 of the West Coast Tariff Bureau, Inc., and Local Freight Tariff PCT 204 of the Pacific Coast Tariff Bureau.

3. Respondent ACE has violated PU Code §§ 3667 and 3737 by failing to charge respondent shippers the rates set forth in Local Freight Tariffs cited above as the minimum rates a highway contract carrier may charge and collect.

4. As sums less than the generally applicable common carrier rate required by Rule 13 of GO 147-A have been charged, collected, or received, a fine in the amount of the undercharges set forth in Finding of Fact 6 should be imposed upon respondent ACE pursuant to PU Code § 3800.

5. Pursuant to PU Code § 3800 and Rules 6.1 and 13 of GO 147-A, respondent ACE should be ordered to collect the respective undercharges, as set forth in Finding of Fact 6 above, from each of the respondent shippers.

6. A fine in the amount of \$1,500 should be imposed pursuant to PU Code § 3774.

7. Respondent ACE should be ordered to cease and desist from any and all unlawful operations and practices.

8. Other orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

9. The undercharge enforcement provisions of GO 147-A do not violate PU Code § 3663 and related sections of the PU Code.

10. Pursuant to PU Code § 1709, GO 147-A has become final and is not subject to attack in a collateral proceeding.

O R D E R

IT IS ORDERED that:

1. All Counties Express, Inc. (ACE), shall pay to this Commission a fine of \$1,500 pursuant to PU Code § 3774 on or before the fortieth day after the effective date of this order.

2. Pay seven percent annual interest on the fine, beginning when the payment is delinquent.

3. Take such action as may be necessary to collect the undercharges set forth in Finding of Fact 6, including timely legal action.

4. Pay a fine to this Commission under PU Code § 3800 equal to the amount of those undercharges, such fine to be paid as those undercharges are collected, provided that the full \$56,398.07 of such fine shall be paid no later than the 120th day after the effective date of this order.

5. ACE shall cease and desist from future violations of the PU Code and Commission rules and regulations.

6. I.88-08-047 is discontinued.

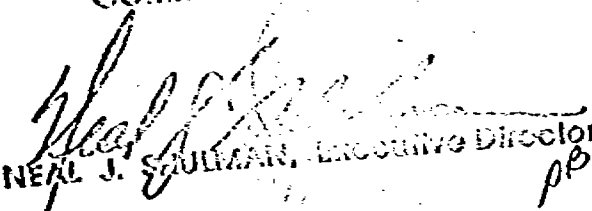
7. The Executive Director of the Commission shall cause personal service of this order to be made upon ACE and shall cause service by mail to be made upon Cascade Steel Rolling Mills, Inc., Gary Metals, Inc., and Pitcal, Inc. and Posco-West Corporation.

This order becomes effective 30 days after completion of service on respondent ACE.

Dated SEP 12 1990, at San Francisco, California.

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

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

  
NEAL J. SULLIVAN, Executive Director  
PB

Commissioner John B. Ohanian,  
being necessarily absent, did  
not participate.