

APR 11 1991

Decision 91-04-025 April 10, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of Randy
Howard Gentry, an individual, dba
Randy H. Gentry Trucking and Sierra
Gypsum West, Inc., a California
corporation, as Shipper Respondent,

Respondents.

ORIGINAL

I.89-04-053
(Filed April 26, 1989)

Alberto Guerre, Attorney at Law, and
William Waldorf, for the Transportation
Division; petitioner.
Armour, Goodin, Schlotz & MacBride, by John
Clark, Attorney at Law, for Sierra
Gypsum West, Inc.; and Donald G.
Redlingshafer, for Randy Howard Gentry;
respondents.
Gerhard H. Demut, for himself; interested
party.

O P I N I O N

On April 26, 1989, based upon probable cause presented by the Commission's Transportation Division (TD), the Commission instituted an investigation into the operations, rates, and practices of Randy Howard Gentry, an individual, doing business as Randy H. Gentry Trucking (Gentry) for transporting wallboard for Sierra Gypsum West, Inc. (Sierra) during the period June - August, 1987. It appeared that Gentry performed this service in violation of our rules governing the transportation of general commodities, General Order (GO) 147-A, by not having a contract on file and in effect (Rule 6.1) and without charging the lowest generally applicable common carrier rate (Rule 13). TD alleges that these actions violate Public Utilities (PU) Code §§ 3664, 3667, and 3737.

On July 19, 1989, the First Prehearing Conference (PHC) in this investigation was held to discuss possible settlement of the case. A Second PHC was held October 27, 1989. No settlement was reached.

A Third PHC was held on February 16, 1990. The parties indicated that a settlement of the case was not likely. Rulings were made regarding prepared testimony, the exchange of exhibits, and the number of witnesses to testify. Gentry was ordered to file a written response to the investigation order.

On March 26, 1990, Gentry filed a written response indicating his position and requesting that this proceeding be dismissed. Gentry contends that he accepted work from Sierra as a highway contract carrier after being employed as a subhauler of Jewel Transport (Jewel) for the same transportation for approximately two years. Gentry asserts that he was advised by TD staff to "get a written contract" prior to rendering the transportation services in this proceeding. Gentry argues that the Jewel/Sierra contract on file until November 30, 1987 satisfies Commission requirements. In addition, Gentry quotes numerous portions of the Commission's decisions establishing a new regulatory framework, Decision (D.) 89-10-039 (as modified by D.90-02-021), to support his allegation that a contract carrier may set its own rates. Gentry challenges TD's application of the class rates¹ of a tariff bureau to the transportation in this proceeding. Gentry alleges that the rates of the 1,256 common carriers who file individual tariffs, many of which contain commodity rates,² are the lowest generally applicable rates. Gentry cites PU Code §§ 3662-3663 and D.89497 in support of his

1 One rate which applies to a variety of similar commodities.

2 One rate for a specific commodity, such as, gypsum wallboard.

position. These references address the establishment or approval of minimum rates.

On April 5, 1990, TD responded that the action of a party not named as a respondent in this proceeding is irrelevant and does not excuse Gentry's conduct. TD asserts that Gentry is seeking retroactive application of the Commission's new regulatory framework for general commodity carriers which was not in effect at the time of the transportation involved in this proceeding. TD points out that Gentry's oral motion to dismiss on the same grounds as the written motion was denied at the First PHC. TD requests that the written motion to dismiss also be denied.

On April 12, 1990, Gentry's written motion to dismiss was denied and an evidentiary hearing was scheduled.

On May 31, 1990, a Fourth PHC was held to discuss discovery and clarify the subpoena of Commission employees by Gentry.

At the evidentiary hearing on September 18, 1990, TD indicated that settlement of all issues in the case with Gentry and Sierra was again being pursued and that Gentry intended to enter into a settlement with TD.³ TD represented that Gentry could not be present, but did not desire to postpone the proceeding further. Therefore, TD and Sierra agreed to proceed with their showings. The future settlement agreement was marked as a late-filed exhibit.

TD sponsored documents to show that Gentry is an authorized highway contract carrier who transported 101 shipments of gypsum wallboard for Sierra from June to August, 1987.

³ On September 12, 1990, the Commission issued D.90-09-058 in the investigation of the operation, rates, and practices of All Counties Express, Inc., I.88-08-047. Parties in the Gentry proceeding agree that issues in the Gentry proceeding are the same as in the All Counties case.

(Exhibits 1 and 2.) TD's rate analysis shows that Gentry charged a flat rate of \$245 for shipments weighing less than 50,000 lbs. and \$296 for shipments weighing 50,000 lbs. or more. In the absence of a lawful contract on file with the Commission, TD contends that the lowest generally applicable common carrier rates should be assessed pursuant to Rule 13 of GO 147-A. TD recalculated the applicable rate per shipment based upon rates found in West Coast Freight Tariff Bureau No. 100. TD's charges per shipment range from \$285 to \$505 plus a surcharge of \$6.27 per shipment. TD's calculates total undercharges to be \$20,358.05. (Exhibit 3.)

Sierra stipulates to the accuracy of TD's exhibits. However, Sierra requests that official notice be taken of common carrier rates on file with the Commission that are less than the lowest generally applicable common carrier rates set forth in TD's exhibits. Sierra stipulates that these rates required cost-justification by individual carriers.

On January 4, 1991, TD filed a stipulated settlement with a motion for its acceptance (Appendix A). The stipulated settlement, signed by Gentry and TD, indicates that TD's exhibits should be received into evidence. Gentry agrees that the rates he charged within the investigated time period violate GO 147-A. Gentry agrees to pay a punitive fine of \$750 and to collect from Sierra and remit to the Commission undercharges of \$20,358.05 as a fine. Gentry agrees to pay the \$750 fine within 30 days after the effective date of the final decision in this proceeding, to commence collection of undercharges within 120 days of that date, to remit any undercharges collected within 10 days of receipt, and to file monthly reports of its collection progress within 150 days of the effective date. Gentry agrees to pursue timely legal action, if necessary, in order to collect undercharges. TD agrees to forgo further investigation and/or prosecution of acts performed by Gentry regarding the transportation at issue in this proceeding

provided Gentry proceeds diligently to take all reasonable steps, including legal action, to collect all undercharges.

On January 14, 1991, Sierra filed its response to the motion for approval of the stipulation. Sierra argues that acceptance of this agreement shifts the burden of payment of undercharges to the shipper while the carrier pays only a \$750 fine. Sierra contends that acceptance of TD's calculations violates PU Code §§ 3662 and 3663. Sierra asserts that D.90-09-058, which interprets these statutes, is based upon poor reasoning and should not be relied upon to decide the facts of this proceeding.

On January 29, 1991, TD replies that Sierra is inappropriately seeking to reopen this proceeding after agreeing that briefs would not be filed. TD alleges that Sierra is directly challenging the Commission's conclusions in D.90-09-058 after rehearing has been denied. TD requests that Sierra's response be rejected and the stipulated settlement adopted.

On March 4, 1991, the Proposed Decision of Administrative Law Judge Bennett was mailed. Comments and reply comments were duly received from TD and Sierra. We make only minor adjustments to the Proposed Decision as suggested by TD. We are not persuaded by Sierra that the conclusion should be changed.

Discussion

We find that the issues and argument in this proceeding are the same as those reviewed in D.90-09-058. We have denied rehearing in the All Counties investigation and are provided no reason in this proceeding to revisit these issues or reverse our conclusion in that decision. TD's calculation of Gentry's undercharges are based upon the conclusion reached in D.90-09-058 that cost-justified rates are not included within the meaning of the term "generally applicable common carrier rates" contained in GO 147-A, Rule 3.12. Sierra's argument in this proceeding that the shipper is financially burdened by the assessment of undercharges is addressed in D.90-09-058. In that decision, we concluded that GO 147-A is lawful, public policy requires its enforcement, and that such enforcement is supported by California case law, citing

cases contained in TD's brief (at pp. 7 - 8). Rehearing of D.90-09-058 has been denied (D.90-11-032).

Accordingly, we find the stipulated settlement is reasonable and will adopt it.

Findings of Fact

1. Gentry transported wallboard for Sierra from June to August, 1987. Gentry charged a rate of \$245 - 296 per shipment for these services.

2. Gentry and the Commission's TD entered into a stipulated settlement on December 19, 1990.

3. In the stipulated settlement Gentry:

- a. Admits that he charged a rate which was not contained in a lawful contract on file with the Commission for transportation services which are the subject of this investigation and that such action violates PU Code §§ 3667 and 3737.
- b. Agrees to pay a punitive fine of \$750 and to collect from Sierra and remit to the Commission undercharges of \$20,358.05 as a fine.
- c. Agrees to pay a fine of \$750 within 30 days after the effective date of the final decision in this proceeding, to commence collection of undercharges within 120 days of that date, to remit any undercharges collected within 10 days of receipt, and to file monthly reports of its collection progress within 150 days of the effective date.
- d. Agrees to timely pursue legal action, if necessary, in order to collect undercharges.

4. The undercharges calculated by TD in the stipulated settlement are based upon its rate analysis contained in Exhibit 3. TD applies the rates contained in West Coast Freight Tariff Bureau No. 100 to derive the lowest generally applicable rate.

5. Sierra asserts that the stipulated settlement should be rejected because it places a greater financial burden on the shipper than the carrier and it violates PU Code §§ 3662 and 3663.

These issues are addressed in D.90-09-058 (Rehearing denied - D.90-11-032).

6. Sierra agrees that the issue in this case is the same as in I.88-08-047.

7. The sole issue in dispute is whether cost-justified rates satisfy the requirements for a generally applicable common carrier rate.

8. The stipulated settlement is reasonable because the calculated undercharges are based upon rules contained in GO 147-A and findings by this Commission in D.90-09-058. Sierra's arguments in this proceeding are addressed in that decision.

Conclusions of Law

1. Respondent Gentry violated PU Code §§ 3667 and 3737 by performing transportation services for respondent shipper Sierra without filing a contract containing the rates charged as required by Rule 6.1 of GO 147-A.

2. The lowest generally applicable common carrier rate is the rate to be applied to the transportation services performed by Gentry for Sierra. In this proceeding, the lowest generally applicable common carrier rate is the rate calculated by the Commission's TD staff.

3. The issue of whether cost-justified rates satisfy the requirements of GO 147-A, Rule 6, was reviewed in D.90-09-058. Rehearing of D.90-09-058 was denied in D.90-11-032.

4. The stipulated settlement agreement between Gentry and TD is reasonable and should be adopted.

5. A fine in the amount of the undercharges set forth in Appendix A should be imposed upon respondent Gentry pursuant to PU Code § 3800 because sums less than the lowest generally applicable common carrier rate required by Rule 13 of GO 147-A have been charged, collected, or received.

6. Respondent Gentry should be ordered to collect the undercharges set forth in Appendix A pursuant to PU Code § 3800 and Rules 6.1 and 13 of GO 147-A.

7. A fine in the amount of \$750 should be imposed upon respondent Gentry pursuant to PU Code § 3774.

8. Respondent Gentry should be ordered to cease and desist from any and all unlawful operations and practices.

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

ORDER

IT IS ORDERED that:

1. Respondent Randy Howard Gentry shall comply with each and every term of Items 6 - 10 of the stipulated settlement agreement contained in Appendix A.

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

3. The Executive Director shall have this order personally served upon respondent Gentry and served by mail upon all other respondents.

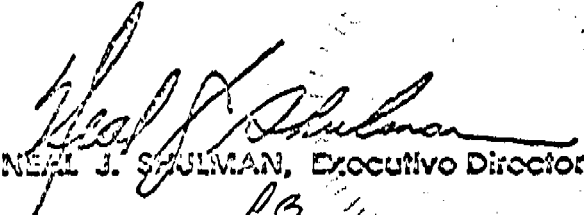
4. The order shall become effective for each respondent 30 days after the order is served.

This order is effective today.

Dated April 10, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SCHULMAN, Executive Director
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APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own)
motion into the operations, rates, and)
practices of Randy Howard Gentry, an)
individual dba Randy H. Gentry Trucking)
Sierra Gypsum West, Inc., a California)
corporation as Shipper Respondent,)
Respondents.)

I. 89-04-053

STIPULATION FOR SETTLEMENT

THE PARTIES TO THIS PROCEEDING now pending before the Public Utilities Commission desiring to avoid the expense, inconvenience and uncertainty attendant to litigation of the issues in dispute between them have agreed upon a settlement of the said issues and desire to submit to the Public Utilities Commission this stipulation for approval and adoption as its final disposition of the matters herein.

NOW, THEREFORE, THE PARTIES DO STIPULATE AS FOLLOWS:

1. That the Commission staff has conducted an investigation of the operations, rates, charges and practices of respondent Gentry,
2. That as a result of the investigation, Order Instituting Investigation No. 89-04-053 was issued by the Commission.
3. That as a result of communications between respondents and Commission staff, a stipulated agreement has been reached as set forth herein.
4. That for purposes of this stipulated settlement, Ordering Paragraph Nos. 1 through 7 in OII 89-04-053 should be deemed answered in the affirmative.
5. That the following documents be marked for identification as exhibits and received as evidence:
 - (a) A volume set of documents entitled "Randy H. Gentry dba RANDY H. GENTRY TRUCKING Vacaville, CA, Volumes I & II."

APPENDIX A

(b) A document entitled "Summary of Certain Shipping Data Contained in the records of Randy Howard Gentry dba RANDY H. GENTRY TRUCKING for Transportation Performed for SIERRA GYPSUM WEST, INC.

6. That Respondent Randy Howard Gentry dba Randy H. Gentry Trucking (Gentry) agrees to pay an amount to be deposited with the Public Utilities Commission ("Commission") in the sum of \$ 750 pursuant to Section 3774 of the Public Utilities Code. The fine is due within 30 days after issuance of the Commission's final order approving and adopting this Stipulation For Settlement as its final disposition of the matters subject to this investigation.

7. Respondent Gentry agrees to take all reasonable steps including legal action if necessary to collect undercharges in the amount of \$ 20,358.05 for the transportation of property for the shipper respondent in this proceeding and to pay a sum of \$ 20,358.05 to the Public Utilities Commission pursuant to Section 3800. Payments may be made as such undercharges are collected.

8. That respondent Gentry agrees, within 120 days after the effective date of this order to initiate collection from respondent shipper in this proceeding the undercharges as reflected in the exhibits enumerated above under Section 5 (a) and (b) of this stipulation, including, if necessary, filing a timely legal action under Public Utilities Code Section 3671; and to pay a fine in the amount of the total undercharges, pursuant to Section 3800 of the Public Utilities Code.

9. That respondent Gentry agrees to remit undercharge payments in the same amount to the Commission within ten (10) days of receipt.

10. That, beginning within 150 days after the effective date of this order, respondent Gentry will file monthly reports with the Commission noting its progress in collecting undercharges from the respondent shipper.

11. The staff of the Public Utilities Commission, specifically the Compliance and Enforcement Branch of the Transportation Division, agrees with the terms of this stipulation and recommends to the Commission that these terms be accepted, that this proceeding known as I. 89-04-053 be terminated, that all respondents in I. 89-04-053 shall henceforth not be subject to any future undercharges, sanctions, or fines arising from transportation performed by Gentry for the shipper respondent for the period in question in this Order Instituting Investigation, and be relieved of liability for the payment of any amounts other than those specifically agreed to be paid in this stipulation.

APPENDIX A

12. That this stipulation shall, along with the exhibits admitted into evidence, serve as staff's and respondent's proposed basis for a Commission decision.

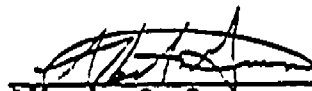
13. The parties enter into this agreement freely and voluntarily.

14. It is understood and agreed that the terms herein are binding when approved by the Commission.

Dated: *Dec. 19, 1990.*



Don G. Redlingshafer
Transportation Consultant for
Randy H. Gentry
1263 Cape Cod Way
Concord, CA 94521



Alberto C. Guerrero
Attorney at Law
Counsel for Compliance
and Enforcement Branch
of Transportation Division