

Decision 91-06-027

June 5, 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)

ORDER MODIFYING DECISION 91-04-025
AND DENYING REHEARING

Sierra Gypsum West, Inc. (Sierra) has filed an application for rehearing of Decision 91-04-025, in which we found that Randy H. Gentry Trucking (Gentry) violated Public Utilities (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, and ordered Gentry 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.

We have carefully considered all of the allegations of error raised in Sierra's application. Although we have concluded that the application for rehearing should be denied, upon reconsideration we believe that the decision should be modified as set forth below.

Therefore, for good cause appearing,

IT IS HEREBY ORDERED that:

1. Decision 91-04-025 is modified as follows:
 - a. The second sentence in the "Discussion" section on page 5 is replaced by the following: "We have denied rehearing in the All Counties investigation and are provided no reason in this proceeding to reverse our conclusion in that decision. We will, however, clarify our reasons for that conclusion."

Sierra claims that undercharges must be based on cost-justified common carrier rates if those rates are lower than the minimum rates the Commission established for contract carriers. It asserts that GO 147-A, Rule 13, "establishes" GACC rates as minimum rates for contract carriers, notes that PU Code §3663 states that such minimum rates cannot exceed current rates of common carriers for similar transportation, and concludes that the Commission's approval of cost-justified common carrier rates that are lower than contract carrier minimum rates means that those lower rates must be used in contract carrier undercharge calculations.

Sierra contends that even if the GACC rates were "approved," rather than "established," as minimum rates for common carriers, there is no way around the fact that in Rule 13 the Commission "established" these rates as the minimum contract carrier rates.

Finally, Sierra argues that the failure to apply PU Code §3663 to either the Gentry or the ACE undercharge calculations cannot be reconciled with D.89-01-006, which found that §3663 prohibited the Commission from basing undercharges on the Commission's now defunct Transition Tariff No. 2 (TT 2) where lower common carrier tariffs existed. Sierra notes that although the Commission's regulatory program in effect at the time was different than GO 147-A, the law itself hasn't changed, and still prevails over Commission regulations.

A brief review of regulatory history reveals the flaws in Sierra's logic.

From 1938 to 1979, the Commission's general freight regulatory program was based on a set of minimum rate tariffs established by the Commission in order to prevent destructive

competition within the trucking industry.¹ By the mid-1970's, the Commission recognized that conditions had changed, and that increased competition between carriers was now likely to help, rather than harm, consumers of transportation services.

In 1979, the Commission cancelled general freight Minimum Rate Tariffs 1-B, 2, 9-B, 11-A, 15 and 19, after concluding that: "A regulatory system of competitive individual carrier-filed rates should be established in lieu of the present minimum rate system." (D.90663, 2 CPUC 2d 249, at 257 (Conclusion of Law 2).)

D.90663 answers Sierra's question whether the regulatory programs which replaced the old minimum rate tariff system "established," rather than "approved," rates for contract carriers: "The rates contained in contracts filed by contract carriers will be approved by the Commission under [PU Code] Section 3662." (Id., Conclusion of Law 3, (Emphasis added.)). D.90663 further concluded that: "Since we are adopting a system of individual carrier-filed rates and cancelling minimum rates, neither Section 726 nor Section 3663 will apply." (Id., Conclusion of Law 5.)

Although GO 147-A implements a regulatory program somewhat different than that established by D.90663, both programs were based on competitive carrier-filed, Commission approved, rates rather than on a set of anti-competitive minimum rate tariffs established by the Commission itself. (See D.86-04-045, D.86-11-026, and D.86-12-102.) Given this background, the Commission's establishment in GO 147-A of minimum rates for contract carriers would have made no sense.

Furthermore, if the Commission wanted to "establish," rather than "approve," minimum rates for contract carriers, it would have said so. It was familiar with these terms and well

1. See D.90354 for an excellent recital of the history of the Commission's regulation of the transportation industry. (Although D.90354 was superceded by D.91861, the value of the history lesson remains unaffected.)

understood their regulatory implications. Instead, the Commission through Rule 13 established the lowest GACC rate as "a just and reasonable charge the carrier is required to assess when the transportation of property is provided in the absence of a schedule of filed tariff rates ... or contract on file in compliance with this General Order." (Emphasis added.)

Unlike Commission-established minimum rates, "default" charges are an essential element of a carrier-filed rate program. GO 147-A required carriers to file tariffs or contracts covering the transportation they intended to provide. The possibility that some carriers might fail to file the necessary tariffs or contracts required the Commission to establish a transportation charge for use in such circumstances. This GACC rate based default charge encouraged compliance with GO 147-A's tariff and contract filing requirements and assisted the Commission's enforcement of its carrier-filed, Commission approved, rate program.

Contrary to Sierra's contentions, our interpretation of GO 147-A, Rule 13, does not conflict with D.89-01-006, an undercharge case based on GO 147, which had no default charge or enforcement clause equivalent to Rule 13. The absence of a provision stating what rates applied when a contract carrier failed to have the required contract on file led the Commission to find that PU Code §3663 required undercharges to be calculated using the current rates of common carriers by land, not TT 2. D.89-01-006 noted that the result would have been different under GO 147-A, which established GACC rates as the default charge applicable to transportation conducted by a contract carrier in the absence of a filed contract. (D.89-01-006, p. 13.)

To sum up, GO 147-A, Rule 13, did not "establish" minimum rates for contract carriers; it simply established a default charge to be assessed by carriers who failed to comply with GO 147-A by filing a tariff or contract covering the transportation at issue. This default charge was based on the lowest GACC rates. GACC rates, as defined by GO 147-A, Rule

3.12, excluded cost-justified rates. Thus, undercharge assessments based on the Rule 13 default charge cannot be based on cost-justified rates.²

b. The fourth sentence in the "Discussion" section on page 5 is converted to the lead sentence in a new paragraph. The following sentence concludes this new paragraph: "We conclude that TD correctly applied GO 147-A, Rule 13, to the transportation at issue."

c. The fifth sentence in the "Discussion" section on Page 5 is converted to the lead sentence of a new paragraph.

d. The following paragraph is inserted after the first complete sentence on page 6:

"We note that shippers may have a remedy for any increased financial burden resulting from our strict enforcement of the default charge set forth in GO 147-A, Rule 13, however, since shippers damaged by a carrier's unlawful actions or omissions may bring a civil action to recover such damages. (See, e.g., D.65717, 61 CPUC 234; and D.87310, 81 CPUC 649.)"

e. Finding of Fact 9, which reads as follows, is added to Decision 91-04-025:

"9. Unlike Commission-established minimum rates, "default" charges are an essential element of a carrier-filed rate program. GO 147-A required carriers to file tariffs or contracts covering the transportation they intend to provide. The possibility that some carriers might fail to do so made it necessary to establish a charge to apply in such circumstances. This GACC rate based default charge encouraged compliance with GO 147-A's tariff and contract filing

2. PU Code § 3800 states that highway permit carriers shall be required to collect undercharges whenever the Commission finds that they have received "less than the minimum rates and charges applicable to the transportation established or approved by the Commission...." (Emphasis added.) Thus, the fact that GO 147-A, Rule 13, establishes a "charge," rather than a "rate," does not affect the Commission's enforcement obligations.

requirements and assisted the Commission's enforcement of its carrier-filed, Commission approved, rate program."

f. Conclusions of Law 3a and 3b, which read as follows, are added to Decision 91-04-025.

"3a. GO 147-A, Rule 13, did not "establish" minimum rates for contract carriers; it simply established a default charge to be assessed by carriers who failed to comply with GO 147-A by filing a tariff or contract covering the transportation at issue. This default charge was based on the lowest GACC rates. GACC rates, as defined by GO 147-A, Rule 3.12, exclude cost justified rates. Thus, undercharge assessments based on the Rule 13 default charge cannot be based on cost-justified rates."

3b. Shippers damaged by a carrier's unlawful actions or omissions may bring a civil action to recover such damages."

2. Rehearing of Decision 91-04-025, as modified hereby, is denied.

3. The Executive Director shall serve a copy of this decision on the parties listed in Appendix A ("List of Appearances" to Decision 91-04-025.

This order is effective today.

Dated June 5, 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

[Handwritten signature]
6/5/91
PC