

FEB 9 1992

Decision 92-02-020 February 5, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Brian Bertolini,

Complainant,

vs.

Yuba Trucking, Inc.,

Defendant.

**ORIGINAL**Case 91-03-018  
(Filed March 8, 1991; amended  
September 12, 1991)O P I N I O N

While it does not appear in his pleadings, complainant is a dump truck carrier (T-155,422), who competes with defendant. Defendant Yuba Trucking, Inc. (T-93,892) applied (DT 91-015S) for renewal of Simplified Rate Deviation, which allowed it to charge less than MRT 7-A rates for transportation of construction materials for Yuba River Sand & Gravel; the deviation is governed by the provisions of Decision 89-04-086, as modified by Decision 89-09-104. (The original deviation had been granted in DT90-010S.) There were no protests, and staff did not reject the application. Therefore, this deviation became effective on March 5, 1991.

The original complaint alleges that the actual one-way mileage for these hauls is 31.2 miles rather than the lesser amount stated in the defendant's deviation application. The complaint requests that an investigation be instituted concerning "the use of erroneous mileage information."

Defendant answered, alleging that the correct mileage was 28.3 miles. It argued, however, that mileage was irrelevant since the deviation was from hourly, not distance, rates. It also pointed out that the application was for a renewal of a previously existing deviation and was accompanied by an allegation that the

circumstances which originally justified the deviation were still in effect.

By ruling, the complaint was referred to the Transportation Division for informal resolution. The informal process was unsuccessful. A second ruling noted that the complaint did not seek relief other than the institution of an investigation and consequently failed to state a cause of action. Complainant was given an opportunity to amend. The ruling required that any amendment calculate what complainant believes the correct amount of the deviated rates and charges should have been.

The amendment, dated September 12, 1991 now concedes that the actual mileage is 28.3 miles. Complainant now raises a completely new theory, that the effective MRT 7-A rate on the date of filing was \$56.60/hour and that the deviation should have been based on this rate. The amendment now asserts that because of the use of the wrong hourly rate, the deviation "should be denied...." The request for an investigation is withdrawn. The amendment does not respond directly or indirectly to the defendant's claim that a renewal of a deviation can be granted based on the level of rates in effect when the original deviation application was filed, rather than those in effect when the renewal is applied for.

The answer to the amendment merely denies that the effective minimum rate at the time of filing was \$56.60 per hour.

#### Discussion

We take official notice that the effective minimum rate for the original deviation was \$56.60. However that rate was subsequently reduced to \$55.28 and the renewal authorized defendant to charge 90% of that rate. Complainant is either ignorant of the minimum rates in effect at the time when renewal was sought or failed to investigate to determine the effect of the DT91-015S authority.

If complainant wishes to challenge a competitor's implementation of deviated rate authority in the future, he should

bring the matter to the attention of Transportation Division staff before filing a formal complaint or else be represented by counsel or a recognized transportation rate expert.

We also note that the amendment to the complaint was not merely the clarification contemplated by the ruling; rather, it is in effect an entirely new cause of action. We can determine that this cause of action is defective; either complainant does not know what level of rates was in effect, or does not understand the effect of the authorization to deviate. In either event, we doubt that giving complainant another opportunity to amend would be useful.

Finding of Fact

Defendant properly filed for and was authorized to charge a rate less than 90% of \$56.60. It is not clear from the amended complaint whether complainant's mistake was one of fact or one of law.

Conclusion of Law

The complaint should be dismissed without further opportunity to amend.

O R D E R

IT IS ORDERED that the complaint is dismissed.  
This order becomes effective 30 days from today.  
Dated February 5, 1992, at San Francisco, California.

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

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

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NEAL J. SHULMAN, Executive Director  
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