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Decision 92-06-021 June 3, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's )  
 own motion into the operations, )  
 rates, and practices of Brink & )  
 Marini, Inc., a California )  
 corporation, Ricky M. Manica, an )  
 individual doing business as Manica )  
 Trucking, Sugar Mountain Pump Co., )  
 Ltd., a California corporation, )  
 Harry G. Moosberg, an individual )  
 doing business as Moosberg Trucking, )  
 The Robert Cole Company, a )  
 California corporation, and David )  
 Cervantes, Sr., an individual doing )  
 business as D C Trucking, and John )  
 Kemp, William Cummings and Angelo )  
 Tsakopoulos, a copartnership doing )  
 business as American River )  
 Aggregates, respondents. )

ORIGINAL

I.89-12-004  
(Filed December 6, 1989)

Edward J. Hegarty, Attorney at Law, and  
Harold F. Culy, for American River  
 Aggregates; Ernest Marini for Brink &  
 Marini, Inc.; and John V. Power, Attorney at  
 Law, for The Robert Cole Company;  
 respondents.

Larry Farrens, for California Carriers  
 Association, interested party.

Alberto Guerrero, Attorney at Law, and  
Carroll D. Smith, for the Commission's  
 Compliance and Enforcement Branch.

O P I N I O N

On December 6, 1989, we issued an Order Instituting  
 Investigation (OII) into the operations of the following highway  
 carrier respondents:

1. Brink & Marini, Inc. (Brink);
2. Ricky M. Manica, an individual doing  
 business as Manica Trucking (Manica);

3. Sugar Mountain Pump Co., Ltd. (Sugar Mountain);
4. Harry G. Moosberg, an individual doing business as Moosberg Trucking (Moosberg);
5. The Robert Cole Company (Cole);
6. David Cervantes, Sr., an individual doing business as DC Trucking (DC);

and respondent shipper John Kemp, William Cummings and Angelo Tsakopoulos, a copartnership doing business as American River Aggregates (American) for the purpose of determining:

1. Whether respondent Brink, in transporting property for respondent American, violated Public Utilities (PU) Code §§ 3664, 3667, 3668 and 3737 by failing to assess and collect the applicable minimum rates established by the Commission.
2. Whether respondent Brink, in procuring subhaul transportation from underlying carrier respondents Manica, Sugar Mountain, Moosberg, Cole and DC, and from others, violated PU Code §§ 3669 and 3737 by paying to such underlying carriers amounts less than the minimum amounts established by the Commission.
3. Whether respondents Manica, Sugar Mountain, Moosberg, Cole, or DC, in providing respondent Brink with subhaul transportation service, violated PU Code §§ 3664, 3667, 3668 and 3737 by failing to assess and collect the applicable amounts established by the Commission.
4. Whether respondent American, by knowingly and willfully, by means of a device or otherwise, violated PU Code § 3669 by procuring from respondent Brink transportation service at rates less than the minimum rates established by the Commission.
5. Whether respondent Brink should be ordered to collect from respondent American any

difference between the charges actually received and the minimum rates and charges that may be found applicable, pursuant to PU Code § 3800.

6. Whether in the event respondent Brink is found to have failed to assess and collect said applicable minimum rates, a fine in the amount of the undercharges should be imposed upon respondent Brink pursuant to PU Code § 3800.
7. Whether any or all of respondent carriers' operating authority should be cancelled, revoked, or suspended, or in the alternative, a fine of up to \$20,000 be imposed on each or any of them, pursuant to PU Code § 3774.
8. Whether a fine of up to \$5,000 should be imposed on respondent American pursuant to PU Code § 3804.1.
9. Whether any or all of the respondent carriers should be ordered to cease and desist from unlawful exercise of the Commission's jurisdiction.
10. Whether any other orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

Public hearings were held before Administrative Law Judge (ALJ) O'Leary in Sacramento on September 24, and 25, 1991. The matter was submitted subject to the filing of an opening brief by the Commission's Transportation Division (Staff) and closing briefs by respondents. Staff's opening brief was filed on January 3, 1992. The matter was submitted with the filing of a closing brief on January 21, 1992 by respondent American. No other respondents filed closing briefs. On February 26, 1992, ALJ O'Leary issued a ruling wherein he set aside submission of the proceeding for the purpose of accepting and ruling on a motion by the staff to accept a reply brief to the closing brief of American. The ruling denied the motion and resubmitted the matter on February 26, 1992.

Staff presented evidence through the testimony of two witnesses and six exhibits.

All of the highway carrier respondents hold Dump Truck Carrier permits.

Mr. Harald Paasche, an Associate Transportation Representative employed by the staff testified that he examined the records of Brink for the three months of October 1987 through December 1987. Exhibit 4 which was sponsored by Mr. Paasche contains shipping documents covering transportation performed by Brink for American during that period.

The documents contained in Exhibit 4 pertain to the transportation of earth, as described in Item 30 of Minimum Rate Tariff (MRT) 7-A, from the Clark Property on White Rock Road in Sacramento County to American's Property on Prarie City Road in Folsom. The distance between origin and destination is 6.7 miles. The weight of the shipments was obtained by weighing one of the loads as a sample and using that sample weight for all loads on a given invoice. Exhibit 4 also contains the following statement by Mr. Paasche: "Mr. Marini said he did not know you had to pay the subhaulers on the same basis you billed the shipper. He also stated he has no written agreement to use hourly rates for this job with American River Aggregates."

Exhibit 4 alleges the following:

1. Rates and charges assessed and collected by carrier (Brink) are less than the minimum in MRT 7-A.
2. Payments to the subhaulers are less than the minimum in MRT 7-A.
3. Failure to observe "Unit of Measure" rule in MRT 7-A. Shipper/debtor was billed on a tonnage basis while subhaulers are paid hourly. The hourly computation is a "conversion" from a tonnage rate.

In support of Allegation 1 above, Rita Clark, an associate transportation rate expert, testified that she prepared a rate statement, which was received as Exhibit 5, setting forth her opinion as to the applicable minimum rates for the transportation set forth in Exhibit 4.

Exhibit 5 sets forth the rate and charge assessed and the minimum distance rate published in MRT 7-A. Brink assessed a rate of \$0.95 per ton, the minimum distance rate in MRT 7-A is \$1.17 plus a 2.2% surcharge. Exhibit 5 shows the total undercharges to be \$47,804.45.

Since a sample weight was used for all loads on each invoice, the ALJ instructed staff to prepare another exhibit as late filed exhibit 6 utilizing the estimated weight provision in MRT 7-A, Item 190. Exhibit 6 shows the total undercharges to be \$33,227.78.

In its brief, staff argues that if the Commission finds that the estimated weights should be used, in connection with this transportation the estimated weights should only apply to the loads not weighed and the actual weights should be used for the loads that were weighed. Attached to its brief as Attachment I is an exhibit calculating undercharges under said theory in the amount of \$38,691.31.

The staff did not present an exhibit nor did it testify with respect to the amounts of underpayments to the subhaulers. Normally in proceedings of this nature the staff submits an exhibit similar to Exhibits 5 and 6 which sets forth the alleged underpayments. We are unable to determine the amount of underpayments, if any, from the evidence presented by staff.

Staff submitted Exhibits 1 and 2 which are stipulations for settlement between the staff and respondents Manica and Sugar Mountain, respectively. The stipulations provide for the payment of a fine in the amount of \$750.00 pursuant to PU Code § 3774, said amount to be paid to the Commission no later than 30 days

after the issuance of the Commission's final order approving and adopting the terms of the stipulations. Exhibit 1 also included a check indicating that the fine has already been paid. Exhibit 3 is a letter from respondent Moosberg enclosing a check in the amount of \$750.00 as an advance payment of the fine he expected to incur in this matter and a letter from the staff acknowledging receipt of the letter and check.

Respondent American presented evidence through the testimony of two witnesses and one exhibit. Exhibit 7 is the prepared statement of John Kemp, one of the partners of American. That exhibit states that:

"In early 1987 and long before the transportation which is the subject of this investigation was performed, Brink-Marini, Inc. prepared and Ernie Marini, as President of that carrier, and I, for American River Aggregates, signed an hourly rate agreement by which transportation by Brink-Marini for American River Aggregates was agreed by contract to be performed at minimum P.U.C. hourly rates. I state without qualification, and as fact, that this is true."

A copy of the agreement is included in Exhibit 7 as Attachment 1.

Mr. Kemp also testified that:

"American River Aggregates has always considered this haul as one for which my company would pay at least the level of PUC minimum hourly rates and there was a written agreement for such rates. However, Ernie Marini advised me that it was easier to bill American River Aggregates at the rate of 95¢ per ton based upon the average tonnage of a small sampling of loads multiplied by the number of loads hauled by a subhauler on any given day but that, regardless of the manner of billing, American River Aggregates would pay an amount that was at least equal to the PUC minimum hourly rate. It was my impression at the time that this billing mechanism of Brink-Marini might have been for the purpose of providing that carrier with what might be called an override or profit over and above the hourly rate that its actual

subhaul truckers were being paid but I was not aware then, nor am I now, that the shipper need be concerned as long as the resulting charges paid by American River Aggregates were equal to, or above, the minimum hourly rate.

"My staff received copies of freight tags on a daily basis and upon receipt of billings were able to reasonably check the charges claimed due by Brink-Marini against the charges which were actually due based upon the transportation hours times the applicable hourly rate. We did make such verifications on a spot basis and, in most instances, found that the charges claimed due by Brink-Marini were about equal to or, in many cases, exceeded the charges which were due under the effective hourly rate agreement. We believed that this excess was the Brink-Marini profit."

#### Discussion

Staff and American are in agreement that if an hourly rate agreement was in effect at the time the transportation took place, the applicable minimum rates are the hourly rates set forth in MRT 7-A.

In its brief staff argues that since the transportation charges were billed on the basis of distance rates there is an inescapable conclusion that the the parties intended that the hourly rate agreement was not to be in effect for the transportation in question; and that sometime prior to the commencement of the transportation, the parties by mutual assent rescinded the agreement as evidenced by their use of distance rates.

This is an interesting theory; however, no evidence was presented by the staff to show that the hourly agreement had been rescinded. Both signators to the hourly agreement, namely, Ernie Marini of Brink and John Kemp of American testified concerning the existence of the agreement. No questions were posed by staff to either of these witnesses concerning any rescission of the agreement prior to the commencement of the transportation. The

staff also did not seek to present rebuttal evidence concerning the supposed rescission of the hourly agreement.

We can only conclude from the evidence of record that an hourly agreement was in effect prior to the commencement of the transportation in question, and that the applicable minimum rates are the hourly rates set forth in Section 2 of MRT 7-A. There is no evidence that the charges assessed by Brink were less than the minimum hourly rates applicable to the transportation.

MRT 7-A sets forth minimum hourly rates in Section 2, minimum distance rates in Section 3 and minimum zone rates in Section 4.

Item 180 of MRT 7-A provides as follows:

UNITS OF MEASUREMENT TO BE OBSERVED

- a. Rates or accessorial charges shall not be quoted or assessed by carriers based upon a unit of measurement different from that in which the minimum rate and charges in this tariff are stated for the type of shipment being rated.
- b. Where rates in Section 4 are applicable, zone rates in cents per ton shall be quoted and assessed.
- c. If there is no zone rate provided in Section 4, rates in Sections 2 or 3 shall be quoted and assessed.

Paragraph (a) of Item 180 requires that when Section 2 rates are applicable, which is the case here, the rates and charges for the transportation shall be quoted and/or assessed on an hourly basis. Likewise when Section 3 or Section 4 of rates are applicable, rates and charges shall be quoted and assessed on a distance or zone basis, respectively.

It is essential that carriers comply with this provision of the tariff, especially when more than one unit of measurement may be utilized for the quotation and/or assessment of charges. It



is essential that freight bills accurately reflect the basis upon which charges are being assessed. One auditing the records contained in Exhibit 4 could make a valid assumption that the applicable minimum rate was the distance rate since the transportation was being billed at distance rates, because, indeed, that is what the documents reflect. In this instance, the documents covering the transportation set forth charges based on distance rates rather than hourly rates. There is no question that this is a violation of Item 180. It is not a violation which we regard as minor. The practice of assessing rates based on one unit of measurement when another unit of measurement is applicable is misleading to an auditor and can render the time utilized and effort spent by said auditor useless. Such is the case in the instant proceeding. We are also concerned about the amount of monies expended in this proceeding, which could have been more effectively utilized in other areas had the staff not been misled. The punitive fine of \$5000 recommended by the staff against Brink will be imposed.

We now turn to the stipulations contained in Exhibits 1 and 2 wherein respondents Manica and Sugar Mountain have agreed to a fine of \$750.00 pursuant to PU Code § 3774 and Exhibit 3 wherein respondent Moosberg tendered a check as payment of a fine pursuant to PU Code § 3774. There is insufficient evidence contained in the record to show any violations by these three respondents. However, since these respondents incurred no costs defending the allegations against them contained in the OII the stipulations entered into by Manica and Sugar Mountain will be approved.

The check tendered by Moosberg in the amount of \$750.00 will be considered as a settlement under Rule 51.1 of the Commission's Rules of Practice and Procedure and will be approved.

Comments to the Proposed Decision

The ALJ's proposed decision was filed and mailed to the parties on April 27, 1992. Comments on the proposed decision were filed by the staff. No other appearances filed comments, however, replies to the comments filed by staff were filed by American.

The comments filed by the staff are basically further argument as to why its position in this proceeding should be adopted.

Rule 77.3 of the Rules of Practice and Procedure deals with the Scope of Comments. The rule provides in part that:

"Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed."

In view of the above provision of Rule 77.3, it is not necessary for us to comment on staff's comments or upon the replies to comments filed by American.

Findings of Fact

1. All highway carrier respondents hold permits authorizing them to operate as dump truck carriers.

2. During the three-month period from October 1, 1987 to December 31, 1987, respondent Brink transported earth for the account of respondent American from the Clark Property on White Rock Road in Sacramento County to American's property on Prairie City Road in Folsom at a distance of 6.7 miles.

3. Brink engaged respondents Manica, Sugar Mountain, Moosberg, Cole and DC as underlying carriers to perform portions of the transportation set forth in Finding of Fact 2.

4. Prior to the commencement of the transportation described in Finding of Fact 2, Brink and American executed an hourly rate agreement. A copy of the agreement is contained in Exhibit 7 as Attachment 1.

5. The record contains no evidence to support staff's theory that the hourly rate agreement described in Finding of Fact 4 was rescinded prior to October 1, 1987.

6. The hourly agreement described in Finding of Fact 4 was in effect during the period the transportation described in Finding of Fact 2 occurred.

7. The minimum rates applicable to the transportation at issue in this proceeding are the hourly rates set forth in MRT 7-A.

8. The freight bills covering the transportation described in Finding of Fact 2 show the assessment of rates on a distance basis.

9. Item 180 of MRT 7-A requires that rates not be quoted or assessed upon a unit of measurement different from that which the rate and charges are stated for the type of shipment being rated.

10. No evidence was presented with respect to whether Brink paid respondents Manica, Sugar Mountain, Moosberg, Cole, or DC amounts less than the minimum amounts established by the Commission.

11. No evidence was presented with respect to whether Manica, Sugar Mountain, Moosberg, Cole or DC failed to assess and collect the applicable amounts established by the Commission.

12. Respondents Manica and Sugar Mountain agreed to a fine of \$750.00 pursuant to PU Code § 3774.

13. Respondent Manica has paid the \$750.00 fine agreed to in the stipulation.

14. Respondent Moosberg tendered a check in the amount of \$750.00 in settlement of the alleged violations against him in this proceeding.

15. Respondents Manica, Sugar Mountain and Moosberg did not appear at the hearing held on September 24, and 25, 1991 nor did they submit briefs.

Conclusions of Law

1. Respondent Brink in transporting property for American has violated PU Code § 3737 and Item 180 of MRT 7-A by assessing rates upon a unit of measurement different from that in which the minimum rate and charges in MRT 7-A are stated.

2. Respondent Brink should be ordered to pay a fine of \$5,000 pursuant to PU Code § 3774.

3. The stipulations entered into by respondents Manica and Sugar Mountain should be approved.

4. The payment of a \$750.00 fine, as tendered by respondent Moosberg should be approved as a settlement under Rule 51.1 of the Commission's Rules of Practice and Procedure.

5. The investigation as to all other respondents should be discontinued.

ORDER

IT IS ORDERED that:

1. Brink & Marini, Inc. shall pay a fine of \$5,000 under Public Utilities (PU) Code § 3774 on or before the 40th day after the effective date of this order.

2. The stipulations entered into by Ricky M. Manica, doing business as Manica Trucking and Sugar Mountain Pump Co., Ltd. are approved.

3. The \$750.00 tendered as a fine by respondent Harry G. Moosberg, doing business as Moosberg Trucking is approved as a settlement.

4. Sugar Mountain Pump Co., Ltd. shall pay a fine of \$750.00 under PU Code § 3774 on or before the 40th day after the effective date of this order.

5. The investigation is discontinued as to the following respondents: the Robert Cole Company; David Cervantes, Sr. doing business as DC Trucking and John Kemp, William Cummings and Angelo

Tsakopoulous, a copartnership doing business as American River Aggregates.

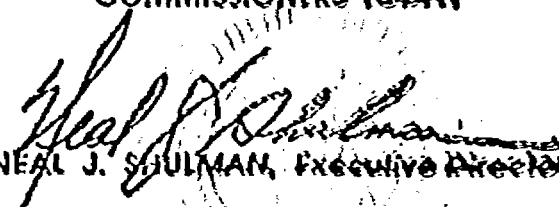
6. The Executive Director shall have this order personally served upon respondents Brink & Marini and Sugar Mountain Pump Co., Limited and served by mail upon all other respondents.

This order becomes effective for each respondent 30 days after order is served.

Dated June 3, 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

  
NEAL J. SHULMAN, Executive Director