

Decision 82 02 126

FEB 17 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into the operations,)
rates, charges and practices of)
Bay Area Express, Inc.)

OII 95
(Filed September 1, 1981)

Donald R. Platt, Attorney at Law, and
Michael Leiden, for Bay Area Express,
Inc., respondent.
James R. Foote, for Associated Independent
Owner-Operators, Inc., interested party.
Carl K. Oshiro, Attorney at Law, and W.J.
Anderline, for the Commission staff.

O P I N I O N

Statement of Facts

Bay Area Express, Inc. (Bay Area) is engaged in the business of transporting property for compensation over the public highways of this state under a highway common carrier certificate, a highway contract carrier permit, and an agricultural carrier permit.

Bay Area operates from two terminals which are also warehouses; one is located in Hayward and the other in Union City. Employing 4 office personnel, 16 warehousemen and 7 drivers, Bay Area operates 3 tractors, 5 bobtail trucks, an econoline van and 20 45-foot van semitrailers. Bay Area makes extensive use of subhaulers. In 1980 it employed 20 and paid them \$706,887 from gross revenues of \$1,646,692.

At the time of the transportation here at issue, Bay Area had three major clients, Scott Paper Company, Western Kraft, and Seneca. Bay Area used subhaulers to handle its Scott shipments. As a consequence of an informal complaint from one

of these subhaulers, Don Sanders, that he was being paid less than the amount set forth in his subhaul agreement, staff began this investigation. The initial contact at Bay Area was made March 31, 1981 with Michael Leiden, Bay Area's president. He referred staff to Diane Mello, corporate secretary, who provided most of the records and data used by the investigation team. The investigation included transportation performed for Bay Area for the account of Scott Paper from January 1 through March 31, 1981.

As a prime carrier, Bay Area was subject to the provisions of General Order (GO) 102, which pertains to the employment of and payments to subhaulers.^{1/} During the first three months of 1981, the GO required that written agreements be entered into between a prime carrier and his subhaulers specifying the amount to be paid by the prime carrier to his subhauler, and that payments be made within 15 days after completion of a shipment. It further required that a prime carrier provide subhaulers with copies of rated freight bills; that a prime carrier maintain separate subhaul registers or single books of account for each subhauler, and that a prime carrier have a good and sufficient bond on file with this Commission. Lastly, it prohibited employment of unauthorized carriers.

The staff preliminary investigation disclosed what appeared to be substantial violations of the GO and Public Utilities (PU) Code §§ 702 and 1074.^{2/}

1/ GO 102 has been amended a number of times. At the times relevant here the order in effect was GO 102-G. By Decision (D.) 93146 issued July 2, 1981 the Commission amended GO 102-G, inter alia: (1) making it the prime carrier's responsibility to ensure that subhaulers are authorized; (2) requiring prime carrier to provide rated freight bills only upon request; and (3) increasing the bond requirement to \$15,000. GO 102-H became effective August 31, 1981.

2/ Section 702 of the PU Code requires every public utility to obey and comply with every Commission order, decision, direction, or rule.

Section 1074 of the PU Code requires every common carrier engaging subhaulers to file a bond with the Commission to secure the payment of subhauler claims.

Consequently, by order of the Commission on September 1, 1981, the informal check ripened into this formal investigation, Order Instituting Investigation (OII) 95. The purpose of the OII was to determine whether Bay Area: (1) paid its subhaulers less than the full amount set forth in its subhaul agreements, (2) furnished subhaulers with copies of rated freight statements, (3) maintained separate subhauler registers, (4) engaged subhaulers without having a good and sufficient bond on file with the Commission, and (5) engaged unauthorized carriers to perform its subhauling.

In the event violations as charged were found to have occurred, a further purpose of the OII was to determine (1) whether Bay Area should be ordered to cease and desist, (2) whether Bay Area should be fined or have its operating authority canceled, revoked, or suspended under PU Code § 1070, and (3) whether any additional orders should be made.

A duly noticed public hearing was held in San Francisco on October 14, 1981 before Administrative Law Judge (ALJ) John B. Weiss. At the conclusion of the hearing the OII was submitted for decision subject to the filing by October 30, 1981, of a late-filed exhibit in the form of a copy of the new subhauler agreement with identification of the new bond carrier. ✓

At the hearing, through witness John Montanaro, a transportation analyst, staff introduced three exhibits. Through these exhibits, and corroborative testimony by Montanaro and subhauler Sanders,^{3/} staff asserted and the evidence tended

^{3/} Don Sanders was purchasing a tractor from Bay Area Express at the times relevant here under terms of a separate off-setting agreement. The tractor was registered to Bay Area Express. Payments were \$600/month and Sanders was in arrears.

to show that during the period covered by the investigation, in violation of GO 102-G, and consequently of PU Code §§ 702 and 1074, Bay Area had paid three subhaulers, Sanders, Don Crockett, and Thomas Delivery Service, an aggregate of \$14,348.67 less than the amount which should have been paid them under the provisions of the respective subhaul contracts. Montanaro testified that the device used by Bay Area to underpay Sanders was to represent to him that the shipments he hauled had been master billed to Scott, when in fact they had not. Bay Area billed Sanders' hauling as separate shipments. Apparently, Sanders was the only subhauler against whom this form of skulduggery was employed.

The staff witness went on to assert, and provided documentary evidence to show, that his investigation had disclosed the probability that 15 other subhaulers^{4/} had also been paid less than the amounts which should have been paid them under the terms of their respective subhaul agreements then in effect. These additional underpayments appear to aggregate \$21,104.58. In these latter instances the device employed by Bay Area to underpay was to exclude from the gross the substantial fuel and labor cost offset surcharge and the Central Coast surcharge.

In addition staff's evidence indicated the probability that Bay Area failed to provide subhaulers with copies of rated freight bills, even after some haulers had specifically asked for them; that Bay Area failed to maintain separate subhauler registers;

^{4/} The fifteen other subhaulers are: Jack Reed, Milt Muchna, Blueitt Trucking, Golden Star Trucking, Clark Transportation, Lou Chavier, Gary Smith, David Jones, Jim Rittman Enterprises, Canadian Truck Lines, R&S Drayage, Circle R Trucking, Michael Saxton, Horace McCaroy, and Hervey Byrd.

that Bay Area had not obtained and maintained a good and sufficient bond after the existing one was canceled by the insurance company after a claim; and that Bay Area had employed Circle R Trucking to subhaul although Circle R lacked PUC authority.

Staff's witness Sanders testified he had hauled for Bay Area during the months of January, February, and March 1981, and that his contract provided for payment of 70% of gross revenue. He said there were no verbal agreements otherwise. He stated that there had been no information given him of any switch in the billing basis. He further asserted that along with fellow subhaulers Crockett, Blueitt, and Williams he had asked specifically for copies of the invoices to Scott, but that Bay Area refused to provide them. Sanders testified that his brother in mid-February 1981 had told him of rumors of a new contract in the works which would change the revenue division from 70 to 55%, and that later, in March, Crockett had told him that most of the subhaulers had been sounded out on a proposed new contract calling for "as agreed" division provisions. Sanders stated that the last week of March 1981 he went to Leiden to ask about it and was told a copy would be mailed to him. None ever was. But the next day Leiden's secretary Mello told Sanders his services would no longer be needed. He has not worked for Bay Area since.

In its defense, through its president Leiden, Bay Area asserted that before 1981 it had had standard subhaul agreements with all its subhaulers, agreements which provided for a revenue division of either 70 or 75% of the gross revenue, but that in either September or October of 1981 for economic reasons it had had to change. He stated Bay Area switched from Master Billing to an LTL basis, and that accordingly he had verbally renegotiated the subhaul agreements with the subhaulers, intending to reduce these to writing later. Leiden insisted that he had discussed these new financial arrangements with most of the

subhaulers, including Sanders and Crockett, but admitted he had not spoken to Thomas Delivery. It was his contention that under the new arrangements, the subhaulers were better off; that there being more revenue from an LTL billing basis than from a consolidated billing, 55% of the gross would net them more income overall. He stated that events show a 15% improvement. Leiden testified that on April 29, 1981 all the subhaulers then employed signed new contracts. These new contracts provided for 55% payment on all LTL, and 70% on consolidated master billings.

Leiden went on to contend that the other violations of GO 102 were only technical in nature. He admitted that he had not kept separate subhaul registers or single books of account as required under the order, but stated that he had segregated all records pertaining to the subhaulers in separate file cabinets and therefore was in substantial compliance. He further testified that as a rule Bay Area always checked out a subhauler's "T" file number before engaging him, but admitted that in this instance Circle R had slipped by. He said Circle R had approached Mello for work giving another's "T" number and had been engaged without any further check being made.

With regard to the bond, Leiden stated that although it appears that the carrier canceled his bond on November 26, 1980, he was not notified at that time; that he first learned of the cancellation early in February 1981 in a telephone call from his insurance agency, Whitney S. Baird. After being unable to obtain a release on the potential claim which had caused the cancellation in the first instance, he got a binder from a new agency, AA&B Insurance Brokers of San Francisco, in the fall of 1981 and subsequently a new bond through Royal Globe Insurance Company.

Associated Independent Owner-Operators, Inc.'s (AIOO) role in the proceeding was to stress through the argument of its head, James Foote, that this case is but another good example of

why the AIOO had struggled so assiduously in Petition 904 in Case (C.) 10278 (see D.91247 dated January 15, 1980) to establish a set division of revenues between overlying carriers and subhaulers. Foote contended that his association is aware of many such violations as those in this proceeding and urged vigorous enforcement of the GO, stating that such enforcement would help protect subhaulers; making an example of this carrier would serve to deter others.

Finally, staff, stressing that the facts of this case speak for themselves as to the willfulness of respondent's actions, and noting the growth and financial resources of Bay Area, urged the Commission to take four actions, that:

1. Bay Area be required to pay Sanders, Crockett, and Thomas Delivery, the underpayments owed them in the aggregate amount of \$14,348.67 within 30 days of the effective date of this decision.
2. Bay Area be required to recompute the payments to the other 15 subhaulers for Scott for the period January 1 through March 31, 1981 in terms of the written subhaul agreements then in effect with respect to these subhaulers, and be required to pay each of these subhaulers the full amount of underpayments determined, with such review and payment to be made in full within 60 days of the effective date of this decision.
3. Bay Area be ordered to cease and desist from (1) operating henceforth without appropriate bond, (2) operating without maintaining separate subhaul registers, and (3) from engaging unauthorized carriers as subhaulers.
4. A punitive fine in the amount of \$3,000 be imposed upon Bay Area with payment to be required within 30 days of the effective date of this order.

Discussion

Staff initiated this investigation with some information supplied by subhauler Sanders. GO 102-G, in paragraph 4, Agreement Between Parties, stated, during the first three months of 1981:

"d. Every prime carrier engaging subhaulers shall maintain a separate subhaul register or single book of account in such manner and form as will plainly and readily show the following information:

1. Name and T-number of the subhauler.
2. Freight bill and the date.
3. Date shipment completed.
4. Gross due the subhauler, deductions therefrom, and net amount due the subhauler.
5. Date payment tendered to the subhauler."

In the absence of the separate subhaul registers or separate account books required under GO 102, the investigator had to ask Bay Area's personnel for the specific information he wanted on the three subhaulers he was aware of, Sanders, Crockett and Thomas Delivery. Bay Area cooperated as to these three, but volunteered nothing relating to the existence of other subhaulers and, in the absence of separate registers, the only way the staff learned that there were 16 others subhaulers was from information gleaned from Bay Area's Revenue Distribution Sheets while tracing shipments carried by the first three. Staff had to dig this information out; whereas had registers been maintained as required, it would have been readily ascertainable. Failure to obey the GO is a violation of PU Code § 702.

In the two volumes that constitute staff's Exhibit 2, staff has laid out its case pertaining to the underpayment charges. In 15 instances staff's assertions are supported by affidavits and other evidence. The affidavits attest in each instance (1) to the fact of engagement during the period in issue by Bay Area,

(2) to a specific subhaul agreement in effect during the first three months of 1981, (3) that no new subhaul agreement changing the division of revenues had been signed relative to those three months, (4) to the type of equipment used to perform the service, (5) to each subhauler's understanding of the division of revenue applicable under his agreement, and (6) that the subhauler had not received copies of rated freight bills.

For subhaulers Sanders, Crockett, and Thomas Delivery, apart from obtaining affidavits, staff also traced each shipment transported for Bay Area by the subhaulers, week by week, from Bay Area's freight invoice to Scott covering individual shipments and Scott's payment vouchers showing a corresponding invoice number and amount, to the week by week subhauler statements prepared by Bay Area which accompanied Bay Area's payment checks to each subhauler. Staff's comparison of the gross appearing on Bay Area's invoices to Scott, and the gross set forth on the subhauler statement furnished the subhauler in each instance, reveal significant differences. Where Sanders was concerned Bay Area billed Scott the freight charges plus appropriate surcharges for each individual shipment but then for the purpose of crediting Sanders with his division of revenue share, Bay Area grouped a number of shipments as though they had been consolidated as one shipment, re-rating the consolidated total to arrive at a lesser subhauler payment.^{5/} In the case of Crockett and Thomas Delivery

5/ For example: On March 5, 1981 Sanders transported two shipments for Bay Area on Scott's account: the first of toilet paper and facial tissue (Scott's tally U 12661) from Scott's Bay Area facility to Long's in Oakland, a distance of 22 miles; the second of paper towels, toilet paper, and paper cleansing

(Continued)

(as well as all the other subhaulers), Bay Area billed Scott the freight charges plus the appropriate surcharges, but then credited the subhaulers only with the freight charges, leaving out the surcharge amounts.^{6/} In its exhibit staff provides a recapitulation

5/ (Continued)

tissue (Scott's tally 153010) from Scott's Bay Area facility to Associated Corp. in Richmond, a distance of 35 miles. By Invoice 20684 Bay Area billed Scott for \$177.38, charging for the freight and appropriate surcharges for the first shipment. By Invoice 20683 Bay Area billed Scott for \$219.15, charging for the freight and appropriate surcharges. By terms of Sander's subhaul agreement then in effect, his division of the revenue should have been \$277.75 (70% of \$177.38 or \$124.17, and 70% of \$219.15 or \$153.41; $\$124.17 + \$153.41 = \$277.58$). Instead, for purposes of the subhaul weekly statement, Bay Area recomputed the gross to consolidate the weights by commodities; then re-rated the consolidated weights, applied the respective rates and surcharges applicable to the consolidated weights, and arrived at a consolidated gross of \$246.86 of which the subhauler's 70% share was indicated as being only \$172.00. Thus Sanders was underpaid \$105.58 for these two shipments.

6/ For example: On March 4, 1981 Crockett transported 90 packages of paper towels weighing 2,745 lbs. from Scott's Bay Area facility to Long's in Auburn, a distance of 147 miles. By Invoice 20407, Bay Area billed Scott \$250.01 as follows:

Freight: 2,745 lbs. as 5,000 lbs. @ \$0.0337	\$192.09
Central Coast surcharge	1.25
Fuel and labor cost offset surcharge @ 29%	<u>56.67</u>
Total	\$250.01

But, the March 6, Bay Area weekly subhauler statement shows that Crockett was credited with, and subsequently paid, only \$134.46 (70% of \$192.09 = \$134.46), whereas by the terms of his subhaul agreement in effect during the first three months of 1981, Crockett should have been paid \$175.01 (70% of \$250.01 = \$175.01). Thus Crockett was underpaid \$40.55 for this shipment.

in detail for Sanders, Crockett, and Thomas Delivery, showing these underpayment amounts, shipment by shipment, week by week. The recapitulation shows that over the first three months of 1981, Bay Area deliberately underpaid Sanders \$7,953.95, Crockett \$4,921.85, and Thomas Delivery \$1,472.87.

For each of the other dozen subhaulers ^{7/} from whom affidavits were obtained, staff, after checking the terms of each's subhaul agreement, checked Bay Area's Account Distribution Sheets, week by week, through the three-month period of the audit, and extracted the total amount paid each of them for the period. For each staff then recalculated the gross revenue to Bay Area from Scott for the hauling performed, using either the 70 or 75% factor (depending upon whether the respective subhauler had used either a tractor or a bobtail (in one instance, R&S Drayage, it had been a tractor and a trailer)), then computed the appropriate total surcharges applicable to that gross revenue and applied that subhauler's percentage under his subhaul contract to obtain an estimate of the subhauler's division of revenue share that had not been paid to him.

For the three subhaulers for whom Bay Area could furnish no subhaul agreements, and from whom affidavits had not been obtained, ^{8/} staff performed similar searches of the Account Distribution Sheets

^{7/} Jack Reed, Jim Rittman Enterprises, R&S Drayage, Inc., Blueitt Trucking, Milton Muchna, D.L. Jones Trucking, Gary Smith Trucking, Louis A. Chavier, Canadian Truck Lines, Golden Star Trucking, Clark Transportation, and Circle R Trucking.

^{8/} Michael Saxton, Hervey Byrd, and Horace McCaroy.

and reconstructions to obtain estimates of the subhauler shares that were not paid these three. (One other subhauler, Lausten, had also provided transportation services under an agreement similar to the others, but his hauling had been performed under MRT 15 rates.)

Staff's recomputations showed the probability that these 15 other subhaulers had been paid \$21,104.58 less than provided under the division of revenue provisions of their respective subhaul agreements for the services they provided during the first three months of 1981.^{9/}

It is clear that Bay Area did not adhere to the terms of its subhaul contracts which were in effect with these 18 subhaulers during the first three months of 1981. GO 102-G required that every agreement for subhauling entered into by a prime carrier be reduced to writing no less than five days after commencement of the service, and that it contain the amount to be paid to the subhauler. So called "verbal understandings," regardless of any intent to reduce them to writing later, cannot serve to alter the terms of those subhaul agreements. Accordingly, we are constrained to find that staff's determination of the respective amounts still owed Sanders, Crockett, and Thomas Delivery, being based as they are upon Bay Area's own books of account and copies of the subhaul agreements, are correct. Therefore, we will require that Bay Area pay Sanders, Crockett, and Thomas Delivery the amounts respectively set forth above.

In addition, we will direct Bay Area to redetermine immediately the share of the gross revenue which should have been

^{9/} The indicated individual underpayments are set forth in Appendix A.

paid to each of the other 15 subhaulers, basing that redetermination upon the full gross, including surcharges, billed to Scott, and with regard to the division of revenue percentages set forth in the respective subhaul agreements of these subhaulers in effect the first three months of 1981. To the extent these recomputations differ from those made by staff and set forth in Exhibit 3, Bay Area will submit them to the Executive Director for verification. After verification by the staff of the amount still due each of the 15 subhaulers, Bay Area will be required to pay each subhauler the amount owed him.

It is also evident that Bay Area violated PU Code § 702 by its willful failure to obey and comply with a GO made by the Commission. For example, subhaulers were not given copies of the rated invoices so that they could check these against the gross reported on the subhauler summary against which they were paid. Even when subhaulers specifically asked for these, as Sanders, Crockett, Blueitt, and Williams did, they were refused. At the time in issue, the first three months of 1981, GO 102-G, in paragraph 5, Payments to Subhaulers and Sub-Subhaulers, stated:

"b. Before or at the time of the settlement the prime carrier shall furnish the subhauler with a copy of the rated freight bill or freight bills, except in those instances in which five or more shipments have been consolidated by the prime carrier for transportation by the subhauler in a single movement. A prime carrier may take reasonable steps to delete confidential information from the freight bill furnished by the subhauler, but may not delete the charges actually assessed or the information necessary to determine such charges." 10/

10/ Subsequently, GO 102-H, adopted June 2, 1981 and effective August 31, 1981, amended the subparagraph to provide that the prime carrier "shall make available to the subhauler, upon request, at or before the time of settlement a rated copy of the freight bill or bills."

It seems that not only was Sanders denied access to the evidence of the charges actually assessed Scott by Bay Area, in clear disregard of his right to see the rated freight bills, but that he also was rewarded for his efforts to see them by losing his subhaul job with this prime carrier.

At the time in issue, GO 102-G, in paragraph 3, Engagement of an Unauthorized Carrier either as a Subhauler or Sub-Subhauler by a Prime Carrier, provided:

"A prime carrier shall not engage any unauthorized carrier as a subhauler or sub-subhauler."^{11/}

Staff charged that Bay area, in violation of the GO, had merely taken the word of Circle R Trucking as to its T-number at time of engagement. According to Leiden, Circle R had approached Mello for work, filled out an agreement and was put to work after giving the prime carrier a T-number. In this instance Bay Area states it failed to check with the Commission. Subsequently, it developed that Circle R had no T-number of its own, but had merely used a T-number belonging to a Los Angeles subhauler. But the courts in California have held that a highway contract carrier engaging another carrier as a subhauler is under a practical compulsion in its own and in the public's interest to verify that such subhauler possesses an unrevoked authority and the required insurance coverage (Klein v Leatherman (1969) 270 CA 2d 792). By its failure to obey and comply with the provisions of the GO, Bay Area has violated PU Code § 702.

Lastly, in this litany of GO violations, for a period of almost a year Bay Area had continued to engage subhaulers without having had a good and sufficient bond on file with this Commission. GO 102-G in paragraph 7 required in part that "no carrier shall engage any subhauler...unless and until it has on

^{11/} Since then, the GO has been amended to provide that it shall be the responsibility of the prime carrier who engages a subhauler to assure compliance.

file with the Commission a good and sufficient bond in such form as the Commission may deem proper, in the sum of not less than \$10,000...." Leiden testified that he just learned in February 1981 that Balboa Insurance Company had canceled his bond on 30 days' notice in October 1980 as the consequence of an unresolved claim by Gary Smith. Leiden further testified that he had unsuccessfully tried to get Smith to sign a release so as to reinstate the bond, and that failing that, in September 1981, he obtained a new bond with Royal Glove after changing agents. Leiden also states that he was unavailable in June, July, and August 1981. But the fact remains that Bay Area continued to engage and use subhauliers long after becoming aware that it had no bond on file. Nor was Leiden, its president and sole stockholder, unaware of the GO 102-G requirement; in 1979 Leiden was cited as an individual for violating the requirement (see Citation Forfeiture No. F-1739 dated May 25, 1979). Therefore, in disregarding the provisions on bonding contained in the GO, Bay Area also violated PU Code §§ 702 and 1074.

Having determined that Bay Area has in fact violated PU Code §§ 702 and 1074, we must now address staff's recommendation that under provisions of PU Code § 1070, we require Bay Area to pay a punitive fine of \$5,000. As a punitive statute, § 1070 provides that for good cause the Commission may suspend, revoke, alter, or amend any operative right or certificate, or as an alternative, impose a fine not to exceed \$5,000. Such punitive measures are intended to punish for past wrongdoing and to deter similar wrongdoing in the future. While intent is not an element in determining whether noncompliance with Commission orders has resulted in a violation of the Code, in admeasuring the penalty to be imposed once a violation has been found, the Commission does consider the question of willfulness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462).

In the matter of the subhauler underpayments, the evidence reflects more than mere occasional or isolated instances; rather it reflects a deliberate and substantial practice. Bay Area was well aware of the terms of its subhaul contracts; so much so that in April 1981 it unsuccessfully tried to persuade many of the subhaulers to sign and substitute backdated agreements which would have provided for an "as agreed" division of revenue instead of the existing contractual 70 or 75% of gross split. Bay Area deliberately and secretly shortchanged its subhaulers. In Sander's case, it represented to him grosses computed as though there had been consolidation of shipments; substituting these for the individual shipment grosses actually billed to Scott. In the case of the other 17 subhaulers it excluded surcharges from the grosses reported to the subhaulers although these same surcharges were included in the gross billed to Scott. In at least four instances, and despite their requests, it refused to permit subhaulers to receive copies of the Scott invoices, thereby making it difficult, if not impossible, for the subhaulers to verify the prime carrier's division of revenue.

Leiden admitted to having held himself out once as a freight traffic consultant, a vocation necessitating some knowledge of the rules, orders, and decisions of this Commission. He also admitted to a basic awareness of GO 102 and knew that written subhaul agreements were required. He "thought" that the requirement of separate books of account was met by having separate files for subhaulers. He was certainly aware of the necessity for current bonding, having been cited and fined in 1979 for a bonding violation. Finally, Leiden was unable to explain why it was that Bay Area had not checked out Circle R's T-number before engaging it as a subhauler.

It is apparent that Bay Area chose to approach its obligations as a prime carrier in a very lax manner, adopting an almost disdainful disregard for Commission rules and orders. Its attitude is reflected by characterization of its violations as being only "technical violations." We are further disturbed that a prime carrier operating under our jurisdiction should be so avariciously contemptuous of the rights of its subhaulers. We agree with Foote's contention that those who so willfully violate our orders must be made to suffer the consequences, both as punishment for their wrongdoings and as a deterrent to others. The question is how much.

While PU Code § 1070 provides the Commission with jurisdiction and power to suspend at any time, and after hearing, revoke, alter, or amend any operating right, the Commission does not usually favor revocation of such rights unless there has been some voluntary act in defiance of statute, Commission order, etc. (Leonard A. Kinzel (1967 66 CPUC 816)). Revocation results in abrupt discontinuance of respondent's operations with adverse consequences to the innocent shippers depending upon the carrier, a loss of jobs during a recession period, and almost certain doom or impairment to the chances of subhaulers in collecting underpayments still owed them. Furthermore, it is not the Commission's desire to deprive this carrier of its livelihood unless repetition of the offenses shows that revocation or suspension is the only means to bring about compliance. Given the gross disregard of applicable rules, regulations, and orders by Bay Area, we find a punitive fine of \$5,000 reasonable. More severe sanctions will be taken if violations persist.

Findings of Fact

1. During the first three months of 1981, Bay Area operated under highway common carrier and highway contract carrier authorities issued earlier by this Commission.

2. During the first three months of 1981, Bay Area hauled substantial volumes of paper products for Scott Paper Company, handling this traffic by engaging the subhaul services of 19 independent contractor subhaulers.

3. During the first three months of 1981, Bay Area's written subhaul agreements with the 19 engaged subhaulers provided for a division of the gross revenues obtained, with the subhaulers to receive either a 70 or 75% share of the gross depending on the equipment used.

4. During the first three months of 1981, Bay Area deliberately and as a regular practice misrepresented to its subhaulers the gross on each shipment invoice to Scott, with the result that 18 subhaulers were substantially underpaid for the shipments they transported during this period.

5. Subhaulers Sanders, Crockett, and Thomas Delivery Service were underpaid \$7,953.95, \$4,921.85, and \$1,472.87 respectively. Conservative estimates of underpayments to the remaining subhaulers indicate, respectively, underpayments of \$5,302.51 to Jack Reed, \$1,280.90 to Jim Rittman Enterprises, \$3,312.60 to Blueitt Trucking, \$132.75 to R&S Drayage, Inc., \$759.68 to Milton Muchna, \$80.87 to D.L. Jones Trucking, \$27.14 to Gary Smith Trucking, \$1,738.38 to Circle R Trucking, \$270.05 to Louis A. Chavier, \$401.94 to Canadian Truck Lines, \$2,981.11 to Golden Star Trucking, \$1,204.78 to Clark Transportation, \$45.88 to Michael Saxton, \$102.70 to Hervey Byrd, and \$3,463.29 to Horace McCaroy.

6. During the first three months of 1981, in disregard of provisions of GO 102-G, Bay Area did not maintain separate subhauler registers, did not furnish subhaulers with copies of rated freight bills, engaged one subhauler, Circle R Trucking, although that subhauler was not authorized to haul by this Commission, and engaged and used subhaulers without having the requisite bond on file with this Commission.

7. The purposes of regulatory justice would best be served in this instance by imposition of a monetary fine rather than by suspension, revocation, alteration, or amendment of Bay Area's operating authorities.

Conclusions of Law

1. The engagement of and payment to the 19 independent contractor subhaulers were matters subject to the provisions of GO 102-G.

2. Bay Area violated PU Code §§ 702 and 1074 by reason of its failure to comply with the provisions of GO 102-G.

3. Bay Area's failure to adhere to the terms of its subhaul agreements with certain of its subhaulers resulted in underpayments of \$14,348.67 to three, and estimated underpayments of an additional \$21,104.58 to 15 others.

4. Bay Area should be required to pay the 18 underpaid subhaulers all amounts underpaid them for their subhaul services performed for this prime carrier during the first three months of 1981.

5. Bay Area should be ordered to cease and desist from further violations.

6. Bay Area should be required to pay a punitive fine under PU Code § 1070 in the amount of \$5,000 as an alternative to the suspension, revocation, alteration, or amendment of its operating authorities. ✓

O R D E R

IT IS ORDERED that:

1. Bay Area Express, Inc. (Bay Area) shall within 30 days after the effective date of this order pay Don Sanders \$7,953.95, Don Crockett \$4,921.85, and Thomas Delivery Service \$1,472.87. Bay Area shall advise the Executive Director of this Commission in writing, certifying the date these payments are made.

2. Bay Area shall within 60 days after the effective date of this order either (1) pay the remaining 15 subhaulers the amounts set forth in Appendix A, or (2) within 30 days after the effective date of this order submit to the Executive Director a separate recomputation for each of those 15 subhaulers, setting forth week by week in tabular form corresponding in detail to the Subhauler Statement form used in this regard during the audit period by Bay Area, starting with each freight bill number, and stating the gross invoiced to Scott Paper Company (including all appropriate surcharges applicable) for that shipment, and indicating the recomputed subhauler gross pertaining to that shipment and invoice to Scott Paper Company. This recomputation shall be accompanied by photo copies of the actual Bay Area invoice to Scott Paper Company applicable to each shipment. In addition, Bay Area shall furnish to each subhauler a week by week summary setting forth the gross amount that should have been paid the subhauler vis-a-vis the amount actually paid him, and indicating the underpayment still due. After staff verification, the Executive Director will advise Bay Area in writing, and the carrier shall thereupon, but still within the 60-day period following the effective date of this order, pay each of the subhaulers listed in Appendix A the amount of the underpayment due him.

3. Bay Area shall within 30 days of the effective date of this order, pay to the Commission a punitive fine in the amount of \$5,000 under PU Code § 1070.

4. Bay Area shall cease and desist from further violations of GO 102, and shall cease paying subhaulers less than the amounts provided by their contracts.

The Executive Director of the Commission shall cause personal service of this order to be made upon Bay Area, and shall cause service by mail to be made upon the 15 subhaulers listed in Appendix A as well as subhaulers Sanders, Crockett, and Thomas Delivery Service. The effective date of this order shall be 30 days after completion of personal service upon Bay Area.

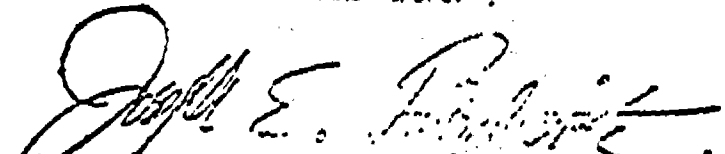
Dated FEB 17 1982, at San Francisco, California.

RICHARD D GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. CREW
Commissioners

Commissioner JOHN E. BRYSON

Present but not participating.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE
COMMISSIONERS.


Joseph E. Bodovanz, Executive Director

APPENDIX A

Bay Area Express Subhaulers and Indicated
Amounts Probably Underpaid

Jack Reed	\$ 5,302.51
Jim Rittman Enterprises	1,280.90
Blueitt Trucking	3,312.60
R&S Drayage, Inc.	132.75
Milton Muchna	759.68
D.L. Jones Trucking	80.87
Gary Smith Trucking	27.14
Circle R. Trucking	1,738.38
Louis A Chavier	270.05
Canadian Truck Lines	401.94
Golden Star Trucking	2,981.11
Clark Transportation	1,204.78
Michael Saxton	45.88
Hervey Byrd	102.70
Horace McCaroy	<u>3,463.29</u>
Total	\$21,104.58

(END OF APPENDIX A)