

Decision 82 09 030 SEP 22 1982**ORIGINAL**

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own )  
motion into the operations, rates, and )  
practices of Kenneth C. Butin and )  
Michael K. Butin, dba M-K Trucking and )  
Capital Lumber Company, a corporation, )  
Charleys Fence Company, a corporation, )  
Marquart-Wolfe Lumber Co., a corpora- )  
tion, Products Sales Inc., aka )  
Fleetwood Western Inc., a corporation, )  
Ransom Lumber Sales, a corporation, )  
Shaw Lumber Company, a corporation, )  
South Bay Redwood Co., a corporation, )  
T & R Lumber Co., a corporation, )  
respondents. )

OII 3  
(Reopened March 3, 1981)

(For appearances see Decision 90384.)

Additional AppearancesJack C. Hamson, for Kenneth C. Butin,  
respondent.Jeffrey B. Thomas, for the Commission  
staff.OPINION ON REOPENING OF OII 3

Decision (D.) 92764 dated March 3, 1981 reopened Order Instituting Investigation (OII) 3 for further hearing for the purpose of determining the reasons Kenneth C. Butin (KCB) and Michael K. Butin (MKB), doing business as M-K Trucking, have failed to comply with certain directives in D.90384, as amended by D.92151, and whether further sanctions should be imposed on them.

Background

The respondent carrier is engaged primarily in the transportation of lumber from northern to southern California.

D.90384 dated June 5, 1979 directed KCB and MKB (Butins) to:

1. Collect \$72,834.46 in undercharges from nine respondent shippers.
2. Pay an undercharge fine in the amount of \$81,154.62.
3. Pay a punitive fine of \$5,000.
4. Pursue all reasonable measures to collect the undercharges.
5. File monthly status reports of the action taken to collect any uncollected undercharges.

The undercharge fine, in addition to the undercharges the Butins were directed to collect, included \$6,185.55 in undercharges they collected from one of the respondent shippers, Marquart-Wolfe Lumber Company (M-Wolfe), while the investigation was in progress and also \$2,134.61 in undercharges which they had collected but had not paid as a fine as required by an undercharge citation served on them on July 16, 1976. The fines were due and payable on or before July 15, 1979. The punitive fine has been paid. The undercharge fine was not paid.

Counsels for the Butins pointed out in a Petition for Modification of D.90384, an amendment to the petition, and various correspondence and reports, that:

1. Informal attempts to collect the undercharges have been unsuccessful.
2. Civil actions have been filed against the individual respondent shippers for collection of the undercharges.
3. The Butins do not have the financial resources to pay the fine until the undercharges are collected.
4. It will take time to conclude the civil actions.

They requested that the time period within which the undercharge fine is to be paid be amended to provide that as undercharges are collected from the individual shipper respondents, the amount so collected shall be paid toward the fine within 30 days of collection.

D.92151 dated August 19, 1980 granted the requested installment basis extension of time for the payment of the amount of the undercharge fine which is based on the \$72,834.46 in undercharges the Butins were directed to collect from the respondent shippers. The decision also extended to September 28, 1980, the time within which the remaining amount of the undercharge fine based on the \$8,320.16 in undercharges already collected by the Butins shall be paid. It further provided that in all other respects D.90384 shall remain in full force and effect.

All of the undercharge fine continued to remain unpaid, and monthly status reports of the uncollected undercharges as required by D.90384 had not been filed since the issuance of D.92151. The Commission staff advised that it had made several calls to the Butins' present attorney and on October 6, 1980 sent a letter to the Butins and their attorney regarding payment of the \$8,320.16 and the filing of monthly status reports. No response was received from either. The staff requested that the matter be reopened.

D.92764 reopened the proceeding for further hearing for the purpose of determining:

- "1. The reason for the failure by Kenneth C. Butin and Michael K. Butin (Butins), doing business as M-K Trucking, to pay the \$8,320.16 portion of the undercharge fine by September 28, 1980 as required by Ordering Paragraph 1.a. of Decision No. 92151.
- "2. The reason for the failure by the Butins to file monthly reports of the current status of the action taken to recover all uncollected undercharges as required by Ordering Paragraph 4 of Decision No. 90384.
- "3. Whether the Butins and their attorney are diligently, and in good faith,

prosecuting the law suits that have been filed against shipper respondents for collections of the undercharges specified in Ordering Paragraph 3 of Decision No. 90384 as specifically required by Ordering Paragraph 2 of Decision No. 92151.

- "4. Whether the Butins' operating authority should be canceled, revoked, or suspended.
- "5. Whether the Butins should be ordered to pay additional penalties.
- "6. Whether the Commission should issue an order to show cause why the Butins should not be held in contempt for failure to comply with Decision No. 90384, as modified by Decision No. 92151.
- "7. Whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction."

#### Hearing

Public hearing in the reopened investigation was held before Administrative Law Judge (ALJ) Arthur M. Mooney in San Francisco on April 10 and December 12, 1981 and January 12, 1982. The matter was submitted on the latter date.

The attorney who represented the Butins at the original hearing in this proceeding has notified the Commission in writing that he has withdrawn as their counsel. Jack C. Hamson is now the attorney for KCB in the matter. MKB is the son of KCB. According to the staff: (1) MKB withdrew from the partnership with his father on September 16, 1980, and the operating authorities both had held were transferred to the father; (2) since that date MKB has not been in the trucking business or held any operating authority from the Commission; and (3) KCB has assumed all liability for the trucking business. Although it may be difficult because of this to now require MKB to comply with the undercharge collection and fine

provisions of D.90384, as amended, the dissolution of the partnership was subsequent to the issuance of this decision and does not excuse him as a respondent in this proceeding.

On the day before the April 10, 1981 hearing, KCB's present attorney notified the ALJ that his client was ill and physically unable to attend the hearing. He also informed the ALJ that he had been advised by KCB that he was having financial difficulties and not to attend the hearing because he could not pay the legal fees for the appearance. The attorney explained that the Commission had canceled KCB's common carrier certificate on March 17, 1981 leaving him with only his permitted authority and that this had caused a drastic reduction in KCB's business. The attorney further stated that he had not brought the complaints he had filed against the nine respondent shippers to trial because he had received no payment from KCB to do so. This was all confirmed by letter from the attorney. During the telephone conversation the ALJ advised the attorney that some representative of the respondent carrier should be in attendance at the hearing. None appeared.

At this hearing, a supervising staff representative of the staff stated that he had also had several similar conversations with KCB's attorney, but it had been his understanding that the attorney would appear. He recommended that the matter be held over to a date to be set so that the Commission's Revenue Requirements Division could investigate KCB's financial condition and an appropriate disposition of the matter could be formulated. Staff counsel stated that if the investigation disclosed that KCB does not have funds to pay his attorney, it might be appropriate to adjust the amount of the undercharge fine accordingly.

No evidence was taken on this date. The staff recommendation to set the matter over to a date to be set was granted.

KCB's attorney did appear at the remaining two hearings. KCB did not attend. Evidence, arguments, and recommendations were presented by both the staff and the attorney at these hearings.

Staff Evidence

The supervising transportation representative testified as follows regarding the current status of the undercharge fine and conversations he had had with KCB's attorney:

1. As of December 21, 1981 none of the undercharge fine has been paid to the Commission, and other than March 27, 1980 and April 24, 1981, no status reports have been received from KCB or his attorney.
2. He advised the attorney on several occasions to request a change in the reporting requirements from monthly to every six months. This was not done.
3. The attorney informed him that undercharges had been collected from two of the nine respondent shippers, \$1,529.55 from Shaw Lumber Company (Shaw) and \$3,188.52 from Ramson Lumber Sales (Ramson).
4. The attorney advised that: (1) the money from the two collections is being held in his trust account because he has not been paid for his legal services by KCB; and (2) because of this nonpayment and the costs involved, suits he had filed in southern California against the seven respondent shippers who have not paid are not being actively pursued.

Following is a summary of the evidence presented by a financial examiner of the Commission's Revenue Requirements Division:

1. With the collection of the \$4,718.07 from Shaw and Ramson, \$68,116.39 in undercharges remain to be collected from the other seven respondent shippers. With the amount collected from these two respondent shippers plus the \$6,185.55 collected from M-Wolfe while the investigation was in progress and the \$2,134.61 collected in connection with the July 16, 1976 undercharge citation, a total of \$13,038.23 of the undercharges on which the \$81,154.62 undercharge fine was based have been

collected. None of this amount has been applied toward this fine. The total amount remains unpaid.

2. As shown in Exhibit RH-2, for the year 1980 the respondent carrier had gross income of \$407,778.85, expenses of \$384,643.54, and a net income of \$23,135.31 before income taxes. The 1980 cash flow was \$39,078.59. For the first six months of the year the business was a partnership of KCB and MKB. For the last six months it was a sole proprietorship of KCB.
3. As shown in Exhibit RH-3, for the first 11 months of 1981, the respondent carrier had income of \$383,442.11, expenses of \$381,483.30, and a net income of \$1,958.81 before income taxes. The cash flow was \$20,377.99. \$6,500 from the sale of trailers and the \$4,718.07 in undercharges collected from Shaw and Ramson were not recorded as income on the carrier's books for this period.
4. The carrier operated one truck in 1980, two trucks the first half of 1981, and one truck thereafter. All driving was done by employees. Most, if not all, hauling was from northern to southern California. The major expense items for both years were purchased transportation (subhaulers), which exceeded \$200,000 each year, and fuel. The witness verified these two items and was of the opinion that the other expense items listed in his Exhibits RH-2 and -3 were reasonable.
5. KCB's business records were maintained separately from his personal finances. KCB would not answer any questions or make any disclosures for the financial examiner regarding his personal finances. However, KCB did inform the witness that he does not have the money to pay his attorney the legal fees to litigate the cases against the seven respondent shippers who have not paid and that he would rather relinquish his authority than pay the undercharge fine.

6. The witness was told by KCB's attorney that he would not litigate the seven court cases unless his legal fees were assured.
7. It is the financial examiner's opinion that the respondent carrier has the financial ability to make some sort of incremental payments to the attorney and toward the portion of the undercharge fine based on the undercharges that have already been collected.
8. The respondent carrier's accounting records are not kept in accordance with the system of accounts prescribed by the Commission, and his annual report for the business was based on a six-month period only.
9. Respondent shipper T & R Lumber Company (T&R) has been bought by respondent shipper Charleys Fence Company (Charleys).
10. KCB is continuing to occasionally do business with the following respondent shippers: (1) M-Wolfe; (2) Shaw; (3) South Bay Redwood Company (South Bay); (4) Product Sales, Inc., aka Fleetwood Western Inc. (Product); and (5) Ramson. The amount of hauling for each is about a truckload a month.

Evidence by KCB's Attorney

The following evidence was presented by the attorney for

KCB:

1. The reason no reports have been filed with the Commission since April 24, 1981 is because there was nothing new to report.
2. The attorney does not know what has happened to the \$8,320.16 in undercharges collected prior to the initial decision, D.90384. This money has never been in his possession.
3. Copies of the demand letters sent to all respondent shippers on July 9, 1979 by KCB's former attorney cannot be located. A response was received from



one of the shippers, and the former attorney advised the Commission by letter dated September 5, 1979 that the demand letters had been sent.

4. The nine complaints for money have been filed in various southern California courts. Two are in superior courts and the balance are in municipal courts. Service has been made on some defendants. It has been attempted on the others. The attorney will resubmit these to Attorney's Messenger Service of Los Angeles to effect service. M-Wolfe and South Bay have both filed general denial answers. Copies of the documents are included in Exhibit RH-6.
5. The attorney was informed by his client that: (1) he is very ill with cancer; (2) the substantial decline in the northern California lumber industry has had a drastic adverse impact on his business and financial conditions; and (3) as a result, he does not have funds to pay the legal fees for prosecuting the complaints.
6. According to the attorney's Exhibit RH-4, his legal fees to date total \$3,929.50. The specific items shown in the exhibit are: (1) a \$300 fee for preparing and handling each of the nine complaints for a total of \$2,700; (2) \$222 for filing fees; (3) \$103.50 in service costs; and (4) \$900 for preparing for and appearing at the hearings in this matter before the Commission on December 12, 1981 and January 12, 1982. The filing and service fees were paid by the attorney. He has not rendered a statement for this to his client.
7. The \$4,718.07 in undercharges collected from Shaw and Ramson were paid by KCB to the attorney for his legal fees to date. No other payment has been made to the attorney by KCB. The attorney has deposited this money in his trust account with the Savings Bank of Mendocino County in Ukiah where his

office is located. A copy of the latest statement of this account is included in Exhibit RH-5.

8. The attorney has not proceeded further with the seven outstanding cases since there is little, if any, possibility that he will receive any further compensation from KCB for the time, effort, and expense involved. In this connection, each of the cases could involve various motions and demurrers, answers, pretrial conferences, court appearances, and other procedural matters. Also, all are in various judicial districts in southern California. This would mean many long trips and a substantial amount of time away from the office.
9. It is the attorney's opinion that the only logical manner in which the seven court cases could be further advanced by him would be on a contingency fee based on any further collections that might result. He considers 40%, which would include all costs, to be a reasonable amount. However, he would not proceed on this basis unless he had Commission approval.

#### Staff Recommendation

The following recommendations were made by staff counsel:

1. KCB should be directed to pay in monthly installments of \$500 each the \$8,320.16 portion of the undercharge fine that was based on the \$2,134.61 he collected in connection with the 1976 citation and the \$6,185.55 he collected from M-Wolfe prior to D.90384. The first payment should be due 30 days after the effective date of the order in this matter, and each subsequent payment should be due at 30-day intervals.
2. A contingency fee basis should be authorized for the uncollected undercharges. As these undercharges are collected, KCB's attorney should, after retaining his share for advancing the seven suits, pay the balance of any

amounts as collected directly to the Commission toward the undercharge fine. KCB should remain liable to the Commission for the full amount of the fine notwithstanding the fact that his attorney is being compensated from the collections.

3. At least part of the \$4,718.07 collected from Shaw and Ramson, which amount is now in KCB's attorney's trust account, should be paid to the Commission toward the undercharge fine within 30 days after the effective date of this order.
4. If there are any defaults by KCB in the \$500 per month payments and/or the payment of the amount ordered from his attorney's trust account is not made within the required time, KCB's contract carrier and agricultural carrier permits should be automatically suspended without further hearing until KCB is back on schedule with his payments and/or the required payment has been made from his attorney's trust account.

Staff counsel pointed out that the Commission has the choice of revoking KCB's operating authority, in which case it might not recover any of the fine based on the uncollected undercharges, or approving the contingency fee arrangement whereby it would receive a percentage of the undercharges collected. He stated that probably a 40% contingency fee basis for KCB's attorney would be appropriate. He asserted that by so doing the original order would be preserved to the extent possible and the respondent shippers who have not paid the undercharges KCB was directed to collect would be prevented from escaping any liability for their underpayments.

Staff counsel recommended that any order authorizing a contingency arrangement and deferring part of the undercharges should be tightly drawn around the facts in this record to preclude any other carriers from expecting this type of treatment in the future unless similarly extreme conditions were present.

KCB's attorney took no exception to the staff recommendation. He stated that he will contact his client and execute a written contingency fee contract with him.

Discussion


The background and evidence are set out in detail above and require no detailed discussion.

According to the evidence KCB has been the sole owner of the trucking business since September 18, 1980 and has assumed all responsibility for it. His son, MKB, has had no connection with any business subject to our jurisdiction since then. As stated, because of this it may be difficult to require MKB to comply with the undercharge and collection provisions of D.90384, as amended. KCB is now the primary person responsible for the undercharge fine. He is in poor health. The financial condition of his business is not good. Although there is no specific evidence regarding KCB's personal financial position, both the financial examiner and his attorney testified that he informed them that he does not have the financial resources to pay any legal expenses. From this it is reasonable to presume that his personal financial condition is not substantial.

We will adopt the staff-recommended payment schedule of \$500 per month for the payment by KCB of the \$8,320.16 portion of the undercharge fine based on the undercharges he collected in connection with 1976 citation and from M-Wolfe while the investigation was in progress. This is money that should have been paid to the Commission toward undercharge fines. This he did not do. Instead he retained the money for his own use ignoring the fines. Such action will not be tolerated.

KCB's attorney will take no further action to collect the \$68,116.39 in unpaid undercharges involved in the seven court actions unless some arrangement is made for his expenses and legal fees. Based on the specific facts and circumstances before us, the contingency fee method suggested by the staff and KCB's attorney is the most logical approach for handling this situation. According to the record it appears that all, or at least most, of these undercharges may be collected if the court actions are processed. At least some of the fines based on these uncollected undercharges will be recovered if the attorney is successful. Because the court proceedings are all in various southern California courts and the time and expenses that would be involved are unknown, it would be extremely difficult to formulate a fee on any other basis. The 40% contingency fee basis referred to as a possibility by the staff and recommended by KCB's attorney would be appropriate. As pointed out by the staff, this will preserve the original order to the extent possible and prevent the seven respondent shippers from escaping any liability for the unlawful undercharges.

We will direct KCB to file or have his attorney file with the Commission within 30 days after the effective date of this decision a copy of the contingency fee contract they have executed. The contract should include the following provisions:

1. The attorney may retain as compensation for his expenses and legal fees 40% of the money he collects for prosecuting the court actions for undercharges filed on behalf of KCB against (1) Capital Lumber Company (Capital); (2) Charleys; (3) M-Wolfe; (4) Pacific-Madison Lumber Company (Pacific); (5) Product; (6) South Bay; and (7) T&R, all of which are corporations.
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2. All moneys recovered in the seven court actions shall be paid to KCB's attorney, and he shall immediately upon receipt of any such payments remit 60% of the amount collected to the Commission as payment toward the undercharge fine imposed on his client by D.90384, as amended.
3. All seven court proceedings shall be pursued promptly, diligently, and in good faith.

It is noted that the civil action filed against M-Wolfe seeks a judgment of \$8,915.66. This amount is not correct. While D.90384 did find that KCB undercharged M-Wolfe this amount, Finding 8 of the decision pointed out that the respondent shipper paid him \$6,185.55 of this amount substantially after the transportation was performed and after the investigation was commenced and that for this reason it should be included in the undercharge fine. There is, therefore, \$2,730.11 in undercharges remaining to be collected from M-Wolfe, and KCB's attorney should amend the complaint against this respondent shipper accordingly. Also, the financial examiner pointed out that Charleys has purchased T&R. It is expected that the attorney will make any necessary amendments to these two complaints.

The payment of the \$4,718.07 in undercharges by Shaw and Ramson was the result of the court actions filed against these two respondent shippers by KCB's attorney. As explained by the attorney, this money was paid by KCB to him for his legal fees to date for preparing, filing, and handling the complaints against all nine respondent shippers and appearing at two hearings in the Reopening of OII 3. The money is in the attorney's trust account. This again was money that should have been applied toward the undercharge fine but was not. The attorney has certainly had some expense in handling the Shaw and Ramson complaints and for the two appearances before the Commission. Unless he can retain some of this money he will receive

no compensation for these efforts. We agree with the staff that some of this money should be paid toward the undercharge fine. Again based on the particular facts and circumstances in this proceeding, the same procedure should be applied to the collected Shaw and Ramson undercharges as will be applied to the uncollected undercharges in the other seven court actions. We will, therefore, excuse 40% of this amount of the undercharge fine and require that the remaining 60% be paid to the Commission toward the fine within 30 days after the effective date of this decision. The result of this is that the attorney will retain \$1,887.23 and \$2,830.84 will be paid toward the fine.

Although KCB's attorney will withhold 40% of the undercharges collected from Shaw and Ramson and those that may be recovered in the seven court actions, this does not excuse KCB from any part of his obligation to pay the full amount of the undercharge fine. He shall continue to remain liable for the amount retained by his attorney. We have not previously allowed carriers to avoid payment of fines because of attorney fees incurred in legal action to recover undercharges. In this decision we do not depart from that policy. We merely permit KCB to defer payment of part of the undercharge fine in order that the undercharges may be collected. To allow a carrier to escape payment of attorney fees under the contingency fee plan authorized in this decision would only encourage carriers to plead poverty as an excuse for not pursuing undercharge actions. That is a result we cannot tolerate. Therefore KCB remains liable for the full amount of the undercollection. We also stress that we have permitted the contingency fee agreement to be used in this case only as a last resort to ensure that no shippers have an unlawful windfall. In the absence of the conviction of our staff that KCB could not otherwise pursue the undercharge actions, we would not approve the contingency fee plan.

Based on the \$1,887.23 the attorney will withhold from the Shaw and Ramson collections and the \$27,246.56 he will retain from the collections in the seven court actions, if all are successful, the total amount of the 40% attorney fee would be \$29,133.78. For the reasons stated above, we will authorize KCB to pay this amount in \$500 monthly installments which will be added to those recommended by the staff for repayment of the \$8,320.16 in undercharges KCB has collected and not paid toward the undercharge fine as directed. As a result, the total amount KCB will be required to pay in monthly installments is \$37,453.83. His attorney will pay directly toward the fine \$43,700.17, \$2,830.84 immediately from the collections from Shaw and Ramson in his possession and the balance as collections are made from the defendants in the seven court proceedings.

Ordering Paragraph 4 of D.90384 requires KCB to file a monthly status report of undercharges remaining to be collected. Since the undercharges remaining to be collected are those involved in the seven court actions KCB's attorney is to progress, quarterly status reports will be adequate for the future. The reporting requirement will, therefore, be changed to every third month with the first report due 30 days after the effective date of this decision. KCB and his attorney are cautioned that a report must be filed on each due date irrespective of whether anything new has occurred since the last report. In such circumstances, the report can so state.

We agree with the staff that KCB's operating authority should be automatically suspended during any periods that: (1) he is in default in the \$500 monthly payments; and/or (2) the required payment to the Commission from his attorney's trust fund is in default. We will also apply the automatic suspension provision to any period that a status report has not been filed within 15 days after the due date, and such suspension shall continue until the report is filed.

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Our decision here is based on the particular unique facts and circumstances in this proceeding. It is not to be considered a precedent for any future proceeding that may come before us.

Because there is an immediate need for the further modification of D.90384, as amended, the following order will be made effective on the date signed.

Findings of Fact

1. KCB now operates as a sole proprietorship under contract carrier and agricultural carrier permits. Prior to September 16, 1980 the trucking business was operated as a partnership by KCB with his son, MKB. On this date: (1) the partnership was dissolved; (2) MKB entirely withdrew from the business and has held no part of any operating authority from the Commission since then; and (3) KCB assumed all responsibility and liability for the business.

2. Although it may be difficult because of the dissolution of the partnership to now require MKB to comply with the undercharge collection and fine provisions of D.90304, as amended, this was subsequent to the decision and does not excuse him as a respondent in this proceeding. (While it may be, based on this record, that KCB is the primary, if not the only, party whom the Commission can effectively require to comply with the undercharge collection and fine directives, the following order will be directed to him and respondent MKB.)

3. D.90384, as amended, directed KCB and MKB, among other things, to:

- a. Collect \$72,834.46 in undercharges from nine respondent shippers.
- b. To pay an undercharge fine of \$81,154.62 in accordance with the following schedule: (1) \$8,320.16, which was based on undercharges already collected by KCB, to be paid by September 21, 1980; and (2) the balance, which was based on the undercharges ordered to be

collected, to be paid in installments as the undercharges are collected with each installment based on the amount collected and due 30 days after collection.

- c. File monthly status reports of the undercharges remaining to be collected.

4. None of the undercharge fine has been paid to date.

5. No monthly status report of undercharges remaining to be collected has been filed since April 24, 1981.

6. Complaints were filed in various judicial districts in southern California by KCB's attorney in January 1980 against each of the nine respondent shippers for the undercharges ordered to be collected. Two were filed in superior courts and the remaining were filed in municipal courts.

7. As a result of the filing of the court actions against respondent shippers Shaw and Ramson, these two have paid the \$4,718.07 KCB was directed to collect from them. This money was paid by KCB to his attorney for legal fees and is in the attorney's trust account. The legal fees were for preparing, filing, and handling the court actions to date and for appearing two days at the hearing in this reopened proceeding. No other money has been paid by KCB to his attorney for these legal services. ✓

8. KCB is in ill health. The net income from the trucking business before income taxes was \$23,135.31 in 1980 and declined to \$1,958.81 for the first 11 months of 1981.

9. KCB does not have the financial ability to pay the undercharge fine or any substantial part of it in a single payment. He does have the ability to make some incremental payment toward the \$8,320.16 portion of the undercharge fine which was based on previously collected undercharges and which he was directed to pay by September 21, 1980. A \$500 per month payment by KCB toward this portion of the fine is appropriate.

10. KCB's attorney will not further advance the court actions filed against the following seven respondent shippers for the remaining uncollected undercharges shown for each unless his costs and legal fees for this are assured:

Shipper	Amount of Uncollected Undercharges
Capital	\$ 3,538.70
Charleys	5,264.56
M-Wolfe	2,730.11
Pacific	3,415.78
Products	23,694.50
South Bay	23,224.55
T&R	6,248.19
Total	\$68,116.39

11. It appears that all, or at least most, of the undercharges referred to in Finding 10 could be collected if the seven court actions are litigated.

12. KCB does not have the financial ability to make any meaningful payment to his attorney for the expenses and legal fees for litigating the court actions for undercharges referred to in Finding 10.

13. KCB's attorney is willing to process the seven remaining court actions on a contingency arrangement with his client providing for a fee of 40% of the amounts of money recovered. ✓

14. It is in the public interest that the essential litigation of each of the seven remaining court actions be continued to conclusion.

15. Based on the unique facts and circumstances here, the contingency fee arrangement referred to in Finding 13 is appropriate. It should provide that the attorney may retain 40% of all undercharge moneys recovered in the seven court actions and that the remaining 60% shall be remitted to the Commission as payment toward the undercharge fine.

16. In accordance with the directive referred to in Finding 3.b.(2), the \$4,718.07 in undercharges collected from Shaw and Ramson and referred to in Finding 7 should have been paid toward the undercharge fine.

17. Since the collections from Shaw and Ramson were the result of two of the court actions filed by KCB's attorney, these two complaints and the money collected should be subject to the contingency arrangement referred to in Finding 15. (Under this arrangement the attorney will retain \$1,887.23, and he will pay \$2,830.84 to the Commission toward the undercharge fine.)

18. Although KCB's attorney will retain 40% of the undercharge collections referred to in Findings 15 and 17 for his expenses and fees, this does not excuse KCB from any part of his obligation to pay the entire amount of the undercharge fine imposed on him by D.90384, as amended.

19. Because of KCB's ill health and meager financial condition, he should be authorized to pay the \$29,133.78 portion of the fine represented by the undercharge collections retained by his attorney in monthly installments of \$500 each.

Conclusions of Law

1. D.90384, as amended by D.92151, should be further modified as provided in the following order.

2. Because there is an immediate need to advance court proceedings under the terms of the further modification, the following order should be made effective on the date signed.

ORDER ON REOPENING OF OII 3

IT IS ORDERED that:

1. The fine of \$81,154.32 imposed on Kenneth C. Butin (KCB) and Michael K. Butin (MKB) by Ordering Paragraph 2 of D.90384, as amended, and the time period within which it shall be paid are modified as follows:

- a. \$37,453.83 of the fine shall be paid in monthly installments as follows:  
74 payments of \$500 each and a final payment of \$453.83 with the first payment due 30 days after the effective date of this order and each subsequent payment due on the same day of each succeeding month until all 75 payments have been made.
- b. KCB may execute a 40% contingency fee contract with his attorney for the collection of the \$72,834.46 in undercharges ordered to be collected by Ordering Paragraph 3 of D.90384, as amended. The contract shall require that all undercharge moneys collected be paid directly to the attorney and that all court actions filed against respondent shippers for undercharges shall be litigated promptly, diligently, and in good faith to conclusion. The contingency fee contract shall not alter KCB's duty to pay the full amount of the undercharge fine.
- c. Under the contingency fee contract referred to in the above paragraph, the \$43,700.68 of the fine to be paid from the nine court actions shall be paid as follows:
  - (1) \$2,830.84 of the undercharges collected from respondent shippers Ramson Lumber Sales and Shaw Lumber Company, both corporations, and in the trust account of KCB's attorney shall be paid to the Commission toward the fine within 30 days after the effective date of this order.
  - (2) As undercharges are collected from each of the remaining seven respondent shippers from whom payment has not as yet been received, the 60% of the amount collected shall be immediately paid to the Commission toward the fine.

2. The requirement in Ordering Paragraph 4 of D.90384, as amended, that a report of uncollected undercharges be filed each month is modified to require that such reports be filed quarterly with the first report due 30 days after the effective date of this order.

3. In the event of any default for a period exceeding 15 days in any of the requirements set forth in Ordering Paragraphs 1 and/or 2 above, any operating authority held by either or both Butins shall be automatically suspended until the default has been remedied.

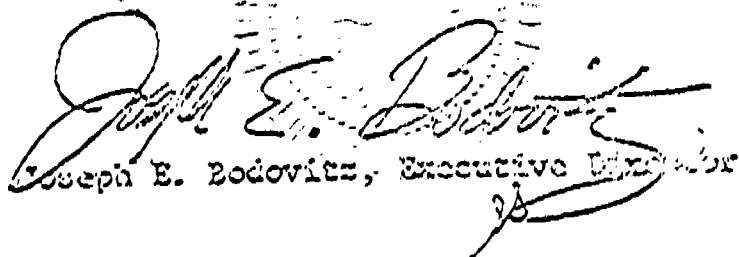
4. Except as modified here, D.90384, as amended, shall remain in full force and effect.

This order is effective today.

Dated SEP 22 1982, at San Francisco, California.

JOHN E. ERYSON  
President  
RICHARD D. GRAVELLE  
LEONARD M. GRIMES, JR.  
VICTOR CALVO  
PRISCILLA C. CREW  
Commissioners

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

  
Joseph E. Bodovitz, Executive Director

Staff Evidence

The supervising transportation representative testified as follows regarding the current status of the undercharge fine and conversations he had had with KCB's attorney:

1. As of December 21, 1981 none of the undercharge fine has been paid to the Commission, and other than March 27, 1980 and April 24, 1981, no status reports have been received from KCB or his attorney.
2. He advised the attorney on several occasions to request a change in the reporting requirements from monthly to every six months. This was not done.
3. The attorney informed him that undercharges had been collected from two of the nine respondent shippers, \$1,529.55 from Shaw Lumber Company (Shaw) and \$3,188.52 from Ramson Lumber Sales (Ramson).
4. The attorney advised that: (1) the money from the two collections is being held in his trust account because he has not been paid for his legal services by KCB; and (2) because of this nonpayment and the costs involved, suits he had filed in southern California against the seven respondent shippers who have not paid are not being actively pursued.

Following is a summary of the evidence presented by a financial examiner of the Commission's Revenue Requirements Division:

1. With the collection of the \$4,718.07 from Shaw and Ramson, \$68,116.39 in undercharges remain to be collected from the other seven respondent shippers. With the amount collected from these two respondent shippers plus the \$6,185.55 collected from M-Wolfe while the investigation was in progress and the \$2,134.61 collected in connection with the July 16, 1976 undercharge citation, a total of \$13,038.23 of the undercharges on which the \$81,154.62 undercharge fine was based have been

collected. None of this amount has been applied toward this fine. The total amount remains unpaid.

2. As shown in Exhibit RH-2, for the year 1980 the respondent carrier had gross income of \$407,778.85, expenses of \$384,643.54, and a net income of \$23,135.31 before income taxes. The 1980 cash flow was \$39,078.59. For the first six months of the year the business was a partnership of KCB and MKB. For the last six months it was a sole proprietorship of KCB.
3. As shown in Exhibit RH-3, for the first 11 months of 1981, the respondent carrier had income of \$383,442.11, expenses of \$381,483.30, and a net income of \$1,958.81 before income taxes. The cash flow was \$20,377.99. \$6,500 from the sale of trailers and the \$4,718.07 in undercharges collected from Shaw and Ramson were not recorded as income on the carrier's books for this period.
4. The carrier operated one truck in 1980, two trucks the first half of 1981, and one truck thereafter. All driving was done by employees. Most, if not all, hauling was from northern to southern California. The major expense items for both years were purchased transportation (subhaulers), which exceeded \$200,000 each year, and fuel. The witness verified these two items and was of the opinion that the other expense items listed in his Exhibits RH-2 and -3 were reasonable.
5. KCB's business records were maintained separately from his personal finances. KCB would not answer any questions or make any disclosures for the financial examiner regarding his personal finances. However, KCB did inform the witness that he does not have the money to pay his attorney the legal fees to litigate the cases against the seven respondent shippers who have not paid and that he would rather relinquish his authority than pay the undercharge fine.

SS



6. The witness was told by KCB's attorney that he would not litigate the seven court cases unless his legal fees were assured.
7. It is the financial examiner's opinion that the respondent carrier has the financial ability to make some sort of incremental payments to the attorney and toward the portion of the undercharge fine based on the undercharges that have already been collected.
8. The respondent carrier's accounting records are not kept in accordance with the system of accounts prescribed by the Commission, and his annual report for the business was based on a six-month period only.
9. Respondent shipper T & R Lumber Company (T&R) has been bought by respondent shipper Charleys Fence Company (Charleys).
10. KCB is continuing to occasionally do business with the following respondent shippers: (1) M-Wolfe; (2) Shaw; (3) South Bay Redwood Company (South Bay); (4) Product Sales, Inc., aka Fleetwood Western Inc. (Product); and (5) Ramson. The amount of hauling for each is about a truckload a month.

Evidence by KCB's Attorney

The following evidence was presented by the attorney for KCB:

1. The reason no reports have been filed with the Commission since April 24, 1981 is because there was nothing new to report.
2. The attorney does not know what has happened to the \$8,320.16 in undercharges collected prior to the initial decision, D.90384. This money has never been in his possession.
3. Copies of the demand letters sent to all respondent shippers on July 9, 1979 by KCB's former attorney cannot be located. A response was received from

SS

KCB's attorney took no exception to the staff recommendation. He stated that he will contact his client and execute a written contingency fee contract with him.

Discussion

The background and evidence are set out in detail above and require no detailed discussion.

According to the evidence KCB has been the sole owner of the trucking business since September 18, 1980 and has assumed all responsibility for it. His son, MKB, has had no connection with any business subject to our jurisdiction since then. As stated, because of this it may be difficult to require MKB to comply with the undercharge and collection provisions of D.90384, as amended. KCB is now the primary person responsible for the undercharge fine. He is in poor health. The financial condition of his business is not good. Although there is no specific evidence regarding KCB's personal financial position, both the financial examiner and his attorney testified that he informed them that he does not have the financial resources to pay any legal expenses. From this it is reasonable to presume that his personal financial condition is not substantial.

SS We will adopt the staff-recommended payment schedule of \$500 per month for the payment by KCB of the \$8,320.16 portion of the undercharge fine based on the undercharges he collected in connection with 1976 citation and from M-Wolfe while the investigation was in progress. This is money that should have been paid to the Commission towards undercharge fines. This he did not do. Instead he retained the money for his own use ignoring the fines. Such action will not be tolerated.

KCB's attorney will take no further action to collect the \$68,116.39 in unpaid undercharges involved in the seven court actions unless some arrangement is made for his expenses and legal fees. Based on the specific facts and circumstances before us, the contingency fee method suggested by the staff and KCB's attorney is the most logical approach for handling this situation. According to the record it appears that all, or at least most, of these undercharges may be collected if the court actions are ~~progressed~~ <sup>successful</sup> SS  
At least some of the fine ~~based~~ on these uncollected undercharges will be recovered if the attorney is successful. Because the court proceedings are all in various southern California courts and the time and expenses that would be involved are unknown, it would be extremely difficult to formulate a fee on any other basis. The 40% contingency fee basis referred to as a possibility by the staff and recommended by KCB's attorney would be appropriate. As pointed out by the staff, this will preserve the original order to the extent possible and prevent the seven respondent shippers from escaping any liability for the unlawful undercharges. SS

We will direct KCB to file or have his attorney file with the Commission within 30 days after the effective date of this decision a copy of the contingency fee contract they have executed. The contract should include the following provisions:

- SS
1. The attorney may retain as compensation for his expenses and legal fees 40% of the money he collects for prosecuting the court actions for undercharges filed on behalf of KCB against (1) Capital Lumber Company (Capital); (2) Charleys; (3) M-Wolfe; (4) Pacific-Madison Lumber Company (Pacific); (5) Product; (6) South Bay; and (7) T&R, all of ~~whom~~ <sup>which</sup> are corporations.

collected, to be paid in installments as the undercharges are collected with each installment based on the amount collected and due 30 days after collection.

- c. File monthly status reports of the undercharges remaining to be collected.

4. None of the undercharge fine has been paid to date.

5. No monthly status report of undercharges remaining to be collected has been filed since April 24, 1981.

6. Complaints were filed in various judicial districts in southern California by KCB's attorney in January 1980 against each of the nine respondent shippers for the undercharges ordered to be collected. Two were filed in superior courts and the remaining were filed in municipal courts.

7. As a result of the filing of the court actions against respondent shippers Shaw and Ramson, these two have paid the \$4,718.07 KCB was directed to collect from them. This money was paid by KCB to his attorney for legal fees and is in the attorney's trust account. The legal fees were for preparing, filing, and handling the court actions to date and for appearing two days at the hearing in this reopened proceeding. No other money has been paid by KCB to his attorney for these legal services.

8. KCB is in ill health. The net income from the trucking business before income taxes was \$23,135.31 in 1980 and declined to \$1,958.81 for the first 11 months of 1981.

9. KCB does not have the financial ability to pay the undercharge fine or any substantial part of it in a single payment. He does have the ability to make some incremental payment toward the \$8,320.16 portion of the undercharge fine which was based on previously collected undercharges and which he was directed to pay by September 21, 1980. A \$500 per month payment by KCB toward this portion of the fine is appropriate.

10. KCB's attorney will not further advance the court actions filed against the following seven respondent shippers for the remaining uncollected undercharges shown for each unless his costs and legal fees for this are assured:

<u>Shipper</u>	<u>Amount of Uncollected Undercharges</u>
Capital	\$ 3,538.70
Charleys	5,264.56
M-Wolfe	2,730.11
Pacific	3,415.78
Products	23,694.50
South Bay	23,224.55
T&R	6,248.19
Total	\$68,116.39

11. It appears that all, or at least most, of the undercharges referred to in Finding 10 could be collected if the seven court actions are litigated.

12. KCB does not have the financial ability to make any meaningful payment to his attorney for the expenses and legal fees for litigating the court actions for undercharges referred to in Finding 10.

13. KCB's attorney is willing to ~~progress~~ <sup>proceed</sup> the seven remaining court actions on a contingency arrangement with his client providing for a fee of 40% of the amounts of money recovered. SS

14. It is in the public interest that the essential litigation of each of the seven remaining court actions be continued to conclusion.

15. Based on the unique facts and circumstances here, the contingency fee arrangement referred to in Finding 13 is appropriate. It should provide that the attorney may retain 40% of all undercharge moneys recovered in the seven court actions and that the remaining 60% shall be remitted to the Commission as payment toward the undercharge fine.