

Decision ~~83-01-008~~ January 12, 1983

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 Frank F.
Cancilla, Jr., dba Frank Cancilla
Trucking, and Potlatch Corporation,
a Maryland corporation.

OII 82-08-03
(Filed August 18, 1982)

Frank Cancilla, Jr., for himself,
respondent.
Ralph M. Davisson, Attorney at Law, for
Potlatch Corporation, respondent.
Javier Plasencia, Attorney at Law, for the
Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the highway carrier operations, rates, and practices of Frank F. Cancilla, Jr. (Cancilla), dba Frank Cancilla Trucking, and into Potlatch Corporation (Potlatch) pertaining to 12 specified shipments transported by Cancilla for Potlatch during 1981. The Order Instituting Investigation (OII) requires a determination of the following:

- "1. Whether respondent, Frank Cancilla Trucking, has violated Section 494 of the Public Utilities Code by failing to assess and collect from respondent Potlatch Corp. the applicable rates and charges set forth in Transition Tariff 2.
- "2. Whether respondent Potlatch Corp. has paid Frank Cancilla Trucking less than the applicable rates and charges.

- "3. Whether, in the event sums less than said applicable rates and charges are found to have been charged, collected, or received, a fine in the amount of such undercharges should be imposed upon respondent Frank Cancilla Trucking pursuant to Section 2100 of the Public Utilities Code.
- "4. Whether respondent Frank Cancilla Trucking should be ordered to collect from respondent Potlatch Corp. the difference between the charges actually received and the applicable rates and charges.
- "5. Whether any or all of respondent Frank Cancilla Trucking's operating authority should be canceled, revoked, or suspended, or in the alternative, whether a fine should be imposed pursuant to Section 1070 of the Public Utilities Code.
- "6. Whether respondent Frank Cancilla Trucking should be ordered to cease and desist from any unlawful operations or practices.
- "7. Whether any other order or orders that may be appropriate should be enacted in the lawful exercise of the Commission's jurisdiction."

A hearing was held in San Francisco on October 7, 1982, before Administrative Law Judge Pilling.

History of the Proceeding

In September 1981, a staff member of the Commission's Transportation Division in a routine audit of Cancilla's shipping records found 12 shipments Cancilla handled for Potlatch which appeared to have been incorrectly rated. The staff member sent

copies of the shipping documents pertaining to the 12 shipments (Exhibit 1) to a Commission transportation analyst who concluded that the shipments had been underrated (Exhibit 4). Based on this conclusion, the Commission issued Cancilla an undercharge citation for \$3,804.92 covering the 12 shipments. A Commission staff (staff) member personally served the citation on Cancilla on or about January 26, 1982 (Exhibit 2). The citation required Cancilla to respond to it, but Cancilla did not respond, even though the staff sent letters to him on March 19, 1981 and June 2, 1981 reminding him of his failure to respond and warning him that a formal proceeding could be instituted against him if he continued to fail to respond to the citation (Exhibit 2).

Carrier Profile

Cancilla was issued a highway contract carrier permit in 1949 and an agricultural carrier permit in 1979. On April 30, 1980 he was issued a highway common carrier certificate under the conversion privileges of Public Utilities (PU) Code § 1063.5. Also, on April 30, 1980 he adopted, as his highway common carrier tariff, Commission Minimum Rate Tariff (MRT) 2,¹ Exception Ratings Tariff (ERT) 1, and Distance Table (DT) 8 (Exhibit 5). Cancilla employs four drivers, operates five tractors and eight trailers, and for the calendar year 1981 had gross operating revenues of \$459,000. In 1976 Cancilla was cited by the Commission for undercharging and for failing to timely collect freight charges. He responded to the citations by paying fines, respectively, of \$2,227.46 and \$250 (Exhibit 6). The record does not reveal which shipper was involved in the undercharge citation.

¹ Renamed Transition Tariff (TT) 2.

Cancilla's Alleged Violations

The staff introduced evidence (Exhibit 1) showing that Cancilla transported 12 truckload shipments in his highway common carrier operations between May 4, 1981 and June 9, 1981 for Potlatch from its Pomona plant to Berkeley Farms in Emeryville. Each shipment consisted of "cases, boxes fibreboard other than corrugated, K.D. flat" (new milk cartons). Each shipment was assessed a flat rate of \$545 and each charge was paid by Potlatch. There was a note on each of the freight bills or bills of lading covering the 12 shipments that the shipments were being rated under Item 721.5, but the documents did not name the tariff in which the item was to be found. MRT 2 and TT 2 do not contain an Item 721.5. Neither do those tariffs contain a commodity rate covering new milk cartons nor a class rate producing a charge of \$545 for new milk cartons.

The staff contends the shipments should have been rated in accordance with TT 2, Item 508 (or Item 508.2 depending on the weight of the shipment) based on the Class 35 rating in Item 29940, National Motor Freight Classification 100, then in effect, plus a surcharge from Supplement 154 and 139 to TT 2 (Exhibit 4). Shipments moving under the Item 508 rate in TT 2 would result in a charge between \$838.77 and \$962.84 depending on the weight of the shipment. Total undercharges for all 12 shipments, as calculated by the staff, are \$3,804.92 (Exhibit 4).

The staff recommends that Cancilla be ordered to collect the \$3,804.92 undercharges from Potlatch and that Cancilla be fined in that amount. The staff also recommends that a punitive fine of \$1,000 be levied on Cancilla and that he be ordered to cease and desist from violating applicable tariff rates and rules.

The staff witness was asked why the rates in TT 2, Item 898, Volume Incentive Service (Exhibit 8), were not used in calculating the undercharges. The use of those rates, which are less than the rate in Item 508, would reduce the amount of undercharges. The staff witness pointed out that Item 898 required the shipper to annotate the bill of lading before Item 898 rates could apply. Since none of the bills of lading covering the subject shipments were annotated as required by that item, the rates in that item could not apply to any of the shipments. Item 898 requires the bill of lading to be annotated with the words "FREIGHT NOT OTHERWISE SPECIFIED-- VOLUME INCENTIVE SERVICE". It also requires the shipment be released to one-half actual value, or 50 cents per pound per article, whichever is less. Neither annotation appeared on the bills of lading.

Cancilla's Position

Cancilla testified that he had always charged Potlatch the Item 898 rate for the move from Pomona to Emeryville until one day, before the 12 subject shipments moved, Potlatch told him that the rate for the move was a flat \$545 per truckload shipment. He then charged Potlatch the \$545 flat rate until he determined the \$545 rate was noncompensatory and he quit engaging in the moves. Cancilla neither confirmed nor denied that the \$545 rate was the applicable rate but deferred to Potlatch's statement to him that it was the correct rate. He did not point to any item or items in TT 2 which would permit him to assess the charge of \$545 for any of the 12 shipments. He contended, however, that if he was found to have undercharged Potlatch, the amount of the undercharges should be measured using the Item 898 rate rather than the Item 508 rate (thereby decreasing the undercharges) since he had always charged Potlatch the Item 898 rate before he started charging the \$545 rate.

Potlatch's Position

The Potlatch witness, who was employed at its Pomona plant, testified that his company had been using Cancilla's trucking services for approximately nine years. Until the shipment of May 4, 1981, Cancilla had been charging Potlatch the Item 898 rate on the Pomona-to-Emeryville traffic. The witness produced copies of Cancilla's bills of lading and freight bills (Exhibit 9) covering this traffic which moved prior to May 4, 1981 and were dated as far back as July 1980. These shipping documents showed that the Item 898 rate had been charged and that they were annotated as required by that item. The witness stated that some time before May 4, 1981, he was approached by two carriers soliciting the Pomona-to-Emeryville traffic and that they stated that they were members of West Coast Motor Tariff Bureau (WCMTB) and that its rate covering the subject traffic as published in the WCMTB tariff² in Item 721.5 was \$1.09 per hundred pounds, minimum weight 50,000 pounds (equals \$545 per shipment). The witness stated that this \$545 rate was brought to Cancilla's attention in hope that Cancilla would consider taking steps to meet the rate.

Subsequently, Cancilla started charging Potlatch \$545 per shipment for moving the Pomona-to-Emeryville traffic, and Potlatch, assuming that Cancilla decided to meet the rate and had taken the necessary steps to make the rate legally effective, paid the \$545 billings. Potlatch did not know that it was improper for Cancilla to charge the \$545 rate, had no inkling that it was an improper rate, and since Potlatch has no traffic department in California had no technical traffic people to readily ascertain the propriety of the

² The Commission's records show that at all times pertinent, Cancilla was not a member of WCMTB.

rate. The witness stated that Potlatch relied on Cancilla, as a trucker who should know his own legal rates, for charging Potlatch the proper rate. Potlatch contends it would be highly inequitable if the Commission should order Cancilla, the trucker who got it into this situation, to attempt to collect the alleged undercharges from Potlatch. Potlatch requests, in effect, that we leave the parties where they are.

Discussion

PU Code § 494, in part, provides:

"494. No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rate, fares, and charges specified in its schedules filed and in effect at the time..."

It is evident that Cancilla, in receiving \$545 for each of the 12 Pomona-to-Emerlyville shipments, received compensation for those shipments different from the applicable rates and charges specified in his tariff in effect at the time of each shipment. The applicable tariff rates would have produced a charge per shipment of between \$838.77 and \$962.34, whereas Cancilla charged and received \$545 per shipment and thereby violated PU Code § 494. The fact that some other carrier may have a published rate of \$545 per shipment of the involved commodity is no defense for the failure of Cancilla to follow his own tariff. The Commission has made it relatively easy for a carrier to "me too" a rate found in another carrier's tariff (see Commission General Order 147, Rule 9A1(a)). The carrier must

first publish the "me too" rate in its tariff before it can legally charge that rate. Otherwise, PU Code § 494 is not satisfied. Cancilla did not adopt the \$545 rate in his tariff, and hence, could not lawfully charge that rate.

The staff correctly used Items 508 and 508.2 of TT 2 rather than Item 898 in calculating the undercharges. The former items are class rates while Item 898 is only applicable, as here pertinent, when the shipper annotates the bill of lading with the words "FREIGHT NOT OTHERWISE SPECIFIED-VOLUME INCENTIVE SERVICE". Paragraph A4 of Item 898 provides that by making such annotation the shipper agrees to all the requirements of that item, among which is the requirement that the shipment be released in value. No such annotation was placed on any of the bills of lading covering the 12 shipments. The bills of lading contained no annotation that the shipments were released at one-half their actual value or 50 cents per pound per article, whichever is less. Since the shipments moved without the annotation and released value, Item 898 has no application to the shipments. Items 508 and 508.2 apply.

We are unable to accede to Potlatch's request that we not order Cancilla to collect the alleged undercharges. PU Code § 2100 requires us to order the collection of undercharges where, after hearing, we find that a carrier has undercharged a shipper. That section reads, in part, as follows:

"2100. Whenever the commission, after a hearing, finds that any common carrier...has charged, collected, or received, a lesser compensation for the transportation of...property...than the applicable rates,

fares, and charges, specified in its tariff schedules filed and in effect at the time...the commission shall require the carrier to collect the undercharges involved..."

That section admits to no equitable defense where undercharges are involved. Granting Potlatch's request would, in effect, be granting reparation to Potlatch. Reparation can only be granted where the applicable rate is found to be unreasonable, excessive, or discriminatory (PU Code § 734) and no allegations or proof have been submitted to that effect. As a matter of fact, Cancilla testified that the \$545 rate was noncompensatory.

Based on our staff audit, we will order Cancilla to collect the undercharges.

Findings of Fact

1. Cancilla operates as a highway contract carrier, agricultural carrier, and highway common carrier.
2. On April 30, 1980 he adopted as his highway common carrier tariffs what are now known as TT 2, ERT 1, and DT 8.
3. For the calendar year 1981 he had gross operating revenue of \$459,000.
4. Cancilla has hauled for Potlatch for approximately nine years.
5. Between May 4, 1981 and June 9, 1981 Cancilla transported 12 truckload shipments under his highway common carrier authority for Potlatch from its Pomona plant to Berkeley Farms in Emeryville as set out in Exhibit 1.
6. Cancilla charged and Potlatch paid \$545 to transport each of the 12 shipments.

7. Each of the freight bills or bills of lading covering the 12 shipments had noted on them that the shipments were being rated under Item 721.5 but did not indicate in what tariff the item was to be found.

8. TT 2 contains no Item 721.5.

9. TT 2 contains no commodity rate covering the commodity involved in the 12 shipments.

10. TT 2 contains no \$545 charge applicable to any of the 12 shipments.

11. There is a \$545 charge covering the involved shipments in Item 721.5 of the WCMTB tariff.

12. Cancilla is not a participant in the WCMTB tariff nor a party to Item 721.5 of the WCMTB tariff.

13. Each of the 12 shipments should have been rated in accordance with TT 2, Item 508 (or Item 508.2 depending on the weight of each shipment) based on the Class 35 rating in Item 29940 of the National Motor Freight Classification 100, plus surcharges from Supplements 154 and 139 of TT 2 as set out in Exhibit 4.

14. Potlatch forfeited its right to have any of the 12 shipments rated in accordance with TT 2, Item 898 as Potlatch (a) did not annotate any of the bills of lading covering the shipments as required by such item and (b) did not release any shipment to one-half value, or 50 cents per pound per article, whichever is less, as required by the item.

15. Exhibit 4 accurately sets forth the amount per shipment that Cancilla undercharged Potlatch.

16. Total undercharges amount to \$3,804.92.

Conclusions of Law

1. Cancilla violated PU Code § 494 by failing to assess and collect from Potlatch the applicable rates and charges set forth in TT 2 to the extent of undercharging Potlatch \$3,804.92.

2. Cancilla should be fined in the amount of \$3,804.92 levied under PU Code § 2100.

3. Cancilla should be ordered to collect from Potlatch the amount specified in Conclusion of Law 1.

4. Cancilla should be fined \$1,000 levied under PU Code § 1070.

5. Cancilla should be ordered to cease and desist from any and all violations of the PU Code.

Cancilla should promptly take all reasonable actions to collect the undercharges. If necessary, he should file timely complaints according to PU Code § 737. The staff will investigate respondent's compliance. If it believes Cancilla or his attorney has not acted in good faith, the Commission will reopen this proceeding to determine whether to impose sanctions.

O R D E R

IT IS ORDERED that Frank Cancilla shall:

1. Pay a fine of \$3,804.92 to this Commission under PU Code § 2100 on or before the 40th day after the effective date of this order.
2. Pay 7% annual interest on the fine levied by Ordering Paragraph 1 beginning when the payment of the fine is delinquent.
3. Pay a fine of \$1,000 to this Commission under PU Code § 1070 on or before the 40th day after the effective date of this order.
4. Take such action, as may be necessary to collect the undercharges set forth in Finding of Fact 16, including timely legal action under PU Code § 737.
5. Notify the Commission in writing upon collection.
6. Promptly take all reasonable steps to collect the undercharges.

7. File with the Commission on the first Monday of each month a report of any undercharges remaining uncollected 60 days after the effective day of this order, specifying the action to collect them, and the result of such action, until they have been collected in full, or until further order of the Commission. Failure to file any such monthly report within 15 days after due date shall result in the automatic suspension of the operating authority until the report is filed.
8. Not charge or collect less than the rates set forth in Transition Tariff 2 without having prior approval from the Commission.
9. Cease and desist from any and all operations and practices in violation of the PU Code.

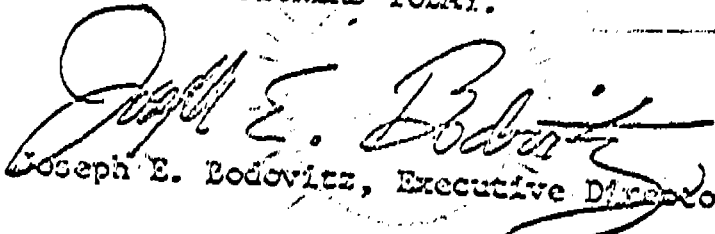
The Executive Director shall have this order personally served upon respondent Frank Cancilla and served by mail upon all other respondents.

This order becomes effective 30 days from today.

Dated JAN 12 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

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


Joseph E. Rodovitz, Executive Director

Decision 83 01 008 JAN 12 1983

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