

Decision 83 04 052 APR 6 1983

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)
R & E Trucking.)

OII 82-11-01
(Filed November 3, 1982)

O P I N I O N

Ronald I. Nisewander, Jr., an individual doing business as R & E Trucking (respondent) is engaged in the business of transporting property over the public highways in this State for compensation. He holds a highway common carrier certificate, and highway contract, agricultural carrier, and heavy specialized carrier permits. The Commission opened this investigation because a staff investigation indicated that respondent may have violated Public Utilities (PU) Code Section 702, provisions of General Order (GO) Series 102, and Decision (D.) 91247. Specifically, it appeared that respondent:

1. Failed to specify subhaul charges in written subhaul agreements;
2. Failed to issue written subhaul agreements to all subhaulers;
3. Failed to pay subhaulers the amount agreed to, either as set forth in the Schedule of Subhaul Payments or as verbally agreed to;
4. Failed to provide subhaulers with copies of rated freight bills; and
5. Engaged unauthorized carriers as subhaulers.

The order instituting investigation (OII) was served on respondent on November 12, 1982. The scope of the investigation and hearing dates, December 14 and 15, 1982, were set forth in the OII. The OII involves a determination of 11 specific items. The OII states:

"The scope of this investigation includes, but is not limited to, the transportation performed for R & E Trucking from July 1, 1981 to March 6, 1982, by subhaulers Roy Abbott, Manuel Correia, Charles Hays, Frank Becerra, Phil Buettner, Jess Diaz Trucking, Inc., Frank Jenkins, Dave Condon, Paul Garcia, Larry Smith, and Charles Lopez, as evidenced by subhaul agreements, record of subhaul payments, subhauler affidavits, and proof of payment to subhaulers and as further evidenced by the sample of freight bills listed below..."^{1/}

By letter dated November 24, 1982, Mary MacKenzie, staff counsel, confirmed a telephone conversation with respondent in which he agreed to enter into a stipulation. Respondent agreed to pay underpayments totaling \$16,213.34 to those 11 subhaulers. This figure represents underpayments to subhaulers between July 1, 1981 and March 6, 1982. In addition, respondent agreed to pay a punitive fine to the Commission. The draft stipulation was signed by Wilbur Anderline and Mary MacKenzie for the Commission staff. Exhibits 1, 2, and 3, prepared by the staff, were attached to and made part of the stipulation. These exhibits carry a profile and results of the staff's investigation into respondent's operations, rates, charges, and practices. Staff

^{1/} The OII lists an 11-freight bill sampling.

counsel advised respondent to review the stipulation with his attorney before signing it. The stipulation states that neither of the parties request a hearing or believe that a hearing is necessary in this proceeding. Respondent signed the stipulation on December 1, 1982. After receipt of the stipulation the matter was taken off calendar.

In the stipulation respondent admits to violations of PU Code Section 702, GO Series 102, and D.91247. He specifically admits that he: (a) does not have specified subhaul charges in written subhaul agreements; (b) has not issued written subhaul agreements to all subhaulers; (c) has not paid subhaulers either the full amount set forth in the Schedule of Subhaul Payments or as verbally agreed to; (d) has not furnished his subhaulers with copies of rated freight bills; (e) engaged unauthorized subhaulers; (f) should pay subhaulers additional amounts owed under contracts between him and subhaulers within 30 days after the effective date of the order in this decision; and (g) should be ordered to cease and desist from any and all unlawful operations and practices.

Item 10 in the OII is: "10. Whether Respondent's operating authority should be canceled, revoked or suspended, or, in the alternative, whether a fine should be imposed pursuant to Public Utilities Code Section 1070;"^{2/} The stipulation provides

2/ "1070. The commission may at any time for a good cause suspend, and upon notice to the holder of an operating right acquired by virtue of operations conducted on July 26, 1917, or to the grantee of any certificate, and upon opportunity to be heard, revoke, alter, or amend any such operative right or certificate.

"As an alternative to the suspension, revocation, alteration, or amendment of an operating right or certificate, the commission may impose upon the holder of such operating right or certificate a fine of not exceeding five thousand dollars (\$5,000). The commission may assess interest upon any fine imposed, such interest to commence upon the day the payment of the fine is delinquent. All fines and interest collected shall be deposited at least once each month in the State Treasury to the credit of the General Fund." (§ 1070 was amended by Stats. 1982, Ch. 1004, effective January 1, 1983. However, the amendments do not apply to acts occurring before that date.)

that "because of R & E Trucking's misconduct and the violations agreed to in this stipulation, and in consideration of the circumstances of this case, the staff and R & E Trucking agree that R & E Trucking should pay, and be ordered to pay, a punitive fine of \$5,000.00." This amount was the maximum fine provided in 49 Code Section 1070 for violations committed prior to January 1, 1983.

Items 6 and 7 in the OII are:

- "6. Whether Respondent should be required to review his records to determine if instances other than those shown by the freight bills listed below exist where the shipper was charged a rate higher than that shown on the copy furnished to the subhauler and;
- "7. Whether Respondent should be required to make a written report to the staff of the Commission concerning the results of his investigation, and if such discrepancies exist;"

Exhibit 2 lists shipper payments, payment amounts furnished to subhaulers, and shows the amount of underpayments based on percentages of shipping charges which should have been paid to respondent's subhaulers. Percentage payments to subhaulers are permissible (GO 102-H, Section 5). Respondent's stipulation to the correctness of the material contained in Exhibit 2 expands the freight bill sampling listed in the OII, but no further investigation or report for the period between July 1, 1981 and March 6, 1982 is needed or required.

Exhibit 4 is a letter dated December 22, 1982 to Administrative Law Judge Levander transmitting a staff statement and a staff memorandum from staff counsel explaining why staff is not requesting the Commission to order respondent to review his records outside of the period from July 1, 1981 to March 6, 1982. A staff field investigator, Bonnie Somes, states

she is not recommending respondent review subhaul records, prior to July 1, 1981, because (a) her random review of respondent's records prior to July 1, 1981 failed to reveal subhaul payment violations, and (b) all of the subhaulers involved told her that the violations began in July 1981. Based on Exhibit 4, we will not require respondent to further review his records or make any report on discrepancies between freight bills charged to shippers and the information furnished to the subhauler outside of the period between July 1, 1981 and March 6, 1982, inclusive.

We concur with the provisions of the stipulation, except for our clarification of Items 6 and 7 in the OII. Respondent will be ordered to pay the listed underpayments to the subhaulers, shown in the table below, within 30 days after the effective date of this order. Respondent will be ordered to send a letter to the Commission with copies to staff counsel and to the named subhaulers specifying compliance with these requirements. In addition, respondent will be required to pay a fine of \$5,000 to the Commission within 30 days after the effective date of this order.

Respondent should furnish the Commission with current subhauler agreements entered into in conformity with GO Series 102, including the required surety information (see footnote a/ in table below) and specified amounts or percentage of billings to be paid for subhauler services. Separate agreements are needed if an amount to be paid for subhauling is specified or if the percentage of freight bills paid to the subhauler changes. The agreements must also be revised to reflect changes in the surety, the surety's address, or expiration dates of the surety bond.

The following table summarizes the violations found in the staff investigation of respondent's billings between July 1, 1981 and March 6, 1982.

Subhauler	Agreement	to be Paid	Subhauler	Rated Bills	Shipments	Underpayments	Total
	: Violation : : in Written :	: Agreement : : of % Gross :	: Unauthor- ized :	: Subhauler : : Not Allowed :	: Underpayments : : /# Intrastate :		
Roy Abbott	<u>a/</u>	80%		X	50/90		\$5,584.40
Manuel Correia	<u>a/</u>	80		X	40/87		2,787.28
Charles Hays	<u>a/</u>	80 ^{c/}	Yes ^{d/}	X	34/71		2,589.37
Frank Becerra	<u>a/</u>	80		X	48/98		2,027.54
Phil Buettner	<u>b/</u>	80	Yes ^{d/}	X	7/13		1,039.04
Jess Diaz Trucking, Inc.	<u>b/</u>	80 or 85		X	17/81		899.45
Frank Jenkins	<u>a/</u>	80		X	4/26		453.90
Dave Condon	<u>a/</u>	75 or 80		X	10/127		467.00
Paul Garcia	<u>a/</u>	80		X	2/15		168.94
Larry Smith	<u>b/</u>	80 or 75	Yes ^{d/}	X	3/41		136.75
Charles Ray Lopez	<u>a/</u>	80 or 75		X	5/101		59.67

a/ Name and address of surety providing required bond and expiration date of surety bond not shown. Agreement does not specify amount or percentage of freight bill payable to subhauler.

b/ No written agreement entered into.

c/ 70% when hauling respondent's trailer.

d/ Permit subsequently obtained by subhauler.

Findings of Fact

1. Respondent has:
 - a. Failed to specify subhaul charges or percentages of freight bill revenues in written subhaul agreements;
 - b. Failed to specify the name and address of the surety providing the required bond and the expiration date of such bond in its written subhaul agreements;
 - c. Failed to issue written subhaul agreements to all subhaulers;
 - d. Failed to pay subhaulers the amount agreed to, either as set forth in the Schedule of Subhaul Payments or as verbally agreed to;
 - e. Failed to provide subhaulers with copies of rated freight bills; and
 - f. Engaged unauthorized carriers as subhaulers.
2. Respondent has underpaid the subhaulers listed in the table in this decision by the amounts shown in that table. These underpayments total \$16,213.34.
3. Respondent has entered into a stipulation prepared by the Commission staff in which he agrees to (a) pay the listed subhaulers the amounts of underpayments shown in the table within 30 days after the effective date of the order in this decision, and (b) pay a \$5,000 punitive fine to the Commission.
4. Respondent has cooperated with the staff in this investigation. The staff provided no recommendation or reason for imposition of a further penalty against respondent.

Conclusions of Law

1. In light of the cooperative position taken by respondent in this proceeding, there would be no benefit from suspending, revoking, altering, or amending respondent's operating rights.

2. There is no need for respondent to further review his records or to make a written report of such review to the staff to determine if there are undercharges other than those listed in Exhibit 2.

3. Respondent should be ordered to correct the unlawful practices described in Finding 1.

4. Respondent should be ordered to pay the underpayments listed in the table in this decision to the 11 affected subhaulers in the total amount of \$16,213.34 within 30 days after the effective date of this order.

5. Respondent should be ordered to pay a \$5,000 punitive fine for its violations of PU Code Section 702, GO Series 102, and D.91247 within 30 days after the effective date of this order.

6. There is no need for a hearing in this proceeding. The effective date of this decision should be today to permit expeditious payment of underpayments to the subhaulers and of the punitive fine.

7. The investigation should be terminated on receipt of the ordered filings.

O R D E R

IT IS ORDERED that:

1. Ronald I. Nisewander, Jr., doing business as R & E Trucking (respondent), shall pay underpayments of \$5,584.40 to Roy Abbott, \$2,787.28 to Manuel Correia, \$2,529.37 to Charles Hays, \$2,027.54 to Frank Becerra, \$1,039.04 to Phil Buettner, \$899.45 to Jess Diaz Trucking, Inc., \$453.90 to Frank Jenkins, \$467 to Dave Condon, \$168.94 to Paul Garcia, \$136.75 to Larry Smith, and \$59.67 to Charles Ray Lopez within 30 days after the effective date of this decision. A sworn declaration stating these underpayments have been made shall be sent to the Commission, to staff counsel, and to the subhaulers within 5 days after the date of mailing. If any underpayments are returned, respondent shall promptly notify the Commission of the steps it is taking to make the required payments.

2. Respondent shall pay a punitive fine of \$5,000 to the Commission within 30 days after the effective date of this decision.

3. Respondent shall file with the Commission a copy of each of his current subhauler agreements which have been conformed to General Order (GO) Series 102 and correct the deficiencies listed in Finding 1(a) and (b) not later than 30 days after the effective date of this order.

4. The staff of the Transportation Division is directed to audit the records of respondent within six months of the effective date of this order to determine compliance with the Commission's rates, rules, regulations, and general orders.

5. This investigation shall be terminated on receipt of the required filings and the \$5,000 fine.

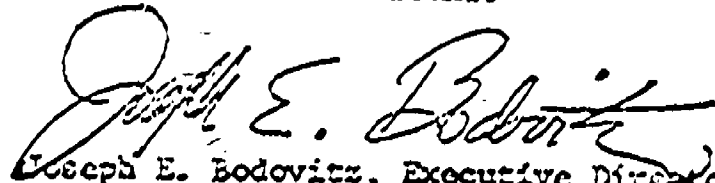
This order is effective today.

Dated April 6, 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. Bodovitz, Executive Director



she is not recommending respondent review subhaul records, prior to July 1, 1981, because (a) her random review of respondent's records prior to July 1, 1981 failed to reveal subhaul payment violations, and (b) all of the subhaulers involved told her that the violations began in July 1981. Based on Exhibit 4, we will not require respondent to further review his records or make any report on discrepancies between freight bills charged to shippers and the information furnished to the subhauler outside of the period between July 1, 1981 and March 6, 1982, inclusive.

We concur with the provisions of the stipulation, except for our clarification of Items 6 and 7 in the OII. Respondent will be ordered to pay the listed underpayments to the subhaulers, shown in the table below, within 30 days after the effective date of this order. Respondent will be ordered to send a letter to the Commission with copies to staff counsel and to the named subhaulers specifying compliance with these requirements. In addition, respondent will be required to pay a fine of \$5,000 to the Commission within 30 days after the effective date of this order.

In light of the violations, we will also require respondent to file a sworn declaration that he (a) has specified subhaul charges or percentages of freight bill revenues in all of his outstanding written subhaul agreements; (b) has issued and will continue to enter into written subhaul agreements with all subhaulers engaged by him in compliance with GO Series 102; (c) will make full payment to subhaulers consistent with his subhaul agreements; (d) will, upon request, furnish his subhaulers paid a percentage of freight bill revenues with a rated copy of freight bills; and (e) will not engage any unauthorized subhaulers.

Conclusions of Law

1. In light of the cooperative position taken by respondent in this proceeding, there would be no benefit from suspending, revoking, altering, or amending respondent's operating rights.

2. There is no need for respondent to further review his records or to make a written report of such review to the staff to determine if there are undercharges other than those listed in Exhibit 2.

3. Respondent should be ordered to correct the unlawful practices described in Finding 1.

4. Respondent should be ordered to pay the underpayments listed in the table in this decision to the 11 affected subhaulers in the total amount of \$16,213.34 within 30 days after the effective date of this order.

5. Respondent should be ordered to pay a \$5,000 punitive fine for its violations of PU Code Section 702, GO Series 102, and D.91247 within 30 days after the effective date of this order.

~~6. Respondent should be ordered to submit the sworn declaration and letter of notification discussed on page 5 and the subhauler agreements discussed on page 6.~~

6.7. There is no need for a hearing in this proceeding. The effective date of this decision should be today to permit expeditious payment of underpayments to the subhaulers and of the punitive fine.

7.8. The investigation should be terminated on receipt of the ordered filings.

O R D E R

IT IS ORDERED that:

1. Ronald I. Nisewander, Jr., doing business as R & E Trucking (respondent), shall pay underpayments of \$5,584.40 to Roy Abbott, \$2,787.28 to Manuel Correia, \$2,589.37 to Charles Hays, \$2,027.54 to Frank Bocerria, \$1,039.04 to Phil Buettner, \$899.45 to Jess Diaz Trucking, Inc., \$453.90 to Frank Jenkins, \$467 to Dave Condon, \$168.94 to Paul Garcia, \$136.75 to Larry Smith, and \$59.67 to Charles Ray Lopez within 30 days after the effective date of this decision. A sworn declaration stating these underpayments have been made shall be sent to the Commission, to staff counsel, and to the subhaulers within 5 days after the date of mailing. If any underpayments are returned, respondent shall promptly notify the Commission of the steps it is taking to make the required payments.

2. Respondent shall pay a punitive fine of \$5,000 to the Commission within 30 days after the effective date of this decision.

3. Respondent shall file with the Commission a copy of each of his current subhauler agreements which have been conformed to General Order (GO) Series 102 and correct the deficiencies listed in Finding 1(a) and (b) not later than 30 days after the effective date of this order. This filing shall be accompanied by respondent's sworn declaration that (a) he has no other current subhauler agreements; (b) he shall issue future subhaul agreements in compliance with GO Series 102; (c) he shall make payments to his subhaulers consistent with his subhaul agreements; (d) he shall, upon request, furnish subhaulers paid a percentage of freight bill revenues with a rated copy of freight bills; and (e) he shall not engage any unauthorized subhaulers.

54. This investigation shall be terminated on receipt of the required filings and the \$5,000 fine.

This order is effective today.

Dated APR 6 1983, at San Francisco, California.

4. The staff of the Transportation Division is directed to audit the records of respondent within six months of the effective date of this order. To determine compliance with the Commission's rates, rules, regulations, and general orders.

LEONARD W. GRIMES, JR.
President

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Commissioners