

Decision 83 10 081 OCT 19 1983

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of Donald McKay and Arnold McKay, dba Twins Trucking, and of Jim's Supply Company, Inc., a California corporation.

OII 83-05-02  
(Filed May 4, 1983)

Donald McKay and Arnold McKay, for themselves, respondents.  
Mary McKenzie, Attorney at Law, and W. J. Anderline, for the Commission staff.

O P I N I O N

This proceeding is an investigation on the Commission's own motion into the operations, rates, and practices of Donald McKay and Arnold McKay (McKays), dba Twins Trucking, to determine whether the McKays in the operation of their transportation business, violated Public Utilities (PU) Code Sections 3664, 3667, and 3737 by failing to assess the applicable rates and charges as set forth in Transition Tariff (TT) No. 2; and whether Jim's Supply Company, Inc. (Jim's Supply) has paid the McKays less than the applicable rates and charges.

A public hearing was held before Administrative Law Judge William A. Turkish in Los Angeles on July 19, 1983, and the matter was submitted on that date.

The McKays, a partnership, have been engaged in the business of transporting property over the public highways of this State for compensation, having been issued a certificate of public convenience and necessity as a highway common carrier and permits to operate as a highway contract carrier, an agricultural carrier, and a heavy specialized carrier. Jim's Supply has received services over the public highways of this State for compensation from the McKays and, therefore, is a shipper of property. Jim's Supply did not appear at the hearing.

The McKays' address is 1130 James Road, Bakersfield, California 93308. During the period of investigation, their equipment consisted of five tractors, four flat beds, and two dry van semitrailers. They employed two office personnel and four drivers. The 1981 quarterly gross operating reports filed with the Commission disclosed gross revenues of \$644,582 for the four quarters ending December 1981. Commission records show the following tariffs were served upon the McKays: Minimum Rate Tariff (MRT) 2, Exception Ratings Tariff, and Distance Table 8. The above carrier profile was stipulated to by the McKays.

On January 26, 1983 a staff representative of the Commission's Transportation Division went to the McKays' place of business in Bakersfield to continue the investigation of a former staff representative, since retired, concerning undercharges during the period of September, October, and November of 1981. The representative reviewed various documents on file in the offices of the McKays. The documents reviewed were freight bills, job orders and delivery tags, and bills of lading shown in Exhibit 2. A total of 66 different steel product

shipments made by the McKays for Jim's Supply were reviewed. Donald McKay verified the accuracy of the records with the representative.

A staff analyst examined the shipping documents contained in Exhibit 1 to determine compliance with tariffs or contracts. Exhibit 3 is a report filed by the analyst covering shipments during the period September to November 1981. In determining whether any violation of tariffs occurred, the analyst used TT-2 and the National Motor Freight Classification NMF 100 Series as references. A comparison of the charges billed for shipment of the commodities shown in Exhibit 2 with the tariff charges resulted in total undercharges of \$30,720.26. There was no contract of any type between the McKays and Jim's Supply on file with the Commission. The evidence shows that the McKays were charging flat rates rather than charging according to tariff schedules.

Donald McKay testified that in September 1981 he contacted Jim's Supply to negotiate a price for hauling the steel. During the negotiation Jim's Supply showed McKay a contract it had with another carrier which called for a flat rate of \$300 per shipment. McKay agreed with Jim's Supply to assess a flat charge of \$300 per shipment. McKay admitted that he did not have a written contract with Jim's Supply filed with the Commission during the period in issue. Sometime following the period in question McKay did file a contract between the McKays and Jim's Supply with the Commission.

McKay admitted he had a copy of TT-2 but testified that he never looked at it because he felt it was not applicable. He testified he did not know of any carrier using it. He was under the impression he could haul commodities for any published steel rates as a common carrier and that competitors were using an even lower rate than he was charging. He stated the Commission has twice adopted reduced rates for steel hauling which do not even compare with the higher rates quoted by the staff analyst from TT-2. He pointed out that the Commission has recently approved a rate for I-GO for \$235, which is \$65 less than that charged by the McKays during the period in question, and that, as a result, the McKays are near bankruptcy. The witness admitted that his failure to file a contract with the Commission or to read TT-2 was ignorance on his part, but he asserted that numerous carriers were hauling steel at lower rates than the McKays' rates. The witness testified he was under the impression that when he and his brother went into the trucking business as a common carrier, they could haul for any published steel rate that was in effect. He also thought that the transportation service performed for Jim's Supply was under the McKay's authority as a highway common carrier. The witness was led to believe by Jim's Supply that the I-GO contract was a published rate reduction that it had filed with the Commission, and the witness thought, as a common carrier, the McKays could haul freight at the same rate as the competitor hauled. He admitted he had not verified whether I-GO's contract rate was on file with the Commission.

The witness admitted he had filed with the Commission a contract with Giumarra Vineyards, prior to the period at the request of Giumarra Vineyards, who informed him it

wanted the contract on file for rate purposes. He also stated he checked with his rate man, Sam Miles (a rate consultant), who told him he had to file that contract as well as one with Lowe's. He was under the impression he only had to file those contracts with shippers Miles told him to file. One of the reasons he did not file any of the contracts with Jim's Supply was because no written contracts had ever been drawn. He stated he relied upon Miles, who told him contradictory things. At one point, Miles told him that with some customers a contract was necessary and with some it was not. McKay did not realize he had to have a contract with Jim's Supply until the staff representative informed him that it was necessary.

Exhibit 4 is an affidavit signed by Donald McKay on October 23, 1979, indicating an intent to conduct operations exclusively as a subhauler and that the McKays would provide no service to shippers directly as a common carrier. The witness remembered signing it, but was told by a staff representative that he had to sign it to enable the McKays to do business as a subhauler.

Prior to April 30, 1980, MRT-2 rates were applicable to steel articles. In addition, an alternative rate method permitted carriers subject to MRT-2 to use any rates that were published by common carriers, including rail rates. (PU Code Section 3663.) This alternative application allowed truckers to use the steel rates that were published by the railroad as long as they met the minimum weights and the rules and regulations in that tariff. When the Commission cancelled MRT-2 and established TT-2, the alternative rate method became moot, since the Commission was no longer establishing minimum rates for commodities formerly subject

to MRT-2. It forced carriers who were using rail rates prior to April 30, 1980, to publish those rates in a common carrier tariff or file them in a contract, or, if subsequent to April 30, 1980, file a rate reduction request by showing cost justification for the lower rate. Under the Commission's new program of carrier filed rates, a certificated carrier had to publish his own tariffs, adopt Commission transition tariffs, or sign a subhaul affidavit saying he was only going to subhaul under his certificate. If a carrier signed such subhaul affidavit, it meant he was basically subhauling under his certificate and if he was going to do any for-hire hauling of general commodities, it would be under a highway contract carrier permit. As a highway contract carrier, if he wanted to charge other than a transition tariff rate, he would have to justify the rate either through operational and cost data, or by reference to a competing highway carrier's rate. According to Commission records, the McKays were performing transportation services for Jim's Supply under their highway contract carrier authority which made TT-2 applicable since there was no rate reduction or "me-too"<sup>1/</sup> contract on file with the Commission.

During the period in issue here, the only Commission filings by the McKays were the contracts with Giumarra Vineyards and Lowe's. During that same period the McKays had an affidavit on file which stated they would only subhaul under their common carrier certificate. On February 10, 1982 the subhaul affidavit was canceled by the McKays, at which time they adopted TT-2.

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<sup>1/</sup> A "me-too" contract permits a carrier to use the same rate as a competitor who has filed a rate reduction for the shipment of the same commodity merely by filing such contract with the Commission without need to show additional justification.

Staff recommends that the Commission issue an order directing the McKays to do the following:

1. Collect undercharges of \$30,720.26 from Jim's Supply.
2. Pay a fine in the amount of the undercharges under PU Code Section 3800.
3. Pay a punitive fine of \$5,000 under PU Code Section 3774.
4. Case and desist from violating applicable tariff rates and rules.

We will adopt the staff recommendation except for the amount of the proposed fine based on the violation of PU Code Section 3774. While willful or intentional conduct need not be shown before a fine can be imposed, the absence of willful or intentional conduct may mitigate against the imposition of the maximum fine under Section 3774.

In this case there was no evidence of either willful or intentional violation of Section 3774 and for that reason we will assess a fine of \$5,000 with \$2,500 suspended.

Findings of Fact

1. During the period September through November 1981 Donald and Arnold McKay performed transportation services for Jim's Supply under the McKays' highway contract carrier permit.
2. During the period September through November 1981 the McKays were subject to their previous filing of an affidavit of intent to conduct highway common carrier operations exclusively as a subhauler and to provide no service to shippers directly under their highway common carrier certificate.
3. Prior to September 1981, the McKays had been served with MRT-2, Exception Ratings Tariff, and Distance Table 8.

4. During the period September through November 1981 the McKays did not have any contract on file with the Commission for transportation service provided to Jim's Supply.

5. The commodities transported by the McKays for Jim's Supply were ratable under TT-2.

6. The McKays did not file a request for rate reduction or a "me-too" contract with the Commission for the transportation services provided to Jim's Supply during the period September through November 1981.

7. The rates charged by the McKays for the transportation services provided to Jim's Supply for the period in issue were flat rates and resulted in collection of less than the applicable tariff charges.

8. Jim's Supply has paid the McKays less than the applicable rates and charges for the transportation of steel commodities.

9. During the period September through November 1981 the McKays undercharged Jim's Supply in the amount of \$30,720.26.

10. The McKays did not willfully or intentionally violate the provisions of TT-2.

Conclusions of Law

1. The McKays have violated PU Code Sections 3664, 3667, and 3737 and, therefore, should pay a fine under PU Code Section 3774.

2. The staff recommendations, set forth elsewhere in this decision, are reasonable and should be adopted. However, since it is found that the McKays did not willfully and intentionally violate TT-2, the amount of the punitive fine should be reduced.



O R D E R

IT IS ORDERED that:

1. Donald McKay and Arnold McKay shall pay a fine of \$5,000 to this Commission of which amount \$2,500 is suspended. The fine shall be paid to the Commission within 60 days of the effective date of this order.

2. Donald McKay and Arnold McKay shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges from Jim's Supply Company, Inc., including the institution of legal proceedings should the undercharges remain uncollected or unpaid 60 days after the effective date of this order and shall promptly pay a fine to the Commission in the amount of the undercharges under PU Code Section 3800.

3. In the event the undercharges ordered to be collected or any part of such undercharges remain uncollected 120 days after the effective date of this order, Donald McKay and Arnold McKay shall file with the Commission, on the first Monday of each month after the end of 120 days, a report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the results of such action, until such undercharges have been collected in full or until further order of the Commission.

4. Donald McKay and Arnold McKay shall cease and desist from violating any rules established by the Commission and from charging and collecting compensation for the transportation of property or for any services in connection with it in a lesser amount than the applicable tariff or contract rates and charges.

5. The Executive Director is ordered to cause personal service of this order to be made upon Donald McKay or Arnold McKay and to cause service by mail upon Jim's Supply Company, Inc.

The effective date of this order shall be 30 days after the completion of such service upon either Donald McKay or Arnold McKay.

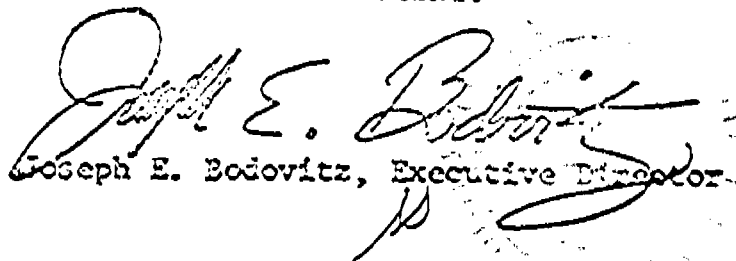
Dated OCT 19 1983, at San Francisco, California.

I dissent.

VICTOR CALVO, Commissioner

LEONARD M. GRIMES, JR.  
President  
PRISCILLA C. CREW  
DONALD VIAL  
WILLIAM T. BAGLEY  
Commissioners

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

  
Joseph E. Bodovitz, Executive Director

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