

ORIGINAL

Decision 83 10 052 OCT 19 1983

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 Hamilton)
Distributing, Inc., Apex Bulk)
Commodities, Hamilton Materials,)
Inc., and Hunter Woodworks, Inc.,)
California corporations.)

OII 91
Filed June 16, 1981

Dunne, Phelps, Mills, Smith & Jackson, by
James O. Abrams, for Apex Bulk
Commodities, and Floyd L. Parano,
Attorney at Law, for Hamilton
Distributing, Inc., respondents.
Alberto Guerrero, Attorney at Law, and
Ed Hjelt, for the Commission staff.

O P I N I O N

This investigation was instituted to determine whether Hamilton Distributing, Inc. (Distributing) and Apex Bulk Commodities (Apex) had charged less than established minimum rates for intrastate transportation of freight. The alleged Apex undercharges occurred on shipments of talc for Hamilton Materials (Materials), an affiliate of Distributing. The alleged undercharges by Distributing occurred on shipments for Hunter Woodworks, Inc. (Woodworks).¹

¹ When this transportation was conducted, Distributing held radial highway common carrier and agricultural permits. Distributing has since added contract and heavy-specialized authority and converted its radial permit to a \$ 1063.5 highway common carrier certificate. Apex originally held agricultural, contract, dump truck, and radial highway common carrier permits. It has purchased a \$ 1063.5 certificate and been issued a cement carrier certificate.

Two days of hearings were conducted before Administrative Law Judge (ALJ) Gilman on April 7, 1982 and November 18, 1982.² A settlement conference was conducted on April 14, 1983; the Hamilton parties, Apex, and staff subsequently submitted written settlement proposals. The settlement proposals were taken under submission after service of the proposals on Woodworks on June 29, 1983.

The Stipulations

The stipulation between staff and Distributing agrees that Distributing will collect the sum of \$2,005 from Woodworks and pay that amount to the Commission as a \$ 3800³ fine. In addition, Distributing will pay a punitive fine under § 3774 of \$3,500 and accept a cease and desist order.

Under the staff/Apex stipulation, the latter will collect \$5,011.61 of undercharges from the Distributing respondents, paying that amount as a \$ 3800 fine. It will also pay a \$ 3774 fine of \$3,500 and accede to a cease and desist order.

² On April 14, 1982, Distributing filed an action in U.S. District Court (Central District of California) against the Commissioners, the ALJ, and Commission staff members. The suit argued that portions of the Public Utilities (PU) Code and Commission rules, regulations, and policies are unconstitutional and deny Distributing certain federally guaranteed rights, privileges, and immunities. The complaint sought damages of \$150,000, an injunction, and declaratory relief. Summary judgment was entered in favor of the defendants on November 30, 1982. Appeal is now pending in the U.S. Court of Appeals (9th Circuit).

³ Unless otherwise noted, all statutory citations refer to the PU Code.

Both documents constitute a conditional waiver of respondents' rights to further evidentiary hearing; the waiver is effective only if the Commission decides not to impose any sanctions other than those stipulated. If the Commission disapproves the stipulations, the stipulations do not constitute admission of liability (Evidence Code § 1152; cf. Rule 50 of the Commission's Rules of Practice and Procedure).

An attorney representing Woodworks has written to the Commission, stating that Woodworks did not intend to appear and that it is willing to pay any undercharges found to exist. It was furnished a copy of the stipulations and has not objected to the amount of stipulated undercharges.

Should the Proposed Settlement be Adopted?

For the Distributing/Woodworks shipments, the stipulated undercharges approximate the amount found by the staff rate expert. The stipulated amount of undercharges on the Apex/Materials shipments is approximately \$3,600 less than the amount found by the staff analyst. We note, however, that her opinion relied on the validity of the dating on certain weighmaster's certificates. The weighmaster testified at hearing; his testimony if believed would support a finding that the dates on those documents were not accurate. It therefore appears that there is a valid triable dispute concerning a major portion of these undercharges, and that the stipulation is a compromise of that issue. Since all parties are represented by counsel, there is no reason to doubt that the compromise represents a realistic appraisal of the likely outcome if the issue were to be decided after full hearing.

Finally, we have considered the amount of stipulated \$ 3774 fines. They do not appear to be either unreasonably high or low, considering the amount of stipulated undercharges and fines imposed in comparable cases.

It seems unlikely that further hearings would change the outcome significantly. It is especially unlikely that any change would have enough economic impact to justify the costs of further hearing.

Based on these considerations, we will find that the settlement is not unjust, unreasonable, or adverse to the public interest, and will issue a decision based thereon.

Findings of Fact

1. Apex has agreed to collect undercharges in the amount of \$5,011.61 from the Distributing respondents and to pay that amount to the Commission as a fine pursuant to § 3800. Apex has also agreed that it will pay a fine in the amount of \$3,500 under § 3774 and to accede to a cease and desist order without demanding further hearing.

2. Distributing has agreed to collect undercharges in the amount of \$2,005 from respondent Woodworks and to pay that sum to the Commission under § 3800. Distributing has also agreed to pay a fine in the amount of \$3,500 under § 3774 and to accede to a cease and desist order without demanding further hearing.

3. Woodworks has been furnished with a copy of the stipulation affecting it and has not objected to submission of the stipulation as a basis for judgment.

4. The proposed settlement is not unjust or unreasonable or adverse to the public interest. It should be accepted.

Conclusions of Law

1. The Commission is never bound by a settlement stipulated between the parties to a Commission proceeding. Such stipulation is only an offer of settlement until accepted by a majority vote of the Commission in conference.

2. Respondent carriers should promptly take all reasonable actions to collect the undercharges. If necessary, they should file timely complaints according to PU Code § 3671. The Commission staff will investigate respondents' compliance. If it believes that respondents or their attorneys have 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:

1. Apex Bulk Commodities shall:
 - a. Pay a fine of \$3,500 to this Commission under PU Code § 3774 on or before the 40th day after the effective date of this order.
 - b. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
 - c. Pay a fine to this Commission under PU Code § 3800 of \$5,011.61 on or before the 40th day after the effective date of this order.
 - d. Take such action as may be necessary to collect the undercharges set forth in Finding 1, including timely legal action under PU Code § 3671.
 - e. Notify the Commission in writing upon collection.
 - f. Promptly take all reasonable steps to collect the undercharges.
 - g. File with the Commission on the first Monday of each month a report of any undercharges remaining uncollected 60 days after the effective date of this order, specifying the action taken 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 the due date shall result in the automatic suspension of the operating authority until the report is filed.

- h. Not charge or collect less than minimum rates set by the Commission.
- 2. Hamilton Distributing, Inc., shall:
 - a. Pay a fine of \$3,500 to this Commission under PU Code § 3774 on or before the 40th day after the effective date of this order.
 - b. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
 - c. Pay a fine to this Commission under PU Code § 3800 of \$2,005 on or before the 40th day after the effective date of this order.
 - d. Take such action as may be necessary to collect the undercharges set forth in Finding 2, including timely legal action under PU Code § 3671.
 - e. Notify the Commission in writing upon collection.
 - f. Promptly take all reasonable steps to collect the undercharges.
 - g. File with the Commission on the first Monday of each month a report of any undercharges remaining uncollected 60 days after the effective date of this order, specifying the action taken 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 the due date shall result in the automatic suspension of the operating authority until the report is filed.
 - h. Not charge or collect less than minimum rates set by the Commission.

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

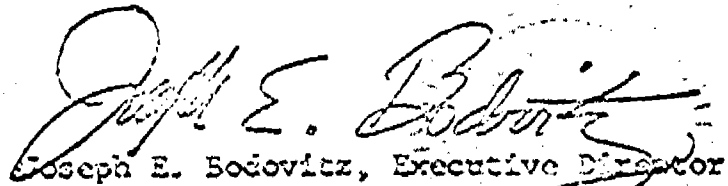
This order shall become effective for each respondent 30 days after order is served.

Dated October 19, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
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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Existing Case Law - Stipulations
In Undercharge Matters

Staff has called the ALJ's attention to certain prior decisions of this Commission. Staff is not sure whether these decisions are intended to prohibit it from agreeing to, or even participating in negotiations for certain kinds of settlements of undercharge proceedings.

The pertinent portion of Decision (D.) 82-05-036 in Order Instituting Investigation (OII) 44 states:

"In public utility regulatory matters, protection of the public interest is a fundamental obligation and duty of this Commission. Here, the stipulation by its silence on the issue provides for no § 3774 punishment to be imposed. We recognize that at law stipulations are agreements between the parties signing them, and, as long as they are within the authority of the attorneys, are binding upon the signatory parties, and unless contrary to law or policy, are also binding upon the forum (Glade v Superior Court (1978) 76 CA 3d 738, 744). But in public utility enforcement matters, the setting of or amount of a fine, or the decision whether to impose either a punitive fine or an alternate measure as punishment, is a responsibility reserved to the Commission. While it is entirely



proper to accept stipulations of counsel which appear to have been made advisedly and after due consideration of the facts, the forum cannot surrender its duty to see that the judgment to be entered is a just one; nor is the forum to act as a mere puppet in the matter (City of Los Angeles v Harper (1935) 8 CA 2d 552, 555). In summary, the parties in an enforcement proceeding cannot, by means of a stipulation, oust the Commission of the jurisdiction given exclusively to it by the Code. Nor can the Commission ignore the issue.

"While intent is not an element in determining whether noncompliance with tariff provisions has resulted in a Code violation, in measuring the penalty to be imposed where there has been a violation, the Commission does consider the question of willfulness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462)."

The pertinent portions of D-92153 in OII 50 state:

"In the instant proceeding the staff stipulated that it was not contending that Applegate in violating the Code and tariff in the subhauler issue did so with any intent to evade or otherwise improperly circumvent the law. While intent is not an element in determining whether noncompliance with tariff provisions has resulted in violation of the Code or of a tariff, in measuring the penalty to be imposed where there is a violation, the Commission does consider the question of willfulness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462). Where there is no indication of willfulness, a punitive fine need not be imposed at all (Jack Robertson (1969) 69 CPUC 563)."

* * *

"But here the staff's stipulation that Applegate's violations in regard to the transportation payments to the owner-operators were not intentional, if binding upon the Commission, would tend to negate any possibility of finding requisite good cause to impose a fine, despite Applegate's stipulation that it would pay a

punitive fine of \$2,000." Without some legally derived foundation showing culpable wrongdoing, this Commission has no jurisdiction to impose a punitive fine. (Emphasis added.)

There is also a reported opinion, Inv. of Dolphin Transportation, Inc. (1980) 4 CPUC 2d 409, which states that courts are "usually" bound by stipulations of the parties, and holds that there must be evidence of culpability before a \$ 3774 fine can be imposed. The decision found that there was evidence of willfulness and imposed the stipulated fine of \$5,000. KL

The ALJ Ruling which took these stipulations under submission offered all appearances an opportunity to persuade the Commission to revise these decisions, or to otherwise explain the apparent conflict between the holdings and the settlement proposal. None of the appearances have exercised their right to argue or explain. We will therefore consider whether the stipulation should be adopted.

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- Rn*

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