

ORIGINAL

Decision No. 87310

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  
Dee Jay Transportation, Inc., a  
California corporation; H&E  
Bros., Inc.; A. J. Lynch Co.;  
Gainey Ceramics; S. Paul Ward  
Inc.; Advance Coatings Incor-  
porated; John K. Bice, Inc.; G-J  
Industries, dba Commodore Vanity;  
Asphalt Products Oil Corp.; and  
Dowman Products, Inc.; all  
California corporations; Pfizer,  
Inc., a foreign corporation;  
Robert Lee Ross, dba B&R Roofing.

Case No. 10211  
(Filed November 23, 1976)

John D. Hudson, for Dee Jay Transportation,  
Inc.; Douglas A. Scott, Attorney at Law,  
for Gainey Ceramics; and Donald R.  
Wellington, for Dowman Products, Inc.;  
respondents.  
Maxine C. Dremann, Attorney at Law, and  
E. H. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion  
(OII) into the operations, rates, charges, and practices of  
respondent Dee Jay Transportation, Inc., (Dee Jay) a California  
corporation, to determine whether it has violated Sections 3664,  
3667, 3668, and 3737 of the Public Utilities Code while transporting

property for certain respondents named in the OII (shippers) at less than the established minimum rates and to determine:

- (1) Whether Dee Jay in performing transportation for the shippers violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code<sup>1/</sup> by charging less than the minimum rates set forth in Minimum Rate Tariff 2 (MRT 2) including the failure to comply with the requirements of rules established in Items 85, 162, 172, 200, 210, 250, and 255 of MRT 2 for said operations.
- (2) Whether shippers have paid less than the applicable rates and charges for the transportation performed by Dee Jay.
- (3) Whether any sum of money is now due and owing Dee Jay from shippers.
- (4) Whether Dee Jay should be ordered to collect from shippers, or from any persons liable therefor, the difference between the charges collected and the charges due under the aforementioned tariff.
- (5) Whether Dee Jay should be ordered to cease and desist from any and all unlawful operations and practices.
- (6) Whether the operating authority of Dee Jay should be canceled, revoked, suspended, or as an alternative, whether a fine should be imposed pursuant to Section 3774.
- (7) Whether Dee Jay should be ordered to pay a fine in the amount of the undercharges, pursuant to Section 3800.
- (8) Whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

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<sup>1/</sup> Unless otherwise specified, all statutory references are to the Public Utilities Code.

The shippers are H&E Bros., Inc., a corporation; A. J. Lynch Co., a corporation; Gainey Ceramics, a corporation; Pfizer, Inc., a Delaware corporation; S. Paul Ward, Inc., a corporation; Advance Coatings Incorporated, a corporation; John K. Bice, Inc., a corporation; G-J Industries, doing business as Commodore Vanity, a corporation; Asphalt Products Oil Corp., a corporation; Dowman Products, Inc., a corporation; and Robert Lee Ross, an individual doing business as B&R Roofing.

After proper notice a public hearing was held before Examiner James D. Tante on January 5, 1977 in Victorville, California, and the matter was submitted as of the date of filing concurrent briefs in the form of letters to the presiding officer on or before February 18, 1977.

At the hearing the Commission staff contended that: the undercharges were in the total sum of \$8,215.88; Dee Jay should be ordered to pay a fine in that amount pursuant to Section 3800; Dee Jay should be ordered to collect from the respondent shippers the difference between the charges collected and the proper charges, in the aggregate sum of \$8,215.88, pursuant to Section 3800; Dee Jay should be ordered to pay a fine of \$3,000 and to cease and desist from any and all unlawful operations and practices, pursuant to Section 3774; Dee Jay's operating authority should not be canceled, revoked, or suspended; and it is not necessary to issue any other order in this case.

An associate transportation representative and a transportation rate analyst, employed by the Commission, and an assistant bookkeeper employed by Lunday-Thagard Oil Co., testified for the Commission; its president testified for Dee Jay; and its president testified for shipper Dowman Products, Inc.

Exhibit 1, records of and relating to Dee Jay; Exhibit 2, a two-page document relating to economic information of Dee Jay; Exhibit 3, a three-page document relating to rail information; Exhibit 4, an Undercharge Citation and Citation Forfeiture and supporting documents; Exhibit 5, four Department of Motor Vehicles certifications; Exhibit 6, Industrial Minerals Company bills of lading and invoices; Exhibits 7-A to 7-K, rate analysis statements; Exhibit 8, a check and an invoice concerning shipper Gainey Ceramics; and Exhibit 9, purchase order No. 2676 and invoice, and freight bill and corrected freight bill No. 8993; were received in evidence.

Pfizer, Inc., by its traffic manager Robert A. Damiano, and the Commission staff stipulated that as to freight bills Nos. 8813, dated August 5, 1975 in the amount of \$580, and 8943, dated October 2, 1975 in the amount of \$620, the charges made by Dee Jay were not in conformance with Item 85 of Section 1, Rules of General Application, of MRT 2.

Dee Jay and the Commission staff stipulated that Exhibits 1 to 8, including 7-A to 7-K, are accurate.

Dee Jay is a radial highway common carrier whose permit was issued September 17, 1962 to transport limited commodities and to whom a cement certificate was issued June 23, 1964 to operate in eight counties. Dee Jay employs eight drivers, one mechanic, and one clerical employee; has eight tractors and nine sets of flatbed trailers; and maintains one terminal consisting of a garage, office, and parking area.

An Undercharge Citation and a Citation Forfeiture were issued relating to Dee Jay in July of 1973, were not contested, and pursuant thereto Dee Jay paid a fine of \$1,063.38 by reason of the Undercharge Citation and \$150 by reason of the Citation Forfeiture.

Dee Jay subscribes to minimum rate tariffs, MRT 2, 10, 14, 15, ERT 1, and DT 7, and on July 13, 1976 its president stated that he was in receipt of such tariffs and was receiving supplements thereto.

In performing transportation for certain shippers, Dee Jay violated Sections 3664, 3667, 3668, and 3737 by charging less than the minimum rates set forth in MRT 2 in that it transported shipments free of charge, used incorrect rates, and failed to comply with the requirements of Items 85, 162, and 172 of MRT 2 concerning the consolidation of multiple lot, split pickup, and split delivery shipments; assessed incorrect rail common carrier rates and failed to assess applicable off-rail combinations applied under provisions Items 200 and 210 of MRT 2; failed to issue shipping documents or bill and collect transportation charges as required by MRT 2, Items 250 and 255; and falsified shipping documents and accounting records, as follows:

- (1) H&E Bros., Inc., as indicated by delivery receipts Nos. 6854, 8092, 12924, and 13101, on July 11, August 8, September 22, and September 24, 1975 was charged nothing for transportation of certain commodities when the proper charge, and therefore an undercharge, was \$165.36, \$333.54, \$336.60, and \$325.24, for a total of \$1,160.74 in violation of Items 250, "Collection of Charges", and 255, "Issuance of Documents".
- (2) A. J. Lynch Co., as indicated by freight bills Nos. 8811, 8817, 8821, 8822, 8846, 8858, 8870, and 8895, on August 3, 6, 8, 11, 20, 26, 27, and September 10, 1975 was charged \$2,144.07 less than the proper charge in violation of Items 85, "Shipments Transported in Multiple Lots", 162, "Split Pickup", and 172, "Split Delivery".

- (3) Gainey Ceramics, as indicated by freight bills Nos. 8806, 8833, 8842, and 8932 on August 1, 13, 21, and September 30, 1975, was charged \$1,253.63 less than the proper charge in violation of Items 85 and 210, "Alternative Application of Combinations with Carrier Rates".
- (4) Pfizer, Inc., as indicated by freight bills Nos. 8813 and 8943 on August 5 and October 2, 1975, was charged \$746.14 less than the proper charge in violation of Item 85.
- (5) S. Paul Ward Co., Inc., as indicated by freight bill No. 8815 on August 5, 1975, was charged \$282.80 less than the proper charge in violation of Item 210.
- (6) Advance Coatings, Inc., as indicated by freight bill No. 8818 dated August 6, 1975, was charged \$240.15 less than the proper charge in violation of Item 162.
- (7) John K. Bice, Inc., as indicated by freight bills Nos. 8820 and 8860 dated August 7 and August 25, 1975, was charged \$399.59 less than the proper charge in violation of Item 172.
- (8) G-J Industries, dba Commodore Vanity, as indicated by freight bills Nos. 8825 and 8884 dated August 14 and September 5, 1975, was charged \$435.40 less than the proper charge in violation of Items 85 and 210.
- (9) Asphalt Products Oil Corp., as indicated by freight bills Nos. 8835 and 8984 dated August 15 and October 16, 1975, was charged \$523.93 less than the proper charge in violation of Items 85 and 200.

- (10) Dowman Products, Inc., as indicated by freight bills Nos. 8855 and 8910 dated August 25 and September 12, 1975, was undercharged \$307.32 in violation of Items 85 and 507.
- (11) Robert Lee Ross, dba B&R Roofing, as indicated by delivery receipts Nos. 6328 and 14701 dated June 27 and October 13, 1975, was charged nothing for the transportation of the commodities and the proper charge should have been \$546.11 and \$176, respectively, for an undercharge of \$722.11 in violation of Items 250 and 255.

The total amount of undercharge during the period involved herein is \$8,215.88.

Dee Jay's president testified that he has had some difficulty interpreting the tariffs and has made some effort to obtain assistance in the past but has been unable to do so. He stated that he now has a tariff expert who is going to assist him in the future and believes that a similar undercharge situation will not arise again. Although the rating of shipments may often be difficult and may require technical proficiency, the law is settled that neither negligence, inexperience, nor inadvertence constitutes a defense to a failure to collect the proper tariff charge.

(H. A. Morrison Trucking Co. (1963) 61 CPUC 234.)

He stated that he relied on the shippers and thought a team track and a spur track were the same and this misunderstanding was the cause of a large portion of the undercharge. A carrier has the burden of ascertaining the correct rate to be charged and cannot escape this responsibility by relying upon information supplied by his shippers. (Emmett Aiken (1958) 56 CPUC 329; William H. Anderson (1959) 57 CPUC 225 (unreported opinion).) He

stated that he has billed all of the shippers for the undercharges and that Gainey Ceramics, Pfizer, Inc., John K. Bice, Inc., and Asphalt Products Oil Corp. have all agreed to pay him the amount of the undercharges and he believes that all of the other shippers will also agree to pay the amount of the undercharges.

He testified that with respect to the undercharges to H&E Bros., Inc., that an employee of that shipper had stated that the company would give Dee Jay four tarpaulins valued at approximately \$1,000 for the cost of shipment, but he has been unable to obtain any documentation of this agreement and the employee is no longer employed by that shipper. An offset is proper only if its recognition causes no danger that it may be used as a medium for evasion of scheduled tariff rates. (Gould Transportation Co. (1967) 67 CPUC 350.) In light of the requirement that a proper offset must be an expense of definite amount directly related to the transportation performed and substantiated by supporting documents, this alleged agreement is invalid as an offset. As all transportation must be separately and properly billed, rated, and assessed (MRT 2, Item 2(h)), it appears that the transportation was performed in such a manner as a means to evade the applicable minimum rate. No offset for the tarpaulins against the assessed \$1,160.74 can be allowed. He stated that he believed that the fine of \$3,000 as recommended by the staff was more than the Commission should impose in this case and that the Commission should impose no such fine or in any event a fine less than the amount recommended by the staff. He also stated that he would appreciate having a three-month period over which to pay any punitive fine in this case and his request was not objected to by the staff.



Section 3774 provides for the imposition of a fine, not to exceed \$5,000, in the event of violation of applicable provisions of MRT 2.

This fine which is an alternative to cancellation, revocation, or suspension of the carriers operating permit may be imposed when the Commission finds that the carrier has charged and collected rates less than the applicable minimum rates, furnished transportation without charge, improperly consolidated shipments, falsified documents, and possessed inadequate documentation. The amount of penalty is discretionary with the Commission. The Commission, in determining the penalty to be imposed should consider the willfulness of the acts as opposed to errors resulting primarily through carelessness.

Dee Jay has a history of previous violations. An Undercharge Citation in the amount of \$1,063.38 and a Citation Forfeiture in the amount of \$150 were imposed in 1973 for violation of Sections 3664 and 3737, assessing rates and charges less than the applicable minimum rates, and violation of MRT 2, Item 85, "Shipments Transported in Multiple Lots". Pfizer, Inc., and J. K. Bice, respondent shippers in the present action, were among the named shippers. Dee Jay knew and understood the requirements of proper documentation and pickup and the possible results of its violation.

In the present action, Dee Jay intentionally and willfully attempted to obscure evidence of its violations. This is evidenced by documents and admissions of Herman Schlosser, its president, found throughout Exhibit 1. A staff representative specifically testified to several of these instances, including Section 3 of Exhibit 1, "Gainey Ceramics", Part 1, (page 57). This document shows an account receivable entry for freight bill No. 8806 which

has been altered from \$1,032.22 to \$1,632.22. The staff representative testified that the ledger had been altered in the amount of \$600 after Dee Jay had been notified by him of an undercharge approximately of that amount. A check and invoice sent to Dee Jay from Gainey Ceramics (Exhibit 6) and the testimony of John J. Gainey, Jr., president of Gainey Ceramics, establishes that \$1,032.22 was the amount paid for the transportation furnished.

Dee Jay had also altered dates on other documents in its possession in an attempt to obscure instances of improper consolidation of shipments. (Violations of MRT 2, Items 85, 162, and 172) One such instance is demonstrated by Section 3, Part 1 (pages 54, 55, and 56) of Exhibit 1, bills of lading Nos. 14800, 14809, and 14821. Dates on these shipper-originated documents in the carrier's possession were erased or changed in an attempt to create an appearance that delivery was made within the required time limit. Dates on the original documents, copies of which were introduced into evidence (Exhibit 6), demonstrate that shipments were delivered outside the required time period. This changing of dates on documents indicates a willful attempt to first violate the regulations then prevent discovery by the Commission.

Transportation was performed free of charge for H&E Bros., Inc. (Section 1 of Exhibit 1), and Robert Lee Ross (Section 11 of Exhibit 1). The staff rates this transportation at \$1,160.74 and \$722.11 respectively. No billing documents were prepared for this transportation and no payment was collected, indicating an attempt to provide transportation in violation of the Commission's minimum rate schedules.

Dee Jay received its permit September 17, 1962. Its president, Herman Schlosser, has received the applicable tariffs and supplements thereto (Exhibit 2). This company has been regulated by the Commission for approximately 15 years and is aware of the Commission's rules, regulations, and procedures. Its conduct of committing violations, then attempting to obscure them, illustrates a disregard for the Commission's authority. The \$3,000 fine is appropriate.

The president of the shipper Dowman Products, Inc., testified that his company was willing to pay the \$31.01 undercharge indicated by freight bill No. 8855 dated August 25, 1975, but did not believe that it should be required to pay \$276.31 undercharge as indicated by freight bill No. 8910 dated September 12, 1975. He stated that his company purchased certain commodities from Pfizer, Inc., which weighed approximately 100,000 pounds and expected that the entire shipment would be picked up by Dee Jay and delivered to Dowman on one occasion which would constitute only the charge indicated by the freight bill and would not result in an undercharge. He stated that his company had no way of knowing that the entire shipment was not picked up by Dee Jay within a 24-hour period as required by the applicable tariff and that his company had no control over the time that the shipment was made available by Pfizer or picked up by Dee Jay, but it was delivered to his company all at the same time, and he believes that under such circumstances his company should not be required to pay the \$276.31 undercharge.

It is well established that the carrier, here Dee Jay, has both the right and the duty to recover undercharges, that such recovery is essential to preserve the minimum rate structure, and that the collection of undercharges from the shipper by the carrier is one of the most effective means of preserving the minimum rate schedule and eliminating collusion between the carrier and the shipper. (West v Holstrom (1968) 67 Cal Rptr 831, 261 CA 2d 89.)

Section 3800<sup>2/</sup> is mandatory and directs us to order Dee Jay to collect the undercharges. (Decision No. 86854 dated January 11, 1977.) If, as a result of the default of a carrier, a shipper has been damaged, the shipper has his action at law against the carrier, but the shipper must, nevertheless, pay the proper tariff charges. (Lloyd Cannon Trucking (1973) 75 CPUC 239 (unreported opinion).)

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2/ Section 3800 (in part):

"Whenever the commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges applicable to such transportation established or approved by the commission, or has directly or indirectly refunded or remitted in any manner or by any device any portion of such minimum rates or charges, or has paid a commission, without an order of the commission so authorizing, the commission shall require such carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges."  
(Emphasis added.)

Findings

1. Dee Jay is engaged in the business of transporting property for compensation upon the public highway pursuant to a radial highway common carrier permit issued September 17, 1962 to transport limited commodities and pursuant to a cement certificate issued June 23, 1964 to operate in eight counties.

2. Dee Jay was served with all applicable minimum rate tariffs and the distance table, together with all supplements and additions thereto.

3. During the period of July 1 through October 31, 1975 while engaged in the business of transporting property for compensation for the respondents herein, Dee Jay charged less than the lawfully prescribed minimum rates as follows: H&E Bros., Inc., \$1,160.74; A. J. Lynch Co., \$2,144.07; Gainey Ceramics, \$1,253.63; Pfizer, Inc., \$746.14; S. Paul Ward, Inc., \$282.80; Advanced Coatings Incorporated, \$240.15; John K. Bice, Inc., \$399.59; G-J Industries, dba Commodore Vanity, \$435.40; Asphalt Products Oil Corp., \$523.93; Dowman Products, Inc., \$307.32; Robert Lee Ross, dba B&R Roofing, \$722.11; for a total undercharge during the period of \$8,215.88.

4. All respondents were cooperative with the staff at all times during the investigation and the hearing.

Conclusions

1. Respondent Dee Jay violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code.

2. Dee Jay should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$8,215.88 and, in addition, thereto, should pay a fine pursuant to Section 3774 in

the amount of \$3,000 payable \$1,000 on or before the 40th day after the effective date of this order, \$1,000 on or before the 70th day after the effective date of this order, and \$1,000 on or before the 100th day after the effective date of this order.

3. Dee Jay should be ordered to collect from the respondent shippers the difference between the charges collected and the proper charges in the aggregate sum of \$8,215.88 pursuant to Section 3800 of the Public Utilities Code.

4. Respondent Dee Jay should be directed to cease and desist from violating the rates and the rules of the Commission.

5. No other penalties or sanctions are warranted.

O R D E R

IT IS ORDERED that:

1. Dee Jay Transportation, Inc., a California corporation, shall pay a fine of \$8,215.88 to this Commission pursuant to Public Utilities Code Section 3800 on or before the fortieth day after the effective date of this order.

2. Dee Jay Transportation, Inc., shall pay a fine of \$3,000 to this Commission pursuant to Public Utilities Code Section 3774 payable \$1,000 on or before the fortieth day after the effective date of this order, \$1,000 on or before the seventieth day after the effective date of this order and \$1,000 on or before the hundredth day after the effective date of this order.

3. Dee Jay Transportation, Inc., shall pay interest at the rate of seven percent per annum on the fine set forth in Ordering Paragraph 2, such interest to commence upon the day the payment of the fine is delinquent.

4. Dee Jay Transportation, Inc., shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

5. Dee Jay Transportation, Inc., is ordered to collect from the respondent shippers the difference between the charges collected and the charges due in the amount set forth in Finding 3 above and shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent Dee Jay Transportation, Inc., shall file with the Commission, on the first monday of each month after the end of the sixty days, a report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full

or until further order of the Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of respondents' operating authority until the report is filed.

6. Dee Jay Transportation, Inc. is placed on notice that failure to collect the undercharges will not serve as an equitable cause for a reduction in the undercharge fine pursuant to Public Utilities Code Section 3800.

The Executive Director of this Commission shall cause personal service of this order to be made upon respondent Dee Jay Transportation, Inc., and cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 10<sup>th</sup>  
day of MAY 1, 1977.

Robert Bateman  
President  
William J. Sweeney  
Vernon L. Sturges  
Richard D. Kneale  
Commissioners