

ORIGINAL

Decision No. 87448 June 7, 1977

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 BERKELEY WAREHOUSE & DRAYING CO., INC., a California Corporation; INDUSTRIAL DRAYAGE, INC., a California Corporation; MACOMBER'S, INC., a California Corporation and MACOMBER'S FOOD PRODUCTS, a California Corporation.

Case No. 10265
(Filed February 23, 1977)

Investigation on the Commission's own motion into the operations, rates, charges and practices of M & L TRUCKING COMPANY, INC., a California Corporation, MACOMBER'S FOOD PRODUCTS, a California Corporation, MACOMBER'S, INC., a California Corporation, and PAN PACIFIC SCREW AND BOLT COMPANY, a Michigan Corporation.

Case No. 10266
(Filed February 23, 1977)

Handler, Baker and Greene, by Randall M. Faccinto, Attorney at Law, for M & L Trucking Company, Inc., and Eldon M. Johnson, Attorney at Law, for Berkeley Warehouse & Draying Co., Inc. and Industrial Drayage, Inc., respondents.
Jasper Williams, Attorney at Law, and E. E. Cahoon, for the Commission staff.

O P I N I O N

Case No. 10265 is an investigation on the Commission's own motion to determine whether or not Berkeley Warehouse & Draying Co., Inc. (Berkeley) and its affiliate, Industrial Drayage, Inc. (Industrial), have violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging respondents Macomber's, Inc. (Macomber) and Macomber's Food Products (Macomber's Food) less than

the applicable minimum rates set forth in Minimum Rate Tariff 2 (MRT 2) and supplements thereto by failing to comply with Item 257 thereof which requires that minimum rates are to be assessed and collected only on the basis of units of measurements established in the tariff.

Case No. 10266 is an investigation on the Commission's own motion to determine whether or not M & L Trucking Company, Inc. (M & L) has (1) violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging Macomber and Macomber's Food less than the applicable minimum rates set forth in MRT 2 and supplements thereto by failing to comply with Item 257 thereof which requires that minimum rates are to be assessed and collected only on the basis of units of measurement established in the tariff; (2) violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code by charging Pan Pacific Screw and Bolt Company (Pacific) less than the applicable minimum rate set forth in MRT 2 and supplements thereto by failing to comply with the requirements of Items 160 and 163 thereof governing the transportation of split pickup shipments; (3) violated Section 453 of the Public Utilities Code by extending a preference to respondent Pacific by means of improper shipment consolidations for unauthorized split delivery service to Pacific for less than the applicable rates and charges specified in M & L's tariff schedule filed and in effect at the time of such transportation; (4) violated Sections 494 and 532 of the Public Utilities Code by charging, demanding, collecting, or receiving a different compensation for the transportation of property for Pacific than the applicable rates and charges specified in M & L's tariff filed and in effect at the time of such transportation.

The two cases were consolidated for hearing and decision. The consolidated hearing was held at San Francisco on April 20, 1977 before Examiner Pilling.

The facts in both cases were agreed to by the Commission staff and the appropriate carrier respondents by written and signed stipulation admitted into evidence. In Case No. 10265 Berkeley and Industrial admitted to undercharges of \$6,513.01 and agreed to an assessment of a fine against them of the same amount pursuant to Section 3800 of the Public Utilities Code. The stipulation is silent as to a punitive fine pursuant to Section 3774 of the Public Utilities Code. The Commission staff recommends a punitive fine of \$1,500. In Case No. 10266 M & L admitted to undercharging Macomber and Macomber's Food \$19,251.05 and of undercharging Pacific a total of \$1,641.63 and agreed to being assessed a fine in those amounts pursuant to Section 3800 of the Public Utilities Code. M & L also agreed to being assessed a punitive fine in the amount of \$1,500. Industrial agreed to have its permit, which is dormant, canceled.

Respondent carriers undercharged Macomber and Macomber's Food because they charged the two shippers a flat \$.25 a case regardless of the volume, weight, or destination of the shipments, and the amounts collected by the respondent carriers totaled less than the applicable MRT 2 charges. M & L undercharged Pacific through the use of two devices, the one where M & L under its permit picked up shipments over varying periods of time and designated certain groups of pickups as a split pickup of a single shipment and the other where M & L under its certificate treated shipments which were picked up over a week's period as a single shipment and wrongfully charged split delivery rates.

The respondent carriers request that they be given until after they recover the undercharges from Macomber and Macomber's Food to pay any fine levied against them under Section 3800 of the Public Utilities Code. M & L showed that it instituted suit against Macomber and Macomber's Food on December 2, 1975 to collect the subject undercharges and the case still has not come to trial on the merits.

M & L contends that Macomber and Macomber's Food is resisting payment of the undercharges through spurious defenses. The court's docket list shows that there have been 42 separate pleadings filed so far in the case. The respondent carriers plead that they are small carriers--Berkeley with a 1976 gross revenue of \$473,110, Industrial with a 1976 gross revenue of \$1,883, and M & L with a 1976 gross revenue of \$653,670--and to make them pay the Section 3800 fine before they collect from Macomber and Macomber's Food undercharges would leave them financially strapped.

Berkeley and Industrial resist the assessment of a punitive fine against them. They contend that they have already paid the price of their actions in that in hauling for Macomber and Macomber's Food they were required to pay several thousands of dollars because of the hauls in breach of a covenant not to compete contained in the sale agreement of another truck operation. The Commission staff contends that a punitive fine of \$1,500 should be levied against them because they have been in the trucking business for a considerable length of time--Berkeley since 1957--and that their attempted evasion of the applicable tariff provisions was deliberate. The Commission's files contain no violation history for them or for M & L.

We find that the facts are as set out in the stipulations contained in Exhibits 1, 2, and 3 and the same are incorporated by reference herein.

Conclusions

1. Berkeley and Industrial have violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code in hauling for Macomber and Macomber's Food by undercharging that shipper in the amount of \$6,513.01 and that a fine should be levied on Berkeley and Industrial in that amount.

2. M & L has violated Sections 453, 494, 532, 3664, 3667, 3668, and 3737 of the Public Utilities Code in hauling respectively for

Macomber and Macomber's Food and Pacific by undercharging Macomber and Macomber's Food in the amount of \$19,251.05 and in hauling for Pacific by undercharging Pacific \$1,641.63 and a fine in total of those amounts should be assessed against M & L.

3. The permit of Industrial should be canceled.

4. Berkeley and Industrial should be assessed a combined punitive fine of \$1,500 and M & L should be assessed a punitive fine of \$1,500 since their evasion of the minimum rate tariffs was deliberate.

The Commission expects that Berkeley and/or Industrial and M & L will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges (including, if necessary, the timely filing of complaints pursuant to Sections 737 and 3671 of the Public Utilities Code). The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that either Berkeley and/or Industrial and M & L or their attorneys have not been diligent, or have not taken all reasonable measures to collect all undercharges, or have not acted in good faith, the Commission will reopen this proceeding as to the recalcitrant carrier(s) for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Berkeley Warehouse & Draying Co., Inc. (Berkeley) and Industrial Drayage, Inc. (Industrial) shall pay a fine of \$1,500 to the Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Berkeley and/or Industrial shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. Berkeley and/or Industrial shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$6,513.01 on or before the fortieth day after the effective date of this order.

3. Berkeley and/or Industrial shall take such action, including legal action, (instituted within the time prescribed by Section 3671 of the Public Utilities Code), as may be necessary to collect the subject undercharges and shall notify the Commission in writing upon collection.

4. Berkeley and/or Industrial 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 paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent 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 Berkeley's operating authority until the report is filed.

5. Berkeley 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.

6. Berkeley and/or Industrial at its election may pay the fine ordered by Ordering Paragraph 2 in monthly installments of no less than \$550 each plus undercharges collected up to the due date of each installment payment. Installment payments are due and payable on or before the first day of each month starting with the first day of August 1, 1977 and continuing thereafter until the full amount of the fine is paid. If an election is made to pay the fine in

installments as set out above and Berkeley and/or Industrial fails to make any of the installments when due, the full amount of the unpaid balance of the fine will become immediately due and payable.

7. M & L Trucking Company, Inc. (M & L) shall pay a combined fine of \$1,500 to this Commission pursuant to Public Utilities Code Sections 1070 and 3774 on or before the fortieth day after the effective date of this order. M & L shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

8. M & L shall pay a combined fine to this Commission pursuant to Public Utilities Code Sections 2100 and 3800 of \$20,892.68 on or before the fortieth day after the effective date of this order.

9. M & L shall take such action, including legal action, (instituted within the time prescribed by Sections 737 and 3671 of the Public Utilities Code), as may be necessary to collect the subject undercharges and shall notify the Commission in writing upon collection.

10. M & L 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 paragraph 9 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent 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 M & L's operating authority until the report is filed.

11. M & L 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 and in a lesser or greater amount than its applicable tariff rates and charges.

12. M & L at its election may pay the fine ordered by Ordering Paragraph 8 in monthly installments of notless than \$875 each plus undercharges collected up to the due date of each installment payment. Installment payments are due and payable on or before the first day of each month starting with the first day of August 1, 1977 and continuing thereafter until the full amount of the fine is paid. If an election is made to pay the fine in installments as set out above and M & L fails to make any of the installment payments when due, the full amount of the unpaid balance will become immediately due and payable.

13. The permit of Industrial is canceled.

The Executive Director of the Commission shall cause personal service of this order to be made upon respondent carriers 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 7th day of JUNE, 1977.

Robert Bateman
President
William Synnott, Jr.
Vernon L. Livingston
Richard W. Howell
Commissioners