

Decision No. 87751 AUG 23 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of Walter H. Wilson and Glendora M. Wilson, his wife, a partnership, doing business as Walt Wilson Trucking; and Marquart-Wolfe Lumber Co., a California corporation.

Case No. 10171
(Filed September 14, 1976)

Virant & deBrauwere, by John E. deBrauwere,
Attorney at Law, for Walt Wilson Trucking,
and Silver, Rosen, Fischer & Stecher, by
John Paul Fischer, Attorney at Law, for
Marquart-Wolfe Lumber Co., respondents.
Elmer Sjostrom, Attorney at Law, and Edwin Hjelt,
for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's own motion to determine whether or not Walter H. Wilson and Glendora M. Wilson, his wife, a partnership doing business as Walt Wilson Trucking (Wilson), violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code^{1/} by failing to bill and collect transportation charges as prescribed by Item 250 of Minimum Rate Tariff No. 2 (MRT 2),^{2/} and by using the device of a vehicle purchase agreement to permit respondent Marquart-Wolfe Lumber Co. (Marquart) to obtain transportation of property between points within this State at rates less than the minimum rates; whether Marquart paid less than the applicable rates and charges for transportation performed by respondent Wilson; whether any sum of money is now due and owing to respondent Wilson from Marquart for transportation services; whether respondent Wilson failed to issue and maintain shipping documents as

^{1/} See Appendix A.

^{2/} See Appendix A.

required by Items 255 and 256 of MRT 2;^{3/} whether respondent Marquart violated Section 3669^{4/} by seeking to obtain or obtaining transportation of property by respondent Wilson at less than the applicable minimum rates and charges; whether respondent Wilson should be ordered to collect from Marquart the difference between the charges collected, if any, and the charges due under the aforementioned tariff; whether respondent Wilson should be ordered to cease and desist from any and all unlawful operations and practices as a carrier; whether his operating authority should be cancelled, revoked, or suspended or, in the alternative, whether a fine should be imposed pursuant to Section 3774, and whether Wilson should be ordered to pay a fine in the amount of the undercharges pursuant to Section 3800.

A duly noticed public hearing was held in Los Angeles on January 25, 1977 before Examiner Bernard A. Peeters, and submitted on that date.

Stipulation

The parties stipulated to the authenticity of the documents to be introduced into evidence by the staff. (Exhibits 1 through 7).

The Evidence

The staff presented its case through three witnesses and nine exhibits. Respondent Wilson presented one witness and one exhibit. Respondent Marquart made no affirmative showing.

Walter H. Wilson and Glendora M. Wilson (his wife) are partners operating Walt Wilson Trucking under the following permits: Radial highway common carrier permit issued to the carrier by transfer on July 31, 1956; cement contract carrier permit issued on June 23, 1964; and dump truck carrier permit issued November 1, 1974. Wilson maintains an office and yard at 1150 Alameda Street, Wilmington, and shares office facilities at 550 Redwood Highway North, Petaluma. As of April 29, 1976, Wilson was operating one tractor and one set of

^{3/} See Appendix A.

^{4/} See Appendix A.

flatbed trailers locally in the Long Beach Harbor area. Employees, as of April 29, 1976, consisted of one driver, a bookkeeper in the Petaluma office, his daughter helping with dispatching in the Wilmington office, and his son Lavern, a nonsalaried employee who acts as office manager and dispatcher in the Petaluma office. Gross receipts for 1975 were \$424,925.

Staff witness Hunziker testified that he investigated Wilson's operations for the period from July 1, 1975 through December 31, 1975. He began his investigation with a visit to Wilson's Petaluma office on February 2 and 3, 1976, where he requested all of the carrier's records for the review period for inspection. In the course of examining these records, he found evidence of payments to subhaulers for which there were no supporting shipping documents showing payment to Wilson. This absence of shipping documents or evidence of payment triggered further investigation, resulting in this formal proceeding.

Hunziker next undertook an extensive field investigation, visiting carriers, lumberyards, and weighmasters around the State. Consequently, he was able to document sixteen instances of transportation performed by Wilson for which no evidence of payment (or billing) had appeared in Wilson's records. All sixteen were for the account of Marquart.

Hunziker then returned to the carrier's Petaluma office on April 13 and 14, and requested all of Wilson's records relating to Marquart. Exhibit 2 is a copy of Wilson's accounts receivable ledger pages 5 and 6 for Marquart, as of April 14.

On April 29, 1976, Hunziker met with Wilson at the Wilmington office. Hunziker confronted Wilson with the evidence of the sixteen loads and asked for an explanation. Wilson was unable to explain the circumstances and asked Hunziker to return the next day.

On April 30, 1976, Hunziker returned to Wilson's office, along with Don Weidman of the PUC staff. Wilson then produced from his desk drawer an envelope containing shipping documents for the sixteen shipments and a purported contract dated August 12, 1975 between Wilson and Marquart regarding the sale of a truck and trailer owned by Marquart. Exhibit 1 contains these shipping documents. Exhibit 5 is a copy of the contract. Staff contends that this contract is in fact part of a device whereby Wilson and Marquart together sought to cover up their evasion of the minimum rates by means of alleged "hauling credits."

In further support of this contention, staff offered Exhibits 3 and 4, further copies of page 6 of Wilson's accounts receivable ledger for Marquart, as of May 6 and October 5, 1976, respectively. Exhibit 3 shows that entries had been made as of May 6 to include the sixteen shipments in Wilson's receivables. Exhibit 4 reflects payment to Wilson by Marquart of \$8,633.63 on September 15, 1976. Exhibit 4 also includes an unnumbered check stub showing that the \$8,633.63 payment covered the sixteen shipments discovered by Hunziker.

Staff also offered Exhibit 6, showing the 1975 and 1976 vehicle registration forms for a 1974 Peterbilt tractor owned by Marquart. The exhibit also purports to show that Marquart owned no trailing equipment.

Staff witness Weidman sponsored Exhibit 8, a "Security Agreement and Power of Attorney" dated October 7, 1976, between Wilson and United California Bank. This document was furnished to Weidman by Wilson in response to Weidman's inquiry regarding performance of the August 12, 1975 contract. A comparison of the serial numbers indicates that the vehicle covered by the security agreement in Exhibit 8 is the same vehicle previously registered to Marquart as shown by Exhibit 6.

Staff witness Dallas Cooper sponsored Exhibit 9, a summary of the shipping records contained in Exhibit 1 with the applicable minimum rate for each shipment. Cooper calculated the amount of undercharges as \$8,172.95, relying on staff's contention that the sixteen shipments had not been timely billed nor collected as part of a scheme to evade minimum rates.

Walt Wilson testified in his own behalf. He stated that he has been in the trucking business for 21 years and that for the last 10 years has had an office in Wilmington as well as Petaluma. In June 1975, he moved to Wilmington. He stated that shortly thereafter he decided he needed another truck and trailer. After several discussions with Mr. Wolfe of Marquart, he and Mr. Wolfe reached an agreement regarding the purchase of a truck and trailer from Marquart (Exhibit 5). The contract required a \$10,000 down payment before Wilson could take possession and provided that the down payment could be made by cash, check, or hauling credits, at Wilson's option. He explained that these sixteen shipments were all applied as hauling credits and that their absence from the records was through inadvertent omission. He said that he randomly selected shipments at the Wilmington office to apply as hauling credits, but always notified the Petaluma office, by letter or by phone, of the shipments selected. Wilson sponsored Exhibit 10, allegedly a Memo Account maintained by Marquart as a current record of the credits as they accrued. He testified that ultimately he elected not to carry out the contract, but instead reached a new agreement with Marquart covering the tractor only. Wilson testified that he collected the \$8,633.63 that Marquart owed and then paid Marquart \$10,000 as a down payment on the truck. He testified that they then went to the bank and arranged for Wilson to take over Marquart's payments. He did not reconcile this testimony with the dates shown in the documentary evidence: September 15 for the payment of the \$8,633.63 (Exhibit 4) and October 7 for the financing agreement (Exhibit 8).

Discussion

It is clear from the record that staff has established a willful failure by the carrier Wilson to bill and collect from the shipper Marquart for sixteen instances of transportation. The purported contract, dated August 12, 1975, is obviously part of a device whereby the carrier and shipper attempted to cover up the actual circumstances of their relationship.

The experienced staff investigator reasonably suspected an attempt to evade the minimum rates after his initial visit to Wilson's Petaluma office. His further field investigation was an appropriate procedure in view of the circumstances, particularly when the identity of the shipper became known. Marquart has been a shipper respondent in numerous Commission proceedings where violations of the minimum rates have been proven.

Wilson's April 29 failure to offer even a tentative explanation for the absence of the shipping documents cannot be justified in light of his subsequent testimony that he personally selected which of the loads to apply as hauling credits under the contract. It seems highly unlikely that he could have "forgotten" the existence of the contract, especially as Exhibit 10 purports to show that a credit was applied on April 23, 1976, only a week earlier. In this context it appears certain that the "contract" produced on April 30 is a sham. This is the second time that staff has shown that Marquart and a carrier have fabricated documents in an attempt to cover up the transportation of free loads. (The first was Case No. 9795, involving Dan J. Walden, wherein Marquart antedated checks to give the appearance that payments had been timely made.)

The alleged contract appears spurious on its face. It purports to set a price for the sale of goods for which no date of performance is set. Obviously, the equipment depreciated substantially over the year the "contract" was in force, but the

price did not change. Wilson claimed that the price was the best deal he could make. But why did he wait for a year to rescind it, particularly when he ceased regular hauling for Marquart in late 1975? The alleged rescission and collection of the payments occurred only after the Commission's order instituting this investigation.

Wilson's testimony fails to overcome the overwhelming implications of the staff showing. His ambiguous ramblings regarding bookkeeping procedures fail to reconcile his statements that the Petaluma office was always notified of these "hauling credits" with the evidence that the Petaluma office had no record of any of them (except as to payments to subhaulers). The coincidence that the sixteen loads found by Hunziker would be the same sixteen applied on the "contract" would startle anyone, except one familiar with the practices of Marquart.

It is also curious that the carrier's accounts receivables were altered after the confrontation with Hunziker, to show the sixteen shipments as receivables. Clearly, they could not be treated as receivables and "hauling credits" simultaneously. (The Dan J. Walden case also included altered accounts receivable.)

Wilson was unable to offer any documentary evidence to overcome staff's prima facie case. He had no records of transmittals to Petaluma, in spite of his testimony of such letters. He had no records of transmittals to Marquart (or of receipts from Marquart) for any of the sixteen shipments. Exhibit 10 was offered, but as a purported business record of Marquart it is entitled to no weight (other than to further implicate Wilson as noted above) without testimony from Marquart to establish the foundational facts.

Enforcement of trucking regulations is a matter of serious concern for this Commission. For this reason we direct our General Counsel to proceed with the prosecution of the shipper penalty suit arising out of these facts (Orange County Superior Court No. 25-40-46). The sort of subtle device attempted here requires that the Commission proceed vigorously to avoid a proliferation of such measures.

Findings

1. Wilson is a highway permit carrier operating under authority of this Commission.
2. Wilson transported the shipments represented in Exhibits 1 and 9 for Marquart.
3. Wilson transported the shipments referred to in Finding 2 but did not bill or collect any charges for this transportation within the time review period specified in MRT 2.
4. Wilson collected the transportation charges referred to in Finding 3 after this investigation was initiated by Commission order.
5. Wilson altered his accounts receivable and Wilson and Marquart fabricated a contract in an attempt to cover up the failure to bill or collect the charges for the transportation referred to in Finding 2.
6. The failure to bill or collect was willful.
7. The minimum rates and charges computed by the staff in Exhibit 9 are correct.

Conclusions

1. Wilson violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code.
2. Wilson should pay a fine pursuant to Section 3800 in the amount of \$8,172.95 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$5,000.
3. Wilson should be directed to cease and desist from violating the rates and rules of the Commission.

O R D E R

IT IS ORDERED that:

1. Walter H. Wilson and Glendora M. Wilson, his wife, (Wilson) shall pay a fine of \$5,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Wilson 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. Wilson shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$8,172.95 on or before the fortieth day after the effective date of this order.

3. Wilson 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.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon respondent Wilson and to cause service by mail of this order to be made upon Marquart-Wolfe Lumber Co. 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 23rd day of AUGUST, 1977.

I concur except that the nature of the violations here would suggest at least a weeks suspension of the operating authority.

Richard D. Gualle
Robert Batemanich
Clare J. Delbrick

Robert Batemanich
President
William J. Gerson
Vernon L. Sturgeon
Richard D. Gualle
Clare J. Delbrick
Commissioners

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All references are to the Public Utilities Code.

1/ "3664. It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

* * *

"3667. No highway permit carrier shall charge, demand, collect, or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the commission.

"3668. No highway permit carrier, or any officer, or agent thereof, or any person acting or employed by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or by any other device, assist, suffer, or permit any corporation or person to obtain transportation for any property between points within this State at rates less than the minimum rates or more than the maximum rates then established or approved by the commission."

* * *

"3737. Upon the issuance by the commission of any decision or order made applicable to a particular class or group of carriers, or to particular commodities transported or areas served, the commission shall only be required to serve a copy of the decision or order without charge upon each party appearing in the case or proceeding resulting in such decision or order. Upon the issuance of a permit to operate as a highway carrier, the carrier shall obtain copies of each tariff, decision, or order previously issued that is then applicable to the class or classes of transportation service authorized by the permit. Thereafter, the carrier shall maintain copies of all tariffs, decisions or orders subsequently issued that are currently applicable to the class or classes of transportation service authorized by the permit, and shall observe any tariff, decision, or order applicable to it.

"The commission shall arrange to furnish copies of any tariff, decision or order previously issued that is currently applicable to the class or classes of transportation service each highway carrier is authorized to perform. For such service the commission shall establish a reasonable schedule of charges, not to exceed cost, for individual tariffs, decisions and orders as well as annual charges for tariffs, decisions and orders applicable to each class of transportation service.

"The commission shall, after thirty (30) days' written notice, revoke the permit of any carrier failing to obtain and maintain currently applicable tariffs, decisions and orders."

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"COLLECTION OF CHARGES

"(a) Except as otherwise provided in this rule, transportation and accessorial charges shall be collected by the carriers prior to relinquishing physical possession of shipments entrusted to them for transportation.

"(b) Upon taking precautions deemed by them to be sufficient to assure payment of charges within the credit period herein specified, carriers may relinquish possession of freight in advance of the payment of the charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called debtors, for a period of 7 days, excluding Sundays and legal holidays other than Saturday half-holidays. When the freight bill covering a shipment is presented to the debtor on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the debtor on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill."

* * *

"(d) Freight bills for all transportation and accessorial charges shall be presented to the debtors within 7 calendar days from the first 12 o'clock midnight following delivery of the freight."

* * *

"(f) The mailing by the debtor of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit period allowed such debtor may be deemed to be the collection of the charges within the credit period for the purpose of these rules. In case of dispute as to the time of mailing, the postmark shall be accepted as showing such time."

3/

"ISSUANCE OF DOCUMENTS
(Items 255 and 256)

* * *

"2. ISSUANCE OF FREIGHT BILL. A freight bill shall be issued by the carrier for each shipment transported. Except with respect to intercarrier transactions, the carrier shall not apportion, prorate, or otherwise divide the freight charges between or among the consignor(s), consignee(s), or any other parties. The freight bill shall show the following information:"

* * *

"5. A copy of each bill of lading, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request or any other written document

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which supports the rates and charges assessed and which the carrier is required to issue, receive or obtain by this tariff for any transportation or accessorial service shall be retained and preserved by the carrier, at a location within the State of California, subject to the Commission's inspection, for a period of not less than three years from the date of issue."

- 4/ "3669. No person, corporation, or any officer, agent or employee of a corporation shall, by means of false billing, false or incorrect classification, false weight or weighing, false representation as to the content or substance of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of a highway permit carrier, or any of its officers, agents, or employees, seek to obtain or obtain transportation for property at less than the minimum rates or charges or more than the maximum rates or charges established or approved by the commission."