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Decision No. 90323 MAY 22 1979 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Frank O. Culy, Jr., F. O. Culy, Sr., and Harold F. Culy dba Riteway Transportation Company under Section 1708 of the California Public Utilities Code for Modification of the Commission Orders in Decision No. 88491 of Case No. 10374 and Decision No. 86169 of Application No. 56346.	Application No. 58010 (Filed April 19, 1978)
Investigation on the Commission's own motion into the operations, rates and practices of Riteway Transportation, a partnership; Milton Ayer, an individual; Warren E. Fields, an individual; Eddie F. Lane, an individual; Don R. Manning, an individual; Ron Manning, an individual; Robert K. Miller, an individual; Louis Pirrone, an individual; John A. Sitko, an individual; Maurice Spillane, an individual; and Raymond E. Wilson, an individual.	Case No. 10374 (Filed July 19, 1977)
In the Matter of Frank O. Culy, Jr., F. O. Culy, Sr., and Harold F. Culy dba Riteway Transportation Company for the authority to deviate from minimum rates and charges on shipments between Long Beach plant, plant distribution warehouse, on the one hand, and Sacramento plant, plant distribution warehouse, on the other hand, for the Procter and Gamble Company under Section 3666 of the Public Utilities Code.	Application No. 56346 (Filed March 23, 1976)

Loughran & Hegarty, by Edward J. Hegarty and James H. Gulseth, Attorneys at Law, for Frank O. Culy, Jr., doing business as Riteway Transportation Company, applicant and respondent.
Charles D. Gilbert, for California Trucking Association, interested party.
William C. Bricca, Attorney at Law, Carroll D. Smith, and Paul Wuerstle, for the Commission staff.

O P I N I O N

By Decision No. 89044 dated June 27, 1978 the Commission granted the request of Frank O. Culy, Jr., dba Riteway Transportation Company (Riteway)[1/] to reopen Case No. 10374 and Application No. 56346 to allow submission of additional evidence with a view to the modification of Commission orders in Decision No. 88491 in Case No. 10374 and Decision No. 86169 in Application No. 56346. Petition for Rehearing of Decision No. 88491 filed by Riteway was denied by Decision No. 88809 dated May 2, 1978.

Case No. 10374 is an investigation of the operations of Riteway with respect to the charges paid to subhaulers under the less than minimum rate authority initially granted to Riteway by Decision No. 89169 in Application No. 56346, and to determine whether any sum of money is due and owing to the ten subhaulers also made respondents in the investigatory proceeding.[2/]

1/ At the time of filing of Application No. 58010, Riteway was a copartnership consisting of Frank O. Culy, Jr., F. O. Culy, Sr., and Harold F. Culy. Frank O. Culy, Jr. is now the sole proprietor of Riteway.

2/ The subhaulers named as respondents are:

Milton Ayer, 7628 Stockton Blvd., Sacramento, CA 95823;
Warren E. Fields, 4248 Scott Dr., Santa Susana, CA 93063;
Eddie F. Lane, 420 Los Angeles Ave., Shafter, CA 93263;
Don R. Manning, Route 1, P.O. Box 842, Bonanza, AZ;
Ron Manning, Route 2, P.O. Box 567A, Klamath Falls, OR 97601;
Robert K. Miller, 3530 Sutter, Oxnard, CA 93030;
Louis Pirrone, 3803 Conquista Ave., Long Beach, CA 90808;
John A. Sitko, Star Route, P.O. Box 3, Orland, CA 95963;
Maurice Spillane, Route 2, P.O. Box 720, Klamath Falls, OR 97601; and
Raymond E. Wilson, 1114 Virginia Ave., Modesto, CA 95350.

Decision No. 88491 found as follows:

1. Riteway was authorized by Decision No. 86169 to transport shipments of named commodities between Procter and Gamble Company's (P&G) plant warehouses in Sacramento and Long Beach at rates less than the established minimum rates.

2. Paragraph 4 of Appendix A of Decision No. 86169 reads as follows:

   "4. Applicant has not indicated that subhaulers will be engaged nor have any costs of subhaulers been submitted. Therefore, if subhaulers are employed, they shall be paid no less than the rates authorized herein."

3. Riteway employed the other named respondents to transport goods of P&G between Riteway's terminals in Sacramento and Long Beach.

4. Riteway supplied trailers to the other respondents for use on P&G loads.

5. Exhibit 2 lists the P&G shipments subject to Riteway's rate deviation authority in Decision No. 86169 which were transported by other respondents during the staff's review period between August 16 and November 16, 1976.

6. Exhibit 2 shows that such respondents were paid on the basis of 44 cents per loaded mile, or $180.40 per load, less a deduction for insurance of $5.40 per load.

7. The named respondents (other than Riteway) are subhaulers within the meaning of that term as defined in Minimum Rate Tariff 2 and other Commission minimum rate tariffs.

8. Such respondents were not paid on the basis specified in paragraph 4 of Appendix A of Decision No. 86169.

9. Paragraph 4 of Appendix A of Decision No. 86169 makes no provision for an equitable offset for use of Riteway's trailers by other respondents.

10. The offsets for loading and unloading and for use of Riteway's trailers by subhaulers proposed by the staff are contrary to the language and the intent of paragraph 4 of Appendix A of Decision No. 86169.

11. Respondent Riteway has revised its operating practices so that subhaulers will not be used on loads subject to the rate deviation authorized in SDD-632.

12. Respondent Riteway withdrew its petition to amend the payment to subhaulers provisions of paragraph 4 of Appendix A of Decision No. 86169, and that petition has been dismissed by Decision No. 88254 dated December 20, 1977.

13. Respondent Riteway has violated the provisions of Decision No. 86169 with respect to payments to other named respondents in connection with the transportation of P&G loads more specifically described in Exhibits 2 and 3.

The Commission concluded in Decision No. 88491 that Riteway had violated Section 3737 of the Public Utilities Code and directed Riteway to pay to the other named respondents the difference between the charge under the authorized deviation rate and amounts actually paid to said respondents on the loads described in Exhibit 3 in Case No. 10374. The order also directed that a fine of $5,000 should be paid to the general fund.

Public hearing in the captioned proceedings was held before Administrative Law Judge Mallory in San Francisco on November 27, 1978 and the matter was submitted. Evidence was presented on behalf of Riteway by its owner, by its accountant, and by one subhauler. California Trucking Association and the Commission staff participated through examination of those witnesses.

The evidence presented by Riteway was designed to show: (1) that there was a misunderstanding by it of the meaning of paragraph 4 of Appendix A to Decision No. 86169; (2) that the actual method of payment to subhaulers was fair and equitable to the subhaulers involved, and (3) that Riteway does not know the current whereabouts of eight of the subhaulers named as respondents in Case No. 10374.

Mr. Culy's prepared testimony was incorporated in Exhibit 1 in Application No. 58010. Mr. Culy's testimony was that Riteway misunderstood the intent of the language of paragraph 4 of Appendix A to Decision No. 86169 in that it assumed that the Commission was aware by granting the deviation, of all the circumstances surrounding that transportation. Thus, Riteway contends that the Commission could not have expected it to pay subhaulers 100 percent of the deviation rate when it is not possible for subhaulers to perform the entire door-to-door service involved. The current record and the record in Case No. 10374 show that under Riteway's contract with P&G for transportation between P&G plants in Long Beach and Sacramento, Riteway's employees are required to load and unload the shipments. Under that contract subhaulers which are not employees of Riteway are prevented from entering the P&G plants. It is Riteway's practice to spot trailers at the plants for loading and unloading. The filled or empty trailers are moved from the P&G plants to Riteway's nearby terminals by Riteway's local drivers. The line haul movement between Riteway's terminals is performed by Riteway's line drivers, or during the time period in issue in Case No. 10374, by independent contractor subhaulers. The subhaulers furnished only the motive power (tractors) to perform the interterminal movements as the shipments were loaded in Riteway's trailers.

Mr. Culy asserts that if he is required to pay subhaulers the full deviation rate he will lose $154.60 on each load, inasmuch as the deviation rate was designed to cover costs associated with loading and unloading and use of Riteway's trailers, as well as the line-haul services performed by the subhaulers. According to Mr. Culy, it was reasonable for him to assume that the Commission intended that he pay subhaulers only for that segment of the transportation service performed by them.

Exhibit 1 contains data designed to show that the actual payment to subhaulers during the time period in issue in Case No. 10374 was reasonable. Subhaulers were paid during that period on the basis of 44 cents per loaded mile. Mr. Culy testified that subhauling on all other hauls performed during that period was compensated for on the same basis. Exhibit 1 contains Riteway's estimated costs of performing service for P&G using employed drivers. The sum of the labor and equipment costs (excluding trailer costs) as of September 1, 1976 for a 410-mile movement was $185.59, or 45.0 cents per loaded mile. Based on the payment of 44 cents per loaded mile, the subhauler's revenue was $180.40. The witness stated that P&G interplant movements were balanced north- and southbound so that subhaulers were loaded in both direction. Mr. Culy asserts that the subhaulers were paid approximately the same as Riteway's costs for the same service using its employed drivers.

Exhibit 1 in Application No. 58010 also contains the estimated operating costs for three subhaulers for the year 1977 and for one subhauler for the year 1976. The 1977 cost data for the three subhaulers as set forth in Exhibit C to Exhibit 1 are summarized as follows:

SUBHAULERS' COSTS

	Milton Ayers	John Rector	Keith Foster
Miles Operated per Year	170,000	120,000	118,000
Cost of Tractor (Incl. Sales Tax)	$ 53,000	$ 13,250	$ 24,380
Life and Salvage (10%)	7 Yrs.	3 Yrs.	5 Yrs.
Annual Depreciation	$ 6,800	$ 3,975	$ 4,400
Annual License Fees	$ 600	$ 445	$ 405
Federal Highway Use Tax	$ 220	$ 220	$ 220
Fuel Consumption (4.5 mpg) [Gallons]	[37,800]	[26,700]	[26,200]
Cost at 52¢ per Gallon	$ 19,660	$ 13,890	$ 13,600
Engine Oil (Quarts)	[680]	[240]	[472]
Cost at 75¢ per Quart	$ 500	$ 180	$ 350
Repairs, Tires, Service	$ 5,270	$ 6,700	$ 4,250
Insurance	$ 1,980	$ 1,800	$ 1,200
Total Equipment Costs	$ 35,830	$ 27,210	$ 24,425
Costs per Mile (Cents)	21.1	22.7	20.7
Compensation - Cents per Mile at $.44/mile	22.9	21.3	23.3
Compensation - Cents per Mile at $.50/mile	28.9	27.3	29.3

Exhibit E of Exhibit 1 contains the verified statements of the above-named subhaulers. Each of the verified statements indicates that the subhaulers were satisfied with the payments made by Riteway. They also ask that the restriction requiring payment of 100 percent of the P&G deviation rate to subhaulers be rescinded because that restriction removes profitable work opportunities for subhaulers. Mr. Milton E. Ayer, a subhauler, presented testimony confirming the data in his verified statement including the cost summary set forth above. Based on the subhauler cost data and the cost data associated with Riteway's operation, Mr. Culy contends that the actual payments to subhaulers were reasonable.

Mr. Culy pointed out that prior to the issuance of Case No. 10374 the Commission staff attempted informally to have Riteway adjust the revenues paid to subhaulers to an amount per load greater than paid by Riteway but less than the charge under the full deviation rate. Mr. Culy stated that he assumed that the Commission would interpret the restriction in the same manner as the staff in its initial enforcement attempt.[3/]

Riteway specifically asks that the Commission amend Condition 4 of Appendix A to Decision No. 86169, insofar as that paragraph applies to shipments embraced by the order instituting investigation in Case No. 10374, to read as follows (in the alternative):

(a) "4. Applicant has not indicated subhaulers will be engaged and has not submitted subhauler's costs. Therefore, if subhaulers are employed, they shall be paid no less than the total direct cost per mile for vehicle fixed and running costs and driver costs which applicant has submitted herein to establish the cost of operation of its own equipment by employee drivers."; or

(b) "4. Applicant has indicated subhaulers will be engaged and has submitted subhaulers cost data. Therefore, if subhaulers are employed, they shall be paid no less than 43.93 cents per mile."

Riteway asks that should Condition 4 of Appendix A of Decision No. 86169 not be amended as above prayed, that the Commission amend its orders in Decision No. 88491 by reducing payments required of Riteway under that order and by allowing Riteway to offset costs from payments required of Riteway under that order. Riteway indicated that the foregoing has the same result as amending Condition 4.

3/ In Exhibit 3 in Case No. 10374 the staff proposed that Riteway should be able to offset loading and unloading costs and trailer costs in amounts specified therein. The deviation authority was effective July 27, 1976. The violations alleged by the staff occurred prior to the staff's initial contact with Riteway on November 16, 1976.

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Riteway also asks that Ordering Paragraph 1 of Decision No. 88491 and all findings and conclusions related thereto be rescinded. That ordering paragraph requires Riteway to pay a fine of $5,000 pursuant to Section 3774 of the Public Utilities Code.

Riteway withdrew its request to amend its current rate deviation for P&G granted by SDD-670, which requires payment of 70 percent of the deviation rate to subhaulers.[4/] Mr. Culy testified that subhaulers are not used on P&G interplant hauls because the condition that subhaulers be paid 70 percent of the deviation rate does not provide sufficient revenues to Riteway for its services. That order also names three carriers which may operate as subhaulers under the current rate deviation. Riteway stipulated that it would not seek herein to change the subhaulers named in SDD-670. In accepting those stipulations, California Trucking Association withdrew any protest to the relief sought in Application No. 58010. The Commission staff indicated that its position with respect to the enforcement action initiated in Case No. 10374 is the same as that expressed in that proceeding.

The Commission staff moved that Application No. 58010 be dismissed without prejudice due to failure of Riteway to provide all of the information required by Resolution No. TS-284.

4/ SDD applications are renewals of existing rate deviations, which are generally granted for a one-year period. The condition that subhaulers be paid 70 percent of deviation rate first appeared in SDD-670, and apparently was added at the staff's request as it was not part of the SDD application filed by Riteway.

Discussion

Decision No. 88491 states, in part, as follows:

"We routinely place restrictions on the amount subhaulers are to be paid when granting deviations. Absent a showing of subhauler costs to support a particular revenue split, we require subhaulers to be paid 100 percent of the deviated rate. Such restrictions are to insure that a carrier does not profit by gaining a deviated rate (placing him at a competitive advantage with other carriers) at the expense of owner-operator subhaulers. Riteway's disregard of the subhauler restriction ordered in Decision No. 86169 concerns us. Unless vigorous enforcement of our subhauler remuneration restrictions is carried out, those restrictions will be meaningless, and we will have failed to protect against carriers using subhaulers to gain rate advantage over other carriers. The staff recommended a punitive fine pursuant to Section 3774 of the Public Utilities Code in the amount of $1,000. We are of the opinion that a $5,000 punitive fine is appropriate. Riteway was authorized to assess the deviated rate on July 27, 1976. The staff's review covered the period commencing August 16, 1976. Riteway almost immediately started paying $180.40 per load rather than 100 percent of the deviated rate, or $335.00 per load. Apparently, Riteway intended to use subhaulers for this deviated rate traffic at the outset and likewise intended to remunerate the subhaulers at a rate far less than the deviated rate Riteway would collect. This conduct shows complete disregard for our order in Decision No. 86169. That disregard cannot be tolerated. This decision should put the carrier industry on notice that we intend to vigorously enforce provisions requiring payment to subhaulers."

Based on the additional evidence adduced herein it is reasonable to assume that there was not a "complete disregard" by Riteway of our order in Decision No. 86169. Decision No. 88491 states: "the staff does not contend that such amount should be paid to respondent subhaulers, either in its original informal directive to Riteway to review its charges, or in the evidence presented at the hearing in support of the allegations in the OII." For several months

prior to the initiation of the enforcement action in Case No. 10374 our field staff was negotiating with Riteway for payment to subhaulers on a basis in excess of the amount actually paid, but substantially less than 100 percent of the total charge under the deviation rate. If Riteway had accepted the staff's offer, the matter would have been settled informally and no fine or other penalty would have been imposed. Riteway should have been able to rely upon the staff's interpretation of the Commission decision, and Riteway should not be severely penalized for accepting that interpretation.

The question thus presented is whether the staff offsets proposed in the enforcement proceeding should be adopted, or whether Riteway's proposals herein are reasonable. The evidence clearly shows that the revenue split actually made was reasonable. The revenue split closely follows Riteway's estimated costs attributable for the separate services performed by subhaulers; the revenue split appears to provide adequate compensation to subhaulers, based on their own cost data and their willingness to accept that compensation, and no regulatory purpose would be subverted by permitting the actual revenue split to stand.

Subsequent to the issuance to Riteway of its original P&G rate deviation authority, we have adopted a rule requiring that subhauler costs be furnished in those instances where subhaulers will perform the actual transportation service under the deviation rate. Our purpose (in addition to providing adequate compensation to subhaulers) is to prevent a carrier-broker from obtaining a rate deviation below the costs incurred by the carriers' actually performing the transportation service. Below-costs rates of that kind are predatory rates.

While Riteway has not furnished every detail of the information specified in Resolution No. TS-284, it has substantially complied with that resolution. The information it has furnished is sufficient. Consequently, the staff's motion for dismissal of Application No. 58010 is denied.

Riteway has therefore met the burden of showing that subhaulers Milton, Ayer, John Rector, and Keith Foster were adequately compensated for their services, both on the basis of the subhaulers' own costs and on a revenue split corresponding to Riteway's costs for that segment of the transportation service performed by subhaulers.[5/] The staff's proposal, on the other hand, is not reasonably related to the actual costs incurred by the subhaulers or by Riteway.

We will revise the findings in Decision No. 88491 to conform to the above discussion and will rescind our directives to Riteway to pay respondent subhaulers 100 percent of the deviation rate and to pay a $5,000 fine.

Revised Findings

1. Riteway was authorized by Decision No. 86169 dated July 26, 1976 in Application No. 56346 to transport shipments of named commodities between P&G's plant warehouses in Sacramento and Long Beach at rates less than the established minimum rates.

2. Paragraph 4 of Appendix A of Decision No. 86169 reads as follows:

> "4. Applicant has not indicated that subhaulers will be engaged nor have any costs of subhaulers been submitted. Therefore, if subhaulers are employed, they shall be paid no less than the rates authorized herein."

3. Riteway employed the respondent subhaulers named in Case No. 10374 to transport goods of P&G between Riteway's terminals in Sacramento and Long Beach.

4. Riteway supplied trailers to the respondent subhaulers for use on P&G loads.

5. Exhibit 2 in Case No. 10374 lists the P&G shipments subject to Riteway's rate deviation authority in Decision No. 86169 which were transported by respondent subhaulers during the staff's review period between August 16 and November 16, 1976.

5/ Riteway and the testimony of Ayer was to the effect that other subhauler respondents had not operated for Riteway for at least two years. Riteway could not locate those subhaulers and, therefore, could not present cost data for such subhaulers similar to that shown in the tabulation on page 7.

6. Said Exhibit 2 shows that such respondents were paid on the basis of 44 cents per loaded mile, or $180.40 per load, less a deduction for insurance of $5.40 per load. The total charge under the deviation rate is $335.00 per load.

7. Respondent subhaulers were not paid on the basis specified in paragraph 4 of Appendix A of Decision No. 86169.

8. By letter dated January 28, 1977 Riteway was informed by the Acting Executive Director of the Commission that it was expected to review its records and adjust payments made to subhaulers on P&G hauls transported under rates authorized in Decision No. 86169 by increasing the payment to subhaulers by $78.64 per load, making a total payment to subhaulers of $269.04 per load. That directive was not carried out by Riteway. If Riteway had acceded to the staff directive, no fine or penalty would have been imposed.

9. On September 7, 1976 Riteway filed a Petition for Modification of Decision No. 86169 requesting deletion of paragraph 4 of Appendix A to that decision. A hearing scheduled on March 10, 1977 was removed from the calendar. That petition was subsequently withdrawn.

10. Following several informal contacts by the staff which failed to achieve an adjustment in charges on the basis recommended by the staff, Case No. 10374 was instituted.

11. The staff proposed in Exhibit 3 in Case No. 10374 that Riteway be directed to pay respondent subhaulers on the basis set forth in Finding 8 above.

12. It was prudent for Riteway to rely upon the staff's interpretation of the meaning of paragraph 4 of Appendix A to Decision No. 86169. That interpretation, as set out in the directive in the letter of January 28, 1977 and in all communications with Riteway thereafter, was that an equitable offset from the charge accruing under the deviation rate could be made for that portion of the total

transportation service performed by Riteway. Therefore, Riteway did not act with total disregard of the Commission's order in Decision No. 86169.

13. In the reopened proceeding Riteway presented evidence that showed (1) the amount paid to subhaulers approximated its own costs of performing the transportation service with Teamster Union drivers, and (2) that the amount paid to subhaulers was satisfactory to them and provided reasonable compensation for their services.

14. In the most recent renewal (SDD-670) of the rate deviation originally granted by Decision No. 86169, Riteway is required to pay to subhaulers named therein not less than 70 percent of the deviation rate. Riteway has revised its operating practices so that subhaulers will not be used on loads subject to the rate deviation.

15. Respondent Riteway has not violated the provisions of Decision No. 86169 with respect to payments to other named respondents in connection with the transportation of P&G loads more specifically described in Exhibits 2 and 3 in Case No. 10374.

Conclusions

1. The conclusions and order in Decision No. 88491 should be withdrawn.

2. Application No. 58010 should be granted to the extent provided by the order which follows, and Case No. 10374 and Application No. 56346 should be discontinued.

O R D E R

IT IS ORDERED that:

1. The conclusions and order in Decision No. 88491, Case No. 10374, are withdrawn and that proceeding is terminated.
2. Applications Nos. 56346 and 58010 are discontinued.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 22nd day of MAY, 1979.

President

Commissioners

Commissioner JOHN E. BRYSON

Present but not participating.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.