

ORIGINAL

Decision No. 90512 JUL 3 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own )  
 motion into the operations, rates and )  
 practices of Grand Central Produce, Inc., )  
 Jack Hadley, Luis Campos, Tony Martinez, )  
 d.b.a. E and M Trucking, Richard Vargas, )  
 I. Manriquez, a.k.a. Chilo Manriquez, )  
 Genero L. Bracamonte, George Bracamonte, )  
 Sr., George Bracamonte, Jr., William P. )  
 Hoyt, d.b.a. Hoyt Trucking, Samuel L. )  
 Johnson, Frank Estupinian, John Livacich )  
 Produce, Inc., a corporation, d.b.a. )  
 Aapollo, and John Livacich Produce, Inc., )  
 a corporation. )

OII No. 29  
(Filed October 17, 1978)

Millard Davis, Leslie E. Millage, and Calhoun E. Jacobson, for Grand Central Produce, Inc., and John L. Livacich, for John Livacich Produce, Inc., respondents.  
Elmer Sjostrom, Attorney at Law, and E. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, and practices of Grand Central Produce, Inc. (GCP) for the purpose of determining whether GCP charged less than the applicable minimum rates and charges in connection with transportation of produce performed for John Livacich Produce, Inc. (Livacich) and whether GCP also charged less than the applicable minimum rates and charges in connection with transportation of produce performed for Livacich, doing business as Aapollo (Aapollo), through the device of free loads subhauled for it by the 11 other respondent carriers named in the caption.

Public hearing was held before Administrative Law Judge Arthur M. Mooney in San Bernardino on December 13, 1978 and February 28, 1979. The matter was submitted on the latter date.

GCP operates pursuant to a radial highway common carrier permit. At the time of the staff investigation referred to hereinbelow, it had a terminal in San Bernardino; employed three supervisory and three clerical personnel and also three drivers; operated three tractors and three trailers; and had received all applicable minimum rate tariffs, distance tables, and exception rating tariffs. Its gross operating revenue for the years 1976 and 1977 was \$590,615 and \$900,522, respectively, and for the first half of 1978 was \$122,694.

As indicated above, Aapollo is another name under which Livacich does business. The transportation under investigation wherein various produce companies were the consignors and Livacich or its customers were the consignees is summarized in the Commission staff's Exhibit 3-1, and the total amount of the undercharges alleged therein is \$476.46. According to the evidence presented by the staff, all of this transportation was performed by GCP for Livacich, and it is the debtor responsible for the undercharges.<sup>1/</sup> The traffic consultant for GCP agrees, and Livacich did not take exception to these undercharges. We, likewise, concur with the undercharges shown in Exhibit 3-1, and in the circumstances, no further discussion of the transportation covered by this exhibit is necessary. For the balance of the transportation under investigation, Aapollo was the consignor, and there is no agreement between the parties as to the amount of undercharges for this transportation. Our discussion will, therefore, be concerned with the Aapollo transportation only for which Livacich, the alter ego of Aapollo, is in fact also the debtor.

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<sup>1/</sup> Debtor is defined in Item 10 of Minimum Rate Tariff 8-A (MRT 8-A) as "the person obligated to pay the freight charges to the carrier, whether consignor, consignee, or other party".

Staff

A staff representative visited GCP's place of business in December 1976 and various dates thereafter and reviewed its transportation records for the period July through October 1976. The representative testified that: (1) GCP is also in the produce business; (2) a considerable amount of the transportation performed by GCP during the review period was for Aapollo, and a substantial amount of this transportation was subhailed for GCP by the other 11 respondent carriers; (3) many of the Aapollo shipments were from growers and produce merchants in central California to Aapollo's warehouse at 2501 South Alameda Street, Los Angeles; (4) this is the Aapollo transportation under investigation herein; (5) because the documentation for these shipments in GCP's files all showed Aapollo's warehouse as the final destination and because produce is not sold to retail customers at warehouses, he interviewed the subhaulers who performed the transportation for GCP to determine the ultimate destination of the shipments; (6) in explaining the procedure by which the shipments in issue were handled, the subhaulers informed him that they would be dispatched by Mr. Kovacevich, an employee of Aapollo, to pick up produce in the Central Valley and elsewhere and return with it to the warehouse where they would wait several hours to several days and then be told by Mr. Kovacevich or another Aapollo employee to deliver the produce to a retail grocery chain in the Los Angeles Area, Von's Grocery Co., Alpha Beta Acme Markets, Inc., or Lucky Stores, Inc.; (7) the subhaulers also informed him that occasionally they would leave their loaded trailers and another subhauler would deliver the shipment to the retail outlet; (8) he then visited the various chain stores and reviewed delivery receipts and weight certificates in their files which verified the deliveries made to them; (9) according to the information furnished to him by Mr. Montbrand, the transportation supervisor for GCP, the destination shown on GCP's freight bill for each shipment was its

actual destination; (10) GCP was paid by Aapollo and it paid the subhaulers for the transportation to Aapollo's warehouse; however, there was no evidence in GCP's or the subhaulers' files that any payment had been made for the transportation from Aapollo's Los Angeles warehouse to the retail outlets; (11) he was informed by the subhaulers that when they questioned why they were not paid for the transportation from the warehouse to the retail store, they were referred back and forth between Aapollo and GCP; and it appeared to them that if they were to press their claims, they might lose some of this business; and (12) he made true and correct photostatic copies of the documents in the files of GCP and the chain stores for the Aapollo transportation in issue, and they are included in Exhibits 2-2, 2-3, and 2-4.

In explaining the documents for each load of produce in Exhibits 2-2, 2-3, and 2-4, the representative testified that (1) the following documents were in GCP's files: the freight bills issued by GCP and the subhauler for the transportation from the field to Aapollo's warehouse, the weight certificate obtained near the point of pickup, and the check voucher and settlement statement showing payment to the subhauler for the movement to Aapollo's warehouse; (2) there were no documents in GCP's or any of the subhauler's files for the subsequent movement from the warehouse to the retail chain store; and (3) the following documents were in the files of Aapollo's retail chain customers: Aapollo's invoice to it for the produce, a weight certificate at destination which the customer required, the customer's weight verification, and Aapollo's delivery receipt. The witness stated he was informed by the subhaulers that in addition to Aapollo's oral instructions, the only documents given to them for each of the movements from Aapollo's warehouse to its customer were two copies of a delivery receipt by Aapollo and that one of the copies was left with the customer and the other was returned to Aapollo. The representative stated that he did not review Aapollo's files during the investigation.

At the request of the staff, subpoenas were issued for the 11 other respondent carriers named in the caption. Testimony was presented by Luis Campos, Tony Martinez, doing business as E and M Trucking, George Bracamonte, Jr., and Jack Hadley. They verified the evidence presented by the representative regarding the procedure for handling the transportation from the field to Aapollo's warehouse and the movement from the warehouse to Aapollo's customers. It was agreed by the parties that had the other seven been called as witnesses, their testimony would have been substantially similar to that presented by the four witnesses.

A staff rate expert testified that he took the sets of documents in Exhibits 2-2, 2-3, and 2-4, together with the supplemental information testified to by the representative, and formulated a separate rate exhibit for the transportation performed by each of the 11 other respondent carriers from Aapollo's Los Angeles warehouse to Aapollo's chain store customers. He pointed out that for each shipment summarized in his exhibits he has shown the applicable minimum rate and charge and the resulting undercharge and that since no charge was assessed or collected for this transportation, the minimum charge and undercharge for each shipment are the same. The witness asserted that none of this transportation could be rated as through produce service shipments from the initial pickup points in the field to Aapollo's retail chain customers. In this connection he pointed out that produce service shipment is defined in Item 10 of MRT 8-A as follows:

"PRODUCE SERVICE SHIPMENT means a quantity of freight transported in one unit of carrier's equipment in one continuous movement not exceeding 48 hours in duration, consisting of one or more component parts delivered to, and/or received from, one or more consignee(s) or consignor(s) at one or more points of origin and/or destination. All shipping instructions and freight charges must be assumed by a single party when there is more than one consignee or

consignor, and any oral shipping instructions must be confirmed by a single shipping document not later than 48 hours after final delivery. Applies only to truckload shipments subject to a minimum weight of 30,000 pounds or more."

The rate expert testified that the conditions in the produce service shipment rule requiring a continuous movement from the original pickup to the ultimate destination and confirmation of oral shipping instructions by a single shipping document within 48 hours after final delivery have not been met. As to the continuous movement requirement, he asserted that: (1) the documentation issued by GCP and the subhaulers was for transportation to Aapollo's warehouse only; (2) the initial transportation terminated here, and it was not until several hours or days after a shipment arrived at the warehouse that Aapollo would tell GCP's subhauler to take the freight to its customer; and (3) since there was a definite break between the two movements, there was no continuous movement; and the transportation from the warehouse to the retail chain customers is a separate shipment. With respect to the confirmation document, the representative stated that no such document was given to GCP or its subhauler by Aapollo, and Aapollo's delivery receipt, which only it and its customer had a copy, does not satisfy this requirement. He also pointed out that a produce service shipment must be completed in 48 hours and that some of the shipments were held at Aapollo's warehouse beyond this time period.

The amount of the undercharges shown in each of the 11 rate exhibits and the total amount thereof are as follows:

<u>Exhibit No.</u>	<u>GCP Subhauler</u>	<u>Amount of Undercharges</u>
3-2	Genero L. Bracamonte	\$ 347.84
3-3	George Bracamonte, Jr.	374.14
3-4	George Bracamonte, Sr.	456.74
3-5	William P. Hoyt	502.25
3-6	Samuel L. Johnson	717.92
3-7	Frank Estupinian	532.47
3-8	Tony Martinez	1,159.20
3-9	Richard Vargas	646.26
3-10	I. Manriquez	510.91
3-11	Jack Hadley	1,106.75
3-12	Luis Campos	<u>2,514.72</u>
	Total	\$8,869.20

Respondents

Evidence was presented by the traffic consultant for GCP. He testified that except for a few of the shipments that either exceeded 48 hours or otherwise did not qualify, the Aapollo transportation in issue could be rated as produce service shipments from the field origins to the ultimate chain store destinations. He stated that by rating the transportation in this manner, as shown in his Exhibit 5, the total amount of the undercharges for the transportation summarized in the staff's Exhibits 3-2 through 3-12 is \$2,272.56. The witness asserted that the definition of produce service shipment in Item 10 of MRT 8-A is somewhat ambiguous, and in accordance with general rules of tariff interpretation, such ambiguities are to be resolved in favor of the shipper. In this regard, he stated that the continuous movement requirement in the definition is met if the transportation of the produce from the initial field pickup to the ultimate chain store destination, including any stop time at Aapollo's warehouse, has been completed within 48 hours. The traffic consultant also asserted that since the required single shipping document confirming oral shipping instructions for a produce service shipment is not further defined in Item 10, the Aapollo delivery receipt would suffice for this even though the subhauler was given only two copies and was required to return one to Aapollo and leave the other with Aapollo's customer.

Although Mr. Livacich did enter an appearance and did cross-examine several witnesses, no evidence was presented on behalf of Livacich or Aapollo.

Discussion

We concur with the ratings and undercharges computed by the staff for the Aapollo transportation summarized in its Exhibits 3-2 through 3-12.

The staff has correctly pointed out that the shipments from Aapollo's warehouse to its customers were separate shipments and not part of continuous produce service shipments from the original points of field pickup. The fact that, with several exceptions, the total elapsed time between the pickup of each load of produce in the field, its delivery to Aapollo's warehouse, and its later subsequent delivery to Aapollo's customer did not exceed 48 hours does not by itself entitle the two movements to be rated as a single produce service shipment. While the definition in Item 10 of MRT 8-A does allow 48 hours for a produce service shipment, it also states that such shipments must be transported in one continuous movement. As indicated by the staff, the only documentation issued by either GCP or the subhaulers was for the transportation from the field pickups to Aapollo's warehouse, and this is the only transportation for which GCP was paid and for which it or anyone else paid its subhaulers. Had through produce service shipments from the field to Aapollo's customers been contemplated, documentation for such service would have been issued and GCP and its subhaulers would have been paid accordingly. Furthermore, we are not persuaded by GCP's assertion that the Aapollo delivery receipts could be considered confirming shipping instructions for produce service shipments as required by the definition in Item 10. According to the evidence, there were only two copies of this document given to the subhaulers for each delivery from Aapollo's warehouse, and they were required to leave



one of the copies with Aapollo's customer and return the other copy, which was signed by the customer, to Aapollo. It is apparent that the purpose of this document was to confirm for Aapollo that its customer had received the merchandise that had been sold to it. Had this been intended to be a confirmation of oral instructions for a produce service shipment, there would obviously have been a copy for the carrier. From a review of the evidence, it is apparent that produce service shipments were not contemplated at the time the transportation moved, and there is no reasonable basis for now rating the transportation in this manner and thereby reducing the amount of the undercharges. The produce service shipment rules are set forth in Item 290 of MRT 8-A. It is noted that the primary purpose of these rules is to allow multiple pickups and deliveries.

Based on a review of the evidence, it is reasonable to conclude that the 11 other respondent carriers were subhauling for GCP and were not prime carriers in connection with the transportation from Aapollo's warehouse to its customers. This is the position taken by GCP in its rate Exhibit 5.

We are of the opinion that GCP should be directed to (1) collect the undercharges shown in the staff's rate Exhibits 3-1 through 3-12; (2) pay a fine in the amount of \$476.46 in undercharges shown in Exhibit 3-1; (3) pay to each of the 11 respondent subhaulers the amount of the underpayments shown for each in Exhibits 3-2 through 3-12, less applicable Transportation Rate Fund and Uniform Business License Taxes; (4) advise the Commission promptly if any of the subhaulers cannot be located, and if the Commission agrees that GCP has taken all reasonable actions to locate such subhaulers, the amount of the underpayments due such subhaulers shall be included in the undercharge fine; and (5) pay a punitive fine of \$5,000.

The argument by GCP that any errors that did occur in connection with the transportation under investigation were unintentional and, for this reason, no punitive fine is warranted and is without merit. As the evidence establishes, at least some of the subhaulers contacted GCP regarding the free deliveries from the warehouse to Aapollo's customers. GCP certainly cannot plead ignorance that this transportation was performed without charge. GCP's actions show a complete disregard of the Commission's rules and regulations as well as applicable provisions of the Public Utilities Code. As we have consistently held, such behavior on the part of any carrier subject to our jurisdiction will not be tolerated. In the circumstances, the maximum punitive fine of \$5,000 specified in Section 3774 of the Public Utilities Code is appropriate. It is to be noted that this section also authorizes the Commission to cancel, revoke, or suspend a carrier's operating authority, and the punitive fine is an alternative to such action by the Commission.

Findings of Fact

1. GCP operates pursuant to a radial highway common carrier permit.
2. GCP was served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs.
3. GCP used the 11 other respondent carriers as subhaulers to transport produce during the staff review period from various locations in central California and elsewhere to Aapollo's warehouse in Los Angeles. When a subhauler arrived at the warehouse, he was required to either wait or leave the shipment on its trailer at the warehouse for several hours to several days and was then instructed by an employee of Aapollo to deliver the freight to one of its customers.

4. The only documents in the files of GCP and the subhaulers were for the transportation from the field to Aapollo's warehouse, and this is the only transportation for which GCP was paid and for which it or anyone else paid its subhaulers.

5. The transportation of each of the Aapollo shipments in issue from the field to Aapollo's warehouse and the subsequent transportation of the freight to Aapollo's customer were separate shipments and not a single continuous produce service shipment from the field to the customer. The documentation that was issued and the charges that were assessed and paid clearly shows that these were not continuous produce service shipments.

6. In providing the transportation from Aapollo's warehouse to its customers, the 11 other respondent carriers were operating as subhaulers for GCP, and GCP and not the other carriers should, therefore, be directed to collect the undercharges for this transportation.

7. No payment was received by GCP or its subhaulers for the transportation from Aapollo's warehouse to its customers, and they had no documentation for this transportation.

8. The minimum rates and charges computed by the staff for the transportation summarized in Exhibits 3-1 through 3-12 are correct.

9. Aapollo is the alter ego of Livacich, and Livacich is, therefore, responsible for any undercharges in connection with transportation performed for Aapollo.

10. GCP charged Livacich less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 3-1 in the total amount of \$476.46.

11. GCP has not collected from Aapollo or Livacich the lawfully prescribed minimum rates in the instances set forth in Exhibits 3-2 through 3-12, resulting in the undercharges shown in the following tabulation:

<u>Exhibit No.</u>	<u>GCP Subhauler</u>	<u>Amount of Undercharges</u>
3-2	Genero L. Bracamonte	\$ 347.84
3-3	George Bracamonte, Jr.	374.14
3-4	George Bracamonte, Sr.	456.74
3-5	William P. Hoyt	502.25
3-6	Samuel L. Johnson	717.92
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3-8	Tony Martinez	1,159.20
3-9	Richard Vargas	646.26
3-10	I. Manriquez	510.91
3-11	Jack Hadley	1,106.75
3-12	Luis Campos	<u>2,514.72</u>
	Total	\$8,869.20

12. The total of the undercharges in Findings 10 and 11 is \$9,345.66.

13. GCP should pay to each of the subhaulers listed in Exhibits 3-2 through 3-12 the amount of underpayments shown for each in Finding 11, less applicable Transportation Rate Fund and Uniform Business License Taxes.

Conclusions of Law

1. GCP violated Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code.

2. GCP should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$476.46 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of \$2,000.

3. GCP should pay \$8,869.20 to the 11 respondent subhaulers, less applicable Transportation Rate Fund and Uniform Business License Taxes.

4. GCP should be directed to cease and desist from violating the minimum rates and rules of the Commission.

5. Since the transportation in issue was performed in 1976 and to avoid any collection of undercharges problems, the order which follows will be made effective on the date it is issued.

The Commission expects that GCP 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 Section 3671 of the Public Utilities Code and to pay its subhaulers the amounts found due them in Finding 13. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that GCP or its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges and to pay its subhaulers that which is due them, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Grand Central Produce, Inc. (GCP) shall pay a fine of \$<sup>5</sup>3,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. GCP 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. *ll*

2. GCP shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$476.46 on or before the fortieth day after the effective date of this order.

3. GCP 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 undercharges set forth in Findings 10 and 11, and shall pay its subhaulers the amounts stated in Finding 13, and shall notify the Commission in writing upon collection and payment.

4. GCP shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges and to pay its subhaulers. In the event the undercharges or payments ordered to be collected and paid by paragraph 3 of this order, or any part of such undercharges or payments, remain uncollected or unpaid 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 or the payments remaining to be made, specifying the action taken to collect such undercharges or make such payments and the result of such action, until such undercharges have been collected in full or until the total payments have been made 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 GCP's operating authority until the report is filed.

5. GCP shall promptly notify the Commission if any of the subhaulers cannot be located, and if the Commission agrees that GCP has taken all reasonable action to locate such subhaulers without success, the amount of the underpayments due such subhaulers shall be added to the Public Utilities Code Section 3800 fine specified in paragraph 2.


6. GCP shall cease and desist from providing free transportation and 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.


7. GCP shall cease and desist from paying to subhaulers amounts less than the minimum payments prescribed by this Commission.


The Executive Director of the Commission shall cause personal service of this order to be made upon respondent GCP and cause service by mail of this order to be made upon all other respondents.

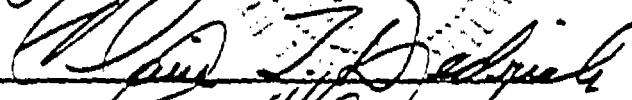
The effective date of this order is the date hereof.

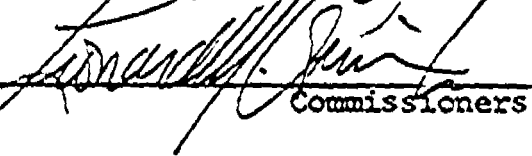
Dated JUL 3 1979, at San Francisco, California.

  
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President

  
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Vernon L. Sturgeon

  
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Charles D. Gable

  
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Paul J. Delgado

  
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Commissioners