

ORIGINAL

Decision No. 91824

MAY 20 1980

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 RICH DOSS,)
 INC., a California corporation,)
 formerly RICH DOSS TRUCKING, an)
 individual; INLAND LUMBER CO., a)
 California corporation; RICK BEILFUSS)
 and GARY HANSEN, a partnership, doing)
 business as COMPASS LUMBER PRODUCTS;)
 GUY LAVERTY, JR., an individual, doing)
 business as SUNOL FOREST PRODUCTS;)
 KELLEHER LUMBER CO., a California)
 corporation; and CAL-WAII MOLDING)
 COMPANY, a California corporation.)

OII No. 45
(Filed May 8, 1979)

Silver, Rosen, Fischer and Stecher, by
Michael J. Stecher, Attorney at Law,
 for Rich Doss, Inc., respondent.
Elmer Sjostron, Attorney at Law, and
 E. Hjelt, for the Commission staff.

O P I N I O N

Statement of Facts

By its order dated May 8, 1979, the Commission instituted an investigation into the operations, rates, charges, and practices of Rich Doss, Inc., formerly Rich Doss, an individual doing business as Rich Doss Trucking (Doss), Inland Lumber Co. (Inland), Rick Beilfuss and Gary Hansen, partners doing business as Compass Lumber Products (Compass), Guy Laverty, Jr., an individual doing business as Sunol Forest Products (Sunol), Kelleher Lumber Co. (Kelleher), and Cal-Waii Molding Company (Cal-Waii). The purpose of the investigation was to determine whether, in violation of Sections 3664, 3667, 3668, and 3737 of the Public Utilities Code, Doss had transported shipments of lumber,

including split pickups and split deliveries, for respondents Inland, Compass, Sunol, Kelleher, and Cal-Wai in some instances without charge by the device of free loads or failing to issue freight bills, and in other instances at less than minimum rates by assessing rates and charges less than those applicable to split pickups and split deliveries, and whether, in violation of Section 3669, any of the above-named shipper respondents had sought or obtained transportation of lumber by Doss at less than applicable minimum rates. A further purpose of the investigation was to determine, in the event violations were found to have occurred, whether the provisions of Public Utilities Code Sections 3800 and 3774 should be invoked to order collection of the undercharges, impose fines, and/or order cancellation, revocation, or suspension of all or part of Doss's operating authority, and whether Doss should be ordered to cease and desist from any unlawful operations and practices.

Doss is engaged in the business of transporting property for compensation over the public highways of this State pursuant to radial highway common carrier authority, and a permit to operate as an agricultural carrier, both issued by this Commission. Permits T-125, 317 were transferred to Rich Doss, Inc., a California corporation, from Rich Doss, an individual doing business as Rich Doss Trucking, on January 2, 1979. Rates applicable to his common carrier authority are found in Minimum Rate Tariffs Nos. 2 and 15. During the period involved in this investigation, June 1, 1977 through September 30, 1977, Doss employed three drivers. His wife and a parttime bookkeeper helped to maintain carrier records. Doss maintains an office and yard at 3809 Stony Point Road, Santa Rosa. As of March 23, 1978, Doss operated one truck, two tractors, and five flatbed trailers. In 1977 he had gross operating revenues of \$1,026,299, and paid \$644,973 to subhaulers.

A public hearing was held in San Francisco on July 17, 1979 before Administrative Law Judge John B. Weiss at which time the case was submitted subject to receipt of a stipulation (received by the Judge September 21, 1979). At the hearing the staff asserted and through two staff witnesses presented evidence tending to show that during the July, August, and September 1977 period covered by the staff's investigation, Doss:

1. Had provided free transportation services to respondent shippers Inland, Compass, Kelleher, and Cal-Waii in the amount of \$2,453.35;
2. Had delayed billing or collecting until May or June of 1978, well after the staff's investigation period, for transportation services provided respondent shippers Inland, Compass, Sunol, and Kelleher in the amount of \$10,708.75; and
3. Had undercharged through miscalculations of split pickup and split delivery charges for transportation services provided respondent shippers Inland, Compass, Sunol, and Kelleher in the amount of \$6,170.70.

Evidence during the hearing established that this proceeding is the first instance of a Commission investigation leading to an alleged violation of the Public Utilities Code by Doss. Evidence was also adduced tending to show that while Doss had been cooperative during the investigation, not all of the documentation requested had been provided the staff investigator until the second or third visit in June and July 1978, respectively, following the initial visit and demand in January, 1978.

After submission of the staff's case in chief, Doss's counsel, with concurrence of staff counsel, presented an informal recitation of the factual background of the events and acts involved as he viewed it.

He stated that during the early stages of Doss's venture into lumber trucking, Mrs. Doss virtually ran the entire bookkeeping function out of their Novato home and was responsible for maintaining files, issuing freight bills, and handling collections. It was during this period of time that Mrs. Doss became pregnant, he stated, the baby being delivered June 15, 1977. Consequently the bookkeeping became chaotic. Counsel went on to relate that in May 1977 the Dosses also moved to Santa Rosa, and Doss suffered an accident requiring amputation of several fingers.

Doss's counsel then asserted that the undercharges did not result from culpability; that there was no intent to withhold or delay issuing freight bills or make collections, or any intent to undercharge for split deliveries. Rather, he asserted, the undercharges were a consequence of personal difficulties and ailments, chaotic bookkeeping, and lack of adequate personnel. Counsel pointed out that the operation was now cleaned up, and that new procedures, a fulltime bookkeeper, a parttime consultant, and services of a tariff service agency would prevent future problems. Stressing lack of specific intent and culpability, counsel argued that revocation of Doss's operating authority was not warranted in this proceeding, pointing out the alternative of a maximum punitive fine.

Regarding the undercharges disclosed by the investigation, counsel offered to stipulate that Doss be ordered to collect the total \$19,332.80 involved from the respective respondent shippers. Further, pursuant to Section 3800 of the Public Utilities Code Doss would agree to pay a fine into the State Treasury to the credit of the General Fund in the amount of \$13,162.10 for the free loads involved. In addition, Doss would also pay a fine of \$6,170.70 to the State Treasury to the credit of the General Fund for the split delivery undercharges involved. Finally, as an alternative to any cancellation, revocation, or suspension

of his operating permits, Doss would agree to pay the maximum \$5,000 punitive fine provided for under Section 3774 of the Public Utilities Code. However, arguing that Doss's operations do not generate any substantial volume of net income, counsel proposed that Doss be required to pay the \$13,162.10 fine related to the free loads and the \$5,000 punitive fine at the rate of \$1,000 per month to begin 30 days after the effective date of the Commission order in this proceeding. He further proposed that the \$6,170.70 fine related to the split deliveries be paid within 15 days after collection of the respective amounts from the involved respondent shippers.

Staff counsel agreed to and joined the proffered stipulation as an equitable foundation for a proposed Commission order, whereupon the Administrative Law Judge directed Doss's counsel, in conjunction with staff counsel, to prepare a formal written stipulation memorializing the agreements for subsequent presentation to the bench. On September 21, 1979 the parties signed the stipulation and delivered it to the Administrative Law Judge who made it part of the record in this proceeding as late-filed Exhibit No. 9.

Respondents Inland, Compass, Sunol, Kelleher, and Cal-Waii did not answer or appear as parties at the hearing. However, in response to a specific question from the Administrative Law Judge, the staff witness who performed the investigation testified that he had found no evidence of culpability on the part of the respondent shippers in his investigation.

Discussion

The staff-sponsored evidence included four volumes (bound as two) containing photocopies of freight bills and underlying documents relating to the asserted undercharges attributable to each respondent shipper for transportation during the three-month period of the investigation. In addition to the bound volumes, five folders were

submitted, each containing summarized data derived from the bound volumes. A separate folder pertained to each of the five respondent shippers named. Each of the folders, except that relevant to Cal-Waii, contained three sections; one section for each of the three major types of violation involved. In each folder the first section covered delayed billing and collections, and for each delayed billing or collection there was developed a comparison of the actual rates and charges from the freight bill and the legal minimum rates and charges which should have been charged for the transportation represented in the exhibits. In each folder the second section covered miscalculations of split delivery charges, and for each billing involved there was developed a comparison of the actual rates and charges made by Doss and the legal minimum rates and charges which should have been charged. In each folder the third section covered unbilled free loads, and for each unnumbered and unbilled shipment there was developed a comparison of the rates and charges set forth on the unnumbered freight bill and the legal minimum rates and charges which should have been charged. The Cal-Waii folder contained only one shipment item; that being an unbilled free load, and it was similarly covered.

In that Doss stipulates to the staff's tally of undercharge violations in all three categories, in effect he concedes their occurrence.^{1/} No appearances having been made by any of the respondent shippers to take issue with the staff interpretation of the rates which

^{1/} Stipulations as to a fact are the same as conclusive proof of that fact. See California Jury Instructions, Civil No. 1.02; and Witkin, California Evidence, 2nd Ed. Section 505.

should have been charged, we will accept the staff computation of \$19,332.80, the amount stipulated to by Doss, as being the total of the undercharges applicable to the shipments in issue, attributable as follows:

Inland	\$10,123.29
Compass	4,306.73
Sunol	2,839.55
Kelleher	1,913.23
Cal-Waii	150.00
	<u>\$19,332.80</u>

and will direct Doss to collect these undercharges, to the extent they have not already been collected, from the respective shippers in accordance with the mandatory collection provisions of Section 3800 of the Public Utilities Code.

Although Doss asserted, through his attorney, that there was no intent to charge lower than legal rates, that the free loads were the product of Doss's personal and family difficulties and ailments, chaotic bookkeeping problems, and lack of adequate personnel, and that the split delivery undercharges were attributable to use of a wrong rate column sheet, the carrier nonetheless elected not to proceed through hearing on these issues and stipulated to his acceptance of a fine in the amount of the undercharges. The violations involved in this short three-month period were numerous and sufficiently repetitious to raise serious questions regarding the adequacy of the exculpatory explanations offered. Taking into consideration the seriousness of the issues raised, the above reflections, and the stipulation willingly entered into, we see no reason in this case why a fine of \$19,332.80, an amount equal to the undercharges, should not be levied upon Doss as provided in Section 3800 of the Code.

Left for resolution is the matter whether we should, under provisions of Section 3774 of the Public Utilities Code, cancel, revoke, or suspend Doss's operating authority, or whether, in the alternative, we should impose a punitive fine. In the stipulation offered by the parties a \$5,000 punitive fine is recommended. Of course, while a stipulation will not be allowed to control the action of the Commission or to determine any judgment we render,^{2/} it will be very persuasive in assisting us to an equitable determination.

In admeasuring a penalty to be imposed the Commission will always consider the question of willfulness in the conduct involved (Progressive Transportation Co. (1961) 58 CPUC 462). And where there is no indication that the undercharges were willful or for the purpose of undercutting competition, a punitive fine need not be imposed (Jack Robertson (1969) 69 CPUC 563). Here, considering the lack of any prior violations in Doss's lumber hauling operation and his cooperation during the investigation, we do not conclude that the violations dictate cancellation, revocation, or suspension of Doss's operating authority. But the sheer number of free loads involved alone, for example, give rise to very serious questions of patterned violation of the Code. There would appear to have been more involved than mere occasional neglect or a lax approach to bookkeeping obligations. By electing not to pursue any defenses open to him in

^{2/} Parties to a proceeding cannot arrogate to themselves a Commission function or oust the Commission of the jurisdiction given to it by the Code.

favor of voluntarily joining into a stipulation which accepts the staff's tally of undercharges alleged and set forth in detail in the staff's evidence presented at the hearing, and recommending imposition of the maximum \$5,000 punitive fine open under Section 3774 of the Code, respondent concedes that there is no need to plumb motives nor test the exculpatory explanations further. Nor will we. We will adopt the recommendation contained in the stipulation and will impose the \$5,000 maximum punitive fine upon Doss as provided under Section 3774.

Although Doss already has billed and collected \$10,708.75 of the \$13,162.10 involved in the free loads, these undercharge collections apparently are no longer available to pay toward the Section 3800 fine we will impose. Furthermore, Doss's operations allegedly do not generate any substantial volume of net income. Since it is to no one's interest to force Doss out of existence by insisting upon immediate payment of the fines imposed, we will accept the stipulation proposal that we schedule payment of the \$13,162.10 free load and Section 3774 \$5,000 punitive fine out of forthcoming proceeds of the operation. Doss will be ordered to pay this \$18,162.10 fine at the rate of \$1,000 per month, the first payment to begin 30 days after the effective date of the order of the Commission in this proceeding. The fines related to the split delivery undercharges amounting to \$6,170.70 will be paid within 15 days after collection of each shipment amount from the respective shippers.

In that the staff testimony was that it had discovered no evidence of collusion between Doss and the shippers involved, we will conclude that such lack of evidence disposes of the Section 3669 aspect of the instant investigation.

Findings of Fact

1. Doss is engaged in transporting property for compensation under authority granted by this Commission.

2. During the inclusive period July, August, and September 1977, Doss furnished transportation services in part free of charge or in part at less than the lawfully prescribed minimum rates, and shipper respondents received transportation services without payment or paid less than the lawfully prescribed minimum rates for them, resulting in undercharges totaling \$19,332.80, ascribable as follows:

Inland	\$10,123.29
Compass	4,306.73
Sunol	2,839.55
Kelleher	1,913.23
Cal-Waii	150.00
	<u>\$19,332.80</u>

3. Doss, after the Commission staff investigation, but prior to the hearing, had billed and collected \$10,708.75 of the \$19,332.80 total of the undercharges.

4. At the July 17, 1979 hearing in San Francisco Doss elected not to proceed with a defense, and stipulated to the above stated undercharges.

5. Doss generally cooperated with the staff during the staff investigation leading to this proceeding.

6. The sheer number of free loads and delayed billing shipments made during the three-month period involved precludes, in the absence of some defense, a finding of a lack of willful intent.

7. The staff discovered no degree of culpability on the part of the shipper respondents in these undercharges.

8. The records of this Commission pertaining to Doss show no prior infractions resulting in investigation leading to charges.

9. Doss has undertaken appropriate steps to insure that these violations should not occur again.

Conclusions of Law

1. Doss violated Sections 3664, 3667, and 3737 of the Public Utilities Code by providing free loads and by charging less than the lawfully prescribed minimum rates for these transportation services.

2. Doss should be required to bill and collect the \$8,624.05 balance of the undercharges outstanding of the \$19,332.80 total, and should be required to pay a fine pursuant to the provisions of Section 3800 of the Code in the amount of \$19,332.80.

3. Doss should be required to pay a punitive fine pursuant to the provisions of Section 3774 of the Code in the amount of \$5,000.

4. Doss should be permitted to pay the \$13,162.10 portion of the \$19,332.80 fine attributable to free loads, and the \$5,000 punitive fine, in scheduled \$1,000 monthly payments. The \$6,170.70 portion of the fine attributable to split delivery undercharges should be paid within 15 days after collection from respective shippers.

5. The Commission expects that Doss will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the respective undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent Doss and the results thereof. If there is reason to believe that respondent Doss or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

6. Doss should be ordered to cease and desist from any and all unlawful operations and practices in the future.

O R D E R

IT IS ORDERED that:

1. Rich Doss, Inc. shall pay to this Commission a fine of \$19,332.80 pursuant to the provisions of Public Utilities Code Section 3800, and a punitive fine of \$5,000 pursuant to the provisions of Public Utilities Code Section 3774. Of these fines \$18,162.10 shall be paid \$1,000 per month to begin thirty (30) days after the effective date of this order; and the remaining \$6,170.70 shall be paid within fifteen (15) days after collection of the outstanding amount due from each respective shipper-respondent undercharged for split deliveries.

2. Rich Doss, Inc. shall take such action, including legal action, as may be necessary to collect (1) the \$6,170.70 undercharges as found by this Commission to be outstanding attributable to split delivery shipments, and (2) the \$2,453.35 balance of undercharges as found by this Commission to be outstanding attributable to free load shipments, and shall notify the Commission in writing upon collection.

3. Rich Doss, Inc. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, Rich Doss, Inc. shall file with this 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.

4. Rich Doss, Inc. shall cease and desist from any and all unlawful operations and practices.

5. The order instituting investigation as to respondent shippers Inland Lumber Co., Rick Beilfuss and Gary Hansen, a partnership, doing business as Compass Lumber Products, Guy Lavery, Jr., an individual doing business as Sunol Forest Products, Kelleher Lumber Co., and Cal-Wai Molding Company is terminated.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon respondent Rich Doss, Inc., and to 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 thirty days after completion of service on that respondent.

Dated MAY 20 1980 at San Francisco, California.

John E. Byrne
President
Vernon L. Strickland
Richard W. Kavelle
Clair J. DeLuca
Edward W. Penning
Commissioners