

ORIGINAL

Decision No. 92202 SFP 3 - 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations,)
 rates and practices of Maurice E.)
 Whitchurch, Sr., dba WHITCHURCH &)
 SON TRANSPORTATION, a sole)
 proprietorship; Loren W. Edsall;)
 Carl L. Harr, dba Harr Trucking,)
 a sole proprietorship; Maurice E.)
 Whitchurch, Jr., dba M&M)
 Transportation, a sole proprietor-)
 ship; and Dubug Number 7, Inc.,)
 dba Wood Ply Forest Products, dba)
 Payless Building Supply, a)
 California corporation.)

OII No. 64
(Filed February 13, 1980)

M. E. Whitchurch, for himself, respondent.
Ellen LeVine, Attorney at Law, and Ed Hjelt,
 for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's own motion into the operations, rates, charges, and practices of Maurice E. Whitchurch, Sr. (Whitchurch), dba Whitchurch & Son Transportation, a sole proprietorship; Loren W. Edsall; Carl L. Harr, dba Harr Trucking, a sole proprietorship; and Maurice E. Whitchurch, Jr., dba M&M Transportation, a sole proprietorship, regarding 18 loads of wallboard and five loads of sacked cement transported from the San Francisco Bay Area to Chico and Susanville for Dubug Number 7, Inc. (Dubug), a corporation, under Dubug's assumed business name of Payless Building Supply (Payless) between July and December 1978 to determine the following:

1. Whether Whitchurch has violated Section 3621 of the Public Utilities Code (the Code) by transporting sacked cement in truckload shipments without the required operating authority.
2. Whether Whitchurch, in performing transportation for Dubug, has violated Sections 3664, 3667, 3668, and 3737 of the Code by charging less than the minimum rates set forth in Minimum Rate Tariff 2 (MRT 2), including the failure to comply with the requirements set forth in Items 255, 256, and 257; and by charging less than the minimum rates set forth in Minimum Rate Tariff 10 (MRT 10), including the failure to comply with the requirements set forth in Items 163, 180, and 190.
3. Whether Whitchurch, in performing transportation for Dubug, has violated General Order No. 102-F for failure to execute written subhaul agreements.
4. Whether Dubug has paid less than the applicable rates and charges for the transportation performed by Whitchurch.
5. Whether any sum of money is now due and owing Whitchurch from Payless.
6. Whether Whitchurch should be ordered to collect from Dubug, or from any persons liable therefor, the difference between the charges collected and the charges due under the aforementioned tariffs.
7. Whether Whitchurch should be ordered to cease and desist from any and all unlawful operations and practices.
8. Whether the operating authority of Whitchurch should be canceled, revoked, suspended, or, as an alternative, whether a fine should be imposed pursuant to Section 3774 of the Code.
9. Whether Whitchurch should be ordered to pay a fine in the amount of the undercharges pursuant to Section 3800 of the Code.

10. Whether any other order or orders as may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

A hearing was held before Administrative Law Judge Pilling in Chico on June 3, 1980.

At all times pertinent, Whitchurch, who headquarters in Chico, conducted trucking operations under a radial highway common carrier permit, a contract carrier permit, and an agricultural carrier permit which authorizes the transportation of commodities, including wallboard, subject to MRTs 2, 8-A, and 14-A. None of those tariffs cover the transportation of sacked cement. Whitchurch operated two tractors and two flatbed trailers and engaged subhaulers in his operation. Whitchurch also drives one of the tractors in his operation. In 1978 Whitchurch grossed \$290,000 from trucking operations.

The uncontroverted evidence shows that (1) Whitchurch transported 18 loads of wallboard and accessories from Antioch to Chico and Susanville between July and December 1978 for Payless; (2) Whitchurch transported five loads of cement in sacks from Permanente to Chico between July and December 1978 for Payless; (3) the applicable transportation charges for transporting the 23 shipments amounted in total to \$7,005.36; (4) Whitchurch never issued any freight bills to Payless or anyone else covering the 23 shipments; (5) Whitchurch has never received any money from Payless or from anyone else for transporting the 23 shipments; (6) Whitchurch's operating authority does not authorize it to transport cement in sacks; (7) most of the 23 hauls were made by subhaulers of Whitchurch but that Whitchurch had no written subhaul agreements with them as required by General Order No. 102-F; and (8) Whitchurch has done business with Payless through its owner, Frank Solinsky (Solinsky), for 11 years.

An investigator from the Commission staff testified that in June 1979 he checked the records of Whitchurch looking for evidence of the 23 hauls but found none. When he asked Whitchurch about the hauls, Whitchurch, while not denying he made the hauls, could not remember having made them. The next month the investigator met with Whitchurch. He told the investigator he remembered having made the hauls but that he had no records concerning them. Whitchurch also told him that no freight bills had been issued because he had a trade agreement with Solinsky whereby Payless would offset the amount of freight charges against the price of building materials Payless would be giving him and that he allowed Payless, on October 15, 1978, a further offset against the freight charges in the amount of \$2,000 as payment of a finder's fee for Solinsky putting Whitchurch in touch with a machinery broker through whom Whitchurch bought, on September 19, 1978, a 1949 Hyster forklift for \$2,000. The investigator next visited Whitchurch in August 1979 and obtained copies of the shipping documents covering the 23 loads. And at that time Whitchurch gave the investigator a Payless estimating form containing a list of building materials and their price which was purported to be a list of building materials involved in the trade agreement. The price of the materials totaled \$5,754.44. The list of materials had been made up in July 1979. The staff investigator asked the Hyster Company manager in Sacramento the going value of a 1949 Hyster forklift as of the fall of 1978, and the manager said the used retail price at that time would have been between \$3,500 and \$4,500 for one in good condition.

Whitchurch testified that he had an oral agreement with Solinsky that Whitchurch would haul merchandise for Payless and that when the accumulated freight charges at \$300 a load equaled about \$7,000, Payless would give Whitchurch building materials of that retail value to go into the construction of a 100' x 30' repair garage which Whitchurch had been wanting to build for his equipment. Once the accumulated charges reached the value of the required building materials Whitchurch could pick up the materials any time. To date, however, Whitchurch has not called for the building materials. He stated he did not call for them during the winter of 1978-79 because he did not have the time to build the garage and he did not call for them during the summer of 1979 or thereafter because he received a visit during June 1979 from an investigator from the Commission who called into question the propriety of the form of payment of freight charges. Whitchurch has never applied for a building permit from local authorities to build the garage. Whitchurch did not think \$2,000 was an unreasonable figure to give as credit against the freight charges as a finder's fee as Whitchurch thought he got a good deal on the transaction. He uses the forklift regularly in his business.

Solinsky confirmed that he had a trade agreement with Whitchurch, as testified to by Whitchurch. He stated that Whitchurch also gave Payless a credit of \$2,000 against the freight charges as payment of a finder's fee for Solinsky steering Whitchurch onto a used forklift which a machinery broker told Solinsky was for sale. Solinsky testified that the only money and effort he expended in earning the finder's fee was to relay to Whitchurch by telephone the information about the location of the forklift and its price. Solinsky, who owns about a dozen forklifts in his business and buys and sells them, stated that the forklift he put Whitchurch onto had a sale value of \$4,000 and that if cleaned up and repainted could be sold for \$5,000.

Whitchurch was cooperative with the staff investigator. The staff recommends a punitive fine of \$2,500 be levied against Whitchurch and that Whitchurch be ordered to collect the undercharges of \$7,005.36 and be fined in that amount.

Discussion

Following are pertinent portions of the Code:

- "3664. It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate...established by the commission under this article."
- "3667. No highway permit carrier shall charge, demand, collect, or receive for the transportation of property,...rates or charges less than the minimum rates and charges... 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..."
- "3668. No highway permit carrier,...shall...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...then established or approved by the commission."
- "3737. ...the carrier shall maintain copies of all tariffs, decisions or orders... applicable to the class or classes of transportation service authorized by the permit, and shall observe any tariff, decision, or order applicable to it."

Following are pertinent portions of MRT 2:

(Item 250)

- "(b) ...carriers may...extend credit...for a period of 7 days...
* * *
- "(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."

(Items 255 and 256)

- "2. ISSUANCE OF FREIGHT BILL. A freight bill shall be issued by the carrier for each shipment transported...[showing] the following information:"

* * *

"(h) Rate and charge assessed."

(Item 257)

"...rates...shall not be quoted or assessed by carriers based upon a unit of measurement different from that in which the minimum rates and charges in this tariff are stated."

Following are pertinent portions of MRT 10:

(Item 145)

(Same as Item 250 of MRT 2.)

(Item 163)

"Charges paid by any overlying carrier to an underlying carrier...shall be 100 percent of the charges applicable under minimum rates prescribed in this tariff."

(Item 180)

(Same as Items 255 and 256 of MRT 2.)

(Item 190)

(Same as Item 267 of MRT 2.)

Section 3737 of the Code requires a carrier to abide by the applicable tariffs. The applicable tariffs in this case required Whitchurch to issue a freight bill at the end of each Payless move and to collect the applicable freight charges for each move within each credit period allowed. Whitchurch failed to either timely bill or timely collect. Each such failure puts Whitchurch in violation of Section 3737 of the Code and Items 250, 255, and 256 of MRT 2 and of Items 145, 180, and 190 of MRT 10.

To date Whitchurch has neither billed, demanded, nor collected any money as payment of transportation charges for moving the subject shipments, thereby violating Sections 3664 and 3667 of the Code for each such failure.

The fact that Whitchurch, when first confronted by the staff investigator, could not remember having made any of the 23 hauls and had no records pertaining to the hauls strongly indicates that the purported trade agreement, as well as the credit for a finder's fee, was of recent contrivance and that Whitchurch originally never intended to charge Payless for making the hauls as contended by the staff. This contention is fortified by the fact of Whitchurch's failure to claim the building materials for at least six months after he allegedly was entitled to claim them.

But even if the trade agreement had been in being before the hauls were made, it would have constituted a device prohibited by Section 3668 of the Code to permit Payless to evade the payment of freight charges. It would have allowed Payless to evade payment of the transportation charges for each haul until the accumulated charges reached approximately \$7,000. Looking at it another way, the trade agreement would have been an attempt to satisfy the transportation charges with a mere conditional promise--a promise to deliver building materials at some future indefinite time when Payless' indebtedness to Whitchurch reached an approximate amount, thus permitting Payless to evade the actual payment of the charges. Either way, through the medium of the purported trade agreement, payment of the transportation charges was evaded.

The staff made no showing that Whitchurch failed to pay his subhaulers 100 percent of the rate for hauling the sacked cement in violation of Item 163 of MRT 10.

Findings of Fact

1. At all times pertinent Whitchurch operated under a radial highway common carrier permit and contract carrier permit which authorized the transportation of commodities subject to MRTs 2, 8-A, and 14-A, which included wallboard but did not include sacked cement.

2. Between July and December 1978 Whitchurch, for the account of Payless, transported 18 loads of wallboard and accessories from Antioch to Chico and Susanville and five loads of cement in sacks from Permanente to Chico.

3. The applicable transportation charges for transporting the 23 shipments amounted in total to \$7,005.36.

4. Whitchurch never issued any freight bills to Payless or to anyone else covering the 23 shipments.

5. Whitchurch has never received any money from Payless or from anyone else for transporting the 23 shipments.

6. Payless has never paid Whitchurch or anyone else for transporting the 23 shipments.

7. Whitchurch used subhaulers to make the 23 moves.

8. Whitchurch had no written subhaul agreement with any of the subhaulers who made the 23 moves.

9. When confronted by the staff investigator, Whitchurch could not remember having made the subject hauls and claimed to have no records pertaining to the subject hauls.

10. Whitchurch failed to pick up certain building materials until six months after he claimed he was entitled to them under an alleged trade agreement as payment for the subject freight charges.

11. The alleged trade agreement was devised several months after all of the subject hauls had been made.

12. The idea of giving Payless credit for a \$2,000 finder's fee against the subject freight charges was contrived some months after all of the subject hauls had been made.

13. The alleged trade agreement, if it had been in force at the beginning of the hauls, would have allowed Payless to evade the payment of transportation charges for each individual shipment until at least such time as the cumulative amount of all charges reached \$7,000.

14. Whitchurch was not shown to have failed to pay his subhaulers 100 percent of the charges for transporting the shipments of sacked cement.

Conclusions of Law

1. Whitchurch violated Section 3621 of the Code by transporting five loads of sacked cement without the required operating authority.

2. Whitchurch violated General Order No. 102-F for failure to execute written subhaul agreements.

3. Whitchurch violated Section 3737 of the Code and Items 250, 255, and 256 of MRT 2 and Items 145, 180, and 190 of MRT 10 by failing to issue freight bills and timely collect the subject freight charges.

4. Whitchurch violated Sections 3664 and 3667 of the Code by failing to bill, demand, or collect the subject freight charges.

5. Whitchurch should be ordered to collect the subject undercharges in the amount of \$7,005.36.

6. Whitchurch should be ordered pursuant to Section 3800 of the Code to pay a fine of \$7,005.36.

7. Whitchurch should be ordered to pay a fine of \$2,500 levied pursuant to Section 3774 of the Code.

8. Whitchurch should be ordered to cease and desist from any and all operations and practices of the nature found herein to be in violation of the Code.

9. Whitchurch did not violate Item 163 of MRT 10.

The Commission expects that Whitchurch 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. The staff of the Commission will make a subsequent field investigation

into such measures. If there is reason to believe that Whitchurch 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 determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Maurice E. Whitchurch, Sr. shall pay a fine of \$2,500 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. Maurice E. Whitchurch, Sr. 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. Maurice E. Whitchurch, Sr. shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of \$7,005.36 on or before the fortieth day after the effective date of this order.

3. Maurice E. Whitchurch, Sr. 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 Finding 3 and shall notify the Commission in writing upon collection.

4. Maurice E. Whitchurch, Sr. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of the sixty days, a

report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of Maurice E. Whitchurch, Sr.'s operating authority until the report is filed.

5. Maurice E. Whitchurch, Sr. shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

6. Maurice E. Whitchurch, Sr. may elect to pay the fine levied in Ordering Paragraph 1 in ten consecutive monthly installments of \$250 each, the first installment to be paid on or before the thirtieth day of the month following the month this order becomes effective and the remaining installments on or before the thirtieth day of each month thereafter until the fine is paid in full; provided, however, that if any installment payment is not paid when due, then the entire balance of the fine is due and owing.

The Executive Director of the Commission shall cause personal service of this order to be made upon respondent Maurice E. Whitchurch, Sr. and cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be thirty days after completion of service on that respondent.

Dated SEP 3 - 1980, at San Francisco, California.

John E. Byrne
President
Thomas P. Stinson
Charles D. Gendle
Clair J. Davis
Donald W. Smith
Commissioners