

ORIGINAL

Decision 93518 SEP 1 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own) motion into the operations, rates,)
 and practices of Russell T. Phillips,)
 dba Russ Phillips Trucking, a sole)
 proprietorship, J. D. Meat Packing)
 Co., Damar International, General)
 Processors, Inc., Griffith Meat)
 Brokerage, Glenn's Choice Meat Co.,)
 Inc., dba Lido Products, P. A.)
 Graziani Meat, Richmond Wholesale)
 Co., Salem Packing Co., Scott Meat,)
 Select Meat Co., Inc., and Union)
 Packing Company.)

OII 76
(Filed July 2, 1980)

R. M. Farran, for Russell T. Phillips;
Ronald A. Hillman, for Scott Meat Company;
Pino A. Graziani, for P. A. Graziani
 Meat; respondents.
Robert Cagen and Lynn Theilacker Carew,
 Attorneys at Law, and Ed Hjelt, for the
 Commission staff.

O P I N I O N

This investigation concerns the hauling of 204 loads of chilled or frozen meat by Russell T. Phillips (Phillips) between points in the Bay Area and points in Southern California to determine the following:

1. Whether Phillips in transporting shipments of fresh meat for respondent meat companies violated Public Utilities (PU) Code Sections 3664, 3667, 3668, and 3737 by failing to assess the applicable rates as set forth in Minimum Rate Tariff 2 (MRT 2).

2. Whether respondent meat companies, or persons liable therefor, have paid less than the applicable rates and charges for transportation performed by Phillips.
3. Whether, in the event sums less than the applicable rates and charges are found to have been charged, collected, or received, a fine in the amount of such undercharges should be imposed upon Phillips under PU Code Section 3800.
4. Whether Phillips should be ordered to collect from the respondent meat companies the difference between the charges actually received and the applicable minimum rates and charges.
5. Whether any, or all, of Phillips' operating authority should be canceled, revoked, or suspended, or in the alternative, a fine imposed under PU Code Section 3774.
6. Whether Phillips should be ordered to cease and desist from any unlawful operations or practices.
7. Whether any other order, or orders, that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

A hearing was held before Administrative Law Judge Fraser in Fresno, on August 19, 1980 and November 25, 1980. An additional hearing was held in Los Angeles on January 22, 1981 and the matter was submitted.

During the period under investigation Phillips operated out of a terminal in Fresno as a radial highway common carrier, highway contract carrier, livestock carrier, and as an agricultural carrier. Commission records show that Phillips has been served

copies of and is a subscriber to supplements on MRTs 1-B, 2, 8, 9-B, and 15; also Distance Table 8 and Exceptions Rating Tariff 1 (ERT-1). Phillips has also been served with a copy of the informal rulings.

Phillips employs 11 drivers, 5 mechanics, and 4 office employees. He operates 9 three-axle tractors and 15 refrigerated semitrailers. The gross operating revenue for 1978 totaled \$939,125.

Staff's Evidence

An investigator for the Commission staff testified that he visited Phillips' terminal for the first time on March 20, 1979 and reviewed respondent's records for the first half of March 1979. The investigation was extended to cover the period from October 1978 through March 19, 1979, during subsequent visits on March 23 and March 26, 1979. Documents were photostated during a later visit in October 1979. Subsequent visits were necessary to copy documents missing during initial visits. Some freight bills were obtained from shippers or consignees. Exhibit 1 was placed in evidence by stipulation of the parties. It lists respondent Phillips' terminal location, number of employees, operating equipment, tariff service, and gross business for 1978. The staff investigator authenticated Exhibits 2-A, 2-B, and 2-C, which consist of copies of all shipping documents. The staff witness

admitted on cross-examination that all of respondent's employees cooperated during this investigation.

Exhibits 3 through 12 were sponsored by the staff rate expert. The witness testified that the rates charged and collected by respondent carrier are considerably less than the lawful minimum rates set out in MRT 2, due to a rating policy which included:

1. Charging a flat rate for each truckload, rather than computing the rate on cents-per-100 pound basis, in violation of the unit of measurement rule (Item 257, MRT 2).
2. Charging a cents-per-pound rate rather than cents per 100-pounds.
3. Violation of the split delivery rule (Item 172) and split pickup rule (Item 162) by picking up and delivering multiple shipments without written instructions from the consignor, as required by the identified tariff rules.

P. A. Graziani Meat (Graziani) owes no undercharges, and staff counsel moved for its dismissal as a respondent. Phillips did not contest the accuracy of the staff exhibits, which are summarized as follows:

<u>Shipper</u>	<u>Exhibit</u>	<u>Commodity</u>	<u>No. of Shipments</u>	<u>Period Transportation Performed</u>	<u>Undercharges</u>
D and V Meat Co., a Division of J. D. Meat Packing Co.	3	Meat, fresh, chilled	34	10/7/78 to 3/13/79	\$ 4,407.75
Damar Inter- national	4	Meat, fresh, frozen	2	3/5/79 to 3/13/79	708.59
General Processors, Inc. (Edco)	5	Meat, fresh, frozen, and chilled	16	10/9/78 to 3/18/79	3,113.02
Griffith Meat Brokerage	6	Meat, fresh, chilled	11	10/20/78 to 1/23/79	1,080.28
Glenn's Choice Meat Co., Inc. (Lido)	7	Meat, fresh, chilled	22	10/16/78 to 3/19/79	35,521.13
Richmond Wholesale Meat Co.	8	Meat, fish, cheese, poultry, frozen	24	10/7/78 to 3/9/79	9,801.43
Salem Packing Co.	9	Meat, fresh, chilled, or frozen	17	10/5/78 to 3/7/79	1,447.58
Scott Meat Company	10	Meat, fresh, chilled, or frozen	30	10/5/78 to 3/16/79	5,320.30
Select Meat Co., Inc.	11	Meat, fresh, chilled, or frozen	25	10/13/78 to 3/16/79	1,727.94
Union Packing Company	12	Meat, fresh, chilled	<u>23</u>	10/6/78 to 3/14/79	<u>4,718.22</u>
	Total		204		\$67,846.24

Phillips' Evidence

Phillips did not take the stand as a witness, nor make a statement. A Fresno rate expert testified for him. He stated that:

1. If Phillips had obtained authority to deviate from the minimum rates, the lower rates charged may have been lawful.
2. Phillips had authority to charge the lower rate at one time, but failed to renew it.
3. Phillips hired him to apply for a deviation, but 40 other clients had priority and he handles his requests in the order they are received.
4. The Phillips' request to deviate has been filed and is pending before the Commission on less than truckload hauls.
5. Phillips lost a large account after his authority to deviate expired, because large shippers expect carriers to haul at less than minimum rates.

Evidence from Respondent Shippers

A representative employed by Scott Meat Company for 15 years testified briefly as follows:

1. Scott Meat Company (Scott) is now out of business and has sold all of its facilities.
2. Scott ceased to operate as a corporation on October 19, 1979.

3. Scott did not have any transportation rate tariffs during the time they were shipping meat.
4. Various carriers were called to obtain quotes on transporting meat, which sum was added to other factors and included in the sum charged the consignee.
5. There is no way Scott could determine what the transportation rate should be, having neither tariffs nor rate experts.
6. A shipper should not be penalized for a carrier's mistake where it is impossible for the shipper to recover the additional sum or penalty from the original purchaser of the meat.
7. Deregulation of trucking would be welcomed by the meat business.

The Los Angeles hearing was convened to hear testimony from two other shipper respondents.

A representative from Union Packing Company (Union) testified that:

1. Union has been in California since 1923 and he has been with the company since 1972.
2. Phillips was already employed when he joined the company and has been used continuously since to haul all meat sold in Bakersfield or further north.
3. He made a deal with Graziani to deliver meat to Bakersfield on Phillips' trucks.
4. There was no agreement to undercut Commission-set rates and his company did not know that the rates charged were too low.

5. The foreman at his warehouse filled out bills of lading but did not make out a master bill, due to a lack of familiarity with tariff requirements.
6. All bills from Phillips were paid promptly.
7. He has received calls from truckers who advise they will haul for less than anyone else. These offers are always rejected.
8. This summer Union received a notice that more than \$4,700 was owing on transportation performed two years ago.
9. If Union was aware of this discrepancy when the transportation was performed, the additional transportation charge could have been added to the selling price of the meat.
10. Union lost money in 1979 and 1980. A fine at this time would pose a serious financial burden on a company that does not feel it is at fault.
11. On cross-examination he stated that Phillips is still being used because of outstanding service.

A witness testified for both General Processors, Inc. and Lido Products as follows:

1. The former has been in business for three years, and the latter for 14 years.
2. When General Processors, Inc. was formed, Safeway was picking up its meat at his warehouse.
3. Safeway paid and took title to the meat at the loading ramp.
4. When Safeway stopped providing the transportation, his company had to find a suitable carrier to satisfy Safeway demands for 6-day service and emergency delivery on a few hours' notice.

5. Safeway suggested that the meat be priced as it was in the past, with the cost of transportation added.
6. Phillips was selected as a dependable carrier with adequate equipment to haul loads from 1,000 to over 18,000 lbs.
7. There was no reason to employ those who charge less for trucking service.
8. He was not concerned whether freight charges were two cents or ten cents a lb., as long as the correct rate was quoted.
9. In the present case the shippers were not advised of the violations until long after the transportation was performed.
10. Thus, the extra transportation charge cannot be collected from Safeway, for whom the transportation was performed.
11. Meat packers do not have the transportation tariffs needed to find the applicable rates, nor the expertise required to use them.
12. He is in the meat business, not trucking, and follows the buyer's instructions on how the meat should be delivered.
13. In this proceeding a meat packer is being punished for paying an unlawful transportation rate selected and billed by the carrier on transportation performed two years ago for a third person, who is not involved in the proceeding.
14. Finally, although his company is required to pay the difference between the rates charged and the lawful rate as a penalty, the sum involved cannot be collected from those for whom the transportation was performed.

Final Arguments

Staff counsel advised that Phillips was found to have tariff violations in 1963 and 1975 (Decision (D.) 63441 dated March 20, 1963 in Case (C.) 7179 and D.85139 dated February 19, 1975, in C. 9878). The latter case involved undercharges on the shipment of chilled meat from meat-packing houses.

Counsel advised that Phillips has more than 20 years' trucking experience and in view of this experience and his prior violations, staff recommended a 30-day suspension of operating authorities, or a \$5,000 fine as an alternative; in addition to an order to cease and desist from further violations of the PU Code.

Respondent's representative did not challenge the staff's evidence or argument. He stated that Phillips had authority to charge less than the minimum rates, but neglected to renew it, possibly due to a change in shippers. Phillips had requested that the necessary authority be obtained, but his tariff service was busy with other filings and could not get the necessary authority in time. He stated that "deregulation" of transportation is possible in the near future. He further stated that it is not the time to enforce rules that may be eliminated in a few months, and that Phillips seems to be the only Fresno carrier prosecuted, although the evidence indicates that a carrier who charged minimum rates would get no business, since others would haul for less. He

argued that respondent has already lost almost all of the business represented by the shippers who would pay the undercharges, and many other carriers who have not been investigated will haul for less than Phillips.

Discussion

Phillips' defense is directed toward mitigation and reduction of any penalty to be imposed. There was no effort to refute the staff evidence. A fine of \$5,000 is reasonable, in view of Phillips trucking experience, prior violations, and gross volume of business. Further violations may result in a suspension, as recommended by the staff in this proceeding.

Collection of all undercharges has historically been the best method of enforcing the minimum rate program. Requiring the collection of undercharges by the carrier is the most effective way to eliminate collusion between carrier and shipper. (West v Holstrom (1968) 261 CA 289.) Finally, section 3800 of the PU Code makes it mandatory for this Commission to direct the collection of undercharges. "If as a result of the default of the carrier, a shipper has been damaged, the shipper has his action at law against the carrier, but the shipper must, nevertheless, pay the proper tariff charges." (Dee Jay Transportation, Inc. (1977) 81 CPUC 649, 656.)

Findings of Fact

1. During the period under investigation, Phillips engaged in the business of transporting property for compensation upon the public highways under a radial highway common carrier permit issued on November 12, 1963, a highway contract carrier permit issued on July 28, 1963, a highway contract carrier permit issued on July 28, 1972, a livestock carrier permit issued on July 23, 1973, and an agricultural carrier on March 21, 1978.

2. Phillips was served with all applicable minimum rate tariffs and the distance tables, together with all their supplements and additions.

3. During the period from October 5, 1978 through March 20, 1979 while engaged in the business of transporting property for compensation for the respondents, Phillips charged less than the lawfully prescribed minimum rates as follows:

D and V Meat Company, a division of J. D. Meat Packing Co.	\$ 4,407.75
Damar International	708.59
General Processors, Inc. (Edco)	3,113.02
Griffith Meat Brokerage	1,080.28
Glenn's Choice Meat Co., Inc. (Lido)	35,521.13
Richmond Wholesale Meat Co.	9,801.43
Salem Packing Co.	1,447.58
Scott Meat Company	5,320.30
Select Meat Co., Inc.	1,727.94
Union Packing Company	4,718.22
Total Undercharges	\$67,846.24

4. All respondents were cooperative with the staff at all times during the investigation and the hearing.

Conclusions of Law

1. Phillips violated PU Code Sections 3664, 3667, 3668, and 3737.

2. Phillips should pay a fine under PU Code Section 3800 in the amount of \$67,846.24 and, in addition, should pay a fine under Section 3774 in the amount of \$5,000, payable \$1,500 on or before the 40th day, \$1,500 on or before the 70th day, and \$2,000 on or before the 100th day, after the effective date of this order.

3. Phillips should be ordered to collect from the respondent shippers the difference between the charges collected and the proper charges in the aggregate sum of \$67,846.24 under PU Code Section 3800.

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

5. No other penalties or sanctions are warranted.

Phillips should promptly take all reasonable actions to collect the undercharges. If necessary, he should file timely complaints according to PU Code Section 3671. The Commission staff will investigate Phillips' compliance. If it believes that Phillips or his attorney has not acted in good faith, the Commission will reopen this proceeding to determine whether to impose sanctions.

O R D E R

IT IS ORDERED that Russell T. Phillips shall:

1. Pay a fine of \$5,000 to this Commission under PU Code Section 3774 with \$1,500 to be paid on or before the 40th day, \$1,500 on or before the 70th day, and \$2,000 on or before the 100th day, after the effective date of this order.
2. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
3. Pay a fine to this Commission under PU Code Section 3800 of \$67,846.24 on or before the 40th day after the effective date of this order.
4. Take such action, as may be necessary to collect the undercharges set forth in Finding 3, including timely legal action under PU Code Section 3671.
5. Notify the Commission in writing upon collection.
6. Promptly take all reasonable steps to collect the undercharges.
7. File with the Commission on the first Monday of each month a report of any undercharges remaining uncollected 60 days after the effective date of this order, specifying the action taken to collect them and the result of such action, until they have been collected in full, or until further order of the Commission. Failure to file any such monthly report within 15 days after the due date shall result in the automatic suspension of the operating authority until the report is filed.
8. Not charge or collect less than minimum rates set by the Commission.
9. P. A. Graziani Meat is dismissed as a respondent in this investigation.

The Executive Director shall have this order personally served upon Russell T. Phillips and served by mail upon all other respondents.

✓
SS
The order shall become effective for each respondent 30 ^{the} days after ^{the} order is served.

Dated SEP 1 1981, at San Francisco, California.

John E. Byrne
President
Richard D. Hooley
Thomas W. Herin
Walter C. ...
Prescilla C. ...
Commissioners