

Decision 93647 .OCT 20 1981

ORIGINAL

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 NEWMAN)
TRUCKING COMPANY, INC., a California)
corporation, and NEWHALL REFINING CO.,)
INC., a Delaware corporation,)
respondents.)

OII 47
(Filed May 8, 1979)

Randolph L. Wu, Attorney at Law,
and Eugene Kremsdorf, for the
Commission staff.

O P I N I O N

This investigation was instituted on the Commission's own motion to determine whether Newman Trucking Company, Inc. (Newman), violated Public Utilities (PU) Code Sections 3664 and 3737 by charging less than the applicable minimum rates set forth in the Commission's Minimum Rate Tariff (MRT) 6-B^{1/} in performing transportation for Newhall Refining Company, Inc. (Newhall). The investigation was also instituted to determine whether Newman has violated PU Code Section 3705 by failing to make available to the staff certain transportation documents.

Background

Newman, a California corporation, was issued a petroleum contract carrier permit on November 7, 1975. This proceeding involves questions of fact similar to those considered in OII 46, an investigation on the Commission's own motion into the operations, rates, and practices of Samuel H. Stanley and Robert Ross, copartners doing business as Sad Sam's Trucking (Sad Sam's), and Samuel H. Stanley (Stanley), an individual. Richard Rosenberg, attorney representing respondent carriers

^{1/} MRT 6-B was canceled July 31, 1980 by Decision (D.) 91861 dated June 30, 1980 in Case (C.) 5436, Order Setting Hearing 244.

in OII 46, also represents Newman. At the conclusion of hearings held on OII 46 in September 1979, Rosenberg, the staff, and the assigned Administrative Law Judge agreed that hearings on OII 47 should be deferred until after a decision was issued in OII 46. Therefore, this matter was temporarily removed from the Commission's Daily Calendar until final disposition of OII 46.

D.91952 was issued June 17, 1980 in OII 46. The decision found, inter alia, that respondent carriers had transported a commodity described as "top crude" at rates less than the applicable minimum rates stated in MRT 6-B. OII 47 involves, for the most part, transportation of the identical commodity considered in OII 46.

OII 47 was reset for hearing to October 23, 1980 and again reset to November 7, 1980. However, as related below, the staff experienced considerable difficulty in obtaining some of the documents underlying the rate exhibits presented in this proceeding.

OII 47 was again removed from the Commission's Daily Calendar and finally reset for hearing on August 10, 1981. Accordingly, a duly noticed public hearing was ultimately held before Administrative Law Judge John Lemke in Los Angeles on August 10, 1981, and the matter was submitted subject to the receipt of late-filed Exhibit 7, which was received August 31, 1981.

Evidence

The hearing was attended only by the staff. Evidence consisted of seven exhibits offered through Eugene Kremsdorf, a Transportation Representative, and through staff counsel Randolph L. Wu.

Exhibit 1 consists of carrier data showing the following information:

Employees: 3 drivers
 Equipment: 3 tractors, 5 tank trailers
 Gross Operating Revenue:

	<u>Quarter</u>		<u>Quarter</u>
4th 1977	\$ 54,734	4th 1978	\$ 52,755
3rd 1977	43,920	3rd 1978	50,084
2nd 1977	24,185	2nd 1978	52,020
1st 1977	<u>34,483</u>	1st 1978	<u>35,855</u>
Total 1977	\$160,322	Total 1978	\$190,714

Newman has been served with MRT 6-B and the applicable distance table.

Exhibit 2 contains information relating to staff efforts to examine Newman's records. This exhibit details the following history:

Kremsdorf made an appointment on February 20, 1979 with Max Newman, president of Newman, to examine transportation records at Newman's place of business in Granada Hills. Max Newman canceled this appointment, and subsequently advised Kremsdorf that he was refusing any further contact or examination, referring Kremsdorf to his attorney. After contacting Newman's attorney, a notice was sent to Newman, by certified mail, requesting its appearance at the nearest Commission field office on March 14, 1979 with certain shipping documents. On March 13, 1979 Max Newman advised Kremsdorf that he would not appear, on the advice of his physician, and that he would permit no other corporate officer to act in his stead.

Included in the formal file is a Request for Production of Documents dated November 21, 1980, addressed to Newhall. By this request, Newhall furnished the shipping documents which the staff could not obtain from Newman, and which provide the basis for calculation of a portion of the undercharges set forth in the rate statements attached to late-filed Exhibit 7. The documents have been reproduced and are included in Exhibits 4 and 5.

Exhibit 3 is a copy of Undercharge Citation F-1579, served on Newman October 12, 1978. The citation, which was denied by Newman, alleged undercharges of \$7,065.74 on transportation performed for Newhall. Newman denied the citation and requested a formal hearing because it was believed the staff calculations were based on erroneous data.

Late-filed Exhibit 7 is a stipulation of the Commission staff and Newman. The stipulation contains the following essential provisions, the first three of which we adopt as findings of fact in this proceeding:

1. Newman transported petroleum products for Newhall between June 1977 and June 1979. Rates for this transportation were provided in MRT 6-B.
2. The transportation provided involved the same commodities, origin points, destination points, and flat rates which were considered by the Commission in OII 46.
3. The Commission staff has calculated undercharges for the above transportation. The undercharges were determined in a manner consistent with the method adopted by the Commission in D.91952, supra, and total \$19,347.42. Attachments B and C to the stipulation are the rate exhibits showing the calculations for each of the shipments included in the total undercharges.

4. Newman will attempt to collect the undercharges from Newhall, and will diligently pursue all reasonable measures to collect the undercharges, including the filing of complaints under PU Code Section 3671.

5. Newman will pay to the Commission a fine in the amount of \$19,347.42 under PU Code Section 3800 as soon as its efforts to collect the undercharges from Newhall are concluded. However, Newman shall tender payment of the fine within one year of the effective date of the Commission's decision in OII 47, unless an extension of time is requested and granted.

Staff counsel stated that ordinarily in a situation of the type we are considering, where a lack of cooperation is evidenced on the part of a respondent carrier, a punitive fine of \$5,000 would be recommended under PU Code Section 3774.

However, in light of the stipulation signed by Max Newman, the staff is recommending a punitive fine of only \$2,500.

Discussion

In view of the stipulation between the staff and Newman set forth in Exhibit 7, the principal issue requiring discussion is the amount of punitive fine, if any, to be assessed. PU Code Section 3774 authorizes us to impose a fine up to \$5,000, plus interest. The history detailed in Exhibit 2 relating to the lack of cooperation on the part of Newman convinces us that a fine should be imposed. The staff was forced to obtain many of the transportation documents contained in Exhibits 4 and 5 from the shipper, because Newman would not provide them. In the circumstances, the staff recommendation of a punitive fine in the amount of \$2,500 is proper and should be adopted.

The shipments included in the determination of undercharges were transported during an approximate two-year period from June 1977 to June 1979. The age of some of these shipments may suggest difficulty in collecting undercharges or successfully prosecuting a legal claim should Newhall decline to voluntarily pay the undercharges specified in the stipulation. In this connection, we will refer the respondents to D.92255 dated September 16, 1980 in C.10030. We held in that decision that the Statute of Limitations applicable to the efforts of permitted carriers to collect undercharges is PU Code Section 3671; and the time from which the cause of action accrues under PU Code Section 3671 is the effective date of the Commission decision finding undercharges.

Findings of Fact

In addition to the three findings of fact listed under the heading "Evidence," we further find:

4. The Commission staff has correctly determined undercharges applicable in connection with the transportation performed by Newman for Newhall, as more particularly set forth in the rate exhibits attached to Exhibit 7.

5. During the course of the investigation, Newman did not make available to the staff pertinent transportation records, and did not provide the cooperation expected by the Commission which would have permitted the staff to expeditiously perform its administrative duties.

Conclusions of Law

1. Newman violated PU Code Sections 3664 and 3737 by charging and collecting for transportation at rates less than those contained in MRT 6-B.

2. Newman violated PU Code Section 3705 by failing to make available to authorized employees of the Commission access to all accounts, records, and memoranda, including all documents, books, papers, and correspondence kept or required to be kept by highway permit carriers.

3. Newman should be ordered to collect from Newhall the undercharges set forth in Finding 3.

4. A fine of \$19,347.42 should be imposed upon Newman under PU Code Section 3800.

5. An additional fine of \$2,500 should be imposed upon Newman under PU Code Section 3774.

Newman should promptly take all reasonable actions to collect the undercharges. If necessary, it should file timely complaints according to PU Code Section 3671. The Commission staff will investigate Newhall's compliance. If it believes that Newhall or its 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 Newman Trucking Company, Inc. shall:

1. Pay a fine of \$2,500 to this Commission under PU Code Section 3774 on or before the 40th 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 \$19,347.42 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.

The Executive Director shall have this order personally served upon respondent Newman Trucking Company, Inc. and served by mail upon all other respondents.

The order shall become effective for each respondent 30 days after order is served.

Dated OCT 20 1981, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I certify that this decision was approved by the above Commissioners today.

Joseph E. Bobbitt