

## **Opinion No. 69-41**

May 9, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Robert J Laughlin, Assistant Attorney General

**TO:** Mr. Floyd Cross, Chairman, State Corporation Commission, P. O. Box 1269, Santa Fe, N.M. 87501

### **QUESTIONS**

#### QUESTIONS

A. Does a common motor carrier have the right to recover the difference between the full amount of the published rates for a particular class of service, and the amount of an under charge resulting from its own erroneous quotation of rates to the shipper?

B. Does the State Corporation Commission have an obligation to attempt to compel the carrier to collect the difference between the published rates and any under charge which has been made?

#### CONCLUSIONS

A. Yes.

B. See analysis.

### **OPINION**

#### {\*63} ANALYSIS

Section 7 and Section 10 of Article XI of the Constitution of New Mexico and Section 64-27-6, N.M.S.A., 1953 Compilation grant to the State Corporation Commission the power and authority and the duty to govern all transportation companies and common carriers in the State of New Mexico, and to fix and regulate rates, fares and charges of such transportation companies and common carriers.

Sections 64-27-7 and 64-27-34, N.M.S.A., 1953 Compilation, provide that when a common motor carrier has published a particular rate for a particular class of service and such rate has been approved and established by the State Corporation Commission, it is unlawful to charge more or less than the published and established rate. The first question dealt with by this opinion is whether a carrier who has charged less than the established rate may collect the difference between such established rate and the amount of the under charge which was made.

There appear to be no New Mexico cases which deal directly with this question. Other jurisdictions, having statutes which prohibit carriers from charging more or less than the established or published rate of a particular service, have almost universally held that the public policy to prevent discrimination, which is behind such statutes, will not permit any mistake of the carrier or its agents to stand in the way of recovery of the full legal rate from the person responsible for the payment. 13 Am. Jur. 2d, Carriers, § 108, p. 648. The various federal and state cases which hold to this effect are discussed and annotated at 88 A.L.R. 2d 1375. These cases hold that a carrier and a shipper may not contract for rates other than the legal rates, and the carrier may collect the legal rate regardless of whether the under charge came about as a result of an honest mistake by the carrier or as a result of deliberately misinforming the shipper with intent to mislead him.

We would conclude that the New Mexico rule should be the same as that in other jurisdictions, and that a carrier may collect the full amount of the legally established rates from the shipper.

The next question is whether the State Corporation Commission is obligated to attempt to require a common carrier who has made {\*64} such an under charge to collect the full legal rate from the shipper.

Section 64-27-65, N.M.S.A., 1953 Compilation, provides in part as follows:

"Whenever after investigation in accordance with the provisions of this act, the corporation commission shall be of the opinion that any provision or requirement of this act, or any order of said commission is being, has been or is about to be violated, it may make and enter of record an order in the premises, specifying the actual or proposed acts or omissions to acts which constitute such real or proposed violation and requiring that such violation be discontinued or rectified, or both, or that it be prevented. \* \* \*"

It appears that the above quoted statute would give the Corporation Commission the power to require that a common carrier collect the full legal rate from a shipper where an under charge has been made. It is to be noted however, that the above statute says that the commission "may" enter such an order. The language is permissive rather than mandatory. We recognize that all public officials have an obligation to enforce the laws of the state and nation, however, just as a prosecuting attorney has some discretion as to which cases to pursue, the Corporation Commission, in its discretion, may find that certain violations are not worth pursuing.