

**ORIGINAL**Decision No. 59760

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

## PETITIONS of:

Baker & Hamilton  
 The Berch Co. and Berch Silk Co., Inc.  
 California Electric Supply Company  
 Central City Chemical Corporation  
 Davis Fabrics  
 Harris & Stroh  
 Keyston Bros.  
 Leo H. Lindauer  
 Merck & Co., Inc.  
 Leo J. Meyberg Company  
 Olin Mathieson Chemical Corporation  
 Parke, Davis & Company  
 Scovel & Sons Co.  
 Sterling Drug, Inc.  
 Tri-State Supply Corporation  
 of San Francisco  
 Westinghouse Electric Supply Company  
 Zack Radio Supply Co., and  
 Zack Radio Supply Co. of Palo Alto,  
 seeking relief from the payment of  
 alleged undercharges demanded by  
 IRVING LEWIN, doing business as  
 SPEE-DEE DELIVERY SERVICE, for  
 transportation of parcel shipments  
 between points in the San Francisco  
 Bay area.

Case No. 5432  
 Petitions for Modifications  
 Nos. 154, 156, 158, 162,  
 163, 164, 165, 167

(Appearances are Listed in Appendix A)

O P I N I O N

In this proceeding, as amended in Petitions Nos. 154 and 162, 18 shippers representing various San Francisco Bay area commercial and industrial businesses<sup>1</sup> are petitioning the Commission for special relief from the payment of certain undercharges to Irving Lewin, doing business as Spee-Dee Delivery Service, a highway contract carrier. The above petitions, except No. 167, were joined and public hearings were held on the consolidated cases in San Francisco on October 20, 21 and 22, 1959, before Examiner James F. Mastoris;

---

<sup>1</sup> Petitioners are listed in Appendix B

these matters were submitted upon receipt of written arguments and briefs on December 17, 1959. Petition No. 167 was filed on October 14, 1959; however, no hearing is deemed necessary in this case; it will be incorporated along with the others into a single consolidated decision covering all eight petitions.

Specific Relief Requested

The relief sought can be summarized as follows:

1. It is requested that the Commission issue an order relieving the petitioners from the obligation to pay undercharges on certain shipments of parcel freight transported for them between San Francisco Bay area points during the period from July 1, 1957 to December 31, 1957 by said Spee-Dee Delivery Service.

2. The petitioners request that the Commission issue an order directing said carrier to refrain from prosecuting legal actions commenced in the courts of this State for the collection of undercharges on said shipments.

3. The Commission make a formal determination that the petitioners have paid the minimum rates prescribed by Minimum Rate Tariff No. 2 for the services rendered by said Spee-Dee Delivery Service.

4. The Commission determine specifically that the "election in writing" mentioned under Item 20 of Local Parcel Tariff of United Parcel Service, Cal. P.U.C. No. 15, is superfluous and unnecessary and that the rates of said tariff apply as minimum rates to traffic handled by said carrier for said shippers without regard to said writing.

Petitioners' Evidence

Evidence was presented that during the period from July 1, 1957 to December 31, 1957 each of the petitioners engaged

said Irving Lewin to transport parcel-type packages for them between various San Francisco Bay area cities. Prior to using this carrier's services, these shippers had been transporting said packages by United Parcel Service. Testimony was received that Mr. Lewin represented to said petitioners, at the time he solicited their business, that his company could perform transportation for them at the same rate at which certificated carriers, and in particular United Parcel Service, had been carrying petitioners' parcels, but with better and, in some situations, more frequent delivery service. Based upon such representations these shippers transferred their business to this carrier. Petitioners Olin Mathieson Chemical Corporation, Baker & Hamilton, Central City Chemical Corporation and Leo H. Lindauer offered into evidence formal written agreements with Mr. Lewin for this transportation, however, the balance of the carriage performed was pursuant to verbal arrangements accompanied by written "rate sheets" between the shipper and the carrier. These latter documents, describing the rates to be charged to the points in the Bay Area listed therein, were given to the petitioners by Mr. Lewin prior to or at the time of the movement of the freight in question. The rates listed thereon were the same as United Parcel's rates. No other written instruments relating to the transportation to be performed were executed by the parties. Payments for all these shipments were made upon the basis that the tariff rates of said United Parcel Service were the applicable and controlling rates.

Prior to the commencement of this proceeding the carrier presented claims to each of the petitioners demanding additional amounts due on each of the shipments carried. Upon refusal of said shippers to pay the amounts claimed, Mr. Lewin filed legal actions against each of them in the courts of this State for the difference between the United Parcel tariff rate and Minimum Rate Tariff No. 2.

The basis for this difference, alleged by the carrier in his actions before the courts, is that there was a failure on the part of each of the shippers to elect in writing, in advance, that they would utilize the rates of such United Parcel tariff for the transportation to be performed. Such election is mentioned in Item 20 of United Parcel's tariff on file with this Commission. Considerable evidence was presented by the petitioners as to the interpretation to be placed upon this provision.

Position of the Carrier

Mr. Irving Lewin, representing the carrier, testified that he was compelled to collect undercharges for the transportation in issue because instructions issued to him by this Commission demanded that he do so. Letters sent to him, signed by the Secretary of the Commission, indicated that an audit of his records disclosed that undercharges resulted and as a consequence he was directed to take all necessary steps to collect the amounts below Minimum Rate Tariff No. 2. Legal action was instituted when the petitioners refused to pay.

Evidence was also offered that United Parcel's tariff must be interpreted to mean that an election, in writing, was required before a permitted carrier could use these rates. It was claimed that as no such election was evident that the rates in Minimum Rate Tariff No. 2 had to be applied. Therefore undercharges did occur and the carrier's pursuit of collections through lawsuits was appropriate and in accordance with the law. Upon agreement of counsel all such actions now awaiting trial before the courts will not be prosecuted by the carrier pending the outcome of this Commission's action on this matter.

Conclusions

The issues in this proceeding revolve around the question whether Irving Lewin lawfully could assess and collect certain rates and charges contained in the tariff of United Parcel Service without having received from the consignors the election in writing in advance which is specified in the tariff of United Parcel Service. The reasonableness of the rates, rules and regulations set forth in the tariff of United Parcel Service is not in issue, except as such provisions may relate to the transportation services performed by Irving Lewin.

As a general proposition, under the minimum rate orders of this Commission, it is incumbent upon highway permit carriers electing to apply the rates of common carriers to observe all of the rules and regulations governing the common carrier rates. However, from the evidence adduced in the instant proceeding, it is clear that the disputed undercharges are premised solely upon the possible absence of, or insufficiency of, an election in writing to do that which the consignors and carrier had agreed to do, clearly intended to do, and in fact did do. The record shows that the carrier solicited and secured the traffic in accordance with this agreement, and assessed the agreed rates accordingly. The inequity of requiring the carrier to collect and the shippers to pay additional charges, premised solely upon the absence of, or deficiencies in the written election, is apparent.

This Commission is empowered under Section 3667 of the Highway Carriers' Act to authorize highway permit carriers to adjust their rates below the minimums which otherwise would apply. The interests of equity and justice dictate that this power should be exercised in the present proceeding. The following order will rescind the directives heretofore given by the Commission staff to

Irving Lewin to collect undercharges, and will relieve him from any obligation to collect undercharges.

No other order is required nor would be appropriate. This Commission may not properly direct Lewin to refrain from prosecuting legal actions. All requests of record not granted by the following order will be denied.

O R D E R

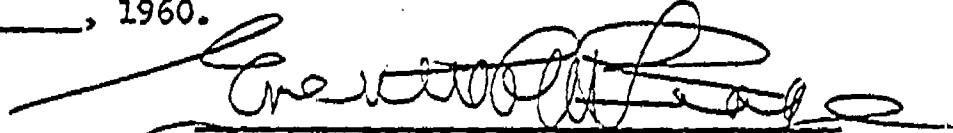
Public hearings having been held in the above-entitled matters and the Commission being fully informed therein, now, therefore,

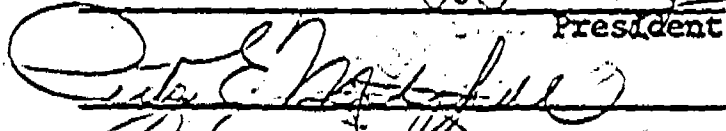

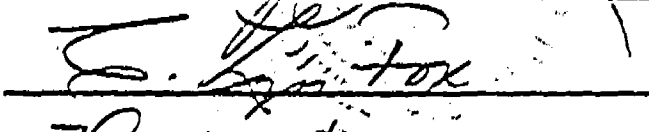
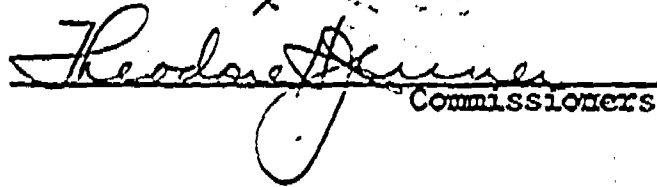
IT IS ORDERED:

1. That Irving Lewin, doing business as Spee-Dee Delivery Service, is hereby relieved and released from any obligation or duty arising from any directives heretofore given to him by the Commission or its staff to collect undercharges, or to proceed in any court.
2. That letters dated January 8, 1958 and May 19, 1958, from this Commission addressed to Mr. Irving Lewin, doing business as Spee-Dee Delivery Service, are hereby rescinded and canceled.
3. That in all other respects the petitions are denied and dismissed, and all requests of record not granted by the foregoing are denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 8th day of March, 1960.

  
\_\_\_\_\_  
President

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_  
Commissioners

APPENDIX A

LIST OF APPEARANCES

Frank Loughran, for Westinghouse Electric Supply Company, Tri-State Supply Corporation of San Francisco, and Leo J. Meyberg Company; Noel Dyer & Harlan Richter, for Parke-Davis & Company, Olin Mathieson Chemical Corporation, Sterling Drug, Inc., Keyston Bros., Baker & Hamilton, and Central City Chemical Corporation; William L. Blaine, Chickering & Gregory, for Merck & Co., Inc.; Walter A. Dold, for California Electric Supply Company; William E. Kidd and Elliot Seymour, for Zack Radio Supply Co., and Zack Radio Supply Co. of Palo Alto; William Berger and William T. Eckhoff, for Harris & Stroh, petitioners.

Jacobs Blanckenburg & May by Reynold H. Colvin, for Irving Lewin, doing business as Spee-Dee Delivery Service, respondent.

Frank J. Mahoney, for Irving Lewin; J. C. Kaspar, A. D. Poe, and J. X. Quintrall, for California Trucking Associations; Russell Bevans, for Draymen's Association of San Francisco; Sam J. Campisi, for National Blank Book Co.; E. H. Griffiths, in propria persona; Edward J. Maurer, for General Delivery Service; Harold Silen, of Goldstein Brann and Stern, for Berch Silk Co., Inc., Scovel and Sons, and Davis Fabrics; Philip A. Winter, for Delivery Service Co., interested parties.



APPENDIX B

LIST OF PETITIONERS

Petition No. 154

1. Leo J. Meyberg Company, a corporation
2. Westinghouse Electric Supply Company, a corporation
3. Tri-State Supply Corporation of San Francisco, a corporation

Petition No. 156

4. Merck & Co., Inc.

Petition No. 158

5. California Electric Supply Company, a corporation

Petition No. 162

6. Parke, Davis & Company
7. Olin Mathieson Chemical Corporation
8. Sterling Drug, Inc.
9. Keyston Bros.
10. Baker & Hamilton
11. Central City Chemical Corporation
12. Leo H. Lindauer

Petition No. 163

13. Harris and Stroh

Petition No. 164

14. Zack Radio Supply Co., a corporation

Petition No. 165

15. Zack Radio Supply Co. of Palo Alto, a corporation

Petition No. 167

16. Sidney Davis, dba Davis Fabrics
17. The Berch Company and Berch Silk Co., Inc.
18. Scovel & Sons Co.