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Decision No. 67291

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of FRANK C. WINANS and GRANT A. WINANS, a partnership, doing business as WINANS BROTHERS, WINANS BROS. TRUCKING COMPANY, a corporation, WINANS BROS. TANKER DIVISION, a corporation, and NORCAL TRUCKING COMPANY, a corporation.	Case No. 7172

Handler, Baker and Mastoris, by Marvin Handler, for respondents.
Meyer L. Kapler, for American Forest Products Corporation; Pillsbury, Madison & Sutro, by Harlan M. Richter, for Hudson Lumber Company; Western Motor Tariff Bureau; and Denver J. McCracken, for Western Motor Tariff Bureau; interested parties.1/
Donald B. Day, for the Commission staff.

O P I N I O N

Public hearings herein were held before Commissioner Grover and Examiner Power at San Francisco on November 30 and December 1, 1961, March 8, 26 and 30, April 2, and May 16 and 17, 1962. The hearing on March 9, 1962 was held before Examiner Power. On May 17, 1962 the matter was orally argued and submitted.

The issues raised by this order were numerous and varied. Transportation provided at less than filed rates of a common carrier (Section 458, Public Utilities Code) was one. Another allegation was that respondents provided storage and other services without charge, violating Minimum Rate Tariff No. 2 (MRT-2) and California

1/ Hudson Lumber Company sought to appear as an intervenor but its intervention did not comply with Rule 45.

Motor Tariff Bureau Local Freight Tariff No. 2 (CMTB-2). Violation of these tariffs falls within the scope of Sections 453, 494, 3667 and 3737 of the Public Utilities Code. It is also alleged that Sections 3664 and 3668 of said Code relative to minimum rates were violated. In connection with the tariff (CMTB-2) of Winans Bros. Trucking Company (hereinafter called Trucking), the issue of alter ego was implicitly raised.

Frank C. Winans and Grant A. Winans are engaged in the trucking business with headquarters at Redding. They conduct this operation through a partnership and three corporations. One of the latter, Winans Bros. Tanker Division, is included in the order instituting this investigation but no evidence was presented against this entity and no further consideration will be given to it in this opinion.

The staff presented evidence relating to 24 movements of lumber, paper and steel. Some of these present more than one problem. This is especially true when, though the movement was within the certificate referred to, it was billed as if it were governed only by a Commission minimum rate order, including the alternative application of rail rates.

The order instituting investigation reveals the operating authority of respondents. Winans Bros. Trucking Company (Trucking) has a certificate of public convenience and necessity, a radial highway common carrier permit and a highway contract carrier permit. Norcal Trucking Company (hereinafter called Norcal) has the same two kinds of permits but no certificate. Winans Brothers (hereinafter called the partnership) has a contract carrier permit only.

The staff presented two witnesses from its Transportation Division. Both of the Winans brothers, their traffic consultant, the traffic manager of one lumber company, the general manager and traffic consultant of another lumber company, and the general manager of a steel contractor all testified for respondents. Thirty-eight exhibits were received in evidence.

The evidence on the question of "alter ego" reveals the following facts: A staff witness had reviewed Commission records concerning these three entities. Norcal, he testified, had one power vehicle and one trailer; the partnership had 23 power vehicles and 60 trailers; Trucking had nine power vehicles and three trailers. Gross revenues for four quarters (last quarter of 1960, first three quarters of 1961) amounted to $614,505 for the partnership; $189,656 for Trucking; and $372,813 for Norcal. The total gross for the three companies was $1,176,973. There were a headquarters terminal in Redding and a facility in Stockton, with a manager. The total organization included 30 drivers, four office personnel and one mechanic. Drivers' wages were charged to the partnership or one of the corporations in accordance with whose business was handled by a particular driver on a particular day. It will be noted that Norcal managed to do a business of approximately $31,000 per month without a driver or billing clerk of its own, and with only one road unit of equipment. It was dependent on the common pool at Redding for management, accounting, billing, equipment and drivers. As between Trucking and the partnership, it is difficult, when not actually impossible, to ascertain, merely by examining documents, which entity carried a particular shipment. The partnership had no billhead of its own.

It used the bill form of Trucking; presumably, the words "Trucking Company" were supposed to be crossed out, but in the five Hudson Lumber Company shipments for which documentation is in evidence, this was done only once. Apparently, even Winans' employees were confused by these two entities.

All the witnesses of respondents and American Forest Products testified that this shipper insisted on being served by a carrier devoted exclusively to its transportation and having no other customers. No satisfactory reason for this preference was ever given by any of those witnesses. The Commission finds that respondents' operations were so arranged that they might serve their valued accounts under one or another of their many permits while less valued accounts were served under the certificate. Under permits, the respondents could apply lower rail rates in the alternative without the necessity of filing them in the common carrier tariff. The result was lower rates for preferred customers. As indicated in the detailed findings hereinafter made, and with the exception hereinafter noted, we find that the respondents (other than Winans Bros. Tanker Division) are alter egos of each other.

We turn now to the individual rate violations alleged by the Commission staff.

Two rate violations alleged by the staff concern an American Forest Products mill at Wilseyville. (Exhibit 6, Parts 1-1 and 1-2.) This mill is off rail. At the time of the transactions here involved, there was a mill at Toyon belonging to another American subsidiary. The Toyon mill had one or more siding tracks, one of which was available to the Wilseyville mill. The Wilseyville

mill had actually shipped lumber from this Toyon spur by rail. Toyon, though a railroad station, has no team track. The nearest team track to the Wilseyville mill is at Valley Springs, a short distance beyond Toyon. The staff witness rated a shipment from Wilseyville to Los Angeles represented by Freight Bills Nos. 676 and 680 of Norcal by constructing his rate across Valley Springs. Norcal constructed its rate across Toyon. The staff shows an undercharge of $12.12. Respondents contend there is no undercharge. The staff position rests on the wording of Minimum Rate Tariff No. 2, Item 210 Series, which provides that such rating shall be made across "a team track or established depot..." The item in question is designed to prevent abuse of the rail alternative rates available under Section 3663 of the Public Utilities Code. The Commission has prohibited the making of combinations of rates over private spur tracks for the reason "that said property, not being dedicated to public use, is not available to all persons." (Decision No. 57829, Case No. 5330, et al. (Order Setting Hearing dated June 4, 1958), unreported.) We are of the opinion that the staff position is correct and find that there was an undercharge of $12.12 on this shipment.

Bills Nos. 691 and 694 (Exhibit 6, Part 1-2) covered a shipment from Wilseyville to Apple Valley. Apple Valley is an off-rail point and both respondents and the staff constructed rates over Victorville. Respondents used the statewide rate of seven cents per cwt. for the distance from Victorville to Apple Valley. The staff used an eight-cent rate applicable only when both origin and destination are within 150 miles of Los Angeles, Zone 1, which includes Victorville and Apple Valley. We are of the opinion that

the staff position is correct and find that there was an undercharge of $18.79 on this shipment. The goods in question actually moved entirely by truck from Wilseyville to Apple Valley; except for the mandate of Section 3663 and the implementing alternative rate provisions of the minimum rate tariff, the minimum rate for this all-truck movement would have been higher than either the rate charged by respondents or the rate urged by the staff. The staff position is that, in applying the alternative rate provisions, respondents may not arrive at a final rate which is lower than the total rate applicable if the goods had in fact moved by rail. We agree. Had the goods moved by rail, they would have been transferred to truck for the last portion of the journey (Victorville to Apple Valley); since both the origin and destination of this final truck movement would have been within 150 miles of Los Angeles, an extra charge of one cent per cwt. would have been applicable in accordance with the minimum rate tariff. Respondents may not use the lower rail rate from Valley Springs to Victorville and then be heard to say that the extra one-cent charge is not applicable because the "origin" was really Wilseyville and the goods did not move by rail after all.

Freight Bill No. 283 (Exhibit 6, Part 1-3) related to a shipment which respondents rated on a rail rate from Willits to Hermosa Beach with a "stop" at West Covina. Since Hermosa Beach is a Santa Fe point and West Covina is not, this rating is conceded to be incorrect. The staff rated the movement as two separate shipments using a rail rate having a minimum weight requirement of 60,000 pounds. The respondents' expert witness rated the shipment under a lower rate with a greater minimum weight requirement. He

constructed his charge by using the rail rate from Willits to Hermosa Beach and adding a stop-in-transit charge at Azusa, plus an off-rail charge from Azusa to West Covina. Azusa is a Santa Fe point, intermediate between northern California and Hermosa Beach. There is an undercharge of $128.43 in any event.

Freight Bill No. 2722 (Exhibit 6, Part 1-4) covered a shipment from Red Bluff to Ventura. This bill presents two possible violations, one of Trucking's filed tariff and one of failure to assess an off-rail charge as required by MRT-2. Respondents' rate witness conceded this violation, which amounted to a $71.20 undercharge. The staff also claimed that this shipment should have been rated under Trucking's filed tariff (CMTB-2), rather than under MRT-2; if so, the undercharge would be $238.16. In view of our findings concerning alter ego, we find that the staff position is the correct one.

Freight Bill No. 515 (Exhibit 6, Part 1-5) related to a shipment which respondents rated on a rail rate from Yreka to Downey with a "stop" at Lawndale. Respondents incorrectly billed this as if the Downey portion were on rail and the Lawndale portion were a stopover. Respondents' witness conceded that Lawndale could not be a stop in transit. He billed the shipment as a rail shipment to Downey with a reshipment of a portion to Lawndale on a truck rate. The staff was able to show that the Downey destination was physically off rail. Although the evidence showed that the consignee had permission to use a nearby rail spur in the same block, the shipment was delivered, by truck, to the consignee's property and not to the spur; respondents made no provision in their rating for transportation from the team track at Downey to

the consignee. Moreover, we do not agree that mere permission to use another party's spur can justify application of alternative rail rates under Public Utilities Code Section 3663. We are of the opinion that the staff position is correct and find that there was an undercharge of $111.08 on this shipment.

Master Freight Bill No. 3080 (Exhibit 6, Part 1-6) and its constituent bills were rated by Norcal at the correct minimum rate. However, under Trucking's tariff the charge would have been $204.03 higher. In view of the alter ego relationship, we find that the higher rate was applicable.

Freight Bills Nos. 2, 12, 47 and 87 (Exhibit 7, Parts 2-1, 2-2, 2-3 and 2-4) concern the transportation of cedar stock for Hudson Lumber Company from a sawmill near Anderson (Shasta County) to San Leandro. All of this traffic was within the authority of Trucking's certificate but was rated under permitted authority. Winans Brothers (the partnership) entered into a contract (Exhibit 16) with Hudson Lumber Company on April 1, 1949 (Trucking, a corporation, had not been formed at the time) to perform this transportation under a rate which deviated from the applicable minimum rate and which the Commission had authorized in Decision No. 42666 in Application No. 30100. Later the rate was authorized in Cases Nos. 4808 and 5432 (Petition No. 1) and filed in CMTB-2. The last extension, under Decision No. 56451 (April 1, 1958), expired on April 1, 1959. After April 1, 1959, the service was purportedly performed under permits (but whether of Trucking or the partnership is not clear) because the railroads had filed a rate, which combined with an off-rail charge from MRT-2, was lower than the specially authorized rate and was available under the

alternative rate provisions of MRT-2. The charges paid by Hudson Lumber Company after April 1, 1959 were lawful minimum charges under MRT-2, but it is claimed that CMTB-2 was applicable under the doctrine of alter ego. Where a permitted entity applies minimum rates for special customers while its certificated affiliate maintains higher filed tariff rates for the public generally, undue discrimination results and the alter ego doctrine is properly applicable; we find in these instances that there were undercharges amounting to $79.60.

Freight Bill No. 701 (Exhibit 7, Part 2-5) involves a shipment from Hayfork to the B & D Lumber Co. at Redding. From the evidence it appears that, in a formal proceeding, Trucking had justified, and been authorized to apply, a reduced rate from Hayfork to Redding. (Decision No. 50193, dated June 29, 1954, in Case No. 5432, Petition No. 32.) It applied this rate on the shipment to B & D. However, B & D is outside Trucking's pickup and delivery limits at Redding. Both the applicable minimum rate and Trucking's filed rate (they are identical) therefore reveal an undercharge of $15.48. In effect, Trucking does not challenge this rate or the facts on which it is based. It does contend that its misrating was based on a general mistake. Witness Grant Winans testified that all the studies made at the time the special Redding rate was authorized contemplated that it would affect B & D traffic and that he had informed staff observers of the fact that 50 to 60 percent of the Hayfork traffic would go to B & D. He further testified that the staff and his own employees had included in their studies the B & D traffic. This testimony is in mitigation and will be so considered. The authority has since been enlarged to include the B & D premises.

(Decision No. 63522, dated April 3, 1962, in Case No. 5432, Petition No. 228.)

Freight Bills Nos. 1204, 938 and 920 (Exhibit 7, Parts 2-6, 2-7 and 2-8) concern shipments originating purportedly at Burnt Ranch, California, located in a mountainous and thinly settled area. The point of origin was found by a staff witness to be seven actual miles (eleven constructive miles) from the Burnt Ranch post office. Freight Bill No. 1204 covered 9,900 pounds, only. It appears from the evidence that the same trucks carried lumber belonging to the Winans brothers themselves, but the split delivery requirements were not complied with. The respondents have rated these shipments under their permitted authority using MRT-2 although Trucking had filed rates covering the points in question. We find an undercharge of $43.12 on Freight Bill No. 1204, an undercharge of $12.75 on Freight Bill No. 938, and an undercharge of $25.20 on Freight Bill No. 920.

On Freight Bill No. 20238 (Exhibit 7, Part 2-9), Redding to Mountain View, staff and respondents' rate witnesses agreed on an undercharge of $41.68. On Freight Bill No. 20265 (Exhibit 7, Part 2-10) the undercharge was $35.53. In both of these last two shipments the violation arose because Trucking's tariff did not contain a publication of the switching limits of Anderson, California.

Freight Bill No. 820 (Exhibit 7, Part 2-11), dated March 30, 1960, involves a load of cedar transported by the partnership from San Leandro to Stockton. Respondents introduced an invoice (Exhibit 27) dated March 31, 1960, listing 14 loads moving between March 29 and April 1, 1960. Five of these loads moved on

March 30. The records show that the requirements of the multiple lot rule were not met. In the circumstances, each load must be treated as a separate shipment. We accordingly find an undercharge of $8.25 on Freight Bill No. 820.

Freight Bill No. 20695 (Exhibit 7, Part 2-12) involved an undercharge of $35.52, which was conceded by respondents.

Freight Bills Nos. 5355, 5357, 4866, 4643, 4907, 4909, 4870, 4740 and 5352 (Exhibit 7, Parts 2-13, 2-14, 2-15, 2-16 and 2-17) deal with shipments of steel used in the Trinity River Dam project. One issue common to several of these shipments involves the applicability of the so-called Kett rate. It appears that the Commission, in its Special Tariff Docket of August 23, 1960, had approved a rail rate of 30 cents per cwt., minimum weight 80,000 pounds, from Groups 1, 2 and 3 and Niles to Kett, a station about five miles west of Redding. This rate is in evidence as Exhibit 26. It is flagged to apply "only as a proportional rate on traffic moving beyond Kett, California, via highway vehicle to off-rail construction site in connection with Spring Creek Tunnel project." It is a matter in dispute in this proceeding whether or not there is such a thing as a "Spring Creek Tunnel project." Technically speaking there is not. The precise title is "Trinity River Division, Central Valley Project, California", followed by the words "Spring Creek Tunnel". The federal title of this federal project and the reference in the tariff item do not precisely agree. Although the point was much debated at the hearing, neither the staff nor respondents presented significant evidence, other than Exhibit 26, concerning the history of this special railroad rate, and the

ambiguity was never adequately resolved. In light of the rule that tariff ambiguities are to be resolved in favor of the shipper (Atlantic Coast Line R. Co. v. Atlantic Bridge Co. [1932 CCA5], 57 Fed. 2d 654), we find that the burden of proving the unlawfulness of the Kett rate for these movements has not been met.[2/]

Certain undercharges were conceded by respondents with respect to other rate factors involving these steel shipments. The conceded undercharges amount to $35.88 on Part 2-13, $19.19 on Part 2-14, $31.42 on Part 2-15, and $36.04 on Part 2-17.

On Freight Bill No. 20626 (Exhibit 7, Part 2-18), another Burnt Ranch shipment, the staff's allegation of an undercharge is conceded.

The Commission finds that:

1. Frank C. Winans and Grant A. Winans are partners engaged in the for-hire carrier business upon the public highways of the State of California.

2. A portion of said business is conducted through a partnership and two corporations.

3. Said partnership, consisting of Frank C. Winans and Grant A. Winans, is known as Winans Brothers. Winans Brothers formerly held Contract Carrier Permit No. 45-1289.

2/ This result makes it unnecessary to pass upon the propriety of the project limitation stated in the Kett rate, or to determine whether, under Section 3663 of the Public Utilities Code, such a limitation is binding upon respondents and others operating under the Highway Carriers' Act.

4. Frank C. Winans and Grant A. Winans own all, or substantially all, of the stock of Winans Bros. Trucking Company, a corporation. Winans Bros. Trucking Company holds a certificate of public convenience and necessity as a highway common carrier under Decisions Nos. 43424 and 45016 of this Commission, Radial Highway Common Carrier Permit No. 1-2928 and Highway Contract Carrier Permit No. 45-819.

5. Frank C. Winans and Grant A. Winans are the owners of all, or substantially all, of the stock of Norcal Trucking Company, a corporation. Norcal Trucking Company holds Radial Highway Common Carrier Permit No. 45-1286 and Highway Contract Carrier Permit No. 45-1287.

6. The Winans Brothers partnership, Winans Bros. Trucking Company and Norcal Trucking Company collectively constitute a single for-hire carrier business having a common headquarters, common management, common office staff, common accounting personnel, common billing, a common pool of drivers and hauling equipment, and substantially common ownership.

7. Winans Bros. Trucking Company is the nominal owner of the certificate noted in Finding 4 and, as such owner, is a participating carrier in California Motor Tariff Bureau Local Freight Tariff No. 2, hereinafter in these findings referred to as CMTB-2.

8. The respondents other than Winans Bros. Tanker Division provided transportation at less than lawful rates and charges, as follows:

Freight Bill or Bills No. or Nos.	Correct Charge	Charge Billed	Under-charge	Tariff Reference	Part Number (Exhibit 6 or 7)
676 & 680	$648.42	$636.30	$ 12.12	MRT-2*	1-1
691 & 694	577.98	559.19	18.79	MRT-2	1-2
284-285	600.00	471.57	128.43	MRT-2	1-3
2722	729.21	491.05	238.16	CMTB-2**	1-4
516 & 517	703.51	592.43	111.08	MRT-2	1-5
3080	859.21	665.18	204.03	CMTB-2	1-6
2	163.40	146.79	16.61	CMTB-2	2-1
12	163.40	141.89	21.51	CMTB-2	2-2
47	167.15	148.85	18.30	CMTB-2	2-3
87	165.40	142.22	23.18	CMTB-2	2-4
701	108.36	92.88	15.48	CMTB-2	2-5
1204	64.90	21.78	43.12	CMTB-2	2-6
938	292.30	279.55	12.75	CMTB-2	2-7
920	287.28	262.08	25.20	CMTB-2	2-8
20238	235.12	193.44	41.68	CMTB-2	2-9
20265	219.98	184.45	35.53	CMTB-2	2-10
820	55.00	46.75	8.25	MRT-2	2-11
20695	173.79	138.27	35.52	MRT-2	2-12
5355	355.61	319.73	35.88	MRT-2	2-13
5357	359.82	340.63	19.19	MRT-2	2-14
4866) 4643) 4907)	537.12	505.70	31.42	MRT-2	2-15
5352	356.21	320.17	36.04	MRT-2	2-17
20626	311.40	274.54	36.86	CMTB-2) MRT-2)	2-18

Total Undercharges: $1,169.13.

*MRT-2 - Calif. P.U.C. Minimum Rate Tariff No. 2, including the alternative application of rail rates thereunder.

**CMTB-2- California Motor Tariff Bureau Local Freight Tariff No. 2.

9. Respondents other than Winans Bros. Tanker Division applied reduced rail rates under their various permits and Commission minimum rate orders for a period of two years before such rates were filed in the tariff of Winans Bros. Trucking Company. Such reduced rates were applied during said period to transportation authorized by the certificate and tariff of Winans Bros. Trucking Company as well as to transportation not so authorized.

10. The effect of such conduct (Finding 9) was to set up two levels of rates, one level for selected customers and another (higher) level for that portion of the public which might make use of common carrier services.

11. Respondents other than Winans Bros. Tanker Division on numerous occasions provided storage and other nontransportation services without charge to certain customers.

12. Contract Carrier Permit No. 45-1285 of Winans Brothers, a partnership, was revoked at the request of the permittee on July 20, 1962.

13. Winans Bros. Trucking Company, a corporation, has filed rates in CMTB-2 purporting to be rail competitive rates, effective June 14, 1962.

14. Winans Brothers, a partnership, Winans Bros. Trucking Company, a corporation, and Norcal Trucking Company, a corporation, are all alter egos of one another.

15. Transportation by the Winans Brothers partnership or by Norcal Trucking Company between the points, and involving the commodities, included in the highway common carrier operating rights of Winans Bros. Trucking Company's certificate of public convenience and necessity was subject to the rates set forth in the filed tariff

schedules of Winans Bros. Trucking Company, except as herein otherwise found.

Findings 12 and 13 above are based on official notice taken by the Commission of its own records rather than on evidence received in the public hearings herein.

The Commission concludes that the respondents other than Winans Bros. Tanker Division have violated Sections 453, 494, 3664, 3667, 3668 and 3737 of the Public Utilities Code.

The record reveals that corrective action is necessary in respect to the permits held by Winans Bros. Trucking Company and Norcal Trucking Company. They should be restricted to service which is not authorized by the certificate of Winans Bros. Trucking Company.

O R D E R

IT IS ORDERED that:

1. If, on or before the twentieth day after the effective date of this order, respondents have not paid the fine referred to in paragraph 7 of this order, then the certificate of public convenience and necessity authorizing operations as a highway common carrier granted to Winans Bros. Trucking Company, a corporation, by Decisions Nos. 43424 and 45016, Radial Highway Common Carrier Permit No. 1-2928 and Highway Contract Carrier Permit No. 45-819 issued to Winans Bros. Trucking Company, a corporation, and Radial Highway Common Carrier Permit No. 45-1286 and Highway Contract Carrier Permit No. 45-1287 issued to Norcal Trucking Company, a corporation, are hereby suspended for a period of five consecutive days, starting at 12:01 a.m., on the second Monday following the

twentieth day after said effective date. Respondents Winans Bros. Trucking Company, Norcal Trucking Company and Frank C. Winans and Grant A. Winans, doing business as Winans Brothers, shall not, by leasing the equipment or other facilities used in operations under the certificate of public convenience and necessity and permits hereinbefore set forth, for the period of suspension, or by any other device, directly or indirectly allow such equipment or facilities to be used to circumvent the suspension.

2. If such operating authority and permits are suspended as hereinabove provided, respondents Winans Bros. Trucking Company, a corporation, and Norcal Trucking Company, a corporation, shall post at their terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that the operating authority of Winans Bros. Trucking Company and Norcal Trucking Company has been suspended by the Commission for a period of five days. Within five days after such posting respondents shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

3. Respondents Winans Bros. Trucking Company, a corporation, Norcal Trucking Company, a corporation, and Frank C. Winans and Grant A. Winans, doing business as Winans Brothers, shall examine their records for the period from June 1, 1961 to the present time, for the purpose of ascertaining all undercharges that have occurred.

4. Within ninety days after the effective date of this order, said respondents shall complete the examination of their records required by paragraph 3 of this order and shall file with the

Commission a report setting forth all undercharges found pursuant to that examination.

5. Said respondents shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 3 of this order, and shall notify the Commission in writing upon the consummation of such collections.

6. In the event undercharges ordered to be collected by paragraph 5 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondents shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges remaining to be collected and 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.

7. As an alternative to the suspension of operating rights imposed by paragraph 1 of this order, respondents may pay a fine of $3,500 to this Commission on or before the twentieth day after the effective date of this order.

8. On the effective date of this order, the Secretary of the Commission shall cause Radial Highway Common Carrier Permit No. 45-1286 and Highway Contract Carrier Permit No. 45-1287, issued to Norcal Trucking Company, a corporation, and Radial Highway Common Carrier Permit No. 1-2920 and Highway Contract Carrier Permit No. 45-819, issued to Winans Bros. Trucking Company, a corporation, to be amended to prohibit said corporations from transporting commodities which Winans Bros. Trucking Company, a corporation,

is obligated to transport as a highway common carrier as defined in the Public Utilities Act.

9. Case No. 7172 is hereby dismissed as to Winans Bros. Tanker Division, a corporation.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each respondent. The effective date of this order as to each respondent shall be twenty days after the completion of such service upon such respondent.

Dated at San Francisco, California, this 26th day of May, 1964.

Peter E. Mitchell
President

Everett C. McKeage

Commissioners

Having voiced my objection to the protracted period of time that this matter was under submission, I have concurred herein only because of the clear evidence as to violations and because the maximum penalties have not been imposed.

William M. Bennett

C 7172

SEPARATE OPINION OF COMMISSIONERS GROVER AND HOLOBOFF

We concur in the order, and also in the opinion and findings, except as to the following matters:

1. In discussing Parts 1-1 and 1-2 of Exhibit 6, the Commission's opinion upholds the requirement of MRT-2 that the so-called alternative common carrier rates here involved must be constructed across a team track or established depot. In our view, such a requirement is contrary to the mandate of Section 3663 of the Public Utilities Code. That statute contemplates equality of rate competition between railroads and trucks. By rail, similar goods actually moved across this private spur, and the resulting rate was lower than that herein allowed respondents by the Commission.

2. The Hudson Lumber Company shipments (Parts 2-1, 2-2, 2-3 and 2-4 of Exhibit 7) do not justify the application of the alter ego doctrine. That doctrine applies only when adherence to the fiction of separate entities would lead to an inequitable result. (Automotriz etc. v. Resnick, 47 Cal.2d 792.) No such result has been shown in connection with these shipments. We agree that "where a permitted entity applies minimum rates for special customers while its certificated affiliate maintains higher filed tariff rates for the public generally, undue discrimination results and the alter ego doctrine is properly applicable;" the Commission has correctly so held in connection with respondents' operations generally. The history of the Hudson Lumber Company contract, however, shows that the filed common carrier tariff was not so used; quite the contrary, that tariff included the special less-than-minimum rate which had been authorized by the Commission. The evidence is clear that the parties allowed the special rate authority to lapse solely because the even lower alternative rail rate became available under MRT-2; so far as the Hudson Lumber Company transactions are concerned, the subsequent use of the MRT-2 rate and the failure to lower the CMTB-2 rate to the new rail rate were not for an inequitable purpose.

3. The Commission has here displayed, we think, excessive zeal in enforcing certain of the documentation provisions of the tariff.

For example, some of the Hudson Lumber Company shipments failed to comply strictly with the multiple lot rules. It is true that a heavy burden rests upon a carrier to explain any failure to adhere to the technicalities of the minimum rate tariffs; detailed evidence of shipping transactions is often within the control of the parties and difficult for the Commission or its staff to uncover. (Gem Freight Lines, 61 Cal.PUC 411, 416.) However, the evidence shows that on virtually every day in question there was more than one load carried, so that the claimed minimum weight was in fact picked up. Moreover, the presentation of the shipper is compelling that the asserted deficiencies as to particular details of compliance were due to inadvertence; the amount of lumber which was daily available for pickup far exceeded the necessary minimum, and the written contractual arrangements of the parties left no doubt concerning instructions or tender. The evidence negates the possibility that the parties sought or needed to evade the minimum rate tariffs in connection with these movements.

Again, where shipments were erroneously rated with stops in transit (Exhibit 6, Parts 1-3 and 1-5), the parties naturally did not bother to provide the documentation necessary for the type of rating ultimately determined to be appropriate; the Commission has seized upon these deficiencies to increase the undercharges, ignoring the fact that the necessary documentation could easily have been included - and no doubt would have been included - if respondents had not thought it unnecessary. No suggestion has been made that respondents stood to benefit in any way in connection with the documentation procedures actually used.

This has been an unusually complicated case, and at the hearing even our staff experts were shown to have committed error in their rating. Moreover, there is established precedent for adopting a reasonable attitude

toward mere technical mistakes of the type here involved. (J. L. Talkington, 58 Cal.PUC 720.) The rule that filed common carrier tariffs are to be strictly interpreted is wholly inappropriate in a minimum rate enforcement proceeding. The Commission, not the carrier, designs and promulgates the minimum rate tariffs; they are laws, and, like other laws, they are to be reasonably interpreted with a view to accomplishing their purpose. The harsh application of the documentation requirements in this case does nothing to further the objective of suppressing harmful competition.

George G. Grover

Frederick B. Holoboff

Commissioners