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Decision No. 72645

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of CALIFORNIA CARTAGE CO., INC., a California corporation.	Case No. 8268 (Filed September 14, 1965)

Arthur H. Glanz, William F. Clements and E. D. Yeomans, for respondent.
Anthony J. Konicki, for Pacific Motor Trucking Company, interested party.
William C. Bricca, Counsel, and E. E. Cahoon, for the Commission staff.

O P I N I O N

By its order dated September 14, 1965, the Commission instituted an investigation into the operations, rates and practices of California Cartage Company, Inc., a California corporation.

Public hearing was held before Examiner Mooney in Los Angeles on November 17, 1965, and January 17, 18 and 19, 1966.

Respondent presently conducts highway common carrier operations pursuant to a certificate of public convenience and necessity authorizing it to transport general commodities between Los Angeles and San Francisco via U. S. Highways 99 and 50 and between the San Diego Territory and San Luis Obispo via U. S. Highways 101 and 101A, and also operates pursuant to radial highway common carrier, highway contract carrier and city carrier permits. Respondent's main terminal is located in Vernon. It has subterminals at San Diego and Berkeley. Respondent operates 67 bobtail pickup trucks, 79 tractors and 198 van and flatbed semitrailers. It employs 150 drivers, 10 mechanics, 10 dock employees and 30

office employees. Respondent's gross operating revenue for the year ending June 30, 1965 was $2,772,719. Copies of Minimum Rate Tariffs Nos. 2, 5 and 8 and Distance Table No. 4, together with all supplements and additions thereto, were served on respondent. It participates in Western Motor Tariff Bureau Tariffs Nos. 101, 109 and 111 and National Motor Freight Classifications Nos. A-7 and A-8, together with the California supplements thereto.

During September and October 1964, a representative of the Commission's Field Section visited respondent's terminals in Vernon, San Diego and Berkeley and reviewed its records for the period from March 31, 1964 to September 30, 1964. The representative testified that respondent issued approximately 100,000 freight bills covering both interstate and intrastate movements during the review period. He stated that he made true and correct photostatic copies of 51 freight bills and supporting documents which covered intrastate movements of wine, brandy, alchoholic liquors, nails, aluminum scrap, metal ingots, solder, cadmium anodes, steel pipe and piling, titanium dioxide, motorcycles, bananas, empty pallets returning and oil well casing pipe, and that the photostats are all included in Exhibit 1. Parts 1 through 43 relate to transportation under respondent's certificated authority, and Parts 44 through 51 relate to transportation under its permitted authority.

A rate expert for the Commission staff testified that he had taken the set of documents in Exhibit 1 and formulated Exhibit 2, which shows for the transportation covered by each of the 51 parts the rate and charge computed by respondent, the rate and charge computed by the staff and the resulting undercharge alleged by the staff. Exhibit 2 reflects purported undercharges in the total amount of $5,734.05.

The staff witnesses testified that the transportation covered by Parts 1, 4, 6, 7, 9, 11, 12, 13, 45 through 49 and 51 of the staff exhibits was rated by respondent as split delivery shipments; that in each instance freight charges were paid by a consignee; that the definition of split delivery shipment in each of the applicable tariffs specifically provides that "the carrier shall not collect charges of any nature from any consignee" (Item 250 of Western Motor Tariff Bureau Tariff No. 111 and Item 11 of Minimum Rate Tariff No. 2); and that for this reason it was necessary to rate each component delivery in each of the 14 parts as separate shipments. They stated that for the transportation covered by Parts 2, 14, 16, 18, 19, 20, 23, 25, 27, 28 and 29 an incorrect rate or accessorial charge was assessed by respondent; that respondent did not assess applicable rate arbitraries for the transportation covered by Parts 3, 8 and 10; that for the transportation covered by Part 17 respondent based the freight charge on actual rather than the applicable minimum weight; and that respondent did not assess C.O.D. charges on the shipment covered by Part 50. They explained that respondent had rated the transportation covered by Part 5 as a split delivery shipment, the transportation covered by Parts 15, 22, 26 and 30 as multiple lot shipments, the transportation covered by Part 21 under volume incentive service rates, the transportation covered by Part 24 under hourly rates and the transportation covered by Part 44 as a split pickup shipment; that respondent had not complied with applicable documentation rules or had picked up components beyond the authorized time limit in connection with each of said parts; and that for this reason it was necessary to rate each component pickup as a separate shipment.

The staff witnesses testified that the undercharges in Parts 31 through 42 resulted from free transportation of pallets by respondent. The representative explained that each of the freight bills covering this transportation show the number of pallets transported but do not show the weight; that the office manager of respondent had informed him that the pallets weighed 40 pounds each; and that by multiplying the number of pallets in each shipment by this weight, the staff was able to calculate the weight of each pallet shipment.

With respect to Part 43, the representative testified that respondent had handled the transportation covered by said part as a purported subhauler. He stated that the transportation involved the movement of eight truckloads of scrap aluminum weighing 219,130 pounds from Chula Vista to Los Angeles for one of respondent's customers; that respondent did not have a rail competitive rate published in its common carrier tariff for this movement; that in order to perform this transportation for its customer at the rail competitive rate, applicant entered into an arrangement with Campbell Trucking Company, a permitted carrier who could assess the rail alternative rate, whereby Campbell would act as the prime carrier and respondent would act as a subhauler for Campbell; that Campbell furnished a blank revenue bill and a group of hand tags to respondent who prepared all of the billing; that all of the transportation was performed by respondent's equipment; that payment for the transportation in the total amount of $766.97 was received by Campbell who in turn paid $720.97 to respondent; that respondent did not report this as subhaul revenue in its Quarterly Reports; and that the total amount realized by Campbell under this arrangement was $46.00. The representative testified that the documents

covering this transportation were not voluntarily shown to him by respondent. He asserted that this matter came to his attention when he visited respondent's San Diego office and that it was necessary for him to return to respondent's main terminal in Vernon and specifically request said documents. It is the staff's contention that the subhaul arrangement was a subterfuge; that respondent was in fact the prime carrier and not a subhauler; that the applicable rate for this transportation was respondent's published common carrier rate; and that respondent should be directed to collect undercharges in the amount of the difference between respondent's published tariff rate and the competitive rail rate assessed in connection with said transportation.

To support its position regarding Part 43, the staff subpoenaed the owner of Campbell Trucking Company. He testified that a representative of respondent suggested the subhaul arrangement to him; that he furnished blank document forms to respondent; that all documentation was prepared by respondent; that the shipper involved was never his customer; that the shipper paid part of the freight charges directly to him and part to respondent; that respondent and he settled payment among themselves in accordance with their agreement; and that he was satisfied with this arrangement.

Two additional staff representatives testified that they had made informal investigations of respondent in 1961 and 1962 and that they had brought to respondent's attention certain practices, including the transportation of pallets without charge, which they considered, in their opinion, to be improper.

The president of respondent testified that he has been associated with the company for 21 years; that he has been vice chairman of the Rate and Research Committee of the California Trucking Association for the past seven or eight years; and that

the employees of respondent's traffic department are experienced and competent in rating procedures. He stated that although he agrees with the staff ratings shown in Parts 2, 5, 15 through 18, 22 through 25, 44 and 50 of Exhibit 2, the errors in said parts were inadvertent and unintentional and that balance due bills have already been issued to the debtors on most of them. He testified that he is of the opinion that the transportation covered by Part 14 was interstate commerce but is unable to prove this and, therefore, cannot dispute the staff rating of said part.

The president and a traffic consultant representing respondent testified as follows regarding the transportation which respondent had rated as split delivery shipments and which the staff contends cannot be rated in this manner (Parts 1, 4, 6, 7, 9, 11, 12, 13, 45 through 49 and 51 of the staff exhibits): Note 1 was added to the definition of split delivery in Minimum Rate Tariff No. 2 at the request of the California Trucking Association; the note provides that all charges must be prepaid and that the consignee may not pay any of the charges; the identical provision is published in respondent's common carrier tariff; the intent of the Rate Committee of C.T.A. (of which respondent's president was a member at the time of the proposal) was to prohibit the apportioning or prorating of freight charges among consignees of split delivery shipments which practice made it necessary for the carrier to issue multiple billings and make multiple collections; it was never intended by the proponents of Note 1 that it be interpreted in the manner suggested by the staff; the decision which added Note 1 to Tariff No. 2 does not explain why this note was added, what the purpose of the note might be or how it is to be interpreted;[1/] the

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1/ Decision No. 66453 in Case No. 5432 (Pet. 233) et al., 62 Cal. P.U.C. 14 (1963).

term "prepaid" in Note 1 means that payment is guaranteed by one person and will be made within the authorized credit period; all of the transportation covered by the 14 parts in issue were prepaid and can be rated as split delivery shipments.

The staff rate expert testified that if the aforementioned transportation could have been rated as split delivery shipments as contended by respondent, there would still be rate errors on 12 of the 14 parts in question. He stated that the undercharges on Parts 45 and 51 would be eliminated, an overcharge of $5.69 would result on Part 1, the undercharge on Part 13 would increase slightly to $199.65 and the undercharges on the remaining ten parts would be reduced and would be as follows:

Part	Revised Undercharge
4	$ 43.25
6	28.75
7	82.75
9	98.97
11	182.16
12	196.74
46	1.00
47	10.40
48	126.34
49	2.61

With respect to Part 48, the rate expert testified that even assuming that split delivery privileges could be accorded, the dates on the hand tags issued by respondent show that a portion of the freight was picked up before the master document was issued, and for this reason, it was necessary to rate said portion as separate shipments. Respondent's president testified that all of the transportation covered by Part 48 was picked up after the master documentation was issued. He explained that the shipper had ordered the transportation the day before it was picked up and that the dispatcher in respondent's Berkeley office in typing the hand tags

for each component delivery inadvertently typed the date the order was received rather than the pickup date on two of the tags in error. He pointed out that the master document, all of the subdocuments prepared by the shipper and the remainder of respondent's hand tags show the date of pickup.

Respondent's president testified that the transportation of steel pipe from San Pedro to Modesto and Hayward covered by Parts 19 and 20 of the staff exhibits was part of a through movement originating in Japan and that the applicable rate for interstate or foreign commerce was assessed. He stated that Trans-Global Metals purchased the pipe for the plants of Heieck & Moran in Modesto and Hayward from Matsui and Company (Exhibit 4); that the pipe was to have been shipped to San Francisco but Matsui and Company shipped it to Los Angeles in error; that Crescent Wharf & Warehouse, which is shown as the shipper on the freight bills in each part, was the stevedoring company that unloaded the pipe from the Grace Lines' vessel at Berth 53, San Pedro; and that the transportation by respondent was not subject to regulation by the Commission.

The president pointed out that Part 21 of the staff exhibits covered the transportation of 163,220 pounds of scrap aluminum from the Salvage Department of the North Island Naval Base to Long Beach for Apex Smelting Co. He asserted that the applicable volume incentive rate was assessed. However, he admitted that the shipping document was not annotated by the shipper certifying that the shipment meets the requirements for volume incentive service as required by the applicable tariff rule. In this connection, he explained that the shipment was from a government salvage yard and although the shipper (Apex) had requested the lowest possible rate,

it was unable to have a representative at said yard to annotate the shipping document.

Respondent's president testified as follows regarding Parts 26 and 27 of the staff exhibits: Both parts cover shipments of steel piling from San Leandro to Wilmington; the shipper is shown as the consignor and consignee on the freight bills; respondent handles both intrastate and interstate shipments for this shipper; the freight bills for both shipments have the notation "X Car" which indicates that the shipments were picked up from a rail car; he is of the opinion that the transportation in issue was part of a through interstate movement by rail to San Leandro and by truck to Wilmington. Counsel for respondent asserted that the type of steel piling covered by Parts 26 and 27 is not manufactured in San Leandro.

The president testified as follows regarding Parts 28, 29 and 30 of the staff exhibits which cover shipments of bananas from the dock in Wilmington to San Diego: For the past three or four years respondent has been transporting between 25 and 40 truckloads amounting to about three million pounds of bananas per week from the dock at Wilmington to various destinations in Southern California; the bananas are loaded onto the trucks on the dock from an endless conveyor belt directly from the boat; the bananas originate in a foreign country; rail lines have been applying interstate rates to this transportation since 1927; respondent has likewise applied interstate rates to this transportation, including the shipments in issue. The witness asserted that even assuming that the transportation covered by the three parts was intrastate, which he does not concede, the applicable intrastate rate is 36 cents per 100 pounds, minimum weight 40,000 pounds, as provided on

First Revised Page 287 of Western Motor Tariff Bureau, Inc. Tariff No. 111 and not 46 cents per 100 pounds as contended by the staff. He testified that although the subdocuments in Part 30 indicate that two truckloads were picked up on August 3, 1964 and one was picked up on August 6, 1964, he is of the opinion that the date shown for the last load was in error and that all of the bananas were picked up at one time.

A representative of the United Fruit Sales Corporation, the shipper shown on the freight bills in Parts 28, 29 and 30, testified as follows in support of respondent regarding said parts: The ocean bills of lading show that the bananas were shipped by vessel from Puerto Armuelles, Panama, to the Port of Wilmington (Exhibit 3); United Fruit Sales is a subsidiary of United Fruit Company; two of the vessels on which the bananas were shipped are owned by foreign subsidiaries of United Fruit Company and the third is owned by said parent company; at origin the bananas move over a public railroad to the port; prior to loading the vessel at origin, United Fruit Sales contacts its west coast offices, including Los Angeles, and inquires how many bananas should be shipped to each port (Wilmington, San Francisco and Seattle); each of the west coast offices knows it has certain standing orders for bananas and will call its customers to firm up the orders before the vessel arrives in port; practically all of the orders are finalized before the ship arrives at destination; the cargo for Wilmington is unloaded within 24 hours; the transportation from the California ports to other locations in California by rail and by truck has always moved under interstate or foreign tariffs.

The witness for United Fruit Sales stated that in his opinion the transportation covered by Parts 28, 29 and 30 is

interstate or foreign commerce. He pointed out that a number of cases involving the issue of whether the movement of bananas beyond the ports is subject to the jurisdiction of the state or federal government are now before the Central Division of the United States District Court for the Southern District of California. He asserted that it would be ill-advised to attempt to determine the issue of jurisdiction based on the inadequate and incomplete record in this proceeding which involves only several shipments; whereas, there are several thousand similar truckload shipments in California each week and many more thousand in other states.

The president of respondent testified as follows regarding the transportation of empty pallets from the San Francisco Bay area to the Los Angeles area covered by Parts 31 through 42 of the staff exhibit: In each instance the pallets were returned without charge to the shipper of the outbound palletized shipment; the two shippers involved informed respondent's chief dispatcher in Los Angeles that they would not allow respondent to remove the pallets from their premises if respondent did not agree to return the pallets; the dispatcher agreed; each shipper loaded the equipment by forklift; the loading time was thereby minimized; this arrangement was for the benefit of respondent only; had the dispatcher elected not to use the pallets, it would have been necessary in each instance for respondent's driver to remove the freight from each pallet and hand load it onto the equipment which would have resulted in an additional cost to respondent of approximately $45 to $50 per load; respondent was not aware of any rule prohibiting such an arrangement for its own benefit; this practice has been discontinued.

With respect to the subhaul arrangement with Campbell Trucking Company covered by Part 43 of the staff exhibits, the president testified as follows: Respondent did not have a rail

competitive rate published in its tariff to cover the haul from San Diego to Los Angeles; respondent suggested to the shipper that it contact Campbell Trucking and agreed to subhaul if Campbell Trucking did not have sufficient equipment, which Campbell Trucking did not have; he is of the opinion that the documentation for the subhaul was in order and that no illegality was involved; through error respondent had failed to include the revenue it received from the subhaul in its Quarterly Report; a supplemental report including this will be filed.

A tariff publishing agent and traffic consultant, engaged by respondent, testified that he did not concur with the staff rating of Parts 3, 8 and 10 of Exhibit 2. He stated that although there would be undercharges under his suggested rating procedure, the undercharges would be less than those alleged by the staff. He agreed with the line haul rate from San Francisco to Los Angeles applied by the staff. However, he did not agree with the method employed by the staff in rating the various component deliveries for each shipment. The staff rate expert testified in rebuttal that the transportation covered by said parts cannot be rated in the manner suggested by the consultant.

Discussion

The record in this proceeding is not persuasive that each component part of the split delivery shipments of wine and liquor from the San Francisco Bay area to various distributors in the Los Angeles area covered by the documents in Parts 1, 4, 6, 7, 9, 11, 12, 13, 45 through 49 and 51 of the staff exhibits should be rated as a separate shipment as contended by the staff. The tariff provision in issue is included in the note to the definition of split delivery shipment in paragraph (m) of Item 150 and paragraph (u) of

Item 250 of Western Motor Tariff Bureau Tariffs Nos. 109 and 111, respectively, and also in Item 12 of Minimum Rate Tariff No. 2. The note is identical in the three tariffs and provides as follows:

> "NOTE - All charges must be prepaid, and the carrier may not collect charges of any nature from any consignee."

With the exception of Part 6, the freight bill in each of the aforementioned parts shows two entries in the space for filling in the name of the consignor. The name of the wine or liquor distributor or warehouse from which the shipment originated is shown and immediately thereunder is shown the name of the party paying the freight charges, who, in each instance, received a component part of the shipment. According to the evidence presented by respondent, the name of the wine or liquor distributor or warehouse was shown on the document merely to indicate the precise point of origin. As to Part 6, the freight bill and supporting documents show the party paying the freight charge, who also received part of the shipment, as the consignor. It is apparent that all of the 14 shipments were f.o.b. origin and that the transportation was performed for the party paying the freight charges.

It is noted that the term "consignor" is defined in paragraph (c) of Item 250 of Tariff No. 111 and Item 10 of Tariff No. 2 as the party shown on the shipping document as the shipper (it is not defined in Tariff No. 109); whereas, the "Collection of Charges" rule in Item 135 of Tariff No. 109, Item 190 of Tariff No. 111 and Item 250-A of Tariff No. 2 each refer to the party who undertakes to pay the freight charges as the shipper. The terms "consignee" and "prepaid" are not specifically defined in any of the three tariffs. As to the term "prepaid," both the staff and respondent agreed that it does not mean that payment must be made prior to or at the time

freight is tendered to the carrier for transportation. Both pointed out that it is the generally accepted view in the transportation industry that "prepaid" means payment is guaranteed to be made within the credit period provided in the applicable tariff. The staff asserted that the guarantee must be made by the consignor or at the origin and of the shipment. Respondent contended that the guarantee could be made by anyone anywhere.

As indicated above, the three named tariffs offer no guideposts to us as to the meaning of the term "prepaid." In the circumstances and until a specific definition of this term as included in said tariffs, we will accept the construction placed on this term by the transportation industry in California which is that payment is guaranteed to be made within the applicable credit period. As to who may be the guarantor, we agree with respondent, based on the broad construction we have attached to the term, that it could be by anyone.

"Prepaid" has been noted on the master bill of lading prepared by the shipper in 13 of the 14 parts in issue. Although "prepaid" has not been marked on the master bill of lading in Part 4, it has been marked on all of the subdocuments prepared by the carrier in said part. Also, with the exception of several subdocuments in Parts 12 and 13, most of the subdocuments in the other 12 parts were marked "prepaid." On the issue of whether the transportation was prepaid, the record establishes that all of the transportation covered by the 14 parts was prepaid and that the several subdocuments marked "collect" were so marked in error.

From a review of all the facts and circumstances surrounding the 14 parts, it is apparent that in each part the party paying the freight charges prepaid them in its capacity as consignor of shipper

and not in its capacity as a consignee of a component delivery. We pointed out in our decision in the Investigation of Pacific Motor Trucking Company that "the purpose for adding the note to the definition of split delivery shipment was to prohibit the apportioning or prorating of any of the freight charges among the consignees, thus increasing carrier costs."[2/] There is no apportioning or prorating of freight charges in the instant proceeding.

We concur with the staff that by rating the 14 parts as split delivery shipments errors continue to exist on Parts 1, 4, 6, 7, 9, 11, 12, 13, 46, 47 and 49 as hereinbefore set out. By rating Parts 45 and 51 as split delivery shipments, there is no undercharge on either part. As to Part 48, the staff pointed out that the date on the hand tags prepared by respondent for two of the components is one day prior to the date shown on the master bill of lading and on the hand tags for the other components; that an employee of respondent advised that the dates shown on the hand tags were the dates of shipment pick up; that the split delivery rule in the applicable tariff (Item 170, Tariff No. 2) provides that if any of the component parts are picked up before the master document is issued, all components must be rated as separate shipments; and that for this reason, all components of said part must be rated as separate shipments. Respondent, on the other hand, pointed out that the subbills of lading prepared for the two components in issue by the shipper show the same date as the master bill which was the date of pick up; that the two hand tags were prepared in respondent's Berkeley terminal and the party typing said tags inadvertently typed in the wrong

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2/ Decision No. 71788 dated December 29, 1966 in Case No. 8341 (mimeograph copy).

date; that all components were picked up after the master documentation was issued; and that by rating Part 48 as a split delivery shipment, there is no undercharge. It is a general rule that the dates shown on the individual subdocuments for each component lot of a split delivery shipment establishes the date each component was picked up. We have here a conflict in the dates shown on the subdocuments prepared by respondent and those prepared by the shipper for the two components in question. We will accept the testimony by respondent's president that the date of pickup of said lots was the date shown on the shipper's documents.

With respect to Parts 3, 8 and 10 of the staff exhibits (split deliveries of liquor from San Francisco to the Los Angeles area), we concur with the staff rating of said parts. In each instance, the staff applied the competitive rail rate published in W.M.T.B. Tariff No. 109 from origin, which is served by rail facilities, to a team track in the Los Angeles area plus the applicable loading charges at origin and to this added the charges for a split delivery shipment from said team track to the destinations of the component lots. The staff based its ratings on paragraph (b) of Item 30 of Tariff No. 109. Respondent's traffic consultant asserted that under the provisions of paragraph (e) of Item 335 of Tariff No. 109, each of the parts could be rated as follows: Apply the same line haul rate used in the staff rating plus applicable loading charges from origin to one of the destinations which is served by rail plus an unloading charge based on the weight delivered to said destination; add thereto a stop-in-transit charge at an intermediate station; rate the balance of the component deliveries as a separate split delivery shipment from the stop-in-transit point to the various destinations and base the rate on the combined

weight of said remaining components. In connection with each of the three parts, there are two intermediate stations at which component deliveries are made between origin and final destination. Paragraph (e) of Item 335 is limited in its application to situations where only one intermediate station is involved. To rate the transportation in the manner suggested by the consultant, it would be necessary to have written rerating instructions from the shipper to respondent on the documentation. There are no such instructions on the documentation in Parts 3, 8 and 10.

The record herein does not refute respondent's contentions that the transportation covered by Parts 19 and 20 of the staff exhibits (steel pipe from San Pedro to Modesto and Hayward) was part of a through movement in foreign commerce which originated in Japan and that the transportation covered by Parts 26 and 27 of said exhibits (steel piling from San Leandro to Wilmington) was part of a through interstate movement which originated beyond the state. To support its position respondent introduced contracts which establish that the pipe was shipped from Japan (Exhibit 4) and pointed out that the freight bills for the steel piling shipments include the notation "X Car" which, it asserted, indicates that piling was picked up from rail cars.

We agree with the staff that each of the five loads of scrap aluminum from North Island to Long Beach covered by Part 21 of the staff exhibits must be rated as a separate shipment. Respondent has combined the five loads and rated them as a single shipment under a volume incentive service rate. However, the tariff item governing volume incentive service rates requires that the documentation be annotated by the shipper certifying that the shipment meets all of the requirements of said item and requesting volume

incentive service. This was not done. Furthermore, volume incentive shipments must be loaded in their entirety during one calendar day and charges must be based on not less than 45,000 pounds per unit of equipment used; whereas, pickups were made by respondent over a three day period and charges were not based on said minimum weight per unit of equipment.

The record herein will not support a finding that the transportation of bananas from the dock at Wilmington to San Diego covered by Parts 28, 29 and 30 of the staff exhibits is intrastate in character. The staff witnesses expressed the opinion that the transportation by vessel to the dock was proprietary transportation. However, no affirmative evidence was presented by the staff to support this position. Respondent and United Fruit Sales, on the other hand, alleged that vessels operating in foreign commerce are not classified private or for-hire in the same manner as carriers operating within California and that the transportation to the dock was not proprietary. The United States District Court for the Southern District of California has recently held in a consolidated proceeding involving facts apparently similar, that the transportation of bananas from the port of entry in California by common carrier to inland points in California were inseparable parts of shipments in foreign commerce and subject to the provisions of the Interstate Commerce Act.[3/] The Interstate Commerce Commission has held, on the other hand, that for-hire transportation entirely within

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3/ Long Beach Banana Distributors, Inc., v. The Atchison, Topeka and Santa Fe Railway Co., Civ. A. No. 841-59-PH; Consolidated Produce Co. v. Pacific Electric Railway Co., Civ. A. No. 1147-59-PH; Eugene Nella, et al. v. Southern Pacific Co., Civ. A. No. 1148-59-PH; U. S. District Court, Southern District of California, Central Division, August 1, 1966.

a state of property which has moved from or to a point outside the same state by proprietary carriage is not subject to economic regulation under Part II (Motor Carrier Regulations) of the Interstate Commerce Act, and this decision has been affirmed by the U. S. District Court for the Eastern District of Pennsylvania and the United States Supreme Court.[4/] It is noted that the Interstate Commerce Commission confined its conclusions to the situation in which motor carriage alone is used.

The record establishes that respondent returned empty pallets without charge for two shippers in the instances set forth in Parts 31 to 42 of the staff exhibits. Respondent alleged that the two shippers involved had allowed respondent to use their pallets for its convenience on outbound movements and that this practice has been discontinued. The staff pointed out, however, that respondent has heretofore been placed on notice that it may not transport pallets free. Respondent will be directed to collect transportation charges for the return of the pallets and to cease and desist from any further return transportation of empty pallets without charge, except to the extent authorized by the Commission's minimum rate tariffs.

4/ ICC Docket MC-C-3626, Motor Transportation of Property Within a Single State, 94 MCC 541 (1964); affirmed by U. S. District Court, Eastern District of Pennsylvania, in American Trucking Associations, Inc., et al. v. United States, et al., and Pennsylvania Railroad Co. v. Same, 242 F. Supp. 890 (1965); affirmed per curiam by U. S. Supreme Court in No. 510, American Trucking Associations, Inc., et al. v. United States, et al., and No. 511, Pennsylvania Railroad Co. v. Same, 382 U. S. 372, 15 L ed 2d 421, 86 S Ct 533 (1966); Petitions for Rehearing in Nos. 510 and 511 denied by U. S. Supreme Court in Memorandum Decision dated April 18, 1966, -- U.S. --, 16 L ed 2d 366, 86 S. Ct. -- (1966).

With respect to the subhaul arrangement between respondent and Campbell Trucking covered by Part 43, there is no prohibition preventing a highway common carrier from properly performing subhaul services for any other carrier, including a highway permit carrier. In this regard, the Commission found and concluded as follows in its Investigation into Subhaul Operations of Highway Common and Petroleum Irregular Route Carriers:

> "The Commission has the power to supervise and regulate the contractual arrangements of highway common and petroleum irregular route carriers. However, in the absence of complaint by any party and any evidence of abuses by independent contractor subhaulers, further restrictive rules and regulations will not be imposed by this Commission. See Decision No. 42647 in Case No. 4308 (48 Cal.P.U.C. 576)."5/

The record here shows that respondent, the subhauler, controlled the arrangement and that this was not an arm's length transaction between respondent and Campbell Trucking. Furthermore, respondent did not include information, as required, in its quarterly report of gross operating revenue filed with this Commission. Respondent will be directed to collect from the shipper the difference between its published tariff rate and the rate actually assessed.

There is no controversy in the record regarding the undercharges shown in Parts 2, 5, 14 through 18, 22 through 25, 44 and 50 of Exhibit 2. Respondent alleges that these were inadvertent errors and asserts that precautions have been taken to prevent their reoccurrence in the future.

The staff recommended that, pursuant to Sections 2100 and 3800 of the Public Utilities Code, a fine in the amount of the undercharges shown in Exhibit 2 be assessed against respondent.

5/ Decision No. 60584 in Case No. 6195, 57 Cal.P.U.C. 800, 803 (1960).

In addition, the staff recommended that, pursuant to Sections 1070 and 3774 of the Code, the Commission should consider imposing an additional fine in an amount to be determined by it. Respondent asserted that the facts and circumstances in this proceeding do not warrant the imposition of any fine.

Findings and Conclusions

The Commission finds that:

1. Respondent is a highway common carrier, radial highway common carrier, highway contract carrier and city carrier.

2. Respondent is a party to all common carrier tariffs and classifications involved in this proceeding (Western Motor Tariff Bureau Tariffs Nos. 101, 109 and 111 and National Motor Freight Classification Nos. A-7 and A-8) and was served with Minimum Rate Tariffs Nos. 2, 5 and 8 and Distance Table No. 4, together with all supplements and additions to each.

3. The transportation covered by Parts 1 through 43 of Exhibits 1 and 2 was performed under respondent's common carrier authority, and the transportation covered by Parts 44 through 51 of said exhibits was performed under its highway permit authority.

4. In each instance, the party paying the freight charges for the transportation covered by Parts 1, 4, 6, 7, 9, 11, 12, 13, 45 through 49 and 51 of Exhibit 2 paid said charges in its capacity as consignor or shipper and not as consignee.

5. The date shown on the subbills of lading prepared by the shipper for all components of the transportation covered by Part 48 of Exhibit 2 (referred to in Finding 4) is the date on which all components of said transportation were picked up. The earlier date shown on the hand tags prepared by respondent for two of the components was the day the order for the transportation was received

from the shipper and not the date of pickup. All components of the transportation covered by said part were picked up after the master document was executed.

6. The transportation covered by each part of Exhibit 2 referred to in Finding 4 was a split delivery shipment and should be rated as such.

7. By rating each part of Exhibit 2 referred to in Finding 4 as a split delivery shipment, there is an overcharge of $5.69 on Part 1, there are no undercharges on Parts 45, 48 and 51 and the undercharges on the remaining 10 parts are as follows:

Part	Undercharge	Part	Undercharge
4	$ 43.25	12	$196.74
6	28.75	13	199.65
7	82.75	46	1.00
9	98.97	47	10.40
11	182.16	49	2.61

8. The evidence adduced does not establish that the transportation covered by Parts 19, 20 and 26 through 30 of Exhibit 2 was in fact intrastate transportation subject to regulation by this Commission.

9. Respondent returned empty pallets without charge to two customers in the instances set forth in Parts 31 through 42 of Exhibit 2. This practice has been discontinued. Respondent will be directed to collect from the shippers transportation charges for the return of pallets. (Respondent is placed on notice that it may not in the future perform free transportation of shipper-owned pallets under any circumstances, except to the extent authorized by applicable tariffs.)

10. The subhaul arrangement between respondent and Campbell Trucking covered by Part 43 of Exhibit 2 was a device whereby respondent attempted to evade his tariff rates on file with the Commission.

11. Applicable tariff provisions do not authorize rating the transportation covered by Parts 3, 8 and 10 of Exhibit 2 in the manner suggested by respondent's rate consultant.

12. Tariff requirements for volume incentive service rates were not complied with in connection with the transportation covered by Part 21 of Exhibit 2 and, for this reason, volume incentive service rates cannot be applied to said transportation.

13. The rate and charge and resulting undercharge computed by the staff in Parts 2, 3, 5, 8, 10, 14 through 18, 21 through 25, 31 through 42, 43, 44 and 50 of Exhibit 2 are correct.

14. Respondent charged less than the prescribed rates set forth in its applicable common carrier tariffs in the instances set forth in Finding 7 (Parts 4, 6, 7, 9, 11 through 13 of Exhibit 2) and Finding 13 (Parts 2, 3, 5, 8, 10, 14 through 18, 21 through 25, 31 through 42, and 43 of Exhibit 2), resulting in undercharges in the total amount of $2,713.97.

15. Respondent charged less than the applicable minimum rates authorized by (alternative common carrier rates) or prescribed in Minimum Rate Tariff No. 2 in the instances set forth in Finding 7 (Parts 46, 47 and 49 of Exhibit 2) and Finding 14 (Parts 44 and 50 of Exhibit 2), resulting in undercharges in the total amount of $87.15.

16. The total of the undercharges referred to in Findings 14 and 15 is $2,801.12.

17. Respondent charged more than the prescribed tariff rates set forth in its applicable common carrier tariffs in the instance set forth in Finding 7 (Part 1 of Exhibit 2), resulting in an overcharge of $5.69.

The Commission concludes that:

1. Respondent violated Sections 494, 3664 and 3737 of the Public Utilities Code.

2. Respondent should pay a fine pursuant to Section 2100 of the Public Utilities Code in the amount of $2,713.97 and pursuant to Section 3800 of the Code in the amount of $87.15, and in addition thereto respondent should pay a fine pursuant to Section 1070 of the Code in the amount of $1,000.00.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges and refund the overcharge. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that respondent or its attorney has not been diligent, or has not taken all reasonable measures to refund the overcharge and collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of $3,801.12 to this Commission on or before the fortieth day after the effective date of this order.

2. Respondent shall refund the overcharge and take such action, including legal action, as may be necessary to collect the undercharges found herein and shall notify the Commission in writing upon the consummation of such refund and collections.

3. Respondent shall proceed promptly, diligently and in good faith to refund the overcharge and to pursue all reasonable measures to collect the undercharges, and in the event the overcharge ordered to be refunded or undercharges ordered to be collected by paragraph 2 of this order, or any part of such overcharge or undercharges, remain unrefunded or uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the overcharge remaining to be refunded and the undercharges remaining to be collected and specifying the action taken to refund such overcharge and collect such undercharges, and the result of such action, until such overcharge has been refunded in full and such undercharges have been collected in full or until further order of the Commission.

4. Respondent shall cease and desist from any further return transportation of empty shipper owned pallets without charge, except to the extent authorized by applicable tariffs.

5. Respondent shall, in connection with its common carrier operations, cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a different amount than the applicable tariff rates and charges.

6. Respondent shall, in connection with its permit operations, cease and desist from charging and collecting compensation for the

transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

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

Dated at San Francisco, California, this 20th day of June, 1967.

President

Commissioners

I will file a dissent

Peter E. Mitchell

COMMISSIONER PETER E. MITCHELL DISSENTING:

The length of time consumed in the resolution of this investigation (September and October, 1964 - June 19, 1967) merely reinforces my original dissent. At that time I stated, "but unless the Commission is able to shorten the time lapse between field audits of a carrier by the staff and a final order of the Commission substantiating violation of a tariff enumerated in the audit, the enforcement program will become (and has become) bogged in a morass of procedure".

A major portion of the time consumed in this case concerned the application of a tariff of "questionable lawfulness", to which I had also alluded. (See Footnotes 3 and 4 of the instant decision).

I would further mention one specific allocation, covered by Part 43 of Exhibit 2 of the staff, regarding the subhaul arrangement between the respondent and Campbell Trucking. There is no prohibition preventing a highway common carrier from performing subhaul services for any other carrier. Decision No. 60584, in Case No. 6195, found that highway common carriers "may enter into special contracts, agreements or arrangements for the transportation of traffic as independent contractor subhaulers. No further rules and regulations relating to such contracts, agreements or arrangements will be issued at the present time".

While I realize that rules are often produced by decisions of this Commission as herein, I also defer to the right of a carrier not to be charged with post hoc regulations.

San Francisco, California
June 21, 1967

Peter E. Mitchell, Commissioner