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ORIGINAL

Decision No. 72684

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of GOULD TRANSPORTATION CO., INC.	Case No. 8316 Filed December 14, 1965

Milton W. Flack, for respondent.
Arthur H. Glanz, for Alcoa Transportation Company, Boulevard Transportation Company, California Cartage Company, California Motor Transport Co., Delta Lines, Inc., Desert Express, DiSalvo Trucking Company, Oregon-Nevada-California Fast Freight, Pacific Intermountain Express Co., Pacific Motor Trucking Company, Ringsby-Pacific, Ltd., Shippers Express Company, Southern California Freight Lines, Inc., Sterling Transit Co., Inc., T.I.M.E. Freight, Inc., Walkup's Merchants Express, Willig Freight Lines, interveners.
John C. Gilman, Counsel, and Frank O'Leary, for the Commission staff.

O P I N I O N

Public hearing was held before Examiner DeWolf on May 3 and 4, and July 19, 20 and 21, 1966, and submitted on July 21, 1966, subject to the filing of concurrent briefs, which have been received. The interveners, by statement of their counsel, withdrew from this proceeding on May 3, 1966, without offering any evidence.

The order of investigation dated December 14, 1965 specifies four separate types of violations[1] that may have been committed by Gould Transportation Co., Inc., hereinafter referred to as respondent, during the period June 1, 1964 to November 30, 1964, both dates inclusive. The types of violations will be considered separately in this opinion. First, there must be considered respondent's motion for dismissal because of lack of jurisdiction.

Jurisdiction

Respondent states that since July 1, 1966 it has held no operating authority whatsoever from the Commission. It asserts that upon the loss or removal of the operating authority the Commission no longer has any jurisdiction to regulate the carrier or to investigate its operations, citing Lyon & Hoag v. Railroad Com., 183 Cal. 145, and Sec. 701 Public Utilities Code.

The evidentiary facts are, and we find:

1. At all times during the period June 1, 1964 to November 30, 1964, both dates inclusive, respondent held authorities to conduct operations as a highway common carrier specified in certificates of public convenience and necessity granted by the Commission, and it held authorities to conduct operations as a radial highway common carrier, a highway contract carrier, and a city carrier pursuant to permits issued by the Commission.

1 Set forth in numbered paragraphs 1, 2, 3 and 4 of the order of investigation and concerning shipments specified by freight bill number and date in numbered paragraph 7 of the order.

2. At all times during said period respondent maintained a schedule of rates in Western Motor Tariff Bureau Local, Joint and Proportional Tariff No. 111 (WMTB No. 111), Western Motor Tariff Bureau Scope of Operations and Participating Carrier Tariff No. 100 (WMTB No. 100), Western Motor Tariff Bureau Exception Sheet No. 1-A (WMTB ES No. 1-A) and National Motor Freight Classification A-7, and A-7 (Cal.), (NMFC A-7).

3. At all times during said period and prior thereto the Commission served, without charge, upon respondent the following minimum rate orders together with supplements and amendments thereto that were in effect during the period June 1 to November 30, both dates inclusive:

Minimum Rate Tariff No. 2
Minimum Rate Tariff No. 8
Exception Ratings Tariff No. 1
Distance Table No. 5.

4. The Commission issued the order of investigation herein on December 14, 1965 and said order was personally served upon Jack Gould, a Vice President of respondent, on December 21, 1965 at the City of Commerce, California.

5. Notice of hearing in this proceeding was mailed, postage prepaid, to Joseph Gould, President, Gould Transportation Co., Inc., 4600 Brazil Street, Los Angeles, in accordance with the Commission's procedural rules.

6. By Application No. 47841, filed August 23, 1965, respondent requested authority to transfer its highway common carrier operative rights to Oertly Bros. Trucking Co., a corporation. By amendment, filed January 11, 1966, to said application, respondent proposed, offered and agreed that if the transfer were authorized and the proposed sale consummated, respondent

"would not raise as a defense to the payment of fines, if any, imposed by the Public Utilities Commission in Case No. 8316 under Sections 1070 and 3774 of the Public Utilities Code on the ground that the Public Utilities Commission lacks the jurisdiction to impose said fines as a result of the transfer and sale of the operating rights of Gould by the instant application and revocation or lapse of Gould's operating permit." The authority to effect the transfer proposed in the application as amended was granted by the Commission by Decision No. 70584, dated April 19, 1966. The consummation of the transfer became effective July 1, 1966.

7. Respondent's operating permits were suspended on April 25, 1965 and were revoked by the Commission on April 26, 1966.

8. Respondent's participation in the tariffs named in Finding No. 2, above, were canceled effective July 1, 1966.

Based on the foregoing findings, we conclude:

1. At all times specified in the order of investigation herein, respondent was subject to the jurisdiction of the Commission and was required to observe, obey and comply with the requirements of the sections of the Public Utilities Code and of the orders of the Commission set forth therein.

2. At all times with respect to this proceeding respondent is and has been under the jurisdiction of the Commission.

3. By reason of waiver respondent is not entitled to raise as a defense the jurisdiction of the Commission to impose any fines that may result from any violation by respondent in connection with the transportation performed by it specified in said order of investigation.

4. The citations offered by respondent are not in point with respect to the jurisdiction of the Commission over respondent in this proceeding.

5. The motion for dismissal for lack of jurisdiction should be denied.

We shall now consider the inquiry set forth in paragraph 1 of the order of investigation:

> "1. Whether respondent has transported shipments of sodium phosphate for Food Machinery Corporation of 2121 Yates Street, Los Angeles, at rates less than the minimum rates established by the Commission's Minimum Rate Tariff No. 2 by improperly demanding and collecting payment for each of said shipments as a single shipment with split deliveries under Item 170 of said tariff, rather than as separate shipments to each destination, thereby violating Sects. 3664, 3667 and 3737 of the Public Utilities Code."

The staff alleges 61 counts of violation, all of which involve shipments of sodium phosphate tendered and consigned by F.M.C. Corporation at its plant at Newark for transportation to its warehouse at 2121 Yates Avenue, Los Angeles (apparently City of Commerce) and to one or more other destinations in Southern California. It is the contention of the staff that the method used by respondent to rate these shipments is not permitted by the Commission's minimum rate orders and that the methods that are prescribed result in higher charges than those assessed by respondent. In its presentation, the staff did not allege nor did it confront respondent with any particulars concerning violations regarding these shipments other than that the method used by respondent of assessing the rates was not authorized by the Commission's minimum rate orders. In view of the fact that the method used by respondent was the same with respect to the 61 counts, if that method was authorized the 61 counts must be dismissed. For purposes of consideration of the allegations we shall examine the facts regarding the first count which concerns transportation charges reflected in documents comprising Part A-1 of Exhibit 1.

On June 1, 1964, F.M.C. Corporation, Mineral Products Division, tendered to respondent 670 bags of sodium phosphate weighing 55,170 pounds and 1 H/T sodium phosphate weighing 31,220 pounds of which 370 bags were to be delivered to F.M.C. Corporation, Inorganic Chemical Division (whse at Yates Street), Los Angeles, 300 bags were to be delivered at Betz Labs. Inc., Hawthorne, and 1 H/T was to be delivered at Kelite Corporation, 1250 N. Main Street, Los Angeles. A document was given respondent by F.M.C. at Newark showing that the entire amount tendered was consigned to:

"F.M.C. Inorganic Chem. Div. L.A.: STOP AT KELITE - Deliver from WHSE to HAWTHORNE."

Respondent delivered the described lots to Kelite, Betz and F.M.C.'s warehouse in Los Angeles and issued Freight Bill No. 4549 with charges computed in the following manner: The entire amount (86,390 pounds) at a rail rate from F.M.C. Newark to F.M.C., Los Angeles, amounting to $301.90, a rail stop in transit charge of $20 and a rail switching charge of $8.27, loading and unloading of 86,390 pounds at 8 cents per cwt. with a charge of $69.11, a charge of $72 for transportation from Los Angeles to Hawthorne based upon 36,000 pounds at 20 cents per cwt., and a charge of $6.91 for overtime. The total charges amounted to $478.19.

The method used by respondent to rate the shipment was to treat it as two separate and distinct shipments; one of the entire amount weighing 86,390 pounds as if moving by railroad from Newark to F.M.C. warehouse with a stop in transit to partially unload at Kelite, and the other as a shipment of 300 bags weighing 30,300 pounds from F.M.C. warehouse, Los Angeles to Betz Labs. Inc., at Hawthorne. If there actually were two separate and distinct shipments it is apparently conceded by the staff that the charges,

amounting to $301.90, $8.27, $20, $69.11 and $6.91, for a total of $406.19 would have not been lower than the minimum rate established by the Commission to be assessed by any highway permit carrier for the transportation of the 86,390 pounds to F.M.C. warehouse at Los Angeles with a stop in transit to unload 31,220 pounds at Kelite; and that the charge of $72 would have not been less than the minimum rate established by the Commission for the transportation of 30,300 pounds from F.M.C. warehouse at Los Angeles to Betz Lab., Inc., at Hawthorne. Its contention is that respondent cannot rate the movements as if it constituted two separate and distinct shipments in the manner stated.

The property consisting of 86,390 pounds of sodium phosphate tendered by F.M.C. at Newark was a split-delivery shipment as defined in Item 12 of Minimum Rate Tariff No. 2 (hereinafter called MRT 2) in that it consisted of two or more component parts delivered to more than one consignee at one or more points of destination, the composite shipment weighing not less than 5,000 pounds, said shipment being shipped by one consignor from one point of origin with charges prepaid. Respondent has rated the shipment under the provisions of Item 171(e) of MRT 2 which states:

> "In determining the charge for a split delivery shipment, component parts may be rated as separate shipments from any point or points on the split delivery route (as provided in paragraph (a) hereof) to point or points of destination of such component parts; provided that the written instructions furnished to the carrier under paragraph (b) hereof show (1) the component parts to be treated as separate shipments and (2) the points between which the separate shipment rates are to be applied."

Item No. 171(e) was placed in MRT 2 by the Commission in Decision No. 57829 and Decision No. 58428 (on Petition for Rehearing). The staff's objections to the method of rating used by the respondent are based upon the opinion of the Commission stated in Decision No. 57829 as follows:

> "While it is true that shippers may actually arrange with one of the consignees to accept a composite shipment to reship component parts to other consignees, the consignee is not obligated to perform such service. Indeed, a consignee that holds himself out to all comers and obligates himself to reship the property of others via the lines of a common carrier could be a freight forwarder subject to regulation under the Public Utilities Code."

In this case there is no need to impute agency. The shipper at Newark, the consignee at Los Angeles, and the shipper of the reshipped portion at Los Angeles are all the same corporate entity, F.M.C. Corporation, which has the right and the ability to receive or ship property at its warehouse at Los Angeles, as well as to receive or ship property at its plant at Newark.

Decision No. 57829 further states:

> "The Commission has prohibited the making of combinations of rates over a private noncarrier facility such as a spur track for the reason that said property, not being dedicated to public use, is not available to all persons." (Emphasis added.)

With regard to the shipment in question, a combination of rates is not involved. Under the provisions of Item 171(e) of MRT 2, respondent has rated a single shipment as if it were two shipments, applying separate rates to each. The staff's arguments, therefore, are not well founded.

We find that it has not been shown that respondent transported shipments of sodium phosphate for F.M.C. Corporation at rates less than the minimum rates in the manner specified in paragraph 1 of the order of investigation herein.

Respondent presented a number of other defenses, including a motion to dismiss on grounds of variance, with respect to the transportation specified in paragraph 1 of the order of investigation. No discussion of those defenses, or of the motion, is necessary in view of the foregoing finding.

The next inquiry is:

> "2. Whether respondent has transported various commodities for Lady's Choice Foods of 4578 Worth Street, Los Angeles, at rates less than the minimum rates established by the Commission in Minimum Rate Tariff No. 2 and by respondent's filed tariffs, by improperly consolidating as single shipments, goods transportable under respondent's certificate and filed tariffs with goods transportable only under its authorities as a highway permit carrier and under Minimum Rate Tariff No. 2, and by demanding and collecting rates for each such improper shipment at a single shipment rate rather than as separate shipments of each class of goods, thereby violating Sections Nos. 494, 453, 3664, 3667 and 3670 of the Public Utilities Code."

The staff alleges 27 counts of violations and contends that the amount of undercharges resulting therefrom is $3,520.79. Paragraph 5 of the order of investigation requires a determination of whether respondent should be ordered to collect any undercharges.

The transportation involved in the 27 counts consists of movements from Los Angeles to such points as San Leandro, Richmond,

Modesto, Fresno, Reedley and Sacramento, of various commodities, a partial list of which includes fibreboard cartons, beverages, coffee, bleach, soda ash, swimming pool supplies, household ammonia, jams, jellies, preserves and apple butter. A number of the shipments in the 27 counts were split-pickup shipments or split-delivery shipments. It is the contention of the staff that the respondent was required to assess rates named in its common carrier tariffs for the transportation of some of the commodities and assess rates no lower than those prescribed in MRT 2 for the transportation of other commodities, and in no case could respondent assess a single rate for the transportation of a mixture of the commodities subject to its tariff rates and commodities not subject to its tariff rates.

In every one of the shipments involved in the 27 counts there was a mixture of jellies with jams, preserves or apple butter. One of the contentions made by the staff is that respondent was required to assess its tariff rates with respect to jams, preserves and apple butter and that it could not assess its tariff rates on jellies. Respondent's only defense to the allegations in the 27 counts is that it was not required to assess its tariff rates on jams, preserves and apple butter. Both the staff and respondent presented evidence regarding their respective points of view and briefed the matter.

In examining respondent's tariff to determine the validity of the respective contentions, we encountered a maze of uncertainties and ambiguities. During a portion of the period involved it is uncertain whether respondent maintained any rates in its tariff for transportation to or from Los Angeles (WMTB No. 111, Second Revised Page 22-A). The only place that

one may find just what transportation respondent holds itself out to perform at its tariff rates named in WMTB No. 111 is in the Scope of Operations and Participating Carrier Tariff, WMTB No. 100. With respect to the jams versus jellies issue, Item 1210 of that tariff merely states that Gould Transportation Co., Inc., holds itself out as a highway common carrier to transport "Fruits, canned or preserved" between Los Angeles, on the one hand, and points in San Francisco Territory and points on and along U. S. Highway 99 to and including Sacramento, on the other hand. Respondent's tariff is uncertain and ambiguous with respect to this issue. Respondent, however, is not able to assert such defense as it is the duty of the carrier to plainly state in its tariffs the places between which property will be carried, the property it will transport, and the rates it will charge. (Section 487 of the Public Utilities Code and General Order No. 80-A.) In such circumstances we conclude that respondent should not be ordered to attempt the collection of undercharges from Lady's Choice Foods with respect to any of these shipments. In any proceeding involving Lady's Choice Foods with respect to these shipments, that company would be able to assert the uncertainty and ambiguity as a defense.

In view of the aforementioned conclusion, the number of counts of violation with respect to the shipments included in the allegations involving paragraph 2 of the order of investigation will have no effect upon the resulting fine, if any. (See Sections 1070 and 3774 of the Public Utilities Code.) Under the circumstances, for the purposes herein, we will consider the contentions made by respondent with respect to the jams and jellies issue as acceptable, and furthermore, we will resolve any other doubts in its favor. We find that with respect to Count No. B-25:

1. On November 20, 1964 and November 23, 1964 and November 24, 1964, respondent transported from Los Angeles a variety of goods weighing 99,417 pounds of which 11,800 pounds was delivered at Modesto and 87,617 pounds at San Leandro. The goods delivered to San Leandro included, among other things, 123 bundles of knocked-down fibreboard cartons weighing 1,975 pounds and 519 cases of coffee weighing 16,898 pounds, and was transported for Lady's Choice Foods of 4578 Worth Street, Los Angeles.

2. On a master freight bill, numbered No. 12116, dated November 20, 1964, respondent charged and assessed Lady's Choice Foods $472.39 designated on said freight bill as the charges to be paid for the transportation of the aforementioned merchandise between said Los Angeles and Modesto and San Leandro in its capacity as a highway contract carrier, said charges being computed as if the property transported constituted a single shipment.

3. At all times involved herein, with respect to the transportation of knocked-down fibreboard cartons between Los Angeles, on the one hand, and Modesto and San Leandro, on the other hand, respondent maintained rates for said transportation in WMTB No. 111.

4. Respondent was not authorized to engage nor could it have engaged in the transportation of knocked-down fibreboard cartons between Los Angeles and San Leandro or Modesto as a highway permit carrier by reason of Section 3542 of the Public Utilities Code.

5. At all times involved herein, with respect to the transportation of coffee between Los Angeles, on the one hand, and Modesto and San Leandro, on the other hand, respondent did not maintain in its tariffs any rates for such transportation, nor was it authorized to publish or maintain such rates as a highway common carrier for such transportation.

6. At the times involved herein, the applicable charges under the rates maintained by respondent in tariff WMTB No. 111 for the transportation of knocked-down fibreboard cartons and such other commodities transported that may have been subject to said tariff (not including coffee) were different than those actually charged and assessed by respondent.

7. The minimum charges applicable to the transportation described on Master Freight Bill No. 12116, and performed by respondent, consisted of the sum of the charges of at least two separate shipments; one of which being composed of the knocked-down fibreboard cartons and other commodities subject to the rates in tariff WMTB No. 111, and the second of which being composed of coffee and other commodities not subject to the rates in tariff WMTB No. 111; and the sum of such minimum applicable charges would, in every instance, regardless of whether the rates in tariff WMTB No. 111 applied to any or all or any mixture of the commodities other than knocked-down paper cartons and coffee, be more than the charges actually assessed by respondent for such transportation.

8. The charges assessed by respondent for the transportation described in Master Freight Bill No. 12116, dated November 20, 1964, were less than the minimum rates established by the Commission to be charged, assessed or collected by highway common carriers and highway permit carriers for such transportation.

9. On November 20, 1964, respondent transported various commodities, including knocked-down fibreboard cartons and coffee, for Lady's Choice Foods of 4578 Worth Street, Los Angeles, at rates less than the minimum rates established by the Commission in Minimum Rate Tariff No. 2 and by respondent's filed tariffs, by improperly consolidating as a single shipment, goods transportable

under respondent's certificate and filed tariffs with goods transportable only under its authorities as a highway permit carrier and under Minimum Rate Tariff No. 2, and by demanding and collecting rates for such improper shipment at a single shipment rate rather than as separate shipments of each class of goods.

We should point out that substantially the same findings could and would be made with respect to the other counts (particularly Counts B-24, cartons versus coffee; B-21, beverages versus ammonia; B-20, beverages versus bleach; B-19, beverages versus coffee; and B-17, beverages versus bleach). As stated above, the number of counts here would not have any effect on our conclusions as to fines. The next inquiry is:

> "3. Whether respondent has transported for Lady's Choice Foods, free of charge, shipments of fresh whole strawberries in cans and drums from Santa Maria to Los Angeles and of empty steel drums from El Monte to Santa Maria, said transportation being in excess of 50 constructive miles and thus not exempted by Item 40 of Minimum Rate Tariff No. 8 from the minimum rates established by the Commission in said Tariff, thereby violating Sections 3664, 3667 and 3737 of the Public Utilities Code."

The staff alleges 10 counts of violation (Parts C-1 through C-10). Counts C-1 through C-6 cover the transportation of 6 shipments of whole chilled strawberries in cans or drums from Santa Fe Driscoll Packers, Santa Maria, to Lady's Choice Foods, c/o Rancho Cold Storage, Los Angeles, performed during the period September 3, 1964 to September 12, 1964, both dates inclusive.

The evidence presented by the staff shows that the shipments were transported by respondent free of charge.

Respondent presented evidence that the shipments were held in interim storage at Rancho Cold Storage and later delivered

to Lady's Choice Foods, 4578 Worth Street, Los Angeles, where the strawberries were processed into jams, preserves and other products; that the location at 4578 Worth Street, Los Angeles is a plant with facilities for processing strawberries and other fruit into manufactured products such as jams, preserves, jellies and fruit butters. It also presented testimony of respondent's president and of the former president of Lady's Choice Foods to the effect that there was a gentleman's agreement between them that Lady's Choice Food would furnish respondent with a special type of trailer for respondent's own use and that the compensation for the use of that trailer would be $300 per month which respondent could pay by providing, at no charge, transportation of strawberries and cucumbers and the empty containers returning; that the trailer was in fact used by respondent for the transportation of sugar during the years 1961, 1962 and 1963 for a period of 24 months, and that this transaction was not recorded nor does it appear on any records, ledgers or other books of account maintained by Lady's Choice Foods or Gould Transportation Co. Inc.

Counts C-7 through C-10 cover the transportation of 4 shipments of empty reconditioned drums from Lady's Choice Foods c/o Pacific Coast Drum, 2204 North Rosemead Boulevard, El Monte to Santa Fe Driscoll, Santa Maria, performed during the period September 1, 1964 to September 9, 1964, both dates inclusive. The documents describe the commodity as empty drums returned for fresh strawberries.

The staff presented evidence that the 4 shipments were transported by respondent free of charge.

Respondent's presentation of evidence consisted of the testimony related above concerning the use of a trailer.

The staff applied to each of the 10 counts the minimum rates in Minimum Rate Tariff No. 8 established by the Commission and in effect at the time for the transportation of strawberries and of empty containers returning for an outbound haul.

Respondent asserts that it has not been shown that the transportation was subject to the rates and rules in MRT 8. It contends that Item 40 of MRT 8 specifically excludes shipments of fresh fruit from the application of the minimum rates when the point of destination is a cannery. It also contends that inasmuch as the shipments of fresh strawberries were exempt, the containers returning for use in that hauling were also exempt.

Item 40 (Fifth Revised Page 7) and Item 41 (Twenty-Fifth Revised Page 8) of MRT 8 contain certain rules for the application of the rates in that tariff. Item 40 provides that the rates in MRT 8 apply to the transportation of certain commodities including: fresh fruits in their natural form; containers, empty, secondhand, returning from an outbound paying load, or forwarded for a return paying load, of commodities for which rates are provided in MRT 8; and containers, empty, for which rates are provided in Section 4 of MRT 8; subject to certain specified exceptions. The exceptions, insofar as they pertain to the case here provide that the rates in MRT 8 will not apply to the transportation of (portions not pertinent to the case here are deleted):

> "(a) Fresh or green fruits, ..., as described herein, when the point of destination of the shipment is a cannery, accumulation station, precooling plant, or winery; nor to the empty containers used or shipped out for use in connection with such transportation, subject to Note 2.
>
> (aa) Fresh or green fruits, ..., as described herein, moving to a cold storage plant to be held for interim storage for a subsequent movement to a cannery, subject to Notes 2 and 4.
>
> (b) Fresh or green fruits, ..., as described herein, when transperated (sic) from the field or point of growth to a packing plant, cold storage plant or packing shed, nor when transported between packing sheds, subject to Notes 2, 3 and 5.

(bb) Empty containers used or shipped out for use in connection with transportation described in paragraph (b) above, subject to Notes 2 and 3."

Notes 2, 3, 4 and 5, referred to in the exceptions are set forth in Item 41. Exception (a) does not apply to the transportation of fresh fruit destined to a cold storage plant. The point of destination of the shipments of strawberries was Rancho Cold Storage, a cold storage plant within the definition of that term set forth in Item 41, Note 2(c), and was not Lady's Choice Foods, a cannery within the definition of that term in Item 41, Note 2(d).

Exception (aa) would seem to apply to the transportation in that the evidence shows that the strawberries moved to a cold storage plant where they were held in storage and later shipped to Lady's Choice Foods for processing. Note 4 provides, however, that this exemption applies only when the shipper certifies on the shipping document covering the transportation to the cold storage plant that the ultimate destination of the shipment is a cannery. The shipping documents in Exhibits C-1 through C-6 do not have that certification.

Exception (b) is not applicable because Note 3 provides that this exemption does not apply when the distance between the point of origin and point of destination exceeds 50 constructive miles. The distance between the point of origin and the point of destination of the shipments of strawberries was between 190 and 200 constructive miles.

Had Lady's Choice Foods certified on the shipping documents that the shipments of strawberries delivered to Rancho Cold Storage were to be held in interim storage and later shipped to its plant, the minimum rates in MRT 8 would not have been applicable to the shipments of strawberries. Such certification was not made, therefore the minimum rates are applicable.

With respect to the transportation of the empty drums, there is no evidence that these particular shipments involved the movement of drums used for the transportation of the strawberries described in Parts C-1 through C-6. It is noted in Exhibit 8 (Part D-1) that respondent transported a number of shipments of strawberries from Santa Maria to Los Angeles during the times involved here. The drums could have been for use in that transportation in which event the movement of drums would have come within Exception (a).

We find that:

1. On September 3, 4, 8, 10, 11 and 12, 1964, respondent transported truckload shipments of fresh chilled strawberries for Lady's Choice Foods from Santa Maria to a cold storage plant at Los Angeles, said transportation being as described in Freight Bills Nos. 8238, 8309, 8349, 8478, 8561, 8647 and other shipping documents supporting said freight bills, for which respondent did not charge, assess or collect any rate or charge for said transportation.

2. The minimum rates prescribed by the Commission and established in MRT 8 for such transportation and the lowest lawful charges required to be assessed and collected by respondent for such transportation are those set forth as the minimum rate and charge in Parts C-1 through C-6 of Exhibit 11.

3. The undercharges involved in the shipments transported by respondent described in Parts C-1 through C-6 of Exhibit 11 amount to $1,593.85.

4. Respondent, a highway permit carrier, charged, demanded, collected and received for the transportation of fresh strawberries rates and charges less than the minimum rates and charges established by the Commission.

5. It has not been shown that the transportation of drums described in Parts C-7 through C-10 were subject to the minimum rates in MRT 8.

The claim by respondent that no undercharges resulted or are due because of compensation received by it in the form of use of a trailer or offset of the charges for amounts owing to Lady's Choice Foods for rental of the trailer cannot prevail here. Minimum Rate Tariff No. 8 (Item 65) provides that rates shall not be quoted or assessed by carriers based upon a unit of measurement different from that in which the minimum rates and charges are stated. Item 50 requires each shipment to be rated separately. Item 255 requires the carrier to issue a shipping document for each shipment setting forth the rate and charge assessed for that shipment.

The next inquiry is:

> "4. Whether respondent has transported for Lady's Choice Foods, free of charge, shipments of fresh cucumbers in sacks from Los Angeles to Hayward and of fresh whole strawberries in cans and drums from Santa Maria to Los Angeles, as a rebate and allowance to Lady's Choice Foods on other shipments transported at respondent's filed rates or under any or all of the Commission's Minimum Rate Tariffs, thereby violating Section 494, and Section 3667, 3668, 3670 and 3737, of the Public Utilities Code, and whether by performing such free transportation respondent has granted a preference or advantage to Lady's Choice Foods not available to the other shippers, thereby violating Section 453 of the Public Utilities Code."

The staff presented evidence that respondent transported 14 truckload shipments of fresh strawberries from Santa Maria to Los Angeles during the period August 5, 1964 to October 27, 1964, 14 shipments of empty drums from Los Angeles to Santa Maria during the period August 7, 1964 to October 28, 1964, 30 shipments of

fresh cucumbers from Los Angeles to Hayward during the period June 3, 1964 to August 3, 1964, and 8 shipments of empty-sacks from Hayward to Los Angeles during the period June 12, 1964 to July 14, 1964, as more particularly set forth on the shipping documents included in Parts D-1 and D-2 of Exhibits 8 and 9. Respondent issued freight bills with respect to each of said shipments stating that no charge was assessed, demanded or due for the transportation of the shipments. The staff does not contend that any of said transportation was subject to any minimum rates that had been established by the Commission.

Respondent contends that there has been no evidence presented by the staff that (1) there was any intent by respondent to evade the tariffs, and (2) that such free transportation constituted a rebate or allowance on other shipments transported by the carrier for Lady's Choice Foods under the carrier's tariff or under the Commission's established minimum rates. It also urges as a defense that there had been a rental of the trailer at a fixed amount of $300 per month and that in accordance with such rental agreement there was a pre-existing debt of $7,200 prior to the hauling in question, that the charge for the transportation of the shipments involved had been determined by the respondent to be $6,839.78, and that said latter amount was properly offset from the pre-existing debt, citing Koffman v. Modern-Imperial, 239 Adv. Cal. App. 135.

Intent is not charged or specified with respect to the issues here nor is it a necessary element of a violation of Sections 453, 494, 3667, 3668, 3670 and 3737 of the Public Utilities Code.

The evidence presented by the staff shows that respondent transported for Lady's Choice Foods during the period June 1 to

November 30, 1964 such commodities as fibreboard cartons and beverages, flavored or phosphated, which respondent was required to transport as a highway common carrier at rates no different from those set forth in its tariff, that during the same period respondent transported spices, bleaches, swimming pool supplies and household ammonia, among other commodities for which it was required to charge rates no lower than those established by the Commission in its Minimum Rate Tariff No. 2, and that during the same period respondent transported fresh strawberries for which it was required to charge rates no lower than those established by the Commission in its Minimum Rate Tariff No. 8.

The claim of respondent to offset the no charge transportation by an agreement for payment of rental for a special trailer is not supported by any written bookkeeping entries of any party and the testimony of a retired official in regard to a personal agreement to make credits in this regard is not sufficient for making credits for rating purposes. The rule in Koffman v. Modern Imperial is that a set-off is clearly proper if its recognition causes no danger that it may be used as a medium for evasion of scheduled tariff rates. That clearly is not the case here where the issue is whether there has been an evasion of scheduled tariff rates. Furthermore, under the Koffman rule the amount of the pre-existing debt must be definite and certain. In this case there was no evidence of indebtedness on the books of either party, the parties were unsure of the particular dates the trailer was rented, the respondent had not been given any written statement concerning the supposed debt of $7,200, respondent was uncertain when the amounts owing for performing the transportation were computed, and with respect to the transaction no money changed

hands but the presidents of the shipper and respondent "agreed to call it square."

We find that:

1. Respondent, a public utility as defined in Section 216 of the Public Utilities Code, by furnishing transportation of strawberries, empty drums, cucumbers and empty sacks free of charge did make and grant a preference or advantage to Lady's Choice Foods.

2. Respondent, a common carrier as defined in Section 211 of the Public Utilities Code, by the device of furnishing transportation of strawberries, empty drums, cucumbers and empty sacks free of charge did remit a portion of the applicable rates and charges specified and filed in its schedules and tariffs without authority from any order of the Commission and did extend to Lady's Choice Foods a privilege in the transportation of property not regularly and uniformly extended to all corporations and persons.

3. Respondent, a highway permit carrier as defined in Section 3515 of the Public Utilities Code, by the device of furnishing transportation of strawberries, empty drums, cucumbers and empty sacks free of charge did remit to Lady's Choice Foods, a corporation, without any authority from the Commission, a portion of the rates and charges established by the Commission in its Minimum Rate Tariff No. 2 and Minimum Rate Tariff No. 8.

4. Respondent, a highway permit carrier as defined in Section 3515 of the Public Utilities Code, by the device of furnishing transportation of strawberries, empty drums, cucumbers and empty sacks free of charge did permit Lady's Choice Foods, a corporation, to obtain transportation of property, including such commodities as coffee, bleaches, jams and jellies, between points within this state at rates less than the minimum rates then established by the Commission.

Conclusions

Based on the foregoing findings, we conclude that:

1. Respondent violated Sections 453, 494, 3664, 3667 and 3668 of the Public Utilities Code.

2. Respondent should be ordered to collect from Lady's Choice Food the undercharges amounting to $1,593.85.

3. Pursuant to Section 1070 of the Public Utilities Code, respondent should pay a fine of $1,500.

4. Pursuant to Section 3774 of the Public Utilities Code respondent should pay a fine of $1,000.

5. Pursuant to Section 3800 of the Public Utilities Code respondent should pay a fine of $1,593.85.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. 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 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 $4,093.85 to this Commission on or before the twentieth day after the effective date of this order.

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

3. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain 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 undercharges remaining to be collected, 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.

4. The motion to dismiss is denied.

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 6th day of JULY, 1967.

President

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.