

ORIGINALDecision No. 73857

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation }
 for the Purpose of Considering and }
 Determining Revisions in or Reissues }
 of Exception Ratings Tariff No. 1. }

Case No. 7858
 Petition for Modification
 No. 29
 (Filed October 16, 1967)

William H. Kessler, for David and Sons, Inc.,
 petitioner.
Ronald C. Broberg, H. F. Kollmyer and A. D.
 Poe, for California Trucking Association,
 protestant.
Ralph Hubbard, for Cal-Farm Bureau, interested
 party.
T. H. Peceimer, for the Commission staff.

O P I N I O N

This petition was heard and submitted January 11, 1968
 before Examiner Thompson at Fresno.

David and Sons, Inc., a wholly owned subsidiary of Sunline,
 Inc., is engaged in the processing, packaging and sale of roasted
 sunflower seeds, roasted pumpkin seeds, peanuts and pistachio nuts.
 It has its plant at Fresno. By this petition it asks that the
 following commodity descriptions be added to the list of articles
 named in Item 480 of Exception Ratings Tariff No. 1 under the
 heading of "Confectionery, viz.:"

Pumpkin Seeds, in shell, cooked or roasted,
 salted or not salted,

Sunflower Seeds, in shell, cooked or roasted,
 salted or not salted,

Sunflower Seeds, shelled, cooked or roasted,
 salted or not salted.

The request is opposed by California Trucking Association (C.T.A.). It was joined by the Commission staff in a motion for dismissal on the grounds that petitioner has not followed the procedure established by the Commission in its Decision No. 67610 in Case No. 5432, Petition 332 (Technibilt Corporation) governing changes in classification ratings. The indicated procedure is that parties advocating a change in classification should first address the requested change to the National Classification Board.

The instant petition differs from the usual type of request for change in classification. What petitioner seeks here is for the Commission to include the articles involved in an item in the Commission's own exception ratings tariff, which item now provides a fourth class exception rating on candy, chewing gum, nutmeats and roasted corn kernels with which petitioner's articles compete for the consumer's five cents, ten cents or twenty-nine cents at store counters and markets. Petitioner has no grievance with the ratings established by the National Classification Board for its products and for the competing products. In the National Motor Freight Classification, hereinafter referred to as N.M.F.C., roasted sunflower seeds in the shell, roasted pumpkin seeds in the shell, candy, chewing gum, roasted corn kernels and shelled roasted peanuts are rated second class; sunflower seed kernels is rated third class and nutmeats, N.O.I., is rated first class. Petitioner's real grievance is with the Commission, which has established in Item 480 of Exception Ratings Tariff No. 1 a rating of fourth class applicable to certain items such as candy and nutmeats and not applicable to petitioner's seed products. The motion to dismiss will be denied. We do not imply a rescission of the policy announced in Technibilt Corporation. We expect shippers and carriers to refer requests for

change in classifications to the Board except, as in the case here, where the Board cannot provide the relief sought.

To establish an exception rating it must be shown that the transportation characteristics or conditions in California intra-state traffic of the article in question are different than elsewhere, or that the characteristics are similar to many other articles presently enjoying the sought rating. (Pet. of E. I. du Pont de Nemours & Co., 61 Cal. P.U.C. 162.) Petitioner points only to one item, namely Item 480 of Exception Ratings Tariff No. 1. The required showing, therefore, is either (1) the transportation characteristics or conditions of the seeds and kernels in California intra-state commerce are the same as those that provided the basis for the fourth class exception rating for the article listed in Item 480, or, (2) the characteristics of the seeds and kernels are similar to many other articles listed in Item 480. Petitioner has not made either of the required showings.

The basis for the fourth class exception rating in Item 480 is lost in antiquity. In 1938, at the time the Commission established minimum rates in what is now Minimum Rate Tariff No. 2, there was maintained, and apparently for some time, in Pacific Freight Tariff Bureau Exception Sheet No. 1-P a fourth class exception rating on confectionery, which rating was applicable to most of the articles listed today in Item 480. Exception Sheet 1-P, as well as the Western Classification, was adopted and approved to govern the minimum rates then being established. (Inv. re Minimum Rates (Decision No. 31606 of December 27, 1938) 41 CRC 671, 722.) By Decision No. 66195, dated October 22, 1963 (61 Cal. P.U.C. 587) the Commission issued Exception Ratings Tariff No. 1 to supersede Exception Sheet No. 1-S (a reissue of E. S. No. 1-P) as the governing exceptions tariff for Minimum Rate Tariffs Nos. 2 and 5. Item 480 of E.R.T.-1 was lifted from Item 473 of Exception Sheet No. 1-S.

From time to time since 1938 there have been changes involving the ratings now covered by Item 480. The fourth class exception rating was made applicable to the following articles by the decisions listed, of which decisions we take official notice.

<u>Article</u>	<u>Decision No.</u>	<u>Date</u>
Icing Powder	55630	October 1, 1957
Candy Coating	60318	June 28, 1960
Roasted Corn Kernels	68582	February 9, 1965
Cocoa Paste	70095	December 14, 1965

An examination of those decisions fails to disclose any basis for the fourth class rating on the articles listed in Item 480 under the generic heading "Confectionery, viz.:". They also fail to disclose why nutmeats are listed under the heading of confectionery. The reasons for the inclusion of the articles listed above are set forth in the listed decisions; generally the inclusions were based on findings that the transportation characteristics of the articles were similar to those of many other articles listed or were virtually the same as one or more of the articles listed. For example, the characteristics of candy coating were virtually the same as chocolate coating, those of roasted corn kernels virtually the same as cashew nuts and other edible nutmeats; those of cocoa paste virtually the same as cocoa, and those of icing powder similar to those of all of the items covered by the exception. Therefore, we are not cognizant of the differences, if any, between the transportation circumstances and conditions in California intrastate commerce of the articles listed in Item 480 as compared to the circumstances and conditions elsewhere. Although there must have been some basis or reasons for the exception rating on confectionery at the time it was first published, we do not know the reasons now. It had been maintained prior to the establishment of minimum rates by the Commission and, like Topsy, it just "grewed".

Petitioner's presentation consisted of showing that roasted pumpkin seeds and roasted sunflower seeds and kernels are packaged in cellophane bags and are sold at retail for five cents, ten cents, fifteen cents and twenty-nine cents at candy counters and markets. It was also shown that roasted corn kernels, shelled peanuts and other nutmeats, candy, jerky, pistachio nuts in the shell, among other things, are also packaged in cellophane bags and are sold at retail at candy counters and markets at similar prices. Petitioner displayed bags of corn nuts (roasted corn kernels), candy, roasted pumpkin seeds, roasted sunflower seeds and roasted sunflower kernels at the hearing. The bags were of similar type and size. Petitioner's plant manager testified concerning the weight densities and values of his company's products and he said that he had purchased a shipping case of five-cent bags of corn nuts, had measured the case and had weighed it. He said that his computations disclosed that the case of corn nuts had a weight density of 13.40 pounds per cubic foot and a value of 53.07 cents per pound. In Decision No. 68582 the Commission found that there are two major packs shipped by the Corn Nuts Company; one, containing 16 cartons each containing 24 five-cent bags weighed 30 pounds and was 1-2/3 cubic feet in dimension which results in a weight density of 18 pounds per cubic foot, and the other which is a vending pack containing 120 five-cent bags of corn nuts with a weight density of 22.9 pounds per cubic foot. Said decision states that the value of corn nuts was between 36 and 40 cents per pound. Petitioner did not make comparisons of its products with any other articles listed in Item 480.

The weight densities and the values of some articles listed in Item 480 are set forth in the decisions of which we have taken notice. The weight densities and values of petitioner's products are set forth in Exhibit 2. The following tabulation sets forth such data.

<u>Article Description</u>	<u>Pounds Per Cubic Foot</u>	<u>Value Per Pound</u>	<u>Reference</u>
Pumpkin Seeds, roasted, in shell	14.45	75.65	Exh. 2
Sunflower Seeds, roasted, in shell	14.27	41.06	Exh. 2
Sunflower Seed Kernels	20.35	84.43	Exh. 2
Candy Coating, Chocolate	59.74	41.8	D. 60318
Candy Coating, O/T Chocolates	42.68	31.5	D. 60318
Icing Powder	20.75-28.89	29-46	D. 55630
Roasted Corn Kernels	18-23	36-40	D. 66582
All Articles in Exception	18.57-54	25.7-95.4	D. 55630

With respect to the weight density of sunflower seeds in the shell, petitioner's plant manager testified that petitioner has several different shipping packs and the weight densities range from 12.6 pounds to 16.7 pounds per cubic foot. Most of the containers of sunflower seeds shipped by petitioner have densities of 12.6 pounds and 14.2 pounds per cubic foot. The 14.27 figure is an average of the densities of the several packs.

While petitioner made comparisons with bags of candy and nuts, those articles are also shipped and sold in other forms such as in paper boxes, in glass, and in metal containers. Petitioner did not make comparisons with other articles listed in Item 480 and it is difficult to find any similarity between its products and cocoa butter, candy fondant, chocolate candy, or chocolate coating, ice cream coating, cocoa, cocoa paste, cough drops or tablets, chewing gum or icing powder.

In appearance, the roasted seeds are more similar to pistachio nuts or pinon nuts in the shell than to nutmeats or corn nuts. They have no similarity of appearance to any of the other articles listed in Item 480. The exception rating is not applicable to nuts in the shell. If we accept petitioner's showing as a basis

for including roasted seeds in Item 480, then anything that is sold at retail at candy counters and markets at the prices named, including jerky, smoked sausage, potato chips, corn chips, cracklings, cheese puffs and possibly a hundred more items would be entitled to the same rating.

We find that:

1. The transportation characteristics of roasted pumpkin seeds, roasted sunflower seeds and roasted sunflower kernels are not similar to the transportation characteristics of the articles listed in Item 480.

2. Some of the articles listed in Item 480, namely candy, nutmeats and roasted corn kernels, are sometimes packaged in cellophane bags and are sold at places where petitioner's products are sold at the same prices as petitioner's products.

3. Petitioner has been able to successfully market its products in California and has increased its production even though said bags of candy, nutmeats and roasted corn kernels enjoy an exception rating of fourth class as provided in Item 480 and roasted sunflower kernels has a rating of third class and roasted pumpkin seeds and roasted sunflower seeds have a rating of second class.

4. It has not been shown that the exception rating in Item 480 prejudices or in any way interferes with the marketing of petitioner's products.

5. It has not been shown that the establishment of a fourth class exception rating on roasted pumpkin seeds, roasted sunflower seeds or roasted sunflower seed kernels is reasonable or is justified by transportation conditions.

We conclude that the petition should be denied.

C. 7858, Pet. No. 29 lm

ORDER

IT IS ORDERED that Petition for Modification No. 29 filed by David and Sons, Inc., herein, is denied.

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

Dated at San Francisco, California, this 19th day of MARCH, 1968.

[Signature]
President

[Signature]

[Signature]

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Commissioners