MS

ORIGINAL

Decision No. 78065

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation into the rates, rules regulations, charges, allowances, and practices of all common carriers, highway carriers, and city carriers relating to the transportation of sand, rock, gravel, and related items (commodities for which rates are provided in Minimum Rate Tariffs Nos. 7 and 17).	Case No. 5437 Petition for Modification No. 112, Second Amendment filed March 11, 1968, and Order Setting Hearing in Decision No. 72028 dated February 15, 1967

(Appearances are shown in Appendix A)

O P I N I O N

The Proposed Report of Examiner John W. Mallory was filed March 13, 1970 and was duly served upon the parties. The Examiner's Report is appended hereto as Appendix B.

Exceptions to the Examiner's Report were filed by California Dump Truck Owners Association (CDTOA), by California Trucking Association (CTA), by Southern California Rock Products Association (SCRPA), and by the Commission staff (Staff). A pleading entitled "Memorandum In Regard to Proposed Report of Examiner" was filed by Western Conference of Teamsters (Teamsters). Replies to exceptions and to the Teamsters' pleading were filed by CDTOA, SCRPA and California Asphalt Pavement Association (CAPA).

Because of the number and extent of the exceptions and replies, detailed discussion of the excepted findings appears necessary.

No exceptions were directed to the Examiner's recommended findings A-1, A-2, A-4, B-2 and B-4; said findings should become the findings of the Commission.

DISCUSSION OF EXCEPTIONS

Recommended Findings A-3 and A-5

Recommended Finding A-3 reads as follows:

> "A-3. Dump truck overlying carriers engaged in construction work perform more services and incur more overhead expenses than dump truck carriers engaged in transportation of manufactured materials (such as aggregates and asphaltic concrete), thus indicating that dump truck overlying carriers engaged in construction should receive a greater amount of revenue for services performed for underlying carriers than overlying carriers engaged in transportation of manufactured materials."

CDTOA, in excepting to the foregoing finding, states:

> "The only basis for this proposal seems to be the opinion of a witness for CTA and the staff witness testimony under cross examination 'that overlying carriers engaged in dirt hauling felt that the 5 percent retained by them was insufficient.' (Proposed Report, p. 21) The CTA witness described certain work performed and expenses encountered by overlying carriers in connection with construction work and stated these were generally unnecessary for transportation under interplant rates. Without indication or any apparent investigation of the work and expenses encountered by overlying carriers in connection with dump truck transportation under interplant rates - or other types of dump truck service such as zone hauling - the CTA witness voiced his conclusion. For the Commission to make a Finding of Fact on such tenuous bases, and especially when it is not a premise to a recommended Conclusion Law or a Recommended Order seems improper, erroneous and superfluous." CDTOA recommends A-3 be deleted.

Finding A-3, together with Finding A-4,[1/] are preliminary to Finding A-5, reading as follows:

> "A-5. The present provisions of Item 94 of MRT 7 and Item 460 of MRT 17 are in need of revision."

1/ No exceptions were taken to Finding A-4, which reads as follows:

> "A-4. Certain carriers and carrier groups are not wholly satisfied with the present division of revenues as between overlying carriers and underlying carriers; particularly subhaulers with respect to payments for hauling aggregate materials and asphaltic concrete under zone rates in MRT 17, and overlying carriers with respect to hauling on construction projects under rates in MRT 7."

CDTOA and the Commission staff except to Finding A-5. CDTOA stated as follows:

> "This finding can only be premised on the finding of A-3 above and is not based on any testimony or evidence of probative value received during the course of these proceedings. Furthermore no Conclusion of Law or Recommended Order derives from this recommended Finding. It also would appear to be in direct conflict with recommended Finding of Fact A-6 which clearly stated that the record does not contain sufficient economic data including cost information, to determine and prescribe just, reasonable and non-discriminatory rates as between overlying and underlying carriers." CDTOA proposes that recommended finding A-5 be deleted.

The Commission staff states as follows:

> "There is nothing in the record to support a conclusion that these provisions 'are in need of revision.' Such a finding is entirely without foundation and should be stricken."

The present provisions of MRT 7 and MRT 17 require that subhaulers receive 95 percent of the applicable minimum rates (less certain taxes and liquidated amounts) regardless of the type of dump transportation performed and the type of rates under which said transportation is performed. Incorporated in this record were certain portions of the record in Petition 122, which led to Order Setting Hearing in Decision No. 72028, dated February 15, 1967. The data introduced by CTA's witness furnishes a general comparison of the responsibilities of overlying carriers engaged in so-called dirt hauling versus hauling from an aggregate producing plant to a concrete batch plant. The evidence introduced by CTA's witness and in the earlier proceeding indicates that different services on behalf of subhaulers are required of, and are performed by, overlying carriers engaged in different types of dump truck services. The fact that more services apparently are performed by overlying carriers engaged in so called "dirt-hauling" presents a prima facie indication that a greater recompense for such service than for aggregates hauling would

be reasonable. It is true that there are no accurate measurements of the costs of such different services. As indicated by Finding A-2, the flat 5 percent retention by overlying carriers was initially established (on petitions of CDTOA) without the benefit of the specific cost information which CDTOA now believes is essential as basis for revision of the 5 percent retention, as indicated in its exception to Finding A-3.

The purpose of the Order Setting Hearing herein was to develop such cost data. No party to the proceeding (including our Staff) attempted to quantify the value of overlying carriers' services under different transportation conditions, nor did any party express a willingness to make such attempt. The record herein contains sufficient facts to show that different amounts of service are required to be performed by overlying carriers for dirt hauling on construction projects, as opposed to hauling from an aggregate producing plant to a concrete batch plant; the record does not show the dollar amounts of these differences.

The record herein is sufficient to adequately support the need for further investigation of the allocations of revenues between overlying carriers and underlying carriers to determine their adequacy. Findings A-3 and A-5 should be modified to read as follows:

> "A-3. Dump Truck Overlying Carriers engaged in construction work perform more services and incur more overhead expenses than dump truck carriers engaged in transportation of manufactured materials (such as aggregates and asphaltic concrete), thus indicating that dump truck overlying carriers engaged in construction <u>may require</u> a greater amount of revenue for services performed for underlying carriers than overlying carriers engaged in transportation of manufactured materials."

"A-5. The present provisions of Item 94 of MRT 7 and Item 460 of MRT 17 are in need of further study with a view to prescribing different provisions for transportation services on construction projects, as opposed to other types of services."

Recommended Finding A-6

Recommended Finding A-6 reads as follows:

"A-6. The record herein does not contain sufficient economic data, including cost information, to determine and prescribe just, reasonable and nondiscriminatory provisions relating to allocations of gross dump truck revenues as between overlying and underlying carriers. (Section 3662 of the Highway Carriers' Act.)"

In its exceptions to this finding, the Staff states as follows:

"It should be noted that the record does not establish that the 'allocations' of revenues are unjust, unreasonable or discriminatory. In fact the reverse is true. The staff evidence (TR. Vol. 10, Page 863-872) as discussed on Page 21 of the Proposed Report is clearly to the contrary. Moreover, these tariff provisions have been in existence for over twenty years. It is axiomatic in the consideration of rates that a rate or tariff provision of long standing is prima facie reasonable until proven otherwise. This particular provision has stood the test of time and has been used extensively. To suggest that the provision is other than reasonable merely because a study relating to some undefined cost areas has not been made is groundless and wholly unsupportable. It is, therefore, recommended that this finding be stricken."

As stated in connection with Recommended Findings A-3 and A-5, the provisions of MRT 7 and MRT 17 establishing divisions of revenues between overlying carriers and underlying carriers were not based on cost information, nor was such type of data produced in the instant Order Setting Hearing. In view of modified Findings A-3 and A-5, above, Recommended Finding A-6 is a necessary requisite to disposing of the issues raised in the Order Setting Hearing, and should be retained.

In its exceptions to Recommended Finding A-6, CTA stated as follows:

> "CTA offered evidence to show that tariff provisions dealing with allocation of revenue between overlying and underlying carriers should be deleted from the Commission's Minimum Rate Tariffs Nos. 7 and 17. It is CTA's position that regulation is neither needed nor effective in this area. Lack of cost evidence does not affect the validity of CTA's position that such regulation must be either deleted or made complete, as it is in Minimum Rate Tariff No. 10. In fact, cost evidence is not a necessary element for the Commission to consider in conjunction with CTA's proposal."

CTA's proposals, that all existing regulations regarding transactions between overlying carriers and underlying carriers be cancelled, are considered and disposed of in later findings. CTA's alternate proposal was that overlying carriers pay underlying carriers 100 percent of the minimum rates, such as is required in connection with cement rates in MRT 10. (The Examiner made no recommended finding with respect to CTA's alternate proposal.) MRT 10 also contains provisions fixing the amount of trailer rental (at 9 percent of the applicable minimum rate). No useful purpose would be served by establishing a 100 percent provision for subhauling without concurrently setting trailer rental rates; otherwise, subhaulers' revenues are easily adjusted by varying the amount of trailer rental charges, even though the tariff would provide a payment of 100 percent of the minimum rate to the subhauler. As indicated hereinafter adequate bases for establishing trailer rental rates were not presented in this record. The following additional finding is required:

> "As an alternative to cancelling all provisions in MRT 7 and MRT 17 regulating payments to subhaulers, CTA proposed that subhaulers receive 100 percent of the minimum rates. Such revision would serve no purpose unless trailer rental rates or similar provisions were concurrently established. The record herein is not adequate to establish reasonable trailer rental rates."

Recommended Finding B-1

Recommended Finding B-1 reads as follows:

> "B-1. CTA proposes that all provisions set forth in MRT 7 and MRT 17 regulating relationships between overlying and underlying carriers be canceled."

In its exceptions to this finding, CDTOA states:

> "Unless the findings of fact are to include all of the recommendations and proposals of participating parties, the proposal of a single party in this proceeding hardly seems proper. It seems to be pure verbiage insofar as these findings are concerned." CDTOA recommends this proposed finding be deleted.

This finding will be deleted.

Recommended Finding B-3

Recommended Finding B-3 reads as follows:

> "B-3. Determination of the question of whether dump truck subhaulers are employees within the meaning of the applicable labor laws, or are independent contractors, lies within the jurisdiction of the National Labor Relationship Board."

Exceptions to this finding were filed by CDTOA, the Commission staff, and Teamsters. Replies to Teamsters' exceptions were filed by CAPA, SCRPA and CDTOA.

It is the consensus of the exceptions and replies that the foregoing question, as raised in CTA's evidentiary presentation, is partially answered by Decision No. 77072, dated April 14, 1970, in Case No. 8481, which established General Order No. 130 governing the leasing of motor vehicles. Said decision reads (on mimeo page 29) as follows:

> "Throughout the hearings there were references to the owner operator who leases his equipment to a carrier and goes on the carrier's payroll as an employee. One of the primary purposes of the General Order has been to compile the criteria which determine whether such a person has effectively removed himself from Commission regulation. These criteria are set forth in Part 1 of the General Order. Those who do not comply with Part 1 are subhaulers."

In view of the criteria adopted by the Commission in Decision No. 77072, the Examiner's Recommended Finding A-6 clearly is inappropriate and should be deleted.

Recommended Finding B-5

Recommended Finding B-5 is as follows:

> "B-5. It has not been shown that it would be in the public interest to cancel existing provisions in MRT 7 and MRT 17 regulating relationships between overlying carriers and underlying carriers. (Section 3502 of the Highway Carriers' Act.)"

CTA excepts to this finding, stating as follows:

> "CTA presented evidence to show that maintaining such existing provisions is not in the interest of the general public of California. CTA believes that the real issue is whether or not the existence of such provisions are in the public interest, not whether cancelling them is in the public interest. CTA has made every effort to show that such provisions are not in the public interest. It is unreasonable to impose upon the proponent of cancellation the burden of proving that such cancellation is in the public interest. That is similar to asking one to prove that something does not exist. CTA raised the issue of whether or not such regulation is necessary in the public interest and whether or not such regulation does not in fact result in situations contrary to the public interest."

We have carefully considered the above argument. In face of vigorous opposition by carrier groups and individual carriers to CTA's proposal, on the basis that existing provisions are required for the protection of carriers operating as subhaulers, the burden of proving existing provisions are not in the public interest has not been met by CTA. Therefore, Finding B-5 should be amended to read as follows:

> "It has not been shown that existing provisions in Minimum Rate Tariffs Nos. 7 and 17 regulating relationships between overlying carriers and underlying carriers are not in the public interest. (Section 3502 of the Highway Carriers' Act.)"

Recommended Finding A-6

The Examiner's Recommended Finding A-6 reads as follows:

"A-6. The question whether certain types of dump truck operations should be exempted from regulation by this Commission has been the subject of proposed legislation in several prior sessions of the Legislature. Legislation which would have exempted dump truck transportation on construction projects was passed by the Legislature, but was vetoed by the Governor. The Highway Carriers' Act was amended during the time these proceedings were being held to incorporate therein a new class of carrier, viz.: 'Dump Truck Carrier', and to establish regulations in connection therewith. (Statutes 1969, Chapter 1004.)"

CTA, in its exceptions to this finding, states as follows:

"No legislative attempt to exempt dump truck operations from regulation by the Public Utilities Commission is remotely connected to CTA's proposal in these proceedings. CTA is herein proposing to eliminate Commission imposed regulation between carriers. CTA does not herein propose any interference with the legislatively imposed regulation between carrier and shipper. This recommended finding seems to imply that the Commission cannot modify or rescind regulation of its own making and that legislative action is required."

The foregoing finding merely states the existing factual situation, and does not imply that the Commission cannot regulate in the particular field. Said finding is a foundation to the Examiner's Recommended Conclusion 2, that the Legislature, having considered and passed legislature similar to CTA's proposal herein, should determine those dump truck operations which should be regulated and those which should be exempted. This finding should be retained.

Recommended Finding C-1

The Examiner's Recommended Finding C-1 reads as follows:

"C. On the issues raised by the proposals of CDTOA in Petition No. 112 (Second Amendment):

1. Petitioner has not shown that present industry practices result in unfair treatment to subhaulers or to overlying carriers, nor that such practices cause a hardship to either class of carriers."

CDTOA and the Commission's staff except to this finding. CDTOA urges that the testimony of its General Manager presents sufficient facts to show unfair treatment. The testimony referred to (on pages 4 through 7 and on page 259 of the transcript) merely recites certain inquiries to the Commission and its replies, and cites the belief of CDTOA that the absence of regulation creates a void.

CDTOA also cites the testimony of the Staff field representative on pages 47, 48, and page 57 of the transcript. That witness stated that from an enforcement standpoint regulation of trailer rental would be helpful. He pointed to no specific instance of unfair treatment directly within his knowledge.

CDTOA also cites the testimony of the Staff rate expert, on page 95 of the transcript, as follows:

> "Well, I found that there is a great disparity in the charges made by trailer rentals.
>
> "Now, the percentages which were found to be paid for trailer rentals are confirmed by the testimony of Mr. Maderious (the Staff field representative).
>
> "The discussions that I had with the carriers also indicated there was need for the establishment of either a maximum trailer rental charge or a minimum - so called puller rate.
>
> "The carriers indicated that they favor the establishment of such provisions."

Such testimony does not establish unfair treatment of any group of carriers; it merely indicates carriers' preference for regulation.

CDTOA also states with respect to the matters covered by Recommended Finding C-1 as follows:

> "It would seem clear that the lack of a specified rate for tractors pulling non-owned dump truck equipment or the absence of a limit on the amount which can be paid for the leasing of trailers makes it difficult if not impossible for the staff, carriers or shippers to enforce or comply with the rates and regulations promulgated by Minimum Rate Tariffs Nos. 7 and 17. Recommended Finding of Fact C-1 should be deleted."

The Staff, in its exceptions to this finding states as follows:

> "This finding does not reflect the record and is erroneous. Abuse of the subhauler is amply documented by virtually every witness of record. Petitioner through several witnesses including its general manager (TR Vol. 1, Pages 3-16) and witnesses testifying for AIOO (TR Vol. 8, Pages 567-573; 597-610; Vol. 15, Page 1379) fully demonstrated that present industry practices with respect to trailer fees result in unfair treatment to both subhaulers and to overlying carriers. Moreover, the abuse of subhaulers was demonstrated by a CTA witness (TR. Vol. 14, Page 1286). The Commission itself has recognized that these present practices result in unfair treatment. In Investigation of MacDonald & Dorsa Transportation, 68 Cal. P.U.C. 87, for example, the Commission found the trailer rentals deducted by the overlying carrier from subhaulers were excessive and unreasonable. The Examiner cites this finding on Page 28 of the proposed report. His proposed report itself contradicts Recommended Finding C-1. It should be stricken."

The MacDonald & Dorsa decision (cited by the Staff) found that the ostensible overlying carrier (MacDonald & Dorsa) was not a highway carrier, but was the alter ego of the shipper (Santa Clara Sand and Gravel). Therefore, the cited case deals with shipper-carrier relationships, not with carrier-carrier relationships as implied in the Staff argument. The finding above relates to the presentation of petitioner herein and not to Commission findings in other proceedings (See Finding C-4).

It is true that testimony of AIOO witnesses indicate that they felt, as subhaulers, the amounts deducted for trailer rental were excessive. However, this testimony was not presented on behalf of petitioner. Although there was testimony on this point by

witnesses for AIOO, petitioner's presentation did not stress that the present situation was unfair to any particular group of carriers, as indicated in the Examiner's finding. As the Examiner's finding relates only to the evidence adduced by petitioner and not by other parties, it should be supplemented to indicate the nature and extent of other evidence on this point, as follows:

> "Petitioner did not present evidence to show that present industry practices result in unfair treatment to subhaulers or to overlying carriers, nor that such practices cause a hardship to either class of carriers. The only testimony adduced to this effect was presented by subhaulers appearing for AIOO. Their testimony indicated that the average 25 percent of gross revenues now assessed for trailer rental is excessive in their opinion."

It should be pointed out here that petitioner proposes that the "industry-average" trailer rental of approximately 25 percent be established as reasonable. The only testimony relating to whether or not carriers are unfairly treated under existing conditions was presented by subhaulers appearing for AIOO, who indicated that trailer rental in amount of 15 or 20 percent would be reasonable in their estimation.

Recommended Finding C-2

The Examiner's Recommended Finding C-2 reads as follows:

> "C-2. The record does not establish that there is, at this time, a compelling reason to establish additional minimum rate provisions governing the allocation of revenues between 'tractor only' subhaulers and their overlying carriers."

Exceptions to this finding were made by CDTOA and the Commission staff. CDTOA argues as follows:

> "Both Exhibit A-2 and Exhibit A-3 show that the practice of power units pulling non-owned dump truck trailing equipment over the public highways is widespread, and testimony indicated that the numbers of power and trailing units involved in this practice have been increasing. In addition to CDTOA and the staff, AIOO urge the adoption of some regulation in

> the dump truck tariffs to define and regulate the relationships between separately owned components of a dump truck unit of equipment. The AIOO differed only as to the level of the proposed rate. No other participants in the proceeding except the CTA opposed establishment of such a rule or rate. The absence of any rate or rule places all carriers and shippers involved in these practices in jeopardy of violating the Commission's tariff unless and until such a rule is adopted. It follows therefore that there is a compelling reason to promptly establish additonal minimum rate provisions governing these revenue allocations. Recommended Finding C-2 should be deleted."

The Commission staff argues as follows:

> "This proceeding emanates from a number of previous proceedings involving the subject. The Commission itself is the authority for the urgent need to establish a division of charges for this service. The categorization of this basis of divisions as 'additional' minimum rates is a misnomer. The urgency is clearly established in the record as testified to by CDTOA (TR. Vol. 1, Page 5). The staff also testified as to the need for establishing the minimum rate provisions (TR. Vol. 1, Page 95; Vol. 2, Pages 143, 150, 153, 154; Vol. 3, Pages 191, 192). This need was further demonstrated by the wide range of trailer rental charges being assessed as testified to by CDTOA, AIOO and the staff. The division of revenue between overlying and underlying carriers or the deduction from the minimum rates in case of shippers providing trailers has long been determined as necessary in the dump truck industry. The urgency for this adjustment is a matter of common knowledge in the transportation industry as this record establishes. Failure to act here evades this very basic issue."

We must disagree with the Staff that the testimony of CDTOA on page 5 of the transcript indicates any urgency. On the contrary, such testimony merely indicates the lack of trailer rental charges is a longstanding problem which CDTOA desires be corrected. The wide range of trailer rentals, absent evidence to show their non-compensatory or discriminatory nature, merely indicates that different agreements have been reached.

However, the record does establish that it is the desire of the majority of the parties to the proceeding that such type of rates be established. For that reason, Finding C-2 should be deleted.

Recommended Finding C-3

The Examiner recommended the following:

> "C-3. The record herein does not contain adequate economic data, including cost information, on which to make a determination of just, reasonable and nondiscriminatory minimum rates for services of 'tractor only' subhaulers; either when the trailer is furnished by a carrier or by a shipper. (Section 3662 of the Highway Carriers' Act.)"

Exceptions to this finding were made by CDTOA and the Commission staff. CDTOA's exceptions read as follows:

> "Admittedly the record does not contain information relative to 'tractor only' operational costs. CDTOA has premised its proposal on the preponderant practice in the industry. We contend that this is, in fact, economic data. The reasonability of the proposed division of revenues was tested by Petitioner's Exhibit A-6. That this approach is proper, is borne out by the fact of Item 94 of Minimum Rate Tariff No. 7 which was premised on substantially the same basis. The 95% rule contained in Item 94 of Minimum Rate Tariff 7 has withstood the test of approximately 20 years, to the obvious general satisfaction of most of the for-hire dump truck industry..."

The approach recommended by CDTOA, as indicated above, is not appropriate for further amendment of the tariff for two reasons; the first being that individual subhaulers testifying on their own behalf believe something substantially less than the industry average would be reasonable. The second is that the reasonableness of the provisions of Item 94, established on this basis, is questionable as indicated by the discussion in connection with foregoing findings. We should not attempt to set additional rates on the method used for Item 94.

The Staff's objections to the Examiner's Recommended Finding C-3 are the following:

> "The record contains adequate economic data, including cost information, on which to make a determination of just, reasonable and nondiscriminatory minimum rates for services of 'tractor only' subhaulers... Two carrier groups, the California Dump Truck Owners

> Association and the California Trucking Association have offered evidence with respect to cost in this record. A formalized type of cost presentation in a designated form has never been required by the Commission. Moreover, there are a number of precedent cases where the Commission has acted in the absence of such formal cost studies where the record considers costs. The establishment of the current relationship between overlying and underlying carriers in Southern California by Decision No. 40724 (47 PUC 460) and its extension to Northern California by Decision No. 52388 (54 PUC 557) is a case in point."

In view of the foregoing, the Staff urges that Recommended Finding C-3 be revised to state that the record contains sufficient economic data, and it further recommends that appropriate provisions establishing the division of revenue be prescribed.

The Staff, in its exceptions to C-3, urges that CDTOA's cost study be given a weight that CDTOA doesn't accord to its own study in its exceptions to this finding. CTA's studies were derived from basic cost studies introduced by the Staff. Said studies relate to interplant movements; whereas the preponderance of "tractor only" operations are conducted in connection with so-called "dirt hauling" on construction projects. Moreover, the CTA study involving MRT 7 applies only to a very limited portion of the traffic subject to that tariff (certain interplant movements in Northern Territory). Reliance upon the cost data of record would require the Commission to choose between inadequate studies which produce conflicting results. The CDTOA study apparently shows that trailer operating costs are in the neighborhood of twenty-five percent of total costs; CTA's studies indicate trailer costs are in the range of 11 to 16 percent of total costs. The Commission staff rate witness had these data available to him in the course of the hearing and refused to make a recommendation based thereon. The Commission staff exceptions would now have us find that these data are adequate on which to base a division of

revenues between carriers; again without specifying what the Staff believes a reasonable division would be.

The Examiner's Recommended Finding C-3 correctly reflects the record and should be retained.

Recommended Finding C-4

Recommended Finding C-4 reads as follows:

"C-4. The Commission has heretofore found that MRT 7 contains no authority for a shipper to make any deduction from the transportation charges provided therein, whether or not such deduction is reasonable. (Decisions Nos. 73791 and 76055 supra.) MRT 7 and MRT 17 should be amended to specifically provide that 100 percent of the minimum rate must be received by the carrier when the shipper furnishes the trailer, unless authority to do otherwise is granted to the carrier."

CDTOA excepted to the above finding, stating as follows:

"Neither the MacDonald and Dorsa decision nor the Kelly decision referred to above required that the amounts charged and collected by the alter ego shipper entities be refunded to the carriers. It is true that the Commission has found that MRT 7 contains no authority for a shipper to make deductions from the transportation charges provided therein but the Commission also stated, as quoted from the Kelly Decision hereinabove, that trailer rentals from the shipper entity must be handled as a separate transaction. The clear conclusion is that a reasonable and fair trailer rental is proper if settlement for such rentals is not a part of the settlement for the transportation charges. Therefore imposition of a 100% rule as an alternative to the proposal of petitioner herein does not seem justified and would in fact have the effect of simply creating additional paperwork, and/or additional rate applications with resultant hearings thereon, or both. For these reasons, Recommended Finding C-4 should be deleted."

The Commission staff excepted to C-4, as follows:

"As we have heretofore pointed out, the conditions in the industry demand and the record supports the establishment of a prescribed division of revenue. There is no support for a 100% figure in the record. As a fundamental concept, Finding 4 and Conclusion 1 are erroneous on this record. Moreover, they are untenable with respect to basic tariff interpretation. The Examiner relates this finding to the discussion at the top of Page 28 (of the Proposed Report) to the effect that transactions between

> carriers and shippers are 'fraught with a danger of possible rebates'. It is precisely the danger of possible rebate, as outlined by the Examiner in his lengthy discussion of various Commission investigations, which is sought to be eliminated by petitioner's proposal. In effect, the Examiner concludes in view of the Kelly Trucking Co. proceeding (Decision No. 76055) that because the Commission found that the minimum rate tariff contains no provision authorizing a shipper to make any deduction from the applicable minimum rates and charges for the transportation performed that a provision to that effect should be included in the minimum rate tariff... Finding 4 and Conclusion 1 are neither responsive to petitioner's proposal or to the evidence offered in support thereof and should be stricken."

SCRPA, in its exception to C-4, states as follows:

> "At page 28 of the Proposed Report, there is argument given to support the recommendations of the Examiner in this regard. There shall be no attempt here to further encumber the file with direct quotations. Suffice it to say that the Examiner cites Investigation of MacDonald & Dorsa Transportation 68 Cal P.U.C. 87, and Investigation of Kelly Trucking Company, Decision 76055 dated August 19, 1969, in Case No. 8805, in support of his contentions. Even assuming that the issue of compensation for shipper-owned trailers were the exclusive subject of this proceeding (which this Association respectfully submits was not a separate issue at all), the cited cases are not in point at all. They merely recite legal truisms which are not codified, either affirmatively or negatively..."

Inasmuch as none of the parties to the proceeding proposed rules similar to that stemming from the Examiner's Recommended Finding C-4, and as the Examiner's rule is opposed by the parties, Recommended Finding C-4 will be deleted.

Findings of Fact

Based upon the record, the Examiner's Report, the exceptions and replies thereto, and the foregoing discussion, the Commission finds as follows:

On the issues raised by the Commission in Order Setting Hearing in Decision No. 72028:

1. The 5 percent of gross revenues allocated to overlying carriers under the provisions of Item 94 of MRT 7 is intended to recompense such carriers for services performed by them on behalf of subhaulers, and such services fall in the category of overhead or indirect expenses. (Decisions Nos. 40724 and 52388.)

2. The existing provisions of Item 94 of MRT 7 were established on data relating to industry practices, some 20 years ago; substantially identical provisions were subsequently incorporated in Item 460 of MRT 17; and the provisions of Item 94 of MRT 7 and Item 460 of MRT 17 never have been tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers.

3. Dump truck overlying carriers engaged in construction work perform more services and incur more overhead expenses than dump truck carriers engaged in transportation of manufactured materials (such as aggregates and asphaltic concrete), thus indicating that dump truck overlying carriers engaged in construction may require a greater amount of revenue for services performed for underlying carriers than overlying carriers engaged in transportation of manufactured materials.

4. Certain carriers and carrier groups are not wholly satisfied with the present division of revenues as between overlying carriers and underlying carriers; particularly subhaulers with respect to payments for hauling aggregate materials and asphaltic concrete under zone rates in MRT 17, and overlying carriers with respect to hauling on construction projects under rates in MRT 7.

5. The present provisions of Item 94 of MRT 7 and Item 460 of MRT 17 are in need of further study with a view to prescribing

different provisions for transportation services on construction projects, as opposed to other types of services.

6. The record herein does not contain sufficient economic data, including cost information, to determine and prescribe just, reasonable and nondiscriminatory provisions relating to allocations of gross dump truck revenues as between overlying and underlying carriers. (Section 3662 of the Highway Carriers' Act.)

On the issues raised in connection with CTA proposals:

7. As an alternative to cancelling all provisions in MRT 7 and MRT 17 regulating payments to subhaulers, CTA proposed that subhaulers receive 100 percent of the minimum rates. Such revision would serve no purpose unless trailer rental rates or similar provisions were concurrently established. The record herein is not adequate to establish reasonable trailer rental rates. (Finding 3.)

8. While present regulation by the Commission of dump truck carriers is not wholly satisfactory, such regulation is not such a complete failure as to require abandonment of a portion of said regulation, as proposed by CTA.

9. Interviews conducted by the staff and testimony of individual carriers show that the present type of regulation between carriers is generally satisfactory to them, although some carriers believe that the allocation of revenues between overlying and underlying carriers should be revised.

10. It has not been shown that existing provisions in MRT 7 and MRT 17 regulating relationships between overlying carriers and underlying carriers are not in the public interest. (Section 3502 of the Highway Carriers' Act.)

11. The question whether certain types of dump truck operations should be exempted from regulation by this Commission has been the

subject of proposed legislation in several prior sessions of the Legislature. Legislation which would have exempted dump truck transportation on construction projects was passed by the Legislature, but was vetoed by the Governor. The Highway Carriers' Act was amended during the time these proceedings were being held to incorporate therein a new class of carrier, viz.: "Dump Truck Carrier", and to establish regulations in connection therewith. (Statutes 1969, Chapter 1004.)

On the issues raised by the proposals of CDTOA in Petition No. 112 (Second Amendment):

12. Petitioner did not present evidence to show that present industry practices result in unfair treatment to subhaulers or to overlying carriers, nor that such practices cause a hardship to either class of carriers. The only testimony adduced to this effect was presented by subhaulers appearing for AIOO. Their testimony indicated that the average 25 percent gross revenues now assessed for trailer rental is excessive in their opinion.

13. The record herein does not contain adequate economic data, including cost information, on which to make a determination of just, reasonable and nondiscriminatory minimum rates for services of "tractor only" subhaulers; either when the trailer is furnished by a carrier or by a shipper. (Section 3662 of the Highway Carriers' Act.)

Conclusions of Law

1. The Legislature, having had such provisions under consideration in recent sessions, and having enacted statutory provisions relating thereto, should determine those dump truck operations which should be regulated by this Commission and those which should be exempted from such regulation.

2. Petition No. 112 (Second Amendment) should be denied and Order Setting Hearing in Decision No. 72028 should be discontinued.

O R D E R

IT IS ORDERED that Petition No. 112 (Second Amendment) in Case No. 5437 is hereby denied and Order Setting Hearing in Decision No. 72028 is hereby discontinued.

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

Dated at San Francisco, California, this 8th day of DECEMBER, 1970.

Chairman

Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A

List of Appearances

PETITIONER

E. O. Blackman, for California Dump Truck Owners Association, petitioner in Petition No. 112.

INTERESTED PARTIES

G. Ralph Grago, Robert Kelly, Don A. Fendon, and Richard G. Brown, for Associated Independent Owner-Operators, Inc.; Richard W. Smith, H. F. Kollmyer, and A. D. Poe, for California Trucking Association; Scott J. Wilcott and Ernest E. Gallego, for Southern California Rock Products Association; Brundage & Hackler, by Daniel Feins, for Western Conference of Teamsters; Harry C. Phelan, Jr., for California Asphalt Pavement Association; Fred Imhof, by Harry C. Phelan, Jr., for Industrial Asphalt, Inc.; Bill T. Farris, for the County of Los Angeles (Flood Control District); E. J. Bertana, for Pacific Cement & Aggregates; and Lawrence A. Wixted, for Blue Diamond Company.

RESPONDENTS

Robert L. Payan and Bertha L. Payan, for Payan Trucking, Inc.; Elton Lackridge, for Princeton Equipment Company; Les Calkins, for Les Calkins Trucking, Inc.; and George Kishida, for himself.

COMMISSION STAFF

William J. McNertney, Counsel, Robert E. Walker, John R. Laurie, and Robert W. Stich.

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APPENDIX B

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances, and practices of all common carriers, highway carriers, and city carriers relating to the transportation of sand, rock, gravel, and related items (commodities for which rates are provided in Minimum Rate Tariffs Nos. 7 and 17).	Case No. 5437 Petition for Modification No. 112, Second Amendment filed March 11, 1968, and Order Setting Hearing in Decision No. 72028 dated February 15, 1967

(Appearances are shown in Appendix A)

EXAMINER'S PROPOSED REPORT

Petition No. 112 (Second Amendment) seeks the establishment in Minimum Rate Tariffs Nos. 7 and 17 of rules providing for compensation for separately owned power units with drivers, when such equipment is operated as a unit with trailers owned by other carriers or shippers. Public hearing in Petition No. 112 (Second Amendment) was held in San Francisco and Los Angeles on September 17 and 18 and October 1 and 2, 1968, respectively. At these hearings evidence was presented by petitioner, California Dump Truck Owners Association (CDTOA), and by the Commission staff.

On October 2, 1968, motions were filed by California Trucking Association (CTA) and by Associated Independent Owner-Operators, Inc. (AIOO) seeking the consolidation of Petition No. 112 (Second Amendment) with Order Setting Hearing in Decision No. 72028, dated February 15, 1967.[1/] Decision No. 74943, dated November 13,

1/ Order Setting Hearing dated February 15, 1967 reads, in part, as follows:

> "In Decision No. 72020 it was concluded that an inquiry should be made into the relationship between overlying and underlying carriers engaged in the transportation of property in dump truck equipment, including the nature of and justification for fees paid to underlying carriers. A public hearing should be held in the captioned proceeding (Order Setting Hearing in Decision No. 72028) for the receipt of evidence in this matter."

1968 granted these motions, and further hearings, on a common record, were held on January 7 and March 18 and 19, in San Francisco, April 1 and 2 in Los Angeles, and June 17 and 18, July 29, November 24 and 25, and December 15 and 16, 1969 at San Francisco. The matters were submitted on the latter date for the preparation of a proposed report, authorized by the Commission on September 30, 1969.

Evidence in the consolidated proceeding was adduced by witnesses appearing for CTA, AIOO, Pacific Cement & Aggregates (PCA), Southern California Rock Products Association (SCRPA) and the Commission staff.

Petition No. 112 (Second Amendment)

CDTOA's general manager testified that CDTOA is a non-profit association of dump truck carriers and has approximately 600 members throughout the State. Its membership includes both underlying carriers (subhaulers) and overlying carriers.[2/] The witness stated that the matter of independently owned power units pulling separately owned dump-truck trailing equipment has been an increasing factor within the dump truck business for the past several years. These situations occasionally involve carrier-owned power units

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2/ MRT 7 contains the following definitions:

"OVERLYING CARRIER (PRINCIPAL CARRIER) means a carrier which contracts with a shipper to provide transportation service for the latter, but which carrier in turn employs another carrier, known as the Underlying Carrier (independent-contract subhauler), to perform that service."

"UNDERLYING CARRIER (independent-contractor subhauler) means any carrier who renders service for an overlying carrier (principal carrier), for a specified recompense, for a specified result, under the control of the overlying carrier as to the result of the work only and not as to the means by which such result is accomplished."

pulling shipper-owned trailers; but the great bulk of the split ownership of equipment involves overlying carriers owning fleets of trailers and so-called owner-operators subhauler owning the power units.

CDTOA's general manager testified as follows with respect to background of separate ownership of power units and trailing units: This type of operation began initially in a small way in 1951 and has become more prevalent with use of bottom dump equipment for the transportation of excavated materials. The great bulk of split ownership involves two entities: overlying carriers owning fleets of trailers and individuals who are owner-drivers of the power units. CDTOA feels that some specific relationship should be set forth in MRT 7 and MRT 17 for such operations. The Commission has heretofore commented on this type of arrangement, but has not stated what the rate relationship should be. CDTOA was advised by the Commission staff that permits are required of power-unit owners pulling trailers owned by other carriers. In response to another inquiry the Commission staff advised CDTOA that no specific division of revenues or charges for the separate units have been established in MRT 7 and MRT 17. It is the purpose of Petition No. 112 (Second Amendment) to have established in MRT 7 and MRT 17 a reasonable division of revenues between the owner-operator of the power unit and the owner of the trailing unit. Other than the foregoing, the witness did not explain in his testimony the reasons why CDTOA believes that its proposal is necessary or desirable.

Petitioner proposes that the following rule be added to MRT 7 and MRT 17:

"TRUCKS OR TRACTORS PULLING DUMP TRUCK TRAILING EQUIPMENT

"Whenever a carrier operating a powered vehicle pulls a dump truck trailer and/or semi-trailer equipment owned or controlled by another carrier, a motor transportation broker or a shipper, not less than 75% of the rate otherwise applicable under the tariff shall be assessed and collected.

"Maintenance or other such expense connected with operation of the dump truck trailing equipment shall not reduce the rate established in this item.

"Note (1) - Provisions of this item apply to minimum rates provided elsewhere in this tariff and do not preclude application of Item 94 (MRT 7) (Item 460 - MRT 17) to such other rates if said item is appropriate."3/

CDTOA's general manager testified that the division of revenues in the association's proposed rule reflects current industry practices in that the percentage of revenue accruing to the power unit is the average or mean of charges currently received by carriers who furnish power units.

CDTOA's general manager and a senior transportation representative of the Commission staff introduced exhibits showing the prevailing practice in the dump truck industry with respect to the division of the assessed rate between overlying carriers and underlying carriers in the instances where the overlying carrier owns or controls the trailers and the subhauler owns or controls the power unit. (Exhibits A-1 and A-2 of CDTOA and Exhibit A-3 of the staff.) Exhibit A-2 (CDTOA) shows that the revenue split between overlying carriers and subhaulers ranges from a low of 65 percent to the subhauler and 35 percent to the overlying carrier, to a high of 85 percent to the subhauler and 15 percent to the

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3/ CDTOA's Exhibit A-7 contains alternative rules to accomplish the same result as the foregoing proposal.

overlying carrier. The data are separately shown for Northern and Southern Territory and for bottom-dump doubles, bottom-dump semis, end-dump semis and transfer trailers. The witness explained that the percentage of the total rate retained by the overlying carrier included (in addition to "trailer rental"): "brokerage" and liquidated amounts (Item 94 of MRT 7), maintenance of the trailer equipment, and liability and property damage insurance for the entire unit of equipment. 4/ The witness did not explain how the revenues retained by the overlying carrier were broken down between

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4/ Item 94 reads as follows:

"PAYMENTS TO UNDERLYING CARRIERS

"Charges paid by anyoverlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall be not less than 95 percent of the charges applicable under the minimum rates prescribed in this tariff, less the gross revenue taxes applicable and required to be paid by the overlying carrier. (See Notes 1 and 2.) The underlying carrier may extend credit to the overlying carrier for a period not to exceed twenty days following the last day of the calendar month in which the transportation was performed, and payment to the underlying carrier must be made within that time. Freight bills for transportation and accessorial charges shall be presented by underlying carriers to overlying carriers within three days after the last calendar day of the month in which the transportation was performed.

"NOTE 1.--As used in this item the term gross revenue taxes means the California Transportation Tax payable to the California Board of Equalization and the tax payable to the California Public Utilities Commission under the Transportation Rate Fund Act.

"NOTE 2.--Nothing herein contained shall prevent an overlying carrier, in paying such charges, from deducting therefrom such liquidated amounts as may be due from the underlying carrier to the overlying carrier, providing such deductions have been authorized in writing by the underlying carrier. Any overlying carrier electing to employ this procedure shall itemize such amounts and maintain for the Commission's inspection all documents involved in the transaction."

Item No. 94 became effective on July 22, 1948 in Southern Territory, pursuant to Decision No. 40724 dated September 16, 1947 (47 Cal. P.U.C. 447) and on January 15, 1956, in Northern Territory, pursuant to Decision No. 52388 of December 20, 1955. (54 Cal. P.U.C. 555.)

the several elements included therein. The data in Exhibit A-2 reflect the operations of approximately 53 overlying carriers and approximately 795 trailing units, of which the preponderance were bottom-dump trains. Exhibit A-2 indicates that the two principal breakdowns were 70 percent/30 percent and 75 percent/25 percent.

Exhibit A-3 (staff) shows the average percentage of the gross revenue deducted by overlying carriers as trailer rental. The percentages set forth in the exhibit are separately shown by the type of equipment and by number of units in operation. The exhibit shows that the mathematical average trailer rental for 807 sets of bottom-dump trailers was 24.4 percent, exclusive of so-called "brokerage" (5 percent) and liquidated amounts. The exhibit covers the operations of 79 overlying carriers and 1,187 units of dump truck equipment. Assertedly this represents the operations of 90 percent of the dump truck carriers engaged in such type of operations.

The Commission staff field representative who presented Exhibit 3-A stated that, while he had no opinion as to what a fair division of rates would be, it appeared from his analyses of current practices that the larger overlying carriers owning the greatest number of equipment units and having the greatest overhead costs also exacted the greatest deduction for trailer rental. This witness also testified that he believed that the proposed division of revenues between the power unit and driver, on the one hand, and the trailer, on the other hand, should be established primarily for the following reasons:

1. Such division of revenues would preclude overlying carriers from competing with each other in bidding for power equipment, and so that the underlying carrier can expect the same compensation for whomever he works.

2. It would be a stabilizing effect for the industry.

A transportation rate expert from the Commission's staff proposed that the following rule be adopted (Exhibit A-4):

"CHARGES FOR PULLING TRAILING EQUIPMENT

"Carriers pulling trailing equipment owned or controlled by another carrier or a shipper shall assess and collect not less than ___ percent of the charges otherwise applicable under the provisions of this tariff. The carrier pulling such trailing equipment shall not be assessed any charge for the maintenance of trailing equipment."

The staff rate expert stated that the foregoing rule is intended as a substitute for the language of CDTOA's proposal, and is intended to accomplish the same purpose. The witness stated that the proposed rule and the provisions of Item 94 of MRT 7 (or Item 460 of MRT 17) should be applied concurrently. Although the proposed rule does not so specify, the witness stated that the carrier furnishing the motive equipment should retain 100 percent of the charges for accessorial services, demurrage and stand-by time.

The staff witness stated that the exact percentage figure needed to complete his proposed rule could not be furnished by him because the cost analyses necessary to such a proposal had not been undertaken by the staff; however, the Commission "in its wisdom" could make a determination of the missing percentage figure.

Testimony to the effect that compensation is inadequate under existing arrangements and would be inadequate under CDTOA's proposed rule was presented by three carriers appearing for AIOO and by that association's general manager. These witnesses represented that trailer rental less than that resulting from CDTOA's proposal would be reasonable and that the amount proposed by CDTOA would be excessive. One carrier witness, who formerly operated as a "puller"

and now operates as a "full-unit" subhauler, urged that 15 percent for trailer rental is adequate, based on his experience in owning and maintaining trailers. Said witness urged that a division of revenues be established in the tariff based on trailer rental of 15 percent, plus 5 percent for so-called "brokerage". Another carrier owning a tractor and pulling trailers owned by a trailer leasing firm, testified that trailer rental was assessed by said firm amounting to 25 percent of gross revenue and 5 percent of gross revenue was assessed as "brokerage" by the overlying carrier. This witness testified that his 1968 gross revenues were $26,323, his total operating expenses (including trailer rental charges) amounted to $19,071, and that trailer rental charges amounted to $6,910. The witness stated that 25 percent for trailer rental is excessive, and that 15 percent would adequately compensate the trailer-owner for use of its equipment. A third carrier also testified that 25 percent for trailer rental is excessive based on his experience in operating as a "puller". The witness testified that the overlying carrier which supplies trailers to him now charges 20 percent trailer rental, and said overlying carrier formerly assessed 25 percent. The witness testified that he had been offered work at 30 percent trailer rental, which he refused. This witness urged that a division of revenues be established based on trailer rental of 20 percent of gross revenues.

The business manager of AIOO presented the position of that association. He testified that AIOO supports the theory of Petition No. 112 (Second Amendment), but prefers that a maximum trailer rental rate rather than a "tractor-only" rate be established. The witness stated that his association believes that the "tractor-only" operator should receive a greater proportion of the minimum

rate than he does now, therefore existing practices should not form the basis for establishing the division of revenues accorded to the "tractor-only" operator. It was the opinion of this witness that, based on the testimony of carrier members of AI00, trailer rental based on 25 percent of gross revenues is exorbitant. A realistic figure, in the opinion of this witness, would be 15 percent.

Cost information was presented by CDTOA's general manager (Exhibit A-6) and by CTA's assistant director of its Division of Transportation Economics (Exhibits A-9 and A-10).

CDTOA's Exhibit A-6 contains cost estimates for the four basic types of dump truck equipment units which involve use of trailers. They are: tractor and bottom-dump semi-trailer, tractor and two bottom-dump trailers, tractor and end-dump semi-trailer, and truck and transfer-trailer. CTA's general manager stated that the cost data shown in Exhibit A-6 are his judgement figures resulting from "cumulative information (recently) developed from contacts with carriers, suppliers and operators." The hourly cost for each type of equipment assertedly is representative of operations under all types of rate conditions in both Southern and Northern Territories of MRT 7 and in the area covered by MRT 17.[5/] The hourly costs in Exhibit A-6 exceed the hourly rates in MRT 7

5/ MRT 7 contains separate levels of rates for Northern Territory and Southern Territory; also different levels of hourly rates are established based on loading conditions. Moreover, MRT 17 contains mileage-tonnage rates different from rates in MRT 7.

current at time of hearing.[6/] The percentage split of costs in Exhibit A-6 between power units and trailers are as follows:

a. Tractor - 74.02%, Semi and Pull Trailers - 25.98%.
b. Truck - 78.64%, Transfer Body and Trailer - 21.36%.
c. Tractor - 76.19%, Semi Bottom-Dump Trailer - 23.81%.
d. Tractor - 77.48%, Semi End-Dump Trailer - 22.52%.

CDTOA's witness testified that the purpose of his cost exhibit was to check the reasonability of existing practices in the industry with relation to the split of revenues. The witness testified that it is not possible to determine the original cost bases for many of the minimum rates in MRT 7. The witness stated that it was not his purpose to justify the level of minimum rates as of today; his purpose was to explore the reasonableness of a practice as it exists in the industry, and the costs presented are generalizations of operating costs for all cost situations

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6/ The hourly costs developed in Exhibit A-6 are compared with hourly rates effective June 1, 1969 in MRT 7: 1

Unit of Equipment	Exh. A-6 Hourly Costs	Minimum Hourly Rates Northern Terr. Col.A.	Northern Terr. Col.C	Southern Terr. Col.A	Southern Terr. Col.C
Tractor - Semi - Pull	$17.774	$16.55	$15.17	$15.85	$15.15
Truck - Transfer Body & Trailer	16.603	↓	↓	↓	↓
Tractor - Semi Bottom	17.408				
Tractor - Semi End	17.040				

1 Assuming all units are five-axle equipment hauling maximum pay-loads.

Col. A Power loading
Col. C Bunker loading

occurring in the State. Assertedly, the power-unit portion of the costs represents a one-unit operation by a self-employed owner-operator and the trailer portion of the costs reflects a fleet operation of 20 units of trailer equipment. The annual use-hours of 1900 assumed by the witness assertedly does not relate to any particular type of transportation under dump truck rates.

CDTOA's witness testified that he did not have access to the information necessary to develop cost data to show the reasonableness of the proposed split of revenues when the shipper supplies the trailer equipment to the highway permit carrier.

CTA's witness testified that the most recent basic cost study covering transportation in Southern Territory was made by a staff engineer in connection with the establishment of the zone rates on a tonnage basis in MRT 17. The underlying cost factors are set forth in Exhibit A-22 in Case No. 5437 (Order Setting Hearing of March 24, 1959); modification of labor costs were made in Exhibit A-56 in that proceeding; further modification of these data were adopted in Decision No. 68543; and additional information regarding cost factors is set forth in Exhibit 166-2 (Case No. 5437, Petition No. 166). Assertedly, the purpose of CTA's Exhibit A-9 is to analyze the costs underlying concrete-aggregate rates in MRT 17 to determine those assignable to the power unit and those assignable to the trailing equipment, and to determine the respective percentages each group of costs bear to total costs. Exhibit A-9 shows that average costs amount to 98.26 cents per ton, of which 87.05 cents (or 88.6 percent) are assignable to the power unit and 11.21 cents (or 11.4 percent) are assignable to the trailing unit.

CTA's Exhibit A-10 is an analysis of the most recent basic cost study for transportation in Northern Territory. Assertedly, said study was undertaken by the Commission staff in Order Setting Hearing dated February 15, 1955, and rates reflecting said costs were adopted by Decision No. 52952, dated April 24, 1956, in said proceeding. CTA's witness testified that the underlying cost data are set forth in Exhibit C-1 in the aforementioned proceeding. CTA's witness analyzed costs for representative movements of concrete aggregates from production areas to delivery zones under tonnage rates. His analyses show that costs assigned to the power unit range from 83.7 to 84.7 percent of total costs, while costs assigned to the trailing unit range from 16.3 to 15.3 percent of total costs.

CTA's witness concluded that, based on his analyses of the basic cost studies underlying existing minimum rates, the measure of the relative portion of total costs underlying existing minimum rates which are assignable to the power unit or to the trailing unit is quite different from the actual amounts assigned under current industry practices.

The CTA witness also testified that in his opinion the proposal of CDTOA to establish a "tractor-only" rate at a level of 75 percent of the minimum rate when trailing equipment is furnished by the shipper would constitute a rebate. The witness assertedly reached this conclusion because the cost analyses in Exhibit A-9 and A-10 indicate that the percentages of trailer costs to total costs developed therein (15.3 to 16.3 percent in Northern Territory and 11.4 percent in Southern Territory) are far less than the 25 percent rate reduction the shipper would receive for furnishing trailers under CDTOA's proposal. The witness stated the incremental cost of

trailer ownership to shippers who now operate fleets of equipment would be almost wholly direct costs assignable to the purchase, operation and maintenance of the equipment; and the existing overhead costs of the shipper would be spread over more units of equipment. Thus, the shipper's overhead costs would be less than the indirect expense portion of the costs underlying the minimum rates.

CTA's cost witness also testified that in his estimation there is a wide difference in indirect expenses incurred by dump truck carriers, depending upon the type of transportation service performed. He cited in his testimony the principal differences between construction dump-truck operations, on the one hand, and interplant dump-truck operations, on the other hand. The witness explained that in connection with construction work, dump truck carriers must do preliminary survey and estimating work to determine the location of sources of materials, condition of roads, lengths of haul and conditions of terrain. Said carriers generally provide supervisory personnel on the jobsite. The witness stated that surveying, estimating and the furnishing of supervisory personnel are generally unnecessary for transportation under interplant rates. The witness concluded that the overhead (indirect) expenses of a carrier engaged in construction work is greater than such expenses of a carrier engaged in interplant movements. CTA's witness stated that the five percent deduction from minimum rates accruing to overlying carriers under Item 94 of MRT 7 is to compensate said overlying carriers for services performed by them for underlying carriers, and that said services fall in the area of indirect expenses. The witness stated that the 5 percent deduction was not supported by cost or economic studies when Item 94 was added to MRT

7; said amount was an arbitrary figure based on industry practices. The witness urged that before additional rules bottomed on industry practices (such as proposed in Petition No. 112) are added to the tariff, the rule in Item 94 of MRT 7 should be subjected to scrutiny and costs should be furnished to support the level of deduction provided by said item.

CTA Proposals In Order Setting Hearing

As heretofore indicated, Order Setting Hearing in Decision No. 72028 was consolidated for hearing with Petition No. 112 (Second Amendment) and the evidence adduced in the latter proceeding was incorporated in the former. Decision No. 74943 (supra) consolidating these proceedings reads in part as follows:

> "CTA and AI00 contend that the evidence adduced in Petition No. 112 (Second Amendment) shows that the operators of power units are generally employed as subhaulers for overlying carriers which own the trailer equipment; and that a determination of the reasonable compensation for said "tractor-only" subhaulers or for trailer rental also involves the reasonableness of the fees paid by said subhaulers to overlying carriers for all the functions performed by overlying carriers, including the furnishing of trailer equipment. CTA contends that the subject matter of Petition No. 112 (Second Amendment) cannot be thoroughly considered by the Commission without the concurrent consideration of the relationship between overlying and underlying carriers which is the subject of the Order Setting Hearing. CTA argued that consideration of trailer rental in a vacuum without consideration of the total value of all services rendered by an overlying carrier to an underlying carrier fails to recognize that the problem of trailer rental fees is directly related to the problem of how revenues shall be divided between overlying and underlying carriers. The Commission agrees with the foregoing arguments.
>
> "It is not possible, from the cost showing made by CDTOA, to determine what part of the total costs accrue for the use of trailers and what part is for the other services performed by the trailer owner (overlying carrier) for the tractor owner (subhauler). The Commission staff studies introduced in Petition No. 112 do not provide cost information from which the Commission could determine a basis for the establishment of a reasonable division of revenues between the classes of carriers involved. As CTA and AI00 are prepared to present evidence upon this subject, it appears proper, and the Commission finds, that the two proceedings should be consolidated for hearing."

Evidence concerning the rules in MRT 7 and 17 relating to payments to underlying carriers was presented by witnesses appearing on behalf of CTA, CDTOA, AIOO, SCRPA, PCA and the staff.[7/]

CTA's proposal, presented by the director of its Division of Transportation Economics, is that all rules be canceled in MRT 7 and MRT 17 which are designed to regulate rates or charges between underlying carriers and overlying carriers (Exhibit A-11). CTA's managing director and assistant managing director and an attorney specializing in the field of labor relationships also testified in support of this proposal. The CTA proposal in these proceedings, as summarized by Witness Kaspar, at pages 514 through 516 of the transcript, is as follows:

a. All regulations in MRT 7 and MRT 17 which govern the relationships between carrier should be removed.

b. Under circumstances of unusual nature and limited scope (such as shipper-controlled trucklines), where the Commission should find that regulation is necessary, such regulation should provide that 100 percent of the revenue received from the shipper should accrue to the carrier performing the transportation service.

The reasons advanced by CTA's director of its Division of Transportation Economics for its proposal herein are as follows: The Commission's regulation in the dump truck field has been inappropriate and ineffectual, and has tarnished the image of regulation for all for-hire carriers. In exploring the reasons why regulation of dump truck carriers has been a failure when compared with regulation of

7/ No cost data was introduced in the order setting hearing proceeding by the Commission staff or other parties relating to services provided by overlying carriers to underlying carrier's under Item 94 of MRT 7 and Item 460 of MRT 17.

other types of transportation services, it is CTA's conclusion that such failure is the direct result of regulations governing carrier-to-carrier relationships in the dump truck field, while such operations are largely unregulated in other fields of transportation.[8/] The regulation of carrier-to-carrier relationships in the dump truck field has caused an artificial evolution of small, uneconomic operating units (subhaulers), as there is no incentive for individual entrepreneurs to advance up the scale and become fleet operators. There is a large and floating number of owner-operators and a large turnover in such carriers. Inasmuch as the payment to underlying carriers is fixed, while the services performed by overlying carriers on behalf of underlying carriers varies, artifices are developed to vary the relative amount of compensation received by overlying and underlying carriers under different cost situations. This results in uneconomic and inefficient transportation services and, therefore, is a burden on those who pay for such transportation services. CTA believes that Commission regulation of intercarrier relationships in the dump truck field interjects the Commission into the sphere of labor relations, and that labor relations are best handled through collective bargaining methods. The Legislature has, from time to time, considered proposed legislation both to exempt specified dump truck operations from Commission regulation and to establish a fixed percentage of revenue as between overlying and underlying carriers. One bill exempting dump truck work on construction projects was passed by the Legislature but vetoed by the governor. Bills attempting to establish a fixed division of revenue between carriers have

8/ The witness pointed out that the only other minimum rate provisions governing carrier-to-carrier relationships are in MRT 10 (cement), and that said tariff provides that 100% of the minimum rate accrues to the subhauler and trailer rental is set at 9%.

failed because of the extreme difficulty of determining a reasonable percentage figure. CTA believes that regulation of intercarrier relationships is contrary to Section 3502 of the Public Utilities Code, because present regulation has resulted in an oversupply of truckers and thus has not limited the use of the public highways; because such regulation is not necessary to produce reasonable rates to shippers; and because such regulation has not furthered the development of adequate and dependable service by dump truck carriers. CTA believes preservation of the use of the public highways and more adequate and dependable service would result from the evolution of larger economic units (fleet operators) as opposed to the present small economic unit (owner-operator). For all of the foregoing reasons, CTA urges the Commission to reverse the trend of its regulation in the dump truck field (a) by cancellation of rules governing intercarrier relationships and (b) by not establishing additional rules of this nature, such as are proposed in Petition No. 112.

CTA's managing director testified that CTA's dump truck carrier members earn over 50 percent of the gross revenues earned by California for-hire dump truck carriers; therefore, CTA has a major interest in this proceeding. Said witness also asserted that many dump truck carriers regulated as carriers are considered by CTA's member-carriers to be their employees. Said witness also asserted that collective bargaining would better serve the interests of said group of carriers than Commission regulation. The witness stated that the primary purpose of the Commission should be regulating carriers who serve the public, rather than adjudicating disputes between "employer-carriers and employee truck operators."

CTA's managing director also testified that dump truck industry problems stem from the manner in which this Commission has regulated the dump truck industry. The witness testified as follows:

> "It is our belief that Commission regulation has seriously overemphasized the interest of a particular class of dump truck carrier; namely, underlying carriers or subhaulers. No one will dispute that it is the Commission's responsibility to assure that a sound dump truck industry will endure to serve the public. However, there is certainly no responsibility imposed upon the Commission to regulate the industry for the benefit of a particular class of carrier. Such regulation is justified only if required in the interest of the public. But, since subhaulers are not serving the public directly, regulation for their sole benefit cannot be said to be in the public interest....
>
> "It is our belief that the Commission will recognize that public interest requires that the dump truck industry be regulated in the interest of all of the people of California and not just that of any special groups. Additionally, we believe that the Commission will recognize that past regulation has failed to protect or to give the proper priority to all interests within the realm of the Commission's jurisdiction.
>
> "It is the position of the California Trucking Association that the proposal which we have made in this proceeding through Witness Kaspar, is the only proposal of any party which is consistent with the Commission's total responsibility."

CTA's assistant managing director and supervisor of its public relations programs testified concerning the trucking industry's public relations programs, safety programs and driver courtesy programs. The witness stated that all of these programs, to be effective, require control over and education of the driver of the unit of trucking equipment; and that such control is lacking in the dump truck field, primarily because the majority of equipment units are operated by independent owner-operators. This witness indicated that the dump truck industry's public relations are poor and cannot be improved until more control can be exercised over individual carriers in that field.

An attorney specializing in labor relations law, and formerly a legal advisor to the Chairman of the National Labor Relations Board, a federal agency, testified on behalf of CTA with respect to the status of owner-operators. It was his testimony that it is a difficult problem to determine the status of owner-operators under applicable labor statutes, because of the several criteria involved. He asserted that the principal test under common law, and as accepted by various federal agencies, is the "right of control test" and that there are various elements that come into a final determination concerning the application of said test. The witness recited several elements which should be considered, but could assign no weight to any particular element. The witness indicated that, in his opinion, the mere fact that an individual owned a piece of trucking equipment or that he has a permit is not determinative of whether said individual is an employee or an independent contractor. The witness indicated that a balance must be achieved between the various elements of the "right of control" test in reaching a conclusion concerning status.

Staff Proposal in Order Setting Hearing

The Commission staff, through an associate transportation rate expert, presented in evidence Exhibit A-12 relating to the subject matter of the order setting hearing. The witness testified as follows: To the extent that for-hire carriers are to be used, the shipper seeks out carriers that will best perform the service. Shippers using for-hire equipment normally deal through one or a few principal carriers. This is less expensive and more convenient to the shipper in that it provides him with more reliable service than having to deal with many carriers. The principal carriers may supply all of the shipper's needs with their own equipment. Usually,

however, the principal carriers cannot meet the full requirements of the shippers and arrange with other carriers to augment their fleet to haul the traffic. This latter arrangement is the common overlying-underlying carrier or subhauler relationship. The overlying-underlying carrier arrangement is mutually beneficial. The overlying carrier provides many services that the subhauler cannot perform himself or certainly not nearly as well. Overlying carriers generally perform the following services for subhaulers:

1. Solicitation,
2. Dispatching,
3. Bookkeeping,
4. Collection of charges.

In addition, many overlying carriers perform services which are beneficial to the subhauler, such as:

a. Group purchasing of gasoline, oil, tires, etc.,
b. Loan of tools,
c. Mechanics' assistance,
d. Advance of monies.

The staff witness further testified that the question of changing the compensation retained by an overlying carrier for his services to the subhauler and the effects on the industry was explored. He stated that it is clear that the reduction or elimination of the overlying carriers' compensation would have far-reaching effects. Overlying carriers would not perform the current services for subhaulers at a reduced payment. In this event, shippers would have to hire individual carriers directly which would result in increases in their costs of operation for such things as dispatching, telephoning and bookkeeping. In order to offset such increased costs, shippers anticipate it would be necessary to increase their proprietary trucking fleets or engage only those carriers who are able to supply an adequate number of units of equipment.

The staff witness testified that based on interviews with carriers he determined that, in general, subhaulers are satisfied with the current arrangement. Many stated that they were not capable of handling jobs on their own and would not take the risks and responsibilities for the 5 percent which the overlying carriers retain from their services. The witness indicated that his study showed that the 95 percent payment to subhaulers is acceptable to such carriers generally and is considered reasonable.

The staff witness recommended that the 95 percent provision of MRT 7 and MRT 17 be retained without change.

Cross-examination of the staff witness showed that some underlying and overlying carriers expressed dissatisfaction with the provisions of Item 94 of MRT 7 and Item 460 of MRT 17. The witness indicated, for example, that overlying carriers engaged in dirt hauling felt that the 5 percent retained by them was insufficient; and that some overlying carriers engaged in aggregates hauling realized a profit of $60 per $100 of the amount retained by them from earnings for services performed by underlying carriers.

CDTOA Rebuttal Testimony

Four witnesses testified on behalf of CDTOA in opposition to the proposals of CTA.

An overlying carrier operating in Ventura, Santa Barbara and San Luis Obispo Counties, testified that he engages in performing transportation for concrete aggregate producers. He owns no equipment; all transportation is performed by subhaulers owning full units of equipment. The witness explained the various services performed for subhaulers, which include dispatching, collection of charges, and solicitation. The witness testified that he has advanced monies to subhaulers and arranged for credit for repairs

of equipment. It was the opinion of this witness that if CTA's proposal were adopted owner-operators would disappear; and fleet dump truck operators or proprietary operations of aggregate producers would fill the gap.

An overlying carrier operating in Southern California testified that he engaged in the transportation of rock and sand (concrete aggregates) using 14 units of his own equipment, supplemented by an average of 100 subhaulers. It is also his opinion that adoption of the CTA proposal would force out owner-operators and that fleet operators would fill the gap.

A witness owning three units of dump truck equipment testified that he operated exclusively as a subhauler. He testified that the overlying carrier for whom he performs service furnishes him parking, shop facilities and tire-changing equipment. The witness testified that the present rules regulating relationships between underlying and overlying carriers protect his interests, and that he desires that such rules be retained.

An officer of an overlying carrier headquartered in the Sacramento area testified that he is in favor of retention of the existing 95 percent rule in MRT 7, as such rule is a protection to the subhauler, and the rule makes for a more stable industry. The witness indicated that he had an "open mind" as to whether minimum rates should be established for tractor equipment pulling trailers belonging to others.

Position of AI00

The business manager of AI00 presented the position of that association. He stated AI00 opposes the proposal of CTA with respect to cancellation of present rules regulating relationships between overlying and underlying carriers. The membership of AI00

consists principally of owner-operators, who assertedly would be adversely affected if the proposal were adopted.

Shipper Testimony

Two witnesses testified on behalf of SCRPA. The first witness, the transportation manager of a company producing and shipping aggregates materials, testified as to the position of SCRPA with respect to the CTA proposal. The witness stated his company uses overlying carriers for its transportation needs, in order that it will be assured that sufficient dump truck equipment will be available when needed. The witness testified that the transportation committee of SCRPA, of which he is a member, supports continued Commission regulation of the relationship between overlying and underlying carriers. The witness stated that the independent owner-operator and the overlying carrier each provides a vital function to shippers, and that deregulation of the relationship between said classes of carriers would increase shippers' problems. Shippers would need to seek out fleet operators to provide their transportation needs, or shippers would need to augment their existing fleets of proprietary equipment.

SCRPA's associate executive secretary and general counsel also testified. This witness stated that it is the position of the association that the Commission should continue to regulate the relationship between overlying and underlying carriers, and that said association has no position with respect to the proposals in Petition No. 112 (Second Amendment). The witness urged that the adoption into law of Senate Bill 654 (1969 Legislature), which established the new class of "dump truck carrier" and also established provisions relating to said carriers in the Highway Carriers' Act, resolved, clarified or rendered moot some of the issues raised in the proceedings herein.

The traffic manager of a large producer of concrete aggregates with several plants in Northern California presented the position of that company, and of the Northern California Ready Mixed Concrete & Materials Association and the Rock, Sand & Gravel Producers Association of Northern California. These organizations oppose the removal of the 95 percent rule in MRT 7. The witness explained that cancellation of said rule would require that producers of concrete aggregates increase their proprietary operations, engage fleet operators to perform dump truck transportation services, or employ directly former subhaulers. The foregoing methods of operations could cause inconvenience to shippers and increase their costs.

ISSUES

The material issues in these proceedings, based on the pleading, the proposals of the parties, and the evidence adduced, are the following:

1. Should the present allocation of revenues under dump truck minimum rates, as between overlying carriers (5 percent) and underlying carriers (95 percent) be revised? (Issue set forth in Order Setting Hearing in Decision No. 72028.)

   a. Does the present allocation result in just and reasonable rates to each carrier entity?

   b. If not, does the record contain sufficient evidence to prescribe an equitable division of carrier revenues?

2. Should all regulation under MRT 7 and MRT 17 of rates and charges paid by dump truck overlying carriers to dump truck underlying carriers be canceled? (Proposal of CTA in Order Setting Hearing.)

a. Are subhaulers employees of overlying carriers or are they independent contractors?

b. Has present regulation of dump truck carriers failed?

c. Is it in the public interest to discontinue regulation of rates paid by dump truck overlying carriers to underlying carriers?

3. Should the Commission establish in MRT 7 and MRT 17 additional rules regulating the division of revenues under minimum rates as between "tractor only" subhaulers and overlying carriers? (Proposal of CDTOA in Petition No. 112, Second Amendment.)

a. Do present industry practices result in unfair treatment to subhaulers or to overlying carriers, or cause a hardship to either class of carrier?

b. If such rules should be established, does the record contain sufficient evidence to prescribe just, reasonable and nondiscriminatory minimum rates?

4. Should the Commission establish additional rates or rules in MRT 7 or MRT 17 to cover the situation wherein a shipper furnishes trailers used by a dump truck carrier employed by it? (Proposal of CDTOA in Petition No. 112.)

a. Do present industry practices indicate a need for provisions?

b. If such provisions should be established, does the record contain sufficient evidence to prescribe just, reasonable and nondiscriminatory rates?

DISCUSSION

General

The order setting hearing herein is an outgrowth of Petition No. 123 in Case No. 5437. Said order was issued to explore the reasonableness of payments by overlying carriers to underlying carriers because evidence received in Petition No. 123 indicated that

the present 5 percent of the minimum rate allocated to overlying carriers, as provided in Item 460 of MRT 17, may be excessive for interplant movements.[9/] No cost and economic studies were made by the the Commission staff in response to said order setting hearing. The staff has indicated that such studies are not practical without conducting complete studies of all transportation services performed under MRT 7 and MRT 17. Similarly, the record also indicates that cost and economic studies relating to "tractor only" service (or to trailer-rental rates) are practical only in connection with full-scale studies of all transportation services conducted under said tariffs.

Witnesses for CDTOA and CTA showed that the relationship cannot now be determined between the present hourly rates and the basic cost data on which such rates were initially predicated. The record also indicates that the basic cost studies underlying other MRT 7 rates are so old that their accuracy and reliability are doubtful.[10/] It is quite clear that new full-scale cost and economic studies relating to the transportation services covered by MRT 7 and MRT 17 are needed. Said studies, when undertaken, should develop pertinent data concerning divisions of revenues between carriers.

Establishment of "Tractor Only" Minimum Rates

Before establishing additional minimum rates, the Commission should be furnished with compelling reasons for doing so. CDTOA, petitioner in Petition No. 112, and the Commission staff do not urge that the present industry practices with respect to the division of dump truck revenues between the entity furnishing the power

9/ Pertinent portions of the record in Petition No. 123 are incorporated in the record herein.

10/ Applying the criteria used in connection with cost-offset rate adjustments, Re Minimum Rate Tariff No. 2, Decision No. 76353, dated October 28, 1969, in Case No. 5432, Petition 523 et al.

unit and driver, on the one hand, and the entity furnishing the trailer unit, on the other hand, are unfair or unreasonable or cause a hardship on either entity. Such situation, if shown to occur, may provide a compelling reason for the establishment of additional minimum rates.[11/] However, such position would be wholly incompatible with the proposal that the Commission adopt existing industry practices as the measure of a reasonable division of the minimum rates between said carrier entities. Petitioner has not furnished any evidence to show that there is an urgent need to establish additional minimum rates, as proposed in Petition No. 112 (Second Amendment).

The limited cost information introduced in this proceeding does not support the request of petitioner with respect to "tractor only" rates. CDTOA's cost study admittedly is not reflective of any specific movements under MRT 7 or MRT 17 and, therefore, has no relationship to existing minimum rates. CDTOA's cost witness also indicated that he could not show separately the costs related to "brokerage" services from other costs in his study.

CTA's analyses of the basic cost studies underlying existing minimum rates show that a division of revenues based on 25 percent for use of trailers under CDTOA's proposal would be excessive. Such conclusion is also supported by the testimony of witnesses presented by AIOO to the effect that trailer rental of 15 or 20 percent would be reasonable, based on the experience of individual carriers. The record herein does not establish conclusively what

11/ For example see Decision No. 53288 (54 Cal. P.U.C. 555, 558), wherein the proponents testified that the subhaul rule was "urgently needed because there had been considerable abuse of subhaulers by some overlying carriers."

division of revenue would be reasonable and nondiscriminatory in the circumstances where one carrier furnishes a power unit and driver and another carrier furnishes the trailing unit.

Shipper-Owned Trailers

There are no data in the record which would substantiate the establishment of a level of charges for service when a carrier furnishes the power unit and driver and the shipper furnishes the trailer. As indicated by the testimony of CTA's cost witness and as stated in prior Commission decisions, such type of transaction is fraught with the danger of possible rebates.

The Commission found in Investigation of MacDonald & Dorsa Transportation, 68 Cal. P.U.C. 87, that alleged trailer rental deductions of 33-1/3 percent were excessive for use of trailers owned by a shipper who was the alter ego of the overlying carrier. The Commission also found as follows:

> "Minimum Rate Tariff No. 7 contains no authority for a shipper to make any deduction from such transportation charges, whether or not the deduction is reasonable." (Ibid, page 90.)

In Investigation of Kelly Trucking Company, Decision No. 76055, dated August 19, 1969, in Case No. 8805, the Commission found that respondent was the alter ego of the shipper; that respondent was required under its permit to pay subhaulers 100 percent of the minimum rates. Said decision found as follows:

> "4. For the purpose of this proceeding, respondent is the alter ego of Kel-Tez. The services of the purported subhaulers when engaged by respondent to transport the property of Kel-Tez are in reality those of prime carriers, and in such circumstances, respondent is acting in its capacity as a shipper. Minimum Rate Tariff No. 7 contains no provision authorizing a shipper to make any deduction from the applicable minimum rates and charges for transportation performed for it, irrespective of whether or not the deduction is reasonable." (Underscoring supplied.)

It appears that the foregoing findings of the Commission should be incorporated in MRT 7 and MRT 17. Therefore, those tariffs should be amended to specifically prohibit deductions from minimum rates when trailing equipment is furnished by the shipper to the carrier. The following provision should be added to said tariffs:

> "No payment of lease, rental or other charges shall be made by a dump truck carrier for use of trailer equipment (or other motive equipment) furnished to said carrier by a shipper or its agents, nor shall charges be assessed which are less than 100 percent of those applicable under minimum rates prescribed in this tariff for transportation performed in said trailer (or other motive) equipment, except in special cases upon application by a carrier to the Commission, and a showing by the Commission that such rental, lease or other payment or charge is reasonable. As used herein, the term 'trailer equipment' means a semitrailer, full trailer, pup trailer, transfer-trailer, dolly, or any combination thereof."

Cancellation of Rules for Compensation of Underlying Carriers

CTA proposes that all rules in MRT 7 and MRT 17 regulating transactions between overlying and underlying carriers be canceled. The principal reasons advanced by CTA in support of this proposal are that present regulation under such rules is a failure, that other minimum rate tariffs do not contain such rules, and that economic forces are more effective regulators for the transportation services covered by MRT 7 and MRT 17.

Testimony to counter CTA's contentions was presented by CDTOA, SCRPA, PCA, and the Commission staff. The staff evidence indicated that, while all carriers are not completely satisfied with present rules, the majority of carriers interviewed were satisfied. Witnesses presented by CDTOA indicated that economic hardship would be suffered by subhaulers if the rules were canceled and that at least three overlying carriers desire that the rules be maintained.

The evidence advanced both for canceling and retaining present rules are largely reflective of the opinions of the witnesses. Such type of evidence, being subjective rather than objective in nature, is difficult to evaluate and to determine its proper weight in relation to other evidence.

It is recognized that the present methods of regulating relationships between carriers in the dump truck field have not been wholly successful nor entirely satisfactory to all parties involved. On the other hand, it is alleged by some carriers that economic hardship could evolve if present rules were canceled. This record also indicates that a uniform deduction or allowance of 5 percent of the minimum rates for services performed by overlying carriers for subhaulers may be insufficient for certain types of hauling and excessive for others. As heretofore indicated, the existing division of revenues is based on industry practices of some 20 years ago, and never has been tested against a cost analysis. In the absence of factual evidence of the costs of the various services involved, it is not possible on this record to prescribe a more equitable division of the minimum rates.

This record does not show conclusively that present rules regulating relationships between carriers should be canceled, nor does the record contain the facts necessary to revise or adjust the present rules to more equitably distribute between overlying and underlying carriers the revenues accruing under minimum rates in MRT 7 and MRT 17. In the circumstances, it appears that the CTA proposal to cancel present provisions regulating the division of revenues between carriers should be denied, and that current provisions should not be amended nor additional provisions added to the tariffs until adequate evidence, including cost and economic studies, is presented.

RECOMMENDED FINDINGS AND CONCLUSIONS

Recommended Findings of Fact

A. On the issues raised by the Commission in order setting hearing in Decision No. 72028:

1. The 5 percent of gross revenues allocated to overlying carriers under the provisions of Item 94 of MRT 7 is intended to recompense such carriers for services performed by them on behalf of subhaulers, and such services fall in the category of overhead or indirect expenses. (Decisions Nos. 40724 and 52388, supra.)

2. The existing provisions of Item 94 of MRT 7 were established on data relating to industry practices, some 20 years ago; substantially identical provisions were subsequently incorporated in Item 460 of MRT 17; and the provisions of Item 94 of MRT 7 and Item 460 of MRT 17 never have been tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers.

3. Dump truck overlying carriers engaged in construction work perform more services and incur more overhead expenses than dump truck carriers engaged in transportation of manufactured materials (such as aggregates and asphaltic concrete), thus indicating that dump truck overlying carriers engaged in construction should receive a greater amount of revenue for services performed for underlying carriers than overlying carriers engaged in transportation of manufactured materials.

4. Certain carriers and carrier groups are not wholly satisfied with the present division of revenues as between overlying carriers and underlying carriers; particularly subhaulers with respect to payments for hauling aggregate materials and asphaltic concrete under zone rates in MRT 17, and overlying carriers with respect to hauling on construction projects under rates in MRT 7.

5. The present provisions of Item 94 of MRT 7 and Item 460 of MRT 17 are in need of revision.

6. The record herein does not contain sufficient economic data, including cost information, to determine and prescribe just, reasonable and nondiscriminatory provisions relating to allocations of gross dump truck revenues as between overlying and underlying carriers. (Section 3662 of the Highway Carriers' Act.)

B. On the issues raised in connection with CTA proposals:

1. CTA proposes that all provisions set forth in MRT 7 and MRT 17 regulating relationships between overlying and underlying carriers be canceled.

2. While present regulation by the Commission of dump truck carriers is not wholly satisfactory, such regulation is not such a complete failure as to require abandonment of a portion of said regulation, as proposed by CTA.

3. Determination of the question of whether dump truck subhaulers are employees within the meaning of the applicable labor laws, or are independent contractors, lies within the jurisdiction of the National Labor Relationship Board.

4. Interviews conducted by the staff and testimony of individual carriers show that the present type of regulation between carriers is generally satisfactory to them, although some carriers believe that the allocation of revenues between overlying and underlying carriers should be revised.

5. It has not been shown that it would be in the public interest to cancel existing provisions in MRT 7 and MRT 17 regulating relationships between overlying carriers and underlying carriers. (Section 3502 of the Highway Carriers' Act.)

6. The question whether certain types of dump truck operations should be exempted from regulation by this Commission has been the subject of proposed legislation in several prior sessions of the Legislature. Legislation which would have exempted dump truck transportation on construction projects was passed by the Legislature, but was vetoed by the Governor. The Highway Carriers' Act was amended during the time these proceedings were being held to incorporate therein a new class of carrier, viz.: "Dump Truck Carrier", and to establish regulations in connection therewith. (Statutes 1969, Chapter 1004.)

C. On the issues raised by the proposals of CDTOA in Petition No. 112 (Second Amendment):

1. Petitioner has not shown that present industry practices result in unfair treatment to subhaulers or to overlying carriers, nor that such practices cause a hardship to either class of carriers.

2. The record does not establish that there is, at this time, a compelling reason to establish additional minimum rate provisions governing the allocation of revenues between "tractor only" subhaulers and their overlying carriers.

3. The record herein does not contain adequate economic data, including cost information, on which to make a determination of just, reasonable and nondiscriminatory minimum rates for services of "tractor only" subhaulers; either when the trailer is furnished by a carrier or by a shipper. (Section 3662 of the Highway Carriers' Act.)

4. The Commission has heretofore found that MRT 7 contains no authority for a shipper to make any deduction from the transportation charges provided therein, whether or not such deduction is reasonable. (Decisions Nos. 73791 and 76055 supra.) MRT 7 and MRT 17 should be amended to specifically provide that 100 percent of

the minimum rate must be received by the carrier when the shipper furnishes the trailer, unless authority to do otherwise is granted to the carrier.

Recommended Conclusions of Law

1. MRT 7 and MRT 17 should be amended, in accordance with Finding C(4), to incorporate the following rule:

> "No payment of lease, rental or other charges shall be made by a dump truck carrier for use of trailer equipment (or other motive equipment) furnished to said carrier by a shipper or its agents, nor shall charges be assessed which are less than 100 percent of those applicable under minimum rates prescribed in this tariff for transportation performed in said trailer (or other motive) equipment, except in special cases upon application by a carrier to the Commission, and a showing by the Commission that such rental, lease or other payment or charge is reasonable. As used herein, the term 'trailer equipment' means a semitrailer, full trailer, pup trailer, transfer-trailer, dolly, or any combination thereof."

2. The Legislature should determine those dump truck operations which should be regulated by this Commission and those which should be exempted from such regulation.

3. This Commission is not the appropriate body to make the determination of whether dump truck subhaulers are employees of overlying carriers, or are independent contractors.

4. Except to the extent provided by conclusion 1 above, Petition No. 112 (Second Amendment) should be denied and Order Setting Hearing in Decision No. 72028 should be discontinued.

RECOMMENDED ORDER

An appropriate order, or orders, should be issued:

a. Amending Minimum Rate Tariffs Nos. 7 and 17 as indicated in the foregoing conclusions;

b. Denying Petition No. 112 (Second Amendment); and

c. Discontinuing Order Setting Hearing in Decision No. 72028.

/s/ John W. Mallory
JOHN W. MALLORY, Examiner

San Francisco, California
March 13, 1970.

APPENDIX A

List of Appearances

PETITIONER

E. O. Blackman, for California Dump Truck Owners Association, petitioner in Petition No. 112.

INTERESTED PARTIES

G. Ralph Grago, Robert Kelly, Don A. Fendon, and Richard G. Brown, for Associated Independent Owner-Operators, Inc.; Richard W. Smith, H. F. Kollmyer, and A. D. Poe, for California Trucking Association; Scott J. Wilcott and Ernest E. Gallego, for Southern California Rock Products Association; Brundage & Hackler, by Daniel Feins, for Western Conference of Teamsters; Harry C. Phelan, Jr., for California Asphalt Pavement Association; Fred Imhof, by Harry C. Phelan, Jr., for Industrial Asphalt, Inc.; Bill T. Farris, for the County of Los Angeles (Flood Control District); E. J. Bertana, for Pacific Cement & Aggregates; and Lawrence A. Wixted, for Blue Diamond Company.

RESPONDENTS

Robert L. Payan and Bertha L. Payan, for Payan Trucking, Inc.; Elton Lackridge, for Princeton Equipment Company; Les Calkins, for Les Calkins Trucking, Inc.; and George Kishida, for himself.

COMMISSION STAFF

William J. McNertney, Counsel, Robert E. Walker, John R. Laurie, and Robert W. Stich.