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ORIGINAL

Decision No. 85880

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the Commission's own motion into the operations, rates, charges and practices of DOUDELL TRUCKING CO., INC., a California corporation, CHARLES PANKOW and PITTSBURGH-DES MOINES STEEL CO. | Case No. 9580 (Filed July 3, 1973) |

Handler, Baker & Greene, by Marvin Handler, Attorney at Law, for Doudell Trucking Co., Inc.; Benjamin F. Dick, Attorney at Law, for Charles Pankow, Inc.; and Jules Pearlman, Attorney at Law, for Pittsburgh-Des Moines Steel Co.; respondents.
Handler, Baker & Greene, by Marvin Handler, Attorney at Law, and Jess Butcher, for California Manufacturers Association, interested party.
Rufus G. Thayer, Attorney at Law, and E. E. Cahoon, for the Commission staff.

## O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, and practices of Doudell Trucking Co., Inc. (Doudell) for the purpose of determining whether Doudell charged less than applicable tariff rates or received a different compensation than that specified in its tariff in connection with transportation performed for Charles Pankow, Inc. (Pankow), and Pittsburgh-Des Moines Steel Co. (PDM) and whether Doudell failed to publish and make available for inspection any storage or storage in transit rules to cover the assessment of charges for such services allegedly performed in connection with transportation services for PDM.

Public hearing was held before Examiner Arthur M. Mooney in San Jose on October 10 and 11, 1973 and in San Francisco on November 7 and 8, 1973. The matter was submitted upon the filing of concurrent briefs on January 30, 1974.

Doudell operates pursuant to a highway common carrier certificate, and it also holds other operating authorities which are not involved herein. During the period covered by the staff investigation referred to below, Doudell had terminals in San Jose, Richmond, Fontana, and Compton, California and in Phoenix, Arizona; it operated one tractor and 318 flatbed, 10 tank, and 38 van semi-trailers; it employed 49 office, sales, and clerical personnel and had no drivers or mechanics; the maintenance of its equipment was performed by Diamond Sales & Service; and it was a party to all applicable common carrier tariffs and had been served with all minimum rate tariffs and distance tables referred to herein. Its gross operating revenue for the year ending September 30, 1972 was $4,218,235, which included $2,780,658 in interstate revenue and $26,109 in subhaul revenue. During this period, it paid $2,540,808 to subhaulers.

A representative of the Commission's Transportation Division staff testified that the staff was directed by the Commission in Decision No. 80088 in Case No. 5432 et al. to initiate an accelerated enforcement and tariff compliance program regarding credit rule regulations and that as a result of this directive he was assigned to review the credit rule practices of Doudell. He stated that his audit was performed during the months of November and December 1972 and January 1973 and that he concentrated his examination on records relating to transportation performed for Pankow during the period May through November 1972 and for PDM during the period February through July 1972. The witness testified that his audit disclosed apparent credit rule and rate violations in connection with transportation performed for Pankow and apparent rate violations in connection with transportation performed for PDM during the respective review periods. He stated that photocopies of various freight bills

and underlying documents relating to transportation performed for the respondent shippers were furnished to him by Doudell or prepared by him and that the photocopies are included in Exhibits 2, 3, and 4. He stated that the president of Doudell asked him to make any requests for documents through him and insisted that the requests be specific; that because he had to wait until the president was available before he could make any requests for such data, his audit was slowed; and that he did obtain information from other Doudell personnel.

A rate expert for the Commission staff testified that he took the sets of documents in Exhibits 2, 3, and 4 together with supplemental information testified to by the representative, which is referred to hereinafter, and formulated Exhibits 8 (Pankow) and 9 (PDM), which show the rates and charges assessed by Doudell, the rates and charges computed by the staff, and the undercharges alleged by the staff for the transportation in issue.

Testimony on behalf of Doudell was presented by two traffic consultants, its tariff publishing agents, its operations and sales manager, and its vice president. The manager of purchasing and traffic for the Western Division of PDM testified on behalf of his company.

Since the issues involved in connection with the transportation performed for the two respondent shippers differ, we have separately set out our discussion of the evidence relating to each.

Pankow

Exhibit 2 includes photocopies of the documentation for 116 shipments of concrete panels, slabs, and beams transported by Doudell for Pankow from the shipper's plant in Milpitas to itself at a jobsite in San Jose during the period reviewed (May through November 1972). The staff representative pointed out that the documentation shows that 65 of the 116 shipments were not billed by Doudell to the shipper within the time period specified in paragraph (d) of Item 315 of

Pacific Coast Tariff Bureau Tariff 16 (PCTB 16) to which Doudell is a party. Paragraph (d) provides that freight bills shall be presented to the debtor within 7 calendar days from the first 12:00 midnight following delivery of the freight. A review of the freight bills for the 65 late-billed shipments discloses that approximately one-half were issued within a week after the billing deadline and that most of the balance were issued 2 or 3 weeks thereafter.

The staff rate expert testified that the basic rate error in connection with the 116 Pankow shipments was the assessment by Doudell of an exception rating of Class 35.4 provided in Item 103 of Pacific Coast Tariff Bureau Exception Sheet 1 (PCTB ES 1) rather than the Class 50 less-than-truckload or Class 35 truckload ratings provided in Items 32690, Sub 3, and 32020 of National Motor Freight Classification A-12 (NMFC A-12). He explained that seven of the shipments were subject to less-than-truckload ratings and the balance were subject to truckload ratings. The witness stated that the commodities transported are included in Item 103 of the exception tariff; that a Class 35.4 exception rating is provided therein for truckload shipments of panels or slabs in other than permit shipments; that the truckload exception ratings for the panels or slabs in permit shipments and for the beams or girders is higher; that the item is restricted to apply only when the shipper declares in writing on the shipping document that the shipment is released to a value of one-half of actual value or 50 cents per pound, whichever is less; and that this declaration was made by the shipper on the documentation for only one of the shipments. Doudell has an annual permit from the county of Santa Clara for loads such as those herein and others exceeding legal height limits. The witness testified that the other rate errors by Doudell in connection with this transportation resulted from the assessment of incorrect surcharges and, in several instances, failure to observe an increase in rates. He pointed out that the total of the undercharges shown in the staff's Exhibit 8 is $6,191.61.

The vice president and general manager of Doudell testified that he is the majority stockholder of Truck Data, Inc., which provides dispatchers, rate clerks, salesmen, and general office help for Doudell and various services and personnel for other companies and that he also controls Diamond Tank Lines and Transport, Inc., which has no connection with Doudell and does not compete with it. As to the late billing for some of the Pankow shipments, he stated that Doudell uses owner-operator power equipment exclusively; that Doudell's billing department cannot determine rates and charges and issue the billing for a shipment until the owner-operator has turned in the completed documentation for the shipment to it; that although the owner-operator is not paid until the required documentation has been turned into Doudell, many of the drivers have delayed doing this; that this is the cause of the late billing; that steps are being taken to remedy this situation; and that it is the policy of Doudell to bill all shipments as soon as possible because of the high cost of money.

The Doudell witness testified as follows regarding the Pankow undercharges: When it became apparent that the staff investigation involved more than a mere credit rule check, Doudell engaged an independent rate auditor to review its records while the staff investigation was still in progress to determine if there were any errors in them; the audit disclosed that Pankow had not declared a released valuation on the shipping documents; as a result thereof, Doudell billed Pankow on March 26, 1973 for additional charges in the amount of $6,305.04, which is more than the $6,191.61 in undercharges alleged by the staff; on April 9, 1973, Doudell received Pankow's check dated March 29, 1973 for the amount billed; the investigation order herein was issued by the Commission July 3, 1973 and was served on Doudell on July 6, 1973; it was not until Doudell received a copy of the staff's rate Exhibit 8 on August 11, 1973 that it was aware that the staff alleged undercharges in connection with the Pankow shipments; the staff representative had not informed Doudell during

his investigation that there were any undercharges in connection with the Pankow transportation; since the Pankow undercharges were determined on Doudell's own initiative and were billed and collected before being informed of this by the Commission staff and before the investigation order was issued, Doudell should be allowed to retain the monies collected and should not be penalized or fined in the amount of the undercharges.

Counsel for Doudell argued in his brief that under the circumstances herein, Section 2100 of the Public Utilities Code precludes the Commission from assessing a fine in the amount of the Pankow undercharges; that the section requires a hearing at which the undercharges are determined to exist and with respect to which the Commission may then impose a fine equal to such undercharges and require the carrier to collect them; that there is no Commission decision which would permit it to impose a fine upon a carrier which has collected all applicable charges prior to the institution of a formal proceeding; and that there is nothing in Section 2100 that states the Commission may impose a fine upon a carrier merely because a staff employee of the Commission had commenced an informal investigation of a carrier prior to its billing of any underpayments.

Staff counsel in his brief asserted that to allow Doudell to retain the undercharges which were collected subsequent to the staff audit would reward Doudell at the expense of the Commission's policy of enforcement against undercharge practices; that the staff investigation was concluded in January 1973, and the collection by Doudell was not until latter March 1973; that performing undercharge audits of carrier records for the purpose of enriching the carrier at the taxpayers' expense is not a function of the Commission staff; and that the purpose of the legislation authorizing a fine equal to the amount of the undercharges was to prevent the inequitable windfall which would otherwise result from the Commission's concern over the integrity of the minimum rates (Inv. Russell Thomas Phillips (1965) 64 CPUC 755).

We are of the opinion that the rates and charges computed by the staff and the resulting undercharges shown in Exhibit 8 are correct and that the Commission has the authority to include the amount of such undercharges in a fine pursuant to Section 2100 of the Public Utilities Code. As pointed out by the staff, Doudell did not bill and collect the undercharges until several months after the investigation had been completed. According to Doudell's witness, it did not hire the outside auditor until it became concerned over the extent of the staff's investigation. It seems apparent, therefore, that the Pankow undercharges would not have been billed and collected had it not been for the staff investigation. We agree with the staff that the Commission's enforcement policy would be seriously jeopardized if Doudell's position were sustained. Such an interpretation could encourage shippers and carriers to engage in destructive rate cutting practices. If a staff investigation were to disclose such action, the carrier could immediately collect the correct rate prior to the issuance of the investigation order with no fear of any penalty. Furthermore, Section 2100 of the Code makes no distinction between undercharges that were billed and collected prior to the issuance of a formal Commission order of investigation and those that were not. The only conditions precedent therein to the assessment of such a fine are that a hearing be held and that a finding be made that a carrier charged and collected a lesser compensation than that provided in the applicable tariff. Here, a hearing has been held, and the record supports a finding of undercharges.

One final matter for comment is the allegation by Doudell that the value of the commodities shipped was substantially less than the 50 cents per pound, per article specified in Item 103 of PCTB ES 1. However, this is irrelevant. As pointed out, the released value provision refers to a released value of one-half actual value or 50 cents per pound, per article, whichever is less.

PDM

During the period covered by the staff review of the transportation performed by Doudell for PDM (February through July 1972), Doudell transported 203 loads of fabricated structural steel, including beams, girders, and similar products. They were rated by Doudell as 61 shipments, 192 were combined into 50 multiple-shipments, and 11 were rated as single shipments. The loads were moved from PDM's fabrication plant at Agnew, which is served by rail, to Doudell's San Jose terminal, which is not. From Doudell's San Jose terminal the loads were transported to its southern California terminal. The southern California terminal was located at Montebello prior to April 22, 1972, and was moved to Compton on that date. The Montebello terminal did not have rail facilities; however, the Compton terminal does. From the southern California terminal, the loads were moved to the jobsite at Seventh and Hope Streets, Los Angeles, which is not served by rail. The staff rated the traffic as 235 separate shipments.

The staff representative testified that Exhibits 3 and 4 include true and correct photostatic copies of the 61 freight bills and supporting documents issued by Doudell for the transportation in issue and that they are separately numbered as parts one through 61 of the two exhibits. He explained the documentation in Part 6 of Exhibit 3, which he stated was typical of the documentation in the other parts, as follows: Freight Bill 017896 issued for the Part 6 transportation covered three truckloads of fabricated structural steel; in the upper left hand corner of the freight bill are Manifest Nos. 521-2-3, one for each load; also shown on the freight bill are the number and date of the bill of lading prepared by the shipper; separate delivery receipts were prepared for each segment of the transportation of each load from PDM's plant at Agnew to the jobsite at Seventh and Hope Streets in Los Angeles; the subhauler is required to turn in a receipted copy of the delivery

receipt for the segment or segments of the transportation he performed; for the transportation covered by Manifest Nos. 521 there are three delivery receipts, No. 18551 dated February 4, 1972 covering the transportation from PDM's plant at Agnew to Doudell's terminal at San Jose, No. 018938 dated February 15, 1972 covering the transportation from Doudell's San Jose terminal to its southern California terminal, and No. 025509 dated March 13, 1972 covering the transportation from Doudell's southern California terminal to the jobsite in Los Angeles; and there are similarly three delivery receipts for each segment of the transportation for the other two loads. The witness testified that he was informed by Doudell's sales and job supervisor for this project that Doudell applied the rail competitive rate from PDM's Agnew plant to the southern California terminal plus the off-rail rate from there to the jobsite in downtown Los Angeles provided in its tariff to the transportation; that when the southern California terminal was moved from Montebello to Compton, he was advised by his rate department that the movement of the terminal would have no effect on the combination rate; and that it was necessary to have a holding yard for the material in the Los Angeles area because it was not possible to schedule the steel to arrive at the jobsite as it was needed for construction from as far away as Agnew, the steel could not be stored on the street at the jobsite, and the high salaries paid steel workers make timing of arrival at the jobsite critical.

The representative testified that he was informed by the president of Doudell that the traffic handled by the carrier is predominantly between the San Francisco Bay area and the Los Angeles Metropolitan area; that during the period covered by the investigation, the northbound traffic was heavier than that to the south; that because of this, PDM would be contacted to determine if there were any loads available; that by picking up PDM shipments before they were needed at the jobsite, it was possible to balance out trailer

equipment between the north and south and to keep subhaulers employed; and that it was necessary to please the customer. The witness stated that Doudell's chief dispatcher told him that PDM would also contact Doudell when shipments were ready to move south. He testified that a Doudell employee informed him that the erection crew at the jobsite would advise Doudell's southern California terminal when steel was needed and that there were at times as many as 20 trailer-loads of steel at the southern California terminal.

The staff rate expert testified that the part numbers in the staff's rate Exhibit 9 correspond with those in Exhibits 3 and 4. The witness explained Part 6 of Exhibit 9, which is the same part number referred to by the representative in his testimony, as follows: The three truckloads of structural steel covered by Freight Bill No. 017896 in this part were rated by Doudell as a single shipment from PDM in Agnew to the jobsite in Los Angeles; Doudell had applied the rail competitive rate in its tariff to Los Angeles plus a beyond railhead rate of 19 cents per 100 pounds with a 6 percent surcharge on the latter rate; he rated the transportation as four shipments, the three loads were combined as a single shipment from PDM's Agnew plant to Doudell's Montebello terminal and the deliveries from there to the jobsite were rated as three new and separate shipments; he applied the same rail competitive rate used by Doudell for the transportation from Agnew to Los Angeles plus a 12-1/2 cents per 100 pound beyond railhead rate to the Montebello terminal and a 31 cents per 100 pound rate to each of the three deliveries from the terminal to the jobsite. With respect to the beyond railhead rate, the rate expert pointed out that at the time the transportation moved, a rate of 12-1/2 cents per 100 pounds was published both in Item 1252 on First Revised Page 189-G of PCTB 16 to which Doudell was a party and in Item 764 on Second Revised Page 66-K of the Commission's Minimum Rate Tariff 2 (MRT 2); that a restriction in Item 764 of MRT 2 prohibited the use of this rate in combination with alternative rail rates; that Decision No. 79551 dated January 4, 1972

in Case No. 5432, which added Second Revised Page 66-K to MRT 2, ordered common carriers to publish the same restriction in their tariffs; that this was not done in Item 1252 of PCTB 16; that in the circumstances, although the 12-1/2 cent rate was an unlawful rate when used in combination with rail competitive rates in PCTB 16, it was the legally published rate; and that since a common carrier is required to charge published rates, it was the applicable beyond railhead rate for this transportation. He stated that his rating of the other parts of Exhibit 9 were similar to Part 6. The amount of undercharge alleged by the staff for the transportation covered by Part 6 is $186.87, and the total of the undercharges alleged by it for all of the transportation covered by the 61 parts of Exhibit 9 is $10,984.67.

Exhibit 10, introduced in evidence by the rate expert, shows the number of days certain of the loads transported from Agnew were held at either Doudell's Montebello or Compton terminal beyond a period of two days, excluding Saturdays, Sundays, and holidays. The witness testified that PCTB 16 had no provisions participated in by Doudell for demurrage, stopping-in-transit, or storage; that MRT 2 likewise contained no such provisions; that he reviewed the tariffs of various highway common carriers and Freight Tariff 4I of B. B. Maurer, Agent, which contains demurrage and storage rules and charges for railroads; that based on this review and discussions with other staff members, he concluded that a reasonable holding time for any of the shipments in issue after their arrival at Doudell's southern California terminal and prior to delivery was two days, excluding Saturdays, Sundays, and holidays; that any holding beyond this free-time period constituted a termination of the shipment and commencement of storage; and that the subsequent movement of the freight to the jobsite was a new shipment. He explained that this was the basis he used in calculating the number of days of storage shown in Exhibit 10. According to Exhibit 10, 40 of the 203 loads transported from Agnew were delivered to the jobsite within

the free-time period, and of the balance of 163 loads, 66 were held in storage at Doudell's southern California terminal prior to delivery to the jobsite for from one to five days, 46 were held in storage for from six to 10 days, 34 were held in storage for from 11 to 15 days, and 17 were held in storage for from 16 to 25 days.

The rate expert testified that there were no instructions on the bills of lading issued by PDM regarding stopping-in-transit or storage at Doudell's southern California terminal; that he had no knowledge as to whether a written notice of arrival was sent to the consignee by Doudell when a load arrived at the southern California terminal or whether there was any agreement between the parties regarding this; that it was his understanding from the information furnished to him and testified to by the staff representative that when freight arrived at the southern California terminal, it was held there until called for by the consignee; that for this reason, he was of the opinion that the holding at the southern California terminal was for the convenience of the consignee; that when freight was held at the southern California terminal beyond the two-day free-time period, the carrier was providing a service not provided for in its tariff; that there should have been a storage charge for freight held at the southern California terminal beyond the free-time, but since Doudell's tariff did not include such a charge in its tariff, he did not include a storage charge in his ratings in Exhibit 9; and that he considered any holding of a shipment at Doudell's San Jose terminal to be for the convenience of the carrier and not storage. The witness stated that there were some instances in which the multiple-lot rule in Doudell's tariff had not been complied with, and it was necessary in such situations to rate components of shipments from Agnew to Doudell's southern California terminal as separate shipments.

The operation and sales manager and the vice president and general manager of Doudell and the western division manager of purchasing and traffic for PDM testified that the facts and circumstances surrounding the transportation in issue were as follows: After contacting other carriers and three or four months preliminary discussions with Doudell, PDM awarded the job to Doudell. This was the only job PDM had in southern California at the time. The agreement between the parties was verbal, and the only service requested by PDM was transportation of the steel from the fabrication plant to the jobsite. PDM made no requests either orally or in writing on the bills of lading or any other documents for any additional services. PDM gave no routing or scheduling instructions to Doudell. This was left up to the carrier. All PDM insisted upon was that the steel arrive at the job as needed. Generally, loaded trailers were hauled from PDM's Agnew plant, which was open weekdays only, directly to southern California with the exception of loads to be transported south on weekends which were picked up on Fridays and taken to Doudell's San Jose terminal, a distance of approximately 2-1/2 miles. All or most of the loads were taken to the southern California terminal before delivery, and deliveries to the jobsite were made on Mondays through Fridays and ranged from 0 to 8 per day depending upon weather and other circumstances and averaged approximately 2-1/2 deliveries per day. The time in transit to southern California was overnight, and deliveries to the jobsite were made by local drivers. Doudell had approximately 318 trailers at the time and was handling approximately 20 percent more traffic northbound between the San Francisco Bay and Los Angeles areas than southbound. Since it had a sufficient number of trailers and because of the economies involved, none of the loaded trailers were unloaded at the southern California terminal. Both the Montebello and new Compton terminals were approximately five or more acres and had ample space for parking loaded trailers. Also, the subhaulers furnishing the motive equipment

did not want to haul loads north unless they had a return load. If there were no return loads, Doudell would pay the subhauler one-half the usual fee for returning empty, and this was a losing proposition for both. Furthermore, Doudell wanted as much lead time as possible between pick up at Agnew and delivery at the jobsite so that any contingencies that might arise, such as checking equipment, equipment breakdowns, employee meal time, and the like, would not hold up the construction crews which were for the most part on schedule or ahead of schedule. To avoid any problems that might arise for these reasons and to achieve a better balance between the northbound and southbound movement of its trailers, Doudell at times asked PDM for more loads than were needed and would leave the loaded trailers at its southern California terminal until called for by the construction crew. Since the steel could have been moved directly from the plant to the jobsite, this was of no benefit to PDM. The loads were numbered for erection sequence. PDM had a man at the jobsite who was knowledgeable of when a particular shipment left the fabrication plant, what shipments were in transit, and what particular freight was at Doudell's southern California terminal. There is no reasonable basis for the assessment of any additional charges to or from Doudell's southern California terminal. Doudell is primarily an iron and steel hauler but also handles a substantial amount of government traffic and some general commodities.

Following is a summary of the testimony presented on behalf of Doudell by the two traffic consultants and its tariff publishing agent: It is typical for carriers in hauling steel to deliver it at their own convenience. The delays here were for Doudell's convenience and certainly did not result in a competitive advantage to Doudell because other carriers with adequate power equipment and trailers could have made direct deliveries from the fabrication plant to the jobsite. Load balancing between north and south shipments is an economical way of doing business and is particularly important during this period of fuel crisis. There is no regulatory or legal

basis for the staff's allegation that any shipment or part thereof held by a carrier at its destination terminal for two days prior to delivery, excluding Saturdays, Sundays, and holidays, terminates; that the carrier thereupon becomes a storer of the freight; and that the subsequent transportation to the consignee is a new shipment. This would be true even if the holding were at the specific instructions of the shipper since there are no rules in either PCTB 16 relating to Doudell or in MRT 2 which limit in any manner whatsoever time in transit of a shipment. The only such rule issued by the Interstate Commerce Commission was enjoined by the United States District Court in Oregon. The courts, the Interstate Commerce Commission, and this Commission have consistently held that highway common carriers must abide by their tariff and cannot arbitrarily assess charges not specifically provided for therein. If the Commission were to hold that Doudell were giving something of value by holding the steel at its southern California terminal, the only logical basis for compensation for this should be the reasonable charge for delay of the trailers which would be the average daily rental for such equipment which ranges from $2 to $5 per day. Since there was no tender of the freight for delivery at the jobsite prior to actual delivery, there could be no demurrage or storage. These would occur after delivery had been refused or after constructive delivery, which is a term used by the rail lines and occurs after a shipment has arrived at destination but cannot be accepted by the consignee for some reason. The rail tariffs provide free time of two more or less days depending upon the commodity transported and other circumstances after constructive delivery before demurrage charges accrue, and the free time does not commence to run until after written notice of arrival has been sent to the consignee by the rail carrier. The fact that there was daily communication between the consignee and Doudell's terminal as to what shipments were to be delivered to the jobsite does not constitute constructive delivery of

any and all freight that may have been at the terminal. There was no tender until actual delivery to the jobsite, and furthermore, there was no written notice of arrival sent to the consignee or agreement between the parties regarding this. It is not uncommon for rail shipments to be routed or handled in such a manner, either for the carrier's convenience or at the request of the shipper, so as to require many days in transit before either actual or constructive delivery. The erector crews at the jobsite want the steel on trailers so it can be taken off with a crane. A certain amount of lead time, usually 24 hours, is required on such shipments from the Bay Area to Los Angeles in order to assure proper coordination between arrival and the erection crew's schedule and avoid construction delays and the needless expense that would result therefrom. There would be no benefit to the consignee in having more than 48 hours steel available in southern California at one time, and certainly a lead time of a week or so is unnecessary. If the Commission were to adopt the staff position, it would have an extremely adverse impact on the shipping public. The question of whether any special tariff rules or provisions are required to cover the situation herein should be considered in a separate general proceeding in which the public at large could participate and present its views. This is not the proper proceeding in which to consider matters of statewide importance. The fact that in several instances part of a multiple-lot shipment from Agnew was handled through Doudell's Montebello terminal and the other part was handled through the carrier's Compton terminal doesn't require that the part through each terminal be rated as a separate shipment from origin as alleged by the staff. The competitive rail rate used by Doudell is the same to both locations, and a highway carrier using a rail competitive rate does not have to follow the rail route. The failure to restrict the 12-1/2 cent rate in Item 1252 of PCTB 16 was an oversight and will be corrected.

The vice president and general manager of Doudell further testified that it is Doudell's policy to assess correct tariff rates; that it has never knowingly given any rebates or performed any unauthorized services for any customer; that Doudell has over 300 customers and more than half of its revenue is from interstate operations, which include hauling from the docks in the San Francisco and Los Angeles areas and interline traffic into Arizona and Nevada; that the revenue earned from the PDM haul in issue was approximately $70,000, and this was less than 2 percent of Doudell's annual gross revenue; that when it became evident the staff investigator's review included more than a credit rule check, an independent auditor was hired by Doudell to review its records; that the auditor informed Doudell that in his opinion the charges it had assessed PDM were correct; that he made a second audit using a different theory, and as a result thereof, a balance due bill of $16,970.63 was sent to PDM on May 4, 1973, which was before the investigation order was issued; that PDM responded that it did not agree that there were any errors in the original billing; and that Doudell and the auditor agree that the original theory used to rate the transportation was correct and that no undercharges exist.

Discussion

We are not convinced by the record before us that any of the transportation should be rated as separate shipments from Agnew to Doudell's southern California terminal and as separate shipments to the jobsite. The evidence clearly establishes that there are no rules in Doudell's common carrier tariff or any Commission established rules or regulations relating specifically to the factual situation before us. The staff in its brief refers to our decision in the Investigation of Steel Transport, Inc. (Decision No. 76622 dated October 15, 1969 in Case No. 8869, unreported) and urges that the same result should be reached in this proceeding. The factual situation in the Steel Transport case was as follows: Steel coils were shipped from Kaiser Steel Corporation at Fontana to Kaiser Fabrication

at a location in Los Angeles; after pickup, the freight was taken to the carrier's terminal and unloaded and held; when the consignee could accept the freight, it was reloaded on the carrier's equipment and delivered; and the unloading and holding of the freight at the carrier's terminal was at the request of, and because of, the operating requirements of the consignor-consignee group. Finding 3 of the decision stated that the unloading, storage, and later reloading and delivery were accessorial services for the shipper, "and all of these accessorial services were performed for the convenience of the shipper". Based on these facts, the decision held that the transportation to the carrier's terminal constituted one shipment and the transportation from the terminal to destination constituted a separate shipment. However, the facts before us do not persuade us that the holding of the freight at Doudell's southern California terminal was requested by or for the convenience of either the shipper or the consignee. The mere fact that freight was held at the terminal does not establish this. We have, on the one hand, the testimony of the staff representative that he was informed by Doudell personnel that it was necessary to have a holding yard in southern California where freight could be held because it was not possible to schedule timely deliveries to the jobsite from a point as far away as Agnew; that the steel could not be stored on the street at the jobsite; and that both Doudell and PDM made the determination as to when the shipments were to be picked up from the plant in Agnew. On the other hand, we have the testimony of witnesses for Doudell and PDM that there were no instructions on the bills of lading or any other document or writing prepared by the shipper or any oral instructions by the shipper requesting the carrier to hold any shipment at any intermediate point between Agnew and the jobsite; that PDM had ample space at its Agnew plant to store any steel until it was needed at the jobsite; that the transportation of any of the steel prior to its need at the jobsite was to accommodate the carrier

in balancing its southbound traffic with its northbound traffic; that there was no need to ship any of the steel in advance of 24 hours of the time it was needed by the construction crew at the jobsite; and that the holding of any of the steel at Doudell's San Jose or Los Angeles terminals in no way benefited the shipper or consignee and was for the convenience of the carrier only. Based on the evidence before us, it would be patently unjust to find that the holding of any of the freight at the carrier's southern California terminal was requested by or for the benefit of the shipper or consignee, and that any of the transportation should be rated as a separate shipment from the terminal to destination. Having so concluded, it is not necessary to give further consideration to the arguments presented by the various parties on this issue. However, it is noted that Administrative Ruling No. 66 of the Interstate Commerce Commission, Bureau of Motor Carriers (Federal Carriers' Reports CCH 25,066) and Baltimore and Ohio Railroad Co. v United States ((1939) 305 U.S. 507; 83 L Ed 318), cited by the staff, refer to instances wherein storage was requested by or for the benefit of the shipper or consignee. This is not the situation here. Also, the decision of the United States District Court, District of Oregon, in Oregon-Pacific Industries, Inc., et al. v U.S., et al. (Civil No. 73-386 dated October 18, 1973) referred to by Doudell in its brief is not in point. That decision was concerned with an interpretation of the Interstate Commerce Commission's authority under the emergency car service section of the Interstate Commerce Act and is not comparable to the case before us.

Having determined that none of the transportation from Agnew to the jobsite in Los Angeles should be broken into separate shipments to and from Doudell's southern California terminals, the next issue for our determination is whether Doudell should be required to refund the difference between the 19 cents per 100 pound rate assessed and the 12-1/2 cents per 100 pound rate for the beyond railhead charge at destination. As pointed out above, the 12-1/2 cent

rate is published in both Item 1252 of PCTB 16 to which Doudell is a party and in Item 764 of MRT 2; the MRT 2 item includes a restriction which prohibits the use of the 12-1/2 cent rate in combination with alternatively applied rail rates; there is no such restriction in Item 1252 of Doudell's tariff; and both tariffs include the 19 cent rate which has no similar restriction. Item 764 was added to MRT 2 by Decision No. 78264 dated February 2, 1971 which also cancelled MRT 5 which included a similar item. Finding 9 of Decision No. 78264, as amended by Decision No. 78326 dated February 17, 1971 in Case No. 5432, et al., found that the rate in Item 764, including the restriction therein prohibiting the use of the rate with alternatively applied common carrier rates, was just, reasonable, and nondiscriminatory. Ordering Paragraphs 4, 5, and 7 of Decision No. 78264 provided that highway common carriers, which included Doudell, may not maintain in their tariffs rates, charges, or rules lower in volume or effect than those prescribed by the decision and that such tariff publications as are required shall be made effective not later than March 13, 1971. We agree with the staff that it is a general rule that a highway common carrier cannot deviate from its published tariff rates. If we were to follow the general rule here, the 12-1/2 cent rate, as urged by the staff, would be applicable since Doudell's tariff does not restrict its application in connection with the rail competitive rates in the tariff. However, as pointed out, Decision No. 78264 found the restriction against combining this rate with rail competitive rates to be just and reasonable and directed highway common carriers to publish this prohibition in their tariff prior to the transportation herein. In effect, the Commission has heretofore found the application of the 12-1/2 cent rate in the circumstances before us to be unreasonable. Therefore, if we were to direct Doudell to refund the difference between the 19 cent and 12-1/2 cent rates, we would be directing it to base its charges on an unreasonable rate. It is noted that according to the testimony of Doudell's

tariff witness, the failure to publish the restriction in Item 1252 of Doudell's tariff was an inadvertent error which was to be corrected immediately. We are of the opinion that the circumstances herein constitute an exception to the general rule, and we will not require Doudell to refund the difference.

As to the several instances wherein part of a shipment was held at Doudell's Compton terminal and part was held at its Montebello terminal, it is our conclusion that this was done for the convenience of the carrier and not at the request of or for the benefit of the shipper or consignee. In the circumstances, the holding would have no effect on the rates assessed by Doudell.

Although no undercharges will be found herein in connection with the transportation performed for PDM, it by no means follows that this portion of the investigation was improvidently pursued. Whenever it is brought to our attention that an apparent service of benefit to a shipper has been performed by a carrier and there is no tariff authority or charge made for such service, a most thorough inquiry will be made. Such circumstances are inherently suspicious, and the carrier must be prepared to demonstrate affirmatively that such service was for its convenience and was not requested by or for the benefit of the shipper.

Having determined that undercharges do exist in connection with the transportation performed for Pankow; that it has not been sufficiently demonstrated on this record that undercharges do in fact exist in connection with the transportation performed for PDM; and that no refunds need be made to PDM, the only issue remaining for our discussion is the penalties, if any, that should be imposed on Doudell.

As pointed out and for the reasons stated hereinabove, we are of the opinion that Doudell should be directed to pay a fine in the amount of the $6,191.61 in undercharges shown in the staff's Exhibit 8 in connection with the transportation performed for Pankow.

Additionally, we are of the opinion that a punitive fine in the amount of $2,000 should be imposed on Doudell and that it should be directed to cease and desist from violating the rates, rules, and regulations in its tariff.

Findings

1. Doudell operates pursuant to a highway common carrier certificate and also pursuant to other operating authority not involved herein.

2. Doudell is a party to all highway common carrier tariffs involved herein and has been served with numerous Commission minimum rate tariffs, including MRT 2, and distance tables.

3. The rates and charges computed by the staff in its Exhibit 8 (Pankow) are correct.

4. Doudell charged less than its lawfully prescribed tariff rates in the instances set forth in Exhibit 8 (Pankow) resulting in undercharges in the total amount of $6,191.61.

5. Prior to the issuance of the investigation order but subsequent to the commencement of the staff investigation, Doudell collected additional freight charges from Pankow in excess of the amount of undercharges referred to in Finding 4. The Pankow transportation in issue was performed over a span of from four to 11 months prior to the collection of the additional charges.

6. Although the additional charges, which included the undercharges referred to in Finding 4, were collected by Doudell from Pankow prior to the issuance of the investigation order, this does not insulate Doudell from the penalty provision in Section 2100 of the Public Utilities Code which provides in part that whenever the Commission, after hearing, finds that a highway common carrier has charged and collected less than its applicable tariff rates, the Commission shall require the carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges. Hearing has been held and undercharges have been found to exist. In such circumstances, the legislative mandate

in Section 2100 requires that Doudell be directed to collect the undercharges and confers discretionary authority on the Commission to levy a fine in the amount thereof. The fact that the undercharges may have already been collected is irrelevant. Furthermore, the fact remains that Doudell did not collect the applicable charges for the involved transportation when it was performed, and it did not review this matter or attempt to collect any undercharges until after the staff investigation had been under way.

7. Neither the copies of the bills of lading issued by PDM nor any other documentation in Exhibits 3 and 4 include thereon a request or instructions from PDM that any of its shipments were to be held at Doudell's San Jose or southern California terminals.

8. It has not been established on this record that the holding of the transportation referred to in Finding 7 and summarized in Exhibit 9 by Doudell at its San Jose or southern California terminals was requested by or for the benefit of PDM.

9. The holding of the PDM shipments in issue at Doudell's San Jose or southern California terminals was for Doudell's convenience.

10. Since the PDM shipments were held at Doudell's San Jose and/or southern California terminals for the carrier's convenience, no additional charge need be made in connection therewith.

11. It has not been shown on this record that undercharges exist in connection with the PDM transportation summarized in Exhibit 9.

12. The failure by Doudell and its tariff publishing agent to comply with the directive in Decision No. 78264, supra, to publish the restriction in Item 1252 of PCTB 16 prohibiting the use of the 12-1/2 cents per 100 pound rate therein in connection with the rail competitive rates in the tariff was an inadvertent oversight. Steps are being taken to correct this.

13. The restriction referred to in Finding 12 was found by Decision No. 78264, supra, as amended, to be reasonable.

14. The assessment by Doudell of the beyond railhead charge of 19 cents per 100 pounds provided in PCTB 16 for the transportation summarized in Exhibit 9 does not result in unreasonable and excessive charges for this service.

15. For the reasons stated in Findings 12, 13, and 14, Doudell will not be required to make any refund to PDM for any of the transportation summarized in Exhibit 9.

16. Doudell should collect charges for all transportation it performs within the applicable credit period.

Conclusions

1. Doudell violated Sections 453, 458, 494, and 532 of the Public Utilities Code.

2. Doudell should pay a fine pursuant to Section 2100 of the Public Utilities Code in the amount of $6,191.61 and, in addition thereto, should pay a fine pursuant to Section 1070 in the amount of $2,000.

3. Doudell should be directed to cease and desist from violating the rates and rules in its highway common carrier tariffs.

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

## O R D E R

IT IS ORDERED that:

1. Doudell Trucking Co., Inc. shall pay a fine of $2,000 to this Commission pursuant to Public Utilities Code Section 1070 on or

before the fortieth day after the effective date of this order. Doudell Trucking Co., Inc. shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. Doudell Trucking Co., Inc. shall pay a fine to this Commission pursuant to Public Utilities Code Section 2100 of $6,191.61 on or before the fortieth day after the effective date of this order.

3. Doudell Trucking Co., Inc. shall cease and desist from violating applicable tariff rules, including collection of charges rules, and from charging and collecting compensation for the transportation of property or for any service in connection therewith in a different amount and/or in a different manner than that prescribed in its tariffs.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon respondent Doudell Trucking Co., Inc. and to cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 2nd day of JUNE, 1976.

President

Commissioners