ALJ/bg

Decision 84 02 070 FEB 16 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, charges and practices of California American Trucking, Inc. and Alpha Steel Tubes and Shapes, Inc., Amrol, Inc., Anaheim Foundry Company, Domaine Chandon, Chase Bag Co., the Wickes Corporation, Flintkote Supply Co., Mortarless Building Materials, and Soule Steel Co.	OII 82-09-01 (Filed September 22, 1982)

Hegarty, Pougiales, Loughran & Gulseth, by James H. Gulseth, Attorney at Law, for Cal-American Trucking, Inc.; Donald Murchison, Attorney at Law, for Anaheim Foundry Co., Soule Steel Company, and Amrol, Inc., dba American Rolling & Manufacturing Company; and Clapp & Custer, by James S. Clapp, Attorney at Law, for Chase Bag Co.; respondents.
Alberto Guerrero, Attorney at Law, and Wilbur Anderline, for the Commission staff.

O P I N I O N

This matter was initiated by the Commission to determine whether California American Trucking, Inc. (Cal-American), a highway contract carrier, has operated in violation of California Public Utilities (PU) Code §§ 494, 1063, 3664, 3667, and 3737 by assessing rates and charges less than those prescribed in Minimum Rate Tariff (MRT) 10 and Transition Tariff (TT) 2; has violated General Order (GO) 102; and has transported cement over the public highways for compensation without authority, in violation of PU Code §§ 1063 and/or 3621.

In the Order Instituting Investigation (OII) it was alleged that violations may have occurred in connection with transportation performed for nine different freight bill payers, and that transportation was performed by five unauthorized carriers.

On October 29, 1982, counsel for shipper Anaheim Foundry Company (Anaheim) filed a motion to dismiss the OII as it relates to Anaheim. Grounds for the motion are that PU Code § 3502 provides, in part, "It is the purpose of this chapter...to secure to the people just and reasonable rates for transportation by carriers operating upon such highways..." and that the basic purpose in regulating transportation is not to obtain higher rates for carriers, but to make sure that the "people" are not overcharged; further, that the "people" cannot be charged with errors of carriers failing to comply with orders of this Commission, and that a good faith contract entered into between shippers and carriers is binding and final. Counsel notes that Decision (D.) 93766, dated November 13, 1981 in OIR 4 which established rulemaking procedures during the transition period from minimum rates placed no responsibility on the "people" to see that rules are observed, nor any basis for fining shippers by claiming undercharges on the part of carriers. This motion was amended at the hearing held March 8, 1983 to include shippers Amrol, Inc., and Soule Steel Co. (Soule Steel).

Hearings were held in March, May, and June 1983 in San Francisco before Administrative Law Judge (ALJ) John Lemke. At the hearing on May 5 counsel for shipper Chase Bag Co. (Chase) presented an oral motion to stay or dismiss the OII as a result of the filing by Cal-American of a petition in bankruptcy. The ALJ took the motion under submission with the understanding that parties would address this issue in post-hearing briefs. The proceeding was submitted upon the receipt of concurrent briefs on August 5, 1983. Farmaster, a division of The Wickes Corporation, filed a response brief August 30, 1983.

Several principal issues are presented for our consideration in this proceeding:

1. Whether a shipper is liable or responsible for a carrier's failure to comply with the orders of the Commission when a good faith, binding contract was relied upon and entered into between a shipper and carrier.
2. Whether rates contained in TT 2 are "minimum" rates as that term is used in PU Code §§ 3664, 3667, and 3800.
3. Whether interstate or intrastate rates apply to shipments transported for Chase.
4. Whether the Commission may properly address the issues in this proceeding in light of the fact that Cal-American and shipper The Wickes Corporation, doing business as Farmaster Division, have filed petitions for relief under Chapters 7 and 11, respectively, of the Federal Bankruptcy Code (FBC).

Evidence

Carrier

Cal-American presented no evidence during the course of this proceeding.

Staff

Staff presented its case through the testimony and exhibits of Donald Schieck, Senior Transportation Representative, and Rita Clark, Associate Transportation Rate Expert. Schieck sponsored Exhibit 7, a profile of Cal-American. This exhibit is reproduced below.

Carrier Profile

Carrier: California American Trucking,
a California Corporation
1215 South Main Street
P.O. Box 3
Yreka, CA 96097

Officers: Clyde Franklin, President
John Harleman, Secretary

Operating Authority: Highway contract carrier permit issued October 10, 1980. (Presently under suspension.)

Tariff Service: Commission records show the following tariffs were served upon the carrier pursuant to subscription:

Transition Tariff 2
Exception Ratings Tariff 1
Distance Table 8

Motor Vehicle Equipment: No power units or trailers are owned or are being purchased. Seventeen trailers are rented by carrier and in turn are rented to owner-operators.

Terminals Maintained: None. The office is located on South Main Street in Yreka.

Employees: 7 office and clerical
3 dispatchers

Bonds: Carrier has a subhaul lease bond on file with the Commission.

Operating Revenue: (As reported)

	All Gross	Calif. Gross
3rd Quarter 1981	$1,134,263	$21,224
2nd Quarter 1981	1,042,536	86,479
1st Quarter 1981	766,838	0
4th Quarter 1980	418,896	0

Exhibits 1 through 5 contain copies of freight bills and shipping documents relating to the shipments transported for the debtors involved in this proceeding. Exhibit 6 contains copies of documents reflecting services performed by nonpermitted independent contractor subhaulers engaged by Cal-American. Five individual subhaulers, holding no operating authority from this Commission, were engaged by Cal-American to transport intrastate shipments during the review period.

Exhibit 1 contains freight bills and supporting documents covering 26 truckload shipments of sacked Portland cement transported for Flintkote Supply Co. Schieck testified that Cal-American did not execute a written contract for this transportation, nor did it hold operating authority to transport truckload shipments of cement.

Undercharges determined by witness Clark in connection with transportation performed for the nine shipper respondents designated in the OII are as shown in Table 1 below:

TABLE 1

Exhibit No.	Shipper	Undercharges
10	Flintkote Supply Co.	$ 2,120.29
11	Alpha Steel	3,446.56
12	Amrol, Inc.	6,174.72
13	Anaheim Foundry	1,767.89
14	Domaine Chandon	2,112.43
15	Wickes Corporation	4,295.98
16	Mortarless Bldg.	7,063.99
17	Soule Steel	11,336.63
18	Chase Bag Co.	19,426.89
	Total Undercharges	$57,745.38

Exhibit 6, in addition to containing documents demonstrating the engagement of five unlicensed subhaulers by Cal-American, includes a copy of GO 102, which sets forth rules concerning leasing of equipment and hiring of subhaulers by prime carriers. Rule 3 of GO 102 prohibits the engagement by prime

carriers of unauthorized carriers as subhaulers. Schieck pointed out that the lease of equipment agreements do not comply with GO 102 because they do not contain provisions for compensation or expiration dates.

Shippers

Considerable testimony was presented by employees of three shippers - Anaheim, Amrol, Inc., and Soule Steel - to the effect that contracts had been entered into with Cal-American; that these contracts were relied upon by shippers as purporting to contain valid, effective rates and contract terms; and that shippers had received no information from the staff or any other party stating that the contracts were either rejected or not received by the Commission. Shippers stated they assumed Cal-American would file the contracts with the Commission, but this was apparently never done.

Staff witness Clark testified that a contract between Cal-American and Soule Steel, which had been received by the Commission on June 1, 1981 was rejected because it contained rates based on a tariff of another carrier - Teresi Trucking, Inc. (Teresi) - which had been increased a month earlier. The rejected rates did not reflect the increases. Exhibit 9 is a copy of the notice of rejection. Clark also testified that the shipments which are covered by the documents contained in Exhibit 2 along with the undercharge calculations shown in Exhibit 17 for Soule Steel would not have been covered by the contract regardless of the rejection. This is because the shipments included in the staff's undercharge determinations were either transported before the contract was filed, or else consisted of commodities not covered by the Teresi tariff.

Clark testified that a similar contract filing had been made for transportation performed by Cal-American for Anaheim, but was also rejected.

Chase presented evidence initially through Edward Francom, a transportation consultant. Francom testified that he had prepared

an application to the Interstate Commerce Commission (ICC) in 1979 on behalf of another carrier, Washington-Oregon Lumber Freighters, Inc. (WOLF), requesting authority to transport paper items from Portland, Oregon, and from Hanford, California, to various destinations in the western states. A copy of the application was introduced as Exhibit 20. It contains a support statement from Chase's general traffic manager describing inbound shipments of wrapping paper to Hanford from Portland and Seattle, and outbound shipments of paper bags from Hanford to various destinations, including points in California. The outbound shipments were deemed by Chase interstate in nature, whether destined to points within or without California, because they were consigned to repeat customers on a regular basis. The application was granted by the ICC, and WOLF subsequently filed a tariff (Exhibit 22) containing rates applicable to transportation performed under this authority.

Francom testified further that he assisted Cal-American in securing interstate motor carrier operating authority comparable to that held by WOLF, and in preparing and filing with the ICC a tariff containing rates for that authority. Cal-American's interstate tariff - Freight Tariff No. 201 - was received as Exhibit 23. Francom had no personal knowledge concerning the marketing procedures observed by Chase and could not state whether ultimate destinations of the shipments of bags transported from Hanford to California points included in the OII were known at the time the rolls of paper were shipped from Oregon or Washington.

Staff witness Schieck testified that in a telephone discussion with Charles Dwyer, general traffic manager for Chase in Chicago, Dwyer stated that the inbound rolls of paper were not preprinted prior to arrival at Hanford, nor identified to correlate with a bag name or printing order number. He stated Dwyer informed him that about 50% of the time Chase has knowledge of ultimate consignees of bag shipments when inbound shipments of wrapping paper

are made to Hanford. Schieck further testified that no written transit records were executed by Cal-American or Chase in connection with this transportation.

Further hearing was held June 22 for the purpose of receiving testimony concerning late-filed Exhibit 24. This exhibit contains documents covering outbound shipments of bags from Hanford to various California destinations. It also contains documents and shipping orders covering inbound movements of wrapping paper from northwest origins. These documents demonstrate essentially that there is a continuing movement of paper into Hanford, and a continuing movement of bags from Chase at Hanford to various repeat customers located at many California destinations.

Discussion

Bankruptcy Issues

Staff argues, in response to Chase's motion to dismiss, that while it is true that the filing of a bankruptcy petition operates as an automatic stay to the commencement or continuation of a judicial, administrative, or other proceeding against a debtor under FBC Section 362(a)(1),[1] it does not operate as a stay where,

---

[1] "§ 362. Automatic stay

"(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of--

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;"

as here, there is an action by a government unit to enforce its police or regulatory powers, citing FBC Section 362(b)(4).[2]

Simply stated, if this OII falls within the exception to the automatic stay provided in Section 362(b)(4) we are not enjoined from directing the collection and payment of undercharges as provided in PU Code §§ 3774 and 3800. If the OII does not fall under the exception, the proper course for us may well be to (1) dismiss the proceeding or (2) determine the precise amount of undercharges, and rather than direct the collection of those undercharges, serve a copy of our decision upon Cal-American's trustee in bankruptcy so that the undercharges may be collected and shippers not be unjustly enriched.

Chase cites a number of cases in support of its contention that we should dismiss: The exception stated in Section 362(b)(4) is intended to encompass only governmental action necessary to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar laws. (In re Ryan, 15 Bankruptcy Reporter (BR) 514, Maryland, 1981.) If the focus of police or regulatory power is directed at a debtor's financial obligations rather than the state's health and safety concerns, the exception in Section 362(b)(4) to the automatic stay is inapplicable. (In re Sampson, 17 BR 528, Connecticut, 1982.) Requiring payment of delinquent taxes owed the state before a state liquor license could issue does not avoid the automatic stay. (In re Pizza of Hawaii, Inc., 12 BR 796, Hawaii, 1981.)

---

[2] "(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay--"

* * *

"(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;"

In In re State of Missouri, 647 F 2d 768, 8th cir. 1981 (cert. denied) the court distinguished between conduct of the state in the enforcement of police powers and actions relating to pecuniary matters. The court held that Missouri's grain laws, while regulatory in nature, relate primarily to the protection of a pecuniary interest of the state in the debtor's property and not to matters involving safety and health. These laws were held not to fall within the Section 362(b)(4) exception. (The Missouri statutes empower the state to operate and liquidate insolvent grain warehouses; accordingly, the Missouri Department of Agriculture filed receivership petitions in state courts.) In deciding that the Missouri laws did not fall within the exception, the court stated that the present exception provisions amplify and clarify provisions of the former bankruptcy laws and rules providing for automatic stay of proceedings against debtors. In explaining the Section 362(b)(4) exception the court referred to Congressional House Report comments:

> "Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a government unit of a money judgment would give it preferential treatment to the detriment of all other creditors. (H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, 5963, 6299)."

The court also quoted comments of Congressman Don Edwards, chairman of a subcommittee of the Judiciary Committee considering the Bankruptcy Code:

> "This section (362(b)(4)) is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate. (124 Cong. Record H 11089, reprinted in 1978 U.S. Code Cong. & Ad. News 6436, 6444-6445.)"

The court then stated that in light of the legislative history and court decisions under the earlier bankruptcy act, the term "police or regulatory power" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not laws that directly conflict with the control of the res or property by the bankruptcy court.

To further illustrate the paramount and exclusive nature of the federal bankruptcy courts, the court stated that the bankruptcy court could take steps under FBC Section 105(a)[3] to protect its jurisdiction over an estate regardless of whether a proceeding falls within the exception, and observed that the bankruptcy court may enjoin action by state regulatory agencies even when state action is not automatically stayed, citing 2 Collier on Bankruptcy, Par. 105.02 (15th ed. 1979).

We have not been referred to nor found any precedent involving fines or penalties in bankruptcy proceedings. While our action in this OII is regulatory in nature, the holdings in the cases referred to us, particularly the Missouri case, supra, are persuasive

---

[3] "§ 105. Power of Court
"(a) the bankruptcy court may issue any order, power, or judgment that is necessary or appropriate to carry out the provisions of this title."

that jurisdiction over the undercharges which we will find hereafter lies primarily with the bankruptcy court since they are pecuniary, or monetary, in nature. However, having made this determination, we are not obliged to dismiss the OII, as Chase suggests we must do. This proceeding is an investigation to determine whether, inter alia, Cal-American has transported cement without proper Commission authority, failed to issue subhaul agreements in violation of GO 102, engaged unauthorized carriers as subhaulers in violation of the same GO, and whether it should be ordered to cease and desist from unlawful operations or practices. We find that these latter issues are not concerned primarily with any pecuniary interest in Cal-American, and properly fall under the Section 362(b)(4) exception relating to police or regulatory powers.

Even though we are deferring to the bankruptcy court on the issue of undercharge collections, we do not consider the Commission to be enjoined from finding that undercharges exist, and from bringing that information to the attention of the trustee in bankruptcy for the estate of Cal-American. Hopefully, such action on our part will operate to prevent the unjust enrichment of shippers which would almost certainly occur were we to merely dismiss the OII. In investigation proceedings where there is no bankruptcy issue, we direct respondent carriers to take such action as may be necessary, including legal action, to effect collection of undercharges. The trustee in bankruptcy for Cal-American clearly has the authority to institute the necessary action to effect the collection of undercharges under the provisions of FBC Section 3234(b): "The trustee in a case under this title has capacity to sue and be sued."

With respect to fines assessed under PU Code §§ 3774 (punitive) and 3800 (undercharges) we note these are not discharged

as are other debts because of the provisions of FBC Section 523(a)(7).[4] The undercharges we are finding in this decision, if and when collected by the trustee, will more than likely be dispersed to creditors higher in priority than the Commission. However, in the circumstances it appears reasonable to require that Clyde Franklin or John Harleman, the two shareholders in Cal-American, pay the undercharge fine applicable under PU Code § 3800 prior to the issuance to either of any new operating authority. This fine ($57,745.38) would be in lieu of any fine otherwise assessed under PU Code § 3774.

We note from records maintained by our Transportation Division that Clyde Franklin and John Harleman, principal shareholders in Cal-American, are the principal owners in another entity holding operating authority issued by this Commission - Commonwealth Trucking, Inc. (Commonwealth) (Cal T-135,974). This latter company was issued a highway contract carrier permit on October 6, 1981. File information shows that Franklin and Harleman own 520 of the 1,000 shares outstanding in Commonwealth.

We place Commonwealth on notice that present PU Code § 3774 (Statutes 1982, Chapter 1004) contains sanctions considerably harsher than those applicable under that section at the time of the violations covered by this OII. Should Commonwealth be found to have engaged in any unlawful practices over which this Commission has jurisdiction, serious consideration will be given to invoking the maximum penalties authorized under PU Code §§ 3774 and/or 3800.

---

[4] "§ 523. Exceptions to discharge
"(a) A discharge under Section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debit--"

* * *

"(7) to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss,..."

Insofar as this OII relates to undercharges for the account of the Wickes Corporation, the Chapter 11 petitioner in bankruptcy, we will leave to the trustee in bankruptcy for Cal-American the determination whether those undercharges are collectible.

Undercharges for Chase

Chase alleges that the transportation of paper bags from its Hanford facility is interstate in nature, and therefore not subject to rates named in TT 2 as claimed by the staff. The evidence of record persuades us otherwise. Shipments of wrapping paper are received by Chase at Hanford from points in Oregon and Washington throughout the year. There is no indication on inbound shipping documents that shipments are intended to be delivered ultimately to a consignee other than Chase at Hanford.

A very large inventory is maintained at Hanford. Much of the time paper received from out of state is not ordered with a specific customer in mind. (Tr. 246-4.) Billy Holiman, office manager at the Hanford facility, testified that Chase's regular customers generally order their shipments at regular times and for the same type of bags, so that Chase anticipates these orders in maintaining the Hanford inventory. He testified that the material received from out of state is in all cases wrapping, or wall-to-wall grade paper. (Tr. 258-17.)

Schieck testified he was informed by Chase's general traffic manager, Charles Dwyer, that paper could remain in the Hanford inventory for up to six months. He also testified that Dwyer informed him that approximately half of the time Chase has knowledge, and half of the time it does not, concerning precisely where shipments of bags will be destined when the shipments of wrapping paper leave Washington.

Chase maintains that in the design of Cal-American's Freight Tariff 201, the processing of the paper was considered, and

that both wrapping paper and paper bags come under the category of wrapping materials. It is conceded by Chase that these two commodities take different classifications in the National Motor Carrier or Rail Classifications, but claimed that Cal-American was not a member of the National Motor Freight Classification and created its own classifications of traffic.

Cal-American's Tariff No. 201 provides in Item 900.1 that transit rates apply only when inbound shipments to Hanford are transported by Cal-American. The item also requires that at the time of shipment from point of origin to Hanford, the carrier must be advised by the shipper if the shipment is to be recorded for transit and a record maintained of all inbound transit shipments. Furthermore, shipments accorded transit must be reshipped from transit point within 30 days if transit rates are to apply. Schieck testified he was advised by Dwyer that no written records were executed by carrier or shipper in connection with this transportation.

Chase argues that the interpretation of Cal-American's tariff and certificate should be left with the ICC, and refers us to Service Storage and Transfer Co. v Commonwealth of Virginia (1959) 359 U.S. 171. In that case a motor carrier was operating from origins in Virginia to destinations in the same state, but was actually moving the freight through West Virginia for alleged operating convenience. The Virginia Corporation Commission and Virginia Court of Appeals both held that the operation through West Virginia was a subterfuge to evade state law. The U.S. Supreme Court held that the interpretation of the carrier's interstate commerce certificate should first be litigated before the ICC under provisions of the Interstate Commerce Act (ICA). The court noted that Section 204(c) of the ICA provided, in effect, that upon complaint by a state commission to the ICC, the latter could investigate whether a carrier had violated the terms of its certificate.

A copy of Cal-American's certificate, No. MC-152238, Sub 1F, is contained in Exhibit 23:

> "To operate as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting (1) paper bags and wrapping paper, and (2) materials and supplies used in their manufacture between points in Multnomah County, Or, and Kings County, Ca, on the one hand, and, on the other, points in Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming."

Interstate rates were found to apply where cottonseed cake destined for export was transported within a single state to a point where it was converted into meal, the court even finding that it made no difference that the shipments within a single state were not made on through bills of lading, as in the case before us. (S.P. Terminal Co. v ICC (1907) 219 U.S. 498.)

However, we find the facts before us similar to those cited by the staff in Arkadelphia Co. v St. Louis S.W. Ry. Co. (1918) 249 U.S. 134. There, the court held that where a commodity is transported to a point where a manufacturing process takes place which materially changes its character, utility, and value, the commodity has ended its journey, and any subsequent transportation of the finished product is separate and distinct. The inbound material in Arkadelphia was rough wood; the outbound product was a commodity manufactured into finished staves, hoops, etc. Furthermore, the finished product about 95% of time was shipped to points beyond the boundaries of the state within which the inbound movements took place. Nevertheless, the inbound movements within the State of Arkansas were held to be intrastate in nature. The court stated: "It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough

material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period,--manufacture and storage occupying five months on the average,--for the purpose of finding a market."

With respect to the holding in Service Transfer Co., supra, that interpretation of federal certificates should be made in the first instance by the ICC, we do not intend to interpret Cal-American's ICC certificate, which authorizes interstate operations. Instead, we find that the movement of paper bags from Hanford to California consignees cannot possibly be interstate traffic under the Arkadelphia rule, and that intrastate rates must be applied to this transportation. Moreover, it should be noted that in the Service case the court did not state that all certificates should be interpreted by the ICC, but that the interpretation of federal certificates "of this character" should be made first by that body. The facts characterizing Service are significantly different from those found in the case before us, Service involving primarily the issues of operating convenience and possible subterfuge.

Amrol, Inc., Anaheim, and Soule Steel argue that the PU Code sections cited in the OII which Cal-American is charged with violating apply solely to public utilities (§ 494), or to transportation performed under minimum rates (§3664, 3667), but that they are not applicable here since minimum rates for this transportation have been canceled by D.90663 dated August 14, 1979 in Case 5432, Petition 884 et al., and Cal-American is not a public utility.

While it is true that MRT 2 was canceled effective April 30, 1980, D.90663 also provided that rates named in TT's would function as a threshold for purposes of contract carrier rate justification requirements, and that rates filed by contract carriers below the transition rates must be accompanied by a statement of justification. Justification must consist either of (1) reference to another motor carrier's rate, or (2) operational and cost data showing that a proposed rate will contribute to carrier profitability. It follows that without one of these two means of justification, TT 2 rates are the applicable rates for transportation performed for these shippers. The title page to TT 2 states that it applies to transportation performed by highway contract carriers and to highway common carriers.

We find that where a written contract for transportation covered by TT 2 has not been executed by a carrier and shipper, and approved by the Commission, specifying rates different from those named in TT 2, rates applicable to transportation performed are those contained in TT 2. Further, these rates in TT 2 are, in effect, minimum rates within the meaning of PU Code §§ 3664, 3667, and 3800.

Although Amrol, Inc., Anaheim, and Soule Steel testified that they executed contracts with Cal-American and relied upon those contracts, the contracts were not produced for the record. These shippers allege they relied upon a provision in the contracts stating that they would be held harmless and indemnified for any loss or expense due to Cal-American's failure to comply with Commission rules or regulations.

We have stated in previous cases addressing this particular issue:

> "'It has been well established that a misquotation or misunderstanding of a rate does not relieve

> the parties from assessing and paying the proper tariff rate, as the law charges all parties with a knowledge of the proper rates from which neither the shipper nor the carrier can deviate.' Sunny Sally, Inc. v Lom Thompson, Decision No. 57327, p. 3 (1958)."

Furthermore,

> "In this connection, it is pointed out that no equitable defense, based upon the default of a carrier, may be interposed to the collection of proper tariff charges applicable to the transportation service furnished, notwithstanding any agreement or understanding between the carrier and the shipper which may be contrary thereto. (citation omitted) Morrison Trucking Co., 61 CPUC 234, 236, 237 (1963)."

By asserting that they are protected from any liability based on their contractual agreements with the carrier, the shipper respondents are challenging the Commission's right to impair those contracts by modifying the rate contracted to by the parties during the period of performance of the contract. It has long been settled that action by a regulatory body in fixing rates which may change the terms of a previously entered into contract is not an impairment thereof (see Earth Commodities Transport, CPUC D.72858, p. 4).

During the hearing, respondent shippers implied that it is the Commission's responsibility to inform shippers that a filed contract has been rejected. Nowhere in the rules and regulations or decisions of this Commission or in statutes or court decisions will such a duty be found.

Thus, as indicated by the Commission in its D.86461 (1976), the Commission is required to order collection of the undercharges involved. The Commission's interest is the public interest and it

must give the utmost consideration to its obligation and duty to maintain the integrity of the established minimum rates. (Acme Truck Co. (1965) 65 CPUC 20, 24.)

Findings of Fact

1. During the period April through September 1981 Cal-American, a highway contract carrier, performed transportation for the shippers designated as respondents in this proceeding, at rates lower than those specified in TT 2 and MRT 10.

2. During this same period Cal-American engaged unauthorized carriers as subhaulers, in violation of GO 102, and entered into lease of equipment agreements lacking information required by GO 102.

3. Cal-American transported 26 truckload shipments of sacked cement for Flintkote Supply Co., without holding authority from the Commission to transport this commodity.

4. Undercharges occurring in connection with transportation included in this proceeding total $57,745.38. Undercharges for individual shippers are those contained in Exhibits 10 through 18 and in Table 1, infra.

5. Cal-American filed its petition for bankruptcy under Chapter 7 of the FBC on April 27, 1983 in the United States Bankruptcy Court in Sacramento, California, in Case No. 28301847.

6. The Wickes Corporation filed its petition for relief under Chapter 11 of the FBC in the United States Bankruptcy Court for the Central District of California on April 24, 1982.

7. FBC Section 362(a)(1) provides for a stay to the commencement or continuation of this OII, as it relates to pecuniary matters, upon the filing of the above petitions in bankruptcy. Filing of the petitions does not operate as a stay to the matters addressed in this OII which are nonpecuniary in nature.

8. FBC Section 362(a)(1), when read with FBC Sections 362(b)(4) and 523(a)(7), does not prohibit a finding by this decision of the existence of undercharges.

9. Transportation performed for Chase included shipments of a commodity from Hanford, paper bags, materially different in use and value from the wrapping paper transported into Hanford.

10. The shipments of paper bags from Hanford for Chase to California destinations must be considered intrastate transportation under the holding in Arkadelphia Co. v St. Louis W.W. Ry. Co. (1918) 249 U.S. 134.

11. Cal-American held only a highway contract carrier permit when it performed the transportation included in this OII. The permit is presently under suspension.

12. TT 2 named rates applicable to the transportation covered by this proceeding, except for the truckload shipments of cement hauled for Flintkote Supply Co.

13. Rates contained in TT 2 are minimum rates in that carriers may not assess rates less than those named in TT 2 without prior Commission approval.

14. There is no probative record evidence in this proceeding of the existence of Commission-approved contracts containing rates for transportation at levels lower than rates contained in TT 2.

Conclusions of Law

1. Cal-American has violated PU Code §§ 3664 and 3667 by assessing and collecting rates less than those named in TT 2 and MRT 10.

2. Cal-American has violated PU Code § 3737 by performing transportation services as a highway contract carrier without having contracts on file with the Commission, as required by D.90663, dated August 14, 1979.

3. Cal-American has engaged unauthorized carriers as subhaulers in violation of GO 102.

4. Cal-American has further violated GO 102 by entering into lease of equipment agreements which lack information required by GO 102.

5. Cal-American has transported truckload shipments of cement without proper Commission authority, in violation of PU Code § 3621.

6. Cal-American should be ordered to cease and desist from violating PU Code §§ 3664, 3667, and 3621, GO 102, and D.90663.

7. No highway carrier authority should be issued to Clyde Franklin or John Harleman, principal shareholders in Cal-American, or to any entity in which either of those individuals has a beneficial interest exceeding 5%, until payment is made to the Commission of a fine in the amount of $57,745.38, as provided in PU Code § 3800.

8. The Executive Director should cause a copy of this decision to be served upon the trustee in bankruptcy for Cal-American and upon each shipper respondent named in the OII. The Executive Director should also cause a copy of each rate exhibit setting forth undercharges and introduced into evidence in this proceeding to be served upon the trustee in bankruptcy for Cal-American.

9. The motions of Amrol, Inc., Anaheim, Soule Steel, and Chase to dismiss this OII should be denied.

O R D E R

IT IS ORDERED that:

1. California American Trucking, Inc. (Cal-American) shall cease and desist from violating any and all rules established by this Commission and from charging and collecting compensation for the transportation of property, or for any services in connection with it, in a lesser amount than the applicable tariff or contract rates and charges.

2. The permit held by Cal-American will not be removed from suspension, nor will any new highway carrier operating authority be issued to Clyde Franklin or John Harleman, or to any entity in which either Clyde Franklin or John Harleman has a beneficial interest exceeding 5%, until payment is made to the Commission of a fine in the amount of $57,745.38, as provided in PU Code § 3800.

3. The motions of Amrol, Inc., Anaheim Foundry Company, Soule Steel Co., and Chase Bag Company to dismiss this OII are denied.

4. The Executive Director shall cause a copy of this decision to be served upon Cal-American upon the trustee in bankruptcy for Cal-American, upon Commonwealth Trucking, Inc., and upon each respondent shipper named in this OII.

5. The Executive Director shall cause to be served upon the trustee in bankruptcy for Cal-American one copy each of Exhibits 10 through 18 received in evidence in this proceeding.

The effective date of this order shall be 30 days after service of this decision upon the trustee in bankruptcy for Cal-American.

Dated FEB 16 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Victor Calvo, being necessarily absent, did not participate

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

as here, there is an action by a government unit to enforce its police or regulatory powers, citing FBC Section 362(b)(4).[2]

Simply stated, if this OII falls within the exception to the automatic stay provided in Section 362(b)(4) we are not enjoined from directing the collection and payment of undercharges as provided in PU Code §§ 3774 and 3800. If the OII does not fall under the exception, the proper course for us may well be to (1) dismiss the proceeding or (2) determine the precise amount of undercharges, and rather than direct the collection of those undercharges, serve a copy of our decision upon Cal-American's trustee in bankruptcy so that the undercharges may be collected and shippers not be unjustly enriched.

Chase cites a number of cases in support of its contention that we should dismiss: The exception stated in Section 362(b)(4) is intended to encompass only governmental action necessary to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar laws. (In re Ryan, 15 Bankruptcy Reporter (BR) 514, Maryland, 1981.) If the focus of police or regulatory power is directed at a debtor's financial obligations rather than the state's health and safety concerns, the exception in Section 362(b)(4) to the automatic stay is inapplicable. (In re Sampson, 17 BR 528, Connecticut, 1982.) Requiring payment of delinquent taxes owed the state before a state liquor license could issue does not avoid the automatic stay. (In re Pizza of Hawaii, Inc., 12 BR 796, Hawaii, 1981.)

---

[2] "(b) The filing of a petition under section 301, 302, or 303 of this title does operate as a stay--"

* * *

"(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;"