

ORIGINAL

Decision No. 86779

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 S. J. STEEL TRANSPORTATION, INC., a California corporation; DOUDELL TRUCKING CO., a California corporation; ANIMAL FOODS CO., a Nevada corporation; BETHLEHEM STEEL CORPORATION, a Delaware corporation; THE FLINTKOTE CO., a Massachusetts corporation; KAISER STEEL CORPORATION, a Nevada corporation; SAN JOSE STEEL COMPANY, INC., a California corporation; and those individuals, partnerships and corporations listed in Attachment A, attached hereto.

Case No. 9786
(Filed August 27, 1974)

Carl Silverhart, Attorney at Law, for S. J. Steel Transportation, Inc.; Handler, Baker & Greene, by Marvin Handler, Attorney at Law, for Doudell Trucking Co.; Robert N. Baker, Attorney at Law, for San Jose Steel Company, Inc.; and John M. Cunningham, for Bethlehem Steel Corporation; respondents.
James T. Quinn, 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 to determine whether alter ego relationships existed between S. J. Steel Transportation, Inc. (SJST) and Doudell Trucking Co. (DTC), a corporation, and between DTC and Animal Foods Co., (AFC); whether the carriers listed in Attachment A to the order instituting investigation, each of whom were engaged by SJST as purported

subhaulers to transport canned pet food for AFC at less than minimum rates, were in fact prime carriers and should have received the applicable minimum rates for this transportation; and whether SJST should have received the applicable rates in DTC's common carrier tariff in connection with the transportation of steel products, tin plate, pipe, and pipe fittings it performed for Bethlehem Steel Corporation (Bethlehem), The Flintkote Company (Flintkote), a corporation, Kaiser Steel Corporation (Kaiser), and San Jose Steel Company, Inc. (San Jose Steel).

Eleven days of public hearing were held in San Jose and San Francisco before Examiner Arthur M. Mooney during January, February, and March 1975. The matter was submitted upon the filing of concurrent briefs on July 1, 1975.

SJST operates pursuant to radial highway common carrier and dump truck carrier permits and has been served with all applicable minimum rates tariffs, distance tables, and exception ratings tariffs. During the year 1972, its gross operating revenue was \$351,623, including \$1,338 earned from subhauling. For this period, it paid \$173,232 to subhaulers.

DTC operates pursuant to a highway common carrier certificate authorizing the transportation of general commodities between numerous points within the State, a cement carrier certificate, and also radial highway common carrier, highway contract carrier, and dump truck carrier permits. In addition, it holds authority from the Interstate Commerce Commission. It has all applicable highway common carrier tariffs. During the year 1972, its gross operating revenue from all sources was \$4,048,677, which included \$27,754 earned from intrastate subhauling and \$2,963,995 earned from interstate transportation. For this period it paid \$1,446,876 to subhaulers.

Issues

The primary issue for our determination is whether alter ego relationships did in fact exist between SJST and DTC and between DTC and AFC during the period from late June through the end of 1972. If the answer is in the affirmative, the secondary issues are whether SJST should be directed to pay the independent owner-operators engaged by it as ostensible subhaulers to transport the property of AFC during this period the difference between the amounts paid them and the applicable minimum rates for such transportation, and whether during the same period, there were undercharges in connection with transportation performed by SJST for Bethlehem, Flintkote, Kaiser, and San Jose Steel within the area covered by DTC's highway common carrier authority and for which SJST charged minimum rates rather than the rates named in DTC's common carrier tariff. If the answer is in the negative, the investigation will be dismissed.

We will first set forth the background of SJST, DTC, AFC, and seven other companies which the Commission staff alleges are related to SJST and DTC. This will be followed by a summary of the evidence presented by and the positions of the staff and the respondents and our discussion thereof.

Background

The evidence establishes that the following facts existed during the period from late June through the end of 1972, and we find them to be such:

1. DTC's highway common carrier certificate authorized the transportation of general commodities, with the usual exceptions, generally between San Rafael, Sacramento, and the Nevada stateline, on the north, and the Mexican border, on the south. The stock of DTC was owned 100 percent by John Doudell. The officers of the corporation, who were also the directors, were as follows: John Doudell, president; Armand Kunde, vice president; and Paul Doudell, secretary-treasurer.

DTC's 1972 Annual Report filed with the Commission stated that Tankways, Inc. (TKWY) and R.J.D. Equipment Company (RJD) were under common control with it. The radial highway common carrier permit held by DTC authorized the statewide transportation of general commodities, with certain exceptions, and included a restriction that the carrier shall not engage in the transportation of property over the public highways under this permit when such transportation is covered by the carrier's highway common carrier operative authority or by joint rates published in its tariff schedules on file with the Commission.

2. SJST's radial highway common carrier permit included a restriction which required SJST to pay not less than 100 percent of the applicable minimum rates and charges established by the Commission to other carriers engaged by it to transport its property or the property of its customers or suppliers. All of the stock of SJST was owned by Raymond Kunde. Its officers, who were also its directors, were as follows: Raymond Kunde, president and general manager; F. J. Lutz, vice president; and Margaret Kunde, secretary-treasurer. According to its 1972 Annual Report filed with the Commission, it was not under common ownership or control with any other company.

3. TKWY held a petroleum irregular route certificate and a highway common carrier certificate for the transportation of petroleum products. It was owned 100 percent by John Doudell, and its officers were as follows: John Doudell, president; John Cunningham, vice president; and Paul Doudell, secretary-treasurer. According to its 1972 Annual Report filed with the Commission, it was under common control with DTC and RJD.

4. Diamond Tank Lines & Diamond Transportation Co. (DTL) held a petroleum irregular route certificate and a highway common carrier certificate for the transportation of petroleum products. The company was an individual proprietorship owned by Armand Kunde. According to the 1972 Annual Report filed by Armand Kunde with the Commission, the company was not under common ownership or control with any other company. The business was incorporated in 1973.

5. Petroleum Products (PP) held a petroleum contract carrier permit. The company was an individual proprietorship owned by G. Lamy.

6. Truck Data Incorporated (TD) was in the business of performing bookkeeping, accounting, billing, payroll, and other business services for DTC, SJST, TKWY, DTL, PP, RJD, Diamond Sales & Service Incorporated (DSS), and Petroleum Specialties (PS). It held no carrier operating authority from the Commission. Armand Kunde owned 50 percent of its stock, and the balance was owned by the estate of Raleigh Doudell. Its officers, who were also its directors, were as follows: Armand Kunde, president; Raleigh Doudell, vice president; and Raymond Kunde, secretary-treasurer. After Raleigh Doudell's death, Paul Doudell became vice president. TD acted as employer of all personnel for the aforementioned companies. It issued the payroll checks to all of the employees of the eight companies and paid all subhaulers used by any of the five carriers, DTC, SJST, TKWY, DTL, and PP. It issued invoices to and was reimbursed by the various companies for this service. Practically all of the employees performed services for more than one of the companies. Approximately every six months, Armand Kunde with the assistance of Raymond Greuel prepared a percentage distribution sheet which showed the percentage of the weekly salary of each employee that was to be allocated to the various companies. However, the actual distribution was done on a weekly basis. During the last seven months of 1972, TD did not perform any services for any other companies than those listed above.

7. RJD was a lessor of equipment to the aforementioned carriers. Its stock was owned by John Doudell. Its officers were as follows: Raleigh Doudell, president; John Doudell, vice president and treasurer; and Raymond Doudell, secretary.

8. DSS serviced and maintained the equipment of the aforementioned carriers. Its officers were as follows: Armand Kunde, president; Robert Gaffney, vice president; and Raymond Kunde, secretary-treasurer. The officers were also the owners and directors.

9. PS was a partnership owned by John Doudell and Armand Kunde. It sold petroleum products to the above carriers and their subhaulers.

10. AFC was a manufacturer of dog food. Its stock was owned 100 percent by John Doudell who was the recipient of the business from the estate of his deceased wife. The business was sold at the end of 1973.

11. The following tabulation shows the relationship of the owners and officers of the above ten companies to John Doudell:

- Paul Doudell, brother
- Raleigh Doudell, brother (deceased)
- Margaret Kunde, sister (deceased)
- Armand Kunde, nephew (1)
- Raymond Kunde, nephew (1)
- G. Lamy, former brother-in-law
- F. J. Lutz, no relationship
- John Cunningham, no relationship
- Robert Gaffney, no relationship

(1) Brothers

Staff Evidence and Position

A staff representative testified that he had conducted a prior investigation of the operation of DTC during latter 1972 and early January 1973 (see Investigation on Doudell Trucking Co., Inc., Decision No. 85880 dated June 2, 1976 in Case No. 9580); that during this earlier investigation, he discovered that there were certain

apparent relationships existing between DTC and SJST and certain other companies; and that as a result of this information, he commenced the investigation herein in mid-January 1973 which covered the period from late June through the end of 1972.

The representative asserted that his investigation disclosed the existence of common offices, operation, management, control, ownership, officers, personnel, and equipment in varying degrees between DTC, SJST, and the other alleged affiliated companies. He described the background and functions of each of the ten companies he reviewed and pointed out the family relationship between John Doudell and Raymond and Armand Kunde and their ownership interests and positions in the various companies.

The representative stated that SJST's office was located at 190 North 30th Street, San Jose; that San Jose Steel also had its facilities at this location; that SJST's office was a one-room, corrugated metal structure attached to San Jose Steel's building; that there were several desks and other office fixtures and a telephone in the room; that other than Frank Canepa who performed dispatching duties for SJST, there were no other employees regularly at this office; that other than dispatching, SJST did not, in his opinion, conduct business here; and that SJST parked trailers in a lot across the street from this location. He testified that DTC's headquarters was located at 545 Queens Lane, San Jose; that in addition to other terminal structures at this location, there were two adjoining one-story buildings that were used for offices; that part of one was used by TD, and the remainder of the space was used by DTC; that except for SJST, AFC, and PP, the other seven alleged affiliated companies had their headquarters at this address. He stated that he reviewed the records of DTC, TKWY, TD, RJD, and DSS at this location, and that he reviewed the records of SJST in the conference room in the building of San Jose Steel adjacent to SJST's office.

The representative testified that he observed bank deposit slips, dispatch sheets, and other records of SJST at TD's and other's offices at DTC's headquarters. He asserted that most of the alleged affiliated companies banked at Branch No. 684 of the United California Bank in San Jose; that except for DTC and TKWY, which had a joint account, the others all had separate accounts; and that TKWY was merged into DTC on February 1, 1974. The witness testified that SJST had an agreement with TD to have it do its billing and other accounting work and paid it \$660 a month for this service; that SJST, RJD, PP, and PS all used P.O. Box 532, San Jose, for their mail; that several of the SJST freight bills he reviewed had DTC hand tags attached to them, and in each instance, the origin shown on the hand tag was one of DTC's California terminals which were located at San Jose, Richmond, Los Angeles, and Fontana; that SJST used these terminals whenever necessary and did not pay DTC for this; that both DTC and SJST had the same telephone number in Los Angeles; that SJST used DTC's telephone leaseline and teletype between San Jose and Los Angeles and was billed by DTC for this service; that SJST issued checks for repairs of its equipment to DSS and TKWY; and that many similar business forms were used interchangeably between the various companies.

The representative testified that the various alleged affiliated companies operated along functional lines with the same employees and not as separate entities and that they interchanged equipment. He stated that he developed information regarding common employees from distribution sheets and payroll and other records of TD and from information furnished to him by John Doudell, Armand Kunde, and Raymond Kunde and that he developed information regarding equipment from Department of Motor Vehicles records furnished to him by the Commission's Systems & Procedures Branch, a trailer inventory for the various companies furnished to him by Armand Kunde, monthly invoices from RJD and TKWY to SJST for trailer rentals, dispatch sheets of DTC and SJST, and other records of the various companies and from personal observations.

Following is a summary of the evidence presented by the representative regarding common employees: Raymond Kunde, the president and owner of SJST and the secretary-treasurer of TD, spent most of his time in the Los Angeles area where he performed some solicitation services for DTC and signed checks for it when no DTC officer was present; he received money advances from DTC for expenses for these services; he had other business interests outside SJST; for the year ending June 30, 1972, SJST was paid \$800 per month by DTC for management advice and consultation services; and although all of his pay was allocated to SJST during 1972, 25 percent of it was charged to DTC in 1973 purportedly because of a decline in SJST's business. Armand Kunde, the president and half owner of TD, vice president and general manager of DTC, owner of DTL, and president of DSS, had the ultimate responsibility for establishing rates paid to subhaulers by SJST and DTC and various other administrative duties for these two carriers and other alleged affiliated companies; by a resolution of the board of directors of SJST noted in its corporate minutes of March 31, 1967, its president was authorized to engage Armand Kunde as an independent contractor for soliciting, pricing, and rating at a fee of \$9,600 per year; he was paid \$9,000 by SJST's Check No. 9370 dated June 20, 1972 for these services for the fiscal year ended April 30, 1970; and although he continues to perform services for SJST, he has received no additional payment from it for this other than some reimbursement for expenses. Gerard Lamy, the brother-in-law of John Doudell and owner of PP, was in charge of safety and the insurance supervisor for all of the alleged affiliated carriers, and TD's distribution sheets allocated only 10 percent of his time to his own company. Raymond Greuel was the office manager of DTC and various other companies; he signed the quarterly reports of SJST as its office manager; and he had bank deposit slips of DTC, SJST, and various other affiliated companies in his possession. John Cunningham, a 30-year employee of

DTC, was the fleet superintendent and responsible for maintenance for the various alleged affiliated carrier entities, and TD allocated his time and pay between them, with most allocated to DTC. Richard Mortensen was a salesman and job superintendent for DTC; he also performed similar duties for SJST and DTL; and his time and pay was allocated by TD between the various companies. Ronald Williams was the chief dispatcher for DTC; he had dispatch sheets of SJST in his possession; and he signed some subhaul agreements for SJST. Frank Canepa performed dispatching duties for both SJST and DTC. James Chapman was the head of the rate department of DTC; he also performed rating services for SJST on an hourly contract basis; and during the investigation, he produced various SJST records for the representative. Various other employees also performed duties for some or all of the alleged affiliated companies.

Following is a summary of the evidence presented by the representative regarding equipment: SJST leased 12 specifically designated trailers from RJD at \$95 each per month. It also leased 16 trailers from TKWY, at \$150 each per month, which were not specifically designated and were interchangeable with other trailers. The leases were not in writing and were loose agreements. SJST also occasionally rented trailers from several outside leasing companies but avoided this additional expense if possible. Trailers with DTC's color and name on them were parked in the lot leased by SJST across from its office at San Jose Steel's plant. SJST used more trailers than it was invoiced for and paid no additional charge for them. This was one of the advantages of the family relationship between the uncle and nephews. During the fourth quarter of 1972, 35 of the trailers, each of which had its own identification number, used by DTC out of its Los Angeles terminal were also used by SJST out of San Jose. Flatbed trailers were used by SJST for the AFC hauls, and this was a backhaul for steel shipments from Los Angeles.

For the transportation for AFC and the other four respondent shippers which is summarized in the staff rate Exhibits 14 through 18, SJST used more than 185 different trailers, and of these, 72 were owned by DTC, 29 were owned by RJD, 29 were owned by TKWY, one was owned by DTL, four were owned by SJST, and the ownership of the remainder could not be identified. During the last three months of 1972, SJST used a total of 160 different trailers, and of these, 22 was the greatest number used on any one day, two was the least number used on any one day, and the average used per day was 8.4. When a company leases trailers, the lease generally covers specific trailers, and it is not normal to freely substitute trailers.

The representative testified that DTC and SJST each exclusively used trailers which it owned or leased and tractors furnished by independent owner-operators for the transportation they performed; that the owner-operators that were regularly employed by them were those who had purchased their tractors from one of the alleged affiliated companies; that when DTC or DTL subhailed for SJST, the owner-operator was in effect a sub-subhauler; and that many of the same subhaulers were used by both DTC and SJST during the third and fourth quarters of 1972, and some of these were also used by DTL. He stated that a master insurance policy was issued to DTC by the Insurance Co. of North America, Policy No. SMT10951, and that it included in its coverage many of the owner-operators and also SJST, DTL, TKWY, Armand Kunde, and Gerard Lamy, among others. This was corroborated by a staff Transportation Analyst III who is the custodian of the insurance records for the Commission.

The representative asserted that during his investigation, there was a lack of cooperation at times by SJST and certain of the other alleged affiliated companies. In this regard, he stated that he was not allowed to review the records of RJD, TD, and DSS, none of which held operating authority from the Commission, until after a

demand letter had been issued by the Commission and several meetings were held regarding this; that he had to give written requests to Raymond Kunde for some of the records of SJST; that there were frequent delays in obtaining SJST's records and sometimes some were missing; that only part of SJST's subhaul agreements were given to him by Raymond Kunde, and he had to obtain the remainder of them from Armand Kunde at TD; that it was only after he had been advised by his counsel to do so that Raymond Kunde allowed the witness to take SJST's freight bills to the Commission's Oakland office to be photocopied; and that he was not allowed to talk to SJST's dispatcher, Frank Canepa, unless Raymond Kunde was present.

The representative testified that he made true and correct photostatic copies of freight bills, subhaul agreements, and related documents covering the transportation performed by SJST for AFC, Bethlehem, Flintkote, Kaiser, and San Jose Steel from late June through the end of 1972, and that the copies are all included in Exhibits 4, 5, 6, 7, and 8, respectively. He pointed out that SJST engaged other carriers as purported subhaulers to perform the AFC transportation for it and that the transportation by SJST for the other four respondent shippers was all within the area covered by DTC's highway common carrier operating authority.

It is the position of the staff that the evidence clearly demonstrates that by reason of the common ownership of AFC and DTC by John Doudell, an alter ego relationship existed between the two companies; that with the exception of AFC, the other nine alleged affiliated companies, including DTC and SJST, were all part of a unified family operation tied together by TD; that for this reason, an alter ego relationship existed between DTC and SJST; and that because of the alter ego relationships, the purported subhaulers engaged by SJST to perform the actual transportation of the property of AFC were in fact acting as prime carriers and should have been paid the applicable minimum rates for this transportation, and the

applicable rates for the transportation in issue performed by SJST for the other four respondent shippers were those named in DTC's applicable highway common carrier tariff.

A staff rate expert testified that he took the sets of documents in Exhibits 4 through 8, together with the supplemental information testified to by the representative, and formulated Exhibits 14, 15, 16, 17, and 18 which summarize the transportation performed by SJST for AFC, Bethlehem, Flintkote, Kaiser, and San Jose Steel, respectively. He stated that in Exhibit 14 (AFC) he has shown for each shipment listed therein the rates and charge assessed by SJST, the minimum rates and charge for the transportation, the amount paid to the purported subhauler or subhaulers for performing the transportation, and the difference between the minimum charge and the amount paid to the purported subhauler or subhaulers, and that the total amount less than the applicable minimum charges paid to the purported subhaulers for all of the shipments was \$11,086.46. He pointed out that in the other four rate exhibits he has shown the rates and charge assessed by SJST, the DTC tariff rates and charge, and the resulting alleged undercharge for each of the shipments listed therein. The total of the undercharges shown in Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel) are \$11,063.71, \$903.35, \$9,612.50, and \$7,436.62, respectively, and the total of the undercharges shown in the four exhibits is \$29,016.18.

In response to subpoenas duces tecum issued at the request of the staff, Raymond Kunde and Armand Kunde were called as adverse witnesses by the staff to furnish certain corporate minutes and dispatch sheets of SJST and to verify certain other records which the staff had photocopied. The counsel representing SJST and DTC both argued that pursuant to Section 1795 of the Public Utilities Code, their clients were entitled to immunity in connection with any evidence presented by the witnesses in response to the subpoenas duces

tecum. Staff counsel pointed out that the privilege against self-incrimination was not involved; that in any event, the privilege against self-incrimination does not apply to corporations; and that the two witnesses were called as representatives of corporations, SJST and TD, and not as individuals. We agree with the staff on this point. The law is clear that in such circumstances no privilege exists.

The staff recommended in its brief that DTC should be directed to collect the undercharges shown in its rate Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel) and to pay to the Commission a fine in the amount of such undercharges plus a punitive fine of \$2,500, and that SJST should be directed to pay the purported subhaulers the amounts shown in Exhibit 14 (AFC) and to pay to the Commission a punitive fine in the amount of \$2,500.

Respondents

The district transportation manager of Bethlehem testified as follows: In arranging for the transportation summarized in Exhibit 15, Bethlehem dealt exclusively with SJST. The shipments were loaded on equipment furnished by that carrier. At no time did Bethlehem have any dealing with DTC in connection with these shipments. Bethlehem was unaware of any possible connection whatsoever between SJST and DTC and was of the opinion that they were two separate entities. Although Bethlehem has used DTC for other transportation, it did not use it for the transportation in issue because DTC did not publish rail alternative rates between the points involved. SJST is a permit carrier and could and did apply rail alternative rates. Had Bethlehem been aware of any possible problem in the relationship

between SJST and DTC, it could have used any number of other permit carriers who would have applied the same rates assessed by SJST. Bethlehem relied upon the permit issued by the Commission. In the circumstances, it would be unconscionable for the Commission to require the assessment of any undercharges against Bethlehem, a shipper completely innocent of any participation in or knowledge of any conduct of SJST which could be possibly violative of any law, rule, or regulation administered by the Commission.

Testimony substantially similar to that presented by the witness for Bethlehem was presented by the vice president of San Jose Steel regarding the transportation for his company summarized in Exhibit 18. He also asserted that at no time did his company have any knowledge of any questionable relationship between SJST and DTC and that it would be unjust to require his company to pay any undercharges.

Armand Kunde, the vice president and general manager of DTC and the president of TD, presented the following evidence: He co-manages and runs the operations of DTC in California, Arizona, and part of Nevada. Although DTC does not have operating rights of its own into Arizona, it serves the state through an interline agreement with Associated Freight Lines. As shown in the 1972 Annual Report of DTC, it controlled TKWY and RJD and no other carriers at that time. Recently TKWY was merged into DTC, and RJD was merged into DSS. AFC is out of business. By Decision No. 83583 dated October 16, 1974 in Application No. 55162, Doudell Enterprises, a corporation, was authorized to acquire the outstanding capital stock of DTC and DSS. He holds 49 percent of the common stock of Doudell Enterprises, and John Doudell holds the remaining 51 percent. John Doudell is the president of Doudell Enterprises, he is the vice president and secretary-treasurer, and Jay Margulies is the assistant secretary. DTL, which primarily hauls petroleum products in bulk, was incorporated approximately two years ago, and he was the sole owner

before incorporation and now owns 100 percent of the stock. PS, a partnership of John Doudell and himself engaged in buying and selling petroleum products, has not been in business since December 31, 1974. During 1972, 1973, and 1974, DTC had the same directors who were also its officers, and they were John Doudell, president, himself, vice president and Paul Doudell, secretary-treasurer. During this same period, TD also had the same directors who were its officers, and they were himself, president, Paul Doudell, vice president, and Raymond Kunde, secretary-treasurer, and the stock of TD was owned one-half by himself and one-half by Raleigh Doudell, who is now deceased. TD was formed as a partnership around mid-1967 between himself and Raleigh Doudell, and it was incorporated in 1968. TD purchased a Burroughs computer which DTC was not interested in doing on its own. TD's costs were allocated to the various companies it serviced. The investment in TD has proved to be profitable. His explanation of the operations and functions of TD was substantially similar to that presented by the staff representative. TD does not control the operations of DTC, SJST, or any other company it services. He is not now and never has been an officer, director, or shareholder of SJST. Although he has had discussions with Raymond Kunde and Frank Canepa, he never participated in the negotiation of any union contracts for SJST or attended any union meetings on its behalf. To his knowledge, he never told the staff representative that he directed, supervised, or personally performed any services for SJST after 1970. He did perform some services for SJST between May 1969 and April 1970 for which he was paid in 1972; however, anything done for SJST since then was by TD and not by him personally. In the past, Raymond Kunde's pay was allocated 100 percent to SJST, but later, because of a decline in SJST's business, his brother performed solicitation and various other services for DTC primarily in the Los Angeles area and part of his pay was allocated to DTC for this. SJST has never held any interstate

authority, and some of the solicitation by Raymond Kunde for DTC was for interstate business. DTC and SJST compete with each other. He has never influenced a shipper as to which of the two companies it should do business with. This determination is made by the shipper. DTC, because of its experience and capability, was the primary carrier for San Jose Steel for inbound shipments of raw materials to its plant and for outbound shipments to construction jobs which were at substantial distances from the plant. SJST primarily handled shipments to local job sites for this shipper. San Jose Steel is now operating on a small scale because of the tight money situation and, as a result, DTC is performing much less hauling for it now.

Armand Kunde presented the following evidence regarding equipment owned or operated by the various companies: As of December 31, 1974, DTC owned six power units, which were used for moving trailers in its terminals only, and 198 trailers; SJST owned eight trailers and no power units; DSS owned 47 trailers and 52 power units; and DTL owned nine trailers and no power units. There have been no material changes in the equipment owned by these companies since then. In 1972, most of the equipment, including that now owned by DTC, was owned by TKWY which was subsequently merged into DTC. The equipment owned by RJD in 1972 has been owned by DSS since the merger of the two companies. DSS was originally a Diamond Reo truck distributor and now is a used truck dealer only, and it has either leased, sold, or has for sale the 52 power units which were owned by RJD in 1972. The leases SJST had in 1972 with RJD for 12 trailers and with TKWY for 16 trailers were terminated in mid-1974 because they were no longer needed due to a slowdown in SJST's business. While the leases were in effect, never more than 22 of the trailers were used by SJST at one time. There was a free interchange of one trailer for another while the leases were in effect. This pool arrangement was beneficial to all parties concerned as, for example,

a particular trailer could be used for a DTC load outbound and for a return SJST load, thus eliminating any deadhead mileage. This resulted in lower operating cost for the two companies. The rental charges for the 28 leased trailers were comparable to or less than those of other trailer rental companies.

Armand Kunde testified that during the period investigated, SJST had union drivers and DTC did not, and because of this, SJST got certain jobs which required union drivers; that DTC disposed of all of its power equipment in 1967; that it had union drivers at that time; that in 1972, DTC used in excess of 100 subhaulers, some of whom also worked for SJST as well as other carriers; that the selection of subhaulers for SJST was not his job but was the responsibility of Raymond Kunde; that SJST and DTC both had terminals in San Jose which the subhaulers used interchangeably for their convenience for dropping and parking trailers; that DTC had leased teletype and telephone service between its terminals which was used by SJST, and SJST was charged for this by TD; that neither DTC nor SJST had any control over the other in any respect, including the sale of fuel and the use of trailers; that the trailer pools were conveniently located at both companies' terminals and were available for use by either company or their subhaulers; that the originals of SJST's records at 545 Queens Lane belonged to it and the duplicates belonged to TD; and that no dispatching for SJST was ever done at 545 Queens Lane.

Armand Kunde asserted that he was cooperative with the staff representative during the investigation; that at the outset of the investigation, there was some question about whether the staff had authority to review the records of any companies which were not under the Commission's jurisdiction; that after a meeting with various staff personnel regarding this, all information under his jurisdiction relating to the non-regulated entities was made available to the staff investigator; and that because he felt some words were being put into

his mouth by the staff representative, he had the meeting on March 15, 1974 with the staff investigator and another staff member reported, and a transcript of this meeting is included in Exhibit No. 22.

Raymond Kunde, the president and sole owner of SJST, testified as follows: Initially, upon the advice of an attorney not involved in this proceeding, he did not make available certain documents which the staff investigator had requested. However, after a meeting with various staff members and another attorney, he then made all documents except certain tax returns available for review by the staff. He has had considerable experience in most phases of the trucking industry and has also operated various other businesses. In 1972, he purchased equipment from San Jose Steel and commenced operating SJST. The permit of SJST was initially limited in scope but was later broadened several times. The only time Armand Kunde was employed by SJST pursuant to the SJST resolution of March 31, 1967 was, as stated by his brother, from July 1969 through June 1970, the services performed consisted primarily of advice and consultation regarding the availability of business and what operations would be most profitable, and his brother was paid a total of \$9,000 for this in 1972. Subsequent to this, Armand Kunde was never personally engaged to perform any services for SJST. Until last year, he maintained a home in San Jose. Presently, his legal residence is in Rio Del Mar and he maintains an apartment in Long Beach. During the period covered by the staff review in 1972, he spent approximately 60 percent of his time in northern California and the remaining 40 percent in southern California. He would go where he felt his presence was necessary and had no particular time schedule at either location. During 1972, he did maintain an apartment in the Los Angeles area. SJST's office in San Jose was a small, one-room building approximately 15 feet by 15 feet on the premises of San Jose Steel. It was rented from San Jose Steel together with a parking

area approximately 125 feet by 125 feet for equipment at a rental of \$500 per month. SJST has terminated its arrangement with San Jose Steel and no longer has an office or yard here. Because of the inadequacy of the office, the meetings with the staff representative during the investigation were held in the conference room of San Jose Steel.

The following evidence was presented by Raymond Kunde: SJST engaged TD to perform its bookkeeping, accounting, billing, and other clerical duties. Prior thereto, SJST had a full-time bookkeeper and outside auditor. SJST had considered two other sources for performing its clerical duties before choosing TD which was the only company that was equipped to perform all of the services it required. After TD was retained, Frank Canepa, the dispatcher, and himself were the only two fulltime employees of SJST. TD furnished part-time clerical and other personnel as needed. Payments by customers to SJST were deposited by TD in SJST's bank account. The only checks issued by TD for SJST were for payments to subhaulers and for payroll. SJST reimbursed TD for this. Checks for all other purposes, including insurance premiums, were prepared and issued directly by SJST. His position as a director and vice president of TD was strictly honorary, he has never received any money or salary for this, and he has had no duties in connection therewith. He knew three business people in the Los Angeles area who had interstate freight from and to the Los Angeles harbor and was able to line up a substantial amount of this freight for DTC. He also assisted in the acquisition of a valuable piece of terminal land in Los Angeles for DTC and worked out a lease for its former terminal. Originally he was reimbursed for his expenses in connection with these activities by SJST. However, after a time, he realized that DTC was obtaining a substantial benefit from his efforts, and DTC agreed to pay SJST \$200 per month for his expense and time. He did not receive any direct payment from DTC until the middle of 1974.

Raymond Kunde testified as follows regarding the equipment operated by SJST during the latter part of 1972: SJST owned some dollies and 35-foot trailers and had no operable power equipment. By oral agreements, it rented 16 trailers from TKWY and 12 trailers from RJD. It was understood that it was paying for a total of 28 trailers and could use any trailers as long as it did not use over 28 per day. It paid for the 28 trailers even if it used less. The majority of the trailers utilized by SJST had the name DTC on them, and the remainder had SJST or other names on them. All owner-operator power units used were placarded with the name SJST. It is not unusual for a tractor to pull a trailer with the name of another company on it.

Raymond Kunde further testified as follows: In the past, he held a 5 percent interest in DSS which he sold in 1973 for \$1,200. SJST paid DTC for the use of its lease line and teletype between San Jose and the Los Angeles area. SJST was allowed to park its trailers at DTC's terminals overnight, but it had no personnel there. He personally solicited Vern Crider, the plant manager of AFC, and obtained its business for SJST and had this account until AFC sold out and closed in 1973 or 1974. His agreement with AFC was to charge applicable minimum rates which SJST did. SJST's revenues have now substantially declined due to the loss of its major accounts. The revenue is now down to about \$2,000 per month, and it is probable that the business will be discontinued if new accounts are not obtained. DTC has never, through its officers or otherwise, in any manner whatsoever controlled or directed the operations of SJST. Likewise, SJST has never in any manner whatsoever controlled DTC. While he has talked to John Doudell, his uncle, and Armand Kunde, his brother, and received advice from them, he was never under any obligation to follow their suggestions and usually did not. He and no one else was responsible for setting the policy for SJST. He made all decisions as to the kinds of freight SJST would handle and the geographical area in which it would operate. As to rates charged customers, these were prescribed by the State of California.

SJST and DTC presented no rate evidence and did not dispute the computations in the staff rate exhibits. However, it is their position that there were no alter ego relationships, and for this reason, there were no underpayments to other carriers or undercharges.

SJST and DTC in their joint brief urge that the Commission find that there was no alter ego relationship between the two carriers; that the carriers engaged by SJST to transport the property of AFC were in fact subhaulers and not prime carriers; and that the shipper respondents paid the applicable rates to SJST for the transportation performed for them.

Discussion

There is no controversy in the evidence regarding the existence of an alter ego relationship between DTC and AFC during the period covered by the staff investigation. This has been clearly established, and no further discussion of this issue is necessary.

The record also established that an alter ego relationship existed between DTC and SJST during the time period in 1972 involved herein. The evidence and argument presented by the staff on this issue is persuasive. Generally, the elements considered in determining whether an alter ego relationship exists are common ownership, management, control, and operation. However, there are no rigid formulas or tests for determining whether this relationship does or does not exist. (See McLoughlin v L. Bloom Sons Co., Inc. (1962) 206 C.A.2d 848 and Stark v Coker (1942) 20 C 2d 839.)

According to the evidence, there was no direct common ownership of SJST by DTC, John Doudell owned 100 percent of the stock of DTC, and Raymond Kunde owned 100 percent of the stock of SJST. However, the lack of common ownership by and of itself is not sufficient to establish that an alter ego relationship does not

in fact exist. In this regard, the sole shareholder of SJST was related by blood to the sole shareholder of DTC. This family relationship certainly shows a common interest. (Investigation of DiSalvo Trucking Co., et al. (1966) 66 CPUC 559.) This is further accentuated by the fact that John Doudell had no children of his own.

With respect to management and control, this was accomplished mainly through TD. Armand Kunde was a director, the vice president, and the general manager of DTC, and he was also a director, the president, and a one-half owner of TD. Prior to the time period in issue, Armand Kunde had been engaged by SJST to perform certain management functions for it. During the period investigated herein, various management functions were performed by Armand Kunde in his capacity as president of TD for SJST. While both Armand Kunde and Raymond Kunde attempted to differentiate between services which were performed by Armand Kunde as an individual for SJST in 1970 and those performed by the same individual for the same carrier in 1972 in his capacity as president of TD, this is in effect a distinction without a difference. They also attempted to minimize the role of TD in the control and management of SJST. However, the weight of the evidence is to the contrary. As pointed out in the staff brief, though John Doudell, the owner of DTC, did not serve as an officer or director of SJST, the control over SJST exercised by Armand Kunde, his nephew, and the general manager of DTC, through the medium of TD, was actual, and also Raymond Kunde his other nephew, served as an officer and director of TD, which exercised control over DTC.

Regarding the common operation of DTC and SJST, the evidence shows a substantial existence of this. The leases SJST had with TKWY and RJD were oral and were, as the staff asserted, very loose arrangements. Both lessors were owned 100 percent by John Doudell and were under common control with DTC. The trailers used under this arrangement by SJST were drawn from a common pool, and a substantial

number of the trailers in the pool were owned by DTC. Dispatching of the trailers was in many instances coordinated so that a particular trailer was used to transport a load for either DTC or SJST in one direction and immediately, or soon thereafter, transport a load for the other in another direction. SJST was authorized to use any of DTC's terminal facilities for parking equipment and no charge was made for this. Also, there were instances where DTC employees signed SJST subhaul agreements. Many of the same employees were used by both carriers, and their pay was apportioned between the two companies by TD. Furthermore, Raymond Kunde did perform certain services for DTC in the Los Angeles area. Both DTC and SJST had the same telephone number in Los Angeles. In the light of this and other evidence presented by the staff, to state that DTC and SJST were separate competing companies, as asserted by the Kundes, is nonsense. By carefully sifting through the purposes and functions of the various carrier and non-carrier companies herein which were owned, managed, or controlled by John Doudell, Armand Kunde, and/or Raymond Kunde, it is obvious that they were operated one in conjunction with the other and that a sufficient degree of common interest, control, management, and operation has been shown to establish that an alter ego relationship did in fact exist between DTC and SJST.

Having determined that an alter ego relationship existed between DTC and SJST, on the one hand, and between DTC and AFC, on the other hand, it follows that the other carriers engaged as ostensible subhauers by SJST to transport the property of AFC were in fact prime carriers and should have been paid the applicable minimum rates for this transportation. In the circumstances, the other carriers should have received the applicable minimum charges shown in the staff's Exhibit 14 for the transportation they performed. However, one of these carriers was DTL, to which the alter ego relationship also extended by virtue of its ownership by Armand Kunde. Therefore, the carriers engaged by DTL in this instance should have received the

applicable minimum charges for the actual transportation performed by them as reflected in Parts 9 and 10 of Exhibit 14.

We agree that the staff is technically correct in its assertion that because of the alter ego relationship between DTC and SJST, any transportation performed for shippers by SJST within the area covered by DTC's certificated authority was subject to the rates provided in DTC's applicable common carrier tariff for such transportation. However, we are of the opinion that this general rule should not be applied to the transportation which SJST performed for Bethlehem, Flintkote, Kaiser, and San Jose Steel and which is summarized in the staff's Exhibits 15 through 18. As pointed out by the witnesses for Bethlehem and San Jose Steel, their dealings with SJST were at arm's length, they had no knowledge of any possible alter ego relationship between the two carriers, they could have obtained the same rates assessed by SJST from any other permitted carrier, and, for this reason, they obtained no economic benefit by using SJST. Although Flintkote and Kaiser did not make appearances, it can reasonably be presumed that their positions would be the same as that expressed by Bethlehem and San Jose Steel had they appeared. Where special circumstances have been shown to exist and to avoid inequitable and unjust results, the Commission may, pursuant to Section 494 of the Public Utilities Code, dispense with the requirement that undercharges be collected. (Inv. of Oil Fields Trucking Co., et al., Decision No. 85355 dated January 20, 1976 in Case No. 9785, unreported.) Because of the special circumstances surrounding the transportation summarized in Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel), it would be unjust to the shippers involved to require SJST to collect the undercharges shown in the four exhibits.

The final matters for our consideration are the penalties, if any, that should be imposed on DTC and SJST. We are of the opinion that a punitive fine in the amount of \$2,500 should be imposed on DTC and that a punitive fine in the amount of \$2,500 should be imposed on SJST. We will also require SJST to pay the other carriers it engaged to transport the shipments for AFC summarized in Exhibit 14 the difference between the amounts paid the other carriers and the applicable minimum charges for such transportation. The specific amounts due the other carriers are set forth in Appendix A hereof. In the event SJST is unable to comply with the directive to pay such other carriers the amounts due them, we will direct that the payments be made by DTC, its alter ego.

Findings

In addition to the above 11 findings, we further find that the following facts existed during the period from late June through the end of 1972:

12. SJST had been served with all applicable minimum rate tariffs, distance tables, and exception ratings tariffs.

13. DTC had all applicable highway common carrier tariffs.

14. John Doudell, the sole owner of DTC, and Raymond Kunde, the sole owner of SJST, are related by blood. There was a common use of terminals, equipment, personnel, and communication facilities by DTC and SJST. TD exercised effective management and control of both companies. Raymond Kunde was an officer and director of TD. Armand Kunde was a one-half owner, officer, and director of TD and an officer and director of DTC. A sufficient degree of common management, control, operation, and interest existed between DTC and SJST to establish an alter ego relationship between the two.

15. An alter ego relationship existed between AFC and DTC by reason of the common ownership, management, and control of both companies by John Doudell.

16. The minimum rates and charges in Exhibit 14 (AFC), the DTC highway common carrier rates and charges in Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel), and the resulting undercharges in the five exhibits computed by the staff are correct.

17. AFC engaged SJST to perform the transportation summarized in Exhibit 14, and SJST engaged other carriers as ostensible subhaulers to perform the actual transportation and paid the other carriers a total of \$11,086.46 less than the applicable minimum rates for the transportation.

18. Because of the alter ego relationships referred to in Findings 14 and 15, the transportation by SJST for AFC referred to in Finding 17 was not an arm's length transaction.

19. For the reasons stated in Findings 14, 15, and 18, the other carriers referred to in Finding 17 were in fact prime carriers and should have been paid the full minimum rates and charges for the transportation for AFC summarized in Exhibit 14.

20. Because of the unity of interest, management, and control among DTC, SJST, and DTL, when DTL was engaged by SJST as an ostensible subhauler to perform any of the transportation for AFC summarized in Exhibit 14 and in turn engaged other carriers as ostensible sub-subhaulers to perform the actual transportation, such other carriers were in fact prime carriers and should have received the full minimum rates for the transportation they performed.

21. Because of the alter ego relationship between DTC and SJST, the applicable rates and charges for all transportation performed by SJST within the highway common carrier certificated area of DTC were those named in DTC's applicable common carrier tariff.

22. The transportation performed by SJST for Bethlehem, Flintkote, Kaiser, and San Jose Steel and which is summarized in Exhibits 15, 16, 17, and 18, respectively, was all within the area encompassed by DTC's highway common carrier certificate. SJST assessed and collected minimum and alternative application rates and charges for this transportation which were lower than the lawfully prescribed tariff rates and charges in DTC's applicable common carrier tariff. The resulting undercharges for the transportation summarized in Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel) are \$11,063.71, \$903.35, \$9,612.50, and \$7,436.62, respectively, and the total of the undercharges for the four shippers is \$29,016.18.

23. None of the four respondent shippers referred to in Finding 22 were aware that an alter ego relationship existed between DTC and SJST. They could have engaged other permitted carriers to transport the shipments summarized in Exhibits 15 through 18 at substantially the same rates and charges assessed by SJST for this transportation. For this reason, they gained no economic benefit by using SJST. It has not been shown that they did not act in good faith.

24. The Commission has remitted the collection of undercharges in the past. Under the special circumstances of this case, the Commission should not require the collection of the undercharges referred to in Finding 22 for the transportation summarized in Exhibits 15 (Bethlehem), 16 (Flintkote), 17 (Kaiser), and 18 (San Jose Steel).

25. There is no immunity in connection with any evidence presented by Armand Kunde and Raymond Kunde in response to the subpoenas duces tecum issued at the request of the staff.

Conclusions

1. DTC and SJST violated Sections 453, 494, 532, and 3668 of the Public Utilities Code.

2. DTC should pay a fine pursuant to Section 2100 of the Public Utilities Code in the amount of \$2,500.

3. SJST should pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$2,500.

4. SJST should be directed to pay the other carriers engaged by it to transport the shipments for AFC summarized in Exhibit 14 the specific amounts set forth in Appendix A hereof.

5. In the event SJST does not, for any reason whatsoever, comply with Conclusion 4, DTC should be required, because of the alter ego relationship existing between the two, to make the required payments to the other carriers.

The Commission expects that SJST and DTC will proceed promptly, diligently, and in good faith to pursue all reasonable measures to pay the other carriers the amounts due them shown in Exhibit 14. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that either or both respondents or their attorneys have not been diligent, or have not taken all reasonable measures to pay the other carriers that which is due them, or have not acted in good faith, the Commission will reopen this proceeding for the purpose of determining whether further sanctions should be imposed against either or both respondents.

O R D E R

IT IS ORDERED that:

1. Doudell Trucking Co., a corporation, shall pay a fine of \$2,500 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. shall pay interest at the rate of 7 percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. S. J. Steel Transportation, Inc. shall pay a fine of \$2,500 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. S. J. Steel Transportation, Inc. shall pay interest at the rate of 7 percent per annum on the fine, such interest is to commence upon the day the payment of the fine is delinquent.

3. S. J. Steel Transportation, Inc. shall pay to each of the carriers listed in Appendix A attached hereto the amount of the undercharges shown therein as due such carriers on or before the sixtieth day after the effective date of this order and shall notify the Commission in writing when the payments have been completed.

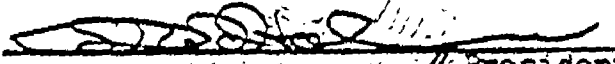
4. To the extent that S. J. Steel Transportation, Inc. does not make all of the payments referred to in Ordering Paragraph 3 within the time period specified therein, it shall immediately notify the Commission and Doudell Trucking Co. in writing, and Doudell Trucking Co. shall pay the unpaid balance of the aforementioned payments due to the other carriers on or before the ninetieth day after the effective date of this order and shall notify the Commission in writing when the payments have been completed.

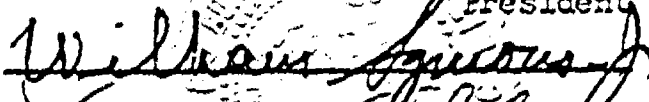

5. S. J. Steel Transportation, Inc. and/or Doudell Trucking Co. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to pay the other carriers.


6. Doudell Trucking Co. and S. J. Steel Transportation, Inc. shall obey the statutes, regulations, and tariffs governing their operations.

The Executive Director of the Commission is directed to make personal service of this order on Doudell Trucking Co. and on S. J. Steel Transportation, Inc. The effective date of this order as to those two respondents shall be twenty days after completion of personal service. The Executive Director is further directed to cause service by mail of this order to be made upon all other respondents. The effective date of this order, as to those respondents, shall be twenty days after the completion of service by mail.

Dated at San Francisco, California, this 21st
day of DECEMBER, 1976.



President





Commissioners

Commissioner Robert Batimovich, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A
DISTRIBUTION OF UNDERCHARGES FROM EXHIBIT 1A

Marsan Freight, Inc.			
Part 1		\$143.64	
7		77.21	
14		223.89	
23		<u>188.84</u>	\$633.58
C & S Trucking			
Part 1			84.28
A & M Trucking			
Part 1			150.53
Viking Delivery Service, Inc.			
Part 2		\$436.32	
4		196.41	
5		479.89	
6		102.13	
15	\$259.09		
	<u>202.66</u>	<u>461.75</u>	1,676.50
Riss Transportation Co.			
Part 3			312.74
Lyell Hintz			
Part 6	\$167.63		
	<u>81.31</u>	\$248.94	
7		102.51	
11		<u>137.80</u>	489.25
Ray Nap Trucking			
Part 6			91.74
Ro-Zak Trucking			
Part 6			-0-
Jerry L. Grundy			
Part 8			81.33
Diamond Transportation Co.			
Part 9 (See Handle Bar Trucking)			
10 (See William J. Adams)			
Marvin Ham Trucking			
Part 10			58.12
Oral George			
Part 10			153.13

APPENDIX A

Bayview Trucking, Inc.

Part 10		\$164.30	
11	\$112.09		
	<u>99.43</u>	211.52	
14		<u>144.31</u>	
15	\$178.54		
	<u>188.41</u>	366.95	
16		365.77	
17		142.84	
20		168.35	
21		180.53	
23		181.98	
28	\$ 89.31		
	<u>121.00</u>	210.31	
29		92.62	
31		<u>191.50</u>	\$2,420.98

Handle-Bar Trucking

Part 9 (Diamond Transportation)	\$ 50.45	
Part 12	<u>131.02</u>	181.47

Mammoth Freight Lines, Inc.

Part 13		190.95
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William J. Adams

Part 10 (Diamond Transportation Co.)		163.93
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Base Transportation, Inc.

Part 17		188.84
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Cal Transport

Part 17		168.79
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V. Moore

Part 18		56.33
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W. H. Burke & Co. Inc.

Part 19		180.07
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Monroe Trucking

Part 19		160.73
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Sidsalsims Trucking

Part 20	\$228.11	
25	59.87	
29	<u>187.19</u>	475.17

Phil Brock Trucking

Part 21	\$145.40	
25	<u>129.38</u>	274.78

Gary Woods

Part 22		138.00
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Milton E. Francis		
Part 24	\$136.83	
26	134.26	
27	<u>120.98</u>	\$ 392.07
Ray Edwards Trucking		
Part 24		152.97
Walter A. Neller		
Part 25		188.84
Robb Fast Freight		
Part 25		188.84
G & G Express		
Part 26		168.75
Lyndell Bailey		
Part 26		162.93
Corey Express		
(formerly S.F. Express)		
Part 26		210.60
John Munoz		
Part 27		128.39
Lewis K. Bowman		
Part 28		173.38
Mike Conrotto Trucking		
Part 28		128.12
G. M. C. Trucking		
Part 31		173.38
G. P. H. Trucking		
Part 32		128.00
Ross Trucking		
Part 32		40.56
Barker Trucking		
Part 32		50.55
W. G. Harbach & Son Trucking		
Part 29		100.88
Olsen Trucking		
Part 30		67.45
Ellis Trucking		
Part 21		62.85
Ray Davis		
Part 19	\$147.36	
27	<u>89.30</u>	<u>236.66</u>
		<u>\$11,086.46</u>