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Decision No. 90802 SEP 12 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of any and all commodities statewide, including, but not limited to, those rates which are provided in Minimum Rate Tariff 2 and the revisions or reissues thereof.	Case No. 5432, OSH 1019 (Filed April 18, 1978)
And Related Matters.	Case No. 5439, OSH 324 Case No. 5441, OSH 408 (Filed April 18, 1978)

Donald Murchison, Attorney at Law, and Fred H. Mackensen, for Warren Trucking Co., Inc., and Inland Freight Lines; Carr, Smulyan & Hartman, by Leslie M. Hartman and George M. Carr, Attorneys at Law, for G.C.T., Inc.; Alvin A. Lyly, for Arvo Lyly & Sons; C. E. Goacher, for Di Salvo Trucking Co.; John MacDonald Smith, Attorney at Law, for Southern Pacific Transportation Company, and Northwestern Pacific Railroad Company; and Graham & James, by David J. Marchant, Attorney at Law, for Sharps Farm Trucking Company; respondents.

Paul V. Miller, Attorney at Law, and William A. Watkins, for Bethlehem Steel Corporation; Susan Wong Gissible, Attorney at Law, for Kaiser Steel Corporation; and James R. Steele, for Leslie Salt Company; protestants.

Kenneth R. Pepperney, Attorney at Law, for United States Steel Corporation; Silver, Rosen, Fischer & Stecher, by Michael J. Stecher, Attorney at Law, for MacMillan Bloedel Limited, and Schnitzer Steel Products; Robert W. Skirvin, Attorney at Law, for himself; William R. Haerle, Attorney at Law, for California Trucking Association; Leon R. Peikin, for RCA Corporation; Frank Spellman, for himself; John T. Reed, for Steamship Operators Intermodal Committee; Ray Greene, Attorney at Law, for himself; Tuttle & Taylor, by Ronald C. Peterson, Attorney at Law, for Sunkist Growers, Inc.; Joseph D. Cunliffe, for United States Borax & Chemical Corporation; and Edward A. Sand III, for

Morton Salt, Division of Morton Norwich Company; interested parties.
Ellen LeVine, Attorney at Law, and John Lemke, for Commission staff.

O P I N I O N

Minimum Rate Tariff 2 contains statewide minimum rates for transportation of general commodities by highway carriers. By its White Paper distributed to interested parties on December 13, 1977, the Commission's staff proposed an addition to Item 42 of MRT 2. The proposed amendment would provide an exemption from minimum rates for motor carrier shipments having an immediately prior or subsequent water vessel movement, which had not been interrupted by processing (ex-vessel traffic). Objections to the adoption of the staff's proposal were received from interested parties furnished copies of the White Paper. On April 18, 1978, the Commission issued an order setting hearing in the captioned minimum rate proceedings for the receipt of evidence relative to the extent that Minimum Rate Tariffs 2, 1-B, 9-B, and 19 (MRTs 2, 1-B, 9-B, and 19) should be modified with respect to transportation of ex-vessel traffic by highway carriers.

Public hearing was held before Administrative Law Judge Mallory in San Francisco on November 21 and 22 and December 12 and 13, 1978. The matter was submitted subject to the receipt of concurrent briefs on or before March 30, 1979.[1/] Several parties support and several parties oppose the staff proposals.

1/ Briefs were filed by the Commission staff; United States Steel Corporation (US Steel); Bethlehem Steel Corporation (Bethlehem); Respondents Hobbs Trucking Co., Inland Freight Lines and Warren Trucking Co., Inc. (collectively Warren Trucking); MacMillan Bloedel Limited and Schnitzer Steel Products (Schnitzer); Robert W. Skirvin (Skirvin); Sunkist Growers, Inc. (Sunkist); Sharp Farms Trucking, Inc. (Sharp Farms); and California Trucking Association (CTA).

C.5432 OSH 1019 et al. hk/FS/rr *

Staff Proposal

The Transportation Division staff proposal, as amended at the hearing on December 12, 1978, is to exempt from the application of the minimum rates the following described traffic:

> "Property, in interstate or foreign commerce, when transported in continuity with a prior or subsequent vessel movement".

Background

The staff proposal in this proceeding stems from the most recent of a series of Interstate Commerce Commission (ICC) and federal court cases defining the scope of federal economic regulation of motor and rail carriers. In Allen - Investigation of Operations and Practices (1977) 126 MCC 336, the ICC concluded that the movement of goods by a for-hire motor carrier within a single state that was immediately preceded by a movement in foreign commerce in a private vessel carrier is intrastate commerce not subject to federal regulation.[2/]

As a consequence of the Allen decision this Commission may regulate certain ex-vessel motor carrier movements. Shippers of newsprint paper and carriers hauling newsprint paper from the ports asked the staff to exempt that traffic from minimum rates, inasmuch as they desired to continue to apply the negotiated rates filed with the ICC. That request led to the staff proposal in its White Paper that all ex-vessel motor carrier traffic be exempted. Several organizations that believed that they would be adversely affected objected to the implementation of the staff proposal by ex parte order, resulting in the OSH herein.

2/ Staff Counsel on November 8, 1978, filed a brief entitled "Jurisdiction Over Common Carrier Movement Ex-Vessel in Foreign Commerce" that fully explains the legal and historical basis for our jurisdiction over the traffic in issue.

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Based on the analysis set forth in our staff counsel's pleading referred to in Footnote 2, our Transportation Division determined that, as a consequence of our jurisdiction over ex-vessel traffic within this state, motor carriers performing that transportation are subject to the minimum rates set forth in MRTs 2, 1-B, 9-B, and 19.3/

Exhibit 1 containing the study and report of the staff associate transportation rate expert states that the following practical considerations underlie the staff White Paper recommendation to exempt ex-vessel traffic from minimum rates.

1. The unreasonable burden that the enforcement of minimum rate regulation could place on a California motor carrier because of the distinction it would be required to make concerning the nature of the prior or subsequent water carriage.

2. The probable difficulties that would tend to prohibit effective enforcement of minimum rates by the Commission staff (again due to the distinction that would have to be made regarding the nature of the related water carriage).

3. The unassessable economic impact that enforcement of the minimum rates could have on both carriers and shippers in the event presently used rate stru tures now moving this traffic should prove to be based, either through jurisdictional ignorance because of an inability on the part of carri ascertain related water transportation sta

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Staff Evidence

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1. The unreasonable burden that the enforcement of minimum rate regulation could place on a California motor carrier because of the distinction it would be required to make concerning the nature of the prior or subsequent water carriage.
2. The probable difficulties that would tend to prohibit effective enforcement of minimum rates by the Commission staff (again due to the distinction that would have to be made regarding the nature of the related water carriage).
3. The unassessable economic impact that enforcement of the minimum rates could have on both carriers and shippers in the event presently used rate structures now moving this traffic should prove to be ICC based, either through jurisdictional ignorance or because of an inability on the part of carriers to ascertain related water transportation status.

In response to the protests which the staff White Paper evoked, and in an effort to specifically substantiate the existence and define the extent of the conditions the staff initially felt would render minimum rate regulation of the subject traffic inappropriate, a further investigation was conducted, in which the staff

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3/ The tariffs contain minimum rates for the transportation of general commodities; MRT 2 applies statewide, MRT 1-B applies within the East Bay Drayage Area, MRT 9-B applies within the San Diego Drayage Area, and MRT 19 applies within the San Francisco Drayage Area.

interviewed a combined total of 140 motor carriers, shippers, port authorities and maritime shipping interests thought to be involved in this particular type of transportation. The data accumulated through these contacts showed that the amount of traffic falling within the scope of this proceeding is difficult to quantify in terms of precise numerical values. However, through interviews with personnel employed by charter divisions of steamship companies and independent vessel transportation brokers the staff estimated that approximately three-fifths of this undefined California tonnage moves from or to California's ports by privately owned or shipper chartered water vessel. That estimate contains a substantial amount of traffic that falls outside the scope of this proceeding.

The staff study found that bulk commodities tend to be transported by private or charter vessel almost exclusively. On the other hand, non-bulk freight generally moves by water common carrier. The staff White Paper report indicated that ex-vessel single-state transportation of borate products, salt, steel, newsprint and wood chips appear to fall within the scope of this proceeding. The further investigation conducted by the staff has broadened this list of commodities to include bagged rice, fresh fish, lumber, sugar, and scrap iron and steel.

The staff investigation revealed that the overwhelming majority of California motor carriers involved in transporting ex-vessel traffic are unable to ascertain the vessel transportation information necessary to make jurisdictional rate distinctions on their traffic. Due partly to this inability, and partly to a widespread ignorance of the need to make such a distinction for minimum rate compliance, California motor carriers are assessing ICC based rates on all ex-vessel single-state traffic that they deem continuous.

The staff concluded that enforcement of the minimum rates in connection with this traffic is neither a practical course of action, nor one necessary to protect the public interest, and that exempting this transportation from minimum rates should tend to maintain the current, and apparently adequate, ICC based service-rate relationship now afforded this traffic.

Exhibit 1 contains analysis of the total import and export tonnage of certain commodities. The analysis developed estimates of total traffic which is moved in private vessel service. The exhibit shows the following:

Commodity	Total Annual Tonnage	Percent Carried in Private Vessels
Borate Products	567,000 (2)	50-75%
Fresh Fish	90,000 (1)	100%
Lumber	1,045,000 (2)	0-25%
Newsprint	559,000 (1)	75-100%
Rice, in bags	645,000 (2)	75-100%
Salt	304,000 (1)	100%
Scrap iron and steel	1,376,000 (2)	100%
Steel	2,390,000 (1)	0-25%
Sugar	9,000	100%
Wood chips	1,079,000 (2)	100%

(1) Predominantly import traffic.

(2) Predominantly export traffic.

Exhibit 2 is the staff's comparison of the ICC rates and our minimum rates for typical ex-vessel movements. The exhibit shows that the ICC rates, in almost every instance, are less than the comparable minimum rates, and that the ICC rates range from 12.5 percent above to 77.1 percent below the minimum rates. Wood chip rates bear the closest relationship between ICC and minimum rates; steel rates show the greatest disparity.

The testimony of the staff witness indicates that his conclusions and recommendations are based solely on the criteria expressed above. No analysis was made of the economic impact of his proposal on the various manufacturing firms, processors and other commercial entities affected by the staff proposal, except as to newsprint. The staff testimony indicated that inquiries from the newsprint industry prompted the staff White Paper. The initial conclusion that ex-vessel traffic should be exempted was based on conditions surrounding the transportation of newsprint.

Protestants

California Trucking Association (CTA), United States Steel Company (US Steel), and Bethlehem Steel Company (Bethlehem). filed written protests to the White Paper, and also presented evidence in opposition to the staff proposal. Other parties presenting testimony in opposition to the staff proposal were Kaiser Steel Corporation (Kaiser) and Leslie Salt Company (Leslie).

Steel Import Shipments

Witnesses for US Steel, Bethlehem, and Kaiser opposed the staff proposal on the basis that lower truck rates would result from the proposal for imported steel; domestic companies manufacturing and selling steel in California already are hard hit by loss of business to imported steel products sold below the cost of manufacture in this country; and any further loss of business as a result of the lower truck rates for imported steel would adversely impact domestic steel manufacturers. The steel mill witnesses pointed out that they must pay the minimum rates for steel manufactured and sold within this State, that the interstate motor carrier rates on imported steel are substantially below the minimum rates for comparable distances, and that imported steel moves for shorter distances from the ports to principal points of consumption than the hauls from steel manufacturing points to the same destinations.

It was the opinion of the witnesses for the steel mills that a substantial portion of the steel imported through California ports reached this country in private vessels. It was the position of the steel mills that further competition from imported steel products would not be in the public interest as it would reduce jobs in California and would reduce steel mill profits. The steel mills pointed out that the staff made no analyses of the economic impact of its proposal on the steel mills or on other industries adversely affected by the proposal; therefore, the steel mills assert that the reasons advanced by the staff for its proposal are insufficient.

Two carriers that transport steel from ports to inland points testified in opposition to the exemption as it would apply to steel shipments. One carrier witness stated that he would experience a great deal of confusion as to whether the steel shipments had a prior movement in a private vessel; the other carrier indicated that to his knowledge all imported steel shipments were transported in common carrier vessels. Both carriers opposed the exemption on the basis that competition would force rate levels on imported steel to decline which would adversely affect their operations.

Steel Scrap (Export)

The vice president-general manager of Schnitzer Steel Products Company, a shipper of scrap steel for export, supported the staff proposal. The witness stated that scrap steel destined to Europe or the Orient is transported by rail and motor carrier to ports, and then moved by private vessel to destination. That traffic now moves at the vehicle unit rates contained in Minimum Rate Tariff 15 (MRT 15). The witness stated that MRT 15 requires that complex time and mileage records be kept, which he believes are onerous. The witness supported the staff proposal on the basis that a simplified system of rate assessment would result. The witness also believes that the existing rate levels on scrap steel are too high and that the adoption of the staff proposal would result in lower rates.

Wood Chips

Devine and Son Trucking Company (Devine) transports wood chips. A witness for Devine testified in opposition to the staff proposal. The witness stated that the principal export market for wood chips is Japan. Wood chips generally are handled in private vessels, and move through the Port of Sacramento. The witness testified that if wood chips are exempted from rate regulation, he would expect the large lumber mills to employ loggers in their off season to transport wood chips at rates below those generally assessed when a surplus of logging equipment was not available.

Fresh Fish and Seafood Products

A witness appearing for San Francisco Seafood Express testified in opposition to the staff proposal with respect to transportation of fresh fish. The witness pointed out the vessels carrying fresh fish are fishing vessels, not carriers for hire. Almost all of the fresh fish discharged at California ports was caught by such vessels; thus, no prior interstate or foreign vessel movements are involved. The witness believes that the motor carrier movement of fresh fish and seafood products from ports to inland California points is intrastate commerce, and that the character of such movement was not affected by the Allen decision or prior ICC and federal court decisions.

Salt Shipments

Leslie testified that there is no local truck movement of salt for export; therefore, only import movements are affected by the staff proposal. Leslie produces bulk industrial salt in the San Francisco Bay area and ships it by rail to a point in the Los Angeles area where it is stockpiled. When orders are received, the salt is transported from the stockpile to destination by truck at the applicable minimum rates for bulk movements.

Ocean Salt (Ocean), a major competitor of Leslie in Southern California, acquires its salt from Mexico. Ocean's salt is transported in a private vessel to San Diego or San Pedro, thence shipped by motor carrier. If the exemption is granted, the motor carrier handling bulk salt for Ocean could assess rates below the minimum rates, thus placing Leslie at a disadvantage in marketing its salt in southern California. Leslie pointed out that bulk salt has a very low value and that more than 50 percent of the selling price of its salt in Los Angeles area markets is the cost of transportation.

A witness appearing for Von's and Brownie's Trucking, Incorporated, also testified against the staff proposal as it would apply to shipments of bulk salt. The witness explained that he uses specialized pneumatic trailers equipped with blowers to handle bulk salt for Ocean. Conventional dump truck equipment also can be used.

The witness stated that his company is the principal hauler for Ocean, and that he desires the minimum rates to apply for such transportation. Rate exemption of Ocean's traffic may permit other carriers with less efficient and less expensive types of equipment to reduce rates below the operating costs of pneumatic equipment and, thus, would adversely affect his operations.

Newsprint Paper

Motor carriers transporting newsprint concur in the staff proposal, as do the shippers and receivers of newsprint. Carrier witnesses appearing for Alltrans Express, G.C.T., Inc., and the Newsprint Haulers committee of CTA testified in support of the exemption. In addition, testimony on behalf of MacMillan Bloedel, Limited, a Canadian manufacturer of newsprint, was adduced in support of the exemption of newsprint paper. The testimony of those witnesses showed that 30 to 40 percent of the newsprint used by newspapers and other publications in California is shipped by rail from Washington State and British Columbia. The balance is shipped in vessels from such origins. The local movements within California, both ex-rail and ex-vessel are handled by the motor carriers. ICC rates are assessed as it is the view of the witnesses that such motor carrier service is merely the completion of an interstate or foreign shipment. The witnesses testified that ICC rates are negotiated between carriers and shippers, and are compensatory. They also assert that a determination of whether the vessel transporting the newsprint is a private vessel would be difficult to make.

The traffic consultant appearing for the Warren Group submitted an alternate rate proposal. The proposed rule is as follows:

ALTERNATE APPLICATION OF RATES

"On shipments having a prior or subsequent movement by water vessel, rates of common carriers by motor vehicle on file with the Interstate Commerce Commission may be applied in lieu of the rates provided in this tariff when such rates produce a lower charge for the same transportation than the rates herein provided."

In support of this proposal the proponents state that the problem of determining whether a water vessel movement was by for-hire carrier or private vessel was resolved in Warren Trucking Co., Inc., Decision No. 89474 dated October 3, 1978, pursuant to Petition No. 940 in Case No. 5432, in which Warren sought and was granted authority to publish the same rates to apply intrastate as are published in its tariff on file with the Interstate Commerce Commission, thus eliminating any need to determine whether the vessel movement was for-hire or private, whether the traffic came to rest, whether shipments were earmarked for final destination before arriving at an intermediate storage point, and other problems, involved in the assessment of the correct rates. In other words, since the rates are the same there is no need to determine whether a shipment is intrastate or interstate in character.

Proponents also ask that certificated carriers be authorized to publish the same rates on intrastate traffic as they publish for application on interstate or foreign commerce, when the latter rates are lower.

The traffic consultant stated that adoption of the newsprint carriers' alternate proposal would result in the following benefits:

> There would be no need to determine whether the traffic was intrastate or interstate in character based on the type of water vessel utilized;
>
> there would be no need to file numerous petitions to modify or deviate from established minimum rates;
>
> economic regulation and control would be maintained outside of the ICC commercial zones as well as within those commercial zones, paralleling regulation applicable to shipments moving in interstate or foreign commerce; and
>
> all shippers would have a means of knowing what transportation rates were being paid by their competitors, and larger shippers could not obtain more favorable treatment than the smaller shippers.

In summation, it is the position of the carrier and shipper witnesses that the present arrangements for the transportation of newsprint, including the assessment of ICC rates, is satisfactory and should not be disturbed.

The transportation consultant further testified that the processing of a rate deviation application under Section 3666 is expensive and time consuming and such authority would not adequately serve to meet the needs of newsprint carriers should that traffic not be exempted.

CTA Evidence

In addition to evidence presented by motor carriers hereinabove described, a policy witness for CTA testified in opposition to the staff proposal. CTA agreed that this Commission should assume jurisdiction over ex-vessel traffic, and that upon assumption of that jurisdiction the Commission's minimum rate tariffs are applicable to ex-vessel traffic. CTA disagrees with the position of the carrier-members of its association that engage in the newsprint transportation; the position of CTA as a whole is that ex-vessel traffic should not be exempted from minimum rates.

CTA's position is based on (1) its historical position of opposition to exemptions from minimum rates, and (2) the nature of the staff study and the assumed results that would flow from the staff recommendation. CTA believes that the staff study was conducted with the premise in mind to ascertain only those facts that support its conclusion, and that the study did not attempt to evaluate the economic impact upon shippers or upon carriers. It is CTA's views that many carriers and shippers would encounter adverse economic impacts as described in the testimony of the steel mills and salt producers and the testimony of carriers (other than those handling newsprint).

CTA used as an example of the economic impact of the recent rate exemption of flattened auto bodies (Decision No. 88895 dated May 31, 1978 in Case No. 5432, Petition 965). The witness stated that rate levels were cut in half almost immediately after the

exemption took effect and unregulated carriers began transporting that traffic. The CTA witness characterized the situation with respect to flattened auto bodies as a "classic scenario for destructive competition". CTA believes the broad rate exemption proposed herein would have the same economic effect upon existing carriers as the flattened auto body exemption.

Issues

The initial issue to be determined is whether this Commission has jurisdiction to regulate the intra-California transportation by motor carriers of commodities that have received a prior or subsequent movement in a private vessel.

If that initial question is answered in the affirmative, the other issues are:

1. Will the rate exemption proposed by the staff adversely affect a significant portion of the public?

2. Will the rate exemption result in undue preference or prejudice to any group of shippers or to any specific localities?

3. Are the reasons advanced by the staff in support of its proposal sufficient to justify that proposal, and will that proposal result in reasonable and nondiscriminatory provisions?

4. Is the alternative proposal of the newsprint carriers lawful, reasonable and justified?

Preliminary Discussion

If we agree with our Legal Staff's analysis and interpretation of the federal court cases and ICC decisions construing the Interstate Commerce Act and the commerce clause of the federal constitution, we have the authority to regulate the traffic in issue and, in the absence of any action on our part, the established minimum rates for transportation by highway permit carriers are applicable to the transportation in issue. On the other hand, if we do not have such authority, the involved traffic would not be subject to regulation by this or any other commission, inasmuch as the ICC no longer has jurisdiction to regulate such traffic.

The matter was brought to the attention of our Transportation Division staff by shippers and carriers of newsprint. They assumed that jurisdiction over their ex-vessel traffic lies with us. The newsprint carriers and shippers are satisfied with the negotiated level of rates formerly filed with the ICC and they desire to continue to apply those rates, which are generally below the level of our minimum rates. Our staff's solution to the problem is to exempt the newsprint traffic and all other ex-vessel traffic from minimum rates. The Staff initially based its proposal on the complexity surrounding the determination of whether a private vessel is involved in the ocean movement. On being informed that certain shippers and carriers did not accept that basis for an exemption, the staff made additional studies to support its premise. The staff made no significant studies concerning the economic impact of its proposal on shippers of commodities other than newsprint.

The evidence adduced at the hearing showed that the staff proposal would have a widely different effect on individual shippers and carriers. Shippers of steel and salt with production facilities located in California would continue to pay the minimum rates for transportation of those commodities, while competing foreign shippers would be free to negotiate the rates for movements from ports to inland points. California producers of steel and salt believe they will be adversely affected by the staff proposal and strongly oppose it. On the other hand, shippers of newsprint, steel scrap, and other articles not subject to market competition between foreign and domestic producers, support the staff proposal. The parties supporting the staff proposal generally do so in the belief that they will achieve lower truck rates under the proposed exemption.

In this proceeding we must weigh the conflicting interests of the shippers and carriers affected by the staff proposal and arrive at an equitable solution.

Jurisdiction

Staff Counsel, US Steel, Bethlehem, and CTA argued that this Commission has jurisdiction over the traffic in issue. Sunkist Growers (Sunkist), MacMillan Bloedel and Robert W. Skirvin (Skirvin) argued that we do not have that jurisdiction.

Staff counsel submitted to the parties prior to the hearing her brief with respect to the jurisdictional issue. Staff counsel concluded that the traffic in issue is subject to our regulation under the following rationale, which we adopt.

The Interstate Commerce Act provides that the federal government has authority to regulate transportation in continuous interstate or foreign commerce. In the past, the courts have held that the essential character of the commerce will turn on the "fixed and persisting" intent of the shipper at the time of shipment. (Erie R. Co. (1929) 280 US 98.) As long as the movement is continuous, the character of the shipment will be retained. Continuity of movement will depend on the particular facts and circumstances of each case. Later cases, however, have held that although the "fixed intent" test may establish the nature of the commerce, it is not controlling in determining whether the ICC has jurisdiction to economically regulate such commerce. (Pennsylvania Railroad v Public Utilities Commission of Ohio (1935) 298 US 170; Allen-Investigation of Operations and Practices (1977) 126 MCC 336.) The issue thus framed is whether the commerce, albeit interstate or foreign, is the type of commerce which Congress has subjected to federal regulation.

In the leading case of Pennsylvania Railroad v Public Utilities Commission of Ohio, supra, the Supreme Court stated that not all commerce is "transportation" for the purpose of federal regulation. Transportation begins for that purpose when the merchandise has been placed in the possession of a carrier. The Court then noted that wherever the word "carrier" is used in this chapter, it shall be held to mean "common carrier."

Applying this logic to the facts of the case, the Court concluded that the shipment of goods into a state by private rail carriage followed by common carrier shipment wholly intrastate is not that particular form of interstate commerce which Congress has subjected to regulation by a federal commission. Under the Interstate Commerce Act, transportation begins for purposes of federal economic regulation when goods are placed in interstate commerce. Since the only common carrier movement was wholly intrastate, the Court reasoned that the Interstate Commerce Act did not apply, notwithstanding the interstate nature of the transportation. The Court went on to say that the question was not whether the movement was interstate in character but whether it was that particular form of interstate commerce which Congress has subjected to federal rate regulation. The Court further held that the Interstate Commerce Act forbids combining the interstate common carrier shipment with the interstate private shipment in order to subject the whole to federal rate regulation.

Subsequently, in Motor Transportation of Property Within a Single State (1954) 94 MCC 541 (hereafter, Single State) the ICC expanded the rationale and holding of Pennsylvania to include motor carrier shipments under Part II of the Interstate Commerce Act in addition to rail shipments under Part I. The Commission stated: "Thus, under Part II, just as under Part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same state, the relevant transportation is not interstate transportation," for the purpose of federal economic regulation. The Commission also extended the rationale of Pennsylvania to include private interstate movement which follows as well as precedes the intrastate common carrier movement.

The principles developed in Pennsylvania and Single State were next applied in Behnken Truck Service, Inc., Ext. - Exbarge Traffic (1967) 103 MCC 787 to include shipments in which the intrastate movement by common motor carrier is preceded by interstate movement by common water carriers which are exempt from economic regulation under the Act. In that case the Commission stated that the rationale in Pennsylvania is equally applicable when the property is transported into the state in for-hire carriage that is excepted or exempted from economic regulation under the Act.

The most recent major development governing federal economic regulation over single state movements was expressed in the ICC decision of Allen-Investigation of Operations and Practices (1977) 126 MCC 336. In that case the ICC concluded that the Single State rationale also applied to movements in foreign commerce by private water vessel followed by wholly intrastate common motor carrier movement.[4/] In so holding, the ICC was careful to distinguish Atchison, T. & S.F. Ry. Co., 407 F 2d 1173 (9th Cir. 1969), which held that interstate rates were applicable to wholly intrastate railroad carriage preceded by private water carriage in foreign commerce. The ICC reasoned that unlike Part I of the Act, the language of Part II relating to motor carrier transportation did not include a provision that interstate rates would apply to transportation wholly within one state provided that prior or subsequent

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4/ In Allen, proprietary and charter ocean vessels transported bananas from Central America to a Texas port. From there, the bananas were shipped by a for-hire motor carrier to various points in Texas. In finding that the motor carrier transportation did not fall within the jurisdiction of the ICC, the Commission stated that although the shipment was in continuous foreign commerce, the controlling question is whether the for-hire motor carriage wholly within one state has been preceded or followed by a movement in private carriage. Since the only transportation by for-hire motor carrier was wholly within the State of Texas, it was not subject to economic regulation under the Interstate Commerce Act.

shipments were not from a foreign country. Specifically, Part I Section 1(2)(a) of the Act governing rail transportation provides that:

> "The provisions of this Chapter...shall not apply (a) to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within the State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, ..." (Emphasis added.)

Part II, however, contains no similar provision. Accordingly, the ICC concluded that in the absence of specific statutory language to the contrary, the Commission was free to apply the rationale of Pennsylvania and Single State. Although the ICC recognized that its holding would lead to unequal regulation between rail and motor common carriers, it stated that it had no authority to regulate in the absence of express language to that effect. Any inequity must be resolved by Congress.

Left unanswered, however, by the Pennsylvania - Single State cases is the question whether provisions exempting common carriers from federal economic regulation are preemptive of state economic regulation. In State Corporations Commission v Bartlett, 388 F 2d 495 (10th Cir. 1964) (cert. den. 380 US 972) the Court held that the agricultural commodity exemption under Section 303 6(b) of the Interstate Commerce Act was preemptive of state rate regulation, and further concluded that Congress had intended the federal regulation and exceptions under the Motor Carrier Act (Part II of Interstate Commerce Act) to occupy the entire field. Relying in part on this holding the court in Baltimore Shippers and Receivers Ass'n v Public Utilities Commission of California (1967) 268 F Supp 836 (affirmed 389 US 583) found that the commercial zone exemption under Section 303(b)(8) preempted state rate regulation. It would thus appear that the exemption provisions under the Interstate Commerce Act are preemptive of state economic regulation. Unlike the Pennsylvania - Single State line of cases where the federal government has no authority to act, Congress has granted the ICC jurisdiction

under Section 303(b) to regulate common motor carrier movement; however, it has chosen to exempt certain motor carrier movement from Commission regulation until such time as the national policy dictates otherwise. (Section 303(b).)

As a practical matter in determining the applicability of preemptive statutory exemptions to the instant proceeding, it would appear that the issue of preemption would not be reached. The vast majority of shipments in this proceeding involve motor carrier shipments transacted wholly within California which are preceded or followed by ocean carrier shipments in foreign commerce. In those cases where the ocean carrier movement is by private vessel, the exemptions under the Motor Carriers Act would never apply since the ICC would lack jurisdiction over the single state motor carrier movement. Only where the ocean movement is by common carrier vessel, would the motor carrier exemptions preempt state economic regulation of the intrastate movement. In such cases the motor carrier movement would be free of both federal and state regulation.[5/]

Applying the foregoing line of cases to the proceeding at hand, it is concluded that this Commission has jurisdiction to economically regulate common motor carrier movement wholly intrastate where the prior or subsequent movement is performed by private vessel. Shipments by common carrier vessel under federal economic regulation subject the common motor carrier intra-California movement to ICC jurisdiction.

5/ Article III Section 3.5 of the California Constitution (formerly Proposition 5 - June, 1978) prohibits an administrative agency from declaring a statute "unenforceable, or refusing to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute, unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." (emphasis added). In the instant proceeding, the U.S. Supreme Court in *Baltimore*, *supra*, and the federal court of appeal in *Barlett*, *supra*, have determined that the exemptions of Section 303(b) of Part II of the Interstate Commerce Act are preemptive over state economic regulation.

Sunkist asserts that this Commission does not have jurisdiction to regulate rates for the transportation of property in interstate or foreign commerce when transported in continuity with a prior or subsequent water vessel movement. Sunkist requests that the proceeding be discontinued on the ground that we lack jurisdiction.

Sunkist contends that our staff counsel's conclusion is based on an erroneous interpretation of Allen. Sunkist argues that Allen only holds that the ICC does not have jurisdiction over certain transportation ex private water vessel which admittedly was foreign commerce. Sunkist asserts that the fact that the ICC lacks jurisdiction over a particular type of transportation does not mean that states have authority to regulate that transportation for two reasons. Sunkist argues, first, that, Article I, Section 8, Clause 3, of the United States Constitution (Commerce Clause), standing alone, prohibits states from regulating rates for transportation which is interstate or foreign commerce regardless of whether the ICC has jurisdiction over such transportation. The second reason is that the Interstate Commerce Act preempts state regulation of rates for transportation which is interstate or foreign commerce; preemption is especially clear where, as here, the Act specifically exempts from ICC economic regulation the particular type of transportation over which a state asserts jurisdiction. The third argument advanced by Sunkist is that as Allen is erroneously decided this Commission should disregard it entirely in determining whether it has jurisdiction over the subject transportation.

MacMillan Bloedel and Schnitzer Steel, in their joint brief, also contend that this Commission lacks jurisdiction. They argue, in the same manner as Sunkist, that this Commission may not prescribe minimum rate regulation of motor carriers transporting commodities wholly within California in foreign

commerce because to do so would offend (1) the federal government's paramount power in the area of foreign commerce, (2) the constitutional mandate that the free flow of interstate and foreign commerce not be subject to unreasonable interference by the states, (3) the preemptive exemption from regulation granted by Congress for such transportation, and/or (4) the statutes of this State. They argue that the Commission should find that it lacks jurisdiction to impose economic regulation on this foreign commerce transportation.

MacMillan Bloedel and Schnitzer Steel argue that the Pennsylvania and the Single State cases fall far short of justifying this Commission's regulation of the rates of a motor carrier engaged in the California portion of a foreign commerce movement. They state that those cases do not touch upon the proposition advanced by the ICC in Allen that Congress did not intend that the motor transportation here involved be the subject of regulation. Given the congressional position, this Commission may not superimpose its minimum rate structure on this traffic; were it to so do, it would offend the power vested in the federal government by Article I, Section 8 and Article VI, Clause 2 of the United States Constitution (Commerce Clause). In this vein they state that assuming arguendo, that some concurrent state economic regulation of foreign commerce is permissible, California may nonetheless not prescribe rates for the motor carrier portion of the transportation here involved because interstate and foreign commerce would be impermissibly burdened.

We have reviewed the arguments of the parties which reach a different interpretation of the Allen and Single State cases than that adopted herein. We do not agree that Allen was erroneously decided. We believe that decision was the distillation of the holdings of the ICC and the federal courts in several prior proceedings, and that Allen is fully consistent with the Pennsylvania and Single State decisions. We do not agree that Congress has

preempted state regulation in this field under the holding in Baltimore Shippers and Receivers Assn., Inc. v Public Utilities Commission of California, supra.

We also disagree that the economic regulation of the traffic in issue by this Commission, in the absence of any federal statutory prohibition against such action, would cast a burden on interstate commerce, and thus would be in violation of the Commerce Clause of the federal constitution. However, even if we were to construe that the result of our regulation would cast a burden on interstate commerce, we cannot avoid economic regulation for that reason alone, in view of the requirements of Article III, Section 3.5 of the Constitution of the State Of California. Where there exists a direct conflict between federal statutory or constitutional provisions and the statutes or Constitution of this State, we must continue to assert our jurisdiction in the absence of an appeals court decision to the contrary.[6/] With respect to the assertion that there exists such a conflict between the Commerce Clause of the federal Constitution and the Highway Carriers' Act, to our knowledge there is no federal or state appeals court decision which specifically denies us the authority to regulate the traffic in isssue.

We reach the following conclusions of law with respect to jurisdictional issues:

1. This Commission has jurisdiction to economically regulate a wholly intrastate motor carrier movement preceded or followed by a private water vessel movement in continuous foreign commerce.

2. The ICC has jurisdiction to regulate the same if the prior or subsequent water vessel movement is by common carrier.

3. The preceding conclusions are applicable to motor carrier traffic subject to all minimum rates tariffs issued by this Commission.

6/ See Footnote 5.

4. The exemptions under the Interstate Commerce Act are preemptive of state economic regulation only when (a) the motor carrier movement is not wholly intrastate; (b) the prior or subsequent water vessel movement is by common carrier. In all other cases the state has authority to regulate.

Discrimination Between Producers of Steel

US Steel contends that if the staff proposal is adopted, competition between carriers will drive rates for the rate-exempt import steel shipments substantially below the minimum rates applicable to domestic steel shipments. Based on our analyses of other exempt transportation, US Steel's contention in this regard reasonably may be expected to occur.

US Steel also contends that the evidence shows that the transportation conditions surrounding the import and domestic steel shipments by motor carrier within California are substantially similar. US Steel argues that maintenance of a lower level of rates on import steel than on domestic steel subjects domestic producers to an undue prejudice or disadvantage in violation of Section 453 of the Public Utilities code. US Steel cites California Portland Cement v Pub. Util. Com. of Calif. (1957) 49 Cal 2d 171. In that proceeding the California Supreme Court found the provisions of Section 453 forbidding discrimination between places or localities are violated when the operating conditions between competing localities are substantially the same, the mileage between such localities is approximately the same, and there are no other disparate transportation conditions that justify the maintenance of different rates between localities (49 Cal 2d 171 at 184).

The holding of the Court in California Portland Cement can be distinguished from the rate situation on steel shipments in several respects. In the cited case, a single rail carrier was involved; in this proceeding an unknown number of highway carriers are involved. It is not a violation of Section 453 for

a difference in rates to exist between competing localities when different carriers are involved in performing the transportation services. Secondly, the precise rates of a common carrier were under consideration in the cited case, while herein we are dealing with minimum rates for permit carriers. Our minimum rates are not precise rates, as permit carriers can and do charge more than the minimum rates when conditions require or permit. Section 453 is not applicable to the minimum rates of permit carriers.

US Steel contends that import steel now has a price advantage in California markets over steel produced in California and in other western states, and that lower local transportation costs would widen that price advantage, to the detriment of domestic steel producers. While the extent of that price advantage is not indicated in the record, it is not a material fact in this proceeding inasmuch as it is not the function or duty of this Commission to attempt to allocate markets between competing producers, or to equalize variations in production and distribution costs of different producers of the same commodity through the establishment of freight rates on that commodity.

Staff Proposal

As indicated hereinbefore, the staff proposal initially was proposed to solve the problems of the shippers and carriers of newsprint, and little consideration was given to the economic effect of the staff proposal upon other affected shippers and carriers. It is very clear that all shippers and carriers are not affected in the same manner by the staff proposal. While the statutes governing the minimum rates do not apply in the manner argued by US Steel, those statutes do require that the minimum rates established or approved by the Commission be "just, reasonable, and nondiscriminatory" (Section 3662).

The record shows that discrimination could result if the minimum rates are to apply to domestic steel and salt and not apply to imported steel and salt. Insofar as salt is concerned, all movements into California from foreign ports are in private vessels, so that no difficulty arises in determining the nature of the vessel movement. The record indicates that imported steel moves both in common carrier vessels and in private vessels. Apparently the difficulties alleged by the staff would exist in making a determination whether the incoming shipment would be subject to our jurisdiction. The same situation would apply to other commodities.

The shippers and the carriers directly involved in the movement of the principal commodities (other than domestic steel, salt and wood chips) desire that their shipments be rate exempt. Concerning wood chips, we do not believe that the result envisioned by the protestant wood chip hauler would occur, that is that the lumber mills would use loggers in their off season to lower the rates charged by the carriers regularly engaged in wood chip transportation. The transportation of wood chips through the Port of Sacramento for movement to Japan is performed under negotiated ICC rates, in a similar manner as newsprint. The newsprint haulers and shippers support the proposed exemption because it would permit them to continue to apply rates on the same level as the current ICC rates. We believe that the newsprint carriers and shippers have correctly analyzed the situation that will exist if the proposed exemption is granted, and we believe the rate situation with respect to newsprint also will be applicable to wood chips for export.

All commodities involved in this proceeding that have a prior or subsequent movement in a private vessel should be exempted from the minimum rates on general commodities in MRTS 2, 1-B, 9-B, and 19 for the reason that it is very difficult to distinguish whether a shipment arrived in this country in a private vessel or in a common carrier vessel. Our staff is not in the

position to enforce the minimum rates in situations where it is not readily ascertainable whether a private or common carrier vessel was involved, particularly when our staff's enforcement activities are conducted in a time frame well after the shipment moved.

Another primary consideration is that the granting of the exemption would be consistent with the current policy of the Commission. At its conference of June 5, 1979, the Commission adopted the following policy with respect to recyclable materials.

1. The Commission should request that the State Legislature amend the Public Utilities Code so as to provide for an exemption in the Public Utilities Code, thus allowing private highway carriers as well as for-hire to be free to participate in recyclable material traffic.

2. Until this legislation can be enacted, the Commission should authorize a commodity exemption for the applicable tariffs so that general commodity and dump truck carriers may transport the recyclable material at negotiated rates which can be responsive to market conditions.

The exemption of the commodities involved in this proceeding also would be in a harmony with our treatment of flattened auto bodies and sea vans (Decision No. 88895, dated May 31, 1978, in Case No. 5432, OSH 965, et al.). In that decision we found that it is in the public interest to exempt flattened auto bodies inasmuch as the existing minimum rates were excessive and tended to inhibit the movement of that recyclable commodity. We also exempted sea vans from the minimum rates because the principal movements of empty sea vans are accomplished under provisions of interchange agreements and/or contracts between motor carriers and steamship companies.

As can be seen from the above, we have exempted specific commodities or types of transportation when we have found that the minimum rates were not suitable for that transportation. As also may be seen, there is a myriad of reasons that may substantiate a finding that the minimum rates are not suitable to a particular transportation service. In this proceeding, the principal reasons for granting an exemption are that the imposition of minimum rates on traffic formerly subject to ICC rates would cause a substantial increase in rates, and that the determination that must be made as to whether the foreign ocean movement was in a private or common carrier vessel is very difficult to make. In the latter vein, the application of minimum rates depending on the type of prior or subsequent movement accorded a commodity creates an anomaly. Our minimum rates should be easily understood and should be simply stated and uncomplicated. While we must agree with the legal result of the series of court and ICC decisions cited above, the hiatus in the federal regulatory statutes has thrust upon us a type of transportation we see no need to regulate and we will not attempt to do so.

Findings of Fact

1. The culmination of the series of court and ICC decisions cited in the opinion has placed in this Commission the authority to regulate the motor carrier movements within this State of commodities that have a prior or subsequent movement in interstate or foreign commerce in a private vessel.

2. The principal commodities involved in the transportation described in the preceding finding are manufactured iron and steel articles, newsprint paper, common salt, wood chips, and iron and steel scrap.

3. The Commission's Transportation Division, in a White Paper and subsequently in this proceeding, proposed that the transportation described in Finding 1 be exempted from minimum rate regulation.

4. The determination of whether a motor carrier shipment has had a prior or subsequent movement in a private vessel is difficult to make with respect to those commodities which regularly move from or to the ports of this State in both private and common carrier vessels. Such commodities are manufactured iron and steel articles, newsprint paper, and iron and steel scrap.

5. Prior to the determination that jurisdiction to regulate the traffic in question lies with this Commission, the applicable rates for the transportation were the rates filed with the ICC. The ICC rates for wood chips and newsprint paper are substantially below the level of the applicable minimum rates.

6. The producers of manufactured iron and steel articles and common salt located within California compete in California markets with foreign producers of the same commodities. The domestic producers of iron and steel articles and common salt may be adversely affected if foreign import shipments are accorded rates below the level of minimum rates applicable for movements from plants of domestic producers to common destinations within California. The statutes enforced by this Commission prohibit the allocation of markets between producers and it would be inappropriate to do so under the facts of this proceeding. Exemption from minimum rates is neither the establishment nor approval of minimum rates.

7. This Commission has exempted certain commodities or general classes of traffic from minimum rates when it has found that the minimum rates were not suitable.

8. The minimum rates in MRTs 2, 1-B, 9-B, and 19 are not suitable to the class of traffic described in Finding 1 hereof because of the difficulty of determining the type of vessel used for the prior or subsequent foreign or interstate movement, and because the application of minimum rates to a number of commodities

would substantially increase rates above the level of the ICC rates formerly applied to such commodities. The mere fact that jurisdiction over the regulation of those commodities has changed does not justify an increase in rate levels. It is not appropriate to develop reasonable minimum rates in this proceeding.

9. It is in the public interest to exempt the type of transportation described in Finding 1 hereof from the minimum rates.

10. The proposal that the Commission adopt as the minimum rates for the commodities and movements in question the rates approved by the Interstate Commerce Commission, as proposed by the newsprint carriers, would be an unreasonable delegation of this Commission's statutory obligation.

Conclusions of Law

1. The transportation of the type of traffic described in Finding 1 above should be exempted from the minimum rates named in MRTs 2, 1-B, 9-B, and 19.

2. To facilitate tariff distribution the amendment of MRT 2 will be provided in the ensuing order and like tariff amendments to MRTs 1-B, 9-B, and 19 will be made by separate order.

3. Orders Setting Hearing should be issued concurrently with the issuance of this order in minimum rate proceedings applicable to other minimum rate tariffs to determine whether an exception similar to that adopted herein should also be adopted in such other minimum rate tariffs.

ORDER

IT IS ORDERED that:

1. Minimum Rate Tariff 2 (Appendix D to Decision No. 31606, as amended) is further amended by incorporating therein, to become effective thirty-nine days after the date hereof, Seventh Revised Page 14-A, attached hereto and by this reference made a part hereof.

2. Common carriers subject to the Public Utilities Act, to the extent that they are subject to Decision No. 31606, as amended, are hereby authorized to establish in their tariffs the amendments necessary to conform with the further adjustments ordered herein.

3. Tariff publications authorized to be made by common carriers as a result of this order shall be filed not earlier than the effective date of this order and may be made effective not earlier than the ninth day after the effective date of this order, and may be made effective on not less than five days' notice to the Commission and the public if filed not later than sixty days after the effective date of the minimum rate tariff pages incorporated in this order.

4. Common carriers, in establishing and maintaining the rates authorized by this order, are authorized to depart from the provisions of Section 461.5 of the Public Utilities Code to the extent necessary to adjust long- and short-haul departures now maintained under outstanding authorizations; such outstanding authorizations are hereby modified only to the extent necessary to comply with this order; and schedules containing the rates published under this authority shall make reference to the prior orders authorizing long- and short-haul departures and to this order.

5. In all other respects Decision No. 31606, as amended, shall remain in full force and effect.

6. The Executive Director shall serve a copy of this decision on every common carrier, or such carriers' authorized tariff publishing agents, performing transportation services subject to Minimum Rate Tariff 2.

7. The Executive Director shall serve a copy of each of the tariff amendments on each subscriber to Minimum Rate Tariff 2.

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

Dated SEP 12 1979, at San Francisco, California.

President

Commissioners

SECTION 1--RULES OF GENERAL APPLICATION (Continued)	ITEM
APPLICATION OF TARIFF--COMMODITIES (Concluded) (Items 40, 41 and 42) Disaster Supplies, i.e., those commodities which are allocated to provide relief during a state of extreme emergency or state of disaster; and those commodities which are transported for a civil defense or disaster organization established and functioning in accordance with the California Disaster Act to ultimate point of storage or use prior to or during a state of disaster or state of extreme emergency *Property, in interstate or foreign commerce, when transported in continuity with a prior or subsequent vessel movement Property of the United States, or property transported under an agreement whereby the United States contracted for the carrier's services Property shipped to or from producers of motion pictures or television shows when transported subject to the rates and rules provided in Decision No. 33226, in Cases Nos. 4246 and 4434, as amended Property transported for a displaced person when the cost thereof is borne by a public entity as provided in Section 7262 of the Government Code Property transported to a United States Post Office for mailing and United States mail transported from a post office to the addressee thereof (subject to Note 1) Shipments of the folloing commodities, hen transported by carriers engaged in courier service as defined in Item No. 10 of this tariff: (1) Business Records, viz., checks, drafts, money orders, securities, transit items, sales audit media, tabulation cards, data processing materials, legal documents, printed or reproduced documents or data and related items, video tapes, films and printed news stories; (2) Medical specimens, viz., Human and animal specimens, contained in glass or plastic tubes or vials, or whole blood serum for medical laboratory examination; individual units of whole blood; glass slides for microscopic tissue examination; urine and stool specimens; sputum, wound and other similar cultures; tissue samples for pathological examination; X-ray photographs medical transmittal documents, and documents reporting results of laboratory examination, and specimen envelopes, laboratory test forms and transmittal containers furnished by medical laboratories to their clients. Shipments weighing 100 pounds or less when delivered from retail stores or retail store warehouses where the property has been sold at retail by a retail merchant, or when returned to the original retail store shipper via the carrier which handled the outbound movement (subject to Note 2) Shipments weighing 10 pounds or less when transported by carriers which operate no vehicles exceeding a licensed weight of 4,000 pounds (subject to Note 3) NOTE 1.--Exemption applies only to transportation between points within a radius of 25 miles of the intersection of 1st and Main Streets, Los Angeles, said mileage to be computed in accordance with the provisions of Item 100. NOTE 2.--Exemption applies only when the distance between point of origin and destination does not exceed 35 miles, computed in accordance with the provisions of Item 100. NOTE 3.--Exemption applies only to transportation between points located within the Los Angeles Basin Territory as described in Item 270.	ø42 (Concluded)

ø Change
* Addition } Decision No. 90802

EFFECTIVE

Correction

ISSUED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
SAN FRANCISCO, CALIFORNIA.