ALJ/hh

ORIGINAL

Decision No. 92153 AUG 19 1980

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 APPLEGATE DRAYAGE COMPANY, a California corporation, CHARLES ALLRED, ROBERT PHILLIP GRAY, KENNETH N. KINDER, SAMMIE JAMES SMITH, JOEL TORRES, MARK E. WILLIAMS, KENNETH V. BARRENTINE, JOHN SCOTT BEEBE, JOHN W. HENKE, CHRISTOPHER MICHAEL LOMBARDO, TOM OLIVER MOORE, EARL QUONG, SACRAMENTO DEALERS SUPPLY, INC., a California corporation, and JAMES F. ARTHERTON, doing business as JIM'S PLASTERING, an individual.	OII No. 50 (Filed May 22, 1979)

Silver, Rosen, Fisher and Stecher, by Martin J. Rosen, Attorney at Law, for Applegate Drayage Company, respondent.
Robert Cagen, Attorney at Law, and Ed Hielt, for the Commission staff.

O P I N I O N

Statement of Facts

On May 22, 1979 the Commission on its own motion instituted an investigation against Applegate Drayage Company (Applegate), owner-operator carriers Charles Allred (Allred), Robert Phillip Gray (Gray), Kenneth N. Kinder (Kinder), Sammie James Smith (Smith), Joel Torres (Torres), Mark E. Williams (Williams), Kenneth V. Barrentine (Barrentine), John Scott Beebe (Beebe), John W. Henke, (Henke), Christopher Michael Lombardo (Lombardo), Tom Oliver Moore (Moore), and Earl Quong (Quong), and shippers Sacramento Dealers Supply, Inc. (Dealers Supply), and James F. Artherton (Artherton), dba Jim's Plastering.

The investigation was to determine whether Applegate by use of a lease device or arrangement had violated Sections 458, 494, and 702 of the Public Utilities Code by failing to comply with Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, in paying to owner-operator carriers Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Henke, Lombardo, Moore, and Quong, amounts different than the applicable rates and charges prescribed in that tariff. A further purpose was to determine whether Applegate, by transporting shipments of dolomite and hydrated lime at rates and charges less than the applicable tariff rates and charges, had violated Section 494 of the Public Utilities Code. In addition, the investigation was to determine whether owner-operator carriers Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Henke, Lombardo, Moore, and Quong had violated Sections 1063 and 3621 of the Public Utilities Code by operating as cement carriers or as cement contract carriers without concurrently having certificates or permits from the Commission authorizing such operations. And finally, the investigation was to determine whether shippers Dealers Supply and Artherton had paid less than the applicable tariff rates and charges for transportation performed by respondent Applegate. The scope of the investigation included, but was not limited to, the period April 1, 1978 through June 30, 1978.

In the event violations as charged were found to have occurred, a further purpose of the investigation was to determine: (1) whether Applegate should be ordered to pay to the respondent carriers, or any of them, the difference between the amounts actually paid and the amounts payable under provisions of the law; (2) whether besides being required to collect the undercharges from Dealers Supply and Artherton, Applegate should also be fined

an amount equal to the amount of the undercharges; (3) whether as a punitive measure for its transgressions, the operating rights and certificate of Applegate[1] should be cancelled, revoked, or suspended, or in the alternative a fine levied upon Applegate; (4) whether the respondent carriers, or any of them, should be required to collect from Applegate the difference between the payments actually made to them, or any of them, and the payments due under the law; and (5) whether any of the respondents should be ordered to cease and desist from any future violations, or if any other order or orders should be entered by the Commission.

Applegate is engaged in the business of transporting property for compensation over the public highways of this State, and elsewhere, pursuant (as to this State) to Highway Common Carrier Certificate issued by Decision No. 78692 dated March 18, 1971, Cement Carrier Certificate issued by Decision No. 78332 dated February 22, 1971, Radial Highway Common Carrier issued August 27, 1948, Highway Contract Carrier issued August 27, 1948, and Dump Truck Carrier issued January 14, 1970. For the year ending March 31, 1978, the carrier's gross operating revenue was $2,552,566, of which $1,069,398 was California revenue. Commission records show that Applegate subscribed (as of August 14, 1978) to and had been served with Minimum Rate Tariffs, Numbers 1-B, 2, 7, 8, 9-B, 10, 14, 15, 17, 19, and 20; ERT 1, DIR 1, DIR 2, and D.T. 8. In addition, the carrier subscribed to and was a participant of

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1/ Early in the hearing, the staff stipulated that with regard to the issue of revocation of operating authority, the OII was intended only to reach Applegate's cement carrier certificate. The ALJ accordingly so ruled.

Western Motor Tariff Bureau Tariffs Nos. 111 and 17. Applegate maintains its offices at 325 North Fifth Street in Sacramento, and operates terminals there and at other locations.

Public hearing was held before Administrative Law Judge (ALJ) John B. Weiss in San Francisco on September 25 and 26, 1979, with further days for hearing reserved. However, as the result of meetings between Applegate and the Commission staff, a stipulation between these parties as to the issues involving Applegate was reached. When the hearing resumed on November 8, 1979, this stipulation was submitted to the ALJ as a recommended basis for a decision on the issues involving respondent Applegate. The staff having offered no additional evidence pertaining to the other respondents and those respondents having failed to enter an appearance, on November 8, 1979 OII was submitted.

At the outset of the hearing Applegate's attorney emphasized the jeopardy the respondents faced, considering the penalties and restrictions potentially applicable should the charged violations be proven. Those penalties include revocations of operating authorities, fines, and restrictions inherent in cease and desist orders. He therefore raised a fundamental jurisdictional issue pertaining to deficiencies in the alleged service of the order instituting investigation by the Commission on the various respondents other than Applegate. After establishing that service of process to respondents other than Applegate had not been in compliance with provisions of Rule No. 17 of the Commission's Rules of Practice and Procedure and Sections 8 and 1704 of the Public Utilities Code, and furthermore that as to respondent Henke, there had been no notice, actual or constructive,[2/] Applegate's attorney moved for dismissal of the proceeding with respect to all respondents other than Applegate.

2/ The envelope containing the notice to Henke (mailed 1st class, not registered mail) was returned to the Process Office by the Post Office, indicating delivery could not be made. After some checking, no further effort was made to accomplish service and the envelope was placed into the case file, undelivered.

In response, the ALJ ruled that Henke would be dismissed as a respondent to the OII for lack of notice. We affirm and adopt his ruling as our own. As to the other respondents to this OII, the ALJ, while not condoning the use of shortcut procedures not contained in our Rules of Practice and Procedure and the Public Utilities Code, determined that the OII would proceed as to those respondents. He noted that Rule No. 87 of our Rules of Practice and Procedure provides that the rules should be liberally construed "to secure just, speedy, and inexpensive determination of the issues presented." He also noted that it appeared reasonably certain from the evidence that there had been actual or at least constructive notice to each of these respondents, other than Henke. Although unorthodox procedure had been used to give notice, he ruled that the motion to dismiss these respondents would be denied and that individual respondents who deemed themselves disadvantaged by the ruling could request reconsideration. We also affirm and adopt this ruling as our own.

At the hearing the staff presented evidence through witness Mark D. Walker (Walker) and subhauler witnesses (and respondents) Smith, Barrentine, Gray, Moore, Kinder, Beebe, and Torres, and entered seven exhibits aside from the stipulation. Through its evidence the staff asserted and the evidence it presented showed that during April, May, and June, 1978, the period of the staff investigation, Applegate, through use of a leasing and psuedo-employment arrangement with respondent subhaulers, in violation of the provisions of General Order No. 130, employed the equipment and service of the subhaulers to haul cement in an attempt to evade the provisions of Item 2185 of Western Motor

Tariff Bureau, Inc., Tariff 17,[3/] in violation of Sections 458, 494, and 702 of the Public Utilities Code. The evidence presented also showed that Applegate, during that three-month period, had used Item 4410 Western Motor Tariff Bureau, Inc., Tariff 111, to incorrectly rate certain shipments of hydrated lime Applegate transported for respondent Dealers Supply, and had applied incorrect surcharges, resulting in rates charged Dealers Supply which were below minimum. Similar undercharges were indicated from evidence showing that dolomite shipments for Artherton were also misrated under Item 4410 Western Motor Tariff Bureau, Inc., Tariff 111. These latter shipments also involved a destination different from that shown on the freight bills, as well as different surcharges resulting from supplement changes at different dates. Staff witness James D. Westfall was scheduled but was not called when submission of the staff-Applegate stipulation obviated further testimony.

By the stipulation submitted, expressly limited to the facts and issues of the instant OII, Applegate neither admits nor denies the truth or accuracy of the six documentary exhibits entered by the staff. Applegate, in order to avoid expenditure of further time and money, agrees, however, that these exhibits reflect that payments and charges are due and owed the eleven respondent subhaulers and Henke in the total amount of $8,132.33, and will pay those subhaulers and Henke within 30 days of the effective date of this decision. Applegate also agrees to collect

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3/ In general, Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17 provides that charges paid by a principal carrier to subhaulers for services shall be 100 percent of the charges applicable under the minimum rates of that tariff, except for liquidation of certain amounts owed by the subhauler to the principal carrier.

$1,498.57 in undercharges within the same 30 days from respondents Dealers Supply and Artherton, and to pay a fine in that amount pursuant to Section 2100 of the Public Utilities Code. For its part, the staff stipulates that it does not contend that in violating General Order No. 130, Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, and Sections 458, 494, and 702 of the Public Utilities Code, Applegate did so intentionally. Nonetheless, Applegate agrees to pay a fine of $2,000 pursuant to Section 1070 of the Code, and agrees to a Commission cease and desist order prohibiting further violations, intentional or unintentional, of the General Order, Tariff Item, and Code Sections. Finally, Applegate and the staff agree that the stipulation will not be admitted or admissible in any proceeding other than the instant OII and any subsequent proceeding involving alleged violation of any provision of the stipulation and this order. The ALJ entered the Applegate-staff stipulation as Exhibit No. 10 in this proceeding.

Discussion

The crux of the case insofar as the owner-operator payments are concerned is whether those dozen individuals were bona fide employees of Applegate or independent contractors. If, as the staff contends, they were independent contractors, the violations alleged in the order instituting investigation occurred. An employee is one engaged to do something for the benefit of the employer or a third person (Lab. C. 2750), whereas an independent contractor is one who in rendering services exercises an independent employment and represents the employer only as to the results of his work and not as to the means whereby it is accomplished. (Green v Soule (1904) 145 C 96, 99.) Labels used by the parties to characterize their status are not determinative. The common law

test is that of control - not necessarily the control actually exercised, but the right of control; and against it the factors inherent in the factual relationship are weighed. But the meaning of the terms independent contractor, employee, and employer should be determined in light of the particular legislation under which the terms are to be applied. Rather than select factors based on the bare legal powers each party holds under their working agreement, the economic realities of the situation should determine. Otherwise the disparity between legal relationships and economic reality can only generate confusion. Here we deal not with social welfare legislation issues but with the economic realities of the trucking industry.

Applegate secured certain cement delivery contracts from Kaiser Cement and Gypsum Corporation and Lone Star Industries, providing for a fairly steady stream of deliveries of bulk and sacked cement to various consignees. Applegate did not possess sufficient drivers or tractors to handle all these deliveries itself. The cement-hauling business inherently fluctuates as business conditions vary. Owning expensive pulling equipment and maintaining a drivers corps, if both are only marginally to be used, is not the way to prosperity or even survival in the trucking business. In such a situation a trucking company may elect to turn the surplus over to subhaulers as provided under the tariff. These subhaulers are nominally independent businessmen who (together with their bank) own a tractor and frequently operate on the economic fringe of the hauling industry. They provide a necessary if not indispensable service by handling overload peaks. But the prime contractor often wants to keep control of the business and does not want to lose the profit. Therefore, there is the temptation to seek out a way to fold in enough subhaulers to meet his needs and keep the business "in house". There are always

subhaulers willing, at the moment, to cut corners to keep afloat, banking on a better tomorrow. But the relationships are usually temporary because the subhauler is essentially an independent entrepreneur.

As the evidence tends to show, Applegate did not share its regular work between the company drivers and the owner-operators; the latter were used to fill in and handle surplus when and as it was available. They were supernumeraries. Barrentine testified how he successively lost the Reno and Quincy runs when the regular "company driver" returned. While Applegate ostensibly represented the owner-operators to be employees, and maintained a payroll countenance which reflect for them many of the stock indicia of employee status, i.e., employment applications, withholding forms, paychecks, employee earnings records, federal and state statutory deductions, etc., Applegate carefully segregated these hybrids from the treatment afforded its regular Teamsters Union drivers, both in form and substance. Paid not by the hour for a regular work week worked, but according to a schedule of rates based on various mileages run up by their tractors, and denied any of the stock benefits which characterize the present day employee, such as paid vacation, sick leave, group insurance, retirement plans, etc., the owner-operators were required to pay for the fuel and oil used hauling Applegate's trailers, P.U.C. taxes, shop expenses, licenses, insurance (including that on Applegate's trailers), and even for the painting of their tractors in Applegate's colors (unless their attachment went beyond certain limits). Having no regular work week as did company drivers, they were kept in line by getting assignments at the discretion of the Applegate dispatcher. In reality, these owner-operators picked up almost all of the economic risks while the contract benefits and profits went to Applegate. To attempt to assess this relationship by weighing the common law factors centering upon control would

be meaningless. The economic reality of the relationship was that the owner-operators continued to be independent contractors, but were now tied up, as many in time discovered, in a losing proposition. At best they were temporarily and superficially within the nimbus of Applegate's trucking operations, but tney were never employees.

The documentary foundations of the staff charges, in both the subhauler and undercharge areas of this case, were set forth in fourteen volumes of evidence, submitted as three bound volumes. Apart from five attachments included in the first bound volume as a sort of preamble,[4] the contents of twelve of these volumes pertain to the operations of the twelve owner-operators providing services for Applegate. The remaining two volumes pertain to Applegate transportation provided to shippers Dealers Supply and Artherton. Each owner-operator's operation is assigned a separate volume. Each such volume, apart from an introductory attachment,[5] includes one or more parts. Each part pertains to a suspect shipment and includes an Applegate revenue freight bill with supporting documents.

In addition to the three bound volumes, the staff placed three bound folders into evidence, each containing summarized shipment data drawn from the bound volumes. The first folder pertained to transportation furnished Applegate by the dozen

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4/ These attachments contain Applegate's violation history, shipper's identity statements, Applegate's equipment list, general notes on the owner-operator operations, and a copy of Applegate's lease arrangement.

5/ Containing photocopies of such Applegate "employment" documents as a subhaul application, lease arrangement, equipment registration, W-4 form, promissory notes, termination notice, driver-owner leaving settlement statement, employee earnings record, subhaul statements, etc.

owner-operators. Aside from introductory general information and appendix pages, the balance of the first folder was devoted to individual page parts, one to cover each shipment transported by an owner-operator. These were segregated, owner-operator by owner-operator. Each such page part sets forth for that shipment the rate and charges collected from that shipper. These were correctly assessed pursuant to Item 3000 of Western Motor Tariff Bureau, Inc., Tariff 17. Following this, and pursuant to Applegate's scheme, there was shown a deduction of the gross due the owner-operator (determined from a schedule of rates based upon various mileages set forth in the subhauler leases). Also deducted were the P.U.C. Rate Fund Fee (based on 3/10 of 1 percent of the gross revenue due the subhauler) and an Applegate payroll administration expense (set at 20.47 percent of 25 percent of the gross due the subhauler). The remainder was the net amount paid the owner-operator for his equipment. The staff exhibit then contrasts this computation with a computation showing the amount which should have been paid the subhauler. This amount, pursuant to Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, is 100 percent of the amount collected from the shipper, less the 0.3 percent P.U.C. Rate Fund Fee and a 9 percent trailer rental fee authorized by Decision No. 69557 dated August 17, 1965 in Case No. 5440, Pet. for Mod. 23 (64 CPUC 684). The difference is the amount of the underpayment due the owner-operator for that shipment.

The second and third folders pertained respectively to transportation services Applegate provided shippers Dealers Supply and Artherton. Again each shipment was individually set out as a separate page part and presented a comparison of the rate and charges (1) as calculated by and actually collected for that shipment by Applegate, contrasted with (2) the legal minimum rate charges and surcharges which should have been collected for the

transportation based upon the appropriate rate for the distance[6] applicable to that shipment, plus the correct surcharges.[7]

The above documentary evidence introduced by the staff was corroborated in part and supported and supplemented in part by the testimony of seven owner-operator witnesses.[8] These witnesses testified variously on the details of their "employment" relationship, including such matters as how they learned of the work and came to be engaged; of being required to suspend their operating authorities; how their work and working conditions substantially differed from those of Applegate's regular work force of Teamsters Union drivers; of their nonunion status; of the fact that they received no sick leave or pension benefits; that each paid the cost of all maintenance of his tractor as well as the cost of the fuel he used, oil, tires, vehicle license fees, etc.; that no one else ever drove their tractors at any time or would be permitted to do so; that each provided his own insurance, and insurance on Applegate's trailers being hauled; and that they were paid on a constructive mile, declining rate pay scale for some work, and on a fixed hourly rate for other

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6/ In the instance of Dealers Supply. where the commodity was bagged hydrated lime, the 55 cent rate was for 95 constructive miles (from Distance Table 8), per Item 4410, WMTB No. 111, based on Class 35.2 rating, per Item 42160, Sub 2, NMFC 100-E (NMFC 100-D prior to May 5, 1978), and Item 42160, WMTB Exception Sheet 1-B.

In the instance of Artherton, where the commodity was sacked dolomite, the 78 cent rate was for 200.16 constructive miles (from Distance Table 8), per Item 4410, WMTB No. 111, based on Class 35.2 rating, per Item 57520, NMFC 100-E (NMFC 100-D prior to May 15, 1978), and Item 57520, WMTB Exception Sheet 1-B.

7/ From Supplements 84, 86, and 87 of WMTB No. 111, and the Central Coastal Surcharge from Supplement 70 to that Tariff.

8/ Those witnesses subpoenaed by the staff were Sammie James Smith, Kenneth V. Barrentine, Robert Gray, Tom Oliver Moore, Kenneth N. Kinder, John Scott Beebe, and Joel Torres.

work, all subject to a deduction for Applegate's "payroll administration expense". Availability of work hours was at Applegate's pleasure.

Submission of the Applegate-staff stipulation on the third day of hearing cut off development of the balance of the staff's case in chief and Applegate's defense. In view of that development it is unnecessary to weigh the conflicts in the evidence to determine all the facts of the case or further to apply criteria such as those set forth in Federal Cement Transportation, Inc. (1969) 70 CPUC 553, and elsewhere. Since Applegate has stipulated to receipt into evidence of the staff exhibits, agreeing that these exhibits show certain payments in the total amount of $8,132.33 are due the dozen owner-operators for the subhauls made, by inference[9/] Applegate has, in effect, conceded that these owner-operators were indeed independent contractors and not employees of Applegate. Therefore, insofar as the transportation handled for Applegate by these dozen subhaulers is involved, there have been violations of General Order No. 130, Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, and of Section 702 of the Public Utilities Code. These violations appear amply supported by the evidence submitted. But since the staff exhibits appear to concede that Applegate correctly assessed the shippers involved pursuant to Item 3100 of Western Motor Tariff Bureau, Inc., Tariff 17, for the transportation furnished through use of these dozen subhaulers, violations of Sections 458

9/ Stipulations as to a fact are the same as conclusive proof of that fact. See California Jury Instructions, Civil No. 1.02; and Witkin, California Evidence, 2nd Ed. Section 505.

and 494 of the Code have not been shown for that transportation. No appearances having been made on the record by any of the respondent owner-operators to take issue with the staff interpretation of the respective amounts which should have been paid each owner-operator,[10] we will accept the staff compilation, stipulated to by Applegate, as reflecting the correct balance of the amounts due each owner-operator, allocated as follows:

Subhauler	Amount
Allred	$ 64.06
Gray	2,626.83
Kinder	406.76
Smith	545.36
Torres	414.95
Williams	77.07
Barrentine	1,597.26
Beebe	57.83
Henke	1,028.13
Lombardo	86.60
Moore	1,125.03
Quong	102.45
	$8,132.33

Accordingly, Applegate will be directed to pay each of these subhaulers the amount indicated within 30 days of the effective date of this decision.

Further, by the stipulation it signed, Applegate agreed to Commission imposition of a $2,000 fine as an alternative to any suspension or revocation of its cement carrier certificate, pursuant to the provisions of Section 1070 of the Public Utilities Code. Under Section 1070 as applicable here, the Commission for

10/ Although seven drivers appeared as witnesses, none made an appearance as a respondent party.

good cause may suspend or revoke a carrier's authority, or in the alternative, impose a fine not exceeding $5,000. Now, stipulations are agreements between the parties, and so long as they are within the authority of the attorneys, are binding upon the signatory parties, and, unless contrary to law or policy, they are also binding upon the court (Los Angeles v Harper (1935) 8 CA 2d 552, 555). But here we are considering the imposition of a substantial fine. Section 1070 is a punitive statute[11/] intended to punish for past wrongdoing as well as to deter similar wrongdoing in the future. In public utility matters protection of the public interest is the duty of this Commission, and the decision whether or not it is in the public interest to impose a punitive fine, and the amount of any such fine, are matters reserved for the Commission to determine. While stipulations can help us to reach an equitable determination, parties to a proceeding cannot be permitted by use of a stipulation to arrogate to themselves so important and fundamental a Commission function, nor may they by stipulation oust the Commission of the jurisdiction given to it under the Code (Los Angeles v Harper, supra).

In the instant proceeding the staff stipulated that it was not contending that Applegate in violating the Code and tariff in the subhauler issue did so with any intent to evade or otherwise improperly circumvent the law. While intent is not an element in determining whether noncompliance with tariff provisions has resulted in violation of the Code or of a tariff, in admeasuring the penalty to be imposed where there is a violation, the Commission does consider the question of willfulness with respect

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11/ A punitive statute is one which creates a forfeiture or imposes a penalty (Peterson v Bell (1931) 211 C 461, 481).

to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462). Where there is no indication of willfulness, a punitive fine need not be imposed at all (Jack Robertson (1969) 69 CPUC 563).

As noted earlier, before the Commission can impose a punitive fine under Section 1070 of the Code, good cause must be found. But here the staff's stipulation that Applegate's violations in regard to the transportation payments to the owner-operators were not intentional, if binding upon the Commission, would tend to negate any possibility of finding requisite good cause to impose a fine, despite Applegate's stipulation that it would pay a punitive fine of $2,000. Without some legally derived foundation showing culpable wrongdoing, this Commission has no jurisdiction to impose a punitive fine. But, as we concluded above, this Commission is not bound by the staff's stipulation that Applegate's acts with regard to payment of the owner-operators were not done with intention of evading or otherwise circumventing the law. We are free to examine the record as it exists for evidence of culpable wrongdoing, for indications of an intention to evade or otherwise circumvent the law. We are free to make our own determination of what Applegate had in mind or sought to attain in regard to the owner-operators.

Intention connotes an awareness of and a power of making or effecting a deliberate choice or decision, in short, willfulness. Here the record is clear that Applegate knew what it was doing. It made a deliberate choice. In 1976, in the Terry Allen Cook matter,[12/] Applegate was paying subhaulers less than the required

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12/ An informal investigation made by the staff involving Applegate Drayage Co. and Bud Line Trucking, Sacramento Transport, Red Arrow Trucking, Chris Lombardo, and Joe Mavas.

100 percent of the minimum rate less the 9 percent trailer rent. Applegate was then informed that anyone who transported cement for it within California must have cement authority. It was also pointed out that the lease agreement Applegate was using did not conform to General Order requirements. Applegate stated that it would cease using subhaulers without cement authority, and that thereafter it would make subhaul agreements to correspond to Commission requirements. Since Applegate had cooperated and apparently was attempting to comply with Commission requirements, the complaint was dropped. But those circumstances make it clear that Applegate was thereafter well aware of the issue. What Applegate has since done is also clear. It has renewed its efforts to avoid paying cement subhaulers the 100 percent (less applicable trailer rent) set forth in the regulatory scheme. It did this through adoption of the so-called "employment" arrangement coupled with a leasing device. By adoption of this facade it recruited haul-hungry owner-operators and posed them as a sort of employee, an employee outside the scope of Applegate's Teamsters Union labor contract and bereft of any nonstatutory employee benefits.[13/] This is a fiction that cannot stand.

Anyone is free to attempt to so arrange his business operations so as to avoid costs, or what he may regard as cumbersome, unpleasant, or restrictive burdens. But in doing so, even when done with professional assistance, he also assumes the risk that his actions may fail to have comported with the requirements of law. If his actions are found unlawful he cannot avoid opprobrium and imposition of penalties by pleading that he had no intent to

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13/ As noted earlier, we are not bound by classification determinations appropriate to and derived from differing objectives found in other legislative programs (Workmen's Compensation, Unemployment Insurance, Social Security, etc.); rather we will look at the relationship from the aspect of the realities of the trucking industry.

violate the law. He who would probe the law assumes the risk. Some mitigation may well result where there has been advance consultation with the regulatory agency involved, or where that agency has been kept fully informed of steps as they are taken. But such steps very definitely were not taken here. There was no consultation and the staff was not kept informed, either before or after Applegate began recruiting and using the owner-operators. The practice came to light only as the result of informal complaints from disillusioned owner-operators.

It cannot be fairly stated that the thrust of the regulatory scheme involving these subhauler payments was unclear. It is plainly set forth in the applicable tariff and has been reiterated in Commission enforcement decisions. Accordingly, where, under these circumstances, we find that there was a deliberate, albeit unsuccessful, attempt to fashion and employ an evasion of the regulatory scheme for subhauler payments, we must conclude that Applegate's conduct was culpable and wrong. Therefore, good cause exists to impose a punitive penalty under Section 1070 of the Code. The extent of the evasion and of the advantage taken of the owner-operators would incline us to impose a severe monetary penalty; however, because we have only a partial record upon which to make a determination of the appropriate penalty to be imposed, we will in this instance be guided by the stipulation of the parties, and will impose a fine of $2,000 pursuant to Section 1070, requiring that Applegate pay it to the Commission within 30 days of the effective date of this decision.

We look next to the actions of the eleven respondent owner-operators: Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Lombardo, Moore, and Quong. In view of our determination that they were independent contractor subhaulers and not employees of Applegate, it follows that they have violated

Sections 1063 and 3621 of the Public Utilities Code to the extent they operated as for-hire carriers without holding concurrent Commission authority to do so. However, in view of the fact that as a condition of becoming engaged by Applegate it was a requirement to place such individually held authorities in suspension, and considering the adhesion nature of the so-called employment-lease agreements[14] under which they were recruited and provided their demiclasse employment, it would be inequitable were we to impose any penalties against any of them for these technical violations. Accordingly, as to these eleven the order instituting investigation will be dismissed except as hereafter provided.

Applegate's stipulation to admission of the staff exhibits, and its agreement in that same stipulation to collect a total of $1,498.57 from Dealers Supply and Artherton for undercharge violations of Section 494 of the Public Utilities Code, when coupled with the failure of Dealers Supply and Artherton, after notice, to make an appearance in this proceeding, obviates the need for further evidentiary discussion of these undercharges issues in this decision. In effect, by its stipulation Applegate concedes that these two shippers were undercharged.[15] Therefore, we will accept the staff's compilation of the amounts undercharged and undercollected from each, and Applegate will be directed to collect within 30 days of the effective date of this decision $835.58 from Dealers Supply, and $662.99 from Artherton. Furthermore, pursuant to the provisions of Section 2100 of the

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14/ The term "adhesion contract" signifies a standardized contract, which, imposed or drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. There is no freedom in bargaining or equality in bargaining.

15/ See footnote No. 11, supra.

Public Utilities Code, the Commission will impose a fine of $1,498.57, equal to the amount of the undercharges applicable to these two shippers, upon Applegate, and Applegate will be ordered to pay this fine to the Commission within 30 days of the effective date of this decision.

Although respondents Dealers Supply and Artherton were shown to have repeatedly received transportation services at less than the minimum rates applicable, no evidence was entered into the record which would indicate evidence of collusion between Applegate and the two respondent shippers. Accordingly, we will conclude that failure to present such evidence disposes of any Section 3669 aspect of the instant investigation.

Finally, we will order the respective respondent owner-operators, Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Lombardo, Moore, and Quong to cease and desist from transporting cement until such time as they obtain current authority from this Commission to do so. We will also order Applegate to cease and desist from future unlawful operations and practices in violation of General Order No. 130, Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, and Sections 458, 494, and 702 of the Public Utilities Code.

Findings of Fact

1. At the time the transportation which is the subject matter of this investigation took place, the inclusive period April, May, and June, 1978, Applegate held authority granted by this Commission to transport cement, as well as other authorities.

2. During all or part of the inclusive period April, May, and June, 1978 Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Henke, Lombardo, Moore, and Quong, owner-operators, did not hold current authority from this Commission to transport cement.

3. During all or part of the inclusive period April, May, and June, 1978 Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Henke, Lombardo, Moore, and Quong, owner-operators, were under adhesion contracts with Applegate providing for Applegate to have exclusive use of their driver services and their tractor equipment, and each transported cement, sacked or in bulk, for Applegate's customers Kaiser Cement and Gypsum Corporation and Lone Star Industries to designated consignees for Applegate's account.

4. The terms of the individual agreements between Applegate and these dozen owner-operators were such as to place them far apart from Applegate's regular unionized employees in terms of such fundamental matters as method of compensation, hours and conditions of work, scope of responsibility for equipment, basic nonstatutory benefits, and in the degree of assumption of the proprietary risks of doing business, so that the owner-operators, while cast in the guise of employees, nonetheless remained independent contractors under the fragile cover of the adhesion contracts.

5. During all or part of the inclusive period April, May, and June, 1978 Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Henke, Lombardo, Moore, and Quong furnished Applegate underlying carrier (subhauler) services, each using his tractor to pull Applegate trailers to transport cement for Applegate's customers, with compensation for each subhauler being based upon the gross earnings of his equipment less certain deductions, but less than the lawfully prescribed rates for such subhauling, resulting in underpayments to these subhaulers totaling $8,132.33, apportioned as follows:

Allred	$ 64.06	Barrentine	$1,597.26
Gray	2,626.83	Beebe	57.83
Kinder	406.76	Henke	1,028.13
Smith	545.36	Lombardo	86.60
Torres	414.95	Moore	1,125.03
Williams	77.07	Quong	102.45

6. During the inclusive period April, May, and June, 1978 Applegate furnished, and shipper respondents Dealers Supply and Artherton received, transportation of hydrated lime and dolomite at less than the lawfully prescribed minimum rates, resulting in undercharges totaling $1,498.57, ascribable as follows:

Dealers Supply	$835.58
Artherton	662.99

7. The evidence before the Commission provides no basis for any finding of culpability on the part of shipper respondents Dealers Supply and Artherton in these undercharges.

8. At start of the third day of hearing November 8, 1979, Applegate elected to proceed no further with its defense, and stipulated to the above stated underpayments in the amount of $8,132.33 and undercharges in the amount of $1,498.57; agreed to pay the underpayments and to collect the undercharges; agreed to imposition of a $1,498.57 fine under provisions of Section 2100 of the Public Utilities Code and to imposition of a punitive fine of $2,000 under provisions of Section 1070 of the Public Utilities Code; and agreed to imposition of a cease and desist order prohibiting further violations. In response, the staff stipulated that Applegate in violating the law, did not do so intentionally.

9. The record reveals that in 1976, on a separate occasion than the one at bar, Applegate underpaid subhaulers in violations of the law, made amends, and at that time agreed to thereafter follow the law in its subhaul contracts.

10. During the instant proceedings Applegate cooperated with the staff in the latter's investigation.

11. The evidence introduced by the staff and the facts of the stipulation lead the Commission to infer that Applegate deliberately determined in this instance to attempt to structure

the services of the dozen owner-operator respondents named herein to a form of pseudo-employment in an effort to avoid the payment requirements required under the law for cement subhaulers. Therefore Applegate's efforts were willful and provide the requisite good cause for imposition of punitive measures as provided under Section 1070 of the Public Utilities Code.

12. The dozen owner-operator respondents named herein were not culpably involved in that each was merely a deluded participant to an adhesion contract scheme and operation set up by Applegate.

13. Respondent Henke was not provided notice of the Order Instituting Investigation.

Conclusions of Law

1. Applegate violated General Order No. 130, Item 2185 of Western Motor Tariff Bureau, Inc., Tariff 17, and Section 702 of the Public Utilities Code by underpaying the dozen named owner-operator subhaulers herein for transportation services in the total amount of $8,132.33.

2. Applegate should be required to pay these dozen subhaulers the $8,132.33 amount they were underpaid for their subhaul services.

3. Applegate violated Section 494 of the Public Utilities Code by charging and collecting less than the lawfully prescribed minimum rates which should have been charged and collected for transportation services it provided Dealers Supply and Artherton. The total amount of these undercharges is $1,498.57.

4. Applegate should be required to bill and collect the $1,498.57 undercharges, including $835.58 from Dealers Supply, and $662.99 from Artherton, and should also be required to pay a fine in the amount of $1,498.57 pursuant to the provisions of Section 2100 of the Public Utilities Code.

5. Good cause exists for imposition of punitive measures against Applegate under provisions of Section 1070 of the Public Utilities Code, and Applegate should be required to pay a punitive fine in the amount of $2,000 under that Code Section as an alternative to revocation or suspension of Applegate's cement operating authority.

6. Applegate should be ordered to cease and desist from any and all lawful operations.

7. The eleven respondent owner-operators, Allred, Gray, Kinder, Smith, Torres, Williams, Barrentine, Beebe, Lombardo, Moore, and Quong should be ordered to cease and desist from transporting cement for compensation until such time as they obtain and hold appropriate authorization from this Commission.

8. Respondent Henke was properly dismissed as a respondent in this proceeding by reason of failure to provide notice.

O R D E R

IT IS ORDERED that:

1. Applegate Drayage Company, within thirty days of the effective date of this order, shall pay to the following listed owner-operator subhaulers the sum of $8,132.33, as follows:

Charles Allred	$ 64.06	Kenneth V. Barrentine	$1,597.26
Robert Phillip Gray	2,626.83	John Scott Beebe	57.83
Kenneth N. Kinder	406.76	John W. Henke	1,028.13
Sammie James Smith	545.36	Christopher M. Lombardo	86.60
Joel Torres	414.95	Tom Oliver Moore	1,125.03
Mark E. Williams	77.07	Earl Quong	102.45

and shall advise the Executive Director in writing when these payments have been made.

2. Applegate Drayage Company, within thirty days of the effective date of this order, shall pay to this Commission a punitive fine of $2,000 pursuant to the provisions of Public Utilities Code Section 1070.

3. Applegate Drayage Company shall take such action, including legal action, as may be necessary to collect $835.58 from Sacramento Dealers Supply, Inc. and $662.99 from James F. Artherton, in undercharges as found by this Commission to be outstanding as a consequence of erroneously computed charges for shipments of hydrated lime and dolomite during the inclusive period April, May, and June, 1978, and shall notify the Executive Director of this Commission in writing upon collection.

4. Applegate Drayage Company shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges owed by Sacramento Dealers Supply, Inc. and James F. Artherton. In the event undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, Applegate Drayage Company shall file with this Commission, on the first Monday of each month after the end of the sixty days, a report of the undercharges remaining to be collected, specifying the action taken and proposed to be taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission. If there is reason to believe that respondent Applegate Drayage Company or its attorney has not been diligent, or has not taken all reasonable measure to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

5. Applegate Drayage Company within thirty days of the effective date of this order shall pay to this Commission a punitive fine of $1,498.57 pursuant to the provisions of Public Utilities Code Section 2100.

6. Applegate Drayage Company shall cease and desist from any and all unlawful operations and practices.

7. Charles Allred, Robert Phillip Gray, Kenneth N. Kinder, Sammie James Smith, Joel Torres, Mark E. Williams, Kenneth V. Barrentine, John Scott Beebe, Christopher Michael Lombardo, Tom Oliver Moore, and Earl Quong shall each cease and desist from operating as a carrier of cement until such time as he is properly authorized to do so by this Commission.

8. The Order Instituting Investigation as to respondent Sacramento Dealers Supply, Inc., and James F. Artherton, is terminated.

9. The Order Instituting Investigation as to John W. Henke is dismissed.

The Executive Director of this Commission is directed to cause personal service of this order to be made upon each named respondent, and upon John W. Henke. The effective date of this order as to each respondent and as to John W. Henke shall be thirty days after completion of service on that respondent, or individual.

Dated AUG 19 1980, at San Francisco, California.

John E. Bryson
President

Commissioner Richard D. Gravelle, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioners