Decision No. 28697

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of Beaman Bros., G. R. Haines, Norman E. Williams, J. M. Lentz, Gilruth Denman and Harry Viechman, Highway Contract Carriers, for authority to perform transportation at lesser rates than the minimum rates established by the Railroad Commission.

ORIGINAL

Application No. 20447.

William Guthrie, for Applicants and for Oro Grande Lime & Stone Company and John D. Gregg.

A. E. Rogers, for petitioners for rehearing (filed March 27, 1936) in Case 4087.

BY THE COMMISSION:

O P I N I O N

Applicants above named, all highway contract carriers operating dump trucks, have applied to the Commission under Section 11 of the Highway Carriers' Act (Chapter 223, Statutes 1935) for authority to transport sand, rock and gravel within the Los Angeles area for Oro Grande Lime & Stone Company, hereafter called the Company, and John D. Gregg, at rates less than the minimum rates therefor established by the Railroad Commission by Decision No. 28625 in Case No. 4087, decided March 9th, 1936, effective March 29th, 1936.

Section 11 provides:

> "If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of section 10 hereof."

The application sets forth in substance that the Company has entered into numerous contracts for the sale of sand, rock and gravel at prices based upon transportation rates agreed to be charged by applicants, which rates are less than the minimum rates fixed by the Commission; that the payment of the minimum rates will cause loss to the Company in the performance of such sales contracts, and to John D. Gregg, the producer from whom the Company buys the commodities; that if undue hardship is imposed on the Company and John D. Gregg, applicants fear the former may be compelled, for the fulfillment of the sales contracts, to purchase transportation equipment rather than use applicants' services, to applicants' loss. Accordingly applicants pray for authority to charge the Company and John D. Gregg, in the performance of the sales contracts, the rates charged for their services prior to the effectiveness of Decision No. 28625.

Public hearing of the application was held before Examiner Elder at Los Angeles on April 1st, 1936.

The record shows that applicants have been principally engaged in hauling sand, rock and gravel for Oro Grande Lime & Stone Company, a dealer engaged in selling such commodities to consumers on a delivered basis. The Company is not a producer, but buys the commodities as it needs them from John D. Gregg, taking possession at Gregg's producing plant located in the Roscoe area. Neither Gregg nor the Company own any transportation

equipment, and delivery to the Company's customers is accomplished through applicants' services.

The Company's sales contracts above referred to, still uncompleted, were entered into in the usual course of its business between November, 1935, and March 19th, 1936, perhaps a majority of them being entered into subsequent to February 1st, 1936. The cost of transportation constitutes a large part of the delivered price of sand, rock and gravel, and the prices agreed upon by the Company in these contracts were based very largely upon applicants' existing rates for transportation from Gregg's plant.

No written contracts for the transportation exist. The rates upon which the prices were based were "going rates" subject to change, or sometimes specially quoted rates. They were fixed on a weight basis according to zones, similar to but considerably below those set forth and established by Decision No. 28625, Exhibit "C". It is claimed that payment of the increased rates would cause great loss to the Company and John D. Gregg in fulfilling these contracts. This, applicants say, threatens them with loss of the Company's patronage, either through the Company going out of business or installing proprietary trucks.

All the witnesses testified that the general effect in the Los Angeles area of the increase in rates resulting from Decision No. 28625 will be to make it difficult for the Company and Gregg, and other dealers and producers without trucks to compete with companies who operate their own equipment and who, not being subject under the law to the Railroad Commission's jurisdiction, are thereby in a position to undersell the others at point of delivery. Applicant Lentz expressed apprehension that the situation would result in the general use of company-owned equipment, which would render it impossible for him, in common with all other independent dump truck operators in the field, to get any business.

On the other hand, it was testified that the establishment of minimum rates has already tended to produce a stabilizing effect on the price of sand, rock and gravel, and Gregg and Lentz both stated they anticipated the industry would adjust itself to the new rates in the future. Witness Thompson, General Manager of the Company, testified no decision had been reached as to how the contracts would be performed if this application were denied, and there is no evidence sufficient to establish that applicants' face loss from the precise source set forth in their application, namely, installation of plant facilities by the Company or Gregg.

Applicants thus predicate their claim to relief partly upon the contention that the minimum rates will, in general, divert this sand, rock and gravel traffic in the Los Angeles area to proprietary trucks to the exclusion of all for-hire dump trucks, and partly upon the contention that by reason of the Oro Grande

company's existing uncompleted contracts, the minimum rates will result in loss to the company and Gregg and indirectly to applicants. Neither contention, under the circumstances shown here, presents a proper case for invocating Section 11.

If the threatened diversion of traffic to proprietary trucks (assuming such threat to exist) justifies the relief applicants request, it justifies the same relief to all the other independent dump truck operators in the Los Angeles area, as all are admittedly in the same position. Decision No. 28625 would thus be wholly nullified to the extent of the minimum rates established thereby set forth in Exhibit "C" of the order. If any criticism is to be made of the decision on that ground, Section 11 does not offer the proper proceeding. That section was never intended as a means to accomplish the complete nullification of any established rate.

It is to be greatly deplored if the establishment of the minimum rates results in any loss or hardship to the Oro Grande Lime & Stone Company, to Gregg, or to any other shipper. Yet, if rates established pursuant to Section 10 are to be put into effect without granting so many exceptions, exemptions and postponements as to greatly diminish their utility, occasional hardship to some shippers may prove to be unavoidable. It seems doubtful that Section 11 was designed to apply to such situations either; for to so apply it would introduce discriminations between shippers based merely upon differences in their individual expectations of profit or loss.

In any event, resort to Section 11 cannot be approved under the circumstances of the present case; for here all of the sales contracts from which losses are anticipated were entered into after the institution of Case 4087 on November 4th, 1935. Some of the contracts were even made after the issuance of Decision No. 28625 on March 9th and as long as ten days thereafter. Both applicants and the Company, therefore, had ample opportunity to protect themselves against the predicament in which they now claim to be.

Furthermore, Case No. 4087 was the second proceeding instituted for the establishment of minimum rates for transportation by dump truck. Case No. 4076 was instituted for that purpose on September 30th, 1935, and Decision No. 28274 therein, fixing such rates temporarily, became effective on October 14th, 1935, and remained in effect until superseded by Decision No. 28625. The rates upon which the contracts in question were based and which applicants wish authority to charge now, are subject to question under that decision. It cannot be said that such rates are reasonable within the meaning of Section 11.

Finally, the Commission has already granted a petition for rehearing in Case No. 4087 based upon certain of the contentions which applicants make here and which will receive the Commission's consideration upon rehearing therein.

For these reasons the application must be denied.

O R D E R

Public hearing having been held in the above entitled proceeding, the matter having been submitted and the Commission being fully advised:

IT IS HEREBY ORDERED that Application No. 20447 be and the same is hereby denied.

Dated at San Francisco, this 6th day of April, 1936.

M B Harris

Leon O. Whitsell

Wm M Carr

Commissioners.