

ORIGINALDecision No. 68941

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application)
of C. F. O. ENTERPRISES, INC., a)
corporation, of Lancaster, for a)
certificate to operate as a)
cement carrier (Application No.)
T-66,150, CMT-G), Los Angeles)
County, et al, (File No. T-66,150).)

Application No. 46460

Russell & Schureman by Carl H. Fritze, for Max
Binswanger Trucking, Matich Transportation
Company, Daniel Lohnes Trucking Company,
Valley Transportation Company, Phillips
Trucking and More Truck Lines; Lauren M.
Wright and O'Melveny & Myers, for American
Cement Corporation; George H. Roc, for
California Portland Cement Company,
Protestants.

G. E. Shannon & C. R. Boyer, for Southwestern
Portland Cement Company; Waldo A. Gillette,
for Monolith Portland Cement Company,
Interested Parties.

Donald J. Harvey, for the Commission staff.

OPINION ON REHEARING

Applicant was granted a "cement carrier" certificate by
ex parte Resolution No. 13823, Sub. No. 1, dated June 23, 1964,
to become effective August 4, 1964. On August 4, 1964 a pleading
entitled "Protest and Petition for Rehearing" was filed by Max
Binswanger Trucking, Matich Transportation Co., Daniel Lohnes Truck-
ing Co., Valley Transportation Co., Phillips Trucking, and More
Truck Lines. Said petition specifically alleged that applicant had
failed to establish that it had continuously provided service as
a cement carrier from and since June 1, 1963, as required by Public
Utilities Code Section 1063. Said petition was granted by Order
Granting Rehearing dated September 30, 1964. A hearing pursuant to
said Order Granting Rehearing was held before Examiner Gravelle at
Los Angeles on March 2, 1965, on which date the matter was submitted.

No appearance was made by or on behalf of the applicant.

The only evidence adduced at the hearing was presented by Walter Max Binswanger, president of Max Binswanger Trucking. His testimony was to the effect that he is engaged in the business of hauling cement in the southern California area; that he has made it a part of his business operation to keep himself advised of the activities of his competitors in the cement hauling business and how they operate; that the last time he knew of any operations as a cement hauler by applicant was prior to June 1, 1963; that evidence adduced at the hearings in the matter of Application No. 46118 et al., commonly known as the "Francisco" or "Shatto" proceedings, indicated that applicant herein had sold all its cement hauling equipment to Wm. H. Shatto, Inc. sometime in the early part of 1964.

Based upon this testimony the protestants argued that applicant had failed to operate "continuously thereafter" as required by Section 1063 of the Public Utilities Code. The thrust of protestants' argument is that while the Commission may have acted properly on the original application based on the documents attached thereto, certain facts occurring subsequent to the "grandfather" date of June 1, 1963 and prior to the date of Commission action, June 23, 1964, would have caused the Commission to act differently had it been aware of them. It is urged that these facts, which are the alleged sale of operating equipment and the abandonment of cement hauling operations, having now been presented to the Commission by way of the petition for rehearing and the testimony of Mr. Binswanger, the Commission has the evidence necessary for a ruling on the original application.

The decision in this matter turns on the construction of Section 1063 of the Public Utilities Code. The pertinent portion of that section is as follows:

"The commission shall grant a certificate to operate as a cement carrier to any cement carrier as to the counties to and within which it was actually transporting cement as a cement carrier in good faith within one year prior to June 1, 1963, and continuously thereafter, provided such cement carrier applies to the commission for such certificate prior to December 31, 1963, and submits adequate proof of such prior operations. The delivery of one or more loads of cement either in bulk or in packages to a point in a particular county shall constitute adequate proof of such prior operations and shall entitle the applicant to authority to serve all points in said county from any and all points of origin. Any right, privilege, franchise, or permit held, owned, or obtained by any highway common carrier, cement carrier, or petroleum irregular route carrier, may be sold, leased, transferred, or inherited as other property, only upon authorization by the commission." (Emphasis added.)

What must be construed are the words "and continuously thereafter" in light of the following sentence, which established the quantum of proof to be made by a successful "grandfather" application.

In Decision No. 68397 (the "Francisco" or "Shatto" decision) the Commission construed the "in good faith" aspect of Section 1063 in light of the standard of proof mentioned above and concluded:

"Whether or not the applicant is in other respects a law violator, financially irresponsible, morally unfit or deviously motivated has no bearing on the question of its right to a certificate; it need meet only the specific and exclusive standards which the Legislature has set."

No attack was made herein on the validity of the application evidencing service to points in the counties to which applicant was granted its "grandfather" certificate. Applicant therefore has met the "specific and exclusive standards which the Legislature has set" and is entitled to a certificate. Whether or not applicant ceased operations and sold its operating equipment subsequent to the filing date of December 30, 1963 is not material in this type of proceeding; it has supplied "adequate proof of such prior operations" by means of the undisputed showing in its application. We find that the standard of proof established by the Legislature (that is, "the delivery of one or

more loads of cement" to the counties in question) is the controlling criterion with regard to the construction of the words "and continuously thereafter" in Section 1063.

We conclude that the cement carrier certificate issued to C. F. O. Enterprises, Inc. by ex parte Resolution No. 13823, Sub. No. 1, was properly issued and that said C. F. O. Enterprises, Inc. was entitled thereto.

ORDER ON REHEARING

IT IS ORDERED that the order granting C. F. O. Enterprises, Inc. a certificate of public convenience and necessity as a cement carrier (Resolution No. 13823, Sub. No. 1, dated June 23, 1964) is hereby confirmed.

Dated at San Francisco, California, this 20th day of April, 1965.

Frederick B. Holbrook
President

John E. Mitchell

George H. Trover

Augustus
William W. Bennett
Commissioners