

ORIGINALDecision No. 69163

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 Lincoln A. Richmond, an individual,)
 doing business as LINK RICHMOND &)
 SONS, of Baldwin Park, for a)
 certificate to operate as a cement)
 carrier (Application No. T-58,683,)
 CMT-G), Ventura County, et al.)
 (File No. T-58,683).

Application No. 46565

Phil Jacobson, for Lincoln A. Richmond, applicant.
Russell & Schureman, by R. Y. Schureman, for Max
 Binswanger Trucking, Matich Transportation
 Company, Daniel Lohnes Trucking Company, Valley
 Transportation Company, Phillips Trucking, More
 Truck Lines; Wallace K. Downey, for California
 Portland Cement Company, protestants.
O'Melveny & Myers, by Lauren M. Wright, for
 American Cement Corporation; Enright, Elliott
 & Betz, by Joseph T. Enright, for Monolith
 Portland Cement Company; Waldo A. Gillette, for
 Monolith Portland Cement Company; G. B. Shannon
 and C. R. Boyer, for Southwestern Portland
 Cement Company; interested parties.
Donald J. Harvey and Douglas C. Quinlan, for the
 Commission staff.

OPINION ON REHEARING

Ex parte Resolution No. 13821, Sub. No. 62, dated
 June 23, 1964 granted a cement carrier certificate to applicant to
 and within the Counties of Los Angeles, Orange, San Diego, Santa
 Barbara and Ventura to become effective on August 4, 1964. On that
 latter day two petitions for rehearing were filed, one by Max
 Binswanger Trucking, Matich Transportation Company, Daniel Lohnes
 Trucking Company, Valley Transportation Company, Phillips Trucking,
 and More Truck Lines and the other by California Portland Cement
 Company. The petition of Binswanger et al. was granted by Order

Granting Rehearing dated September 15, 1964, and that of California Portland Cement Company was granted by Order Granting Rehearing dated October 20, 1964. Notice of Rehearing was given on February 8, 1965 and rehearing was held before Examiner Gravelle on March 3, 1965 at Los Angeles. On the latter date the matter was submitted subject to the filing of briefs on or before March 29, 1965 and subject to a ruling on a motion for a continuance to allow petitioners further opportunity to secure a subpoena and serve the same upon applicant. A brief was filed by California Portland Cement Company on March 23, 1965.

This matter involves both procedural and substantive problems.

On March 3, 1965 at the hearing pursuant to the Orders Granting Rehearing, applicant was in a position of one who had been granted a certificate of public convenience and necessity by this Commission and who had no quarrel with what he had been granted. He was in no way a moving party. Petitioners, on the other hand, were the moving parties since they had sought and been granted the rehearing before the Commission. With the foregoing posture in mind the presiding examiner asked petitioners if they were ready to proceed. Counsel for Binswanger et al. then asked counsel for applicant if applicant was present in the hearing room. When a negative answer was given, counsel for Binswanger et al. called his first witness, the traffic manager for California Portland Cement Company. The latter's testimony generally concerned the documents attached to the application to show delivery of cement to various counties. Five out of a total of six such documents were documents of California Portland Cement Company prepared by

such company as a multi-copy document and issued to various persons including the consignee and the carrier.

Document No. 66594 indicates the carrier to be "Link Richmond #4" and the point of destination to be Costa Mesa, which is in Orange County. The document is dated May 30, 1963.

Document No. 66589 indicates the carrier to be "Link Richmond Truck #1" and the point of destination to be Claremont, which is in Los Angeles County. The document is dated May 31, 1963.

Document No. 66597 indicates the carrier to be "Link Richmond Truck #7" and the point of destination to be West Los Angeles, which is in Los Angeles County. The document is dated May 31, 1963.

Document No. 05534 does not indicate the carrier except that where the name of the carrier should appear is typed the word "Their". The point of destination is La Mesa, which is in San Diego County. The document is dated May 31, 1963.

Document No. 66565 indicates that the words, "Harrison-Nichols" have been crossed out and the word, "Richmond" substituted, followed by "Truck #4". The point of destination is Saticoy, which is in Ventura County, and the date is May 29, 1963.

As to the delivery to Orange County, Document No. 66594, the witness testified he did not know what carrier actually delivered the cement. As to the delivery to Claremont in Los Angeles County, Document No. 66589, he testified that the delivery had been made by Beverly Trucking Company and that he knew this because Beverly Trucking Company had used the same document in its application for "grandfather" rights. He also stated that

the document in question had been prepared by his own firm at the point of origin and that his firm had paid Link Richmond & Sons for this transportation. The delivery to West Los Angeles in Los Angeles County, Document No. 66597, has a penciled notation "D.E.I." The witness testified that this indicated that Diversified Enterprises had actually hauled the load of cement, that the change had been made by the dispatcher for his firm and that payment had been made to Diversified Enterprises. Exhibit No. 1, a photocopy of a check drawn by California Portland Cement Company, verified this fact. He did not know how, or in what manner, if any, applicant was involved in this movement, although applicant's name also appears on Document No. 66597. The San Diego County movement reflected by Document No. 05534 was one in which someone other than California Portland Cement Company paid the freight charges. It was an F.O.B. mill sale. The witness did not know if or to what extent applicant was involved with that movement. The last of the California Portland Cement Company documents was No. 66565, a movement to Ventura County. He testified that this was another movement which Beverly Trucking Company had utilized for "grandfather" authority; that the change from Harrison-Nichols to "Richmond" was made by the cement company dispatcher; and that applicant was the carrier paid by the cement company for the movement.

The testimony of the witness, other than as specifically enumerated above, dealt with the fact that applicant had never hauled for his company prior to May 29, 1963 and did not haul for it after June 1, 1963 until sometime in June of 1964.

The above testimony, together with official notice of the fact that applicant operates pursuant to a city carrier permit

issued July 9, 1957, a highway contract carrier permit issued April 3, 1956 and a radial highway common carrier permit (specifying cement as a transportable commodity) issued September 4, 1962, and the formal file herein were all that was before the Commission when counsel for Binswanger et al. moved for a continuance in order to secure a subpoena to compel the presence of applicant Lincoln A. Richmond to testify. The motion was supported by the other protestants.

A subpoena was issued forthwith at 11:30 a.m., returnable at 2:00 p.m., the same day. When the hearing reconvened at 2:00 p.m., the sales manager for California Portland Cement Company testified that he had unsuccessfully attempted that day to find Lincoln A. Richmond for the purpose of serving him with a subpoena. Thereafter, witnesses from Southwestern Portland Cement Company and Monolith Portland Cement Company testified that applicant was unknown to them as a cement hauler for their respective companies.

A witness from the Riverside Division of the American Cement Company testified that Document No. G 71120 attached to the application reflected a movement to Santa Barbara County on May 31, 1963 hauled by applicant, on which he was paid, and that it was the only haul by applicant for that company in 1963.

An offer of proof was requested by the examiner as an indication of what evidence might be adduced from the applicant, Lincoln A. Richmond, should the Commission decide to grant the motion for a continuance.

In support of his motion counsel for Binswanger et al. stated that he would hope to prove through applicant that:

(1) applicant had no cement hauling equipment prior to June 1, 1963;

(2) even if he had hauled cement within one year prior to June 1, 1963, he had discontinued such hauling for at least one year after that date; (3) applicant had no cement hauling equipment for at least one year after June 1, 1963; (4) applicant had not provided cement transportation "continuously thereafter" as required by Section 1063 of the Public Utilities Code. This statement was supported by the other protestants, who also urged that the failure of applicant to appear except through his attorney raised the inference that his presence would lead to the production of evidence damaging to him, that protestants had made a prima facie case that the proof contained in the application was inadequate, and that since rehearing had been granted the matter was completely opened and applicant had the burden of going forward and presenting affirmative evidence. This latter point was the subject of a brief submitted by counsel for California Portland Cement Company.

Applicant's counsel argued that the Commission records would indicate he had three operating permits and ample equipment with which to transport cement; that applicant was not present because he did not need him; that had he been present he would merely affirm the proof submitted with the application and accepted by the Commission in the granting of the certificate; that since applicant was operating pursuant to his certificate the burden was on petitioners to prove their case, not on applicant to make their case; that petitioners' counsel were not novice attorneys, but experienced counsel, and had they desired the testimony of applicant they had ample time before the hearing to secure and serve a subpoena upon applicant; and finally that the only issue really before the Commission was whether or not it had acted properly in

granting the cement carrier certificate to applicant in the first instance.

Even if we assume that protestants would be able to elicit through the testimony of Lincoln A. Richmond all the evidence which they stated it was their desire to prove, it would not be sufficient to deprive applicant of his certificate. As we have held consistently in the past, the Legislature has determined the exclusive standard for the issuance of a cement carrier "grandfather" certificate. That standard of proof is contained in Public Utilities Code Section 1063: "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." The fact that applicant had no cement hauling equipment for one year before or after June 1, 1963, or discontinued hauling cement for one year after such date, is not relevant in the face of the proof submitted with the application and fully supported by the testimony of protestants' own witnesses.

We find that petitioners on rehearing have failed to establish that the cement carrier certificate granted to applicant should be amended, altered, suspended or revoked. No useful purpose would be served by further hearing in this matter or by the issuance of a subpoena to Lincoln A. Richmond. The motion for a continuance is denied.

After consideration the Commission concludes that the cement carrier certificate issued to Lincoln A. Richmond, an individual, by ex parte Resolution No. 13821, Sub. No. 62, was

properly issued and that said Lincoln A. Richmond was and is entitled thereto.

ORDER ON REHEARING

The certificate of public convenience and necessity to operate as a cement carrier granted to Lincoln A. Richmond by ex parte Resolution No. 13821, Sub. No. 62, is hereby affirmed.

Dated at San Francisco, California, this 1st day of June, 1965.

Frederick B. Holdoff
President

George H. Prover
Avogadro

William W. Burnett
Commissioners