

ORIGINAL

Decision No. 69165

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of MINGLE TRANSPORTATION WAREHOUSE,
a corporation, of Fresno, for a
permit to operate as a Cement
Contract Carrier (Appl. No.
10-9750-CC), statewide, (File
No. T-60,410).

Application No. 46861

- G. Thomas Caswell, Jr., of Crossland, Crossland, Richardson & Caswell, for Mingle Transportation Warehouse, applicant.
- Lauren M. Wright, for American Cement Corporation;
- Wallace K. Downey, for California Portland Cement Co.; J. D. Sisemore, for More Truck Lines; Russell & Schureman by R. Y. Schureman, for Max Binswanger Trucking, Matich Transportation Co., Daniel Lohnes Trucking Co., Valley Transportation Co., Phillips Trucking, and More Truck Lines, and Miles & Sons Trucking Service; Jack Matheny, for Matheny Trucking; S. A. Moore, for Permanente Trucking Company, protestants.
- Harry C. Spence, for Ideal Cement Company, interested party.
- Donald J. Harvey, for the Commission staff.

O P I N I O N

Applicant originally filed a timely application for a cement contract carrier permit under the so-called "grandfather" provisions of Public Utilities Code Section 3623, but failed to attach thereto any documents reflecting transportation of cement during the grandfather period. Thereafter, on June 15, 1964 applicant filed a supplemental application seeking a permit to operate as a cement contract carrier throughout the state. A public hearing was held before Examiner Gravelle at Fresno on February 18, 1965 and the matter was submitted subject to the receipt of a late-filed exhibit. Said exhibit was filed on March 22, 1965.

Applicant presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 10-1958 issued in 1940, Highway Contract Carrier Permit No. 10-1009 issued in 1937, Household Goods Carrier Permit No. 10-7579 issued sometime prior to 1951, and City Carrier Permit No. 10-5776 also issued prior to 1951.

Applicant's operation has grown from a sole proprietorship commenced by Fred Mingle in 1937. Mr. Mingle died in 1951 and the business was continued by his widow, Margaret Mingle. The corporation was formed in 1956 and Mrs. Mingle is its president and sole shareholder. It was the testimony of Mrs. Mingle that the corporation serves some 50 regular customers, although they do change from time to time, and that none of these present regular customers are normally in the business of shipping cement. She did state that at the present time perhaps ten of those customers are occasional shippers of cement. Examples of the type of customer who is a potential cement shipper were given as lumber yards or pipe manufacturers. Mrs. Mingle testified that the corporation sought this permit to be able to provide a full well-rounded service to its customers. There are at present no restriction as to commodities in the current operating authority of applicant. Applicant has previously had experience in the hauling of cement, although none has been transported in the past three to four years. While the authority sought by applicant is for statewide operations of both dry sack and bulk cement, Mrs. Mingle stated that applicant would be agreeable to accepting a permit restricted in area and also limited to dry sack cement as such transportation was the type applicant anticipated. The present operations of applicant were described as mostly line haul between Los Angeles and San Francisco or Sacramento and other valley points, with a single terminal in Fresno.

Applicant operates five tractors, three trucks and sixteen trailers. It has no equipment suitable for the movement of bulk cement. Exhibit No. 4 is a balance sheet of applicant dated December 31, 1964 which shows a net worth of \$45,722.95.

Applicant operates its own maintenance shop and requires written vehicle condition reports from its drivers to the mechanic and the main office. The mechanic is on duty two days a week and applicant also avails itself of the service of a 24-hour truck garage operated by International Harvester and located one block from its terminal.

Applicant's three regular line haul drivers have been employed from a minimum of two to a maximum of six years. It also employs one or two regular local drivers. Each driver is required to fill out an extensive employment application and all references are checked by applicant. Applicant also requires physical examinations of its drivers and does not allow any of its new driver employees out alone with its equipment until such driver has been road-checked by one of its regular line haul drivers. Applicant also employs the service of Market Insurance Company to make on-the-road investigations of the safe driving habits of its drivers and the condition of its equipment. The results of these investigations are submitted to applicant and are unknown to the drivers. Mrs. Mingle stated that applicant's drivers receive very few citations and have had no accidents in the past twelve months.

Applicant is fully insured through a local Fresno insurance broker. Mrs. Mingle testified that all applicant's drivers are instructed to avoid peak hour freeway traffic when moving near large metropolitan centers. There was no evidence

presented that applicant had been or would be guilty of overloading any of its equipment.

Mrs. Mingle testified that it was not the intention of applicant to try to solicit business from other cement carriers, but rather to be able to service its own customers so that such customers would not have to seek other carriers when they had cement to be moved.

Protestants presented testimony through six witnesses, four of whom were cement haulers and two of whom were cement manufacturers. They all testified that the granting of this permit would have an adverse effect upon previously certificated and permitted cement haulers who have idle equipment and are able to transport any cement that requires movement. The claim was made that such cement haulers had many fixed costs and that, the more each of such carriers is in a position to transport, the more efficient the service they can all provide. None of the cement carrier protestants knew whether or not applicant's customers were or had been customers of theirs or whether they would be prospective customers. In effect, they wanted no more cement haulers licensed in this state. The witnesses from the cement companies testified that there was at present an overabundance of cement haulers, that they wanted no more to be given authority, and that the use of dry sack cement was declining as the use of bulk cement was growing.

Arguments were presented on behalf of the applicant and most of the protestants. Counsel for applicant claimed that applicant had presented evidence to comply with all the requirements of Section 3623 of the Public Utilities Code, that these requirements were set by the Legislature as the standards to be met by applicants

for cement contract carrier permits, and that if the Commission were to deny a permit to one who had met the standard of proof, such action by the Commission would be arbitrary and would be subject to a proceeding in mandamus. He argued that had the Legislature intended to give the Commission absolute discretion over entry into the field of cement hauling, it would have done so expressly and that the mere fact that the language of the statute is permissive as to the Commission does not mean that such absolute discretion has been granted. If such were the case, he stated, there would be no reason for the specific standards of Section 3623. He pointed out that the proposed operation would be small, could be limited by the Commission, and would impose no economic hardship upon any of the protestants. In answer to the argument of one of the attorneys for protestants (who claimed that the provision against impairing the service of previously certificated or permitted cement haulers precluded the granting of any new permits because any diversion of existing traffic was tantamount to such impairments), counsel for applicant stated such reasoning is absurd, and that the Legislature, on that assumption, performed no more than an idle act in enacting legislation setting out standards for the grant of authority thus automatically foreclosed.

The protestants argued that the language of the statute makes the granting of a permit permissive and gives the Commission discretion to grant or not, drawing upon the Commission's own expertise as well as the standards of the statute. It was their position that considering all the provisions in the Public Utilities Code, relative to the transportation of cement, the Legislature has given the Commission absolute discretion over entry into the

cement hauling business so that the standards of Section 3623 are merely minimum requirements without which the Commission may not grant a permit. Such absolute discretion in regulatory bodies, it was argued, has more and more been sustained by the courts because of the expertise of the regulating bodies and the public interest involved. They contended that the Commission has been given a public trust to protect the public, not only from excessive use of the highways, but also from the rising cost of transportation which could result from an overabundance of cement haulers.

After consideration the Commission finds that:

1. Applicant possesses the ability and reasonable financial responsibility to initiate the operations as a cement contract carrier herein authorized.

2. The privilege herein granted will not endanger the safety of the public, nor interfere with the public use of the public highways, nor impair the condition or maintenance of said public highways, directly or indirectly.

3. The privilege herein granted will not impair the service of previously certificated cement carriers or permitted cement contract carriers.

4. Applicant is a fit and proper person to receive a permit to operate as a cement contract carrier upon the terms and conditions set forth in the following order.

Based upon the evidence presented and the foregoing findings of fact, the Commission concludes that:

1. Applicant should be granted a permit to operate as a cement contract carrier.

2. Applicant's permit should be restricted to a radius of 225 airline miles from the City of Fresno.

3. Applicant's permit should be restricted to the transportation of dry sack cement only.

ORDER

IT IS ORDERED that the Secretary of the Commission be directed to issue a cement contract carrier permit to Mingle Transportation Warehouse, a corporation, authorizing the transportation of dry sack cement only, within a radius of 225 airline miles from the City of Fresno.

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

Dated at San Francisco, California, this 12th day of June, 1965.

Frederick P. Halbach
President

George E. Hoover

Augustin

William W. Dinnick
Commissioners