

Decision No. 69366

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of HARRISON-NICEOLS CO., LTD., a)
corporation, of Irwindale, for a)
certificate to operate as a)
cement carrier (Application No.)
T-8,757, CMT-G), Los Angeles)
County, et al, (File No. T-8,757).)

Application No. 46367
(Filed December 11, 1963)

William E. Dannemeyer, for Harrison, Nichols, Ltd., applicant.
Russell & Schureman, by R. Y. Schureman, for Max Binswanger Trucking, Matich Transportation Co., Daniel Lohmes Trucking Co., Valley Transportation Co., and More Truck Lines; O'Melveny & Myers, by Lauren M. Wright, for American Cement Corporation; George H. Roe, for California Portland Cement Co., protestants.
H. H. Lowthian, Jr., for Kaiser Cement & Gypsum Corp., interested party.
Douglas C. Quinlan, for the Commission staff.

OPINION ON REHEARING

Ex parte Resolution No.13821, Sub. No. 73, dated June 23, 1964, granted a certificate of public convenience and necessity to applicant to operate as a cement carrier in the Counties of Los Angeles, Orange, Santa Barbara, Ventura and San Diego.

Petitions for rehearing were filed (1) by applicant (alleging that its certificate should have included the County of San Bernardino), (2) by California Portland Cement Company, and (3) by Max Binswanger Trucking and others (alleging in substance that applicant was not entitled to a certificate since its operations in the "grandfather" period were those of a motor transportation broker and not those of a cement carrier). Said petitions were granted by Orders Granting Rehearing dated November 2, 1964, October 13, 1964, and September 30, 1964.

Rehearing was held before Examiner Gravelle in Los Angeles on May 21, 1965, on which date the matter was submitted.

Attached to applicant's petition for rehearing are two maps which are designated as Exhibit "A" and which indicate that the Claremont Plant of Consolidated Rock Products Co. is actually located in the County of San Bernardino. It was stipulated at the rehearing that such was the case and said plant was designated as No. 31 by the parties. (The City of Claremont is in the County of Los Angeles.)

Attached to applicant's petition for rehearing as Exhibit "B" is a photocopy of a shipping document, No. 66590, issued by California Portland Cement Company and indicating the movement of a load of cement on May 31, 1963 from Mojave to Consolidated Rock Products Co., Plant No. 31 in Claremont. In the place on said document where the carrier's name should appear are typewritten the words "H. Nichols Truck #"; the "H. Nichols" portion is crossed out, and inserted by hand is the word "Shatto" and the number "38". Kent B. Harrison, an officer of applicant, testified that applicant acted as the prime carrier on this movement, that Wm. H. Shatto, Inc. acted as a subhauler, and that applicant received payment in full from California Portland Cement Company for this transportation. Document No. 66590 was the same document which had been attached to the application filed by Harrison-Nichols Co., Ltd. on December 11, 1963.

Under cross-examination by protestants, it was brought out that although applicant has held permits as a highway carrier since 1935, it hauled no cement prior to May 27, 1963; that applicant owned or leased no trucking equipment prior to June 1, 1963; and that applicant acted only as a prime hauler while

employing subhaulers for the actual movements. Mr. Harrison admitted that the corporation actively solicited the movements used in its application for cement carrier authority solely for the purpose of qualifying for such authority. Each of those movements was to a plant of Consolidated Rock Products Co. and in each case the physical movement was accomplished by Wm. H. Shatto, Inc., acting as a subhauler. The witness admitted that in other Commission proceedings he may have described applicant's operation by the use of the word "brokerage" but explained that in reality it was a prime carrier-subhauler type of operation with the prime carrier having no operating equipment.

Redirect examination of the witness disclosed that applicant had been actively engaged in seeking the cement transportation of Consolidated Rock Products Co. as early as November of 1962. On December 8, 1963 a corporation known as Harrison Trucking Co., Inc. was formed having the same officers and stockholders as applicant. The latter corporation purchased 19 sets of double bottom dump trailers from San Diego Consolidated Rock Products for a price of approximately \$100,000. This equipment is utilized by subhaulers who provide service for applicant.

Prior to May 7, 1963 applicant held a Radial Highway Common Carrier Permit, a Highway Contract Carrier Permit and a City Carrier Permit. The radial permit was unrestricted as to commodities and hence applicant was authorized to transport cement. On May 7, 1963 this permit was amended to specify cement as a transportable commodity in order that applicant might be sure to qualify for cement carrier authority and secure the transportation business of Consolidated Rock Products Co. At the time of such amendment said permit was also restricted so

that applicant was required to pay 100 percent of the applicable minimum rates to subhaulers who were transporting the property of Harrison-Nichols Co., Ltd. or its customers or suppliers. There is no evidence in this record that the cement transported by applicant as a prime carrier in late May of 1963 was the property of Harrison-Nichols Co., Ltd. or of its customers or suppliers.

The arguments presented by applicant and protestants concern basically whether or not a person owning no transportation equipment can be a highway carrier. Past decisions of this Commission indicate that one cannot be both a highway carrier and a motor transportation broker. (Re Petersen, 40 CRC 71 (1936); Re Schempp, 47 CPUC 510 (1947).) Counsel for Binswanger has sought to distinguish the Schempp case from the instant proceeding by pointing to the fact that Schempp owned one truck. In the Petersen decision, however, the applicant operated no transportation equipment of his own and his operations were nevertheless held to be those of a common carrier. (See also Re Contractors Dump Truck Service, Inc. et al., 63 CPUC 187 (1964), wherein it was held that a respondent who had no equipment or terminal facilities was operating pursuant to radial and city carrier permits and was in violation of Section 3737 of the Public Utilities Code.)

We find that applicant was and is a highway carrier operating pursuant to permits and a certificate issued by this Commission, is operating over the public highways of this State, and was not, at the time in question, performing the functions of a motor transportation broker.

Based upon the evidence submitted upon rehearing, we find that applicant's certificate to operate as a cement carrier should be amended to include the County of San Bernardino.

The Commission concludes that the cement carrier certificate issued to Harrison-Nichols Co., Ltd., a corporation, by ex parte Resolution No. 13821, Sub. No. 73, was properly issued and that said Harrison-Nichols Co., Ltd. was and is entitled thereto, revised to include the County of San Bernardino.

Applicant is hereby placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

ORDER ON REHEARING

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Harrison-Nichols Co., Ltd., authorizing it to operate as a cement carrier as defined in Section 214.1 of the Public Utilities Code as more particularly set forth in Appendix A attached hereto and made a part hereof.

2. In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations:

- (a) Within thirty days after the effective day hereof, applicant shall file a written acceptance of the certificate herein granted. By accepting the certificate of public convenience and necessity herein granted, applicant is placed on notice that it will be

required, among other things, to file annual reports of its operations and to comply with and observe the safety rules of the California Highway Patrol, and the insurance requirements of the Commission's General Order No. 100-D. Failure to file such reports, in such form and at such time as the Commission may direct, or to comply with the safety rules and the provisions of General Order No. 100-D, may result in a cancellation of the operating authority granted by this decision.

- (b) Within one hundred twenty days after the effective date hereof, applicant shall establish the service herein authorized, and file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than thirty days after the effective date of this order on not less than thirty days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the establishment of the service herein authorized.
- (d) The tariff filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 117.

3. The certificate of public convenience and necessity granted in paragraph 1 of this order shall supersede the certificate of public convenience and necessity granted by Resolution No. 13821, Sub. No. 73, dated June 23, 1964, which latter named certificate is hereby revoked effective concurrently with the effective date of the tariff filings required by paragraph 2(b) hereof.

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

Dated at San Francisco, California, this 7th day of JULY, 1965.

Frederick B. Hallock
President

George E. Crow

Augustin

William B. Deane
Commissioners

Harrison-Nichols Co., Ltd., by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to operate as a cement carrier to and within the Counties of Los Angeles, Orange, San Diego, Santa Barbara, Ventura and San Bernardino from any and all points of origin.

(End of Appendix A)

Issued by California Public Utilities Commission
Decision No. 69366. Application No. 46367.