

ORIGINAL

Decision No. 69922

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of LEE G. GALE, an individual, of)
Whittier, for a certificate to)
operate as a cement carrier)
(Application No. T-75,996, CMT-G),)
Santa Barbara County, et al,)
(File No. T-75,996).

Application No. 46537
(On Rehearing)

Donald Murchison, for applicant.
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,
protestants.
George H. Roe, for California Portland Cement Co.;
O'Melveny & Myers, by Lauren M. Wright, for
American Cement Corporation; George B. Shannon,
for Southwestern Portland Cement Co.;
interested parties.
Timothy E. Treacy, for the Commission staff.

O P I N I O N

Ex parte Resolution No. 13841, Sub. No. 6, dated June 30,
1964, dismissed this application and the amendment thereto for a
"grandfather" certificate to operate as a cement carrier to and
within all counties within California, stating the applicant had
"not satisfied the statutory requirements." A petition for re-
hearing or reconsideration was filed by applicant's attorney.
Said petition was granted by Order Granting Rehearing dated August
11, 1964.

Public hearing on the petition for rehearing was held
before Examiner Mooney in Los Angeles on October 1, 1964.

The application was timely filed under the "grandfather"
provisions of Sections 1063 and 1064 of the Public Utilities Code,
which provide:

"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." (Sect. 1063.)

* * *

"Provided proper application is timely filed, the commission shall issue a certificate to each cement carrier conforming to the proof of good faith operations produced by such cement carrier with respect to its operations prior to June 1, 1963, and continuously thereafter." (Sect. 1064.)

Applicant's predecessor in interest, Donaco, Inc., a California corporation, doing business as D. V. Gale & Co., acquired Permit No. 19-52177 in 1958. Said permit authorized the transportation of various commodities, including the transportation of portland or similar cement in bulk or in packages in vehicles loaded substantially to capacity. Donaco, Inc. was wholly owned by applicant. In August 1963, the permit was transferred from Donaco, Inc. to applicant. Both applicant and Donaco, Inc. will be collectively referred to as applicant hereinafter.

Attached to the application as proof of operations as a cement carrier during the "grandfather" period (June 1, 1962 to May 31, 1963) are photostatic copies of shipping documents which cover one truckload shipment of cement delivered by applicant to a destination in each of the following counties: Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura. The transportation covered by the documents for Fresno, Santa Barbara and Ventura Counties was performed by

applicant as a subhauler. Applicant did not furnish copies of shipping documents covering the delivery of cement during the "grandfather" period to any of the other counties in the State.

The evidence shows that at the time the application was filed (December 30, 1963) applicant was the president of Diversified Enterprises, Inc. and owned fifty percent of the outstanding stock in said corporation; that Diversified was granted a "grandfather" certificate to operate as a cement carrier to and within most of the counties covered by the documents attached to the instant application;^{1/} and that applicant resigned as president of Diversified and divested himself of all interest therein in August, 1964.

According to the record, applicant owned one tractor and leased two additional tractors and two sets of double hopper trailers during the "grandfather" period. Applicant was unable to recall whether the leased equipment was also used by Diversified Enterprises, Inc. during the "grandfather" period to haul cement. He denied that either Diversified or he had engaged in any illegal "buy and sell" arrangements.

No evidence was presented by the protestants or the Commission staff. Counsel for protestants urged that the dismissal of the application by Resolution No. 13841 be affirmed.

Discussion

The Commission is directed by Section 1063 of the Code to issue a cement carrier certificate to any cement carrier as to the counties to and within which it was actually transporting

^{1/} Diversified Enterprises, Inc. was granted a "grandfather" certificate to operate as a cement carrier to and within the Counties of Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, Kern, San Diego and Ventura by ex parte Resolution No. 13823, Sub. No. 32, dated June 23, 1964, as amended by Decision No. 68631, in Application No. 46515, dated February 16, 1965.

cement as a cement carrier within one year prior to June 1, 1963 and continuously thereafter. The only qualifications set forth in Section 1063 are that the "grandfather" operations must have been "in good faith," the application must have been filed prior to December 31, 1963 and adequate proof of operations during the "grandfather" period must accompany the application. There are no other qualifications or exceptions in Section 1063. We believe that the Legislature intended that all existing cement carriers, irrespective of any affiliation that might exist between them, should be given the opportunity to obtain a certificate to continue such operations as they were then conducting, provided they qualified under the "grandfather" provisions.

We need not consider whether or not Diversified Enterprises, Inc. used the same equipment that was used by applicant during the "grandfather" period. The definition of a cement carrier in Section 214.1 of the Code refers to the "ownership, control, operation or management" of motor vehicle equipment used to carry cement. The words "ownership, control, operation or management" are in the alternative. According to the record, the equipment was under the exclusive management and control of applicant when it was being operated by him to transport cement. The fact that it may have been used by someone other than applicant at other times is not controlling.

Likewise, we need not consider whether or not applicant may have engaged in any "buy and sell" operations, lease arrangements or other activities that may have violated any minimum rate orders or other regulations. In discussing the words "in good faith" in the Kenneth D. Francisco decision,^{2/} we stated

^{2/} Decision No. 68397, dated December 22, 1964, in Applications Nos. 46118 et al., at page 9 (mimeograph copy).

as follows:

"We find that the words 'in good faith' standing alone in Section 1063 mean only that the operation which is the basis for qualification pursuant to said section shall not have been merely an illusory creation of the applicant to avoid the necessity of applying for a new certificate. 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."

The standard of proof required by Section 1063 to establish operations during the "grandfather" period to or within a particular county is evidence of the delivery of one or more loads of cement to that county during said period. The Commission has found in numerous proceedings involving applications for "grandfather" cement carrier certificates that photostatic copies of shipping documents covering such transportation are sufficient. Applicant has furnished copies of documents covering transportation to or within the Counties of Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura, only. No documents or other proof evidencing transportation as a cement carrier to or within any other county in the State during the "grandfather" period were furnished by applicant. Applicant has, therefore, furnished the required proof of "grandfather" operations to or within the nine counties covered by the aforementioned documents, but he has failed to do so for all other counties in the State.

The evidence establishes that the transportation covered by several of the documents attached to the application was performed by applicant as a subhauler. The question of whether such documents may be used to qualify an applicant for cement carrier authority has been ruled upon in the affirmative by the

Commission in numerous decisions, including the aforementioned Kenneth D. Francisco decision.

Findings and Conclusions

After consideration, the Commission finds that:

1. The application was timely filed under the "grandfather" provisions of Section 1063 of the Public Utilities Code.

2. Applicant has filed proof that it was actually transporting cement as a cement carrier in good faith within one year prior to June 1, 1963 by submitting evidence of delivery of at least one load of cement to the Counties of Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura.

3. Except for the counties listed in Finding 2 above, applicant has not met the standard of proof required by Section 1063 of the Public Utilities Code to establish prior operations as a cement carrier during the "grandfather" period.

4. Applicant divested himself of all ownership interest, control and management of Diversified Enterprises, Inc. in August, 1964.

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

1. Ex parte Resolution No. 13841, Sub. No. 6, dated June 30, 1964, should be rescinded.

2. Applicant should be granted a cement carrier certificate to operate as a cement carrier to and within each of the following counties: Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura.

3. In all other respects, Application No. 46537, as amended, should be denied.

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.

O R D E R

IT IS ORDERED that:

1. Ex parte Resolution No. 13841, Sub. No. 6, dated June 30, 1964, is hereby rescinded.

2. A certificate of public convenience and necessity is granted to Lee G. Gale, an individual, authorizing him to operate as a cement carrier as defined in Section 214.1 of the Public Utilities Code between the points particularly set forth in Appendix A attached hereto and hereby made a part hereof.

3. 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 date 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 he will be required, among other things, to file annual reports of his operations and to comply with and observe the safety rules of the California Highway Patrol, and 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 and observe 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 to 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.

4. In all other respects, Application No. 46537, as amended, is denied.

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

Dated at San Francisco, California, this 9th day of NOVEMBER, 1965.

Frederick B. Holschoff
President
George T. Hoover
Augusta
William B. ...
Commissioners

Lee G. Gale, an individual, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to operate as a cement carrier from any and all points of origin to all points and places within the Counties of Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura.

(End of Appendix A)

Issued by the California Public Utilities Commission.
Decision No. 69922, Application No. 46537.