

Decision No. 69923**ORIGINAL**

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of MOUNTAIN ROCK PRODUCTS, a corporation, of Fullerton, for a certificate to operate as a cement carrier (Application No. T-67,052, CMT-G), San Bernardino County, et al., (File No. T-67,052).

Application No. 46540  
(Reopened for Hearing)

In the Matter of the Application of BULK TRANSPORTATION, a corporation, of Walnut, for a certificate to operate as a cement carrier (Application No. T-71,340, CMT-G), Orange County, et al., (File No. T-71,340).

Application No. 46541  
(On Rehearing)

In the Matter of the Application of GLENN E. WALKER, a corporation, of Fullerton, for a certificate to operate as a cement carrier (Application No. T-65,146, CMT-G), San Bernardino County, et al., (File No. T-65,146).

Application No. 46545  
(On Rehearing)

Enright, Elliott & Betz, by Joseph T. Enright, for applicants.  
 Russell & Schureman, by Theodore W. Russell, for Max Binswanger Trucking, Match Transportation Company, Daniel Lohnes Trucking Company, Valley Transportation Company, Phillips Trucking and More Truck Lines, protestants.  
 C. R. Boyer and G. B. Shannon, for Southwestern Portland Cement Company; D. K. Graham and S. A. Moore, for Kaiser Cement & Gypsum Corporation; George H. Roc, for California Portland Cement Company and William Mitze, for Riverside Cement Company, Division of American Cement Corporation, interested parties.  
Timothy E. Treacy, for the Commission staff.

O P I N I O N

The above applications filed by Mountain Rock Products, a corporation, Bulk Transportation, a corporation, and Glenn E. Walker, a corporation (hereinafter referred to as Mountain Rock, Bulk,

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and Walker, (respectively) were filed on December 30, 1963, under the "grandfather" provisions of Section 1064 of the Public Utilities Code, for certificates of public convenience and necessity to operate as cement carriers with respect to certain specified counties. The applications of Mountain Rock and Walker contain statements that some stockholders have an interest in both corporations and as such have a voice in the control of both companies. The application of Bulk states that its president has a stock interest in Mountain Rock and Walker and as such has a voice in the control of the transportation business of all three applicants. A protest to the granting of each of the applications was filed on behalf of six cement carriers. The protest to each application requested that the application be denied and that in any event not more than one of the applicants be granted operating authority.

By ex parte Resolution No. 13823, Sub. No. 38, dated June 23, 1964, Mountain Rock was granted a certificate, subject to certain restrictions, to operate as a cement carrier to and within Fresno, Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura Counties from any and all points of origin. The restriction which requires payment of 100 percent of the minimum rates to subhaulers in connection with transportation for certain shippers with whom Mountain Rock is affiliated was revised by Decision No. 69103 dated May 20, 1965, in Case No. 7827<sup>1/</sup> to read as follows:

"Whenever Mountain Rock Products engages other carriers for the transportation of property of Mountain Rock Products, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers less than one hundred percent of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

1/ Case No. 7827 was an investigation on the Commission's own motion into the operations, rates and practices of Mountain Rock and several other carriers not involved herein. Rehearing of the matter was denied by Decision No. 69577 dated August 24, 1965.

By ex parte Resolution No. 13841, Sub. Nos. 7 and 8, dated June 30, 1964, the applications of Bulk and Walker were denied.

Petitions for rehearing by Bulk and Walker were granted by Commission order dated July 21, 1964. The Commission reopened the Mountain Rock application by order dated August 18, 1964, to determine whether the certificate granted Mountain Rock should be revoked, modified or made subject to additional restrictions. The three matters were consolidated for hearing.

Public hearing was held before Examiner Mooney in Los Angeles on September 2, 1964.

Applications were timely filed by each of the three applicants 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." (Sec. 1063.)

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"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." (Sec. 1064.)

All of the applicants herein were issued permits by the Commission prior to June 1, 1963. The permits authorized the transportation of various commodities, including the transportation of portland or similar cements in bulk or in packages in motor vehicles loaded substantially to capacity.

Attached to each application, as proof of operations as a cement carrier during the "grandfather" period (June 1, 1962 to May 31, 1963), are copies of documents which cover truckload shipments of cement to destinations within certain counties. The standard of proof required by Section 1063 of the Code to establish operations during the "grandfather" period to or within a particular county is evidence of delivery of one or more loads of cement to that county during said period. The Commission has in other proceedings accepted photostatic copies of documents covering such transportation as adequate proof of operations during the period.

Gerard L. Werner and Glenn E. Walker testified and presented evidence on behalf of applicants. Mr. Werner is a director of Mountain Rock and the treasurer of both Mountain Rock and Walker, and he owns ten percent of the stock in Mountain Rock and approximately nine percent of the stock in Walker. Mr. Walker is a director of both Walker and Bulk, the secretary of Walker and the president of Bulk, and he owns ten percent of the stock of Mountain Rock, 25 percent of the stock of Walker and 100 percent of the stock of Bulk. The record shows that two of the four members of the board of directors of Mountain Rock are also directors of Walker; that the same individuals serve as president and as secretary of both Mountain Rock and Walker; that eight of the nine shareholders of Mountain Rock own 75 percent of the shares of Walker; and that of the remaining 25 percent of the outstanding stock issued by Walker, the president of Mountain Rock and Walker owns one half. According to the evidence, Mr. Walker supervises the transportation operations of Mountain Rock, Walker and Bulk.

The witnesses testified that each applicant in fact transported and was paid for the cement shipments represented by the

whose application it was attached. The witnesses explained these changes as follows: The documents were prepared by the cement mills; the mills have on hand a supply of partially prepared blank documents for each carrier that regularly serves them; a number of the documents are made up for each consignee to whom the carrier regularly makes deliveries; when a carrier picks up a load of cement for a particular consignee, the mill will take one of the documents on which the name of the carrier and the consignee are already shown and fill in the balance of the necessary information; if a shipment is destined to a particular location and there are no documents made up which show the name of both the carrier and the destination, the mill will take a document which shows the correct destination and cross out the name of the carrier shown thereon and write in the name of the carrier which actually performs the transportation.

The traffic manager of Riverside Cement Company, a Division of the American Cement Company, testified that he had reviewed his company's records and verified that the shipment represented by each Riverside Cement Company document which was attached to the applications was transported by the applicant shown on the document and that transportation charges were paid to that particular carrier. He gave the same explanation as applicants' witnesses regarding the reason for crossing out the name of one carrier and writing in the name of another carrier on certain of the documents. He testified that Riverside Cement Company has been satisfied with the service which each of the three applicants has rendered for it.

The two witnesses for the applicants further testified as follows: Mountain Rock operates a rock plant in which it has an investment of approximately \$750,000 as well as its transportation business; Walker operates both a transportation and equipment leasing business; Bulk is in the transportation business only; Mountain Rock

leases its cement trailer equipment from Walker and hires drivers who furnish their own tractors and are paid on a mileage basis to pull the trailers; Walker and Bulk own their own equipment; both Mountain Rock and Walker keep their equipment at the same location, and it is all serviced and maintained by Walker; Bulk's equipment is kept at a different location, and Bulk takes care of its own servicing and maintenance; the records of Mountain Rock and Walker are also kept at the same location and are maintained by the same office staff, which is paid by both companies; Mr. Walker solicits business for all three applicants; all of the equipment of the three applicants is busy most of the time; all of the applicants have the financial ability and experience to operate as cement carriers; none of the applicants employ subhaulers unless an emergency arises, and when any of them have used subhaulers, the subhaulers have been paid 100 percent of the applicable minimum rates; certain of the shareholders in Mountain Rock and Walker have an interest in other companies that are cement shippers.

#### Discussion

The Legislature has set out in Section 1063 of the Code the specific and exclusive conditions that must be met by an applicant for a "grandfather" cement carrier certificate. If the conditions are met, the Commission is directed to issue the certificate. The Commission has no discretion in the matter. The conditions are:

- (1) applicant must have actually transported cement as a cement carrier to and within each county for which the authority is sought within one year prior to June 1, 1963, and continuously thereafter;
- (2) the "grandfather" operations must have been in good faith;
- (3) the application must have been filed prior to December 31, 1963; and
- (4) adequate proof of operations during the "grandfather" period must accompany the application.

Each of the three applications was timely filed. With the exception of two counties named in the Walker application,<sup>2/</sup> evidence of delivery of at least one load of cement during the "grandfather" period to each county for which authority is sought by Walker and Bulk was submitted with their applications. Similar evidence establishing operations to each county for which Mountain Rock was granted a certificate by ex parte Resolution No. 13823, supra, was submitted with its application. Section 1063 provides that evidence of the delivery of one or more loads of cement to a point in a particular county during the "grandfather" period shall constitute adequate proof of operations to or within that county during said period.

The evidence establishes that common control, management and ownership exists in varying degrees as to the three applicant corporations. Although this overlap is present, it is not a factor to be considered herein in determining whether each of the applicants is entitled to a "grandfather" cement carrier certificate. The record shows that each corporation has been continually operated as a separate and distinct entity; that each held separate operating authority from the Commission to transport cement prior to the enactment of the cement carrier legislation; and that each did in fact separately transport cement during the "grandfather" period. The three corporations do not appear to have been separately created as a sham or device to obtain three, rather than one, "grandfather" cement carrier certificates.

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<sup>2/</sup> Walker submitted documents covering transportation during the "grandfather" period to nine of the eleven counties named in its application. The counties for which documents were not submitted were Ventura and Kern Counties.

Applicants' witnesses were extensively cross-examined regarding lease arrangements between Mountain Rock and Walker and also concerning the hiring by Mountain Rock of drivers who used their own tractors. Whether these arrangements did or did not violate the minimum rate orders or other regulations need not be considered in determining whether the operations conducted by any of the applicants during the "grandfather" period were "in good faith" as required by Section 1063. The Commission in discussing the words "in good faith" in the Kenneth D. Francisco decision<sup>3/</sup> stated 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."

With respect to the documents on which the name of one carrier had been marked out and the name of the carrier to whose application the document has here been attached had been written in, the witnesses for the applicants and the traffic manager of Riverside Cement Company explained that this is a common occurrence and averred that the transportation was in fact performed by the applicant involved. No evidence was presented to refute their testimony.

#### Findings and Conclusions

After consideration, the Commission finds that:

1. Mountain Rock, Walker and Bulk have each filed timely applications for a cement carrier certificate pursuant to Public Utilities Code Section 1063.

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<sup>3/</sup> Decision No. 68397, dated December 22, 1964, in Applications Nos. 46118 et al., at page 9 (mimeograph copy).



2. Mountain Rock 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, Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura.

3. Walker 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, Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo and Santa Barbara.

4. Bulk 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, Imperial, Inyo, Kern, Los Angeles, Merced, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura.

5. Glenn E. Walker owns 100 percent of Bulk, 25 percent of Walker and 10 percent of Mountain Rock. He is the president of Bulk and the secretary of Walker, and he supervises the transportation operations of all three applicants.

6. The majority of the shares of both Mountain Rock and Walker are held by the same individuals. Several of the directors and officers of Mountain Rock are also directors and officers of Walker.

7. An affiliation exists among the three applicant corporations by reason of common management and control, but they were distinct legal entities and were operated as separate corporations prior to June 1, 1963.

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

1. Ex parte Resolution No. 13823, Sub. No. 38, dated June 23, 1964, as amended by Decision No. 69103, supra, which granted a cement carrier certificate to Mountain Rock, should be affirmed.

2. Ex parte Resolution No. 13841, Sub. Nos. 7 and 8, dated June 30, 1964, which denied the applications of Bulk and Walker should be rescinded.

3. The application for a cement carrier certificate filed by Bulk should be granted.

4. With the exception of the Counties of Ventura and Kern, Walker should be granted a cement carrier certificate to operate as a cement carrier to and within each of the counties named in its application from any and all points of origin.

5. Proper and lawful regulatory objectives will be achieved by including in the restriction added to the radial highway common carrier permit and cement carrier certificate of Mountain Rock by Decision No. 69103, supra, a further restriction that Mountain Rock shall not pay less than 100 percent of the minimum rates and charges established by the Commission to other carriers engaged by it to transport the property of Bulk or the customers or suppliers of Bulk. Corresponding restrictions should be inserted in the cement carrier certificates to be issued to Bulk and Walker.

For clarification purposes, the operative right granted to Mountain Rock Products by Resolution No. 13823, Sub. 38, as amended by Decision No. 69103, will be revoked and a new certificate will be issued in lieu thereof.

Applicants are 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 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. 13823, Sub. No. 38, dated June 23, 1964, as amended by Decision No. 69103 dated May 20, 1965, in Case No. 7827, which granted a certificate of public convenience and necessity to Mountain Rock Products, a corporation, to operate as a cement carrier is hereby affirmed, subject to paragraphs 5, 8, 9 and 10 of this order.

2. A certificate of public convenience and necessity is hereby granted to Bulk Transportation, a corporation, authorizing it to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, from any and all points of origin to and within the counties particularly set forth in Appendix A attached hereto and hereby made a part hereof.

3. A certificate of public convenience and necessity is hereby granted to Glenn E. Walker, a corporation, authorizing it to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, from any and all points of origin to and within the counties particularly set forth in Appendix B attached hereto and hereby made a part hereof.

4. In all other respects, Application No. 46545 filed by Glenn E. Walker, a corporation, is hereby denied.

5. The certificate of public convenience and necessity to operate as a cement carrier granted to Mountain Rock Products is hereby made subject to the following restriction:

"Whenever Mountain Rock Products engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers."

6. The certificate of public convenience and necessity to operate as a cement carrier granted herein to Bulk Transportation, a corporation, is hereby made subject to the following restriction:

"Whenever Bulk Transportation engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers."

7. The certificate of public convenience and necessity to operate as a cement carrier granted herein to Glenn E. Walker, a corporation, is hereby made subject to the following restriction:

"Whenever Glenn E. Walker engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers."

8. Bulk Transportation, a corporation, Glenn E. Walker, a corporation, and Mountain Rock Products, a corporation, in providing service pursuant to the respective certificates granted herein shall each 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 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 and observe the safety rules, or the provisions of General Order No. 100-D, may result in a cancellation of the operating authority granted by this decision.
- (b) On or before December 31, 1965, applicant shall file tariffs in triplicate in the Commission's office, said tariffs to comply with the regulations governing the construction and filing of tariffs set forth in General Order No. 117 and to be made effective not earlier than ten days after the effective date of the authority herein granted on not less than ten days' notice to the Commission and the public.

9. As indicated by Ordering Paragraph 8(b) hereof, the time within which Mountain Rock Products, a corporation, was required to file tariffs with the Commission by ex parte Resolution No. 13823, Sub. No. 38, dated June 23, 1964, is hereby extended to and including December 31, 1965.

10. Concurrently with the effective date of the tariff filings required by Ordering Paragraph 9 hereof, the operative right granted by Resolution No. 13823, Sub. No. 38, dated June 23, 1964, as amended by Decision No. 69103, dated May 20, 1965, in Case No. 7827,

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is hereby revoked and, in place and stead thereof, a certificate of public convenience and necessity to operate as a cement carrier is hereby granted to Mountain Rock Products, a corporation, as particularly set forth in Appendix C attached hereto.

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. Holbrook  
President  
George H. Grover  
William La. Belmont  
Commissioners

Bulk Transportation, 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 Fresno, Imperial, Inyo, Kern, Los Angeles, Merced, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura from any and all points of origin.

Whenever Bulk Transportation engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers.

(End of Appendix A)

Issued by California Public Utilities Commission.

Decision No. 69923, Application No. 46541.

Glenn E. Walker, 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 Fresno, Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo and Santa Barbara from any and all points of origin.

Whenever Glenn E. Walker engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers.

(End of Appendix B)

Issued by California Public Utilities Commission.

Decision No. 69923, Application No. 46545.



Mountain Rock Products 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 Fresno, Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura from any and all points of origin.

Whenever Mountain Rock Products engages other carriers for the transportation of property of Mountain Rock Products, Bulk Transportation, Glenn E. Walker, Glenn E. Walker Corporation, Mountain Ready-Mix, Contractors Ready-Mix, Freeman Ready-Mix, or Foster Sand & Gravel, or customers or suppliers of said individuals, partnerships or corporations, carrier shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with the Commission for the transportation actually performed by such other carriers.

(End of Appendix C)

Issued by California Public Utilities Commission.

Decision No. 69923, Application No. 46540.