

ORIGINALDecision No. 71662

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
 into the rates, rules, regulations,)
 charges, allowances and practices)
 of all common carriers, highway)
 carriers, and city carriers relat-)
 ing to the transportation of sand,)
 rock gravel and related items)
 (commodities for which rates are)
 provided in Minimum Rate Tariff)
 No. 7).

Case No. 5437
 Petition for Modification
 No. 114

Filed May 20, 1965;
 Amended June 23, 1965 and
 September 13, 1965.

(Appearances are shown in Appendix A)

O P I N I O N

Pursuant to the Commission's Rules of Procedure, Sections 69-72, the proposed report of Examiner Mallory was filed in the the above-entitled matter on March 31, 1966.

Exceptions to the proposed report were filed on May 20, 1966, by the Western Conference of Teamsters (Teamsters), by the California Dump Truck Owners Association (CDTOA), by Southern California Rock Products Association (SCRPA) and by the Commission's Transportation Division staff (staff). On May 25, 1966, exceptions were filed by Associated Independent Owner-Operators, Inc. (Independent). Replies to the exceptions were filed by Tariff No. 7 Committee (petitioner) on June 21, 1966, and the matter was submitted on that date.

The Commission has considered all of the evidence of record herein, the statements of position of the parties to the proceeding, the proposed report and the exceptions and replies thereto. The proposed report accurately sets forth the material issues raised

by the parties and the pleadings. The Commission concurs in the discussion set forth in the proposed report on pages 1 through 9 and the first six lines of page 10, and therefore adopts it as if set forth at length herein.¹ Our findings and conclusions, however, are different from those reached by the examiner.

At issue in this matter is a sought exemption from the minimum rates in Minimum Rate Tariff No. 7 of the transportation of earth, borrow, or nonprocessed fill, and subbase when such subbase does not originate at a commercial producing plant as defined in the tariff, to, from or within a public works construction project awarded on an open bid.

The examiner recommended, based on the findings set forth in the proposed report, that an exemption from minimum rates be accorded transportation of earth and related commodities on highway or freeway construction projects, when the contract is awarded on an open bid, and transportation is performed in hopper-bottom dump equipment and extends over a period of 14 or more consecutive days. The findings and conclusions contained in the proposed report are set forth in full in Appendix B.

The parties filing exceptions, excepting SCRPA, disagree with the examiner's recommended findings and conclusions that the traffic described above should be exempted.² Petitioner, in its reply to said exceptions, supports in full the examiner's recommended findings and conclusions.

¹ Exceptions taken to this portion of the examiner's report are de minimis, and require no further consideration.

² SCRPA exceptions deal with the description of certain commodities which would be exempted.

CDTOA, Independent, Teamsters, and the staff, in essence, take the position that the present minimum hourly rates are reasonable for the transportation here in issue and that such rates should continue to apply. In addition, protestants, CDTOA, Independent and Teamsters assert that the removal of minimum rates would result in financial disasters for subhaulers engaged in such transportation because the resulting down pressure would inevitably result in non-compensatory rates. The exceptions filed by protestants were made in support of these contentions. Most of the exceptions reiterate the position of parties taken at the hearings. The position of the parties and the evidence related thereto are fully discussed in the examiner's report.

Protestants and the staff take the position that hourly rates are the only rates which reasonably reflect the varying operating conditions encountered on freeway construction projects; that the Commission should require that these rates be assessed; and that whatever efforts are necessary to enforce the application of such rates should be undertaken by the Commission. Protestants and the staff filed exceptions to those portions of the examiner's report which are contrary to this position. Petitioner, in its reply, urged that the record shows that the job of transporting earth, as defined within the scope of the recommended exemption, is awarded to carriers on the basis of fixed bids made to general contractors; that this is a situation which is unique to the area of service which would be affected by the examiner's proposed exemption; and that on any sizable highway project the carrier making the successful bid must post a performance bond guaranteeing that the movement undertaken will be completed within an agreed time and for the price quoted. Petitioner contends that hourly rates do not fit

the needs of this particular arrangement and, for that reason, minimum rate regulation would be difficult. Petitioner also questioned the effectiveness of rate regulation in the field of transportation here in issue,³ and felt that if the members of petitioner were required to apply minimum hourly rates, contractors would, of necessity, be forced to perform transportation services other than with for-hire carriers.

The record discloses that the carriers here involved are overlying carriers; that is, they employ subhaulers to perform all or a major portion of the actual transportation. The record also shows that petitioner's membership consists principally of overlying carriers who regularly contract for dump truck transportation on large freeway construction projects. Protestants, the record shows, largely represent subhaulers⁴ who actually perform most of the transportation involved.

³ Petitioner's witnesses were quite frank in their testimony that for several years they have not applied the minimum rates for the transportation in issue, but have engaged in various devices and types of circumvention to give the appearance that such rates have been applied. These witnesses, and also witnesses who operate as subhaulers, presented testimony to show that subhaulers are paid, not on the basis of the minimum rates, but on a tonnage or yard basis. All of the various methods under which subhaulers are paid, such as the time-cycle method and the hourly conversion method, result in payment for the number of tons or yards hauled, rather than for the number of hours worked.

⁴ The membership of Independent consists solely of operators of one or two units of equipment. CDTOA claims to represent a cross-section of all types of carriers engaged in dump truck transportation activities. It presented four witnesses who operate as overlying carriers. Three of such carriers opposed the petition. One has the type of equipment which would be covered by the exemption recommended by the examiner. This witness testified that he did not believe the present rates were reasonable for service on large construction projects; but urged that the Commission establish procedures under which carriers could expeditiously be granted relief from minimum rates.

Witnesses for the Petitioner describe in great detail the manner in which carriers price a transportation job. They point out that they have men in their employ who do nothing but estimate costs of transportation. These highly skilled persons go over the blueprints of the project and accompany the general contractor to the job site, determine the materials to be moved and the areas to be filled. The estimator finds out where the pit is to be located, the location of the access roads, the placement points, and the kind of placement to be required. The general contractor describes to the estimator the manner in which loading is to be accomplished and indicates where loading devices are to be placed. The estimator examines the kind of material which is to be handled and endeavors to determine the moisture retention properties. When roads are available at the time the estimate is made, trial runs are made with equipment at the approximate time of the year when the work is to take place, so that the weather conditions can be properly taken into consideration. In this connection, available weather predictions are consulted concerning the job. The estimator must know the general contractor's schedules so that it can be determined if the movement is going to be continuous or broken. The daily production rate and the scheduling of the number of yards or tons which must be moved every day also must be known and appraised as this will determine the number of trucks needed on the job.

After all of these factors are analyzed, petitioners quote a rate to the general contractors not in accordance with the tariff but on a fixed price per ton or cubic yard. This method of pricing is insisted upon by the general contractor because it is the manner in which he must submit his bid to the Public Works Agency.

The record indicates that the estimating has been so accurate that had the tariff rate (hourly) actually been applied by the carriers, the charges to the general contractor would have been

about the same in dollar costs, and in some instances would have been less.

Notwithstanding that the highly developed estimating techniques show, by this record, the risks of general contractors to be negligible, if any, the general contractor insists the carrier take the risk because as one of the carrier witnesses stated: "Any price subject to a minimum is unsuitable to the contractor because he would not be able to depend upon the dump truck operator's appraisal of the job" We have no quarrel with the general contractor's desire to immunize himself against uncertainties. Transportation rate regulation, however, has been found to be in the public interest, and regardless of how inconvenient the general contractor may regard this to be, he is, nevertheless, the risk-taker envisioned by Public Utilities Commission statutes as well as by his contract with the Public Works Agency.

Petitioner's witnesses suggest that work performed in accordance with the tariff on an hourly basis (that performed by subhaulers in particular) is without efficiency incentives and thereby promotes substandard performances, delays, slow downs, etc. We have doubts that such is the case if for no other reason than that the record shows there is a serious over-abundance of subhauling truck equipment, the financial condition of many of the subhaulers is precarious, and there is spirited solicitation for limited work opportunities. The record further indicates not only that the subhaulers are carefully screened as to driver performance and condition of equipment before being put on the job, but that their work is closely supervised. The record shows that when an overlying carrier finds a subhauler to be inept or without adequate equipment, his services, which are in any event used only on a day-to-day basis, are terminated at the completion of the day's work.

The carrier witness also testified he believes general contractors would buy their own equipment and do the job themselves were they required to pay a carrier in accordance with the tariff provisions. How this would improve the general contractor's position in any respect, including achievement of "responsible and meaningful pricing of this part of his work" is not explained nor is it apparent to the Commission.

Furthermore, there are other large users of dump truck equipment of highway permit carriers who are subjected to substantially the same conditions and risks as general contractors of public works projects, but the record does not disclose that such users find the provisions of the minimum rate tariff onerous.

Under extraordinary circumstances involving singular movements, unusual commodities, or specialized transportation equipment, the Commission has at times found the application of minimum rates would not be in the public interest. Here, however, the commodity, the equipment, and the transportation techniques do not justify extraordinary consideration. The principal reason advanced for the exemption is that present rates do not allow, without risks to the general contractor, establishment of the fixed-amount bids required by the Public Works Agency. Absent minimum rates, the general contractor, under the procedure outlined, is immune from costs of miscalculation and any loss would fall to the overlying carrier. He, in turn, can shift all or a portion of such loss to the subhauler who, while not having participated in the estimating, preparation of bid, or negotiations, would appear to be the ultimate risk taker.

Based upon the record herein, the examiner's proposed report, and the exceptions and replies to exceptions thereto, the Commission finds as follows:

1. That general contractors are required to submit bids to the State of California or other governmental agencies in connection

with construction, alteration or maintenance of freeways; that such general contractors are required to submit fixed bids in any transportation involved therein; and that such contractors unless they perform the transportation themselves usually meet their contractual duties by employing one highway carrier under the jurisdiction of this Commission and whose rates are set forth in California Public Utilities Commission Minimum Rate Tariff No. 7.

2. That, irrespective of the requirement of general contractors to quote a fixed price for dump truck transportation on construction projects, the reasonable minimum rates which he must pay for dump truck transportation of earth, borrow and fill materials on such projects by carriers under the jurisdiction of California Public Utilities Commission are the hourly rates set forth in Minimum Rate Tariff No. 7.

3. That subhaulers are generally employed by carriers whose operations are described in finding 1 hereof, and that the provisions of Minimum Rate Tariff No. 7, including Item No. 94 thereof, apply to said subhaulers.

4. That petitioner has not shown that exemption from the minimum rates proposed in the petition is necessary to meet the needs of commerce or is justified and will be in the public interest.

The Commission concludes that the petition herein should be denied.

ORDER

IT IS ORDERED that Petition for Modification No. 114 in Case No. 5437 is hereby denied.

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

Dated at San Francisco, California, this 6th day of DECEMBER, 1966.

Walter E. Mitchell
President

George L. Hoover

Fredrick B. Hebluff

Alvin

William W. Brown
Commissioners

LIST OF APPEARANCES

PETITIONER

Berol, Loughran & Geernaert, by
Frank Loughran, Edward J. Hegarty,
and Edward M. Berol
100 Bush Street
San Francisco, California

Tariff No. 7 Committee

E. H. Griffiths
451 Turk Street
Room 23
San Francisco, California

PROTESTANTS

E. O. Blackman
511 South Atlantic Blvd.
Monterey Park, California

California Dump Truck
Owners Association

G. Ralph Grago
12851 East Imperial Highway
Santa Fe Springs, California

Independent Truck
Owner-Operators Union

Brundage & Hackler, by
Daniel Feins
870 Market Street
San Francisco, California

Teamsters Union, Local
No. 684, and Western
Conference of Teamsters

Sal F. Burke
Secretary-Treasurer
Teamsters Union
P. O. Box 684
Eureka, California

Teamsters Union
Heavy Highway
Construction Committee

INTERESTED PARTIES

Arlo D. Poe
639 South Spring Street
Los Angeles, California

California Trucking
Association

J. C. Kaspar
841 Folger Avenue
Berkeley, California

H. F. Kollmyer
3301 South Grand Avenue
Los Angeles, California

Fred Imhof
1811 Fair Oaks Avenue
South Pasadena, California

Southern California
Rock Products
Association

LIST OF APPEARANCESINTERESTED PARTIES (CONTD.)

Jefferson H. Myers
Room 2000
Ferry Building
San Francisco, California

San Francisco
Port Authority

Earle Beattie
850 Battery Street
San Francisco, California

Associated General
Contractors

Robert O. Fuller
833 Mahler Road
Burlingame, California

Peter Kiewit Sons' Co.

Jack Cedarblade
564 Market Street
San Francisco, California

Rock, Sand and Gravel
Producers Association
of Northern California

Marc Fosgate
2009 Newby Road
Stockton, California

A. Teichert & Sons, Inc.

E. J. Bertana
400 Alabama Street
San Francisco, California

Pacific Cement & Aggregates

Martin J. Rosen
140 Montgomery Street
San Francisco, California

Self

RESPONDENTS

Dan D. Tobey
211 South Inverness
Glendora, California

Dispatch Trucking

Tom Hess
Mrs. Joyce Hull
1744 - 36th Street
Sacramento, California

Hess-Mace Trucking

A. J. Eyraud
2222 East 38th Street
Los Angeles, California

Asbury Contractors

Marshall J. Smith, Jr.
Reliable Traffic Service
638 Divisadero
Fresno, California 93721

Jim Foster Trucking

Harold F. Culy
8536 Elder Creek Road
Sacramento, California

S.C.T. Bulk Division of
Sierra Distributing, Ltd.

LIST OF APPEARANCESRESPONDENTS (CONTD.)

Ray S. Bruton
440 Santa Rita
Menlo Park, California

Dana Exum
P. O. Box 859
Merced, California

Les Calkins
P. O. Box 736
Lodi, California

Lail Johnson
Route 1, Box 961
Tracy, California

La Fay Lindeman
800 E. Street
Broderick, California

W. J. Willis
Box 189
9150 Lucey Blvd.
Hanford, California

Handler, Baker & Greene, by
Daniel W. Baker
405 Montgomery Street
San Francisco, California

Walter D. Carlos
6751 Swenson Way
Sacramento, California

D. D. Anspach
1712 Park Blvd.
West Sacramento, California

Miles & Sons
Trucking Service

Les Calkins Trucking, Inc.

Johnson Bros. Trucking

Lindeman Bros.

Hitchcock Transportation-
Co.

Universal Transport
System, Inc.

Self

Self

COMMISSION STAFF

R. J. Carberry
John R. Laurie
Francis J. Spellman
California Public Utilities
Commission
State Building
San Francisco, California

Commission Staff

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Recommended Findings and Conclusions Set
Forth in the Proposed Report of Examiner
John W. Mallory in Case No. 5437, Peti-
tion For Modification No. 114.

Recommended Findings:

1. That costs of providing dump truck transportation services on large highway and freeway construction projects awarded on an open bid vary considerably from job to job; that the present minimum mileage-tonnage rates developed on average cost conditions and based on actual mileages are not reasonably related to the specific costs of providing service on any particular project; and that, while properly constructed hourly rates would reasonably reflect cost variations from job to job, said rates do not fit the needs of commerce, nor are such rates reasonably capable of being enforced.

2. That the needs of the general engineering contractors on large highway construction projects awarded on an open bid are for a firm bid price for the dump truck transportation in question; that such contractors have seldom paid, and overlying carriers have seldom assessed, rates stated in the same units of measurement or computed in the manner prescribed in Minimum Rate Tariff No. 7 for earth hauling on large highway construction projects; and that to compel such contractors to pay and such carriers to assess hourly rates or mileage-tonnage rates on public works construction projects would pose a serious threat to the use of for-hire transportation on such projects.

3. That present minimum rates for transportation of earth, fill and subbase on large highway construction projects awarded on an open bid have been shown to result in rates which are not just, reasonable and nondiscriminatory for the services to which

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they apply; no basis exists in this record on which to establish just, reasonable and nondiscriminatory rates for such services; and until such time as just, reasonable and nondiscriminatory rates may be established, the transportation in question should be exempted from the provisions of Minimum Rate Tariff No. 7.

Recommended Conclusions:

1. That the following transportation should be exempted from the provisions of Minimum Rate Tariff No. 7:

Earth, borrow, nonprocessed fill and subbase (other than subbase originating at a commercial producing plant) transported in hopper-bottom dump truck equipment to, from or within a public works construction project involving the construction, alteration or repair of a highway or freeway, when the contract is awarded on an open bid, and the transportation services on such project extend over a period of 14 or more consecutive days.

2. That the following additional definitions should govern the aforementioned exemption:

PUBLIC WORKS CONSTRUCTION PROJECT means a project embracing all fixed works constructed for public use or protection on which bids are let by or on behalf of the State, any county or municipal government, or any political subdivision or district thereof.

BORROW means any soil or upper layer of earth removed from one place on a public works construction project and transported to another place on the same project.

SUBBASE means any crushed rock, stone, gravel, or similar material used as the initial base layer in the construction of a paved roadway.

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FILL means earth, rock, gravel or stone in its natural state originating at point outside a public works construction project.

3. That Minimum Rate Tariff No. 7 should be amended in accordance with Conclusions 1 and 2 hereof.

4. That Petition for Modification No. 114 should be granted to the extent provided above, and in all other respects should be denied.