

ORIGINAL

Decision No. 72461

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 relating)
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. 124
(Filed February 14, 1966)

Scott Elder and E. O. Blackman, for California Dump
Truck Owners Association, petitioner.
R. W. Smith, H. F. Kollmyer and Arlo D. Poe, for
California Trucking Association, protestant.
Robert F. Walker and Robert W. Stich, for the
Commission staff.

O P I N I O N

In this petition, California Dump Truck Owners Association (CDTOA) seeks (1) the establishment of a rule in Minimum Rate Tariff No. 7 (MRT 7) describing the services for which the rates in said tariff apply, and (2) a declaration by the Commission that contracting operations which are encompassed by the California Contractors License Law are operations not subject to regulation by this Commission, and that any contractor using the services of a for-hire carrier should pay 100 percent of the minimum rates established by this Commission.

Public hearing was held before Examiner Mallory on February 16, 1967 at San Francisco. The matter was submitted subject to the filing of briefs, which have been received. The relief sought in the petition was opposed by California Trucking Association (CTA). The Commission staff assisted in the development of the record.

Evidence in support of the establishment of a tariff rule defining the services included in the minimum rates set forth in MRT 7 was presented by petitioner's secretary-manager. He stated that from his analysis of the cost exhibits which form the basis for the development of the rates in MRT 7, it appears that said rates are intended to cover only the furnishing of a dump truck vehicle with driver for transportation from point of origin to point of destination (as those terms are defined in MRT 7). The witness testified that in certain instances carriers are furnishing, in addition, equipment for loading, compacting and spreading of materials, and for maintenance or repair of haul roads on private property.^{1/} The witness stated that the furnishing of said equipment could result in unlawful rebates or remissions of transportation charges, because at times said equipment had been furnished at no cost to the consignor or consignee, or at less than the full cost of operating said equipment by the entity providing the equipment. No specific examples were furnished by the witness. He indicated that he was reluctant to testify to specific situations which he claimed were within his knowledge, because of possible punitive action against the carriers involved. The proposed rule, as amended at hearing, would read as follows:

^{1/} The equipment involved is: power shovels, skip loaders and automatic belt loaders, to load at origin; belt loaders and bulldozers to unload or spread at destination; scrapers and sheepsfoot rollers to compact; and watering trucks and road patrol equipment (scrapers) to maintain haul roads.

"Rates provided in this tariff are for transportation services only, which consist of providing trucking equipment and driver at the point of origin for loading by the consignor, transporting the commodity to the point of destination, dumping the commodity onto the ground, into a fixed receptacle, or into a spreading machine at the point of destination and returning to point of origin."

The witness stated that the purpose of the rule is to describe the services included under the rates set forth in MRT 7. The witness agreed that if the proposed rule is adopted, said rule would not prohibit the furnishing of equipment other than dump truck vehicles by a highway permit carrier. The witness, on cross-examination, stated that in his opinion the wording of the proposed rule would not prohibit the furnishing of accessorial services, such as towing or pushing of spreading equipment or handling C.O.D. shipments, although no mention of said accessorial services is contained in the proposed rule.

It is the petitioner's contention that other minimum rate tariffs issued by the Commission contain rules similar to that proposed herein; and that such a rule is necessary to guide the users of the tariff and to assist in the enforcement activities of the Commission staff. While petitioner's desire to clarify the application of MRT 7 is commendable, the record does not contain information which would indicate how the proposed rule would apply in specific situations. The testimony in support of the adoption of the proposed rule related particularly to the asserted possibilities of unlawful rebates in connection with the furnishing of loading, unloading, compacting and road maintenance equipment by highway permit carriers. There is no evidence to show the specific circumstances under which said equipment is furnished. Also there is no evidence relating to other services which are performed by dump truck carriers which may be proscribed if the proposed rule

is adopted. The testimony of petitioner's witness fails to provide an adequate evidential basis for the establishment of the proposed rule.

Petitioner's witness also briefly outlined, in the broadest terms, the situations which he stated gave rise to the request (in paragraph IV of the petition) that the Commission declare certain activities on construction projects are operations encompassed by the Contractors' License Law. Petitioner requested that the Commission take official notice of the testimony adduced in Case No. 5437, Petition for Modification No. 114, as the evidentiary basis for the relief sought. Testimony in that proceeding was advanced by witnesses called by the petitioner in Petition No. 114, the Tariff No. 7 Committee. The testimony so adduced not only was by witnesses presented by a different organization from the petitioner herein, but was for a different purpose. The Commission's Rules of Procedure (Section 64) provides that official notice may be taken of such matters as may be judicially noticed by the courts of the State of California. Judicial notice may not be taken in the circumstance before us. (Sections 451, et seq., Evidence Code.) We affirm the Examiner's ruling that official notice will not be taken of the testimony of witnesses presented on behalf of petitioner Tariff No. 7 Committee in Petition No. 114.

CTA moved to strike the portion of Petition No. 124 (paragraph IV) and the portion of Exhibit 1 corresponding thereto, relating to the request for a declaration by the Commission that contracting operations which are encompassed by the California Contractors' License Law are operations not subject to regulation by this Commission. The reasons advanced in support of the motion

are that no probative evidence with respect thereto was submitted, and that it is impossible on this record to determine the scope of the relief sought or the precise relief sought by petitioner. This motion was taken under submission, inasmuch as the granting of said motion by the examiner would have had the effect of making a final determination of the subject matter of the petition embraced in the motion (Rule 54 of the Commission's Rules of Procedure).

Confronted with the aforementioned motion, counsel for petitioner then requested, as alternative relief, that the Commission investigate the subject matter of paragraph IV of the petition on its own motion, and issue an appropriate order thereafter.

Petitioner has not sustained the burden of proof with respect to the subject matter of paragraph IV of the petition. The relief sought therein and the alternate requested should be denied.

We find as follows:

1. The evidence adduced with respect to the subject matter of paragraphs II and III of the petition is insufficient to sustain the burden of proof necessary to show that a need exists for the establishment of the rule proposed in paragraph III (as modified by Exhibit 1 herein), nor is there any evidence to show the effect or the effectiveness of or on carriers' operations of said rule, if promulgated in MRT 7.

2. Evidence adduced in this proceeding with respect to the subject matter of paragraph IV of the petition herein is insufficient to establish the necessity for the relief sought.

The Commission concludes that Petition for Modification No. 124 should be denied.

O R D E R

IT IS ORDERED that Petition for Modification No. 124 in Case No. 5437 is denied.

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

Dated at San Francisco, California, this 27th day of MAY, 1967.

Robert E. Hatchell
President
William G. Brown
Auditor
William J. Lyons
Paul P. Morrissey
Commissioners