

ORIGINALDecision No. 75592

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Fresno Cooperative
Trucking, Inc., for authority to
deviate from minimum rates for the
transportation of material in dump
truck equipment for Public Works
construction project under Section
3666 of the Public Utilities Code.

Application No. 50955
(Filed March 17, 1969)

William H. Kessler and Harold Bernie White,
for Fresno Cooperative Trucking, Inc.,
applicant.
E. O. Blackman, for California Dump Truck
Owners Association; and G. Ralph Grago
and Richard E. Brown for Associated In-
dependent Owner Operators, protestants.
Richard W. Smith, A. D. Poe and H. F.
Kollmyer, for California Trucking Associ-
ation; R. E. Kasler, for Kasler Corporation
and Gordon H. Ball, Inc.; Ernest E. Gallego,
for Southern California Rock Products
Association and Southern California Ready
Mixed Concrete Association; and Harry C.
Phelan, Jr., for California Asphalt Pavement
Association, interested parties.
Ralph J. Staunton and Fred P. Hughes, for the
Commission staff.

O P I N I O N

Fresno Cooperative Trucking, Inc., a nonprofit corporation, and its members operate as permitted highway carriers for the transportation of property in dump truck equipment. The Cooperative and its member owner-operators request authority to deviate from the minimum rates for the transportation of asphaltic concrete in 5-axle semi-end dump truck equipment from and to points located in the Antelope Valley Area.

Public hearing was held before Examiner Gagnon, at Los Angeles, on March 26, 1969, and the matter was submitted for decision.

On October 25, 1968, Kasler Corporation & Gordon H. Ball, Inc. (contractors) were awarded a contract for the Runway-Taxiways Project at Air Force Plant No. 42, Palmdale, California, which involves, among other matters, some 254,000 tons of asphaltic concrete to be hauled during the period January 28, 1969 - July 31, 1969. Included in the contractors' bid for the project was a transportation cost factor of 65 cents per ton for hauling the asphaltic concrete to the job site. This transportation cost factor was based upon the Cooperative's prior advice and agreement with applicants to perform the transportation with 5-axle dump truck equipment and to assess therefor an hourly rate of \$13.88, plus \$3.88 per hour for overtime, which the Cooperative alleges it initially believed to be the applicable minimum hourly rates for the transportation involved.

On January 15, 1969 the contractors awarded the transportation of the asphaltic concrete to applicants. On January 28, 1969 applicants started hauling the asphaltic concrete in 5-axle dump truck equipment for the hourly rate of \$13.88, plus the overtime rate of \$3.88 per hour.

The hourly rates assessed by applicants were originally named in Items 365 and 366 of Minimum Rate Tariff No. 7 (MRT 7). The Cooperative's vice-president stated that the initial quotation and subsequent application of such hourly rate provisions was predicated upon advice received from a Commission staff field representative. It is alleged that the staff advice was based upon an interpretation of MRT 7 in the light of an Informal Ruling No. 190, dated December 14, 1967, issued by the Commission's Transportation Division. Said ruling refers to the application of MRT 7 and 17 for shipments

of asphaltic concrete in trucks with trailing equipment or tractor-
and-trailer equipment.^{1/}

The vice-president explained that after the Cooperative started to perform the transportation services involved, he was informed by the Commission's staff that, as of March 8, 1969, Informal Ruling No. 190 was cancelled. Such action assertedly caused the Cooperative to become apprised of the fact that its hauling of asphaltic concrete in 5-axle equipment from and to the point in question was subject to MRT 7 zone rates and not the hourly rates set forth in that tariff. This latter sequence of events, plus the fact that under the MRT 7 zone rates substantially higher freight charges would result than those obtained under the MRT 7 hourly rates currently being assessed, generated the request for authority to deviate from the governing provisions of MRT 7.

The asphaltic concrete hauled by the Cooperative's owner-operators originates at the batching plants of Industrial Asphalt, Inc., and the Asphalt Construction Company. The plant sites are located within the Antelope Valley Production Area A as described in MRT 7. The destination of the asphaltic concrete is located in Antelope Valley Delivery Zone 19-861, also set forth in MRT 7. The destination is specifically described as follows:

"Reconstruction of Runway 7-25
and Taxiways
Air Force Plant 42, Palmdale, California"

The minimum rate applicable to the movement of asphaltic concrete transported in 5-axle dump truck equipment, from and to the

^{1/} Informal Rulings by the Transportation Division staff are made in response to questions propounded by the public, indicating what are deemed by the Division to be correct applications and interpretations of the particular minimum rate tariff involved. These rulings are tentative and provisional and are made in the absence of formal decisions upon the subjects by the Commission.

points described above is now, and was prior to the time of the initial movement involved, the zone rate of 96 cents per ton, minimum weight 8 tons, named in Items 295-1 and 295-A of MRT 7. In lieu of the applicable zone rate, authority is now requested to apply the minimum hourly rate of \$13.88, plus \$3.88 for transportation services performed on an overtime basis, formerly named in Items 365 and 366 of MRT 7 and currently provided in Items 2210 and 2220 of MRT 17.

In support of the sought relief, applicants make reference to Decisions Nos. 75249 and 75250, dated January 28, 1969 in Case No. 5437. In the former decision the Commission stated:

"By Decisions Nos. 71874 and 71875 of January 17, 1967, in Case No. 5437, the Commission made substantial revisions to the zone rates for transportation of asphaltic concrete by 2- and 3-axle trucks. The Commission in Finding No. 6 of Decision No. 71874 found that within the geographical area embraced by Minimum Rate Tariff 17 (MRT-17), minimum rates for 4- and 5-axle equipment transporting asphaltic concrete should be the hourly rates in (MRT 7)....."

".....The record in this proceeding shows that the tariff pages attached to those decisions were not clear, and resulted in the issuance of Informal Ruling No. 190, which did not correctly reflect the Commission's intent....."

"...In Decision No. 71874...extensive revisions were made in the zone rates for 2- and 3-axle trucks. These were based on extensive cost studies and found to be reasonable minimum rates. As to 4- and 5-axle trucks, that decision recognized that such equipment could be operated more economically, but lacking definite cost figures, reached the result stated in Finding No. 6, so as to recognize the lower costs of the larger equipment..." (Emphasis supplied)

In the aforesaid Decision No. 71874 (66 Cal. P.U.C. 725) the Commission also found (Finding No. 7) that:

"Further public hearings in this proceeding should be held to receive evidence on the levels and types of rates which should be applicable to the movement of asphaltic concrete and cold road oil mixture in equipment larger than 3-axle dump trucks,..."

Effective March 8, 1969, the minimum hourly rates applicable to shipments of asphaltic concrete transported in 4- and 5-axle dump truck equipment were transferred from MRT 7 to MRT 17, whereupon Informal Ruling No. 190 was cancelled. Such action was designed to clarify the provisions of MRT 7 and 17 so as to remove any doubt that the hourly rates for movements of asphaltic concrete in 4- and 5-axle equipment were limited to the geographical area embraced by MRT 17. Such action also highlighted the fact that from and to points located within the Antelope Valley Area, which is not encompassed within the territory covered by MRT 17, shipments of asphaltic concrete in 4- and 5-axle equipment were, and are now, subject to the zone rates in MRT 7.

Applicants direct attention to the fact that the only hauling of asphaltic concrete in 4- and 5-axle equipment now subject to zone rates is from and to points within the Antelope Valley Area. Applicants contend that the zone rates are obsolete in that they reflect operations in 2- and 3-axle equipment and do not recognize technological advancements which have made feasible the hauling of asphaltic concrete in 4- and 5-axle dump trucks. Applicants submit that the minimum hourly rates, found just and reasonable by the Commission for the movement of asphaltic concrete in 4- and 5-axle equipment elsewhere in California, are equally just and reasonable for like shipments from and to points located within the Antelope Valley Area.

In further support of the sought relief, the truck superintendent for the contractors presented in evidence time and motion studies of the transportation involved. It was explained that, based on the sought hourly rates and his cycle time studies, a transportation cost factor of 65 cents per ton was included as part

of the contractors' successful bid for the public works project in question. Cycle time studies from Industrial Asphalt to the job site, introduced into evidence by the truck superintendent, indicate that the transportation services can be performed at an overall average cost per ton of less than the contractors' cost factor of 65 cents per ton. On the other hand, under the applicable minimum zone rate of 96 cents per ton, the superintendent's cycle time studies indicate that an hourly rate of \$21.51 per hour would be produced, in lieu of the sought hourly rate of \$13.88, plus \$3.88 per hour for overtime. The superintendent considers the hourly rate of \$21.51 an excessive charge for the hauling of asphaltic concrete.

The president for one of the contractors testified that their contract with the federal government contains no provision for increases in transportation costs. He explained that if the sought relief is denied and the minimum zone rate of 96 cents per ton must be observed, the contractors will have to absorb approximately \$75,000 additional transportation costs. The president stated that while approximately 20,000 tons of asphaltic concrete have already been transported to the job site, the contractors are primarily concerned that the sought rate proposal be applied to the remainder of the asphaltic concrete yet to be transported (approximately 234,000 tons).

The California Asphalt Pavement Association supports the granting of the relief sought by the Fresno Cooperative Trucking, Inc., and its member owner-dump truck operators. The California Trucking Association (CTA), while not protesting the granting of the sought relief per se, made the following observations with respect to the application of Section 3666 of the Highway Carriers' Act.

- (1) Acme Truck Co., 65 Cal. P.U.C. 20, 23 (Decision No. 69871): "...The Commission has declined for lack of statutory authority to establish retroactive rates under the Highway Carriers' Act." (citing cases)
- (2) Authority to deviate from the established minimum rates between fixed termini and over regular routes may, under Section 3666 of the Highway Carriers' Act, be authorized only to highway contract carriers. 2/

The CTA has correctly noted prior Commission action relative to requests for retroactive relief. As to its reference to the Commission's practice in the past, whereby radial highway common carriers were required to obtain highway contract carrier permits as a condition to receiving authority to deviate from minimum rates, it should be noted that the Legislature amended Section 3666 in 1959 to permit the Commission to authorize deviations by all carriers other than highway common carriers, thus eliminating this problem. Moreover, a district court has recently held that a radial highway common carrier may lawfully enter into a special contract with a shipper and provide regular service for that shipper between fixed termini, AT&SF Ry. Co. v. Flintkote, (1967) 256 Cal. App. 2d 764. ^{3/}

The California Dump Truck Owners Association (CDTOA) and the Associated Independent Owner-Operators, Inc., protest applicants' sought relief. The CDTOA opposes the sought relief for two reasons. First, it objects to the granting of applicants' request for retroactive relief. Secondly, the CDTOA is concerned over the possibility that authorization of the sought relief may establish a precedent or otherwise encourage other dump truck

2/ Cabs Unlimited, Decision No. 69965 of November 16, 1965.
Rocko Transportation, Decision No. 73676 of January 30, 1968.
Evans Tank Lines, Decision No. 73834 of March 12, 1968.

3/ In Decision No. 75546, dated April 8, 1969, in Application No. 50911, the Commission made a like response to the same observations of the CTA.

operators to quote less than the applicable minimum rates in an effort to capture competitive traffic and, having been successful in such efforts, endeavor to obtain appropriate authority to honor the prior unauthorized rate quotation. Such action, the CDTOA submits, will create a serious minimum rate enforcement problem and have an overall deteriorating effect upon the minimum rates governing the transportation of property in dump truck equipment.

Protestant's objection to the granting of any retroactive relief in this proceeding is well taken. However, with respect to applicants' belated request for minimum rate relief on other than a retroactive basis, the record shows that such action was initiated in good faith, and stems from extenuating and peculiar circumstances which were largely beyond the control of the Cooperative. It is also evident that the occurrence of these circumstances in the future, under the same or similar transportation conditions, is highly unlikely. We also note that applicants' ability to make available the required large fleet of 5-axle semi-end dump truck equipment make them singularly qualified to perform the transportation involved.

The Commission finds that:

1. The transportation of asphaltic concrete in 5-axle dump truck equipment from the plant sites of Industrial Asphalt, Inc., and Asphalt Construction Co., to the Runway-Taxiways Reconstruction Project at Air Force Plant 42, Palmdale, California, is subject to the minimum zone rate of 96 cents per ton, minimum weight 8 tons, named in Minimum Rate Tariff No. 7.

2. The asphaltic concrete zone rates applicable from and to points within Antelope Valley were developed from a base hourly rate

of \$7.93 per hour for 3-axle equipment of 12-1/2-ton capacity; whereas the shipments of asphaltic concrete in 5-axle equipment involved herein will average 23-1/2 tons.

3. By Decision No. 71874, movements of asphaltic concrete in 4- and 5-axle dump truck equipment, within the geographical area embraced by Minimum Rate Tariff 17, were made subject to the hourly rates set forth in Minimum Rate Tariff No. 7 in recognition of the fact that such equipment could be operated more economically than the 2- and 3-axle trucks for the same transportation.

4. The only transportation of asphaltic concrete in 4- and 5-axle equipment presently subject to the established zone rates in Minimum Rate Tariff No. 7 is from and to points located within the Antelope Valley Area as described in said tariff.

5. The minimum zone rate applicable to the transportation involved results in substantially higher hourly charges than otherwise applicable under the established minimum hourly rates for like transportation not within the Antelope Valley Area.

6. The sought minimum rate of \$13.88 per hour, plus \$3.88 per hour for work performed on an overtime basis, presently set forth in Items 2210 and 2220 of Minimum Rate Tariff 17 (formerly named in Items 365 and 366 of Minimum Rate Tariff No. 7) has been previously found to be just and reasonable for the transportation of asphaltic concrete in 4- and 5-axle equipment from and to points not located in the Antelope Valley Area.

7. The proposed application of the minimum rate of \$13.88 per hour, plus \$3.88 per hour for overtime, for the transportation of asphaltic concrete in 5-axle equipment from and to the points involved located within the Antelope Valley Area, has been shown to be just and reasonable.

We conclude that:

1. The authority sought in Application No. 50955 should be granted insofar as such authority pertains to shipments transported subsequent to the effective date of the order herein.
2. Applicants' request for retroactive rate relief should be denied.
3. The authority granted herein should expire upon completion of the transportation involved.

Since the transportation in question is now in progress, the order which follows will be made effective on the date hereof.

O R D E R

IT IS ORDERED that:

1. Fresno Cooperative Trucking, Inc., and its member owner-operators, who are applicants herein, are authorized to transport asphaltic concrete, in 5-axle dump truck equipment, from the plant sites of Industrial Asphalt, Inc., and Asphalt Construction Co., (located in Antelope Valley Production Area A) to the Reconstruction of Runway 7-25 and Taxiways, Air Force Plant 42, Palmdale, California (located in Antelope Valley Delivery Zone 19-861) at the minimum hourly rate of \$13.88, plus \$3.88 for work performed on an over-time basis, in lieu of the otherwise governing zone rate named in Minimum Rate Tariff No. 7.
2. Applicants' request for retroactive rate relief is hereby denied.
3. The authority granted herein shall expire upon completion of the transportation of asphaltic concrete by applicants to the

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Runway-Taxiways Project at Air Force Plant No. 42, Palmdale, California, but in no event later than August 31, 1969.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 22nd day of APRIL, 1969.

President

August

Paul P. Monissen

W. H. ...

[Signature]

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.