

ORIGINAL

Decision No. 80542

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 any and all commodities between and within all points and places in the State of California (including, but not limited to, transportation for which rates are provided in Minimum Rate Tariff 2).

Case No. 5432
Petition for Modification
Nos. 675, 693 & 695
(Filed November 11, 1971,
March 14, 1972 and March
16, 1972, Respectively) ✓

In the Matter of the Application of W. H. BURKE AND CO., INC., a corporation, for Declaratory Relief finding operations, to be proprietary and not subject to regulation, or, in the alternative, for authority to deviate from rates specified in Minimum Rate Tariff 2 for the transportation and assembly of motorcycles for the account of retail motorcycle dealers in Northern California.

Application No. 52989
(Filed November 11, 1971,
Amended March 14, 1972) ✓

In the Matter of the Application of WILLIAM ABRAMS, AND JOHN SHIELDS, individually, and doing business as COYOTE TRUCKING, for Declaratory Relief finding operations to be proprietary and not subject to regulation, or, in the alternative, for authority to deviate from rates specified in Minimum Rate Tariff 2 for the transportation and assembly of motorcycles for the account of retail motorcycle dealers in Northern California.

Application No. 53207
(Filed March 16, 1972)

In the Matter of the Application of GARY L. DENNY AND HAROLD R. DENNY, a partnership, doing business as DENNY'S CYCLE SET-UP and as DENNY'S CYCLE TRANSPORT, for Declaratory Relief finding operations to be proprietary and not subject to regulation.

Application No. 53203
(Filed March 14, 1972)

Silver & Rosen, by John Paul Fischer, Attorney at Law, for W. R. Burke and Co., Inc; and Robert C. Marks, Attorney at Law, for William Abrams and John Shields, doing business as Coyote Trucking and for Gary L. Denny and Harold R. Denny, doing business as Denny's Cycle Set-Up and Denny's Cycle Transport; applicants and petitioners.

W. T. Meinhold, Richard W. Smith and A. D. Poe, Attorneys at Law and H. F. Kollmyer, for California Trucking Association, protestant. Rufus G. Thayer, Attorney at Law, Alan Silvius and John Gloyka, for the Commission staff.

O P I N I O N

These matters were heard before Examiner Mallory at San Francisco on March 29, 1972, and were submitted upon the receipt of closing briefs received May 12, 1972.

Background

The three applicants herein seek exemption from provisions of Minimum Rate Tariff 2 (MRT 2) or a finding by the Commission that the transportation performed herein is not subject to Commission jurisdiction but is proprietary in nature and in pursuit of the furtherance of a primary business enterprise other than transportation within the provisions of Section 3549 of the Public Utilities Code.

Application No. 52989, W. H. Burke, was originally filed November 11, 1971. Said application originally petitioned for a finding that the operations of applicant are proprietary and not subject to regulation or, in the alternative, said applicant petitioned for a modification of Minimum Rate Tariff 2 and for authority to deviate from rates specified therein for the transportation and assembly of motorcycles for the account of retail motorcycle dealers in Northern California.

A Prehearing Conference was held on February 1, 1972. At that time it became apparent that two other parties were also engaged in practices similar to those of applicant, W. H. Burke.

Accordingly, a hearing date was set for March 29, thereby providing time for Coyote Trucking Company and Denny's Cycle Set-Up to file applications similar to that filed by W. H. Burke. Subsequently, petitioner W. H. Burke filed on March 14, 1972 an Amendment to its Application and Petition for Modification wherein said applicant requested that the application for authority to deviate from rates specified in MRT 2 be dismissed, and that the application for declaratory relief finding operations to be proprietary and not subject to regulation remain in effect.

On March 14, 1972, Application No. 53203 seeking relief for Denny's Cycle Set-Up was filed and on March 16, 1972, Application No. 53207 seeking relief for Coyote Trucking Company was filed.

Accordingly, at the commencement of the hearing on these three applications on March 29, 1972, applicants were in the posture of seeking a determination by the Commission that movement of assembled motorcycles is proprietary carriage or, in the alternative, that said movement should be exempt from the provisions of MRT 2. A deviation from MRT 2 for the specific carriage was not requested. Each of the applicants holds currently effective radial highway common carrier permits or contract carrier permits issued by this Commission.

Evidence

Mr. W. H. Burke, Mr. William Abrams and Mr. Gary L. Denny each appeared as witnesses on behalf of their companies. Each described their respective operations and introduced in evidence profit and loss statements and balance sheets for the latest accounting periods. In each case the profit and loss statements purported to represent income and expenses for the motorcycle assembly portion of operations only, while in each case the balance sheets purport to represent consolidated operations of transportation and motorcycle assemblies. Accordingly, revenues and expenses for the transportation operation do not appear to be separately stated.

Each of the three applicants testified that they would propose to adopt the mode of operations as set out in W. H. Burke Exhibit No. 4, titled "Mode of Operations for W. H. Burke and Company, Inc. and Denny's Cycle Set-Up", which states:

- "1. Cycles are imported at Los Angeles and warehoused in the Los Angeles and Long Beach Area.
- "2. The dealer corresponds with the manufacturer's representative with regard to the number of units the dealer needs.
- "3. The dealer specifies that crated units will be picked up and delivered to the assembler.
- "4. Either the dealer notifies the assembler or the assembler makes daily contact with the warehouse facility to determine how many units are ready to pick up and assemble.
- "5. The orders for various dealers are picked up in the Los Angeles area, consolidated onto one line unit and delivered to the assembler. This function may be performed by the assembler, by a common carrier or by a permitted carrier. The movement of the crated and disassembled unit will be performed under the rates, rules and regulations of MRT 2. If an assembler performs the transportation under its permit, but utilizing a subhauler, the subhauler will be paid 100 percent of the applicable minimum rate.
- "6. At the assembly plant, the assembler performs the following activities:
 - a. Uncrating
 - b. Inspection for missing, defective or damaged parts
 - c. Replacement of missing, defective or damaged parts
 - d. Assembly:
 - (1) Front fender
 - (2) Front wheel
 - (3) Stabilizer bars (front and back)
 - (4) Clean disc (brake)
 - (5) Damper
 - (6) Speed-O drive cable
 - (7) Brake cable
 - (8) Handle bars
 - (9) Clutch and brake levers
 - (10) Speedometer

- (11) Tackometer
- (12) Headlight
- (13) Headlight wiring
- (14) Shift lever and kick starter lever
- (15) Footpegs and buddy pegs
- (16) Skid pan
- (17) Header pipes
- (18) Muffler
- (19) Seat
- (20) Carrier rack
- (21) Gas lines
- (22) Kick stand
- (23) Brake light and return springs
- (24) Tail light assembly and wire
- (25) Turn signals and wire
- (26) Fairings

- e. Cosmetic cleaning and polishing
- f. Disposal of trash

"7. The fully assembled unit is then loaded onto specially designed truck-trailer units and delivered to the dealer.

"8. Two bills will be issued with regard to each consignment of cycles ordered:

- a. A bill for transportation services based on the rates, rules and regulations of MRT 2 for transportation service from the Southern California warehouse location to the assembly point.
- b. A bill for assembly services based on prevailing competitive rates for assembly by the various entities providing an assembly service."

The bill for services described in paragraph 8.b. above includes the services of assembly, as well as transportation of the assembled motorcycles to the dealers.

Position of the Parties

Upon completion of the hearing, the applicants collectively asserted that within the meaning of Section 3549 of the Public Utilities Code outgoing transportation from the motorcycle assembly points to the respective motorcycle dealers is transportation within the scope and furtherance of their primary business of motorcycle assembly and therefore is transportation not subject to regulation by this Commission. At that point an attorney for the California Trucking Association, who had actively participated throughout the proceeding, announced that the position of his client

had changed from that of an interested party to that of a protestant. The Commission staff requested time to consider the evidence before taking a position as to whether the outgoing transportation from the assembly point to the ultimate dealer was exempt from regulation under Section 3549 of the Public Utilities Code.

CTA's brief urged that the Commission find that the transportation services are not exempt from regulations and cited several cases in support thereof.

In its brief, the Commission staff concluded that the transportation services performed by the applicants as determined by the facts which appear on the record in this case are transportation services for compensation within the meaning of Section 3511 of the Public Utilities Code and therefore Section 3549 of the Public Utilities Code is not applicable to the transportation services and accessorial assembly services provided by applicants. It further concluded that Burke's request for dismissal of its request for deviation from MRT 2 should not be granted.

The staff brief recommended that, subject to stipulation by applicants Coyote and Denny, the proposed assembly and freight charges appearing as Exhibit "G" in the original application by Burke be put into effect for a provisional 90-day period in order to allow all parties to determine whether the proposed rates are compensatory. (Decision No. 71258, Applications Nos. 48166 and 48215, Sierra Distributing, Ltd. and John T. Lane, 66 CPUC 177 (1966).) At the end of said 90-day period, if the applicants find that the proposed rates are not compensatory or that other rates should be put into effect, a further hearing could then be held at which time applicants could present economic evidence necessary to support a change in such rates. Otherwise the proposed rates should become the established rate at the end of said 90-day period.

The staff brief further recommended that if Coyote and Denny do not wish to stipulate to the trial period for use of the proposed assembly and freight charges as appearing in Exhibit "G"

of Burke's original application, then further hearings should be held, at which time all parties could present economic data to show what rates should be ordered.

The answering brief of applicants indicate that they do not concur in the stipulation offered in the staff brief. It is the position of applicants that they render a specialized service, the assembly of motorcycles for retail motorcycle dealers for a specific contractual rate based upon the size and complexity of assembly; that said business, rather than transportation, is their primary business; and, inasmuch as their primary business is other than transportation, they are not operating within the scope of the Highway Carriers' Act and, therefore, are not subject to MRT 2.

Pertinent Statutes

Section 3511 of the Highway Carriers' Act defines "Highway Carrier" as "every corporation or person... engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle", subject to certain exceptions not pertinent herein.

Section 3549 of the Highway Carriers' Act contains a specific exception to Section 3511, reading as follows:

"Any person or corporation engaged in any business or enterprise other than the transportation of persons or property who also transports property by motor vehicle for compensation shall be deemed to be a highway carrier for hire through a device or arrangement in violation of this chapter unless such transportation is within the scope and in furtherance of a primary business enterprise, other than transportation, in which such person or corporation is engaged."

As hereinbefore indicated, it is the position of applicants that their operations are within the scope and furtherance of a primary business other than transportation. It is the position of CIA and the staff that such operations are not.

Prior Decisions

The briefs of the parties point out that only one prior Commission decision interprets Section 3549, which was enacted in

1963. The briefs refer to other decisions of this Commission and of the Interstate Commerce Commission (ICC) which bear on the subject, as well as an opinion of the Attorney General of the State of California.

The Commission interpreted the provisions of Section 3549 in Van Dykes' Rice Dryer, Inc., 67 Cal. P.U.C. 748 (1967). Van Dyke dried and stored rice belonging to the Rice Growers Association. As part of its service for the Rice Growers Association, Van Dyke hauled rough paddy rice from farmer-members of the Association to the rice dryer in vehicles operated by Van Dyke. Such transportation was found to be within the scope and furtherance of Van Dyke's primary business of rice drying and storage and, therefore, exempt from minimum rate regulations under Section 3549 of the Public Utilities Code.

Opinion No. 65-312 of the Attorney General (49 O.P.S. Atty. Gen. 23)(1967) stated as follows with respect to an inquiry concerning logging operations involving transportation services:

"Therefore, when the contractor performs all the work necessary to reduce trees to logs awaiting only to haul to the mill, the actual hauling by him of the logs to the mill is secondary to the logging. In such case, the contractor cannot be deemed a highway carrier according to §3549."

The aforementioned opinion concluded with the following statement:

"As the contractor performs less of the logging work necessary to prepare the trees for hauling and concentrates proportionately more of his effort, time and expense on hauling the logs, whether he has altered his primary business enterprise from logging to transportation and thus excluded himself from the qualification to section 3511 found in section 3549 becomes a question capable of resolution only after examination of the particular facts of his operations."

In Green Bros. Inc., 67 Cal. P.U.C. 10 (1967), the Commission found that respondent Green's operations which involved only transportation were subject to regulation, and stated as follows:

"Transportation which is incidental to and inseparable from a primary business other than transportation is an exception to the general rule and is not subject to regulation.

"The portion of respondent's business referred to as for-hire work would come within the general rule and is subject to regulation. The only function performed by respondent in connection with this work is the transportation of debris for another person or corporation from a demolition job to a disposal area.

"Respondent's contract work would most likely be within the exception and not subject to regulation. If the contract includes both demolition and disposal, the transportation by respondent's own equipment would be incidental to and inseparable from its primary business of demolition."

In Charles W. Carter Co., 57 Cal. P.U.C. 756 (1960), the Commission found that respondent's operations were not those of a public utility warehouse requiring a certificate for the warehousing of automobile parts, because the compensation received by respondent was in the form of commission's from the sale of the merchandise stored. Said decision stated as follows:

"The record is replete with the undisputed testimony that respondent provides a comprehensive service on a commission basis and while storage is involved in the service rendered, it cannot be said to be the basic service. On the contrary, it is one of a number of services which range from maintenance of inventory, packaging, shipping, sales efforts, collecting bills and providing credit information to prospective customers. Although a public utility warehouse frequently may offer some of the services rendered by respondent, such services are distinct and separate from the basic service of storage and additional charges are levied therefor; insofar as public utility warehouses are concerned such auxiliary services may be said to be incidental to the basic service of storage. In contrast, the storage provided by respondent as a part of its comprehensive service may be said to be incidental to the overall service rendered; hence, it cannot be said that the business as conducted by respondent conforms to the definition of a warehouseman in Section 239."

The foregoing presents a clear line of cases, including cases decided before the enactment of Section 3549, indicating that transportation services which, if performed alone, are subject to regulation, but when performed in connection with a nontransportation activity, which is the primary business of the company performing said services, are not subject to regulation.

The Commission in decisions differing from the above-cited cases, determined that transportation was the primary activity involved and that the additional activities performed were accessorial to the main function of transportation. In such decisions the Commission found that all of the services performed were subject to regulation. One such decision is in Minimum Rates for Housemoving, 65 Cal. P.U.C. 730 (1966), wherein the Commission found that the services of housemovers involving disconnecting and reconnecting utility services and removing from and replacing the building on foundations was work which was preparatory to and ancillary to the main function of transportation of houses. The Commission stated that such services:

"...may be considered as assessorial to said movement but they are integral parts of the transportation service performed by the house mover, and as such subject to regulations by this Commission."

Discussion

In this proceeding, we must first determine whether the service of assembling of motorcycles is an integral part of the transportation service performed by petitioners, or whether the transportation of the assembled motorcycles is incidental to the primary business of motorcycle assembling.

At this point, we emphasize that petitioners do not seek a finding that the transportation of the knocked-down motorcycles in boxes from distributors in the Los Angeles area to the point of assembly is not subject to regulation. Two of the petitioners

perform such transportation service, the third does not.^{1/} Petitioners concede that transportation of the knocked-down motorcycles is not an essential part of their nontransportation services, and that such transportation does not necessarily have to be performed by them.

On the other hand, petitioners claim that the transportation of assembled motorcycles from point of assembly to individual dealers is an essential part of their nontransportation service.

Considering the initial movement of crated motorcycles to the assembly point (Paragraph 5 of Exhibit 4, supra) to be separate and distinct from the balance of the services described in Exhibit 4 (supra), it is clear that the primary business of applicants is the assembly of motorcycles for dealers, and that the transportation of the assembled motorcycles is secondary to the assembly. In the absence of the assembly service performed by applicants, crated motorcycles would be transported direct to dealers who ordered them, and the dealers either would perform the assembly themselves or would have an assembler pick up the crated motorcycles for assembly elsewhere. The transportation of assembled motorcycles by applicants following their assembly is similar to the local transportation of paddy rice to the rice dryer found to be exempt in Van Dykes' Rice Dryer, Inc. (supra). Most of the effort, time and expense involved in the operation of applicants is expended in the assembly function than in the transportation of the assembled motorcycles, and the transportation of uncrated assembled motorcycles would not be performed by applicants if they had not performed the assembly service.

^{1/} Coyote Trucking does not perform the transportation from distributors to point of assembly; said transportation is performed by other, nonaffiliated carriers.

Findings and Conclusions

The Commission finds:

1. The movement of crated motorcycles from the manufacturer's representative in the Los Angeles area to the point of assembly can be performed by any highway carrier and need not be performed by applicants in connection with their business of assembling motorcycles for dealers and, in fact, is not performed by one of the applicants herein.

2. Disregarding the transportation of crated, knocked-down motorcycles, the greatest portion of the time, effort and expense involved in the performance of applicants' services is expended in the assembly of motorcycles and the transportation of the assembled motorcycles is incidental to the assembly function.

3. The primary business of applicants is the assembly of knocked-down motorcycles. The transportation of assembled motorcycles from point of assembly to dealers is incidental to said primary business and is within the scope and furtherance thereof.

The Commission concludes that:

1. The transportation of assembled motorcycles which is incidental to the assembly service performed by applicants is exempt under Section 3549 of the Public Utilities Code.

2. Proprietary carriage is not involved in the transactions described in Exhibit 4 in this proceeding.

3. No relief from the minimum rates is necessary in order for applicants to perform the services described in paragraphs 6 and 7 of Exhibit 4 herein.

4. The applications and petitions herein should be dismissed.

C. 5432, Pet. 675 et al. lmm *

O R D E R

IT IS ORDERED that Applications Nos. 52989, 53203 and 53207 and Petitions for Modification Nos. 675, 693 and 695 in Case No. 5432 are hereby dismissed.

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

Dated at San Francisco, California, this 26th day of SEPTEMBER, 1972.

Vernon L. Stearns
President
William J. Jones, Jr.
John H. Jones
John H. Jones
John H. Jones
Commissioners