

Decision No. 81013**ORIGINAL**

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 No. 2).

Case No. 5432
Petition for Modification
No. 621
(Filed January 5, 1971)

And Related Matters.

Case No. 5330, Petition No. 54
Case No. 5433, Petition No. 35
Case No. 5435, Petition No. 170
Case No. 5436, Petition No. 106
Case No. 5437, Petition No. 207
Case No. 5438, Petition No. 81
Case No. 5439, Petition No. 136
Case No. 5440, Petition No. 72
Case No. 5441, Petition No. 217
Case No. 5603, Petition No. 94
Case No. 5604, Petition No. 25
Case No. 7857, Petition No. 42
Case No. 8808, Petition No. 12
(Filed January 5, 1971)

ORDER MODIFYING ORDER GRANTING REHEARING

By Decision No. 80698, dated November 8, 1972, the Commission granted the petitions of California Railroads and California Trucking Association (CTA) requesting rehearing of Decision No. 79937 in Case No. 5432, Petition for Modification No. 621.

Since that time, questions have arisen whether it is necessary to rehear Decision No. 79937 in its entirety or whether a more limited rehearing should be ordered.

The Commission granted rehearing of Decision No. 77937 based on its conclusion that CTA's eighth ground for rehearing had merit. CTA's contention was as follows:

"THE DECISION IS BASED ON FACTUAL MATERIAL NOT IN EVIDENCE 1/

In the 'Discussion' of the subject Decision between pages 12 and 26, it makes three references to the record of the hearings in these proceedings and eighteen references to factual material contained in exceptions. Factual material submitted as a part of exceptions is NOT evidence upon which the Commission can act. Facts so alleged are unverified and unsworn. They are not subject to the inquiry of cross-examination. The use of such allegations in derogation of sworn testimony and of the Commission's lawful duty is gross procedural error."

While we accede, in general, to the correctness of this position, it does not follow that each and every part of Decision No. 79937 is necessarily defective. We will therefore separately discuss each of the ten specific proposals of CTA with a view to determining whether, for any given proposal, evidence need be taken.

1. The discussion of proposal No. 1 (mimeo p. 13) makes no reference whatever to the exceptions or replies to exceptions to the Examiner's proposed report. There is evidence of record to support our decision not to adopt proposal No. 1. Accordingly, we conclude that there is no necessity to receive evidence on rehearing related to said proposal.

1/ Memorandum of CTA, p. 16, filed May 30, 1972.

2. Proposal No. 2 contains two references to exceptions. In the first reference (mimeo p. 14) the matter alluded to is basically argumentative, and not factual. There is evidence of record to support our decision. We conclude, therefore, that there is no necessity to take evidence on rehearing relating to that portion of proposal No. 2 ending on mimeo page 14.

However, the second reference to the exceptions (mimeo p. 15) alludes to and relies upon factual matter which is not of record. We conclude that on rehearing evidence should be received on proposal No. 2, but only as it concerns the existence and availability of spur track agreements.

3. In deciding upon proposal No. 3 (mimeo p. 15) we cited specifically and relied upon the exceptions of Fibreboard Corporation (mimeo p. 16). These exceptions contained factual matter which was not of record, and could not have been, since the data were accumulated, in part, after the close of the record. We conclude, therefore, that evidence should be received on rehearing related to proposal No. 3.

4. The exceptions alluded to in the discussion of proposal No. 4 (mimeo p. 17) contained only matter of which the Commission could take official notice. In addition the record contains evidence to support the Commission's decision on proposal No. 4. We conclude that evidence should not be taken on rehearing regarding such proposal.

5. Although reference is made to exceptions in the discussion of proposal No. 5 (mimeo p. 19), we did not rely upon the exceptions in reaching our decision. We conclude that no evidence need be received on rehearing relating to proposal No. 5.

6. There is evidence of record to support the Commission's decision on proposal No. 6. The exceptions introduce no new factual material and it is, therefore, not erroneous to rely thereon. We conclude that no evidence should be taken on rehearing relating to proposal No. 6.

7. The exceptions referred to and relied upon in the discussion of proposal No. 7 (mimeo p. 21) contain factual matter not of record. Evidence should be received on rehearing relating to proposal No. 7.

8. No exceptions were taken to proposal No. 8. Accordingly, there is no need to hear evidence relating to this proposal.

9. The exceptions to proposal No. 9 contain new factual matter which we relied upon in reaching our decision. We conclude that evidence should be received on rehearing relating to proposal No. 9.

10. The matter in the exceptions referred to in the discussion of proposal No. 10 is argumentative only and involves no new factual material. We conclude that no evidence should be taken on rehearing relating to proposal No. 10.

We further conclude that Decision No. 80698 should be modified to limit rehearing to the receipt of evidence on the portions of Decision No. 79937 set forth in the following order.

IT IS ORDERED that Decision No. 80698 is modified hereby to limit rehearing of Decision No. 79937 to the receipt of evidence and argument on:

- a) That portion of proposal No. 2 of Decision No. 79937 dealing with spur track agreements.
- b) Proposal No. 3 of Decision No. 79937.
- c) Proposal No. 7 of Decision No. 79937.
- d) Proposal No. 9 of Decision No. 79937.

Dated at San Francisco, California, this 30th day of JANUARY, 1973.

William L. Sturgeon President

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[Signature], Commissioner