JR

Decision No. 81733

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, charges and practices of DICK BELL TRUCKING, INC., a California corporation, and CAL-COMPACK FOODS, INC., a California corporation.	Case No. 9416 (Filed August 1, 1972)

Emanuel Gyler, Attorney at Law, for Dick Bell Trucking, Inc. and Cal-Compack Foods, Inc.; Vernon G. Noller, for Dick Bell Trucking, Inc.; and C. W. Anderson, for Cal-Compack Foods, Inc.; respondents.
Lionel B. Wilson, Attorney at Law, and E. H. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, and practices of Dick Bell Trucking, Inc. (Bell) for the purpose of determining whether it charged less than applicable minimum rates in connection with transportation performed for Cal-Compack Foods, Inc. (Cal-Compack).

Public hearing was held before Examiner Mooney in San Bernardino on September 20, 1972, on which date the matter was submitted.

Bell operates as a radial highway common and highway contract carrier. It has terminals in Fontana, Pittsburg, and Montebello. During the staff investigation referred to hereinafter, it employed 28 drivers and three office and three shop personnel; it operated 27 tractors and 84 trailers; and it had all applicable tariffs and distance tables. Bell's gross operating revenue for the year 1971 was $1,452,449.20.

A representative of the Commission staff visited Bell's place of business in Fontana during March 1972 and examined its records for the period November and December 1971. He prepared photostatic copies of freight bills and supporting documents for transportation performed by Bell for Cal-Compack from the shipper's dehydrator in King City to the shipper's plant in Santa Ana and to cold storage warehouses in Anaheim and Fullerton during the review period. The photocopies are all included in Exhibit 2. The commodity transported is described on the documents as drums of ground chili pepper or drums of ground chili. The chili pepper had been ground to mesh 34 at King City, and each drum weighs 250 pounds (Exhibit 9).

A rate expert for the Commission staff testified that he prepared Exhibit 3 which summarizes the transportation covered by the documents in Exhibit 2 and shows the rate and charge assessed by Bell, the minimum rate and charge computed by the staff, and the amount of undercharge alleged by the staff for each shipment included therein. The witness explained that chili peppers, whole or ground, are included in Item 170820 of the National Motor Freight Classification; that exception ratings for commodities as described in Item 170820 are included in Items 320 (Canned Goods) and 360.5 (Groceries and Grocers' Supplies) of Minimum Rate Tariff 2 (MRT 2); and that he applied the rating in Item 320 which is the lowest of the three. Bell had assessed a flat charge of $1.06 per drum. The total of the undercharges alleged by the staff in Exhibit 3 is $5,914.27.

The rate expert testified that chili pepper ground to mesh 34 does not come within the exemption from minimum rates provided in Item 42 of MRT 2 for dried pepper pods. Mesh 34 is a screen with 34 wires in each direction per square inch or 1,024 openings per square inch. Chili powder ground to mesh 34 will pass through a 34 mesh screen. The witness stated that the exemption in Item 42 for dried pepper pods was established by Decision No. 31606 (1938) 41 CRC 671; that the decision states at page 708 that the exemption

applies to "unmanufactured products of agriculture"; and that in his opinion, the exemption covers dried pepper pods in their natural state and not ground chili pepper. He explained that the exemption for dried, ground chili pepper in Administrative Ruling No. 117 of the Interstate Commerce Commission Bureau of Operations applies to interstate commerce only and has no application to California intrastate commerce with which we are here concerned.

The Vice President of Operations of Cal-Compack testified that his company's primary business is a wholesaler of chile powder. He described the operation of the company's facility at King City as follows: The plant commenced operations in 1966 although the grinding machinery was not ready until 1967; it is automatic; fresh chili pepper pods are brought to the plant by truck from the field; the fresh pods must be dehydrated within 24 hours or deterioration sets in; the plant is operated continuously during the season which runs approximately six weeks commencing in mid-October; the fresh pods are placed on a receiving conveyor and are washed, graded, weighed, and chopped by knives; they are then moved by a stainless steel conveyor through dehydrator units which remove the liquid in the chopped peppers; the dehydrated, chopped pepper pods are then ground to mesh 34; it is then loaded for shipment in 44-gallon fibre drums which have metal tops and bottoms and are 22 inches tall with a diameter of 18 inches.

The shipper witness testified that he was of the opinion that the dried chili pepper shipped from the King City plant was under an agricultural rate exemption and that this was one of the considerations for locating the plant here. He stated that prior to the opening of the King City facility, the primary source of chili pepper for his company was Orange County; that most now comes from the King City area; that approximately five and one-half million pounds of chili pepper are processed at King City in a season; and that the fresh pods from the field are about five times this weight.

The vice president further testified as follows: The drums of mesh 34 chili pepper are shipped from King City to either the company's Santa Ana plant for processing or to the cold storage warehouses for storage; if the mesh 34 pepper is not processed promptly or not placed in cold storage, it will deteriorate; if the pepper were not ground to mesh 34, substantially more storage space would be required; the pepper is withdrawn from storage during the year as demands require; the mesh 34 pepper is never used as a food seasoning or sold to the public in the form in which it arrives from King City; something more must be done to it; at the Santa Ana plant, the mesh 34 pepper is blended with other chili peppers and ingredients according to customers' or the company's specifications and most is ground to a mesh 46 or finer before it is sold; the resulting products are primarily sold to customers in bulk for packaging and sale to the public; it is his opinion that the processing procedure commences when the fresh pepper pods are brought into the King City plant.

The former president of Bell who left the company in April 1972 testified that both the carrier and shipper were of the good faith opinion that the King City haul was exempt from rate regulation. The rate expert for Bell testified that the mesh 34 pepper from King City is the same product as a dried chili pepper pod only in another form; that it is not edible or salable and does not change its character until it is blended and processed at Santa Ana; and that for these reasons, he is of the opinion that it is within the rate exemption in Item 42 of MRT 2 for dried pepper pods.

Discussion

Based on a review of MRT 2, we are of the opinion that a reasonable doubt exists as to whether the mesh 34 chili pepper shipped from King City is subject to the minimum rates. In the circumstances, the investigation will be discontinued.

Exception ratings for ground chili are provided in MRT 2, Item 320, which includes numerous canned goods commodities, and Item 360.5, which includes numerous groceries and grocers' supplies.

Ground chili is specifically named in Item 320, and the item authorizes shipments of the commodities named therein in various containers, including drums. Item 360.5 does not name ground chili but lists spices and refers to various items in the National Motor Freight Classification, including Item 170820, for descriptions. The description in Item 170820 reads as follows:

> "Chili Peppers, whole or ground, including Chili Powder, in bags, barrels, boxes or pails."

The ratings in Item 320 are lower than those in Item 360.5. If the mesh 34 chili powder is subject to rate regulation, the lower ratings in Item 320 would apply. These are the ratings applied by the staff to the transportation in issue.

Items 40, 41, and 42 of MRT 2 list numerous commodities that are exempt from the rates therein. Included in Item 42 is the listing:

> "Vegetables, dried, viz.: ...Pepper Pods,"

While it could be argued that a chili pod is technically a fruit, it is generally referred to as a vegetable as in Cal-Compack's brochure of its products (Exhibit 11). We adopt the generally accepted designation. Dried chili pepper pods would, therefore, be exempt from minimum rates. There appears to be no dispute on the record that washing, grading, and weighing the chili pepper pods prior to the dehydration process would have any effect on their rate exempt status. However, the staff is of the opinion that the exemption relates to the pods in their natural or whole state and is lost when they are cut and ground. In support of this position, the staff relied on the statement in Decision No. 31606, supra, that the rate exceptions for agricultural commodities in MRT 2 apply to unmanufactured products of agriculture. It is the staff's position that the mesh 34 chili pepper is a manufactured article. Respondents, on the other hand, allege that this is not a manufactured product and rely on the informal interpretation of the Bureau of Operations of

the Interstate Commerce Commission (ICC) in its Administrative Ruling No. 119 dated April 27, 1972 that chili powder consisting of dried, ground pepper pods is not a manufactured product.

Section 203(b)(6) of the Interstate Commerce Act provides in part that the transportation by motor vehicle of agricultural and horticultural commodities, not including manufactured products thereof, is not subject to the rate provisions of the Act. Administrative Ruling No. 119 lists numerous commodities which have been found by the Federal Courts and by formal decisions of the ICC and informal interpretations of its staff to be within this exemption.

The U. S. Supreme Court has adopted the substantial identity test as the basis for determining whether a commodity is or is not manufactured. In considering this question, it has stated as follows:

> "...Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartfrant v Wiegman, 121 US 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" (Anheuser-Busch Assn. v United States (1908) 207 US 556, 562.)

> "At some point manufacturing and processing will merge. But when the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of Sec. 203(b)(6)." (East Texas Lines v Frozen Food Exp. (1955) 351 US 49, 55.)

In applying the substantial identity test, the U. S. District Court (S D Texas) has held that although they had undergone some processing, chopped hay and ground shelled peanuts, among other products, are not manufactured commodities within the meaning of the aforementioned section. (Frozen Food Exp. v United States (1956) 148 F Supp 399.) Based on this and the U. S. Supreme Court decisions, the ICC has held that ground paprika is not a manufactured commodity. (Acme Motor Carriers, Inc. (1958) 74 M.C.C. 797.)

Under the substantial identity test of the Supreme Court, the mesh 34 ground chili shipped from King City would not be considered a manufactured product. The only difference between it and the whole dried pod is the form of the commodity - ground instead of whole. Before the mesh 34 pepper would be considered a manufactured product something more must be done to it. It must be blended with other chili powders, and other ingredients of varying types and amounts must be added. It is not until after this has been done that it is sold to the public.

It could be argued that since there are exception ratings in Items 320 and 360.5 of MRT 2 for ground chili and ground chili peppers, the exception ratings take precedence over the exemption in Item 42. However, it could likewise be argued that the exception ratings in Items 320 and 360.5 apply to canned goods and to groceries and grocers' supplies, respectively, and that the reference to ground chili and ground chili peppers in the two items is to the manufactured product. It is a general rule in the field of tariff interpretation that any ambiguities or uncertainties in a tariff will be resolved in favor of the party obligated to pay the transportation charges. Until such time that exemption in Item 42 is amended to exclude dried pepper pods when they have been ground, it would be patently unjust to require a carrier to charge and collect minimum rates based on the Item 320 exception ratings for the transportation in issue.

Finding and Conclusion

The Commission finds that under present tariff provisions the transportation in issue is exempt from minimum rates and concludes that the investigation in Case No. 9416 should be discontinued.

C. 9416 JR

O R D E R

IT IS ORDERED that the investigation in Case No. 9416 is discontinued.

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

Dated at San Francisco, California, this 14th day of AUGUST, 1973.

President

Commissioners

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

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.