

**ORIGINAL**Decision No. 83672

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 Tariffs Nos. 7-A and 17-A).

Case No. 5437  
 Order Setting Hearing 238  
 (Filed January 16, 1973)  
 Petition for Modification  
 No. 240  
 (Filed February 9, 1973)

(Appearances are shown in Appendix A.)

ORDER DENYING MOTION TO DISMISS

Order Setting Hearing 238 was issued to receive evidence with respect to proposals of the Commission's Transportation Division concerning revision of Minimum Rate Tariffs 7-A and 17-A (MRTs 7-A and 17-A) to incorporate therein rules and regulations providing for compensation to carriers which furnish units of equipment consisting of a tractor and driver without trailing equipment for the movement of commodities covered by said tariffs.

Associated Independent Owner-Operators, Inc. (AIOO), a nonprofit corporation with a membership of approximately 1,000 highway permit carriers, seeks in Petition No. 240 modification of MRTs 7-A and 17-A by incorporating therein rules and regulations providing for the compensation to be paid to overlying carriers who furnish trailing equipment without power units to subhaulers for the movement of commodities covered by said tariffs.

The two matters were heard on a consolidated record before Examiner Mallory at San Francisco on February 27 and 28 and March 1, 1974. Evidence was presented by witnesses appearing for the

Commission staff (staff), AIOO, and California Trucking Association (CTA). The matters were temporarily removed from the calendar in order that the Commission may rule on CTA's motion to dismiss OSH 238 and Petition 240. Briefs supporting the motion were filed by CTA, Lindeman Bros., Inc. (Lindeman), and Overlying Carrier Chapters of the California Dump Truck Owners Association (Overlying Carriers). Briefs opposing the motion were filed by the staff, AIOO, Universal Transport Service (UTS), and California Dump Truck Owners Association (CDTOA). The Commission is prepared to rule on CTA's motion to dismiss.

CTA presents the following arguments in support of its motion to dismiss:

1. There is so much to be done by the Commission with respect to the regulation of rates and practices between shippers and carriers that the Commission should not be expending time and resources considering the need for regulating the relationship between carriers or between a carrier and its employees.

2. The Commission has acknowledged in a finding in one of its own decisions that the "95 percent rule" was adopted without any cost study of the relationship of overlying and underlying carriers, as follows:

"2. The existing provisions of Item 94 of MRT 7 were established on data relating to industry practices, some 20 years ago; substantially identical provisions were subsequently incorporated in Item 460 of MRT 17; and the provisions of Item 94 of MRT 7 and Item 460 of MRT 17 never have been tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers." (Emphasis supplied.) (Page 18 of mimeo Decision No. 78065 issued on December 8, 1970 in Petition 112 and Order Setting Hearing in Decision No. 72028 dated February 15, 1967.)

If tariff rules are considered to further regulate the relationship of overlying and underlying carriers, the Commission should study the cost consequences of different services required by and performed on behalf of underlying carriers by overlying carriers.

3. The Commission regulation of the overlying-underlying carrier relationship has presupposed that the underlying carrier is an independent contractor by virtue of its permit authority from the Commission. This supposition has now been rendered in doubt, since the National Labor Relations Board has determined in a de-certification proceeding that these underlying carriers (although recognized as being regulated by this Commission) are employees rather than independent contractors because the construction contractors "have retained and exercised such control over the manner and means of achieving the desired results at the jobsite that any finding of independent contractor would be inconsistent with the application of the common law right of control test." (Page 12 of mimeo decision reported at 201 NLRB No. 36, in Case No. 20--RD--721 and Case No. 21--RD--1008, decided January 17, 1973.) Now that an agency with primary and unquestioned jurisdiction has determined that these underlying carriers are in reality employees, the Commission should refrain from any inconsistent action when it has no clear and specific authority over the same subject matter.

4. In Decision No. 78065 in Petition 112, in this case, the Commission considered and denied the specific relief now requested again in Petition 240, i.e., for a specified rental for trailers to be paid by the tractor-only subhauler. In view of the workload requirements of the Commission and its staff relating to matters between the shipping public and the carriers, it seems incredulous that the Commission would dissipate its time and resources by replowing this ground.

Arguments 1 and 4 do not present valid reasons for dismissal of the matters herein. The Commission believes the effort of its staff in preparing evidence for these proceedings was appropriate. Denial of the prior proceeding involving the same subject matter was based, in part, on the finding that the record therein lacked adequate economic data to support the relief sought. The staff and AIOO have indicated that they intend to present the requisite cost and other economic data necessary to support their tariff proposals.

Argument 2 above assumes that neither the staff nor AIOO will present studies designed to show that the provisions of the Item 94 of former MRT 7 are reasonable and appropriate provisions in connection with their other proposals. The Commission considers that evidence of such nature is essential to resolve the issues presented in these proceedings. The parties should have adequate opportunity to present such information. The matters should not be dismissed solely on the assumption that such information will not be presented by the parties.

The third argument presented by CTA, if correct, would render these proceedings moot with respect to the dump truck transportation services subject to National Labor Relations Board (NLRB) jurisdiction, inasmuch as federal regulation in the field of labor relations preempts state or local regulation. [United Farm Workers Organizing Committee v Superior Court (1971) 4 C 3d 556, 94 Cal Rptr 263; San Diego Building Trades Council v Garmon (1959) 359 US 236, 3 L ed 2d 775; Fullerton v International Sound Technicians (1961) 194 CA 2d 801, 15 Cal Rptr 451.] The ruling on CTA's motion to dismiss was not promptly acted upon by the Commission in order that actions by the parties to these proceedings challenging NLRB orders requiring owner-operators to be maintained on the payroll of

contractors on federal highway construction projects could be concluded; and because decertification elections involving membership of subhaulers in Teamster Union construction trucking locals are in progress. The issues regarding NLRB regulations and union membership by owner-operators have not been resolved at this time. It appears such issues may not be finally concluded until NLRB actions are reviewed by federal appellate courts. In the circumstances, further delay of these proceedings awaiting final conclusion of pending lawsuits and decertification elections is not justified.

Based on the foregoing, the Commission concludes that the motion of CTA to dismiss the proceedings should be denied and that further hearings should be scheduled for the receipt of additional evidence. Parties are placed on notice that the Commission considers the reasonableness of the provisions of Item 210 (Payments to Underlying Carriers) of MRT 7-A and related provisions of MRT 17-A and MRT 20 is an issue in OSH 238 and Petition 240.

IT IS ORDERED that:

1. The motion to dismiss OSH 238 and Petition 240 in Case No. 5437 filed by California Trucking Association is denied.

2. All other motions filed in OSH 238 and Petition 240 not heretofore ruled upon are denied.

3. Further hearing in OSH 238 and Petition 240 shall be held before Commissioner Holmes and/or Examiner Mallory in the Commission's Courtroom, State Building, San Francisco, at 10:00 a.m. on December 9, 1974, or at such other time or place as hereinafter may be designated.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 29<sup>th</sup>  
day of OCTOBER, 1974.

James L. Stearns  
President  
William S. ...  
Thomas M. ...  
Robert E. McLeod  
Commissioners

APPENDIX A

LIST OF APPEARANCES

Petitioner (Petition 240): G. Ralph Grago, James R. Foote, and John C. Grissom, for Associated Independent Owner-Operators, Inc.

Respondents: Ray S. Bruton and Mike Mallin, for Miles & Sons Trucking Service; Robert K. Davidson, for Roy E. Lay Trucking; Don L. Hays, for A. W. Hays Trucking; La Fay Lindeman, for Lindeman Bros. Inc.; Kenneth P. Harrison, for Harrison-Nichols Co. Ltd.; Walker Brown, for Walker Brown Trucking, Inc.; N. Vannucci, for CBM Trucking Co.; Albert Giorgi, for Giorgi Trucking Co.; Jack Wood, for Edgewood Materials; Les Calkins, for Les Calkins Trucking Co.; E. Lockridge, for Pacific Construction Trucking, Inc.; William R. Della-Rosa, for Della-Rosa Bros. Trucking, Inc.; F. R. Golzen, for Universal Transport System; Stanley A. Ziganti, for CAP Transport, Inc.; Richard M. Davilla, for Davilla Trucking, Inc.; and Don R. Moe, for Southern California Eagle Company.

Protestant: Richard W. Smith and William T. Meinhold, Attorneys at Law, and H. Hughes, for California Trucking Association.

Interested Parties: Steve Wilcox, for Kaiser Sand and Gravel; Harry C. Phelan, for California Asphalt Pavement Association; Richard Cunha and R. A. Lubich, for themselves; Graham & James, by David J. Marchant, Attorney at Law, and James Quintrall, for Overlying Carrier Chapters of the California Dump Truck Owners Association; E. O. Blackman and C. Ralph Eighmy, for California Dump Truck Owners Association; and E. J. Bertana, for Lone Star Industries, Inc.

Commission Staff: E. Q. Carmody and J. M. Jenkins.