

Decision No. 83997**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. 813
 (Filed July 15, 1974)

R. C. Broberg and H. W. Hughes, for California
 Trucking Association, petitioner.

Harry R. Dull, for Dick Bell Trucking Co.,
 respondent.

Emanuel Gyler, Attorney at Law, James R. White,
 and C. W. Anderson, for Cal-Compact Foods, Inc.,
 protestant.

William D. Mayer, for Del Monte Corporation, and
Ralph O. Hubbard, for California Farm Bureau
 Federation, interested parties.

Joseph C. Matson, for the Commission staff.

O P I N I O N

Minimum Rate Tariff 2 (MRT 2) contains minimum rates, rules, and charges governing the transportation of general commodities statewide within California. Item 41 (Application of Tariff-Commodities) of the tariff lists those commodities which are exempt from the otherwise governing provisions of MRT 2. The list of exempt commodities includes: "Vegetables, dried, viz.: Beans (except Mesquite), Lentils, Onions, Peas (except Cow Peas), Pepper Pods." (Hereinafter collectively referred to as dried vegetables.)

In Petition 813 the California Trucking Association seeks to clarify the exemption for dried vegetables and promote tariff uniformity. Public hearing was held on November 15, 1974 before Examiner Gagnon at San Francisco. Petitioner's tariff proposal is opposed by Cal-Compact Foods, Inc. and the Commission's Transportation Division staff.

Petitioner contends that the Commission previously recognized the ambiguous nature of the present tariff exemption for dried vegetables when in Decision No. 81733 dated August 14, 1973 in Case No. 9416 it stated:

" . . . 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..."

The petition explains that the exemption of dried vegetables was established by Decision No. 31606 (1938) 41 CPUC 671 which exempted from minimum rates "...unmanufactured and unprocessed dried fruit and other unmanufactured products of agriculture..." According to petitioner the source of the tariff uncertainties and ambiguities is the absence of a definition for the term "unmanufactured" as it was used in Decision No. 31606. Petitioner contends that the Commission intended the term "unmanufactured" to be applied to the dried vegetables in a manner no different from that which is applied to dried fruits. The dried fruit exemption set forth in Item 40 of MRT 2 reads:

"Fruit, dried, unmanufactured and unprocessed
(subject to Note 3)."

(MRT 2, Item 41)

"NOTE 3. - Exemption applies only as to dried
fruit in the natural state and which has not
been cleaned, washed, stemmed, or otherwise
prepared or partially prepared for human
consumption."

The petitioner's proposed tariff revisions follow:

Proposed Modification of Items 40, 41, and 42
Of Minimum Rate Tariff 2
Application of Tariff - Commodities

ITEM 41: Application of Tariff - Commodities

2. Rates in this tariff will not apply to shipments
consisting of the following commodities (concluded):

Vegetables, dried, unmanufactured and unprocessed,
viz.: Beans (except Mesquite), Lentils,
Onions, Peas (except Cow Peas), Pepper Pods
(subject to Note 3).

NOTE 3. - Exemption applies only as-to-dried
~~fruit~~ when commodities making reference hereto,
are in the natural state and which-has have not
been cleaned, washed, stemmed, chopped, ground,
or otherwise prepared or partially prepared for
human consumption.

(Overscoring indicates deletion and
underscoring indicates addition.)

Petitioner would restrict the exemption for dried vegetables to unmanufactured and unprocessed vegetables as defined in Note 3 of Item 41 of MRT 2. In addition, petitioner suggests that Note 3 of Item 41 be amended so that the existing exemptions for both dried fruit and dried vegetables will not apply when such commodities are chopped or ground. When a similar provision was proposed by the Commission staff in connection with a proposed definition for the term "in their natural form" in MRT 8 (Decision No. 66586 (1964) 62 CPUC 155, 163) petitioner's research director stated that "...the last sentence in the proposed definition... would do more to mislead and to confuse than to clarify." The director suggested the proposed sentence be omitted.

Petitioner's witness explained on cross-examination that his tariff proposal was not predicated upon any specific study or investigation. He was unable to testify to the volume or characteristics of the exempt agricultural traffic involved and the effects, if any, his suggested tariff revisions would have thereon. No evidence was presented to show that the existing level of MRT 2 rates applicable to the movement of dried fruits and vegetables under petitioner's tariff proposal would, in fact, constitute a minimum reasonable level of rates for this heretofore exempt traffic. The petitioner's witness did, however, admonish the Commission and its staff for their failure to establish rates on exempt commodities even though confronted with, what the witness contends, a statutory mandate to do so under the provisions of Section 3662 of the Public Utilities Code. In support of this latter contention the witness submitted (Exhibit 2) a series of informal opinions and analyses of a deputy legislative counsel for the Legislative Counsel of California. A review of the pertinent informal expressions involved shows such informal opinions do not support the contentions or admonishments addressed to this Commission by petitioner's witness. For example, the legislative counsel's informal response to Question No. 2 provides:

"QUESTION NO. 2

"In light of the word 'shall' in Section 3662, is not the commission denied discretionary power to refuse to approve just, reasonable, and nondiscriminatory rates upon complaint?

"OPINION AND ANALYSIS NO. 2

"In view of our analysis of the first question, we have reached the conclusion that the commission does not have the discretionary power to refuse to establish or approve just, reasonable, and nondiscriminatory minimum or maximum rates, or both, upon complaint.

"Again, we point out that the establishment of a particular rate, whether minimum or maximum, is not required. It is up to the commission to determine whether minimum or maximum rates, or both, are needed in the interest of the public under the circumstances of a particular case." (Emphasis added.)

In this proceeding petitioner seeks the establishment of minimum rates for only a portion of the MRT 2 exempt dried fruit and vegetable traffic. To accomplish this, it merely suggests more restrictive language changes in the existing tariff provisions exempting such agricultural traffic from minimum rate regulation. Standing alone such a tariff proposal does not constitute the quantum of proof necessary to sustain the relief sought.

Petition 813 was generated by Decision No. 81733 wherein petitioner contends that the Commission recognized the ambiguous nature of the present MRT 2 exemption provision for dried vegetables in connection with the movement of ground chili peppers. However, a careful reading of the decision reveals that the ambiguity referred to by the Commission does not relate to the exemption of dried vegetables in Item 42 of MRT 2 but rather to the substantial identity test employed by the U. S. Supreme Court, on the one hand, and the application of the exception ratings provided in Items 320 and 360.5

of MRT 2 for ground chili and ground chili peppers, on the other hand. Pertinent portions of the opinion in Decision No. 81733 not referred to by petitioner follow:

"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." (Emphasis added.)

Petitioner's witness contends that the Court's test for determining whether a commodity is or is not manufactured is not applicable in connection with California intrastate traffic. We disagree. However, the basic intent of Decision No. 31606 would be better expressed if the exemption for dried vegetables in MRT 2 included the specific reference to the term "unmanufactured". Accordingly, the exemption for dried vegetables should be amended as follows:

MRT 2 - Item 41

Vegetables, dried, unmanufactured, viz.:
Beans (except Mesquite), Lentils, Onions,
Peas (except Cow Peas), Pepper Pods.

Findings

1. Items 40, 41, and 42 of MRT 2 provide that the transportation of certain dried fruits and vegetables is exempt from the otherwise applicable minimum rates named in the tariff. The minimum rate exemptions for such commodities were initially established by Decision No. 31606 (1938) 41 CPUC 671.

2. Petitioner seeks adoptions of proposed revisions of MRT 2 which it contends will clarify the application of the tariff exemption for dried vegetables, promote uniformity in the application of minimum rates, and reflect more accurately the intent of Decision No. 31606.

3. Petitioner's proposal to further limit the scope of application of the existing MRT 2 exemption for dried fruits and vegetables is not supported by any factual evidence pertaining to the highway transportation of dried fruits and vegetables within California under either the existing or proposed MRT 2 commodity exemptions.

4. Petitioner presented no evidence to show that the existing level of MRT 2 rates that would be applicable to the otherwise exempt movement of dried fruits and vegetables under petitioner's tariff proposal would, in fact, constitute a minimum reasonable level of rates therefor.

5. The substantial identity test adopted by the U. S. Supreme Court as a basis for determining whether a commodity transported in interstate commerce is or is not manufactured was properly applied in Decision No. 81733 in Case No. 9416 and is also an appropriate procedure (among others) to apply in this proceeding relative to the California intrastate movement of agricultural commodities.

6. The basic intent of Decision No. 31606 (1938) 41 CPUC 671 would be better reflected in MRT 2 if the exemption provision for dried vegetables included a specific reference to the term "unmanufactured".

Conclusions

1. MRT 2 should be amended as set forth in the order herein.
2. Common carriers should be authorized to depart from the long- and short-haul of Section 460 of the Public Utilities Code to the extent necessary to establish the tariff provisions ordered herein.
3. To the extent not granted herein, Petition 813 should be denied.

O R D E R

IT IS ORDERED that:

1. Minimum Rate Tariff 2 (Appendix D to Decision No. 31606, as amended) is further amended by incorporating therein, to become effective February 21, 1975, Sixty-second Revised Page 15 attached hereto and by this reference made a part hereof.
2. Common carriers subject to the Public Utilities Act, to the extent that they are subject also to Decision No. 31606, as amended, are directed to establish in their tariffs the increases necessary to conform with the further adjustments ordered by this decision.
3. Common carriers maintaining rates on a level other than the minimum rates for transportation for which rates are prescribed in Minimum Rate Tariff 2 are authorized to increase such rates by the same amounts authorized by this decision for Minimum Rate Tariff 2 rates.

4. Common carriers maintaining rates on the same level as Minimum Rate Tariff 2 rates for the transportation of commodities and/or for transportation not subject to Minimum Rate Tariff 2 are authorized to increase such rates by the same amounts authorized by this decision for Minimum Rate Tariff 2 rates.

5. Common carriers maintaining rates at levels other than the minimum rates for the transportation of commodities and/or for transportation not subject to Minimum Rate Tariff 2 are authorized to increase such rates by the same amounts authorized by this decision for Minimum Rate Tariff 2 rates.

6. Tariff publications required or authorized to be made by common carriers as a result of this order shall be filed not earlier than the effective date of this order and may be made effective not earlier than the tenth day after the effective date of this order, on not less than ten days' notice to the Commission and to the public; such tariff publications as are required shall be made effective not later than February 21, 1975; and as to tariff publications which are authorized but not required, the authority shall expire unless exercised within sixty days after the effective date of this order.

7. Common carriers, in establishing and maintaining the rates authorized by this order, are authorized to depart from the provisions of Section 460 of the Public Utilities Code to the extent necessary to adjust long- and short-haul departures now maintained under outstanding authorizations; such outstanding authorizations are hereby modified only to the extent necessary to comply with this order; and schedules containing the rates published under this authority shall make reference to the prior orders authorizing long- and short-haul departures and to this order.

8. In all other respects Decision No. 31606, as amended, shall remain in full force and effect.

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

Dated at San Francisco, California, this 21st
day of JANUARY, 1975.

Vernon L. Stephens
President
William J. Quinn
[Signature]

Commissioners

SECTION 1--RULES OF GENERAL APPLICATION (Continued)	ITEM
<p style="text-align: center;">APPLICATION OF TARIFF--COMMODITIES (Continued) (Items 40, 41 and 42)</p> <p>2. Rates in this tariff will not apply to shipments consisting of the following commodities (concluded):</p> <ul style="list-style-type: none"> Liquids, compressed gases, commodities in semi-plastic form and commodities in suspension in liquids in bulk, in tank trucks, tank trailers, tank semi-trailers or a combination of such highway vehicles Livestock (when rates are not otherwise provided in Minimum Rate Tariff 3-A) Lots (wood) Milk, liquid (subject to Note 1) Newspapers, newspaper supplements, sections or inserts (not scrap or waste) Nuts, in the shell (when rates are not otherwise provided in Minimum Rate Tariff 8) Nuts, field shelled (when rates are not otherwise provided in Minimum Rate Tariff 8) Optical goods transported from or to wholesale houses in packages weighing 10 pounds or less Pits, fruit Pot Cheese (subject to Note 1) Poultry, live Sea shells, crushed, ground, powdered or disintegrated (subject to Note 5) Seeds, as described under that heading in the Governing Classification, when shipped from point of growth to an accumulation station or point of initial processing, or from an accumulation station to point of initial processing; in bulk, or in containers with a capacity exceeding 40 cubic feet, or in packages weighing 50 pounds or more Shell Marl, crushed, ground or powdered (subject to Note 5) Shells, walnut Sulphur United States mail transported for the Post Office Department under contract Used property, as described in Minimum Rate Tariff 4-B, of state, county or municipal governments, or transported under an agreement whereby the governments contracted for the carrier's services Vegetables, fresh or green, including mushrooms, fresh, not cold pack nor frozen (when rates are not otherwise provided in Minimum Rate Tariff 8) Vegetables, which are placed in a preservative and are destined to a cannery for processing into a preserved or pickled vegetable Vegetables, dried, "unmanufactured, viz.: Beans (except, Mesquite), Lentils, Onions, Peas (except Cow Peas), Pepper Pods Voting Booths, Ballot Boxes, Election Tents and Election Supplies, when transported from or to polling places <p>NOTE 1--(a) Except as provided in paragraph (b), exemption applies only in connection with straight or mixed shipments of commodities making reference hereto and only when shipped in quantities of not less than 20,000 pounds. (b) The provisions of paragraph (a) of this note do not apply in connection with:</p> <ul style="list-style-type: none"> (1) The transportation of eggs moving in straight shipments from point of production. (2) Shipments moving in tank trucks, tank trailers, tank semitrailers or a combination of such highway vehicles or in milk shipping cans from point of production. <p>NOTE 2--Includes only used empty carriers which are returning from an outbound paying load of traffic for which rates are not provided in this tariff, or which are being forwarded for a return paying load of traffic for which rates are not provided in this tariff (subject to Item 80 of the Exception Ratings Tariff).</p> <p>NOTE 3--Exemption applies only as to dried fruit in the natural state and which has not been cleaned, washed, stemmed or otherwise prepared or partially prepared for human consumption.</p> <p>NOTE 4--Exemption applies only when the distance between point of origin and destination does not exceed 35 miles, computed in accordance with the provisions of Item 100.</p> <p>NOTE 5--Exemption applies only when shipper certifies on the shipping document covering the transportation that the shells or shell marl are being shipped for use as a fertilizer.</p> <p style="text-align: right;">(Continued in Item 42)</p>	41
<div style="display: flex; justify-content: space-between;"> Change) Decision No. 83997 </div> <div style="display: flex; justify-content: space-between;"> Addition) </div>	
EFFECTIVE	
<div style="display: flex; justify-content: space-between;"> Correction ISSUED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA. </div>	