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ORIGINAL

Decision No. 85188

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of LINDEMAN BROS., INC., for authority, pursuant to the provisions of Section 3666 of the Public Utilities Code, to depart from the minimum rates, rules and regulations of Minimum Rate Tariff No. 7-A.	Application No. 55639 (Filed April 17, 1975)

Handler, Baker & Greene, by Daniel W. Baker, Attorney at Law, for Lindeman Bros., Inc., applicant.
James R. Foote, for Associated Independent Owner-Operators, Inc.; E. C. Blackman and C. Ralph Eighmy, for California Dump Truck Owners Association; protestants.
Everest A. Benton, for the Commission staff.

O P I N I O N

By Decision No. 84507 dated June 3, 1975, Lindeman Bros., Inc. was authorized, pending public hearing, to assess specific tonnage rates for the transportation of concrete pavement aggregate, aggregate base, and cement treated base from Perkins to a construction jobsite near Hood involving an extension of Interstate Highway 5 in Sacramento County. The tonnage rates authorized were subject to the following conditions:

(a) Carrier's charges for the transportation shall not be less than revenues that would have been earned under the applicable hourly rates in Minimum Rate Tariff 7-A for the same transportation.

> Carrier shall retain and preserve copies of its freight bills, subject to the Commission's inspection, for a period of not less than three years from the dates of issuance thereof; and each such copy of its freight bills shall have attached a statement of the charges which would have been assessed if the minimum rates had been applied and full information necessary for accurate determination of the charges under the minimum rates.

(b) Other than the authority described above, all other provisions of Minimum Rate Tariff 7-A shall apply to the service.

Public hearing was held before Examiner Tanner at San Francisco on July 30, 1975. The matter was submitted on August 29, 1975 upon the filing of concurrent closing statements limited to the question of the application of Item 210, Minimum Rate Tariff 7-A (MRT 7-A) to the transportation involved in this application. In addition to the applicant, the California Dump Truck Owners Association (CDTOA) and the Associated Independent Owner-Operators, Inc. (AIOO) filed closing statements.

Issues

Applicant's vice-president testified that the transportation services involved here are for A. Teichert & Sons, Inc. (Teichert). These services are performed under a contract with Teichert Construction (a division of Teichert) and involve transporting material from Teichert Aggregate, Perkins (also a division of Teichert). According to the witness, applicant has provided transportation services to the Teichert organization for many years, resulting in a unique relationship which enables both parties to take advantage of many operating efficiencies not usually found in similar operations. The witness explained that most of the service was performed by independent contractor subhaulers pulling applicant's trailing units. He detailed the careful scheduling, and tight

control exercised over the trucking fleet, and the requirement for maximum utilization of time. He emphasized his belief that when services of the type involved here are provided at hourly rates, efficient use of time is difficult. He made it clear that in his opinion the revenues earned under the authorized rate would, in total, exceed the revenue which would have accrued under the application of the hourly rates, under the same circumstances.

CDTOA and AIOO do not dispute the facts as related by applicant concerning the methods in performing the service. They both, however, take exception to applicant's method of computing charges based on the applicable hourly rates for comparison with revenue earned under the authorized tonnage rates, principally due to the relationship such computation has to the compensation paid to underlying carriers.

Applicant's position is simply that the total revenue from the job as a whole should be measured against the revenue that would have occurred under the hourly rates computed on the basis of the total time in computing the job to determine the application of the conditions in Decision No. 84507. Underlying carriers should receive, according to applicant, 95 percent of the tonnage rates authorized by the interim order.

Discussion

The relief granted by Decision No. 84507 is clear and straightforward. There is nothing in the record questioning the reasonableness of the relief, as granted, per se. There were, however, a number of questions raised relating to the proper application of the condition that the transportation "...shall not be less than revenues that would have been earned under the applicable hourly rates...". The question is quickly resolved when one considers the fact that the "applicable hourly rates" can only be determined according to the provisions of MRT 7-A.

Item 360 requires that charges for service conducted under hourly rates shall be determined.

(a) From time reporting for work to the time completed hourly service.

(b) Allowances may be made only for delays caused by failure of carrier's equipment or for time taken out for meals. Time to be charged shall include time for transportation in both directions, time for loading and unloading and waiting or stand-by time at origin and/or destination. Total chargeable time shall be computed to the nearest six (6) minutes or one-tenth of an hour.

Paragraph 2(b) of Item 170 requires that a freight bill shall be prepared for each engagement showing the following information:

(1) Time reporting for work.

(2) Location of reporting for work.

(3) Commodity transported.

(4) Number of axles.

(5) Capacity in cubic yards (applies in connection with rates in Item 400).

(6) Time unit of equipment completed last loading.

(7) Time unit of equipment commenced discharging last load.

(8) Time unit of equipment completed discharging last load.

(9) Time completed hourly service.

(10) Overall time: From time reporting for work to the time completed hourly service.

(11) Any deductions for meals or failure of carrier's equipment.

(12) Net chargeable time (10 minus 11).

(13) Applicable hourly rate.

(14) Charges due.

Paragraphs 3 and 4 of Item 170 require:

> 3. When accessorial charges are to be assessed under the provisions of Item 90 to any shipment, additional information shall be supplied as follows:
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> (1) Whether truck and transfer trailer combination.
>
> (2) Chargeable time.
>
> (3) Rate to be assessed.
>
> (4) Charges to be assessed.
>
> (5) Signature of consignee or his agent.
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> 4. In the event that transportation is performed by an underlying carrier, a combined shipping order and freight bill (or other document) shall be issued by such underlying carrier to the overlying carrier. Such document must contain all of the above information[1] except the following:
>
> 1. Name of debtor if other than consignor.
>
> 2. Address of debtor if other than consignor.
>
> 3. Rate and charges assessed.
>
> Two or more copies of the document shall be presented by the underlying carrier to the overlying carrier within seven calendar days of the date transportation is performed, except that they shall be presented no later than three days after the last calendar day of the month.

From these tariff provisions it is clear that charges based on hourly rates must be based on the total elapsed time for each engagement less time for meals and equipment failure. In addition charges for delays as described in Item 90 must be included. The primary element here is the term "engagement." A definition of this term is not included in the tariff; however, when one considers all

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1/ Paragraph 2(b), Item 170.

the tariff provisions together relating to the computation of charges under hourly rates, it is clear that an engagement would constitute a single period during which there is no interruption of service other than meals or equipment failure. Furthermore, due to the requirements of paragraph 4 of Item 170, an engagement must also include the total continuous time (less allowable deductions) an underlying carrier is employed. Thus a single engagement by a shipper of an overlying carrier must be made up of the separate engagements by the overlying carrier of underlying carriers. Regardless of the time span of the engagement revenue earned under the "applicable hourly rates" must be determined as provided in MRT 7-A. In regard to the application before us, the determination of the application of condition "a" to the relief granted must be on the basis of each "engagement." A computation based on the total time of all units used in the job in question times the applicable hourly rate would not satisfy the governing tariff provisions, nor would it produce a valid figure to use as a basis of determining compliance with the condition to the authorized tonnage rates.

Item 210 of MRT 7-A provides:

> Charges paid by any overlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall be not less than 95 percent of the charges applicable under the minimum rates prescribed in this tariff, less the gross revenue tax applicable and required to be paid by the overlying carrier. (See Notes 1 and 2.) The underlying carrier may extend credit to the overlying carrier for a period not to exceed twenty days following the last day of the calendar month in which the transportation was performed, and payment to the underlying carrier must be made within that time. Freight bills for transportation and accessorial charges shall be presented by underlying carriers to overlying carriers within three days after the last calendar day of the month in which the transportation was performed.

The CDTOA contends that underlying carriers should be paid not less than 95 percent of the applicable hourly rates. AIOO takes the position that applicant is not a carrier, but is a contractor and therefore underlying carriers should receive 100 percent of the applicable rates.

> Condition (b) to the authority granted provides:
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> Other than the authority described above, all other provisions of Minimum Rate Tariff 7-A shall apply to the service.

It could be argued that this condition requires that underlying carriers receive "95 percent of the charges applicable under the minimum rates prescribed in this tariff," such rates being the tonnage rates provided in Section 2 of the tariff. We do not believe such an argument is reasonable. We are of the view that Item 210 must be applied to the charges determined by the rates authorized by Decision No. 84507, subject to all the conditions thereof. This amounts to a determination of the charges for each engagement, based on the authorized tonnages rates compared with the charges computed under the applicable hourly rates. The higher of the two charges so determined is then the proper charge for the service involved, 95 percent of which is due to the underlying carrier.

It was alleged that the documentation required by the second paragraph of condition (a) was not prepared or retained. If this allegation is a fact, then the tonnage rates authorized by Decision No. 84507 cannot be applied and no authority to deviate from the minimum rates exists. In such a circumstance, applicant must assess charges based on the applicable rates in Section 2 of MRT 7-A and underlying carriers must be paid 95 percent of such charges.

The contention that applicant "became a contractor and thenceforward ceased to meet the tariff definition of an overlying carrier" raised by AIOO requires careful consideration. The implication is that the service applicant is providing Teichert is not transportation but rather the service of securing transportation as an intermediary (broker). It is significant to note that applicant's vice-president frequently referred to his activities as a broker and the monies withheld from underlying carriers as "brokerage fees."

By Decision No. 40843 in Application No. 28710 (re Schempp (1947) 47 CPUC 510) we held:

> "A broker is an intermediary between the shipper and the carrier. His status is that of an agent with its resulting fiduciary obligations to the party he represents, whether that party be shipper or carrier. Such status is clearly distinguishable from a straight shipper-carrier relationship. It is not a broker's proper function to issue bills of lading, either as a shipper or as a carrier nor to issue, in his own name, freight bills to cover transportation charges, nor to hold himself out as a carrier. Contract of carriage is properly one between a shipper and a carrier; a broker should not be a party thereto."

(See also re Peterson (1936) 40 CRC 71, and re Newell (1936) 40 CRC 169.) In the cited cases a license as a motor transportation broker was sought (Chapter 5, Public Utilities Code). In each the operations of each applicant were measured against the provisions of Chapter 5 of the Public Utilities Code. In most, if not all, cases there was no indication that carrier operations would cease, but that the proposed broker activities would be conducted with or would supplement carrier operations. All of the cases heretofore relied on for the distinction of broker activities clearly described such activities as an intermediary between the shipper and carrier and all

unequivocably hold that one cannot be a carrier and a motor transportation broker at the same time. (See also Section 4805.) None, however, indicate that possession of highway carrier authority is license to conduct business as a motor transportation broker without authority. The AIOO contention amounts to nothing less than an accusation that applicant's carrier authority is a smoke screen concealing broker operations. Their contention is bolstered with applicant's description of the operations, and in particular the revelation of the long association and close working relationship between Teichert and applicant. We do not believe that the evidence in this record would support a conclusion that applicant is in fact a broker. We must, however, warn that the operations of a prime carrier where little or none of its own equipment is utilized, and where the actual transportation is performed by underlying carriers, will be carefully scrutinized, particularly in those instances where the prime carrier is seeking to assess rates less than the established minimum.

Findings

1. Charges under the applicable hourly rates are determined in accordance with Item 360, MRT 7-A for each engagement.

2. For the purpose of determining charges under hourly rates named in MRT 7-A, an engagement is the total elapsed time from reporting for work to the time service is completed, less delays caused by carrier equipment and time out for meals.

3. In the event the transportation is performed by an underlying carrier, charges under hourly rates named in MRT 7-A should be determined on the basis of each engagement of each underlying carrier.

4. The rates authorized by Decision No. 84507 have been shown to be justified for the transportation service involved.

5. The condition that carrier's charges for the transportation shall not be less than revenues which would have been earned under the applicable hourly rates in MRT 7-A for the same transportation requires that charges be computed pursuant to the provisions of Item 360 of MRT 7-A for each engagement as described in Findings 2 and 3. If the charge so determined is higher than the charge determined under the rates authorized by Decision No. 84507, the charge determined under the hourly rates shall be assessed for the engagement in question.

6. In the event that the test of the condition described in Finding 5 is not made or the records specified in the second paragraph of condition (a) to the rate authorized by Decision No. 84507 are not kept, the charges must be assessed under the applicable rates named in Section 2, MRT 7-A.

7. Underlying carriers shall be paid not less than 95 percent of the charges determined pursuant to Findings 5 or 6, whichever is applicable. In all other respects the provisions of Item 210, MRT 7-A shall apply to the determination of payments to underlying carriers.

8. The evidence in this proceeding will not sustain a finding that applicant's service is that of a broker.

In the circumstances the Commission concludes that Application No. 55639 should be granted and the temporary authority granted by Decision No. 84507 be made to apply to the transportation service conducted by applicant for the construction job involved, subject to the findings herein.

O R D E R

IT IS ORDERED that the authority to depart from the minimum rates set forth in Minimum Rate Tariff 7-A granted to Lindeman Bros., Inc. by Decision No. 84507 dated June 3, 1975 shall remain in full force and effect until the completion of the required transportation services in connection with the construction of an 8.3 mile segment of Interstate Highway 5 near Hood, Sacramento County.

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

Dated at San Francisco, California, this 2nd day of DECEMBER, 1975.

President

Commissioners