

Decision No. 86190

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
HAWKEY TRANSPORTATION, INC., a
California corporation; and
CEN-VI-RO PIPE CORP., a California
corporation.

Case No. 9673
(Filed March 5, 1974)

Handler, Baker & Greene, by Marvin Handler,
Attorney at Law, for Hawkey Transportation,
Inc., and Frank Loughran, Attorney at Law,
for Cen-Vi-Ro Pipe Corp., respondents.
James Quinn, Attorney at Law, and Edwin 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 Hawkey Transportation, Inc. (Hawkey) for the purpose of determining whether Hawkey charged less than minimum rates in connection with transportation performed for Cen-Vi-Ro Pipe Corp. (CVR). Seven days of public hearing were held during the latter part of 1974 before Examiner Arthur M. Mooney in San Francisco. The matter was submitted upon the filing of concurrent briefs on April 1, 1975.

Background

The following facts are established by the record and we find them to be such:

1. Hawkey operates pursuant to a radial highway common carrier permit. It also holds highway common carrier and cement carrier certificates and a dump truck carrier permit which are not involved

herein. During the period covered by the staff investigation referred to below, it had a terminal in Anderson, employed 12 drivers and 3 shop and 2 office employees, operated 18 tractors and 16 low-bed and 59 high-bed trailers, and had all applicable minimum rate tariffs, distance tables, and exception tariffs. Its gross operating revenue for the years 1972 and 1973 were \$829,714 and \$843,113, respectively.

2. A representative of the Commission staff visited Hawkey's place of business in Anderson on various days during September, October, and November 1973 and reviewed its freight bills and supporting documents and accounting records for the period October 26, 1972 through June 7, 1973. He made true and correct photostatic copies of freight bills issued by Hawkey to CVR for transporting 1,176 loads of reinforced concrete pipe during the review period, and all of the photocopies are included in Exhibit 2. Each load consisted of a single piece of identical pipe, and the transportation was performed with low-bed equipment. The pipe was 16 feet 8-1/2 inches long, weighed 37,440 pounds, had an inside barrel diameter of 78 inches, an outside barrel diameter of 93 inches, and had a bell with an outside diameter of 102-1/2 inches on one end and a spigot on the other end with a slightly smaller diameter than the barrel for joining the pieces together. The barrel was 14 feet 11/32 inches long. The pipe was transported from CVR's plant in Shafter to a jobsite near Three Rocks, a distance of 111.9 constructive miles. The route traversed was along a level, paved road from Shafter to Interstate Highway 5, north on Interstate Highway 5 to a short distance from the jobsite, left at this point along a level, paved road to Cantua Creek, and south thereof over level dirt and gravel roads to the start of the jobsite. The pipe was strung along the jobsite. Hawkey unloaded the

pipe with its forklift and placed it perpendicular to the ditch. The pipe was part of an irrigation project. Hawkey assessed a flat charge of \$95 per load plus an unloading charge. An overwidth permit was required for each load.

3. On October 2 and 3, 1973, the staff representative personally observed the same type of pipe as that involved herein being loaded on high-bed equipment at CVR's facility at Stockton, and he followed two of the loads to a jobsite in Sacramento where he saw 16 additional loads come in on high-bed equipment. The transportation was performed by McDaniel-Costa Trucking who used subhaulers for some of the transportation. The representative took pictures of some of the loads. He visited the carrier's place of business and found that 40 such loads were transported. He made photostatic copies of the freight bills for each load, and these together with the photographs he had taken are included in Exhibit 4. He was informed by the carrier that this transportation was a backhaul from Shafter to the jobsite in Sacramento with a stop-in-transit at CVR's plant in Stockton.

4. During his investigation, the staff representative visited various carriers and shippers to determine whether they used low-bed or high-bed trailers to transport reinforced concrete pipe with an inside diameter of 78 inches. One of the shippers informed him that it manufactured such pipe in 16, 20, and 24 foot lengths; that the 16 and 20 foot lengths were transported on high-bed trailers; and that the 24 foot lengths were transported on low-bed trailers. Some of the others used either high-bed or low-bed trailers for transporting the 78-inch pipe, depending on which type of equipment was available. He observed two 9 foot lengths of such pipe with an inside diameter of 84 inches loaded crosswise on a high-bed trailer.

5. A low-bed trailer is defined in Item 11 of Minimum Rate Tariff 2 (MRT 2) as "trailing equipment, other than van-type, having its principal load carrying bed or platform not more than 42 inches above ground or street level". The low-bed equipment used by Hawkey to transport the pipe in issue would come within this definition.

6. Item 40 of MRT 2 sets forth exceptions to the commodities which are subject to the rates of MRT 2. Included in the exceptions are:

"Commodities of abnormal size or weight which because of such size or weight require the use of and are transported on low bed trailers."

7. The low-bed exception referred to in Finding 6 was added to MRT 2 as a temporary measure by Decision No. 34540 dated August 26, 1941 in Case No. 4246. Since that time, it has been continued in MRT 2. The decision points out that low-bed trailers are designed for and capable of handling extremely heavy, lengthy, or bulky articles; that in this type of hauling the carriers experience unusually high costs because of the special equipment required, difficult loading and unloading operations, slow movement over the highways, and the securing of the necessary permits for overweight, overwidth, or overheight loads; and that although the charges assessed by carriers for such specialized service generally exceed those that would accrue under minimum rates, it is not practical because of the peculiar transportation characteristics involved to quote and assess rates in cents per hundred pounds as specified in the tariff. The Commission has not issued any opinion as to what commodities would require low-bed equipment for transportation or what constitutes abnormal size or weight.

8. If Hawkey transported the pipe in issue on low-bed equipment for convenience only, the transportation would have been subject to the applicable minimum rates named in MRT 2. If minimum rates were applicable, the charges assessed by Hawkey for this transportation would have been less than the lawfully prescribed minimum rates, and the total of the resulting undercharges would be \$66,081.79 as shown in the staff's Exhibit 9. However, if the transportation did come within the exemption quoted in Finding 6, it would have been exempt from minimum rates and there would have been no undercharges.

9. Hawkey did not collect freight charges for 14 shipments transported for the Pacific Gas and Electric Company (PG&E) within the credit period specified in MRT 2. The delinquencies ranged from 26 to 98 days.

Issue

The primary issue in this proceeding is, as indicated above, whether low-bed equipment was required to transport the concrete reinforced pipe in issue.

Position of Parties

Staff

It is the staff's position that since the identical type and size of concrete reinforced pipe as that in question had been transported by other carriers on high-bed trailers, it could not be considered to be of such abnormal size or weight as to require the use of low-bed trailers and that the transportation with which we are here concerned was subject to the minimum rates and charges computed by its rate expert in Exhibit 9. The staff representative testified that with proper bracing under the pipe, the stresses of the load on a high-bed trailer can be evenly and safely distributed. According to testimony presented by the vice-president of McDaniel-Costa

regarding the transportation by his company referred to in Finding 3 above, there was no damage to the high-bed trailers used to transport the pipe, there was no breakage of any of the pipe, no citations were issued by the California Highway Patrol for any of this transportation, and if McDaniel-Costa were to transport more of this type of pipe, it would continue to use high-bed equipment for the transportation.

Representatives of three trailer manufacturers and a state traffic officer specializing in commercial enforcement presented evidence in support of the staff position. The three manufacturers' representatives each testified that the heavy-duty trailers manufactured by his company had the capability, with adequate bracing under the load, to withstand any static or dynamic stresses that may be encountered in transporting the pipe involved herein; that this could be done with safety and efficiency; and that, in his opinion, low-bed equipment was not required for this transportation. The state traffic officer stated that he is familiar with the type of pipe in question; that there are no regulations requiring that such pipe be transported on low-bed equipment; and that in his opinion, with proper bracing and tie downs, this pipe can be safely transported on high-bed equipment.

The staff in its brief argued that the pipe in issue has been routinely transported on high-bed trailers; that such transportation complies with highway safety regulations and meets manufacturers' structural requirements for high-bed equipment; that it has not been demonstrated on this record that low-bed equipment was required; that in the circumstances, this transportation does not come within the low-bed exemption in Item 40 of MRT 2, and is subject to the applicable minimum rates set forth in the tariff; that the Commission should not loosely and liberally interpret the low-bed exemption; that if the

Commission were to do so, it could then be argued that all transportation on low-bed equipment, irrespective of whether it be canned goods or any other commodity, would be exempt from minimum rates; and that this was never the intent of the exemption as stated in Decision No. 34540.

The staff recommended that Hawkey be directed to collect the \$66,081.79 in undercharges from CVR and pay a fine in the amount of the undercharges plus a punitive fine of \$2,500.

Hawkey and CVR

It is the position of both respondents that the transportation under consideration did come within the low-bed exemption in Item 40 of MRT 2 and that it was therefore exempt from minimum rate regulation. Following is a summary of the evidence presented on behalf of respondents by the president and manager of Hawkey, the president and general manager of CVR, representatives of three other carriers, a rate and tariff expert, and an engineering expert: Although it might be possible to transport the pipe on high-bed equipment, there is serious doubt about the adequacy of such equipment for this transportation. Because of the weight of the load at the center of the trailer, the tie down requirements, the tendency for the corners of the equipment to pull up, and the greater convenience of loading and unloading, such pipe has generally been transported on low-bed equipment. Furthermore, the stresses of the load on a low-bed trailer would be much less, and the lower center of gravity would greatly reduce the possibility of tipping the load. Low-bed trailers would be from 40 to 100 percent safer for transporting such pipe. No other company manufactures the identical type of pipe as that herein. However, three other companies do manufacture a 78-inch inside diameter pipe without a bell and mainly use their own low-bed

equipment for transporting it. Any high-bed trailers they use are specially constructed for this type of load. The other carriers who submitted bids to CVR for the job in question all based their bids on the use of low-bed trailers and the exemption in Item 40 of MRT 2. CVR's profit on this job was \$23,000, and if it were now required to pay the MRT 2 charges in Exhibit 9, it would lose approximately \$46,000 on the project. In determining whether a commodity requires the use of special equipment such as low-bed trailers, the Interstate Commerce Commission has consistently applied a broad and common sense interpretation to the word 'require' and in so doing has taken into account various subjective factors, including safety, industry practices, and historic methods of handling. This reasonable approach should be applied in interpreting the low-bed exemption.

The witness for Hawkey testified that in early 1969 he had a discussion with a member of the Commission staff, who is now deceased, and was informed by him that the transportation of the type of pipe herein would come within the low-bed exemption and that he relied on this interpretation. Another staff representative called as an adverse witness by Hawkey's attorney stated that although he was aware that the Hawkey witness and the deceased staff member had discussed the transportation of pipe and the low-bed exemption, he was not present during the conversation; that he did not know if the discussion involved the identical type pipe as that herein; and that he had informed the Hawkey witness that he was not personally familiar with the application of the low-bed exemption.

In their joint brief, respondents urged that the Commission find that the transportation in issue did come within the low-bed exemption in Item 40 of MRT 2; that Hawkey did not assess unlawful charges; that there are no undercharges; and that the facts and circumstances do not warrant the imposition of any fines on Hawkey. They asserted that if there had been any doubt on their part regarding the applicability of the low-bed exemption to this transportation, CVR would have used the vehicle unit rates in Minimum Rate Tariff 15, which would have resulted in total charges substantially the same as those actually assessed by Hawkey, or purchased or leased trucks for the haul. They also stated that with respect to the late collection of charges from PG&E referred to in Finding 9, Hawkey made every attempt to collect within the applicable credit period but was unable to secure the shipper's cooperation.

Discussion

We are of the opinion that a reasonable doubt has been raised on this record whether the low-bed exemption in Item 40 of MRT 2 does or does not apply to the transportation in issue. The evidence and argument presented by respondents on this issue are persuasive. It is obvious that the exemption would not apply to the transportation of canned goods or other similar commodities. However, the pipe in question weighs 37,440 pounds per joint, and because of its weight and size, only one piece can be transported on a unit of equipment. Furthermore, it requires a heavy-duty forklift for loading and unloading, and special bracing and tie downs are required for the load. It is certainly evident that the pipe is something more than

what could be considered normal size and weight. On the other hand, there is evidence in this proceeding that the pipe has been transported on regular high-bed equipment. However, inasmuch as this transportation is in a gray area insofar as the exemption is concerned, it would be unfair, in the circumstances, to deny the use of the exemption for this case at this time. Carriers are placed on notice that in the future it will be their responsibility to be prepared to fully justify the use of charges which they consider exempt from minimum rates under Item 40 of MRT 2.

Although Hawkey's failure to collect transportation charges from PG&E within the applicable credit period may have been due to a lack of cooperation by the shipper, the fact remains that MRT 2 requires that charges be collected within the credit period stated therein, and it is Hawkey's responsibility to see to it that this rule is complied with.

We are of the opinion that this investigation should be discontinued.

Findings

In addition to the above nine findings, we further find as follows:

10. In the absence of reasonable guidelines to the contrary, the transportation in issue comes within the low-bed exception in Item 40 of MRT 2.

11. Hawkey should collect charges for all transportation it performs within the applicable credit period.

Conclusion

Case No. 9673 should be discontinued.

O R D E R

IT IS ORDERED that Case No. 9673 is discontinued.

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

Dated at San Francisco, California, this 3rd
day of AUGUST, 1976.

William J. Quinn President
James L. Stinson
Leonard R. ...
Commissioners

Commissioner Robert Batimovich, being necessarily absent, did not participate in the disposition of this proceeding.