

Decision 84 10 033

OCT 3 1984

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
 own motion into the operations,  
 rates, and practices of Frank C.  
 Alegre Trucking, Inc., a California  
 corporation, Kaiser Cement  
 Corporation, a Delaware corporation,  
 and individuals, partnerships, or  
 corporations listed in Attachment A,  
 Respondents.

OII 83-05-01  
 (Filed May 4, 1983)

(For appearances see Appendix A.)

O P I N I O N

This proceeding was instituted to investigate the operations, rates, and practices of Frank C. Alegre Trucking, Inc. (Alegre); Kaiser Cement Corporation (Kaiser) and 38 carriers who subhailed for Alegre (subhaulers) for the purpose of determining:

1. Whether respondent Alegre has violated Public Utilities (PU) Code §§ 3664, 3667, and 3737 by failing to charge and collect the applicable minimum rates and charges as set forth in Minimum Rate Tariff (MRT) 7-A. Specifically, whether Alegre has, as a device, assessed rates and charges based on fictitious hours calculated by a conversion formula using a distance tonnage rate less than the applicable minimum distance tonnage rate set forth in MRT 7-A, resulting in undercharges.

2. Whether respondent Alegre has violated PU Code § 3737 and Item 210 of MRT 7-A by failing to pay subhaulers 95% of the applicable minimum rates and charges set forth in MRT 7-A.
3. Whether respondent Alegre has violated PU Code §§ 3664, 3667, and 3737 by furnishing respondent Kaiser a service of value in the form of a truck scale, load weights, and a weighmaster without assessing a reasonable charge for such services.
4. Whether the respondent subhaulers have violated PU Code §§ 3737 and 3668 by participating in the conversion device.
5. Whether respondent Kaiser has paid respondent Alegre less than the applicable rates and charges.
6. Whether, in the event sums less than said applicable minimum rates and charges are found to have been charged, collected, received or paid, certain sanctions should be imposed.

Public hearings were held before Administrative Law Judge O'Leary on September 20 and 21 and December 5 and 6, 1983 at San Francisco. The matter was submitted on February 24, 1984 with the filing of concurrent briefs by the Commission staff (staff), respondent Alegre and California Dump Truck Owners Association.

Staff Evidence

The evidence presented by the staff discloses that Alegre operates as a dump truck carrier and a highway contract carrier under permits issued July 16, 1973 and September 10, 1981, respectively.

In August 1982 the staff received an anonymous "hot line" complaint alleging that Alegre was undercharging the shipper and underpaying subhaulers on shipments of clay from North American Refractories Co. (NARCO), Indian Hills to Kaiser Cement, Permanente. As a result of the complaint an investigation was conducted by the Associate Transportation Representative (Representative) who is in charge of the Commission's office in Stockton.

The investigation revealed that Alegre was hauling approximately 30 to 40 loads per day in bottom dump equipment. Approximately 20 units of equipment were used to make the haul on a Monday through Friday basis. One-third of the units were owned and operated by Alegre, one-third were owned by subhaulers who also used their own trailers, and the other third were subhaulers who owned their own tractors but pulled trailers owned by Alegre. Exhibit 3 contains copies of Alegre's records covering the above-described transportation for the period May 1982 through August 1982. The commodity transported was described as both laterite and red clay. ✓

The invoices contained in Exhibit 3 indicate that transportation charges assessed by Alegre and paid by Kaiser were based on an hourly rate. The staff presented evidence that actually transportation charges were based on a tonnage rate of \$8.80 per ton. The charges arrived at were divided by the hourly rate of \$42.00 to arrive at the number of hours that should be set forth for billing purposes.

Testimony of the staff representative and the invoices to subhaulers contained in Exhibit 8 disclose that a similar conversion practice was used for the payment to subhaulers. Rather than being paid 95% of the hourly rate, they were paid 95% of a tonnage rate. However, they were not paid 95% of the \$8.80 per ton rate at which Kaiser was being billed. Prior to August 1982, they were paid on the basis of an \$8.20 per ton rate. After August 1, they were paid on the basis of an \$8.00 per ton rate even though Kaiser continued to be billed at the rate of \$8.80 per ton.

In addition to hauling the material for Kaiser, Alegre also provided a weighing service at no charge. A scale was installed at the quarry and was operated by an Alegre employee who was paid at the rate of 75¢ per load. The scale was owned by Alegre and was purchased at the cost of \$15,000. Although Kaiser has its own scales at the Permanente plant, Kaiser representatives told the staff representative that the trucks were not reweighed at the plant. Visits to the plant by the staff representative revealed that the Kaiser scales were extremely busy.

Les Calkins, president of Les Calkins Trucking Inc. (Calkins) testified on behalf of the staff. His testimony disclosed that during 1980 and 1981 Les Calkins Trucking Inc. transported the material from Ione to Permanente. It further disclosed that in 1980 Kaiser requested that he install a scale at the quarry and provide weights because of traffic problems Kaiser was having at the plant with so many trucks to weigh. The scale itself cost \$27,000 while the decking cost an additional \$3,000. Covington, the Kaiser employee who awarded the contract suggested a price of 25¢ per ton for the weighing service which was accepted. He charged and was paid at the rate of 25¢ per ton during both 1980 and 1981.

Calkins was an unsuccessful bidder in 1982, the year when Alegre received the contract. Prior to submitting his bid in 1982 he was informed by Doug Reynolds, the new traffic manager for Kaiser, that the company would again require a scale. Consequently, he included a charge for the weighing service in his bid. He bid the haul itself at the minimum tonnage rate for clay under the provisions of MRT 7-A using a distance of between 120 and 130 miles.

A staff rate expert presented a rate exhibit indicating that between May 12, 1982 and August 27, 1982 Alegre charged Kaiser \$16,352.86 less than the minimum tonnage rate and charge for clay as described in Item 40 of MRT 7-A and hauled a distance of between 120 and 130 miles. The staff rate expert also testified that Alegre

hauled 48,899.27 tons for Kaiser between May and August 1982. He further testified that in his opinion Kaiser should have been charged a weighing fee for the service and that a fee of 25¢ per ton would have generated a charge of \$12,224.82.

Exhibits 14 and 15 sponsored by this witness are copies of dictionary definitions of laterite from Funk & Wagnalls Standard College Dictionary and Merriam Webster's Third New International Dictionary, respectively. The definitions are as follows:

Exhibit 14:

"Laterite 1. A reddish, porous clay consisting principally of aluminum and iron hydroxide, formed in tropical regions by the disintegration of underlying rocks. 2. a type of soil produced by such distingration."

Exhibit 15:

"Laterite 1. A residual product of rock decay that is red in color and has a high content in the oxides of iron and hydroxide of aluminum and a low proportion of silica 2a: a zonal group of red soils developed in hot humid climates that show intense weathering and chemical change and leaching away of bases and silica leaving aluminum and iron hydroxides. b: a crusted soil of this group or a horizon in such soil developed through restricted drainage; esp: a mottled quarriable clay which hardens on exposure to air".

Exhibit 16 is a copy of page 92 of Pacific Southcoast Freight Bureau Clay Tariff whereas the commodity is deccribed as "Clay, laterite crude".

Defense by Respondent Alegre

Alegre argues that in this type of proceeding the staff is the moving party and has the burden of proving the allegations set forth in the Order Instituting Investigation (OII).

Alegre did not present any evidence to refute the staff evidence concerning the billing method (conversion of tons to fictitious hours) used for the assessment of charges nor the similar method of payment to subhaulers. It also did not present any evidence to refute providing of a weighing service without charge.

Alegre's defense is based upon three premises as follows:

1. The subject transportation was not rendered as a dump truck carrier.

Alegre argues that the allegations of the OII (page 1 unnumbered paragraph 1) and the stipulation between Alegre and the staff (Exhibit 1) clearly establish that the transportation is alleged to be rendered under Alegre's dump truck carrier permit. It further argues that the transportation of laterite to Kaiser, which was for use in the process of manufacturing of cement, does not fall within the definition of dump truck carrier as defined in PU Code § 3520.

2. The Commodity transported is not properly classified as clay.

Alegre presented three witnesses concerning the commodity laterite as follows:

- a. John Y. Cole Jr., manager of Mines for NARCO who holds a Bachelor of Science and Masters degree in mineral sciences.
- b. Harvey E. Doner, a professor of soil biology at the University of California, Berkeley.

- c. Harley O. Biggs, the chief chemist in charge of quality control at Kaiser's Permanente plant.

Each of the above testified that laterite is not clay.

Witness Doner testified concerning a chemical test to identify laterite and distinguish it from clay. The test is based upon the ratio of iron, aluminum and silica contained in the commodity. When the ratio is 1.33 or less the commodity is laterite. A ratio of 2.00 identifies the commodity as clay. A ratio between 1.33 and 2.00 identifies the commodity as laterite soil.

Witness Biggs presented component and additive analyses sheets (Exhibit 24) which show that the ratio for the commodity transported during 1982 and 1983 was always less than 1.33.

3. Alegre not required to assess charges for weighing service at point of origin.

Alegre asserts in its brief that the staff contends that the weighing service is a violation of the second clause of PU Code § 3667 which states:

"...; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the Commission."

Alegre contends that until it is established that Alegre was operating as a dump truck carrier and that laterite is properly classified as clay, subject to the minimum rates in MRT 7-A there can be no refund or remittance of any portion of any rate or charge.

The respondent subhaulers did not present any evidence in their own behalf.

Staff Rebuttal

A soil mineralogist, employed by the State of California, Division of Mines and Geology, with a Bachelor of Science degree in soils science, a Master of Science degree in soil clay mineralogy, and a degree of Doctor of Philosophy in soil mineralogy testified in rebuttal that in his professional opinion laterite contained clay materials.

The staff rate expert presented Exhibit 31 which calculates that the undercharges would have been \$77,308.26 rather than \$16,852.26 had the commodity transported been rated as Earth rather than Clay. This represents an increase in the undercharge figure of \$60,955.60.

Discussion

There is no doubt that in an enforcement type proceeding the staff is the actual moving party and has the burden of proving the allegations set forth in the OII.

The argument that the transportation was not rendered as a dump truck carrier is a nonissue in this proceeding. The alleged PU Code violations by Alegre are set forth in Ordering Paragraphs 1, 2, and 3 of the OII. The PU Code Sections alleged to have been violated are 3664, 3667, and 3737. The application of these sections is not confined to Dump Truck Carrier but rather apply to the broader group of "Highway Permit Carrier" which group includes dump truck carriers as well as highway contract carriers. There is no question that Alegre performed the transportation as a highway permit carrier. As the staff points out in its brief if the transportation was not performed as a dump truck carrier it was performed as a highway contract carrier. The mere fact that the OII does not mention Alegre's highway contract carrier permit or the fact that the staff stipulated that Alegre was responding to the OII as a dump truck carrier is of no consequence. It would be a different situation if we were dealing with a matter involving the failure to have certain operating authorities or if PU Code §§ 3664, 3667, and 3737 dealt



with only dump truck carriers rather than the broader class of highway permit carrier. In view of this it is not necessary for us to determine whether the transportation was performed as a dump truck carrier. We must only determine whether the transportation was performed as a highway permit carrier. There is no question in this record that such was the case.

We now turn to the commodity transported. There is no question that the commodity is laterite. The basic question to be resolved is whether laterite is properly rateable as clay. The staff rate expert's rate study is based on the premise that the commodity is clay as listed in Item 40 of MRT 7-A. Three eminently qualified experts testified on behalf of Alegre that laterite is something other than clay. Laterite is not listed as a commodity in MRT 7-A. "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." Dick Bell Trucking Inc. (1973) 75 CPUC 418. We are of the opinion that a reasonable doubt exists as to whether laterite is properly rateable as clay under MRT 7-A. Since there are no longer minimum class rates, the commodity cannot be rated by analogy. Therefore, it follows that there is an ambiguity as to whether laterite is subject to the minimum rates. This ambiguity should be resolved in favor of respondents and the investigation should be discontinued.

Since the transportation in question is not subject to minimum rates under the present provisions of MRT 7-A there is no need to discuss whether or not charges should be assessed for the weighing services.

Finding and Conclusion

The Commission finds that the transportation of laterite is not subject to minimum rates under the present provisions of MRT 7-A and concludes that the investigation in OII 83-05-01 should be discontinued.

O R D E R

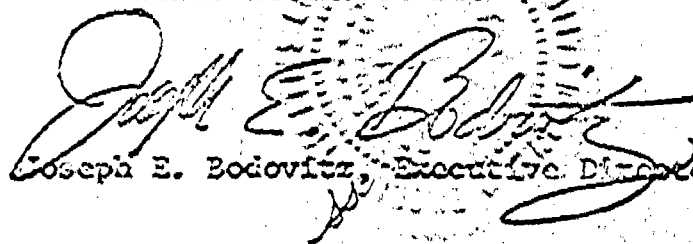
IT IS ORDERED that OII 83-05-01 is discontinued.

This order becomes effective 30 days from today.

Dated OCT 3 1984, at San Francisco, California.

VICTOR CALVO  
PRISCILLA C. GREW  
DONALD VIAL  
WILLIAM T. BAGLEY  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

  
Joseph E. Bodovitz, Executive Director

APPENDIX A

LIST OF APPEARANCES

Respondents: Edward J. Hegarty, Attorney at Law, for Alegre Trucking Inc.; Eloy S. Urias, David A. Borth, Tony Calvillo, Ben Muniaín, Ronald D. Gouvaia, Frederick James O'Carroll, for themselves; Rufus Cervantes, for Cervantes Trucking; Bob Evans, for Bob Evans Trucking; and Clarence W. Maas, for C. W. Maas Trucking; Mike Mallin, for South Bay Transportation; and Manuel Mello, for Mac Trucking.

Interested Parties: Handler, Baker, Greene & Taylor, by Daniel W. Baker, Attorney at Law, for Lemore Transportation, Inc. dba Royal Trucking Co.; John Dayak, for Amaral Trucking, Inc.; Fred R. Covington, for Covington & Carothers; Jerry Hansen, and James D. Martens, for California Dump Truck Association; Silver, Rosen, Fischer & Stecher, by John Paul Fischer, Attorney at Law, for Raymond E. Skaggs; and Don G. Redlingshafer, for self.

Commission Staff: Patrick Gileau, Attorney at Law, and Will Anderline.

(END OF APPENDIX A)

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