ALJ/JSL/rsr

Decision 87 11 022 ORIGINAL NOV 13 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California Trucking Association to amend the provisions of General Order 150 governing the transportation of cement and related commodities by cement carriers, highway common carriers, contract carriers, and cement contract carriers.	)	Application 84-11-036 (Filed November 15, 1984)

O P I N I O N

On July 16, 1986 we issued Decision (D.) 86-07-036 on the request of California Trucking Association (CTA) to revise General Order (GO) 150 to conform with new legislation (AB 4033, effective September 27, 1984) concerning the regulation of rates for cement transportation.

By D.86-09-032, dated September 17, 1986 we stayed D.86-07-036 pending further order of the Commission.

D.86-07-036 resulted in the following:

1. Cancellation of GO 150 and Resolution TS-672; adoption of Go 150-A.

2. Cancellation of all rate reductions (RRs), except six, some involving backhauls, and some not involving backhauls.

3. The six RRs not canceled were required to be rejustified within 60 days.

Under the provisions of AB 4033, reduced rates must be fully compensatory based solely upon the cost from origin to destination and return, and revenues therefrom, i.e., without regard to backhaul revenues. (Public Utilities Code Section 452.1.)

By D.87-01-075, dated January 28, 1987 we modified D.86-07-036 and denied rehearing.

Ordering Paragraph 3 of D.87-01-075 states as follows:

"3. D.86-07-036 is hereby modified as follows:

"a. Ordering paragraph 2 is amended to read:

'General Order 150-A, attached to this decision as Attachment B, is adopted and made effective on the effective date of this order, except that the second paragraphs of both Rule 7.1(A)(1) and Rule 7.1(C) of General Order 150-A are amended to read:

"A cement carrier may not meet a rate that was authorized to be published under Rule 7.1(A)(2) herein."

'and except that the last sentence of the first paragraph of Rule 7.1(A)(2) is amended to read:

"Cement rates that are reduced in accordance with this rule may be authorized for no longer than one year."'

"b. Ordering paragraph 4 is amended to read:

'All cement transportation rate reductions originally cost-justified by including backhaul revenues in their calculations, and "me-too's" of all cement transportation rate reductions so justified, are canceled, effective 180 days from the effective date of this order.'" (July 27, 1987.)

and Ordering Paragraph 5 of D.87-01-075 states:

"5. All rate reductions affected by this order shall be canceled within 180 days of the effective date of this order. All rate reductions applied for after the effective date of this order must be justified under law as amended by AB 4033, and rejustified annually thereafter."

In D.87-01-075 we observed by way of discussion, (page 3) but did not find or hold, that prior to AB 4033 cost-justification of RRs could involve calculations including backhauls, "i.e., including revenues derived from carrying commodities other than cement on the return journey." We further observed (page 4) that to grandfather all backhaul-justified RRs would be to ignore AB 4033 altogether and simply continue with things as they were prior to the passage of that legislation. We concluded that the only way to comply with the legislation and preserve the competitive balance in the industry would be to grandfather none of the backhaul-justified RRs at all, but to require justification of all RRs and me-too's according to the provisions of AB 4033.

On July 8, 1987 Frank C. Alegre Trucking, Inc. (Alegre) and Customer Truck Service (CTS) (petitioners) presented their request "Under Public Utilities Code Section 1705 To Abrogate And Annul, As A Matter Of Law, Ordering Paragraphs 3(b) And 5 Of Decision 87-01-075 And To Extend Time For Any Compliance With These Orders By These Applicants Pending Disposition Of This Application And A Reasonable Time Thereafter." The request was docketed as a "Petition for Modification of Decision 87-01-075 and to Extend Time..." et cetera.

Petitioners allege generally as follows:

1. Ordering Paragraphs 3.b. and 5 of D.87-01-075 are legally void, of no effect, and, as a matter of law, fatally defective as applicable to cement carrier services provided by petitioners subsequent to July 27, 1987. The primary reason for this position is that Public Utilities (PU) Code § 1705 requires that each "decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision...".

2. Even if D.87-01-075 is not, as a matter of law, void, it would not require cancellation of any significant portion of Alegre's RR 1305, since RR 1305 is premised upon 45 separately

cost-justified movements, 20 of which involve only the one-way transportation of cement and the revenue derived therefrom. Furthermore, another 21 of the separately justified 45 movements involve two or more segments of cement transportation, and therefore, do not rely upon "backhaul" revenues as "defined" in D.87-01-075. (That is, the wording in D.87-01-075 on page 3: "Cost-justification of RRs could involve calculations including backhauls, i.e., including revenue derived from carrying commodities other than cement on the return journey" Alegre has taken literally, alleging that since Alegre's backhaul movements do involve movements of cement, this "definition" of backhaul revenue does not apply to his situation.)

Petitioners also assert that they did not file a Petition for Review of D.87-01-075 with the California Supreme Court for two principal reasons: First, the Court almost invariably exercises its discretion by refusing to accept transportation-related proceedings for review; and, second, petitioners believe that if the decision is susceptible of different interpretation, the settled law in California is that the interpretation consistent with the findings of fact and conclusions of law must be adopted.

Petitioners maintain that Ordering Paragraphs 3.b. and 5 of D.87-01-075 cannot be sustained because they are contrary to and not supported by the findings of fact and conclusions of law (of D.86-07-036). They refer us to Pacific Freight Lines (1952) 51 CPUC 744 (review denied), where the Commission (prior to the amendment of PU Code § 1705 in 1961 to require separately stated findings and conclusions) stated:

> "An order of the Commission must be construed in the light of the findings contained in the decision which precede it. No construction of a phrase employed in an order can be supported if it is contrary to the findings contained in

> the opinion. Stated another way, an order of the Commission must be supported by the findings; and if the order is subject to two different interpretations, that one which is consistent with the findings must prevail."

Petitioners also cite Industrial Communications Systems, Inc. v Pomona Radio Dispatch Corp. (1973) 75 CPUC 433, where we stated:

> "Contrary to the defendant's contention, it is a settled administrative principle that an order of the Commission is governed and controlled by its findings. An order of the Commission cannot be sustained if it is contrary to or not supported by the findings contained in the decision of the Commission. If the order is susceptible of different interpretation, that construction which is consistent with the findings must be adopted, and prevails."

A number of similar additional citations have been furnished by petitioners. They argue that a pivotal material issue in this proceeding was stated by the Commission itself in D.86-07-036 (page 4):

> "1. What action, if any, should be taken with regard to rate reductions filed and effective subsequent to April 1, 1982 but prior to the effective date of AB 4033, September 27, 1984?"

The importance of this issue, petitioners contend, was further emphasized on pages 6 and 18-19 of D.86-07-036. However, they profess, in D.87-01-075 the Commission modified D.86-07-036, denied rehearing, and attempted to dispose of this material issue with Ordering Paragraphs 3.b. and 5, supra.

Petitioners believe that the above manner of attempting to subject all cement carriers to the rate reduction provisions of AB 4033 is not supported by underlying findings of fact and conclusions of law. The findings of fact and conclusions of law

upon which D.87-01-075 are premised are stated in D.86-07-036, and are as follows:

"Findings of Fact

"2. On September 27, 1984 AB 4033 was signed into law, substantially amending portions of the PU Code affecting the transportation of cement."

"4. One of the significant changes enacted by AB 4033 is contained in PU Code §§ 452.1 and 3666.1(b)(1) and requires that rates filed as rate reductions be fully compensatory based solely upon the cost of transportation from origin to destination and return. This wording is mandatory only as to requests to establish a rate less than the maximum reasonable rate filed after the enactment of AB 4033. It does not apply to reduced rates established between April 1, 1982 and September 27, 1984."

"7. Adequate provisions exist through established complaint procedures, contained in Go 150, PU Code § 728 and Rule 9 of the Commission's Rules of Practice and Procedure, for challenging rates of cement carriers and cement contract carriers which are alleged to be unreasonably low.

"8. The existing rate reductions which involve significant current activity, 1203 and 1205 of PAR, 1305 of Alegre, 1544 of Lopes, 1571 of CTS, and 1680 of CAP, were cost justified when initiated on the basis of the law applicable on the dates of their establishment."

"12. Our conclusion herein that the rate reduction requirements established pursuant to AB 4033 do not apply to rate reductions established prior to September 27, 1984, obviates the need for the proposed report filed by protestants."

"Conclusions of Law

"5. The wording contained in PU Code §§ 452.1 and 452.2 relating to rate reductions is prospective and does not apply to rate reductions established prior to September 27, 1984."

"8. The new wording enacted by AB 4033 may not be applied to rate reductions established prior to September 27, 1984."

Petitioners also believe that Ordering Paragraph 3.b. of D.87-01-075 had the effect of authorizing, in perpetuity, and with no future cost-justification requirement, the active and inactive rate reductions and "me-toos" of those filings not originally cost-justified by including backhaul revenue.

The issues thus raised by petitioners in their petition for modification are the following:

1. The abrogation/annulment of D.87-01-075 as a matter of law;

2. The need for justification of Alegre's RR 1305, i.e., those movements involving backhauls of cement and those justified only on the basis of one-way costs;

3. The "definition" of backhaul on page 3 of D.87-01-075, and its effect on Alegre's RR 1305; and

4. The alleged omission from consideration of RRs not involving backhauls because of the wording contained in Ordering Paragraph 3.b., of D.87-01-075, in amending Ordering Paragraph 4 of D.86-07-036.

It is apparent that the findings of fact and conclusions of law stated above do not conform with Ordering Paragraphs 3.b. and 5 of D.87-01-075. Properly, we should have amended the above findings and conclusions in D.86-07-036 to agree with D.87-01-075. However, petitioners were bound to apply for rehearing of D.87-01-075 in a timely manner if they wished to stay that order; and this they failed to do. Therefore, D.87-01-075 is not defective as a matter of law. The citations which petitioners have referred us to do not involve decisions of this Commission where applicants had not pursued their duty in seeking rehearing within the time constraints set forth in the PU Code. Section 1731

thereof provides that "No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance..." The filing of petitioners' request on July 8 to abrogate or annul D.87-01-075, issued in January 1987 is untimely. Petitioners were negligent in their duty to follow the provisions of § 1731 and cannot be excused from complying with D.87-01-075, nor can they sustain their argument that D.87-01-075 should, as a matter of law, be abrogated and annulled. The California Supreme Court held in Northern California Association to Preserve Bodega Head and Harbor v Public Utilities Commission (S.F. No. 21483, March 17, 1964) that there is no statutory right to reopen Commission proceedings once they have been submitted and decided.

The 45 movements of cement shown in Exhibit 31 represent transportation performed under Alegre's RR 1305. About half involve both front- and backhauls of cement; the balance are one-way hauls.

We find Alegre's argument that the movements involving backhauls of cement are not covered by D.87-01-075, because they do not fall under the "definition" appearing on page 3 of the decision, to be without merit. The wording on page 3 of the decision is not a definition; it is mere observation, or dictum. It was not intended to be taken as an all-inclusive definition for the term "backhaul." This "definition" does not appear in the findings, conclusions, or ordering paragraphs of the decision. However, to remove any doubt or misunderstanding which may exist with respect to this matter, we will modify D.87-01-075 to clarify and emphasize this point.

Our intent in D.87-01-075 was partially stated on page 4 of the decision, as follows:

> "To grandfather all backhaul-justified RRs would be to ignore the legislation altogether and

> simply continue with things as they were before the passage of AB 4033. New carriers would be subject to AB 4033, but the law itself would create a permanent barrier to their entry in the industry, because they could not compete effectively with the grandfathered RRs of older carriers. Therefore, the only way to comply with the legislation and preserve the competitive balance in the industry is to grandfather none of these RRs at all, but to require justification of all RRs and me-toos according to the provisions of AB 4033."

The above-stated intent may not adequately address our purpose concerning all cement RRs and me-too's thereof, since it inadvertently appears to deal only with those reductions involving backhauls. Therefore, we hereby clarify our intent by stating that all RRs and me-toos should be rejustified by December 31, 1987, and annually thereafter. Our order herein will reflect this purpose. The correction of this inadvertence will properly dispose of Alegre's RR 1305.

On July 31, 1987 Frank E. Hicks Trucking, Inc. (Hicks) and Raymond E. Skaggs Trucking, Inc. (Skaggs) filed their joint Reply In Opposition To Petition For Modification Of Decision 87-01-075 filed by Alegre/CTS. Hicks/Skaggs allege generally that petitioners' filing was untimely on its face; that they seek an unfair advantage in waiting so long to file their petition, since other carriers will have canceled their RRs; and that petitioners should be censured and be required to collect undercharges based upon the difference between RR rates and rates otherwise applicable.

Petitioners responded to the Hicks/Skaggs reply on August 5, 1987, again stressing the requirement of findings of fact and conclusions of law which will support the order, and denying the allegation regarding unfair advantage.

After consideration, we will resolve this tangled dispute by clarifying our intent in D.87-01-075 and removing the wording construed by petitioners as a definition on page 3 of the decision.

In view of the industry uncertainty resulting from our issuance of D.87-01-075, and the fact that the decision only required RRs involving backhauls to be rejustified, we do not deem it fair or necessary to require petitioners to collect any differences which may exist between charges applicable under RR authority and those otherwise applicable after July 27, 1987. They, and all other cement haulers having used RRs, will be allowed until December 31, 1987 to justify their RRs on the basis of AB 4033. Most carriers had cancelled their RRs, and will require this time to submit appropriate cost data.

Findings of Fact

1. By D.86-07-036 we canceled Go 150 and Resolution TS-672, and adopted GO 150-A. The decision canceled all RRs and me-toos thereof.

2. By D.87-01-075 we denied rehearing on D.86-07-036, and modified that decision, ordering that all cement RRs originally cost-justified by including backhaul revenues in their calculations, and "me-toos" thereof, were to be canceled 180 days from the effective date of the order (July 27, 1987).

3. Page 3 of D.87-01-075 contained the following language:

> "Cost-justification of RRs could involve calculations including backhauls, i.e. including revenues derived from carrying commodities other than cement on the return journey."

This wording is not a definition, and was not intended by this Commission to be understood as a definition.

4. D.87-01-075 is a final decision of this Commisson. It is not, as a matter of law, null and void. As a matter of discretion, based upon petitioners' petition for modification, the Commission may change, alter or amend its decision. Further, the

Commission's findings and conclusions on matters of fact are final and its decisions are presumed to be valid. (American Toll Bridge Co. v Railroad Com. (1938) 12 Cal. 2d 184.)

5. The Commission's intent in D.87-01-075 was to require justification of all RRs according to the provisions of AB 4033.

Conclusions of Law

1. D.87-01-075 should be modified to give proper effect to our intent in that decision.

2. The language on page 3 of D.87-01-075 considered by petitioners to be a definition should be stricken.

3. Petitioners' request to extend time for compliance with D.87-01-075 should be granted and extended to all cement carriers and cement contract carriers, to December 31, 1987.

O R D E R

IT IS ORDERED that:

1. D.87-01-075 is modified as follows:

   a. Ordering Paragraph 3.b. is modified to read:

   "All cement transportation rate reductions, and me-toos of all cement transportation rate reductions, are canceled unless justified on the basis of AB 4033 by December 31, 1987."

   b. Ordering Paragraph 5 is modified to read:

   "All rate reductions applied for after the effective date of this order must be justified on the basis of AB 4033, and rejustified annually thereafter."

2. The first full sentence appearing at the top of page 3 of D.87-01-075 is deleted.

3. RRs and me-toos thereof already canceled pursuant to D.87-01-075, may be reinstated effective on one day's notice to the Commission and the public, but must be justified by December 31, 1987 and rejustified annually thereafter on the basis of AB 4033.

4. The Executive Director shall serve a copy of this decision on each cement carrier and each cement carrier's publishing agent, and on each cement contract carrier.

This order is effective today.

Dated NOV 13 1987, at San Francisco, California.

STANLEY W. HULETT
President
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

Commissioner Donald Vial, being necessarily absent, did not participate.

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

Victor Weissor, Executive Director

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