

ALJ/EGF/ltq

Decision 87 11 056 NOV 25 1987

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pyramid Commodities)
to transfer Cement Carrier Certificate)
(T-97258) to Charles Baker and)
Marilyn Baker doing business as)
Charles Baker (T-69100) for Fresno,)
Kern, Los Angeles, Orange, Riverside,)
San Bernardino, San Diego, Santa)
Barbara and Ventura Counties.)

Application 87-08-002
(Filed August 3, 1987)

O P I N I O N

Pyramid Commodities (Pyramid) has applied to sell and transfer a cement carrier certificate authorizing service in nine California counties, originally granted to Lee Gayle by Decision 69922, in Application 46537.

Pyramid was incorporated as a California Corporation on November 18, 1970. A copy of its Articles of Incorporation is on file with the Commission in File T-97258. Pyramid has applied to transfer its authority to operate as a cement certificated carrier in the Counties of Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura. The operating authority to be transferred was granted to Pyramid by Commission Decision 78782, dated June 15, 1971, in Application 52485. Charles Baker (Baker) will pay a purchase price of \$10,000 as soon as the transfer is authorized by Commission order. The application includes a copy of a freight bill showing that applicant has exercised the authority to be transferred within the 12 months immediately preceding the date of filing this application.

Baker operates under a general commodity highway common carrier certificate, a highway contract carrier permit, and a dump truck carrier permit, with 3 tractors, 3 pneumatic

semitrailers, and 3 pneumatic trailers. Baker's balance sheet dated May 5, 1987 covers the calendar year 1986. It shows assets of \$739,480 and liabilities of \$360,835.

Charles Baker is identified as a partner with Marilyn Baker, his wife. Each has a half interest in the business known as Charles Baker (T-69100). Charles Baker has certified that he is an equal partner, and that he has resided in the State of California continuously for not less than 90 days next preceding the filing of this application; that he will not lease equipment from employees and will not engage subhaulers.

A protest was filed on July 28, 1987, prior to the filing of the formal application. An amended protest was filed on September 4, 1987, which requests that a hearing be held. Protestants are listed as United Ready Mixed Concrete Company, Inc., United Premix Concrete, Inc., Mobile Concrete, Inc., and TTT, Inc. It is alleged that the first two named are cement and concrete products companies who utilize the services of cement certificated carriers and are involved in this action as a result of a suit brought against them by Pyramid in the Los Angeles Superior Court, which concerns the validity of the certificate to be transferred in this proceeding. Mobile Concrete, Inc. is also a defendant in the Los Angeles action and is participating in the protest for that reason. TTT, Inc. is identified as a cement certificated carrier who operates in all nine counties mentioned in the authority applicant seeks to transfer. TTT, Inc. has the same address as the first two protestants named and the verifications for all 4 protestants are signed by the same individual as corporate representative. TTT, Inc. is not identified as a defendant in the Los Angeles court action.

Those who oppose applications filed by truck carriers to obtain additional operating authority, are invariably competitors of the applicant, who allege that granting the application will permit another carrier to enter protestant's area of operation.

This type of protest is not effective on transfers of active operating authorities, since the right transferred is already in existence and can't be collaterally attacked.

Three of the protestants are identified as defendants in Pyramid's Los Angeles law suit where the validity of the Pyramid certificate may be challenged. TTT, Inc. serves the nine counties to be transferred as a certificated cement carrier, but it and the other protestants fail to allege that a grant of the application will affect their transportation operation, or tend to influence their customers.

It is alleged on "information and belief" that Pyramid carried no cement for extended periods of 12 months or more from 1976 through August of 1982 and that Pyramid represented to the Commission that it was operating when the transportation was performed by other carriers. Protestants argue that Pyramid's cement carrier certificate thereby terminated and lapsed due to a lack of use or abandonment as provided in Public utilities (PU) Code Section 1065.2,

"1065.2--"except that any such certificate not exercised for a period of 12 consecutive months, inclusive of all periods of suspension, shall lapse and terminate."

Protestants cite two cases to support their position. The first is A. W. Hays Trucking, Inc. (1970) 71 CPUC 20. A.W. Hays Trucking, Inc. (Hays) applied for authority to sell 8 of 47 counties it was authorized to serve under its cement carrier certificate. Hays had not served these counties since its certificate was obtained in 1966. It was held that Hays had abandoned the 8 counties under the provisions of PU Code § 1065.2, even though it operated in all other counties. A rehearing was granted and the decision was rescinded and the findings and conclusions overruled at pages 614 and 615 of the same volume (71 CPUC). The latter decision held that a charge of abandonment must

be applied to the entire certificate and not to segments thereof. The second case (Granzotto Trucking Co., Inc. (1975) 79 CPUC 12) concerns a cement carrier certificate which was designated as abandoned after it was not exercised for a period of at least three consecutive years prior to the filing of the application requesting authority to transfer it. Neither case is on point here. The protest should be rejected.

Finally, protestants allege that the Pyramid certificate has terminated due to abandonment resulting from long periods of nonuse extending from 11 to 5 years ago. The period is so remote that transportation records may no longer be available and witness testimony will be blunted by the passage of time. The Commission has already adopted a position on the allegation of a cement certificate abandonment and the present facts and pleadings do not justify any change in the rule originally adopted. Cement has been transported under the certificate in 1986 as evidenced by a freight bill attached to the application.

The Commission has stated that:

"Protestants appear to be raising the old argument of abandonment in a transfer proceeding, along with the attendant argument that this, in effect, would constitute a new service, which can only be justified by a showing of public convenience and necessity. The Commission has repeatedly rejected this argument and rejects it once again. (Readymix Concrete Co., Ltd. (1966) 65 Cal PUC 587, at 590.)

Further, we note that the protests were filed on information and belief. While protestants are permitted to do this under our rules, they must realize that such a protest does not carry the weight that a protest alleging specific facts and detailing the evidence to be presented at hearing carries. Rule 8.1 of the Commission's Rules of Practice and Procedure defines a protest as containing (a) an objection to the granting of the

authority sought, (b) a request for a public hearing, and (c) an offer of the evidence which the protestant would sponsor or elicit at a public hearing. Rule 8.2 provides that the filing of a protest does not insure that a public hearing will be held; the content of the protest is determinative.

Protestants have filed a protest, a lengthy response to applicant's motion to dismiss the protest, and an amended protest. Nowhere do the protestants state what evidence they would elicit and, in fact, admit that they have not obtained much of the evidence they intend to produce. Even in the face of the motion to deny the protest, protestants have not offered anything more specific than "protestants are informed and believe that Pyramid carried no cement between July 1980 and at least January 1982." We do not find this persuasive.

Notice of the filing of the application was published in the Commission's Daily Calendar on August 5, 1987 and in the Daily Transportation Calendar on August 6, 1987. A letter dated August 31, 1987 was received from WMB Transportation, Inc. (WMB), a certified cement carrier. The letter identifies WMB as an interested party and requests that the Commission rule on the validity of the Pyramid certificate.

The request to participate in this proceeding, filed by WMB Transportation, Inc. should be denied.

Findings of Fact

1. Charles Baker has resided in the State of California continuously for not less than 90 days next preceding the filing of this application.
2. Baker applied to serve 9 counties under authority of a cement carrier certificate to be purchased and transferred from Pyramid.
3. A protest was filed by a group of 3 noncarriers, and a cement carrier who operates in all 9 counties Baker has applied to serve.

4. Protestants have not alleged that granting the application will reduce their business or customers.

5. It is alleged that protestants were informed that Pyramid Commodities abandoned its cement operating authority by not using it for 12 consecutive months and more during the period from 1976 through August of 1982.

6. Pyramid has provided a freight bill to prove operation as a cement carrier within the last 12 months.

7. There is no indication that Pyramid Commodities has not operated under the certificate in recent years.

8. The noncarriers have failed to show sufficient interest in the transfer proceeding to qualify as Protestants.

9. The carrier (TTT, Inc.) is qualified as a protestant, but does not indicate that granting the application will affect its cement hauling in any way.

10. The letter from WMB is not a protest, nor does it raise issues which would justify continuing this proceeding and scheduling a hearing.

11. The proposed transfer would not be adverse to the public interest.

12. A public hearing is not necessary.

Conclusions of Law

1. The argument of protestants that an operating right to be transferred has been abandoned by nonuse for a 12-month period, 5 or more years prior to the transfer proceeding, should be rejected (Readymix Concrete Co. Ltd.) (1966) 65 Cal PUC 587, 590.)

2. The application should be granted.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

ORDER

IT IS ORDERED that:

1. Pyramid Commodities may sell and transfer the operative rights and property specified in the application to Charles and Marilyn Baker. This authorization shall expire if not exercised by January 30, 1988, or within such additional time as the Commission may authorize.

2. Purchasers shall:

- a. File with the Transportation Division written acceptance of the certificate and a copy of the bill of sale or other transfer document within 30 days after transfer.
- b. Amend or reissue seller's tariffs. The tariffs shall not be effective before the date of transfer, nor before 5 days' notice is given to the Commission.
- c. Comply with General Orders Series 100, 117, and 123, and the California Highway Patrol safety rules.
- d. File an annual report of seller's operations for the period from the first day of the current year to the date of transfer.
- e. Maintain accounting records in conformity with the Uniform System of Accounts.
- f. File an annual report by April 30 of each year.
- g. Comply with General Order Series 84 (collect-on-delivery shipments). If purchasers elect not to transport collect-on-delivery shipments, they shall file the tariff provisions required by that General Order.

3. When the transfer is completed, and on the effective date of the tariffs, a certificate of public convenience and necessity

is granted to Charles and Marilyn Baker authorizing them to operate as a cement carrier, as defined in PU Code § 214.1 between the points set forth in Appendix A.

4. The certificate of public convenience and necessity granted by Decision 78782 is revoked on the effective date of the tariffs.

5. The protest is dismissed.

6. The petition of WMB Transportation, Inc. to intervene as an interested party is denied.

This order is effective today.

Dated NOV 25 1987, at San Francisco, California.

STANLEY W. EULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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


Victor Weisser, Executive Director

Charles and Marilyn Baker, by the certificate of public convenience and necessity granted in the decision noted in the margin, are authorized to conduct operations as a cement carrier as defined in Section 214.1 of the Public Utilities Code from any and all points of origin to all points and places within the Counties of Fresno, Kern, Los Angeles, Riverside, Orange, San Bernardino, San Diego, Santa Barbara, and Ventura.

This certificate of public convenience and necessity shall lapse and terminate if not exercised for a period of 12 consecutive months, inclusive of all periods of suspension.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

Decision 87 11 056, Application 87-08-002.