

MAY 12 1988

Decision 88 05 033 MAY 11 1988

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. and Kaiser)
 Cement Corporation, Lone Star)
 Industries, Calmat Co., Calaveras)
 Cement, Granite Construction,)
 Nevada Cement Company, and Blue)
 Circle West Cement, and order to)
 show cause.)

I.88-04-065
(Filed April 27, 1988)

Edward J. Hegarty, Attorney at Law, for Frank C. Alegre Trucking, Inc., respondent.
Ellis Ross Anderson, Attorney at Law, for E. F. Mitchler, Inc.; John Dayak, for Amaral Trucking, Inc.; Gary E. Haas, for Dolo-Chem Transport, Inc. and Grimsley Trucking, Inc.; Stan Kody, for RMC Lonestar; Priscilla Ladeira, for Rich Ladeira Trucking, Inc.; Julie A. McKnight and D. J. Reynolds, for Kaiser Cement Corporation; Silver, Rosen, Fischer & Stecher, by John Paul Fischer, Attorney at Law, for Les Calkins Trucking, Inc. and Frank E. Hicks Trucking, Inc.; Richard W. Smith, Attorney at Law, for California Trucking Association; Shirley Tibbs, for Foothill Bulk Transport, Inc.; and D. G. Redlingshafer, for himself; interested parties.
Lawrence O. Garcia, Attorney at Law, for the Transportation Division.

INTERIM OPINION ON THE ORDER TO SHOW CAUSE RE CEASE AND DESIST ORDER

On April 27, 1988 we issued Order Instituting Investigation 88-04-065 which, among other things, ordered Frank C. Alegre Trucking, Inc. (Alegre or Respondent) to appear and show cause why it should not be ordered to cease and desist from soliciting and transporting cement in bulk or packages at rates proposed in Application (A.) 87-12-052 pending this Commission's

approval (or nonapproval) of the rates proposed in that application.

This order was based on the allegations set forth in a Motion for an Ex-Parte Cease and Desist Order filed in A.87-12-052 on February 26, 1988 on behalf of the Commission's Transportation Division staff. Specifically, staff asserted that Respondent was, in January, 1988, soliciting and transporting cement at rates proposed in Item 205, First Revised Page 17, of the amended rates proposed in its A.87-12-052, which rates had not been authorized by this Commission, and some of which rates are lower than the rates authorized in 1983 pursuant to Rate Reduction RR-1305. Staff further asserted that Respondent's vice president, Frank Alegre confirmed that Respondent is currently assessing the rates and charges for the transportation of cement set forth in A.87-12-052.

This show-cause hearing was held on an expedited basis in the Commission's courtroom in San Francisco on May 9, 1988 and submitted that day. At the hearing staff presented two witnesses, Alegre presented one witness, and staff, Alegre, Les Calkins Trucking, Inc., and Frank E. Hicks Trucking, Inc., and the California Trucking Association, presented closing legal argument on the propriety of issuing a cease and desist order in this matter.

Staff witness Moira R. Simmerson, a Senior Transportation Rate Expert, sponsored Exhibit 1 which compares rates in Item 250 of Respondent's rates as filed pursuant to RR-1305 with corresponding rates proposed in Item 205 in A.87-12-052. The exhibit shows that the proposed rates would be higher for some routes, lower for some routes, and the same for some routes.

Staff witness Greg Thompson, Associate Transportation Representative in the Commission's Stockton District Office, testified that he conducted an inspection of Respondent's Lodi office on February 11, 1988 and on February 19, 1988 and that he and his associate copied the various bills of lading and other

documents regarding rates charged for cement transportation in February, 1988 and sent them to the Commission's rate experts in San Francisco for review. Thompson also testified that Mr. Alegre stated that Respondent was then using the new rates and charges which are set forth in A.87-12-052, and that it was doing so at the advice of counsel.

Thomas J. Hays testified on behalf of Respondent, Alegre. He described himself as a "transportation cost-finding technician". He testified that he prepared A.87-12-052 filed December 28, 1987 and its amendment filed December 31, 1987. Mr. Hays' affidavit was received as Exhibit 2. He testified that Alegre had authority for less than maximum rates pursuant to RR-1305 on 45 different cement hauls, all in its northern territory. He stated that when this Commission issued Decision (D.) 87-11-032 on November 13, 1987, cancelling all cement transportation rate reductions unless they were justified on the basis of AB 4033 by December 31, 1987, he had "serious doubt that accurate costs and rates could be developed within the time frame allotted in the decision". Based on the Commission not setting out a specific definition of the terms "justified" or "rejustified" in its decision, his concern about the adverse impact on customer relations due to the loss of authority to charge reduced rates, and his belief that "there appeared to be no logical economic basis for approximately one-half of [Alegre's] cement business to be provided on a reduced rate basis while the other half was assessed full rates", he produced a "mileage scale of rates" which he claims complies with D.87-11-032 and AB 4033. Mr. Hays also testified that the rates set forth in A.87-12-052 are fully compensatory and that he believed since the application which he had prepared justifies Alegre's proposed new rates, that he interprets Ordering Paragraph 3 of D.87-11-032 to permit these rates to take effect upon one day's notice, since "any other interpretation [of D.87-11-032] would give an unfair advantage to

the carriers who had already cancelled their RR's." That Ordering Paragraph states:

- "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."

Discussion

D.87-11-032 does not change the terms of D.87-01-075 which required the cancellation of any rate authorized at a level less than the maximum reasonable rate, except that it allowed previously effective RR and me-too rates to be reinstated until December 31, 1987, by which time they had to be justified. The basic question before this Commission in the present is what we meant by "justified" in D.87-11-032. It is Alegre's position that since it would be unlikely that we could hold a hearing and issue a decision on its showing in compliance with AB 4033 (that is, Public Utilities (PU) Code Sections 452.1 and 452.2, effective September 27, 1984), we must have meant that they could implement their proposed rate reductions as soon as they filed an application with this Commission.

The law does not permit a carrier to set rates for the transportation of property at less than the maximum reasonable "except upon such showing as is required by the commission and a finding by it that the rate is justified by transportation conditions." (PU Code Section 452.) The law establishes an additional requirement when it is a cement carrier which is requesting authority to establish such rates. PU Code Section 452.1 requires this Commission to ascertain that the rate requested "is fully compensatory based solely upon the cost of transportation from origin to destination and return and the projected revenue to be derived from the requested rate." Such authority may be granted for not more than one year. If the carrier wishes to continue the

same reduced rate it must again make a showing which satisfies the requirements of Section 452.1 and additionally "make a showing to the satisfaction of the commission, supported by operating results and cost data developed from the transportation to which the less-than-maximum reasonable rate was applicable, that the renewal at less than the maximum reasonable rate is justified." (PU Code Section 452.2 (a).)

GO 152-A, Rule 7.1 A.(2) describes the means of cement carrier compliance with these code sections. It specifies that rate justification for proposed reductions in cement rates to a level "lower than the rates of competing cement carriers" is to be made by application and specifies what must be included with the application when it is and is not a renewal. Rule 7.1 B. describes the requirements for cement carrier rate increase applications.

No statute or General Order (GO) rule permits a cement carrier to unilaterally implement new rate reductions. For the Commission to permit such action would be an abrogation of its duty to make a determination that the rates are justified and fully compensatory. As Mr. Smith pointed out in his closing statement on behalf of the California Trucking Association there are situations in which we have, in some general freight transport situations, delegated to our staff rate approval functions based on specifically stated criteria. We have made no such delegation of authority with respect to cement transport or the provisions of GO 150-A, and none should be implied. Furthermore, while it may be true that we could not have made a determination, particularly in a contested application, between the effective date of D.87-11-032 and January 1, 1988, we would remind Alegre that D.87-01-075, issued January 28, 1987 had already placed such a requirement on cement carriers, by cancelling their reduced rates in 180 days. It was a final order of this Commission, albeit an order which Alegre, 19 days before the July 27, 1987 cancellation date, decided to challenge.

Alegre could have protected itself by filing an application justifying its existing reduced rates or its new rate reduction proposal concurrent with its challenge to that decision, but it chose to take the chance that this Commission would agree with its position and not require the cancellation of any significant portion of Alegre's RR-1305 rate authorization. The gamble did not pay off, except that this Commission did agree to allow the cancelled rates to be reinstated until the end of 1987. Unfortunately, the decision granting this extra bit of time was not issued until November, 1987. This Commission's business often results in the issuance of decisions which take longer than we would ideally prefer. Alegre probably knows this since it has appeared before us on numerous occasions over the last several years. It took a risk which resulted in an adverse impact, and now it comes before us with an untenable interpretation of the clear mandate of the statutory law and GO 152-A, in an apparent attempt to protect itself from the consequences of that risk.

As a separate argument Respondent suggests that issuance of an order to cease and desist would be procedurally improper because Rule 9 of GO 150-A requires the Commission's issuance of notice of improperly filed rates and directing the carrier to amend or cancel the improperly filed rate. This rule is not applicable to the facts before us. There is no basis for asserting that the rates Alegre filed in its application are improper. What is certain is that Alegre is assessing rates different from the maximum reasonable rates which should have been in effect since January 1, 1988.

D.87-01-075 as modified by D.87-11-032 cancelled the less than maximum reasonable rates authorized for Alegre in RR-1305 as of January 1, 1988. Only maximum reasonable rates are presently authorized, and this will be true unless and until such time as this Commission might authorize a different rate or rates. The cement rates Alegre is presently charging, to the extent that they

are not the maximum reasonable rates, violate the mandate of these decisions.

We do not wish to delay our review of the rates proposed in A.87-12-052, therefore, we will set the matter to be heard on the earliest feasible date.

Findings of Fact

1. Frank Alegre Trucking Inc. has, since at least February of 1988, implemented and collected the reduced cement rates which are set out in its A.87-12-052.
2. The rates set out in A.87-12-052 differ from maximum reasonable rates in that some are higher, some are lower, while some remain the same.
3. A.87-12-052 is still pending before this Commission.
4. This Commission has not issued any authorization of the cement rates set out in A.87-12-052.

Conclusions of Law

1. D.87-01-075 as modified by D.87-11-032 as applicable to Frank Alegre Trucking Inc. requires that Alegre charge maximum reasonable cement rates unless and until the rates it proposes in a properly filed application are authorized by this Commission.
2. To the extent that cement rates now being charged and solicited for by Frank Alegre Trucking Inc. are not maximum reasonable rates, said carrier is in violation of this Commission's orders in D.87-01-075 as modified by D.87-11-032.

INTERIM ORDER

Therefore, IT IS ORDERED that:

1. Frank Alegre Trucking, Inc. shall cease and desist from charging or soliciting to charge cement rates other than maximum reasonable rates as described in this decision unless and until this Commission issues a further order authorizing different rates.



2. A hearing shall be held regarding Application 87-12-052 before Administrative Law Judge Colgan in the Commission Courtroom, 505 Van Ness Avenue, San Francisco, California, on Monday, May 23, 1988, at 10:00 a.m.


3. The Executive Director shall mail a copy of this order to all parties in Application 87-12-052.

This order is effective today.

Dated May 11, 1988, at San Francisco, California.

STANLEY W. HULETT
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

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