

Decision 89 02 002 FEB 8 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
Mailed

James L. Wright, an Individual,)
Complainant,)
vs.)
Otto Terkildsen, Inc.,)
a California corporation,)
Otto Terkildsen,)
Defendant.)

FEB 9 1989

Case 88-05-001
(Filed May 2, 1988)

D. G. Redlingshafer, for James L. Wright,
complainant.
Holden, Fergos, and Celio, by Richard C. Celio,
Attorney at Law, for Otto Terkildsen, Inc.,
defendant.
Priscilla Ladeira, for Rich Ladeira Trucking,
Inc., and Les Calkins, for Les Calkins
Trucking, Inc., interested parties.
Raul Wuerstle, for the Transportation Division.

OPINION

James L. Wright (complainant) operates as a cement carrier under a Certificate of Public Convenience and Necessity granted by this Commission.

The complaint alleges that defendant Otto Terkildsen, Inc. (OTI) is a California Corporation operating out of Oakdale, California. It holds authority to operate as a highway common carrier, dump truck carrier, highway contract carrier, and an agricultural carrier. It is alleged that Otto Terkildsen has been the president and principal stockholder of OTI since May 1984 and is therefore responsible for its present and past operation. It is

further alleged that since May of 1984 OTI has operated in California as a cement common carrier without first obtaining the necessary authority under Public Utilities (PU) Code §§ 211 and 1063, and that said transportation is therefore performed in violation of PU Code § 1068.2. The complaint thereupon requests that the Commission issue a Cease and Desist Order against defendant forbidding it from engaging in the transportation of cement in California until the proper authority is obtained. The Complaint also requests that the Commission institute a formal investigation of the activities of OTI.

Defendant filed an Answer on June 8, 1988. OTI admits operation under California authority as a highway common carrier, highway contract carrier, dump truck carrier, and an agricultural carrier, and to holding authority from the Interstate Commerce Commission (ICC) under MC-169882. All other allegations in the complaint are denied and defendant alleges that the transportation services in question are interstate and are not subject to Commission jurisdiction.

A public hearing was held on June 23 and July 21, 1988 in San Francisco before Administrative Law Judge Edward G. Fraser. Complainant provided testimony from three witnesses. Defendant provided testimony from two witnesses. Documentary evidence was introduced by both parties. The matter was submitted on July 21, 1988, subject to the filing of briefs, which were received on September 30, 1988.

An amicus curiae brief was filed on September 15, 1988, by the Los Angeles law firm of Russell and Hancock. The brief favored complainant's position and was filed in the name of WMB Transportation and Fikse Bros., Inc. The amicus curiae brief has been accepted and placed with the other briefs and pleadings in this proceeding.

The Transportation

Basalite (a Division of Pacific Coast Building Products) purchased cement from Nevada Cement Company in Fernley, Nevada from 1979 through December 31, 1986. Truck transportation was utilized from 1979 to 1982 to move the cement from Fernley to Pacific's cement block plant in Napa, and to Redding, California. Truck transport was discontinued in 1982 and the cement was transported from Fernley to Perkins (near Sacramento) by the Southern Pacific Railroad Company, in hopper cars. Upon reaching Perkins, the cement was stored in large silos, until transported by truck to Napa or Redding.

About January 1, 1987, Pacific stopped dealing with Nevada Cement Company of Nevada and started buying all bulk cement from Blue Circle West Cement and Concrete, Inc. of Richmond, California. Blue Circle purchases cement in Mexico and transports it to Richmond, California by ship. The ships are chartered by Blue Circle and deliver at least 5,000 tons every 2 or 3 weeks. The bulk cement is unloaded in Richmond and stored in a private warehouse operated by Blue Circle, which has a 14,000 ton capacity. Blue Circle later sells to Basalite which transports the cement to Napa or Redding in OTI trucks. The Redding facility was recently shut down and no longer handles cement. OTI also hauls cement to other points in, and outside the State of California.

The question is whether the described transportation is intrastate in character, or interstate commerce.

The Motions

Defendant moved to dismiss the complaint on the first day of hearing prior to receipt of evidence. Defendant argued that the Commission is without jurisdiction since the concerned transportation is interstate in character. This motion was taken under submission. Defendant also moved for a continuance to provide defendant more time to obtain witnesses and to prepare a defense. This motion was denied. Defendant made a motion just

before submission to request that the Commission stay its decision on this proceeding until the ICC has ruled on Defendant's Petition For Declaratory Order, (filed with the ICC on July 29, 1988 in Washington, D.C. MC-C 30121). Said petition requests that the ICC find that the transportation of cement from Perkins to Napa and from Richmond to Napa are a continuation of a prior interstate shipment and therefore subject to the jurisdiction of the ICC. Defendant's counsel noted that the ICC requires six to eight months to decide petitions for declaratory relief.

The Evidence

Complainant provided testimony from a truck driver who worked for OTI from January 20, 1987 to about February 28, 1988. He authenticated Exhibit 1 and offered it in evidence. The exhibit information is taken from Driver's Daily Reports and covers transportation performed by OTI trucks from January 20, 1987 through February 24, 1987 and from February 16, 1988 through February 20, 1988. The document shows trucks moving from a new cement plant in Dixon (Solano County) to Richmond, to be loaded; then to Redding to be unloaded, and returned to Dixon, or Redding. The cement plant at Dixon and the (block) cement plant at Redding were both owned by Basalite (Pacific). A few loads were hauled into Dixon, but most loads went to Redding. When the Dixon plant expanded, the Redding plant was closed. The witness testified that the bill of lading from the shipper (Blue Circle Cement) listed Glass Mountain Block in Carson City as the destination of the cement, when it was actually delivered to Redding, or Napa, in California. The driver usually calls his dispatcher the night before pickup to verify where the load is to be delivered. When the witness contacted OTI he was told by Terkildsen to deliver the load in California but to make no change on the destination listed on the bill of lading. The witness testified that when he was told to haul the load to a destination in California, Terkildsen told him that OTI "would get in trouble" if the destination was changed

on the freight bill. The witness admitted on cross-examination that changing the destination of a load of bulk cement on the evening prior to pickup was not unusual, but the action requires a change on the bill of lading to show where the cement was actually delivered. This entry would be important to provide information which determines what the driver is entitled to as payment for the trip.

Complainant's second witness worked as a mechanic and dispatcher for OTI from 1985 through 1987, into 1988. The witness testified that his dispatching concerned movements from Fernley in Nevada) to Napa, then from Sacramento (Perkins) to Napa. The final shipments were dispatched from Blue Circle in Richmond to the Napa plant. The witness identified the commodity as bulk cement and identified the two drivers by name who usually handled the loads. There were other drivers who were employed for short periods of time.

The witness testified that he painted one truck (power unit) white in December of 1986 and a second truck in February, 1987 at Terkildsen's request. He testified that Terkildsen advised the job was done to support the claim the vehicles were leased to Basalite (Pacific), and Basalite Block Co. stickers were attached to the doors. The witness advised that Terkildsen stated this action was necessary since he had no authority to transport cement. The witness further testified that no copies of a lease agreement were kept in the truck cab as required, and the drivers were paid by OTI, not by the lessee, as required. The witness believed that anyone seeing a white truck with Basalite decals on the doors would infer that the purchaser of the cement was transporting in its own trucks. The witness stated that he saw some of the freight bills covering transportation of cement in OTI trucks from Perkins to Napa and his recollection is that the freight bills showed Perkins as the origin and Napa as the destination.

Complainant's last witness was a truck driver who authenticated Exhibit 2, which includes 13 pages of loads (of cement) he transported as a truck driver for OTI, from January 11, 1987 through September 3, 1987. The exhibit refers to the paperwork on 407 loads, which moved from Richmond to Napa, with very few exceptions. He stated that no one ever asked him to change the origin or destination on a freight bill or bill of lading. His testimony was provided to prove the number of hauls performed by OTI during the stated period.

Defendant's first witness was sales manager for the Basalite Division of Pacific Coast Building Products, based in Sparks, Nevada. He stated that Basalite is the Division of Pacific Coast responsible for manufacturing and distributing concrete products, with California installations at Redding, Napa, and Dixon. Nevada units are located at Sparks, and Carson City, with a mining operation 7 miles east of Dayton (Nevada).

He stated that he was responsible for purchasing the large quantity of cement required by Basalite during the period covered by this complaint. Nevada Cement Company of Fernley, Nevada, provided the product from 1979 through December 31, 1986. He testified that he met with representatives of Nevada Cement once a year and negotiated a cement price FOB their plant, for the entire year. The negotiations included an estimate of the tonnage of cement to be required for the period under discussion and was based on the record of cement used during the prior period. He stated that the cement was moved by truck, at first, with defendant participating in the transportation. He stated that in 1982 the cement was moved by rail, due to a more favorable rate and the difficulty of getting trucks over the Sierra during winter storms. The rail shipments moved from Fernley to Perkins, in California. Upon arrival the bulk cement was unloaded into large silos and later loaded into trucks for transportation to Redding or Napa. Capacity of the silos at Perkins was estimated as 5,000 tons, with

Basalite purchasing 3,500 or 4,000 tons a month, of which 400 tons was destined to Redding. The witness further testified that Basalite operated under the impression that Perkins was a mere stopover and that the final destination was either Napa or Redding.

The witness testified that the destination of loads of cement may be changed without notice to anyone and without changing the shipping documents. This occurs frequently, when large purchasers experience a shortage on a job and demand deliveries without delay.

The witness described the purchase of cement from Blue Circle after January 1, 1987. Blue Circle chartered steamships to transport what the witness estimated to be 10,000 tons of cement per load from Mexico to Richmond, with a load coming in every two or three weeks. Basalite or Pacific would purchase about 4,000 tons of cement per month as one of Blue Circle's principal buyers. He further testified that the cement is purchased FOB Richmond by Basalite and transported by truck from the Richmond warehouse where it is stored, to Napa. Since title passes to Basalite at the Richmond warehouse, Basalite arranges for transportation to move the cement. OTI's trucks would normally be employed for this purpose.

Otto Terkildsen was defendant's second witness. He testified that he is the owner and president of OTI, Inc. He has 23 years experience as an owner, transporting bulk commodities, including cement. OTI's ICC Certificate of Public Convenience and Necessity (CPC&N) was placed in evidence as Exhibit 10. He stated OTI was incorporated in 1984 and authority was transferred to OTI from the prior holder Viking Trucking. OTI holds authority from the PUC as a certificated highway common carrier, a highway contract carrier, dump truck carrier, and agricultural carrier. All of the authorities held exclude the transportation of cement.

The witness stated that Commission investigators have checked his records several times over the past year, with the last

visit about 6 months prior to July, 1988. Nothing was said to indicate that he was doing anything illegal and he provided complete cooperation convinced that the transportation is interstate in scope.

The witness admitted that two OTI trucks were painted white around January 1, 1987 to haul exclusively for Basalite. The lease with Basalite evolved when the latter complained about OTI's incompetent drivers. The lease was executed to provide a legal basis for Basalite to hire its own employees. Under the agreement Basalite was to hire and pay its own drivers and operate the two trucks. Driver service improved however, and Basalite did not bother to bring in new drivers. OTI then continued to furnish and pay its own drivers to operate the trucks. The trucks only hauled for Basalite and were on call at all times. Copies of the written lease were not placed in the trucks and the lease became much less important when the driver controversy was solved. The witness testified that he did not remember advising defendant's second witness of the reason for painting the trucks.

Discussion

Defendant has not received cement from Fernley, Nevada since December 31, 1986. It is pointless to order a carrier to cease transportation it has not performed for two years. It is also pointless to classify the transportation as interstate or intrastate in character when it is not being performed and will not be re-established in the foreseeable future. We will therefore not rule on the Fernley transportation and will deny the request for a cease and desist order on this segment of Defendants' operation.

The transportation of cement from Mexico to Richmond, then to Napa or Redding is ongoing. Blue Circle Cement, Inc. purchases the cement in Mexico and transports it by ship to the Port of Richmond, California. The cement is then sold to Basalite, from Redding, California, who takes title at the Richmond warehouse where the cement is stored, and Basalite arranges for OTI to

transport the cement from Richmond to Napa or Redding. The transportation from Mexico is separate and ends when the cement is sold. A new owner takes over in California and moves the cement by carrier from a California origin to one or more California destinations. The transportation by OTI out of Richmond is intrastate in character and is subject to regulation by this Commission.

Bills of lading (Exhibit 6) on this transportation are prepared by Blue Circle West Cement, Inc. of Richmond, California, and addressed to Basalite Division of Pacific Coast, at a Redding, California Post Office Box for payment.

The Applicable Law

The Federal District Court stated the rule succinctly as follows:

"Transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier, and if delivery is then made at a point in the same state, the transportation is not interstate transportation subject to economic regulation by the Interstate Commerce Commission." (Penn RR. Co. vs. ICC. (1965) 242 Fed Sup. 890.)

Defendant has cited a 1987 ICC case in which a carpet company manufactured its product in Georgia, then shipped the carpets to a large distribution center in Arlington, Texas. The ICC held that all of the carpet shipped to Arlington was in interstate commerce when delivered to local Texas customers, even where carpet had been stored for weeks and was not designated for a particular customer from the time of arrival. (Armstrong World Industries, Inc. (E & B Carpet Mills) - Transportation Within Texas (April - 1986) No. MC-C-10963); Appeal (in which the Cal. P.U.C. is a party) pending in U.S. Court of Appeals, 5th Circuit, New Orleans (Case 87-4725).) The ICC rationale for finding interstate transportation seems to have been that there was control of the product by the carpet company. According to the ICC, the

manufacture of the product and its transportation to the distribution point and to final customers was controlled by a single party, the carpet company.

The Quaker Oats case appeal (in which the Cal. P.U.C. is a party) pending in U.S. Court of Appeal, 9th Circuit, San Francisco, Cases 87-7439, 88-7041 (The Quaker Oats Company - Transportation Within Texas and California (August - 1987) No. MC-C-30006) was referred to as a recent example of the efforts of the ICC to classify various within-a-single state transportation as interstate in character. The Quaker Oats Company (Quaker) petitioned the ICC for a declaratory order that certain ex-warehouse transportation performed within Texas, or within California, was interstate in character. Quaker has large distribution centers at Dallas, Texas, and Fullerton, California containing food goods that has been transported to the centers from out-of-state points. Approximately 75% of the goods moving out of the Dallas warehouse was eventually delivered to customers in Texas; 98% of the Fullerton distribution was to California customers. The states of California and Texas argued that the transportation is intrastate since the final destinations of the goods is undetermined when they come to rest in the Quaker distribution centers. Quaker argued that the goods which come from Quaker's 60 manufacturing or distribution points in other states are closely monitored while they are stored in the California and Texas warehouse/distribution centers and should be considered to remain in interstate commerce.

All shipments from the California and Texas distribution points were classified by the ICC as interstate in scope. The decision was based on the supposed intent of the shipper (Quaker), who controls the goods from the date of manufacture or receipt at one of Quaker's distribution facilities.

The transportation of cement from Mexico to Napa or Redding is accomplished by two shippers. Blue Circle purchases the

cement in Mexico and transports it to Richmond, California, where it is stored in a warehouse until purchased. Basalite purchases the cement, takes title at Richmond, and moves the cement in its own carrier to Napa or Redding. The last move has no connection with the transportation from Mexico to Richmond. Blue Circle has no control or interest in the cement after it is sold in Richmond, where Basalite takes over on transportation with origin and destination in the State of California.

Defendant also argues that this Commission is precluded from further action in this proceeding until the ICC has acted upon the Petition for Declaratory Relief filed by defendants herein on July 29, 1988. The legal basis for this argument is a case decided in 1982 (App. of Greyhound Lines, Inc. December - 1982) 10 Cal PUC 2d, 541). Greyhound had requested that non-employees who were performing pickup-and-delivery within commercial zones established by the ICC be excused from the provisions of the Public Utilities Code. Shipments could be intrastate or interstate and many of the carriers performing this service held no authority from the PUC. We held that federal regulation was applicable to the transportation and that state control of the intrastate PUD operation described would constitute an unreasonable burden on interstate commerce. The facts of the Greyhound case do not relate to this proceeding. We are concerned with transportation of cement purchased in California, by a California carrier, from the California location where the cement was purchased, to a destination in California.

Findings of Fact

1. Defendant OTI is a California carrier with authority to operate within California as a certificated highway common carrier, a highway contract carrier, a dump truck carrier, and an agricultural carrier. None of OTI's authorities authorize the transportation of cement.

2. OTI does have authority to transport cement under a certificate of public convenience and necessity issued by the ICC.

3. This complaint was filed to charge that OTI has been and is transporting cement between points in California without first obtaining the required authority from the California PUC and to request an order from the Commission requiring that OTI cease and desist from performing such transportation until the proper authority has been acquired.

4. The transportation concerns movement of cement from Fernley, Nevada, to Perkins, California, thence to Napa and Redding. Also, from Mexico to Richmond, California, thence to Napa and Redding.

5. The movement of cement from Fernley, Nevada, to Perkins, California, was discontinued by defendant on December 31, 1986 and there is no indication that this movement will be reinstated.

6. The issuance of a cease and desist order to forbid transportation which has not been performed for two years would serve no purpose.

7. On the Mexico to Richmond transportation, the cement is purchased by a shipper with an address in Redding, California, at the Richmond warehouse, and transported to a destination in Napa or Redding by a California carrier, the defendant herein.

8. The transportation of cement by OTI from Richmond California to either Napa or Redding is intrastate transportation, completely within the State of California.

9. OTI should be ordered to cease and desist transporting cement from Richmond, California to Napa and Redding without first obtaining the necessary authority from this Commission.

Conclusions of Law

1. The transportation of cement by OTI from Richmond to Napa and/or Redding is intrastate commerce and is subject to regulation by this Commission.

2. The motion to dismiss this complaint should be denied.

3. The motion to defer all action in this proceeding until the ICC rules on the Petition For Declaratory Relief should be denied.

4. Defendants should be ordered to cease and desist from transporting cement from Richmond to Napa, or Redding without property to do so.

5. This order should become effective on the day after it is served on defendants.

ORDER

IT IS ORDERED that:

1. Otto Terkildsen, Inc., Otto Terkildsen, an individual, and their agents, drivers, servants, employees, attorneys, and all persons acting in concert with them are to cease and desist from transporting and moving cement by dump truck, cement truck, or other motor vehicle from Richmond to Napa, or Redding, California, until further order of the Commission.

2. The motion to dismiss the complaint is denied.

3. The motion to defer the issuance of an order in this proceeding is denied.

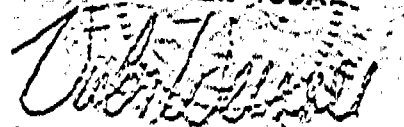
4. The Executive Director shall cause a copy of this cease and desist order to be personally served on Otto Terkildsen, Inc., and Otto Terkildsen, an individual.

The order will become effective the day after personal service is accomplished.

Dated FEB 8 1989, at San Francisco, California.

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

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


Victor Weiser, Executive Director

AS

transport the cement from Richmond to Napa or Redding. The transportation from Mexico is separate and ends when the cement is sold. A new owner takes over in California and moves the cement by carrier from a California origin to one or more California destinations. The transportation by OTI out of Richmond is intrastate in character and is subject to regulation by this Commission.

Bills of lading (Exhibit 6) on this transportation are prepared by Blue Circle West Cement, Inc. of Richmond, California, and addressed to Basalite Division of Pacific Coast, at a Redding, California Post Office Box for payment.

The Applicable Law

The Federal District Court stated the rule succinctly as follows:

"Transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier, and if delivery is then made at a point in the same state, the transportation is not interstate transportation subject to economic regulation by the Interstate Commerce Commission." (Penn RR. Co. vs. ICC. (1965) 242 Fed Sup. 890.)

Defendant has cited a 1987 ICC case in which a carpet company manufactured its product in Georgia, then shipped the carpets to a large distribution center in Arlington, Texas. The ICC held that all of the carpet shipped to Arlington was in interstate commerce when delivered to local Texas customers, even where carpet had been stored for weeks and was not designated for a particular customer from the time of arrival. (Armstrong World Industries, Inc. (E & B Carpet Mills) - Transportation Within Texas (April - 1986) No. MC-C-10963); Appeal (filed by Cal. P.U.C.) pending in U.S. Court of Appeals, 5th District, New Orleans (Case 87-4725).) The finding of interstate transportation seems based on the control of the product by the carpet company. The manufacture of the product and transportation to the distribution

point and to final customers was controlled by a single party, the carpet company.

The Quaker Oats case appeal (filed by Cal. P.U.C.) pending in U.S. Court of Appeal, 9th Circuit, San Francisco, Cases 87-7439, 88-7041 (The Quaker Oats Company - Transportation Within Texas and California (August - 1987) No. MC-C-30006) was referred to as a recent example of the efforts of the ICC to classify various within-a-single state transportation as interstate in character. The Quaker Oats Company (Quaker) petitioned the ICC for a declaratory order that certain transportation performed entirely within Texas, or within California, was interstate in character. Quaker had large distribution centers at Dallas, Texas, and Fullerton, California. Approximately 75% of the goods moving out of the Dallas warehouse are destined to customers in Texas; 98% of the Fullerton distribution is to California customers. The states of California and Texas argued that the transportation is intrastate since the out-of-state business is intermittent and unimportant. Quaker argued that a substantial quantity of the goods at both distribution points came from one of Quaker's 60 manufacturing or distribution points in other states, and that Quaker monitors every shipment to its final destination.

All shipments from the distribution points were classified by the ICC as interstate in scope. The decision was based on the supposed intent of the shipper (Quaker), who controls the goods from the date of manufacture or receipt at one of Quaker's distribution facilities.

The transportation of cement from Mexico to Napa or Redding is accomplished by two shippers. Blue Circle purchases the cement in Mexico and transports it to Richmond, California, where it is stored in a warehouse until purchased. Basalite purchases the cement, takes title at Richmond, and moves the cement in its own carrier to Napa or Redding. The last move has no connection with the transportation from Mexico to Richmond. Blue Circle has

no control or interest in the cement after it is sold in Richmond, where Basalite takes over on transportation with origin and destination in the State of California.

Defendant also argues that this Commission is precluded from further action in this proceeding until the ICC has acted upon the Petition for Declaratory Relief filed by defendants herein on July 29, 1988. The legal basis for this argument is a case decided in 1982 (App. of Greyhound Lines, Inc. December - 1982) 10 Cal PUC 2d, 541). Greyhound had requested that non-employees who were performing pickup-and-delivery within commercial zones established by the ICC be excused from the provisions of the Public Utilities Code. Shipments could be intrastate or interstate and many of the carriers performing this service held no authority from the PUC. We held that federal regulation was applicable to the transportation and state control of the intrastate PUD operation described would constitute an unreasonable burden on interstate commerce. The facts of the Greyhound case do not relate to this proceeding. We are concerned with transportation of cement purchased in California, by a California carrier, from the California location where the cement was purchased, to a destination in California.

Findings of Fact

1. Defendant OTI is a California carrier with authority to operate within California as a certificated highway common carrier, a highway contract carrier, a dump truck carrier, and an agricultural carrier. none of OTI's authorities authorize the transportation of cement.

2. OTI does have authority to transport cement under a certificate of public convenience and necessity issued by the ICC.

3. This complaint was filed to charge that OTI has been and is transporting cement between points in California without first obtaining the required authority from the California PUC and to request an order from the Commission requiring that OTI cease and

desist from performing such transportation until the proper authority has been acquired.

4. The transportation concerns movement of cement from Fernley, Nevada, to Perkins, California, thence to Napa and Redding. Also, from Mexico to Richmond, California, thence to Napa and Redding.

5. The movement of cement from Fernley, Nevada, to Perkins, California, was discontinued by defendant on December 31, 1986 and there is no indication that this movement will be reinstated.

6. The issuance of a cease and desist order to forbid transportation which has not been performed for two years would serve no purpose.

7. On the Mexico to Richmond transportation, the cement is purchased by a shipper with an address in Redding, California, at the Richmond warehouse, and transported to a destination in Napa or Redding by a California carrier, the defendant herein.

8. The transportation of cement by OTI from Richmond California to either Napa or Redding is intrastate transportation, completely within the State of California.

9. OTI should be ordered to cease and desist transporting cement from Richmond, California to Napa and Redding without first obtaining the necessary authority from this Commission.

Conclusions of Law

1. The transportation of cement by OTI from Richmond to Napa and/or Redding is intrastate commerce and is subject to regulation by this Commission.

2. The motion to dismiss this complaint should be denied.

3. The motion to defer all action in this proceeding until the ICC rules on the Petition For Declaratory Relief should be denied.

4. Defendants should be ordered to cease and desist from transporting cement from Richmond to Napa, or Redding without property to do so.

5. This order should become effective on the day after it is served on defendants.

ORDER

IT IS ORDERED that:

1. Otto Terkildsen, Inc., Otto Terkildsen, an individual, and their agents, drivers, servants, employees, attorneys, and all persons acting in concert with them are to cease and desist from transporting and moving cement by dump truck, cement truck, or other motor vehicle from Richmond to Napa, or Redding, California, until further order of the Commission.

2. The motion to dismiss the complaint is denied.

3. The motion to defer the issuance of an order in this proceeding is denied.

4. The Executive Director shall cause a copy of this cease and desist order to be personally served on Otto Terkildsen, Inc., and Otto Terkildsen, an individual.

The order will become effective the day after personal service is accomplished.

Dated FEB 8 1989, at San Francisco, California.

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