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Decision 90-12-017 December 6, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
BD Technology, Inc. for declaratory )  
relief finding operations to be )  
exempt pursuant to Section 3549 of )  
the Public Utilities Code and not )  
subject to regulation under the )  
Public Utilities Code. )

**ORIGINAL**

Application 90-08-002  
(Filed August 2, 1990)

O P I N I O N

BD Technology, Inc. (BD Technology or applicant) seeks an ex parte finding of this Commission that the transportation in which it is engaged is in furtherance of a primary business other than transportation and, therefore, is exempt from the Commission's jurisdiction under Public Utilities (PU) Code § 3549. For the reasons discussed herein, the requested relief is denied.

BD Technology filed its application on August 2, 1990 and the matter appeared in the Commission's Daily Calendar on August 6, 1990. On August 24, 1990, the Commission's Transportation Division filed an Advice of Participation but did not object to ex parte approval of the requested relief. No protest was filed and a public hearing is not necessary.

Inasmuch as the record in this matter consists solely of BD Technology's application, we must reach our decision on the basis of facts alleged in the application and by application of the relevant law.

Applicant submitted a detailed description of its operations. BD Technology currently holds a highway contract carrier permit (T-164,580) and began operations in May 1989 as a hazardous waste carrier.

Applicant's operations consist of the classification, segregation, and packaging of hazardous wastes under rules promulgated by the Federal Department of Transportation and the U.S. Environmental Protection Agency. BD Technology provides the containers used in packaging these materials and employs skilled chemists and technical employees who also act as drivers. A single 20-ft. "bobtail" truck is employed by BD Technology. When BD Technology does not transport the materials itself, it subcontracts with a carrier with similar qualifications. BD Technology does not actually perform the disposal operation, but arranges for that activity with an appropriate treatment, storage or disposal facility (TSDF). The disposal fees are billed to BD Technology which in turn bills its customers. BD Technology performs all required paperwork.

BD Technology provides the following breakdown of its activities:

- 15% Identification, Classification, and Segregation of Wastes
- 30% Packaging Wastes
- 5% Marking and Labeling
- 15% Obtaining disposal permits and transportation documentation
- 10% Transporting Wastes
- 25% Providing Disposal Services

BD Technology lists its assets consisting of its 20-foot truck, equipment, office, and automobiles.

Applicant argues that although this Commission has jurisdiction over the transportation of hazardous wastes, BD Technology is exempt from such regulation by virtue of PU Code § 3549 which states:

"Any person or corporation engaged in any business or enterprise other than the transportation of persons or property who also transports property by motor vehicle for compensation shall be deemed to be a highway carrier for hire through a device or arrangement in violation of this chapter unless such transportation is within the scope and in

furtherance of a primary business enterprise, other than transportation in which such person or corporation is engaged. (emphasis added.)"

Applicant submits the following points in support of its request for a finding of exemption under PU Code § 3549: BD Technology believes that its services are primarily waste disposal and that "transportation is merely an incidental adjunct." BD Technology asserts that the financial risk associated with hazardous waste outweighs any risk associated with transportation. The amount of BD Technology's total fees attributable to transportation service are small. The service employs specialized workers. BD Technology serves only hazardous waste shippers. BD Technology does not solicit or perform transportation services apart from hazardous waste disposal. BD Technology would not perform transportation service unless it included its specialized services. BD Technology's ultimate goal is to provide waste disposal service.

#### Discussion

None of the factors listed by BD Tehnology is determinative of the question of whether its transportation activity is within the scope and in furtherance of a primary business other than transportation. The fact that BD Technology specializes and tailors its service to a particular class of shipper does make the service incidental to a non-transportation business. We have found that housemovers also provide skilled specialized service and yet are not exempt from our regulation. (See D.84315.) The financial risks and the portion of charges for "specialized services" are all preparatory to carriage.

Applicant cites Operations of Burke and Co. 74 Cal. PUC 267 (1972); Personal-Attorney Service 79 Cal. PUC 506 (1976); and Van Dykes Rice Dryer 67 Cal. PUC 748 (1967) in support of its request for an exemption. The Burke decision was our first

construction of PU Code § 3549. In that case, three motorcycle assemblers sought declaratory relief in the form of a finding that the carriage of assembled motorcycles from the place of assembly to various motorcycle dealers was exempt from regulation under the statute. In that decision, we set forth the proper test for determining the exemption: is the non-transportation activity (assembling motorcycles) an integral part of the transportation activity, or is the transportation merely incidental to the non-transportation business? (74 Cal. PUC 267, 274.) Stated another way, is the non-transportation activity necessary or preparatory to the transportation? In Burke, we found that the assembly of motorcycles was not necessary for transporting them to dealers, and, accordingly, we held that the transportation of the motorcycles by Burke was exempt from our regulation.

We applied that same test in the Personal Attorney Service decision. There the question was whether the handling and delivery of court documents and service of process were accessorial to the delivery of the legal documents. We held that they were not. We found that the handling and processing of the paperwork was not done merely so that it could be delivered, but that the handling was in fact the primary business of Personal Attorney Service. Likewise, in the Van Dykes Rice Dryer decision, which preceded the enactment of PU Code § 3549, we held that the delivery of raw paddy rice from the field to Van Dykes' rice dryer was exempt from regulation. The rice in question was not dried so that it could be transported, but rather, it was transported so that it could be dried.

In applying this test to the facts of BD Technology's activities, it is obvious that the non-transportation activity consisting of identifying, classifying, and packaging of wastes is done in preparation for transportation. It may well be that these activities are also necessary for the actual disposal in a TSDF, but even so, BD Technology is not engaged in the business of

operating a TSD and, therefore, cannot claim it is exempt on that basis. Even though BD Technology may devote significant effort to the accessorial activities, these activities are merely preparatory to the transportation of hazardous waste from the point of origin to a point of disposal. BD Technology has not demonstrated that its non-transportation activity would be solicited by a customer who did not intend to ship the material.

Conclusion

Inasmuch as we do not regulate the rates of hazardous materials carriers, it may seem anomalous that we assert our regulatory jurisdiction over them. However, rate regulation is only one aspect the state's jurisdiction over those who are engaged in transportation for hire on the public highway. We have not determined that the public interest requires that we establish rates for this type of carriage, but it does not automatically follow that the public interest does not require our other regulation. It is also clear that the law as it exists does not allow us to conclude that such carriers are exempt from our regulation.

Findings of Fact

1. BD Technology is engaged in the business of identifying, classifying, packaging, and transporting hazardous wastes to appropriate treatment storage and disposal facilities.
2. BD Technology does not operate a treatment, storage, and disposal facility.
3. BD Technology's non-transportation activities are done with a view to and in preparation for transportation of hazardous wastes to a disposal facility.
4. BD Technology has not demonstrated that its non-transportation services would be engaged unless hazardous materials were intended to be shipped.
5. No protest has been received and a public hearing in this matter is not necessary.

Conclusions of Law

1. BD Technology is engaged in the transportation of property for compensation as a business over the public highway in this state by means of a motor vehicle.
2. BD Technology is not engaged in transportation within the scope and in furtherance of a primary business other than transportation.
3. The relief sought should be denied.

ORDER

IT IS ORDERED that BD Technology shall comply with all statutes and rules and orders of this Commission which are applicable to highway contract carriers.

This order is effective today.

Dated December 6, 1990, at San Francisco, California.

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

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

  
NEAL J. SULLIVAN, Executive Director