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Decision 91-09-002 September 6, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of Frank C. Alegre Trucking, Inc. to depart from the provisions of General Order 150-A governing transportation of cement and related commodities by cement carriers and cement contract carriers, and related matters.	Application 90-08-023 (Filed August 9, 1990; amendments filed November 13, 1990 and December 6, 1990)

Edward Hegarty, Attorney at Law, and Thomas J. Hays, for Frank C. Alegre Trucking, Inc., applicant.
Ronald C. Broberg, for Rich Ladeira Trucking, Miles & Sons Trucking Service, Inc., Reliable Trucking, Inc., and Amaral Trucking, Inc., protestants.
T. W. Anderson, for National Cement Co. of California, Inc.; Silver, Rosen, Fischer & Stecher, by Michael J. Stecher, Attorney at Law, for Senator Bulk Transport, Inc.; Barry D. Broad, Attorney at Law, for California Teamsters Public Affairs Council, and Daniel W. Baker, Attorney at Law, for himself, interested parties.
Lynn A. Maack and Maryalis McGuinness, for the Division of Ratepayer Advocates.

OPINION

1. Summary

The request of Frank C. Alegre Trucking, Inc. (Alegre) for authority to assess rental charges of up to 20% of its tariff rates for cement trailer equipment is denied. Alegre's request for approval of its proposal to act as an intermediary between cement shippers and carriers for a fee of up to 10% of the transportation charges; or, alternatively, for dismissal of the proposal for lack of jurisdiction, is also denied. Alegre is authorized to lease its cement trailers to other carriers on a short-term basis.

2. Background

General Order (GO) 150-A governs the transportation of cement and related commodities by cement carriers (§§ 214.1 and 3519.1) and cement contract carriers (§ 3519).[1] Alegre is authorized to conduct for-hire transportation service under various permits and certificates issued by the Commission, including transportation governed by GO 150-A. This proceeding focuses on Alegre's cement carrier operations. By this application, as amended, Alegre seeks authority to:

1. Depart from Rule 13.1 of GO 150-A, which sets a maximum trailer equipment rental "...of 9% of the charges applicable under the rates prescribed in the overlying carrier's tariff or contract for the transportation performed in said trailer equipment..."

   Specifically, Alegre seeks authority to publish a trailer rental rule in its cement transportation tariff. Under its proposed Item 160, Alegre would assess negotiated trailer rental charges not to exceed 20% of the charges applicable under the tariff. Alegre would not rent trailer equipment to shippers under Item 160.

2. Depart from Rule 13.3 of GO 150-A, which provides that "[n]o lease of trailer equipment shall be for a term of less than thirty (30) days."

3. Add a rule to its cement transportation tariff (proposed Item 170) entitled "Charges for Commissions". This rule states that Alegre may assess other for-hire carriers of cement agreed-upon commissions not to exceed 10% of the "hauling carrier's transportation charges".

Alegre believes that its fleet of approximately 60 sets of pneumatic hopper-type cement trailers is the optimal size for its operations. Still, because the bulk cement transportation

1 All references are to the Public Utilities Code.

market is volatile, subject to variations in the level of construction activity, Alegre states that it sometimes suffers from an overcapacity of trailing equipment. Alegre would like to make its cement trailers available to other carriers when this occurs. Rule 13.1 of GO 150-A allows leases of trailers, but, Alegre asserts, the rule's 9% limit does not allow it to recover its costs. Alegre would also like to lease its trailers on a short-term or shipment-by-shipment basis, but this requires authority to depart from Rule 13.3 of GO 150-A.

During peak demand periods, Alegre has a shortage of equipment, and it finds a need to call upon other carriers to fulfill transportation commitments it has made to shippers and receivers. By proposed Item 170, Alegre seeks to charge those carriers a fee of up to 10% of their transportation charges.

Protests to the application were filed by Senator Bulk Transport, Inc. (Senator) and jointly by Rich Ladeira Trucking, Miles & Sons Trucking Service, Inc., Reliable Trucking, Inc., and Amaral Trucking, Inc. (protestants). Senator withdrew its protest after reviewing the amendments to the application and applicant's prepared testimony.

Evidentiary hearings were held before Administrative Law Judge (ALJ) Wetzell. The only witnesses were Alegre's consultant, Thomas J. Hays, and protestants' consultant, Ronald Broberg. Concurrent briefs were filed by Alegre, protestants, and the California Teamsters Public Affairs Council (Teamsters).

3. Proposed Trailer Rental Charge

Rule 13.1 of GO 150-A allows payment of trailer rental in excess of 9% of the applicable tariff charges only in special cases, after Commission approval. Alegre seeks continuing, general authority to enter into lease agreements at any time, with any other carrier of cement, at negotiated rates. We do not believe that this is a special case within the meaning of Rule 13.1. However, Rule 4 of GO 150-A states that departures may be granted upon formal application if the Commission finds that they are reasonable and necessary. Alegre's request to depart from Rule 13.1 (and Rule 13.3) is appropriately considered under Rule 4.

3.1 Applicability of Rule 13.1

The parties devoted most of their attention in this proceeding to a cost and rate analysis used by Alegre in support of the proposed 20% limit on trailer rental. Before considering that analysis, we first consider a threshold jurisdictional question: are the trailer rental transactions planned by Alegre governed by Rule 13.1?

Alegre's witness Hays explained the transactions anticipated under Item 160. A carrier who needs cement trailing equipment would contact Alegre. If Alegre has equipment available at the time and the two parties agree on a rate, they would enter into a rental agreement. Charges for the trailer rental would be assessed by Alegre on the basis of the agreed-upon percentage and weight tickets (showing the shipment's origin, destination, and weight) submitted to Alegre by the carrier. Alegre does not intend to lease trailers to shipper-affiliated carriers, and it agrees to the addition of tariff language to accomplish that intent. Hays testified that it is unlikely that Alegre would operate as an overlying carrier in the transportation of cement and lease trailer equipment to an underlying carrier.[2]

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2. Rule 12 of GO 150-A requires overlying carriers to pay underlying carriers 100% (less gross revenue taxes) of the applicable transportation charges. As defined in Rule 12, an overlying carrier is "an authorized carrier that contracts with a shipper to provide transportation service for the latter, but in turn, engages the services of another authorized carrier known as the independent-contractor subhauler (subhauler or underlying carrier) to perform the service." A subhauler is an authorized carrier which performs service for an overlying carrier.

Except for the infrequent occasions when Alegre performs cement transportation through the use of subhaulers, the leases would involve only Alegre and carriers which are actually providing transportation. There is no question that Rule 13.1 governs leases to subhaulers. Arguably, however, the rule would not apply to the vast majority of the leases because Alegre would not be operating as a carrier. It would be doing no more than leasing out its equipment. The question arises whether Alegre's proposed leases are any different than those involving an independent third party vendor such as Ryder.[3]

In its brief, Alegre states that it presumes that Rule 13.1 is applicable to all leasing transactions involving

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3 The 9% limit in Rule 13.1 is calculated by determining the overlying carrier's tariff or contract charges. The reference to "overlying" might appear to bolster the position that Rule 13.1 is inapplicable to the subject leases if one infers that the rule is operative only when there is an overlying carrier/underlying carrier relationship. We reject such an interpretation.

When an earlier version of the rule was adopted, the Commission clearly intended that the 9% limit would apply to carrier/shipper relationships (to prevent rebates) as well as intercarrier relationships. (D.69557; Minimum Rate Tariff 10 (1965) 64 CPUC 684.) In the case of shipper/carrier leases, the limit applied whether or not there was also an overlying carrier/underlying carrier relationship involved. The term "overlying" did not appear in the rule when it was a component of former Minimum Rate Tariff (MRT) 10. It was added along with other minor language changes when MRT 10 was cancelled and a program of carrier-filed rates was adopted. (See D.82-02-134.)

It is apparent that the language changes were made merely to adapt the rule to the new regulatory program of carrier-filed rates, not to substantively change the rule. The only meaning that can be given to the term "overlying" in Rule 13.1 is that whenever there is an overlying carrier/underlying carrier relationship, it is the former's filed transportation charges that form the basis for calculation of the 9% limit.

cement carriers. Protestants argue that even if the rule is not technically applicable, the Commission has absolute jurisdiction over the activities of carriers, which ought to be exercised by enforcing the language of the rule. Since the parties agree that Rule 13.1 is applicable for purposes of this matter, although for different reasons, we will proceed on that basis without making a more definitive determination of the issue.

3.2 Trailer Costs

Alegre's witness Hays presented a study of the costs that Alegre incurs in providing bulk cement transportation. The study developed estimated costs for shipments of various lengths of haul ranging from 25 to 200 constructive miles. The study isolated trailer costs by separately measuring expenses for depreciation, repair and maintenance, tires, and licensing. During the course of the hearings, Hays revised various cost components in response to criticisms of the study. Protestants accept the costs shown in Hays' final revisions except for his calculations of indirect expenses as they relate to trailer costs.[4]

Using a breakdown of Alegre's 1987 trucking expenses, Hays determined that the carrier's indirect expenses were 16.64% of its total expenses. He then used this indirect expense factor to develop total costs of providing transportation with a full unit

4 Hays used a rate of $17.46 per $100 for workers' compensation insurance. Protestants point out that the Manual Rate was scheduled to increase to $17.62 per $100 upon renewal of Alegre's policy. This difference is of no significance for the purposes of this proceeding.

consisting of both power and trailing equipment. Protestants do not take issue with this calculation.[5]

To estimate trailer costs, Hays first calculated the direct cost of providing transportation as if no direct trailer costs would be incurred. He then expanded that cost by an indirect expense factor of 13.64%. Finally, after adding the gross revenue tax and converting the shipment cost to a cost per 100 pounds, he subtracted the cost of a power unit only from the full unit cost to arrive at the estimated trailer cost. It is the 13.64% indirect expense factor with which protestants' witness Broberg takes issue. Protestants believe that the 16.64% factor should be used throughout the analysis.

A single example for a 100 constructive mile shipment illustrates the methodology used by the parties as well as their differences:

5 We use the term "indirect expense factor" to avoid confusion with the related term "indirect ratio". The indirect percentages used by Alegre are related to total operational expenses. The term indirect ratio is typically defined as the relationship of indirect to direct expenses, expressed as a percentage. (See D.76353 and GO 150-A, Appendix B.) Alegre's indirect expense factor of 16.64%, which was adopted by the Commission in another Alegre proceeding (D.89-04-083), is equivalent to an indirect ratio of 19.96%.

Table 1

Development of Total Cost Per 100 Pounds
100 Constructive Miles

	Full Unit (1)	Power Unit Only (2) Alegre	Power Unit Only (3) Protestants
1. Direct cost	$242.814	$220.214	$220.214
2. Indirect expense factor	16.64%	13.64%	16.64%
3. Direct & indirect cost	$291.284	$254.995	$264.172
4. Total (incl. 0.35% tax)	$292.303	$255.887	$265.097
5. Shipment weight (pounds)	53,565	53,565	53,565
6. Total cost per 100 pounds	$ 0.546	$ 0.478	$ 0.495
		Trailer Cost	
7. Trailer cost per 100 pounds (L.6, Col 1 less L.6, Col. 2 or 3)		$ 0.068	$ 0.051

We share protestants' criticism of Alegre's indirect expense methodology, and find other problems as well. To understand these problems, it is necessary to review Hays' calculation and use of the 13.64% indirect expense factor.

Hays started with the premise that when Alegre leases trailers, it will not incur dispatching costs as it does when it provides transportation. Using the same expense breakdown that he used to calculate the 16.64% indirect expense factor, he determined that dispatching expenses were $270,829 in 1987. He subtracted $10,000 from this amount as an arbitrary estimate of additional trailer rental expenses that would be incurred under the proposal. The remainder, $260,829, is 2.82% of Alegre's total expense of $9,260,565. Finally, he rounded this "dispatch cost ratio" to 3% and subtracted that amount from the carrier's indirect expense factor to arrive at the 13.64% factor. This analysis is summarized below.

Table 2

Applicant's Calculation of Indirect Expenses
Calendar Year 1987

Direct expenses	$7,687,400	83.01%
Indirect expenses	1,540,884	16.64%
Other (Gross Revenue)	32,281	0.35%
Total expenses	$9,260,565	100.00%
LESS		
Net dispatch expenses	$ 260,829	2.82%
Rounded		3.00%
Adjusted indirect expense factor		13.64%

The overriding problem with applicant's indirect cost analysis is its use of the 13.64% factor. Accepting for the moment the validity of the underlying calculation of dispatch costs, it is important to bear in mind what the 13.64% factor actually measures: what Alegre's indirect expense factor for its overall 1987 trucking operations would have been if there had been no dispatch costs. Hays applied this factor to the cost of providing transportation service with a power unit and a driver, but that is not the cost at issue. The cost of leasing trailers is. Even if 13.64% were representative of what Alegre's indirects would be as a trailer lessor, it should have been applied to the trailer cost, not to the power unit cost.

The problem with this method is perhaps best demonstrated by restating Table 1 to isolate direct trailer costs, then determining the method's implied indirect expense factor for trailers. Using power unit and full unit costs from Table 1, Table 3 shows that for a 100 constructive mile shipment, the method used by Hays implies an indirect expense factor of more than 37%. Such a high figure is inconsistent with the premise that indirect costs for trailer leasing are lower than for overall operations.

Table 3

Implied Indirect Expense Factor For Trailers 100 Constructive Miles

		Trailers
1.	Direct cost ($242.814 - $220.214)	$22.600
2.	Direct & indirect cost ($291.284 - $254.995)	$36.289
3.	Indirect cost (L.2 less L.3)	$13.689
4.	Total (incl. 0.35% tax) ($292.303 - $255.887)	$36.416
5.	Indirect expense factor (L.3 / L.4)	37.49%

Other problems worth noting, because they indicate that the dispatch "savings" of 3% of total expenses is overstated, include the following:

- Applicant used inconsistent degrees of precision by calculating indirect expense factors to the nearest one-hundredth of one percent, while it rounded the dispatch cost adjustment to the nearest whole percentage, from 2.82% to 3%. The difference of 0.18% is not a major one, but the total expense of $9,260,565 times that difference is $16,669. By rounding, applicant added an amount which more than offsets the arbitrary $10,000 amount included to reflect estimated trailer leasing indirect costs.

- As shown in Table 2, the indirect expense factor of 16.64% was calculated by dividing indirect expenses by total expenses. The dispatch-adjusted factor of 13.64% was calculated, in effect, by subtracting $260,829 from the numerator of the division operation. Since the adjustment is based on the assumption that dispatch costs do not exist, the same amount should have been subtracted from the denominator as well.

- Included in the $260,829 dispatch expense calculation was a $30,078 expense item for radios. Applicant's 1987 expense breakdown (Table 4 of Exhibits 1 and 2) shows that $29,149 of the radio expense is allocated to direct expense. Only $929 is allocated to indirect expense. Even if the method were otherwise valid, only the amount allocated as an indirect expense should have been subtracted from total indirect expense. The remainder

> should have been subtracted from the total direct expense.

Even if Alegre's dispatch cost had been isolated with greater precision, we would hesitate to measure trailer-related indirect expenses solely by subtracting that particular cost. At best, indirect expense analysis always requires a series of arbitrary decisions. By definition, these are expenses which cannot be directly attributed to any particular phase of an operation (see GO 150-A, Appendix B, p. 8.). But, if it was possible to isolate trailer leasing indirect expenses from applicant's overall indirect expenses, Alegre should have been able to isolate its cement transportation indirect expenses as well.

In summary, even though we would generally expect indirect expenses for trailer leasing to be different from those for providing cement transportation, we cannot conclude from the record that the indirect expenses that Alegre would incur as a lessor of cement trailing equipment would be significantly different than 16.64%. That factor should be used for the cost analysis in this proceeding. More importantly, even if a different indirect factor for trailer leasing had been conclusively demonstrated, it should have been applied to trailer costs, not to power unit costs.

3.3 Profit Factor

The Commission originally adopted 9% as a reasonable maximum lease charge in D.69557 dated August 17, 1965. In that decision the Commission referred to a study which supported that finding:

> "The assistant director of the California Trucking Association's Division of Transportation Economics testified in regard to a study he made which showed that 9 percent was a reasonable maximum amount to use for the trailing equipment lease charge. He explained that he took the last cost study (dated 1952) for the transportation of cement prepared by the Commission's staff and from this developed the costs attributable to the trailers and computed it as a percentage of total costs.

> The figures were developed for distances of 80 and 175 miles, separately for Southern and Northern California. The percentages ranged from 8.1 to 9.0...." (D.69557; 64 CPUC 684, at 685.)

Hays used a different approach to support Alegre's proposed lease charge of up to 20%. Instead of measuring trailer costs as a percentage of total costs, he developed a measure of Alegre's revenue need and expressed it as a percentage of Alegre's transportation rate. Table 4 demonstrates his calculation for a 100 constructive mile shipment:

Table 4

Applicant's Calculation of Revenue Need Per 100 Pounds[6]
100 Constructive Miles

1.	Full cost with trailers	$0.5460
2.	Full cost without trailers	$0.4780
3.	Trailer cost (L.1 - L.2)	$0.0680
4.	Tariff rate including surcharge	$0.5742
5.	Full cost plus 7% (L.1 / .93)	$0.5871
6.	Cost/Rate Difference (L.5 - L.4)	$0.0129
7.	Trailer cost plus 7% (L.3 / .93)	$0.0731
8.	Revenue need for trailer rental (L.6 + L.7)	$0.0860
9.	Revenue need as percent of rate (L.8 / L.4)	14.98%

This calculation includes the fully allocated cost of trailing equipment plus a 7% profit factor related to that cost. It also includes an unrelated amount equal to the revenue shortfall (measured against its own fully allocated cost plus 7% profit) that Alegre would experience if it were to perform the transportation in

6 Instead of the term "cost at 93 O. R.", we refer instead to "cost plus profit factor" or "revenue need". This is consistent with the approach we adopted in D.89-04-083, where we determined that a cement tranportation rate is fully compensatory under § 452.1 if it covers full costs excluding profit or return on equity. (D.89-04-083 at p. 23, mimeo.)

its own equipment. But Alegre will not be performing transportation when it leases equipment to others. The revenue need measured by applicant is based in part on a phantom shortfall.

There is no requirement that an applicant for authority to depart from the 9% rental limit use the same methodology that supported that limit in 1965. We believe there should be some flexibility in the choice of methodology used to justify such applications. However, we find no reasonable basis for Alegre's use of hypothetical revenue shortfalls to support its request. We agree with protestants that only the cost of trailing equipment plus, at most, a profit factor related to that cost should be considered.

The following table shows Alegre's trailer costs based on the direct costs it presented. These costs are expanded by the adopted indirect expense factor of 16.64% and by a 7% profit factor. The table also shows the percentage relationships of trailer costs plus profit factor to Alegre's filed rates.

Table 5

Adopted Trailer Cost-Rate Analysis

	Length of Haul - Constructive Miles				
	25	50	75	100	200
1. Full unit	$108.356	$153.975	$198.052	$242.814	$418.093
2. Power unit	102.706	142.675	181.102	220.214	372.893
Trailer Costs					
3. Direct cost (L.1-L.2)	5.650	11.300	16.950	22.600	45.200
4. Full cost (L.3/.8336)	6.778	13.556	20.333	27.111	54.223
5. Revenue need (L.4/.93)	7.288	14.576	21.863	29.152	58.304
6. Revenue need Per 100 lbs. (53,565 lbs.)	0.0136	0.0272	0.0408	0.0544	0.1088
7. Alegre's filed tariff rate	0.2627	0.3605	0.4893	0.5742	0.8858

8. Revenue need Percent of rate (L.6/L.7)	5.18%	7.55%	8.34%	9.47%	12.28%

9. Average (mean) Line 8, all mileages: 8.56%

3.4 Conclusion-Trailer Rental Charges

3.4.1 Leases to Subhaulers

A lease payment made by a lessee-subhauler in excess of the lessor's revenue need could work at cross purposes with Rule 12 of GO 150-A by offsetting a portion of the payment to the underlying carrier. Such an offset would enable the lessor to effectively pay less than 100% of the rate to the lessee-subhauler. We believe that the Commission intended to prevent such a possibility when it adopted (in D.69557) the 9% limit on trailer leasing as well as the 100% subhaul payment requirement.

Table 5 shows that even with the lease charge now allowed, Alegre would receive an amount at least approximately equal to its fully allocated trailer cost plus profit factor for all but the 200 mile bracket. In our opinion, lease payments from subhaulers exceeding 9% would be unreasonable for all but the lengthiest of Alegre's shipments. The proposed maximum of 20% is unjustifiably high for all lengths of haul. Alegre intends to lease trailers to subhaulers rarely if ever, but we find no basis for authorizing even occasional opportunities for circumvention of the 100% rule. The request will be denied as it pertains to leases to subhaulers.

3.4.2 Leases to Other Carriers of Cement

We need not follow such a strict standard in the case of leases to other carriers, where the 100% payment requirement of Rule 12 is inapplicable. In reviewing D.69957 we find no indication that such leases were included among the questionable practices which the Commission sought to curb. Rather, the Commission was plainly concerned about carriers obtaining and controlling traffic by leasing trailers from others and paying excessive rentals as a form of rebating, and about carriers which were using subhaulers entirely but which were "actually no more than brokers", owning little or no equipment. (D.69557, supra; 64 CPUC 684, at 685.)

Protestants, however, raise another concern. They argue that Alegre has an ability to control a "book of business" and that it will use that ability to force other carriers to rent its trailers at "excessive and unreasonably high rental rates". Protestants suggest that the situation may arise in which Alegre will auction freight to carriers who will pay the most rent for its trailers.

That Alegre would be able to take advantage of excessive trailer rentals through an ability to allocate a shipper's transportation purchases among carriers who are willing or even compelled to pay such rentals is a serious allegation for which this record lacks adequate proof. We would view such schemes with great disfavor, and we agree that if carried out, they could seriously disrupt competitive relationships in the cement transportation market. Nevertheless, we must dismiss their potential existence and likelihood of success as speculative. As Hays testified:

> Q. Maybe I am just paranoid, but the hypothetical that I have worked out in my mind -- and maybe, let me lay out the hypothetical and you comment on it, maybe it is not a worry at all -- is that a shipper signs an exclusive agreement with Alegre Trucking which says, "You are going to get all my cement for the next year," and Alegre in return says, "I will provide the transportation and I got this list of carriers that will provide the excess when I can't and in addition, you know, since this is a long-term relationship, there might be some rate reductions available from myself or those other carriers."
>
> A. I just can't imagine, knowing the people in the cement business, that they are going to give up any kind of authority like that. It just boggles my mind. How would they

> protect their own product if that carrier failed to perform? Why would they give off their transportation? Transportation is a significant cost in the manufacturing and distribution of cement. I just don't believe that any manufacturer would do that under any conditions.
>
> Q. Well, I guess my question is is that a danger, and you feel it is not. I guess it is for the rest of us to decide whether we think it is.
>
> A. I don't feel it is a danger, number one, and I don't think it is going to happen. That is not something Alegre is shooting for. It is a virtual impossibility in my mind.
>
> (Transcript V. 2, pp. 130-131.)

Even protestant's witness Broberg appears to agree in part with Hays' assessment of such a scheme, acknowledging that it would succeed only if there were some "legal means" for a shipper to receive a financial benefit for taking part in it:

> A. I have to say that I concur with Mr. Hays in that I think the likelihood of that instance with that scenario coming about is extremely rare. There would have to be some financial benefit flowing to the shipper through that scenario, and in the parameters you laid out there doesn't appear to be any.
>
> Now, if there could be developed some financial benefit to the shipper through some legal means,....yes, I believe there could be disruption to the competitive relationship between the parties through the devices talked about here particularly if the shipper were of a sort and size to control substantial amount of traffic which would then be invested in Alegre.
>
> (Transcript V. 2, p. 138.)

While we cannot rely on protestants' argument that carriers will be compelled to lease trailing equipment from Alegre at exorbitant rates, we must still determine whether the proposed departure from the 9% rule is reasonable and necessary. The basic premise underlying Alegre's request for the departure is that it suffers from occasional overcapacity, and during those occasions there are many other carriers with power equipment and available traffic who are unable to provide transportation because they lack trailing equipment.

Alegre has provided us with extensive data about its costs, but with little information about the nature or duration of the occasions when it suffers from overcapacity. Further, Alegre has provided us with little information about the identity or numbers of authorized cement carriers which are not able to acquire and operate trailers. There is little evidence concerning the costs incurred by those other carriers or the reasonableness of a 20% rental fee from their perspective. Not one shipper or carrier witness was called to support the proposal or to shed any light on the problem of capacity mismatches. When asked about carriers who cannot obtain trailers, Hays testified as follows:

> Q. [The application] states that there are many potential carriers who are not able to acquire and operate a full set of tractor and trailers at the present high cost of such equipment. I wanted you to name a few of those potential carriers for the record that you base your statement upon.
>
> A. Well, there is only one on the list that I have in front of me, that is a gentleman by the name of Clarence Daniels.

(Transcript V. 1, p. 47.)

Alegre has not shown that the proposed lease payments of up to 20% are either reasonable or necessary. Although the leases will be entered into voluntarily, we cannot ignore the fact that a charge of 20% of Alegre's filed rate far exceeds any reasonable measure of the revenue need associated with the rental of trailers, including the fully allocated cost plus a 7% factor for profit.

Alegre argues that on occasion, a "lessee may be willing to net something less than return of all fully allocated costs when it is in a temporary dilemma of undercapacity to meet its obligation to its shipper." (Applicant's brief, p. 11.) We believe that the same principle would apply to a lessor suffering from a temporary dilemma of overcapacity. It strikes us that a carrier which maintains the optimal fleet size but occasionally suffers from overcapacity would welcome the opportunity to enter into short-term leases at any level of charges above the marginal cost of such transactions. Reviewing the trailer costs shown in Table 5, we are not persuaded that Alegre needs more than is now allowed under GO 150-A to make such transactions worthwhile.

4. Proposed Short-term Leases

Although we are denying Alegre's request to charge rentals of up to 20%, we will separately consider its request for authority to enter into shipment-by-shipment and other short-term leases of trailers.

Alegre argues that there is no present logic to the required minimum lease term of 30 days, and that leases of trailer equipment are common in all transportation industry segments (except cement) to enable handling of peaks and valleys of demand. Alegre believes that regardless of the level of trailer rental charges, cement carriers should be allowed to freely lease trailers from one another for any term which fits their need, or lack of need, for such equipment for operating efficiency and economy reasons.

We are not prepared to agree with Alegre's blanket condemnation of the 30 day requirement of Rule 13.3. Such determinations are properly the subject of more broadly-noticed investigative and rulemaking proceedings. We do agree that waiver of the rule could present Alegre with a reasonable solution to its occasional oversupply problem. When it has an oversupply that it expects to be of limited duration of one or a few days, it might be reluctant to release a temporarily idle unit of trailing equipment, knowing that the equipment would then be unavailable for its own needs for the next month.

We find that a need exists for Alegre to have the ability to enter into leases of its equipment to other carriers for periods of less than 30 days. We note that no party expressed any opposition to this aspect of Alegre's application. The request is reasonable and will be granted.

Alegre has not requested authority regarding leases involving shippers or shipper-affiliated carriers. Our order will include a prohibition on short-term leases to these entities. We will also restrict subhauling arrangements from the short-term lease authorization. Alegre states that it needs to lease its trailers when business is slow and it suffers from overcapacity. Alegre indicates it rarely uses subhaulers for cement transportation in any event, and we would anticipate little or no need for Alegre to augment its fleet with subhaulers during these slow periods, at the same time it has an oversupply of equipment.

5. Proposed 10% Commission Fee

5.1 Summary of Proposal

When the level of cement transportation business which it has secured through its sales efforts exceeds its capacity, Alegre sometimes contacts other carriers and makes arrangements on behalf of the shipper to have the transportation performed by them. Under proposed item 170, Alegre would charge a negotiated fee of up to 10% of the other carrier's transportation charges to recover its administrative costs. Hays explained the need for the proposed fee in Item 170 as follows:

> "At present, Alegre, at times, books more shipments than it can handle with its existing fleet and it calls upon other carriers to fill the void. In these circumstances, Alegre recovers none of its sales and related cost in

> securing this business. We believe Alegre is very aggressive in the marketplace and incurs substantial cost in securing business. Shippers in most cases, expect their carrier to meet their needs, even though it is on-call or as-needed. When these conditions arise, it is reasonable for Alegre to recover its sales cost. Our analysis of [Alegre's indirect expenses] indicates that 10% of the hauling carriers revenue will recover that cost and since the hauling carrier incurs no sales expense, that carrier should still earn a profit if all other circumstances are equal." (Exhibit 1, p. 6.)

Alegre takes the position that the practice of turning business over to other carriers of cement and collecting fees from them is not subject to the Commission's jurisdiction. Accordingly, it intends to publish Item 170 for informational purposes only. Alegre also asserts that it does not need to provide cost justification for the 10% fee in order to obtain approval to publish Item 170. On brief, Alegre requests that the proposal be dismissed for lack of jurisdiction or, in the alternative, granted.

5.2 Motor Transportation Brokers' Act

At issue in this proceeding is the role the Motor Transportation Brokers' Act (MTBA). (Public Utilities Code, Division 2, Chapter 5, commencing at § 4801.) Alegre states that when it arranges to turn cement transportation over to other carriers, it will be acting as an intermediary between the shipper and the carrier on the shipper's behalf. Under § 4804, such transactions would be "brokerage" or "brokerage service", and under § 4808, a person who arranges for transportation by a "motor carrier" would be a "motor transportation broker" (MTB). However, under § 4807, the MTBA specifically excludes carriers of cement:

> As used in this chapter, "motor carrier" includes any person or corporation, or its lessee, or trustee or receiver appointed by any court, transporting or offering to transport property for compensation over the highways of this state. "Motor carrier" does not include a

> passenger stage corporation engaged in transporting baggage or express incidental to the transportation of passengers or a cement carrier, cement contract carrier, dump truck carrier, or household goods carrier.

The parties disagree on the effect of the exceptions listed in the second sentence of § 4807. Alegre takes the position that the practice of arranging cement transportation as an intermediary is exempt not just from the MTBA, but from the Commission's power and jurisdiction generally. In effect, Alegre's position is that with the enactment of the MTBA, the Legislature has created a regulatory vacuum which displaces the Commission's jurisdiction.[7]

Protestants take the opposite view, arguing that it is unlawful for any person to arrange cement transportation as an intermediary. They argue that the MTBA "sets forth the exclusive means by which to become an MTB", and that "[e]xcept as specifically authorized and allowed by the MTB Act, it is unlawful to engage in activities as an MTB."

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7 In its brief, Alegre attempts to draw a distinction between the effects of § 4807's exceptions for cement carriers and cement contract carriers on the one hand, and dump truck carriers and household goods carriers on the other hand. (Alegre doesn't take a position on the status of persons who arrange express shipments by passenger stage corporations.) We are not persuaded that there is such a distinction.

It is true that the Commission has preserved minimum rate regulation for dump truck and household goods transportation for many years, but has not done so for cement transportation. It is also true that cement transportation is performed both by public utility carriers and by contract carriers. These differences do not appear to us to be significant for the purpose of determining whether the MTBA allows or prohibits unregulated arranging of shipments as an intermediary on behalf of these classes of carriers.

We are not persuaded by either interpretation. Protestants' contention that no person can arrange for cement transportation as an intermediary may have some merit, but we believe that the argument is not sufficiently developed in this proceeding. For example, while it is clear that a person may not engage in activities as an MTB except in accordance with the MTBA, that conclusion is a tautology which does not answer the question of whether a person may be lawfully engaged as an intermediary arranging cement transportation.

Moreover, although protestants have asserted that there is legislative intent in support of their interpretation, they have not demonstrated that intent to our satisfaction. The Legislature revised the MTBA extensively in 1985. (Stats. 1985, Ch. 599.) It made further revisions two years later. (Stats. 1987, Ch. 740.) It seems reasonable to assume that in making these changes it intended to exclude carriers of cement and dump truck carriers from any brokerage-like arrangements because of the Commission's subhauling regulations (and household goods carriers and passenger stage carriers because of their special dealings with the public), but we are not convinced that is the case. We note that the MTBA could have more explicitly defined the status of the practice if indeed that was the intent.

But neither can we accept Alegre's contention that we are powerless to assert jurisdiction over its proposed practices in this proceeding. As noted by protestants and by Teamsters, we have broad authority to supervise and regulate the practices of public utilities such as Alegre. Under § 701 the Commission may "do all things....which are necessary and convenient in the exercise of such power and jurisdiction". Also, § 1062 provides, in relevant part, that the Commission may:

> "(a) Supervise and regulate every highway common carrier and cement carrier in this state."

* * *

> "(d) Supervise and regulate these carriers in all other matters affecting the relationship between them and the shipping public."

* * *

> "...by general order or otherwise...prescribe rules applicable to any and all highway common carriers and cement carriers."

Alegre has not demonstrated that recent revisions to the MTBA have diminished the Commission's jurisdiction over the practices of cement carriers. Even though the provisions of the MTBA are inapplicable to the practice of arranging cement transportation as an intermediary, it does not follow that other provisions of the Public Utilities Code are inapplicable.

As discussed in the following section, we determine that Alegre's proposal to engage in transactions under Item 170 has not been justified. For the purposes of this proceeding, we do not need to decide whether protestants are correct in asserting that the MTBA prohibits any person from arranging cement transportation for others. That issue is not ripe for decision. It is sufficient for now that under its broad regulatory powers, the Commission can assert jurisdiction over carriers who would do so.

5.3 Conclusion- 10% Commission Fee

Alegre's proposed Item 170 must be evaluated in the context of our overall scheme of cement transportation regulation. After reviewing the elements of this regulatory scheme, including the Public Utilities Act, the Highway Carriers' Act, and GO 150-A, we are convinced that the request should be denied. The activities contemplated pose at least the potential for conflicts with regulations governing cement carriers and the request has not been shown to be necessary.

5.3.1 Common Carriage

Alegre's operations as an intermediary cannot be completely isolated from its carrier operations. We give little weight to Alegre's contention that it will not simultaneously act as a carrier and as an intermediary for cement transportation. Rather than the narrow perspective of a single transaction, we must look at the totality of Alegre's relationships with its shippers.

It is on behalf of the very same shippers who have requested its services, and for whom Alegre normally provides service as a common carrier, that Alegre proposes to turn loads over to other carriers. We cannot ignore the fact that Alegre is, first and foremost, a public utility common carrier. (§§ 211 (d), 214.1, and 216 (a).)[8]

Much has been made in this proceeding of the "book" of freight which Alegre maintains through its sales efforts. We have already determined that certain allegations about Alegre's control of shippers' freight and abuses of such control are speculative. Nevertheless, when a common carrier cannot fulfill transportation commitments it has made to a customer, we fail to see why it should be entitled to collect a fee from another regulated carrier for the sales costs incurred. A common carrier does not, through its sales efforts, acquire a right to a shipper's business which it may in effect sell to other carriers.

Capacity mismatches notwithstanding, the practice of a cement carrier controlling a book of a shipper's freight, along with the ability to selectively accept some loads for its own account and refer other loads to other carriers, is at best questionable. We see no reason for promoting an opportunity to expand the practice by approving Alegre's request.

8 We recognize that under § 4842 of the MTBA, an authorized carrier may hold a license as an MTB (but may not act both as a carrier and as an MTB for the same transportation transaction). This authority to conduct dual operations does not extend to Alegre's request due to the inapplicability of the MTBA.

When Alegre, on behalf of a shipper for whom it normally provides transportation, contacts other carriers and makes arrangements to have transportation performed by them, it may be going beyond its role as a common carrier. It is one thing for a carrier who has committed its services to a shipper to then inform the shipper that it cannot perform the requested transportation. But Alegre apparently intends to do more than that. Identifying available carriers who are able to meet the shipper's transportation needs and making arrangements for an available carrier to perform the requested transportation may be a traffic management function that the shipper would have to accomplish at its own expense if it were not done by Alegre.

Valuable services performed by a carrier on a shipper's behalf at no charge to the shipper can constitute unlawful rebates of transportation charges. Devices to refund or remit any portion of a carrier's filed rates are prohibited by § 494. From this record we can make no findings on the question of whether the services that Alegre would perform on behalf of the shipper pursuant to Item 170 constitute such rebates. In our view the potential for such an abuse constitutes support for a policy against authorizing cement carriers to act as intermediaries.

5.3.2 100% Rule

Teamsters and protestants see Alegre's proposed Item 170 as part of an attempt to circumvent Rule 12 of GO 150-A. According to this view, by turning loads over to other carriers who actually perform the transportation and collecting a fee of up to 10%, Alegre will be effectively acting as an overlying carrier and paying out less than the 100% amount required by Rule 12.

We agree with Alegre that there are several important distinctions between its proposed transactions and the carrier relationships governed by Rule 12. Alegre correctly points out that for Rule 12 to apply there must be an overlying-underlying carrier relationship by which the overlying carrier would contract with the shipper; bill and be paid by the shipper; engage another authorized carrier to perform the transportation; and pay the underlying carrier charges for the service.

Despite these differences, we believe that Teamsters and protestants are substantially correct in their assertions about circumvention of Rule 12 when we look at the proposal's practical effect. On the continuum of possible business relationships, Alegre's proposed item 170 transactions are not far from those governed by Rule 12. In either case, transportation that Alegre is authorized to perform would be referred to another authorized carrier to perform the actual hauling. In either case, the hauling carrier incurs most of the cost of performing transportation. The sales costs incurred by Alegre would presumably be the same in either case. In fact, the most significant differences appear to be that in a subhauling arrangement, Alegre would pay out 100% of its own tariff rate (in other words, receive no net compensation) and incur billing costs. Under Item 170 it would receive up to 10% of the carrier's transportation charges and incur no billing costs.[9]

For the purposes of this proceeding, the similarities of Item 170 arrangements and subhauling arrangements are more significant than the differences. If Item 170 were to be approved, Alegre would be able to accomplish what it now cannot under Rule 12. Whether or not Alegre intends to do so, such a result should be authorized only in a proceeding where departure from (or a change in) Rule 12 is sought.

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9 It is not surprising that in trucking industry parlance, overlying carriers are sometimes referred to as brokers. The Commission noted a degree of similarity in the relationships in D.69557 by referring to testimony declaring that carriers who use subhaulers entirely "are actually no more than brokers".

5.3.3 Need for 10% Commission

Alegre claims that it needs to recover "sales, dispatch and other costs associated with the development of business" when it turns loads over to other carriers. Alegre also claims that it is not required to provide cost justification for the 10% fee because of its position that the Commission lacks jurisdiction concerning Item 170. Alegre points out, however, that under § 4825(b), an MTB may collect an agreed-upon commission of not more than 10% of the carrier's applicable rate.

It is not significant for our purposes that the Legislature has authorized persons in the business of brokerage to collect fees of up to 10%. The MTBA is inapplicable to Alegre's proposal. More importantly, Alegre does not indicate that it wants to regularly refer transportation to other carriers as a business. It wants to do so on an occasional basis when its own fleet has reached capacity (a capacity problem which is apparently in part one of Alegre's own making since it is admittedly aggressive in its marketing efforts). Alegre's indirect expense measurements appear to include sales-related costs (Table 4 of Exhibit 2); Alegre may already be recovering sales-related costs in its transportation rates to the extent that those rates cover fully allocated costs.

6. Shipper-Controlled Carriers

A minor issue arose over the most appropriate manner for accomplishing Alegre's intent to exclude not only shippers but also affiliated carriers from the application of the tariff provisions which it seeks to publish. Alegre proposes to exclude any "for-hire carrier owned or controlled by a shipper or consignee" from such transactions. Protestants prefer language adapted from Rule 1.4 of GO 147-A, recommending that application of the tariff items be precluded when there is "a unity of ownership, management or control between the carrier and a shipper, consignor, consignee or debtor".

This issue has diminished in its significance since we are not authorizing Alegre to publish either of its proposed tariff items. Since we are authorizing Alegre to depart from Rule 13.3 of GO 150-A by entering into short-term leases with other carriers, but not shippers or subhaulers, it is still necessary to include a prohibition on short-term leases to affiliated carriers. The language suggested by Alegre is sufficient for the limited purpose of the order which follows. Similarly, it is not necessary to require any written declaration or acknowledgement on the part of lessor or lessee that the lessee is not affiliated with a shipper.

7. Proposed Decision

Protestants were the only parties to file comments on the ALJ's proposed decision. No reply comments were filed.

Protestants urge that Alegre's request to depart from Rule 13.3 of GO 150-A be denied. They refer to testimony that Alegre lacks an economic incentive to lease its equipment at 9% for hauls over 25 miles. Upon reviewing this testimony, it is clear that it was made with reference to, and reliance on, the witness' own cost-rate analysis, which we are rejecting by this decision. Accordingly, we discount this testimony. Our adopted cost-rate analysis (Table 5) suggests that Alegre may have more economic incentive to lease its trailers than its own analysis indicated.

Noting testimony in this proceeding that existing cement rate structures "will not provide a 7% return at any length of haul to most carriers", protestants assert that "most carriers who would pay as much as 9% for leasing a trailer would be operating at a loss..." In our view, the latter statement does not necessarily follow from the former. A carrier which earns a 6% return when using its own trailers could pay 9% for trailer rental and still not operate at a loss if its power unit costs are sufficiently low. In the absence of more definitive data about the costs of "most" carriers, we believe such assertions are necessarily speculative.

Accordingly, we adopt without changes the findings, conclusions and order made in the proposed decision.

Findings of Fact

1. Alegre's 1987 indirect expenses for its overall operations were 16.64% of its total expenses.

2. Even if the 13.64% indirect expense factor used by Alegre were a reliable measure of its indirect expenses as a trailer lessor, that factor should have been applied to the direct trailer costs, not to power unit costs.

3. The indirect expense method used by Hays implies an indirect expense factor for trailers of more than 37% for a 100 constructive mile shipment; such a high figure is inconsistent with the premise that indirect costs for trailer leasing are lower than for overall operations.

4. Alegre's estimated dispatch savings of 3% of total expenses is overstated because of inconsistent rounding, failure to subtract dispatch costs from total expenses as well as indirect expenses, and inclusion of $29,149 for radio expense in total direct expense.

5. Indirect expenses, by definition, cannot be directly attributed to any particular phase of an operation.

6. Alegre's revenue need calculation for trailers includes not only the fully allocated cost of trailing equipment plus a 7% profit factor related to that cost, but also an unrelated factor equal to the amount by which Alegre's own full unit transportation cost plus a 7% profit factor exceeds its filed rate for the transportation to be performed by the lessee.

7. Alegre's revenue need for trailer rental, based on fully allocated costs plus a profit factor calculated to provide a 93% cost/rate relationship, represents the following percentages of its filed transportation rates for hauls of 25, 50, 75, 100, and 200 constructive miles respectively: 5.18%, 7.55%, 8.34%, 9.47%,

12.28%. The average (mean) percentage for all mileage brackets is 8.56%

8. For all but one of the lengths of haul measured, trailer rental charges allowed by GO 150-A are approximately equal to or in excess of Alegre's fully allocated trailer costs plus a 7% profit factor.

9. Trailer rental charges of 20% of Alegre's filed rates far exceed Alegre's fully allocated trailer costs plus a 7% profit factor for all lengths of haul measured.

10. A trailer lease payment in excess of the lessor's revenue need could offset a portion of the lessor's payment to the underlying carrier, enabling the lessor to effectively pay less than 100% of the rate to the lessee-subhauler.

11. Alegre has not shown that there is a significant number of authorized carriers of cement who have power equipment but no trailing equipment.

12. It has not been shown that trailer lease payments of up to 20% are necessary to make such transactions economically worthwhile.

13. Waiver of the rule requiring 30-day minimum term leases could present Alegre with a solution to its occasional trailer oversupply problem.

14. Alegre proposes to arrange for transportation by other carriers on behalf of the same shippers who have requested its services, and for whom at other times Alegre provides service as a common carrier.

15. The services of identifying available carriers who are able to meet the shipper's transportation needs, and making arrangements for an available carrier to perform the requested transportation, may be a traffic management function that the shipper would have to accomplish at its own expense if it were not done by Alegre.

16. There are several important distinctions between Alegre's proposed transactions as an intermediary and the overlying carrier/underlying carrier relationships governed by Rule 12 of GO 150-A, but in either case, transportation that Alegre is authorized to perform would be referred to another authorized carrier to perform the actual hauling, and it would be the hauling carrier that incurs most of the cost of performing transportation.

17. In a subhauling arrangement governed by Rule 12 of GO 150-A, Alegre would receive no net compensation but would incur billing costs. Under the Item 170 proposal, Alegre would receive up to 10% of the carrier's transportation charges and incur no costs for billing the shipper.

18. Alegre does not propose to regularly refer transportation to other carriers as a business. It proposes to do so on an occasional basis when the capacity of its own fleet has been reached.

19. Alegre may already be recovering sales related costs in its transportation rates to the extent that those rates cover fully allocated costs.

20. Alegre proposes to exclude not only shippers but also any "for-hire carrier owned or controlled by a shipper or consignee" from its proposed transactions.

<u>Conclusions of Law</u>

1. Alegre's requests to depart from both Rule 13.1 and Rule 13.3 are appropriately considered under Rule 4 of GO 150-A, which requires the Commission to find that such departures are reasonable and necessary.

2. Alegre's indirect expense factor of 16.64% should be used for the cost analysis in this proceeding.

3. Only the fully allocated cost of trailing equipment plus, at most, a profit factor related to that cost should be considered as cost justification for proposed fees.

4. Trailer lease payments from subhaulers exceeding 9% would be unreasonable as they would create opportunities for circumvention of the 100% rule.

5. Alegre has not met its burden of showing that its proposed 20% limit on trailer leasing charges is reasonable and necessary, and its request to publish proposed Item 160 should be denied.

6. Alegre's request for authority to enter into shipment-by-shipment and other short-term leases of trailers may be considered separately from its other requests.

7. The MTBA is inapplicable to the practice of acting as an intermediary arranging transportation performed by cement carriers and cement contract carriers, but, under § 701 and § 1062, the Commission may assert broad jurisdiction over the practices of cement carriers regardless of the applicability of the MTBA.

8. It is neither necessary nor appropriate to decide at this time whether a person who, as an intermediary, arranges transportation by cement carriers or cement contract carriers is allowed to or prohibited from doing so by the MTBA.

9. Valuable services performed by a carrier on a shipper's behalf at no charge to the shipper can constitute unlawful rebates of transportation charges in violation of § 494, and the potential for such an abuse constitutes support for a policy against authorizing cement carriers to act as intermediaries.

10. Since Alegre's proposal to act as an intermediary for cement transportation poses potential conflicts with regulations governing cement carriers, and it has not been shown to be necessary, it should be denied.

11. The language suggested by Alegre for excluding shipper affiliated carriers is sufficient for the limited purpose of the order which follows.

12. Since a need exists for Alegre to have the ability to enter into leases of its equipment to other carriers for terms of

less than 30 days, Alegre's proposal to depart from Rule 13.3 of GO 150-A should be granted as provided in the order which follows. In all other respects the application should be denied.

O R D E R

IT IS ORDERED that:

1. Frank C. Alegre Trucking, Inc. (Alegre) is authorized to depart from Rule 13.3 of General Order 150-A in connection with leases of its trailing equipment to authorized cement carriers and cement contract carriers. This authority does not apply to leases of trailing equipment to any shipper, consignor, or consignee; or to any for-hire carrier owned or controlled by a shipper, consignor, or consignee. This authority does not apply to leases of trailing equipment to a carrier which is operating in the capacity of an underlying carrier subhauler for transportation performed by Alegre as an overlying carrier.

2. In all other respects the application is denied. This is a final order and the proceeding is closed.

This order becomes effective 30 days from today.

Dated September 6, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

I abstain.

/s/ G. MITCHELL WILK
Commissioner

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

NEAL J. SHULMAN, Executive Director