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SEP 26 1991

Decision 91-09-070 September 25, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
U. S. Transport Services, to act as)
a Contract Rate Schedule Publishing)
Agent, as defined in G. O. 80-C, and)
allow carrier participation therein.)

ORIGINAL
Application 90-04-012
(Filed April 9, 1990)

OPINION

On April 9, 1990, U. S. Transport Services, 2805 N. Blackstone Avenue, Fresno, California (applicant), filed an application requesting that it be allowed to act as a "Contract Rate Schedule Publishing Agent" as defined in Rule 1 of Commission General Order 80-C (GO 80-C), and allow carrier participation therein.

Notice of the filing of the application was published in the Commission's Daily Calendar of April 13, 1990.

An "Advice of Participation" memorandum was submitted by the Commission's Transportation Division on May 3, 1990 urging denial of the application on the ground that the Highway Carriers Act (Public Utilities Code Section 3501, et seq.) does not afford immunity from anti-trust laws to Highway Contract Permit carriers.

On May 8, 1990, applicant submitted a letter responding to the Advice of Participation filed by the Transportation Division.

Under date of May 24, 1990, the Transportation Division submitted a Supplemental Advice of Participation reiterating and expanding upon its anti-trust concerns and requesting that a prehearing conference be held.

On May 29, 1990, applicant responded to the Transportation Division's Supplemental Advice of Participation and challenged its anti-trust concerns.

On February 7, 1991, a Notice of Prehearing Conference was served on all parties advising that a prehearing conference was scheduled for February 27, 1991.

On February 27, 1991, a prehearing conference was held before Administrative Law Judge (ALJ) Anand V. Garde at which conference both applicant and the Transportation Division appeared by counsel. In addition, representatives of several tariff publishers entered appearances as interested parties. At the conference, it was agreed that no formal hearing on the application would be required as there were no factual disputes and the sole issue to be decided was strictly a question of law. At the conclusion of the conference, ALJ Garde stated the question of law that was to be decided and directed the parties to file and serve concurrent opening briefs on the designated issue by April 19, 1991 and concurrent reply briefs by May 17, 1991. Opening and reply briefs have been filed and served by the applicant, the Transportation Division and by West Coast Freight Tariff Bureau, Inc., an interested party. All briefs having been filed and served, and no other pre-decision matters remaining unresolved, the record is closed; the controversy is submitted for decision.

The issue designated by ALJ Garde, briefed by the parties, and to be decided by this Commission is:

Whether highway contract permit carriers can participate in [an] agency contract schedule under the provisions of General Orders 80-C and 147-B¹ and Public Utilities Code Section 496.

We answer that question in the negative.

¹ Since this application was filed, GO 147-B has been superseded by GO 147-C (D.91-05-027). However, this change had no impact on the provisions of the GO at issue in this proceeding.

Discussion

By this application, applicant, a tariff and rate schedule publisher, seeks to obtain permission to publish and file a single contract carrier rate schedule which multiple contract carriers could adopt as their own and refer to in individual contracts with shippers and file with the Commission. In this way, any contract carrier could simply make reference to the rate schedule and incorporate its terms and conditions by reference in its individual contracts, rather than having to include the rate schedule in each individual contract into which it enters.

Highway carriers operating within this State are governed by the Highway Carriers' Act (Stats. 1951, Ch. 764), now codified as California Public Utilities (PU) Code § 3501, et seq. Pursuant to PU Code § 3502, the use of the public highways for the transportation of property for compensation is a business affected with a public interest. Further, that section of the Code makes it clear that one of the purposes of the Act is to secure to the people just and reasonable rates for transportation by carriers operating upon such highways. That task falls to this Commission in the exercise of its constitutionally mandated jurisdiction.

In 1988, a generic investigation (I.88-08-046) into regulation of general freight transportation by truck was undertaken. That investigation comprehensively reexamined the trucking industry, its practices and its problems, particularly as they relate to ratemaking. In its decision concluding the investigation, Decision (D.) 89-08-046 (October 12, 1989), subsequently modified and re-released as D.90-02-021 (February 7, 1990), the Commission clearly differentiated between common carriers and contract carriers and adopted GO 80-C and GO 147-B, which contain the rules by which these segments of the transportation industry are to be governed and operated.

One of the basic premises underlying regulation in the transportation field is the preservation of competition and the

prevention of monopolies which would run afoul of antitrust statutes. Agreements between carriers, whether common or contract, to utilize the same rates for the same commodities under the same conditions are, by their nature, anti-competitive. As such, those agreements are, in the absence of an appropriate exemption, unlawful. Northern Pacific Railroad Company v. United States, 356 U.S. 1 (1958); Mailand et al. v. Burckle, 20 Cal. 3d 367; 143 Cal. Rptr. 1, 572 P.2d 1142 (1978).

In the case of common carriers, PU Code § 496 provides such an exemption upon such terms and conditions as the Commission finds will safeguard the public interest. There is, however, no counterpart of § 496 applicable to contract carriers. Therefore, if any exemption in favor of contract carriers is to be found, it will be found in the Commission's General Orders which govern the filing of schedules by contract carriers, namely, GO 80-C and/or GO 147-B.

The provisions of GO 80-C control filing of schedules by contract carriers. Rule A.1(b) provides that this GO governs the construction and filing of schedules by highway contract carriers for transportation subject to GO 147 series. The term "Highway Contract Carrier" is not defined in GO 80-C, thus we must look to GO 147-B to supply the desired definition. GO 147-B, Rule 1.3 (b) provides that those carriers subject to GO 147-B include "Highway Contract Carriers" as defined in Code [PU] § 3517. Our search for a definition to this elusive term does not, however, end with PU Code § 3517. That section states: "'Highway contract carrier' means every highway permit carrier other than (a) a tank truck carrier, (b) a vacuum truck carrier, (c) a cement contract carrier, (d) a dump truck carrier, (e) a livestock carrier, (f) an agricultural carrier, or (g) a heavy-specialized carrier. Finally, our search leads to PU Code § 3515, which provides the desired definition. That section reads: "'Highway permit carrier' means every highway carrier other than a common carrier." Thus, for

purposes of GO 80-C, "Highway contract carriers" means any carrier other than a common carrier except those carriers specified in PU Code §-3517.

Rule 5 of GO 147-B is concerned with tariff filings by common carriers. Rule 5.2 deals directly with the matter of joint filings by common carriers. Pursuant to the specific terms of Rule 5.2, "nothing in this rule shall prohibit carriers from publishing their own tariffs, or from joining in tariffs issued by rate bureaus or tariff publishing agents." Thus, common carriers are specifically authorized to engage in conduct (participate in joint tariffs) that would, but for the provisions of PU Code § 496, be illegal under anti-trust laws.

Rule 6 of GO 147-B deals with contract filings by contract carriers. Rule 6 contains no authorization to participate in a joint filing analogous to that contained in Rule 5.2. Given the fact that otherwise anti-competitive behavior can be made legally acceptable only by a specific grant of anti-trust immunity (such as PU Code § 496 or Rule 5.2), the lack of similar exemption or authority with respect to contract carriers is significant, if not fatal to the present application.

Further support for the proposition that contract carriers may not jointly participate in a contract rate schedule is to be found by returning to GO 30-C.

Rule 6 of GO 80-C governs the form and content of tariffs and schedules filed with the Commission. In particular, Rule 6.7 of GO 80-C specifies eight items, designated (a) through (h) inclusive, which are to be contained in any tariff filed. Of significance is the fact that of these eight items designated to be included in the case of tariffs, only four, (a), (c), (d) and (g) are required to be included in a contract rate schedule. Of particular interest to our discussion is the elimination of item (b) which reads as follows: "The name of each participating carrier when a bureau or agency tariff is involved." Had it been

intended that contract carriers could participate in a joint publishing contract rate schedule, this item, with the substitution of the word term "schedule" for "tariff" would be appropriate to include in any such schedule. Its intentional omission is consistent with an anti-trust prohibition.

Though applicant asserts that filings such as it proposes are proper, it provides this Commission with no legal authority that an exemption from the anti-trust laws exists in the case of contract carriers. As indicated, this Commission could find no such exemption.

In view of the foregoing, we are of the opinion that since the applicable law and GOs of this Commission do not provide for an exemption from the anti-trust laws so as to allow multiple contract carriers to file joint contract rate schedules or to participate therein, to allow such would be to encourage collective ratemaking in violation of law. The application must, therefore, be denied.

Findings of Fact

1. Applicant has applied for permission to act as a contract rate schedule publishing agent, as defined in General Order (GO) 80-C, and to allow carrier participation therein.

2. The Transportation Division of the Commission opposes the application on anti-trust grounds.

3. The Commission finds no exemption which would allow the application to be granted.

Conclusions of Law

1. The application proposes a form of collective ratemaking.

2. In the absence of an exemption, collective ratemaking is violative of the anti-trust laws.

3. Public Utilities (PU) Code § 496 provides an exemption from the anti-trust laws in the case of common carriers.

4. The PU Code contains no provision analogous to § 496 which would provide an exemption from the anti-trust laws in the case of contract carriers.

5. Neither GO 80-C nor GO 147-B allow filing of contract rate schedules for more than a single contract carrier.

6. The application, if granted, would violate anti-trust laws.

7. The application must be denied.

ORDER

IT IS ORDERED that the application of U. S. Transport Services to act as a Contract Rate Schedule Publishing Agent, as defined in GO 80-C, and to allow carrier participation therein by more than one contract carrier, is denied.

This order is effective today.

Dated September 25, 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