

Decision 83 04 086 APR 20 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of MICHAEL VAUGHN doing business)
as VAUGHN'S TRUCKING COMPANY for)
Cement Contract Carrier Permit)
to operate in the Counties of)
Alameda and San Mateo.)

Application 82-06-46
(Filed June 15, 1982)

Colin C. Kelley, Attorney at Law, for
Michael Vaughn, applicant.
Steven M. Bernard, Attorney at Law, for
Amaral Trucking, Inc.; Les Calkins,
for Les Calkins Trucking, Inc.;
Terry D. Fortier, Attorney at Law,
for Commercial Transfer, Inc.;
Priscilla Ladeira, for Rich Ladeira,
dba Rich Ladeira Trucking;
Ronald Rigazio, for Max Binswanger
Trucking, Inc.; and Shirley Tibbs,
for Foothill Bulk Transport;
protestants.
Dorothy Ligon, for the Commission staff.

O P I N I O N

Michael Vaughn (applicant) holds highway contract, dump truck, agricultural, and heavy specialized carrier permits (T-105,003). He also holds a highway common carrier certificate (GC-507).

In March of 1982, applicant sent the Commission copies of an application for a cement contract carrier permit. Copies of the application were served on carrier associations, cement sellers, and at least one company holding cement authority.

The application was incomplete; among other defects, it did not specify the territory in which operations were to be conducted.

Because of the defects, the matter was not docketed and did not appear on the Commission's Daily Calendar. The staff received at least one protest, but returned it as premature.

Applicant amended the filing to meet staff's standards for a satisfactory cement contract carrier permit application. Apparently none of the amending material was sent to the premature protestant or to the other parties who received copies of the original filing. The modified application was accepted for filing on June 15, 1982. Notice of the filing appeared in the June 22, 1982 Daily Calendar. The Daily Calendar listing showed that the application concerned Alameda and unspecified other counties.

As amended, the application proposes to transport cement to two manufacturing plants belonging to the Christy corporations (Christy).^{1/} Those plants, located in Colma and Fremont, are presently supplied with cement from a plant in Davenport. Protestant Amaral Trucking, Inc. (Amaral) now performs this transportation. Christy is considering a change in operations, under which all cement for these plants would originate in Redwood City. Applicant, who now performs other noncement transportation for Christy, plans to conduct the Redwood City cement transportation, supplanting Amaral. (Any of the protestants with the exception of Max Binswanger Trucking, Inc. could compete for either haul.) Applicant's proposed service territory does not include the Davenport origin.

Amaral, Commercial Transfer, Inc. (Commercial), and Rich Ladeira (Ladeira), dba Rich Ladeira Trucking, attempted to file protests

^{1/} The Colma plant is operated by Christy Vault Co. Christy Concrete Products, Inc. operates the Fremont plant.

more than 30 days after June 22. These were rejected as not timely filed (Rule 8.1).

Commercial's filing included a letter requesting relief on equitable grounds from the 30-day rule. Nevertheless the pleading was not treated as a motion and was rejected in toto. Ladeira, on the other hand, resubmitted his protest as an attachment to a formal motion for relief from the 30-day rule. The motion was accepted for filing.^{2/}

The matter was set for hearing. Hearing was held in San Francisco on September 20, 1982, under an Administrative Law Judge (ALJ) ruling that any protestant who appeared at hearing would be permitted to participate whether or not its protest had been timely filed.

During the hearing, after applicant had rested, protestant Amaral moved for a dismissal. The motion was based on numerous asserted defects in applicant's showing, including the failure to demonstrate operating knowledge. The motion was supported by protestant Commercial.

The ALJ denied the motion, without prejudice. After the filing of briefs the matter was submitted on November 10, 1982.

Positions of the Parties

Applicant elected not to produce any evidence to satisfy the operating experience and nonimpairment requirement of Public Utilities (PU) Code § 3623(b) and (c)(3) (quoted below). Instead

^{2/} Until July 1, 1982, our Rules (Title 20, Ch. 1, Cal. Admin. Code) did not specifically require applicants for cement permit authority to serve anyone. Subsequent to that date, Rule 15.1 provides that the Daily Transportation Calendar constitutes notice of all filings noticed on it. The Daily Transportation Calendar is a new document separate from the Daily Calendar. The Daily Transportation Calendar was first published on July 1, 1982.

he argued that the Commission should refuse to consider either question in deciding whether to issue a permit.

Both protestant Amaral and protestant Commercial rely on the legislative finding that cement transportation is a highly specialized business (PU Code § 3620). They also emphasize PU Code § 3623 which directs that:

"...the commission shall require the applicant to establish by a preponderance of evidence:"

* * *

"(b) That he has sufficient operating...ability to initiate and continue the proposed operation.

"(c) That the privilege sought:"

* * *

"(3) Will not impair the ability of presently certificated cement carriers or permitted cement contract carriers to provide...adequate services as such, at the lowest possible reasonable rates."

* * *

"If the commission finds that the applicant has established all of the foregoing, then a permit may be granted...; otherwise it shall refuse to issue the permit requested." (Emphasis added.)

They both contend that applicant failed to present a prima facie case under PU Code § 3623. They argue that the Commission therefore has a statutory obligation to dismiss the proceeding without considering the merits of any other factual or policy issue raised.

The Evidence

Applicant testified that he has held intrastate authority for 10 years. For all of that period he has hauled for Christy Concrete Products, Inc. and Christy Vault Co. (Christy). His business shares a lot and a telephone with Christy. He has transported aggregate for them as a dump truck carrier. He also provides rental equipment for Christy's customers, frequently using his heavy hauling equipment to transport the rented equipment to the job site.

He already possesses the power equipment he needs to haul cement; he will purchase a set of trailers. He has located an acceptable set at a truck broker and will arrange to buy when the authority is issued. The trailers are used, priced at \$15,000. They are equipped with a blower and pump.

He testified that Christy now buys its cement from a plant in Santa Cruz County. When a permit is issued he plans to shift to a closer facility (in Redwood City) saving both mileage and time.

Christy presently has several plant locations, including one in Colma and one in Fremont. Both locations have batch plants for making precast concrete products such as vaults. His plan is to transport cement for the Christy plants in Colma and Fremont and no one else.^{3/} Christy will need four loads per week at each plant. Applicant will not back-haul. He estimates that his charge for a full load from Redwood City to either Christy plant would be \$237.50 per load or \$9.50 per ton. He did not know whether this figure covered fixed costs or not. He guessed that the trip to both plants is roughly 75 miles.

^{3/} However, we note that when business is slow, he actively solicits new traffic for his other operation.

He does not know what the minimum charge would be for the proposed haul. He relied on the cement seller's quotation of \$9.50 per ton.

Applicant does not know whether any of his drivers have experience in transporting cement. He believes, however, that both he and his drivers can easily learn to transport cement by experience.

He hauls much of Christy's raw materials and finished products, except for cement. His facility is located on Christy's land, which he uses rent free. He shares a telephone line with Christy as well as having one in his own name. Applicant believes that Christy will benefit from having to deal with one carrier rather than two. He does not plan to engage in rate competition.

He was unfamiliar with the pricing practices of cement sellers. He did not know whether cement companies adjust their prices so that more distant suppliers can compete on an equal price basis with closer competitors despite the differential in transportation costs. He conceded that if there were a distance differential, the change to Redwood City would not benefit Christy.

A representative of the Christy corporations testified. He explained that suppliers of cement submit offers to Christy frequently and that prices fluctuate substantially. Christy will routinely accept the lowest bid for cement.

If any carrier is willing to charge rates lower than either applicant or Amaral, it would receive Christy's cement traffic.

He testified that Christy can purchase cement under either a delivered or FOB price. If it selects a delivered price, its suppliers will reduce the price to pass on any reduction in

transportation costs. Therefore, with either type of pricing, Christy can benefit if able to purchase cement from a location closer to its plants.

Competitors' Evidence

The president of Amaral testified that his company had been hauling cement for Christy's Fremont and Colma plants for 18 or 19 years. His company has added equipment in order to handle this business. At present, they are operating only about 60% of their cement hauling equipment. This is due to the fact that the depressed state of the economy has greatly reduced the demand for cement and thus for cement transportation.

He claimed that Amaral would be able to perform the proposed Redwood City operation as well as applicant. He would use the same rates as applicant plans to use. He explained, however, that there are certain economies in the present Santa Cruz operation since Amaral has the opportunity to back-haul cement.

In a typical year, revenue from the Christy cement operation would be approximately \$50,000 or roughly 8% of gross revenue. Recently, however, Christy's gross has dropped to about \$30,000.

He explained that when Amaral started, it contacted trailer and blower companies to learn how to use the equipment. Now if he needs a new driver, the older drivers are expected to train him.

He indicated that virtually all of the cement transportation is prepaid with Christy or other purchasers ultimately paying the transportation cost as part of the delivered price of cement.

Another officer of Amaral testified to present cost and revenue statistics affecting the service to Christy.

The representative of Commercial testified that it has a cement certificate (D.82-02-053, dated February 4, 1982) which authorizes it to serve in Alameda and San Mateo Counties. It has, in fact, conducted operations in northern California counties for the past 10 years. Commercial is capable of serving Christy and has substantial (approximately 40%) excess capacity in terms of both drivers and vehicles available for such operations. The representative emphasized that the demand for cement transportation is depressed and that the resulting increase in excess capacity pushes his costs up.

While Commercial's nearest regular home base for vehicles and drivers is in San Jose, it now has trucks in the Bay Area every night. Such extended operations are economically feasible in part because of back- and cross-hauls. Commercial regularly performs transportation in the San Francisco Bay Area.

A regional manager of protestant Binswanger testified. It is a cement common carrier and holds other authority as well. It has 85 tractors and 95 sets of trailers, 70 of which are pneumatic equipment. They have additional trailing equipment which could be used for cement hauling; 40% of its cement equipment is regularly idle.

Since it is a southern California carrier it is not in direct competition with either applicant or protestant, even though the parent corporation has some termini in the Bay Area.

The representative of Foothill testified. Its operation has a terminus in Mountain View. It has nine tractors and 11 sets of pneumatic-equipped trailers. Foothill holds a cement certificate

including Alameda and San Mateo Counties; 40% of its equipment is regularly idle.

It has lost nine customers who have gone out of business in the last three years. The corporation is currently losing approximately \$4,000 on an annual gross of between \$300,000 and \$400,000.

The representative testified that it would violate the ethics of the cement transportation business if Foothill were to establish a rate lower than a competitor's or try to solicit Christy away from Amaral.

Mrs. Ladeira testified for protestant Ladeira. She dispatches for the family business, which holds a certificate authorizing transportation in 25 counties including San Mateo and Alameda; its home base is in Antioch. About 40% of its total gross is derived from cement hauling. Its current year revenue is 40% to 50% less than the \$160,000 gross revenue for 1981. The cement gross revenue for 1982 is 75% of 1981 revenue. Her pneumatic trailers are idle one or two days in a 5-day week. Total idle capacity for all cement equipment is 50%. Ladeira is ready and able to perform the same services as those proposed. It currently operates on a regular basis between plants and receivers who are even further away from Antioch.

When she and her husband started the business another experienced individual acted as their teacher.

Summary

As explained below, we have determined that applicant has not presented any evidence to demonstrate either that he has operating skills or that his operation will not impair existing carriers' rates or service and concluded that no permit can be issued.^{4/}

DiscussionWas Hearing Required?

In the circumstances, the protestants' failure to file a timely protest was not their fault. The ALJ's actions in setting the matter for hearing and in permitting all appearances to participate fully were proper and are ratified.

Can the Application Be Granted?

Applicant has chosen not to produce any evidence to support findings on the operating knowledge (PU Code § 3623(b)) and nonimpairment (PU Code § 3623(c)(3)) issues. Instead he argued that it would be inequitable and bad policy to consider those issues in this proceeding. Regardless of equity or policy considerations, the statute unequivocally prohibits us from issuing a permit in the absence of such proof.

The issue has been presented here in terms of excess capacity; although other analyses may also be appropriate for other proceedings, it is appropriate to use only an excess capacity test

^{4/} We should note that any denial of an application without a weighing of the evidence is not, in any sense, res judicata. Applicant is therefore free to submit evidence on the statutory issues in a new application.

in this proceeding. Idle capacity in any industry generates costs which sooner or later will be passed on to the ultimate consumer either directly in the service problems created by deferred maintenance or through other false economies.

If this application is granted, it will add the services of at least one truck to, and take \$30,000 to \$50,000 of gross revenue out of, the relevant market, even though applicant has effectively conceded that excess capacity in that market is in the 40% range. On the other hand, if the application is denied, this traffic will be available to one or more of the existing carriers, thereby reducing the waste and its pressure on rates and service. The statute is clear; absent an affirmative showing by applicant, we have a responsibility to alleviate this kind of economic waste by denying permits whenever the proposed service would adversely affect either service or rates of existing carriers.

Findings of Fact

1. Neither applicant nor his employees have any training or experience in cement carriage.
2. Applicant does not have the operating knowledge needed to initiate and conduct a specialized form of carriage.
3. The relevant market is the market for cement transportation between San Mateo and Alameda Counties.
4. Applicant has not shown that his proposed operation will not materially increase the level of excess capacity in the relevant market.
5. Excessive capacity can be expected to raise unit costs by idling equipment thereby compelling existing carriers to either charge more than the lowest possible reasonable rates or render less adequate service.
6. The protestants' failure to file timely protests was not the result of their own negligence.

Conclusions of Law

1. Cement carriage is a specialized form of carriage requiring specialized training and/or experience.

2. Applicant has not demonstrated compliance with PU Code § 3623(b) and (c).

3. The Commission cannot grant a cement permit unless it can find that there is enough traffic to support both new and existing services in the relevant market.

4. The protestants should not be deemed to have waived hearing.

5. This application should be denied without prejudice.

O R D E R

IT IS ORDERED that the application of Michael Vaughn, dba Vaughn's Trucking Company, for a cement contract carrier permit is denied without prejudice.

This order becomes effective 30 days from today.

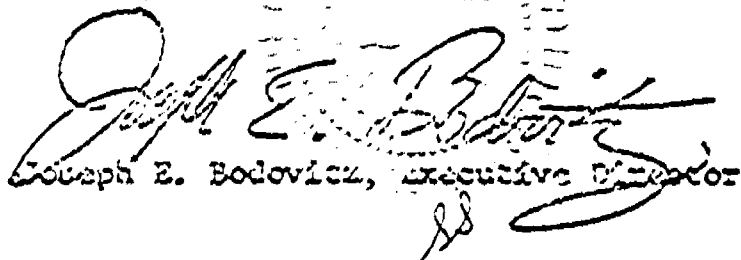
Dated April 20, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
DONALD VIAL
Commissioners

Commissioner Priscilla C. Grew,
being necessarily absent, did not
participate.

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


Joseph E. Bodovick, Executive Director



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The Evidence

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(END OF APPENDIX A)

Summary

As explained below, we have determined that applicant has not presented any evidence to demonstrate either that he has operating skills or that his operation will not impair existing carriers' rates or service and concluded that no permit can be issued.^{3/} Since an analysis of all of the evidence is not required, the usual summary of the testimony has been included in an appendix rather than in the text. ✓

DiscussionWas Hearing Required?

In the circumstances, the protestants' failure to file a timely protest was not their fault. The ALJ's actions in setting the matter for hearing and in permitting all appearances to participate fully were proper and are ratified.

Can the Application Be Granted?

Applicant has chosen not to produce any evidence to support findings on the operating knowledge (PU Code § 3623(b)) and nonimpairment (PU Code § 3623(c)(3)) issues. Instead he argued that it would be inequitable and bad policy to consider those issues in this proceeding. Regardless of equity or policy considerations, the statute unequivocally prohibits us from issuing a permit in the absence of such proof.

The issue has been presented here in terms of excess capacity; although other analyses may also be appropriate for other proceedings, it is appropriate to use only an excess capacity test

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6. The protestants' failure to file timely protests was not the result of their own negligence.

Conclusions of Law

1. Cement carriage is a specialized form of carriage requiring specialized training and/or experience.

2. Applicant has not demonstrated compliance with PU Code § 3622(b) and (c).

3. The Commission cannot grant a cement permit unless it can find that there is enough traffic to support both new and existing services in the relevant market.

4. The protestants should not be deemed to have waived hearing.

5. This application should be denied without prejudice. ✓

O R D E R

IT IS ORDERED that the application of Michael Vaughn, dba Vaughn's Trucking Company, for a cement contract carrier permit is denied without prejudice. ✓

This order becomes effective 30 days from today.

Dated APR 20 1983, at San Francisco, California.

LEONARD M. CRIMES, JR.
President

VICTOR CALVO
DONALD VIAL
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate in the disposition of this proceeding.