ALJ/vdl *

Decision 83 06 013 JUN 1 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of used household goods and related property statewide as provided in Minimum Rate Tariff 4-B and the revisions or reissues thereof. | Case 5330, OSH 110 (Order Granting Rehearing dated February 4, 1982) |
| And Related Matters. | Case 5433, OSH 73<br>Case 5436, OSH 290<br>Case 5437, OSH 309<br>Case 5438, OSH 124<br>Case 5440, OSH 112<br>Case 5603, OSH 216<br>Case 5604, OSH 66<br>Case 6008, OSH 41<br>Case 7857, OSH 171<br>Case 7783, OSH 164<br>Case 8808, OSH 50<br>Case 9819, OSH 39<br>Case 9820, OSH 17<br>(Order Granting Rehearing dated February 4, 1982) |

APPEARANCES ON REHEARING

Belnap, Spencer & McFarland, by Stephen C. Herman, Attorney at Law, and Murchison & Davis, by Donald Murchison, Attorney at Law, for International Minerals & Chemical Corporation, petitioner.

Howard D. Clark, for Asbury System, and L. Filipovich, for General Drayage, respondents.

Frank Pfost, for Pacific Coast Cement Corporation; George B. Shannon, for Southwestern Portland Cement Company; Silver, Rosen, Fischer & Stecher, by Andrew J. Skaff, Attorney at Law, for Cargill, Incorporated; Handler, Baker, Greene & Taylor, by Daniel W. Baker, Attorney at Law, for Harbor Carriers Association; and Don Austin, for Monolith Portland Cement Company; interested parties.

Lynn T. Carew, Attorney at Law, and William J. Tait, for the Commission staff.

Changes of Appearance on Rehearing

Tuttle & Taylor by Jeffrey M. Hamerling, Attorney at Law, for Sunkist Growers, Inc.; Graham & James, by David J. Marchant, Attorney at Law, and James B. Henly, for ABT, Inc. and California Carriers Association; John P. Hellmann, for California Trucking Association; Arvel G. Batchelor, for JBA Company Inc.; and John C. Craig, for California Association of Port Authorities; interested parties.

OPINION ON REHEARING

These consolidated matters are on rehearing. To address the issues presented it is appropriate to set forth the background of the proceeding.

In Decision (D.) 90802 (Case (C.) 5432, OSH 1019 et al.) the Commission determined that it had the authority to regulate the motor carrier movements within this State of commodities having prior or subsequent movement in interstate or foreign commerce in a private vessel (ex-vessel traffic). It had previously been assumed that ex-vessel traffic was either subject to, or exempt from, Interstate Commerce Commission (ICC) rates. In C.5432, OSH 1019 et al., the Commission considered the ramifications of asserting its jurisdiction in the context of the prevailing framework in which ICC or ICC-exempt rates were being assessed. The Commission, in D.90802, D.90804, and D.90805 exempted ex-vessel traffic from the minimum rates named in Minimum Rate Tariffs (MRTs) 2, 1-B, 9-B, and 19. Simultaneously in D.90803 the Commission issued the Orders Setting Hearing in these consolidated matters (C.5330, OSH 110 et al.), to determine whether an exemption similar to that applicable to the general commodities (MRTs 2, 1-B, 9-B, and 19) should be adopted for other commodities (MRTs 3-A, 4-B, 7-A, 8-A, 10, 12-A, 14-A, 17-A, 18, and 20; Transition Tariffs 6-B, 11-A, 13, and 15).

Meanwhile, D.90802 and its companion decisions were challenged in two separate legal proceedings. In one proceeding

Sunkist Growers, Inc. (Sunkist) filed suit in the United States District Court for the Northern District of California (No. C-80-3090 AJZ), seeking declaratory relief, alleging that the Commission lacked jurisdiction over the in-state carriage of citrus shipped overseas in private vessels. On March 6, 1981 the District Court issued an order granting the Commission's Motion for Summary Judgment and denying Sunkist's Motion for Summary Judgment. The court determined that no justiciable case or controversy existed between the Commission and Sunkist, since D.90803 ordered hearings be held to consider exempting other commodities, including citrus (MRT 8-A), and the potential for such administrative relief suggested that there was not yet an adequate controversy within the meaning of the Declaratory Judgment Act (28 U.S.C. § 2201). Further, the District Court indicated that neither party had submitted any evidence on the nature of the vessels used by Sunkist in its export activities. The court directed Sunkist to prove to the Commission that the vessels in question were not private, if such was the case.

The other challenge to D.90802 and its companion cases occurred in the California Supreme Court where petitioner United States Steel Corp (U.S. Steel) contended that the Commission failed to consider the discriminatory impact of the exemption of foreign steel on domestic steel producers, who would still be subject to minimum rates (United States Steel Corp. v Public Utilities Commission (1981) 29 C 3d 603).

C.5330, OSH 110 et al. proceeded to hearing on June 17, 1981, with the U.S. Steel challenge unresolved. Evidence was presented by the Commission Staff (Staff) and Sunkist, and subsequently, these matters were temporarily removed from the calendar pending the outcome of the U.S. Steel challenge.

On July 6, 1981, the California Supreme Court issued its opinion in the United States Steel case annulling D.90802. The court concluded that the Commission erred in failing to consider the economic impact of the exemption on foreign and domestic steel producers.

No further hearings were held in C.5330, OSH 110 et al. Thereafter, on August 18, 1981, the Commission issued D.93459 in C.5330, OSH 110 et al., in which it rejected the Staff's recommendation that ex-vessel traffic be exempted from the rates contained in the tariffs under consideration, stating: "No investigation was made by the Staff to determine whether any local producers would be subject to rate discrimination similar to that found to be unlawful in U.S. Steel v Public Utilities Commission (supra)." The Commission defined "private water vessel" as any vessel-owned or chartered by the owner or lessee of the goods being transported on that vessel. The Commission also indicated that: "Favorable consideration should be given to deviation applications filed by carriers seeking to assess rates on the levels of ICC or negotiated rates formerly considered to be applicable to ex-vessel traffic, if a showing is made similar to that required for rate reduction filings under the Commission's reregulation plan enunciated in D.90663."

On October 19, 1981, International Minerals and Chemical Corporation (IMC) filed a Petition for Rehearing of Decision No. 93459 and a Petition for Stay of the Order in Decision 93459. IMC alleged in its petition that:

1. The Commission had violated its right to due process of law since IMC had not received notice of C.5330, OSH 110 et al.
2. The evidentiary record before the Commission in C.5330, OSH 110 et al. was inadequate to support the decision with respect to petroleum coke ex-vessel traffic.
3. The Commission committed legal error in concluding that it has jurisdiction to regulate ex-vessel traffic moving solely within the commercial zone.

While the Commission was considering IMC's petition, IMC filed a Petition for Writ of Review of Decision No. 93459 with the

California Supreme Court based on the presumption, under Public Utilities Code § 1733(b), that its petition had been denied. By order of February 4, 1982, (D.82-02-064) the Commission granted IMC's Petition for Rehearing, and IMC voluntarily withdrew its Petition for Writ of Review. The order granting rehearing was not limited to IMC. It encompassed D.93459 with respect to all parties.

A duly noticed rehearing was held in these matters before Administrative Law Judge Donald B. Jarvis in San Francisco on June 22, and 23, 1982. The proceeding was submitted subject to the filing of transcipt and briefs, which were received by October 13, 1982.

Position of the Parties

Numerous parties appeared and participated in the rehearing. However, evidence was only adduced by IMC and Cargill, Incorporated (Cargill).

Sunkist

Sunkist appeared but did not actively participate in the rehearing. It took the following position:

> "Sunkist stands on its prior submissions and again emphasizes that it disagrees with the staff's view that ex-vessel traffic of agricultural products is subject to PUC jurisdiction. Sunkist continues to take the position that it will challenge the Commission's jurisdiction over such transportation in the appropriate judicial proceeding, if and when that issue is ripe for judicial resolution."

IMC

IMC takes the position that while fully participating in the rehearing it does not waive its right to raise, in an appropriate court, "the constitutional issues which exist with respect to the Commission's assertion of jurisdiction over ex-vessel traffic moving solely within commercial zones."

IMC asserts that the record on rehearing supports the granting of an exemption from minimum rates for its ex-vessel traffic for export moving within the Los Angeles Harbor Commercial Zone.

Cargill

Cargill contends that the record on rehearing establishes the need for exemption of ex-vessel movements of grain from the Commission's minimum or transition rate tariffs.

Staff

The Staff modified its position on rehearing in the light of the U.S. Steel decision:

> "...the Staff now supports the approach adopted by the Commission in D.93459. This approach contemplates application of the relevant state rates, since the definition of "private vessel" adopted in D.93459, makes enforcement of these state rates feasible. The Staff also agrees with the Commission that favorable consideration should be given to deviation applications filed by carriers seeking to assess rates on the levels of ICC or negotiated rates formerly considered to be applicable to ex-vessel traffic, if a showing is made similar to that required for rate reduction filings under the Commission's reregulation plan. This solution obviates the need for exempting ex-vessel traffic, since it will provide carriers with the tool to conform their rates to the specific transportation conditions they encounter."

The Staff contends that although Cargill's proposal for an MRT 14-A exemption is jurisdictionally sound, it is infeasible in view of the U.S. Steel case. The Staff asserts that the exemption proposed by IMC would be a shipper exemption, which the Commission has never granted. The Staff argues that both exemptions should be denied.

Harbor Carriers Association

The Harbor Carriers Association (Association) appeared at the rehearing but presented no evidence. Its position is that:

(1) If the IMC request is granted, an exemption from minimum rates for the transportation of petroleum coke, in bulk, should be made applicable to all commercial zones in the state. (2) The Commission should order that favorable consideration be given to deviation applications filed by carriers seeking to assess rates at the ICC levels which were formerly considered applicable to the ex-water traffic, and the filing of true and correct copies of tariff pages containing such rates, lawfully filed with the ICC should be prima facia proof that the charges are just and reasonable.

Other Parties

The California Association of Port Authorities supported the position of IMC.

The California Trucking Association and Southwestern Portland Cement Company supported the Staff's position.

General Drayage and Asbury System supported affirming D.93459.

Pacific Coast Cement Corporation, Monolith Portland Cement, JBA Co. Inc., California Carriers Association, and ABT, Inc. appeared as interested parties but took no position on rehearing.

Material Issues

The material issues presented in these consolidated proceedings are: (1) Should D.93459 be modified with respect to ex-vessel transportation of grain? (2) Should D.93459 be modified with respect to ex-vessel transportation of petroleum coke?

Discussion

A. Jurisdiction

Sunkist directly challenges and IMC indicates it reserves the right to challenge the Commission's jurisdiction over ex-vessel traffic.

The California Supreme Court has held that:

> "Though federal authorities control intrastate motor carrier movement that precedes or follows import or export by common carrier vessel, it is

> undisputed that the commission has jurisdiction over wholly intrastate movement preceded or followed by movement in foreign commerce via private vessel." (United States Steel Corp. v Public Utilities Com. (1981) 29 C 3d 603, 606.)

The ruling of the Supreme Court is determinative and binding on the Commission. (See also Pennsylvania Railroad Company v Public Utilities Comm. of Ohio (1935) 298 U.S. 170; Motor Transportation of Property Within a Single State (1954) 94 MCC 541; Behnken Truck Service, Inc., Ext. -- Exbarge Traffic (1967) 103 MCC 787; Allen-Investigation of Operations and Practices (1977) 126 MCC 336.)

B. The U.S. Steel Case

The Staff contends that the requests by IMC and Cargill cannot be granted because neither presented an analysis of the impact of its proposal on foreign and domestic markets. The Staff argues that the U.S. Steel case mandates such an analysis before the Commission can take the requested action. The Staff misreads the U.S. Steel case.

The U.S. Steel case involves a failure of proof and the Commission's failure to consider all the issues presented.

> "There was no evidence of economic justification for the rate disparity or of a difference in cost for the transportation of foreign and domestic steel." (29 C 3d at p. 607.)

> "Concomitant with the discretion conferred on the commission is the duty to consider all facts that might bear on exercise of that discretion. The commission must consider alternatives presented and factors warranting adoption of those alternatives...Since here the commission refused to consider the economic effects of different rates on shippers, the question is whether those effects are material to the exercise of discretion." (29 C 3d at pp. 608-609.) (Emphasis added.)

The Supreme Court indicated "That the commission must consider the economic effects of alternative rules. Because it 'may

and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve.'" (29 C 3d at p. 609.)

The Supreme Court also discussed the question of discriminatory rates as a "guide" to the Commission. (29 C 3d at p. 610, et seq.) The Court focused on the questions of preferences and the constitutional mandate of equal protection which requires reasonable classifications. Again the Court focused on lack of proof:

> "The aim of minimum rate regulation is to preclude destructive rate practices and to provide for movement at the lowest rates compatible with the maintenance of adequate transportation service...Rates below the minimum do not serve that aim absent some showing of a difference in cost in hauling private-vessel steel as compared with domestic steel, or of a difference regarding destructive rate practices. There is no showing here." (29 C 3d at p. 612.) (Emphasis added.)

Subject matter aside, the U.S. Steel case rests on fundamental rules of jurisprudence:

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evidence Code § 500.)
>
> "(a) The burden of producing evidence as a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.
>
> "The burden of producing evidence as a particular fact is initially on the party with the burden of proof as to that fact." (Evidence Code § 550.)

U.S. Steel does not require a certain type of evidence. The Supreme Court did not prescribe a particular mode of proof. It did not require extensive economic surveys in all cases. It did not mandate the Commission to conjure and destroy straw men. What is

required is sufficient evidence, of whatever kind, to sustain findings in the light of the controlling constitutional and statutory provisions.

C. The Cargill Request

Cargill seeks to have exempted from minimum or transition rates all ex-vessel shipments of grain for export. The following evidence was presented in support of this position.

The exemption sought is only for exports. Thus, no question of price differential in California or any domestic market due to regulated, as against exempt, rates is presented.

Cargill is in the business of merchandizing grain. It has 45 branch offices, 50 terminals and export facilities, and 130 country elevators in the United States. Most of these are located in the Midwest. In California it has offices in Sacramento, Tranquility, and Los Angeles. In addition, it has facilities in Dixon, Grimes, Sacramento, Goshen, and Famoso.

All grain shippers in California operate and arrange for transportation in the same manner as Cargill. In the past three years California has exported 50,000,000 to 80,000,000 bushels of wheat annually. In California most of the grain for export is moved by truck. It is brought to an elevator where it is either stored or immediately loaded on a vessel and exported. The grain moves in bulk. Trucks hauling grain have a capacity to carry 800 to 1,000 bushels per unit. Cargill exports 15,000,000-30,000,000 tons of grain annually.

Grain for export is sold FOB the vessel, which is chartered by the buyer. Most of Cargill's export traffic moves through its Sacramento facility, although some moves through facilities in southern California. In the 12 months preceding the hearing Cargill exported grain to Russia, China, Indonesia, Jordan, Ecuador, Mexico, Chile, and other countries. Cargill uses truckers in its operations which range from companies that have 10-30 tractors to individuals who own a single truck and trailer.

Prior to the U.S. Steel decision and D.93459 the following situation applied to the transportation of grain for export. During June, July, and August, the peak of the harvest grain for export moved at MRT 14-A rates. This was due to the competition for available equipment for domestic as well as export moves. During nonpeak periods, September-May, some grain for export moved at negotiated rates. Approximately 15-20% of the grain for export moved annually at negotiated rates.

California grain dealers compete not only among themselves with wheat raised in California but with wheat raised in the Pacific Northwest, the Texas Gulf, and the Louisiana Gulf. In the case of hard wheat, the cheapest price delivered to the buyer is determinative. The transportation differential may be the difference between California grain growers and dealers being competitive with other parts of the country.

The record indicates that negotiated rates occurred during the off-peak season, when not all grain transporting trucking equipment is used. This affords truckers the opportunity to make some profit on equipment not otherwise used. Negotiated rates were also used for backhauls after delivery of a domestic shipment. In these instances the trucker does not have to deadhead back after a domestic movement under MRT-14A rates. California grain growers and dealers are able to sell grain for export which might not otherwise have moved.

There is evidence that some California grain has been exported through Portland, Oregon because the interstate transportation was based on a cheaper, negotiated rate, since the ICC does not regulate the transportation of agricultural bulk commodities.

Many transactions in the grain export business are made within hours or a few days. Also, because of the state of the world economy buying is made for current needs rather than in advance. Contracts are being made for delivery in one month rather than six

months. In these circumstances the Commission's deviation procedure does not adequately meet the needs of commerce. Because of the time involved in processing and uncertainty of result, reliable expeditious quotes cannot be given and business is lost. Furthermore, the "me too" provisions allowing a carrier to use deviation rates filed and justified by another carrier are of little help in this situation. Grain moves from hundreds of locations in California and it is unlikely that there will be an identical deviation for a proposed movement, assuming the carriers had the resources to research prior deviations.

It is in the public interest and reasonable to grant an exemption from minimum rates for export ex-vessel traffic in grain. The exemption will have no effect on the domestic price of grain or the cost of transportation of domestic grain. The exemption will benefit California truckers by generating additional business. The exemption will benefit California grain growers and brokers by enabling them to be more competitive for export trade.

D. The IMC Request

The IMC request for an exemption from the minimum rates for hauling petroleum coke (MRT-7A) differs from the one involving grain in one major aspect. The exemption sought is limited to traffic for IMC in the Los Angeles Harbor Commercial Zone. In the case of grain, Cargill produced evidence about the export grain traffic in California generally, as well as its own operations. IMC limited its presentation to facts about its operations.

The staff contends that the exemption requested by IMC would be a shipper's exemption: that the Commission has no authority or jurisdiction over shippers; that IMC has no standing to request the exemption and that the Commission cannot grant the exemption. The Staff argues that the proper procedure to obtain relief is to have the carriers serving IMC file requests for deviation from minimum rates under Resolution TS-284.

IMC contends that it is not seeking a shipper's exemption but one involving transportation; that the Commission has jurisdiction to grant the exemption and IMC has standing in this matter.

Neither statute nor Commission rule precludes IMC from seeking the relief requested in this matter. In fact Rules 42 and 54 authorize such participation. The Commission has permitted parties whose interests have been affected to file or appear in proceedings before the Commission. (Re Antelope Valley Water Co. (1972) 73 CPUC 485, 487: Ronnie Allen. D.82-07-100 in A.82-03-85, entered July 21, 1982: MRT-7A, Pet. 314, D.93523 in C.5437, entered September 1, 1981: see also. Investigation of Union Pacific R.R. et al. (1981) D.93105 in OII 18). The Commission has been reversed when it refused to permit an affected party to assert its rights. (Ventura County Waterworks Dist. v Public Util. Com. (1964) 61 C 2d 462: California Trucking Assn. v Public Util. Com. (1977) 19 C 3d 240.) IMC has standing in these consolidated proceedings.

The Commission has jurisdiction to exempt transportation from minimum rates (United States Steel Corp v Public Util. Com., supra; Minimum Rate Tariff No. 2 (1954) 54 CPUC 107: Investigation of Recyclables, D.82-06-091 in OII 85, entered June 15. 1982: OSH 965 (1978) 84 CPUC 45, mem. op.) or to grant deviations from minimum rates (Harrison-Nichols Co. (1977) 83 CPUC 1, mem.op.; Burton Truck & Transfer Co. (1977) 82 CPUC 200: J.S. Shafer, Jr. (1977) 82 CPUC 590). The question presented is whether IMC has presented facts sufficient to justify the exercise of that jurisdiction.

Petroleum coke is the end product of petroleum refining. There are two types: green and calcine. Green petroleum coke is the kind that comes straight from the refinery after crushing. Calcine petroleum coke is green petroleum coke which has been treated in a kiln to remove 10½-13% of its volatiles and moisture.

IMC's request relates only to green petroleum coke for export ex-vessel traffic in the Los Angeles Harbor Commercial Zone.

Unless otherwise specified the term petroleum coke will refer to green petroleum coke.

The record indicates that at the present time no petroleum coke is imported on the west coast. Therefore, there is no question of the transportation charges here involved affecting the California or domestic price of petroleum coke.

As indicated, petroleum coke is the end product of petroleum refining. The petroleum coke must be moved from the refinery for it to continue operations. Refineries enter into extended term contracts in order to move the petroleum coke from their premises. These contracts presently range from three to five years. It is necessary to have storage facilities in order to handle a refinery contract. This is particularly important if the petroleum coke is for export. The petroleum coke produced by a refinery in one day is not sufficient to load a vessel. High wharfage would result without storage to allow prompt loading of a vessel.

IMC is a major world broker of petroleum coke. It maintains a storage facility at Pier G in Long Beach for the export of petroleum coke. The facility consists of an automated warehouse with a capacity of 110,000 tons and an uncovered storage area with a capacity of 30,000 tons. The warehouse contains a crushing facility which can crush 170 tons an hour and return the material back to the warehouse. IMC's 140,000-ton capacity is the largest on Pier G. The next largest is a building owned by Standard Oil of California which has a capacity of 65,000 tons. IMC has emergency storage facilities

at the Port of Los Angeles. They are not automated but antiquated and used only in emergency situations.

The automated warehouse at Pier G operates in the following manner: The system electronically senses the arrival of a dump truck and activates all the machinery in the warehouse to receive the petroleum coke. The dump truck is unloaded in one minute and the petroleum coke is transported into storage by conveyor belts.

IMC has an agreement with the Port of Long Beach to ship a minimum of 750,000 tons annually. If it does not ship that amount IMC must pay wharfage. The commitment with the Port of Long Beach plus the carrying charges on inventory support IMC's contention that all of the petroleum coke received at the warehouse is exported.

At the present time substantially all of the petroleum coke export traffic from the Los Angeles Basin moves through the Port of Long Beach. No petroleum coke export traffic has moved through the Port of Los Angeles since 1979, and IMC was the only exporter from that port prior to that time. The following table shows petroleum coke exports from the Los Angeles Basin, with IMC's share of the total:

Petroleum Coke Export Shipments - L.A. Basin
1979 - 1981

| | Total Export Tons | IMC Export Tons | IMC % of Total |
|---|---|---|---|
| 1979 | 3,159,000 | 1,517,000 | 48 |
| 1980 | 2,841,000 | 1,745,000 | 61 |
| 1981 | 2,677,000 | 1,003,000 | 37 |
| Total | 8,677,000 | 4,265,000 | 49 |

In 1981, IMC had contracts to move the petroleum coke from Chevron - El Segundo (Chevron), ARCO - Watson (ARCO), and Shell - Wilmington (Shell). At the time of hearing IMC had contracts with ARCO and Shell. However, the ARCO contract is not directly involved

in this matter. The ARCO contract calls for the petroleum coke to be delivered FOB the vessel. ARCO has its own warehouse on Pier G. ARCO arranges for the transportation of petroleum coke from the refinery to its warehouse and the loading of the vessel. There is no evidence about the facilities for loading and unloading at the ARCO refinery and warehouse or the type of transportation used to transport the petroleum coke.

The evidence in the record relates to the petroleum coke handled under the contract with Shell. The Shell refinery is located within the Los Angeles Harbor Commercial Zone. It produces 2,500 tons of petroleum coke daily, which must be removed from the refinery for it to continue operating. It is approximately six miles from the Shell refinery to IMC's warehouse on Pier G. One-half of this distance is by freeway.

IMC has been using six owner-operator dump truck carriers to handle the Shell traffic. These carriers use similar equipment. The loading facilities at the Shell refinery consist of automatic loading bins. The trucker can load his vehicle without waiting with the desired weight, which is recorded on a computer. As the truck pulls out of the loading bin it goes through an automatic truck wash. This removes the dust from the truck and cakes the top of the load so it does not spread dust on the streets and freeway. It takes two minutes to load one truck and all six trucks can be loaded and out of the refinery in 12 minutes. The unloading process at the IMC warehouse has been previously described and need not be repeated. It takes one-half hour to make a round trip from the refinery. Each driver makes approximately 16 trips a day. In emergencies, the drivers make trips to Pier 28 or the Los Angeles storage facility.

IMC has used negotiated rates with its carriers for more than 10 years. This was in accordance with the general industry practice prior to the U.S. Steel case and D.93459. The hourly equivalent of IMC's negotiated tonnage rate is approximately $51 per

hour. IMC contends that if it is required to use MRT-7A rates the hourly equivalent would be over $60 per hour, which it deems excessive for the transportation involved. In these circumstances, IMC would pay its carriers using the MRT-7A hourly rate, which would diminish the carriers' income between 5-12%.[1]

The record establishes that a transportation exemption from MRT-7A should be granted for traffic in green petroleum coke for export between and among the Shell refinery, IMC's storage facility on Pier G, and IMC's Los Angeles Harbor storage facility. An exemption is warranted because of the characteristics of the haul. These characteristics include automatic, rapid transloading devices at the Shell refinery and IMC warehouse on Pier G; favorable traffic conditions; continuous year-round movements; constant, rapid trip-cycle times and high equipment use factors. Most of these characteristics relate to noncarrier facilities. In the circumstances, an exemption is preferable to requiring individual carriers to file for deviations under Resolution TS-284.

As indicated, the exemption will not affect the price or transportation movement of domestic petroleum coke. Refinery contracts for the sale of petroleum coke are dependent on two primary factors: price and ability to move the petroleum coke from the refinery. During the 10 years in which IMC erroneously used negotiated rates for the transportation of export petroleum coke there appears to have been competition in this field in which the negotiated transportation rates had little effect. The record indicates that in 1981, IMC lost the Chevron contract. ARCO, which sells to IMC, uses its own facilities and other transportation to deliver the petroleum coke FOB the vessel. IMC's competitors had knowledge of its request and these proceedings. None protested.

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[1] IMC pays negotiated tonnage rates for the haul between Shell and Pier G. It pays negotiated hourly rates for the hauls to Pier 28 and Los Angeles storage facility. Approximately 70% of the hauling is done under the tonnage rate.

The exemption will not hurt any carrier. Testimony was presented about one of the six carriers used by IMC. In 1981, that carrier had gross earnings of $124,620 which, after deducting expenses and a pre-tax 20% profit factor, netted $52,481. It appears that the negotiated rates yield a reasonable amount to these carriers. Other carriers will not be adversely affected. The exemption would not divert or have an effect on traffic handled by other carriers. Any carrier making the same haul would be similarly treated under the exemption.

While IMC requested an exemption for all movements of petroleum coke in the Los Angeles Harbor Commercial Zone, the proof which it presented only justifies an exemption among the points indicated. There is no evidence of automated loading facilities and refineries other than Shell or of terminals other than IMC, nor is there evidence of distance and types of highways between other shipping points.

Association takes the position that if an exemption is granted in this proceeding, there should be an exemption relative to the transportation of petroleum coke, in bulk, applicable to all commercial zones in California. Association's brief states that: "The record in this and all other Commission proceedings discloses that all bulk coke movements are transported in hopper-type vehicles, and the loading and dumping does not vary between geographical areas in this state. Therefore, if an exception is warranted for the Los Angeles Commercial Zone, then it is equally justified for all other such zones in California." (Reply Brief of Association p. 2.) Association cites no portion of the record to support its position. In fact, the record contradicts it.

It may be true that all bulk movements of petroleum coke are transported in hopper-type vehicles. The record indicates that a different type petroleum coke is exported from the San Francisco Bay Area than from the Los Angeles Harbor Zone. (RT 303-04.) There are different kinds of transportation movements for ex-vessel petroleum

coke. (RT 96-103.) There is an absence of proof in this record to justify exempting ex-vessel petroleum coke to points other than the ones encompassed in the exemption granted. If evidence exists, the Commission can act on an appropriate record in a proper proceeding.

Association requests that: "Favorable consideration shall be given to deviation applications filed by carriers seeking to assess rates at the levels of rates filed with the Interstate Commerce Commission, which were formerly considered applicable to the ex-water traffic, and the filing of true and correct copies of tariff pages containing such rates, lawfully filed with the Interstate Commerce Commission, shall be prima facia proof that the charges therein are just and reasonable." (Reply Brief of Association, p. 5.) 5.) Again, this request cannot be granted for lack of proof. In the U.S. Steel case the court stated:

> "The second proposed justification---the tradition of not applying minimum rate regulation to private-vessel steel---does not by itself justify the classification. The reason for the traditional exemption, exclusive federal jurisdiction (see fn. 1), has evaporated. While grandfather clauses have been upheld in a variety of statutes (New Orleans v. Dukes (1976) 427 U.S. 297. --- [49 L.Ed.2d 511, --- 96 S.Ct. 2513, 2517]; In re Norwalk Cali (1964) 62 Cal 2d 185, 188 [41 Cal.Rptr. 600, 397 P.2d 426] legislation that favors existing business must have a reasonable relation to the public interest. For example, the fact that a company had been in business prior to regulation may furnish a basis for exemption from a licensing statute designed to assure competency. (Accounting Corp. v. St. Bd. of Accountancy (1949) 34 Cal. 2d 186,190 [208 P.2d 964].) And a grandfather clause may serve the purpose of avoiding inequities that might result to those who prior to the adoption of the regulatory scheme had already established a business. Minimum rates do not relate to competency, however, and it is not shown that California trucking companies will be unable to compete if required to observe the minimum rates.

> "Where a grandfather clause does not appear to relate to the public interest the statute may offend constitutional protection against arbitrary classification. (Accounting Corp. v. St. Bd. of Accountancy, supra, 34 Cal. 2d 186, 191; see Harris v. Alcohol Bev. etc. Appeals Bd. (1964) 61 Cal. 2d 305, 310 [38 Cal.Rptr. 409, 392 P.2d 1].) Administrative classifications enjoy no greater immunity from challenge than do statutes, and exemptions may not be justified on the basis of tradition alone." (29 C 3d at pp. 612-613.)

In the light of the Supreme Court's holding the Commission cannot hold that rates filed with the ICC are reasonable without an evidentiary basis. None exists in this record. Association produced no evidence to support its position.

In sum, the evidence sustains granting an exemption for the transportation of ex-vessel petroleum coke for export among specified points in the Los Angeles Harbor Commercial Zone. The record does not justify a broader exemption.

No other points require discussion.

Findings of Fact

1. Sunkist presented no evidence at the rehearing. No evidence was presented with respect to ex-vessel movement of citrus.

2. In this matter, Cargill seeks to have exempted from minimum rates all ex-vessel shipments of grain for export.

3. Transportation rates for ex-vessel export of grain traffic have no effect on the price of grain in California or any domestic market.

4. All grain shippers in California operate and arrange for transportation in the same manner as Cargill.

5. In the past three years California has exported 50,000,000 to 80,000,000 bushels of wheat annually. Most of the grain for export is moved in California by truck. It is brought to an elevator where it is either stored or immediately loaded on a vessel and exported. The grain moves in bulk. Trucks hauling grain have a capacity to carry 800 to 1,000 bushels per unit. Cargill exports 15,000,000-30,000,000 tons of grain annually.

6. Grain for export is sold FOB the vessel, which is chartered by the buyer. Most of Cargill's export traffic moves through its Sacramento facility, although some moves through facilities in southern California. In the 12 months preceding the hearing Cargill exported grain to Russia, China, Indonesia, Jordan, Ecuador, Mexico, Chile, and other countries. Cargill uses truckers in its operations which range from companies that have 10-30 tractors to individuals who own a single truck and trailer.

7. Prior to the U.S. Steel decision and D.93459 the following situation applied to the transportation of grain for export. During June, July, and August, the peak of the harvest grain for export moved at MRT 14-A rates. This was due to the competition for available equipment for domestic as well as export moves. During nonpeak periods, September-May, some grain for export moved at negotiated rates. Approximately 15-20% of the grain for export moved annually at negotiated rates.

8. California grain dealers compete not only among themselves with wheat raised in California but with wheat raised in the Pacific Northwest, the Texas Gulf, and the Louisiana Gulf. In the case of hard wheat, the cheapest price delivered to the buyer is determinative. The transportation differential may be the difference between California grain growers and dealers being competitive with other parts of the country.

9. Previously negotiated rates occurred during the off-peak season, when not all grain transporting trucking equipment is utilized. This afforded truckers the opportunity to make some profit on equipment not otherwise utilized. Negotiated rates were also used for backhauls after delivery of a domestic shipment. In these instances the trucker does not have to deadhead back after a domestic movement under MRT-14A rates.

10. Because of negotiated rates, California grain growers and dealers were able to sell grain for export which might not otherwise have moved.

11. Some California grain has been exported through Portland, Oregon because the interstate transportation was based on a cheaper, negotiated rate, since the ICC does not regulate the transportation of agricultural bulk commodities.

12. Many transactions in the grain export business are made within hours or a few days. Because of the state of the world economy buying is now made for current needs rather than in advance. Contracts are being made for delivery in one month rather than six months. In these circumstances the Commission's deviation procedure (Resolution TS-284) does not adequately meet the needs of commerce. Because of the time involved in processing and uncertainty of result, reliable expeditious quotes cannot be given and business is lost. Furthermore, extending the "me too" provisions allowing a carrier to use deviation rates filed and justified by another carrier would be of little help in this situation. Grain moves from hundreds of locations in California and it is unlikely that there will be an identical deviation for a proposed movement, assuming the carriers had the resources to research prior deviations.

13. It is in the public interest and reasonable to grant an exemption from minimum rates for export ex-vessel traffic in grain. The exemption will have no effect on the domestic price of grain or the cost of transportation of domestic grain. The exemption will benefit California truckers by generating additional business. The exemption will benefit California grain growers and brokers by enabling them to be more competitive for export trade.

14. IMC has standing in this matter.

15. IMC's request for a transportation exemption relates only to green petroleum coke for export ex-vessel traffic in the Los Angeles Harbor Commercial Zone.

16. Petroleum coke is the end product of petroleum refining. There are two types: green and calcine. Green petroleum coke is the kind that comes straight from the refinery after crushing. Calcine

petroleum coke is green petroleum coke which has been treated in a kiln to remove 10½-13% of its volatiles and moisture. Unless otherwise specified in the findings and conclusions the term petroleum coke refers to green petroleum coke.

17. At the present time no petroleum coke is imported on the West Coast.

18. There is no question of the transportation charges here involved affecting the California or domestic price of petroleum coke.

19. Petroleum coke must be moved from the refinery for it to continue operations. Refineries enter into extended term contracts in order to move the petroleum coke from their premises. These contracts presently range from three to five years. It is necessary to have storage facilities in order to handle a refinery contract. This is particularly important if the petroleum coke is for export. The petroleum coke produced by a refinery in one day is not sufficient to load a vessel. High wharfage would result without storage to allow prompt loading of a vessel.

20. IMC is a major world broker of petroleum coke. It maintains a storage facility at Pier G in Long Beach for the export of petroleum coke. The facility consists of an automated warehouse with a capacity of 110,000 tons and an uncovered storage area with a capacity of 30,000 tons. The warehouse contains a crushing facility which can crush 170 tons an hour and return the material back to the warehouse. IMC's 140,000-ton capacity is the largest on Pier G. The next largest is a building owned by Standard Oil of California which has a capacity of 65,000 tons. IMC has emergency storage facilities at the Port of Los Angeles. They are not automated, but antiquated and used only in emergency situations.

21. The automated warehouse at Pier G operates in the following manner: The system electronically senses the arrival of a dump truck and all the machinery in the warehouse is activated to receive the petroleum coke. The dump truck is unloaded in one minute and the petroleum coke is transported into storage by conveyor belts.

22. IMC has an agreement with the Port of Long Beach to ship a minimum of 750,000 tons annually. If it does not ship that amount IMC must pay wharfage.

23. All of the petroleum coke received at the warehouse is exported.

24. At the present time substantially all of the petroleum coke export traffic from the Los Angeles Basin moves through the Port of Long Beach. No petroleum coke export traffic has moved through the Port of Los Angeles since 1979, and IMC was the only exporter from that port prior to that time. The following table shows petroleum coke exports from the Los Angeles Basin, with IMC's share of the total:

Petroleum Coke Export Shipments - L.A. Basin
1979 - 1981

| | Total Export Tons | IMC Export Tons | IMC % of Total |
|---|---|---|---|
| 1979 | 3,159,000 | 1,517,000 | 48 |
| 1980 | 2,841,000 | 1,745,000 | 61 |
| 1981 | 2,677,000 | 1,003,000 | 37 |
| Total | 8,677,000 | 4,265,000 | 49 |

25. In 1981, IMC had contracts to move the petroleum coke from Chevron, ARCO, and Shell. At the time of hearing IMC had contracts with ARCO and Shell. The ARCO contract is not directly involved in this matter. The ARCO contract calls for the petroleum coke to be delivered FOB the vessel. ARCO has its own warehouse on Pier G. ARCO arranges for the transportation of petroleum coke from the refinery to its warehouse and the loading of the vessel. There is no evidence about the facilities for loading and unloading at the ARCO refinery and warehouse or the type of transportation used to transport the petroleum coke.

26. The evidence in the record relates to the petroleum coke handled under the contract with Shell. The Shell refinery is located within the Los Angeles Harbor Commercial Zone. It produces 2,500 tons of petroleum coke daily, which must be removed from the refinery for it to continue operating. It is approximately six miles from the Shell refinery to IMC's warehouse on Pier G. One-half of this distance is by freeway.

27. IMC has been using six owner-operator dump truck carriers to handle the Shell traffic. These carriers use similar equipment. The loading facilities at the Shell refinery consist of automatic loading bins. The trucker can load his vehicle without waiting with the desired weight which is recorded on a computer. As the truck pulls out of the loading bin it goes through an automatic truck wash. This removes the dust from the truck and cakes the top of the load so it does not spread dust on the streets and freeway. It takes two minutes to load one truck and all six trucks can be loaded and out of the refinery in 12 minutes. It takes one-half hour to make a round trip from the refinery. Each driver makes approximately 16 trips a day. In emergencies, the drivers make trips to Pier 28 or the Los Angeles storage facility.

28. IMC has used negotiated rates with its carriers for more than 10 years. This was in accordance with the general industry practice prior to the U.S. Steel case and D.93459. The hourly equivalent of IMC's negotiated tonnage rate is approximately $51 per hour. If it is required to use MRT-7A rates the hourly equivalent would be over $60 per hour, which IMC deems excessive for the transportation involved. If it is required to pay MRT-7A rates, IMC would pay its carriers using the MRT-7A hourly rate, which would diminish the carriers income between 5-12%.

29. IMC paid negotiated tonnage rates for the haul between Shell and Pier G. It pays negotiated hourly rates for the hauls to Pier 28 and Los Angeles storage facility. Approximately 70% of the hauling is done under the tonnage rate.

30. A transportation exemption from MRT-7A should be granted for traffic in green petroleum coke for export moving between and among the Shell refinery, IMC's storage facility on Pier G, and IMC's Los Angeles Harbor storage facility. An exemption is warranted because of the characteristics of the haul. These characteristics include automatic, rapid transloading devices at the Shell refinery and IMC warehouse on Pier G; favorable traffic conditions; continuous year-round movements; constant, rapid trip-cycle times and high equipment use factors. Most of these characteristics relate to noncarrier facilities. An exemption is preferable to requiring individual carriers to file for deviations under Resolution TS-284.

31. The exemption will not affect the price or transportation movement of domestic petroleum coke. Refinery contracts for the sale of petroleum coke are dependent on two primary factors: price and ability to move the petroleum coke from the refinery. During the 10 years in which IMC erroneously used negotiated rates for the transportation of export petroleum coke there was competition in this field in which the negotiated transportation rates had little effect.

32. ARCO, which sells to IMC, uses its own facilities and other transportation to deliver the petroleum coke FOB the vessel. IMC's competitors had knowledge of its request and these proceedings. None protested.

33. The exemption will not hurt any carrier. The testimony presented about one of the six carriers used by IMC is indicative of the operations of all of the carriers. In 1981, that carrier had gross earnings of $124,620 which, after deducting expenses and a pre-tax 20% profit factor, netted $52,481. Negotiated rates yield a reasonable amount to these carriers. Other carriers will not be adversely affected. The exemption would not divert or have an effect on traffic handled by other carriers. Any carrier making the same haul would be similarly treated under the exemption.

34. The proof which IMC presented only justifies an exemption among the points indicated.

35. Association presented no evidence upon rehearing.

36. There is no evidence in the record on rehearing to justify a general exemption from minimum rates for the transportation of petroleum coke, in bulk, in all commercial zones in California.

37. There is no evidence in the record on rehearing to justify an order that the filing of tariff pages of ICC rates should be prima facie proof that the ICC rates are just and reasonable and should be allowed as deviation rates by this Commission.

Conclusions of Law

1. There is no evidence in the record to justify modifying D.93459 with respect to ex-vessel movements of citrus.

2. An exemption from minimum rates should be granted for export ex-vessel traffic in grain.

3. The Commission has jurisdiction to exempt specified transportation from minimum rates where the circumstances surrounding the transportation indicate that the exemption is reasonable, nondiscriminatory, and in compliance with law.

4. An exemption from minimum rates should be granted for export ex-vessel movements of petroleum coke among the following points in the Los Angeles Harbor Commercial Zone: Shell Refinery - Wilmington: Long Beach Pier G - Berth 212: and IMC storage facility at the Los Angeles Harbor.

5. Except as modified by this order, D.93459 should be affirmed.

ORDER ON REHEARING

IT IS ORDERED that:

1. An exemption from minimum rates for export ex-vessel traffic in grain is granted as set forth in Appendix A to this decision.

2. An exemption from minimum rates is granted for export ex-vessel shipments of petroleum coke moving among the following points in the Los Angeles Harbor Commercial Zone: Shell Refinery - Wilmington; Long Beach Pier G - Berth 212; and IMC storage facility at the Los Angeles Harbor.

3. Minimum Rate Tariff 14-A (Appendix A to D.67397, as amended) is further amended by incorporating Tenth Revised Page 5-A, attached, to become effective 39 days after today.

4. Minimum Rate Tariff 7-A (Appendix B to D.82061, as amended) is further amended by incorporating Twelfth Revised Pages 10 and 11, attached, to become effective 39 days after today.

5. Except as modified here, D.93459 is affirmed.

6. Tariff publications authorized to be made by common carriers as a result of this order shall be made effective not earlier than 39 days after today, and may be made effective on not less than 5 days' notice to the Commission and to the public if filed not later than 60 days after the effective date of the minimum rate tariff pages incorporated in this order.

7. In all other respects D.67397 and D.82061, as amended, shall remain in full force and effect.

8. The Executive Director shall serve a copy of this decision on every common carrier, or such carriers authorized tariff publishing agents, performing transportation services subject to Minimum Rate Tariffs 7-A and 14-A.

9. The Executive Director shall serve a copy of the tariff amendments on each subscriber to Minimum Rate Tariffs 7-A and 14-A.

This order becomes effective 30 days from today.

Dated JUN 1 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I dissent.

DONALD VIAL, Commissioner

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

Joseph E. Bodovitz, Executive Director

SECTION 1--RULES OF GENERAL APPLICATION (Continued) | ITEM

APPLICATION OF TARIFF--COMMODITIES

Rates in this tariff apply for the transportation of the following commodities:

(a) Hay, Fodder (bean, cane, corn or pea), Straw, Wood Shavings (used for bedding), in machine pressed bales;

(b) Grain; Grain Products; Feed, Animal or Poultry; and certain mixtures of commodities named in Items 515, 520, 525 and 530, in bulk, or in bins;

(c) Seeds and Related Articles, as described in Item 525, in bulk, or in bins, or in containers with a capacity exceeding 40 cubic feet;

(d) Seeds, viz.: Cotton, Flax or Safflower.

EXCEPTIONS:

This tariff is not applicable to:

(a) Disaster Supplies, i.e., those commodities which are allocated to provide relief during a state of extreme emergency or state of disaster; and those commodities which are transported for a civil defense or disaster organization established and functioning in accordance with the California Disaster Act to ultimate point of storage or use prior to or during a state of disaster or state of extreme emergency. ø40

ø(b) Grain, grain products and rice for export when transported in continuity with a subsequent vessel movement.

ø(c) Property transported for a displaced person when the cost thereof is borne by a public entity as provided in Section 7262 of the Government Code.

ø(d) Seeds (other than cotton, flax or safflower), as described in Item 525, when shipped from point of growth to an accumulation station or point of initial processing, or from an accumulation station to point of initial processing; in bulk, or in containers with a capacity exceeding 40 cubic feet.

ø(e) Shell Marl when shipper certifies on the shipping document covering the transportation that the Shell Marl is being shipped for use as a fertilizer.

ø(f) Transportation of property of the United States or property transported under an agreement whereby the United States contracted for the carrier's services.

APPLICATION OF GOVERNING PUBLICATIONS

This tariff is governed to the extent shown herein by the Governing Classification. | 45

ø Change
* Addition
ô Reduction
o No change

Decision No. 83 06 019

EFFECTIVE JUL 10 1983

ISSUED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA.

Correction

| SECTION 1--RULES (Continued) | ITEM |
|---|---|
| APPLICATION OF TARIFF--COMMODITIES<br><br>When reference is made to this item, rates apply to the transportation of the following commodities:<br><br>Coke, petroleum;<br>Concrete, broken, asphaltic or hydraulic;<br>Concrete, premixed, wet;<br>Debris: From street or highway maintenance, including ice, mud, and slush; also debris from drainage or flood control construction and/or maintenance projects;<br>Fodder: Chopped green corn and sorghum grain plants, including heads, stalks, and leaves;<br>Salt cake (crude sulphate of soda);<br>Slurry (mixed sand, dust, crushed stone and/or gravel, wet). | 60 |

No change on this page, Decision No. 83 06 019

EFFECTIVE JUL 16 1983

ISSUED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA.

Correction

| ITEM | SECTION 1--RULES (Continued) |
|---|---|
| | APPLICATION OF TARIFF--GENERAL |
| | Rates in this tariff do not apply to the transportation of: |
| | (a) Disaster Supplies, i.e., those commodities which are allocated to provide relief during a state of extreme emergency or state of disaster; and those commodities which are transported for a civil defense or disaster organization established and functioning in accordance with the California Disaster Act to ultimate point of storage or use prior to or during a state of disaster or state of extreme emergency. |
| ø 70 | *ø(b) Petroleum coke for export when transported among the following points in the Los Angeles Harbor Commercial Zone: Shell Oil Company Refinery, Wilmington; Long Beach Pier G, Berth 212; and International Minerals and Chemical Corporation's storage facility at Los Angeles Harbor. |
| | o(c) Property of the United States or property transported under agreement whereby the United States contracted for the carrier's service. |
| | o(d) Property for which rates are provided in Minimum Rate Tariffs 17-A or 20 when said property is transported under the provisions of such tariffs. |
| | o(e) Property transported for a displaced person when the cost thereof is borne by a public entity as provided in Section 7262 of the Government Code. |
| | For rates for the transportation of commodities in dump truck equipment, other than as provided in this tariff, see Minimum Rate or Transition Tariffs 1-B, 2, 9-B, 17-A, 19, or 20, as the case may be. |
| | APPLICATION OF TARIFF--TERRITORIAL |
| 80 | Rates in this tariff apply for transportation between all points within the State of California. |
| | ACCESSORIAL CHARGES |
| | In addition to the charges under the rates in Sections 2, and 4, and when, through no fault of the carrier, the unloading and release of carrier's equipment at destination is delayed beyond the time allowances shown herein, the following accessorial charges shall be assessed: |

| | a | b | c |
|---|---|---|---|
| Charge per unit of carrier's equipment for delay beyond the time allowance shown below. Charge applies for each six(6) minutes (one-tenth of an hour) or fraction thereof | 24¢ | 24¢ | 24¢ |
| Time allowance in minutes, per unit of carrier's equipment (See Note) | 30 | 45 | 20 |

a. Applies when transportation is performed by truck without trailing equipment.

b. Applies when transportation is performed by truck with transfer type trailer.

c. Applies when transportation is performed by truck with other than transfer type pull trailers, tractors with semitrailers or tractors with semitrailers and pull trailers operating in train.

NOTE:--In computing the time allowances under this rule, time shall commence when the carrier arrives at point of destination.

ø Change
* Addition
ð Reduction
o No change

Decision No. 83 06 019

EFFECTIVE JUL 10 1983

Correction

ISSUED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA.

ALJ/vdl

Decision 83 06 019 JUN 1 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of used household goods and related property statewide as provided in Minimum Rate Tariff 4-B and the revisions or reissues thereof. | Case 5330, OSH 110 (Order Granting Rehearing dated February 4, 1982) |
| And Related Matters. | Case 5433, OSH 73<br>Case 5436, OSH 290<br>Case 5437, OSH 309<br>Case 5438, OSH 124<br>Case 5440, OSH 112<br>Case 5603, OSH 216<br>Case 5604, OSH 66<br>Case 6008, OSH 41<br>Case 7857, OSH 171<br>Case 7783, OSH 164<br>Case 8808, OSH 50<br>Case 9819, OSH 39<br>Case 9820, OSH 17<br>(Order Granting Rehearing dated February 4, 1982) |

APPEARANCES ON REHEARING

Belknap, Spencer & McFarland, by Stephen C. Herman, Attorney at Law, and Murchison & Davis, by Donald Murchison, Attorney at Law, for International Minerals & Chemical Corporation, petitioner.

Howard D. Clark, for Asbury System, and L. Filipovich, for General Drayage, respondents.

Frank Pfost, for Pacific Coast Cement Corporation; George B. Shannon, for Southwestern Portland Cement Company; Silver, Rosen, Fischer & Stecher, by Andrew J. Skaff, Attorney at Law, for Cargill, Incorporated; Handler, Baker, Greene & Taylor, by Daniel W. Baker, Attorney at Law, for Harbor Carriers Association; and Don Austin, for Monolith Portland Cement Company; interested parties.

and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve.'" (29 C 3d at p. 609.)

The Supreme Court also discussed the question of discriminatory rates as a "guide" to the Commission. (29 C 3d at p. 610, et seq.) The Court focused on the questions of preferences and the constitutional mandate of equal protection which requires reasonable classifications. Again the Court focused on lack of proof:

> "The aim of minimum rate regulation is to preclude destructive rate practices and to provide for movement at the lowest rates compatible with the maintenance of adequate transportation service...Rates below the minimum do not serve that aim absent some showing of a difference in cost in hauling private-vessel steel as compared with domestic steel, or of a difference regarding destructive rate practices. There is no showing here." (29 C 3d at p. 612.) (Emphasis added.)

Subject matter aside, the U.S. Steel case rests on fundamental rules of jurisprudence:

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evidence Code § 500.)
>
> "(a) The burden of producing evidence as a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.
>
> "The burden of producing evidence as a particular fact is initially on the party with the burden of proof as to that fact." (Evidence Code § 550.)

The Staff misreads U.S. Steel in its contention that a certain type of evidence is required. The Supreme Court did not prescribe a particular mode of proof. It did not require extensive economic surveys in all cases. It did not mandate the Commission to conjure

and destroy straw men. What is required is sufficient evidence, of whatever kind, to sustain findings in the light of the controlling constitutional and statutory provisions.

C. The Cargill Request

Cargill seeks to have exempted from minimum or transition rates all ex-vessel shipments of grain for export. The following evidence was presented in support of this position.

The exemption sought is only for exports. Thus, no question of price differential in California or any domestic market due to regulated, as against exempt, rates is presented.

Cargill is in the business of merchandizing grain. It has 45 branch offices, 50 terminals and export facilities, and 130 country elevators in the United States. Most of these are located in the Midwest. In California it has offices in Sacramento, Tranquility, and Los Angeles. In addition, it has facilities in Dixon, Grimes, Sacramento, Goshen, and Famoso.

All grain shippers in California operate and arrange for transportation in the same manner as Cargill. In the past three years California has exported 50,000,000 to 80,000,000 bushels of wheat annually. In California most of the grain for export is moved by truck. It is brought to an elevator where it is either stored or immediately loaded on a vessel and exported. The grain moves in bulk. Trucks hauling grain have a capacity to carry 800 to 1,000 bushels per unit. Cargill exports 15,000,000-30,000,000 tons of grain annually.

Grain for export is sold FOB the vessel, which is chartered by the buyer. Most of Cargill's export traffic moves through its Sacramento facility, although some moves through facilities in southern California. In the 12 months preceding the hearing Cargill exported grain to Russia, China, Indonesia, Jordan, Ecuador, Mexico, Chile, and other countries. Cargill uses truckers in its operations which range from companies that have 10-30 tractors to individuals who own a single truck and trailer.

IMC contends that it is not seeking a shipper's exemption but one involving transportation; that the Commission has jurisdiction to grant the exemption and IMC has standing in this matter.

~~The Staff's position is the type of stand that has brought disrepute to regulation.~~ Novelty is not a valid objection to the exercise of jurisdiction. IMC has standing to raise the issues presented.

Neither statute nor Commission rule precludes IMC from seeking the relief requested in this matter. In fact Rules 42 and 54 authorize such participation. The Commission has permitted parties whose interests have been affected to file or appear in proceedings before the Commission. (Re Antelope Valley Water Co. (1972) 73 CPUC 485, 487; Ronnie Allen, D.82-07-100 in A.82-03-85, entered July 21, 1982; MRT-7A, Pet. 314, D.93523 in C.5437, entered September 1, 1981; see also, Investigation of Union Pacific R.R. et al. (1981) D.93105 in OII 18). The Commission has been reversed when it refused to permit an affected party to assert its rights. (Ventura County Waterworks Dist. v Public Util. Com. (1964) 61 C 2d 462; California Trucking Assn. v Public Util. Com. (1977) 19 C 3d 240.) IMC has standing in these consolidated proceedings.

The Commission has jurisdiction to exempt transportation from minimum rates (United States Steel Corp v Public Util. Com., supra; Minimum Rate Tariff No. 2 (1954) 54 CPUC 107; Investigation of Recyclables, D.82-06-091 in OII 85, entered June 15, 1982; OSH 965 (1978) 84 CPUC 45, mem. op.) or to grant deviations from minimum rates (Harrison-Nichols Co. (1977) 83 CPUC 1, mem.op.; Burton Truck & Transfer Co. (1977) 82 CPUC 200; J.S. Shafer, Jr. (1977) 82 CPUC 590). The question presented is whether IMC has presented facts sufficient to justify the exercise of that jurisdiction.

34. The proof which IMC presented only justifies an exemption among the points indicated.

35. Association presented no evidence upon rehearing.

36. There is no evidence in the record on rehearing to justify a general exemption from minimum rates for the transportation of petroleum coke, in bulk, in all commercial zones in California.

37. There is no evidence in the record on rehearing to justify an order that the filing of tariff pages of ICC rates should be prima facie proof that the ICC rates are just and reasonable and should be allowed as deviation rates by this Commission.

Conclusions of Law

1. There is no evidence in the record to justify modifying D.93459 with respect to ex-vessel movements of citrus.

2. An exemption from minimum rates should be granted for export ex-vessel traffic in grain.

3. The Commission has jurisdiction to exempt specified transportation from minimum rates where the circumstances surrounding the transportation indicate that the exemption is reasonable, nondiscriminatory, and in compliance with law.

4. An exemption from minimum rates should be granted for export ex-vessel movements of petroleum coke among the following points in the Los Angeles Harbor Commercial Zone: Shell Refinery - Wilmington; Long Beach Pier G - Berth 212; and IMC storage facility at the Los Angeles Harbor.

5. Except as modified by this order, D.93459 should be affirmed.

ORDER ON REHEARING

~~O R D E R~~

IT IS ORDERED that:

1. An exemption from minimum rates for export ex-vessel traffic in grain is granted as set forth in Appendix A to this decision.