

Decision 83 46 106 JUN 29 1983

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application  
of Roy Jameson & Son for permission  
to operate as cement contract carrier  
in Napa County.

Application 83-04-04  
(Filed April 4, 1983)

O P I N I O N

Roy Jameson & Son (applicant), a California corporation, requests a cement contract carrier permit to operate in the County of Napa. Notice of the filing of the application appeared in the Daily Transportation Calendar of April 7, 1983. No protests have been filed.

Discussion

The application is supported by a shipper who will need enough transportation to provide applicant with \$50,000 per year in gross revenue. This traffic was previously transported by the shipper in a proprietary capacity. The shipper will sell its tractor and dump trailer to applicant. Applicant already has an established continuing relationship with the shipper as a carrier of other commodities. Thus, applicant can transport this traffic without reducing the amount of revenue now available to any established cement carrier.

Applicant holds authority as a highway common carrier, (GC-2294), a highway contract carrier, a cement carrier,<sup>1</sup> a heavy specialized carrier, a dump truck carrier, an agricultural carrier, and a tank truck carrier.

As of the beginning of 1983 applicant had \$412,436 of assets. The original cost of its equipment was \$671,069; accumulated depreciation is \$393,736. Its liabilities amount to \$273,778; this

<sup>1</sup> Applicant's existing cement authority does not cover Napa County.

includes \$26,113 of obligations to shareholders. Its initial and additional capital amounts to \$158,255 less \$19,597 of deficit. The deficit has increased \$8,779 since the previous year.

Applicant's certificate as a common carrier of cement does not permit operations in Napa County. There is a question, under Public Utilities (PU) Code § 3542.1, whether the Commission has the power to allow any carrier to hold both kinds of authority, even though the contract operations will not use any highway used in common carrier service.

PU Code § 3542.1 states:

"No person or corporation shall engage or be permitted by the commission to engage in the transportation of portland or similar cements, either alone or in combination with lime or powdered limestone, on any public highway, both as a cement carrier and as a cement contract carrier."

There are two ways to interpret that statute's prohibition.

Under the narrower interpretation, a carrier could hold both types of authority as long as there is no territorial overlap (i.e., as long as the carrier does not operate both as a cement carrier and a cement contract carrier on the same highway).

Alternatively, it is possible to interpret this as a prohibition against granting a carrier both types of authority even in nonoverlapping territories (i.e., a carrier could not operate both as a cement carrier on any highway, and a cement contract carrier on any highway). In Application of Kinzel (1967) 66 CPUC 817, we adopted the broader interpretation.

Until recently the PU Code contained a similar provision governing carriers' general commodities. Senate Bill 1122 (adopted in 1981) amended § 1066.2 of the PU Code and repealed § 3542. Section 1066.2 now reads as follows:

"Nothing in this code shall be construed to prohibit any person or corporation from engaging in the transportation of property, both as a highway common carrier, and under written contract as a highway contract carrier, of the same commodities between the same points."

Section 3542 reads:

"No person or corporation shall engage or be permitted by the commission to engage in the transportation of property on any public highway, both as a common carrier and as a highway permit carrier of the same commodities between the same points, except as provided in § 1066.2."

As can be seen, § 3542 prohibited overlapping contract and common carrier operations. This prohibition was usually explained as a corollary to the basic principle which prohibits a common carrier from discriminating. Conventional thinking held that it would be discriminatory for a carrier to perform contract carriage at rates different from its published common carrier rates for the same service. The statute prohibited not merely overlapping operations at differing rates but all overlapping operations. ✓

If § 3542.1 is interpreted as banning only overlapping operations, it could be explained as a vestige of that conventional thinking. However, we know of no public interest which would be furthered by a ban on nonoverlapping dual operations.

Since the discussion of this issue in Kinzel appears to be dicta, and since the decision gave no reason for rejecting the narrower interpretation, we refuse to follow Kinzel. We will grant ✓ the application, thus permitting applicant to operate as common and contract carrier of cement on different highways.

Findings of Fact

1. Applicant:

- a. Is a fit and proper corporation to receive a permit to operate as a cement contract carrier.
- b. Has sufficient operating knowledge and financial ability to initiate and continue the proposed operation.
- c. Has demonstrated that the privilege sought:
  - (1) Will not endanger the safety of the public or interfere with the public use of the public highways or impair the condition or maintenance of them, directly or indirectly.
  - (2) Will not unnecessarily burden the public highways.
  - (3) Will not impair the ability of presently permitted cement carriers to provide adequate service at the lowest possible reasonable rates.

2. Applicant is a California corporation.

3. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

4. The following order complies with the Commission's Energy Efficiency Plan.

5. A public hearing is not necessary.

Conclusions of Law

1. Applicant should be granted the proposed authority except that it should not be granted overlapping authority.

2. The following order should be effective today to be consistent with other permit grants.

3. Applicant may lawfully hold and exercise authority as both a common and contract carrier of cement, as long as it is not authorized to perform both kinds of service on the same route.

ORDER

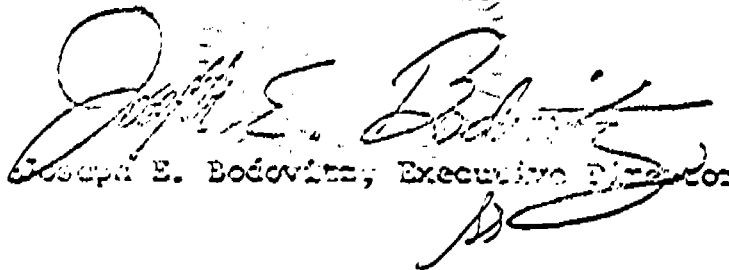
IT IS ORDERED that the Executive Director shall issue a cement contract carrier permit to Roy Jameson & Son, a California corporation, authorizing operations from all points of origin, on the one hand, to all points in the County of Napa, on the other hand, with a condition prohibiting operation over any highway over which it may operate as a common carrier of cement, upon compliance with General Order Series 100.

This order is effective today.

Dated JUN 29 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President  
VICTOR CALVO  
PRISCILLA C. GREW  
DONALD VIAL  
WILLIAM T. BAGLEY  
Commissioners

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

  
Joseph E. Bodovitz, Executive Director

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If § 3542.1 is interpreted as banning only overlapping operations, it could be explained as a vestige of that conventional thinking. However, we know of no public interest which would be furthered by a ban on nonoverlapping dual operations.

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