

Decision SS 11 119 NOV 30 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Charles D. Tobey,)
doing business as C & M Trucking, for)
authority to deviate from the minimum)
rates and rules established for the)
transportation of asphaltic concrete)
in MRT 17-A and MRT 7-A.)

Application 82-08-42
(Filed August 20, 1982;
amended November 18, 1982
and May 9, 1983)

Charles Tobey and E. O. Blackman, for applicant.
James D. Martens, for California Dump Truck
Owners Association, protestant.
Dennis Reed, for California Carriers Association;
and James R. Foote, for Associated Independent
Owner-Operators, Inc.; interested parties.
Gene Peters, for the Commission staff.

O P I N I O N

By this application, Charles D. Tobey, an individual doing business as C & M Trucking, requests authority to charge less than the applicable rates in Minimum Rate Tariffs (MRTs) 7-A and 17-A for the transportation of asphaltic concrete for the account of Huntmix, Inc. from Huntmix's ultra-modern, new plant in Irwindale to a construction project at Berths 121-126 in Los Angeles Harbor, a distance of 36.3 miles one way. Continental-Heller Company is the general contractor for the Los Angeles Harbor Department on the project. Best Western Paving Co. (BWP) is the grading and paving subcontractor to whom the asphaltic concrete will be shipped. The area to be paved is approximately two miles long and one-half mile wide. A support letter from Huntmix is attached to the application.

Section 11 of MRT 17-A contains tonnage zone rates for the transportation of asphaltic concrete in the area in question. However, when the transportation is performed in units with trailing equipment, the hourly rates in Item 390 of MRT 7-A are applicable. The rates proposed by Tobey are stated on a tonnage basis and would apply to transportation performed in five-axle bottom-dump units and

five-axle transfer dump units. They are \$3.35 per ton, minimum weight 25.5 tons, for the bottom dump equipment and \$3.62 per ton, minimum weight 24.5 tons, for the transfer equipment.

According to the application, approximately 204,000 tons of the asphaltic concrete would be transported over an estimated 12-month period. In support of the sought authority, the application asserts that special circumstances exist, including favorable loading, unloading, and route conditions, and better than average use of equipment. It states that, based on Tobey's past experience on similar projects, the proposed rates are reasonable.

While no actual performance times and cost data for the transportation in issue were submitted, a cost statement based on cost exhibits presented in Case 5437, Petition 315, the most recent general MRT 7-A rate proceeding, modified to reflect Tobey's alleged efficiencies and economies was attached to the application.

According to this cost analysis, transportation under the proposed reduced rates may reasonably be expected to be profitable. Also, the application alleges that the costs for providing the service are less than the datum plane costs on which the rates in MRT 17-A are based.

The application states that subhaulers will be used on the proposed haul. Support statements signed by a number of subhaulers are attached to the application and the August 20, 1982 amendment. However, no performance or operating cost data have been furnished with either the application or amendment for these subhaulers.

The application states that the harbor project is now underway and that the shipper will require the asphaltic concrete in October 1982. It requests that if a hearing is to be held on the matter, interim authority be granted immediately.

Because the commencement of the public works harbor project was imminent, Tobey was granted temporary authority with an

expiration date of January 20, 1983 by Decision (D.) 82-09-102 dated September 22, 1982. However, the unusually heavy rainy season during late 1982 and early 1983 substantially delayed the delivery and placement of base materials which had to be accomplished before the paving materials could be used. As a result, the expiration date of the interim authority was extended by D.83-01-060 dated January 19, 1983, D.83-05-083 dated May 18, 1983, and D.83-08-067 dated August 17, 1983. The latest extension is to November 30, 1983.

The ordering paragraphs of D.82-09-102, as amended, provide in part as follows:

1. The matter will be set for hearing to, among other things, receive evidence regarding performance and cost data experienced by Tobey and subhaulers he engages in providing this transportation.
2. Unless appropriate cost showings for Tobey and for subhaulers are furnished, no continuation of the authority will be authorized.
3. Tobey shall pay subhaulers the full amounts provided in MRTs 7-A and 17-A for all transportation subject to this order in the event that results of operations for the first 500 loads transported at the authorized deviated rates should show the relief not justified.
4. Tobey shall furnish the Commission with the detailed performance data listed in Appendix B to the decision for the first 500 loads transported at the authorized interim rates.

Appendix A to D.82-09-102, as amended, sets forth the authorized rates and the conditions to which they are subject. Following is a summary of the four conditions:

1. The minimum weight applies to each unit of carrier's equipment.
2. Tobey may pay 35 named subhaulers 95% of the authorized rates and deduct an additional 20%

for the use of his trailing equipment.
(These are the subhaulers who signed the support statements.)

3. Any other subhaulers employed by Tobey shall be paid not less than the authorized deviated rates.
4. In all other respects, the rules and regulations in MRTs 7-A and 17-A shall apply.

Appendix B to D.82-09-102, as amended, lists the following data to be recorded by Tobey for each of the first 500 loads transported under the deviation:

- "1. For each unit of equipment used:
 - a. Tractor or truck license no.; and
 - b. Trailing equipment license nos.
2. For each day's movement show:
 - a. Carrier's T-No.;
 - b. Driver's name;
 - c. Time and mileage reading when service commenced;
 - d. Loading time, en route loaded time and mileage, unloading time, en route empty returning time and mileage, and repeat for each subsequent load;
 - e. Time out for lunch and other breaks shall be noted; and
 - f. Breakdown of equipment or delays to equipment shall be noted."

The transportation of the asphaltic concrete commenced in late June 1983. Tobey has furnished the documentation for more than the first 500 loads to the Commission Transportation staff.

Public hearing was held before Administrative Law Judge Arthur M. Mooney in Los Angeles on October 18 and 19, 1983. The matter was submitted upon the filing of written closing statements on November 3, 1983 by the California Dump Truck Owners Association

(CDTOA), the California Carrier's Association (CCA), the Associated Independent Owner-Operators, Inc. (AIOO), and the staff. Evidence was presented by Tobey, the staff, and CDTOA.

Tobey

Tobey has had considerable experience in the dump truck industry. He holds a dump truck carrier permit and has a subhaul bond on file with the Commission. He has operated as an overlying carrier for the past six years and at times subhauls for other carriers. Tobey's place of business is located at Diamond Bar, which is two miles west of Pomona. He has one two-axle tractor and five sets of bottom-dump trailers. He drives his power unit with a set of his trailers every day.

Tobey testified that the asphaltic concrete haul commenced around June 22, 1983. He explained that the inclement winter weather was the major reason for the delay in commencing the job. He stated that approximately 60,000 tons of material have been delivered to date and that the job will require at least 140,000 tons more. The witness estimated that the job will be completed in approximately four months provided there are no further delays due to unfavorable weather.

Tobey testified that while there have been delay problems at destination, actual experience has established that conditions and time factors estimated in the application for loading and travel are correct. Following is a summary of this information and data:

1. The new Huntmix plant has substantial storage facilities to assure a continual supply of asphaltic concrete for loading the trucking equipment with no delay. The average time for loading is under five minutes and frequently in the neighborhood of two minutes.
2. Three routes are available between origin and destination. The primary and secondary routes are similar in distance and time. The third route is used only when there are

traffic slowdowns on the other two, which has been seldom. On the overall, the total round-trip travel time of 102 minutes (1.7 hours) between origin and destination has been met.

3. The problem area has been delays at the unloading end due to an inexperienced BWP crew and breakdowns with the paving equipment. At first the BWP crew ordered too many trucks each day. This part of the problem has been remedied. However, because of other inefficiencies, delay time continues. Frequently it has been 20 minutes and the worst was four hours on a day there was no backup machinery on hand when the paving equipment broke down. The improvements that have occurred in delay time have been sporadic, generally two good days followed by two bad days. Because of this, it has generally not been possible to meet the total terminal end times for both loading and unloading of 12 minutes for hopper equipment and 20 minutes for transfer equipment estimated in the application.

Tobey pointed out that the majority of the hauling will be handled by the hopper equipment which dumps directly to the paving machine. He explained that the transfer equipment has hauled 6,000 to 10,000 tons of the asphaltic concrete to date and is used only for finishing the end parts of the paving where the hopper equipment cannot be used. The witness stated that the transfer unit operators refused to work at the deviated rate and have been paid on the basis of the minimum hourly rates which was agreed to by Huntmix. He testified that no transfer equipment is now being used and that regular end-dump equipment will most likely be used for the balance of the finishing of the ends of the pavement.

Tobey testified that generally the asphaltic concrete is hauled every other week to allow time for the placement of the base material during the alternate weeks. He stated that when the

transportation is in progress, the number of shipments per day has ranged from a low of 30 to a high of 135 and averaged 60. According to the witness, he seldom hauls loads for this job and his trailing equipment is rarely pulled by any of the subhaulers. He explained that at times he has engaged a subhauler not included in the list of the 35 whom he is authorized by his interim authority to pay 95% of the applicable authorized rate. He stated that he does not recall whether these subhaulers were paid 100% of the deviated rate as required by this authority or 95% of it.

Following is a summary of Tobey's testimony regarding the profitability of the deviated rate for subhaulers with bottom-dump equipment:

1. There is nothing wrong with the deviated rate. Tobey has hauled aggregates from the same origin to a plant in Wilmington about two miles from the job site almost every day at the same rate for the past six years. The aggregate haul is over the same routes as the haul in issue and has been profitable.
2. The only problem with the asphaltic concrete haul has been the delays at destination to unload. Because of this, the subhaulers have not been too happy with the deviated rate, and it has not been a completely profitable operation for them. When the destination delay has been excessive, the haul is not profitable. For all other aspects of the haul, the deviated rate is compensatory for them. Taking all hauls together, including those with the excessive delay time, the transportation may not be a losing venture. Tobey has not had a problem getting subhaulers even though there are many other jobs without the delay time problem available for them. If any subhaulers lose money on this haul, Tobey will give them other profitable jobs to make up for it.
3. Tobey has now obtained an agreement by Huntmix to pay for destination delay time over one-half hour at the MRT 7-A charge.

However, Huntmix has informed Tobey that the driver must have the delay document signed by a BWP crew member. The crew has refused to do so and will only stamp the document. The driver initials it. Tobey has recently sent these documents to Huntmix with a bill for delay time. However, he does not know if Huntmix will pay the delay charges since the documents were not signed by a member of the paving crew.

4. The solution to the destination delay problems is to amend the deviation authority by incorporating a specific rule and charge for delay time in it. Exhibit 1 has been reserved for a late-filed exhibit setting forth the specific wording and charge for the rule which is to be patterned after the Accessorial Charge rule in Item 90 of MRT 7-A.
5. With the delay time rule and charge to be proposed, all hauling by subhaulers will be compensatory.

Tobey pointed out that he had sent the documentation for more than the first 500 loads together with time sheet summaries to the staff as required by Ordering Paragraph 1.c. of D.82-09-102, as amended. As to the requirements in Ordering Paragraphs 1.a. and 3 of the decision, as amended, that Tobey furnish costs experienced by himself and his subhaulers in performing the transportation in issue, he stated that no such specific data had been prepared. He asserted, however, that with a charge for excess delay at destination, the cost estimates and data attached to the application adequately reflect the various costs of the operation.

During the hearing, the traffic consultant representing Tobey argued that the sought extension of the interim deviation authority with the addition of the delay charge has been sufficiently justified and that additional cost data, including separate costs for subhaulers, are not necessary. It is his opinion that any costs for owner-operator subhaulers would not be relevant because of the

question of what would be a proper labor cost for them. He urged that the extension be granted.

The traffic consultant has advised by telephone that because of severe illness he has been unable to prepare Late-Filed Exhibit 1 or a written closing statement. He advised that the delay rule which would apply after one-half hour should include the appropriate charge for delay in Item 90 of MRT 7-A and that his client's position has been sufficiently stated on the record. He stated that it was his intent to confirm this by letter with copies to the parties. The letter has not been received.

Staff

A staff representative testified that he reviewed the documents furnished to the Commission by Tobey and formulated Exhibits 2, 3, and 4 which include photostatic copies of most of the documents and summary sheets. He stated that although documents for approximately 1,100 shipments had been furnished, the documentation for only 727 was included in the three exhibits. He explained that most of the documents not used either had insufficient or no time information on them. The witness also stated that some of the documents were excluded because they were billed at MRT 7-A hourly rates or were for an only load transported by a subhauler on a particular day which was unusual for the subhaulers employed. He pointed out that none of the documents included all of the performance data Tobey was directed to furnish D.82-09-102, as amended.

Exhibit 2 includes the documentation and summaries for 440 loads transported by subhaulers in bottom-dump trailers on June 23, 24, 27, 28, 29, and 30, 1983, a total of six days. According to the exhibit, the actual average round-trip running time for this transportation closely approximates the 102 minutes estimated in the application. However, the actual average terminal time is

approximately 54 minutes and substantially exceeds the 12 minutes estimated in the application by about 42 minutes. By adding the running and terminal times, the total average time per trip is 2.6 hours; whereas, the estimated total time shown in the application is 1.9 hours.

Exhibit 3 includes the documentation and summaries for 205 loads transported by subhaulers in bottom-dump trailers on July 5, 25, 26, and 27, 1983, a total of four days. The actual average times developed from this exhibit are substantially similar to those developed from Exhibit 2.

Exhibit 4 includes the documentation and summaries for 82 loads transported by subhaulers in transfer equipment during August 1983. MRT 7-A hourly rates were paid for this transportation. Since Tobey has indicated that he will not use transfer equipment operators in the future and is no longer interested in the rate deviation for this equipment, an analysis of this data is not necessary.

The witness also prepared Exhibit 5 which lists 18 bottom-dump equipment subhaulers who were not included in the list of 35 whom Tobey was authorized to pay 95% of the authorized rates. He pointed out that Tobey did not remember the basis on which these subhaulers were paid.

A second representative testified that he visited the job site on June 27 and 28, 1983. He stated that he observed 26 trucks on the job on June 27. According to the witness the average unloading time and total round-trip time for the trucks on this date were approximately 11.9 minutes and 2 and one-quarter hours, respectively. He stated that on June 28 the paving equipment broke down and that after this there were substantial delays at the job site for the trucks.

The written closing statement by the staff recommends that any further extension of the interim authority be denied. In support of this position, the statement asserts as follows:

1. Appropriate cost showings for Tobey and his subhaulers were not presented as required by D.82-09-102, as amended.
2. All of the required performance data was not furnished by Tobey to the Commission.
3. The performance data the staff was able to develop from the documents furnished by Tobey clearly shows that the actual average performance time exceeds the estimates on which the deviated rates were based by a wide margin.
4. Any condition authorizing Tobey to assess delay charges would be difficult to enforce. Without continued surveillance by the staff, there is no way actual unloading time could be verified.

Other Parties

The general manager of CDTOA testified that based on his review of the documents in the staff's Exhibits 2 and 3, the average loading time for the bottom-dump equipment was slightly over 13 minutes and not the two to five minutes Tobey had indicated. The other actual average performance times developed by the witness were the same as those referred to above. He stated that the actual performance data clearly establishes that the deviated rate for bottom dump equipment is not compensatory.

In their closing statements, CDTOA, CCA, and AIOO each recommended that no further extension of the authority be granted. The reasons stated for their position were substantially similar to those set forth in the staff's closing statement. The CDTOA and CCA statements point out that Commission Resolution TS-284 dated January 24, 1978 sets forth the information to be included in applications for minimum rate deviation authority and that cost data was not presented by Tobey in conformity with the resolution. In this connection, the resolution states that the carrier shall furnish estimates of the labor, vehicle, and other direct and indirect costs

of performing the service. It further states that if subhaulers are to be employed and paid less than the sought rate, detailed financial and cost data shall be furnished for each subhauler to be used.

Discussion

According to Tobey, transfer equipment operators have been paid MRT 7-A hourly rates and will not be used in the future. There is, therefore, no need for an extension of the deviated rate for this equipment. As to the deviated rate for the bottom-dump equipment, the evidence clearly establishes that an extension of this rate has not been justified.

Appropriate cost showings for Tobey and the subhaulers were not presented. Instead Tobey relied on dump truck industry cost data presented in exhibits in another proceeding. There is no way of determining whether this data is appropriate for Tobey or any of the subhaulers in the performance of the transportation in issue. As noted above, Resolution TS-284 requires specific and not general cost data for the applicant and any subhaulers he intends to use and pay less than the deviated rate. Also, Ordering Paragraph 1.a. of D.82-09-102 states that unless appropriate cost data is presented for Tobey and the subhaulers, the interim authority will not be continued. Since Tobey has not furnished the required cost data, the ordering paragraph precludes a continuance of the authority.

The estimated and actual performance data presented by the parties has been sufficiently set forth above and will not be discussed in detail. It does show that the total per trip performance time estimated by Tobey and on which the deviated rate for the bottom-dump equipment was based has seldom been met and that the average total per trip performance time experienced by carriers in performing the service substantially exceeds the estimate.

We agree with the staff and CCA that the inclusion of a rule and charge for destination delay time in the deviation authority does not overcome the deficiencies in Tobey's presentation. We have only the statement by Tobey that the addition of a destination delay charge to the interim authority would assure that it is compensatory. Mere speculation alone without supporting evidence is not enough to justify the sought extension. It is to be noted that Condition 4 of the interim authority provides that except for the rates and minimum weights, it is subject to the rules and regulations in MRTs 7-A and 17-A. This would include the delay charge in Item 90 of MRT 7-A which applies after a 30 minute delay at destination.

Tobey testified and the staff's Exhibit 5 shows that some of the transportation was provided by subhaulers not included in the list of 35 whom he was authorized to pay 95% of the interim rates. According to Tobey, he could not recall whether these subhaulers were paid the full authorized rate as required by Condition 3 of the interim authority or 95% of it as authorized by Condition 2 for the 35 named subhaulers. Tobey will be directed to review his records to determine this and to pay any amounts of underpayments that may be due any of them because they had not been paid 100% of the deviated rate in accordance with Condition 3.

With the expiration of the interim authority, Tobey will be required to bill the debtor and to pay subhaulers on the basis of the applicable minimum rate tariff for all future transportation for the harbor project. We will not direct him to recompute payments to subhaulers on this basis for past transportation and pay them the differences between the amounts paid under the interim authority and the minimum rate tariff amounts. We recognize that some of the past hauls may not have been profitable. However, there is no basis on this record to determine how extensive this may have been. There have been no known complaints from subhaulers regarding this.

Because the interim authority has an expiration date of November 30, 1983, this order should be made effective on the date it is signed.

Findings

1. D. 82-09-102, as amended, granted interim authority to Tobey to charge less than minimum rates for the transportation of asphaltic concrete in bottom-dump and transfer equipment from the plant of Huntmix at Irwindale to a construction project at Berths 121-126 in Los Angeles Harbor. The authority has an expiration date of November 30, 1983.

2. The transportation in issue commenced in late June 1983 and will continue into the early part of 1984 or later depending on weather conditions.

3. Some of the past transportation has been provided with transfer equipment. The applicable hourly rate in MRT 7-A has been paid for this transportation rather than the interim rate authorized by D.82-09-102, as amended. Tobey does not intend to use transfer equipment for any of the future transportation.

4. For the reasons stated in Finding 3, there is no need for the interim rate authorized for the transfer equipment.

5. Ordering Paragraph 1.a. of D.82-09-102, as amended, provides that unless appropriate cost data is presented for Tobey and the subhaulers, the interim authority will not be continued.

6. Tobey has relied on dump truck industry cost data presented in exhibits in another proceeding and his estimates of performance times as cost justification for the interim authorized rate for bottom-dump equipment.

7. Actual average total performance time experienced by carriers performing the transportation in issue is much more than that estimated by Tobey.

8. Tobey has not presented appropriate cost data for himself and his subhaulers.

9. It has not been established that the authorized interim rate for bottom-dump equipment is reasonable and compensatory for Tobey and his subhaulers.

10. Tobey has engaged subhaulers not included in the list of 35 whom he was authorized to pay 95% of the interim rate. He does not

recall whether he paid these subhaulers 95% of the interim rate or 100% of it as required by Condition 3 of the interim authority.

11. It has not been established that the inclusion of a charge for excess delay time at destination in the deviation authority would assure that the interim rate for bottom-dump equipment will be compensatory.

12. The fact that Tobey is transporting a different commodity from the same origin point to a destination plant near the harbor project at the same rate as the interim rate is irrelevant. Transportation conditions for the two movements differ.

13. The proposed extension of the interim authority is opposed by the staff, CDTOA, CCA, and AIOO.

Conclusions

1. The interim authority granted to Tobey by D.82-09-102 as amended, and which has an expiration date of November 30, 1983 should not be further extended.

2. Tobey should be directed to review his records to determine whether any subhaulers whom he was not authorized to pay a lesser amount than the interim rate were paid less than 100% of the rate and to pay any amounts of underpayments that may be due them.

3. This order should be effective on the date signed because the interim authority has an expiration date of November 30, 1983.

O R D E R

IT IS ORDERED that:

1. The interim authority granted to Charles D. Tobey by D.82-09-102, as amended, and which has an expiration date of November 30, 1983 shall not be further extended.

2. Applicant shall review his records to determine whether any subhaulers whom he was not authorized to pay a lesser amount than the interim rate were paid less than 100% of the rate, and he shall pay any amounts of underpayments that may be due them. Within 60 days after the effective date of this order, he shall inform the Commission in writing of the results of his record review and the payments, if any, that have been made to the subhaulers.

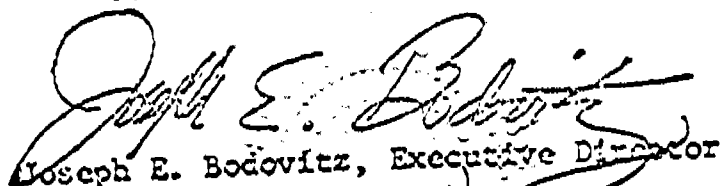
This order is effective today.

Dated NOV 30 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. CREW
WILLIAM T. BAGLEY
Commissioners

Commissioner Donald Vial, being necessarily absent, did not participate.

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


Joseph E. Bodovitz, Executive Director

question of what would be a proper labor cost for them. He urged that the extension be granted.

SS The traffic consultant has advised by telephone that because of severe illness he has been unable to prepare Late-Filed Exhibit 1 or a written closing statement. He advised that the delay rule which would apply after one-half hour should include the appropriate charge for delay in Item 90 of MRT 7-A and that his client's position has been sufficiently stated on the record. He stated that it was his intent to confirm this by letter with copies to the parties. The letter has not been received.

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Exhibit 2 includes the documentation and summaries for 440 loads transported by subhaulers in bottom-dump trailers on June 23, 24, 27, 28, 29, and 30, 1983, a total of six days. According to the exhibit, the actual average round-trip running time for this transportation closely approximates the 102 minutes estimated in the application. However, the actual average terminal time is

Findings

1. D. 82-09-102, as amended, granted interim authority to Tobey to charge less than minimum rates for the transportation of asphaltic concrete in bottom-dump and transfer equipment from the plant of Huntmix at Irwindale to a construction project at Berths 121-126 in Los Angeles Harbor. The authority has an expiration date of November 30, 1983.

2. The transportation in issue commenced in late June 1983 and will continue into the early part of 1984 or later depending on weather conditions.

3. Some of the past transportation has been provided with transfer equipment. The applicable hourly rate in MRT 7-A has been paid for this transportation rather than the interim rate authorized by D.82-09-102, as amended. Tobey does not intend to use transfer equipment for any of the future transportation.

4. For the reasons stated in Finding 3, there is no need for the interim rate authorized for the transfer equipment.

5. Ordering Paragraph 1.a. of D.82-09-102, as amended, provides that unless appropriate cost data is presented for Tobey and the subhaulers, the interim authority will not be continued.

6. Tobey has relied on dump truck industry cost data presented in exhibits in another proceeding and his estimates of performance times as cost justification for the interim authorized rate for bottom-dump equipment.

7. Actual average total performance time experienced by carriers performing the transportation in issue is much more than that estimated by Tobey.

8. Tobey has not presented appropriate cost data for himself and his subhaulers.

9. It has not been established that the authorized interim rate for bottom-dump equipment is reasonable and compensatory for Tobey and his subhaulers.

10. Tobey has engaged subhaulers not included in the list of 35 whom he was authorized to pay 95% of the interim rate. He does not