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ORIGINAL

Decision No. 86562

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of GUTHMILLER TRUCKING, INC., a California Corporation, for authority to deviate from the provisions of Minimum Rate Tariff Number 2 in connection with the transportation of glass beverage bottles equipped with plastishield devices, for the account of ROYAL BEVERAGE COMPANY, Oakland, California, pursuant to the provisions of Section 3666 of the California Public Utilities Code.	Application No. 56374 (Filed April 1, 1976)

INTERIM OPINION

Applicant, a highway permit carrier, seeks interim authority to deviate from the minimum rates for the transportation of glass beverage bottles equipped with plastishield devices from the plants and facilities of Owens-Illinois, Inc. located at Tracy to Royal Beverage Company located at 155 Ninety-Eighth Avenue, Oakland.

Royal Beverage Company of Oakland, California, bottles and markets the soft drink known as Royal Crown Cola. Royal Beverage Company has not heretofore offered Royal Crown Cola in plastishield bottles, but intends to do so in the near future. These beverage bottles with plastishield devices move on a collect basis. Royal Beverage Company is aware that its competitors--particularly Pepsi-Cola Bottling Company and Seven-Up Bottling Company--have the benefit of rate deviations for beverage bottle movements from the manufacturing plants of major glass companies in the Bay Area. (Decision No. 84447, Application No. 55389 for Yandell Truckaway, Inc.; and Decisions Nos. 85160 and 84444, Application No. 55447 for applicant.) By this application Royal Beverage Company seeks a parity of rates with its competitors.

The application states that:

"For many years, APPLICANT has engaged long-term independent owner/driver sub-haulers--each with his own Commission-issued permitted authority--to perform APPLICANT'S over-the-road transportation. This style of owner/driver sub-haul transportation service has proved highly efficient and satisfactory, not only to APPLICANT, but also to the owner/driver sub-haulers, who have a high motivation for productivity (since--to a large extent--they are in business for themselves), and have a high motivation to care for the motor equipment involved (since they own it themselves).

"Under APPLICANT'S arrangement with its owner/driver sub-haulers, a gross revenue division of 70% for the owner/driver is provided for those operating a tractor/drom/trailer-van unit equipped with rollerized floors, and a gross revenue division of 75% for the owner/driver is provided for those operating a tractor with a set of two flatbed trailers."

Data included in the application indicates that the transportation at the proposed rates will be compensatory to the applicant and the owner-operators. Data submitted by letter dated August 16, 1976 indicates that the service proposed may be expected to generate about $103,488 annually; $21,120 less than the minimum rates would have produced, or an average reduction of approximately 17 percent.

The authority requested by applicant has been granted on an interim basis to Tony Lucchetti, doing business as Rodeway Transport, (Decision No. 85846 dated May 18, 1976 in Application No. 56197) and Yandell Truckaway, Inc. (Decision No. 86189 dated August 3, 1976 in Application No. 56530).

The California Trucking Association (CTA) advised that it is opposed to ex parte consideration and requests the matter be set for hearing. By letter dated August 9, 1976 counsel for applicant renewed his request for interim authority pending hearing so that competitive parity may be maintained in view of the fact that similar authority has been granted to Yandell Truckaway, Inc. CTA, by letter dated August 18, 1976, advises that competitive parity may be maintained by the immediate rescission of the authority granted by Decisions Nos. 85846 and 86189 and that the matters be consolidated for early hearing on a common record.

It is obvious that competitive parity between the three carriers for the involved traffic should be maintained. We are not convinced that the previous authorities granted to Rodeway and Yandell should be rescinded.

Undue hardship may result by delay of this matter, especially since two of applicant's competitors have been granted the authority herein sought; therefore, the order that follows will be made effective on this day.

Subject to further review and consideration of actual cost evidence submitted by applicant, we find that the proposed rate deviation is reasonable and conclude that interim authority should be granted as set forth in the following order.

INTERIM ORDER

IT IS ORDERED that:

1. Guthmiller Trucking, Inc. is authorized to depart from the provisions of Minimum Rate Tariff 2 to the extent set forth in Appendix A of this decision. This authority does not include any deviation from any rates, rules, or regulations except as specifically set forth in Appendix A.

2. The authority granted herein shall expire one year after the effective date of this order unless sooner canceled, modified, or extended by order of this Commission.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 26th day of OCTOBER, 1976.

I will file a dissent.
William Symons, Jr.
Commissioner

I abstain
Vernon L. Sturgeon
Commissioner

President

Robert Batinovich
Commissioners

APPENDIX A

Commodity: Class beverage bottles equipped with plastishield devices.

Origin: Owens-Illinois, Inc. plants and facilities located at Tracy, California.

Consignee and Destination: Royal Beverage Company plant located at
155 Ninety-Eighth Avenue
Oakland, CA 94614.

Rate: 49 cents per 100 pounds, subject to a minimum weight of 40,000 pounds.

Conditions:

a. Rates above shall apply to single truckload shipments only.

b. Shipments are to be palletized and loaded and unloaded with power equipment without the assistance of, or any expense to, the carrier or subhauler.

c. To the extent not otherwise specifically provided, the provisions of Minimum Rate Tariff 2 shall apply.

d. Subhaulers will be paid not less than 70 percent of gross revenue when transportation is performed by a tractor/drom/trailer-van equipped with rollerized floors.

e. Subhaulers will be paid not less than 75 percent of gross revenue when transportation is performed by a tractor with a set of two flatbed trailers.

A.56374 - D.86562

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

The statutory framework which governs minimum rate regulation in California is the product of an active Legislature: first, in the system's initial enactment and thereafter in the fine tuning of its operations by amendments adopted over several decades. While the Legislature empowers the Commission to grant deviations below established minimum rates, this delegation of authority is not "Carte Blanche". This fact is ignored in the sudden surge in willy-nilly granting of deviations, without proper consideration, such as the decision in the case before us today. It makes a mockery of the Legislature's directives.

On the subject of deviations, the Legislature provided in Public Utilities Code Section 3666, that:

> "If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the Commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate."

This section establishes the requirement that before a deviation is granted, a "finding" must be made that the proposed rate is reasonable. Since deviations pertain to a particular move, it has been the policy of this Commission to examine each deviation petition to see if the cut rate is justified as reasonable by the special circumstances of the transportation in question. (Major Trucklines, Inc. (1970) 71 Cal P.U.C. 447 (D.77767))

But in a recent flurry of cases the Commission neglects that duty. In the case before us, applicants did not file supporting evidence on the

deviation in question, only an averment that they could get by on less, and general financial statements on the strength of their corporation. Perhaps we could consider this approach the "John Paul Getty Justification". Not only were the protestants alarmed at this, noting that "... the absence of underlying detail .. preclude any proper evaluation of the proposal." but the Commission's Transportation Division was concerned as well. They reported "the application does not show costs applicable to this transportation" and recommended the case go to public hearing.

Wrongly, however, this case did not have a hearing though requested by protestants, recommended by staff, and required by the circumstances. Instead, the case became caught up in the new wave of deviation decisions issuing from the Commission without hearing and without substantiated justification.

Two lame rationales are used to avoid the statutory duty which requires that the Commission obtain and examine pertinent evidence.

The first is to cite earlier cases and bootstrap the authority by saying it is similar. Of course, this has the danger of building a house of cards. For, other than cite the earlier case, the premises go unexamined. I reviewed the records underlying the two decisions cited on page 3 of today's opinion, Decision Nos. 85846 and 86189.

The latter is an August 31, 1976 decision bootstrapping on the earlier Decision No. 85846, saying that undue hardship would exist to allow the earlier to stand without the granting of the one in question.

The earlier Decision No. 85846 is from May 18, 1976 of this year. (By way of background I might explain that May was the month when the sequence of "new-wave" deviation decisions began to issue from the Commission. At the time I did not note the greatly loosened standards being applied to this category of decisions. Deviations had traditionally been thoroughly scrutinized and justified, and were rather routine matters on the calendar when compared to the major transportation and energy utility cases before us at that time. However, in August, as petitions for rehearing began to reach the Commission, the departure which began in May was noticed and its destructive implications assessed.) Decision No. 85846, upon re-examination, reveals another sorry case of inadequate eliciting of evidence. Applicant's cost evidence was questionable. Among other things, the protestants objected that the cost data omitted any "... allowance for owners salaries or wages or any allowance or provision for drivers' wages." I surmise that maybe the equipment was to be robot-controlled. They requested hearing. Yet the case was issued without hearing and <u>even without the required finding of reasonableness</u> by the Commission!

The decision relied on the second of two lame rationales which is now cropping up in our deviation decisions: the "interim" deviation relying on cost evidence <u>in the future</u>. This is an abuse of the statutory authority set down in Section 3666. We must recall that deviations can be destructive. The carrier with the deviation has the advantage on all other carriers in the state in obtaining a shipper's business. To allow a six-month trial deviation, where there has been no evidence to base the finding of reasonableness upon, is contrary to the law. Putting the term "interim" on it, in no way disguises the reality that it is a current deviation; and that it will take the business with it.

One further point, some of the majority's recent decisions have bandied the phrase of "predatory practices" around. But ill-considered deviations will bring on that evil faster than anything I know. Also, in the vein of real predatory practice, is the danger I see rearing its head in cases like this one -- where a deviation is granted and along with it, the applicant is authorized to pay subhaulers 70% to 75% of his deviated rate. Now the shipping public and the consumer benefits from this not one iota. They pay the full deviated rate. Yet the applicant, with the privilege of the deviation, is sitting pretty. What the applicant does that justifies taking 25% to 30% of the rate is not explained. We have no data on it in this record -- no evidence. Further, there is absolutely no evidence from any subhauler that the full costs of transportation are covered by 70% of the deviated rate or whether he will be the victim of a predatory relationship.

I am appalled at the lack of inquiry so apparent in this case and the flood of deviation cases coming before us which I have dissented to in the past three months. This must be remedied.

San Francisco, California
October 26, 1976

William Symons, Jr.
WILLIAM SYMONS, JR.
Commissioner