

Decision No. 86648

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of J. S. Shafer, Jr.,
for authority, pursuant to Provisions
of Section 3666 of the Public
Utilities Code, to depart from the
minimum rates, rules and regulations
of Minimum Rate Tariff No. 17-A.

) Application No. 55672
(Filed May 6, 1975; amended
May 29, September 17, and
October 17, 1975 and March 12
and May 26, 1976)

Graham & James, by David J. Marchant, Attorney
at Law, for J. S. Shafer, Jr., applicant.
James R. Foote and L. Wade Austin, for Associated
Independent Owner-Operators, Inc., and
E. O. Blackman, for California Dump Truck Owners
Association, protestants.
H. W. Hughes, J. C. Kaspar, and C. D. Gilbert, for
California Trucking Association, and Harry C.
Phelan, Jr., for California Asphalt Pavement
Association, interested parties.
Leonard Diamond, Mark Wetzell, and George L. Hunt,
for the Commission staff.

O P I N I O N

This matter was heard before Examiner Tanner on October 17,
1975 and April 6, 1976 at Los Angeles and April 12, 1976 at San
Francisco. It was submitted on briefs filed June 30, 1976.

Antecedence

By application filed May 26, 1975 and amended May 29, 1975,
applicant J. S. Shafer, Jr., sought authority to deviate from the
minimum rates named in Minimum Rate Tariff 17-A (MRT 17-A) for the
transportation of rock, sand, and gravel between the production
plant of Owl Rock Company, Azusa, and the asphalt plant of Griffith
Company, Wilmington. Four bottom dump trailers were to be used,
three pulled by tractors furnished by underlying carriers and one

by applicant's tractor. The operations occur after normal working hours, allowing a potential increase in use hours for the units involved.

Decision No. 84531 dated June 10, 1975 granted the authority requested on a temporary basis pending public hearing. A rate of \$1.89 per ton was authorized. The charges to underlying carriers for trailer rental was set at 25 percent of the authorized rate.

By amendment filed September 17, 1975 applicant requested that the production plant of Conrock, Irwindale, be added as an origin point. Decision No. 84952 dated September 30, 1975 added Conrock as an origin point. The temporary authority granted by Decision No. 84531 remained otherwise unchanged.

At the initial hearing applicant presented cost estimates consisting of adjustments to cost evidence received in Petition for Modification No. 10, Case No. 9819. Applicant was advised that actual cost measurements would be required, including actual costs experienced by the three underlying carriers. The matter was thereupon deferred to allow applicant time to develop the required information. By Decision No. 85214 dated December 2, 1975, the temporary authority was extended, subject to adjustments proportionate to any adjustment to the minimum rate named in MRT 17-A applicable to the transportation involved.

On October 17, 1975 and March 12, 1976 the application was further amended. In the first case a rate reduction was requested. The adjustment was based on the passage of Assembly Bill 1352,^{1/} which raised the maximum gross vehicle weight from 76,800 pounds to 80,000 pounds. The latter amendment was filed following the issuance of Decision No. 85518 which adjusted the rates in MRT 17-A upward.

^{1/} Section 35550 and 35551, Vehicle Code, Chapter 651, 1975 Statutes.

The amendment sought modification of the requirement of Decision No. 85214 that the rates authorized in this matter be adjusted proportionately with any adjustment in MRT 17-A. The requested modification was based on the increase in payload permitted by Assembly Bill 1352.

Decision No. 85650 dated March 30, 1976 authorized a rate of \$1.99 per ton, an increase of 5.21 percent, effective April 1, 1976.

At the April 6, 1976 hearing, applicant requested that the application be amended to provide a rate of \$1.92 per ton from Conrock and \$1.99 per ton from Owl Rock.

There are four basic issues requiring resolution:

1. Are the requested minimum rate deviations justified in consideration of the circumstances under which the transportation services are conducted?
2. Are the proposed rates reasonable to applicant, shipper, and underlying carriers?
3. Will the granting of this application result in providing Griffith Company an improper competitive advantage?
4. In consideration of Item 460, MRT 17-A, may applicant be authorized to pay less than 95 percent of the minimum rate named in that tariff to underlying carriers who are not coapplicants?

Discussion

Section 3666 of the Public Utilities Code provides:

"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."

The record is clear that the transportation service involved is performed under circumstances that are favorable, that the operations are compensatory, and that the proposed rates are reasonable under the tests customarily applied. The tests customarily applied are those which may be measured by comparing the requirements of the proposed service to the applicant's capabilities, equipment, and cost of performing the service. This application differs in that the applicant assumes the primary role of project manager and equipment lessor, rather than the usual carrier status. About 75 percent of the service to be conducted will be accomplished by three underlying carriers pulling trailing equipment leased from applicant. This circumstance requires a finding that the proposed deviation is reasonable, as contemplated by Section 3666, in relation to the underlying carriers.

Before considering whether the proposed deviation is reasonable in relation to the underlying carriers, the issue raised by the California Dump Truck Owners Association (CDTOA) must be decided. Specifically, CDTOA questions whether applicant may be authorized to pay less than 95 percent of the applicable minimum rate to underlying carriers if such underlying carriers are not also applicants.

Item 460, MRT 17-A provides:

"Charges paid by any overlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall be not less than 95 percent of the charges applicable under the minimum rates prescribed in this tariff, less the gross revenue tax applicable and required to be paid by an overlying carrier in connection with said charges. (See Notes 1 and 2)

"Charges paid by an underlying carrier (a subhauler) to another underlying carrier (a sub sub-hauler), and collected by the latter for services performed for the former, shall not be less than 95 percent of the charges received by the former from the overlying carrier (exclusive of allowances for liquidated debts of the subhauler to the overlying carrier) under the minimum rates prescribed in this tariff.

"Note 1.--As used in this item the term gross revenue tax means the fees payable to the California Public Utilities Commission under the Transportation Rate Fund Act.

"Note 2.--Nothing herein contained shall prevent an overlying carrier, in paying such charges, from deducting therefrom such liquidated amounts as may be due from the underlying carrier to the overlying carrier, providing such deductions have been authorized in writing by the underlying carrier. Any overlying carrier electing to employ this procedure shall itemize such amounts and maintain for the Commission's inspection all documents involved in the transaction."

CDTOA argues that underlying carriers are highway carriers as that term is used in Section 3666 by virtue of the definition of "Underlying Carrier" in Item 20, MRT 17-A, and as such the minimum rates applicable to any subhauler (underlying carrier) cannot be reduced below those otherwise established by the Commission without an application and a showing of reasonability by specific subhaulers.^{2/}

Applicant, on the other hand, contends that no procedural requirement exists requiring affected underlying carriers to be joint applicants in proceedings of this nature.

The three participating underlying carriers have actively participated in this proceeding. Each presented verified statements indicating their support for the relief sought, and which included summaries of income showing estimated profits ranging from \$11,000

to \$32,000 annually. There is no doubt that the three underlying carriers are completely aware of and sincerely endorse this application.

In a proceeding involving a deviation from the minimum rates, consideration must be given to the conduct of the proposed service. In the instant case the performance depends on the use of the three underlying carriers. The record includes estimates of their revenues and expenses. There was no effort to conceal any element of their participation, earnings, or expenses in connection with the service involved.

Item 460 of MRT 17-A provides, in effect, minimum rates on applicable services performed by underlying carriers. Its purpose is simple and speaks for itself. There was no intention when it came into being, nor is it now, to become a procedural trap. We see no reason why underlying carriers should not be coapplicants in proceedings of this kind, if they so choose, but Item 460 does not require that they must be. The important element is that the proposed operations must be completely and fully disclosed, permitting a complete evaluation of the proposed operation, including that of the underlying carriers. If the proposal is reasonable for the applicant, underlying carriers (in consideration of the intent of Item 460), and the general public, it shall be authorized pursuant to Section 3666.

The record in this matter clearly demonstrates that the primary question to be resolved concerns the role of the underlying carriers. None of the participants questioned the reasonableness of the proposed rates as such rates would apply to service performed by applicant in applicant's equipment.

Cost estimates, based on actual operations and furnished to applicant by the three underlying carriers, were received in evidence (Exhibit 8). The estimated costs were developed in the

same manner employed in minimum rate proceedings involving transportation subject to MRT 17-A. According to the exhibit, the underlying carriers will require a rate of \$1.41 per ton on the Conrock operation and \$1.48 per ton on the Owl Rock haul to return actual operating costs which include a ten percent allowance for indirect expenses and eight percent profit. The calculations are based on the average of the cost factors of applicant and the three underlying carriers. If the costs are calculated for applicant and each underlying carrier, the required rate ranges from \$1.26 to \$1.55 per ton for the Conrock operation and \$1.33 to \$1.63 per ton for the Owl Rock service. When the provision for profit is removed, the ranges are reduced to \$1.16 to \$1.43 and \$1.22 to \$1.50 per ton, respectively. The calculations include labor costs of \$11.003 per hour, the labor cost used as the basis of the existing sand, rock, and gravel rates in MRT 17-A.

The California Trucking Association (CTA), Associated Independent Owner-Operators, Inc. (AIOO), and the CDTOA contend that the cost estimates, as they relate to the underlying carriers, are faulty as the use factor is not realistic, the average payload is too high, and the fuel use and maintenance expenses for one of the underlying carriers is understated. According to CTA a rate per ton of \$1.475 from Conrock and \$1.53 from Owl Rock would be more appropriate compensation for the underlying carrier service. This includes 12 cents per ton (8%) above full cost for profit.

It is noted that the labor cost used by applicant was that used as the basis for the present MRT 17-A rates for sand, rock, and gravel. If one were to substitute the actual labor cost (assuming that 25 percent of gross revenue is appropriate for all three underlying carriers) and an average load of 26.88 tons per load (as per CTA's calculations), rates of \$1.40 and \$1.47 per ton

will result, and still include ten percent indirect costs and an eight percent provision for profit. In consideration of this and the financial statements of the three underlying carriers, the proposed payment to the underlying carriers does not appear unreasonable.

The transportation involved here is from Production Area 19-G to Delivery Zone 19245. According to CDTOA this application seeks rate discrimination between shippers which have had a Commission established rate parity for years. This application obviously does seek rate discrimination. We do not agree, however, that rate parity from a single production area to a single delivery zone must be maintained without exception. Minimum rates named in the various minimum rate tariffs are rates which are common to a given service and as such have the character of common carrier rates. Such rates may not be unduly discriminatory, preferential, or otherwise unreasonable, and must give appropriate recognition to competitive forces, including competition between shippers in a common market. The zone rates in MRT 17-A apply from production areas to delivery zones whose geographic, economic, and transportation circumstances are such that each may be treated as a single economic unit. The zone rates named in MRT 17-A are formulated under the same principles as common carrier rates and are, therefore, free of discrimination between shippers located in the same production area.

Section 3666 recognizes that there may be occasions when the "common" rates may not be appropriate for a particular service. It is through this statutory provision that the minimum rate structure may exhibit the character of private (contract) carriage. The rates in issue here are of such character. They are not appropriate, nor does applicant propose that they be "public" rates. There is no indication that the rate levels were designed to disadvantage a

competing carrier, or to give Griffith Company an advantageous competitive position. So long as the rates are appropriate for the special services involved, such rates would not be unduly discriminatory.

Findings

1. Applicant seeks authority to transport rock, sand, and gravel for Griffith Company, Wilmington, from Owl Rock, Azusa, for \$1.99 per ton and from Conrock, Irwindale, for \$1.92 per ton.
2. Applicant proposes to engage three underlying carriers who will pull trailing equipment supplied by applicant.
3. The underlying carriers to be engaged by applicant are:
 - a. Richard C. Kellogg
P.U.C. T No. 106,459
 - b. Scott P. Swope
P.U.C. T No. 88,941
 - c. Juan A. Vegezzi
P.U.C. T No. 105-434
4. The loading and unloading facilities, the volume to be transported, the hours of service, and general transportation conditions constitute special circumstances and conditions distinguishing the transportation service subject to this application from that subject to MRT 17-A, and results in lower operating costs.
5. The rates sought by applicant and referred to in Finding 1 are reasonable.
6. A rate of \$1.44 per ton from Conrock and \$1.49 from Owl Rock is reasonable for the underlying carrier service described in Finding 2.
7. The cost estimates covering the operations of the underlying carriers named in Finding 3 justify the rates found reasonable in Finding 6. In the event applicant engages another underlying carrier, a verified statement should be filed indicating the name

of the underlying carrier, the equipment to be used, and such other data that will clearly show that the cost of operations will be within the range of costs received in evidence in this application.

8. The rates sought by this application will not result in an improper competitive advantage for Griffith Company.

9. Item 460, MRT 17-A, does not require underlying carriers to be coapplicants in applications seeking rates that deviate from the minimum rates. The purpose and intent of that item does require a full and complete showing of the involvement of underlying carriers in such proceedings, and requires a finding that the charges to be paid to underlying carriers are reasonable.

We conclude that this application should be granted to the extent provided in the following order.

Since conditions under which the service is performed may change at any time, the authority granted in the ensuing order will expire at the end of one year unless sooner canceled, modified, or extended by order of the Commission.

O R D E R

IT IS ORDERED that:

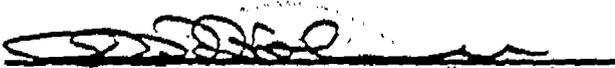
1. J. S. Shafer, Jr., is authorized to depart from the minimum rates set forth in Minimum Rate Tariff 17-A by charging those rates set forth in Appendix A of this decision. This authority does not include any deviation from any rates, rules, or regulations except as specifically set forth in Appendix A.

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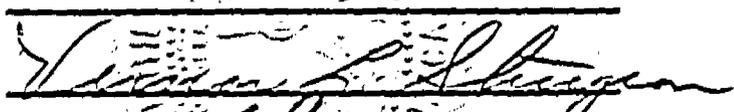
2. The authority granted shall expire one year after the effective date of this order unless sooner canceled, modified, or extended by order of the Commission.

The effective date of this order shall be November 30, 1976.

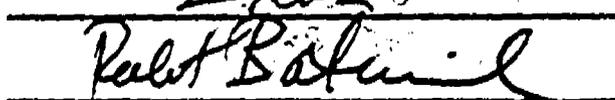
Dated at San Francisco, California, this 16th day of NOVEMBER, 1976.



President



Commissioners



Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A

Shipper: Griffith Company, Wilmington. California.

Commodities: Rock, sand, and gravel as described in Item 60,
Minimum Rate Tariff 17-A.

To: Griffith Company, Wilmington. Delivery Zone 19245.

From: Owl Rock Company, Azusa. Production Area 19-G.

Rate: \$1.99 per ton.

From: Conrock, Irwindale. Production Area 19-G.

Rate: \$1.92 per ton.

Conditions:

- (a) Underlying carriers supplying tractors pulling trailing equipment furnished by J. S. Shafer, Jr., shall be paid no less than \$1.49 per ton from Owl Rock Company and \$1.44 from Conrock.
- (b) If any underlying carrier, other than Richard C. Kellogg, Scott P. Swope, or Juan A. Vegezzi, is employed, a verified statement shall be filed with the Commission showing the underlying carrier's name, equipment description, and cost information, such that it may be determined whether such an underlying carrier's cost is within the range established by the three carriers named above.
- (c) Other than the authority described above, all other provisions of Minimum Rate Tariff 17-A shall apply.