

ORIGINAL

Decision No. 87200

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
FROSTY FREIGHTWAYS, INC., dba )  
MARATHON DELIVERY SERVICE for )  
authority to deviate from provisions )  
contained in Item 50 of Minimum Rate )  
Tariff No. 15 under provisions of )  
Section 3666 of the California )  
Public Utilities Code. )

Application No. 56422  
(Filed April 22, 1976)

Silver, Rosen, Fischer & Stecher, by  
John Paul Fischer, Attorney at Law,  
for applicant.  
Charles D. Gilbert and H. Hughes, for  
California Trucking Association,  
interested party.

O P I N I O N

Applicant holds authority as a radial highway common carrier and as a highway contract carrier. It seeks authority to deviate from the provisions of Minimum Rate Tariff 15 (MRT 15) in connection with the transportation of property for Department Store Shippers Association (DSSA). By Decision No. 86171 dated July 27, 1976 in Application No. 56421 applicant was granted similar authority for transportation performed for Mervyn's.

Public hearing was held at San Francisco before Examiner O'Leary on November 22, 1976. The matter was submitted subject to the filing of Memoranda of Points and Authorities which were filed December 22, 1976.

The monthly and yearly vehicle unit rates in MRT 15 are limited to service performed within a radius of 250 air miles from the base of operations. Applicant proposes to assess the rates in this tariff for transportation exceeding the 250-mile limitations.

DSSA is a nonprofit shippers association composed of approximately 19 members, the majority of which are department stores and manufacturers who supply goods to department stores. DSSA presently utilizes applicant to transport shipments from the terminal of DSSA at Los Angeles to the San Francisco area five times per week. The shipments are presently transported pursuant to the split delivery provisions in MRT 2. DSSA also utilizes applicant to transport shipments from the San Francisco area to the terminal of DSSA five times per week. The shipments are presently transported pursuant to the split pickup provisions in MRT 2. Should the relief requested herein be authorized applicant intends to utilize two tractors and four van trailers under the monthly unit rates set forth in MRT 15. Applicant also desires to use subhaulers should the relief sought be granted.

Revenue and expense data (Exhibit 4 and late-filed Exhibit 5) disclose that the proposed operation would be compensatory to applicant utilizing its own equipment to perform the transportation. Late-filed Exhibit 5 contains revenue and expense data of one subhauler whom applicant would engage in the proposed operations. The exhibit shows that the operations of the subhaulers would result in a profit of \$27.29 per week; however, the data utilized to arrive at this figure is questionable and we are unable to determine with certainty that the operations of the subhauler would be compensatory. For example, the tractor maintenance and fuel cost is shown as 22 cents per mile but the weekly cost is shown as \$418 which is arrived at by multiplying 2,200 miles per week by 19 cents. If the 2,200 miles were multiplied by 22 cents rather than 19 cents the weekly cost would be \$484, a difference of \$66 with a resulting net loss of \$38.71. Applicant's cost

figures when utilizing an owner-operator disclose a payment to the subhauler of 26 cents per mile which would result in revenue to the subhauler of \$572 (26 x 2,200). The revenue and expense data of the subhauler shows a revenue of \$1,025.

California Trucking Association (CTA) contends that if DSSA is operating as a freight forwarder within Division 1 of the Public Utilities Code (Section 220) then applicant's operations are those of a highway common carrier. It further contends that if DSSA's activities are not those of a freight forwarder then DSSA is subject to regulation as a radial highway common or highway contract carrier since no exemption exists for DSSA as to regulations under Division 2 of the Public Utilities Code.

The first contention of CTA is without merit. Freight forwarder is defined in Section 220 of the Public Utilities Code as follows:

"'Freight forwarder' means any corporation or person who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the property via the line of any common carrier at the tariff rates of such carrier, or who receives such property as consignee thereof.

"This section shall not apply to any agricultural or horticultural cooperative organization operating under and by virtue of the laws of this or any other state or the District of Columbia or under federal statute in the performance of its duties for its members, or the agents, individual or corporate, of such organization in the performance of their duties as agents.

"This section shall not apply to the operation of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, to the operations of a warehouseman or other shippers' agent in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

DSSA's operations are those of a group or association of shippers and thus are not those of a freight forwarder.

The record developed in this proceeding does not address the details of DSSA's internal operations and relationship with its affiliate members in sufficient detail to support CTA's contention that DSSA operates as a radial highway common or highway contract carrier. While CTA's contention may ultimately prove to have merit, it is beyond the scope of this proceeding and the evidentiary record developed in this proceeding. If CTA has reason to believe DSSA's activities are those of a radial highway common or highway contract carrier, it may file a complaint; likewise, if the staff has similar reason it may request an appropriate Order Instituting Investigation.

#### Findings

1. Applicant operates as a radial highway common and highway contract carrier.
2. DSSA is not a freight forwarder. The evidence is not sufficient to find that DSSA is a radial highway common carrier or highway contract carrier.
3. The circumstances that exist for applicant's transportation for Department Store Shippers Association is a 5-day-a-week movement in each direction.
4. In the event applicant was required to travel in either direction empty it would receive compensation under the provisions of MRT 15.

5. Applicant's proposal is compensatory, reasonable, and justified when utilizing its own equipment.

6. Applicant's proposal has not been shown to be compensatory to subhaulers should they be utilized.

The Commission concludes that the application should be granted as set forth in the ensuing order, and the effective date of this order should be the date hereof because there is an immediate need for this relief.

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. Frosty Freightways, Inc., a corporation, is authorized to depart from the provisions of paragraph (c) of Item 50 of Minimum Rate Tariff 15 by assessing rates in MRT 15 for transportation beyond the 250-mile limitation in connection with the transportation of property for Department Store Shippers Association.

2. The authority granted herein will not apply in the event subhaulers are utilized to perform the transportation.

A.56422 dz

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

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 12<sup>th</sup>  
day of APRIL, 1977.

Robert B. ...  
President  
William ...  
Thomas L. ...  
Leonard ...  
Richard W. ...  
Commissioners