

ORIGINAL

Decision No. 87526 June 28, 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Adeline F. Mello & )  
Richard D. Mello, dba Northern Refrigerated Transportation for authority  
to deviate from the provisions of Minimum Rate Tariff #2 for the transportation of candy or confectionery for Hershey Foods Corp. between Oakdale and points within California.

Application No. 56420  
(Filed April 22, 1976;  
amended June 3, 1976)

Carr, Smulyan & Hartman, by George M. Carr, Attorney at Law, for applicant.  
Handler, Baker & Greene, by Daniel W. Baker Attorney at Law, for Mammoth of California, Inc., protestant.  
Charles D. Gilbert and H. Hughes, for California Trucking Association; and Joseph MacDonald, for California Motor Express; interested parties.  
William J. Jennings, Attorney at Law, and Harry E. Cush, for the Commission staff.

O P I N I O N

Adeline F. Mello and Richard D. Mello, a partnership doing business as Northern Refrigerated Transportation (NRT), operate as a highway contract carrier. NRT here seeks authority to deviate from the provisions of Minimum Rate Tariff 2 (MRT 2) in connection with the transportation of candy and confectionery from Hershey Foods Corp. (Hershey) located at Oakdale to points throughout California. The application is protested by Mammoth of California, Inc. (Mammoth).

Public hearings were held in San Francisco before Examiner Tanner on December 16, 1976 and before Examiner O'Leary on December 17, 1976, January 18, 19, and 20, and February 1, 1977. The matter was submitted with the issuance of the ruling by Examiner O'Leary that Exhibit 34 was not received in evidence, Application No. 56420 was submitted on April 12, 1977.

In the application NRT proposed the following:

- a. A reduction in the applicable rates of \$0.05 per hundredweight on shipments of 20,000 pounds or subject to minimum weights of 20,000 pounds or over. This reduction is subject to shipper loading with power equipment on pul-pac sheets at no additional cost to carrier. All load times are to be prescheduled for afternoon loading and subject to a maximum delay time of 45 minutes per truck. Any delays in excess of 45 minutes shall be charged for at the rates provided in Item 145 of Minimum Rate Tariff 2.
- b. Products included in these shipments are those listed in Item 318-1 of Minimum Rate Tariff 2 and would be subject to the following class rates:

Class 55 at 20,000 pounds minimum.  
Class 35 at 30,000 pounds minimum.  
Class 35.1 at 36,000 pounds minimum.  
Class 35.2 at 42,000 pounds minimum.  
Class 35.3 at 45,000 pounds minimum.

- c. A special temperature control charge is requested for shipments tendered to carrier requesting chill refrigeration service no lower than 65° Fahrenheit. Such temperature control charge to be determined by adding five percent to the class rates determined under paragraph b above.

At the hearing NRT revised its proposal to the extent that it would apply to shipments wherein the freight charges were based upon minimum weights of 30,000 pounds or greater rather than 20,000 pounds, the \$0.05 reduction would apply to the actual weight shipped rather than the minimum weight upon which rates are computed in the event such minimum weight is higher than the actual weight shipped, and would only apply to shipments destined to a point at least 200 miles from Hershey's plant at Oakdale. NRT's revised proposal is set forth in Exhibit 1-A.

Richard D. Mello, one of the partners of NRT, testified he had been soliciting the Hershey account for approximately six years. The traffic manager of Hershey's Oakdale facility testified that since he assumed his duties approximately 2-1/2 years ago Richard D. Mello called upon him several times soliciting business. In January or February 1976 Richard D. Mello asked the traffic manager if Hershey would be interested in using NRT's service if he was able to obtain a rate deviation. The traffic manager replied that Hershey would be willing to try NRT's service, if in fact they did obtain the deviation. Subsequent to the filing of the instant application and the filing of the protest by Mammoth, Hershey diverted the traffic previously enjoyed by Mammoth to NRT. The witness also testified that Hershey utilizes five carriers in addition to applicant for transportation needs in California. The pul-pac system of loading is used for loading all shipments at Hershey.

NRT's terminal is located at Modesto which is approximately 15 to 18 miles from the Hershey plant at Oakdale. NRT operates five tractors and eight refrigerated van trailers. Prior to September 1, 1976 it operated four tractors and six refrigerated van trailers. Approximately 2/3 of the revenue earned by NRT is derived from transportation performed with its own equipment and the remaining 1/3 is derived from transportation performed by subhaulers. Richard D. Mello testified that NRT transports more traffic northbound from southern California than it transports southbound to southern California. One of the reasons for filing the application is to obtain southbound traffic and thus reduce deadhead miles. The preponderance of NRT's northbound traffic consists of subhaul operations for two carriers headquartered in southern California.

Exhibit 8-A is a cost study covering sample shipments destined to various points in southern California under the proposed deviation rates. The exhibit also contains revenue and cost data covering return loads from southern California. The length of the southbound shipments ranges from a low of 371 miles to a high of 585 miles. The exhibit discloses that the transportation at the proposed rates will be compensatory.

The cost factors utilized by NRT for transportation performed with its own equipment are set forth in Exhibit 5. Some of the figures were updated in Exhibits 14 and 17. The cost factors are as follows:

<u>Description</u>	<u>Factor</u>	<u>Source Exhibit</u>
Fixed Cost	\$32.76 Per Trip <sup>1/</sup>	5
Running Cost	\$0.2218 Per Mile	14
Driver Wages	25% of Revenue	5
Driver Payroll Taxes and Fringe Benefits	\$19.11 Per Trip	17
Worker's Compensation	8.42% of Wages	14
Indirect Expenses	15.55% of Direct Expenses	5
Gross Revenue Expense	.435% of Revenue	14
Interest Expense	2.55% of Revenue	5

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<sup>1/</sup> Computed as follows: Yearly fixed expense \$6,815 ÷ 52 weeks x 1/4 = \$32.76. This assumes two southbound trips from Oakdale to southern California and two return trips from southern California to northern California per week.

Evidence presented by protestant consisted of testimony and an exhibit by a certified public accountant, with a specialty in motor carrier accounting, and testimony of its vice president/general manager. The certified public accountant did not agree with NRT's computation of fixed expenses and indirect expenses. He also questioned whether the transportation at the proposed rates would be compensatory to NRT when subhaulers were utilized to perform the transportation. With respect to NRT's fixed cost computation the witness testified that it assumes 104 round trips per year for one unit of equipment. He also testified that because NRT has five tractors and eight trailers the fixed expense cost factor should provide for 1.6 trailers. In connection with NRT's computation of indirect expenses the witness testified that no provision was made for salaries of the partners. He contends that the amount of the drawings of each partner should be included as indirect expenses. During the first ten months of 1976 the drawings totaled \$41,052. The witness also questioned the cost studies for two of the subhaulers which are contained in Exhibits 6 and 7. In view of the findings and order hereinafter made there is no need to discuss the witness' testimony in this regard.

The vice president/general manager of protestant testified that his company had been transporting Hershey traffic for approximately seven years prior to the diversion of the business to NRT. The protest was filed because at the time of the filing of the application NRT had not transported any of the Hershey shipments and therefore any costs to support the deviation would of necessity be estimated. He further testified that his company transported approximately two shipments per week to the Los Angeles area for Hershey. The witness requested that should the sought authority be granted it contain a restriction that subhaulers not be utilized.

He further testified that a provision requiring that subhaulers be paid a certain percentage of the revenue would be unsatisfactory because applicant could withhold more than the normal amount from subhaulers on other traffic, thus circumventing any percentage of payment requirement provision required should the sought authority be granted.

Evidence presented by the staff consisted of testimony and exhibits by an associate transportation rate expert and testimony and an exhibit by a supervising transportation rate expert. The associate transportation rate expert testified that he reviewed the data contained in the original application and prepared Exhibits 18 through 23 and concluded that the transportation at the proposed rates would be compensatory except for shipments based upon a minimum weight of 20,000 pounds. The amended request of NRT (Exhibit 1-A) does not apply to shipments of 20,000 pounds. The supervising transportation representative testified concerning his opinion of predatory practices. It is his opinion that the filing of an application for authority to assess rates less than the minimum prior to the applicant's performing the transportation is not a predatory practice per se. The exhibit (Exhibit 35) presented by this witness is entitled,

"A Guide to Filing INITIAL APPLICATIONS and RENEWALS for Authority to Charge Less Than a Maximum Reasonable Rate Under the Provisions of Section 452 or Less Than Minimum Rates Under Sections 3666 and 5195 of the Public Utilities Code".

The exhibit states in its opening paragraph:

"When transportation is performed under operating conditions which are unusually favorable, or are substantially different from those considered in establishing the minimum rates, a highway carrier may obtain authority from the Commission to charge a rate lower than the established minimum rate for such transportation. . . ."

This application is unusual in that NRT has applied for authority to assess less than the minimum rates before it has gained experience in the very transportation for which they seek the authority. As a result its initial studies have to be based on estimates rather than actual results of operation since NRT had not transported any of the involved traffic prior to the filing of the application. It is interesting to note that during the course of the hearing NRT amended the proposal to apply on shipments based on a minimum weight of 30,000 pounds rather than 20,000 pounds especially since one of the staff witnesses testified that he did not believe the proposed rates would be compensatory for shipments based on a 20,000 pound minimum weight.

In analyzing NRT's cost evidence we have made certain adjustments regarding the fixed expense factor and the indirect costs. NRT's fixed expense factor provides the same cost regardless of the number of miles traveled and assumes two trips per week from Hershey to southern California. A fixed expense factor per mile traveled is a more acceptable method of computing fixed costs in this case. We have utilized a fixed expense factor of \$0.1020 which was computed as follows from data contained in Exhibit 5:

$$\begin{aligned} \$6,815^a &\div 12 = \$567.92^b \\ \$17,397.65^c &\div 7 = \$2,485.38^d \\ \$2,485.38^d &\div 4^e = \$621.35^f \\ \$621.35^f &\div .1116^g = 5,567^h \\ \$567.92^b &\div 5,567 = .1020^i \end{aligned}$$

<sup>a</sup> Annual fixed cost of unit of equipment.

<sup>b</sup> Monthly fixed cost of unit of equipment.

<sup>c</sup> Fuel and oil expense for seven months.

<sup>d</sup> Fuel and oil expense for one month.

<sup>e</sup> Number of tractors operated for seven months.

<sup>f</sup> Fuel and oil expense for one tractor for one month.

<sup>g</sup> Fuel and oil expense per mile.

<sup>h</sup> Miles traveled by one unit of equipment monthly.

<sup>i</sup> Fixed cost per mile.

We do not concur with protestant's accountant that the fixed expense figure should provide for 1.6 trailers as the evidence discloses that NRT utilizes only one trailer for each shipment. We have increased the indirect cost factor to 21.33 percent which was arrived at by adding the partners' salaries of \$8,800<sup>2/</sup> to the \$23,685 indirect cost figure set forth in Exhibit 5 making a total indirect expense of \$32,485 divided by the direct cost figure of \$152,314 equalling 21.33 percent.

Taking the above adjustments into account the transportation at the proposed rates would be compensatory to NRT when utilizing its own equipment, however, when subhaulers are employed NRT's direct cost factor is 85 percent of revenue, the amount paid to the subhauler, when we add to that the adjusted indirect cost factor of 21.33 percent it is apparent that transportation at the proposed rates when transported by subhaulers would not be compensatory to NRT.

NRT has not shown any circumstances that exist in its transportation which are different from the usual and ordinary circumstances attendant to the transportation at issue herein. Except in rare instances when justified, we have in the past required a showing of such special circumstances in addition to a showing that transportation at the proposed rates will be compensatory.

The evidence herein discloses that NRT was unsuccessful in its solicitation efforts for the involved traffic until sometime after it filed the instant application. The traffic it was successful in obtaining was diverted by Hershey from protestant Mammoth.

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2/ Testimony of Richard D. Mello:

Richard D. Mello salary - January to June \$600 monthly.  
Richard D. Mello salary - July \$1,000.  
Adeline F. Mello salary - January to July \$600 monthly.

This Commission will not authorize Section 3666 relief when it appears, as it does here, that the sole purpose of the application is to divert traffic from other highway carriers without a showing that the applicant can provide a more efficient service than the service being performed by the existing carrier or carriers.

Findings

1. Applicants hold a highway contract carrier permit.
2. Applicants filed the instant application prior to performing any transportation services for Hershey.
3. The application is protested by Mammoth.
4. Prior to filing of its protest Mammoth performed transportation services for Hershey.
5. Subsequent to the filing of its protest the traffic formerly enjoyed by Mammoth was diverted to NRT.
6. A total of five carriers, in addition to NRT and Mammoth, perform transportation services for Hershey.
7. Transportation at the proposed rates will be compensatory to NRT when the transportation is performed with its own equipment.
8. Transportation at the proposed rates will not be compensatory to NRT when subhaulers are engaged to perform the transportation.
9. Applicants have not shown any circumstances that exist in its transportation which are different from the usual and ordinary circumstances attendant to the transportation at issue herein.

A.56420 ap

The Commission concludes that the application should be denied.

O R D E R

IT IS ORDERED that Application No. 56420 is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 28<sup>a</sup>  
day of JUNE, 1977.

Robert Batwinich  
President  
William Sprouse Jr.  
James L. Ferguson  
Richard N. Gavalla

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Commissioners