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ORIGINAL

Decision No. 87593 July 12, 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of BURTON TRUCK & TRANSFER CO., a corporation, for authority to deviate from the provisions of Minimum Rate Tariff No. 2 in connection with the transportation of clay pipe and face brick for PACIFIC CLAY PRODUCTS, INC., pursuant to the provisions of Section 3666 of the California Public Utilities Code.

Application No. 56824
(Filed October 20, 1976)

Milton W. Flack, Attorney at Law, for applicant.
C. D. Gilbert and H. Hughes, for California Trucking Association; Don Warner and James Foote, for Associated Independent Owner-Operators; and Lloyd Amaral, for Amaral Trucking; interested parties.
George Hunt, Thomas Fann, and John F. Specht, for the Commission staff.

O P I N I O N

Burton Truck & Transfer Co. (Burton), a corporation, operates as a radial highway common carrier. It also holds a certificate of public convenience and necessity authorizing highway common carrier operations, with the usual exceptions, between various points within Los Angeles and Orange Counties pursuant to Decision No. 85200 dated December 2, 1975 in Application No. 56008 and coextensive interstate and foreign authority from the Interstate Commerce Commission. Its highway common carrier operations are not involved herein.

By this application, Burton seeks authority to assess less-than-minimum rates for the transportation of clay pipe and face brick for Pacific Clay Products, Inc. (PCP) to all points and places between 100 and 625 miles from the shipper's pipe manufacturing plant at Santa Fe Springs and its brick manufacturing plant at Alberhill, which is approximately 60 miles southeast of Santa Fe Springs. The proposed rates are set forth in Appendix A attached hereto. They are stated on a graduated mileage scale basis, and the same rates apply to both the clay pipe and the face brick. Although there are variations in the various mileage blocks, the proposed rates average approximately 20 and 10 percent less than the applicable minimum rates for the transportation of clay pipe and face brick, respectively. The deviation rates are not subject to the surcharge in Supplement 128 to Minimum Rate Tariff 2 (MRT 2); however, they are subject to a minimum weight of 47,000 pounds per unit of carrier's equipment and all other applicable provisions of MRT 2. With the 100-mile minimum distance, the proposed rates apply only to transportation beyond Burton's certificated area.

Public hearing was held before Examiner Arthur M. Mooney in Los Angeles on February 11 and 22, 1977. The matter was submitted upon a receipt of late-filed Exhibits 13 and 14 on March 11, 1977.

Applicant's Evidence

Burton's intrastate operations involve primarily the transportation of building materials. It has a terminal in Santa Fe Springs. It operates 25 tractors, most of which are 3-axle, 40 42-foot flat trailers, and 10 sets of 24-foot flat trailers. It leases 15 of the power units and all of the trailing equipment from PKM Leasing Inc. (PKM) at average monthly rentals of $285 and $150 respectively. The other 10 power units are leased from owner-operators who are paid on a mileage basis for pulling Burton's trailers at a rate of 44 cents per mile when the trailer is loaded and 30 cents per mile when it is empty. The owner-operators are not assessed a trailer rental charge. Each owner-operator pays all of his own operating expenses, including the driver's wages if he is not driving himself. Burton has its own maintenance facility and maintains and pays all operating expenses for the equipment it leases from PKM. Burton employs two dispatchers, three office employees, four mechanics, and three salesmen. It regularly has 20 to 30 drivers, all of whom are furnished by California Transport Labor (CTL) and paid by it. CTL is not affiliated in any way with Burton, and it invoices Burton each week for the drivers furnished. The charge per driver is 13½ cents per mile for over the road transportation and $5.50 per hour for local transportation. CTL screens and tests all of its drivers. The drivers of the owner-operator power units are paid by CTL on the same basis, this charge is included in the weekly invoice to Burton, and Burton deducts this amount from the amount paid the owner-operators.

The general manager, who is also the secretary-treasurer of Burton, testified that he owns all of the stock of Burton, Heavy Haul Truck Service, Inc. (Heavy Haul), Able Transportation, Inc. (Able), and PKM; that Heavy Haul and Able share the same terminal with Burton; that the three carriers are operated together and file joint tax returns; that only Burton is involved in the deviation authority sought herein; and that he also has a financial interest in other entities which are likewise not involved herein. According to the joint balance sheet for Burton, Heavy Haul, and Able dated June 30, 1976, they had assets of $845,073.10, liabilities of $477,291.85, and a shareholder's equity of $367,781.25. For the period January 1, 1976 to June 30, 1976, Burton's operating revenue was $634,094.56, and its total net income before state and federal taxes was $89,987.62. For the same period, Able's and Heavy Haul's operations, which amount to approximately 12 and 6 percent, respectively, of those performed by Burton, were also profitable.

The following evidence regarding the facts and circumstances surrounding the transportation in issue was presented by the general manager of Burton and the vice-president of finance of PCP: The clay pipe is a vitrified clay pipe which is used almost exclusively for underground sewers and is primarily sold to underground contractors working for governmental agencies or directly to governmental agencies. The brick facing is sold to dealers or to contractors engaged in both public and private building projects. PCP arranges and pays for the transportation of these commodities to the buyers. Generally, for distances up to 250 miles, PCP uses its own trucks, and for longer distances and for emergency shipments within the 250 miles, it uses for-hire transportation. It has no manufacturing facilities in northern California, and ships there from its southern California plants. Its customers require timely and reliable delivery service for their orders. Approximately 20 truckloads per week are shipped north, the average weight per shipment is 46,000 to 47,000 pounds for both the pipe and brick, and the pipe accounts for 90 percent of this business and the brick makes up the balance. Since January 1976, PCP has used three carriers for this transportation. Burton handles 70 percent, Shamrock Truck Lines handles 20 percent, and Amaral Truck Lines handles the remaining 10 percent. The reason Burton transports most of this freight is that its terminal is quite close to PCP's pipe plant, and there is a good relationship between the two companies. If the deviation is granted, PCP will continue to distribute the traffic between the three carriers in the same manner, and the other two carriers have informed it that they will seek a similar deviation. The destinations are job sites, which could be anywhere in the state, and dealers' yards which are likewise scattered throughout the state. PCP has two competitors, Gladding McBean & Co., formerly Interpace, and Mission Clay Pipe Co.

The two competitors have manufacturing plants in both southern and northern California. For this reason, they have a competitive advantage over PCP in northern California, and because of this, PCP's business here is eroding. If the sought deviation is granted, PCP would be better able to compete in the northern market and would perhaps be able to increase the amount of freight it gives Burton. Burton leaves several trailers at both of PCP's plants. PCP loads the trailers and weighs them without the presence of Burton's drivers and supplies all necessary dunnage without charge. When a driver comes to pick up a load, he has only to hook the trailer to the power unit and tie down the load which takes 15 to 20 minutes. Many times PCP's employees assist with the tying down. All unloading is done by the consignees with power equipment. This results in substantial time and money savings for Burton. At times, Burton strings some of the pipe loads, and any applicable delay or other charges in connection therewith are assessed for this. Less than 5 to 10 percent of the shipments are mixed shipments of pipe and brick, and when this occurs, sufficient brick is stored at the pipe manufacturing plant so that it is not necessary to make a trip to the Alberhill plant for the brick. There are rarely any split deliveries, and when these occur, the applicable charges are assessed for them. Burton has keys to PCP's facilities. The average time for unloading is one hour. On the average, Burton handles two or more northbound loads per day for PCP.

The general manager of Burton testified that in October of 1976 when the application was filed, Burton had an arrangement with BBD Transportation Company (BBD) whereby BBD gave it return subhauls for all of its northbound shipments; that these loads were picked up from either U.S. Steel Company in Pittsburg or at BBD's yard in Antioch and were destined to various points in southern California; that at that time, BBD paid Burton

$175 for each subhaul load and increased this to $200 in December 1976; that Burton continues to have return subhauls for all of its northern California shipments; and that 80 percent of these are now interstate freight subhauled for C & E Trucking Company, Inc. of Paramount which pays it substantially more revenue, and the remaining 20 percent continues to be for BBD. The witness stated that Burton has a considerable interstate business to and from the Los Angeles and Long Beach harbors under its certificated authority; that a good part of the transportation handled for it by the owner-operators involves this harbor operation; and that the owner-operators are included on Burton's insurance policy without cost to them and can purchase fuel and oil from Burton at its cost.

Following is a summary of the revenue and cost data set forth in Exhibit 4 for hauling 47,000 pounds of clay pipe at the proposed rates from Santa Fe Springs to Sacramento: The revenue received for this shipment would be $399.50. If owner-operator power equipment were used and there were no return revenue haul, the round-trip cost would be $390.93, the profit would be $8.57, and the operating ratio for the round trip would be 98 percent. Under the same circumstances with a return subhaul at $175 from Pittsburg to Los Angeles, the total round-trip revenue would be $574.50 the round-trip cost would be $499.23, the profit would be $75.27, and the operating ratio would be 87 percent. If a company-operated truck leased from PKM were used and there were no return haul, the round-trip cost would be $386.47, the profit would be $13.03, and the operating ratio would be 97 percent. With the company-operated equipment leased from PKM and the $175 return subhaul, the total round-trip revenue would be $574.57, the round-trip cost would be $462.82, the profit would be $111.68, and the operating ratio would be 81 percent. Burton also presented similar cost studies for transporting 47,000-pound shipments of clay pipe from Santa Fe Springs to Antioch, Oakland, and Stockton and the results shown in each of them were substantially similar to those shown in Exhibit 4.

Burton's general manager testified that there is little or no difference in the transportation costs for the face brick and the clay pipe; that the operating results for transporting either commodity at the proposed rates would be very close, if not identical; and that for this reason, and since 90 percent of the movement would be pipe, he did not prepare any detailed cost studies for transporting the face brick at the proposed rates. He stated that the basis for paying the owner-operators for pulling loads of clay pipe or face brick at the proposed rates would be identical to the basis used for compensating them for any other transportation they perform for Burton; that most of the owner-operators have been with Burton for at least five years and have more than one truck; and that although he does not know their exact operating costs, they would not continue their association with Burton if they were not covering their costs and making money. The witness asserted that the transportation performed by Burton for PCP is not a regular highway common carrier type of operation; that the proposed rates are reasonable; and that the PCP hauling accounts for approximately 30 percent of Burton's gross revenue.

In his closing statement, the representative of the California Trucking Association (CTA) did not specifically object to the sought deviation but did raise several questions. He pointed out that Burton did not furnish any actual operating costs for the owner-operators and that the only driver costs furnished were the amounts paid by Burton to CTL. He asserted that the savings to the shipper under the proposed deviation would be at the expense of the carrier and questioned whether this might not be a predatory practice. He also pointed out that pursuant to Decision No. 86833 dated

January 5, 1976 in Petition 926 in Case No. 5432 (mimeograph copy), lower truckload efficiency service rates were incorporated in MRT 2 and became effective January 17, 1977 and that with these lower minimum rates, the rates Burton requests would, in many instances, be moot.

No recommendations regarding the sought authority were made by the Commission staff or the other interested parties.

Counsel for Burton, in his closing statement, argued that the proposal herein in no way involves any predatory practices whatsoever. In support of this position he asserted that PCP requires the lower rates in order to compete in the northern part of the state with its two competitors who have manufacturing facilities there and that the lower rates would benefit the public by making PCP's products available to them in that part of the state. He contended that the fact that there is no detailed breakdown of owner-operator or driver costs in the record is irrelevant; that drivers and owner-operators are not paid on a percent of revenue; and that for this reason, the deviation rates would have no effect on the amounts they would receive. As to the truckload efficiency service rates in MRT 2, he pointed out that these rates are based on a minimum weight of 50,000 pounds and the sought rates are based on a minimum weight of 47,000 pounds and that for this reason, there would still be differences between the two. He stated that it has been clearly established on the record that Burton realizes numerous savings on the transportation it performs for PCP and that it can make a profit at the proposed rates. He urged that the application be granted.

Discussion

Subject to the condition that Burton shall pay subhaulers, if used, 100 percent of the authorized rates, we are of the opinion that the application should be granted. As stated above, counsel for Burton in his closing argument urged that it was irrelevant that Burton did not present a detailed breakdown of owner-operator costs. We cannot agree that owner-operator cost data is irrelevant. The specter of carriers using owner-operators to extensively perform transportation at less than minimum rate is of increasing concern to us. See, Trails Trucking, Decision No. 87345, Application No. 56520 (May 17, 1977). We must try to insure that less than minimum rate transportation is not available because subhaulers are inadequately compensated by overlying carriers (overlying carriers who in some instance own no power equipment and who are essentially brokers).

Here, the applicant indicated owner-operators would be compensated at the usual rate of 44 cents per mile loaded, and 35 cents per mile if trailers are empty. These amounts include an allowance for labor in that CTL pays owner-operators 13½ cents per mile, which Burton is billed for, and Burton accordingly deducts the labor expense paid from the gross mileage rates due the owner-operators. Burton justifies the 44 cents per mile paid subhaulers on the grounds that most of the owner-operators who would perform transportation at the deviated rate have been affiliated with Burton for some time, and that in view of their continued business with Burton they must be adequately compensated. We understand Burton's pragmatic reasoning. However, in fairness we should be consistent with our recent decision in Trails Trucking wherein we stated:

> As a matter of policy, the Commission has required that subhaulers be paid 100 percent of the authorized rates in Section 3666 proceedings when revenue and expense data of subhaulers are not submitted. This requirement was intended to prevent abuses of Section 3666 authorities through the excessive use of subhaulers.

In authorizing deviated rates we must be convinced that the submitted cost data supports the proposed rate. And our burden becomes administratively more complex when an applicant proposes to use subhaulers because there is not as much revenue under deviated rate transportation for revenue splitting. Accordingly, we must be convinced that the deviated rate obtained by a carrier (which indeed provides competitive advantage) does not exist at the expense of short-changing small owner-operators. We are aware that annually hundreds of owner-operator carriers have financial difficulties and go out of business. While we cannot and should not guarantee business success, we should not compound problems by ignoring the revenue split when a rate less than our established reasonable minimum rate is to be applicable.

Burton has 15 company-operated trucks and is in a position to use its own equipment to perform the proposed transportation; in fact, according to Burton's cost data, the transportation is more profitable using its company-operated trucks. Our decision does not cause undue hardship to Burton.

As we have heretofore held in our decision in the Application of Major Truck Lines, Inc. (1970) 71 CPUC 447, one of the factors considered in rate deviation applications is whether there are circumstances and conditions attendant to the transportation in issue which are not present in the usual or ordinary transportation performed by highway carriers under the applicable minimum rates. The record before us does establish such differences. According to the evidence, Burton leaves empty trailers with the shipper; the shipper, without the presence of any of Burton's personnel, loads and weighs the trailers, and it furnishes all necessary dunnage at no cost to Burton when the power equipment arrives to pick up a loaded trailer, the driver ties down the load and, in many instances, the shipper's personnel assist him with this; the loads average 47,000 pounds each; and when the shipment arrives at destination, it is power unloaded by the consignee. Other than the tying down of the load, all that is done by Burton's personnel is the driving of the equipment from origin to destination. There are considerable savings to Burton. We held in our decision in the Major Truck Lines, Inc. proceeding that we will not consider revenue from backhaul traffic in less-than-minimum rate proceedings unless the backhauls are assured and performed for the same shipper, or if performed for any unrelated shipper, the customer must be one of long standing. Here, Burton has had a relationship with BBD for a substantial period of time whereby BBD will furnish it with southbound subhaul loads for all of its northbound shipments. With these return subhauls, Burton will realize, under the sought rates operating ratios of approximately 80 percent with leased company-operated power equipment for round-trip operations between southern and northern California, and if for some reason it should not have a return haul for a northbound PCP shipment, it would at the very least cover its round-trip cost for the transportation with leased company-operated power equipment. Furthermore, Burton's general manager testified that there is now a substantial amount of interstate freight available to it for subhauling from northern California which would substantially increase its earned round-trip revenue. The evidence reasonably supports findings that Burton does have return freight available to it for the transportation it performs to the northern part of the State for PCP at the proposed rates and that the proposed rates are reasonable.

As to CTA's argument regarding predatory practices, we do not consider that the operation here is in any way a predatory practice.

Because the applicant has shown that a rate less than the applicable minimum rate is reasonable, and savings can begin to accrue to the shipper, the order which follows is made effective on the date of issuance.

Findings

1. The type of service Burton would perform under the proposal herein is different from that contemplated by the minimum rates generally.

2. Burton has been providing the transportation in issue for PCP at minimum rates.

3. PCP has manufacturing facilities in southern California only. If the application is not granted PCP can foreseeably have difficulty competing on an equal basis in northern California with its two competitors, who each have manufacturing plans in both northern and southern California.

4. Burton will have backhaul traffic available to it from northern California, as a subhauler for BBD, for all shipments transported north by it for PCP at the proposed rates.

5. The sought deviation herein does not involve any predatory practices.

6. The proposed rates are compensatory for equipment operated by Burton.

7. The proposed rates are reasonable and justified.

Conclusions

1. Subject to the condition that Burton shall pay subhaulers, if used, 100 percent of the authorized rates, the application should be granted as set forth in the ensuing order.

2. As conditions may change, the authority will be made subject to expire one year after the effective date of this order unless sooner canceled, modified, or extended by order of the Commission.

O R D E R

IT IS ORDERED that:

1. Burton Truck & Transfer Co., a corporation, is authorized to depart form the minimum rates in Minimum Rate Tariff 2 to the extent set forth in Appendix A attached hereto.

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 is the date hereof.

Dated at San Francisco, California, this 12th day of JULY, 1977.

I dissent
William Symons Jr.

Robert Batinovich
President

Vernon L. Sturgeon

Richard D. Gravelle

Commissioners

Commissioner CLAIRE T. DEDRICK did not participate in the disposition of this proceeding.

A.56824 kw

Carrier: Burton Truck & Transfer Co., a corporation.

Shipper: Pacific Clay Products, Inc.

Commodity: Clay pipe and face brick.

Service and Rates: From the plants and facilities of Pacific Clay Products, Inc., located at Santa Fe Springs and Alberhill, California, to all points and places within the State of California.

Applicable rates per hundred pounds:

Mileage Scale	Proposed Rates
100 - 110	$0.43
110 - 120	.46
120 - 130	.47
130 - 140	.48
140 - 150	.50
150 - 160	.52
160 - 170	.54
170 - 180	.55
180 - 190	.56
190 - 200	.57
200 - 220	.59
220 - 240	.62
240 - 260	.63
260 - 280	.66
280 - 300	.68
300 - 325	.70
325 - 350	.74
350 - 375	.76
375 - 400	.78
400 - 425	.82
425 - 450	.85
450 - 475	.87
475 - 500	.88
500 - 525	.90
525 - 550	.94
550 - 575	.99
575 - 600	1.00
600 - 625	1.02

A.56824 kw/km

Conditions:

A. Consignor shall power load shipments, furnish dunnage, and weigh shipments at no expense to carrier.

B. Consignee shall power unload shipments at no expense to carrier.

C. No surcharge as set forth in Supplement 128 to Minimum Rate Tariff 2 shall be applicable to these rates.

D. Rates above shall apply only to a minimum weight of 47,000 pounds per unit of carrier's equipment.

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

F. In the event owner-operators are engaged to perform any transportation for shipper at the rates above, carrier shall pay such owner-operators not less than 100 percent of the rate authorized herein.