

ORIGINAL

Decision No. 88315 JAN 10 1976

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of DeWitt Transfer and Storage Company pursuant to Public Utilities Code §5010 for refund of transportation rate fund payments made during the past three years. Application No. 56978 (Filed January 3, 1977)

Knapp, Stevens, Grossman & Marsh, by David P. Christianson, Attorney at Law, for applicant. H. W. Hughes and J. C. Kaspar, for California Trucking Association, interested party. Maxine C. Dremann, Attorney at Law, James R. White, Jimmie G. Low, and Edward Larossi, for the Commission staff.

OPINIONS Applicant is engaged in the transportation of property for compensation over the highways of California and operates under radial highway common carrier, contract carrier, and household goods carrier authorities. Applicant also holds a certificate of public convenience and necessity to operate as a common carrier in interstate and foreign commerce under the authority of the Interstate Commerce Commission. As an added transportation activity, applicant performs a transportation service under contract with the United States Government in the transportation of mail within certain of the western states, including the State of California. This latter transportation is performed using a fleet of vehicles devoted exclusively to the transportation of mail.

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Applicant seeks a refund of taxes it was required to pay pursuant to Section 5003.1 of the Public Utilities Code. Applicant contends that Section 3511(e) of the Public Utilities Code exempts its contract United States mail operations from the transportation rate fund tax and that monies collected thereunder

1/ "5003.1. Every railroad corporation, express corporation, freight forwarder, and every person or corporation operating vessels, as these terms are defined in Part 1 (commencing with Section 201) of Division 1, and every motor transportation broker, as the term is defined in the Motor Transportation Brokers' Act, and every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the commission shall, between the first and fifteenth days of January, April, July, and October of each year, file with the commission a statement showing the gross operating revenue derived by such person or corporation from the transportation of property for the preceding three calendar months, and shall at the time of filing such report pay to the commission a fee of four dollars (\$4) for each quarter. Every express corporation, freight forwarder, motor transportation broker, and every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the commission shall, at the time of filing such report, pay to the commission a fee equal to one-third of 1 percent of the amount of such gross operating revenue; provided, however, that for any particular fiscal year the commission, with the approval of the Department of Finance, may fix said fee at less than one-third of 1 percent of said amount."

2/ "3511. 'Highway carrier' means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in transportation of property for compensation or hire as a business over any public highway in this state by means of a motor vehicle, except that 'highway carrier' does not include

(e) Any person exclusively transporting United States mail pursuant to a contract with the United States government."

over the last three years have been collected illegally. Pursuant to the provisions of Section 5010 of the Public Utilities Code, ^{3/} applicant requests that refund be made of such amounts as have been erroneously levied on its contract United States mail operations. The following amounts of tax collected on the proceeds of revenue from the mail contracts are sought to be refunded:

	1973	1974	1975	1976*
Revenue	\$751,723.58	\$976,494.11	\$1,023,747.07	\$987,408.25
Taxes Paid	3,254.96	4,228.23	4,432.82	4,275.47

*First nine months.

Total Revenue: 3-3/4 years, \$3,739,373.01

Total Tax Paid: 3-3/4 years, \$16,191.48

A prehearing conference was held on May 24, 1977.

It was agreed that the parties would stipulate to the facts; that the issues were primarily legal in nature; and that rather than holding a hearing after the facts had been stipulated, briefs on the issues would be filed.

An executed Stipulation of Facts was filed on July 12, 1977. This will be received as Exhibit 1. The facts stipulated to are:

STIPULATION OF FACTS

1. DeWitt Transfer and Storage Company conducts operations as a permitted carrier within the State of California, holding radial highway common carrier, contract carrier, and household goods carrier authorities.

3/5010. The commission may make refunds out of money in its possession of the fees provided for in this chapter when it appears that such fees were paid in error."

2. DeWitt Transfer and Storage Company is additionally certified to operate as a common carrier in interstate and foreign commerce under authority of the Interstate Commerce Commission.

3. DeWitt Transfer and Storage Company performs express and transportation service under contract with the United States Postal Service Government in the transportation of mail within certain western states, including the State of California.

4. The transportation of the above-stated mail is performed using a fleet of vehicles not used to transport any other commodities.

5. Some of the above contracts cover the transportation of mail from the Bulk Mail Center in Bell, California, to various points throughout California. Mail of an interstate and intrastate nature is commingled in individual mail sacks. It is not possible for DeWitt Transfer and Storage Company to determine the percentage of intrastate mail involved.

6. Four of DeWitt Transfer and Storage Company's United States Postal Service mail delivery contracts are strictly of an intrastate nature. They are contracts numbered: 907 AW (1976 revenue: \$5,587.40); 900 AR (1976 revenue: \$9,190.17); 900 CW (1976 revenue: \$2,883.52); and 900 MW-(A)(B) (1976 revenue: \$17,692.00) totaling revenues of \$35,353.09, which constitute 2.3 percent of DeWitt Transfer and Storage Company's 1976 revenues for its California delivery of mail service. 1976 revenue for California delivery of mail totaled \$1,519,149.78.

7. Of the amount contributed to the transportation rate fund, pursuant to Public Utilities Code Section 5003.14 (one-third of one percent of gross operating revenues derived from the transportation of property for hire upon the public highways under the jurisdiction of the Commission), for 1976, all but 2.3 percent will be refunded, pursuant to Public Utilities Code Section 5010.

8. Similar percentages of purely intrastate transportation of United States mail under contract will be calculated for the years 1974 and 1975, along with resulting refunds, at a future time agreeable to both parties.

9. Similar percentages of purely intrastate transportation of United States mail under contract will also be calculated for payments made in 1977, along with resulting refunds.

10. DeWitt Transfer and Storage Company will include in their future quarterly report of Gross Operating Revenue to the Commission all revenues received from transportation performed pursuant to United States mail delivery contracts of a purely intrastate nature.

In view of the facts stipulated to, the parties requested that the briefing schedule agreed to at the prehearing conference not be followed. It was their opinion that it was no longer necessary to litigate or argue the legal issues since a resolution satisfactory to both parties had been reached.

There is one issue that we must decide and that has to do with the statute of limitations. We hold that the three-year statute of limitations provided in Section 338 of the Code of Civil Procedure is applicable, and that the statute was tolled by the filing of a formal application on January 13, 1977. Therefore, applicant is entitled to refunds only for the three prior years.

Findings of Fact

We adopt the Stipulation of Facts as our findings based on

4/ "§ 338.

* * *

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."

Conclusion of Law

The three-year statute of limitations contained in Section 338 of the Code of Civil Procedure is applicable.

O. R. D. E. Responses

IT IS ORDERED that:

1. Pursuant to Section 5010 of the Public Utilities Code, the Executive Director is directed to cause a refund to be made to DeWitt Transfer and Storage Company of the difference between the amount contributed to the transportation rate fund pursuant to Section 5003.1 based upon \$35,353.09 intrastate revenue for the transportation of United States mail in 1976 and the total amount contributed to the fund in 1976 for the transportation of United States mail.

2. DeWitt Transfer and Storage Company shall compute the percentage of purely intrastate transportation of United States mail for the years 1974, 1975, and the first three quarters of 1977. Upon completion of such computation and the determination of the separate total revenues for intrastate and interstate mail transportation, DeWitt Transfer and Storage Company may file its application for refunds in this proceeding by letter. Upon notification from the staff to the Executive Director of its agreement with the claim, and pursuant to Section 5010 of the Public Utilities Code, the Executive Director shall cause a refund to be made to DeWitt Transfer and Storage Company of such over-contributions to the transportation rate fund.

3. DeWitt Transfer and Storage Company shall include in its future quarterly reports of Cross Operating Revenue to the Commission all revenues received from transportation performed pursuant to United States mail delivery contracts of a purely intrastate nature.

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

Dated at San Francisco, California, this 10th day of JANUARY, 1978.

Robert Batistich
President
William A. ...
Verona L. ...
Charles ...
Gene ...
Commissioners