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Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
ASBURY SYSTEM, a corporation, for)
hearing for determination of liability))
under provisions of the Transportation))
Rate Fund and Uniform Business License))
Tax.)

Application No. 58140
(Filed June 14, 1978)

Marchison and Davis, by Donald Marchison,
Attorney at Law, for applicant.
William J. Jennings, Attorney at Law,
for the Commission staff.

O P I N I O N

This proceeding arises out of the transportation described in the following written stipulation of facts entered into between counsel for Asbury System (Asbury) and counsel for the Commission staff:

- "1. Petroleum coke (the sole commodity involved in the instant proceeding) is picked up by Applicant at the plantsite of Chevron USA (the refinery), at El Segundo, CA, and transported to trans-shipping sheds located at Pier G, Long Beach, CA, which transportation encompasses approximately 20 miles.
- "2. The trans-shipping shed(s) is the shipping device or vehicle through which petroleum coke is off-loaded into the holds or hatches of the ocean-going vessel, and which vessel transports said petroleum coke to various foreign destinations.
- "3. In each case, the petroleum coke which is loaded into Applicant's specially designed hoppers at origin is destined in foreign commerce to a foreign port or destination.

- "4. Applicant, neither at time of pickup nor at any other time prior to or at the time of the transportation above-described, is aware or is able to determine the actual foreign port to which said petroleum coke is destined.
- "5. ASBURY has no knowledge prior to or at the time of pickup into which vessel the coke will be off-loaded; nor is Applicant able to determine the ownership of the vessel or whether or not the said vessel is chartered by shipper, whether in whole or in part.
- "6. No facilities exist at Pier G, Long Beach, CA, save and except for off-loading into ocean vessels bound for foreign port(s).
- "7. The transportation of petroleum coke from the various facilities located within the confines of the Los Angeles Harbor Commercial Zone, as defined by the ICC, to the said trans-shipper shed located at Pier G, Port of Long Beach, CA, is handled in the same manner as the movement of petroleum coke from the refineries at El Segundo, CA, to the Pier G trans-shipping sheds at Long Beach, CA, and, in each case, the destination is a foreign port or ports.
- "8. As to the transportation of petroleum coke described in Paragraph 7, Applicant has no knowledge prior to or at the time of pickup into which vessel the coke will be off-loaded; nor is Applicant able to determine the ownership of the vessel or whether or not the said vessel is chartered by shipper, whether in whole or in part.
- "9. There are no intrastate movements of petroleum coke from the trans-shipping shed(s) to any point or place within the State of California; all intrastate movements of petroleum coke originate at the refinery or facility located within the Los Angeles Harbor Commercial Zone and move therefrom to point of destination in the State of California.
- "10. There are no interstate movements of petroleum coke to points within the United States, including Hawaii and Alaska, from the trans-shipping shed(s) at Long Beach, CA; any such interstate movement originates at the refinery or at a point within the Los Angeles Harbor Commercial Zone, and moves directly to the point or place of destination within the United States." (Exhibit 1.)

The action of the staff which provoked the filing of the instant application is described in a further written stipulation of facts entered into between counsel for Asbury and counsel for the staff, as follows:

- "1. A Notice of Determination was served on Applicant on or about August 9, 1977 making a demand of \$9,687.92 plus a penalty of \$2,421.98 for the Transportation Rate Fund; and a demand of \$2,906.38 plus a penalty of \$726.59 for the Uniform Business License Tax, resulting in a total demand of \$15,742.87.
- "2. Said demand of \$15,742.87 covers transportation by the Applicant for the period April 1, 1973 through March 31, 1976 which the staff contends is due the PUC." (Exhibit 2.)

On June 14, 1978, Asbury filed the instant application in which it alleged facts substantially as recited above. Asbury contends that it "has disagreed, and continues to disagree, with the conclusions and contentions of the Public Utilities Staff that [the] subject transportation should be charged for under provisions of the Commission's Minimum Rate Tariff No. 7-A, and, hence, become subject to the heretofore discussed fees and taxes." (Application, p. 3.) Asbury requests that the Commission determine whether it is subject to the fees and taxes described above.

Following the submission of the second stipulation, which was by letter dated July 13, 1979, the parties filed concurrent briefs. On September 17, 1979, the proceeding was submitted for the preparation of a proposed decision by Administrative Law Judge Robert T. Baer.

Discussion

The issue upon which this proceeding turns is whether the transportation of petroleum coke described in the stipulated facts is subject to the jurisdiction of the Commission. In Decision No. 90802, dated September 12, 1979, in Case No. 5432, OSH 1019, et al. the Commission held that:

"...this Commission has jurisdiction to economically regulate common motor carrier movement wholly intrastate where the prior or subsequent movement is performed by private vessel. Shipments by common carrier vessel under federal economic regulation subject the common motor carrier intra-California movement to ICC jurisdiction." (Decision No. 90802, p. 19.)

Since Asbury is the moving party, and since it is seeking affirmative relief from the staff's determination that certain taxes, fees, and penalties are due and payable, Asbury has the burden of proving every factual element essential to the relief sought. It has failed to do so with respect to the issue of jurisdiction. There are no facts of record which indicate the nature of the subsequent vessel movement. Rather it is specifically stipulated that:

"ASBURY has no knowledge prior to or at the time of pickup into which vessel the coke will be off-loaded; nor is Applicant able to determine the ownership of the vessel or whether or not the said vessel is chartered by shipper, whether in whole or in part." (Exhibit 1, paragraph 5; see also paragraph 8.)

Since it cannot be determined from this record that the subsequent vessel movement is performed by common carrier vessel, Asbury has failed to show that the Commission lacks jurisdiction of the subject transportation.

Findings of Fact

1. The facts are as stated in the written stipulations quoted above.
2. No evidence was introduced from which the Commission could make a finding that the subsequent vessel movement of petroleum coke was by common carrier vessel.

Conclusions of Law

1. The Commission has jurisdiction of purely intrastate motor carrier transportation where the subsequent vessel movement in foreign commerce is by private or chartered vessel, rather than common carrier vessel.
2. Asbury has the burden of proof on the factual issue of the nature of the subsequent vessel movement.
3. Since no evidence was introduced as to the nature of the subsequent vessel movement, the Commission cannot determine that it lacks jurisdiction of the transportation of petroleum coke described in the written stipulations.
4. The relief requested by Asbury should be denied for failure of proof.

O R D E R

IT IS ORDERED that the application of Asbury System for relief from the taxes, fees, and penalties assessed by the staff is denied.

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

Dated JUN 3 1920, at San Francisco, California.

John E. Bryson
President

Hermon L. Stephens
Richard P. Howell

Samuel W. Genies
Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.