

Decision 93694 NOV 3 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application )  
of MAURICE J. FOYE, doing business )  
as Foye Trucking, to extend his )  
certificate of public convenience )  
and necessity for the transporta- )  
tion of cement between points in )  
the counties of Riverside, )  
San Bernardino, San Diego, Kern, )  
and Santa Barbara pursuant to )  
Section 1063 of the California )  
Public Utilities Code. )

Application 60114  
(Filed November 28, 1980)

Richard C. Celio, for applicant.  
Russell & Hancock, by  
John C. Russell, Attorney at Law, for  
Max Binswanger Trucking, Fikse Bros., Inc.,  
Harris Transportation Co., Morosa Bros.,  
Inc., and Fairburn Transportation Co.,  
protestants.

O P I N I O N

Maurice J. Foye, doing business as Foye Trucking, operates out of Victorville as a cement carrier, providing service in the Counties of Los Angeles, Orange, and Ventura. He has applied under Public Utilities (PU) Code Section 1063 for authority to extend his operation to include the Counties of Riverside, San Bernardino, Kern, Santa Barbara, and San Diego. Applicant operates five 2-axle tractors, and 13 trailers, on a 7-day week, 24-hour a day basis. The

application was protested by Max Binswanger Trucking (Binswanger), Fikse Bros., Inc. (Fikse), Harris Transportation Co. (Harris), Morosa Bros., Inc., and Fairburn Transportation Co. (Fairburn). The protests prompted a public hearing, which was held on March 5 and 6, 1981, in Los Angeles, before Administrative Law Judge Edward G. Fraser.

Applicant placed a series of exhibits in evidence.

Exhibit 2 is a copy of D.90033, dated February 27, 1979, in Application 58551, which granted applicant a certificate to operate as a cement carrier, as defined in PU Code Section 214.1, in the Counties of Los Angeles, Orange, and Ventura. Exhibit 3 is applicant's statement of income for the year ending December 31, 1980; it shows income of \$358,277.81 and operating expenses of \$279,435.00. Net income totals \$25,970.90. Exhibit 4 is the March 1981 equipment list, including five 2-axle tractors and 13 trailers, designed for transportation of bulk cement. Exhibit 5 consists of two photographs showing applicant's equipment, which seems to be new and adequately maintained. Exhibit 6 is a map of the portion of California which includes Riverside, San Bernardino, Kern, Santa Barbara, and San Diego Counties, the additional area applicant has applied to serve. Exhibit 7 is a document of two pages. Page 1 shows 13 subhauls performed by applicant for Nobles Trucking during the period from September 29, 1980 to October 28, 1980; the loads were picked up in

either Victorville or Lucerne Valley, and hauled to either Bakersfield or Taft. Page 2 lists 41 subhauls performed for Bulk Transportation during the period from November 20, 1980 through December 12, 1980. The point of origin was Victorville; the destination was Indian Wells on 37 hauls, and San Diego on 4 hauls.

Applicant testified that he has 10 years of trucking experience, including 9 years as a cement hauler. He started his own trucking business in Victorville about October, 1979, with one truck. He operates out of a two-acre lot where the trucks are parked, with five drivers, a secretary, yard mechanic, and himself. He drives and manages the business. His subhaul services are "on call," which means that he is hired when there is too much business for the prime carrier to handle on short notice. When this happens, although called a subhauler, he receives 100% on the revenue paid for the transportation. Applicant admitted having two idle trucks and was not certain of his operating cost per truck, or unit. He had no estimate of the additional cost involved in expanding his business to the five counties he seeks to serve. He stated that his drivers are non-union and are paid by the week.

The first witness to testify at the hearing was a shipper who placed Exhibit 1 in evidence. It is a brochure which illustrates a trailer designed to transport and dump small quantities of ready-mix

concrete. The trailer can be towed by the family car. The brochure states that these small trailers are far more efficient than a rented concrete mixer, since the concrete is purchased and transported to where it is to be used, then dumped wherever it is needed. The trailer is then returned and is ready for the next load.

The witness testified that he is using applicant to haul bulk cement from various supply points to cement silos, where the equipment on the truck is used to blow the cement into the silo. He is using about seven truckloads a month, but business will increase since his company holds the franchise on the small "U-CART" trailers and is trying to get others throughout southern California in the business of supplying the small trailers along with the concrete to fill them. As his business expands, applicant's trucks will be used to haul the cement to the silos maintained by others in his system. He has a large hardware store on his premises and applicant hauls the bagged cement he keeps on the premises. Applicant's drivers are all qualified to operate forklifts and unload the cement from their trucks on arrival. This is an important advantage; the driver performs two functions and there is no delay in unloading. Applicant's service is excellent and he has no desire to employ other cement carriers.

Applicant's second witness was the president of Soil Stabilization, Inc., which sells and applies a mixture of soil and cement. The compound is used on highways, parking lots, and in rivers, ditches, and dams. Exhibits 8 through 11 were placed in evidence. Exhibit 8 has photographs of the trucks which bring the compound to the job site, the smaller trucks that spread it over the area to be covered, and the graders and water trucks that level and water it down. Exhibits 9, 10, and 11 are information brochures on "Soil-Cement" from Portland Cement Association. Large quantities of cement are required and the cement is transported directly to the job site, which may be anywhere in southern California. His company purchases about 15,000 tons of cement a year, usually in quantities of 1,000 or 2,000 tons. After the cement is ordered, the carrier (applicant) arranges to pick it up as needed. The cement workers are on the job at 5:30 or 6:00 a.m. and it is the responsibility of the carrier to have his trucks spaced so cement is always flowing until the job is completed. Applicant's service has been outstanding in this respect and his drivers know how to regulate the cement blowing equipment so the cement is evenly delivered. He has used other cement haulers and was disappointed due to late arrivals and drivers who could not control the cement blower mechanism on the trucks.

Four of the protestants provided testimony and exhibits. The president of Binswanger testified that his company hauls bulk and bagged cement through 15 counties in southern California and in four other states, using 98 tractors, 9 sets of flatbed trailers, 11 sets of bottom-dump trailers and 70 sets of pneumatic trailers, out of four terminals, all in California (Santa Fe Springs, Mojave, Oro Grande, and Colton). Most of the equipment is designed to haul bulk cement. The trucks are equipped with two-way radios and the terminals are connected by a private telephone system. The Colton terminal operates on a 24-hour a day basis, 6 days a week, and there is a Sunday dispatcher. Binswanger is very active in the five counties applicant seeks to serve. Exhibit 12 shows that during the period from August 1980 through January 1981, Binswanger hauled 146 loads to Riverside County, 712 loads to San Bernardino County, 1,616 to San Diego County, 49 to Kern County, and 119 to Santa Barbara County. Exhibits 13 through 17 show the number of hauls Binswanger delivered in the five counties that applicant seeks to serve, during two weeks in January, 1981. The witness stated that Binswanger has averaged 10 idle trucks daily, during the last six months. The tonnage hauled in 1980 was 12% less than the 1979 total. There are now about 180 cement carriers in California, with half of the total in the southern part of the State. There are too many carriers now; if more authority is granted, it will

raise everyone's cost and further divide the available business. Finally, the cement company traditionally selects the carrier to transport the cement. The exceptions are usually customers who buy cement, then haul it with their own trucks. The witness emphasized that Binswanger also transports 7 days a week, 24 hours a day, if the business is there.

The president of Fikse testified. He incorporated the company in 1962 and has been its president since that date. His company operates as a dump truck and cement carrier in 25 California counties and in Arizona, Nevada, Utah, and New Mexico, out of terminals in Cerritos and Chino, and an office in San Diego. They haul whenever a cement company requests service, on a 24-hour a day, 7 days a week basis. He placed his 5-page equipment list in evidence as Exhibit 18. The company operates with about 60 tractors and 50 sets of trailers. Most of the tractors and trailers are modified to unload cement by blowing it out of the transport vehicle. Company records indicate that during the last six months Fikse transported 1,340 truckloads of cement to the five counties applicant seeks to serve. The loads were 99% bulk cement. Exhibit 19 was placed in evidence to show loads hauled to the five counties during the two-week period from December 1, 1980 through December 12, 1980. The transportation adds up to 124 deliveries of cement. He estimated

that 10 or 15 trucks have been idle every day for the last six months due to lack of business. There was a 13 to 14% rate increase in 1980, but revenues were still way down; 1979 revenue was \$3,834,000.29; 1980 revenue totaled \$3,238,000.02. Construction of buildings, highways, dams, and other large construction projects has been curtailed due to budget restrictions and high interest. There is not sufficient work for the cement carriers already operating in the area applicant seeks to serve.

The president of Harris testified. He has been with the company since it was formed. Its cement operation includes all of southern California as far north as Fresno. All five of the counties applicant seeks to serve are included. Harris has one terminal in Victorville. Exhibit 20 shows that 35 of the 45 tractor and trailer combinations operated are available for cement hauling. Exhibit 21 states that during the period from December 8, 1980 through December 19, 1980 there were 13 hauls to San Diego County, 1 to Santa Barbara County, 4 to Riverside County, 3 to Kern County, and 41 to San Bernardino County. December is a slow month because of the uncertainty of the weather. Summer months are much more active in the cement-hauling business. Revenues from Harris' operations were greater in 1979 than 1980, even with substantial rate increases last year. He has idle equipment every day and calls for cement-hauling



are decreasing due to federal and state restrictions on highway construction and high interest rates on loans in the building industry. Harris trucks should all be working before another carrier is certificated.

The president of Fairburn testified that his corporation hauls cement through all of southern California south of San Luis Obispo and Fresno. It operates in all five counties that applicant seeks to serve with 5 tractors and 9 sets of varied trailers, available to haul cement in bags or bulk. Business has decreased from 10 loads a day to 5 loads a week, due to less freeway and construction work. Gross revenue increased in 1980, but net profit was less than 1979 due to an increase in operating costs, especially fuel. During the six-month period from September, 1980 through February, 1981 his corporation hauled 332 loads of cement to the five counties applicant hopes to serve.

Discussion

Applicant proposes to serve five counties as a cement carrier. He is currently operating in three of the counties under alleged subhaul relationships with two prime carriers for three purchasers of cement who support his application. The purchasers control shipments of cement to the counties now served and indicate the possibility for future cement shipments to the additional counties applied for.

Applicant has demonstrated his technical and financial ability to perform the proposed service. He has extensive experience in the general trucking business including several years as a cement transporter under his existing cement certificate and a highway contract carrier permit.<sup>1/</sup> Cement transportation is provided by several highway vehicles designed for efficient operations and his financial statement shows profitable operations although two of his vehicles are not fully utilized.

The shippers indicate that their use of cement places demanding scheduling and technical service requirements on the cement transporter. These specific needs must be precisely met; otherwise,

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<sup>1/</sup> Cross-subhauling between all types of highway carriers was authorized by Commission D.91247, dated January 15, 1980, in Case 10278.

their projects will be delayed and their costs significantly increased because of unproductive downtime. Their experience with other truckers has not been satisfactory and they have received complaints about inadequate service. Applicant and his drivers have demonstrated a high degree of proficiency in providing for shipper service needs. Because of the shippers' complete satisfaction with applicant's performance, they consistently request his service either directly to him or through the cement suppliers. Apparently little or no contact is made through the prime carriers who ostensibly engage his services as a subhauler. The shippers will continue to use applicant's services in the counties he now serves and also desire to employ him as a prime carrier for transportation business which may develop to the other counties covered by the application.

The position of protestants can be summarized as a general objection to the entry of additional carriers into the cement transportation field in their areas of operation. They point to a decrease in cement transportation caused by an extended slump in the general construction industry which has resulted in significant excess capacity in the use of their highway equipment. By implication, they interpret possession of certificated authority as a prior claim on available cement traffic. Assertedly, they actively seek cement traffic through cement suppliers who they allege exercise exclusive control over the selection of cement haulers.

The contention of protestants that applications for certificated operating authority should not be granted when service is available from existing carriers may be a valid reason for denial of such applications. Where the transportation needs of the public are reasonably provided for, a clear demonstration of public need must be shown to justify the addition of carriers into the field, especially where the market is fully saturated with respect to existing and foreseeable traffic volumes.

The fact that protestants express their availability for cement transportation, however, is not by itself conclusive as to the disposition of a certificate application. It is necessary to consider the circumstances which underly their assertions. Although they refer to competition with other carriers for business from cement suppliers, they do not indicate a readiness to provide the type and caliber of service which will meet the specific and exacting needs of the affected shippers. Moreover, the evidence clearly disputes the contention that suppliers exercise exclusive control over the selection of carriers. In periods of intense competition for sales, particularly in a shrinking market, suppliers will tend to be highly responsive to the preferences of their customers.

In the disposition of the application, it is necessary to determine whether or not an unfulfilled public need for transportation exists which will support a finding of public convenience and necessity. After consideration of the evidence it is our conclusion that, at least within the counties in which the applicant is operating as an alleged subhauler, the supporting shippers are not actually being provided service by a certificated carrier.

The record in this proceeding reveals an absence of an overlying carrier role by the prime carriers who reportedly engage applicant. Actually there is a de facto assumption of the prime carrier role by applicant who is only technically a subhauler. The cement shippers directly engage applicant or specifically request his services from the cement suppliers. Payment for his services is frequently, if not usually, made directly to him instead of the alleged overlying carriers, at 100% of the tariff rates and changes.<sup>2/</sup> Operational control of the transportation is centered directly on applicant with only nominal participation by the supposed principals. We note that these carriers are not protestants in this proceeding and surmise that, as a result of their minimal

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<sup>2/</sup> Item 163, Minimum Rate Tariff 10.

participation in the traffic, they recognize and accept the actual status of applicant as a de facto prime carrier. The alleged overlying carrier-subhauler contractual relationship is a convenience existing only to satisfy the technical requirements of the law which enables applicant to provide service without a cement certificate.

In recognition of the real nature of his operations, applicant has requested operating authority which will be appropriate to his services. We will grant the authority for the counties he is now serving. The grant however will not include the Counties of San Bernardino and Santa Barbara. The record contains only vague speculation of additional traffic to those counties. If the expected traffic does materialize, the applicant may file an additional application, based on the needs of the public, for a further extension of his certificate.

#### Findings of Fact

1. Applicant has applied for a cement carrier certificate authorizing transportation of cement to and within the Counties of Kern, Riverside, San Bernardino, San Diego, and Santa Barbara.

2. Applicant holds a cement carrier certificate authorizing transportation of cement as a prime carrier to the Counties of Los Angeles, Orange, and Ventura.

3. Applicant transports cement to the Counties of Kern, Riverside, and San Diego as a subhauler, under his highway contract carrier permit, for two licensed cement carriers.

4. The application is opposed by five protestants who operate in all five counties applicant seeks to serve under the requested certificate.

5. The protesting carriers have expressed their willingness and ability to provide the existing and prospective transportation services required by the shippers who support the application.

6. The described traffic to the Counties of San Bernardino and Santa Barbara is speculative and is not now moving.

7. The supporting shippers have been receiving transportation services adequate to their needs from applicant who performs the physical transportation operations through subhaul arrangements.

8. Applicant has established that unfulfilled public needs are present which will support a finding that public convenience and necessity require the grant of his application for an extension of his certificate as a cement carrier to and within the Counties of Kern, Riverside, and San Diego.

9. Applicant has the necessary experience, operating equipment, and financial resources to institute and maintain the proposed additional service.

10. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

11. The following order has no reasonably foreseeable impact upon the energy efficiency of highway carriers.

Conclusion of Law

The application should be granted as set forth in the ensuing order.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

O R D E R

IT IS ORDERED that:

1. A revised certificate of public convenience and necessity is granted to Maurice J. Foye authorizing him to operate as a cement carrier, as defined in PU Code Section 214.1, between the points set forth in Appendix A.



2. Applicant shall:
  - a. File a written acceptance of this certificate within 30 days after this order is effective.
  - b. Establish the authorized service and file tariffs within 120 days after this order is effective.
  - c. State in his tariffs when service will start; allow at least 30 days' notice to the Commission; and make tariffs effective 30 or more days after this order is effective.
  - d. Comply with General Orders Series 100, 104, and 117, and the California Highway Patrol safety rules.
  - e. Maintain accounting records in conformity with the Uniform System of Accounts.
  - f. File an annual report by April 30 of each year.
  - g. Comply with General Order Series 84 (collect-on-delivery shipments). If applicant elects not to transport collect-on-delivery shipments, shall file the tariffs required by that General Order.

3. The cement carrier certificate granted by D.90033 is revoked on the effective date of the tariffs.

4. Applicant's request for certificate authority to serve the Counties of San Bernardino and Santa Barbara is denied without prejudice.

This order becomes effective 30 days from today.

Dated NOV 3 1981, at San Francisco, California.

JOHN E. BRYSON  
President  
RICHARD D. GRAVELLE  
LEONARD M. GRIMES, JR.  
VICTOR CALVO  
PRISCILLA C. CREW  
Commissioners

*I certify that this decision was approved by the above Commissioners today*  
*John E. Bryson*

Appendix A

MAURICE J. FOYE  
(an individual)

Original Page 1

Maurice J. Foye, an individual, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to conduct operations as a cement carrier as defined in Public Utilities Code Section 214.1 from any and all points of origin to all points in the Counties of Kern, Los Angeles, Orange, Riverside, San Diego, and Ventura, subject to the following restriction.

RESTRICTION:

This certificate of public convenience and necessity shall lapse and terminate if not exercised for a period of one year.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

Decision 93694, Application 60114.